No. _____

IN THE
Supreme Court of the United States

RUSSELL L. OVERTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Brady v. Maryland*, 373 U.S. 83 (1963), evidence favorable to the defense is material, and constitutional error results from its suppression by the government, if "there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (per curiam) (quotations omitted).

In this case, the District of Columbia Court of Appeals required petitioner to show a reasonable probability that the suppressed evidence—including identifications of two potential alternative perpetrators, information suggesting that the crime was committed by a much smaller group than posited by the government, information calling into question the thoroughness and accuracy of the government's investigation, and evidence impeaching a purported eyewitness who testified against petitioner—"would have led the jury to doubt virtually everything" about the government's case. Applying that standard, the court rejected petitioner's *Brady* claim, even though the jury deadlocked repeatedly before finding him guilty and the prosecution itself acknowledged that the case "easily could have gone the other way."

The question presented is whether, consistent with this Court's *Brady* jurisprudence, a court may require a defendant to demonstrate that suppressed evidence "would have led the jury to doubt virtually everything" about the government's case in order to establish that the evidence is material.

PARTIES TO THE PROCEEDING

Petitioner is Russell L. Overton, appellant below.

Overton's co-defendants—Charles S. Turner, Christopher D. Turner, Levy Rouse, Clifton E. Yarborough, Kelvin D. Smith, and Timothy Catlett—also appellants below, are petitioning this Court separately for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

Respondent is the United States of America, appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Russell L. Overton respectfully requests a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 116 A.3d 894, and is reprinted in the Appendix to the Petition ("App.") at 1a-84a. The opinion of the Superior Court of the District of Columbia is unpublished but is reported at 2012 WL 3635827 and reprinted at App. 85a-139a.

JURISDICTION

The District of Columbia Court of Appeals issued its decision on June 11, 2015, App. 1a, and on January 14, 2016, denied a timely petition for rehearing and rehearing en banc, App. 140a. On March 24, 2016, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to May 13, 2016. On April 27, 2016, the Chief Justice further extended the time within which to file until June 10, 2016. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall … be deprived of life, liberty, or property, without due process of law … ." U.S. Const. amend. V.

INTRODUCTION

For more than half a century, this Court has held that the due process clause prohibits prosecutors from withholding material, favorable evidence from defendants, recognizing that such suppression renders the criminal process fundamentally unfair and subverts its truth-seeking function. Yet more than two decades after petitioner was convicted of murder, it emerged that the government had done exactly that—systematically withheld from him an array of critical exculpatory and impeachment evidence. Among other things, the government did not disclose an eyewitness statement identifying a man other than petitioner as the victim's lone assailant. The government did not disclose information from several other witnesses describing another man acting suspiciously at the murder scene and fleeing as the police arrived—even though the government knew that that individual was serially assaulting and robbing women in the neighborhood where the victim was robbed, beaten, and killed. And the government did not disclose evidence that one of the government's key "eyewitnesses" against petitioner had convinced another witness to lie to implicate another individual in the crime.

Armed with all of that suppressed evidence—and more—petitioner moved to vacate his conviction, asserting that the government had failed to fulfill its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, suppression of evidence violates a defendant's due process rights if there is any reasonable likelihood the evidence could have affected the judgment of the jury—i.e., if the evidence is

"material." This Court has made abundantly clear that *Brady*'s materiality standard is *not* a sufficiency-of-the-evidence test; the question instead is whether the suppression undermines confidence in the outcome of the defendant's trial. But the District of Columbia Court of Appeals in this case demanded that petitioner show that the evidence withheld would have rebutted virtually everything in the government's case against him, and, applying that standard, concluded that his trial was not unfair. That holding cannot be reconciled with *Brady* and this Court's subsequent decisions applying it.

The court of appeals' departure from the Court's *Brady* jurisprudence would be unacceptable in any case. But the substantial weaknesses in the government's case against petitioner make the significance of the court's legal error especially apparent here. The prosecution itself acknowledged that the case "easily could have gone the other way." The jury deadlocked repeatedly before finding petitioner guilty; it took more than forty or fifty votes, a declaration of impasse, and encouragement from the court to keep deliberating for the jury to reach a verdict. No physical evidence tied petitioner to the crime. The three purported eyewitnesses who implicated petitioner in the attack all had serious credibility problems. And the jury clearly did not fully credit the testimony proffered by two of them—the cooperating witnesses who were the centerpiece of the government's case—as the jury *acquitted* one of petitioner's co-defendants who both of those witnesses implicated in the crime. The government itself was "very skeptical" of the third purported eyewitness, who was only sixteen years old, used PCP, and re-

peatedly contradicted her own and others' accounts—and who would have been further impeached by suppressed evidence that she had persuaded another witness to lie to investigators in this case.

