No. 15-1503

In the Supreme Court of the United States

CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, CHARLES S. TURNER, LEVY ROUSE, & TIMOTHY CATLETT,
PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR FORMER PROSECUTORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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BRIEF FOR FORMER PROSECUTORS AMICI CURIAE SUPPORTING PETITIONERS

INTEREST OF AMICI CURIAE

Amici are former prosecutors who have dedicated years of service to the criminal justice system and have a continuing and active interest in the fair and effective administration of criminal trials.[1] As long recognized by this Court, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) (citing *Mooney* v. *Holohan*, 294 U.S. 103 (1935)). In implementing this fundamental principle, the Court found over fifty years ago in *Brady* v. *Maryland* that a prosecutor's failure to disclose "evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

From amici's many years of combined prosecutorial experience, they understand that basic fundamental fairness and public confidence in our justice system depend upon a prosecutor's faithful compliance with his or her affirmative duty of disclosure. Amici sub-

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[1] No counsel for a party authored this brief, in whole or in part, and no person other than amici or their counsel contributed any money to fund its preparation or submission. Counsel for amici provided timely notice of amici's intent to file this brief, and the parties have consented. A list of amici is appended to this brief.

mit this brief because the District of Columbia Court of Appeal's decision undermines the constitutional protections of due process and right to a fair trial on which that duty is based. At a time when our criminal justice system is coming under increasing challenge, now is scarcely the time to weaken the protections that due process requires.

SUMMARY OF ARGUMENT

This case presents precisely the type of evidence withholding that this Court has consistently recognized in its *Brady* jurisprudence as a violation of an accused's right to a fair trial mandated by the Due Process Clause. On October 1, 1984, the body of Catherine Fuller, a forty-eight-year-old mother of six, was found in an alley in Washington D.C.—she had been robbed, violently sodomized, and beaten to death. The pressure to find the person (or persons) who committed this heinous sodomy-murder was understandably enormous. There was, however, no physical evidence identifying a perpetrator. The government conducted about 400 interviews of civilian witnesses and, based on conflicting and ever-changing statements of a small subset of those interviews, the prosecution developed the theory that a group of thirteen young men committed the crime.[2] In 1985, the six petitioners were convicted of having killed Mrs. Fuller in a group attack.[3] The jury deliberated for

[2] Court of Appeals Brief of Petitioners Clifton Yarborough, Charles Turner, Levy Rouse, and Timothy Catlett ("Pets. C.A. Br.") 1-5, 24 (citing evidence in the record).

[3] Co-defendant Russell Overton has filed a companion petition for certiorari in *Overton* v. *United States*, No. 15-1504. An eighth individual, Steven Webb, was convicted, but has since died in prison. Pets. C.A. Br. 7 n.1.

seven days prior to convicting six defendants and acquitting two others. In the case of two other defendants, Christopher Turner and Russell Overton, the jury first reported that they could not reach a verdict and, only after being instructed by the court to continue to try, did the jury render a guilty verdict after two additional days of deliberations. As acknowledged by the lead prosecutor, the case against petitioners—which was based solely on conflicting testimony from witnesses with substantial credibility problems—was "[n]ot a good one," and "easily could have gone the other way." Pets. C.A. Br. 61 (citing testimony in record).

Years after the trial, it came to light that the government failed to disclose a plethora of favorable evidence to the defense, including, among other things, at least six eyewitness accounts suggesting that one or two alternative perpetrators, rather than a large group, committed the murder. That evidence included three eyewitness statements specifically identifying James McMillan, who was a known "violent criminal prone to assaulting and robbing vulnerable women in the area" where Mrs. Fuller was murdered. *Turner* v. *United States*, 116 A.3d 894, 915 (D.C. 2015). Prior to the trial, prosecutors had only disclosed to the defense that the street vendor who found Mrs. Fuller's body had observed two men in the alley—one of whom "appeared to be concealing an object under his coat"—who had fled when the police arrived. *Id.* at 908. Despite a specific request for the identities of those two men, prosecutors failed to disclose that Mr. McMillan was one of them. Pets. C.A. Br. 12; *Turner*, 116 A.3d at 908. Unbeknownest to the defense, two *other* witnesses also had reported to the government that Mr. McMillan was in the alley where

Mrs. Fuller's body was found shortly after her murder. *Turner*, 116 A.3d at 908. Those witnesses confirmed Mr. McMillan's "suspicious behavior" around the time Mrs. Fuller was murdered. *Id.*

Making matters worse, the prosecutors also failed to disclose to the defense the statements of three witnesses who had walked through the alley around the estimated time of Mrs. Fuller's death, and who each reported that they did not see any group of individuals. *Id.* Two of those witnesses also reported hearing groans coming from inside the small garage in the alley where Mrs. Fuller's body was found. *Id.* As acknowledged by the trial prosecutor, if the assault was taking place at that time it "could not have been committed by a large group of people." *Id.* at 915.

