IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 16-6001

UNITED STATES,
Appellee

v.

DZHOKHAR A. TSARNAEV,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

ADDENDUM FOR DEFENDANT-APPELLANT

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Addendum

TRANSCRIPTS

Jury Selection Transcripts

Guilt Phase Transcripts

Penalty Phase Transcripts

Conference and Hearing Transcripts

PLEADINGS AND OTHER DOCUMENTS

EXHIBITS

STATUTES AND REGULATIONS

Federal Rules and Regulations

Massachusetts Statutes

Federal Statutes

VIDEO AND MEDIA[1]

[1] On accompanying USB drive.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA - v. - DZHOKHAR A. TSARNAEV, a/k/a "Jahar Tsarni," Defendant.	Crim. No. 13CR10200 (MBB) Violations: 18 U.S.C. § 2332a - Use of a Weapon of Mass Destruction and Conspiracy; 18 U.S.C. § 2332f - Bombing of a Place of Public Use and Conspiracy; 18 U.S.C. § 844(i) & (n) - Malicious Destruction of Property and Conspiracy; 18 U.S.C. § 924(c) - Use of a Firearm During and in Relation to a Crime of Violence; 18 U.S.C. § 924(j) - Use of a Firearm During and in Relation to a Crime of Violence Causing Death; 18 U.S.C. § 2119(2) - Carjacking Resulting in Serious Bodily Injury; 18 U.S.C. § 1951 - Interference With Commerce by Threats or Violence; 18 U.S.C. § 2 - Aiding and Abetting; 18 U.S.C. § 981(a)(1)(G) - Forfeiture.

The Grand Jury charges that:

At all times relevant to this Indictment, unless otherwise indicated:

GENERAL ALLEGATIONS

1. DZHOKHAR A. TSARNAEV was a naturalized United States citizen residing in Cambridge, Massachusetts.

2. Tamerlan Tsarnaev was a Russian citizen residing in Cambridge, Massachusetts.

3. The 117th running of the Boston Marathon ("the Marathon") took place on April 15, 2013. The Marathon is an annual race that attracts thousands of runners from all over the United States and the world. It is normally held on Patriots' Day, a Massachusetts holiday that celebrates American patriotism and independence. Every year, friends and family members of the runners, and tens of thousands of others, line the race course to cheer on the runners and enjoy the race.

4. Many runners and their family members travel to the Boston, Massachusetts area from other states and countries and stay at local area hotels, eat at local area restaurants, and shop at local area businesses.

5. The final stretch of the Boston Marathon runs eastward along the center of Boylston Street in Boston from Hereford Street to the finish line, which is located between Exeter and Dartmouth Streets. Low metal barriers line both edges of the street and separate the spectators from the runners. Many businesses line the streets of the Marathon route. In the area near the finish line, businesses are located on both sides of Boylston Street, including restaurants, a department store, a hotel, and various retail stores.

6. On April 15, 2013, at approximately 2:49 p.m., while the Marathon was still underway, two improvised explosive devices ("IEDs") exploded on the north side of Boylston Street along the

Marathon's final stretch. The first exploded in front of Marathon Sports, located at 671 Boylston Street, and the second exploded in front of the Forum restaurant, located at 755 Boylston Street. The IEDs were placed near the metal barriers where hundreds of spectators were watching runners approach the finish line. Each explosion killed at least one person, maimed, burned, and wounded scores of others, and damaged public and private property, including property owned by people and businesses in the locations where the explosions occurred.

7. The IEDs that exploded at the Marathon were constructed from pressure cookers, low explosive powder, shrapnel, adhesive, and other materials. They were concealed inside black backpacks.

8. Inspire magazine is an English language online publication of al-Qaeda in the Arabian Peninsula. Volume One of Inspire magazine, which is dated summer 2010, contains detailed instructions for constructing IEDs using pressure cookers, explosive powder from fireworks, shrapnel, adhesive, and other materials. IEDs constructed in this manner are designed to shred flesh, shatter bone, and cause extreme pain and suffering, as well as death.

9. On April 18, 2013, at approximately 5:00 p.m., the Federal Bureau of Investigation ("FBI") published on its web site photographs of Tamerlan Tsarnaev and DZHOKHAR A. TSARNAEV,

identifying them as the two individuals suspected of detonating IEDs at the Marathon. (It did not identify them by name because law enforcement had not yet learned their names). These photographs were widely disseminated on television and elsewhere.

10. On April 19, 2013, while DZHOKHAR A. TSARNAEV was hiding from police in a drydocked boat in a Watertown, Massachusetts backyard, he wrote a message on an inside wall and beams of the boat that said (among other things): "The U.S. Government is killing our innocent civilians;" "I can't stand to see such evil go unpunished;" "We Muslims are one body, you hurt one you hurt us all;" "Now I don't like killing innocent people it is forbidden in Islam but due to said [unintelligible] it is allowed;" and "Stop killing our innocent people and we will stop."

COUNT ONE
Conspiracy to Use A Weapon
Of Mass Destruction Resulting in Death
(18 U.S.C. § 2332a(a)(2))

11. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

12. From at least in or about February 2013, up to and including on or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly conspired with Tamerlan Tsarnaev to use a weapon of mass destruction, namely, a destructive device as defined by Title 18, United States Code, Section 921, without lawful authority, against a person and property in the United States, and (1) such property was used in interstate and foreign commerce and in an activity that affects interstate and foreign commerce; (2) the mail and a facility of interstate and foreign commerce were used in furtherance of the offense; (3) a perpetrator traveled in and caused another to travel in interstate and foreign commerce in furtherance of the offense; and (4) the offense, and the results of the offense, affected interstate and foreign commerce.

13. The conspiracy resulted in at least one person's death; specifically, it resulted in the deaths of Krystle Marie Campbell, Officer Sean Collier, Lingzi Lu, and Martin Richard.

OVERT ACTS

14. In furtherance of the conspiracy, and to effect its illegal object, DZHOKHAR A. TSARNAEV, the defendant, and Tamerlan Tsarnaev committed the following overt acts, among others, in the District of Massachusetts and elsewhere:

15. At a time unknown to the Grand Jury, but before on or about April 15, 2013, DZHOKHAR A. TSARNAEV downloaded to his computer a digital copy of a book entitled, "The Slicing Sword, Against the One Who Forms Allegiances With the Disbelievers and Takes Them as Supporters Instead of Allah, His Messenger and The Believers." The version that DZHOKHAR A. TSARNAEV downloaded had a foreword by Anwar Al-Awlaki, who was a well-known al-Qaeda propagandist. This publication directs Muslims not to give their allegiance to governments that invade Muslim lands.

16. At a time unknown to the Grand Jury, but before on or about April 15, 2013, DZHOKHAR A. TSARNAEV downloaded to his computer a publication entitled "Defense of the Muslim Lands, the First Obligation After Imam," by Abdullah Azzam, who is also known as "the Father of Global Jihad." This publication advocates violence designed to terrorize the perceived enemies of Islam, among other things.

17. At a time unknown to the Grand Jury, but before on or about April 15, 2013, DZHOKHAR A. TSARNAEV downloaded to his computer a digital copy of the publication, "Jihad and the

Effects of Intention Upon It." The version he downloaded was published by an extremist web forum called At-Tibyan publications. The publication glorifies martyrdom in the service of violent jihad.

18. At a time unknown to the Grand Jury, but before on or about April 15, 2013, DZHOKHAR A. TSARNAEV downloaded to his computer a copy of Volume One of Inspire magazine, which includes instructions on how to build IEDs using pressure cookers or sections of pipe, explosive powder from fireworks, and shrapnel, among other things.

19. On or about February 6, 2013, Tamerlan Tsarnaev traveled to Phantom Fireworks in Seabrook, New Hampshire, and purchased 48 mortars containing approximately eight pounds of low explosive powder.

20. On or about March 20, 2013, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev traveled to a firing range in Manchester, New Hampshire, where DZHOKHAR A. TSARNAEV rented two 9mm handguns, purchased 200 rounds of ammunition, and engaged in target practice with Tamerlan Tsarnaev for approximately one hour.

21. On or about April 5, 2013, Tamerlan Tsarnaev used the internet to order electronic components that could be adapted for use in making IEDs, and those components were delivered by the United States Postal Service to the Cambridge, Massachusetts, residence shared by DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev.

22. On or about April 14, 2013, DZHOKHAR A. TSARNAEV opened a prepaid cell phone account under the name "Jahar Tsarni."

23. On April 15, 2013, at approximately 2:40 p.m., Tamerlan Tsarnaev walked to the front of Marathon Sports at 671 Boylston Street, where he placed a backpack concealing an IED constructed from a pressure cooker, low explosive powder, shrapnel, adhesive, electronic components, and other materials, among a dense crowd of Marathon spectators that included men, women, and children.

24. On April 15, 2013, at approximately 2:40 p.m., DZHOKHAR A. TSARNAEV walked to the front of the Forum restaurant at 755 Boylston Street, where he placed a backpack concealing an IED constructed from a pressure cooker, low explosive powder, shrapnel, adhesive, electronic components, and other materials, among a dense crowd of Marathon spectators that included men, women, and children.

25. On April 15, 2013, at approximately 2:48 p.m., DZHOKHAR A. TSARNAEV called Tamerlan Tsarnaev using his prepaid cell phone and spoke to him for several seconds.

26. On April 15, 2013, at approximately 2:49 p.m., seconds after DZHOKHAR A. TSARNAEV completed his phone call to Tamerlan Tsarnaev, Tamerlan Tsarnaev detonated the bomb he had placed in front of Marathon Sports, killing Krystle Marie Campbell and maiming and seriously injuring many others.

27. On April 15, 2013, at approximately 2:49 p.m., seconds after Tamerlan Tsarnaev detonated the bomb he had placed in front of Marathon Sports on Boylston Street, DZHOKHAR A. TSARNAEV detonated the bomb he had placed in front of the Forum restaurant on Boylston Street, killing Lingzi Lu and Martin Richard, and maiming and seriously injuring many others.

28. On or before April 18, 2013, DZHOKHAR A. TSARNAEV stored in his college dormitory room his computer and a backpack containing fireworks that had been emptied of low explosive powder.

29. On April 18, 2013, at approximately 8:45 p.m., a few hours after television stations and other media began disseminating a photograph of DZHOKHAR A. TSARNAEV that identified him as a suspect in the Marathon bombings, DZHOKHAR A. TSARNAEV sent a text message to a college classmate and close friend that read, "If you want u can go to my room and take what you want."

30. On April 18, 2013, at approximately 10:00 p.m., DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev armed themselves with five IEDs, a Ruger P95 9mm semiautomatic handgun, ammunition for the Ruger, a machete, and a hunting knife, and drove in their Honda Civic to the Massachusetts Institute of Technology ("MIT") in Cambridge, Massachusetts.

31. On April 18, 2013, at approximately 10:25 p.m., in the vicinity of 32 Vassar Street in Cambridge, Massachusetts, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev murdered Sean Collier, an MIT Police Officer, by shooting him in the head at close range with a Ruger P95 9mm semiautomatic handgun, and attempted to steal his service weapon.

32. On April 18, 2013, at approximately 11:00 p.m., in the vicinity of 60 Brighton Avenue in Boston, Massachusetts, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev carjacked D.M.'s leased Mercedes ML350 by pointing a gun at D.M. and threatening to kill him. They indicated to D.M. that they intended to drive his vehicle to Manhattan.

33. After carjacking and kidnaping D.M., DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev forced him to drive to Watertown, Massachusetts, where they retrieved a portable GPS device and other items from their Honda Civic. Then they forced D.M. to drive to a gas station in order to fill the Mercedes's gas tank.

34. While DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev were searching for a gas station, they drove D.M. to a Bank of America branch in Watertown Square and forced D.M. to hand over his Automatic Teller Machine ("ATM") debit card and personal identification number ("PIN"). Then DZHOKHAR A. TSARNAEV used the ATM card and PIN to withdraw $800 from D.M.'s Bank of America account against D.M.'s will.

35. On April 19, 2013, at approximately 12:15 a.m., D.M. escaped from the Mercedes and called 911. DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev then drove to the vicinity of Laurel Street and Dexter Avenue in Watertown, Massachusetts, where officers of the Watertown Police Department located them and tried to apprehend them.

36. On April 19, 2013, at approximately 12:43 a.m., DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev began firing at the officers trying to apprehend them and used four IEDs against them, one of which was made from a pressure cooker, low explosive powder, shrapnel, and other materials.

37. On April 19, 2013, at approximately 12:50 a.m., after attempting to shoot, bomb, and kill or disable the law enforcement officers who were trying to apprehend them, Tamerlan Tsarnaev was tackled by three Watertown police officers -- Sergeant Jeffrey Pugliese, Sergeant John MacLellan, and Officer John Reynolds -- and struggled with them as they tried to handcuff him. DZHOKHAR A. TSARNAEV reentered the Mercedes and drove it directly at the three police officers.

38. When DZHOKHAR A. TSARNAEV drove the Mercedes at the three police officers, he barely missed Sergeant Jeffrey Pugliese, who was attempting to drag Tamerlan Tsarnaev to safety. Then DZHOKHAR A. TSARNAEV ran over Tamerlan Tsarnaev, seriously injuring him and contributing to his death.

39. In the course of making his escape in the Mercedes, DZHOKHAR A. TSARNAEV also caused Richard Donohue, a Massachusetts Bay Transportation Authority officer, to sustain serious bodily injury.

40. After escaping in the Mercedes, DZHOKHAR A. TSARNAEV abandoned the car on Spruce Street in Watertown, smashed both of his cell phones, and hid in a drydocked boat in a Watertown backyard until he was captured by police.

All in violation of Title 18, United States Code, Section 2332a(a)(2).

COUNT TWO:
Use of a Weapon of Mass Destruction
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 2332a(a)(2); 18 U.S.C. § 2)

41. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

42. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly, and without lawful authority, used a weapon of mass destruction, namely, a destructive device as defined in Title 18, United States Code, Section 921, against a person and property within the United States, and: (1) such property was used in interstate and foreign commerce and in an activity that affects interstate and foreign commerce; and (2) the offense, and the results of the offense, affected interstate and foreign commerce, to wit, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev produced explosive bombs from pressure cookers, low explosive powder, ball bearings, nails, adhesives, electronic components, and other materials, then Tamerlan Tsarnaev, aided and abetted by DZHOKHAR A. TSARNAEV, placed and detonated one such bomb ("Pressure Cooker Bomb #1") in the vicinity of 671 Boylston Street in Boston, Massachusetts, which resulted in a premature end to the Boston Marathon and damage to Marathon Sports and other property.

43. The Grand Jury further charges that the offense resulted in at least one person's death; specifically, it resulted in the death of Krystle Marie Campbell.

All in violation of Title 18, United States Code, Section 2332a(a)(2), and Title 18, United States Code, Section 2.

COUNT THREE:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

44. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

45. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, use of a weapon of mass destruction, as charged in Count Two of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a bomb constructed from a pressure cooker, low explosive powder, and other materials ("Pressure Cooker Bomb #1").

46. The Grand Jury further charges that the firearm was discharged.

47. The Grand Jury further charges that the firearm was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

48. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18,

United States Code, Section 1111; specifically, he caused the death of Krystle Marie Campbell.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) & (iii), 924(c)(1)(B)(ii), 924(c)(1)(C)(ii), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT FOUR:
Use of a Weapon Of Mass Destruction
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 2332a(a)(2); 18 U.S.C. § 2)

49. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

50. On or about April 15, 2013, in the District of Massachusetts, and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly, and without lawful authority, used a weapon of mass destruction, namely, a destructive device as defined by Title 18, United States Code, Section 921, against a person and property within the United States, and: (1) such property was used in interstate and foreign commerce and in an activity that affects interstate and foreign commerce; and (2) the offense, and the results of the offense, affected interstate and foreign commerce, to wit, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev produced explosive bombs from pressure cookers, low explosive powder, ball bearings, nails, adhesives, electronic components, and other materials, then DZHOKHAR A. TSARNAEV placed and detonated one such bomb ("Pressure Cooker Bomb #2") in the vicinity of 755 Boylston Street in Boston, Massachusetts, which resulted in a premature end to the Boston Marathon and damage to the Forum restaurant and other property.

51. The Grand Jury further charges that the offense resulted in at least one person's death; specifically, it resulted in the deaths of Lingzi Lu and Martin Richard.

All in violation of Title 18, United States Code, Section 2332a(a)(2), and Title 18, United States Code, Section 2.

COUNT FIVE:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

52. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

53. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, use of a weapon of mass destruction, as charged in Count Four of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a bomb constructed from a pressure cooker, low explosive powder, and other materials ("Pressure Cooker Bomb #2").

54. The Grand Jury further charges that the firearm was discharged.

55. The Grand Jury further charges that the firearm was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

56. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18,

United States Code, Section 1111; specifically, he caused the deaths of Lingzi Lu and Martin Richard.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) & (iii), 924(c)(1)(B)(ii), 924(c)(1)(C)(ii), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT SIX
Conspiracy to Bomb a Place of Public Use Resulting in Death
(18 U.S.C. § 2332f(a)(1) & (c))

57. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and 14 through 40 and further charges that:

58. From at least in or about February 2013, up to and including on or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly conspired with Tamerlan Tsarnaev unlawfully to deliver, place, discharge, and detonate an explosive and other lethal device in, into, and against a place of public use (1) with the intent to cause death and serious bodily injury, and (2) with the intent to cause extensive destruction of such place, where such destruction results in and is likely to result in major economic loss.

59. The Grand Jury further charges that the offense took place in the United States and (1) it was committed in an attempt to compel the United States to do and abstain from doing any act, and (2) a victim was a national of another state and the offense had a substantial effect on interstate and foreign commerce.

60. The Grand Jury further charges that the offense resulted in the death of at least one person; specifically, it

resulted in the deaths of Krystle Marie Campbell, Officer Sean Collier, Lingzi Lu, and Martin Richard.

All in violation of Title 18, United States Code, Sections 2332f(a)(1), 2332f(a)(2) and 2332f(c).

COUNT SEVEN
Bombing of a Place of Public Use
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 2332f(a)(1) & (c); 18 U.S.C. § 2)

61. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

62. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly and unlawfully delivered, placed, discharged, and detonated an explosive and other lethal device ("Pressure Cooker Bomb #1") in, into, and against a place of public use (1) with the intent to cause death and serious bodily injury, and (2) with the intent to cause extensive destruction of such place, where such destruction results in and is likely to result in major economic loss, to wit, Tamerlan Tsarnaev, aided and abetted by DZHOKHAR A. TSARNAEV, placed Pressure Cooker Bomb #1 in front of Marathon Sports located at 671 Boylston Street, Boston, Massachusetts, and then detonated it, causing extensive destruction to Marathon Sports and other places of public use.

63. The Grand Jury further charges that the offense took place in the United States, and that (1) it was committed in an attempt to compel the United States to do and abstain from doing any act, and (2) a victim of the offense was a national of another state and the offense had a substantial effect on interstate and foreign commerce.

64. The Grand Jury further charges that the offense resulted in the death of at least one person; specifically, it resulted in the death of Krystle Marie Campbell.

All in violation of Title 18, United States Code, Section 2332f(a)(1) & (c), and Title 18, United States Code, Section 2.

COUNT EIGHT:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

65. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

66. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, bombing of a place of public use, as charged in Count Seven of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a bomb constructed from a pressure cooker, low explosive powder, and other materials ("Pressure Cooker Bomb #1").

67. The Grand Jury further charges that the firearm was discharged.

68. The Grand Jury further charges that the firearm was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

69. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18,

United States Code, Section 1111; specifically, he caused the death of Krystle Marie Campbell.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) & (iii), 924(c)(1)(B)(ii), 924(c)(1)(C)(ii), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT NINE
Bombing of a Place of Public Use
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 2332f(a)(1) & (c); 18 U.S.C. § 2)

70. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

71. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly and unlawfully delivered, placed, discharged, and detonated an explosive and other lethal device ("Pressure Cooker Bomb #2") in, into, and against a place of public use (1) with the intent to cause death and serious bodily injury, and (2) with the intent to cause extensive destruction of such place, where such destruction results in and is likely to result in major economic loss, to wit, DZHOKHAR A. TSARNAEV placed Pressure Cooker Bomb #2 in front of the Forum restaurant located at 755 Boylston Street, Boston, Massachusetts, and then detonated it, causing extensive destruction to the Forum restaurant and other places of public use.

72. The Grand Jury further charges that the offense took place in the United States, and that (1) it was committed in an attempt to compel the United States to do and abstain from doing any act, and (2) a victim of the offense was a national of another state and the offense had a substantial effect on interstate and foreign commerce.

73. The Grand Jury further charges that the offense resulted in the death of at least one person; specifically, it resulted in the deaths of Lingzi Lu and Martin Richard.

All in violation of Title 18, United States Code, Section 2332f(a)(1) & (c), and Title 18, United States Code, Section 2.

COUNT TEN:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

74. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

75. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, bombing of a place of public use, as charged in Count Nine of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a bomb constructed from a pressure cooker, low explosive powder, and other materials ("Pressure Cooker Bomb #2").

76. The Grand Jury further charges that the firearm was discharged.

77. The Grand Jury further charges that the firearm was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

78. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18,

United States Code, Section 1111; specifically, he caused the death of Lingzi Lu and Martin Richard.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) & (iii), 924(c)(1)(B)(ii), 924(c)(1)(C)(ii), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT ELEVEN:
Conspiracy to Maliciously Destroy Property
Resulting in Personal Injury and Death
(18 U.S.C. § 844(i) & (n))

79. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and 14 through 40 and further charges that:

80. From at least in or about February 2013, up to and including on or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly conspired with Tamerlan Tsarnaev to maliciously damage and destroy, by means of fire and an explosive, a building, vehicle and other real and personal property used in interstate and foreign commerce and in an activity affecting interstate and foreign commerce.

81. The Grand Jury further charges that the offense resulted in personal injury to at least one person; specifically, it resulted in personal injury to many persons who were participating in, viewing, and passing by the Boston Marathon.

82. The Grand Jury further charges that the offense resulted in the death of at least one person; specifically, it resulted in the deaths of Krystle Marie Campbell, Officer Sean Collier, Lingzi Lu, and Martin Richard.

All in violation of Title 18, United States Code, Sections 844(i) and 844(n).

COUNT TWELVE:
Malicious Destruction of Property Resulting in Personal Injury and Death; Aiding and Abetting
(18 U.S.C. § 844(i); 18 U.S.C. § 2)

83. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

84. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

maliciously damaged and destroyed, and attempted to damage and destroy, by means of fire and an explosive, a building, vehicle, and other real and personal property used in interstate and foreign commerce and in an activity affecting interstate and foreign commerce, to wit, Tamerlan Tsarnaev, aided and abetted by DZHOKHAR A. TSARNAEV, placed and detonated an explosive ("Pressure Cooker Bomb #1") in the vicinity of 671 Boylston Street in Boston, Massachusetts that resulted in a premature end to the Boston Marathon and damage to Marathon Sports and other business property.

85. The Grand Jury further charges that the offense resulted in personal injury to at least one person; specifically, it resulted in personal injury to many persons who were participating in, viewing, and passing by the Boston Marathon.

86. The Grand Jury further charges that the offense resulted in the death of at least one person; specifically, it resulted in the death of Krystle Marie Campbell.

All in violation of Title 18, United States Code, Section 844(i), and Title 18, United States Code, Section 2.

COUNT THIRTEEN:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

87. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

88. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, malicious destruction of property, as charged in Count Twelve of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a bomb constructed from a pressure cooker, low explosive powder, and other materials ("Pressure Cooker Bomb #1").

89. The Grand Jury further charges that the firearm was discharged.

90. The Grand Jury further charges that the firearm was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

91. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18,

United States Code, Section 1111; specifically, he caused the death of Krystle Marie Campbell.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) & (iii), 924(c)(1)(B)(ii), 924(c)(1)(C)(ii), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT FOURTEEN:
Malicious Destruction of Property Resulting in Personal Injury and Death; Aiding and Abetting
(18 U.S.C. § 844(i); 18 U.S.C. § 2)

92. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

93. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

maliciously damaged and destroyed, and attempted to damage and destroy, by means of fire and an explosive, a building, vehicle, and other real and personal property used in interstate and foreign commerce and in an activity affecting interstate and foreign commerce, to wit, DZHOKHAR A. TSARNAEV placed and detonated an explosive ("Pressure Cooker Bomb #2") in the vicinity of 755 Boylston Street in Boston, Massachusetts that resulted in a premature end to the Boston Marathon and damage to the Forum restaurant and other business property.

94. The Grand Jury further charges that the offense resulted in personal injury to at least one person; specifically, it resulted in personal injury to many persons who were participating in, viewing, and passing by the Boston Marathon.

95. The Grand Jury further charges that the offense resulted in the death of at least one person; specifically, it resulted in the deaths of Lingzi Lu and Martin Richard.

All in violation of Title 18, United States Code, Section 844(i), and Title 18, United States Code, Section 2.

COUNT FIFTEEN:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

96. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

97. On or about April 15, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, malicious destruction of property, as charged in Count Fourteen of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a bomb constructed from a pressure cooker, low explosive powder, and other materials ("Pressure Cooker Bomb #2").

98. The Grand Jury further charges that the firearm was discharged.

99. The Grand Jury further charges that the firearm was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

100. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18,

United States Code, Section 1111; specifically, he caused the death of Lingzi Lu and Martin Richard.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) & (iii), 924(c)(1)(B)(ii), 924(c)(1)(C)(ii), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT SIXTEEN:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

101. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

102. On or about April 18, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, conspiracy to use a weapon of mass destruction, as charged in Count One of this Indictment), did knowingly use and carry a firearm (namely, a Ruger P95 9mm semiautomatic handgun), and did, in furtherance of such crime, knowingly possess said firearm.

103. The Grand Jury further charges that the firearm was brandished.

104. The Grand Jury further charges that the firearm was discharged.

105. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18, United States Code, Section 1111; specifically, he caused the death of Officer Sean Collier.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii) & (iii), 924(c)(1)(C)(i), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT SEVENTEEN:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

106. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

107. On or about April 18, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, conspiracy to bomb a place of public use, as charged in Count Six of this Indictment), did knowingly use and carry a firearm (namely, a Ruger P95 9mm semiautomatic handgun), and did, in furtherance of such crime, knowingly possess said firearm.

108. The Grand Jury further charges that the firearm was brandished.

109. The Grand Jury further charges that the firearm was discharged.

110. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18, United States Code, Section 1111; specifically, he caused the death of Officer Sean Collier.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii) & (iii), 924(c)(1)(C)(i), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT EIGHTEEN:
Possession and Use of a Firearm
During and in Relation to a Crime of Violence
Resulting in Death; Aiding and Abetting
(18 U.S.C. § 924(c) & (j); 18 U.S.C. § 2)

111. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

112. On or about April 18, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, conspiracy maliciously to destroy property, as charged in Count Eleven of this Indictment), did knowingly use and carry a firearm (namely, a Ruger P95 9mm semiautomatic handgun), and did, in furtherance of such crime, knowingly possess said firearm.

113. The Grand Jury further charges that the firearm was brandished.

114. The Grand Jury further charges that the firearm was discharged.

115. The Grand Jury further charges that DZHOKHAR A. TSARNAEV, in the course of committing the violation alleged in this count, caused the death of a person through the use of the firearm, and the killing was a murder as defined in Title 18, United States Code, Section 1111; specifically, he caused the death of Officer Sean Collier.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii) & (iii), 924(c)(1)(C)(i), and 924(j)(1), and Title 18, United States Code, Section 2.

COUNT NINETEEN
Carjacking Resulting in
Serious Bodily Injury; Aiding and Abetting
(18 U.S.C. § 2119(2); 18 U.S.C. § 2)

116. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

117. On or about April 18, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

with the intent to cause death and serious bodily harm, knowingly took and attempted to take from the person and presence of D.M., by force and violence, and by intimidation, a motor vehicle that had been transported, shipped, and received in interstate and foreign commerce, that is, a 2013 Mercedes ML350 bearing Massachusetts license plate 137N71 and VIN 4JGDA5HB1DA193885.

118. The Grand Jury further charges that the offense resulted in serious bodily injury to Officer Richard Donohue.

All in violation of Title 18, United States Code, Section 2119(2), and Title 18, United States Code, Section 2.

COUNT TWENTY:
Possession and Use of a Firearm
During and in Relation To
a Crime of Violence; Aiding and Abetting
(18 U.S.C. § 924(c); 18 U.S.C. § 2)

119. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

120. On or about April 18, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, carjacking, as charged in Count Nineteen of this Indictment), did knowingly use and carry a firearm (namely, a Ruger P95 9mm semiautomatic handgun), and did, in furtherance of such crime, knowingly possess said firearm.

121. The Grand Jury further charges that the firearm was brandished.

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i) & (ii) and 924(c)(1)(C)(i), and Title 18, United States Code, Section 2.

COUNT TWENTY-ONE
Interference With Commerce
by Threats and Violence; Aiding and Abetting
(18 U.S.C. § 1951; 18 U.S.C. § 2)

122. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

123. On or about April 18, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

committed a robbery that in some way and degree obstructed, delayed, and affected commerce, to wit, DZHOKHAR A. TSARNAEV unlawfully took and obtained personal property consisting of eight hundred dollars from the person and in the presence of D.M., against his will, by means of actual and threatened force, violence and fear of injury, immediate and future, to his person and property, by forcing D.M. to provide his Bank of America Automatic Teller Machine ("ATM") debit card and personal identification number ("PIN") to DZHOKHAR A. TSARNAEV, who then and there used the ATM card and PIN to obtain eight hundred dollars from the Bank of America branch located at 39 Main Street in Watertown, Massachusetts.

All in violation of Title 18, United States Code, Section 1951, and Title 18, United States Code, Section 2.

COUNT TWENTY-TWO:
Possession and Use of a Firearm
During and in Relation To
a Crime of Violence; Aiding and Abetting
(18 U.S.C. § 924(c); 18 U.S.C. § 2)

124. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

125. On or about April 18, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, interference with commerce by threats and violence, as charged in Count Twenty-One of this Indictment), did knowingly use and carry a firearm (namely, a Ruger P95 9mm semiautomatic handgun), and did, in furtherance of such crime, knowingly possess said firearm.

126. The Grand Jury further charges that the firearm was brandished.

All in violation of Title 18, United States Code, Section 924(c)(1)(A)(i) & (ii) and 924(c)(1)(C)(i), and Title 18, United States Code, Section 2.

COUNT TWENTY-THREE:
Use of a Weapon of Mass Destruction;
Aiding and Abetting
(18 U.S.C. § 2332a(a)(2); 18 U.S.C. § 2)

127. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

128. On or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly, and without lawful authority, used a weapon of mass destruction, namely, a destructive device as defined in Title 18, United States Code, Section 921, against a person and property within the United States, and: (1) such property was used in interstate and foreign commerce and in an activity that affects interstate and foreign commerce; and (2) the offense, and the results of the offense, affected interstate and foreign commerce, to wit, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev used an explosive device constructed from a pressure cooker, low explosive powder, and other materials ("Pressure Cooker Bomb #3"), against law enforcement officers in the vicinity of Laurel Street and Dexter Avenue in Watertown, Massachusetts, resulting in damage to property used in an activity that affects interstate and foreign commerce and in the closure of businesses, as the Governor of Massachusetts and other public officials asked residents in Watertown, Boston, and elsewhere in Massachusetts to

assist law enforcement by remaining indoors while the officers attempted to apprehend DZHOKHAR A. TSARNAEV.

All in violation of Title 18, United States Code, Section 2332a(a)(2), and Title 18, United States Code, Section 2.

COUNT TWENTY-FOUR:
Possession and Use of a Firearm
During and in Relation To
a Crime of Violence; Aiding and Abetting
(18 U.S.C. § 924(c); 18 U.S.C. § 2)

129. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

130. On or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, use of a weapon of mass destruction, as charged in Count Twenty-Three of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a Ruger P95 9mm semiautomatic handgun ("the Ruger") and a bomb constructed from a pressure cooker, low explosive powder, and other materials ("Pressure Cooker Bomb #3").

131. The Grand Jury further charges that a firearm was brandished; specifically, the Ruger and Pressure Cooker Bomb #3 were brandished.

132. The Grand Jury further charges that a firearm was discharged; specifically, the Ruger and Pressure Cooker Bomb #3 were discharged.

133. The Grand Jury further charges that the firearm, namely, Pressure Cooker Bomb #3, was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii), & (iii), 924(c)(1)(B)(i) & (ii), and 924(c)(1)(C)(i) & (ii), and Title 18, United States Code, Section 2.

COUNT TWENTY-FIVE:
Use of a Weapon of Mass Destruction;
Aiding and Abetting
(18 U.S.C. § 2332a(a)(2); 18 U.S.C. § 2)

134. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

135. On or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly, and without lawful authority, used a weapon of mass destruction, namely, a destructive device as defined in Title 18, United States Code, Section 921, against a person and property within the United States, and: (1) such property was used in interstate and foreign commerce and in an activity that affects interstate and foreign commerce; and (2) the offense, and the results of the offense, affected interstate and foreign commerce, to wit, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev used an explosive device constructed from a section of pipe, low explosive powder, and other materials ("Pipe Bomb #1") against law enforcement officers in the vicinity of Laurel Street and Dexter Avenue in Watertown, Massachusetts, resulting in damage to property used in an activity that affects interstate and foreign commerce and in the closure of businesses, as the Governor of Massachusetts and other public officials asked residents in Watertown, Boston, and elsewhere to assist law enforcement by

remaining indoors while the officers attempted to capture DZHOKHAR A. TSARNAEV.

All in violation of Title 18, United States Code, Section 2332a(a)(2), and Title 18, United States Code, Section 2.

COUNT TWENTY-SIX:
Possession and Use of a Firearm
During and in Relation To
a Crime of Violence; Aiding and Abetting
(18 U.S.C. § 924(c); 18 U.S.C. § 2)

136. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

137. On or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, use of a weapon of mass destruction, as charged in Count Twenty-Five of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a Ruger P95 9mm semiautomatic handgun ("the Ruger") and a bomb constructed from a section of pipe, low explosive powder, and other materials ("Pipe Bomb #1").

138. The Grand Jury further charges that a firearm was brandished; specifically, the Ruger and Pipe Bomb #1 were brandished.

139. The Grand Jury further charges that a firearm was discharged; specifically, the Ruger and Pipe Bomb #1 were discharged.

140. The Grand Jury further charges that the firearm, namely, Pipe Bomb #1, was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii), and (iii), 924(c)(1)(B)(i) & (ii), 924(c)(1)(C)(i) & (ii), and Title 18, United States Code, Section 2.

COUNT TWENTY-SEVEN:
Use of a Weapon Of Mass Destruction;
Aiding and Abetting
(18 U.S.C. § 2332a; 18 U.S.C. § 2)

141. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

142. On or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly, and without lawful authority, used a weapon of mass destruction, namely, a destructive device as defined in Title 18, United States Code, Section 921, against a person and property within the United States, and: (1) such property was used in interstate and foreign commerce and in an activity that affects interstate and foreign commerce; and (2) the offense, and the results of the offense, affected interstate and foreign commerce, to wit, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev used an explosive device constructed from a section of pipe, low explosive powder, and other materials ("Pipe Bomb #2") against law enforcement officers in the vicinity of Laurel Street and Dexter Avenue in Watertown, Massachusetts, resulting in damage to property used in an activity that affects interstate and foreign commerce and in the closure of businesses, as the Governor of Massachusetts and other public officials asked residents in Watertown, Boston, and elsewhere to assist law enforcement by

remaining indoors while the officers attempted to capture DZHOKHAR A. TSARNAEV.

All in violation of Title 18, United States Code, Section 2332a(a)(2), and Title 18, United States Code, Section 2.

COUNT TWENTY-EIGHT:
Possession and Use of a Firearm
During and in Relation To
a Crime of Violence; Aiding and Abetting
(18 U.S.C. § 924(c); 18 U.S.C. § 2)

143. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

144. On or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, use of a weapon of mass destruction, as charged in Count Twenty-Seven of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a Ruger P95 9mm semiautomatic handgun ("the Ruger") and a bomb constructed from a section of pipe, low explosive powder, and other materials ("Pipe Bomb #2").

145. The Grand Jury further charges that a firearm was brandished; specifically, the Ruger and Pipe Bomb #2 were brandished.

146. The Grand Jury further charges that a firearm was discharged; specifically, the Ruger and Pipe Bomb #2 were discharged.

147. The Grand Jury further charges that the firearm, namely, Pipe Bomb #2, was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii), and (iii), 924(c)(1)(B)(i) & (ii), 924(c)(1)(C)(i) & (ii), and Title 18, United States Code, Section 2.

COUNT TWENTY-NINE:
Use of a Weapon Of Mass Destruction;
Aiding and Abetting
(18 U.S.C. § 2332a; 18 U.S.C. § 2)

148. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

149. On or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

knowingly, and without lawful authority, used a weapon of mass destruction, namely, a destructive device as defined in Title 18, United States Code, Section 921, against a person and property within the United States, and: (1) such property was used in interstate and foreign commerce and in an activity that affects interstate and foreign commerce; and (2) the offense, and the results of the offense, affected interstate and foreign commerce, to wit, DZHOKHAR A. TSARNAEV and Tamerlan Tsarnaev used an explosive device constructed from a section of pipe, low explosive powder, and other materials ("Pipe Bomb #3") against law enforcement officers in the vicinity of Laurel and Dexter Streets in Watertown, Massachusetts, resulting in damage to property used in an activity that affects interstate and foreign commerce and in the closure of businesses, as the Governor of Massachusetts and other public officials asked residents in Watertown, Boston, and elsewhere to assist law enforcement by

remaining indoors while the officers attempted to capture DZHOKHAR A. TSARNAEV.

All in violation of Title 18, United States Code, Section 2332a(a)(2), and Title 18, United States Code, Section 2.

COUNT THIRTY:
Possession and Use of a Firearm
During and in Relation To
a Crime of Violence; Aiding and Abetting
(18 U.S.C. § 924(c); 18 U.S.C. § 2)

150. The Grand Jury realleges and incorporates by reference paragraphs 1 through 10 and further charges that:

151. On or about April 19, 2013, in the District of Massachusetts and elsewhere, the defendant,

DZHOKHAR A. TSARNAEV,

during and in relation to a crime of violence for which he may be prosecuted in a court of the United States (namely, use of a weapon of mass destruction, as charged in Count Twenty-Nine of this Indictment), did knowingly use and carry a firearm, and did, in furtherance of such crime, knowingly possess said firearm, to wit, a Ruger P95 9mm semiautomatic handgun ("the Ruger") and a bomb constructed from a section of pipe, low explosive powder, and other materials ("Pipe Bomb #3").

152. The Grand Jury further charges that a firearm was brandished; specifically, the Ruger and Pipe Bomb #3 were brandished.

153. The Grand Jury further charges that the firearm, namely, the Ruger, was discharged.

154. The Grand Jury further charges that the firearm, namely, Pipe Bomb #3, was a destructive device as defined in 18 U.S.C. § 921(a)(4)(A).

All in violation of Title 18, United States Code, Sections 924(c)(1)(A)(i), (ii), and (iii), 924(c)(1)(B)(i) & (ii), 924(c)(1)(C)(i) & (ii), and Title 18, United States Code, Section 2.

NOTICE OF SPECIAL FINDINGS

155. The Grand Jury realleges and incorporates by reference the general allegations in paragraphs 1 through 10 as well as the allegations in Counts One through Ten and Twelve through Eighteen of this Indictment as if fully set forth herein. The Grand Jury further alleges that the defendant, DZHOKHAR A. TSARNAEV, with respect to the Counts specified after each allegation:

a. was 18 years of age or older at the time of the offense (18 U.S.C. § 3591(a)(2)) (Counts One through Ten and Twelve through Eighteen);

b. intentionally killed Krystle Marie Campbell (18 U.S.C. § 3591(a)(2)(A)) (Counts One, Two, Three, Six, Seven, Eight, Twelve, and Thirteen);

c. intentionally killed Officer Sean Collier (18 U.S.C. § 3591(a)(2)(A)) (Counts One, Six, Sixteen, Seventeen, Eighteen);

d. intentionally killed Lingzi Lu (18 U.S.C. § 3591(a)(2)(A)) (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen);

e. intentionally killed Martin Richard (18 U.S.C. § 3591(a)(2)(A)) (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen);

f. intentionally inflicted serious bodily injury that resulted in the death of Krystle Marie Campbell (18 U.S.C.

§ 3591(a)(2)(B)) (Counts One, Two, Three, Six, Seven, Eight, Twelve, and Thirteen);

g. intentionally inflicted serious bodily injury that resulted in the death of Officer Sean Collier (18 U.S.C. § 3591(a)(2)(B)) (Counts One, Six, Sixteen, Seventeen, Eighteen);

h. intentionally inflicted serious bodily injury that resulted in the death of Lingzi Lu (18 U.S.C. § 3591(c)(2)(B)) (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen);

i. intentionally inflicted serious bodily injury that resulted in the death of Martin Richard (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen);

j. intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and Krystle Marie Campbell died as a direct result of the act (18 U.S.C. § 3591(a)(2)(C)) (Counts One, Two, Three, Six, Seven, Eight, Twelve, and Thirteen);

k. intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and Officer Sean Collier died as a direct result of the act (18 U.S.C. § 3591(a)(2)(C)) (Counts One, Six, Sixteen, Seventeen, Eighteen);

l. intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and Lingzi Lu died as a direct result of the act (18 U.S.C. § 3591(a)(2)(C)) (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen);

m. intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and Martin Richard died as a direct result of the act (18 U.S.C. § 3591(a)(2)(C)) (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen);

n. intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life, and Krystle Marie Campbell died as a direct result of the act (18 U.S.C. § 3591(a)(2)(D)) (Counts One, Two, Three, Six, Seven, Eight, Twelve, and Thirteen);

o. intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life, and Officer Sean Collier died as a direct result

of the act (18 U.S.C. § 3591(a)(2)(D)) (Counts One, Six, Sixteen, Seventeen, Eighteen);

p. intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life, and Lingzi Lu died as a direct result of the act (18 U.S.C. § 3591(a)(2)(D)) (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen);

q. intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life, and Martin Richard died as a direct result of the act (18 U.S.C. § 3591(a)(2)(D)) (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen);

r. knowingly created a grave risk of death to one or more persons in addition to the victim of the offense in the commission of the offense and in escaping apprehension for the violation of the offense (18 U.S.C. § 3592(c)(5)) (Counts One through Ten and Twelve through Fifteen);

s. committed the offense in an especially heinous, cruel and depraved manner in that it involved serious physical abuse to

the victim (18 U.S.C. § 3592(c)(6)) (Counts One through Ten and Twelve through Fifteen);

t. committed the offense after substantial planning and premeditation to cause the death of a person and commit an act of terrorism (18 U.S.C. § 3592(c)(9)) (Counts One through Ten and Twelve through Fifteen);

u. intentionally killed and attempted to kill more than one person in a single criminal episode (18 U.S.C. § 3592(c)(16)) (Counts One through Ten and Twelve through Fifteen).

156. The Grand Jury realleges and incorporates by reference the general allegations in paragraphs 1 through 10 as well as the allegations in Counts One through Ten and Twelve through Eighteen of this Indictment as if fully set forth herein. The Grand Jury further alleges, with respect to the Counts specified after each allegation:

v. The death, and injury resulting in death, of Krystle Marie Campbell occurred during the commission and attempted commission of, and during the immediate flight from the commission of (1) an offense under 18 U.S.C. § 2332a (use of a weapon of mass destruction), and (2) 18 U.S.C. § 844(i) (destruction of property affecting interstate commerce by explosives) (18 U.S.C. § 3592(c)(1)) (Counts One, Two, and Twelve);

w. The death, and injury resulting in death, of Officer Sean Collier occurred during the commission and attempted commission of, and during the immediate flight from the commission of an offense under 18 U.S.C. § 2332a (use of a weapon of mass destruction) (18 U.S.C. § 3592(c)(1)) (Count One);

x. The death, and injury resulting in death, of Lingzi Lu occurred during the commission and attempted commission of, and during the immediate flight from the commission of (1) an offense under 18 U.S.C. § 2332a (use of a weapon of mass destruction), and (2) 18 U.S.C. § 844(i) (destruction of property affecting interstate commerce by explosives) (18 U.S.C. § 3592(c)(1)) (Counts One, Four, and Fourteen);

y. The death, and injury resulting in death, of Martin Richard occurred during the commission and attempted commission of, and during the immediate flight from the commission of (1) an offense under 18 U.S.C. § 2332a (use of a weapon of mass destruction), and (2) 18 U.S.C. § 844(i) (destruction of property affecting interstate commerce by explosives) (18 U.S.C. § 3592(c)(1)) (Counts One, Four and Fourteen); and

z. The victim, Martin Richard, was particularly vulnerable due to youth (18 U.S.C. § 3592(c)(11)) (Counts One, Four, Five, Six, Nine, Ten, Fourteen, and Fifteen).

FORFEITURE ALLEGATION

157. As a result of planning and perpetrating Federal crimes of terrorism against the United States, as defined in 18 U.S.C. § 2332b(g)(5) and as alleged in Counts One, Two, Four, Six, Seven, Nine, Eleven, Twelve, Fourteen, Twenty-Three, Twenty-Five, Twenty-Seven, and Twenty-Nine of this Indictment, the defendant, DZHOKHAR A. TSARNAEV, shall forfeit to the United States, pursuant to Title 18, United States Code, Sections 981(a)(1)(G) and Title 28, United States Code, Section 2461:

a. all right, title, and interest in all assets, foreign and domestic;

b. all right, title and interest in all assets, foreign and domestic, acquired and maintained with the intent and for the purpose of supporting, planning, conducting, and concealing a Federal crime of terrorism against the United States, citizens and residents of the United States, and their property; and

c. all right, title and interest in all assets, foreign and domestic, derived from, involved in, and used and intended to be used to commit a Federal crime of terrorism against the United States, citizens and residents of the United States, and their property; including, but not limited to, a sum of money

representing the value of the property described above as being subject to forfeiture.

(Title 18, United States Code, Sections 981(a)(1)(G) and 2332b(g)(5) and Title 28, United States Code, Section 2461.)

A TRUE BILL

FOREPERSON OF THE GRAND JURY

WILLIAM D. WEINREB
ALOKE CHAKRAVARTY
NADINE PELLEGRINI
Assistant U.S. Attorneys

DISTRICT OF MASSACHUSETTS; June 27, 2013

Returned into the District Court by the Grand Jurors and filed.

DEPUTY CLERK

6/27/2013
@ 12:46pm

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
a/k/a "Jahar Tsarni,"
Defendant.

VERDICT

COUNT ONE:

1. As to Count One of the Indictment charging conspiracy to use a weapon of mass destruction, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the conspiracy charged in Count One of the Indictment resulted in at least one of the four deaths alleged in Count One, we unanimously find:

a. As to the death of Krystle Marie Campbell:
☐ No ☑ Yes

b. As to the death of Officer Sean Collier:
☐ No ☑ Yes

c. As to the death of Lingzi Lu:
☐ No ☑ Yes

d. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT TWO:

1. As to Count Two of the Indictment charging use of a weapon of mass destruction (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street in Boston, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the offense charged in Count Two resulted in the death of Krystle Marie Campbell, we unanimously find:

☐ No ☑ Yes

COUNT THREE:

1. As to Count Three of the Indictment charging that the defendant used or carried a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as charged in Count Two of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Three (Pressure Cooker Bomb #1) was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the firearm charged in Count Three (Pressure Cooker Bomb #1) was a destructive device, we unanimously find:

☐ No ☑ Yes

4. As to whether the defendant, in the course of committing the violation alleged in Count Three, caused the death of Krystle Marie Campbell through the use of the firearm, and the killing was a murder, or aided or abetted another in causing the death of Krystle Marie Campbell through the use of the firearm, and the killing was a murder, we unanimously find:

☐ No ☑ Yes

COUNT FOUR:

1. As to Count Four of the Indictment charging use of a weapon of mass destruction (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street in Boston, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the offense charged in Count Four of the Indictment resulted in at least one of the two deaths alleged in Count Four, we unanimously find:

a. As to the death of Lingzi Lu:
☐ No ☑ Yes

b. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT FIVE:

1. As to Count Five of the Indictment charging that the defendant used or carried a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as charged in Count Four of this Indictment, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Five was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the firearm charged in Count Five was a destructive device, we unanimously find:

☐ No ☑ Yes

4. As to whether the defendant, in the course of committing the violation alleged in Count Five, caused one of the two deaths alleged in Count Five, and the killing was a murder, or aided or abetted another in causing one of the two deaths alleged in Count Five, and the killing was a murder, we unanimously find:

a. As to the death of Lingzi Lu:
☐ No ☑ Yes

b. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT SIX:

1. As to Count Six of the Indictment charging conspiracy to bomb a place of public use, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the conspiracy charged in Count Six of the Indictment resulted in at least one of the deaths alleged in Count Six, we unanimously find:

a. As to the death of Krystle Marie Campbell:
☐ No ☑ Yes

b. As to the death of Officer Sean Collier:
☐ No ☑ Yes

c. As to the death of Lingzi Lu:
☐ No ☑ Yes

d. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT SEVEN:

1. As to Count Seven of the Indictment charging the bombing of a place of public use (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street, Boston, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the offense charged in Count Seven resulted in the death of Krystle Marie Campbell, we unanimously find:

☐ No ☑ Yes

COUNT EIGHT:

1. As to Count Eight of the Indictment charging that the defendant used or carried a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, the bombing of a place of public use as charged in Count Seven of this Indictment, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Eight (Pressure Cooker Bomb #1) was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the firearm charged in Count Eight (Pressure Cooker Bomb #1) was a destructive device, we unanimously find:

☐ No ☑ Yes

4. As to whether the defendant, in the course of committing the violation alleged in Count Eight, caused the death of Krystle Marie Campbell through the use of the firearm, and the killing was a murder, or aided or abetted another in causing the death of Krystle Marie Campbell through the use of the firearm, and the killing was a murder, we unanimously find:

☐ No ☑ Yes

COUNT NINE:

1. As to Count Nine of the Indictment charging the bombing of a place of public use (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street, Boston, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the offense charged in Count Nine of the Indictment resulted in the death of at least one of the two persons alleged in Count Nine, we unanimously find:

a. As to the death of Lingzi Lu:
☐ No ☑ Yes

b. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT TEN:

1. As to Count Ten of the Indictment charging that the defendant used or carried a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, the bombing of a place of public use as charged in Count Nine of this Indictment, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Ten (Pressure Cooker Bomb #2) was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the firearm charged in Count Ten (Pressure Cooker Bomb #2) was a destructive device, we unanimously find:

☐ No ☑ Yes

4. As to whether the defendant, in the course of committing the violation alleged in Count Ten of the Indictment, caused the death of one of the two persons alleged in Count Ten through the use of the firearm, and the killing was a murder, or aided or abetted another in causing the death of one of the two persons alleged in Count Ten through the use of the firearm, and the killing was a murder, we unanimously find:

a. As to the death of Lingzi Lu:
☐ No ☑ Yes

b. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT ELEVEN:

1. As to Count Eleven of the Indictment charging conspiracy to maliciously destroy property, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the conspiracy charged in Count Eleven of the Indictment resulted in at least one of the four deaths alleged in Count Eleven, we unanimously find:

a. As to the death of Krystle Marie Campbell:
☐ No ☑ Yes

b. As to the death of Officer Sean Collier:
☐ No ☑ Yes

c. As to the death of Lingzi Lu:
☐ No ☑ Yes

d. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT TWELVE:

1. As to Count Twelve of the Indictment charging malicious destruction of property by means of an explosive (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street in Boston, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-3. If not guilty, proceed to the next Count.

2. As to whether the offense charged in Count Twelve of the Indictment resulted in personal injury to at least one person, we unanimously find:

☐ No ☑ Yes

3. As to whether the offense charged in Count Twelve of the Indictment resulted in the death of Krystle Marie Campbell, we unanimously find:

☐ No ☑ Yes

COUNT THIRTEEN:

1. As to Count Thirteen of the Indictment charging that the defendant used or carried a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, malicious destruction of property as charged in Count Twelve of this Indictment, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Thirteen was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the firearm charged in Count Thirteen was a destructive device, we unanimously find:

☐ No ☑ Yes

4. As to whether the defendant, in the course of committing the violation alleged in Count Thirteen, caused the death of Krystle Marie Campbell through the use of the firearm, and the killing was a murder, or aided or abetted another in causing the death of Krystle Marie Campbell through the use of the firearm, and the killing was a murder, we unanimously find:

☐ No ☑ Yes

COUNT FOURTEEN:

1. As to Count Fourteen of the Indictment charging malicious destruction of property by means of an explosive (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street in Boston, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-3. If not guilty, proceed to the next Count.

2. As to whether the offense charged in Count Fourteen resulted in personal injury to at least one person, we unanimously find:

☐ No ☑ Yes

3. As to whether the offense charged in Count Fourteen of the Indictment resulted in at least one of the two deaths alleged in Count Fourteen, we unanimously find:

a. As to the death of Lingzi Lu:
☐ No ☑ Yes

b. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT FIFTEEN:

1. As to Count Fifteen of the Indictment charging that the defendant used or carried a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, malicious destruction of property as charged in Count Fourteen of this Indictment, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Fifteen (Pressure Cooker Bomb #2) was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the firearm charged in Count Fifteen (Pressure Cooker Bomb #2) was a destructive device, we unanimously find:

☐ No ☑ Yes

4. As to whether the defendant, in the course of committing the violation alleged in Count Fifteen of the Indictment, caused the death of one of the two persons alleged in Count Fifteen, and the killing was a murder, or aided or abetted another in causing the death of one of the two persons alleged in Count Fifteen, and the killing was a murder, we unanimously find:

a. As to the death of Lingzi Lu:
☐ No ☑ Yes

b. As to the death of Martin Richard:
☐ No ☑ Yes

COUNT SIXTEEN:

1. As to Count Sixteen of the Indictment charging that on or about April 18, 2013, the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun) during and in relation to a crime of violence, namely, conspiracy to use a weapon of mass destruction as charged in Count One of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-3. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Sixteen (Ruger P95 9mm semiautomatic handgun) was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the defendant, in the course of the violation charged in Count Sixteen, caused the death of Officer Sean Collier, and the killing was a murder, or aided or abetted another in causing the death of Officer Sean Collier, and the killing was a murder, we unanimously find:

☐ No ☑ Yes

COUNT SEVENTEEN:

1. As to Count Seventeen of the Indictment charging that on or about April 18, 2013, the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun) during and in relation to a crime of violence, namely, conspiracy to bomb a place of public use as charged in Count Six of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-3. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Seventeen was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the defendant, in the course of committing the violation charged in Count Seventeen of the Indictment, caused the death of Officer Sean Collier, and the killing was a murder, or aided or abetted another in causing the death of Officer Sean Collier, and the killing was a murder, we unanimously find:

☐ No ☑ Yes

COUNT EIGHTEEN:

1. As to Count Eighteen of the Indictment charging that on or about April 18, 2013, the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun) during and in relation to a crime of violence, namely, conspiracy to maliciously destroy property as charged in Count Eleven of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-3. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Eighteen was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether the defendant, in the course of committing the violation charged in Count Eighteen, caused the death of Officer Sean Collier, and the killing was a murder, or aided or abetted another in causing the death of Officer Sean Collier, and the killing was a murder, we unanimously find:

☐ No ☑ Yes

COUNT NINETEEN:

1. As to Count Nineteen of the Indictment charging carjacking and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the offense charged in Count Nineteen resulted in serious bodily injury to Officer Richard Donohue, we unanimously find:

☐ No ☑ Yes

COUNT TWENTY:

1. As to Count Twenty of the Indictment charging that on or about April 18, 2013, the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun) during and in relation to a crime of violence, namely, carjacking as charged in Count Nineteen of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Twenty (Ruger P95 9mm semiautomatic handgun) was brandished, we unanimously find:

☐ No ☑ Yes

COUNT TWENTY-ONE:

1. As to Count Twenty-One of the Indictment charging interference with commerce by threats or violence on or about April 18, 2013, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

COUNT TWENTY-TWO:

1. As to Count Twenty-Two of the Indictment charging that on or about April 18, 2013, the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun) during and in relation to a crime of violence, namely, interference with commerce by threats and violence as charged in Count Twenty-One of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

If guilty, proceed to Question 2. If not guilty, proceed to the next Count.

2. As to whether the firearm charged in Count Twenty-Two was brandished, we unanimously find:

☐ No ☑ Yes

COUNT TWENTY-THREE:

1. As to Count Twenty-Three of the Indictment charging use of a weapon of mass destruction (Pressure Cooker Bomb #3) on or about April 19, 2013, in the vicinity of Laurel Street and Dexter Avenue in Watertown, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

COUNT TWENTY-FOUR:

1. As to Count Twenty-Four of the Indictment charging that the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun and Pressure Cooker Bomb #3) during and in relation to a crime of violence, namely, use of a weapon of mass destruction, as charged in Count Twenty-Three of this Indictment, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

a. As to the Ruger P95 9mm semiautomatic handgun:
☐ Not Guilty ☑ Guilty

b. As to Pressure Cooker Bomb #3:
☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the Ruger P95 9mm semiautomatic handgun charged in Count Twenty-Four was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether Pressure Cooker Bomb #3 charged in Count Twenty-Four was discharged, we unanimously find:

☐ No ☑ Yes

4. As to whether Pressure Cooker Bomb #3 was a destructive device, we unanimously find:

☐ No ☑ Yes

COUNT TWENTY-FIVE:

1. As to Count Twenty-Five of the Indictment charging use of a weapon of mass destruction (Pipe Bomb #1) on or about April 19, 2013, in the vicinity of Laurel Street and Dexter Avenue in Watertown, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

COUNT TWENTY-SIX:

1. As to Count Twenty-Six of the Indictment charging that the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun and Pipe Bomb #1) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as charged in Count Twenty-Five of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

a. As to the Ruger P95 9mm semiautomatic handgun:
□ Not Guilty ☑ Guilty

b. As to Pipe Bomb #1:
□ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the Ruger P95 9mm semiautomatic handgun charged in Count Twenty-Five was discharged, we unanimously find:

□ No ☑ Yes

3. As to whether Pipe Bomb #1 charged in Count Twenty-Five was discharged, we unanimously find:

□ No ☑ Yes

4. As to whether Pipe Bomb #1 was a destructive device, we unanimously find:

□ No ☑ Yes

COUNT TWENTY-SEVEN:

As to Count Twenty-Seven of the Indictment charging use of a weapon of mass destruction (Pipe Bomb #2) on or about April 19, 2013, in the vicinity of Laurel Street and Dexter Avenue in Watertown, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

COUNT TWENTY-EIGHT:

1. As to Count Twenty-Eight of the Indictment charging that the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun and Pipe Bomb #2) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as charged in Count Twenty-Seven of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

a. As to the Ruger P95 9mm semiautomatic handgun:
☐ Not Guilty ☑ Guilty

b. As to Pipe Bomb #2:
☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4. If not guilty, proceed to the next Count.

2. As to whether the Ruger P95 9mm semiautomatic handgun charged in Count Twenty-Eight was discharged, we unanimously find:

☐ No ☑ Yes

3. As to whether Pipe Bomb #2 charged in Count Twenty-Eight was discharged, we unanimously find:

☐ No ☑ Yes

4. As to whether Pipe Bomb #2 was a destructive device, we unanimously find:

☐ No ☑ Yes

COUNT TWENTY-NINE:

1. As to Count Twenty-Nine of the Indictment charging use of a weapon of mass destruction (Pipe Bomb #3) on or about April 19, 2013, in the vicinity of Laurel Street and Dexter Avenue in Watertown, Massachusetts, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

☐ Not Guilty ☑ Guilty

COUNT THIRTY:

1. As to Count Thirty of the Indictment charging that the defendant used or carried a firearm (Ruger P95 9mm semiautomatic handgun and Pipe Bomb #3) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as charged in Count Twenty-Nine of this Indictment, and aiding and abetting, we unanimously find the defendant, Dzhokhar A. Tsarnaev:

a. As to the Ruger P95 9mm semiautomatic handgun:
☐ Not Guilty ☑ Guilty

b. As to Pipe Bomb #3:
☐ Not Guilty ☑ Guilty

If guilty, proceed to Questions 2-4 and then sign and date the Verdict. If not guilty, proceed directly to signing and dating the Verdict.

2. As to whether Pipe Bomb #3 charged in Count Thirty was brandished, we unanimously find:

☐ No ☑ Yes

3. As to whether the Ruger P95 9mm semiautomatic handgun charged in Count Thirty was discharged, we unanimously find:

☐ No ☑ Yes

4. As to whether Pipe Bomb #3 was a destructive device, we unanimously find:

☐ No ☑ Yes

The foregoing represents the unanimous decision of the jury.

FOREMAN: 286

uror Number

DATE: 4/8/2015

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
a/k/a "Jahar Tsarni,"
Defendant.

PENALTY PHASE
VERDICT

SECTION I. AGE OF DEFENDANT

General directions for Section I:

- As used in this section, the term "capital counts" refers to:

  Count One (1): Conspiracy to use a weapon of mass destruction resulting in death of Krystle Marie Campbell, Officer Sean Collier, Lingzi Lu, and Martin Richard

  Count Two (2): Use of a weapon of mass destruction (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street in Boston, Massachusetts, and aiding and abetting, resulting in death of Krystle Marie Campbell

  Count Three (3): Possession or use of a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as in Count Two of this section, and aiding and abetting, resulting in death of Krystle Marie Campbell

  Count Four (4): Use of a weapon of mass destruction (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street in Boston, Massachusetts, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

  Count Five (5): Possession or use of a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, use of a weapon of mass destruction as in Count Four of this section, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

  Count Six (6): Conspiracy to bomb a place of public use, resulting in deaths of Krystle Marie Campbell, Officer Sean Collier, Lingzi Lu, and Martin Richard

  Count Seven (7): Bombing of a place of public use (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street, Boston, Massachusetts, and aiding and abetting, resulting in death of Krystle Marie Campbell

  Count Eight (8): Possession or use of a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, the bombing of a place of public use as in Count Seven of this section, and aiding and abetting, resulting in death of Krystle Marie Campbell

  Count Nine (9): Bombing of a place of public use (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street, Boston, Massachusetts, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

  Count Ten (10): Possession or use of a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, the bombing of a place of public use as in Count

Nine of this section, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

Count Twelve (12): Malicious destruction of property by means of an explosive (Pressure Cooker Bomb #1) on or about April 15, 2013, in the vicinity of 671 Boylston Street in Boston, Massachusetts, and aiding and abetting, resulting in death of Krystle Marie Campbell

Count Thirteen (13): Possession or use of a firearm (Pressure Cooker Bomb #1) during and in relation to a crime of violence, namely, the malicious destruction of property as in Count Twelve of this section, and aiding and abetting, resulting in death of Krystle Marie Campbell

Count Fourteen (14): Malicious destruction of property by means of an explosive (Pressure Cooker Bomb #2) on or about April 15, 2013, in the vicinity of 755 Boylston Street in Boston, Massachusetts, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

Count Fifteen (15): Possession or use of a firearm (Pressure Cooker Bomb #2) during and in relation to a crime of violence, namely, malicious destruction of property as in Count Fourteen of this section, and aiding and abetting, resulting in deaths of Lingzi Lu and Martin Richard

Count Sixteen (16): Possession or use of a firearm (Ruger P95 9mm semiautomatic handgun) on or about April 18, 2013, during and in relation to a crime of violence, namely, conspiracy to use a weapon of mass destruction as in Count One of this section, and aiding and abetting, resulting in death of Officer Sean Collier

Count Seventeen (17): Possession or use of a firearm (Ruger P95 9mm semiautomatic handgun) on or about April 18, 2013, during and in relation to a crime of violence, namely, conspiracy to bomb a place of public use as in Count Six of this section, and aiding and abetting, resulting in death of Officer Sean Collier

Count Eighteen (18): Possession or use of a firearm (Ruger P95 9mm semiautomatic handgun) on or about April 18, 2013, during and in relation to a crime of violence, namely, conspiracy to maliciously destroy property, and aiding and abetting, resulting in death of Officer Sean Collier

- In this section, please indicate whether you unanimously find the government has established beyond a reasonable doubt that the defendant, Dzhokhar Tsarnaev, was eighteen (18) years of age or older at the time of the offense charged under the particular capital count. You must mark one of the responses.

1. **Dzhokhar Tsarnaev was eighteen (18) years of age or older at the time of the offense charged under the particular capital count.**

✓ We unanimously find that this has been proved beyond a reasonable doubt with regard to all of the capital counts.

_____ We do not unanimously find that this has been proved beyond a reasonable doubt with regard to any of the capital counts.

_____ We unanimously find that this has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

Directions:

- For each capital count, if you do not unanimously find the government has proven beyond a reasonable doubt the defendant was eighteen years of age or older at the time of the offense charged under the particular capital count, then your deliberations are over as to that count.
- If there is no capital count for which you unanimously find the government has proven beyond a reasonable doubt the defendant was eighteen years of age or older at the time of the offense, skip forward to Section VII and complete that section in accordance with the directions there. Then notify the Court that you have completed your deliberations.
- If you have found the government has proven beyond a reasonable doubt the defendant was eighteen years of age or older at the time of the offense charged with regard to one or more capital counts, continue on to Section II.

SECTION II. GATEWAY FACTORS

General directions for Section II:

- As used in this section, the term "capital count(s)" refers only to those counts for which you found the defendant was eighteen years of age or older at the time of the offense charged under the particular count in Section I. Do not consider gateway factors in this section with regard to any counts for which you have not found the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I.
- In this section, please indicate which, if any, of the following gateway factors you unanimously find the government has proven beyond a reasonable doubt. For each of the four gateway factors listed below, you must mark one of the responses.

1. **Dzhokhar Tsarnaev intentionally killed the victim or victims of the particular capital count you are considering.**

   _____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

   _____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

   ✓ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

   1, 4, 5, 6, 9, 10, 14, 15

2. **Dzhokhar Tsarnaev intentionally inflicted serious bodily injury that resulted in the death of the victim or victims of the particular capital count you are considering.**

   _____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

__X__ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

1, 4, 5, 6, 9, 10, 14, 15

3. **Dzhokhar Tsarnaev intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim or victims of the particular capital count you are considering died as a direct result of the act.**

__X__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

4. **Dzhokhar Tsarnaev intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim or victims of the particular capital count you are considering died as a direct result of the act.**

__X__ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

Directions:

- For each capital count you are considering in this section, if you do not unanimously find the government has proven beyond a reasonable doubt at least one of the above gateway factors with respect to that count, then your deliberations are over as to that count.
- If there is no capital count for which you unanimously find a gateway factor has been proved beyond a reasonable doubt, skip forward to Section VII and complete that section in accordance with the directions there. Then notify the Court that you have completed your deliberations.
- If you have found at least one gateway factor with regard to one or more capital counts, continue on to Section III.

SECTION III. STATUTORY AGGRAVATING FACTORS

General directions for Section III:

- As used in this section, the term "capital count(s)" refers only to those counts for which you found the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I and at least one gateway factor in Section II. Do not consider statutory aggravating factors in this section with regard to any counts for which you have not found the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I and at least one gateway factor in Section II.
- In this section, please indicate which, if any, of the following six (6) statutory aggravating factors you unanimously find the government has proven beyond a reasonable doubt. For each of the six statutory aggravating factors listed below, you must mark one of the responses.

1. **The death, and injury resulting in death, occurred during the commission and attempted commission of, and during the immediate flight from the commission of, an offense under:**
   a. **18 U.S.C. § 2332a (use of a weapon of mass destruction) [Applies to all capital counts]; and/or**
   b. **18 U.S.C. § 844(i) (destruction of property affecting interstate commerce by explosives) [Only applies to capital counts 1-10 and 12-15.]**

✓ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

2. **Dzhokhar Tsarnaev knowingly created a grave risk of death to one or more persons in addition to the victim of the offense in the commission of the offense and in escaping apprehension for the violation of the offense. [Applies to all capital counts.]**

_____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_X_ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

1, 4, 5, 6, 9, 10, 14, 15
16, 17, 18

3. **Dzhokhar Tsarnaev committed the offense in an especially heinous, cruel and depraved manner in that it involved serious physical abuse to the victim. [Only applies to capital counts 1-10 and 12-15.]**

_____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_X_ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

1, 4, 5, 6, 9, 10, 14, 15

4. **Dzhokhar Tsarnaev committed the offense after substantial planning and premeditation to cause the death of a person and commit an act of terrorism. [Only applies to capital counts 1-10 and 12-15.]**

_✓_ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

5. **Dzhokhar Tsarnaev intentionally killed and attempted to kill more than one person in a single criminal episode. [Only applies to capital counts 1-10 and 12-15.]**

✓ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

6. **Dzhokhar Tsarnaev is responsible for the death of a victim, Martin Richard, who was particularly vulnerable due to youth. [Only applies to capital counts 1, 4, 5, 6, 9, 10, 14, and 15.]**

✓ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

Directions:

- For each capital count you are considering in this section, if you do not unanimously find the government has proven beyond a reasonable doubt at least one of the above statutory aggravating factors with respect to that count, then your deliberations are over as to that capital count.
- If there is no capital count for which you unanimously find at least one statutory aggravating factor has been proved beyond a reasonable doubt, skip forward to Section VII and complete that section in accordance with the directions there. Then notify the Court that you have completed your deliberations.
- If you have found one or more statutory aggravating factors with regard to one or more capital counts, continue on to Section IV.

SECTION IV. NON-STATUTORY AGGRAVATING FACTORS

General directions for Section IV:

- As used in this section, the term "capital count(s)" refers only to those counts for which you have found that the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III. Do not consider non-statutory aggravating factors in this section with regard to the counts for which you have not found that the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III.
- In this section, please indicate which, if any, of the following six (6) non-statutory aggravating factors you unanimously find the government has proven beyond a reasonable doubt. For each of the proposed factors, you must mark one of the responses provided.

1. **In conjunction with committing acts of violence and terrorism, Dzhokhar Tsarnaev made statements suggesting that others would be justified in committing additional acts of violence and terrorism against the United States. [Applies to all capital counts.]**

_____ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>all</u> of the applicable capital counts.

_✓_ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to <u>any</u> of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

2. **Dzhokhar Tsarnaev caused injury, harm and loss to:**
   a. **Krystle Marie Campbell and her family and friends [Only applies to capital counts 1, 2, 3, 6, 7, 8, 12, and 13];**
   b. **Martin Richard and his family and friends [Only applies to capital counts 1, 4, 5, 6, 9, 10, 14, and 15];**
   c. **Lingzi Lu and her family and friends [Only applies to capital counts 1, 4, 5, 6, 9, 10, 14, and 15]; and/or**
   d. **Officer Sean Collier and his family and friends [Only applies to capital counts 1, 6, 16, 17, and 18].**

✓ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

3. **Dzhokhar Tsarnaev targeted the Boston Marathon, an iconic event that draws large crowds of men, women and children to its final stretch, making it especially susceptible to the act and effects of terrorism. [Only applies to capital counts 1-10 and 12-15.]**

✓ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

_____ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

4. **Dzhokhar Tsarnaev demonstrated a lack of remorse. [Applies to all capital counts.]**

✓ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

___ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

___ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

5. **Dzhokhar Tsarnaev murdered Officer Sean Collier, a law enforcement officer who was engaged in the performance of his official duties at the time of his death. [Only applies to capital counts 1, 6, 16, 17, and 18.]**

✓ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

___ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

___ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

6. **Dzhokhar Tsarnaev participated in additional uncharged crimes of violence, including assault with a dangerous weapon, assault with intent to maim, mayhem, and attempted murder:**
   a. **On April 15, 2013, in Boston, Massachusetts [Only applies to capital counts 1-10 and 12-15]; and/or**
   b. **On or about April 19, 2013, in Watertown, Massachusetts [Applies to all capital counts].**

✓ We unanimously find that this factor has been proved beyond a reasonable doubt with regard to all of the applicable capital counts.

___ We do not unanimously find that this factor has been proved beyond a reasonable doubt with regard to any of the applicable capital counts.

_____ We unanimously find that this factor has been proved beyond a reasonable doubt only with regard to the following capital counts. *Identify each count by count number.*

_____

_____

Directions:

- After you have completed your findings in this section (whether or not you have found any of the above non-statutory aggravating factors to have been proved), continue on to Section V.

SECTION V. MITIGATING FACTORS

General directions for Section V:

- As used in this section, the term "capital count(s)" refers only to those counts for which you have found that the defendant was eighteen years of age or older at the time of the offense charged under the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III.
- As to the alleged mitigating factors listed below, please indicate which, if any, you find Dzhokhar Tsarnaev has proven by a preponderance of the evidence.
- Recall that your vote as a jury need not be unanimous with regard to each question in this section. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established in making his or her individual determination of whether or not a sentence of death shall be imposed, regardless of the number of other jurors who agree that the factor has been established.
- In the space provided, please indicate the number of jurors who have found the existence of that mitigating factor to be proven by a preponderance of the evidence with regard to each of the capital counts.

1. **Dzhokhar Tsarnaev was 19 years old at the time of the offenses.**

   Number of jurors who so find: 12

2. **Dzhokhar Tsarnaev had no prior history of violent behavior.**

   Number of jurors who so find: 11

3. **Dzhokhar Tsarnaev acted under the influence of his older brother.**

   Number of jurors who so find: 3

4. **Whether because of Tamerlan's age, size, aggressiveness, domineering personality, privileged status in the family, traditional authority as the eldest brother, or other reasons, Dzhokhar Tsarnaev was particularly susceptible to his older brother's influence.**

   Number of jurors who so find: 3

5. **Dzhokhar Tsarnaev's brother Tamerlan planned, led, and directed the Marathon bombing.**

   Number of jurors who so find: 3

6. **Dzhokhar Tsarnaev's brother Tamerlan was the person who shot and killed Officer Sean Collier.**

   Number of jurors who so find: 2

7. **Dzhokhar Tsarnaev would not have committed the crimes but for his older brother Tamerlan.**

   Number of jurors who so find: 3

8. **Dzhokhar Tsarnaev's teachers in elementary school, middle school, and high school knew him to be hardworking, respectful, kind, and considerate.**

   Number of jurors who so find: 12

9. **Dzhokhar Tsarnaev's friends in high school and college knew him to be thoughtful, caring, and respectful of the rights and feelings of others.**

   Number of jurors who so find: 11

10. **Dzhokhar Tsarnaev's teachers and friends still care for him.**

    Number of jurors who so find: 3

11. **Dzhokhar Tsarnaev's aunts and cousins love and care for him.**

    Number of jurors who so find: 12

12. **Mental illness and brain damage disabled Dzhokhar Tsarnaev's father.**

    Number of jurors who so find: 12

13. **Dzhokhar Tsarnaev was deprived of needed stability and guidance during his adolescence by his father's mental illness and brain damage.**

Number of jurors who so find: 2

14. **Dzhokhar Tsarnaev's father's illness and disability made Tamerlan the dominant male figure in Dzhokhar's life.**

Number of jurors who so find: 2

15. **Dzhokhar Tsarnaev was deprived of the stability and guidance he needed during his adolescence due to his mother's emotional volatility and religious extremism.**

Number of jurors who so find: 1

16. **Dzhokhar Tsarnaev's mother facilitated his brother Tamerlan's radicalization.**

Number of jurors who so find: 10

17. **Tamerlan Tsarnaev became radicalized first, and then encouraged his younger brother to follow him.**

Number of jurors who so find: 9

18. **Dzhokhar Tsarnaev's parents' return to Russia in 2012 made Tamerlan the dominant adult in Dzhokhar's life.**

Number of jurors who so find: 2

19. **Dzhokhar Tsarnaev is highly unlikely to commit, incite, or facilitate any acts of violence in the future while serving a life-without-release sentence in federal custody.**

Number of jurors who so find: 1

20. **The government has the power to severely restrict Dzhokhar Tsarnaev's communications with the outside world.**

Number of jurors who so find: 2

21. **Dzhokhar Tsarnaev has expressed sorrow and remorse for what he did and for the suffering he caused.**

Number of jurors who so find: 2

General directions for Section V, continued:

- The law does not limit your consideration of mitigating factors to those that can be articulated in advance. Therefore, you may consider during your deliberations any other factor or factors in Dzhokhar Tsarnaev's background, record, character, or any other circumstances of the offense that mitigate against imposition of a death sentence.
- The following extra spaces are provided to write in additional mitigating factors, if any, found by any one or more jurors.
- If more space is needed, write "CONTINUED" and use the reverse side of this page.

22. _____

_____

Number of jurors who so find: _____

23. _____

_____

Number of jurors who so find: _____

24. _____

_____

Number of jurors who so find: _____

25. _____

_____

Number of jurors who so find: _____

26. _____

_____

Number of jurors who so find: _____

27. _____

_____

Number of jurors who so find: _____

28. _____

_____

Number of jurors who so find: _____

29. _____

_____

Number of jurors who so find: _____

30. _____

_____

Number of jurors who so find: _____

31. _____

_____

Number of jurors who so find: _____

Directions:

- After you have completed your findings in this section (whether or not you have found any mitigating factors in this section), continue on to Section VI.

SECTION VI. DETERMINATION OF SENTENCE

General directions for Section VI:

- As used in this section, the term "capital counts" refers only to those counts for which you found the defendant was eighteen years of age or older at the time of the offense charged in the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III. You may not impose a sentence of death on a particular capital count unless you have first found with regard to that count, unanimously and beyond a reasonable doubt, the defendant was eighteen years of age or older at the time of the offense charged in the count in Section I, and at least one gateway factor in Section II, and at least one statutory aggravating factor in Section III.
- In this section, enter your determination of Dzhokhar Tsarnaev's sentence with regard to each of the capital counts.

Based upon consideration of whether the aggravating factor or factors found to exist for each count sufficiently outweigh the mitigating factor or factors found to exist for that count to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death:

_____ **We, the jury, unanimously find, for all the capital counts, that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factor or factors found to exist or, in the absence of any mitigating factors, that the aggravating factor or factors are alone sufficient—so that death is the appropriate sentence for Dzhokhar Tsarnaev. We vote unanimously that Dzhokhar Tsarnaev shall be sentenced to death separately as to each count.**

_____ **We, the jury, unanimously find that a sentence of life in prison without the possibility of release is the appropriate sentence for Dzhokhar Tsarnaev for all of the capital counts. We vote unanimously that Dzhokhar Tsarnaev shall be sentenced to life imprisonment without the possibility of release separately as to each count.**

X **We, the jury, unanimously find, for some of the capital counts, that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factor or factors found to exist or, in the absence of any**

mitigating factors, that the aggravating factor or factors are themselves sufficient—so that death is the appropriate sentence for Dzhokhar Tsarnaev with regard to each of the following capital counts only (identify each count by count number):

4, 5, 9, 10, 14, 15

With regard to the above listed capital counts, we vote unanimously that Dzhokhar Tsarnaev shall be sentenced to death as to each count.

_____ **Based upon our consideration of the evidence and in accordance with the Court's instructions, after making all reasonable efforts, we, the jury, are unable to reach a unanimous verdict in favor of a life sentence or in favor of a death sentence, for any of the capital counts.**

Directions:

- After you have completed your sentence determination in this section (regardless of what the determination was), continue on to Section VII.

SECTION VII. CERTIFICATION REGARDING DETERMINATION OF SENTENCE

Each juror must sign his or her name and juror number below, indicating that the above sentence determinations accurately reflect the jury's decisions:

Date: 5/15/15

Directions:

- After you have completed this section, continue on to Section VIII.

SECTION VIII. CERTIFICATION

By signing your name below, each of you individually certifies that consideration of the race, color, religious beliefs, national origin, or the sex of Dzhokhar Tsarnaev or the victims was not involved in reaching your individual decision. Each of you further certifies that you, as an individual, would have made the same recommendation regarding a sentence for the crime or crimes in question regardless of the race, color, religious beliefs, national origin, or the sex of Dzhokhar Tsarnaev, or the victims.

The foreman shall indicate the date [illegible]

Date: 5/15/15

AO 245B(05-MA) (Rev. 06/05) Judgment in a Criminal Case
Sheet 1 - D. Massachusetts - 10/05

UNITED STATES DISTRICT COURT
District of Massachusetts

UNITED STATES OF AMERICA
V.

DZHOKHAR A. TSARNAEV
a/k/a Jahar Tsarni

JUDGMENT IN A CRIMINAL CASE

Case Number: **1: 13 CR 10200 - 001 - GAO**

USM Number: 95079-038

MIRIAM CONRAD, JUDY CLARKE, ESQUIRES
Defendant's Attorney

☐ Additional documents attached

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P.36)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☑ was found guilty on count(s) Counts 1 through 30 (Date of Verdict: 4/8/15) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses: Additional Counts - See continuation page ☑

Title & Section	Nature of Offense	Offense Ended	Count
18 USC Sec. 2332a (a)(2)	Conspiracy to use a Weapon of Mass Destruction Resulting in Death	04/19/13	1
18 USC Sec. 2332a (a)(2)	Use of a Weapon of Mass Destruction Resulitng in Death	04/15/13	2

The defendant is sentenced as provided in pages 2 through 12 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

06/24/15
Date of Imposition of Judgment

Signature of Judge

George A. O'Toole, Jr.
Judge, U.S. District Court
Name and Title of Judge

June 24, 2015
Date

DEFENDANT: **DZHOKHAR A. TSARNAEV**
CASE NUMBER: **1: 13 CR 10200 - 001 - GAO**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of a Violence Resulting in Death	04/15/13	3
18 USC Sec. 2332a (a)(2)	Use a Weapon of Mass Destruction Resulting in Death	04/15/13	4
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death	04/15/13	5
18 USC Sec. 2332f (a)(1) & (a)(2) & (c)	Conspiracy to Bomb a Place of Public Use Resulting in Death	04/19/13	6
18 USC Sec 2332f (a)(1) & (c)	Bombing a Place of Public Use Resulting in Death	04/15/13	7
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death	04/15/13	8
18 USC Sec. 2332f (a)(1) & (c)	Bombing a Place of Public Use Resulting in Death	04/15/13	9
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death	04/15/13	10
18 USC Sec. 844(i) & (n)	Conspiracy to Maliciously Destroy Property Resulting in Personal Injury and Death	04/19/13	11
18 USC Sec. 844(i)	Malicious Destruction of Property Resulting in Personal Injury and Death	04/15/13	12

AO 245B(05-MA) (Rev. 06/05) Judgment in a Criminal Case
Sheet 1A - D. Massachusetts - 10/05

DEFENDANT: **DZHOKHAR A. TSARNAEV**
CASE NUMBER: **1: 13 CR 10200 - 001 - GAO**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death;	04/15/13	13
18 USC Sec. 844(i);	Malicious Destruction of Property Resulting in Personal Injury and Death	04/15/13	14
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death	04/15/13	15
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death	04/18/13	16
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death	04/18/13	17
18 USC Sec. 924(c) & (j)	Possession and Use of a Firearm During and in Relation to a Crime of Violence Resulting in Death	04/18/13	18
18 USC Sec. 2119(2)	Carjacking Resulting in Serious Bodily Injury	04/18/13	19
18 USC Sec. 924(c)	Possession and Use of a Firearm During and in Relation to a Crime of Violence	04/18/13	20
18 USC Sec. 1951	Interference with Commerce by Threats and Violence	04/18/13	21
18 USC Sec. 924(c)	Possession and Use of a Firearm During and in Relation to a Crime of Violence	04/18/13	22
18 USC Sec. 2332a (a)(2)	Use of a Weapon of Mass Destruction	04/19/13	23

AO 245B(05-MA) (Rev. 06/05) Judgment in a Criminal Case
Sheet 1A - D. Massachusetts - 10/05

DEFENDANT: **DZHOKHAR A. TSARNAEV**
CASE NUMBER: **1: 13 CR 10200 - 001 - GAO**

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 USC Sec. 924(c)	Possession and Use of a Firearm During and in Relation to a Crime of Violence	04/19/13	24
18 USC Sec. 2332a (a)(2)	Use of a Weapon of Mass Destruction	04/19/13	25
18 USC Sec. 924(c)	Possession and Use of a Firearm During and in Relation to a Crime of Violence	04/19/13	26
18 USC Sec. 2332a (a)(2)	Use of a Weapon of Mass Destruction	04/19/13	27
18 USC Sec 924(c)	Possession and Use of a Firearm During and in Relation to a Crime of Violence	04/19/13	28
18 USC Sec. 2332a (a)(2)	Use of a Weapon of Mass Destruction	04/19/13	29
18 USC Sec. 924(c)	Possession and Use of a Firearm During and in Relation to a Crime of Violence	04/19/13	30

AO 245B(05-MA) (Rev. 06/05) Judgment in a Criminal Case
Sheet 2 - D. Massachusetts - 10/05

DEFENDANT: **DZHOKHAR A. TSARNAEV**
CASE NUMBER: **1: 13 CR 10200 - 001 - GAO**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

Upon the jury's verdict, the defendant is sentenced to death on Counts 4, 5, 9, 10, 14, and 15.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: **DZHOKHAR A. TSARNAEV**
CASE NUMBER: **1: 13 CR 10200 - 001 - GAO**

ADDITIONAL IMPRISONMENT TERMS

As to Counts 1, 2, 6, 7, and 12, life imprisonment without the possibility of release, the sentences on these enumerated counts to be served concurrently.
As to Counts 11, 23, 25, 27, and 29, life imprisonment, the sentences on these five counts to be served concurrently with each other, but consecutively to the terms of imprisonment imposed on Counts 1, 2, 6, 7, and 12.
As to Count 19, imprisonment for a term of 25 years. As to Count 21, imprisonment for a term of 20 years. The sentences on these two counts are to be served concurrently with each other, but consecutively to the terms of imprisonment imposed as to Counts 11, 23, 25, 27, and 29.
As to Count 3, life imprisonment without the possibility of release, to be served consecutively to all prior terms of imprisonment.
As to Count 8, life imprisonment without the possibility of release, to be served consecutively to all prior terms of imprisonment.
As to Count 13, life imprisonment without the possibility of release, to be served consecutively to all prior terms of imprisonment.
As to Count 16, life imprisonment without the possibility of release, to be served consecutively to all prior terms of imprisonment.
As to Count 17, life imprisonment without the possibility of release, to be served consecutively to all prior terms of imprisonment.
As to Count 18, life imprisonment without the possibility of release, to be served consecutively to all prior terms of imprisonment.
As to Count 20 and 22, terms of 7 years and 25 years, respectively. As to Counts 24, 26, 28, and 30, life imprisonment. These sentences are to be served consecutively to each other and consecutively to all prior terms of imprisonment.
Defendant is committed to the custody of the Attorney General until the exhaustion of the procedures for appeal of the judgement of conviction and for review of the sentences. See 18 USC Sec. 3596(a). When the sentence of death is to be implemented, the Attorney General shall release the defendant to the custody of a United States Marshal, who shall supervised the implementation of the sentence in the manner prescribed by the law of the State of Indiana. See 18 USC Sec. 3596(a).

DEFENDANT: **DZHOKHAR A. TSARNAEV**
CASE NUMBER: **1: 13 CR 10200 - 001 - GAO**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ $3,000.00	$	$

☑ The determination of restitution is deferred until 09/22/15. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

☐ See Continuation Page

TOTALS	$ $0.00	$ $0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **DZHOKHAR A. TSARNAEV**
CASE NUMBER: **1: 13 CR 10200 - 001 - GAO**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

The assessment fee is due forthwith.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

☐ See Continuation Page

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

See Preliminary Order of Forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY FOUR

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, January 15, 2015
9:29 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

(The juror is excused.)

MS. CLARKE: Your Honor, is this an appropriate time to ask the Court about follow-up with a juror like that?

THE COURT: What would you like to do?

MS. CLARKE: The concern that I have is that -- there's two: One is on the question of guilt, presumption of guilt. And the Court had the juror essentially say, Well, I would consider the evidence. The question is really whether there could be a presumption of innocence at this point in time.

And the second thing is a *Morgan* question. You know, this is a juror in the abstract saying I can take aggravating and mitigating, but it really is if you're 100 percent guilty that you're going to get death in a case like this. So it's the case-specific *Morgan* questions that we've asked the Court to ask. Where there is proof beyond a reasonable doubt of intentional murder, weapons of mass destruction, death of three people, maiming of many others, the death of a child and the death of a police officer, is there anything that would make you sentence other than death?

THE COURT: Well, I'm not going to ask those kinds of specific -- case-specific questions. You call them *Morgan*. I think they're stakeout questions, so...

And as to the other, I think the examination was adequate.

juror knows or has read. And we would ask the Defendant's 2 follow up -- Number 2 on the general voir dire request be asked to really draw out what this juror knows and has heard about this case. We would ask Number 3 be asked, Number 4.

We would also -- I'm sorry.

MS. CLARKE: Your Honor --

THE COURT: She's got it. Thank you.

(Pause.)

MR. BRUCK: Again, we feel that -- we had hoped that since none of these questions were put into the questionnaire despite our requests, that this would be the time that we would find out what jurors bring into the courtroom given the unprecedented level of publicity and the unprecedented level of direct talk, verbal communication and direct experience of the marathon bombing in this division of the Massachusetts -- of the District of Massachusetts. So we would -- we really feel that it's impossible to assess the impartiality of a juror like this without getting to what he has heard or read.

In addition, it's -- this is a juror who believes the defendant is -- I'm sorry. This is a defendant [*sic*] who says he's unsure whether he's guilty or not. That covers an awful lot of territory. We think our Number 11 -- our 10 and 11, which asks the juror to imagine that he was on the jury and the government didn't prove its case and they acquitted Mr. Tsarnaev and he went home, and then the juror is asked to

say, Well, how do you think people would react, how would you react, how would you feel about that prospect, that gets at whether or not jurors can put it aside; not the verbal formulation of whether they could listen to the evidence and come to their own conclusion.

But this is reality, and there may be jurors who say, If the government didn't prove their case, sure, I could do that. But there are going to be a lot of jurors who will say, Well, we all know he's guilty and people would be furious and there would be an uproar. But if we don't ask the question, we'll never know.

So we think that these questions are really quite critical. In effect, we're asking can these jurors really presume this man innocent or is it a situation where everybody knows he's guilty and let's get on to the penalty phase, but, sure, I could listen to the evidence and, you know, make it look like I was a regular juror.

Secondly -- or maybe it's thirdly, as to the *Morgan* question, we, of course, will stand on our legal position that we're entitled to ask whether under the charges that have been brought in this case the juror could still consider life imprisonment. We're not asking for all of the facts to be laid out.

And then what we're asking for is for someone who has been charged with a terrorist crime, that is, the use of a

weapon of mass destruction, that is the charge in the indictment, could the juror ever impose life imprisonment rather than the death penalty in that case?

The same is true of the statutory aggravating factors which are found in the indictment. They are alleged as special findings. And we think it's important to ask whether -- and we only use a couple of examples, "especially vulnerable victim due to childhood." In other words, if the murder involved a child, under *Ring v. Arizona* that has the legal equivalent of the element of an offense. Is the jurors' views on the death penalty such that he could never impose the death penalty in that -- life imprisonment, rather, in that situation? Is he talking about a completely different kind of case when he says "I could go either way"? It doesn't matter whether he could impose life imprisonment in a completely different kind of case.

This is not a murder charge; this is a charge of use of a weapon of mass destruction where death results. And *Morgan* requires that you test the jurors' ability to impose life imprisonment for the crime charged. So we think we are clearly entitled under *Morgan* to questioning on the -- on that issue.

Finally, even if the Court were to rule against us on that, it would -- we would -- we should nevertheless be allowed to find out whether the juror would always impose the death

penalty on somebody where it was proven beyond a reasonable doubt that he intentionally committed a murder or a killing which, of course, has to be proven as a threshold finding.

Those are the only kinds of killings in which it's what's alleged in this case and it's what's required. It doesn't matter whether the juror might vote for life for an unintentional killing because that's not what we're dealing with. It's not what the government has charged. It's not what is on trial in this case. It's purely academic.

It would be like saying for the government, Well, I could never impose the death penalty for anyone under the age of 25. The government wouldn't say, Well, that's fine because who knows what age the defendant will turn out to be. That would not be acceptable to the government and it's not acceptable to us and it's not acceptable under the Eighth Amendment and the due process clause of the Fifth Amendment to be tried by a jury that would impose the death penalty -- or even has a single member that would impose the death penalty for every intentional murder. This juror is a blank slate on that. We don't know because he hasn't been asked.

So those are the questions -- those are why we ask for those follow-up questions, and we really don't think we're going to have a fair jury unless they're asked.

MR. MELLIN: Your Honor, may I respond to that?

THE COURT: Go ahead.

MR. MELLIN: As to the issue about the pretrial publicity, I think the Court has been able to determine and assess the credibility of witnesses based on their answers concerning that. If there was some concern that the Court had about their truthfulness about whether or not something they read or saw before they came into Court today, the Court would be able to follow up on that.

Up to this point these jurors have been very clear about the fact that they are not affected by what they have read or seen prior to coming into court. So I don't think there's any need for what Mr. Bruck is asking for, which would be to ask each of these jurors exactly what article did you read or which news story did you see on television. I think that's completely unnecessary. I think in a case-by-case basis based on the answers that a juror gives, I'm sure the Court will ask some follow-up questions, but I think it's unnecessary at this time.

Concerning the *Morgan/Witt* questions, your Honor, we completely disagree with what Mr. Bruck has said *Morgan/Witt* requires. He is asking for specific stakeout questions saying in this case where you have an intentional killing and a weapon of mass destruction and a child killed and all of these other aggravating factors, would you be able to consider life imprisonment? That is only one half of the equation.

He is only advising or wanting the Court to advise

these jurors of all of the aggravating factors without even talking about the mitigating factors and asking the jurors if they could impose life imprisonment. And that's an unfair question to ask because that is assuming the juror has, in fact, found all of the government's aggravating factors.

So if that is the case and this is the only evidence they have at that time, each of these jurors would be entitled to impose a sentence of death because they have found those aggravating factors. So I think that's completely unfair.

I would suggest maybe an alternative to what Mr. Bruck says by asking these jurors if they understand that if we get to the penalty phase, at that point you will have already found the defendant guilty beyond a reasonable doubt of the actual offenses. When we are in the penalty phase would you be able to meaningfully consider both the aggravating factors and the mitigating factors before you came to a decision as to what the appropriate sentence would be? I think that would cover the issues that Mr. Bruck is talking about without going into any degree of trying to specify specific aggravating factors or mitigating factors.

One last question the government would ask for, your Honor, with some of these jurors, it's not clear when they leave whether or not they would actually be able to impose the death penalty themselves. And so we would ask the Court with those jurors, if the Court would ask them, If you got to the

final stage and you actually believed that the aggravating factors substantially outweigh the mitigating factors, would you be able to impose -- or vote to impose a sentence of death against another human being.

THE COURT: Well, again, these are follow-up questions to a detailed questionnaire. This goes to both points. Just taking the last one, we do ask them that in the questionnaire. Questions 95 and 96 ask those questions. I don't see any need to repeat questions that they've answered in the questionnaire straightforwardly or perhaps unambiguously. To the extent there is ambiguity -- and in this last case he apparently misunderstood the direction of those questions, and so it was necessary to follow up on that. He answered on the questionnaire, apparently from what he says here today, anyway, opposite of what he meant to say.

As it goes for other matters, I make the same observation about publicity questions. We have detailed answers in the questionnaire concerning what exposure to the media about this is. I don't think as a general matter we have to repeat all of that and get -- there are multiple concerns about that, one of which is committing the witness, the juror witness, to positions that he'll feel he has said here and has to stick with. And so digging for details from someone who hasn't prepared by spending time reflecting and recalling all of that will not likely yield reliable answers and, again, it's

a matter I covered in the questionnaire.

With respect to the specificity of the questions about aggravation/mitigation, I agree, essentially, with the government. I think that the kinds of categorical questions are really questions about the case and fall into the category of stakeout. I think it has to be a more general level to be consistent with the principles of those cases. So -- and -- so anyway, I think I will continue to use the more general level with respect to those.

With respect to the -- one final one I guess was raised was what will people think of you if you do this? Again, it's Question 94 that we ask in the questionnaire and people have answered it variously. Some people say they think they would be criticized for it; some people say they wouldn't. So there's no reason to think that people who answered the questionnaire weren't able to understand that and give us an answer.

MR. BRUCK: If I may, your Honor, Question 94 goes only to the question of penalty. Our request is not about penalty; it is about guilt. And that's where the rubber hits the road, I think, in terms of prejudgment in this community. It's the idea of being on a jury that acquits this man and lets him go home, and then people themselves go home and face the members of their family and the people they work with and their neighbors. And I mean, let's face it, we all know how that

doing the strikes, we keep it off as it's normally done.

THE COURT: Right. We had talked about talking about it after each five. I'm concerned about the time. We have another panel. So I'm just wondering if we should reconsider that. Would it be adequate for everybody sort of take note of their positions, and we can do it all at once once we've been through all the jurors?

MR. WEINREB: All today's jurors?

THE COURT: All -- no, no, just -- even after the first 20.

MR. WEINREB: That's fine by the government.

THE COURT: I think I'd like to just keep going.

MS. CLARKE: We'll be going until 6:00 tonight if -- I'm not complaining.

MR. WEINREB: That's fine.

THE COURT: We'll proceed with the next juror.

MR. WEINREB: Actually, your Honor, before we proceed with the next juror -- this can be on the record.

THE COURT: Okay. Go ahead.

. . . END OF SIDEBAR CONFERENCE.)

MR. WEINREB: So we wanted to actually revisit for one moment the issue of how the *Morgan* question should be asked because I think that in the back and forth that the parties engaged in over how it should be asked, there's a formulation that the government had proposed that also didn't make it into

the questionnaire. And although I think the Court has effectively asked it in the way that it has questioned the jurors so far, I think that in an excess of caution, to make sure that the record is clear, that the defendants are being asked the precise question that *Morgan* require it be asked, we would ask that each juror be asked that, if the defendant is found guilty of a capital crime and the case proceeds to a penalty phase, would you be able to meaningfully consider both aggravating and mitigating factors in reaching a penalty decision?

"Meaningfully consider" is the phrase that *Morgan* calls for. It's the ability to meaningfully consider mitigating factors that was the essence, the key question, at issue in *Morgan*. And we do believe the jurors should be asked on the record if they will meaningfully consider mitigating factors without further elaboration.

MR. BRUCK: Well, we think there are two things missing from that. One is: Found guilty of what? A capital crime doesn't tell the juror anything. And the capital crimes charged in this case include use of a weapon of mass destruction. If we conceal that from the juror in asking the question, it doesn't tell us anything that is legally significant under *Morgan*.

The second thing is that Mr. Weinreb's formulation doesn't include the possibility that, after considering the

aggravation and mitigation, the juror could potentially vote for a life sentence rather than the death penalty. That's what *Morgan* is all about.

The problem with not being able to consider a life sentence is that the juror wouldn't consider mitigation, but you can't substitute "would you meaningfully consider mitigation" or "could you ever impose a life sentence on someone that you convicted of using a weapon of mass destruction resulting in death?" That's the *Morgan* question.

MR. WEINREB: If I could briefly respond, your Honor. So I understand that that is Mr. Bruck's understanding or theory of what *Morgan* holds, but I don't believe that is literally what *Morgan* holds. I believe that would be an extension of *Morgan* beyond what the Supreme Court held; and, therefore, there's no existing legal problem with the Court asking the question the way that the Supreme Court in *Morgan* said it needed to be asked.

And that's why -- and there is case law, as the Court is aware and has cited, that disapproves of asking these kinds of case specific questions because it asks the jurors to stake out a position ahead of time. And so we continue to oppose that.

As for the issue that one must go beyond asking whether the jurors could meaningfully consider mitigating factors and ask them if they could, in addition, sentence the

defendant to life imprisonment without parole, that is subsumed in the *Morgan* question.

So what was at issue in *Morgan* was that defendant's -- a juror's ability to follow the law as the Court gives it to the jurors. And the question in *Morgan* was -- the holding in *Morgan* was that if jurors could not meaningfully consider mitigating factors they effectively could not be fair and impartial jurors because they were not following the law which requires them to balance or weigh mitigating against aggravating factors.

So if they say they can meaningfully consider mitigating factors, that is what the law requires. And that's all that they, in the government's view, *Morgan* requires that they be asked.

THE COURT: Well, I think we -- I understand the defendant's position. I think we've talked about this a couple of times. I do think the additional specifics referencing the specific -- drawing attention to specific circumstances, either by the nature of the offense or by the identifying categories of victims and so on, is more specific than is called for and gets into the stakeout territory.

I would, I guess, add that the jurors know that this is about a bombing, and they know that there are three people who were killed in the bombing. So in light of what we've also heard about, what people understand from the media about the

case, is they have those specifics already in their minds as they would answer the question about the ability to meaningfully consider life imprisonment in this case. In other words, what they've -- even just as it's been framed in my preliminary instructions, by telling them what the offenses were in general, they have those specifics, and I think that's sufficient under the circumstances.

Okay. Let's proceed with No. 11.

THE JUROR: Do I sit?

THE COURT: Please.

THE JUROR: Good afternoon.

THE COURT: Good afternoon. It's getting there. I appreciate your patience.

Have you been able to, since the last time you were here, avoid any exposure to the case in the media or from talking with anybody?

THE JUROR: I don't talk to anybody, so, no, I don't --

THE COURT: Okay. You have not talked about the case with anybody?

THE JUROR: No one's business.

THE COURT: Tell me a little bit about your work. You're a software engineer?

THE JUROR: I am a contractor presently. It's going to present a little bit of a financial hardship if I'm going to

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY FIVE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Friday, January 16, 2015
9:24 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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THE COURT: Okay. I think that's fair. Do you have any quarrel with that statement?

MR. BRUCK: No, sir.

THE COURT: Okay. So defense has filed some additional follow-up questions this morning.

MR. BRUCK: Yes.

THE COURT: I've looked at them. A lot of them, I think, are territory we covered yesterday. I will say that I have -- for example, Question No. 2, I don't know if it was phrased in this way to every juror, but I know particularly as to later prospective jurors, I began to phrase the Question 77 question in terms of the responsibility of the government to prove beyond a reasonable doubt despite what people might have thought and the defense has no burden and so on. I'll continue to do that. I think that satisfies the issue on No. 2.

MS. CONRAD: Your Honor, if I could on that point, the proposed question asks about the presumption of innocence. And one issue that we have with the questioning yesterday, particularly with the vast number of people who say that they have formed an opinion about guilt, is your Honor's follow-up to that was asking them about the burden of proof and understanding the burden is on the government. But your Honor did not ask about and did not follow up about whether, despite that preconceived belief in Mr. Tsarnaev's guilt, they could presume him innocent. And *Taylor v. Kentucky* says those are

two separate concepts, and it seems to me that that is a crucial area of this inquiry where you -- especially where you have so many people coming in with the belief that Mr. Tsarnaev is guilty, is to ask them whether they can and will presume him innocent. It is insufficient, I would suggest, to simply say, Do you understand that the burden of proof is on the government?, because that suggests that they start at an equal plane as opposed -- and then decide whether the evidence amounts to proof beyond a reasonable doubt as opposed to
00:08 starting with the presumption of innocence. I did a quick search of the transcripts from yesterday, and your Honor did not ask them about the presumption of innocence at all. And I would urge your Honor to do so certainly going forward.

In addition, a somewhat related but perhaps different point -- and this maybe goes to Mr. Bruck's point -- with respect to certain issues where the defense -- the juror, excuse me, expressed a certain bias -- for example, I believe -- was it the first juror questioned yesterday, had an anti-Muslim bias, your Honor asked whether that would interfere
00:09 with their ability to fairly and impartially evaluate the evidence in the case. Well, that's fine for the guilt phase, putting aside the issue about presumption of innocence, but I would submit that it's not fine for the penalty phase because, for the penalty phase, the question of bias is not just a fair and impartial evaluation of the evidence. It's whether they

can fairly weigh the aggravating and mitigating factors. Many of the jurors' responses are looking at this, Do I believe the witnesses? The facts are the facts. But that's not at issue in the penalty phase. I think that needs to be addressed more directly.

MR. BRUCK: If I could finish with our request, what we have done here, your Honor, is to boil down the earlier series of requests. We're not withdrawing any of the ones that we made in writing in our prior filing, which were three sets of requests: one on publicity, one on *Morgan*, and one on *Witherspoon*. But I have combined them for efficiency sake into a single follow-up request. I'd like to say a couple of things about some of the other ones that Miss Conrad didn't refer to.

The first one, as we noted, What stands out in your mind?, is the question that was included in the *Skilling* transcript at the defense request, and the Court cites that with approval. That question was excluded from the questionnaire when we asked for it or any similar question about content. And the Court at that time -- it told us that that would be covered in the oral voir dire. So we think it's -- to ask this *Skilling* question is, to say the least, appropriate.

And then we've suggested some prompts for jurors who say, Well, just what I read in the papers, or Nothing particular. Got to say that the investigation that we've done

tells us that jurors know an extraordinary amount of detail. They know things about the welfare history of this family. It's constantly being talked about on talk radio. They know things -- derogative information, much of it false, about the defendant's sisters. And that is the staple of talk radio. But if there isn't a question posed, these people will be on the jury, and none of us will be any the wiser. We really -- if ever there was a case where some modest amounts of content inquiry is necessary, this is the case.

00:12 Miss Conrad has talked about our second request.

Our third request, If you were the defendant on trial in this case, would you want someone on your jury who thinks about you the way you think about Mr. Tsarnaev? That is taken from *Irvin v. Dowd*. The United States Supreme Court cited almost exactly that question. I put it into slightly more modern wording. It was a 1961 case. But the Court noted with great concern that many of the jurors in the *Irvin v. Dowd* case answered no to that question or many of the members of the venire. So it's a proper question. It does get close to the 00:12 juror, but that's what this is all about. That's the point of this process. And so we think that that is a traditional, well-established question with a very, very good pedigree, and it should be asked.

Then we've -- we continue to feel that there has to be questions about Paris, and we've asked for that again, very

short, succinct question. But it's on people's minds, and I've just seen a news account that there is -- two more hostages have apparently been seized this morning in Paris. They're not sure if it's a terrorist attack or not, but this is what jurors are hearing about when they're driving to the courthouse today. And how could we not ask about it?

And then, No. 5, I don't think that this is appropriate for every juror, but we have got jurors who want to be on this jury. I won't belabor this anymore. We've made this point. This is a route to celebrity and to -- possibly to financial profit for some people who are of a mind to look at this opportunity in that way. And this is the one question that no one will be ready for who is of that mind. What's the right answer? If you're someone with an agenda and the judge says, Do you want to be on this jury?, what are you supposed to say? Yes, and you give it away? No, and the judge might say, Well, guess what? I've got good news for you. You're off. What would be valuable is not so much the answer but the body language, the reaction, the hesitation, the, Uh-oh, what am I supposed to say now? That will speak volumes but only if the question is asked. So we'd ask you to keep that in your arsenal for inquiry and to use it as appropriate.

The *Morgan* question, the first No. 6 is the question asked in *Morgan*. It's not a particularly good question, but it's the one that caused the United States Supreme Court to

reverse the death sentence in *Morgan v. Illinois*. It goes far beyond the quite-difficult-to-understand question that the government proposed about, Would you meaningfully consider aggravation and mitigation?, without any inkling of what the point of that is. The first juror that was asked that question said, Can you repeat the question? I don't understand it. And for good reason. So this is the *Morgan* question.

And then No. 7, 8, and 9, we've tried to put that into English in a form that's understandable just to be sure that we're not getting jurors who are actually -- whose actual state of opinion is, Sure, in a run-of-the-mill murder case, I could consider both punishments but not in a terrorism case, not in a case where a child was killed, not in a case involving weapons of mass destruction. I don't want to belabor this, but these are not stakeout questions. These are *Morgan* questions framed in terms of the charge that the government has brought in this case.

Finally, the *Witherspoon* questions are just -- speak for themselves, and I think, by the end of the day, the Court was asking fairly close to something like this, but we wanted to put our request in writing.

Then as to the procedure, we think it's terribly important that the Court give us an opportunity outside the presence of the juror to ask for follow-up questions rather than simply send the juror home after the Court's questioning

has concluded. We'd prefer, and actually think it would be faster, if the Court would, as was done in the *Skilling* case, allow limited follow-up questioning by counsel. If the Court is unwilling to do that, then at a minimum, if you would excuse the juror and hear from us so that we have an opportunity to ask for specific follow-up questions, we'd appreciate that.

THE COURT: Well, I think we're doing that at the end of the day or actually in the middle of the day.

MS. CONRAD: May I just add one thing to that? With respect to follow-up questions -- in our original submission, Question 4, we asked, "How did you first learn about the bombing of the Marathon?" "Where were you?" "What did you do?" "What was your reaction?" "Did your feelings change?" That was not included.

Instead, the questionnaire asks if you or anyone close to you was personally affected. If the person says no or even if the person says a friend was there, but even if they say no, we think all of the prospective jurors should be asked where they were on the 15th of April 2013 and how they learned about the Marathon bombing and where they were on April 19th because many people -- even though the question asks whether the effects include shelter in place, many people whom we know, based on where they lived or worked, must have sheltered in place, put down no. I don't think we should simply accept the no answer as covering everything.

Your Honor asked follow-up questions for people who put down that they don't use social media. Your Honor asked them, Well, what kind -- you really don't use social media? But it seems to me -- that's fine, but the crucial question that we want to get at is not just whether they were affected but how they were affected. Someone who had a loved one or even a friend or a neighbor at the Marathon in 2013, their reaction would have been presumably, when they heard about the bombing, you know, Is that person safe? Try to call. Not be able to reach. A sense of panic. A sense of fear. And we're not getting that out because we're going straight from, you know, the -- my friend or my whatever was at the Marathon to would that affect your ability to be fair and impartial in this case? We need to find out what their reaction was, not just how it relates to this case.

THE COURT: Mr. Weinreb.

MR. WEINREB: Your Honor, if I might, I'll respond in reverse order. With respect to that last request, the government agrees that a searching and probing voir dire of the jurors is appropriate in this case, but we also believe that that is the process that has taken place. And the parties jointly negotiated over a 100-plus-question questionnaire, were given an opportunity to review those, ask for follow-up on specific questions. The Court has asked follow-up on many of the questions, asked follow-up on questions of his own. It

will always be the case that one more question could be asked or a hundred more questions could be asked if you had more and more information.

The whole point of that process was to try and come up with an approach that satisfied the objectives and the needs of voir dire without making the process unduly cumbersome, lengthy, and perhaps even counter-productive from having to drag on too long. We don't believe that there's any need for these additional specific questions. Many of the things that the defense has asked about are subsumed in other questions that are already on the questionnaire. One of them, for example, "Do you want to be on this jury?" This was a question on the questionnaire, "What was your reaction when you got the summons in this case?" And that fairly invited the -- an answer to this same question, "Do you want to be on this jury?" Was your reaction positive, negative, neutral? Where did your mind go? In some ways, it's an even better question because it does not force them -- it doesn't channel them into one just particular answer but gives all the whole range of things that might have been on their mind.

We don't think there's any need to ask whether they've heard or read anything about the recent attacks in Paris. There are terrorist attacks going on all over the world at virtually all times. Most of these jurors have been instructed not to listen or hear about any news related to this case.

It's quite speculative to imagine they've drawn comparisons between that case and this case. I think it seems like, again, an unnecessary additional question that is covered by so many of the others that it would just be superfluous.

The question from *Irvin v. Dowd*, If you were the defendant on trial in this case, would you want someone on the jury who thinks about you the way you think about Mr. Tsarnaev?, that doesn't imply that question was necessary to be asked. It just noted that it had been asked and that the answer troubled the Court in that case. But all the cases that the Supreme Court has decided have emphasized over and over again that there is no catechism for voir dire. There is no requirement that particular questions be asked or that they be asked in a particular way except in very narrow exceptions, which is the *Witherspoon* and *Morgan* questions.

The government's view is that the Court has formulated -- the parties first together and now the Court has formulated -- adequate ways of asking these questions. And this particular case could have been -- this particular question, rather, could have been proposed to be included in the questionnaire. It wasn't. There are only a limited number of questions that we could include in that questionnaire. The defense evidently thought others would be better. And so I don't think now is the time to be amending it.

And then with respect to the *Morgan* question, I don't

want to belabor that because we've had so much discussion about it. But I just want to say that the idea that the defense -- that jurors need to be asked about the specific charges in the case is a reimagining of what *Morgan* held. I think that if the Court looks at the language of the *Morgan* opinion carefully, what the Court there said over and over and over again is that it is necessary to screen out jurors who have made up their minds to vote for the death penalty in a capital case before they know anything about the particular case. That's what it says again and again. A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances because such a juror has already formed an opinion before he knows anything about what the charges are in this case other than it's a capital case.

Again, the very last sentence of the case, where the Court is summarizing its holding, "Petitioner was entitled upon his request to inquiry discerning those jurors who, even prior to the state's case in chief, in other words, before they even had any idea what the evidence was going to be in the case, had predetermined the terminating issue of this trial," that being whether to impose the death penalty.

I'm not going to read all the quotes, but I've underlined ten more where the Court essentially says the exact same thing, that is, that the holding in that case is limited

to determining -- to ferreting out jurors who are committed to imposing the death penalty in every capital case, every one, not just -- not necessarily limited to or potentially limited to the ones where the charges in the case -- before the facts in the case but before they know anything about the case. And so for that reason, again, we oppose these requests for case-specific warning questions.

THE COURT: Let me -- I don't want to prolong this by again going through each of the questions and addressing it. I understand the arguments, and I think you will -- I think largely we -- particularly as we got going and got further experience with the jurors, we did most of this satisfactorily yesterday. I expect I might make some modest amendments, and so you'll -- I understand your positions. You'll see what they are as they come up.

In other words, one of the difficulties here is being too tied to a script. Every juror is different. Every juror has to be sort of questioned in a way that is appropriate to the juror's questionnaire answers and then to the preceding voir dire answers and so on. So to try to stick with a repeatable formula is -- can be counter-productive actually rather than helpful. So I understand the points.

Let me raise a couple of procedural matters, I guess. A couple of occasions the -- while I was looking at the juror, the parties were looking at each other and agreeing that the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY SEVEN

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, January 21, 2015
9:22 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
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John J. Moakley U.S. Courthouse
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Court --

THE COURT: Yes. Yeah.

MS. CLARKE: Thank you.

THE COURT: Is this a sidebar matter or not?

MR. BRUCK: No.

We filed this morning a third request for follow-up voir dire questions, and I just wanted to very briefly explain what that is. We have re-filed publicity *Morgan* and *Witherspoon* questions, some of which are the same as the ones we filed before and some of which were different. It seemed better to file a complete new list each time we made substantial changes rather than asking the Court and asking the record to keep track of various discrete additional requests. So basically, this is everything. We don't mean to withdraw anything that's been asked before, but this is, going forward, the requests we're making. We also have some requests concerning the way voir dire is being conducted.

First, we would ask that the Court explore the facts before instructing the juror; that is to say, to find out what the juror thinks, what the juror knows, what the juror has heard, the basis of the juror's opinions, if they have any, before telling the juror what the law is and their obligation, if they can, to put those opinions aside.

We think that it's important to understand the underlying facts behind the juror's opinion in order to assess

its strength, and that's why we're asking that it be done in that order. The particular questions that probe for the facts are listed on the second page of our request.

We appreciate the latitude the Court has given us, and to the extent the Court does not itself ask these questions, we would -- we will seek to ask them ourselves, but we think it's better for the Court on the initial round to ask probing questions of the jurors because the Court has greater authority and greater prestige with each juror, and we just think we're going to get better results if that is done.

Second, the Court called me out more than once for asking leading questions over the last few days. It's not my place to critique something that I have never done and you have done for many, many years, but the fact is that when the Court has explained the legal principles to the jurors, we think the record reflects that it has done so in a leading manner, that is, a manner which conveys in the way the -- in both the quickness with which the Court goes to the legal matters after the opinion is expressed by the juror and the way the question is asked, we think it conveys very powerfully to the juror what the juror should say; that is to say, that the Court wishes the juror to be able to say, or to say, that he or she can put his opinions or her opinions aside and follow the law.

There is great social pressure for someone to say, "Yes, I can follow the law." It's hard for someone to say,

"No, I can't follow the law. If you tell me to do something, I won't do it. I can't do it." That is hard to do. And it's harder to do it if the questions are posed in a way that invite that pro-social response of, "Yes, I could put my feelings aside."

So we're asking the Court to be mindful of that problem so we could get to where the jurors really are given the exposure -- extraordinary exposure not only to publicity but to direct personal experience of the Boston Marathon bombing and its aftermath.

Then as to the questions that we're asking for, as I say, some of them are the same. We have added the question which we have attempted to ask of some jurors about, "How did you find out about the bombing?" that is Number 2, "Where were you? How did the news make you feel? And what, if anything, did you do?" And then Number 3 is, "Where were you and what did you do on April 19th?" That gets to shelter in place and is particularly appropriate for jurors who say they had no personal contact with the bombing or its aftermath even though they lived in an area where there was a general shelter in place in effect.

We continue to believe that Number 6 is a very appropriate question in some cases, for jurors who seem to be especially non-forthcoming, and raises the question of whether they are curtailing their responses or changing their responses

in order to be picked to serve.

And then we have rewritten *Morgan* questions to take into account the government's objection that we don't talk about mitigation before asking jurors whether they could ever vote for a sentence other than death. So we actually give examples of mitigation and then ask the juror whether they could consider mitigating factors and ever meaningfully consider a sentence of less than death in a case involving terrorism with multiple victims, in a case involving the death of a child. Our *Witherspoon* questions are unchanged.

So again, our overall request is that we prefer the Court to do the bulk of these questions with our being able to follow up, but we appreciate the latitude to ask these questions ourselves should the Court feel that is more appropriate.

THE COURT: Mr. Weinreb?

MR. WEINREB: Your Honor, as a general matter the government objects to these requests. And I say "as a general matter" because I think if the Court were to determine in a particular case that asking one or more of these questions made sense, we wouldn't necessarily object to it. But as a general matter, asking jurors the basis of their opinions I would suggest starts off voir dire in the wrong direction. It gives the jury -- it would suggest to the jurors that all the things that they have heard and seen in the press and the things that

they have -- the opinions they formed based on that is the important thing in this case, the important thing going forward, when they're not. The important thing is the jurors' ability to put aside what they have heard and what they might believe based on what happened outside the courtroom and decide the case based on the evidence inside the courtroom.

And I think that that same consideration counsels against asking in detail how you first heard about it, how did the news make you feel and so on. It suggests -- it will suggest to the jurors that all of those things are the essential considerations for them when, in fact, they are not.

And that leads to the third request which I think also -- I think we disagree with the premise of it, which is that the Court has asked leading questions about the jurors' ability to be fair and impartial. A leading question would be, "Now, you can set all that aside and decide the case based on the evidence, can't you?" And "You can apply the presumption of innocence, can't you?"

That's not what the Court has been doing. The Court has been simply asking -- instructing them what the law requires them to do and asking them whether they can follow the law and do it. That is the key question. That is where the jurors' minds should be focused.

They need to begin the process today of putting aside everything they have heard or might have thought about the case

and focusing on their duty, their obligation to decide the case based solely on the evidence applying all the legal principles. And we would suggest that the best way to begin the process of encouraging and helping jurors to do that and making sure that they can do it is by approaching the task of questioning them in that way, in a way that is consistent with that goal.

As for the *Morgan* questions that are proposed, we have the same objections to them that we've had all along. They're very specific about particular factors that will be essentially aggravating factors in this case. They are extremely general and non-suggestive, nonspecific about mitigating factors. The jurors are almost certainly going to hear, if this case proceeds to a penalty phase, a very in-depth, vigorous presentation of mitigating evidence along with lots of argument about why these factors are important and should make a difference. These questions do not even begin to convey any of that.

The jurors know virtually nothing about this defendant or anything that might mitigate the crimes. They may -- you know, the facts of the case themselves tell them a great deal about what might aggravate the crime, and it's simply misleading to ask the questions in this way because it suggests to them that is where they will be at the end of the process rather than, you know, where they are just coming into the process.

So again, we don't think *Morgan* requires that. It's not about that; it's about predisposition based on general views about the death penalty. And so this would both be unrequired legally and unwise.

MR. BRUCK: If I may respond very briefly, I don't want to prolong this unduly, but I do ask that the Court be mindful of the fact that if to the extent that the voir dire fails to plumb what the jurors are really thinking, the government is advantaged and the defendant is disadvantaged. We do not have an equal stake in this voir dire; and thus, it is unsurprising that the government asks for relatively formulaic probing whereas we are asking for something more.

I hope the Court will be mindful of the fact that we are sailing in unchartered seas. By that I mean that so far as we are aware, there has never been a court that has attempted to seat a jury in a community that has had an experience of the type of the Boston Marathon bombing. If it happened before, we don't know about it. And that means I think the Court must look with particular care at this process of eliciting the biases, the experiences, the opinions, the feelings, the emotions of these jurors. And that is the basis of our request.

THE COURT: Okay. I have your requests in mind. I think by and large the manner in which we've conducted the voir dire has been successful, and I don't think I intend to make

major changes in it. We've had the discussion about how to ask the questions about Question 77. I agree with the government with respect to that, that detailed questioning about what the juror thinks he or she knows about the events and the sources places the wrong emphasis for the juror. Many, obviously, have views about this because of the extensive publicity. That's far from limited to the local community. And to emphasize them, I think, misdirects things a little bit.

It's been my experience over the years that jurors take their responsibilities very seriously, including particularly the obligation to hold the government to its proof. I think reminding them of that is not -- and getting their reaction to that task that they will have, knowing what they know, I think is a way of determining whether the juror is prepared to undertake the service that we might ask of him or her.

Jurors tell me from time to time that they can't do that, so it's not an automatic answer, and it's one, of course, that we make observations of the juror as well when he or she is answering that question and can form some judgments about whether that's a rogue answer or a sincere one and a commitment to look forward to the presentation of evidence rather than look backward to the exposure to the events.

So in general I'm satisfied with the course we've been following and, again, subject to adjustment as necessary for

each witness -- sometimes we do have to get more specific because of what the juror says. But generally, I think as I say, I'm satisfied with the method we've been using.

So let's call in the first.

THE CLERK: Juror 83.

MR. McALEAR: Juror 83.

THE CLERK: Sir, over here, please. Have a seat, if you would.

THE COURT: Hello. Since you filled out the questionnaire and we're here, have you been able to abide by my instruction to avoid any discussion of the case?

THE JUROR: Yes, sir.

THE COURT: And any unnecessary avoidable exposure to the media reports?

THE JUROR: Yes.

THE COURT: So that's the questionnaire, and we may ask you to look at a couple of things as we follow up on some of the questions you gave.

THE JUROR: Sure.

THE COURT: It appears from your questionnaire that you are a student interrupted. Is that --

THE JUROR: Yeah. I was going to end up taking a break this semester anyways because my financial aid fell through, so...

THE COURT: So what are you doing?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY NINE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Friday, January 23, 2015
9:26 a.m.

Marcia G. Patrisso, RMR, CRR
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John J. Moakley U.S. Courthouse
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business from yesterday. I've reviewed the transcript with respect to Juror No. 60 and see no reason to change my assessment made at the time when we were observing her reactions and assessing her answers in light of all circumstances, including the way she answered the questions. So I'm satisfied that she's properly included.

MR. BRUCK: If I may, before the next -- first juror comes out, I wanted to raise an issue respecting the record on *Morgan* qualification. As the Court has been extremely patient
01:03 in hearing us out as to our position on the right to be able to pose life-qualifying questions that assume the actual charge in this case, such as weapon of mass destruction, the Court has ruled. We have attempted to pose that question, the government has objected, the Court has consistently sustained the objection and reaffirmed the ruling. And that leaves us in a position where we don't really want to go through this objection and sustaining if we can avoid it with each juror; on the other hand, we have to make our record.

So what I'm requesting is that we make a standing
01:04 request for the *Morgan* questions, beginning with Question 7 on our third list, and including as alternatives the reformulations that we posit, 8, 9 and 10, and that that be treated as a standing request on our part on which the Court has ruled as a matter of law that we may not ask those questions; otherwise, we'll have to keep asking the question

and having the objection and having the ruling.

MR. WEINREB: Your Honor, I think the motion that the defense filed is on the record, and if they want the record to reflect that the motion applies to each juror who's summoned, I don't have any argument with that. But I don't think that the record should reflect that the motion has been denied in whole or even in part with respect to each juror. That is something that remains to be seen.

And so the record will be what it is with respect to what questions were actually asked of the juror in the end, but to the extent that the request is simply that the record reflect that it's -- it applies to each juror, we have no problem with that.

THE COURT: Okay. I think that's what you were asking.

MR. BRUCK: Well, no. Yes, if it means that it applies to each juror. What we don't want to have a situation is that you've ruled as to every time we ask the question, but if we don't keep asking the question, an appellate court would say, Well, they didn't ask that juror the question.

THE COURT: No. The request is made, it hasn't been withdrawn, and it continues. And as jurors are examined, what happens with the examination can be compared against the request.

So I think it's sufficient that it's noted, and I

think it's obvious anyway, that the request has been generally made and generally I've adopted a different method of examining, and if the witness isn't examined as you have requested, that will be clear from the record and the request applies.

MR. BRUCK: Well, the problem is that you have granted us, which we greatly appreciate, considerable latitude in follow-up questioning. And we don't want it to appear that we should have used that latitude to go back to Question 7, 8, 9 and 10 and chose not to do so. If the record can be clear that that's not what happened, we'll be okay.

THE COURT: I was with you until -- I didn't quite get the "not what happened." But I think it is clear that you want that done on any witness to whom it may apply where there's a *Morgan* issue, if we could call it that, and the examination will stand against it. And the appellate court, I think, will see the issue and the context from the record. I don't -- so you don't have to -- as far as I'm concerned --

MR. BRUCK: Yes.

THE COURT: -- you don't have to renew it.

I understand that it applies consistently when there's a *Morgan* issue.

MR. BRUCK: And when you say we don't -- I'm sorry.

THE COURT: And we'll proceed the way we have been because of the attitude I've taken towards that line of

questioning. I can't speak for the appellate court.

MR. BRUCK: I understand. But just -- it's amazing what is clear at trial and becomes an issue of contention later. When the Court says we don't have to renew it, do you mean that to be we don't have to pose the question to the juror?

THE COURT: Yes.

MR. BRUCK: Very well.

MS. CONRAD: So just so I understand so the record is clear for purposes of appeal, we have a continuing objection to those questions not being asked by your Honor and to us not --

THE COURT: In this form.

MS. CONRAD: -- being permitted to ask the question in that form.

THE COURT: Fair enough.

MS. CONRAD: Just so we don't have to keep asking the question, have an objection, have it sustained and take more time --

THE COURT: Yes.

MS. CONRAD: Thank you.

I don't know if Mr. Bruck had something else. I had something about a juror we've already seen and also one who's coming up.

Did you have something, Ms. Clarke, first?

MS. CLARKE: I do on Juror No. -- the first juror, but

Twitter pages, and she -- I believe it's her.

THE COURT: 140? Wait a minute. Well, there two different things coming up. We're dealing with a Question 40 issue and this is not a Question 40 issue.

MS. CONRAD: It's not a Question 40 issue; it's a Question 29 and 30 issue.

THE COURT: Okay. Let's deal with Juror No. 138 and Question 40. Is there anything -- I see what I see.

MS. CONRAD: Right.

01:13 THE COURT: I guess we'll ask about it, okay?

MS. CONRAD: Yeah. I just wanted to alert the Court.

THE COURT: All right.

THE CLERK: Ready? Juror No. 138.

MR. McALEAR: Juror 138.

THE CLERK: Sir, over here, please. Have a seat. Make sure you speak into the mic so everyone can hear you.

THE COURT: Good morning.

THE JUROR: How are you doing?

THE COURT: Good. When you left last time you were

01:15 here, I had instructed everyone to avoid any discussion of the subject matter of the case with anybody. You could talk about coming here, obviously, but -- and also to avoid any exposure to media articles about the case.

Have you been able to do that?

THE JUROR: Yeah, I haven't looked at anything.

THE COURT: Keep your voice up so everyone can hear you.

THE JUROR: Yeah. No, I haven't talked to anybody about it.

THE COURT: Okay. Tell us what you do for employment.

THE JUROR: I work for the City of Peabody. I'm in the water department.

THE COURT: What do you do?

THE JUROR: I'm in the distribution. I work out in the street doing water breaks, services, fixing all the mains.

THE COURT: And what is the basis of your compensation? Are you salaried or hourly or --

THE JUROR: I'm hourly.

THE COURT: What would happen if you were on this case for an extended period of time? Would you be paid?

THE JUROR: Yeah, as far as I know I'm getting paid. Yes.

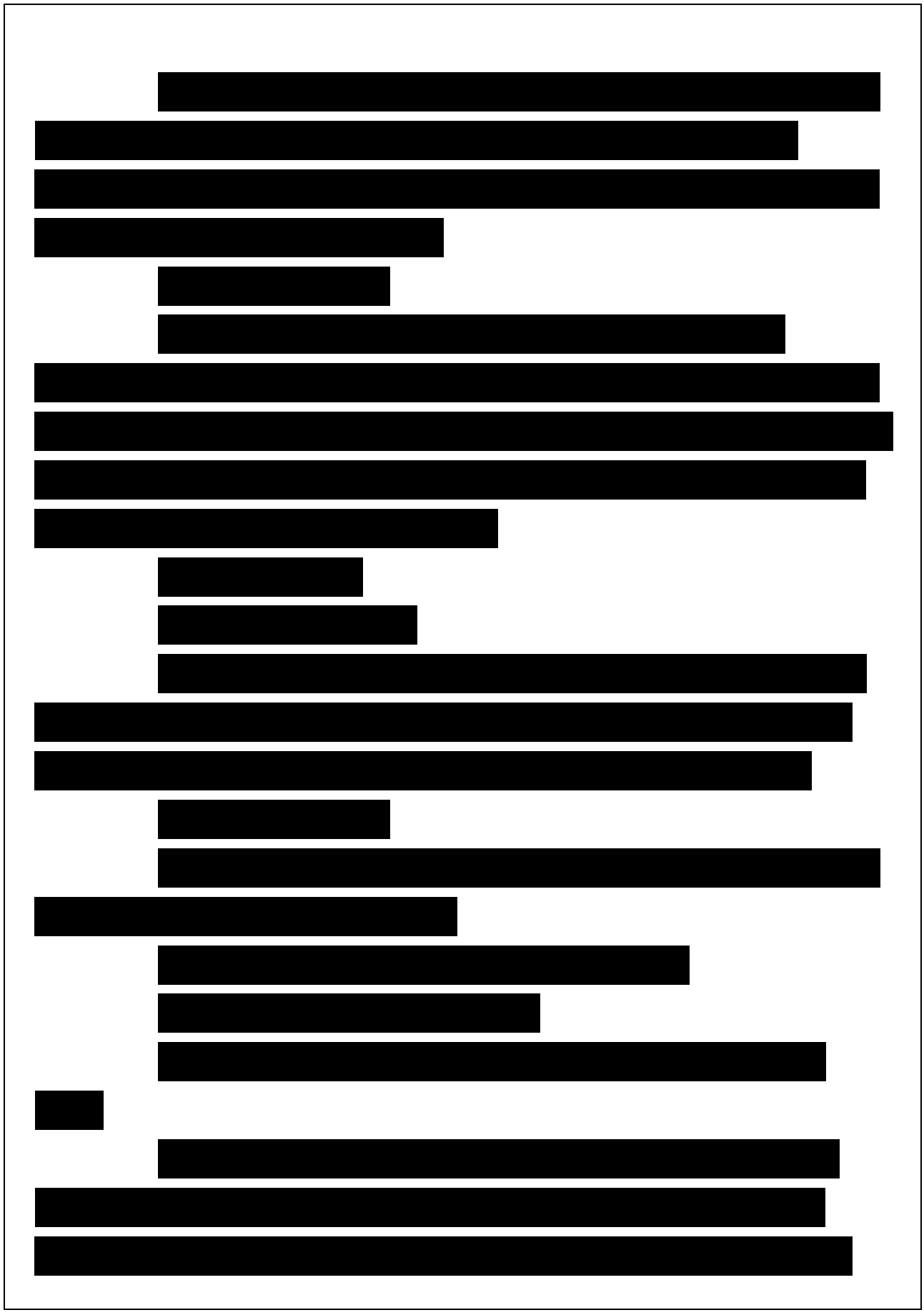
THE COURT: Even though you'll be here?

THE JUROR: Yes.

THE COURT: And is that -- you say as far as you know. Is that because you talked with higher-ups about it?

THE JUROR: My foreman actually was picked for jury duty like a month ago, and he served on a case for a week. So he got paid for the week. If they stop that after a certain time or what, I could find out.

THE COURT: You haven't specifically asked anybody?
THE JUROR: No.
THE COURT: Let me ask -- we asked you a little bit about social media, and you said you use Facebook?
THE JUROR: Yes.
THE COURT: I guess you post to it once or twice a week but you check it every day or something like that?
THE JUROR: Yeah. We drive around in the city truck. If I'm not driving, I'm sitting in the passenger seat just playing on my phone unless we're working. But other than that, I don't really -- I'm not posting on it or talking to people on it.
THE COURT: What's the nature of your use of it? Is it essentially personal, social-type things?
THE JUROR: Yeah.
THE COURT: Do you comment on public affairs or anything like that?
THE JUROR: Yeah, I see what my friends are doing and comment on that.
THE COURT: Anybody commenting about this trial?
THE JUROR: No.
THE COURT: Could we cut the audio for a minute and excuse the reporters?
(Discussion at sidebar and out of the hearing of the public:)



[redacted]

(In open court:)

THE COURT: That is the questionnaire you filled out, so we may refer to some of the questions and it might help you to take a look at it. I'm looking at page 19, Question 74. We asked did you have a reaction when you received the summons to possibly serve on this case, and you said "interested."

Can you tell us what you were thinking when you wrote that; what you might have meant by that?

THE JUROR: I wasn't sure what to really expect at all. I didn't expect it to be like anything I'd ever done, so I was curious, basically.

THE COURT: Did you have a reaction one way or the other in terms of it would be interesting to serve or just interested to find out and then get excused or what was your --

THE JUROR: More like to see what it was all about, I guess. I mean, like interested in what would be going on, not like looking to get out of work for a month or nothing like that.

THE COURT: Okay. On the next page, Question 77, we asked people if they had from any source, media or otherwise, formed an impression about whether the defendant was guilty or not or whether he should be punished in a certain way or not, and you answered "no" to all of those questions.

THE JUROR: Yeah. I wasn't going to make any decisions until I'd seen everything that was presented, basically, in front of me.

THE COURT: In other words, if you were a juror, you would wait to hear what the evidence was before making up your mind. Is that what you're saying?

THE JUROR: Yes. Yes.

THE COURT: In any criminal case -- you may know, but I'll lay it out, the basics anyway -- in any criminal case a person accused of a crime under our system is presumed to be innocent, or not guilty --

THE JUROR: Yes.

THE COURT: -- unless and until the government proves

otherwise by evidence at trial, and convinces the jury that the person is guilty by proof that leaves them with no reasonable doubt.

THE JUROR: Uh-huh.

THE COURT: Do you have any concern or hesitation about your ability to -- if you were a juror to ensure that the government proved any crime beyond a reasonable doubt?

THE JUROR: Yeah, if the evidence was there, yes, I'd be able to make the right decision.

01:22 THE COURT: But if it wasn't there, is really I guess what I'm asking, would you then accept that the government had failed and that the verdict should be not guilty in that circumstance?

THE JUROR: Yes, I would be able to go both ways, whether it's right or wrong.

THE COURT: We asked a series of questions about attitudes or beliefs concerning the death penalty. That's on page 23. It's kind of -- a general question in 88 asks if you have any views in general, what are they, and you said "none."

01:23 Is that --

THE JUROR: Yeah. I mean, I've never really -- I don't know. Other than seeing anything on, like, movies or TV shows, I've never really known much else about the death penalty. And -- I don't know. I mean, it never really interested me too much but...

THE COURT: Okay. The next question we asked a slightly different question which was on a scale of 1 to 10 from strongly opposed to strongly favor -- do you -- and you selected 8 indicating -- so you're sort of on the favor side of the weighing there of the death penalty but not quite at the highest level.

THE JUROR: Yeah, I'd say I'd be more going on the circumstances of the event or -- what happened for, like, each individual, like, that would be that -- the death penalty would be addressing.

THE COURT: You heard me explain this morning the penalty phase where there would be consideration of things --

THE JUROR: Yes.

THE COURT: -- that might aggravate the seriousness of the offense and things that might mitigate the punishment that should be imposed?

THE JUROR: Yes.

THE COURT: You've heard about that?

On the next page we asked in Question 90 for you to indicate which of a number of possible statements was closest to your view. You circled E which says, "I'm in favor of the death penalty but I could vote for a sentence of life imprisonment without the possibility of release if I believed that sentence was called for by the facts and the law in the case."

Does that represent your view?

THE JUROR: Yeah. Yes.

THE COURT: So you would be able to, after hearing all the evidence, consider carefully the alternatives that were available and decide based on your evaluation of the evidence?

THE JUROR: Yes.

THE COURT: Is that what you're saying?

THE JUROR: Yes.

THE COURT: You would be open to either? You're not predisposed -- or precommitted, I guess --

THE JUROR: Yeah, I'd be open to either. Earlier you mentioned something if he is to -- or we do decide to say he's guilty, you said that we would be presented with more evidence.

THE COURT: Yes.

THE JUROR: Why would we be given more evidence after we make our decision depending on --

THE COURT: Because the first decision is actually whether he committed the crime, he's proved guilty of the crime, okay? That's the first stage. It doesn't consider what penalty might be imposed; it just asks whether you are persuaded by the government's evidence that he has -- he is guilty of a charged crime.

THE JUROR: Uh-huh.

THE COURT: The second phase is then to consider what the penalty should be for that crime having found him guilty of

a capital offense. It would typically be -- or for -- not typically, but an example of a capital offense of which he would be convicted would include an intentional murder, okay?

Once the jury had concluded that the government had proved that, the jury would then decide what penalty should be imposed between two alternatives: the penalty of death or the penalty of life without possibility of release, okay? And in that phase the government would present factors -- evidence about what we call "aggravating factors" that make the crime more serious than other crimes of intentional murder and argue that -- the government would argue that would mean the death penalty is appropriate.

01:26

The defense would present evidence about the events or about the defendant himself or other things that might mitigate the punishment and lead the jury to think that the death penalty was not appropriate for him but life imprisonment was better as a penalty for him, okay?

Are you following that?

THE JUROR: Yeah, yeah, it's that --

01:27

THE COURT: So that's why we ask what your disposition is. Are you open to the consideration of either alternative depending on your evaluation of the evidence? That's really the question.

THE JUROR: Yeah, yeah, yeah. Yes, I am. I'm not more in favor of one way or the other; it would all depend on

the outcome of everything presented.

THE COURT: Not to belabor this too much, but let me ask you to look at page 25 at the bottom. Question 95 we ask if you found the defendant guilty and you decided the death penalty was an appropriate punishment, could you conscientiously vote for the death penalty, and you said, "I'm not sure." And if you go to the next question, sort of the other alternative is asked: If you found him guilty and you decided life imprisonment without possibility of release was
01:28 the appropriate punishment, could you conscientiously vote for life imprisonment, and you voted that "I'm not sure." So you gave "I'm not sure" to both. I just want to --

THE JUROR: I think you kind of answered my question. We were just talking about it would all factor on how everything is presented to me how I would make my decision with that.

THE COURT: So earlier, I think with respect to the question -- we were looking at Number 77, we asked whether you had an opinion about whether he was guilty and what the penalty
01:29 should be, you said you were reserving until you heard --

THE JUROR: Yeah, I don't really have an opinion as of now.

THE COURT: Is that the same thing you were saying here?

THE JUROR: Yes, basically. I would have to wait.

THE COURT: Okay. Follow-up?

MR. WEINREB: Just a bit. Good morning.

THE JUROR: How are you?

MR. WEINREB: My name's Bill Weinreb. I'm one of the prosecutors in the case. I just wanted to follow up with you very briefly on the questions the judge asked about the death penalty.

So as the judge just explained to you, if the jury were to find the defendant guilty of a crime that is

01:29 potentially punishable by death, then -- in a capital case, then it's up to the jurors to decide what the penalty should be.

THE JUROR: Yeah.

MR. WEINREB: The law doesn't require one penalty or the other; each juror has to make a decision.

THE JUROR: Uh-huh.

MR. WEINREB: Have you thought about, at all, what it would be like to sit on a jury in a capital case and decide whether someone lives or dies?

01:30 THE JUROR: Yeah, it's a pretty serious situation.

MR. WEINREB: And although you've never been in that situation, having to make that decision, do you believe that you could sentence someone to death if you thought that that was the appropriate sentence given the circumstances of the case and the characteristics of the defendant?

THE JUROR: Yeah, I guess I could -- I can't really say for sure until I would know all the facts in front of me, but if I had to -- if that was the right decision to be made, then I would make the right decision, yes. If that was what I had to do, that's what I would do.

MR. WEINREB: Okay. And just so I'm clear and I understand you, you're using "if I have to." You understand that you would never have to, it would be up to you. You'd make the decision one way or another.

01:31 THE JUROR: Yeah, I'd be able to make the decision. Yes.

MR. WEINREB: All right. Thank you.

THE JUROR: Yup.

MS. CLARKE: Good morning. It's over here now. My name is Judy Clarke. I'm one of the lawyers for Mr. Tsarnaev.

THE JUROR: Uh-huh.

MS. CLARKE: And I had just a few follow-up questions.

The judge asked you about your answer to Question 74, if you want to take a look. It's at page 19.

01:31 THE COURT: 19, yeah.

MS. CLARKE: And you talked to him about that. I wondered if you would take a look at 75. You indicated that a few people were jealous. Can you explain that to us a little bit more, talk to us a little bit more about that?

THE JUROR: I think it was right around Thanksgiving I

had mentioned it right when I got the whole packet about having to come here, and a few people just mentioned that I was lucky, in their words, and they wished that they got the chance to be here. That was basically it. And I just told -- I was saying that I wasn't really sure how I felt about it yet, it all just came on so quick, so...

MS. CLARKE: Feeling lucky because why?

MR. WEINREB: Objection. I don't know why it's relevant what other people felt.

01:32 THE COURT: Well, did other people explain to you why they thought you were lucky?

THE JUROR: No, it didn't really go much further than that. I really wasn't too interested in talking about it. It was like a family dinner, so we were, like, eating.

THE COURT: So these were family members who were saying it?

THE JUROR: Yes.

THE COURT: Okay.

MS. CLARKE: What did you take that to mean?

01:32 MR. WEINREB: Objection. Same objection.

MS. CLARKE: I'm just trying to get to the --

THE COURT: No, you could answer that, what you thought --

THE JUROR: I mean as --

MS. CLARKE: Lucky because?

THE JUROR: I'm not sure. I mean, these weren't like close family members; these are like distant cousins and stuff. It wasn't people I see and interact with frequently. But I'm not -- it's maybe something that they were more interested in than I was or --

MS. CLARKE: So you took no meaning from them saying "Hey, you're lucky you get to go. I wish I could go"?

THE JUROR: My uncle is -- the only thing I could see him saying --

01:33 MR. WEINREB: Your Honor, objection. This is asking him to speculate about what other people felt. He's already said that he --

THE COURT: No, go ahead. Go ahead. Tell us what --

THE JUROR: I think he's more interested in, I don't know, I'd say like -- I don't know how to put it. I'd say more interested in, like, more action-type things and like excitement, and he'd be more, like, locked in and like more interested in everything that would be going on. Like he would take a lot of interest in this type of stuff, I think.

01:34 MS. CLARKE: One more question about that: Was it clear to you that the conversation was about this case coming up?

THE JUROR: Yes.

MS. CLARKE: For this case?

THE JUROR: I just assumed it was because a few days

before I had noticed on the news that this case was -- the jury selection for this case was supposed to start January 5th along with Hernandez's case. And so that was just what -- I was going under the assumption that it was for this case.

MS. CLARKE: If I could take you to Question 19 on page 8. Are you with me?

THE JUROR: Yes.

MS. CLARKE: And apparently your sister has a role in your life, right?

01:35 THE JUROR: Yes.

MS. CLARKE: And have you talked to her about the jury summons?

THE JUROR: Not that I recall. I mentioned it to her, that was about it. I don't recall anything other than her just knowing that I'm here and stuff.

MS. CLARKE: Have you talked to her about the Boston Marathon bombing?

THE JUROR: Yeah, that was more closer to the event and the time. Nothing recent or since that other than being

01:36 picked for this.

MS. CLARKE: And did you express any opinion to her about it?

THE JUROR: No.

MS. CLARKE: Then or now?

THE JUROR: I'd say then I was more interested in what

was really going on and curious to see how everything was going to turn out.

MS. CLARKE: What do you mean?

THE JUROR: The whole, like, few days -- everything was going on at the time of the event, like. That was about it.

MS. CLARKE: Where were you on that marathon Monday?

THE JUROR: I was at work. I was right at the end of my day. We leave work at three, so we're usually back a little before -- like 2:40 or so -- watching TV.

MS. CLARKE: And did you watch the events unfold on TV?

THE JUROR: Yeah. Yes.

MS. CLARKE: And the 19th of April, the last day of the week when Mr. Tsarnaev was arrested, where were you then?

THE JUROR: We were still working. I think I was -- I think I worked every day that week. I'm trying to remember.

MS. CLARKE: Let me ask this: Did you follow the events on TV or radio?

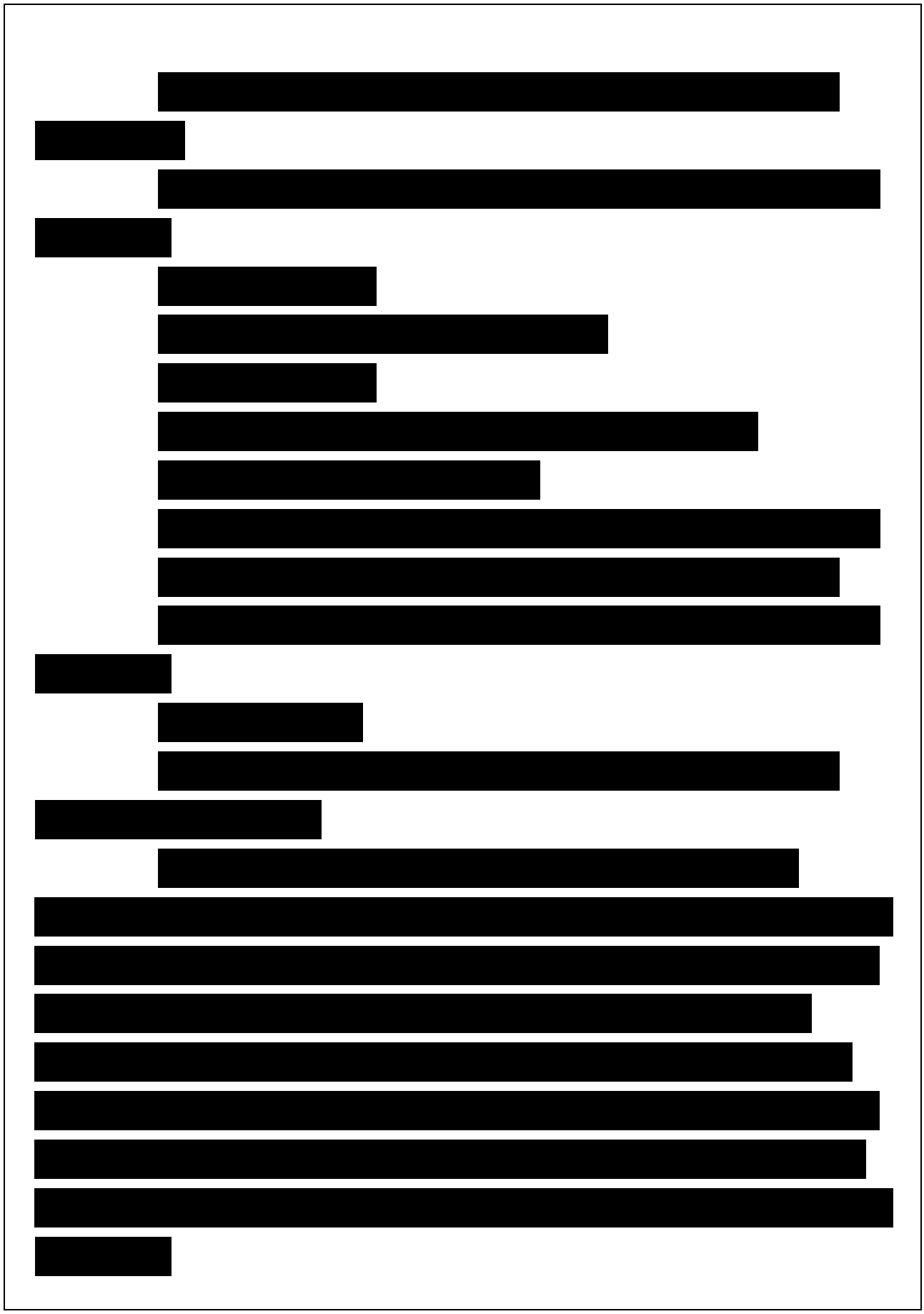
THE JUROR: Not really a lot. I mean, here and there I would catch bits and pieces of it, but it was mostly watching for the weather-wise.

