No. 16-6001

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

DZHOKHAR A. TSARNAEV,
Defendant–Appellant.

On Appeal from the United States District Court for the
District of Massachusetts, No. 1:13-CR-10200
(Hon. George A. O'Toole)

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INTRODUCTION

In April 2013, Dzhokhar Tsarnaev and his brother set off two bombs near the finish line of the Boston Marathon, killing three spectators and injuring hundreds. Three days later, they shot a police officer who was sitting in his car and then engaged in a shootout during which Tsarnaev threw bombs at police officers and ran over his brother to escape. Police finally located Tsarnaev hiding in a boat where he had written a jihadist justification for his actions. After the district court and this Court denied his requests to transfer his trial out of the District of Massachusetts, a jury convicted him on 30 counts, including numerous counts of using firearms and weapons of mass destruction to kill his victims. The jury subsequently recommended that Tsarnaev receive the death penalty on six counts, and the district court imposed that sentence. The court also sentenced Tsarnaev to multiple concurrent and consecutive life sentences on other counts.

Contrary to Tsarnaev's claims, his convictions and sentences were lawful. Tsarnaev received a fair trial in Boston, and the district court did not abuse its discretion by refusing to move the trial elsewhere. The jury was selected after a careful and searching voir dire, and the jurors who tried and sentenced Tsarnaev were unbiased. The district court's evidentiary rulings were well within its discretion, the court's jury instructions fully complied with Supreme Court and circuit law, and the government committed no misconduct. Tsarnaev's challenges to the death penalty

and the capital sentencing process—which have been rejected by many other courts—are groundless. The district court's judgment should be affirmed.

STATEMENT OF JURISDICTION

Defendant–Appellant Tsarnaev appeals from a final judgment of conviction in a criminal case. The district court (O'Toole, J.) had jurisdiction under 18 U.S.C. § 3231 and entered judgment on June 25, 2015. Add.99-106.[1] The district court denied Tsarnaev's motion for a new trial on January 15, 2016, Add.483-505, and Tsarnaev filed a timely notice of appeal on January 29, 2016, 1.App.152-53. *See* Fed. R. App. P. 4(b)(3)(A)(ii). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3595(a).

[1] This brief uses the following citation format:

Appellant's Addendum	Add.[page #]
Appellant's Appendix	[volume #].App.[page #]
Appellant's Sealed Addendum	Sealed.Add.[page #]
Appellant's Sealed Special Appendix	[volume #].SPA.[page #]
Appellant's Supplemental Sealed Addendum	Supp.Sealed.Add.[page #]
Appellant's 12.2 Addendum	12.2.Add.[page #]
Appellant's 12.2 Appendix	12.2.App.[page #]
Appellee's Supplemental Appendix	[volume #].Supp.App.[page #]
District court docket entries	Doc.
Trial Exhibits	[Gov't or Def.] Exh. #

Video and audio exhibits cited in this brief are available on a disc enclosed with the government's supplemental appendix. All the trial exhibits, including those not cited in the parties' briefs, are available to the Court on flash drives provided by the government.

ISSUES PRESENTED

I. Whether the district court abused its discretion by denying Tsarnaev's motions for change of venue based on pretrial publicity.

II. Whether Tsarnaev is entitled to a new trial or evidentiary hearing based on alleged voir dire dishonesty by two jurors.

III. Whether the district court abused its discretion when it dismissed Juror 355 based on his opposition to the death penalty.

IV. Whether the district court abused its discretion by not allowing Tsarnaev to ask prospective jurors (a) whether they could consider a life sentence under the particular facts of this case, and (b) what specific media coverage of this case they had seen.

V. Whether the district court abused its discretion by (a) excluding from the penalty phase evidence that Tsarnaev's older brother may have been involved in an unrelated triple murder in 2011, and (b) denying disclosure of an interview report relating to the murder.

VI. [redacted]

VII. Whether the admission of testimony about the bombing's effect on surviving victims violated the Federal Death Penalty Act.

VIII. Whether Tsarnaev is entitled to a hearing on his claim that video of him buying milk at a Whole Foods was the fruit of his allegedly coerced confession.

IX. Whether (a) the district court reversibly erred by allowing expert testimony that mentioned the Islamic State (ISIS) and whether the government committed misconduct by (b) using a slideshow presentation during closing argument that juxtaposed the audio of an Islamic *nasheed* with pictures of Tsarnaev and the bombing, and (c) using a poster display during the penalty-phase opening of the four homicide victims beside a poster of Tsarnaev raising his middle finger to a security camera in a detention cell.

X. Whether the district court reversibly erred by not instructing the jury that, to recommend a death sentence, the jury must find that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt.

XI. Whether the district court reversibly erred by failing to inform the jury that, if the jury did not unanimously recommend a death sentence, Tsarnaev would be sentenced to life without the possibility of release.

XII. Whether cumulative error justifies reversal of Tsarnaev's death sentences.

XIII. Whether the use of *ex parte* proceedings in which the government sought *in camera* review of its discovery determinations violated Tsarnaev's rights to due process and the assistance of counsel.

XIV. Whether this Court should overrule its precedent applying an absolute-disparity analysis to claims that the grand and petit jury wheels in the District of Massachusetts underrepresented African-Americans.

XV. Whether the district court plainly erred by not holding that the death penalty is unconstitutional for a defendant who was under 21 years old at the time of his offense.

STATEMENT OF THE CASE

A. Procedural History

After 21 days of jury selection and a 17-day guilt phase trial, a jury convicted Tsarnaev on 30 counts: conspiracy to use a weapon of mass destruction resulting in death, in violation of 18 U.S.C. § 2332a(a)(2) (Count 1); two counts of using a weapon of mass destruction resulting in death, in violation of 18 U.S.C. § 2332a(a)(2) (Counts 2 and 4); conspiracy to bomb a place of public use resulting in death, in violation of 18 U.S.C. § 2332f(a)(1), (a)(2), and (c) (Count 6); two counts of bombing a place of public use resulting in death, in violation of 18 U.S.C. § 2332f(a)(1) and (c) (Counts 7 and 9); conspiracy to maliciously destroy property resulting in personal injury and death, in violation of 18 U.S.C. § 844(i) and (n) (Count 11); two counts of malicious destruction of property resulting in personal injury and death, in violation of 18 U.S.C. § 844(i) (Counts 12 and 14); nine counts of possessing and using a firearm during and in relation to a crime of violence resulting in death, in violation of 18 U.S.C. § 924(c) and (j) (Counts 3, 5, 8, 10, 13, 15, 16, 17 and 18); carjacking resulting

in serious bodily injury, in violation of 18 U.S.C. § 2119(2) (Count 19); six counts of possessing and using a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 20, 22, 24, 26, 28, and 30); interference with commerce by threats and violence, in violation of 18 U.S.C. § 1951 (Count 21); and four counts of using a weapon of mass destruction, in violation of 18 U.S.C. § 2332a(a)(2) (Counts 23, 25, 27, and 29). Add.99-102.

After a 12-day penalty phase trial, the jury recommended that Tsarnaev be sentenced to death on Counts 4, 5, 9, 10, 14, and 15, and the district court imposed death sentences on those counts. Add.95-96, 103. The court also sentenced Tsarnaev to concurrent terms of life imprisonment on Counts 1, 2, 6, 7 and 12; concurrent terms of life imprisonment on Counts 11, 23, 25, 27, and 29, to be served consecutively to the other sentences; consecutive terms of life imprisonment on Counts 3, 8, 13, 16, 17, 18, 24, 26, 28, and 30; concurrent terms of 25 years on Count 19 and 20 years on Count 21, to be served consecutively to other sentences; and consecutive terms of seven years on Count 20 and 25 years on Count 22. Add.104.

B. Relevant Facts

On April 15, 2013, Tsarnaev and his brother Tamerlan set off two bombs near the Boston Marathon's finish line, killing three spectators and injuring hundreds. Three days later, after police released pictures of the suspects (whose identity was not yet known), they killed a police officer, carjacked an SUV, and engaged in a lengthy shoot-out with police in a Boston suburb during which Tsarnaev threw bombs at

police officers. Tsarnaev escaped the scene after running over his brother with the stolen SUV. After several communities were on lockdown for most of a day, a homeowner found Tsarnaev hiding in a winterized boat. While in the boat, Tsarnaev wrote a manifesto defending his actions and characterizing his brother as a martyr.

1. While a student at the University of Massachusetts Dartmouth, Tsarnaev quietly adopted a radical Islamic ideology.

Dzhokhar Tsarnaev was born in July 1993 in Kyrgyzstan, and came to the United States with his parents at age eight. 14.App.6198; 17.App.7855; Gov't Exh. 1210 (physical exhibit (passport)). He attended public and charter schools in the Cambridge, Massachusetts area, where he got good grades and related well to his fellow students. *See* 17.App.7912-15, 7919-23, 7929-31, 7945-46; 18.App.8152-53, 8290, 8306-07.

In 2011, Tsarnaev began attending the University of Massachusetts Dartmouth. 17.App.7960-63; 18.App.8148-49; 1.Supp.App.58 (Gov't Exh. 1180E). He did poorly in his classes, failing many of them, and lost his academic scholarship. 14.App.6140-6142; 1.Supp.App.56-58 (Gov't Exhs. 1180C and 1180E) (transcripts and academic progress appeal). He spent his time hanging out with friends, watching TV, playing video games, drinking alcohol, and smoking marijuana. 12.App.5255; 17.App.7963-64, 7980, 7983-84, 7990; 18.App.8098-99, 8105. His friends found him "fun," "laid back," and "goofy." 17.App.7970; 18.App.8106. Although they knew he was a Muslim, he rarely talked about religion or politics. 17.App.7983; 18.App.8107, 8153.

But there was another side of Tsarnaev that his friends did not see. While projecting an image of a laid-back partier, he was reading and watching radical Islamic propaganda. For example, in January 2012, he obtained a PDF copy of the first edition of *Inspire* magazine, an al-Qaeda publication first printed in 2010. 13.App.5652 (provenance of computer), 5663 (access date), 5684-85 (location on the computer), 5906-09 (description of magazine). The magazine included an interview with an al-Qaeda leader who encouraged his "Muslim brothers in the West . . . to acquire weapons and learn methods of war." 13.App.5917. It contained an article entitled "Make a bomb in the kitchen of your Mom," which said, "If you are sincere in your intentions to serve the religion of Allāh, then all [t]hat you have to do is enter your kitchen and make an explosive device that would damage the enemy if you put your trust in Allāh and then use this explosive device properly." 2.Supp.App.210 (Gov't Exh. 1142-091 at 33) (non-English characters omitted). The article gave detailed instructions on how to make bombs out of metal pipes and pressure cookers. 2.Supp.App.211-17 (Gov't Exh. 1142-091 at 34-40).

At the end of the *Inspire* magazine was a message from Anwar al-Awlaki, an American-born imam who was "an extraordinarily effective radicalizer." 13.App.5907. He told "Muslims in the West" that they had "two choices: either *hijra*[2]

[2] "Hijra" in this context means migration to a place where there is a Muslim majority. 13.App.5924.

or jihād. You either leave or you fight. You leave and live among Muslims or you stay behind and fight with your hand, your wealth and your word." 1.Supp.App.45 (Gov't Exh. 1142-091 at 56, 58).

On the day of the 2012 presidential election, Tsarnaev texted a friend that he wanted "the lesser of two evils to win[,] which would be Obama[,] but either way they're shaytan [Satan] ass niggas, puppets of the system, killing Muslims is the only promise they will fulfill." 1.Supp.App.68 (Gov't Exh. 1385); *see* 14.App.6341, 6337 (explaining meaning of "shaytan"). In December 2012, when texting a friend about his future plans, he said, "I wanna bring justice for my people." 1.Supp.App.72 (Gov't Exh. 1387); 14.App.6343.

At the end of January 2013, Tsarnaev texted a friend that he was "tryina finish school" but "[c]ome [M]ay I'm out." 1.Supp.App.74 (Gov't Exh. 1395); 14.App.6344. His friend asked if he was planning to get married, to which Tsarnaev responded, "[W]e'll see. . . . I mean there's 1 other option bro. Highest level of Jannah."[3] 1.Supp.App.74. His friend replied, "Jihad? I really am down for that Jihad life though. I've been thinking about that lately." 1.Supp.App.74. Tsarnaev replied, "Don't be hot over the phone." 1.Supp.App.74. When his friend said that thinking about jihad was "affecting [his] future plans," Tsarnaev said, "I'm with you on this one i[ ] wanna talk to yu in person sometime soon." 1.Supp.App.75.

[3] "Jannah" means "Paradise." 13.App.5934.

In March 2013, Tsarnaev created a twitter account with the username Al_FirdausiA and the display name "Ghuraba."[4] 10.App.4488-90, 4500-01. In his first tweet, he said, "[D]ear Muslim brothers and sisters follow me for some Islamic insight." 1.Supp.App.62 (Gov't Exh. 1266). Over the next few days, he tweeted seven more times. 1.Supp.App.61. He said, for example, "I want the highest levels of Jannah, I want to be able to see Allah every single day for that is the best of pleasures." 1.Supp.App.61. He recommended that his followers "[l]isten to Anwar al Awlaki's . . . the here after series" in order to "gain an unbelievable amount of knowledge." 1.Supp.App.61. Awlaki's "Hereafter Series" includes lectures that serve as an introduction to Islam; although they do not call for jihad, they often serve as a gateway to Awlaki's more radical lectures. 13.App.5908-09; 14.App.5974-75. Tsarnaev's final tweet on this account—one month before the Boston Marathon bombing—said, "It's our responsibility my brothers & sisters to ask Allah to ease the hardships of the oppressed and give us victory over kufr."[5] 1.Supp.App.61.

2. Sometime in late 2012 or early 2013, Tsarnaev and his brother hatched a plot to commit an act of terrorism.

Tsarnaev's parents left the United States and moved to Dagestan in 2012. 17.App.7830. Tsarnaev's older brother Tamerlan also traveled to Dagestan between

[4] "Firdaus" refers to the highest level of paradise in the teaching of Islam. 11.App.4541; 13.App.5937. "Ghuraba" means "stranger." 10.App.4500.

[5] "Kufar" or "kafir" means "infidel" or "non-believer." 12.App.5300; 13.App.5934.

January and July 2012, hoping to participate in jihad, but Tamerlan found that no fighting was actually taking place. 14.App.6250; 15.App.6718; 17.App.7861-64; 1.Supp.App.96-97 (Def. Exh. 1433).

Tsarnaev began his sophomore year at the University of Massachusetts Dartmouth in the fall of 2012, and he was naturalized as a United States citizen on September 11 of that year. Gov't Exh. 1210 (passport); 17.App.7970-71. He failed three of his four classes that semester. 1.Supp.App.58 (Gov't Exh. 1180E). In December, he spent part of his holiday break with Tamerlan in Cambridge. *See* 11.App.4713-15 (cell phone records); 14.App.6343-44; 1.Supp.App.73 (Gov't Exh. 1388) (texting a friend on December 25, "Doing something with Tamerlan").

Sometime in January 2013, Tsarnaev asked to borrow his friend Stephen Silva's Ruger P95 pistol, which had an obliterated serial number. 12.App.5259, 5264, 5267. *See* 1.Supp.App.31 (Gov't Exh. 930) (photo of gun). Tsarnaev told Silva he wanted to use the gun to "rip [rob] some kids." 12.App.5264. Silva loaned him the gun, but never got it back. 12.App.5273. When Silva asked about the gun over the next few months, Tsarnaev "just kept coming up with excuses" and "beating around the bush." 12.App.5273-74.

In late January, three days after Tsarnaev had texted his friend about jihad and two hours after the brothers spoke on the phone, Tamerlan used cash to buy two Fagor pressure cookers at a Macy's department store in Saugus, Massachusetts. 11.App.4693, 4697; 14.App.6261-63, 6269-73; 15.App.6686-87. *See* 1.Supp.App.49,

52, 100-101 (Gov't Exhs. 1152-06, 1159; Def. Exhs. 3002 at 34 (Item 846), 3127). In March 2013, Tamerlan purchased four boxes of BB-gun ammunition, containing 24,000 BBs, from two different Wal-Mart stores. 14.App.6277-79; 15.App.6688-92. *See* 1.Supp.App.50, 54-55, 102 (Gov't Exh. 1152-07, 1161; Def. Exh. 3128). And between February and early April 2013, Tamerlan ordered several transmitters and receivers for radio-controlled cars. 14.App.6280-85.

One or both of the brothers then constructed two pressure cooker bombs. 14.App.6423, 6439, 6443. They lined the bombs on the inside with BBs embedded in sealant (the second bomb also had nails) and filled them with powder from fireworks. 14.App.6301-02, 6308, 6310-11, 6443, 6481. The bombs could be detonated remotely using a radio-controlled car receiver attached to a Christmas tree light bulb. 14.App.6430-34 (bomb #1), 39-42 (bomb #2). The bombs closely followed the pattern in *Inspire* magazine, which showed how to make a bomb by gluing "shrapnel to the inside of the pressurized cooker" and suggested using nails or "spherical shaped" shrapnel. 2.Supp.App.217 (Gov't Exh. 1142-091 at 40); 14.App.6479-80. The magazine showed how to use a Christmas tree light bulb to detonate the bomb, and recommended using a "timed circuit or . . . a remote controlled circuit." 2.Supp.App.212-13 (Gov't Exh. 1142-091 at 35-36); 14.App.6473-76.

On March 20, 2013, during Tsarnaev's spring break, he and Tamerlan went to a gun range in Manchester, New Hampshire. 14.App.6060-67; 17.App.7992. They rented two 9mm handguns and purchased four boxes of 9mm ammunition.

14.App.6064-65. *See* Gov't Exh. 1165 (video of Tsarnaev and Tamerlan leaving range). Tsarnaev and Tamerlan were at the range for about an hour. 14.App.6065. That evening, Tsarnaev tweeted, "Evil triumphs when good men do nothing." 10.App.4498; 1.Supp.App.63 (Gov't Exh. 1307).

3. On April 15, 2013, Tsarnaev and his brother detonated two bombs at the Boston Marathon, killing three people—Krystle Campbell, Lingzi Lu, and Martin Richard—and wounding hundreds.

The Boston Marathon is held every year on Patriots' Day, a school holiday in Massachusetts. 10.App.3990. The day of the 2013 marathon—Monday, April 15—was "beautiful," "sunny but a little chilly." 10.App.4047, 4095, 4139. A "party atmosphere" pervaded the finish line on Boylston Street in downtown Boston, and "everyone was having a great time." 10.App.4046-47. Thousands of spectators gathered to cheer and to take pictures of family and friends running in the marathon. 10.App.4047, 4064-65, 4076, 4078. *See* 1.Supp.App.1-2 (Gov't Exhs. 1, 3) (photos near the finish line).

Krystle Campbell went to the marathon with her co-worker and "fast friend[ ]" Karen Rand, whose boyfriend was running.[6] 10.App.4092-94. The two friends "were being kind of silly and touristy" and had a passerby take their picture. 10.App.4095-

[6] By the time of trial, Rand had married and become Karen McWatters. 10.App.4091-92.

96. *See* 1.Supp.App.7 (Gov't Exh. 15) (photo of Campbell and Rand). They found a spot near the finish line as they waited for Rand's boyfriend to finish. 10.App.4095.

Bill and Denise Richard "made it a ritual" to attend the marathon every year with their children Henry, Martin, and Jane. 10.App.4266. They went to their usual place on the corner of Hereford and Newbury Streets, where Martin (eight years old) and Jane (six), who were "really into watching the runners," could stand on the metal fence lining the course. 10.App.4268-71, 4292, 4295. After a stop for ice cream at Ben and Jerry's, they decided to "try and find a place closer to the finish line." 10.App.4272-73. They found a spot along Boylston Street in front of the Forum restaurant, where Martin and Jane were again able to stand on the railing. 10.App.4273-74; 1.Supp.App.14 (Gov't Exh. 29) (photo of Martin, Jane, and other children on railing with Tsarnaev behind).

Lingzi Lu, a Boston University student from China, was near the finish line with two Chinese friends, including Danling Zhou. 10.App.4340, 4343, 4345-47. The students knew the Boston Marathon was a "big thing," and they wanted to "see how people celebrate [the] marathon." 10.App.4345. They shopped, ate some lunch, and walked along Boylston Street near the Forum restaurant. 10.App.4346-49.

* * *

Around 2:37 p.m., as the race clock neared the four-hour mark, Tsarnaev and Tamerlan approached the finish line along Boylston Street. 10.App.4417; 15.App.6573-74; Gov't Exh. 22 at 00:00-00:20. Most of their movements were

captured by surveillance cameras from nearby businesses. Gov't Exh. 22 at 00:00-2:15 (combined videos). Tsarnaev wore a hooded sweatshirt, a black coat, and a backward white hat. Gov't Exh. 22 at 00:25-00:28; 3:13-3:21. Tamerlan wore a hooded sweatshirt, a black coat, a black hat, and sunglasses. Gov't Exh. 22 at 1:13. Each carried a backpack containing a pressure cooker bomb. Gov't Exh. 22 at 00:20-00:45; 14.App.6423.

Tsarnaev and Tamerlan split up just before reaching the Forum restaurant. 10.App.4436, 4438. Tamerlan walked to a spot near the finish line in front of Marathon Sports. 10.App.4020-21, 4031; Gov't Exh. 22 at 2:20-3:50. *See* 1.Supp.App.3 (Gov't Exh. 6). As he was pushing through the crowd, Tamerlan bumped into Jeffrey Bauman, who was there to watch his girlfriend run. 10.App.4136, 4139-40. Bauman thought Tamerlan looked suspicious. 10.App.4140. He "wasn't . . . watching the race," and "it didn't look like he was having fun like everybody else." 10.App.4140. *See* 10.App.4153-55; 1.Supp.App.81 (Gov't Exh. 1473) (photo of Tamerlan next to Bauman). Bauman later looked behind him and saw an unattended backpack on the ground, but he no longer saw Tamerlan. 10.App.4140-41.

After splitting up with Tamerlan, Tsarnaev waited a few minutes and then followed Tamerlan's path up Boylston Street. Gov't Exh. 22 at 2:17-35. He stopped in front of the Forum restaurant. Gov't Exh. 22 at 3:29-3:50. He slipped off his backpack and placed it on the ground near a tree a few feet from where Martin and

Jane Richard and other children stood along the metal railing lining the race course. 10.App.4422-23; 16.App.7418; Gov't Exh. 22 at 3:40-3:50; 1.Supp.App.14 (Gov't Exh. 29) (photo showing Tsarnaev and his backpack behind Martin and Jane). Tsarnaev watched the runners for several minutes, and then made a 19-second telephone call to Tamerlan. 10.App.4424-25; Gov't Exh. 22 at 3:45-7:30 (video of Tsarnaev watching runners and making call).

About 20 seconds after Tsarnaev hung up, an explosion rocked the crowd in front of Marathon Sports. Gov't Exh. 5 at 00:00-00:34; Gov't Exh. 22 at 7:20-7:45. The spectators in front of the Forum restaurant all turned and looked toward the finish line. Gov't Exh. 22 at 7:43. Tsarnaev glanced that way briefly, then began quickly edging away from the finish line, leaving his backpack on the ground. Gov't Exh. 22 at 7:43-7:54. About 12 seconds after the first blast, Tsarnaev gave one last look back toward his backpack. Gov't Exh. 22 at 7:54; 10.App.4251. Then it exploded. Gov't Exh. 22 at 7:54-7:55 (video from Forum restaurant); Gov't Exh. 5 at 00:22-00:28 (video from near finish line).

* * *

When the first bomb exploded, instantly "[i]t was chaos. It was confusion, screaming, yelling, smoke." 10.App.4099. *See* Gov't Exh. 5 (video of both bomb blasts from a distance). There was "blood everywhere," 10.App.4127, and the ground was covered with "chunks of metal," BBs, nails, "shards . . . of glass," and "body parts." 10.App.4051-52, 4066. *See* 1.Supp.App.4-6 (Gov't Exhs. 8, 9, 12) (photos

after the blast). The air smelled of "smoke . . . , blood, [and] flesh. Just acrid, disgusting." 10.App.4051. The wounded screamed in pain and called out things like, "Help us or we're going to die," and "Stay with me, stay with me." 10.App.4037, 4102, 4313; 16.App.7133, 7182. *See* Gov't Exhs. 11b, 11c, 14 (close-up post-blast videos). A five-year-old whose leg was cut to the bone called out, "'Mommy,' 'Mommy,' 'Mommy,' over and over and over again." 10.App.4065, 4067, 4070. Sirens and fire alarms added to the chaos. 10.App.4037-38, 4234; Gov't Exh. 14 (video). Some uninjured bystanders "were running away" while others "jumped in" and "tried to help." 10.App.4127. *See* 10.App.4143-44. Police officers and volunteers called out directions and used belts and clothing to apply tourniquets to injured limbs. 10.App.4036, 4055, 4143; 16.App.7135; Gov't Exhs. 11C, 14 (videos).

The scene of the second blast was similarly "brutal." 10.App.4261. "[I]t . . . looked like people had just been dropped like puzzle pieces onto the sidewalk . . . ." 10.App.4385. *See* 1.Supp.App.11, 16-17 (Gov't Exhs. 24, 32, 34) (photos after the blast); Gov't Exhs. 36, 41 (videos after the blast). Blood and "body parts" were "littered on the sidewalk," and there was an "overwhelming" smell of "burning tissue and blood." 10.App.4384-85, 4389. A doctor helping the injured noticed "a severed foot . . . on the curb." 10.App.4385. A police officer accidentally stepped on a severed leg. 10.App.4261-62. People screamed. 10.App.4316; 16.App.7274, 7352; Gov't Exh. 1634C (post-blast video with sound added). A three-year-old with a head injury yelled, "Mommy, daddy, mommy, daddy." 16.App.7425, 7430. Police officers,

medical professionals, and other volunteers "jump[ed] in" to help the wounded by applying tourniquets and trying to get them to ambulances. 10.App.4233, 4255-57, 4264, 4373-76; 16.App.7278, 7370-71.

* * *

After the first bomb exploded, Karen Rand found herself lying on the ground. 10.App.4100. She knew something was wrong with her leg, but she dragged herself over to Krystle Campbell, burning her hands on hot pieces of metal in the process. 10.App.4100-01. Rand and Campbell put their faces together and held hands. 10.App.4101. A police officer began chest compressions on Campbell, who "appeared to be in a lot of pain." 10.App.4131. From her waist down, it was "complete mutilation." 10.App.4133. *See* 1.Supp.App.9 (Gov't Exh. 17) (photo showing Campbell and Rand lying together after the blast); 2.Supp.App.201 (Gov't Exh. 655) (autopsy photo). Campbell "very slowly" told Rand that her "legs hurt." 10.App.4101. "And shortly after that her hand went limp in [Rand's], and she never spoke again after that." 10.App.4101. Campbell bled to death on the sidewalk. 14.App.6535.

Jeffrey Bauman had just turned back to the race after noticing the abandoned backpack when the first bomb exploded. 10.App.4141. He "saw a flash," heard "three pops," and "was on the ground." 10.App.4141. His "ears were ringing and everything was muffled." 10.App.4141-42. When he looked at his legs, "it was just . . . pure carnage." 10.App.4142. His right knee was gone, and he "didn't have any

leg beyond" his left fibula, which was exposed. 10.App.4144-45. *See* 1.Supp.App.10 (Gov't Exh. 20) (photo of Bauman after the blast). There was "a little stream of blood shooting out from underneath" that leg, so Bauman "grabbed [his] left leg and squeezed it and . . . didn't let go until [he] was . . . into the ambulance." 10.App.4144.

Lingzi Lu and Danling Zhou were in front of the Forum restaurant when the second bomb exploded. 10.App.4350-52. Zhou found herself lying on a fence with "smoke everywhere" and "blood . . . all over the ground." 10.App.4354. A man in front of her turned toward her and yelled, and she saw his legs were "not there anymore." 10.App.4355. Zhou herself had been cut across the stomach and had to hold her insides in. 10.App.4262, 4356-58. She saw that Lu still had her arms and legs, but was injured in her thigh. 10.App.4356.

A doctor who happened to be watching the marathon saw that Lu's right leg "had a very deep, long laceration." 10.App.4385. "[B]asically her leg had been filleted open down to the bone." 10.App.4385. *See* 2.Supp.App.202-04 (Gov't Exhs. 662, 667, 668) (autopsy photos). The doctor tried to tourniquet Lu's leg, but "a lot of her blood was now on the sidewalk" and "there really wasn't much of a pulse left." 10.App.4386. When Lu started agonal breathing, the doctor "realized she was dying," but asked one of the people at Lu's head to start CPR "realizing that that was not going to save her but . . . hoping I was wrong." 10.App.4386-87.

As a firefighter pumped air into Lu's mouth with a mask, a Boston Police officer did chest compressions. 10.App.4221-22. The officer had noticed Lu's name

on her school identification card, so she kept saying, "Lingzi, stay with us. You can do this. You're going to be okay. Stay strong." 10.App.4222. The officer and others put Lu on a backboard and placed her in the back of a nearby ambulance. 10.App.4223. But a paramedic told them to "take her off because she was gone and he needed to keep the ambulance available for people who they could save." 10.App.4223.

* * *

The second explosion blew Bill Richard into the street. 10.App.4279. He got back up and, after getting his bearings, returned to his wife and children on the sidewalk. 10.App.4279, 4281; 1.Supp.App.11 (Gov't Exh. 24) (photo); Gov't Exh. 23 at 06:52-7:10 (video). Denise was leaning over her little boy Martin, pleading with him to stay alive. 10.App.4283; 16.App.7448. Bill found their other son Henry, who helped him find six-year-old Jane. 10.App.4281. Jane tried to get up, but she fell because her left leg had been blown off. 10.App.4284-85, 4371-73; Gov't Exhs. 23 at 07:01-07:07 (video of Jane falling after trying to stand), 39, 40 (photos of Jane after the blast). Bill picked Jane up and took her and Henry into the middle of Boylston Street, where an off-duty firefighter ran up and used a belt to form a tourniquet around Jane's leg. 10.App.4284-85, 4371-73; Gov't Exh. 41 (video from across the street); Gov't Exh. 23 at 07:43-08:07 (video from Forum restaurant). Bill briefly returned to Denise and Martin, but when he saw Martin's condition he "knew that he wasn't going to make it." 10.App.4286.

Martin did not make it. The bomb had sent nails, pellets, and a piece of the pressure cooker tearing through his body. 15.App.6622-26, 6637. *See* 1.Supp.App.20-23 (Gov't Exhs. 648, 649, 650, 651) (photos of debris from Martin's body); 2.Supp.App.109-200 (Gov't Exhs. 638, 639) (autopsy photos). His abdomen had a two- by four-inch laceration; his spinal cord, liver, pancreas, large intestine, and abdominal aorta were all cut; two of his ribs were broken; and his left forearm was almost completely severed, with only "soft tissue approximately an inch wide . . . connecting the two pieces of the forearm together." 15.App.6619-21, 6623. *See* 2.Supp.App.200 (Gov't Exh. 639) (autopsy photo). Martin moved his arms a few times in the minute or so after the blast, 16.App.7448-50; Gov't Exh. 1634d at 00:22-01:15 (video highlighting Martin after the blast), but he bled to death on the sidewalk. 10.App.4389; 16.App.7403.

* * *

In addition to killing Krystle Campbell, Lingzi Lu, and Martin Richard, the bombs caused devastating injuries to dozens of others. For example, the first bomb blew newlyweds Jessica Kensky and Patrick Downes through the air "like [they were] on a rocket." 10.App.4313. Downes's "foot and part of his leg w[ere] completely detached, hanging on . . . by a thin thread." 10.App.4313. As Kensky, a nurse, tried to use her purse straps as a tourniquet, a bystander told her, "Ma'am, you're on fire," and pushed her down to the ground to put out the flames, which extended from her "shoulder blades all the way down [her] pants." 10.App.4314, 4323. Kensky's own

legs were severely damaged, and doctors amputated her left leg later that day. 10.App.4320. They initially tried to save her right leg, even though the bomb had blown off her entire Achilles tendon and half of her heel bone, 10.App.4320, 4323, but that leg had to be amputated in 2015, 10.App.4307-08. Kensky's burns, which covered much of her lower body, had to be dressed regularly, causing "[a]bsolutely horrendous" pain. 10.App.4324. Downes lost his left leg below the knee, and the dirt from the bomb caused a serious infection. 10.App.4322-23.

Nine people lost one or both of their legs as a result of the first bomb—Jeff Bauman (both legs), Karen Rand, Jessica Kensky (both legs), Patrick Downes, Celeste Corcoran (both legs), Mery Daniel, Erika Brannock, Rebekah Gregory, and Bill White. 10.App.4063-64, 4107-08, 4148, 4307-08, 4322; 16.App.7109, 7115, 7186, 7375, 7377. Eight people lost a leg as a result of the second bomb—Jane Richard, Adrianne Haslet-Davis, Marc Fucarile, J.P. Norden, Paul Norden, Heather Abbott, Stephen Woolfenden, and Roseann Sdoia. 10.App.4235-36, 4292; 16.App.7282, 7353-7354, 7362, 7373, 7435. A number of people had their feet or legs blown off entirely on Boylston Street, while others had to have their legs amputated because they were so severely mangled. *See* 10.App.4144-45, 4308, 4325-26, 4371-73, 4387-88; 16.App.7372-73. *See* 1.Supp.App.12-13 (Gov't Exhs. 25, 26) (photos of Roseann Sdoia's leg); 1.Supp.App.19 (Gov't Exh. 40) (photo of Jane Richard's leg), 23 at 14:40-14:50 (video showing Fucarile's leg). Marc Fucarile actually handed his severed leg to

a firefighter who arrived on the scene. 16.App.7355. In addition, about 90 percent of Fucarile's body from the waist down was burned. 16.App.7354.

The bombs caused serious injuries to many others. The first bomb blew a hole through 17-year-old Sydney Corcoran's foot and severed her femoral artery. 10.App.4078, 4081, 4090. She almost bled to death on the street. 10.App.4081. Eighteen-year-old Gillian Reny's right tibia was "completely snapped in half and was sticking out of [her] leg[ ]," and the muscle on her left leg was "flapping over . . . [her] shredded jeans," but doctors managed to save both legs. 16.App.7129, 7132, 7134, 7141-7142. Nicole Gross's right quadriceps muscles were blown open, the tibia and fibula in her left leg were broken, and her right Achilles tendon was three-quarters severed. 16.App.7181, 7185. Rebekah Gregory's five-year-old son Noah "had a cut to [the] bone on his right leg." 10.App.4044, 4070.

A piece of metal from the second bomb lodged in Denise Richard's eye, blinding that eye. 10.App.4292, 4294. Eleven-year-old Aaron Hern, who had been standing next to Jane Richard, had injuries on both legs that required 62 staples to close up. 10.App.4184, 4186-87, 4190, 4199-4200; 1.Supp.App.14 (Gov't Exh. 29) (photo of Aaron next to Jane). Three-year-old Leo Woolfenden had a fractured skull, a perforated eardrum, and a laceration on the side of his head. 16.App.7425, 7436. *See* 1.Supp.App.15 (Gov't Exh. 30) (photo of Leo after the blast). Ann Whalley's "heel was blown off," and she had "significant chunks of shrapnel" in her thigh, both wrists, and her mouth. 16.App.7251-52. Her husband Eric was blinded in his right

eye by a ball bearing that passed through the eye and into his brain. 16.App.7253. Doctors managed to save Eric's right leg by reconstructing the bones and transplanting blood vessels from the left leg, but he could not walk for about 16 months. 16.App.7260-61, 7265.

All told, the bombs injured more than 240 people. 10.App.4464. The scene of the bombing was close to several hospitals, and emergency personnel and private citizens were able to quickly transport many of the wounded to triage centers. 10.App.4234, 4448-49, 4452-53. The ready availability of critical medical care likely prevented the death toll from being much higher. *See* 10.App.4081; 16.App.7279.

Many of the bombing survivors had to undergo multiple surgeries as a result of their injuries. *See, e.g.*, 10.App.4069 (Rebekah Gregory—18 surgeries), 4323 (Patrick Downes—about 15 surgeries), 4324 (Jessica Kensky—15 to 20 surgeries); 16.App.7109 (Celeste Corcoran—three surgeries), 7185 (Nicole Gross—ten or 11 surgeries), 7186 (Erika Brannock—more than 20 surgeries), 7255-56 (Eric Whalley—20 to 25 surgeries), 7256 (Ann Whalley—15 to 20 surgeries), 7362 (Marc Fucarile—more than 60 surgeries), 7373 (Heather Abbott—five surgeries).

The survivors have dealt with lasting effects from their injuries. For example, many victims experienced ruptured eardrums that led to permanent hearing loss or tinnitus (ringing in the ears). 10.App.4051 (Colton Kilgore), 4070 (Rebekah Gregory), 4152 (Jeffrey Bauman), 4198 (Aaron Hern), 4313, 4324-25 (Kensky and Downes), 4363 (Danling Zhou); 16.App.7110-11 (Celeste Corcoran), 7185 (Nicole Gross), 7266

(Eric Whalley), 7282 (Adam Davis), 7355 (Marc Fucarile), 7373 (Heather Abbott), 7436 (Leo Woolfenden), 7437 (Stephen Woolfenden). Some of the amputees experienced phantom pain years afterward. Roseann Sdoia sometimes felt as though she was being tased in her amputated right foot. 10.App.4237. Patrick Downes and Jessica Kensky experienced phantom pain that kept them up at night and that felt like "electric pulses and shocks that just come over you randomly." 10.App.4321, 4327.

Two years after the bombing, many survivors still had metal or debris in their bodies that could not be removed. Jessica Kensky had about 30 or 40 BBs "pretty deep" in her legs. 10.App.4320. Rebekah Gregory had shrapnel in her body that occasionally would work its way to the surface and have to be removed. 10.App.4070. Marc Fucarile had plastic, dozens of BBs, and a small nail in his body, as well as a BB stuck in his heart. 16.App.7359-61; 1.Supp.App.92-94 (Gov't Exhs. 1608 to 1610) (x-rays of Fucarile showing shrapnel). In addition to shrapnel in his legs, Eric Whalley had a ball bearing lodged in his brain. 16.App.7253, 7267. *See* 1.Supp.App.89 (Gov't Exh. 1593) (demonstrative exhibit) (x-ray of Whalley's brain).

4. After the bombing, Tsarnaev returned to college and acted as if nothing happened.

After the bombs exploded, Tsarnaev and Tamerlan left Boylston Street along parallel routes, then met up and drove to Cambridge. 10.App.4418; 11.App.4703-05. At 3:12 p.m.—less than 25 minutes after the bombing—they stopped at a Whole Foods in Cambridge. 10.App.4469-70; 11.App.4703-05. Tsarnaev entered the store

and purchased a half gallon of milk using cash. 10.App.4471-72; Gov't Exh. 1456 at 00:08-01:05 (Whole Foods surveillance video). A minute after he left the store, he returned and exchanged the jug of milk for a different one. Gov't Exh. 1456 at 01:58-3:40.

About six hours after the bombing, Tsarnaev tweeted, "Ain't no love in the heart of the city, stay safe, people." 10.App.4493; 1.Supp.App.64 (Gov't Exh. 1313) (screenshot). That same evening, he tagged someone's twitter account and wrote: "and they what 'god hates dead people?' Or victims of tragedies? Lol [laugh out loud] those people are cooked." 10.App.4493; 1.Aupp.App.75 (Gov't Exh. 1314) (screenshot).

The day after the bombing, when someone posted a false news story about the bombing on Twitter, Tsarnaev wrote, "fake story." 10.App.4494-95; 1.Supp.App.99 (Def. Exh. 3000 at 1). That afternoon, he opened up *Inspire* magazine (the issue that showed how to build bombs) on his computer. 1.Supp.App.39 (Gov't Exh. 1142-013 at 5). *See* 13.App.5671-73, 5772. At about 9:00 p.m. that evening, he and a friend went to the fitness center at the University of Massachusetts Dartmouth and worked out for an hour. 10.App.4476, 4480-82. As he entered and left the fitness center, he chatted with his friend. Gov't Exhs. 1181 to 1183 (video of Tsarnaev entering and leaving gym). At 10:43 p.m. that night, he tweeted, "I'm a stress free kind of guy." 10.App.4496; 1.Supp.App.66 (Gov't Exh. 1320) (screenshot).

5. After authorities released their pictures, Tsarnaev and his brother killed Sean Collier, a Massachusetts Institute of Technology policeman, in an attempt to steal his gun.

Immediately after the bombing, the FBI and other law enforcement agencies began gathering video from security cameras near the blasts and along possible escape routes, as well as photographs and videos from bystanders' cameras and phones. 10.App.4158-63, 4401-03, 4405. After Jeff Bauman woke up from surgery on April 16, he wrote out a description of the suspicious man he had seen, including his build, black hat, black jacket, hoodie, backpack, and aviator sunglasses. 10.App.4148-50. From videos and photographs, the FBI eventually pinpointed two suspects (later identified as Tsarnaev and Tamerlan) whom they referred to as "white hat" and "black hat." 10.App.4406.

At 5:00 p.m. on Thursday, April 18, the FBI held a press conference during which they released surveillance-camera images of the bombing suspects and asked the public to help identify them. 11.App.4753-57. *See* 1.Supp.App.84 (Gov't Exh. 1510) (television screenshot from press conference). A few hours later, Tsarnaev's friend Dias Kadyrbayev texted him and asked, "u saw the news?" 13.App.5752; 1.Supp.App.51 (Gov't Exh. 1153). Tsarnaev responded, "Yea bro I did . . . I saw the news." 1.Supp.App.51. He told Kadyrbayev, "Better not text me my friend . . . Lol."

1.Supp.App.51. He added, "If yu want yu can go to my room and take what's there :) . . . ."[7] 1.Supp.App.51.

At about 10:20 p.m. that night, Officer Sean Collier of the Massachusetts Institute of Technology (MIT) Police Department was parked in his patrol car next to MIT's Koch Building. 11.App.4795, 4797-98. Collier, 27, had been an MIT police officer for just over a year and was well-liked by his fellow officers. 11.App.4768; 16.App.7212, 7238-39. Tsarnaev and Tamerlan approached Collier's car from the rear and shot him with the Ruger P95 that Tsarnaev had acquired from Silva. 11.App.4827-29, 4840-42; Gov't Exhs. 723 & 724 (surveillance videos); 14.App.6039-43, 6047 (ballistic evidence). They shot him at very close range—twice in the side of the head, once between the eyes, and three times in the hand. 11.App.4884-86, 4894-99, 4903-08. *See* 2.Supp.App.205-07 (Gov't Exhs. 727, 728, 729) (autopsy photos). The brothers tried to take Collier's pistol but were thwarted by his holster's retention system. 11.App.4771-73, 4808-10. While they were struggling with the holster, an MIT student rode past on his bicycle and saw Tsarnaev stand up startled from where he was leaning into the patrol car. 11.App.4837, 4840-44. After about forty seconds,

[7] Kadyrbayev did go to Tsarnaev's room, along with two friends. They found a backpack containing fireworks from which some of the powder had been removed, and they threw the backpack and its contents into a dumpster. 14.App.6301-11, 6314-15. *See United States v. Kadyrbayev*, No. 1:13-CR-10238, Doc. 380-1 at 3-5 (D. Mass. Aug. 21, 2014). They also took Tsarnaev's computer back to their apartment. 13.App.5609-10, 5652, 5679-82. Investigators later located the backpack by digging through the landfill where the dumpster's contents had been taken. 14.App.6302-08. *See* 1.Supp.App.59-60 (Gov't Exhs. 1256-01 and 1256-04) (photos).

Tsarnaev and Tamerlan ran away from the patrol car, but then slowed to a walk and returned to where their Honda Civic was parked. 11.App.4854-63; Gov't Exh. 723 (surveillance video).

Someone in the Koch Building called 911 to report loud noises, and MIT's dispatch officer was unable to contact Collier on the radio. 11.App.4783-85; Gov't Exh. 679 (911 audio recording). Another officer arrived about five minutes after the shooting and found Collier with blood all over his body. 11.App.4800-02. Collier still had a slight pulse and made a gurgling sound, so officers began CPR. 11.App.4802, 4805, 4817. But Collier was dead. 11.App.4902.

6. Tsarnaev and his brother carjacked a sport utility vehicle and kidnapped the owner at gunpoint.

A short time after Collier's murder, a graduate student named Dun Meng pulled to the curb along Brighton Avenue in Boston to respond to a text message. 11.App.4938-39. A sedan "pull[ed] over to the curb very quickly" behind him, and Tamerlan got out of the passenger side and knocked on Meng's passenger window. 11.App.4940-41, 4954. When Meng rolled down the window, Tamerlan reached in, opened the door, and jumped inside. 11.App.4941. He pointed a gun at Meng's head and demanded cash. 11.App.4941. Meng gave Tamerlan his cash (about $40 or $45) as well as his wallet and told Tamerlan his bank card PIN. 11.App.4941, 4948.

Tamerlan showed Meng that his pistol was loaded and said, "You know I'm serious, so don't be stupid." 11.App.4943. He asked Meng, "Do you know the

Boston Marathon explosion?" 11.App.4943. Meng said he did. 11.App.4943. Tamerlan said, "I did it, and I just killed a policeman in Cambridge." 11.App.4943. Tamerlan ordered Meng to drive and directed him where to go. 11.App.4944-45. They engaged in small talk, during which Tamerlan said he was a Muslim and that "Muslims hate Americans." 11.App.4946.

Tamerlan ordered Meng to pull over on Dexter Street in Watertown, and Tsarnaev pulled up behind them in the sedan. 11.App.4950, 4953-54. Tsarnaev and Tamerlan loaded some things into Meng's Mercedes SUV, and Tamerlan made Meng switch to the passenger seat. 11.App.4950-54. Tsarnaev then got into the back seat, and Tamerlan drove them to a Bank of America. 11.App.4954-55, 4959. There, Tsarnaev got out of the car and, after asking Meng for his PIN, withdrew $800 from the ATM with Meng's bank card. 11.App.4954-55, 5004; 1.Supp.App.24 (Gov't Exh. 768) (ATM records); Gov't Exh. 756 (video of Tsarnaev using ATM). Tsarnaev tried to withdraw another $800 but could not do so because of the daily withdrawal limit. 11.App.5005.

After Tsarnaev returned with the cash, Tamerlan continued driving toward Waltham, Massachusetts. 11.App.4959. Tamerlan asked Meng how far his car could go on a quarter of a tank of gas and (because it was leased) whether it could "go out of state, like to New York." 11.App.4937, 4959-60. Tamerlan also asked whether it had a GPS in it, and Meng told him (falsely) that it did not. 11.App.4960-61.

When one of Meng's roommates called to check on him, Tamerlan pointed the gun at Meng and said, "You have to answer the phone, but if you say a[ ] single word in Chinese, I will kill you right now." 11.App.4968-69. At Tamerlan's direction, Meng told his roommate (in English) that he was "very sick" and was "going to stay at [his] friend's home." 11.App.4970.

At one point, Tamerlan drove back to where Tsarnaev's sedan was parked, and Tsarnaev quickly retrieved a CD. 11.App.4963-64. He later played the CD in Meng's Mercedes, and the music sounded a "bit weird" and "religious" to Meng. 11.App.4964. The CD contained a number of nasheeds—a type of Islamic chant. 13.App.5678, 5715-16; Gov't Exh. 1148 (audio files from CD).

At about 12:15 a.m., Tamerlan stopped at a Shell gas station on Memorial Drive in Cambridge. 11.App.4921-22, 4971-72. Tsarnaev tried to purchase gas at the pump with Meng's credit card, but the station only accepted cash. 11.App.4972. Tamerlan told Tsarnaev to put in $50 worth of gas, so Tsarnaev went into the station's store. 11.App.4972.

While Tsarnaev was in the store, Tamerlan was focused on his Garmin GPS device, and the Ruger P95 was in the driver's door pocket. 11.App.4972-74. Tamerlan had earlier told Meng he would not kill him but might "drop you off at someplace" where "you have to walk about five or six miles" to find anyone. 11.App.4974. Meng was unsure whether to trust Tamerlan on this point, and both brothers claimed to have guns. 11.App.4956, 4975. Meng decided to make a break

for it while only Tamerlan was in the car and the doors were unlocked. 11.App.4973-75. He unbuckled his seat-belt, opened the door, and jumped out. 11.App.4975. As he did so, Tamerlan yelled "Fuck" and grabbed at him. 11.App.4975. Meng ran to the Mobil gas station across the street and frantically asked the attendant to call 911. 11.App.4975-76, 4981; Gov't Exh. 752 at 00:01-00:38 (surveillance video of Meng's escape and request). Meng then crawled into a back room, where he hid until the police arrived. 11.App.4976-77; Gov't Exh. 752 at 00:40-04:05:29 (video).

Meanwhile, Tsarnaev had been inside the Shell station casually selecting some drinks and snacks. Gov't Exh. 748 at 00:33-2:50 (video of Tsarnaev inside store). After Meng's escape, Tamerlan ran to the door of the Shell store and called to Tsarnaev, who dumped his snacks on the counter and ran out. Gov't Exh. 748 at 2:30-2:51. The two then drove off in Meng's Mercedes. Gov't Exh. 748 at 2:51-3:04.

7. Police tracked Tsarnaev and his brother to a residential street in Watertown, where they engaged in a gun battle with police and detonated several improvised bombs.

When police arrived at the Mobil station, Meng told them that the carjackers were the Boston Marathon bombers and that his Mercedes had a built-in tracking system called Mbrace. 11.App.4984-86, 5016. A Cambridge police dispatcher contacted Mbrace and learned that Meng's Mercedes was near 87 Dexter Avenue in Watertown. 11.App.5023. The dispatcher radioed out this location. 11.App.5023-24.

Officer Joseph Reynolds of the Watertown Police Department was on Arsenal Street about 100 yards from Dexter Avenue when the dispatch went out.

12.App.5036-37. He turned onto Dexter, where he passed a green Honda Civic and a black Mercedes SUV driving slowly in the other direction. 12.App.5037-38. The SUV's license plate matched that of the carjacked vehicle, so he turned around and began following the SUV, notifying dispatch as he did so. 12.App.5037-39. His supervisor, Sergeant John MacLellan, radioed Reynolds not to stop the SUV until he had backup. 12.App.5039, 5066-67.

Reynolds followed the Honda and Mercedes as they sped up and turned left onto Laurel Street. 12.App.5040. Sergeant MacLellan was approaching Laurel from the other direction, so he radioed that Reynolds could "light them up." 12.App.5067. But before Reynolds could turn on his lights, the two cars stopped in the middle of Laurel Street and Tamerlan, who was driving the Mercedes, got out and started shooting at Reynolds's police cruiser. 12.App.5040. Reynolds ducked down, threw his car in reverse, and backed up about 30 yards, notifying dispatch that there were "[s]hots fired." 12.App.5041, 5072. *See* Gov't Exh. 1564 (demonstrative exhibit) (audio of a later radio transmission). Then, using his driver's door as cover, he began shooting back at Tamerlan, who ducked behind the Mercedes's door. 12.App.5041.

Sergeant MacLellan pulled his Ford Expedition alongside Officer Reynolds's cruiser, getting a bullet through his windshield as he did so. 12.App.5042, 5073. *See* 1.Supp.App.34 (Gov't Exh. 948-174) (photo of bullet hole). MacLellan left his Expedition in drive so it would continue rolling toward the Tsarnaevs. 12.App.5042, 5073-74. *See* 1.Supp.App.25 (Gov't Exh. 775) (diagram of Laurel Street showing

position of police cars). As it rolled, both McLellan and Reynolds used it for cover, "continuing to fire at the two suspects," who were now in front of the Mercedes's hood. 12.App.5043, 5074. MacLellan and Reynolds ran into a side yard on Laurel Street and ducked behind a tree. 12.App.5043-44, 5145. Reynolds could see two men, but he could not distinguish who was shooting. 12.App.5044. *See* 1.Supp.App.85-87 (Gov't Exhs. 1522 to 1524) (photos of Tsarnaev and Tamerlan ducking behind Mercedes during gunfight). In addition to muzzle flashes, he saw a cigarette lighter and something that looked like a wick burning. 12.App.5044. Then one of the brothers threw a pipe bomb at the officers, which exploded in the middle of Laurel Street. 12.App.5044, 5076. After this explosion, Reynolds ran back to get more cover behind the houses. 12.App.5044.

The Tsarnaev brothers threw a few more pipe bombs, two of which exploded. 12.App.5045, 5090, 5150. Then Tsarnaev threw a "larger-type bomb" that looked "almost like a big cooking pot."[8] 12.App.5045-46, 5077-78, 5151, 5157. *See* 1.Supp.App.32-33 (Gov't Exhs. 948-10, 948-11) (showing portion of pressure-cooker bomb embedded in a car parked on Laurel Street). The noise of this bomb was "incredible." 12.App.5078. It "shook [Reynolds] to [his] knees" and made his ears

[8] Two witnesses agreed that it was Tsarnaev who threw the pressure-cooker bomb. 12.App.5077-78, 5151, 5157. Sergeant MacLellan could tell Tamerlan and Tsarnaev apart by both their size and their throwing styles since Tsarnaev threw the bombs with "a hook shot, over the head." 12.App.5077. Tsarnaev also threw at least one of the pipe bombs. 12.App.5078.

ring. 12.App.5046. MacLellan re-holstered his pistol because his "eyes were shaking violently in [his] head" and he "couldn't see straight." 12.App.5078, 5104. Car alarms went off all along the street, and there was a huge cloud of smoke. 12.App.5046, 5079. Debris rained down on Reynolds and MacLellan. 12.App.5046-47, 5079. Reynolds ran around the house at the corner of Laurel and Dexter and returned to his cruiser. 12.App.5047.

Officer Miguel Colon and Sergeant Jeffrey Pugliese had arrived on the scene, and Pugliese decided to run behind the houses along Laurel Street to flank the Tsarnaevs. 12.App.5049-50, 5121-23. Pugliese got slightly behind and to the side of the brothers and began shooting at Tamerlan. 12.App.5124-26; 1.Supp.App.85 (Gov't Exh. 1522) (photo of Tsarnaev brothers on Laurel Street). Tamerlan left the front of the SUV and charged Pugliese, shooting as he ran. 12.App.5050-51, 5126-27. Tamerlan got within six or eight feet of Pugliese but had a problem with his gun—either "it jammed or he ran out of ammunition"—so he threw the gun at Pugliese, hitting him in the left bicep.[9] 12.App.5128-29. Tamerlan turned and started running toward Officers Reynolds and Colon, who were near Reynolds's cruiser at the corner of Dexter and Laurel. 12.App.5050-51, 5129. *See* 1.Supp.App.25 (Gov't Exh. 775) (diagram). Pugliese holstered his gun and chased Tamerlan. 12.App.5129.

[9] This was the same Ruger P95 that Tsarnaev had acquired from Silva. 12.App.5267-69; 14.App.6029-30. The Tsarnaevs fired 56 shots from the Ruger on Laurel Street that night. 14.App.6037.

Sergeant MacLellan had his (now-empty) pistol trained on Tamerlan and ordered him to get on the ground. 12.App.5090. Tamerlan ignored that command, and Sergeant Pugliese tackled him from behind. 12.App.5051, 5090, 5130. Reynolds, Pugliese, and MacLellan tried to subdue Tamerlan and to handcuff him, but, although he was bleeding from several wounds, they "just weren't able to control him." 12.App.5051-52, 5130.

While the officers wrestled with Tamerlan, Tsarnaev got back into the Mercedes. 12.App.5152. Tsarnaev did a three-point turn and "floored" the SUV right toward the officers, even though there was room on the street to avoid them. 12.App.5052, 5091, 5097-98, 5133, 5137-38, 5152, 5167. *See* 1.Supp.App.88 (Gov't Exh. 1525) (photo of Tsarnaev driving toward the officers). Reynolds yelled a warning, drew his gun, and shot at Tsarnaev. 12.App.5052, 5131. Although Reynolds's shots hit the windshield, Tsarnaev did not stop. 12.App.5052. Sergeant Pugliese grabbed Tamerlan by the back of the belt and "tr[ied] to drag him out of the street to prevent him from getting struck." 12.App.5134. He was only able to drag Tamerlan about a foot before the Mercedes was "right in [Pugliese's] face." 12.App.5134. Pugliese rolled out of the way in the nick of time. 12.App.5134-36. Tsarnaev ran the Mercedes over Tamerlan, who "kind of bounced up and underneath the undercarriage a couple of times" and "got hung up in the rear wheels." 12.App.5053, 5092, 5134-36. The Mercedes dragged Tamerlan for 25 or 30 feet before striking Officer Reynolds's cruiser and dislodging Tamerlan. 12.App.5092,

5134. Tsarnaev freed the Mercedes from Reynolds' car and sped away. 12.App.5053-55, 5092, 5136.

Sergeant Pugliese and Officer Reynolds managed to handcuff Tamerlan, who was still resisting despite his injuries. 12.App.5055-56, 5136. Paramedics transported Tamerlan to Beth Israel Deaconess Medical Center, where he died. 10.App.3969; 17.App.7892-96.

Paramedics also transported another responding officer, Massachusetts Bay Transportation Authority Officer Richard Donohue, who had been hit in the groin by a stray bullet. 12.App.5056-59, 5171-72. Donohue "bled out almost his entire blood volume on the street" and was "essentially dead" when he arrived at the hospital—not breathing and without a heartbeat. 12.App.5172. Doctors managed to restart his heart and stop the bleeding from his injury, but not until Donohue had received 28 pints of blood. 12.App.5173-75. Donohue recovered only after months in the hospital. 12.App.5175-76.

8. Tsarnaev hid for 18 hours in a shrink-wrapped boat, where he wrote a jihadist justification of the attacks.

Tsarnaev abandoned the Mercedes on Spruce Street about two blocks from the shootout. 12.App.5182. He then fled on foot for a short distance before smashing his cell phones and hiding them (along with Dun Meng's debit card) behind a shed on Franklin Street. 12.App.5344-45, 5349-52; 13.App.5728-33. *See* 1.Supp.App.80 (Gov't Exh. 1455) (map showing relative locations of Laurel, Spruce, and Franklin

Streets); 1.Supp.App.27 (Gov't Exh. 810) (photo of smashed phones and debit card). He then climbed into a shrink-wrapped boat near the shed. 12.App.5191, 5223-25. *See* 1.Supp.App.26 (Gov't Exh. 805) (photo of boat).

Police established a perimeter around the area where they found the Mercedes and deployed "hasty teams" of officers and dogs. 12.App.5181-83. At about 2:30 a.m. on April 19, authorities stopped the dog searches and began to use tactical teams to search house to house. 12.App.5183-84. While the manhunt was underway, the Governor of Massachusetts requested that citizens in six communities shelter in place. 12.App.5187.

While hiding in the boat, Tsarnaev decided to write a manifesto justifying his actions. In two wooden slats, he carved the words: "Stop killing our innocent people and we will stop." 12.App.5237-38, 5335; 1.Supp.App.78-79 (Gov't Exhs. 1450 & 1451) (photos of slats). And with a pencil he found in the boat, 12.App.5233-34, he wrote the following message on the boat's fiberglass hull (portions obscured by bullet holes are noted by brackets):

> I'm jealous of my brother who ha [ ] ceived the reward of jannutul Firdaus[10] (inshallah)[11] before me. I do not mourn because his soul is very much alive. God has a plan for each person. Mine was to hide in this boat and shed some light on our actions. I ask Allah to make me a shahied[12] (iA[13]) to allow me to return to him and be among all the

[10] The highest level of paradise in the teaching of Islam. 13.App.5937.
[11] "Insha'Allah" means "God willing." 13.App.5937.
[12] "Shahid" means "martyr." 13.App.5939.
[13] Likely an abbreviation for "Insha'Allah." 13.App.5938.

> righteous people in the highest levels of heaven. He who Allah guides no one can misguide. A [ ] bar![14]
>
> I bear witness that there is no God but Allah and that Muhammad is his messenger. [ ] r actions came with [ ] a [ ] ssage and that is [ ] ha Illalah.[15] The U.S. Government is killing our innocent civilians but most of you already know that. As a M [ ] I can't stand to see such evil go unpunished, we Muslims are one body, you hurt one you hurt us all, well at least that's how Muhammad (pbuh[16]) wanted it to be [ ] ever, the ummah[17] is beginning to rise/awa [ ] has awoken the Mujahideen[18], know you are fighting men who look into the barrel of your gun and see heaven, now how can you compete with that. We are promised victory and we will surely get it. Now I don't like killing innocent people it is forbidden in Islam but due to said [ ] it is allowed. All credit goes [ ].

11.App.4555-57; 1.Supp.App.28-30 (Gov't Exhs. 826, 827, 828) (photos of message in boat).

9. Authorities arrested Tsarnaev on April 19, four days after the bombing.

On the morning of April 19, David Henneberry woke up at his residence on Franklin Street and learned about the shelter-in-place order. 12.App.5222-23. He saw through the window that his winterized boat had some loose shrink-wrap, but he blamed it on the wind and stayed inside. 12.App.5220-24.

Authorities lifted the shelter-in-place order at about 6:00 p.m., though they had not located Tsarnaev. 12.App.5187. Henneberry went outside to fix his boat.

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[14] Presumably "Allahu Akbar," which means "God is great." 13.App.5941.

[15] Presumably "Our actions came with a message and that is la ilaha illa'lah [there is no God but Allah]." *See* 13.App.5941-42.

[16] An abbreviation for "peace be upon him." 13.App.5948.

[17] Muslim nation. 13.App.5888, 5945.

[18] Jihad fighters. 13.App.5920.

12.App.5223-24. As he climbed up a ladder, he noticed blood in the boat and a person lying inside with a hooded sweatshirt pulled over his head. 12.App.5224-25. *See* 1.Supp.App.26 (Gov't Exh. 805) (photo of boat the next day). Henneberry went inside and called 911. 12.App.5225.

Police responded to Henneberry's house and surrounded the area. 12.App.5188, 5190-91. After Tsarnaev failed to respond to "[n]umerous requests" to surrender, police threw flash-bangs into the boat and, at one point, shot at the boat multiple times. 12.App.5193, 5198. Police finally arrested Tsarnaev about an hour and a half after Henneberry's initial report. 12.App.5192.

An ambulance took Tsarnaev to Beth Israel Deaconess Medical Center. 17.App.7904-08. He answered the paramedics' questions, but he became "mad" and "[g]ot loud" because a dressing on his leg was tight. 17.App.7907-09. He arrived at the hospital at about 9:00 p.m. and underwent surgery to treat his wounds, which included a gunshot wound to the left side of his face and "multiple gunshot wounds to the extremities," including his left hand. 20.App.8991-92; Doc. 319 at 5.

10. A jury convicted Tsarnaev on 30 counts and recommended the death penalty on six counts.

On June 27, 2013, a federal grand jury issued a 30-count indictment, charging Tsarnaev with the following:

1. Conspiracy to use a weapon of mass destruction resulting in the deaths of Krystle Campbell, Sean Collier, Lingzi Lu, and Martin Richard, in violation of 18 U.S.C. § 2332a.

2. Use of a weapon of mass destruction (pressure cooker bomb #1) resulting in the death of Krystle Campbell, in violation of 18 U.S.C. § 2332a.

3. Use of a firearm (pressure cooker bomb #1) during and in relation to a crime of violence (Count 2) resulting in the murder of Krystle Campbell, in violation of 18 U.S.C. § 924(c) and (j).

4. Use of a weapon of mass destruction (pressure cooker bomb #2) resulting in the deaths of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 2332a.

5. Use of a firearm (pressure cooker bomb #2) during and in relation to a crime of violence (Count 4) resulting in the murders of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 924(c) and (j).

6. Conspiracy to bomb a place of public use resulting in the deaths of Krystle Campbell, Sean Collier, Lingzi Lu, and Martin Richard, in violation of 18 U.S.C. § 2332f.

7. Bombing of a place of public use (Marathon Sports) resulting in the death of Krystle Campbell, in violation of 18 U.S.C. § 2332f.

8. Use of a firearm (pressure cooker bomb #1) during and in relation to a crime of violence (Count 7) resulting in the murder of Krystle Campbell, in violation of 18 U.S.C. § 924(c) and (j).

9. Bombing of a place of public use (Forum restaurant) resulting in the death of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 2332f.

10. Use of a firearm (pressure cooker bomb #2) during and in relation to a crime of violence (Count 9) resulting in the murders of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 924(c) and (j).

11. Conspiracy to maliciously destroy property resulting in the deaths of Krystle Campbell, Sean Collier, Lingzi Lu, and Martin Richard, in violation of 18 U.S.C. § 844(i) and (n).

12. Malicious destruction of property (Marathon Sports and other property) resulting in the death of Krystle Campbell, in violation of 18 U.S.C. § 844(i).

13. Use of a firearm (pressure cooker bomb #1) during and in relation to a crime of violence (Count 12) resulting in the death by murder of Krystle Campbell, in violation of 18 U.S.C. § 924(c) and (j).

14. Malicious destruction of property (Forum restaurant and other property) resulting in the deaths of Lingzi Lu and Martin Richard, in violation of 18 U.S.C. § 844(i).

15. Use of a firearm (pressure cooker bomb #2) during and in relation to a crime of violence (Count 14) resulting in the murders of Lignzi Lu and Martin Richard, in violation of 18 U.S.C. § 924(c) and (j).

16. Use of a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 1) resulting in the murder of Sean Collier, in violation of 18 U.S.C. § 924(c) and (j).

17. Use of a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 6) resulting in the murder of Sean Collier, in violation of 18 U.S.C. § 924(c) and (j).

18. Use of a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 11) resulting in the murder of Sean Collier, in violation of 18 U.S.C. § 924(c) and (j).

19. Carjacking resulting in serious bodily injury to Richard Donohue, in violation of 18 U.S.C. § 2119(2).

20. Use of a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 19), in violation of 18 U.S.C. § 924(c).

21. Interference with commerce by threats or violence (obtaining $800 using Dun Meng's ATM card and PIN), in violation of 18 U.S.C. § 1951.

22. Use of a firearm (Ruger 9mm handgun) during and in relation to a crime of violence (Count 21), in violation of 18 U.S.C. § 924(c).

23. Use of a weapon of mass destruction (pressure cooker bomb #3), in violation of 18 U.S.C. § 2332a.

24. Use of a firearm (Ruger and pressure cooker bomb #3) during and in relation to a crime of violence (Count 23), in violation of 18 U.S.C. § 924(c).

25. Use of a weapon of mass destruction (pipe bomb #1), in violation of 18 U.S.C. § 2332a.

26. Use of a firearm (Ruger and pipe bomb #1) during and in relation to a crime of violence (Count 25), in violation of 18 U.S.C. § 924(c).

27. Use of a weapon of mass destruction (pipe bomb #2), in violation of 18 U.S.C. § 2332a.

28. Use of a firearm (Ruger and pipe bomb #2) during and in relation to a crime of violence (Count 27), in violation of 18 U.S.C. § 924(c).

29. Use of a weapon of mass destruction (pipe bomb #3), in violation of 18 U.S.C. § 2332a.

30. Use of a firearm (Ruger and pipe bomb #3) during and in relation to a crime of violence (Count 29), in violation of 18 U.S.C. § 924(c).

Add.1-65.

Consistent with the Federal Death Penalty Act, 18 U.S.C. §§ 3591-3599, the indictment set forth a number of specific allegations that would support application of the death penalty. Add.66-71. On January 30, 2014, the government gave Tsarnaev notice of its intent to seek the death penalty on all 17 death-eligible counts (Counts 1-10 and 12-18) and listed the aggravating factors that it intended to prove. 1.App.133-39. *See* 18 U.S.C. § 3593(a).

Under the Federal Death Penalty Act, capital trials are divided into two phases—a guilt phase and a penalty phase. *See* 18 U.S.C. § 3593(b). During the 17-day guilt phase, the government called 92 witnesses and introduced more than 1,200 exhibits. Although Tsarnaev called four witnesses, he did not dispute that he

committed the acts charged in the indictment. 10.App.3977. Tsarnaev's counsel said in her opening statement, "It was him." 10.App.3977. Counsel reiterated during her closing argument that Tsarnaev "stands ready, by your verdict, to be held responsible for his actions." 15.App.6936. The jury convicted Tsarnaev on all 30 counts in the indictment. Add.74a-74ag (verdict form).

The court then conducted a 12-day penalty phase at which the government called 17 witnesses and Tsarnaev called 46 witnesses. After weighing the aggravating and mitigating factors alleged by the government and the defense, the jury recommended the death penalty on six of the death-eligible counts—Counts 4, 5, 9, 10, 14, and 15. Add.75-96. *See* 18 U.S.C. § 3593(e). The district court sentenced Tsarnaev to death on those counts. Add.103. *See* 18 U.S.C. § 3594. The court sentenced Tsarnaev to numerous concurrent and consecutive terms of imprisonment on the remaining counts, including 20 life sentences. Add.104.

SUMMARY OF ARGUMENT

1. The district court appropriately exercised its discretion by denying Tsarnaev's motions for change of venue. About 56% of the prospective jurors either had not concluded that Tsarnaev was guilty or indicated they could set aside their opinions about his guilt and reach a decision based solely on the evidence presented in court; 64% of prospective jurors indicated an ability to keep an open mind about the death penalty. And all of the jurors who actually sat on the jury confirmed that they could be impartial. The jury declined to impose death on 11 of the 17 death-eligible counts,

indicating that the jurors carefully considered the evidence. This Court has previously rejected Tsarnaev's claims that the jury pool—drawn from a district that extended far beyond Boston, with a population of nearly five million people—was so tainted by "factual news media accounts" of the bombing as to preclude a fair trial. *In re Tsarnaev*, 780 F.3d 14, 22 (1st Cir. 2015) (per curiam). The fact that Tsarnaev subsequently received a fair trial confirms the correctness of that ruling.

2. The district court correctly denied Tsarnaev's motions to strike two jurors based on alleged dishonesty during voir dire, and it did not abuse its discretion by declining to hold an evidentiary hearing. Juror 286 failed to disclose in her questionnaire that she had tweeted or retweeted about the marathon bombing on a number of occasions. But the juror questionnaire asked only whether she had "commented on *this case*," Add.553 (emphasis added), which Juror 286 could have understood to refer to Tsarnaev's criminal trial, not the marathon bombing in general. And although Juror 286's negative response to a question about whether she or her family had "'shelter[ed] in place'" during the manhunt for Tsarnaev was inaccurate, Add.554 (emphasis omitted), Juror 286 corrected that misstatement during voir dire. In any event, the fact that Juror 286 and her family had sheltered in place did not reveal disqualifying prejudice.

Nor did Juror 138 make any dishonest statements that would have justified a for-cause dismissal. Juror 138 had posted on Facebook about the fact that he had been called for jury service in this case. His later negative response to a question

about whether he had talked to anyone about "the subject matter of the case," 3.App.1146, was not dishonest. And even if Juror 138 had fully disclosed his Facebook posts, they would not have justified a dismissal for cause. The posts indicated no bias, and they did not violate the district court's instructions, which allowed prospective jurors to "tell others that [they] may be a juror in this case." 1.App.182.

3. The district court appropriately exercised its discretion when it dismissed for cause Prospective Juror 355 (a criminal defense attorney) based on his opposition to the death penalty, which would have substantially impaired him in the performance of his duties as a juror. Although Juror 355 "thought" he could impose the death penalty, he reached this conclusion only "[a]fter a lot of . . . soul-searching." 6.App.2448. When asked whether he could impose the death penalty *if* he found Tsarnaev guilty and concluded the penalty was appropriate, he repeatedly fought the hypothetical and said he would not assume Tsarnaev's guilt. And when asked to name circumstances in which he thought the death penalty might be appropriate, he could give no example beyond genocide. His tentative and evasive answers justified the for-cause strike.

4. The district court appropriately exercised its discretion when imposing limits on voir dire. Contrary to Tsarnaev's contention, *Morgan v. Illinois*, 504 U.S. 719 (1992), did not entitle him to ask prospective jurors whether they believed the death penalty was appropriate in light of specific aggravating circumstances. The district court did

not commit legal error by concluding that Tsarnaev's proposed questions were impermissible "stakeout" questions that effectively asked the jury to prejudge the appropriateness of the death penalty in this case without consideration of the district court's instructions or mitigating factors. In any event, the prospective jurors were already aware of key facts about this case from the juror questionnaire and the court's preliminary instructions, and they could have considered those facts when answering questions about their views on the death penalty

The district court also acted within its discretion when it disallowed inquiry into the specific media coverage that prospective jurors had seen, heard, and read. Although this Court has said in dicta that district courts should question jurors individually about the "kind and degree" of their media exposure, *Patriarca v. United States*, 402 F.2d 314, 318 (1st Cir. 1968), it has not suggested that detailed questioning about the contents of the media coverage is required. And in *Mu'Min v. Virginia*, 500 U.S. 415 (1991), the Supreme Court subsequently rejected the argument that a trial court must inquire into the contents of news reports that potential jurors have read. Here, the questionnaire asked jurors what news sources they consumed, the amount of media coverage they had seen, and whether, based on this coverage, they had concluded that Tsarnaev was guilty or should receive the death penalty. This was sufficient under the circumstances.

5. The district court appropriately exercised its discretion by excluding from the penalty phase evidence indicating that Tsarnaev's brother, Tamerlan, may have been

involved in killing three people in Waltham, Massachusetts in 2011. The court also properly denied the defense access to an interview report related to the killings.