Only by distorting *Brady*'s materiality standard beyond recognition was the court of appeals able to conclude that the evidence withheld from petitioner in this case was not material. The values *Brady* protects—including the fairness, accuracy, and legitimacy of the criminal justice system—are too important to permit such an erosion to stand. Certiorari should be granted.

STATEMENT OF THE CASE

1. On October 1, 1984, Catherine Fuller was robbed, sodomized, and murdered in an alleyway garage near the intersection of Eighth and H Streets in Northeast Washington, D.C. App. 5a. Police found no physical evidence at the scene linking anyone to the crime. A2361-62; A11038.[1] Their investigation of Mrs. Fuller's murder was guided by an anonymous tip received at 2:45 a.m. the night of her death. A1370. The caller told police that he "knew about 7 or 8 subjects that hung in the alley" that "call themself [sic], The [sic] 8th and H Crew." *Id.* Over the next several days, police and prosecutors developed the theory that a large group of young people had attacked Mrs. Fuller. A2484; A2590.

2. The police ultimately arrested seventeen individuals in connection with Mrs. Fuller's murder;

[1] "A__" citations are to the Appendix in the D.C. Court of Appeals.

thirteen were indicted, including petitioner Russell Overton. *See* App. 5a, 119a-120a. All but one of the other defendants were teenagers. Overton was twenty-five at the time. Russell L. Overton, Superior Court of the District of Columbia, Criminal Complaint (Dec. 7, 1984), at 2. Three of the thirteen defendants eventually pleaded guilty, and two—Calvin Alston and Harry Bennett—agreed to testify for the government. App. 5a-6a. The remaining ten defendants, including Overton, went to trial in D.C. Superior Court in the fall of 1985. App. 6a.

a. With no physical evidence to tie any of the defendants to the crime, Alston and Bennett were "[a]t the center of the government's case." App. 6a. The case against Overton, in particular, came primarily from three purported eyewitnesses who claimed to have seen Overton participate in the attack—Alston, Bennett, and Carrie Eleby—all of whom had serious credibility problems. *See* App. 6a-8a. As the prosecution itself recognized, A1751; A2341; A2417, each of those witnesses lied under oath or offered wildly inconsistent testimony over time.

Alston and Bennett got numerous details about the crime wrong, changed their stories significantly as time passed, and differed on many key points. *See, e.g.*, App. 7a ("Bennett and Alston each had made prior inconsistent statements to the police and the grand jury regarding who was present in the park [near where Mrs. Fuller was attacked] and who participated in [the attack]."). Unsurprisingly, the jury did not credit everything Alston and Bennett said. The jury acquitted one of Overton's co-defendants, Alphonso Harris, who both Alston and

Bennett identified as an active participant in the crime. App. 12a; *see* A893-909; A5873-74; A6342-47.

Eleby was also an unreliable witness—so much so that lead prosecutor Jerry Goren himself was "very skeptical" of her testimony. A2417. Eleby used PCP, contradicted her own and others' accounts, could not keep names and dates straight, and claimed that she did not remember anything she had told the police or the grand jury. App. 7a; *see* A1005; A1343. Her story, too, changed dramatically over time. *See* A1001; A1005; A1660.

Two other witnesses also testified against Overton, but neither claimed to have witnessed the attack on Mrs. Fuller. The first, Melvin Montgomery, testified that he was in a park at 8th and H Streets on October 1, getting high and dealing drugs, and that he saw some of the defendants there, including Overton. A316; A328-32. Montgomery said that one of the defendants, Timothy Catlett, was singing a popular Chuck Brown song about "getting paid" and otherwise talking about "making money." A302; A341-42. Montgomery also testified that he heard someone—he did not know who—say they were going to "get" someone. A302-03. Montgomery testified that he then saw Overton point in the direction of H Street. Although Montgomery said he could see a woman in that direction, he did not know who that woman was or recall anything about what she looked like, and he did not know what Overton was pointing at. A303-04; A345; A346-47. Montgomery then saw a group leave the park and walk up 8th Street toward H Street; according to Montgomery, Overton left the park around the same time, but went in a

different direction, towards his home. A325; A336; A351. Montgomery did not see Overton, or anyone else, assault Mrs. Fuller. *See* App. 8a.