Despite the plain import of this exculpatory evidence in a case that the prosecutor has acknowledged was a weak one, the District of Columbia Court of Appeals concluded that this failure to turn over exculpatory information was not "material" under *Brady*. *Id.* at 926. That decision represents a serious departure from the principles set forth by this Court in its *Brady* line of cases, as well as common sense principles of fairness and justice. The Court should grant review to correct an egregious *Brady* violation. The heinous nature of the crime at issue here should not lead to a reduction of due process protections, but a more observant application of them.

In *United States* v. *Agurs*, this Court expressly found that "obviously exculpatory" evidence must be disclosed under *Brady* as a matter of "elementary fairness," and that prosecutors must be faithful to their duty that "justice shall be done." 427 U.S. 97, 107, 110-11 (1976) (internal quotation marks omitted). Indeed, we are not aware of a single decision that has

found undisclosed eyewitness identification of an alternative perpetrator at a crime scene immaterial under *Brady*.

The Court also has consistently made clear that to prevail on a *Brady* claim, petitioners need *not* show that they "more likely than not would have been acquitted had the new evidence been admitted." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016) (citing *Smith* v. *Cain*, 132 S. Ct. 627, 629-31 (2012)) (internal quotation marks omitted). Rather, petitioners "must show only that the new evidence is sufficient to 'undermine confidence' in the verdict." *Id.* Plainly, under the salient facts, that standard has been met here.

Finally, in conducting its materiality analysis, the Court of Appeals also expressly disregarded highly probative post-trial events, specifically Mr. McMillan's post-trial conviction for a shockingly similar sodomy-murder that took place just three blocks from the alley where Mrs. Fuller's body was found. *Turner*, 116 A.3d at 917-18. In excluding such evidence, the Court of Appeals deepened a split in authority as to whether post-trial events can be considered in a *Brady* materiality analysis.[4] Amici believe that at least where, as here, post-trial events directly relates to and confirms the materiality of the withheld evidence, the principles that undergird *Brady* require that such evidence be considered and not simply disregarded.

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[4] *See* Pet. at 16-20 (citing *Apanovitch* v. *Bobby*, 648 F.3d 434 (6th Cir. 2011); *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001); *Wright* v. *State*, 91 A.3d 972 (Del. 2014); *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013); *State ex rel. Griffin* v. *Denney*, 347 S.W.3d 73 (Mo. 2011)).

Amici respectfully request that this Court grant petitioners' petition for a *writ of certiorari* to correct an egregious *Brady* violation that is contrary to well-established *Brady* precedent and threatens to undermine the *Brady* standard. The *Brady* concept is so essential to our system of criminal justice that it must be zealously guarded against attempts to pare it back—particularly at a time when the justice system is under challenge. This Court's review is also needed to resolve a split in authority regarding whether courts can consider post-trial events in determining the materiality of suppressed evidence under *Brady* and to provide uniform guidance to prosecutors and the lower courts where fundamental fair trial rights are at stake.

ARGUMENT

I. THE COURT OF APPEALS' MATERIALITY STANDARD IS INCONSISTENT WITH *BRADY* AND DOES NOT EFFECTIVELY PROTECT DUE PROCESS.

Under *Brady*, prosecutors have an "affirmative duty to disclose evidence favorable to a defendant." *Kyles* v. *Whitley*, 514 U.S. 419, 432 (1995). That obligation reflects the "special role played by the American prosecutor in the search for truth in criminal trials." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999); *see United States* v. *Nixon*, 418 U.S. 683, 709 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence."). Where the government withholds evidence favorable to the defendant, this Court has explained, the prosecutor abandons that assigned role and assumes instead "the role of an architect of a proceeding

that does not comport with the standards of justice." *Brady*, 373 U.S. at 87-88; *Kyles*, 514 U.S. at 432-33.