The district court correctly concluded that evidence of the Waltham murders, which arose out of a drug-related robbery and were completely unrelated to the marathon bombing, was not relevant mitigating evidence. Contrary to Tsarnaev's claim, the Waltham evidence did not show that Tamerlan "influenced" or "intimidated" him into committing the crimes in this case or that Tsarnaev played a lesser role in the bombing. Rather, the evidence showed that Tsarnaev was independent, did not follow his brother's strict religious lifestyle, and was a willing and eager participant in the marathon bombing. And even if the Waltham evidence had some minimal relevance, the district court correctly concluded that its probative value was outweighed by the risk of confusing the issues and misleading the jury.

The district court also appropriately denied Tsarnaev access to reports and recordings of interviews with Tamerlan's friend, Ibragim Todashev, who implicated Tamerlan in the Waltham murders. The reports and recordings were not helpful or material mitigating information because, as explained above, evidence about Tamerlan's alleged commission of unrelated murders did not mitigate Tsarnaev's role in this offense. And because Tsarnaev was already aware that Todashev had implicated Tamerlan, he cannot show that the details contained in the withheld reports were themselves favorable and material under *Brady v. Maryland*, 373 U.S. 83 (1963). Regardless, even if the statements were discoverable on some other theory,

they were protected by the qualified law enforcement privilege because disclosure of the details of Todashev's statements would have jeopardized the ongoing investigation into the Waltham murders by the Middlesex County District Attorney's Office.

6. [redacted]

7. The district court properly admitted testimony from surviving victims. Contrary to Tsarnaev's contention, their testimony was not improper victim-impact evidence because it was admitted to prove other aggravating factors, including that Tsarnaev created a grave risk of death to people other than the deceased victims, that

he committed an act of terrorism, and that he participated in additional uncharged crimes of violence. The victims' testimony about their immediate reaction to the bombing was also admissible to provide context to their testimony. And even if the survivors' testimony had been offered to prove the victim-impact aggravator (which it was not), Tsarnaev's claim would still fail. The Federal Death Penalty Act expressly allows the government to present a wide variety of information about the effect of a defendant's crimes on his "victim[s]," 18 U.S.C. § 3593(a), and does not limit the term "victim" to deceased victims. Both that term's ordinary meaning and its use elsewhere in § 3593 include all victims injured by a capital offense, not just those who were killed.

In any event, any potential error did not prejudice Tsarnaev. The district court instructed the jury to consider only the aggravating factors that the government had alleged and to avoid being swayed by passion or prejudice. The jury heard ample evidence about the effect of Tsarnaev's crimes on the victims he killed and their families, as well as undisputed evidence that established other aggravating factors, including witnesses' descriptions of losing their legs and video and photographic evidence of the bombings' aftermath. In light of that evidence, Tsarnaev cannot show that excluding the challenged victim evidence would have changed the trial's result.

8. Tsarnaev is not entitled to a remand for a hearing on his claim that a video of him shopping at Whole Foods was derived from his allegedly involuntary

statements in the hospital after his arrest. Tsarnaev waived his challenge to the video by failing to move to suppress it before trial, as required by Federal Rule of Criminal Procedure 12(b). The district court did not abuse its discretion by denying Tsarnaev's request that the government provide documentary proof of the tip that led to the video, and in any event, investigative records show that Tamerlan's wife Katherine Russell provided the information that led the government to search for Whole Foods surveillance video. Finally, any error in admitting the Whole Foods video was harmless beyond a reasonable doubt because other evidence overwhelmingly showed that Tsarnaev lacked remorse after the bombings, and Tsarnaev's counsel even conceded that Tsarnaev was not remorseful at any time before his arrest.

9. The district court did not admit, and the government did not use, improper or inflammatory evidence or presentations.

a. The district court properly exercised its discretion under Fed. R. Evid. 403 in admitting testimony from terrorism expert Dr. Matthew Levitt that briefly mentioned the Islamic State terrorist organization (ISIS). The district court reasonably found that the testimony helped the jury understand how the global jihad movement radicalizes home-grown extremists and inspires then to conduct independent terrorist attacks. The danger of unfair prejudice was slight because the testimony was objective, academic in tone, and brief. And even if the evidence was improperly admitted, it was harmless.

b. The government did not commit prosecutorial misconduct by using during the guilt-phase closing argument a PowerPoint presentation that played a 19-second audio clip of a nasheed (a type of Islamic song) over photos of Tsarnaev and the bombing's aftermath. The nasheed and the photos were already in evidence. The presentation was not designed to appeal to anti-Islamic prejudices, but was tied specifically to the trial evidence regarding Tsarnaev's inspiration for the bombing. In any event, the district court instructed the jury not to be swayed by passion or prejudice or to consider Tsarnaev's religious beliefs, and the jurors specifically certified on the verdict form that they had not considered Tsarnaev's religious beliefs in reaching a verdict. Any error was therefore harmless.

c. The government did not plainly commit misconduct by displaying during its penalty-phase opening statement posters of the four homicide victims alongside a still shot of Tsarnaev raising his middle finger at a security camera. The government notified Tsarnaev before the penalty phase that it planned to use the photos during its opening, and the district court reasonably ruled in advance that the photos were admissible to show Tsarnaev's lack of remorse. Tsarnaev cannot show, on plain-error review, that the government committed misconduct by using photographs during its argument that the court had already ruled were admissible for that purpose.

Contrary to Tsarnaev's claim, the government did not say Tsarnaev's middle finger was a message "to his victims." Rather, the government argued that Tsarnaev's gesture was intended to send the same "message" that he had written in a boat before

his arrest, when he wrote that the bombings were a "message" to the United States Government. 16.App.7090. The government properly argued that the photo suggested that Tsarnaev lacked remorse. And even if Tsarnaev could show misconduct, he could not show that a single photo of a rude gesture affected the trial's outcome. The gesture was far less dramatic than the other evidence in this case, which included photographs and video of Tsarnaev placing and detonating a bomb behind a row of children. Tsarnaev had the opportunity to contextualize the still shot by showing the entire security video and eliciting evidence that he later apologized. The district court instructed the jury that the parties' opening statements were not evidence. And the other evidence overwhelmingly established Tsarnaev's callous attitude toward his victims and lack of remorse for his crimes.

10. The district court correctly instructed the jury that, to impose a death sentence, it must find that the aggravating factors "sufficiently outweigh" the mitigating factors "to justify imposing a sentence of death." Contrary to Tsarnaev's claim, the jury's selection of an appropriate penalty is not a factual determination that must be found beyond a reasonable doubt. This Court specifically rejected that argument in *United States v. Sampson*, 486 F.3d 13, 31-32 (1st Cir. 2007) (*Sampson I*). The Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), does not call *Sampson I* into question.

11. The district court did not plainly err by declining to instruct the jury that, if the jury could not unanimously agree on whether to recommend the death penalty,

the court would automatically sentence Tsarnaev to life without release and no new penalty phase would occur. Although Tsarnaev asked the district court to issue an instruction on the consequences of deadlock, he failed to do so on the grounds he now raises, and thus review is limited to plain error. Tsarnaev cannot show there was any error, much less reversible plain error. The Supreme Court has specifically held that capital defendants are not entitled to such an instruction. *Jones v. United States*, 527 U.S. 373 (1999). And Tsarnaev cannot show that instructions correctly explaining the consequences of deadlock at earlier stages affirmatively misled the jury into believing that deadlock on the death sentence would lead to a new penalty phase, or that (contrary to their instructions) any jurors felt pressure to agree to a death verdict against their will.

12. The cumulative error doctrine does not support reversal of Tsarnaev's death sentences based on the errors alleged in issues V through XI. Because the district court committed no error, much less multiple errors, the cumulative-error doctrine does not apply. And even if the court had committed harmless errors, the cumulative effect of those errors would not call into doubt the verdict's reliability and the trial's fairness.

13. The district court did not violate Tsarnaev's rights to due process or to effective assistance of counsel by conducting certain proceedings *ex parte* and *in camera*. Aside from an *ex parte* motion relating to restitution that the district court never ruled on, all of the 12 docket entries that remain *ex parte* on appeal relate to classified or

otherwise sensitive material that the government submitted to the district court for *in camera* review of whether the material was discoverable. The Supreme Court and this Court have specifically endorsed such *in camera* review, which benefitted Tsarnaev by enabling the district court to independently assess whether the materials were discoverable. The court determined that the materials were not discoverable, and thus Tsarnaev had no right to obtain them. Although Tsarnaev has not asked this Court to do so, the Court can review the *in camera* materials and confirm that the district court's rulings were correct.

14. This Court should reject Tsarnaev's argument that African-Americans were underrepresented in the qualified jury wheels from which his grand and petit juries were drawn, in violation of the fair cross-section requirements of the Jury Selection and Service Act, 28 U.S.C. § 1861, and the Sixth Amendment. Tsarnaev concedes that he cannot establish a prima facie claim of underrepresentation under the absolute disparity framework required by this Court's precedent. He argues that this Court's precedent "should be overruled," Br. 451, but he has neither requested an initial en banc hearing nor suggested that the relevant precedent has been abrogated. And even if the en banc Court were to adopt a comparative disparity analysis, the comparative disparities in this case are well below those that other circuits have found to be constitutionally permissible. In any event, Tsarnaev could not prevail on his fair cross-section claim because, in light of the racially neutral methods for constituting

the jury wheel, he cannot show that any underrepresentation of African-Americans resulted from systematic exclusion.

15. The district court did not plainly err in imposing a death sentence on Tsarnaev for murders he committed when he was 19 years old. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Supreme Court drew the line for death eligibility at age 18. Tsarnaev asks this Court to extend that line to age 21 based on developments in brain science and claims of a growing national consensus. Tsarnaev's arguments are incorrect, but more importantly, this Court lacks the authority to overrule the Supreme Court or to say, particularly on plain-error review, that *Roper* should have adopted a different age limitation.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion by Denying Tsarnaev's Motions for Change of Venue.

Tsarnaev contends (Br. 45-101) that his trial in the Eastern Division of the District of Massachusetts violated his right to an impartial jury because "[t]he community's exposure to the bombings and ensuing pre-trial publicity . . . warranted a presumption of prejudice." *Id.* at 84. He also argues in the alternative that "the jurors' questionnaire and voir dire responses establish actual prejudice." *Id.* at 93. Neither argument is correct. Prejudice should not be presumed in a venue with a population of almost five million and where more than half of the prospective jurors had either not prejudged guilt or had stated under oath that they could set aside their

view that Tsarnaev was guilty. And nothing in the record suggests that the seated jurors were actually biased.

A. Background

In June 2014, five months before jury selection was scheduled to begin, Tsarnaev filed his first motion for change of venue, arguing that "prejudice must be presumed in the District of Massachusetts" based on pretrial publicity. 23.App.10706. He cited polling data collected by a defense expert indicating that potential jurors in the Eastern Division of the District of Massachusetts were more likely to believe that Tsarnaev was guilty and deserved the death penalty than potential jurors in the district's Western Division, the Southern District of New York, and the District of Columbia. 23.App.10711. Tsarnaev "preliminarily recommend[ed] the District of Columbia as the venue with the least prejudicial attitudes." 23.App.10714. In response, the government argued that Tsarnaev failed to show that "12 fair and impartial jurors cannot be found" among the Eastern Division's "large, widespread, and diverse . . . population." 23.App.10722. The government also pointed out a number of problems with the defense expert's analysis, including the facts that the expert's polling data had not been persuasive in other cases and that he overrepresented the extent of the media coverage of the bombing. 23.App.10726-29; 24.App.11260-84.

The district court denied Tsarnaev's motion. Add.407-13. The court observed that the District of Massachusetts' Eastern Division contained about five million

people, including many from cities and communities outside of Boston. Add.409. "[I]t stretches the imagination to suggest that an impartial jury cannot be successfully selected from this large pool of potential jurors." Add.409-10. The court recognized that "[m]edia coverage of this case . . . has been extensive." Add.410. But neither the defense expert's polling nor his newspaper analysis "persuasively show[ed] that the media coverage has contained blatantly prejudicial information that prospective jurors could not reasonably be expected to cabin or ignore." Add.410. The court "agree[d] with the government that many of the search terms" in the defense expert's newspaper analysis were "overinclusive" and yielded "news articles that are . . . unrelated to the Marathon bombings." Add.410. As to the expert's polling, the court noted that "the response rate was very low (3%)" and was "not representative of the demographic distribution of people in the Eastern Division." Add.410. Moreover, some of the results were "at odds with [Tsarnaev's] position" because they showed that respondents in other jurisdictions were nearly as likely to believe Tsarnaev was guilty as respondents in the District of Massachusetts' Eastern Division. Add.410-11. Although "media coverage ha[d] continued" in the eighteen months since the bombing, "the 'decibel level of media attention [had] diminished somewhat.'" Add.411 (quoting *Skilling v. United States*, 561 U.S. 358, 361 (2010)). In short, the court concluded that Tsarnaev had "not proven that this is one of the rare and extreme cases for which a presumption of prejudice is warranted." Add.412.

In December 2014, Tsarnaev filed a second motion for change of venue, 24.App.11316-33, arguing that continued pretrial publicity and alleged leaks of information by law enforcement "require[d] fresh evaluation of all the circumstances and criteria that inform a venue determination." 24.App.11316. The district court denied the motion, concluding that the motion was an inappropriate attempt to "bolster former, unsuccessful arguments with additional information." Add.439. In the alternative, the court determined that the second motion failed on the merits because it contained nothing "that would persuade [the court] that the denial of the first motion . . . was wrong." Add.439, 441.

While his second motion was pending, Tsarnaev sought mandamus relief in this Court. *In re Tsarnaev*, 780 F.3d 14, 17 (1st Cir. 2015) (per curiam) (explaining sequence). A divided panel of this Court denied his petition, concluding that Tsarnaev had "not made the extraordinary showing required to justify mandamus relief." *In re Tsarnaev*, 775 F.3d 457, 457 (1st Cir. 2015) (memorandum decision); *see id.* at 457-59 (Torruella, J., dissenting).

Jury selection began on January 5, 2015, with the district court summoning 1,373 prospective jurors to the federal courthouse to complete written juror questionnaires. *See* 1.App.172-259 (transcripts); Special Appendix vols. 1-68 (completed questionnaires). The questionnaire contained 100 questions that asked about the prospective jurors' backgrounds, social media habits, exposure to pretrial publicity in this case, and views on the death penalty. *See, e.g.*, 26.App.11684-711. The

parties agreed to excuse many of these prospective jurors, but the court called back 256 of them for further voir dire. The court and the parties questioned those prospective jurors individually over the course of 21 days. *See* 1.App.260-9.App.3910.

While voir dire was ongoing, Tsarnaev filed a third motion for change of venue. 25.App.11450-70. He argued that the jury questionnaires, which he quoted extensively, confirmed the existence of prejudice that could not be adequately weeded out through voir dire. 25.App.11455-69. The district court denied this motion. Add.463-68. "[C]ontrary to [Tsarnaev's] assertions," the court concluded, "the voir dire process is successfully identifying potential jurors who are capable of serving as fair and impartial jurors in this case." Add.463-64. Although the jury questionnaires remained an "important source of information," they had limitations when compared to in-person voir dire. Add.464-66. For example, some jurors who indicated that they could set aside pre-conceived opinions regarding Tsarnaev's guilt "backed off from that position when questioned during voir dire," while others "confirmed their answer[s]" and indicated that "they understand and are committed to the principles of the presumption of innocence and proof beyond a reasonable doubt." Add.465-66. The court recognized "legitimate concerns" about jurors' "fixed opinions," "emotional connections to events," and vulnerability to "improper influence from media coverage," but noted that "[t]he Court and the parties are diligently addressing them through the voir dire process." Add.468.

While his third venue motion was pending, Tsarnaev filed a second petition for a writ of mandamus in this Court. *See Tsarnaev*, 780 F.3d at 14. This Court denied the petition in a published opinion, over Judge Torruella's dissent. *Id.* at 15, 20. *See id.* at 29-50 (Torruella, J., dissenting). The Court concluded that Tsarnaev could not show a clear and indisputable right to a change of venue. *Id.* at 20-28. Although Tsarnaev argued that the Court "must presume prejudice for any jury drawn from the Eastern Division of Massachusetts," this Court found that Tsarnaev's "own statistics reveal that hundreds of members of the venire have not formed an opinion that he is guilty," and "[t]he voir dire responses have confirmed this." *Id.* at 21.

The Court noted that "Boston . . . is a large, diverse metropolitan area" and that "Boston-area residents obtain their news from a vast array of sources." *Tsarnaev*, 780 F.3d at 21. Although "extensive," the pretrial publicity consisted primarily "of factual news media accounts" of the bombings, and the Court determined that those accounts lacked the "grossly prejudicial character" that could warrant a change of venue. *Id.* at 21-22 (citing *Rideau v. Louisiana*, 373 U.S. 723 (1963)). Moreover, "[t]he nearly two years that have passed since the Marathon bombings ha[ve] allowed the decibel level of publicity about the crimes themselves to drop and community passions to diminish." *Id.* at 22. The Court noted that, although there was "ongoing media coverage" regarding the upcoming trial, "that would be true wherever trial is held, and the reporting has largely been factual." *Id.*

The Court also concluded that the then-ongoing jury selection process did not indicate pervasive prejudice. *Tsarnaev*, 780 F.3d at 24-28. The district court's process was "thorough and appropriately calibrated to expose bias, ignorance, and prevarication." *Id.* at 24-25. The Court agreed with the district court that Tsarnaev's "selective quotations" from the jury questionnaires were "misleading" because they were not "fairly representative of . . . the questionnaires generally." *Id.* at 28 (quotations omitted). The Court found no "basis for concluding, on mandamus, that pervasive prejudice taints the entire jury pool." *Id.*

After excusing or interviewing about half of the 1,373-person venire, the district court had provisionally qualified 75 prospective jurors, which was enough for the parties to exercise their peremptory challenges.[19] *See* 9.App.3768, 3894 (last provisionally qualified juror was number 697). Two days before the trial's guilt phase began, Tsarnaev filed a fourth motion for change of venue. 25.App.11558-60. The district court denied this motion orally on the first morning of trial. 10.App.3927.

The parties each had 20 peremptory challenges, plus an additional three peremptory challenges for the selection of alternate jurors. Fed. R. Crim. P. 24(b)(1), (c)(4)(C). *See* 25.App.11411-13 (denying defense request for additional peremptory

[19] Five of these were excused for hardship before the parties exercised their peremptory challenges. *See* 21.App.9561-62 (excusing prospective juror 60); 9624-26 (excusing prospective jurors 32, 54, 74, and 145).

challenges). The parties exercised these challenges to select 12 jurors and six alternates. 25.App.11572. *See* Doc. 1122.

B. Standard of review

This Court reviews the denial of a motion for change of venue based on alleged jury partiality for abuse of discretion. *United States v. Casellas-Toro*, 807 F.3d 380, 385 (1st Cir. 2015). That standard applies both to a claim that prejudice should be presumed and a claim that the jury was actually prejudiced. *Id.*; *United States v. Quiles-Olivo*, 684 F.3d 177, 182 (1st Cir. 2012); *United States v. Rodriguez-Cardona*, 924 F.2d 1148, 1158 (1st Cir. 1991). "In reviewing claims of this type, the deference due to district courts is at its pinnacle . . . ." *Skilling v. United States*, 561 U.S. 358, 396 (2010). "A trial court's findings of juror impartiality may be overturned only for manifest error." *Mu'Min v. Virginia*, 500 U.S. 415, 428 (1991) (quotations omitted).

C. Tsarnaev was tried by an impartial jury.

The Sixth Amendment provides criminal defendants the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. *See also* U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . . ."). The presumption that venue lies in the crime's location "do[es] not impede transfer of the proceeding to a different district at the defendant's request if extraordinary local prejudice will prevent a fair trial." *Skilling*, 561 U.S. at 378.

To obtain reversal of a conviction based on pretrial prejudice, a defendant must show either presumed or actual prejudice. "[A] presumption of prejudice is reserved for those extreme cases where publicity is both extensive and sensational in nature" and has "inflamed passions in the host community past the breaking point." *Quiles-Olivo*, 684 F.3d at 182 (quotations omitted). *See Skilling*, 561 U.S. at 381 ("A presumption of prejudice . . . attends only the extreme case."). Where prejudice cannot be presumed, a reviewing court examines "whether actual prejudice infected [the defendant's] jury." *Id.* at 385. "Actual prejudice hinges on whether the jurors seated at trial demonstrated actual partiality that they were incapable of setting aside." *Quiles-Olivo*, 684 F.3d at 183 (quotations omitted).

1. Tsarnaev cannot establish a presumption of prejudice.

The Supreme Court has presumed juror prejudice based on pretrial publicity in only one case, *Rideau v. Louisiana*, 373 U.S. 723 (1963). Police filmed Wilbert Rideau's uncounseled jailhouse confession to kidnapping and murder. *Id.* at 724. On three occasions in the two months before trial, a local television station broadcast the confession to audiences ranging from 24,000 to 53,000 people. *Id.* at 724 (majority opinion), 728-29 (Clark, J., dissenting). Rideau argued that he could not receive a fair trial in the parish, which had a population around 150,000, but the trial court denied his motion for change of venue. *Id.* at 724-25. The Supreme Court reversed Rideau's conviction, explaining that the community had seen him on television "in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the

robbery, kidnapping, and murder." *Id.* at 725. "[T]o the tens of thousands of people who saw and heard it," this televised interview "in a very real sense *was* Rideau's trial—at which he pleaded guilty." *Id.* at 726. Thus, the Court "d[id] not hesitate to hold, without pausing to examine a particularized transcript of the voir dire," that these "kangaroo court proceedings" violated due process. *Id.* at 726-27.

In the half-century since *Rideau*, the Supreme Court has presumed jury prejudice in only two other cases, each of which involved media interference with the courtroom proceedings themselves, not mere pretrial publicity. *See Estes v. Texas*, 381 U.S. 532 (1965); *Sheppard v. Maxwell*, 384 U.S. 333 (1966).[20] But although the Court has presumed prejudice where the "trial atmosphere . . . had been utterly corrupted by press coverage," the Court's decisions "cannot be made to stand for the proposition that juror exposure to . . . news accounts of the crime . . . alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975). Jurors need not be "totally ignorant of the facts and issues involved." *Irvin v.*

[20] In *Estes*, a dozen cameramen filled the courtroom during preliminary hearings, and the news media "bombard[ed] the community with the sights and sounds" of the hearing, causing "considerable disruption" and depriving the defendant of the "judicial serenity and calm to which [he] was entitled." *Estes*, 381 U.S. at 536, 538. In *Sheppard*, "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom," thrusting the jurors "into the role of celebrities" and "expos[ing] them to expressions of opinion from both cranks and friends." *Sheppard*, 384 U.S. at 353, 355. The Court has noted that reliance on *Estes* and *Sheppard* is "misplaced" where the defendant does not claim that "news coverage reached and influenced his jury after it was empaneled." *Skilling*, 561 U.S. at 382 n.14. Tsarnaev has not made that claim here. *See* 21.App.9848-66 (court questioned jurors before deliberations to ensure no post-empaneling media exposure).

Dowd, 366 U.S. 717, 722 (1961). "[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits." *Reynolds v. United States*, 98 U.S. 145, 155-56 (1879). "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*, 366 U.S. at 723.

The Supreme Court did not presume prejudice in *Skilling*, where former Enron executive Jeffrey Skilling was tried in Houston, Texas (where Enron was headquartered), even though there had been substantial media coverage of Enron's collapse and its effect on the city. *Skilling*, 561 U.S. at 375-76 & n.8. The Court concluded that "[i]mportant differences separate[d] Skilling's prosecution from those in which [the Court had] presumed juror prejudice." *Id.* at 381-82. First, unlike *Rideau*, where the murder "was committed in a parish of only 150,000 residents," Houston was home to more than 4.5 million people eligible for jury service. *Id.* at 382. Second, "although news stories about Skilling were not kind, they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." *Id.* Third, "over four years elapsed between Enron's bankruptcy and Skilling's trial," and "the decibel level of media attention diminished somewhat in the years following Enron's collapse." *Id.* at

383. "Finally, and of prime significance, Skilling's jury acquitted him of nine insider-trading counts," which undermined any "supposition of juror bias." *Id.*

a. The extent of the venire's exposure to media coverage does not support a presumption of prejudice.

The district court did not abuse its discretion by declining to presume prejudice here. Although the publicity was "extensive," it primarily "consist[ed] of factual news media accounts" and did not deprive Tsarnaev of his right "to be adjudged by a fair and impartial jury." *Tsarnaev*, 780 F.3d at 21-22.

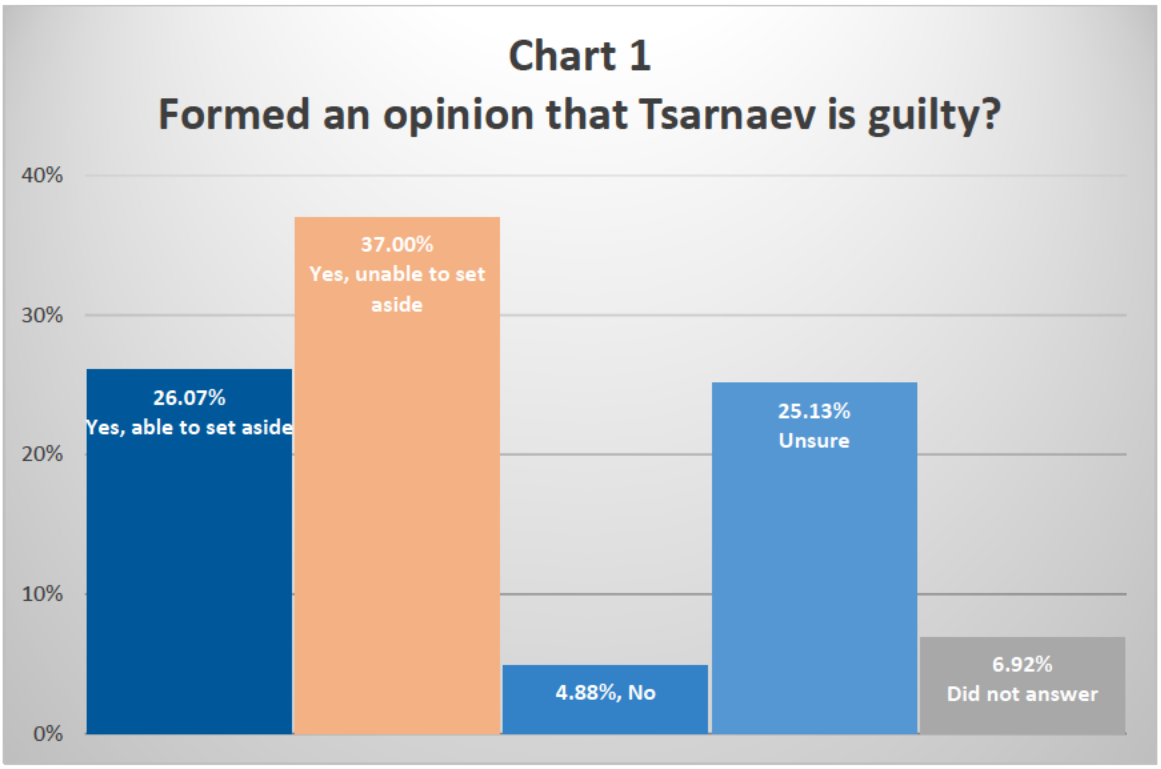
Tsarnaev argues that this case is similar to *Rideau* because "[v]irtually every prospective juror had read publicity about Tsarnaev" and "69% thought he was guilty." Br. 90. These numbers do not, however, give the whole picture. Tsarnaev is correct that 69% of the responding jurors (67% of the total venire) said they had "formed an opinion . . . that Dzhokhar Tsarnaev is guilty." 1.Supp.App.174. But 38% of those jurors (*i.e.*, 26% of the venire) indicated that they would "be able . . . to set aside [that] opinion and base [a] decision about guilt . . . solely on the evidence" that would be "presented to them in court." 1.Supp.App.175. The prospective jurors' opinions were reflected in their responses to Question 77 of the questionnaire, which asked:

> 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

See Doc. 1178 at 20; Add.525.

Only 37% percent of prospective jurors indicated that they had "formed an opinion" that Tsarnaev was guilty and were "[u]nable" to set that opinion aside. 1.Supp.App.175. Nearly 5% indicated they had not formed the opinion that Tsarnaev was guilty, 26% said that they had formed an opinion he was guilty but were "[a]ble" to set that opinion aside, and another 25% indicated that they were "[u]nsure" whether he was guilty. 1.Supp.App.175. The following chart shows the venire's responses to Question 77:

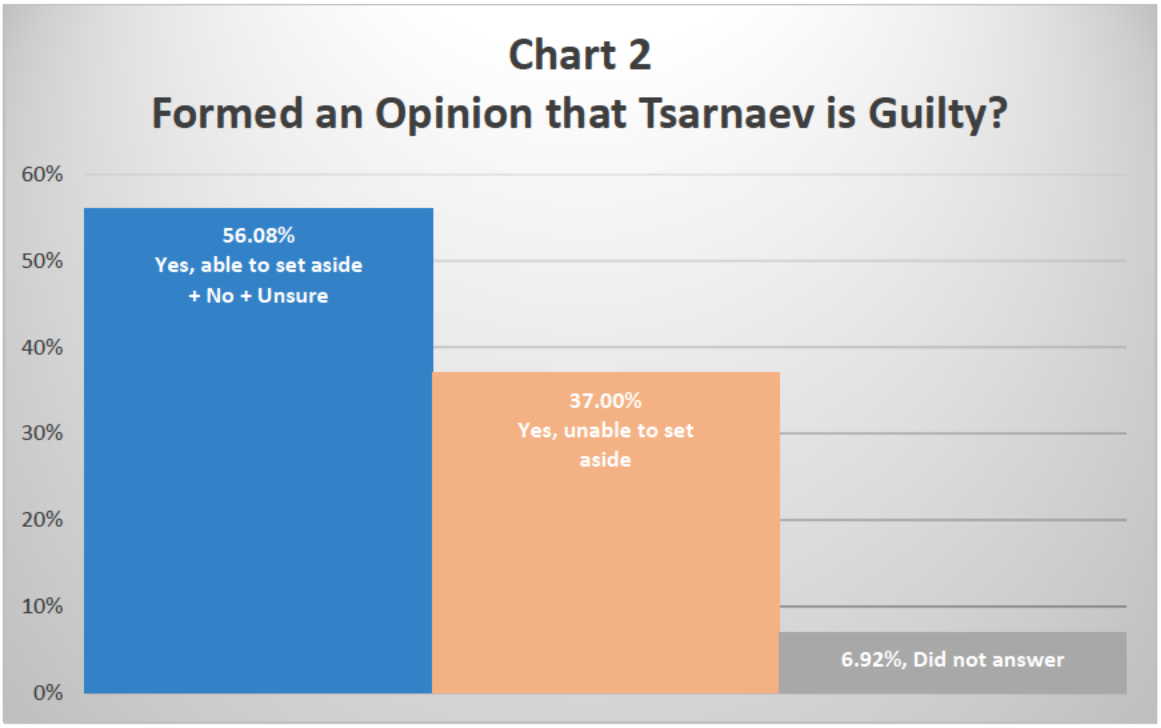


See 1.Supp.App.175.[21]

As reflected in the chart, only about a third of the venire had a disqualifying prejudice with respect to guilt—that is, had formed the opinion that Tsarnaev was guilty and could not set that view aside. *See Irvin*, 366 U.S. at 723 ("It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."); *compare id.* at 727 (62% of prospective jurors had "fixed

[21] This chart treats as "Did not answer" nine prospective jurors who answered "Yes" to both Questions 77(a) and 77(b), indicating that they had formed an opinion both that Tsarnaev "is guilty" and "is not guilty." 1.Supp.App.175. Beyond these nine who gave conflicting answers, only four additional prospective jurors (numbers 227, 721, 1105, and 1254) indicated that that they had formed an opinion that Tsarnaev "is not guilty." 1.Supp.App.131, 148, 162, 168. (One of them wrote [redacted] 62.SPA.34602.) Because some prospective jurors who answered Question 77(a) failed to answer the final part of Question 77, the two "Yes" categories in Chart 1 add up only to 63%, not 67%.

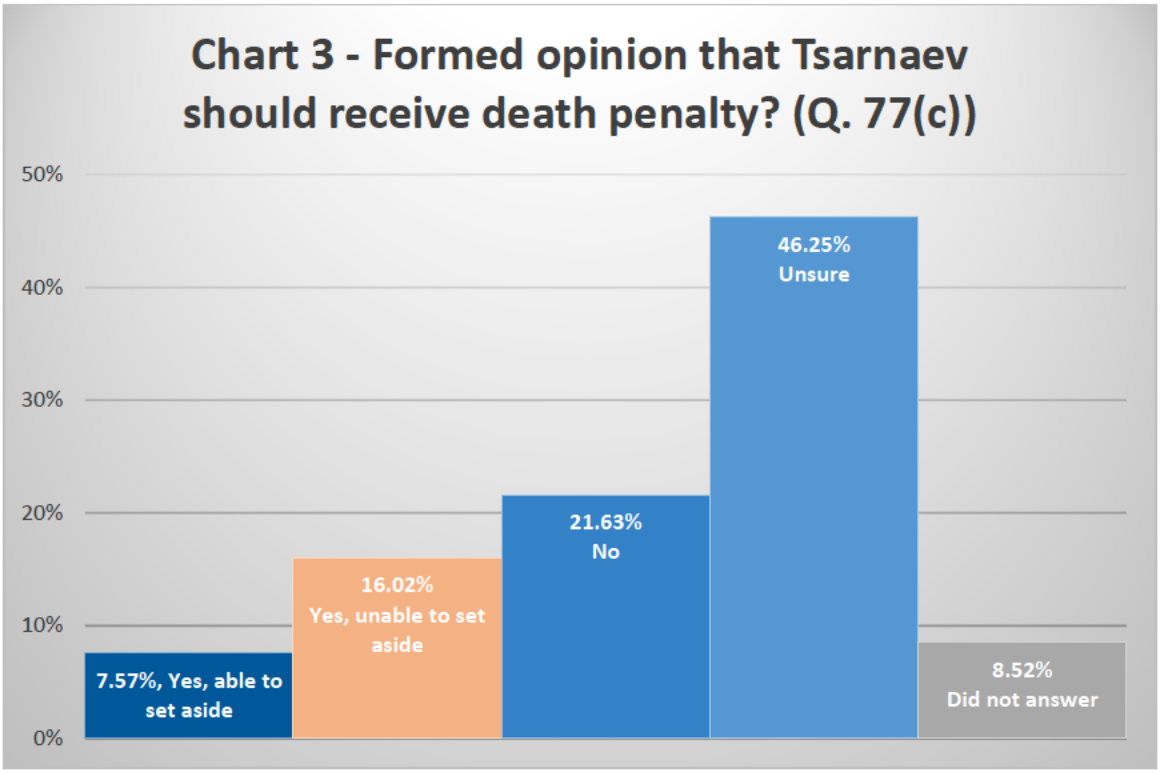
opinions" as to the defendant's guilt). By contrast, more than half of the prospective jurors—56%—either (a) had not formed the opinion that Tsarnaev was guilty, or (b) had formed that opinion but were able to set it aside. *See* 1.Supp.App.175. The following chart combines the categories of prospective jurors that did not report disqualifying opinions regarding guilt:



See 1.Supp.App.175. Prejudice should not be presumed in a case where more than half the jurors indicated no disqualifying prejudice as to Tsarnaev's guilt, particularly since Tsarnaev never contested guilt.

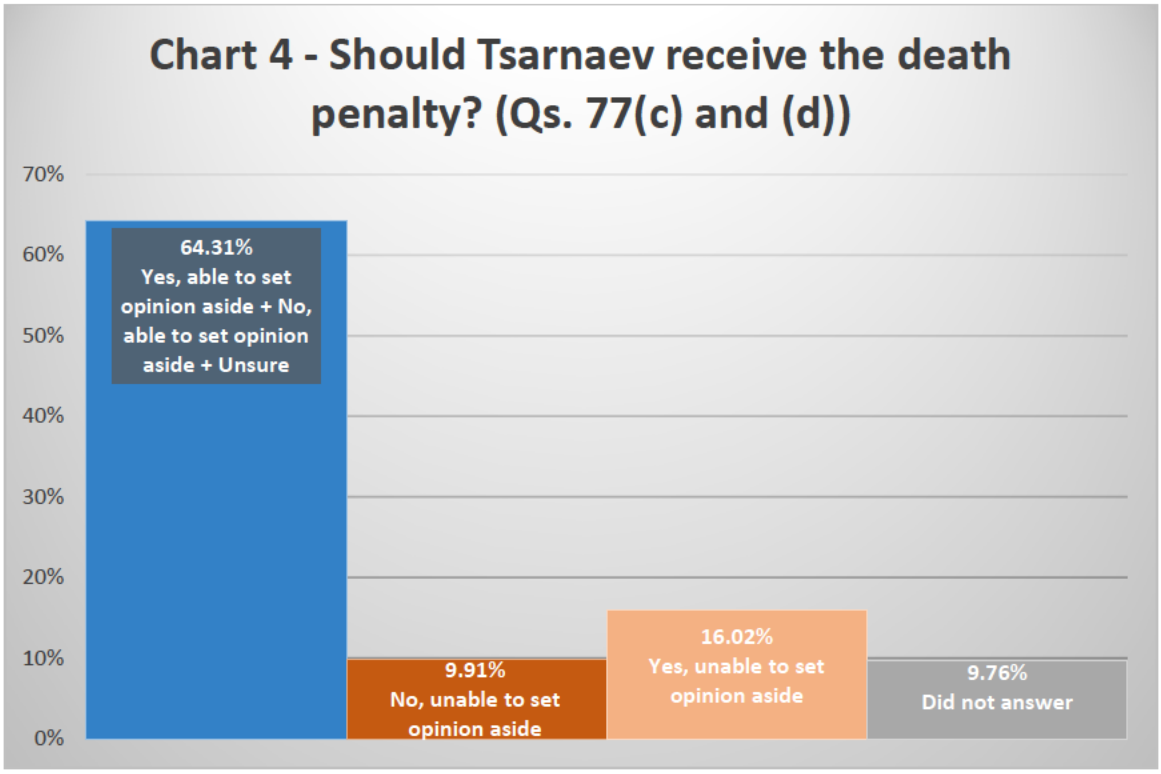
Tsarnaev also asserts that "of the members of the venire who had concluded that he should receive the death penalty before even coming to court, 69% . . . admitted they would not be able to set that view aside." Br. 90. *See also id.* at 70, 92. Again, this fails to give the whole picture. In the venire as a whole, 75% of

prospective jurors had *not* reached a fixed opinion that Tsarnaev should receive the death penalty. Nearly half of the prospective jurors (46%) indicated that they were "[u]nsure" whether Tsarnaev should receive the death penalty. 1.Supp.App.177. About 17% had affirmatively concluded he should *not* receive the death penalty. 1.Supp.App.179. Only 23% held the opinion that Tsarnaev should receive the death penalty, and only 16% both held this opinion and were unable to set that opinion aside. 1.Supp.App.176. The responses to Question 77(c) ("[H]ave you formed an opinion . . . that Dzhokhar Tsarnaev should receive the death penalty?") are reflected in the following chart:



1.Supp.App.176. This shows that the overwhelming majority (75%) of prospective jurors had not reached a fixed conclusion that Tsarnaev should receive the death

penalty. Some of those prospective jurors (9.91% of the venire) had formed the opinion that Tsarnaev should *not* receive the death penalty and indicated they were unable to set aside that opinion. Those prospective jurors' firm opposition to the death penalty would likely result in them being stricken for cause. But, even after subtracting them, 65% the venire did not indicate any disqualifying opinions regarding the death penalty. The percentages are reflected in the following chart:



See 1.Supp.App.177. Tsarnaev cannot show that prejudice should be presumed based on prospective jurors' views of the death penalty where nearly two-thirds of the venire did not hold a disqualifying opinion with respect to whether Tsarnaev should receive the death penalty.

Tsarnaev argues (Br. 65-72) that there was an "extraordinarily high correlation" between the amount of publicity to which a prospective juror had been exposed and the likelihood that the prospective juror had formed an opinion that Tsarnaev was guilty. Although a correlation exists, it is not nearly as dramatic as Tsarnaev claims. Tsarnaev points out (Br. 65-66) that, of the prospective jurors who responded to the relevant questions, almost 19% of those exposed to "a little" media coverage had formed an opinion that Tsarnaev was guilty, 56% of those exposed to "a moderate amount" had formed that opinion, and 89% of those exposed to "a lot" of coverage had formed that opinion. These numbers (from Tsarnaev's Table 4, Br. 65) are reflected in the following table:

Table 1
Effect of Media Coverage on Views Regarding Tsarnaev's Guilt

Media coverage (Q. 73)	Total prospective jurors answering both Qs. 73 & 77(a)	Formed opinion Tsarnaev was guilty ("Yes" on Q. 77(a))	% of total responses
"A little"	69	13	18.8%
"A moderate amount"	636	359	56.4%
"A lot"	606	540	89.1%

From these numbers, Tsarnaev draws the conclusion that "[p]rospective jurors were nearly 42 times more likely to prejudge guilt if they had been exposed to 'a lot' of publicity . . . than if they had been exposed to 'a little' publicity." Br. 67. He is incorrect. Table 1 shows that prospective jurors exposed to "a lot" of media coverage

were about five times as likely to have formed an opinion that Tsarnaev was guilty than those exposed to "a little" coverage (89.1% compared to 18.8%).

Tsarnaev arrives at his inflated number ("42 times more likely") by comparing the wrong percentages. He compares the percentage of the *entire venire* that had been exposed to "a little" media coverage and had formed the opinion he was guilty (1.4%) with the percentage of the venire that had been exposed to "a lot" of coverage and had formed that opinion (59.2%). *See* Br. 67 (Table 5). These numbers are distorted by the fact that far more prospective jurors were exposed to "a lot" of media coverage (540 people) than to "a little" (13 people). A comparison of the absolute number of prospective jurors in each category does not demonstrate the likely effect of media exposure on individual prospective jurors.

Tsarnaev uses similarly improper comparisons with respect to the prospective jurors' views on the death penalty. Tsarnaev asserts that prospective jurors "who believed Tsarnaev was guilty[ ] were 105 times more likely to also believe . . . 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." Br. 95. The numbers are shown in the following table (using the assumptions in Tsarnaev's Table 7, 26.App.12139):

Table 2
Effect of Media Coverage on Views Regarding Whether Tsarnaev Should Receive the Death Penalty

Media coverage (Q. 73)	Total prospective jurors answering Qs. 73 & 77(c) & answering "yes" to 77(a)	Formed an opinion that Tsarnaev should receive death penalty ("Yes" on Q. 77(c))	% of total responses
"A little"	11	2	18.2%
"A moderate amount"	342	110	32.0%
"A lot"	495	210	42.4%

Again, a comparison of the correct numbers shows that prospective jurors exposed to "a lot" of media coverage were actually about 2.3 times more likely to have formed an opinion that Tsarnaev deserved the death penalty than those exposed to "a little" (42.4% compared to 18.2%).

Finally, Tsarnaev asserts that prospective jurors exposed to "a lot" of media coverage "were 81.5 times more likely to be unable to set aside their views." Br. 72. Using the limitations he applies,[22] the relevant numbers are as follows:

[22] Tsarnaev counts only jurors who responded to Questions 73, 77(a), 77(c), and 77-final, had been exposed to media coverage, had formed the opinion that Tsarnaev was guilty, and had formed the opinion he should receive the death penalty. Br. 71, Table 8.

Table 3
Effect of Media Coverage on Ability to Set Aside Views that Tsarnaev was Guilty and Should Receive the Death Penalty

Media coverage (Q. 73)	Total prospective jurors answering Q. 73 and answering "Yes" on Qs. 77(a) & (c)	Unable to set views aside (Q. 77-final)	% Unable
"A little"	2	2	100%
"A moderate amount"	105	50	47.6%
"A lot"	201	163	81.1%

This shows that, in this subset of prospective jurors, those exposed to "a little" media coverage were actually *more* likely to be unable to set aside their views than those exposed to "a lot" of coverage. That is, both (100%) of the two prospective jurors exposed to "a little" media coverage were unable to set aside their views, whereas only 81.1% of the 163 jurors exposed to "a lot" of coverage were unable to do so.

Looking at all of the responding prospective jurors who had formed an opinion that Tsarnaev was guilty (without Tsarnaev's additional limitations), there is evidence of at least some correlation, but it is not nearly as strong as Tsarnaev suggests:

Table 4
Effect of Media Coverage on Ability to Set Aside Views Among Prospective Jurors Who Had Concluded Tsarnaev Was Guilty

Amount of media coverage (Q. 73)	Total prospective jurors answering Q. 73, answering "Yes" on Q. 77(a), and answering Q. 77-final	Unable to set views aside (Q. 77-final)	% Unable
"A little"	13	5	38.46%
"A moderate amount"	343	113	32.94%
"A lot"	510	392	76.86%

In this broader swath of the venire, jurors exposed to "a lot" of media coverage were twice as likely to be unable to set aside their views as those exposed to "a little." They were not 81.5 times more likely.

In any event, the correlation that Tsarnaev asserts between prospective jurors' media exposure and their opinions as to guilt and punishment does not support a presumption of prejudice. Overwhelming evidence showed that Tsarnaev committed the bombing, and his counsel admitted his guilt. *See* 10.App.3977-78. So it is unsurprising that increased exposure to factual reports about the bombings would make jurors more likely to have formed the opinion that Tsarnaev was guilty. One would expect a person who had heard *something* about the case to be more likely to believe Tsarnaev guilty or deserved a certain punishment than someone who had heard *nothing*. But the mere existence of this correlation does not establish a presumption of prejudice. It fails to account for prospective jurors who (a) had not

formed an opinion as to guilt or punishment, or (b) had formed an opinion but were able to set it aside.

Nor does the composition of the venire necessarily mirror the composition of the petit jury, as evidenced by the jury actually selected in this case. Two of the 12 jurors that convicted Tsarnaev had seen "a lot" of media coverage, and both indicated they were "unsure" about Tsarnaev's guilt. 26.App.11702-03, 11926-27, 12132. A third juror had seen "somewhere in between" "a lot" and "a moderate amount" and indicated that she had formed the opinion that Tsarnaev was guilty, but stated that she was able to set this opinion aside. 26.App.11842-43. Thus, although the questionnaires show some correlation between media exposure and a belief in guilt, the jury selection process was able to weed out those with disqualifying prejudice. Moreover, not a single seated juror indicated that he or she had formed the opinion based on media coverage that Tsarnaev should receive the death penalty. Add.506-61; 26.App.11684-12131. So any correlation between media exposure and the opinion that Tsarnaev should receive the death penalty does not suggest that "12 impartial individuals could not be empaneled" in Massachusetts. *Skilling*, 561 U.S. at 382.

Tsarnaev's argument suffers from another flaw. He cannot show that exposure to pretrial publicity was substantially lower in other jurisdictions. As this Court noted before trial, Tsarnaev's "own polling data shows that, in his preferred venue, Washington D.C., 96.5% of survey respondents had heard of the bombings at the Boston Marathon." *Tsarnaev*, 780 F.3d at 16; *see United States v. Salameh*, 1993 WL

364486, at *1 (S.D.N.Y Sep. 15, 1993) (declining to transfer venue for trial related to 1993 World Trade Center bombing, noting that the publicity "permeates the nation"). His polling data also showed that 86.1% of respondents in D.C. believed he was either "definitely" or "probably" guilty, as compared to 92.3% in Boston. Doc. 461-23 at 5. If the district court had transferred the case to Washington, D.C., that percentage likely would have increased as a result of additional media coverage relating to the transfer and trial. This marginal (and likely disappearing) difference in media exposure did not justify a transfer. *Cf. Casellas-Toro*, 807 F.3d at 388-89 (96.6% of potential jurors were aware of defendant's murder of his wife, but defendant "would be relatively unknown outside Puerto Rico").

Tsarnaev's bombing of the 2013 Boston Marathon was (and was intended to be) a "case of public interest" for the entire nation. *Reynolds*, 98 U.S. at 155. His terrorist attack on the Boston Marathon was widely reported on national networks, cable stations, and the Internet, and publicity was not confined to the District of Massachusetts. But exposure to high levels of pretrial publicity does not necessarily render a community unable to convene an impartial jury. Otherwise, no venue would be acceptable, and no trial possible, in the most nationally significant cases. Tsarnaev was not entitled to a jury without "any preconceived notion as to [his] guilt or innocence." *Irvin*, 366 U.S. at 723. The Constitution is satisfied when each juror actually empaneled can "lay aside his impression or opinion and render a verdict

based on the evidence presented in court." *Id.* The voir dire process shows that there were many such jurors in the District of Massachusetts.

b. Statements by excused venire members do not establish a presumption of prejudice.

Tsarnaev cites various prospective jurors' statements that he claims were "representative" of "the local community's impressions of Tsarnaev and the charges against him" and "disclosed connections to the Marathon that were extraordinary in their number and degree." Br. 46, 75. *See id.* at 72-75, 77-78. But of the 49 prospective jurors that he quotes, 19 were excused by agreement of the parties without being called back for individual voir dire,[23] 16 were excused by agreement of the parties after individual voir dire,[24] two were excused on defense motion,[25] and 11 were never called back for individual voir dire because the court had already provisionally qualified a sufficient number. Only *one* of these 49 (Prospective Juror 245) was provisionally qualified as a juror, and his statements do not show disqualifying bias. *See* 4.App.1882. Prospective Juror 245 acknowledged that it could be "kind of difficult" to "set [media attention] aside and just isolate yourself based on

[23] Prospective jurors 12, 137, 182, 196, 293, 301, 302, 319, 364, 372, 430, 438, 442, 495, 511, 522, 610, 615, and 652. *See* 25.App.11448-49 (dismissing some of these jurors).

[24] Prospective jurors 4, 14, 20, 50, 61, 85, 115, 158, 208, 248, 306, 343, 391, 529, 557 and 612. *See* 1.App.430; 2.App.629, 810, 949; 3.App.1121, 1332-33; 4.App.1692; 5.App.2057, 2251; 6.App.2487, 2700; 8.App.3338, 3437; 9.App.3623, 3753.

[25] Prospective jurors 38 and 605. *See* 2.App.639; 8.App.3596, 3601.

just the evidence." 4.App.1780. But he also indicated that he would be able to decide the case "without reference to things outside the trial." 4.App.1780. Tsarnaev did not move to strike him for cause. 4.App.1882.

Tsarnaev's quotations from 49 "representative" prospective jurors (out of the 1,373-person venire) simply show that the voir dire succeeded in excluding those who had disqualifying biases. As *Skilling* observed, "[s]tatements by nonjurors do not themselves call into question the adequacy of the jury-selection process; elimination of these venire members is indeed one indicator that the process fulfilled its function." *Skilling*, 561 U.S. at 389 n.24.

Tsarnaev's sampling also overlooks the many prospective jurors who identified no "connections to the Marathon" (Br. 75) and indicated that they *could* be impartial. Twenty-five percent of the prospective jurors indicated that, based on their media exposure, they were "unsure" about Tsarnaev's guilt. 1.Supp.App.174. Nearly half (46%) were "unsure" whether Tsarnaev should receive the death penalty. 1.Supp.App.176. And even among those jurors who had formed the opinion that Tsarnaev was guilty and should receive the death penalty, 29% indicated that they would be "able . . . to set aside [their] opinion and base [their] decision about guilt and punishment solely on the evidence that will be presented . . . in court." *See* 26.App.12140 (96 out of 325 prospective jurors).

A number of juror questionnaires specifically noted the ability to be impartial.

[redacted]

[redacted]

Many more prospective jurors explained during individual voir dire that they could set aside any previously held views. *See, e.g.*, 1.App.380 (#21) ("I do know that media jumps to conclusions and we don't always have all of the facts."); 2.App.724 (#69) ("I haven't really formed an opinion myself. . . . I believe that it's up to the justice system to make that determination . . . ."); 2.App.776 (#75) ("I would listen to the case, both sides, the defense, the prosecution, and form an opinion on what I would hear and subject to what's going on in the court. So that's what I think a juror is supposed to do. And I think I'm able to do that."); 2.App.913 (#92) ("Obviously, I don't know all the facts. I haven't paid close attention to it."); 2.App.926 (#98) ("I understand . . . the need for evidence, logic and following laws, and I also understand based on your instructions that if I were to be in this case, I must only accept whatever evidence is presented within the court. And logically I can do that, or at least I believe I can."); 3.App.994 (#113) ("I would be able to separate whatever personal preconceived notions that I have based on what I was exposed to in the press . . . ."); 3.App.1078-81 (#129) (explaining that she could set aside "preconceived ideas," which she was used to doing in her human resources job); 3.App.1109 (#134)

("I don't know what all the evidence is which is why I couldn't say yes [to having formed an opinion of Tsarnaev's guilt].").

Likewise, all 12 seated jurors indicated during voir dire that they could avoid drawing any conclusions at trial based on media coverage. *See* 2.App.502 (#35) ("Should I be drawing a conclusion without all the evidence presented? That's what my thought process was . . . ."); 2.App.542 (#41) ("I don't really have an opinion. Obviously, I know what happened on that day. I have seen some of it in the media, but I don't really follow it."); 2.App.875 (#83) ("You know, you guys have to do a fair job in presenting the facts the best you can. . . . I think it would be wrong to . . . have any preconceived notion as to what he deserves or doesn't deserve otherwise until that happens."); 2.App.937-38 (#102) ("I can't make a decision whether he's guilty or not until I hear evidence. I don't know really much about it, so I can't tell you one way or the other . . . . I don't know."); 3.App.1151 (#138) ("I wasn't going to make any decisions until I'd seen everything that was presented, basically, in front of me."); 4.App.1663 (#229) ("I'm a little bit jaded with the media . . . . I just know what the media tells us, there's always more."); 5.App.2009 (#286) ("I wasn't comfortable with the information I knew to make an accurate decision."); 6.App.2351 (#349) ("I can't know that he's guilty, because I don't know what the charges are or what the evidence is and all of that."); 6.App.2633 (#395) ("I have formed an opinion . . . 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. So . . . once I had more information, I believe that . . .

I could change my mind. . . ."); 7.App.2880 (#441) (indicating he would "[n]eed to see more evidence" and had not concluded that "yes, he's guilty or, no, he's not guilty"); 7.App.3050 (#480) ("[W]hen it did happen, it was all over the media. Everyone comes up with their own opinion. Mine is I don't know whether he was involved or not. . . . I mean, I need to sit and look at evidence that would be provided and make my decision from that."); 7.App.3075-76 (#487) (admitting that from "the little bit that I knew of the case, . . . it seemed he played a role in it," but saying "I would be able to put that aside until I see all the evidence"). These responses show that Tsarnaev's "representative" quotations do not reflect the views of the entire venire.

c. The *Skilling* factors indicate that prejudice should not be presumed.

The factors that *Skilling* considered further support the district court's conclusion that an impartial jury could be found in Massachusetts.

i. Large and diverse jury pool

First, although not as large as Houston, the Boston metropolitan area is the tenth most populous metropolitan area in the nation, with nearly five million people. *See* U.S. Census Bureau, New Census Bureau Population Estimates Show Dallas-Fort-Worth-Arlington Has Largest Growth in the United States, https://www.census.gov/newsroom/press-releases/2018/popest-metro-county.html#popest-tab6 (March 22, 2018). *Compare Irvin*, 366 U.S. at 719 (venue was a rural county of 30,000 inhabitants). Moreover, the Eastern Division of the District

of Massachusetts includes more than just Greater Boston. It embraces "suburban, rural, and coastal communities" scattered over the state's entire eastern seaboard and Cape Cod. Add.409. *See* D. Mass. Local Rule 40.1(c)(1) (listing counties in the Eastern Division).

Tsarnaev tries to minimize this factor by pointing out that "the [media] coverage was universal" and that "99.7% of the venire was exposed to the negative publicity." Br. 91. But "[p]rominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*." *Skilling*, 561 U.S. at 381. For example, in *Patton v. Yount*, 467 U.S. 1025, 1029 (1984), all but two members of a 163-person venire (or 98.8%) had heard of the case, which involved a re-trial of the same defendant for a brutal murder, yet the Supreme Court held that prejudice could not be presumed. Moreover, the widespread media coverage in this case was not limited to Massachusetts. Tsarnaev's "own polling data show[ed] that, in his preferred venue, Washington D.C., 96.5% of survey respondents had heard of the bombings." *Tsarnaev*, 780 F.3d at 16. So the mere fact that nearly all members of the venire had been exposed to pre-trial publicity does not support a presumption of prejudice. This is especially true considering that "the reporting has largely been factual." *Id.* at 22.

Tsarnaev also argues that, "despite the large population, everyone in this community was affected by the crime and coalesced in the Boston Strong movement

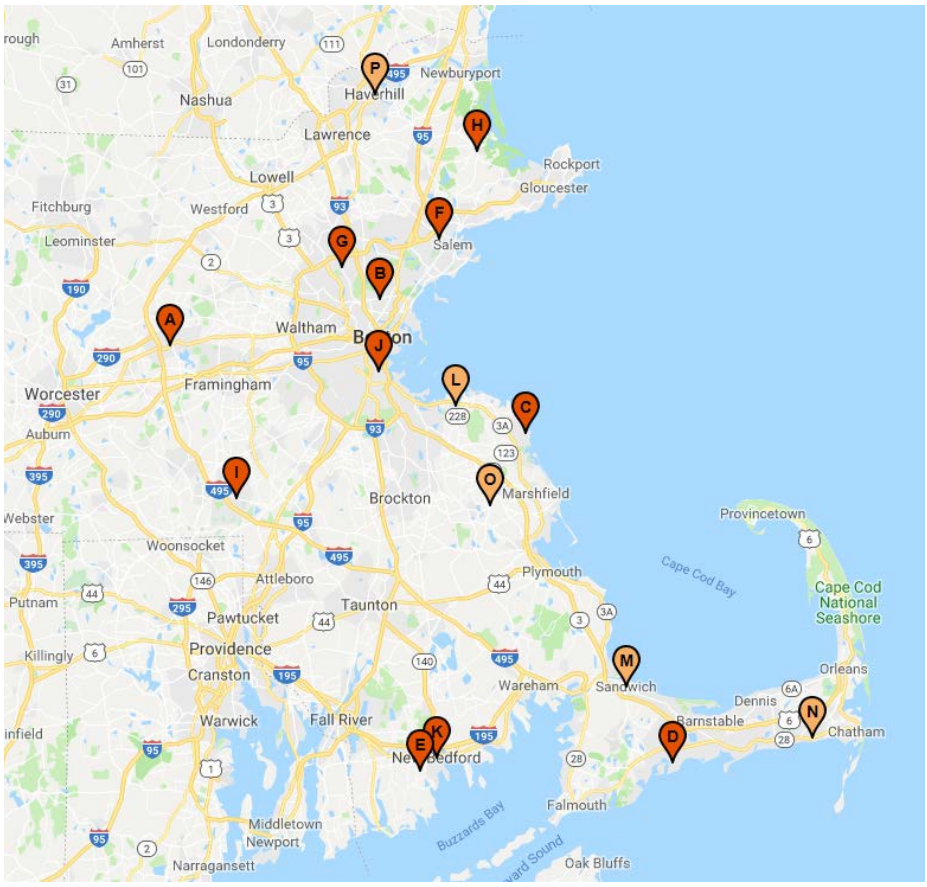
in a show of solidarity."[26] Br. 91. But the district court took great care to exclude potential jurors who were significantly "affected by the crime." *Id.* And although the Boston Strong movement received significant support—including from some of the provisionally qualified jurors, *see* Tsarnaev Br. 81—only 52% of the prospective jurors (or their family members) had contributed to the One Fund or purchased or worn "Boston Strong" merchandise. 1.Supp.App.180 (Question 82). Thus, not "everyone" in the Eastern Division had "coalesced in the Boston Strong movement." Br. 91.

Tsarnaev compares this case to the trial of Timothy McVeigh, whose trial for bombing the federal building in Oklahoma City was transferred to Denver. Br. 91 (citing *United States v. McVeigh*, 918 F. Supp. 1467, 1471 (W.D. Okla. 1996)). In *McVeigh*, however, the issue was not whether the trial should be moved out of Oklahoma City, upon which both parties agreed. *McVeigh*, 918 F. Supp. at 1470. The bombing had killed 169 people, caused "massive damage" to the federal courthouse, and resulted in the recusal of Oklahoma's federal district judges. *Nichols v. Alley*, 71 F.3d 347, 349 (10th Cir. 1995) (per curiam). Instead, the issue was "whether to move the trial elsewhere in Oklahoma or out of the state entirely." *Tsarnaev*, 780 F.3d at 23. And, "[i]nsofar as the cases are similar, the *McVeigh* judge's decision to move the trial

[26] The "Boston Strong" slogan "appears to have arisen in the aftermath of the marathon bombings," Add.495 n.11, and was, at least initially, "about civic resilience and recovery," *Tsarnaev*, 780 F.3d at 25 n.13. The One Fund was a foundation set up to help the marathon bombing victims. 23.App.10795.

to Denver does not suggest that a decision to keep [Tsarnaev's] trial in Boston is an abuse of discretion." *Id.*

Tsarnaev also points out that "[t]he bombings targeted a Boston tradition and the city itself." Br. 91. But the venire was drawn from a large part of the state, not just Boston. The geographic diversity of the jury pool is reflected in the jury that was actually selected, whose cities of residence are shown in this map (alternate jurors marked by lighter pins).



See Doc. 1639. (Two seated jurors and one alternate were from Peabody, Massachusetts, marked by Point F.) "Given this large, diverse pool of potential

jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." *Skilling*, 561 U.S. at 382.

ii. Lack of confession or blatantly prejudicial information

Second, this case was not "marred by the repeated broadcast of a defendant's questionable taped confession two months before trial in a small area of 150,000 people, as in *Rideau*." *Tsarnaev*, 780 F.3d at 21. The publicity "consist[ed] of factual news media accounts" that were not "of the grossly prejudicial character that attended *Rideau*." *Id.* at 22. *See Beck v. Washington*, 369 U.S. 541, 556 (1962) (noting that pretrial publicity consisted of "straight news stories rather than invidious articles which would tend to arouse ill will and vindictiveness"); *United States v. Angiulo*, 897 F.2d 1169, 1181 (1st Cir. 1990) ("To justify a presumption of prejudice . . . , the publicity must be both extensive *and* sensational in nature."). *Cf. Casellas-Toro*, 807 F.3d at 383 (media had published allegedly false rumors about the defendant, including that he had "drunkenly bragged about assassinating the then-governor of Puerto Rico").

Tsarnaev points to a number of reasons why he believes the media coverage was prejudicial. Br. 56-60, 89. First, he contends that the venire was exposed "not just to a single confession from the defendant, but to multiple confessions." Br. 89. *See id.* at 60. He points out (Br. 56) that the news media characterized as a "confession" the message he wrote inside the boat explaining his motive for the bombing. But, unlike the uncounseled confession in *Rideau*, Tsarnaev's statement in

the boat was admissible and admitted at trial. Thus, any pretrial exposure to the message would not unfairly prejudice the jury.

Tsarnaev argues that "prejudice should be presumed where particularly damaging information is disclosed," "even where . . . that same information is later admitted at trial." Br. 86. He points out (Br. 86-87) that two confessions (one written and one oral) were admitted at trial in *Rideau*. *See Rideau*, 373 U.S. at 730 (Clark, J., dissenting). But *Rideau*'s finding of presumed prejudice was not based on the admitted confessions; it was based on the "televised interview," which, "to the tens of thousands of people who saw and heard it, in a very real sense was Rideau's trial—at which he pleaded guilty to murder." *Id.* at 726 (majority opinion).

The Supreme Court and other courts of appeals have recognized that admissibility is relevant to determining whether pretrial publicity is prejudicial. *Compare, e.g.*, *Sheppard*, 384 U.S. at 360 (noting that the information reported by the media was "clearly inadmissible" and that "[t]he exclusion of such evidence in court is rendered meaningless when news media make it available to the public"), *with Murray v. Schriro*, 882 F.3d 778, 805 (9th Cir.) ("There was no inflammatory barrage of information that would be inadmissible at trial. Rather, the news reports focused on relaying mainly evidence presented at trial."), *cert. denied*, 139 S. Ct. 414 (2018); *Henderson v. Dugger*, 925 F.2d 1309, 1314 (11th Cir. 1991) ("[B]ecause we have found [the defendant's] confessions were admissible, the damage if any from the [pretrial] publicity is negligible."). And even where an *inadmissible* confession is reported in the

media, the resulting prejudice may dissipate. *See Patton*, 467 U.S. at 1029. Media reports of Tsarnaev's "confession" in the boat are therefore inadequate to establish a presumption of prejudice.[27]

Tsarnaev also notes that the media referenced his "admissions" to the FBI after his arrest, which were "not introduced at trial." Br. 56. Those news articles do not establish a presumption of prejudice. As an initial matter, reading a news report that Tsarnaev "made [an] admission," 23.App.10851, or "allegedly admitted," 24.App.10930, 10935, 11053, to his role in the bombings is not nearly as "dramatic[ ] or "indelibl[e]" as watching the televised confession in *Rideau*. *Skilling,* 561 U.S. at 382-83. And other evidence admitted at trial—such as the message Tsarnaev wrote in the boat—clearly indicated that he acknowledged committing the bombing.

Furthermore, Tsarnaev did not contest his guilt; indeed, his counsel essentially *asked* the jury to convict him during the guilt phase. *See* 10.App.3977 ("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. . . . It was him."); 10.App.3978 ("We . . . will not . . . attempt to sidestep . . . [Tsarnaev]'s responsibility for his actions . . . ."); 15.App.6958 ("[W]e are not asking you to go easy on [Tsarnaev]. . . . The horrific acts that we've heard about, the death, destruction

[27] This is particularly true considering that Tsarnaev wrote his statement in the boat to "shed some light on our actions," which, he said, "came with a [me]ssage." 11.App.4555-56. Tsarnaev voluntarily wrote a manifesto, and he can hardly complain that it became public.

and devastation . . . deserve to be condemned, and the time is now."). So any pretrial publicity indicating that he acknowledged committing the bombings was consistent with both the overwhelming evidence and Tsarnaev's own admissions at trial. It cannot establish unfair prejudice.

Tsarnaev also points out that "[s]ome articles falsely claimed that [he] wrote 'Fuck America' in the boat." Br. 56. This inaccurate report appears in only one of the many articles included in Tsarnaev's appendix. *See* 24.App.10988 ("[Expletive] America"). And the jury was able to see Tsarnaev's messages and even view the entire boat in person. 1.Supp.App.28-30 (Gov't Exhs. 826, 827, 828); 12.App.5206-5214. The jury therefore learned definitively that Tsarnaev did *not* write "Fuck America."

Moreover, even if jurors had read and remembered this inaccurate claim, the resulting prejudice would be minimal in light of the other evidence. Jurors read Tsarnaev's text messages calling President Barack Obama and now-Senator Mitt Romney "s[a]tan ass niggas." 1.Supp.App.68 (Gov't Exh. 1385); 14.App.6341. They read Tsarnaev's statement in the boat that "killing innocent people . . . is allowed" because "[t]he U.S. Government is killing our innocent civilians." 1.Supp.App.29-30 (Gov't Exhs. 827, 828); 11.App.4555-4557. And they saw video of Tsarnaev raising his middle finger at a security camera. 1.Supp.App.90 (Gov't Exh. 1595); Add.CD.DX4001 at 00:14-00:16; 16.App.7294-7295, 7308-7309. Faced with this evidence, jurors were unlikely to be improperly swayed by any misconception they

might have had—subsequently debunked by the trial evidence—that Tsarnaev had written "Fuck America."

Second, Tsarnaev points out that many articles "described the video footage of the Tsarnaev brothers walking down Boylston Street carrying the backpacks containing the bombs." Br. 56. He also points out that this video and another video depicting the bomb blasts were posted online and viewed millions of times. Br. 56-57. But that information would not have unfairly swayed the jury. Although those specific videos were not admitted at trial (though they could have been), very similar videos of the bombing were put into evidence. *See* Gov't Exhs. 5, 22. Nor were the videos unfairly prejudicial, especially considering that Tsarnaev did not contest his guilt. Moreover, the "nearly 30 million views" (Br. 57) that the *Boston Globe*'s bombing-related videos received undoubtedly included millions of people from outside Massachusetts. Unlike in *Rideau*, exposure to those videos was not unique to a particular venue.

Third, Tsarnaev points to media coverage of the victims, including "poignant descriptions" of the "pain and suffering" endured by the decedents' families, as well as the survivors' "horrific injuries," "the daunting recoveries they faced, and their courage as they went through the rehabilitation process." Br. 57-58. Although this media coverage would likely engender sympathy for the victims, it was not "blatantly prejudicial" or comparable to the "dramatically staged admission of guilt" in *Rideau*. *Skilling*, 561 U.S. at 382-83. And similar evidence about the victims' horrific injuries

and the impact on the deceased victims was admitted at trial. *See, e.g.*, 10.App.4066 ("[M]y bones and all of my flesh was sticking out of my left hand and blood was running down my arm."); 4142 ("I looked down and I saw my legs, and it was . . . pure carnage. . . . I could see my bones and my flesh sticking out."), 4286-95 (injuries to Richard family); 16.App.7152-53, 7170 (effect on Krystle Campbell's family), 7210-11, 7223-27 (effect on Sean Collier's family), 7335-40; Gov't Exh. 1600 (video showing effect on Lingzi Lu's family). Jurors who sat through the poignant trial testimony were unlikely to be influenced by any previous exposure to this media coverage. The mere existence of the coverage does not show that an impartial jury could not be selected in Massachusetts.

Fourth, Tsarnaev points out that the media reported the views of "prominent community members[ ]" and some victims' families that Tsarnaev should receive the death penalty. Br. 58-59. *See id.* at 89-90. But the media also reported personal opposition to the death penalty by Cardinal Sean Patrick O'Malley. 23.App.10834. The *Boston Globe* ran an editorial arguing that then-U.S. Attorney General Eric Holder erred in authorizing the death penalty. 24.App.11051. And the *Globe* conducted a poll indicating that a majority of Massachusetts residents (57%) supported life imprisonment, as opposed to the death penalty, for Tsarnaev. 24.App.11047. In light of those diverse viewpoints, jurors were unlikely to be prejudiced in favor of the death penalty by media coverage. And considering that only 25% of prospective jurors had

formed the opinion that Tsarnaev should be punished by death, any effect these reports had did not prevent the district court from selecting an impartial jury.

Finally, Tsarnaev points to various articles "characterizing" him as a "monster," "a terrorist," or "evil." Br. 59-60. *See id.* at 89. As an initial matter, such characterizations are hardly surprising given the nature of Tsarnaev's crimes, which his own counsel described as "tragic," "senseless," "horribly misguided," and inspired by "violent Islamic extremism." 10.App.3975, 3976, 3978. In any event, the fact that some people expressed such views to the news media is not enough to presumptively disqualify every prospective juror in the Eastern Division of the District of Massachusetts. In any case involving the bombing of innocent civilians, some members of the community will condemn the actions with harsh words. But "even pervasive, adverse publicity does not inevitably lead to an unfair trial." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). And the media publication of these viewpoints does not show that the passions of every person in the Eastern Division were "inflamed . . . past the breaking point." *Quiles-Olivo*, 684 F.3d at 182 (quotations omitted).

iii. Lapse of nearly two years between crime and trial

The third factor that *Skilling* considered—the passage of time—also undermines a presumption of prejudice. Unlike in *Rideau*, where the defendant's trial took place within two months of his arrest and televised confession, Tsarnaev's trial

took place almost two years after the marathon bombing. *See* 10.App.3922, 3944 (opening statements began on March 4, 2015). As this Court observed in denying mandamus relief, "[t]he nearly two years that have passed since the Marathon bombings ha[ve] allowed the decibel level of publicity about the crimes themselves to drop and community passions to diminish." *Tsarnaev*, 780 F.3d at 22. *See also* Add.411 (district court's judgment that, eighteen months after the bombing, "media coverage has continued but the 'decibel level of media attention [has] diminished somewhat'" (quoting *Skilling*, 561 U.S. at 361)). *Cf. Casellas-Toro*, 807 F.3d at 383-84, 388 (jury selection in defendant's federal trial took place just two months after the televised sentencing in his local case).