Like the other witnesses who testified against Overton, Montgomery's story shifted over time. During his first interview with the police, approximately three months after Mrs. Fuller's death, Montgomery maintained that he knew nothing about the murder. A319. He later changed course when he was brought back to the police station and told that if he did not tell the police about the crime he "would be involved" and "[t]hey could say [he] had a part of it." A321-22.

The other witness against Overton, Detective Daniel Villars, testified that he overheard co-defendant Christopher Turner, while in custody, say to Overton that they could not be charged because they had never touched Mrs. Fuller's body. App. 9a; *see* A690. As the government conceded during a later evidentiary hearing, that statement—even as described by the detective—could be understood as a denial of involvement in the crime. A1755. Indeed, Turner consistently maintained that he in fact was saying that he had never touched or even seen a body and that he was not present during the crime. A739-40. Detective Villars subsequently lied under oath while testifying in another matter and was placed on a list of officers who are not permitted to testify in any case. A1722; A2287-88.

Other evidence presented at trial suggested that Overton was not involved in the attack. Non-defendant Maurice Thomas—a purported eyewitness—testified that he saw many of the defendants assault a woman but did *not* see Overton in the

group, App. 8a-9a, even though Overton is "exceptional[ly]" tall and Thomas knew him personally, *Catlett v. United States*, 545 A.2d 1202, 1217 (D.C. 1988).[2]

Overton also presented an alibi defense, which was supported by three witnesses. App. 9a-10a. Marita Michaels, a friend, testified that Overton left the Eighth and H Street park drunk between 2:00 and 2:30 p.m. on the day of the crime. *Id.* And Overton's grandmother and sister both testified that he had come home drunk and was asleep at the time of Mrs. Fuller's murder. *Id.*

b. The case was submitted to the jury on December 9, 1985. App. 12a. After convicting six of Overton's co-defendants and acquitting two others, the jury announced that a unanimous verdict against Overton and one of his co-defendants, Christopher Turner, would be "impossible." A893-909. The court instructed the jury to keep deliberating. A910. After forty to fifty more votes, and further claims of impasse, the jury ultimately convicted Overton and Turner. A915-17; A925-47; A2045.

The D.C. Court of Appeals affirmed Overton's conviction on direct appeal. App. 3a.[3] He was sen-

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[2] Montgomery's testimony, described above, also pointed against Overton's involvement, as Montgomery testified that he saw Overton leave the park and head in another direction—away from the alley and toward his home. *See supra* at 6-7.

[3] The court of appeals, however, remanded to the sentencing court to vacate one of Overton's two felony murder convictions as well as the conviction for the predicate felony underlying the murder charge that was permitted to stand, leaving Overton convicted of one count of felony murder and the non-

tenced to thirty-five years to life in prison. Am. Sentencing Order (Nov. 23, 1988).

3. Overton and his co-defendants have consistently maintained their innocence. More than two decades after Overton was convicted, a Washington Post reporter investigating the case discovered a statement implicating an alternative perpetrator that had not been turned over to the defense. Discovery subsequently sought by Overton and his co-defendants after they petitioned to vacate their convictions revealed that the government had suppressed numerous pieces of exculpatory and impeachment evidence. App. 3a-4a. Among other things, the government withheld the following information:

a. *The Blue Evidence.* The government did not disclose an eyewitness statement that identified James Blue as Mrs. Fuller's lone killer. App. 21a-24a. Blue was "a habitual criminal" wholly unrelated to Overton or any of his co-defendants "who, by 1984, had served time for assault and had a record of arrests for rape, sodomy, and armed robbery." App. 21a-22a. Less than a month after Mrs. Fuller's murder, Ammie Davis told police that she and a friend were "present when the actual homicide took place," A1245, "in the alley off H Street," A1243-44. Davis said that they "saw [Blue] grab [the victim] by the back of the neck and pull her into the alley," and that "[h]e beat the fuck out of her." A1244.

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corresponding felony. *Catlett*, 545 A.2d at 1219. It was on resentencing thereafter that Overton received a sentence of thirty-five years to life. *See* Am. Sentencing Order (Nov. 23, 1988).