MS. CLARKE: Okay. I'd like to ask a couple of follow-up questions about Question 21, your Honor.

THE COURT: Fine. We'll cut the audio, please.

(Discussion at sidebar and out of the hearing of the public:)

[redacted]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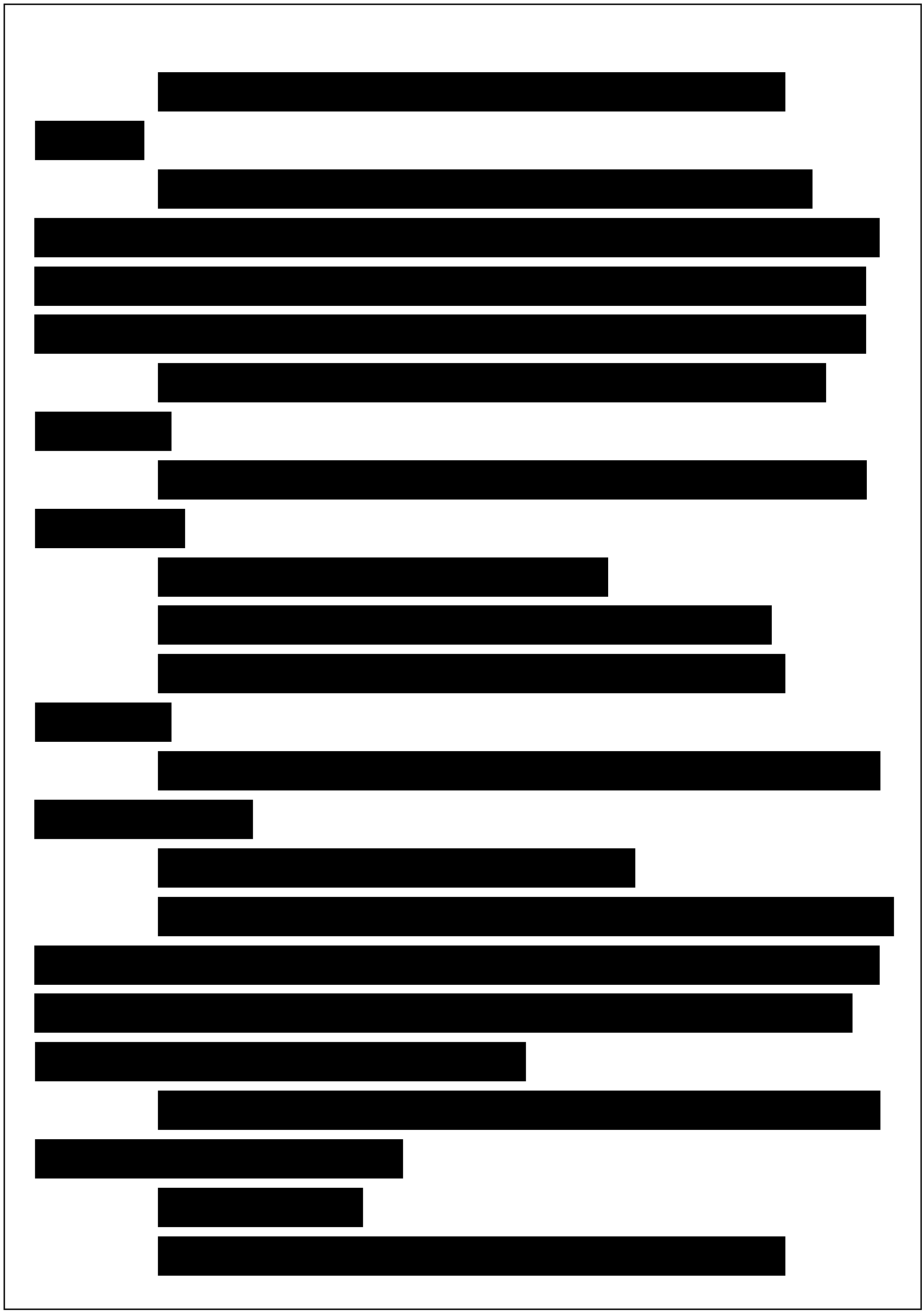

MS. CLARKE: I had some public follow-up.

THE COURT: I'm sorry. We'll go back on the audio.

01:42 (In open court:)

THE COURT: We're back on? Okay. Go ahead.

MS. CLARKE: If I could take you back to page 25, Question 93, you answered that life in prison without the possibility of release is less severe than the death penalty, and your explanation was that someone being allowed to live their life after taking someone else's life is not always fair. Can you elaborate on that a little bit?

THE JUROR: I guess it would be more -- I guess it would be more of how the person took the life, it wouldn't be

01:44 as fair -- if somebody's suffering -- if somebody is killed and they're suffering the whole time, I'd feel that -- I'm not really sure. The death penalty seems like sometimes it could be an easy way out, how it would -- it could go both ways, I guess, but I'm really not sure.

MS. CLARKE: Well, I guess one of the questions is --

and only you know --

THE JUROR: Yeah.

MS. CLARKE: -- is are you looking solely to the crime itself or something else?

MR. WEINREB: Objection. I don't understand the question.

THE COURT: Yeah, I think it's too vague a question.

MS. CLARKE: The judge has explained that there are two phases to a capital case, the first phase where the jury
01:45 makes a determination of whether or not the person is guilty beyond a reasonable doubt of the capital crimes.

THE JUROR: Uh-huh.

MS. CLARKE: And that means, and I think the judge has explained, that you would never get to the penalty phase unless the person were found guilty of the crime, an intentional murder.

THE JUROR: Yes.

MS. CLARKE: Not a self-defense, not a duress, no excuse.

01:45 THE JUROR: Uh-huh.

MS. CLARKE: Intentionally kill, okay?

THE JUROR: Yes.

MS. CLARKE: So I'm wondering if that's where you stop in making your determination of whether somebody should get the death penalty or not or whether you want to know more.

THE JUROR: Yeah. I mean, I can't really say I have a certain line of where I'm going to make my decision or not. It would more depend on the outcome of how everything was presented to me and what -- how everything, like, really played out.

MS. CLARKE: Let me ask it this way: If you made a decision that the person was guilty of an intentional murder, no excuses, in the penalty phase would you be giving consideration, meaningful consideration, to the fact that someone may have had a bad childhood?

01:46

THE JUROR: Yes.

MR. WEINREB: Objection.

MS. CLARKE: Would that make a difference?

MR. WEINREB: I don't think it's appropriate to ask particular mitigating factors.

THE COURT: I think we've ruled that out before. I mean, I think we can keep coming at this. I think the witness has expressed his disposition -- the witness, the juror. I keep calling him "the witness."

01:47

MS. CLARKE: Mr. 138. Thank you.

THE COURT: Anything else? You're done?

Anything else?

MR. WEINREB: No.

THE COURT: Okay. Thank you, sir.

THE CLERK: Right this way, sir.

THE JUROR: Thank you.
(The juror is excused.)
THE CLERK: Juror No. 139.
MR. McALEAR: Juror 139.
THE CLERK: Sir, over here, if you would, please. Have a seat. Make sure you speak into the mic so everyone can hear you, okay.
THE JUROR: Sure.
THE COURT: Good morning.
01:48 THE JUROR: Good morning.
THE COURT: Have you been able to follow my instructions the last time about not discussing the case with anybody or try to avoid any --
THE JUROR: Correct.
THE COURT: -- avoidable contact with media stories about this?
THE JUROR: Correct.
THE COURT: Tell us what you do for a living.
THE JUROR: I'm an IT professional. So I work for a
01:48 large computer manufacturer developing platforms for cloud solutions.
THE COURT: And how long have you been doing that?
THE JUROR: I've been in this role for two and a half years. I've been with the company for about 30 years in the IT space working on different technologies around Microsoft.

MR. WEINREB: Or even ten minutes, frankly.

THE COURT: Why don't we say quarter to four.

(The Court exits the courtroom and there is a recess in the proceedings at 3:26 p.m.)

(The Court entered the room at 4:05 p.m.)

THE COURT: I apologize for being delayed. I got caught on a phone call.

Okay. So let's run through the people we saw today and entertain any cause objections. Number 138.

07:29 MR. WEINREB: No motion.

MS. CLARKE: No.

THE COURT: Number 139.

MR. WEINREB: No motion.

MS. CLARKE: No.

THE COURT: Number 143.

MR. WEINREB: So we have a motion on him, your Honor. [redacted], is, again, somebody who seems like the quintessential example of somebody who, if not prevented, then is certainly substantially impaired about his opposition to the

07:30 death penalty.

He is, again, somebody who indicated quite clearly he did not want to appear to be an absolutist but, as a practical matter, could not imagine a real-world situation where he would impose the death penalty. And I think that really his views were very neatly encapsulated by his answers to Miss Clarke's

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY ELEVEN

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, January 29, 2015
11:10 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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THE JUROR: Well, I just think that as far as probably not being as naive and just thinking that -- you know, that sometimes bad things happen out there and there needs to be more consequence, whereas when I was younger and it was just myself, I probably didn't have that point of view.

MS. CONRAD: Would a case that involved the death of a child make it more difficult for you --

MR. MELLIN: Objection.

THE COURT: Sustained.

05:18 MS. CONRAD: You told us that -- well, you said on your form that you were unsure whether you'd formed -- the way the question is framed is a little bit difficult. If you'd look at page 20, Question 77. So it's a little confusing, but the way the question is actually written is it asks whether you'd formed an opinion about whether Mr. Tsarnaev is guilty, and your answer to that is "unsure."

THE JUROR: Uh-huh.

MS. CONRAD: So are you saying there that you're unsure whether he's guilty or you're unsure whether you formed

05:19 an opinion?

THE JUROR: Well, I think they're one and the same because I don't have that information, you know, as far as if I just watched the television that day, then, you know, that wouldn't be -- I don't know. That's just not where I would come from, you know? I just don't feel like -- I am unsure as

far as, like, what you're asking. Like I'm not someone who's going to say "guilty" or not "guilty."

MS. CONRAD: Sure. And I appreciate that and I really appreciate -- first of all, I want you to understand that we're really trying to find out how you feel. There are no right or wrong answers here, which is really the most important thing, is that you tell us as honestly as you can. And sometimes it's hard to know yourself how you feel about something.

And of course, we appreciate that you understand the 05:20 legal concepts, but before you ever got your jury summons, did you have an opinion about whether Mr. Tsarnaev was guilty?

THE JUROR: From what I saw on TV?

MS. CONRAD: Yes.

THE JUROR: I guess, yes, I suppose that we knew that he was involved.

MS. CONRAD: And what was that based on?

THE JUROR: From the media. And like I started off, it's just -- you know, I don't always believe everything that I, you know, hear or see from the media, but it was from what 05:20 the media coverage was telling us.

MS. CONRAD: And is there anything about that media coverage that stands out in your mind?

MR. WEINREB: Objection.

THE COURT: Yeah, I think so.

MS. CONRAD: Again, focusing on your state of mind, if

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY THIRTEEN

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, February 4, 2015
10:11 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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about the facts that would be presented to you in court during the trial?

THE JUROR: Yes.

MR. WEINREB: Were you at MIT on the night that Sean Collier was murdered?

THE JUROR: I was on -- I was not in the Stata Center. I was on campus.

MR. WEINREB: Were you in the area --

THE JUROR: No.

02:51 MR. WEINREB: -- where it occurred?

Thank you very much.

MS. CONRAD: I have no questions. Thank you very much.

THE COURT: All right. Thank you, ma'am.

We'll take a break for lunch, come back at 2.

(Luncheon recess taken at 1:00 p.m.)

(The Court entered the courtroom at 2:05 p.m.)

THE CLERK: Juror No. 286. Ma'am, over here, please, if you would. Have a seat.

03:57 THE COURT: Good afternoon.

THE JUROR: Good afternoon.

THE COURT: Since you were here to fill out the questionnaire, have you been able to follow my instructions to avoid discussing the substance of the case?

THE JUROR: I have.

THE COURT: And as much as possible, to avoid any media accounts?

THE JUROR: Yes.

THE COURT: Thank you. Tell us about your work.

THE JUROR: I'm a general manager of a restaurant.

THE COURT: And you've been doing that for a couple of years?

THE JUROR: No. I've been doing it for about a year and a half. I've been with the same restaurant for about 24 years.

THE COURT: So you were recently promoted to general manager?

THE JUROR: Correct.

THE COURT: How big -- how many staff people do you supervise?

THE JUROR: About 50.

THE COURT: We asked a little bit about social media you use. You use what? Facebook?

THE JUROR: Facebook, Twitter, Instagram.

THE COURT: Mostly for family or social?

THE JUROR: Yeah, just social. Facebook, I keep up with friends and relatives. Twitter, I watch TV and kind of tweet while I'm watching TV with other people that are watching the same programs that I'm watching.

THE COURT: Does that include news programs?

THE JUROR: No.
THE COURT: You have prior jury experience in the Suffolk Superior Court?
THE JUROR: I do.
THE COURT: That was a civil commitment? Was that what it was? What was it?
THE JUROR: It was a --
THE COURT: A patient?
THE JUROR: Right. He was kind of -- I guess they had
03:59 stated that he wasn't going to be allowed back out into the public, and he was kind of appealing, I guess, that decision.
THE COURT: When was that?
THE JUROR: Probably about four years ago.
THE COURT: What was the decision?
THE JUROR: He was sent back to Bridgewater State Hospital.
THE COURT: So if you'd turn to Page 20, I want to direct your attention to Question 77. In that question we asked whether, based on what you'd seen or read in the media or
04:00 heard from any other source, had you formed an opinion the defendant was guilty or not guilty or should receive the death penalty or should not receive the death penalty. To each of those you answered, no, you hadn't formed an opinion.
THE JUROR: Correct.
THE COURT: Is that accurate?

THE JUROR: Yes.

THE COURT: You probably have seen things about the case?

THE JUROR: Absolutely.

THE COURT: But that hasn't led you to form any --

THE JUROR: I'll tell you, I watch the news. I've seen reports of the -- everything on the news. When I read those questions, I was kind of -- you know, you're putting it on me, and I don't feel I knew enough of the facts to base a decision. I assume while I'm watching the news that I'm -- the police or whatever have done -- they got who they were looking for. I kind of left it at that. When it was being pinpointed at me, I wasn't comfortable with the information I knew to make an accurate decision.

THE COURT: You know that in a criminal prosecution anybody who is accused of a crime is presumed to be innocent, not guilty, unless the government proves otherwise, proves the person guilty by evidence at the trial.

THE JUROR: I understand.

THE COURT: The evidence has to be convincing to the degree of -- the jurors would be convinced of his guilt beyond a reasonable doubt. Corollary of that is, if the jurors are not so convinced, it's their obligation to find the government has failed its burden of proof and to find the defendant not guilty.

THE JUROR: Correct.
THE COURT: Would you be able to faithfully apply those principles if you were a juror in this case?
THE JUROR: I would.
THE COURT: With respect to guilt or innocence?
THE JUROR: Absolutely.
THE COURT: You say you went to the Boston Strong concert at the Garden and bought a T-shirt there?
THE JUROR: Yeah. Actually, I was -- I realized
04:01 afterwards that I bought the T-shirt actually for the concert. I thought, when I was filling out the questionnaire, that I had bought it at the concert. But I bought it to attend the concert.
THE COURT: Do you still use it?
THE JUROR: No. I'm not really a T-shirt -- I'll tell you the last time I remember wearing it was at Disney World a year and a half ago only because so many people commented on it when we were there, but I'm not really a T-shirt, jeans-type person.
04:02 THE COURT: We asked a series of questions about attitudes towards the death penalty in general and perhaps more particularly. If you'd turn to Page 23, with Question 88, we started by asking you if you had any views about the death penalty in general, what are they, and you said you don't really have any.

THE JUROR: I don't.

THE COURT: Is it something you've thought about over the years or not thought about it over the years?

THE JUROR: I never really thought it. It doesn't really apply to me or my life. That maybe sounds selfish, but I just -- if it doesn't apply to me, I don't really give it much thought.

THE COURT: Okay. In the next question, we asked you to indicate where you thought you might fall on a numerical scale from 1 to 10, from strongly opposed to strongly favor. You're sort of in the middle.

04:03

THE JUROR: I'm in the middle, yeah.

THE COURT: And then Question 90 on the next page, there's a series of propositions that go from opposition -- strong opposition to strongly in favor. And we asked you to pick the statement that might best capture your own point of view on this. And you've selected (d), which is, "I'm not for or against the death penalty. I could vote to impose it, or I could vote to impose a sentence of life imprisonment, whichever I believed was called for by the facts and the law in the case." That's what you selected then. Does that -- today, that does seem to still be the way you would be on the scale of things?

04:03

THE JUROR: Yes.

THE COURT: You heard me this morning talk about how

there would be a penalty phase and there would be presentations probably about aggravating factors and mitigating factors. Would you be able to listen to all that evidence and in the end decide which, assuming -- of course, you don't get to the penalty phase until you found the defendant guilty of intentional murder. That's the premise. Would you be able in the penalty phase then to consider all the aggravating, mitigating circumstances, anything else that seemed important to you and be able to choose in either direction depending on how you weighed the evidence?

04:04

THE JUROR: I could.

THE COURT: The bottom of 25, Question 95, and then 96 on the top of the next page, we asked first -- now, these are not about general views about the death penalty but kind of bring you to this case. If you found this defendant guilty and you decided that the death penalty was an appropriate punishment, could you conscientiously vote for the death penalty?

THE JUROR: Yes.

04:04

THE COURT: You said "yes."

THE JUROR: Uh-huh.

THE COURT: The other side of that is the next question. If you found him guilty and decided on the other hand that life imprisonment without possibility of release was the appropriate punishment, could you conscientiously vote to

impose that --

THE JUROR: Yes.

THE COURT: -- punishment?

Okay. Anything? Mr. Mellin.

MR. MELLIN: Good afternoon, ma'am. I'm Steve Mellin. I'm one of the prosecutors on the case. I want to go right where Judge O'Toole was asking questions about the death penalty. If we can just kind of see if we can dig down a little bit on that. You say you were kind of not for it, not against it. But where -- when you think about it, I mean, what impressions do you have of the death penalty?

THE JUROR: I don't really have any. I mean, I could -- it doesn't bother me. I don't feel like -- I guess I don't feel like I'm the one that's sentencing somebody to death or prison for the rest of their life. It's their own actions that are determining that factor. If I'm following the law or whatever -- it's kind of the same thing with my job. I fire people, and they're, like, How can you do that to somebody? I'm, like, I didn't do that. They did that. They consciously made the effort to not come to work or to steal or be late or whatever. I feel the same way with being a juror, being told to follow the law and what I've heard, and I'll decide that by what I've heard in the courtroom.

MR. MELLIN: You've heard a little bit about how this process works. But if the jury does find the defendant guilty

of one of these capital offenses, the jury would go on to decide whether it will be life imprisonment or death penalty; do you understand that?

THE JUROR: I do.

MR. MELLIN: So it really is going to be up to the jurors to make the call between does the evidence support the death penalty or does it support life imprisonment. And it's going to be a call that you will have to make. And if you believe that the aggravating factors sufficiently outweigh the mitigating factors to justify a sentence of death, would you actually be able to vote to sentence someone to death?

THE JUROR: I could.

MR. MELLIN: Thank you.

THE JUROR: You're welcome.

MS. CLARKE: Hi. My name is Judy Clarke. I'm one of Mr. Tsarnaev's lawyers.

THE JUROR: Good afternoon.

MS. CLARKE: You're a supervisor?

THE JUROR: I'm a general manager, supervisor.

MS. CLARKE: A big supervisor --

THE JUROR: Yes.

MS. CLARKE: -- of a good number of people, it sounded like. A jury, everybody is sort of equal. Have you thought about how that might work for you?

THE JUROR: No. I mean, I kind of almost prefer it.

I don't like being the center of attention. I kind of actually like being -- it would be more comfortable for me actually.

MS. CLARKE: Can you help us understand that a little bit more? More comfortable --

THE JUROR: I took the position. It was offered to me. I actually said no six times to my boss. I didn't want the position. I didn't want the responsibility. I was kind of guilted, I guess, into it, but they didn't have anybody else that they felt comfortable doing it. I've had a problem with
04:07 that decision since the day that I've taken the job. I've played the lottery more in the last year and a half then -- hoping for that retirement. It's not a comfortable position for me. It's -- so being level with everybody and equal with everybody is a lot more comfortable for me personally.

MS. CLARKE: Not having anybody to boss around?

THE JUROR: Right, or being responsible for somebody.

MS. CLARKE: Well, it's huge responsibility being on a jury deciding whether somebody is going to live or die based on their actions or not. How do you think you would cope with
04:08 that responsibility?

MR. WEINREB: Objection.

THE COURT: No. I think you can answer that. Go ahead if you're able to.

THE JUROR: Yeah. I don't feel like I would have an issue with it. I've done -- it hasn't been a death penalty

case before, but I've been on a case before and I've had no problem.

MS. CLARKE: With your prior jury service? You said that was a positive experience, I think.

THE JUROR: Yeah. Actually, it's, like, when you were giving our instructions on day one, you have this sense of pride coming out of there, whatever, that you've done something very important. Somebody like myself, I haven't really gone to college. I was a waitress for years. I feel the same way when I come out of the voting booth every time I vote. It's something very important that I've done. It's probably one of the most important things that I will do in my life.

MS. CLARKE: Okay. At the restaurant, did your employees or coworkers, colleagues, talk about the Boston Marathon bombing when it happened?

THE JUROR: No. I work 20 miles out of the city. We were actually really busy. I was a waitress at the time. I was kind of like joking with my boss I wanted to go home. Boston was -- I live in Boston, and Boston was on lockdown. I'm, like, I have to go home. We're on lockdown. We were really busy. All the restaurants around rely on people coming from public transportation. It was shut down. We were already there and open. It's a breakfast restaurant so all -- we open at 7 a.m. We were all there at 6:00 in the morning. Yeah, we were busy. We were working.

MS. CLARKE: But you knew about it?
THE JUROR: Yeah, yeah.
MS. CLARKE: Over the course of time, have people there talked with you about it?
THE JUROR: No, not really.
MS. CLARKE: All right.
THE JUROR: No.
MS. CLARKE: Family or friends talk with you about the Marathon bombing?
04:10 THE JUROR: No.
MS. CLARKE: Or any of the events of that week?
THE JUROR: No. I remember talking to my kids about it explaining situations with them. There was something else going on at UMass Boston when the bombing was all going on. I was a lot more concerned about what was going on there. I guess it ended up being like a -- I can't think of the word but an explosion of an AC unit or something.
MS. CLARKE: Oh.
THE JUROR: I have a brother that works over there, so
04:10 I was more concerned about what was going on over there than what was actually going on in Downtown Boston.
MS. CLARKE: All right. You've just not had any conversations really about this case? I mean, before the judge instructed you.
THE JUROR: Before, yeah. I mean, maybe in general or

something but not really. It didn't really -- I don't attend the Marathon. I don't go into Downtown Boston. I didn't know anybody that was affected from it. Maybe just in general. You know, I mean, just in general. Hey, did you hear what happened at the Marathon?, something like that.

MS. CLARKE: I think you said in the questionnaire that you'd read a moderate amount of the press coverage. That's Question 73 if you wanted to take a look. Can you tell us what stands out in your mind that you read about it?

04:11 MR. WEINREB: Your Honor, I object.

THE COURT: Yeah. I think so.

MR. WEINREB: We've already plowed this ground.

THE COURT: She's already indicated what her attention was to it. I think that's enough.

MS. CLARKE: You mentioned you went to Disney World, I guess the Florida --

THE JUROR: Right.

MS. CLARKE: -- version of it. And people commented on your Boston Strong shirt. What were those conversations

04:12 like?

MR. WEINREB: Objection.

THE COURT: You can summarize what people may have said.

THE JUROR: It was more or less, like, Oh, cool. Cool shirt. They would point or whatever. It was -- my boyfriend

and I attended the concert together. It only stood out in my mind because I had worn it that day, and then the very next day, he wore his. I said, Oh, you just got jealous about all the attention I got yesterday from my shirt. But there were people, like, Cool shirt, high five. They'd walk by and be like, Hey.

MS. CLARKE: He did get the appropriate attention, I take it?

THE JUROR: He did.

04:12 MS. CLARKE: And was one up on you, I take it?

THE JUROR: Right.

MS. CLARKE: Let me go back to your job very quickly. You're a general manager. If you're in trial here for three or four months, do you get paid okay?

THE JUROR: You know, it's not something I discussed with my boss. She's not on-site. I'm the only one on-site. She knows about my service here. I just kind of, I guess, taken it into my own that we're here Monday through Thursday. I could really work Friday, Saturday, Sunday. And we're not

04:13 here on holidays. Most of my job is, when everybody else isn't at work, that's when I work. I work weekends. I work holidays so -- and they'll have to cover, you know, or not cover, whatever.

MS. CLARKE: So you're not evaluating this as a hardship for you if you were to actually serve?

THE JUROR: No. I could probably squeeze in most of my hours with the schedule of the court.

MS. CLARKE: All right. Just one second, Judge. Thank you very much.

THE JUROR: You're welcome.

THE COURT: That's it. Thank you. Just leave that there.

THE CLERK: Juror 288. Ma'am, over here, please. Have a seat.

04:14 THE COURT: Good afternoon.

THE JUROR: Hello.

THE COURT: Since you were here last, have you been able to follow the instructions not to discuss the case with anyone except to tell them you're here?

THE JUROR: Yup.

THE COURT: And also to avoid any media reports?

THE JUROR: Yup.

THE COURT: So we have your questionnaire. That's the one you filled out. I'm going to follow up on some of the

04:14 information you gave us. You can see I'm turned to the page where you've listed your employment. It looks like you're doing kind of two different jobs at the same time. Is that fair?

THE JUROR: Yup.

THE COURT: You're a supermarket deli clerk, and you

don't know how strictly grant money is accounted for. They suggested that if they couldn't get it out of the grant, they would find it somewhere else.

MR. BRUCK: She said there were mechanisms.

THE COURT: It looks like they're going to take care of her. So I don't think the hardship is sufficient, and so I think she's passable. We'll accept her.

The next is 286. Anything? Anything on 286? No? Okay. She's passed.

06:16 288?

MR. WEINREB: Your Honor, the government has a motion. Does the Court need to hear argument on it? We thought it was pretty clear at the end that she --

THE COURT: Is there disagreement on it?

MR. BRUCK: I don't think it was clear at all, no.

THE COURT: Go ahead.

MR. WEINREB: So this is a juror who by the end of the voir dire was extremely clear in her -- that she was impaired in her ability to impose the death penalty. She was asked no

06:16 fewer than four times, sometimes by me and sometimes by Mr. Bruck, who was trying to rehabilitate her at the time whether she could impose the death penalty. And four times she said, "I'm not sure." "I am not sure that I could do it."

And this was not the kind of "not sure" like "I think I could do it but, you know, you have to be there to know in

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY FIFTEEN

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Friday, February 6, 2015
10:19 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporters
Loretta Hennessey, RDR, CRR
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condition she cannot be fair-minded. That is the germane point.

MS. CONRAD: So do you want me to --

THE COURT: Yeah. So if you want to hand it to me now we'll get to it. But I just want to make sure we get efficient in your questioning.

MS. CONRAD: I'm not going to read everything.

THE COURT: We still have a ways to go.

I guess we're ready for Juror No. 355.

MR. DOREAU: Audio and video on.

(In open court:)

THE CLERK: Juror No. 355.

THE JURY CLERK: Juror 355.

(The juror enters the courtroom.)

THE CLERK: Sir, if you would, over here, please. Speak into the mic so everyone around the table can hear you. And this is adjustable, so if you need to move it.

THE COURT: Good afternoon.

THE JUROR: Good afternoon, your Honor.

THE COURT: Since you were last here have you been able to follow the instructions not to discuss the case on the merits or --

THE JUROR: I have.

THE COURT: And also to try to avoid any exposure to media accounts?

THE JUROR: The best I can.

THE COURT: They're there, but you have to put them aside.

So we're going to follow up on some of the areas touched on by the questionnaire, and of course we'll start with your occupation, which is attorney. And you work for the Committee for Public Counsel Services?

THE JUROR: Correct.

THE COURT: And you've been doing that for a while?

THE JUROR: For a while, yes.

THE COURT: A little over ten years, maybe?

THE JUROR: At the committee, yes. I started actually at New Hampshire back in 1992. So I've been a criminal defense lawyer for over 22 years.

THE COURT: When you were in private practice, your practice was criminal defense?

THE JUROR: Yes, as --

THE COURT: Has it changed in any way?

THE JUROR: Yeah, 99.9 percent, and I was still taking mostly court-appointed.

THE COURT: Do you have any feeling that that would make it difficult for you to be an impartial juror in a criminal case?

THE JUROR: I don't think so. I actually think it makes it a little bit easier because I look at every case about

what can be proved in court, what are the facts.

THE COURT: Have you had any particular concentration in your practice in, I guess, what courts you practice in or anything like that?

THE JUROR: District and superior courts in Massachusetts and in New Hampshire back when I was up there, but...

THE COURT: Are you a member of the bar of this court? Have you practiced --

THE JUROR: No, I've never practiced in federal court.

THE COURT: Just working through the -- well, wait a minute. Let me just see if -- just working through, somewhat in order, and you can follow if you want -- this is the bottom of page 10 and top of page 11 -- in Questions 29 and 30 we asked you about blogging or social media. You said you blogged last year when you were training to run the 2014 Boston Marathon and to fund-raise for charity. What was the charity?

THE JUROR: It was a Framingham charity, the Boys and Girls Club.

THE COURT: It wasn't a marathon-related charity?

THE JUROR: No, it was a part of --

THE COURT: The One Fund or anything like that?

THE JUROR: No, what -- the way I got my bib is that the Town of Framingham had, I think, 20 bibs given to them by the Boston Marathon, and basically picked numbers out of a hat.

And what you had to do was raise charity [*sic*] for a local Framingham charity. And they had a list of six and they -- we got to choose which one.

THE COURT: And what were you blogging; what kinds of things?

THE JUROR: My ups and downs of trying to go from running five miles at top to trying to finish a marathon. Nothing political.

THE COURT: Facebook?

THE JUROR: I have my own Facebook.

THE COURT: How do you use it?

THE JUROR: Mostly to keep track of my friends' kids and whatnot. I post very infrequently, and if I do, it's usually a picture of my kids or about a disastrous running.

THE COURT: It looks like you served as a juror in Middlesex?

THE JUROR: I did.

THE COURT: That was a civil workers' comp case?

THE JUROR: Yes.

THE COURT: When was that?

THE JUROR: Four years ago now? Four and a half maybe? It was a two-week-long case.

THE COURT: So if you'd turn to page 20, I'd like you to look at Question 77, and that's a question where we ask if you'd seen or read things in the news media or else-wise, had

you formed an opinion prior to filling out the questionnaire that the defendant was guilty or not guilty or should receive the death penalty or should not, and to each of those you selected the option "unsure." Can you tell us about that?

THE JUROR: Sure. I mean, it's mostly based upon my training and experience. I think, like everybody in the courtroom here, I know what I see in the papers and in the media isn't necessarily entirely accurate. And while it certainly was constant for a time, I know and I can wait until I see what the actual facts are before making up my mind. I mean, I do that in my own cases. I mean, reading a police report isn't necessarily what makes me decide how I feel about the case.

THE COURT: And I guess it was unnecessary, I guess in the way you answered the first question, but in the second part of that question it said if you'd answered yes, which you hadn't done, would you be able or unable to set aside any opinion and base your decision on the -- based solely on the evidence in the case. You checked "able."

THE JUROR: I thought it was a good expression of how I felt about everything.

THE COURT: The next page, Question 82, we asked if people had participated in any what we might call support activities after the fact, and you might have bought some merchandise or something, maybe Boston Strong kinds of things?

THE JUROR: Yeah, I'm sure. There was another marathon I did in October that I think there might be a Boston Strong logo on the shirt they gave out.

THE COURT: October 2014?

THE JUROR: Yes.

THE COURT: Question 84, you know some of the federal defenders, including Ms. Conrad who's seated at the table?

THE JUROR: I've met Ms. Conrad once, I think at a function, like a talk or something. I know one of their recent employees who just recently left the office, Mr. Mirhashem.

THE COURT: And you also include Tim Watkins?

THE JUROR: Yes.

THE COURT: How do you know Tim?

THE JUROR: Again, I met him at a function or two.

THE COURT: Met, not --

THE JUROR: Met.

THE COURT: -- socialize with or --

THE JUROR: I would not call it that.

THE COURT: I'm working my way through --

THE JUROR: Sure. My handwriting is atrocious. I can interpret it if you want.

THE COURT: No, that's okay.

So beginning at page 23, Question 88, we asked questions related to your views about the death penalty. So let's -- I'd like to run through those.

THE JUROR: Sure.

THE COURT: Question 88 is if you have any views on the death penalty in general, what are they. You said, "It should be the rarest of punishments. It is much too prevalent in the country." And you preface that by saying, "Since it is legal." I guess you're accepting as a proposition that it's legal?

THE JUROR: Yes.

THE COURT: Although you might have some view that it shouldn't be?

THE JUROR: I mean, if I was asked to vote on it, I would probably vote against it because of my belief that it is overused.

THE COURT: Well, as to the opinion that -- or the view that it should be the rarest and is too prevalent, do you want to amplify on that at all?

THE JUROR: I think we are -- we hear quite often about people who are on death row who are later exonerated and just how some states have higher death penalty conviction rates than others; and additionally, the racial and economic disparity on who gets the death penalty. And for a lot of those reasons, I just think it's overused.

THE COURT: Have you ever been personally involved as a lawyer in a death penalty case?

THE JUROR: I haven't.

THE COURT: Question 89 we asked you to put yourself on a scale from 1 to 10, 1 being it should never be imposed and 10 being it should be imposed whenever someone's convicted of murder. You selected 2. Do you want to amplify on that?

THE JUROR: Sure. I did a -- when I found out I was going to be in this pool, I did a lot of soul-searching, and I came to the conclusion that because I believe it should be in the most rarest of situations, that's why I'm down at that end, but I could foresee situations where I might consider it appropriate.

THE COURT: Okay. Next page, Question 90, we set forth a series of statements of different attitudes towards the death penalty and we asked you if you thought there was one that represented your views. You selected C. It says you're opposed to the death penalty but could vote to impose it if you believed that the facts and the law in a particular case called for it.

Is that an accurate statement of your --

THE JUROR: I think that's an accurate statement.

THE COURT: So you can envision there could be a case where you could vote in favor of the death penalty?

THE JUROR: After a lot of thought and soul-searching, I think I could.

THE COURT: Let's go down to the bottom of page 25. Question 95 we asked kind of focusing on this case if you found

this defendant guilty and you decided that the death penalty was the appropriate punishment, could you conscientiously vote for the death penalty. You selected "I'm not sure," and added in your own words, "I cannot possibility prejudge his guilt or potential punishment at this stage." And you gave essentially the same answer for the reciprocal question on the next page about whether you could conscientiously vote for life imprisonment.

Do you want to tell us why you answered those questions that way?

THE JUROR: Sure. Without having the facts in front of me or, frankly, the instructions from the Court, I find it very difficult to make that far of a prediction.

THE COURT: In part, the question may have been getting at whether in Question 95, for example, if you had intellectually concluded the death penalty was appropriate, could you actually vote for it; in other words, would you have any moral or other scruple about voting for it even if you were convinced intellectually that there was a case for it to be made?

THE JUROR: I find it very difficult to answer that without hearing everything.

THE COURT: Okay.

MR. MELLIN: Thank you, your Honor.

Good afternoon, sir. I'm Steve Mellin. I'm one of

the prosecutors.

Let me just kind of go right where Judge O'Toole just cut off, which was -- the question was if you found Mr. Tsarnaev guilty and you decided that the death penalty was the appropriate punishment, could you conscientiously vote for the death penalty. So it says -- the question is assuming -- and you're a lawyer. The question is assuming that he's guilty and that you found that the death penalty was appropriate.

THE JUROR: I guess part of my problem is that I'm disturbed that I have to assume his guilt at this stage without hearing anything and to prejudge the particular case I'm asked to come and judge. I don't know that I really want to exercise that fantasy. And I'm sorry if I'm being difficult about it.

MR. MELLIN: Well, we're all here today. It's really not a fantasy, though. I mean, we're getting down to if you found him guilty, which means the jury's now deciding life versus death, and if you believed that death was appropriate, could you ever vote to sentence someone to death?

MS. CLARKE: That's mixing this case with "could you ever vote someone." I mean, I think we -- the juror's problem is prejudging this case.

THE COURT: Yeah, I think as I was hearing it, your answer, the difficulty was that the question was phrased in terms of this case. Let's generalize it.

THE JUROR: You want me to step back?

THE COURT: If you were sitting on a death penalty case where the defendant -- that is, when I say that, a capital case, and the defendant is found guilty of a capital crime, and you concluded that for that defendant and for that crime the death penalty was an appropriate punishment, could you conscientiously vote to impose it in that case? And --

THE JUROR: If, after hearing the Court's instructions, and if I believed it was one of those -- it fit into one of those rare cases where I believed the death penalty should be imposed, having understood the law as given to me, then, yes, I could vote to impose the death penalty.

THE COURT: Do you have a collection of the category of cases you're thinking of? Do you have some examples?

THE JUROR: I don't really.

MR. MELLIN: Well, can you imagine any case that you would think is appropriate for the death penalty?

THE JUROR: Yes.

MR. MELLIN: What?

THE JUROR: I think Slobodan Milosevic was close, if not a prime example. Again, I didn't do that trial.

MR. MELLIN: So genocide?

THE JUROR: Genocide's a good starting point.

MR. MELLIN: Okay. Anything other than genocide?

THE JUROR: I mean, I think -- I cannot say that I have sat and thought about a list of particular crimes or

severity of crimes where I would have a checklist of what I thought was appropriate for the death penalty or not. And having never worked on a death penalty case, I've never even read an instruction about what, at least legally, is considered for the death penalty or not.

I mean, everybody uses the example if somebody hurts your child, you know, a child, that's sort of a prime example of where people can go. But I like to think that we all take a step back and that's why we have juries decide rather than letting our emotions take over.

Without -- I guess that's my answer. I have not come up with a list of cases where I think it would be appropriate. I mean, I'd have to listen to the Court's instructions, I would have to judge the facts in front of me and determine whether or not that satisfied me.

MR. MELLIN: But you've known since January 5th that you were going to be coming back in here, because you're a lawyer, you understand how this works, right?

THE JUROR: Uh-huh.

MR. MELLIN: In fact -- you just have to say "yes" or "no."

THE JUROR: Yes.

MR. MELLIN: In fact, you're a criminal defense attorney, right?

MS. CLARKE: Your Honor, this is not

cross-examination.

THE COURT: Yes, this sounds a little bit too much like cross-examination.

MR. MELLIN: Well, I think in answer to one of the questions, you said you'd been a criminal defense attorney for how long?

THE JUROR: A little over 22 years.

MR. MELLIN: Since 1992?

THE JUROR: Yes.

MR. MELLIN: And in answer to Question 92 which you filled out on January 5th, you said, "Killing people, especially government-sponsored killing, is generally wrong. While I can imagine a scenario where facts and law call for it, it is an exceedingly rare case."

So you wrote that as your answer to 92, right?

THE JUROR: Yes.

MR. MELLIN: And there what were you referring to as you can imagine a scenario where facts and law call for it?

THE JUROR: The Milosevic example is usually the one I rest on when I say I can immediately come up with a scenario. Whether or not there are other scenarios, again, without knowing specifics, I find it difficult to answer the question.

MR. MELLIN: Okay. So since January the 5th, though, you haven't been able to come up with any other scenario, and as you sit here today the only scenario you can come up with is

the genocide scenario?

MS. CLARKE: Your Honor, I think that's an unfair question. He hasn't been asked to come up with other scenarios.

THE COURT: I think we can move along anyway. I think I'm understanding the witness -- the juror's position.

MR. MELLIN: All right. The judge asked you earlier a little bit about your concentration in your type of work that you've been doing. What do you concentrate in?

THE JUROR: Right now I'm one of the supervising attorneys in the district court office in Worcester. So I do a lot of supervising of the lawyers in that office. I am -- I -- directly over six lawyers. I still do maintain a caseload of my own in both district and superior court in Worcester.

MR. MELLIN: All right. And just for the record, you didn't really indicate if that was for the prosecution or for public defender service or who that is for. Who is that for?

THE JUROR: It's for the public defender service, the Committee for Public Counsel Services.

MR. MELLIN: Okay. And you actually worked for the New Hampshire public defender at some point. Is that correct?

THE JUROR: Yes.

MR. MELLIN: Have you ever worked for the prosecutors?

THE JUROR: No. I have worked with the prosecutors.

MR. MELLIN: On cases, correct?

THE JUROR: Well, on cases. And we're very -- Worcester is actually a very collegial area. Just last night, for example, I coordinate with members of the D.A.'s office and the court and Bar Advocate Program in advanced trial skills training. And so we do work collaboratively on some issues.

MR. MELLIN: But in your actual job you've never prosecuted a case, right?

THE JUROR: Right.

MR. MELLIN: Now, you mentioned in answer to Question 76, and it's on page 20, that you read the First Circuit's decision rejecting the delay of trial and change of venue.

THE JUROR: Yes.

MR. MELLIN: When did that occur, that you read that?

THE JUROR: I don't remember the day. I heard on the radio there had been a motion and it was, I think, several days before we were to come on that Monday. And I wanted to see what the court's decision was to find out if I was actually going to be arriving in court. So that's why I sought it out.

MR. MELLIN: Okay. You said that you've met two of the public defenders on this case before, correct?

THE JUROR: Yes.

MR. MELLIN: And when did you meet Ms. Conrad?

THE JUROR: I couldn't tell you when. It was years ago.

MR. MELLIN: Do you remember what function it was at?

THE JUROR: I'm not entirely sure. It might have been -- it might have been a MACDL event, a Massachusetts Association of Criminal Defense Lawyers event. I'm really not 100 percent sure.

MR. MELLIN: And what about Mr. Watkins?

THE JUROR: I want to say it's a similar-type event.

MR. MELLIN: And I think you told the judge you've never worked on a death penalty case on behalf of a defendant, correct?

THE JUROR: Correct.

MR. MELLIN: Well, do you know what the Innocence Project is?

THE JUROR: I do.

MR. MELLIN: What is that?

THE JUROR: We have -- at CPCS there is a lawyer -- there may be more than one lawyer in that unit -- who do work on sort of Innocence Project-type cases.

MR. MELLIN: Okay. And what is the Innocence Project?

THE JUROR: My understanding is the Innocence Project looks at old cases, determines whether or not they require -- usually -- sometimes in death penalty cases, but I don't think it's exclusive, and determine whether or not there was some error in trial and/or actual innocence of the defendant, and they begin to file -- whether it's discovery

pleadings or motions for a new trial, depending on new evidence.

MR. MELLIN: Do you know if they advocate on behalf of people on death row?

THE JUROR: I'm certain they do.

MR. MELLIN: Now, the one person that you're talking about in your office who deals with that, who is that person?

THE JUROR: [redacted].

MR. MELLIN: Is she under your control?

THE JUROR: No, she's not even in Worcester.

MR. MELLIN: Have you ever gone to any functions or training concerning Innocence Project?

THE JUROR: No.

MR. MELLIN: Do you have any affiliation with it?

THE JUROR: I don't.

MR. MELLIN: Do you --

THE JUROR: Other than there's somebody in my office who's affiliated with it.

MR. MELLIN: Have you anything on a website that would indicate that you have any affiliation or connection to the Innocence Project?

THE JUROR: No.

MR. MELLIN: Your Honor, may I ask the juror about the issue that was raised previously?

THE COURT: I don't think it's necessary.

MR. MELLIN: All right. All right. Thank you.

MS. CLARKE: May I? Just a couple of questions about --

THE COURT: Just a couple would be perfect.

MS. CLARKE: It might have some subparts.

THE COURT: You might set a good example for somebody else.

MS. CLARKE: You know, we don't typically see genocide cases in the courts in the United States. And really, this just is sort of a question to flush out whether your views against the death penalty are such that you could never consider it or you could in a given set of circumstances.

My name is Judy Clarke. I'll really sorry. I'm one of the lawyers for Mr. Tsarnaev, but I was feeling pressured to go fast.

THE COURT: I'm glad. I just want to make that clear to everybody.

MS. CLARKE: I'm not feeling singled out.

THE COURT: You're not singled out at all.

MS. CLARKE: What the judge will instruct a jury that's just convicted a defendant of a capital crime is that they have an obligation to consider the aggravating factors presented by the government, the mitigating factors presented by the defense, deliberate about them, weigh them, and come to their own individual judgments about whether that justifies a

sentence of death.

And then -- and I assume from what I'm hearing about you is that you would be able to do that, go through that process of listening to your fellow jurors and weighing aggravation and mitigation. Is that right?

THE JUROR: I think that's a fair statement.

MS. CLARKE: And that you would then be able to deliberate and debate the pros and cons of imposing a sentence of death or life. Is that right?

THE JUROR: That's right.

MS. CLARKE: And if in your conscience, your individual conscience, you decided that the death penalty was an appropriate sentence for that given set of facts, the question is could you then actually vote to impose it?

THE JUROR: I think I could.

MS. CLARKE: Are you pretty confident of that answer?

THE JUROR: Yes.

MS. CLARKE: One question -- one area about -- there's been some suggestion that you're a criminal defense lawyer so you're biased toward one side or the other. As I read your answers to Questions 44 through 46, that was if you have positive feelings one way or the other about defense, prosecutors and law enforcement, you sort of cut across the board: "I've got friends that are prosecutors; I've got friends that are police officers; I've got friends that are

defense lawyers." Is that a fair assessment?

THE JUROR: That's a fair assessment. Everybody -- having worked in the system for as long as I have, I mean, there are lawyers I think are stellar whether they're prosecutors or defense attorneys. There are police officers I think are stellar; there are police officers I don't. But it's really an individual determination on the person's work.

MS. CLARKE: So just given your role as a criminal defense lawyer and the fact that you know people in the FPD's office, would that bias you one way or the other for or against the defense?

THE JUROR: I don't think it would one way or the other. Again, I think based on the training and experience I've had, I look at what's in front of me and I make a decision based upon what I see.

MS. CLARKE: Okay. Thank you very much.

THE COURT: Thank you.

(The juror is excused.)

THE CLERK: Juror No. 356.

THE JURY CLERK: Juror 356.

(The juror enters the courtroom.)

THE CLERK: Ma'am, over here if you would, please. Have a seat.

THE JUROR: Thank you.

THE CLERK: Do me a favor and keep your voice up,

THE COURT: I don't think she should be struck. I think she should be in the pool. She is clearly at one end of the spectrum, but I was influenced in part by her answer that she had a couple of examples and was open to more if you can present any. But I was also just sort of evaluating her by how she presented herself. And she's obviously a very intelligent, very thoughtful person. She seems kind of disciplined. And, of course, that's one of the qualities that this project calls upon, is discipline in jurors.

So I think she can be thoughtful about it. She'd be -- will take some persuasion, obviously, but I think she fits within the range of acceptable jurors.

353, 354 were agreed, I believe.

And now we have 355.

MR. MELLIN: And, your Honor, the government moves to strike this juror for two reasons, for his bias and also for his death penalty answers. He is a person who admitted that he's been a criminal defense attorney since 1992. So for 22 years his concentration of work has been representing criminal defendants. He admitted that he remembered meeting Ms. Conrad and Mr. Watkins. I think just on its face that is a sufficient bias that no one would be able to overcome given 22 years of work.

In addition, I asked him about the Innocence Project. And I have a piece of paper that I think that Mr. Chakravarty

has but he has not handed it over.

MR. CHAKRAVARTY: Sorry.

MR. MELLIN: And I asked him about the Innocence Project, and he indicated -- or tried to claim kind of no real connection to it, but even on his LinkedIn page he has a group that is the Innocence Project. And if the Court goes on to the next page, which is just a short synopsis of what the Innocence Project is, it says, "The Innocence Project supports a moratorium on capital punishment while the causes of wrongful convictions are fully identified and remedied. This has been the Innocence Project's position since our inception in 1992, and it is the same position that the American Bar Association adopted more than a decade ago."

THE COURT: So I'm trying to navigate what you've given me. I see. Is that what you're talking about?

MR. MELLIN: On the second page. Yes, your Honor.

THE COURT: And that takes you to the single page?

MR. MELLIN: That takes you to the Innocence Project's page.

MS. CONRAD: Well, I'm sorry --

MS. PELLEGRINI: We're not done yet.

THE COURT: Let him finish. Let him finish.

MR. MELLIN: That's the issue of bias, your Honor. I don't even think the Court, frankly, needs this information. I think that someone who is a criminal defense attorney for over

22 years, they're biased in a case like this.

Then I've gone on to discuss his position on the death penalty where he said that even having a substantial amount of time to think about it -- he is a criminal defense attorney. He knows what the process is. He understood at the time that he fills out this jury questionnaire that he's going to be brought back and asked questions about his questionnaire. And as he sat here today the only time that he said he could think that he could impose the death penalty would be in a case of genocide.

There are cases that say that that -- in and of itself if that is the only position that you're espousing, that that is the only time that you can think of the use of the death penalty, that that is a reason to excuse a juror. I cite specifically to the *Antwine v. Delo*. That's an Eighth Circuit opinion, 54 F.3d 1357. There the juror talked about Adolf Hitler, that the only time the juror could see imposing the death penalty was Adolf Hitler.

There's another opinion from the Ninth Circuit, *United States versus Mitchell*, 502 F.3d 931. That is a case where the juror said that the death penalty is only appropriate for murderers like Charles Manson or Ted Bundy. This man is even well beyond Ted Bundy or Charles Manson. He is saying there has to be genocide.

So I think given his answers in court today, that he

is substantially impaired.

MS. CLARKE: I know Miss Conrad is going to run over me. I might as well --

MS. CONRAD: Can I just make a couple of points and then let her make a couple of points? I just want to address this professional aspect.

THE COURT: All right. Go ahead.

MS. CONRAD: I don't remember meeting the man. He has a look that's vaguely familiar. I mean, these Massachusetts Association of Criminal Defense Lawyers -- I've been a member over 20 years. They're big, twice-yearly dinners, meetings. Somebody's having a conversation. I walk up; they say, "Do you know so-and-so?" They introduce us. We walk away. That's it. I don't see how that, which occurred sometime in the last 22 years, means that he's biased.

And I just want to say, I am trying desperately, since the government didn't see fit to bring this up about the LinkedIn page before, to bring up his LinkedIn page. I can't. It looks like they didn't go to his actual profile. So I just want to correct what I think is a misimpression that somehow this link on his page, if it is a link to the Innocence Project, takes you to this page on the death penalty. I assume that it does not take you to this page on the death penalty; it takes you to the home page, presumably, for the Innocence Project. And of course the Innocence Project is primarily an

organization that tries to make sure that people are not wrongfully convicted.

That's all I have to say, and I'll let Ms. Clarke deal with the death penalty issue which I'm not really that qualified to do.

MS. CLARKE: Well, you know, I think [redacted] tried to tell us that he was not comfortable with the death penalty but he could impose it. He was hit with the question of, "Well, tell us a time that you could," and he said, "Well, genocide is a time," but then when he stepped back and talked about whether he could weigh aggravation and mitigation and come to a conclusion with other jurors and make a decision in a given set of facts, he said he could do it.

He's friends with prosecutors. He's friends with law enforcement officers. He's friends with defense lawyers. He's been a defense lawyer. It's a little bit strange to listen to the prosecution talking about admitting to being a criminal defense lawyer. I never sort of had that as something to deal with. But at any rate, I think he's across the board as fair as they can come.

I know that the Court has ruled previously with regard to a criminal defense lawyer, that you were concerned about the life imprisonment with one side or the other, but he essentially sounds aligned with all the sides. He's been working as a criminal defense lawyer. His death penalty views

seem to fit right within what we're looking for.

THE COURT: So this really is not -- I don't approach this at all on a categorical way. Everybody is different, and the value of this process is you can sit here five feet away and you can sense the being. And I -- my sense of him is different from my sense of the last juror that we just qualified who I thought is open to the possibility of the death penalty in a way that I do not think that [redacted] is.

I agree that his -- the zone of possibility is so narrow, I think you would have to regard it as substantially impaired, this is the genocide issue, in contrast to her -- the other juror's examples were more possible, I guess, in the world that we'll be operating in. So I think he's not qualified under the death penalty question.

I would not exclude him just because of his criminal justice -- criminal defense work. Again, there was a juror where that figured in. It was more in that case, as I recall it, that she -- her career was postconviction -- finding problems with trials. And I was, among other things, concerned she might be spending her time finding trouble in the law along the way. But his career as a criminal defense lawyer wouldn't by itself be a factor. I think it may explain where his alignment is on these issues, but ultimately, it was his answers to the questions and my sense of it.

He was a learned witness, in a sense. He knew what we

were talking about whereas others don't necessarily, and I guess that could go in either direction. But in the end, it was not convincing to me that he was going to be truly open in the way that would be necessary.

356?

MR. CHAKRAVARTY: No motion.

MR. BRUCK: No motion.

MS. CLARKE: No motion.

THE COURT: And I think we run the table after this.

MR. BRUCK: Yes.

THE COURT: So the ones that have passed are, to summarize, 340, 349, 350, 352, 356.

Okay? All right.

MR. CHAKRAVARTY: Thank you, your Honor.

MS. CONRAD: Judge, I just want to raise the Juror 318 from yesterday.

THE COURT: Yeah, I know you filed something. I haven't looked at it.

MS. CONRAD: It kind of --

THE COURT: I will look at it.

MS. CONRAD: It leads you through how we get to that being her husband, basically.

THE COURT: All right. I'll take a look at it.

MS. CONRAD: Thanks.

(The Court exits the courtroom and the proceedings

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY NINETEEN

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, February 17, 2015
10:56 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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MS. CONRAD: As Judge O'Toole told you this morning, the penalty phase would include things about the crime as well as things about the defendant.

THE JUROR: Okay.

MS. CONRAD: Would you be willing to consider things that have nothing to do with the crime itself, but facts about the defendant, in deciding whether or not the death penalty was appropriate?

THE JUROR: Not the evidence itself?

04:24 MS. CONRAD: No, not the crime itself.

THE JUROR: Not the crime itself.

MS. CONRAD: You would hear evidence, for example -- let me just make this general. In a death penalty case generally, would you be willing to consider facts about the defendant such as his criminal history, his personal background, childhood, and so forth?

THE JUROR: Yes.

MS. CONRAD: The judge also described how you would -- the jury would be instructed to weigh the aggravating factors

04:24 and mitigating factors. Do you think that the fact that the death of a child was part of this case would make it difficult for you to weigh both sides before --

MR. CHAKRAVARTY: Objection, your Honor.

MS. CONRAD: -- before coming to a decision?

THE COURT: Sustained.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY TWENTY-SEVEN

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, March 4, 2015
9:16 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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MR. BRUCK: Thank you.

THE COURT: Let me just, for the record, resolve some pending motions. Motion No. 1080, and the motion that is attached to the motion filed under seal which is 1103, the motion proper does not have -- I'll allow the motion to seal and it will have a number, and Motion 1108, the fourth motion to change venue, all those motions are denied and a brief statement of the reasons will be forthcoming.

There are a couple of other matters that I think counsel may want to be heard briefly at the side about so we'll do a short -- a quick sidebar with respect to those.

(Discussion at sidebar and out of the hearing of the public:)

THE COURT: Let me just say one of the motions that we heard the other day, it was in the afternoon session, the DNA motion, the government should avoid using the DNA for the time being. My conclusion is that on the proffer that I've heard, it is not sufficiently probative under 402, 403 to be admitted. I do not reach the DNA or the late-filed issues.

Anything else?

MS. CLARKE: At sidebar?

THE COURT: That's what I was led to believe.

MS. CLARKE: The picture in the defense opening, there's one picture that the defense does not object to. That's Boylston Street.

THE COURT: Yeah. I can't promise I'm going to stick to the script but I understand the point. The one thing I did add to it, you'll hear that I will explain the three different ways that the defendant could be found responsible substantively for having committed the offense directly as an aider and abetter and as a conspirator, because there are conspiracy counts and I thought they should understand --

MS. CLARKE: And aiding and abetting counts.

THE COURT: Yeah, the aiding and abetting is throughout.

MR. BRUCK: Is this the proper time to lodge our final objection to the jury as --

THE COURT: Is this the final one?

(Laughter.)

MR. BRUCK: Yes.

THE COURT: Noted. The jurors are all here, they seem to be in good spirits and we're ready to proceed.

MR. BRUCK: Well, if we may, I think we're probably required, now that the jury is selected, to object to the panel. And that's what we would like to do. And we would like to incorporate all of the motions both regarding the jury pool and venue, all of the objections about the voir dire, all of the government's objections that were sustained and all of the individual motions respecting particular jurors who are now seated during the course of the jury selection.

THE COURT: Okay. Your rights are preserved. The objections are overruled.

MS. CLARKE: Thank you.

(In open court:)

THE COURT: The parties had argued, I guess Monday, the government's motion to exclude mitigation evidence as a motion in limine. Motions in limine are often considered with whether a certain particularly identified matter may or may not be offered in evidence, such as a particular physical item or perhaps evidence concerning a discrete subject matter. The government's motion is directed rather at a general category, mitigation evidence, the contents of which cannot be precisely defined and about which the parties are likely to have different views. It is therefore not possible to give a precise ruling that will provide all the necessary guidance to the parties. That said, the motion is granted as a general matter.

After the presentation of evidence in the first phase of the trial, the jury will be asked to say whether the government has proved the defendant guilty of the crimes charged in the indictment or not. That is a binary determination. The jury will say either that he is guilty or not guilty of each of those charges. Whether he is more or less culpable than other participants is not a question to be resolved in the first phase, and evidence bearing on such

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY TWENTY-EIGHT

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, March 5, 2015
9:12 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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MS. CONRAD: Okay.

THE COURT: I read the email to indicate that they were Forum, so -- they are Boylston Street photographs and they seem cumulative, and I'm interested more in the moving-things-along aspect than the prejudicial aspect, frankly.

MS. PELLEGRINI: We will not be using some of them because they are very similar to one another, and we have talked about that; however, with respect to the Forum stills, which I believe is also in the email, that we feel is not repetitive. As the Court can see from yesterday, it's difficult as they play a video, to stop the video at a specific point. We would be entitled to take a screen shot once we got there and had it printed out for the record. So we just have done that ahead of time.

THE COURT: Okay. The only limitation I think is that the number of similar photographs should be reduced, all right? Okay. Let's proceed.

MR. BRUCK: We have two other matters, your Honor, before the jury comes in. If I could confer with Ms. Clarke for just a moment?

(Counsel confer off the record.)

MR. BRUCK: There's concerns on the question of what we've described as victim impact evidence from surviving -- survivors of the Boston Marathon bombing. We have

today filed under seal, because it is in connection with a sealed series of pleadings, a motion to renew a renewed motion. And as the Court will recall, this issue was raised by a motion we filed back in January, the government responded at the end of February and represented that the sequelae of the -- of the bombing injuries suffered by survivors would only be offered to the extent they were necessary to show either what the victim -- why the victim remembers particular parts of the testimony or as it bears on the witness's ability to perceive the events, which is a proper and very narrow justification.

However, during the extremely moving and poised and articulate testimony of three of the survivors yesterday, we realize that the government is not actually abiding by that restriction, and so we have filed a motion to reassert the reasonable and legal limitations that exist in a proceeding like this.

We want to emphasize that the defense in absolutely no way, shape or form wishes to limit the right of survivors of the marathon bombing to have their day in court and to speak fully about every aspect of the impact of these crimes on them and on their lives and on their families, the only issue is at which proceeding the law provides for this testimony to occur.

The law is well settled and the Federal Death Penalty Act makes quite clear that non-homicide victim impact testimony is not admissible at the penalty phase of a capital

sentencing -- of a capital trial, and it seems as though given this restriction, the government is, in effect, attempting to introduce that type of evidence at the guilt phase where it is even less admissible, would not be admissible in any trial, let alone a capital trial.

The evidence is being offered at the wrong proceeding. And for that reason, and particularly in light of the testimony that is scheduled for this morning, we have reasserted the motion and we ask that the Court order the government to abide by the very restrictions that it said it would be guided by when it responded to our motion and caused us to withdraw the motion because we thought there was no dispute.

MR. MELLIN: Your Honor, in no way have we not abided by that. We are not asking about victim impact, we are not asking one witness about how has this affected the future of your life, how is this affecting whether or not you can get a job, how has this affected others around you? That is what victim impact testimony is. That is something that we will elicit at the appropriate time.

It's ironic, I think, that Mr. Bruck just stood up and said that he's not trying to limit these witnesses' ability to talk about victim impact, yet then he turns around and says, Well, actually, if they're not a decedent, then the government is not allowed to talk about victim impact. And that is, in fact, the law. The government is not talking about victim

impact.

We're asking these jurors -- or excuse me -- these witnesses about their pre-blast activities to put them on the scene, to explain how it is they were there, how they were able to observe the things they observed, and then what happened after the explosion and the extent of their injuries. Specifically in the indictment we have alleged that individuals were maimed or burned during these explosions. That is what we are eliciting, the extent of the injuries that occurred.

00:07 THE COURT: All right. I think the testimony yesterday did not go out of bounds.

MR. BRUCK: Well, if I could just, for the record, be specific. One example of where we think -- the reason for our reasserting the motion was testimony concerning surgical procedures that extended for nearly -- until a few weeks ago, close to two years after the bombing. We think that is an example of where --

THE COURT: All right. I disagree. I disagree with that.

00:07 MS. CONRAD: I have two matters, your Honor. Just to go back to the issue regarding the photographs. I just want to be clear because it was done by email that the exhibit numbers that we are objecting to -- if I can find my email. I just want to put those on the record and inquire, first of all, whether the government -- okay. So those were Exhibits 24, 25,

26, 27, 31, 32, 33, 34, 35, 20, 39, 40, 30 and 634.

And so if the government now says it's going to limit those, if the government would be so kind to show us the exhibits before, or put them up on the screen but not for the jury before offering them -- yesterday they just asked, "Have you seen exhibits such and such and such"; and also, I would just ask if the -- our rights -- our objection is preserved with respect to those so we don't have to renew them in front of the jury.

00:09 THE COURT: Yes to the last question.

MS. CONRAD: Right.

THE COURT: What I had in mind was the range -- it's not every number between these -- but between 24 and 35. That's what I was addressing. I think those should be limited. I'll leave it to the government to offer a subset of those. I don't think we have to go through them now.

As to the others, the objections's overruled.

MS. CONRAD: And 20 is overruled?

THE COURT: Yes.

00:09 MS. CONRAD: Your Honor, the other matter is we had raised with the Court before, the government wanted to have a number of FBI agents who they described as case agents exempted from the sequestration. They've given us a list of four, one of whom will not testify. We have no objection to him being present. The other three we're told are likely not to testify,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY THIRTY-SEVEN

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Monday, March 23, 2015
9:10 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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P R O C E E D I N G S

THE COURT: Morning.

MR. CHAKRAVARTY: Your Honor, Agent Swindon is still on the stand. I have a few minutes left with him just to clarify some things, and then I would hand him over for cross-examination. My understanding there's anticipated to be a lengthy cross-examination of this witness. And the next witness is Dr. Levitt, who is our terrorism expert. He has a flight to Europe scheduled for this afternoon after the court day. And so our hope was that we would get all of his testimony in.

In light of the prospect of Mr. Swindon potentially going longer than expected, if the Court has no objection, I'd like to potentially call Mr. Levitt out of order -- Dr. Levitt out of order and then conclude Agent Swindon's.

THE COURT: Mr. Bruck?

MR. BRUCK: That's fine with us, your Honor. I should note, however, that there is a motion in limine respecting the terrorism experts, of which Dr. Levitt is one. And his report is specifically referenced in that motion. So that will have to be addressed before his testimony.

THE COURT: Well, I've reviewed his report, and I think he can testify. So as to him, it's denied. The motion is denied as to him. I've reviewed the report and the motion. The motion was addressed to a number of people, and I take no

position whether it applies to others or not -- whether this ruling applies to others or not. As to him, he may testify.

MR. BRUCK: That leaves me, I guess, with the question about the extent to which I will have to continually object during the course of his testimony on the grounds stated in the motion in limine or whether we can have a continuing objection to the background information.

THE COURT: Yes, you may have a continuing objection to it.

00:01 MR. BRUCK: Thank you very much.

THE COURT: How long will the Levitt testimony be?

MR. CHAKRAVARTY: I anticipate -- it's my anticipation so it might be generous -- about an hour and a half on direct, your Honor.

THE COURT: On direct?

MR. CHAKRAVARTY: On direct.

THE COURT: And how much on cross?

MR. BRUCK: Considerably less than that, your Honor.

THE COURT: Well -- so who's doing the cross of this

00:02 witness?

MR. FICK: I am, your Honor.

THE COURT: And your estimate?

MR. FICK: Possibly a couple of hours.

THE COURT: Yeah. Well, why don't we proceed -- well, there's two ways of doing it, I guess. You can finish the

to preserve it but I'll give you an opportunity to renew your objection.

MR. BRUCK: Oh, thank you. I would just like to renew the objection as made in a motion in limine that the Court denied today, and that particularly goes to the background of the various authors and figures, jihadi or radical Islamic figures who are referenced in Dr. Levitt's report and I gather are about to be referenced in his testimony. And the -- and we have a continuing -- wish to have a continuing objection to the biographies of those figures and to the people that influenced -- there's a whole back story of each of these individuals on the grounds that there has been and will be no showing that the defendant was aware of any of them, and even if he was, we think under 403, extraordinary prejudicial effect of essentially putting in the history of Islamic terrorism in the 21st century and burdening this defendant with everything that has gone on since 9/11 and before and after is far -- the prejudicial effects far outweighs its probative value. We also think that it injects an arbitrary factor in violation of the Eighth Amendment in a capital case, and for the rest of it I would like to rest on our papers.

THE COURT: Okay. As I've indicated, I think the testimony is admissible. I do think 403 is an important consideration, and I trust the government won't step too far on this, but it is relevant.

Let me also say for -- a different reason for calling you over here, I've never been attracted by the idea of declaring an expert to be an expert because it has always been my view that it depends on what he gets asked. So I've done it already on a couple of other experts because I just didn't want to offer the resistance, but this guy may be different so I will not give him blanket qualification. But I suspect within the scope of things in his report, he is qualified to testify as an expert.

03:27 MR. CHAKRAVARTY: Thank you.

MR. WEINREB: Your Honor, if I may clarify something, I understand the Court's ruling is a denial of the defense motion in limine that as a categorical matter everything should be excluded on either 401 or 403 grounds, but I don't understand the meaning of a continuing objection of relevance on 403 grounds. I don't think that we should assume that every single question has to be objected to --

THE COURT: No, I agree with that. I guess when I was talking about a continuing, I was thinking of his

03:28 qualifications to testify under Rule 702. That was the context of that. Other matters I think are more appropriate.

MR. BRUCK: So I will have to object each time he goes into these back story details about -- I mean, we gave --

THE COURT: No, I don't -- I mean, to the extent he wants to talk about a particular source of jihadi

encouragement, I don't think you have to object to each question.

MR. WEINREB: Yeah, I guess the motion in limine addresses categories of evidence. And the Court has denied it and at the same time cautioned the government to be prudent in its questioning. But the parties and the Court could all be of different minds about what crosses the line into irrelevance of 403, and without an objection we're not going to have a ruling and the defense will be in a position to say that there's no
03:29 plain error review here because it has a standing objection to every single question being asked on relevance of 403 grounds. That's just not appropriate.

The defense may wish that it didn't have to get up and object to things, but that's the way trials work so the Court can focus on a particular question. And whether it, in fact, asks for irrelevant or unduly prejudicial evidence, there's no way to make that ruling one way or the other with respect to an entire line of questions.

THE COURT: Well, I think there are some categorical
03:30 qualities to what I meant by the ruling, which is he can testify about the history of recent terrorist activity, particularly the encouragement of jihadi actions by particular prominent figures. I don't think every time a question gets asked about al-Awlaki, that he has to stand up and object to that.

MR. WEINREB: Well, I understand. So I understand there's a continuing objection to certain categories of evidence, but if it is the view of the defense that the government has gone beyond what the Court has permitted, then I think it needs to get up and object so the Court can decide if it's on this side of the line or the far side of the line, especially since many questions may be in a blurry area.

THE COURT: Okay.

MR. BRUCK: Well, it's going to become unwieldy. And
03:30 I don't know what the government intends to do, but his report -- Dr. Levitt's report goes into areas like -- there's al-Maqdisi. He's a Jordanian jihadi figure -- was the mentor to al-Zarqawi, the head of al-Qaeda in Iraq. And of course people will recall the American war to try to -- and they were eventually successful in killing al-Zarqawi.

Now, you know, to our way of thinking, that way crosses the line. It's -- that's the back story. Now, do I -- you know, I feel like we should have a continuing objection to things like that.

03:31 THE COURT: It's that kind of evidence. But I think -- I guess understanding that I will permit it to some degree, I guess the 403 objection has to be that you think it's gone beyond the degree to which I will permit it. I don't know how else to say it.

MR. BRUCK: I would just object. I would like the

record to reflect, if it may, when I make a 403 objection, I intend that to include an Eighth Amendment constitutional and due process constitutional objection, this being a death penalty case especially. I mean, I could recite the entire legal litany each time I get to my feet but I would rather just have that be a shorthand for Fifth and Eighth Amendment and 403 when I say "403," if that satisfies the Court.

MR. WEINREB: That I think isn't problematic as long as we have the objections and the rulings in real time so the government can perhaps rephrase a question, ask a different question --

THE COURT: Yeah.

MR. WEINREB: -- or knows that it's now going into an area that the Court thinks has crossed the line; otherwise, we have no idea. We could create an error without even knowing it.

MR. BRUCK: One last thing. I trust your witness is on a short leash about this and will not simply give -- in response to a simple question about al-Maqdisi, will give the entire back story without another question, because then it's extremely hard to know where you're going.

MR. CHAKRAVARTY: We've been very sensitive to Mr. Bruck's concerns from the motion in limine. I don't anticipate there will be many back stories at all. Those back stories that will be testified about are going to be relevant

activity. They also encourage people to travel to other places. A common refrain is: Come here. But if you don't come here, do something at home.

We discussed earlier this personal obligation, right? You can't shirk this responsibility. If you still are intent on living amongst unbelievers, then at least you've got to do what you've got to do: terrorist attacks at home. They welcome you to come and fight somewhere else too. And this is not only al-Qaeda; now the so-called Islamic state or ISIS --

05:07 MR. BRUCK: I'd object to bringing in organizations that have nothing to do with --

THE COURT: As a general background I think it's all right. Go ahead.

BY MR. CHAKRAVARTY:

Q. You were talking about ISIS. That we've all heard of, ISIS. How does that relate to the global jihad movement?

A. ISIS is the latest incarnation of this global jihad movement, a group that in the region in the Middle East is fighting with al-Qaeda and yet it won't be uncommon to see

05:07 people who have a primary affiliation with al-Qaeda and people who have a primary affiliation with ISIS somewhere in diaspora doing something together as we've seen in just the past few weeks, in one instance.

ISIS, like al-Qaeda, has glossy magazines, and even better than al-Qaeda very impressive online radical and radicalization

literature. And it too explicitly says: Come. But if you don't come -- you don't have to come -- just do something back home.

Q. So is there a common narrative to these global jihadi groups?

A. Well, as we discussed before, there's plenty of things that divide them on theological points, on points of strategy. What should you do first? Should you target the near enemy; say, for example, the government of Egypt first, or should you target the far enemy, say the government of United States first, or could they be done concurrently?

Where there is this commonality is in the motivational ideology, the idea that there is a personal obligation upon every good Muslim, every member of this ummah to this Muslim nation to do their part for which they can be rewarded both altruistically, that is to say, giving of themselves on behalf of this ummah, defending those who are defenseless. And you can do that -- you know, you can defend people in, you know, some foreign conflict at home if you're in the United States by targeting the United States, which is this head of the snake as it were, but you also get this personal, if you will, selfish individualized benefit which is absolution, deliverance, entry into the highest levels of paradise.

Q. So is there a particular demographic or particular traits of people that this narrative attempts to appeal to?

Syrian conflict now. I believe one is named for him. He became a very prominent personality in the Chechen context, in the Chechen jihadi context.

Q. Moving on to Syria, what's the role of the Syrian conflict in this global jihadi movement?

A. Can't be overstated. We just marked four years since the beginning of what, when it started, was a rebellion against the rule of Bashar al-Assad. But as has been the case in Chechnya and other place, jihadis use this opportunity to take a rebellion and make it a jihad of their own, and it has become a rallying cry around the world.

We talked earlier about the different types of radicalization.

MR. BRUCK: I'm going to object to the whole discussion of Syria that goes beyond the date of any of the events alleged in the indictment.

THE COURT: Overruled.

THE WITNESS: Sticking even to the first two years of the Syrian conflict two years ago, there's a whole host of different things that drew jihadis to this conflict. Some were drawn by jihadi ideology and wanted to go fight with the next incarnation of al-Qaeda, and some were drawn to defend Muslims, Sunni Muslims who were being butchered by the Assad regime. Some of those people didn't go farther and stayed with what you might call moderate, or non-Islamist, non-jihadi battalions.

Many did move to still more radical battalions.

Within the radical literature circulating in the home of any person who has a computer, online Syria has become the most powerful magnet drawing people to fight jihad. And not just to fight in Syria, or now more recently in Iraq as well, but again, as al-Qaeda in the Arabian Peninsula said even earlier through its *Inspire* magazine, today groups like this Islamic state which has a magazine called *Dabiq*, glossy, English, very much like *Inspire* magazine, echoes *Inspire*'s message saying: Come here if you want, but you don't have to. And if you don't come here, take it to the infidels at home and hit them at home.

BY MR. CHAKRAVARTY:

Q. Pakistan and Afghanistan: How do they relate to the contemporary global jihad movement as of 2013?

A. After the war in Afghanistan -- well, first, the war in Afghanistan after 9/11, and after years of fighting in Afghanistan what was left of the al-Qaeda core and some al-Qaeda affiliates was in that border area of Afghanistan/Pakistan, and in some cases individuals or cells elsewhere in large cities in Pakistan. And this was something of the everyday news, of coalition forces continuing to fight the remnants of al-Qaeda and the Taliban in Afghanistan and in Pakistan, increasingly through the use of drones which has become a very controversial tactic, which in and of itself

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY FORTY-THREE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Monday, April 6, 2015
9:59 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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Watertown.

And then finally, the robbery of Dun Meng. He was charged with carjacking Dun Meng's car, and the fact that Officer Dick Donohue was seriously injured as a result of that carjacking.

Many of the charges involve the use of a firearm, one of the bombs and the Ruger, in conjunction with the other charges that I mentioned. Because of this, you'll have to go through and assess whether each of the bombs that exploded was used and whether the Ruger was carried, brandished -- which the judge explained means shown -- or discharged, because the evidence in this case is that all of those things happened. Even though these charges capture similar conduct, they involve different elements, and for that reason, the defendant is guilty of those crimes as well.

The defendant and his brother teamed up to terrorize a region in 2013. They bought bags full of bombs, planned to kill even more, and by the end, they had murdered four people, they had maimed 17, and they wounded hundreds, more than 240 others. Martin William Richard, Krystle Marie Campbell, Lingzi Lu, and Officer Sean Collier are no longer with us. This is the result of the defendant's choice to be a terrorist hero, to make a statement. These were choices that he was proud of, and it devastated the lives of those who survived.

This is how the defendant saw his crimes.

(Audio and video recording played.)

MR. CHAKRAVARTY: But this is the cold reality of what his crimes left behind.

(Photographs displayed.)

MR. CHAKRAVARTY: Officer Collier was shot five times, at least three shots in the head, two from close range. One shot was between the eyes. He died of his gunshot wounds.

Krystle Campbell received massive blast injuries to her lower extremities. Parts of her body were shredded from the bomb. She lived for up to a minute while the blood seeped out of her body onto the pavement. She told her friends that her legs hurt, and she died from loss of blood.

Lingzi Lu received mass injuries all over her body. She didn't even plan to be there on that day. Her leg was torn open, transecting her blood vessels. She bled out as emergency responders performed CPR on her.

And Martin Richard. His entire body was shattered. It was broken, eviscerated, burned. There wasn't a part of this boy's body that wasn't destroyed.

You'll probably never forget Bill Richard. At one point he said, as only he could, "I guess we were just unlucky that day." But there was nothing about this day that was a twist of fate. This was a cold, calculated, terrorist act. This was intentional. It was blood thirsty. It was to make a point. It was, "Tell America that we will not be terrorized by

crime charged, you must give the defendant the benefit of that doubt and find him not guilty.

Your verdict must be a unanimous one, whether it is guilty or not guilty. And as I have previously told you, where there are alternate ways to prove an offense under the relevant statute, you must be unanimous as to the theory on which you base any guilty verdict.

Finally, remember that in determining the guilt or innocence of the defendant, the jury should not give any consideration at this point to the matter of punishment. Your function is to weigh the evidence in the case and to determine whether the defendant is guilty or not guilty as to the charges presented in the indictment based solely on the evidence. Under your oath as jurors, you must not allow any possible punishment which may be imposed upon the defendant to influence your verdict as to guilt or not in your deliberations.

I'll wrap up in a minute, but let me see counsel at the side.

(Discussion at sidebar and out of the hearing of the jury:)

MS. CONRAD: Okay. Before I begin with the instructions, may I address the government's closing and rebuttal? First of all, I would like -- a portion of the government's presentation, that was sort of the photo montage with the nasheed playing in the background, to be made part of

the record in this case. And I'm moving for a mistrial based on that. The apparent purpose of that, I can't imagine any other purpose, is essentially to try and inflame religious or ethnic prejudice. There was no relevance to any of the charges here.

As we argued in Docket No. 279, in which we successfully sought to strike betrayal of the United States as an nonstatutory aggravating factor, 18 U.S.C. Section 3593(f) prohibits and requires a jury to form that any penalty, essentially, is not based on race, religion or national origin.

In this case, the government played this haunting music over a photograph of the Shahada, the black flag with Arabic writing, which the government's own expert testified was not jihadi but was a sign of Islamic faith. It's an Islamic motto. They followed that with a picture of the defendant, a selfie, presumably, with one finger up, which is the Muslim finger for one god, which is an expression of religious belief. And then on top of that, they immediately followed that with scenes of the devastation of the marathon bombing. It was clearly an effort to portray the defendant as an alien and to deem him as -- not just him, but his religion. And I move for a mistrial based on that.

In addition, during Mr. Weinreb's reply, he said at one point that the defendant is not trying to take responsibility, suggesting that the defendant should have

gotten up and himself taken responsibility, which is both counter to the presumption of innocence and the government proof, as well as to the defendant's right not to testify. And it's an improper comment on the defendant's right not to testify, as was a number of comments Mr. Weinreb made in his rebuttal, including, for example, "We don't know whose idea it was to search for these terms."

As the First Circuit has made perfectly clear, whenever a prosecutor says we don't know something, where the only person who could address that issue is the defendant, it is considered burden-shifting and an improper comment on the defendant's right not to testify.

Mr. Weinreb also stated that there were emptied-out fireworks found in Mr. Tsarnaev's dorm room. There was no evidence of that. The government chose not to call Azamat to testify to that, and that would be entirely improper.

So for all of those reasons we move for a mistrial, and if the Court denies that, we would ask that the video montage be made part of the record.

THE COURT: How do you respond to the First Amendment?

MR. CHAKRAVARTY: There were any number of non-national origin -- and I assume what I'm hearing from Ms. Conrad is it's both national origin as well as religious-based attack on other people. These are items in evidence which the defendant both had, and the government

simply juxtaposed the evidence with some of those photos. That was the only -- in terms of practical -- because the record is not clear as to what was actually shown. I took one piece of evidence which happened to be a flag, which was in the defendant's room, and as the government's own expert said, it is not exclusively a Jihadi flag but that it has been corrupted and it can be expressed to show a statement of deep and abiding faith.

The audio file, which was also entitled "Ghuraba," which is "Stranger," which is a theme that we've heard throughout the entire case, and it echoes the fact that the defendant believes that he was one of these few Mujahid who, amongst the people within the faith, a small percentage which we've said throughout, including in the rebuttal, a small percentage of people in the faith who believes in terrorism as a means to an end, that this defendant believed, and he consumed these audio files on all of his media.

Together it allows the jury to determine that what they are viewing, as we all are, as horrific acts of terrorism, that they get the perspective from what the defendant's state of mind was of the same acts. That was the purpose for which it was put together. It was a legitimate purpose. That was evidence in the case. Evidence of his state of mind, his radicalization. They were combined together and the fact that it was effectual and it didn't sanitize each of these things

independently doesn't change the probative value of what the materials were themselves, neither does it make it a backhanded attack on his national origin.

The language of -- both the flag as well as the audio file were in Arabic, not a language that the defendant speaks. There's nothing inherently religious about the audio file at all. Dr. Levitt explained the significance of this portable inspiration, the audio files, amongst especially the radical sect, and I think the evidence bears out that not only do the terrorism materials talk about these nasheeds and the Shahada and the statement of faith, but that the defendant himself believed that. That's exactly what he wrote in the note in the boat and that's exactly what he did in terms of the terrorist attack. So frankly, it's --

THE COURT: All right. I think it was -- arguments were the government's radicalization position and it was not improper.

MS. CONRAD: Well, I still ask it be made a part of --

THE COURT: You may preserve it for the record.

MR. BRUCK: One of the last points to be made about this, too, that the effect, we submit, was heightened by the decision not simply to give the content of the Ghuraba, but to play the actual chant, which was, as Dun Meng said, weird only because of the fact that it comes from a foreign culture, which is unfamiliar. This is exactly the sort of exacerbating a

national and cultural --

THE COURT: I understand the point. It is in evidence, though. The jurors can listen to it on their --

MS. CONRAD: But it's the juxtaposition --

THE COURT: So let me go on to something else.

MR. WEINREB: Yes, your Honor. In the defense's opening statement, Ms. Clarke stated that the defendant was not going to sidestep responsibility for these crimes, and in the very beginning of her closing argument she again emphasized that the defendant accepts responsibility for these crimes. That invited a response from the government that the defendant was, in fact, portraying himself as accepting responsibility for the crimes when, in fact, he was dodging responsibility for them by attempting to shift the blame elsewhere.

And the government's rebuttal arguments on those two points, first, on pointing that fact out to the jury, that this was really an attempt to avoid responsibility, not to accept responsibility, and second, by disputing the facts that according to the defense, Tamerlan Tsarnaev was responsible for the radicalization of the defendant.

As to the reference of the fireworks, I did not say that the emptied-out fireworks were found in the defendant's dorm room; I said that they were found in the backpack that the defendants removed from his dorm room and threw away --

THE COURT: Right. That's what I recall.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY FORTY-SEVEN

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, April 21, 2015
10:08 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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conspiracy to bomb a place of public use resulting in death, bombing a place of public use resulting in death, malicious destruction of property resulting in injury and death, and possession and use of a firearm during and in relation to a crime of violence resulting in death.

We're now about to begin the penalty phase of the trial where you must consider separately with regard to each of the capital counts whether imposition of a sentence of death is the appropriate sentence for that conviction or whether the defendant, Dzhokhar Tsarnaev, should be sentenced to life imprisonment without the possibility of release.

As I have previously told you, the law leaves this sentencing decision exclusively to you, the jury. If you determine that the defendant should be sentenced to death or that he should be sentenced to life imprisonment without the possibility of release, the Court is required to impose that sentence. You should understand that there is no parole in the federal system.

The penalty phase is essentially a second trial, and in many ways is like the trial you have just completed on the issue of guilt, although now the sole issue for your consideration is punishment. You should understand that in making all the determinations you're required to make in this phase of the trial, you may consider any and all evidence that was presented during the guilt phase of the trial as well as

MR. MELLIN: Thank you, your Honor.

MS. CLARKE: Thank you very much. No questions.

THE COURT: No questions?

All right, Ms. Corcoran. Thank you. You may step down. You're excused.

(The witness is excused.)

THE COURT: We'll take a short recess.

Jurors, again, you know what I'm going to say. No discussion of the evidence in the case. There will be a time for that, but it is certainly not now.

We'll take a 15-minute recess.

THE CLERK: All rise for the Court and the jury. The Court will be in recess.

(The Court and jury exit the courtroom and there is a recess in the proceedings at 11:54 a.m.)

THE CLERK: All rise for the Court.

(The Court enters the courtroom at 12:16 p.m.)

THE COURT: I understand counsel would like to be seen.

(Discussion at sidebar and out of the hearing of the public:)

MR. BRUCK: We move for a mistrial based on the testimony of the last witness, Celeste Corcoran. We think it was -- you know, partly restating the objections that we raised -- have raised consistently and previously concerning

what we described as victim impact relating to the survivors, we think that the -- any arguable relevance to any statutory aggravating factor was exceeded by the excessively detailed, excessively graphic and excessively prolonged-in-time testimony. In other words, the testimony went beyond describing her injuries or the risk of death from her injuries and became victim-impact testimony of which we received no statutory notice which is not relevant to any statutory aggravating factor.

02:16 The underlying harm that comes from this and where the line was far transgressed by this testimony is that it pressures the jury and induces the jury to sentence the defendant for the murders, for the crimes against these surviving victims. They do not sit as sentences for the injuries to Ms. Corcoran or to any of the amputees or to any of the many people that were injured that did not die; they are sentences only with respect to capital counts which involve homicides. And that is where the line must be drawn and where it was transgressed here.

02:16 We think it invites not only a violation of the statutory scheme under the Federal Death Penalty Act but also invites arbitrary decision-making in violation of the Eighth Amendment. There was no possible way that we could have jumped up repeatedly during Ms. Corcoran's testimony without drawing the wrath of the jury, not only upon the lawyer making the

objection, but also vicariously on the defendant.

We had made our objections prior to the testimony. I point out that in addition to all of this, the witness was permitted to give a narrative that went on and on without being interspersed by -- with questions, and across the board this was way over the top. And it is prejudicial and we think requires a mistrial.

If the mistrial should be denied, we are asking that the government be instructed to keep their testimony from this category of witness with far stricter bounds than was true of this last witness if there is any hope of maintaining the focus on the actual capital counts that the law requires.

MR. MELLIN: Your Honor, we disagree. Her testimony was tied to the injuries for herself and her daughter. And explaining all of that, that's important for us to prove the cruel, heinous and depraved manner in which the victims died, in addition to also just proving the grave risk of death to each of these individuals.

I disagree with Mr. Bruck saying that the only thing these jurors are to consider is -- are the decedents. There is a specific aggravating factor tied to the 17 amputees which talks about grave risk of death.

MR. WEINREB: Your Honor, if I may just add one thing. The government does not accept that the defense need not make a real time objection. And if they believe, for example, that a

particular question or -- has pushed -- gone over a line that the Court has drawn, or a motion to strike testimony if they believe it's gone over the line, or, for example, if a witness is giving narrative testimony and they believe that that's improper and more questions should be asked, these are precisely the kinds of objections that need to be made in real time; cannot be made ahead of time. And they are waived if not made.

And the defense's concern that the jury be -- resent them for bringing objections to be dealt with by the Court's instruction to the jury that they should not hold objections against the attorneys. There is nothing different about this case than every other case. No party ever wants to object and be seen as objecting in front of the jury and yet that's part of how trials work in an adversarial system. They're not excepted from it just because they have a special sensitivity to it.

02:19

THE COURT: Okay. First, I agree with that general observation. It would be prejudicial to repeatedly stand up and object. I don't think that means you're excused from doing it at least once, because it calls the issue to the Court's attention while it can still be addressed and perhaps remedied. And as a matter of fact, I believe the Supreme Court in *Payne* actually acknowledged the dilemma, was the word used, but brushed by it, frankly, saying that's a decision you have to

make.

MR. BRUCK: They're referring there to victim-impact testimony. That's not what --

THE COURT: And I think it was with respect to how you object.

As to the substance, I agree, essentially, that it is relevant to statutory factors as well as grave risk.

MS. CLARKE: So in other words, it would have done no good to object?

02:20 MR. BRUCK: And a great deal of harm.

THE COURT: Well, I don't see how that helps.

MS. CLARKE: Well, that's what I'm hearing. Because I don't want to have to do it to this next witness when the exact same kind of --

THE COURT: If it's the same ground, yeah. But it won't be a basis for a mistrial motion after the testimony either. If you think it sometimes -- with each witness it gets worse and, therefore, may support more radical action, then I think you do have to call it out and it can be headed off.

02:21 MS. CLARKE: Can the government be instructed not to allow the witness to go on with a narration as opposed to answering the question?

THE COURT: Well, that's a whole different area. And I noticed that myself, actually, that she was going on a little bit.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY 48

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, April 22, 2015
9:13 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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the grief just has not gone away.
Q. Has Sean's death had an impact on you personally?
A. It has, sir.
Q. Can you say what that is?
A. You know, sometimes I wonder if I want to continue as a police administrator. Policing is the only thing I've ever done in my life. And it's -- and I've always tried very hard to be good at what I do and I always take a personal interest in my people. And I lost one of my own. And I have two
01:08 children at home, and I always thought I would be very, very proud if they wore the uniform. Now I'm not so sure I want them to do that.
MR. WEINREB: Thank you, Chief.
THE WITNESS: You're welcome.
MR. BRUCK: Thank you, Chief DiFava. We have no questions for you.
THE WITNESS: Thank you, sir.
(The witness is excused.)
MR. CHAKRAVARTY: The government calls Eric Whalley.
01:09 MS. CONRAD: May we approach, please, your Honor?
THE COURT: All right.
(Discussion at sidebar and out of the hearing of the jury:)
MR. BRUCK: We need to renew our continuing objection to what amounts to victim impact testimony from non-homicide

survivors. We also have this -- I don't know if the Court has ruled on the exhibits, including the extremely graphic medical photographs of this survivor, including the open heel which we thought was --

THE COURT: I think I reserved it. I wanted to hear how the testimony lay at the time it was being offered to see what value it had.

MR. BRUCK: Here's my understanding. Mr. Whalley --

THE COURT: We've had similar kinds of evidence in the other phase.

MS. CONRAD: This photo, your Honor --

THE COURT: No, I've seen it. We've had some pretty gruesome pictures. So I think its relevance and probative value, that's what I want to hear before --

MR. BRUCK: Okay. We would point out for the most part, the most graphic evidence has been autopsy photos which concerns the homicides, and we're now in the sentencing phase for the homicides, not for Mr. Whalley's injuries or any other survivor victim's. It's this persistent problem that we're facing that the jury will find it impossible not to sentence this man in part for injuries and -- for which it has no sentencing authority; that is to say, they're non-capital offenses that are being depicted by -- I don't know how you draw the line when evidence this inflammatory is presented as something I cannot imagine.

We also have -- we've registered an objection to testimony about -- unless it's -- I'm trying to remember if your Honor has excluded the testimony about London in the 1970s. But this witness, as we understand it, is going to say he knew this was a terrorist attack because he'd been in one before, 40 years before in London.

MR. CHAKRAVARTY: We've directed him not to say that, your Honor. And just for the record, there are a host of other factors which are relevant, like grave risk of death, like the heinous nature of the crime, all of which the medical photos go to. The medical photos are going to be a guide to my witness as to the injuries that I'm going to be asking about, that he'll be talking about, all of which go to grave risk of death.

The only thing inflammatory about that photo is after multiple surgeries, it was inflamed, and as part of the healing process itself, he will use that to demonstrate to the jury all of the complexities to actually put a leg back together and that there are risks along the way, both from the complications with the procedures themselves as well as the long-term risk to both his leg -- because it still might be -- as has happened with other victims, it may still have to be amputated, as well as complications and issues that may jeopardize his life.

He's not going to talk about victim impact on his life; we're simply going to talk about, as we did in the liability phase, the procedures he went through, the risks

attendant to those procedures, and what he's doing now in terms of where his medical status is now.

MR. BRUCK: Well, I know this Court will wait to rule, but even if we were wrong about the admissibility of this type of evidence in support of the grave risk of death factor or any other -- and I notice the government keeps citing the heinousness factor. And that specifically refers in this case only on the basis of aggravated battery to the victim, which is the statutory factor. So to be able to support that by showing aggravating battery to other victims just goes beyond the statute.

But all of that said, even if they establish a relevance, if the 403-type provision of the statute means anything, it has got to mean that photograph.

THE COURT: Can you tell me what the authority is for your argument that people who are not killed but were injured by the bomb were not victims of the capital offense?

MR. BRUCK: Well, there is no authority one way or the other on -- all of the grave risk of death -- you mean for --

01:13 01:14

THE COURT: For victim impact.

MS. CONRAD: -- victim impact?

THE COURT: Yeah.

MR. BRUCK: The victim impact provision of the statute refers to the crime which in context I think there's a --

THE COURT: Right. And so the crime -- let me just

guide the question a little bit. The crime here, to pick one, is bombing a place of public use, that's the capital offense, resulting in death. I don't see why as a natural, ordinary matter, the law aside for a moment, it's not proper to regard somebody who is injured by the same bomb that killed somebody as a victim of the bombing.

MR. BRUCK: The way that -- and I'm not looking at the statute in front of me, but the way that language in the statute, referring to the victim impact testimony, is -- it refers to a victim of the offense within the meaning of 3591, I think it's (b) -- (a), (b), (c) -- or (2)(a), (b), (c) or (d) and (e), which refers to the homicide. That's the reason that we say -- and I think that's something that Judge Wolf in *Sampson* --

THE COURT: I've read the *Sampson* case and I've read the *Gooch* case, which you also cited to me.

MR. BRUCK: That is our authority.

THE COURT: And I think those are very different circumstances.

MR. MELLIN: Although, your Honor, I think it's very unclear at this point what the law is in this case and how you define "victim." But the way we had tried to compartmentalize this throughout is not to say that we're putting on victim impact through these witnesses who have not died but, in fact, put on evidence of the cruel, heinous and depraved nature of

the offense as well as the grave risk of death to these people.

THE COURT: Are you aware of any cases besides *Gooch* and *Sampson?*

MR. MELLIN: There isn't a lot of case law, your Honor.

THE COURT: In both of those cases -- we'll take the *Sampson* case. Sampson was tried for the murder of McCloskey and Rizzo. And the government, I guess, offered evidence of the victim Whitney who was killed in New Hampshire, which was not one of the crimes of the offense. And that makes perfect sense to me. I agree with that outcome, that that was not the offense.

But we have an offense which not only killed people but maimed people. It seems natural that they fall within the scope. I recognize it's undecided, but that's why I was looking to see -- well, I guess now I recognize it's undecided. That's why I asked the question.

So I think -- the government may not like me saying this, I think that's an additional reason why it's admissible, but I will admit it to go to the grave risk issue.

MS. CONRAD: May I ask --

THE COURT: So the objection is preserved.

MS. CONRAD: As for the photographs, your Honor, even if the testimony -- assuming for the sake of argument testimony is relevant, the photograph -- showing the photograph is far

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

JURY TRIAL - DAY FIFTY-NINE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, May 13, 2015
9:36 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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Requiring something to be proved by a preponderance of the evidence is a lesser standard of proof than proof beyond a reasonable doubt. To prove something by a preponderance of the evidence is to prove that it is more likely true than not; that it is supported by the greater weight of the reliable evidence. If, however, the evidence is equally balanced as to a mitigating fact or proposition, the defendant will not have carried the burden of proving the fact or proposition by a preponderance of the evidence. The preponderance of the evidence is not determined by the number of witnesses or the volume of evidence, but by the quality and persuasiveness of the relevant evidence.

In making the determinations you're required to make at this stage, you must consider the information presented during this penalty phase. You may also consider the evidence previously admitted in the prior liability phase. Let me provide some reminders about evidence and how to think about the evidence that you will remember from the first phase of the trial.

First I'll remind you what is not evidence. The lawyers' summaries of the evidence in their openings, when they're telling you what they expect the evidence will be, and now, today, in their closings, when they try to recall it for you, are not part of the evidence. The summaries are an attempt to marshal the evidence for you, to try to persuade you

have found the defendant was at least 18 years of age at the time of the capital offense and have found the existence of at least one gateway factor.

Fourth, you will consider, as appropriate, whether any non-statutory aggravating factors identified by the government have been proven beyond a reasonable doubt and to your unanimous satisfaction as to each of the capital offenses for which you have found the defendant was at least 18 years of age at the time of the offense and have also found the existence of at least one gateway factor and the existence of at least one statutory aggravating factor.

Fifth, you will consider, as appropriate, whether any of you individually or together with other jurors find that the defendant has proved, by a preponderance of the evidence, any mitigating factor or factors.

Sixth, if you have found the defendant was at least 18 years of age at the time of the particular offense under consideration, and at least one gateway factor and at least one statutory aggravating factor, you must then weigh the aggravating factors, statutory and non-statutory, that you have unanimously found to exist and any mitigating factors that you personally have found to exist to determine the appropriate sentence.

You must decide, in regard to that particular capital offense, whether the aggravating factors that have been found

to exist sufficiently outweigh the mitigating factors found to exist for that offense so as to justify imposing a sentence of death on the defendant for that offense; or, if you do not find any mitigating factors, whether the aggravating factors alone are sufficient to justify imposing a sentence of death on the defendant for that offense.

Now let me give you some greater detail. Excuse me. I'm fighting a spring cold here at an inopportune time.

Before you may consider the imposition of the death penalty, you must first unanimously agree beyond a reasonable doubt that Mr. Tsarnaev was 18 years of age or older at the time of the offense.

I'm going to put on your monitors because we're going to display for you the verdict slip that you will be filling out because I think it may help you to track these instructions as I go through them.

So in the event that you unanimously find beyond a reasonable doubt that Mr. Tsarnaev was 18 years of age or older at the time of the offenses as to all counts, you are to indicate that finding on the appropriate line in Section I of the verdict form. And you'll see that's the top line, the first one of the three.

In the event that you unanimously find beyond a reasonable doubt that he was 18 years of age or older at the time of the offenses as to some of the counts but not others,

respect to any of the capital counts, you shall mark the appropriate space in Section II, and that will be the second option of the three.

I instruct you that any gateway factor found by you to exist is not an aggravating factor -- that's a separate matter. These are gateway factors -- and may not be considered by you in the process of weighing any aggravating and mitigating factors in ultimately deciding whether or not to impose a sentence of death.

And for any capital count, if you do not unanimously find that the government has proven beyond a reasonable doubt the existence as to that count of any of the four gateway factors, your deliberative task is -- as to that capital count is over, and I will impose a mandatory sentence of life imprisonment without the possibility of release.

Now let me turn to the statutory aggravating factors. If you unanimously find the government has proven beyond a reasonable doubt that at least one of the four gateway factors exists as to a particular capital count and that the defendant was 18 years or older at the time of the offense, you must then proceed to determine whether the government has proven beyond a reasonable doubt the existence of any of the following statutory aggravating factors with respect to the same count. You may consider only statutory aggravators alleged as to the offenses for which you have found the defendant was 18 years

for which you have found the evidence of at least one gateway factor or threshold intent factor, you ought to indicate that finding on the appropriate line in Section III of the verdict form. You're also to identify on the line provided, by count number, those particular counts as to which you have found the statutory aggravating factor applies.

If you do not unanimously find that a particular statutory aggravating factor has been proved beyond a reasonable doubt with respect to any of the relevant capital counts that you're considering, you should mark that in the appropriate space in Section III of the verdict form.

If you do not unanimously find that, as to any capital count, the government has proved the existence of at least one statutory aggravating factor, then your deliberative task on that count will be over and I will impose a mandatory sentence on that count of life imprisonment without the possibility of release.

Let me now set forth for you in detail the specific elements necessary for the government to prove any of the alleged statutory aggravating factors.

The government alleges, as to all of the capital counts, that death or injury resulting in death occurred during the commission of or during the immediate flight from the commission of another offense or offenses. Specifically, the government alleges that the death or deaths occurred during the

must then consider whether the government has proven the existence of any alleged non-statutory aggravating factors with regard to that same count.

You must agree unanimously and separately as to each count that the government has proved beyond a reasonable doubt the existence of any of the alleged non-statutory aggravating factors before you may consider that statutory -- that non-statutory aggravating factor in your deliberations. Again, any such finding must be based on Mr. Tsarnaev's actions and intent.

The law permits you to consider and discuss only the six non-statutory aggravating factors specifically claimed by the government and listed below. You're not free to consider any other facts in aggravation that you may think of on your own.

The non-statutory aggravating factors alleged by the government with regard to the capital counts are as follows: First, in conjunction with committing acts of violence and terrorism, Mr. Tsarnaev made statements suggesting that others would be justified in committing additional acts of violence and terrorism against the United States. The government alleges this factor in connection with all of the capital counts.

Second, the government alleges that Mr. Tsarnaev caused injury, harm and loss to Krystle Marie Campbell and her

family and friends in Counts 1, 2, 3, 6, 7, 8, 12 and 13; to Martin Richard and his family and friends, Counts 1, 4, 5, 6, 9, 10, 14, and 15; to Lingzi Lu and her family and friends, Counts 1, 4, 5, 6, 9, 10, 14 and 15; and to Officer Sean Collier and his family and friends, Counts 1, 6, 16, 17 and 18.

The third non-statutory aggravating factor alleged is that Mr. Tsarnaev targeted the Boston Marathon, an iconic event that draws large crowds of men, women and children to its final stretch, making it especially susceptible to the act and effects of terrorism. The government alleges this factor in connection with Counts 1 through 10 and Counts 12 through 15 only.

The government alleges that Mr. Tsarnaev demonstrated a lack of remorse. The government alleges this factor in connection with all of the capital counts.

The government alleges that Mr. Tsarnaev murdered Officer Sean Collier, a law enforcement officer who was engaged in the performance of his official duties at the time of his death. The government alleges this factor in connection with Counts 1, 6, 16, 17 and 18 only.

Finally, the government alleges that Mr. Tsarnaev participated in additional uncharged crimes of violence, including assault with a dangerous weapon, assault with intent to maim, mayhem and attempted murder on April 15 in 2013 in Boston, Massachusetts -- that's for Counts 1 through 10 and 12

through 15 -- and on or about April 19, 2013, in Watertown, Massachusetts. That relates to Counts 1 through 10 and 12 through 18. That is all the capital counts.

These non-statutory aggravating factors are set forth in the verdict slip, and they are generally self-explanatory and do not require further amplification or instruction. I do want to provide further instructions, however, regarding two of the non-statutory aggravating factors.

The first non-statutory aggravating factor I would like to address is the government's allegation that Mr. Tsarnaev has, quote, demonstrated a lack of remorse. In determining whether the government has proven this fact beyond a reasonable doubt, you may not consider the fact that the defendant has not testified or made any statement here in court. I remind you the defendant has a constitutional right not to testify or speak both at the first phase of the trial and at his sentencing hearing.

Again, there may be many valid reasons why a defendant would exercise his constitutional right not to testify. You must, therefore, not draw any conclusion against him as to any issue from his failure to testify at this stage of the trial.

The second non-statutory factor on which I need to provide some additional information is the allegation that Mr. Tsarnaev participated in uncharged crimes of violence, either directly or as an aider and abetter, as I've previously

You must consider whether you are unanimously persuaded that the aggravating factors sufficiently outweigh any mitigating factors or, in the absence of any mitigating factors, that the aggravating factors are themselves sufficient to call for a sentence of death on that particular count that you are considering.

You are to conduct this weighing process separately with respect to each of the capital counts for which you have found the defendant was 18 years of age or older and you have found at least one gateway or threshold intent factor and at least one statutory aggravating factor.

Each juror must individually decide whether the facts and circumstances in this case as to each count call for death as the appropriate sentence. In determining the appropriate sentence for any particular capital count you're considering, each of you must independently weigh the aggravating factor or factors that you unanimously found to exist with regard to that count, whether those aggravating factors are statutory or non-statutory; and each of you must weigh any mitigating factors that you individually or with others have found to exist.

You're not to weigh, in the process, any of the gateway or threshold intent factors. In the weighing process you must avoid any influence of passion, prejudice or any of the arbitrary considerations. Your deliberations must be based

on your reasoned evaluation of the evidence as you have seen it and heard it and on the law which I am instructing you in.

Now, you've heard evidence about the impact of the deaths of the deceased victims' -- deaths on the deceased victims' families -- family members and friends. You may not consider that evidence in deciding whether any of the gateway or statutory aggravating factors have been proved.

If you have found with respect to any particular count that Mr. Tsarnaev was 18 years old or older at the time of the offense and have found the existence of a gateway factor and at least one statutory aggravating factor, then you may consider the victim impact evidence in deciding what the appropriate punishment should be.

Again, I remind you that you are not to be influenced by speculation concerning what sentence you think anyone else, including victims' families, might wish to see imposed on the defendant. You have been selected to decide this case because you committed to be fair and impartial in all respects, and you made your oath or affirmation to that effect. It is for you alone, the fair-minded jurors, to decide the appropriate punishment in this case based on your careful evaluation of the evidence that you have heard and seen.

I also want to caution you again, as I did during the trial, that you are not to consider any possible financial costs to the government that may be involved in carrying out

either the death penalty or life imprisonment without the possibility of release. This is so for two reasons: First, whether one sentence may be more expensive than another is simply not a proper basis upon which to decide a matter as grave as this; and, second, even it were proper to impose either the death penalty or life imprisonment to save money, there's no evidence before you as to which sentence, if either, is actually more expensive to carry out. For both of these reasons, it would be improper for you to base any part of your decision on the notion that the government could save money by imposing one sentence rather than another. And that is, again, a subject that should not even be discussed by you in the jury room.

Again, whether or not the circumstances in this case call for the sentence of death is a decision that the law leaves entirely to you. All 12 jurors must agree that death is, in fact, the appropriate sentence in order for it to be imposed. And no juror is ever required to impose a sentence of death. The decision is yours, as individuals, to make.

The process of weighing aggravating and mitigating factors against each other or weighing the aggravating factors alone, if you find no mitigating factors, in order to determine the proper punishment is by no means a mathematical or mechanical process. In other words, you should not simply count the total number of aggravating and mitigating factors

and reach a decision based on which number is greater. Rather, you should consider the weight and significance of each factor. As I've said, in carefully weighing these factors, you are called upon to make a unique, individual judgment about the sentence Mr. Tsarnaev should receive.

The law contemplates that different factors may be given different weights or values by different jurors. Thus, you may find that one mitigating factor outweighs all aggravating factors combined or that aggravating factors proved do not, standing alone, justify the imposition of a sentence of death. Similarly, you may instead find that a single aggravating factor sufficiently outweighs all mitigating factors combined so as to justify a sentence of death.

Any one of you is free to decide that a death sentence should not be imposed so long as, based on the evidence and your sense of justice, you conclude that the proven aggravating factors do not sufficiently outweigh the mitigating factors such that the death penalty should be imposed. Each juror is to individually decide what weight or value is to be given to any particular aggravating or mitigating factor in the decision-making process.

Bear in mind, of course, that in order to find that a sentence of death is appropriate for a particular count, the jurors must be unanimous in their conclusion that the aggravating factor or factors proven as to that count

sufficiently outweigh any mitigating factors found or, in the absence of any mitigating factors, that the aggravating factors alone are sufficient to call for a sentence of death.

In the event that you unanimously find as to all the capital counts that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factor or factors found to exist or, in the absence of any mitigating factors, that the aggravating factor or factors alone are sufficient to justify a sentence of death, then you will indicate that in Section VI of the verdict form.

In the event you -- that you unanimously find that a sentence of life in prison without the possibility of release is the appropriate sentence for Mr. Tsarnaev for all of the capital counts, then you would indicate that in Section VI, which is the second option.

In the event that you unanimously find that some of the capital counts -- for some of the capital counts that the aggravating factor or factors found to exist sufficiently outweigh the mitigating factor or factors found to exist or, in the absence of mitigating factors, the aggravating factor or factors are alone sufficient to justify death, with respect to those counts, please indicate also in Section VI and then identify those counts by number.

In the event that the jury is unable to reach a unanimous verdict in favor of a death sentence or in favor of a

life sentence for any of the capital counts, please so indicate in Section VI of the verdict form. Before you reach any conclusion based on a lack of unanimity on any count, you should continue your discussions until you are fully satisfied that no further discussion will lead to a unanimous decision.

After you have completed your sentence determination in Section VI, regardless of what the decision determination was, continue on to Section VII and complete the certificate regarding the determination of sentence.

As I instructed you at the beginning of the penalty phase, in your consideration whether the death sentence is appropriate you must not consider the race, color, religious beliefs, national origin or sex of either Mr. Tsarnaev or of the victims. You are not to return a sentence of death unless you would return a sentence of death for the crime in question without regard to the race, color, religious beliefs, national origin or sex of either Mr. Tsarnaev or any victim.

To emphasize the importance of this consideration, Section VIII of the verdict form contains a certification statement. Each juror should carefully read -- when you've completed your deliberations, each juror should carefully read the statement and sign your name in the appropriate place if the statement accurately reflects the manner in which each of you reached your individual decision.

So that is the conclusion of my instructions at this

during the course of the trial has been said or done to suggest to you what I think the outcome should be. What the sentencing decision should be is your exclusive duty and responsibility.

Let me see counsel again at the side, please.

(Discussion at sidebar and out of the hearing of the jury:)

MR. BRUCK: Well, the first objection we'd like to make is the Court's refusal of our Instruction No. 3, which is the instruction that -- concerning the consequences of a deadlock.

THE COURT: Okay. All right.

MR. BRUCK: And I understand that the rule may require me to spell that out unless --

THE COURT: I don't think so.

MS. CONRAD: The First Circuit does. You can't just refer to it by the number. You actually have to state what was requested and what's not --

MR. BRUCK: No, that's not the one.

THE COURT: I think that's stating a summary.

MR. BRUCK: Maybe I should read it to be sure.

MS. CONRAD: The First Circuit says -- it's very short. The First Circuit says you have to read it.

MR. BRUCK: The request --

THE COURT: Well, I'm concerned about the jury hearing it.

MS. CONRAD: Well, your Honor, I'm telling you the First -- that our appeals chief is in the courtroom. If you want to bring her up to sidebar, she'll tell you. She'll be all over me if we don't read it.

THE COURT: Well, I'll tell you what, we can excuse the jury without commissioning them to begin deliberating.

MR. BRUCK: That would be great.

(In open court:)

THE COURT: Jurors, we have to do this outside your hearing, and because the music is dipping on us, we are afraid that you might be able to hear it. So we're going to actually ask you to step out of the room, not to begin deliberating. We're going to have you back in before you do that. But just step out so that we can have a conversation, frankly, without having to worry about whether you're hearing things you shouldn't hear.

THE CLERK: All rise for the jury.

(The jury exits the courtroom at 3:56 p.m.)

THE COURT: Okay. You may be seated.

I don't think there's any need to be at sidebar, particularly since everybody can hear anyway.

MR. BRUCK: If I may?

THE COURT: Please.

MR. BRUCK: If it please the Court, we would first like to object to the Court's refusal to include in its

instructions and the verdict slip our Request No. 3, which is an instruction regarding the effect of the jury's inability to reach a unanimous decision.

The instruction as requested and as refused by the Court is as follows: "If the jury is unable to reach a unanimous decision in favor of either a death sentence or a life sentence, I will impose a sentence of life imprisonment without possibility of release upon the defendant. That will conclude the case. At the sentencing stage of the case, the inability of the jury to agree on the sentence to be imposed does not require that any part of the case be retried. It also does not affect the guilty verdicts that you have previously rendered."

We argued this issue yesterday. As the Court is aware, I simply want to note at this time that, notwithstanding the authority of the *United States versus Jones*, we think that under the extraordinary circumstances of this case, any misapprehension, which is very likely, that the jury will labor under that a non-unanimous -- or failure to achieve unanimity would require a mistrial, and a retrial would be extraordinarily prejudicial because of the nature of this particular case and what it would signify to put the victims and the survivors and the entire community through this entire case again.

Of course, everybody but the jury now knows that

that's not what happens, and we think that this is a situation which is fraught with the risk of coercion. So understanding that there is a -- that there is, at this time, authority supporting the Court's decision, we note that it is a practice which is very commonly -- the practice of informing the jury, of telling them the truth about the results of a failure to agree, is extremely widespread in the federal courts, even under cases where the necessity, we believe -- or where the reasons for giving a full and complete and accurate instruction are nowhere near so compelling as here.

THE COURT: All right. As to that, I've made my reasons clear on the lobby conference record. I don't think it's necessary to repeat them. I adhere to those views.

MR. BRUCK: Very well.

In the alternative, and reserving our rights under that request, we would request that the Court give the instruction contained in Sand's *Modern Federal Jury Instructions*, Instruction No. 9A-20, which, in pertinent part -- I've handed the entire instruction up to the Court yesterday at the lobby conference, but the pertinent part for purposes of the record reads as follows: "If, after engaging in the balancing process I have described to you, all 12 members of the jury do not unanimously find beyond a reasonable doubt that the defendant should be sentenced to death, then you may not impose the death penalty. In that event, Congress has

provided that life imprisonment without any possibility of release is the only alternative sentence available. If the jury reaches this result, you should do so by unanimous vote and indicate your decision in Section" blank "of the special verdict form."

So we, as a follow-up, reserving our rights under Request No. 3, make that request as well and object to the Court's having declined to give it at the lobby conference yesterday and today.

THE COURT: Okay. Again, my reasons were stated on the record yesterday, and I adhere to them.

MR. BRUCK: Next, we submitted a proposed instruction following the language from Sand's *Modern Jury Instructions* that on the issue of the appropriateness of the death penalty, the reasonable doubt standard should apply. That is to say that the jury should only impose the death penalty if it found beyond reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances sufficiently so as to justify the death penalty. That is the language from Judge Sand. That was the language of our request. The Court removed the requirement of beyond a reasonable doubt from that instruction, and we wish to preserve our objection to having done so.

THE COURT: As you know, the ruling was consistent with circuit law.

MR. BRUCK: We also except to the Court's refusal to include as a mitigating factor that the defendant would be sentenced to a sentence of life imprisonment without possibility of release, if the death penalty is not imposed, we understand that the jury has been informed of that fact, but we think that that is a mitigating factor or a circumstance weighing against imposition of the death penalty. Mitigating factor within the meaning of the Federal Death Penalty Act and the Eighth Amendment, which should have been included on the list of mitigating factors.

THE COURT: Okay.

MR. BRUCK: I went to check with counsel to make sure I haven't missed anything.

(Counsel confer off the record.)

MR. BRUCK: That's it. Thank you.

THE COURT: Okay. Does the government have anything?

MR. WEINREB: No, your Honor.

THE COURT: All right. Let's get the jury back in.

(Pause.)

THE CLERK: All rise for --

MR. BRUCK: Oh, before the jury is summoned -- I'm sorry -- just to be absolutely clear, we are requesting not only the instruction but also a spot on the verdict slip for the jury -- where the jury would be informed of the consequences of a failure to agree.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

MOTION HEARING

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Wednesday, April 16, 2014
10:01 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

available to them, in particular, the A files that were requested, so that request is now moot. There was a request for certain interviews that took place in 2011. We intend to make those available. That request is moot. And the third one is certain reports from MIT which the government itself had never received. We've since received them. We will make those available, all of them, so that issue is moot.

MS. CONRAD: There was one more area which I believe were interviews with Todashev.

MR. WEINREB: So with respect to the interviews with Todashev, as we state in our motion, the Middlesex District Attorney's Office is continuing to actively investigate the Waltham triple homicide. And we maintain what we said in our first motion and continue to say in this motion, which is that it would jeopardize that investigation unnecessarily by publicizing details of it just as it would in the case of any homicide investigation.

The defense has since narrowed its focus to certain areas of information that relates specifically to their client and the degree to which he may have been radicalized at different points in his life and other materials which they laid out in their motion. We have agreed to provide all information in the reports responsive to those four areas and have omitted only the ones that relate specifically to the triple homicide and that fit within the perimeter of our

earlier concerns about jeopardizing the investigation.

THE COURT: Okay. Mr. Bruck?

MR. BRUCK: Your Honor, I would like to just respond to the last area and then Ms. Conrad will deal with the rest.

We do not yet have the Todashev interview materials that the government has agreed to disclose, so I'm a little bit at a disadvantage in responding to those disclosures, but the one thing that we know we're not going to get under the government's latest response is the information that Todashev provided about the Waltham murders, which as we understand it and as anybody who reads the newspapers knows, apparently implicated himself and Tamerlan Tsarnaev, not our client. I think Mr. Weinreb may have misspoken. We were not looking for materials from Todashev about our client's radicalization, but about his brother Tamerlan's.

MR. WEINREB: I did misspeak. I meant to say Tamerlan's.

MR. BRUCK: What I said at the beginning of this hearing continues to loom large. This case is largely about a family and the relationships between it -- between, in this instance, these two brothers. And the fact, if it is a fact, that Tamerlan Tsarnaev slit the throats of three helpless people, one of whom was described as a close friend, whether the defendant ever learned of it or not is clearly a very important part of the story in terms of who is the motivating,

the leading, the active participant in what happened later.

We think we're entitled to know what Todashev said about this crime. We realize that he was apparently -- or from accounts he was apparently shot and killed before he could finish describing the Waltham murders, but we think it's critically important to find out what he said about Tamerlan Tsarnaev's involvement as long as the interview lasted. The government says no unless we apparently make some greater showing of relevance to our own client's state of mind, but I think what I've said is gracious plenty and that we ought to know that.

This is not disclosing to the public anything about an ongoing investigation. We obviously are subject to a protective order. We don't share this with anybody who's not entitled to have it, that doesn't need to have it on the defense team. It's information in the broad strokes that seem to have been leaked out or published in all different sorts of ways already anyway, so it's a little difficult to see how this additional part of the Todashev interviews is going to prejudice anything about an ongoing investigation that apparently is directed, as far as we know, as two people who are both dead.

We think this is important and we're entitled to it, and we would like the Court to order that that additional portion of the Todashev information be disclosed.

THE COURT: What's the volume of this material?

MR. WEINREB: Are you referring to the material --

THE COURT: The 302s.

MR. WEINREB: Solely related to any purported involvement by Tamerlan Tsarnaev in both murders?

THE COURT: Both, I guess.

MR. WEINREB: I would say not great.

THE COURT: Well, my thought is I may review it in camera.

MR. WEINREB: We have no dispute with that, your Honor. But I would like to emphasize we have noticed a tendency in the defense pleadings to attempt to establish the materiality of large categories of information simply by labeling it critically important. We really dispute the idea that details about Tamerlan Tsarnaev's purported involvement in the Waltham homicides is critically important, particularly in the absence of any allegation that Dzhokhar Tsarnaev knew anything about it.

We have already disclosed that Tamerlan Tsarnaev was implicated by this man, Todashev, in the triple homicides. Unless there is something that -- in it that somehow relates to Dzhokhar Tsarnaev, either that he knew about it, that he somehow participated in it, anything like that, it has -- far from being critically important, it really seems to have no relevance. Their mitigation theory, which is that Mr. Tsarnaev

was influenced by his older brother, depends on what Mr. Tsarnaev believed to be the case, not what Mr. Todashev may or may not have said was the case. And there is nothing in those statements that would indicate that Tamerlan Tsarnaev, to the extent that he was involved in the triple homicide at all, conveyed that to the younger Mr. Tsarnaev.

So we don't think it has any relevance at all, let alone critical importance, to the mitigation strategy.

THE COURT: I understand the parties' disagreement about the critical importance and materiality issue. And let me just say that as a general matter, it seems that a good part of the defense argument is -- sort of going over that ground by way of general advisory, I'm not inclined to change the view that I took last November about materiality as it relates to discovery issues either as a *Brady* matter or as a Rule 16 matter. That's a general observation occasioned by Mr. Weinreb's comments.

So with respect to this particular problem, then why don't we follow that course. If the government would make a submission in camera indicating what has been provided, what -- the portions that have been provided to the defense and what is at issue and the government would seek to withhold, and I'll examine it and make a determination.

I'm not sure that there are a lot of issues that -- I mean, the papers -- as I've said, I think the papers are pretty

complete on setting forth your positions on this, so I guess I'd look to anything that you really want to highlight and --

MS. CONRAD: Sure. Thank you, your Honor. I will try not to go over old ground.

THE COURT: And, again, I say it in the context of what I've just said, which is I think a lot of the defense argument was asking, in a sense, for a reconsideration of the materiality assessment.

MS. CONRAD: But it apparently succeeded in getting the government to reconsider on some of these issues.

THE COURT: On some of the things you did?

MS. CONRAD: So in that respect I suppose I should maybe on those issues quit while I'm ahead.

Your Honor, I would like to focus my attention on two matters primarily, and that is the FTK, Forensic Toolkit, and the FISA. I do think there are outstanding issues with respect to lab reports. I just want the Court to know that we are working very hard. We've had a team go down to Quantico to review discovery there. We've gone to the Mass. State Police. We've gone to two FBI locations. We have reviewed thousands and thousands of items. We have -- are in the process of organizing and reviewing the information provided to date.

We are working very hard on this case. But the Court should know that there are a lot of things -- if you review the government's opposition, as I'm sure you have, that the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

STATUS CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, August 14, 2014
10:03 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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to Assistant Warden Smith Tuesday afternoon" -- sort of like a billing record, I guess, that a lawyer would do. That would keep track of what interactions there were without adding the burden of having to conduct them in a cumbersome way.

Is that something the government would find acceptable?

MS. PELLEGRINI: Yes, your Honor. And I'll communicate that to the firewall.

THE COURT: Okay. Other than, with respect to communications to the Court, I would expect them to be in writing in the ordinary course anyway, so I don't think we have to provide for that. To the extent they would not be in writing, they would likely be on the record. So I don't think we have to take any steps on that.

So beyond that, adding the requirement of the log for communications, I see no reason for any further relief. There were four points raised, and the government agreed with 1 and 4. So this addresses Number 2, I think. So that resolves that motion.

To the extent there is a still outstanding issue about further discovery of what we might call Todashev matters, I thought actually we had resolved it. I had reviewed the matters that the government submitted in camera, including recordings, and I see no reason to compel any further discovery from that material.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

STATUS CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Monday, October 20, 2014
10:15 a.m.

chief because Monday is normally an empanelment day for everybody, and I don't know whether -- I haven't yet looked to -- or had anybody look to see whether there are jury trials scheduled to begin on the 5th.

There are two possibilities: If there's one jury trial scheduled to be done on the 5th, the presiding judge might agree to postpone it a week, for example; but if there are several already scheduled and they're expected to go, I think we would probably let them complete their empanelments on the 5th and have our jurors come in on the 6th. That would be my expectation. But all of this is still, you know, subject to revision. But generally, yes, we're going to get going on that schedule.

Just sort of a small housekeeping matter. I guess I didn't -- yes, I did. Just to clean up the list on the computer, there are two motions that show up as pending, but they're really not because they've been resolved in other ways. The motion to suppress statements has just been put aside. It's subject to renewal as needed. But in light of the government's statement that it would be not offering those statements in its case-in-chief, we've treated that as, I guess, denied without prejudice, which is appropriate given the government's position. So that's 295. That shouldn't be listed as pending.

And the motion that goes back to April, Number 242,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, December 30, 2014
10:35 a.m.

Marcia G. Patrisso, RMR, CRR
Cheryl Dahlstrom, RMR, CRR
Official Court Reporters
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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phrase and read it as illegal immigration. So I want to emphasize we're talking about legal immigration: "Do you have any problem with legal immigration?"

Question 70 in the Phillipos -- well, not Phillipos, I guess Tavhayakov case, there was a questions, it said the defendant was born in wherever he was born, Kazakhstan, and is of Russian descent, and then it said, "Do you have any beliefs, attitudes or opinions regarding Kazakhstan, Russia" -- it listed them. It was basically the same question but expanded a little as to why you're asking me this question. They're not going to know why you're asking about Dagestan. So I think we just save the preamble by leaving it in that region.

Question 71 and 72: I don't know anybody who would answer Question 71 "no." It's in the nature of being a teenager to be influenced by others. So I'm not sure how helpful that one is.

The next one, I wonder whether you need to say "positively or negatively." I could imagine that going both ways. But I guess maybe that's a follow-up question? I don't know. So can we live with just 72?

MS. CLARKE: This was a government --

MR. WEINREB: Yes.

THE COURT: Okay. Obviously, these will get renumbered because we're eliminating...

Now, I'm on 18 -- 79. I guess I see this as a

question that will cause trouble because it will be so unfocused I don't know if -- I mean, I guess it's one that might get very interesting answers. Maybe it's a trigger to follow-up.

MS. CLARKE: I think it is. I mean, you know the point.

THE COURT: I expect you'll get answers which have untrue facts. I mean, something everybody would agree was untrue.

MR. BRUCK: Or very prejudicial facts which are not going to come into evidence. People know everything about this case, it's been reported, whether it's true or not, whether it's admissible or not.

MS. CLARKE: You might want to add a few more lines.

THE COURT: You would have to. I guess that's one of my concerns. But if you want to live with it -- this is a question that we'll probably be asking every voir dire person.

MR. FICK: I think it helps to flush out at the top whatever anybody said. No matter how they impressionistically treated it, it's useful to trigger a follow-up.

MR. WEINREB: I suppose it could be amended to say what are the, you know, three or four most memorable things.

MR. BRUCK: That will reduce the value. Everyone will say the same thing: Bombs went off at the Marathon. A police officer was killed.

MR. WEINREB: I guess my concern about it is that -- is the opposite of an overlong answer which is getting a partial answer, you know, that a juror may know ten things about it, and if you only put down two of them, does that give you a fair picture?

MR. BRUCK: Well, that's a probe and it's for follow-up.

MR. CHAKRAVARTY: We could end up following up on every fact asserted. Then that would be -- I'm not sure how constructive that would be. This would take forever with every witness.

MR. WEINREB: Yeah. And if the question is designed to determine whether the jurors have been exposed to pretrial publicity, that might have affected their ability to be fair and impartial, but I do think that the case law of the Supreme Court ruled it is not necessary to ask jurors what the pretrial publicity is to which they have exposed; it's only possible to ask whether they can put it aside and be fair and impartial.

And I am concerned that this one question will turn out to be the question that dominates the entirety of voir dire of the individual jurors unnecessarily.

THE COURT: Yeah, I guess that's my concern as well, I guess. There will be sort of unmanageable data, I guess is my concern about that. I think that the preconceptions, and so on, we deal with in a series of other kinds of questions -- I

think we're better off without this one as a narrative.

MR. BRUCK: We would -- I think our feelings about that would be affected by the extent to which there will be questioning on this exact issue in individual voir dire where jurors can --

THE COURT: I think one of the common questions is going to be to a juror who answers to 83A, that she thinks Dzhokhar Tsarnaev is guilty, and then we're going to have to ask regardless of that idea that you have now, would you be able to hear the evidence and judge it fairly and perhaps change your mind if the evidence warranted that? We'll do all that with these other questions, I think.

MR. BRUCK: But it's true that there is a 5-to-4 Supreme Court decision that says it does not violate due process not to ask for content, *Mimin versus Virginia*. It's very much the minority view among courts, state and federal, in the country. And it tends to, in a case like this where you -- where you have really no ideas what the juror may have swirling around in their head, it makes the juror the judge of their own impartiality in the end not to be able to --

THE COURT: To a large extent that's true.

MR. BRUCK: I'm sorry?

THE COURT: To a large extent that's true, the juror is ordinarily --

MR. BRUCK: But the Court can evaluate more

realistically when you know what it is the juror and how much --

THE COURT: I think the other questions will help us do that. I think this is -- I think we can do without 79. I mean, I think what we touched on is the biggest issue in voir dire, obviously, because there are going to be a lot of people with preconceptions. As a matter of fact, you may even wonder about people who have a preconception in the other direction, whether they pay attention to anything in the world. If they say, no, I know he's not -- that's another -- maybe touching on that -- so we're going to get a lot of "yes" answers to 83A.

MR. MELLIN: Your Honor, Question 78 talks about how much have you been exposed to.

THE COURT: Right. So I think we'll do okay with that.

With respect to 83, I think I would like to add to the menu for each of the subparts a third option, which is "not sure" or "undecided" or something like that: Yes, no, undecided.

MS. CLARKE: Judge, that raises our --

THE COURT: Yeah, your -- I have it someplace here. Anyway...

MS. CLARKE: Excuse my fingerprints on that.

THE COURT: Yeah, this is the question that added the fifth opportunity, whoever committed the crimes. So I take

it -- take from its absence in the joint draft that the government objects to that?

MR. WEINREB: Yeah, we filed an opposition to that.

THE COURT: Okay. Let me get those.

By the way, let me -- because it came up, Cheryl is another stenographer. She's going to be splitting time with Marcia. And she just wanted to get familiar with the vocabulary by sitting in.

MS. CLARKE: I think I passed both of those because we had to file a supplement --

MR. WEINREB: It's possible that the government addressed it in the context of the --

THE COURT: The memo on voir dire.

MR. WEINREB: Exactly, our response to the defense memo on voir dire because I know we did discuss the so-called specific *Morgan* questions there. But that would not necessarily have addressed the whoever question, although we do object to that question.

MR. BRUCK: That's a publicity question.

MR. WEINREB: Right. It's sort of a combination.

(Pause.)

THE COURT: Well, so there are two questions that the defense proposed: One was the one -- let me just pause again to add an E, which is whoever committed the crimes should receive the death penalty. The second one is a new question,

death penalty is only appropriate -- is the only appropriate punishment for anyone who has, A, murdered a child, deliberately murdered a police officer. Those are case-specific, you think?

MR. WEINREB: Those are, although --

THE COURT: So is your objection more to the first one than the second one?

MR. WEINREB: Your Honor, our objection is to -- it's to both of them on that the grounds that they're both, in our view, including the first one, classic so-called stakeout questions, which ask the jurors to stake out a position on the death penalty before they have been instructed that there is a process that is designed to guide their discretion. It's a legal requirement that they follow it, that they will hear evidence, not just of what they've already heard, may have read or seen in the press, but they will hear evidence of both aggravating factors and mitigating factors and that they will be required to weigh those to make a decision.

If you ask them, based on everything you've seen or heard, do you believe that anyone who committed the crime deserves the death penalty, that essentially -- anybody who is asked that, who all they knew was that there was this bomb that went off -- bombs went off at the Marathon; people were killed; it may have been a terrorist act -- many people might say yes to that. And then later on, What if you were told that this

mitigating factor and that mitigating factor and this other mitigating factor, then they might say, Then that's another story. Then maybe not necessary they should receive the death penalty. But now you've got inconsistent answers. They've said one thing in response to written questions, and they've said another thing during follow-up.

The Supreme Court has held that inconsistent answers are evidence of substantial impairment, that a person is substantially impaired in considering either mitigating factors under *Morgan* or aggravating factors under *Witt*. We think that it is a big mistake to lard the record with all of these inconsistent answers which are bound to arise once -- if the jurors are first asked the question in this very one-sided manner and then asked it on follow-up in a much more balanced and fulsome manner, because it will raise a question about every strike for cause or failure to strike somebody for cause, whether it was appropriate or not.

So we oppose all of these such questions and think that the Court could ask a -- we're not insensible to the defense's desire to know whether the jurors could, in fact, consider mitigating factors, as they're required to do under *Morgan*, given the aggravating factors in this case. We're simply asking that the question be asked in a balanced way where the Court could, for example, say to the jurors, If you find the defendant guilty of a capital crime, there will then

be -- if the jury finds the defendant guilty of a capital crime, there will then be a second phase of the case where you will hear evidence of aggravating factors and mitigating factors. Aggravating factors are factors the government believes justify a death sentence; and mitigating factors, the defense believes, justifies a life sentence. And then the specifics could be introduced.

So the government will seek to prove to you, among other things, that -- as an aggravating factor, that the defendant murdered a child, murdered more than one person during the course of the crime, murdered a police officer, deliberately committed murder during an act of terrorism. And the defense will seek to prove mitigating factors, among other things, that the defendant was 19, that he was influenced by his brother to commit the crime, that his dysfunctional family made him vulnerable to that kind of influence. Would you be able to balance any aggravating factors you found proved with any mitigating factors you found proved in making a death-penalty decision or a sentencing decision? And that way the specific aggravating factors are presented to the jury in a context where they understand what their obligation is going to be down the road.

MR. BRUCK: Well, first of all, I think we need to separate the two issues. I think both questions are critical, but they are about different things. Our proposed No. 83 is

really a pretrial publicity question. It is not disqualifying in and of itself, but it is certainly extremely important to know if, on the basis of what a juror has heard outside the courtroom, the only remaining question in their mind is whether the government charged the right person and, if so, he should get the death penalty.

Now, that is a -- nobody could think that an impartial juror could be seated in that frame of mind. That is clearly a question that goes to a bias. We are not saying that an affirmative answer to that is the end of the inquiry, but it most certainly flags something that the Court would want to follow up on, which is true of most of the questions on the questionnaire, except this one is about something that's really important.

If the task is could a juror be rehabilitated, could a juror still be impartial despite an answer, we might as well not have a questionnaire because almost every question flunks that test. That's not the test. This is an important thing to know.

There will be jurors who say, Nothing could change my mind. This case -- this crime deserves the death penalty, period, based on what they've heard, but they're willing to make sure that they've got the right guy. So that's 83, and it goes to exposure to pretrial publicity much more directly than a lot of other questions that were on the questionnaire.

Number 100, our proposed, we don't at all agree that the Court should pretry the case by listing aggravating and mitigating factors and getting the jury to say if they could go either way depending on family or brother or someone. That is stakeout. That is a pretrial of the case.

We're talking about something very different. The *Morgan* v. Illinois inquiry is whether or not, where the government charges a crime, the juror would always vote for the death penalty upon conviction of that crime. And we are referring to the actual charges that have been brought by the government. That is the basic *Morgan* inquiry.

Now, the juror will have -- will -- it will be explained to the juror about aggravation and mitigation before there's a ruling. Mr. Weinreb says, Well, it would be a mistake to put things on the record that would create a problem. As their briefing makes clear, the appellate -- standard of appellate review on these rulings is extremely differential. If there's conflicting evidence, 99 times out of 100 the appellate court defers to the way that the trial judge resolved the issue.

I think what the government is really afraid of is finding out what jurors actually think because there are a lot of jurors who have a categorical view, which is, if you kill a child, you get the death penalty. They are not relativistic about it. They have fixed core moral values that -- they don't

vary. And there's nothing wrong with that. But it is a disqualifying bias under *Morgan* v. Illinois because we have a discretionary sentencing system in this country, and it's required by the Eighth Amendment. And a lot of people reject that. And the point of this process is to find out whether such a person is the juror before you.

So these are critically important questions. They flag an area for follow-up. The fact that someone, again, says this doesn't mean the inquiry is over. It means there has to be the inquiry. If we don't know that a juror holds this view, we're going to miss inquiring and really testing, and we weren't really being able to evaluate critically whether this juror is in the eye-for-an-eye category. With respect to the charges in this case, which is the only really legal question, it doesn't matter if a person could vote for life in some other kind of capital crime that is not charged in this case. That doesn't make them a competent juror.

So that's why these are not stakeout questions. They are questions that go to this basic question of impartiality. And we think, at this preliminary stage, this is valuable information. We've cited the very, very troubling findings of the National Capital Jury Project, which show that huge percentages of jurors go through the entire process, sentence people to death, and then tell an interviewer later that they thought it was mandated by the law. It wasn't really

discretionary. We need to get at that to make sure we identify jurors who take that view. So that's why we think that there's nothing at all wrong with this question, and it ought to be on the questionnaire.

MR. WEINREB: Your Honor, if I could just respond briefly. So the record is clarified, there already is, in Question 83 in the questionnaire, this proposed 83, just Subsection (e) that would add something. We -- frankly, when we were talking to the defense about this -- none of these Questions (a) through (d) are legally required to be asked, and there's case law holding that they not be asked. We thought it was a reasonable compromise to allow (a) through (d) to be asked but that (e) took the inquiry a step too far. I just want to make that point.

And, secondly, I also want to reemphasize the point that the government is not proposing that the jurors not be asked whether the fact that a child -- the government will seek to prove as an aggravating factor. It's not an element of the crime that a child be murdered. It's not an element of any of these crimes. It's not an element that a police officer be murdered or any of those things. These are aggravating factors. They're -- and what we're not -- we're not proposing that jurors not be asked whether, in the face of those, they would be unable to weigh aggravating factors or mitigating factors.

We're only objecting to the manner in which the question is asked. In our view, it's simply that it should be asked in a manner that lets the jurors know that there will be evidence of mitigating factors -- that these are aggravating factors. There will be evidence of mitigating factors and that they will be required to weigh the aggravators and the mitigators. And the question that should be asked is whether they would be capable of doing that. That is what *Morgan* held, is that the jurors have to be able to give consideration to mitigating factors in order to be fair and impartial.

THE COURT: Okay. Well, I think, for these two questions, I want to go back to the case law a little bit before I resolve that. So we'll let you know about that. I understand the arguments.

With respect to 84, the only concern I have is it doesn't distinguish -- this is about expressed opinions. It doesn't distinguish between casual or trivial expressions and more deeply-held ones. And so the contrast, for example, the difference between somebody who mentions something relatively briefly or casually to a family member or something like that, that they may be watching TV with, as opposed to somebody who's a loud mouth broadcasting their views to the world. I mean, the second one we really want to know about. I'm not sure we'd need to know about the first one.

You know, in a case where people -- large numbers of

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Friday, January 2, 2015
11:05 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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THE COURT: You might.

MR. BRUCK: I mean, the agreed-upon questionnaire included the question about what you remember about this case. Now we have three questions that are sort of pretesting about siblings, and another one about teenagers and siblings, and no question that says what do you know about this case. And, you know, given the issues around venue, we really think that one needs to go back in.

MR. WEINREB: Do we have a number?

MS. CLARKE: It's not in this new one.

MR. BRUCK: It was.

THE COURT: Where was it?

MR. BRUCK: It was 79, "What did you know about the facts of this case before you came to court today, if anything?"

THE COURT: Yeah. Right. Yeah. No, we took that out. We took it out. It implied that there were facts of the case that they could objectively know and I didn't want to support that misimpression.

MR. BRUCK: If it were changed to "What did you read or hear about this case before you came here," it would solve that problem.

THE COURT: No, I think it -- again, I think it's too unguided. I think the questions we asked are okay, so...

MR. BRUCK: And then the last one was whether -- there

were two more: One was, "Have you decided that the person that bombed the marathon should get death" without -- you know.

THE COURT: The E to the A, B, C, D?

MR. BRUCK: The E.

THE COURT: Yeah. So I spent a good bit of time with the cases that we talked about last time, and I think that for the calibration that we're looking for, the questionnaire is too clumsy and it is -- but those kinds of issues, I think, can be addressed in the voir dire. We're going to have voir dire with, I expect, just about every one of them about their death penalty answers. And I think it's probably a more finely tuned tool than a question like that on the questionnaire.

So I expect we'll be touching on those issues, but -- to find out what their true dispositions, if any, are, but I think it's an oral matter rather than a written matter. And the same with the other --

MR. BRUCK: Pretrial publicity?

THE COURT: Sure. But, you know, your other specific -- police officer, child.

MR. BRUCK: Terrorism. Okay.

THE COURT: Yeah. We'll certainly talk with them about pretrial publicity. No question. Okay. So I think we're okay on that.

We got a trial brief from the government, I think, on Wednesday. Are we getting one?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, March 3, 2015
10:10 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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P R O C E E D I N G S

THE COURT: First of all, I wanted to address the pending motions regarding qualified -- or provisionally qualified jurors. The government has a motion to strike the first five and the defense has a motion on various others. Both motions are denied.

As to the government's motion, I don't think that there is a substantial difference in the quality of the voir dire on the first two days from other days. It is true that we have loosened up a little bit as we got going and got used to it. I don't think that has had any substantial effect. I've reviewed both the jury questionnaires and the voir dire examination of those jurors, and I find them satisfactory and I don't see any reason to alter that.

MR. WEINREB: Your Honor, if I may just make the record clear, we agree with that. As we made clear in our motion, we don't believe it was insufficient. It was really just in the interest of uniformity, which is not a strong interest.

THE COURT: I will note that three of the five there was no objection from either side to. There was one each for the other two, and we'll come back in a minute to that.

As to the several defense motions, again, I reviewed the jury questionnaires, I reviewed the transcripts. First of all, I agree with the government that the objections are late

and it is -- we have a procedure. We have done it with some care and taken the time to do it. And I think the time to raise the issues was in the course of that process and not thereafter. So I am not inclined - and will not - reopen the voir dire for late discovery matters that could have been discovered earlier.

That said, considering the objections, I find them largely speculative. There are various possible explanations and none of them is, in my view, serious enough to warrant changing our provisional qualification, and in particular, none of the issues that were raised seem to me to suggest the presence of a bias that would be harmful to jury impartiality in this case. They're collateral matters about things, they are -- people close to them may have done, but none of them speak to actual bias in the case. So we leave the roster as it is.

That said, as we expected having called people in this morning, there are some issues. Two of them relate to two of the first five jurors. Juror No. 32, you may recall, was on medical leave and has since returned to work at Home Depot. And I think it is the kind of position that would be a hardship for him if he had to serve. As you'll recall, he expected to return the end of January. So I think we should excuse him.

Juror 54 has a doctor's letter today that Jim McAlear has given me. As these letters tend to be, it is rather

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE - SEALED

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, March 12, 2015
3:18 p.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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boat, most of it's on the inside wall of the boat, but there were also wooden slats in which the defendant essentially carved a writing. And it's the one that says, "Stop killing our innocent civilians and we will stop." Those sections were physically cut out of the boat two years ago and taken down to the FBI lab in Quantico. There's no problem with us bringing -- we're happy to bring them into court if the jurors want to see them, but to try and put them back in where they were --

THE COURT: Yeah, I think that's sufficient. If they're an issue, they can be seen here, okay?

MS. CONRAD: There is one final issue, your Honor. The other day when the government put in the Whole Foods video, it hadn't occurred to me that -- until I think it was Agent Fitzgerald was asked, you know, "Did you receive information that the defendant Tsarnaev had gone to Whole Foods" and he said "yes," that was something that was Mr. Tsarnaev's hospital statement, that he'd gone to Whole Foods.

The government said it would not put the statements in during its case-in-chief. I haven't had a chance to go back and look at this again, my memory's a little dim in terms of what the law is on fruits, but the issue of voluntariness of those statements was never resolved.

Now, Mr. Chakravarty in response to an inquiry I had today told me that the source of the information for

the -- that they had gone to the Whole Foods was not Mr. Tsarnaev, even though the timing -- the chronology lines up that way, but some independent tip which I'm not aware of. We probably have it on our database of tips but hasn't been pointed out to me.

My point is simply this: Because the issue of voluntariness has not been resolved, the issue of fruits remains potentially a live one unless the government can show inevitable discovery, independent source and the like. We don't necessarily know as evidence is coming in what the source of that evidence is. We had assumed, based on the fact that the search warrants were issued before the hospital statements -- or the bulk of the search warrants were issued on April 19th before the hospital statements were taken, that they were not fruits. But this Whole Foods business gives us pause.

And I asked Mr. Chakravarty, and I want to put on the record, that to the extent the government is offering evidence that was derived from information provided by Mr. Tsarnaev, the issue of voluntariness may be joined and should be, we think, addressed before that evidence is intro- -- admitted. The only point of this is to simply ask that some notice be provided so to give us an opportunity to raise the issue before the cow is out of the barn -- horse is out of the barn, whatever the expression is.

THE COURT: Chickens, maybe.

(Laughter.)

MS. CONRAD: You notice I looked at Mr. Bruck to see if I got that right. I'm not so big on farm analogies.

MR. BRUCK: I'm apparently the font of farm wisdom.

MR. CHAKRAVARTY: So first, in preparation with Mr. Fitzgerald when he told me about this tip, he made it clear that it was somebody else entirely. My understanding is he doesn't even know about what was said in the hospital statement. And his communications with the investigator is -- when it happened was based on what this other evidence, or this tipster, what information that person had.

THE COURT: As long as that person didn't have it from the statement.

MR. CHAKRAVARTY: And that person -- he named a civilian witness who was not involved in the investigation, so in this case it's a nonissue entirely. But it raises the broader issue of the defense raising post fact, either now or on appeal, by mining the defendant's hospital statement and trying to find anything that overlaps with evidence that the government has presented as somehow creating some obligation for the government to identify pre-presentation of evidence of something that -- for which they could preserve better. That's not our job, that's theirs, and they should do that at or near the time of the admission of evidence.

MS. CONRAD: But we don't know what the source is

especially on the -- I did not -- I was taken aback. I hadn't really thought about how -- how the FBI got to the Whole Foods video in the first place until he said, "I got information." When you say "from a civilian witness," you know, it sounded to me more like he got information from another FBI agent who could have gotten it either from a civilian witness or from the defendant. And we can't just sit there and look at every piece of evidence and try to guess. And if we did that, if we followed Mr. Chakravarty's preferred procedure, that means before any piece of evidence conceivably is introduced, we have to stand up, go to sidebar and object because it might be a fruit of the defendant's statement. And I don't think unless it was obtained before the defendant's statement was made, I don't think that that's a very efficient or sensible solution.

MR. CHAKRAVARTY: Well, here it wasn't even being offered for the truth; it was just being offered to say why he did this analysis.

THE COURT: I think you just have to be -- in light of this, particularly sensitive to the source of that kind of information, that it does not trace back to those statements.

MR. CHAKRAVARTY: We have been diligent throughout. But as Ms. Conrad suggests, for example, that search warrants were all done on the 19th, before those statements were made, that's actually not true. There were dozens of search warrants, many of which went into May and beyond, and we have

evidence derived from those, in none of those search warrants did we ever put information that was derived from those -- the hospital statements. But this is my point, that some of the subsequent law enforcement actions that were not derived or dependent upon those statements still might be prone to this kind of opportunistic attack.