The Supreme Court's decision in *Patton v. Yount* is instructive. There, the defendant confessed to a brutal murder and was initially convicted, but his conviction was overturned because his confession was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). *Patton*, 467 U.S. at 1027. At voir dire for his second trial, 98% of the venire had "heard of" the case, and 77% "admitted they would carry an opinion into the jury box." *Patton*, 467 U.S. at 1029. Eight of the 14 jurors and alternates admitted that they had previously formed an opinion regarding the defendant's guilt. *Id.* at 1029-30. But the Supreme Court rejected the defendant's claim that prejudice should be presumed, pointing out that "prejudicial publicity [had] greatly diminished and community sentiment had softened" in the four years that elapsed between the first and second trials. *Id.* at 1032. Similarly here, the time that

passed between the 2013 bombing and the 2015 trial allowed passions to cool and reduced the likelihood of pervasive prejudice.

iv. Jury's decision not to impose death on 11 of 17 eligible counts

Finally, as in *Skilling*, the jury's verdict undermines a presumption of prejudice. The jury did not acquit Tsarnaev on any counts, but that is hardly surprising considering that Tsarnaev did not contest his guilt. *See* 10.App.3977-3978; 15.App.6958. The jury did, however, decline to impose the death penalty on 11 of the 17 counts for which the government sought it. Add.96. This indicates just as persuasively as the acquittals in *Skilling* that the jury did not act out of bias or prejudice, but took seriously its responsibility to weigh the aggravating and mitigating factors and to select an appropriate sentence.[28] As *Skilling* observed, "[i]t would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." *Skilling*, 561 U.S. at 383. There is no justification for applying such a presumption here.

[28] Indeed, the jury failed to find one aggravating factor (advocating additional acts of terrorism) with respect to any count, found some aggravating factors to exist only as to certain counts, and took a nuanced approach to the mitigating factors, with at least one juror finding each of the 21 listed factors, but all the jurors agreeing only on four. *See* Add.82-92. This was far from being a straight verdict for the government.

In *Casellas-Toro*, by contrast, the jury's verdict "support[ed] a presumption of juror bias" because the jury convicted on all three counts, but the district court granted a judgment of acquittal on two of them. *Casellas-Toro*, 807 F.3d at 388.

d. Even if Tsarnaev could establish a presumption of prejudice, the government could rebut it.

If this Court were to conclude that a presumption of prejudice applies in this case, the government could rebut that presumption. This Court has assumed, without explicitly deciding, that a presumption of prejudice is rebuttable. *Casellas-Toro*, 807 F.3d at 388-90. *See also United States v. Moreno Morales*, 815 F.2d 725, 739 n.18 (1st Cir. 1987) ("*Rideau* may allow the presumption of prejudice to be rebutted by a showing of impartiality in the voir dire testimony."). As the Supreme Court has made clear, an error is "structural" and therefore subject to reversal without inquiring into prejudice "only in a very limited class of cases." *Neder v. United States*, 527 U.S. 1, 8 (1999) (quotations omitted). And potential jurors' exposure to extensive pretrial publicity should not be considered a structural error. The effects of the error can be ascertained through *voir dire*, and the district court can ensure that individuals actually selected for the jury do not have the same biases that pervade the more general population. As explained below, the record shows that the jury that convicted Tsarnaev was not biased. The government therefore could meet its burden of rebutting any presumption of juror bias that might arise.

2. The record does not demonstrate actual prejudice.

"Actual prejudice hinges on whether the jurors seated at trial demonstrated actual partiality that they were incapable of setting aside." *Quiles-Olivo*, 684 F.3d at 183 (quotations omitted). In assessing whether actual prejudice exists, "[a]ppellate courts

. . . should be mindful that their judgments lack the on-the-spot comprehension of the situation possessed by trial judges." *Skilling*, 561 U.S. at 386. "When pretrial publicity is at issue, 'primary reliance on the judgment of the trial court makes [especially] good sense' because the judge 'sits in the locale where the publicity is said to have had its effect' and may base her evaluation on her 'own perception of the depth and extent of news stories that might influence a juror.'" *Id.* (quoting *Mu'Min,* 500 U.S. at 427). Moreover, the trial judge's "estimation of a juror's impartiality" is "ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Id.* "[T]he trial court's resolution of such questions is entitled, even on direct appeal, to special deference." *Patton*, 467 U.S. at 1038 (quotations omitted).

a. Excluded venire members' views do not establish actual prejudice.

In seeking to establish actual prejudice, Tsarnaev first reprises some of his presumed-prejudice arguments, pointing out that "99.7% of the venire admitted they had been exposed to some amount of the publicity" and that "920 [prospective] jurors . . . reached the conclusion that Tsarnaev was guilty based solely on what they had heard before coming to court." Br. 95. He also cites prospective jurors' "[i]ndividual responses" to the juror questionnaire. *Id.* at 95-96. Although he admits that these prospective jurors "were *not* provisionally qualified" and did not sit on his jury, *id.* at

96, he argues that their views are relevant based on this Court's observation that "[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 (quoting *Angiulo*, 897 F.2d at 1181-82).

This Court's observation in *Casellas-Toro* (echoing other cases) was based on the Supreme Court's dicta in *Murphy*, 421 U.S. at 803, which observed that "[i]n a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question." *Murphy* cited the example of *Irvin*, 366 U.S. at 727, where "90% of those examined on the point were inclined to believe in the accused's guilt." *Murphy*, 421 U.S. at 803. But *Murphy* concluded that where only "20 of the 78 persons questioned . . . indicated an opinion as to [the defendant's] guilt," the facts did not "suggest[ ] a community with sentiment so poisoned against [the defendant] as to impeach the indifference of jurors who displayed no animus of their own." *Id.* Subsequently, in *Patton*, the Supreme Court rejected a challenge to the jury where 77% of the venire "admitted they would carry an opinion into the jury box." *Patton*, 467 U.S. at 1029. This is higher than the 67% of prospective jurors in Tsarnaev's case who indicated that they had formed the opinion that Tsarnaev was guilty, and far higher than the 37% who had formed that opinion and could not set aside that view. Moreover, in *Skilling*, the Court observed that "[s]tatements by nonjurors do not themselves call into question the adequacy of

the jury-selection process; elimination of these venire members is indeed one indicator that the process fulfilled its function." *Skilling*, 561 U.S. at 389 n.24. So the fact that some prospective jurors expressed disqualifying prejudice does not support the inference that the seated jurors were lying when they indicated an ability to be impartial.

This Court has already addressed some of the potential jurors' statements that Tsarnaev now quotes, concluding that they were not "so common among the pool of excused jurors that a court must infer bias among others who have been provisionally qualified." *Tsarnaev*, 780 F.3d at 27. "It is not surprising that in a pool of over a thousand jurors . . . , some will make strong statements that disqualify them from jury service." *Id.* But other prospective jurors "expressed their ability to be fair and impartial," and the district court evaluated their claims through "extensive voir dire." *Id.* The district court's conclusion that impartial jurors could be found was not "manifest error." *Mu'Min*, 500 U.S. at 428 (quotations omitted).

b. The seated jurors' views do not show actual prejudice.

Tsarnaev next points to several facts that, in his view, show the actual prejudice of the seated jurors in this case. First, he points out that "all 12 seated jurors (and all six alternates) admitted to having been exposed to . . . pre-trial publicity." Br. 97. But the Supreme Court's cases clearly establish that this fact alone does not show prejudice. *See Skilling*, 561 U.S. at 381 ("Prominence does not necessarily produce prejudice, and juror *impartiality* . . . does not require *ignorance*."); *Patton*, 467 U.S. at 1029

(98.8% of prospective jurors had heard of the case); *Reynolds*, 98 U.S. at 155-56 ("[E]very case of public interest is . . . brought to the attention of all the intelligent people in the vicinity . . . ."). And, as demonstrated by his polling data, Tsarnaev would have been hard-pressed to find any U.S. jurisdiction in 2015 where a significant percentage of potential jurors had *not* been exposed to media coverage of the bombing. *See Tsarnaev*, 780 F.3d at 16 ("[I]n his preferred venue, Washington D.C., 96.5% of survey respondents had heard of the bombings.").

Second, Tsarnaev asserts that "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." Br. 97. *See id.* at 83-84 (voir dire quotations). Tsarnaev is correct that three of the seated jurors (Jurors 349, 395, and 487) indicated in their questionnaires that they had formed the opinion Tsarnaev was guilty. *See* 26.App.11843, 11870, 11955. But they also checked the box saying they would be "able . . . to set aside [their] opinion[s] and base [their] decision[s] about guilt and punishment solely on the evidence that will be presented . . . in court." *Id.* And each was "unsure" whether Tsarnaev should receive the death penalty. *Id.*

The Supreme Court has made clear that a juror is not disqualified for having "formed some impression or opinion as to the merits of the case." *Irvin*, 366 U.S. at 722. "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* at 723. All three jurors

expressed an ability to do so, both in their questionnaires and during voir dire. *See* 6.App.2351-52, 2633-34; 7.App.3076-77. As one juror (#349) explained, after she indicated on the questionnaire that she believed Tsarnaev was "guilty," she "realized" that "I can't know that he's guilty, because I don't know what the charges are or what the evidence is." 6.App.2351.

As to the three additional jurors that Tsarnaev says "admitted they believed Tsarnaev participated in the bombings," Br. 97, the full context of their voir dire statements does not indicate that they were biased. Juror 83 candidly admitted, "I don't think this would be a case of mistaken identity," and "obviously he [Tsarnaev] was involved in something." 2.App.874, 879. But that juror added: "[I]t is my understanding that you're . . . innocent until proven guilty." 2.App.874. Juror 229 admitted when pressed by defense counsel that "I guess, yes, I suppose that we knew that he was involved." 4.App.1675. But she explained she was "unsure" about Tsarnaev's guilt because "I'm a little bit jaded with the media, and I just thought with our legal system I should keep an open mind. . . . I just know what the media tells us, there's always more." 4.App.1663. "So I felt like, you know, you're innocent before proven guilty, that I should have that open mind." *Id.* Juror 286 said she "assume[d]" while watching the news that "the police . . . got who they were looking for." 5.App.2009. But she explained that "I wasn't comfortable with the information I knew to make an accurate decision" regarding Tsarnaev's guilt. *Id.*

Far from demonstrating "actual partiality" that these three jurors were "incapable of setting aside," *Quiles-Olivo*, 684 F.3d at 183, their voir dire responses show that they were unwilling to prejudge Tsarnaev's guilt without first seeing the charges and hearing the evidence. As with all the seated jurors, the district court confirmed through additional questioning that these jurors could apply the presumption of innocence and reach a conclusion based solely on the evidence presented at trial. *See* 2.App.874-875; 4.App.1663-1664; 5.App.2009-2010. Their belief that Tsarnaev was "involved" with the bombing does not establish disqualifying prejudice. And any details the jurors might have remembered from pretrial media coverage paled in comparison to what they heard and saw at trial. *See* 21.App.9864 (juror observing after the guilt phase that he was now "an eyewitness" to the bombing).

Third, Tsarnaev points out (Br. 82, 97) that five of the seated jurors had made financial contributions to the bombing victims, either by directly donating to the Boston One Fund or by purchasing Boston Strong merchandise. *See* 2.App.503-504 (Juror 35 made a $50 or $75 contribution); 5.App.2010 (Juror 286 attended a One Fund concert and bought a "Boston Strong" t-shirt); 6.App.2353 (Juror 349 bought a "life is good" t-shirt with some proceeds going to One Fund); 26.App.11872 (Juror 395 contributed to One Fund); 7.App.3086 (Juror 487 bought a "Boston Strong" t-shirt for her nephew). The mere fact that these five jurors had contributed to a charitable cause aimed to aid the victims of the bombing does not show that they

harbored actual prejudice against Tsarnaev. As this Court observed, "the Boston Strong theme is about civic resilience and recovery. It is not about whether [Tsarnaev] is guilty of the crimes charged." *Tsarnaev*, 780 F.3d at 25 n.13. "That someone buys a Boston Strong T-shirt is not proof that he or she could not be fair and impartial if selected as a potential juror on the question of guilt." *Id.* All five of these jurors indicated that they could decide the case based on the evidence presented. *See* 2.App.502-503; 5.App.2009; 6.App.2351-2352, 2633-2634; 7.App.3076-3077. And Tsarnaev did not move to strike any of them for cause, "strong evidence that he was convinced the jurors were not biased." *Beck*, 369 U.S. at 558. The district court's decision to credit these jurors' responses was not an abuse of discretion.

Fourth, Tsarnaev asserts that "it took 21 court days . . . to obtain this compromised jury." Br. 97. But, as this Court pointed out previously, a jury selection of this length is "not unusual," particularly for a death penalty case that received nationwide attention. *Tsarnaev*, 780 F.3d at 26 & n.14 (citing cases). "Moreover, it defies logic to count the efforts the district court has taken to carefully explore, and eliminate, any prejudice as *showing* the existence of the same." *Id.* at 26. Tsarnaev points (Br. 97) to the Supreme Court's statement that "[t]he length to which the trial court must go in order to select the jurors who appear to be impartial is another factor relevant in evaluating those jurors' assurances of impartiality." *Murphy*, 421 U.S. at 802-03. But *Murphy* does not suggest that a 21-day voir dire in a capital case raises an inference of prejudice.

Finally, Tsarnaev argues that "the Court should also consider that at least two of the seated jurors deceived the [district c]ourt as to their bias against Tsarnaev." Br. 98. As explained below, these jurors were not dishonest, and any inaccuracies in their statements do not indicate disqualifying bias against Tsarnaev.

In short, there is no evidence to support Tsarnaev's contention that the 12 jurors who convicted him were anything short of impartial. They assured the district court that they could be impartial, and the court "did not simply take venire members who proclaimed their impartiality at their word." *Skilling*, 561 U.S. at 394. The court conducted individualized voir dire during which both the court and the parties were able to ask the jurors questions. "This face-to-face opportunity to gauge demeanor and credibility, coupled with information from the questionnaires regarding jurors' backgrounds, opinions, and sources of news, gave the court a sturdy foundation to assess fitness for jury service." *Id.* at 395. The district court individually questioned the seated jurors a second time before the end of the guilt phase to ensure that they had avoided media coverage during the trial. *See* 21.App.9848-66. And the jury's decision to impose the death penalty on only six of the 17 death-eligible counts "suggests the court's assessments were accurate." *Skilling*, 561 U.S. at 395. This Court should reject Tsarnaev's claim of actual prejudice.

D. Federal Rule of Criminal Procedure 21 and this Court's supervisory powers do not justify reversal.

Tsarnaev argues that, even if the Constitution does not require a change of venue, this Court should require one based on Federal Rule of Criminal Procedure 21 and this Court's supervisory power. Br. 93. Although Tsarnaev summarily mentioned Rule 21 in several of his change-of-venue motions, *see* 23.App.10706; 25.App.11450, 11558, he never argued that Rule 21's standard is more lenient than the constitutional standard, and he never mentioned the court's supervisory power. He therefore failed to preserve this argument, meaning that this Court's review is for plain error. Fed. R. Crim. P. 52(b). To obtain relief under this standard, Tsarnaev must show "that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected [his] substantial rights . . . ; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (quotations and brackets omitted).

It is not "clear or obvious" that the standard under Rule 21 or a federal court's supervisory power is "more favorable to the defense . . . than the constitutional standard." Br. 93. Rule 21 requires transfer if the district court is satisfied that "the defendant cannot obtain a fair and impartial trial" in the district. Fed. R. Crim. P. 21(a). This is textually indistinguishable from the constitutional standard, which ensures the right to "an impartial jury" and a "fair trial." *Skilling*, 561 U.S. at 377-78. It would make little sense to interpret the term "fair and impartial trial" in Rule 21 to

mean something other than the "fair trial" by an "impartial jury" guaranteed by the Sixth Amendment.

As to the Court's supervisory powers, federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505 (1983). And a few justices have suggested in individual opinions that the Court's supervisory powers may justify a change of venue even when the Constitution does not. *See Skilling*, 561 U.S. at 446 n.9 (Sotomayor, J., dissenting); *Murphy*, 421 U.S. at 804 (Burger, C.J., concurring); *Rideau*, 373 U.S. at 728-29 (Clark, J., dissenting). But the Court has never adopted that view, and it has made clear that its inherent power "does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure." *Carlisle v. United States*, 517 U.S. 416, 426 (1996). Because Rule 21 already establishes a venue-transfer standard that echoes the constitutional standard, it would be inappropriate for courts on their own authority to create a lower threshold for transfer. *See id.* at 426-28 (court could not invoke inherent power to circumvent Federal Rule of Criminal Procedure 29's time limits for a motion for judgment of acquittal). That is particularly true here, where Tsarnaev forfeited his argument that this Court should adopt a lower standard.

Nor is it "clear or obvious" that Tsarnaev would be entitled to relief under the "more expansive Rule 21 standard" that he advocates. Br. 93. He admits that the Supreme Court has "never articulated" this supposedly lower standard, Br. 93, and he

points to no authority from this Court establishing such a standard. The district court did not plainly err by failing to *sua sponte* order a change of venue based on its supervisory power.

E. The Eighth Amendment does not independently require reversal.

Tsarnaev also argues that "the Eighth Amendment independently requires a change of venue" based on the "heightened need for reliability" in capital cases. Br. 99 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985)). To be sure, the importance of an impartial jury is at its peak "[w]here one's life is at stake." *Irvin*, 366 U.S. at 727. But the Sixth Amendment already "secures to criminal defendants the right to trial by an impartial jury." *Skilling*, 561 U.S. at 377. Even in capital cases, the Supreme Court has relied on the Sixth Amendment as guaranteeing an impartial jury. *See Ross v. Oklahoma*, 487 U.S. 81, 85 (1988) ("It is well settled that the Sixth and [in state cases] Fourteenth Amendments guarantee a defendant on trial for his life the right to an impartial jury."). And the Court has recognized even in capital cases "the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity." *See Mu'Min*, 500 U.S. at 427. Here, the district court's careful voir dire ensured that Tsarnaev received an impartial jury. The Eighth Amendment required nothing more.

II. Tsarnaev is Not Entitled to a New Trial or Remand Based on Alleged Juror Dishonesty.

Tsarnaev next contends that two members of the jury—Jurors 286 and 138—gave knowing false answers during voir dire about their social media postings and that Juror 286 falsely indicated that she and her family did not shelter in place. Br. 102-160. He argues that the district court's "failure to strike both [jurors] for cause was structural error that requires reversal of Tsarnaev's convictions, or in the alternative, . . . his death sentences." Br. 103. "At a minimum," he argues, this Court "should remand for further proceedings." Br. 103-04. In fact, the jurors were not dishonest about their social media postings. Although Juror 286 appears to have given an inaccurate answer on the questionnaire regarding whether her family sheltered in place, she volunteered that fact during her individual voir dire, correcting the inaccuracy and alerting defense counsel to the issue. And even if both jurors had fully disclosed everything Tsarnaev argues they should have, they would not have been stricken for cause. So Tsarnaev cannot show entitlement to a new trial or an evidentiary hearing.

A. Background

1. Juror 286

When Juror 286 filled out her jury questionnaire in January 2015, she disclosed in response to Questions 29 and 30, which asked jurors about their social media use, that she looked at Facebook and Twitter "daily," but did not "post daily." Add.544.

Question 79 asked whether she had "commented on this case in a letter to the editor, in an online comment or post, or on a radio talk show." Add.553. Juror 286 wrote, "[I] don't believe I have." Add. 553. In response to Question 81, which asked whether she or a family member had been "*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)," she wrote "N/A." Add.554.

Months before she appeared to fill out her questionnaire, between April 2013 and April 2014, Juror 286 had tweeted or retweeted posts about the Boston Marathon bombing 22 times.[29] *See* 25.App.11538-51. For example, on the day of the bombing, she tweeted, "Need something to make you smile and warm your heart after today's tragedy at #BostonMarathon , take a look at #BostonHelp." 25.App.11541. About Martin Richard, she tweeted, "Little 8yr old boy that was killed at marathon, was a Savin Hill little leaguer :-(RIP little man #Dorchester #bostonmarathon." 25.App.11551. (Juror 286 was from the Dorchester neighborhood of Boston. Add.537.) On April 19, she indicated that she was "locked down" with her family, saying, "[I]t's worse having to work knowing ur family is locked down at home!! Finally home locked down w/them #boston." 25.App.11544.

[29] When a Twitter user "retweets another user, the other user's original tweet will appear on the retweeter's timeline" with a notation that it is "Retweeted." *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 944-45 (W.D. Wis. 2019).

After Tsarnaev's arrest, Juror 286 retweeted several expressions of celebration that had been posted by other users, including a tweet that said, "Told y'all. Welcome To Boston The City Of CHAMPS! We get our shit DONE! #BostonStrong." 25.App.11540. Another tweet that Juror 286 retweeted said, "Congratulations to all of the law enforcement professionals who worked so hard and went through hell to bring in that piece of garbage." 25.App.11540. Over the following year, Juror 286 retweeted additional posts relating to the victims, including a photo of Sean Collier and Richard Donohue (the Transportation Authority officer who almost died on Laurel Street) at their police academy graduation, a photo of Martin Richard's younger sister Jane singing the national anthem at Fenway Park, and a photo of Martin's older brother Henry running the Boston Marathon's Youth Relay races in April 2014. 25.App.11548-50.

When Juror 286 appeared for individual voir dire on February 4, 2015, she said that she used Facebook, Twitter, and Instagram for "just social" purposes, saying, "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." 5.App.2007. She indicated she had "[a]bsolutely" seen reports about this case and saw "everything on the news." 5.App.2009. But she explained that she had not formed an opinion regarding Tsarnaev's guilt because "I don't feel I knew enough of the facts to base a decision [on]." 5.App.2009. And she indicated that she would "[a]bsolutely" be able to apply

the presumption of innocence and to acquit Tsarnaev if the government failed in its proof. 5.App.2009-10.

Juror 286 indicated that she had "never really thought" about the death penalty, but was neither for nor against it and could vote to impose it or a sentence of life imprisonment, depending on the facts and the law. 5.App.2011. When asked if she could "listen to all th[e] evidence," consider the aggravating and mitigating factors, and "choose in either direction depending on how [she] weighed the evidence," she said, "I could." 5.App.2012. In response to the prosecutor's questions, Juror 286 stated, "I guess I don't feel like I'm the one that's sentencing someone to death or prison for the rest of their life." 5.App.2013. It was the person's "own actions that are determining that," and she would just be "following the law." 5.App.2013. Since she had been "told to follow the law," she would "decide . . . by what [she had] heard in the courtroom." 5.App.2013.

2. Juror 138

On the morning of January 5, 2015, when Juror 138 appeared in court to complete his juror questionnaire, he posted on Facebook: "Jury duty....this should be interesting...couple thousand people already here." 25.App.11537. This prompted responses from two of his Facebook "friends," who said, "How'd you get stuck going to Boston?" and "Did you get picked for the marathon bomber trial!!! ??? That's awesome!" 25.App.11537. Juror 138 responded, "Ya awesome alright haha there's

like 1000s of people." 25.App.11537. Over the next few hours, people left more comments, saying,

> If you're really on jury duty, this guys got no shot in hell.
>
> OMG you could be on this jury!!!
>
> 1200 people it's one out of 100 chance.
>
> They're gonna take one look at you and tell you to beat it.
>
> Did you get selected?

25.App.11537.

During preliminary instructions, the district court instructed prospective jurors (including Juror 138) "not to discuss this case with your family, friends or any other person." 1.App.182. The court said prospective 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." 1.App.182. But it warned them "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." 1.App.182. And it told them not to "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." 1.App.183.

Later that day, Juror 138 returned to the Facebook thread and posted:

> There's 1200 or so of us...250 a day mon-fri this week go in full out survey 100's of ques and then we call back to see when we go back and they select 18 of us out of the 1200 but single people out one by one over the next month they are telling me the process will take until the

> 23rd or 24th...then the whole trial it self is going to be 3-4 months they say

25.App.11537.

A few minutes later, he added: "Shud be crazy he was legit like ten feet infront of me today with his 5 or 6 team of lawyers...can't say much else about it tho...that's against the rules." 25.App.11537. This prompted a number of responses from his Facebook friends:

> Whoa!!
>
> Since when does [Juror 138] care about rules?
>
> Play the part so u get on the jury then send him to jail where he will be taken care of

25.App.11537. Juror 138 responded: "When the Feds are involved id rather not take my chances...them locals tho...pishhh ain't no thaang." 25.App.11537. Another Facebook friend added one more comment: "Yea super careful bc should you get picked any mention of anything can get you booted or call for mistrial." 25.App.11537.

When Juror 138 returned for individual voir dire a few weeks later (on January 23), the district court said, "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?" 3.App.1146. Juror 138 responded, "Yeah, I haven't looked at anything. . . . I haven't talked to anybody about it." 3.App.1146-47.

The district court also asked Juror 138 about the nature of his Facebook use:

> 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.

3.App.1148.

When asked why he had responded "no" to Question 77, which asked whether he had formed any opinions with respect to guilt or punishment, *see* Add.525, Juror 138 responded, "I wasn't going to make any decisions until I'd seen everything that was presented . . . in front of me." 3.App.1151. The court asked whether he could render a not-guilty verdict if the evidence "wasn't there," and Juror 138 responded, "Yes, I would be able to go both ways . . . ." 3.App.1152.

Juror 138 said he did not have any "views in general" on the death penalty because he had "never really known much" about it and it "never really interested [him] too much." 3.App.1152. Although he indicated that he was generally in favor of the death penalty, he thought it should depend "on the circumstances of the event" or "what happened for . . . each individual." 3.App.1153. He said he would be "open to either" the death penalty or life imprisonment, 3.App.1154, and was "not more in favor one way or the other; it would all depend on the outcome of everything presented," 3.App.1155-56. As to the penalty in Tsarnaev's case specifically, Juror

138 said, "I don't really have an opinion as of now. . . . I would have to wait." 3.App.1156. In response to questioning from the prosecutor, Juror 138 acknowledged that "it's a pretty serious situation" to decide whether someone lives or dies. 3.App.1157. But when asked whether he thought he could sentence someone to death, he said, "I can't really say for sure until I would know all the facts in front of me, but . . . if that was the right decision to be made, then I would make the right decision, yes." 3.App.1158.

3. Defense motions to strike

On Friday, February 27, 2015, three days before the pretrial conference and four days before the parties were to exercise their peremptory challenges, Tsarnaev filed motions to strike Jurors 138 and 286 for cause based on newly discovered evidence. Add.469-475. These motions followed on the heels of several motions (and renewed motions) challenging five other provisionally qualified prospective jurors. *See* Docs. 994, 1042, 1064, 1065, 1094. Tsarnaev argued that Juror 286's tweets were "contrary to answers given in her juror questionnaire" and "reveal[ed] a community allegiance that is certain to color her view of the case." Add.472. He argued that Juror 286 should be stricken or "recalled for follow-up questioning." Add.475. And he argued that Juror 138 "was dishonest with the Court about comments on Facebook and violated the Court's instructions within just a few hours of receiving them." Add.470.

The government responded to all seven of Tsarnaev's motions to strike in a single filing. Sealed.App.95-101 (excerpts); Doc. 1106-1 (entire opposition). The government argued that these motions were untimely because the defense failed to object when Jurors 138 and 286 were provisionally qualified (on January 23 and February 4, 2015) and filed their motions "just one or two business days before the parties will exercise their peremptory challenges," and that the untimeliness should not be excused based on newly discovered evidence because the motions relied on "social media postings . . . that predated voir dire, often by years." Sealed.App.95, 96. *See* 3.App.1329; 5.App.2078.

On the merits, the government argued that Juror 286's tweets "express[ing] gratitude to law enforcement and sympathy for the victims" did not indicate that she "has a fixed opinion about guilt or punishment that she cannot set aside." Sealed.App.100. And it argued that Juror 286 "may well not have considered 'tweeting' (or especially 'retweeting') a photograph to be the same as 'comment[ing] on this case in a letter to the editor, in an online comment or post, or on a radio talk show.'" Sealed.App.101. The government argued that Juror 138 did not violate the court's instructions by "simply reporting that Tsarnaev was ten feet in front of him at one point and had a team of five or six lawyers." Sealed.App.99.

The district court denied all of Tsarnaev's motions to strike in an oral ruling:

> 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.

Add.321-22.

B. Standard of review

This Court reviews for abuse of discretion "the district court's response to . . . allegations of juror misconduct," including the district court's decision to grant or deny an evidentiary hearing. *United States v. Zimny*, 846 F.3d 458, 464 (1st Cir. 2017). Because Tsarnaev requested further voir dire only with respect to Juror 286, Add.469-75, his claim that the court should have questioned Juror 138 further is reviewed for plain error. Fed. R. Crim. P. 52(b).

C. The jurors did not make material false statements that would support challenges for cause.

"One touchstone of a fair trial is an impartial trier of fact," and voir dire "serves to protect that right by exposing possible biases." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (plurality opinion). "Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause," and "[t]he necessity of truthful answers by prospective jurors . . . is obvious." *Id.* But a

juror's inaccurate answer on voir dire does not automatically entitle a party to a new trial. Instead, to obtain a new trial "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. *See Sampson v. United States*, 724 F.3d 150, 164-65 (1st Cir. 2013) ("*Sampson II*").

"Jurors normally are subject to excusal for cause if they are biased or if they fail to satisfy statutory qualifications." *Sampson II*, 724 F.3d at 165. "Traditionally, courts have distinguished between two types of challenges for cause: those based on actual bias and those based on implied bias." *United States v. Mitchell*, 690 F.3d 137, 142 (3d Cir. 2012). *See United States v. Wood*, 299 U.S. 123, 133 (1936) ("The bias of a prospective juror may be actual or implied . . . .").

Actual bias "is typically found when a prospective juror states that he can not be impartial, or expresses a view adverse to one party's position and responds equivocally as to whether he could be fair and impartial despite that view." *Fields v. Brown,* 503 F.3d 755, 767 (9th Cir. 2007) (en banc); *see also United States v. Chandler,* 996 F.2d 1073, 1102 (11th Cir. 1993) (actual bias can be demonstrated by "an express admission of bias").

Implied bias, by contrast, is "bias conclusively presumed as a matter of law," *Wood,* 299 U.S. at 133, and is limited to "exceptional" or "extreme" circumstances. *McDonough*, 464 U.S. at 556-57 (Blackmun, J., concurring); *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring). Some examples of the "extreme

situations that would justify a finding of implied bias" include "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Smith*, 455 U.S. at 22 (O'Connor, J., concurring); *see Amirault v. Fair*, 968 F.2d 1404, 1406 (1st Cir. 1992) (per curiam) (concluding that a juror's blocking of a hurtful memory "does not rise to the level of 'exceptional' or 'extreme' circumstances which may permit a finding of implied bias").

Although the *McDonough* plurality stated the standard in terms of a juror's dishonesty, the five concurring justices clarified that, even where a juror gives an honest (but mistaken) response, a party can still attempt to show actual or implied bias. *See McDonough*, 464 U.S. at 556-57 (Blackmun, J., concurring) (noting that, "regardless of whether a juror's answer is honest or dishonest," the district court may afford a party "the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred"); *id.* at 558 (Brennan, J., concurring in the judgment) ("Whether the juror answered a particular question on *voir dire* honestly or dishonestly, or whether an inaccurate answer was inadvertent or intentional, are simply factors to be considered in this latter determination of actual bias."). But three of the concurring justices agreed with the plurality that "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." *Id.* at 556 (Blackmun, J., concurring). As the

Ninth Circuit has put it, "an honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation." *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc). *See Sampson II*, 724 F.3d at 164 n.8 ("[I]n the absence of dishonesty, post-trial relief, if available at all, will require a more flagrant showing of juror bias.").

"Any inquiry into potential bias in the event of juror dishonesty must be both context specific and fact specific." *Sampson II*, 724 F.3d at 165. And "[a] number of factors may be relevant in determining whether a juror has both the capacity and the will to decide the case solely on the evidence." *Id.* at 166. These factors include "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.* (citations omitted). The ultimate inquiry is whether a "reasonable judge" would conclude "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 167. "[E]ven an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality." *Dyer*, 151 F.3d at 973. "The party seeking to upset the jury's verdict has the burden of showing the requisite level of bias by a preponderance of the evidence." *Sampson II*, 724 F.3d at 166.

1. Juror 286's voir dire statements do not justify a new trial.

Tsarnaev argues that "Juror 286's responses to questions about her online activity and her experience during the manhunt were false; material; and knowingly dishonest." Br. 123. That argument lacks merit.

a. Juror 286 was not dishonest.

McDonough's first step requires Tsarnaev to show that Juror 286 "failed to answer honestly a material question on *voir dire*." *McDonough*, 464 U.S. at 554. "[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." *Sampson II*, 724 F.3d at 165 (quoting *Neder v. United States,* 527 U.S. 1, 16 (1999)). The juror's answers to Questions 79 and 81, which asked whether prospective jurors had publicly commented about the case or were personally affected by the charged crimes, were "capable" of influencing the district court's impartiality determination and were therefore material.

Contrary to Tsarnaev's claim, however, the record does not show "knowing dishonesty." Br. 128. A juror may give "honest, but mistaken responses" when, "for example, the juror misunderstands the wording of the question, fails to recall the correct response, or is not asked a question that would necessitate disclosure of the relevant information." *Sampson II*, 724 F.3d at 164 n.8. *See McDonough*, 464 U.S. at 555 (noting that "jurors are not necessarily experts in English usage" and "may be uncertain as to the meaning of terms which are relatively easily understood by lawyers

and judges"). The possibility of honest but mistaken responses is particularly high for juror questionnaires, as opposed to in-court questioning. Prospective jurors may not understand or carefully read the questions, and there is no opportunity for them to ask clarifying questions. As the district court observed, questionnaires have inherent limitations, and "may result in answers that appear more clear and unambiguous than the juror may have intended or than is actually true." Add.464-65.

With respect to Question 79, Juror 286 could have reasonably believed that tweeting or retweeting about events surrounding the 2013 Boston Marathon was not "comment[ing] *on this case*." Add.553 (emphasis added). The word "case" ordinarily refers to legal proceedings. *See* Oxford English Dictionary (3d ed. 2014) (defining "case" in the legal sense as "[a] legal action"); Black's Law Dictionary (10th ed. 2014) (defining "case" as "[a] civil or criminal proceeding, action, suit or controversy at law or in equity"). Because Juror 286 had not tweeted about Tsarnaev's criminal proceedings, she had not tweeted about the "case" in that sense. Moreover, she might have understood the question's reference to "a letter to the editor, in an online comment or post, or on a radio talk show," Add.553, as referring to something more formal than a tweet or retweet. Because the question did not clearly ask about tweets or retweets relating to the bombing, as opposed to Tsarnaev's legal case, Juror 286's answer "[I] don't believe I have," Add.553, was not dishonest.

As to Question 81, Juror 286 wrote "N/A" on her questionnaire when asked if she, a family member, or a close friend was "*personally* affected by the Boston

Marathon bombings . . . including being asked to 'shelter in place' on April 19, 2013." Add. 554. Her questionnaire indicated, however, that she lived in Boston's Dorchester neighborhood with her two children. Add.537, 540; 2.Supp.App.198. And during individual voir dire, Juror 286 explained that her home was within the shelter-in-place area, though she was already at work outside the city by 6:00 a.m. on April 19:

> 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.

5.App.2016. Additionally, Juror 286's April 19 tweet indicated that her family was "locked down at home" while she was at work and that she eventually arrived home and was "locked down w/them." 25.App.11544. Although she may not have been home for long before the shelter-in-place order was lifted at 6:00 p.m., *see* 12.App.5187, the questionnaire also asked not just whether she had sheltered in place, but whether her "family member[s]" had, so her response of "N/A" was inaccurate.

But the record does not indicate "knowing dishonesty." Tsarnaev Br. 128. If Juror 286 had been trying to conceal the fact that she and her family sheltered in place, she would not have volunteered that she "live[d] in Boston, and Boston was on lockdown," 5.App.2016, an answer that was not called for by the question asked. *See* 5.App.2016 ("At the restaurant, did your employees or coworkers, colleagues, talk about the Boston Marathon bombing when it happened?"). Her openness indicates

that, whatever the reason for her inaccurate answer in the questionnaire, she was not trying to mislead the court. And the inaccuracy does not suggest that she suffered from a disqualifying prejudice.

b. Juror 286's tweets and sheltering in place would not have justified a for-cause strike.

In any event, Juror 286's questionnaire answers do not entitle Tsarnaev to a new trial because fully accurate answers would not "have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556. *McDonough* "requires a party to offer more than the mere possibility that, given the chance, counsel might have removed a prospective juror." *Zerka v. Green*, 49 F.3d 1181, 1185 (6th Cir. 1995). Instead, the party must show that "the juror lacked the capacity and the will to decide the case based on the evidence." *Sampson II*, 724 F.3d at 165-66.

Juror 286's bombing-related tweets would not have justified her dismissal. Her expressions of empathy for the victims of the "tragedy" do not indicate that she could not be impartial. 25.App.11541. Indeed, Tsarnaev's own counsel called the bombings "tragic" and "heinous," and acknowledged the "unbearable grief, loss, and pain" caused by Tsarnaev's "senseless, horribly misguided acts." 10.App.3975, 3976; 19.App.8762. And, contrary to Tsarnaev's claim, Juror 286 did not "call[ ] Tsarnaev a 'piece of garbage.'" Br. 115, 123. Rather, she retweeted a post written by someone else that said, "Congratulations to all of the law enforcement professionals who worked so hard and went through hell to bring in that piece of garbage." Br. 107.

The focus of this tweet was more on the congratulations due to law enforcement than on Tsarnaev. Moreover, Juror 286's retweet was nearly two years before the trial in this case, and it is inadequate to call into question her affirmation that she would "[a]bsolutely" be able to apply the presumption of innocence and the burden of proof at trial, 5.App.2009-2010, and that she would "follow the law" with respect to the death penalty and "decide . . . by what [she had] heard in the courtroom," 5.App.2013.

Nor would Juror 286 have been stricken for cause if she had disclosed in her questionnaire that she had sheltered in place. Tsarnaev admits that "not every [prospective] juror who sheltered in place was disqualified." Br. 135. In fact, nine of the 75 provisionally qualified jurors had sheltered in place, yet Tsarnaev moved to strike only one of them (#98) for cause.[30] *See* 3.SPA.1451; 2.App.630-33 (#54); 2.App.926-27, 950-952 (#98); 3.App.1093-94, 1122 (#129); 3.App.1113, 1122 (#134); 3.App.1264, 1331-32 (#156); 9.SPA.4671; 4.App.1564 (#172); 4.App.1536, 1570 (#195); 14.SPA.7749; 5.App.2071-78 (#283); 6.App.2295, 2487 (#340). His reasons for moving to strike that juror included not only that the juror had sheltered in place but also that the juror had indicated on his questionnaire that "he thought the

[30] In fact, he affirmatively opposed government motions to strike three of them. *See* 2.App.630-33; 3.App.1331-32; 5.App.2071-78.

defendant was guilty and . . . should be sentenced to death." 2.App.950. And the district court denied the motion.[31] 2.App.952.

Considering that not a single prospective juror was stricken for cause on the basis of having sheltered in place—and that Tsarnaev accepted without protest eight who did—he cannot show that an accurate answer in Juror 286's questionnaire would have resulted in her being stricken for cause. This is especially true considering that Juror 286's questionnaire indicated that she and her children lived within the lockdown area, and individual voir dire specifically put Tsarnaev on notice that Juror 286's neighborhood had been "on lockdown." 5.App.2016; 2.Supp.App.198. Counsel could have inquired further, but chose not to. Moreover, the fact that Juror 286 joked with her boss about the "lockdown" as an excuse to leave work early suggest that the shelter-in-place order did not seriously affect her ability to serve as an impartial juror. *See* 5.App.2016. Tsarnaev cannot satisfy *McDonough*'s requirement of showing that a correct response would have provided a valid basis for a challenge for cause.

[31] Tsarnaev also moved to strike prospective juror 429, a bank manager who closed several area banks during the shelter-in-place order. 7.App.2810-11. But Tsarnaev's motion to strike also relied on the fact that the manager had attended on the bank's behalf a dinner honoring first responders. 7.App.2847-48. In counsel's view, the prospective juror's "life has been too impacted professionally and . . . he's already taken part in honoring people who are likely to be prosecution witnesses." 7.App.2848.

2. Juror 138 was not dishonest during voir dire, and his Facebook postings did not justify a for-cause strike.

Tsarnaev's arguments are similarly unavailing with respect to Juror 138. Tsarnaev first claims that Juror 138 was dishonest during individual voir dire when he said he had obeyed the district court's instructions to avoid talking about the case. Br. 136. The district court asked whether Juror 138 had "been able" to "avoid any discussion of *the subject matter of the case* with anybody," and he replied, "I haven't talked to anybody about it." 3.App.1146-47 (emphasis added). That was not dishonest. Juror 138 did not discuss "the subject matter of the case" by reporting to his Facebook friends that Tsarnaev had been "legit like ten feet infront of me . . . with his 5 or 6 team of lawyers." 25.App.11537. He merely reported a fact about the jury selection itself, consistent with the court's clarification that Juror 138 "could talk about coming here, obviously." 3.App.1146.

Tsarnaev next claims (Br. 136-38) that Juror 138 "lie[d]" when he said people were not "commenting about this trial" on Facebook. 3.App.1148. In response to Juror 138's Facebook post about the fact that he had been called for jury service—which the district court's instructions permitted—some of his Facebook "friends" responded that it was "awesome" that Juror 138 might "get picked" and suggested that Juror 138 "[p]lay the part so [he could] get on the jury then send [Tsarnaev] to jail where he will be taken care of." 25.App.11537. Those comments—which appeared in the context of flippant and joking remarks by other commenters, and which Juror

138 never endorsed—quickly ended after Juror 138 indicated he would "rather not take [his] chances" and another person warned that "should you get picked any mention of anything can get you booted or call for mistrial." 25.App.11537. It is not clear that these passing comments about Juror 138's possible jury service amounted to comments "about this trial" that fell within the court's question. 3.App.1148.

At the very least, the evidence does not show that any misstatement rose to the level of knowing dishonesty. In his questionnaire, Juror 138 disclosed that some people "were jealous" of him being summoned for jury duty and others told him "[g]ood [l]uck." Add.524. During voir dire, he explained that these comments came from his extended relatives over dinner around Thanksgiving and that he "really wasn't too interested in talking about it" with them. 3.App.1158-60. His disclosure of his family's comments indicates that he was not trying to hide other people's comments in order to get on the jury.

In any event, even if Juror 138 had disclosed these Facebook comments, which were publicly available to the defense, they would not have justified dismissal for cause because they do not indicate that he was prejudiced. True, one person recommended that Juror 138 "send [Tsarnaev] to jail where he will be taken care of," and another said, "If you're really on jury duty, this guy[']s got no shot in hell." 25.App.11537. But two flippant remarks by Juror 138's Facebook connections is far from adequate to show that Juror 138 had a disqualifying bias. Juror 138 did not express those views, nor did he control what comments people would make on his

post.[32] The district court found that the facts did not "suggest the presence of a bias that would be harmful to jury impartiality in this case." Add.322. Indeed, Juror 138 stated that he would not "make any decisions" about guilt until he had "seen everything that was presented," 3.App.1151, and that his views on the death penalty "would all depend on the outcome of everything presented," 3.App.1155-56.

Tsarnaev also argues (Br. 140-41) that Juror 138's "refusal to follow the Court's instructions" provided grounds for a for-cause challenge. Again, Tsarnaev's assumption that the juror disobeyed the court's instructions is incorrect. In its preliminary instructions, the court said, "You may tell others that you may be a juror in the case," but "you are not to discuss anything else, or allow anyone to discuss with you anything else." 1.App.182. Simply reporting on Facebook that he might be chosen as a juror was consistent with the court's instructions. And although it might have been best not to mention that he was "like ten feet" from Tsarnaev and his lawyers, this hardly counts as "discuss[ing] th[e] case," 1.App.182, and certainly would not have justified removal for cause. Moreover, Juror 138 told his friends that he could not "say much else about it" because "that's against the rules," 25.App.11537, indicating that he was trying to follow the court's instructions.

[32] Not all Facebook "friends" are "friends in the traditional sense." *Lane v. Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012) (Kleinfeld, J., dissenting). "Some are more in the nature of contacts, or acquaintances, or people we think may want to see what we post." *Id.*

Contrary to Tsarnaev's claim, Juror 138 did not "disobey[ ] a pellucid Court order" or "solicit[ ] others to 'communicate about this case' with him." Br. 141-42. He simply followed up on a Facebook thread that he had started *before* the court's preliminary instructions and indicated that he was not allowed to say much. And even if his posts could be construed as violating the court's instructions, they would not have justified dismissal for cause. *See United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011) (finding no prejudice where juror violated court's instructions and posted on Facebook about the trial).

3. The jurors' post-trial social media comments do not indicate dishonesty or prejudice.

Tsarnaev also points to several additional publicly available social media posts by Jurors 286 and 138 after trial, Br. 117-18, none of which support his claim of juror bias. A few hours after the jury rendered its penalty-phase verdict on May 15, 2015—and the court instructed jurors that they were "now free to talk with [their] family and friends about the case," 19.App.8866—Juror 138 posted on Facebook, "That's a wrap," 25.App.11622. Some of his Facebook friends expressed agreement with the verdict, such as saying, "Great job [Juror 138]! Thanks for serving up some justice." 25.App.11623. On the morning of Tsarnaev's June 24, 2015 sentencing, Juror 138 posted that he was "[b]ack to boston today.... see the end of this...for now anyway." 25.App.11623. After the sentencing, he posted the single word: "Scum." 25.App.11624. That same day, Juror 286 changed her Facebook profile picture to a

"BOSTON STRONG" banner, but the picture said nothing about Tsarnaev or serving on the jury. 25.App.11625. Juror 138 later posted, "At[ ]least they finally moved that trash out of the state and making their way to the dungeon where he will be forgotten about until his time comes." 25.App.11624.

These Facebook posts, all of which took place after the jury rendered its verdict, do not support Tsarnaev's claim of juror bias. They do not suggest that Jurors 286 or 138 were dishonest during voir dire or harbored biases against him prior to trial that they were unable to set aside. They came only after the jurors had sat through trial and had seen the full picture of the horror that Tsarnaev caused. At most, these comments indicate that the jurors remained convinced at the time of Tsarnaev's sentencing that he deserved the death penalty. That is neither surprising nor problematic. *Cf. Liteky v. United States*, 510 U.S. 540, 550-51 (1994) (noting that a trial judge "may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person," but that "the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings").

D. The district court did not abuse its discretion or plainly err by failing to conduct a more extensive inquiry.

The district court did not abuse its discretion (as to Juror 286) or plainly err (as to Juror 138) by failing to conduct a more extensive inquiry into the claim of juror

dishonesty. "[W]here a defendant makes a colorable or plausible claim of juror misconduct, the district court must investigate it." *Zimny*, 846 F.3d at 464. "[T]he court nonetheless has broad discretion to determine the type of investigation which must be mounted." *United States v. Rodriguez*, 675 F.3d 48, 58 (1st Cir. 2012) (quotations omitted). "'The trial judge may, but need not, convene a fullblown evidentiary hearing.'" *Id.* (quoting *United States v. Boylan*, 898 F.2d 230, 258 (1st Cir. 1990)). "Instead, the court's 'primary obligation is to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial.'" *Id.* (quoting *Boylan*, 898 F.2d at 258). The ultimate inquiry is "reasonableness: did the trial court fashion, and then even-handedly implement, a sensible procedure reasonably calculated to determine whether something untoward had occurred?" *United States v. Paniagua-Ramos*, 251 F.3d 242, 249-50 (1st Cir. 2001).

Tsarnaev argues that the district court's ruling "deserves no deference" because the court "undertook no inquiry and made no specific findings at all." Br. 143-44. He is incorrect. Before ruling on Tsarnaev's motions to disqualify multiple jurors, the district court "reviewed the jury questionnaires," "reviewed the transcripts," and "consider[ed] the objections," before finding them "largely speculative." Add.321-22. That the court believed no further hearing was necessary does not mean its conclusions are not entitled to deference.

Tsarnaev contends that, in any event, the district court abused its discretion by resting its decision to deny a hearing "on multiple legal errors." Br. 144. First, he

asserts that the court "was incapable, as a matter of law, of determining that [Juror 286] was impartial without knowing more." *Id.* Contrary to his contention, this Court's decision in *French* does not require a district court always to determine "why [a juror] answered as she did." *Id.* at 145 (quoting *United States v. French*, 904 F.3d 111, 118 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 949 (2019)). *French* addressed a juror's failure in a marijuana-manufacturing case to disclose that her son was a small-time marijuana trafficker. *French*, 904 F.3d at 114-15. The Court said, "we 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." *Id.* at 118. But *French* did not establish a categorical rule. And the district court here concluded that, although there were "various possible explanations" for the prospective jurors' answers, "none of them is . . . 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." Add.322.

Next, Tsarnaev argues that the district court committed legal error by "ignor[ing] the 'similarity' between Juror 286's experience during the lockdown and 'important facts presented at trial,'" as well as "the 'scope and severity' of both jurors' dishonesty." Br. 145 (quoting *Sampson II*, 724 F.3d at 166). He also contends that the court "neglected that 'juror dishonesty, by itself . . . can be a powerful indicator of bias.'" *Id.* (quoting *Sampson II*, 724 F.3d at 167). These claims are simply disagreements with the court's ultimate resolution of his factual claims, not legal errors that themselves show an abuse of discretion.

The ultimate inquiry on appeal is "reasonableness," *Paniagua-Ramos*, 251 F.3d at 249, and the district court's actions were reasonable under the circumstances. The district court gave the parties seven days to review the jury questionnaires once they were completed. Sealed.App.97. The court then conducted 21 days of individual voir dire during which the defense had ample opportunity to ask about publicly available social media posts and to make oral motions to strike. Yet Tsarnaev waited until the Friday before the pretrial conference to move to strike Jurors 138 and 286. The challenge to Juror 138 was based on fairly innocuous postings about being called for jury duty. And the challenge to Juror 286 was based on an inaccuracy in her questionnaire about whether her family sheltered in place—a fact that she volunteered on voir dire and that Tsarnaev did not treat as a ground for disqualifying other prospective jurors. The district court properly concluded that these challenges were untimely, and the court did not abuse its discretion by denying further voir dire after reviewing the record and concluding that none of the alleged misstatements "suggest[ed] the presence of a bias."[33] Add.322.

[33] If this Court were to conclude that the district court's inquiry was inadequate, remand would be the appropriate remedy. As this Court observed in *French*, "we are aware of no case in which, faced with a potentially biased juror and the need to investigate further, an appellate court has ordered a new trial without first permitting the district court to investigate." *French*, 904 F.3d at 120.

III. The District Court Acted Within Its Discretion by Dismissing Prospective Juror 355.

Tsarnaev contends that the district court improperly dismissed one prospective juror (Juror 355) for cause. Br. 161-81. The district court acted well within its discretion in concluding that Juror 355's opposition to the death penalty substantially impaired his ability to serve as a juror in this case. Juror 355 gave hesitant and carefully hedged answers about the death penalty, refused to answer hypothetical questions, and was unable to think of any category of crimes beyond genocide where he believed the death penalty would be appropriate.

A. Background

Juror 355 had worked as a criminal defense attorney for 22 years, most recently for the Committee for Public Counsel Services, Massachusetts's public defender agency. 6.App.2442, 2454. When asked on his questionnaire about his views of the death penalty, he wrote, [redacted] Sealed.Add.70. On a scale of 1 to 10 (with 1 being "a belief that the death penalty should never be imposed" and 10 being a belief that it should be imposed for all cases of "intentional murder"), Juror 355 circled the number 2. Sealed.Add.70. In response to Question 90, he circled option (c), which read, "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." Sealed.Add.71. In response to Question 92, he said, [redacted]

[redacted] Sealed.Add.72. Question 95 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?" Sealed.Add.72. Juror 355 checked the box for "I am not sure," and then wrote, [redacted]

Sealed.Add.72.

During individual voir dire, Juror 355 said he did not think his work as a public defender would affect his impartiality. 6.App.2442-43. When asked about his views on the death penalty, he said, "I mean, if I was asked to vote on it, I would probably vote against it because of my belief that it is overused." 6.App.2447. As to why he marked "2" on a scale of 1 to 10, he explained, "[W]hen 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 . . . ." 6.App.2448. "[B]ut," he added, "I could foresee situations where I might consider it appropriate." 6.App.2448. When discussing Question 90, the district court asked, "So you can envision there could be a case where you could vote in favor of the death penalty?" 6.App.2448. Juror 355 said, "After a lot of thought and soul-searching, I think I could." 6.App.2448.

The district court asked Juror 355 about his statement that he could not "possibly prejudge" Tsarnaev's guilt, explaining that what "the question may have

been getting at" was whether "if you had intellectually concluded the death penalty was appropriate, could you actually vote for it." 6.App.2449. Juror 355 responded, "I find it very difficult to answer that without hearing everything." 6.App.2449.

The government picked up this line of questioning, explaining that "[t]he question is assuming that [Tsarnaev is] guilty and that you found that the death penalty was appropriate." 6.App.2450. Juror 355 responded, "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." 6.App.2450. The district court then stepped in to "generalize" the question, asking, "If you were sitting on a death penalty 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?" 6.App.2450-51. Juror 355 replied, "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.App.2451.

When asked whether he could "imagine any case that [he] would think is appropriate for the death penalty," Juror 355 said, "I think Slobodan Milosevic was

close, if not a prime example."[34] 6.App.2451. The prosecutor asked, "So genocide?" 6.App.2451. Juror 355 said, "Genocide's a good starting point," but "I have not come up with a list of cases where I think it would be appropriate." 6.App.2451-2452. When asked by the defense whether he could "actually vote to impose" the death penalty in an appropriate case, Juror 355 said, "I think I could." 6.App.2459. When asked if he was "pretty confident of that answer," he said, "Yes." 6.App.2459.

The government subsequently moved to strike Juror 355 "for his bias" based on his role as a criminal defense attorney and "also for his death penalty answers." 6.App.2500. The prosecution argued that Juror 355 was "substantially impaired" in his ability to impose the death penalty because the "only time . . . he could think that he would impose the death penalty could be in the case of genocide." 6.App.2502-03. The defense opposed the motion, pointing out that Juror 355 said he could "make a decision in a given set of facts" and impose the death penalty. 6.App.2504.

The district court granted the government's motion. 6.App.2505-06. The court explained that Juror 355's "career as a criminal defense lawyer wouldn't by itself be a factor," although it "may explain where his alignment is on these issues." 6.App.2505. Rather, the court based its decision on Juror 355's "answers to the question" and the court's "sense of him." 6.App.2505. In the court's view, Juror 355 was not adequately "open to the possibility of the death penalty." 6.App.2505. The

[34] [redacted] 18.SPA.9692.

court noted the "genocide issue" and concluded that "the zone of possibility is so narrow" that "I think you would have to regard [Juror 355] as substantially impaired." 6.App.2505. The court said, "[I]n the end, it was not convincing to me that he was going to be truly open in the way that would be necessary." 6.App.2506.

B. Standard of review

This Court "review[s] a trial court's for-cause dismissal of a juror for abuse of discretion." *United States v. Sampson*, 486 F.3d 13, 39 (1st Cir. 2007) ("*Sampson I*"). As explained further below, review in this context is very deferential. *Id.*

C. The district court reasonably concluded that Juror 355 was substantially impaired by his views regarding the death penalty.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court determined that jurors in a capital case must be willing to "consider returning a verdict of death," and that jurors who are invariably "opposed to capital punishment" may therefore be excused for cause. *Id.* at 518, 520. The Court held, however, that a capital defendant's right to an impartial jury prohibits the exclusion of venire members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. As the Court subsequently explained, the relevant inquiry is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quotations omitted). This standard "does not require that a juror's bias be proved

with 'unmistakable clarity.'" *Id.* at 424. Instead, a court may excuse a juror for cause "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425-26. The wrongful exclusion of a juror under *Witherspoon* is not subject to harmless-error review, but requires vacating the death sentence. *Gray v. Mississippi*, 481 U.S. 648, 667-68 (1987) (plurality opinion).

When a defendant raises a *Witherspoon* claim, "reviewing courts are to accord deference to the trial court," which "is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. 1, 7, 9 (2007). *See Witt*, 469 U.S. at 428 (noting that the trial court's judgment as to "whether a venireman is biased" is "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province"). Even when there is a "lack of clarity in the printed record . . . , there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425-26. "[T]his is why deference must be paid to the trial judge who sees and hears the juror." *Id.* at 426.

The case for deference is particularly strong in the *Witherspoon* context because the risk of actual constitutional harm flowing from a single *Witherspoon* error is low. Ordinarily, a claim of juror partiality focuses on "the jurors who ultimately sat," not on those who were excluded. *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988). But

Witherspoon reasoned that the government should not be allowed to use for-cause strikes to "[c]ull[ ] all who harbor doubts about the wisdom of capital punishment" from the jury. *Witherspoon*, 391 U.S. at 520. That is because the jury in capital cases should "express the conscience of the community on the ultimate question of life or death." *Id.* at 519.

But the erroneous exclusion of a single juror under *Witherspoon* does not suggest that the defendant has been deprived of an impartial jury. Assuming an otherwise proper jury selection process, an equally qualified juror will take the excluded juror's place. And where a defendant is "convicted by a jury on which no biased juror sat, he has not been deprived of any . . . constitutional right." *See United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000). Nevertheless, the Supreme Court has held that *Witherspoon* errors are excepted from the harmless-error rule and result in automatic reversal. *Gray*, 481 U.S. at 667-68 (plurality opinion); *id.* at 669-70 (Powell, J., concurring in part and concurring in the judgment). But that is because the existence of peremptory challenges makes it too difficult to assess harmlessness in the *Witherspoon* context, *not* because a single "*Witherspoon* exclusion" necessarily yields a biased jury. *See Gray*, 481 U.S. at 665-66 (majority opinion), 668 (plurality opinion); *Ross*, 487 U.S. at 87-88. Because the institutional cost of finding a single *Witherspoon* error is so high—automatic reversal requiring a new penalty phase—the deferential standard is particularly appropriate.

1. The deferential standard applies.

Tsarnaev argues that the district court's "disqualification ruling merits no deference." Br. 174. He first points (Br. 174) to *Uttecht*'s statement that "[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." *Uttecht*, 551 U.S. at 20. But *Uttecht* went on to say that "where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire,* the trial court has broad discretion." *Id.* Far from the situation contemplated in *Uttecht*—where there is *no* record support for the trial court's decision—this case involved "lengthy questioning" as part of a "diligent and thoughtful *voir dire*." *Id.* The district court therefore enjoyed "broad discretion." *Id.*

Next, Tsarnaev quotes *Gray*'s statement that "deference is inappropriate where . . . the trial court's findings are dependent on an apparent misapplication of federal law, and are internally inconsistent." Br. 176 (quoting *Gray*, 481 U.S. at 661 n.10). He argues that the district court's ruling in this case "depended on the erroneous legal premise that Juror 355, having given one example of a death-appropriate case, had to give others." Br. 176.

The district court did not misapply the law. In *Gray*, the trial court struck a juror who was "clearly qualified" under *Witherspoon* in an attempt to remedy its previous failure to strike several jurors who were *not* qualified. *Gray*, 481 U.S. at 654-

55, 659 (quotations omitted). The Court gave no deference to the trial court's decision, which was clearly at odds with *Witherspoon* and *Witt*. As the Court observed, "we cannot condone the 'correction' of one error by the commitment of another." *Id.* at 663. Here, by contrast, the district court did not "misappl[y] federal law." *Id.* at 661 n.10. The court applied the correct standard and found as a matter of fact that Juror 355 did not meet that standard because he was impaired in his ability to impose the death penalty. 6.App.2505.

Contrary to Tsarnaev's suggestion (Br. 177), there is nothing wrong with a court inquiring into the general categories of cases in which a person opposed to the death penalty could nevertheless vote for it. In *Uttecht*, the defense asked the prospective juror for examples of the "severe situations" in which the death penalty was appropriate. *Uttecht*, 551 U.S. at 14. The juror mentioned situations where the defendant "actually wanted to die" or "would reviolate if released." *Id.* When informed that the defendant would never be released, the juror was unable to say whether he could impose the death penalty. *Id.* at 15. Although the prospective juror eventually stated that he could consider the death penalty and follow the law, *id.*, the Supreme Court concluded that "the trial court acted well within its discretion in granting the State's motion to excuse" the juror, *id.* at 17.

Consistent with *Uttecht*, the courts of appeals have regularly considered (and deferred to district courts that considered) prospective jurors' unwillingness to impose the death penalty beyond narrow classes of cases as evidence that the juror would be

incapable of fairly considering the death penalty. *See United States v. Rodriguez*, 581 F.3d 775, 793 (8th Cir. 2009); *United States v. Fell*, 531 F.3d 197, 211 (2d Cir. 2008); *United States v. Fields*, 516 F.3d 923, 937 (10th Cir. 2008); *Morales v. Mitchell*, 507 F.3d 916, 942 (6th Cir. 2007); *United States v. Moore*, 149 F.3d 773, 780 (8th Cir. 1998).[35] Thus, the district court here did not apply "an erroneous legal premise" when it considered Juror 355's inability to think of cases beyond genocide in which he could impose the death penalty.

Tsarnaev also contends (Br. 167, 177) that the district court later changed its mind when it said, "I think it's a mistake to try to get people to try to characterize the circumstances that they think would justify [the death penalty] or not." 9.App.3889. The district court made this comment when it denied the government's motion to strike Juror 671 for cause. 9.App.3886-89. Juror 671 was opposed to the death

[35] Tsarnaev cites several cases that, he says, "approve[d] courts' refusal to ask prospective jurors for examples." Br. 177. But those cases are inapposite. In *United States v. Caro*, 597 F.3d 608, 614 (4th Cir. 2010), the district court declined to ask "what kind of case does or does not deserve the death penalty," but the defendant did not challenge on appeal the omission of that specific part of his proposed question. In *Spivey v. Head*, 207 F.3d 1263, 1273 n.8 (11th Cir. 2000), the trial court did not permit the defense to ask, "In what type of cases do you think the death penalty would be appropriate?" But it *did* allow other questions such as, "Do you feel the death penalty should be limited to certain types of crimes?" *Id.* Given the "breadth of the questions permitted," the Eleventh Circuit found "the voir dire constitutionally adequate." *Id.* And in *McQueen v. Scroggy*, 99 F.3d 1302, 1329 (6th Cir. 1996), *overruled on other grounds by In re Abdur'Raham*, 392 F.3d 174 (6th Cir. 2004), the district court disallowed the question, "In what kinds of cases do you think the death penalty is warranted?" But it allowed questions that were "equally illuminating." *Id.* at 1330. The fact that courts may have discretion in certain circumstances to refuse to ask such questions does not mean that the district court was required to do so here.

penalty but mentioned that "some crimes are just so heinous that, you know, maybe the death penalty would be appropriate." 9.App.3855. When the government asked whether he was referring to someone "like Hitler," the district court sustained a defense objection to the question "as phrased." 9.App.3855. But the court allowed the rephrased question: "When you say 'some crimes are so heinous,' say more about that. What do you mean?" 9.App.3855. The juror replied that he meant "unbelievably cruel, cold-blooded murder . . . on a big scale." 9.App.3855. In concluding that Juror 671 was qualified, the court specifically mentioned the juror's openness to the death penalty for "unbelievably cruel, cold-blooded murder on a big scale." 9.App.3889.

The context therefore makes clear that the district court did not think it was categorically a "mistake" to ask about broad categories of crimes for which the person would be able to impose the death penalty. *See* 9.App.3872, 3875 (asking similar questions of another juror). And, at the very least, the court's suggestion that such questions are "mistake[n]" does not establish a legal error sufficient to make deference inappropriate.

Nor is Tsarnaev correct that the district court's findings were "internally inconsistent" because the court "qualified pro-death penalty jurors . . . without requiring those jurors to provide examples of the circumstances in which they would deem a sentence of life imprisonment appropriate." Br. 178. Tsarnaev cites the example of Prospective Juror 260, who was generally in favor of the death penalty

(rating himself as a "7" on Question 89's scale of "strongly oppose" to "strongly favor"), but could not immediately come up with circumstances where the death penalty would *not* be appropriate. Br. 178-79. Tsarnaev argues that "[i]t 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." Br. 179.

Tsarnaev ignores important differences between Jurors 355 and 260. Juror 355 believed the death penalty is [redacted] and would be appropriate only in [redacted] or "the most rarest of situations." Sealed.Add.72; 6.App.2448. It was appropriate to ask what those situations were to ensure that Juror 355 was not merely thinking of extreme examples like Hitler and Stalin, *see Antwine v. Delo*, 54 F.3d 1357, 1369 (8th Cir. 1995), or where the defendant himself wanted to die, *see Uttecht*, 551 U.S. at 14.

Juror 260, by contrast, did not believe that capital punishment *should* be imposed in all but the "rarest of situations." Instead, he said it was "[s]ometimes appropriate" and he was "not for or against the death penalty" and could vote for whatever was "called for by the facts and the law in the case." 13.SPA.7107-08. His inability on the spot to think of situations where the death penalty "would not be appropriate" for someone "convicted of willful murder" did not raise the concern that he would apply the death penalty in every case. 5.App.1932. As he explained, "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 have done." 5.App.1933. This was a far more open-minded attitude than that displayed by Juror 355.

At the very least, this supposed "inconsistency" in treatment between Juror 355, who had serious reservations about the death penalty, and Juror 260, who said the death penalty was "[s]ometimes appropriate," does not merit giving no deference. In almost any capital case, a party could argue that the exclusion of one juror is inconsistent with the inclusion of another. But this is nothing like the situation in *Gray*, where the trial court denied the state's for-cause challenges to five jurors who were "unequivocally opposed" to the death penalty, yet struck a juror who said she *could* vote for the death penalty. *Gray*, 481 U.S. at 653 n.5, 655 n.7. *Gray*'s observation that "deference is inappropriate where . . . the trial court's findings are . . . internally inconsistent," *Gray*, 481 U.S. at 661 n.10, does not apply to a case like this one, where the defendant simply takes issue with the district court's factual findings regarding specific jurors.

2. The district court did not abuse its discretion.

Tsarnaev does not assert that he could prevail under the deferential standard that applies here, nor could he. Juror 355's answers in his questionnaire and during individual voir dire evinced significant hesitation regarding the death penalty. He said that the death penalty is [redacted] Sealed.Add.72, though he "could foresee situations" where he "might consider it appropriate." 6.App.2448. When asked if he

could "envision" a case where he "could vote in favor of the death penalty," he said, "After a lot of thought and soul-searching, I *think* I could." 6.App.2448 (emphasis added). This hesitancy alone provides significant support for the district court's for-cause strike.

Tsarnaev claims that Juror 355 showed "no equivocation" and "was 'confident' in his ability" to impose the death penalty. Br. 172-73 (quoting 6.App.2459). He is incorrect. Juror 355 twice indicated that he had to do "a lot of soul-searching," 6.App.2448, and it was only when Tsarnaev's counsel was trying to rehabilitate him that he indicated he was "pretty confident" of his answer that he *thought* he could actually impose the death penalty. 6.App.2459. "[I]solated statements indicating an ability to impose the death penalty do not suffice to preclude the prosecution from striking for cause a juror whose responses, taken together, indicate a lack of such ability . . . ." *Morales*, 507 F.3d at 941. *See Uttecht*, 551 U.S. at 18 ("Juror Z's assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired . . . .").

Moreover, when the court and the government asked hypothetical questions that went to the crux of the *Witherspoon* inquiry, Juror 355 resisted answering them. The questionnaire asked whether he could conscientiously vote for the death penalty "*[i]f* [he] found Mr. Tsarnaev guilty and . . . decided that the death penalty was the appropriate punishment." Sealed.Add.72 (emphasis added). Rather than answer this

clearly hypothetical question, Juror 355 said [redacted] Sealed.Add.72. When the district court asked whether he could "actually vote for" the death penalty "*if* [he] had intellectually concluded the death penalty was appropriate," he said it would be "very difficult to answer that without hearing everything." 6.App.2449 (emphasis added). And when the prosecutor pointed out that "[t]he question is assuming that he's guilty and that you found the death penalty was appropriate," Juror 355 responded, "I'm disturbed that I have to assume his guilt at this stage" and said he did not "want to exercise that fantasy." 6.App.2450.

As a long-time criminal defense attorney, Juror 355 clearly knew how to ask (and presumably answer) hypothetical questions, yet he consistently refused to answer them. It was only when the district court rephrased the question without reference to Tsarnaev that Juror 355 finally said he could "vote to impose the death penalty" if he "believed it . . . fit into one of those rare cases where [he] believed the death penalty should be imposed." 6.App.2451. Even this answer was carefully hedged, if not tautological. In light of Juror 355's resistance to the questioning, the district court could reasonably question whether he "was going to be truly open" to imposing the death penalty. 6.App.2506.

It was also reasonable for the district court to consider Juror 355's inability to identify any cases beyond genocide in which he considered the death penalty appropriate. Contrary to Tsarnaev's contention, the district court did not

"misunderst[and] Juror 355's answers" or "f[i]nd, contrary to what Juror 355 actually said, that he would entertain the possibility of capital punishment only in cases involving genocide." Br. 162. The court knew from Juror 355's answers that genocide was a "starting point," not necessarily the "ending point." Br. 161, 176. But the fact remains that Juror 355 was unable to give any other examples. And the court's observation that Juror 355's "zone of possibility" was "narrow," 6.App.2505, is supported by Juror 355's repeated statements that the death penalty is appropriate only in [redacted] Sealed.Add.72, and "the most rarest of situations," 6.App.2448. *See* Sealed.Add.70 [redacted]); 6.App.2451 ("rare cases").

Other courts of appeals have upheld the exclusion of jurors who, like Juror 355, are unable to identify situations in which they could impose the death penalty beyond particularly severe crimes such as genocide. *See Rodriguez*, 581 F.3d at 793 ("[g]enocide" or "somebody like Hitler or Stalin or a person in Bosnia"); *Fell*, 531 F.3d at 211 ("'unforgivable type[s] of war crimes' like genocide or mass murder"); *Fields*, 516 F.3d at 937 ("genocide; torture; and willful killing of children"); *Morales*, 507 F.3d at 942 ("mass murder or torture"). The district court acted well within its discretion by considering Juror 355's inability to give further examples.

Finally, the district court was able to observe Juror 355's demeanor and specifically noted that "the value of this process is you can sit here five feet away" from the prospective juror. 6.App.2505. In light of the "deference" that "must be

paid to the trial judge who sees and hears the juror," *Witt*, 469 U.S. at 426, Tsarnaev cannot show an abuse of discretion.

3. Tsarnaev's other assertions have no merit.

Tsarnaev makes a few additional assertions that are beside the point. He first claims that "the government took full advantage of the law to purge the venire of people who . . . opposed capital punishment," pointing out that the district court "sustained 27 of the government's *Witt* challenges." Br. 179. Of course, the government "has a strong interest in having jurors who are able to apply capital punishment within the framework [the] law prescribes," *Uttecht*, 551 U.S. at 9, and there is nothing wrong with the government making (and the district court sustaining) *valid* motions to strike. The fact that the court sustained 27 government motions is hardly surprising considering that the court interviewed 256 prospective jurors in a jurisdiction where, as Tsarnaev points out, "most residents . . . oppose[ ] capital punishment." Br. 179. And Tsarnaev does not assert that any of these other exclusions were improper under *Witherspoon*.

Tsarnaev also claims that the government "used 18 of its 20 peremptory strikes on jurors who had expressed some opposition to, or uncertainty regarding, imposing the death penalty." Br. 179-80. But he does not explain how that is improper. The government has the "right to remove peremptorily jurors whom [it] believes may not be willing to impose lawful punishment." *Gray*, 481 U.S. at 671 (Powell, J. concurring). "Absent intentional discrimination violative of the Equal Protection

Clause, parties should be free to exercise their peremptory strikes for any reason, or no reason at all." *Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., concurring in the judgment). *See Holland v. Illinois*, 493 U.S. 474, 481 (1990) (noting that each party may "use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side"). And, of course, Tsarnaev had the same opportunity "to remove jurors he believe[d] may be prosecution oriented." *Gray*, 481 U.S. at 671 (Powell, J., concurring).

Unsurprisingly, then, the jury consisted mostly of people with neutral views on the death penalty, with ten of the 12 seated jurors indicating they were "not for or against the death penalty," Add.557; 26.App.11707, 11735, 11763, 11791, 11819, 11847, 11875, 11903, 11959, and two indicating they were "in favor of the death penalty but . . . could vote for a sentence of life imprisonment . . . if [they] believed that sentence was called for by the facts and the law in the case," Add.529; 26.App.11931.[36] Thus, contrary to Tsarnaev's claim, the government did not "produce[ ] a jury uncommonly willing to condemn a man to die," Br. 180-81 (quoting *Witherspoon*, 391 U.S. at 520-21). And he cites no authority suggesting that the government used its peremptory challenges improperly.

[36] Similarly, five of the six alternates said they were "not for or against" the death penalty, 26.App.11987, 12015, 12071, 12099, 12127, and one indicated she was "opposed to the death penalty but . . . could vote to impose it," 26.App.12043.

IV. The District Court Appropriately Exercised Its Discretion by Limiting the Questions Asked on Voir Dire.

Tsarnaev contends that the district court prevented him "from asking voir dire questions essential to seating impartial jurors." Br. 182 (capitalization omitted). First, he claims that the district court "misapplied" *Morgan v. Illinois*, 504 U.S. 719 (1992), by not allowing him 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." Br. 182. Second, he claims that the court erred by denying his request "to ask prospective jurors what they had seen, read, or heard about his case." Br. 183. Neither argument has merit. *Morgan* does not require fact-specific questioning, and, in any event, the potential jurors were aware of the critical aggravating facts in this case when they answered the general *Morgan* questions. Nor does this Court's precedent require detailed inquiry into what prospective jurors have seen and heard about a case. In fact, the Supreme Court has specifically rejected the claim that such an inquiry is required. *Mu'Min v. Virginia*, 500 U.S. 415, 417 (1991). The district court did not abuse its discretion.