Davis's account was consistent with several independent facts known about the crime. Davis told police that Blue "just got out of jail the same day and killed her for just a few dollars. He got out of jail on Monday and killed her on Monday." A1243. Davis thus correctly noted that Mrs. Fuller was robbed at the time of the murder, and that the perpetrator made away with only a small amount of cash. *See* App. 22a. Davis also knew where and how Mrs. Fuller was killed, accurately stating that the murderer did not attack her with a knife or gun. *See id.* And Davis correctly identified the date of Mrs. Fuller's murder—Monday, October 1—which corresponds to the date that Blue was released from prison. *Id.*; A1299.

Lieutenant Loney, the police officer who interviewed Davis, sent his report recording her statement to the homicide office the same day it was given, but Loney's report was "lost in the shuffle" and did not turn up until August 1985, nine months later. A2307-08; A12315-16. Goren, the lead prosecutor, interviewed Davis on August 8 and 9, but he did not inform Overton or his co-defendants about Davis's statement. App. 23a. Days before Overton's trial began, Blue shot and killed Davis. App. 24a.

b. *The McMillan Evidence.* Several individuals told the police that they had seen James McMillan, a non-defendant, acting suspiciously at the murder scene, concealing something under his coat,[4] and

[4] This detail was significant because the evidence suggested that Mrs. Fuller was sodomized with an object, but the object was never found. App. 5a.

fleeing as the police arrived. App. 19a. "[T]he police knew that McMillan lived on 8th Street about three doors down from the alley [where Mrs. Fuller was killed] and that he had violently assaulted and robbed two other middle-aged women walking in the vicinity three weeks after Fuller's death." App. 19a-20a. The lead prosecutor deemed the information sufficiently important to pursue an interview with McMillan. Notes of AUSA Goren, Ex. A to Supp. Authority in Support of Mot. to Vacate, at 7. Yet the government never disclosed the McMillan identifications to the defense.[5]

c. *The Luchie Evidence.* Jackie Watts, Willie Luchie, and Ronald Murphy "told investigators that at around 5:30 p.m. on October 1, they happened to be walking through the alley and by the garage where Fuller was murdered." App. 18a. "Luchie and Watts heard the sound of groans coming from inside the garage." *Id.* "According to Luchie, both doors of the

[5] McMillan later committed a strikingly similar crime: He robbed, sodomized, and beat to death another woman mere blocks from the site of Mrs. Fuller's death. App. 20a-21a; *see* Paul Duggan, *Life Without Parole Ordered in D.C. Woman's Slaying*, Wash. Post, Oct. 2, 1993, at 2. At a 2012 postconviction hearing, a forensic pathologist testified that he "could not say the two murders were 'signature crimes,' but … , in his experience, anal sodomy with an object occurred in considerably less than one percent of homicide cases." App. 21a. The court of appeals did not consider McMillan's subsequent crime in its materiality analysis, App. 39a-40a, as discussed at greater length in the petition for certiorari filed on behalf of several of Overton's co-defendants.

garage were closed at this time." *Id.*[6] "The trio continued on their way without investigating the source of the groans." *Id.* At a 2012 postconviction evidentiary hearing, the lead prosecutor "agreed that if the witnesses heard groaning at 5:30 p.m., it meant Fuller was still alive at that time." *Id.* "He also agreed that if (counterfactually, in his view) the assault was still in progress at that time, it could not have involved more than one or a very few assailants," *id.*—much less the large group that the government contended had committed the crime. Yet again, none of this information was disclosed to the defense. *Id.*

d. *The Eleby Impeachment.* The government further withheld impeachment evidence against Carrie Eleby, a purported eyewitness who at trial implicated Overton in the attack. That evidence indicated that Eleby told Kaye Porter, another government witness, to lie to the authorities in order to implicate another person in the crime. App. 24a-25a.[7] Specifically, during one of Eleby's early interviews with the police, she denied having witnessed Mrs. Fuller's murder, but falsely claimed that Alston had confessed his involvement to her. App. 24a. Porter, who accompanied Eleby to the interview, corroborated her claim. App. 24a-25a. Porter, however, later admitted that she had not witnessed the supposed conversation between Eleby and Alston, and that she

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[6] This detail was significant because one of the doors was open when William Freeman, a street vendor, discovered Mrs. Fuller's body at approximately 6:00 p.m. App. 5a.