MS. CONRAD: That was not my point. My point was that we looked at the search warrants and confirmed that they were not based on the statement. I am excluding the search warrants because those documents -- the bases and the sources for the information. I was not saying we need to go back to the search warrants. So I'm sorry that it --

THE COURT: This sounds like it may be a hypothetical problem.

MS. CONRAD: It would be helpful if the government could provide some documentation of the tip that was -- even redacted that was underlying the Whole Foods.

THE COURT: I don't think that's necessary under the present circumstances.

Let me go over two other matters. With respect to the 12.2(b) issue, I would like as part of a determination whether good cause exists to permit a late filing a rather detailed ex parte proffer of the probative value of the medical evidence so I can assess whether this is something strong or weak, I guess is the best way to put it. That may affect my decision on

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni, Defendant.	Criminal Action No. 13-10200-GAO

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

SEALED TRANSCRIPT

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, March 31, 2015
9:04 a.m.

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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this phase.

THE COURT: Well, what's the point, I guess?

MR. FICK: I guess it's just a little bit more cumbersome to introduce -- I can do pullouts of the individual search terms that I discussed yesterday that are pertinent to who did a particular piece of research about the crime. And we could introduce those, I guess, at the end of everything and put those in evidence as A, B, C subparts. It's a little bit more cumbersome.

08:08 THE COURT: We did some of that yesterday.

MR. FICK: Okay.

THE COURT: I think it -- yeah, I think it -- to the extent the jurors will pay attention to the whole history, which I think is perhaps open to doubt --

MS. CLARKE: We just don't want to have --

THE COURT: -- and search through it themselves, I think it probably would produce irrelevant and potentially 403 types of things. Eventually, if there's a second phase, you'll have the chance to put in all the stuff about Tamerlan you

08:08 want. Don't quote me.

MR. WEINRAB: We move to strike that from the record.

(Laughter.)

MR. FICK: Understood. I guess, perhaps just even in terms of presentation -- I don't know -- if the government has no objection to -- rather than having to switch the screen for

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni, Defendant.	)	Criminal Action No. 13-10200-GAO

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED

MOTION HEARING

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Monday, April 13, 2015
10:04 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 10:04 a.m.)

THE CLERK: For a motion hearing, United States versus Dzhokhar Tsarnaev, 13-10200. Will counsel identify yourselves for the record, please.

MR. WEINREB: Good morning, your Honor. Bill Weinreb for the United States.

MR. CHAKRAVARTY: Aloke Chakravarty.

00:09 MS. PELLEGRINI: Good morning, your Honor. Nadine Pellegrini.

MR. MELLIN: Good morning, your Honor. Steve Mellin.

MR. BRUCK: Good morning, your Honor. David Bruck for the defendant with Judy Clarke and Bill Fick.

THE COURT: Good morning.

All right. So we're going to have argument on some of the pending motions relating to evidence in the penalty phase. Let's start with the government's motion regarding evidence of the Waltham murders.

00:09 MR. WEINREB: Your Honor, the defendant's opposition to the motion makes clear that their argument is purely a -- essentially a 403(b) type of argument, that it's an argument that Tamerlan Tsarnaev had a propensity to commit violent crimes and to rope others into committing them with him, and the jury should infer from that that he is the type of person

who does this and that he acted in conformity with that trait or that character when he -- in this case as well.

Putting aside for a moment the relevance of that kind of argument, which as the Court knows is quite suspect and problematic under the law, a condition precedent to that kind of evidence every time it's ever offered is that there is enough evidence for the jury to believe that the prior bad act, in this case Tamerlan Tsarnaev's committing of the murders in Waltham, actually happened. And that evidence is completely lacking in this case. The only thing that the defense has to offer is the uncross-examined and uncross-examinable statement of someone who was clearly somewhat unbalanced, if not deranged at the time he made it, Abraham Todashev. And I say that because right after making it, as he was writing it down, he attacked a Massachusetts state police officer with the intent to kill him and, as the Court knows, was shot dead in the course of doing that.

It's important to take a look at just how unreliable that statement by Mr. Todashev is. He was interviewed several times about Tamerlan Tsarnaev after the marathon bombings. Three or four at least. In the first of those interviews he never said anything about Tamerlan Tsarnaev being involved in the Waltham triple homicides; in fact, he said that he and Tamerlan Tsarnaev were never close, that they had had a falling-out in 2010 after which they essentially stopped

talking.

It was not until agents asked Mr. Todashev about his own potential involvement in the Waltham triple homicides that he first implicated Tamerlan Tsarnaev in them and tried to blame the whole thing on Tamerlan Tsarnaev. He did that at a time when he knew that Tamerlan Tsarnaev had been implicated as a murderer in the Boston Marathon bombings and, therefore, it was plausible to blame the whole thing on Tamerlan Tsarnaev, but he did it when he also knew that Tamerlan Tsarnaev was dead and therefore could not deny his involvement in the Waltham triple homicides. And before saying anything about Tamerlan Tsarnaev at all, he first asked for a deal that would protect him from his own liability in connection with those homicides.

The first time he told the story of what happened that night in Waltham, he blamed the entire thing on Tamerlan Tsarnaev. He said that he personally wasn't even there, that he was there beforehand and that he learned about the murders the next day afterwards. When the police confronted him with evidence suggesting that they could prove differently, that he himself, Todashev, had personally participated in the homicides, he took back everything he had just said, admitted that it was all a lie, and then admitted that he did, in fact, participate in the homicides. But he still tried to blame everything on Tamerlan Tsarnaev, saying that Tamerlan had masterminded it, Tamerlan had actually committed the murders,

that Todashev was actually, you know, a somewhat passive participant who just went along.

Even then his story was internally inconsistent. He made statements during it which contradicted each other. When they were pointed out to him, he just took them back and said other things. He said things that seemed fairly, if not wildly, implausible, such as that Tamerlan Tsarnaev proposed the crime at a mosque during Ramadan despite the fact that Tsarnaev had just become very religious. He also said that
00:14 Tamerlan Tsarnaev had a gun, even though we know that during the marathon bombings he had to use his brother's gun and was very much in search of a gun, and all of the evidence points to the fact that Tamerlan Tsarnaev did not own a gun.

But most importantly, because Mr. Todashev is dead, he can't be cross-examined about any of this. It's little different than if the defense had just picked up a rumor that Tamerlan Tsarnaev had participated in these murders and wanted to put that in front of the jury and have them conclude on the basis of all of that that Mr. Todashev actually committed
00:15 them -- I'm sorry -- that Tamerlan Tsarnaev committed them.

So the Court should exclude the evidence to begin with on the grounds that even assuming that it was relevant and even assuming it was not more prejudicial than probative, which I'll address in a minute, that there simply is not enough evidence that Tamerlan Tsarnaev actually committed these murders. The

only evidence again that they offer to propose is this single statement by a person who gave it under circumstances indicating that he had every motive to lie, to implicate somebody else, to cover up his own involvement in it, and he made an accusation against someone he knew was a murderer but who he also knew was dead and couldn't respond to it. And he then himself, immediately after giving it, engaged in an act of violence that resulted in his own death and he can no longer be cross-examined about it. That is about as unreliable a basis for the jury to conclude that this happened as it gets.

The government also moves to exclude it on the grounds that it is -- this type of argument in general about propensity and this particular argument is prone to confusing, misleading and distracting this jury. The first thing that will confuse, distract and mislead them is the need for them to determine whether Tamerlan Tsarnaev participated in the murders at all. This is going to require them to consider in detail a great deal of evidence about Mr. Todashev's credibility because if the defense is permitted to put into evidence the statement of Mr. Todashev, the government will be obliged to bring in all the evidence it has to show that Mr. Todashev is not credible. And there is a boatload of evidence. And the jury will be distracted into a sideshow of trying to figure out whether somebody -- whether Tamerlan Tsarnaev is guilty of some other crime entirely separate from the one that they are -- they just

decided. They'll have to be debating or deciding the outcome of a murder case that has nothing to do -- or almost nothing to do with the sentencing of the defendant, which is the reason they're here today.

And even if they conclude that based on Mr. Todashev's statement there is reason to believe that Tamerlan Tsarnaev was involved in the triple homicides, they're still going to have to conclude that he was involved in it in the way that Mr. Todashev says that he was because, for example, if

00:17 Mr. Todashev planned the robbery and just asked Tamerlan Tsarnaev to participate and Tamerlan Tsarnaev was the one who just went along and so on, then the information has zero relevance. There's no propensity argument that could even be made on the basis of it. And the government, therefore, will be obligated to offer evidence to that effect, that there is nothing to corroborate Mr. Todashev's account, at least as far as the government knows, of the respective roles that he says that he and Tamerlan Tsarnaev played in this.

So again, we will be having a mini trial on this that

00:18 will get involved in forensic evidence, the scope of the investigation, what other witnesses have said about Mr. Todashev, about Tamerlan Tsarnaev, about their relationship with one another and so on.

Then even assuming we get past all of that, the jury still has to decide what weight to give propensity of evidence.

And that's something they could also conceivably hear evidence on.

And then the fourth thing they would have to do is figure out what bearing all of this should have on the sentence of Dzhokhar Tsarnaev, which is the reason they're here in the first place. The connection between Tamerlan Tsarnaev's potential involvement in a murder, the circumstances of which will forever be murky and perhaps unknowable because Mr. Todashev, who was the one person who confessed to actually being involved in it, is dead, that is going to become part of the mix of this very difficult decision that the jurors have to make -- an individualized decision about the culpability of this defendant, Dzhokhar Tsarnaev, for these crimes. And it's simply too much of a distraction, it's too confusing, it has too much of a risk of misleading them for the Court to admit it given its very, very slim, if existent, probative value.

THE COURT: Mr. Fick?

MR. FICK: Thank you, your Honor.

On the question of reliability, I guess the first thing I would say is all of the things that Mr. Weinreb just said really go more to weight than to admissibility, particularly in a capital sentencing proceeding where the rules of evidence on this kind of thing are relaxed. And the government is, I think, overstating the extent to which the confession is unreliable. I mean, to hear everything the

government says, if those arguments could be employed, for example, by a defendant whose admission is sought to be admitted into evidence, then I would suspect there would be many, many more excluded defendants' confessions in other cases and verdicts of acquittal. Essentially, all of these things are issues for the jury to decide: whether the confession is reliable and why or why not.

The government is also, I think, overstating the extent to which the confession is the only evidence of Tamerlan's involvement in this murder. First of all, you have the computer file that apparently Tamerlan was reading within weeks of the Todashev murder -- of the Waltham murders about stealing or taking or seizing the property of infidels. Within a couple of weeks of that the Waltham murders happened. It's characterized as a drug rip-off. And it would seem then that Tamerlan has found the ideological basis for what he's about to do and then goes about doing it with the assistance of his friend Mr. Todashev.

THE COURT: You have, I presume, thoroughly looked at Tamerlan's computers and his files. Is there any connection in there -- any mention of Waltham?

MR. FICK: Any mention of Waltham?

THE COURT: Not necessarily by using the word "Waltham," but anything to suggest he was writing about the events that are suspected?

MR. FICK: Not that I'm aware of, writing about the events either before or after in any specific way.

THE COURT: Are there references to Todashev?

MR. FICK: There's extensive communication, particularly by Skype, with Todashev. Mr. Tamerlan sends back and forth messages to Mr. Todashev including links to various radical, one might say, jihadist images and videos on the Internet, so they're certainly in communication in the years surrounding all of these events about the views of radical Islam, one might say.

THE COURT: And anything that sounds like they're talking about the Waltham events?

MR. FICK: Not in any explicit way other than the extent to which they're conferring with each other about religiously motivated violence and why that may or may not be justified.

THE COURT: How about selling marijuana?

MR. FICK: I don't have -- I'm not sure standing here right now. It's not something that I focused on.

I'd also note that the government sought a search warrant or search warrants -- either the government or the Massachusetts authorities. I'd have to look at the warrant now to recall exactly, but it was in the discovery -- for Tamerlan's vehicle based on probable cause to believe he was involved in the Waltham murders. And so at least at some point

authorities believed there was probable cause to believe that that occurred.

And the final thing is it's a very peculiar argument the government is making because they have chosen taking their representations at face value to insulate themselves from all of the investigation that Middlesex has done about these homicides, and saying essentially, We don't know, and we don't want to know, and in conjunction with that, essentially block the defendant from pursuing additional investigations.

00:23 So we have a situation where there is a confession, a confession and implication of Tamerlan Tsarnaev. The person who made that confession was killed by the FBI in circumstances that are, shall we say, murky and not definitively resolved? And so -- and at the same time the government has chosen not to learn anything about other evidence that may bear on those murders. And so for all of those reasons, this is really, again, a question of weight rather than admissibility. The jury is capable of sorting out evidence like this, they're capable of deciding what, if any, importance it deserves, and

00:24 this is not a reason to exclude it.

It's particularly odd in the context of a capital proceeding because in any normal case where, say, two brothers were not coconspirators or co-committers of the underlying crime, part of the family history in any normal capital sentencing presentation would talk about instances of violence

or instances of bad conduct by other members of the family, instances of mental health problems by other members of the family.

And so this kind of evidence, even if there were no connection to the underlying crimes which we have here, would be sort of part and parcel of the overall family history picture that gets painted in a capital proceeding. And so to exclude it here because it has particularly strong relevance would be a peculiar result indeed.

00:24 And I think that essentially -- you know, what the government says about the reasons why this particular species of propensity evidence in general would create a sideshow, I mean, any piece of evidence, depending on how the parties focus on it, argue it and the importance the jury attributes to it, could wind up taking on outside pieces of importance in their deliberations or it may not. But, again, these are things that the parties are capable of arguing and the jury is capable of deciding, whereas here we have a clear -- well, we have a variety of types of evidence and types of personal history that 00:25 we expect to put in evidence about the nature of Tamerlan Tsarnaev, the outside influence he had on his brother, the kinds of interpersonal violence he exercised in a variety of settings to essentially coercively control other people. The evidence that he committed a particularly gruesome crime by sort of enlisting somebody who he had influence over is a very,

very -- it's an exceptionally strong piece of evidence that the defense ought to be able to introduce.

THE COURT: How would you present the evidence? What would it be?

MR. FICK: Well, in the first instance, we have Todashev's written confession itself, and then there are various investigative materials from a Florida attorney general investigation which we would submit are admissible under the government -- official investigation against the government hearsay exception. I mean, so those would, at least in the first instance, paint the picture of this is what Todashev said, this is what the interaction was with law enforcement.

In addition to that, we have the evidence from the computer about the relationship between Todashev and Tamerlan, as well as the -- just weeks before this idealogical document, so to speak, about seizing or stealing the property of infidels.

Whether we're able to pursue more I guess would depend on the Court's rule. If the Court determines this is admissible, we can certainly pursue initial third-party discovery of this issue as well. It seems to me that, again, we don't know what Middlesex authority's position is sitting here today, but given the passage of time, the likely -- sort of the weighing of their law enforcement privilege, so to speak, as that exists under the law versus the need for the

evidence and the potential importance it has in this case, I think that weighing may be different than it was early on when we were seeking discovery really at the beginning of the case. So there may well be forensic and other evidence in the possession of Middlesex authorities which we could obtain, although obviously we do not have it right now.

THE COURT: Okay. Go ahead.

MR. WEINREB: Your Honor, the government -- contrary to what Mr. Fick said, the government is not questioning the reliability of Mr. Todashev's confession to his own criminal activity. That is a statement against interests, and I believe that that alone gives that portion of it some indicia of reliability. It's his attempt to shift blame onto a third person that is the opposite of -- that's an indication of unreliability, well acknowledged under the case law. The defense cites the hearsay exception for statements against interest, but normally if somebody confesses but in the course of confessing they essentially try to shift all of the culpability onto somebody else, that part is redacted and is excised out. It's just their own confession that is admitted in recognition of the fact that the blame-shifting part is the opposite of reliable and it's only the self-implication part that is normally deemed reliable.

It is not true that the government has chosen to insulate itself from the Middlesex District Attorney's

investigation of the Waltham triple homicides. The Middlesex district attorney's office has decided to insulate us from their investigation. We made requests for that information. They said no. They said it's a confidential investigation by a sovereign that is independent of their investigation of this case, and they declined to allow us to view the file or to look at the evidence in that case. And that position, as far as I know, has not changed.

There is nothing murky about the circumstances under which Mr. Todashev was shot dead after confessing. It was investigated thoroughly by three separate agencies who issued very lengthy published reports. No need for me to repeat what's in them. They speak for themselves. But I think that is yet another example of the kind of sideshow that we will see if this information is put before the jury during the sentencing phase and will just serve to further distract them from the job that they have here, which is to make an individualized assessment of the defendant's character and the nature of his crimes, not the character and nature of other people stretching from his brother all the way through Todashev to the officers who were present in the room when Mr. Todashev was shot.

And then finally, this idea of coercive control, that's just not even in the statement itself. Even Mr. Todashev did not go so far in trying to shift blame onto

Tamerlan Tsarnaev to say that Tamerlan Tsarnaev coercively controlled him nor would that have been remotely plausible. Mr. Todashev, as the Court is probably aware, was an extremely experienced mixed martial arts expert. He was a walking deadly weapon. Shortly before he attacked the agents in his apartment, he engaged in an episode of what's commonly referred to as road rage where he beat someone to a bloody pulp who just got into a traffic altercation with him. There's no evidence that the defense can point to anywhere, including Mr. Todashev's own statement, that Tamerlan Tsarnaev controlled him in any way.

THE COURT: Go ahead.

MR. FICK: Just very briefly on the statement against interests, again, we're, of course, operating not in a strictly, you know, four corners of the rules of evidence. And certainly if Tamerlan Tsarnaev were on trial, Todashev's statement against interests implicating Tamerlan might be excludable in the sense that -- well, because the sort of due process right of Tamerlan vis-à-vis the nature and reliability of the statement, that weighing would be different.

But what we have here is a very different situation where Todashev implicates himself. And the only way that implicating of himself makes any sense is to talk about what he did together with Tamerlan. I mean, these people who were killed, Brendan Mess and the two others, these are Tamerlan's

friends. There's no indication that Todashev had any preexisting relationship with them. So everything about Todashev's self-implication only makes sense in the context of it being part of what Tamerlan did.

THE COURT: Let me ask about the computer information. Again, with respect to the victims in Waltham, what, if anything, do Tamerlan's computers have to say about that? Do they show a dealing relationship, for example?

MR. FICK: You know, Tamerlan did not communicate a
00:32 lot on his computer except via Skype and so -- and that was largely with either Mr. Todashev in Florida or here or people up overseas. His text messages and emails are really not on the computer itself. There were search warrant returns for providers for those things, and you don't really see a lot of interaction between him and Mr. Mess or others in the electronic evidence that we have.

THE COURT: So I guess what I'm looking for: Is there anything that you're aware of that would tend to be some kind of objective corroboration for your theory about the
00:33 relationship of Todashev and Tamerlan?

MR. FICK: Well, many, many civilian witnesses, including Tamerlan's wife, although whether we would call her or not is a question, but there's ample sort of lay witness evidence to suggest that Brendan Mess, one of the three people killed, was one of Tamerlan's best friends for years, they

spent time together, they smoked marijuana together. There may have been some sales relationship back and forth. And certainly there's evidence to suggest -- or there is civilians who would suggest that Mess in particular and the others were sort of large-scale marijuana dealers themselves.

You know, exactly how we could corroborate that in terms of electronic evidence, I'm not certain. That may not be something that within the four corners of electronic evidence is there. But there's -- certainly lay witnesses would be able 00:33 to establish the basic bona fides of the relationship between Tamerlan and the murder victims.

Oh, and the other peculiar piece of behavior was -- and this is something that civilians have talked about -- Tamerlan did not attend Brendan Mess's funeral, sort of stayed away, even though for years they had been considered best friends. And that was something that people thought odd, that, you know, there had been questions asked about why law enforcement didn't think that odd and investigate Tamerlan earlier. But, again, for what it's worth, that's another piece 00:34 of civilian testimony -- or available civilian evidence that would go to Tamerlan's peculiar behavior around these homicides and his relationship with those individuals.

And Ms. Clarke reminds me, again, I would have to go back and look exactly at the call history, but there may well have been some telephone calls around the time of the homicide

either between Tamerlan and one or more of the victims and/or between Tamerlan and Todashev. But standing here right now, I don't have that sort of lined up in my head.

THE COURT: Okay. All right. I'll reserve on it.

I think the next -- actually, the next one in sequence on the docket is the government's motion regarding plea negotiations. That's repeated in the omnibus motion. I don't know whether -- why don't we address that.

Mr. Mellin?

00:35 MR. MELLIN: Thank you, your Honor.

Your Honor, as to that, there are actually three circuits that have kind of decided and discussed this issue. It's the Fourth, Sixth and Eighth Circuits have all come out with either one circuit saying that this information should not come in because it doesn't go to acceptance of responsibility, or the Fourth Circuit went a little more restricted in saying that the district court in the *Caro* case did not err in restricting that information from coming in.

The basis of the argument is, your Honor, that under 00:35 Rule 410, plea negotiations are supposed to be kept private. I mean, that is the whole point of plea negotiations and that's the point of Rule 410, that the information is not supposed to be used by either side later on because that would tend to discourage plea negotiations and not encourage plea negotiations.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Friday, April 17, 2015
12:08 p.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

P R O C E E D I N G S

THE CLERK: All rise.

(The Court enters the courtroom at 12:08 p.m.)

THE CLERK: The United States District Court for the District of Massachusetts. Court is in session. Be seated.

For a lobby conference in the case of United States versus Dzhokhar Tsarnaev, 13-10200. Will counsel identify yourselves for the record.

MR. WEINREB: Good afternoon, your Honor. William Weinreb for the United States.

00:05

MR. CHAKRAVARTY: As well as Aloke Chakravarty, your Honor.

MS. PELLEGRINI: Good afternoon, your Honor. Nadine Pellegrini.

MR. BRUCK: Good afternoon, your Honor. David Bruck, Judy Clarke and Tim Watkins for the defendant.

THE COURT: Okay. Let me begin by resolving some of the issues that were discussed the last occasion. The government's motion in limine to preclude reference to the

00:06

Waltham triple homicide or other alleged bad acts is granted as to the Waltham events. The reason is that there simply is insufficient evidence to describe what participation Tamerlan may have had in those events. I know that the defense has a theory about what those things were, but I don't believe there's any evidence that would permit a neutral finder of fact

to conclude that from the evidence.

From my review of the evidence, which includes an in camera review of some Todashev 302s, it is as plausible, which is not very, that Todashev was the bad guy and Tamerlan was the minor actor. There's just no way of telling who played what role, if they played roles. So it simply would be confusing to the jury and a waste of time, I think, without very -- without any probative value.

As to other bad acts, it will depend. I mean, I see on the witness list witnesses who might be able to testify to behavior of Tamerlan that would be relevant to the defense theory of domination. So I'm not going to, as a blanket matter, exclude all bad acts. We'll deal with those issues as they arise.

With respect to the government's motion to preclude reference to plea negotiations, to the extent the government presses its non-statutory aggravating factor of absence of remorse, I think it's fair that the defendant could respond by showing an offer to plead guilty, but it would then be open to the government to explain the conditions that were attached, including with respect to the sentence and the refusal to participate in a proffer. If that goes forward, let me just suggest that the best way to handle that, if the parties wanted to, would be by stipulation, perhaps.

MR. WEINREB: Your Honor, I consider it unlikely the

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
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DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, April 21, 2015
9:16 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

Mechanical Steno - Computer-Aided Transcript

P R O C E E D I N G S

THE COURT: So I understand there's some issues about exhibits and other evidence. I just wanted to be practical about it so we can get going, what we'll get the first part of the government case today, this morning, this afternoon maybe, including the opening.

MR. WEINREB: So I think probably the most efficient way to start is for us to review which of these exhibits we're not going to offer. That's all new.

THE COURT: Oh, I don't have the new list. My list goes through 1610, which was the end of last week.

LAW CLERK: I can go get the binder.

THE COURT: It's in the binder?

LAW CLERK: Yes.

MS. CLARKE: Would you mind if I grabbed my list?

THE COURT: No.

So, yeah, why don't you go get it.

(Pause.)

MR. WEINREB: So we already informed Mr. Bruck which witnesses on our list we won't be calling.

THE COURT: Okay.

MR. WEINREB: Does the Court want to know as well?

THE COURT: Sure. I want to know as much as I can know.

MR. WEINREB: Then we need that list. Actually,

Mr. Bruck has the list. He has his notes on it.

MR. BRUCK: Well, we've been told Karen McWatters won't be called, Lawrence, Williams, which are the emails; Danling Zhou.

THE COURT: Wait a minute. So on the list that I have has FBI Special Agent Lawrence or Williams. Neither?

MR. WEINREB: Neither.

MR. BRUCK: Lawrence or Williams. Okay.

And then moving down to Danling Zhou, we have crossed out, and also Laura Woods.

THE COURT: All right. But Jinyan Zhao will?

MR. WEINREB: Yes.

THE COURT: She's a relative?

MR. MELLIN: Right.

MR. WEINREB: Yes.

THE COURT: Okay.

MR. BRUCK: And those are the only ones that are definitely out.

MR. WEINREB: That's correct. And then with respect to exhibits, if there are any discrepancies, we can discuss it. So we don't intend to offer Exhibit 10, which is the first one. Exhibits 1603 and 1605 are noted as video survivors' montage. They are the subject of a defense motion. We're not going to offer those in the way that -- in the form -- we're not going to offer them at all, frankly. What we're going to offer

instead, to focus -- hopefully address the defense objection, is individual photos of each of the victims who actually suffered amputations, but fully dressed photos of them, not showing any scars or gore or anything like that, just them with their prosthetic limbs attached.

THE CLERK: Judge, here's a list.

THE COURT: I looked at these over the weekend, and 1603, I didn't understand what it was. Maybe you could tell me what it is.

MR. WEINREB: Those are -- all of the 260 victims who suffered physical injury at the blast were asked to submit photographs of themselves, not showing their injuries or anything like that, just to -- so they could easily be identified in court, but...

THE COURT: So these are people who suffered some physical injury as a result of the bomb blast?

MR. WEINREB: Correct.

THE COURT: Okay. But you're not going to use, what, 1603 or 1605, in that form?

MR. WEINREB: Correct. Now, those exhibits included photos of people who had lost limbs, and so we're just narrowing it down to that number, which I believe is 17 or 18 people.

THE COURT: I see. Okay. Is there an objection to that? Let's just pause on that.

MS. CLARKE: Yes, same objection.

THE COURT: The generalized objection to that it's unnecessary on the grave risk. Is that it?

MR. BRUCK: Exactly.

MS. CLARKE: It's not relevant to any aggravating factor and the prejudice, probative value weighing.

MR. WEINREB: Your Honor, we would argue that it's relevant to several aggravating factors. One is grave risk. One is also substantial planning and premeditation to commit an act of terrorism, and --

MR. MELLIN: Cruel, heinous and depraved, the manner in which the act occurred.

MR. WEINREB: Evidence of how the act occurred.

MR. BRUCK: As to that, we think that that focuses on the murders, the homicides, not with reference to others.

MR. WEINREB: We're not saying that it was heinous, cruel and depraved as to these individuals but that these individuals -- what happened to them is evidence that it was heinous, cruel and depraved to the ones who died.

THE COURT: I think it is relevant evidence and admissible under the statute.

MR. WEINREB: We won't be offering any of these emails that are -- or translations that are 1611 to 1618. And I should just note for the record that to the extent that the defense seeks to introduce defendant emails or emails from

were in the same place that they were in 2013.

MR. WEINREB: Well, we're not offering the location of where the barriers were yesterday. That was just a background as to what prompted the creation of this exhibit.

We intend to use a single photograph, Government's Exhibit 1575, which is already in evidence. It quite clearly depicts where the barrier was on the date of the actual marathon blast.

THE COURT: When do you expect to get to this?

MR. WEINREB: This afternoon. By "this afternoon," I mean after the break.

THE COURT: Yeah.

MR. WEINREB: So we have the exhibit --

THE COURT: Assuming the foundation, it sounds admissible to me.

MS. CONRAD: And the late disclosure?

THE COURT: Show me some prejudice, I guess.

MR. WEINREB: The grate has been in evidence. The actual grate was in evidence -- or not in evidence, rather, but was available in discovery. It was a 1B item that the defense had access to. So all this is, is a photograph of that grate.

THE COURT: Okay. On the proffer it sounds like it will be admitted.

MR. WEINREB: So that's it for preliminaries.

MR. BRUCK: We have a series of other objections that

have not been withdrawn. The most pressing one is the photograph of the defendant in his lockup. And the reason which the government has advised us they intended to use in opening statement and have an enormous mockup, the prejudice -- this is what it looks like.

THE COURT: I've seen it.

MR. BRUCK: The prejudice is really quite extraordinary because what this is is a still from a video that goes on for hours and the -- in context, it shows that the defendant is sort of using this picture as a mirror and he's kind of bouncing off the walls the way a 19-year-old kid with nothing to do for a long period of time might do, and then he's doing a little sort of dance and then he jumps up and he does a V sign. It's not clear whether he's addressing this as a camera or as a mirror.

And then for a split second, you have to really squint to see it, the V sign seems to turn into a -- or does turn into a finger. But if you cut a split second of this you create a completely false image of what is happening. I think the -- I think the Court needs to see it in context. And the immediate problem is that this absolutely should not be shown in opening statement out of context and let us not be able to answer it for a week.

The prejudicial effect of that would be -- even assuming that the Court admits it at all.

MS. CONRAD: A couple of things further on that, Judge. First of all, we have the video clip to show you if you would like to see it. But second of all --

THE COURT: How long is it?

MS. CONRAD: I'm sorry?

THE COURT: How long is it?

MR. WATKINS: Very short. Two minutes maybe, even.

MS. CONRAD: Do you want to see it before --

THE COURT: Go ahead.

MS. CONRAD: The other issue is that the context of this -- first of all, I think there's a discovery and a *Jencks* issue here. We wrote to the marshals after there was a report about this video in the *Boston Globe*, and the U.S. Marshals Service in Washington started an internal investigation that's now in the office of the Inspector General. And I have correspondence I could share with the Court regarding that investigation about how this video came to be disclosed to the press.

And I inquired yesterday of the general counsel, Gerald Auerbach, what the status of that is, and he told me it's still under investigation. Again, I have the correspondence to show your Honor, and I'd like it to be made part of the record.

But in addition, we have no *Jencks* for Deputy Oliveira. I assume Deputy Oliveira was questioned in

connection with this investigation. I've asked General Counsel Auerbach for any statements or reports written by or taken regarding -- statements by Deputy Oliveira, and he said he would inquire. We've received nothing from the government. And we would at least like an opportunity to determine whether there are such reports.

In addition, we filed an ex parte motion regarding further -- getting further information from the marshals, including an opportunity to inspect the camera before this evidence is presented.

MR. WEINREB: Your Honor, the claim that is made in the papers and that's made again here is that the image needs to be understood in context. That is an argument about the weight of the evidence, not its admissibility. And the way the defense counsel puts something in context is through cross-examination or in their own case.

They're always free on cross-examination of the witness to play the entire video, five minutes, ten minutes, however much they think is needed to put it in context and however much the Court will allow.

There's nothing prejudicial about showing an actual photographic image of something that the defendant undeniably did. It's not likely to confuse the jury, to mislead them. On the contrary. It's probative evidence of what his state of mind was at the time that he did it. And if the defense thinks

that it's not, that they should have another interpretation of it, they're always free to suggest that through cross-examination and argument.

Every other argument that was made today should have been made 15 months ago when we first produced this video in discovery. The defense has had it for 15 months. There's been no claim that it should be suppressed on some ground, no claim that there's anything wrong with it or that more information should have been produced.

I think the *Jencks* claim is a red herring. To the extent that the witnesses were interviewed about how -- information about the video -- and by the way, I don't think the video itself ever appeared in the press, or a photograph of it. I think there were just reports of it that appeared in the press -- that's something for the marshals to deal with internally and it has nothing to do with its admissibility in this case and that would have nothing to do with the weight of the evidence. It would just be an effort to get into collateral matters that normally are decided outside of the jury's hearing, which is when there's an argument to suppress evidence based on a claim of misrepresentation in a search warrant. It would have nothing to do with the admissibility -- once the admissibility of it is decided, that no longer has anything to do with the weight of the evidence.

So the government -- it's obvious why the defense

doesn't like this photograph. I don't need to articulate it. But the fact is that their client did it. It's nonverbal. There's no constitutional problems here. It's probative evidence. And certainly coming in, there's no reason why the government should not be able to both admit it and use it as an exhibit -- as a chalk in opening statements.

THE COURT: What about statements by Oliveira?

MR. WEINREB: If there is actual *Jencks* by Oliveira, then we'll produce it. But as far as we know, we're not aware of any and we don't believe that any statements that he might have made regarding how information about this may have appeared in the press would be *Jencks* material for him because it wouldn't relate to --

THE COURT: No, I agree with that.

MS. CONRAD: But it might be *Giglio*. If he's the subject of an investigation relating to this, it might be *Giglio*.

THE COURT: Remotely, perhaps. But what I was getting at is if he had something to say about -- did he learn of this gesture because he was observing at the time?

MR. WEINREB: I believe so, yes. I believe that he was --

THE COURT: So if he had statements about his observations, I think those would be *Jencks*.

MR. WEINREB: Yes. If there were written statements

about his observations.

THE COURT: And the circumstances of his discovering the tape or whatever it is.

MR. WEINREB: Yeah. I mean, if he wrote a report saying, "On such and such a date I was observing this and this is what I saw," then we would provide that as *Jencks*. I'm not aware of any such --

THE COURT: We're not going to get to him for a while, anyway, right?

MR. WEINREB: No, but --

THE COURT: But you want to use it in the opening.

MR. WEINREB: -- we want to use it as a chalk in the opening.

MS. CONRAD: This is the correspondence that we provided to the Court --

MR. WEINREB: I think this is truly a red herring; in fact, I would object to this going on the record. Whether somebody in the Marshal's Service did something, you know, that --

THE COURT: Right. I agree with that. I think that's beside the point. It does seem to me that if it's truly out of context and indicates something other than what the government suggests, then that can be shown to the government's embarrassment.

MR. BRUCK: The problem is the week interval. It

seems so unfair that the government --

THE COURT: Why can't you do it on cross-examination -- I mean, Oliveira is going to testify in the next day or so. You can --

MS. CONRAD: Can we show you the video?

THE COURT: Sure, if it's just two minutes.

MR. WEINREB: I'd also mention that to the extent Mr. Bruck's argument is that he's not going to have a chance to open for a week and say something about it, that's his choice, so...

THE COURT: All right.

(Video recording viewed.)

THE COURT: Is it just video and not audio?

MR. WATKINS: Exactly.

THE COURT: This is the day of the arraignment?

MR. WEINREB: Yes.

THE COURT: Before the arraignment?

MR. WEINREB: Approximately 11:30, and the arraignment was approximately 3:30.

THE COURT: And what determines the scope of this clip? Who decided when to start and when to stop?

MS. CLARKE: It's just the minute or two around that --

THE COURT: It's actually a lot less than that.

MS. CLARKE: Around the camera incident.

THE COURT: Is there a timer? There is at the top.

(Video recording viewed.)

MR. BRUCK: Do you see the problem?

THE COURT: So it's about 36 seconds, it looks like, by the counter. Okay.

MS. CONRAD: May I just note, your Honor, that this still was not provided in discovery. The still was not provided until last week. What was provided in discovery were the entire tapes from that day, not the isolated still. And in addition, if there is going to -- this is going to be presented, in addition to making a request for Mr. Oliveira's reports or statements, I would ask for any logs the marshals kept that day of Mr. Tsarnaev's conduct, any other observations that were made of him that day to put this in context. They had him under observation for an entire day, for about six hours.

MR. WEINREB: Your Honor, this was provided 15 months ago, at the time the discovery request --

THE COURT: I agree that that's discovery. But in terms of *Jencks*, if Oliveira has anything to say about it or I guess maybe anybody else who viewed it that might impeach his testimony about what he saw.

MR. WEINREB: I believe he's being offered just to authenticate this. And the photo speaks for itself. It's really just, This was a fair and accurate photo.

THE COURT: So I think it can be used.

MS. CLARKE: To be clear, I thought Mr. Weinreb suggested that our only objection was it was out of context. We have a more prejudicial and probative objection under the Death Penalty Act as well and --

THE COURT: Okay.

MS. CLARKE: And nobody knows what that bird or peace or whatever shot was to, to himself, to a camera, nobody knows, and it really takes a leap that the government, I think is trying to take unfair advantage of and it will confuse and prejudice the jury. We're already in a place in this case where there's a lot of loss, grief, pain, blood, damage. And to further inflame I think would be inappropriate.

THE COURT: Okay. I think it's admissible. And the video can be shown to contextualize it --

MR. BRUCK: If it's admissible, we want to emphasize this enormous blowup still should not be used in opening.

MR. MELLIN: Your Honor, it's no different than photographs.

THE COURT: I don't see why not. I understand why you don't like it, but I think it's admissible.

MS. CONRAD: I'll take that back if it's not being made part of the record.

MS. CLARKE: Your Honor, it has to be offered for an aggravating purpose in the death penalty, so I gather it's

being offered for lack of remorse?

THE COURT: That's what I infer.

MS. CLARKE: Thank you.

THE COURT: Anything else with respect to the exhibits that are proposed to be used that you want to use?

MS. CLARKE: I'm told that Ms. Pellegrini will use some photographs of the victims in her opening. There are some photographs of the victims in evidence already and she was not sure that they were the same ones, offered us an opportunity to look. But it seems like the Court ought to rule on the admissibility of those photographs if they're not ones that are already in evidence.

MR. WEINREB: Your Honor, they're just innocuous family photographs that don't show anything inflammatory. Just pictures of victims and life.

THE COURT: Yeah. Some number of pictures. I mean, I think it can be overdone. And actually, an issue I had with the montages was that it was just too much. I think photos in the montages can be used, but I think the compiling of the montages was an emotional impact that is separate from the informational value. So I would -- I think there's an objection to that, and I think the montages themselves are a little too emotional, but individual pictures from them can be selected and the witnesses can talk about them.

MR. WEINREB: Right. So we -- one thing we could do

in medical testimony how gravely these people were injured and how close they came to death, we could probably arrange a doctor to examine the films and the medical reports and give testimony about how close they came to death.

MR. BRUCK: It's a little late for that now.

MR. WEINREB: I don't think so.

THE COURT: Let's see how it goes.

MS. CLARKE: Well, Judge, is that a situation where we just have to object?

THE COURT: Yeah, I think so. We'll see what they found -- what the government offers before --

MR. BRUCK: There are some particular -- there's a picture of Mr. Whalley's heel which you cannot -- it's a grievous, hideous injury, and the picture -- I don't know if the Court has seen it.

THE COURT: I have.

MR. BRUCK: You know what I'm talking about. It goes to grievous injury which is not an aggravating factor. It does not tend to show grave risk of death. Whether it did or not, the probative effect of that -- I don't think that's the one you're offering but it's one where the heel is sewed up.

MS. CLARKE: That's 1599.

MR. BRUCK: Is it?

MS. CONRAD: Yeah.

MR. BRUCK: I mean, the prejudicial effect of that so

far outweighs its probative value that I don't think it's a close call under the Federal Death Penalty Act. It wouldn't be a close call under 403.

MR. MELLIN: Your Honor, to the contrary, I think this shows the grave risk of death these people are facing.

MR. BRUCK: Even if it did, that should not come in.

MR. WEINREB: Your Honor, we have a limited number of photos to choose from. Virtually all of them show some kind of -- some body part in some state that could -- is not what jurors are accustomed to seeing. So we have tried to avoid the bloodiest, the goriest, you know, the most shocking and picked ones that are relatively antiseptic. And for Marc Fucarile, for example, the X-ray photos are, by far, the least graphic of the many, many photos of his injuries that are utterly extraordinary in their -- we think the probative impact they would have on the jury but potentially an emotional one.

THE COURT: Well, I think -- I'll assess it as he testifies. We'll just see what the photo will add, if anything, at the time it's offered.

MR. BRUCK: May I ask you, with respect to this same witness, we have been told that he knew this was a terrorist attack because he had been present at a terrorist bombing in the past. We have no further information about that.

MS. CLARKE: In London in the 1970s.

MR. BRUCK: Well, we think that serves no probative

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	Criminal Action
v.	)	No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, April 23, 2015
8:45 a.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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Do you want to do the list?

MR. BRUCK: Well, we've made the objection to the -- the most recent iteration of these survivors' photographs. We objected to a depiction of a couple hundred -- or a very large number of injured people in relatively innocuous settings and fully clothed, and the government has now substituted photos of all 17 amputees displaying their prostheses or amputated limbs. We think that for all of the reasons that we've consistently argued throughout, these are irrelevant to any statutory aggravating factor, they are inflammatory, they are cumulative. Enough is enough.

The jury is going to sentence -- impose a capital sentence to punish for these crimes. As the evidence just gets higher and higher and higher concerning victims that did not die and are not the subject of capital counts. And we just think that we've long since passed the point and certainly would pass it by any reckoning if these -- all of these photographs of 17 amputees are introduced.

In addition, they -- we just learned that the government proposes to offer them through the testimony of one of the amputees talking about these people. She knows them all. They're her friends. And she has suffered with them and endured great trauma with them. It's victim impact testimony. And so it's a way of enhancing the empathy and the emotion from injuries which are not, in the final analysis, the subject of

this sentencing hearing. So we think it's far more prejudicial than probative. It's really just time to focus on the subject of this hearing.

MR. WEINREB: So, your Honor, I'm somewhat mystified as to why we keep being told that the subject of this hearing is the sentencing of the four decedents. Obviously it is, but the government has alleged that the defendant's sentence should be a death sentence because of various aggravating factors, and the aggravating factors don't all necessarily relate just to the four decedents. On the contrary. Many of them specifically relate to people other than the decedents.

In the opposition that we filed last night, we noted five separate aggravating factors to which these photographs are relevant and probative: three statutory aggravating factors and two non-statutory aggravating factors. To the extent that Mr. Bruck's argument is that there's already been evidence of them, that's not a dispositive objection. The question is not simply whether the aggravating factors exist or not, but what weight they should be given in a weighing process that the jury is about to begin.

One of the important aggravating factors in this case was that the defendant terrorized an entire population by committing the crimes in a particular manner, a manner calculated to gratuitously disfigure the decedents' bodies. And the evidence of what happened to people who did not die is

evidence of what he intended to do to the people who did die.

One of the things that made it terrifying was the number of people who were affected by it who were seriously damaged by it. One of the things that made it a particularly heinous crime was the grave risk of death to which he exposed many people who did not actually die.

He picked the marathon as -- one of the aggravating factors we've alleged was that he picked the marathon to commit the crime because it was particularly susceptible to the active effects of terrorism. And all of these photos -- these photos all go to that -- those aggravating factors.

It's true that of these 17 people, 12 of them have testified, but five of them haven't. And the 12 who testified, I don't believe it is the case, as Mr. Bruck argued in his motion, that the jury had ample opportunity to actually see with their own eyes that these individuals now are fated to live their lives with prosthetic limbs. The jury's view of them was blocked first by the people in the audience, then by counsel and the tables that obscured -- or clips their view of them, and then by the walls of the jury box itself. The purpose here -- and furthermore, they saw them interspersed with other witnesses over the course of a seven-week presentation of evidence. The goal here is to emphasize a particular point which is that this was an offense that occurred that involved all of these people.

These pictures are -- were selected precisely to minimize any prejudicial impact that they might have. They are pictures mostly of people smiling, showing their resilience, in spots that are conducive to a belief among the jurors that they still are capable of finding happiness in their lives. It basically just emphasizes to them the magnitude of the crime without inflaming them, without being particularly emotional, without seeking to arouse their passions. And therefore, we think that the probative value really does outweigh any danger of unfair prejudice.

THE COURT: Yeah. No, I think they, among other things, summarize points the government is entitled to make. They are not themselves inflammatory except for the fact that they show people with prosthetic limbs. But I've looked at all of them before this.

There is one minor issue. I believe it's Kensky appears twice.

MR. MELLIN: Correct. She's only going to appear once, your Honor. We've removed the other one.

THE COURT: So she's only going to be in the one with her husband?

MR. MELLIN: She's going to be in the one with her husband, correct.

MR. BRUCK: There are a couple more things. Does the government still intend to put photographs of Martin Richard

consider.

THE COURT: Is there any intention to do that?

MS. CONRAD: No.

MR. BRUCK: No.

MS. CLARKE: We do have a concern about victim impact being put in through an FBI official. She may not be an agent but she works for the FBI, and that seems inappropriate. If the Richard family, in fact, did not want to participate in the penalty phase, an FBI official shouldn't be permitted to put in victim impact that they themselves did not want introduced.

THE COURT: I don't think that's a principle I would endorse, that they couldn't do it in this phase where the rules of evidence are relaxed. If the photos can warrantably be found to be what they say they are, then I think they're admissible.

MR. BRUCK: One last point of record-keeping very briefly. We wanted to put on the record that during Ms. Pellegrini's opening statement, she displayed the cell block photograph in what appeared to be a 4-by-3 foot blowup between equally large blowup photograph displays of all four of the homicide victims of this case on easels directly in front of the jury, so it's our view that the prejudicial effect of what we think was an out of context and, therefore, quite distorted still from the cell block was greatly enhanced and its inflammatory effect was greatly enhanced by its

juxtaposition between these very attractive and touching photographs of the victims in life. And I wanted the record simply to reflect that that was, in fact, the way that all three -- the cell block video and the victim photographs were displayed at the end of the closing -- of the opening statement.

MS. CLARKE: Your Honor, one last thing on Dr. King: There was some mention of having treated two victims, and I think we got that kind of blurred up with testimony about the three deceased victims, but we have received no reports by Dr. King or medical records of those two people; in fact, as Mr. Bruck said, we just learned that he was going to testify about them minutes ago.

MR. WEINREB: So that's the two to whom I was referring when I said those records are not in our possession, custody or control. So he treated them in the course of his ordinary work at the hospital on that day, not as an expert for us who was providing records.

THE COURT: Is he going to describe the treatment of them in particular?

MS. PELLEGRINI: Not specifically the treatment but as it relates to -- of course Marc hasn't testified yet, but as it relates to, for example, with Roseann's injuries that she has already testified about and which there is photographic evidence of, how that relates to grave risk of death, what

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Criminal Action
v.	)	No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED LOBBY CONFERENCE

Excerpted from Day 57 of Jury Trial

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Thursday, May 7, 2015
12:38 p.m.

Cheryl Dahlstrom, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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MS. CLARKE: The last thing is I don't think the Court has ruled on the Waltham issue.

THE COURT: Yeah. The motion is denied for the usual reasons. It's been denied before, basically. That's one reason, that it's not really new matter. I'm not sure that I straight up have the authority to order the state authorities to give me their law enforcement materials. I don't know. Maybe I do. But, in any event, I think the law enforcement privilege applies.

11:56 MS. CONRAD: Certainly, the Court has the authority to order a police department --

THE COURT: I don't know. In a case where the police department is in front of me, I agree. It's a separate --

MS. CONRAD: Internal Affairs files for a witness, Boston police officer witness, done all the time.

THE COURT: That's because the officer is in front of me. Anyway, I don't want to debate it. There are multiple reasons why the motion is denied. Most of them you're familiar with.

11:56 MR. CHAKRAVARTY: Your Honor, there's one quick thing. I'm not sure whether we want to ask for this, but for purposes of -- if we -- the last defense witness testifies, we may want to do our own investigation of the witness. And to the extent that the witness is going to testify about contact she had with the defendant, then we want to make sure we're not running

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Criminal Action No. 13-10200-GAO
DZHOKHAR A. TSARNAEV, also known as Jahar Tsarni,	)	
Defendant.	)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED

LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, May 12, 2015
2:42 p.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
(617) 737-8728

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anyway, so I'd like to get an earlier start and resolve things before we do that.

(Interruption in the proceedings.)

MR. BRUCK: I guess this is why we have lobby conferences in the lobby.

THE COURT: All right. I shut it off and I don't know how to turn it on. We're trying to solve the music problem, the music dipping in volume, and the IT people were working on it. So just speak louder. Sorry.

00:03 So 8:30 in the morning we can iron out any last-minute issues. Just to highlight a couple of those items, though, that I think are perhaps more important, I am not going to instruct on the effect of the lack of unanimity. They will have the option, obviously, to indicate they are not unanimous, but I'm not going to tell them what the effect of that will be.

MR. BRUCK: I recognize the Court has ruled, but could we be heard on this issue?

THE COURT: Well, you have. I mean, I've read the papers. And I appreciate that a number of courts have done it.

00:04 I read Judge Wolf's explanation in *Sampson*. I respectfully disagree with it. I think that the policy should encourage unanimity, encourage it to the extent it is possible conscientiously in each juror's sound judgment. And I think to suggest that this could be a truncated process by one juror simply deciding that the decision was his or hers I think

undercuts what is the process anticipated by the statute, so...

MR. BRUCK: Well, as a fallback position, your Honor, Judge Sand proposes a -- not in the form that we submitted, but in the form that is in his Instruction 9A-20 proposes an instruction which says that if the jury -- well, I'll just read it, because it both does not mislead the jury, or allow the jury to be misled, and requires unanimous verdict as to either verdict. And he does it in this way: He would tell the jury "If, after engaging in the balancing process I have described

00:05 to you, all 12 members of the jury do not unanimously find beyond a reasonable doubt that the defendant should be sentenced to death, then you may not impose the death penalty," which of course is uncontroversial.

THE COURT: Right.

MR. BRUCK: "In that event, Congress has provided that life imprisonment without any possibility of release is the only alternative sentence available. If the jury reaches this result, you should do so by unanimous vote and indicate your decision in Section..." so forth of the special verdict form.

00:06 So it preserves -- it follows the -- what's really only a recommendation of *United States versus Jones*, but it doesn't have the terrible vice which is more present in this case than perhaps any other that has ever been tried under the Federal Death Penalty Act of coercing the jury into unanimity by causing the minority jurors to feel -- to assume, as they

will, that if they don't go over to the majority, this entire traumatic process will have to be repeated, and the victims and the family members and the government and the law enforcement and the entire community will have to go through this again because one, two or three jurors did not surrender their vote and go with the majority.

That's what the jury's going to think. And there's pressure in any case, and the law doesn't necessarily condemn that, but in this case the coercive effect of that misconception -- and it is a misconception -- is far more powerful than any -- any erroneous deadlock instruction or *Allen* charge that could ever be given in a normal criminal case. It will be overpowering. No one will have the ability to hold on to their conscientiously held belief in the face of that misconception. And of course it is a misconception.

So this proposal by Judge Sand is a middle ground, and it simply tells the jury, just as the jurors were told in voir dire -- and as the government was careful to point out, to jurors who were weak on the death penalty in voir dire -- that if it's not unanimous, you know, there's no death penalty, it says that. And then it says that if that's where you come to rest, then by unanimous vote indicate that the life sentence, which is the other alternative, is the option you've reached.

There is no misconception. It is accurate. It, as Judge Sand says in his comments, upholds the preference for

unanimous verdicts while at the same time not subjecting holdout jurors to that tremendous pressure which, as I say, will be exponentially greater in this case than in any other.

This is -- the case comes down to this instruction, I think. I mean, *Sampson* -- the *Sampson* case resulted in a death verdict even with this instruction. So it hardly makes, you know, the government's burden all that heavier, but it makes our burden extremely unfairly heavy because we have to overcome the false belief that if this juror can't agree -- if this jury can't agree, everything will have to start from the beginning again with a new jury.

The sense of public failure, of failing to do their job, of having been entrusted with this high responsibility for this community and having failed to discharge it, will be overpowering. And it's all based on a false assumption, that this case is like every other, when it's not. It's different from every other. So we really implore the Court to consider using Judge Sand's middle-ground instruction.

MS. CONRAD: May I just confer with Mr. Bruck for one second?

(Counsel confer off the record.)

MR. BRUCK: Thank you.

THE COURT: Anything from the government? No?

Well, I think the concern is addressed more properly at the -- with a very strong instruction about each individual

juror must give his or her own and not agree just to agree with others. I think that's the place where that danger can be satisfied.

MR. BRUCK: In that case --

THE COURT: It's a balance. I acknowledge. I mean, I understand the considerations, but I think they're considerations in the direction that I've been persuaded to as well, and so we'll...

MR. BRUCK: In that connection, defense counsel has planned to argue this point to the jury in argument.

THE COURT: No. That would be improper. If I am refraining from instructing on it, it's improper to argue on it.

MR. BRUCK: Well, if we may for the record have the record reflect that in addition to all the arguments that we've advanced in favor of the instruction, we also submit that ordering defense counsel from -- to refrain from informing the jury of the consequences of a deadlock has the further constitutional harm of violating the defendant's Sixth Amendment right under *Herring versus New York* to a full closing argument and the assistance of counsel at the -- in summation.

THE COURT: I don't think that could be true in the light of *Jones*.

MR. BRUCK: I must say that at oral argument one time on one of these *Simmons* cases, I was berated by Justice Scalia

for not having raised that precise claim rather than the claim I was actually raising. So I've resolved that next time we're going to raise it.

THE COURT: Okay.

I think the next thing I'd like to address is the government's -- which I think it's a recent -- second motion to strike or modify certain mitigating factors. I guess that was filed today?

MR. WEINREB: Yes, your Honor.

00:12 THE COURT: Last night? Today?

MR. WEINREB: We received the mitigating factors yesterday.

THE COURT: Yesterday. Okay.

MR. WEINREB: So we filed this today.

THE COURT: Though you have a response.

Let me say that I guess -- let me give you my disposition before hearing from people, is that what is identified as Mitigating Factor 19, which is this -- which is the proposition that if he's not sentenced to death, the only 00:12 other punishment will be imprisonment for the rest of his life without the possibility of release, I think we've talked about it in the past. I regard that as a proposition of law and not a factor to be proved. It is true, but I don't think it's something the jury has to consider. So I would be inclined to strike that.

As to the others, I think that the general structure and gist of the statute is to allow the defendant pretty much to propose anything that might be found to be mitigating, and I don't think there's -- should be much policing of those propositions as long as they're matters of fact that could be determined from the evidence. So I would be inclined not to strike anything else. If you want to come back at any particular one...

So the distinction I draw is between what is really not a mitigating fact but a mitigating proposition of law, on the one hand, which I think is not proper for consideration, and mitigating possible facts that -- as to which there would be dispute how mitigating they were if they were true, so...

MR. WEINREB: Well, your Honor, with that guidance in mind, although I think there's a very good argument that the cases make clear that mitigation may be broad, but it's not an empty vessel that you can just pour anything into. It's not a rubric for everything. I'll focus my attention on a couple of things, and that is the way that some of these are worded.

So we object to the way some of these are worded because they essentially state several propositions. They sort of bundle two or three propositions into a single mitigating factor, but they phrase one or two of them as if they're already true and then ask you -- ask the jury to find if the third is true. And that's an improper way of essentially

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

ORDER
November 27, 2013

O'TOOLE, D.J.

In accordance with a schedule established by Magistrate Judge Bowler, the government provided automatic discovery materials specified in Local Rules 116.1 and 116.2 to the defendant on or before September 3, 2013. Pursuant to Local Rule 116.3, the defendant made written requests for additional discovery on September 23, 2013, to which the government replied by letter on September 30, 2013. Dissatisfied with the government's reply, the defendant moved to compel the government to provide information responsive to nine discovery requests. The defendant contends that he is entitled to such information either under Brady v. Maryland, 373 U.S. 83 (1963), and following cases, or Federal Rule of Criminal Procedure 16, or both. The government asserts that it has fully complied with its present discovery obligations.

I. Discovery under *Brady*

In a line of cases beginning with Brady, the Supreme Court has made clear that the prosecution in a criminal case has an affirmative duty to disclose information in its possession that is favorable to the defendant and material to the question of guilt or punishment. See Kyles v. Whitley, 514 U.S. 419, 432-33 (1995) (summarizing cases). See also United States v.

Prochilo, 629 F.3d 264, 268 (1st Cir. 2011). Evidence is "material" for these purposes only if there is a reasonable probability that it could affect the outcome of the trial. United States v. Bagley, 473 U.S. 667, 682 (1985). Such information is commonly referred to as "Brady material." Generally speaking, Brady material falls into one of two categories–that which tends to be more or less directly exculpatory in that it casts doubt on the defendant's guilt, and that which is indirectly exculpatory in that it tends to impeach the reliability of other prosecution evidence. Under this Court's Local Rules, the government must provide directly exculpatory material and some impeachment material as part of its automatic discovery, see L.R. 116.2(b)(1), and other impeachment material no later than 21 days before trial, unless otherwise ordered, see L.R. 116.2(b)(2). The government's obligation to provide Brady material to the defendant is ongoing.

The object is to assure that the defendant ultimately receives a fair trial, as required by the constitutional guarantee of due process. "Brady disclosure is a *trial* right. The principle supporting Brady was avoidance of an unfair trial to the accused." United States v. Pray, 764 F. Supp. 2d. 184, 189 (D.D.C. 2011) (internal quotation marks omitted). Accordingly, to satisfy the constitutional principle, Brady information need only be disclosed "in adequate time for the information to be used effectively by the defense at trial." United States v. Brassard, 212 F.3d 54, 56 (1st Cir. 2000). Our Local Rules aim to regularize the timing of discovery obligations and thereby reduce unnecessary motion practice, but they do not alter the constitutional rule. Moreover, they allow for the alteration of timetables by order of the Court as may be appropriate. See L.R. 116.1(e), (f).

The defendant argues that in some potential death penalty cases courts have permitted discovery of information that may be favorable to the defendant as mitigation evidence as early as possible so that it may be used in conjunction with participation in the Department of Justice's

death penalty authorization procedures. The government's position is that the defendant's request for mitigation-related information is premature, as its discovery obligations are directed toward the trial of the case, not the Department's internal deliberations. There is some merit to both contentions, but the question of the timing of any disclosures is secondary to the prior question whether the government possesses Brady material that it has not produced.

The government has asserted that it has diligently reviewed the materials it has gathered regarding the prosecution of the defendant and has provided to him all materials that it has determined fall within the scope of its obligation under Brady and related cases. There is no indication that its representation to this Court is not made in good faith. The defendant has not offered any information tending to show that the government possesses specific Brady material that it has withheld from disclosure.

"There is no general constitutional right to discovery in a criminal case, and Brady did not create one." Weatherford v. Bursey, 429 U.S. 545, 559 (1977). "The government is primarily responsible for deciding what evidence it must disclose to the defendant under Brady." Prochilo, 629 F.3d at 268 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 59-60 (1987)). "And at least where a defendant has made only a general request for Brady material, the government's decision about disclosure is ordinarily final–unless it later emerges that exculpatory evidence was not disclosed." Id.

The defendant's requests for further production are not specific and targeted but rather broad and categorical. They call for the production of "all documents" in various categories (requests 5, 7, 8, and 9), "all information and documents" in another (request 1), "complete immigration A-files" (request 2), and similarly encompassing requests for various reports, transcripts, and the like (requests 3 and 4). His general argument is that if given access to all of

these materials, he will be able to find evidence favorable to his mitigation case. That argument turns the Brady doctrine on its head. Under Brady and following cases, it is the government's responsibility to identify and provide exculpatory material in its possession, an obligation that is enforceable by vacation of a conviction obtained when a breach of that obligation is demonstrated. While it is no doubt true that "the eye of an advocate may be helpful to a defendant in ferreting out information," nonetheless, "[u]nless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the [government]'s files to argue relevance." Ritchie, 480 U.S. at 59.

In some circumstances a defendant might point to particular information in the government's possession and argue that it is exculpatory and material in the necessary Brady sense, despite the government's implicit or articulated view to the contrary. The Court could then review the identified information in camera to resolve the dispute. See Prochilo, 629 F.3d at 268. But in seeking an in camera review, the defendant cannot rely on "mere speculation," but rather must "be able to articulate with some specificity what evidence he hopes to find in the requested materials, why he thinks the materials contain this evidence, and finally, why this evidence would be both favorable to him and material." Id. (citation omitted). The defendant has not made such a showing as to any of the categories in his present motion.

II. Discovery under Federal Rule of Criminal Procedure 16(a)(1)(E)

Separate from constitutionally required disclosure by the government of exculpatory material, Rule 16 of the Federal Rules of Criminal Procedure requires the prosecution in a criminal case to provide certain information in its possession to the defense:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible

objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;
(ii) the government intends to use the item in its case-in-chief at trial; or
(iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E). The defendant argues that the materials he seeks by his present motion constitute "item[s] . . . material to preparing the defense" within the meaning of subpart (i) of this Rule because the materials will help him prepare his mitigation case. The government responds that the defendant has not shown that the requested information is "material" in the necessary sense.

Before getting to that main issue, there is a minor skirmish to be addressed. The government argues that the "defense" referred to in the rule is defense to the government's case for conviction, not a defendant's arguments regarding punishment. In making the argument, the government cites United States v. Armstrong, where the Supreme Court held that a claim of selective prosecution by the defendant was not part of his "defense" within the meaning of the discovery provision, because the rule referred to a defense to the government's case in chief, and the defendant's claim of selective prosecution was a collateral attack on the indictment. 517 U.S. 456, 462-63 (1996). Considering Armstrong, the Sixth Circuit has held that the "defense" referred to in the rule does not encompass sentencing hearings. United States v. Robinson, 503 F.3d 522, 531-32 (6th Cir. 2007).

In a non-death penalty case, it may well be appropriate not to extend Rule 16(a)(1)(E)(i) to require pretrial disclosure of information that is material only to sentencing. However, sentencing in a federal death penalty case is unique in that it involves a hearing "before the jury that determined the defendant's guilt." 18 U.S.C. § 3593(b)(1). The penalty phase is a part of the bifurcated trial. United States v. Catalan Roman, 376 F. Supp. 2d 108, 113 (D.P.R. 2005)

(collecting cases). Therefore, I conclude that in the context of a death-eligible case, discovery under Rule 16(a)(1)(E)(i) includes information material to defense preparation for the penalty phase.

Now the main dispute. The information requested to be produced must be "material" to the defense, and the defendant bears the burden of making a "prima facie showing of materiality." United States v. Bulger, 928 F. Supp. 2d 305, 324 (D. Mass. 2013) (quoting United States v. Carrasquillo-Plaza, 873 F.2d 10, 12 (1st Cir. 1989)). "[T]he requested information must have more than an abstract relationship to the issue presented; there must be some indication that the requested discovery will have a significant effect on the defense." Id. (internal quotation marks omitted). In the Rule 16 context, materiality depends on "not only the logical relationship between the information and the issues in the case, but also the importance of the information in light of the evidence as a whole." In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, 125 (2d Cir. 2008) (citation omitted). In other words, the information sought must not only be relevant (having a logical relationship to the issues), it must also be material, that is, having some significant tendency to "alter the quantum of proof in [the defendant's] favor." United States v. Zhen Zhou Wu, 680 F. Supp. 2d 287, 290 (D. Mass. 2010) (quoting United States v. Ross, 511 F.2d 757, 763 (5th Cir. 1975)).

The defendant has not made a prima facie showing of materiality under Rule 16(a)(1)(E)(i) as to any of his discovery requests. Instead, he relies on general assertions. As an example, he contends that material found in the immigration A-files of family members will help in presenting his full life history.[1] Again, he conflates relevance and materiality. Rule 16 does

[1] The defendant cites the statement in Tennard v. Dretke, 542 U.S. 274, 285 (2004), that penalty-phase mitigation evidence has "virtually no limits." The point is inapposite. In Tennard, the Court

not require the pretrial disclosure of all evidence relevant to the defense, but only such relevant evidence as is material.

What the standard is for assessing materiality under Rule 16(a)(1)(E)(i) is somewhat unsettled. See United States v. Pesaturo, 519 F. Supp. 2d 177, 190 (D. Mass. 2007). Some courts have concluded that it "essentially tracks the Brady materiality rule." United States v. LaRouche Campaign, 695 F. Supp. 1290, 1306 (D. Mass. 1988). Others have had an arguably more latitudinarian view. See United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993) (stating that "evidence is material as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal") (quoting United States v. Felt, 491 F. Supp. 179, 186 (D.D.C. 1979)). Still others seem to cite both articulations, as if there was no substantial difference between them. See United States v. George, 786 F. Supp. 56, 58 (D.D.C. 1992).

The defendant has not made a prima facie showing of materiality under any of these formulations. He essentially seeks access to the government's information haystack because he is confident there are useful evidentiary needles to be found there. That is simply not enough to trigger a disclosure obligation under Rule 16(a)(1)(E)(i). Contrast the generality of the defendant's presentation here with the very specific showing of materiality made in Pesaturo. In that case, the defendant presented detailed information in support of his claim to the discoverability of the identity of a non-testifying informant. 519 F. Supp. 2d at 181-83. There is not a similar showing here.[2]

was assessing the "constitutional relevance" of evidence of mental retardation in a penalty-phase trial. It did not address the question of materiality under Rule 16.

[2] In request 9, the defendant seeks "[a]ll documents concerning the investigation of the 2011 triple homicide in Waltham, MA, on September 10-11, 2011." In addition to the reasons discussed in the text as to all his requests, this request should also be denied because of the qualified "law

The defendant also contends that certain materials are discoverable under Rule 16(a)(1)(E)(ii) as items that the government "surely" intends to use in its case in chief. The government represented at oral argument that it has produced all such items. I accept that representation in the absence of any specific indication to the contrary. As noted, the government's discovery obligations are ongoing, and if it later appears that the government has not produced material covered by Rule 16(a)(1)(E)(ii), the matter can be revisited.

III. Discovery under Federal Rule of Criminal Procedure 16(a)(1)(B)

In request 6, the defendant seeks production of all "[a]udio recordings of telephone calls from FMC Devens and reports/transcripts concerning/comprising those calls if/as they are created" under Rule 16(a)(1)(B), which states that:

> Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing . . .
>
> (i) any relevant written or recorded statement by the defendant if:
>
> • the statement is within the government's possession, custody, or control; and
>
> • the attorney for the government knows--or through due diligence could know--that the statement exists . . . .

Fed. R. Crim. P. 16(a)(1)(B)(i). The government has responded that while it is obliged only to produce "relevant" recorded statements by the defendant, it will voluntarily produce reports or transcripts of his calls on a periodic basis.

In light of that position, the only distance between the parties is that the defendant seeks the audio recordings of the defendant's phone calls, not just reports or transcripts. Because the actual audio recording may convey information beyond the meaning of the words themselves as they appear in a transcript, such as vocal inflection, I agree with the defendant that the recordings

enforcement investigatory privilege," which protects from disclosure investigative files in an ongoing criminal investigation. See Cabral v. U.S. Dep't of Justice, 587 F.3d 13, 23 (1st Cir. 2009). The defendant has not articulated a specific need for these privileged materials, much less a need which overrides the need to keep confidential the details of an ongoing investigation.

are the "best evidence" in full of his statements and should be disclosed to him. Accordingly, I grant the motion insofar as it seeks production of the recordings, subject to the following limitation. Unless otherwise ordered by the Court, the audio recordings are to be accessible only to the defendant himself and defense counsel with an appearance in the case, in order to guard against accidental public dissemination. I add this limitation not because of any Special Administrative Measure imposed by the Bureau of Prisons, but as a modest precaution in aid of the eventual selection of a fair and impartial jury.

The government shall disclose to the defendant and make available for inspection or copying any recordings of the defendant's telephone calls on a rolling basis, as such recordings are made, to the extent that the recorded statements are relevant either to the crimes charged or sentencing.

IV. Conclusion

For the foregoing reasons, the defendant's Motion to Compel (dkt. no. 112) is GRANTED only as to Defense Request #6 and is otherwise DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

ORDER
April 17, 2014

O'TOOLE, D.J.

The defendant's discovery motions (dkt. nos. 233, 235) are DENIED with the exception that reports of Ibragim Todashev's statements to the FBI are to be submitted to the Court for in camera review in a way that indicates: (a) what will be produced to the defendant, and (b) what the government seeks to withhold from production.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA v. DZHOKHAR TSARNAEV	No. 13-CR-10200-GAO

MOTION TO SUPPRESS STATEMENTS

Defendant, Dzokhar Tsarnaev, by and through counsel, respectfully moves that this Court suppress all statements that he made to law enforcement agents while he was hospitalized at Beth Israel Deaconess Medical Center. The agents began interrogating him approximately 20 hours after he arrived at the hospital. They questioned him on and off over a period of 36 hours, despite the fact that he quickly allayed concerns about any continuing threats to public safety, repeatedly requested a lawyer, and begged to rest as he recovered from emergency surgery and underwent continuing treatment for multiple and serious gunshot wounds.

Suppression is required for the following reasons:

1) The statements were involuntary, *see Mincey v. Arizona*, 437 U.S. 385 (1978);

2) The so-called "public safety exception" does not permit admission of the statements; and

3) The delay in presenting Mr. Tsarnaev to a court, for the purpose of prolonging interrogation without counsel, violated his due process rights.

Facts

In the early morning hours of April 19, 2013, Mr. Tsarnaev was shot and his brother, Tamerlan, was killed during a gun battle in the streets of Watertown. Mr. Tsarnaev fled. He was arrested some 20 hours later, after suffering multiple gunshot wounds when police unleashed a

barrage of bullets into the boat where he was hiding, unarmed. Before he surrendered to law enforcement, he also was subjected to a number of "flash-bang" grenades, designed to disorient a suspect.

Mr. Tsarnaev was transported by ambulance to Beth Israel Deaconess Medical Center ("BIDMC") at approximately 9 p.m. on April 19. He was in critical condition, with numerous serious injuries from gunshot wounds to his head, face, throat, jaw, left hand, and both legs.[1] Although oriented upon arrival, Mr. Tsarnaev's mental status suddenly declined and he required intubation to keep him alive during the initial examination of his injuries. After being stabilized, he underwent emergency surgery to address life-threatening wounds. At about 7 a.m. on April 20, he was transferred to the Surgical Intensive Care Unit. He was given narcotic pain medication throughout the following days.

The news media publicized Mr. Tsarnaev's arrest and hospitalization around the world. Many of these news accounts highlighted federal officials' announcement that they intended to interrogate him without first giving him constitutionally-required Miranda warnings. *See, e.g.*, ABC News, "Feds Make Miranda Rights Exception for Marathon Bombing Suspect Dzhokhar Tsarnaev" April 19, 2013, http://abcnews.go.com/blogs/politics/2013/04/next-for-bombing-suspect-high-value-detainee-interrogation-group/.

Agents from the FBI "High Value Interrogation Group" began questioning Mr. Tsarnaev at 7:22 p.m. on April 20. *See* FBI 302 report dated April 21, 2013 (filed under seal as Exhibit 1S), at 6-7; agent notes dated April 20, 2013 (filed under seal as Exhibit 2S). The interrogation continued, with breaks ranging from 30 minutes to 3 hours and 13 minutes, until 7:05 a.m. the next day. *Id.* The agents resumed interrogation at 5:35 p.m. on April 21, and continued, with

[1] The description of Mr. Tsarnaev's medical condition and treatment is based on a review of records from the Beth Israel Deaconess Medical Center.

breaks of varying lengths, until 9:00 a.m. the following day, April 22, when counsel was appointed to represent Mr. Tsarnaev. FBI 302 Report dated April 22, 2013 (filed under seal as Exhibit 3S), at 8-9; agent notes dated April 21, 2013 (filed under seal as Exhibit 4S). A complaint charging Mr. Tsarnaev with crimes carrying a potential death sentence had been filed the previous evening, under seal. *See* DE 1, 3. Throughout the time that Mr. Tsarnaev was being questioned, lawyers from the Federal Public Defender's Office repeatedly asked the court to appoint them to represent Mr. Tsarnaev.

Before interrogation began, two lawyers from the Federal Public Defender Office and a private lawyer who had been appointed by the state public defender's office (pursuant to its authority to assign lawyers before charges are filed in homicide cases) attempted to meet with Mr. Tsarnaev at the hospital. They were turned away by FBI agents, who refused to accept a letter to Mr. Tsarnaev notifying him of counsel's availability. *See* Affidavit of Charles P. McGinty ("McGinty Aff."), attached as Exhibit 1. One of the agents insisted, nonsensically, that Mr. Tsarnaev was not in custody. *Id*.

Hospital records show that Mr. Tsarnaev suffered gunshot wounds, including one to the head, which likely caused traumatic brain injury. Following emergency surgery, Mr. Tsarnaev was prescribed a multitude of pain medications, including Fentanyl, Propofol and Dilaudid.[2] The side effects of these medications include confusion, light-headedness, dizziness, difficulty concentrating, fatigue, and sedation. Damage to cranial nerves required that his left eye be

[2] The FBI reports state that, according to two nurses, Mr. Tsarnaev was taking only "phenatyl" (presumably Fentanyl) and antibiotics. The medical records reflect that Mr. Tsarnaev received Dilaudid during this time period and may have received Propofol as well. "Fentanyl, which is used to relieve severe pain and is often given to end-stage cancer patients, can be as much as 40 times more powerful than heroin and 100 times more powerful than morphine." Brian MacQuarrie, *Deadly opioid Fentanyl confirmed in Boston overdose*, Boston Globe, April 30, 2014, *available at* http://www.bostonglobe.com/metro/2014/04/29/fentanyl-deadly-opiod-confirmed-boston-overdose/LVVkH6Jzng1CJypurWWM1L/story.html .

sutured shut; his jaw was wired closed; and injuries to his left ear left him unable to hear on that side. Although apparently able to mouth words when asked about his medical condition by hospital staff, he was unable to talk, in part because of a tracheotomy. He was handcuffed to the bed railing and under heavy guard.

A "high powered" gunshot wound had fractured the base of his skull. *See* transcript of April 22, 2013 testimony of Dr. Stephen Odom, at 4, DE 13. This injury would likely have caused a concussion. Immediately before the initial appearance on April 22, Dr. Odom, who was treating Mr. Tsarnaev, described his condition at that time — approximately 36 hours after the agents began their interrogation and two hours after it ended — as "guarded." *Id*. Mr. Tsarnaev had received Dilaudid, a narcotic painkiller, at 10 a.m. on April 22. *Id.*

The first interrogation began at 7:22 p.m. on April 20 and continued through the night until 7 a.m. on April 21. Exhibit 1S, 2S. Mr. Tsarnaev wrote answers to questions in a notebook because he was unable to speak. These notes reflect his attempt to respond to urgent questions (he assured the agents that no public safety threat remained), as well as his poor functioning and limited cognitive ability. On the first page, he wrote his address in Cambridge incorrectly the first time. *See* notes (filed under seal as Exhibit 5S). His next note assured the agents that there were no more bombs. On the fourth page, he wrote, "is it me or do you hear some noise," an indication of how those injuries were interfering with his cognitive processes.[3] The notes contain repeated requests to be allowed to rest and for a lawyer.

Interspersed with these pleas are his assurances that no one other than his brother was involved, that there was no danger to anyone else, and that there were no remaining bombs. In all, he wrote the word "lawyer" ten times, sometimes circling it. At one point, he wrote, "I am

[3] It is unclear whether Mr. Tsarnaev was hearing actual sounds or experiencing auditory hallucinations at that point. A later note reads, "whats that noise, she made it stop can you tell her please".

tired. Leave me alone. I want a l[illegible]." His pen or pencil then trails off the page, suggesting that he either fell asleep, lost motor control, or passed out. At least five other times in these pages, he begged the agents to leave him alone and to let him sleep. He also wrote, "I'm hurt," "I'm exhausted," and "Can we do this later?" At one point, he wrote, "You said you were gonna let me sleep." Another note reads, "I need to throw up."

According to the FBI report regarding the interrogation on April 20-21, Exhibit 1S, Mr. Tsarnaev "asked to speak to a lawyer on multiple occasions" sometime between 8:35 pm and 9:05 pm on April 20. "JAHAR was told that he first needed to answer questions to ensure that the public safety was no longer in danger from other individuals, devices, or otherwise." *Id.* The reports omit any mention of Mr. Tsarnaev's repeated pleas for sleep.

Mr. Tsarnaev also asked the agents several times about his brother, who, by the time of questioning, had been dead for nearly 48 hours. It is apparent that the agents falsely told him that Tamerlan was alive. One of Mr. Tsarnaev's notes reads: "Is my brother alive I know you said he is are you lying Is he alive? One person can tell you that." Exhibit 5S. Another asked: "Is he alive, show me the news! Whats today? Where is he?" *Id.* In his last note,[4] Mr. Tsarnaev wrote, "can I sleep? Can you not handcuff my right arm? Where is my bro Are you sure." *Id.*

Despite Mr. Tsarnaev's entreaties to be left alone, allowed to rest, and provided with a lawyer, the agents persisted in questioning him throughout the night and into the morning of April 20. The FBI report and notes makes it clear that the interrogation was wide-ranging, covering everything from how and where the bombs were made to his beliefs about Islam and U.S. foreign policy, as well as his sports activities, future career goals, and school history. The interrogation resumed on the afternoon of April 21. *See* FBI report dated April 22, Exhibit 3S;

[4] The notes do not contain any indication of when they were written. Apart from the sequence in which they were provided, it is impossible even to determine on what day they were written.

Agent notes, Exhibit 4S. This second round of interrogation covered many of the same topics as the first one, eliciting a detailed description of the brothers' activities during the days after the bombings.

It is hard to ascertain exactly what questions the agents posed, since their reports simply summarize his statements in a continuous narrative format and their notes reflect only a few questions. In keeping with its controversial and much-criticized practice, the FBI chose not to make any audio or video recording of the questioning. Such a recording would have permitted the Court to assess Mr. Tsarnaev's condition and functioning, to hear the actual words he used and the way he used them, and to verify the sequence of events. Instead, the FBI reports reconfigure Mr. Tsarnaev's statements into an unbroken narrative. Mr. Tsarnaev's handwritten notes provide a much clearer picture of the circumstances of the interrogation than the 302 reports do.

At 6:45 p.m. on Sunday evening, April 21, a criminal complaint was filed under seal. DE 3. However, counsel were not appointed until the next morning. It was only at that point that the agents ceased interrogation.

Argument

I. THE STATEMENTS WERE NOT VOLUNTARY AND THEREFORE MUST BE SUPPRESSED.

Any use of an involuntary statement against a defendant is a denial of due process. *See Mincey v. Arizona*, 437 U.S. 385, 398 (1978). A statement is involuntary if it was not "the product of a rational intellect and a free will." *Townsend v. Sain*, 372 U.S. 293, 306 (1963) (quoting *Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). The government bears the burden of proving that any statements it seeks to introduce were made voluntarily. *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

B. Tsarnaev's physical and mental condition during questioning

Following Tsarnaev's arrest he was taken directly by ambulance to Beth Israel hospital in Boston. He arrived at approximately 9:00 p.m. According to medical records, he was awake, alert, and conversing fluently both during the ambulance ride and at Beth Israel. He had no internal injuries, and his psychological condition appeared normal. Shortly after his arrival, his mental status began to decline and he was intubated, but after receiving a single unit of blood he quickly stabilized. He was given pain medication, examined by various doctors, and then transferred to the operating room for treatment of multiple gunshot wounds. He underwent surgery to repair his wounds, which was successful.

On April 20, 2013, at approximately 5:00 a.m., Tsarnaev was transferred to the surgical intensive care unit to begin his recovery. He spent the next 14 hours sleeping, resting, and receiving care. By 6:30 p.m., according to a note in his chart, he had been weaned off propofol, a short-acting sedative that normally wears off quickly, and was receiving only Fentanyl for pain. At 11:30 p.m. that night, the Fentanyl was discontinued, and Tsarnaev was given Dilaudid as needed for pain. At 6:00 a.m. the next morning, a nurse noted on Tsarnaev's chart, "Pain adequately controlled with low doses of Dilaudid." Tsarnaev signed informed consent forms for various procedures on April 21 at 4:00 a.m., 7:15 a.m., and 2:30 p.m.

Two FBI agents started interviewing Tsarnaev on April 20 at 7:22 p.m., nearly 24 hours after he arrived at the hospital. Before they began, the nurse overseeing Tsarnaev's care informed them that the interview would pose no medical risk to him. The nurse also told them that Tsarnaev had suffered no brain injuries and that his only medications at that time were an antibiotic and Fentanyl, neither of which, at their current dose, would inhibit his mental faculties. The agents then introduced themselves to Tsarnaev, and he confirmed that he could hear and understand them, could respond to them notwithstanding his tracheostomy, and was not in too much pain. (The agents

sought and obtained these same assurances a second time at the beginning of the second day of questioning.)

The interview proceeded as follows:

Questioning	Rest/sleep/medical treatment
43 min	30 min
30 min	90 min
45 min	140 min
67 min	197 min
65 min	10hrs, 30 min
60 min	80 min
83 min	27 min
45 min	15 min
35 min	125 min
50 min	17 min
13 min	112 min
43 min	90 min
75 min	19 min
36 min	End

Tsarnaev was able to speak despite his tracheostomy by covering it. To spare him the effort, the agents began by asking mostly yes or no questions. Tsarnaev at first answered mainly by nodding or writing in a notebook; later he answered virtually all questions orally. Throughout the entire interview he appeared alert, mentally competent, and lucid.

On April 22, 2013, at 11:00 a.m., two hours after the interview concluded, Tsarnaev's attending physician testified in a hearing before United States Magistrate Judge Marianne B. Bowler. He described Tsarnaev's condition as "guarded" but "not critical." He stated that Tsarnaev had received .5 mg of Dilaudid at 7:00 a.m. and another .5 mg at 10:00 a.m., and that this was the only pain medication or sedation that Tsarnaev had received during the preceding eight hours. He testified that, despite Tsarnaev's injuries, medical treatment, and this medication, Tsarnaev was lucid enough to understand and respond to basic questions. On the basis of this expert testimony, Judge Bowler proceeded forthwith to conduct an initial appearance.

During the initial appearance, Tsarnaev was told the charges against him, the maximum penalties, and certain legal rights, among other things. He repeatedly indicated that he understood everything that was being said to him. At the conclusion of the hearing, having had the benefit of observing Tsarnaev and hearing his answers in person, the court stated: "I find that the defendant is alert, mentally competent, and lucid."

C. The FBI interview of Tsarnaev

From the moment the agents began questioning Tsarnaev about the Marathon bombings, he readily admitted his own involvement, and soon afterwards admitted that he had personally detonated one of the bombs and that he was motivated by a radical extremist agenda, namely, to punish America for "killing innocent people" in Afghanistan and Iraq.

But Tsarnaev steadfastly denied that any other bombs existed or that anyone else was involved in the bombings. Specifically, he said that he and his brother had purchased all of the fireworks and had built the bombs together at their home in Cambridge; that they alone had chosen to bomb the Marathon; that he (Tsarnaev) had chosen on his own where to detonate the bomb he was carrying; that the gun they used to kill Officer Collier belonged to the two of them and no one else; that the decision to target other police officers in Watertown was theirs alone; and that the plan to travel to New York and explode additional bombs in Times Square was also theirs alone.

In the face of these denials, the agents continued to question Tsarnaev not to extract a confession, which they already had, but because of their reasonable belief that Tsarnaev was concealing information about impending attacks, accomplices, and/or the existence of additional bombs. For example, Tsarnaev's claim that he and his brother had built the bombs in their Cambridge apartment and hidden them under Tsarnaev's bed seemed implausible given the absence of any traces of black powder in the apartment. The agents also needed to determine whether Tsarnaev was unaware of the existence of accomplices who might be plotting additional attacks but

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

OPINION AND ORDER
September 24, 2014

O'TOOLE, D.J.

This Opinion and Order resolves several pending motions.

I. Defendant's Motion for Change of Venue

The defendant has moved, pursuant to Federal Rule of Criminal Procedure 21 and the Fifth, Sixth, and Eighth Amendments to the United States Constitution, to transfer his trial to a place outside of the District of Massachusetts. He asserts that pretrial publicity and public sentiment require the Court to presume that the pool of prospective jurors in this District is so prejudiced against him that an impartial trial jury is virtually impossible.

In two provisions, the Constitution of the United States addresses where criminal trials are to be held. Article III provides that the trial of a criminal case "shall be held in the State where the said Crimes shall have been committed." U.S. Const. Art. III, § 2, cl. 3. The Sixth Amendment to the Constitution guarantees a criminal defendant the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." Id. amend. VI. Due process requires, however, that the Constitution's "place-of-trial prescriptions . . . do not impede

transfer . . . to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial." Skilling v. United States, 561 U.S. 358, 378 (2010).[1]

In Skilling v. United States, the Supreme Court recently analyzed in depth the circumstances under which a presumption of prejudice would arise and warrant or command a change of venue, making clear that prejudice is only to be presumed in the most extreme cases. In that case, the defendant was a former Chief Executive Officer of Enron Corporation, a large Houston-headquartered corporation that "crashed into bankruptcy" as the result of the fraudulent conduct of the company's executives. Id. at 367. After the defendant was charged in federal court in Houston, he sought to move his case to another district based on widespread pretrial publicity and what was characterized as a general attitude of hostility toward him in the Houston area. The district court found that the defendant had not satisfied his burden of showing that prejudice should be presumed and declined to change the trial venue.

The Supreme Court agreed with the district court's conclusion. It addressed four factors it regarded as pertinent to whether the defendant had demonstrated a presumption of prejudice that required a venue transfer: 1) the size and characteristics of the community in which the crime occurred and from which the jury would be drawn; 2) the quantity and nature of media coverage about the defendant and whether it contained "blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight"; (3) the passage of time

[1] The Federal Rules of Criminal Procedure mirror these principles. Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed."); Fed. R. Crim. P. 21(a) (requiring transfer if the court is satisfied that "so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there").

between the underlying events and the trial and whether prejudicial media attention had decreased in that time; and (4) in hindsight, an evaluation of the trial outcome to consider whether the jury's conduct ultimately undermined any possible pretrial presumption of prejudice. Id. at 381-85.

The Court found that the potential jury pool—4.5 million people living in the Houston area—was a "large, diverse pool," making "the suggestion that 12 impartial individuals could not be empaneled . . . hard to sustain." Id. at 382. With respect to media coverage, "although news stories about [the defendant] were not kind, they contained no confession or other blatantly prejudicial information" of the type that readers or viewers could not reasonably be expected to ignore. Id. at 382-83. The Court also noted that the "decibel level of media attention diminished somewhat" in the time between Enron's bankruptcy and the defendant's trial. Id. at 383. Finally, after trial the jury acquitted the defendant of nine counts, indicating careful consideration of the evidence and undermining any presumption of juror bias.[2] Id. at 383-84. The Court, finding that no presumption of prejudice arose, went on to conclude that the district court had not erred in declining to order a venue change. Id. at 385 ("Persuaded that no presumption arose, we conclude that the District Court, in declining to order a venue change, did not exceed constitutional limitations.") (footnotes omitted).

There is much about this case that is similar to Skilling. First, the Eastern Division of the District of Massachusetts includes about five million people. The division includes Boston, one of the largest cities in the country, but it also contains smaller cities as well as suburban, rural, and coastal communities. As the Court observed in Skilling, it stretches the imagination to suggest that an impartial jury cannot be successfully selected from this large pool of potential

[2] Similarly, previous Enron-related prosecutions in Houston "yielded no overwhelming victory for the Government." Id. at 361.

jurors. See also United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993) (declining to transfer trial of defendant accused of the 1993 World Trade Center bombing out of the district due in part to the district's size and diversity).

Media coverage of this case, as both sides acknowledge, has been extensive. But "prominence does not necessarily produce prejudice, and juror impartiality does not require ignorance." Skilling, 51 U.S. at 360-61 (emphasis in original). Indeed, the underlying events and the case itself have received national media attention. It is doubtful whether a jury could be selected anywhere in the country whose members were wholly unaware of the Marathon bombings. The Constitution does not oblige them to be. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, 366 U.S. 717, 723 (1961).

The defendant relies almost exclusively on a telephonic poll and an analysis of newspaper articles to support his argument that venue must be transferred due to the impact of pretrial publicity. I have reviewed the materials submitted. For substantially the same reasons articulated in the government's sur-reply, those results do not persuasively show that the media coverage has contained blatantly prejudicial information that prospective jurors could not reasonably be expected to cabin or ignore. For instance, regarding the newspaper analysis, I agree with the government that many of the search terms are overinclusive (e.g., "Boston Marathon" or "Marathon" or "Boylston Street"), hitting on news articles that are completely or generally unrelated to the Marathon bombings. Regarding the poll, the response rate was very low (3%), and that small sample is not representative of the demographic distribution of people in the Eastern Division. Additionally, some of the results appear at odds with the defendant's position. For example, almost all individuals who answered the poll questions were familiar with

the bombing and the majority of them answered that they believed the defendant is "probably" or "definitely" guilty in all four jurisdictions surveyed. In any event, "[s]carcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits" of a widely-publicized criminal case such as this one. See Irvin, 366 U.S. at 722-73.

As to the passage of time, unlike cases where trial swiftly followed a widely reported crime, e.g., Rideau v. Louisiana, 373 U.S. 723, 724 (1963) (two months after videotaped confession was broadcasted), more than eighteen months have already passed since the bombings. In that time, media coverage has continued but the "decibel level of media attention [has] diminished somewhat." See Skilling, 561 U.S. at 361. The defendant's submissions do not prove otherwise.

Finally, although it is not possible to evaluate the jury's verdict for impartiality in hindsight at this stage, this Court's recent experience with high profile criminal cases in this District suggests a fair and impartial jury can be empaneled. In each of those cases, the jurors returned mixed verdicts, indicating a careful evaluation of the trial evidence despite widespread media coverage. See, e.g., Jury Verdict, United States v. O'Brien, Cr. No. 12-40026-WGY (July 24, 2014) (ECF No. 579); Jury Verdict, United States v. Tazhayakov, Cr. No. 13-10238-DPW (July 21, 2014) (ECF No. 334); Jury Verdict, United States v. Bulger, Cr. No. 99-10371-DJC (Aug. 12, 2013) (ECF No. 1304); Jury Verdict, United States v. DiMasi, Cr. No. 09-10166-MLW (June 15, 2011) (ECF No. 597).

In support of his argument, the defendant cites in passing only a few cases in which the Supreme Court has presumed prejudice for the purposes of transferring a case, Rideau v. Louisiana, 373 U.S. 723 (1963), Sheppard v. Maxwell, 384 U.S. 333 (1966), and Estes v. Texas,

381 U.S. 532 (1965).[3] First, all three cases are about fifty years old, and both the judicial and media environments have changed substantially during that time. Second, important differences separate those cases from the defendant's. Rideau involved a defendant whose detailed, twenty-minute videotaped confession during a police interrogation was broadcast on television multiple times in a small community parish of only 150,000 people two months before trial. 373 U.S. at 724-28. In both Estes and Sheppard, the actual courtrooms were so overrun by media that the trial atmosphere was "utterly corrupted by press coverage." See Skilling, 561 U.S. at 380; Sheppard, 384 U.S. at 353, 355, 358 ("[B]edlam reigned at the courthouse during the trial and newsman took over practically the entire courtroom," thrusting jurors "into the role of celebrities" and creating a "carnival atmosphere"); Estes, 381 U.S. at 536 (describing reporters and television crews who overran the courtroom with "considerable disruption" so as to deny the defendant the "judicial serenity and calm to which [he] was entitled"). None of those circumstances are present here.

The defendant has not proven that this is one of the rare and extreme cases for which a presumption of prejudice is warranted. See Skilling, 561 U.S. at 381; United States v. Quiles-Olivo, 684 F.3d 177, 182 (1st Cir. 2012). Although the media coverage in this case has been extensive, at this stage the defendant has failed to show that it has so inflamed and pervasively prejudiced the pool that a fair and impartial jury cannot be empaneled in this District. A thorough evaluation of potential jurors in the pool will be made through questionnaires and voir dire sufficient to identify prejudice during jury selection. See Skilling, 561 U.S. at 384 ("the

[3] The defendant attempts to rely more heavily on United States v. McVeigh, 917 F. Supp. 1467 (D. Colorado 1996), a pre-Skilling out-of-circuit district court case. Though there may be some similarities, that case is not pertinent. There, the main federal courthouse itself had suffered physical damage in the explosion at issue, and both parties agreed the case should not be tried in the district where the crime occurred. The issue was to which other district the trial should be moved.

extensive screening questionnaire and follow-up voir dire were well suited" to screening jurors for possible prejudice).

The defendant's motion is denied.

II. Defendant's Motion for Continuance

The defendant has also filed a Motion for Continuance requesting the trial date be rescheduled from November 3, 2014 until September 1, 2015. The defendant's previous request for that same trial date was rejected.

Upon a review of the parties' submissions and oral argument, I find that a short continuance is warranted in this case, primarily on the basis of the amount of discovery involved. Although it appears that the defendant may have overstated his perceived predicament related to the volume and timing of discovery, particularly in light of (a) the government's representation that the defendant has been in possession of the relevant computers for over a year and (b) the level of detail of the government's September disclosures, there is likely utility in allowing the defendant some additional, though limited, time to prepare. See United States v. Maldonado, 708 F.3d 38, 42-44 (1st Cir. 2013); United States v. Saccoccia, 58 F.3d 754, 770-71 (1st Cir. 1995). An additional delay of ten months as requested by the defendant does not appear necessary, however, given the size and experience of the defense team; the availability of assistance from outside sources; the time period the defense already has spent in trial preparation; the relative impact on the other interests, including the Court, the government, and the public, if such a long postponement were granted; and the nature of the defendant's other concerns and the uncertainty that more time would actually be helpful in those respects. See Maldonado, 708 F.3d at 42-44; Saccoccia, 58 F.3d at 770-71.

Accordingly, the trial will commence on January 5, 2015. The final pretrial conference will be on December 18, 2014. The current pre-trial conference scheduled for October 20, 2014 is converted to a status conference.

III. Government's Discovery Motions

The government has filed a Renewed Motion to Compel Reciprocal Discovery (dkt. no. 530), requesting an order compelling the defendant to produce discovery and precluding him from using in his case-in-chief any Rule 16(b)(1)(A)—(C) information in his possession that he has failed to produce. The government adopts by reference the arguments it advanced in its motion on the same topic (dkt. no. 245) which is still pending.

Although the Court previously ordered the defendant to produce reciprocal discovery under Rule 16(b)(1)(A)—(C) by September 2, 2014, the government says (and the defendant does not dispute) that the defendant has not made any disclosures under Rule 16(b)(1)(A) or (B), and only one brief disclosure under Rule 16(b)(1)(C). The defendant, in response, argues that he has not yet "identified" which "'documents, data, photographs' or other exhibits might corroborate or illustrate the defense case."

The defendant has stated that it would be considerably easier to respond to the government's Rule 16 requests in staggered stages based on whether the discovery relates to the guilt or penalty phase. A staggered schedule will not unduly prejudice the government as the defendant's Rule 16 discovery for both phases will be due well in advance of jury selection and the deadline for the submission of witness and exhibit lists.

In light of the change of trial date and the defendant's representations, the Court adopts a bifurcated reciprocal discovery schedule to be issued in a separate Scheduling Order. The

government's motions are otherwise denied subject to renewal if the defendant fails to provide the required discovery by the now-extended deadlines.

The government has also filed a Renewed Motion for List of Mitigating Factors (dkt. no. 529), which the defendant has opposed, primarily on Fifth Amendment self-incrimination grounds. It is within the Court's statutory discretion to require the disclosure. See, e.g., United States v. Wilson, 493 F. Supp. 2d 464, 466-67 (E.D.N.Y. 2006); United States v. Taveras, No. 04-CR-156 (JBW), 2006 WL 1875339, at *8-9 (E.D.N.Y. July 5, 2006); see also Catalan Roman, 376 F. Supp. 2d. 108, 115-17 (D.P.R. 2005). The Federal Death Penalty Act provides both parties a fair right of rebuttal, see 18 U.S.C. § 3593(c), a right which would be meaningless if information is not provided sufficiently early to rebut. See Catalan Roman, 376 F. Supp. 2d. at 116-17; Wilson, 493 F. Supp. 2d at 466; see also Williams v. Florida, 399 U.S. 78, 82 (1970) (A criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played."). Further, to the extent there are mitigating factors the defendant presently intends to pursue at a sentencing phase which it has not already disclosed, the disclosure of that information may be necessary to select a fair and impartial jury, and ultimately will "contribute to the truth-seeking process, resulting in a more reliable sentencing determination." See Catalan Roman, 376 F. Supp. 2d. at 114. The government does not seek to use the list of mitigation factors as a statement against him at trial, and if the defendant is found guilty, he would ultimately have to disclose to the jury the mitigating factors he pursues. See id. at 117 ("[T]here is no constitutional violation by requiring a defendant to disclose mitigating information he intended to offer the jury anyway.").

Consequently, the defendant shall provide the government a list of all mitigating factors he currently intends to prove in the penalty phase of the case, if any, on or before December 15, 2014. The submission shall be made under seal.

IV. Conclusion

The defendant's Motion for Change of Venue (dkt. no. 376) is DENIED. The defendant's Motion for Continuance (dkt. no. 518) is GRANTED in part and DENIED in part. The government's Motion to Compel Defendant's Compliance with Automatic Discovery Obligations (dkt. no. 245), Renewed Motion to Compel Reciprocal Discovery (dkt. no. 530), and Renewed Motion for List of Mitigating Factors (dkt. no. 529) are GRANTED in part and DENIED in part.

A separate scheduling order shall issue.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

OPINION AND ORDER
October 17, 2014

O'TOOLE, D.J.

I. Introduction

On June 27, 2013, a grand jury returned an indictment that charges the defendant with multiple crimes arising from the detonation of two improvised explosive devices at the 2013 Boston Marathon. The defendant has moved to dismiss the indictment and stay proceedings, arguing various violations of the District of Massachusetts Plan for Random Selection of Jurors, the Jury Selection and Service Act, and the Sixth Amendment to the United States Constitution. The government opposes the motion.

II. Background of the Massachusetts Jury Plan for Random Selection of Jurors

The Jury Selection and Service Act (the "Act") directs each district court to "devise and place into operation a written plan for random selection of grand and petit jurors" in accordance with the statute's requirements. 28 U.S.C. § 1863(a). Pursuant to that directive, this Court adopted the Plan for Random Selection of Jurors. U.S. District Ct. for the District of Mass. Jury Plan for Random Selection of Jurors (Mar. 3, 2009) (the "Plan").

The Plan relies on the Massachusetts Office of Jury Commissioner to furnish randomly generated lists of current residents for use in constituting jury pools.[1] Plan § 6(a). In brief, the Clerk randomly selects the names of at least 35,000 residents in the Eastern Division for inclusion in the "master jury wheel," taking care that the counties within the division are proportionally represented. Id. The Clerk randomly selects and assigns numbers to names from the master jury wheel to identify what residents will receive summons and qualification forms. Id. § 7(a), (c)-(d). Certain classes of individuals are exempt from jury service, including active members of the armed forces, police officers, firefighters, and certain public officers. Id. § 9(b).[2] Additionally, the Plan directs the Clerk to excuse upon individual request certain classes of persons, including "any person over the age of 70 years old." Id. § 9(c). After returned questionnaires are reviewed, the names of jurors who appear to be qualified for service are placed in sequence based on their assigned number in a "qualified jury wheel" from which jurors are drawn in numerical order as needed.

The Plan, as revised in 2009, also includes a supplemental draw procedure.[3] Pursuant to the Plan, the Clerk must create a supplemental jury wheel using the same procedures as for the

[1] The Act authorizes courts generally to select prospective jurors from voter registration lists or lists of actual voters, but it also specifically authorizes this District to use the annual resident lists required to be prepared by Massachusetts General Laws chapter 234A, §10. 28 U.S.C. § 1863(b)(2). Since all voters must be residents, but all residents need not be voters, the resident list is broader than a list of registered or actual voters.

[2] These exemptions are mandated by the Act. 28 U.S.C. § 1863(b)(6).

[3] The Plan was revised after Judge Gertner identified disproportionately high rates of undeliverable summonses and non-responses in localities with higher proportions of African-Americans. United States v. Green, 389 F. Supp. 2d 29 (D. Mass. 2005), rev'd, In re United States, 426 F.3d 1 (1st Cir. 2005). Judge Gertner ordered a supplemental draw procedure to help cure the deficiencies. Id. at 78-79. On the government's petition for mandamus, the First Circuit held that the existing jury plan complied with fair cross section requirements of the Act and that Judge Gertner's imposition of a supplemental draw procedure had exceeded the scope of her authority. In re United States, 426 F.3d 1, 7-9 (1st Cir. 2005). It noted, however, "cause for concern" in the lower proportional representation of African-Americans among qualified

master jury wheel. Id. § 6(b). For each summons returned as "undeliverable," the Clerk "shall draw at random from the supplemental jury wheel the name of a resident who lives in the same zip code to which the undeliverable summons had been sent" and mail the resident a summons and qualification form. Id. § 8(a). The step was added in order to further the policy of the Court that all citizens have the opportunity to be considered for service and to ensure, to the greatest extent possible, that juries are drawn randomly from source lists in the relevant division that represent a fair cross section of the community of each division. Id. §§ 5(a)-(b), 6(b).

III. Discussion

28 U.S.C. § 1867(a) provides:

> In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

Pursuant to this provision, the defendant moves to dismiss his indictment, arguing first that the purported failure of the Clerk to send replacement summonses for summonses returned as undeliverable constitutes a substantial violation of the Plan and therefore a "substantial failure to comply with the provisions" of the Act. See id. According to the defendant, of the 400 summonses issued to obtain the grand jury that returned his indictment, 19 (4.75% of the total) were returned as undeliverable, and the Clerk did not issue replacement summonses for any of

potential jurors and remarked that the district court "has always been free to revise its jury plan in compliance with the statute." Id. at 9. The Court thereafter acted to amend the plan to provide for a supplemental draw. See Revisions to the Jury Plan of the United States District Court of the District of Massachusetts: Notes of the Jury Plan Committee, March 2007, available at www.mad.uscourts.gov/general/pdf/a2007/NotesofJuryPlanCommittee.pdf (last visited Oct. 14, 2014).

the 19 undeliverable summonses, as the supplemental jury wheel provision of the Plan required.[4] (Mot. to Dismiss Indictment Ex. A ¶ 15 (Decl. of Jeffrey Martin) (dkt. no. 506-1).) Additionally and more generally, in the pools for which data was supplied for the years 2011 through 2013, 4,964 of the 68,201 summonses, or 7.28%, were returned as undeliverable. Of those, 3,186, or 64.18%, were sent replacement summonses, while the rest were not. (See id. ¶¶ 11, 14.) The government does not contest these figures.

For present purposes, the figures that matter are those pertaining to the pool from which the grand jury in question was drawn. Neither compliance nor non-compliance with the Plan in the establishment of pools for other juries would affect the issue addressed here. Other than the bare fact that there were 19 undeliverable summonses out of 400 sent out, the Martin Declaration contains no further information about those summonses. In particular, no information is presented about what zip codes were implicated, so it cannot be determined what zip codes might have been underrepresented, or to what degree, in the pool as a result of the failure to send replacement summonses. Without knowing whether the replacement summonses should have been sent to Dorchester or to Dover, for example, there is no way to assess any possible impact of the omission on the composition of the jury pool.

The lack of information on these matters is critical because, even if the omission to send replacement summonses for the 19 undeliverable ones was a violation of the Plan *strictissimi juris*, to obtain relief the defendant would have to show that the omission resulted in a

[4] The defendant previously received authorization for disclosure of various jury records, such as AO-12 Forms or JS-12 Forms completed for 2011, 2012, and 2013 master and supplemental Jury wheels; 2011, 2012, and 2013 master and supplemental jury wheel data; all draws from the 2011, 2012, and 2013 master and supplemental jury wheel; and various source data, including municipal resident lists and statistical analyses of municipal resident lists. (Order for Disclosure of Jury Records (dkt. no. 393).)

"substantial failure to comply" with the Act. United States v. Royal, 174 F.3d 1, 11 (1st Cir. 1999) .

> A substantial failure is one that contravenes one of . . . two basic principles . . . : (1) random selection of jurors, and (2) determination of juror disqualification, excuses, exemptions, and exclusions on the basis of objective criteria. Technical violations, or even a number of them, that do not frustrate [the random selection and cross section requirements] and do not result in discrimination and arbitrariness do not constitute a substantial failure to comply.

Id. (quoting United States v. Savides, 787 F.2d 751, 754 (1st Cir. 1986)); see also In re United States, 426 F.3d at 8.

The limited statistical information the defendant has offered does not establish that the failure to send 19 replacement summonses "frustrated" the fair cross section requirements of the Act. Specifically he has failed to show that the omission to send replacement summonses compromised either the principle of random selection of jurors or the principle that juror qualification is to be assessed on objective criteria.

The defendant also argues that the Plan itself violates the fair cross section requirements of the Sixth Amendment and the Act. First, he argues that a comparative analysis methodology demonstrates that African-Americans are not fairly and reasonably represented in the jury wheel as the result of systematic exclusion. Second, he argues that the Plan's opt-out opportunity for persons aged 70 or older amounts to systematic exclusion and underrepresentation of that group.

The Sixth Amendment requires that the jury venire be drawn from a fair cross section of the community. Taylor v. Louisiana, 419 U.S. 522, 530 (1975); Royal, 174 F.3d at 5-6. The Act "impose[s] essentially the same obligation." In re United States, 426 F.3d at 8 (relying on Royal, 174 F.3d at 6); see 28 U.S.C. § 1861.

However, the fair cross section requirement does not guarantee that a jury will be of any "particular composition" or that venires will be "a substantially true mirror of the community."

Royal, 174 F.3d at 6 (quoting Taylor, 419 U.S. at 538, and Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc)). Rather, what is required is that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id. (quoting Taylor, 419 U.S. at 538).

In order to establish a prima facie case of a violation of the fair cross section requirement, a defendant must show: (1) that the group alleged to be excluded is a distinctive group in the community; (2) that the group is not fairly and reasonably represented in venires from which juries are selected; and (3) that the underrepresentation is due to systematic exclusion in the jury-selection process. Duren v. Missouri, 439 U.S. 357, 364 (1979); Royal, 174 F.3d at 6.

A. African-Americans

There is no dispute in this case that African-Americans represent a "distinctive" group in the community. United States v. Hafen, 726 F.2d 21, 23 (1st Cir. 1984) (citing Peters v. Kiff, 407 U.S. 493, 498-99 (1972)). However, as the defendant concedes, he has failed to demonstrate that the representation of African-Americans on the jury wheel was not "fair and reasonable" when assessed using the absolute disparity methodology that has been approved by the First Circuit. Under that method, the 2.06% absolute disparity between the proportion of African-Americans in the jury-eligible population and the proportion in the qualified jury wheel is insufficient to establish a prima facie violation of the fair cross section requirement.[5] See, e.g., Royal, 174 F.3d at 7-11 (no violation where absolute disparity was 2.97%); United States v. Joost, 94 F.3d 640, at

[5] Absolute disparity measures the difference between the percentage of members of the distinctive group in the relevant population and the percentage of that group on the jury wheel. Royal, 174 F.3d at 7. Here, according to the defendant, African-Americans make up 6.00% of the Eastern Division jury eligible population and, for the years 2011, 2012, and 2013, 3.94% of the qualified jury wheel. The difference between those rates is 2.06%.

*8 (1st Cir. 1996) (table) (no violation where absolute disparity was 7.13%); Hafen, 726 F.2d at 23 (no violation where absolute disparity was 2.02%). The defendant's argument that the Court should instead look at the comparative disparity to measure underrepresentation has been considered and consistently rejected by the First Circuit, which the defendant acknowledges.[6] Royal, 174 F.3d at 7-11; Hafen, 726 F.2d at 23-24.

B. Persons 70 and Older

The Plan permits persons 70 and older to be excused from jury service on request. The defendant argues that persons 70 and older should be considered a distinctive group and that they are underrepresented because they are systematically excluded by the excusal option the Plan gives them.

The Supreme Court has treated African-Americans, Mexican-Americans, and women as distinctive groups for purposes of assessing "jury-representativeness" claims under both the fair cross section standard of the Sixth Amendment and the equal protection standard of the Fifth and Fourteenth Amendments. See Taylor, 419 U.S. at 532-33 (women); Castaneda v. Partida, 430 U.S. 482, 494-95 (1977) (Mexican-Americans); Peters v. Kiff, 407 U.S. 493, 498-99 (1972) (African-Americans). It has not spoken to the question whether persons within a specified age group may be deemed a distinctive group for such purposes.

The First Circuit, however, has declined to regard a proposed age group as distinctive in this context. Barber, 772 F.2d at 997 (1st Cir. 1985) (declining to recognize "young adults" between the ages of 18 and 34 as a distinctive group). In that case, the Court of Appeals said that distinctiveness for fair cross section purposes requires that (1) the group be defined or limited by

[6] Comparative disparity is measured by calculating the percentage difference between the proportion of the distinctive group eligible to serve as jurors and the deficit in the distinctive groups' representation. Royal, 174 F.3d at 7.

some clearly identifiable factor, such as sex or race; (2) the group share a common thread or basic similarity "in attitude, ideas, or experience"; and (3) there be a "community of interest" among group members such that "the group's interests cannot be adequately represented if the group is excluded." Id. These requirements, the Court said, serve the ultimate goal of choosing a jury which represents the "attitudes, values, ideas and experience of the eligible citizens that compose the community where the trial is taking place." Id. The Court concluded that there was a lack of evidence that those within the 16-year proposed age range had any more in common than the members of any arbitrarily constructed age group or, for that matter, everyone else. The Court noted various social indicators and statistics pointing to differences within the age range, such as differences in marital and divorce rates, school enrollment, economic status, and attitude toward important social issues. Id. at 998-99. Simply to posit common experiences and attitudes on the basis of similar age, the Court said, would be to act "by arbitrary fiat superimposed on intuition." Id. at 998.

Other Circuits considering proposed age groups have similarly rejected those categories as distinctive, including the very category the defendant proposes here. See, e.g., Brewer v. Nix, 963 F.2d 1111, 1112-13 (8th Cir. 1992) (persons over the age of 65); Silagy v. Peters, 905 F.2d 986, 1010-11 (7th Cir. 1990) (persons aged 70 and over); Wysinger v. Davis, 886 F.2d 295, 296 (11th Cir. 1989) (per curiam) (persons aged 18 to 25); Ford v. Seabold, 841 F.2d 677, 682 (6th Cir. 1988) ("young adults" between the ages of 18 and 29).

While the Supreme Court has not directly addressed this specific question, it has suggested that a group defined by a particular shared point of view will not qualify that group as "distinctive" for fair cross section purposes. For example, in Lockhart v. McCree, 476 U.S. 162, 176-77 (1986), the Court held that potential jurors who said they would not be open to the

possibility of voting to impose a death penalty were not to be considered a "distinctive" group for fair cross section purposes. See also Buchanan v. Kentucky, 483 U.S. 402, 415 (1987) (stating that McCree established that "no fair cross section violation would be established when [jurors who would never vote to impose the death penalty] were dismissed from a petit jury, because they do not constitute a distinctive group for fair cross section purposes"). Rather, the Court has suggested, a distinctive group for fair cross section purposes will be identified "on the basis of some immutable characteristic such as race, gender, or ethnic background." McCree, 476 U.S. at 175. Age is immutable only in the sense that a person cannot change her age. At the same time, however, a person's age is in a constant state of change. A 71 year old is a former 69 year old (and 30 year old) in a way, for example, that an African-American is not a former white person. The analogy of age to race, ethnicity, and sex is for these purposes inapt.

Moreover, unlike racial or ethnic minorities and women, septuagenarians have not been the victims of historical discrimination or exclusion from participation in activities of self-government. Nor is there any persuasive evidence offered to suggest a common and distinct thread of shared experience that binds them together and distinguishes them from the community at large.[7] The cohort of seventy-somethings includes men and women of diverse heritages. In that sense, they are like any other arbitrarily defined age group.

[7] The defendant's attempt in his reply brief to analogize his proposed category with women, the group at issue in Duren, in order to dismiss the intra-category differences is unpersuasive. In Duren, the Supreme Court

> used the concept of "distinctive group" in a case where women were subjected to discrimination. It is fair to assume that the court wanted to give heightened scrutiny to groups needing special protection, not to all groups generally. There is nothing to indicate that it meant to take the further step of requiring jury venires to reflect mathematically precise cross sections of the communities from which they are selected. Yet if the age classification is adopted, surely blue-collar workers, yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications will be entitled to similar treatment. These are not the groups that

The most pertinent guidance remains the Circuit's opinion in Barber. Here, just as in that case, persons within the proffered age group do not constitute a distinctive group in the necessary sense based on their age alone. The defendant's argument that they should be considered a distinctive group for fair cross section purposes is entirely unconvincing.

The defendant's reliance on a business article regarding multi-generational marketing strategies does not help his argument. First of all, the article proposes that persons between 65 and 80 years old should be regarded as a distinct group, and treats persons in their 80s (who are also over 70) as members of a different distinct group. Williams & Page, Marketing to the Generations, 3 Journal of Behavioral Studies in Business, Apr. 2011, Table 1, available at www.aabri.com/manuscripts/10575.pdf (last visited Oct. 14, 2014). This illustrates the fundamental arbitrariness of any proposed age range. That was the Barber court's point exactly. It may also be noted that persons in their late sixties do not have an opt-out and do serve on juries, so that the members of the 65 to 80 year old "generation" addressed by the article are not entirely systematically excluded.

In addition, the article's narrative pertaining to the 65 to 80 year old group is little more than breezy intuitive advice about how to market to those folks:

> Stress simplicity, convenience, accessibility, ease of use, service, and support as key product and service features. While this generation has a positive attitude toward shopping, marketers still need to be aware of enhancing their shopping experience. These traditionalists will be customers for life if you provide a quality product and give them what they want.

Id. at 4 (reference notes omitted). This is a small excerpt, but it captures the flavor of the article.

> the court has traditionally sought to protect from under-representation on jury venires.

Barber, 772 F.2d at 999 (rejecting defendant's argument that the proposed age-based category was a distinctive group).

I conclude that the persons aged 70 and above should not be regarded as a distinctive group in considering whether there was a violation of the fair cross section principle, and the defendant has consequently failed to establish a prima facie showing of a violation of that principle under the Duren criteria.

Accordingly, he has failed to prove a violation of the fair cross section requirements of either the Sixth Amendment or the Act.

IV. Conclusion

For the reasons stated herein, the defendant's Motion to Dismiss Indictment and Stay Proceedings (dkt. no. 506) is DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

OPINION AND ORDER
November 25, 2014

O'TOOLE, D.J.

The defendant's Motion to Compel Discovery (dkt. no. 602) is DENIED.

Documents from the Russian Government: The defendant's request for unredacted copies of documents furnished by the Russian government after the Marathon bombings is denied at this time. If the defendant's ability to use disclosed information at trial is hampered by the redactions, the matter can be revisited. In addition, the defendant's request for complete copies of pages with text which appears to have been cut off inadvertently is moot in light of the government's representations that it will try to obtain a copy of the materials with the text restored and will produce the material if successful.

Pre-2013 Communication from the Russian Government: The government represents that it has disclosed the substance of the communication. It does not appear that the production of a copy of the communication would furnish additional information that would be helpful or material to the defense. The defendant's request for a copy of the communication itself, which the government describes as consisting of an unidentified Russian analyst's opinion about the significance of the underlying information, is therefore denied.

Transcripts/Translations of the Defendant's BOP Calls: In light of the government's agreement to produce any transcripts in its possession, the defendant's request is moot.

Reports of Computer Forensic Examinations: The government has represented that there are no other reports of examination similar to the analysis of the defendant's computer referred to in the defendant's motion. (Mot. to Compel Ex. E (dkt. no. 602-5) (under seal).) In light of the representation, the defendant's request is moot.

List of Digital Devices: The defendant's request for the "government's list identifying which among [the digital] devices it actually intends to use at trial," (Mot. to Compel) (dkt. no. 602), is denied in light of the scheduling order establishing a deadline for production of the government's exhibit list.

Russian Communications Regarding Defense Team Travel Issues: The defendant's request is denied.

OIG Report: The defendant's request is denied.

FBI Todashev Materials: The defendant seeks production of certain FBI materials related to Ibragim Todashev's statements about Tamerlan Tsarnaev's participation in the murder of three men in Waltham in 2011. With respect to this issue, the government had submitted to me for in camera review FBI 302 reports of interviews of Todashev, as well as a video and audio recording of an additional interview. Only one of these materials, an FBI 302 report dated June 7, 2013, is pertinent to the request. The government objects to the request.

The government represents that a state law enforcement investigation of the Waltham murders is ongoing and for that reason invokes the limited investigatory privilege. See Comm. of Puerto Rico v. United States, 490 F.3d 50, 62-64 (1st Cir. 2007). It also asserts that it has already

conveyed the fact and general substance of Todashev's statements concerning the murders, and principles governing discovery in criminal cases do not require more.

After careful consideration, I agree with the government as to both points. As to the first, disclosure of the report risks revealing facts seemingly innocuous on their face, such as times of day or sequences of events, revelation of which would have a real potential to interfere with the ongoing state investigation. As to the second, I fully understand the mitigation theory the defense thinks the requested discovery may advance. After review, it is my judgment that, contrary to the defense speculation, the report does not materially advance that theory beyond what is already available to the defense from discovery and other sources. It would be a different matter if Todashev were available as a potential witness. Without that possibility, the utility of the report to the defense in building a mitigation case is very low at best. I conclude that the report is not material and helpful in the necessary sense.

The defendant's motion regarding this topic is denied.

Search Warrant Return for Zubeidat Tsarnaeva's Emails: The requested materials do not appear to fall within the scope of Local Rule 116.1(c)(1)(B).[1] The defendant's request is therefore denied.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

[1] Implicit in this ruling is my understanding that the government represents that the search warrant also did not lead to the discovery of evidence that the government intends to use in its case-in-chief. See L.R. 116.1(c)(1)(B)(i).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 13-10200-GAO
	)	
DZHOKHAR TSARNAEV	)	

SEALED MOTION TO SUPPLEMENT AGREED-UPON QUESTIONNAIRE UNDER SEAL

Defendant, Dzhokhar Tsarnaev, by and through counsel, respectfully requests that the Court supplement the agreed-upon proposed jury questionnaire by adding two additional questions that were proposed by the defense and objected to by the government. The grounds for this motion are as follows.

In working toward an agreement concerning the contents of the proposed jury questionnaire, the parties were able to compromise on all but a small number of issues. In order to submit a substantially-complete joint draft, the defense and the government agreed to submit their remaining differences by way of a motion to supplement and response.

The two questions that the defendant asks the Court to add to the questionnaire are:

No. 83 [As a result of what you have seen or read in the news media, or what you have learned or already know about the case from any source, have you formed an opinion:]

(e) that whoever committed the crimes charged in this case should receive the death penalty? ❑ Yes ❑ No

[After No. 100]: State whether you agree or disagree with the following statements:

The death penalty is the ONLY appropriate punishment for ANYONE who:

A. murders a child. ❑ Agree ❑ Disagree
B. deliberately murders a police officer. ❑ Agree ❑ Disagree
C. deliberately commits murder as an act of terrorism. ❑Agree ❑Disagree

As now written, Question 83 asks jurors whether they have formed an opinion that the defendant Dzhokhar Tsarnaev is or is not guilty, and whether he should or should not receive the death penalty. But there likely exists a substantial group of jurors who have already formed an opinion that *whoever* committed the Marathon bombing should be sentenced to death, but who are unwilling or unable to state that Mr. Tsarnaev is that person until they have heard the evidence *of his guilt.* Stated differently, these are jurors for whom the only open question is whether the government has charged the right person; if it has, the question of punishment is already settled in their minds. Given that the penalty phase of a capital case must comport with the requirements of due process, *Gardner v. Florida,* 430 U.S. 349 (1977), *Deck v. Missouri*, 544 U.S. 622 (2005), this is clearly the type of pre-existing opinion about which a capital defendant has a constitutional right to inquire on voir dire examination. The defendant does not contend that an affirmative answer to this question, without more, would necessarily require that a juror be excused for cause. But the very purpose of the questionnaire is to bring such pre-existing opinions to light, and for this reason, the question should be included.

The reason for the second additional question has already been set out in *Defendant's Memorandum of Law Respecting Voir Dire Examination of Prospective Jurors on*

Death-Penalty Views, DE 682, pp. 7-17, and is further discussed in Judge Bennett's comprehensive survey of the issue in *United States v. Johnson*, 366 F.Supp.2d 822 (N.D. Iowa 2005); *see also, United States v. Fell,* 372 F.Supp.2d 766 (D. Vt. 2005). The government may reflexively insist that such questions are improper attempts to "stake-out" jurors' views regarding the verdict they would render given particular facts of the case. But as *Johnson* lucidly explains, 366 F.Supp.2d at 842-847, these are the opposite of "stake-out" questions, because they seek only to probe whether jurors' minds are open to considering all of the evidence relevant to sentence once the government has proven particular elements of the aggravated capital crimes charged in the case to be tried.

Again, the defendant recognizes that affirmative answers to these questions would not automatically mandate disqualification. But that is not the test for a jury questionnaire; if it was, no question would qualify. This series of questions does effectively probe for a common form of bias—the belief that the death penalty should always or automatically be imposed *for certain types of murder.* No other agreed-upon question is designed or likely to uncover this form of bias. The defendant therefore submits that the proffered question should be included in the questionnaire.

Conclusion

Based on the foregoing, and on the reasons set forth in his *Memorandum of Law Respecting Voir Dire Examination,* DE 682, the defendant requests that the Court add the two questions set forth above to the supplemental jury questionnaire in this case.

Respectfully submitted,

DZHOKHAR TSARNAEV

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Certificate of Service

I hereby certify that a copy of this document was hand-delivered to counsel of record on December 3, 2014.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

OPINION AND ORDER
January 2, 2015

O'TOOLE, D.J.

I. Defendant's Second Motion for Change of Venue

A. Relevant Background

At a status conference on September 23, 2013, the Court first raised the issue of venue with the defendant. At that time, defense counsel stated that they had not yet considered whether to contest venue in this District. Two months later, at a further status conference on November 12, 2013, the Court set February 28, 2014 as the deadline for the defense filing of a motion to change venue. About a month later, on December 16, 2013, the defendant moved to vacate that deadline for a motion to change venue, stating that it would be impossible to investigate whether a motion to change venue was warranted, determine whether a motion should be filed, and file an adequately briefed and supported motion by February 2014. (Mot. to Vacate Filing Deadline for Mot. to Change Venue (dkt. no. 154).) The government opposed the motion. On January 14, 2014, the Court granted the defendant's motion and vacated the filing deadline. At a status conference on February 12, 2014, the Court extended the deadline by four additional months to

June 18, 2014, just slightly less than a year after the return of the indictment and nine months after the Court first raised the question.

On June 11, 2014, one week before the defendant's motion to change venue was due, the defendant filed a two-page motion for extension of time, requesting that the Court extend the deadline for six additional weeks to August 3, 2014. The government opposed the further extension. The Court denied the defendant's request for additional time.

On June 18, 2014, the defendant filed his Motion for Change of Venue. The motion relied only on a "preliminary review of still-to-be-finalized survey data," was not supported by any declarations or exhibits, and concluded with a request that the Court grant him additional time to prepare his venue-change submission. (Mot. for Change of Venue (dkt. no. 376).) The government timely opposed the motion.

Two weeks later, on July 15, 2014, the defendant sought leave to file a reply to the government's opposition and to submit supplementary material in support. He did not append the proposed reply brief or supporting materials to the motion, but instead requested to be allowed to file the materials on August 7, 2014. On July 22, 2014, the Court granted the defendant's motion over the government's opposition.

On August 7, 2014, pursuant to the leave granted, the defendant filed his "reply" brief and supporting documents. The material, which totaled 9,580 pages, set forth new arguments with new evidentiary support, including a 37-page declaration by an expert, Edward J. Bronson. In order to permit the government to respond to the matter raised for the first time in the defendant's "reply," the Court permitted the government to file a sur-reply, which it did on August 25, 2014.

On August 29, 2014, the defendant filed a motion for leave to respond to the government's sur-reply, essentially asking for a third round of briefing on a motion that the defendant had already received multiple extensions of time to file. The defendant actually filed the proposed reply to the sur-reply and an affidavit from a new expert, Neil Vidmar, without waiting for a decision from the Court on the motion for leave, in contravention of the Local Rules. L.R. 7.1(B)(3), D. Mass. That same day, the government opposed the defendant's motion, arguing that the third round of briefing was unwarranted and that, "[b]y ignoring deadlines and filing unauthorized briefs without first obtaining permission, Tsarnaev has indicated that he does not believe the rules apply to him." (Gov't's Opp'n to Def.'s Mot. for Leave to File Resp. and Mot. to Strike Def.'s Resp. (dkt. no. 519).) The Court granted the government's motion to strike the defendant's inappropriately filed materials and denied the defendant's motion for leave to file.

Despite the Court's denial of his motion for leave to file the materials, the defendant filed yet another motion on September 4, 2014 to "supplement" the record by responding to the government's sur-reply and to enter into the record the just-stricken Vidmar declaration. Unsurprisingly, the government opposed the defendant's renewed request. On September 18, 2014, the Court denied the defendant's motion to supplement the record, stating that "[t]he record is complete." (Status Conf. Tr. at 4 (dkt. no. 580).)

The Court denied the motion to change venue in an order entered September 24, 2014 (dkt. no. 577). There were no further filings on the issue of venue until the defendant filed his Second Motion for Change of Venue, the subject of this Order. The second motion relies largely on previously argued grounds but seeks to expand the supporting materials by, among other things, including the Vidmar affidavit which the Court already twice rejected. The government

moved to strike Vidmar's affidavit and related material and, after receiving leave from Court, filed a late opposition to the defendant's second motion to change venue. The defendant opposed the motion to strike and, with leave, filed a reply to the government's opposition.

On December 31, 2014, having signaled the decision to both parties at a jury selection-related lobby conference on December 30, the Court denied the defendant's motion to change venue, stating that this explanatory opinion would be issued shortly.

B. Discussion

i. Opportunity to Develop Argument and Supporting Evidence

As the chronology described above makes clear, the defendant had ample time and opportunity to develop and present a venue change motion. It was the Court, rather than the defendant, who first raised the issue of venue in this case. When the first deadline appeared to set too tight a schedule, the Court granted a considerable extension. When the first motion was filed, it was summary and unsupported by affidavits or other evidentiary materials. Nevertheless, even though it is generally inappropriate for a moving party to advance new arguments and supporting facts in a reply brief, the Court permitted the defendant the opportunity to expand on his opening brief in his reply to the government's opposition. In substance, the reply brief became the main motion. And in effect, the defendant gave himself the extension of time the Court had denied him in June.

The defendant now justifies his late submission of supporting materials in August and again in December by complaining of what he calls "bifurcated funding for Prof. Bronson's work." (See, e.g., Opp'n to Mot. to Strike Exhibits to Def.'s Second Mot. for Change of Venue at 3 n.1 (dkt. no. 774).) Because of the confidential nature of a criminal defendant's requests for funds for expert services and in order to limit the risk of divulging any defense work product, the

Court will not address the merits of the argument in detail. It is sufficient to say that the Court rejects the defendant's explanation. After the Court raised the issue of venue, the defendant waited several months to seek funds for a venue expert and once funds were certified, waited a further period of time to request continued funding. In any event, the Court permitted him the time and opportunity to submit Bronson's material as his "reply" to the government's opposition to his first venue motion.

ii. Procedural Impropriety of Present Motion

Although it is not styled as such, the defendant's second motion for a change of venue is essentially a motion for reconsideration. It does not advance new or different arguments, but seeks instead to bolster former, unsuccessful arguments with additional information.

Although motions for reconsideration in criminal cases are not specifically authorized by either statute or rule, they may be considered in the exercise of the Court's inherent authority to revisit its own orders. See United States v. Ortiz, 741 F.3d 288, 292 n.2 (1st Cir. 2014); see also United States v. Iacaboni, 667 F. Supp. 2d 215, 216 (D. Mass. 2009) (noting that courts which have considered motions to reconsider in criminal cases "generally borrow standards either from civil cases or from the local rules"). As a general matter, under those standards motions for reconsideration are "not to be used as 'a vehicle for a party to undo its own procedural failures [or] allow a party to advance arguments that could and should have been presented' earlier." United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009) (quoting Iverson v. City of Boston, 452 F.3d 94, 104 (1st Cir. 2006)). Rather, such motions "are appropriate only in a limited number of circumstances: if the moving party presents newly discovered evidence, if there has been an intervening change in the law, or if the movant can demonstrate that the original decision was

based on a manifest error of law or was clearly unjust." Id. (citing Marie v. Allied Home Mortgage Corp., 402 F.3d 1, 7 n.2 (1st Cir. 2005)).

As to the first circumstance, the defendant does not present newly discovered evidence within the relevant meaning of the term. The "new evidence" the defendant proffers is comprised of (a) the already-twice rejected Vidmar declaration and (b) a declaration by Josie Smith and accompanying exhibits concerning the extent of publicity about the case updated since similar exhibits were submitted and considered last summer. As explained below in Section B(iii), although the new survey covers publicity in recent months since the ruling on the prior motion, it does not advance anything genuinely "new." Additionally, several paragraphs in Smith's declaration purport to respond to the government's sur-reply to the defendant's first motion to change venue. Having previously found the record complete and denied the defendant's multiple attempts to initiate a third round of briefing, the Court does not now consider those paragraphs. Similarly, the Court rejects the defendant's third attempt to insert Vidmar's declaration into the record.

As to the second and third circumstances in which a reconsideration motion may be entertained, the defendant does not point to any intervening change in the law since the Court decided the defendant's first motion to change venue and does not appear to argue that the decision was a manifest error or law or was clearly unjust under the circumstances. Rather, it is plain that he does not agree with the Court's decision on the first motion and seeks to relitigate the same matter with what he presumably hopes is a more convincing showing. That is not recognized as an appropriate ground for reconsideration, which has never been considered a mechanism for serial relitigation of decided issues.

Consequently, the motion is procedurally deficient.

iii. Substantive Merits of Motion

Even were the Court to overlook the procedural deficiency, the defendant has not presented anything that would persuade it that the denial of the first motion to transfer venue, for the reasons explained in that Opinion and Order, was wrong.

In support of his renewed motion, the defendant again focuses on pretrial publicity. As the Court recognized in its previous opinion, media coverage of the case has been extensive. Although the defendant proffers a new media "analysis" based on the number of search hits in the Boston Globe and Boston Herald between July and November, he does not actually offer anything that is genuinely "new." The survey continues to be flawed for the same reasons the Court explained before. For instance, the search terms, some of which are overbroad, hit on articles that sometimes have little (or nothing) to do with the case. More importantly, it also does not distinguish between articles which might be deemed inflammatory and those that are largely factual in nature.

The defendant again argues that the jury pool has been so tainted that a change of venue is required, this time on a theory of "nearly universal local victimization." (See Mem. Supp. Second Mot. for Change of Venue at 8-10 (dkt. no. 686).) In summary, the defendant appears to suggest that it would not be possible to find 18 qualified and capable jurors out of the millions who reside in the Eastern Division of the District because "victims" in this case should be construed broadly to include the Boston Marathon; the entire cities of Boston, Watertown, and Cambridge, including their residents and those involved in the events in those locations; the Marathon spectators and their families, friends, and acquaintances; and those who treated and cared for the injured. The defendant bases his argument on the disclosure by the government of an expert witness who may testify as to injury to the local population. The disclosure, however,

was made on August 1, 2014, prior to the defendant's filing of his important reply brief of his first motion to transfer venue, and the defendant's argument should be rejected for that reason alone. The argument was plainly available to be made in the prior motion, and it is therefore an inappropriate basis for reconsideration.

Further, as previously emphasized by the Court, the Eastern Division is large and diverse. It certainly includes Boston, Cambridge, and Watertown—each of which contains a "diverse cross-section of ethnicities, backgrounds, and experiences"—but it is also a large district expanding significantly beyond those specific communities. See, e.g., United States v. Awadallah, 457 F. Supp. 2d 246, 253 (S.D.N.Y. 2006) (internal quotation marks and citation omitted); United States v. Salim, 151 F. Supp. 2d 281, 284 (S.D.N.Y. 2001); United States v. Yousef, No. S12 93 CR. 180 (KTD), 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997); United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993).

The defendant also argues that the Court should not base its analysis of the issues on the teachings of Skilling v. United States, 561 U.S. 358 (2010), and instead adopt the analysis utilized in United States v. McVeigh. (See Mem. Supp. Second Mot. for Change of Venue at 11 ("The defense submits that the analysis employed by the court in United States v. McVeigh is more appropriate [than Skilling] to the facts of this case.") (internal citation omitted).) The Court, however, regards Supreme Court precedent as the more authoritative source of guidance.

Finally, the defendant reargues claims that Bronson's declaration from the defendant's first venue motion supports a change of venue. As already noted, the Court rejects the defendant's attempt simply to reargue matters already considered and rejected.

In sum, the Court adheres to the reasons previously expressed in concluding that the defendant has not shown that a presumption of inevitable prejudice arises so as to support a change of venue. See Skilling, 561 U.S. at 381; United States v. Quiles-Olivo, 684 F.3d 177, 182 (1st Cir. 2012).

iv. Upcoming Voir Dire Procedures

The defendant requests the Court to revisit its prior comment that a "thorough evaluation of potential jurors in the pool will be made through questionnaires and voir dire sufficient to identify prejudice during jury selection." (Sept. 24, 2014 Opinion and Order at 6 (dkt. no. 577).) The Court declines to do so.

First, the purported support the defendant advances in furtherance of his attack against the voir dire process is not new. The Bronson declaration supported his first venue motion, the Vidmar declaration has been twice (and now thrice) rejected, and the proffered Studebaker and Penrod article is from 1997. Evidence is not "new" if it "in the exercise of due diligence[] could have been presented earlier." Emmanuel v. Int'l Bhd. of Teamsters, Local Union No. 25, 426 F.3d 416, 422 (1st Cir. 2005).

Second, since the Court's opinion citing recent District experience with high-profile cases, another case generating wide publicity has been tried to verdict here. On October 28, 2014, a jury returned a mixed verdict in the case of Robel Phillipos, who was charged with making false statements in connection with the Boston Marathon bombing investigation. Verdict, United States v. Phillipos, Cr. No. 13-10238-DPW (Oct. 28, 2014) (ECF No. 510). The verdict, which reflects a careful evaluation of the trial evidence in the face of widespread media coverage, supports the Court's previous observation regarding the capacity to empanel a fair and partial jury in the District.

Finally, voir dire has long been recognized as an "effective method for rooting out such [publicity-based] bias, especially when conducted in a careful and thoroughgoing manner." Correia v. Fitzgerald, 354 F.3d 47, 52 (1st Cir. 2003) (citing Patton v. Yount, 467 U.S. 1025, 1038 & n.13) (1984)). It "is a singularly important means of safeguarding the right to an impartial jury. A probing voir dire examination is '[t]he best way to ensure that jurors do not harbor biases for or against the parties.'" Sampson v. United States, 724 F.3d 150, 163-64 (1st Cir. 2013) (quoting Correia, 354 F.3d at 52)).[1]

In this case, the parties and the Court have been working diligently to develop a comprehensive juror questionnaire that every qualified juror, culled from the initially summonsed group of 3,000, will complete.[2] The questionnaire contains approximately 100 questions, and many of them are designed to determine the extent to which potential jurors have been affected in the ways in which the defendant is concerned. The questionnaire will be followed by oral voir dire examination of all prospective jurors who were not excused for cause based on the questionnaire alone. The parties will be asked to submit to the Court questions they

[1] See also United States v. Mitchell, 752 F. Supp. 2d 1216, 1227 (D. Utah 2010) (concluding that defendant's poll did not support a finding of presumed prejudice and that defendant "failed to demonstrate that his concerns regarding community impact [could not] be adequately addressed and ameliorated through an extensive juror questionnaire and voir dire"); Salim, 189 F. Supp. 2d at 97 ("Precautions can function to assure the selection of an unbiased jury. Specifically, careful voir dire questioning on this topic, accompanied by the assembling of a jury pool significantly larger than the normal size, will be sufficient in detecting and eliminating any prospective jurors prejudiced by their personal connection to [the terrorist attack]."); United States v. Lindh, 212 F. Supp. 2d 541, 549 (E.D. Va. 2002) (volume of pretrial publicity alone was insufficient as "[n]o juror will be qualified to serve unless the Court is satisfied that the juror (i) is able to put aside any previously formed opinions or impressions, (ii) is prepared to pay careful and close attention to the evidence as it is presented in the case and finally (iii) is able to render a fair and impartial verdict based solely on the evidence adduced at trial and the Court's instructions of law").

[2] Indeed, the Court is implementing several protective voir dire procedures recommended by the defendant's expert, Edward Bronson, in at least one case, including a comprehensive jury questionnaire, an expanded jury pool, individualized voir dire when indicated, and attorney input on the content of the voir dire. See Salim, 189 F. Supp. 2d at 97 n.7.

would like each potential juror to be asked during individual voir dire, particularly based on the questionnaire answers, and while the Court anticipates itself primarily conducting the voir dire, counsel-led follow-up may be permitted as appropriate.

The process is designed to screen out jurors who would be unable to conscientiously perform the impartial and fair assessment of the evidence at trial. "[T]he proof of this pudding will be the voir dire results; only those prospective jurors found to be capable of fair and impartial jury service after careful voir dire will be declared eligible to serve as jurors." See United States v. Lindh, 212 F. Supp. 2d 541, 549 (E.D. Va. 2002). The Court has confidence that a sufficient number of qualified, impartial jurors will be identified and ultimately sworn as jurors. Should the process of voir dire prove otherwise, the question of transfer can obviously be revisited. See id. at 549-50 & n.7.

II. Government's Motion to Strike Exhibits

In response to the defendant's Second Motion for Change of Venue, the government has moved to strike certain paragraphs of Exhibit 1 (Declaration of Josie Smith) and all of Exhibit 2, the Vidmar declaration. The government argues that their inclusion in the defendant's motion papers constitute an attempt to reopen a record the Court previously declared complete. For the reasons articulated by the government and also described in Sections B(i) and B(ii) of this Opinion, the Court agrees. Paragraphs 11 through 14 of Exhibit 1 and all of Exhibit 2 to the defendant's Second Motion for Change of Venue are hereby STRICKEN.

III. Conclusion

As previously ordered, the defendant's Second Motion for Change of Venue (dkt. no. 684) is DENIED. The government's Motion to Strike Exhibits to Defendant's Second Motion for Change of Venue (dkt. no. 760) is GRANTED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED UNDER SEAL

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 13-10200-GAO
	)	
DZHOKHAR TSARNAEV	)	

DEFENSE FOLLOW-UP VOIR DIRE QUESTIONS (SECOND REQUEST)

Defendant, Dzhokhar Tsarnaev, by and through counsel, respectfully submits the following proposed voir dire questions.

Defense counsel further asks that before each juror's voir dire examination is concluded, the Court afford counsel a reasonable opportunity to submit specific follow-up voir dire requests based on the juror's initial responses, or to ask brief follow-up questions themselves.

PUBLICITY

1. What stands out in your mind from everything you have heard, read or seen about the Boston Marathon bombing and the events that followed it?[1]

   [If juror has difficulty responding, prompt with: Do you recall anything . . . .]

   a. About how the bombings occurred?
   b. About the people who are supposed to have carried it out?
   c. About any of the bombing victims who died?
   d. About any of the victims who were hurt but survived?
   e. About the MIT police officer who was killed several days later?

[1]*Skilling v. United States*, 561 U.S. 358, 371 (2010) (noting that jurors were asked on questionnaire "to report on 'what st[ood] out in [their] mind[s]' of 'all the things [they] ha[d] seen, heard or read about Enron.'"

f. About the defendant, Dzhokhar Tsarnaev?
g. About any members of Mr. Tsarnaev's family?

2. Despite what you have heard, read or seen about this case and this defendant, can you presume him to be innocent of all of the charges against him?

3. If you were the defendant on trial in this case, would you want someone on your jury who thinks about you the way you think about Mr. Tsarnaev?[2]

4. Have you heard or read anything about the very recent attacks in Paris? (If yes)

   a. Has this news given you any additional concerns?
   b. Do you feel that the Boston Marathon bombing and what happened in Paris on January 7-9 are similar or connected in any way? (If yes) In what way(s)?
   c. (Depending on the response) Would this affect your ability to sit as a juror in this case—either with respect to deciding whether the defendant is guilty or innocent, or with respect to his punishment if he is convicted.

5. Do you want to be on this jury? [If juror hesitates or is evasive, follow up with:]

   a. If I just left it up to you whether you are seated or excused from this jury, which would you choose? Would you rather be on the jury that will decide this case, or would you rather be excused?

SUPPORT FOR DEATH PENALTY — *MORGAN*

6. The defendant is charged, as you know, with intentionally setting off bombs at the Boston Marathon that resulted in the deaths of three people. If you found the defendant guilty of this crime, would you automatically sentence him to death no matter what the facts are?[3]

7. [Alternative formulation:] Do you believe that the death penalty is the only appropriate punishment for a person who deliberately uses a weapon of mass destruction to cause the deaths of several victims? Or could there be cases in which, after considering mitigating factors about the crime or the defendant, you

[2]*Irvin v. Dowd*, 356 US 717, 727 (1961) ("A number [of veniremen] admitted that if they were in the accused's place in the dock and he in theirs in the jury with their opinions, they would not want him in the jury.")

[3]*Morgan v. Illinois*, 504 U.S. 719, 723 (1993).

would favor life imprisonment — rather than the death penalty — for someone guilty of such a crime?

8. [Alternative formulation:] If you were convinced beyond a reasonable doubt that the defendant deliberately committed an act of terrorism that killed multiple victims, could you consider imposing a life sentence rather the death penalty in that situation?

9. If you were convinced beyond a reasonable doubt that the defendant killed a child by deliberately using a weapon of mass destruction, would you automatically vote for the death penalty without regard to any mitigating circumstances (such as, for example, the defendant's youth, or his family background and relationships)?

OPPOSITION TO THE DEATH PENALTY — *WITHERSPOON*

10. Understanding that you do not support the death penalty, could you meaningfully consider both life imprisonment without possibility of release *and* the death penalty, and not be committed in advance to voting against the death penalty no matter what the evidence might turn out to be?

11. Please understand that I am not asking you whether you would impose the death penalty in this case. Rather, I am asking only this: Could there *ever* be a case — involving especially horrible murders, for example, or a very dangerous defendant — in which you would be able to fairly consider voting for the death penalty as a member of a jury?

    a. (If yes): In other words, if I understand you correctly, are you telling me that while you do not support the death penalty and would be very reluctant to impose it, you could still consider both sentences that are provided by law — life imprisonment without release and the death penalty — and choose between them based on the evidence presented in court about the crime and the convicted murderer?

Respectfully submitted,

DZHOKHAR TSARNAEV
by his attorneys

DEFENDANT'S REQUESTED VOIR DIRE QUESTIONS (GENERAL)

1) Before coming here today, have you heard or read about anything this case?

2) What stands out in your mind from everything you have heard, read or seen about the Boston Marathon bombing and the events that followed it?[1]

   [If juror has difficulty responding, prompt with: Do you recall anything . . . .]

   a) About how the bombings occurred?
   b) About the people who are supposed to have carried it out?
   c) About any of the bombing victims who died?
   d) About any of the victims who were hurt but survived?
   e) About the MIT police officer who was killed several days later?
   f) About the defendant, Dzhokhar Tsarnaev?
   g) About any members of Mr. Tsarnaev's family?

3) **[Follow-up to Q. 73]:** Can you estimate how many news reports you have read, listened to or watched about the Boston Marathon bombing, its aftermath, or this case since April 15, 2013? Would you say dozens? More than a hundred?

4) How did you first learn about the bombing at the Marathon?

   a) Where were you?
   b) What did you do?
   c) What was your first reaction? Did your feelings change as you learned more? How?

5) **[Follow-up to Q. 81-82]:** Did the events surrounding the Marathon bombing affect you personally in any way? How?

   a) Did they affect anyone close to you? How?

6) **[Follow-up to Q. 82]** Did you or anyone close to you do anything in response to the Marathon bombings (such as donating to the One Fund or other charities, buying Boston Strong clothing or other merchandise or books, attending or helping organize special events, volunteering time, expressing support for the victims on-line, or anything else)?

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[1] *Skilling v. United States*, 561 U.S. 358, 371 (2010) (noting that jurors were asked on questionnaire "to report on 'what st[ood] out in [their] mind[s]' of 'all the things [they] ha[d] seen, heard or read about Enron.'"

ATTACHMENT 1

7) Have you heard anything about the court cases — including this one — that have resulted from the Marathon bombing? What have you heard?

8) Do you think that most people in this area believe that Mr. Tsarnaev is guilty?

9) (If yes) Why do you think most people feel that way?

10) If the government in this case did not present enough evidence to prove that Mr. Tsarnaev was guilty *beyond a reasonable doubt*, the jury would have to find him not guilty, and he would then be released.

   a) If that happened, how do you think most people in the Boston area would feel about it?
   b) How would *you* feel about it?

11) If you were on the jury, and the jury found Mr. Tsarnaev *not* guilty, how do you think the people you know (your relatives, friends, neighbors, co-workers) would react when you returned home, went back to work, etc.?

   a) Would you want people to know that you had been on the jury that acquitted him?
   b) Would you be concerned if people did know?
   c) Why?
   d) Is it possible that you would think about other people's reactions while you were on the jury deliberating? Could this affect you? (If no:) Are you sure?

12) If you were the defendant on trial in this case, would you want someone on your jury who thinks about you the way you think about Mr. Tsarnaev?[2]

13) Apart from the people who were actually killed or hurt, do you think the Marathon bombing has had any effect or impact on the people who live in the Boston area? If yes, what sort of effect? Has it had any effect on you? On any members of your family?

14) Did you participate in or attend any part of the **2014** Boston Marathon? Did you participate or have any involvement in events surrounding the first anniversary of the Marathon bombing?

15) Have you heard or read anything about the very recent attacks in Paris? (If yes)

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[2] *Irvin v. Dowd*, 356 US 717, 727 (1961) ("A number [of veniremen] admitted that if they were in the accused's place in the dock and he in theirs in the jury with their opinions, they would not want him in the jury.")

a) Has this news given you any additional concerns?
b) Do you feel that the Boston Marathon bombing and what happened in Paris on January 7-9 are similar or connected in any way? (If yes) In what way(s)?

16) How do you feel about the way that law enforcement responded to the Marathon bombing and its aftermath?

17) Do you have any feelings or opinions about:

a) the way the prosecution has been conducted so far, or the prosecutors in this case?
b) the way the defense has been conducted so far, or defense attorneys in this case?
c) any of the legal proceedings so far?

18) **[Follow-up to Q. 87]** As was mentioned on the questionnaire, jurors in this case are going to have to look at graphic photographs and videotape, and listen to audio recordings, of people who have just suffered horrible injuries from bomb explosions. Some of the victims who survived will also testify, and may provide details about what happened to them. Now that you have had some time to reflect, and to remember how you learned about and experienced the Marathon bombings yourself, do you think that such evidence and testimony might affect your ability to serve as an impartial juror in this case and be completely fair to both sides?

19) Do you want to be on this jury? [If juror hesitates or is evasive, follow up with:]

a) If I just left it up to you whether you are seated or excused from this jury, which would you choose? Would you rather be on the jury that will decide this case, or would you rather be excused?

GENERAL QUESTIONS RE: SUPPORT FOR DEATH PENALTY
(*Morgan v. Illinois*)

As you know, the government is seeking the death penalty in this capital case. And for this reason the jurors who hear this case may – if the case proceeds to a sentencing trial – be in a position to decide between imposing a sentence of life imprisonment without the possibility of release or death. For this reason, I have to ask you some questions about your beliefs and opinions concerning punishment, life imprisonment without the possibility of release, and the death penalty.