A. Background

Before voir dire, the parties submitted a joint proposed questionnaire that asked whether prospective jurors "would vote for [the death penalty] in every case in which the person charged is eligible for a death sentence." 24.App.11395. The proposed questionnaire also asked, "If you were on the jury and you decided that life

imprisonment without possibility of release was the appropriate punishment for Mr. Tsarnaev, could you vote for life imprisonment without possibility of release?" 24.App.11397. The district court approved slight variations of these questions, which made it into the final questionnaire. *See* Add.529, 531.

> Tsarnaev also moved to add an additional question:
>
> [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

Add.432. Tsarnaev argued that this question was useful 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." Add.433 (emphasis omitted).

In a separate memorandum of law, Tsarnaev argued that he should be allowed to ask prospective jurors whether they could consider life imprisonment with respect to each of the "charged offenses and the statutory aggravating factors that the government has actually alleged." 24.App.11310 (emphasis omitted). For example, he suggested that jurors should be asked whether they could consider life imprisonment for a person charged with using a weapon of mass destruction resulting in death where (a) "[t]he defendant committed the offense in an especially heinous,

cruel, or depraved manner," (b) "the killings were committed after substantial planning and premeditation to cause the death of a person or commit an act of terrorism," (c) "the defendant intentionally killed or attempted to kill more than one person in a single criminal episode," or (d) "one of the victims was particularly vulnerable due to youth." 24.App.11308.

The government argued that Tsarnaev's proposed questions were improper because they effectively "ask[ed] jurors to commit (or 'precommit') to a penalty decision before they have heard any mitigation evidence or been told that the law requires them to weigh aggravating and mitigating factors." 24.App.11407. The government contended that such questions—sometimes referred to as "stakeout" questions, *see Richmond v. Polk*, 375 F.3d 309, 329-30 (4th Cir. 2004)—are "certain to confuse and mislead venire members about their duty to weigh and consider the evidence." 24.App.11410.

The district court denied Tsarnaev's requested additions to the jury questionnaire, concluding that "the questionnaire is too clumsy" and that "those kinds of issues, I think, can be addressed in voir dire." Add.319. Tsarnaev then filed several sets of additional requested questions, which included questions asking whether jurors could consider life imprisonment in light of the particular offenses and aggravating factors in this case. *See* Add.448 ("us[ing] a weapon of mass destruction to cause the deaths of several victims"); 449 ("deliberately committ[ing] an act of terrorism that killed multiple victims"); *id.* ("kill[ing] a child by deliberately using a

weapon of mass destruction"); 454 ("using a weapon of mass destruction to carry out an intentional killing"); 455 ("assume for the moment 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"); 456 ("intentionally murder[ing] a police officer in the line of duty").

The district court denied Tsarnaev's repeated requests to ask these and similar questions. *See* Add.108, 116, 123, 127-29, 134, 142-44. *See also* Add.147-49 (noting the defense's standing objection). As the court explained:

> I do think . . . 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, . . . 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.

Add.120-21.

As to pretrial publicity, the parties' proposed questionnaire included a question asking, "What did you know about the facts of this case before you came to court today (if anything)?" 24.App.11391. The district court said the question "might get very interesting answers," but could "cause trouble because it will be so unfocused" and would likely yield "unmanageable data." Add.304-05. The court decided to "do

without" the question. Add.307. But the court included what became Question 77, which asked whether, "[a]s a result of what [they] ha[d] seen or read in the news media," prospective jurors had already "formed an opinion" that Tsarnaev was "guilty" or "not guilty" and "should" or "should not" receive the death penalty. *See* Add.525.

Before individual voir dire, Tsarnaev proposed questions that asked for details about prospective jurors' media exposure, such as, "What stands out in your mind from everything you have heard, read or seen about the Boston Marathon bombing and the events the followed it?" and "How did you first learn about the bombing at the Marathon?" Add.450. *See id.* (suggesting follow-up questions asking what jurors remembered about "how the bombings occurred," "the people who are supposed to have carried it out," "any of the bombing victims who died," "any of the victims who were hurt but survived," "the MIT police officer who was killed several days later," "the defendant, Dzhokhar Tsarnaev," and "any members of Mr. Tsarnaev's family").

The district court denied Tsarnaev's request for these specific questions, noting that "[w]e have detailed answers in the questionnaire concerning . . . exposure to the media" and 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." Add.115. The court also denied Tsarnaev's subsequent requests to inquire into the details of prospective jurors' media exposure. *See, e.g.,* Add.129, 134, 138, 142-44. The court

explained that "detailed questioning about what the juror thinks he or she knows about the events . . . places the wrong emphasis for the juror." Add.143.

B. Standard of review

"This court reviews a district court's conduct of voir dire for abuse of discretion . . . ." *United States v. Casanova*, 886 F.3d 55, 60 (1st Cir. 2018). Even in capital cases, "the trial court retains great latitude in deciding what questions should be asked on *voir dire*." *Mu'Min*, 500 U.S. at 424.

C. The district court did not abuse its discretion under *Morgan v. Illinois* by not allowing case-specific voir dire questions.

In *Morgan v. Illinois*, the Supreme Court held that a juror "who will automatically vote for the death penalty in every case" is not impartial and must be removed for cause. 504 U.S. at 729. *Morgan* also concluded that "general fairness and 'follow the law' questions" are insufficient to "detect those in the venire who automatically would vote for the death penalty." *Id.* at 734. Instead, a defendant in a capital case is entitled to an inquiry sufficient to "discern[ ] those jurors who . . . had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Id.* at 736. *Morgan* held that the defendant should have been able to ask the prospective jurors the following question: "If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Id.* at 723. Phrased another way, the relevant question is whether the juror would "automatically vote for the death penalty without regard to [whether] the mitigating

evidence . . . is sufficient to preclude imposition of the death penalty." *Id.* at 738 (emphasis omitted).

1. *Morgan* does not require case-specific questions like those Tsarnaev requested.

Although *Morgan* requires the district court to permit an inquiry into whether prospective jurors would "automatically" vote to impose the death penalty no matter the facts, the courts of appeals agree that "*Morgan* does not compel a trial court to allow questions about how a potential juror would vote if given specific examples of aggravating or mitigating circumstances." *Hodges v. Colson*, 727 F.3d 517, 528 (6th Cir. 2013) (holding that venire need not be informed of defendant's prior murder conviction). *See Richmond v. Polk*, 375 F.3d 309, 330 (4th Cir. 2004) (same); *United States v. McVeigh*, 153 F.3d 1166, 1207 (10th Cir. 1998) (no abuse of discretion where district court excluded questions about whether jurors believed death was the "only appropriate punishment for anyone convicted of the [Oklahoma City] bombing"), *overruled on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999).

Tsarnaev points to three federal district court decisions that have "permitted defendants to pose . . . questions that refer to case-specific aggravating circumstances." Br. 206. These decisions are not precedential, and they do not hold that *Morgan* requires case-specific questions. *See United States v. Johnson*, 366 F. Supp. 2d 822, 849 (N.D. Iowa 2005) ("*Morgan* does not require 'case-specific' questions during *voir dire* of prospective jurors in capital cases, but neither does *Morgan* bar such

questions . . . ."); *United States v. Fell*, 372 F. Supp. 2d 766, 769-70 (D. Vt. 2005) (noting that "appellate courts usually address whether a trial court was *required* to ask a particular question" and that cases like *McVeigh* do "*not* hold[ ] that a trial court may never ask such questions"); *United States v. Burgos Montes*, 2012 WL 1190191 (D.P.R. Apr. 7, 2012) (following *Fell*). Instead, these district courts exercised their "extremely broad discretion" to allow case-specific questions during voir dire. *See Fell*, 372 F. Supp. 2d at 769-70 (quotations omitted). The fact that some trial courts, exercising their broad discretion in managing voir dire, have permitted such questions does not support Tsarnaev's contention that *Morgan* "entitled" him to ask those questions in this case. Br. 199.

Tsarnaev cites a number of state cases that have found an abuse of discretion where a state trial court prevented voir dire inquiry into certain salient facts. Br. 206. One of those cases, *Ellington v. State*, 735 S.E.2d 736 (Ga. 2012), was decided on state-law grounds. *Id.* at 753-55 (holding that state statute required the trial court to inform the venire that defendant murdered his two-year-old twin sons). The others cited *Morgan* and the U.S. Constitution, but primarily relied on state-court precedent. *See State v. Turner*, 263 So. 3d 337, 360-64 (La. 2018) (venire not informed that the charged murder occurred during the course of an armed robbery), *petition for cert. filed*, No. 18-9710 (June 14, 2019); *State v. Jackson*, 836 N.E.2d 1173, 1188-92 (Ohio 2005) (venire not informed that murder victims included a three-year-old); *State v. Clark*, 981 S.W.2d 143, 147-48 (Mo. 1998) (same); *People v. Cash*, 50 P.3d 332, 340-43 (Cal. 2002) (venire

not informed that defendant had killed his grandparents eight years before the charged murder).

Because these cases relied more on state-court precedents than on *Morgan*, they do not undermine the unanimous authority in the federal courts of appeals holding that *Morgan* does not require case-specific questioning. Other state courts have reached the same conclusion.[37] The Court should therefore reject Tsarnaev's expansive reading of *Morgan*, as every other court of appeals to consider the question has done.

2. Even if *Morgan* required jurors to be informed of certain case-specific facts, the veniremembers in this case were so informed.

Even if Tsarnaev were correct that *Morgan* requires jurors to be informed of certain case-specific facts, Tsarnaev's proposed questions were unnecessary. In its preliminary instructions to the venire before they filled out the questionnaires, the district court twice informed the venire that Tsarnaev was "charged in connection

[37] *See, e.g.*, *Ex Parte Taylor*, 666 So. 2d 73, 82 (Ala. 1995) (holding that *Morgan* does not require voir dire questions seeking "to identify any prospective juror who would vote for death under the facts of this particular case" (emphasis omitted)); *People v. Brown*, 665 N.E.2d 1290, 1303 (Ill. 1996) ("[I]nquiring how the venire members would act given the particular aggravating circumstances of the victims' murders in the present case, is clearly not required by *Morgan*."); *State v. Lynch*, 459 S.E.2d 679, 686 (N.C. 1995) ("[I]t [i]s not proper to ask potential jurors if they would impose the death penalty under the particular facts and circumstances of the case."); *Clagett v. Commonwealth,* 472 S.E.2d 263, 269 (Va. 1996) (holding it was "not the proper inquiry" under *Morgan* to ask if prospective jurors would "automatically impose the death penalty even if they accepted [the defendant's] theory of the case").

with events that occurred near the finish line of the Boston Marathon . . . that resulted in the deaths of three people." *See, e.g.*, 1.App.175; 2.App.481-82. The jury questionnaire gave a "summary of the facts of this case," indicating that "two bombs exploded . . . near the Boston Marathon finish line" and that the "explosions killed Krystle Marie Campbell (29), Lingzi Lu (23), and Martin Richard (8), and injured hundreds of others." Add.554. It said that "MIT Police Officer Sean Collier (26) was shot to death in his police car." Add.554. And it said that Tsarnaev "has been charged with various crimes arising out of these events." Add.554.

After informing the venire of these facts, the questionnaire asked prospective jurors their views on the death penalty for someone convicted of "intentional murder" and whether they could "conscientiously vote for life imprisonment without the possibility of release." Add.556, 559. And the district court later conducted individual voir dire, asking, for example, whether prospective jurors would "be prepared to vote for a penalty of life imprisonment without parole instead of the death penalty" if Tsarnaev were "convicted of a capital crime." 2.App.544.

Because the jury knew these details, the voir dire adequately covered Tsarnaev's proposed questions. Those questions asked some variant of whether jurors would "automatically sentence him to death" for "intentionally setting off bombs . . . that resulted in the deaths of three people." Add.448-49. *See* Add.448 ("Do you believe that the death penalty is the only appropriate punishment for persons who deliberately uses a weapon of mass destruction to cause the deaths of several victims?"); Add.449

("If . . . the defendant deliberately committed an act of terrorism that killed multiple victims, could you consider imposing a life sentence rather [than] the death penalty . . . ?"). Including those questions in the voir dire would not have meaningfully added to the information the jury already had.

The voir dire similarly covered Tsarnaev's proposed questions about other aggravating circumstances. He proposed asking whether a juror would automatically impose the death penalty where the defendant "killed a child by deliberately using a weapon of mass destruction," Add.449, "us[ed] a weapon of mass destruction to carry out an intentional killing," Add.454, "deliberately committed an act of terrorism that killed multiple victims, including a child," or "intentionally murder[ed] a police officer in the line of duty." Add.455. Again, the questionnaire informed the prospective jurors that Tsarnaev was charged with using "bombs" to kill three people, including an eight-year-old child, and attempting to "injure[ ] hundreds of others." Add.554-56. And it said he was charged with the death of "MIT Police Officer Sean Collier (26)," who was "shot to death in his police car." Add.554. The venire was thus informed of the critical aggravating facts before being asked general *Morgan* questions. This was sufficient even under the state cases on which Tsarnaev relies. *See Clark*, 981 S.W.2d at 147 ("Only those critical facts—facts with substantial potential for disqualifying bias—must be divulged to the venire."); *Jackson*, 836 N.E.2d at 1191 (noting that if jurors had "been aware of th[e] fact" that one murder victim was a three-year-old "when they were asked general questions of fairness and impartiality, they may well

have been prompted to admit to a predisposition to recommend the death penalty for those who murder children").

Tsarnaev argues that several prospective jurors demonstrated the need for case-specific questions, pointing to three who failed to indicate any disqualifying bias on their jury questionnaires but admitted during individual voir dire that they would be inclined to impose the death penalty for Tsarnaev. Br. 204-05. He concedes that "[v]oir dire happened to identify these ineligible venirepersons," but claims "there is no telling whether others . . . passed unnoticed" because they were "asked no questions that would have revealed their inability to consider mitigating evidence." Br. 205-06. In fact, these potential jurors' responses prove the opposite point. They were *not* asked Tsarnaev's case-specific questions, yet still admitted they would have difficulty considering a sentence of life imprisonment under the facts of this case. *See* 1.App.278-79; 4.App.1478, 1627. Their failure to reveal their hesitation fully in their questionnaires demonstrates the importance of in-person voir dire. But it does not suggest that Tsarnaev's additional questions were necessary.

3. The district court did not commit any legal error that would constitute an abuse of discretion.

Tsarnaev argues that the district court's "refusal to ask Tsarnaev's proposed questions rested on two errors of law" and "therefore constituted an abuse of discretion." Br. 209. The district court correctly applied the law.

a. Characterizing Tsarnaev's questions as "stakeout" questions was not legal error.

Tsarnaev first claims that the district court "mistakenly rejected the [proposed case-specific] inquiries as 'stakeout questions.'" Br. 209. He cites a Northern District of Iowa opinion stating that "it is a misconception to assume that *any* 'case-specific' question is necessarily a 'stake-out' question." Br. 209 (quoting *Johnson*, 366 F. Supp. 2d at 845). Tsarnaev is incorrect for several reasons.

First, the district court did not conclude that *all* case-specific questions were impermissible stakeout questions—that is, questions that ask prospective jurors to "stake out" a position on whether the death penalty is appropriate under particular facts. Instead, it concluded that Tsarnaev's proposed questions "about aggravation/mitigation" were "really questions about the case and fall into the category of stakeout," and that the relevant case law required questions at "a more general level." Add.116. This was a fact-specific determination about Tsarnaev's proposed questions, not a conclusion that "*any*" case-specific question is necessarily a stakeout question. Br. 209. Even cases requiring case-specific questioning have recognized that "[t]he line between permissible inquiry into 'prejudice' . . . and impermissible questions of 'pre-judgment' . . . can be hazy." *Ellington*, 735 S.E.2d at 754. The district court was entitled to deference in its determination that Tsarnaev's proposed questions fell on the "pre-judgment" side of the line.

Moreover, the district court's determination was correct. Several of Tsarnaev's proposed questions asked prospective jurors whether they believed the death penalty was the "only appropriate punishment" for the charged offenses. Add.448, 454, 456. One question went so far as to ask, "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?" Add.455-56. And Tsarnaev twice tried to ask prospective jurors (who were ultimately seated) whether "the death of a child" would "make it more difficult" for them to consider life imprisonment. Add.176, 224. As worded, these questions did not ask whether veniremembers "could fairly consider" either a life or death sentence, *Johnson*, 366 F. Supp. 2d at 845 (emphasis omitted), or would "automatically" impose death, *Morgan*, 504 U.S. at 723. Instead, they improperly sought "to discover in advance what a prospective juror's decision will be under a certain state of the evidence."[38] Br. 209 (quotations and emphasis omitted) (quoting *Johnson*, 366 F. Supp. 2d at 845). Thus, several of these questions were inappropriate even under Tsarnaev's preferred cases. *See Johnson*, 366 F. Supp. 2d at 849 ("[T]o avoid 'stake-out' questions, which this court agrees are improper, questions must be in the form of whether or not the prospective juror 'could fairly consider' a

[38] A few of Tsarnaev's proposed questions were better worded, focusing on whether the juror would "automatically sentence him to death," Add.448-49, or would "*always* vote to impose the death penalty," Add.455, in a given situation. But these questions were unnecessary given the court's general *Morgan* questions.

life sentence, a death sentence, or both, *not whether the prospective juror would vote for life or death in light of particular facts*." (emphasis added)).

Second, the district court's conclusion was consistent with decisions from all three federal appellate courts to address the question. *See Hodges*, 727 F.3d at 529; *Richmond*, 375 F.3d at 330-31; *McVeigh*, 153 F.3d at 1207. As those decisions point out, questions about "specific aggravating and/or mitigating factors" often go beyond "attempting to identify members of the venire who would *always* vote for the death penalty" and "attempt[ ] to preview how prospective jurors will vote given the specific facts of the individual case." *Hodges*, 727 F.3d at 529. Such questions may benefit a defendant by allowing him to identify and strike jurors who are more likely to impose the death penalty. But *Morgan* does not require such a preview of how jurors will vote. *Morgan* "is designed to illuminate a juror's basic beliefs 'regardless of the facts and circumstances of conviction,' not to allow defendants to pre-determine jurors' views of the appropriate punishment for the particular crime charged." *McVeigh*, 153 F.3d at 1208 (citation omitted) (quoting *Morgan,* 504 U.S. at 735).

Third, as the government pointed out below, Tsarnaev's proposed questions about specific aggravating factors gave "only one half of the equation." Add.113. The questions failed to mention any mitigating factors and assumed that "the juror has, in fact, found all of the government's aggravating factors." Add.114. But a juror who indicates he would "always vote for the death penalty" in such a hypothetical situation, Add.455, is not constitutionally unqualified. *Morgan* requires the exclusion

of a juror who "has already formed an opinion on the merits" and who "will fail in good faith to consider the evidence of aggravating and mitigating circumstances." *Morgan*, 504 U.S. at 729. *See id.* at 736-38 (emphasizing the need to exclude jurors who would "refuse to give [mitigating] evidence any weight," would not "follow the instructions to consider the mitigating evidence," or "w[ould] automatically vote for the death penalty without regard to the mitigating evidence"). *Morgan* does *not* require the exclusion of a juror who believes the death penalty is appropriate for a death-eligible crime where the government has proven aggravating factors but the defense has failed to prove any mitigating factors.[39] Yet most of Tsarnaev's proposed questions were aimed at identifying the latter category, and not the former.[40] *See* Add.455.

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[39] The Federal Death Penalty Act allows the imposition of the death penalty in such a situation. *See* 18 U.S.C. § 3593(e) (requiring jury to "consider whether all the aggravating . . . factors found to exist sufficiently outweigh the all the mitigating . . . factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating . . . factors alone are sufficient to justify a sentence of death").

[40] One of Tsarnaev's proffered questions asked, "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)?" Add.449. This question was arguably proper because it asked if prospective jurors would "automatically" impose the death penalty and it asked about both aggravating and mitigating factors. But this question added little to the *Morgan* questions already posed in the questionnaire and during individual voir dire, and the district court was not required to ask this specific question, particularly when it was sandwiched between Tsarnaev's other improper questions.

Finally, most of Tsarnaev's proposed questions failed to focus on the ultimate inquiry—whether the prospective jurors could follow the district court's instructions and weigh the aggravating and mitigating factors. Instead, his proposed questions unhelpfully asked the jurors to opine, unguided by any instructions on the law, on whether they thought the death penalty was appropriate in particular factual circumstances. Prospective jurors asked to make off-the-cuff assessments might reflexively agree that the death penalty is the "only appropriate punishment" for certain crimes, Add.448, 454, 455, yet be perfectly willing and able to consider life imprisonment if properly instructed on the need to weigh aggravating and mitigating factors.

As the government pointed out below, it would be far more helpful to ask whether, if prospective jurors had "already found the defendant guilty beyond a reasonable doubt of the actual offenses," they would "be able to meaningfully consider both the aggravating factors and the mitigating factors before [they] came to a decision as to what the appropriate sentence would be." Add.114. And the jurors were asked some variation of this question. *See* Add.529 (Question 90); 2.App.507-08, 544-45, 878-79, 939-42; 3.App.1153-54, 4.App.1666-67, 1671; 5.App.2011-12; 6.App.2355-58, 2637-38; 7.App.2882-87, 3051-52, 3078-79 3085. But Tsarnaev's proposed questions asked jurors to opine on an appropriate sentence *without*

considering the aggravating and mitigating factors.[41] Because Tsarnaev's proposed questions did not focus on the key inquiry, the district court did not abuse its discretion by disallowing them.

b. Considering prospective jurors' awareness of the key facts was not legal error.

Tsarnaev also contends that the district court committed "legal error" by concluding that "venirepersons' knowledge of certain details about this case made general *Morgan* questions 'sufficient.'" Br. 212. He argues (Br. 212) that the Supreme Court rejected such reasoning in *Ham v. South Carolina*, 409 U.S. 524, 527 (1973), where it held that the Fourteenth Amendment entitled an African-American defendant to ask specific questions about racial prejudice and that general questions about "any bias or prejudice" were insufficient. *Id.* at 526 n.3. Tsarnaev points out that the state argued in *Ham* that the general "bias or prejudice" question was sufficient because the defendant was "within sight of the jury," which could observe his race. *See* Br. for Resp., *Ham v. South Carolina*, 1972 WL 135829, at *3-4.

Ham does not support Tsarnaev's contention for several reasons. First, *Ham* never addressed the state's argument that a general question was sufficient, and there is no reason to extrapolate a broad rule, applicable in other contexts, from the Court's

[41] Tsarnaev likely could have asked potential jurors whether there were any categories of cases in which they could not consider life imprisonment. *See* 6.App.2451 (government asked Juror 355 about the "category of cases" in which he could impose the death penalty). But Tsarnaev did not seek to do so.

implicit rejection of that argument. Second, *Ham* dealt specifically with racial prejudice, an evil at which the Fourteenth Amendment was directly aimed. *Ham*, 409 U.S. at 526-27. *Ham* did not suggest that specific questioning was required for every type of prejudice. In fact, it held that the defendant was *not* entitled to ask whether jurors were prejudiced by "the fact that [the defendant] wore a beard." *Id.* at 527. Third, subsequent cases have clarified that specific questions about racial bias are required only where "there [i]s a reasonable probability that racial or ethnic prejudice would affect the jury," such as a case involving a violent crime "where the defendant and the victim are members of different racial or ethnic groups." *Rosales-Lopez v. United States*, 451 U.S. 182, 192, 194 (1981) (plurality opinion). *See Ristaino v. Ross*, 424 U.S. 589, 596 (1976) ("By its terms *Ham* did not announce a requirement of universal applicability."). In short, *Ham* does not indicate that it was "legal error" for the district court to consider whether case-specific questions about prospective jurors' views on the death penalty were rendered unnecessary by what the venire already knew about the case.

Tsarnaev also contends that the district court improperly relied on "what the venirepersons had learned 'from the media.'" Br. 213. But although the court referenced "what people understand from the media," the court went on to mention its "preliminary instructions." Add.120-21. As explained above, the court's preliminary instructions and the questionnaire adequately informed the prospective jurors of the salient facts, regardless of what they had heard in the media.

Tsarnaev speculates that jurors might have responded to the court's *Morgan* questions based on "information that was widely reported pre-trial and mitigating in nature . . . but not introduced at trial." Br. 213. The only example he can give of *mitigating* evidence reported pretrial is "Tamerlan's commission of three murders in 2011." *Id.* As explained further below, Tamerlan's alleged involvement in those unrelated murders was not mitigating because it does not indicate that Tsarnaev was somehow forced or intimidated into bombing the Boston Marathon. And it is implausible to believe that the seated jurors' stated willingness to consider life imprisonment was conditioned solely on what they might have read about those unrelated murders. Tsarnaev cannot show that the district court abused its discretion.

4. The voir dire adequately ensured that the seated jurors were qualified under *Morgan*.

Nothing in the record suggests that any of the seated jurors held categorical views about the death penalty that prevented them from following the court's instructions and considering mitigating factors. Indeed, quite the opposite is true. All the seated jurors indicated that they had open minds about the death penalty, and nothing in their answers suggested that case-specific *Morgan* questions were necessary.

Despite being aware of the general facts of the case, not a single seated juror indicated that he or she had "formed [the] opinion . . . that Dzhokhar Tsarnaev should receive the death penalty." *See* Question 77(c); Add.525. Ten of the twelve jurors marked (d) on Question 90, indicating they were "not for or against the death

penalty" in cases of murder, and two marked (e), indicating they were "in favor of the death penalty" for murder, but "could vote for a sentence of life imprisonment without the possibility of release if [they] believed the sentence was called for by the facts and the law." *See* Add.529; 26.App.11931. And when asked whether they could "conscientiously impose" the death penalty (Question 95) or life imprisonment (Question 96), Add.530-31, the jurors indicated that they had open minds.

The jurors' answers to relevant questions are reflected in the following table:

Juror	Q. 77(c) – formed opinion Tsarnaev should receive death penalty?	Q. 90 – feelings about death penalty for murder	Q. 95 – conscientiously impose death penalty?	Q. 96 – conscientiously impose life without release?
35	Unsure	(d)	I am not sure	Yes
41	No	(d)	Not sure	Yes
83	Unsure	(d)	Yes	Yes
102	Unsure	(d)	Yes	Yes
138	No	(e)	I am not sure	I am not sure
229	Unsure	(d)	Yes	Yes
286	No	(d)	Yes	Yes
349	Unsure	(d)	Yes	Yes
395	Unsure	(d)	I am not sure	Yes
441	No	(d)	Yes	Yes
480	Unsure	(e)	Yes	Yes
487	Unsure	(d)	Yes	Yes

See Add.506-61; 26.App.11684-12131.

The individual voir dire further confirmed that the jurors who were eventually seated had open minds regarding the death penalty, with none suggesting that they would automatically impose the death penalty in *any* case, much less this one. *See* 2.App.508 (Juror 35) (indicating he was "committed . . . to make a decision based on

. . . all the evidence in the case"); 2.App.545 (Juror 41) ("I don't know any evidence. And where I'm not one way for death penalty or one way not for the death penalty, to me, I would have to . . . hear the circumstances and the evidence . . . ."); 2.App.882 (Juror 83) ("I would say definitely life in prison at this point . . . if I had to make a decision based on what you said, but in terms of the death penalty, . . . I couldn't say that right now."); 2.App.940 (Juror 102) ("I have no . . . views either way. I am really in the middle. I would have to hear everything and make an educated decision."); 3.App.1155-56 (Juror 138) ("I'm not more in favor of one way or the other; it would all depend on the outcome of everything presented."); 4.App.1673 (Juror 229) ("I'm not somebody who's just going to say right at a cocktail party that, yes, somebody should be put to death or, no, they shouldn't. I need more information. I'm not going to just jump to that."); 5.App.2011-13 (Juror 286) (explaining that she had "never really thought" about and did not "really have any" impressions of the death penalty, but could "follow the law" and "decide that by what I've heard in the courtroom"); 6.App.2354, 2358 (Juror 349) (saying she was not "for or against" the death penalty, but "would have to hear the evidence," and "whatever the law is, I would go with that"); 6.App.2641-42 (Juror 395) (although she "always thought [she] was against" the death penalty, she was not "in a position, without hearing all of the facts, to say that I am either for it or against it" in Tsarnaev's case); 7.App.2881 (Juror 441) ("I mean, very, very neutral on it. . . . I don't really have any concrete feeling on it."); 7.App.3058 (Juror 480) ("[I]t might be [better], from my standpoint, that he lives

the rest of his life in prison versus the death penalty. I mean, I'm still going back and forth on that."); 7.App.3077 (Juror 487) ("I don't have an opinion either way. . . . Obviously, death would be the worst penalty you can have. But I've never felt it shouldn't exist. I really didn't have an opinion one way or the other on it.").

In light of the jurors' responses, the district court properly concluded that further follow-up with case-specific questions was unnecessary. Moreover, the district court took a flexible approach to voir dire and asked or allowed questions highlighting the aggravating facts in several instances. *See* 2.App.521 ("You know what the case is about. It's about bombings in which three people died and in which a police officer was shot. . . . If somebody is convicted of doing that intentionally . . . . [w]ould you think that . . . it should necessarily be the death penalty . . . ?"); 2.App.782 ("You know that there were bombings in which people were killed?"); 2.App.881 ("[K]nowing that this case is the Boston Marathon bombing and its aftermath. . . . [d]o you lean one way or another regarding death penalty or life imprisonment?"). And the court allowed the defense to ask repeatedly whether prospective jurors "lean[ed] one way or the other" regarding the death penalty for this particular case. *See* 2.App.699; 4.App.1406, 1460-61; 5.App.1986; 6.App.2366; 8.App.3507; 9.App.3882. The district court did not abuse its discretion by disallowing questions focused on the specific aggravating facts of this case that the venire already knew.

D. The district court did not abuse its discretion by denying inquiry into the specifics of what each prospective juror had read, heard, or seen about the case before trial.

Tsarnaev next contends that this Court's decision in *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968), required the court to ask "not just *whether* prospective jurors had seen media coverage of this case, but *what*, specifically, they had seen." Br. 192. He relies on *Patriarca*'s statement that a district court should question potential jurors "with a view to eliciting *the kind and degree of his exposure to the case or the parties*." Br. 218 (quoting *Patriarca*, 402 F.2d at 318, and adding emphasis). And he asserts that by failing to ask such questions, the district court "created a jury biased by prejudicial publicity." Br. 225. Those contentions are incorrect.

1. *Patriarca* does not require district courts to ask about the specific contents of media coverage.

Patriarca does not support Tsarnaev's assertion that the district court's questioning was inadequate. In *Patriarca*, this Court held that pretrial publicity did not require a change of venue. *Patriarca*, 402 F.2d at 317. The Court noted that a month had elapsed between the trial and the widely publicized car-bombing of a government witness's attorney and that the media reporting contained no "prejudicial statements or records of conviction, . . . pejorative characterizations of [the] defendant, description of evidence against the accused[,] or reports of plea negotiation." *Id.* at 316-17.

Patriarca also observed that voir dire provided "another opportunity for counsel to mitigate any possible effect of pretrial publicity." *Patriarca*, 402 F.2d at 317. But the defense did not ask for any questions about pretrial publicity beyond the court's asking prospective jurors whether they could "give the defendants a fair and impartial trial." *Id.* at 318. This Court observed that "such a single question posed to the panel en bloc . . . achieves little or nothing by way of identifying, weighing, or removing any prejudice from prior publicity." *Id.* And where there is "a significant possibility" of prejudicial pretrial publicity and a "request of counsel," "we think that the court should proceed to examine each prospective juror" individually "with a view to eliciting the kind and degree of his exposure . . . , 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.*

Patriarca does not, as Tsarnaev claims, establish that the district court in this case committed reversible error by failing to ask prospective jurors "what they had seen, read, or heard about his case." Br. 183. This is so for several reasons.

First, this part of *Patriarca* was dicta. *Patriarca* found no abuse of discretion even though the district court *failed to conduct* the recommended inquiry.[42] *Patriarca*,

[42] Tsarnaev points out (Br. 218-19) that *Patriarca* said (again in dicta) that its view was "in accord with the suggestions" of the ABA Standards Relating to Fair Trial and Free Press, § 3.4 (Tentative Draft, Dec. 1966). *Patriarca*, 402 F.2d at 318. Those standards said that voir dire should determine what prospective jurors have "read and heard about the case." *See* 25.App.11628. The Supreme Court has declined to place much weight on the ABA Standards in subsequent cases, however, particularly

402 F.2d at 317-18. And even that recommended inquiry would not require more detailed questioning than took place in this case. *Patriarca* recommended individual questioning "with a view to eliciting the kind and degree of [the potential juror's] exposure to the case or the parties." *Id.* And the questionnaire in this case *did* ask each individual juror about the "kind and degree" of media exposure. *Id.* It asked what newspapers, radio programs, and television programs each prospective juror viewed and with what frequency, as well as how much media coverage he or she had seen about the case. *See* Add.551-52. More importantly, both the questionnaire and the individual voir dire focused on the key inquiry—"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." *Patriarca*, 402 F.3d at 318.

Tsarnaev is incorrect that "[t]his Court's subsequent decisions have read *Patriarca* to compel content questioning." Br. 219. In *United States v. Medina*, 761 F.2d 12, 20 (1985), this Court concluded that voir dire "fully complied" with circuit precedent, including *Patriarca*, where the court asked jurors about the "extent" of their knowledge of the case and whether they had "formed an opinion of the guilt or

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because earlier versions of those Standards (such as the version cited by *Patriarca*) provided that "answers to questions about content, without more, could disqualify the juror from sitting," whereas, "[u]nder the constitutional standard, . . . '[t]he relevant question is not whether the community remembered the case, but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant.'" *Mu'Min*, 500 U.S. at 430 (quoting *Patton v. Yount*, 467 U.S. 1025, 1035 (1984)). *See* 25.App.11628 (1966 ABA Standards).

innocence of the defendant." *Medina* does not indicate whether the court asked jurors about the specific content of the pretrial publicity, and it had no occasion to decide whether any particular manner of questioning is constitutionally inadequate. *Id.*

Tsarnaev's citations to *United States v. Vest*, 842 F.2d 1319 (1st Cir. 1988), and *United States v. Orlando-Figueroa*, 229 F.3d 33 (1st Cir. 2000), are similarly inapposite. Those cases addressed claims that the failure to conduct *individual* questioning regarding pretrial publicity was reversible error. *Vest*, 842 F.3d at 1331; *Orlando-Figueroa*, 229 F.3d at 43. Neither held that any specific types of questions were required. And although Tsarnaev is correct (Br. 220) that the questionnaire in *Skilling* asked jurors about the details of their media exposure, the Supreme Court did not suggest that such questions were required. *See Skilling v. United States*, 561 U.S. 358, 388 & n.22 (2010) (noting that the dissent "undervalue[d] the 77-item questionnaire," which "helped to identify prospective jurors excusable for cause").

In any event, *Patriarca*, *Medina*, and the out-of-circuit cases that Tsarnaev cites (Br. 220) were all decided prior to the Supreme Court's decision in *Mu'Min*, which rejected the argument that the Constitution requires courts to question prospective jurors "about the specific contents of the news reports to which they had been exposed." *Mu'Min*, 500 U.S. at 417. *Mu'Min* acknowledged that specific questions about content "might be helpful in assessing whether a juror is impartial." *Id.* at 425. "To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render

the defendant's trial fundamentally unfair." *Id.* at 425-26. The Constitution does not require the trial court to "make precise inquiries about the contents of any news reports that potential jurors have read." *Id.* at 424-25. *Mu'Min* seriously undermines Tsarnaev's claim that the voir dire process in this case "compromised [his] right to an impartial jury." Br. 196.

Tsarnaev claims that *Mu'Min* does not apply to this case for two reasons. First, he contends that this case "falls within *Mu'Min*'s dictum that due process 'might well have required more extensive examination' had that case involved . . . a 'wave of public passion engendered by pre-trial publicity,'" like that in *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). Br. 222 (some quotation marks omitted) (quoting *Mu'Min*, 500 U.S. at 429). But *Mu'Min* simply noted that more questions "might" be required in a given situation; it did not establish a constitutional requirement. And there are important differences between this case and *Irvin*, most notably the population of the venue (30,000 in *Irvin* versus about five million in eastern Massachusetts) and the fact that several seated jurors in *Irvin* expressed serious bias. *See Irvin*, 366 U.S. at 728 (one juror said he "could not . . . give the defendant the benefit of the doubt that he is innocent," and another said he had a "somewhat" fixed opinion as to the defendant's guilt).

Moreover, the district court in this case conducted a "more extensive examination" than the one in *Mu'Min*. An important issue in *Mu'Min* was whether the trial court properly questioned prospective jurors in groups of four, or whether, as the

defendant claimed, it should have questioned "each potential juror . . . individually." *Mu'Min*, 500 U.S. at 425. Here, of course, the district court conducted individual voir dire, augmented by extensive preliminary questionnaires, which the trial court in *Mu'Min* did not use. The thorough voir dire process here was sufficient even if this case required a "more extensive examination" under *Mu'Min*'s dicta.

Second, Tsarnaev points out that *Mu'Min* addressed only the constitutional standard, and he argues that "*Patriarca*, which made no reference to the Constitution, announced a supervisory rule unaffected by *Mu'Min*." Br. 222-23. But *Patriarca* made no reference to supervisory powers, and Tsarnaev has cited no cases that have interpreted it in that way. And because *Patriarca*'s observations about proper questioning were dicta, it did not "announce[ ]" any sort of binding "supervisory rule." Br. 223.

Even if *Patriarca* could somehow be construed as announcing a supervisory rule unaffected by *Mu'Min*, there was no abuse of discretion here. Although federal courts "enjoy more latitude in setting standards for *voir dire* in federal court under [their] supervisory power" than when interpreting the Constitution, in "both sets of cases," the "trial court retains great latitude in deciding what questions should be asked on *voir dire*." *Mu'Min*, 500 U.S. at 424. The district court here did not exceed that latitude.

2. The voir dire was adequate to determine whether jurors were impartial.

"No hard-and-fast formula dictates the necessary depth or breadth of *voir dire*." *Skilling*, 561 U.S. at 386. "The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury." *Morgan*, 504 U.S. at 729. Thus, "[w]hether a trial court decides to put questions about the content of publicity to a potential juror or not, it must make the same decision at the end of the questioning: is this juror to be believed when he says he has not formed an opinion about the case?" *Mu'Min*, 500 U.S. at 425. The voir dire in this case was adequate to allow the court to answer that question.

The district court took a flexible approach to voir dire. As Tsarnaev recognizes (Br. 195 n.109), he was allowed to ask one of the seated jurors what "st[ood] out in [her] mind, if anything, about this case from anything [she had] heard, seen." 2.App.942. Two other seated jurors volunteered information about what they had seen or heard in the media. *See* 6.App.2351; 7.App.3075.

None of the seated jurors' responses suggested a need to delve into the specifics of the media coverage they had seen. Only three of the 12 indicated that they had formed an opinion that Tsarnaev was guilty, 26.App.12132, and those three indicated they could set their opinions aside, 26.App.11843, 11870, 11955. During individual voir dire, all 12 jurors indicated that they gave little weight to what they had seen or heard and could avoid drawing any conclusions at trial based on media

coverage. *See* 2.App.502, 542, 874, 937; 3.App.1151; 4.App.1663; 5.App.2009; 6.App.2351, 2633; 7.App.2880, 3050, 3075-76. The record does not suggest that any follow-up was necessary or that any seated juror was actually biased. *See McVeigh*, 153 F.3d at 1210 ("[T]he record reveals sufficient indicia of safeguards for us to conclude that each prospective juror was impartial . . . .").

The district court could also reasonably conclude that the costs of detailed content-based questioning would outweigh any marginal benefit. As the court pointed out, asking jurors to recall everything they had read or seen would "not likely yield reliable answers" and could result in "unmanageable data." Add.115, 304-05. The court also expressed legitimate concern that "detailed questioning about what the juror thinks he or she knows about the events" creates the "wrong emphasis" and could inadvertently create bias where none existed. Add.143. Inquiring into jurors' (potentially faulty) memories of what they had read or seen in the press months or years earlier, for example, could have reinforced potentially prejudicial information from those sources. In declining to ask further questions, the district court did not abuse its "wide discretion." *Mu'Min*, 500 U.S. at 427.

3. **Any error was harmless.**

In any event, any error in failing to allow inquiry into the specific media coverage to which potential jurors had been exposed was harmless. The ultimate question is not what a juror had heard about the case or even whether he had "formed some impression or opinion as to the merits," but whether "the juror can lay

aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 722-23. As already explained, the district court engaged in an extensive voir dire process to ensure that the jurors in this case could do so. Nothing suggests that more specific questions about media coverage would have revealed any undisclosed bias in the seated jurors. Thus, any alleged error was harmless.

V. The District Court Appropriately Exercised Its Discretion by Excluding Evidence That Tsarnaev's Brother May Have Committed an Unrelated Triple Murder and by Protecting an Interview Report From Disclosure.

Tsarnaev argues that the district court violated his right to present a complete defense by excluding evidence implicating his brother Tamerlan in the murder of three people in Waltham, Massachusetts, in 2011. Br. 227-73. He also contends that the district court violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by not allowing the defense to see an FBI report and recordings relating to an interview in which Tamerlan's friend Ibragim Todashev implicated Tamerlan in the Waltham killings. Br. 274-85. The district court acted within its discretion by excluding the evidence, which would not have mitigated Tsarnaev's punishment and would have confused the issues in this case. Even if the court did abuse its discretion, any error was harmless beyond a reasonable doubt. The district court also correctly concluded that disclosure of the Todashev-related materials was unnecessary because Tsarnaev already had access to much of the same information, the information was not

discoverable under *Brady*, and the information was subject to the law enforcement privilege. Tsarnaev is not entitled to reversal.

A. Background

On September 11, 2011, three men were murdered at a residence in Waltham, Massachusetts. 25.App.11437. They were found bound and beaten, with their throats cut and their bodies covered with marijuana. 25.App.11437. One of the victims, Brendan Mess, was Tamerlan's friend. 25.App.11437. The Waltham killings went unsolved. 23.App.10465.

After the Boston Marathon bombing, law enforcement officers interviewed Todashev, then living in Florida, on four separate occasions in April and May 2013. Sealed.Add.32-33; Supp.Sealed.Add.4; 23.App.10556. [redacted][43] [redacted] At some point, investigators began to suspect Todashev in the 2011 Waltham murders. 23.App.10556. During a final interview on the night of May 21, 2013, an FBI agent and two Massachusetts State Troopers

[43] The Todashev 302s were filed *ex parte* in the district court and are available for this Court's review. This Court also made them available to the defense for review pursuant to a protective order. Order of the Court, No. 16-6001 (1st Cir. Oct. 3, 2018) (granting the motion in part); Order of the Court No. 16-6001 (1st Cir. Oct. 25, 2018) (modifying the protective order to include learned appellate counsel).

questioned Todashev about the Waltham killings over the course of several hours. 23.App.10556, 10568, 10571. Todashev eventually said he knew something about the murders and asked if he could get a deal for cooperating. 23.App.10571, 10575.

[redacted] he attacked the law enforcement agents and was shot and killed. 23.App.10557, 10566-67.

As part of a pretrial discovery request, Tsarnaev asked the government for "[a]ll documents concerning the investigation of the triple homicide" including "documents concerning investigation of the alleged involvement of Tamerlan Tsarnaev, Ibragim Todashev, and/or our client in those murders." *See* 23.App.10442. The government

declined to provide the requested information because the matter was still under investigation by local authorities. *See* Doc. 112-5 at 12.

Tsarnaev then moved to compel discovery, arguing that "evidence about the nature and extent of Tamerlan's alleged involvement in the Waltham murders, and the absence of information about any involvement by [Tsarnaev], provides critical mitigating information." 23.App.10442-43. The government argued that the documents were "not discoverable under the Federal or Local Rules of Criminal Procedure or *Brady*." 23.App.10464. The government also invoked the law enforcement investigatory privilege, pointing out that the "Middlesex District Attorney's Office is engaged in an active, ongoing investigation into the Waltham triple homicide." 23.App.10465.

The district court denied Tsarnaev's motion to compel, concluding that the Waltham murder evidence was not discoverable under *Brady* or Federal Rule of Criminal Procedure 16. Add.390-94. The court concluded "[i]n addition" that the Waltham-related evidence was subject to the law enforcement investigatory privilege and that Tsarnaev had "not articulated a specific need for these privileged materials" that could override the government's interest in confidentiality. Add.394 n.2.

In another motion to compel, Tsarnaev argued that "Tamerlan's having committed a gruesome triple murder—and having included a 'close friend' among the victims—would powerfully support the inference that [Tsarnaev] experienced his older brother as an all-powerful force who could not be ignored or disobeyed."

23.App.10486. In response to this motion, the district court ordered that "reports of Ibragim Todashev's statements to the FBI . . . be submitted to the Court for *in camera* review." Add.397. [redacted] After reviewing the materials, the district court again denied disclosure, explaining: "I ha[ve] reviewed the matters that the government submitted in camera, including recordings, and I see no reason to compel any further discovery from that material." 20.App.9171.

While Tsarnaev's second motion to compel was pending, an attorney representing Tsarnaev's friend Dias Kadyrbayev, who was facing prosecution for concealing Tsarnaev's backpack and computer, told the government that his client "may be able to provide" some information, including that "Kadyrbayev learned in the fall of 2012 from Dzhokhar Tsarnaev that Tamerlan Tsarnaev was involved in the Waltham murders" and that "Dzhokhar Tsarnaev told Kadyrbayev that his brother 'had committed jihad' in Waltham." 24.App.11294. The government disclosed Kadyrbayev's proffer to Tsarnaev's counsel. 24.App.11294-95.

Tsarnaev subsequently sought access to the Todashev materials through a third motion to compel. 24.App.11291. The district court again denied Tsarnaev's request.

Add.429-30. The court observed that only one of the *in camera* documents—an FBI 302 from the May 21 interview—was "pertinent to the request," and determined that disclosure of that information could interfere with the ongoing investigation into the Waltham murders. Add.429-30. The court further observed that the government had "already conveyed [to the defense] the fact and general substance of Todashev's statements concerning the murders" and that "principles governing discovery in criminal cases do not require more." Add.429-30. The court explained that it "fully underst[ood] the mitigation theory the defense thinks the requested discovery may advance," but, in the court's view, "the report does not materially advance that theory beyond what is already available to the defense from discovery and other sources." Add.430. Instead, the report's "utility . . . to the defense in building a mitigation case is very low at best." Add.430.

The government subsequently moved *in limine* to preclude Tsarnaev from introducing at the penalty phase any evidence that Tamerlan participated in the Waltham murders. 25.App.11437-41. The government argued that such evidence was irrelevant unless Tsarnaev "in fact believed his brother had committed the Waltham murders and was influenced to commit the crimes charged in [this case] by that belief." 25.App.11439. In addition, the government argued, Todashev's statements implicating Tamerlan were unreliable because he "had an obvious motive to try to shift the blame to someone else." 25.App.11439. Finally, the government contended that the Waltham evidence would confuse the jurors by opening the door

to "a great deal of information having nothing to do with the crimes charged in the Indictment" and by misleading the jury "into believing that a comparison of Tamerlan's character and [Tsarnaev's] character is a relevant consideration in recommending a sentence." 25.App.11440.

The district court granted the government's motion *in limine*, concluding that "there simply is insufficient evidence to describe what participation Tamerlan may have had" in the Waltham murders. Add.351. The court said: "From my review of the evidence, which includes an in camera review of some Todashev 302s, it is as plausible . . . 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." Add.352. Thus, the court concluded that the evidence "would be confusing to the jury and a waste of time, I think, . . . without any probative value." Add.352.

At the sentencing phase, Tsarnaev alleged as mitigating factors various aspects of his relationship with Tamerlan, including that Tsarnaev was "particularly susceptible to his older brother's influence" because of Tamerlan's "age, size, aggressiveness, domineering personality, privileged status in the family, traditional authority as the eldest brother, or other reasons"; that Tsarnaev "acted under the influence of his older brother"; that he "would not have committed the crimes but for his older brother"; and that Tamerlan was "the dominant male figure in [Tsarnaev's] life." Add.90-91. In support of these factors, Tsarnaev introduced evidence about the traditional role of an older brother in Chechen families and about Tamerlan's

radical Islamist beliefs and aggressive character. *See* 17.App.7521-25, 7530-32, 7540-50, 7793-7800, 7861-64; 18.App.8134-43, 8206-07.

Before Tsarnaev filed his opening brief on appeal, this Court allowed Tsarnaev's appellate counsel to view all the Todashev-related materials that the district court had reviewed *in camera*, including the FBI 302 of the May 21, 2013 interview in which Todashev implicated Tamerlan. Order, No. 16-6001 (1st Cir. Oct. 3, 2018).

B. Standard of review

This Court "review[s] adequately preserved objections to rulings admitting or excluding evidence for abuse of discretion." *Sampson I*, 486 F.3d 13, 42 (1st Cir. 2007). *See United States v. Mikhel*, 889 F.3d 1003, 1062 (9th Cir. 2018) ("We review the exclusion of mitigating evidence for abuse of discretion."), *petitions for cert. filed*, Nos. 18-7489 (Jan. 14, 2019), and 18-7835 (Feb. 4, 2019). "Where evidence is challenged on the ground that the trial court has struck the wrong balance between probative and prejudicial effect," this Court "afford[s] great deference to the trier's first-hand knowledge of the case and ordinarily will sustain the district court's exercise of discretion unless its judgment is plainly incorrect." *Sampson I*, 486 F.3d at 42.

Tsarnaev argues that "deference is not appropriate" [redacted]

[redacted] And for good reason. Such a prohibition would unnecessarily burden district courts, which often must rule on the admissibility or disclosure of voluminous materials. The two cases that Tsarnaev cites (Br. 245) are inapposite, involving courts that denied discovery without conducting *any* review of the materials at issue. *See United States v. Rosario-Peralta*, 175 F.3d 48, 55 (1st Cir. 1999) ("[W]e find that the district court abused its discretion in finding that the records and logs were irrelevant without first reviewing them."); *United States v. Buford*, 889 F.2d 1406, 1407-08 (5th Cir. 1989) (district court abused its discretion by "failing to perform the promised in camera inspection").

[redacted]

The abuse-of-discretion standard also applies to Tsarnaev's claim that non-disclosure of the Todashev reports and recordings violated *Brady*. This Court "review[s] a district court's *Brady* determinations after its in camera review for an

abuse of discretion." *United States v. López-Díaz*, 794 F.3d 106, 116 (1st Cir. 2015). *See United States v. Bulger*, 816 F.3d 137, 153 (1st Cir. 2016) (same). Again, Tsarnaev contends that this "deferential standard of review is not warranted" because the district court "failed to . . . review . . . most of the material in question." Br. 276. But the district court could determine whether the details of the Todashev interviews were properly withheld from disclosure by reading the report. It did not need to "actually listen[ ] to Todashev's words," Br. 277, or see his "behavior and demeanor," *id.* at 275 n.121, neither of which was relevant to whether the report was privileged or material.

C. The district court did not abuse its discretion by excluding evidence of the Waltham murders from the penalty phase.

Both the Eighth Amendment and the Federal Death Penalty Act "protect the right to present relevant mitigating evidence in capital sentencing proceedings." *Mikhel*, 889 F.3d at 1062. In *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982), the Court held that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) ("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis omitted)).

The Federal Death Penalty Act (FDPA) states that a defendant "may present any information relevant to a mitigating factor," regardless of whether it would be

admissible under the rules of evidence. 18 U.S.C. § 3593(c). "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (quotations omitted). The FDPA allows courts to exclude mitigating evidence "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c).

In excluding evidence of the Waltham murders, the district court acted well within its discretion. The evidence had little or no relevance to whether Tsarnaev deserved the death penalty. And any relevance that it had was outweighed by the danger of confusing the issues and misleading the jury.

1. The evidence was not relevant.

The Supreme Court has recognized several types of potentially mitigating evidence in capital cases, including "the background and mental and emotional development of a youthful defendant," *Eddings*, 455 U.S. at 116, "evidence that the defendant would not pose a danger if spared (but incarcerated)," *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986), and "absence of direct proof that the defendant intended to cause the death of the victim" or evidence that the defendant had a "comparatively minor role in the offense," *Lockett*, 438 U.S. at 608 (plurality opinion). And the FDPA requires the jury to consider 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).

But there are still limits on what is relevant for mitigation purposes. Trial courts retain their "traditional authority . . . to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *Lockett*, 438 U.S. at 604 n.12 (plurality opinion). *See Skipper*, 476 U.S. at 7 n.2 (district courts may exclude evidence that is "irrelevant to the sentencing determination").

The fact that his brother was implicated in an unrelated triple murder almost two years before the Boston Marathon bombing does not mitigate Tsarnaev's offense or punishment. Tamerlan's alleged involvement in prior crimes has nothing to do with *Tsarnaev*'s "character or record," nor does it relate to the "circumstances of" *this* "offense." *Eddings*, 455 U.S. at 110 (quotations omitted). Nothing suggests that Tamerlan's alleged commission of the Waltham murders had any connection to Tsarnaev's commission of the crimes in this case. Tsarnaev's attempts to demonstrate relevance fail.

a. Tamerlan's violent history is not automatically relevant merely because he was a co-conspirator.

Tsarnaev first broadly asserts that "a co-conspirator's history of violence is relevant evidence" in capital cases. Br. 230. But he fails to show how this is true absent a connection between the co-conspirator's violent history and the defendant's

commission of the instant offense. Tsarnaev cites the statutory mitigating factor applicable when "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death." 18 U.S.C. § 3592(a)(4). "This factor does not measure the defendant's culpability itself, but instead considers—as a moral data point—whether that same level of culpability, for another participant in the same criminal event, was thought to warrant a sentence of death." *United States v. Gabrion*, 719 F.3d 511, 524 (6th Cir. 2013) (en banc). Because Tamerlan was already dead, the fact that he did not face the death penalty indicates nothing about whether Tsarnaev deserved death.

Next, Tsarnaev cites *Enmund v. Florida*, 458 U.S. 782, 801 (1982), where the Court held that the death penalty was unconstitutional for felony murder without proof that the defendant "intended or contemplated that life would be taken." Br. 230. *Enmund* said nothing about what evidence is admissible in a capital penalty phase or whether a deceased co-conspirator's "history of violence is relevant." Br. 230. It simply held that the death penalty is impermissible for a "minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have any culpable mental state." *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (summarizing *Enmund*). Tsarnaev cannot credibly contend that he was anything like the getaway driver in *Enmund*, who was only "vicariously guilty" and was not proven to have "intended or contemplated that life would be taken." *Enmund*, 458 U.S. at 800-01.

Tsarnaev personally placed and detonated a bomb in a crowded area with the goal of taking lives.

The state and district court cases Tsarnaev relies on are closer, but still miss the mark. In *Cooper v. Dugger*, 526 So. 2d 900, 902-03 (Fla. 1988), the Florida Supreme Court held that it was improper to exclude evidence of a co-defendant's "violent character and domination of" the defendant. And in *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461-62 (S.D. Fla. 1986), the court held that counsel rendered ineffective assistance by failing to learn that the co-defendant had a violent history and motive for the killing (which the defendant lacked). In each case, however, the co-defendant's violent history was arguably linked to the charged offense, either because there was other evidence of "domination," *Dugger*, 526 So. 2d at 903, or because the co-defendant had a greater motive for the offense and therefore may have had a greater role, *Troedel*, 667 F. Supp. at 1461-62. Neither factor is present here.

To be sure, Todashev's statements, if credited, tend to show that Tamerlan was "violent" and a "cold-blooded killer." Br. 229. But that fact was not in question, considering his participation in the crimes in this case. Nor does it mitigate Tsarnaev's offense. Indeed, the fact that Tsarnaev continued to associate with Tamerlan (and excused the cold-blooded Waltham murders as "jihad") is arguably *aggravating*. Evidence about Tamerlan's violent nature was not automatically relevant as mitigating evidence in the absence of any connection between Tamerlan's prior crime and Tsarnaev's offenses.

b. The evidence was not relevant to show fear or intimidation.

Next, Tsarnaev argues that the Waltham murder evidence was relevant to show that Tamerlan "influenced" or "intimidated" him. *See* Br. 245, 247, 250, 251, 269. Specifically, Tsarnaev argues that "the bombings were not the first time Tamerlan had committed brutal crimes and influenced another person to help him." Br. 245-46. *See id.* at 247. He claims that his "knowledge of his brother's willingness to kill someone very close to him—[Brendan] Mess—in pursuit of jihad" might have persuaded a juror that Tsarnaev "placed the bomb on the finish line out of fear of what his brother might do to him if he refused." Br. 250.

This argument fails because *no* evidence indicates that Tsarnaev committed the bombings and subsequent crimes out of fear for his life or safety.[44] Evidence is irrelevant where "proof of some additional fact is required before the evidence could support the point for which it is offered" or where "there is no other proof supporting the proposition to which the evidence is directed and that evidence is insufficient to prove it without something more." 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, § 4:2 (4th ed.). *See United States v. Brandon*, 17 F.3d 409, 444-45 (1st Cir. 1994) (evidence that zero-down loans were common in commercial real estate was irrelevant where the charged crimes involved *fake* down payments). As

[44] Tsarnaev did not seek a duress instruction during the guilt phase, nor did he try to prove the statutory mitigating factor that applies when "[t]he defendant was under unusual and substantial duress," 18 U.S.C. § 3592(a)(2).

explained above, evidence that Tamerlan may have committed unrelated murders is, by itself, "insufficient to prove" that Tsarnaev committed the crimes in this case out of fear of Tamerlan. Muller & Kirkpatrick, § 4:2. And because there "is no other proof supporting the proposition" to which the Waltham evidence was directed, that evidence was inadmissible. *Id.*

McVeigh is instructive. There, the district court excluded from the penalty phase evidence that an anti-government organization had plotted to bomb the same federal building in Oklahoma City that McVeigh himself bombed. *United States v. McVeigh*, 153 F.3d 1166, 1211 (10th Cir. 1998), *overruled on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999). McVeigh argued that this evidence showed that he was a "less culpable" member of a "broader conspiracy." *Id.* at 1213. The Tenth Circuit disagreed. *Id.* Because there was no "evidentiary link" between McVeigh and the organization, "there simply was no basis for the jury to conclude that McVeigh had a 'lesser role' in a broader . . . conspiracy." *Id.*

Here, there was simply no evidence that Tsarnaev feared Tamerlan or committed the marathon bombing out of fear for his own safety. The district court allowed Tsarnaev to introduce extensive evidence about Tamerlan's aggressive behavior toward others. *See* 17.App.7521-25 (angrily shouted down an imam for references to Thanksgiving and Martin Luther King, Jr.), 7530-32 (angry outburst to store owner about halal turkeys at Thanksgiving), 7540-50 (poked opponent in the chest during a heated argument about Islam), 7793-7800 (radical Islamic views and

physical aggression toward a stranger); 18.App.8134-43 (punched a man in the chest, had a physical fight with his girlfriend, threatened and frightened his girlfriend's roommates). Yet nothing suggested that Tamerlan was ever aggressive toward Tsarnaev or that he pressured or intimidated Tsarnaev into committing the bombing.

The evidence showed that Tsarnaev was independent and willing to make his own decisions. At the time of the bombing, he was a sophomore at the University of Massachusetts Dartmouth, living more than 60 miles away from Tamerlan's home in Cambridge. *See* 1.Supp.App.77 (Gov't Exh. 1440 at 12) (demonstrative exhibit with map). Tsarnaev had his own car and his own group of friends. 17.App.7963, 7969. And although Tamerlan had become very religious and stopped drinking or smoking marijuana (at least in the presence of others), 17.App. 7545, 7670-71,7808, Tsarnaev continued to do so up until the marathon bombing. 12.App.5266, 5287-89; 18.App.8098-99. Tsarnaev told his friend Stephen Silva that Silva would not want to meet Tamerlan because he was "very strict," "very opinionated," and might "give [Silva] a little shit" for not being a Muslim. 12.App.5309. Yet Tsarnaev himself did not live by Tamerlan's strict rules and instead lived a carefree party lifestyle. 17.App.7980-84; 18.App.8098-99.

Moreover, the evidence shows that Tsarnaev was a willing and at times independent participant in joint crimes with his brother. He texted and tweeted that he wanted to attain the "highest level of Jannah." 10.App.4501; 14.App.6344. He borrowed the 9mm pistol used in the offense. 12.App.5264-67. He rented and shot a

9mm pistol at a firing range less than a month before the bombing. 14.App.6060-65; 17.App.7992. On the day of the bombing, he carried his own separate bomb. 14.App.6423; Gov't Exh. 22 (video). After splitting up with Tamerlan, he placed and detonated that bomb in the middle of a crowd that included children, resulting in two deaths and dozens of injuries. 14.App.6423; 1.Supp.App.14 (Gov't Exh. 29); Gov't Exhs. 22 (video). After three days (during which he returned to Dartmouth), he joined Tamerlan in killing a police officer in an attempt to get a second gun, helped kidnap Dun Meng at gunpoint, and stole money using Meng's ATM card. 11.App.4840-44, 4884-86, 4954-55. Later, Tsarnaev lobbed bombs at police officers on Laurel Street while his brother shot at them. 12.App.5045-46, 5077-78, 5151, 5157. When the bombs ran out and police were arresting Tamerlan, Tsarnaev did not surrender or even try to escape through the unblocked end of Laurel Street. *See* 14.App.6119. Instead, he turned Meng's Mercedes around and drove it straight toward the officers and his still-living brother in an attempt to kill them all. 12.App.5091-92, 5097-98, 5137.

Even after Tamerlan's death, Tsarnaev never suggested that he committed his crimes out of fear. While hiding in the boat, he praised Tamerlan as a martyr, said he wanted to become a martyr himself, and tried to "shed some light on our actions," which, he wrote, "came with a [me]ssage." 11.App.4555-56. He wrote that the United States government was killing innocent Muslims and that "I can't stand to see such evil go unpunished." 11.App.4556. He considered himself a mujahideen who

could "look into the barrel of [a] gun and see heaven." 11.App.4557. And he wrote that the United States' actions justified "killing innocent people." 11.App.4557. These are not the statements of someone forced into committing violence against his will. The evidence overwhelmingly showed that Tsarnaev was fully committed to the brothers' joint crimes.[45]

Even if there *had* been evidence that Tsarnaev "fear[ed] Tamerlan," Br. 269, the Waltham murders' relevance would have been highly questionable. That Tamerlan allegedly was willing to kill a former friend (who was not a Muslim) [redacted] or "in pursuit of jihad," Br. 250, does not mean he would have harmed his own brother, a fellow Muslim. *See* 18.App.8347 (testimony of family member that, when they were growing up, "Tamerlan loved his younger brother, absolutely adored him"). In fact, the brothers' shared Islamist ideology and Tsarnaev's description of the Waltham murder as "jihad" suggest that Tsarnaev *approved* of the Waltham killings, not that they made him fear Tamerlan.

Moreover, there are important dissimilarities between the crimes. *See Baker v. Corcoran*, 220 F.3d 276, 294 (4th Cir. 2000) (no prejudice to defendant from failure to admit evidence of a co-defendant's previous carjacking, which was "not similar to the . . . murder" for which they were jointly charged). [redacted]

[45] [redacted]

[redacted]

But video footage before and after the marathon bombing—as well as Tsarnaev's nonchalant tweets and texts—suggest that Tsarnaev was not nervous or fearful at all. *See* Gov't Exhs. 22 (Forum restaurant video); 1181 to 1183 (UMass Dartmouth fitness center video); 748 (Shell gas station video); 1.Supp.App.64 (Gov't Exh. 1313) ("Ain't no love in the heart of the city, stay safe, people."); 1.Supp.App.66 (Gov't Exh. 1320) ("I'm a stress free kind of guy."); 1.Supp.App. 51 (Gov't Exh. 1153) ("Better not text me my friend . . . Lol."). And Tsarnaev's willingness to commit additional violence—including participating in the murder of Officer Collier, throwing bombs at police officers, and trying to run officers over—is entirely inconsistent with his claim that he was coerced into committing the bombing.

c. The evidence was not relevant to show Tsarnaev's lesser role.

Next, Tsarnaev claims that the Waltham murder evidence was relevant to show that Tamerlan "played a much greater role in these offenses than [Tsarnaev]" because he "initiated the bombings and the brothers' failed escape." Br. 250. *See id.* at 247, 262, 267. He is incorrect. As an initial matter, the primary question for the jury was *Tsarnaev's* role in the offense, not his brother's. Even if Tamerlan played a "greater role," the jury could still have concluded that Tsarnaev's comparatively lesser role justified the death penalty.

More importantly, Tamerlan's alleged participation in the Waltham murders did not tend to show that Tsarnaev played a "less significant" or "less culpable" role in the Boston Marathon bombings and the brothers' subsequent crimes.[46] Br. 262, 268. Tsarnaev claims that evidence that Tamerlan had previously "influenced a less culpable person (Todashev) to participate in murder," Br. 268-69, supported the inference that Tamerlan had done the same with Tsarnaev. But Tamerlan did not "influence[ ]" Todashev to "participate in a murder" at all. [redacted] Because Tamerlan had not previously "recruit[ed]" (much less coerced) someone into "commit[ting] violence," Br. 269, the Waltham incident provides no support for Tsarnaev's claim that he played a less culpable role in the bombing.

[46] Tsarnaev introduced other evidence at trial tending to show that Tamerlan was the leader in the brothers' relationship. *See* 12.App.5302 (when Stephen Silva heard about the bombing he thought "it must have been [Tsarnaev's] brother who got him into it"); 17.App.7802 (Tsarnaev never spoke much at the gym when Tamerlan was in the room); 18.App.8293 (Tsarnaev was proud of Tamerlan). And five jurors found that Tamerlan "became radicalized first, and then encouraged his younger brother to follow him," Add. 92, yet still found the death penalty appropriate.

[redacted]

Tsarnaev *did* want to kill people. Months before the bombing, he texted a friend about jihad and his desire to reach the "[h]ighest level" of paradise. 1.Supp.App.74 (Gov't Exh. 1395). He repeated that sentiment on Twitter and expressed a desire for "victory over kufr," or unbelievers. 1.Supp.App.61 (Gov't Exh. 1266); 12.App.5300; 13.App.5934. A month before the bombing, as well as the day after it, he accessed the *Inspire* magazine file on his computer that showed how to build bombs and urged Muslims in the West to "damage the enemy" with them. 13.App.5663; 1.Supp.App.39 (Gov't Exh. 1142-013 at 5); 2.Supp.App.210 (1142-091 at 33). And after the bombings, he explained that "killing innocent people" was "allowed" based on perceived wrongs committed by the United States government. 11.App.4557; *see* 11.App.4556 ("I can't stand to see such evil go unpunished."). Because Tsarnaev had a clear motive for the bombing and personally took part in it, his position is nothing like Todashev's. Evidence of the Waltham murders is not relevant to show that he played a less culpable role.

Tsarnaev cites cases (Br. 247-49) that, he says, hold "that a defendant's death sentence may not stand where the jury has been prevented from hearing evidence tending to show that the defendant may not have had the primary role in the offense." Br. 247. But in those cases, the evidence was about the co-defendant's role *in the charged offense*, not his participation in an unrelated crime. For example, in *Mak v.*

Blodgett, 970 F.2d 614, 622 (9th Cir. 1992) (per curiam), the court found prejudice from cumulative errors, including the court's "refusal . . . to admit at the penalty phase" evidence that Mak's co-defendant and a third party actually "may have planned the massacre," which rebutted the state's argument that Mak himself had planned it. And in *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1354-55 (11th Cir. 2011), the court concluded that the defendant was prejudiced by his counsel's failure to call his family members to corroborate a psychologist's opinion that the defendant was "susceptible to being dominated by older, dominant males" such as his co-defendants—an opinion the sentencing court rejected because it was based solely on the defendant's self-reporting. *See also Dugger*, 526 So. 2d at 902-03 (improper exclusion of non-statutory mitigation circumstances, including testimony about the co-defendant's "violent character and domination of" the defendant); *Troedel*, 667 F. Supp. at 1461-62 (counsel rendered ineffective assistance by failing to investigate co-defendant's violent history and motive for the killing); *Buttrum v. Black*, 721 F. Supp. 1268, 1314-16 (N.D. Ga. 1989) (improper exclusion of evidence that defendant's husband had urges to rape women, wanted to kill his mother, and had attacked his mother with a knife, all of which suggested the husband was the dominant actor in the charged rape and murder and rebutted the state's claim that he did nothing violent before he met the

defendant), *aff'd*, 908 F.2d 695 (11th Cir. 1990). None of the cases Tsarnaev cites involved evidence of unrelated, uncharged murders committed by a co-defendant.[47]

Other courts have concluded that a co-defendant's prior murders or other crimes are not relevant for mitigation purposes. *See Cauthern v. Colson*, 736 F.3d 465, 488 (6th Cir. 2013) (no prejudice from counsel's failure to present evidence that the co-defendant was suspected of an unrelated and unsolved rape and murder; the evidence was "inadmissible" in the defendants' joint trial because "a reasonable juror would not have concluded" that the evidence "had any bearing on [the defendant's] relative culpability"); *Fuller v. Dretke*, 161 F. App'x 413, 416 (5th Cir. 2006) (unpublished) (co-defendant's propensity to violence had "little, if any, relevance to [the defendant's] character and background"); *Carter v. Gibson*, 27 F. App'x 934, 949-51 (10th Cir. 2001) (unpublished) (evidence that co-defendant owned guns, distributed drugs, and received stolen property "would not have been mitigating as to [the defendant's] participation in the crime or his character"); *Lawrence v. State*, 846 So. 2d 440, 449-50 (Fla. 2003) (no error in excluding co-defendant's criminal history

[47] Furthermore, each of these cases involved *additional* errors that supported reversal of the death sentences. *See Mak*, 970 F.2d at 624-25 (erroneous jury instructions and verdict form); *Cooper*, 646 F.3d at 1354-56 (failure to present childhood and family background information); *Cooper*, 526 So. 2d at 901-02 (improper exclusion of evidence showing rehabilitation); *Troedel*, 667 F. Supp. at 1458-66 (state presented false and misleading testimony, counsel failed to depose state's expert witness, and state violated its *Brady* obligations); *Buttrum*, 721 F. Supp. at 1312-14, 1316-18 (failure to provide sufficient psychiatric assistance to the defense, use of psychiatric interrogation violated Fifth and Sixth Amendment, prosecutorial misconduct during closing argument).

where there was "no evidence presented or proffered indicating how [the co-defendant's] record influenced [the defendant's] behavior in the instant crime"); *Jones v. State*, 539 S.E.2d 154, 161 (Ga. 2000) (concluding that co-defendant's prior murder conviction "would not tend to lessen [the defendant's] culpability for the murder, nor would it constitute mitigating evidence pertaining to [the defendant's] character, prior record, or the circumstances of the offense" (quotations omitted)); *State v. Goode*, 461 S.E.2d 631, 651 (N.C. 1995) ("[H]is accomplice's criminal record has no bearing on defendant's character or propensity to commit the crime."). In light of these decisions—and the dissimilarities between the Waltham murders and the marathon bombing—the district court's conclusion that the Waltham evidence was irrelevant was not an abuse of discretion.

2. Even if the evidence was minimally relevant, its probative value was outweighed by the risk of confusing the issues and misleading the jury.

Even if the Waltham evidence had some relevance for mitigation, the district court was within its discretion to exclude the evidence based on the risk of "confusing the issues[ ] or misleading the jury." 18 U.S.C. § 3593(c). Consistent with the Supreme Court's view that it is "desirable for the jury to have as much information before it as possible" in a capital penalty phase, *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) (plurality opinion), the FDPA states that "[i]nformation is admissible regardless of its admissibility" under the Federal Rules of Evidence, 18 U.S.C. § 3593(c). But the Act allows district courts to exclude information "if its probative value is outweighed

by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c). This allows for the exclusion of more evidence than Federal Rule of Evidence 403, which requires that the "probative value be *substantially* outweighed by the danger of unfair prejudice before evidence may be excluded." *Sampson I*, 486 F.3d at 42.

The district court reasonably concluded that the Waltham evidence risked confusing the issues. Tsarnaev wanted to prove Tamerlan's guilt for the unrelated murders, not simply through a prior conviction (which obviously did not exist), but through evidence such as Todashev's hearsay statements, computer chats between Tamerlan and Todashev, an article on Tamerlan's computer that justified stealing from non-Muslims, computer records from Tamerlan's wife's computer, and witness testimony about Tamerlan's close relationship with Brendan Mess. *See* Add.339-40, 343, 346-48; 25.App.11574; Doc. 1292-1 at 3. Tsarnaev also now indicates that he would have called his friend Kadyrbayev to testify that Tsarnaev knew about Tamerlan's participation in the Waltham murder.[48] *See* Br. 238, 257.