[7] Porter testified at trial, but she did not implicate Overton in the crime. *See* App. 50a.

had falsely implicated Alston at Eleby's request. App. 25a.

Virtually all of the testimony the government presented against Overton was subsequently recanted. Notably, the governments' two primary witnesses—Alston and Bennett—asserted that they fabricated their "eyewitness" testimony under threats from the police officers and prosecutors investigating Mrs. Fuller's murder. App. 13a-16a. The only remaining eyewitness who identified Overton as a participant in the attack was Eleby, who, aside from all of her other credibility problems, *see supra* at 6, twice told police that she did not witness the crime and was simply relating information told to her by Alston, A8595-99.

4. Overton filed a motion to vacate his conviction pursuant to D.C. Code Sections 23-110 and 22-4135 in D.C. Superior Court, arguing that he did not receive a fair trial because the government withheld exculpatory and impeachment evidence in violation of its constitutional obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and that newly discovered evidence, including witness recantations, established that he was actually innocent of the crimes against Mrs. Fuller. App. 13a. After a three-week evidentiary hearing, the court denied Overton's motion and those filed by his co-petitioners. *See* App. 139a.

Overton appealed, and the D.C. Court of Appeals affirmed. App. 84a. As to the *Brady* claim relevant here, the court concluded that "[t]he primary and dispositive question … [wa]s the question of materiality"—that is, whether the withheld evidence, analyzed cumulatively, "could reasonably be taken to

put the whole case in such a different light as to undermine confidence in the verdict." App. 31a (quotation omitted). In the court of appeals' view, that materiality standard required Overton to show that there was a reasonable probability that the suppressed evidence "would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." App. 59a. Because the court did not believe Overton had met that standard, it denied his plea for relief. *Id.*

Overton's timely petition for rehearing and rehearing en banc was denied. App. 141a-142a.

REASONS FOR GRANTING THE PETITION

This case presents an important question about the materiality standard applied to evaluate *Brady* claims. The D.C. Court of Appeals below held that the undisclosed evidence in this case was not material under *Brady* because petitioner had not demonstrated that the suppressed evidence would have rebutted "virtually everything" the government's key witnesses said. But *Brady* requires no such showing. The court of appeals' standard is irreconcilable with this Court's *Brady* precedents, which instruct that materiality is not a sufficiency-of-the-evidence inquiry.

Instead, the relevant question for purposes of assessing materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Put differently, if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confi-

dence in the verdict," it is material. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Under that standard, there is no question that the evidence withheld from Overton in this case was material and that he is entitled to a new trial as a matter of due process.

The court of appeals' distortion of this Court's *Brady* materiality jurisprudence undoubtedly harmed Overton, who faces potential life imprisonment predicated on an unconstitutional conviction. But the harms caused by the court of appeals' decision below are not limited to Overton or the particular circumstances of this case. That decision also threatens the broader values *Brady* protects, weakening prosecutors' incentives to disclose exculpatory and impeachment evidence to the defense and eroding a key mechanism for ensuring that the criminal justice system fairly and accurately adjudicates guilt or innocence. And when due process violations go unchecked, the public's trust in the criminal justice system is inevitably undermined.

The Court should grant certiorari to ensure that the due process principles at the heart of *Brady* are conscientiously and consistently applied.

A. The D.C. Court of Appeals' Materiality Standard Is Incompatible With This Court's Precedents

The decision below—requiring Overton to prove that the suppressed evidence would have rebutted "*virtually everything*" in the government's case, App. 59a—contravenes fifty years' worth of this Court's *Brady* jurisprudence. Indeed, the court of appeals applied the very sufficiency-of-the-evidence approach this Court has repeatedly disavowed.

1. Under *Brady v. Maryland*, 373 U.S. 83 (1963), the government's suppression of evidence favorable to a criminal defendant violates due process where the evidence is material to guilt or punishment. *Id.* at 87. A successful *Brady* claim has three components: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

To assess the prejudice prong, courts ask whether the undisclosed evidence was "material" to the defense. Favorable evidence is material, and "constitutional error results from its suppression by the government," *Kyles*, 514 U.S. at 433, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," *Bagley*, 473 U.S. at 682; *accord Wearry*, 136 S. Ct. at 1006 (evidence is material if "there is any reasonable likelihood it could have affected the judgment of the jury" (quotations omitted)). "The question 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, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. In other words, "[a] 'reasonable probability' of a different result is … shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *Bagley*, 473 U.S. at 678). Under that standard, a defendant "can prevail even if … the un-

disclosed information *may not* have affected the jury's verdict." *Wearry*, 136 S. Ct. at 1006 n.6 (emphasis added).