There are no "right" or "wrong" answers to any of these questions. People in our community hold many different views on a variety of topics and nobody will be judged or criticized for having or holding a particular belief or opinion. In responding to your Juror Summons and participating in this process you are serving your civic duty as a citizen of the United States and throughout this process we will endeavor to ensure you are treated with dignity and respect.

I explained to you earlier this (morning/afternoon) that if a defendant is convicted in a capital case of an intentional murder, the same jury will hear additional evidence and then decide whether to sentence the defendant to life imprisonment without the possibility of release or death. Before making that decision, the jurors must consider and weigh both aggravating and mitigating evidence. "Aggravating evidence" is evidence that the prosecution believes supports imposing the death penalty. "Mitigating evidence" is evidence that the defense offers to show that life imprisonment without possibility of release is a sufficient or appropriate punishment in this case.

ATTACHMENT 2

The jury does not get to the final step of a sentencing trial where they consider imposing the death penalty or life imprisonment without the possibility of release unless it has already found, beyond a reasonable doubt, that the defendant intentionally murdered the victims, and that he did so with aggravating factors. The aggravating factors alleged in this case include that the murders were committed after substantial planning to commit an act of terrorism, that the defendant killed and attempted to kill several victims, and that one of the people he killed was a child, and was therefore especially vulnerable. If the government proves any or all of these factors, the jurors must then consider mitigating factors—reasons *not* to impose the death penalty—and finally it must choose between the punishments of death and life imprisonment without release. Which punishment to choose is up the each juror; the law never requires that the death penalty be imposed.

1. The first question I want to ask you is whether, if you found a defendant guilty beyond a reasonable doubt of using a weapon of mass destruction to carry out an intentional killing, you believe that the death penalty is the only *appropriate* punishment for a person you are convinced is guilty of such a crime.

2. To put the question differently, could you realistically consider *both* the death penalty and life imprisonment without release as possible punishments? Please keep in mind in answering this question that if a jury reached this point, each juror would *already* have found that the defendant was guilty of an intentional killing, and that he had no valid defenses—in other words, he was not legally insane, the crime was not an

accident, he did not act in self-defense or in the heat of passion, etc. If *you* reached that point as a juror and had to choose between the death penalty rather than life imprisonment, would you always vote for the death penalty in that situation?

3. Now assume for the moment that the government proves aggravating factors—for example that:

- the defendant engaged in substantial planning to kill and to commit an act of terrorism,
- he intentionally killed and tried to kill multiple victims, and
- he killed a child.

If all of that was proven beyond a reasonable doubt, would you realistically be able to consider life imprisonment as a possible punishment? Or would you *always* vote to impose the death penalty in such a case?

3. [Alternative formulation:] If you were convinced beyond a reasonable doubt that the defendant deliberately committed an act of terrorism that killed multiple victims, including a child, could you consider imposing a life sentence rather the death penalty in that situation?

4. [Alternative formulation:] Do you believe that the death penalty is the only appropriate punishment for a person who deliberately commits an act of terrorism that resulted in the deaths of several victims, including a child? Or could there be cases in which you would favor life imprisonment — rather than the death penalty — for someone guilty of such a crime? (If yes) In what sort of situation, or for what sort of

convicted defendant, would you favor life imprisonment rather than the death penalty in a terrorism-murder case?

5. Do you believe that the death penalty is the only *appropriate* punishment for anyone who intentionally murders a police officer in the line of duty?

6. You have referred in the questionnaire to having heard about this case before you were summoned to be a juror. Based on what you know or have heard about this case, do you have an opinion about whether whoever committed the Boston Marathon bombing deserves the death penalty? (If yes):

a. What is your opinion?

b. Given your opinion, would it be difficult for you to start over with a "clean slate" if you were selected to serve in this case?

c. If the defendant is convicted of crimes carrying a possible death sentence, would you require the defense to change your mind about whether he should be sentenced to death?

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 13-10200-GAO
	)	
DZHOKHAR TSARNAEV	)	

DEFENSE FOLLOW-UP VOIR DIRE QUESTIONS (THIRD REQUEST)

Defendant, Dzhokhar Tsarnaev, by and through counsel, respectfully requests that

1. the Court question each prospective juror about the *basis of* and *reasons for* their opinions respecting the defendant's guilt or innocence and the punishment he should receive if convicted *before* instructing the juror concerning his or her obligation to presume the defendant innocent, to hold the government to its burden of proof, and to evaluate the defendant's punishment without regard to previously-held opinions or to information gained outside of court;
2. to use only non-leading, non-directive language in explaining the requirements for jury service;
3. and to ask, or permit defense counsel to ask, the following questions of each juror:

PUBLICITY AND PERSONAL EXPERIENCES

1. What stands out in your mind from everything you have heard, read or seen about the Boston Marathon bombing and the events that followed it?[1]

   [If juror has difficulty responding, prompt with: Do you recall anything . . . .]

   a. About how the bombings occurred?
   b. About the people who are supposed to have carried it out?
   c. About any of the bombing victims who died?
   d. About any of the victims who were hurt but survived?
   e. About the MIT police officer who was killed several days later?
   f. About the defendant, Dzhokhar Tsarnaev?
   g. About any members of Mr. Tsarnaev's family?

2. Please tell us how you first heard about the Marathon bombings. Where were you, how did the news make you feel, and what if anything did you do?

3. Please tell us where you were and what you did on April 19, 2013. What about your immediate family?

4. Despite what you have heard, read or seen about this case and this defendant, can you presume him to be innocent of all of the charges against him?

5. If you were the defendant on trial in this case, would you want someone on your jury who thinks about you the way you think about Mr. Tsarnaev?[2]

6. Do you want to be on this jury? [If juror hesitates or is evasive, follow up with:]

   a. If I just left it up to you whether you are seated or excused from this jury, which would you choose? Would you rather be on the jury that will decide this case, or would you rather be excused?

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[1] *Skilling v. United States*, 561 U.S. 358, 371 (2010) (noting that jurors were asked on questionnaire "to report on 'what st[ood] out in [their] mind[s]' of 'all the things [they] ha[d] seen, heard or read about Enron.'"

[2] *Irvin v. Dowd*, 356 US 717, 727 (1961) ("A number [of veniremen] admitted that if they were in the accused's place in the dock and he in theirs in the jury with their opinions, they would not want him in the jury.")

SUPPORT FOR DEATH PENALTY — *MORGAN*

7. The defendant is charged, as you know, with intentionally setting off bombs at the Boston Marathon that resulted in the deaths of three people. If you found the defendant guilty of this crime, would you automatically sentence him to death no matter what the facts are?[3]

8. [Alternative formulation:] Do you believe that the death penalty is the only appropriate punishment for a person who deliberately uses a weapon of mass destruction to cause the deaths of several victims? Or could there be cases in which, after considering mitigating factors about the crime or the you would favor life imprisonment — rather than the death penalty — for someone guilty of such a crime?

9. [Alternative formulation:] If you were convinced beyond a reasonable doubt that the defendant deliberately committed an act of terrorism that killed multiple victims, could you nevertheless give meaningful consideration to mitigating factors (such as, for example, a defendant's age, lack of a prior criminal record, or family background), and actually consider imposing a life sentence rather the death penalty?

10. [Alternative formulation:] If you were convinced beyond a reasonable doubt that the defendant killed a child by deliberately using a weapon of mass destruction, would you always vote for the death penalty as the only appropriate punishment in such a case, or could there be cases in which you could consider and impose life imprisonment without release after considering mitigating factors (such as, for example, the defendant's youth, lack of a prior criminal record, or family background)?

OPPOSITION TO THE DEATH PENALTY — *WITHERSPOON*

11. Understanding that you do not support the death penalty, could you meaningfully consider both life imprisonment without possibility of release *and* the death penalty, and not be committed in advance to voting against the death penalty no matter what the evidence might turn out to be?

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[3] *Morgan v. Illinois*, 504 U.S. 719, 723 (1993).

12. Please understand that I am not asking you whether you would impose the death penalty in this case. Rather, I am asking only this: Could there *ever* be a case — involving especially horrible murders, for example, or a very dangerous defendant — in which you would be able to fairly consider voting for the death penalty as a member of a jury?

    a. (If yes): In other words, if I understand you correctly, are you telling me that while you do not support the death penalty and would be very reluctant to impose it, you could still consider both sentences that are provided by law — life imprisonment without release and the death penalty — and choose between them based on the evidence presented in court about the crime and the convicted murderer?

Respectfully submitted,

DZHOKHAR TSARNAEV
by his attorneys

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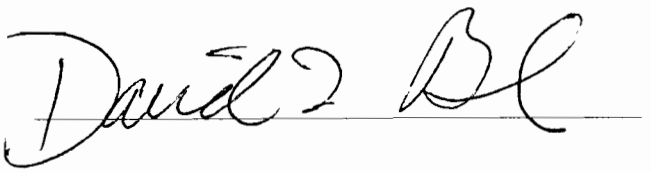

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

OPINION AND ORDER
February 6, 2015

O'TOOLE, D.J.

On January 22, 2015, the defendant filed his third motion for a change of venue.[1] On January 28, the motion was opposed by the government. That same day, the defendant moved to file a reply to the government's opposition (without attaching the requested reply brief) and on January 30, filed a motion for leave to file under seal a reply brief with a proposed reply. On February 2, the next business day, operations in the courthouse were limited due to weather. Then, at the end of the day on February 3, the defendant filed a motion to stay jury selection pending the disposition of a second petition for mandamus apparently filed that same day.

I. Defendant's Motions for Leave to File a Reply Brief

As an initial matter, the motions for leave to file a reply (dkt. nos. 993, 996) are DENIED. The venue issues have been thoroughly briefed and rebriefed. In his motion to file a reply, the defendant points to the government's use of "features of the ongoing voir dire procedure" and seeks to file a reply in order to "similarly cite" material from voir dire. (Mot. for Leave to File Reply to Gov't's Opp'n to Third Mot. for Change of Venue at 1 (dkt. no. 993).)

[1] The relevant procedural history regarding the defendant's prior motions to change venue is fully described in the Court's January 2, 2015 Opinion and Order (dkt. no. 887).

First, the defendant filed his third venue motion while the conduct of individual voir dire was ongoing, but chose to focus exclusively on data from the juror questionnaires. A reply brief is not the proper place to raise new arguments which could have been advanced in the supporting memorandum. Cf. United States v. Bradstreet, 207 F.3d 76, 80 n.1 (1st Cir. 2000) (citing United States v. Brennan, 994 F.2d 918, 922 n.7 (1st Cir. 1993)). Second, as voir dire advances on a daily basis, new data will also emerge on a daily basis. Permitting the defendant to add select quotes from the transcript of the ongoing voir dire process will only serve to encourage unhelpful serial briefing as the process develops daily. Third, having reviewed the defendant's proposed reply brief, I find that permitting the defendant to file it would not materially change my analysis, chiefly because the defendant's strategic selections of quotes and specific experiences with a few jurors during voir dire are misleading and not representative of the process as a whole.[2]

II. Defendant's Third Motion for Change of Venue

The third motion for a change of venue is denied, for reasons both old and new. The old reasons are essentially the same reasons the prior motions were denied, and those opinions are hereby incorporated by reference.[3]

The new reason is that, contrary to the defendant's assertions, the voir dire process is successfully identifying potential jurors who are capable of serving as fair and impartial jurors in

[2] To the contrary, the experience of voir dire suggests instead that the full process—including summonsing an expanded jury pool; utilizing a lengthy questionnaire jointly developed by the parties and the Court; giving the parties ample time to review questionnaires, research jurors, and consult with their jury selection advisers; and permitting both the Court and the parties to conduct thorough voir dire—is working to ferret out those jurors who should appropriately be excused for cause.

[3] I again reject the defendant's attempt to rely upon the declaration of Neil Vidmar, which has now been disallowed four times, and the portions of the Josie Smith declaration which have already been stricken.

this case. In light of that ongoing experience, the third motion to change venue has even less, not more, merit than the prior ones.

That the voir dire process has been time-consuming is not an indication that a proper jury cannot be selected for this case. It is rather in the main a consequence of the careful inquiry that the Court and counsel are making into the suitability of prospective jurors. That takes time, and we have been taking it.

It is also necessary to have a large pool of qualified jurors available for the next phase of jury selection, which is the exercise of peremptory challenges. Because this is a death penalty case, both sides have significantly more peremptory challenges than they would in other criminal cases. Whereas in a typical non-capital federal case the parties might have between them a total of 18 to 22 peremptory challenges (depending on the number of alternates seated), in this case they each have 23, for a possible total of 46. That requires that we clear for possible service a minimum of 64 potential jurors, many more than commonly necessary. Indeed, if this were a typical criminal case of the sort tried routinely in this Court, we would likely already be finished. We have made substantial progress toward achieving the goal of the ongoing voir dire process. There is no reason to expect that such progress will cease, and there is no reason to halt a process that is doing what it is intended to do.

At base, the defendant's argument purports to be based on an examination of the written questionnaires completed by prospective jurors in early January. While the questionnaires remain an important source of information about jurors and their attitudes, they are no longer the only source, nor for some matters the best source. Some questions on the written form asked jurors to answer by selecting from various options presented, usually by checking a box. Other questions asked jurors to respond in their own words. Checking a box may result in answers that appear

more clear and unambiguous than the juror may have intended or than is actually true. On the other hand, answers in the jurors' own words can often be unclear, inapposite, or incomplete. In the voir dire that is underway, the Court and the parties have been able to follow up on the written answers as appropriate to try to clarify what may be ambiguous, to explore whether a juror would qualify or amplify an apparently unambiguous answer, and to probe matters not expressly addressed in the questionnaire. In other words, at this stage the questionnaire answers are only a starting point. Decisions to qualify or excuse any prospective juror will be made on the basis of all the information available, but especially on the individual interviews of each of the jurors, face to face. It is therefore a fundamental flaw in the defendant's argument in support of his motion that it relies primarily on the questionnaire answers. As pointed out above regarding the motion to file a reply, when the defendant filed his motion it was open to him to support it by reference to what emerged during voir dire, but he apparently chose not to do so. The technique of saving main arguments for a reply brief is one the defendant has previously sought to employ on this issue.

The defendant is correct that in answering the questionnaire a substantial number of jurors checked the box "yes" in responding to a question whether, based on media reports or other information, they had formed an opinion that the defendant is guilty.[4] The government is likewise correct in pointing out that a substantial number of those jurors also indicated, again by checking a box, that they would be "able" to set such an opinion aside and decide the issues in the case based solely on the evidence presented at trial. Neither answer needs or deserves to be

[4] To this point, it is worth noting that the percentage the defendant claims checked the box (68%) was substantially smaller than the percentage of poll respondents who thought the defendant was clearly or probably guilty in the four jurisdictions previously surveyed by the defendant. (Reply to Gov't's Opp'n to Def.'s Mot. for Change of Venue and Submission of Supplemental Material in Supp., Decl. of Edward J. Bronson, Ex. 4f at 5 (dkt. no. 461-23) (92% in Boston, 84% in Springfield, 92% in Manhattan, and 86% in Washington, D.C.).)

accepted at face value, and voir dire has afforded an opportunity, participated in by counsel for both parties, to explore the issues further with jurors. Some jurors who said on the form they would be "able" to put a prior opinion aside and decide issues solely on the trial evidence backed off from that position when questioned during voir dire and said they would not be able to do so. Other jurors confirmed their answer, usually explaining why they thought they would be able to decide the case only on the trial evidence. For example, one human resources professional explained that it was a common occurrence in her experience for her initial impression of the merits of a workplace controversy to be altered or even reversed when she had information from a fuller or more careful investigation, and so she had learned to keep her judgment suspended until she had all the necessary information. Other jurors have said that as citizens they understand and are committed to the principles of the presumption of innocence and proof beyond a reasonable doubt. Others have said they do not always accept media coverage as reliable. Neither such reversals of position nor added explanations can appear from examination of the questionnaires alone. They are the product of the voir dire process that the defendant seeks to interrupt.

The defendant also contends that there are too many jurors who have some "connection" to the Marathon events. There are many different kinds of possible "connections," from participation in the race itself to presence as a spectator to relationships with victims to donations to charitable funds to possession of "Boston Strong" merchandise. To understand whether any such "connection" should disqualify a juror otherwise qualified to serve requires going beyond the face of the questionnaire and asking jurors directly about it. That also is happening in the voir dire process and permits the development of additional, and thus helpful, information about the nature and strength of any "connection" in a face-to-face, give-and-take with a juror.

It must also be noted that the defendant's presentation of a series of selective quotations from the 1300-plus questionnaires is misleading because the quotations are not fairly representative of the content of the questionnaires generally. It is possible to match the defendant's selection with a different group of quotations that, considered by themselves, would lead to opposite conclusions. The selected quotations are attention-getting, and they have gotten attention from the media. After putting them in a public filing and thus having effectively invited the media to give them publicity, the defendant now piously complains about the level of media coverage.[5]

When I learned that the defendant's memorandum included quotations from the confidential juror questionnaires, on my own motion I ordered the unredacted memorandum to be placed under seal. In that brief electronic order, I described the public filing of contents of the questionnaire as improper, and I adhere to that characterization. (See infra Part IV.) At the time jurors filled out the questionnaires, I told each panel of jurors that the completed questionnaires would initially be reviewed only by the participants in the case and by the Court, and that they would not become part of the public record unless and until I determined whether they include any sensitive information that should be kept confidential permanently. All parties were aware of that advice to jurors. Notwithstanding, the defendant made parts of completed questionnaires part of the public record without leave of Court, and that is unfortunate. It not only nullified the assurance I had given the jurors, but it also invited further public discussion of matters to be raised in the voir dire process, creating a possible impediment to the success of that process.

[5] During the voir dire process, interviewed jurors have assured me that they have followed my instructions to avoid media stories about this case.

Concerns about jurors who have fixed opinions or emotional connections to events, or who are vulnerable to improper influence from media coverage, are legitimate concerns. The Court and the parties are diligently addressing them through the voir dire process.

The defendant's third motion for a change of venue (dkt. no. 980) is DENIED.

III. Defendant's Motion to Stay

On February 3, the defendant apparently filed with the Court of Appeals a second petition for mandamus, and in connection with that filed at 5:19 p.m. a motion with this Court to stay proceedings pending resolution of the petition. The motion for a stay (dkt. no. 1003) is DENIED.

IV. Defendant's Motion to Amend Electronic Order re: Change of Venue Filing

The defendant asks the Court to amend the electronic order finding as improper the defendant's memorandum copying specific quotes from prospective juror questionnaires. For the reasons described above, the defendant's request (dkt. no. 984) is DENIED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED UNDER SEAL

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 13-10200-GAO
	)	
DZHOKHAR TSARNAEV	)	

DEFENDANT'S MOTION TO EXCUSE JUROR 138 FOR CAUSE BASED ON NEWLY DISCOVERED INFORMATION

The defendant, Dzhokhar Tsarnaev, by and through counsel, respectfully moves to excuse for cause Juror 138, who was questioned on January 23, 2015. The motion is based on newly discovered information, set forth below, which directly contradicts his sworn answer to the Court's questions and shows that he violated a direct court order.

On January 5, the juror made several posts on Facebook regarding his appearance for jury service. Several of his Facebook friends commented in reply. When he appeared for voir dire on January 23, the juror was asked about his Facebook use, including whether anyone had commented "about this trial." 1/23/15: 17. The juror responded, "No."

The January 5 posts, attached as Exhibit 1, start with his comment, apparently made before 7:16 a.m. (judging by the first response), that he was at the federal courthouse: "Jury duty … this should be interesting … couple thousand people already here [.]" One friend responded: Did you get picked for the marathon bomber trial!!!??? That's awesome." He answered, "Ya awesome alright haha there's like 1000s of

people[.]" A friend commented less than an hour later (at 8:12 am) "If you're really on jury duty, this guys got no shot in hell."

At 1:15 p.m, after the jury pool was instructed, the juror posted details about the schedule. At 1:22 p.m., he wrote "Shud (sic) be crazy he was legit like ten feet infront (sic) of me today with his 5 or 6 team of lawyers .. can't say much else about it tho … that's against the rules[.]" A friend responded, "Since when does Mike Neal care about rules?" Another advised, "Play the part so u get on the jury then send him to jail where he will be taken care of [.]"

The juror wrote, "When the Feds are involved id rather not take my chances . .. them locals tho .. pishhh ain't no thang[.]" A friend commented, "Yea supercareful bc should you get picked any mention of anything can get you booted or call for mistrial."

The juror was dishonest with the Court about comments on Facebook and violated the Court's instructions within just a few hours of receiving them. The Court told the assembled jury panel, "I now order each of you not to discuss this case with your family, friends, or any other person until I either excuse you, or if you are selected as a juror, until the case concludes. This is a court order, willful violation of which may be punishable as a contempt of court or otherwise."

The Court did instruct the jurors that they could tell others that they may be a juror in this case and discuss the schedule. The Court added, "you are not to discuss anything else or allow anyone to discuss with you anything about this case until you are excused or, if you are a juror, until the trial concludes."

The juror's eagerness to communicate his experience to his friends, just after being sternly told not to, reveals a willingness to flout the rules, a lack of maturity, and a failure to appreciate the seriousness of these procedures.

His friends' comments also are troubling, as they suggest that he is not likely to abide by rules and that "this guys got no shot in hell" if the juror was selected.

Conclusion

For the foregoing reasons, as well as the fact that the juror disclosed during jury selection that he is currently under treatment for opiate addiction, the defendant requests that Juror 138 be excused for cause.

Respectfully submitted,

DZHOKHAR TSARNAEV
by his attorneys

s/ _____
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED UNDER SEAL

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 13-10200-GAO
	)	
DZHOKHAR TSARNAEV	)	

DEFENDANT'S MOTION TO EXCUSE JUROR 286 FOR CAUSE BASED ON NEWLY DISCOVERED INFORMATION

The defendant, Dzhokhar Tsarnaev, by and through counsel, respectfully moves to excuse for cause Juror 286, who was questioned on February 4, 2015. The motion is based on newly discovered information, set forth below, which calls into question her candor with the Court as well as her impartiality. As set forth below, this newly discovered information includes Juror 268's Facebook postings at the time of the Boston Marathon Bombings and their aftermath, which are contrary to answers given in her juror questionnaire reveal a community allegiance that is certain to color her view of the case.

In her response to question 29 of the juror questionnaire, which asks "[i]f you blog or post messages or opinions on websites, please describe the websites, the types of things you blog or post, and how often you do it," Juror 286 answered "Facebook – family pictures, share events I've come across I think others might be interested in." In response to question 79, which asks "[i]f you have commented on this case in a letter to the editor, in an online comment or post, or on a radio talk show, please describe," she responded "don't believe I have." At voir dire, she told the Court that she could

faithfully apply the Court's instructions on determining guilt and innocence and conscientiously vote to impose either life or the death penalty. [Tr. 13:115-19].

After her voir dire questioning, the defense located a series of Twitter posts by Juror 286[1] related to this case beginning the day of the Bombing and through the lockdown and the defendant's capture. Case related tweets continued over the next year and through to the 2014 anniversary. The undisclosed tweet and retweet posts, attached hereto as Exhibit A, make clear her community ties and allegiances, as well as her patent bias in favor of law enforcement. These tweets include the following:

- A tweet authored by Juror 286 on the day of the bombing, reading "Little 8yr old boy that was killed at marathon, was a Savin Hill little leaguer :-(RIP little man #Dorchester #bostonmarathon";
- A retweet of a Boston Fire Department tweet on April 16 that reading "A sad day but a day where training, pre-planning, unified command and a quick first response by many saved lives. Thanks to All!";
- A tweet authored by Juror 286 while the April 19 search for the defendant was underway, speculating that "They must've got some blood test back and know this kid is just bleeding to death somewhere #bostonbombing";
- A tweet authored by Juror 286 during the lockdown on April 19 reading "it's worse having to work knowing ur family is locked down at home!! Finally home locked down w/them #boston";

[1] The defense has confirmed that the Twitter account from which the posts were obtained belongs to Juror 286 by its link to the juror's Facebook page and comparing the Twitter profile picture with her photograph obtained from the Massachusetts Registry of Motor Vehicles information.

- A retweet of a Boston EMS (Emergency Medical System) tweet released on April 19, 2013, after the defendant's arrest that read "Monday started in celebration and ended in tragedy Today began in tragedy and ended in celebration. You can't keep us down. #BostonStrong";
- A retweet that same evening reading "Sleep tight #Boston! #Bostonyou'remyhome."
- A retweet that same evening, referring to the defendant's capture, reading "Congratulations to all of the law enforcement professionals who worked so hard and went through hell to bring in that piece of garbage."
- A fourth retweet that evening reading "Told y'all, Welcome To Boston The City Of CHAMPS! We get our shit DONE! #Boston Strong";
- A tweet authored by Juror 286 on April 19 lauding a Boston Strong graphic incorporating all of the area professional sports teams;
- A retweet on an April 20, 2013 Braintree Police Department tweet featuring the pictures of both MBTA Officer Richard Donahue and MIT Officer Sean Collier with the heading "Officer Donohue and Officer Collier. . . Graduation day at the MBTA Police Academy Please keep both in your prayers;"
- An October 13, 103 retweet of a picture of Jane Richard with the heading "Marathon bombing victim Jane Richard sang the national anthem with other children from St Ann's Parish at Fenway";

- An April 19, 2014 retweet of a Boston Police Department tweet, published just after the anniversary of the Boston Marathon Bombings, which features a picture of Martin Richard's brother and reads "#BostonStrong: Henry Richard, Martin's older brother, seen running strong in today's BAA Youth 2014 Relay Races."

The existence of these postings, which Juror 286 tweeted and retweeted long after the initial trauma of the bombings subsided, along with her lack of candor in omitting them from her juror questionnaire, make Juror 286's assurances to the Court that she would give the defendant the benefit of the doubt and conscientiously consider life versus the death penalty at trial exceedingly suspect. Juror 286 is not qualified to serve and must be excused.

Conclusion

For the forgoing reasons, the defendant requests that Juror 286 be excused for cause. Alternatively, the defendant requests that Juror 286 be recalled for follow-up questioning regarding the omissions in her jury questionnaire and the postings made on her Twitter account.

Respectfully submitted,

DZHOKHAR TSARNAEV
by his attorneys

s/

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Certificate of Service

I hereby certify that this document was served upon opposing counsel by email and hand delivery on February 27, 2015.

Timothy G. Watkins

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

OPINION AND ORDER
March 13, 2015

O'TOOLE, D.J.

I. Introduction

On June 27, 2013, a grand jury returned an indictment that charges the defendant with multiple crimes arising from the detonation of two improvised explosive devices at the 2013 Boston Marathon. On August 22, 2014, the defendant moved to dismiss the indictment based on the selection of the grand jury who returned the indictment, arguing various violations of the District of Massachusetts Plan for Random Selection of Jurors (the "Plan"), the Jury Selection and Service Act (the "Act"), and the Sixth Amendment to the United States Constitution. On October 17, the Court denied the motion. United States v. Tsarnaev, No. 13-cr-10200-GAO, 2014 WL 5308084 (D. Mass. Oct. 17, 2014).

In November 2014, approximately 3000 summonses were mailed to potential jurors for the selection of a petit jury in this case. On December 29, pursuant to 18 U.S.C. § 3432, the defendant was furnished with a list of those veniremen. On January 5, 2015, jury selection commenced with approximately 1373 qualified jurors coming to the courthouse to complete jury questionnaires over the course of three days. Because of space limitations at the courthouse, the

summonsed jurors were divided into six panels of a little more than 200 jurors each. With a few minor exceptions due to scheduling conflicts of a few jurors, the panels of jurors were summonsed in order from the list of veniremen, with the first 200 coming in on Monday morning, the second 200 coming in on Monday afternoon, and so on. The defendant received a list of jurors who completed questionnaires at the end of each day. On January 7, after all questionnaires had been completed, the defendant received a list of all jurors in what is known informally as the "Judge's List," a list of all prospective jurors who completed questionnaires and remained in the pool.

On January 2, the Friday before jury selection began, the defendant filed a motion for the production of records regarding the summonsing of jurors for the petit jury. On January 20, the Court met with the Jury Administrator, who then began assembling the requested materials. On January 21, the Court indicated to the defense that the motion was generally granted, subject to data maintenance and retrieval. On February 5, the Court memorialized the granting of the motion in a written order. On February 13, the Jury Administrator provided the jury records.

On February 26, the defendant filed a second motion to dismiss the indictment, arguing that the procedures used to select the petit jury in this case violated the Plan, the Act, and the fair cross-section requirement of the Sixth Amendment. On March 4, I denied the motion in open court, noting that an explanatory opinion would follow. This is that opinion.

II. Discussion

Section 1867(a) of Title 28 of the United States Code provides:

> In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

Invoking this provision, the defendant moves to dismiss his indictment, arguing that: (1) the Plan was violated by re-ordering each panel of jurors after they completed questionnaires; and (2) the Plan itself violates the fair cross-section requirement of the Sixth Amendment because it permitted the excuse, upon request, of any person over the age of 70, and because it supposedly resulted in the underrepresentation and systematic exclusion of African-Americans.

A. Timeliness of Motion

As an initial matter, the defendant's claim under the Act appears untimely. A defendant "may move to dismiss the indictment . . . on the ground of substantial failure to comply" with the Act in the procedures for the selection of a petit jury "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." Id. Here, the defendant did not move to dismiss the indictment before voir dire. Additionally, he did not do so within seven days after receipt of the Judge's List on January 7, the date he could have discovered any purported deficiencies based on the order of jurors, nor did he move within seven days after receipt of the jury records on February 13, the date he could have discovered any purported deficiencies based on fair cross-section requirements. His present motion can be denied on an untimeliness basis alone.

B. Reordering of Jurors Within Each Panel

Even if his motion were considered timely, it lacks merit on substantive grounds as well. As to the reordering of jurors within each panel, the defendant's argument is premised on a fundamental misunderstanding. As was explained to the defendant on January 9, the reordering of jurors within each panel had nothing to do with "non-random factors such as arrival time" as the defendant now alleges. (Second Mot. to Dismiss Indictment and Stay Proceedings Pending

Reconstituting Jury Wheel to Conform with Statutory and Constitutional Requirements at 2 (dkt. no. 1080).) In each session, after all jurors had checked in, a computer program randomly assigned a number to each juror in the panel to create the Judge's List. I understand that this is the regular procedure used for the selection of all juries in the District.

Even if the random assignment of jurors within each panel was a strict violation of the Plan, the defendant would have to show that the procedure resulted in a "substantial failure to comply" with the Act in order to obtain relief. United States v. Royal, 174 F.3d 1, 11 (1st Cir. 1999). As explained in the Court's prior order, "[a] substantial failure is one that contravenes one of . . . two basic principles . . . : (1) random selection of jurors, and (2) determination of juror disqualification, excuses, exemptions, and exclusions on the basis of objective criteria." Tsarnaev, 2014 WL 5308084, at *2 (quoting Royal, 174 F.3d at 11). "Technical violations, or even a number of them, that do not frustrate [the random selection and cross-section requirements] and do not result in discrimination and arbitrariness do not constitute a substantial failure to comply." Id.

The random ordering of each panel of jurors to create the Judge's List if anything furthers the Act's goal of the random selection of jurors. The defendant's expert appears to agree. (Second Mot. to Dismiss Indictment, Ex. 1 at 2, ¶ 5 (Decl. of Jeffrey O'Neal Martin) (dkt. no. 1080-1) ("If the re-ordering merely reordered the potential jurors within groups of 200 or so without the introduction of any non-random factor such as arrival time, then, on average, there would not be any systematic effects on the randomness of the order.").) Arrival time had no effect on the generation of the Judge's List.

Martin also says that "certain potential jurors have moved from group to group causing the re-ordering to be non-random and the effect on cognizable groups to not be neutral." (Id.)

However, the randomized assignment of juror numbers within each panel is a separate matter from the rescheduling of a few jurors to different panels to accommodate their own scheduling conflicts. The defendant has not provided any evidence as to those specific jurors which would allow the Court to assess any possible impact on the composition of the jury pool or to determine whether it "frustrated" the principles of the Act and resulted in discrimination and arbitrariness. See Royal, 174 F.3d at 11.

The various statistical information the defendant offers in support of his argument does not establish otherwise. For example, the defendant complains that the re-ordering caused five African-Americans who were in the first ninety-four on the list of veniremen to shift below the first ninety-four. But he does not show how that matters when the qualified pool from which the parties exercised peremptory challenges was drawn from the first 700 jurors across the first four panels of jurors who completed questionnaires.

C. Alleged Violations of Fair-Cross-section Requirements

The defendant has also failed to establish a prima facie showing of a violation of the fair cross-section requirement of the Act and Sixth Amendment under the criteria articulated in Duren v. Missouri, 439 U.S. 357, 364 (1979). As the defendant concedes, his arguments regarding the fair cross-section are generally foreclosed by the Court's previous decision on the selection of the grand jury. Indeed, the defendant's own memorandum on the subject is virtually identical to his first motion to dismiss. As to African-Americans, the defendant again fails to demonstrate that the disparity of representation—1.89%—of African-Americans is constitutionally meaningful when assessed using the absolute disparity methodology that has been approved by the First Circuit. See, e.g., Royal, 174 F.3d at 10 (no violation where absolute disparity was 2.97%); United States v. Joost, 94 F.3d 640, at *8 (1st Cir. 1996) (table) (no

violation where absolute disparity was 7.13%); United States v. Hafen, 726 F.2d 21, 23 (1st Cir. 1984) (no violation where absolute disparity was 2.02%). The defendant concedes as much. (Second Mot. to Dismiss at 11.) As to persons 70 and older, the defendant's argument that they should be considered a distinctive group for fair cross-section purposes remains unconvincing. See Barber v. Ponte, 772 F.2d 982, 997-1000 (1st Cir. 1985) (en banc) (declining to recognize "young adults" between the ages of 18 and 34 as a distinctive group); United States v. Stile, No. 1:11-cr-00185-JAW, 2014 WL 5465341, at *4-6 (D. Me. Oct. 28, 2014) (persons over 70); see also Brewer v. Nix, 963 F.2d 1111, 1112-13 (8th Cir. 1992) (persons over the age of 65); Silagy v. Peters, 905 F.2d 986, 1010-11 (7th Cir. 1990) (persons aged 70 and over); Wysinger v. Davis, 886 F.2d 295, 296 (11th Cir. 1989) (per curiam) (persons aged 18 to 25); Ford v. Seabold, 841 F.2d 677, 682 (6th Cir. 1988) ("young adults" between the ages of 18 and 29).

Accordingly, the defendant has failed to prove a violation of the fair cross-section requirements of either the Sixth Amendment or the Act.

III. Conclusion

For the foregoing reasons, the defendant's Second Motion to Dismiss Indictment and Stay Proceedings Pending Reconstituting Jury Wheel to Conform with Statutory and Constitutional Requirements (dkt. no. 1080) was DENIED in open court on March 4, 2015.

/s/ George A. O'Toole, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA,

v.

DZHOKHAR A. TSARNAEV,
Defendant.

OPINION AND ORDER
January 15, 2016

O'TOOLE, D.J.

Dzhokhar Tsarnaev was tried on a thirty-count indictment arising out of the bombings at the Boston Marathon on April 15, 2013. Jury selection for his trial began January 5, 2015. On April 8, 2015, the jury returned a verdict in the first phase of his capital trial finding him guilty under all counts. The maximum penalty for seventeen of the crimes was death. On May 15, 2015, the jury returned its verdict in the second phase of the trial, deciding that the death penalty should be imposed on six of the seventeen capital counts, but not on the other eleven. On June 24, 2015, the Court sentenced the defendant to death on those six counts in accordance with the jury's verdict and to various terms of imprisonment on the remaining counts.

On July 6, 2015, the defendant moved for a new trial in the interests of justice pursuant to Federal Rule of Criminal Procedure 33 and, in the alternative, for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. In his motion, he reiterates some grounds for such relief that he had previously raised before or during trial. As to those grounds that are repeated from prior written or oral motions, both aspects of the present motion are denied for the same reasons

the prior motions were denied. As to most of them, no further discussion is necessary; the issues are preserved for the defendant on appeal.

He repeats his objection to trial in this District, and the reasons for denying his renewed attack on venue are discussed below.

Lastly, he argues that all of his convictions under 18 U.S.C. § 924(c) for carrying a firearm during and in relation to a crime of violence must be vacated. His argument is based first on issues he claims arise from the Supreme Court's decision, issued days after he was formally sentenced, declaring a portion of the Armed Career Criminal Act unconstitutionally vague. See Johnson v. United States, 135 S. Ct. 2551 (2015). He also argues that his § 924(c) convictions must be set aside because it cannot properly be determined whether the various underlying crimes were "crime[s] of violence" in the necessary sense.

The Court permitted an extended briefing schedule and, after oral argument on a portion of the defendant's motion, allowed the parties to file supplemental memoranda. This Opinion and Order resolves the issues raised by the post-trial motion.

I. Venue

The issue of venue has been previously litigated in this case and extensively addressed in opinions of this Court and of the Court of Appeals. The defendant now again renews his venue argument, contending generally that local media coverage, local events, and information or postings on social networks during the course of the trial should raise a presumption of prejudice[1] and require a conclusion that the District of Massachusetts was an improper venue for his trial. The defendant's opening brief contains only limited references to legal authority, but he appears

[1] Notably, he does not argue that there was actual prejudice. (See Reply to Gov't's Opp'n to Mot. for J. Notwithstanding Verdict and for New Trial at 1-2 (dkt. no. 1589).)

to be raising the claim under both the Sixth Amendment to the Constitution and Federal Rule of Criminal Procedure 21(a), although he does not distinguish between them.

In Skilling v. United States, the Supreme Court identified four factors generally relevant to a determination whether a presumption of prejudice should be indulged: (1) the size and characteristics of the community in which the crime occurred; (2) the nature of the publicity surrounding the case; (3) the time between the crime and the trial; and (4) whether the jury's decision indicated bias. 561 U.S. 358, 382-84 (2010); see also United States v. Casellas-Toro, 807 F.3d 380, 386 (1st Cir. 2015); In re Tsarnaev, 780 F.3d 14, 20-21 (1st Cir. 2015) (per curiam).[2] The defendant does not expressly articulate a legal framework for analyzing his claim, but it appears he seeks to advance an argument related primarily to the second and third factors. For the sake of completeness, in this post-trial analysis I will address all four Skilling factors.

A. Size and Characteristics of the Community

As has been previously described, see In re Tsarnaev, 780 F.3d at 21; United States v. Tsarnaev, Cr. No. 13-10200-GAO, 2014 WL 4823882, at *2 (D. Mass. Sept. 24, 2014), Boston is located in a large, diverse metropolitan area. The geographic region from which the jury was drawn, the Eastern Division of the District of Massachusetts, includes about five million people living not

[2] Some case law suggests that the number or percentage of jurors excused could be relevant to the inquiry. See, e.g., Casellas-Toro, 807 F.3d at 389 (citing cases regarding percentages of potential jurors excused for cause). The defendant does not make that argument here. Such a metric would not reliably assess the extent of any potential juror prejudice in this case. A very large number of jurors were excused because of the personal hardship they would endure if required to serve on the protracted trial. Another significant cohort of excused prospective jurors included those whose firmly held beliefs about the death penalty in general, and not about this case in particular, disqualified them under applicable law. Additionally, the Court was deferential to the parties' joint agreements about for-cause excusals of particular jurors, which appeared at least sometimes to be based on negotiations about those prospective jurors' general death penalty views. In light of these facts, the percentage of jurors excused would be an unreliable—indeed plainly inaccurate—proxy for the extent of any potential juror bias against the defendant.

just in Boston, but also in smaller cities and towns, encompassing urban, suburban, rural, and coastal communities.[3] Residents in the area obtain their daily news from a variety of sources. In re Tsarnaev, 780 F.3d at 21. In light of these facts, this factor weighs against a finding of presumed prejudice. Compare Skilling, 561 U.S. at 382 (stating that "large, diverse pool" of approximately 4.5 million eligible jurors in Houston area made the "suggestion that 12 impartial jurors could not be empaneled . . . hard to sustain"), and United States v. Yousef, No. S12 93 CR. 180 (KTD), 1997 WL 411596, at *3 (S.D.N.Y. July 18, 1997) (noting in pre-Skilling case that the district was one of the "largest and most diverse in the country" (quoting United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486, at *1 (S.D.N.Y. Sept. 15, 1993))), with Rideau v. Louisiana, 373 U.S. 723 (1963) (remarking that community where the crime occurred was a small parish of only 150,000 people), and Casellas-Toro, 807 F.3d at 386-87 (explaining district court acknowledgement that, although Puerto Rico has a population of 3 million people, a fact tending to mitigate the potential for prejudice, Puerto Rico is "a compact, insular community . . . highly susceptible to the impact of local media" (citation omitted)).

B. Nature of the Publicity

The main basis for the defendant's motion appears to be the extent and nature of the publicity concerning the case itself and the events at issue in it. In his post-trial motion, he focuses largely on media coverage concerning observances of the anniversary of the bombings, the 2015 Boston Marathon itself, and publicity about victims; coverage of foreign family witnesses; physical surroundings of the courthouse; and social media.[4]

[3] The residences of the empaneled jury reflect this geographic diversity.

[4] The defendant submitted two compact discs containing voluminous materials purportedly in support of his post-trial motion. In the Scheduling Order regarding post-trial motions, the parties were directed to include in their post-trial briefs "specific and detailed citations to the record and appropriate legal authority." (May 28, 2015 Scheduling Order at 2 (dkt. no. 1449).) To the extent

i. Marathon-related media coverage

The defendant relies heavily on local marathon-related media coverage. It is certainly true that the local media gave substantial coverage to the anniversary of the bombings, its victims, and the 2015 marathon. What the defendant disregards, however, is the national—and international—interest in those same events and people. This was not a crime that was unknown outside of Boston. To the contrary, media coverage of the bombings when they occurred was broadcast live around the world over the Internet and on television. Contrast Casellas-Toro, 807 F.3d at 388 (noting that defendant "would be relatively unknown outside of Puerto Rico"). The defendant's own pretrial poll, for instance, show that even in his preferred venue, Washington, D.C., those polled overwhelmingly were familiar with the bombings.[5] (Reply to Gov't's Opp'n to Def.'s Mot. for Change of Venue and Submission of Supp. Material in Supp. Ex. 4F at 4 (dkt. no. 461-23)); see also In re Tsarnaev, 780 F.3d at 16 (96.5% of survey respondents).

Nor did the crime affect an event about which only Bostonians are concerned. Although the Boston Marathon is an important event in the city and region, it is also an iconic event known worldwide. According to testimony by the executive director of the Boston Athletic Association,

there is material on the compact discs that is not expressly referred to by the defendant in his briefing, I decline to comb through uncited materials in order to locate what I might conclude the defendant would regard as relevant portions and then try to connect them to his legal arguments; that is a party's responsibility. (See, e.g., Mem. in Supp. of Mot. for J. Notwithstanding Verdict and for New Trial at 3 (dkt. no. 1506) ("A sample of . . . additional information is summarized . . . ."); id. ("Supporting materials—including those expressly mentioned in this [m]emorandum as well as many others—have been compiled . . . .").) Therefore, I generally limit discussion and consideration of the exhibits that were actually referenced by the defendant in his post-trial motion, as required by the Scheduling Order.

[5] Similarly, 86.1% of Washington D.C. survey respondents in the defendant's pretrial poll indicated that "[b]ased on what [they had] read, seen or heard about the case," they "believe[d] Dzhokhar Tsarnaev was" either "definitely" or "probably" guilty. (Reply to Gov't's Opp'n to Def.'s Mot. for Change of Venue and Submission of Supplemental Material in Supp. Ex. 4F at 5) (dkt. no. 461-23).)

the organization which hosts the Boston Marathon, the race was originally known as "America's Marathon." (Mar. 4, 2015 Tr. of Jury Trial – Day Twenty-Seven at 69 (dkt. no. 1528).) Because "it is the only marathon outside of the Olympic Games and the world championships for which one needs to qualify in order to run, . . . it's an aspiration for a great many people." (Id. at 68.) It "attracts some of the finest competitors in the world." (Id. at 70.) The approximately 27,000 registered runners come from all 50 states and many countries. (Id. at 68, 75.) At least 40% of them are from "outside Massachusetts and New England." (Id. at 75.) Similarly, spectators include not only people from the Boston area but also many visitors from elsewhere, coming to watch friends and family members participating in the race. (Id. at 73.) Like the Olympic Games, the event receives worldwide media coverage. In recent years, approximately 1,000 media credentials have been issued to representatives of about 80 registered news organizations. (Id. at 80.) The marathon is broadcast live locally, nationally, and internationally to about 20 countries, and it is also live-streamed over the Internet. (Id. at 80-81.)

Not surprisingly, then, the pretrial and trial proceedings were covered not only locally but also nationally and internationally. National and international news outlets comprised approximately two-thirds of the media organizations that requested one of the thirty seats reserved for media in the trial courtroom and more than one-half of the media organizations that were ultimately assigned a seat or rotating seat there. Many others followed the proceedings from overflow rooms in the courthouse. Newspapers around the world closely followed the trial as it unfolded, both in their print editions and on the Internet, focusing not just on the more significant trial events like opening statements and closing arguments, but even on the more particular aspects

of the legal process.[6] There is no reason to think—and certainly no specific evidence—that this extensive coverage would have been any different in kind or degree if the trial had been conducted elsewhere.

Moreover, there is no reason to think that if the trial had been moved to another district, the local media in that district would not also have given it attentive coverage. What was first a national story would have become a local story in that venue. It surely is not plausible to believe that if the trial had been moved to the District of Columbia, as the defendant sought, the Washington Post, which covered the trial as a national story, would have ignored it as a local one, and residents of the vicinage from which jurors would have been drawn would have been exposed to that local, as well as national, reporting. In this case, that would likely have been inevitable wherever the trial was held.

I also disagree with the defendant's implicit assertion that the local coverage of the trial was prejudicial to him simply because there was coverage. Not only was the coverage generally factual in nature, rather than inflammatory, but with regard to the appropriate punishment for his crimes much of it skewed in the defendant's favor.[7] For example, as trial proceeded, media coverage regarding the appropriate punishment suggested a growing disapproval of the imposition of the death penalty by residents in the Boston area. One poll released by Boston's National Public

[6] For example, a graphics editor from the Washington Post, the most widely circulated newspaper published in the defendant's preferred venue, chronicled the end of the guilt phase and the entirety of the penalty phase of the trial in blogs and courtroom sketches. Richard Johnson, The Tsarnaev Trial: Drawing a Line, Washington Post, http://wapo.st/Tsarnaev (last updated May 15, 2015).

[7] Although it was not evident at the time the pretrial motions to change venue were briefed and decided, in the trial itself the potential for unfair prejudice from media coverage was as a practical matter confined to the question of punishment, not guilt. Any possibility of unfair prejudice with respect to whether the defendant was guilty of the crimes charged was effectively and dramatically overborne by his counsel's opening statement in the guilt phase, acknowledging, "It was him." See infra at 19.

Radio news station in March showed that the death penalty was not a popular choice in the community. Zeninjor Enwemeka, WBUR Poll: Most in Boston Think Tsarnaev Should Get Life in Prison over Death Penalty, WBUR News, Mar. 23, 2015, http://www.wbur.org/2015/03/23/wbur-poll-tsarnaev-death-penalty-life-in-prison (27% in Boston and 38% in Boston area favored execution as penalty). According to a later poll, the percentage of poll respondents in favor of a death sentence for the defendant decreased slightly as the case proceeded to the penalty phase. Asma Khalid, Death Penalty for Tsarnaev Increasingly Unpopular, WBUR Poll Finds, WBUR News, Apr. 16, 2015, http://www.wbur.org/2015/04/16/tsarnaev-death-penalty-poll-wbur (26% in Boston and 31% in Boston area favored execution). As the penalty phase continued, a poll conducted by the Boston Globe indicated that support for the imposition of the death penalty had declined further. Evan Allen, Few Favor Death for Tsarnaev, Poll Finds, Bos. Globe, Apr. 27, 2015, at A (15% in Boston and 19% in Massachusetts favored execution).

Both local and national media reported on statements of victims' family members, elected officials, religious leaders, and other organizations opposing the imposition of the death penalty for the defendant's crimes. For example, during the penalty phase of the trial, the parents of Martin Richard, the eight-year old boy killed by the bomb placed by the defendant, urged the prosecution not to pursue imposition of the death penalty in a letter published on the front page of the Boston Globe. Bill and Denise Richard, To End the Anguish, Drop the Death Penalty, Bos. Globe, Apr. 17, 2015, at A. The media also reported statements by two amputee victims and a social media post by the sister of Sean Collier, the police officer killed in the aftermath of the bombings, conveying their opposition to the imposition of the death penalty in this case. Eric Moskowitz, 2 More Oppose Death for Tsarnaev, Bos. Globe, Apr. 20, 2015, at B; John R. Ellement, Victim's

Sister Still Against Death Penalty, Bos. Globe, Apr. 14, 2015, at B. There were published reports of similar statements by the Massachusetts Attorney General, both United States Senators, a local bar association, area Catholic leaders, veterans, and others. See, e.g., David Scharfenberg, Most Top Lawmakers Oppose Execution in Bombing Case, Bos. Globe, Apr. 10, 2015, at A; Associated Press, AG Healey: Marathon Bomber Should Spend Rest of Life in Jail, Bos. Herald, Apr. 8, 2015, http://www.bostonherald.com/news_opinion/local_coverage/2015/04/ag_healey_marathon_bomber_should_spend_rest_of_life_in_jail; Bob Oakes, Why the Boston Bar Association Wants the Death Penalty Removed from Tsarnaev Trial, WBUR News, Feb. 25, 2015, http://www.wbur.org/2015/02/25/why-boston-bar-opposes-death-penalty-tsarnaev; Cardinal Seán P. O'Malley, Letter, Bishops Oppose Death Penalty, Taunton Daily Gazette, Apr. 10, 2015, at A4; Danny McDonald, Vets for Peace: Spare Tsarnaev, Metro – Bos., Apr. 21, 2015. Shortly before the jury began deliberations in the penalty phase, an anti-death penalty forum on the topic "Beyond the Death Penalty: A Public Conversation with Family Members of Murdered Victims," sponsored mostly by local organizations opposing capital punishment, was held in Boston. Juan Esteban Cajigas Jimenez, As Tsarnaev Trial Nears End, Death-Penalty Opponents Address Forum, Bos. Globe, May 12, 2015, at A. No doubt, these expressions were directed to the prosecution team in an effort to persuade the government to abandon its pursuit of the death penalty. The point to be made is that, even if the trial jurors saw and absorbed the extensive media coverage during the penalty phase, and I have no evidence whatsoever to believe that they did (and do have their repeated assurances to me that they did not), the coverage was not of a nature that would support a conclusion—or even a justifiable presumption—that the defendant was unfairly prejudiced by such exposure.

In sum, the extensive coverage of the trial was not limited to this District. Contrast Casellas-Toro, 807 F.3d at 388. Consequently, moving the trial to another venue would not likely have eliminated or even substantially reduced the coverage. Furthermore, the media coverage of the trial as it unfolded was not demonstrably prejudicial to the defendant. And finally, the jurors gave repeated assurances that they were avoiding media reports about the case.[8]

ii. "Media Circus" over Foreign Witnesses

The defendant complains about media coverage of the arrival and lodging of several witnesses who traveled from overseas to the United States with the government's assistance and pursuant in part to a court order. It is unclear how the circumstances of the travel and lodging of the foreign witnesses contribute to the defendant's venue arguments. The defendant describes a "media circus" surrounding the witnesses, but he does not suggest either that the jurors were at all aware of the so-called "circus"—there is no information suggesting that they were—or that it disrupted the court proceedings in any way.

As to court proceedings more broadly, it is an obvious fact but it bears emphasizing that throughout the trial, the atmosphere within the trial courtroom itself was quite solemn and essentially undisturbed by interruption throughout the trial proceedings. Prior to trial, I issued a Decorum Order governing trial conduct and prohibiting observers from any contact with jurors or depictions of them or reports of their names. (Decorum Order at 1-5 (dkt. no. 879).) The defendant does not contend that the Order was violated either by the media or general public.

[8] The defendant's present motion focuses on the media attention during trial. Of course, in denying the previous motions for a change of venue, I made the same conclusions about pretrial publicity that came after the flurry of initial news reports—that is, while extensive, it subsided somewhat in the time period between the crimes and trial, was largely sober and factual, and was not in any substantial degree inflammatory.

For those who were not present, a brief description of the courtroom may be helpful. About thirty seats in the gallery were reserved for media representatives, who were able to take notes but not photograph or record the proceedings. The remaining seats, numbering about eighty, were reserved for the defense and government teams, the defendant's family and supporters, victims and their advocates, law enforcement personnel, and members of the general public. There were no substantial disruptions of any kind; proper decorum was observed by all in attendance. There is no reason at all to believe the sitting jurors could have been affected in any way by the presence or deportment of the people in the gallery, except, perhaps, to be impressed by their good behavior.[9] Contrast Sheppard v. Maxwell, 384 U.S. 333, 353, 355, 358 (1966) (noting that "bedlam reigned at the courthouse during the trial and newsman took over practically the entire courtroom," thrusting jurors "into the role of celebrities" and creating a "carnival atmosphere"); Estes v. Texas, 381 U.S. 532, 536 (1965) (describing how reporters and television crews overran the courtroom with "considerable disruption" so as to deny the defendant the "judicial serenity and calm to which [he] was entitled").

Outside the courthouse, reporters and cameras were organized in an orderly way so that they could report on the comings and goings of various trial participants, including the foreign witnesses. On most days, a small number of people demonstrated against the death penalty and, on occasion, individuals demonstrated in general support of the defendant. Except that a relatively

[9] The Decorum Order also prohibited observers in the trial courtroom and overflow locations from "wear[ing] or carry[ing] any clothing, buttons, or other items that carry any message or symbol addressing the issues related to this case that may be or become visible to the jury," including law enforcement uniforms and badges. (Decorum Order at 2-3.)

large number of people were positioned outside the entrance to the courthouse, there was to my knowledge nothing approaching a "circus" atmosphere.[10]

In any event, the jurors did not enter the courthouse through the main entrance. Rather, they assembled at a remote location and travelled together by van directly into the garage of the building, bypassing the front and side doors to the courthouse. So even if there were some legitimate concern about the number of people at the front entrance, which I do not share, the jurors were not exposed to it in any significant way. Similarly, when they were not in the trial courtroom, jurors were in limited access space behind the courtroom where the media and other members of the general public are not permitted. (See Jury Management and Transportation Order at 1-3 (dkt. no. 1113) (under seal).) After they were seated and sworn, the jurors were never in the public spaces of the courthouse where they might have observed either media representatives or members of the public.

I am fully satisfied that the Decorum Order was effectively implemented and observed. Within and around the courthouse, the defendant was not deprived of the solemnity and sobriety to which he was entitled.

iii. Physical Surroundings of Courthouse

The defendant next argues that jurors could not have avoided exposure to various events and publicity about the marathon and related issues, including such things as "Boston Strong"

[10] The United States Marshals Service and other officers kept me informed about any issues possibly touching on security or public order. I am aware that over the whole length of the trial from January through mid-May, there were only a few occasions when a member of the general public present in the public spaces of the courthouse (not the courtroom itself) had to be reprimanded and warned by security personnel to observe proper decorum. To the best of my information, that is the full extent of anything that could remotely be called "disruption" in the courthouse. The jury was not exposed to any of those minor incidents.

signs and paraphernalia both in the vicinity of the courthouse and in other public places.[11] The defendant offers various photographs of things he claims the jurors might have been exposed to, but there really is no way to tell whether that happened during the trial or not, or if it happened, how much and to what extent.[12] We know, of course, that before they were jurors, they were people in the area who were aware of the events of the bombings and the aftermath. We know they had heard the term "Boston Strong" because we asked them about it in their written questionnaire and in their face-to-face *voir dire*. They were ultimately seated because I was satisfied that any prior exposure to such images or materials would not prevent their faithful performance of their duty to be impartial and fair-minded.

Between the verdict in the guilt phase and the commencement of the penalty phase, there was significant publicity about the 2015 running of the marathon, as well as various events commemorating the second anniversary of the bombings. By that time, the jurors had been advised recurrently to avoid all media accounts of the subject matter of the case, as well as publicity about events concerning the 2015 marathon. (See, e.g., Jan. 5, 2015 Tr. of Jury Trial – Day One – A.M. Session at 11-12 (dkt. no. 1512); Mar. 4, 2015 Tr. of Jury Trial – Day Twenty-Seven at 12-13, 189

[11] The Boston Strong theme is (or was) "about civic resilience and recovery. It is not about whether [the defendant] is guilty or not of the crimes charged" or about what kind of sentence he should receive if he were found guilty. In re Tsarnaev, 780 F.3d at 25 n.13. While the term, drawing from a history of similar slogans, appears to have arisen in the aftermath of the marathon bombings, that association weakened somewhat over time through overuse, particularly as people and companies coopted the term, often for profit. The defendant's materials showing Boston Strong merchandise sold at the airport alongside Red Sox hats, magazines, candy, and stuffed animals underscore this point. (See Mem. in Supp. of Mot. for J. Nothwithstanding Verdict and for New Trial Ex. A "Photos Collected By Defense Team" (dkt. no. 1509-1) (under seal).)

[12] For example, a banner hanging at a hotel across from the courthouse would not have been visible at the entrance used by the jurors or from their jury room, which faced only a large commercial building on the opposite side of the courthouse. Similarly, the cement truck referenced by the defendant in his brief was within a construction site bordered by a tall enclosure (See Fourth Mot. for Change of Venue Ex. A at 2 (dkt. no. 1108-1) (photograph taken from above on February 12, 2015, a day on which no empaneled juror attended court).)

(dkt. no. 1528); Apr. 6, 2015 Tr. of Lobby Conference at 3-21 (dkt. no. 1541) (under seal); Apr. 14, 2015 Tr. of Jury Trial – Day Forty-Six at 3-7 (dkt. no. 1287); Apr. 21, 2015 Tr. of Jury Trial – Day Forty-Seven at 5, 137 (dkt. no. 1603); May 13, 2015 Tr. of Jury Trial – Day Fifty-Nine at 4, 183-84 (dkt. no. 1418).) Not only are jurors presumed to follow a court's instructions, but the jurors in this case continually affirmed their adherence to my repeated instructions. Specifically, before the guilt phase case was submitted to them, I interviewed each juror individually *in camera* to inquire whether he or she had faithfully abided by my instructions to avoid media coverage and private conversations concerning the case. They all assured me that they had. (Apr. 6, 2015 Tr. of Lobby Conference at 3-21.) Between their verdict in the guilt phase and the commencement of the penalty phase, on April 14, 2015, we had a short session in open court the main purpose of which was to strongly instruct the jurors to avoid media coverage of the upcoming marathon and any related events. (Apr. 14, 2015 Tr. of Jury Trial – Day Forty-Six at 3-7.) When they returned the following week to begin the penalty phase, I asked them collectively, as I had generally done throughout the trial, whether they had continued to abide by my instructions to avoid extraneous influences. They affirmed their adherence. At the times of these inquiries, the defendant made no objection nor request for any further follow-up inquiry.[13]

Moreover, in addition to sights and images which may have been sympathetic to victims or associated with the marathon, there were also sights and images with messages friendly to the

[13] It is also significant that by the time of the anniversary of the bombings, the jurors had been immersed in the trial evidence for weeks, and had heard testimony from almost 100 witnesses and seen over 1,000 exhibits. The jurors themselves were so "saturated" with the actual evidence at trial by that point that passing glimpses of media reports or other physical images would have been inconsequential. As one alternate juror observed when asked about his compliance with the Court's instructions to avoid media: "[I]f there's anything on, I just walk away. There's nothing—I didn't see any point. There's nothing that I could absolutely hear about this. I mean, what's the point? . . . I'm an eyewitness." (Apr. 6, 2015 Tr. of Lobby Conference at 19.)

defendant's interests, including the presence and signs of death penalty opponents who peacefully protested every day of trial near the front entrance to the courthouse and occasionally distributed leaflets. Their signs included messages such as, "Death penalty is murder," "Capital punishment dehumanizes us all," "Blessed are the merciful," "Mercy, not sacrifice," and "Why do we kill people to show that killing people is wrong?" See, e.g., Shira Schoenberg, Anti-Death Penalty Advocates Maintain Presence Outside Dzhokhar Tsarnaev Trial, Masslive.com, Apr. 30, 2015, http://www.masslive.com/news/boston/index.ssf/2015/04/anti-death_penalty_advocates_maintain_presence_dzhokhar_tsarnaev_trial.html; Philip Marcelo, Death Penalty Protest Resumes, N.H. Gazette, Apr. 21, 2015, http://www.gazettenet.com/home/16604387-95/death-penalty-protest-resumes. Again, of course, because the jurors did not pass through the front entrance, any exposure to the signs would have been minimal at most, if it occurred at all.

iv. Social Media

The defendant also argues that the jurors should be presumed to have been prejudiced because of social media activity, primarily by uninvolved third-parties.[14] As an initial matter, I consider the argument largely waived. Most of the evidence cited by the defendant was available to him during the course of the trial and he had ample opportunity to raise any such issue while the proceedings were ongoing. (See, e.g., Apr. 6, 2015 Tr. of Lobby Conference at 3-22 (questioning each juror individually prior to the close of the guilt phase regarding their adherence

[14] In support of his claim of presumptive prejudice, the defendant also cites some limited social media activity by the jurors, but he does not contend that the jurors were actually prejudiced, nor that they engaged in any misconduct. (See Reply to Gov't's Opp'n to Mot. for J. Notwithstanding Verdict and for New Trial at 2).) The defendant utilizes the jury's social networks as his sample, but he appears to dismiss as irrelevant whether any jurors actually saw any of the cited material. (See id. at 5-7.)

to the Court's instructions without any objections or requests for follow-up from counsel); May 13, 2015 Tr. of Lobby Conference at 11-12 (dkt. no. 1510) (under seal) (raising explicitly with counsel, prior to close of penalty phase, whether there was any issue regarding jurors' use of social media).) In light of the evident effort the defendant expended on social network research during jury selection and the nature of his venue objection, it strains credulity to suggest that no one on the defense team could follow—or actually was following—the jury's social media activity during the course of the proceedings.[15]

In any event, the defendant's claims regarding social media "saturation" are overblown. The defendant describes social media activity during the trial to argue that the jurors' accounts were "saturated" by social media activity he labels "inflammatory." But much of the activity is not "inflammatory" in any sense of the word, and the defendant provides no context by which to measure the "saturation." The government's analysis, which assumes that the jury's "friends"[16] each generated one "story"[17] per day, suggests that the cited activity was merely a small fraction of all stories that may have appeared in any particular "news feed" on any particular day. Although the government's calculation may both overvalue and undervalue the total number of "stories" generated by the activity of any particular user, it does reflect what we already know from this

[15] Indeed, the data in the file "Name" and "Date Modified" fields for many of the submitted files suggest that files were created during the trial. The same is true for Facebook's timestamps of some of the posts included as exhibits.

[16] The parties uses the term "friend" to describe a connection on Facebook. Of course, the term does not actually suggest a real-world relationship. Over a billion people use Facebook and connect with other users as "friends." Some may be friends in the traditional sense, but others are no more than acquaintances or contacts or in some cases may even be complete strangers.

[17] A "story" might include a post with a status update or other textual remark, photo, video, or hyperlink; app activity; "likes" from other people and groups with whom a user may be connected; and other social networking activity. When a Facebook user takes one of these actions, Facebook generates a "story" which then *may* appear on the constantly-updating "news feeds" of their "friends." (See Opp'n to Def.'s Mot. for J. Notwithstanding the Verdict and for New Trial at 8-11 (dkt. no. 1542); see id. Ex. A at 1-22 (dkt. no. 1542-1).)

case's history: the selective citation of data does not always accurately represent the whole. See, e.g., In re Tsarnaev, 780 F.3d at 21 (describing defendant's selective quotations from jury questionnaires as "misleading").

C. Time Between Crime and Trial

Nearly two years passed in between the marathon bombings and the presentation of evidence in the trial. The trial did not swiftly follow the crimes or contemporaneous reports about them, permitting the overall level of any community passions to diminish. See In re Tsarnaev, 780 F.3d at 22. This case is therefore dramatically unlike Rideau, 373 U.S. at 724-26, where the defendant's lengthy confession was videotaped and broadcasted three times throughout a small town only two months before trial, and Irvin v. Dowd, 366 U.S. 717, 719-20, 725-26 (1961), where jury selection began less than twelve months after the crime and eight months after a widely-reported confession in a small community of 30,000 where 95% of the households received local newspapers which detailed the confession, and Casellas-Toro, 807 F.3d at 383, 387-88, where jury selection began only two months after defendant's televised sentencing in an "intertwined" criminal case that had been covered "every minute of every day" by the media. In this case, local and national media attention naturally increased as the trial neared and then began, but that would be expected no matter where the trial occurred and, as noted *supra*, the coverage was composed of largely factual, and not emotional, accounts describing the proceedings. See Tsarnaev, 780 F.3d at 22.

D. Jury Verdict

Prior to trial, the Court noted that recent experience with high profile trials in this District reflected local jurors' capacity to carefully evaluate trial evidence despite widespread media coverage. United States v. Tsarnaev, Cr. No. 13-10200-GAO, 2015 WL 45879, at *5 (D. Mass.

Jan. 2, 2015) (citing Jury Verdict, United States v. Phillipos, Cr. No. 13–10238–DPW (Oct. 28, 2014) (ECF No. 510)); Tsarnaev, 2014 WL 4823882, at *3 (citing Jury Verdict, United States v. O'Brien, Cr. No. 12–40026–WGY (July 24, 2014) (ECF No. 579); Jury Verdict, United States v. Tazhayakov, Cr. No. 13–10238–DPW (July 21, 2014) (ECF No. 334); Jury Verdict, United States v. Bulger, Cr. No. 99–10371–DJC (Aug. 12, 2013) (ECF No. 1304); Jury Verdict, United States v. DiMasi, Cr. No. 09–10166–MLW (June 15, 2011) (ECF No. 597)).

It is now possible to evaluate the jury's verdicts in this case in hindsight for possible signs of improper prejudice, on the one hand, or expected impartiality, on the other. In the guilt phase of the trial, the jury found the defendant guilty on all counts in the indictment. In some cases, such an outcome might possibly be a sign of abdication of duty and simple submission to the government's theory and authority. That concern is absent in this case. Here, the guilty findings were hardly surprising in light of the defendant's strategy and the overwhelming evidence against him. After all, in her opening remarks, defense counsel essentially conceded that the defendant was guilty of the crimes with which he was charged:

> The government and the defense will agree about many things that happened during the week of April 15th, 2013. On Marathon Monday, . . . Jahar Tsarnaev walked down Boylston Street with a backpack on his back carrying a pressure cooker bomb and placed it next to a tree in front of the Forum restaurant. . . .
>
> After their pictures were on television and on the Internet, Tamerlan and Jahar went on a path of devastation the night of April the 18th, leaving dead in their path a young MIT police officer and a community in fear and sheltering in place. Tamerlan held an unsuspecting driver, Dun Meng, at gunpoint, demanded his money and compelled him, commanded him, to drive while Jahar followed behind.
>
> The evening ended in a shootout. You've heard about it. Tamerlan walked straight into a barrage of gunfire, shooting at the police, throwing his gun, determined not to be taken alive. Jahar fled, abandoned a car, and was found hiding in a boat.
>
> There's little that occurred the week of April the 15th—the bombings, the murder of Officer Collier, the carjacking, the shootout in Watertown—that we dispute. If the only question was whether or not that was Jahar Tsarnaev in the video that you will see walking down Boylston Street, or if that was Jahar Tsarnaev who dropped the backpack on the ground, or if that was Jahar Tsarnaev . . . captured in the boat, it would be very easy for you: It was him.

(Mar. 4, 2015 Tr. Excerpt: Jury Trial – Day Twenty-Seven at 3-5 (dkt. no. 1117); see id. at 5-6 ("We do not and will not at any point in this case sidestep—attempt to sidestep or sidestep Jahar's responsibilities for his actions . . . .").) So too in her closing in the guilt phase, counsel said:

> Jahar Tsarnaev followed his brother down Boylston Street carrying a backpack with a pressure cooker bomb in it and put it down in front of the Forum restaurant, knowing that within minutes it would explode. Three days later, Tamerlan Tsarnaev murdered Officer Collier, and Jahar was right there with him.
>
> Within a half an hour or so, . . . Tamerlan Tsarnaev held a gun to Dun Meng's head, demanded him to drive, and Jahar followed in the Honda. He took the ATM card, he took the code, and he stole $800 from Dun Meng's ATM account. Jahar was part of a shootout in Watertown. We know that his brother had the Ruger P95 because he was shooting at the police. We know that Jahar had a BB gun.
>
> Still, he hurled explosives at the police, and when he saw his brother walk into a hail of gunfire shooting, clearly determined to go out in a blaze of glory, he ran to the Mercedes and escaped as police riddled the Mercedes with bullets. And he ran over his older brother, the brother that he loved, and the brother that he followed.
>
> When I talked with you almost—just over a month ago, I said to you the evidence would bear out all of the events that I just talked about and that they just talked about. And it has. I said to you that we would not disagree with this evidence or dispute it, challenge it, and we haven't. I said to you that it was inexcusable, and it is. And Jahar Tsarnaev stands ready, by your verdict, to be held responsible for his actions.
>
> . . .
>
> And now when you go back to the jury room, we are not asking you to go easy on Jahar. We are not asking you to not hold him accountable and responsible for what he did. The horrific acts that we've heard about, the death, destruction and devastation that we've heard about deserve to be condemned, and the time is now. I know, and we know, that by your verdict, you will do what is right and what is just, and your verdict will speak the truth.

(Apr. 6, 2015 Tr. Excerpt: Jury Trial – Day Forty-Three at 4-5, 27 (dkt. no. 1244).) Consistent with these concessions, during the guilt phase the defendant often chose to not cross-examine witnesses or to challenge the prosecution's version of "who, what, where and when."[18] (Id. at 5.)

[18] Indeed, it was the defendant who introduced photographs documenting his capture from the boat in Watertown and who successfully moved for a jury view of the boat and the message the defendant wrote in it prior to his capture. (Ex. Def-3060G ("Boat photos_DT arrest on ground"); Mot. to Bar Spoliation of So-Called "Boat Writings" and to Make Boat Available for View by Jury at Trial (dkt. no. 923) (under seal).)

Yet, despite the defendant's strategy and defense counsel's wholesale concessions, it appears that the jury nevertheless thoughtfully deliberated the defendant's guilt of the crimes charged. At the end of their second day of deliberations, the jury asked two questions. The questions indicated that, notwithstanding counsel's concessions, the jury was measuring the evidence against the applicable legal principles as to the various charges in the indictment. For example, the jury asked, "Can a conspiracy pertain to a sequence of events over multiple days or a distinct event?" (Apr. 8, 2015 Tr. Excerpt: Jury Trial – Day Forty-Five at 3 (dkt. no. 1250).) The jury later asked, "What is the difference between aiding and abetting? Is there a differentiation between the two? If there is phrasing of aiding and abetting, it doesn't seem like there is evidence of both aiding and abetting, but rather only aiding or abetting. How can it be said that aiding and abetting took place?" (Id. at 6.) These questions suggest that the jury did not take an "all or nothing" view of the case, or mindlessly accede to the government's arguments, but rather carefully considered some of the more complicated—and arguably at times weaker—parts of the government's case, such as what events appropriately should be considered within the scope and duration of the charged conspiracies and to what extent co-conspirator Tamerlan Tsarnaev's conduct should be imputed to the defendant. The questions suggest patient and careful deliberation. They do not suggest a jury inflamed by prejudice, eager to return a verdict adverse to the defendant, *even when the defendant had effectively conceded the point*.

Similarly, in the penalty phase of the trial, the jury did not simply blindly accept the government's case. Again, during their deliberations, the jury asked several questions. (See, e.g., May 14, 2015 10:20 a.m. Note from the Jury (requesting additional copies of the verdict form and jury charge because it "would be helpful" for some jurors to have a "visual to use") (dkt. no. 1433); May 14, 2015 11:08 a.m. Note from the Jury (posing multiple questions related to the consideration

of aiding and abetting and conspiracy in determining whether the government had proved the gateway intent factors); May 14, 2015 12:43 p.m. Note from the Jury (asking additional question on whether to consider aiding and abetting when determining gateway intent factor).) The questions reflect serious thought and consideration of the issues they were required to resolve.

Second, their ultimate verdict in the penalty phase appears to be the product of careful, nuanced decision-making. For example, despite the government's focus on the defendant's boat writings and social media posts, the jury entirely rejected the government's alleged aggravating factor regarding whether the defendant made statements suggesting that others would be justified in committing additional acts of violence and terrorism against the United States. They also declined to find some of the government's proposed statutory aggravating factors, such as whether the defendant knowingly creating a grave risk of death to the victim in the commission of a crime or his subsequent flight and whether the defendant committed the offense in an especially heinous, cruel, and depraved manner. The jury also appeared to carefully consider, as individuals, mitigating factors about the defendant, answering the mitigation questions with varying degrees of approval. And perhaps most notably, the jury ultimately distinguished the defendant from his brother, and overt conduct from conspiracy, determining that death was the appropriate sentence only for the harms caused directly by the defendant and his bomb: the deaths of Lingzi Lu and Martin Richard. The discriminating nature of the verdict itself is convincing evidence that this was not a jury impelled by gross prejudice or even reductive simplicity, but rather a group of intelligent, conscientious citizens doing their solemn duty, however reluctantly.

"The jury's ability to discern a failure of proof" in the government's case and to carefully evaluate as individuals mitigating factors about the defendant "indicates a fair minded consideration of the issues and reinforces [the Court's] belief and conclusion that the media

coverage did not lead to the deprivation of [the] right to an impartial trial." See Skilling, 561 U.S. at 384 (quoting United States v. Arzola-Amaya, 867 F.2d 1504, 1514 (5th Cir. 1989)) (second alteration in original). As I have previously noted, the jury's penalty verdict was not the only possible outcome, but it was a reasoned moral judgment on the evidence before them.

For all the foregoing reasons, I find and conclude that the defendant has failed to demonstrate that this is one of the rare and extreme cases where prejudice must be presumed so as to override the constitutional norms requiring criminal trials to be held in the State where the crimes were committed. See U.S. Const. art. III, § 2, cl. 3 ("Trial shall be held in the State where the said Crimes shall have been committed . . . ."); id. amend. VI ("[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."); see also Fed. R. Crim. P. 18 ("[T]he government must prosecute an offense in a district where the offense was committed."). The defendant's renewed attack on venue is again rejected.

II. Convictions under 18 U.S.C. § 924(c)

A. The "Residual" Clause – Section 924(c)(3)(B)

In Johnson v. United States (Samuel Johnson), 135 S. Ct. at 2557,[19] the Supreme Court held that a portion of a statutory definition of the term "violent felony" set forth in 18 U.S.C. § 924(e)(2)(B) was unconstitutionally vague. The defendant argues that the decision requires a

[19] In this Opinion and Order, the short-form citation includes the petitioner's first name because there is a second case relied on by the defendant in which the petitioner was a Curtis Johnson. That case, Johnson v. United States, 559 U.S. 133 (2010), will be referred to in short form as Curtis Johnson. Referring to the cases as "Johnson I" and "Johnson II", as the parties and other writers have done, can be misunderstood as suggesting a lineal or historical relationship between the cases that does not exist.

For Official Use Only: 138
Juror Number

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

[redacted]
Juror Name

For Official Use Only: 138
Juror Number

United States v. Dzhokhar Tsarnaev
Cr. No. 13-10200-GAO

Juror Questionnaire

The information that you provide in this questionnaire will be used by the Court and the parties to select a qualified jury in this case; that is, a jury that can render a verdict fairly and impartially based upon the evidence offered at trial in accordance with the law as instructed by the Judge. Both parties are entitled to a jury that is fully fair and impartial. This questionnaire and the jury selection process that we are about to begin is not meant to be intrusive; rather, it serves the important function of ensuring that a fair and impartial jury is selected to hear and decide this case.

It is very important that you answer these questions as completely and accurately as you can. Please write legibly and answer the questions as candidly as possible. There are no right or wrong answers to these questions. But honesty and candor are of the utmost importance. You have taken an oath promising to give truthful answers. The integrity of the process depends upon your truthfulness.

Please bear the following instructions in mind:

- Do not consult, confer, or talk with any other person in completing this questionnaire.
- If you are unable to answer a question because you do not understand the question, please write "Do not understand" in the space after the question. Do not ask anyone, including court personnel, for clarification or assistance.
- If you are unable to answer a question because you do not know the answer, please write "Do not know" in response to the question.
- If you believe that your response to a particular question is of a sensitive or private nature and would like to request that your response not be made public, please write the number of that question in your response to Question #100. Alternatively, if you would prefer not to write an answer to a particular question because of the sensitive or private nature of your response, please write "Private" after the question. The Court may still need to speak with you about the topic, but will endeavor to do so bearing your concerns in mind.
- Please do not write on the back of any page. Use the blank space at the end of the questionnaire (front side only) where there is insufficient room on the form for your answer to any question. When using this space, please include the number of the question(s) you are answering.
- Please write legibly.

You will be permitted to leave for the day when you have completed the questionnaire. Do not discuss any of the questions or your answers on this questionnaire with anyone, including

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members of your family, co-workers, or other potential jurors. If anyone approaches you and attempts to discuss any aspect of this questionnaire, the jury selection process, or any aspect of this case, you may not answer their questions or engage in any discussion.

Do not discuss anything about this case with anyone and do not read, listen to, or watch anything relating to this case until you have been excused as a potential juror, or if you are selected as a juror, until the trial is over. You may not discuss this case or allow yourself to be exposed to any discussions of this case in any manner.

When you have completed the questionnaire, please sign it, affirming the truth of your answers and confirming that you had no assistance in completing it. As explained by the Court, you will receive further instructions about whether you need to return for the next phase of jury selection by calling the juror information line and entering your nine-digit participant number.

The Court thanks you for your attention and willingness to serve as a juror, an important duty of citizenship in our democracy.

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1. Date of birth: [redacted]

2. Gender: ☒ Male ☐ Female

3. Race: (This information will not affect your selection for jury service.)
☐ Black/African American ☐ Asian ☐ American Indian/Native Alaskan
☒ White ☐ Native Hawaiian/Pacific Islander ☐ Other: _____

4. In what city or town do you live? Peabody

5. How long have you lived there? 28 Years

If you have lived at that location fewer than 5 years, please list the cities or towns in which you have lived since 2010:

_____

_____

6. In what city, state, and country were you born and raised?

Born: Salem MA Raised: Peabody

If you were born in another country, when did you move to the United States, and when did you obtain U.S. citizenship?

Moved: _____ Citizenship: _____

7. Have you ever lived in another country? ☐ Yes ☒ No

What Country? For How Long?

_____ _____

_____ _____

8. Do you have any problem understanding English that would make it difficult or impossible for you to serve as a juror in this case? ☐ Yes ☒ No
If "yes," please explain:

_____

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9. If you believe you have a medical, physical, psychological, or emotional problem, issue, or condition that would affect your ability to serve as a juror, including difficulty hearing, seeing, reading, or concentrating, please explain:

No

If you believe you could serve as a juror if such condition were accommodated in some way, please state the accommodation:

10. If you are selected to serve on this jury, the trial is scheduled to start immediately after jury selection is completed and to continue for three or four months. The jury will sit on Monday through Thursday from 9:00 a.m. to 4:00 p.m. with a mid-morning break and a lunch break. The jury will also sit on Friday during a week in which the Monday is a legal holiday, such as President's Day. Once the jury begins its deliberations, the jury will sit at least every weekday from 9:00 a.m. until the end of the day (usually 4:30 p.m.).

    The Court is well aware that this is a demanding schedule. However, in fairness to all involved in this important process, the Court will only excuse someone from jury duty for the most compelling reasons. That is, answering "yes" to this question will not necessarily result in the Court allowing you to be excused from service. With this in mind, does the schedule described above impose a special hardship on you such that it would be difficult or impossible for you to serve in this case?
    If "yes," please explain:

No

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11. If you take any medications that you think might affect your ability to serve as a juror, please describe them and their effects:

Medication *Example: Xanax*	Side Effects *Makes me sleepy*
NO	

12. What is your current relationship status?

☐ Married ☒ Single ☐ Separated
☐ Divorced ☐ Widowed ☐ Civil Union/Domestic Partner

13. Please identify your current spouse or domestic partner (if any) and all former spouses and domestic partners (if any) and provide their highest levels of education and occupations while you were together:

Relationship to You *Example: Ex-wife*	Highest Education Level *BA in Physics*	Occupation *Engineer*
NONE		

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14. Please describe your parents' and/or step-parents' current or, if retired, former occupations. Write "none" or "deceased" if that applies.

Father: Currently working for [redacted]

Step-father: _____

Mother: Manager [redacted]

Step-mother: _____

15. Please identify all your children and step-children (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	N/A			
#2				
#3				
#4				

16. Please identify all your siblings and step-siblings (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	F		[redacted]	
#2				
#3				
#4				
#5				

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17. Have any of your siblings tried to influence your direction in life or your major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☒ No
If "yes," please explain:

18. Have you tried to influence any of your siblings' direction in life or major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☒ No
If "yes," please explain:

19. Do you feel that any of your siblings has had a major positive or negative influence on you? ☒ Yes ☐ No
If "yes," please explain:
I would'n't say major but my sister is very successful and that motivates me to set goals and achieve them.

20. Do you believe most teenagers are easily influenced by older siblings? ☐ Yes ☒ No

21. If you or any close family member has (or ever had) a mental health or addiction problem that you know about, please describe it:
[redacted]

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22. Please list all schools you attended after high school, what you studied, and any certificates or degrees that you received:

School	Location	Area of Study	Degree/Certificate
N/A			

23. If you have studied law, medicine, psychiatry, psychology, counseling, sociology, social work, or religion, please describe your training:

N/A

24. If you have studied ballistics, explosives, arson, criminology, terrorism, computer science, crime scene investigation, or law enforcement, please describe your training:

Just took fire arms safety course.

25. Do you plan to attend school in the future? ☐ Yes ☒ No
If "yes," what do you intend to study?

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26. List any jobs you have held for the past 10 years, in reverse chronological order, noting periods of unemployment, retirement, disability, homemaking, study, or stay-at-home parenting. Check "Sup." if you supervised others. If you can't remember exact names, titles, or time periods, please give your best estimate.

Employer	Title/Position	Years	Sup.
City of Peabody	Water Shop Craftsman	2010 to 2015	☐
Boswns Marine	Mechanic/Forman/Truck Driver	2006 to 2010	☒ for 2 yrs
Stop & Shop	front End/Produce/Dairy	2002 to 2006	☐
		____ to ____	☐
		____ to ____	☐
		____ to ____	☐
		____ to ____	☐

27. If you are currently employed, please describe your job responsibilities:

Work in the Distribution system of the water Dept for the City of Peabody. I fix and Maintain all water mains/services/Fire Hydrants

28. If you have ever been a published or unpublished author, please describe the things you have written and when you wrote them:

N/A

29. If you blog or post messages or opinions on websites, please describe the websites, the types of things you blog or post, and how often you do it:

Facebook — 1-2 Times a week.

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30. If you use social media (Facebook, Instagram, Twitter, etc.), please list all the social media you use and how frequently you use each one:

Facebook Every other Day @ most

31. If you, a family member, or close friend ever served in the military (including Reserves, National Guard, or ROTC), please describe the nature and length of that service:

Close friend served in the Army Reserves 5 years something in the medical field. Not sure exactly

32. If one or more of the people you listed ever experienced combat (that you know about), please explain:

NB

33. Have you, a family member, or close friend ever worked for, applied for a job at, or volunteered at a prosecutor's office, public defender's office, criminal defense attorney's office, or any other law office? ☐ Yes ☑ No
If "yes," please explain (including employer and dates of work):

Relationship	Office	Dates
Example: Wife	*State Prosecutor*	*2007-present*

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34. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at a law enforcement agency (e.g., FBI, DEA, ATF, ICE, IRS, U.S. Marshals Service, police, sheriff, or correctional department)?
☐ Yes ☒ No
If "yes," please explain (including agency and dates of affiliation):

Relationship	Agency	Dates
Example: Son	*FBI Agent*	*2007-present*

35. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at any federal, state, or local department of corrections, prison, jail, board of prisons, pardons or parole board or probation agency, youth authority, or correctional or detention facility? ☐ Yes ☒ No
If "yes," please explain:

Relationship	Agency	Dates
Example: Self	*Parole Officer*	*2007-present*

36. The jurors in this case will be instructed that the testimony of a law enforcement officer is to be treated the same as the testimony of any other witness. Jurors are to give neither greater nor lesser weight to the testimony based solely upon the witness's status as a law enforcement officer. Do you have any concerns about your ability to follow this instruction? ☐ Yes ☒ No
If "yes," please explain:

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37. Have you ever done paid or volunteer work for the benefit of people accused of crimes or people who served time in prison? ☐ Yes ☒ No
If "yes," please explain:

38. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with victims' rights? ☐ Yes ☒ No
If "yes," please explain:

39. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with the reform of any laws? ☐ Yes ☒ No
If "yes," please explain:

40. If you, a family member, or a close friend have ever (to the best of your knowledge) committed a crime and/or been arrested, accused of a crime, charged with a crime, or prosecuted for a crime, other than a minor traffic violation, please explain (include the person's relationship to you, the charge, the approximate date, the location, and the outcome):

Example: Close friend, Drug Possession, 1982, New Mexico, Pleaded guilty

Not that Im aware of.

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41. If you, a family member, or close friend, have ever (to the best of your knowledge) been the victim of a crime, please explain (including the person's relationship to you, when and where the crime occurred, and the outcome of any prosecution):

Example: Sister, Victim of assault, 1999, Chicago, Defendant convicted

No

42. If you (to the best of your recollection) have ever had to appear in court or in any court proceeding (e.g., court trial, court or administrative hearing, civil or criminal deposition, etc.) OTHER THAN as a defendant (e.g., as a witness), please explain:

No

43. If you, a family member, or a close friend (to the best of your knowledge) have ever been treated unfairly by a law enforcement officer or by the criminal justice system, please explain:

No

44. If you have strongly positive or negative views about prosecutors, please explain:

No they just doing their Jobs

45. If you have strongly positive or negative views about defense attorneys, please explain:

None

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46. If you have strongly positive or negative views about law enforcement officers, please explain:

None

47. Have you ever served on a jury before? If "yes," please describe (to the best of your recollection), for each case on which you served, whether it was state or federal, civil or criminal, what the charges or allegations were, when, where, whether the jury reached a verdict, and whether you were a foreperson:

No

48. If you answered "yes" to ~~#46~~ 47, is there anything about the experience that would make you want to serve, or not serve, on a jury again? Please explain:

49. Have you ever served on a grand jury? If "yes," when and where?

No

50. In the past 10 years, what court cases have you followed with interest? What interested you about these cases?

None

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51. If, to the best of your knowledge, you, or anyone close to you has participated in a group that takes positions on political or social issues (e.g., civil rights, prisoners' rights, crime control, the environment, death penalty, digital freedom, tax reform), please describe the group and any relevant leadership position:

Relationship	Organization	Level of Participation
Example: Spouse	*The Sierra Club*	*Board of Directors*
N/A		

52. Have you ever changed your mind about an important decision you had to make in your life? If "yes," please give a specific example or examples:

No

If you answered the previous question affirmatively, what do you think led you to change your mind? Answer as many as apply:

___ Additional information
___ Reconsideration of pros and cons
___ Opinions of others
___ Other: _____

53. What religion were you born into (if any)? Christian / Catholic

54. What religion do you currently practice (if any)? Christian / Catholic

55. How religious do you consider yourself? Not Very

56. How often do you attend your place of worship (if any)? Not often

57. How familiar are you with the teachings of Islam (i.e., the Muslim religion)?

☐ Very familiar ☐ Somewhat familiar ☒ Not at all familiar

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58. Do you have any interactions with people who are Muslim or practice Islam?
☐ Yes ☒ No
If "yes," please explain:

59. Do you have strongly held thoughts or opinions about Muslims or about Islam?
If "yes," what are they?
NO

60. Do you believe the United States government acts unfairly towards Muslims in this country or in other parts of the world? ☐ Yes ☒ No
If "yes," please explain:

61. Do you believe the "war on terror" unfairly targets Muslims? ☐ Yes ☒ No

62. Do you believe the "war on terror" is overblown or exaggerated? ☐ Yes ☒ No

63. Do you have strong feelings about our laws or government policies concerning legal immigration? ☐ Yes ☒ No
If "yes," please explain:

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64. Do you believe that our government allows too many Muslims, or too many people from Muslim countries, to immigrate legally to the United States? ☐ Yes ☒ No
If "yes," please explain:

65. The defendant was born in Kyrgyzstan and is of Russian descent. Do you have any beliefs, attitudes, or opinions regarding Kyrgyzstan, Russia, Chechnya, or Dagestan, or the people who live there that would make it difficult for you to be a completely fair and impartial juror in this case?

No

66. If you know anyone who, to the best of your knowledge, is Chechen, Avar, Dagestani or of Chechen, Avar, or Dagestani descent, please describe who it is you know and how you know them:

No

67. Do you understand any of the following foreign languages:
☐ Russian ☐ Chechen ☐ Arabic

NO

68. What is your primary source of news (e.g., newspapers, internet, TV, radio, word-of-mouth, etc.)? Please list all that apply.

TV - Not a big fan of watching the news.

69. What newspapers do you read and how often do you read them? Please include online editions of newspapers in your answer:

None

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70. What news or talk radio programs do you listen to on the radio or over the internet and how often do you listen?

None

71. What national or local news programs do you watch on TV or over the internet and how often do you watch?

None

72. To the best of your recollection, have you ever called into a talk show, written a letter to the editor, or posted a comment on a website to express your opinion about ANY issue? If "yes," what was the issue?

No

73. How would you describe the amount of media coverage you have seen about this case:

___ A lot (read many articles or watched television accounts)
X A moderate amount (just basic coverage in the news)
___ A little (basically just heard about it)
___ None (have not heard of case before today)

74. What did you think or feel when you received your jury summons for this case?

Interested

75. To the best of your recollection, what kinds of things did you say to others, or did others say to you, regarding your possible jury service in this case?

Few people were jealous others told me "Good Luck"

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76. If you did any online research about this case, or about anything relating to it, after receiving your jury summons, please describe it:

NO

77. As a result of what you have seen or read in the news media, or what you have learned or already know about the case from any source, have you formed an opinion:

(a) that Dzhokhar Tsarnaev is guilty? ☐ Yes ☒ No ☐ Unsure
(b) that Dzhokhar Tsarnaev is not guilty? ☐ Yes ☒ No ☐ Unsure
(c) that Dzhokhar Tsarnaev should receive the death penalty? ☐ Yes ☒ No ☐ Unsure
(d) that Dzhokhar Tsarnaev should not receive the death penalty?
☐ Yes ☒ No ☐ Unsure

If you answered "yes" to any of these questions, would you be able or unable to set aside your opinion and base your decision about guilt and punishment solely on the evidence that will be presented to you in court? ☐ Able ☐ Unable

78. If you answered "yes" to subparts (a), (b), (c), or (d) of #77, have you expressed or stated your opinion to anyone else? ☐ Yes ☐ No
If "yes," please explain:

79. If you have commented on this case in a letter to the editor, in an online comment or post, or on a radio talk show, please describe:

N/A

80. If you or, to the best of your knowledge, a family member, or close friend witnessed the Boston Marathon explosions or the response to them IN PERSON, please describe who was there and what he or she saw:

Noone I know

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81. If you or, to the best of your knowledge, a family member, or close friend were personally affected by the Boston Marathon bombings or any of the crimes charged in this case (including being asked to "shelter in place" on April 19, 2013), please explain:

NO

82. If you or, to the best of your knowledge, anyone in your family or household has personally (1) taken part in any of the activities, events, or fundraisers that have been held in support of the victims of the Boston Marathon bombings; (2) contributed to the One Fund; or (3) bought or worn any merchandise, clothing, or accessories that have logos such as "Boston Strong" that relate to the Boston Marathon bombings, please explain: None

The following is a summary of the facts of this case. Please read it carefully and answer the questions that follow.

On Monday, April 15, 2013, two bombs exploded on Boylston Street in Boston near the Boston Marathon finish line. The explosions killed Krystle Marie Campbell (29), Lingzi Lu (23), and Martin Richard (8), and injured hundreds of others. Four days later, on Thursday, April 18, 2013, at approximately 10:30 p.m., MIT Police Officer Sean Collier (26) was shot to death in his police car near the corner of Main Street and Vassar Street in Cambridge. Approximately 90 minutes later, a man named Dun Meng called the police from a gas station on Memorial Drive in Cambridge; he said that two men had carjacked him in Boston, kidnapped and robbed him, and still had his car. Approximately 20 minutes after that, two men in Watertown had a confrontation with police near the intersection of Laurel Street and Dexter Avenue in which shots were fired and bombs were thrown. One of the men, Tamerlan Tsarnaev, was injured at the scene and died shortly thereafter. The other, Dzhokhar Tsarnaev, was captured some 15 hours later after he was found hiding in a boat in Watertown.

Dzhokhar Tsarnaev has been charged with various crimes arising out of these events. Mr. Tsarnaev was raised in Cambridge and attended Rindge and Latin High School. At the time he is alleged to have committed the crimes, he was a 19-year-old student at UMass-Dartmouth.

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83. To the best of your knowledge, do you or anyone close to you have any PERSONAL connection to any of the individuals or places mentioned in the case summary you just read? If "yes," please explain:

NO

84. Do you believe you know any of the following people, their colleagues, staff members, or family members? ☐ Yes ☒ No

(a) Presiding judge: The Honorable George A. O'Toole, Jr.;

(b) Defense lawyers: Judy Clarke, David I. Bruck, Miriam Conrad, Timothy Watkins, and William Fick;

(c) Prosecutors: William D. Weinreb, Aloke S. Chakravarty, Nadine Pellegrini, and Steven Mellin;

(d) Defendant: Dzhokhar Tsarnaev

If you answered "yes," please identify whom you know and how you know them:

85. Attached to this document as Attachment A is a list of people who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, identify them here by number and describe how you know them.

NONE

86. Attached to this document as Attachment B is a list of people who do not live in the United States and who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, please circle them directly on Attachment B. Do not write their names on this part of the questionnaire.

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87. The evidence in this case may include graphic photographs and videos showing very severe injuries suffered by victims of the bombings. Do you think that seeing such graphic pictures would affect your ability to serve as a juror? NO

88. Mr. Tsarnaev is charged with 17 crimes that carry the possibility of a sentence of death. If the jury finds Mr. Tsarnaev guilty of one or more of those crimes, the same jury will then decide whether to sentence Mr. Tsarnaev to death or to a sentence of life imprisonment without the possibility of release.

If you have any views on the death penalty in general, what are they?

NONE

89. Please circle one number that indicates your opinion about the death penalty. A "1" reflects a belief that the death penalty should never be imposed; a "10" reflects a belief that the death penalty should be imposed whenever the defendant has been convicted of intentional murder.

Strongly Oppose									**Strongly Favor**
1	2	3	4	5	6	7	(8)	9	10

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90. Which of the following best describes your feelings about the death penalty in a case involving someone who is proven guilty of murder?

(a) I am opposed to the death penalty and will never vote to impose it in any case no matter what the facts.

(b) I am opposed to the death penalty and would have a difficult time voting to impose it even if the facts supported it.

(c) I am opposed to the death penalty but I could vote to impose it if I believed that the facts and the law in a particular case called for it.

(d) I am not for or against the death penalty. I could vote to impose it, or I could vote to impose a sentence of life imprisonment without the possibility of release, whichever I believed was called for by the facts and the law in the case.

(e) I am in favor of the death penalty but I could vote for a sentence of life imprisonment without the possibility of release if I believed that sentence was called for by the facts and the law in the case.

(f) I am strongly in favor of the death penalty and I would have a difficult time voting for life imprisonment without the possibility of release regardless of the facts.

(g) I am strongly in favor of the death penalty and would vote for it in every case in which the person charged is eligible for a death sentence.

(h) None of the statements above correctly describes my feelings about the death penalty.

If you selected (h) as your answer, please explain:

_____

_____

91. If your views about the death penalty have changed over the past 10 years (e.g., now more in favor or less in favor), please explain how and why your views have changed:

No

_____

_____

_____

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92. If your views about the death penalty are informed by your religious, philosophical, or spiritual beliefs, please describe how they are so informed:

They are not

93. Which of the following best describes your opinion? Please check only one.

Life imprisonment without the possibility of release is:

- ☒ Less severe than the death penalty
- ☐ About the same as the death penalty
- ☐ More severe than the death penalty
- ☐ No opinion

Please explain your answer:

someone being allowed to live their life after taking someone elses life is not always fair.

94. Do you believe that anyone close to you would be critical of you or disappointed in you if you voted for the death penalty in this case? If you voted for life imprisonment without the possibility of release? If your answer is "yes" or "I'm not sure" to either question, please explain:

No

95. If you found Mr. Tsarnaev guilty and you decided that the death penalty was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for the death penalty?

- ☐ Yes
- ☒ I am not sure
- ☐ No

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96. If you found Mr. Tsarnaev guilty and you decided that life imprisonment without the possibility of release was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for life imprisonment without the possibility of release?

☐ Yes
☒ I am not sure
☐ No

97. Is there any other matter or any information not otherwise covered by this questionnaire—including anything else in your background, experience, employment, training, education, knowledge, or beliefs—that would affect your ability to be a fair and impartial juror?

No

98. Is there anything else that you would like to tell us, or that you feel we should know about you?

No

99. Did you have any problems reading or understanding this questionnaire?

No

100. Did you have a response to any specific question above that you deem private or sensitive that you request not be made public at this time? If so, list the number of that question here:

No

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101. Additional Space (Please indicate question number):

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Additional Space (continued): _____

I do hereby certify, under the pains and penalties of perjury, that I had no assistance in completing this questionnaire and the answers that I have given in this questionnaire are [redacted]**edge and belief.**

1-5-15
Date

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 13-10200-GAO

UNITED STATES OF AMERICA

v.

DZHOKHAR A. TSARNAEV,
Defendant.

[redacted]

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United States v. Dzhokhar Tsarnaev
Cr. No. 13-10200-GAO

Juror Questionnaire

The information that you provide in this questionnaire will be used by the Court and the parties to select a qualified jury in this case; that is, a jury that can render a verdict fairly and impartially based upon the evidence offered at trial in accordance with the law as instructed by the Judge. Both parties are entitled to a jury that is fully fair and impartial. This questionnaire and the jury selection process that we are about to begin is not meant to be intrusive; rather, it serves the important function of ensuring that a fair and impartial jury is selected to hear and decide this case.

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- If you are unable to answer a question because you do not know the answer, please write "Do not know" in response to the question.
- If you believe that your response to a particular question is of a sensitive or private nature and would like to request that your response not be made public, please write the number of that question in your response to Question #100. Alternatively, if you would prefer not to write an answer to a particular question because of the sensitive or private nature of your response, please write "Private" after the question. The Court may still need to speak with you about the topic, but will endeavor to do so bearing your concerns in mind.
- Please do not write on the back of any page. Use the blank space at the end of the questionnaire (front side only) where there is insufficient room on the form for your answer to any question. When using this space, please include the number of the question(s) you are answering.
- Please write legibly.

You will be permitted to leave for the day when you have completed the questionnaire. Do not discuss any of the questions or your answers on this questionnaire with anyone, including

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members of your family, co-workers, or other potential jurors. If anyone approaches you and attempts to discuss any aspect of this questionnaire, the jury selection process, or any aspect of this case, you may not answer their questions or engage in any discussion.

Do not discuss anything about this case with anyone and do not read, listen to, or watch anything relating to this case until you have been excused as a potential juror, or if you are selected as a juror, until the trial is over. You may not discuss this case or allow yourself to be exposed to any discussions of this case in any manner.

When you have completed the questionnaire, please sign it, affirming the truth of your answers and confirming that you had no assistance in completing it. As explained by the Court, you will receive further instructions about whether you need to return for the next phase of jury selection by calling the juror information line and entering your nine-digit participant number.

The Court thanks you for your attention and willingness to serve as a juror, an important duty of citizenship in our democracy.

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1. Date of birth: [redacted]

2. Gender: ☐ Male ☒ Female

3. Race: (This information will not affect your selection for jury service.)
☐ Black/African American ☐ Asian ☐ American Indian/Native Alaskan
☒ White ☐ Native Hawaiian/Pacific Islander ☐ Other: _____

4. In what city or town do you live? Dorchester

5. How long have you lived there? 42 years

If you have lived at that location fewer than 5 years, please list the cities or towns in which you have lived since 2010:

N/A

6. In what city, state, and country were you born and raised?

Born: Dorchester, ma Raised: Dorchester, ma

If you were born in another country, when did you move to the United States, and when did you obtain U.S. citizenship?

Moved: N/A Citizenship: _____

7. Have you ever lived in another country? ☐ Yes ☒ No

What Country? For How Long?

8. Do you have any problem understanding English that would make it difficult or impossible for you to serve as a juror in this case? ☐ Yes ☒ No
If "yes," please explain:

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9. If you believe you have a medical, physical, psychological, or emotional problem, issue, or condition that would affect your ability to serve as a juror, including difficulty hearing, seeing, reading, or concentrating, please explain:

N/A

If you believe you could serve as a juror if such condition were accommodated in some way, please state the accommodation:

10. If you are selected to serve on this jury, the trial is scheduled to start immediately after jury selection is completed and to continue for three or four months. The jury will sit on Monday through Thursday from 9:00 a.m. to 4:00 p.m. with a mid-morning break and a lunch break. The jury will also sit on Friday during a week in which the Monday is a legal holiday, such as President's Day. Once the jury begins its deliberations, the jury will sit at least every weekday from 9:00 a.m. until the end of the day (usually 4:30 p.m.).

The Court is well aware that this is a demanding schedule. However, in fairness to all involved in this important process, the Court will only excuse someone from jury duty for the most compelling reasons. That is, answering "yes" to this question will not necessarily result in the Court allowing you to be excused from service. With this in mind, does the schedule described above impose a special hardship on you such that it would be difficult or impossible for you to serve in this case?
If "yes," please explain:

NO

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11. If you take any medications that you think might affect your ability to serve as a juror, please describe them and their effects:

Medication *Example: Xanax*	Side Effects *Makes me sleepy*
N/A	

12. What is your current relationship status?

☐ Married ☐ Single ☐ Separated
☐ Divorced ☐ Widowed ☒ Civil Union/Domestic Partner

13. Please identify your current spouse or domestic partner (if any) and all former spouses and domestic partners (if any) and provide their highest levels of education and occupations while you were together:

Relationship to You *Example: Ex-wife*	Highest Education Level *BA in Physics*	Occupation *Engineer*
Boyfriend	High School	Warehouse Supervisor
Ex husband	GED	Line Cook

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14. Please describe your parents' and/or step-parents' current or, if retired, former occupations. Write "none" or "deceased" if that applies.

Father: deceased

Step-father: N/A

Mother: retired lunch lady

Step-mother: N/A

15. Please identify all your children and step-children (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	M	[redacted]		
#2	M			
#3				
#4				

16. Please identify all your siblings and step-siblings (including any who are deceased):

	M/F	Age	Occupation (if any)	Place of Residence
#1	M	[redacted]		
#2	F			
#3	M			
#4	M			
#5				

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17. Have any of your siblings tried to influence your direction in life or your major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☒ No
If "yes," please explain:

18. Have you tried to influence any of your siblings' direction in life or major life decisions (e.g., choice of job, spouse, religion, congregation)? ☐ Yes ☒ No
If "yes," please explain:

19. Do you feel that any of your siblings has had a major positive or negative influence on you? ☒ Yes ☐ No
If "yes," please explain:

I strive to be more financially independant like my older brother.

20. Do you believe most teenagers are easily influenced by older siblings? ☒ Yes ☐ No

21. If you or any close family member has (or ever had) a mental health or addiction problem that you know about, please describe it:

[redacted]

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22. Please list all schools you attended after high school, what you studied, and any certificates or degrees that you received:

School	Location	Area of Study	Degree/Certificate
Quincy College	Quincy, MA	Computer Science	N/A.

23. If you have studied law, medicine, psychiatry, psychology, counseling, sociology, social work, or religion, please describe your training:

N/A

24. If you have studied ballistics, explosives, arson, criminology, terrorism, computer science, crime scene investigation, or law enforcement, please describe your training:

One Semester at Quincy College basic Computer 101 class

25. Do you plan to attend school in the future? ☐ Yes ☒ No
If "yes," what do you intend to study?

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26. List any jobs you have held for the past 10 years, in reverse chronological order, noting periods of unemployment, retirement, disability, homemaking, study, or stay-at-home parenting. Check "Sup." if you supervised others. If you can't remember exact names, titles, or time periods, please give your best estimate.

Employer	Title/Position	Years	Sup.
IHOP	General Manager	2013 to 2015	☒
IHOP	Server	1999 to 2013	☐
		____ to ____	☐
		____ to ____	☐
		____ to ____	☐
		____ to ____	☐
		____ to ____	☐

27. If you are currently employed, please describe your job responsibilities:

General Manager of a Restaurant, in charge of all areas of running establishment. hiring, training, ordering food.

28. If you have ever been a published or unpublished author, please describe the things you have written and when you wrote them:

N/A

29. If you blog or post messages or opinions on websites, please describe the websites, the types of things you blog or post, and how often you do it:

facebook - family pictures, share events I've come across I think others might be interested in.

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30. If you use social media (Facebook, Instagram, Twitter, etc.), please list all the social media you use and how frequently you use each one:

Facebook, Instagram and Twitter don't post daily but usually will read or look at daily

31. If you, a family member, or close friend ever served in the military (including Reserves, National Guard, or ROTC), please describe the nature and length of that service:

my father was in air force and national guard. Unsure how long his service was. Completed before I was born.

32. If one or more of the people you listed ever experienced combat (that you know about), please explain:

No

33. Have you, a family member, or close friend ever worked for, applied for a job at, or volunteered at a prosecutor's office, public defender's office, criminal defense attorney's office, or any other law office? ☐ Yes ☐ No
If "yes," please explain (including employer and dates of work):

Relationship *Example: Wife*	Office *State Prosecutor*	Dates *2007-present*
brother	unsure.	present.

my brother works at a law firm unsure of name. In Copier Room for Xerox I believe.

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34. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at a law enforcement agency (e.g., FBI, DEA, ATF, ICE, IRS, U.S. Marshals Service, police, sheriff, or correctional department)?
☐ Yes ☒ No
If "yes," please explain (including agency and dates of affiliation):

Relationship	Agency	Dates
Example: Son	*FBI Agent*	*2007-present*

35. Have you, a family member, or close friend ever, to your knowledge, worked for, applied for a job at, or volunteered at any federal, state, or local department of corrections, prison, jail, board of prisons, pardons or parole board or probation agency, youth authority, or correctional or detention facility? ☐ Yes ☒ No
If "yes," please explain:

Relationship	Agency	Dates
Example: Self	*Parole Officer*	*2007-present*

36. The jurors in this case will be instructed that the testimony of a law enforcement officer is to be treated the same as the testimony of any other witness. Jurors are to give neither greater nor lesser weight to the testimony based solely upon the witness's status as a law enforcement officer. Do you have any concerns about your ability to follow this instruction? ☐ Yes ☒ No
If "yes," please explain:

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37. Have you ever done paid or volunteer work for the benefit of people accused of crimes or people who served time in prison? ☐ Yes ☒ No
If "yes," please explain:

38. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with victims' rights? ☐ Yes ☒ No
If "yes," please explain:

39. Have you ever attended a meeting, sponsored an effort, or supported any group that deals with the reform of any laws? ☐ Yes ☒ No
If "yes," please explain:

40. If you, a family member, or a close friend have ever (to the best of your knowledge) committed a crime and/or been arrested, accused of a crime, charged with a crime, or prosecuted for a crime, other than a minor traffic violation, please explain (include the person's relationship to you, the charge, the approximate date, the location, and the outcome):

Example: Close friend, Drug Possession, 1982, New Mexico, Pleaded guilty

[redacted]

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41. If you, a family member, or close friend, have ever (to the best of your knowledge) been the victim of a crime, please explain (including the person's relationship to you, when and where the crime occurred, and the outcome of any prosecution):

Example: Sister, Victim of assault, 1999, Chicago, Defendant convicted

N/A.

42. If you (to the best of your recollection) have ever had to appear in court or in any court proceeding (e.g., court trial, court or administrative hearing, civil or criminal deposition, etc.) OTHER THAN as a defendant (e.g., as a witness), please explain:

for my divorce

43. If you, a family member, or a close friend (to the best of your knowledge) have ever been treated unfairly by a law enforcement officer or by the criminal justice system, please explain:

NO

44. If you have strongly positive or negative views about prosecutors, please explain:

N/A

45. If you have strongly positive or negative views about defense attorneys, please explain:

N/A

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46. If you have strongly positive or negative views about law enforcement officers, please explain:

N/A

47. Have you ever served on a jury before? If "yes," please describe (to the best of your recollection), for each case on which you served, whether it was state or federal, civil or criminal, what the charges or allegations were, when, where, whether the jury reached a verdict, and whether you were a foreperson:

yes, Suffolk Superior Court. Patient at Bridgewater State Hospital appealing his ruling on being released. We reached a verdict. I was not the foreperson.

48. If you answered "yes" to #47, is there anything about the experience that would make you want to serve, or not serve, on a jury again? Please explain:

N/A. Was a positive experience. Not persuaded either way.

49. Have you ever served on a grand jury? If "yes," when and where?

NO

50. In the past 10 years, what court cases have you followed with interest? What interested you about these cases?

N/A

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51. If, to the best of your knowledge, you, or anyone close to you has participated in a group that takes positions on political or social issues (e.g., civil rights, prisoners' rights, crime control, the environment, death penalty, digital freedom, tax reform), please describe the group and any relevant leadership position:

Relationship	Organization	Level of Participation
Example: Spouse	*The Sierra Club*	*Board of Directors*
N/A		

52. Have you ever changed your mind about an important decision you had to make in your life? If "yes," please give a specific example or examples:

My divorce - asked my husband to move back home after filing. Realized after only 2 weeks It was wrong. Had him move home for kids and not me asked him to leave. again.

If you answered the previous question affirmatively, what do you think led you to change your mind? Answer as many as apply:

___ Additional information
~~b~~ Reconsideration of pros and cons
___ Opinions of others
___ Other: _____

53. What religion were you born into (if any)? baptist.

54. What religion do you currently practice (if any)? None

55. How religious do you consider yourself? ~~Baptist~~. not at all

56. How often do you attend your place of worship (if any)? not at all

57. How familiar are you with the teachings of Islam (i.e., the Muslim religion)?

☐ Very familiar ☐ Somewhat familiar ☒ Not at all familiar

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58. Do you have any interactions with people who are Muslim or practice Islam?
☒ Yes ☐ No
If "yes," please explain:

work in a restaurant, have customers who are muslim and have dietary restrictions we accomodate.

59. Do you have strongly held thoughts or opinions about Muslims or about Islam?
If "yes," what are they?

NO

60. Do you believe the United States government acts unfairly towards Muslims in this country or in other parts of the world? ☑ Yes ☐ No
If "yes," please explain:

61. Do you believe the "war on terror" unfairly targets Muslims? ☐ Yes ☑ No

62. Do you believe the "war on terror" is overblown or exaggerated? ☐ Yes ☑ No

63. Do you have strong feelings about our laws or government policies concerning legal immigration? ☐ Yes ☑ No
If "yes," please explain:

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64. Do you believe that our government allows too many Muslims, or too many people from Muslim countries, to immigrate legally to the United States? ☐ Yes ☒ No
If "yes," please explain:

65. The defendant was born in Kyrgyzstan and is of Russian descent. Do you have any beliefs, attitudes, or opinions regarding Kyrgyzstan, Russia, Chechnya, or Dagestan, or the people who live there that would make it difficult for you to be a completely fair and impartial juror in this case?

NO

66. If you know anyone who, to the best of your knowledge, is Chechen, Avar, Dagestani or of Chechen, Avar, or Dagestani descent, please describe who it is you know and how you know them:

N/A

67. Do you understand any of the following foreign languages:
☐ Russian ☐ Chechen ☐ Arabic

NO

68. What is your primary source of news (e.g., newspapers, internet, TV, radio, word-of-mouth, etc.)? Please list all that apply.

Internet

69. What newspapers do you read and how often do you read them? Please include online editions of newspapers in your answer:

None

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70. What news or talk radio programs do you listen to on the radio or over the internet and how often do you listen?

none

71. What national or local news programs do you watch on TV or over the internet and how often do you watch?

local news at least once a week

72. To the best of your recollection, have you ever called into a talk show, written a letter to the editor, or posted a comment on a website to express your opinion about ANY issue? If "yes," what was the issue?

NO

73. How would you describe the amount of media coverage you have seen about this case:

___ A lot (read many articles or watched television accounts)
X A moderate amount (just basic coverage in the news)
___ A little (basically just heard about it)
___ None (have not heard of case before today)

74. What did you think or feel when you received your jury summons for this case?

got nervous, mostly about having to take public transit to a place I've never been.

75. To the best of your recollection, what kinds of things did you say to others, or did others say to you, regarding your possible jury service in this case?

have had several people make the different comments you hear about how to get out of jury duty. Just stated "It is what is" I'll go, answer honestly.

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76. If you did any online research about this case, or about anything relating to it, after receiving your jury summons, please describe it:

N/A

77. As a result of what you have seen or read in the news media, or what you have learned or already know about the case from any source, have you formed an opinion:

(a) that Dzhokhar Tsarnaev is guilty? ☐ Yes ☑ No ☐ Unsure
(b) that Dzhokhar Tsarnaev is not guilty? ☐ Yes ☑ No ☐ Unsure
(c) that Dzhokhar Tsarnaev should receive the death penalty? ☐ Yes ☑ No ☐ Unsure
(d) that Dzhokhar Tsarnaev should not receive the death penalty?
☐ Yes ☑ No ☐ Unsure

If you answered "yes" to any of these questions, would you be able or unable to set aside your opinion and base your decision about guilt and punishment solely on the evidence that will be presented to you in court? ☐ Able ☐ Unable

78. If you answered "yes" to subparts (a), (b), (c), or (d) of #77, have you expressed or stated your opinion to anyone else? ☐ Yes ☐ No
If "yes," please explain:

79. If you have commented on this case in a letter to the editor, in an online comment or post, or on a radio talk show, please describe:

don't believe I have.

80. If you or, to the best of your knowledge, a family member, or close friend witnessed the Boston Marathon explosions or the response to them IN PERSON, please describe who was there and what he or she saw:

N/A

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81. If you or, to the best of your knowledge, a family member, or close friend were personally affected by the Boston Marathon bombings or any of the crimes charged in this case (including being asked to "shelter in place" on April 19, 2013), please explain:

N/A

82. If you or, to the best of your knowledge, anyone in your family or household has personally (1) taken part in any of the activities, events, or fundraisers that have been held in support of the victims of the Boston Marathon bombings; (2) contributed to the One Fund; or (3) bought or worn any merchandise, clothing, or accessories that have logos such as "Boston Strong" that relate to the Boston Marathon bombings, please explain:

I went to Boston Strong Concert at the Boston Garden. I have a Boston Strong T-Shirt, I bought at Concert.

The following is a summary of the facts of this case. Please read it carefully and answer the questions that follow.

On Monday, April 15, 2013, two bombs exploded on Boylston Street in Boston near the Boston Marathon finish line. The explosions killed Krystle Marie Campbell (29), Lingzi Lu (23), and Martin Richard (8), and injured hundreds of others. Four days later, on Thursday, April 18, 2013, at approximately 10:30 p.m., MIT Police Officer Sean Collier (26) was shot to death in his police car near the corner of Main Street and Vassar Street in Cambridge. Approximately 90 minutes later, a man named Dun Meng called the police from a gas station on Memorial Drive in Cambridge; he said that two men had carjacked him in Boston, kidnapped and robbed him, and still had his car. Approximately 20 minutes after that, two men in Watertown had a confrontation with police near the intersection of Laurel Street and Dexter Avenue in which shots were fired and bombs were thrown. One of the men, Tamerlan Tsarnaev, was injured at the scene and died shortly thereafter. The other, Dzhokhar Tsarnaev, was captured some 15 hours later after he was found hiding in a boat in Watertown.

Dzhokhar Tsarnaev has been charged with various crimes arising out of these events. Mr. Tsarnaev was raised in Cambridge and attended Rindge and Latin High School. At the time he is alleged to have committed the crimes, he was a 19-year-old student at UMass-Dartmouth.

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83. To the best of your knowledge, do you or anyone close to you have any PERSONAL connection to any of the individuals or places mentioned in the case summary you just read? If "yes," please explain:

NO

84. Do you believe you know any of the following people, their colleagues, staff members, or family members? ☐ Yes ☒ No

(a) Presiding judge: The Honorable George A. O'Toole, Jr.;

(b) Defense lawyers: Judy Clarke, David I. Bruck, Miriam Conrad, Timothy Watkins, and William Fick;

(c) Prosecutors: William D. Weinreb, Aloke S. Chakravarty, Nadine Pellegrini, and Steven Mellin;

(d) Defendant: Dzhokhar Tsarnaev

If you answered "yes," please identify whom you know and how you know them:

85. Attached to this document as Attachment A is a list of people who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, identify them here by number and describe how you know them.

N/A

86. Attached to this document as Attachment B is a list of people who do not live in the United States and who may testify at this trial. Please review the names on the attached list. If you personally know any of the individuals on the list, or any of their immediate family members, please circle them directly on Attachment B. Do not write their names on this part of the questionnaire.

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87. The evidence in this case may include graphic photographs and videos showing very severe injuries suffered by victims of the bombings. Do you think that seeing such graphic pictures would affect your ability to serve as a juror? ND

88. Mr. Tsarnaev is charged with 17 crimes that carry the possibility of a sentence of death. If the jury finds Mr. Tsarnaev guilty of one or more of those crimes, the same jury will then decide whether to sentence Mr. Tsarnaev to death or to a sentence of life imprisonment without the possibility of release.

    If you have any views on the death penalty in general, what are they?

    don't really have any

89. Please circle one number that indicates your opinion about the death penalty. A "1" reflects a belief that the death penalty should never be imposed; a "10" reflects a belief that the death penalty should be imposed whenever the defendant has been convicted of intentional murder.

Strongly Oppose									**Strongly Favor**
1	2	3	4	5	(6)	7	8	9	10

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90. Which of the following best describes your feelings about the death penalty in a case involving someone who is proven guilty of murder?

(a) I am opposed to the death penalty and will never vote to impose it in any case no matter what the facts.

(b) I am opposed to the death penalty and would have a difficult time voting to impose it even if the facts supported it.

(c) I am opposed to the death penalty but I could vote to impose it if I believed that the facts and the law in a particular case called for it.

(d) I am not for or against the death penalty. I could vote to impose it, or I could vote to impose a sentence of life imprisonment without the possibility of release, whichever I believed was called for by the facts and the law in the case.

(e) I am in favor of the death penalty but I could vote for a sentence of life imprisonment without the possibility of release if I believed that sentence was called for by the facts and the law in the case.

(f) I am strongly in favor of the death penalty and I would have a difficult time voting for life imprisonment without the possibility of release regardless of the facts.

(g) I am strongly in favor of the death penalty and would vote for it in every case in which the person charged is eligible for a death sentence.

(h) None of the statements above correctly describes my feelings about the death penalty.

If you selected (h) as your answer, please explain:

_____

_____

91. If your views about the death penalty have changed over the past 10 years (e.g., now more in favor or less in favor), please explain how and why your views have changed:

N/A

_____

_____

_____

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92. If your views about the death penalty are informed by your religious, philosophical, or spiritual beliefs, please describe how they are so informed:

N/A.

93. Which of the following best describes your opinion? Please check only one.

Life imprisonment without the possibility of release is:

- ☐ Less severe than the death penalty
- ☒ About the same as the death penalty
- ☐ More severe than the death penalty
- ☐ No opinion

Please explain your answer:

Life as you know it is impaired with either decision.

94. Do you believe that anyone close to you would be critical of you or disappointed in you if you voted for the death penalty in this case? If you voted for life imprisonment without the possibility of release? If your answer is "yes" or "I'm not sure" to either question, please explain:

NO

95. If you found Mr. Tsarnaev guilty and you decided that the death penalty was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for the death penalty?

- ☒ Yes
- ☐ I am not sure
- ☐ No

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96. If you found Mr. Tsarnaev guilty and you decided that life imprisonment without the possibility of release was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for life imprisonment without the possibility of release?

☒ Yes
☐ I am not sure
☐ No

97. Is there any other matter or any information not otherwise covered by this questionnaire—including anything else in your background, experience, employment, training, education, knowledge, or beliefs—that would affect your ability to be a fair and impartial juror?

NO

98. Is there anything else that you would like to tell us, or that you feel we should know about you?

NO

99. Did you have any problems reading or understanding this questionnaire?

NO

100. Did you have a response to any specific question above that you deem private or sensitive that you request not be made public at this time? If so, list the number of that question here:

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101. Additional Space (Please indicate question number):

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Additional Space (continued): _____

I do hereby certify, under the pains and penalties of perjury, that I had no assistance in completing this questionnaire and the answers that I have given in this questionnaire are [redacted] and belief.

[redacted]

1/5/2015
Date

GX 1595

Federal Rules and Regulations

Fed. R. App. Pro. 4
Appeal as of Right – When Taken

(b) Appeal in a Criminal Case.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment.

Fed. R. Crim. Pro. 12.2
Notice of an Insanity Defense; Mental Examination

(a) Notice of an Insanity Defense. A defendant who intends to assert a defense of insanity at the time of the alleged offense must so notify an attorney for the government in writing within the time provided for filing a pretrial motion, or at any later time the court sets, and file a copy of the notice with the clerk. A defendant who fails to do so cannot rely on an insanity defense. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) Notice of Expert Evidence of a Mental Condition. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case, the defendant must—within the time provided for filing a pretrial motion or at any later time the court sets—notify an attorney for the government in writing of this intention and file a copy of the notice with the clerk. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.

(1) Authority to Order an Examination; Procedures.

(A) The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241.

(B) If the defendant provides notice under Rule 12.2(a), the court must, upon the government's motion, order the defendant to be examined under 18 U.S.C. § 4242. If the defendant provides notice under Rule 12.2(b) the court may, upon the government's motion, order the defendant to be examined under procedures ordered by the court.

(2) Disclosing Results and Reports of Capital Sentencing Examination. The results and reports of any examination conducted solely under Rule 12.2(c)(1) after notice under Rule 12.2(b)(2) must be sealed and must not be disclosed to any attorney for the government or the defendant unless the defendant is found guilty of one or more capital crimes and the defendant confirms an intent to offer during sentencing proceedings expert evidence on mental condition.

(3) Disclosing Results and Reports of the Defendant's Expert Examination. After disclosure under Rule 12.2(c)(2) of the results and reports of the government's examination, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence.

(4) Inadmissibility of a Defendant's Statements. No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:

(A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2(a) or (b)(1), or

(B) has introduced expert evidence in a capital sentencing proceeding requiring notice under Rule 12.2(b)(2).

(d) Failure to Comply.

(1) Failure to Give Notice or to Submit to Examination. The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(2) Failure to Disclose. The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention.

Fed. R. Crim. Pro. 21
Transfer for Trial

(a) For Prejudice. Upon the defendant's motion, the court must transfer the proceeding against that defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

(b) For Convenience. Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties, any victim, and the witnesses, and in the interest of justice.

(c) Proceedings on Transfer. When the court orders a transfer, the clerk must send to the transferee district the file, or a certified copy, and any bail taken. The prosecution will then continue in the transferee district.

(d) Time to File a Motion to Transfer. A motion to transfer may be made at or before arraignment or at any other time the court or these rules prescribe.

Fed. R. Crim. Pro. 24
Trial Jurors

(b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.

(1) Capital Case. Each side has 20 peremptory challenges when the government seeks the death penalty.

Fed. R. Crim. Pro. 32
Sentencing and Judgment

(i) Sentencing.

(4) Opportunity to Speak.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

Fed. R. Evid. 104
General Provisions
Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Fed. R. Evid. 401
Relevance and Its Limits
Test for Relevant Evidence

Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

Fed. R. Evid. 403
Relevance and Its Limits
Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Fed. R. Evid. 801
Hearsay
Definitions That Apply to This Article; Exclusions From Hearsay

(c) Hearsay. "Hearsay" means a statement that:
(1) the declarant does not make while testifying at the current trial or hearing; and
(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Massachusetts Rules and Regulations

Mass. Gen. Laws ch. 234A, § 10
Office of Jury Commissioner for the Commonwealth
Numbered Resident List

On or before the first day of June of each year, each city and town shall make a sequentially numbered list of the names, addresses, and dates of birth of all persons who were seventeen years of age or older as of the first day of January of the current year and who resided as of the first day of January of the current year in such city or town. The names of residents shall be listed and numbered, without duplication, in alphabetical order, one name to each number, along with such other information and in such form and format as shall be specified in the regulations of the jury commissioner. On or before the said date, each city and town shall submit one copy of this list to the office of jury commissioner and make a copy of such list available for inspection by members of the public. Hereinafter in this chapter, such list shall be referred to as the "numbered resident list" and a particular individual on such list shall be referred to as a "numbered resident". The cost of preparing the numbered resident list shall be paid by the city or town.

Title 18 of the United States Code

18 U.S.C. § 3231
District Courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

18 U.S.C. § 3432
Indictment and List of Jurors and Witnesses for Prisoner in Capital Cases

A person charged with treason or other capital offense shall at least three entire days before commencement of trial, excluding intermediate weekends and holidays, be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating

the place of abode of each venireman and witness, except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

18 U.S.C. § 3501
Witnesses and Evidence
Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the

United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

Federal Death Penalty Act

18 U.S.C. § 3591
Death Sentence
Sentence of death

(a) A defendant who has been found guilty of—

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593—

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

(b) A defendant who has been found guilty of—

(1) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under the conditions described in subsection (b) of that section which involved not less than twice the quantity of controlled substance described in subsection (b)(2)(A) or twice the gross receipts described in subsection (b)(2)(B); or

(2) an offense referred to in section 408(c)(1) of the Controlled Substances Act (21 U.S.C. 848(c)(1)), committed as part of a continuing criminal enterprise offense under that section, where the defendant is a principal administrator, organizer, or leader of such an enterprise, and the defendant, in order to obstruct the investigation or prosecution of the enterprise or an offense involved in the enterprise, attempts to kill or knowingly directs, advises, authorizes, or assists another to attempt to kill any public officer, juror, witness, or members of the family or household of such a person, shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense.

18 U.S.C. § 3592
Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified

(a) Mitigating factors.—In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

(1) Impaired capacity.—The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) Duress.—The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) Minor participation.—The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) Equally culpable defendants.—Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(5) No prior criminal record.—The defendant did not have a significant prior history of other criminal conduct.

(6) Disturbance.—The defendant committed the offense under severe mental or emotional disturbance.

(7) Victim's consent.—The victim consented to the criminal conduct that resulted in the victim's death.

(8) Other factors.—Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

(b) Aggravating factors for espionage and treason.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(1), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Prior espionage or treason offense.—The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law.

(2) Grave risk to national security.—In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security.

(3) Grave risk of death.—In the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(c) Aggravating factors for homicide.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Death during commission of another crime.—The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 37 (violence at international airports), section 351(violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section

1201 (kidnapping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2245 (offenses resulting in death), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy).

(2) Previous conviction of violent felony involving firearm.—For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.

(3) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.—The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(4) Previous conviction of other serious offenses.—The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(5) Grave risk of death to additional persons.—The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

(6) Heinous, cruel, or depraved manner of committing offense.—The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(7) Procurement of offense by payment.—The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(8) Pecuniary gain.—The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(9) Substantial planning and premeditation.—The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

(10) Conviction for two felony drug offenses.—The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(11) Vulnerability of victim.—The victim was particularly vulnerable due to old age, youth, or infirmity.

(12) Conviction for serious Federal drug offenses.—The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(13) Continuing criminal enterprise involving drug sales to minors.—The defendant committed the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859).

(14) High public officials.—The defendant committed the offense against—

(A) the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or

(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution—

(i) while he or she is engaged in the performance of his or her official duties;

(ii) because of the performance of his or her official duties; or

(iii) because of his or her status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

(15) Prior conviction of sexual assault or child molestation.—In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation.

(16) Multiple killings or attempted killings.—The defendant intentionally killed or attempted to kill more than one person in a single criminal episode. The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(d) Aggravating factors for drug offense death penalty.—In determining whether a sentence of death is justified for an offense described in section 3591(b), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.—The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

(2) Previous conviction of other serious offenses.—The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(3) Previous serious drug felony conviction.—The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

(4) Use of firearm.—In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

(5) Distribution to persons under 21.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 418 of the Controlled Substances Act (21 U.S.C. 859) which was committed directly by the defendant.

(6) Distribution near schools.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 419 of the Controlled Substances Act (21 U.S.C. 860) which was committed directly by the defendant.
(7) Using minors in trafficking.—The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act (21 U.S.C. 861) which was committed directly by the defendant.
(8) Lethal adulterant.—The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

18 U.S.C. § 3593
Special hearing to determine whether a sentence of death is justified

(a) Notice by the government.—If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and
(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.
(b) Hearing before a court or jury.—If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the

trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted—

(1) before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if—

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

(a) Proof of mitigating and aggravating factors.—

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

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

(d) Return of special findings.—The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) Return of a finding concerning a sentence of death.—If, in the case of—

(1) an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist;

(2) an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or

(3) an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist, the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

(f) Special precaution to ensure against discrimination.—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the

crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

18 U.S.C. § 3594
Imposition of a sentence of death

Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

18 U.S.C. § 3595
Review of a sentence of death

(a) Appeal.—In a case in which a sentence of death is imposed, the sentence shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time specified for the filing of a notice of appeal. An appeal under this section may be consolidated with an appeal of the judgment of conviction and shall have priority over all other cases.
(b) Review.—The court of appeals shall review the entire record in the case, including—

(1) the evidence submitted during the trial;
(2) the information submitted during the sentencing hearing;
(3) the procedures employed in the sentencing hearing; and
(4) the special findings returned under section 3593(d).

(c) Decision and disposition.—

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

(2) Whenever the court of appeals finds that—

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

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

(C) the proceedings involved any other legal error requiring reversal of the sentence that was properly preserved for appeal under the rules of criminal procedure, the court shall remand the case for reconsideration under section 3593 or imposition of a sentence other than death. The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, including any erroneous special finding of an aggravating factor, where the Government establishes beyond a reasonable doubt that the error was harmless.

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

18 U.S.C. § 3771
Crime Victims' Rights

(a) Rights of Crime Victims.—A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(9) The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.

(10) The right to be informed of the rights under this section and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.

(b) Rights Afforded.

(1) In General.—

In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeus Corpus Proceedings.—

(A)In general.—In a Federal habeas corpus proceeding arising out of a State conviction, the court shall ensure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B)Enforcement.—

(i)In general.—These rights may be enforced by the crime victim or the crime victim's lawful representative in the manner described in paragraphs (1) and (3) of subsection (d).

(ii)Multiple victims.—In a case involving multiple victims, subsection (d)(2) shall also apply.

(C)Limitation.—This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any agency of the Executive Branch of the Federal Government.

(D)Definition.—For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c)Best Efforts to Accord Rights.

(1)Government.

Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2)Advice of an Attorney.—The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

(3)Notice.—Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

(d)Enforcement and Limitations.—

(1)Rights.—The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2)Multiple Crime Victims.—In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3)Motion for Relief and Writ of Mandamus.— The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration. In deciding such application, the court of appeals shall apply ordinary standards of appellate review. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4)Error.—In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on Relief.— In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if—

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No Cause of Action.—Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e)Definitions. For the purposes of this chapter:

(1)Court of Appeals.—The term "court of appeals" means—

(A) the United States Court of appeals for the judicial district in which a defendant is being prosecuted; or

(B) for a prosecution in the Superior Court of the District of Columbia, the District of Columbia Court of Appeals.

(2)Crime Victim.—

(A)In general.—The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia.

(B)Minors and certain other victims.—In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

(3)District Court; Court.—The terms "district court" and "court" include the Superior Court of the District of Columbia.

(f)Procedures to Promote Compliance.

(1)Regulations.— Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2)Contents.—The regulations promulgated under paragraph (1) shall—

(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;
(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;
(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and
(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant

Title 28 of the United States Code

28 U.S.C. § 1291
Final Decisions of District Courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1861
Juries; Trial by Jury
Declaration of Policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court

convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

28 U.S.C. § 1863
Juries; Trial by Jury
Plan for random jury selection

(b) Among other things, such plan shall—

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title. The plan for the district of Massachusetts may require the names of prospective jurors to be selected from the resident list provided for in chapter 234A, Massachusetts General Laws, or comparable authority, rather than from voter lists.

28 U.S.C. § 1867
Jury; Trial by Jury
Challenging Compliance with Selection Procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document will be filed electronically through the ECF system to the registered participants as identified on the Notice of Electronic Filing (NEF) and by FEDEX on December 27, 2018 to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 16-6001

UNITED STATES,
Appellee

v.

DZHOKHAR A. TSARNAEV,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

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Introduction

This case should not have been tried in Boston. The bombings targeted the Marathon, a 116-year-old tradition and a source of deep civic pride. Bill Richard testified that "[e]veryone in this room probably knows someone" who was "running the Marathon that day." The bombings killed Richard's eight-year-old son Martin and two young women, Krystle Campbell and Lingzi Lu. They injured hundreds more, many catastrophically. And they left behind, in the government's words, "a community in fear and sheltering in place." A fourth victim, police officer Sean Collier, was killed a few days later. When police arrested 19-year-old Jahar Tsarnaev, crowds flooded the streets in relief and jubilation.

The community's trauma and catharsis birthed Boston Strong, a movement that at once proclaimed defiance, resilience, and solidarity. "[O]ne could not go anywhere in Boston in the bombing's aftermath without seeing the slogan on a car, t-shirt, bracelet, tattoo, or even mowed into the outfield of Fenway Park." In re Tsarnaev, 780 F.3d 14, 32 (1st Cir. 2015) ("Tsarnaev II") (Torruella, J., dissenting). The bombings united a region broken but brave. And as Tsarnaev's trial began, "Boston ha[d] not yet fully recovered, and . . . every resident—whether or not they were at the [M]arathon that day, knew a victim, or were subject to the shelter-in-place order—was deeply and personally affected by the tragedy." Id. Forcing this case to trial in a venue still suffering from the bombings was the

District Court's first fundamental error, and it deprived Tsarnaev of an impartial jury and a reliable verdict, in violation of the Fifth, Sixth, and Eighth Amendments.

Having charted that unsound course, the District Court should have taken every precaution to protect the integrity of these proceedings. Instead, in a second critical error, the Court ignored uncontroverted evidence that two venirepersons who would become seated jurors lied during voir dire. Juror 286, the foreperson, had published two dozen Twitter posts about the bombings, including one that called Tsarnaev a "piece of garbage" and another that described being "locked down" with her family. Yet during voir dire, she swore that she had neither "commented on this case" online nor been asked to "shelter in place." Likewise, Juror 138 disobeyed the Court's instructions by starting and contributing to a Facebook discussion about this case, where one of his friends urged him to "play the part," "get on the jury," and "send" Tsarnaev "to jail where he will be taken care of." Yet this juror swore that he had not "talked to anybody" about this case and that none of his Facebook friends were "commenting about this trial."

Confronted with this evidence before the jury was selected, the Court did nothing, summarily denying Tsarnaev's cause challenges and refusing to ask a single additional voir dire question. That dereliction of the "unflagging duty" to investigate "colorable or plausible" claims of juror misconduct, United States v.

French, 904 F.3d 111, 117 (1st Cir. 2018), would have been error in any trial. In a capital prosecution, it was intolerable.

The appropriate sentence in this case turned, in large part, on a single question: Why did Tsarnaev commit these terrible crimes? He was a 19-year-old college sophomore, beloved by his teachers and friends, described as "kind," "hardworking," "humble," and "respectful"—captain of his high-school wrestling team and volunteer "Best Buddy" to special-needs children. What turned him down this misbegotten path? The defense explained that in the years before the bombings, Jahar's 26-year-old brother Tamerlan Tsarnaev embraced radical Islam. He planned the bombings. And he brought his brutal influence to bear on his younger brother, enlisting Jahar in his destructive plot. In urging a death sentence, the government belittled that explanation. Prosecutors told the jury that Tamerlan was just "bossy" and "sometimes lost his temper," asserting that there was no "evidence" that Tamerlan "coerced or controlled" Jahar.

But there was, and the District Court's third grave error was keeping this evidence from the jury. On September 11, 2011, a year and a half before the bombings, Tamerlan robbed and murdered three people in Waltham, Massachusetts, [redacted] before [redacted]. He [redacted], Ibragim Todashev, [redacted]. And Tamerlan told Jahar, months later, that he committed these crimes, in pursuit of "jihad." This proof

went to the heart of Jahar's defense: that Tamerlan was a killer, an angry and violent man; that he conceived and led this conspiracy; that he [redacted] Jahar to join; and that otherwise, Jahar would never have been on Boylston Street on Marathon Monday. The exclusion of this mitigating evidence violated the Eighth Amendment and yielded a verdict unworthy of confidence.

These three errors resulted in a fundamentally unfair proceeding that "damages the credibility of the American judicial system." Tsarnaev II, 780 F.3d at 30 (Torruella, J., dissenting). So do the dozen other errors set forth in this brief—defects that contaminated every aspect of the trial, from jury selection to the penalty phase to the adversarial framework itself. Tsarnaev admitted heinous crimes, but even so—perhaps especially so—this trial demanded scrupulous adherence to the requirements of the Constitution and federal law. Again and again this trial fell short. Tsarnaev is entitled to relief.

Statement Of Jurisdiction

Tsarnaev appeals from a judgment of conviction and sentence of death entered on June 24, 2015 by the United States District Court for the District of Massachusetts. Add.99–106; 1.A.141–51.[1] The Court denied Tsarnaev's new trial motion on January 15, 2016. Add.483–505. Tsarnaev filed a timely notice of appeal on January 29, 2016. 1.A.152. See Fed. R. App. P. 4(b)(3)(A)(ii). The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3595.

[1] The Appendix is cited "A." Volume 1 of the Appendix is cited "1.A," Volume 2 is cited "2.A," and so on. The separately-filed Sealed Appendix is cited "SA." The Addendum is cited "Add." The separately-filed Sealed Addendum is cited "SAdd." The separately- and electronically-filed Sealed Special Appendix, which contains the questionnaires of the non-seated prospective jurors, is cited "SPA." See November 7, 2018 Order of Court. Volume 1 of the Sealed Special Appendix is cited "SPA.1," Volume 2 is cited "SPA.2," and so on. The separately-filed, sealed, and firewalled 12.2 Appendix, which contains the record of proceedings relating to Fed. R. Crim. P. 12.2, is cited "12.2A." The separately-filed, sealed, and firewalled 12.2 Addendum is cited "12.2Add." Entries on the District Court docket, United States v. Tsarnaev, 13–CR–10200 (GAO) (D. Mass.) are cited "DE." Government and defense exhibits are cited "GX" and "DX."

Statement Of The Issues

I. Did Tsarnaev get a fair trial before an impartial jury in a venue traumatized by the bombings, ordered to shelter in place during the manhunt, saturated by prejudicial publicity, and united in the Boston Strong movement?

II. Before the jury was empaneled, Tsarnaev identified social media posts showing that two venirepersons who would become seated jurors, including the foreperson, had lied during voir dire, concealing evidence of actual bias and disobedience of the Court's instructions. Did the Court err by summarily denying Tsarnaev's cause challenges and refusing to conduct any investigation into this misconduct?

III. Did the dismissal of Juror 355, who testified with confidence that he "could" "vote to impose the death penalty" in an appropriate case, violate Witherspoon v. Illinois, 391 U.S. 510 (1968), and Wainwright v. Witt, 469 U.S. 412 (1985)?

IV. The Court refused to ask prospective jurors two essential questions: whether they could consider a life sentence on the particular facts of this case, see Morgan v. Illinois, 504 U.S. 719 (1992); and what publicity, specifically, they had seen about this case, see Patriarca v. United States, 402 F.2d 314 (1st Cir. 1968). Did this deficient voir dire compromise Tsarnaev's right to an impartial jury?

V. To prove the mitigating factors that Tamerlan Tsarnaev planned and led the bombings and that Jahar participated because of his older brother's influence, the

defense sought to introduce evidence that Tamerlan had murdered three people [redacted]. Did the Court's exclusion of that evidence, compounded by its refusal to disclose the accomplice's confession to the defense, violate Tsarnaev's rights under the Eighth Amendment and the Federal Death Penalty Act ("FDPA") to present a complete mitigation case?

[redacted]

VII. The government introduced poignant testimony from survivors of the bombings about the lasting effects on their lives and families. Was this material barred by 18 U.S.C. § 3593(a), which codifies Payne v. Tennessee, 501 U.S. 808 (1991), and permits capital jurors to hear victim-impact evidence only with respect to homicide victims?

VIII. Did the admission of the fruit of Tsarnaev's coerced confession—video of him buying milk soon after the bombings, exploited relentlessly by the government to prove the aggravating factor that he lacked remorse—without a determination of voluntariness or an independent source violate Tsarnaev's Fifth Amendment privilege against self-incrimination?

IX. The government elicited irrelevant testimony about ISIS; presented a slideshow that paired images of the bombings with audio of an unrelated Arabic-language chant to suggest that Islam is foreign and violence-prone; and argued, with no factual basis, that Tsarnaev flashed his middle finger to a security camera in a holding cell to send a "message" to the victims. Did this misconduct improperly incite the jury to return death sentences tainted by passion and prejudice, in violation of the Eighth Amendment and 18 U.S.C. § 3595(c)(2)(A)?

X. Hurst v. Florida, 136 S. Ct. 616 (2016), confirms that whether aggravating factors "sufficiently outweigh" mitigating factors "to justify a sentence of death," 18 U.S.C. § 3593(e), is a fact, for Sixth Amendment purposes, that must be found by a unanimous jury beyond a reasonable doubt. Was the Court's failure to so instruct this jury structural error?

XI. By refusing to inform the jury that deadlock as to the penalty would result in the imposition of a mandatory life sentence—not, as the instructions implied, a costly and painful retrial—did the Court risk coercing jurors to acquiesce in a death sentence, contrary to the Eighth Amendment and the FDPA?

XII. Does the cumulative impact of the errors described in Points V–XI mandate reversal of Tsarnaev's death sentences?

XIII. The District Court engaged in 26 *ex parte* communications with the government, eight of them concerning contested discovery motions resolved

against the defense and still secret today—unprecedented conduct in a federal capital case, and "a gross breach of the appearance of justice," Haller v. Robbins, 409 F.2d 857, 859 (1st Cir. 1969). Did this practice violate Tsarnaev's Fifth Amendment right to due process and his Sixth Amendment right to the assistance of counsel?

XIV. Did the underrepresentation of African-Americans in the grand and petit jury wheels violate the fair cross-section requirements of the Fifth and Sixth Amendments and the Jury Selection and Service Act ("JSSA")?

XV. In light of evolving scientific understanding of adolescent brain development, does Roper v. Simmons, 543 U.S. 551 (2005), categorically prohibit the execution of emerging adults like Tsarnaev who committed their capital crimes at age 19?

Statement Of Facts

A. The offenses.

On April 15, 2013, two bombs detonated near the finish line of the Boston Marathon. The blasts killed three people—Martin Richard, Krystle Campbell, and Lingzi Lu—and severely injured many more. 10.A.4063–4110; 10.A.4134–45, 4226–42, 4291, 4304–36, 4365. The perpetrators were not immediately known, and federal and local authorities requested that members of the public submit any videos, photographs or leads regarding the bombers' identities and whereabouts.[2] The FBI also created a website to provide continuous updates on the manhunt and investigation. 11.A.4750–51.

In the following days, law enforcement obtained video footage showing two men with backpacks walking down Boylston Street. 10.A.4415–16. One put his backpack in front of Marathon Sports. Id. at 4434–35. The other put his backpack in front of the Forum Restaurant. Id. at 4422–23. Law enforcement would eventually learn that each backpack contained a homemade bomb made from a pressure cooker filled with explosive powder, BBs, and nails, which each man detonated using a device made from toy remote control car parts. 10.A.4368–88;

[2] See FBI Boston, FBI Assists Boston Police Department Regarding Explosions along Marathon Route and Elsewhere (Apr. 15, 2013), https://archives.fbi.gov/archives/boston/press-releases/2013/fbi-assists-boston-police-department-regarding-the-explosions-along-the-marathon-route-and-remains-on-scene.

14.A.6378–90, 6429–42. The video footage showed the backpacks explode and the aftermath of the detonation. 10.A.4050–52; 10.A.4425–26.

On April 18, the FBI released the video footage to news agencies and posted it on its own website, and requested that the public contact law enforcement with any information about the depicted men. Within 15 hours, Jahar was named as one of the suspects. 11.A.4757–58. The FBI then initiated a manhunt, which included producing a "wanted poster" on their website and advising the local Boston community to provide any information that would assist in capturing the men pictured. Id. at 4754–56.[3]

That night, Tamerlan and Jahar loaded Tamerlan's Honda Civic with a handgun, several pipe bombs and another pressure cooker bomb and drove from Tamerlan's home in Cambridge to the Massachusetts Institute of Technology ("MIT") campus nearby. 11.A.4854–60; 12.A.5381–90. At about 10:20 p.m., MIT police officer Sean Collier was parked on campus in his patrol car. 11.A.4774. Tamerlan and Jahar approached Officer Collier's patrol car and shot

[3] See FBI Boston, Remarks of Special Agent in Charge Richard DesLauriers at Press Conference on Bombing Investigation (Apr. 18, 2013), https://archives.fbi.gov/archives/boston/press-releases/2013/remarks-of-special-agent-in-charge-richard-deslauriers-at-press-conference-on-bombing-investigation-1.

and killed him. 11.A.4802, 4839–42. Tamerlan's fingerprints were found on the firearm and magazine used to kill Officer Collier. 11.A.4854–60; 12.A.5381–90.[4]

The brothers then drove from Cambridge to Brighton, Massachusetts, where they encountered Dun Meng, a graduate student sitting in a parked Mercedes SUV. 11.A.4939. Tamerlan approached Meng's SUV, flashed his gun, and got into the passenger seat. Id. at 4939–41. Tamerlan told Meng he was responsible for the Marathon bombings and confessed to having just killed Officer Collier. Id. at 4943. He then ordered Meng to drive them to a location in Watertown, Massachusetts. Id. at 4949. Jahar followed behind in the Honda. Id. at 4951. Once at the location in Watertown, Meng stopped the SUV, Tamerlan got into the driver's seat, and Meng got into the passenger seat. Jahar parked the Honda and got into the back seat of the SUV. Id. at 4953.

Meng recalled that Tamerlan did all the talking, with Jahar staying mostly silent. Id. at 4957, 4960, 4969–70. Tamerlan drove to an ATM and Jahar withdrew $800 from Meng's bank account using Meng's ATM card and pin number. Id. at 4955–59, 5011. Tamerlan then drove to Cambridge where he

[4] Although MIT graduate student Nathan Harman thought he saw Jahar at Officer Collier's car, 11.A.4837, 4840, 4842, the weight of the testimonial and forensic evidence indicates that Tamerlan committed the murder. Indeed, the jury refused to impose a death sentence for Jahar's role in any of the capital counts related to Officer Collier. Add.96.

stopped for gas. Meng used the opportunity to flee across the street to a different gas station where he called police to report he had been carjacked. 11.A.4975–76.