Faced with all this evidence relating to the Waltham murders, the jurors easily could have been confused as to what issues they needed to decide and how they bore

[48] Tsarnaev mentioned Kadyrbayev's potential testimony in his third motion to compel, 24.App.11292, but he did not mention it when arguing that the Waltham murder evidence was admissible at trial, *see* Add.343-44, 347-49; Doc. 1292-1. Thus, he failed to provide the district court with an essential link in his argument that the Waltham evidence was relevant—evidence that Tsarnaev knew of Tamerlan's alleged role in the triple murder.

on Tsarnaev's culpability. For example, they would have had to determine whether Todashev's account of the Waltham murders was believable, or whether he had exaggerated Tamerlan's responsibility for the murders in order to minimize his own. As the district court observed, it was possible that "Todashev was the bad guy and Tamerlan was the minor actor." Add. 352. [redacted] And Todashev attacked an FBI agent at the conclusion of the interview in which he was questioned about the Waltham murders. Todashev's actions, which are more consistent with guilt, could suggest that he committed the murders and only pinned them on Tamerlan because Tamerlan was dead and was therefore an easy scapegoat.

Moreover, in trying to determine how much Tsarnaev knew about the murders, the jury easily could have speculated (quite prejudicially to Tsarnaev) about whether he knew about Tamerlan's plans to kill in advance and failed to thwart them, and why he told Kadyrbayev about the murders, but not the police. Because the Waltham evidence was at best only minimally relevant—and possibly harmful to Tsarnaev—the district court could reasonably decline to allow a miniature trial regarding those murders.

The Waltham evidence also could have misled the jury into believing that Tsarnaev did not deserve the death penalty simply because he was not as bad as his

brother. The primary focus of the jury's inquiry is "the *defendant*'s background, record, or character" and the "circumstance[s] of the offense." 18 U.S.C. § 3592(a)(8) (emphasis added). *See Lockett*, 438 U.S. at 604 n.12 (plurality opinion) ("the defendant's character, prior record, [and] the circumstances of his offense"). The Waltham evidence would have confusingly focused the jury's attention on *Tamerlan*'s character and the circumstances of an *unrelated* offense.

The Ninth Circuit upheld the exclusion of similar collateral evidence in *United States v. Mitchell*, 502 F.3d 931, 991-92 (9th Cir. 2007), where a capital defendant sought to put on evidence about the details of two unrelated murders in order to impeach a prosecution witness and to "contrast his culpability" with that of the other murderer, who did not face the death penalty. The Ninth Circuit concluded that the district court did not "abuse[ ] its discretion in concluding that more information than this about these separate murders would confuse the issues and mislead the jury." *Id.* at 992. The details of the unrelated murders "had little apparent bearing on *Mitchell*'s character or the circumstances of *Mitchell*'s offense." *Id.* at 991. *Cf. United States v. Purkey*, 428 F.3d 738, 757 (8th Cir. 2005) (the "scandalous and perplexing nature" of evidence that the defendant's wife had tried to poison him "had significant potential to confuse or mislead the jury"). Similarly here, trying to prove Tamerlan's role in an unrelated triple murder would have risked confusing the issues.[49]

[49] Tsarnaev faults (Br. 261-62) the district court for saying that evidence of the Waltham murders would not only be "confusing to the jury," but also "a waste of

Any attempt to prove that Tamerlan was involved in these unsolved murders would have exposed this jury to a large amount of sensational and gruesome evidence relating to the Waltham crime scene and Todashev's being shot by the FBI in Florida. It would have required them to find that Tamerlan committed a dramatic unsolved murder on the basis of a dead declarant's self-serving statements and other circumstantial evidence. The district court properly concluded in its ample discretion that presentation of this evidence would have distracted the jury from the issues it had to decide.

The question here is not whether "the district court was required to exclude the evidence" or even whether "it was preferable to exclude it," but whether the action was "within the [district court's] discretion." *United States v. Taylor*, 814 F.3d 340, 363 (6th Cir. 2016). A "district court is not an automaton that can only come to one right answer on any evidentiary issue just because the case is a capital case." *Id.* Here, the district court could reasonably conclude that the probative value of the unrelated murders was "outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593(c).

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time." *See* Add. 352. To be sure, the FDPA "makes no express mention of the factors of undue delay, waste of time, and cumulativeness as grounds for exclusion." *Sampson I*, 486 F.3d at 42-43. *Compare* Fed. R. Evid. 403. But despite this omission, "the trial court, in a capital sentencing proceeding, remains free to consider cumulativeness." *Sampson I*, 486 F.3d at 43. Trial courts accordingly retain inherent authority to exclude evidence that would cause needless delay. The Court need not reach the question because, even if the Waltham evidence was minimally relevant, the concerns of jury confusion were sufficient to justify the district court's ruling.

D. Even if the district court abused its discretion by excluding the Waltham murder evidence, the error was harmless.

Even if this Court were to find an abuse of discretion, any error on this issue would be harmless beyond a reasonable doubt. Contrary to Tsarnaev's suggestion (Br. 264-67), harmless-error review applies to the erroneous exclusion of mitigation evidence in capital cases. And the record overwhelmingly shows that any error in excluding the Waltham evidence was harmless.

1. Harmless-error review applies to the erroneous exclusion of mitigating evidence in capital cases.

The FDPA directs that courts "shall not reverse or vacate a sentence of death on account of any error which can be harmless, . . . where the Government establishes beyond a reasonable doubt that the error was harmless." 18 U.S.C. § 3595(c)(2). Thus, harmless error review applies if the exclusion of mitigating evidence is an error that "can be harmless." *Id.*

Since *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court "has applied harmless-error analysis to a wide range of errors." *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (collecting cases). "[M]ost constitutional errors can be harmless." *Neder v. United States*, 527 U.S. 1, 8 (1999) (quotations omitted). To justify automatic reversal without regard to prejudice, an error must be a "structural defect" that so fundamentally alters the "framework within which the trial proceeds" that it "def[ies] analysis by 'harmless-error' standards." *Fulminante*, 499 U.S. at 309-10. Such structural errors "deprive defendants of 'basic protections' without which 'a criminal

trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, 527 U.S. at 8-9 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)). The Supreme Court has found structural error "[o]nly in rare cases," *Washington v. Recuenco*, 548 U.S. 212, 218 & n.2 (2006), including *Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (racial discrimination in grand jury selection); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation right at trial); *Waller v. Georgia*, 467 U.S. 39 (1984) (denial of public trial); and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction).

A mistaken evidentiary ruling is quite different from the errors the Supreme Court has deemed structural. An evidentiary ruling does not make the proceeding fundamentally unfair, and its significance can be "quantitatively assessed in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." *Fulminante*, 499 U.S. at 307-08.

The Supreme Court has specifically treated evidentiary rulings that result in the improper exclusion of mitigating evidence in capital trials as non-structural. In *Skipper*, 476 U.S. at 5, the Court held that "evidence that the defendant would not pose a danger if spared (but incarcerated)" is mitigating and "may not be excluded from the sentencer's consideration." In analyzing the erroneous exclusion of such evidence, however, the Court did not suggest that the error was structural. To the

contrary, the Court considered, and then rejected, the State's argument that exclusion of the evidence was harmless. *Id.* at 7-8. The Court held that, under the circumstances of that particular case, "the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." *Id.* at 8.

Similarly, in *Hitchcock v. Duggar*, 481 U.S. 393, 396-99 (1987), the Court ordered that the habeas petitioner's capital sentence be vacated because Florida law unconstitutionally prohibited the sentencing jury and judge from considering certain mitigating evidence introduced during the penalty phase. The Court noted that the State had "made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge." *Id.* at 399. The Court then explained that, "*[i]n the absence of such a showing* our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid." *Id.* (emphasis added). Thus, both *Skipper* and *Hitchcock* presumed that erroneous exclusion of mitigating evidence is reviewed for harmlessness, rather than considered structural error. *Cf. Satterwhite v. Texas*, 486 U.S. 249, 257 (1988) ("We have permitted harmless error analysis in both capital and noncapital cases where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial."); *Jones v. United States*, 527 U.S. 373, 402 (1999) (holding that harmless-error review applies when the jury considers improper aggravating factors).

Although this Court has not yet weighed in, other courts of appeals have uniformly applied harmless-error review to evidentiary rulings improperly excluding

mitigating evidence during the sentencing phase of a capital trial.[50] *See, e.g.*, *Rhoades v. Davis*, 914 F.3d 357, 367-68 (5th Cir. 2019), *petition for cert. filed*, No. 18-9614 (June 10, 2019); *McKinney v. Ryan*, 813 F.3d 798, 821 (9th Cir. 2015) (en banc); *Dixon v. Houk*, 737 F.3d 1003, 1011 (6th Cir. 2013); *United States v. Troya*, 733 F.3d 1125, 1137 (11th Cir. 2013); *United States v. Lighty*, 616 F.3d 321, 363, 365-66 (4th Cir. 2010); *Williams v. Norris*, 612 F.3d 941, 948 (8th Cir. 2010); *Bryson v. Ward*, 187 F.3d 1193, 1205 (10th Cir. 1999). If this Court finds an abuse of discretion, it too should review for harmless error.

2. Any error here was harmless.

Any error in excluding the Waltham evidence was harmless. A constitutional error is harmless when the government proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. The question is whether, absent the error, the jury "would have reached the same recommendation as it did." *Jones*, 527 U.S. at 404. Here, the answer to that question is "yes," for several reasons.

[50] Tsarnaev cites *Nelson v. Quarterman*, 472 F.3d 287, 314-15 (5th Cir. 2006) (en banc), where the court treated as structural error jury instructions that prevented the jury from giving full effect to mitigating evidence that had already been admitted. As the Fifth Circuit has subsequently explained, however, harmless-error review still applies when the question is "whether the trial judge erred in refusing to admit one piece of mitigating evidence as irrelevant." *Rhoades v. Davis*, 914 F.3d 357, 368 n.39 (5th Cir. 2019), *petition for cert. filed*, No. 18-9614 (June 10, 2019).

First, as discussed above, Tsarnaev was unable to muster *any* evidence suggesting that Tamerlan intimidated or coerced him into bombing the Boston Marathon, much less that the Waltham murders somehow contributed to that coercion. Thus, even if the jury had heard about Tamerlan's alleged commission of the Waltham murders, there would have been no basis other than speculation to conclude that Tsarnaev committed the instant crimes out of fear of Tamerlan.

Second, the evidence in this case overwhelmingly demonstrated that Tsarnaev participated in the bombings and subsequent crimes willingly. He read radical Islamic publications, including the *Inspire* magazine that showed how to make pressure cooker bombs and encouraged Muslims to use bombs to "damage the enemy." *See* 13.App.5652, 5663, 5684-85; 2.Supp.App.210 (Gov't Exh. 1142-091). He texted with a friend about being interested in jihad. 14.App.6344-45. He placed and detonated a bomb in the middle of a crowd, within a few feet of several children. 14.App.6423; Gov't Exh. 22 (video). When he returned to college after the bombing, he did not report Tamerlan to authorities or express any fear or remorse, but instead worked out at the gym and tweeted that he was a "stress free kind of guy." 1.Supp.App.66 (Gov't Exh. 1320); Gov't Exhs. 1181, 1182, 1183 (gym videos). When his friend realized he was one of the bombers, Tsarnaev texted back, "Better not text me my friend . . . Lol [laugh out loud]." 1.Supp.App.51 (Gov't Exh. 1153).

Tsarnaev later voluntarily returned to the Boston area and joined Tamerlan in murdering Officer Sean Collier, carjacking Dun Meng's car, and trying to kill police

officers on Laurel Street by lobbing bombs. 12.App.5045-46, 5077-78. Even after Tamerlan was captured, Tsarnaev tried to run down officers with an SUV. 12.App.5091-92, 5097-98. And after Tamerlan was dead, Tsarnaev wrote that his killing of "innocent people" was justified by the "evil" committed by the United States and described himself as a mujahideen. 11.App.4556-57. In light of all this evidence, there is no reason to believe the Waltham evidence would have changed the jury's decision to impose the death penalty.

Finally, the Waltham evidence could have cut both ways. If jurors had known Tsarnaev was aware that "Tamerlan was a cold-blooded killer" who "had slit three people's throats a year and a half earlier," Br. 229, they could have concluded that Tsarnaev himself was similarly cold-blooded. Tsarnaev did not report his brother's crimes to authorities or distance himself from his brother, even when Tamerlan spent six months in Dagestan. Instead, Tsarnaev continued to communicate with Tamerlan, exchanging Islamic videos and articles by email. *See* 17.App.7561-7572; 1.Supp.App.103-122 (Def. Exh. 3316-02). Moreover, according to Kadyrbayev's proffer, Tsarnaev characterized as "jihad" Tamerlan's unprovoked murder of Tamerlan's friend Brendan Mess. 24.App.11294. That Tsarnaev was undisturbed by Tamerlan's violence—and even praised it as "jihad"—indicates that he himself was "cold-blooded" and would commit similar acts of violence based on his jihadist beliefs.

Tsarnaev's attempts to show prejudice are unpersuasive. He argues that the government "capitalized on the exclusion of Todashev's statements," Br. 271, and "belittled the defense's mitigation evidence as showing merely that Tamerlan was 'bossy,' 'charming,' and 'loud,' and 'sometimes lost his temper,'" Br. 247. The government's arguments did not suggest that Tamerlan was never violent. The prosecutor referenced a *defense* witness's testimony that Tamerlan "could be charming." 19.App.8783; *see* 17.App.7741. (The defense also said at closing argument that Tamerlan was "charming." 19.App.8751.) But the prosecutor also pointed out Tamerlan's volatility: "Tamerlan was loud, flashy, in your face. The defendant was quiet, polite and laid back. Tamerlan couldn't stop talking about his beliefs. The defendant kept his beliefs to himself. Tamerlan sometimes lost his temper. The defendant knew how to keep his cool." 19.App.8783. This was entirely accurate. It was similarly accurate for the government to say that Tamerlan "was bossy," "didn't want [Tsarnaev] to smoke, drink or do drugs," and "wanted him to pray and go to the mosque more often." 19.App.8787. As the government observed, this was "a far cry from coercion or control." 19.App.8787. Even if the court had admitted the Waltham evidence, the government could have made the very same arguments.

Tsarnaev also asserts that the government misleadingly claimed he "acted 'independently' and 'alone.'" Br. 241. The context makes clear that the government was *not* saying Tsarnaev committed the bombings entirely on his own. *See* 16.App.7085 (saying Tsarnaev "walked alone down Boylston Street, knowing that his

brother had taken up his own place at another location"); 19.App.8725 (saying Tsarnaev "independently got the gun used to murder Officer Sean Collier" and "independently chose the Forum restaurant as the bombing site . . . in spite of the children"). In fact, the government argued that the bombing "was a full-on partnership" between Tamerlan and Tsarnaev and that "[t]hey did not do the exact same things, but they were both terrorists engaged in a joint effort." 19.App.8798. The exclusion of the Waltham murder evidence did not allow the government to improperly characterize Tamerlan or minimize his role. Any error was harmless.

E. The district court did not abuse its discretion by concluding that the details contained in the Todashev materials were not discoverable.

Tsarnaev contends that, even assuming the district court properly excluded the Waltham evidence, the district court violated *Brady v. Maryland* by denying his trial counsel access to the report and recordings of the May 21 Todashev interview.[51] Br. 274-85. He also argues that the district court erred in relying on the qualified law enforcement privilege to deny disclosure. Br. 281-85. The district court properly denied disclosure because the undisclosed details were neither favorable nor material under *Brady*. To the extent the details were discoverable on some basis other than

[51] As noted above, this Court granted appellate counsel access to the report of that interview, and counsel relied on the details of that report in the opening brief. *See* Br. 255-56, 274-75, 280.

Brady, the court correctly concluded that they were protected by the law enforcement investigative privilege.

1. The undisclosed information was not discoverable under *Brady* because it was neither favorable to the defense nor material to guilt or punishment.

"*Brady* requires that the Government disclose 'evidence favorable to an accused' that is 'material either to guilt or to punishment.'" *United States v. Cruz-Feliciano*, 786 F.3d 78, 87 (1st Cir. 2015) (quoting *Brady*, 373 U.S. at 87). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). Put another way, the question is whether the non-disclosure "undermines confidence in the outcome of the trial." *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678).

The undisclosed details of the Waltham murders were not discoverable because they were neither "favorable to an accused" nor "material either to guilt or to punishment." *Brady*, 373 U.S. at 87. They were not favorable to the defense because, as explained above, they were not relevant for any mitigation purpose. The other evidence provided no basis for the jury to conclude that Tsarnaev feared Tamerlan or that the Waltham murders influenced Tsarnaev to commit the instant offenses.

Even if the details of the Waltham murders had been favorable, they were not material. The district court properly concluded that the evidence was inadmissible

because it was irrelevant and confusing to the jury. "Inadmissible evidence is by definition not material," *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983), unless it provides "so promising a lead to strong exculpatory evidence that there could be no justification for withholding it," *Ellsworth v. Warden*, 333 F.3d 1, 5 (1st Cir. 2003). As explained further below, the inadmissible and irrelevant details of the Waltham murder did not provide a lead to strong exculpatory or mitigating evidence.

[redacted]

Tsarnaev also contends that access to the Todashev FBI 302 and recordings would have helped him "respond to the government's argument for the complete preclusion of the Waltham evidence." Br. 278. *See id.* at n.122. But even if knowing the details of Todashev's statements might have been marginally helpful when

opposing the government's motion *in limine*, evidence that is merely helpful for litigation purposes is not "favorable to an accused" in the *Brady* sense because it is neither impeaching nor exculpatory. *Brady*, 373 U.S. at 87. And even if it were favorable, such evidence would not be material. *See United States v. Agurs,* 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense . . . does not establish 'materiality' in the constitutional sense.").

In any event, Tsarnaev's failure to obtain the precise details of Todashev's statements did not disadvantage him. Tsarnaev already knew "the fact and general substance of Todashev's statements concerning the murders." Add.430. [redacted] Tsarnaev was therefore adequately equipped to litigate the Waltham evidence's admissibility.

Finally, Tsarnaev claims that access to the Todashev materials would have allowed him to "develop[ ] additional mitigation evidence." Br. 275. Inadmissible evidence can be material if it provides "so promising a lead to strong exculpatory evidence that there could be no justification for withholding it." *Ellsworth*, 333 F.3d at 5. But Tsarnaev does not seriously contend that the report's details would have led to *additional* mitigating evidence. Instead, he points only to the possibility of discovering

further corroboration of Tamerlan's alleged participation in the Waltham murders—the purportedly mitigating evidence already at issue. [redacted] Br. 280.

Evidence corroborating these peripheral details would not be material. Indeed, because the Waltham murders themselves are irrelevant, the *details* of the murders are *a fortiori* irrelevant. And even assuming the murders had some minimal relevance and were admissible, Tsarnaev cannot show that additional corroboration on collateral details of the Waltham murders would have changed the outcome of the penalty phase.

Moreover, Tsarnaev's assertion that he could have found additional evidence is entirely speculative. He cannot show that the previously undisclosed details in the FBI 302 report would have provided a "promising lead" to "strong" mitigating evidence. *Ellsworth*, 333 F.3d at 5. There is no reasonable probability that disclosure of the details of Todashev's statements would have led to a different outcome.

2. To the extent the Todashev reports and recordings were discoverable on some other basis, they were protected by the qualified law enforcement privilege.

Because the details of Todashev's May 21, 2013 interview were not favorable or material, they were not discoverable under *Brady*. And Tsarnaev has not asserted that the Todashev materials were discoverable on any basis other than *Brady*, such as

Federal Rule of Criminal Procedure 16 or the Jencks Act, 18 U.S.C. § 3500. Accordingly, this Court need not reach the question of whether the law enforcement privilege applies. The privilege is potentially applicable to shield information from discovery only if the information is first determined to be discoverable. *See United States v. Stewart*, 590 F.3d 93, 131 (2d Cir. 2009) (before considering the privilege applicable to classified information, court must "determine whether the material in dispute is discoverable"). As explained, there is no basis for discovery here.

But even assuming the details of the Todashev interview were discoverable on some basis other than *Brady*, the district court properly concluded that they were protected from disclosure by the law enforcement privilege. Both this Court and the Supreme Court have "recognized a qualified privilege for certain information related to law enforcement activities." *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 62 (1st Cir. 2007). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the Court held that the government has a qualified privilege to withhold a confidential informant's identity in order to protect "the public interest in effective law enforcement" by encouraging citizens to report crimes. This Court has extended the law enforcement privilege to "confidential government surveillance information," *United States v. Cintolo*, 818 F.2d 980, 1002 (1st Cir. 1987), and to "law enforcement techniques and procedures," *Commonwealth of Puerto Rico*, 490 F.3d at 64 (quotations omitted). The privilege helps prevent "jeopardiz[ing] future criminal investigations." *Id.* The privilege "can be overcome by a sufficient showing of 'need.'" *Cintolo*, 818 F.2d at

1002. And when ruling on the privilege, a district court must "balanc[e] the federal government's interest in preserving the confidentiality of sensitive law enforcement techniques against the requesting party's interest in disclosure," *Commonwealth of Puerto Rico*, 490 F.3d at 64.

The district court recognized that the Middlesex County investigation into the Waltham murders was "ongoing" and concluded that "disclosure of the [May 21, 2013] 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." Add.429-30. It also concluded that the report was "not material" because its "utility . . . to the defense in building a mitigation case is very low at best." Add. 430.

Tsarnaev argues that the government failed to show that disclosure "would have endangered the ongoing Waltham murder investigation." Br. 281. But considering that [redacted] and allegedly excused the Waltham murders as "jihad," 24.App.11294, a real danger existed that he could reveal facts or investigative techniques to other targets or potential witnesses. And his attorneys could have unintentionally interfered with the Middlesex investigation by attempting their own investigation into the Waltham murders. For example, Tsarnaev suggests his counsel could have "interviewed people close to Mess and Tamerlan" and investigated Tamerlan's and Todashev's financial transactions, Br. 280, actions that

could have tipped off targets, scared off witnesses, or otherwise interfered with the investigation.

Tsarnaev argues that because "the sole identified suspects . . . were both dead" by the time of his penalty phase in 2015, there was "[b]y all indications . . . no case left to solve." Br. 282. [redacted] As late as April 2018, three years after Tsarnaev's penalty phase, the Middlesex District Attorney stated publicly that the Waltham murder probe "continues to be an open and active investigation." Phillip Martin, Is the Waltham Triple Murder Investigation at a Dead End?, WGBH (Apr. 12, 2018). The district court could reasonably conclude that disclosure would jeopardize that investigation.

The district court was also correct in concluding that Tsarnaev's "interest in disclosure" of the report was low. *Commonwealth of Puerto Rico*, 490 F.3d at 64. As explained above, the details contained in the report were not favorable to the defense because they were not relevant for mitigation purposes in the absence of any evidence that Tamerlan coerced or pressured Tsarnaev into committing the bombings. For much the same reason, they would not have affected the outcome of the trial. Therefore, just as they fail to satisfy the *Brady* standard, they fail to outweigh the government's interests in non-disclosure. *See United States v. Nelson-Rodriguez*, 319 F.3d 12, 35 (1st Cir. 2003) (noting that neither *Brady* nor *Roviaro* "provides grounds for

relief unless the exclusion or failure to produce prejudiced [the] defense"). The district court did not abuse its discretion in denying disclosure.

F. [redacted]

As mentioned above, Tsarnaev argues in his opening brief that this Court should give no deference to the district court's rulings on the discoverability of the Todashev materials and the admissibility of the Waltham evidence [redacted] After the government disclosed to Authorized Counsel[52] the previously *ex parte* transcript that provided additional background on this issue, this Court allowed Tsarnaev, through Authorized Counsel, to file a sealed supplemental opening brief. Order, No. 16-6001 (1st Cir. May 21, 2019).

[redacted]

[52] The parties have used the term "Authorized Counsel" to refer to the four appellate defense attorneys to whom this Court granted access to the Todashev-related FBI 302s.

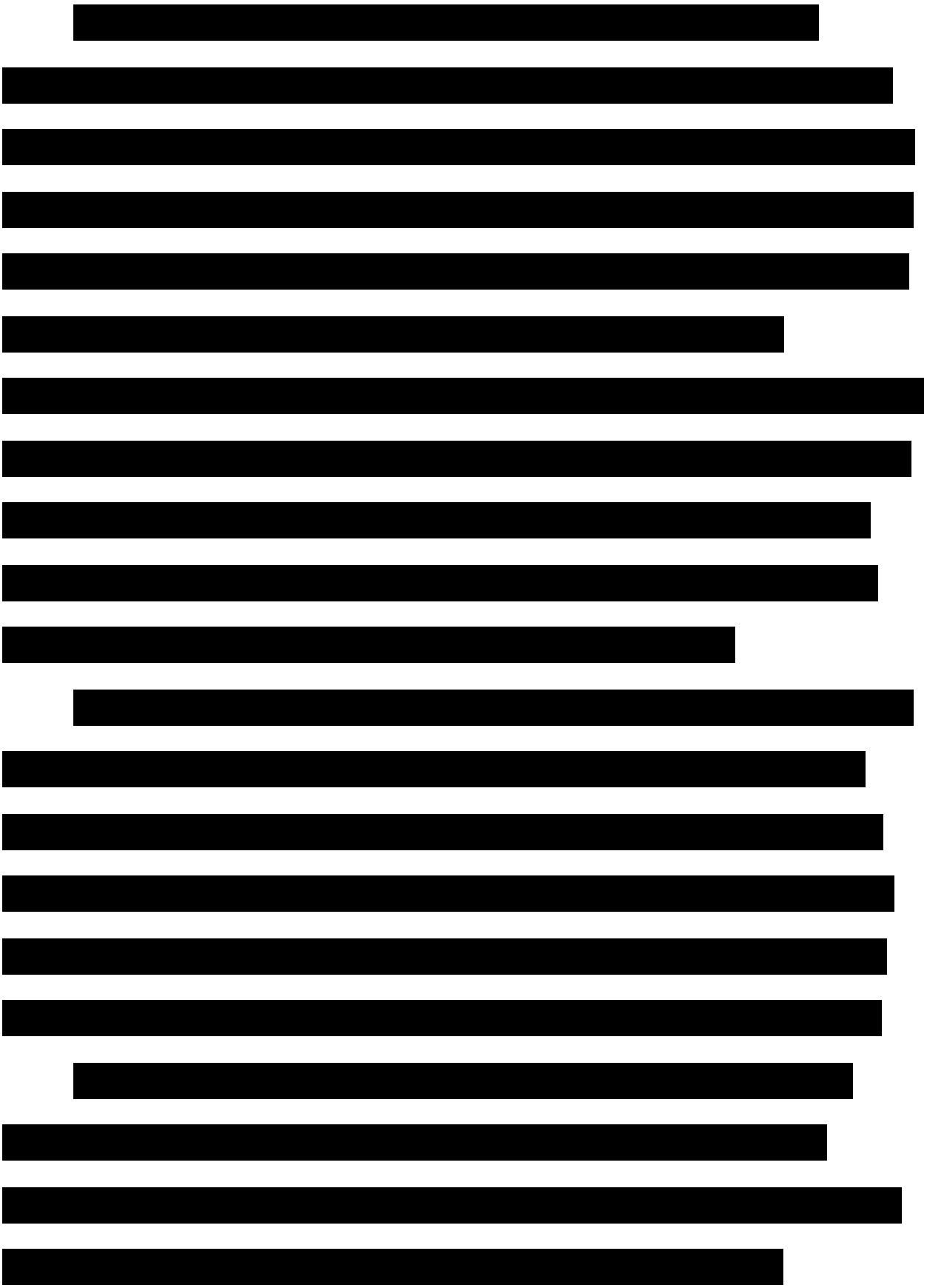
[redacted]

And Tsarnaev is wrong in any event. [redacted] To justify *in camera* review for potential *Brady* information, a defendant "must make some showing that the materials in question could contain favorable, material evidence." *United States v. Prochilo*, 629 F.3d 264, 268 (1st Cir. 2011). "This showing cannot consist of mere speculation." *Id.* at 268-69. "Rather, the defendant should 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.* at 269.

[redacted]

[redacted]

[53] [redacted]



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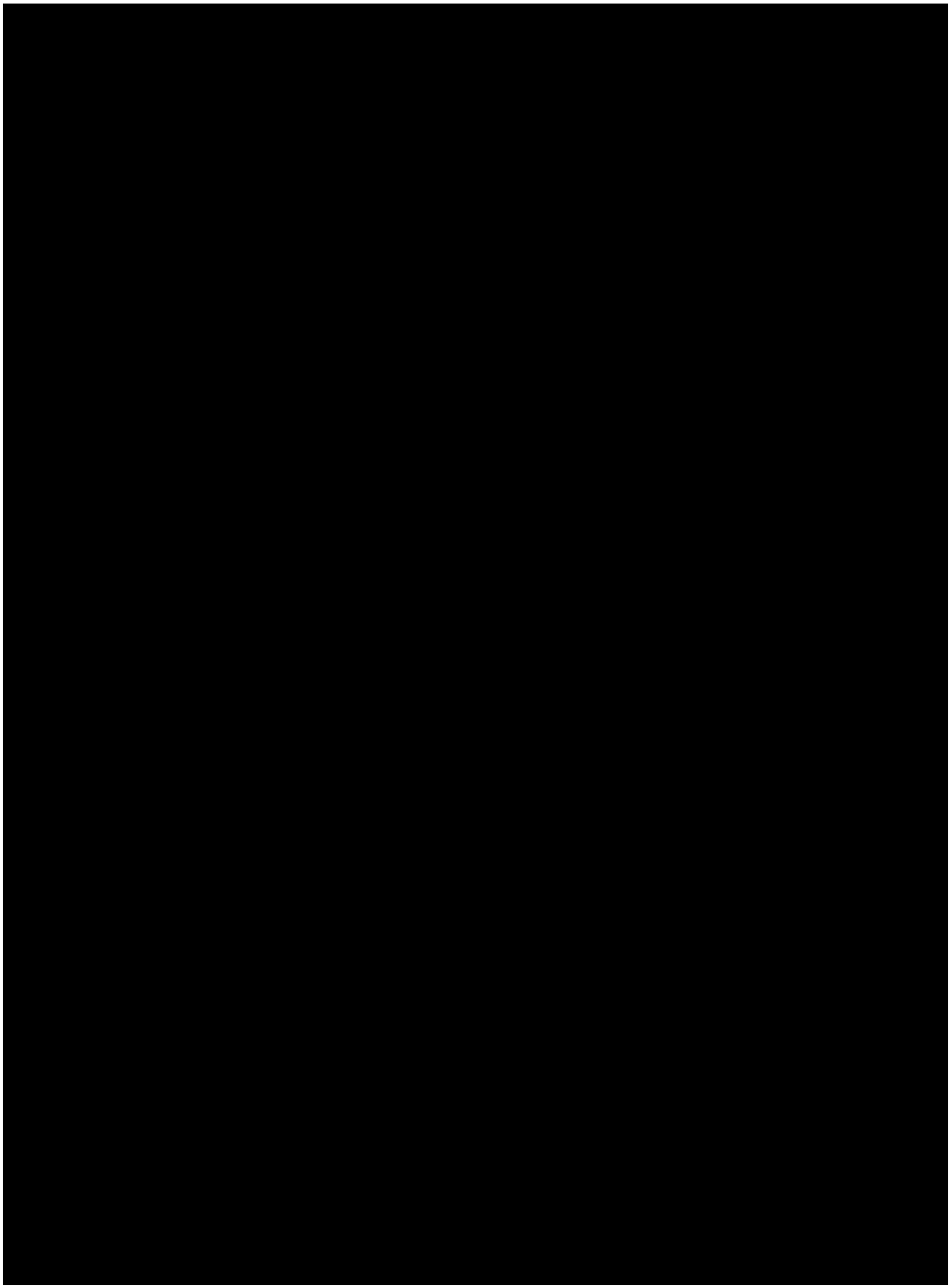