Of particular significance here, this Court has stated unequivocally that materiality is *not* a sufficiency-of-the-evidence test. *Kyles*, 514 U.S. at 434-35 & n.8; *see Strickler*, 527 U.S. at 290. Accordingly, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. Rather, the test is whether "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.

2. The D.C. Court of Appeals recited many of these well-settled constitutional principles at the outset, App. 29a-31a, but the court's fidelity to *Brady* ended there. In substance, the court of appeals held Overton to a heightened, sufficiency-of-the-evidence standard, demanding that he demonstrate that the suppressed evidence would have cast doubt on "virtually everything" supporting his conviction. App. 59a.

That standard is contrary to this Court's guidance that a defendant need not show that "every item of the State's case would have been directly undercut if the *Brady* evidence had been disclosed." *Kyles*, 514 U.S. at 451. In *Kyles*, the suppressed evidence "would have left two [of four] prosecution witnesses totally untouched," *id.* at 435 n.8 (quotation omitted), the third "barely affected," *id.* at 443 n.14 (quotation omitted), and the fourth only "somewhat

impaired," *id.* at 468 (Scalia, J., dissenting). Significant physical evidence also would have remained "unscathed." *Id.* at 451 (majority op.). Yet the Court held that the evidence withheld was material because its disclosure would have significantly weakened the government's case and strengthened the defense, undermining confidence in an already close verdict. *Id.* at 429. *Kyles* thus confirms that a new trial may be necessary under *Brady* even if the suppressed evidence does not call into question all, or even most, of the government's evidence. *See also Wearry*, 136 S. Ct. at 1006 n.6 (a defendant "can prevail even if … the undisclosed information may not have affected the jury's verdict"). The materiality standard actually applied by the court of appeals below is irreconcilable with *Kyles*.[8]

This Court has also affirmed that the mere possibility that "the jury *could* have disbelieved" the undisclosed evidence does not create "confidence that it *would* have done so," and therefore is not an adequate basis for denying a *Brady* claim. *Smith v. Cain*, 132 S. Ct. 627, 630 (2012); *see id.* (declining to "speculate about which of [the eyewitness's] contradictory declarations the jury would have believed" had it been permitted to consider undisclosed statements); *see also Wearry*, 136 S. Ct. at 1007 (lower court "improperly … emphasized reasons a juror might disregard new evidence while ignoring rea-

[8] Moreover, *Kyles* confirms that mere recitation of the correct principles cannot save an analysis that is substantively flawed. *See* 514 U.S. at 440 (passing reference to correct legal standard cannot excuse contrary approach reflected throughout opinion).

sons she might not"). Yet over and over again the court of appeals below engaged in precisely the type of speculation foreclosed by this Court's precedents.

The examples of the court's misguided approach are plentiful:

- "Luchie might have been mistaken in recalling that both garage doors were closed." App. 35a.
- "It is far more likely, in our view, that the jury would have believed that Luchie was mistaken, or that someone came upon the scene and opened the garage door in the interval between Luchie's departure and Freeman's arrival, than that the jury would have thought it plausible that all the government's witnesses were lying and that Luchie had stumbled upon an assault in progress." App. 55a.
- "[T]he jury might have suspected that McMillan arrived on the scene only after Watts and Luchie departed (but before Freeman arrived), and that he and his companion Merkerson looked in the garage—providing an explanation for Luchie's and Freeman's observations of the garage door that did not rely on the supposition that the assailants were still present when Luchie was there." App. 55a.
- "It is not implausible that McMillan heard about the attack and decided to look in out of curiosity; nor that he carried away something from the garage, explaining his suspicious behavior." App. 55a n.51.

- "It is hard to see why the additional impeachment would have made a difference to the jury's assessment of Eleby's credibility." App. 50a.

The court of appeals' approach effectively requires a defendant attempting to establish a *Brady* violation to eliminate the possibility that the jury could have convicted him had the suppressed evidence been disclosed. That is not the *Brady* standard; it is the sufficiency-of-the-evidence standard this Court has rejected. To demonstrate that evidence is material, a defendant must show only that suppression of that evidence "undermines confidence in the outcome of [his] trial," *Kyles*, 514 U.S. at 434 (quotation omitted)—i.e., that the suppressed evidence raises a "reasonable probability" of "a different result," *id.* at 422.