A manhunt followed. Watertown Police officers found Tamerlan and Jahar, who by then had returned to Watertown to collect the Honda Civic, and tried to arrest them. As the officers approached, Tamerlan got out of the SUV and started shooting at them. 12.A.5040–41. Jahar got out of the Civic, joined Tamerlan, shot at the officers with a BB gun and, together, they threw three or four explosives in the officers' direction. Id. at 5040–46, 5060–61, 5077–78, 5109–10; 14.A.6108. After Tamerlan ran out of ammunition and was shot in the gunfight, he threw his weapon at one officer and ran towards other officers, who wrestled him to the ground. 12.A.5050–51, 104, 115. Jahar then ran to the SUV and drove towards Tamerlan and the officers, running over Tamerlan in the process. 12.A.5053. Tamerlan did not survive. Jahar continued driving for less than a mile and then abandoned the SUV, fleeing on foot.[5] 12.A.5184. He found a boat covered with a tarp in a backyard and climbed inside. 12.A.5223–25. Bleeding from his wounds, Jahar hid in the boat overnight. Id.[6]

[5] Officers on the scene fired a fusillade at the SUV as it fled which, among other damage to the SUV, flattened its tires. Jahar was also struck by bullets as he passed through the barrage.

[6] Besides the Tsarnaevs, the only other person shot was Richard Donohue, a police officer, who recovered. 12.A.5056–59.

The following day, April 19, while Jahar was still at large, Massachusetts Governor Deval Patrick ordered nearly a million citizens of Boston and five neighboring cities (Watertown, Cambridge, Waltham, Newton, and Belmont) to "shelter in place" — that is, "to stay indoors with their doors locked and not to open the door for anyone other than a properly identified law enforcement officer." All businesses and schools were ordered to close, except for hospitals and law enforcement.[7]

Later that day, David Henneberry, a Watertown resident, noticed that the shrink wrapping covering his boat had come dislodged and went out to repair it. When he climbed up on a ladder positioned against the boat, he observed blood on several surfaces within it and someone prone on the floor. He went back inside his home and called the police. 12.A.5223–25. Dozens of law enforcement officers arrived and, after waiting 90 minutes, shot more than a hundred rounds of ammunition and multiple flash-bang grenades toward the boat and took Jahar into custody. 11.A.4558; 12.A.5191. Jahar had been shot in the face, resulting in "a skull-base fracture" and injuries to his middle ear, his C1 vertebrae and his pharynx. 20.A.8991. He also had "multiple gunshot wounds to [his] extremities." Id. at 8992. He was taken to Beth Israel Deaconess Medical Center and rushed

[7] See Associated Press, Shelter-in-place Order Extends to Boston, YouTube (Apr. 19, 2013), https://www.youtube.com/watch?v=TfXZd2Qtf_c.

into emergency surgery. 23.A.10490, 10517. After surgery, Jahar's left eye was sutured shut and his jaw was wired closed. He could not hear out of his left ear. He was receiving Fentanyl and Dilaudid intravenously for pain, and he was intubated. 23.A.10490–92, 10517. FBI agents interrogated Jahar off and on for more than 13 hours over the next 36 hours without providing Miranda rights, while at the same time turning away lawyers from the Federal Public Defender's Office who sought access to him. 23.A.10510; SAdd.6–7; SAdd.15–16. Because he could not speak, Jahar answered questions during this interrogation by nodding yes or no, or by writing his answers down. 23.A.10492, 10496, 10518. See post Point VIII.

No weapons were discovered in the boat or on Jahar's person when he was arrested. 11.A.4559. Inside the boat, law enforcement discovered the following note, which Jahar had scribbled in pencil:

> The U.S. Government is killing our innocent civilians but most of you already know that. As a M[uslim] I can't stand to see such evil go unpunished. We Muslims are one body, you hurt one, you hurt us all. . . . Now I don't like killing people innocent people it is forbidden in Islam. But due to said [bullet hole] it is allowed. All credit goes to [Allah].

14.A.4555–57.

The bombings, their aftermath, and the manhunt were front-page news around the country and dominated the news cycle in the Boston area for weeks and months after the crime. The citizens of greater Boston quickly adopted the

"Boston Strong" slogan to represent their grit and resilience. Boston Strong remained a vibrant movement—raising money through fundraisers and merchandise sales to support victims—throughout the case. 2.A.657. It remains so to this day. See Boston Strong, https://www.staystrongbostonstrong.org/.

B. The guilt phase.

The government charged Tsarnaev with 30 counts relating to the bombings and their aftermath. Add.1–74. Notwithstanding the depth of the local news coverage, the shelter-in-place order impacting nearly a million local residents, the manhunt in which the Boston community had played so critical a part, and the enduring Boston Strong movement, the District Court tried the case in downtown Boston less than two years after the bombings.

Prior to trial, the defense filed several motions to change venue based on the nature and volume of the media coverage. 23.A.10706–15; 24.A.11316–33. The District Court denied these motions, promising a thorough and searching voir dire. Add.412. In the ensuing voir dire, however, the District Court generally precluded defense counsel from asking prospective jurors questions such as "what did you know about the facts of this case before coming to court" or "what did you read or hear about this case before you came here." 20.A.9405, 9450; 24.A.11391. See post Point IV. At the end of the day, the jury selection process showed that 99.7% of the venire was exposed to pre-trial publicity; 69% of the venire had already

concluded defendant was guilty before hearing the government's first witness; and of the members of the venire who had concluded that Tsarnaev should receive the death penalty before even coming to court, 69% admitted they would not be able to set that view aside and decide the case based on the facts presented in court. And before the jury was empaneled, the defense presented evidence from the social media accounts of two jurors showing that both had lied under oath during voir dire, concealing bias against Tsarnaev and their disobedience of the Court's instructions. The Court denied the defense's motions to strike and refused even to ask these jurors follow-up questions before seating them. See post Point II.

Trial before this jury began with opening statements on March 4, 2015. Defense counsel made clear that the trial was not going to be about guilt. Instead, counsel immediately conceded that Tamerlan and Jahar had carried out the crime:

> For the next several weeks, we're all going to come face to face with unbearable grief, loss and pain caused by a series of senseless, horribly misguided acts carried out by two brothers: 26-year-old Tamerlan Tsarnaev and his younger brother, 19-year-old Jahar.

10.A.3976. The defense would not "attempt to sidestep . . . Jahar's responsibility for his actions." Id. at 3978. Notwithstanding the defense's concession, the government spent three weeks putting on its case-in-chief, calling 91 witnesses and introducing a colossal amount of graphic crime scene evidence and emotional victim testimony.

The guilt phase record contained substantial evidence regarding the role each brother played in the incident. The government showed the bomb-making instructions found on Tamerlan's and Jahar's computers, in an online magazine called "Inspire," the self-proclaimed "Periodical Magazine Issued by the Al-Qaeda Organization in the Arabian Peninsula." 13.A.5684; 14.A.6473–82. But the evidence showed that it was Tamerlan, not Jahar, who researched the Boston Marathon and bomb construction. 15.A.6731–33. It was Tamerlan who purchased the three pressure cookers, the BBs that were placed inside, and the backpacks used to carry them to the Marathon. 14.A.6271–72, 6274–80, 6286, 6295–97. It was Tamerlan who conducted the internet research and purchased the electronic components, as well as the transmitter and receiver used to detonate the explosives. Id. at 6280–84; 15.A.6731. And it was Tamerlan who traveled to Russia for six months in 2012 to explore violent jihad, 14.A.6249, and who had a library of Muslim extremist materials on his computer. 13.A.5646–51.

The government's evidence also showed that only Tamerlan's fingerprints were recovered from the bomb-making materials seized from his house. 15.A.6797–802. Tamerlan's fingerprints were also found on the lid of one of the pressure cookers, as well as on two pieces of the exploded pressure cooker at the scene. Id. at 6792, 6808–10. Jahar's fingerprints were not found on any of this material. Id. at 6809. And although the government showed that Jahar obtained

the handgun used at MIT and Watertown from a friend, 12.A.5263–69, Tamerlan's fingerprints were found on the handgun and gun magazine. 14.A.6110–11.

In closing argument, defense counsel again recognized there was no dispute as to guilt:

> I said to you that we would not disagree with this evidence or dispute it, challenge it, and we haven't. I said to you that it was inexcusable, and it is. And Jahar Tsarnaev stands ready, by your verdict, to be held responsible for his actions.

15.A.6936. The jury convicted on all counts. Add.74a–74ag.

C. The penalty phase.

1. The government's case.

The government's penalty phase evidentiary presentation consisted of three types of evidence: (1) victim impact testimony regarding the four persons killed; (2) victim impact testimony from eight people injured in the bombings; and (3) testimony from a deputy marshal about video footage taken of Tsarnaev in the holding cell prior to his 2013 arraignment.

As detailed above, there were four people killed in the bombings and their aftermath: Krystle Campbell, Lingzi Lu, Martin Richard and Sean Collier. At the penalty phase, Krystle Campbell's father and brother each testified, offering their memories of her and describing the pain her death caused the family. 16.A.7143–62 (brother); id. at 7163–74 (father). Sean Collier's brother, his stepfather, and the chief of the MIT police department shared their memories of him and testified

about the impact of his death. 16.A.7199–7211 (brother); 16.A.7211–27 (step-father); 16.A.7233–39 (chief of MIT police). Lingzi Lu's aunt talked about her niece and described the impact her death had on the family. 16.A.7315–41.

This left only eight-year-old Martin Richard. On April 17, 2015—five days before the penalty phase began—the Richard family voiced its opposition to the death penalty in an op-ed in the *Boston Globe*.[8] The government did not call any members of the Richard family to testify at the penalty phase. The jury did not learn that the Richard family opposed the imposition of the death penalty on Jahar.

The government also presented penalty phase testimony from certain people injured in the bombings: Celeste Corcoran, Gillian Reny, Nicole Gross, Eric Whalley, Adrianne Haslet-Davis, Marc Fucarile, Heather Abbott, and Stephen Woolfenden. These witnesses testified to the serious injuries they had each sustained and the medical procedures they had undergone following the bombings. 16.A.7099–106 (Corcoran); id. at 7132–34, 7141–42 (Reny); id. at 7181 (Gross); id. at 7253–54 (Whalley); id. at 7280–82 (Haslet-Davis); id. at 7350–55 (Fucarile); id. at 7367–71 (Abbott); id. at 7429, 7435–36 (Woolfenden). At the government's direction to tell "the full story," they also testified about their emotions at the scene and thereafter as mothers, as wives, as husbands and as fathers. See, e.g.,

[8] Bill & Denise Richard, To End the Anguish Drop the Death Penalty, Boston Globe (Apr. 17, 2015), https://www.bostonglobe.com/metro/2015/04/16/end-anguish-drop-death-penalty/ocQLejp8H2vesDavItHIEN/story.html.

16.A.7102–03, 7107 (Corcoran); id. at 7184–85 (Gross); id. at 7254 (Whalley); id. at 7274 (Haslet-Davis); id. at 7428–29 (Woolfenden). See post Point VII.

Finally, the government presented the testimony of Deputy United States Marshal Gary Oliveira, who monitored the courthouse cameras on July 10, 2013, the date Tsarnaev was arraigned. 16.A.7292–96. Through Oliveira, the government introduced a screenshot of Tsarnaev giving the middle finger to the cell-block camera. Id. The defense, on cross-examination, introduced the video footage from which the screenshot was taken. Add.CD.DX4000.[9] According to the video footage from holding cell four, Tsarnaev arrived at 11:08 a.m. for an arraignment scheduled more than four hours later. 16.A.7313. At 11:09 to 11:10 a.m., he used the glass lens of the camera as a mirror to adjust his hair. Add.CD.DX4000; 16.A.7299. Thirteen minutes later, he approached and gave his middle finger to the camera. 16.A.7308–09. See post Point IX.

2. The defense case.

The penalty phase defense theory was that although the teenage Tsarnaev participated in the bombings, he did so only because of the influence of his dominating, violent older brother, who had become a radicalized Muslim. To present this theory, the defense began by putting on substantial evidence about Jahar's childhood and background—specifically, that the Jahar people knew as a

[9] A USB drive containing multimedia files is enclosed with the addendum.

young boy and growing teenager was impossible to reconcile with the events of April 2013. It then presented significant evidence of Tamerlan's Islamic radicalization. But the District Court, through a series of evidentiary rulings, prevented the defense from establishing Tamerlan's violent past, which Jahar was well aware of at the time of the bombings and which was essential to explaining Tamerlan's influence over him.

a. Jahar's background and childhood.

There was no dispute about Jahar's character and temperament from the many teachers, friends and family members who testified at the penalty phase. The Tsarnaev family moved to the United States from Central Asia when Jahar was 8 years old. 19.A.8781. Sam Lipson, the son of the Tsarnaevs' landlord, recalled Jahar as a "sweet . . . skinny kid." 17.A.7826–27.

His elementary and middle school teachers all shared virtually the same opinions of him—he was hardworking, respectful, friendly and bright. Cathryn Charner-Laird, Jahar's third grade teacher, recalled that he "was incredibly hard working" and "always wanted to do the right thing." Id. at 7914. Jahar was never a discipline problem, made a lot of friends, and worked hard to learn English. Id. at 7914–16. In fact, he skipped fourth grade. Id. at 7919.

Tracey Gordon was Jahar's teacher for the next two years. She confirmed that he was "[s]uper kind, really smart, very quick to learn, [and a] very hard

worker." 17.A.7922. He made friends easily and was very respectful of others. Id. at 7923. She remembered him as a "person you enjoyed being around" because he was so "very kind and hardworking."

Rebecca Norris taught Jahar in the seventh and eighth grades. Id. at 7930. She too recalled that he was a "very good student" who was "really bright" and a "hardworking, smart kid, well-behaved." Id. He was taking tenth-grade math classes as an eighth grader. Id. He "just always came off as quiet and friendly and humble." Id. at 7934.

Jahar's high school teachers recalled much the same. Eric Traub taught him math both as a freshman (Algebra) and a senior (honors math). 18.A.8429. Jahar got along well with his classmates, was "a kind student," "participated," and "brought kind of a fun energy to the classroom." Id. at 8429–30.

Jennifer Carr-Callison was the faculty advisor for the high school's "Best Buddies" program, which Jahar was a member of. Id. at 8417–19. The club catered to students with developmental disabilities; the students in the club who did not have disabilities were typically "students that were doing well academically, students that wanted to make more friends, students that wanted to be part of a club that was inclusive." Id. at 8420. Jahar was "kind" and "respectful," and Carr-Callison specifically recalled that he "was very nice" to the intellectually challenged students. Id. at 8423. He was also a member of his high

school's Model United Nations program, and participated in the Harvard Model United Nations program. 17.A.7956–57. Jahar was a captain of his high school wrestling team and, according to his coach, showed "hard work [and] dedication to his peers." 18.A.8307.

Jahar's high school friends had similar recollections. Elizabeth Zamparelli had several classes with Jahar in high school and was in the Best Buddies program with him working with special-needs kids. 18.A.8150. He was "very caring" and she never heard him speak of either politics or religion. Id. at 8150–53. Classmate Rosa Booth never heard him speak of politics or religion; she recalled he was a "sweet boy" who was certainly not a leader in their group of friends. 18.A.8104–06. Wrestler Henry Alvarez recalled Jahar encouraging him during practices, and described Jahar as a "kind person." 18.A.8288, 8290. Jahar never discussed religion—Alvarez only learned that he was Muslim when he would not eat pepperoni pizza. 18.A.8292–93. Jahar's college friends also agreed that he did not discuss religion or politics. 17.A.7969–70, 7983.

Family members confirmed the uniform opinion expressed by Jahar's teachers and friends. Jahar's cousin Raisat Suleimanova traveled from the former Soviet Union to testify; she "categorically reject[ed] what he did" but nevertheless testified that as a child, he was "a very kind, a very warm child." 18.A.8009. His cousin Naida Suleimanova recalled him as a "very nice, very kind caring" child

who was always smiling and who "loved his older brother very much." 18.A.8038–39. Nabisat Suleimanova testified that Jahar was "warm," "caring," and a "wonderful kid." 18.A.8089.

In sum, the evidence presented by the defense at the penalty phase painted a consistent picture. Witness after witness who knew Jahar from his earliest years through high school and the time of the bombings (early college)—family members, friends, teachers, classmates—all described him in a similar way. He was "sweet," and "kind" and "caring' and "hardworking" and "respectful" and "humble." The government itself had no dispute with this portrait of Jahar as a boy and even to the present, as a teenager. To the contrary, the government agreed the evidence showed Jahar was "quiet, polite and laid back." 19.A. 8783. He was "well-liked" and "mature." 19.A.8782–83. He "learned the value of love and caring and support from his family and friends" and "understood the difference between right and wrong." 19.A.8726, 8783.

b. Tamerlan's Islamic radicalization.

The defense sought to explain the otherwise inexplicable involvement of Jahar in the bombings by focusing on Tamerlan. In particular, the defense attempted to demonstrate that, starting about two years before the bombings, Tamerlan had become increasingly radicalized, engaged in prior acts of violence,

and intimidated and otherwise wielded influence over his younger brother, who, before committing these crimes, had exhibited no signs of aggression or hatred.

Tamerlan's friends routinely described him as someone who, prior to 2011, dressed nicely, liked to go to clubs, to drink alcohol and to smoke both cigarettes and marijuana. 17.A.7539–40 (boyhood friend Robert Barnes); id. at 7678–80 (friend Rogerio Franca); id. at 7806–07 (boyhood friend Viskhan Vakhabov); id. at 7827–28 (family friend Sam Lipson). Along with other friends, he would go out to clubs with Katherine Russell, who later became his wife. 18.A.8132–33 (college friend Amanda Ransom). Tamerlan was always "dressed nicely . . . euro-style clothing, cologne . . . kind of slick." 17.A.7827–28 (family friend Sam Lipson).

But all that began to change sometime in 2011. Judith Russell, Tamerlan's mother-in-law, described how Tamerlan's religious beliefs evolved over time, and were evident by the time of his trip to Russia in 2012. 17.A.7608–09. He returned with longer hair and beard. Id. at 7611–12. Every time Russell saw Tamerlan thereafter, he spoke about religion and politics, discussing how the United States harmed Islamic countries. Id. at 7612. Russell felt it had become an "obsession" so pronounced she could no longer speak to her son-in-law. Id. at 7612–13.

Numerous witnesses confirmed the dramatic changes Russell had seen. Boyhood friend Robert Barnes saw Tamerlan in a pizzeria in Cambridge after returning from Russia. Tamerlan was wearing a robe, had a beard, and said he no

longer hung out with their old friends because they drank alcohol and smoked. He spoke passionately about politics and criticized American foreign policy. Id. at 7545–46. Friend Rogerio Franca confirmed that after the Russia trip, Tamerlan was dressed differently (all in white), while his wife Katherine was covered and stood a foot behind Tamerlan when Franca and Tamerlan spoke. 17.A.7685–86. In fact, Franca recalled that the last time they saw each other, Tamerlan demanded to know whether Franca—who was Catholic—had converted to Islam yet. Id. at 7686. Tamerlan told his boyhood friend Viskhan Vakhabov that a true Muslim would not drink or smoke and that extremist violent jihad was the proper path. Id. at 7808–09.

Tamerlan's online activity reflected his intensified Islamic beliefs. He routinely sent people articles and videos prepared by radical extremists. Id. at 7561–75. One such article was titled "Martyrdom and the Apocalyptic Dream of America." Id. at 7567. Another was a tribute to Osama Bin Laden called "Sheikh Usamah Bin Laden, the 'Lion of Islam' with a Tender Heart." Id. One of his YouTube playlists was titled "Terrorists." Id. at 7577.

Even people who did not know Tamerlan as a younger man noted his radicalization. Magomed Dolakov told FBI agents that he met Tamerlan at the Prospect Street Mosque in Cambridge around August 2012. Id. at 7577. Tamerlan was wearing the traditional all-white robe and was expressing radical views on

Islam, explaining his view that Muslims who fight the Russian military—"the mujahidin"—were brave and that he wanted to join them. Id. at 7793–94. When Dolakov told Tamerlan that a mujahidin bomber had attacked a funeral and killed a lot of innocent people, Tamerlan "said that the bomber was right." Id. at 7795. Dolakov considered Tamerlan "a radical." Id.

c. Tamerlan's influence.

Tamerlan did not confine his radicalization to himself. Judith Russell testified that her daughter—Tamerlan's wife Katherine, who had grown up in a Christian family in Rhode Island—began to cover herself like a traditional Muslim. 17.A.7611–12. Tamerlan and Katherine's mutual college friend Amanda Ransom confirmed that Katherine started wearing a hijab, fully covering herself, and pulled away from their friendship. 18.A.8140. And as noted above, longtime friend Rogerio Franca confirmed that Katherine was now fully covered and walked behind Tamerlan. 17.A.7685–86.

Several witnesses testified that Tamerlan's and Jahar's mother Zubeidat had become similarly radicalized at about this time. Naida Suleimanova recalled that growing up, Zubeidat was a "life-loving, beautiful, fashionable woman" but she changed and started "wearing a hijab." 18.A.8039–40. This scared Naida because she associated that change with "extremist Islamists." 18.A.8041–42. Shakhruzat Suleimanova—who was Zubeidat's sister—also recalled that Zubeidat began

wearing the hijab, which shocked and scared Shakhruzat. 18.A.8070–71. And Mirra Kuznetsov—who owned a Russian video store that served the Russian community in Boston—recalled how Zubeidat was "gorgeous" and always "dressed very fancy." 18.A.8166, 8168. But this changed around the time that Tamerlan grew his beard: Zubeidat started wearing a hijab and explained that she was now "religious." Id. at 8168. Kuznetsov "was very surprised." Id.

Still, while the jury was aware of Tamerlan's radicalization and the changes in his wife and mother, it never learned about Tamerlan's history of violence and his powerful, negative influence over his younger, teenage brother—an evidentiary gap the government repeatedly emphasized in urging the jury to impose death. See 19.A.8724 (arguing that "there's no evidence of" Tamerlan's violent influence "in this case"); 19.A.8786–87 (arguing that there was no evidence "that the defendant was under his brother's spell," and "[y]ou've heard no evidence that Tamerlan exercised dominion or control over the defendant"). At best, the jury was aware that Tamerlan interrupted the imam at religious services on two occasions, calling him a hypocrite, and once yelled at the owner of a market for selling halal turkeys. 17.A.7511–13, 7522, 7525, 7530–31. The jury further heard that when Tamerlan was training as a boxer, Jahar followed him around "like a puppy." Id. at 7745. In the government's characterization, this proof established only "that Tamerlan was bossy." 19.A.8785.

The evidence of Tamerlan's violent influence was not missing because it did not exist, however. The jurors did not hear it because, in a series of rulings, the District Court excluded it. Throughout trial, the defense sought to introduce evidence that (1) on September 11, 2011, Tamerlan and a confederate beat, bound, and killed three men during a robbery; and (2) Jahar later learned about the murders. One of the men killed was a close friend of Tamerlan's. As discussed in Point V, this evidence strongly supported the central mitigation theme as well as several important mitigating factors jurors would be asked to weigh, including Tamerlan's greater culpability in the bombings and his influence over Jahar. The District Court excluded it based on an *in camera* review of materials that the defense never had access to during trial. Appellate counsel has now reviewed those materials, [redacted] See post § V.C. Excluding this essential mitigation evidence empowered the government to repeatedly argue that the defense failed to show that Jahar was "under [Tamerlan's] sway." 19.A.8793–94.

Perhaps not surprisingly, given the limited mitigation evidence the District Court permitted, nine of the jurors did not find the crucial mitigating factor that Jahar had "acted under the influence of his older brother" or "was particularly susceptible to his older brother's influence." Add.90–91. Nonetheless, the jury did not impose death on any of the 11 capital charges that involved Tamerlan's

conduct in setting off the first bomb and the resulting death of Krystle Campbell, Jahar's conspiracy with Tamerlan, or the death of Officer Collier. Add.76–77, 96. The six charges on which the jury imposed death all related to Jahar's own act in setting off the second bomb. Id. As to this act, on the truncated record that the defense was allowed to present, the jury imposed death.

Summary Of Argument

As **Point I** explains, the District Court's refusal to change venue deprived Tsarnaev of his Fifth and Sixth Amendment rights to a fair trial by an impartial jury, requiring reversal of his convictions. Almost everyone in the Boston metropolitan area had a friend or family member at the Marathon, sheltered in place, participated in the manhunt, or bought or wore Boston Strong paraphernalia. This Court should presume prejudice because constant, intense, and inflammatory pre-trial publicity saturated all of Eastern Massachusetts, so much so that more than two-thirds of the venire believed Tsarnaev was guilty before they heard a single witness. The wall-to-wall media coverage of the bombings exposed the jury pool to evidence every bit as devastating as the stationhouse confession that triggered the presumption of prejudice in Rideau v. Louisiana, 373 U.S. 723 (1963). Potential jurors saw, again and again, video footage of the brothers on Boylston Street carrying out the bombings, read reports of Jahar's written statement in the dry-docked boat where he was arrested, and learned of his (never-introduced) hospital-bed confession to the FBI. They heard heart-wrenching stories about the homicide victims, the wounded, and their families, not to mention the opinions of dozens of survivors, first responders, and politicians that Tsarnaev—described as a "monster" and "terrorist"—should die. 99.7% of the venire was exposed to pre-trial publicity; 69% of the venire had already

concluded Tsarnaev was guilty before hearing the government's first witness; and, of the members of the venire who had concluded that Tsarnaev should receive the death penalty before even coming to court, 69% admitted they would not be able to set that view aside and decide the case based on the evidence presented in court.

Even if this Court does not presume prejudice, the record demonstrates actual prejudice. The pre-trial publicity was damning: the more a prospective juror had seen, the more likely she was to believe that Tsarnaev was guilty and deserved the death penalty. And those beliefs proved durable. Seating a jury was arduous because so many venirepersons acknowledged disqualifying and intractable biases. Trial was "a waste of time and money," many believed, because [redacted] Referring to video of Tsarnaev [redacted] where he [redacted] one prospective juror wondered: [redacted] That juror also deemed Tsarnaev [redacted] and another prospective juror thought [redacted]

In these extraordinary circumstances, this Court cannot take the seated jurors' declarations of impartiality at face value and should reverse the convictions. At a minimum, this Court should vacate the death sentences, because the victimization of the entire community, virulent local antipathy, and the poisonous

effect of pre-trial publicity combined to deny Tsarnaev his Eighth Amendment right to a reliable penalty determination.

The District Court denied Tsarnaev's motions to change venue with repeated assurances that a "probing" and "thorough" voir dire would produce an impartial jury. But as **Points II– IV** show, the actual voir dire proved those promises hollow. Before the jury was empaneled, Tsarnaev tendered evidence that two venirepersons who would become seated jurors lied under oath during voir dire. Juror 286, the foreperson, said that she had neither commented on this case online nor sheltered in place, but, in fact, she had published two dozen Twitter posts in which she grieved the victims, praised the police, called Tsarnaev a "piece of garbage," and described being "locked down" with her family. Likewise, after disobeying the Court's instructions by discussing this case on Facebook, Juror 138 falsely said that he had not. Then he swore that his Facebook friends were not "commenting about this trial." But one of them had urged Juror 138 to "play the part," "get on the jury," and send Tsarnaev "to jail where he will be taken care of." In a cursory ruling, the Court denied Tsarnaev's motions to excuse these jurors for cause and refused to conduct further voir dire. Those rulings deprived Tsarnaev of his Sixth Amendment right to an unbiased jury and require reversal of his conviction. In the alternative, those rulings deprived Tsarnaev of his Eighth Amendment right to a reliable penalty-phase verdict and require reversal of his

death sentences. At a minimum, the failure to investigate Tsarnaev's well-substantiated claim of juror dishonesty necessitates remand under French, 904 F.3d 111. See **Point II**.

The Court further tilted the scales against Tsarnaev by erroneously excusing Juror 355 on the ground that he was "substantially impaired" in his ability to consider the death penalty. An educated professional who had devoted "a lot of thought and soul-searching" to the question, the juror testified that despite his personal reservations against capital punishment, he "could," in an appropriate case, "vote to impose the death penalty." Pressed by the government for examples, the juror mentioned Slobodan Milosevic as a "starting point"—a case where he could "immediately," without hearing additional information or instructions, deem death a proper penalty. In other cases, Juror 355 said, he would "listen to the Court's instructions" and "judge the facts in front of me" before deciding. Misconstruing those answers, the Court concluded that the juror's "zone of possibility" was limited to "genocide" and was therefore too "narrow." Dismissal of that qualified juror compels reversal of the death sentences. See **Point III**.

Finally, the Court refused to ask two voir-dire questions essential to seating a fair jury: (i) Could you meaningfully weigh mitigating evidence and consider a sentence of life imprisonment in light of the particular factual allegations here, namely, the intentional killing of multiple victims, including a child, in acts of

terrorism? (ii) What publicity, specifically, have you seen, heard, or read about this case? A straightforward application of Morgan, 504 U.S. 719, dictated the first question; an explicit directive in Patriarca, 402 F.2d 314, the latter. Declining to make either inquiry, the District Court created an unacceptable risk that biased and mitigation-impaired jurors sat. This Court should reverse Tsarnaev's convictions (for the Patriarca error), or, in the alternative, his death sentences (for both errors). See **Point IV**.

With this compromised jury in place, the District Court made erroneous evidentiary and instructional rulings that distorted the penalty phase, skewed deliberations in favor of death, and compel reversal of Tsarnaev's death sentences. **Points V–VI** address mitigation; **Points VII–IX**, aggravation; **Points X–XI**, the penalty-phase instructions; and **Point XII** the cumulative effect of these errors.

As **Point V** sets forth, the Court hobbled the defense's mitigation case by preventing the introduction of evidence crucial to the argument that Tamerlan Tsarnaev planned and led the Marathon bombings and that Jahar, a 19-year-old college sophomore with no prior criminal record, participated only as a direct result of his older brother's influence. First, the Court excluded reliable information—information that the government itself had relied on in seeking a search warrant—that on September 11, 2011, a year and a half before the bombings, Tamerlan had carried out a vicious triple homicide in the name of jihad,

and [redacted] Ibragim Todashev, [redacted]. Likewise, the jury did not know that Jahar learned, after the fact, that his brother had committed these grisly killings. The exclusion of this evidence kept from the jury significant proof of Tamerlan's violent history, his power to enlist others in acts of brutality, and thus his relative culpability. Just as damaging, the government took advantage of the ruling in its penalty phase summations, to make the disingenuous argument that Tamerlan was merely "bossy" and "sometimes lost his temper," and to assert that no "evidence" supported the argument that he "coerced or controlled" Jahar.

The Court compounded this error by refusing to disclose to the defense Todashev's confession to the FBI [redacted] These rulings contravened the Fifth Amendment, the Eighth Amendment and the FDPA.

[redacted]

On the aggravating side of the scale, the Court allowed the government to bolster its case for death by introducing a wealth of improper material during both the guilt and penalty phases. First, the Court admitted extensive testimony from survivors of the bombings on the effect of these crimes on their lives and those of their families. Witnesses testified about confronting death in the immediate aftermath of the bombings ("I thought I could very well die . . . . I was terrified of losing my son . . . . I was terrified of never seeing my wife again."); fearing for their loved ones ("I thought that my parents had been violently ripped away from this world and that I was all alone."); and the trauma, months later, of losing a limb ("[T]o become a bilateral amputee was terrifying. I . . . wanted some memory of my body and toes and ankles and legs, and I wanted to paint my toenails and I

wanted to put my feet in the sand."). The introduction of this gripping but inadmissible testimony flouted the FDPA, which codifies Payne, 501 U.S. 808, and permits a jury to hear evidence of the capital offenses' impact only on *homicide* victims—not on *survivors*. 18 U.S.C. § 3593(a). Although these survivors were horribly victimized by the bombings, they were not "victims" in the narrow sense in which the FDPA uses that term, and their pain and suffering was not a permissible penalty-phase consideration for the jury. See **Point VII**.

Second, the Court admitted video of Tsarnaev buying milk at a Whole Foods supermarket soon after the bombings, exploited to great effect by the government as proof of his supposed remorselessness: After Tsarnaev "killed two young women" and "a little boy," a prosecutor told the jury, "he coolly, not 20 minutes later, went to the Whole Foods to make sure he got the half-gallon of milk that he wanted." The defense demonstrated that the video was the fruit of an involuntary confession, elicited over the course of 36 hours from a hospital bed where Tsarnaev lay in critical condition, in significant pain, intubated, under sedation, and rebuffed in his many requests for counsel. Without deciding voluntariness, the Court accepted a prosecutor's uncorroborated oral representation that the tip leading to the discovery of the video had come from a "civilian witness," and refused Tsarnaev's request that the government prove its assertion of an independent source. These errors were not harmless as to penalty because the

government touted this video in its jury arguments, again and again, as evidence to support the pivotal non-statutory aggravating factor that Tsarnaev had displayed a "lack of remorse." See **Point VIII**.

Third, the government used multiple objectionable techniques to stoke anti-Muslim bias and incite a vote for death on the basis of passion and prejudice. The government elicited guilt-phase expert testimony on ISIS, a jihadist organization now notorious for grisly terror tactics but altogether irrelevant to this case. No evidence tied ISIS to either Jahar or Tamerlan and, in fact, ISIS had only formed days before the bombings. Then, during its guilt-phase summation, the government "juxtaposed" unrelated pieces of evidence—a photo slideshow of the post-bombing carnage, and a recording of an Arabic-language chant found on Tsarnaev's electronic devices—to create an inflammatory audiovisual presentation that depicted Islam (and thus Tsarnaev) as foreign, frightening, and violence-prone. Prejudice from these improper tactics spilled over to the penalty phase, where the government's misconduct continued. During its penalty-phase opening, the government displayed a poster-sized photograph of Tsarnaev flashing his middle finger—a freeze-frame taken from a video recording in a holding cell before his arraignment—placed in between same-sized photographs of the four homicide victims. A prosecutor then argued, with no factual basis whatsoever, that this obscene gesture was Tsarnaev's "message" to the victims. In a case that provoked

the strongest of feelings, the government chose not to cool the jurors' passions, so they could reach a reasoned judgment, but instead to fuel the fire, courting death sentences based on unlawful considerations. See **Point IX**.

Having distorted both sides of the penalty-phase balance by constraining the defense's mitigation case while bolstering the government's aggravation case, the Court cemented its errors with flawed penalty-phase instructions, as demonstrated in **Points X–XI**. First, to vote for death under the FDPA, jurors must unanimously find that aggravating factors "sufficiently outweigh" mitigating factors "to justify a sentence of death." 18 U.S.C. § 3593(e). The Court refused Tsarnaev's request to charge the jurors, in line with the Supreme Court's recent Sixth Amendment jurisprudence, that they must make this determination "beyond a reasonable doubt." This Court, in United States v. Sampson, 486 F.3d 13 (1st Cir. 2007) ("Sampson I"), had held such an instruction unnecessary. But Hurst, 136 S. Ct. 616, confirms Sampson I's error: whether aggravators outweigh mitigators is a fact that increases the maximum punishment for an offense from life imprisonment to death, and so must be found beyond a reasonable doubt under Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). This defective charge was structural error. See **Point X**.

Second, the Court refused to tell the jury the truth: that deadlock as to penalty would result in the imposition of a mandatory life sentence. Worse, the

Court created the mistaken impression that the consequence of non-unanimity would be a costly and painful retrial. The FDPA directs a jury to make three unanimous findings before imposing a death sentence: (i) the government has proved a "gateway" mental state, 18 U.S.C. § 3591(a)(2); (ii) the government has proved at least one aggravating factor, id. § 3592(c); and (iii) the aggravating factors sufficiently outweigh any mitigating factors to justify death, id. § 3593(e). The Court correctly informed the jurors that deadlock at steps (i) or (ii) would yield a mandatory sentence of life imprisonment. Even though the consequence of deadlock at step (iii) was the same, the Court this time refused to say so. And the Court prevented the defense from filling the gap itself: counsel was barred from arguing to the jury, truthfully, that if they could not agree at the weighing stage, the Court would sentence Tsarnaev to life imprisonment without the possibility of release and no retrial would follow. These omissions created an intolerable risk of coercing holdout jurors for life to acquiesce in a death verdict in order to spare the victims' families, the survivors, and the Boston community the significant financial and emotional strain of another trial. See **Point XI**.

The cumulative impact of the errors described in Points V–XI mandates reversal of Tsarnaev's death sentences. The Court straitjacketed the defense's case for life, gave the government wide latitude (indeed, more than the government sought) to make its case for death, and kept the jury in the dark on critical points of

law, resulting in a verdict unworthy of confidence. Nor was a death sentence inevitable. Even on this unbalanced record, jurors found mitigating that Tsarnaev was a young man with no prior criminal record, beloved by teachers and friends, in a troubled family beset by mental illness and radicalism. Correct evidentiary rulings would have permitted the defense to complete the picture by showing, with concrete and potent facts, Jahar's vulnerability to Tamerlan's brutal sway. Federal juries across the country have returned life sentences in comparably or more aggravated cases, including those involving terrorism, multiple murders, and the murders of children and police officers. See **Point XII.**

While compiling the record of proceedings below, appellate counsel discovered that the government had conducted at least 26 secret communications with the District Court. As **Point XIII** sets forth, the Court gave Tsarnaev's trial attorneys no notice of these *ex parte* communications, nine of which pertained to [redacted] Eight of the nine remain hidden from Tsarnaev's appellate counsel. It is "a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court," Haller, 409 F.2d at 859, one that "can be justified only in the most extraordinary circumstances," United States v. Innamorati, 996 F.2d 456, 487 (1st Cir. 1993). The District Court's back-channel talks with prosecutors have no precedent in a federal capital case. They deprived

Tsarnaev of his Fifth Amendment right to due process and his Sixth Amendment right to the assistance of counsel, requiring reversal of his convictions, or in the alternative, his death sentences.

Finally, Tsarnaev raises two claims that would require changes in, or extensions of, current law. First, the underrepresentation of African-Americans in the grand and petit jury wheels violated constitutional and statutory fair cross-section requirements. This Court's exclusive measure of underrepresentation—the "absolute disparity" test, see United States v. Royal, 174 F.3d 1 (1st Cir. 1999)—is legally and statistically unsound, and should be discarded. See **Point XIV**. Second, the Eighth Amendment prohibits the death penalty for emerging adults who, like Tsarnaev, committed their capital crimes at age 19. In light of evolving scientific knowledge of adolescent brain maturation and accompanying legal developments, the rule of Roper, 543 U.S 551, should be extended to this group. See **Point XV**.

I.

The District Court Improperly Forced Tsarnaev To Trial In Boston.

[redacted][10]

I feel because I have seen, over the past couple of years, so much on TV and in the media, that still does, you know, linger in my mind and always will linger in my mind. And, you know, I made an opinion from that. And I just think no matter what is presented, I'm still going to feel that same way.[11]

[A]s many people in Boston did, I followed everything that happened during the time. . . . From everything I've heard and everything I've read, which was extensive over the period of time . . . I listened to the radio nonstop about the whole thing. I formed an opinion. I think it would be unbelievably unlikely that I'd change the opinion based on what I've already heard.[12]

[redacted]

[redacted]

[redacted]

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[10] [redacted] Because the District Court denied Tsarnaev's motion for partial unsealing of the non-seated prospective jurors' questionnaires, DE.1753, all quotations from and references to those documents are redacted in the publicly filed opening brief, unless they were repeated in the now-unsealed transcript of voir dire.

[11] 8.A.3221 (PJ 529).

[12] 8.A.3403 (PJ 557).

[redacted]

These responses, all culled from the prospective jurors' questionnaires and voir dire, provide representative examples of the local community's impressions of Tsarnaev and the charges against him before trial. They reflect not just the community's awareness of Tsarnaev and the bombings from news coverage, but its overriding prejudgment of his responsibility and the appropriate sentence for those crimes. These responses reflect the sense of personal victimhood shared by the community from which Tsarnaev's potential jurors were chosen. Above all, the responses reflect the reality that, for this community, the attack on the Boston Marathon was experienced as an attack on the community itself.

Because of the local population's familiarity with and fixed preconceptions about the case, Tsarnaev filed four pre-trial motions for a change of venue—two before jury selection, and two during jury selection as the impact of the publicity became even clearer. See 23.A.10706–14, 10733–42; 24.A.11316–36; 25.A.11450–70, 11558–61. The District Court denied each of Tsarnaev's motions and ordered trial to proceed in downtown Boston, two miles from the Marathon finish line. Add.407–13, 435–46, 462–68; 10.A.3927. The penalty phase began six days after the second anniversary of the bombings, and one day after the Marathon's 119th running. 16.A.7057.

For two separate reasons, the Court's decision was error and deprived Tsarnaev of his rights to a fair trial before an impartial jury protected by the Fifth

and Sixth Amendments. See Groppi v. Wisconsin, 400 U.S. 505, 508 (1971); Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) (holding criminal defendants have a right to trial by "indifferent" jurors "free from outside influences," who will "base their decision solely on the evidence," undisturbed by personal prejudice or public passion).[16]

First, as set forth below, from the bombings until trial, all of Eastern Massachusetts was saturated with print, radio, television, and internet publicity about the case. Much of this publicity referenced prejudicial evidence that was not, and could never be, introduced at trial. Because of the extraordinary nature of the community's victimhood and the press coverage, prejudice should have been presumed and a change of venue ordered. See, e.g., Rideau, 373 U.S. at 726–27; accord Murphy v. Florida, 421 U.S. 794, 798–99 (1975); Sheppard, 384 U.S. at 352–55; United States v. Casellas-Toro, 807 F.3d 380, 386 (1st Cir. 2015). This is especially true here because the charged crime—the bombing of the Boston Marathon—held such civic and symbolic significance for the entire community. Tsarnaev was understood to be targeting not the particular victims, but the city's

[16] The defense also unsuccessfully sought mandamus relief twice from this Court. See In re Tsarnaev, 775 F.3d 457, 457 (1st Cir. 2015) ("Tsarnaev I"); Tsarnaev II, 780 F.3d at 16. Judge Torruella dissented from both decisions, concluding that, in light of the pre-trial publicity, the argument for a change of venue was "compelling," Tsarnaev I, 775 F.3d at 458–59, and that even under the more exacting standards employed during mandamus proceedings, the record showed that a change of venue was required. Tsarnaev II, 780 F.3d at 29–30.

entire population. The community had been tasked with the responsibility of assisting in the identification and apprehension of the Tsarnaevs; Bostonians and nearby residents had been ordered to shelter in place during the manhunt for Jahar; and the region collectively and publicly healed by forming the Boston Strong movement. In light of the nature of the crime, and the nature and extent of the publicity, a jury drawn from the Boston metropolitan area was uniquely incapable of impartially deciding this case.

Alternatively, even if prejudice should not have been presumed, Tsarnaev established actual prejudice. The record showed that 99.7% of the venire was exposed to pre-trial publicity; 69% of the venire had already concluded defendant was guilty before hearing the government's first witness; and, of the members of the venire who had concluded that Tsarnaev should receive the death penalty before even coming to court, 69% admitted they would not be able to set that view aside and decide the case based on the facts presented in court. In these circumstances, the record demonstrates actual prejudice. See United States v. Skilling, 561 U.S. 358, 394–95 (2010); Irvin v. Dowd, 366 U.S. 717, 725–27 (1961). Notwithstanding the predictable assurances of impartiality obtained from the twelve jurors who ultimately served, reversal is required.

A. Factual and procedural background.

1. The Boston Marathon and the community's response to the bombings.

As the government would establish at trial, the Boston Marathon—once named America's Marathon—holds a vaunted place in the city and region's civic life. 10.A.3988–91. The Marathon is synonymous with the city of Boston itself. The race takes place on Patriots' Day, a holiday in Massachusetts (and nowhere else), when schools are closed and many residents have the day off from work. Id. at 3990. The Marathon's route starts in Hopkinton, Massachusetts and moves through Ashland, Framingham, Natick, Wellesley, Newton—the site of Mile 21's "Heartbreak Hill"—and Brookline before finishing on Boylston Street in Boston's Back Bay. 10.A.3989, 3992–93. Each of these communities sits within the Eastern Division of the District of Massachusetts. Participation is high among Bostonians: as William Richard, the father of victim Martin Richard, explained "[e]veryone in this room probably knows someone that's running the Marathon that day." Id. at 4269. And those who do not run spend the morning and afternoon along the race course, cheering the entrants. In 2013, about 27,000 people ran the Marathon, and as many as half a million watched. 10.A.3989, 3996, 4007.

For many in the Boston community, watching the Marathon is a family tradition, a symbol of Boston pride, and a way to celebrate the city. For example, Roseann Sdoia, a trial witness, described how she "would go [to the Marathon]

with [her] dad and [her] sister when" they were young, and "as years kind of went on the tradition stayed the same but [she] would go with friends." Id. at 4227. They would typically go to the Red Sox game, which always takes place on Patriots' Day morning, and then "go over to Boylston Street to watch runners come in." Id. William Richard similarly testified that his family "made it a ritual to go [to the Marathon]" every year, because even when they "didn't know someone who was running, it was just something we did as part of living in the city." Id. at 4266. Visitors and outsiders also understood the significance of the Boston Marathon. Danling Zhou, a Boston University student from China, testified that the "marathon is a big thing here," and it was important that she "go to see how people celebrate" it. Id. at 4345.

The bombings therefore did more than strike a public event; they attacked a touchstone for the city and region's communal life. Anyone who attended the Boston Marathon—or had family or friends who attended—either as a runner or a spectator was a potential victim. And the crimes damaged the local population's faith that the Marathon was a site of neighborly goodwill, forever injecting suspicion and fear where there had only been good feelings and civic pride. "That is the whole point of terrorism—not just to kill or injure a few innocent people, but to make *everyone* scared and make *everyone* believe it could have been them or that they could be next." Tsarnaev II, 780 F.3d at 44 (Torruella, J., dissenting).

Any residents of Boston and the surrounding communities of Eastern Massachusetts not personally affected by the attack itself were ultimately enmeshed in the crime's aftermath. These residents cared for the injured at area hospitals for months after the bombings. Some hospital workers who treated the victims [redacted] about that [redacted] Residents received federal and local authorities' solicitation of "videos, cellphone pictures, and anything that could lead to the capture of whoever set off those pressure cooker bombs," making this "the most crowdsourced terror investigation in American history."[17] They were exposed to constant print, television, and internet coverage of the crime, investigation, and ensuing manhunt for the Tsarnaev brothers.[18]

And anyone not near a smartphone, television, radio, computer, or newsstand during and immediately after the bombings felt their impact when, on April 19, Governor Patrick took the unprecedented step of ordering nearly a million citizens of Boston and five neighboring cities—again, all communities with

[17] Alexander Abad-Santos, Reddit and 4Chan Are on the Boston Bomber Case, The Atlantic (Apr. 17, 2013), https://www.theatlantic.com/national/archive/2013/04/reddit-and-4chan-are-boston-bomber-case/316129/.

[18] See MassLive, Boston Bombing Manhunt Live Stream Coverage: Massive Police Presence, Shots Fired in Watertown (Apr. 19, 2013), https://www.masslive.com/news/boston/index.ssf/2013/04/boston_bombing_manhunt_live_st.html.

the Eastern Division of the District of Massachusetts—to "shelter in place" until Jahar was apprehended. People grasped the gravity and danger of the situation. One prospective juror [redacted] Another [redacted] "[T]he entire city of Boston and its surrounding areas were victimized—as evidenced by the city's virtual lockdown and the images of SWAT team members roaming the streets and knocking door-to-door in Watertown." Tsarnaev I, 775 F.3d at 458 (Torruella, J., dissenting).

The bombings' deep, widespread, and emotional wake was apparent in the community's response to Tsarnaev's capture. People flooded the streets of Watertown cheering for the police and chanting "U.S.A! U.S.A!" In Boston, "people danced in the streets outside Fenway Park," not far from where the bombings occurred.[19] Seven days later, Fenway Park again became the focus as Red Sox designated hitter David Ortiz, standing before a sold-out Fenway Park, rallied the city, exclaiming: "This is our fucking city, and nobody is going to

[19] See Pete Williams et al., Boston Marathon Suspect Is Captured Alive: Police, NBC News (Apr. 19, 2013), https://www.cnbc.com/id/100655686.

dictate our freedom. Stay strong."[20] To many, this was "the most iconic moment" in Ortiz's Hall-of-Fame career, a speech that "cemented his place not solely in the history of the Red Sox, but in the history of Boston."[21]

Perhaps because of Ortiz's rallying cry, what followed became known as the "Boston Strong" movement, and the phrase appeared in fundraisers and on merchandise to raise money for those impacted by the bombings. As one newspaper reported, "[t]he two-word motto has been everywhere in Boston since the Marathon bombings . . . , a handy shorthand for defiance, solidarity, and caring. In its ubiquity, 'Boston Strong' presents a united front in the face of threat."[22] "Boston Strong" remained a vibrant movement up to and through trial, two years after the crimes. During voir dire, prospective Juror 48 explained that the Teamsters Union was distributing Boston Strong t-shirts and jackets to people "since the incident and continuous. They still provide them." 2.A.658.

Having suffered as one, the community responded as one. One Fund Boston, a charity started in the hours after the bombings, raised and distributed $80

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[20] See Major League Baseball, David Ortiz Rallies the Boston Crowd after Boston Marathon Tragedy, YouTube (Apr. 20, 2013), https://www.youtube.com/watch?v=1NttSTenyEk.

[21] Tony Massarotti, Big Love: An Oral History of David Ortiz, Boston Magazine (July 24, 2016) https://www.bostonmagazine.com/news/2016/07/24/david-ortiz-big-papi-oral-history/.

[22] Ben Zimmer, "Boston Strong," the Phrase that Rallied a City, Boston Globe (May 12, 2013), https://www.bostonglobe.com/ideas/2013/05/11/boston-strong-phrase-that-rallied-city/uNPFaI8Mv4QxsWqpjXBOQO/story.html.

million to the victims.[23] Residents bought Boston Strong merchandise and displayed it with pride. Seated Juror 286, for example, recalled wearing a Boston Strong t-shirt during a vacation to Disney World, where she garnered "attention" and "high five[s]." 5.A.2018–19. Residents attended fundraisers and memorial services, which became part of public life. E.g., [redacted]. "All of [Boston's] major sports teams—the Red Sox, the Celtics, the Patriots, and the Bruins—were very actively involved in fundraising, memorials, commemorations, and a large numbers of symbolic efforts . . . , all strongly supportive of the victims." 23.A.10761 ¶ 66. Residents put Boston Strong bumper stickers on their cars and hung ornaments on their Christmas trees. E.g., [redacted] During a blizzard in January 2015 (in the midst of jury selection), a "mystery shoveler" cleared the Marathon finish line on Boylston Street:

[23] Chelsea Rice, One Fund Boston Distributes Final Funds to Bombing Survivors, Boston Globe (Sept. 2, 2014), https://www.boston.com/culture/health/2014/09/02/one-fund-boston-distributes-final-funds-to-bombing-survivors.

25.A.11480d. Thomas Grilk, the executive director of the Boston Athletic Association and the government's first witness, said what all Bostonians must have felt: "[A]n act like we see depicted here proves that—in Boston—everyone owns the Marathon." Id. (quoting Owen Boss & O'Ryan Johnson, Marathon Finish Line Shoveler Did It for Love of the Race, Boston Herald (Jan. 28, 2015)).

2. The publicity to which the venire was exposed and the initial motions to change venue.

While the community recovered and the Boston Strong movement thrived, the media covered the bombings and their aftermath extensively and without interruption, as both the government and the District Court candidly acknowledged. Add.410; 23.A.10722. There were thousands of news stories

about the bombings, covering a wide range of topics, including matters eventually presented and others that would not—and legally could not—be admitted into evidence.

Media accounts repeatedly described as-yet-unreleased details about Tsarnaev's "confession" written inside the boat from which he was captured. See, e.g., 24.A.10974, 10948, 10980–81, 10988, 11001, 11053. Articles discussed Tsarnaev's reference to the victims of the bombings as "'collateral damage,' likening them to Muslims killed in the wars in Iraq and Afghanistan." Id. at 10930–31, 11053. Some articles falsely claimed that appellant wrote "Fuck America" in the boat. See, e.g., id. at 10988. Still more referenced or described Tsarnaev's non-Mirandized "admissions" to police at the hospital after his arrest, statements not introduced at trial. See, e.g., id. at 10851; 24.A.10930, 10935–36, 11053, 11084.

Scores of articles described the video footage of the Tsarnaev brothers walking down Boylston Street carrying the backpacks containing the bombs, or photographs released by the FBI derived from that footage.[24] And that video

[24] 23.A.10798–10801, 10806–08, 10811, 10824, 10832, 10835–36, 10844, 10852, 10860–61, 10865, 10867, 10871–72, 10879, 10882–84, 10886, 10894–95, 10898–99, 10903–05, 10926; 24.A.10947, 10953, 10955, 10975, 10977, 11005, 11030–31, 11040, 11056, 11058, 11071, 11081, 11083, 11086–88, 11090, 11095–96, 11098–11100, 11103–11, 11337–38, 11344, 11346–48, 11353–54, 11360, 11363–64, 11368–69, 11371.

footage was posted online, where it was viewed millions of times before trial, with commentary from viewers calling for Tsarnaev to be sentenced to death before the trial even began.[25] Four of the *Boston Globe*'s five most-viewed videos deal with the bombings, and its combined YouTube coverage of the bombings has garnered nearly 30 million views.[26]

Media coverage assumed Tsarnaev's guilt and focused on whether he should die. Well before trial ever began, the venire was exposed to extensive coverage of the four decedents and the impact of their deaths on their families.[27] These articles' poignant descriptions of the families' pain and suffering anticipated much of the decedent victim-impact evidence the jury would hear in the penalty phase. Separately, the media foreshadowed penalty-phase testimony from spectators injured in the bombings, and articles appeared about 11 of the government's 15 survivor witnesses: Sydney Corcoran, Celeste Corcoran, Jeff Bauman, Roseann

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[25] See FBI, Surveillance Video Related to Boston Bombings, YouTube (Apr. 18, 2013), https://www.youtube.com/watch?v=k2sg5Oc1qY8; Boston Globe, Explosions at the Boston Marathon, YouTube (Apr. 15, 2013), https://www.youtube.com/watch?v=046MuD1pYJg&bpctr=1544716934.

[26] See Boston Globe, YouTube https://www.youtube.com/user/thebostonglobe/videos (Click "videos" tab; sort by "most popular"), available at 25.A.11633.

[27] See, e.g., 23.A.10856, 10889, 10957, 11006, 11062, 11064, 24.A.11062–62p, 11064–11064m (Martin Richard); 23.A.10780 (Krystle Campbell); 23.A.10802, 10810 (Lingzi Lu); 23.A.10809, 10840, 10857 (Sean Collier).

Sdoia, Nicole Gross, Eric Whalley, Adrianne Haslet-Davis, Jessica Kensky, Marc Fucarile, Heather Abbot, and Gillian Reny.[28] See post Point VII.

But the news coverage was not limited to foreshadowing the penalty-phase evidence the government later introduced in open court. Article after article was published about the impact of the bombings on numerous spectators severely injured in the blast but never called as witnesses at either the guilt or penalty phase.[29] The articles about the surviving spectators described—sometimes in excruciating detail—the bombings themselves and the horrific injuries sustained by these witnesses, the many surgeries they each received, the daunting recoveries they faced, and their courage as they went through the rehabilitation process. See, e.g., 23.A.10919, 24.A.10966–69, 11010a–12. None of these spectators testified.

The venire was exposed to articles about prominent community members' opinions regarding the appropriate punishment—evidence that would be constitutionally inadmissible at sentencing. See Bosse v. Oklahoma, 137 S. Ct. 1,

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[28] See, e.g., 23.A.10782–83, 10853, 10923, 24.A.11042, 11066, 11068, 11078a–79, 11360–61 (Sydney Corcoran; Celeste Corcoran); 23.A.10803, 10820, 10906–10907, 10913–14 (Jeff Bauman); 23.A.10888, 24.A.11032–33 (Roseann Sdoia); 24.A.10937 (Nicole Gross); 24.A.10943–10944, 11055, 11092a–93 (Adrianne Haslet-Davis); 23.A.10870, 24.A.10958, 11061 (Heather Abbott); 24.A.11018–11028 (Marc Fucarile); 24.A.11052 (Gillian Reny); 24.A.11073a–76 (Patrick Downes and Jessica Kensky); 23.A.10900 (Eric Whalley).

[29] See, e.g., 23.A.10782–83, 10796, 10822–23, 10890–91, 10897, 10902, 10925; 24.A.10931a–32, 10945, 10949, 10954, 10958–59, 10966–72, 11010a–12, 11035–36, 11066a–67.

2 (2016). For example, Boston Mayor Thomas Menino said that, despite his general opposition to the death penalty, "in this one, I might think it's time . . . that this individual serves his time and [gets] the death penalty." 23.A.10842–43, 10892. Former Boston police commissioner Edward Davis, who led the police department at the time of the bombings, supported the decision to seek death "given the strength of the evidence." 24.A.11047.

Other articles reported the sentencing viewpoints from local residents, including victims of the bombings. The venire learned that the mother of Krystle Campbell, who had previously been opposed to the death penalty, now believed "an eye for an eye feels appropriate." Id. at 10977a–78. Mark Fucarile, who lost a leg in the bombings and underwent 20 surgeries, told the press that pursuing the death penalty was "the right thing to do." Id. at 11048. Liz Norden, whose sons both lost legs in the bombings, publicly urged prosecutors to seek death. Id. at 11048, 11050–51. And other victims and first responders expressed their views that seeking death "will help everyone in their recovery" and that "people want to see [Tsarnaev] suffer, because of the suffering he inflicted." Id. at 11049–50.

There were also hundreds of stories characterizing Tsarnaev and his charged offenses, statements that, like the community's opinions about the appropriate sentence, were inadmissible against him. See Bosse, 137 S. Ct. at 2. Tsarnaev was repeatedly called a monster. See, e.g., 23.A.10829, 10900; 24.A.10988. He was

repeatedly called a terrorist. See, e.g., 23.A.10812–13, 10814–15, 10880, 10909, 10912, 10915, 10918; 24.A.10946, 10982, 11044, 11077, 11343, 11352. And one article questioned whether a photograph of Tsarnaev was "what evil looks like," which it then attempted to answer by interviewing surviving Japanese war criminals who had "rampag[ed] through villages, tortur[ed], rap[ed] and kill[ed] civilians." 23.A.10894.

There can be little dispute about the nature of the press coverage as a whole. The Boston metropolitan area and Eastern Massachusetts were deluged with media coverage about the case. The coverage included video footage of the crime and its aftermath, confessions that did not come in at trial, victim impact evidence from the families of those killed and victim impact evidence from surviving spectators injured in the bombings. It included many victims' and prominent citizens' opinions that Tsarnaev should die. And it included evidence that would either never be offered in open court, or was patently inadmissible. Ultimately, as Judge Torruella previously recognized, the volume, depth, and duration of this publicity was nothing short of extraordinary.

> The press coverage of this case—beginning with the bombing itself and the subsequent manhunt culminating with the shelter-in-place order, continuing thereafter with stories of the victims, Boston's coming together and healing as one united city, and the coverage of the pretrial events—is unparalleled in American legal history.

Tsarnaev II, 780 F.3d at 30.

Based on these "unprecedented" circumstances, and citing polling data confirming the "overwhelming presumption of guilt in the District of Massachusetts" and "prejudgment as to the penalty that should be imposed," the defense moved to change venue five months before the original trial date. 23.A.10706–14; id. at 10733–42. The government opposed that motion, suggesting that "[f]ar from 'demonizing' Tsarnaev, the local press has largely humanized him, portraying him as a popular and successful student and the beloved captain of his high school wrestling team." Id. at 10724. The District Court denied the venue change motion because, in its view, "a thorough evaluation of potential jurors in the pool will be made through questionnaires and voir dire sufficient to identify prejudice during jury selection." Add.412. Defense counsel brought a second motion to change venue one month before the revised trial date, based on the continuing press coverage. 24.A.11318–33. The trial court construed it as a request for reconsideration of its initial ruling, and denied it on January 2, 2015. Add.435–45.

3. After the juror questionnaires reveal the Boston community's views toward Tsarnaev, defense counsel files a third motion to change venue.

Once jury selection began, the actual impact of the local news coverage on the venire became apparent. Of over 1,300 prospective jurors called for service, all but four had been exposed to the media accounts of the crime. Because the Court

precluded the defense from asking prospective jurors such questions as "what did you know about the facts of this case before coming to court today (if anything)" or "what did you read or hear about this case before you came here," it is impossible to know what media coverage various jurors saw. See post § IV.A.2; 20.A.9450, 9499; 24.A.11391. But the questionnaire responses were stark: 99.7% of the jury pool had been exposed to publicity about the case, and, before hearing a single witness, a full 69% of the venire was already convinced that Tsarnaev was guilty. Of those members of the venire who had already concluded that the defendant should receive the death penalty even before coming to court, 69% admitted they would not be able to set that view aside and decide the case based on the facts presented in court.

The jury questionnaire contained a series of questions about prospective jurors' media exposure, knowledge of the crime investigation, and opinions about Tsarnaev's guilt and sentence. Question 73 asked jurors to describe the amount of media coverage they had seen about the case:

> 73. How would you describe the amount of media coverage you have seen about this case:
>
> __ A lot (read many articles or watched television accounts)
> __ A moderate amount (just basic coverage in the news)
> __ A little (basically just heard about it)
> __ None (have not heard of case before today)

Add.524.

Question 77 asked jurors directly whether they had formed an opinion that Tsarnaev was guilty or should get the death penalty:

> 77. As a result of what you have seen or read in the news media, or what you have learned or already know about the case from any source, have you formed an opinion:
>
> (a) that Dzhokhar Tsarnaev is guilty? □ Yes □ No □ Unsure
>
> (b) that Dzhokhar Tsarnaev is not guilty? □ Yes □ No □ Unsure
>
> (c) that Dzhokhar Tsarnaev should receive the death penalty? □ Yes □ No □ Unsure
>
> (d) that Dzhokhar Tsarnaev should not receive the death penalty? □ Yes □ No □ Unsure
>
> If you answered "yes" to any of these questions, would you be able or unable to set aside your opinion and base your decision about guilt and punishment solely on the evidence that will be presented to you in court? □ Able □ Unable

Id. at 525.

Finally, Questions 81–82 asked prospective jurors if they, or a close friend or family member were personally affected by the charged crimes (including sheltering in place during the manhunt); or had (1) personally taken part in activities held in support of the victims of the bombings; (2) contributed money to support the victims; or (3) purchased or worn Boston Strong merchandise. Id. at 525–26.

1,373 prospective jurors filled out jury questionnaires.[30] 25.A.11452. Of that group, 1,357 prospective jurors answered Question 73 about the publicity to which they had been exposed.[31] Of these 1,357 questionnaires, 1,330 gave comprehensible answers for analyzing the impact of the media coverage on prospective jurors' views regarding guilt.[32] Of these 1,330 prospective jurors, 1,326 said that they *had* been exposed to the pre-trial publicity—99.7%.[33] Of the 1,326 prospective jurors exposed to pre-trial publicity about this case, 924—or 70%—admitted they had reached a conclusion about guilt before even coming to court.[34] Of that group, 920 (99.6%) had already concluded Tsarnaev was guilty, while only 4 (0.4%) had concluded he was not guilty.[35]

These numbers demonstrate the nature and impact of the community's exposure to the bombings and the publicity that ensued. They show that, contrary

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[30] All of the jury questionnaire answers relevant to analysis of Questions 73, 77, and 81–82 are set forth in the table at SA.204–39, and the full questionnaires are included in the SPA. Individual tables analyzing particular claims, which do not reveal still-sealed information, are at 26.A.12132 et seq. All data used in the individual analyses is drawn from the full table at SA.204–39. Per the District Court's order, while the non-seated jury questionnaires remain under seal, "permission is granted to cite in percentages statistical data sourced in the questionnaires" and the parties are permitted to file publically the "numeric aggregation of data." DE.1753, at 7 n.6.

[31] Table 1, at 26.A.12133.

[32] Table 2, at 26.A.12134.

[33] Id.

[34] Table 3, at 26.A.12135.

[35] Id.

to the government's assurances, the press had not "humanized" Tsarnaev or presented a "sympathetic young man." 23.A.10724–25. The questionnaire responses indicate, rather, that the publicity painted a picture of prejudged guilt.

Further, the responses reveal an extraordinarily high correlation between the amount of publicity to which a prospective juror had been exposed and the likelihood he or she believed, without hearing a single witness, that Tsarnaev was guilty:[36]

TABLE 4

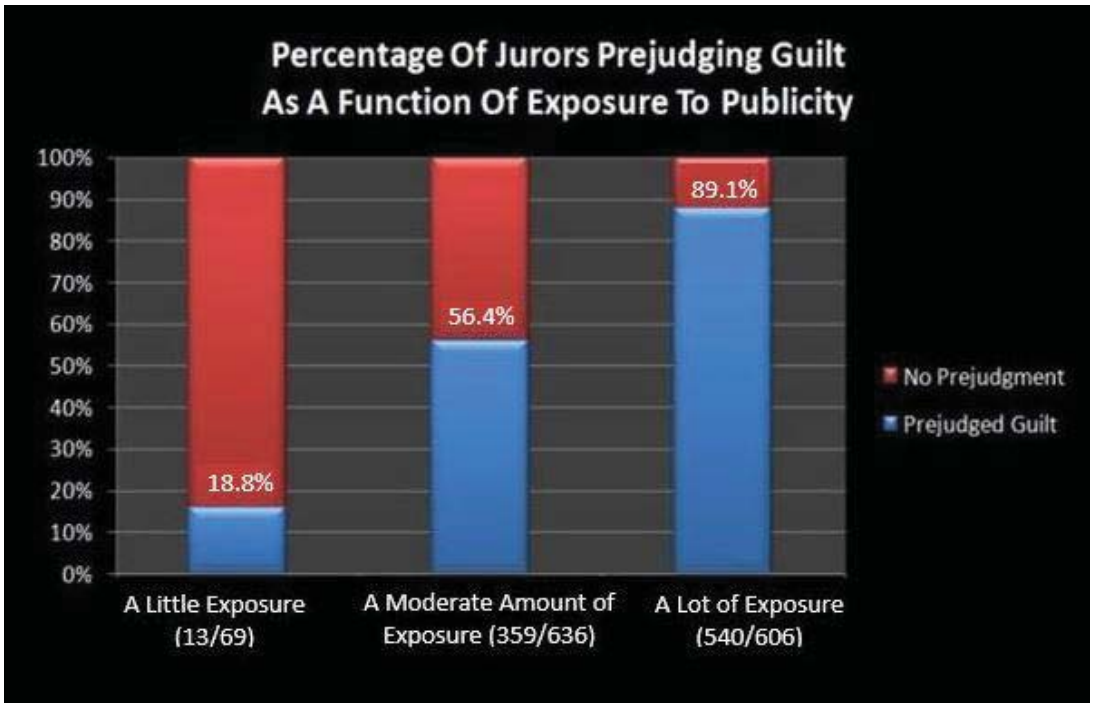
Jurors' Answers To Question 73 And Question 77(a): Correlation Between Amount Of Media Coverage And Likelihood Of Prejudging Guilt	
PROSPECTIVE JURORS WHO ANSWERED QUESTIONS 73 AND 77(a) AND HAD SEEN MEDIA COVERAGE (From Table 2)	**1326**
Exposed To "A Little" Publicity	**69**
Tsarnaev Is Guilty (Yes To Question 77(a))	13
	18.8%
Exposed To "A Moderate Amount" Of Publicity	**636**
Tsarnaev Is Guilty (Yes To Question 77(a))	359
	56.4%
Exposed To "A Lot" Of Publicity	**606**
Tsarnaev Is Guilty (Yes To Question 77(a))	540
	89.1%

[36] Table 4, at 26.A.12136.

As shown, only 18.8% of prospective jurors who had been exposed to "a little" publicity had already concluded Tsarnaev was guilty. Of those prospective jurors who had been exposed to "a moderate amount" of publicity, 56.4% had already concluded Tsarnaev was guilty. And of the 606 prospective jurors who had been exposed to "a lot" of publicity, 89.1% had already concluded Tsarnaev was guilty.

The relative percentages of jurors prejudging guilt in each category of media exposure is graphically depicted here:

GRAPH 1



Simply put, the more publicity a juror was exposed to, the more likely he was to believe—without hearing any evidence in court—that Tsarnaev was guilty.

Prospective jurors were nearly 42 times more likely to prejudge guilt if they had been exposed to "a lot" of publicity about the case than if they had been exposed to "a little" publicity:[37]

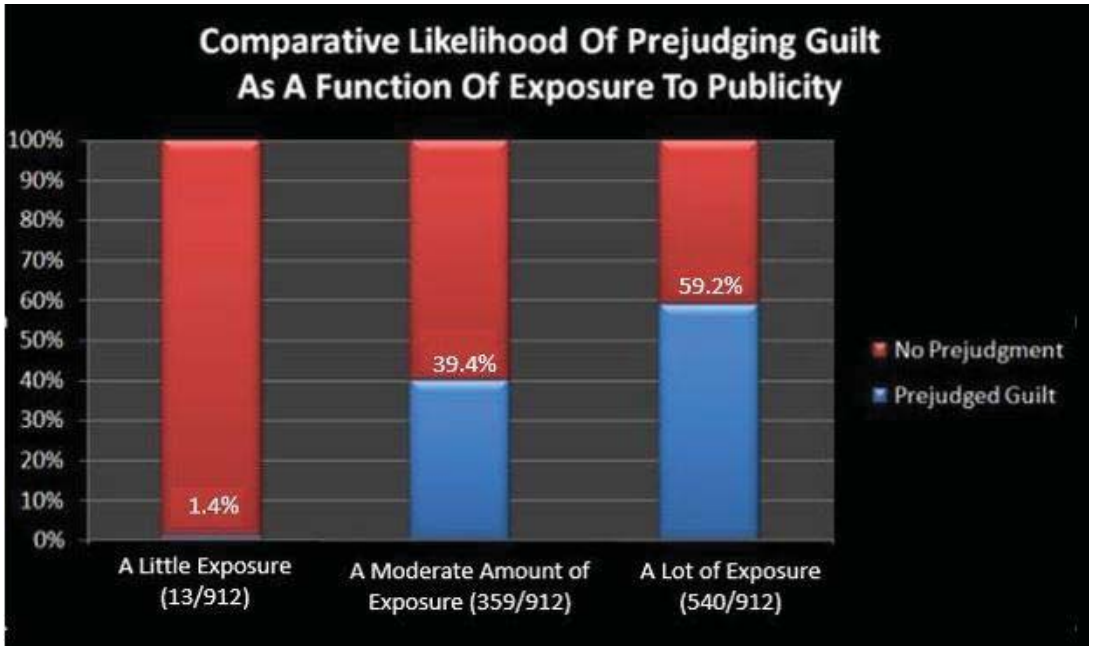
TABLE 5

Jurors' Answers To Question 73 And Question 77(a): Comparative Likelihood Of Prejudging Guilt As A Function Of Amount Of Media Coverage	
PROSPECTIVE JURORS WHO ANSWERED QUESTIONS 73 AND 77(a), HAD SEEN MEDIA COVERAGE, AND BELIEVED TSARNAEV WAS GUILTY (From Table 3)	**920**
Selected Only One Answer For Amount Of Publicity	**912**
Exposed To "A Little" Publicity And Believe Tsarnaev Is Guilty (From Table 4)	13
	1.4%
Exposed To "A Moderate Amount" Of Publicity And Believe Tsarnaev Is Guilty (From Table 4)	359
	39.4%
Exposed To "A Lot" Of Publicity And Believe Tsarnaev Is Guilty (From Table 4)	540
	59.2%

[37] Table 5, at 26.A.12137.

The following graph confirms the publicity's potency:

GRAPH 2



The figures were even starker as to punishment. Of the 920 jurors who had been exposed to publicity and had already concluded Tsarnaev was guilty, 877 gave usable answers to Questions 77(c) and 77(d) as to penalty.[38] Of those, there were 325 prospective jurors who believed Tsarnaev was guilty and should die before hearing a single witness.[39] Despite the general anti-death penalty views of many Massachusetts' citizens, which the government recognized, 23.A.10729, prospective jurors who already believed Tsarnaev was guilty were 105 times more

[38] Table 6, at 26.A.12138.
[39] Id.

likely to also believe Tsarnaev should die if they had been exposed to "a lot" of publicity about the case than if they had been exposed to "a little" publicity:[40]

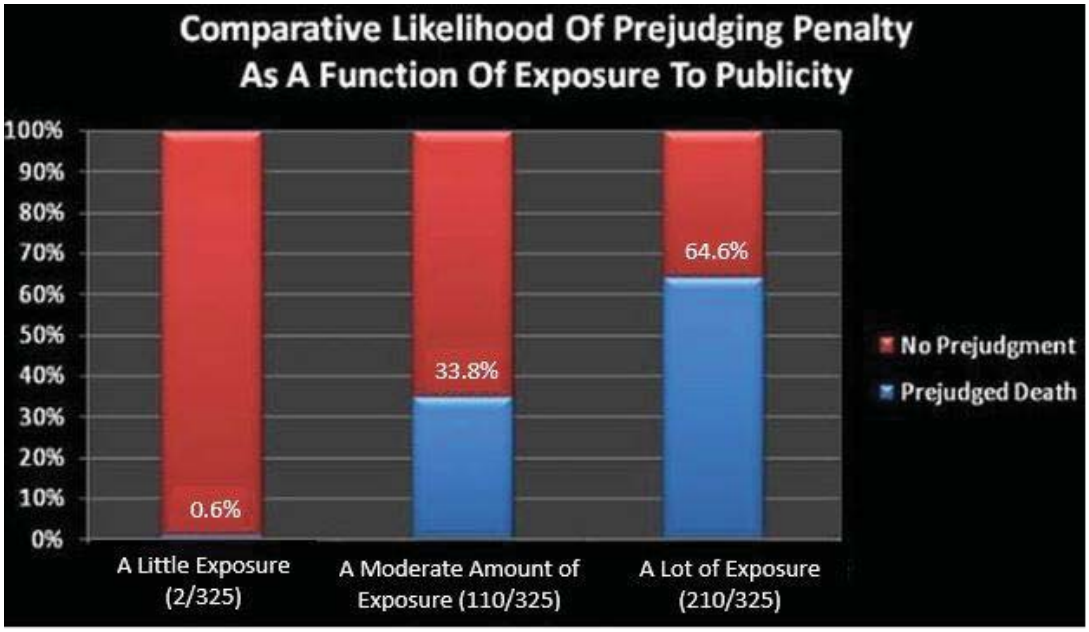
TABLE 7

Jurors' Answers To Question 73 And Questions 77(a) And 77(c): Comparative Likelihood Of Prejudging Penalty As A Function Of Amount Of Media Coverage	
PROSPECTIVE JURORS WHO ANSWERED QUESTIONS 73 AND 77(a), HAD SEEN MEDIA COVERAGE, BELIEVED TSARNAEV WAS GUILTY, AND BELIEVED TSARNAEV SHOULD DIE (Yes To Question 77(c)) (From Table 6)	**325**
Exposed To "A Little" Publicity And Believe Tsarnaev Should Die	2
	0.6%
Exposed To "A Moderate Amount" Of Publicity And Believe Tsarnaev Should Die	110
	33.8%
Exposed To "A Lot" of Publicity And Believe Tsarnaev Should Die	210
	64.6%

[40] Table 7, at 25.A.12139.

The following graph confirms the publicity's influence on penalty:

GRAPH 3



The questionnaire responses not only established that the amount of publicity resulted in a significant percentage of the venire reaching a position on guilt and penalty *before* coming to court, but also that a very high percentage of the venire admitted their positions were fixed. Of the prospective jurors who had already formed an opinion that Tsarnaev was guilty and should die, 69% admitted that they could not set aside their views and decide the case based "solely on the evidence that will be presented to you in court." Add.585.[41] Of that group, 75.8% (163) had been exposed to "a lot" of publicity:

[41] Table 8, at 26.A.12140.

TABLE 8

Jurors' Answers To Question 73 And Questions 77 And 77(a): Comparative Likelihood Of Holding A Fixed Prejudgment Of Death As A Function Of Amount Of Media Coverage	
PROSPECTIVE JURORS WHO ANSWERED QUESTIONS 73 AND 77(a), HAD SEEN MEDIA COVERAGE, BELIEVED TSARNAEV WAS GUILTY, AND BELIEVED TSARNAEV SHOULD DIE (From Table 6)	**325**
Answered Final Part Of Question 77: "Would You Be Able Or Unable To Set Aside Your Opinion And Base Your Decision Solely On The Evidence Presented To You In Court?"	**311**
Able To Set Aside Opinion	96
Unable To Set Aside Opinion	**215**
Number Exposed To "A Little" Publicity	2
% Exposed To "A Little" Publicity	0.9%
Number Exposed To "A Moderate Amount" Of Publicity	50
% Exposed To "A Moderate Amount" Of Publicity	23.3%
Number Exposed To "A Lot" Of Publicity	163
% Exposed To "A Lot" Of Publicity	75.8%

Thus, exposure to pre-trial publicity had an extraordinary impact on the odds that a prospective juror would arrive at jury selection irreparably biased. Jurors exposed to a lot of publicity were 41.5 times more likely to already believe the

defendant guilty than jurors exposed to a little publicity.[42] Such jurors were 105 times more likely to believe Tsarnaev should receive death.[43] And, they were 81.5 times more likely to be unable to set aside their views.[44]

While these statistics show the aggregate prejudice against Tsarnaev, the individual responses to the questionnaires clarify that prejudice's strength and the vitriol that community members felt toward him. Thus, as Judge Torruella partially listed in his dissent from the denial of the defense's second mandamus petition, see Tsarnaev II, 780 F.3d at 35–37, prospective jurors offered these representative comments about Tsarnaev:

> He does not deserve a trial.[45]
>
> Caught redhanded should not waste the $ on the trial.[46]
>
> [T]hey shouldn't waste the bulits [sic] or poison; hang them.[47]
>
> [W]e all know he's guilty so quit wasting everybody's time with a jury and string him up.[48]
>
> I have formed the opinion that convicted terrorists deserve the death penalty. They're the enemy of my country.[49]

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[42] See ante Graph 2; Table 5 at 26.A.12137.
[43] See ante Graph 3; Table 7 at 26.A.12139.
[44] See Table 8 at 26.A.12140.
[45] [redacted]
[49] 8.A.3563 (PJ 605).

[F]or this case I think a public execution would be appropriate, preferably by bomb at the finish line of the marathon.[50]

[redacted]

What a waste of time and money.[54]

[redacted]

[redacted]

[redacted]

Likewise, the questionnaires revealed that the bombings victimized every member of this community, and venirepersons disclosed connections to the Marathon that were extraordinary in their number and degree. Again, as partially listed by Judge Torruella (see Tsarnaev II, 780 F.3d at 36):

> I feel anyone near the Boston area was [a]ffected by this event.[71]
>
> [redacted]
>
> I think we were all [a]ffected by the death of that little boy (Martin) from Dorchester.[73]
>
> [redacted]
>
> I knew 11 people running that day.[75]

[redacted]

[redacted]

[redacted]

> My children were horrified, and even when we thought things were under control, we went into lock-down. It was a horrible week of fear, anger, confusion that we lived through.[78]

[redacted]

[redacted]

Based on those questionnaire results, the defense moved for a change of venue for the third time. 25.A.11450–70. The District Court denied the motion. Despite its previous confidence that "a thorough evaluation of potential jurors in the pool will be made *through questionnaires and voir dire*," Add.412 (emphasis added), the Court now doubted the questionnaires' reliability. Id. at 464–65. Because checking a box "may result in answers that appear more clear and unambiguous than the juror may have intended or that is actually true," and

[redacted]

handwritten answers to questions "can often be unclear, inapposite or incomplete," the District Court refused to rule on the change of venue motion until it received "all the information available," especially "the individual interviews of each of the jurors, face to face." Id.

4. After the voir dire confirms the community's views towards Tsarnaev, defense counsel brings a fourth venue change motion.

Following the denial of Tsarnaev's third motion for a change of venue, the District Court conducted 21 days of voir dire, from January 15 through February 25, 2015 in order to provisionally qualify 75 prospective jurors. The reason the District Court had to go to these lengths was because, as exhibited in their questionnaires, many prospective jurors could not fairly sit in judgment on this case. Voir dire only revealed the extent of that prejudice, as prospective juror after prospective juror admitted their biases because of their experiences as an Eastern Massachusetts resident over the previous two years.

For example, many prospective jurors acknowledged that the pre-trial publicity was so powerful they could not or would not follow the presumption of innocence "no matter what [they] heard at trial." 2.A.900 (PJ 85); see also 1.A.351–52 (PJ 14); 8.A.3221 (PJ 529) ("I made my opinion from [the media] [a]nd I just think that no matter what is presented, I'm still going to feel that way."); id. at 3403 (PJ 557) ("[A]s many people in Boston did, I followed everything that happened during the time. . . . From everything I've heard and

everything I've read, which was extensive over the period of time—I'm in my car a lot. I listened to the radio nonstop about the whole thing. I formed an opinion. I think it would be unbelievably unlikely that I'd change the opinion based on what I've already heard."). 9.A.3621–23 (PJ 612).

Others felt that because of the publicity, the defense would have to prove that Tsarnaev was not guilty. 2.A.527–28 (PJ 38); 3.A.1010–11 (PJ 115). Some articulated the same thought in a different way, admitting that because of the publicity they would start with a "presumption against the defendant." Id. at 1282 (PJ 158); 6.A.2610 (PJ 391). Still others confirmed that whatever doubts they may have had about the death penalty in principle, "I believe this case is no question for me." 4.A.1626 (PJ 208). One provisionally qualified juror conceded he believed defendant was guilty and, based on what he had heard in the media, it would be difficult to "set that aside and just isolate yourself based on just the evidence." Id. at 1780 (PJ 245). Many other prospective jurors shared this view. See, e.g., 5.A.1919–20, 1922 (PJ 248), 2116 (PJ 306). Based on the publicity, some jurors compared this crime to 9/11, expressing their view that defendant was guilty and "I think the punishment should be, you know, death." 6.A.2314 (PJ 343). [redacted]

This was the community from which the District Court would select the jury. And although prospective jurors who forthrightly admitted these views about the impact of the media coverage were ultimately discharged from service, this was not only the community into which those jurors who *were* selected to serve lived, but it was the community into which they would have to return after reaching a verdict as to both guilt and penalty. This was not an academic point. [redacted]

In addition, the "overwhelming display of official government force" greeting prospective jurors on their arrival at the Moakley Courthouse confirmed that this community remained on high alert. Tsarnaev II, 780 F.3d at 37–38 (Torruella, J., dissenting).

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[81] As prospective jurors would also have known, the converse was also true: jurors who imposed death would be lauded by the community. And that is just what happened. After imposing death, Juror 138 received congratulatory Facebook comments, including:

"Good job bro!!!!!"

"Atta boy"

"That's awesome, good choice"

"Great job Mike! Thanks for serving up some justice"

25.A.11622–11623 (comments on post of May 15, 2015, 4:20 p.m.).

> A secure perimeter has been established for several blocks in each direction of the Courthouse; authorized vehicles may be admitted, but only after first being inspected by bomb-sniffing dogs. Anyone who makes it past the perimeter must then navigate crowd-control barriers, only to then be greeted by a phalanx of armed Federal Protective Service officers standing guard at the entrance to the Courthouse. Meanwhile, the roads are lined with Boston Police cars, Department of Homeland Security vans, and vehicles from the U.S. Marshals Service. Upon entering the Courthouse, if one looks out past the garden to the Inner Harbor, one sees that at least two U.S. Coast Guard "Defender" Class Small Response Boats, each armed with a high caliber machine gun, are patrolling the waters behind the Courthouse.

Id. at 38.

Ultimately, of the 1,373 jurors who filled in jury questionnaires, the District Court questioned up through prospective juror 697 before provisionally qualifying 75 jurors. 9.A.3894; SA.80–94. In theory, of course, these 75 prospective jurors would be the very best of the original 1,373 prospective jurors called for service—75 jurors who had survived what the trial court called "a thorough evaluation of potential jurors . . . through questionnaires and voir dire sufficient to identify prejudice during jury selection." Add.412. But without hearing a single witness testify, none of these 75 jurors unequivocally believed Tsarnaev was not guilty.[82] On the other hand, before hearing a single witness testify, nearly one-third of these jurors—23[83]—had already concluded that Tsarnaev was guilty.[84]

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[82] See Chart of Qualified Juror Responses to Selected Questions, SA.250–51.
[83] Id.
[84] Id.

Further, some of the 75 jurors viewed as qualified by the District Court were personally affected by the bombings and helped contribute to the city's recovery. Five jurors[85] told the Court they had themselves been ordered to shelter in place during the manhunt, in response to the police commissioner's warning that defendant was a terrorist who was "here to kill" them. 23.A.10816. Seven had friends or family members who were ordered to shelter in place for the same reason.[86] And an additional juror, Juror 286, had lied in her questionnaire and voir dire by denying that she had sheltered in place with her family. Add.472–74, 554; 5.A.2016. See post Point II.

26 of the 75 qualified jurors (34%) had personally supported the victims of bombings by making contributions, purchasing Boston Strong merchandise, or doing both.[87] Some of these contributions were in cash, see, e.g., 26.A.11852 (Juror 395); others involved attending fundraisers for the victims. See, e.g., 2.A.503–04 (Juror 35); Add.554 (Juror 286). An additional eight qualified jurors had family members who had either contributed money or purchased or worn Boston Strong merchandise,[88] with one remarking, [redacted]

[85] Id.
[86] Id.
[87] Id.
[88] Id.

[redacted]

The amounts given by the twenty contributing jurors ranged in size—some were only $10 or $25 donations, while others were between $50 and $100. 2.A.503–04 (Juror 35); 3.A.1227 (PJ 145); 5.A.2149 (PJ 314); [redacted] Some involved cash contributions, while other, smaller contributions involved receipt of an item[89]—such as a Boston Strong t-shirt or keychain or car magnet—offered by One Fund Boston. Of the 12 jurors ultimately selected to decide whether defendant would live or die, five (42%) had donated money, purchased Boston Strong merchandise, or attended fundraisers designed to aid the victims in this case.[90]

Given the media exposure and first-hand experiences of the 75 provisionally qualified jurors from which the defense would be forced to choose a jury, defense counsel brought a fourth venue change motion, which was also denied. 25.A.11558–61; 10.A.3927. Of the twelve jurors ultimately selected from this group, all had been exposed to pre-trial publicity.[91]

[89] Id.
[90] See Chart of Seated Juror Responses to Selected Jury Questions, at 26.A.12132.
[91] Id.

Three of these jurors had admitted in their questionnaires they already believed defendant was guilty.[92] Five had acknowledged making financial contributions to support victims of the charged crimes, either by directly donating to charities set up for the victims or by purchasing Boston Strong and related merchandise.[93] And one juror had sheltered in place, even though she had falsely denied that fact during jury selection. Compare Add.473; 25.A.11544 (Juror 286 tweets that she is sheltering in place with her family) with Add.554 (Juror 286 writes "N/A" when asked in jury questionnaire if she had sheltered in place).

Voir dire made clear the influence of pre-trial publicity on the seated jurors' prejudgments. Six seated jurors admitted their belief that Tsarnaev participated in the bombings was based on the media coverage. 2.A.879 (Juror 83) ("I mean, just from media reports. . . I don't think this would be a case of mistaken identity, so obviously he was involved in something."); 4.A.1675 (Juror 229) ("I guess, yes, I suppose that we knew that he was involved . . . [f]rom the media."); 5.A.2009 (Juror 286) ("I assume while I'm watching the news that I'm—the police or whatever have done—they got who they were looking for."); 6.A.2351 (Juror 349) ("I think that there's involvement. There was so much media coverage, even just the shootout in Watertown. I watched it on TV. And so I feel like there's

[92] Id.
[93] Id.

involvement there, like I think it's—anybody would think that."); id. at 2632–33 (Juror 395) ("I have formed an opinion up until this point based on what I did read and had seen in the media, but I realize that that's not all the information that would be available to me."); 7.A.3075 (Juror 487) ("I'm not a huge news follower to begin with. But the little bit that I knew of the case, you know, there was video evidence and, you know, being in the boat, the whole bit, obviously, it seemed he played a role in it. So that was, like, my feeling of guilt."). Despite these indicators that the jurors, as community members, had been personally affected by the bombings and exposed to the extensive pre-trial publicity, all 12 jurors assured the Court they would be impartial. 10. A.3934.[94]

B. The community's exposure to the bombings and ensuing pre-trial publicity, as evidenced by so many jurors' disqualifying prejudice, warranted a presumption of prejudice.

The Fifth and Sixth Amendments to the United States Constitution guarantee a criminal defendant's right to be tried by a fair and impartial jury. See Groppi, 400 U.S. at 508. "[I]mpartial" jurors must be "free from outside influences," Sheppard, 384 U.S. at 362, and able to decide "solely on the basis of evidence

[94] After the 12 jurors were selected, defense counsel raised a final challenge to the jury for the record. This challenge was also denied. 10.A.3931–32. The jury was then sworn. Id. at 3934. The defense again challenged the denial of its motions for change of venue in the motion for a new trial (25.A.11614); this too was denied. Add.484–505.

produced in court," Irvin, 366 U.S. at 729 (Frankfurter, J., concurring), undisturbed by personal prejudice or public passion. When a trial court is unable to seat an impartial jury because of prejudicial pre-trial publicity, due process requires that any ensuing conviction be reversed. See Rideau, 373 U.S. at 726.

The Supreme Court has articulated two distinct tests for determining when reversal is required where a trial court has denied a change of venue in the face of substantial pre-trial publicity. The first is referred to as the presumed prejudice test: reversal is required when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory publicity about the crime. See, e.g., id. at 726–27. Accord Murphy, 421 U.S. at 798–99; Sheppard, 384 U.S. at 352–55; Casellas-Toro, 807 F.3d at 386. A defendant need not demonstrate actual prejudice; instead prejudice is presumed. See Sheppard, 384 U.S. at 352; Rideau, 373 U.S. at 726–27; Casellas-Toro, 807 F.3d at 386.

Although trial courts have "wide discretion . . . in conducting voir dire in the area of pretrial publicity," Mu'Min v. Virginia, 500 U.S. 415, 427 (1991), in determining whether prejudice should be presumed from pre-trial publicity, this Court has an independent obligation to decide whether there is a "reasonable likelihood" that pervasive pre-trial publicity resulted in an unfair trial. Sheppard, 384 U.S. at 363. Specifically, this Court has "the duty to make an independent evaluation of the circumstances" surrounding jury selection, including the impact

of the offense and pre-trial publicity upon the local community. Id. at 362. Accord Irvin, 366 U.S. at 725–26. This Court must therefore examine for itself whether those circumstances were so damaging and affected so many potential jurors that prejudice should have been presumed and venue changed. Murphy, 421 U.S. at 798–99; Rideau, 373 U.S. at 726–27; United States v. Orlando-Figueroa, 229 F.3d 33, 43 (1st Cir. 2000).

In undertaking this examination, this Court should scrutinize the information that the community knew before trial. There are several circumstances which call for a presumption of prejudice. For example, prejudice should be presumed where particularly damaging information is disclosed in the press—outside the confines of the adversary system. See Casellas-Toro, 807 F.3d 380 (presuming prejudice where pre-trial publicity extensively covered defendant's prior conviction for murder); Coleman v. Kemp, 778 F.2d 1487, 1538–40 (11th Cir. 1985) (same where "there was an overwhelming showing in the press of petitioner Coleman's guilt."). This is so even where jurors not only declare they could be impartial despite having seen that information before trial, but where that same information is later admitted at trial. Thus, Rideau, 373 U.S. 723, "[t]he 'foundation precedent' for presumed-prejudice analysis," Casellas-Toro, 807 F.3d at 386, held that prejudice should have been presumed, and venue should have been changed, after the defendant's filmed confession was televised three times following his arrest.

Although only three of the seated jurors in Rideau had seen the confession—and each of them declared they would put it aside—and the court admitted two other confessions from the defendant at trial, reversal was required "without pausing to examine a particularized transcript of the voir dire examination" because "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." 373 U.S. at 725–27; see also id. at 729, 732 (Clark, J., dissenting).

Reviewing courts should also consider whether the venire was exposed to facts that were "never offered in the trial" or "clearly inadmissible," as this exposure too tilts the balance toward a presumption of prejudice. Sheppard, 384 U.S. at 360. So, too, a presumption of prejudice is merited "where enough jurors admit to prejudice to cause concern as to any avowals of impartiality by the other jurors." Orlando-Figueroa, 229 F.3d at 43. Accord United States v. Rodriguez-Cardona, 924 F.2d 1148, 1158 (1st Cir. 1991); United States v. Angiulo, 897 F.2d 1169, 1181 (1st Cir. 1990). "In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they may unwittingly have been influenced by it." Murphy, 421 U.S. at 803.

In light of that precedent, this is one of the rare cases in which prejudice should have been presumed. Tsarnaev stood accused of notorious crimes. The bombings were the subject of constant and widespread publicity, which included coverage of matters that would never be admitted at trial. Virtually every single prospective juror was familiar with that publicity, had been personally affected by the crimes and their aftermath, and thus had formed negative, entrenched preconceptions about Tsarnaev's guilt and the appropriate sentence. Those factors compel the conclusion that in this venue Tsarnaev could not receive the fair trial before an impartial jury that the Fifth and Sixth Amendments guarantee.

Under Skilling and Rideau, the first step this Court must take in determining if prejudice should be presumed is to assess the extent and nature of the pre-trial publicity and what jurors knew before trial. That publicity was massive, as demonstrated in Tsarnaev's first two venue motions, which included thousands of pages containing print media coverage of the case for the 19-month period between April 2013 and November 2014. DE.461–1 to 461–25; DE.686–1 to 686–5. Although the parties disagreed about the precise number of articles published, compare 23.A.10750–51 with 24.A.11267–68, the jury questionnaires show that the publicity permeated the community. 99.7% of the venire was exposed to publicity about the case, establishing beyond any real question that regardless of

the precise number of articles—and as the government conceded—the media coverage was "extensive." 23.A.10722.

In light of the publicity involved in Rideau, the publicity here counsels in favor of a presumption of prejudice. The Court found a presumption of prejudice in Rideau where a significant percentage of the venire was exposed to defendant's filmed confession even though defendant's confessions were subsequently properly admitted at trial. Here, over 99% of the venire was exposed not just to a single confession from the defendant, but to multiple confessions, video footage of defendant actually committing the crime and victim impact evidence regarding the four decedents.

Unlike Rideau, however, jurors here were not just exposed to evidence that would later be introduced in court. Instead, they were also exposed to a great deal of evidence that was either not admitted at trial or would have been "clearly inadmissible." Sheppard, 384 U.S. at 360. For example, local media repeatedly characterized Tsarnaev as a monster, a terrorist, and evil. Numerous articles related heart-wrenching stories about the enormous difficulties faced by survivors injured in the bombings, including not only survivors who testified at trial, but also more than 20 survivors who never testified. And the jury was exposed to still more articles offering views from victims, prominent officials, and community members as to the appropriate sentence: that Tsarnaev should be put to

death. While the government may dispute the virulent nature of the media coverage, the objective data here compel the contrary conclusion. Jurors exposed to a lot of publicity were 42 times more likely to have already concluded—before hearing any evidence in court—that Tsarnaev was guilty than jurors exposed to a little of the publicity. They were 105 times more likely to believe—before hearing any evidence in court—that he should die, and more than 81 times more likely to be unable to set aside their opinions.

Just as in Rideau, the presentation of such information to the venire outside the context of the adversary system required a change of venue: "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." 373 U.S. at 726. Virtually every prospective juror had read publicity about Tsarnaev, 69% thought he was guilty, and of the members of the venire who had concluded that he should receive the death penalty before even coming to court, 69% of that group admitted they would not be able to set that view aside and decide the case based on the facts presented in court. Cf. Skilling, 561 U.S. at 380–84, 382 n.15, 384 n.17 (declining to presume prejudice where only a "slim percentage" of the pre-trial publicity actually named the defendant, 66% of the venire did not have a negative view of defendant, 43% had never even heard of him and only 12.3% thought him guilty). And unlike Skilling, there were no

acquittals in this case. Id. (declining to presume prejudice where jury acquitted defendant on nine counts).

It is true that the publicity here occurred in a large community, a factor that this Court would typically weigh against a presumption of prejudice because in a "large, diverse metropolitan area . . . residents . . . obtain their news from a vast array of sources." Casellas-Toro, 807 F.3d at 387; see Skilling, 561 U.S. at 382, 384 (observing that large, heterogeneous community usually dilutes impact of adverse media). Here, however, the coverage was universal: every local news source reported on it. For that reason, 99.7% of the venire was exposed to the negative publicity. Equally important, and despite the large population, everyone in this community was affected by the crime and coalesced in the Boston Strong movement in a show of solidarity. See, e.g., United States v. McVeigh, 918 F. Supp. 1467, 1471 (W.D. Okla. 1996) (presuming prejudice and changing venue in FDPA case involving bombing of federal building in Oklahoma City; noting that "the 'Oklahoma family' has been a common theme in the Oklahoma media coverage, with numerous reports of how the explosion shook the entire state, and how the state has pulled together in response"). The bombings targeted a Boston tradition and the city itself. The entire community participated jointly in the effort to identify and apprehend the bombers. Boston and five surrounding suburbs were subject to Governor Patrick's order to shelter in place during the manhunt. And

during that time, these residents were told by the police commissioner that Tsarnaev was a terrorist determined "to kill them." This is therefore not a case where this Court can assume that the large, diverse pool of prospective jurors would be capable of producing an impartial jury.

Any doubt about the presumptive prejudice of holding the trial in Boston was put to rest by prospective jurors' questionnaire and voir dire responses. Here, "enough jurors admit[ted] to prejudice to cause concern as to any avowals of impartiality by the other jurors." Orlando-Figueroa, 229 F.3d at 43; Rodriguez-Cardona, 924 F.2d at 1158; see also Murphy, 421 U.S. at 803. Specifically, 99.7% of the venire had been exposed to the pre-trial publicity, 69% believed Tsarnaev guilty before hearing a single witness, and of the members of the venire who had concluded that Tsarnaev should receive the death penalty before even coming to court, 69% admitted they could not set aside that view and decide the case based on "the evidence that will be presented to you in court."

These figures confirm what an independent review of the media coverage shows. The pre-trial publicity precluded a fair trial in this district. The District Court erred in not finding a presumption of prejudice.

In moving for a change of venue, the defense relied on Federal Rule of Criminal Procedure 21 in addition to the Constitution. 23.A.10706; 24.A.11318; 25.A.11450; 25.A.11558; see also Mu'Min, 500 U.S. at 422 (observing that federal

rules provide an independent substantive basis for a change of venue). Although the Supreme Court has never articulated the substantive standard governing Rule 21, it is generally understood to be more favorable to the defense—that is, it is less tolerant of prejudicial publicity—than the constitutional standard. See Skilling, 561 U.S. at 446 n.9 (Sotomayor, J., dissenting); Murphy, 421 U.S. at 804 (Burger, C.J., concurring) ("Although I would not hesitate to reverse petitioner's conviction in the exercise of our supervisory powers, were this a federal case, I agree with the Court that the circumstances of petitioner's trial did not rise to the level of a violation of the Due Process Clause of the Fourteenth Amendment."); Rideau, 373 U.S. at 728 (Clark, J., dissenting) (concluding that due process did not require a change of venue but noting that "if this case arose in a federal court, over which we exercise supervisory powers, I would vote to reverse the judgment before us"). Here, a change of venue was required under the stricter constitutional standards. At a minimum, however, the more expansive Rule 21 standard requires a change of venue —and that the District Court's refusal to grant a change of venue requires reversal under the federal rules.

C. In the alternative, the jurors' questionnaire and voir dire responses establish actual prejudice.

Even if this Court were to conclude that the record does not warrant a presumption of prejudice, reversal is still required under the Supreme Court's second test for evaluating pre-trial prejudice: the actual prejudice test. The inquiry

into actual prejudice requires an analysis of both the news coverage and the actual voir dire process. See Skilling, 561 U.S. at 394–95 (in determining whether there was actual prejudice, court examines news stories, level of exposure in community, percentage of seated jurors that had heard of defendant or formed opinions); Irvin, 366 U.S. at 725–27 (in determining actual prejudice, court examines news stories, level of exposure in the community, and numbers of venire persons who had formed opinions about case).

In examining the voir dire and the pre-trial publicity to assess actual prejudice, "[t]he relevant question is not [merely] whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." Patton v. Yount, 467 U.S. 1025, 1035 (1984). A key factor in assessing whether jurors can impartially determine guilt—and in gauging the reliability of juror assurances of impartiality—is the percentage of venirepersons who "will admit to a disqualifying prejudice." Murphy, 421 U.S. at 803. The higher the percentage of venirepersons admitting to a previously formed opinion on the case, the greater the concern over the reliability of the voir dire responses from the remaining potential jurors. Id. A trial court's ruling as to the effects of prejudicial pre-trial publicity is reviewed for abuse of discretion. Skilling, 561 U.S. at 386.

Here, 99.7% of the venire admitted they had been exposed to some amount of the publicity; of 1,373 jurors called, only four said they had not seen publicity about the case.[95] And the nature of the publicity was anything but balanced. It repeatedly called Tsarnaev a "monster" and a "terrorist," discussed inadmissible victim-impact opinions and Tsarnaev's hospital confession, and included graphic video footage of the crime itself and the resulting injuries.

The prejudicial effect of that publicity was plain: 920 jurors, or approximately two-thirds, reached the conclusion Tsarnaev was guilty based solely on what they had heard before coming to court.[96] Jurors who had seen "a lot" of the publicity were 42 times more likely to conclude Tsarnaev was guilty—before hearing any evidence—than jurors who had seen "a little" of the publicity. Even more remarkable, prospective jurors for this case who believed Tsarnaev was guilty, were 105 times more likely to also believe—before hearing any evidence—that Tsarnaev should die if they had been exposed to "a lot" of publicity about the case than if they had been exposed to "a little" publicity.[97]

Individual responses during the voir dire process illuminate these aggregate statistics. Thus, prospective jurors wrote: [redacted]

[95] See Table 1 at 26.A.12133.
[96] See Table 5 at 26.A.12137.
[97] See Table 7 at 26.A.12139.

[redacted]

Tsarnaev acknowledges that the sample responses discussed above come from jurors who were *not* provisionally qualified. Many were, in fact, discharged by the District Court or the defense, and some even by the government. But that does not undercut their importance. In accord with the Supreme Court's decision in Murphy—as this Court has repeatedly concluded—"[w]here a high percentage of the venire admits to a disqualifying prejudice, a court may properly question the remaining jurors' avowals of impartiality, and choose to presume prejudice." Casellas-Toro, 807 F.3d at 390 (internal quotation marks omitted). Accord Angiulo, 897 F.2d at 1181–82. Necessarily then, in order to assess the reliability of assurances of impartiality routinely given by seated jurors, a reviewing court must consider answers given by jurors who were *not* seated. Casellas-Toro, 807 F.3d at 390 (looking at answers given by discharged jurors to determine whether declarations of impartiality given by seated jurors should be accepted at face value). Here, in light of the scope and nature of the publicity, the percentage of the venire admitting to a disqualifying prejudice was sufficient to undercut reliance on the expected declarations of impartiality of the 12 seated

jurors. The record as a whole shows that even if no presumption of prejudice is applied, actual prejudice has been shown.

That conclusion is particularly warranted here, where the venire's overarching prejudice was also present among the petit jury who decided Tsarnaev's fate. Notwithstanding their oaths to decide the case impartially, see 10.A.3934, all 12 seated jurors (and all six alternates) admitted to having been exposed to this same pre-trial publicity and—before hearing even a single witness testify—6 of the 12 seated jurors admitted they believed Tsarnaev participated in the bombings and 3 of these 6 admitted they already thought Tsarnaev was guilty of the charges.[98] Five members of the jury had contributed to help the victims whose testimony they would hear in this case. Add.554; 2.A.504; 26.A.11704, 11846, 11872, 11956. And it took 21 court days, from January 15, 2015, through February 25, 2015, to obtain this compromised jury. See 1.A.270; 9.A.3866–94. The government will no doubt argue that this 21-day voir dire shows the effort the District Court was making to ensure a fair trial. But there is another side to this coin. As both the Supreme Court and this Court have recognized, "[t]he length to which the trial court must go in order to select jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality."

[98] 2.A.879 (Juror 83); 4.A.1675 (Juror 229); 5.A.2009 (Juror 286); 6.A.2351; 26.A.11843 (Juror 349); id. at 232–33 (Juror 395); 7.A.3075; 26.A.11955 (Juror 487).

Murphy, 421 U.S. at 802–03. Accord Casellas-Toro, 807 F.3d at 389; United States v. Misla-Aldarondo, 478 F.3d 52, 58 (1st Cir. 2007).

In assessing the seated jurors' declarations of impartiality, the Court should also consider that at least two of the seated jurors deceived the Court as to their bias against Tsarnaev. As discussed in Point II, Juror 138 concealed his friends' online comments that "if you're really on jury duty, this guys (sic) got no shot in hell," and that he had to "play the part so u get on the jury then send him to jail where he will be taken care of." 25.A.11537. Similarly, Juror 286 deceived the Court both in her questionnaire and at voir dire when she failed to disclose that she had sheltered in place and had posted more than 20 Twitter posts expressing sympathy for the victims, gratitude for law enforcement and contempt for Tsarnaev. Add.472–74, 553–54; 5.A.2016.

Here, given the scope and nature of the publicity and the impact on the entire community, the percentage of the venire admitting to a disqualifying prejudice was sufficient to undercut reliance on the expected declarations of impartiality of the 12 seated jurors. Even if no presumption of prejudice is applied in this case, actual prejudice has been shown. Reversal is required.

D. Given the impact of the crime and publicity on the community, the Eighth Amendment independently required a change of venue due to the risk of an unreliable penalty phase determination.

The death penalty is a punishment that is qualitatively different from any other. See, e.g., Beck v. Alabama, 447 U.S. 625, 638 n.13 (1980). Given the absolute finality of the death penalty, there is a "heightened need for reliability" in capital cases. See, e.g., Caldwell v. Mississippi, 472 U.S. 320, 323 (1985) (internal quotation marks omitted); Beck, 447 U.S. at 637–38 & n.13. Procedures which undercut this heightened need for reliability violate the Eighth Amendment. See, e.g., Lankford v. Idaho, 500 U.S. 110, 125–26 & n.20 (1991); Eddings v. Oklahoma, 455 U.S. 104, 118–19 (1982) (O'Connor, J., concurring); Lockett v. Ohio, 438 U.S. 586, 605 (1978). This is so even when those same procedures do not violate due process. See, e.g., Maynard v. Cartwright, 486 U.S. 356, 361 (1988) (statute unconstitutionally vague under Eighth Amendment even where it is not vague under Due Process Clause); Beck, 447 U.S. at 636–38 (in capital case, Eighth Amendment need for reliability requires instructions on lesser included offenses even though Due Process Clause may not).

There are different ways the special reliability concerns of the Eighth Amendment can be violated. For example, the reliability of a death judgment is undercut when a state's capital punishment scheme precludes presenting mitigating evidence supporting a sentence less than death. Lockett, 438 U.S. 586. A court's

refusal to properly instruct jurors on how to consider mitigating evidence may likewise result in a death judgment too unreliable for Eighth Amendment purposes. See Penry v. Lynaugh, 492 U.S. 302 (1989). And a prosecutor's misleading penalty phase closing argument may also undercut the reliability concerns at the heart of the Eighth Amendment. Caldwell, 472 U.S. 320.

Here, the District Court's refusal to change venue also produced an unacceptably unreliable death verdict. For more than a year prior to trial—and well outside the context of the adversarial system—media coverage exposed the venire to powerful victim impact testimony regarding the four decedents and 11 of 15 survivors who testified.[99] But the media coverage also exposed the venire to a wealth of evidence that would never come into court and was patently inadmissible under the Eighth Amendment and FDPA because it would have produced an unreliable sentencing outcome. For example, the media coverage exposed the venire to victim impact testimony from more than *15 additional survivors who never testified* which, as discussed in Point VII, would have been plainly inadmissible. And the jurors were exposed to many opinions from relatives of victims of the bombings and powerful political figures that Tsarnaev should be executed, all of which were also inadmissible. See Bosse, 137 S. Ct. at 2.[100]

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[99] See ante nn. 27–29.

[100] 23.A.10833–10834 (Senators Dianne Feinstein and Chuck Schumer); 23.A.10843, 10892 (Mayor Menino); 24.A.10977a–78 (mother of victim Krystle

All 12 seated jurors admitted exposure to this pre-trial publicity, much of which bore on their penalty phase determination but was not admitted in court or was otherwise inadmissible. Equally problematic, and as discussed more fully below in Point IV, the trial court repeatedly refused to permit defense counsel to ask prospective jurors what publicity they had seen. Add.450; 1.A.300–301; 4.A.1675; 5.A.2018; 20.A.9403–06, 9450; 24.A.11391. Under all these circumstances, the District Court's refusal to change venue undercut the reliability of the death verdict, violated the Eighth Amendment and requires reversal of the death sentences. Cf. Witherspoon, 391 U.S. at 518–19 (where capital jury "was entrusted with two distinct responsibilities"—determining both guilt and penalty—and record shows jury was tainted as to penalty determination, reversal of penalty required).

Campbell); 24.A.11047 (Boston police commissioner Edward Davis); 24.A.11048 (survivor and amputee Marc Fucarile); 24.A.11050–51 (Liz Norden, mother of two surviving victims).

II.

The District Court's Denial Of Tsarnaev's Cause Challenges To Two Jurors Who Lied During Voir Dire, And The Court's Refusal To Investigate Tsarnaev's Colorable Claim Of Juror Dishonesty, Violated The Fifth, Sixth, And Eighth Amendments.

Affirming the vacatur of a federal death sentence on the ground of juror dishonesty, this Court said: "Jurors who do not take their oaths seriously threaten the very integrity of the judicial process." Sampson v. United States, 724 F.3d 150, 169 (1st Cir. 2013) ("Sampson II"). This case presents that threat.

Before the jury was empaneled, Tsarnaev produced uncontroverted evidence that two venirepersons lied under oath during voir dire. The foreperson, Juror 286, concealed Twitter posts in which she mourned the victims of the bombings, praised the law enforcement officers who captured Tsarnaev—several of them trial witnesses—and called Tsarnaev a "piece of garbage." And she hid the fact that she and her family had sheltered in place in their Dorchester home during the manhunt. Juror 138, after flouting the District Court's instructions by discussing the case on Facebook, falsely told the Court and the parties that he had not. And he failed to disclose that a Facebook friend had urged him to "play the part," "get on the jury," and send Tsarnaev "to jail where he will be taken care of." Tsarnaev moved to strike both jurors for cause, or for further voir dire. Without particularized discussion of either motion, the District Court denied both as "late," deeming

Tsarnaev's showing of bias "speculative" and "collateral," and refused his request for additional questioning.

Those erroneous rulings violated Tsarnaev's Fifth Amendment right to due process, his Sixth Amendment right to an impartial jury, and his Eighth Amendment right to a reliable determination of the appropriate penalty. Both jurors gave knowingly false answers to unambiguous questions. Juror 286 hid strident expressions of bias and the traumatic experience of having sheltered in place. Juror 138 concealed his disobedience of the Court's orders and his exposure to the poisonous suggestions of a friend that he manipulate the voir dire in order to sit on the jury and punish Tsarnaev. The Court's failure to strike both for cause was structural error that requires reversal of Tsarnaev's convictions, or in the alternative, under Eighth Amendment principles, his death sentences.

At a minimum, Tsarnaev made a "'colorable'" and "'plausible'" claim of dishonesty adequate to trigger the Court's "'unflagging duty' . . . to investigate." French, 904 F.3d at 117 (quoting United States v. Zimny, 846 F.3d 458, 464 (1st Cir. 2017)). In failing to undertake any follow-up inquiry—not one single question, even though neither venireperson had yet been seated, and both were present in the courthouse at the time of the ruling—the Court shirked that duty, requiring remand. And with respect to timeliness, the defense exercised diligence in investigating the 1,373-person venire, moved to strike both jurors within days of

uncovering the facts supporting those motions, and raised both challenges before jury selection was complete, in ample time for remedial action.

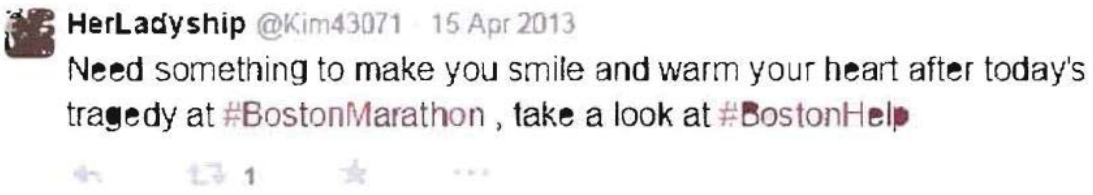
Accordingly, this Court should reverse Tsarnaev's convictions or death sentences. In the alternative, this Court should remand for further proceedings.

A. Factual and procedural background.

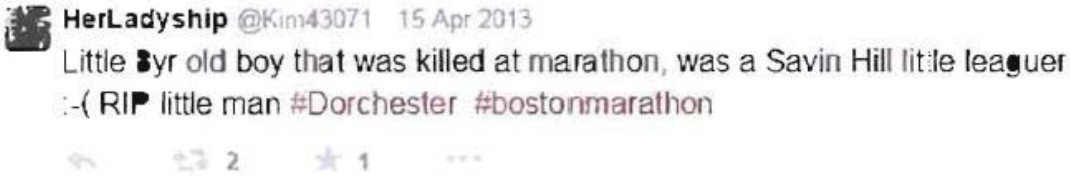
1. Juror 286, the foreperson, conceals Twitter posts that mourn the victims of the bombings, describe being "locked down" with her family, and praise law enforcement for capturing Tsarnaev—a "piece of garbage."

Beginning on April 15, the day of the bombings, and during the year that followed, Juror 286 published 22 Twitter posts concerning this case. 25.A.11538–51. The posts appeared under a username ("HerLadyship") and handle ("@Kim43071") that did not include her full name. Id. at 11538. These posts reflect the profound impact on the juror of the bombings and the manhunt; her sympathy for the victims; her gratitude to law enforcement officers; and her contempt for Tsarnaev.

Starting on the day of the bombings, Juror 286 used Twitter to monitor news coverage and comment on the case. For example, she tweeted:

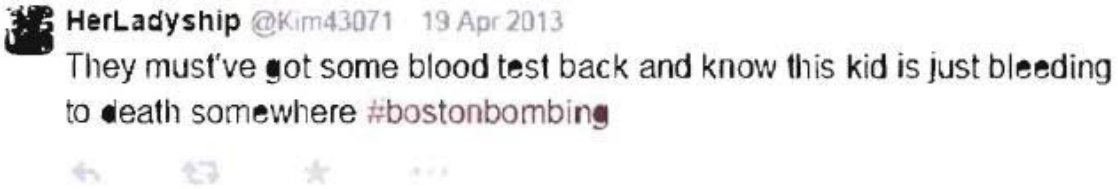


Id. at 11541. The hashtag #BostonHelp, which trended after the bombings, allowed local businesses and residents to offer and seek assistance, such as temporary shelter and food.[101] Juror 286 retweeted that "police and FBI" were "urging anyone with video of the finish line" to come forward. Id. at 11539. And she expressed condolences for Martin Richard:

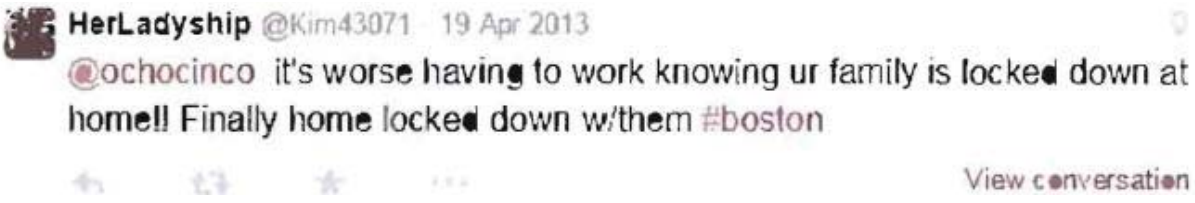


Id. at 11551. Savin Hill is a section of Dorchester, the Boston neighborhood where Juror 286 was born and still lived. Add.537.

On April 19, the day of the lockdown, Juror 286 continued to track events:



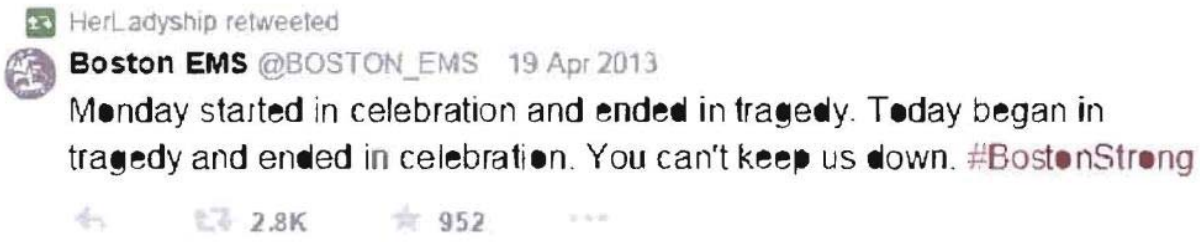
25.A.11544. And she described sheltering in place with her family, including her two sons, at the family's Dorchester home:



[101] Jessica Hartogs, Stories of Kindness Amid Tragedy in Boston Marathon Bombing, CBS News (April 16, 2013), https://www.cbsnews.com/news/stories-of-kindness-amid-tragedy-in-boston-marathon-bombing/.

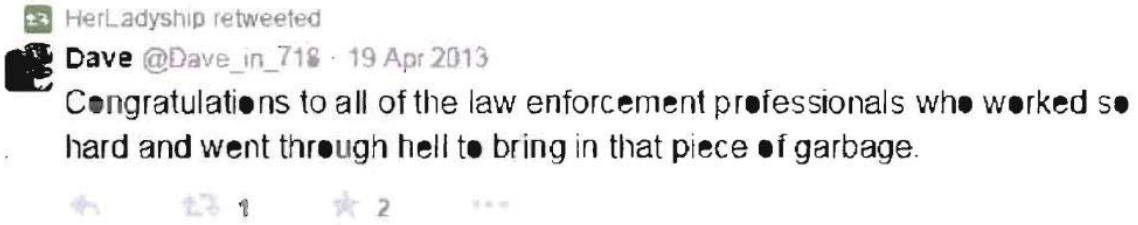
25.A.11544; see Add.537, 539–40. This tweet mentioned the handle "@ochocinco," which belongs to the former New England Patriots wide receiver Chad Johnson. It appears that Juror 286 was responding to a tweet from Johnson that read: "The . . . thought of Boston being lockdown is scary as fuck, a city of 1 million plus under polite martial law is awkwardly unnerving to me."[102]

After Tsarnaev's arrest, Juror 286 tweeted and retweeted a number of celebratory posts and images:



[102] Chad Johnson (@ochocinco), Twitter (Apr. 19, 2013, 1:42 p.m.) https://twitter.com/ochocinco/status/325348725767684097.

25.A.11540, 11544. Finally, she posted a message of praise for law enforcement and vitriol for Tsarnaev:



Id. at 11540.

In the ensuing year, Juror 286 retweeted a number of posts related to the bombings, including a photo of Officer Collier and MBTA Officer Richard Donohue (who was injured during the Watertown shootout) at their graduation from the Police Academy, captioned "[p]lease keep both in your prayers," id. at

11548; a photo of Martin Richard's sister J.R. singing the National Anthem at Fenway Park in October 2013, id. at 11549; and a photo of Martin's brother H.R. running the Marathon's Youth Relay Races in April 2014. Id. at 11550.

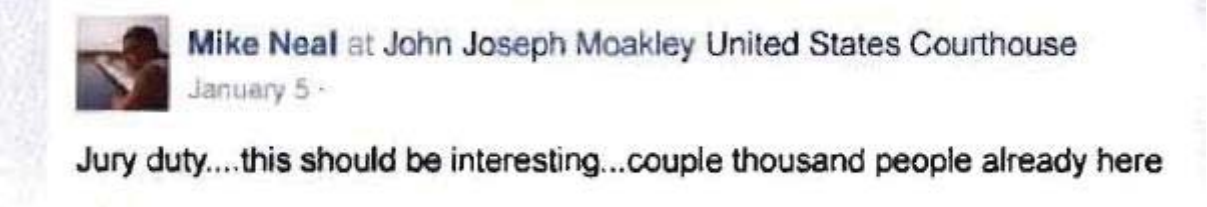
Juror 286 appeared in court to complete her juror questionnaire on January 5, 2015. Add.561; 1.A.186–88; 25.A.11445.[103] When completing her questionnaire (under penalty of perjury, Add.561), Juror 286 did not disclose any of these tweets or retweets, nor did she reveal that she had sheltered in place, even though several questions focused on these topics. For example, Question 79 asked: "If you have commented on this case in a letter to the editor, *in an online comment or post*, or on a radio talk show, please describe." Id. at 553 (emphasis added). Notwithstanding her two dozen tweets and retweets about the bombings, the manhunt, and the victims, the juror answered: "[D]on't believe I have." Id. And Question 81 asked jurors if they or their families had been "personally affected" by the bombings, "including being asked to '*shelter in place*.'" Id. at 554 (emphasis added). Although she tweeted that she had been "locked down" with her family during the manhunt, 25.A.11544, Juror 286 answered: "N/A." Add.554.

[103] Prospective jurors appeared in court on January 5, 6, and 7, 2015, to complete questionnaires. 25.A.11445 ¶¶ 1–2; 1.A.172, 186, 201, 215, 230, 245. With the parties' consent, the District Court excused many prospective jurors solely on the basis of their questionnaire responses. E.g., 25.A.11448–49. Those who were not excused were recalled for individual oral voir dire, which was conducted over 21 court days between January 15 and February 25. See, e.g., 1.A.260.

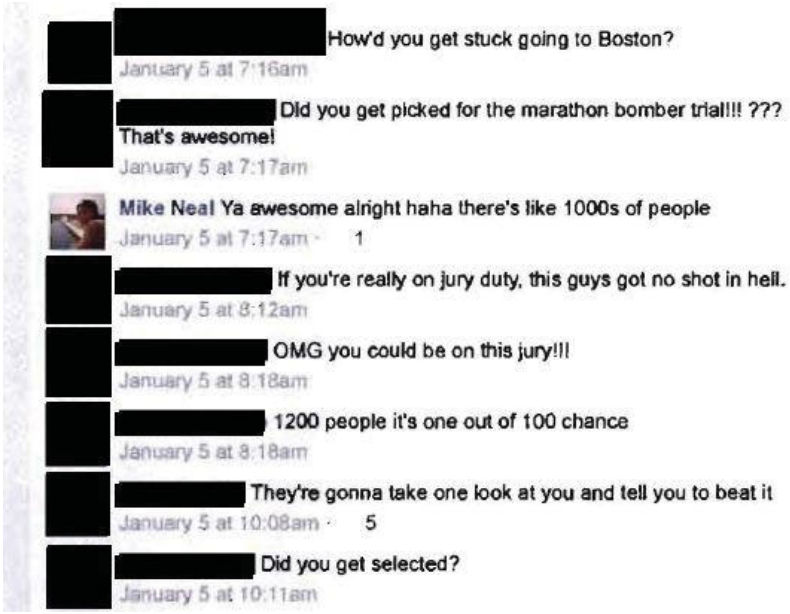
Juror 286 returned to court for oral voir dire on February 4, 2015. 5.A.2006–20. Once again under oath, id. at 1903, her deception continued. She said that she used "Facebook, Twitter, and Instagram" for "just social" purposes, elaborating: "Twitter, I watch TV and kind of tweet while I'm watching TV with other people that are watching the same programs that I'm watching." Id. at 2007. This pastime did not include "news programs." Id. at 2007–08. Nor did Juror 286 disclose that she had been "locked down" with her family. Rather, she implied that she had not. While at work on April 19, she said, "I was . . . joking with my boss I wanted to go home. . . . I live in Boston, and Boston was on lockdown. I'm like, I have to go home." Id. at 2016. Although she "assume[d]," while watching news coverage of Tsarnaev's arrest, that "the police . . . got who they were looking for," the juror professed that she could hold the government to its burden of proof and decide the case based on the evidence. Id. at 2009–10. Neither party moved to strike. Id. at 2078.

2. Juror 138 disobeys the Court's instructions by discussing the trial with Facebook friends, then lies about it.

Juror 138 appeared in court to complete his juror questionnaire on January 5, 2015. Add.533; 1.A.172–74; 25.A.11445. Sometime before 7:16 a.m. that morning, he posted to his Facebook account that he was present for jury selection:



25.A.11537. This post prompted a conversation among the juror's Facebook friends, in which several opined that he was not qualified to serve:

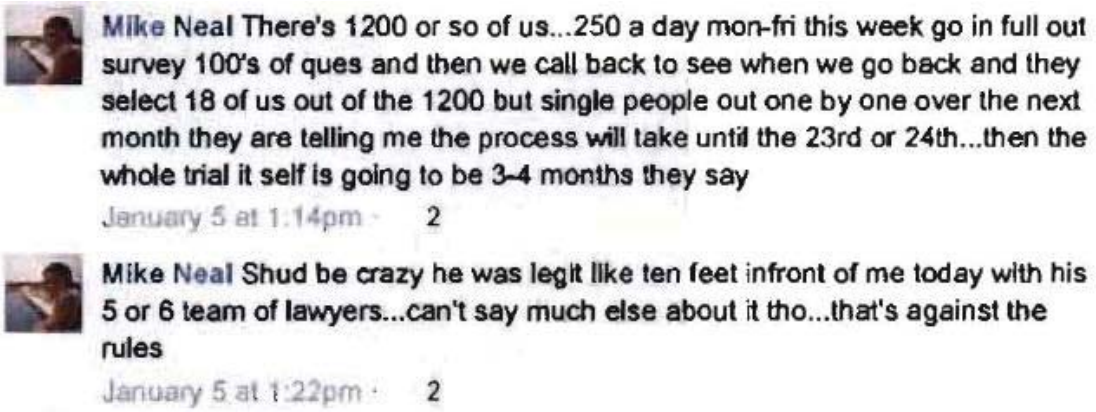


Id.

From 9:15 a.m. to 9:34 a.m., Juror 138 heard preliminary instructions, during which the District Court admonished him "not to discuss this case with your family, friends, or any other person." 1.A.172, 182, 185. Judge O'Toole emphasized: "This is a court order, willful violation of which may be punishable as a contempt of court or otherwise." Id. at 182. Jurors were allowed to "tell others that you may be a juror in the case," and to "discuss the schedule with your family and employer," but "*not to discuss anything else, or allow anyone else to discuss*

with you anything else until you have been excused, or if you're a juror, until the case concludes." Id. (emphasis added). In particular, the Court ordered the jurors to avoid discussions of the case on digital and social media: "Likewise, *you must not communicate about this case or allow anyone to communicate about it with you by* phone, text message, Skype, email, social media, such as Twitter or *Facebook*." Id. at 183 (emphases added). Juror 138 then completed his questionnaire, which contained similar directives: "Do not discuss anything about this case with anyone and do not read, listen to, or watch anything relating to this case until you have been excused as a potential juror, or if you are selected as a juror, until the trial is over. You may not discuss this case or allow yourself to be exposed to any discussions of this case in any manner." Add.507. In response to the question whether he had "commented on this case . . . in an online comment or post," the juror wrote: "N/A." Add.525.

At 1:14 p.m., after completing his questionnaire, Juror 138 resumed posting on the same Facebook thread that he had started that morning:



25.A.11537. Again, several people responded. One urged the juror to lie his way onto the jury, and he implied that in some circumstances, he would:

Id.

Juror 138 returned to court for oral voir dire about two weeks later, on January 23, 2015. 3.A.1146–69. In light of his Facebook posts, he gave untruthful answers to direct, unambiguous questions concerning his online communications about the case. For example, the Court asked: "When you left last time you were here, I had instructed everyone to avoid any discussion of the subject matter of the case with anybody. You could talk about coming here, obviously . . . and also to avoid any exposure to media articles about the case. Have you been able to do that?" Id. at 1146. Juror 138 responded: "Yeah, I haven't looked at anything. . . . I haven't talked to anybody about it." Id. at 1146–47. The juror's answers to the

Court's questions about his Facebook use were likewise dishonest. He testified that he posted to Facebook "once or twice a week," for "essentially personal, social-type things." Id. at 1148. He explained that he checked Facebook on his phone during down time at work, "[b]ut other than that . . . I'm not posting on it or talking on it." Id.

The Court then inquired whether Juror 138's (or his friends') Facebook activity had encompassed this case:

> THE COURT: Do you comment on public affairs or anything like that?
> JUROR 138: Yeah, I see what my friends are doing and comment on that.
> THE COURT: *Anybody commenting about this trial?*
> JUROR 138: *No.*

Id. (emphases added). The juror did not acknowledge one friend's comment that Tsarnaev would have "no shot in hell" if he were on the jury, another's that the Court would "take one look at you and tell you to beat it," or a third's advice to "[p]lay the part so u get on the jury then send him to jail where he will be taken care of." 25.A.11537. Instead, Juror 138 assured the Court that he "wasn't going to make any decisions" about Tsarnaev's guilt or the proper punishment "until I'd seen everything that's presented," and "would wait to hear what the evidence was" before making up his mind. 3.A.1151. Neither party moved to strike. 3.A.1329.

3. Without individualized discussion, the District Court denies the defense's cause challenges and refuses further inquiry.

In the weeks that followed, the defense—while proceeding with ongoing voir dire, reviewing discovery productions, and litigating numerous substantive motions, not to mention preparing for trial—continued its investigation of the jurors, and discovered the social media posts above in late February. 25.A.11553. On February 27, four days before the parties were to exercise their peremptory challenges, the defense moved to strike Jurors 286 and 138 for cause, or in the alternative, for further voir dire. Add.469–471; Add.472–475; 25.A.11554, 11556. The defense questioned Juror 286's candor and impartiality, pointing out her failure to disclose nearly two dozen Twitter posts reflecting "a community allegiance that is certain to color her view of the case." Add.472. As to Juror 138, the defense argued that he "violated the Court's instructions within just a few hours of receiving them" by participating in the Facebook thread, and "was dishonest with the Court" when he denied that any of his Facebook friends "had commented 'about this trial.'" Add.469–70.

The government opposed. [redacted]

[redacted] The government made no mention of the posts in which the juror called Tsarnaev a "piece of garbage" or described being "locked down" with her family. Nor did the government offer any excuse for Juror 138's untruthful testimony that his Facebook friends were not "commenting about the trial." [redacted]

On March 3, just before the parties were to exercise their peremptory strikes, the District Court denied both challenges (as well as several others not pressed on appeal) and refused to conduct further voir dire, even though Jurors 286 and 138 were present in the courthouse. Add.321–22; 9.A.3920. In an undifferentiated oral ruling that did not address any of the challenges in particular, the Court said:

> First of all, I agree with the government that the objections are late . . . . [W]e have a procedure. We have done it with some care and taken the time to do it. And I think the time to raise the issues was in the course of that process and not thereafter. So I am not inclined—and will not—reopen the voir dire for late discovery matters that could have been discovered earlier.
>
> That said, considering the objections, I find them largely speculative. There are various possible explanations and none of them is, in my view, serious enough to warrant changing our provisional qualification, and in particular, none of the issues that were raised seem to me to suggest a bias that would be harmful to jury impartiality in this case. They're collateral matters about things . . .

> people close to them may have done, but none of them speak to actual bias in this case.

Add.321–22.

The defense exhausted all 20 of its peremptory strikes, see Fed. R. Crim. P. 24(b)(1)—the Court had denied the defense's request for 10 more, 25.A.11411–13—but did not strike Jurors 286 or 138. 25.A.11572. After the jury was selected, but before it was sworn, the defense objected to the panel, incorporating "all of the individual motions respecting particular jurors who are now seated. . . ." 10.A.3931. The Court overruled the objections, confirming: "Your rights are preserved." 10.A.3932.

4. Post-trial, both Jurors 286 and 138 gloat about Tsarnaev's death sentence on social media.

After returning a death sentence, both jurors continued to discuss this case on social media. On June 24, 2015, the day of Tsarnaev's sentencing, Juror 286 changed her profile picture to this image:

25.A.11621, 11625. The friend who commented "LOVE IT!" was also a seated juror. 26.A.11852.

For his part, Juror 138, on May 15, 2015, less than two hours after the penalty-phase verdict, posted: "That's a wrap." 25.A.11618, 11622. The post

elicited dozens of congratulatory comments, including: "Thats awesome, good choice," and "Great job Mike! Thanks for serving up some justice. Id. at 11618; 11623. On June 24, the date of Tsarnaev's sentencing, Juror 138 wrote that he had gone "[b]ack to Boston today" to "see the end of this . . . for now anyway." 25.A.11619; 25.A.11623. After the sentencing, he posted:

25.A.11619, 11624.

B. The District Court erred in refusing to strike Jurors 286 and 138 for cause, or, at a minimum, undertake further questioning.

1. The Sixth Amendment requires adequate investigation of prospective jurors to ensure an impartial jury.

"The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury." Skilling, 561 U.S. at 377. "Few accouterments of our criminal justice system are either more fundamental or more precious." Sampson II, 724

F.3d at 154. And "the concern for an impartial jury is certainly at its highest when the defendant's life is on the line." French, 904 F.3d at 120. Voir dire, whose "core purpose is to provide a firm foundation for ferreting out bias," supplies the principal mechanism for securing this right. United States v. Bergodere, 40 F.3d 512, 517 (1st Cir. 1994). But only if venirepersons answer honestly: "The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984).

In Sampson II, this Court held that "a party seeking a new trial based on juror dishonesty during voir dire must satisfy a binary test. The party must show, first, that the juror failed to answer honestly a material voir dire question. For this purpose, a voir dire question is material if a response to it 'has a natural tendency to influence, or is capable of influencing,' the judge's impartiality determination." 724 F.3d at 164–65 (quoting Neder v. United States, 527 U.S. 1, 16 (1999)). "The second part of the binary test requires a finding that a truthful response to the voir dire question 'would have provided a valid basis for a challenge for cause.'" Id. at 165 (quoting McDonough, 464 U.S. at 556).

"Jurors normally are subject to excusal for cause if they are biased." Id. In assessing bias, this Court asks "whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the

juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed." Id. at 165–66. "A number of factors" bear on this inquiry, including "the juror's interpersonal relationships," "the juror's ability to separate her emotions from her duties," "the similarity between the juror's experiences and important facts presented at trial," "the scope and severity of the juror's dishonesty," and "the juror's motive for lying." Id. at 166. In French, this Court clarified Sampson II, explaining that a trial judge cannot deem a juror unbiased without investigating *why* the juror lied: "[T]the ultimate inquiry under [Sampson II] *requires* that the court consider 'the reason behind the juror's dishonesty.'" 904 F.3d at 118 (quoting 724 F.3d at 165–66) (emphasis added).

When a district court denies a defendant's challenge for cause, the defendant has two options. He may use a peremptory strike to remove the juror, and thereby relinquish any objection, or he has "the option" of exhausting all his peremptory strikes, "letting" the juror "sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal." United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000). This Court reviews the district court's denial of a cause challenge for "clear abuse of discretion." United States v. Lowe, 145 F.3d 45, 48 (1st Cir. 1998). That deferential standard only applies, however, "'once the trial

judge has made an appropriate inquiry.'" United States v. Ramirez-Rivera, 800 F.3d 1, 38 (1st Cir. 2015) (quoting United States v. Marti-Lon, 524 F.3d 295, 300 (1st Cir. 2008)). The remedy for the seating of a partial juror is vacatur of the conviction: "The presence of a juror whose revealed biases would require striking the juror for cause in a criminal case is structural error that, if preserved, requires vacatur." French, 904 F.3d at 120. Or, at the very least, in light of the Eighth Amendment's special reliability requirement, vacatur of the death sentence: "If even a single biased juror participates in the imposition of the death sentence, the sentence is infirm and cannot be executed." Sampson II, 724 F.3d at 163.

"Separate and apart from the showing that a defendant must make to obtain a new trial in such cases, there is the question of process." French, 904 F.3d at 117. In French and Zimny, this Court reiterated, in the strongest terms, the responsibility of district judges to probe allegations of juror dishonesty and misconduct. "[D]efendants seeking to establish juror misconduct bear an initial burden only of coming forward with a 'colorable or plausible claim.' Once defendants have met this burden, an 'unflagging duty' falls to the district court to investigate the claim." French, 904 F.3d at 117 (quoting Zimny, 846 F.3d at 464). Thus, although the decision "[w]hether to reopen voir dire and what questions to permit is largely within the discretion of the district court," United States v. Adams, 305 F.3d 30, 35 (1st Cir. 2002), the Constitution circumscribes that

latitude. "[D]ue process may well demand interrogation of a juror *after* the defendant makes some satisfactory threshold showing of partiality or misconduct." Neron v. Tierney, 841 F.2d 1197, 1205–06 (1st Cir. 1988). Likewise, "[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Dennis v. United States, 339 U.S. 162, 171–72 (1950). Accordingly, the Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215 (1982). Discretion does not include inaction. "[A] district court 'judge does not have discretion to refuse to conduct any inquiry at all regarding the magnitude of the taint-producing event and the extent of the resulting prejudice' if confronted with a colorable claim of juror misconduct." Zimny, 846 F.3d at 464 (quoting United States v. Lara-Ramirez, 519 F.3d 76, 87 (1st Cir. 2008)).

2. The jurors' dishonesty warrants a new trial.

A straightforward application of Sampson II's two-step test establishes Tsarnaev's entitlement to a new trial. At the first step, both jurors gave knowingly false answers to material voir dire questions. Juror 286 concealed Twitter posts expressing strident statements of bias and describing the painful experience of sheltering in place. Juror 138 hid his disobedience of the District Court's instructions and his exposure to the prejudicial opinions of his Facebook friends.

At the second step, truthful responses would certainly have "provided a valid basis for a challenge for cause." Sampson II, 724 F.3d at 165. A "reasonable judge, armed with" the knowledge that Juror 286 had called Tsarnaev a "piece of garbage" and had been "locked down" with her family during the manhunt would have concluded that she "lacked the capacity and will to decide the case based on the evidence." Id. at 165–66. So, too, a judge aware that Juror 138 had disobeyed a straightforward order within hours of receiving it, and had been urged to "[p]lay the part," "get on the jury," and send Tsarnaev "to jail where he will be taken care of." The District Court's contrary ruling, made without any investigation or particularized findings, merits no deference. In any case, the Court abused its discretion by committing multiple serious errors of law and fact.

a. Juror 286, the foreperson, should have been dismissed for cause.

i. Juror 286 gave knowingly false answers to material questions.

Tsarnaev satisfies Sampson II's first step because Juror 286's responses to questions about her online activity and her experience during the manhunt were false; material; and knowingly dishonest.

Start with the indisputable: Juror 286 gave false answers. In her questionnaire and during her oral examination, she said that she had not "commented on this case . . . in an online comment or post." But, in nearly two

dozen Twitter posts spanning more than a year, she had. She mourned Martin Richard, the "[l]ittle 8yr old boy that was killed at marathon." 25.A.11551. She urged her followers to "keep" Officers Collier and Donohue in their "prayers," and praised the law enforcement officers "who worked so hard and went through hell" to capture Tsarnaev, a "piece of garbage." Id. at 11540, 11548. Three of those officers—Watertown Police Officer Joseph Reynolds, Sergeant John Maclellan, and Sergeant Jeffrey Pugliese—testified at trial for the government. 12.A.5032, 5061, 5110. She posted expressions of civic pride, including: "You can't keep us down. #BostonStrong." 25.A.11540. More than a year later, she was still retweeting photographs of Martin Richard's surviving siblings. Id. at 11549–50. All of these were "online comment[s] or post[s]" about this case.

In addition, Juror 286 falsely assured the Court and the parties that she had not been "asked to 'shelter in place.'" Add.554. During her oral voir dire, she implied instead that the lockdown was an occasion for levity: "I was kind of like joking with my boss I wanted to go home." 5.A.2016. But her own tweet reported that being separated from her family for part of the manhunt was difficult, so much so that she was relieved when she was "[f]inally home locked down w/them." 25.A.11544.

Turn next to another incontrovertible proposition: the "materiality" of these questions was "nose-on-the-face plain." Sampson II, 724 F.3d at 166. Sampson II

sets a low bar. A question is material if a response is merely "'capable of influencing' the judge's impartiality determination." 724 F.3d at 165 (quoting Neder, 527 U.S. at 16). These questions struck at the core of Juror 286's competence. The juror was asked whether she had expressed prior opinions about this case, and a venireperson's preconceived beliefs bear heavily on her impartiality. See, e.g., Connors v. United States, 158 U.S. 408, 413 (1895) ("[A] suitable inquiry is permissible in order to ascertain whether the juror has any . . . opinion . . . that would affect or control the fair determination by him of the issues to be tried."). In high-profile prosecutions such as this, identifying jurors' "preconceived opinions" is a central—if not *the* central—objective of voir dire. United States v. Moreno Morales, 815 F.2d 725, 733 (1st Cir. 1987). E.g., Skilling, 561 U.S. at 372, 390–92; Mu'Min, 500 U.S. at 420–21; Patton, 467 U.S. at 1030, 1033–35; Irvin, 366 U.S. at 726–28.

Questions asking whether Juror 286 had sheltered in place were material too. No competent trial judge would conduct voir dire without ascertaining whether prospective jurors had been victims of, or affected by, the offenses alleged. E.g., Skilling, 561 U.S. at 371 n.4 ("Do you know anyone . . . who has been negatively affected or hurt in any way by what happened at Enron?"). Indeed, the parties and the District Court itself recognized this precise fact, including question 81 in the questionnaire, which specifically asked prospective jurors if they had sheltered in

place. Add.526. In this context, this Court has approved the for-cause dismissal of a juror who was related to the victim, Subilosky v. Commonwealth of Massachusetts, 412 F.2d 691, 694 (1st Cir. 1969); and the questioning of a juror believed to have been the victim of crimes similar to those charged, United States v. Meader, 118 F.3d 876, 880–81 (1st Cir. 1997). Question 81, which asked whether the jurors themselves had suffered the effects of the instant offense, had even greater relevance.

Finally, Juror 286's answers were knowingly dishonest. See Sampson II, 724 F.3d at 164–65 n.8 (distinguishing between "dishonesty" and "honest, but mistaken responses"). The juror was asked whether she had been ordered to "shelter in place" and she said that she had not. Add.554. She elaborated that she spent the lockdown "joking" with her boss and asking, in jest, to leave work early. 5.A.2016. It is unlikely that Juror 286 misunderstood this plain question. And it is inconceivable that she forgot, less than two years later, having sheltered in place with her family during a daylong, region-wide manhunt for the defendant then sitting before her in court. Juror 286's own tweet confirms the salience of the experience. The lockdown was not just "scary as fuck" to her, as another Twitter user had put it. It was "worse," the juror said, "having to work knowing ur family is locked down at home," until she was "[f]inally home locked down w/them." No

plausible reading of this record admits the possibility that the juror made an innocent mistake, nor did the government offer one below.

So too Juror 286's answers to questions about her social media activity. Again, the Court's inquiries were easily understood. Jurors were asked whether they had "commented on this case . . . in an online comment or post." Juror 286 answered, "don't believe I have." Add. 553. And during her oral voir dire, she added that she used Twitter only to discuss television programs with friends. 5.A.2007–08. [redacted] Many of the juror's posts were original tweets. See ante § II.A.1. Moreover, the juror's knowingly dishonest answers to questions about the lockdown disentitle her to the benefit of the doubt. [redacted] Nor is it probable that Juror 286's nearly two dozen online comments, made over the course of a year and as recently as four months earlier, slipped her mind in the face of direct questioning. And notwithstanding the government's labored attempt to parse the word "comment," the thrust of the overall inquiry was plain: the Court and the parties wanted to know if Juror 286 had expressed opinions about the case,

including on Twitter. The juror denied that she had, and added, gratuitously and inaccurately, that she used Twitter just as a diversion.

In short, this record shows not just inaccuracy but knowing dishonesty. To the extent that any uncertainty remains, however, this Court must remand, not affirm, because the District Court prevented Tsarnaev from developing the facts. The defense sought to voir dire Juror 286 about her Twitter posts. Such questioning would have afforded her the opportunity to clarify or explain her inaccurate responses, and given the parties and the Court the chance to gauge her credibility, and in turn, her impartiality. But the District Court refused. In these circumstances, the government's ability to hazard an innocent explanation does not obviate further inquiry. See French, 904 F.3d at 117.

In French, a juror had written "n/a" on her questionnaire (just as Juror 286 did, App.554) when asked to describe "any court matter" in which a family member had been a "defendant," even though her son had been convicted of drug-related offenses. 904 F.3d at 115. Denying the defendants' new trial motion, the district court "posited that perhaps 'n/a' meant something other than 'not applicable,'" and the government contended "that the juror may not have regarded her son's experience as involving a 'court matter.'" Id. at 117. This Court held that these possibilities did not permit the district judge to forgo a hearing. "Each hypothesis is plausible, but insufficiently likely so as to warrant rejecting without

investigation the claim of juror misconduct as improbable." Id. Because a defendant "need not show at the outset that [his] claim is so strong as to render contrary conclusions impossible, . . . a court-supervised investigation aimed at confirming and then exploring the apparent dishonesty was called for." Id. See also Zimny, 846 F.3d at 469 (rejecting government's inference that no juror misconduct occurred in light of "undeveloped evidentiary record" and remanding for investigation). French and Zimny at least dictate remand. See post § II.B.3.

ii. Truthful answers would have justified Juror 286's dismissal for cause.

Tsarnaev satisfies Sampson II's second step because a reasonable judge would have stricken Juror 286 for cause in light of her dishonesty; forceful and opinionated Twitter posts; and sheltering in place.

Begin, as Sampson II did, with the juror's lies themselves, and with the "scope and severity" of her dishonesty. 724 F.3d at 166. Juror dishonesty "can be a powerful indicator of bias." Id. "In most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial." McDonough, 464 U.S. at 556 (Blackmun, J., concurring). "Knowingly lying" during voir dire, which exposes a venireperson to criminal sanctions for contempt and perjury . . . exhibits "a personal interest" in a particular case "so powerful as to cause the juror to commit a serious crime," and "suggests a view on the merits." United States v. Colombo, 869 F.2d 149, 151 (2d Cir. 1989). A

juror's "bias," the Supreme Court has said, can be "gathered from the disingenuous concealment which kept her in the box." Clark v. United States, 289 U.S. 1, 10 (1933). See also, e.g., United States v. Boney, 977 F.2d 624, 634 (D.C. Cir. 1992); Burton v. Johnson, 948 F.2d 1150, 1159 (10th Cir. 1991); United States v. Perkins, 748 F.2d 1519, 1532 (11th Cir. 1984). In addition, a juror who gives one untruthful answer may give others, including when she professes an ability to follow the law and decide the case on the evidence. Dyer v. Calderon, 151 F.3d 970, 983 (9th Cir. 1998) (en banc); Colombo, 869 F.2d at 151–52. A lack of candor therefore casts doubt on the "expectation that a prospective juror will give truthful answers concerning her or his ability to weigh the evidence fairly and obey the instructions of the court." Id. Besides Sampson II, multiple decisions have ordered new trials based on juror dishonesty. E.g., United States v. Parse, 789 F.3d 83, 87–93, 120 (2d Cir. 2015); Green v. White, 232 F.3d 671, 675–76 (9th Cir. 2000); Burton, 948 F.2d at 1158–59; Perkins, 748 F.2d at 1533.