A violation of constitutional due process occurs where the withheld evidence is "material"—where there is a "'reasonable probability'" of "undermin[ing] confidence in the verdict." *E.g.*, *Kyles*, 514 U.S. at 434–35 (quoting *United States* v. *Bagley*, 473 U.S. 667, 678 (1985)); *see Smith*, 132 S. Ct. at 630. "The question [under *Brady*] is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial." *Kyles*, 514 U.S. at 434. In determining whether the withheld evidence was material, a reviewing court must weigh the effect of the suppressed evidence, individually and cumulatively, in light of the record presented at trial. *See*, *e.g.*, *id.* at 436 & n.10; *Bagley*, 473 U.S. at 683.

A. The Suppressed Evidence of Alternative Perpetrators Constitutes Quintessential *Brady* Material.

As detailed in the petition, the government failed to disclose extensive evidence favorable to the defense, including, among other things, multiple eyewitness accounts of an alternative perpetrator, Mr. McMillan, together with other eyewitness accounts that further undercut the prosecution's basic group-attack theory. Beginning at least as early as then-Judge Marshall's opinion in *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135 (2d Cir. 1964), decided a year after *Brady*, the "courts have long recognized" that such evidence about other potential perpetrators is "core *Brady* material" that must be disclosed. *See Watkins* v. *Miller*, 92 F. Supp. 2d 824, 846 (S.D. Ind.

2000) (citing *United States ex rel. Meers,* 326 F.2d at 138 (2d Cir. 1964)). Those decisions include:

- *Kyles* v. *Whitley*, 514 U.S. 419, 447-48 (1995) (evidence of key eyewitness's "affirmatively self-incriminating assertions"—supporting the theory of an alternative perpetrator—was material under *Brady*);
- *Williams* v. *Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (evidence about a second suspect to a crime is "classic Brady material");
- *DiSimone* v. *Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) (evidence that another person confessed to stabbing the victim was "clearly Brady material");
- *Mendez* v. *Artuz*, 303 F.3d 411, 416-17 (2d Cir. 2002) (per curium) (evidence of an alternative perpetrator with alternative motive was material under *Brady* and required reversal);
- *Clemmons* v. *Delo*, 124 F.3d 944, 949-52 (8th Cir. 1997) (evidence that an eyewitness saw someone else commit the murder was material, exculpatory evidence under *Brady*);
- *United States* v. *Robinson*, 39 F.3d 1115, 1116–19 (10th Cir. 1994) (evidence that eyewitness saw another person, whose description closely matched another witness rather than the defendant, pick up the cocaine should have been disclosed under *Brady*);
- *Cannon* v. *Alabama*, 558 F.2d 1211, 1215-16 (5th Cir. 1977) (evidence of an eyewitness who would positively identify an alternative perpe-

trator was material, exculpatory evidence under *Brady*); and

- *United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 136-40 (2d Cir. 1964) (evidence from two eyewitnesses identifying an alternative perpetrator committing and fleeing the scene of the robbery was "material" under *Brady*).

Indeed, amici are not aware of a single case that has found undisclosed evidence of an alternative perpetrator linked to the crime scene to be immaterial under *Brady*. Yet, in this case, the government withheld information concerning *two* alternative perpetrators who were known violent criminals and were specifically identified by witnesses as having been at the crime scene—both Mr. McMillan, and another individual, James Blue. *See Turner*, 116 A.3d at 908-10. It is difficult to imagine evidence that could be any more helpful to the defense than evidence supporting a conclusion that someone other than the defendant committed the crime—particularly where, as here, there is no physical evidence implicating any defendant.[5]

B. The Court of Appeals' Analysis of the Suppressed Evidence Is Inconsistent with *Brady* and Its Progeny.

Despite this jurisprudence, the Court of Appeals nevertheless found all the suppressed evidence, including the withheld alternative perpetrator evidence concerning Mr. McMillan, immaterial. In its sum-

[5] Notably, nearly all of the purported eyewitnesses called by the government at trial who claimed to have seen a large group of people fatally assault Mrs. Fuller have, under oath, recanted their testimony. Pets. C.A. Br. 40.

mary dismissal of the alternative perpetrator evidence, the Court of Appeals speculated, without foundation, that the jury would have more likely concluded that Mr. McMillan was another participant in the group attack, and it would have been "daunting for the defense to contend that McMillan committed the crime with just one or two accomplices." *Turner*, 116 A.3d at 925. The lower court further found that the suppressed evidence in its entirety "would not have directly contradicted the government's witnesses or shown them to be lying, and it did not tend to show that any given appellant was misidentified," because the suppressed evidence puts at issue the "basic structure of how the crime occurred" (*i.e.*, the prosecution's theory of a group attack versus a single-perpetrator attack). *Id.* at 926. The Court of Appeals, therefore, concluded that "[t]his makes the burden on appellants to show materiality quite difficult to overcome, because it requires a reasonable probability that the withheld evidence . . . would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Id.* (emphasis in original).