3. The D.C. Court of Appeals' "virtually everything" standard is wrong in any case, but its flaws are particularly apparent in a close case like this one. This Court has long instructed that materiality "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112 (1976); *see Kyles*, 514 U.S. at 435. Accordingly, where "the verdict is already of questionable validity"—i.e., if the case is close—even "additional evidence of relatively minor importance" can be material. *Agurs*, 427 U.S. at 113.

The "record" that matters for purposes of determining whether the suppressed evidence was material as to Overton is the evidence against Overton in particular. Guilt is "individual and personal, … not a matter of mass application." *Kotteakos v. United*

States, 328 U.S. 750, 772 (1946). Accordingly, in all criminal proceedings—including those where, as here, multiple defendants are tried together—the guilt or innocence of each defendant must be judged individually. *See* A845 (jury instruction). The *Brady* inquiry, which is closely tied to the determination of guilt, *see Agurs*, 427 U.S. at 112-13, is likewise an individual one.

The D.C. Court of Appeals' materiality analysis makes no sense as to any of the defendants, but its failings are especially pronounced with respect to Overton. The jury's struggle to reach a verdict for Overton demonstrates that it *already* had reservations about the evidence against him. And the fact that the jury repeatedly deadlocked—not to mention that it acquitted Harris—confirms that it harbored serious doubts about the credibility of Alston and Bennett's testimony, even *without* having considered the exculpatory and impeachment evidence withheld by the government.

Thus, to establish a "'reasonable probability' of a different result," *Kyles*, 514 U.S. at 434, Overton did not have to show 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," App. 59a. All he needed to show was that the suppressed evidence would have added enough to the jury's preexisting reservations about the case against him to create a reasonable probability that the jury would have reached a different verdict. A court evaluating materiality cannot ignore or explain away weaknesses in the government's case, nor may it elide them by

lumping defendants into a single entity and merging evidence relevant to different individuals. Any weaknesses in the government's presentation must be given due weight in the court's assessment of the "entire record." *Agurs*, 427 U.S. at 112; *see Kyles*, 514 U.S. at 429, 454 (noting jury deadlock in materiality analysis). The court of appeals' materiality standard was substantively different than the one this Court has prescribed.

4. Finally, it bears emphasis that there is not, as the decision below might suggest, a higher bar for materiality when suppressed evidence could have been used to challenge "the basic structure of how the crime occurred." App. 58a-59a.[9] Again, the Court's guidance is unambiguous: No "*Brady* case[] has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone" of materiality. *Kyles*, 514 U.S. at 435 n.8. Evidence calling into question how a crime occurred—including, for example, the number of assailants—is core *Brady* material, treated like any other type of evidence.

The Court should grant certiorari to bring the D.C. Court of Appeals' approach to *Brady*'s materiality analysis in line with this Court's precedents.

B. Analyzed Under The Correct Legal Standard, The Suppressed Evidence Is Material To Overton's Case

Had the court of appeals properly analyzed the *Brady* materiality question, it could have reached

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[9] The court of appeals, moreover, was wrong to suggest that the evidence withheld in this case could have been valuable only for that purpose. *See infra* at 29-30.

only one conclusion—that the undisclosed evidence was material.

1. The government's case against Overton was weak even without the suppressed evidence to cast further doubt on it. The lead prosecutor conceded that the case was "[n]ot a good one," A1734, and that it "easily could have gone the other way," A1751; A1758. And the D.C. Court of Appeals acknowledged that "the evidence against [Overton] was weaker than that against [his] co-defendants." App. 57a.[10]

The jury agreed. After a week of deliberations, numerous votes, and verdicts against eight co-defendants, including six convictions and two acquittals, the jury declared unanimous verdicts against Overton and co-defendant Christopher Turner "impossible." A893. The court instructed the jury to continue deliberating. A915-16; A918. After deliberations resumed, one juror sent a note, signed by the foreman, stating that he or she did not want to deliberate further because the jury had taken more than ten votes and still could not reach a verdict. A915-16. The court did not reply, and deliberations continued. A916-17. The foreman raised the request to stop deliberating again at the end of the day, but the court responded only that the jury would continue to deliberate. A918. Ultimately, the jury took an additional forty to fifty votes before returning a guilty verdict against Overton. A925-47; A2045.