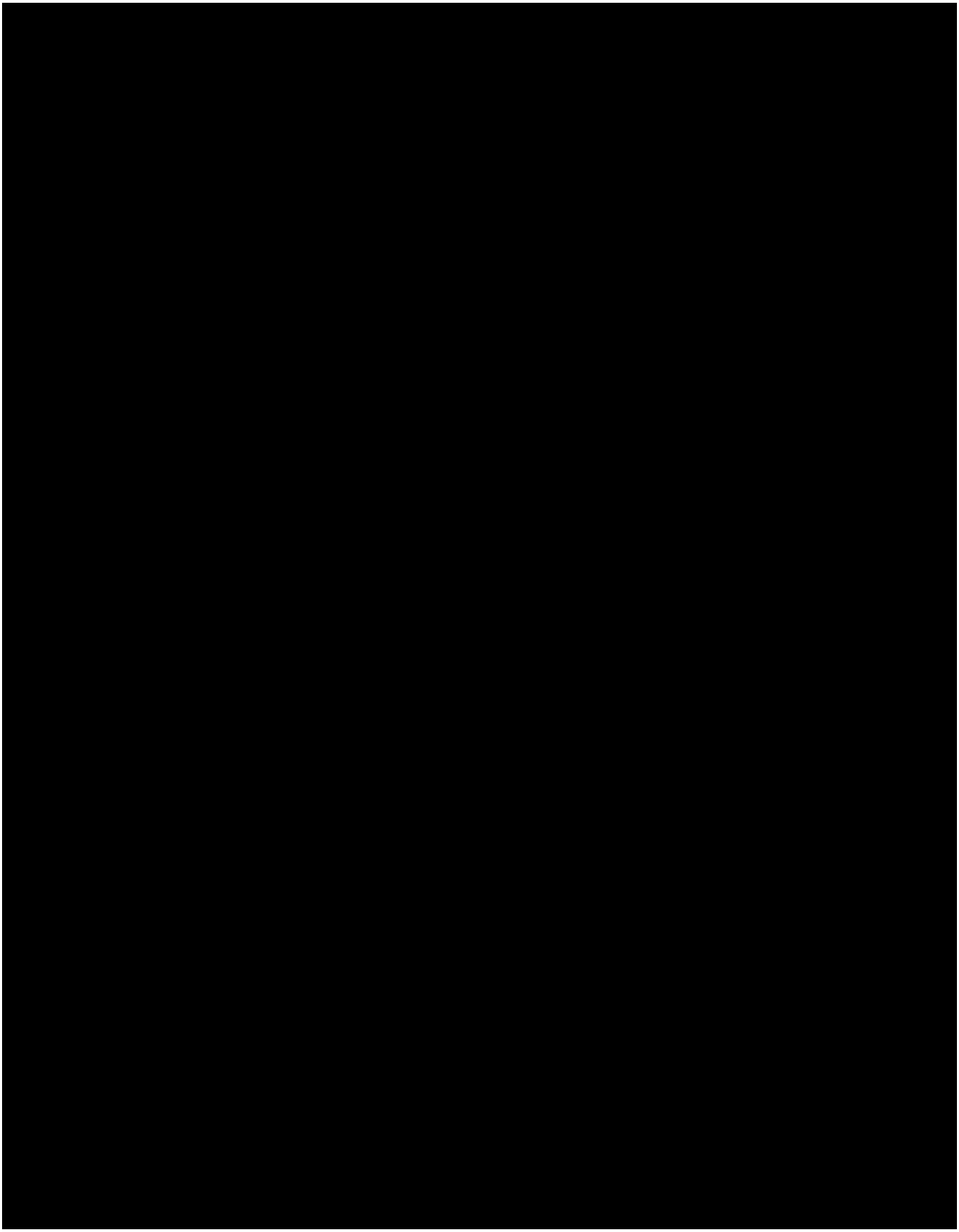

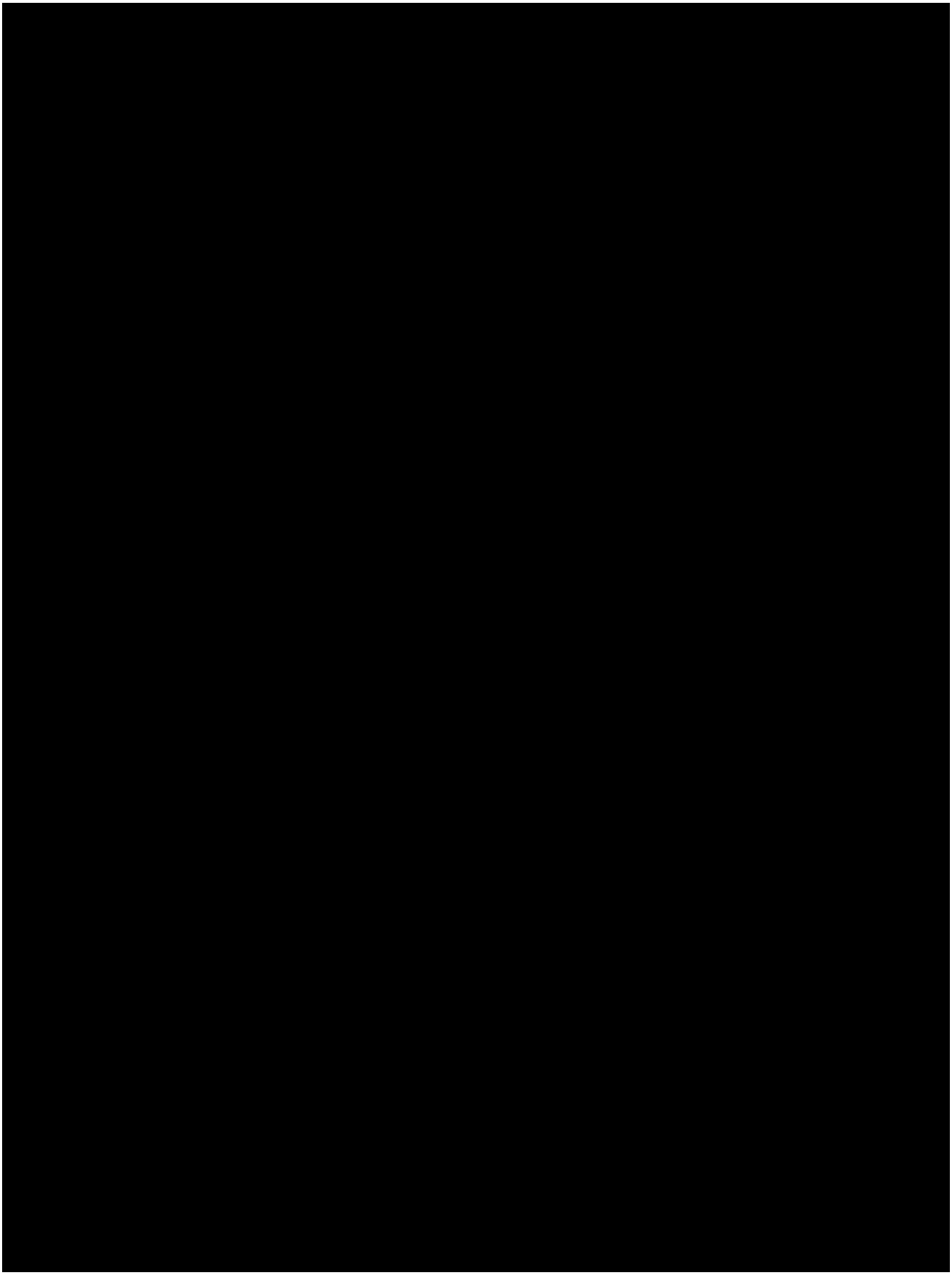

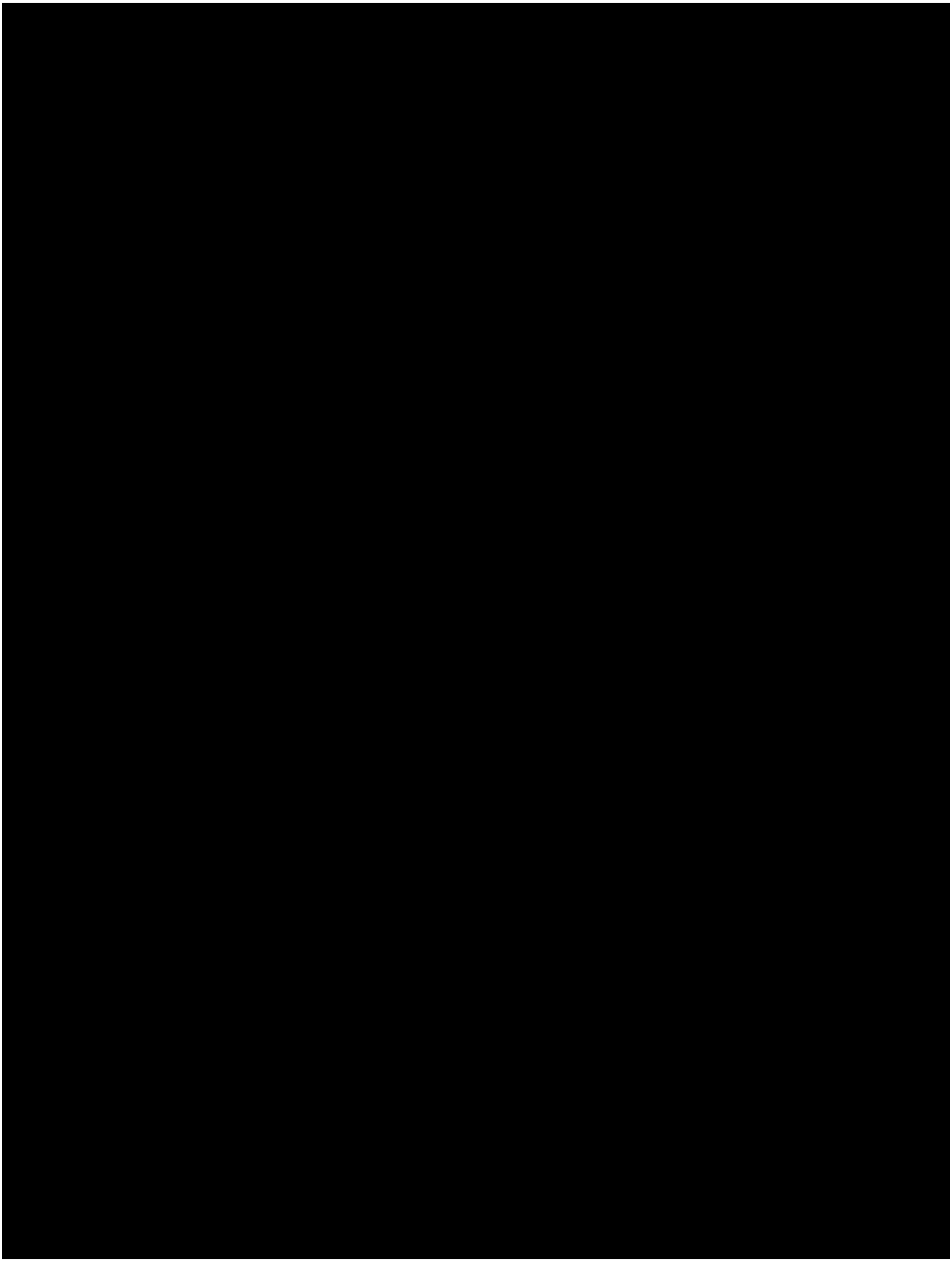

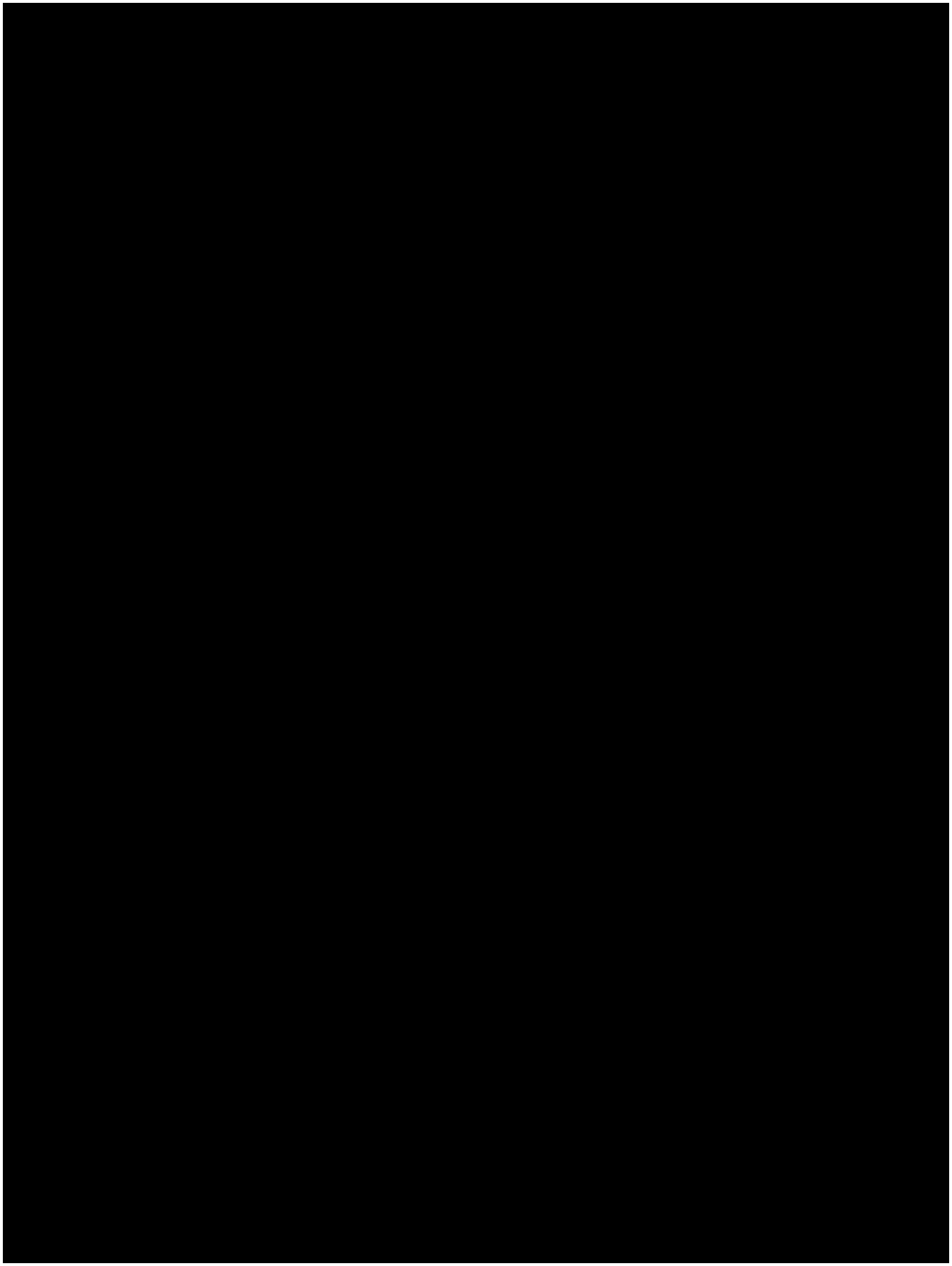

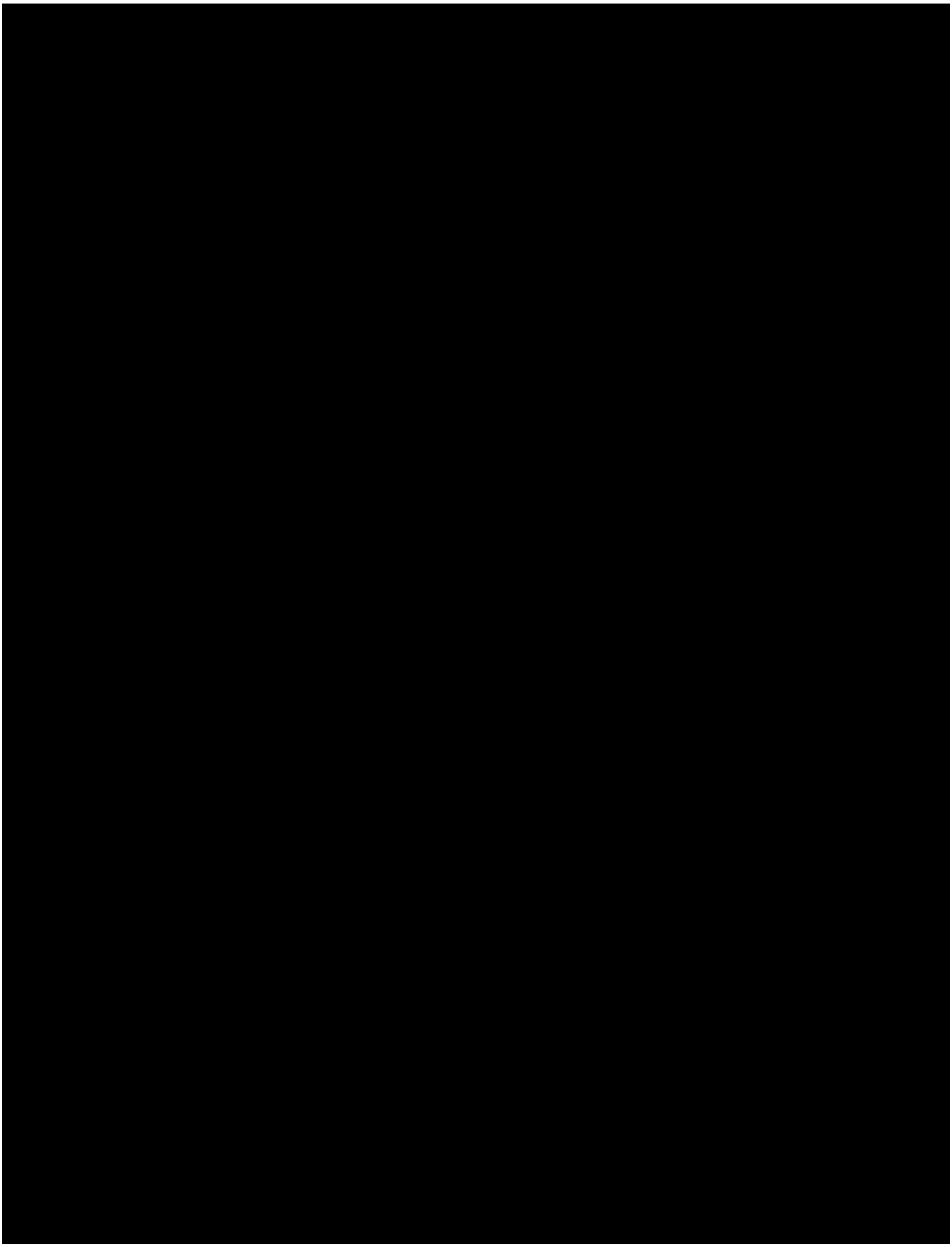

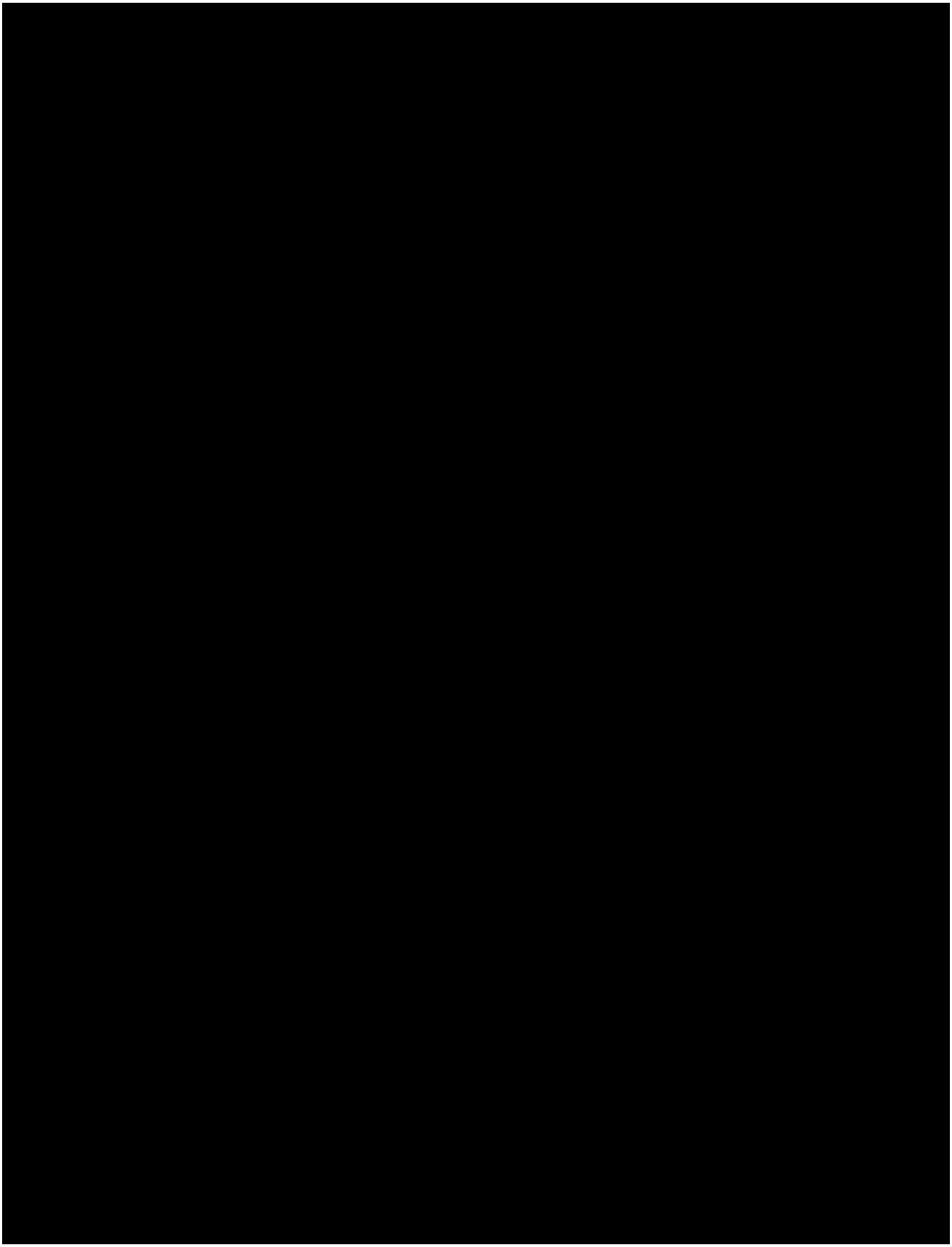

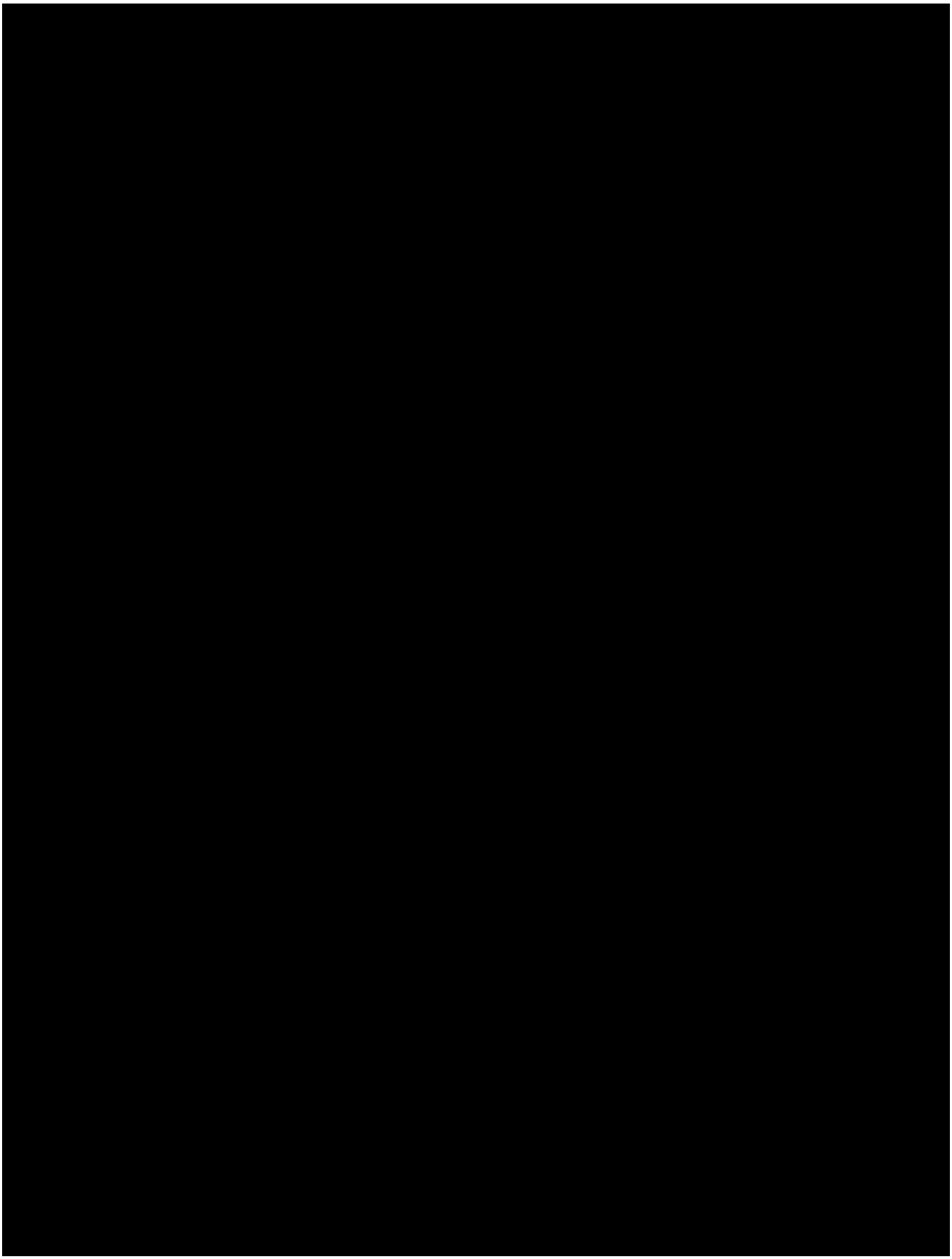

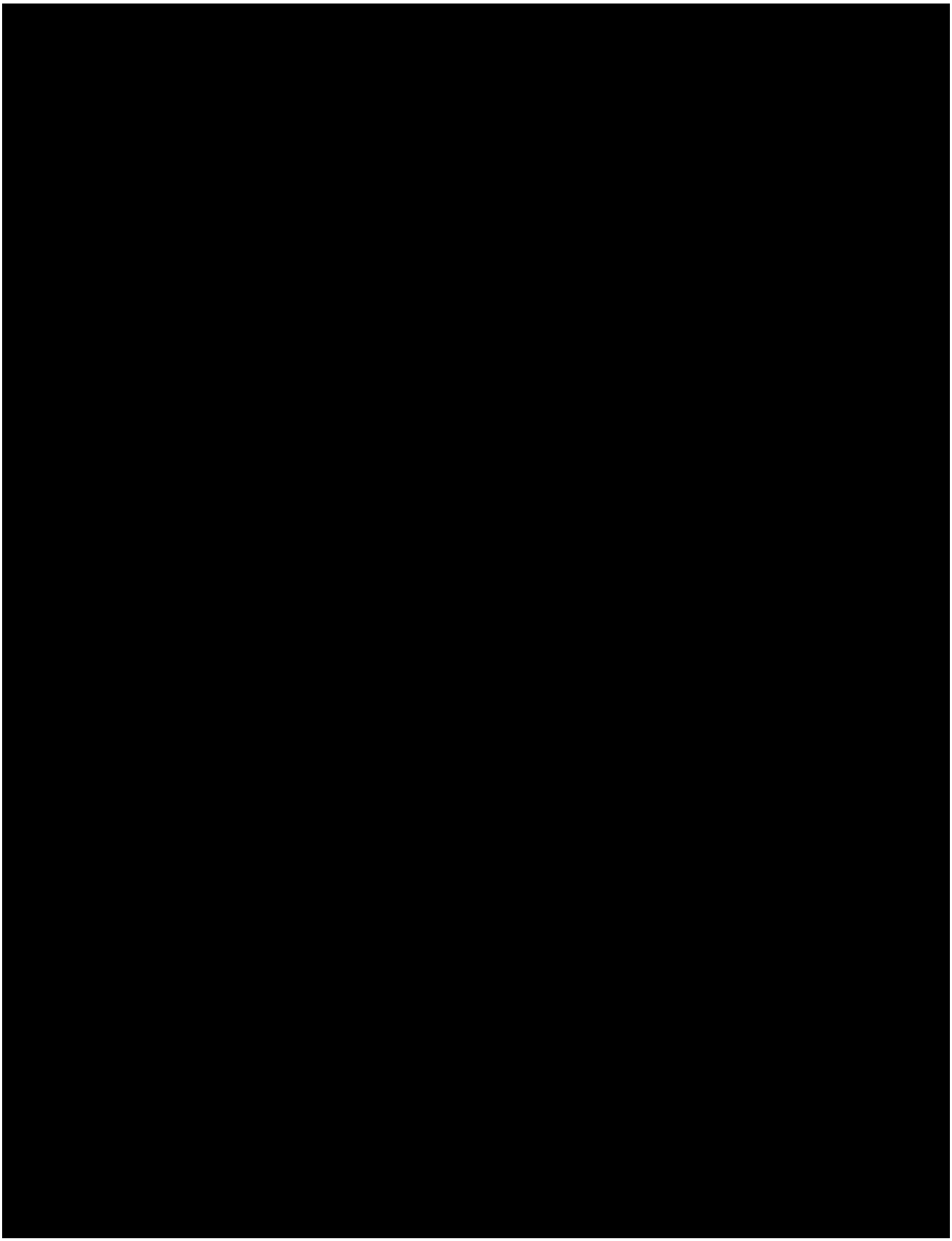

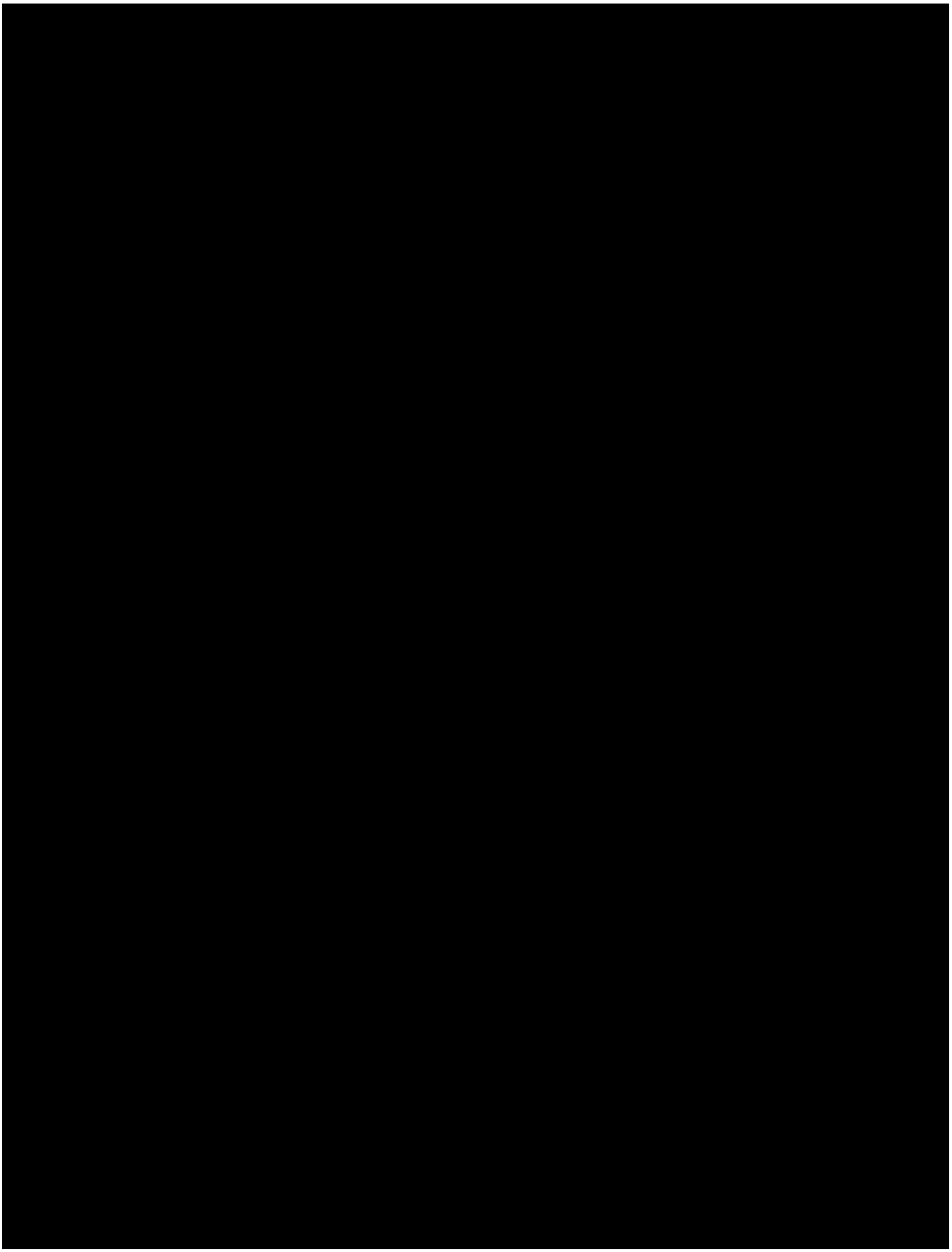

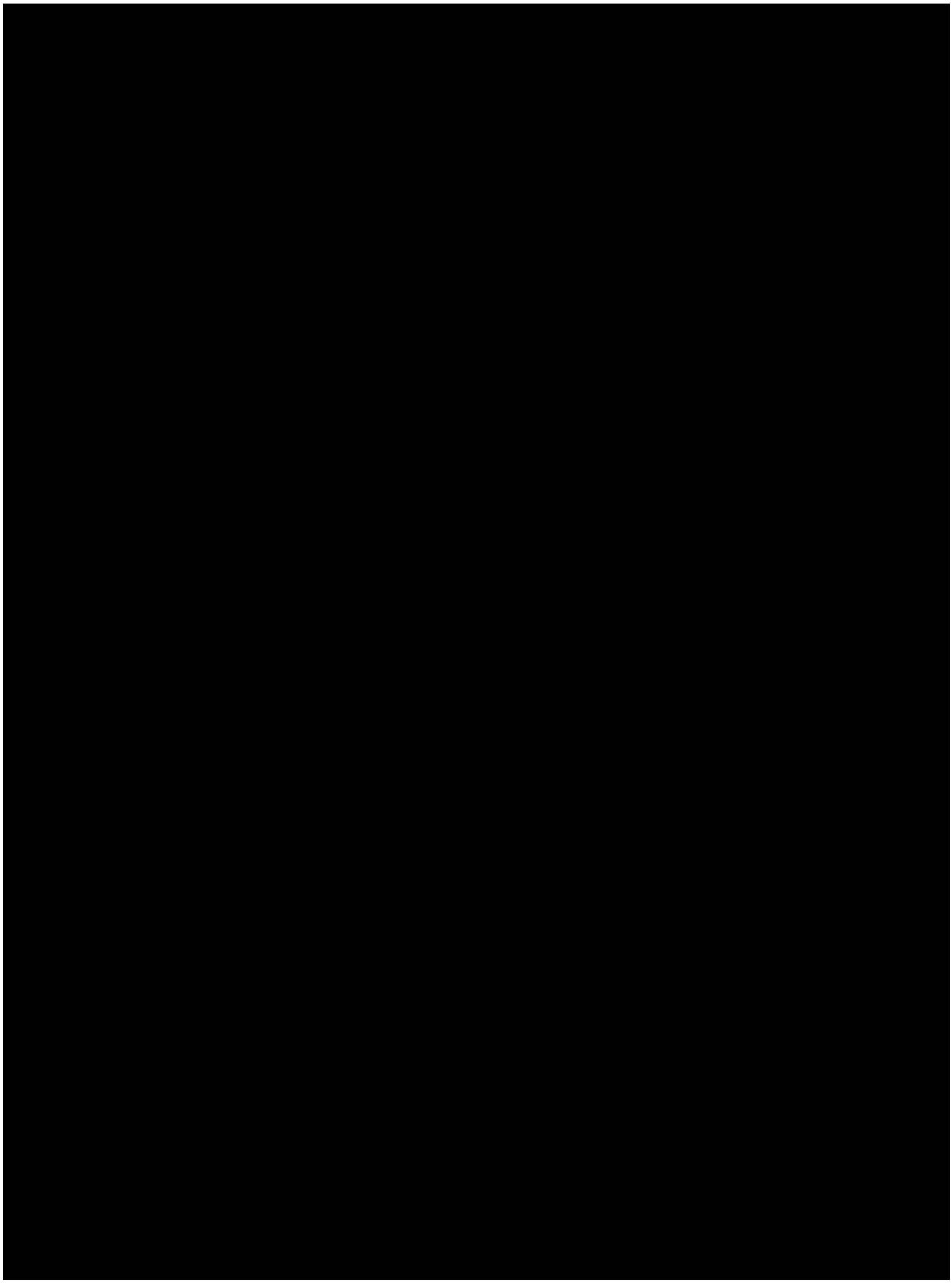

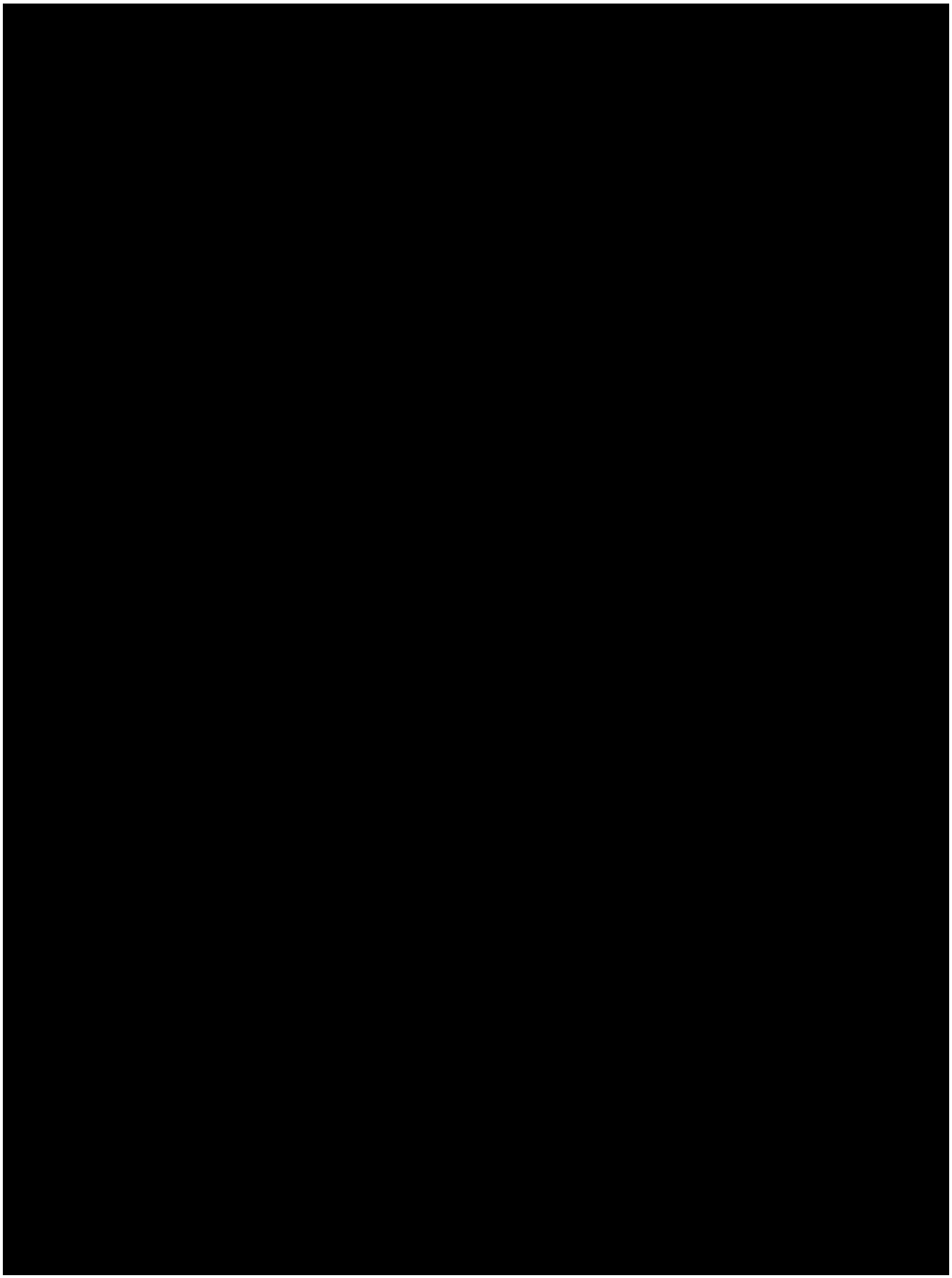

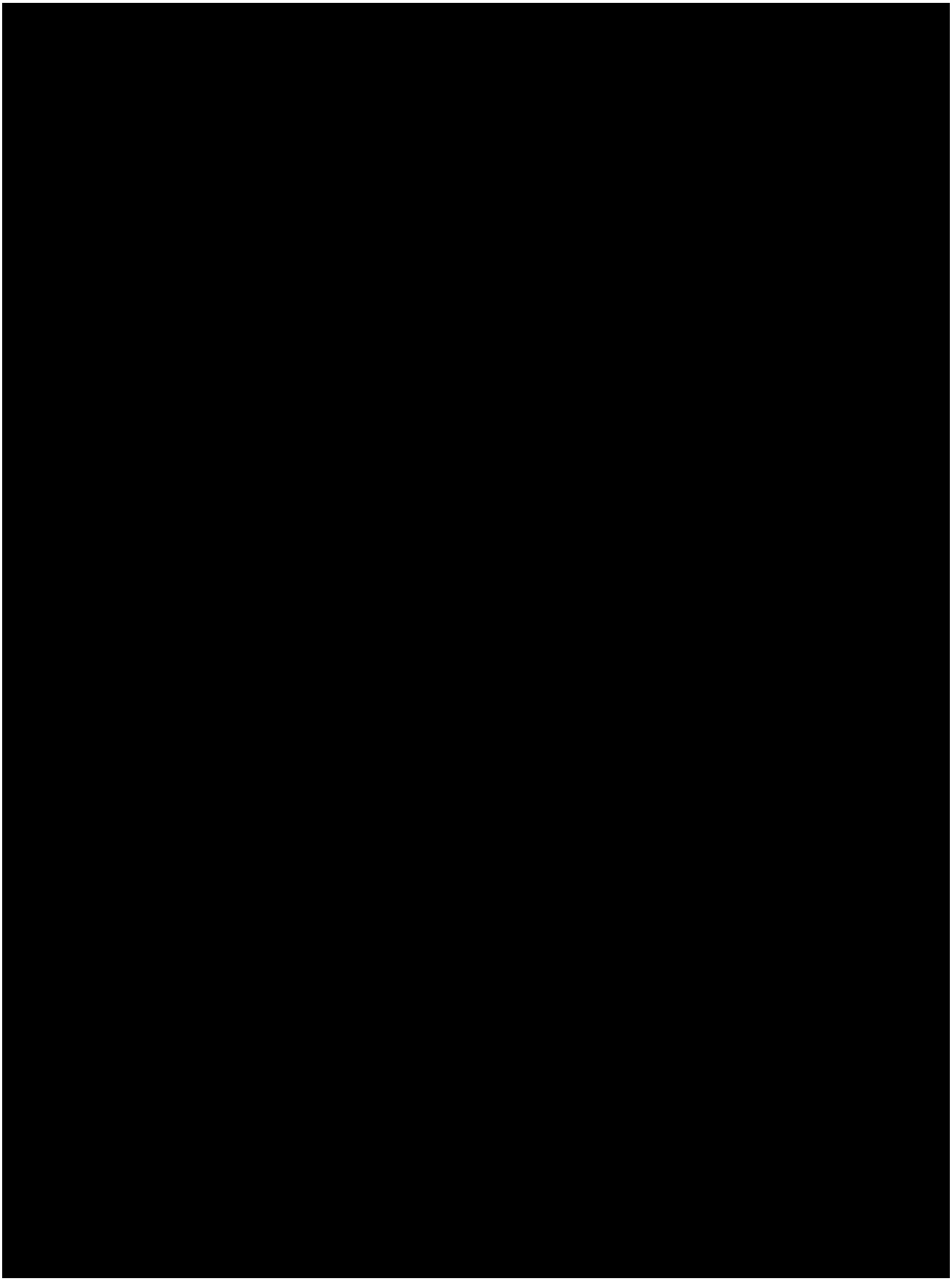

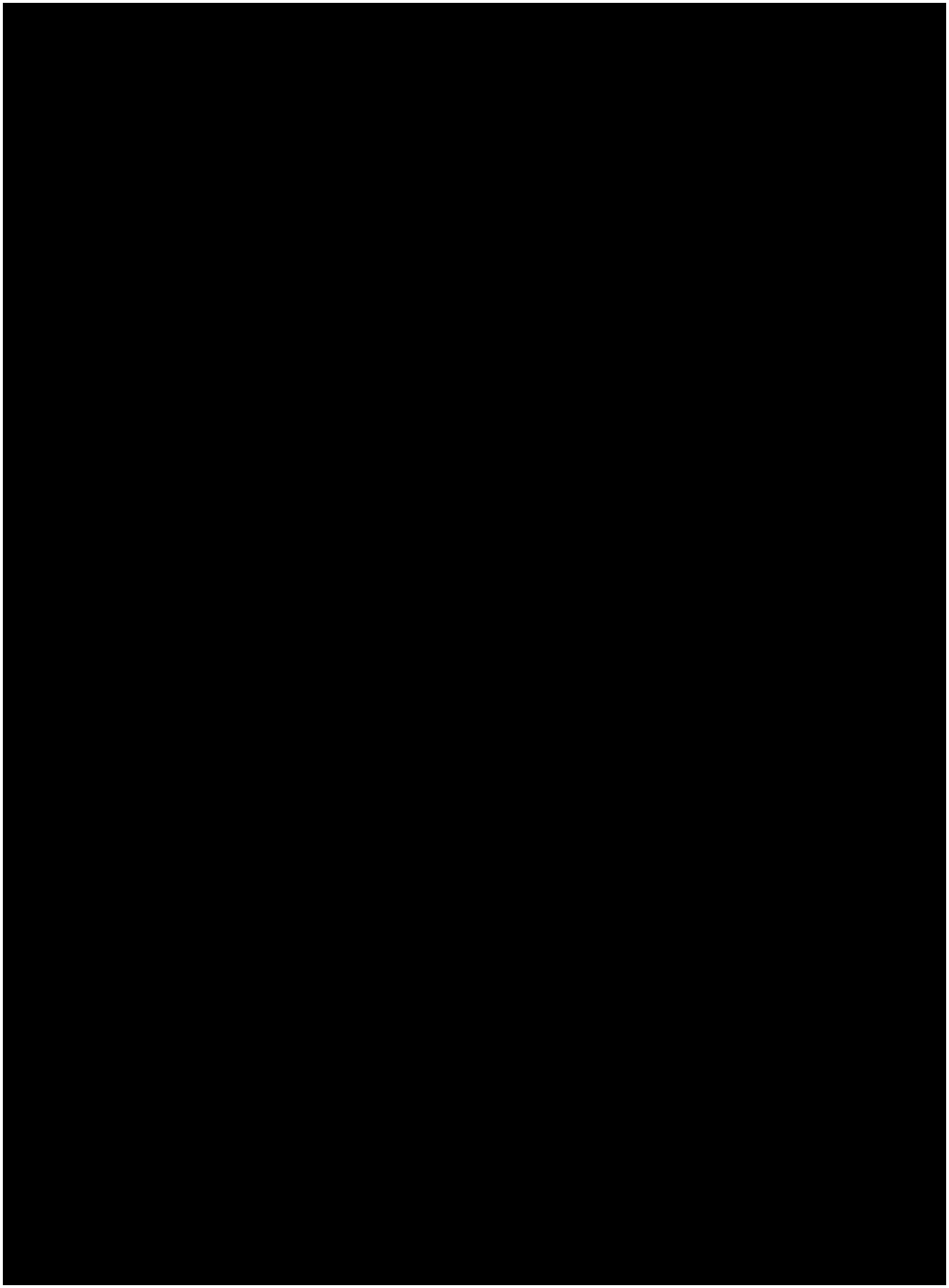

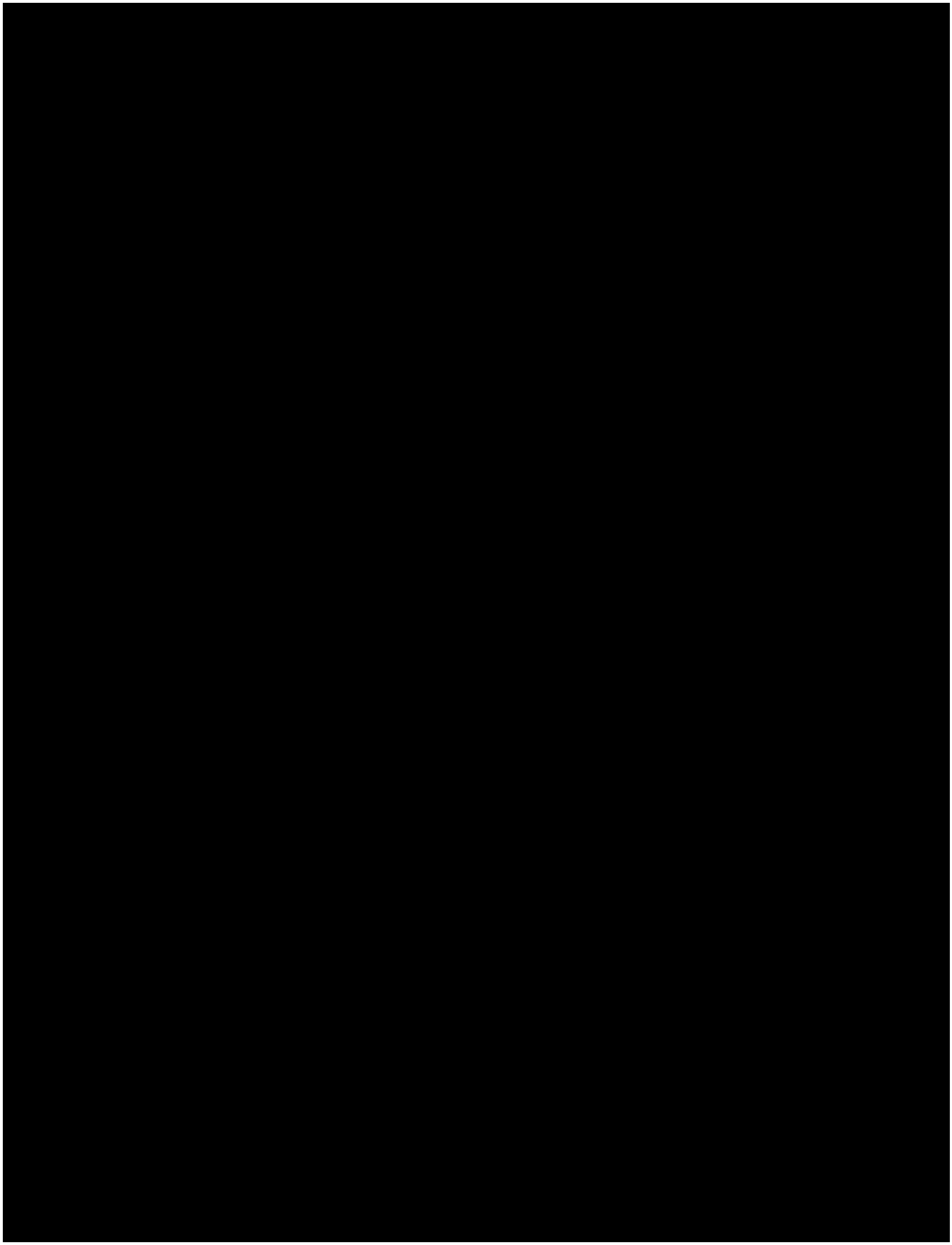

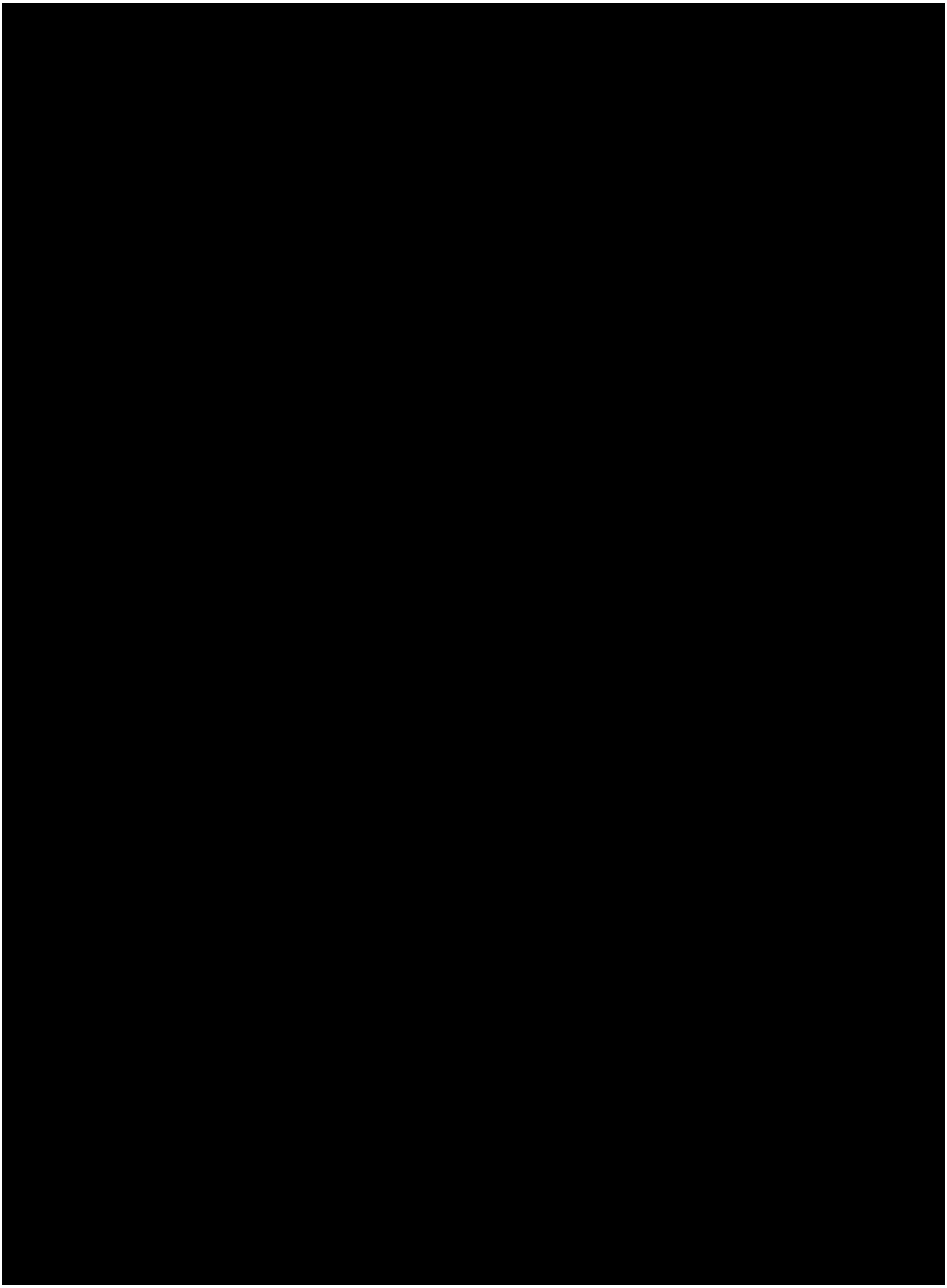

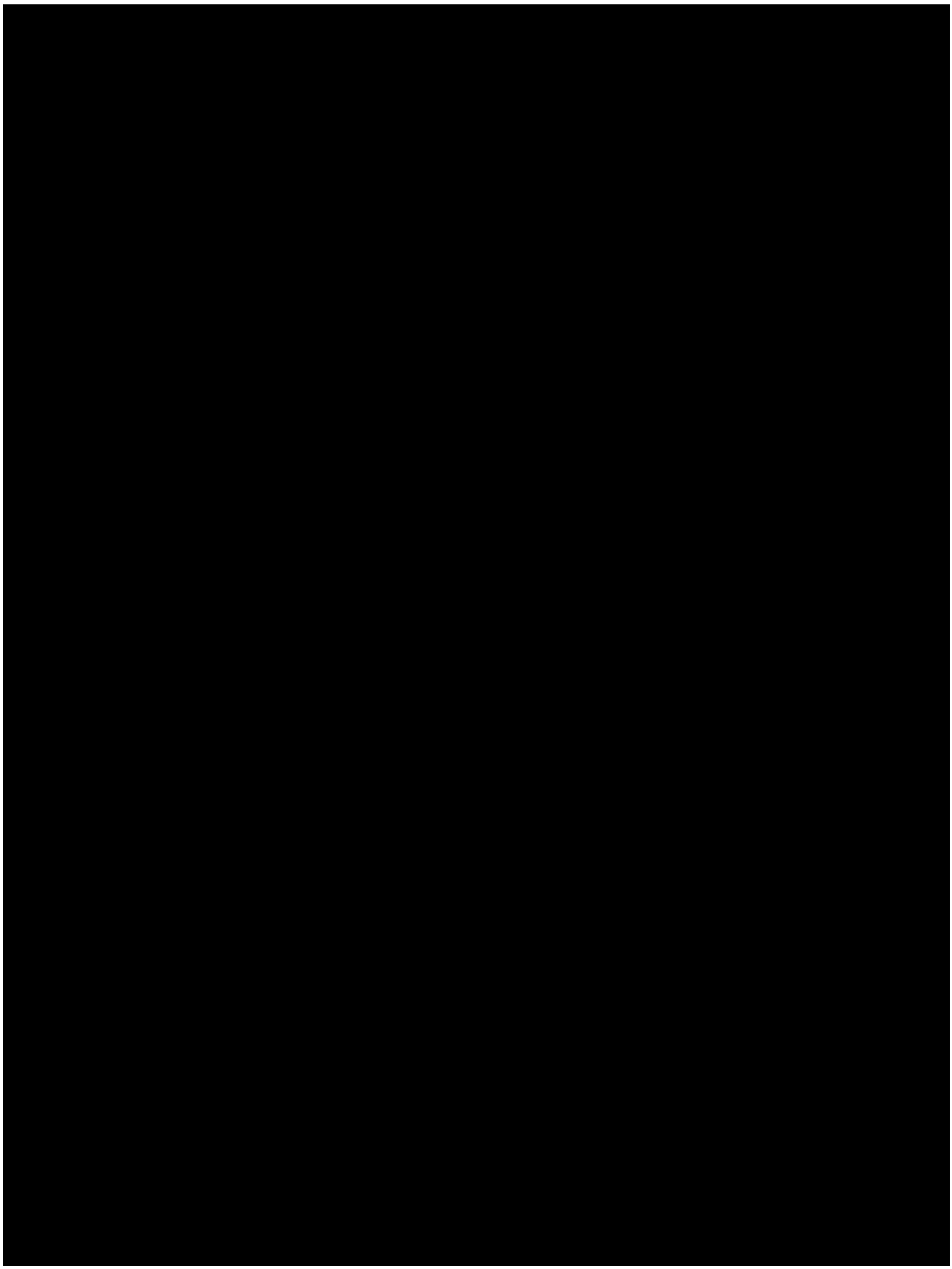

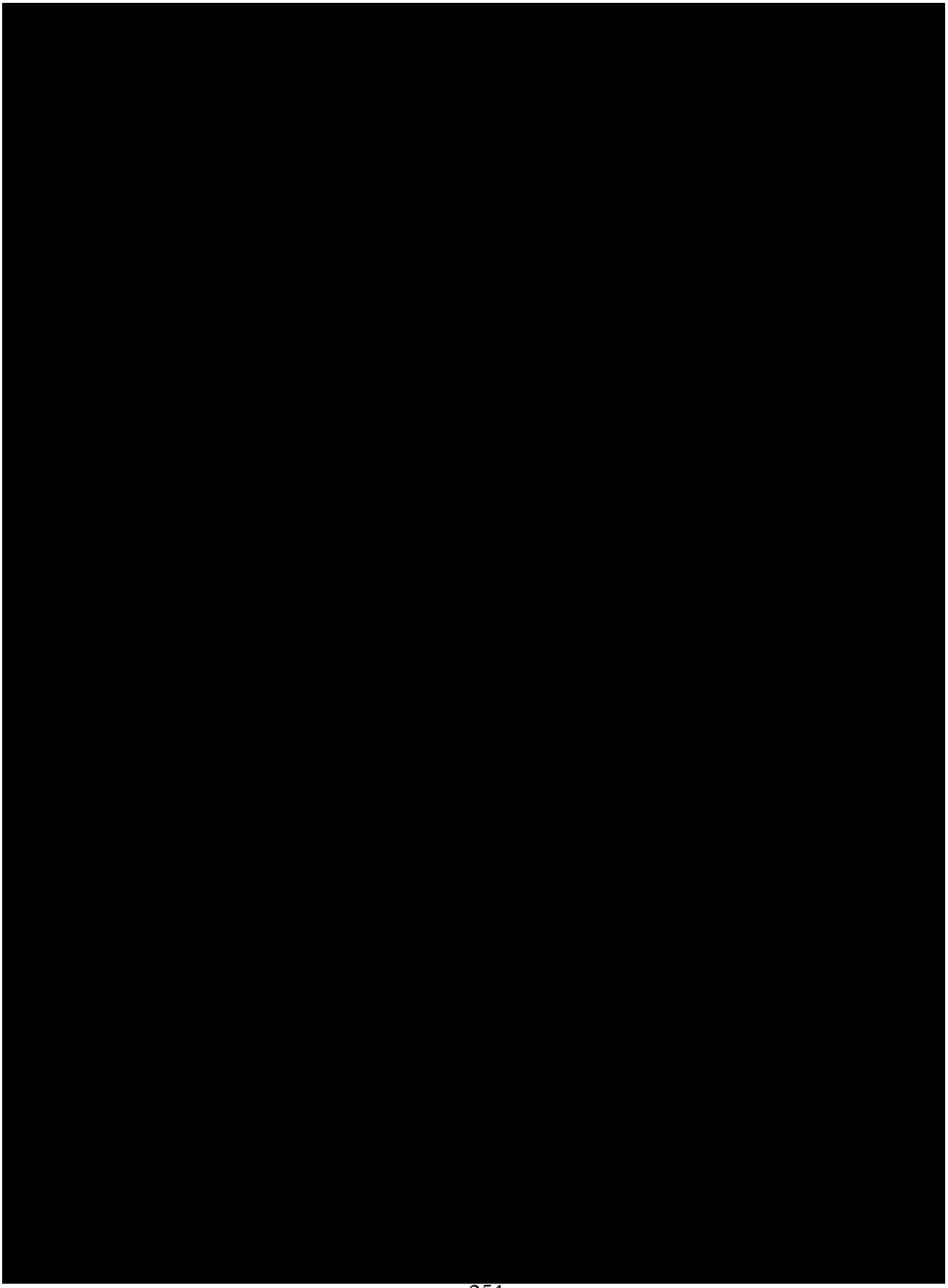

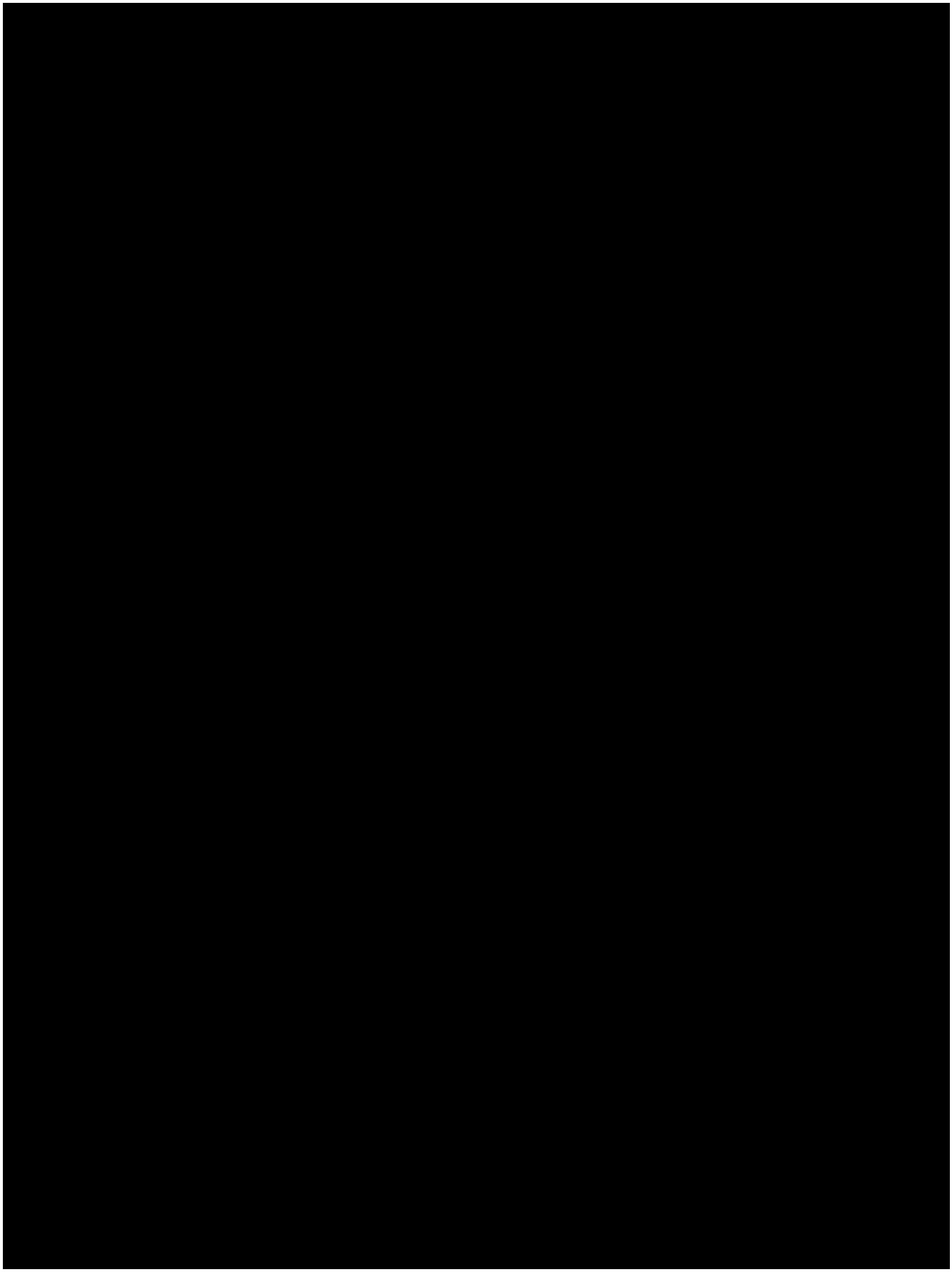

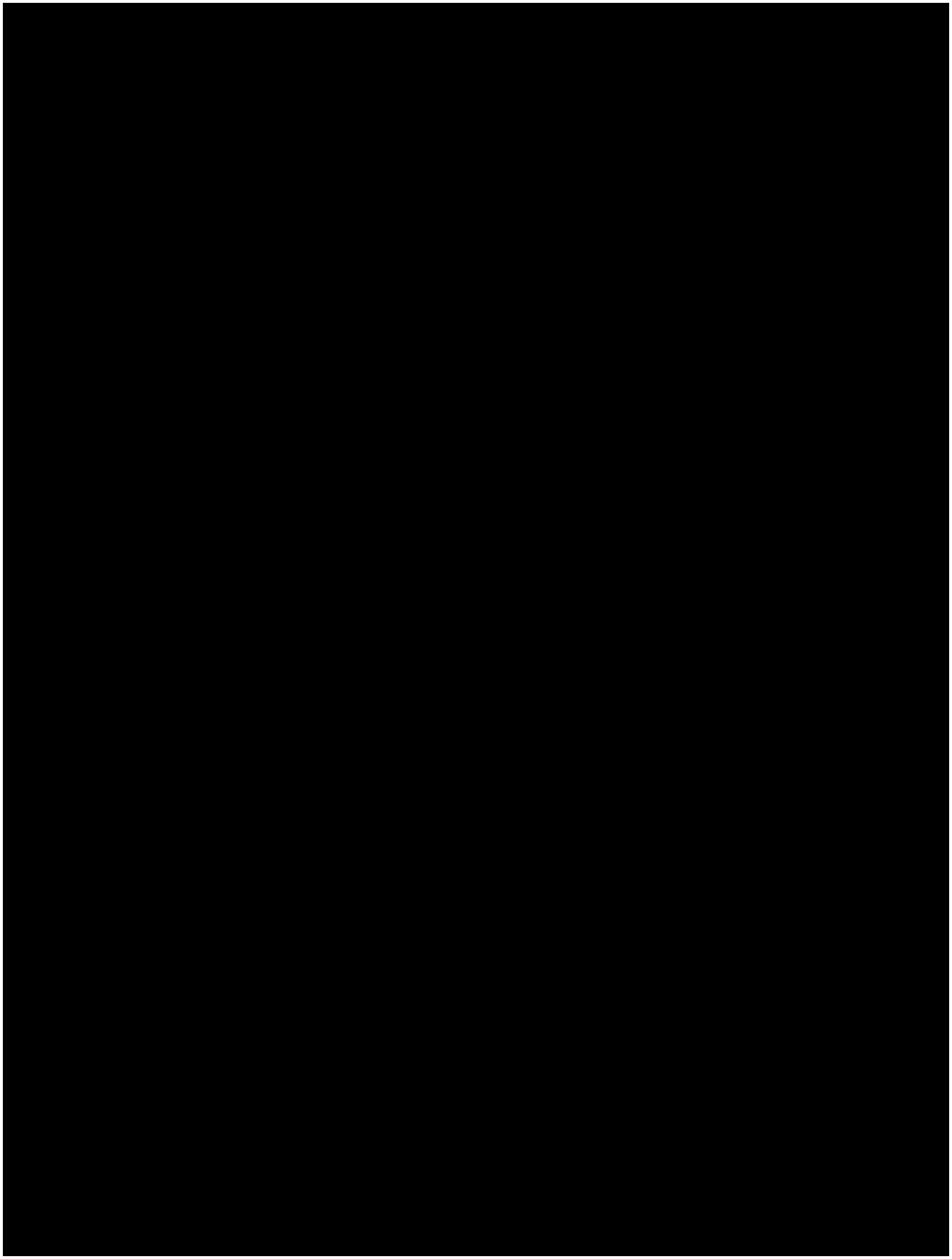

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VII. The District Court Properly Admitted Evidence From Surviving Victims.

Tsarnaev contends (Br. 305-43) that the district court erred by admitting "victim impact" testimony by surviving victims relating to the injuries they suffered from Tsarnaev's bombs. In Tsarnaev's view, the FDPA only permits evidence of the crime's impact on a victim if the victim died. As Tsarnaev recognizes (Br. 336), the "victim impact" aggravating factor that the government submitted in this case referred only to the victims who were killed. *See* 1.App.138. The government did not argue, and the jury was not instructed, that "victim impact" as to surviving victims was among the aggravating factors that the jury could consider. Nevertheless, Tsarnaev maintains that certain testimony by the survivors was effectively "victim-impact" evidence and that the FDPA bars such evidence.

As Tsarnaev acknowledges (Br. 309-10), his claim depends on three separate premises: (1) the FDPA prohibits evidence about the crime's impact on the victim unless the victim was killed; (2) the challenged evidence about the surviving victims' injuries was necessarily "victim impact" evidence because it was not admissible for

[redacted]

60 [redacted]

any other purpose; and (3) the evidence was not harmless. Each of those premises is wrong. First, the testimony at issue here was relevant to establish the existence and weight of other aggravating factors, in particular the factors that Tsarnaev caused a grave risk of death to the surviving victims, and that he committed additional uncharged crimes, including assault with intent to maim. Second, even if the testimony was not admissible for any purpose other than victim impact, the FDPA does not prohibit evidence of the impact of the capital offense on surviving victims. Finally, even if the district court plainly erred or abused its discretion in admitting the testimony, any error did not prejudice Tsarnaev.

A. Background

1. Tsarnaev's first motion *in limine*

In its notice of intent to seek the death penalty, the government gave notice of its intent to prove "[v]ictim [i]mpact" as a non-statutory aggravating factor. 1.App.137-38. Specifically, the government alleged that Tsarnaev "caused injury, harm, and loss" to the four deceased victims and their families, which was "evidenced by the victim's personal characteristics and by the impact of the victim's death upon his or her family and friends." 1.App.138.

Before trial, Tsarnaev filed a motion *in limine* seeking to preclude the government from introducing victim-impact evidence about the effect of Tsarnaev's capital offenses on victims who survived the bombing. 25.App.11495-98. Tsarnaev argued that the FDPA barred victim-impact evidence about surviving victims.

25.App.11496-97. The government responded that it did "not intend to offer victim-impact testimony from bombing survivors during the guilt phase." 25.App.11516. The government argued, however, that some testimony about the "long-term effects" suffered by victims was relevant for other purposes, including providing necessary background and context for their testimony, proving the indictment's allegations that the bombings "maimed, burned, and wounded scores" of people, and explaining why the victims could not "remember certain events" but remembered others with "particular sharpness." 25.App.11516. For that reason, the government contended, "objections to testimony on this ground" should be made at trial "on a question-by-question basis rather than in a motion *in limine*." 25.App.11516. Tsarnaev withdrew his motion based on the government's statement that it would not offer victim-impact evidence that was not relevant on other grounds. 25.App.11569.

2. Rebekah Gregory, Sydney Corcoran, and Karen Rand

Three surviving victims testified on the first day of the guilt phase—Rebekah Gregory, Sydney Corcoran, and Karen Rand. Gregory was at the finish line with her five-year-old son Noah when the bombs exploded. 10.App.4064-65. She testified that the explosion knocked her down and that she was unable to get up. 10.App.4066. She described the scene immediately around her: "My bones were literally laying next to me on the sidewalk, and blood was everywhere, and pools of BBs and nails and shrapnel . . . and people's body parts were . . . laying everywhere." 10.App.4066. Gregory testified that her "first instinct" was to find her son.

10.App.4066. She could hear Noah calling "Mommy!" repeatedly, and she felt "helpless as a mother" because she could not come to her son's aid. 10.App.4066-67. Lying there on the pavement, she said a prayer for Noah, and at that moment a relative "picked Noah up and placed him down beside me, and I knew that he was going to be all right." 10.App.4067.

Corcoran, who was 17 years old at the time of the bombing, testified that she was at the Marathon with her parents. She said that, after the explosion, she limped over to the rail and passed out. 10.App.4077-79. When she woke up moments later, men were putting "massive" pressure on her thigh and tying tourniquets around it because her femoral artery had been cut. She felt her body "going tingly" and "getting increasingly cold." 10.App.4080. She knew she was "fading fast." 10.App.4087. Corcoran was taken immediately to the medical tent, where caregivers were "frantic" and "kept saying, 'She's got a femoral artery break. She has to go. She has to go now. She's not going to make it.'" 10.App.4080.

Corcoran said she was rushed to the hospital, where doctors kept asking her for a phone number so they could contact her family. 10.App.4087-88. Corcoran told them she didn't know whether her parents had survived. 10.App.4088. She said she felt "panicked" at the thought of becoming "an orphan." 10.App.4088. Corcoran described waking up after surgery, seeing her father there, and learning from him that her mother was alive, "[b]ut she doesn't have her legs anymore." 10.App.4089. The

nurses wheeled Corcoran's mother into the room, and they cried and "held hands" and were "just appreciating that we were both still alive." 10.App.4089-90.

Karen Rand testified that, after the bombs went off, injuring her foot and leg, she dragged herself over to her friend Krystle Campbell and held Campbell's hand as she bled to death. 10.App.4100-01. Rand said that, two days later, doctors informed her that her leg had to be amputated, and "they took [her] leg that day." 10.App.4107. Rand also testified that, because she had Campbell's phone in her pocket, hospital staff misidentified her as Campbell. Rand explained that Campbell's parents were initially informed that Campbell was alive, while Rand's parents couldn't find her at any hospital and thought she might have died. 10.App.4109. Rand said that Campbell's parents were "devastated" when they discovered that, in fact, it was their daughter who had been killed. 10.App.4109.

3. Tsarnaev's renewed motion.

Following these witnesses' testimony, Tsarnaev renewed his motion *in limine*, contending that the witnesses' description of the long-term effects of their injuries and emotional experiences with family members was not relevant for guilt-phase purposes but was effectively victim-impact evidence. 25.App.11569-70. Tsarnaev contended that he should not be required to object "on a question-by-question basis" because interrupting the "moving testimony" of "surviving witnesses" would have "shocked and perhaps even angered the jury." 25.App.11570.

The government responded that the testimony about "the extent of the injuries that occurred" was relevant to describe the crime and its surrounding context, and that the testimony did not constitute "victim impact" evidence about how survivors' injuries "affected the future of [their] li[ves]." 10.App.4118-19. The district court ruled that the testimony "did not go out of bounds." 10.App.4119.

4. Jeffrey Bauman, Roseann Sdoia, and Jessica Kensky

Survivors Jeffrey Bauman, Roseann Sdoia, and Jessica Kensky also testified during the guilt phase. Jeffrey Bauman said that the first explosion left him "on the ground." 10.App.4141. His legs were "pure carnage." 10.App.4142. He "grabbed [his] left leg and squeezed it and . . . didn't let go until [he] was . . . into the ambulance." 10.App.4144. Bauman testified that he thought he would die and that he "made peace" with himself, thinking, "I had a great life . . . I had great friends and I experienced a lot in my 26, 27 years on this planet." 10.App.4142-43.

Roseann Sdoia testified that, when the bomb went off, she knew she had lost her leg immediately, "probably before [she] hit the ground." 10.App.4230. She said that "all [she] could see was blood pouring out" of "where [her] knee should have been." 10.App.4230-31. She initially thought that she "didn't want to live as an amputee," and she "knew [she] was bleeding out," but she resolved to "stay calm and stay conscious because if [she] didn't, [she] would die." 10.App.4231. When Sdoia woke up after surgery, she was told her leg had been amputated "above the knee." 10.App.4236. She explained that above-the-knee amputation made a "huge

difference" relative to below the knee, that it had been "extremely difficult to learn how to walk again," and that it was "hard" in the winter "to deal with the snow." 10.App.4236.

Jessica Kensky testified that she was at the finish line with her husband Patrick when the explosion sent her flying "like [she] was on a rocket." 10.App.4313. She knew that both she and Patrick were seriously injured, and Patrick was "bleeding really badly." 10.App.4313-14. As she tried to put a tourniquet on Patrick with her purse straps, a man said, "'Ma'am you're on fire.'" 10.App.4314. The man pushed her to the ground to put out flames that were burning "from [her] shoulder blades all the way down [her] pants." 10.App.4314.

Kensky lost both her legs. 10.App.4307. She said it was "terrifying" being a "bilateral amputee." 10.App.4325. She said she wanted to retain "some memory" of her legs and wanted to be able to "paint [her] toenails" and "put [her] feet in the sand." 10.App.4325. Kensky also described Patrick's injuries and how they had to recover for weeks in separate hospitals because Patrick was being treated for a serious infection. 10.App.4322. She said that she suffered "horrendous" pain as she endured long-term treatment for her burns and 15 to 20 surgeries on her legs. 10.App.4324. She said she was "in a very dark place" and that she "was really not wanting to live." 10.App.4325-26. When she and Patrick eventually got out of the hospital, she moved from Boston to Medford to find "handicap-accessible housing." 10.App.4327.

Kensky testified that, until she brought home a service dog, she had difficulty sleeping "between nightmares and phantom pain." 10.App.4327-28.

5. Celeste Corcoran's testimony and the district court's denial of Tsarnaev's mistrial motion and request for a continuing objection.

At the penalty phase, the government called additional survivors. Celeste Corcoran, whose daughter Sydney had testified earlier, said that the bomb threw her "up in the air," and she "land[ed] hard." 16.App.7099. She said she was in "excruciating" pain as her husband applied pressure on her legs and used his belt as a tourniquet. 16.App.7102. Corcoran's husband told her he loved her and to "[h]old on." 16.App.7102. At the hospital, she felt that the "pain was too much," and she "wanted to die," but she decided she needed to "be there" for her husband and children. 16.App.7104. She described sharing a hospital room with Sydney and how it was "heartbreaking" to see her daughter "in pain and not be able to get up and [help]." 16.App.7107-08.

Following Corcoran's testimony, Tsarnaev moved for a mistrial. 16.App.7120-22. He argued that Corcoran's testimony "went beyond" describing "the risk of death from her injuries and became victim-impact testimony." 16.App.7121. The defense argued that, under the FDPA, the jurors "do not sit as sentence[r]s for the injuries to . . . any of the many people that were injured that did not die" because causing those injuries was not punishable by death. 16.App.7121. The defense acknowledged

that they had not objected during the testimony, but argued that they could not have done so "without drawing the wrath of the jury." 16.App.7121.

The government argued that the evidence was relevant to prove that Tsarnaev created a grave risk of death to persons other than the victims who died. 16.App.7122; *see* 18 U.S.C. § 3592(c)(5) (defining aggravating factor where defendant created a "[g]rave risk of death to additional persons"). The government argued further that, for Tsarnaev to preserve a claim that particular testimony constituted impermissible victim-impact evidence, he had to "make a real time objection." 16.App.7122-23.

The district court denied a mistrial, concluding that the evidence was "relevant" to statutory aggravating factors, including the "grave risk" of death. 16.App.7124. Tsarnaev then requested a "continuing objection" to "testimony about the impact on the surviving victims of their injuries." 16.App.7125. The government responded that "not every word out of a [witness's] mouth" must be "directly relevant to a factor" because witnesses are "allowed to give some narration and context" so "the jury can understand the situation." 16.App.7126. The government argued that Tsarnaev should be required to object in "real time" so that the court could consider his objection to particular questions or statements in the context of the witness's overall testimony. 16.App.7126. The government also contended that the risk of the jury disapproving of objections is an ever-present dilemma for lawyers on both sides,

but it does not excuse the parties from objecting. 16.App.7122-23. The district court agreed and denied Tsarnaev's request for a continuing objection. 16.App.7126.

6. Nicole Gross's testimony and the district court's denial of Tsarnaev's renewed request for a continuing objection.

Nicole Gross also testified at the penalty phase. She said that, after the explosion knocked her down, she "knew something was wrong" and "looked down at [her] legs" and saw that her right leg was "blown open." 16.App.7181. She could "feel [her] shoes just dangling by what felt like threads." 16.App.7181. At the hospital, she was separated from her family, was "worried" about them, and felt "helpless and alone." 16.App.7185.

At a sidebar conference, Tsarnaev sought to "renew" his "continuing objection to what amounts to victim impact testimony from non-homicide survivors." 16.App.7239-40. The government responded that evidence about the medical procedures the victims endured, the "risks attendant to those procedures," and the victims' current "medical status" were relevant to aggravating factors including "grave risk of death." 16.App.7241-42.

The district court asked Tsarnaev's counsel whether any authority supported the premise that "people who are not killed but were injured by the bomb were not victims of the capital offense." 16.App.7242. The court noted that it was "natural" to "regard somebody who is injured by the same bomb that killed somebody as a victim of the bombing." 16.App.7243. The defense responded that their authority consisted

of two district court cases, *United States v. Sampson*, 335 F. Supp. 2d 166 (D. Mass. 2004), and *United States v. Gooch*, 2006 WL 3780781 (D.D.C. Dec. 20, 2006). 16.App.7244. The court noted that those cases were inapplicable because they involved victim-impact evidence from separate conduct that was not part of the capital offenses, whereas here the surviving victims were maimed in the same course of conduct underlying the capital charges. 16.App.7244. The district court concluded that, because this case involved "an offense which not only killed people but maimed people," the injured survivors "fall within the scope" of the victims for which victim-impact evidence may be offered. 16.App.7244. The district court concluded that this was an "additional reason" why the surviving victims' testimony was admissible and that, in any event, the evidence was relevant to aggravating factors, including the "grave risk of death." 16.App.7244.

7. Eric Whalley, Adrianne Haslet-Davis, and Stephen Woolfenden

Eric Whalley, Adrianne Haslet-Davis, and Stephen Woolfenden also testified at the penalty phase. They described severe injuries to themselves and family members who were with them at the marathon. 16.App.7252-54 (Whalley describing injuries to himself, including shrapnel in his eye, and to his wife Ann); 16.App.7280-82 (Haslet-Davis describing losing her leg, as well as her husband's lower leg and foot injuries); 16.App.7436-37 (Woolfenden testifying that he lost his left leg and sustained extensive burns and that his three-year-old son Leo suffred a "skull fracture," a "laceration" on

his head, a perforated ear drum, and "minor burns"). Whalley also testified that both he and his wife had initially believed that the other had been killed, and when they were brought into the same hospital room, Whalley "grabbed her arm" and "wouldn't let go." 16.App.7255.

Haslet-Davis described her husband's "earth-shattering" scream immediately after the bombing. 16.App.7274. She knew her husband was "in shock," so she had to "save [herself]" by crawling "along the broken glass" to get help. 16.App.7274. She testified that her husband was not in the courtroom because he had "bravely admitted himself into a mental [health] facility at the VA hospital." 16.App.7282.

Woolfenden testified that, after the bombing, three-year-old Leo was "crying" and "screaming" for "mommy" and "daddy" repeatedly. 16.App.7429-30. Woolfenden said he was "terrified" when Leo was taken away for treatment because he "didn't know if [he] was ever going to see [his] son again." 16.App.7430.

B. Standard of review

This Court reviews the district court's interpretation of the FDPA *de novo*, *United States v. Troy*, 618 F.3d 27, 35 (1st Cir. 2010), and reviews "adequately preserved objections to rulings admitting or excluding evidence for abuse of discretion," *Sampson I*, 486 F.3d at 42. As explained further below, however, Tsarnaev failed to preserve objections to the specific surviving-victim testimony that he now challenges on appeal. His challenge to the admission of that evidence is therefore reviewed for plain error. 18 U.S.C. § 3595(c)(2)(C) (requiring preservation of alleged penalty phase

errors); *see Jones*, 527 U.S. at 388-89. Finally, even where an objected-to error occurs at a penalty phase proceeding, this Court should not reverse if the error was harmless beyond a reasonable doubt. 18 U.S.C. § 3595(c)(2); *Jones*, 527 U.S. at 402-05.

C. The district court did not plainly err or abuse its discretion by concluding that surviving victims' testimony was relevant and admissible to establish the existence and the weight of other aggravating factors.

Tsarnaev's argument that the district court violated the FDPA by admitting "victim impact" evidence from surviving victims rests on the mistaken premise that the only ground on which that evidence might have been admissible would have been to prove the victim-impact aggravating factor—a use that he contends would be prohibited by statute. As explained in Part D below, Tsarnaev's assertion that victim-impact evidence cannot include evidence of a capital offense's effects on survivors is wrong. As a threshold matter, however, Tsarnaev is also wrong in his belief that the survivors' testimony was not admissible for other purposes. The government offered that testimony to establish several aggravating factors—including that Tsarnaev's conduct created a grave risk of death to other people and was an act of terrorism—that were unrelated to the victim-impact aggravator. The district court did not abuse its discretion by admitting the survivors' testimony for those purposes.

1. Tsarnaev failed to preserve his challenge to surviving victim testimony.

Tsarnaev does not argue that *all* of the survivors' testimony about the trauma they suffered at his hands was inadmissible. He does not dispute (Br. 328, 330-33)

that survivors could tell the jury how the bombs injured them and describe the severity of those injuries, presumably because such testimony is obviously relevant to prove that Tsarnaev's conduct created a "grave risk of death" to them, as the district court found. *See* 16.App.7124, 7244; 18 U.S.C. § 3592(c)(5) (defining the "grave risk of death" statutory aggravating factor). But at various points, Tsarnaev contends, the testimony "went beyond" permissible description of injuries and became allegedly inadmissible victim impact evidence. Br. 317, 320. Tsarnaev has not, however, identified any clear line that he believes marks the boundary between admissible descriptions of injuries and inadmissible "victim impact" evidence. The absence of any bright line underscores the need to evaluate the relevance of such testimony in its particular context.

For that reason, the district court acted within its discretion when it denied Tsarnaev's request for a "continuing objection" and required him to object to particular testimony as it was presented. 16.App.7125-26. But Tsarnaev did not contemporaneously object to the particular testimony he now challenges. To be sure, Tsarnaev repeatedly raised the claim, both in written motions and in conferences with the court, that victim-impact evidence from survivors was not permissible and that certain kinds of testimony—such as the long-term effects of injuries and emotional reactions to family members' injuries—was effectively victim-impact evidence. But that is not sufficient to preserve the challenges to particular testimony that he raises now, and this Court should review only for plain error. *See United States v. Rivera-*

Santiago, 872 F.2d 1073, 1083 (1st Cir. 1989) ("Although the judge's ruling was emphatic and indicated that future objections would be fruitless, defense counsel, absent the grant of a continuing objection, could preserve an 'error of law' issue only by continuing to object when the testimony warranted it as the trial progressed."); *United States v. McVeigh*, 153 F.3d 1166, 1199-1200 (10th Cir. 1998) (noting that, although the district court granted a continuing objection to victim-impact testimony that "went beyond the 'immediate effects'" of the bombing, "continuing objections generally are considered inappropriate" in this context because, due to the "variety of factual contexts" in which such testimony is presented, "the admissibility of victim testimony would not ordinarily be an issue that could be decided in a pretrial hearing or by means of a continuing objection"), *overruled on other grounds by Hooks v. Ward*, 184 F.3d 1206 (10th Cir. 1999).[61] Moreover, even if Tsarnaev had preserved objections to the surviving victims' testimony, he could not prevail under the applicable abuse-of-discretion standard.

[61] Tsarnaev argued below that he should not be required to object in "real time" because the jury might hold it against him. 16.App.7121-22. But that is a risk every trial lawyer, including prosecutors, must run in order to assert legal objections. Moreover, any prejudice can be ameliorated, as it was here, by an instruction that the jury should draw no inferences from objections by counsel or the court's evidentiary rulings. *See* 10.App.3941 ("An objection isn't a signal that this is somehow really important because they're objecting to it. That's not necessarily true at all."); 15.App.6977 ("I remind you there is no significance for your purposes to any of the rulings either admitting or excluding evidence."); 19.App.8651 (same). Tsarnaev cited no authority supporting his claim that he should be exempt from the contemporaneous objection requirement.

2. The district court correctly concluded that the surviving victims' testimony was relevant to aggravating factors other than victim impact.

The FDPA states that, in the penalty phase of a capital trial, the government "may present any information relevant to an aggravating factor for which notice has been provided," regardless of whether it would be admissible under the rules of evidence. 18 U.S.C. § 3593(c). Evidence is relevant if it has "any tendency" to make a fact that "is of consequence in determining the action" "more or less probable than it would be without the evidence." Fed. R. Evid. 401; *see also McVeigh*, 153 F.3d at 1212 ("We conclude that the appropriate relevance standard in a federal capital sentencing hearing is the same standard used throughout the federal courts under [Rule] 401.").

Tsarnaev identifies several categories of surviving victims' testimony that he claims were irrelevant to any aggravating factor, including (1) "their reactions to facing death"; (2) their "uncertainty about what had happened to other family members"; (3) their "feelings of helplessness watching their injured child or partner suffer"; and (4) "the long-term implications of becoming an amputee." Br. 337; *see also* Br. 309. Contrary to Tsarnaev's contention, all of the testimony he challenges was relevant to the jury's finding and weighing of aggravating factors other than victim impact.[62]

[62] Several of the surviving victims testified at the guilt phase. Although Tsarnaev argues that aspects of their testimony were not relevant for guilt-phase purposes, he does not challenge the guilt-phase verdict on these grounds. Accordingly, this brief addresses the relevance of all of the victims' testimony for the jury's penalty-phase verdict, the only verdict at issue. *See* 19.App.8650, 8652 (instructing the jury it could consider at the penalty phase evidence that was

a. Victims' reactions to facing death

Several surviving witnesses testified that they thought they might die from their injuries. Sydney Corcoran described feeling "tingly," "getting increasingly cold," and "fading fast" while she lay bleeding in the street. 10.App.4080, 4087. Jeffrey Bauman described making "peace" with death because he "had a great life." 10.App.4142-43. Roseann Sdoia said she "knew [she] was bleeding out," but she resolved to "stay calm and stay conscious" because if she panicked she "would die." 10.App.4231. Celeste Corcoran testified that she was in so much pain she "wanted to die," but she needed to "be there" for her family. 16.App.7104.

This testimony was relevant to establish that Tsarnaev "knowingly created a grave risk of death to 1 or more persons in addition to" the victims who died. 18 U.S.C. § 3592(c)(5). The fact that the witnesses felt that they might die helps show that they actually faced a grave risk of death. Moreover, the victims' specific descriptions of what that felt like and their thoughts during what could have been their final moments made it more likely that the jury would credit the witnesses' statements that they were at death's door.

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introduced in the guilt phase). In any event, the guilt-phase testimony was relevant to prove the offenses charged in the indictment, including bombing a place of public use "with the intent to cause death and serious bodily injury," Add.23, 27; *see* 18 U.S.C. § 2332f(a)(1)(A), and malicious destruction of property "resulting in personal injury and death," Add.32, 36; *see* 18 U.S.C. § 844(i).

In addition, the witnesses' description of how they experienced their near-death trauma is relevant not only to the existence of the "grave risk" factor but also to the appropriate weight the jurors should give it. Tsarnaev's argument that only the immediate effect of physical injuries is relevant to "grave risk" presumes that the jury's consideration of an aggravating factor is a simple, yes-or-no factual finding. But in a capital sentencing proceeding, the jurors do not just find factors; they also weigh them. *See* 18 U.S.C. § 3593(e) (requiring the jury to "consider whether all the aggravating . . . factors found to exist sufficiently outweigh all the mitigating . . . factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating . . . factors alone are sufficient to justify a sentence of death"). Accordingly, testimony about what the victims thought and felt as they confronted death helped the jury understand the full consequences of the grave risk that each surviving victim faced, both in the immediate aftermath of the bombing and as they underwent surgeries and amputations in the months and years after the bombing. Understanding the full extent of the victims' injuries aided the jury in its responsibility to give appropriate weight to the grave-risk-of-death factor in determining whether a death sentence was justified. *See Sampson I*, 486 F.3d at 44 (upholding admission of detailed, graphic evidence about a murder because it "would help the jury to determine how much weight it should give" the aggravating factors).

The testimony was also relevant to the jury's finding and weighing of other aggravating factors. Those factors include (1) that Tsarnaev committed the offenses

"after substantial planning and premeditation to . . . commit an act of terrorism," 18 U.S.C. § 3592(c)(9); (2) that he "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," 19.App.8683; and (3) that he "participated in additional uncharged crimes of violence, including . . . assault with intent to maim, mayhem and attempted murder," *id.* The fact that so many people nearly died helps show that Tsarnaev's crime was intended to be an act of terrorism and that he intended to maim and murder the surviving victims.

Finally, the witnesses' reactions to facing death were admissible to provide context to their accounts of what happened when the Tsarnaevs detonated their bombs. As the government argued below (and the district court agreed), not "every word out of a [witness's] mouth" must be "directly relevant to a factor." 16.App.7126. Witnesses are "allowed to give some narration and context." *Id.* The "usual standards of trial relevance afford factfinders enough information about surrounding circumstances to let them make sense of the narrowly material facts of the crime itself." *Payne v. Tennessee*, 501 U.S. 808, 840-41 (1991) (Souter, J., concurring); *see also United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980) (stating that evidence is admissible when it provides the context for the crime, "is necessary to a full presentation of the case," or is "appropriate in order to complete the story of the crime on trial by proving its immediate context" (quotations omitted)). Even if the witnesses' reactions to facing death were not "directly relevant" to aggravating factors,

it was within the district court's discretion to find that testimony about how the witnesses felt when they nearly died provided appropriate context to a "full presentation" of the case.

b. Witnesses' uncertainty about what happened to their family members

A number of survivors testified that they lost track of family members in the chaos after the bombs exploded. Rebekah Gregory said that her "first instinct" was to find her five-year-old son. 10.App.4066. Seventeen-year-old Sydney Corcoran said she felt "panicked" at the thought of becoming "an orphan." 10.App.4088. Karen Rand explained that, due to a misidentification at the hospital, Krystle Campbell's parents were initially told that Campbell was alive, while Rand's parents could not locate her at any hospital and thought she might have died. 10.App.4109.[63] Nicole Gross described being separated from her family at the hospital, feeling "worried" about what had happened to them, and feeling "helpless and alone." 16.App.7185. Eric Whalley testified that he and his wife each initially thought that the other had died, and he described their joyful reunion at the hospital. 16.App.7255. Stephen Woolfenden said that he was "terrified" when his three-year-old son was taken away

[63] Tsarnaev cites (Br. 322) Rand's testimony that Campbell's parents were "devastated" to learn that it was their daughter who had died. But that testimony was relevant to the impact flowing from a victim's *death*, and Tsarnaev does not challenge that form of victim-impact evidence.

for medical treatment because he "didn't know if [he] was ever going to see [his] son again." 16.App.7430.

This testimony was relevant to the grave-risk-of-death aggravating factor. In most cases, family members became separated because so many victims were on the verge of bleeding to death that they were evacuated as soon as possible. There was no time to reunite families or to make sure that they were sent to the same hospital. *See* 10.App.4448-53 (describing the triage process, in which victims with critical injuries were transported immediately to various hospitals to avoid overwhelming any single one). The multiple family separations highlighted how "grave" the "risk" was. The evidence therefore helped the jury determine the appropriate weight for that factor.

The victims' uncertainty about their family members' fate was also relevant to show that Tsarnaev committed an "act of terrorism," 18 U.S.C. § 3592(c)(9), and that he "targeted the Boston Marathon," which was "especially susceptible to the . . . effects of terrorism" because of its "large crowds of men, women and children," 19.App.8683. For many people, nothing is more terrifying than to lose track of one's children or parents in a critical situation. Evidence that this occurred underscores the terroristic effect that Tsarnaev intended to achieve. The fact that victims felt afraid of dying, being left alone, and leaving behind their families is directly relevant to these terrorism factors.

Finally, the testimony was admissible to provide context, especially since concern about family members was for many witnesses their first and most important

thought after the blast. Tsarnaev's position would require the survivors to recount the "narrowly material facts," *Payne*, 501 U.S. at 840-41 (Souter, J., concurring), in a wooden and artificial way. Victims could describe what they saw and the details of their physical injuries, but not what they felt or why they reacted as they did. That position finds no support in the FDPA or in common sense.

c. Feelings of helplessness watching an injured child or partner suffer

Some of the surviving witnesses testified that their own injuries left them unable to help a loved one. Rebekah Gregory said that, right after the blast, she could hear her five-year-old son Noah calling "Mommy!" repeatedly, and she felt "helpless as a mother" because she could not go to him, but could only say a prayer for him until someone set Noah down beside her. 10.App.4066-67. Jessica Kensky, who was a nurse, described her frustration about being unable to care for her injured husband. 10.App.4323. Celeste Corcoran said it was "heartbreaking" to see her daughter injured and in pain in the hospital and "not be able to get up and [help]." 16.App.7107-08. Nicole Gross said she felt "helpless and alone" at the hospital when she was separated from her family. 16.App.7185. Stephen Woolfenden testified that, after the bomb exploded, his three-year-old son Leo was "crying" and "screaming" for "mommy" and "daddy." 16.App.7429-30.

This testimony was relevant for the same reasons as the testimony about families becoming separated. Victims' inability to help their family members in the

bombing's aftermath magnified the terror that Tsarnaev sought to create. The testimony was therefore relevant to show the full weight of Tsarnaev's act of terrorism, which was aimed at an event with "large crowds of men, women and children." 19.App.8683.

Tsarnaev suggests (Br. 309, 331) that family members' feelings of helplessness in the hospital long after the attacks were not directly relevant. But the aggravating factor that Tsarnaev committed an "assault with intent to maim" required proof that Tsarnaev "intended to cause a *permanent* disability." 19.App.8685 (emphasis added). The same is true of the "mayhem" aggravating factor. 19.App.8686 (defining "mayhem" as "permanently" depriving someone "of a limb, organ or part of his or her body" with intent to "permanently disable or disfigure" the person). Accordingly, family members' inability to help each other in the recovery process underscored that Tsarnaev caused *permanent* disabilities. Family members' helplessness was also relevant to the appropriate weight jurors should give to these aggravating factors.

d. Long-term implications of becoming an amputee

Several survivors described the long-term effects of their injuries. For example, Roseann Sdoia told the jury that it made a "huge difference" that her amputation was above the knee, which made it "extremely difficult" to relearn to walk and to "deal with the snow." 10.App.4236. Jessica Kensky testified that becoming a "bilateral amputee" was "terrifying." 10.App.4325. She said that she wanted to "paint [her] toenails" and "put [her] feet in the sand." 10.App.4325. She endured long-term

treatment for her burns and had 15 to 20 surgeries on her legs. 10.App.4324. She testified that at one point she was "in a very dark place" and that she "was really not wanting to live." 10.App.4325-26. Adrianne Haslet-Davis said that her husband was not attending the trial because he had admitted himself to a mental-health facility. 16.App.7282.

Testimony about the long-term physical and mental pain and disability caused by the attacks was relevant to the existence and weight of the grave-risk-of-death aggravating factor. The witnesses' descriptions of multiple surgeries, infections, amputations, and suicidal thoughts showed that the risk of death continued well past the immediate aftermath of the bombing. Moreover, as explained above, the assault-with-intent-to-maim aggravating factor and the mayhem factor expressly required "permanent" disability, "permanent" disfigurement, and "permanent" deprivation of limb. 19.App.8685-86. The long-term implications of the victims' injuries were directly relevant to the existence and weight of these factors.

The testimony by surviving victims undoubtedly was emotional. That is not surprising in a case involving a terrorist bombing that killed or grievously maimed dozens of people, including small children, and left multiple amputees. The government is not required to present evidence that is "devoid of all passion." *Williams v. Chrans*, 945 F.2d 926, 947 (7th Cir. 1991); *see also McVeigh*, 153 F.3d at 1221 (finding no error in admission of a "substantial amount" of victim-impact evidence that was "poignant and emotional"). The jury would have been hampered in its ability

to determine the aggravating factors' weight, significance, and scope if it had been limited to considering the bare physical fact of the survivors' immediate injuries. *Sampson I*, 486 F.3d at 44 ("[T]he prosecution is entitled to considerable latitude in deciding how to present its case."). The district court did not err in admitting the victims' testimony.

D. The Federal Death Penalty Act does not prohibit testimony about the effects of a capital crime on surviving victims.

As explained above, the government did not introduce victim-impact evidence from surviving victims in this case. The victim-impact aggravating factor the government alleged was expressly limited to the four victims who were killed. *See* 1.App.138; 19.App.8682-83. The government did not argue, and the jury was not instructed, that "victim impact" as to surviving victims was among the aggravating factors in this case or that the survivors' testimony could be considered for that purpose. The government offered the surviving victims' testimony to prove Tsarnaev's guilt and to prove other aggravating factors. Accordingly, the government never gave notice of any intent to introduce "victim impact" evidence for anyone other than the deceased victims.

Tsarnaev contends that, because the survivors' testimony was inadmissible for any other purpose, it should be deemed "victim-impact" evidence even though it was never offered for that purpose. But even if that were correct, Tsarnaev would be entitled to no relief. First, Tsarnaev does not raise any claim based on lack of notice,

and any such claim is therefore waived.[64] Instead, Tsarnaev bases his claim on the premise that the FDPA flatly prohibits victim-impact evidence as to surviving victims, regardless of whether notice is given. As explained below, that premise is incorrect. Accordingly, even if the survivors' testimony could be characterized as "victim-impact" evidence, Tsarnaev cannot obtain reversal on his claim that admission of that testimony violated the FDPA.

1. *Payne* and the FDPA authorize victim-impact evidence.

In *Payne*, 501 U.S. at 827, the Supreme Court held that states may, consistent with the Eighth Amendment, allow evidence of a crime's impact on the victim and the victim's family to be admitted at the penalty phase of a capital trial. In so doing, the Court overruled its prior decision in *Booth v. Maryland*, 482 U.S. 496 (1987), which had held that victim-impact testimony was "*per se* inadmissible in the sentencing phase of a capital case except to the extent that it 'related directly to the circumstances of the crime.'" *Payne*, 501 U.S. at 818 (brackets omitted) (quoting *Booth*, 482 U.S. at 507 n.10).

The defendant in *Payne* was accused of stabbing to death a mother and her daughter, and he challenged sentencing-phase testimony about the effect of the crimes

[64]Even if Tsarnaev had not waived the issue by failing to raise it in his opening brief, any error based on inadequate notice would not prejudice him because (1) the evidence was relevant to provide context for the victims' fact testimony and to support other aggravating factors, and (2) the jury would have known even without hearing testimony that injuries such as losing a leg would significantly affect the victims.

on a surviving child, whom the defendant had seriously wounded. *Payne*, 501 U.S. at 811-13. The Court held that such evidence was admissible because "a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it . . . evidence of the specific harm caused by the defendant." *Id.* at 825. In addition, because a defendant is constitutionally entitled to present almost unlimited mitigating evidence portraying his uniqueness as a human being, the government has a "legitimate interest" in counterbalancing such mitigating evidence by presenting the full extent of the harm the defendant caused. *Id.* at 825-26 (quotations omitted). The Court accordingly recognized that victim-impact evidence "serves [the] entirely legitimate purpose[]" of "allowing the jury to bear in mind that harm at the same time it considers the mitigating evidence introduced by the defendant." *Id.*

In 1994, Congress passed the FDPA, setting forth the procedures applicable to federal death penalty prosecutions. As relevant here, the FDPA requires the capital jury to consider aggravating factors (provided they are proved unanimously and beyond a reasonable doubt) and mitigating factors (if they are proved to any juror by a preponderance of the evidence). 18 U.S.C. § 3593(c), (d). The government must prove at least one of the "statutory" aggravating factors listed in 18 U.S.C. § 3592, and the government is also permitted to prove "any other" non-statutory aggravating factor. 18 U.S.C. § 3592(c).

Consistent with the Supreme Court's ruling in *Payne*, Congress has specified that the government may allege victim-impact evidence as a non-statutory aggravating factor under Section 3592(c):

> 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.

18 U.S.C. § 3593(a).

2. 18 U.S.C. § 3593(a) does not limit the types of relevant evidence that may be admitted to prove properly-noticed aggravating factors.

Tsarnaev contends that § 3593(a), which says that the aggravating factors "may include" evidence of the offense's effect on the victim and the victim's family, prohibits "victim-impact evidence from surviving victims." Br. 310. He reaches this conclusion by relying on other parts of the FDPA, which use the term "the victim" in relation to deceased victims. Br. 312-14 (citing 18 U.S.C. §§ 3591(a)(2), 3592(a)(7) and (c)(5)).

Tsarnaev fundamentally misunderstands what § 3593(a) does. That provision requires the government to file a pretrial notice that "set[s] forth the aggravating factor or factors that the government . . . proposes to prove as justifying a sentence of death." 18 U.S.C. § 3593(a)(2). Another subsection of § 3593 provides that, at the penalty phase, "information may be presented as to *any matter relevant to the sentence*" and

that the government may "present any information relevant to an aggravating factor for which notice has been provided under subsection (a)." 18 U.S.C. § 3593(c) (emphasis added). Section 3593(a) makes clear that these aggravating factors "*may include* factors concerning the effect of the offense on the victim and the victim's family" and "*may include* . . . 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*." 18 U.S.C. § 3593(a) (emphasis added).

Far from limiting the kinds of information that may be introduced at a capital sentencing, § 3593(a) clarifies that the FDPA's already-expansive language—which allows the government to prove as an aggravating factor "any matter relevant to the sentence" for which it gives notice—includes the kind of victim-impact evidence allowed by *Payne*. *See Sampson I*, 486 F.3d at 44 ("The FDPA broadly provides that the government may present any information relevant to an aggravating factor for which notice has been provided." (quotations and brackets omitted)). Tsarnaev's argument fails to account for § 3593(c)'s broad authority to admit "any" relevant evidence for which notice has been provided.

Tsarnaev's argument also turns § 3593(a)'s expansive wording on its head. That provision's language—"*may include* factors concerning the effect of the offense on the victim and the victim's family . . . *and any other relevant information*," 18 U.S.C. § 3593(a) (emphasis added)—explicitly permits the admission of information beyond the specific categories identified in the provision. *See Chevron U.S.A. Inc. v. Echazabal*,

536 U.S. 73, 80 (2002) ("[T]he expansive phrasing of 'may include' points directly away from the sort of exclusive specification [respondent] claims."); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 54-55 (2d Cir. 1988) ("We are reluctant to read the term 'includes' as meaning 'is limited to.'"); *United States v. Barrett*, 496 F.3d 1079, 1099 (10th Cir. 2007) ("[The FDPA's] use of the phrases 'may include' and 'any other relevant information' clearly suggests that Congress intended to permit the admission of any other relevant evidence . . . ."). Tsarnaev's proposed limiting construction of § 3593(a) is foreclosed by the statutory text.

3. Section 3593(a)'s use of the word "victim" is not limited to victims who have died.

Even if Tsarnaev were somehow correct that § 3593(a) limits the types of otherwise relevant evidence that are admissible, his claim would still fail because the term "victim" in § 3593(a) is not limited to deceased victims. Tsarnaev's construction is inconsistent with the common-sense definition of "victim," both in ordinary usage and in federal criminal law. *See*, *e.g.*, U.S. Dep't of Justice, Guidelines for Victim and Witness Assistance, 48 Fed. Reg. 33,774-02, 33,775 ("A 'victim' is generally defined as someone who suffers direct . . . physical . . . harm as the result of the commission of a crime."); 18 U.S.C. § 3663A(2) (defining "victim" for purposes of the Mandatory Victims Restitution Act as a person "directly and proximately harmed as a result of the commission of an offense"); *id.* § 3771(e)(2)(A) (similar definition in Crime Victims' Rights Act); American Heritage Dictionary of the English Language (5th ed.

2019) (defining victim as "[o]ne who is harmed or killed by another"). As the district court found, people who are seriously injured by a terrorist bomb attack would "natural[ly]" be considered "victims" of the terrorism offense, along with the victims who are killed. 16.App.7243-44.

Section 3593(a)'s wording suggests that Congress had both surviving and deceased victims in mind. The provision includes not only the loss to the victim's family, which was at issue in *Payne*, but also "the extent and scope of the injury and loss suffered by the victim." 18 U.S.C. § 3593(a). It would be odd to refer to the "extent" of the victim's "injury and loss" if the victim must always be dead.

Tsarnaev contends (Br. 312-14) that "victim" must mean a deceased victim because that is how the word is used elsewhere in the FDPA. *See* 18 U.S.C. §§ 3591(a)(2) (referring to offenses in which the defendant "killed the victim," offenses that "resulted in the death of the victim," and offenses in which the "victim died"); 3592(a)(7) (listing as a mitigating factor the fact that the victim "consented to the criminal conduct that resulted in the victim's death"); 3592(c)(5) (providing for an aggravating factor where the defendant created a grave risk of death to one or more persons "in addition to the victim of the offense"). In light of these provisions, Tsarnaev invokes the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." Br. 311 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)).

That principle does not apply here. The other provisions that Tsarnaev cites do not use the word "victim," standing alone, to mean a person who dies as a result of the offense. They simply refer to a "victim"—a term that can encompass both decedents and survivors—who was "killed," "died," or experienced "death." These provisions do not suggest that term "victim" means *only* a person who was killed. For example, the federal kidnapping statute authorizes capital punishment "if the death of any person results." 18 U.S.C. § 1201(a). But that does not mean that every other use of "person" in the kidnapping statute refers to a deceased person.

Moreover, Tsarnaev ignores another provision in § 3593 that plainly uses "victim" in a way that includes survivors. Section 3593(c) says, "[T]he 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." 18 U.S.C. § 3593(c). Section 3510, in turn, provides that in "[c]apital cases," "any victim of [the] offense" has the right to attend "the trial of a defendant accused of that offense," even if the "victim may, during the [capital] sentencing hearing, testify as to the effect of the offense on the victim and the victim's family or as to any other [aggravating] factor." 18 U.S.C. § 3510(b). The provision defines a "victim" by cross reference to 34 U.S.C. § 20141, which states that a "victim" includes any person who has "suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime." 34 U.S.C. § 20141(e)(2); *see* 18 U.S.C. § 3510(c). To the extent the consistent-meaning canon applies, it has particular force for words used in close proximity. *See United States v.*

Kowal, 527 F.3d 741, 746-47 (8th Cir. 2008). Tsarnaev's reference to other sections of the FDPA therefore provides no support for his argument that "victim" is limited to decedents throughout the FDPA.

Tsarnaev argues (Br. 314) that the legislative history supports his reading of the statute. Because nothing in the plain text of § 3593, or anywhere else in the FDPA, provides any express restriction on victim-impact evidence, resort to legislative history is unnecessary. *See United States v. Gonzales*, 520 U.S. 1, 6 (1997) (where a statute is "straightforward," there is "no reason to resort to legislative history"). In any event, the legislative history Tsarnaev relies on simply reflects the same "may include" language as the statute. *See* Comprehensive Violent Crime Control Act of 1991, H. Doc. No. 102-58 (Mar. 12, 1991) (available at 25.App.11640) (noting 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" and that "[t]he 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"). Tsarnaev cites no legislative history that would support his restrictive reading of "victim" under the FDPA.

4. Evidence of a capital crime's impact on surviving victims is relevant to the sentencing determination.

Tsarnaev contends that evidence about survivor's injuries was inappropriate because the jury's role at the penalty phase was to "determin[e] the appropriate

sentence for the capital charges," not for "the many non-capital charges Tsarnaev was convicted of." Br. 315. Tsarnaev is correct that the jury's sentencing determination was limited to the capital offenses in this case, which were all homicides. But that does not mean, as Tsarnaev contends, that "Congress[ ] inten[ded] to limit victim impact evidence to capital-homicide victims." Br. 314. As already explained, Congress did *not* do that in the FDPA, but instead provided for the admission of "any information relevant to an aggravating factor" that "justif[ies] a sentence of death." 18 U.S.C. § 3593(a)(2), (c). And Congress specifically authorized the use of victim-impact evidence in § 3593(a) without limiting it to the impact on deceased victims. *See United States v. McVeigh*, 944 F. Supp. 1478, 1491 (D. Colo. 1996) ("Congress expressly provided for victim impact consideration in the [FDPA] but it did not put any limits on what can be considered.").