Based on an unbroken record of this Court and the lower Courts, the Court of Appeals undertook an analysis and applied a standard that was not within its authority. This Court has already rejected the "sufficiency of the evidence" approach employed by the Court of Appeals, explicitly stating in *Kyles*, that materiality "is not a sufficiency of evidence test." 514 U.S. at 434. The Court disagreed with the dissent for "assum[ing] that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." *Id.* at 435 n.8. The Court emphasized that the suppressed evi-

dence was still material under *Brady* even if it (i) "would have left two prosecution witnesses "'totally untouched,'" (ii) would not cause the jury to doubt *all* the eyewitnesses, and (iii) was "'perfectly consistent'" with the government's case. *Id.* (emphasis added).

A court cannot substitute its judgment for what the jury may have concluded had exculpatory, inconsistent evidence been presented. "One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. *See also Wearry*, 136 S. Ct. at 1006 ("Evidence qualifies as material when there is *any reasonable likelihood* it could have affected the judgment of the jury.") (citations and internal quotation marks omitted) (emphasis added). Accordingly, contrary to the finding of the Court of Appeals, "it is not necessary that 'every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed.'" *Bies* v. *Sheldon*, 775 F.3d 386, 399 (6th Cir. 2014) (quoting *Kyles*, 514 U.S. at 451).

Significantly, missing from the Court of Appeals analysis was a meaningful assessment of the impact the suppressed evidence would have had on the defense's strategy at trial. As the *Brady* rule recognizes, our criminal justice system has certain imbalances prior to the start of a criminal trial. Specifically, a prosecution generally has "tactical advantages" over the accused, including "greater financial and staff resources"; beginning the "investigation shortly after the crime has been committed when physical evidence is more likely to be found and when witnesses are more apt to remember events"; the ability to "force

third persons to cooperate"; and the ability "to search private areas and seize evidence" with probable cause. *Wardius* v. *Oregon*, 412 U.S. 470, 475 n.9 (1973) (internal quotation marks omitted). A defendant, on the other hand, often necessarily relies on his or her constitutional protections—including the *Brady* rule—to offset those advantages.

Alternative perpetrator evidence is powerful evidence to the defense. Not only can it be used to lay a foundation for the possibility that someone else committed the offense, *see Case* v. *Hatch*, 773 F. Supp. 2d 1070, 1084-85 (D.N.M. 2011), *vacated on procedural grounds*, 708 F.3d 1152 (10th Cir. 2013), but it can be used, among other things, to uncover leads and various defense theories, *see Banks* v. *Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995), question the certainty of prosecution witnesses on cross-examination, *see Case*, 773 F. Supp. 2d at 1088, undermine the jury's confidence in the adequacy of the State's investigation and theory, *see Mendez*, 303 F.3d at 415, and impeach the credibility of the prosecution's witnesses by presenting contradictory evidence, *see Jamison* v. *Collins*, 100 F. Supp. 2d 647, 695 (S.D. Ohio 2000), *aff'd*, 291 F.3d 380 (6th Cir. 2002).

Here, the materiality of the suppressed evidence to the defense strategy is further underscored by the defense counsel's specific request for the identity of the men observed in the alley. Although a lack of a request for information does not excuse the government's suppression of it, *see Strickler*, 527 U.S. at 282, "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs*, 427 U.S. at 1064. Without the suppressed alternative perpetrator evidence, none of the defendants had the ability to chal-

lenge the prosecutor's group-attack theory; instead, each was left to assert at trial that he was not a participant in the alleged group attack.

Moreover, the Court of Appeals' materiality analysis fails to take into account the weakness of the prosecution's case here. As stated by this Court, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113.[6] Had petitioners been given the opportunity to present evidence regarding Mr. McMillan, the evidence on which they were ultimately convicted may have appeared even less convincing in this case, which the lead prosecutor acknowledged was a close one. Pets. C.A. Br. 61.