Here, the District Court dismissed Juror 140 for cause based, in part, on a similar lack of candor. 3.A.1192–94. Like Juror 286, Juror 140 failed to disclose Twitter posts about the bombings, including one celebrating Tsarnaev's arrest ("YOU GOT TAKEN ALIVE BITCH!!!!! DON'T FUCK WITH BOSTON!!!!!"). 25.A.11480a–c; SA.79c. Juror 140's language was coarser than Juror 286's, but the emotional substance of the two venirepersons' tweets—exultation, civic pride,

and disgust for Tsarnaev—was the same. Juror 140 also omitted to mention using Twitter on her questionnaire, even though she was following a television reporter who was live-tweeting jury selection. SPA.7.3764; 3.A.1192–94. In light of these nondisclosures, even the government agreed that Juror 140 "[o]bviously . . . doesn't belong on the jury." 3.A.1193. Moreover, the Court struck venirepersons for dishonesty on less central topics: [redacted]

Juror 286 dissembled on core topics—her opinions about the victims, the witnesses, and the defendant, and the effect of the crime on her and her family. "All other things equal, the likelihood that a juror who conceals information is biased increases with the likelihood that disclosure of the information will lead to his disqualification." Boney, 977 F.2d at 634 n.9. There is no reason why Juror 286 would have concealed Twitter posts that she broadcast to the world, or failed to acknowledge the memorable experience of having been locked down (an experience that she tweeted about as well), other than the obvious. She wanted to serve because, as she declared on the day that the Court sentenced Tsarnaev to death, she was "Boston Strong."

Moreover, French establishes that the District Court erred in resolving against Tsarnaev the question whether Juror 286 was "unduly biased without

knowing why she answered as she did." 904 F.3d at 118. As explained above, "the ultimate inquiry under [Sampson II] requires that the court consider 'the reason behind the juror's dishonesty.'" Id. (quoting 724 F.3d at 165–66). Having made no effort to answer that question, the Court could not, as a matter of law, conclude that Juror 286's dishonesty had no bearing on her impartiality.

Next, consider Juror 286's nearly two dozen Twitter posts, which grieved the victims ("RIP little man"); lauded the police ("law enforcement professionals who worked so hard and went through hell"); and cursed Tsarnaev ("piece of garbage"). Clearer statements of bias or more "powerful emotions" do not come readily to mind. Sampson II, 724 F.3d at 168. Juror 286 chose to voice these opinions not just to her family or friends, but to the world. Social media, and Twitter in particular, make up "the modern public square." Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017). "These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'" Id. (quoting Reno v. ACLU, 521 U.S. 844, 870 (1997)). Juror 286's posts, although understandable responses to a civic tragedy, demonstrate strong partiality and "intense feelings" unbefitting a juror in a capital case. Sampson II, 724 F.3d at 167. That is true, in particular, because her "sympathy for victims" of the

bombings "translate[d] into animus toward" Tsarnaev, a distinction the Supreme Court has deemed meaningful. Skilling, 561 U.S. at 391. And her posts continued long after the bombings, with retweets featuring Martin Richard's siblings in October 2013 and April 2014. In dismissing the significance of another juror's Facebook posts at the time of the manhunt, the Court conceded that its analysis would have changed "[i]f it had continued, had it been a meme that he played out over time. . . ." 8.A.3600. This one did.

Finally, Juror 286 sheltered in place during the manhunt for Tsarnaev. This was a striking "similarity" between her "experience and important facts to be presented at trial," and moreover, implicated her "interpersonal relationships" with her sons, who were locked down with her. Sampson II, 724 F.3d at 166. "When a juror has life experiences that correspond with evidence presented during the trial, that congruence raises obvious concerns about the juror's possible bias." Id. at 167. A juror's own life experiences, even if unrelated to the case to be tried, may so resemble the case as to make impartiality an unreasonable expectation. Sampson II, for example, identified several such parallels: a juror had been threatened by her ex-husband with a shotgun (the defendant was charged with threatening bank tellers at gunpoint); the juror's ex-husband and daughter had battled substance abuse (as had the defendant); and the juror's daughter had been incarcerated for larceny (the defendant, for robbery). Id. at 168. "In such a

situation," this Court said, "the juror may have enormous difficulty separating her own life experiences from evidence in the case." Id. at 167. See also, e.g., United States v. Torres, 128 F.3d 38, 47–48 (2d Cir. 1997); Burton, 948 F.2d at 1159 (collecting cases). When a juror and her family have *themselves* suffered some of the effects of the charged crime, that fact bears more heavily still on her capacity to render impartial service. Cf. Skilling, 561 U.S. at 390 n.24 (elimination of venirepersons affected by Enron's bankruptcy was "one indicator" that voir dire "fulfilled its function," because "the seated jurors . . . were personally unaffected by . . . Enron's downfall").

Juror 286 had not just sheltered in place during a manhunt, she had sheltered in place, with her two sons, while law enforcement scoured six cities for Tsarnaev. Venirepersons attested to the distressing effects of the shelter-in-place order, which brought the bombings "close to home." 2.A.790. Sheltering in place was [redacted] It was "scary to be locked in your house, couldn't leave . . . ." 4.A.1536. Residents were "a little on edge all day." Id. And it was a "dangerous precedent to disrupt everyone's life." 3.A.1203. "[S]ome even thought that April 19, the day of the shelter-in-place order, was 'so much scarier' than April 15, the day of the bombings itself." Tsarnaev II, 780 F.3d at 32 n.28 (Torruella, J., dissenting) (quoting Alan Greenblatt, Boston on Lockdown:

"Today Is So Much Scarier," Nat'l Pub. Radio (Apr. 19, 2013). The government even noticed an expert pediatric psychologist to testify to his research showing "a significant increase in likely PTSD symptoms among school-aged children"—like Juror 286's sons—"in several communities who were exposed to the events of April 15–19, 2013." Gov't Opp. To Petition for Writ of Mandamus, at 20, In re Tsarnaev, No. 14–2362 (1st Cir. Jan. 1, 2015). As the government argued, the bombings left behind "a community in fear and sheltering in place." 10.A.3976.

To be sure, not every prospective juror had that reaction, and not every juror who sheltered in place was disqualified. But some did, and some were, and that is why it was essential for Juror 286 to disclose this experience: so that the Court and the parties could determine the lockdown's effect on her. The Court itself made this point below: to "understand" whether a connection to the Marathon was disqualifying "requires . . . asking jurors directly about it." Add.466. That inquiry was all the more imperative with respect to Juror 286 in light of what the record does show. On the day of the manhunt, she complained about the difficulty of "having to work knowing ur family is locked down at home!!" Then, relieved, she added: "Finally home locked down w/ them #boston." 25.A.11544. And as argued above, this Court must resolve any uncertainty by remanding. It at least suggests the possibility of bias that Juror 286 sheltered in her home while hundreds of police officers scoured her hometown for Tsarnaev. Tsarnaev is therefore entitled

to what the District Court refused him: "the opportunity to prove actual bias." Phillips, 455 U.S. at 215.

b. Juror 138 should have been dismissed for cause.

i. Juror 138 gave knowingly false answers to material questions.

The analysis for Juror 138 tracks the framework set forth above. See ante § II.B.2.a. Tsarnaev meets Sampson II's first prong because the juror denied disobeying the Court's instructions and concealed his friends' comments about this case, responses that were false; material; and knowingly dishonest.

Juror 138 gave inaccurate answers. Asked whether he had "been able" to heed the instruction "to avoid any discussion of the subject matter of the case with anybody," he responded: "I haven't talked to anybody about it." 3.A.1146–47. But he had. In his Facebook posts, he described the voir dire process in detail, as well as his reaction to being in proximity to Tsarnaev: "Shud be crazy he was legit 10 feet infront of me with his 5 or 6 team of lawyers." 25.A.11537. By initiating, then participating in, the discussion about jury selection, he not only allowed but invited others to communicate about this case with him. Likewise, Juror 138 testified that he posted to Facebook "once or twice a week," for "essentially personal, social-type things." 3.A.1148. And when asked, point-blank, whether any of his Facebook friends were "commenting about this trial," he said: "No." Id.

That, too was untrue. One friend opined that it was "awesome" that Juror 138 might "get picked for the marathon bomber trial!!!" 25.A.11537. "[A]wesome alright," the juror agreed. Id. Another friend advised Juror 138 to "[p]lay the part so u get on the jury then send him to jail where he will be taken care of." Id.

These questions were "'capable of influencing'" the Court's "impartiality determination." Sampson II, 724 F.3d at 165 (quoting Neder, 527 U.S. at 16). The Court sought to learn whether Juror 138 had been exposed to outside information or opinions about the case, crucial matters in any voir dire involving a notorious crime. E.g., Skilling, 561 U.S. at 374; Mu'Min, 500 U.S. at 419. See also Sheppard, 384 U.S. at 353 (criticizing trial procedure in Estes v. Texas, 381 U.S. 532 (1965), in which jurors were "exposed . . . to expressions of opinion from . . . friends"). The Court's practice reflects the inquiry's relevance. To account for the time that had elapsed between the venirepersons' completion of their questionnaires and their appearance for voir dire, the District Court began the oral examination of every single venireperson with the same question: whether the venireperson had avoided discussing, or listening to discussion concerning, this case. E.g., 3.A.1146.

Independently, the question whether Juror 138 had "been able" to follow the Court's instructions was material. True, Sampson II defined materiality by referring to the trial judge's "impartiality determination," 724 F.3d at 164–65, but

that definition arose in the context of a bias claim. Questions that go to a juror's qualifications to serve, but not necessarily to bias, also rank as material. Whether a juror can heed a common, rudimentary instruction—"[Y]ou must not communicate about this case or allow anyone to communicate about it with," 1.A.183—bears on a judge's assessment of that juror's fitness to deliberate in any case, much less a complex capital case.

Juror 138's answers were not just false, but knowingly so. The question whether the juror's Facebook friends were "commenting about this trial" contained no ambiguity. 3.A.1148. Several of Juror 138's friends were, and their comments had come fewer than three weeks earlier, in a thread in which Juror 138 himself participated, and is sure not to have forgotten—after all, these questions pertained, expressly, to *Facebook* friends. 25.A.11537; 3.A.1148. Like Juror 286, this juror did not just answer falsely, he added gratuitous detail that minimized the topic and confirms his intent to mislead. He told the Court and the parties that he used Facebook only for "essentially personal, social-type things" while idle during his workday. 3.A.1148.

Below, the government did not defend that misstatement. Instead, turning to Juror 138's other lie (that he had followed the Court's orders), [redacted] But as discussed above with respect to

Juror 286, the fact that Juror 138 told one lie makes it likelier that he told two. Moreover, the government did not explain why, if Juror 138 [redacted] he hid this thread in response to direct questions about his and his friends' Facebook activity. And, once again, as with Juror 286, see ante § II.B.2.a, because the Court foreclosed the defense from developing a record, this Court cannot resolve any ambiguity against Tsarnaev, but must instead remand. It is not enough that the government could venture an excuse (strained as it was) for Juror 138's answers, and Tsarnaev "need not show" that his claim "is so strong as to render contrary conclusions impossible." French, 904 F.3d at 117. See also Zimny, 846 F.3d at 849.

ii. Truthful answers would have justified Juror 138's dismissal for cause, or at least compelled further questions.

Tsarnaev meets Sampson II's second prong because a reasonable judge would have excused Juror 138 or questioned him further, in light of his dishonesty; disobedience; and exposure to extraneous prejudicial opinions.

Juror 138's dishonesty on core questions justifies disqualification. As shown above with respect to Juror 286, dishonesty evinces bias and warranted the dismissal of several venirepersons who dissembled on similar or more attenuated matters. See ante § II.B.2.a. That analysis applies with equal force here.

Juror 138's refusal to follow the Court's instructions supplied grounds for challenge too. "Good cause exists to dismiss a juror 'when that juror refuses . . . to follow the court's instructions.'" United States v. Oscar, 877 F.3d 1270, 1287 (11th Cir. 2017) (quoting United States v. Abbell, 271 F.3d 1286, 1302 (11th Cir. 2001)). See also, e.g., United States v. Thomas, 116 F.3d 606, 616–17 & n.10 (2d Cir. 1997); United States v. Fattah, 902 F.3d 197, 234 (3d Cir. 2018); United States v. Vega, 72 F.3d 507, 512 (7th Cir. 1995). In capital cases, a venireperson's refusal to perform "his duties as a juror in accordance with his instructions" is among the most common grounds for discharge. Sampson I, 486 F.3d at 39. A trial judge cannot trust that a juror incapable of obeying straightforward instructions will follow the more complex legal instructions in the capital jury charges to come. The trial judge in Vega stated the obvious: "He has in fact not obeyed fairly elementary instructions, and I am not confident in his ability to obey the more important ones that I'm going to give." 72 F.3d at 512. Put concretely, as one of his Facebook friends did: "Since when does Mike Neal care about rules?" 25.A.11537.

A juror's failure to acknowledge misconduct when questioned warrants disqualification twice over. See United States v. McGill, 815 F.3d 846, 873 (D.C. Cir. 2016) (per curiam) (affirming disqualification of juror who "not only violated the court's instruction" against "removing notes from the jury room," but

"compounded his misconduct by also giving false testimony about the incident under oath"); United States v. Vartanian, 476 F.3d 1095, 1098–99 (9th Cir. 2007) (affirming disqualification of juror who spoke to defendant's family, defense counsel, and defendant himself "in violation of the court's instructions," then "when questioned, . . . had not been forthcoming about all of her contacts").

Either Juror 138's misconduct or his dishonesty, standing alone, would have warranted excusal for cause. Together, they commanded that course. Juror 138 disobeyed a pellucid Court order—indeed, he disobeyed the single most common, and the simplest, instruction jurors receive, within hours of receiving it. The District Court instructed prospective jurors that they could "tell others that you may be a juror in the case," and could "discuss the schedule with your family and employer," but "not to discuss anything else, or allow anyone else to discuss with you anything else. . . ." 1.A.182. The Court mentioned Facebook by name: "[Y]ou must not communicate about this case or allow anyone to communicate about it with you by . . . social media, such as . . . Facebook." Id. at 183. Juror 138 disobeyed those orders at the first opportunity. In a Facebook post, he revealed not just that he might serve as "a juror in the case." He described the jury selection process in detail—not just to his "family and employer," but to the general public—and his reaction to being in proximity to Tsarnaev: "Shud be crazy he was legit 10 feet infront of me with his 5 or 6 team of lawyers." 25.A.11537.

By initiating, then participating in, the discussion about jury selection, he not only "allow[ed]" but solicited others to "communicate about this case" with him, with the result that his Facebook friends exposed him to extrinsic prejudicial opinions about the case. Immediate disobedience of that instruction justifies dismissal.

Truthful disclosure of his Facebook friends' comments would have supplied evidence that Juror 138 harbored actual bias against Tsarnaev, or at least prompted more questioning. In response to the juror's initial Facebook post, one friend commented: "If you're really on jury duty, this guys got no shot in hell." And another predicted: "Theyre gonna take one look at you and tell you to beat it." 25.A.11537. Those statements assert partiality and suggest obvious follow-up.

Even if it did not dismiss him outright, the Court would have been obliged to conduct further voir dire on Juror 138's exposure to the prejudicial opinions of his friends. One thought it "awesome!!!" that the juror might "get picked for the marathon bomber trial." Id. And another encouraged him to "[p]lay the part," sit on the jury, and "send" Tsarnaev "to jail where he will be taken care of." Id. "A trial court has an unflagging duty adequately to probe a nonfrivolous claim of jury taint," United States v. Paniagua-Ramos, 251 F.3d 242, 250 (1st Cir. 2001), and a friend's encouragement to lie one's way onto a capital jury in order to punish the defendant no doubt qualifies. "[U]nsequestered jurors usually have frequent communication outside the courtroom with persons not connected with the case.

In those instances where it is shown that there was a communication about the case, the communication would be deemed prejudicial unless shown to be harmless." United States v. O'Brien, 972 F.2d 12, 14 (1st Cir. 1992). Confronted with concrete, undisputed evidence that a juror's friend has urged the juror to manipulate the judicial process in order to inflict harm on a defendant, a district judge cannot turn a blind eye. But the Court here did just that, creating an intolerable risk that Juror 138 followed his friend's counsel: he "[p]lay[ed] the part" to "get on the jury" and send Tsarnaev "to jail where he will be taken care of." 25.A.11537.

c. The District Court's ruling merits no deference.

The Court rejected Tsarnaev's cause challenges as "speculative," concluding that the defense had identified only "collateral matters" that did not demonstrate "actual bias in this case." Add.322. That perfunctory ruling, made without any investigation of the defense's well-substantiated showings of dishonesty, disobedience, and bias, deserves no deference.

Abuse of discretion review only applies "once the trial judge has made an appropriate inquiry" into allegations of misconduct and bias. Ramirez-Rivera, 800 F.3d at 38. See also Marti-Lon, 524 F.3d at 300; United States v. Tejeda, 481 F.3d 44, 52 (1st Cir. 2007). This Court defers to a district judge "[s]o long as [he] erects, and employs, a suitable framework for investigating the allegation" of bias

"and gauging its effects, and thereafter spells out his findings with adequate specificity to permit informed appellate review." United States v. Boylan, 898 F.2d 230, 258 (1st Cir. 1990). Here, despite Tsarnaev's powerful showing that both jurors lied, concealing evidence of actual bias and exposure to extraneous prejudicial opinions, the Court undertook no inquiry and made no specific findings at all, rendering deferential review inappropriate.

In any case, the Court's denial of all of the defense's cause challenges rested on multiple legal errors, resulting in an abuse of discretion. See Koon v. United States, 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law."). First, as argued above (ante §§ II.B.2.a and II.B.2.b), the Court ignored factors essential to the inquiry into bias. In particular, as French holds, once Juror 286 gave inaccurate answers to questions about her social media posts and her experience during the manhunt, the Court was incapable, as a matter of law, of determining that she was impartial without knowing more. Recall that in French, a juror failed to acknowledge her son's prior convictions for drug-related offenses in response to questions soliciting this information. 904 F.3d at 115. The district judge concluded that the defendants had not shown bias, in part, because the judge "did not know 'exactly what [the juror] was thinking'" when she answered these voir dire questions inaccurately. Id. at 116. This Court explained the mistake: "[W]e do not see how a court can say

whether the juror in this instance was unduly biased without knowing why she answered as she did. For this reason, the ultimate inquiry under [Sampson II] requires that the court consider 'the reason behind the juror's dishonesty.'" Id. at 118 (quoting 724 F.3d at 165–66).

Likewise, the District Court here ignored the "similarity" between Juror 286's experience during the lockdown and "important facts presented at trial," her "interpersonal relationships" with her sons, and the "scope and severity" of both jurors' dishonesty. Sampson II, 724 F.3d at 166. Sampson II said, in no uncertain terms, that "the cumulative effect" of these factors "must . . . be considered." Id. And by concluding that none of the facts set forth above "suggest a bias that would be harmful to jury impartiality," Add.322, the Court neglected that "juror dishonesty, by itself . . . can be a powerful indicator of bias." Id. at 167. See also, e.g., Clark, 289 U.S. at 10; Boney, 977 F.2d at 634; Burton, 948 F.2d at 1159; Colombo, 869 F.2d at 151; Perkins, 748 F.2d at 1532.

In addition, the Court's generalized, three-sentence ruling, whose reasoning pertained to other jurors but not to Jurors 286 or 138, depended on a clearly erroneous review of the record. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling . . . on a clearly erroneous assessment of the evidence."). Tsarnaev established Juror 286's bias not through "speculative" claims, but concrete proof of

her own words and experiences. Her tweets and retweets were not the statements of "people close to" her, nor did they concern "collateral matters." Juror 286 herself grieved, suffered, and celebrated with her fellow Bostonians, mourning the victims, thanking the police officers who would become government trial witnesses, and reviling Tsarnaev. She herself was "locked down" in Dorchester with her family. Most of all, the Court was flat wrong to say that Juror 286's public denunciation of a Tsarnaev as a "piece of garbage" did not "suggest a bias that would be harmful to jury impartiality." What else could those rancorous words have suggested?

The Court's treatment of Juror 138 suffered similar defects. The Court did not determine why the juror had given dishonest responses. See French, 904 F.3d at 118. It was Juror 138, not the "people close to" him, who disobeyed the Court's instructions by participating in a Facebook thread discussing this trial, then falsely denying that he had. Moreover, the question whether any of his Facebook friends were "commenting about this trial" was far from "collateral." Whether a venireperson has heard from his friends opinions about the case in which he may sit in judgment has great bearing on a court's gauge of impartiality. That is why the questionnaire asked: "[W]hat kinds of things . . . did others say to you . . . regarding your possible jury service in this case?" Add.524. This Court's precedents confirm the importance of the inquiry. E.g., O'Brien, 972 F.2d at 14.

And a case such as this, where a crime victimizes and unites an entire community, presents an acute risk that a juror will succumb to public pressure.

Granted, both jurors asserted an ability to remain impartial. But "a juror's representations regarding her ability to perform fairly and impartially are not dispositive." United States v. Barone, 114 F.3d 1284, 1307 (1st Cir. 1997). That principle is doubly true where the juror has demonstrated a lack of candor in response to other questions, and where, as here, the record showed "pervasive, overpowering animus against" Tsarnaev. United States v. McNeill, 728 F.2d 5, 10 (1st Cir. 1984). Each instance of misconduct warranted disqualification.

Because the Court's erroneous rulings resulted in the seating of jurors who should have been dismissed for cause, this Court should vacate Tsarnaev's convictions. See French, 904 F.3d at 120 ("The presence of a juror whose revealed biases would require striking the juror for cause in a criminal case is structural error that, if preserved, requires vacatur."). In the alternative, as set forth in connection with Tsarnaev's venue claim (§ I.D), in light of the Eighth Amendment's special requirement of a reliable penalty-phase determination in a capital case, this Court should vacate Tsarnaev's death sentences. See Sampson II, 724 F.3d at 163 ("If even a single biased juror participates in the imposition of the death sentence, the sentence is infirm and cannot be executed.").

3. At a minimum, Tsarnaev is entitled to remand.

At a bare minimum, however, the District Court's complete failure to investigate Tsarnaev's documented showing of the jurors' dishonesty, misconduct, bias, and exposure to extraneous prejudicial opinions necessitates remand. As this Court has many times held, once a defendant makes a "colorable or plausible" claim of juror misconduct, "an 'unflagging duty' falls to the district court to investigate the claim." French, 904 F.3d at 117 (quoting Zimny, 846 F.3d at 464). See also, e.g., Zimny, 846 F.3d at 464; United States v. Mikutowicz, 365 F.3d 65, 74 (1st Cir. 2004); United States v. Rogers, 121 F.3d 12, 17 (1st Cir. 1997); Meader, 118 F.3d at 880; Boylan, 898 F.2d at 258; Neron, 841 F.2d at 1201. The showing necessary to trigger the duty to investigate is modest. "[A] claim of bias or misconduct on the part of a juror need 'satisfy a rather low threshold of significance' to ignite a due process requirement of adequate inquiry." Neron, 841 F.2d at 1202 n.6 (quoting Neron v. Clemons, 662 F. Supp. 854, 862 (D. Me. 1987)). The showing need only be "colorable or plausible." French, 904 F.3d at 117 (quoting Zimny, 846 F.3d at 464). Thus, "[w]hen a non-frivolous suggestion is made that a jury may be biased . . . , the district court must undertake an adequate inquiry." United States v. Corbin, 590 F.2d 398, 400 (1st Cir. 1979).

To be sure, a district court has "broad discretion to determine the type of investigation which must be mounted." Boylan, 898 F.2d at 258.

"Notwithstanding this broad discretion, however, a district court 'judge does not have discretion to refuse to conduct any inquiry at all regarding the magnitude of the taint-producing event and the extent of the resulting prejudice' if confronted with a colorable claim of juror misconduct." Zimny, 846 F.3d at 465 (quoting Lara-Ramirez, 519 F.3d at 87). Accordingly, this Court has several times reversed convictions for inadequate inquiry into juror misconduct or bias. E.g., United States v. Bristol-Martir, 570 F.3d 29, 42–44 (1st Cir. 2009); United States v. Gaston-Brito, 64 F.3d 11, 12–14 (1st Cir. 1995); United States v. Rhodes, 556 F.2d 599, 601–02 (1st Cir. 1977). In other cases, this Court has instead elected to remand for further evidentiary development. E.g., French, 904 F.3d at 120; Zimny, 846 F.3d at 470–72.

This Court has articulated the above principles in the context of mid- or post-trial allegations of jury misconduct, a juncture at which countervailing considerations—in particular, finality and the "concern for the sanctity of jury deliberations," Lara-Ramirez, 519 F.3d at 87—might counsel against prying. But Tsarnaev's position is stronger because investigating misconduct that comes to light during voir dire does not implicate those considerations. Nor does asking jurors about social media posts that they themselves have broadcast to the world invade their privacy. The "unflagging duty" to probe allegations of bias or improper influence, Paniagua-Ramos, 251 F.3d at 250, reaches its zenith during the

jury selection process, when pointed questions are par for the course, and the competing values of finality and jury secrecy are absent.

Here, Tsarnaev more than carried his "low" burden of making a "colorable," "plausible," and "non-frivolous" showing that Jurors 286 and 138 engaged in misconduct and harbored bias against him. He tendered "clear, strong evidence"—the jurors' own words, in their social media posts—"that . . . specific, nonspeculative impropriet[ies] occurred that could have been highly prejudicial" to him. Zimny, 846 F.3d at 458. Tsarnaev showed that both jurors answered straightforward voir dire questions dishonestly. He demonstrated that Juror 286 had falsely denied having expressed contempt for him or having endured the traumatic experience of sheltering in place. And Tsarnaev established that Juror 138 had falsely denied disobeying the Court's orders or having been exposed to an extraneous prejudicial influence—the Facebook friend who urged him to "[p]lay the part," serve on the jury, and send Tsarnaev "to jail where he will be taken care of." 25.A.11537. This "factual information fairly establish[ed]" that both jurors "likely gave . . . inaccurate answer[s]," that the inaccuracies were "quite likely . . . knowing," and that correct answers "may well have been quite relevant to assessing" partiality. French, 904 F.3d at 117. And these allegations more than cleared the low bar set by this Court's precedents. Thus, even if the District Court's contrary ruling was plausible too, further investigation is still necessary.

Tsarnaev "need not" "render contrary conclusions implausible." Id. Rather, "a court-supervised investigation aimed at confirming and then exploring further the apparent dishonesty [is] called for." Id.

Instead of discharging its "unflagging duty" of inquiry, the District Court below did nothing. Nor would inquiry have cost much time or effort. See Bristol-Martir, 570 F.3d at 43 (reversing conviction for inadequate inquiry, where necessary questioning "would not have been burdensome"). The Court denied the defense's cause challenges on the morning of March 3, 2015. Add.322. Because the parties were to exercise their peremptory strikes that day, all of the provisionally qualified jurors, including Jurors 286 and 138, were present in the courthouse. 9.A.3920. The District Court could have probed Tsarnaev's claims with a handful of questions. Juror 286 could have been shown her tweets and asked to confirm that she was the author, as other venirepersons were. E.g., 8.A.3561–67. Instead of indulging the government's conjectures, the Court could have learned, from the source, why she failed to disclose these posts, why she denied having sheltered in place, and what effect that experience would have on her impartiality. Juror 138 could have been presented with his Facebook posts and asked why he posted about the jury selection process in derogation of the Court's order. And he could have been tested on the effect, if any, of his friend's comment urging him to send Tsarnaev to prison to be "taken care of," and why he had not

revealed that comment when questioned. Instead, the District Court backhanded Tsarnaev's claims as "speculative" and "collateral" and took no steps to inquire whatsoever. That inaction stood in direct conflict with this Court's admonition that it is a district judge's "obligation to develop the relevant facts on the record, not merely presume them." Gaston-Brito, 64 F.3d at 13. To correct that Court's error, remand is required.

4. The defense's challenges were timely.

The District Court's timeliness ruling poses no obstacle to relief. Without giving individualized attention to either of the defense's cause challenges, the Court deemed both of them "late," explaining that "the time to raise the issues was in the course of" the voir dire "process and not thereafter." Add.322. The grounds for these motions, the Court said, "could have been discovered earlier." Id. That ruling was an abuse of discretion. The Court made unrealistic assumptions about defense counsel's capacity to scour the social media profiles of a 1,373-person venire. Those assumptions stood in legal conflict with Williams v. Taylor, 529 U.S. 420, 442–43 (2000), and ignored the extraordinary demands on defense counsel's attention at the time—including the ongoing jury selection process, discovery review, litigation of pre-trial motions, and trial preparation. The Court also disregarded the jurors' own false assurances that they had not commented online about the case. Finally, the defense made both motions days before the

jurors were finally qualified or the Court swore the jury, in ample time for corrective action.

a. The defense acted with diligence.

The defense represented that the motions to strike Jurors 286 and 138 were "filed within days of defense counsel learning of the new information." 25.A.11553. The government did not dispute that representation. Indeed, the government acknowledged that reconsideration of a juror's provisional qualification would be appropriate, even after voir dire examination, if "there is new information brought to the Court's attention that was not available the first time around." 3.A.1126. [redacted] The District Court committed legal and factual error by embracing that assertion.

At the threshold, a unanimous Supreme Court has rejected the proposition that diligence requires defense counsel to investigate public records for all venirepersons. Williams, 529 U.S. at 443. There, a federal habeas petitioner sought an evidentiary hearing on the claim that a juror had failed to disclose, in voir dire, that she had been married to a deputy sheriff who testified for the prosecution, and that one of the prosecutors had represented her in the divorce. Id. at 440–41. The Fourth Circuit had held that the petitioner had not demonstrated

diligence in developing the claim in state habeas proceedings, so that 28 U.S.C. § 2254(e)(2) barred the hearing, because "'the documents supporting [the petitioner's] . . . claim'"—namely, the records of her marriage and divorce—"'have been a matter of public record since [the juror's] divorce became final.'" Id. at 443 (quoting Williams v. Taylor, 189 F.3d 421, 426 (4th Cir. 1999)). The Supreme Court rejected that conclusion: "We should be surprised, to say the least, if a district court familiar with the standards of trial practice were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror." Id. Williams applies *a fortiori* here. State habeas counsel in Williams had only 12 trial jurors to investigate, and 120 days to conduct the investigation. Id. at 443–44. Tsarnaev's trial counsel, in contrast, had 1,373 prospective jurors to investigate, and between 18 days (in Juror 138's case) and 37 (in Juror 286's) to do so, to say nothing of the ordinary duties attendant to guilt- and penalty-phase preparation.

Counsel's ability to investigate Juror 138's Facebook activity arose on January 5, 2015, when the juror made and read the posts. See 25.A.11537. During the 18 days between that date and January 23, when Juror 138 appeared for voir dire, the defense, in addition to the ordinary tasks attendant to trial preparation (locating and interviewing far-flung witnesses, reviewing evidence, preparing examinations):

- appeared in court for seven days of jury selection proceedings and two status conferences; 1.A.201, 215, 230, 245; 20.A.9476, 9492; 1.A.260; 2.A.460, 637, 844; 3.A.964;

- reviewed the 28-page, 101-question juror questionnaires completed by all 1,373 prospective jurors, 137 of whom preceded Juror 138 in the queue, identified and discussed cause challenges with the government, and prepared follow-up voir dire questions; DE.934; DE.942; DE.948; DE.951; DE.956; DE.961; DE.966; DE.968; DE.979;

- conducted oral voir dire examination of 72 prospective jurors;

- prepared and filed 11 substantive motions, motions in limine, and replies (including Tsarnaev's third motion to change venue); DE.918–1; DE.924–1; DE.925–1; DE.933; DE.940–1; DE.941–1; DE.953; DE.974; 25.A.11450–51; and

- received, organized, and reviewed two discovery productions. 25.A.11626.

Counsel's ability to investigate Juror 286's Twitter activity arose on December 29, 2014, when the defense received a list of the venirepersons pursuant to 18 U.S.C. § 3432. See DE.839, 840. During the 37 days between that date and February 4, 2015, when Juror 286 appeared for voir dire, the defense, *in addition to the tasks listed above*:

- appeared in court for five days of jury selection proceedings and two status conferences; Add.302, 317; 1.A.172, 186; 3.A.1132; 4.A.1348, 1577, 1712;

- continued to review the juror questionnaires, 285 of which were completed by jurors ahead of Juror 286 in the queue, identify and discuss cause challenges with the government, and prepare follow-up voir dire questions;

- conducted oral voir dire examination of 41 jurors;

- prepared and filed 15 substantive motions, motions in limine, notices, replies, and memoranda (several of which pertained to complex expert testimony); DE.858; DE.859; DE.860; DE.864; DE.865; DE.871; DE.872–1; DE.880; DE.884–1; DE.886–1; DE.891–1; DE.892–1; DE.984; DE.990–1; DE.994–1; DE.996–2; DE.1003; and

- received, organized, and reviewed four discovery productions, as well as hundreds of trial exhibits. 25.A.11626.

The District Court's belief that defense counsel, in addition to these activities and trial preparation, should have found and reviewed the contents of every social media account maintained by every one of the 1,373 venirepersons was fanciful.

Worse, the jurors' inaccurate and misleading questionnaire responses lulled counsel into believing that further investigation of their social media accounts would bear no fruit. See Williams, 529 U.S. at 443 ("Because of [the juror] and [the prosecutor's] silence, there was no basis for an investigation into [the juror's] marriage history."); French, 904 F.3d at 118 (rejecting waiver argument, explaining that "taking" juror's questionnaire answer "according to its most customary meaning, there was no reason to ask any follow-up"). Both jurors reported that they had not "commented on this case . . . in an online comment or post. . . ." Add.525, 553. Juror 286 did not list Twitter in response to a question that asked her to identify any "websites" where she "post[ed] messages or opinions. . . ." Id. at 543. And she responded "N/A" to the question whether she or her family had sheltered in place. Id. at 554. Juror 286's Twitter account did not use her full name, see ante § II.A.1, and the District Court had refused the

defense's request to order jurors to provide their social media screen names. 25.A.11443; 20.A.9448–49. In light of counsel's other duties, the size of the venire, and the jurors' own assurances that there was nothing in their social media profiles to find, the defense acted with diligence.

b. Independently, the challenges were timely because they were made before the jury was sworn.

Despite these obstacles, the defense discovered the jurors' social media posts while jury selection was ongoing, and moved to strike before the District Court swore the jury. For that independent reason, the defense's challenges were timely. At the time Tsarnaev moved to strike them, both jurors were "yet unseated and not even finally qualified." Tsarnaev II, 780 F.3d at 24 n.11. The District Court acknowledged that its rulings qualifying the pair were merely "provisional." Add.321–22. On the day that Tsarnaev moved to strike, this Court confirmed that the jury "is in the process of being selected and has not been seated for trial." Tsarnaev II, 780 F.3d at 24 n.11. Thus, Tsarnaev moved to strike or for additional voir dire before either was finally qualified or seated. Under the most straightforward application of the contemporaneous-objection rule—"an objection must be made known at the time that the court is making its decision to act," United States v. Walsh, 75 F.3d 1, 6 (1st Cir. 1996)—the motions were timely.

More permissively, this Court deems an objection timely, even if non-contemporaneous, if made when "the district court could have taken any necessary

corrective action." United States v. Appolon, 695 F.3d 44, 65 n.10 (1st Cir. 2012). "[C]alling a looming error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs" and "prevents sandbagging." United States v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995). Accordingly, a "stricture governing the timing of objections should not be employed woodenly, but should be applied where its application would serve the ends for which it was designed." United States v. Mandelbaum, 803 F.2d 42, 44 n.1 (1st Cir. 1986). If a timing rule is "applied blindly and without the benefit of analysis of particular fact situations before individual courts in specific cases, it will be transformed from a sound principle of judicial administration into a trap for the unwary." Id. See, e.g., United States v. Trinidad-Acosta, 773 F.3d 298, 314 (1st Cir. 2014); United States v. Azubike, 504 F.3d 30, 39 n.9 (1st Cir. 2007) (treating non-contemporaneous objections as timely).

These principles compel the conclusion that a cause challenge is timely if made, as here, before the challenged juror is sworn. At that moment, a district judge can assess the juror's qualifications—with follow-up questioning, if necessary—and, if proper, remove him from the venire before jeopardy attaches and the trial begins. And where, as here, a defendant seeks the alternative relief of further voir dire, see ante § II.A.3, his challenge seeks no improper strategic advantage. Consistent with that rule, this Court has found waiver only where a

defendant knowingly fails to challenge a juror "during voir dire." McNeil, 728 F.2d at 10. That is, a defendant waives a for-cause objection only "when the objection is based on facts that could have, and should have, been pressed at a time when the district court could have acted on the challenge." United States v. Cepeda Penes, 577 F.2d 754, 759 (1st Cir. 1978). And in cases of juror bias, a still more forgiving rule governs. "[E]ven after the jury had been sworn, it was not too late to challenge a juror for bias." Arizona v. Washington, 434 U.S. 497, 516 n.36 (1978) (citing United States v. Morris, 26 F. Cas. 1323, 1327–28 (C.C. Mass. 1851) (No. 15,815) (Curtis, J.)). See also, e.g., Marti-Lon, 524 F.3d 295 at 300 (dismissing jury for partiality during trial); Barone, 114 F.3d at 1307–08 (same; during deliberations).

Here, Tsarnaev challenged both jurors for bias days before the parties exercised their peremptory challenges or the District Court swore the jury. The Court thus had ample time to take "corrective action," Appolon, 695 F.3d at 65 n.10, whether striking the jurors outright, or, at a minimum, asking them additional voir dire questions. The Court's qualification of the two was only "provisional." Add.321–22. See Tsarnaev II, 780 F.3d at 24 n.11. And both the Court and the government had acknowledged that some circumstances—for example, the availability of "new information"—warranted "reconsideration" of a juror's provisional qualification. 3.A.1126. Nothing prevented the Court from removing

Jurors 286 and 138 from the venire, or at least investigating Tsarnaev's documented allegation of partiality before the taint infected the trial. Nor was there any danger, as the government argued, that Tsarnaev was "gam[ing] the system" to prevent the prospective jurors from "explaining" their posts. As an alternative to dismissal, Tsarnaev sought further voir dire. But instead of acting, the Court did what Mandelbaum forbids: "blindly" and "woodenly" enforced a timing rule to foreclose any inquiry into why two jurors gave dishonest answers, under oath, to material voir dire questions. 803 F.2d at 44 n.1. That was a dereliction of duty.

Accordingly, this Court should reverse Tsarnaev's convictions or death sentences. In the alternative, this Court should remand for further proceedings.

III.

The District Court's Dismissal Of Juror 355 Violated The Sixth Amendment, Under *Witherspoon*, Because Voir Dire Established The Juror's Ability To Impose The Death Penalty.

Juror 355 was just the sort of juror that the Witherspoon doctrine protects: "[a] man who opposes the death penalty" but can still "make the discretionary decision entrusted to him by the State and can thus obey the oath he takes as a juror." Witherspoon, 391 U.S. at 519. On his questionnaire and during voir dire, Juror 355 several times stated, with confidence and clarity, that he disagreed with capital punishment as a policy matter but could follow the District Court's instructions and vote to impose the death penalty in a particular case if the facts and the law so warranted.

Pressed by the government for "examples" of such cases, Juror 355 explained that he would first "have to listen to the Court's instructions" and "judge the facts in front of me." Nonetheless, Juror 355 could "immediately" agree, without hearing additional evidence or instructions, that one "scenario" where the death penalty would be appropriate was for "Slobodan Milosevic," the former president of Serbia believed to be responsible for the Bosnian genocide. Juror 355 cautioned that Milosevic was just a "starting point," and that he could not "come up with" a "list" of other examples "without knowing specifics." Mischaracterizing that "starting point" as an ending point, the Court struck Juror

355 because his "zone of possibility" was limited to "genocide" and was therefore too "narrow."

That erroneous ruling merits no deference and compels reversal of Tsarnaev's death sentence. Juror 355 gave unequivocal assurances that he could listen to the evidence, follow the Court's instructions, obey his oath, and vote to impose the death penalty in an appropriate case. In concluding otherwise, the Court misunderstood Juror 355's answers and found, contrary to what Juror 355 actually said, that he would entertain the possibility of capital punishment only in cases involving genocide. That was not what the venireman said, and there was "no basis" to find otherwise. Uttecht v. Brown, 551 U.S. 1, 20 (2007).

Rulings elsewhere in the voir dire confirm the error. The Court acknowledged that asking jurors to define the "circumstances" in which they would impose (or not impose) death was a "mistake," and sustained the government's objection when the defense tried to ask that question of a pro-death penalty juror. Worse, the Court singled Juror 355 out for disfavored treatment, seating pro-death penalty jurors who did not offer any examples of cases in which they could vote for life. While the government's decision to purge the venire of dozens of other anti-death penalty jurors may have been permissible under current law, the Court's disqualification of Juror 355 went too far. Juror 355 was

competent to serve and his exclusion violated the Sixth Amendment under Witherspoon and Witt, requiring reversal of Tsarnaev's death sentences.

A. Factual and procedural background.

1. Juror 355 affirms that he "could vote to impose" the death penalty if he "believed the facts and the law in a particular case called for it."

[redacted] He had worked as a criminal defense attorney for over 22 years, the preceding 10 at the Committee for Public Counsel Services, Massachusetts's state indigent defense agency. SAdd.56–58, 60; 6.A.2442–43. His profession, Juror 355 said, would not impair his ability to be impartial, but would instead make it "a little bit easier because I look at every case about what can be proved in court, what are the facts." 6.A.2442–43. Likewise, although he had seen "a lot" of media coverage about the case, Juror 355 assured the Court that he could "wait until I see what the actual facts are before making up my mind," just as he did "in my own cases," "based on my training and experience." SAdd.66; 6.A.2445. Thus, Juror 355 had kept an open mind about this case: he was "unsure" whether Tsarnaev was guilty or not guilty, and "unsure" whether he should or should not receive the death penalty. SAdd.66–67; 6.A.2444–45. The District Court made clear that Juror 355's job as a

criminal defense attorney played no part in the decision to dismiss him for cause. 6.A.2505.

Juror 355's views on capital punishment, however, did. On his questionnaire, Juror 355 stated his "general" "views" on the death penalty: "Since it is legal, it should be the rarest of punishments. It is much too prevalent in this country." SAdd.70. On a scale of 1 ("strongly oppose") to 10 ("strongly favor"), he ranked himself a "2." Id. Asked whether his "religious, philosophical, or spiritual beliefs" informed those views, Juror 355, [redacted] responded: "Killing people, especially gov't sponsored killing, is generally wrong. While I can imagine a scenario where facts and law call for it, it is an exceedingly rare case." SAdd.63, 72. [redacted] Despite his general views, Juror 355 confirmed that he could vote to impose the death penalty in an appropriate case. To describe his "feelings about the death penalty in a case involving someone who is proven guilty of murder," he selected the answer: "I am opposed to the death penalty but I could vote to impose it if I believed the facts and the law in a particular case called for it." SAdd.71.

During voir dire, Juror 355 adhered to that position. He opposed the death penalty, but had confidence in his ability to follow the Court's instructions and to vote to impose death in a proper case. He had come to that view only after careful consideration and reflection. "[W]hen I found out I was going to be in this pool," he explained, "I did a lot of soul-searching, and I came to the conclusion that . . . I believe it should be in the most rarest of situations, . . . but I could foresee situations where I might consider it appropriate." 6.A.2448. Juror 355 acknowledged that he thought the death penalty poor policy: "[I]f I was asked to vote on it, I would probably vote against it because of my belief that it is overused." Id. at 2447. He pointed to "people who are on death row who are later exonerated," "how some states have higher death penalty conviction rates than others," and "the racial and economic disparity on who gets the death penalty." Id. For those reasons, Juror 355 said, "I just think it's overused." Id. But when asked if he could "envision there could be a case where you could vote in favor of the death penalty," Juror 355 responded: "After a lot of thought and soul-searching, I think I could." Id. at 2448.

Both the Court and the government then quizzed Juror 355 on his response to Question 95, which had asked: "If you found Mr. Tsarnaev guilty and you decided that the death penalty was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for the death penalty?" SAdd.72; 6.A.2448–49.

Juror 355 had answered both this question and an analogous one concerning life imprisonment (Question 96) in the same way: "I cannot possibly prejudge his guilt or potential punishment at this stage." SAdd.72–73; 6.A.2448–49. Juror 355 repeated that he could not commit to voting for either punishment before trial, before hearing the evidence or the jury charge: "Without having the facts in front of me or, frankly, the instructions from the Court, I find it very difficult to make that far of a prediction." 6.A.2449. Repeating the question, the government asked: "[C]ould you conscientiously vote for the death penalty . . . assuming that he's guilty and that you found that the death penalty was appropriate." Id. at 2450. Repeating his answer, Juror 355 resisted the assumption:

> I guess part of my problem is that I'm disturbed that I have to assume his guilt at this stage without hearing anything and to prejudge the particular case I'm asked to come and judge. I don't know that I really want to exercise that fantasy. And I'm sorry if I'm being difficult about it.

Id.

The Court recognized that Juror 355's "difficulty" in answering "was that the question was phrased in terms of this case," and so restated the question in general language: "If you were sitting on . . . a capital case, and the defendant is found guilty of a capital crime, and you concluded that for that defendant and for that crime, the death penalty was an appropriate punishment, could you conscientiously vote to impose it in that case?" Id. at 2451. Consistent with all of

his previous answers, Juror 355 said that he could: "If, after hearing the Court's instructions, and if I believed . . . it fit into one of those rare cases where I believed the death penalty should be imposed, having understood the law as given to me, then yes, I could vote to impose the death penalty." Id.

With Juror 355's capacity to vote for the death penalty established, the government changed tacks, asking: "Do you have a collection of the category of cases you're thinking of? Do you have some examples." Id. As discussed below, the Court later described this sort of question as a "mistake," and the government objected when the defense posed it to a pro-death penalty juror. See post § III.B.3. In any case, Juror 355 responded: "I don't really." Id. Persisting, the government tried the question a different way: "[C]an you imagine any case that you would think is appropriate for the death penalty?" Id. Juror 355, [redacted] responded: "I think Slobodan Milosevic was close, if not a prime example." 6.A.2451. "Genocide," Juror 355 said, was "a good starting point." Id. "Anything other than genocide?" the government asked. Id. Juror 355 replied:

> I cannot say that I have sat and thought about a list of particular crimes or severity of crimes where I would have a checklist of what I thought was appropriate for the death penalty or not. And having never worked on a death penalty case, I've never even read an instruction about what, at least legally, is considered for the death penalty or not.

> I mean, everybody uses the example if somebody hurts your child, you know, a child, that's sort of a prime example of where people can go. But I like to think that we all take a step back and that's why we have juries decide rather than letting our emotions take over.
>
> . . . I guess that's my answer. I have not come up with a list of cases where I think it would be appropriate. . . . I'd have to listen to the Court's instructions, I would have to judge the facts in front of me and determine whether or not that satisfied me.

Id. at 2451–52. Asked again by the prosecutor to "imagine a scenario where facts and law call for" the death penalty, Juror 355 repeated: "The Milosevic example is the one I usually rest on when I say I can immediately come up with a scenario. Whether or not there are other scenarios, again, without knowing specifics, I find it difficult to answer the question." Id. at 2453.

In response to defense questions, Juror 355 confirmed that he could "go through [the] process of listening to your fellow jurors and weighing aggravation and mitigation," and "could "deliberate and debate the pros and cons of imposing a sentence of death or life." 6.A.2459. Finally, defense counsel asked: "[I]f in your conscience, your individual conscience, you decided that the death penalty was an appropriate sentence for that given set of facts, the question is could you then actually vote to impose it?" Juror 355 responded: "I think I could." Asked if he was "pretty confident of that answer," he responded: "Yes." Id.

2. The District Court determines, mistakenly, that Juror 355's "zone of possibility" is limited to "genocide" and excuses him for cause.

The government moved to strike Juror 355 on two grounds: bias, based on his work as a criminal defense attorney; and substantial impairment in his ability to consider the death penalty under Witt. 6.A.2500. As to the latter, the government contended that Juror 355 was incompetent because "as he sat here today the only time that he said he could think that he could impose the death penalty would be in a case of genocide." Id. at 2502. The defense opposed the motion, arguing that Juror 355 "tried to tell us that he was not comfortable with the death penalty but he could impose it." Id. at 2504. Juror 355 had mentioned "genocide" when "[h]e was hit with the question, 'Well, tell us a time that you could,'" but "when he stepped back and talked about whether he could weigh aggravation and mitigation and come to a conclusion with other jurors and make a decision in a given set of facts, he said he could do it." Id.

The District Court excused Juror 355, but only on Witt grounds:

> I don't approach this at all on a categorical way. Everybody is different, and the value of this process is you can sit here five feet away and you can sense the being. And . . . my sense of him is different from my sense of the last juror that we just qualified who I thought is open to the possibility of the death penalty in a way that I do not think [Juror 355] is.
>
> I agree that his . . . zone of possibility is so narrow, I think you would have to regard it as substantially impaired, this is the genocide issue . . . . [T]he other juror's examples were more possible, I guess,

> in the world that we'll be operating in. So I think he's not qualified under the death penalty question.
>
> I would not exclude him just because of his . . . criminal defense work. . . . [H]is career as a criminal defense lawyer wouldn't by itself be a factor. I think it may explain where his alignment is on these issues, but ultimately, it was his answers to the questions and my sense of it.
>
> He was a learned witness, in a sense. He knew what we were talking about where others don't necessarily, and I guess that could go in either direction. But in the end, it was not convincing to me that he was going to be truly open in the way that would be necessary.

Id. at 2505–06.

B. Juror 355 was capable of voting to impose the death penalty and the District Court's contrary determination merits no deference.

1. The Sixth Amendment forbids exclusion of a juror who is opposed to the death penalty but could nonetheless impose it.

Under the Sixth Amendment, "a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." Brown, 551 U.S. at 9. To balance that right against the government's "interest in having jurors who are able to apply capital punishment within the framework" that the FDPA prescribes, id., a district court "appropriately may excuse a juror for his views on capital punishment if those views 'would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Sampson I, 486 F.3d at 39 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). "As

with any other trial situation where an adversary wishes to exclude a juror because of bias, … it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." Witt, 469 U.S. at 423.

Principled opposition to the death penalty does not, by itself, constitute substantial impairment. "It cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the imposition of the death penalty . . . thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him." Witherspoon, 391 U.S. at 515 n.9. To the contrary, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." Lockhart v. McCree, 476 U.S. 162, 176 (1986). Consequently, a district court's authority to excuse prospective jurors on Witt grounds "does not extend beyond" removing those who would frustrate administration of the death penalty "'by not following their oaths.'" Gray v. Mississippi, 481 U.S. 648, 658 (1987) (quoting Witt, 469 U.S. at 423). "[I]f prospective jurors are barred from jury service because of their views on capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." Adams, 448 U.S. at 47–48 (quoting Witherspoon, 391 U.S. at 522 n.21). Thus, the erroneous Witt exclusion of a single juror requires vacatur of the

death sentence. Gray, 481 U.S. at 659–61; Davis v. Georgia, 429 U.S. 122, 122–23 (1976) (per curiam).

This Court reviews the dismissal of a prospective juror on Witt grounds for abuse of discretion. Sampson I, 486 F.3d at 39. However, "[t]he need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." Brown, 551 U.S. at 20. Likewise, "deference is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law, and are internally inconsistent." Gray, 481 U.S. at 661 n.10.

2. Juror 355 was capable of voting to impose the death penalty.

The District Court's dismissal of Juror 355 ran afoul of the Witt standard because Juror 355 stated several times, with unmistakable clarity, that he could follow the Court's instructions, obey his oath, and vote to impose the death penalty in an appropriate case. An educated professional, Juror 355 testified that he reached that belief only after "a lot of thought and soul-searching." 6.A.2448. And he maintained that consistent belief throughout the jury selection process. On his questionnaire, he averred: "I am opposed to the death penalty but I could vote to impose it if I believed that the facts and the law in a particular case called for it." SAdd.71. During voir dire, he explained, with no equivocation, that he could

conscientiously vote for death: "If, after hearing the Court's instructions, and if I believed . . . it fit into one of those rare cases where I believed the death penalty should be imposed, having understood the law as given to me, then, yes, I could vote to impose the death penalty." 6.A.2451. He was "confident" in his ability to do so. Id. at 2459.

Juror 355 met the applicable test. He stated "clearly" that he was "willing to temporarily set aside" his own beliefs "in deference to the rule of law." Lockhart, 476 U.S. at 176. His responses fell well in line with—indeed, were more strident than—those held satisfactory in other cases. See, e.g., Gray, 481 U.S. at 653 & n.5 ("I think I could."); Gall v. Parker, 231 F.3d 265, 331 (6th Cir. 2000) (juror "informed counsel and the judge that he would possibly or 'very possibly' feel the death penalty was appropriate in certain factual scenarios" and "also told the judge that he believed he could and would follow the law as instructed"); United States v. Chanthadara, 230 F.3d 1237, 1271 (10th Cir. 2000) (FDPA case) ("I believe the death penalty is proper in some cases . . . ."). By contrast, Juror 355's repeated assurances that he could consider and impose the death penalty lie far afield from responses held disqualifying in Sampson I. E.g., 486 F.3d at 40 ("I can't think of what the government would prove that would make me change my opinion on the death penalty."); id. (juror "did not "really believe that the death penalty was the appropriate sentence for anybody"); id. (juror "stated . . . that he did not know

whether he could perform the duties required of a juror in a capital case" and "would have trouble following the law if it differed from his personal views"). Juror 355's consistent, thoughtful, and unequivocal answers demonstrated his capacity to follow the Court's instructions and obey his oath by considering both penalties. Under controlling precedent, he was competent to serve.

3. The District Court's disqualification ruling merits no deference.

"[A] reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment." Brown, 551 U.S. at 20. As explained above, Juror 355 gave confident, consistent, and unequivocal assurances that he could consider the death penalty and vote to impose it if warranted. The Court's contrary conclusion rested on a clear misinterpretation of Juror 355's voir dire responses, and the mistaken view that Juror 355 could vote death only in cases of "genocide"—an example the venireman proffered only as a "starting point."[104]

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[104] In moving to strike Juror 355, the government cited cases that, it said, held that "if that is the only position that you're espousing, that that is the only time you can think of the use of the death penalty, that that is a reason to excuse a juror." 6.A.2502 (citing Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995); United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007)). In fact, both cases are readily distinguishable because in both, the excused jurors, unlike Juror 355, had expressed unequivocal opposition to the death penalty. Antwine, 54 F.3d at 1369 (venireperson "initially expressed unequivocal opposition to imposing the death penalty in the case before [him]," and "initial opposition" only "wavered when defense counsel asked if he could consider the death penalty against someone like Adolf Hitler"); Mitchell, 502 F.3d at 955 (venireperson indicated, on

Recall that the confusion in this case arose when the government pressed Juror 355 for "some examples" or "a collection of the category of cases" where he could vote to impose the death penalty. See 6.A.2451. As the District Court itself acknowledged later in the voir dire, this question is unhelpful: "I think it's a mistake to try to get people to try to characterize the circumstances that they think would justify it or not." 9.A.3889. When Juror 355 named Milosevic, both the government and the Court misunderstood the reference to mean that Juror 355 would vote to impose the death penalty only in cases involving "genocide." 6.A.2451. The record provides no support for that interpretation. Juror 355 proposed Milosevic in response to the government's question whether he could "imagine any case that you would think is appropriate for the death penalty," and emphasized that genocide was a "starting point." Id. He clarified that "[t]he Milosevic example is usually the one I rest on when I say I can immediately come up with a scenario." Id. at 2453. He had not "come up with" the further "list of cases" sought by the government not because no such cases existed, but because "I'd have to listen to the Court's instructions," "judge the facts in front of me," and "determine whether or not that satisfied me." Id. at 2452.

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questionnaire, that she "could never, under any circumstances, return a verdict which recommended a sentence of death" and "would not follow the instructions given by the court in deciding whether a defendant was guilty or not guilty if a death sentence would result").

Juror 355 therefore made his position clear: he was willing to consider death as an option. He could cite one egregious case where he could "immediately" agree, without knowing more, that death was a proper punishment. But in the mine run of cases, he refused to commit "without knowing specifics." Id. at 2453. That was no ground for disqualification. To the contrary, those answers showed that Juror 355 would be careful and conscientious. He said that genocide was a "starting point," not, as the Court believed, an ending point. In light of that unequivocal testimony, the Court's contrary conclusion—that Juror 355's "zone of possibility" was limited to cases involving "genocide" because he could adduce no other "examples" of death-appropriate cases, 6.A.2505—finds "no basis" in the record. Brown, 551 U.S. at 20.

Likewise, under Gray, "deference is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law, and are internally inconsistent." 481 U.S. at 661 n.10. Both conditions were met here. The Court's Witt ruling depended on the erroneous legal premise that Juror 355, having given one example of a death-appropriate case, had to give others. See 6.A.2505 (contrasting Juror 355 with qualified Juror 352, whose "examples" of cases where she could vote to impose the death penalty "were more possible . . . in the world that we'll be operating in").

To the contrary, no authority requires a prospective juror, as a precondition to Witt qualification, to provide "examples" of cases in which he could impose the death penalty. "[A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." Witherspoon, 391 U.S. at 522 n.21. Rather, "[t]he most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by . . . law." Id. Cases approve courts' refusal to ask prospective jurors for examples of cases where they would (or would not) vote for death. E.g., United States v. Caro, 597 F.3d 608, 613–16 (4th Cir. 2010) ("[W]hat kind of case does or does not deserve the death penalty?"); Spivey v. Head, 207 F.3d 1263, 1273 n.8 (11th Cir. 2000) ("In what type of cases do you think the death penalty would be appropriate?"); McQueen v. Scroggy, 99 F.3d 1302, 1329–30 (6th Cir. 1996) ("In what kinds of cases do you think the death penalty is warranted?").

That rule makes good sense. As even the Court accepted, it is a "mistake" to attempt to extract from jurors the circumstances in which they would, or would not, vote for the death penalty. The jury selection process, the Court observed, presents "a number of people . . . who have never really thought about this question and are now confronted with it. It's difficult for them to formulate a coherent philosophy about it on the spot." 3.A.1332. When one juror explained her failure to express any "general views" about the death penalty on her

questionnaire by confessing, "I've never been put in a position where I've had to think hard about the death penalty," the Court reassured her: "Nothing wrong with that." 4.A.1642. In particular, when this question is posed in a non-death penalty state such as Massachusetts, venirepersons will often have had little occasion to ponder the issue in the abstract. This was true of Juror 355, even though he had practiced criminal law for 22 years: "[H]aving never worked on a death penalty case, I've never even read an instruction about what, at least legally, is considered for the death penalty or not." 6.A.2452. As Juror 355 explained: "I cannot say that I have sat and thought about a list of particular crimes or severity of crimes where I would have a checklist of what I thought was appropriate for the death penalty or not." Id. at 2451–52.

The District Court also handled this issue in an "internally inconsistent" manner. Gray, 481 U.S. at 661 n.10. Specifically, the Court qualified pro-death penalty jurors, over the defense's Witt objections, without requiring those jurors to provide examples of the circumstances in which they would deem a sentence of life imprisonment appropriate. For example, Juror 260, a "7" on the questionnaire's 1 ("strongly oppose") to 10 ("strongly favor") scale, SPA.13.7107, said during voir dire that "there are crimes and times for which a death penalty is the appropriate punishment." 5.A.1928. The Court followed up: "Could you suggest what you think some of those circumstances might possibly be? Or

perhaps you could do it by exclusion. . . . [W]hat are the circumstances where it would not be appropriate?" Id. at 1931–32. The juror responded:

> [I]t's not something I've spent a lot of time on. The outline you gave of how to make the decision of aggravating and mitigating factors seems a reasonable one to me, and I would want to hear what, in fact, they had done. I would not want to make up my own rules . . . and would prefer a thought-out and time-proven framework for decision.

Id. at 1933. That is, Juror 260 could not provide "examples" of life-appropriate cases until, just like Juror 355, he heard the evidence and the Court's instructions. Yet the Court overruled the defense's Witt challenge to him. Id. at 2064. It was illogical and inequitable to grant the government's cause challenge to Juror 355 because he suggested one non-exclusive example, while denying the defense's cause challenge to Juror 260, who could muster none at all.

In this case, the government took full advantage of the law to purge the venire of people who, like most residents of Massachusetts, opposed capital punishment. The Court sustained 27 of the government's Witt challenges.[105] Then, the government used 18 of its 20 peremptory strikes on jurors who had expressed some opposition to, or uncertainty regarding, imposing the death

[105] 1.A.435–36 (Juror 10), 441–42 (Juror 23); 2.A.622–26 (Juror 42), 626–29 (Jurors 43 and 49), 825 (Juror 70); 949 (Juror 84); 3.A.1329–30 (Juror 143); 4.A.1881–82 (Juror 219); 5.A.2078–79 (Juror 288), 2250–51 (Juror 303), 2263–64 (Juror 321), 2264–65 (Juror 323), 2278–79 (Juror 337); 6.A.2500–06 (Juror 355), 2692 (Juror 386), 2700–03 (Juror 393), 2704–08 (Juror 396); 7.A.2838 (Jurors 413 and 418), 2839 (Juror 423), 2985 (Jurors 444 and 447), 3140 (Juror 481); 8.A.3349–53 (Juror 537); 9.A.3753–54 (Juror 623), 3765–67 (Juror 649).

penalty.[106] And the Court skewed the Witt challenge process by refusing the defense's repeated requests to probe whether jurors would always impose the death penalty on facts implicated here. See post § IV.A.1. This campaign crossed the line with the unlawful dismissal of Juror 355—an opponent of the death penalty, to be sure, but nonetheless competent to serve under Witt—who was singled out for differential and unfavorable treatment during the voir dire process. "In its quest for a jury capable of imposing the death penalty," the government thus "produced a

[106] 25.A.11572; see, e.g., [redacted] 3.A.1114 ("I don't like it.") (Juror 134); [redacted] 4.A.1406 ("I probably prefer the life imprisonment route. . . .") (Juror 173); [redacted] 4.A.1456 ("[L]ife imprisonment can be a fate worse than death, particularly if one is thrown in with common criminals and treated as a common criminal and forced to live the rest of their lives with people that have committed heinous acts.") (Juror 185); Id. at 1598 (asked if she could, "in a real-life situation, . . . sentence someone to death," juror responds: "I am not sure.") (Juror 204), 1648 (asked if she could "actually sentence someone to death," juror responds: "I don't know right now") and 1650 ("I want to say yes, but part of me still says I'm unsure.") (Juror 215); id. at 1750 ("[I]t's . . . my conscience, my upbringing, that none of us can take a life except for God, . . . and that's my reservation.") (Juror 243), 1798 ("I knew that there was a potential impact that the older brother had played in terms of influencing the defendant . . . .") and 1800 ("[I]f it's . . . influenced, then I was not so convinced that he should receive the death penalty.") (Juror 245); [redacted] 6.A.2470 ("[O]pposed to it.") (Juror 356); [redacted] 8.A.3197 ("[I]n an ideal world we don't have the death penalty. . . .") (Juror 517).

jury uncommonly willing to condemn a man to die." Witherspoon, 391 U.S. at 520–21.

Accordingly, this Court should reverse Tsarnaev's death sentences.

IV.

The District Court Prevented Tsarnaev From Asking Voir Dire Questions Essential to Seating Impartial Jurors Capable Of Considering A Life Sentence And Disregarding Prejudicial Publicity.

"Voir dire is a singularly important means of safeguarding the right to an impartial jury," a right "nowhere as precious as when a defendant is on trial for his life." Sampson II, 724 F.3d at 163. Here, the District Court diminished that safeguard by curtailing voir dire examination in two critical respects.

First, the Court misapplied Morgan, which holds that a capital defendant is entitled to voir dire adequate to identify those jurors who "will automatically vote for the death penalty without regard to mitigating evidence." 504 U.S. at 738. To realize that entitlement, Tsarnaev sought to ask venirepersons whether they could take into account mitigating evidence and consider a sentence of life imprisonment not just in the abstract, but in light of the specific allegations in his case: the killing of multiple victims, one of them a child, in a premeditated act of terrorism. Taking a crabbed view of Morgan, the Court precluded "life-qualifying" questions that invoked this case's facts, limiting Tsarnaev to inquiries about the jurors' general death-penalty views that shed little light on their competence to serve here. The Court qualified seven of the 12 seated jurors without asking any case-specific questions at all, and, as to two of those seven, sustained the government's objections when the defense tried to ask those questions.

Second, despite the pervasive media coverage of the bombings and their aftermath, which blanketed Boston in the 20 months between the Marathon and the start of voir dire, the Court refused Tsarnaev's request to ask prospective jurors what they had seen, read, or heard about his case. The Court so ruled even though the coverage contained information that was inadmissible (for example, details from Tsarnaev's involuntary hospital confession, and the opinions of victims that he should die) as well as inaccurate (for example, the assertion that Tsarnaev wrote "Fuck America" inside the boat where he was arrested). Instead, the Court asked only whether the venirepersons could put aside any publicity to which they had been exposed. The Court qualified 9 of the 12 seated jurors without learning anything at all about the contents of the publicity they had consumed, and again, as to 2 of those 9, sustained the government's objections when the defense attempted to elicit that information. That was legal error under both the Fifth and Sixth Amendments, and Patriarca, which mandates that in high-profile cases such as this, a district judge must elicit "the kind and degree"—that is, the contents—of each prospective juror's "exposure to the case or the parties." 402 F.2d at 318. Only by learning what they had seen about this case could the Court reliably assess whether the venirepersons could, as they professed, ignore the publicity to which they had been exposed.

Taken together, these two deficiencies resulted in a voir dire that, while protracted, was superficial, and deprived Tsarnaev of information necessary to secure his right to a competent, unbiased jury. The Morgan error requires reversal of Tsarnaev's death sentences. The Patriarca error requires reversal of his convictions, or, in the alternative, his death sentences.

A. Factual and procedural background.

1. The District Court denies the defense's repeated requests for case-specific *Morgan* voir dire.

In Morgan, the Supreme Court held that a capital defendant is entitled to ask potential jurors whether they would consider mitigating evidence and the possibility of a life sentence or whether, instead, they would "automatically vote to impose the death penalty." 504 U.S. at 723, 739. Throughout the jury selection process, the defense made numerous efforts to ensure that venirepersons could, as required by Morgan, give meaningful consideration to mitigating evidence and entertain a sentence other than death in light of the facts of this case.

Before voir dire began, the defense filed a memorandum arguing that Morgan entitled Tsarnaev to question prospective jurors about their ability to consider a life sentence not just "for *some* kinds of murder," but for the particular types of murders charged. 24.A.11307. General "life-qualifying" questions—"Could you weigh all of the aggravating and mitigating evidence and return either a death sentence or a sentence of life imprisonment, depending on the evidence

presented?"— risked "eliciting answers that obscure disqualifying bias rather than expose it." Id. at 11309. As had one judge who presided over an FDPA case, the defense noted "the phenomenon of jurors who agreed that they could 'fairly consider' both life and death sentences in the abstract, but quickly acknowledged that they could only consider one penalty in a case involving certain facts." Id. at 11310 (quoting United States v. Johnson, 366 F. Supp. 2d 822, 847 (N.D. Iowa 2005)).

For example, the defense showed, a prospective juror might profess the ability to consider either death or life imprisonment as a general matter, but believe only the former appropriate for "the murder of children," 24.A.11310 (quoting Johnson, 366 F. Supp. 2d at 847); a "knowing crime," 24.A.11311 (quoting DE.682–1, at 8 (Voir Dire Tr. 1278, United States v. Beckford, 96 Cr. 66 (REP) (E.D. Va. June 12, 1997))); or "multiple murder," 24.A.11313 (quoting William J. Bowers et al., Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes, and Premature Decision-Making, 83 Cornell L. Rev. 1476, 1504 (1998)). Thus, it was "essential to frame 'life-qualifying' questions . . . in terms of the capital crimes alleged by the government in this case," namely, the use of weapons of mass destruction and firearms in the intentional killing of multiple victims, including a child, to commit an act of terrorism. 24.A.11308–09. These circumstances reflected certain of the offenses, mental states and

aggravating factors alleged in the indictment. Add.17–18 (citing 18 U.S.C. § 2332a(a)(2) (use of a weapon of mass destruction resulting in death); Add.66 (citing 18 U.S.C. § 3591(a)(2)(A) (intentional killing)); Add.70–71 (citing 18 U.S.C. §§ 3592(c)(9) (act of terrorism), (11) (vulnerable victim), and (16) (multiple victims)).

The parties submitted a joint proposed juror questionnaire that included inquiries about the venirepersons' general views on capital punishment, among them the question, approved by Morgan, whether the venireperson "would vote for" the death penalty "in every case in which the person charged is eligible for a death sentence." 24.A.11395. The joint proposed questionnaire also asked: "If you found Mr. Tsarnaev guilty and you decided that life imprisonment without the possibility of release was the appropriate punishment for Mr. Tsarnaev, could you conscientiously vote for life imprisonment without the possibility of release?" Id. at 11397. These questions appeared on the questionnaire completed by the prospective jurors. E.g., Add.529, 531.

The defense moved to add more particular questions designed to identify those venirepersons capable of considering a sentence of life imprisonment not just in the abstract, but in light of the specific aggravating circumstances alleged here:

> State whether you agree or disagree with the following statements: The death penalty is the ONLY appropriate punishment for ANYONE who: (A) murders a child . . . ; (B) deliberately murders a police officer . . . ; (C) deliberately commits murder as an act of terrorism.

Add.432. These questions, the defense said, were necessary to "probe for a common form of bias—the belief that the death penalty should always or automatically be imposed *for certain types of murder*." Id. at 433; see also Add.311–15. The government opposed. 24.A.11406–10. In the government's view, Morgan entitled Tsarnaev to ask venirepersons only "whether 'they will always vote to impose death for conviction of a capital offense,'" not "whether they will consider a sentence less than death in face of a laundry list of potential crime elements and aggravating factors." Id. at 11406 (quoting Morgan, 504 U.S. at 735 n.9). Tsarnaev's proposals were, according to the government, "classic . . . stakeout questions, which ask the jurors to stake out a position on the death penalty before they have been instructed that there is a process that is designed to guide their discretion." Add.309.

The District Court ruled that it would not include the proposed questions on the questionnaire, but would cover those topics in voir dire:

> [F]or the calibration that we're looking for, the questionnaire is too clumsy and . . . those kinds of issues, I think, can be addressed in the voir dire. We're going to have voir dire with, I expect, just about every one of them about their death penalty answers. And I think it's probably a more finely tuned tool than a question like that on the questionnaire. . . . [I]t's an oral matter rather than a written matter.

Id. at 319.

In accord with the Court's ruling, the defense next proposed case-specific questions for oral voir dire, including:

> [I]f you found a defendant guilty beyond a reasonable doubt of using a weapon of mass destruction to carry out an intentional killing, [do] you believe that the death penalty is the only *appropriate* punishment[?]
>
> [A]ssume . . . that the government proves aggravating factors—for example that: . . . the defendant engaged in substantial planning to kill and to commit an act of terrorism[;] he intentionally killed and tried to kill multiple victims[;] [and] he killed a child. If all of that was proven beyond a reasonable doubt, would you realistically be able to consider life imprisonment as a possible punishment? Or would you *always* vote to impose the death penalty in such a case? . . .
>
> Do you believe that the death penalty is the only *appropriate* punishment for anyone who intentionally murders a police officer in the line of duty?

Id. at 454–56. The Court did not rule on that request.

On the first day of voir dire, the defense renewed its request for

> the case-specific Morgan questions that we've asked the Court to ask. Where there is proof beyond a reasonable doubt of intentional murder, weapons of mass destruction, death of three people, maiming of many others, the death of a child and the death of a police officer, is there anything that would make you sentence other than death?

Id. at 108. The Court now refused: "I'm not going to ask those kinds of . . . case-specific questions. You call them Morgan. I think they're stakeout questions." Id.

Later that day, the defense repeated its call for specific inquiry:

> [W]e're entitled to ask whether under the charges that have been brought in this case the juror could still consider life imprisonment. . . . [F]or someone who has been charged with a terrorist crime, that is, the use of a weapon of mass destruction, . . . could the juror ever

impose life imprisonment rather than the death penalty in that case?

Id. at 110–11. Again, the Court declined: "[T]he kinds of categorical questions are really questions about the case and fall into the category of stakeout. I think it has to be a more general level to be consistent with the principles of [Morgan and Witt]. . . . I will continue to use the more general level with respect to those." Id. at 116.

Moreover, the Court elaborated, the defense's questions were superfluous:

> [T]he jurors know that this is about a bombing, and they know that there are three people who were killed in the bombing. So in light of what we've also heard, what people understand from the media about the case, . . . they have those specifics already in their minds as they would answer the questions about the ability to meaningfully consider life imprisonment in this case.

Id. at 120–21. In particular, the Court pointed to its own "preliminary instructions," which had advised the venire that Tsarnaev was "charged in connection with events that occurred near the finish line of the Boston Marathon . . . that resulted in the deaths of three people," and "also charged with the death of an MIT police officer." Id.; 1.A.175. "[B]y telling them what the offenses were in general," the Court said, the venirepersons "have those specifics, and I think that's sufficient under the circumstances." Add.121.[107]

[107] The juror questionnaire also contained a factual summary that recounted, in part: "On Monday, April 15, 2013, two bombs exploded on Boylston Street in Boston near the Boston Marathon finish line. The explosions killed Krystle Marie Campbell (29), Lingzi Lu (23), and Martin Richard (8), and injured hundreds of

As voir dire continued, the defense made additional requests for case-specific Morgan questions. See Add.448–49; DE.968, at 1–3; DE.975, at 1–3; Add.459. The Court rebuffed these requests. See 2.A.462; Add.123, 127–28, 134, 142–44. Finally, acknowledging that "the Court has ruled as a matter of law that we may not ask those questions," the defense made a "standing request" for case-specific Morgan inquiry, for example:

> If you were convinced beyond a reasonable doubt that the defendant deliberately committed an act of terrorism that killed multiple victims, could you nevertheless give meaningful consideration to mitigating factors (such as, for example, a defendant's age, lack of a prior criminal record, or family background), and actually consider imposing a life sentence rather than the death penalty?

Id. at 146; see also id. at 459 (proposing this formulation and three alternatives). The Court agreed that the defense had a "continuing objection" to the refusal to pose case-specific questions, and did not "have to renew it." Id. at 147–49.

As a result of these rulings, the Court qualified seven venirepersons who would become seated jurors (Jurors 35, 41, 102, 229, 349, 480, and 487) after they gave affirmative answers to general Morgan questions alone. Juror 41, for example, was asked:

> Assuming that the defendant is convicted of a capital crime . . . and you proceed to a penalty phase, would you be prepared by mental attitude and your general disposition to the manner to vote for penalty

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others. Four days later, . . . MIT police officer Sean Collier (26) was shot to death in his police car . . . . Tsarnaev has been charged with various crimes arising out of these events." E.g., Add.526.

> of death if you thought that was warranted under the circumstances; and on the other hand, would you similarly be prepared to vote for a penalty of life imprisonment without parole instead of the death penalty if you thought that was warranted?

2.A.544; see also id. at 506–07 (Juror 35), 940 (Juror 102); 4.A.1665–67 (Juror 229); 6.A.2354–56 (Juror 349); 7.A.3052 (Juror 480), 3077 (Juror 487). As to two of these seven, when the defense attempted to ask case-specific Morgan questions, the Court sustained the government's objections. Add.176 (Juror 229) ("Would a case that involved the death of a child make it more difficult for you . . . ."); Id. at 224 ("Do you think that the fact that the death of a child was part of this case would make it difficult for you to weigh both sides . . . .") (Juror 480).[108]

2. The Court refuses to question most venirepersons about the content of the publicity that the jurors had seen.

As detailed above (ante § I.A.2), the press coverage of this case was "unparalleled in American legal history." Tsarnaev II, 780 F.3d at 30 (Torruella, J., dissenting). To explore the effects of that extraordinary publicity, the defense

[108] The defense was permitted, over the government's objection, to pose a variant of its requested case-specific question to one seated juror. 2.A.881–82 (Juror 83) ("[K]nowing that this is the Boston Marathon bombing and its aftermath, and assuming now just for my question that he has been convicted, . . . [d]o you lean one way or another regarding death penalty or life imprisonment?"). Three other seated jurors testified that they could consider mitigating evidence even if the defendant had been convicted of an intentional murder. 3.A.1168 (Juror 138); 5.A.2012 (Juror 286); 6.A.2637 (Juror 395). A fifth seated juror, after confirming that he knew "what case" he had "been called for," testified that he was "not leaning" toward either death or life imprisonment, but was "unsure until I see all the evidence." 7.A.2886–87 (Juror 441).

made repeated efforts to learn not just *whether* prospective jurors had seen media coverage of this case, but *what*, specifically, they had seen, as Patriarca requires.

The parties' joint proposed questionnaire, see ante § IV.A.1, included several questions about the venirepersons' exposure to pre-trial publicity. One of those questions was: "What did you know about the facts of this case before you came to court today (if anything)?" 24.A.11391. Despite acknowledging that this question "might get very interesting answers" and function as "a trigger to follow-up," the District Court worried that the question would also "cause trouble because it will be so unfocused" and would generate "unmanageable data." Add.304–05. The Court struck the question, explaining that the venirepersons' "preconceptions" could instead be gauged by asking whether, "[a]s a result of what you have seen or read in the news media," any juror had "already formed an opinion" as to Tsarnaev's guilt or the proper punishment, and if so, whether the juror could "set aside your opinion and base your decision . . . solely on the evidence that will be presented in court?" 24.A.11392; Add.307.

The defense objected that this inquiry was deficient. "[I]n a case like this, . . . where you really have no idea what the juror may have swirling around in their head, it makes the juror the judge of their own impartiality." Add.306. The Court replied that "[t]o a large extent that's true," but reasoned that "the other questions will help us" determine the venirepersons' ability to set aside preconceptions about

the case, which was "the biggest issue in voir dire, obviously." Id. at 306–07. Nonetheless, the Court assured the defense that the proposed media content question was "a question that we'll probably be asking every voir dire person." Id. at 304. As a result, the questionnaire made only general inquiries about the prospective jurors' exposure to publicity, asking them to "describe the amount of media coverage [they had] seen about the case," and whether, "[a]s a result of what you have seen or read in the news media, or what you have learned or already know about the case from any source," they had "formed an opinion" as to Tsarnaev's guilt or the proper penalty. E.g., id. at 524–25.

Before voir dire commenced, the defense proposed oral questions on pre-trial publicity, namely:

> Before coming here today, have you heard or read about anything in this case?
>
> What stands out in your mind from everything you have heard, read or seen about the Boston Marathon bombing and the events that followed it?
>
> [If juror has difficulty responding, prompt with: Do you recall anything . . .]
>
> (a) About how the bombings occurred?
> (b) About the people who are supposed to have carried it out?
> (c) About any of the bombing victims who died?
> (d) About any of the victims who were hurt but survived?
> (e) About the MIT police officer who was killed several days later?
> (f) About the defendant, Dzhokhar Tsarnaev?
> (g) About any members of Mr. Tsarnaev's family?

Id. at 450. The Court rejected Tsarnaev's proposal:

> We have detailed answers in the questionnaire concerning what exposure to the media about this is. I don't think as a general matter we have to repeat all that . . . . [D]igging for details from someone who hasn't prepared by spending time reflecting and recalling all of that will not likely yield reliable answers and, again, it's a matter I covered in the questionnaire.

Id. at 115–16.

Throughout the first several days of voir dire, the defense made renewed requests for content questioning. E.g., id. at 447–48, 458. The Court denied these requests, too. E.g., id. at 134, 142–44. The Court explained that "detailed questioning about what the juror thinks he or she knows about the events and the sources places the wrong emphasis for the juror." Id. at 143. In the Court's experience, general questions about each venireperson's capacity to decide the case on the evidence would suffice:

> [J]urors take their responsibilities very seriously, including the particularly the obligation to hold the government to its proof. . . . [G]etting their reaction to that task that they will have, knowing what they know, I think is a way of determining whether the juror is prepared to undertake the service that we might ask of him or her.

Id.

In accord with these rulings, the Court qualified 9 of 12 seated jurors without learning anything about the contents of the media coverage each had seen, on the basis of general assurances that these jurors could set aside any preconceptions and decide the case based on the evidence. For example, the Court

qualified Juror 35—who had "read a lot" and "watched TV a lot about the case"—after eliciting the juror's view that he should not "be drawing a conclusion without all the evidence presented," and could apply the presumption of innocence and hold the government to its burden of proof. 2.A.502–03. Likewise, the Court qualified Juror 395—who had formed the opinion that Tsarnaev was guilty "based on what I did read and had seen in the media"—after the juror assented to the Court's expectation that she would "focus [her] attention on the evidence that is actually produced in the trial and make [her] decision based on that body of evidence." 6.A.2632–33; see also, e.g., 2.A.542–43 (Juror 41); 873–75 (Juror 83); 3.A.1151–52 (Juror 138); 4.A.1662–64 (Juror 229); 5.A.2008–10 (Juror 286); 6.A.2632–34 (Juror 395); 7.A.2880 (Juror 441); 3049–51 (Juror 480).[109]

Notably, 6 of the 12 seated jurors believed, before the trial, based on media coverage, that Tsarnaev participated in the bombings. See ante § I.A.4 (Jurors 83, 229, 286, 349, 395, and 487). Four of these six (Jurors 83, 229, 286, and 395) disclosed no information at all about the contents of the media coverage that generated these beliefs. And with respect to two of those six (Jurors 229 and 286),

[109] The defense asked Juror 102, "what stands out in your mind, if anything, about this case from anything you've heard, seen." She responded: "The only thing that I definitely can remember from that time is probably after the fact when they showed the finish line." 2.A.942. Unprompted, Juror 349 disclosed that she had watched "the shootout in Watertown" on television, 6.A.2351, and Juror 487 referred to "video evidence" and Tsarnaev's "being in the boat." 7.A.3075.

the Court sustained the government's objections and precluded the defense from asking content questions. Add.177 (Juror 229) ("[I]s there anything about that media coverage that stands out in your mind?"), 191 (Juror 286) ("Can you tell us what stands out in your mind that you read about it?"). Put another way, 2 of the 12 seated jurors, Jurors 229 and 286: (i) believed that Tsarnaev participated in the bombings based on the media coverage that they had consumed; (ii) gave no testimony at all describing what that coverage was; and (iii) were prevented, by the District Court, from answering the defense's content questions.

B. The deficient voir dire compromised Tsarnaev's right to an impartial jury.

1. Capital cases require searching voir dire.

Under the Sixth Amendment, "part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan, 504 U.S. at 729. "[E]ffective voir dire must expose potential bias and prejudice in order to enable litigants to facilitate the impanelment of an impartial jury through the efficient exercise of their challenges." United States v. Noone, 913 F.2d 20, 32 (1st Cir. 1990). "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion). "An appellate

challenge asserting an improper exclusion of voir dire questions is reviewed for abuse of discretion." United States v. Gelin, 712 F.3d 612, 621 (1st Cir. 2013). But the "exercise" of "this discretion, and the restriction upon inquiries at the request of counsel," are "subject to the essential demands of fairness." Aldridge v. United States, 283 U.S. 308, 310 (1931).

Here, this Court's obligation to scrutinize the adequacy of voir dire is at its apex. This is a death-penalty case, and the Supreme Court has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." Morgan, 504 U.S. at 730; e.g., Turner v. Murray, 476 U.S. 28, 37 (1986); Aldridge, 283 U.S. at 315. Specifically, the Sixth Amendment entitles a defendant to "inquiry discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." Morgan, 504 U.S. at 736.

This is also a federal criminal prosecution, and this Court "enjoy[s] more latitude in setting standards for voir dire in federal courts" under its "supervisory power." Mu'Min, 500 U.S. at 424; see also Rosales-Lopez, 451 U.S. at 190; Ristaino v. Ross, 424 U.S. 589, 597 n.9 (1976); United States v. Anagnos, 853 F.2d 1, 3–4 (1st Cir. 1988). In particular, this Court has directed that where there is "a significant possibility that jurors have been exposed to potentially prejudicial material"—namely, pre-trial publicity—a district court should conduct individual,

sequestered voir dire of each prospective juror "with a view to eliciting the kind and degree of his exposure to the case or the parties." Patriarca, 402 F.2d at 318. A district court must then determine "the effect of such exposure on [the prospective juror's' present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence." Id.

The measure of voir dire's adequacy is the risk—not the certainty—that a partial juror has participated in the imposition of the conviction and death sentence, assessed in light of the likelihood of disqualifying bias and the ease with which questioning could have exposed such bias. See Turner, 476 U.S. at 37 (plurality opinion) (reversing on basis of "unacceptable risk of racial prejudice infecting the capital sentencing proceeding"); Aldridge, 283 U.S. at 314 (reversing conviction because "possibility" of racial prejudice was not "so remote as to justify the risk in forbidding the inquiry"); see also Morgan, 504 U.S. at 739 ("Because the 'inadequacy of voir dire' leads us to *doubt* that petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand." (emphasis added) (quoting Turner, 476 U.S. at 37)). Indeed, "'[o]ur system of law has always endeavored to prevent even the probability of unfairness.'" Sheppard, 384 U.S. at 352 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

2. *Morgan* entitled Tsarnaev to ask whether prospective jurors could consider imposing a life sentence on the specific facts of this case.

a. The Sixth and Eighth Amendments entitle a capital defendant to voir dire sufficient to identify those venirepersons incapable of considering mitigating evidence in his particular case.

Invalidating mandatory death-penalty regimes under the Eighth Amendment, the Supreme Court explained that "consideration of the character and record of the individual offender and the circumstances of the particular offense" form "a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). "[I]n order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider '*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense.'" Sumner v. Shuman, 483 U.S. 66, 75–76 (1987) (quoting Lockett, 438 U.S. at 604). The FDPA provides that "[i]n determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor." 18 U.S.C. § 3592(a). Accordingly, the District Court here instructed Tsarnaev's jurors to weigh aggravating and mitigating factors in order "to make a unique, individualized determination about the appropriateness of sentencing another human being to death." 16.A.7071.

In light of these constitutional and statutory directives, "a juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." Morgan, 504 U.S. at 729. "[A] capital defendant may challenge for cause any prospective juror who maintains such views, and "[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." Id. Therefore, to be competent to serve—and to ensure the constitutional validity of any death sentence that results—"sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime." Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007).

Morgan recognized not only that each juror must possess the capacity to consider mitigating evidence, but that the Sixth Amendment entitles a defendant to a voir dire that uncovers those who cannot. "Were voir dire not available to lay bare the foundation of [a defendant's] challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered . . . nugatory and meaningless." 504 U.S. at 733–34. To that end, Morgan held that "general fairness and 'follow the law' questions" were not "enough to detect those in the venire who would automatically

vote for the death penalty." Id. at 734. A juror who would vote for the death penalty in all cases, the Court reasoned, "could in all truth and candor respond affirmatively" to "general questions of fairness and impartiality," "personally confident that such dogmatic views are fair and impartial." Id. at 735. Not so, Morgan explained: "Any juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law." Id. (citing Turner, 476 U.S. at 34–35). Thus, Morgan held that a capital defendant is entitled to ask prospective jurors, at a minimum: "If you found [the defendant] guilty, would you automatically vote for the death penalty no matter what the facts are?" Id. at 723. More generally, Morgan "stands for the proposition that, in order to ensure the fairness and impartiality of the jury, a capital defendant must be afforded the opportunity to conduct adequate voir dire to determine whether potential jurors are capable of imposing a life sentence upon conviction in accordance with the facts and the law." Johnson, 366 F. Supp. 2d at 831.

b. In cases involving highly prejudicial aggravating circumstances, the general question approved in *Morgan* may not capture mitigation-impaired jurors, necessitating more specific questioning.

Morgan addressed a particular kind of disqualifying bias—namely, the belief, incompatible with the Eighth Amendment and the FDPA, that death is the appropriate punishment upon conviction for all capital offenses—so the voir dire question that Morgan approves is framed accordingly. Venirepersons, however,

may harbor more nuanced, but no less disqualifying, forms of partiality. For example, a prospective juror may believe that the death penalty is not *always* appropriate, but *is* always proper for the intentional murder of a child. The district judge who presided over United States v. Honken, 01 Cr. 3047 (MWB) (N.D. Iowa), an FDPA prosecution involving that aggravating circumstance, so observed: "[I]n Honken, several potential jurors readily agreed that they could 'fairly consider' both life and death sentences," but "several of those same potential jurors stated that they were either doubtful that they could consider, or stated expressly that they could not consider, a life sentence if they found the defendant guilty of the murder of children." Johnson, 366 F. Supp. 2d at 847; see also Ellington v. State, 735 S.E.2d 736, 756 (Ga. 2012) (noting same phenomenon).

Jurors harboring those beliefs would be incompetent to sit in a case involving "the murder of children" because they would be unable to obey the court's instruction to consider mitigating evidence, and to weigh it against aggravating evidence, in determining the sentence. "Not only [does] the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but 'Lockett requires the sentencer to listen' to that evidence." Shuman, 483 U.S. at 76 (quoting Eddings, 455 U.S. at 115 n.10). A juror who believed death the only suitable penalty for the intentional killing of a child would be subject to dismissal in a prosecution for that offense

because those "views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Witt, 469 U.S. at 424 (quoting Adams, 448 U.S. at 45).

The government's own litigation position, endorsed by the District Court, proves the point. Juror 10 said that he could impose death only if that penalty were necessary to protect society from a defendant who might escape from prison. 1.A.326–28. Successfully challenging him for cause, the government emphasized that it "has not alleged as an aggravating factor in this case that the defendant presents a risk of future dangerousness." Id. at 435–36. That is, Juror 10 was not qualified because the factual allegations of this case did not implicate the only circumstance in which he could vote for death. See also, e.g., United States v. Flores, 63 F.3d 1342, 1356 (5th Cir. 1995) (FDPA case) (affirming Witt dismissal of juror who "originally did not indicate that he was opposed to the death penalty," but "became aware that some of the victims . . . had been involved in drug trafficking and informed the court that he could never vote for the death penalty in any case in which the victim was involved with drugs"). The converse proposition is equally valid. A juror who can vote for life only on facts not present in a particular defendant's case is not competent either.

The problem, as many courts have recognized, is that the general Morgan question—"would you automatically vote for the death penalty no matter what the

facts are?"—would not identify those incompetent jurors. Venirepersons "might honestly have answered no when asked, per Morgan, if they would automatically impose the death sentence in any murder case. But if they were advised that the case involved the murder of two young children, at least some of the prospective jurors might have changed their answers." Ellington, 735 S.E.2d at 756. Nor is that concern far-fetched. Jury selection in this case revealed numerous venirepersons who gave qualifying answers to the general Morgan question, but, in the course of voir dire, chanced to reveal that they were incapable of considering mitigating evidence as to Tsarnaev in particular.

For example, on his questionnaire, Juror 4, when asked to describe his "feelings about the death penalty in a case involving someone who is proven guilty of murder," selected the answer: [redacted] During oral voir dire, however, Juror 4 testified that he could not "imagine any evidence that would change how I feel" about the appropriateness of the death penalty for Tsarnaev. 1.A.278–79.

Other venirepersons exhibited similar beliefs. Juror 208, for example, [redacted] But during oral voir dire, after agreeing that his general views on the death penalty were "somewhere in the middle," he acknowledged that for "something as heinous as this incident, I think I would be more towards the 10 side of the scale," a score reflecting "a belief that the death penalty should be imposed whenever the defendant has been convicted of intentional murder." 4.A.1627; SPA.11.5680. Likewise, Juror 186's [redacted] But during oral voir dire, she agreed that death was the appropriate punishment for Tsarnaev because "there was a child involved, and I have a strong opinion about the death penalty when children are involved." 4.A.1478. Voir dire happened to identify these ineligible venirepersons. But there is no telling whether others—harboring the same disqualifying views, but asked no questions that would have

revealed their inability to consider mitigating evidence in this case—passed unnoticed and voted to sentence Tsarnaev to death.

For this reason, many courts have permitted defendants to pose not just the abstract question endorsed by Morgan, but questions that refer to case-specific aggravating circumstances (killing a child, multiple killings, a prior murder conviction) apt to provoke disqualifying bias. United States v. Burgos Montes, 2012 WL 1190191 (D.P.R. Apr. 7, 2012); United States v. Fell, 372 F. Supp. 2d 766, 769–71 (D. Vt. 2005); Johnson, 366 F. Supp. 2d at 848; State v. Turner, __ So. 3d__, 2018 WL 6423990, at *14–*16 (La. Dec. 5, 2018); Ellington, 735 S.E.2d at 755; State v. Jackson, 836 N.E.2d 1173, 1192 (Ohio 2005); People v. Cash, 50 P.3d 332, 340–43 (Cal. 2002); State v. Clark, 981 S.W.2d 143, 147 (Mo. 1998).[110]

The reasoning of these decisions is straightforward. "'[A] potential juror who indicates that he will not consider a life sentence and that he will automatically vote for the death penalty under the factual circumstances of the case before him is subject to a challenge for cause.'" Turner, __So.3d at __, 2018 WL 6423990, at *14 (quoting State v. Robertson, 630 So. 2d 1278, 1284 (La. 1994)). "It logically follows . . . , then, that a defendant is entitled to inquire of a potential

[110] But see, United States v. McVeigh, 153 F.3d 1166, 1208 (10th Cir. 1998) (holding that "Morgan does not require courts to allow questions regarding the evidence expected to be presented during the guilt phase of the trial" or "questioning about specific mitigating or aggravating factors," and collecting cases).

juror whether, under the . . . factual circumstances of the case before her, she would automatically vote for the death penalty." Id. Indeed, "[t]he entire premise of the Morgan decision is that highly general questions may not be adequate to detect specific forms of juror bias." Fell, 372 F. Supp. 2d at 769. See Burgos Montes, 2012 WL 1190191, at *2 ("[G]eneral questions may be insufficient to investigate the depths of juror bias."); Johnson, 366 F. Supp. 2d at 847–48 (describing "the ineffectiveness of purely 'abstract' questions to probe . . . whether or not a juror would be able to fulfill his or her duty to give fair consideration to both life and death sentences no matter what the facts are"). Rather, life-qualifying questions must possess enough precision to unearth those biases that would prevent a venireperson from giving the requisite consideration to mitigating evidence in a particular defendant's case. Because the defendant bears the burden of showing partiality, Witt, 469 U.S. at 423, "meaningful examination at voir dire in order to elicit potential biases" is "all the more imperative," Jackson, 836 N.E.2d at 1191.

Thus, a defendant "is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." Cash, 50 P.3d at 341; see also Clark, 981 S.W.2d at 147 ("[S]ome inquiry into the critical facts of the case is essential to a defendant's right

to search for bias and prejudice in the jury . . . . If jurors are not exposed to critical facts during voir dire, the parties lose the opportunity directly to explore potentially biased views, which all concerned have a duty to investigate thoroughly.").

Put concretely, if, as here, a capital prosecution alleges the intentional killing of a child, the defendant is entitled to voir dire sufficient to expose those venirepersons who believe that death is the only appropriate sanction for that offense. The highest courts of Georgia (on state-law grounds), Ohio, and Missouri have so held. Ellington, S.E.2d at 755 ("Ellington was entitled to ask whether the prospective jurors in this case would automatically vote for a death sentence in any case in which two murder victims were young children, regardless of any other facts or legal instructions."); Jackson, 836 N.E.2d at 1192 ("We hold that in a death penalty case involving the murder of a young child the defendant is entitled, upon request, to have the prospective jurors informed of that fact and to ask questions that seek to reveal bias."); Clark, 981 S.W.2d at 147 (reversing conviction and death sentence where "the trial court completely precluded defense counsel from questioning prospective jurors on the 'specifics of the case being tried,' in particular that one victim was only three years old"). Similarly, if a prosecution involves other "facts with substantial potential for disqualifying bias," id. at 147, case-specific inquiry becomes necessary. See, e.g., Turner, __So. 3d at __, 2018 WL 6423990, at *15–*17 (multiple killings during armed robbery); Cash,

50 P.3d at 341 (defendant's prior murder conviction); see also Fell, 372 F. Supp. 2d at 771; Johnson, 366 F. Supp. 2d at 848.

c. The District Court committed legal error in refusing to pose case-specific *Morgan* questions, creating a constitutionally unacceptable risk that mitigation-impaired jurors imposed Tsarnaev's death sentence.

The District Court's refusal to ask Tsarnaev's proposed questions rested on two errors of law (and therefore constituted an abuse of discretion, see Koon, 518 U.S. at 100). First, the Court mistakenly rejected the inquiries as "stakeout questions." See ante § IV.A.1. As several decisions have explained, "it is a misconception to assume that *any* 'case-specific' question is necessarily a 'stake-out' question." Johnson, 366 F. Supp. 2d at 845. See also, e.g., Ellington, 735 S.E.2d at 760–61; Burgos Montes, 2012 WL 1190191, at *2; Jackson, 836 N.E.2d at 1190; Fell, 372 F. Supp. 2d at 770–71; Cash, 50 P.3d at 342. A stakeout question asks a juror "'to speculate or precommit to how that juror *might vote* based on any particular facts,'" seeks "'to discover in advance *what a prospective juror's decision will be* under a certain state of the evidence,'" or tries "'to cause prospective jurors to pledge themselves to a future course of action.'" Johnson, 366 F. Supp. 2d at 845 (first quoting McVeigh, 153 F.3d at 1207, then quoting Richmond v. Polk, 375 F.3d 309, 329–30 (4th Cir. 2004)). In contrast, a proper

case-specific question asks whether a venireperson "*could fairly consider* either a death or life sentence, notwithstanding proof of certain facts." Id.

The distinction is easily grasped, and easily implemented:

> [A] juror may not be asked whether evidence of rape would lead him or her to vote for the death penalty. However, a juror may be asked if, in a murder case involving rape, he or she could fairly consider either a life or death sentence. The first question is an improper stake-out question. The second question is not a stake-out question because it only asks whether the juror is able to fairly consider the potential penalties.

Fell, 372 F. Supp. 2d at 771. The latter, proper question does not ask a venireperson to prejudge the case or commit to a position before hearing the evidence. Rather, the question seeks to ensure, in light of the actual facts of the case, the venireperson's capacity to give meaningful consideration to mitigating evidence, notwithstanding certain aggravating circumstances.

A valid case-specific Morgan question therefore navigates between "two extremes." Cash, 50 P.3d at 342. "[I]t must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented," but, at the same time, "it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties in the case being tried." Id. District judges can strike this balance. E.g., Burgos Montes, 2012 WL 1190191, at *3 ("[T]he Court will allow questions that are reasonably

directed towards discovering whether the juror will be able to fairly and impartially weigh aggravating and mitigating factors. Any questions that attempt to commit the juror to a particular position will be struck."). Indeed, Morgan itself supplies the template for an effective inquiry: "If you found the defendant guilty *of murdering children*, would you automatically vote to impose the death penalty, no matter what the *other* facts are?" Johnson, 366 F. Supp. 2d at 849 (emphasizing additions to Morgan, 504 U.S. at 723).

Tsarnaev's proposed questions conformed to these parameters. The defense sought to ask whether venirepersons "would . . . realistically be able to consider life imprisonment as a possible punishment" if the government proved that Tsarnaev committed a premeditated act of terrorism that killed multiple victims, including a child. Add.455. In the alternative, the defense sought to ask whether venirepersons "would . . . always vote for the death penalty as the only appropriate punishment in such a case." Id. at 459. In rejecting those proposals as "stakeout" questions, the District Court "misconstrued counsel's request . . . as an attempt 'to predispose jurors to react a certain way to anticipated evidence.'" Jackson, 836 N.E.2d at 1190 (quoting Clark, 981 S.W.2d at 147). To the contrary, "[c]ounsel were merely attempting to discover whether prospective jurors could fairly consider imposition of a life sentence" in this case. Id.

The District Court's second legal error was its belief that the venirepersons' knowledge of certain details about this case made general Morgan questions "sufficient." Add.121. Recall the Court's rationale: case-specific inquiries were superfluous because "the jurors know that this is about a bombing," "they know that there were three people who were killed in the bombing," and "they have those specifics . . . in their minds as they . . . answer the question about the ability to meaningfully consider life imprisonment in this case." Id. at 120–21. But that reasoning stands in direct conflict with precedent.

In Ham v. South Carolina, the Supreme Court held that the Fourteenth Amendment entitled the defendant, who was African-American, to voir dire on racial prejudice. 409 U.S. 524, 527 (1973). The Court reversed Ham's conviction because the trial court had refused to make that specific inquiry, even though the prospective jurors all knew that Ham was African-American, see Br. for Resp. 3, Ham v. South Carolina, 409 U.S. 524 (No. 71–5139) (Apr. 27, 1972), available at 1972 WL 135829; and had all given satisfactory answers to general questions about partiality, see 409 U.S. at 526 n.3. Indeed, the state's principal argument for affirmance—indistinguishable from the District Court's reasoning below, and rejected by every member of the Supreme Court—was that specific questions about racial prejudice were redundant:

> [A]sking a prospective juror on his voir dire, "Are you conscious of any bias or prejudice against him?", "him" being the black . . .

> defendant at whom the juror was looking; then to ask "Are you conscious of any bias or prejudice against black people . . . ?" would appear to be not only unnecessary but ridiculous.

Br. for Resp. 4, Ham, ante. Ham therefore establishes that a venireperson's awareness of facts which could give rise to potential bias, coupled with general questions about bias, do not obviate a particularized investigation into prejudice.

Even on their own terms, the Court's assumptions about what the prospective jurors knew and how they might answer voir dire questions offered no substitute for actual investigation. For one thing, the Court could not rely on what the venirepersons had learned "from the media," Add.120, for the simple reason that the Court did not ask, and so did not know, what most of the seated jurors had heard. See ante § IV.A.2. Similarly, the Court's refusal to inquire created the risk that jurors conditioned their qualifying responses on information that was widely reported pre-trial and mitigating in nature—for example, Tamerlan's commission of three murders in 2011, see post Point V—but not introduced at trial. Neither the Court nor the parties could reliably evaluate the jurors' self-assessed competence without knowing what facts and beliefs underlay those self-assessments.

For another thing, the Court's assumption that the venirepersons would answer life-qualifying questions with the facts of this case in mind is not only inconsistent with Ham, but was speculative and unsupported by the voir dire itself. Juror 102, for example, several times professed that she knew next to nothing

about this case. On her questionnaire, she wrote, "I don't watch the news or read newspapers," and had seen only "[a] little" media coverage of this case, that is, had "basically just heard about it." 26.A.11785–86. During her oral examination, she explained: "I've worked nights for ten years, so having that shift, I really don't have much access to news. I'm either sleeping during the day or working during the night." 2.A.938–39. She repeated that she did not "really know much about" this case, and "really could not tell you the accounts of what happened." Id. at 937–38. Juror 102 "honestly . . . didn't even know what [Tsarnaev's] name was until the court summoned me here." Id. at 943.

Similarly, the Court qualified Juror 480 after posing only questions that, by their plain terms, addressed only his "general" views about the death penalty and did not invite him to "have . . . in [his] mind[]" the "specifics" of this case. Juror 480 was asked one "general question" about his "views" on the death penalty, and another about his "general disposition to favor the death penalty." 7.A.3051. He was not asked whether he could weigh mitigating evidence and consider a life sentence for Tsarnaev in particular. The Court's assumption that Juror 480 must nonetheless have been considering Tsarnaev's specific circumstances when answering these "general" questions conflicts with Ham as well as with this Court's precedent: "We readily hold that jurors, ignorant of voir dire procedure, are to be held to the question asked, and not to some other question that should

have been asked." Rhodes, 556 F.2d at 601. The Court could not dispense with case-specific Morgan voir dire by hypothesizing that the venirepersons would incorporate what they knew about Tsarnaev in their answers, then ask only about the venirepersons' "general" views.

Finally, as the Supreme Court has several times made clear, the *risk* that a partial juror participated in the imposition of the death sentence suffices to warrant reversal. Morgan, 504 U.S. at 739; Turner, 476 U.S. at 37; Aldridge, 283 U.S. at 314; see also, e.g., Cash, 50 P.3d at 342–43 ("By absolutely barring any voir dire [about defendant's prior murder conviction] the trial court created a risk that a juror who would automatically vote to impose the death penalty on a defendant who had previously committed murder was empanelled and acted on those views."). In Morgan, the Court explained: "Because the 'inadequacy of voir dire' leads us to *doubt* that [the defendant] was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand." 504 U.S. at 739 (emphasis added) (quoting Turner, 476 U.S. at 37). And in Aldridge, the Court held that "the possibility" of racial prejudice among venirepersons was not "so remote as to justify the risk in forbidding the inquiry" whether any of them were biased against African-Americans. 283 U.S. at 314. Indeed, "this risk becomes most grave when the issue is life or death." Id.

Turner, which held that a capital defendant accused of an interracial crime is entitled to voir dire on racial bias, reasoned that the "unacceptable risk" of prejudice warranting the inquiry flowed from three factors: "the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case." 476 U.S. at 37. The second and third Turner factors appear in identical form here. The FDPA, like the Virginia sentencing scheme at issue in Turner, confers on the jury "discretion not to recommend the death sentence." 476 U.S. at 34; see also 18 U.S.C. § 3593(e). And Tsarnaev's death sentence is just as serious as Turner's. As to the first factor, Tsarnaev was charged with offenses apt to stir the strongest of reactions: the killing of four people, including a child and a police officer, in premeditated acts of Islamic terrorism targeting an iconic civic event. The risk of prejudice here—against a foreign-born member of a disfavored religious minority believed by many to be "violence prone or morally inferior," 476 U.S. at 35—was at least as severe as the risk in Turner.

The District Court's general inquiries did not suffice to mitigate that risk. Several venirepersons who gave acceptable answers to general Morgan questions admitted to disqualifying bias when pressed on the facts of this case in particular. See ante § IV.A.1 (discussing Jurors 4, 186, and 208). The Court qualified seven seated jurors without asking them any case-specific questions at all, and there is no

factual basis for the Court's assumption that these jurors—when answering questions that, by their terms, were posed in "general" language—had in mind the particulars of Tsarnaev's case, as the Court imagined would be true. Nor, in light of Ham, would those questions, even when coupled with the jurors' awareness of facts that might give rise to bias, have sufficed. Case-specific Morgan questions are necessary when "*not* asking them runs a real risk that juror partiality driven by the fact at issue will not otherwise be identified in the voir dire." Ellington, 735 S.E.2d at 761. And the acceptability of constitutional risk is assessed "in light of the ease with which that risk could have been minimized." Turner, 476 U.S. at 36. The danger that a juror unable to give effect to mitigating evidence voted to sentence Tsarnaev to death is real, and the District Court eschewed simple questions that would have reduced the probability of that Sixth Amendment error. Accordingly, this Court should reverse Tsarnaev's death sentences. See Morgan, 504 U.S. at 739.

3. *Patriarca* required the court to ask prospective jurors what they had heard about this case, not just whether they could be impartial.

A second, independent defect in the voir dire necessitates reversal of Tsarnaev's convictions, or in the alternative, his death sentences. A jury's exposure to prejudicial pre-trial publicity undermines a defendant's Sixth Amendment right to trial by an impartial jury. E.g., Rideau, 373 U.S. at 726; Irvin,

366 U.S. at 727–28; Delaney v. United States, 199 F.2d 107, 114 (1st Cir. 1952). Where pre-trial publicity attends a case, the trial court should undertake "searching questioning of potential jurors . . . to screen out those with fixed opinions as to guilt or innocence." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 564 (1976).

In Patriarca—an organized crime prosecution preceded by newspaper coverage dubbing the defendant "'Boss' of the New England 'Cosa Nostra'"—this Court addressed the scope of the voir dire examination that a district court should conduct "[i]n cases where there is, in the opinion of the court, a significant possibility that jurors have been exposed to prejudicial material." 402 F.2d at 315–16, 318. Specifically, Patriarca directed:

> [O]n request of counsel, we think that the court should proceed to examine each prospective juror apart from other jurors and prospective jurors, with a view to eliciting *the kind and degree of his exposure to the case or the parties*, the effect of such exposure on his present state of mind, and the extent to which such state of mind is immutable or subject to change from evidence.

Id. at 318 (emphasis added). That is, in order to assess a prospective juror's impartiality in a high-profile case, a district judge must ascertain *what* the juror has learned—the "kind" of "exposure" he has had "to the case or the parties."

Patriarca confirmed that this was the requirement it was imposing by endorsing § 3.4 of the ABA's then-recent Standards Relating to Fair Trial and Free Press. 402 F.2d at 318 ("[W]e are in accord with the suggestions of section 3.4."). Section 3.4(a) of those standards, in turn, provided that voir dire questioning in

cases marked by prejudicial pre-trial publicity "shall be conducted for the purpose of determining what the prospective juror has read and heard about the case." Am. Bar Ass'n, Standards Relating to Fair Trial and Free Press § 3.4(a), at 130 (Tentative Draft Dec. 1966), available at 25.A.11627–32.[111]

This Court's subsequent decisions have read Patriarca to compel content questioning. In United States v. Medina, for example, the district judge "fully complied" with Patriarca by asking each venireperson "whether he or she had read or heard anything about the case in the newspapers, on television, or radio," and if so, by "prob[ing] further as to the extent of such knowledge." 761 F.2d 12, 20 (1st Cir. 1985). In United States v. Vest, this Court found "no inconsistency" with Patriarca where each venireperson who "had heard 'anything at all' about the case" was "asked to recount all that he or she knew about the case." 842 F.2d 1319, 1332 (1st Cir. 1988). In Orlando-Figueroa, the district judge "asked whether anyone had seen or read anything about the case," then "questioned each prospective juror who had answered affirmatively concerning the circumstances under which he or she had been exposed to publicity." 229 F.3d at 43 (citing

[111] This standard has remained in place for half a century. Am. Bar Ass'n, Fair Trial and Public Discourse, Standard 8–5.4 (2016) ("If it is likely that any prospective jurors have been exposed to prejudicial publicity, they should be individually questioned to determine what they have read and heard about the case and how any exposure has affected their attitudes toward the trial."), https://www.americanbar.org/groups/criminal_justice/standards/crimjust_standards_fairtrial_blk/.

Patriarca). Other Circuits have adopted the same rule. E.g., United States v. Davis, 583 F.2d 190, 196 (5th Cir. 1978); United States v. Addonizio, 451 F.2d 49, 67 (3d Cir. 1971); Silverthorne v. United States, 400 F.2d 627, 639 (9th Cir. 1968). And in Skilling, the Supreme Court approved a questionnaire that asked jurors "to list the specific names of their media sources and to report on 'what stood out in their minds' of 'all the things they had seen, heard or read.'" 561 U.S. at 371 & n.4, 388 & n.22 (alterations omitted).

The rationale for Patriarca's approach is plain. The district court, not the prospective juror, must judge the latter's impartiality. Asking venirepersons only "whether they had read anything that might influence their opinion" is deficient because it "in no way elicit[s] what, if anything, the jurors [have] learned, but let[s] the jurors decide for themselves the ultimate question whether what they [have] learned prejudiced them." Rhodes, 556 F.2d at 601. Where prospective jurors have been exposed to publicity with a serious potential to cause prejudice, this is "altogether too telescopic an approach." Id. (reversing convictions, where district judge made this inadequate inquiry into jurors' exposure to midtrial publicity). Instead, venirepersons should be "questioned as to the facts and extent" of their "knowledge of the case," so that "jurors themselves [are] not asked to decide for themselves the 'ultimate question' of impartiality." Vest, 842 F.2d at 1332; see also Davis, 583 F.2d at 197 ("The juror is poorly placed to make a determination as

to his own impartiality. Instead, the trial court should make this determination."); Silverthorne, 400 F.2d at 639 ("[W]hether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness without something more.").

Delegating to the prospective juror the responsibility to determine his own capacity for service neglects that "the juror may have an interest in concealing his own bias" or "may be unaware of it." Phillips, 455 U.S. at 221–22 (O'Connor, J., concurring). This case implicates both concerns. As demonstrated above, at least two seated jurors (138 and 286) hid material information indicative of bias. See ante §§ II.A.1 and 2. Likewise, the pre-trial publicity here was so damaging and pervasive that six of the 12 seated jurors professed the belief, before hearing any evidence, that Tsarnaev participated in the crimes charged. See ante § I.A.4. In the similar circumstance where eight of 12 seated jurors held such beliefs, the Supreme Court gave their promises of impartiality "little weight." Irvin, 366 U.S. at 728; see also United States v. Concepcion Cueto, 515 F.2d 160, 164 (1st Cir. 1975) (where newspaper article described defendant as "one of the most dangerous drug traffickers in Puerto Rico," jurors' "assurances of continued impartiality" "cannot be dispositive where the information is as damning and material as this"). Thus, it always "remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'"

Murphy, 421 U.S. at 800 (quoting Irvin, 366 U.S. at 723). Deferring to a juror's estimation of his own fitness deprives a defendant of the facts necessary to make the showing that Murphy contemplates.

Mu'Min, which holds that the Fourteenth Amendment's Due Process Clause does not require "questions specifically dealing with the content of what each juror has read," 500 U.S. at 431, is not to the contrary. For one thing, Tsarnaev falls within Mu'Min's dictum that due process "might well have required more extensive examination" had that case involved, as Irvin did, a "'wave of public passion' engendered by pre-trial publicity." Mu'Min, 500 U.S. at 429 (quoting Irvin, 366 U.S. at 728). Here, just as in Irvin, "news accounts included details of the defendant's confessions" in the boat and in the hospital, "as well as his unaccepted offer to plead guilty in order to avoid the death sentence." Mu'Min, 500 U.S. at 429 (describing Irvin). See 23.A.10755–57 ¶¶ 43–50; Tsarnaev II, 780 F.3d at 43–44, 44 n.45 (Torruella, J., dissenting). Likewise, the media coverage of Tsarnaev's case "contained numerous opinions as to his guilt, as well as opinions about the appropriate punishment." Mu'Min, 500 U.S. at 429 (again, describing Irvin). See 23.A.10833–34, 10843; 24.A.11046, 11048–50.

More to the point, Mu'Min arose on direct review of a state criminal conviction, so the Supreme Court's "authority" was "limited to enforcing the commands of the United States Constitution." Id. at 422. In contrast, Tsarnaev's

case was "tried in the federal courts," and is "therefore subject to this Court's supervisory power," which affords "more latitude in setting standards for voir dire." Id. at 422, 424. Patriarca, which made no reference to the Constitution, announced a supervisory rule unaffected by Mu'Min. See Addonizio, 451 F.2d at 67 (adopting Patriarca rule "[a]s an exercise of our supervisory powers over the district courts in this circuit"); see also Anagnos, 853 F.2d at 3–4 (explaining that rule of United States v. Pappas, 639 F.2d 1 (1st Cir. 1980), requiring voir dire as to credibility of law enforcement witnesses, was non-constitutional, and thus applicable only in federal cases). And this Court has reversed convictions for noncompliance with supervisory rules governing the scope of voir dire. E.g., id.

Here, the District Court erred in failing to ascertain, as required by Patriarca, what publicity the jurors had heard and seen. Without a doubt, this case met Patriarca's prerequisites for fulsome inquiry. The defense made a "request" for voir dire on the contents of the material that the jurors had seen. 402 F.2d at 318. See ante § IV.A.2. And there was a "significant possibility" that the jurors had been "exposed to potentially prejudicial material." Patriarca, 402 F.2d at 318. 99.7% of the 1,373 venirepersons had consumed media reports about this case, and 69% had concluded, on the basis of those reports, that Tsarnaev was guilty. See ante § I.A.3. Of course: the wall-to-wall coverage of the bombings and their aftermath featured video surveillance images of the brothers carrying backpacks at

the Marathon, photographs of a bloodied Tsarnaev's arrest in Watertown, and reports of the statement that Tsarnaev wrote in the dry-docked boat where he hid during the manhunt. Ante § I.A.2; Tsarnaev II, 780 F.3d at 30–31 & nn.20–25 (Torruella, J., dissenting). Worse, this coverage included information that was inadmissible at trial and inaccurate, including details from Tsarnaev's involuntary hospital confession, 23.A.10851; 24.A.10930, 10935–36, 11053, 11084; the opinions of victims and public officials that Tsarnaev should die, 23.A.10833–34, 10843; 24.A.11046, 11048–50; and the incorrect assertion that Tsarnaev wrote "Fuck America" inside the boat. Id. at 10988.

With those prerequisites met, it was incumbent on the District Court to ascertain not just the "degree" but the "kind" of "exposure to the case or the parties" that the jurors had undergone, Patriarca, 402 F.2d at 318; that is, "'what the prospective juror ha[d] read and heard about the case,'" Am. Bar Ass'n, Standards Relating to Fair Trial and Free Press § 3.4(a), at 130. As to nine seated jurors, the Court failed. As shown above, the Court qualified jurors who acknowledged having consumed "a lot" of media coverage, and even those who had "already formed" the opinion that Tsarnaev was guilty, on the basis of general promises to decide the case based on the trial evidence alone. See ante § IV.A.2. That was legal error. Indeed, the defense warned the Court that asking only those general questions would improperly "make[] the juror the judge of their own

impartiality," Add.306—the exact legal error that Patriarca aims to prevent. See Rhodes, 556 F.2d at 601; Vest, 842 F.2d at 1332. But the Court dismissed the defense's objection, concluding that "[t]o a large extent" jurors must perform that function. Add.306. That conclusion conflicted with Patriarca, Rhodes, and Vest. It was an abuse of discretion and a direct abdication of the Court's duties.

The Court's other rationales for declining the defense's proposed questions fare no better. The assertion that Tsarnaev's content questions would "repeat" inquiries "covered in the questionnaire," Add.115–16, was mistaken as a matter of fact: the Court had deleted the parties' agreed-upon question asking the venirepersons what they had heard. Id. at 306, 318. And the Court's explanation that "digging for details from someone who hasn't prepared by spending time reflecting and recalling all of that will not likely yield reliable answers," id. at 115, is perplexing. The defense had asked for the most salient details in the jurors' memories: "What stands out in your mind from everything you have heard, read or seen about the Boston Marathon Bombings and the events that followed it?" Id. at 450. Nor did the Court explain how, if a juror could not be expected to give "reliable" answers about the content of the publicity that he had seen, he could nonetheless testify reliably to his ability to set that publicity aside.

Because this error created a jury biased by prejudicial publicity, this Court should reverse Tsarnaev's convictions. See, e.g., Rhodes, 556 F.2d at 601. In the

alternative, as set forth in connection with Tsarnaev's venue and juror bias claims (§§ I.D and II.B.2), in light of the Eighth Amendment's special requirement of a reliable penalty phase determination in a capital case, this Court should reverse Tsarnaev's death sentences.

V.

The District Court Violated Tsarnaev's Right To Present A Complete Mitigation Case By Excluding Evidence That Tamerlan Killed Three People In Waltham In 2011, And By Refusing To Disclose To The Defense The Confession Of Tamerlan's Waltham Accomplice.

In its penalty phase closing argument, the prosecution dismissed defense arguments that Jahar was less culpable than his older brother, Tamerlan, or that Tamerlan had influenced Jahar to commit the bombings. In support of the government's claim that Jahar should receive the death penalty because he and Tamerlan "bear the same moral culpability for what they did together," 19.A.8797, and that Jahar acted "independently," 19.A.8725–26, the prosecution characterized Tamerlan as merely "bossy" and someone who "sometimes lost his temper," perfectly ordinary attributes of an older brother and no reason to mitigate Jahar's culpability:

> When you think back over all the evidence you heard during the mitigation case, ask yourself this: Did you hear any evidence that convinces you that Tamerlan Tsarnaev actually made Jahar Tsarnaev commit these crimes? Not "made him" in the sense of put a gun to his head. Even the defense doesn't claim that. But "made him" in the sense that the defendant was coerced or controlled. "Made him" in the sense that he was so vulnerable to Tamerlan's influence and so influenced by Tamerlan that he should be excused from bearing moral responsibility for what he did.

19.A.8784.

Unknown to the jurors, because the prosecution had successfully prevented them from knowing about it, Tamerlan had planned and carried out a robbery and

the brutal murders of three men on the tenth anniversary of the 9/11 attacks as a form of what he later told Jahar was "jihad." Tamerlan was not just "bossy." He [redacted] a friend, Ibragim Todashev, to join him in committing these vicious crimes. One of the victims, Brendan Mess, was a drug dealer and a childhood friend of Tamerlan's. The killings took place in Mess's apartment in Waltham and [redacted] During the grisly triple homicide, Tamerlan and Todashev bound the three victims' hands, feet, and mouths [redacted] Tamerlan and Todashev then stole [redacted] from the apartment.

The evidence of the brutal crimes in Waltham comes from Todashev's own statements to law enforcement officials, which federal prosecutors credited and relied upon in a sworn affidavit in support of a search warrant well before Jahar's trial. Todashev's account is also supported by independent corroborating evidence, including proffered statements to the government from one of Jahar's friends who stated that, months after the Waltham crimes were committed, Jahar told him he had learned of Tamerlan's role in the killings and that Tamerlan had committed the crimes as a form of "jihad." To this day, no other suspects have ever been identified in the Waltham killings.

This evidence that Tamerlan was a cold-blooded killer who convinced a friend to join him in his crimes strongly supported the defense's central argument in mitigation: 26-year-old Tamerlan, a former New England Golden Gloves heavyweight boxing champion, was a violent man who planned and led the bombings, and Jahar, his 19-year-old younger brother, who had no history of violence, participated in it only under Tamerlan's influence.

But the jury never heard about Waltham. Jurors tasked with evaluating Jahar's culpability and how he came to participate in the bombings never learned that Tamerlan had [redacted] a year and a half earlier, or that Tamerlan had [redacted] Instead, the jury heard only a misleadingly sanitized picture of Tamerlan from the prosecution: that he was merely a "bossy" older brother prone to verbal outbursts. The prosecution spun this false narrative while in possession of the Waltham evidence, most of which was not turned over to the defense, and none of which was presented to the jury.

The District Court committed two distinct errors in relation to this evidence.

First, the District Court prevented the defense from presenting evidence showing Tamerlan had instigated and led the triple homicide and robbery in Waltham. When relevant to assessing the actual role a defendant had in a charged

capital crime, a co-conspirator's history of violence is relevant evidence that the Eighth Amendment and the FDPA entitle a defendant to present in mitigation.[112] See 18 U.S.C. § 3592(a)(4); Enmund v. Florida, 458 U.S. 782, 800 (1982) (relative culpability of co-defendants crucial component of Eighth Amendment analysis because punishment must be tailored to personal responsibility and moral guilt); Troedel v. Wainwright, 667 F. Supp. 1456, 1462 (S.D. Fla. 1986), aff'd sub nom. Troedel v. Dugger, 828 F.2d 670 (11th Cir. 1987) (vacating death sentence where theory of mitigation was that a co-defendant had "dominated and coerced" defendant and was primarily responsible for crime, but evidence regarding co-defendant's violent background had not been presented to jury); Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988) (vacating death sentence where defendant had sought to prove he was a follower, easily led and dominated by his co-defendant

[112] Focus on relative culpability is not, of course, unique to capital sentencing; it is the cornerstone of co-conspirator sentencing generally. It permits the sentencer to take account of the particular circumstances of the offense when setting the appropriate sentence. See, e.g., U.S. Sent'g Comm'n, Aggravating and Mitigating Role Adjustments Primer §§ 3B1.1 & 3B1.2, at 1 (Mar. 2013), https://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Role_Adjustment.pdf (role adjustments "serve the guidelines' objective of ensuring that sentences appropriately reflect the defendant's culpability and specific offense conduct"); United States v. Morosco, 822 F.3d 1, 23–24 (1st Cir. 2016) (relative culpability of fraud co-conspirators sentencing factor); United States v. Martin, 520 F.3d 87, 94 (1st Cir. 2008) ("[D]istrict courts have discretion, in appropriate cases, to align codefendants' sentences somewhat in order to reflect comparable degrees of culpability).

but trial court had excluded evidence of his codefendant's "reputation for violence"). The prosecutors exploited this error by repeatedly mischaracterizing Tamerlan's character and history, and telling the jury there was no evidence indicating that Tamerlan was more culpable than Jahar or had influence over Jahar. The exclusion of this mitigation evidence violated the Due Process Clause, the Eighth Amendment and the FDPA. Accordingly, because the sentencing jury was not permitted to fairly assess Jahar's precise role in the bombings by hearing the evidence regarding Tamerlan's history of violence, the death sentence must be reversed. See post § V.B.

Second, the Court refused to disclose to the defense the confession Todashev had made to the FBI [redacted] The Court erred in withholding this material, favorable evidence from the defense. [redacted]

[redacted] this Court should vacate the death sentences. See post § V.C.

A. Factual and procedural background.

On the evening of September 11, 2011, three men were robbed and killed in an apartment in Waltham, Massachusetts, that belonged to Brendan Mess, a close friend of Tamerlan Tsarnaev's. There was no indication of forced entry. The victims, including Mess, were beaten, bound, and [redacted]. Their [redacted] and thousands of dollars were taken from the apartment. For almost two years, there were no suspects in the murder.

1. Evidence of Tamerlan's participation in the Waltham crimes.

Soon after the bombings, the FBI and state law enforcement interviewed Tamerlan's friend Ibragim Todashev. Todashev was a mixed martial arts fighter who had come to the U.S. from Chechnya in 2008, and met Tamerlan shortly thereafter. The interviews took place in Florida, where Todashev was living. Todashev initially denied having a close relationship with Tamerlan. Add.333–35 (government description of interviews of Todashev). But, at the final interview, which lasted four-and-one-half hours, Todashev admitted that he and Tamerlan had been good friends. Id. He then revealed to the FBI that Tamerlan had committed

the grisly triple homicide and robbery in Waltham. Id. Shortly thereafter, in the same interview, Todashev admitted his own involvement as well:

[redacted]

After confessing, Todashev got into a fight with an FBI agent and was killed. Because the interview and shooting of Todashev took place in Florida, the Attorney General of Florida investigated the shooting and issued a report about the circumstances of Todashev's interview. Ninth Judicial Circuit of Florida, Investigations Section, Law Enforcement Use of Deadly Force SAO Review, Investigation Report (Ibragim Todashev), available at 23.A.10544–705. That report contains various details of Todashev's statements, including the facts that Todashev had been Mirandized, signed an Advice-of-Rights form, made an oral confession, and begun to write out the confession before he was killed.

23.A.10566–71,10581, 10586–92, 10635–36 (attaching photographs of the handwritten confession and the Advice of Rights Form).

Todashev's partial handwritten confession, which is mostly legible, reads:

> "My name is IBRAGIM TODASHEV. I wanna tell story about the robbery me and Tam did in Malden [sic] in September of 2011. That was offered by Tamerlan. [?] want he offered to me to rob the drug dealers. We went to their house we got in there and Tam had a gun he pointed is gun the guy that opened the door for us and then we went upstairs into the house were 3 guys in there [scratched out word] we put them on the ground and then we [?] [?] taped their hands up."

23.A10636.

2. The District Court denies disclosure of the reports and recordings of Todashev's confession.

The defense moved repeatedly pre-trial for production or *in camera* review of all reports and recordings of Todashev's statements pertaining to the Waltham crimes. 23.A.10442–43, 10485–87, 10540–43; 24.A.11291–92; Add.292–94. Todashev's statements were documented in FBI 302 reports, and a Massachusetts State Police Trooper who was participating in the interview recorded the majority of the statements at his final interview. 23.A.10586–87 (The police used three recording devices, resulting in a total of four video recordings with audio and one audio-only recording). The District Court reviewed [redacted] *in camera*, Add.397, but ultimately refused to disclose any of the materials documenting Todashev's statements. Add.429–30. Thus, the defense never received the FBI 302 reports or law-enforcement recordings of Todashev's

statements—not even those the District Court relied on in excluding the Waltham evidence. See § V.C.

The government argued to the District Court that because it had conveyed to the defense the fact and general substance of Todashev's statements concerning the murders, disclosure of the actual reports and recordings was not required, and that disclosure of the statements would endanger the ongoing state investigation into the murders. 24.A.11301–03. The District Court agreed, concluding that the FBI 302 report of Todashev's final interview "does not materially advance [the mitigation] theory beyond what is already available to the defense." Add.429–30. The District Court further ventured that disclosure of Todashev's full statements risked revealing facts "seemingly innocuous on their face, such as times of day or sequences of events, revelation of which would have a real potential to interfere with the ongoing state investigation." Id.

Because of this ruling, the defense never learned crucial details of the grisly murder. Review by appellate counsel of the FBI summary report that was reviewed by the District Court *in camera* shows that [redacted][113]

[113] Cleared and Learned Counsel were provided access to the contents of these materials by this Court. October 3, 2018, Order. Because counsel were not provided a copy of these materials, they cannot be included in the Sealed

[redacted]

Addendum or Appendix, but are part of the record on appeal. DE.266. Neither other defense team members nor the defendant have been provided access to these materials.

3. The defense proffers Waltham evidence in mitigation.

At trial, even without the recordings or the 302 report of the confession, the defense nevertheless possessed significant evidence of Tamerlan's involvement in the Waltham crimes, which it offered to present in its mitigation case (Add.338–48):

Todashev's confession.

- [redacted]
- Todashev's partial handwritten confession (23.A.10589, 10636);
- the Advice of Rights form signed by Todashev during his confession (23.A.10591);
- information in the Florida Attorney General's report on Todashev's shooting describing why Todashev was being interviewed, the circumstances of his interview, his having confessed to law enforcement about his and Tamerlan's involvement in the Waltham murders, and what the video recordings of the interview showed (23.A.10566–96).

Corroborating evidence.

- computer evidence of Tamerlan and Todashev engaging in frequent computer chats (Add.340);
- a document on Tamerlan's laptop setting forth Anwar al-Awlaki's justifications under Islamic precepts for stealing from disbelievers for jihad-related purposes (25.A.11643–55);
- photographs from Todashev's and Tamerlan's computers (produced in discovery by the government) showing Tamerlan holding three different guns (25.A.11656, 25.A.11657, DT–0044237, DT–0032789);

- [redacted]

- witness statements about the close relationship between Tamerlan and victim Brendan Mess, and Tamerlan's surprising failure to attend Mess's funeral (Add.346–48); and,

- a proffer to the government of a close college friend of Jahar's (Dias Kadyrbaev) that Jahar had told him in 2012 that he had learned Tamerlan had committed the triple homicide, and provided other facts corroborating Todashev's statements regarding Tamerlan's participation in the triple homicides, including that (1) Tamerlan possessed a gun at the time of the Waltham homicides; (2) Tamerlan had a knife collection; and (3) Tamerlan had committed "jihad" in killing the men in Waltham. 24.A.11294–95.

4. The government moves to exclude any evidence of Tamerlan's participation in the Waltham crimes at penalty phase.

The government subsequently moved to exclude any penalty phase evidence about the triple murder and robbery—and Tamerlan's involvement in it. 25.11437–40. In seeking exclusion of this evidence, the government argued that Todashev's statements regarding Tamerlan's participation were unreliable. Id.; Add.333–35. The government did not notify the District Court that it had previously relied heavily on these same statements [redacted] Compare Add.333–35 with [redacted]

The government also asserted that, apart from the statements of Todashev, it possessed "no other evidence that Todashev and/or Tamerlan Tsarnaev actually participated in the Waltham triple homicides." 25.A.11438. The government did not apprise the Court of the corroborating evidence it had presented to the Magistrate Judge in its search warrant application. SAdd.30, 33. The government further argued that Todashev's statements should not be admitted because (i) Tamerlan's participation in other crimes was "irrelevant" to Jahar's penalty phase; (ii) Todashev was not available to be cross-examined; (iii) Todashev must have been mentally ill since he ran at armed agents; and (iv) admitting the evidence of the Waltham homicides would lead to a "sideshow." Add.332–38, 345; 25.A.11438–40.

The defense argued that evidence Tamerlan had committed these prior brutal crimes was highly probative as to the brothers' respective roles in the bombings and as family history information, and was sufficiently reliable to be admitted under the relaxed evidentiary standards applicable at a penalty phase. Add.338–42. The defense emphasized that whether to credit Todashev's statements and the other corroborating evidence was for the jury to decide. Add.339.

5. The District Court excludes all evidence concerning the Waltham crimes.

The District Court excluded the entire category of mitigation evidence relating to Tamerlan's involvement in the Waltham crimes, ruling orally:

> The reason is that there simply is insufficient evidence to describe what participation Tamerlan may have had in those events. I know that the defense has a theory about what those things were, but I don't believe there's any evidence that would permit a neutral finder of fact to conclude that from the evidence. From my review of the evidence, which includes an in camera review of some Todashev 302s, it is as plausible, which is not very, that Todashev was the bad guy and Tamerlan was the minor actor. There's just no way of telling who played what role, if they played roles. So it simply would be confusing to the jury and a waste of time, I think, without very—, without any probative value.

Add.351–52.

6. The Government argues Jahar acted "with the same moral culpability as Tamerlan" and that there is no evidence Tamerlan influenced Jahar to plant the bomb.

The central mitigation theory in this case was that Tamerlan had planned the bombings, and influenced Jahar to participate in it: "[I]f not for Tamerlan, this wouldn't have happened. Jahar would never have done this but for Tamerlan. The tragedy would never have occurred but for Tamerlan. None of it." 19.A.8759 (defense closing argument). The defense sought to prove five specific mitigating factors relating to Tamerlan's and Jahar's relationship and their relative culpability. For example, the defense contended that Jahar "acted under the influence of his older brother," and that "because of Tamerlan's age, size, aggressiveness, domineering personality, privileged status in the family," and "traditional authority as the eldest brother," Jahar "was particularly susceptible to his older brother's influence." Add.90–92 (Mitigating Factors 3, 4, 5, 7, 18). The defense could

present only insubstantial evidence in support of these factors once the Waltham evidence was excluded. See 18.A.8205–09 (oldest brother in Chechen families ordinarily receives deference); 17.A.7777–83 (Tamerlan on occasion flouted rules of mixed martial arts gym); 17.A.7510–13, 7521–24 (Tamerlan on two occasions was argumentative at mosque); 17.A.7529–32 (Tamerlan yelled at a store clerk for selling halal turkey for Thanksgiving); 18.A.8140–45 (Tamerlan once might have abused his then-girlfriend who later became his wife).

Conversely, the government sought to persuade the jury that Jahar should be put to death because he and Tamerlan were equally culpable in the bombings, and Tamerlan had not played a role in Jahar's decision to participate. The prosecution argued in its penalty phase opening and closings that the defense's mitigation evidence consisted of little more than "testimony that Tamerlan was bossy." 19.A.8787. The government depicted Tamerlan as a "handsome," "charming," "loud," guy who "sometimes lost his temper." 19.A.8783. The government urged the jurors to "ask yourselves if there's anything about Tamerlan Tsarnaev . . . that will explain to you how Jahar Tsarnaev could take a bomb, leave it behind a row of children, walk away, down the street, and detonate it." 16.A.7083–84. Over and over during its remarks to the jury, the government claimed that Jahar acted "independently" and "alone," 16.A.7085, 19.A.8798, and urged the jury to find

that Jahar and Tamerlan "bear the same moral culpability for what they did together." 19.A.8798.

B. It was prejudicial error to preclude the jury from hearing evidence that Tamerlan had planned and participated in a triple murder and robbery, and recruited another person to participate in those crimes with him.

The District Court prevented the jury from hearing and evaluating relevant mitigation evidence. This was error of constitutional magnitude. That evidence—Todashev's confession and the corroboration of it—was highly probative of Tamerlan's greater culpability as the primary actor in the bombings and his influence over Jahar; it was sufficiently reliable to go to the jury; and, its probative value outweighed any risk of confusion. Without hearing it, the jurors could not render reliable sentencing verdicts.

1. The evidence of Tamerlan's role in the Waltham crimes was highly probative, sufficiently reliable, and did not risk confusing the jury. It should have been admitted.

Exclusion of relevant mitigation is statutory and constitutional error. 18 U.S.C. § 3593(c); Eddings, 455 U.S. at 114; Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam); Lockett, 438 U.S. at 604 (1978). "So long as the evidence introduced and the arguments made . . . do not prejudice the defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 203–04 (1976). The FDPA reflects the Eighth

Amendment's requirement that "the finder of fact shall consider any mitigating factor" in sentencing the defendant, 18 U.S.C. § 3592(a), including any "factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." 18 U.S.C. § 3592(a)(8). Included in this class of core mitigation evidence is information bearing on the extent and nature of co-conspirators' participation in the charged crime. Enmund, 458 U.S. at 800 (evidence bearing on each defendant's role in the offense is a crucial component of Eighth Amendment analysis because punishment must be tailored to personal responsibility and moral guilt); Green, 442 U.S. at 97 (exclusion at penalty phase of evidence showing primary role of co-defendant violated Due Process Clause);

The District Court found that the evidence of Tamerlan's participation in the Waltham crimes was "insufficient" to "describe what participation Tamerlan may have had in those events," "without any probative value," and would confuse the jury and waste time. Add.351–52. Ordinarily, the District Court's rulings on the admission of mitigating evidence at the penalty phase are reviewed for abuse of discretion (unless the admission or exclusion of evidence occurs as a result of an error of law, which is a *per se* abuse of discretion. Sampson I, 486 F.3d at 42.

Here, deference is not appropriate. The defense specifically moved for the District Court to review the video and audio recordings of Todashev's interview.

24.A.11291–92. The District Court agreed to conduct an *in camera* review of Todashev's final statements before ruling on whether the defense could offer the evidence it already possessed concerning the Waltham crimes. App.397. [redacted] The Court ruled that Todashev's statements were "insufficient" to describe Tamerlan's participation in the Waltham crimes, and, consequently, "without any probative value." Add.351–52 (excluding the whole category of Waltham evidence). [redacted]

[114] The defense asked that the government produce, or the District Court review *in camera*, all reports and video and audio recordings of Todashev's final interview. 23.A.10485–86,10540–43 (requesting review of all Todashev statements regarding Waltham); 24.A.11291–92 (specifically requesting review of the four video recordings and one audio-only recording of Todashev's May 21, 2013, interview). The District Court granted *in camera* review. Add.397. Following this Court's October 3, 2018 Order, authorized counsel reviewed the *in camera* materials for the first time. [redacted]

[redacted]. The District Court's failure to review the evidence crucial to determinations of credibility and reliability prior to excluding this entire category of mitigation negates the deference normally accorded on appeal. See United States v. Rosario-Peralta, 175 F.3d 48, 55 (1st Cir. 1999) (district court abused its discretion in finding requested Brady material irrelevant without first reviewing it). In an analogous case, the Fifth Circuit reversed convictions for conspiracy and aiding and abetting the preparation of false tax returns where the defendant had moved for discovery of his tax file, and the District Court had granted *in camera* review of it, but never performed that review. United States v. Buford, 889 F.2d 1406, 1407–08 (5th Cir. 1989). The Court of Appeals held that "[t]here is no authority for the district court's action" "in failing to perform the promised in camera inspection." Id. at 1408.

Accordingly, *de novo* review is appropriate here. But as discussed below, regardless of whether review is *de novo*, or for abuse of discretion, the District Court erred and abused its discretion in excluding this evidence.

a. Evidence of Tamerlan's role in the Waltham crimes was highly probative of the case in mitigation.

[redacted] The probative value of showing that the bombings were not the first time Tamerlan had committed brutal crimes and [redacted] is evident. Relevant "mitigating evidence"

encompasses any "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." Smith v. Texas, 543 U.S. 37, 44 (2004). "Once this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." Tennard v. Dretke, 542 U.S. 274, 285 (2004) (internal quotation and citation omitted).

In its own penalty phase arguments, the government repeatedly stressed Tamerlan's and Jahar's equal culpability and the lack of evidence of Tamerlan's influence over Jahar. And, as the prosecutor himself correctly noted in rebuttal: the entire mitigation case was about Tamerlan. 19.A.8778–79. In light of the government's recognition that Tamerlan's role was the heart of the penalty phase defense, it is difficult to comprehend the District Court's conclusion that there was "no probative value" in evidence showing Tamerlan had previously committed a gruesome triple homicide in order to cover up the robbery of drug dealers, had [redacted] and that Jahar was aware, after the fact, of Tamerlan's having carried out this violent crime. Indeed, the defense had prepared its mitigation case with the assurance of the District Court (made in excluding evidence of Tamerlan's greater role in the offense from the guilt phase) that "if there's a second phase, you'll have the chance to put in all the stuff about Tamerlan you want." 21.A.9831.

The government's arguments to the jurors in the penalty phase underscore the importance of this excluded evidence. Exploiting the preclusion of this evidence, the government belittled the defense's mitigation evidence as showing merely that Tamerlan was "bossy," "charming," and "loud," and "sometimes lost his temper." 19.A.8787, 8791. [redacted]

The specific role in a crime played by co-conspirators is directly relevant to the individualized sentencing mandated by the Eighth Amendment. Enmund, 458 U.S. 782. Thus, courts in a variety of contexts have recognized the general rule that a defendant's death sentence may not stand where the jury has been prevented from hearing evidence tending to show that defendant may not have had the primary role in the offense. See, e.g., Cooper v. Sec'y, Dep't of Corr., 646 F.3d 1328, 1354–55 (11th Cir. 2011) (vacating death sentence where jury did not hear mitigating evidence supporting defendant's theory that he had been dominated by co-defendant); Mak v. Blodgett, 970 F.2d 614, 622 (9th Cir. 1992) (same, where jury did not hear evidence supporting defendant's theory that co-defendant was primary actor). Courts have applied this general rule to fact patterns identical to this case, vacating death sentences where evidence of a co-conspirator's more

violent background was not presented to the jury. For example, in Cooper, 526 So. 2d at 902, the Florida Supreme Court held the trial court had violated the Eighth Amendment by excluding evidence of a codefendant's "reputation for violence" and relationship to the habeas petitioner. Such testimony was "relevant to petitioner's character as well as to the circumstances of the offense," because it showed the co-defendant's "violent nature and dominant relationship to petitioner." Id. By proving the co-defendant's "violent character and domination of petitioner," defense counsel had "sought to persuade the jury that petitioner was easily led by [the co-defendant] and likely played a follower's role in the commission of the crime." Id. at 902–03. The Florida Supreme Court held that such evidence, "if accepted by the jury . . . clearly would have been relevant to whether petitioner was deserving of the death penalty for this crime." Id. at 903 (vacating death sentence).

Likewise, in Troedel v. Wainwright, 667 F. Supp. at 1462, the court granted federal habeas relief and vacated a death sentence where the mitigation theory was that a co-defendant had "dominated and coerced" the defendant and was primarily responsible for the crime, but evidence regarding the co-defendant's violent background had not been presented to the jury due to trial counsel's ineffectiveness. The court recognized that where "a defendant's life may well depend upon the extent and nature of his participation, the background of a co-

defendant could be crucial." Id. at 1461 (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)).

Similarly, in Buttrum v. Black, 721 F. Supp. 1268, 1314–16 (N.D. Ga. 1989), the court ruled that the erroneous exclusion of mitigation evidence about the violent background of the defendant's husband required that her death sentence be vacated. At issue was the exclusion of statements made by the defendant's husband to a social worker admitting that he had urges to rape women, that he felt someone was trying to kill him, and that he had once attacked his mother with a butcher knife. Id. at 1314. Even before addressing the question of relative culpability, Buttrum recognized that the excluded evidence was "clearly relevant . . . as family background information" because "it concerned [the defendant's] husband" and "[d]uring the two years prior to the crime, her life was intrinsically linked to his." Id. at 1315. The court further ruled that such evidence "also was relevant to the defense that [the petitioner's husband] was the initiator and that [the petitioner] acted under his domination and influence." Id. Notwithstanding that the jury had heard some evidence about the husband's previous violence, the court ruled that the excluded evidence of his statements to the social worker "was unique" because "it strongly showed, like no other, that [the husband] could have been the dominant actor in this crime." Id.

The Waltham evidence excluded here is analogous. Tamerlan's initiation of and participation in brutal acts against the drug-dealer "disbelievers" at Waltham—acts committed without Jahar—makes it significantly more likely that Tamerlan initiated the bombings and the brothers' failed escape, and that, contrary to the government's jury arguments, Tamerlan played a much greater role in these offenses than Jahar throughout.

This evidence was also highly probative of Tamerlan's ability to influence Jahar. The Court prevented the defense from showing that Jahar found out, months later, that his brother had committed the horrific murders in Waltham. Jahar had to live with the knowledge that his closest relative was a killer. In 2012, he told a close college friend, Kadyrbayev, that Tamerlan had committed the murders as "jihad," [redacted] 24.A.11294–95. Evidence of Jahar's knowledge of his brother's willingness to kill someone very close to him—Mess—in pursuit of jihad might well have persuaded at least one juror that Jahar placed the bomb on the finish line out of fear of what his brother might do to him if he refused.

Equally, at least one juror might well have found that, because Tamerlan was in fact a brutal killer who [redacted] Tamerlan possessed aggressive, violent characteristics (not just "bossy" ones) that made it more likely that he intimidated those around him. Such a

finding would have directly supported the defense position that Jahar was susceptible to his older brother Tamerlan's influence (Add.91, Mitigating Factor #4) and acted under that influence (Add.90, Mitigating Factor #3). See Buttrum, 721 F. Supp. at 1315.

[redacted]

Tamerlan's influence over Jahar—his younger brother, a 19-year-old with no history of violence—would be even stronger.

b. The Waltham evidence was sufficiently reliable to be admitted at trial where the jury could judge its credibility.

[redacted] Therefore, in finding that the evidence was "insufficient" to show the extent of Tamerlan's participation, and that "it is as plausible, which is not very, that Todashev was the bad guy and Tamerlan was the minor actor,"

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115 [redacted] the government argued to the District Court that "[t]here's no evidence that the defense can point to anywhere, including Mr. Todashev's own statement, that Tamerlan Tsarnaev controlled him in any way." Add.346.

Add.351–52, the District Court must have meant that it did not believe Todashev's version of events. If so, this was improper.

To conform to the constitutional principle that a defendant may introduce all relevant mitigating evidence, the FDPA provides that, at sentencing, "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials." 18 U.S.C. § 3593(c). So long as mitigating evidence has minimal indicia of reliability, it is admissible. See, e.g., Green, 442 U.S. at 97 (vacating death sentence due to the exclusion, on reliability grounds, of hearsay indicating co-defendant was more culpable than defendant in the offense); United States v. Johnson, 495 F.3d 951, 975–76 (8th Cir. 2007) (affirming death sentence based in part on jailhouse informant's testimony regarding co-defendant's out-of-court description of the murders, even though that description bore minimal indicia of reliability). This low standard of admissibility—"some minimal indicia of reliability"—is a necessary due-process requirement in the capital context and is also consistent with generally applicable case law and criminal, evidentiary, and sentencing codes regarding the admission of evidence at sentencing, even *against* the defendant. See 18 U.S.C. § 3661; Fed. R. Evid. 1101(d)(3); U.S.S.G. § 6A1.3(a). Accordingly, this Court has several times deemed hearsay statements reliable enough to be admitted against defendants in non-capital sentencing proceedings. E.g., United States v. Nieves-Mercado,

847 F.3d 37, 43 (1st Cir. 2017); United States v. Ramirez-Negron, 751 F.3d 42, 51–52 (1st Cir. 2014); United States v. Whiting, 28 F.3d 1296, 1304–05 & n. 6 (1st Cir. 1994).