Tsarnaev argues (315-16) that Congress "understood" the "proper place" for "consideration of the views of surviving victims" to be the "actual sentencing for the non-capital crimes." But he does not point to any language in the statute reflecting this alleged understanding. Tsarnaev's attempt to shunt all consideration of the effects upon surviving victims to the non-capital counts ignores that fact that, as the district court found, *see* 16.App.7243-44, Tsarnaev committed capital offenses that both killed and maimed victims in the same course of conduct. Nothing in the FDPA suggests that, in these circumstances, the effects on surviving victims may be

considered only when the district court is imposing sentence on separately-charged, non-capital counts.

Moreover, Congress's decision to allow testimony from injured survivors about the effects of a homicide offense makes good sense. When a defendant commits an offense that harms multiple victims, such as the mass-casualty terrorist attack here, the effect of his crimes on grievously injured surviving victims is "information relevant" to the sentencing determination. As *Payne* noted, "victim impact evidence serves entirely legitimate purposes" by "informing the sentencing authority about the specific harm caused by the crime" and allowing the jury "to assess meaningfully the defendant's moral culpability and blameworthiness." *Payne*, 501 U.S. at 825-26. *Payne* addressed the emotional impact that two victims' deaths had upon a surviving victim. *See id.* at 814 (grandmother's testimony that surviving victim "cries for his mom" and "cries for his sister" and "doesn't seem to understand why [his mom] doesn't come home"). But *Payne*'s reasoning applies with equal force to a crime's effects upon surviving victims.

Tsarnaev's construction of the FDPA would have the anomalous effect of excluding from the jury's consideration the full extent of the harm flowing from his capital offenses. If, for example, a mass bombing instantly killed a recluse with no family or friends, but severely injured dozens of others, Tsarnaev's position would preclude victim-impact evidence in the penalty phase entirely. In this case, Tsarnaev's position is that the jury was required to consider the full range of facts about

Tsarnaev's own character and circumstances, but could not be told the full extent of the harm he inflicted on dozens of grievously injured survivors. As *Payne* observed, "there is nothing unfair about allowing the jury to bear in mind [the] harm [the defendant caused] at the same time as it considers the mitigating evidence introduced by the defendant." *Payne*, 501 U.S. at 826.

Other courts have admitted evidence from surviving victims of terrorist bombings. In *McVeigh*, 153 F.3d at 1216, the court found no error where the government called victim-impact witnesses, including "three injured survivors," to describe the impact of the Oklahoma City bombing. The court noted that the government could have called numerous additional witnesses to testify "about the 168 victims who died in the blast and the impact of the explosion on the numerous injured victims." *Id.*

Similarly, in the trial of the terrorists accused of bombing U.S. embassies in Kenya and Tanzania, the government sought to introduce evidence of "serious injury to surviving victims" as a separate aggravating factor from "victim impact evidence." *United States v. Bin Laden*, 126 F. Supp. 2d 290, 300 (S.D.N.Y. 2001). The district court held that the two factors were "duplicative" because "[b]oth function to provide the jury with details concerning the widespread human trauma allegedly caused by the accused's criminal conduct." *Id.* The court recognized that the "deleterious effects" on both surviving and deceased victims were "an appropriate subject of sentencing consideration" under the FDPA and *Payne*. *Id.* The court accordingly struck the

duplicative "serious injury to surviving victims" factor and amended the "victim impact evidence" factor to "include any 'injury, harm, and loss' suffered by victims and their families, *whether the victims are deceased or surviving*." *Id.* at 300-01 (emphasis added).

These cases make clear that harm to surviving victims is "information relevant" to a capital sentencing determination, 18 U.S.C. § 3593(c), and Tsarnaev cites no cases to the contrary. His assertion that the FDPA prohibits evidence of "the impact of survivors' injuries on those survivors" is simply incorrect. Br. 305.

E. Any error did not prejudice Tsarnaev.

Even if the FDPA bars evidence about a capital crime's effect on surviving victims, and even if the evidence here was not admissible for other purposes, any error did not prejudice Tsarnaev. There was therefore no reversible plain error (if the error was unpreserved) or any error was harmless beyond a reasonable doubt (if the error was preserved). *See* 18 U.S.C. § 3595(c)(2) ("The court of appeals shall not reverse or vacate a sentence of death on account of any error which can be harmless, . . . where the Government establishes beyond a reasonable doubt that the error was harmless."); *Jones*, 527 U.S. at 402-03.

The outcome of the penalty phase would have been the same even if the surviving-victim evidence Tsarnaev challenges had not been admitted. As Tsarnaev acknowledges (Br. 336), the jury instructions and verdict sheet referred only to victim-impact evidence about the four victims Tsarnaev killed. 19.App.8696. The district

court also instructed the jury not to consider aggravating factors that the government had not alleged. *See* 19.App.8682 ("You're not free to consider any other facts in aggravation that you may think of on your own."). According to these instructions, then, the jury was not permitted to consider victim-impact evidence regarding surviving victims unless it was relevant to another aggravating factor. In addition, at the close of the penalty phase, the district court instructed the jury to avoid being swayed by passion or prejudice. 19.App.8695-96. The jury is presumed to have honored these instructions. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Moreover, the jury's verdict shows that the outcome did not depend on the surviving-victim testimony Tsarnaev challenges. The jury heard testimony from several surviving victims who were injured by the bomb Tsarnaev's brother placed at the finish line, but it did not impose the death penalty on any of the counts that were based on the finish-line bomb. Add.96.

The surviving-victim evidence to which Tsarnaev objects generally concerned the emotional and long-term physical effects of his crimes on the wounded survivors. However, given the evidence jurors heard and saw of the devastating trauma that the bombs immediately caused, which Tsarnaev concedes was admissible, the jury would have well understood that the victims would suffer long-term physical and emotional consequences, even if surviving witnesses had been barred from testifying to that effect. Jurors were not likely to have been overawed by testimony confirming that obvious fact.

Finally, numerous other factors, including the certainty of Tsarnaev's guilt, his lack of remorse, his creation of a grave risk of death to many people, his killing of an especially vulnerable eight-year-old child, and the impact on the victims who were killed, supported imposition of the death penalty in this case. *See Jones*, 527 U.S. at 402-03 (inclusion of two improper aggravating factors was harmless in part because jury found other factors sufficient to impose death sentence). The jurors unanimously found the existence of all four statutory intent factors, six statutory aggravating factors, and five non-statutory aggravating factors, with respect to the counts on which the jury imposed the death penalty. Add.79-96. Tsarnaev does not challenge the evidentiary support for any of those factors. Given the aggravating evidence showing the devastating effects of Tsarnaev's terrorist attack on dozens of people, this Court should find beyond a reasonable doubt that the jury would have imposed the death penalty even if the challenged testimony had not been admitted. *See, e.g.*, *Jones*, 527 U.S. at 404-05 (noting that an appellate court conducting harmless-error review of a death sentence may consider whether "the jury would have reached the same conclusion" in the absence of the error). Indeed, lack of prejudice is even more apparent here than in *Jones*. This case does not involve juror consideration of any invalid aggravating factor, *see id.* at 401-02, but instead the allegedly erroneous introduction of discrete evidence of an aggravating factor that the jurors were not instructed to consider. Under those circumstances, any error was harmless.

VIII. The District Court Properly Rejected Tsarnaev's Untimely Request for Information to Support a Potential Motion to Suppress the Whole Foods Video.

Tsarnaev contends (Br. 344-79) that the Court should remand for a hearing to determine whether a surveillance video showing Tsarnaev shopping at a Whole Foods store a half hour after the bombing was the "fruit" of allegedly involuntary statements Tsarnaev made to FBI agents. That contention fails for four independent reasons.

First, Tsarnaev waived his challenge to the Whole Foods evidence because he raised it for the first time during the trial, and he cannot establish any good cause for failing to raise it before trial. Second, given the untimeliness of Tsarnaev's claim, the district court acted within its discretion by declining to order the government to provide documentary proof that the video came from a witness other than Tsarnaev. Third, compelling the government to provide documentation would have made no difference because investigative records show that Tamerlan's wife Katherine Russell Tsarnaev ("Russell") provided the information that led the government to search for Whole Foods surveillance video. Fourth, even if it had been Tsarnaev's statements, rather than Russell's, that led to the discovery of the Whole Foods video, the video's admission was harmless beyond a reasonable doubt because it was cumulative of other evidence that overwhelmingly established Tsarnaev's lack of remorse for his crimes.

A. Background

1. Agents obtained the Whole Foods video following a tip from Katherine Russell.

On April 21, 2013, six days after the bombing, two investigating agents went to a Whole Foods store at 340 River Street in Cambridge. Doc. 1772-7 (Report of Investigation).[65] The agents were investigating a lead provided by Tamerlan Tsarnaev's wife, Katherine Russell, who had informed investigators that Tamerlan had been shopping for milk at Whole Foods between 3:00 and 3:30 pm on April 15, 2013, the day of the marathon bombing. Doc. 1772-3 (report from FBI Orion database).[66] They reviewed video recordings from surveillance cameras covering that time window, but did not see anyone matching the description of Tamerlan Tsarnaev. *Id.*

Two days later, on April 23, 2013, FBI agents went to a different Whole Foods store on Prospect Street in Cambridge. 10.App.4468-72; 25.App.11683 (receipt for April 15, 2013 milk purchase showing retrieval date of April 23, 2013). The agents and the store manager reviewed surveillance video from April 15. 10.App.4468. The

[65] Document 1772-7, as well as the other attachments to Document 1772 cited in this section, are the subject of a pending (and contested) motion in the district court to supplement the record. *See* Doc. 1772. The government moved to supplement the record with two documents that had been made available in discovery (Docs. 1772-2 and 1772-7), discovery letters documenting that discovery (Docs. 1772-4, 1772-5, and 1772-6), and an unredacted version of one of the documents that had been made available only in redacted form (Doc. 1772-3).

[66] Orion is a database that the FBI used to record tips and send leads to investigators. *See* Doc. 1772-1 (Declaration of Timothy D. Brown).

video showed Tsarnaev entering the store at 3:12 pm and buying a half gallon of milk, then returning to get a different half-gallon. 10.App.4471; 1.Supp.App.83 (Gov't Exh. 1502); Gov't Exh. 1456 at 00:08-01:05 (Whole Foods surveillance video).

2. Agents interviewed Tsarnaev at the hospital.

FBI agents began interviewing Tsarnaev at Beth Israel Hospital in Boston on the evening of April 20, about 24 hours after Tsarnaev arrived there. 23.App.10516-17; S.Add.1, 6-7. Before they interviewed Tsarnaev, the nurse overseeing his care told the agents that "the interview would pose no medical risk," that Tsarnaev "had suffered no brain injuries," and that the antibiotics and painkillers he was taking would not, "at their current dose, . . . inhibit his mental faculties." 23.App.10516.

[redacted]

Near the beginning of the first interview, Tsarnaev admitted his responsibility for the attacks. 23.App.10518; S.Add.1. He told the agents that he had personally placed and detonated one of the bombs and that he did so to punish America for killing innocent people in Afghanistan and Iraq. 23.App.10518; S.Add.1, 5. [redacted] Tsarnaev repeatedly denied that any other bombs existed or that anyone else was involved in the bombings.

23.App.10518; S.Add.1. [redacted] [redacted] Tsarnaev told the agents that, on the way back to Cambridge after the bombing, he and Tamerlan had stopped at a Whole Foods to buy milk. S.Add.10.

3. Tsarnaev moved to suppress his confession.

Before trial, Tsarnaev moved to suppress the statements he made to FBI agents on April 20-22, while he was in the hospital recovering from his wounds. 23.App.10489. Tsarnaev argued, *inter alia*, that the statements were involuntary because the agents allegedly exploited Tsarnaev's weakened physical and mental condition to obtain his confession. 23.App.10494-99.

The government opposed, arguing, as relevant here, that the agents did not improperly coerce Tsarnaev into making statements against his will. 23.App.10521-30. The government pointed out that "[t]here is no rule against interrogating suspects who are in anguish and pain" because "police may have legitimate reasons, borne of exigency, to question a person who is suffering," including "ascertaining the whereabouts of a dangerous . . . accomplice." 23.App.10512-13 (quoting *Chavez v. Martinez*, 538 U.S. 760, 796 (2003) (Kennedy J., concurring)). The government noted that, at the time of the interview, law enforcement had "strong reason to believe that the public was at risk from additional bombs, bombers, or bomb plots." 23.App.10512. For that reason, "[f]inding out if there were other bombs, other bombers, or others plotting similar and coordinated attacks was a public safety matter of the utmost urgency." 23.App.10515. *See New York v. Quarles*, 467 U.S. 649, 657-58

(1984) (recognizing an exception to the requirement of *Miranda* warnings where there is an ongoing "threat to the public safety"). The government also noted that Tsarnaev told the agents that he could hear and understand them, that he could respond notwithstanding his tracheostomy, and that he was not in too much pain. 23.App.10516. Finally, the government noted that Tsarnaev "appeared alert, mentally competent, and lucid" throughout the interview. 23.App.10517.

All of these circumstances, the government argued, distinguished Tsarnaev's case from *Mincey v. Arizona*, 437 U.S. 385 (1978), because the defendant in that case was "depressed almost to the point of coma," complained of "unbearable pain," and resisted giving self-incriminating statements until the police wore him down. 23.App.10527 (quoting *Mincey*, 437 U.S. at 398-99). Tsarnaev, by contrast, was "responsive, coherent, and clearheaded" throughout his interviews, and he "readily answered questions about the Marathon bombings, even boasting of his success in carrying them out." 23.App.10528.

Finally, the government stated that, although "the public-safety interview" was "non-coercive and fully justified by the . . . public threat, the government does not intend to use Tsarnaev's statements in its case-in-chief at trial or sentencing" because "[t]he strength of the evidence against Tsarnaev" made using the statements "unnecessary." 23.App.10535.

In light of the government's stipulation that it would not introduce Tsarnaev's statements, the district court denied Tsarnaev's motion without prejudice on October 20, 2014. 20.App.9258.

4. The district court admitted the Whole Foods video without objection.

During the guilt phase, the government called Kaytlin Harper, the manager of the Whole Foods store on Prospect Street in Cambridge. 10.App.4466. Harper testified that FBI agents came to the store, told Harper they thought that "someone [had been] in the building," and asked to see the surveillance video for the day of the marathon bombing. 10.App.4468. Harper testified that she reviewed the surveillance video with the agents and that Government Exhibit 1456, which showed Tsarnaev buying milk at Whole Foods, was an accurate copy of the original. 10.App.4468-69. Harper also testified that a member of her staff retrieved an electronic copy of the receipt that was generated for Tsarnaev's milk purchase. 10.App.4471; 1.Supp.App.83 (Gov't Exh. 1502) (Whole Foods receipt). Tsarnaev's counsel stated that Tsarnaev had "no objection" when the government offered the Whole Foods video and the receipt, and the district court admitted both exhibits. 10.App.4469-71.

Two trial days later, the government called FBI agent Chad Fitzgerald to testify about Tsarnaev's and Tamerlan's movements during the week of the bombing based on cell phone location information. 11.App.4674-75. As Agent Fitzgerald described the Tsarnaevs' cell phone activity and location just after the bombing, he explained,

"[A]t the time the investigation was occurring, we had received information, I believe, from a witness that the people involved stopped at a Whole Foods." 11.App.4704. Over defense objections,[67] Agent Fitzgerald testified further that he had recommended that investigators go to Whole Foods to check the surveillance video "between the 3:15 and 3:30 time period," and that he learned the following day that investigators had located video of one of the brothers at Whole Foods. 11.App.4704-05.

During a conference the following day, defense counsel raised the issue of the Whole Foods video. 21.App.9725. Counsel noted that it had not occurred to her until Agent Fitzgerald's testimony (two days after the video was admitted without objection) that Tsarnaev had said in his "hospital statement" that "he'd gone to Whole Foods." 21.App.9725; *see* 21.App.9728 (counsel stating she "hadn't really thought about . . . how the FBI got to the Whole Foods video in the first place" until Agent Fitzgerald's testimony). Counsel said that, in response to her inquiry, the prosecutor had informed her that the source of the information was not Tsarnaev's statement but an "independent tip." 21.App.9725-26. She noted that, "[b]ecause the issue of voluntariness has not been resolved, the issue of fruits remains potentially a live one." 21.App.9726. Defense counsel acknowledged that "[w]e probably have [the independent tip] on our database of tips," but she contended that "to the extent

[67] Defense counsel did not state a basis for these objections.

the government is offering evidence that was derived from" Tsarnaev's statements, the government should provide "some notice" to give the defense "an opportunity to raise the issue before the cow is out of the barn." 21.App.9726.

The prosecutor responded that defense counsel's request for notice was a "nonissue" as applied to the Whole Foods video because the tip came from "someone else entirely." 21.App.9727. Regarding the "broader issue" defense counsel raised, the prosecutor argued that it was the defense's responsibility to preserve, before the evidence was admitted, any argument that it was derived from the hospital statement, rather than raising such an argument after the fact. 21.App.9727.

The district court stated that the government should be "particularly sensitive to the source of that kind of information, that it does not trace back to [Tsarnaev's] statements." 21.App.9728. The prosecutor responded that the government had "been diligent throughout" by, for example, ensuring that "in none of [the dozens of] search warrants did we ever put information that was derived from" the hospital statements. 21.App.9728-29. The prosecutor argued, however, that if defense counsel were not required to timely preserve arguments that evidence derived from the statements, then any of these "subsequent law enforcement actions that were not derived or dependent upon those statements still might be prone to this kind of opportunistic attack." 21.App.9729.

After the district court suggested that the issue might be "a hypothetical problem," defense counsel stated that "[i]t would be helpful if the government could

provide some documentation of the tip," even if it had to be redacted. 21.App.9729. The court stated, "I don't think that's necessary under the present circumstances." 21.App.9729.

B. Standard of review

The Federal Rules of Criminal Procedure require parties to raise motions to suppress evidence before trial if the basis for the motion is reasonably available. Fed. R. Crim. P. 12(b)(3)(C); *United States v. Walker-Couvertier*, 860 F.3d 1, 9 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 1303, 1339 (2018). "[F]ailure to move to suppress particular evidence before trial result[s] in 'waiver' of any objection," *Walker-Couvertier*, 860 F.3d at 9, although the district court may grant relief from such waiver for "good cause," Fed. R. Crim. P. 12(c)(3). Where, as here, the basis for the motion was reasonably available before trial and the defendant has not shown "good cause," the claim is waived and the defendant "is not entitled to any appellate review."[68] *Walker-Couvertier*, 860 F.3d at 9. While this Court has "suggested that unpreserved suppression arguments may be merely forfeited," more "[r]ecent precedent . . . shows a strong inclination against plain-error review." *United States v. Oquendo-Rivas*, 750 F.3d 12, 17 (1st Cir. 2014) (citing *United States v. Lyons*, 740 F.3d 702, 720 (1st Cir. 2014); *United States v. Crooker*, 688 F.3d 1, 9-10 (1st Cir. 2012)).

[68] Although *Walker-Couvertier* involved the pre-2014 version of Rule 12, subsequent amendments "did not substantively change the rule" regarding the "standard for untimely claims." *Walker-Couvertier*, 860 F.3d at 9 n.1 (quotations omitted).

C. Tsarnaev is not entitled to a remand.

1. Tsarnaev waived his challenge to the Whole Foods video.

Tsarnaev contends that the district court should have required the government to demonstrate, either through documents or at a hearing, that the Whole Foods video was not derived from statements he made during his interview with law enforcement agents at the hospital. If the government could not make that showing, Tsarnaev argues, the video should have been suppressed unless the government could establish that his statements were voluntary. But Tsarnaev first raised his challenge to the Whole Foods evidence during trial, three days after the video had already been admitted into evidence. 21.App.9725-28. The law is clear that a defendant seeking to suppress evidence (as fruit of the poisonous tree or otherwise) must bring that motion before trial. Because Tsarnaev did not raise it before trial, his challenge to the Whole Foods video is "not properly before" this Court. *Oquendo-Rivas*, 750 F.3d at 16-17.

Tsarnaev cannot show that the "basis for [his] motion" was not "reasonably available" before trial. *See* Fed. R. Crim. P. 12(b)(3). [redacted] He was also on notice that the Whole Foods receipt from Tsarnaev's April 15 purchase was retrieved electronically on April 23. *See* 25.App.11683; 1.Supp.App.83 (Gov't Exh. 1502). Tsarnaev claims that this "temporal link," Br. 371, between his statements and the

government's discovery of the video makes "a compelling threshold showing that the video was the confession's fruit." Br. 371. But the facts demonstrating that "temporal link" were available to him before trial. Thus, Tsarnaev had all the facts necessary to seek a pretrial hearing if he wished to move to suppress the video as "fruit" of his allegedly involuntary statements. But he failed to raise this claim until after trial had begun and after the district court had already admitted the video into evidence without objection. 21.App.9725-28. Because the basis for Tsarnaev's "fruits" argument was reasonably available, his failure to seek suppression on that ground constitutes waiver.

The fact that defense counsel did not think to raise this issue until Agent Fitzgerald testified about the Whole Foods video, two days after the video was admitted into evidence, does not mean that the basis for a suppression motion was not reasonably available before trial. Agent Fitzgerald's testimony that a tip about the Whole Foods video came from "a witness" did not materially add to the information about the source of the evidence that defense counsel already had. Where else, after all, would the tip have come from if not a "witness"? And Tsarnaev has pointed to nothing in Agent Fitzgerald's testimony, other than the timing information that Tsarnaev already had before trial, suggesting that the "witness" was actually Tsarnaev himself. Thus the defense's allegedly "powerful showing" that the Whole Foods video was "the confession's fruit," Br. 374, is based entirely on the fact that the government obtained the video one or two days after Tsarnaev mentioned Whole

Foods in his second interview. Because the information establishing the timing of those two events was available to Tsarnaev before trial, his motion was untimely under Rule 12.

Although the district court's denial of Tsarnaev's pretrial motion to suppress his statements was without prejudice and "subject to renewal," 20.App.9258, that did not excuse Tsarnaev from his obligation to challenge the Whole Foods video before trial. Tsarnaev's pretrial motion sought suppression only of the statements themselves. He did not seek suppression of the Whole Foods video or any other evidence as alleged "fruits" of those statements. *See* 23.App.10494-99. The court's order cannot plausibly be interpreted as authorizing Tsarnaev to wait until trial to "renew" a motion to suppress particular pieces of physical evidence on the ground that they derived from his statements, even where the basis of such a motion was available before trial. *See United States v. Bashorun*, 225 F.3d 9, 13 (1st Cir. 2000) (holding that the defendant waived his claim when he sought suppression on a ground not raised in his pretrial motion to suppress because "[a] litigant seeking to suppress evidence cannot jump from theory to theory like a bee buzzing from flower to flower" (quotations and brackets omitted)). Moreover, allowing Tsarnaev to renew his suppression motion at trial, particularly as to evidence that was not mentioned in the pretrial motion, would be inconsistent with the purpose of Rule 12's pretrial-motion requirement. As this Court has explained, if a defendant were "'able to delay such a motion until trial, he could prevent the government from appealing' because

jeopardy would have attached at trial." *United States v. Castro-Vazquez*, 802 F.3d 28, 32 (1st Cir. 2015) (quoting *United States v. Barletta*, 644 F.2d 50, 54-55 (1st Cir. 1981)); *see also id.* (noting that preserving the possibility of appeal is the "main purpose" of the pretrial requirement).

Tsarnaev has not shown that the basis for his "fruits" challenge was unavailable before trial, nor has he demonstrated any other good cause for his failure to raise that challenge before trial. That failure constitutes waiver under Fed. R. Crim. P. 12(b)(3), and it is therefore "fatal to the challenge that he now seeks to pursue." *Walker-Couvertier*, 860 F.3d at 9.

2. The district court properly declined to order the government to produce additional evidence about the source of the tip.

Even if there had been no waiver, Tsarnaev cannot show that the district court abused its discretion in refusing his belated request that the government provide documentary evidence regarding the source of the Whole Foods video. Tsarnaev did not expressly move to suppress the video as the fruit of his statements, nor did he seek a hearing on that question. His only explicit request for relief was his counsel's statement that "[i]t would be helpful if the government could provide some documentation of the tip," 21.App.9729—even though he acknowledged that information about the tip had "probably" already been provided in discovery, *see*

21.App.9726 (counsel acknowledging that "[w]e probably have [the independent tip] on our database of tips, but [it] hasn't been pointed out to me").[69]

Given the untimeliness of this request, it was within the district court's discretion to deny it. Tsarnaev's request for documentation was effectively a preliminary step toward a motion to reopen or to reconsider the admissibility of the video. But at the time of Tsarnaev's request, the Whole Foods video had already been admitted without objection, there was no indication that the "witness" Agent Fitzgerald referred to was actually Tsarnaev himself, and the government had affirmatively represented that the "witness" was someone else. 21.App.9726-29. Moreover, Tsarnaev did not show why he could not have made his request before trial. In these circumstances, Tsarnaev cannot show that the district court abused its discretion in refusing his request. *See United States v. Gomez*, 770 F.2d 251, 253-54 (1st Cir. 1985) (holding that "the district court did not abuse its discretion" under Rule 12 by declining to "reconsider during the government's case-in-chief the pretrial denial of defendant's suppression motion" or to allow defendant to support his suppression argument with evidence that had been introduced at trial, because the defendant

[69] As explained in Part 3 below, defense counsel's suspicion was correct. The "database of tips," which was made available to the defense before trial on a stand-alone computer, *see* Doc. 1772-1, included documentation showing that agents had received information that led them to look for surveillance video from a Whole Foods (albeit the wrong store at first) [redacted] *See* Doc. 1772-2 (redacted Orion report referencing the Whole Foods tip created at 2:24 p.m. on April 21).

"offered no legitimate explanation or excuse for his failure to present [the] evidence at the suppression hearing."); *United States v. Kithcart*, 218 F.3d 213, 219-20 (3d Cir. 2000) ("[C]ourts should be extremely reluctant to grant reopenings." (quotations omitted)).

Tsarnaev contends that the government bears the burden of establishing an independent source for the video and that Agent Fitzgerald's testimony and the prosecutor's representations did not satisfy that burden. Br. 373-75 (citing *Murray v. United States*, 487 U.S. 533, 540 n.2 (1988); *United States v. Rose*, 802 F.3d 114, 123-24 (1st Cir. 2015)). But in the cases Tsarnaev relies on, the defendant timely raised his suppression motion before trial. Where the defendant's mid-trial suppression claim is based on evidence that was available before trial, it is within the district court's discretion to refuse the defendant's request to consider the suppression issue. *Gomez*, 770 F.2d at 253-54.

3. Katherine Russell, not Tsarnaev, provided the tip that led the agents to Whole Foods.

Even if the district court abused its discretion in refusing Tsarnaev's untimely request for documentation, the error made no difference because Tsarnaev's allegation that the Whole Foods video was derived from his statements is incorrect. Katherine Russell, not Tsarnaev, provided the tip that led investigators to search for video evidence from Whole Foods stores in Cambridge.

[redacted]

[redacted], an agent created a report in the FBI's Orion database stating that, based on information received from Katherine Russell, Tamerlan Tsarnaev was "supposed to have been shopping for milk at the Whole Foods on River Street in Cambridge" on the afternoon of the marathon. Doc. 1772-3 at 1 (Orion report noting that it was "created" at 2:24 p.m. EDT on April 21). Investigators went to the River Street Whole Foods store that same day and reviewed surveillance video, but they found nothing because it was the wrong Whole Foods location. *Id.*; *see also* Doc. 1772-7 (Report of Investigation summarizing agents' review of surveillance video from the River Street Whole Foods). The timeline of events indicates that the information received from Russell, rather than Tsarnaev's hospital statement, was the original impetus behind the government's search for Whole Foods surveillance video.

Because the April 21 Whole Foods visit was prompted by information received from Russell, it is reasonable to infer that Tsarnaev's statement was not the "but-for" cause of the April 23 visit to the correct Whole Foods store, during which agents obtained the video. *See Hudson v. Michigan*, 547 U.S. 586, 592 (2006) (a "necessary . . . condition for suppression" is that the evidence would not have been discovered but for the violation). Alternatively, the records establish that Russell's statement was an "independent source," *see Murray*, 487 U.S. at 538-39 (holding that evidence discovered in an unlawful search will not be suppressed if it was separately acquired through a lawful, independent source), or, at the very least, that the video

would inevitably have been discovered if Tsarnaev's statement had not occurred, *see id.* at 539; *Nix v. Williams*, 467 U.S. 431, 448 (1984).

4. Any error was harmless.

In any event, any error in the admission of the Whole Foods video was harmless beyond a reasonable doubt. *See* 18 U.S.C. § 3595(c)(2); *Jones v. United States*, 527 U.S. 373, 388-89 (1999). Tsarnaev concedes (Br. 375) that the video was harmless as to the guilt phase verdict, but contends (Br. 375-79) that the video was not harmless in the penalty phase because the prosecutor referred repeatedly to Tsarnaev's relaxed demeanor at Whole Foods to show that Tsarnaev lacked remorse. But the Whole Foods video was relevant only to whether Tsarnaev lacked remorse immediately after the bombings. *See* 18.App.8031. The evidence on that point was overwhelming—a remorseful Tsarnaev would not have gone on to murder Officer Collier, kidnap Dun Meng, throw bombs at police, or write on a boat that his killings were justified. Nor would he have relaxed with a friend at the gym and tweeted about how he was a "stress free kind of guy" shortly after the bombing. Tsarnaev's counsel conceded at trial that Tsarnaev lacked remorse throughout the period when he and Tamerlan were still at large; counsel argued only that Tsarnaev became remorseful later, while he was in custody. *See* 19.App.8768-69. The Whole Foods video had no bearing on that question.

a. The Whole Foods video was harmless because overwhelming evidence showed that Tsarnaev lacked remorse after the bombing.

At trial, the jury saw and heard overwhelming evidence, besides the Whole Foods video, demonstrating that Tsarnaev was not remorseful in the immediate aftermath of the bombings. First, Tsarnaev published a series of flippant tweets on the afternoon of and the day following the bombing. *See* 1.Supp.App.64 (Gov't Exh. 1313) ("Ain't no love in the heart of the city, stay safe, people."); 1.Supp.App.65 (Gov't Exh. 1314) ("[A]nd they what 'god hates dead people?' Or victims of tragedies? Lol [laugh out loud] those people are cooked."); 1.Supp.App.66 (Gov't Exh. 1320) ("I'm a stress free kind of guy"). The day after the bombing, Tsarnaev went to the gym with a friend to work out, and surveillance video showed him chatting casually with his friend. 10.App.4476, 4480-82; Gov't Exhs. 1181 to 1183.

While Tsarnaev's casual manner suggested that he was untroubled by the fact that he had recently killed or maimed dozens of people, the more powerful evidence that he lacked remorse was his decision to continue his terrorist rampage three days later. With Tamerlan, he murdered Officer Sean Collier, kidnapped Dun Meng and drained Meng's bank account, and attacked the police in Watertown with bombs. Then, entirely on his own, he tried to run over the officers with Dun Meng's SUV. Those are not the actions of a man feeling sorry about the bombing.

If there could be any doubt that Tsarnaev had no regrets about the murders, Tsarnaev removed it by writing a justification for his terrorist attacks while he was

hiding out in a winterized boat. Although Tsarnaev wrote that he did not "like killing innocent people," he declared that his killings were righteous and justified in order to punish the evil deeds of the United States. 11.App.4556-57. He praised Tamerlan as a martyr, chastised the United States government for killing Muslims, and proclaimed that "I can't stand to see such evil go unpunished." 11.App.4555-56. He considered himself a mujahideen who could "look into the barrel of [a] gun and see heaven." 11.App.4557. Those statements do not suggest any remorse whatsoever.

The evidence established overwhelmingly that Tsarnaev felt no remorse in the hours and days after the bombing. His nonchalance at Whole Foods was cumulative of that evidence, and its admission was harmless. This case therefore bears no resemblance to *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996), relied on by Tsarnaev (Br. 375-76, 379), where the inadmissible statements "were the only evidence of [the defendant's] unrepentance," *id.* at 1102.

b. The video was harmless because Tsarnaev conceded that he lacked remorse immediately after the bombing.

At trial, defense counsel affirmatively conceded that Tsarnaev lacked remorse while he was carrying out his crimes and while hiding in the boat. *See* 19.App.8768-69 (telling the jury that "[i]t's okay if you make th[e] finding" that Tsarnaev "was not remorseful during the time of the crime" up through when he "wrote in the boat"). "The critical thing," counsel argued, "is that Dzhokhar is remorseful today. He's grown in the last two years." 19.App.8769. Whether Tsarnaev lacked remorse while

he was still committing the crimes was never in dispute—the defense theory was that he became remorseful *later*, while he was in custody and awaiting trial. But the Whole Foods video was irrelevant to whether Tsarnaev developed remorse during his time in custody.

Defense counsel's concession on this point is unsurprising. Tsarnaev could not credibly claim that he felt remorseful at the same time he was tweeting about his freedom from stress, killing Officer Collier, kidnapping Dun Meng, hurling bombs at police, and proclaiming in his boat manifesto that his terrorist attacks were righteous punishment for America's misdeeds. Tsarnaev's actions may or may not have spoken louder than his words, but on the question of Tsarnaev's pre-arrest lack of remorse, the jury had the benefit of both. Tsarnaev's murderous deeds and his defiant declaration showed unmistakably that he felt no remorse in the days following the bombing. Because the evidence of this fact was overwhelming and uncontested, the admission of the Whole Foods video was harmless beyond a reasonable doubt.

IX. The District Court Appropriately Exercised Its Discretion by Admitting Evidence of Tsarnaev's Terrorist Ideology, and the Government Committed No Misconduct in the Audio and Visual Presentations It Used During Opening and Closing Arguments.

Tsarnaev contends (Br. 380-415) that (a) the district court erred by allowing expert testimony that mentioned the Islamic State (ISIS) terrorist organization and that the government committed misconduct by (b) using a slideshow presentation during the government's guilt-phase closing argument that juxtaposed the audio of an

Islamic song (nasheed) with pictures of Tsarnaev and the bombing victims, and (c) displaying during the penalty-phase opening posters of the four homicide victims beside a still photograph of Tsarnaev raising his middle finger to a security camera in a detention cell. The evidence and arguments Tsarnaev challenges were proper, and they had no effect on the jury's verdict in any event.

A. The district court properly admitted expert testimony regarding the global jihadist movement.

Tsarnaev contends (Br. 396-402) that a government expert's statements about ISIS and the Syrian conflict were insufficiently probative and unduly prejudicial under Fed. R. Evid. 403.

1. Background

During the guilt phase, the government called Dr. Matthew Levitt as an expert witness on international terrorism. Levitt has testified as a terrorism expert in dozens of cases. 13.App.5871; *see, e.g.*, *United States v. El-Mezain*, 664 F.3d 467, 489, 515-16 (5th Cir. 2011). The Supreme Court has relied on his work. 13.App.5871; *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 30-31 (2010).

The government offered Levitt's expert testimony to help the jury understand the jihadist materials and worldview that Tsarnaev adopted, as well as the manifesto Tsarnaev wrote in the Watertown boat. 25.App.11528. Near the beginning of Levitt's testimony, Tsarnaev renewed a motion *in limine* he had filed before trial seeking to preclude expert testimony about jihadist materials unless the government

could show that Tsarnaev "personally endorsed and supported" the views expressed in those materials. 13.App.5875; 25.App.11430, 33-35. The district court refused to exclude the testimony categorically and ruled that Levitt could "testify about the history of recent terrorist activity, particularly the encouragement of jihadi actions by particular prominent figures." 13.App.5877. But the court recognized that the potential risk of unfair prejudice was "an important consideration," and the court cautioned the government not to "step too far" in questioning Levitt. 13.App.5875.

Levitt explained to the jury the concept of the "global jihad movement." 13.App.5882. This movement, he said, had no formal organizational structure, but rather was based on an "idea" going back "several decades" that "there is a need for a global effort on behalf of Muslims to unite as a nation" and to "defend itself" through "acts of violence." 13.App.5882. Levitt said the movement's ideology permitted the killing of innocents and focused its anger on the United States. 13.App.5885-88. Levitt explained that, while the global jihad movement had in the past recruited followers to travel to foreign battlefields to fight for the cause, it had more recently become "decentralized," producing propaganda calling for attacks by individual, home-grown extremists without a "command and control" relationship with a formal group. 13.App.5892-93. Calling on followers to conduct independent terrorist attacks "at home," Levitt explained, has "become a major theme of radical propaganda." 13.App.5893.

Levitt explained that this was true not only of "al-Qaeda," but "now [also] the so-called Islamic state or ISIS." 13.App.5894. Tsarnaev objected to "bringing in" ISIS, but the district court ruled that "[a]s . . . general background I think it's all right." 13.App.5894. Levitt then stated that "ISIS is the latest incarnation of this global jihad movement." 13.App.5894. He explained that ISIS both fought and cooperated with al-Qaeda. 13.App.5894. He explained further that "ISIS, like al-Qaeda, has glossy magazines" and "very impressive online radical and radicalization literature" telling supporters "you don't have to come [to a foreign battlefield] – just do something back home." 13.App.5894-95.

Later in his testimony, Levitt described how the conflict in the Russian republic of Chechnya had become a "rallying cry" that jihadists used to "radicalize people." 13.App.5913. Levitt then testified that the "Syrian conflict," which had begun "four years" previously in 2011, had likewise "become a rallying cry around the world." 13.App.5914. The district court overruled Tsarnaev's objection to "the whole discussion of Syria that goes beyond the date" of the indictment's allegations. 13.App.5914. Levitt explained that "[s]ticking even to the first two years of the Syrian conflict two years ago," there were "different things that drew jihadis to this conflict," including "jihadi ideology and want[ing] to go fight with the next incarnation of al-Qaeda." 13.App.5914.

2. Standard of Review

Because the trial court "virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it," a district court's "striking . . . of the Rule 403 balance between probative value and prejudicial effect should not be disturbed unless an abuse of discretion looms." *United States v. Mehanna*, 735 F.3d 32, 59 (1st Cir. 2013) (quotations omitted). The "wide discretion" that district courts generally enjoy for evidentiary determinations "is particularly true with respect to Rule 403 since it requires an on-the-spot balancing of probative value and prejudice." *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (quotations omitted).

3. Dr. Levitt's testimony was admissible.

Under Federal Rule of Evidence 403, a district court may "exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." *Mehanna*, 735 F.3d at 59 (quoting Fed. R. Evid. 403). In this context, "unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quotations omitted).

Levitt's expert testimony about the global jihad movement was relevant to help the jury understand jihadist materials that were, in turn, highly probative as to Tsarnaev's terrorist motive in committing the offenses. *See* 18 U.S.C. § 3592(c)(9) (defining as an aggravating factor committing the offense "after substantial planning

and premeditation to . . . commit an act of terrorism"); 19.App.8683 (non-statutory aggravating factor that 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"); *see also Mehanna*, 735 F.3d at 60 (defendant's jihadist materials were admissible to show his "motive and intent"). In the context of that testimony, it was within the district court's discretion to allow Levitt to describe ISIS and its propaganda as a more recent manifestation of the global jihad movement. That testimony was admissible to help the jury understand the breadth and scope of the global movement that Tsarnaev saw himself as advancing.

There was little danger of unfair prejudice. The totality of the ISIS testimony Tsarnaev challenges is contained within two transcript pages (13.App.5894-95) out of the 85 pages of Dr. Levitt's testimony on direct examination. *See.*13.App.5864-74, 5881-5950; 14.App.5957-62. There were no graphic descriptions of ISIS violence and no ISIS videos, photographs, or audio. Neither Levitt nor any other witness suggested any connection between Tsarnaev and ISIS other than the "commonality . . . in the motivational ideology" that Levitt described. Levitt's academic description of the jihadist movement is not the sort of evidence that is liable to inflame the jury's passions. Courts have routinely rejected Rule 403 challenges to far more potent evidence. *See Mehanna*, 735 F.3d at 60-61 (rejecting Rule 403 challenge to jihadist material including descriptions of videos in which terrorists beheaded American

civilians); *El-Mezain*, 664 F.3d at 509-10 (rejecting Rule 403 challenge to images of Hamas violence found on computers of company accused of providing material support to Hamas); *United States v. Abu Jihaad*, 630 F.3d 102, 113 n.12, 133-34 (2d Cir. 2010) (admitting terrorist videos defendant had ordered and materials from websites he had visited as relevant to motive and intent, even though defendant had not yet received the videos and government could not prove he actually viewed the website materials).

Tsarnaev contends (Br. 396-98) that the ISIS testimony was irrelevant because ISIS had only just come into being at the time of the Boston Marathon attacks. That contention assumes that ISIS was a distinct, wholly new entity that had nothing to do with the global jihad movement to which Tsarnaev subscribed.[70] But Levitt's central point was precisely the contrary. His expert opinion was that various separately organized terrorist groups such as regional al-Qaeda affiliates and ISIS itself arose out of the same ideological movement. 13.App.5882-94. Because ISIS sought to advance the same ideas as the other terrorist groups and leaders Levitt described, testimony

[70] Tsarnaev's assumption that ISIS was created *ex nihilo* in 2013 is undermined by the U.S. State Department's foreign terrorist organization designation of ISIS as an alias of al-Qaeda in Iraq, which was founded in 2004. *See United States v. Elshinawy*, 2018 WL 1521876, at *1 (D. Md. Mar. 28, 2018) (noting that the Secretary of State designated al-Qaeda in Iraq a foreign terrorist organization in 2004 and "amended the designation to add various aliases, including . . . ISIS"), *appeal filed*, No. 18-4223 (4th Cir.). At bottom, whether ISIS had any relationship to pre-existing jihadist movements is a factual question that Tsarnaev could have challenged through cross-examination or presenting his own evidence, but such factual disputes do not provide grounds for excluding the testimony.

about ISIS could help the jury understand the movement's characteristics, goals, and destructive consequences. *Cf. United States v. Felton*, 417 F.3d 97, 101-02 (1st Cir. 2005) ("Unfortunately for the defendants, evidence of their [white supremacist] beliefs and associations was highly relevant.").

In addition, the jury could properly consider during the penalty phase evidence about terrorism that occurred after the Boston Marathon in 2013 because some mitigating and aggravating factors referred to possible terrorist threats in the future. Tsarnaev claimed, as a mitigating factor, that he was "highly unlikely to commit, incite, or facilitate any acts of violence in the future" while serving a life sentence. Add.92. Similarly, the government alleged as a non-statutory aggravating factor that Tsarnaev had "made statements suggesting that others would be justified in committing additional acts of violence and terrorism against the United States." Add. 86.[71] Both of those factors turn, at least to some extent, on the status of the threat posed by the global jihad movement *after* the Boston Marathon attacks.

Tsarnaev contends (Br. 400-01) that this Court should not defer to the district court's decision because the court failed to conscientiously balance the proffered evidence's probative value against the risk of prejudice. Tsarnaev is incorrect. At the beginning of Levitt's testimony, the district court invited defense counsel to renew

[71] The fact that the jury did not find this aggravating factor, Add.86, undermines Tsarnaev's claim that the jury was swayed by anti-Islamic religious prejudice.

their objection, and the court engaged in a colloquy with counsel about the appropriate boundaries of Levitt's testimony. 13.App.5874-75. The district court specifically noted that "[Rule] 403 is an important consideration" and cautioned the government to be prudent. 13.App.5875. The court's subsequent admission of Levitt's brief references to ISIS as "general background" shows that, in the court's judgment, those references were probative and not unfairly prejudicial because they were part of the expert's explanation of the global jihad movement's broader context and did not constitute an attempt to assert any direct connection between Tsarnaev and ISIS. That on-the-spot judgment was reasonable and entitled to deference. *See Mehanna*, 735 F.3d at 59 ("Only rarely—and in extraordinarily compelling circumstances—will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect" (quotations omitted)); *United States v. Shinderman*, 515 F.3d 5, 16-17 (1st Cir. 2008) (noting that balancing judgments under Rule 403 are "typically battlefield determinations" that are afforded "great deference" on appeal).

In addition, evidence is generally not unfairly prejudicial where it is not "any more sensational or disturbing than the crimes" with which the defendant has been charged. *See United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990); *see also United States v. Smith*, 727 F.2d 214, 220 (2d Cir. 1984) (essential inquiry is whether other-crimes evidence involves "conduct likely to arouse irrational passions"). Here, Levitt's testimony about ISIS was detached, academic, and dispassionate. It was not

nearly as "sensational" and "disturbing" as the aggravating evidence in this case. In the face of the evidence that the jury saw and heard about Tsarnaev's terrorist attack, including his own explanation for why he did it, there was no realistic possibility that the jury was "inflamed" by Levitt's passing references to ISIS.

Tsarnaev's reliance on *United States v. Al-Moayad*, 545 F.3d 139 (2d Cir. 2008), is misplaced. *See Mehanna*, 735 F.3d at 61 (rejecting a terrorism defendant's reliance on *Al-Moayad* because "[i]t is hen's-teeth rare that two cases involving different parties, different facts, and different scenarios will be of much assistance through a comparative analysis of Rule 403 determinations"). In *Al-Moayad*, the Second Circuit held that the district court should have excluded a witness's description of his experiences at an al-Qaeda training camp, including footage of Osama bin Laden visiting the camp, because there was no connection between the witness and the defendant and the witness went far beyond his proffered purpose of merely authenticating a document. 545 F.3d at 163. Here, unlike in *Al-Moayad*, the government's case as to certain aggravating factors "depended on proving that the defendant's actions emanated from views" that aligned with terrorism. *Mehanna*, 735 F.3d at 62.

4. Any error in admitting the testimony was harmless.

Even assuming the district court abused its discretion by permitting Dr. Levitt to testify about ISIS, the error was harmless. *See* 18 U.S.C. § 3595(c)(2); *Jones*, 527 U.S. at 402-05. The testimony was brief, academic in tone, and unemotional. It was

entirely contained within two transcript pages. The government did not mention ISIS in its closing argument. There is no indication that the testimony about ISIS inflamed the jury.

The evidence overwhelmingly demonstrated that Tsarnaev was inspired by radical Islamic propaganda, including by the *Inspire* magazine published by al-Qaeda, 13.App.5906-09, and lectures by Anwar al Awlaki, who was himself associated with al-Qaeda, 13.App.5907, 5926; 1.Supp.App.61 (Gov't Exh. 1266). Any suggestion that Tsarnaev was inspired by another radical jihadist group (ISIS) would not have affected the jury's verdict.

Moreover, the jurors unanimously found the existence of all four statutory intent factors, six statutory aggravating factors, and four non-statutory aggravating factors for the counts on which the jury imposed the death penalty. Add. 79-96. Tsarnaev does not challenge the evidentiary support for any of them. Given the overwhelming force of the aggravating factors showing the devastating effects of Tsarnaev's large-scale terrorist attack on dozens of people, this Court should find beyond a reasonable doubt that the jury would have imposed the death penalty even if the brief, guilt-phase testimony about ISIS had been excluded. *See, e.g.*, *Jones*, 527 U.S. at 404-05 (noting that an appellate court conducting harmless-error review of a death sentence may consider whether "the jury would have reached the same conclusion" in the absence of the error).

B. The government's audiovisual presentation at the guilt-phase closing argument was proper.

Tsarnaev contends (Br. 402-08) that the government committed prosecutorial misconduct during its guilt-phase closing argument by using a PowerPoint presentation that combined an audio clip of an Islamic song with photos of Tsarnaev and the bombing's aftermath.

1. Background

During closing argument at the guilt phase, the prosecutor argued that Tsarnaev and his brother had been "radicalized to believe that jihad was the solution to their problems." 15.App.6918. The prosecutor reviewed the evidence of Tsarnaev's radical beliefs, which included Tsarnaev's boat manifesto, as well as his "library" of jihadist videos, writings, and inspirational songs, or "nasheeds," that Tsarnaev watched, listened to, and read on his computer and other devices. 15.App.6923. The government reminded the jury that after Tsarnaev and his brother carjacked Dun Meng, they "went back to Watertown" to get "a CD containing those jihad nasheeds on it" for some "portable inspiration" as they prepared to take Dun Meng's car to New York. 15.App.6910.

The government also noted that Tsarnaev created a twitter account with the display name "Ghuraba." 15.App.6926. The prosecutor quoted Tsarnaev's explanation for why he used that handle: "Ghuraba means stranger," Tsarnaev wrote.

"Out here in the West, we should stand out among the non-believers." 15.App.6926. *See* 1.Supp.App.61 (Gov't Exh. 1266).

Later in the argument, the government stated that Tsarnaev had "murdered four people" and "wounded hundreds" in order to "make a statement" and to "be a terrorist hero." 15.App.6931. The government then stated, "[t]his is how the defendant saw his crimes," while displaying a PowerPoint presentation. 15.App.6931-32; Add.248. Five slides of the presentation were accompanied by audio of a nasheed, in which the singer chants "Ghuraba" repeatedly. Add.CD.ExcerptPP. The nasheed played for up to 19 seconds. DE 1744, at 3-4. The five slides contained (1) a picture of bomb-making instructions from *Inspire* magazine (Gov't Exh. 1142-091 at 33); (2) a photograph of Tsarnaev sitting in his room in front of a black flag with Arabic script (Gov't Exh. 1341); and (3) three photographs of the scene at the finish line in the aftermath of the bombing (Gov't Exh. 9, 12, 16). *See* 1.Supp.App.5-6, 8, 67; 2.App.210.

After the 19-second audio track ended, the prosecutor said, "But this is the cold reality of what his crimes left behind." 15.App.6932. The presentation then showed a series of additional photographs of the aftermath of the bombing, including Gov't Exh. 17 (showing Krystle Campbell and Karen Rand lying together after the blast), and Gov't Exh. 20 (Jeffrey Bauman after the blast). Add.CD.ExcerptPP; *see* 1.Supp.App.9-10.

After the government concluded its closing argument, Tsarnaev moved for a mistrial. Add.250-51. He argued that the "portion of the government's presentation" consisting of "the photo montage with the nasheed playing in the background" was an attempt to "inflame religious or ethnic prejudice" without any "relevance to any of the charges." Add.250-51.

The government responded that both the audio file and the photographs had previously been admitted into evidence and that Tsarnaev "consumed these audio files" on all of his devices. Add.252-53. The government explained that the title of the audio, "'Ghuraba' which is 'Stranger,'" was "a theme that we've heard throughout the entire case" and reflected Tsarnaev's belief that he was "one of . . . a small percentage of people in the [Muslim] faith who believes in terrorism." Add.253. The government argued that the combination of the audio and photographs had "a legitimate purpose" because it "allow[ed] the jury to determine" the "defendant's state of mind, his radicalization," and his "perspective" on the "horrific acts of terrorism" he committed. Add.253. The government noted that its terrorism expert witness, Dr. Levitt, had "explained the significance of . . . these nasheeds," and that Tsarnaev's writings in the boat were consistent with the nasheeds and the other terrorist materials that were in evidence. Add.254.

The district court agreed that these arguments reflected "the government's radicalization position," and that the government's audiovisual presentation "was not improper." Add.254.

2. Standard of Review

This court reviews de novo whether the government committed misconduct in its closing or rebuttal. *United States v. Nelson-Rodriguez*, 319 F.3d 12, 38 (1st Cir. 2003); *United States v. Glantz*, 810 F.2d 316, 320 n.2 (1st Cir. 1987).

3. The PowerPoint presentation was proper.

"The term 'prosecutorial misconduct' covers a broad swath of improper conduct by the [government]'s attorney that may impair an accused's constitutional rights to a fair trial . . . ." *United States v. Santos-Rivera*, 726 F.3d 17, 27 (1st Cir. 2013). When determining whether a claim of prosecutorial misconduct warrants reversal, this Court first considers whether the government's actions were improper. *United States v. Duval*, 496 F.3d 64, 78 (1st Cir. 2007). If they were, the Court asks whether the misconduct "so poisoned the well that the trial's outcome was likely affected." *United States v. Vázquez-Larrauri*, 778 F.3d 276, 283 (1st Cir. 2015) (quoting *United States v. Kasenge*, 660 F.3d 537, 542 (1st Cir. 2011)). In making that determination, the Court considers "(1) the severity of the prosecutor's misconduct, including whether it was deliberate or accidental; (2) the context in which the misconduct occurred; (3) whether the judge gave curative instructions and the likely effect of such instructions; and (4) the strength of the evidence against the defendant." *Id.* (brackets omitted) (quoting *Kasenge*, 660 F.3d at 542). "The remedy of a new trial is rarely used; it is warranted only where there would be a miscarriage of justice or where the evidence preponderates heavily against the verdict." *United States v. Rodríguez-De Jesús*, 202 F.3d

482, 486 (1st Cir. 2000) (quoting *United States v. Gonzalez-Gonzalez*, 136 F.3d 6, 12 (1st Cir. 1998)).

The government is permitted to argue forcefully and to describe vividly the defendant's criminal conduct, so long as the government does not cross the line into improperly seeking to inflame the jury's passions through gratuitously pejorative and inflammatory argument. *See United States v. Rodriguez-Estrada*, 877 F.2d 153, 159 (1st Cir. 1989). The government has "broad latitude in the inferences it may reasonably suggest to the jury during summation." *United States v. Zackson*, 12 F.3d 1178, 1183 (2d Cir. 1993) (quotations omitted).

The government's audiovisual presentation was proper. The presentation consisted of photographs and an accompanying audio file that had all been admitted into evidence. *See, e.g.*, *United States v. De Peri*, 778 F.2d 963, 979 (3d Cir. 1985) (noting that a district court may permit the government to use visual aids at argument). By showing those exhibits together, with the explanation that "[t]his is how the defendant saw his crimes," Add. 248, the prosecutor invited the jury to infer that Tsarnaev saw the Boston Marathon bombing as an act of terrorist propaganda. The government's argument about Tsarnaev's motive was consistent with the library of jihadist materials recovered from Tsarnaev's computer, *see* 1.Supp.App.35-45; 13.App.5916-39, 5945-49, as well as his own "Ghuraba" twitter account and his writings in the boat. *See United States v. Young*, 470 U.S. 1, 16 (1985) (noting that claims of improper argument must be reviewed in the context of "the entire record"); *United*

States v. Arias-Izquierdo, 449 F.3d 1168, 1177-78 (11th Cir. 2006) (rejecting claim of misconduct during closing argument where prosecutor's comment was based on photograph that had been admitted into evidence). The presentation was well within the latitude afforded prosecutors during closing argument. *See United States v. Vanvliet*, 542 F.3d 259, 271 (1st Cir. 2008) (noting government's "considerable latitude" to "argue the evidence and any reasonable inferences"); *United States v. Wall*, 130 F.3d 739, 745 (6th Cir. 1997) (same).

Contrary to Tsarnaev's contention, the "juxtaposition" of properly admitted photographs and audio did not somehow transform the evidence into an inflammatory appeal to jurors' anti-Islamic prejudices. Rather, as the district court recognized, the presentation was tied to the trial evidence about Tsarnaev's radicalization. Combining the nasheed with the photographs of Tsarnaev, the black flag, and the *Inspire* bomb instructions allowed the jury to see and hear the interconnected elements of the jihadist worldview that inspired the bombing. The prosecutor thus used the presentation for a proper purpose—to argue that Tsarnaev's violence was motivated by his radical ideology.

Other courts have likewise permitted the government to juxtapose separate exhibits in order to support proper argument. In *United States v. McGhee*, 532 F.3d 733 (8th Cir. 2008), the Eighth Circuit held that the district court did not abuse its discretion by permitting the prosecution, during closing argument, to use a collage containing a photograph of the robbery suspect, taken at the time of the robbery, with

an image of the defendant "in a similar pose, inserted next to the suspect." *Id.* at 741. The court explained that "[a]ll the photographs in the collage were previously admitted into evidence. And although the collage included the ultimate conclusion—that the bank robber [wa]s [the defendant]—this was not unfairly prejudicial [because] closing argument may be argumentative and assert conclusions." *Id.* (citation omitted).

Tsarnaev is incorrect in asserting (Br. 405) that the nasheed was "unconnected to the events of April 15." The nasheed was saved to multiple folders on a computer found in Tamerlan's home that Tsarnaev used to browse the Internet. 13.App.5692, 5857. *See* 1.Supp.App.46-48 (Gov't Exh. 1143-05) (file listing); Gov't Exh. 1143-026 ("Ghurabaa" music video). The nasheed chanted the word that Tsarnaev had chosen as his Twitter display name. 1.Supp.App.61; 15.App.6926. Dr. Levitt discussed the importance of nasheeds as inspiration for home-grown extremists. 13.App.5908, 5934. And, as the prosecutor reminded the jury at argument, the Tsarnaevs interrupted their carjacking of Dun Meng to drive back to Watertown to get their CD containing nasheeds before executing their plan to drive down to New York. 15.App.6910. They then played the CD in Dun Meng's car while the carjacking was in progress, minutes before the brothers' showdown with police in Watertown. *See* 11.App.4964 (Dun Meng testifying that the Tsarnaevs played a CD with religious music while driving in his Mercedes). Thus there was substantial evidence in the

record for the government's assertion that the Tsarnaevs used nasheeds as "portable inspiration." 15.App.6910.

Tsarnaev contends that the juxtaposition of the jihadist music and imagery with photographs of his wounded victims was improperly inflammatory. But that is a "function of the acts that the defendant[ ] engaged in." *Felton*, 417 F.3d at 103. Tsarnaev's contention (Br. 402-03) that the audiovisual display was too "emotional and frightening" founders on the fact that terror was the explicit purpose and inevitable consequence of his attacks. As this Court has recognized, terrorism cases generally involve emotional and frightening evidence. *See Mehanna*, 735 F.3d at 64 (noting that even "blood curdling" and "emotionally charged" terrorism-related evidence was admissible because "much of this emotional overlay is directly related to the nature of the [terrorist] crimes" (quotations omitted)). "It should not surprise a defendant that proof of his participation in conspiracies to [commit terrorism offenses] will engender the presentation of evidence offensive to the sensibilities of civilized people." *Id.*; *see also id.* ("Terrorism trials are not to be confused with high tea at Buckingham Palace."); *El-Mezain*, 664 F.3d at 511 (noting that, in a terrorism case, "it is inescapable . . . that there would be some evidence about violence and terrorist activity"). If that is true of *Mehanna* and *El-Mezain*, where the defendants themselves did not commit any violent acts, it is all the more reasonable to expect emotionally charged evidence and argument in this case, where Tsarnaev participated in terrorist attacks that killed four people and grievously injured dozens more.

4. The presentation did not affect the trial's outcome.

Even assuming the government's presentation was improper, it did not so poison the well that the trial's outcome was likely affected. *Vázquez-Larrauri*, 778 F.3d at 283. First, the allegedly improper juxtaposition was limited in scope because it lasted for, at most, 19 seconds. *See* Doc. 1744 at 3-4; *see also United States v. Zehrbach*, 47 F.3d 1252, 1267 (3d Cir. 1995) ("the comments at issue were but two sentences in a closing argument that filled forty pages of transcript"). Moreover, the nasheed was played during summation, not rebuttal, giving Tsarnaev the opportunity to blunt any effect during his own closing argument. *See* 15.App.6947 (defense closing argument noting that the government "just played, to tug on your heartstrings, some nasheeds . . ."). More importantly, the government played the nasheed only at the guilt-phase closing argument, but Tsarnaev challenges its alleged effect solely on the penalty-phase verdict. Br. 405, 410-15. Any effect of the nasheed was likely dissipated, if not forgotten, in the intervening weeks of powerful testimony, and additional closing arguments, that the jury saw and heard before it began deliberating at the close of the penalty phase.

In addition, the district court's instructions to the jury reduced any risk that the nasheed affected the jury's penalty phase verdict. At the close of the penalty phase, the court instructed the jury to avoid being swayed by passion or prejudice. 19.App.8695-96. The district court also instructed the jury that the arguments of counsel did not constitute evidence. 15.App.6976, 19.App.8650-51; *see also United*

States v. Mikhel, 889 F.3d 1003, 1056 (9th Cir. 2018) (finding no reversible plain error in inflammatory comments at closing argument because "the jury was clearly instructed that the government's argument was neither evidence nor law; that it must avoid the influence of passion or prejudice; and that it must weigh all aggravating and mitigating factors"), *petitions for cert. filed*, Nos. 18-7489 (Jan. 14, 2019), and 17-7835 (Feb. 4, 2019).

Moreover, as required by the FDPA, *see* 18 U.S.C. § 3593(f), the district court instructed the jury that it could not consider Tsarnaev's religious beliefs or national origin in considering whether to recommend a sentence of death. 19.App.8700. And as the FDPA also requires, the jury in its verdict specifically certified that "consideration of the . . . religious beliefs, [or] national origin . . . of Dzhokhar Tsarnaev . . . was not involved in reaching [the jurors'] individual decision." Add.98. The jury further certified that each of them, "as an individual, would have made the same recommendation . . . regardless of the . . . religious beliefs, [or] national origin . . . of Dzhokhar Tsarnaev." *Id.* These instructions and certifications blunted any prejudice from the presentation.

Finally, the content of the nasheed, which contained only a single word, was not by nature inflammatory, and in any event it was far less inflammatory than the properly admitted jihadist propaganda in the case, including Tsarnaev's own manifesto. *See Mikhel*, 889 F.3d at 1056 (finding that improper comments at closing argument were not "nearly as inflammatory as the graphic evidence of the murders, or

as powerful as the extensive victim impact testimony, which was quite properly before the jury" (quotations omitted)); *Felton*, 417 F.3d at 103 (no error in referring to defendant as a "terrorist" where the term was "a function of the acts that the defendant[ ] engaged in"). In the context of this case, where the evidence of Tsarnaev's devotion to radical jihadist ideology was overwhelming and where his guilt for horrific terrorist attacks that killed four people and wounded dozens was unquestioned, the jury's penalty-phase verdict was not affected by 19 seconds of music that it heard weeks earlier.

C. The government did not plainly commit prosecutorial misconduct in penalty-phase opening statements by displaying images of the deceased victims alongside an image of Tsarnaev raising his middle finger at a security camera.

Tsarnaev also claims (Br. 408-410) that the government committed misconduct during its penalty-phase opening argument by displaying poster-sized photos of Tsarnaev's victims next to a still image of Tsarnaev raising his middle finger at a security camera. That argument lacks merit.

1. Background

On July 10, 2013, Tsarnaev was brought to the federal courthouse for an arraignment on the indictment. 16.App.7292-94. While in a holding cell there, he climbed up on a bench near the security camera and flashed a "V" sign (with his palm facing inward) and then his middle finger at the camera. 16.App.7294-95, 7309; Add.CD.DX4001 (video); 1.Supp.App.90 (Gov't Exh. 1595) (screenshot). A Deputy

U.S. Marshal confronted him and said that such behavior "was not going to be tolerated." 18.App.8446. When asked if he was going to continue being a problem, Tsarnaev said, "No. I'm done. I'm sorry." 18.App.8446, 8452.

Before the penalty phase, the government informed the defense that it intended to introduce a still shot of Tsarnaev holding up his middle finger (Gov't Exh. 1595) and that it intended to use posters of that still shot and of photographs of the deceased victims during the penalty-phase opening. Add.359, 367-68. Tsarnaev objected to the introduction and use of the still shot on the basis that it was misleading and more prejudicial than probative. Add.359, 367; 25.App.11582. After reviewing the video from which the still shot was taken, the district court concluded that it was "admissible" and that "the video can be shown to contextualize it." Add.365-67. Tsarnaev's counsel also noted that the prosecutor intended to "use some photographs of the victims in her opening" and observed that "it seems like the Court ought to rule on the admissibility of those photographs if they're not ones that are already in evidence." Add.368. The district court said it was excluding the government's "montages" of victim pictures as "a little too emotional" but said the government could use "individual pictures." Add.368.

During the penalty-phase opening statement, the prosecutor displayed on easels three-foot by four-foot photographs of Lingzi Lu, Krystle Campbell, Sean Collier, and Martin Richard. Add.376. A fifth easel in the middle was covered by a black cloth.

16.App.7090; Doc. 1744 at 4 (stipulation). Near the end of the statement, the prosecutor said:

> On July 10th, 2013, almost three months after Dzhokhar Tsarnaev had murdered Krystle Marie Campbell, Lingzi Lu, Martin Richard, and Officer Sean Collier, he was here in this courthouse. He knew the United States had charged him for his crimes. In the room that he was in, there was a video camera. Dzhokhar Tsarnaev was alone. There was no brother with him. And once more, just as he had done with the boat on Franklin Street, he had one more message to send.

16.App.7089-90. The prosecutor then pulled the black cloth off the middle easel to reveal a three-foot by four-foot photograph of Tsarnaev holding up his middle finger in the holding cell. 16.App.7090; Doc. 1744 at 4 (stipulation). The prosecutor concluded:

> This is Dzhokhar Tsarnaev, unconcerned, unrepentant, and unchanged. Without remorse, he remains untouched by the grief and the loss that he caused. And without assistance, he remains the unrepentant killer that he is. It is because of who Dzhokhar Tsarnaev is that the United States will return and ask you to find that the just and appropriate sentence for Dzhokhar Tsarnaev is death.
>
> Thank you.

16.App.7090.

After the opening statement, Tsarnaev's counsel noted as a "point of record-keeping" that the prosecution had displayed the pictures during the opening. Add.376. Counsel asserted that the "prejudicial" and "inflammatory" effect "of what we think was an out of context and . . . quite distorted still [shot] from the cell block was greatly enhanced . . . by its juxtaposition between these very attractive and

touching photographs of the victims in life." Add.376-77. But counsel did not request any additional relief, and the court did not comment on the issue. Add.376-77.

2. Standard of review

Tsarnaev failed to preserve his argument that the government's use of photo displays in its penalty-phase opening amounted to prosecutorial misconduct. His counsel objected before the penalty phase to the admission of the holding-cell photo and to its use in the government's opening. Add.359, 367; 25.App.11582. After the government's opening, the defense noted for "record-keeping" purposes that the government had displayed the photo alongside photos of the homicide victims and noted the defense's "view" that the holding-cell photo's "prejudicial" and "inflammatory" effect was "greatly enhanced" by being displayed alongside the victims' photos. Add.376-77. But counsel neither claimed that the government committed prosecutorial misconduct nor moved for a mistrial. Tsarnaev's renewal of his evidentiary objection was insufficient to preserve a prosecutorial misconduct claim. *See United States v. Montas*, 41 F.3d 775, 782-83 (1st Cir. 1994) (objection on different basis does not preserve error); *United States v. Del Toro-Barboza*, 673 F.3d 1136, 1152 (9th Cir. 2012) (objection for vouching did not preserve prosecutorial-misconduct claim). Review of Tsarnaev's prosecutorial misconduct claim is therefore limited to plain error. *United States v. Peña-Santo*, 809 F.3d 686, 694 (1st Cir. 2015). To

the extent Tsarnaev's argument could be construed as an evidentiary challenge, review would be for abuse of discretion. *Sampson I*, 486 F.3d at 42.

3. The display was proper.

Tsarnaev argues that 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." Br. 408. He argues that the government's statement "inappropriately exploited the jurors' passions" and "blatantly mischaracterized a split-second image of Tsarnaev in a courthouse jail cell, . . . calling it his obscene 'message' to the homicide victims." Br. 408.

The government's penalty-phase opening statement was not misconduct, much less plainly so. Contrary to Tsarnaev's repeated claims (Br. 40, 381, 389, 392, 408-09), the prosecutor never said that Tsarnaev's obscene gesture was a message "to his victims." Br. 381. Rather, the prosecutor explained that Tsarnaev's obscene gesture at the courthouse "almost three months" after the bombing was intended to convey the same "message" that he sought to convey in his written manifesto in "the boat on Franklin Street." 16.App.7089-90. That "message" was that the bombings were justified by a purported religious obligation to wage jihad against the United States. *See* 11.App.4556; 13.App.5941 (statement in the boat that "[ou]r actions came with a [me]ssage"). *See* 16.App.7086 (prosecutor's reference to written statement in the boat). The prosecutor argued Tsarnaev's hand gesture showed that, even after plenty

of time to reflect, he remained "unconcerned, unrepentant, and unchanged." 16.App.7090.

Tsarnaev's argument hinges on the fact that his obscene gesture was displayed alongside the victims' pictures. From this, he draws the inference that the "message" the prosecutor referred to was directed at Tsarnaev's victims. But the Supreme Court has observed that "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). That is especially appropriate here, given the prosecutor's reference to Tsarnaev's "message" in the boat, which was a message to the United States, not his victims personally. *See* 11.App.4555-57. The gesture showed that, three months after the bombing and immediately before his arraignment on terrorism charges, Tsarnaev remained defiant and unfazed by the gravity of his actions.

Moreover, Tsarnaev's claim of prosecutorial misconduct is particularly misplaced given that the government informed the defense beforehand of its intent to use these pictures during its opening statement. *See* Add.359, 367-68. Two of the victims' photos had already been admitted into evidence. *See* 1.Supp.App.82, 91 (Gov't Exhs. 1501, 1601-28). And the district court specifically ruled in advance that the holding-cell photo and the remaining photos were admissible. Add.367. The

decision to use the photos in this context is hardly the kind of deliberate misconduct that could give rise to a prosecutorial misconduct claim.

4. The display did not affect the trial's outcome.

In any event, Tsarnaev cannot show that the alleged misconduct "so poisoned the well that the trial's outcome was likely affected." *Vázquez-Larrauri,* 778 F.3d at 283 (quoting *Kasenge,* 660 F.3d at 542). This is so for a number of reasons.

First, any prejudicial effect was minimal in light of the other evidence in this case. The gesture was crude and defiant, but hardly an uncommon sight for most Americans. It was far less dramatic or prejudicial than other types of evidence that are commonly displayed during capital sentencing proceedings without constituting reversible error. *See Strong v. Roper*, 737 F.3d 506, 521-22 (8th Cir. 2013) (autopsy photos); *United States v. Taylor*, 814 F.3d 340, 365, 367 (6th Cir. 2016) (autopsy photos); *Hovey v. Ayers*, 458 F.3d 892, 923 (9th Cir. 2006) (use of mannequin resembling victim bound with rope and with a bag over its head). And it was far less dramatic than much of the evidence in this case, which included, for example, video of Tsarnaev placing a bomb next to a row of children and walking away just before detonating it, as well as videos and photographs of the carnage after the blast. *See* 1.Supp.App.11-13, 16-19 (Gov't Exhs. 24-26, 32, 39-40); Gov't Exhs. 22, 23 (videos).

Tsarnaev argues that the photo's "effect was powerful," citing news reports that are not in the record. Br. 393. But even if those news reports are correct, the fact that "a collective gasp" was audible in the *overflow* courtroom, Br. 393 (quoting

Catherine Parrotta (@CatherineNews), Twitter (Apr. 21, 2015, 8:05 a.m., https://twitter.com/CatherineNews/status/590531837862268929?s=17), is hardly evidence of the photo's actual effect on the jurors who had sat through both phases of this trial and had seen all of the evidence, including the victims' autopsy photos that were shielded from the spectators. *See* 21.App.9796-99.

Second, Tsarnaev had every opportunity to contextualize, downplay, and re-characterize the photo. The day after its penalty-phase opening, the government called a Deputy U.S. Marshal to authenticate the still photo of Tsarnaev raising his middle finger at the camera. 16.App.7292-95. On cross-examination, Tsarnaev played several video clips, including the one in which Tsarnaev flashed his middle finger, to contextualize the still shot. 16.App.7301-12. Tsarnaev later called another Deputy U.S. Marshal to testify that Tsarnaev had apologized when confronted. 18.App.8446, 8452.

During the defense penalty-phase opening statement (deferred until after the government presented its evidence), Tsarnaev's counsel argued that the full video from the holding cell showed that the "shocking gesture wasn't quite as advertised." 17.App.7503. Counsel argued that Tsarnaev was "using the plastic housing of the security camera as a mirror" and "just for a split second, sticks out his middle finger. To who? To himself? What did it mean? It meant that he was acting like an immature 19-year-old is what it meant." 17.App.7503. In closing argument, counsel argued that the video showed "childish[ ] silliness" and "stupidity." 19.App.8766.

And counsel even tried to turn the video to Tsarnaev's advantage, arguing that he had a clean prison record after two years, and that the most the government could come up with was this "one second of [Tsarnaev] shooting the finger at the camera," for which he later "apologized." 19.App.8765-66. *See id.* at 8766 ("[T]hat's probably a first. I doubt anybody has ever been written up for shooting a finger at the camera."). Thus, even if the government had suggested that Tsarnaev's obscene gesture was directed at his victims, the defense had every opportunity to argue that it was not.

Third, the district court instructed the jury that "[t]he lawyers' summaries of the evidence in their openings . . . are not part of the evidence." 19.App.8650. The summaries were "an attempt to marshal the evidence for you, to try to persuade you to understand it in a way that is consistent with their view of the case." 19.App.8650-51. But, the court said, "it is your understanding and your assessment of the evidence that controls." 19.App.8651.