The Court of Appeals' circumscribed view of a prosecutor's duty to disclose alternative perpetrator evidence runs counter to *Brady* jurisprudence, and the truth-seeking process and principles of fairness on which it is based.

C. The Court of Appeals Improperly Based Its *Brady* Materiality Determination On Its Assessment of the Credibility of the Evidence.

It is a bedrock of the American legal system that credibility determinations are questions for the fact-finder—in this case, the jury. *See*, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 386 n.13 (1964) ("Questions of

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[6] *See also Case*, 773 F. Supp. 2d at 1084 (citing *Banks*, 54 F.3d at 1518) (recognizing that a conviction only supported by the prosecution's inconsistent eyewitness testimony is "significant[ly] weak[]" and the verdict is "already questionable"); *Gantt* v. *Roe*, 389 F.3d 908, 913 (9th Cir. 2004) (holding that newly discovered information is material when it undermines a conviction based upon little physical evidence).

credibility, whether of a witness or a confession, are for the jury.") Even the year after *Brady* was decided, courts recognized that they should not "speculate as to the effect" withheld evidence would have had on a jury. *United States ex rel. Meers*, 326 F.2d at 140. Accordingly, this Court has explicitly rejected *Brady* materiality arguments that focus on what "the jury *could* have disbelieved" without any showing that the jury actually "*would* have done so." *Smith*, 132 S. Ct. at 630 (emphasis added).

Nevertheless, the Court of Appeals here focused its *Brady* analysis in part on what it thought a jury "might have suspected"—even though the appellate court did not have the benefit of observing the witnesses and evidence presented at trial. *Turner*, 116 A.3d at 924. The court ultimately dismissed the suppressed evidence because the alternative perpetrator theory it supported "would have been exceedingly implausible and difficult for the jury to accept." *Id.* at 925. The question under *Brady*, however, is whether, in the absence of the suppressed evidence, the defendant received a fair trial. *Kyles*, 514 U.S. at 434. A primary point of *Brady* is to prevent and preclude that type of appellate court analysis and judging of the evidence. The Court of Appeals' approach promotes impermissible relative credibility determinations and speculation on the part of prosecutors and judges and further underscores the need for this Court's confirmation on the proper application of *Brady* and its progeny. *See Smith*, 132 S. Ct. at 630 ("[T]he dissent['s] . . . various reasons why the jury might have discounted . . . undisclosed statements . . . merely leaves us to speculate about [what] . . . the jury would have believed."); *Lindsey* v. *King*, 769 F.2d 1034, 1040 (5th Cir. 1985) ("It was for the jury, not the

prosecutor, to decide whether the contents of an official police record were credible.").[7]

II. THIS COURT'S GUIDANCE REGARDING WHETHER POST-TRIAL EVENTS CAN BE CONSIDERED IN A *BRADY* MATERIALITY ANALYSIS IS NECESSARY.

As the petition explains, there is a split of authority over whether post-trial events can be considered in determining whether suppressed evidence is material under *Brady* and its progeny.[8] This Court's guidance is necessary. A clear articulation and understanding of the *Brady* materiality standard is of paramount importance; the legal standards upon which prosecutors and the courts rely must be clear in order "to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675; *see also United States* v. *Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (recognizing an "epidemic of *Brady* violations" that "[o]nly judges can put a stop to").

Amici respectfully submit that the District of Columbia Court of Appeals' categorical refusal to consider post-trial events in its *Brady* materiality analysis is inconsistent with the constitutional principles that undergird *Brady*. The focus of the *Brady* doctrine is fairness. *See United States* v. *Beasley*, 576

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[7] For the foregoing reasons, the Court should also grant the companion petition for certiorari filed in *Overton* v. *United States*, No. 15-1504.

[8] *See* Pet. at 16-20 (citing *Apanovitch* v. *Bobby*, 648 F.3d 434 (6th Cir. 2011); *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001); *Wright* v. *State*, 91 A.3d 972 (Del. 2014); *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013); *State ex rel. Griffin* v. *Denney*, 347 S.W.3d 73 (Mo. 2011)).

F.2d 626, 630 (5th Cir. 1978) ("*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation."); *United States* v. *Mahaffy*, 693 F.3d 113, 134 (2d Cir. 2012) ("*Brady* violations obscure a trial's truth-seeking function and, in so doing, place criminal defendants at an unfair disadvantage."). The disclosure of exculpatory evidence serves "to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Kyles*, 514 U.S. at 439 (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)). "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112. To ignore evidence that confirms the materiality of undisclosed evidence runs counter to those principles.