The evidence of Tamerlan's participation in the Waltham triple-homicide and robbery was sufficiently reliable to be admitted at the penalty phase, where each juror could assess the credibility of it, and decide how much weight to give it in relation to specific mitigating factors, or in the juror's own discretion.[116] This is so for four reasons.

First, Todashev's own statements were credible. He was a close friend of Tamerlan's. After the bombings, he voluntarily agreed to meet with law enforcement and answer questions on three or four occasions. [redacted] [redacted] [redacted].[117] [redacted]

[116] A juror can find anything mitigating that the juror individually believes favors the imposition of life imprisonment without the possibility of release, even if the information does not relate to a specific mitigating factor, or has not been argued by the defense. See, e.g., 19.A.8692–93.

[117] The government also asserted that Todashev's statements were unreliable because Todashev *must have been* unbalanced when he confessed that he and Tamerlan committed the robbery-murders. After all, the government speculated, no one in his right mind would run at armed law enforcement agents after confessing to murder. Add.333. Not only is Todashev's mental state a classic jury question, but nothing corroborates the government's bald allegation. The disclosed information about the law enforcement interviews, as well as the Florida Attorney General's comprehensive investigation into the circumstances of Todashev's shooting, contain no evidence of mental illness. Todashev was a highly skilled

[redacted]

martial arts fighter, who might, in a moment of desperation, have preferred his chances of overcoming law enforcement to the probability of going to prison for a long time, after having confessed to participation in these horrific crimes. If the FBI had observed mental illness during their interviews of Todashev, the government would not have relied on Todashev's statements in seeking a search warrant, as it did. [redacted]

[redacted]

Second, contrary to the government's contention, Add.334–35, 344, [redacted] See 23.A.10653 (Trooper Two, who was involved in final interview of Todashev, explained to Florida Attorney General investigators that at the time the interview started, they did not have anything concrete that tied Todashev to the Waltham triple homicide). [redacted]

[redacted]

Third, [redacted] Furthermore, in 2012, not long after the Waltham robbery-murders, Tamerlan traveled to Russia for six months, in order to try to join a jihadi group. 14.A.6249–50. [redacted]

[redacted]. Also, Tamerlan had a lengthy document on his computer setting forth Anwar Al-Awlaki's teachings on how stealing money from nonbelievers to support jihad conformed with Islamic precepts. 25.A.11643–55. This document rebutted the government's claim that because Tamerlan was religious, no one could rationally believe Todashev's statement that Tamerlan had proposed committing this robbery while he and Todashev were at the mosque during Ramadan. Add.335.

Finally, one of the most significant pieces of independent corroboration comes from the proffer made to the government by the lawyer for Jahar's close friend, Kadyrbayev. That proffer included the statement that before the Boston Marathon Bombings Jahar had told Kadyrbayev that he had learned that Tamerlan had committed the Waltham murders and robbery as "jihad," that he had a gun during the crimes, and owned a knife collection as well. 24.A.11294–95. How would Kadyrbayev have had these details if he had not in fact heard it from Jahar? The interlocking combination of Kadyrbayev's statements and Todashev's [redacted] constitute powerful indicia of reliability that go well beyond the minimal amount required for penalty-phase admissibility.

Fourth, [redacted]

[redacted] See Franks v. Delaware, 438 U.S. 154, 164–65 (1978) (holding that, in signing warrant affidavit, officer is expected to be "'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true") (alterations, internal citations and quotation marks omitted). [redacted]

When the government sought preclusion of the Waltham evidence, it never disclosed to the District Court that these same prosecutors had submitted Todashev's confessions to the Magistrate Judge as the primary basis for the warrant to search Tamerlan's car. Compare Add.333–38 with SAdd.29–34. It was

only when the defense sought to use the same evidence in mitigation that the government reversed course and doubted Todashev's statements that Tamerlan had been involved in the murders. Add.334–36.

Todashev's unavailability did not mean the government was barred from rebutting his statements, let alone that the statements themselves were inadmissible. At a penalty phase hearing, the Rules of Evidence do not apply and the exclusion of relevant hearsay in mitigation is error. See 18 U.S.C. § 3593(c); Green, 442 U.S. at 97 (in penalty phase, "'the hearsay rule may not be applied mechanistically to defeat the ends of justice'") (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)); Mak, 970 F.2d 622–24 (state trial judge erroneously excluded at penalty phase hearsay evidence from which jurors could infer that co-defendant and a third party planned the murders). In fact, because hearsay is not excluded at the penalty phase, the District Court permitted the defense, over the government's objection, to introduce several FBI 302 reports of friends of Tamerlan's during the penalty phase, even though the friends could not be cross-examined. See DE.1344–1, at 2, 5–6, 7–8, 9–10; 17.A.7730–34, 7788–809.

Because the Waltham evidence more than satisfied the "minimal indicia of reliability" needed for mitigation evidence in favor of a defendant in a penalty phase proceeding, it was admissible. The government was free to argue to the jury that Todashev's statements should carry less weight because he was not available

to be cross-examined, or to try to challenge the reliability of the statements in whatever way it saw fit. See 18 U.S.C. § 3593(c) (either party is permitted to rebut any information received at the hearing); Dutton v. Brown, 812 F.2d 593, 599–602 (10th Cir. 1987) (error to preclude mitigation witness who had violated sequestration order, because government was free to argue to the jury that the witness had sat through the proceeding).

Whether to credit Todashev's statements and the evidence corroborating them, and how much weight to give this evidence in mitigation, was for the sentencing jury, not for the District Court, to determine. It was for the jury to choose to believe or disbelieve Todashev's account of the Waltham robbery and murders and the respective roles he said he and Tamerlan had played in those crimes. See Nelson v. Quarterman, 472 F.3d 287, 311–13, 315–16 (5th Cir. 2006) (reversing death sentence where trial court's exclusion of mitigation evidence was erroneous because the credibility of defendant's mitigation evidence should be judged by the jury, not the court); Rupe v. Wood, 93 F.3d 1434, 1439–41 (9th Cir. 1996) (reversing death sentence where trial court excluded, on the basis of unreliability, polygraph evidence offered by defendant in mitigation, even though State Supreme Court had previously held this evidence unreliable because it was for sentencing jury to weigh the reliability of evidence and determine whether it mitigated defendant's crime); Rupe v. Wood, 863 F. Supp. 1315, 1340 (W.D.

Wash. 1994) ("At the penalty stage of a capital case it is wise to put aside the normal rules of evidence and permit the defendant to present any relevant mitigating evidence.").

In sum, the prosecution was free to argue to the jury that Todashev's account should not be credited, but it was not free to remove the account from the jury's consideration altogether.

c. There was no real risk of juror confusion; wasting time is not an FDPA consideration.

Finally, this evidence clearly satisfied the FDPA's balancing test for admissibility because its high probative value was not outweighed by any risk of unfair prejudice, confusion, or misleading the jury. 18 U.S.C. § 3593(c). The District Court erred in finding to the contrary. The District Court held, without any explanation or citation to legal authority, that the evidence concerning the Waltham murders would be a "waste of time" and confusing to the jury. Add.351–52. But in fact, the Waltham evidence was highly probative, as discussed above, and did not risk confusing the issues or misleading the jury. To the contrary, keeping this evidence from the jury evaluating Jahar's culpability misled it.

i. Relying on "waste of time" as a basis for exclusion was legal error.

Waste of time is never a consideration for admissibility in the penalty phase under the FDPA. 18 U.S.C. § 3593(c). The District Court committed legal error

by relying on that as a reason for precluding this essential mitigating evidence, and, thus abused its discretion. See Sampson I, 486 F.3d at 42.

But even if it were a valid consideration, evidence bearing on Tamerlan and Jahar's relative culpability could not possibly be a waste of time, or a "sideshow," as the government characterized it. Add.336–38. For the reasons discussed above, this evidence bore directly on the jury's assessment of the specific roles the two brothers had in the charged offenses. As Green and Enmund make clear, evidence tending to show that the defendant's role in the offense was less significant than the government alleged is not a "waste of time," but is instead core mitigation evidence. Green, 442 U.S. at 97; Enmund, 458 U.S. at 800.

And, while the trial court may always limit cumulative evidence, here the jury did not hear *anything* regarding the Waltham crimes. Moreover, the evidence of Tamerlan's participation in the Waltham crimes would not have been particularly time-consuming. It could have been introduced by the defense through no more than a handful of witnesses in the course of a day or two. Much of the corroborating information was already in evidence.

ii. The Waltham evidence was not confusing.

Further, there was nothing confusing about the evidence itself to warrant its exclusion, and any risk of confusion was heavily outweighed by its probative value. The government's summary of Todashev's statements in its sworn search

warrant application uses clear, plain language, as does Todashev's partial handwritten confession. SAdd.29–33; 23.A.10636. While the government claimed that it would confuse the jury to hear about Tamerlan at Jahar's penalty phase, Add.336, 338, in fact, Tamerlan was the heart of the mitigation case, as even the government acknowledged. 19.A.8778–79. See also 19.A.8758 (defense closing argument) ("[I]f not for Tamerlan, this wouldn't have happened. Jahar would never have done this but for Tamerlan."). Evidence bearing on Tamerlan's greater role in the offense and ability to influence others to commit violence mattered, as the government's own jury arguments made clear. In deciding whether Jahar would live or die, the jury had to assess his precise role in the capital crimes. Thus, the exclusion of this evidence—not its admission—caused confusion. The penalty phase jury was deceived into thinking that Tamerlan was far less brutal and less culpable than he actually was, and that Jahar had less reason—none, according to the government's penalty phase rebuttal—to be afraid of Tamerlan than he in fact did. It was profoundly misleading to allow the jury to hear that Tamerlan shouted in a mosque or used another boxer's equipment without permission, but not to hear that just eighteen months before the bombings, he brutally robbed and murdered three men on the anniversary of 9/11 and [redacted]

To the extent there was any lingering potential for confusion, an appropriate jury instruction could have simply and directly advised jurors of the purpose of the Waltham evidence.

2. Given the recognized significance to the mitigation case of the relative extent and nature of Tamerlan and Jahar's participation in the bombings, the District Court's exclusion of the Waltham evidence was prejudicial.

"In a capital case, where a defendant's life may well depend on the extent and nature of his participation, the background of a codefendant could be crucial." Thompson, 787 F.2d at 1450 (counsel's failure to investigate a codefendant's more violent background fell outside the range of reasonably effective assistance). Here, the jury's view on the critical issue of Jahar's culpability for the placing of the bomb at the finish line, and to what degree Tamerlan had influenced him to commit that crime, may well have been dispositive. The District Court's exclusion of powerful evidence bearing on those issues renders the jury's death verdicts unreliable.

a. Standard of prejudice.

The FDPA itself provides a general standard of prejudice to be applied by reviewing courts where there has been a legal error "which can be harmless," requiring reversal unless "the Government establishes beyond a reasonable doubt that the error was harmless." 18 U.S.C. § 3595(c)(2); see also United States v. Barnette, 211 F.3d 803, 824 (4th Cir. 2000) (citing Chapman v. California, 386

U.S. 18, 23–24 (1967)) (FDPA "incorporates the same standard for harmless error review as that used to evaluate direct appeals of Constitutional errors."). The initial question to be resolved is whether this standard applies to the exclusion of mitigating evidence—that is, whether such an error is one "which can be harmless."

The standard of prejudice for the exclusion of mitigating evidence is unsettled.[119] However, the Supreme Court has *never* held that errors which prevent the jury from considering mitigating evidence can be found harmless by a reviewing court, and it has reversed numerous death sentences on that ground without applying any harmless error analysis. See, e.g., Brewer v. Quarterman, 550 U.S. 286, 293–96 (2007) (instructional error precludes full jury consideration of mitigating evidence at defendant's penalty phase; held, death sentence reversed without application of a harmless error test); Abdul-Kabir, 550 U.S. at 247–65

[119] This Court has not previously had an opportunity to analyze the erroneous exclusion of mitigation evidence in reviewing a death sentence, but in United States v. Catalan-Roman, 585 F.3d 453, 471 (1st Cir. 2009), this Court noted that had the defendant been sentenced to death, "it might be necessary to decide whether the exclusion [of defense impeachment evidence] was an error of constitutional dimension, because the harmless error analysis might well be different." In the only prior case in this Circuit reviewing a death sentence imposed under the FDPA, Sampson I, this Court found no erroneously excluded mitigation. 486 F.3d at 44–45. And, while the Sampson I opinion notes generally that evidentiary errors are reviewed for harmlessness, id. at 42, that case presented no opportunity to apply the test in this context.

(same); Penry v. Johnson, 532 U.S. 782, 796–803 (2001) (same); Penry v. Lynaugh, 492 U.S. at 319–28 (same); Eddings, 455 U.S. at 113–17 (sentencer refuses to consider evidence regarding defendant's childhood; held, death sentence reversed without application of a harmless error test); Lockett, 438 U.S. at 602–09 (state statute precluded sentencer from considering mitigating evidence; held, death sentence reversed without application of a harmless error test).

In light of this authority, some Circuits have suggested that exclusion of relevant mitigation evidence is not subject to harmless error review. See, e.g., Nelson, 472 F.3d at 314–15 (applying structural error standard because "it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases"); Wright v. Walls, 288 F.3d 937, 942–46 (7th Cir. 2002) (affirming vacatur of death sentence, without conducting harmless error analysis, for sentencing judge's failure to consider certain mitigating evidence). As the Fifth Circuit has concluded, "upon finding that a jury in a capital murder case was precluded . . . from being able to give effect to constitutionally relevant mitigating evidence, in violation of the Eighth Amendment, [the Supreme Court] has never subjected the defect to a harmless error analysis." Hernandez v. Johnson, 248 F.3d 344, 380 (5th Cir. 2001). Or, as Justice O'Connor explained in her concurrence in Eddings, "[b]ecause the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence . . . it is

our duty to remand this case for resentencing." 455 U.S. at 117, n.* (O'Connor, J., concurring).

Ultimately, there is no need to resolve this question here. As discussed below, whether the error is viewed as structural, or whether the harmless beyond a reasonable doubt standard is applied, the result here is the same: the death sentences should be reversed.

b. Under any standard, exclusion of the Waltham evidence was prejudicial.

Even assuming that harmless error analysis applies to the error here, the Government cannot carry its burden of proving the error harmless beyond a reasonable doubt. That would require proving beyond a reasonable doubt—defined by the Court as to a "near certitude," Victor v. Nebraska, 511 U.S. 1, 14 (1994)—that the errors "did not contribute to the verdict obtained." United States v. Aurenheimer, 748 F.3d 525, 539 (3d Cir. 2014). The excluded evidence was highly relevant, non-trivial, and not cumulative. Indeed, it was the strongest evidence of the most important mitigation themes offered by the defense: Tamerlan's greater culpability and primary role in the bombings and his influence over his younger brother. It bore on five specific mitigating factors concerning Tamerlan and the relationship between the Tsarnaev brothers, as well as on the jury's overarching right to find any other factor or circumstance mitigating in rendering its individualized judgment. See Add.90–93.

Because the Court precluded this evidence, the defense had to argue from an incomplete and inaccurate picture of Tamerlan's history and character that he had influenced Jahar to place the bomb. All that the jury heard to support Tamerlan's greater culpability and influence over Jahar was: testimony that Tamerlan was radicalized first and sent jihadi materials to Jahar; evidence that Tamerlan had traveled to Russia in 2012 to seek jihad; testimony that in traditional Chechen families the older brother has the most authority; testimony that on occasion Tamerlan did not follow the rules of the gym where he worked out, was argumentative at the mosque twice, once yelled at a store clerk for selling halal turkey on Thanksgiving, and frightened the roommates of the woman who became his wife. None of that shows violence. It is a far cry from cold-blooded murder and [redacted]

The excluded evidence would have permitted the defense to persuasively counter the government's claims that Jahar and Tamerlan "bear the same moral culpability for what they did together," 19.A.8798, and that Jahar acted "independently" in placing the bomb at the finish line. 19.A.8725. The Waltham evidence showed that Tamerlan—unlike Jahar—had a history of horrific violence, which he justified as jihad. The Waltham evidence showed that Tamerlan—unlike Jahar—had previously instigated, planned, and led brutal acts. The Waltham evidence showed that Tamerlan—unlike Jahar—had [redacted]

[redacted] in murder, and demonstrated his willingness to kill even his closest friend (Mess) to get what he wanted. And Jahar's knowledge of Tamerlan's brutality gave him good reason to fear Tamerlan and obey his instructions, including placing the bomb at the finish line. Without the proof of Tamerlan's prior planning, leading, and [redacted] commit violence, the sentencing jury could not make a reliable, individualized determination about whether Jahar deserved the death penalty because it was precluded from considering this powerful evidence of his co-conspirator's relative culpability in the offense, and his co-conspirator's ability to influence him. See Gregg, 428 U.S. at 203–04.

On this record, the government cannot prove "beyond a reasonable doubt" that the error had no effect on the sentencing verdict. See Satterthwite v. Texas, 486 U.S. 249, 257–58 (1988) (reversing death sentence where testimony on aggravating factor erroneously admitted, because "question … is not whether the legally admitted evidence was sufficient to support the death sentence … but rather whether the [government] has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"); United States v. Basham, 561 F.3d 302, 330 (4th Cir. 2009) (under 18 U.S.C. § 3595(c)(2)(C), as to *all* errors touching upon capital-sentencing hearing, including non-constitutional ones, government bears burden of showing the errors harmless beyond a

reasonable doubt); United States v. Purkey, 428 F.3d 738, 758–59 (8th Cir. 2005) (same); United States v. Jackson, 327 F.3d 273, 307 (4th Cir. 2003) (same). Death was not a foregone conclusion here. Jahar Tsarnaev was 19 years old. He had no disciplinary issues in his two years in prison awaiting trial. Not only did he lack criminal history, but his case in mitigation established his kind, generous nature. See, e.g., 17.A.7826; 18.A.8104–06; 18.A.8151–53; 18.A.8423–24, 8429. The government did not dispute there was nothing in his past or in his character that indicated violence of any kind. And, even without hearing the Waltham evidence, three jurors found the mitigating factors relating to Jahar acting under the influence of Tamerlan, Jahar being particularly susceptible to Tamerlan's influence and Tamerlan having planned, led, and directed the bombings. Add.90–91. On such a record, the government cannot establish beyond a reasonable doubt that if the entire jury had also heard that Jahar knew his older brother had killed a close childhood friend in cold blood, not even one of the jurors would have thought life was the appropriate sentence as to the remaining capital counts.[120]

[120] Where a jury is not presented with important evidence that is favorable to the defendant, and where a unanimous jury is required to impose a death sentence, relief is required where at least one of the jurors could have been persuaded by the missing evidence. See, e.g., Wiggins v. Smith, 539 U.S. 510, 537 (2003); Mak, 970 F.2d at 620–21; Harris v. Blodgett, 853 F. Supp. 1239, 1270 (W.D. Wash. 1994). See also Kubat v. Thierot, 867 F.2d 351, 371 (7th Cir. 1989) (applying same approach to instructional error).

The jury verdicts themselves show that jurors were specifically focused on the role each brother had in the bombings. Even without this crucial mitigation, the jury imposed death on only 6 of 17 death-eligible counts, those six counts relating to the bomb Jahar himself placed at the finish line. Id. Thus, for every count involving conduct in which Tamerlan was present, Jahar was sentenced to life, not death. This demonstrates the jurors' focus on the specific roles of the brothers.

The harm from the exclusion of the Waltham evidence is particularly acute here, given the government's reliance on the absence of this evidence in its penalty phase arguments to the jury. The government emphasized to the jury that the defense *only* showed that Tamerlan was a "handsome," "charming," "loud," guy who was just "bossy" and "sometimes lost his temper," and not the violent, dominating figure the defense claimed. 19.A.8787, 8791. The prosecution then cited the defense's inadequate proof of lesser culpability in urging the jury not to give weight to the mitigating factors concerning Tamerlan influencing Jahar to commit the bombings. It pointedly argued that the death penalty was the right punishment because "[n]othing was forced upon" Jahar. 16.A.7087; see also 19.A.8785.

The government additionally capitalized on the exclusion of Todashev's statements, arguing to the jury that "the only witnesses the defense subpoenaed to

talk about Tamerlan were people who happened to be present on an occasion when he lost his temper or acted inappropriately. What about the people who spent time with him every day?" 19.A.8793. Ultimately, and despite its knowledge of the Waltham evidence, the government encouraged the jury to reject the defense's arguments about Jahar's lesser culpability, insisting: "It's not true. His brother did not make him do it." 19.A.8779.

The government's strong reliance on the absence of this evidence shows its importance—and the prejudice to Jahar from its exclusion. See, e.g., Clemons v. Mississippi, 494 U.S. 738, 753 (1990) (erroneous instruction on aggravating factor not harmless as to death sentence where "the State repeatedly emphasized and argued the . . . factor during the sentencing hearing"); United States v. Serrano, 870 F.2d 1, 9 (1st Cir. 1989) (erroneous admission of co-conspirator's hearsay statement not harmless because "the government emphasized the statement in its closing arguments to the jury"). Because there is no way for a defendant to respond to such an argument, it violates a defendant's "constitutional rights . . . to rebut evidence and argument used against him." Paxton v. Ward, 199 F.3d 1197, 1217–18 (10th Cir. 1999). The government possessed evidence of Tamerlan's participation in these prior brutal crimes when it argued that the death penalty was the right punishment because "[n]othing was forced upon" Jahar. 16.A.7087. The fairness and reliability guaranteed to a capital defendant by the Fifth and Eighth

Amendments required that the defense be allowed to counter those arguments with its mitigation evidence.

Courts have regularly struck down death sentences as unreliable, even in highly aggravated cases with multiple victims, when the jury was deprived of significant mitigating evidence of this kind. See, e.g., Cooper, 646 F.3d at 1354–55 (vacating death sentence for triple murder where jury did not hear evidence tending to show that Cooper had not been initiator of murders); Mak, 970 F.2d at 622 (vacating death sentence for 13 murders where jury did not hear evidence that tended to show co-defendant had initiated robbery and murders); Buttrum, 721 F. Supp. at 1314–15 (vacating death sentence for rape, sodomy, and murder by 97 stab wounds where jury did not hear hearsay evidence that co-conspirator could have been dominant actor). As in these cases, the exclusion of evidence tending to show the defendant's lesser role in the crime renders the death sentences suspect. Because exclusion of this mitigation evidence "may have affected the jury's decision to impose the death sentence," the District Court's errors are "sufficiently prejudicial" to require that the sentence be reversed. Skipper v. South Carolina, 476 U.S. 1, 8 (1986).

C. Tsarnaev's Fifth Amendment rights were violated by the withholding of material, favorable details in Todashev's confession that were not protected by the qualified law enforcement privilege.

The District Court's legal error went beyond keeping any evidence of the Waltham crimes from the jury. The Court denied the defense access to additional favorable, material information in the government's possession regarding the Waltham murders: the report and recordings of Todashev's full confession to the FBI. Add.429–30. As discussed above, see ante § V.B, [redacted]

[redacted]. While appellate counsel still does not know what further mitigating information may be contained in the best evidence of Todashev's confession—the actual recordings [redacted] appellate counsel still does not have[121]—[redacted] Because the government did not show that disclosure of these details to the defense would endanger any ongoing investigation, withholding them violated Tsarnaev's right to due process.

1. [redacted].

Under Brady v. Maryland, the prosecution's failure to disclose evidence upon request violates due process if the requested evidence is (1) "favorable to [the] accused" and (2) "material either to guilt or punishment." 373 U.S. 83, 87 (1963). Evidence is material if there is "'any reasonable likelihood'" it could have "'affected the judgment of the jury.'" Giglio v. United States, 405 U.S. 150, 154

[121] According to the Florida Attorney General's Report, these recordings "captured the majority of the interview and confession of Todashev." 23.A.10586. While these recordings have not been disclosed to appellate counsel, there can be no dispute that they provide the fullest record of Todashev's actual words about the Waltham crimes, as well as depicting his physical condition, behavior, demeanor, mental state, and understanding of the questions being asked, and what questions the interviewers asked him. [redacted]

(1972) (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959)). For Brady purposes, material evidence includes information that "play[s] a mitigating, though not exculpating, role" in a capital case. Cone v. Bell, 556 U.S. 449, 475 (2009). In the penalty phase context, even a relatively small amount of undisclosed mitigation evidence can be material if its disclosure would have bolstered the defendant's mitigation case. In Cone, for example, the Supreme Court granted habeas relief with respect to a state death sentence where the mitigation theory was that defendant was suffering from acute methamphetamine psychosis when he killed the two victims, and the state had suppressed witness statements supporting this theory but urged jurors to reject it as "baloney." Id.

Where a trial court has reviewed potential Brady material *in camera*, the appellate court ordinarily reviews the denial of disclosure for abuse of discretion. See United States v. Bulger, 816 F.3d 137, 153 (1st Cir. 2016). [redacted] Instead, the Court denied disclosure of *all* of the requested reports and recordings of the four-and-one-half-hour interview of Todashev, [redacted] The District Court ruled that the requested materials were not "material and helpful in the necessary sense," because the Court did not believe they would "materially advance" the defense mitigation theory beyond

what was already available to the defense. Add.430. [redacted] See Rosario-Peralta, 175 F.3d at 55. [redacted] Here, the government was seeking exclusion based in part on a contention that Todashev was "deranged," when he made the statements about Waltham. Add.333. [redacted]

Even under the deferential abuse of discretion standard, however, the District Court's denial of disclosure requires reversal of the death sentences,

because the non-disclosed evidence of Tamerlan's prior robbery and killings and [redacted] undermines confidence in the death sentences. See United States v. Flores-Rivera, 787 F.3d 1, 17–21 (1st Cir. 2015) (reversing district court conclusion that withheld evidence was insufficiently material to warrant a new trial where that evidence bore on pivotal facts and could have been a focus of defendant's closing). [redacted]

Tamerlan's and Jahar's roles in the bombings. Thus, the District Court's ruling withholding these materials adversely affected not only the defense's ability to present mitigation to the jury, but also its ability to respond to the government's argument for the complete preclusion of the Waltham evidence.[122] See United

[122] For example, when the government argued to the District Court that the statements should be excluded because "[t]here's no evidence that the defense can point to anywhere, including Mr. Todashev's own statement, that Tamerlan Tsarnaev controlled him in any way," Add.346, the defense did not, of course, *have* Mr. Todashev's own statement, [redacted] The government also told the Court that Todashev's statements were unreliable because "all of the evidence points to the fact that" Tamerlan did not have a gun. Add.335. [redacted]

States v. Bagley, 473 U.S. 667, 683 (1985) (holding that, in determining the materiality of undisclosed information, reviewing court may consider "any adverse effect" that the nondisclosure "might have had on the preparation or presentation of the defense's case"). The defense was left to rebut the government's exclusion argument [redacted]

Constraining the defense in this way violated Due Process and the Eighth Amendment's guarantee of a reliable penalty phase procedure and undermines confidence in the outcome.

[redacted] See Ellsworth v. Warden, 333 F.3d 1, 54 (1st Cir. 2007) (en banc) (holding that evidence should be disclosed, if it "could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it.") (citing Wood v. Bartholomew, 516 U.S. 1, 6–8 (1995)). [redacted]

[redacted]

[redacted]

Because there is a reasonable probability that, had the details in Todashev's statements been disclosed to the defense, the result of the penalty phase proceeding would have been different, the statements were Brady material and the District Court committed clear error in ruling that the material was not discoverable. See United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

2. The District Court erred in relying in part on the qualified law enforcement privilege to keep the details in Todashev's statements secret from the defense.

Separate and apart from its erroneous conclusion regarding materiality, the District Court additionally relied on the qualified law enforcement privilege to deny disclosure. Add.394–95; Add.429–30. This too was error.

The law enforcement privilege is qualified, not absolute, and courts must determine on a case-by-case basis whether a party has "demonstrated an authentic 'necessity,' given the circumstances to overbear the qualified privilege." See Commonwealth of Puerto Rico v. United States, 490 F.3d 50, 62 (1st Cir. 2007) (quotation marks omitted). The party claiming privilege, here the government, has the burden of establishing its existence. Id.

The government failed to meet the requirements for invoking this qualified privilege. It never offered *any* specific ways in which disclosure to the defense would have endangered the ongoing Waltham murder investigation. See 23.A.10464–66; 20.A.9113 (government argues disclosure would jeopardize the

investigation unnecessarily, "just as it would in the case of any homicide investigation"). Such a showing is always a precondition to withholding under this qualified privilege, let alone where the defendant is facing the death penalty. See Commonwealth of Puerto Rico, 490 F.3d at 62 (discussing United States v. Cintolo, 818 F.2d 980, 983–84 (1st Cir. 1987)).

At trial the defense made a strong showing of need for Todashev's statements. Any fair examination of the actual investigation here forecloses the possibility that disclosure to defense counsel would have harmed law enforcement's interests. The government certainly failed to offer any possibility with even the least specificity. The Waltham homicides occurred in 2011. By 2015, when Tsarnaev's penalty phase began, the sole identified suspects (Todashev and Tamerlan) were both dead. By all indications, there was no case left to solve.[123]

It is, of course, always the government's burden to establish concretely that withholding the materials achieves the exception's "underlying purpose" of not jeopardizing an ongoing investigation. Commonwealth of Puerto Rico, 490 F.3d at 62–63 (quoting Roviaro v. United States, 353 U.S. 53, 60 (1957)). That burden was especially pronounced here given the passage of time and the apparent

[123] Indeed, to this day, over seven years after the killings, no other suspects have ever been identified.

absence of any other suspects. At a minimum, the District Court should have required a specific proffer by the government before denying disclosure based on a qualified privilege. See, e.g., Swanner v. United States, 406 F.2d 716, 719 (5th Cir. 1969) ("[W]hile pendency of a criminal investigation is a reason for denying a discovery of investigation reports, this privilege would not apply indefinitely."); Miller v. Pancucci, 141 F.R.D. 292, 300 (C.D. Cal. 1992) (requiring specific description of how disclosure subject to a carefully crafted protective order would create substantial risk of harm to significant governmental interest). Without that specific information, the District Court's speculation that disclosing Todashev's statements regarding the timing and sequence of when certain things happened during the robbery-homicides would have the potential to interfere with the investigation, was just that—speculation. Add.430 (District Court states that disclosure of the statements risked revealing facts "seemingly innocuous on their face, such as times of day or sequences of events, revelation of which would have a real potential to interfere with the ongoing state investigation."). Such unsupported speculation is plainly insufficient to justify withholding these crucial materials. See, e.g., Torres v. Kuzniasz, 936 F. Supp. 1201, 1211 (D.N.J. 1996) (finding police department's broad speculations of harm insufficient to support withholding under law enforcement privilege).

The trial court did more than inappropriately defer to the government's generalized insistence that disclosure would harm an ongoing investigation. It also failed to assess the defense's competing interests in obtaining the Todashev materials. In doing so, it ignored this Court's admonition that "a showing that the information 'is relevant and helpful to the defense [of a criminal defendant] or is essential to a fair determination of a cause,' may be sufficient to overcome an assertion of privilege." Ass'n for Reduction of Violence v. Hall, 734 F.2d 63, 66 (1st Cir. 1984) (quoting Roviaro, 353 U.S. at 60–61). Indeed, as the Supreme Court said in United States v. Nixon regarding evidentiary privileges, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth." 418 U.S. 683, 710 (1974).

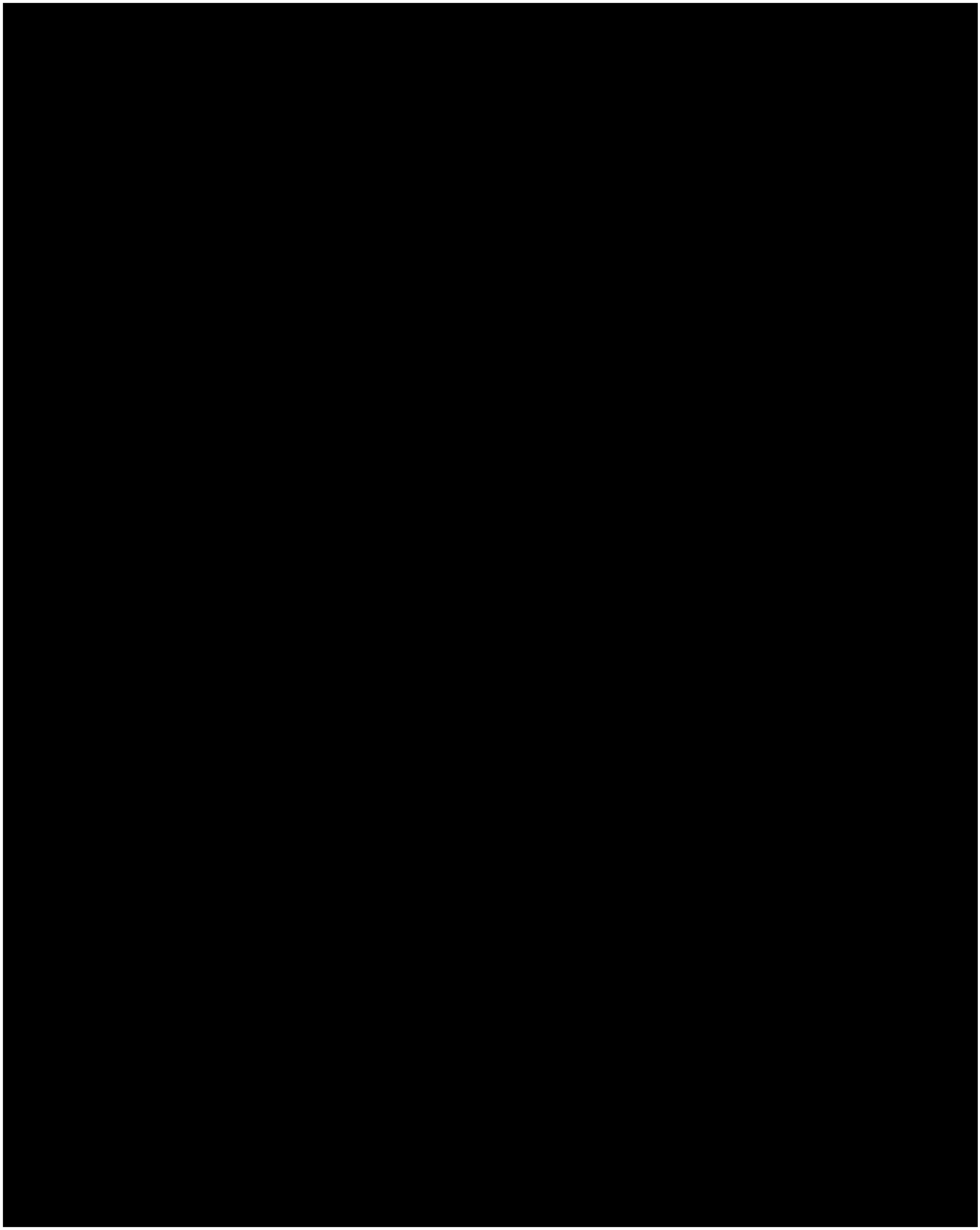
As set forth above, the Todashev materials [redacted] But instead of weighing the materiality of those details on the side of disclosure, the trial court focused its analysis on whether their revelation would harm an ongoing investigation—which the Court, like the government, failed to elucidate in any meaningful way. Further, the District Court overlooked other available mechanisms that would have allowed disclosure while ameliorating the

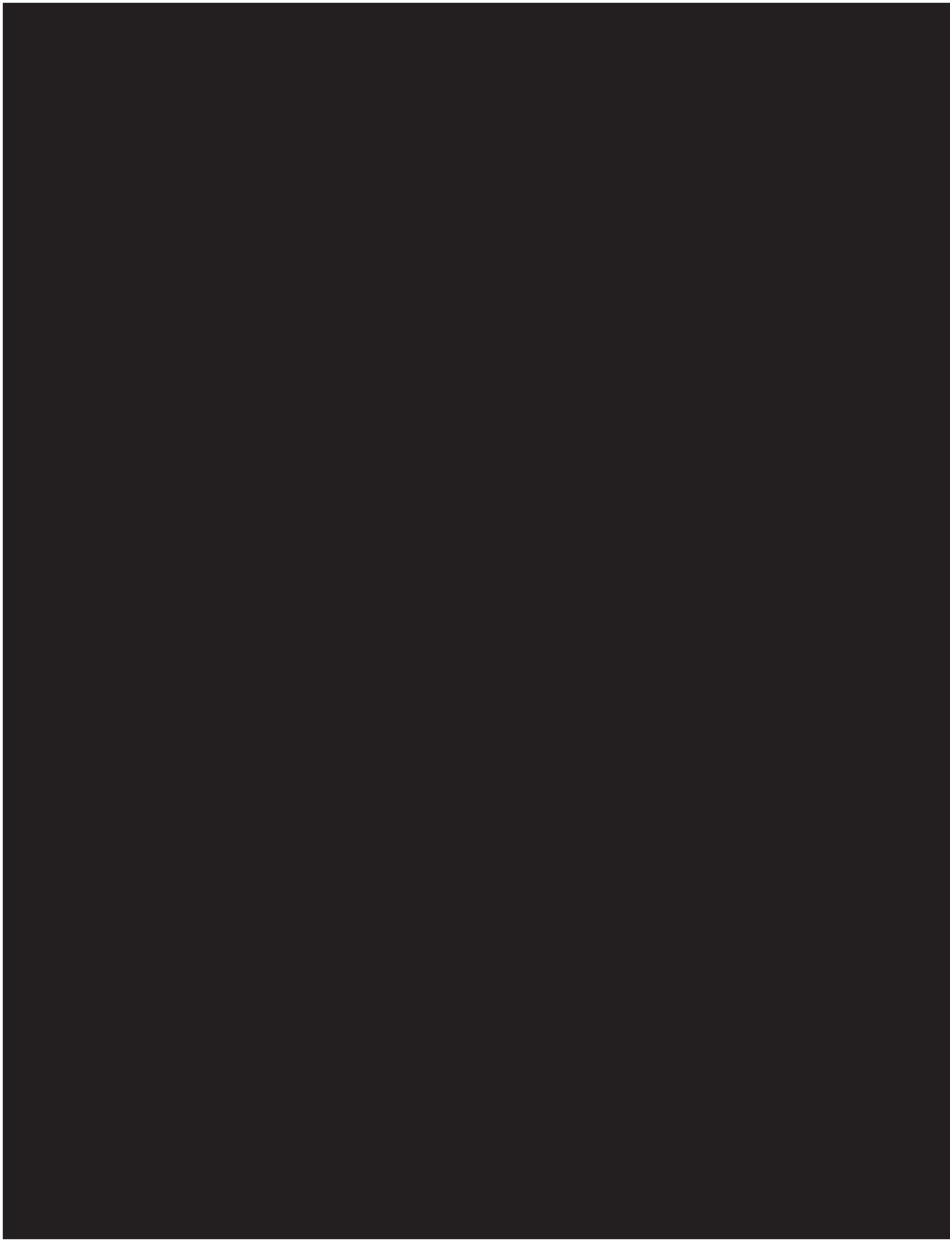
government's concerns, such as the already-existing protective order limiting disclosure of all government discovery. 23A.10423–27. See Ass'n for Reduction of Violence, 734 F.2d at 66 (where possible, court should accommodate moving party's interest in disclosure through excising privileged sections, editing or summarizing the documents, or permitting the discovery subject to a protective order).

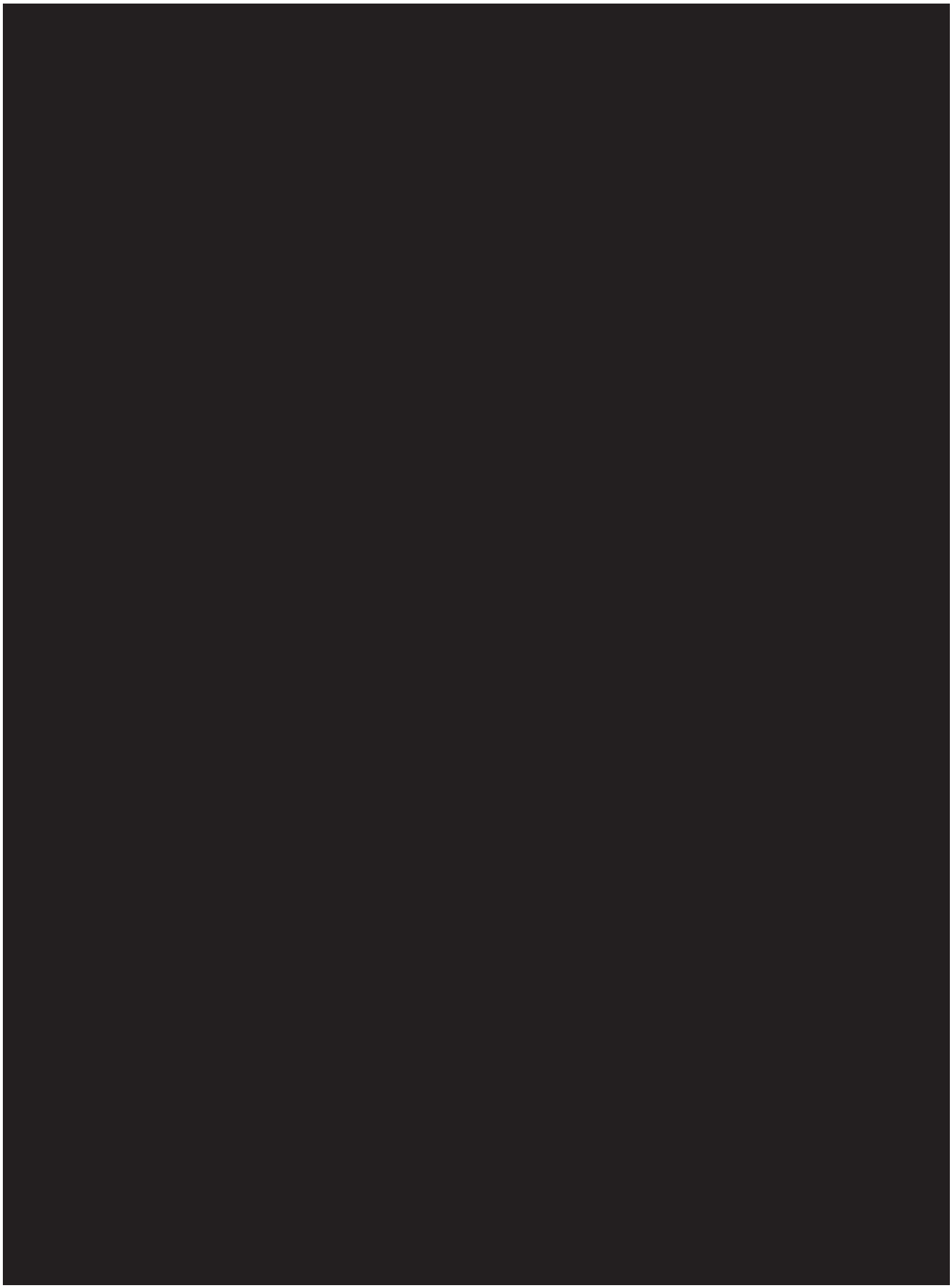
***

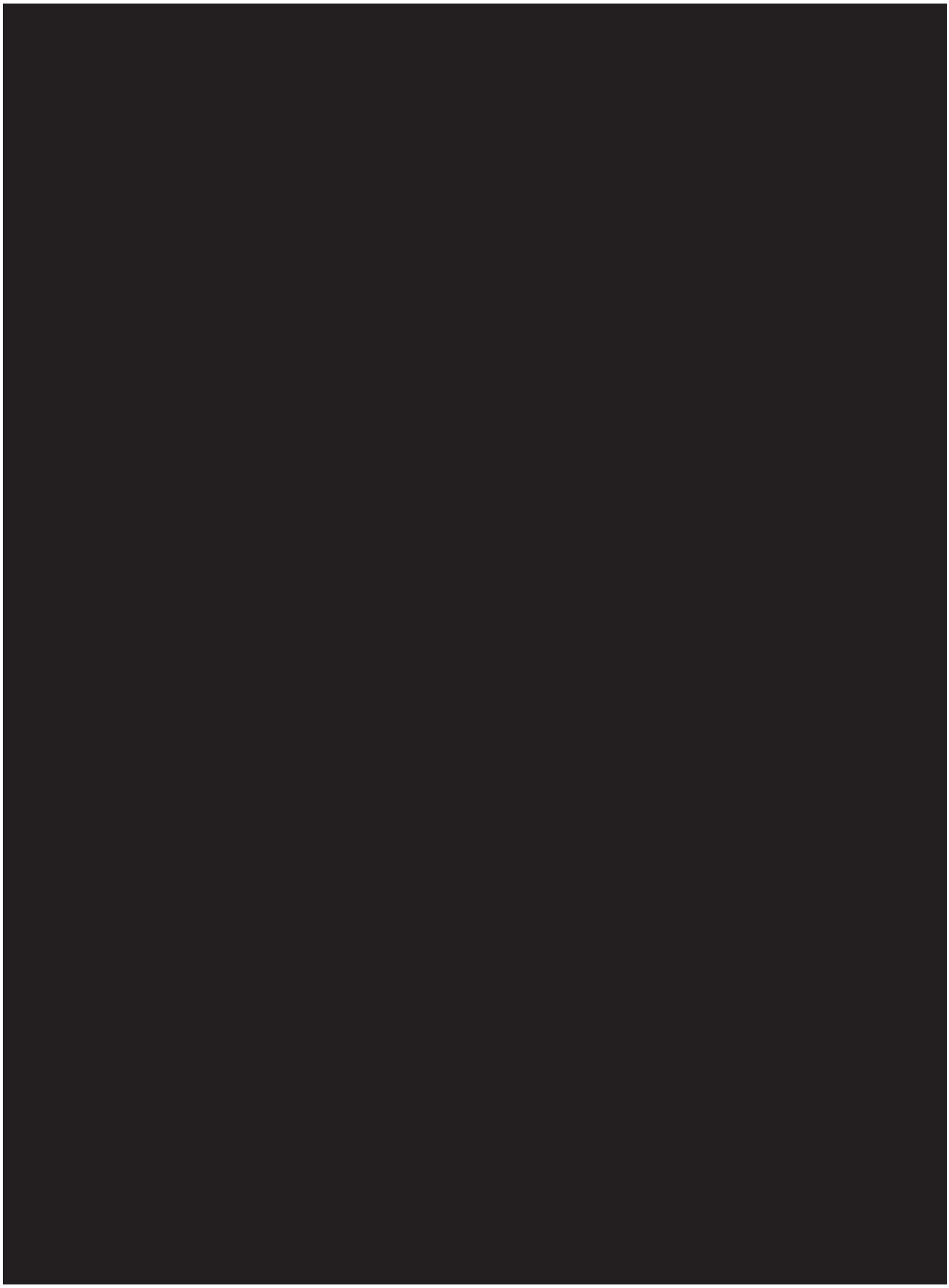
By simply accepting the government's assertion of law enforcement privilege, the District Court abdicated its responsibility to ensure that the materials were properly withheld or disclosed. Worse, withholding Todashev's statements from the defense while the prosecution was actively misleading the jury about the absence of precisely the sort of evidence about Tamerlan that the defense was fighting to introduce, denied Tsarnaev the fair penalty phase hearing guaranteed by the Fifth and Eighth Amendments and the FDPA. Accordingly, this Court should reverse the death sentences.

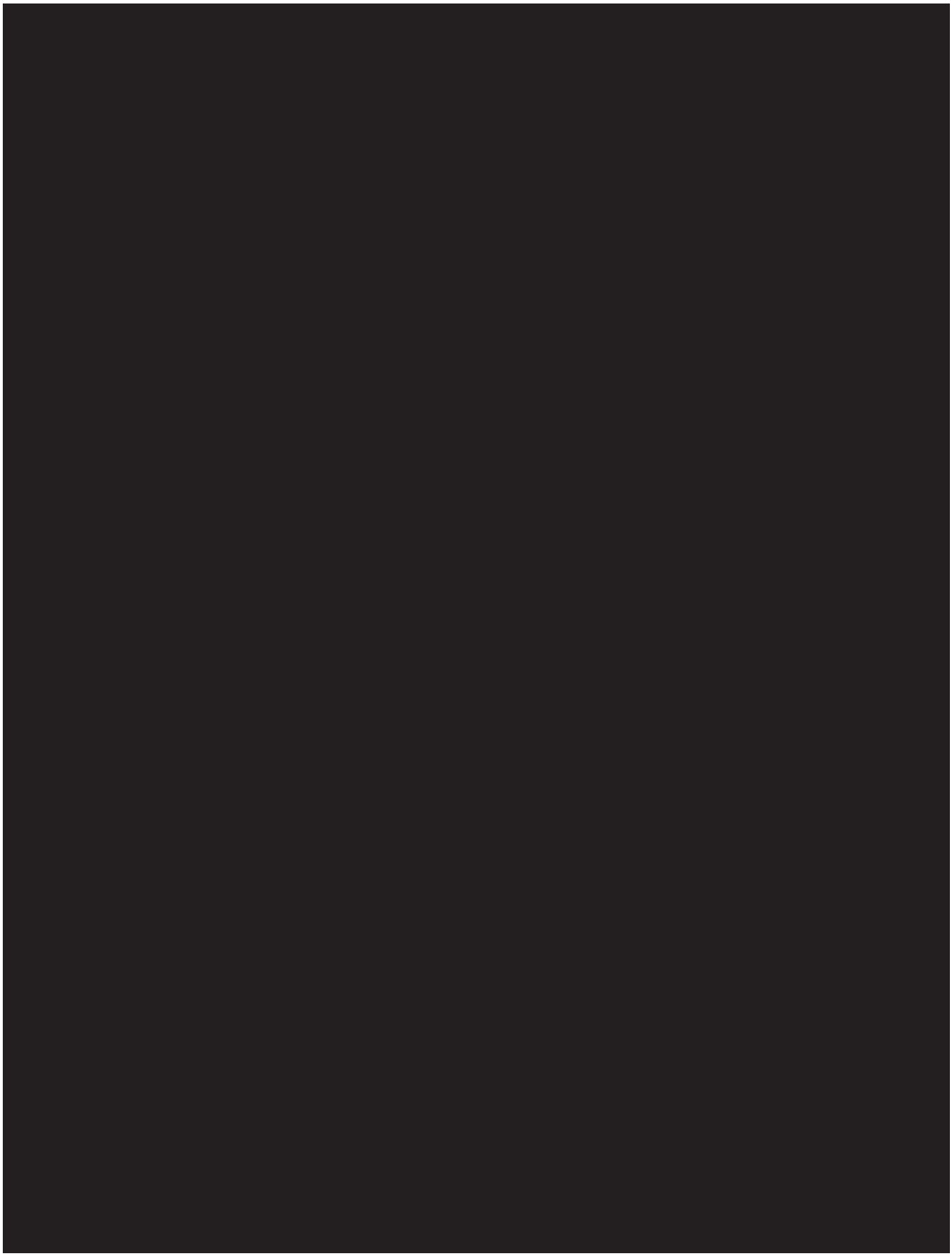
VI.

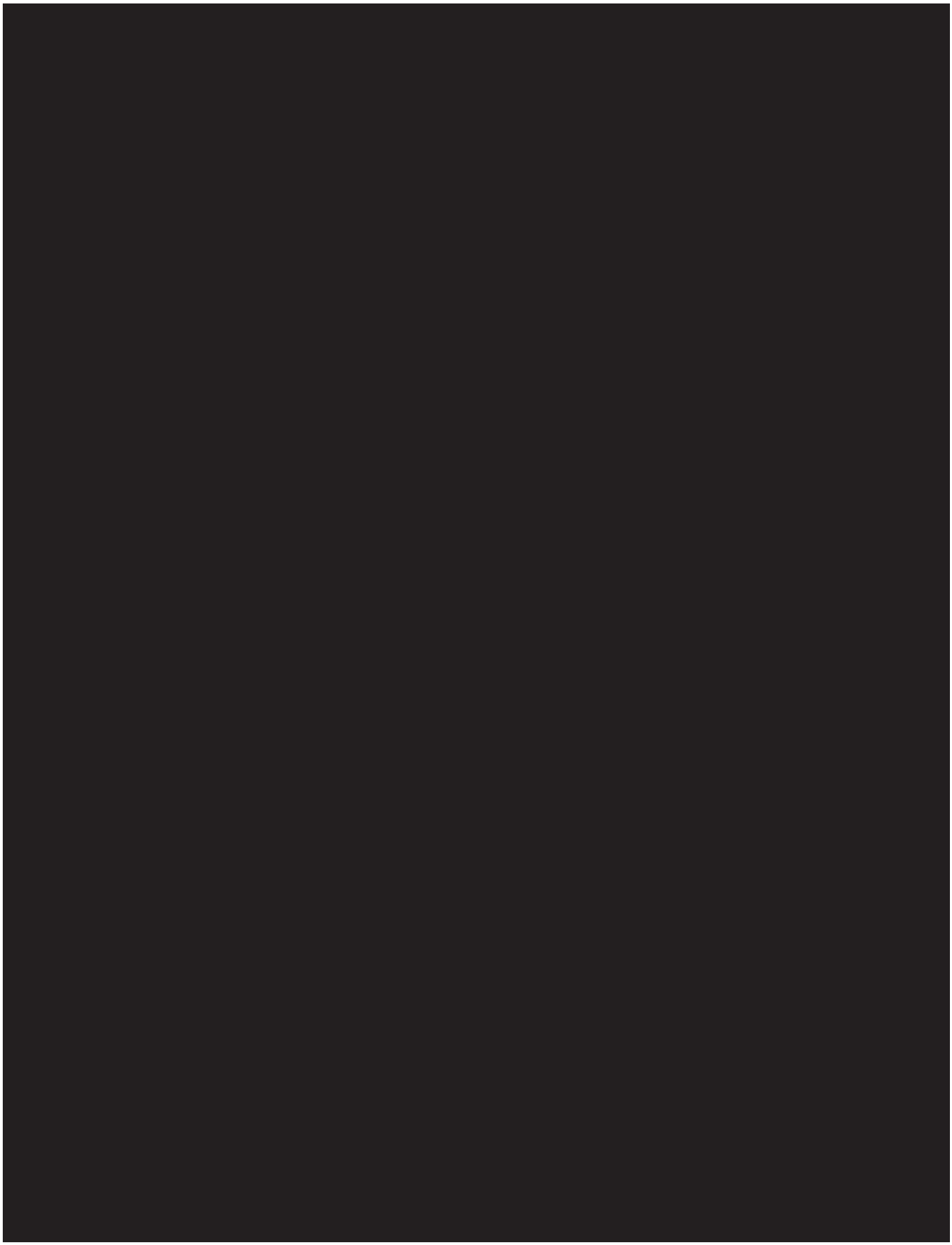


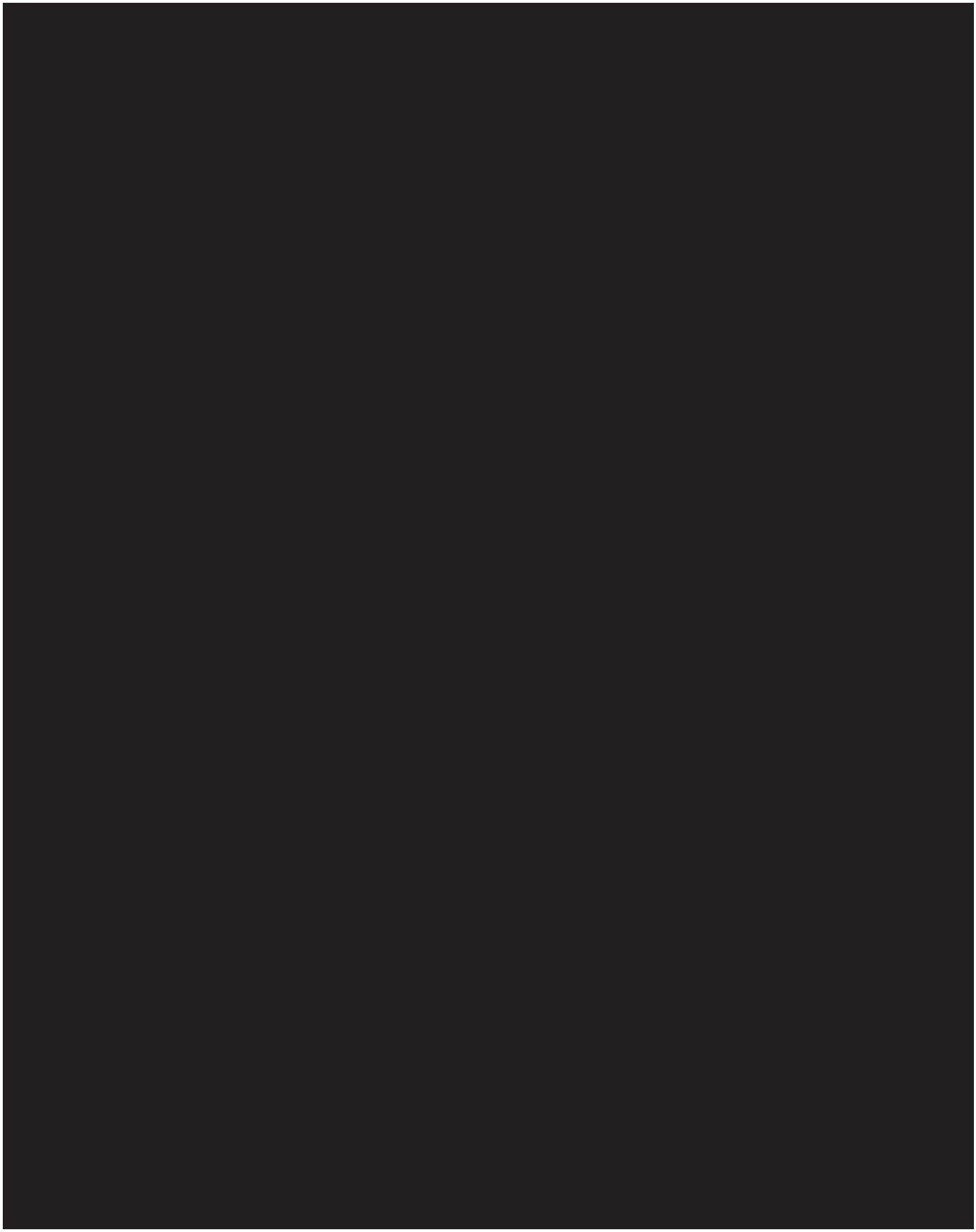


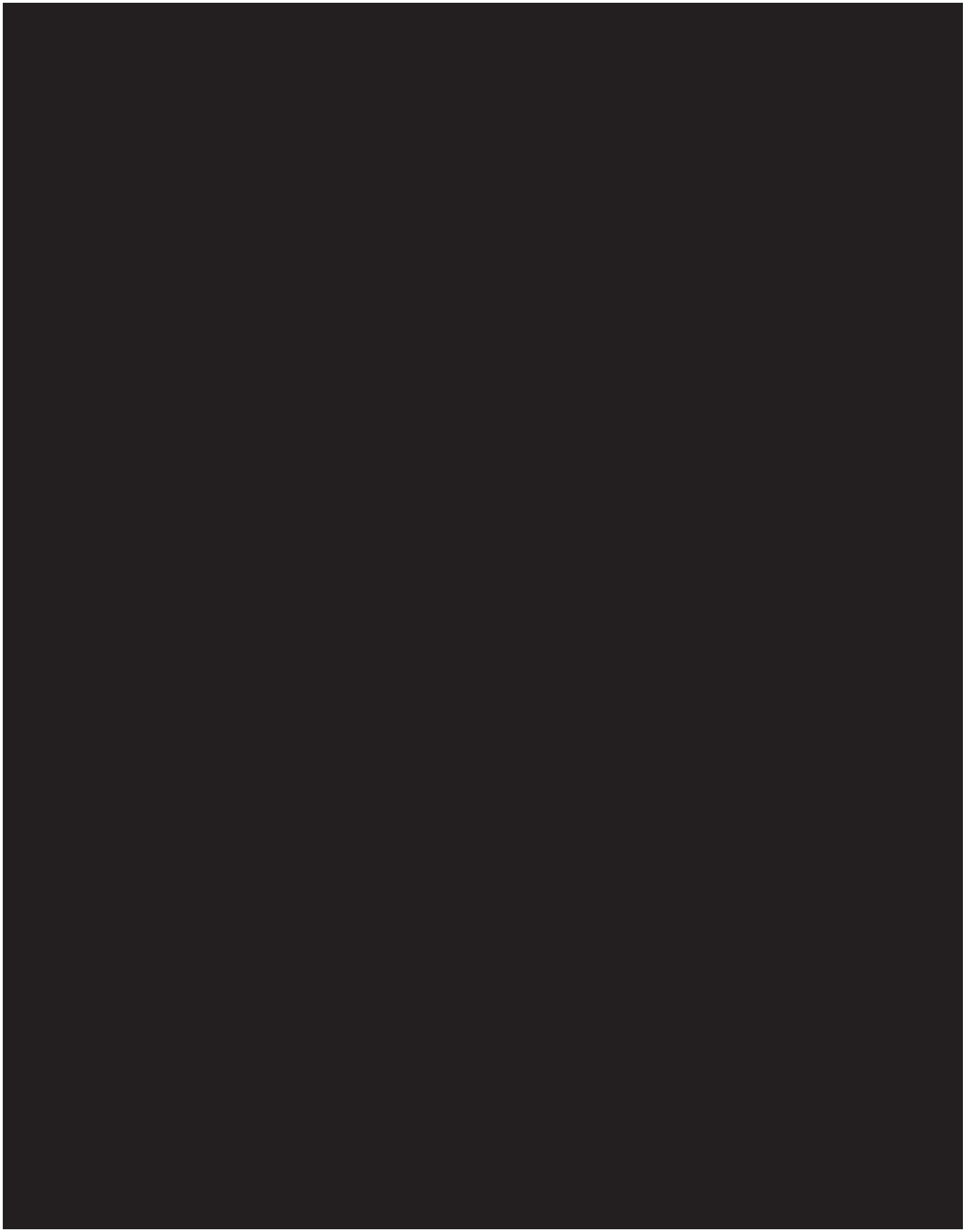


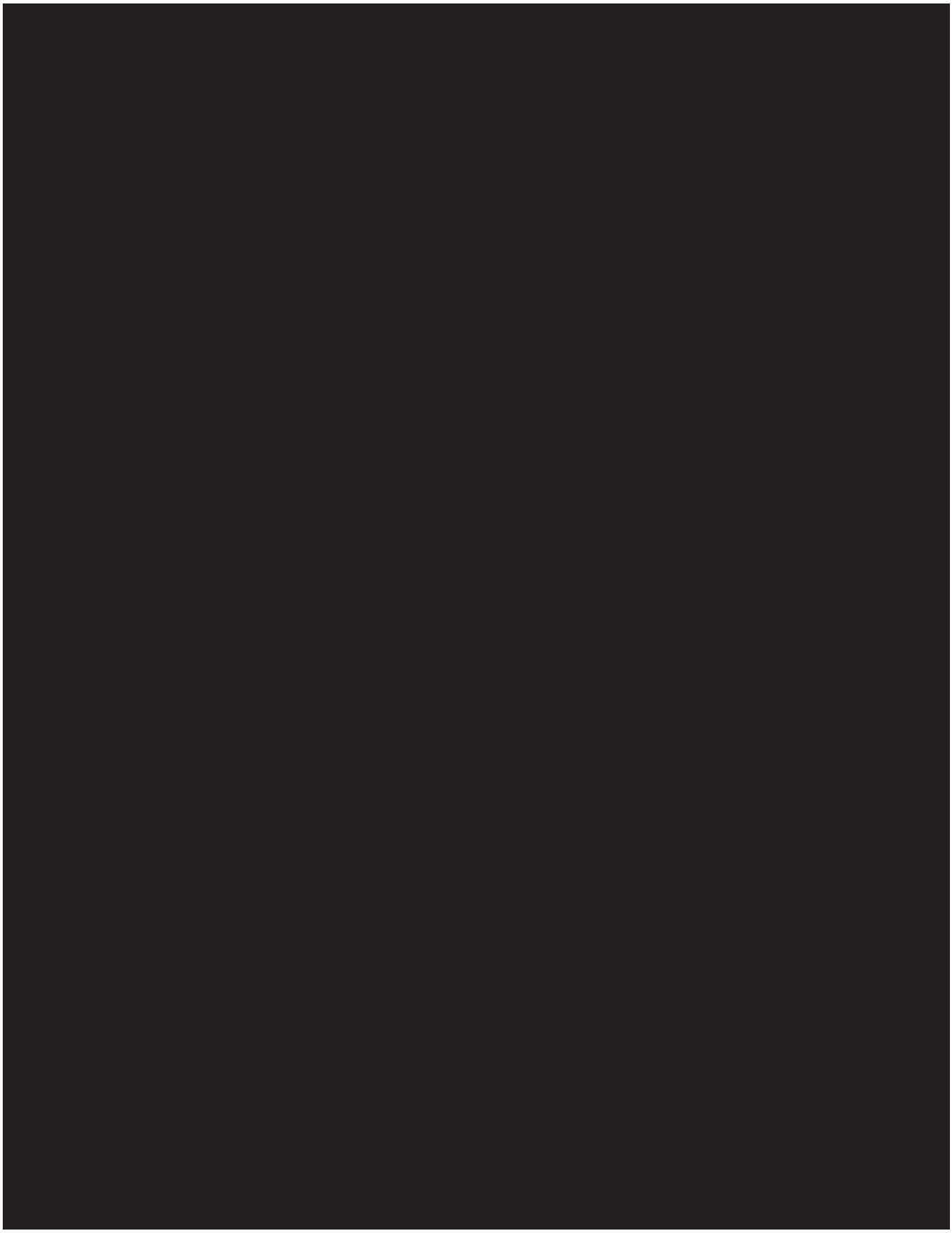


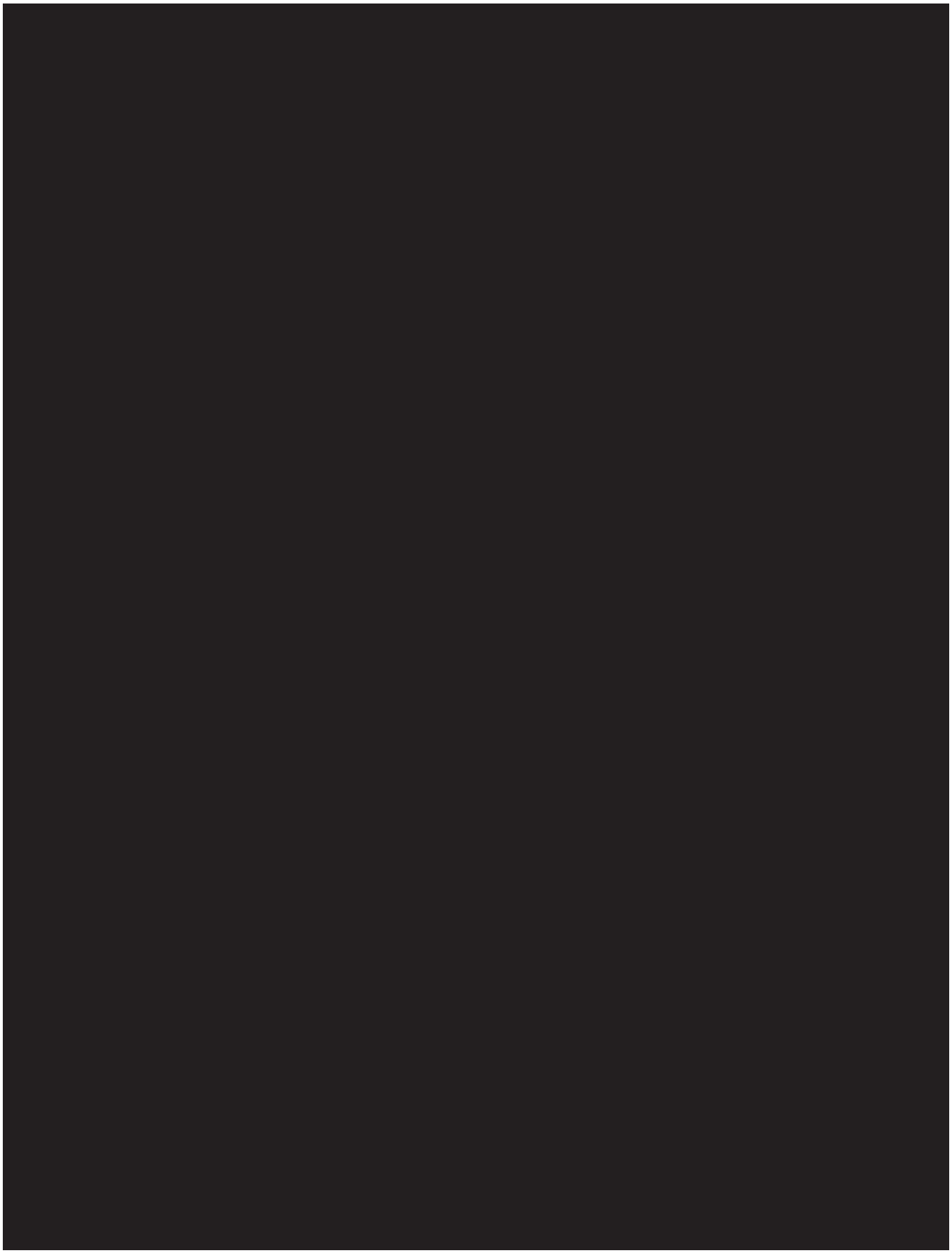


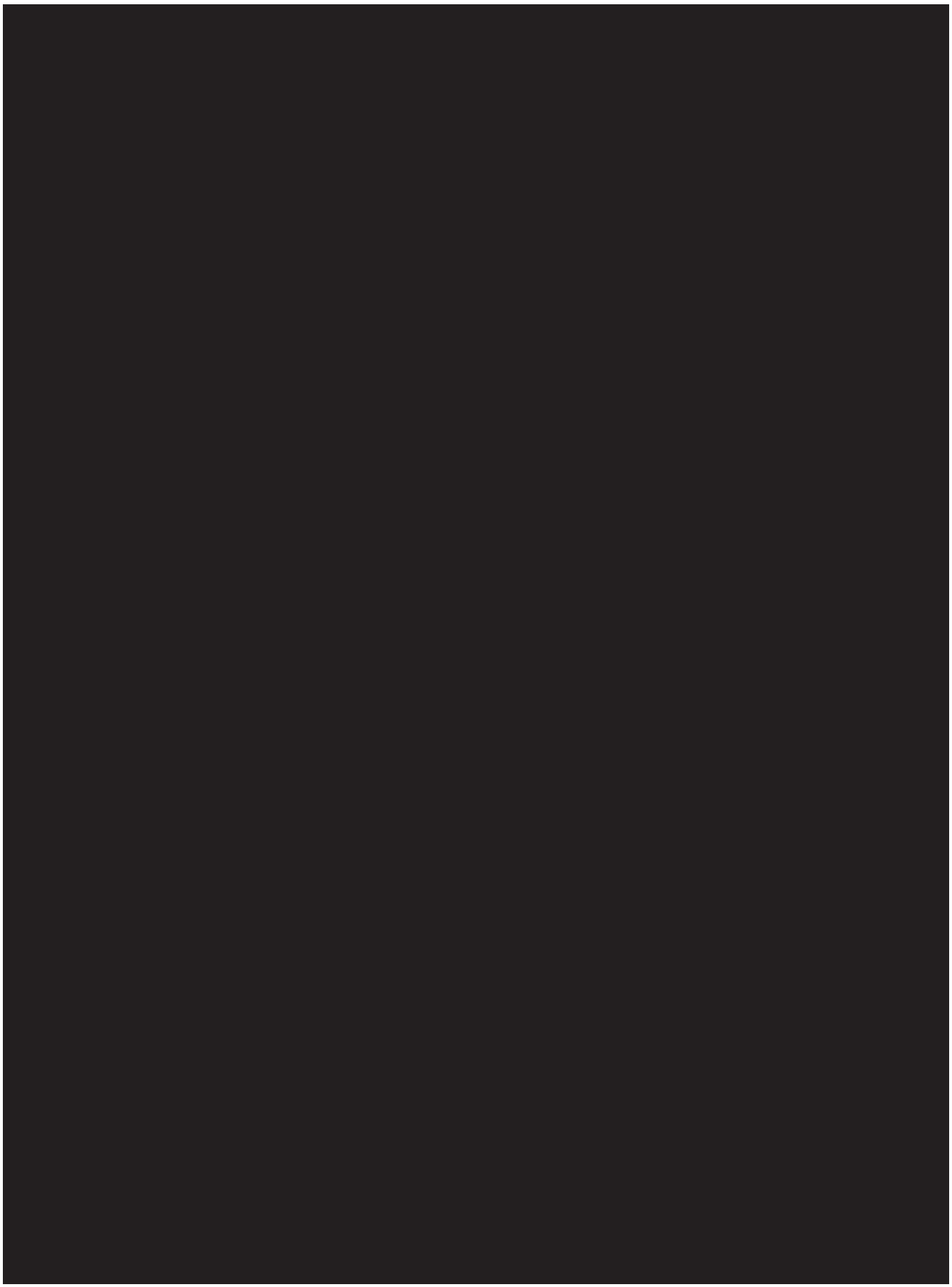


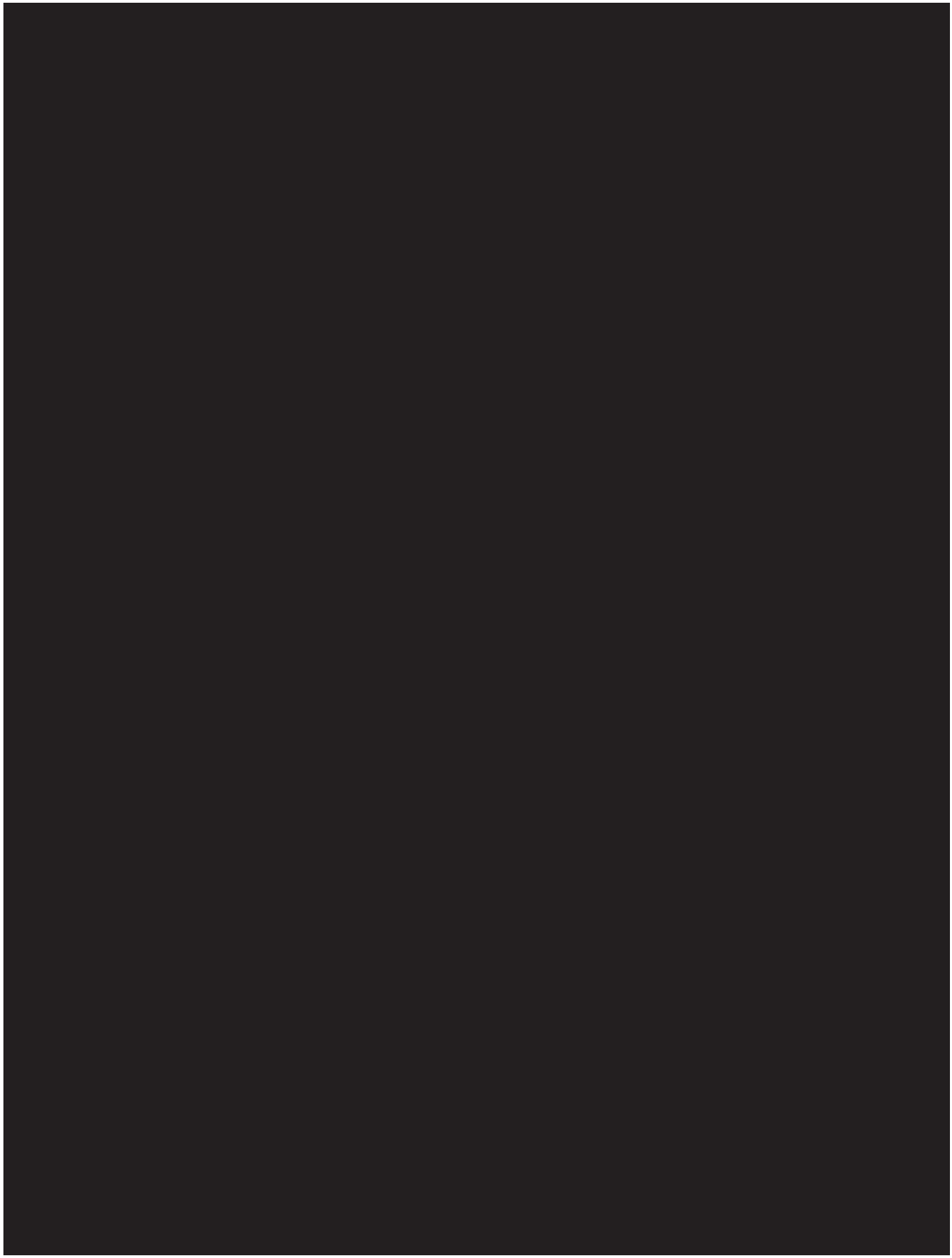


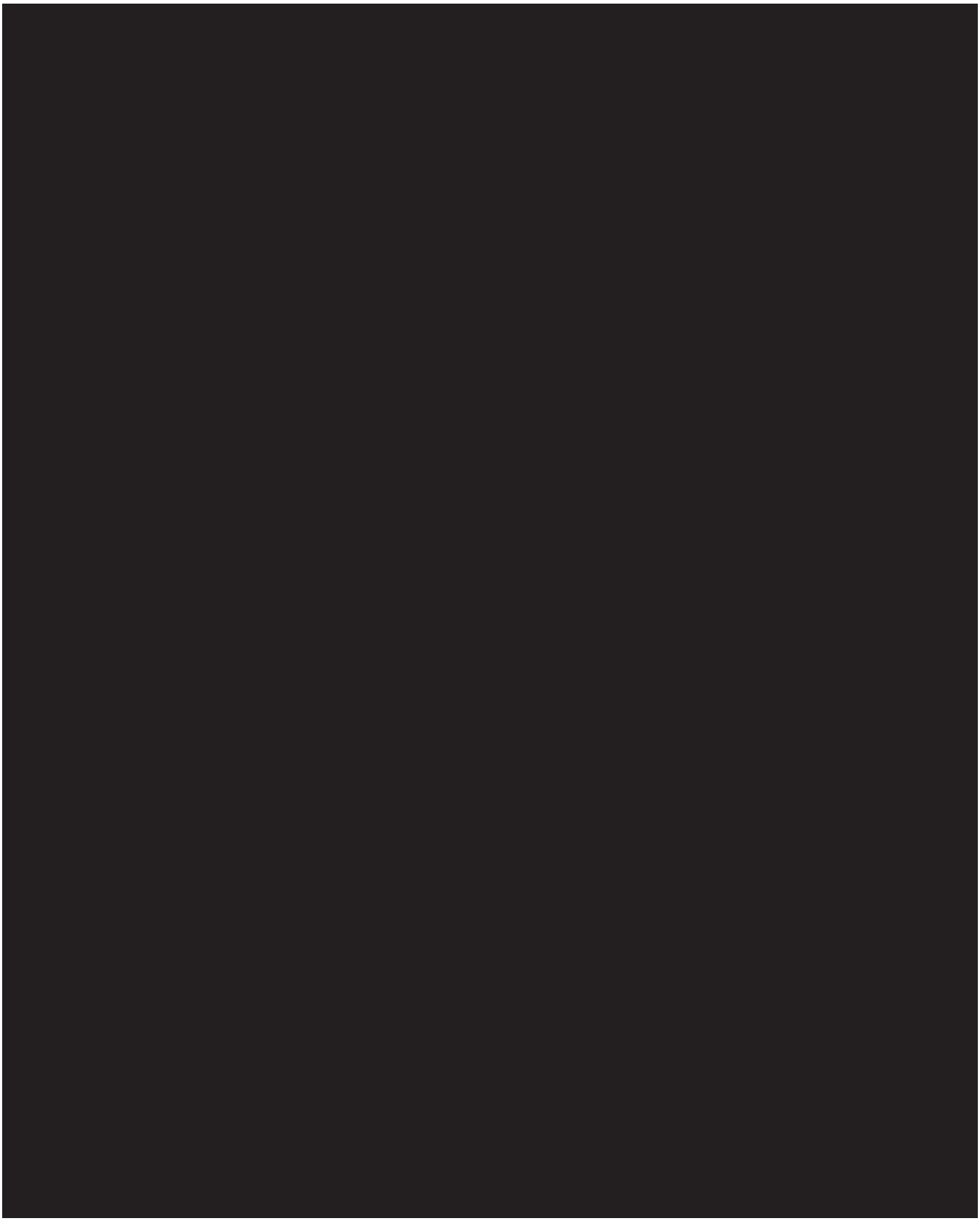


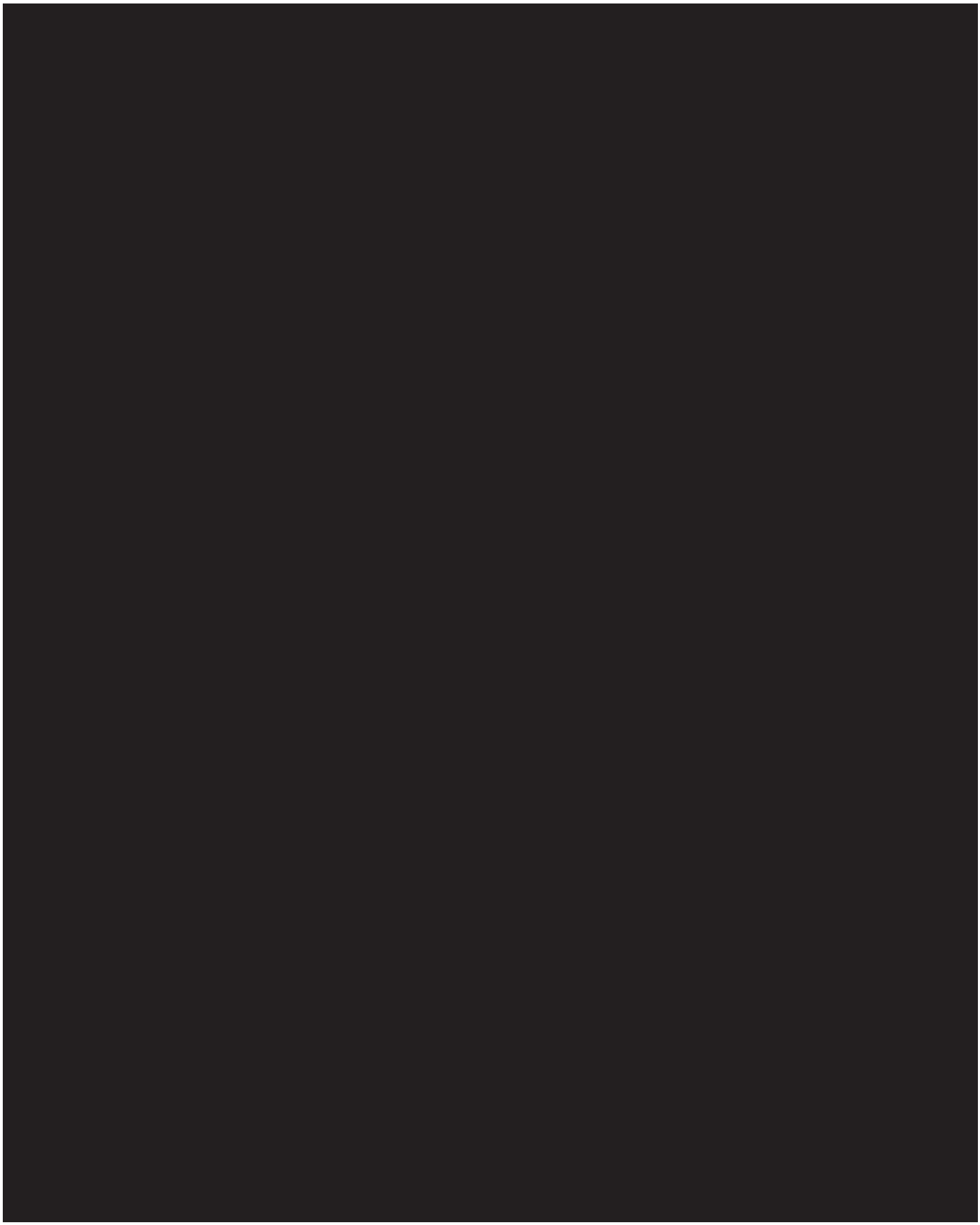


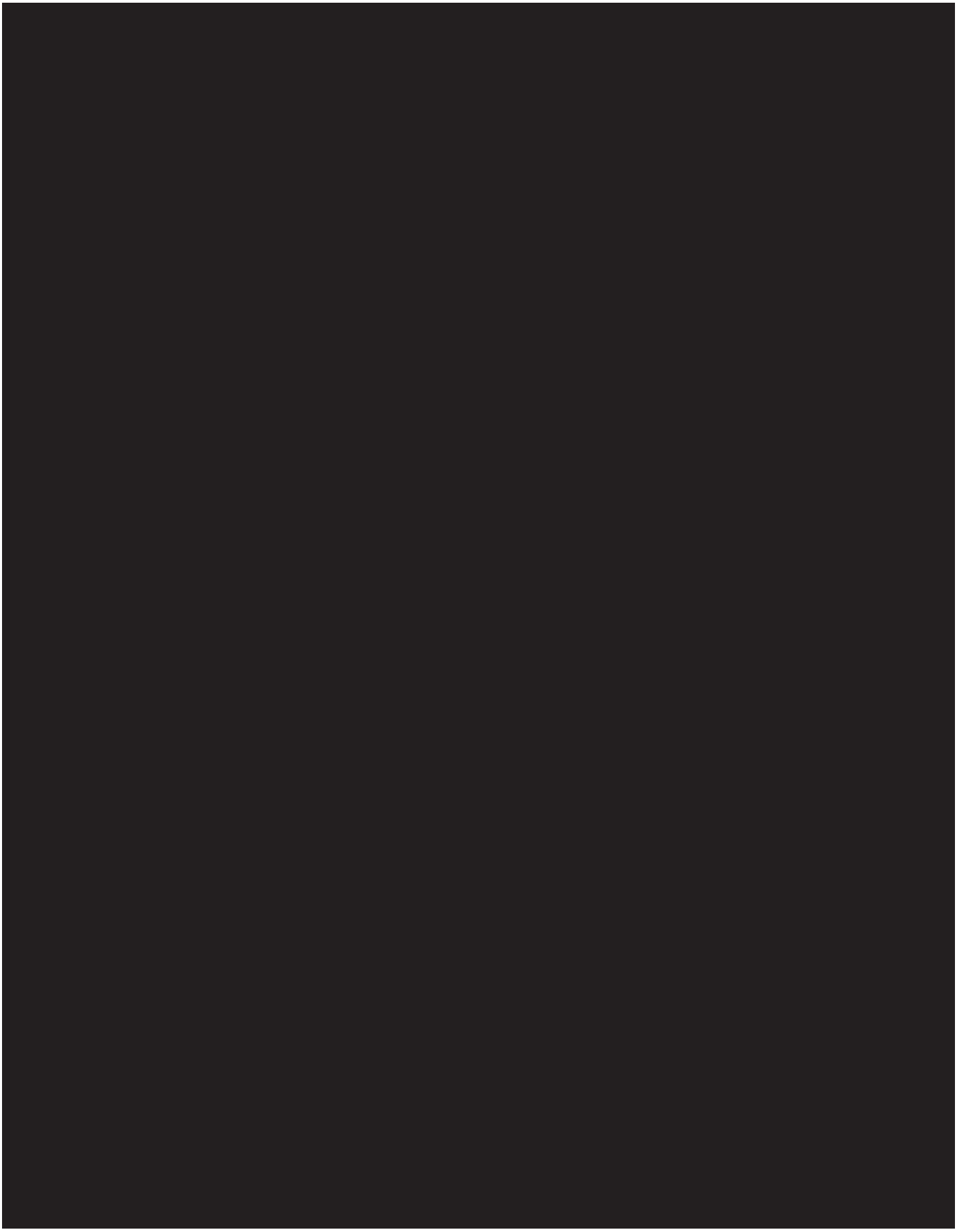


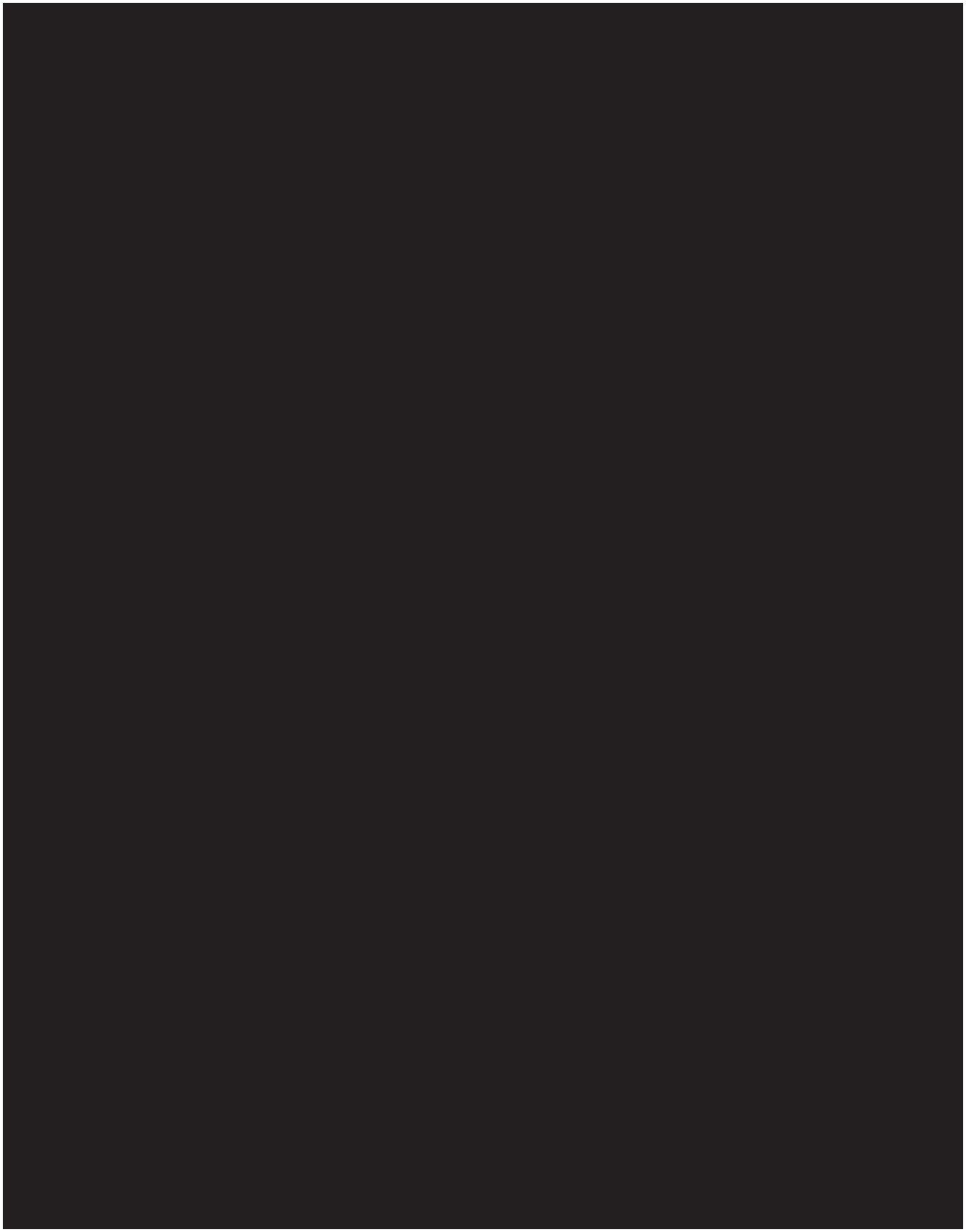


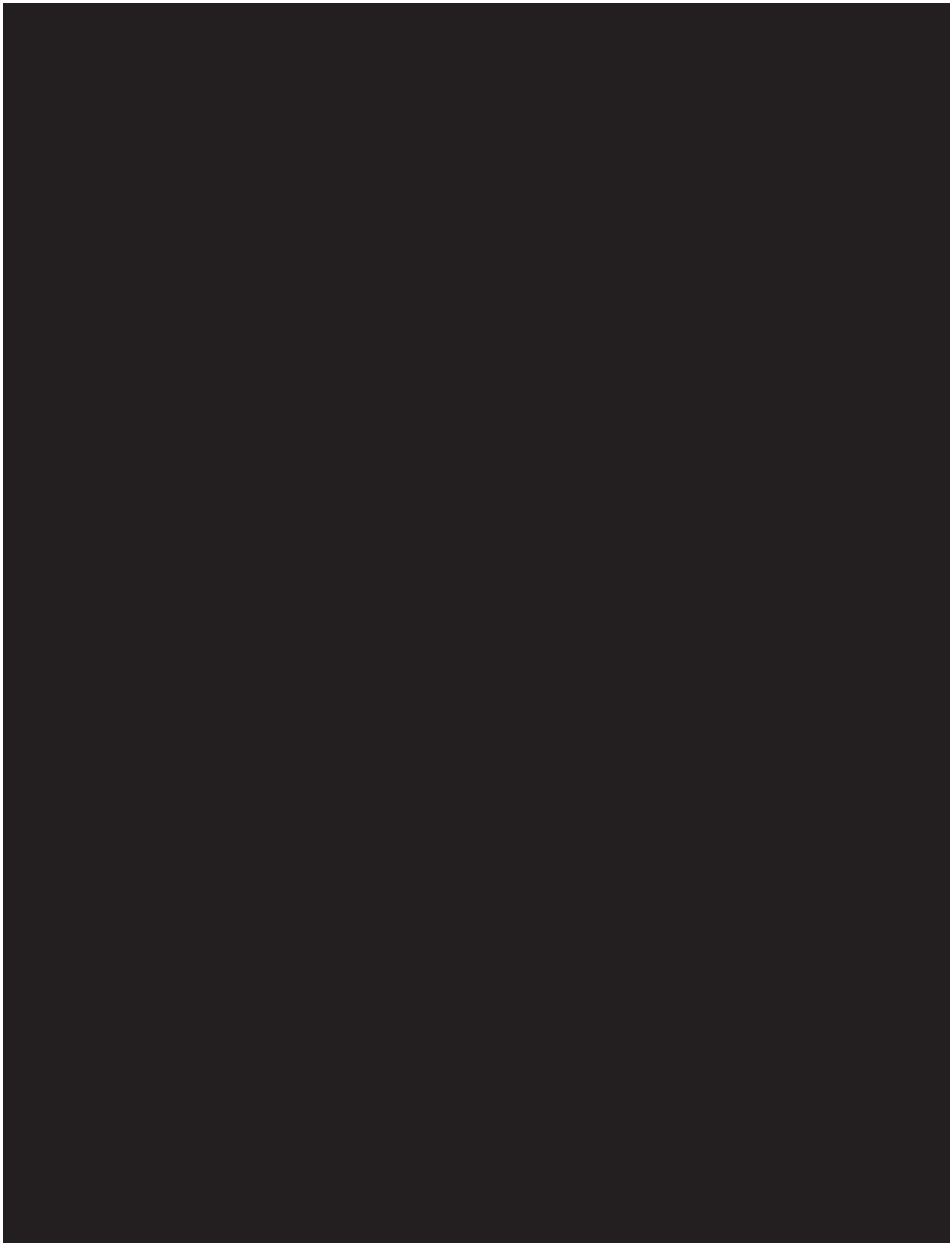


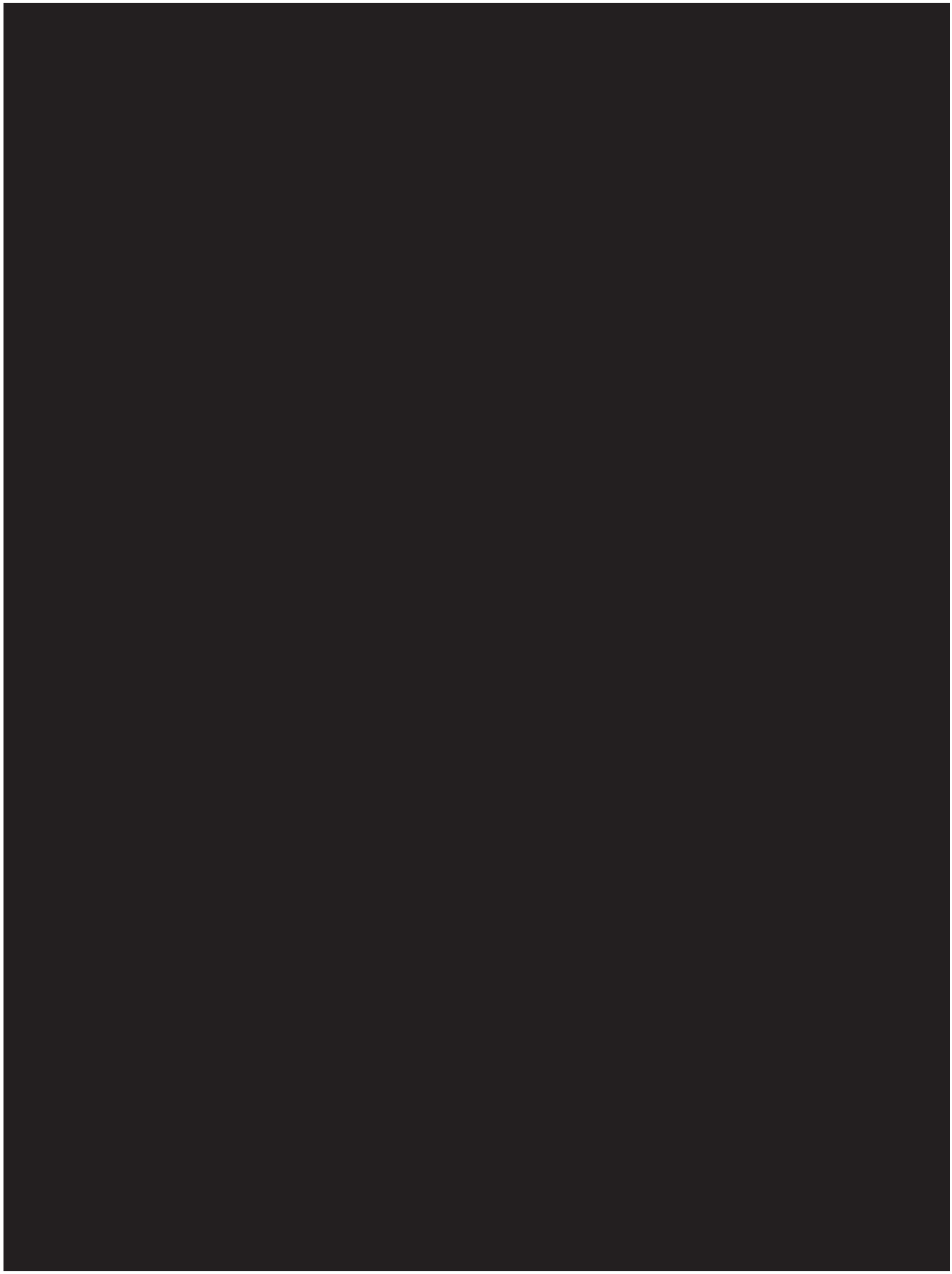












VII.

The District Court Violated The Federal Death Penalty Act In Admitting Victim Impact Testimony From Surviving Spectators Injured In The Bombings.

The Federal Death Penalty Act expressly permits testimony on the impact of homicide victims' deaths on their families at a capital trial's penalty phase. Jurors may weigh that testimony in their sentencing determination. But capital jurors do not make sentencing determinations on non-capital crimes; District Courts do, in separate proceedings. Accordingly, the FDPA does not permit penalty phase testimony on the impact of survivors' injuries on those survivors (or their families) themselves. The District Court violated the FDPA, and committed prejudicial error, in allowing that testimony in Tsarnaev's penalty phase.

In Booth v. Maryland, 482 U.S. 496 (1987), the Supreme Court held that in capital cases, victim impact evidence—evidence from family members of a victim about the impact of the victim's death on the family and community—was precluded by the Eighth Amendment. Several years later, however, in Payne, 501 U.S. 808, the Court overruled Booth and held that the Eighth Amendment did *not* bar evidence of loss from the family members of a murder victim. As Justice O'Connor pointed out in her concurring opinion, Payne allowed individual jurisdictions to decide if they wished to permit consideration of this type of evidence. 501 U.S. at 831.

Congress passed the Federal Death Penalty Act just a few years after Payne, in 1994. In light of fundamental principles of statutory construction, the Act's language makes clear that Congress intended penalty phase jurors to consider the precise type of family victim impact evidence involved in Payne. This makes sense; after all, at the penalty phase of a capital trial, jurors are charged with deciding the appropriate sentence between life and death for the capital crimes and, as Justice O'Connor concluded, Congress could view such information as relevant to their decision.

The narrow question presented here is whether Congress went further and also intended to permit penalty phase jurors to consider victim impact testimony from surviving victims not about the deceased, but about their own lives and the difficulties they have endured following the crime. Resolving what it termed an "undecided" issue, the District Court here answered this question of statutory construction in the affirmative, ruling that such evidence was indeed "within the scope" of the FDPA.

The District Court's construction of the statute was wrong. To be sure, surviving victims—like any other witnesses—may testify at the penalty phase in support of any properly alleged statutory or non-statutory aggravating factor relating to the capital charges. And Congress has specifically provided that such witnesses have an absolute right to heard when the District Court imposes sentence

on both the capital and non-capital charges, following the jury's life or death determination. But as discussed below, in light of the clear language of the FDPA and fundamental principles of statutory construction, Congress never intended to permit jury consideration of victim impact evidence from surviving victims at the penalty phase itself.

In this case, however, and over objection, that is exactly the type of evidence that the jury heard, and heard repeatedly. Although the government did not advocate for the far-reaching statutory construction conclusion the District Court reached—asserting instead that it would not introduce victim impact testimony from survivors—the government elicited true victim impact evidence from eleven surviving victims it called at both the guilt and penalty phases. Because this testimony was both emotional and powerful, it is unreasonable to believe the jury could simply have ignored it. And because this evidence was inadmissible, reversal of the death sentences is required.

A. Factual and procedural background.

Prior to trial, the defense objected to victim impact evidence from surviving spectators who were injured in the bombings, arguing that the FDPA did not permit such evidence. 25.A.11495–98. The government responded that it "[did] not intend to offer victim-impact testimony from Bombing survivors."

25.A.11516. In light of the government's stated position, the defense withdrew its objection. 25.A.11569.

The guilt phase began on March 4, 2015. Given the evidence the government presented on the first day of testimony—and continued to present throughout both the guilt and penalty phases—the defense renewed its previously-withdrawn objection a number of times during both phases. See, e.g., 25.A.11570–71; 10.A.4116–18; 22.A.10047–49, 10068–69; 16.A.7120–22; 16.A.7239–43; 22.A.10089; 16.A.7359, 7374, 7421; 25.A.11587–88. As discussed below, although the government's explanation as to the relevance of this evidence would change from the guilt phase to the penalty phase, at no point did the government argue that victim impact evidence from surviving spectators was actually admissible under the FDPA. Instead, the government offered various non-victim-impact rationales for admission of this evidence from surviving spectators. 10.A.4118–19; 22.A.10049, 10069; 16.A.7122; 22.A.10090; 25.A.11516; 25.A.11590–91.

The District Court overruled the defense objections at the guilt phase of trial. 10.A.4119. The day after the penalty phase began, the Court went further and substantially broadened its ruling. The Court overruled the defense objection yet again and explicitly held that the FDPA *did* permit victim impact evidence from survivors after all. 16.A.7244. Without undertaking any statutory interpretation,

or citing any legal authority in support of its conclusion, the District Court noted the legal issue was "undecided" and although "the government may not like me saying this" this was an "additional reason why [the survivor evidence is] admissible." Id.

In light of the District Court's rulings, the guilt-phase jury heard evidence from numerous survivors about topics ranging far beyond fact witness testimony about the bombings and their injuries, including: their reactions to facing death; their uncertainty regarding other family members in the immediate aftermath of the bombings; being reunited with injured family members; the implications of becoming an amputee; and their families' reactions to amputations. And after the District Court broadened its ruling, the jury heard additional evidence at the penalty phase from survivors of the bombings about whether it was better to live as an amputee or die; their interactions with loved ones at the scene and at the hospital; the agony of trying to save limbs; believing loved ones had been killed and then being reunited; and their individual feelings of helplessness watching their injured loved ones suffer.

There are three questions to resolve. First, whether, as a legal matter of statutory construction, the FDPA permits victim impact testimony from surviving witnesses. Second, assuming the FDPA does not permit such evidence, whether, as a factual matter, the evidence presented here constituted improper victim impact

testimony, or was—as the government initially contended—simply offered for narrow and admissible purposes. Third, assuming the evidence did indeed constitute improper victim evidence, can the government prove the improper admission of this evidence harmless beyond a reasonable doubt?

B. The admission of victim impact testimony from surviving victims is directly contrary to the language and intent of Congress when it enacted 18 U.S.C. § 3593.

The FDPA provides that where the government seeks a death sentence for "an offense described in section 3591," it may properly rely on "the effect of the offense on the victim and the victim's family." 18 U.S.C. § 3593(a). The District Court here interpreted this language to mean that victim impact evidence from survivors was admissible. 16.A.7244. Because this legal ruling was premised on its view that in passing the FDPA Congress intended victim impact testimony from survivors to be admissible, the ruling is subject to *de novo* review. See, e.g., United States v. Brown, 500 F.3d 48, 59 (1st Cir. 2007) (questions of statutory construction are reviewed *de novo*); United States v. Leahy, 473 F.3d 401, 405 (1st Cir. 2007) (same). Applying *de novo* review here, the District Court's ruling as to the admissibility of victim impact evidence from survivors was wrong. The language and legislative history of the FDPA make clear that Congress never intended that such evidence would be admitted in a capital case. The Court's

contrary ruling here was fundamental error that requires reversal of the death sentences.

The starting point for this analysis is the language of § 3593(a) which, as noted above, provides that where the government seeks a death sentence it may properly rely on "the effect of the offense on the victim and the victim's family." Such evidence "may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information." The statutory construction question presented here is whether Congress intended the phrase "the victim and the victim's family" as used in § 3593(a) to include testimony from surviving victims.

The primary goal of statutory construction is to determine Congress's intent and thus effectuate the purpose of the law. See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843, n.9 (1984). In determining the intent behind any particular statute, a court looks first to the language of the statute. See United States v. Yermian, 468 U.S. 63, 68 (1984). Where the language of a statute includes terms which are used in other parts of the same act, it is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Gustafson v. Alloyd Co., 513 U.S. 561,

570 (1995). Accord Dep't of Revenue of Ore. v. ACF Indus., Inc., 510 U.S. 332, 342 (1994); United States v. Morales, 801 F.3d 1, 5 (1st Cir. 2015).

Here, § 3593(a) provides that the government may properly rely on "the effect of the offense on the victim and the victim's family." But the phrase "the victim" does not solely appear in § 3593(a). Instead, that very same phrase appears four separate times in § 3591 as well. Each time it is clear that the phrase references *not* a survivor, but a decedent:

> § 3591. Sentence of death
>
> (a) A defendant who has been found guilty of—
>
> (2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593—
>
> (A) intentionally killed *the victim*;
>
> (B) intentionally inflicted seriously bodily injury that resulted in the death of *the victim*;
>
> (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that the lethal force would be used in connection with a person, other than one of the participants in the offense, and *the victim* died as a direct result of the act; or
>
> (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such

> that participation in the act constituted a reckless regard for human life and *the victim* died as a direct result of the act.

In concluding that the word "victim" as used in § 3593(a) *included* surviving spectators, the District Court here never explained why the term would have such a dramatically different meaning in § 3593(a) than it had in §§ 3591(a)(2)(A), (a)(2)(B), (a)(2)(C) and (a)(2)(D). The Court's conclusion to this effect runs squarely counter to the basic principle of statutory construction, referenced above, that "identical words used in different parts of the same act are intended to have the same meaning." Morales, 801 F. 3d at 5.

But there is more. Congress also used the word "victim" in 18 U.S.C. § 3592(a)(7) and (c)(5). There too in both instances it is clear Congress was referring to a decedent. Section 3592(a)(7) provides:

> (a) **Mitigating Factors.**—In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:
> . . .
> (7) **Victim's consent**.—
>
> The victim consented to the criminal conduct that resulted in the victim's death.

And § 3592(c)(5) provides:

> (c) **Aggravating Factors for Homicide**.—In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

> . . .
>
> (5) **Grave risk of death to additional persons**.—
>
> The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

Yet again, the District Court never explained how the phrase "the victim" could have such a different meaning in § 3593(a) than it has in §§ 3592(a)(7) and (c)(5).

But there is still more. The legislative history confirms Congress' intent to limit victim impact evidence to capital-homicide victims. Prior to Congress' adoption of the FDPA, President Bush had submitted legislation to Congress which included the precise victim-impact language which was to become § 3593(a). Comprehensive Violent Crime Control Act of 1991, H.R. Doc. No. 102–58 (1991), available at 25.A.11634–40. When the President submitted this legislation to Congress, he attached a Message from the President, including a section-by-section analysis, which explained that the victim impact evidence referenced in § 3593(a) was limited to capital homicide victims:

> The subsection specifies that aggravating factors for which notice is provided may include factors concerning the effect of the offense on the victim and the victim's family. *The effect on the victim may include the suffering of the victim in the course of the killing or during a period of time between the infliction of injury and resulting death,* and the victim's loss of the opportunity to continue his characteristic activities and enjoyments and to realize his plans and aspirations *because of the extinction of his life by the defendant.*

Id. at 25.A.11640 (emphasis added).[133] Congress then enacted the proposed language in § 3593(a) without change from the version submitted by the President. Compare § 3593(a) with H.R. Doc. No. 102–58, at 19.

In short, the specific language of the statute and the legislative history both point in the same direction. Congress never intended that victim impact evidence include testimony from persons who survived a charged crime. There were sound practical reasons supporting that judgment, reasons reflected in the record of this case.

Because this was a capital case, pursuant to the FDPA, the jury was charged with determining the appropriate sentence for the capital charges. But the jury had no role at all in selecting sentence for the many non-capital charges Tsarnaev was convicted of. As the District Court itself properly noted at imposition of sentence: "[t]he jury's sentencing decision pertains only to the capital counts of conviction; that is, those counts as to which the death penalty is potentially applicable." 19.A.8872–73. But as to the "number of non-capital counts of conviction . . . sentence is imposed by the Court in accordance with usual procedures." Id. at 8873.

[133] When legislation is proposed by an Administration, and later enacted by Congress, in interpreting that legislation, courts routinely consider the views expressed by the President in submitting the legislation to Congress. See, e.g., Fed. Labor Relations Auth. v. Aberdeen Proving Ground, Dep't of the Army, 485 U.S. 409, 412–13 (1988).

As to these non-capital counts, and before the District Court imposed sentence, "a number of victims of the defendant's crime" addressed the Court. 19.A.8872–73. Some did so in writing, and others did so in person with "oral statements." 19.A.8876. Many such witnesses came forward to provide insights into how the crimes had impacted them. 19.A.8890–8962. After hearing from these witnesses, the District Court selected and imposed an appropriate sentence.

In other words, Congress understood that there was a proper place for consideration of the views of surviving victims. That place is the actual sentencing for the non-capital crimes. Given the powerful nature of victim impact testimony from survivors, and the high risk that the understandable desire by the jury, once such testimony is heard, to vindicate the suffering of the survivors could enter the death calculus, Congress limited victim impact evidence to testimony about the people killed and lost to the community.

Indeed, it is worth noting that at trial at least, the government was of the same view. Prior to trial, the government did not give any notice at all that it would be presenting victim impact evidence from those injured in the bombings. 1.A.138. Instead, the only victim impact evidence the government noticed was the "injury, harm and loss" with respect to the four victims actually killed. Id. Months later, when the government indicated it would be calling witnesses who had been injured in the bombings, the defense objected on this precise basis, noting that

"[t]he government has not expressly indicated any intent to elicit testimony from these witnesses (or from their relatives) concerning long-term effects of the bombing." 25.A.11495.

Even then, in responding to the defense objection, the government did not maintain that it would (or could) present victim impact testimony from surviving spectators. Although conceding it was calling as witnesses spectators injured in the bombings, the government denied that it would be presenting victim impact testimony from them. Instead, the government asserted there were legitimate non-victim-impact purposes for the testimony of these 11 witnesses. 25.A.11516; see also 10.A.4118–19; 22.A.10048–49, 10069; 16.A.7122.

If the government had indeed cabined testimony from the surviving witnesses in this way—that is, limited their evidence to non-victim-impact testimony—then there would have been no violation of the FDPA. Thus, the question becomes whether the testimony from these injured spectators was properly limited to the non-victim-impact purposes asserted by the government, or whether the government went beyond those asserted purposes and elicited inadmissible victim impact testimony. This requires an examination of the actual testimony elicited.

C. The government did not limit the testimony of surviving witnesses to the narrow and permissible purposes it had articulated.

At both the guilt and penalty phases of trial, the government called surviving witnesses to testify. Each of these witnesses provided some testimony that was proper. But each then went significantly beyond that proper testimony and provided victim impact testimony in violation of the FDPA. The government then specifically relied on this inadmissible evidence in its arguments urging the jury to impose death.

1. Victim impact testimony from survivors at the guilt phase.

Before the guilt phase began, and in response to defense counsel's objection to victim impact evidence from survivors, the government stated that it did "not intend to offer victim-impact testimony from bombing survivors." 25.A.11516. Instead, the government offered three very limited guilt-phase purposes for testimony from surviving spectators about their injuries, contending that such testimony was relevant to prove:

> [1] the . . . bombings . . . resulted in personal injury to many persons. . . . [and] [2] may help explain why certain witnesses cannot remember certain events—or why they remember them with particular sharpness. It also may [3] corroborate witnesses' account of things they saw or felt at the scene.

Id. In light of the government's assurance that it did "not intend to offer victim-impact testimony from bombing survivors," the defense withdrew its objection. 25.A.11569.

On the very first day of testimony the government called Rebekah Gregory, Sydney Corcoran and Karen McWatters. 10.A4063, 4075, 4091. Each of these witnesses was at the finish line, watching friends and loved ones finish the race, when the bombs went off. Each was injured in the blast, as were their loved ones.

Gregory was at the Marathon that day with her five-year-old son Noah. 10.A.4065. In line with the stated purpose of the government's evidence, she testified about the moments before the first bomb exploded and to the leg and hand injuries she sustained that day. 10.A.4063–64, 66.

But the prosecutor went on to elicit testimony from Gregory well beyond the government's asserted guilt-phase purpose for her testimony, and well beyond what Congress contemplated in the FDPA. Instead, this additional testimony focused on her emotional reaction to the crime as a mother. Gregory explained that just after the explosion her first thoughts were about Noah:

> And I was looking all around to try to figure out kind of what was going on. My first instinct as a mother where in the world was my baby? Where was my son? And I kept moving my head around trying to figure out what had happened to him and where he was.

10.A.4066. She felt "completely helpless as a mother and . . . could do nothing to help Noah." 10.A.4067. She saw "terror on everyone's faces" and although the bomb had blown out her eardrums, she "could hear my little boy." 10.A.4067.

Q: [by the prosecutor] And what was your little boy saying?

> A: [by Gregory] "Mommy," "Mommy," Mommy" over and over and over again.

10.A.4067. Gregory then "laid down on the pavement and . . . said a prayer." Id. "God, if this is it, take me but let me know that Noah is okay." Id.

Sydney Corcoran testified next. As with Gregory, the government first introduced testimony from Corcoran in accord with its stated guilt-phase purpose of showing injury to many people. Thus, Corcoran explained she was at the Boston Marathon with her parents Celeste and Kevin Corcoran to support her aunt who was running when the first bomb exploded at the finish line. 10.A.4076–79. Corcoran recounted passing out, and that when she came to, she was being carried to a medical tent, a tourniquet around her leg due to a femoral artery break. 10.A.4079–80.

But just as with Gregory, the prosecutor went on to elicit testimony from Corcoran that went beyond both the government's asserted guilt-phase purpose for the testimony and the limited testimony permitted by the FDPA. She explained how she felt at the hospital not knowing what had happened to her parents:

> And at that moment I thought I was an orphan. I thought that my parents had been violently ripped away from this world and that I was all alone. I remember feeling so panicked because I couldn't remember my brother's phone number. He wasn't there that day. And I thought that he was the only one I had left . . . . I was able to calm myself down thinking 'You'll be okay. Your brother's old enough to take care of both of you.'

10.A.4087. When she awoke after surgery her father was waiting for her. Because she was intubated and could not speak, Corcoran wrote a note asking about her mother and testified to her father's response:

> [H]e just started to cry softly and . . . he [said] 'She's okay. She's alive . . . . But she doesn't have her legs anymore.' And I can just remember telling him on the paper that I thought I was an orphan.

10.A.4089. Corcoran went on to testify about seeing her mother after the bombings for the first time:

> When I woke back up, there was a nurse in my room and she told me they were going to wheel my mother into the same room as me because they wanted us to be together. And she . . . wanted to prepare me. So she said . . . 'I just wanted to let you know so you're not scared, your mother doesn't have her legs anymore.'

Id.

The final victim impact witness for the first day of the trial was Karen McWatters. She and a co-worker, Krystle Campbell, were at the finish line that day to cheer for McWatters's boyfriend Kevin who was running the Marathon. 10.A.4092–94. In accord with the government's stated purpose, McWatters testified about the explosion, the injury to her leg, and Campbell's death at the scene. 10.A. 4099–101.

Yet again, however, the prosecutor elicited additional testimony from McWatters which was outside this stated purpose and the FDPA. For example, she testified in vivid detail about the decision to amputate her leg:

> I believe it was two days [after the bombings] and then I was told . . . 'We're just going to take it.' And then they just—they took my leg that day.

10.A.4107.

McWatters also spoke about having Campbell's phone with her after the bombings, and the devastating impact that had on both her family and Campbell's. 10.A.4108–09. The hospital used Campbell's phone, which was in McWatters's possession, to misidentify her as Campbell. 10.A.4109. As a result, Campbell's family was told by the hospital that she was alive and in surgery. Id. They were, however, asked if they might be able to identify McWatters at the morgue. Id. Campbell's family was devastated when they saw the body and discovered that it was not McWatters but their own daughter who had died. Id. McWatters' family, on the other hand, had been told that she was not in any hospital, and they had thus presumed that she was one of those killed by the explosion. Id.

The next morning—and outside the jury's presence—defense counsel noted that the testimony of the three survivors was "extremely moving and poised and articulate." 10.A.4117. But because of the stark disparity between the government's justification for the testimony of these witnesses and the actual testimony introduced at trial, the defense renewed its objection to victim impact testimony from people who survived the bombings. 25.A.11568–71. The defense took pains to add that these survivors would certainly be able to speak about the

impact of the non-capital crimes at Tsanaev's sentencing for those crimes, but that it was impermissible during the guilt phase. 25.A.11570–71; 10.A.4117–18.

The government responded, insisting that it was "not asking about victim impact, we are not asking one witness about how this has affected the future of your life" but warning that "[t]hat is something that we will elicit at the appropriate time." 10.A.4118. The government reiterated its explanation for the relevance of this testimony, arguing it was relevant to show:

> [H]ow it is they were there, how they were able to observe the things they observed and then what happened after the explosion and the extent of their injuries.

10.A.4119. The District Court overruled the defense objection. 10.A.4119. The government then presented additional guilt phase testimony from survivors Jeffrey Bauman, Roseann Sdoia and Jessica Kensky.

Bauman was at the finish line watching his girlfriend and future wife Erin Hurley run the race. 10.A.4136–38. He testified about the explosion and the extremely severe injuries to both of his legs causing both to be amputated above the knee. 10.A.4141–48. In addition, he also has a "hole in [his] arm" from shrapnel and "some burns and scars on [his] back." 10.A.4151.

The government then elicited testimony from Bauman that went beyond "how it is [he was] there, how [he was] able to observe . . . and what happened after the explosion and the extent of the injuries," 10.A.4119, and beyond what was

contemplated in the FDPA. Thus, Bauman testified about regaining consciousness after his surgeries, recalling that his best friend John Sullivan was in the room. 10.A.4147–48. Sullivan was "shaking" and told him "You don't have your legs." 10.A.4148. Bauman also recalled his thoughts on dying:

> I was thinking, you know, 'This is how it is going to end. This is it.' . . . and then I was thinking, it was, like, 'I had a great life. I had a great life.' I saw the world, and you know, played sports growing up, I had great friends and I experienced a lot in my 26, 27 years on this planet. And I kind of made peace with myself at that point.

10.A.4142–43.

The government's next victim impact witness was Roseann Sdoia; she was at the finish line to support the runners. 10.A.4228. She testified to hearing the explosions, and receiving a severe leg injury which required amputation of her right leg above the knee. 10.A.4230, 4235–36. Sdoia also suffered burns to her right hand and left leg. 10.A.4236.

Under questioning by the prosecutor, however, Sdoia also offered testimony having nothing to do with "how it is [she was] there, how [she was] able to observe . . . and what happened after the explosion and the extent of the injuries," instead sharing with jurors her thoughts at the scene and the impact on her life of an above-knee amputation. First, Sdoia described her thoughts at the scene:

> I[t] went through my mind in regards to 'I don't want to live as an amputee.' . . . I told myself I didn't want to live as an amputee, but the thought of my nieces, my grandmother and my parents and my sister,

> I couldn't die. So I fought to stay conscious through the whole trip to the hospital.

10.A.4231–32.

Despite the government's earlier assurance that it would not present evidence from any survivors about how these injuries have "affected the future of [their] life," the government elicited testimony from Sdoia about the difficulties faced by an amputation above the knee. She explained that such an amputation is very different than one below the knee. Sdoia told jurors that a "knee joint" is something that people with two legs take for granted. 10.A.4236. For Sdoia, it was "extremely difficult" to learn how to walk and run again. Id. And "[i]t's really hard in the winter living here in the city having to deal with the snow." Id.

Jessica Kensky was the final guilt phase victim impact witness. She was at the finish line with her husband Patrick. 10.A.4310–12. In accord with the government's asserted purpose for her testimony, Kensky first told jurors about her own injuries, including burns and leg injuries which ultimately required that both legs be amputated. 10.A.4307–08, 4315, 4320, 4322.

Yet again the prosecutor then elicited testimony beyond "how it is [she was] there, how [she was] able to observe . . . and what happened after the explosion and the extent of the injuries" and beyond the intended scope of the FDPA. Kensky shared with jurors her personal feelings about becoming an amputee,

noting that she made "every attempt" to save her remaining leg. 10.A.4325. She explained that she did not want to become a bilateral amputee:

> I didn't want to become a single amputee, but to become a bilateral amputee was terrifying. I also wanted some memory of my body and toes and ankles and legs, and I wanted to paint my toenails and I wanted to put my feet in the sand. I wanted to do all those things, and to lose the second leg was a gut-wrenching, devastating decision.

Id.

Kensky was "in a very dark place" because she "wasn't mobile" and was "in a lot of pain." Id. She explained that she "was really not wanting to live." 10.A.4326.

Kensky also talked with the jury about her husband Patrick who had been at the finish line with her. It was several days after the bombings that she learned he was alive. 10.A.4321. They were separated for over two weeks because he had been transported to another hospital. Id. When she was stable to travel, her medical team found an ambulance to donate its time, and Kensky was transported to the hospital to visit him. 10.A.4321–22. They would spend the next five weeks at their respective hospitals, however, because she was "trying to save a leg: and he was being treated for an infection and was in danger of septic shock." 10.A.4322. Patrick had over 15 surgeries between the bombings and trial. 10.A.4323. Kensky—who was a nurse by profession—described how it felt to watch her husband suffer:

> I became a nurse to help take care of people, and my husband was in probably the most needy time in his life and I could not be there.

Id.

Finally, Kensky told jurors about her post-rehabilitation housing difficulties. After she and Patrick were initially released from the hospital and rehabilitation center, they could not find wheelchair accessible housing in Boston so they had to move out of Boston to Medford. 10.A.4327. She explained that once home she could not sleep through the night "between nightmares and phantom pain." Id.

2. Victim impact testimony from survivors at the penalty phase.

The penalty phase began on April 21, 2015. Prior to the penalty phase, the defense renewed its objection to victim impact testimony from survivors. 22.A.10048–49. The government explained its penalty phase view that once again this evidence was not victim impact evidence at all, but was now relevant to three aggravating factors which it had alleged under 18 U.S.C. § 3592: (1) Tsarnaev knowingly created a grave risk of death to others, § 3592(c)(5); (2) he engaged in substantial planning, § 3592(c)(9); and (3) the crime was committed in an especially heinous and cruel manner, § 3592(c)(6). 22.A.10049. The District Court ruled the evidence "relevant . . . and admissible under the statute." 22.A.10049.

Opening statements began later that day. In accord with current law, the prosecutor appropriately advised jurors they would be hearing victim impact

evidence in connection with the four victims who died. The prosecutor was not subtle, nor did she have to be, explaining:

You will know the full story of those four families.

16.A.7075.

The prosecutor used this identical language in promising jurors evidence about the survivors as well, telling jurors that as to survivors who had been injured:

[N]ow you need to know the full story of all of them, of all of the survivors.

16.A.7078.

The prosecutor told jurors they would hear about survivors who "found their lives dramatically, irrevocably changed in an instant." Id.

Sure enough, the prosecutor's first penalty-phase witness was Celeste Corcoran, whose daughter Sydney had testified in the guilt phase. 16.A.7091–93. To start with, the prosecutor elicited testimony which, arguably at least, was relevant to the aggravating factors identified by the government. Corcoran testified that the bomb blast severely injured her legs, her husband applied tourniquets and she was carried to the medical tent. 16.A.7102. At the hospital, a doctor told Corcoran that both legs needed to be amputated and she went into surgery. 16.A.7106.

But here too, the government then went much further, eliciting testimony well beyond both its proffered rationale and the scope of the FDPA. Corcoran described how her husband tenderly cared for at the scene:

> He just kept touching my head and taking my hair away from my face, and he just kept telling me that he loved me and that I was going to live and he wasn't going to leave my side and that it was going to be okay. 'Hold on. It's going to be okay.' And he said 'I'm not going to leave.'

16.A.7102.

She spoke to jurors about her emotions as a mother and a wife as she was being transported to the hospital:

> And I remember thinking that I wanted to die . . . the pain was too much and I just wanted to die. And then on the heels of that, I remember almost instantaneously it was like . . . I don't know if it was the mom in me . . . . . I just remember thinking, I just want to die, just let me die, and then immediately I was like, Hell no. I don't want to die. Please don't let me die. . . . I can't die. I have to be there for my kids. I have to be there for my husband. I have too much living to do.

16.A.7104.

Corcoran expanded on her emotions as a mother when she spoke about the heartbreak of watching her daughter Sydney, with whom she shared a room at the hospital:

> [Seeing my daughter] was probably the most heartbreaking or heart-wrenching thing as a mom. I am such a mom. . . . and to see your child in pain and not be able to get up and go to them. So our hospital beds were, you know, on either side of the room, and Sydney had a reaction to I think a pain medication that she had. So she was

> violently ill. And I just remember just helplessly laying there in my bed watching my daughter be violently ill.

16.A.7107–08. The jury watched as the prosecutor showed Corcoran photographs of her daughter's scars and testified at length to each one including "two incisions that go the entire length of her calf that basically look like two zippers." 16.A.7116–19.

After Corcoran's emotional testimony, the defense moved for a mistrial, contending that her testimony constituted improper victim impact from a survivor. 16.A.7120–22. The prosecutor largely reiterated his earlier explanation of relevance, arguing that the evidence was relevant to the aggravating factors of (1) grave risk of death and (2) the heinous manner of the act. 16.A.7122. The District Court denied the defense motion, ruling that the evidence was "relevant to statutory factors as well as grave risk." 16.A.7124.

Subsequently, the jury heard from injured spectator Nicole Gross. She was at the Marathon with her husband Michael and sister Erica watching her mother race. 16.A.7176–77. The first bomb exploded as they waited by the finish line. 16.A.7181. Gross was thrown to the ground. Id. In accord with the government's asserted rationale, Gross testified in detail about the injuries to her legs, including a broken tibia and fibula in her left leg, injuries to her right quadriceps, ankle, Achilles tendon, and right eardrum. 16.A.7185–86. But the government went

beyond this asserted rationale (and the FDPA) when it elicited testimony about her feelings of helplessness and loneliness:

> I was completely by myself. . . . [The nurses] gave me pain meds and they wrapped me up because I was freezing. And I just remember laying there completely alone. I was alone in the ambulance, and kept feeling helpless and alone.

16.A.7184.

Prior to the penalty phase testimony of spectator Eric Whalley, the defense "renew[ed] [their] continuing objection to what amounts to victim impact testimony from non-homicide survivors." 16.A.7239–40. After a discussion of several photographic exhibits, the Court considerably broadened the legal basis of its rulings. The Court noted that the question of whether victim impact evidence from survivors fell "within the scope" of the FDPA was "undecided." 16.A.7244. The Court went on to orally resolve this "undecided" issue, ruling that such evidence was indeed within the scope of that law because "we have an offense that not only killed people but maimed people." 16.A.7244. In reaching this conclusion, the District Court cited no legal authority and set forth no statutory interpretation. Id.

After the District Court's ruling, the government called injured spectators Eric Whalley, Adrianne Haslet-Davis, and Stephen Woolfenden to testify. In accord with the government's asserted rationale for relevancy, Whalley testified that both he and his wife Ann sustained significant injuries. His injuries included a

"severe injury to the right leg," shrapnel and burn injuries to both legs, shrapnel in his eye socket and a traumatic brain injury. 16.A.7253–54. Ann had a "severe injury to her right leg and foot" as well as to both her wrists and mouth and burns to her chest, neck and face. 16.A.7252.

But the government then elicited testimony from Whalley which went further. He also explained how he and his wife believed the other had been killed in the blast and their eventual reunion:

> She thought I was dead and I thought she was dead because we didn't know. Ann had been sedated heavily due to her injuries as well, and they decided to bring her into the same hospital room that I was in. And she was wheeled in, side by side. We were both prone. You know, we weren't able to get off the bed. And I just grabbed her arm and just wouldn't let go. So that was when I think we both realized that we were both in this but we were alive and well.

16.A.7254.

Adrianne Haslet-Davis was the next witness for the government. In keeping with the government's stated grounds for admission, she testified that she and her husband Adam Davis were injured in the second explosion. 16.A.7273. She was taken to the hospital and lost her left leg below the knee. 16.A.7280–82. Adam had a blown artery in his left foot which has required skin grafts and multiple surgeries. 16.A.7282.

But the government went beyond eliciting Haslet-Davis' testimony about her injuries. The government also elicited her thoughts as to her husband's reaction to her wounds at the scene:

> I had a few seconds or minutes, the time is difficult to tell, where I felt nothing, and then I heard my husband scream a scream that was earth-shattering and I'd never heard before, and I looked down and I could see blood everywhere. . . . He didn't stop screaming. And my first thought was he's in shock and I have to save myself. . . . so I crawled with my arms, my forearms, and—along the broken glass, and shredding open my forearms, as I drug myself.

16.A.7274. Haslet-Davis then explained that Adam was not in court that day—two years after the bombings—because he had "bravely admitted himself into a mental facility at the VA hospital." 16.A.7282.

Finally it was Stephen Woolfenden's turn to testify for the government. Woolfenden was at the Marathon with his three-year-old son Leo watching his wife Amber race. 16.A.7425. Woolfenden and Leo were hit by the second blast. 16.A.7427–28. In accord with the government's asserted rationale for this evidence, Woolfenden testified in detail regarding his own injuries, including the loss of his left leg below the knee, a perforated eardrum, and various burns. 16.A.7429, 7435. He also testified to Leo's injuries, including a laceration to his head, a skull fracture, a perforated eardrum and minor burns to his body. 16.A.7436.

But the prosecutor went further with this witness as well. The prosecutor asked Woolfenden about his feelings of helplessness at the scene and his emotions as a father and husband about the prospect of losing his son Leo and never seeing his wife Amber again. After the blast, and despite his injuries, Woolfenden explained that "my first instinct was to check on my son, Leo." 16.A.7428. Seeing that Leo was bleeding from a head wound, he "became extremely terrified." 16.A.7428. After discovering that his own leg had been severed, Woolfenden "proceeded to try to remove Leo from the stroller and comfort him." 16.A.7429. Woolfenden explained that "Leo was crying and screaming uncontrollably [saying] [m]ommy, daddy, mommy, daddy, mommy, daddy, mommy, daddy, mommy daddy." 16.A.7429–30. A good Samaritan took Leo to find medical help. 16.A.7430. Woolfenden testified to his feelings on letting a stranger take Leo:

> I was completely terrified because I didn't know if I was ever going to see my son again. . . . I thought I could very well die . . . . I was terrified of losing my son, Leo. I was terrified of never seeing my wife again.

16.A.7430–31. At the hospital and just as he was about to go into surgery, Woolfenden grabbed a nurse, pulled her down to his face and begged her "I was separated from my son, Leo. I have no idea where he is. You have to help me find him." 16.A.7433.

3. The government's penalty phase closing argument.

Penalty phase closing arguments began on May 13, 2015. The prosecutor began his argument for death by relying on the guilt-phase testimony of surviving victims Jeff Bauman and Sydney Corcoran:

> There's a certain clarity that comes to you when you are close to death. Remember the testimony of Jeff Bauman and Sydney Corcoran. Even as they lay bleeding on that sidewalk on Boylston Street, they made peace with death.

19.A.8701.

The prosecutor reminded jurors of Sydney Corcoran's guilt-phase testimony that "she felt her whole body go cold as blood flowed from her severed femoral artery on that sidewalk." 19.A.8713. He urged the jury to consider Celeste Corcoran's penalty-phase testimony that she "just wanted to die" and her agonizing experience of helplessness "recover[ing] in the same hospital room as her daughter Sydney." 19.A.8713–14. He noted the significant testimony from the non-homicide victims: "And it's nearly 20 other people staring in shock at their mangled and ruined limbs when just moments before they were fine." 19.A.8704.

The Court instructed jurors they could consider testimony from both the guilt and penalty phases in determining penalty. 19.A.8650. The jury imposed death.

D. In light of the nature and volume of the improper victim impact evidence, the jury could not reasonably have ignored the evidence.

Under the FDPA, a jury deciding whether to impose death may consider in aggravation both (1) statutory aggravating factors and (2) non-statutory aggravating factors. Victim impact evidence is a non-statutory aggravating factor.

Here, with respect to the non-statutory aggravation, weeks after the government introduced the victim impact evidence from survivors, the District Court told jurors "the law permits you to consider and discuss only the six non-statutory aggravating factors specifically claimed by the government and listed below. You are not free to consider any other facts in aggravation that you may think of on your own." 19.A.8682. The District Court then listed the six non-statutory aggravating factors the jury could consider. 19.A.8682–84, 96. One of the factors listed was victim impact evidence—but only as to the four victims who died. 19.A.8696. If the jury followed this instruction there could have been no harm from the admission of improper victim impact evidence from the survivors since jurors were told: (1) the only victim impact evidence involved victims who died and (2) they could not consider any other non-statutory aggravation.

Appellant recognizes that courts generally assume jurors will follow a trial court's instructions. See Richardson v. Marsh, 481 U.S. 200, 211 (1987). But as the Supreme Court has recognized, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of

failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." Bruton v. United States, 391 U.S. 123, 135 (1968). Where a jury has seen or heard something that could be highly prejudicial to a defendant, limiting instructions may not be sufficient. See United States v. Hale, 422 U.S. 171, 175 n.3 (1975); Bruton, 391 U.S. at 125–26; Jackson v. Denno, 378 U.S. 368, 387–88 (1964); United States v. Ford, 839 F.3d 94, 110 (1st Cir. 2016).

The Supreme Court has proposed a commonsense guide. In deciding the curative effect of a limiting instruction which in effect advises a jury to disregard what it has seen or heard, the question is "plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt." Richardson, 481 U.S. at 208.

Here, the quantity and nature of the victim impact evidence from eleven surviving spectators—extensive and highly emotional—counsels in favor of a conclusion that no jury could "possibly be expected to forget it in assessing the defendant's [death-worthiness]." The surviving victims testified in graphic detail to their reactions to facing death, the uncertainty about what had happened to other family members, feelings of helplessness watching their injured child or partner suffer, and the long-term implications of becoming an amputee. And the prosecutor specifically drew the jury's attention to some of this evidence in his penalty phase closing argument. 19.A.8702, 8704, 8713–14.

Moreover, it is important to recall that when the evidence was introduced, the jury was not given any instruction limiting the use of this evidence for some admissible purpose. The potentially curative instruction came only weeks later, at the end of the penalty phase. And if jurors followed the Court's limiting instruction, they would have had to conclude that the emotional victim impact testimony they had heard from 11 witnesses—Rebekah Gregory, Sydney Corcoran, Karen McWatters, Jeffrey Bauman, Roseann Sdoia, Jessica Kensky, Celeste Corcoran, Nicole Gross, Eric Whalley, Adrianne Haslet-Davis, and Stephen Woolfenden—and the government's argument as to that evidence could not be considered in any way in determining whether to sentence Tsarnaev to life or death. Given the tenor and extent of that very powerful testimony, this hardly seems tenable. Under all these circumstances, it seems unlikely that "the jury can possibly be expected to [simply] forget [the victim impact evidence] in assessing the defendant's [death-worthiness]." Richardson, 481 U.S. at 208.

E. The nature of the improper victim impact evidence requires reversal of the death sentences.

Because the FDPA does not authorize consideration of victim impact evidence from survivors—and because that is just what happened in this case—the question then becomes whether admission of this powerful evidence was somehow harmless. Since admission of this evidence violated the FDPA, the government

must prove the improper admission of this emotional evidence harmless beyond a reasonable doubt. See 18 U.S.C. § 3595(c)(2)(C).

In determining whether the government can carry its burden of proving the improper admission of this aggravating evidence harmless beyond a reasonable doubt, the question is "not whether the legally admitted evidence was sufficient to support the death sentence, . . . but rather, whether the [government] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Satterwhite, 486 U.S. at 258–59 (quoting Chapman, 386 U.S. at 24) (addressing application of harmless-beyond-a-reasonable-doubt standard to improper admission of aggravating evidence). In making this assessment, courts must consider three factors: (1) the power of the improper aggravating evidence; (2) whether the prosecutor relied on that evidence in seeking death; and (3) the nature of any mitigating evidence. Id. at 259.

The first factor weighs heavily against the government here. For obvious reasons, victim impact testimony is considered to be among the most powerful types of evidence which can be presented at a capital penalty phase. The government introduced victim impact testimony from 11 different surviving spectators. By any measure, the testimony of each of these witnesses was extremely powerful.

Adrianne Haslet-Davis spoke of her husband's persistent struggles two years after the bombings, and how he had "bravely admitted himself into a mental facility at the VA hospital." 16.A.7282. Jessica Kensky testified about her inability to care for her husband, her inability to sleep through the night "between nightmares and phantom pain," her difficulties in finding housing and that after losing her first leg, it was a "gut-wrenching, devastating decision" to opt to amputate her second: "I wanted to paint my toenails and I wanted to put my feet in the sand." 10.A.4325–27. Celeste Corcoran told jurors she recalled "thinking I wanted to die . . . just let me die," before deciding "I have to be there for my kids. I have to be there for my husband." 16.A.7104. Sydney Corcoran shared her memory of being told by her dad that her mom "was alive but doesn't have legs anymore." 10.A.4089. Eric Whalley talked about how he and his wife believed the other had been killed in the blast and their emotional reunion at the hospital. 16.A.7255. Roseann Sdoia explained to jurors that she did not want to live as an amputee. 10.A.4231–32. Jeff Bauman told jurors about making peace with his life and resolving himself to dying. 10.A.4142–43. Stephen Woolfenden testified to his terror as he heard his son Leo screaming "[m]ommy, daddy, mommy, daddy, mommy, daddy, mommy, daddy, mommy daddy" and of not knowing if he "was ever going to see [his] son again." 16.A.7429–30. Rebekah Gregory shared with jurors her helplessness as a mother as she tried to help her little boy Noah who was

saying "'Mommy,' 'Mommy,' 'Mommy' over and over and over again" and how she "laid down on the pavement and . . . said a prayer." 10.A.4067. She even recalled the prayer itself: "God, if this is it, take me but let me know that Noah is okay." Id. And as noted above, in urging jurors to impose death, the prosecutor repeatedly called the jury's attention to this evidence. 19.A.8702, 8704, 8713–14.

The testimony from these witnesses was heartfelt and heart-wrenching. As he did below, appellant recognizes there is an important place in the criminal justice system for injured survivors to talk about what has happened to them. For example, Kensky was entitled to speak about her inability to care for her husband, her fears about becoming a bilateral amputee and the housing difficulties she now faced. Sdoia was entitled to convey her emotional thoughts about whether she even wanted to live as an amputee. Bauman had every right to share his thoughts on having made peace with his life and death. Corcoran's views on becoming an orphan and Gregory's helplessness in being unable to help little Noah were all legitimate areas for these survivors to talk about.

But as Congress has recognized, the appropriate place to share this information was not at the guilt phase—it was at the District Court's imposition of sentence. See Fed. R. Crim. P. 32(i)(4)(B) ("Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard."); 18 U.S.C. § 3771(a)(4) (providing a right to

be heard at sentencing). Put simply, these individuals were of course victims of Tsarnaev's crimes, but they were not "victims" in the narrow sense contemplated by § 3593(a), the FDPA provision addressing non-statutory aggravating factors. Their experiences did not bear on the appropriate sentence for the capital counts. Whether a person had to move to a new apartment outside the city, or enter a psychiatric hospital years after the bombings, did not make it more likely that the survivor suffered a grave risk of death, or that the defendant substantially planned the crime, or that his crime was particularly heinous. That a person feared his child's death, or wished for his own, are undeniably trying human experiences. But those emotional reactions, too, do not tend to prove any of the government's stated purposes. Rather, the testimony serves only an impermissible purpose: to taint a capital jury's sentence, on capital crimes, with powerful non-capital evidence.

The second and third harmless error factors—closing argument and mitigation—confirm that the government will be unable to prove admission of this powerful evidence harmless beyond a reasonable doubt. The prosecutor began his argument by citing the testimony of survivors Jeff Bauman and Sydney Corcoran. 19.A.8702. He later referenced Corcoran's testimony as she believed she was dying. 19.A.8713. He separately mentioned Celeste Corcoran's testimony that "she just wanted to die" and her helplessness as a mother. 19.A.8713–14. He

broadly recounted testimony from all the surviving victims. 19.A.8704. As to mitigation, even putting aside wrongly excluded evidence (see ante Points V and VI), the defense presented evidence about Tamerlan's radicalization and mitigating evidence of Jahar's own background in school from classmates and teachers that resulted in unanimous life verdicts on 11 of the 17 capitally charged counts.

On this record, the government cannot prove the admission of victim impact testimony from the survivors was harmless beyond a reasonable doubt with respect to the death sentences. None of the evidence served any permissible purpose in the jury's weighing of the aggravators and mitigators as to the capital counts. There was a time and place for this powerful testimony: before the District Court imposed sentence on the non-capital crimes for which these witnesses were the victims. By allowing the government to instead present this evidence to the jury deciding sentence on the capital crimes, the District Court created a risk that it would taint the jury's finding regarding the capital victims—the only "victims" contemplated by the FDPA. Moreover, the defense needed only one juror to vote for life. See Wiggins, 539 U.S. at 537 (finding prejudice where there was a "reasonable probability that at least one juror would have struck a different balance"). Reversal of the death sentences is required.

VIII.

The Admission Of The Fruit Of Tsarnaev's Coerced Confession Without A Judicial Determination Of Either Voluntariness Or An Independent Source Violated The Fifth Amendment And Tainted Tsarnaev's Death Sentences.

Following his arrest, Tsarnaev was hospitalized and treated for life-threatening injuries, including a gunshot wound to the face. He underwent hours of surgery and was prescribed powerful opioid painkillers. Over a period of 36 hours, two FBI agents questioned Tsarnaev, who was in critical condition in the intensive care unit, in significant pain, intubated, and confined to his bed. The agents did not provide the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), and they rejected Tsarnaev's repeated requests for counsel. Held incommunicado and told that he "needed" to answer the agents' questions, Tsarnaev acquiesced and made a self-incriminating statement. He told the agents, among other things, that "[o]n the way back to Cambridge" after the bombings, he and Tamerlan "stopped at a Whole Foods . . . to buy some milk."

The defense moved to suppress the confession as involuntary under Mincey v. Arizona, 437 U.S. 385 (1978). Based on the government's promise not to use the statement, the District Court denied the motion without prejudice. But during its guilt-phase case-in-chief, the government introduced what appeared to be the statement's fruits—surveillance video of Tsarnaev, about 20 minutes after the bombings, shopping for milk at a Whole Foods supermarket in Cambridge. The

government insisted that the investigators who secured the video had learned of the shopping trip not from Tsarnaev's coerced confession, but from an unnamed "civilian witness." With the issue now live, the defense asked the Court for a voluntariness ruling, as required by 18 U.S.C. § 3501(a), or, in the alternative, to order the government to substantiate its assertion of an independent source. The Court refused both requests. The government exploited the video to great effect, especially during the penalty phase, to support the statutory aggravating factor that Tsarnaev had committed an "act of terrorism," 18 U.S.C. § 3592(c)(9), and the crucial non-statutory aggravating factor that he had shown a "lack of remorse."

Admission of the video without a determination of either voluntariness or an independent source violated the Fifth Amendment. The District Court relieved the government of its burden of proof on both issues. In particular, the Court accepted the government's independent-source representation without a single piece of corroborative evidence. In light of the government's heavy emphasis on the video, which prosecutors mentioned seven times in their jury arguments, the error was not harmless beyond a reasonable doubt as to Tsarnaev's death sentences. Accordingly, this Court should remand for the District Court to determine whether the government's source for the video was genuinely independent of Tsarnaev's hospital confession, and if not, whether the confession was voluntary. If it was neither, Tsarnaev's death sentences must be reversed.

A. Factual background.

On the evening of Friday, April 19, after a daylong manhunt and a shelter-in-place covering greater Boston, law enforcement officers found Tsarnaev, who was wounded and bleeding, hiding in a boat in the backyard of a residence in Watertown. 12.A.5187–88, 5191, 5224. The officers penetrated the boat with a barrage of gunfire and flash-bang grenades. 11.A.4550; 12.A.5193–95; 17.A.7901–03; 25.A.11641–42. Tsarnaev was removed from the boat, arrested, and taken by ambulance to Beth Israel Deaconess Medical Center in Boston, where he arrived, "visibly quite injured," at about 9:00 p.m. 12.A.548; 17.A.7905–08; 23.A.1490.