Finally, the other evidence in this case overwhelmingly established Tsarnaev's disdain for his victims and lack of remorse regarding their deaths. Far from simply gesturing at them, he detonated a bomb designed to kill them by sending metal tearing through their bodies. After the bombing, he flippantly tweeted that he was "a stress free kind of guy," 10.App.4496, and said, "[T]hey what 'god hates dead people?' Or victims of tragedies? Lol [laugh out loud] those people are cooked." 1.Supp.App.65 (Gov't Exh. 1314). While hiding in the boat, he wrote that the bombings were justified by the United States' conduct toward Muslims. 11.App.4555-57. Thus, even

if the jury had understood the prosecutor as saying that Tsarnaev's gesture was directed at his victims, the prejudice from that inference would pale in comparison to the evidence that he violently and intentionally killed them and experienced no remorse. Tsarnaev cannot show that the photo and the prosecutor's statement "inflame[d] [the jury's] passions more than did the facts of the crime." *Payne v. Tennessee*, 501 U.S. 808, 832 (1991) (O'Connor, J., concurring).

X. The Constitution Does Not Require the Government to Prove That the Aggravating Factors Outweigh the Mitigating Factors Beyond a Reasonable Doubt in Order to Justify a Death Sentence.

Tsarnaev contends (Br. 416-24) that the district court erred in instructing the jury that, to impose a death sentence, it must find that the aggravating factors "sufficiently outweigh" the mitigating factors "to justify imposing a sentence of death." 19.App.8661-62. He contends that the jury's ultimate determination under the FDPA of whether a death sentence was justified based on the weighing of aggravating and mitigating factors was a factual finding that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), the jury was required to make beyond a reasonable doubt. As Tsarnaev acknowledges, this Court has squarely rejected that argument. *See Sampson I*, 486 F.3d at 31-32. Contrary to Tsarnaev's contention, *Sampson I* remains good law, and nothing in the Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), undermines *Sampson I*'s clear holding that that the jury's determination of whether a death sentence is justified is not itself a factual determination that must be made beyond a reasonable doubt.

A. Background

Under the FDPA, capital sentencing has two aspects—an eligibility determination and selection of the actual punishment from among the eligible penalties—which are given "differing constitutional treatment." *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998). Eligibility involves the consideration of discrete aggravating factors that determine whether the defendant falls into the narrow category of defendants who qualify for the death penalty, while the selection decision is a "broad inquiry" into all evidence relevant to the ultimate decision of what penalty to impose. *Id.* at 276. The selection phase is "an individualized determination on the basis of the character of the individual and the circumstances of the crime" of whether the defendant should receive a death sentence. *Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis omitted).

At the eligibility stage, the jury must make certain factual findings before it may consider imposing the death penalty. The jury must find, for example, that the defendant intended to kill the victim, intended to inflict serious bodily injury, or intentionally engaged in violence knowing that it posed a grave risk of death. 18 U.S.C. § 3591(a)(2)(A), (B), (C), and (D). The jury must also unanimously find beyond a reasonable doubt that at least one statutory aggravating factor is present. *Id.* § 3593(e)(2); *see also id.* § 3592(c) (enumerating aggravating factors).

Once the jury makes these threshold determinations, the FDPA prescribes additional procedures for the jury's selection-stage determination of the appropriate

penalty. The jury must find any non-statutory aggravating factors unanimously and beyond a reasonable doubt. 18 U.S.C. § 3593(c), (d). But a single juror may find a mitigating factor by a preponderance of the evidence, and that juror "may consider such factor established . . . regardless of the number of jurors who concur that the factor has been established." *Id.* § 3593(c), (d).

The FDPA provides that, after making these determinations, the jury must determine what sentence is "justif[ied]" by weighing the factors that it has found. 18 U.S.C. § 3593(e). In conducting this weighing process, the jury must

> 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.

Id. The jury may impose a death sentence only if it unanimously agrees that the sentence is justified in light of the factors the jury has found. *Id.*

This Court has squarely held that the jury's determination of whether a death sentence is justified based on the FDPA's weighing process is not itself a factual determination that must be made beyond a reasonable doubt under *Apprendi* and *Ring*. *Sampson I*, 486 F.3d at 31-32. Other courts of appeals have uniformly reached the same conclusion. *See United States v. Gabrion*, 719 F.3d 511, 532-33 (6th Cir. 2013) (en banc); *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013); *United States v. Fields*, 516 F.3d 923, 950 (10th Cir. 2008); *United States v. Mitchell*, 502 F.3d 931, 993-94 (9th Cir. 2007); *United States v. Fields*, 483 F.3d 313, 345-46 (5th Cir. 2007); *United States v.*

Purkey, 428 F.3d 738, 749-50 (8th Cir. 2005); *see also United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007) (reaching the same conclusion with respect to the similar weighing determination required by the now-repealed capital sentencing provisions of 21 U.S.C. § 848).

As this Court explained in *Sampson I*, by the time the jury reaches the weighing prescribed by Section 3593(e), it "already ha[s] found beyond a reasonable doubt the facts needed to support a sentence of death." *Sampson I*, 486 F.3d at 32. The jury's determination of what sentence is justified is not a finding of fact in support of a particular sentence but rather a determination of the sentence itself, within a range for which the defendant is already eligible. *Id.*; *see also Gabrion*, 719 F.3d at 533. The FDPA's instruction that jurors determine what sentence is justified by weighing the aggravating and mitigating factors simply prescribes a "process," the outcome of which "is not an objective truth that is susceptible to (further) proof by either party. Hence, the weighing of aggravators and mitigators does not need to be 'found.'" *Sampson I*, 486 F.3d at 32; *see also Mitchell*, 502 F.3d at 993 (finding no indication "how a beyond-reasonable-doubt standard could sensibly be superimposed upon this process, or why it must be in order to comport with due process"); *Fields*, 483 F.3d at 346 (concluding that *Ring* "applies by its terms only to findings of fact, not to moral judgments"); *Purkey*, 428 F.3d at 750 (explaining that the weighing process is not an "elemental fact" the jury must find, but rather "the lens through which the jury must focus the facts that it has found").

Consistent with the FDPA and *Sampson I*, the district court instructed the jury to conduct the "weighing" process as follows:

> 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.App.8661-62.

B. Standard of review

This Court reviews a properly preserved claim that the jury instructions inadequately explained the law *de novo*, "taking into account the charge as a whole and the body of evidence presented at trial." *Sampson I*, 486 F.3d at 29.

C. The jury instruction was correct.

Tsarnaev acknowledges (Br. 419) that his claim is foreclosed by *Sampson I*. He contends, however, that *Sampson I* is no longer good law. In his view, *Hurst v. Florida*, 136 S. Ct. 616 (2016), establishes that the Sixth Amendment rule of *Apprendi* and *Ring* applies to both the eligibility-stage factfinding of statutory aggravators *and* the selection-stage determination of whether a death sentence should be imposed based on the weighing of aggravating and mitigating factors. That contention lacks merit. *Hurst* merely applied *Ring* to the Florida capital sentencing scheme and found that it contravened *Ring* because it required a judge, not a jury, to make *eligibility-stage*

findings. *Hurst* did not expand *Ring* to require courts to superimpose the beyond-a-reasonable-doubt standard on the selection-stage weighing process.

1. *Hurst* did not expand *Ring*.

The Florida sentencing statute at issue in *Hurst* provided that, in a capital sentencing proceeding, the trial court would conduct an evidentiary hearing before a jury and the jury would render an "advisory sentence." 136 S. Ct. at 620. After receiving that "advisory sentence," the trial court was required to independently find and re-weigh all of the aggravating and mitigating circumstances before entering a sentence of life or death. *Id.* If the trial court imposed a death sentence, it was required to set forth in writing the "findings upon which the sentence of death [was] based." *Id.* (quotations omitted).

The Supreme Court determined that Florida's capital sentencing scheme required the judge to independently find aggravating facts that were necessary to make the defendant eligible for a death sentence. *Hurst*, 136 S. Ct. at 620-21 (citing *Ring*'s concern with judicial fact-finding at the eligibility stage of a capital sentencing proceeding). Accordingly, the Court determined that, like Arizona's scheme in *Ring*, Florida's scheme required the judge, not the jury, to make the "critical findings *necessary to impose the death penalty*." *Id.* at 622 (emphasis added). The Court held that this "factfinding" violated the Sixth Amendment, which requires that "the existence of an aggravating circumstance" necessary to render the defendant *eligible* for a death sentence be based "on a jury's verdict, not a judge's factfinding." *Id.* at 624. *Hurst* did

not expand the rule of *Ring* to the selection-stage weighing process, which occurs after the eligibility determination has been made.

The fact that *Hurst* did not address the weighing process is underscored by the limited way in which the Court overruled its prior decisions in *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), and *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Spaziano*, the Court concluded there was no requirement that a jury impose the sentence in a capital case. 468 U.S. at 460-65. And in *Hildwin*, the Court held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U.S. at 640-41. *Hurst* overruled those decisions, but only "to the extent they allow *a sentencing judge* to find an aggravating circumstance, independent of a jury's factfinding, that is *necessary* for imposition of the death penalty." 136 S. Ct. at 624 (emphasis added). By limiting the manner in which it overruled *Hildwin* and *Spaziano*, *Hurst* demonstrated that it did not intend for all findings authorizing the imposition of a death sentence, including the weighing determination, to be subject to the Sixth Amendment rule of *Ring*.

There is accordingly no merit to Tsarnaev's claim that *Hurst* requires applying the beyond-a-reasonable-doubt standard to the ultimate sentencing determination. Tsarnaev purports to find support for that assertion in the following sentence from *Hurst*, which rejected the state's characterization of the jury's role under Florida's scheme: "'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.'" *Hurst*, 136 S. Ct. at 622 (quoting Fla. Stat. § 921.141(3)). But the Court referenced the weighing stage merely to illustrate the "central and singular role the judge play[ed] under Florida law." *Id.* Nothing in *Hurst*'s reasoning—much less its narrow holding that the jury must "find the *existence* of an aggravating circumstance," *id.* at 624 (emphasis added)—supports the sweeping proposition that the ultimate, discretionary weighing process in capital cases constitutes a "fact" that the jury must find beyond a reasonable doubt. That single sentence is far too thin a reed to support Tsarnaev's assertion that *Hurst* implicitly reversed the uniform holdings of this Court and every other court of appeals to have reached the question.

Tsarnaev's reliance (Br. 422) on *United States v. Gaudin*, 515 U.S. 506 (1995), is also misplaced. *Gaudin* applied the principle that "criminal convictions [must] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt," to the materiality element of 18 U.S.C. § 1001. 515 U.S. at 510. The Court held that a different result was not warranted because the element could be characterized as a "'mixed question of law and fact," particularly absent "historical support" for judicial determination of the question. *Id.* at 512. *Gaudin*, however, did not suggest that the ultimate judgment as to the appropriate sentence in a case is an "element" or a fact that must be found by the jury applying a reasonable-doubt standard. As noted above, this Court's post-*Gaudin* decision in *Sampson I* compels the contrary conclusion. Moreover, while the Supreme

Court has held that a fact that increases the penalty for a crime must be proved beyond a reasonable doubt, *see Apprendi*, 530 U.S. at 490, it has emphasized that, once facts are found, States and the federal government have flexibility concerning the manner in which sentencing determinations based on the facts are made. *See*, *e.g.*, *Kansas v. Marsh*, 548 U.S. 163, 175 (2006); *Gall v. United States*, 552 U.S. 38, 49-50 (2007).

2. *Kansas v. Carr* confirms that the beyond-a-reasonable-doubt standard does not apply to the weighing determination.

In *Kansas v. Carr*, 136 S. Ct. 633 (2016), decided one week after *Hurst*, the Supreme Court confirmed that the weighing process in capital cases does not constitute factfinding in any constitutionally relevant sense. In *Carr*, the Court held that the Eighth Amendment does not "require[] capital-sentencing courts . . . to affirmatively inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt." *Id.* at 642 (quotations omitted). In reaching that holding, the Court reaffirmed the discretionary nature of the weighing process and ultimate sentencing decision:

> [W]e doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination[.] . . . Whether mitigation exists . . . is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. *It would mean nothing*, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it.

Id. (emphasis added).[72] If the Supreme Court in *Hurst* had intended to impose the beyond-a-reasonable-doubt standard on the weighing decision, as Tsarnaev maintains, the Court would not have said the following week in *Carr* that instructing the jury to apply that standard would "mean nothing." *Id.*

3. Lower courts have overwhelmingly rejected Tsarnaev's reading of *Hurst*.

The only other court of appeals to have considered Tsarnaev's *Hurst* argument has rejected it. In *Underwood v. Royal*, 894 F.3d 1154 (10th Cir. 2018), *cert denied*, 139 S. Ct. 1342 (2019), a case Tsarnaev does not cite, the Tenth Circuit held that *Hurst* did not reverse prior circuit precedent holding that the *Apprendi/Ring* rule does not apply to the jury's ultimate weighing of aggravating and mitigating circumstances. *Id.* at 1186. The court explained that, "[a]lthough *Hurst* contains some preliminary discussion of Florida judges' authority to both find and weigh aggravating circumstances independently of the jury in capital cases, it invalidated Florida's scheme specifically 'to the extent [it] allow[s] a sentencing judge to find an aggravating circumstance . . . that is *necessary* for imposition of the death penalty.'" *Id.* (quoting *Hurst*, 136 S. Ct. at 622, 624) (original emphasis omitted, alternative emphasis added). The court accordingly concluded that "because *Hurst* did not directly address

[72] *See also Shafer v. South Carolina*, 532 U.S. 36, 51 (2001) (contrasting the jury's two roles under South Carolina law as "aggravating circumstance factfinder," where it "exercises no sentencing discretion itself," and as sentencer, where it renders "the moral judgment whether to impose the death penalty").

Apprendi's application to the weighing of aggravating and mitigating circumstances," it did not contravene circuit precedent holding that *Apprendi* does not apply to the weighing process. *Id.*; *see also Ybarra v. Filson*, 869 F.3d 1016, 1030-31 (9th Cir. 2017) ("We are highly skeptical" of the argument that *Hurst* requires Nevada's weighing determination to be made beyond a reasonable doubt because "the weighing determination is more akin to a sentence enhancement than to an element of the capital offense."); *United States v. Bazemore*, 839 F.3d 379, 393 (5th Cir. 2016) (per curiam) (noting in a non-capital case that *Hurst* "applies only to statutory schemes in which judge-made findings increase the maximum sentence that a defendant can receive"); *Garcia v. Davis*, 704 F. App'x 316, 324 (5th Cir. 2017) (unpublished) (rejecting habeas petitioner's claim that *Hurst* expanded *Ring* to require the state to prove beyond a reasonable doubt the absence of mitigating circumstances), *cert. denied*, 138 S. Ct. 1700 (2018).

The majority of district courts to have considered the *Hurst* claim Tsarnaev raises here have also rejected it. *See*, *e.g.*, *United States v. Christensen*, No. 17-cr-20037, 2019 WL 1976442, at *4 (C.D. Ill. May 3, 2019) (refusing to "read *Hurst* to require instruction that the jury make a finding about the relative weight of the aggravating and mitigating factors beyond a reasonable doubt"); *United States v. Ofomata*, No. 17-cr-201, 2019 WL 527696, at *6-7 (E.D. La. Feb. 11, 2019) (rejecting the argument that, under *Hurst*, the weighing process mandated by the FDPA is a "fact" that must be found by a jury beyond a reasonable doubt); *Garcia v. Ryan*, No. cv-15-0025, 2017 WL

1550419, at *3 (D. Ariz. May 1, 2017) ("*Hurst* did not address the process of weighing the aggravating and mitigating circumstances."); *United States v. Con-ui*, No. 3:13-cr-123, 2017 WL 1393485, at *3 (M.D. Pa. Apr. 18, 2017) (noting that "[n]othing in *Hurst*" invalided the court's previous conclusion that the weighing process is not a "fact" under *Ring* and *Apprendi*); *Runyon v. United States,* No. 4:08-CR-1603, 2017 WL 253963, at *46-47 (E.D. Va. Jan. 19, 2017) (rejecting an argument that *Hurst* requires that the jury make the weighing determination beyond a reasonable doubt), *appeal filed*, No. 17-5 (4th Cir.); *United States v. Roof*, 225 F. Supp. 3d 413, 419 (D.S.C. 2016) (rejecting argument that *Hurst* required reversal of Fourth Circuit precedent holding that the jury need not find that aggravating factors outweighed mitigating factors beyond a reasonable doubt); *United States v. Sanchez*, No. 1:12-CR-155, 2016 WL 4769722, at *2 (D. Idaho Sept. 12, 2016) (distinguishing *Hurst*).

Of the two district court cases Tsarnaev relies on (Br. 423 n.160), only one clearly states that *Hurst* requires applying the beyond-a-reasonable-doubt standard to the weighing process. *See Smith v. Pineda*, No. 1:12-CV-196, 2017 WL 631410, at *3 (S.D. Ohio Feb. 16, 2017). In the other case, *United States v. Fell*, No. 5:01-CR-12 (D. Vt. May 1, 2017), the court relied on *Hurst* to hold that the Sixth Amendment's Confrontation Clause applies to the jury's selection stage finding of non-statutory aggravating and mitigating factors, but the court did not hold that the ultimate weighing of those factors is a "fact" that must be found beyond a reasonable doubt. *See United States v. Fell*, 2017 WL 10809985, at *5 (D. Vt. February 15, 2017) (previous

decision in the same case holding that "[t]he decision about whether these factors outweigh the defense factors is a normative, moral determination, not a factual finding"). Accordingly, there is virtually no support for Tsarnaev's expansive interpretation of *Hurst*, and this Court should reject it.

XI. The Jury Instructions Regarding Deadlock Did Not Unconstitutionally Coerce the Jury into Recommending the Death Penalty.

Tsarnaev contends (Br. 425-35) that the district court erred by not instructing the jury that its failure to reach a unanimous recommendation on the death penalty would result in the court automatically imposing a life sentence without the possibility of release. As Tsarnaev acknowledges (Br. 430), the Supreme Court has held that capital defendants are not entitled to an instruction on the consequences of a jury deadlock. *Jones v. United States*, 527 U.S. 373, 381-82 (1999). In light of *Jones*, Tsarnaev does not contend that the district court's refusal to instruct the jury on the consequences of deadlock, standing alone, constituted error. Rather, he argues that the jury was misled by alleged inconsistencies in the instructions at different stages. Specifically, Tsarnaev argues (Br. 431) that, because the jury was instructed that a lack of unanimity on eligibility-stage findings would result in an automatic sentence of life without release, the jury was misled into believing that a deadlock at the sentence-selection stage would *not* result in a life sentence, but in a new capital sentencing hearing before a different jury. That misimpression, Tsarnaev contends, could have had an unconstitutionally coercive effect on jurors, who may have compromised on a

death sentence in order to spare the victims from the emotional trauma of a second sentencing proceeding. Br. 433-35.

Because Tsarnaev did not raise his inconsistency argument in district court, he cannot prevail unless he shows plain error. Fed. R. Crim. P. 52(b). There was no error, plain or otherwise, because the jury instructions did not lead the jury to believe that deadlock on the penalty recommendation would result in a retrial before a second jury. And even if they did, Tsarnaev cannot show any likelihood of juror coercion because the district court instructed the jurors repeatedly that each individual juror was to make his or her own determination as to the appropriate penalty. Finally, Tsarnaev cannot show that the asserted error affected his substantial rights because the instructions that he claims should have been given would not necessarily have helped him.

A. Background

1. The Supreme Court's decision in *Jones*

The FDPA provides that "[u]pon 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." 18 U.S.C. § 3594. In *Jones*, the Supreme Court interpreted § 3594 as requiring the sentencing determination to pass to the district judge, for the imposition of a sentence other than the death penalty, whenever the jury fails to reach a unanimous verdict on punishment. *Jones*,

527 U.S. at 380-81. Thus, under *Jones*, if a capital sentencing jury deadlocks, the district judge imposes a non-capital sentence—there is no mistrial or second penalty phase before a new jury.

Jones further held that district courts are not required to instruct juries on the consequences of deadlock. *Jones*, 527 U.S. at 381. The Court rejected the defendant's claim that the omission of such an instruction misled the jury about its role in capital sentencing. *Id.* The Court explained that such an instruction "has no bearing on the jury's role" because it addresses only "what happens in the event that the jury is unable to fulfill [that] role." *Id.* at 382. The Court emphasized that the "very object" of the jury system is to "secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Id.* (quotations omitted). "[I]n a capital sentencing proceeding," the Court explained, "the Government has a strong interest in having the jury express the conscience of the community on the ultimate question of life or death," and instructing the jury about the consequences of deadlock "might well have had the effect of undermining" those important interests. *Id.* (quotations omitted). Accordingly, because of the "legitimate reasons for not instructing the jury as to the consequences of deadlock," the Court held that such an instruction is not required under the Constitution, the FDPA, or the Court's supervisory powers. *Id.* at 384; *see also id.* at 383-84 (finding "persuasive" a state court decision holding that instructing on the consequences of deadlock amounts to "an open invitation for the jury to avoid its responsibility and to disagree" (quotations omitted)).

2. Proceedings below

Before the penalty-phase jury deliberations, Tsarnaev requested that the district court instruct the jury that the court would impose a sentence of life imprisonment without the possibility of release if, after weighing the aggravating and mitigating circumstances, the jury could not unanimously agree on a sentencing recommendation. *See* Doc. 1412-1 at 31. Tsarnaev's proposed instruction stated:

> 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.

Id.

Tsarnaev acknowledged that *Jones* had "authorized district courts" to refuse such instructions, but he urged the district court to give the instruction in this case as a matter of "discretion." 25.App.11610. He claimed that, without the instruction, jurors might "wrongly assume that a failure to agree on sentence would require the case to be retried before a new jury." *Id.* at 11611. Tsarnaev contended that this mistaken belief would have an "extraordinarily coercive" effect on jurors, who would face pressure to give in to a majority of the jury in order to avoid "put[ing] the victims and the survivors and the entire community through this entire case again." 19.App.8819. Tsarnaev did *not* argue that his requested instruction was necessary to prevent confusion allegedly caused by other instructions, such as the instructions that

informed the jury of the consequences of deadlock regarding the gateway and statutory aggravating factors.

The district court rejected Tsarnaev's proposed instruction. 22.App.10336. The court reasoned, based on *Jones*, that the instructions should "encourage unanimity" to the extent that such unanimity can be achieved consistent with "each juror's sound judgment." *Id.* The court explained that Tsarnaev's proposed instruction could "undercut[]" the "process anticipated by the statute" by effectively empowering "one juror" to "simply decid[e] that the decision was his" without sufficiently engaging in the deliberative process. 22.App.10336-37. The court noted that it would accommodate Tsarnaev's concerns about potential coercion by giving "a very strong instruction" that "each individual juror must give his or her own [verdict] and not agree just to agree with others." *Id.* at 10339-40.

Following the penalty-phase evidence, the district court instructed the jury that it must determine whether the government had established beyond a reasonable doubt at least one of the mental states specified in 18 U.S.C. § 3592(c) (*i.e.*, the "gateway factors") and at least one of the "statutory" aggravating factors enumerated in the FDPA, 18 U.S.C. § 3593(e). 19.App.8663-69. The court explained that, if the jury did not unanimously find one of the gateway factors, or one of the statutory aggravating factors, then the court would sentence Tsarnaev to life imprisonment on that count:

> [F]or 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 . . . as to that capital count is over, and I will impose a mandatory sentence of life imprisonment without the possibility of release.

19.App.8666; *see also* 19.App.8669 (similar instruction for statutory aggravating factors); Add.81 (verdict form providing that "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"); Add.85 (same as to statutory aggravating factors).

The district court further instructed the jury that, if the jury unanimously found at least one "gateway" factor and at least one statutory aggravating factor, the jury should then consider whether all of the aggravating factors found to exist sufficiently outweighed all of the mitigating factors found to exist to justify a sentence of death. 19.App.8694-99; *see also* 18 U.S.C. § 3593(e). The court instructed the jury that, after the weighing process, if it unanimously found that death or life without the possibility of release was the appropriate sentence, it should mark the corresponding section of the verdict form. 19.App.8699. The court did not instruct the jury about the consequences of deadlock in the weighing process, but instead instructed the jury:

> 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 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.

19.App.8699-8700; *see also* Add.96 (verdict form allowing the jury to indicate that it was "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").

The district court also instructed the jurors repeatedly that each individual juror was to make his or her own determination as to the appropriate penalty. The court said that "[a]ny one of you is free to decide that a death sentence should not be imposed," 19.App.8698, that "[e]ach juror must individually decide" whether to recommend a death sentence, 19.App.8695, and that "no juror is ever required to impose a sentence of death," 19.App.8697.

B. Standard of review

A properly preserved claim that the jury instructions misled the jury is reviewed *de novo*, "taking into account the charge as a whole and the body of evidence presented at trial." *Sampson I*, 486 F.3d at 29, 32. But Tsarnaev did not raise below his current contention that the district court's instructions "affirmatively misled jurors about the consequences of a non-unanimous verdict." Br. 431. His claim is therefore reviewed only for plain error. *United States v. Boylan*, 898 F.2d 230, 249 (1st Cir. 1990).

To be sure, Tsarnaev did argue below that the district court should instruct the jury on the consequences of deadlock. But that is insufficient to preserve the claim he now raises on appeal because Tsarnaev sought that instruction on different grounds than the one he now asserts in this Court. *See* Fed. R. Crim. P. 30(d) (requiring a party "who objects to any portion of the instructions" to "inform the court of the specific

objection and the grounds for the objection before the jury retires to deliberate"); *see also id.* ("Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b)."); *Boylan*, 898 F.2d at 249 (rejecting a defendant's claim that his challenge to an instruction on one ground could preserve for appeal a challenge to the same instruction on a different ground). Tsarnaev's objection at trial focused on the reasons the district court should exercise its discretion to explain the consequences of deadlock on the final determination of sentence. *See* 25App.11608-12 (written memorandum in support of the proposed instruction); 22.App.10336-39 (oral argument); 19.App.8817-21 (renewing objection to district court's denial of the instruction). But Tsarnaev did not object to the instructions governing the "gateway" and statutory aggravating factors, nor did he argue that, because the jury was told about the consequences of deadlock at those earlier stages, the jury might be misled about the consequences of a non-unanimous verdict at the final stage and thereby be unconstitutionally coerced.[73]

By remaining silent about the allegedly misleading inconsistency in the instructions at different stages, Tsarnaev deprived the district court of any opportunity

[73] Tsarnaev's claim of error on appeal is entirely dependent on the allegedly misleading effect of the earlier instructions that, he claims, "explicitly told [the jury] the consequences of deadlock" at the gateway and aggravating factor stage. Br. 431. To the extent Tsarnaev raises on appeal any of the arguments he actually raised below—*i.e.*, arguments inviting the district court to exercise its discretion to instruct the jury on the consequences of a failure to reach a unanimous decision without relying on the allegedly misleading effect of the earlier instructions—those arguments are foreclosed by *Jones*.

to cure the supposed problem. As courts have recognized, a party's failure to raise potential problems in the instructions with sufficient clarity to allow for correction constitutes a failure to satisfy the specific-objection requirement. *See Jones*, 527 U.S. at 387-88 (noting that the requirement that "a party state distinctly his grounds for objection" to an instruction "enable[s] a trial court to correct any instructional mistakes before the jury retires and in that way help[s] to avoid the burdens of an unnecessary retrial"); *Boylan*, 898 F.2d at 249 (holding that objections to jury instructions "must be phrased with sufficient particularity to alert the trial court to the grounds asserted"); *United States v. Wheeler*, 540 F.3d 683, 689 (7th Cir. 2008) (reviewing for plain error where the defendant objected to the instruction's definition of "willfully" on "substantively different" grounds than the argument raised on appeal).

Here, the district court could have corrected the alleged error either by instructing on the consequences of deadlock at the weighing stage, as Tsarnaev contends it should have done, or by deleting the instructions about the consequences of deadlock at the earlier stages. That latter course would have been particularly appropriate because Tsarnaev's counsel conceded during the sentencing-phase closing argument that the government had proved the gateway and statutory aggravating factors and told the jurors to "check them off" on the verdict form. 19.App.8768. Tsarnaev's concession eliminated any realistic possibility of a deadlocked jury at those

stages, and thus deleting the deadlock instructions would not even arguably have affected the case.

To prevail on plain-error review, Tsarnaev must establish an "error" that is "plain," that "affect[s] substantial rights," and that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quotations omitted).

C. Tsarnaev cannot demonstrate plain error

1. Tsarnaev cannot show a reasonable likelihood that jurors drew a misleading inference from earlier instructions.

Tsarnaev contends that the district court's jury instructions improperly led the jurors to believe that, if they deadlocked on the penalty recommendation, there would be a mistrial and a second penalty phase before a different jury. The jury instructions contained no express statement to that effect. Tsarnaev argues, however, that the jury was likely to reach that conclusion by drawing a "negative inference" from the instructions at earlier stages (which informed the jury that deadlock would result in an automatic sentence of life without release) and that this erroneous inference was, in turn, likely to have a coercive effect on the jury's deliberations. Br. 431-34.

A defendant who claims on appeal that the jury instructions are susceptible to an erroneous interpretation must demonstrate "a reasonable likelihood that the jury has applied the challenged instruction[s]" erroneously. *Jones*, 527 U.S. at 390 (quotations omitted); *see also Boyde v. California*, 494 U.S. 370, 380 (1990) (noting that,

although "[t]here is . . . a strong policy" favoring "accurate determination of the appropriate sentence in a capital case," there is an "equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation"). Here, there is no reasonable likelihood that the jury applied the instructions incorrectly.

First, the jury instructions Tsarnaev challenges were correct statements of the law. The district court's instructions that Tsarnaev would be sentenced to life without release if the jury did not unanimously find one of the gateway factors, or one of the statutory aggravating factors, were accurate. 18 U.S.C. § 3594; *Jones*, 527 U.S. at 380-81. The district court's decision not to instruct on the effect of deadlock on the ultimate determination of sentence is explicitly authorized by *Jones*. Tsarnaev cites no precedent establishing that, if the court instructs on the consequences of deadlock at one stage, it must also do so at every other stage.

Second, Tsarnaev's argument that the jury was likely to draw a negative inference based on the instructions about the consequences of non-unanimity at the earlier stages is speculative at best. Neither the defense nor the district court noticed the alleged inconsistency or suggested that the jury might draw a misleading negative inference from it. That is strong evidence that the jurors did not make the negative inference Tsarnaev hypothesizes. The absence of a contemporaneous objection suggests that "the participants in the trial did not perceive the challenged instruction

in the manner [Tsarnaev] now proffers." *Waters v. Thomas*, 46 F.3d 1506, 1527 n.9 (11th Cir. 1995) (en banc).

Tsarnaev speculates (Br. 432) that the jury may have applied the negative-inference canon of statutory construction to infer that deadlock at the weighing stage would result in a retrial. But Tsarnaev places too much weight on this technical interpretive canon. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Brown v. Payton*, 544 U.S. 133, 143 (2005) (quoting *Boyde*, 494 U.S. at 380-81). Juries apply a "commonsense understanding of the instructions in light of all that has taken place at the trial," rather than "technical hairsplitting." *Id.* (quoting *Boyde*, 494 U.S. at 381). Tsarnaev's negative-inference argument relies on the kind of "technical hairsplitting" that jurors are presumed not to do.

Moreover, even assuming that the negative-inference canon of statutory construction applies to the interpretation of jury instructions (which it does not), and even assuming that jurors were aware of that canon (a dubious proposition, given that none of the jurors was a lawyer), the canon would not support Tsarnaev's argument. *See United States v. Vonn*, 535 U.S. 55, 65 (2002) (noting that the canon "is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives"); *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 939 (2017) (noting that the canon "applies only when circumstances support a sensible inference that the term left out must have

been meant to be excluded'") (quotations and brackets omitted). Here, nothing about the context of the instructions suggests that the omission of a consequences-of-deadlock instruction at the weighing stage was intended to signal that a deadlocked jury at that stage would trigger a mistrial and new penalty phase. Indeed, even indulging Tsarnaev's speculation that the jurors drew any inference from the omission, they were at least as likely to conclude that the consequences of deadlock would be the same as at earlier stages. In other words, the jurors were as likely to draw a positive inference from the earlier instructions as a negative one. In any event, given the complexities inherent in Tsarnaev's "negative implication" theory, and the lack of any authority supporting it, his claim of error is hardly "clear" or "obvious" within the meaning of the plain-error rule. *United States v. Olano*, 507 U.S. 725, 734 (1993) (quotations omitted).

The Supreme Court in *Jones* rejected a similar claim that a negative inference from an alleged inconsistency across multiple instructions misled the jury about the consequences of deadlock. The defendant in *Jones* argued that an alleged ambiguity in the instructions might have led the jury to believe that, if it failed to reach a unanimous sentence recommendation, the court might sentence the defendant to a sentence less severe than life without release. *Jones*, 527 U.S. at 387. But the Court rejected the defendant's negative-implication argument, holding that the defendant "parse[d]" the instructions "too finely" and that, considering the instructions as a whole, the inconsistencies and inferences the defendant relied on did not "create a

reasonable likelihood" of confusion over the effect of deadlock. *Id.* at 391-92. This Court should likewise reject Tsarnaev's argument that the district court's omission of his proposed instruction on the consequences of deadlock—an omission explicitly authorized by *Jones*—was rendered constitutionally infirm by ambiguous inferences allegedly arising from the court's earlier instructions.

2. Tsarnaev cannot demonstrate a reasonable likelihood that the instructions had an unconstitutionally coercive effect.

Even if the jurors mistakenly believed that a deadlocked jury at the weighing stage would result in a retrial, Tsarnaev cannot demonstrate that this misimpression was likely to have had an unconstitutionally coercive effect. Jurors who believed that deadlock would result in a retrial, rather than an automatic sentence of life without release, might well feel *less* pressure to agree with a majority view, since hanging the jury would merely defer the death penalty decision to a different jury rather than definitively decide the question.

Moreover, Tsarnaev cites no authority holding that an instruction that is consistent with Supreme Court precedent can be rendered unconstitutionally coercive by ambiguous negative inferences drawn from other instructions. To the contrary, the Court has held that even affirmative instructions that might be "ambiguous in the abstract" can be cured in light of other instructions. *See Jones*, 527 U.S. at 391; *Victor v. Nebraska*, 511 U.S. 1, 14-15 (1994) (problematic language in reasonable-doubt instruction was cured by the remainder of the instruction). Accordingly, it was well

within the district court's discretion to determine that it could mitigate Tsarnaev's concerns about coercion by giving "a very strong instruction" that "each individual juror must give his or her own [verdict] and not agree just to agree with others." 22.App.10339-40. Consistent with that determination, the district court instructed the jury:

> 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.

19.App.8698; *see also id.* ("[I]n carefully weighing these factors, you are called upon to make a unique, individual judgment about the sentence Mr. Tsarnaev should receive"); 19.App.8695 ("Each juror must individually decide whether the facts and circumstances in this case as to each count call for death as the appropriate sentence"); 19.App.8697 ("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.").[74] In

[74] Tsarnaev's counsel emphasized these instructions in closing argument. *See* 19.App.8771-72 ("Whether a sentence of death is justified is your own individual decision . . . . There is no law that ever requires that a sentence of death be imposed. That is an individual decision for each of you . . . . You have an obligation to deliberate with each other . . . to discuss with each other, [and] to hear each other's views. But the law values life, and you have no obligation to vote for death. Each one of you individually, each of you, is a safeguard against the death penalty. Each individual.").

light of these explicit instructions, which the jury is presumed to have followed, *see Richardson v. Marsh*, 481 U.S. 200, 206 (1987), there is no basis for Tsarnaev's speculation that any jurors were coerced into voting for a capital sentence to avoid causing a mistrial.

Tsarnaev notes (Br. 427) that some district courts have decided to inform juries of the consequences of deadlock under the FDPA, even after *Jones*, to avoid the risk of coercion. However, a district court's discretionary decision to give a particular jury instruction in one case is not binding on other courts, or even on the same court in a future case. And those decisions are in tension with the Supreme Court's observation that a jury charge on the consequences of deadlock threatens to undermine deliberations seeking unanimity. *Jones*, 527 U.S. at 382-84. As the Court explained, society has "a strong interest" in encouraging the jury to deliberate with a view toward reaching a unanimous sentencing decision, because such a verdict enables the jury to "express the conscience of the community on the ultimate question" of whether a death sentence should be imposed. *Id.* at 382 (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988)). There are therefore "legitimate reasons for not instructing the jury as to the consequences of deadlock," *id.* at 384, and omitting such an instruction is entirely consistent with the purposes and traditions of the jury system. *See id.*; *see also Scott v. Mitchell*, 209 F.3d 854, 877 (6th Cir. 2000) (noting that "[t]he Supreme Court has chastised such instructions as encouraging deadlock and undermining the strong governmental interest in unanimous verdicts").

Other courts of appeals have likewise recognized that refusing to instruct on the consequences of deadlock does not result in any improper coercion. *See*, *e.g.*, *United States v. Taylor,* 814 F.3d 340, 371-73 (6th Cir. 2016) (upholding a district court's refusal to tell the jury the consequences of deadlock in a capital case even when the deliberating jury asked what would happen if it could not reach a unanimous verdict); *Lyons v. Lee*, 316 F.3d 528, 534 n.8 (4th Cir. 2003) (finding no error in failure to instruct the jury on the consequences of deadlock where the jury asked whether its decision on recommending the death penalty had to be unanimous); *Coe v. Bell*, 161 F.3d 320, 339-40 (6th Cir. 1998) (rejecting claim that Constitution requires a jury instruction on the consequences of deadlock); *United States v. Chandler*, 996 F.2d 1073, 1088-89 (11th Cir. 1993) (same); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 309 (3d Cir. 1991) (same); *Evans v. Thompson*, 881 F.2d 117, 123-24 (4th Cir. 1989) (same). Tsarnaev's suggestion (Br. 434) that instructing on the consequences of deadlock is necessary to avoid juror coercion is contradicted by the case law.

3. Tsarnaev cannot show prejudice

Even assuming that the jury's recommendation was influenced by an erroneous understanding of the effect of deadlock, Tsarnaev cannot meet his burden of showing that any such error affected his substantial rights. *See United States v. Griffin*, 84 F.3d 912, 925 (7th Cir. 1996) (plain-error review is "particularly light-handed in the context of jury instructions," since it is unusual that any error in an instruction to which no party objected would be so great as to affect substantial rights).

Once again, *Jones* controls the outcome here. *Jones* concluded that, "even assuming that the jurors were confused over the consequences of deadlock," the defendant could not show prejudice because he could not establish that "the confusion necessarily worked to his detriment." *Jones*, 527 U.S. at 394. As the Court explained, "[i]t is just as likely that the jurors, loath to recommend a lesser sentence, would have compromised on a sentence of life imprisonment as on a death sentence." *Id.* The Court therefore determined that speculation about the instruction's potential effect on the jury was insufficient to establish prejudice. *Id.* at 394-95.

The same is true here. Even if the instructions erroneously led the jurors to believe that a deadlock would result in a new sentencing proceeding, Tsarnaev cannot establish that he was prejudiced. Assuming the jurors wanted to avoid a new sentencing proceeding, the instructions could just as easily have caused jurors to compromise on a sentence of life imprisonment, *see Jones*, 527 U.S. at 394-95, or they could have had no effect whatsoever. Moreover, there is no indication that any of the jurors in this case *in fact* felt pressure to change their votes—much less actually did so—based on the district court's unanimity instruction. *See Chandler*, 996 F.2d at 1089. To the contrary, the jury's verdict shows that the jury did not feel compelled to return a death verdict. The jury imposed a sentence of life imprisonment on 11 of the 17 death-eligible counts. Tsarnaev cannot demonstrate that the jury was in any way coerced in this case.

XII. The Cumulative Error Doctrine Does Not Justify Reversal.

Tsarnaev contends that, even if the errors alleged in issues V through XI do not individually require reversal, they do when "[c]onsidered cumulatively." Br. 436. "Individual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect." *United States v. Sepulveda*, 15 F.3d 1161, 1195-96 (1st Cir. 1993). But, as explained above, the district court committed no errors. And "cumulative-error analysis is inappropriate when a party complains of the cumulative effect of non-errors." *United States v. Stokes*, 124 F.3d 39, 43 (1st Cir. 1997).

Even where the Court finds multiple errors to be individually harmless, reversal based on cumulative error is justified only if the errors "call into doubt the reliability of the verdict and the underlying fairness of the trial." *United States v. Delgado-Marrero*, 744 F.3d 167, 210 (1st Cir. 2014) (quoting *United States v. Sanabria*, 645 F.3d 505, 519 (1st Cir. 2011)). Relevant considerations include "the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the district court dealt with the errors as they arose . . . ; and the strength of the government's case." *Sepulveda*, 15 F.3d at 1196. Here, even if the district court had committed two or more harmless errors, the errors would not combine to require reversal.

XIII. The District Court's Use of *Ex Parte* Proceedings to Address Sensitive and Classified Matters Did Not Violate the Fifth or Sixth Amendments.

Tsarnaev contends (Br. 441-43) that the district court violated his Fifth Amendment due process rights and Sixth Amendment right to counsel by conducting certain proceedings *ex parte* and *in camera*. This Court and other courts have recognized that such proceedings are appropriate for classified or otherwise confidential material. These proceedings actually help protect a defendant's due process rights by allowing the district court to review and to rule on the discoverability of information. They do not violate a defendant's right to counsel, which does not include a right to access otherwise undiscoverable information. And even if the district court had abused its discretion, any error would have been harmless because the *ex parte* information was neither favorable to the defense nor material.

A. Background

During the course of Tsarnaev's prosecution, the government filed a number of documents *ex parte*, and the district court held a number of *ex parte* conferences with the government, resulting in 26 *ex parte* docket entries, including four orders of the court (Docs. 146, 435, 575, and 600), 16 government motions or notices (Docs. 145, 147, 411, 413, 429, 435, 574, 576, 599, 600, 601, 638, 1151, 1523, 1524, and 1525), and six transcripts of *ex parte* conferences (Docs. 1667 through 1672). In February 2017, in anticipation of this appeal and with the district court's approval, the

government voluntarily disclosed 13 of these *ex parte* filings to the defense.[75] *See* Docs. 1713, 1717. Tsarnaev then filed a motion in the district court seeking disclosure of the remaining *ex parte* filings, Doc. 1719, but the district court denied that motion, Doc. 1732.[76]

Tsarnaev also filed a motion in this Court seeking disclosure of the *ex parte* materials. *See* Motion to Disclose (1st Cir. Apr. 7, 2017). In opposing that motion, the government argued that the *ex parte* materials were not discoverable. Opposition to Motion to Disclose, No. 16-6001 (1st Cir. Apr. 27, 2017). The government attached a sealed summary of each *ex parte* document with an explanation of why each should remain *ex parte*. Sealed.App.199-203. This Court denied Tsarnaev's motion for disclosure. Order, No. 16-6001 (1st Cir. Aug. 11, 2017). After Tsarnaev filed his opening brief, the government disclosed to Tsarnaev's appellate counsel a lightly redacted copy of an additional *ex parte* transcript (Doc. 1668) pursuant to a protective order. *See* Docs. 1763, 1770, 1771.

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[75] The government disclosed Docs. 145, 146, 411, 413, 429, 435, 436, 574, 575, 599, 600, 1670, and 1671, as well as the cover sheets of Docs. 576, 601, 1667, and 1669. *See* Doc. 1716

[76] Tsarnaev points out that the government "file[d] a 27th *ex parte* pleading (DE.1730) in support of its opposition to disclosure." Br. 441 n.168. The purpose of that pleading was to describe the documents that remained *ex parte* and to justify their continued non-disclosure.

B. Standard of review

Tsarnaev's constitutional challenge to the district court's *ex parte* procedures is reviewed *de novo*. *See United States v. Bresil*, 767 F.3d 124, 129 (1st Cir. 2014); *United States v. Lustyik*, 833 F.3d 1263, 1267 (10th Cir. 2016). *See* Doc. 1719 at 3 (preserving claim). Tsarnaev has not asked this Court to review the district court's conclusion that the materials submitted *in camera* were not discoverable, but to the extent the Court conducts such a review, it should review for abuse of discretion. *United States v. Bulger*, 816 F.3d 137, 153 (1st Cir. 2016).

C. The district court's *in camera* and *ex parte* review of classified and other sensitive information did not violate the Fifth Amendment's Due Process Clause.

This Court has recognized that, in a variety of contexts, the "requirements of confidentiality [can] outweigh the interest in adversarial litigation and permit a court to rule on an issue *in camera* and without the participation of an interested party." *United States v. Innamorati*, 996 F.2d 456, 487-88 (1st Cir. 1993). In particular, the Federal Rules of Criminal Procedure explicitly authorize *ex parte* proceedings when the governments submits material for the district court to determine whether it must be disclosed to the defense. *See* Fed. R. Crim. P. 16(d)(1) ("The court may permit a party to show good cause [for an order restricting discovery] by a written statement that the court will inspect ex parte."). And this Court has noted that "[t]he Classified Information Procedures Act, 18 U.S.C. App. §§ 1-16, permits the *ex parte* submission

of affidavits by the government in support of a protective order authorizing the non-disclosure of national security information." *Innamorati*, 996 F.2d at 487.

Tsarnaev's argument that the *ex parte* proceedings in this case violated the Due Process Clause fundamentally misunderstands how criminal discovery works. "In the typical case where a defendant makes only a general request for exculpatory material under *Brady* . . . , it is the [government] that decides which information must be disclosed." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). "Unless 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." *Id.* (footnote omitted). Where it is "fairly debatable" whether information is subject to *Brady* and the government wishes to withhold it, the government may submit the evidence to the court for *in camera* review. *United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003). But, far from violating due process, such procedures help *protect* a defendant's due process rights by allowing the district court to review the government's otherwise unilateral determination that materials are not subject to disclosure under *Brady*.

Aside from four documents involving a restitution-related issue that the district court never ruled upon, the documents that remain *ex parte* in this case all relate to either classified or otherwise sensitive material that the government submitted to the district court for its determination whether the material should be protected from disclosure or should instead be produced to the defense. Thus, the district court's *in camera* review provided an additional safeguard for Tsarnaev's due process rights.

In *Ritchie*, the Supreme Court specifically endorsed the kind of *in camera* review that took place here. There, a defendant charged with raping his minor daughter sought access to records compiled by the state's Children and Youth Services (CYS), but state law protected those records from disclosure. *Ritchie*, 480 U.S. at 43. The Supreme Court held that the defendant was entitled to see those records if they were "material" to his defense. *Id.* at 58, 60. But it specifically rejected the Pennsylvania Supreme Court's conclusion that "defense counsel must be allowed to examine all of the confidential information, both relevant and irrelevant, and present arguments in favor of disclosure." *Id.* at 59. Instead, the Court concluded that the defendant's "interest . . . in ensuring a fair trial can be protected fully by requiring that the CYS files be submitted only to the trial court for *in camera* review." *Id.* at 60.

Even before *Ritchie*, this Court upheld against constitutional attack the use of *ex parte* proceedings to protect national security information under the Classified Information Procedures Act (CIPA). *United States v. Pringle*, 751 F.2d 419, 426-28 (1st Cir. 1984). In *Pringle*, the district reviewed the classified information *ex parte* and *in camera*, determined that it was "neither relevant nor helpful to the defense," and issued orders protecting the information from disclosure. *Id.* at 426-27. This Court concluded that "the [district] court's *ex parte in camera* inspection of the documents was authorized under § 4 of CIPA and Federal Rule of Criminal Procedure 16(d)(1)." *Id.* at 427. And the Court "reject[ed] defendants' contention that the protective orders . . . violated their due process rights." *Id.* This Court "reviewed the classified

information" and "agree[d] with the district court" that it was neither relevant nor helpful the defense and "was, therefore, properly excluded." *Id.* at 427-28.

This Court has reviewed district courts' *ex parte* discovery rulings in other cases without any suggestion that *ex parte* proceedings are unconstitutional. *See, e.g.*, *Bulger*, 816 F.3d at 154; *United States v. Mehanna*, 735 F.3d 32, 65-66 (1st Cir. 2013). And other courts of appeals, like this Court, have upheld such proceedings against due process attacks. *See United States v. Campa*, 529 F.3d 980, 995 (11th Cir. 2008) (rejecting defendants' claim that "the ex parte hearing [to consider classified information] prejudiced them and violated their due-process rights"); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 130 (2d Cir. 2008) (defendant's exclusion from CIPA hearing "did not violate [his] due process right to be present at a crucial stage in his trial"); *United States v. Mejia*, 448 F.3d 436, 458 (D.C. Cir. 2006) (where court determines that withheld classified information is not favorable and material under *Brady*, there is no due process violation); *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (rejecting defendant's claim that CIPA's procedures "infringe upon procedural protections guaranteed him by the Fifth and Sixth Amendments"); *United States v. Aref*, 285 F. App'x 784, 793 (2d Cir. 2008) (unpublished) (rejecting due process challenge to *ex parte* review of classified information).

In the face of this unanimous authority, Tsarnaev cites three inapposite cases. In *United States v. Claudio*, 44 F.3d 10, 12 (1st Cir. 1995), the government affirmatively

submitted *ex parte* reports in an attempt to defeat a defendant's double jeopardy claim. This Court said the defendant's "position on appeal—that the government can *never* affirmatively use information in court *and* withhold it from the defense—may overstate the matter; but not by much." *Id.* at 14. In this case, unlike in *Claudio*, the government never attempted "affirmatively to use the sealed information in court as evidence." *Id.* And *Claudio* observed that the government may properly submit information for *in camera* review of whether it is "privileged or outside the scope of *Brady*" if there is "substantial cause" to keep it *ex parte*, such as a "state secret" or "danger to an ongoing investigation." *Id.* That is exactly what happened here.

The court in *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992), concluded that an *ex parte* bench conference during trial was inappropriate. But the problem in *Minsky* was the timing—the middle of trial. *Id.* The court acknowledged that an *earlier* "*in camera* review by the court was not only proper, but probably required." *Id.* *Minsky* does not suggest that the *in camera* review in this case was inappropriate.

Finally, in *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969), this Court found that "the prosecutor's ex parte conveyance of prejudicial information" to the court prior to sentencing "was a violation of due process." The information at issue in *Haller* related directly to the merits of the case, however, and this Court determined that there was "no practical necessity" for the information to be conveyed *ex parte*. *Id.* Like *Claudio*, *Haller* is inapposite because in this case the government did not try to

affirmatively use *ex parte* information against Tsarnaev. Rather, the government erred on the side of caution by submitting certain information that it believed was not discoverable to the district court for *in camera* review.

D. The *ex parte* proceedings did not violate the Sixth Amendment right to counsel.

Tsarnaev's claim (Br. 442) that the *ex parte* proceedings in this case violated his right to counsel also fails. The Sixth Amendment's guarantee of effective assistance of counsel can be violated where "judicial action before or during trial prevented counsel from being fully effective." *United States v. Morrison*, 449 U.S. 361, 364 (1981). But in order to show a Sixth Amendment violation, a defendant ordinarily must show that he was actually prejudiced. *Strickland v. Washington*, 466 U.S. 668, 694, 700 (1984). A presumption of prejudice arises only where there is a "complete denial of counsel," *United States v. Cronic*, 466 U.S. 648, 659 (1984); "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *id.*; or "counsel is called upon to render assistance under circumstances where competent counsel very likely could not," *Bell v. Cone*, 535 U.S. 685, 696 (2002) (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). Here, Tsarnaev can show neither a complete denial of counsel sufficient for prejudice to be presumed, nor any actual prejudice.

The district court's decision to conduct limited *ex parte* proceedings to gauge the discoverability of classified and other sensitive information did not deprive Tsarnaev of the assistance of counsel. The right to counsel does not include a right to

inspect otherwise non-discoverable information simply because counsel would like to litigate discovery issues. If it did, then other discovery obligations such as the due process obligation recognized in *Brady* would be largely unnecessary. The Supreme Court recognized in *Ritchie* that *ex parte* proceedings "den[y]" the defendant "the benefits of an 'advocate's eye.'" *Ritchie*, 480 U.S. at 60. Yet the Court found no constitutional problem because the trial court was "obligated to release information material to the fairness of the trial." *Id.* Counsel's lack of access to information that is *not* favorable and material cannot deprive a defendant of his right to effective counsel.

Other courts of appeals have rejected claims that *ex parte* proceedings in similar circumstances violated the right to counsel. For example, in *Lustyik*, 833 F.3d at 1269-70, the Tenth Circuit rejected the defendant's claim that his counsel's inability to review classified information prior to sentencing violated his right to counsel. In *United States v. Sedaghaty*, 728 F.3d 885, 910 (9th Cir. 2013), the court held that a protective order that prevented defense counsel from using classified information at trial "did not violate [the defendant's] right to counsel or his right to present a defense," because the order was "justified by compelling national security concerns and the restrictions were limited to a single document that was not relevant to the charges." And in *United States v. Moussaoui*, 591 F.3d 263, 288-89 (4th Cir. 2010), the court rejected the defendant's challenge to a protective order that prohibited his counsel from discussing classified exculpatory evidence with him. Where, as here, the

district court has determined that classified or sensitive information is not discoverable, a defendant is not deprived of assistance of counsel simply because his counsel could not review the non-discoverable information.

E. Because the withheld information was not favorable or material to his defense, Tsarnaev suffered no prejudice.

Aside from the information related to Ibragim Todashev (discussed in issue V above), Tsarnaev does not challenge the district court's determinations that the information it reviewed *in camera* was not discoverable, and he does not ask this Court to review the information *in camera*. Instead, he puts all of his eggs in one basket, asking this Court to drastically depart from precedent and hold that the *ex parte* proceedings below were reversible error *regardless* of whether they involved any information relevant or material to his defense. That claim fails.

But even if the *ex parte* proceedings below were somehow improper, Tsarnaev suffered no prejudice because the information that was withheld would not have affected the trial's outcome. The government disclosed 13 of the originally *ex parte* filings to the defense nearly two years before Tsarnaev filed his opening brief in his Court, yet Tsarnaev does not claim on appeal that any of those filings were improperly withheld or contained favorable and material information. He has therefore waived any challenge to the non-disclosure of those documents.

The government previously provided both this Court and Tsarnaev with a description of the remaining *ex parte* documents and a brief explanation for why they

should remain *ex parte*. Sealed.App.199-203. This Court can review those documents, as well as the classified documents to which they refer. That review will confirm that the district court correctly determined that the information withheld from Tsarnaev was not discoverable under Rule 16, *Brady*, or any other basis. Thus, even if the district court erred by conducting *ex parte* proceedings, any such error did not affect Tsarnaev's substantial rights and would not entitle him to a new trial.

XIV. The Grand and Petit Jury Wheels Did Not Underrepresent African-Americans.

Tsarnaev argues (Br. 444-52) that the grand and petit jury wheels in the Eastern Division of the District of Massachusetts underrepresented African-Americans, resulting in a violation of the fair cross-section requirements of the Jury Selection and Service Act, 28 U.S.C. § 1861, and the Sixth Amendment. He recognizes, however, that this Court's precedent "forecloses this claim." Br. 444. And although he argues that this Court's decisions "should be overruled," Br. 451, he has not asked the Court to hear this case en banc, nor does he explain how a panel of the Court could overrule circuit precedent.

A. Background

The Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1878, directs each federal district court to devise and execute "a written plan for random selection of grand and petit jurors," § 1863(a), and provides a procedural mechanism through which a criminal defendant may contest any "substantial failure to comply with" the

Act, § 1867(a). The Act provides that "[t]he 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. § 1863(b)(2).

Under the Plan for Random Selection of Jurors for the District of Massachusetts, the Jury Commissioner selects names at random from the resident list and transmits them to the Clerk of the Court, who then places at least 35,000 names into the Master Jury Wheel, ensuring that each county is "represented in proportion to the number of names on its resident lists." United States District Court for the District of Massachusetts Jury Plan for Random Selection of Jurors § 6(a) (Mar. 3, 2009), available at http://www.mad.uscourts.gov/caseinfo/pdf/general/030309%20Gen%20Ord%2009-2,%20with%20Jury%20Plan.pdf. At certain intervals, the Clerk draws a large number of names at random from the Master Jury Wheel and sends summonses and qualification forms to those persons. *Id.* § 6(a), (c). Qualified jurors who are not exempted or excused and who report when summoned become available for service as grand or petit jurors. *Id.* §§ 9, 10(c).

Before jury selection in this case, Tsarnaev moved to dismiss the indictment, arguing that African-Americans were underrepresented in the qualified jury wheel from which the grand jury was drawn. Doc. 506. He included evidence that, from 2011 to 2013, African-Americans made up 6% of the jury-eligible population of the District of Massachusetts's Eastern Division but only 3.94% of the qualified jury

wheel. 24.App.11251. Tsarnaev acknowledged that this Court's precedent required applying an absolute disparity analysis that would foreclose his claim. Add.423; Doc. 506 at 12. Consistent with that precedent, the district court concluded that the absolute disparity of 2.06% did not establish a prima facie claim under the Sixth Amendment or the Act. Add.422-23.

Thereafter, Tsarnaev filed another motion to dismiss the indictment on the basis that African-Americans were underrepresented in the qualified jury wheel from which his petit jury was drawn. Doc. 1080. He included evidence that African-Americans made up 6.14% of the jury-eligible population, but only 4.25% of the qualified jury wheel for his petit jury. 25.App.11520. The district court denied this motion, concluding that the 1.89% absolute disparity did not establish a prima facie claim. Add.481-82.

B. Standard of review

When addressing fair cross-section claims, this Court "review[s] the district court's findings of fact for clear error and its conclusions of law de novo." *United States v. Royal*, 174 F.3d 1, 5 (1st Cir. 1999).

C. Tsarnaev concedes that he cannot prevail under the absolute disparity analysis required by this Court's precedent.

Both the Sixth Amendment's guarantee of an "impartial jury" in a criminal case and the Jury Selection and Service Act give criminal defendants the right to have a petit jury selected from a venire representing a fair cross-section of the community.

Taylor v. Louisiana, 419 U.S. 522, 526 (1975); 28 U.S.C. § 1861. This right extends to the selection of the grand jury as well. *United States v. Hafen*, 726 F.2d 21, 22-23 (1st Cir. 1984); 28 U.S.C. § 1861.

In order to prove a violation of the Sixth Amendment's fair-cross-section guarantee, a defendant must first establish a prima facie case by demonstrating (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 v. Missouri*, 439 U.S. 357, 364 (1979). If a defendant establishes a prima facie case, the burden shifts to the government to show that "a significant state interest [is] manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group." *Id.* at 367-68.

Tsarnaev cannot satisfy the second requirement for establishing a prima facie case because he cannot show that African-Americans are underrepresented. This Court has adopted an "absolute disparity analysis," which "measures 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 6-7. The Court has consistently rejected claims of underrepresentation where the disparity is greater than the 2.06% and 1.89% absolute disparities present here. *See*

Royal, 174 F.3d at 10-11 (2.97% absolute disparity); *United States v. Joost*, 94 F.3d 640, 1996 WL 480215, at *8 (1st Cir. 1996) (table decision) (7.13% absolute disparity); *Hafen*, 726 F.2d at 23 (2.02% absolute disparity). *Cf. Duren*, 439 U.S. at 365 (prima facie violation was established where absolute disparity was 39%). Indeed, Tsarnaev acknowledges that the district court's denial of his fair cross-section claim was "dictated by *Royal* and *Hafen*." Br. 449.

Tsarnaev argues, however, that "*Royal* and *Hafen* should be overruled" and that "this Court should assess fair cross-section claims using comparative disparity, either alone or in conjunction with other statistical measures." Br. 451. He argues (Br. 449-51) that comparative disparity—which "is calculated by dividing the absolute disparity percentage by the percentage of the group in the population," *Royal*, 174 F.3d at 7—provides a better measure. And he asserts that the comparative disparities of 34.29% (grand jury) and 30.73% (petit jury) in this case would establish underrepresentation. Br. 451.

Tsarnaev does not explain how this panel can "overrule[ ]" *Royal* and *Hafen*. This panel is bound by those cases unless an intervening decision from the Supreme Court or the en banc court has overruled them or called them into question. *Royal*, 174 F.3d at 9; *United States v. Barbosa*, 896 F.3d 60, 74 (1st Cir.), *cert. denied*, 139 S. Ct. 567 (2018). And Tsarnaev points to no authority overruling or undermining *Royal* and *Hafen*. Nor has he requested an initial en banc hearing under Federal Rule of

Appellate Procedure 35. Therefore, this Court need not consider his claim any further.

Even if the en banc Court were to consider the issue, Tsarnaev has not shown sufficient reason to overrule *Royal* and *Hafen*. This Court has repeatedly "rejected comparative disparity analysis," and its "choice of absolute disparity over comparative disparity . . . is in keeping with the choices made by many of [its] sister circuits." *Royal*, 174 F.3d at 7-8. Tsarnaev raises no arguments that this Court has not already considered and rejected. *See id.* at 7-9; *Hafen*, 726 F.2d at 24.

This case would also be a poor vehicle for en banc review for two reasons. First, Tsarnaev cannot show that he would be entitled to relief even under the comparative disparity analysis adopted by other circuits. Some circuits have found no underrepresentation where the comparative disparities were higher than the 34.29% and 30.73% disparities here. *See United States v. Orange*, 447 F.3d 792, 798-99 (10th Cir. 2006) (noting the court had upheld selection procedures with comparative disparities of up to 59.84%); *Ramseur v. Beyer*, 983 F.2d 1215, 1232 (3d Cir. 1992) (en banc) (describing a comparative disparity of 40% as "borderline").

Second, even if Tsarnaev could show underrepresentation of African-Americans, he could not show that the underrepresentation resulted from "systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364. As this Court has noted, the Massachusetts residence lists provide "the broadest data available," and there is no evidence "that data more conducive to a fair cross section

are available." *United States v. Pion*, 25 F.3d 18, 23 (1st Cir. 1994). Moreover, "since the names included in the Master Jury Wheel are randomly drawn from the most inclusive data available, and random selection also determines to whom juror questionnaires are mailed, there can be no reasonable inference that the jury-selection process itself systematically excludes" African-Americans. *Id.*

Tsarnaev asserted below that the underrepresentation of African-Americans resulted from "systemic exclusion" because "Boston is under-represented in the municipal resident lists." Doc. 506 at 14; Doc. 1080 at 13. He provided no evidence for this claim, and a court-appointed expert has previously found no evidence of such underrepresentation in the residence lists. *See United States v. Green*, 389 F. Supp. 2d 29, 48, 59-60 (D. Mass. 2005), *overruled on other grounds by In re United States*, 426 F.3d 1 (1st Cir. 2005).

Moreover, there is evidence that the apparent underrepresentation of African-Americans in the Eastern Division's jury pool stems from other factors, including that summonses are more often undeliverable or unanswered "in areas that contain[ ] more poor or minority inhabitants."[77] *In re United States*, 426 F.3d at 4. *See Royal*, 174 F.3d at 5 (expert found that "summonses failed twice as often in areas in which more than 50% of the population is black than they did in areas in which blacks make up

[77] In 2007, the District of Massachusetts sought to mitigate the effect of undeliverable summonses by requiring the Clerk, for each summons returned as "undeliverable," to summon an additional person from the same zip code. Jury Plan § 8.

less than 2% of the population"); *Green*, 389 F. Supp. 2d at 62 n.60 (noting that "[t]he literature does suggest that minorities disproportionately fail to respond to jury summonses"). Whatever the exact causes, the apparent underrepresentation is not caused by a correctable systematic defect like those that the Supreme Court has found sufficient to establish a prima facie violation of the Sixth Amendment. *See Taylor*, 419 U.S. at 523 (women could serve on a jury only if they had previously filed a written declaration of willingness to do so); *Duren*, 439 U.S. at 359-60 (women were granted an automatic exemption from jury service upon request). Thus, even if this Court were to grant en banc review and adopt a comparative disparity analysis, Tsarnaev would not be entitled to relief.

XV. The Death Penalty Is Not Plainly Cruel and Unusual Punishment as Applied to Tsarnaev Based on His Age (19) at the Time of His Offenses.

Tsarnaev's final claim is that this Court should vacate his death sentence because he "was just 19 years old when he committed the crimes" in this case. Br. 453. He asks this Court to "hold that those who commit their crimes as 'emerging adults,' when they [a]re under 21 years old, are categorically exempt from the death penalty." *Id.* Tsarnaev failed to preserve this argument below, and it is effectively foreclosed by *Roper v. Simmons*, 543 U.S. 551 (2005), which drew a bright line for death eligibility at age 18. Tsarnaev's arguments do not support his contention that this Court should—or could—modify *Roper*'s bright-line rule, particularly on plain-error review.

A. Standard of review

Tsarnaev argued below that the FDPA was unconstitutional on several grounds that he recognized were foreclosed by this Court's precedent, including that the Act violates the Fifth Amendment's Indictment Clause and that it is applied in a racially and geographically disparate manner. Doc. 291. *See Sampson I*, 486 F.3d at 20-29 (rejecting such challenges to the Act). But he never argued that a death sentence was unconstitutional as applied to him based on his age. Because he forfeited this claim, the Court's review is limited to plain error. Fed. R. Crim. P. 52(b).

B. Because the Supreme Court has specifically held that the death penalty is permissible for those 18 or older at the time of their offense, it was not plain error to apply the death penalty to Tsarnaev.

In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Supreme Court held that the Eighth Amendment "forbid[s] imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." The Court found evidence of a "national consensus against the death penalty for juveniles." *Id.* at 564. At the time, 30 states prohibited the death penalty for juveniles—18 states by "express provision or judicial interpretation" and 12 states by "reject[ing] the death penalty altogether"—and "in the 20 States without a formal prohibition on executing juveniles, the practice [wa]s infrequent." *Id.*

In concluding that the death penalty was a disproportionate punishment for juveniles, the Court noted "[t]hree general differences" between adults and those

under 18 that justified its holding. *Roper*, 543 U.S. at 569. First, adolescents often demonstrate a "lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions." *Id.* (quotations omitted). Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* Third, "the character of a juvenile is not as well formed as that of an adult," meaning that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult." *Id.* at 570.

Roper recognized that "[d]rawing the line at 18 years of age" was "subject . . . to the objections always raised against categorical rules." *Roper*, 543 U.S. at 574. "The qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Id.* But "[t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood," and it was, the Court concluded, "the age at which the line for death eligibility ought to rest." *Id.*

Because *Roper* clearly drew the line for death eligibility at age 18, Tsarnaev cannot show that it was error—much less a "clear or obvious" error—to impose a death sentence on him. *United States v. Marcus*, 560 U.S. 258, 262 (2010) (quotations omitted). And even if Tsarnaev had preserved this claim, it would fail on de novo review. To accept Tsarnaev's argument would require more than an extension of *Roper*'s reasoning to a new situation. *Cf. Los Angeles County, Cal. v. Humphries*, 562 U.S. 29, 38 (2010) (noting that "[a] holding . . . can extend through its logic beyond the

specific facts of the particular case"). It would require this Court to say that *Roper* drew the line in the wrong place. "[T]his court normally is bound by a Supreme Court precedent unless and until the Court itself disavows that precedent." *United States v. Richards*, 456 F.3d 260, 262 (1st Cir. 2006). Indeed, even where Supreme Court precedent "appears to rest on reasons rejected in some other line of decisions," *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989), or rests on "increasingly wobbly, moth-eaten foundations," *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (quotations omitted), it remains the "Court's prerogative alone to overrule one of its precedents," *id.*

Tsarnaev contends that "[t]wo major changes" in the 14 years since *Roper* "have altered the justification for a strict age-18 cutoff." Br. 456. First, he asserts that "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." *Id.* But Tsarnaev cannot point to scientific research regarding brain maturation that is substantially different from the research available when *Roper* was decided. *See Roper*, 543 U.S. at 569, 573 (citing scientific sources). He first points to a May 2017 report by the United States Sentencing Commission entitled "Youthful Offenders in the Federal System," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170525_youthful-offenders.pdf. That report states that "[t]he contribution that neuroscience has made to the study of youthful offending is significant and continues to evolve," and it notes that

"researchers agree that [brain] development continues into the 20s." *Id.* at 6-7. The report, however, relied primarily on studies conducted in 2002 and 2005, at or before the time of *Roper*. *Id.* at 6-7 & nn. 29-32. And the report did not conclude that offenders between the ages of 18 and 20 should be subject to lower penalties than those age 21 or older. It simply cited the relevant research to explain why, "for purposes of this study," the Sentencing Commission "defined youthful offenders as federal offenders 25 years old or younger at the time of sentencing." *Id.* at 5.

Next, Tsarnaev points to the American Bar Association's resolution calling for the prohibition of capital punishment for those younger than 21 at the time of their offenses. Am. Bar Ass'n Resolution 111 (2018), available at https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/111.pdf. The resolution asserts that "the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development," though it admits that "there were findings that pointed to this conclusion prior to 2005." *Id.* at 6-7. In fact, the Supreme Court was fully aware at the time of *Roper* that "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. Yet the Court still concluded that 18 was an appropriate age at which to draw the line. *Id.* The ABA's contrary view does not indicate that *Roper* was wrongly decided.

Second, Tsarnaev contends that there is a "growing national consensus against the death penalty" for offenders between the ages of 18 and 20. Br. 460. He is

incorrect. In fact, as one of Tsarnaev's sources points out, not a single state with an active death penalty scheme prohibits the death penalty for 18- to 20-year-olds.[78] 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, 148 n.11 (2016), available at https://socialchangenyu.com/wp-content/uploads/2016/06/eschels-compliment-piece_clean-copy_6-14-16.pdf. The best Tsarnaev can do is point out that "[t]wenty-one jurisdictions do not have the death penalty at all," Br. 461, but that hardly demonstrates a consensus with respect to 18- to 20-year-old offenders.

Additionally, as another of Tsarnaev's sources points out, "by exempting eighteen- to twenty-year-olds from the death penalty, the United States would be taking an unusual legal stance with respect to prevailing international norms." Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 159 & n.120 (2016). Only Cuba and Iran draw the line at age 21. *Id.* Indeed, *Roper* noted that its holding was supported by the United Nations Convention on the Rights of the Child, which prohibits capital punishment "for crimes committed by juveniles under 18." *Roper*,

[78] In 2017, a Kentucky trial court held that the death penalty is unconstitutional for offenders younger than age 21, but that decision is currently under review in the Kentucky Supreme Court. *See Commonwealth v. Bredhold*, No. 14-CR-161 (Fayette Circuit Court, 7th Div. Aug. 1, 2017).

543 U.S. at 576. Tsarnaev's position is therefore inconsistent even with the international consensus that *Roper* found "instructive." *Id.* at 575.

Unable to show a legislative consensus against the practice, Tsarnaev asserts that the death penalty is rarely imposed on those under 21. Br. 463. But the data on which he relies do not support that claim. According to Tsarnaev's own source, of the 28 states that executed at least one adult between 2001 and 2015, 15 of those states executed offenders who were between 18 and 20 years old at the time of their offenses. Eschels, *Data & the Death Penalty*, at 152. This shows that more than half of the states that used the death penalty during that period applied it to 18- to 20-year-olds, even though that three-year age window is only a small fraction of the total adult population. The same article indicates that 18- to 20-year-olds accounted for 17.8% of total executions between 2001 and 2015, *id.*, and the data upon which the article relied show that 18- to 20-year-olds accounted for about 18.8% of the total arrests for murder and non-negligent homicides in 2010. *See* Howard N. Snyder, Bureau of Justice Statistics, U.S. Dep't of Justice, Arrest in the United States, 1990-2010, at 17-18 (2012), http://www.bjs.gov/content/pub/pdf/aus9010.pdf (2116 of 11,201 such arrests). This suggests that the states apply the death penalty to 18- to 20-year-olds at a rate closely proportionate to their percentage of the overall relevant criminal population.

Finally, Tsarnaev points out that from 2001 to 2015, "[a]pproximately 78% of executions carried out . . . on those who had been emerging adults at the time of their

crimes occurred in just four states: Texas, Oklahoma, Virginia, and Ohio." Br. 463. Considering that three of those same states led the way in executions of those 21 years old and older, however, this is hardly surprising. *See* Eschels, *Data & the Death Penalty* at 152 (noting that "the top four full-adult executing states (which were the same, save the substitution of Florida for Virginia) accounted for . . . 61.17% of executions"). And mere geographic concentration does not demonstrate a nationwide consensus against applying the death penalty to 18- to 20-year-old offenders. Indeed, more than half the states that used the death penalty between 2001 and 2015 executed at least one person who was 18, 19, or 20 years old at the time of his offense. *Id.*

Roper held that 18 is "the age at which the line for death eligibility ought to rest." *Roper*, 543 U.S. at 574. Tsarnaev has not pointed to scientific or consensus-related data that undermines this conclusion, and even if he did, it would not provide grounds for this Court to take the extraordinary step of saying that *Roper* drew the wrong line. *See Khan*, 522 U.S. at 20. At the very least, Tsarnaev cannot show that the district court committed clear or obvious error by failing to take that step *sua sponte*.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the Court's order granting the government leave to file an oversized brief because this brief contains 101,283 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the 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 Garamond 14-point type.

s/ William A. Glaser
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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2019, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ William A. Glaser
WILLIAM A. GLASER