As stated in the Benchbook for U.S. District Court Judges—a practical manual for federal judges prepared by the Federal Judicial Center's Benchbook Committee—"the definition of 'materiality' necessarily is retrospective. It is used by an appellate court after trial to review whether a failure to disclose on the part of the government was so prejudicial that the defendant is entitled to a new trial." Section 5.06(B)(3)(a); *see also United States* v. *Coppa*, 267 F.3d 132, 140 (2d Cir. 2001) ("[T]he scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial.") Courts consider not only the direct impact of the suppressed evidence (*e.g.*, if it contradicts evidence offered at trial), but how the suppressed evidence could have been used by the defense and what further exculpatory information it may have uncov-

ered had it been disclosed. *See Leka* v. *Portuondo*, 257 F.3d 89, 101 (2d Cir. 2001) (*Brady* evidence "could have led to specific exculpatory information" if the defense undertook further investigation); *Banks*, 54 F.3d at 1519 (recognizing that "evidence in the hands of a competent defense attorney may be used 'to uncover other leads and defense theories'"). It is entirely consistent with the purpose of *Brady*—and often necessary—to "consider[] all available evidence uncovered following the trial" in performing this retrospective analysis. *State ex rel Griffin* v. *Denney*, 347 S.W.3d 73, 77 (Mo. 2011) (en banc).

This Court has recognized that post-trial events may be used in this probative way to show that suppressed evidence would have affected the outcome of the trial. In *Kyles*, the government suppressed self-incriminating statements by an adverse witness that could have been used to "attack[] the reliability of the investigation" and "would have supported the defense's theory that [the witness] was no mere observer, but was determining the investigation's direction and success." 514 U.S. at 446, 448. In assessing the materiality of the suppressed evidence, the Court stated that the "potential for damage from using" the statement was "*confirmed* by the prosecutor's admission at one of Kyles' *post-conviction* hearings, that he did not recall a single instance before this case when the police had searched and seized garbage on the street in front of a residence." *Id.* at 447-48 (emphases added).[9]

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[9] *See also Wood* v. *Bartholomew*, 516 U.S. 1, 7, 11 (1995) (finding that defense counsel's "candid acknowledgement" during post-conviction proceedings "that disclosure would not have affected the scope of his cross-examination" was of "great[] importance" in determining the materiality of the suppressed evidence).

Here, in its *Brady* analysis, the Court of Appeals refused to consider that Mr. McMillan (one of the alternative perpetrators whose identities were suppressed by the prosecution) was convicted of committing a similar sodomy-murder, because that particular crime occurred after petitioners' trial. *Turner*, 116 A.3d at 917. While post-trial events themselves, are of course, not suppressed evidence for purposes of *Brady*, they may be probative—as this Court has recognized—of the materiality of the evidence that *was* suppressed. *See Kyles*, 514 U.S. at 447-48. The use of post-trial events to show the likely effect the suppressed evidence would have had on the trial eliminates an element of the guesswork necessarily involved in a retrospective *Brady* materiality analysis and furthers *Brady*'s overarching goal of ensuring fair trials. As stated by this Court, the "proper standard of materiality" is the "justice of the finding of guilt." *Agurs*, 427 U.S. at 112.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 14, 2016

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W. Thomas Dillard served as the United States Attorney for the Northern District of Florida from 1983 through 1987, as the United States Attorney for the Eastern District of Tennessee in 1981, as an Assistant United States Attorney for the Eastern District of Tennessee from 1967 through 1976 and from 1978 through 1983, and as a United States Magistrate Judge for the Eastern District of Tennessee from 1976 through 1978.

John P. Flannery II served as an Assistant United States Attorney for the Southern District of New York from 1974 through 1979.

J. Alan Johnson served as the United States Attorney for the Western District of Pennsylvania from 1981 through 1989.

Steven H. Levin served as an Assistant United States Attorney and Deputy Criminal Chief for the District of Maryland from 2002 through 2008 and as an Assistant United States Attorney for the Middle District of North Carolina from 1999 through 2002.

Michael S. Pasano served as an Assistant United States Attorney for the District of Columbia and the Southern District of Florida from 1978 through 1985.

Terry L. Pechota served as the United States Attorney for the District of South Dakota from 1979 through 1981.

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