Tsarnaev had suffered gunshot wounds that injured his face, skull, neck, jaw, hand, and legs. 20.A.8991–92; 17.A.7905–08. The "most severe" of these "entered through the left inside of his mouth and exited the left face, lower face." 20.A.8991. This "high-powered injury" resulted in a "skull-base fracture, with injuries to the middle ear, the skull base, the lateral portion of his C1 vertebrae, with a significant soft-tissue injury, as well as injury to the pharynx, the mouth, and a small vascular injury." Id. In addition, Tsarnaev had sustained "multiple gunshot wounds to the extremities," including one to his left hand that caused "multiple bony injuries." Id. at 8992. Upon arrival at Beth Israel, Tsarnaev's "mental status began to decline." 23.A.10516. He was intubated and received a

transfusion of one pint of blood before proceeding into emergency surgery that lasted through the night. 23.A.10490, 10516.

Just after midnight on Saturday, April 20, during the surgery, attorneys from the Federal Public Defender Office, as well as a private attorney appointed by the state public defender's office, came to Beth Israel and demanded to see Tsarnaev. 23.A.10491, 10510 ¶ 2. But the government had determined to interrogate Tsarnaev without counsel and without Miranda warnings. E.g., 23.A.10490.[134] So an FBI agent turned the attorneys away, explaining that Tsarnaev "had not been given his Miranda warnings, and agents did not intend to do so." 23.A.10510 ¶ 2. Tsarnaev "had not been formally charged," the agent said, so the attorneys "did not represent him and had no right to meet with him." Id.

Later that morning, Tsarnaev was transferred to the surgical intensive care unit in significant post-operative distress. 23.A.10490, 10516. Damage to Tsarnaev's cranial nerves had required doctors to suture his left eye shut. 23.A.10491–92. His jaw was wired closed and he could not hear out of his left ear. Id. at 10492. Tsarnaev's tracheostomy tube kept him from speaking. Id. The open bullet wound to his hand had been "treated with fixation"—the setting of internal pins—"and soft-tissue coverage, as well as tendon repair and vascular ligation."

[134] See also Charlie Savage, Debate Over Delaying Of Miranda Warning, N.Y. Times (Apr. 20, 2013), https://www.nytimes.com/2013/04/21/us/a-debate-over-delaying-suspects-miranda-rights.html.

20.A.8992. Over the next 48 hours, Tsarnaev was prescribed several painkillers, including Propofol and the opioids Fentanyl and Dilaudid. 23.A.10490; 23.A.10516. Even so, Tsarnaev complained several times of "significant" and "severe" pain. 23.A.10495 n.5.

That evening, Saturday, April 20, at 7:22 p.m., two FBI agents began an interrogation that spanned more than 36 hours—until Tsarnaev made his initial appearance from his hospital bed. 1.A.155. [redacted] More important, Tsarnaev began receiving a different medication, Dilaudid, about four hours into the first session, and there is no evidence that the agents consulted any medical professional to ascertain that

drug's impact. 23.A.10516. See United States v. Crowell, 9 F.3d 1452, 1452–53 (9th Cir. 1993) (Dilaudid "produces effects similar to heroin's"). [redacted] at 3:28 p.m. on April 21, during the first session, caregivers noted Tsarnaev's "significant surgical pain." 23.A.10495 n.5.[135]

For the duration of the questioning, Tsarnaev was confined to his hospital bed, handcuffed, intubated, taking either Fentanyl or Dilaudid, and experiencing significant pain from multiple gunshot wounds, including one that had punctured his face and damaged his skull, spine, ear, and jaw. Id. at 10489–94; 23.A.10516–17. On at least one occasion (at 4:00 a.m. on April 21), questioning was interrupted for a medical procedure. 23.A.10516. Because of his injuries and his tracheostomy tube, Tsarnaev could not speak unless he covered the hole in his

[135] [redacted] But see 23.A.10516–17 (government's unsubstantiated assertion to contrary).

throat. 23.A.10516–17. As a result, Tsarnaev answered some of the agents' questions by nodding yes or no, or by writing his answers in a notebook. 23.A.10492; 23.A.10517; SA.1–79 (The government argued below that "[t]hroughout the entire interview," Tsarnaev "appeared alert, mentally competent, and lucid," 23.A.10517, but offered no factual corroboration for that assertion, and Tsarnaev disputes it.)

[redacted]

Tsarnaev's notebook also reflects, in excruciating detail, his damaged physical and mental state. [redacted]

[redacted]

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
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- [redacted]
- [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] Finally, the agents either failed to answer Tsarnaev's many questions

whether Tamerlan was alive, [redacted] 23.A.10522.

[redacted]

At 6:45 p.m. on April 21, Magistrate Judge Bowler signed a sealed complaint charging Tsarnaev with violations of 18 U.S.C. §§ 2332a(a) and 844(i). DE.3. Despite her courtroom deputy's assurance to the Federal Public Defender Office, a day earlier, that it "would be appointed" to represent Tsarnaev "as soon as a complaint was signed," 23.A.10511, ¶ 5, [redacted]

At 11:00 a.m. on April 22, Tsarnaev made his initial appearance from his hospital bed. 1.A.155. Dr. Stephen Odom, Tsarnaev's attending physician,

testified that Tsarnaev was in guarded condition in the intensive care unit, with "multiple serious injuries that require ongoing inpatient medical care." 20.A.8992. Dr. Odom explained that Tsarnaev had received 0.5 milligrams of Dilaudid at 7:00 a.m. that morning (that is, during questioning), and another 0.5 milligrams at 10:00 a.m. Id. at 8994–95. He opined that Tsarnaev "knows where he is" and "knows that he has had multiple procedures, but I'm not sure how aware he is of the specifics. He knows that he has an injury to the neck and to the hand." Id. at 8992–93. Dr. Odom testified that Tsarnaev was "able to respond vocally" to questions. Id. at 8993. At the conclusion of the initial appearance, Magistrate Judge Bowler found that Tsarnaev (who had spoken only one word, 1.A.158, was "alert, mentally competent, and lucid. He is aware of the nature of the proceedings." Id. at 160.

B. Procedural history.

Before trial, the defense moved to suppress Tsarnaev's statements and for an evidentiary hearing, arguing that the statements were involuntary because the agents exploited Tsarnaev's weakened physical and mental condition, and ignored his repeated requests for counsel, in order to coerce a confession. 23.A.10489–508; DE.359. Acknowledging that an evidentiary hearing on voluntariness was appropriate, the government opposed the motion to suppress, but represented that that it "does not intend to use Tsarnaev's statements in its case-in-chief at trial or

sentencing." 23.A.10535. Based on that representation, the District Court denied the defense motion "without prejudice," specifying that the motion was "subject to renewal as needed." 20.A.9257.

During its guilt-phase case-in-chief, the government introduced surveillance video footage of Tsarnaev, about 20 minutes after the bombings, at a Whole Foods supermarket in Cambridge's Central Square. 10.A.4466–69; A.CD.GX1456.[136] Kaytlin Harper, the manager who authenticated the footage, testified that two FBI agents had come into the store, explained that "they thought that someone was in the building," and asked Harper to "walk them through" surveillance footage from the day of the Marathon. 10.A.4468. The footage showed that Tsarnaev entered the Whole Foods at 3:12 p.m. A.CD.GX1456 at 3:12:37 to 3:12:47 PM; 10.A.4470. He walked to the dairy aisle, examined two different containers of milk, selected one and paid in cash, then left the supermarket and got into the passenger seat of a dark sedan in the parking lot. A.CD.GX1456 at 3:12:47 to 3:15:22 PM. About a minute later, Tsarnaev re-entered the Whole Foods, exchanged the container of milk for a different one, then left, returning to the passenger seat of the same sedan, which pulled out of the parking lot. Id. at 3:15:59 to 3:17:28 PM. The government also introduced an "electronic journal

[136] A CD containing multimedia files is enclosed with the appendix. The time stamps referenced in this section refer to the surveillance video system timer in the bottom left corner of A.CD.GX1456.

report" (a computer-generated receipt) from the store confirming that Tsarnaev had paid $3.49 in cash for a half-gallon of milk at 3:14 p.m. 10.A.4471–72; 25.A.11683. The defense did not object to the introduction of either exhibit. 10.A.4469, 4471. Harper did not say what day the agents had visited the store. But the "electronic journal report" indicates that it was "[r]eported at"—that is, retrieved on—April 23, 2013, at 5:20 p.m., the day after Tsarnaev's hospital interrogation ended. 25.A.11683; see also 10.A.4470–71.

Two trial days later, still during its guilt-phase case-in-chief, the government, through FBI special agent Chad Fitzgerald, introduced cell-site location information to show the Tsarnaevs' whereabouts and movements during the week of April 15. 11.A.4694–4711; 25.A.11673–81. Fitzgerald testified, over defense objection, that "at the time the investigation was occurring," after Tsarnaev's arrest, "we had received information, I believe, from a witness that the people involved stopped at a Whole Foods." 11.A.4704. Fitzgerald reviewed Tamerlan's cell phone records and ascertaining that his phone had been in use between 3:15 and 3:30 p.m. in the vicinity of the Central Square Whole Foods. Id. at 4703–05; 25.A.11677. He therefore "told the investigative team that they probably want to go to the Whole Foods and look at the video in between these two times." 11.A.4705. Fitzgerald testified, again over defense objection, that the

investigators "were able to locate video stills of . . . one of the suspects in the Whole Foods in that time period." 11.A.4705.

Fitzgerald did not specify when the FBI had "received information" from the unnamed "witness." But he did testify that he told the team to investigate the Whole Foods the day before they retrieved the surveillance video. See 11.A.4705 ("I told the investigative team that they probably want to go to the Whole Foods . . . . I was told *the next day* that when they . . . returned, they were able to locate video stills." (emphasis added)). If the agents retrieved the video and receipt on April 23, Fitzgerald must have told them to investigate one day earlier, on April 22—that is, the same day that Tsarnaev's hospital interrogation ended.

The day after Fitzgerald testified, the defense objected that despite promising not to use Tsarnaev's post-arrest statement, the government had used the Whole Foods surveillance video, which looked like the statement's "fruits." 21.A.9725. Counsel explained that it "hadn't occurred to [her]" until Fitzgerald "was asked, . . . 'Did you receive information that defendant Tsarnaev had gone to Whole Foods,' and he said 'yes,'" that that information appeared in Tsarnaev's "hospital statement, that he'd gone to Whole Foods." Id. See SAdd.10. In the defense's view, "the chronology" of the statement and the subsequent investigation "lines up" in a manner that suggested that the government had used the statement to secure the footage. 21.A.9725–26. Thus, the defense sought a determination of

voluntariness: although "the issue of the voluntariness of those statements was never resolved," it had now been "joined," and "should be . . . addressed before that evidence is . . . admitted." Id. "Because the issue of voluntariness has not been resolved," the defense argued, "the issue of fruits remains a potentially live one unless the government can show inevitable discovery, independent source and the like." Id. at 9726.

In response, a prosecutor asserted, based on a prior conversation with Fitzgerald that was not in evidence, that the source of the tip "was somebody else entirely," a "civilian witness who was not involved in the investigation." 21.A.9727. The prosecutor insisted that Fitzgerald "doesn't even know about what was said in the hospital statement." Id. Fitzgerald's directive to the government's investigators—to look for surveillance video from the Central Square Whole Foods between 3:15 and 3:30 p.m. on April 15—"was based on . . . this tipster, what information that person had." Id. Defense counsel questioned these assertions: Fitzgerald's testimony "sounded to me more like he got information from another FBI agent who could have gotten it either from a civilian witness or from the defendant." Id. at 9728. "And," counsel protested, "we can't just sit there and look at every piece of evidence and try to guess" whether it stemmed from the hospital confession or not. Id. at 9728.

The District Court said that the FBI's investigative procedure was acceptable "[a]s long as that person didn't have it from the statement." Id. at 9727. But the Court cautioned the government: "I think you just have to be—in light of this, particularly sensitive to the source of that kind of information, that it does not trace back to those statements." Id. at 9728. To verify that the video did not "trace back" to Tsarnaev's coerced confession, the defense asked the District Court to order the government to substantiate its representation that the Whole Foods tip came from an independent source: "It would be helpful if the government could provide some documentation of the tip . . . that was underlying the Whole Foods." Id. at 9729. The Court refused: "I don't think that's necessary under the present circumstances." Id.

The government made extensive use of the Whole Foods video in its jury arguments, referring to the video at least seven times. 10.A.3950 (guilt-phase opening); 15.A.6889, 6903, 6972 (guilt-phase closing and rebuttal); 16.A.7086 (penalty-phase opening); 15.A.6904, 6918 (penalty-phase closing). The government contended that Tsarnaev's calm behavior in selecting, then exchanging, the milk soon after the bombings evinced his lack of remorse: "he coolly, not 20 minutes later, went to the Whole Foods to make sure he got the half-gallon of milk that he wanted." Id. at 6889. The government urged the jury to "recall his demeanor, his strut walking up and down those aisles," id. at 6903,

when he "strolled into Whole Foods like it was an ordinary day and shopped for milk." 19.A.8722.

The government also used the video to dispute the defense's primary mitigation argument, namely, that Tamerlan had incited Tsarnaev to participate in the bombings: "If you are capable of such hate, such callousness that you could murder and maim nearly 20 people and then drive to Whole Foods and buy milk, can you really blame it on your brother?" 15.A.6972. The government invited the jury to imagine Tsarnaev "at home drinking his milk" on the night of the bombings, an image it contrasted with "the heartbreaking love of a mother comforting her dying child." 19.A.8722. And in its penalty-phase closing, the government made explicit the link between the video and a critical non-statutory aggravating factor, Tsarnaev's lack of remorse: "after causing all of this pain and suffering, this defendant bought a half-gallon of milk without shedding a tear or expressing a care for the lives of the people that were forever altered or destroyed. . . . He was . . . remorse free." 19.A.8708.

C. The admission of the fruits of Tsarnaev's coerced confession violated the Fifth Amendment and tainted the death sentences.

1. Before introducing a confession's fruits, the government must prove voluntariness or an independent source.

The Due Process and Self-Incrimination Clauses of the Fifth Amendment require "that a confession be voluntary to be admitted into evidence." Dickerson v.

United States, 530 U.S. 428, 433 (2000). "[A] defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial." New Jersey v. Portash, 440 U.S. 450, 459 (1979). This prohibition applies not just to an involuntary statement, but also to its fruits. "We have repeatedly explained that 'those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial.'" United States v. Patane, 542 U.S. 630, 640 (2004) (plurality opinion) (quoting Chavez v. Martinez, 538 U.S. 760, 769 (2003) (plurality opinion)). "Where a confession is coerced, evidence derived directly from the confession can also be excluded as involuntary under a doctrine similar to the 'fruit of the poisonous tree' doctrine." United States v. Byram, 145 F.3d 405, 409 (1st Cir. 1998).

A defendant is entitled to a determination of voluntariness before a jury hears evidence of a confession. Sims v. Georgia, 385 U.S. 538, 543–44 (1967); Jackson, 378 U.S. at 394. Thus, in federal cases, before a confession "is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness." 18 U.S.C. § 3501(a); see also United States v. Feliz, 794 F.3d 123, 130 (1st Cir. 2015) ("[I]n federal courts, trial judges are tasked with determining the voluntariness of a conviction before trial." (citing § 3501(a))). As

long as a defendant "'makes a sufficient threshold showing that material facts are in doubt or dispute, and that such facts cannot reliably be resolved on a paper record,'" he is entitled to a voluntariness hearing. United States v. Phillipos, 849 F.3d 464, 468 (1st Cir. 2017) (quoting United States v. Staula, 80 F.3d 596, 603 (1st Cir. 1996)).

The government must prove voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972). "In assessing whether a confession is voluntary, courts must inquire 'whether the will of the defendant had been overborne so that the statement was not his free and voluntary act.'" United States v. Jacques, 744 F.3d 804, 809 (1st Cir. 2014) (quoting Bryant v. Vose, 785 F.2d 364, 367–68 (1st Cir. 1986)). "The voluntariness inquiry probes 'the physical and psychological environment that yielded the confession.'" Feliz, 794 F.3d at 130 (quoting Crane v. Kentucky, 476 U.S. 683, 688–89 (1986)). This Court considers "the totality of the circumstances, including both the nature of the police activity and the defendant's situation." United States v. Hughes, 640 F.3d 428, 438 (1st Cir. 2011). Relevant factors include "the length and nature of the questioning," "the defendant's personal circumstances, including his age, education, intelligence, and mental condition, as well as his prior experience with the criminal justice system." Jacques, 744 F.3d at 809; see also, e.g., 18 U.S.C. § 3501(b) (providing that district court, in deciding voluntariness, shall consider

"all the circumstances," including "time elapsing between arrest and arraignment," and whether defendant "knew the nature of the offense . . . of which he was suspected," was advised of Miranda rights, or was represented by counsel). "[C]oercive police conduct is a necessary predicate to the finding that a confession is not 'voluntary.'" Colorado v. Connelly, 479 U.S. 157, 167 (1986). However, questioning a hospitalized defendant over his objection qualifies. See id. at 163 & n.1 (citing Mincey as an example of a case involving this "crucial element of police overreaching").

The government may introduce evidence derived from a coerced confession if it obtains that evidence from a source "genuinely independent" of that illegality. See, e.g., Murray v. United States, 487 U.S. 533, 542 (1988) (noting that independent source doctrine applies to evidence acquired through Fifth Amendment violations). As with voluntariness, the government bears the burden of proving an independent source by a preponderance of the evidence. United States v. Siciliano, 578 F.3d 61, 68 (1st Cir. 2009). To do so, the government must show that the second, lawful discovery was neither derived from nor "prompted" by the original constitutional violation. Murray, 487 U.S. at 542; see also Siciliano, 578 F.3d at 69 (in Murray, "the question of whether the search was 'in fact a genuinely independent source' depended in part on what prompted the agents to seek a warrant").

2. Admission of the Whole Foods video, absent government proof of voluntariness or an independent source, violated the Fifth Amendment.

a. Tsarnaev's confession was involuntary.

The defense made a powerful showing of involuntariness. Tsarnaev had suffered multiple gunshot wounds, including one that punctured his face and damaged his skull, spine, and jaw. He had received a transfusion of one pint of blood and undergone hours of emergency surgery. During questioning, Tsarnaev complained of "significant" and "severe" pain, and physicians treated him with the opioids Fentanyl and Dilaudid. His left eye was sutured closed and he could not speak unless he covered the tracheostomy hole in his throat. Tsarnaev was held incommunicado, without access to the lawyers who appeared at Beth Israel to represent him. FBI agents questioned him in his hospital bed (to which he was handcuffed), over a 36-hour period, for an aggregate of 13 hours and 30 minutes. They did not advise him of his Miranda rights and refused 11 requests for counsel, telling him that he "first needed" to answer their questions. Thirteen times, he pleaded with the agents to stop questioning him because he was exhausted or nauseated. His written answers reflect confusion and perhaps auditory hallucination. Tsarnaev's statement was not "the product of his free and rational choice." Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968) (per curiam). Rather, it was the submission of a teenager, "weakened by pain and shock" and "isolated

from family, friends, and legal counsel," whose "will was simply overborne." Mincey, 437 U.S. at 401–02.

Tsarnaev's interrogation mirrored the one held involuntary in Mincey. Tsarnaev, like Mincey, made his statements "from a hospital bed" in an "intensive care unit" where he was intubated, medicated, and recovering from a gunshot wound. Id. at 396. Tsarnaev's gunshot wounds appear to have been more serious: Mincey was shot in the "hip, resulting in damage to the sciatic nerve and partial paralysis of his right leg," id., but Tsarnaev was shot in the face, hand, and leg, and suffered a skull fracture and spinal damage. Likewise, Mincey "was unable to talk because of the tube in his mouth, and so he responded to . . . questions by writing answers on pieces of paper." Id. Both complained of significant pain, and both interviews were interrupted for medical treatment. See id. at 398. Most important, like Tsarnaev, Mincey "asked repeatedly that the interrogation stop until he could get a lawyer." Id. Both men, held incommunicado, made repeated pleas for interrogation to stop until they were represented by counsel, but both were rebuffed and succumbed to questioning because their injuries confined them to their hospital beds. Id. at 401.[137]

[137] To be sure, there are modest differences between this case and Mincey. Tsarnaev was not "depressed almost to the point of coma," 437 U.S. at 398, when he arrived at Beth Israel, but his "mental status" did "decline," requiring the transfusion of one pint of blood, before emergency surgery. 23.A.10516. Tsarnaev did not complain of "unbearable" pain, 437 U.S. at 398, just "significant" and

Application of the factors that this Court has deemed relevant compel the same conclusion. See, e.g., Jacques, 744 F.3d at 809; Hughes, 640 F.3d at 438. The "length and nature of the questioning" was extensive. Jacques, 744 F.3d at 809. Agents engaged in a wide-ranging interrogation that spanned 36 hours, including overnight on April 20 and April 21. See, e.g., Spano v. New York, 360 U.S. 315, 322 (1959) (recognizing coercive effect of off-hour questioning, where "slowly mounting fatigue does, and is calculated to, play its part"). The agents denied Tsarnaev access to counsel, even though he asked 11 times for a lawyer, and even though lawyers had come to Beth Israel to represent him. Magistrate Judge Bowler enabled such questioning, assuring the Federal Public Defender Office that it would be appointed once a complaint was signed, but nonetheless allowing a further 14 hours of uncounseled interrogation (from 6:45 p.m. on April 21 until 9:00 a.m. on April 22) after signing the complaint.

These facts compel a determination of involuntariness. See, e.g., Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (holding confession involuntary where officers refused access to lawyer who came to police barracks and rebuffed defendant's multiple requests to "communicate with the outside world," thereby keeping defendant "incommunicado for the 30 to 48 hours during which they

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"severe" pain. 23.A.10495 n.5. On the other hand, Mincey, unlike Tsarnaev, received Miranda warnings, and was questioned for just four hours, not 36. 437 U.S. at 396.

sought and finally obtained his confession"); Haynes v. Washington, 373 U.S. 503, 514 (1963) (holding confession involuntary where police refused defendant's requests to call his wife or a lawyer and questioned him incommunicado for 16 hours). Indeed, the impermissible coercion in Haynes—that the defendant "could call a lawyer" only after he "cooperated and gave . . . a statement," 373 U.S. at 507—is indistinguishable from what the agents told Tsarnaev: [redacted] For a half-century, the Supreme Court has recognized what "experience unmistakably teaches: that secret and incommunicado detention and interrogation" are "devices adapted and used to extort confessions from suspects." Haynes, 373 U.S. at 514. That well-settled understanding resolves this issue.

The other Jacques factors point in the same direction. Tsarnaev's notebook [redacted] See Hughes, 640 F.3d at 438 (including "sleep" among "essentials" whose "deprivation" cuts against voluntariness). Below, the government contended that "Tsarnaev never dozed or drifted off during the interview" and "whenever the agents believed he was growing tired, they ceased questioning him and advised him to rest or sleep." 23.A.10522. But no contemporaneous documentation supports that assertion [redacted]. And "[c]ounsel's factual assertions in

pleadings or legal memoranda are not evidence and do not establish material facts." Jupiter v. Ashcroft, 396 F.3d 487, 491 (1st Cir. 2005). Tsarnaev was a 19-year-old with no "prior experience with the criminal justice system." Jacques, 744 F.3d at 809; see, e.g., United States v. Rivera Ruiz, 797 F. Supp. 78, 80 (D.P.R. 1992) (holding confession involuntary based in part on lack of prior arrests); United States v. Pinto, 671 F. Supp. 41, 59 (D. Me. 1987) (same). His "personal circumstances" and "mental condition," Jacques, 794 F.3d at 809, were straitened: he was cuffed to a hospital bed, recovering from life-threatening injuries, taking potent medication, and was demonstrably confused, drowsy, and nauseated.

Four of the five factors that Congress has identified as relevant to the voluntariness inquiry in § 3501(b) also favor Tsarnaev. Although Tsarnaev "knew the nature of the offense . . . of which he was suspected," § 3501(b)(2), all of the other factors point toward involuntariness. The "time elapsing between arrest and arraignment," § 3501(b)(1), was about 62 hours—*i.e.*, from about 9:00 p.m. on April 19 to 11:00 a.m. on April 22—more than 10 times the six-hour safe harbor provided by 18 U.S.C. § 3501(c). [redacted] "'[T]he use of time . . . to employ the condemned psychologically coercive or third degree practices of interrogators, . . . is proscribed.'" United States v. Beltran, 761 F.2d 1, 8 (1st Cir. 1985) (quoting

United States v. Rubio, 709 F.2d 146, 153 (2d Cir. 1983)). Tsarnaev was not "advised," and there is no evidence that he "knew," "that he was not required to make any statement and that any such statement could be used against him." § 3501(b)(3). [redacted] Consistent with the Justice Department's policy decision to question Tsarnaev without Miranda warnings, the agents did not advise Tsarnaev "of his right to the assistance of counsel." § 3501(b)(4). And he was "without the assistance of counsel when questioned." § 3501(b)(5).

b. At a minimum, Tsarnaev was entitled to a voluntariness hearing.

Tsarnaev adduced ample evidence of coercion. On this record, the District Court could not have held Tsarnaev's confession voluntary without putting the government to its burden of proof at an evidentiary hearing. See, e.g., Boles v. Stevenson, 379 U.S. 43, 45 (1964) (per curiam) ("[W]here a state defendant has not been given an adequate hearing upon the voluntariness of his confession, he is entitled to a hearing in the state courts under appropriate procedures and standards designed to insure a full and adequate resolution of this issue."); § 3501(a).

The Court denied the defense's motion to suppress not because it decided that the government had proved voluntariness, but based on the government's promise not to use Tsarnaev's statement in its case-in-chief or at sentencing.

20.A.9258. And the Court denied the motion "without prejudice" and "subject to renewal." Id. When the defense realized that the government had used what appeared to be the fruits of that statement—the Whole Foods video—the defense took up the Court's invitation and renewed the motion, arguing that "the issue of the voluntariness of those statements" had now been "joined" and "should be . . . addressed before that evidence is admitted," pursuant to Jackson. 21.A.9725–26. See, e.g., United States v. Luciano-Mosquera, 63 F.3d 1142, 1154 (1st Cir. 1995) ("Before the issue of a [Jackson] hearing may be raised on appeal, the issue of voluntariness must have been placed before the district court in a timely and coherent manner.").

The Court's refusal to decide voluntariness was error. Section 3501(a) entitles a federal criminal defendant to a judicial determination of voluntariness before his confession is admitted into evidence. See Feliz, 794 F.3d at 130; United States v. Santiago Soto, 871 F.2d 200, 201 (1st Cir. 1989). In a case where the defendant "never received the ruling on voluntariness to which he was entitled," this Court has held, that omission "raises the specter of basic unfairness in the trial." United States v. Carrasco, 540 F.3d 43, 54 (1st Cir. 2008). Thus, in Carrasco (a plain error case), this Court vacated a conviction based on the district court's failure to determine voluntariness before admitting a defendant's confession. Id.; see also, e.g., Sims, 385 U.S. at 544 (reversing conviction and

remanding for voluntariness hearing); Jackson, 378 U.S. at 396 (reversing denial of habeas corpus petition and remanding for voluntariness hearing).

Logically, this rule applies to a confession's fruits. The premise of Jackson, codified at § 3501(a), is that a defendant deserves a reliable determination of voluntariness, but that the jury charged with deciding guilt "may find it difficult to understand the policy forbidding reliance on a coerced, but true, confession." 378 U.S. at 382; see, e.g., Lego, 404 U.S. at 485 (explaining Jackson's fear that "the reliability and truthfulness of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness"). A jury can no more assess voluntariness for purposes of considering the confession itself than for purposes of considering its fruits. Moreover, in this case, the government did not introduce the confession, so the jury would have had no evidentiary basis for deciding voluntariness at all. Only the District Court could have made that determination. See Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether . . . evidence is admissible.").

c. The government did not prove an independent source.

The government's unsubstantiated assertion that the Whole Foods surveillance video had an independent source did not excuse the District Court's omission. The District Court did not say why it declined to decide voluntariness. 21.A.9725–29. The government suggested that no decision was necessary because

the video was not the fruit of Tsarnaev's hospital confession, but came from "somebody else entirely." Id. at 9727. The Court's comments, e.g., id. at 9727–28, read in light of the government's argument, suggest that the Court pretermitted the voluntariness issue by crediting the government's representation. If so, that, too, was error.

The defense made a compelling threshold showing that the video was the confession's fruit. [redacted] On April 22, Fitzgerald, the government's cell-site location witness, advised the FBI investigative team to look for surveillance footage from the Central Square Whole Foods (which was in the vicinity of the cell towers to which Tamerlan's phone connected) between 3:15 and 3:30 p.m. 11.A.4703–05; 25.A.11677. And on April 23, two agents did, securing the surveillance video and the milk receipt. The defense therefore showed a tight factual and temporal link between Tsarnaev's coerced confession (April 21–22), the government's decision to investigate the Whole Foods (April 22), and the discovery of the surveillance video (April 23).

In response, the government adduced no proof of an independent source whatsoever. Fitzgerald's testimony— ("[*We*] had received information, *I believe*, from a witness," 11.A.4704 (emphases added))—was, by its plain terms, equivocal and uncertain. He himself did not know where the tip came from. Nor is he likely to have been in a position to know. A special agent long assigned to the FBI's Cellular Analysis Survey Team—a technical unit whose duties entail "interpreting and analyzing cell phone data," 11.A.4675—Fitzgerald does not appear to have "received" this "information" from the "witness" directly. His testimony was not substantive evidence of the information's source. Considered for its truth, the testimony would have been hearsay, see Fed. R. Evid. 801(c), and it elicited defense objections (which were overruled). 11.A.4704. In fact, the government conceded that it had not offered Fitzgerald's testimony "for the truth," but rather "to say why" he "did this analysis." 21.A.9728. Fitzgerald's secondhand guess did not suffice to prove the government's independent-source assertion. At the very least, the defense was entitled to cross-examine Fitzgerald on this point and test his account at an evidentiary hearing.

The government's only remaining proof was the prosecutor's oral representation, based on his pre-trial conversation with Fitzgerald. 21.A.9727–28. But that was not evidence, see Jupiter, 396 F.3d at 491, and a party cannot discharge its burden of proof with an unsubstantiated assertion from its counsel,

see, e.g., Corrada Betances v. Sea-Land Serv., Inc., 248 F.3d 40, 43 (1st Cir. 2001). The Supreme Court has explained that proving "inevitable discovery," independent source's close cousin, "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." Nix v. Williams, 467 U.S. 431, 444 n.5 (1984); see also Murray, 487 U.S. at 540 n.2 (declining to "give dispositive effect to police officers' assurances" that warrant would have been sought had illegal search not occurred, and cautioning that "[w]here the facts render those assurances implausible, the independent source doctrine will not apply"); United States v. Rose, 802 F.3d 114, 123–24 (1st Cir. 2015) (same). A prosecutor's say-so does not carry the government's burden.

Even on its own terms, the uncorroborated claim falls short. To invoke the independent source doctrine, the government must show that discovery of the Whole Foods surveillance video was not "prompted" by what the agents learned from the coerced confession. Murray, 487 U.S. at 542; Siciliano, 578 F.3d at 69. This inquiry entails "a subjective test." United States v. Dessesaure, 429 F.3d 359, 369 (1st Cir. 2005). That is, if Tsarnaev's statement motivated the government to focus its investigation on Whole Foods, or to ask civilian witnesses whether they knew that the brothers had stopped there, the video is not "genuinely independent" of the primary illegality. Murray, 487 U.S. at 582. Instead, "to determine whether" the discovery of the video was truly "independent" of the illegal

interrogation, "one must ask whether it would have been sought even if what actually happened had not occurred." Id. at 542 n.3. The government's representation that the Whole Foods tip came from a "civilian witness" does not answer that question—a question Murray says "must" be asked—because it does not establish the investigators' subjective motivation in eliciting the tip. Consequently, even if credited (and before undergoing adversarial testing, it should not be), that assertion does not satisfy the government's obligation to prove independence. See Siciliano, 578 F.3d at 68.

Most important, "'it is the function of the District Court rather than the Court of Appeals to determine the facts,' . . . even where a court of appeals could theoretically cobble together varying aspects of the record to infer the officer's subjective intent." Rose, 802 F.3d at 124 (quoting Murray, 487 U.S. at 543). Here, the District Court made no findings at all, and Tsarnaev had no opportunity to test or rebut the slim proffer that the government made, precluding this Court from resolving the independent source question in the first instance. See, e.g., id. Rather, remand is required.

In short, Tsarnaev made a powerful showing that his hospital confession was coerced and that the Whole Foods surveillance video was the confession's fruit. Consequently, as a prerequisite to admitting the video, the government bore the burden of proving either voluntariness or an independent source. By refusing to

decide voluntariness or require the government to substantiate its assertion that the video was untainted, the District Court relieved the government of both burdens, in violation of the Fifth Amendment.

3. The Fifth Amendment error was not harmless as to the death sentences.

"The use of an involuntary confession is reviewed to see if the error was harmless beyond a reasonable doubt." Carrasco, 540 F.3d at 52 n.17. The government bears the burden of proving harmlessness. Arizona v. Fulminante, 499 U.S. 279, 296–97 (1991). A harmlessness determination "demands a panoramic, case-specific inquiry" that considers "the centrality of the tainted material, its uniqueness, its prejudicial impact, the uses to which it was put during the trial, the relative strengths of the parties' cases, and any telltales that furnish clues to the likelihood that the error affected the factfinder's resolution of a material issue." United States v. Sepulveda, 15 F.3d 1161, 1182 (1st Cir. 1993). "In other words, . . . 'we ask whether we can say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" Carrasco, 540 F.3d at 55 (quoting United States v. Del Rosario, 388 F.3d 1, 10–11 (1st Cir. 2004)).

Tsarnaev acknowledges that the error did not affect the guilt-phase verdict, but the same is not true of the death sentences. See, e.g., United States v. McCullah, 76 F.3d 1087, 1101–02 (10th Cir. 1996) (in FDPA case, holding

admission of coerced confession harmless as to guilt but vacating death sentence). The government hammered the Whole Foods surveillance video in its arguments to the jury, mentioning it at least seven times. See, e.g., Clemons, 494 U.S. at 753 (erroneous instruction on aggravating factor not harmless as to death sentence where "the State repeatedly emphasized and argued the . . . factor during the sentencing hearing"); Serrano, 870 F.2d at 9 (erroneous admission of co-conspirator's hearsay statement not harmless because "the government emphasized the statement in its closing arguments to the jury"). A host of pejoratives accompanied those arguments: in the video, Tsarnaev was behaving "calmly" and "coolly," 10.A.3950; 15.A.6889; he walked with a "strut" and "strolled," 15.A.6903; 19.A.8722; and he "sat at home drinking his milk" while Denise Richard was "comforting her dying child," 19.A.8722. His actions on the video demonstrated Tsarnaev's "hate" and "callousness." 15.A.6972.

And, the government said, the video's temporal connection to the bombings gave it unique relevance and potency. The government several times stressed the video's timing, arguing: "20 minutes—20 minutes—after exploding his bomb, while his victims lay dead and dying and bleeding—20 minutes—that's a lot less than 60 minutes that some of them had—20 minutes later, there's the defendant. He strolled into Whole Foods like it was an ordinary day and shopped for milk." 19.A.8721–22; see also 10.A.3949–50 (same); 15.A.6889 (same). The government

introduced other evidence of Tsarnaev's conduct after the bombings, such as tweets that said "[a]in't no love in the heart of the city, stay safe people" and "I'm a stress free kind of guy." 10.A.4491–93, 4496. But the Whole Foods video had special salience, in the government's view, because it came first.

Most important, the government touted the video, to devastating effect, as proof of Tsarnaev's lack of remorse. See, e.g., 19.A.8708. "In a capital sentencing proceeding, assessments of character and remorse may carry great weight and, perhaps, be determinative of whether the offender lives or dies." Riggins v. Nevada, 504 U.S. 127, 144 (1992) (Kennedy, J., concurring). Case law recognizes, and research confirms, the importance of remorse to capital juries. See, e.g., United States v. Whitten, 610 F.3d 168, 201 & n.25 (2d Cir. 2010) (collecting authorities); United States v. Mikos, 539 F.3d 706, 724 (7th Cir. 2008) (Posner, J., concurring in part and dissenting in part). "Empirical studies of capital juries have demonstrated that a defendant's remorse (or lack of remorse) is one of the single most important factors in the jury's sentencing decision." Michael A. Simons, Born Again on Death Row: Retribution, Remorse, and Religion, 43 Cath. Law. 311, 322 (2004); see also id. at 322 n.55 (collecting studies).

For example, in one study based on interviews of California capital jurors, the "[j]urors . . . identified the perceived degree of the defendant's remorse as one of the most frequently discussed issues in the jury room during the penalty phase."

Id. at 322–23 (quoting Scott E. Sundby, The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty, 83 Cornell L. Rev. 1557, 1560 (1998)). Indeed, "69% of the death jurors who participated in the study . . . pointed to lack of remorse as a reason for their vote in favor of the death penalty," with many citing that as "the most compelling reason." Id. (quoting Sundby, 83 Cornell L. Rev. at 1560). Likewise, a study of South Carolina capital jurors found "lack of remorse" to be "highly aggravating," with 40% citing lack of remorse as their reason for voting to impose a death sentence. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L. Rev. 1538, 1560 (1998).

The government's exploitation of the video worked. All 12 jurors found the non-statutory aggravating factor that Tsarnaev "demonstrated a lack of remorse," but only two found the mitigating factor that he "has expressed sorrow and remorse for what he did and for the suffering he caused." Add.88, 92. Compounding the error, the government also tendered Tsarnaev's lack of remorse as evidence for the statutory aggravating factor (unanimously found) that he committed the offenses "after substantial planning and premeditation to cause the death of a person and commit an act of terrorism." Add.83 (quoting § 3592(c)(9)). See 19.A.8723 ("Who is capable of showing so little remorse? Only a terrorist, someone who had

no reason for remorse because he believed that he had done something brave and something good.").

In light of the importance of the issue to capital jurors, courts in FDPA cases have refused to deem harmless constitutional errors that convey a capital defendant's lack of remorse. E.g., Whitten, 610 F.3d at 200–02 (prosecutorial comment on defendant's decision to proceed to trial, and not to testify); McCullah, 76 F.3d at 1101–02 (coerced confession). In McCullah, the coerced confession—in which the defendant discussed the "paltry sum" he received for the charged murder and expressed willingness to kill again—as here, supplied powerful "evidence of . . . unrepentance" that was "emphasized by the government" in its jury arguments. Id. at 1102. The confession may have "influenced the jury in their findings of aggravating and mitigating factors, as well as affecting the weighing process itself." Id. The same risk that unconstitutionally obtained evidence drove the death sentence appears here.

Accordingly, this Court should remand for the District Court to determine whether the government's source for the video was genuinely independent of Tsarnaev's hospital confession, and if not, whether the confession was voluntary. If it was neither, Tsarnaev's death sentences must be vacated.

IX.

The Government Used Inadmissible Evidence, Inflammatory Audiovisual Presentations, And Improper Arguments To Stoke Anti-Muslim Bias And Incite The Jury To Vote For Death Based On Passion And Prejudice.

The Whole Foods video was not the only inadmissible evidence used by the prosecution to improperly bolster its case in aggravation. By allowing the government both to elicit inadmissible testimony that fanned the flames of religious prejudice, and also to misrepresent evidence in its jury addresses that fueled the jury's passions, the District Court committed two critical errors. First, the Court permitted the government to elicit irrelevant and prejudicial testimony concerning the Islamic State (or "ISIS"), a terrorist group with which Tsarnaev had no connection. ISIS was well known for its barbarism at the time of his trial, but unknown—indeed, hardly existent—at the time of his crimes. Second, the Court permitted the government to present an inflammatory audiovisual presentation, pairing religiously evocative images and gruesome photographs of the bombings, and overlaying both with an Arabic chant. Both played to commonly held biases against Muslims: that they are foreign, frightening, and violence-prone.

But the government's improper strategies were not limited to the introduction of evidence and argument courting anti-Muslim bias. From a four-hour-long cell block surveillance video, the government extracted a split-second image of Tsarnaev raising his middle finger at a cellblock camera, juxtaposed it

with photographs of the four decedents in the case, and then told the jurors, with no factual basis whatsoever, that this obscene gesture was Tsarnaev's "message" to his victims.

These impermissible appeals to the jury's passions combined to irreparably taint the jury's penalty determination. Tsarnaev was a teenager with no prior criminal record, who had spent the two years since the bombings in federal custody without a disciplinary infraction. In urging his execution, the prosecution sought to overcome evidence of Tsarnaev's capacity for remorse and minimal risk of future danger, two closely intertwined and pivotal sentencing factors. In its zeal, the government used misleading and prejudicial arguments and evidence, and succeeded in persuading all of the jurors that Tsarnaev lacked remorse and keeping eleven from finding the mitigating factor that he could be safely imprisoned.

The government's misconduct created a constitutionally unacceptable risk of an unreliable death sentence based on religious bias, passion and prejudice. "[T]he accumulation of errors effectively undermines due process and demands a fresh start." Sepulveda, 15 F.3d at 1195. The death sentences should be reversed.

A. Factual and procedural background.

1. The government's trial strategy.

To make the case for death, the government drove home a theme throughout both phases of his trial: the teenage Tsarnaev not only committed terrible offenses,

but was evil to his core and remained so at the time of trial. The government argued that Tsarnaev was "without remorse," that he "remains untouched by the grief and the loss that he caused," "remains the unrepentant killer that he is," 16.A.7090, and that he "*was and is* unrepentant, uncaring, and untouched by the havoc and the sorrow that he has created." 16.A.7086 (emphasis added). It cemented the theme by telling the jury that even two years after his crimes, he remained "unconcerned, unrepentant, and unchanged." 16.A.7090. "*It is because of who Dzhokhar Tsarnaev is*," the government concluded its opening statement, "that the United States will return and ask you to find that the just and appropriate sentence for Dzhokhar Tsarnaev is death." Id. (emphasis added). And the government painted an uncomplicated, simplistic picture of "who Dzhokhar Tsarnaev is": a recalcitrant Muslim zealot, unfazed by his actions, and unable to be contained.

2. Over objection, the government intentionally elicits testimony concerning the unrelated terrorist group ISIS.

The government purposefully elicited testimony about ISIS from terrorism expert Matthew Levitt, associating Tsarnaev with a brutal terrorist organization that hardly existed when he committed his crimes. Add.243–46. Before trial, the government noticed three expert witnesses—Sebastian Gorka, Evan Kohlmann, and Levitt—indicating that it would call at least one to explain "the ways in which items of evidence in this case relate" to the "objectives and methods" of the

"global jihad movement." 25.A.11414–16. The expert notice did not refer to the Islamic State. Id. Relying on United States v. Mehanna, 735 F.3d 32, 60 (1st Cir. 2013), the defense moved to exclude any expert testimony about terrorism unless the government could show that Tsarnaev knew of the materials under discussion and actually endorsed or absorbed them. 25.A.11433. "The Court should ensure that [Tsarnaev] is tried only for the crimes alleged in the indictment," defense counsel argued, "and that these charges are not conflated with the entire history of violent Islamic radicalism." 25.A.11435.

The District Court held no hearings on this motion and did not rule on it for nearly three months, until the morning that one of the government's proposed experts—Levitt—testified. The District Court denied the motion without setting any parameters. Add.236. The District Court agreed that any contemporaneous "[Fed. R. Evid.] 403 objections" to the expert's testimony would likewise encompass the Eighth Amendment, and the Fifth Amendment's Due Process Clause. Id. at 242. Cautioning the government not to "step too far on this," the District Court recognized that "403 is an important consideration." Id. at 238. For its part, the government, claiming to be "very sensitive" to defense concerns, promised to limit the scope of the testimony to the authors of the material found on Tsarnaev's computer. 13.A.5879–80.

It took less than fifteen transcript pages for the government to break its promise. After testifying at length about the "global jihad movement," Levitt testified that some terrorist organizations encourage followers who are "living amongst unbelievers" to commit "terrorist acts at home." Id. at 5894. He continued: "And this is not only al-Qaeda; now the so-called Islamic state or ISIS—." Id. This prompted the defense to "object to bringing in organizations that have nothing to do with—." The District Court cut off the objection and overruled it, saying, "As general background I think it's all right. Go ahead." Id.

Seizing this invitation, the government elicited further testimony about ISIS, notwithstanding Tsarnaev's lack of any relationship to the group. The prosecutor asked, in a part question, part statement: "You were talking about ISIS. That we all heard of, ISIS. How does that relate to the global jihad movement?" Id. In response, Levitt described ISIS as "the latest incarnation of this global jihad movement," and reminded the jury that the organization had committed a terrorist act "in just the past few weeks."[138] Id. He then went on to describe ISIS

[138] The most widely publicized such act occurred in Copenhagen, where a gunman attacked a free speech forum and fired shots near a synagogue, killing two people and wounding five police officers. See Ralph Ellis, Holly Yan and Susan Gargiulo, Denmark Terror Suspect Swore Fidelity to ISIS Leader on Facebook Page, CNN (Feb. 23, 2015), https://www.cnn.com/2015/02/16/europe/denmark-shootings/index.html; see also Alexander Tange, Special Report: How Denmark's Unexpected Killer Slipped Through the Net, Reuters (Apr. 22, 2015) (quoting expert witness Levitt), https://www.reuters.com/article/us-denmark-attacks-

propaganda—which postdated Tsarnaev's crimes—praising as "even better than al-Qaeda['s]," ISIS's "glossy magazines" and "very impressive online radical and radicalization literature," which explicitly commanded: "Come. But if you don't come—you don't have to come—just do something back home." Id. at 5894–95.

Though Levitt cautioned that "Islam is not terrorism full stop," id. at 5886, 5896, he buried that caveat under layers of detailed testimony highlighting the religious elements of jihad, including what it means to be a "good Muslim." Id. at 5885, 5887, 5895. He did so without differentiating between ISIS and the organizations that, according to the government, had some conceivable influence on Tsarnaev. In this context, Levitt discussed, in expressly religious terms, the "commonality" between ISIS and other jihadi groups: "the motivational ideology, the idea that there is a personal obligation upon every good Muslim, every member of this ummah to this Muslim nation to do their part," whether in the Arab world or "by targeting the United States, which is this head of the snake as it were," so as to achieve "entry into the highest levels of paradise." Id. at 5895.

At the government's urging, Levitt continued to testify about ISIS, focusing on the present-day—that is, two years after the bombings—"role of the Syrian conflict in th[e] global jihadi movement," which "can't be overstated." Id. at 5914.

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hussein-special-repor/special-report-how-denmarks-unexpected-killer-slipped-through-the-net-idUSKBN0ND0EJ20150422.

The District Court summarily overruled a defense objection to "discussion of Syria that goes beyond the date of any of the events alleged in the indictment," id., allowing the witness to reiterate ISIS's direction that would-be jihadis should "come here if you want, but you don't have to. And if you don't come here, take it to the infidels at home and hit them at home." Id. at 5915.

3. The government screens an inflammatory audiovisual presentation during closing argument, which juxtaposes the audio of an Arabic-language chant over gruesome photographs of the victims of the bombings.

During his guilt phase closing argument, the prosecutor used a PowerPoint presentation, Add.CD.ExcerptPP,[139] that combined gruesome images of the victims of the bombings with the audio of an unrelated nasheed—an Arabic-language chant. Add.251–53. The prosecutor first displayed images and video clips of the maimed, dying, and dead, Add.CD.FullPP at Slides 2–8, 14, before turning to Tsarnaev's motive.

"This," the prosecutor argued, "is how the defendant saw his crimes." Add.248. As the jury saw a black flag with the *shahada*—the first pillar of Islam—in Arabic writing, they began to hear an eerie, foreign, unfamiliar chant.

[139] The addendum CD contains the government's full guilt phase closing argument PowerPoint ("Add.CD.FullPP") and a separate file with the challenged excerpt of the PowerPoint ("Add.CD.ExcerptPP").

Add.CD.ExcerptPP[140]; Add.CD.FullPP at Slide 51; see also The Oxford Dictionary of Islam 286 (2003) (explaining that the *shahada* professes "There is no god but God and Muhammad is the messenger of God"). The unidentified chant then played over a slide of bomb-making instructions, the first line of which was "put your trust in Allah." Add.CD.FullPP at Slide 52. Next came a photograph of Tsarnaev seated in front of the flag of the *shahada*, raising his right index finger, a distinctively Islamic prayer gesture. Id. at Slide 53; 25.A.11672; Add.251; see also The Oxford Dictionary of Islam 315 (defining *tashahhud* as an "[a]ttestation of faith," in which the worshipper "testifies while sitting that there is no god but God" while "[t]he index finger of the worshiper's right hand is raised to emphasize God's uniqueness").

As the nasheed continued, the prosecutor displayed three images of severely wounded victims lying in pools of blood in the chaotic aftermath of the bombings. See Add.CD.FullPP at Slide 54–56; 25.A.11658–60. The chant abruptly stopped, and the prosecutor said, "[B]ut this is the cold reality of what his crimes left behind," Add.249. Twenty-four slides then played in silence. Add.CD.ExcerptPP; Add.CD.FullPP at Slides 57–80. First was an image of Krystle Campbell, dead, lying alongside maimed trial witness Karen McWatters; the mutilated bodies of

[140] Opening the Add.CD.ExcerptPP file will cause it to play as played during the government's closing argument. See DE.1744 (Stipulation 10).

both women are positioned in front of a man visibly missing his left leg. See Add.CD.FullPP at Slide 57; 25.A.11661; 10.A.4105. Next came an even more graphic image of Jeff Bauman, another witness, lying in a pool of blood, both of his legs missing. Add.CD.FullPP at Slide 58; 25.A.11662; 10.A.4334. The slideshow continued over 22 more images, many of which are similarly horrifying. Add.CD.FullPP at Slides 59–80. Eight of the images, including the most horrific ones, had already been shown earlier in the slideshow, before the government began playing the nasheed.[141]

The audio file that the government used to score the presentation was unknown to the jury. The government did not single out, name, or play this recording during trial. Rather, the song was one admitted *en masse* along with thousands of digital files recovered from the brothers' electronic devices. The government neither explained the song's purpose, nor mentioned that it was in evidence. The jury had learned only from Levitt that in general, nasheeds, religious songs "like devotionals," are also—at times—appropriated by "radical Islamist groups." 13.A.5900.

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[141] See Add.CD.FullPP at Slides 55 and 5 (showing GX–12, 25.A.11659); Slides 57 and 7 (showing GX–17; 25.A.11661); Slides 58 and 8 (showing GX–20, 25.A.11662); Slides 59–61 (showing three photo stills—GX–21–47, 25.A.11665; GX–21–1, 25.A.11663; GX–21–2, 25.A.11664—from a video admitted as GX–23, A.CD.GX23) and Slide 4 (showing video excerpt from GX–23); Slides 66 and 14 (showing GX–24, 25.A.11666); and Slides 80 and 23 (showing GX–1451, 25.A.11682).

Immediately after closing arguments, before deliberations, the defense moved for a mistrial based on the inflammatory slideshow. Add.250–51, 254–55. The government conceded that it had "juxtaposed the evidence" by playing an audio file over unrelated photographs. Id. at 252–53. In spite of the fact that there was no connection between the photographs and the audio file, the government argued that the slideshow offered "perspective" on the defendant's "state of mind" and "allow[ed] the jury to determine [sic] what they are viewing" as "horrific acts of terrorism." Id. at 253. The District Court denied the defense's mistrial motion, adopting the "government's radicalization position," and finding that "it was not improper." Id. at 254.

4. The government juxtaposes an oversized screenshot of Tsarnaev raising his middle finger in a jail cell with same-sized photographs of his victims and calls it his "message" to them.

At the climax of its penalty phase opening statement, the government unveiled a poster-sized image of Tsarnaev raising his middle finger, flanked by four equally large images of the homicide victims. Three months after their deaths, Tsarnaev, the government stated, "had one more message to send" them: an obscene gesture. 16.A.7090. The government used this misleading "message" to frame both the final words of its opening statement and among the last of its final rebuttal argument.

Just before the penalty phase, the Court heard arguments on Tsarnaev's objection to proposed GX–1595, Add.562, a screenshot of him taken from a surveillance video in a courthouse jail cell, raising his middle finger. 25.A.11581–82; Add.358–67. The defense argued that taken out of context (the four uneventful hours that Tsarnaev spent in the holding cell), the screenshot created a "completely false image of what is happening," and was more prejudicial than probative under the FDPA. Add.359, 367. The four-hour video had been provided in discovery, but the government did not isolate this single freeze-frame until the week before trial. Id. at 366. After the District Court overruled the defense's evidentiary objection, Tsarnaev objected to the use of the enlargement in the opening statement, where its impact would be incurably felt before the defense could put it in context. Id. at 367. The District Court again overruled the objection: "I understand why you don't like it, but I think it's admissible." Id. During (and prior to) the colloquy on the use of the image in opening statements, the government did not warn the defense or the Court of its intention to present this screenshot alongside photographs of the victims.

The enlargement was a still image from courthouse surveillance video, Add.CD.DX4001, recorded by the United States Marshals Service on July 10, 2013, three months after the bombings. 16.A.7292–94. Tsarnaev sat alone in the courthouse cell block from 11:08 a.m. until 3:30 p.m., awaiting arraignment on the

charges in the indictment. 16.A.7293, 7298, 7303. During the first two minutes, Tsarnaev appeared to observe a surveillance camera with a reflective coating, id. at 7304, and use it as a mirror to arrange his hair, after which he walked around the cell. Add.CD.DX4000 at 11:08:34; 11:09:52 to 11:10:36.[142] About fifteen minutes later, after continuing to wander around arranging his hair, Tsarnaev climbed up on a bench in the cell. Add.CD.DX4001 at 11:23:11 to 11:23:16. Then, Tsarnaev made a quick "V" sign with his fingers,[143] id. at 11:23:17, raised his middle finger for a split second, id. at 11:23:18, and then stepped down from the bench. Id. at 11:23:18 to 11:23:38. Moments later, he spoke to someone at the cell's gate, where he apologized. Add.CD.DX4002 at 11:24:59; 18.A.8445–46. He then awaited his arraignment for the next four-and-a-half hours. 16.A.7312.

Throughout her penalty phase opening statement, as she urged the jurors to "know and understand why [the homicide victims'] lives mattered," 16.A.7076, the prosecutor displayed five easels. The two on each end displayed four-foot-by-three-foot photographs of the victims during happy moments; the center easel's same-sized board was draped over in suspense with a black cloth. Add.376–77.[144]

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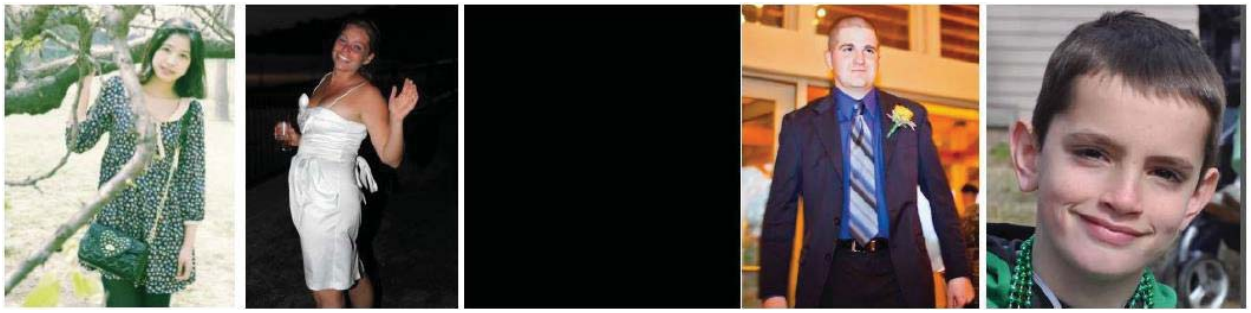
[142] The time stamps in Add.CD.DX4000–02 refer to the surveillance video system timers in the top right corner of each video.

[143] During its cross-examination of Deputy United States Marshal Kevin Roche, called as a defense witness, the prosecutor asked the witness, over objection, to opine that, as "purebred Irish,"—unlike Tsarnaev—the "V" sign and raising the middle finger "mean the same to me." 18.A.8449–50.

[144] See DE.1744 (Stipulation 11).



As she concluded her opening statement, the prosecutor unveiled the center image: an enormous version of the freeze-frame of Tsarnaev flashing the middle finger. 16.A.7090; Add.376–77. In the image, Tsarnaev is in a jail cell, wearing an orange prison-issue jumpsuit; the grainy quality of the enlargement increases the alien effect. Add.562. His hair is wild, and his face is up close to the camera, contorted into an apparent grimace, id., disfigured by having been shot by law enforcement during their pursuit. 16.A.7305. As she exposed the image, flanked by the child, police officer, and two young female victims, the prosecutor asserted that Tsarnaev "had one more message to send" them. 16.A.7090.

Tsarnaev objected after opening statements, immediately following the unanticipated array, to the "greatly enhanced" prejudice of the "still from the cell

block . . . by its juxtaposition between these very attractive and touching photographs of the victims in life." Add.376–77.

The presentation's effect was powerful. "[A] collective gasp was heard in the overflow courtroom as the photo of Tsarnaev giving the camera the middle finger was shown."[145] Defense counsel's own opening statement recognized that he had observed the same reaction from the jury itself: "I could almost hear you gasp when Miss Pellegrini put that still up on the easel." 17.A.7502. Indeed, in his coverage of the trial in the *Boston Globe* the same day headlined, "Flipping Off the Dead,"[146] reporter Kevin Cullen described the government's opening this way: "When they retire to that room in the courthouse, to decide whether Dzhokhar Tsarnaev lives or dies, jurors will have that photo of him, flipping the bird," — "flipping off the dead." The government's closing rebuttal argument for death returned to the notion that this fleeting moment revealed the very essence of Tsarnaev's soul. "If you want to know about the kind of person he became," the government warned the jury, "his actions . . . in this courthouse on the day of his

[145] See Catherine Parrotta (@CatherineNews), Twitter (Apr. 21, 2015, 8:05 a.m.), https://twitter.com/CatherineNews/status/590531837862268929?s=17 (Fox 25 Boston Reporter); see also Ann O'Neill, Prosecution Shows What it Calls Tsarnaev's Defiant Message to U.S., CNN (Apr. 21, 2015), https://www.cnn.com/2015/04/21/us/tsarnaev-boston-bombings-sentencing/index.html.

[146] Kevin Cullen, Flipping Off the Dead, Boston Globe (Apr. 22, 2015), https://www.bostonglobe.com/metro/2015/04/21/flipping-off-dead/CYbBADaZ0lGMleJJ7iIB1J/story.html.

arraignment, they are the best evidence you have about who the defendant became." 19.A.8804.

B. The inadmissible evidence and misleading argument skewed the jurors' evaluation of Tsarnaev's remorse and his ability to be safely imprisoned.

1. The FDPA and the Fifth and Eighth Amendments prohibit a verdict based on passion or prejudice.

"The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed." Simmons v. South Carolina, 512 U.S. 154, 172 (1994) (Souter, J., concurring). The trial judge has a duty to minimize the "risk of a verdict impermissibly based on passion, not deliberation." Payne, 501 U.S. at 836 (Souter, J., concurring). Evidence that inflames the religious biases of the jury implicates the Eighth Amendment, as well as the Fifth Amendment's Due Process Clause. See Zant v. Stephens, 462 U.S. 862, 885 (1983) (identifying religion among factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); Buck v. Davis, 137 S. Ct. 759, 775 (2017) (reaffirming Stephens). The FDPA requires reversal of any death sentence "imposed under the influence of passion, prejudice, or any other arbitrary factor." 18 U.S.C. § 3595(c)(2)(A).

This Court reviews preserved Rule 402 and Rule 403 objections to the admission of evidence for abuse of discretion. See United States v. Brandon, 17

F.3d 409, 444 (1st Cir. 1994) (Rule 402); United States v. West, 877 F.3d 434, 439 (1st Cir. 2017) (Rule 403).

Prosecutorial misconduct "warrants a new trial" when the government's errors "'so poisoned the well' that the trial's outcome was likely affected." Azubike, 504 F.3d at 39 (quoting United States v. Joyner, 191 F.3d 47, 54 (1st Cir. 1999)). This Court conducts a three-part test: "(1) whether the prosecutor's conduct was isolated and/or deliberate; (2) whether the trial court offered a strong and explicit curative instruction; and (3) whether, in light of the strength of the evidence against the defendant, it is likely that any resulting prejudice affected the verdict." United States v. Zarauskas, 814 F.3d 509, 516 (1st Cir. 2016) (citing United States v. Rodriguez, 675 F.3d 48, 62 (1st Cir. 2012)). Because Tsarnaev lodged contemporaneous objections to each instance of misconduct claimed here, review is *de novo*, Rodriguez, 675 F.3d at 61; improper conduct is reviewed for harmless error. Azubike, 504 F.3d at 38–39. Error in the guilt phase of a capital trial may be harmless with respect to guilt, but not harmless with respect to the jury's decision to impose death. Chanthadara, 230 F.3d at 1264–68; McCullah, 76 F.3d at 1102.

2. The government used inadmissible evidence and misleading audiovisual exhibits that invited a verdict tainted by anti-Muslim bias.

The government misled the jurors in two ways during the guilt phase, distorting their calculus at sentencing. The government first presented irrelevant and inflammatory information about the unrelated terrorist group ISIS, and then, during closing arguments, created and screened and unduly prejudicial slideshow. The District Court's rulings on both issues must be viewed in the context of the government's penalty phase trial strategy. Throughout, the prosecution cast Tsarnaev as an unchanged, unchangeable Muslim extremist who "believ[ed] in violent jihad:" that "Allah" was "guiding him" when he attacked the Boston Marathon to "awake the mujahidin." 19.A.8796; 15.A.6889. The government made this argument to a jury containing no Muslims, and only two jurors who were even "somewhat familiar" with Islam—the other ten being "not at all familiar." See Add.521, 549; 26.A.11699, 11727, 11755, 11783, 11811, 11839, 11867, 11895, 11923, 11951.

a. The District Court abused its discretion by admitting testimony concerning the Islamic State (ISIS)—a terrorist group with which the government knew Tsarnaev had no connection.

The protracted testimony the government elicited from Levitt about an unrelated terrorist organization was inadmissible. Full stop. Fundamentally, the testimony was irrelevant: the actions of a group that did not exist prior to

Tsarnaev's crime could not have made any fact of consequence in his case more likely. The government never contended that Tsarnaev had a connection to ISIS or was even aware of it in April 2013. And the testimony was unduly prejudicial: although unknown at the time of his crimes, by the time of trial, for reasons having absolutely no connection to Tsarnaev, ISIS had become infamous and reviled for its grotesque and well-publicized acts of violence.

i. The ISIS testimony was irrelevant.

First, the ISIS testimony was irrelevant to any fact of consequence. See Fed. R. Evid. 401. It did not explain, as the government proffered the expert's testimony would, the "jihadi materials" found on Tsarnaev's computer, including "who authored them, what they are about, what they mean, and how and why they have the power to radicalize." 25.A.11529. After all, none of the materials on Tsarnaev's computer concerned ISIS,[147] an organization that formed just six days before the bombings.[148] Levitt's testimony concerning ISIS therefore exceeded the

[147] See 25.A.11671 (listing April 7, 2013 as the last "created in local time" date for files the government extracted from Tsarnaev's laptop and admitted into evidence); 13.A.5806–07 (testimony of government computer specialist explaining that the "created in local time" date is generally the "date or time that the file appeared on the computer or device where the file is located").

[148] See Charles Lister, Brookings Inst., Profiling the Islamic State 13 (2014) ("On April 9, 2013, Baghdadi confirmed . . . that Jabhat al-Nusra was an offshoot of [the Islamic State in Iraq] and that henceforth, it would be subsumed into the expanded Islamic State in Iraq and al-Sham (ISIS).")

government's proffer. Instead, it suggested to the jury that years after his crimes, Tsarnaev had adopted ISIS's beliefs and therefore would strike again. See United States v. Al-Moayad, 545 F.3d 139, 162–63 (2d Cir. 2008) (reversing conviction where government presented "no evidence linking" defendant to witness's "highly inflammatory and irrelevant" testimony about Al Qaeda training camp).

Nor was this evidence admissible as "background," as the District Court ruled. 13.A.5894. See United States v. Benitez-Avila, 570 F.3d 364, 369 (1st Cir. 2009) (a court may not "justify the receipt of prejudicial, inadmissible evidence just by calling it 'background' or 'context' evidence'"). Background comes before an event, not after. ISIS did not meaningfully exist at the time of the bombings, so testimony about it could not have provided any "background" or "stitch[ed] together an appropriate context in which the jury could assess the evidence introduced during the trial." United States v. McKeeve, 131 F.3d 1, 13 (1st Cir. 1997). The only "context" here was created by the prosecution's inappropriate and unconstitutional efforts to heighten the jurors' fear of a Muslim defendant by erroneously and intentionally linking him to a dangerous organization that had recently committed notorious acts of terrorism.

ii. The ISIS testimony was unduly prejudicial.

Even assuming some minimal probative value of Levitt's ISIS testimony, it was substantially outweighed by the danger of unfair prejudice Tsarnaev suffered

from being falsely associated with ISIS and the acts of terrorism Levitt told the jury the group had committed just weeks before his testimony. See 13.A.5894; Fed. R. Evid. 403. Levitt alluded to incendiary news reports and relied on jurors' lay knowledge to guess at Tsarnaev's relationship to these acts, conjuring an image of Tsarnaev as the partisan of a violent terrorist organization that did not exist when those materials were placed on Tsarnaev's computer.

On April 15, 2013, when the bombings occurred, ISIS's recent formation (on April 9, 2013) was virtually unknown to lay American observers. By the date Levitt testified (March 23, 2015), on the other hand, ISIS's reputation for brutality and its hostility toward the United States were both well established and notorious. The prosecutor could be confident in his assertion before the jury (itself improper) that "we've all heard of . . . ISIS." 13.A.5894. At the time of Levitt's testimony, ISIS atrocities dominated the news. To illustrate, a search for U.S. news reports mentioning the word 'ISIS' in the four weeks preceding the bombings yields one relevant hit—an article announcing the group's founding.[149] By contrast, 4,369 hits emerge from a search for U.S. news reports in the four weeks preceding

[149] This is based on a search of Lexis's U.S. News database with a date range of 03/18/13 to 4/15/13. The query 'ISIS' yields only one responsive hit. See Michael B. Kelley, Al-Qaeda In Iraq Announces Merger With Notorious Syrian Rebel Group, Business Insider (Apr. 9, 2013), https://www.businessinsider.com/al-qaeda-in-iraq-and-al-nusra-in-syria-2013-4.

Levitt's testimony that contain the words 'ISIS,' 'Islamic,' and 'Syria.'[150] There was widespread coverage in the days and weeks preceding Levitt's testimony about its beheading practices, how ISIS inspired the Charlie Hebdo massacre,[151] ISIS's use of systematic rape as a genocidal strategy,[152] and ISIS's publication of a "kill list" of American soldiers for its sympathizers in the United States to pursue.[153]

This Court ordinarily "defer[s] to the district court's balancing under Rule 403 of probative value against unfair prejudice." United States v. Smith, 292 F.3d 90, 99 (1st Cir. 2002). Here, however, the District Court made no discernible effort at balancing. Failing to rule for three months on the defense motion to limit Levitt's testimony, the District Court then allowed the ISIS testimony without

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[150] This is based on a search of Lexis's U.S. News database using the query 'ISIS and Islamic and Syria', and a date range of 2/23/15 to 3/23/15. The wider query 'ISIS and (Islamic or Syria)' yields 9,133 hits. A narrower search—'ISIS and Beheading!'—yields 1,337 hits.

[151] See, e.g., Wolf Blitzer et al., Four New Arrests in Paris Terror Attacks, CNN (March 9, 2015) (reporting that Charlie Hebdo attacker, who shot a kosher grocery store, "self-identified with ISIS"), https://www.cnn.com/videos/world/2015/03/09/wolf-bitterman-woman-four-arrested-in-paris-attack.cnn

[152] See, e.g., James Carroll, By Making War, US Unleashed Mass Rape, Boston Globe (March 16, 2015), https://www.bostonglobe.com/opinion/2015/03/15/making-war-unleashed-mass-rape/t2E3srSjgGdCvKmlj50caI/story.html

[153] See, e.g., Carol Costello et al., FBI Investigates Hit List Against U.S. Troops, CNN (March 23, 2015), https://www.cnn.com/videos/tv/2015/03/23/tsr-brown-isis-hit-list.cnn; Michael S. Schmidt & Helene Cooper, Naming U.S. Service Members, ISIS Asks They Be Killed, N.Y. Times (March 21, 2015), https://www.nytimes.com/2015/03/22/world/middleeast/isis-urges-sympathizers-to-kill-us-service-members-it-identifies-on-website.html.

making any "findings on prejudice and probativeness." Mehanna, 735 F.3d at 62; see also United States v. Frabizio, 459 F.3d 80, 90–91 (1st Cir. 2006) (reversing where district court "did not even comment directly on the probative value" of the evidence under Rule 403); Al-Moayad, 545 F.3d at 162 (reversing where district court "failed to make the required 'conscientious assessment' of the testimony's prejudicial effect in comparison with its probative value," leaving "no adequate basis for deferring to the district court's judgment"). This cursory decision to admit irrelevant and inflammatory evidence merits no deference.

Numerous courts have found an abuse of discretion in the admission of "guilt by association" evidence that affiliates a defendant with others who commit even nonviolent crimes. E.g., United States v. St. Michael's Credit Union, 880 F.2d 579, 601–02 (1st Cir. 1989) (finding admission of defendant's father's gambling activities an abuse of discretion). Linking a defendant to violent gangs is even more damaging. This is so even when the defendant, unlike here, is a member of such a group, if that membership played no role in the commission of the crime. Dawson v. Delaware, 503 U.S. 159 (1992) (vacating death sentence where trial court admitted evidence that defendant was a member of the racist Aryan Brotherhood prison gang that "had no relevance to the sentencing proceeding"); see also United States v. Irvin, 87 F.3d 860, 865 (7th Cir. 1996) (holding that the admission of testimony concerning a defendant's gang

membership was improper under Rule 403 where it was of little probative value); Kennedy v. Lockyer, 379 F.3d 1041, 1056 (9th Cir. 2004) ("[T]he use of gang membership evidence to imply 'guilt by association' is impermissible and prejudicial.") Linking a defendant to ISIS is far worse.

By allowing the government to associate Tsarnaev with ISIS, the District Court risked "the particular perils associated with prosecutions centered on ideology." Mehanna, 735 F.3d at 60. The testimony "saddle[d]" Tsarnaev "indiscriminately with the criminal and cultural baggage of internationally notorious terrorists," the precise peril this Court warned about in Mehanna. Id. The testimony served no conceivable purpose other than to frighten jurors into believing that Tsarnaev was, and continued to be, an ideological menace, "untouched by the havoc and the sorrow that he has created." 16.A.7086.

b. The government committed prosecutorial misconduct by unfairly juxtaposing evidence in a PowerPoint presentation.

The government likewise invited a verdict tainted by passion and prejudice when the prosecutor screened an unfairly crafted PowerPoint presentation. Add.250–51; Add.CD.ExcerptPP. By overlaying images of the victims of the bombings with the audio of an unrelated Arabic nasheed that sounded distinctly non-Western, the prosecutor misleadingly "juxtaposed the evidence"—to borrow his own term. Add.252–53. Layered on top of images of death and destruction, the impact of this foreign-sounding soundtrack is emotional and frightening. By

using the chant to score its gruesome closing slideshow, the government exploited the nasheed's Islamic connotations to stoke religious bias.

As this Court has noted, it is "well established that it is improper to needlessly arouse the emotions of the jury." United States v. Ayala-Garcia, 574 F.3d 5, 16 (1st Cir. 2009) (internal quotation marks omitted); see also United States v. Runyon, 707 F.3d 475, 494 (4th Cir. 2013) ("The Supreme Court has long made clear that statements that are capable of inflaming jurors' racial or ethnic prejudices 'degrade the administration of justice'" (quoting Battle v. United States, 209 U.S. 36, 39 (1908))). For that reason, "misconduct occurs when a prosecutor 'interject[s] issues having no bearing on the defendant's guilt or innocence and improperly appeal[s] to the jury to act in ways other than as dispassionate arbiters of the facts.'" Ayala-Garcia, 574 F.3d at 16 (quoting United States v. Mooney, 315 F.3d 54, 59 (1st Cir. 2002)); see also United States v. Peake, 804 F.3d 81, 94 (1st Cir. 2015); United States v. De La Paz-Rentas, 613 F.3d 18, 26 (1st Cir. 2010); United States v. Felton, 417 F.3d 97, 102 (1st Cir. 2005) (criticizing tactic of isolating and repeating lurid passages "obviously remote" from issues before the jury).

To be sure, where religious beliefs are relevant to a particular sentencing determination, the government may introduce proper evidence and argument on the subject. See Dawson, 503 U.S. at 164. Here, the problem is not that the

government introduced evidence of Tsarnaev's religious beliefs. The misconduct occurred when the government juxtaposed an Arabic-language chant onto photographs of the victims of the bombings to present a grossly misleading picture in its jury argument. Such collages of sound and image are particularly dangerous devices for misconduct because they "manipulate audiences by harnessing rapid unconscious or emotional reasoning processes and exploiting the fact that we do not generally question the rapid conclusions we reach" as viewers. In re Glasmann, 175 Wash. 2d 696, 286 P.3d 673, 708 (2012) (internal citations omitted); see Felton, 417 F.3d at 102. "The alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system." Id. (internal quotation marks omitted). Numerous state appellate courts have thus reversed convictions when, in summations, prosecutors used slideshow presentations that altered or unfairly juxtaposed evidence to inflame the jury. See State v. Walter, 479 S.W.3d 118, 124–27 (Mo. 2016); State v. Walker, 182 Wash. 2d 463, 341 P.3d 976, 979 (2015) (en banc); Watters v. State, 129 Nev. 886, 313 P.3d 243, 247 (2013); State v. Kemble, 291 Kan. 109, 238 P.3d 251, 262 (2010); Glasmann, 286 P.3d at 682; State v. Reineke, 266 Or. App. 299, 337 P.3d 941, 947–48 (2014); State v. Rivera, 437 N.J. Super. 434, 99 A.3d 847, 854–58 (2014); Brown v. State, 18 So. 3d 1149, 1150–51 (Fla. Dist. Ct. App. 2009).

By juxtaposing frightening images of the victims with an Arabic chant that the government never played during trial—much less established as having independent significance to Tsarnaev—the government created "the equivalent of unadmitted evidence" designed not to inform the jury, but to inflame it. Glasmann, 286 P.3d at 678. "Closing argument . . . does not give a prosecutor the right to present altered versions of admitted evidence to support the State's theory of the case." Walker, 341 P.3d at 985; see also Walter, 479 S.W.3d at 125 (same). With this presentation, the prosecutor sought to stir in the jurors' minds associations that exceeded the proof of motive adduced at trial.

The slideshow had no constitutionally permissible relevance to whether Tsarnaev merited a death sentence. See Buck, 137 S. Ct. at 775. Indeed, the only purpose for its use in the prosecutor's summation is because, to non-Muslims, the chant sounds eerie, foreign, and frightening. Certainly, much of the evidence in this trial was "emotionally charged," Mehanna, 735 F.3d at 64, and "'[t]he prosecutor has considerable latitude in summation to argue the evidence and any reasonable inferences that can be drawn from that evidence.'" United States v. Vanvliet, 542 F.3d 259, 271 (1st Cir. 2008) (quoting United States v. Werme, 939 F.2d 108, 117 (3d Cir. 1991)). But the prosecutor wrongly exploited that latitude when he showed eight gruesome and inflammatory images a second time, with an Islamic soundtrack unconnected to the events of April 15.

The government's arguments for the slideshow's legitimacy are unavailing. Based solely on Tsarnaev's possession of this audio file on electronic devices, the prosecutor argued that "simply juxtapos[ing]" it over the images allowed the jury to "get the perspective" of the defendant's "radicalized" "state of mind." Add.252–53. The government did not select the chant, as it contended—to the Court in responding to Tsarnaev's motion for a mistrial—because its title, "Ghuruba," (a word meaning "stranger," repeated nine times during the slideshow) reflected "a theme . . . heard throughout the entire case." Id. at 253. Though the government had presented some evidence during the trial regarding the term, the prosecutor did not so much as inform the jury during the closing that this song, which the jurors had never heard before, had been found on Tsarnaev's devices, and admitted into evidence. And during its case, the government did not highlight this nasheed in any way. Instead, the jury was left to speculate as to the chant's meaning and cultural significance, as it played over images of Tsarnaev making an Islamic prayer sign and the murdered and maimed victims.

The prosecutor's carefully orchestrated audiovisual presentation was "deliberate." Zarauskas, 814 F.3d at 516. "[W]e are not presented with a spur-of-the-moment comment delivered extemporaneously under the stress of countering a defense argument. The statement was included in the [government's] PowerPoint presentation to the jury." Kemble, 238 P.3d at 262. Nor was the misconduct

"isolated." Zarauskas, 814 F.3d at 516. The prosecutor prefaced the slideshow by speculating—based on no evidence in the record—that Tsarnaev "spent most his other life, the jihadi side, in the privacy of his bedroom, sometimes with his brother, sometimes with his headphones on." 15.A.6923. In his bedroom, the prosecutor imagined, Tsarnaev would "put his headphones on and lose himself in . . . the music of jihad." Id. The government had presented no evidence of Tsarnaev putting on headphones in his bedroom, alone or with his brother, to listen to, or "lose himself" in, "the music of jihad." In themselves, such misstatements "constitute prosecutorial misconduct." Azubike, 504 F.3d at 38. As a prologue to the juxtaposed slideshow, they show "a concerted effort to incite the jury." United States v. Kinsella, 622 F.3d 75, 85 (1st Cir. 2010).

Finally, because the District Court erroneously and summarily overruled Tsarnaev's objection the slideshow as "not improper," Add.254, it failed to give any limiting instruction, let alone the "strong and explicit cautionary instruction" that has spared reversal in previous cases. Azubike, 504 F.3d at 39; see, e.g., Runyon, 707 F.3d at 496. This gave the jury time for "sores to fester" when they were called upon to determine whether Tsarnaev should live or die. Sepulveda, 15 F.3d at 1185. In fact, the District Court expressly instructed the jury to "consider . . . evidence that was presented during the guilt phase" in deciding whether to

impose the death penalty, ensuring that the prejudicial slideshow would not be forgotten. Add.257, 271.

3. The government committed prosecutorial misconduct by juxtaposing an image of Tsarnaev raising his middle finger in a jail cell with images of the homicide victims, and arguing that this was his "message" to them.

The government's audiovisual presentation was not the only juxtaposition of evidence employed in urging jurors to find that Tsarnaev "remains the unrepentant killer that he is." 16.A.7090. At sentencing, the government inappropriately exploited the jurors' passions when it blatantly mischaracterized a split-second image of Tsarnaev in a courthouse jail cell, taken three months after the crimes, calling it his obscene "message" to the homicide victims. Tsarnaev's juvenile hand signals may reasonably be interpreted as a motion towards whoever might have been monitoring the surveillance camera—to whom he immediately apologized. There was no evidence that his middle finger gesture had *anything* to do with the victims. He was alone in the jail cell. Without any explicit, implicit, or even circumstantial evidence that Tsarnaev's momentary gesture reflected his feelings towards the decedents or a lack of remorse about their deaths, the prosecutor surrounded the grotesque image with attractive, sympathetic images of the victims and argued that as he awaited arraignment, Tsarnaev callously sent "one more message" to them.

This was purposeful misconduct. Just as combining an unrelated nasheed with gruesome photographs of the Boston Marathon devastation misled the jury, so did the unfounded connection of Tsarnaev's cell block image to the victims' portraits. This is so even though each individual part of the photo display was subsequently admitted. It is "egregious prosecutorial misconduct" for the government to "plainly juxtapose[] photographs of the victim with photographs of [defendant] and his family." Walker, 341 P.3d at 985; see United States v. Lewis, 40 F.3d 1325 (1st Cir. 1994) (acknowledging that array showing defendants' booking photographs next to cocaine and guns "was unfairly prejudicial because it suggested an as-yet unproven connection between them and the contraband"). Here, the government's demonstrative exhibit was not impulsive or spontaneous, but was purposefully staged—after defense objection and long colloquy with the Court on whether the poster could be used at all. Add.358–67.

By twisting the jail cell surveillance camera image into "one more message to send" his sympathetic and particularly vulnerable victims—whom the defendant had already conceded he had killed—the prosecutor left an indelible and unfounded mark. "With visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so." Glasmann, 286 P.3d at 709 (citation omitted). Studies have shown that juries "are often unable to recall whether the source of

information came from a witness, or from one of the attorneys during the opening statement or closing argument." United States v. Moreno, 991 F.2d 943, 951 (1st Cir. 1993) (Torruella, J., dissenting) (citing Saul Kassin and Lawrence Wrightsman, The American Jury On Trial: Psychological Perspectives 106 (1988)). As a result, though the defense made efforts to place the screenshot in its proper context by playing the video from which it was cut during its witness examinations (thwarted, at times, by continuous objections), the damage was done the moment the prosecutor dramatically removed the black cloth. 16.A.7300–14; 18.A.8445–47; cf. n.85, ante.

C. The presentation of inadmissible evidence and misleading argument likely were not harmless with respect to the death sentence, because they impacted critical jury findings.

The FDPA "incorporates the same standard for harmless error review as that used to evaluate direct appeals of Constitutional errors." Barnette, 211 F.3d at 824 (citing Chapman, 386 U.S. at 23–24). Accordingly, the FDPA requires this Court to vacate the sentence unless "the Government establishes beyond a reasonable doubt that the error was harmless." 18 U.S.C. § 3595(c)(2)(C). The reasonable doubt standard applies to the evaluation of the spillover harm of a guilt phase evidentiary error in the sentencing proceeding. See Chanthadara, 230 F.3d at 1265.

These errors impacted two critical inquiries jurors would be making in connection with whether Tsarnaev would live or die. First, the errors impacted the jury's assessment of whether Tsarnaev felt remorse at the time of trial. As discussed above, see ante § VIII.C.3, whether or not a defendant is remorseful carries significant weight in a capital jury's sentencing decision, and is often determinative. Here, the government described Tsarnaev as an "unrepentant killer," who "was *and is* unrepentant." 16.A.7090, 7086 (emphasis added). In its penalty phase rebuttal, the government connected Tsarnaev's alleged lack of remorse to his "core terrorist belief[s]." 19.A.8801. The ISIS evidence tied Tsarnaev, baselessly, to ISIS's current practice of terror. That mantra was only underscored by the slideshow overlaid with the nasheed, which the government purported to represent Tsarnaev's innermost thoughts, while suggesting that his terrifying ideology precluded remorse. And the government rebutted the defense's evidence of remorse by unfairly juxtaposing the jail cell image of Tsarnaev with images of the victims.

As with its exploitation of the Whole Foods video, see ante Point VIII, the government's strategy worked. The jury unanimously found that Tsarnaev lacked remorse, and only two jurors found that he had expressed remorse. Add.88 (Non-Statutory Aggravating Factor #4); Add.92 (Mitigating Factor #21). It is impossible to disaggregate whether each individual juror's critical finding on lack of remorse

was based on admissible evidence and permissible argument, or on the misstatements and misleading inferences constituting prosecutorial misconduct. See United States v. Davis, 912 F. Supp. 938, 946 (E.D. La. 1996) ("Lack of remorse is a subjective state of mind, difficult to gauge objectively since behavior and words don't necessarily correlate with internal feelings.")

The District Court's errors contaminated the jury's consideration of a second critical factor, Tsarnaev's future dangerousness. Empirical studies have likewise shown that such assessments heavily weigh on the minds of actual capital jurors.[154] But as the Supreme Court recently acknowledged, assessments of future danger "inevitably entail a degree of speculation," and are thus susceptible to the influence of improperly admitted evidence. Buck, 137 S. Ct. at 776.

Here, there was no dispute that absent a death sentence, Tsarnaev would serve a life-without-release sentence in a maximum-security federal prison. But Levitt's testimony burdened Tsarnaev, wrongly, with the continuing ruthless activities of ISIS, and the slideshow similarly suggested that he had so "los[t] himself" in the "music of jihad" that he would act again. Both instances of

[154] See, e.g., John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, Future Dangerousness in Capital Cases: Always "At Issue," 86 Cornell L. Rev. 397, 398 (2001); Scott E. Sundby, War and Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J. 103, 117 (2010) (capital jurors "consistently expressed the view—even those who were strongly moved by the defendant's case for life—that they would vote for a death sentence if they were not assured that the defendant would be safely locked away").

misconduct may thus have led jurors to doubt that Tsarnaev could be safely confined: only one juror found him "highly unlikely" to reoffend. Add.92 (Mitigating Factor #19). This is particularly salient given that the government expressly disavowed future danger as an aggravating factor, while strenuously contesting the defense effort to prove in mitigation that he could be safely imprisoned if given a life sentence. See 1.A.435–36; Add.92.

The District Court's errors carried a specifically dangerous risk in this capital case, where the government pursued a trial strategy foregrounding Tsarnaev's Muslim beliefs. In urging jurors to impose death, the government focused on the religious components of the case, arguing that Tsarnaev "believed [Allah] was guiding him" when he committed his crimes. 19.A.8796. By foregrounding religion, the government assumed the risk that religious prejudice might infect the capital sentencing procedure. And while this would be true for any person in a religious minority charged with a violent crime, it is especially true here, where the case involves Muslims in the United States, who—particularly post-September 11, 2001—are a disfavored minority group, lacking in political power and causing anxiety to Americans who lack exposure to them. By placing Tsarnaev's religious beliefs front and center, the government exacerbated the risk—already significant in this high-profile case—that improper considerations would sway the jury. See Turner, 476 U.S. at 35 ("Because of the range of

discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.").

The government's choices during the guilt phase laid the foundation for its case in the penalty phase that these religiously motivated crimes warranted death. At the penalty phase, the government continued to emphasize Tsarnaev's religious motivations, referring back to both Levitt's testimony and the nasheed, ensuring that time would not heal the damage caused by its misconduct during the guilt phase. See 16.A.7083 (penalty phase opening statement); 19.A.8795 (penalty phase rebuttal); see also Caldwell, 472 U.S. at 340 (recognizing that improper prosecutorial comments in closing arguments, "if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment"); United States v. Santos-Rivera, 726 F.3d 17, 27 (1st Cir. 2013) (identifying prosecutorial misconduct in closing arguments as among the "broad swath of improper conduct . . . that may impair an accused's constitutional rights to a fair trial"); United States v. Rodriguez-Cortes, 949 F.2d 532, 541–43 (1st Cir. 1991) (holding that the erroneous admission of evidence was not harmless where the government referenced it in its closing argument).

The government's use of inflammatory and misleading evidence and audiovisual presentations irreparably tainted the death sentence, individually and cumulatively. The government will be unable to prove the District Court's errors

harmless beyond a reasonable doubt. Azubike, 504 F.3d at 39; Chanthadara, 230 F.3d at 1267. Tsarnaev's death sentences must be set aside.

X.

The District Court Violated The Fifth And Sixth Amendments By Refusing To Instruct Jurors That, To Recommend A Sentence Of Death, They Must Find Beyond A Reasonable Doubt That The Aggravating Factors Outweighed The Mitigating Factors.

The question whether aggravators outweigh mitigators is a factual determination that increases the maximum possible punishment from life to death. See 18 U.S.C. § 3593(e). The District Court's refusal to charge the jurors that they had to make this determination "beyond a reasonable doubt" violated the Due Process Clause and the Sixth Amendment, requiring reversal of the death sentences. This Court's contrary holding in Sampson I, 486 F.3d at 29, has been abrogated by Hurst, 136 S. Ct. 616.

A. Factual and procedural background.

Consistent with Judge Sand's pattern instruction, the defense asked the District Court to instruct the jury that it must apply the beyond-a-reasonable-doubt standard to its determination of whether the aggravating factors sufficiently outweighed the mitigating factors to justify a death sentence. 25.A.11600, 11603; see also 25.A.11606–07 (defense proposed verdict form).[155] Without hearing

[155] 19.A.8820–21. See 1 Leonard B. Sand et al., Modern Federal Jury Instructions—Criminal, Inst. 9A–19 (2011) ("This weighing process asks whether you are unanimously persuaded, beyond a reasonable doubt, that the aggravating factors sufficiently outweigh any mitigating factors or, in the absence of any mitigating factors that the aggravating factors are themselves sufficient to call for a sentence of death on the particular capital count you are considering.").

argument, the District Court denied the defense's request, stating that its ruling was "consistent with Circuit law," 19.A.8821, and instructed the jury that:

> You must decide, in regard to that particular capital offense, whether the aggravating factors that have been found to exist sufficiently outweigh the mitigating factors found to exist for that offense so as to justify imposing a sentence of death on the defendant for that offense; or, if you do not find any mitigating factors, whether the aggravating factors alone are sufficient to justify imposing a sentence of death on the defendant for that offense.

19.A.8661–62; id., at 8695, 8697–99.

The defense timely objected to this instruction. 19.A.8821. This preserved question of law is reviewed *de novo*. Sampson I, 486 F.3d at 29.

B. The lack of a beyond a reasonable doubt instruction violated the Fifth and Sixth Amendments and was structural error.

Under the FDPA, jurors may not recommend a death sentence unless they find that the aggravating factors proved by the Government "sufficiently outweigh all the mitigating factors . . . found to exist" so as "to justify a sentence of death." 18 U.S.C. § 3593(e). Absent such a finding, a sentence of death cannot be imposed. Id. Six years after the FDPA was enacted, the Supreme Court recognized that, under the Due Process Clause and the Sixth Amendment right to jury trial, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt*." Apprendi, 530 U.S. at 490 (emphasis added). This rule applies to a

finding that is a prerequisite to imposing a death sentence. Ring, 536 U.S. at 589 ("Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Blakely v. Washington subsequently extended the reasoning of Apprendi further, holding that the Sixth Amendment applies to any fact that is legally essential to the punishment. 542 U.S. 296 (2004); see also Alleyne v. United States, 570 U.S. 99, 108 (2013) ("Facts that increase the mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt."); Ring, 536 U.S. at 610 (Scalia, J., concurring) ("[A]ll facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."). Most recently, in Hurst, decided shortly after Tsarnaev's penalty phase concluded, the Supreme Court confirmed that whether aggravators outweigh mitigators is one such "fact." 136 S. Ct. at 622.

Following Apprendi and Ring, and even before Hurst, many district courts instructed federal capital juries that the reasonable-doubt standard applies to the weighing decision in federal capital sentencing.[156] A number of Courts of Appeals

[156] See, e.g., Final Sentencing Instructions at 7, 33, United States v. Azibo Aquart, No. 3:06–cr–00160–JBA (D. Conn. June 13, 2011), ECF No. 930; Trial Transcript of 4/26/10 at 165, United States v. Phillips, No. 07–549 (E.D. Pa. April 26, 2010),

have disagreed, including this Court.[157] In Sampson I, 486 F.3d at 31–33, this Court rejected the applicability of the beyond-a-reasonable-doubt standard to the weighing determination on both statutory-construction and constitutional grounds. Because the FDPA does not mention the reasonable-doubt standard in the context of weighing aggravating and mitigating factors, but does reference that standard in two proximate sections, this Court found that Congress did not intend the reasonable-doubt standard to apply to the weighing process. Id. at 32. Regarding the Sixth Amendment claim, this Court held that the Apprendi line of cases is inapplicable because the weighing of aggravating and mitigating factors "constitutes a process, not a fact to be found." Id.

Two years ago, in Hurst, the Supreme Court clarified that, contrary to Sampson I, the Sixth Amendment does apply to the weighing stage of a death-penalty determination: the finding whether the aggravators outweigh the mitigators is a "fact" for Apprendi purposes. Hurst, 136 S. Ct. 616. Hurst addressed

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ECF No. 696; Final Sentencing Instructions at 3–4, United States v. Caraballo, No. 01–CR–1367 (E.D.N.Y. March 13, 2008), ECF No. 523; Trial Transcript of 6/27/2007 at 70–71, United States v. Henderson, No. 2:06–CR–00039 (S.D. Oh. June 27, 2007), ECF No. 160–16; Final Sentencing Instructions at 26, United States v. Mohamed, No. S6 98–CR–1023 (S.D.N.Y. May 22, 2001), ECF No. 544; Final Sentencing Instructions at 21, United States v. Garrett, No. 4:99–CR–00133–WTM–ALL (S.D. Ga. August 29, 2000), ECF No. 570.

[157] See Mitchell, 502 F.3d at 993; United States v. Barrett, 496 F.3d 1079, 1107 (10th Cir. 2007); Sampson I, 486 F.3d at 32; United States v. Fields, 483 F.3d 313, 346 (5th Cir. 2007); Purkey, 428 F.3d at 750.

Florida's hybrid capital sentencing scheme, which vested the trial judge, and not the jury, with the ultimate authority to decide whether death was the appropriate sentence. Id. at 620. Under Florida law, in order to impose a death sentence, the trial court was required to find "[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Id. at 622 (citing Fla. Stat. § 921.141(3)). The Supreme Court made clear that *both* those findings were covered by the Sixth Amendment:

> Florida does not require the jury to make *the critical findings necessary to impose the death penalty*. Rather, Florida requires a judge to find *these facts* . . . . State v. Steele, 921 So. 2d 538, 546 (Fla. 2005) ("The trial court alone must make detailed findings about the existence *and weight* of aggravating circumstances . . .").
>
> As [in Ring], the maximum punishment . . . Hurst could have received without any judge-made findings was life in prison without parole . . . . [A] judge increased Hurst's authorized punishment based on her own factfinding.

Id. at 622 (emphasis added).

Critically, the Court further explained:

> Florida concedes that Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty . . . . [Yet t]he State fails to appreciate the central and singular role the judge plays under Florida law . . . . [T]he Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." Fla. Stat. § 775.082(1). The trial court *alone* must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating

> circumstances to outweigh the aggravating circumstances." § 921.141(3); see Steele, 921 So. 2d at 546 . . . .

Id.

Recognizing these two required findings as "*findings of fact*," id., the Supreme Court struck down Florida's capital sentencing law as unconstitutional under the Sixth Amendment and Ring. Id. at 622–24. Hurst thus abrogated Sampson I by rejecting the distinction Sampson I drew between the weighing process required by the FDPA and a finding of fact.[158] Id. at 624. Hurst applied a functional test and treated the trial judge's weighing determination, like the antecedent determination that an aggravator exists, as covered by Ring and Apprendi, because a defendant cannot be sentenced to death without both findings. Id. Hurst's focus on the function of the jury determination—does it increase the maximum allowable punishment?—rather than the nature of that determination, is practical. Criminal law is replete with jurors making subjective judgments (e.g., "unreasonable," "unjustifiable," "substantial," or "adequate"). Yet the Sixth Amendment does not permit such elements to be withdrawn from the jury or found on less than proof beyond a reasonable doubt.

[158] A "'controlling intervening event'" such as a "'Supreme Court opinion on the point'" can dislodge otherwise binding circuit precedent. Gonzalez-Mesias v. Mukasey, 529 F.3d 62, 65 (1st Cir. 2008) (quoting United States v. Chhien, 266 F.3d 1, 11 (1st Cir. 2001)).

In this regard, the distinction Sampson I had drawn between pure factual findings and other legal determinations also failed to take account of United States v. Gaudin, 515 U.S. 506, 514 (1995). In Gaudin, the Supreme Court made clear that the requirement of a jury determination under the reasonable-doubt standard applies not just to "historical," "evidentiary," and "basic" facts, but also more broadly to anything other than pure questions of law, including how to apply a subjective legal standard to a given set of facts and "draw the ultimate conclusion." Id. at 512–15 (rejecting government's argument that "materiality" of defendant's false statements could be decided by a judge instead of a jury).[159]

It is immaterial that Hurst addressed the constitutional requirement that a jury, not a judge, make the weighing determination, and not, explicitly, the reasonable-doubt standard. If a jury must find a fact, it must do so beyond a reasonable doubt. "It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." Sullivan v. Louisiana, 508 U.S. 275, 278 (1993); see also Alleyne, 570 U.S. at 108 ("Facts that increase the

[159] The Supreme Court has repeatedly cited its due process ruling in Gaudin in discussing the scope of the Sixth Amendment requirement of jury findings beyond a reasonable doubt. See United States v. Booker, 543 U.S. 220, 230 (2005); Ring, 536 U.S. at 602; Apprendi, 530 U.S. at 477.

mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt.").

Under the FDPA, a defendant cannot be sentenced to death until a jury finds that the aggravators sufficiently outweigh the mitigators. Under Apprendi and Ring, as clarified by Hurst, this weighing is a "factual" finding. The Fifth and Sixth Amendments require that such a finding be made beyond a reasonable doubt. Hurst makes clear it was constitutional error for Tsarnaev's jury to not have been so instructed.[160]

Failure to provide a correct instruction on the reasonable doubt-standard is structural error. Sullivan, 508 U.S. at 281–82. It is not subject to harmless error analysis, because an omission or misdescription of the burden of proof "vitiates *all* the jury's findings." Id. at 281 (emphasis in original). "A reviewing court can

[160] See also Order on Motion to Reconsider at 10, United States v. Fell, No. 01–CR–0012–GWC (D. Vt. May 1, 2017) (ruling that after Hurst, it is clear that the constitutional requirements of Ring and Apprendi apply with equal force to the selection and weighing phases of the FDPA) (ECF No. 1303); Smith v. Pineda, No. 1:12–CV–196, 2017 WL 631410, at *3 (S.D. Ohio Feb. 16, 2017) ("This Court believes the correct reading of Hurst is that the relative weight of aggravating circumstances and mitigating factors is a question of fact akin to an element under the Apprendi line of cases, that is, a fact necessary to be found before a particular punishment can be imposed."); but see United States v. Con-ui, No. 3:13–CR–123, 2017 WL 1393485 (M.D. Pa. Apr. 18, 2017) (holding that Hurst does not apply to the weighing phase of the FDPA because a defendant is already rendered eligible for a death sentence by the finding of an aggravating circumstance).

only engage in pure speculation—its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'" Id. (quoting Rose v. Clark, 478 U.S. 570, 578 (1986)).

Because Tsarnaev was sentenced to die without the jury being told of the constitutionally required burden of proof at the ultimate weighing stage of the penalty determination, his death sentences must be reversed.

XI.

The District Court Violated The FDPA And The Eighth Amendment By Refusing To Accurately Instruct Jurors That If They Were Not Unanimous As To The Appropriateness Of A Death Sentence, Tsarnaev Would Receive A Life Sentence Without Any Possibility of Release.

"[A]ccurate sentencing information is an indispensable prerequisite to a [jury's] determination of whether a defendant shall live or die." Gregg, 428 U.S. at 190 (joint opinion of Stewart, Powell, and Stevens, JJ.). That indispensable prerequisite was not satisfied in this case. The District Court refused to tell the jury the truth: deadlock as to the ultimate penalty would not result in a costly and painful retrial. It would result in a mandatory life sentence. Instead, the Court's instructions gave the misleading impression that if the jurors could not agree on life or death, a new penalty phase would ensue. Leaving the jurors with this misimpression created an intolerable risk of coercion towards a death verdict, in violation of the FDPA and the Eighth Amendment.

A. Factual and procedural background.

Under the FDPA, jurors in a federal capital case may not sentence a defendant to death unless three prerequisites have been met: (1) the jury has unanimously found at least one "gateway" factor rendering the defendant eligible for death, 18 U.S.C. § 3591(a)(2); (2) the jury has unanimously found at least one statutory aggravating factor, 18 U.S.C. § 3592(c); and (3) the jury has unanimously found that the aggravating factors sufficiently outweigh the mitigating factors to

justify a sentence of death. 18 U.S.C. § 3593(e). Given the other counts of conviction in this case, deadlock with respect to any of these three prerequisites would have resulted, as a matter of law, in the imposition of a mandatory sentence of life imprisonment.

As to the first prerequisite, the District Court explicitly informed the jurors that if they could not unanimously agree as to the existence of at least one gateway factor, the District Court would impose a mandatory sentence of life imprisonment without the possibility of release. 19.A.8665 (regarding Section II of the penalty phase verdict form).

Likewise, as to the second prerequisite, jurors were explicitly told the same: if they could not unanimously agree as to the existence of at least one statutory aggravating factor, the District Court would impose a sentence of life imprisonment without the possibility of release. 19.A.8669 (regarding Section III of the penalty phase verdict form).

When it came to the third prerequisite, however, the Court changed course. Even though the consequences of deadlock were the same, and despite the defense's repeated requests, 25.A.11595; 25.A.11608–12; 22.A.10336–40; 19.A.8817–18, the District Court refused to instruct jurors that if they could not unanimously agree as to the ultimate weighing determination and finding that a

death sentence was justified, the Court would impose a sentence of life imprisonment without the possibility of release. 22.A.10336–40; 19.A.8818–21.

Tsarnaev's requested instruction was:

> If the jury is unable to reach a unanimous decision in favor of either a death sentence or of a life sentence, I will impose a sentence of life imprisonment without possibility of release upon the defendant. That will conclude the case. At this sentencing stage of the case, the inability of the jury to agree on the sentence to be imposed does not require that any part of the case be retried. It also does not affect the guilty verdicts that you have previously rendered.

25.A.11595; see also 25.A.11607 (requested verdict form language).

Defense counsel asked, in the alternative, that the District Court give Judge Sand's pattern instruction on lack of unanimity, which informs the jury that if they do not unanimously find beyond a reasonable doubt that the defendant should be sentenced to death, life imprisonment without any possibility of release is the only alternative sentence available. 25.A.11608, 11610 (quoting 1 Leonard B. Sand, et al., Modern Federal Jury Instructions—Criminal, Inst. 9A–20 (2011)); 19.A.8820–21. Defense counsel cited 71 FDPA cases in which such an instruction had been given, including both of the prior FDPA cases tried in the District of Massachusetts, Sampson and United States v. Kristen Gilbert, 98–CR–30044 (MAP). 25.A.11610–11. Arguing in support of the requested instruction, defense counsel emphasized the coercive effect of the misconception that non-unanimity would require a retrial (as it does in most criminal cases), because, in the unique

circumstances of this case, any holdout jurors would have a sense of having failed to discharge their responsibility to the Boston community to bring Tsarnaev's trial to an end. 22.A.10339; 25.A.11611.

The Court refused to inform the jury of the consequences of non-unanimity at this final stage of the sentencing determination. To do so would, in the Court's view, "suggest that this could be a truncated process by one juror simply deciding that the decision was his or hers" rather than "encourag[ing] unanimity." 22.A.10336. Accordingly, at the end of the penalty phase, after hearing the consequences of deadlock in the two earlier stages of its deliberation, the jury was informed as to the final stage only that:

> In the event that the jury is unable to reach a unanimous verdict in favor of a death sentence or in favor of a life sentence for any of the capital counts, please so indicate in Section VI of the verdict form. Before you reach any conclusion based on a lack of unanimity on any count, you should continue your discussions until you are fully satisfied that no further discussion will lead to a unanimous decision.
>
> After you have completed your sentence determination in Section VI, regardless of what the decision determination [sic] was, continue on to Section VII and complete the certificate regarding the determination of sentence.

19.A.8699.

Similarly, while the verdict form for the two earlier stages clearly stated the consequences of non-unanimity, Add.81 (Gateway Factors); Add.85 (Statutory Aggravating Factors), as to the determination of the sentence, the verdict form

allowed jurors to deadlock, but did not tell them what would happen if they did. Add.96 (Determination of Sentence).

The Court further ruled that defense counsel could not argue to the jury in its penalty phase closing that if it were not unanimous the consequence would be a life sentence. 22.A.10340. The District Court also struck the mitigating factor requested by the defense that if Tsarnaev did not receive the death penalty, he would spend the rest of his life in prison without the possibility of release, ruling that although it was a correct statement of the law, the Court did not believe it was a proper mitigating factor to present to the jury. 22.A.10341.

Defense counsel timely objected. 19.A.8817–21. Because Tsarnaev's challenge to the District Court's instructions is preserved, it presents a question of law that is reviewed *de novo*. Sampson I, 486 F.3d at 29. Tsarnaev need only demonstrate a "reasonable likelihood" that the challenged instruction in his case had the feared coercive effect on jurors. See Boyde v. California, 494 U.S. 370, 380 (1990) (where "[t]he claim is that the instruction is . . . subject to an erroneous interpretation," the "proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction" erroneously).

B. The Eighth Amendment requires a jury to be accurately instructed as to the consequences of a particular verdict.

Under the FDPA, the sentencing jury may vote unanimously for death or life

imprisonment; in either event, the court must impose the chosen sentence. 18 U.S.C. § 3593(e). If the jurors are not unanimous for either, the court may impose a life sentence or a lesser sentence, if one is available under the statutes for the offenses of conviction. Id. § 3594. The only sentences available in Tsarnaev's case were life or death. If the jury does not reach a unanimous verdict, a penalty phase retrial is not an option. Jones v. United States, 527 U.S. 373, 381 (1999).

As a general matter, the Eighth Amendment does not require district courts to instruct jurors on the consequences of failing to reach a unanimous verdict. Id., at 382.[161] But, as Jones recognized, where a jury could be misled as to the consequences of not reaching agreement, an appropriate instruction may be required. Id. at 381–82. And, if a capital sentencing jury were "affirmatively misled," by the lack of an instruction, this would violate the Eighth Amendment. Id. (quoting Romano v. Oklahoma, 512 U.S. 1, 8 (1994)); see also Hooks, 606 F.3d at 742 (under Jones, no instruction on consequences of non-unanimity is required "unless to fail to do so would affirmatively mislead the jury"). No such instruction was required in Jones itself, because, there, non-unanimity was not an available

[161] The Tenth Circuit expressly supports such an instruction in every capital case. See Tenth Circuit Criminal Pattern Jury Instructions, Inst. 3.01 (2018) (notwithstanding Jones, advising district courts that "the most straightforward approach" is to give pattern charge: "If you cannot unanimously agree on the appropriate punishment, I will sentence the defendant to life imprisonment without possibility of release.").

option described in the instructions or verdict form for any of the stages of the jury's sentencing determination. Id. at 387–88, 392. Compare Simmons, 512 U.S. at 168–70 (where jurors could have been misled by prosecutor's future dangerousness argument into believing state law permitted parole for a life sentence, due process was violated by court's refusal to explicitly tell jury consequences of a life verdict—that there was no chance for parole).

C. The District Court unconstitutionally risked coercing a death verdict by allowing jurors to speculate that a non-unanimous verdict would require a retrial.

In light of Jones, the question here is whether the District Court's instructions here affirmatively misled jurors about the consequences of a non-unanimous verdict. They did. Because Tsarnaev's jury explicitly was told the consequences of deadlock at other points in the deliberative process, the risk of coercion from not doing so at the final stage was too high. Nor did the District Court give any explanation as to why, under its reasoning, the purported fear of one juror hijacking the sentencing process if explicitly instructed on the effect of deadlock would not apply with equal force on the findings at the first two stages. And, of course, one juror deciding against a death sentence is not "hijacking" the process, but carrying out the statutory and constitutional mandate that each juror vote her conscience, individually. 18 U.S.C. § 3593(e); see also Wiggins, 539 U.S.

at 537 (whether error prejudiced capital sentencing depends on likelihood that "at least one juror would have struck a different balance").

The specific misconception risked here was a highly logical inference for the jurors to draw, given (i) here, the jury was instructed that non-unanimity at two earlier stages would result in the imposition of a sentence of life imprisonment without the possibility of release, but was told nothing about the third stage; and (ii) in ordinary criminal trials, deadlock results in a retrial. Basic principles of statutory interpretation (themselves based on ordinary English usage) teach that such an inference is the *best* way of understanding the District Court's decision to vary its instructions with respect to non-unanimity. "A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." Hamdan v. Rumsfeld, 548 U.S. 557, 578 (2006); see also, e.g., Sampson I, 486 F.3d at 31 ("[T]he inclusion of a term in one part of a statute is persuasive evidence that its omission elsewhere is deliberate. . . .") (citing United States v. Green, 407 F.3d 434, 443 (1st Cir. 2005)). It is reasonably likely jurors would infer from the District Court's previous instructions about the consequences of non-unanimity at the two earlier stages and the omission of such an instruction at the third stage, that a failure to reach unanimity at this final stage would yield a result other than a mandatory life sentence. This conclusion would

only have been reinforced as the jurors read through the verdict sheet, which likewise informed jurors of the consequence of non-unanimity at the gateway and statutory aggravator stages, but not at the weighing stage. As the Supreme Court emphasized in Jones: "Our decisions repeatedly have cautioned that instructions must be evaluated not in isolation but in the context of the entire charge." 527 U.S. at 391. Here, the jurors were told non-unanimity at the final stage was possible, but were not told the consequence if they were not able to agree. "Courts must presume 'that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case.'" United States v. Houlihan, 92 F.3d 1271, 1287 (1st Cir. 1996) (quoting Francis v. Franklin, 471 U.S. 307, 324 n. 9 (1985)). Taking the instructions in context and viewed as a whole, the jury was likely to conclude that the consequence of non-unanimity at the final verdict stage was *different* than in the earlier stages.

As Judge Wolf reasoned in Sampson, in deciding to give this precise information, "[d]eclining to instruct the jury on the consequences of a deadlock could result in jurors deliberating based on a misunderstanding of the law rooted in speculation and incorrect assumptions." United States v. Sampson, 335 F. Supp. 2d 166, 240–41 (D. Mass. 2004). Under the particular circumstances of this case, there is a "reasonable likelihood" that jurors would have assumed that non-unanimity at

the final weighing stage would result in a retrial. See Buchanan v. Angelone, 522 U.S. 269, 276 (1998); Boyde, 494 U.S. at 380.

Given the extraordinary nature of the victim impact evidence presented in this case—both from numerous family members of those killed and from people injured themselves—an accurate understanding of the consequences of non-unanimity was critical. Defense counsel was very much aware of the real-world implications of keeping this information from the jury, noting that the problem raised by withholding this information:

> is more present in this case than perhaps any other that has ever been tried under the [FDPA] of coercing the jury into unanimity by causing the minority jurors to feel—to assume, as they will, that if they don't go over to the majority, this entire traumatic process will have to be repeated, and the victims and the family members and the government and the law enforcement and the entire community will have to go through this again because one, two or three jurors did not surrender their vote and go with the majority.
>
> That's what the jury's going to think. And there's pressure in any case, and the law doesn't necessarily condemn that, but in this case the coercive effect of that misconception—and it is a misconception—is far more powerful than any—any erroneous deadlock instruction or Allen charge that could ever be given in a normal criminal case. It will be overpowering. No one will have the ability to hold on to their conscientiously held belief in the face of that misconception. And of course it is a misconception.

22.A.10337–38.

D. The instructional error was not harmless as to the death sentence.

The District Court's instructions created an unnecessary and unacceptable risk that one or more life-leaning jurors would feel coerced into switching their votes to death in order to avoid the prospect of a retrial. This violated Tsarnaev's right to a reliable determination of sentence, as guaranteed by the FDPA and the Eighth Amendment. See Lowenfeld v. Phelps, 484 U.S. 231, 241 (1988) ("Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body.").

The government cannot establish that this error was harmless beyond a reasonable doubt. See 18 U.S.C. § 3595(c)(2); Satterwhite, 486 U.S. at 257–58. For it cannot eliminate the possibility that one or more jurors was influenced by an apprehension that a deadlock might result in a retrial, with all the attendant trauma not only to the victims' families and survivors who would have to testify again, but to the community as a whole. For these reasons, the Court should reverse the death sentences.

XII.

The Cumulative Impact Of The Penalty Phase Errors Requires Reversal Of The Death Sentences.

Each of the errors set forth in Points V–XI, considered individually, requires a new penalty phase. Considered cumulatively, they compel that course. "[T]he accumulation of errors effectively undermines due process and demands a fresh start." Sepulveda, 15 F.3d at 1195; Chanthadara, 230 F.3d at 1267 (quoting Lockett, 438 U.S. at 604). "In other words, a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts." Id.; see also Taylor v. Kentucky, 436 U.S. 478, n.15 (1978) (cumulative effect of "potentially damaging circumstances" caused by prosecutor's closing argument and trial court's absence of appropriate instructions violated the due process guarantee of fundamental fairness).

With respect to mitigation, the District Court excluded evidence of Tamerlan's involvement in the brutal Waltham triple homicide, [redacted] and Jahar's knowledge of Tamerlan's involvement. The exclusion of this evidence went to the heart of two main issues in the penalty phase: the nature and extent of Jahar's role in the bombings, and Tamerlan's ability to influence Jahar. It allowed the government to argue vigorously to the jury that there was no evidence Tamerlan had influence over Jahar and that they "bear the same moral culpability." The District Court further

distorted the penalty phase by placing an unconstitutional condition on the defense's [redacted]. Yet again, the jury never heard this. The jury heard only that Jahar was a good student—which he was—[redacted]

These errors on the mitigation side of the death calculus do not stand alone. On the aggravation side of the scale, the government was allowed to present *survivor* victim impact testimony, allowing survivors of the bombings to relate not only the injuries they received, which was proper, but their emotional reactions to the bombings, to facing death, and to the long-term consequences of their injuries. Compounding the harm, without any judicial finding of either voluntariness or an independent source, the government was allowed to use the fruits of Jahar's coerced hospital interrogation to urge jurors to impose death because he was, the government argued, so remorseless that he could shop for milk shortly after the bombings. The government was then allowed to introduce evidence about the terrorist group ISIS—which had no connection to this case—and, in closing argument, both juxtapose an Islamic chant with images of the victims, and use an image of Jahar torn from context to tell jurors that Jahar had "one more" disrespectful "message to send" to the victims.

The government took full advantage of the erroneous rulings in urging jurors to impose death. Prosecutors told the jurors there was no evidence showing Tamerlan had a greater role in the bombings or influenced Jahar; recounted the improper victim impact evidence; relied, again and again, on the Whole Foods video to buttress their position regarding remorse; and exploited unfamiliarity with, and fear of, Islam throughout the closing argument. Taken together, these penalty phase evidentiary errors improperly undercut the case in mitigation while unfairly bolstering the government's case for death.

Even these evidentiary errors do not stand alone. The District Court refused to instruct the jurors that their ultimate determination of whether the aggravating circumstances outweighed the mitigating ones had to be beyond a reasonable doubt, then misled the jury concerning the consequence of non-unanimity.

The government cannot demonstrate either that (1) the evidentiary errors taken together; or (2) the evidentiary errors in conjunction with the instructional errors, were harmless beyond a reasonable doubt, *i.e.*, did not contribute to the verdict obtained. See ante § V.B.2.b (discussing harmless error standard for errors in capital-sentencing hearing and collecting cases).

A death sentence for Tsarnaev was not a foregone conclusion. True, this was an aggravated case involving four deaths, including a child's. But, although the aggravating factors were undoubtedly serious, more than one juror found

substantial mitigating factors involving Jahar's age; his lack of any prior history of violent behavior; that his teachers and friends knew him to be thoughtful, caring, and respectful; that his family loves and cares for him; that his father was disabled by mental illness and brain damage; and that his mother facilitated Tamerlan's radicalization. Add.90–92. Even with the distortions caused by the District Court's various rulings on mitigating and aggravating evidence, the jury rejected death as to 11 of the 17 capital counts, including all the counts arising from conduct in which Tamerlan directly participated. Add.96. Any one of the jurors who found the key mitigators for these 11 capital charges might well have done the same for the remaining six capital offenses, were it not for the errors. A capital juror's sentencing decision is a "difficult, individualized judgment" involving a "range of discretion." Turner, 476 U.S. at 34–35. Absent the errors, at least one juror might well have declined to vote for capital punishment on the remaining counts as well, which would have resulted in a life sentence. See ante § XI.C.

Federal juries across the country have often declined to return unanimous death verdicts in other aggravated capital cases involving multiple murders, child victims, or both. Those have included, for example:

- Several Al-Qaeda members responsible for bombing the U.S. embassies in Kenya and Tanzania and killing 224 people, including 12 Americans, and injuring more than 5,000;[162]

[162] In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, 103–07 (2d Cir. 2008).

- The so-called "20th hijacker" whose actions enabled the 9/11 plot to go forward undetected, resulting in thousands of deaths when his fellow Al-Qaeda terrorists flew hijacked planes into the World Trade Center and Pentagon;[163]

- The head of a drug-trafficking organization in Puerto Rico who killed 20 people, including committing eight RICO murders soon after being released from prison;[164]

- A gang leader in California who committed eight murders, including three to further his racketeering enterprise;[165]

- A white supremacist in Arkansas who drowned an eight-year-old girl and her parents after robbing them, by putting bags over their heads, binding them with duct tape, and weighing them down with rocks;[166]

- A Mafia hitman in New York who committed seven contract killings, including several in which he tortured and dismembered his victims and buried them in a bird sanctuary.[167]

Here, notwithstanding the seriousness of the crimes, the government cannot prove beyond a reasonable doubt that, as to the death verdicts connected to the bomb Jahar placed at the finish line, these numerous errors, taken together, did not alter the final balance for at least one juror.

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[163] United States v. Moussaoui, 591 F.3d 263, 301 n.24 (4th Cir. 2010).
[164] United States v. Candelario-Santana, 834 F.3d 8, 15–16 (1st Cir. 2016).
[165] Special Verdict Form at 6–9, United States v. Duong, No. 01-CR-20154 (N.D. Cal. Dec. 15, 2010), Dkt. No. 1492.
[166] United States v. Kehoe, 310 F.3d 579, 584 (8th Cir. 2002).
[167] Pitera v. United States, 2000 WL 33200254, at *1 (E.D.N.Y. Dec. 21, 2000).

XIII.

Repeated Secret Contacts Between The District Court And The Government Violated Tsarnaev's Rights To Due Process And The Assistance Of Counsel.

In pursuit of a death sentence and unbeknownst to Tsarnaev's trial counsel, the government conducted at least 26 secret communications with the District Court. Thirteen of these remain undisclosed to appellate counsel.[168] Of those 13 still-secret proceedings, the government has acknowledged that [redacted] This secret channel of communication between the prosecution and the District Court [redacted] is unprecedented in a federal capital case and violated Tsarnaev's Fifth Amendment right to due process and his Sixth Amendment right to the assistance of counsel. This Court has been clear: "that the government can *never* affirmatively use information in court *and*

[168] DE.147, 576, 601, 637, 638, 1151, 1523, 1524, 1525, 1667, 1668, 1669, and 1672 remain secret. When the government refused to voluntarily disclose these *ex parte* communications, appellate counsel moved for disclosure in the District Court. DE.1719. Over defense objection, the government sought leave (DE.1723) to file a 27th *ex parte* pleading (DE.1730) in support of its opposition to disclosure of these proceedings for use in the appeal, which the District Court granted. DE.1728. Then, without disclosing the government's arguments or making any findings as to why the *ex parte* materials should remain undisclosed on appeal, the District Court denied Appellant's disclosure motion. DE.1732. This Court subsequently denied Appellant's Motion to Disclose on Appeal without prejudice to the Appellant's ability to raise any issues concerning the *ex parte* proceedings in this merits brief. Order of the Court, filed August 11, 2017.

withhold it from the defense may overstate the matter, but not by much." United States v. Claudio, 44 F.3d 10, 14 (1st Cir. 1995).

The government's repeated private access to the District Court, without justification or notice to the defense, undermines confidence in the fairness of the entire process and in the death sentences imposed. See United States v. Minsky, 963 F.2d 870, 874 (6th Cir. 1992) (reversing conviction due to *ex parte* conference with the government regarding whether certain investigative documents should be disclosed in response to defense motion, because such *ex parte* conduct "undermines confidence in the impartiality of the court" and violates the defendant's right to a fair trial as well as the Sixth Amendment).

The *ex parte* communications concerning [redacted] also violated Tsarnaev's most basic right: to the assistance of counsel. Without Tsarnaev's counsel present, there was no one to represent him. The Sixth Amendment requires that a defendant be represented at every critical stage of his trial. United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." (footnote omitted)). In Haller, for example, this Court found reversible error where the prosecutor provided information *ex parte* to the District Court regarding the defendant's alleged conduct toward the victim of

his offense, even where the prosecutor was later permitted to make the same statement in open court. 409 F.2d at 859.

In such a circumstance, prejudice must be presumed from the denial of the defendant's Sixth Amendment right, and Tsarnaev need not demonstrate a reasonable probability that the result of the proceeding would have been different had he had the assistance of counsel. See, e.g., Bell v. Cone, 535 U.S. 685, 695–96 (2002) (*per se* reversal required "where the accused is denied the presence of counsel at 'a critical stage' . . . to denote a step of the criminal proceeding . . . that held significant consequences for the accused." (citations omitted)); Mickens v. Taylor, 535 U.S. 162, 166 (2002) ("We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding."); Holloway v. Arkansas, 435 U.S. 475 (1978) ("when a defendant is deprived of the presence and assistance of his attorney . . . during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.").

Because counsel on appeal still does not have access to even the subject matter of these undisclosed proceedings [redacted], it is not possible to analyze the specific prejudice to [redacted] that may have been caused by the government's *ex parte* submissions. Should this Court decide to disclose those materials now, counsel respectfully requests leave to brief any harm.

XIV.

The Underrepresentation Of African-Americans In The Grand And Petit Jury Wheels Violated The Fair Cross-Section Requirement Of The Jury Selection And Service Act And The Fifth And Sixth Amendments.

This Court has called the underrepresentation of African-Americans in jury pools in the Eastern Division of the District of Massachusetts "disquieting," Royal, 174 F.3d at 12, warning that the problem presents "cause for concern," In re United States, 426 F.3d 1, 9 (1st Cir. 2005). Those observations remain apt. In this case, the grand and petit jury wheels underrepresented African-Americans to significant degrees. By one measure, "comparative disparity," one-third of the African-Americans in the jury-eligible population were "missing" from the qualified jury wheel. 24.A.11256–57 ¶ 28. Tsarnaev acknowledges that Royal, which restricts the underrepresentation analysis to a different, widely derided measure ("absolute disparity"), forecloses this claim. Nonetheless, Appellant submits that Royal is wrongly decided. Under the more flexible tests adopted by the Third, Fifth, Sixth, Ninth, and Tenth Circuits, he has shown a violation of the fair cross-section requirement of the JSSA and the Fifth and Sixth Amendments.

A. Factual and procedural background.

Before jury selection, the defense moved to dismiss the indictment, arguing that the underrepresentation of African-Americans in the qualified jury wheel from which the grand jurors were drawn violated the fair cross-section requirement of

the JSSA. DE.506; DE.559; see also 28 U.S.C. § 1861; Duren v. Missouri, 439 U.S. 357 (1979). Specifically, the defense showed that for the years 2011, 2012, and 2013, African-Americans made up 6.00% of the jury-eligible population for the Eastern Division of the District of Massachusetts, but only 3.94% of the qualified jury wheel. 24.A.11251 ¶ 6. This represented an absolute disparity of 2.06% and a comparative disparity of 34.29%. Id.[169] The defense attributed this systematic exclusion of African-Americans to the facts that: (i) more African-Americans lived in Boston than in any of the Division's 190 cities and towns; and (ii) Boston was "the least proportionately represented" of the Division's cities "in terms of the percentage of the Master Jury Wheel created from the municipal resident lists compared to the jury eligible population." 24.A.11251 ¶ 7; see also 28 U.S.C. § 1863(b)(2) (authorizing District of Massachusetts to use resident lists, rather than voter lists, to generate wheel); Mass. Gen. Laws ch. 234A, § 10

[169] Absolute disparity is "the difference between the percentage of members of the distinctive group in the relevant population and the percentage of group members on the jury wheel." Royal, 174 F.3d at 7; see also 24.A.11255–56 ¶ 25. Here, the absolute disparity is 6.00% minus 3.94%, or 2.06%. Comparative disparity, in contrast, "'measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service.'" Royal, 174 F.3d at 7 (quoting Ramseur v. Beyer, 983 F.2d 1215, 1231–32 (3d Cir. 1992) (en banc)). It "is calculated by dividing the absolute disparity percentage by the percentage of the group in the population." Id. Here, the comparative disparity is 2.06% divided by 6.00%, or 34.29%. That figure "means that something more than a third of the African-Americans we would have expected to be represented on the jury list are missing." 24.A.11256–57 ¶ 28.

(requiring preparation of such "numbered resident lists"). That is, the resident lists used to populate the wheel omitted more Bostonians than residents of any other municipality, and more African-Americans lived in Boston than anywhere else in the Division. DE.506, at 14.

The defense acknowledged that, under controlling precedent from this Court, the applicable statistical measure was absolute disparity, and that an absolute disparity of 2.06% did not suffice to establish underrepresentation. DE.506, at 12. See Royal, 174 F.3d at 10–11 (holding that absolute disparity of 2.97% did not show underrepresentation of African-Americans); United States v. Hafen, 726 F.2d 21, 23–24 (1st Cir. 1984) (same; absolute disparity of 2.02%). The defense contended, however, that absolute disparity offered a poor tool for small minority groups: Because African-Americans made up only 6% of the population, even their complete exclusion from the qualified jury wheel would yield an absolute disparity of only 6%, below the 10% threshold that courts applying the absolute disparity test require to show underrepresentation. See, e.g., Ramseur, 983 F.2d at 1232 & n.18 (collecting cases); DE.506, at 12; 24.A.11256 ¶ 26. Thus, the defense urged that "a comparative disparity analysis should be used," DE.506, at 12–13, as several Circuits have acknowledged could be appropriate where the "distinctive group at issue made up less than 10% of the population," Royal, 174 F.3d at 9 n.6. A comparative disparity of 34.29%, confirmed by other statistical measures (for

example, standard deviation analysis, impact of risk analysis, and disparity of risk analysis), showed "constitutionally significant" underrepresentation. See DE.506, at 13; 24.A.11257–59 ¶¶ 30–38. Relying on Royal and Hafen, the District Court applied the absolute disparity test and denied the motion. Add.422–23.

Before the petit jury was empaneled, the defense moved once more to dismiss the indictment, renewing its fair cross-section claim under the JSSA and the Sixth Amendment with respect to the qualified jury wheel from which the petit jury was drawn. DE.1080. Again, the defense demonstrated underrepresentation of African-Americans, who now made up 6.14% of the jury-eligible population, but only 4.25% of the qualified jury wheel, an absolute disparity of 1.89% and a comparative disparity of 30.73%. DE.1080, at 3–4; 25.A.11520 ¶ 10. And once more, the defense urged that the use of comparative disparity analysis established underrepresentation, as reflected in other statistical measures as well. DE.1080, at 11–12; 25.A.11525–27 ¶¶ 30–37. Adhering to its earlier reasoning (and adding that the JSSA claim was untimely under 28 U.S.C. § 1867(a)), the District Court denied the motion. Add.479, 481–82.

B. Tsarnaev showed clear underrepresentation of African-Americans in the jury wheels.

1. A defendant has the right to grand and petit juries selected from a fair cross-section of the community.

This Court reviews the District Court's findings of fact for clear error and its legal conclusions *de novo*. Royal, 174 F.3d at 5. Here, neither the government nor the District Court questioned the defense's statistical showing, so this case, like Royal, involves a pure question of law: "the choice of statistical methodology to determine whether there is underrepresentation of black persons." Id.

A federal criminal defendant "shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes." 28 U.S.C. § 1861. This right derives not just from the JSSA but from the Fifth and Sixth Amendments. See Berghuis v. Smith, 559 U.S. 314, 319 (2010) ("The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community."); Castaneda v. Partida, 430 U.S. 482, 509–10 (1977) (Powell, J., dissenting) ("The right to a 'representative' grand jury . . . derives . . . from the Fifth Amendment's explicit requirement of a grand jury.").

To establish a prima facie violation of the fair cross-section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from

> which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364. This test applies to claims under both the JSSA and the Constitution. Royal, 174 F.3d at 6. Here, only the second Duren prong is at issue. As to the first, African-Americans constitute a distinctive group for fair cross-section purposes. Id.; Hafen, 726 F.2d at 23. The District Court did not address the third, systematic exclusion, ruling instead that the defense had failed to show underrepresentation. Add.422–23, 481–82.

2. Comparative disparity, alone or in conjunction with other statistical measures, establishes the underrepresentation of African-Americans in the grand and petit jury wheels.

The District Court ruled that absolute disparities of 2.06% (grand jury) or 1.89% (petit jury) did not satisfy Duren's second prong. Although dictated by Royal and Hafen, that ruling was incorrect. Absolute disparity alone is "imperfect" and "can be misleading when, as here, 'members of the distinctive group compose only a small percentage of those eligible for jury service.'" Smith, 559 U.S. at 329 (quoting People v. Smith, 615 N.W.2d 1, 2–3 (Mich. 2000)). For example, assuming a 10% threshold for absolute disparity claims, a defendant could never state a fair cross-section violation with respect to a minority group making up less than 10% of the population, even if members of that group were excluded from the wheel altogether. See United States v. Hernandez-Estrada, 749

F.3d 1154, 1161–62 (9th Cir. 2014) (en banc) (describing this and other deficiencies in absolute disparity test, and observing that "no court has been able to articulate or defend it on any sound statistical basis").

Moreover, "[o]ne major disadvantage of the absolute disparity test is that it is insensitive to the size of the group involved." Sara Sun Beale, Integrating Statistical Evidence and Legal Theory to Challenge the Selection of Grand and Petit Jurors, 46 Law & Contemp. Probs. 269, 273 (1983). For example, if Group A is 70% of the population but 60% of the jury wheel, while Group B is 12% of the population and 2% of the wheel, the absolute disparity test will report the same degree of underrepresentation, 10%, for both. But those groups are not similarly situated for constitutional fair cross-section purposes. Group B, a sizable minority, is all but absent from the wheel, while Group A remains well-represented. Comparative disparity, by contrast, "illustrates, in a general way, the comparative differences in a manner that takes population size into consideration." Hernandez-Estrada, 749 F.3d at 1162.[170]

[170] The absolute disparity test has received sustained criticism from statisticians and legal commentators alike. See, e.g., Joseph L. Gastwirth & Qing Pan, Statistical Measures and Methods for Assessing the Representativeness of Juries: A Reanalysis of the Data in Berghuis v. Smith, 10 Law, Probability & Risk 17, 21 & n.20 (2011) (collecting authorities), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1529442; Br. of Amici Curiae Social Scientists, Statisticians, and Law Professors 15 n.6, Berghuis v. Smith, 559 U.S. 314 (No. 08–1402) (same), available at http://www.abanet.org/publiced/preview/briefs/pdfs/09-10/08-1402_RespondentAmCuSocScientistsandProfs.pdf.

Royal and Hafen should be overruled, and this Court should assess fair cross-section claims using comparative disparity, either alone or in conjunction with other statistical measures such as standard deviation, impact of risk, and disparity of risk, as the Third, Fifth, Sixth, Ninth, and Tenth Circuits all do. See Hernandez-Estrada, 749 F.3d at 1164–65 (overruling prior Ninth Circuit precedent that required exclusive use of absolute disparity, and holding that "courts may use one or more of a variety of statistical methods to respond to the evidence presented"); see also Ramseur, 983 F.2d at 1231 (3d Cir.) (absolute disparity, comparative disparity, and standard deviation); Mosley v. Dretke, 370 F.3d 467, 479 n.5 (5th Cir. 2004) (noting that Circuit employs absolute disparity test, but leaving open possibility that comparative disparity should be used "if the distinctive group makes up less than 10% of the population"); Garcia-Dorantes v. Warren, 801 F.3d 584, 600 (6th Cir. 2015) (absolute and comparative disparity); United States v. Orange, 447 F.3d 792, 798 (10th Cir. 2006) (absolute and comparative disparity).

Under this approach, Tsarnaev has shown underrepresentation with comparative disparities of 34.29% (grand jury) and 30.73% (petit jury). See Garcia-Dorantes, 801 F.3d at 600 (holding that absolute disparity of 3.45% and comparative disparity of 42% with respect to African-Americans satisfied Duren's second prong); United States v. Rogers, 73 F.3d 774, 776–77 (8th Cir. 1996)

(explaining that absolute disparity of 0.579% and comparative disparity of 30.96% with respect to African-Americans satisfied Duren's second prong, but affirming conviction in light of Circuit precedent upholding district's jury selection plan). Supplemental measures—for example, that the percentage of African-Americans in the grand and petit jury wheels differs from that in the jury-eligible population by 18 and 9 standard deviations, respectively—so confirm. See 24.A.11257–59 ¶¶ 31–38; 25.A.11525–27 ¶¶ 30–37.

Accordingly, this Court should hold that Tsarnaev has satisfied Duren's second prong, vacate the denial of his motions to dismiss, and remand for the District Court to address the third prong, systematic exclusion, in the first instance.[171]

[171] The District Court's ruling that Tsarnaev's JSSA claim with respect to the petit jury wheel was untimely, Add.479, has no impact on the correct disposition of this Point. That ruling concerned only Tsarnaev's claim "under the Act," not the Sixth Amendment, and the two claims are congruent. See Royal, 174 F.3d at 6.

XV.

Under The Supreme Court's Eighth Amendment Jurisprudence, This Court Should Vacate Tsarnaev's Death Sentences Because He Was Only 19 Years Old At The Time Of The Crimes.

Tsarnaev was just 19 years old when he committed the crimes for which he was sentenced to death. According to now well-established brain science, and increasingly reflected by changing law around the country, the physical development of the brain and related behavioral maturation continues well through the late teens and early 20s. Consistent with the Supreme Court's Eighth Amendment jurisprudence and a recent resolution adopted by the American Bar Association, this Court should hold that those who commit their crimes as "emerging adults," when they were under 21 years old, are categorically exempt from the death penalty.

A. Eighth Amendment jurisprudence and youth generally.

The Supreme Court recognized more than three decades ago that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." Eddings, 455 U.S. at 115. Soon thereafter, the Supreme Court held it was unconstitutional to execute persons for acts committed under the age of 16. Thompson v. Oklahoma, 487 U.S. 815, 38 (1988) (plurality op.). The Court then upheld the legality of executing people for acts committed between the ages of 16 and 18. Stanford v.

Kentucky, 492 U.S. 361, 380 (1989). But just fourteen years later, compelled by the growing body of scientific knowledge about brain development in youths, the Court overruled Stanford and categorically banned death sentences for people who committed their crimes when they were juveniles, then defined as under 18 years old. Roper, 543 U.S. 551.

Roper recognized that "juvenile offenders cannot [reliably] be classified among the worst offenders" because of three ways in which they differ from adults: (i) they lack maturity; (ii) they are more susceptible to negative influences and peer pressure; and (iii) their personality traits "are more transitory, less fixed." 543 U.S. at 569–70. These three differences "render suspect any conclusion that a juvenile falls among the worst offenders." Id. at 570. "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." Id. "[I]t is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." Id.

The Supreme Court held that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." Id. at 572–73. Roper recognized that "[a]n unacceptable likelihood exists that the brutality or cold-

blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." Id. at 573.

This constitutionally unacceptable risk is palpable here, where the jury imposed six death sentences on Tsarnaev, a young man with no criminal record and—as found by eleven jurors—no history of violence whatsoever. Add.90.[172] All twelve jurors found the mitigating factor that "Dzhokhar Tsarnaev's teachers in elementary school, middle school, and high school knew him to be hardworking, respectful, kind, and considerate." Add.91. Eleven jurors found that "Dzhokhar Tsarnaev's friends in high school and college knew him to be thoughtful and respectful of the rights and feelings of others." Id. As an adolescent, he had spent many hours volunteering to help children with intellectual disabilities or other special needs. 18.A.8150, 8417–23. Several penalty-phase witnesses testified that his involvement in the bombings was completely out of character for the Jahar Tsarnaev they knew. 18.A.8156–57, 8309, 8423–24, 8435–36.

[172] See State v. Pratt, 125 Idaho 546, 873 P.2d 800, 824 (1993) (holding, under Idaho law, death sentence disproportionate based in part on defendant's lack of any prior felonies); Klokoc v. State, 16 Fla. L. Weekly S756, 589 So. 2d 219, 222 (Fla. 1991) (same, under Florida law); State v. Benson, 323 N.C. 318, 372 S.E.2d 517, 523 (1988) (same, under North Carolina law), overruled in part on other grounds by State v. Hooper, 358 N.C. 122, 591 S.E.2d 514 (2004).

B. Given developments in brain science and the law, the bright line drawn at age 18 in *Roper* is no longer sound.

Developments in the 13 years that have passed since Roper support extending the ban on capital punishment to emerging adults, those whose crimes were committed when they were under 21. Two major changes have altered the justification for a strict age-18 cutoff: (1) scientific research has explained the effects of brain maturation, or the lack thereof, on the behavioral and decision-making abilities of late adolescents in their late teens and early twenties; and (2) recent changes in the treatment of older adolescents in the criminal justice system reflect a more informed understanding of the differences between late adolescents and adults with fully-matured brains.

1. Scientific advances show that the brain remains undeveloped at age 18 and continues to develop for several years into early adulthood.

Roper was based on findings from the medical and scientific community, including the work of two leading researchers in the field, Dr. Laurence Steinberg and Dr. Elizabeth Scott. 543 U.S. at 569–70 (citing Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) ("Less Guilty"); id. at 573 (citing Less Guilty, supra, at 1014–16). At the time the Court drew a bright line at age 18 in Roper, "the research [had] not yet produced a robust understanding of maturation in young

adults age eighteen to twenty-one." See Elizabeth S. Scott, Richard J. Bonnie & Laurence Steinberg, Young Adulthood as a Transitional Legal Authority: Science, Social Change, and Justice Policy, 85 Fordham L. Rev. 641, 653 (2016) ("Young Adulthood").

In the years since Roper, scientists have found that many of the same traits possessed by juveniles—traits that make them ineligible for the death penalty—also apply to older adolescents in their late teens and early 20s. Jay N. Giedd, The Amazing Teen Brain, 312 Sci. Am. 32, 34 (2015) ("[W]e now know that the prefrontal cortex continues to change prominently until well into a person's 20s."). The full development of executive functioning—the aspect of a person's brain that regulates moral decisionmaking—does not occur until a person's 20s. The development of gray matter "peaks latest in the prefrontal cortex, crucial to executive functioning, a term that encompasses a broad array of abilities, including organization, decision making and planning, along with the regulation of emotion." Id. at 35. "Because [the prefrontal cortex functions] do not fully mature until a person's 20s, teens may have trouble controlling impulses or judging risks and rewards." Id. at 36; see also Elizabeth P. Shulman et al., The Dual Systems Model: Review, Reappraisal, and Reaffirmation, 17 Developmental Cognitive Neuroscience 103, 114 (2016) (neuroimaging studies since 2008 show that "psychological and neural reflections of better cognitive control increase gradually

and linearly throughout adolescence and into the early 20s."). "[Y]oung adulthood is a developmental period when cognitive capacity is still vulnerable to the emotional influences that affect adolescent behavior, in part due to continued development of prefrontal circuitry involved in self-control." Alexandra Cohen et al., When Does a Juvenile Become an Adult? Implications for Law and Policy, 88 Temp. L. Rev. 769, 771 (2016).

This full understanding of the current state of developmental science has profound implications for how the law treats crimes committed by youths ages 18–20. As summarized by Dr. Steinberg and his co-authors in 2016, "developmental science does not support the bright-line boundary that is observed in criminal law under which eighteen-year-olds are categorically deemed to be adults." Young Adulthood, ante, at 645.

2. Legal reforms and other developments reflect a national consensus that emerging adults lack maturity and require special protections.

In non-capital cases, it is now readily accepted that, given advances in brain science, emerging adults must be treated differently for purposes of sentencing. In May 2017, the U.S. Sentencing Commission issued a report titled Youthful Offenders in the Federal System ("Youthful Offenders"), defined as "persons age

25 or younger at the time they are sentenced in the federal system."[173] Finding that "[t]he contribution that neuroscience has made to the study of youthful offending is significant and continues to evolve," id. at 6, the Commission's report summarized the current scientific consensus regarding brain maturation: "the prefrontal cortex is not complete by the age of 18;" that brain "development continues into the 20s;" and, though "there will be significant variation from person to person," "the average age at which full development has taken place" is 25. Id. at 7. The Commission's work is relevant evidence of a national scientific consensus. See Cruz v. United States, 2018 WL 1541898, at *21 (D. Conn. March 29, 2018) (applying Miller v. Alabama, 567 U.S. 40 (2012), which holds that Eighth Amendment prohibits mandatory life-without-parole sentences for juveniles, to defendant who was 18 at time of his crime).[174]

[173] U.S. Sent'g Comm'n, Youthful Offenders in the Federal System 1 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf.

[174] Other courts have also recognized that the Eighth Amendment requires special protection for emerging adults. See Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, Commonwealth v. Bredhold, No. 14–CR–161 (Fayette Circuit Court, 7th Div. Aug. 1, 2017) (Scorsone, J.) (relying heavily on brain science to conclude that the death penalty is a disproportionate punishment for offenders younger than 21 because such individuals are categorically less culpable); see also State v. Norris, No. A–3008–15T4, 2017 WL 2062145, at *5 (N.J. Super. Ct. App. Div. May 15, 2017) (relying on Miller to vacate 75-year sentence for murder committed by 21-year-old).

On February 5, 2018, the ABA House of Delegates adopted a formal resolution calling on all death-penalty jurisdictions to prohibit capital punishment for any individual who was 21 years old or younger at the time of the offense.[175] Because of the "evolution of both the scientific and legal understanding surrounding young criminal defendants and broader changes to the death penalty landscape," and consistent with the ABA's "longstanding position that states should administer the death penalty only when performed in accordance with constitutional principles of fairness and proportionality," the ABA concluded that "offenders up to and including age 21" should be categorically exempt from receiving the death penalty.[176]

3. Objective indicators reflect a growing national consensus against the death penalty for emerging adults.

No one who was only 19 years old at the time of his crimes of conviction has ever been executed in the modern era of the federal death penalty. The youngest federal capital defendant who has been executed under the FDPA is Timothy McVeigh, who was 27 years old at the time of his capital crimes.

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[175] See Am. Bar Ass'n, Resolution 111 (2018), available at https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf.

[176] Am. Bar Ass'n, Death Penalty Due Process Review Project: Report to the House of Delegates 1, 14 (2018), available at https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf.

The Supreme Court's recent Eighth Amendment jurisprudence directs courts how to assess evolving standards of decency and determine whether a national consensus against a particular type of sentence has emerged. First, courts examine the trends in the numbers of jurisdictions that have abolished the challenged sentence—either legislatively or de facto through other avenues, such as moratoria on executions. Roper, 543 U.S. at 564 (noting that "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach."). Regarding the availability of the death penalty for those who were emerging adults at the time of their crimes, the figures are roughly comparable to those for juveniles. Twenty-one jurisdictions do not have the death penalty at all.[177] And though death is a possible sentence in federal criminal law, it is unavailable in Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth for the Northern Mariana Islands.[178] Three additional jurisdictions have effectively suspended carrying out death sentences and exhibit long-term

[177] Alaska, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin.

[178] P.R. Const. art. II, § 7 ("The death penalty shall not exist."); 14 V.I. Code R. § 923(a) (2018) ("Whoever commits murder in the first degree shall be imprisoned for the remainder of his natural life without parole."); 9 Guam Code Ann. § 16.30(b) (2018) (punishment for aggravated murder is life); N.M.I. Const. art. I, § 4(i) ("Capital punishment is prohibited.").

disuse: Colorado,[179] Oregon,[180] and Pennsylvania.[181] Thus, in 24 jurisdictions plus several federal territories, the death penalty is not an available penalty for any defendant, including those who were emerging adults.

Next, courts analyze the infrequency with which the challenged sentence, where available, is imposed and carried out. See Graham v. Florida, 560 U.S. 48, 62–67 (2010) (concluding that national consensus had emerged in part because 21 states had abolished life-without-parole sentences for juvenile nonhomicide offenders and "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization."); see also Roper, 543 U.S. at 567 (finding national consensus against juvenile death penalty based in part on "the infrequency of its use even where it remains on the books"; within the previous 16 years, only 6 states had executed individuals who had committed their capital crimes as juveniles; within the previous decade, only 3 had done so).

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[179] Colo. Office of the Governor, Executive Order: Death Sentence Reprieve (2013), https://test.colorado.gov/governor/sites/default/files/d_2013-006_death_sentence_reprieve.pdf.

[180] See Death Penalty Info. Ctr., Oregon Governor Declares Moratorium on All Executions (2011), https://deathpenaltyinfo.org/oregon-governor-declares-moratorium-all-executions.

[181] See Death Penalty Info. Ctr., Pennsylvania Governor Halts Executions (2015), https://deathpenaltyinfo.org/pennsylvania-1.

Data on the use of death sentences from 2001–2015 against those over age 18 but under age 21 demonstrates a national consensus against the practice. Brian Eschels, Data & The Death Penalty: Exploring the Question of National Consensus Against Executing Emerging Adults in Conversation with Andrew Michaels's A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty, 40 N.Y.U. Rev. L. & Soc. Change Harbinger 147, 153 (2016) (concluding that "the pattern of state participation in this punishment has come to mimic the pattern the [Supreme Court] used in Graham to strike down juvenile LWOP for non-homicide offenses"). "[E]xecutions of emerging adults are rare and occur in just a few states." Id. at 152. Approximately 78% of executions carried out during the study period on those who had been emerging adults at the time of their crimes occurred in just four states: Texas, Oklahoma, Virginia, and Ohio. Id. This concentration grew over time. From 2011–2015, the last five years of the study period, Texas alone was responsible for 58% of these executions. Id. And in 2015, Texas was the sole state to carry out such an execution.

Comparing this data to that in Graham supports Tsarnaev's argument that the death penalty for those who were emerging adults at the time of their crimes is a cruel and unusual punishment. Andrew Michaels, A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty, 40 N.Y.U. Rev. L. & Soc. Change Harbinger 139 (2016).

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The Roper cutoff at age 18 "disregard[s] . . . current medical standards." Moore v. Texas, 137 S. Ct. 1039, 1049 (2017). Scientific and legal developments support a categorical ban on the imposition of a death sentence for those who committed their crimes at ages 18–20. Because he was only 19 at the time of his crimes, this Court need not sweep that far, but could, in the alternative, rule that because he was only 19 years old at the time of the crimes, Tsarnaev's death sentences should be vacated and this case remanded for the District Court to sentence him to life without the possibility of release.

Conclusion

For the foregoing reasons, this Court should:

- For **Point I**, reverse the convictions, or in the alternative, the death sentences;
- For **Point II**, reverse the convictions, or in the alternative, the death sentences, or again in the alternative, remand for further proceedings;
- For **Point III**, reverse the death sentences;
- For **Point IV**, reverse the convictions, or in the alternative, the death sentences;
- For **Points V–VII** reverse the death sentences;
- For **Point VIII**, remand for further proceedings;
- For **Points IX–XII**, reverse the death sentences;
- For **Point XIII**, reverse the convictions, or in the alternative, the death sentences;
- For **Point XIV**, remand for further proceedings;
- For **Point XV**, reverse the death sentences and remand for the imposition of sentences of life imprisonment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. By order of December 13, 2018, this Court allowed Tsarnaev's motion to file an overlength brief that does not exceed 115,430 words (approximately 475 pages). This brief complies with that order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): this brief contains **109,234** words (**466** pages).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using **Microsoft Word** in **14-point font** in **Times New Roman** type style.

/s/ Deirdre D. von Dornum
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Dated: New York, New York
December 27, 2018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically through the ECF system to the registered participants as identified on the Notice of Electronic Filing (NEF) and by FEDEX on December 27, 2018 to:

The Honorable Maria R. Hamilton
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for the First Circuit
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