What is more, the jury acquitted co-defendant Alphonso Harris, even though Alston and Bennett

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[10] For example, the court noted that Maurice Thomas "affirmatively denied seeing Overton" in the alley. App. 57a.

identified Harris as an active participant in the crime. App. 12a, 51a; A5873-74; A6342-46. Harris's acquittal confirms that the jury doubted much of the government's case, including portions of Alston and Bennett's testimony.[11] Other than Alston and Bennett, the only witness who testified that she saw Overton participate in the attack was Eleby. And aside from her other credibility problems (which were substantial), Eleby initially told police that she *had not witnessed the attack*. App. 7a.

In addition, there was no physical evidence tying Overton to the crime, a factor this Court and others have frequently recognized as significant to the *Brady* materiality analysis. *See, e.g.*, *Smith*, 132 S. Ct. at 629 (undisclosed statements impeaching eyewitness were material where "[n]o other witnesses and no physical evidence implicated [the defendant] in the crime"); *Gantt v. Roe*, 389 F.3d 908, 913, 916 (9th Cir. 2004) (suppressed exculpatory evidence was material when it undermined conviction based on little physical evidence and the state's case overall "was relatively weak"); *Spicer v. Roxbury Corr. Inst.*, 194 F.3d 547, 559-61 (4th Cir. 1999) (suppressed impeachment evidence was material where there was no physical evidence and eyewitness testimony was weak).

2. In circumstances like those here, suppressed evidence does not need to shift the balance between the prosecution's case and the defense very far to create a reasonable probability of a different out-

[11] It also refutes the court of appeals' assertion that the jury "found the government's witnesses credible." App. 55a.

come. *See Agurs*, 427 U.S. at 113. And the evidence withheld here was of far more than "minor" importance. *See id.*

a. The suppressed evidence would have permitted Overton to present an entirely different type of defense beyond the alibi witnesses he produced at trial. The McMillan evidence placed at the crime scene a man who was serially attacking other women in the same neighborhood, and on that day was seen fleeing the scene of Mrs. Fuller's murder and concealing something under his coat. *See supra* at 10-11. Such alternative-perpetrator evidence is quintessential *Brady* material. *See, e.g.*, *Kyles*, 514 U.S. at 453; *United States v. Jernigan*, 492 F.3d 1050, 1056-57 (9th Cir. 2007) (en banc); *Castleberry v. Brigano*, 349 F.3d 286, 292-94 (6th Cir. 2003); *Clemmons v. Delo*, 124 F.3d 944, 947-52 (8th Cir. 1997).

The Luchie evidence likewise suggested that a smaller group of assailants—or even a lone individual—committed the crime. As the D.C. Court of Appeals explained:

> The groans heard by Watts and Luchie tend[ed] to show that Fuller was still alive between 5:30 and 5:45 p.m. And the fact that Luchie saw *both* garage doors closed, while one of the doors was open when William Freeman came by around 6:00 p.m. and discovered Fuller's body, could be taken to suggest that the attack was then-occurring and that the true killer(s) opened one of the doors and fled in the interim. If the at-

> tack was in progress when Watts, Luchie, and Murphy walked by the garage, then as [the government's lead prosecutor] acknowledged, it could not have been committed by a large group of people.

App. 34a-35a.

Davis's eyewitness statement identifying James Blue as Mrs. Fuller's lone killer would have cast serious doubt on the government's theory of the case, too. That statement was classic, core *Brady* material. *See, e.g.*, *Clemmons*, 124 F.3d at 949-52 (finding *Brady* violation where prosecution withheld memorandum reporting purported eyewitness statement that he had seen someone other than the defendant commit the crime); *Cannon v. Alabama*, 558 F.2d 1211, 1213-16 (5th Cir. 1977) (finding *Brady* violation where government failed to disclose eyewitness statement identifying someone other than the defendant as the assailant).[12]

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[12] The government withheld Davis's statement from Overton because, in the lead prosecutor's estimation, the statement was not credible. App. 23a. But the jury, not the prosecution, is tasked with weighing the evidence and assessing witness credibility. *See Kyles*, 514 U.S. at 440 (*Brady* "preserve[s] the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"); *Miller v. United States*, 14 A.3d 1094, 1110 (D.C. 2011) ("It is not for the prosecutor to decide not to disclose information that is on its face exculpatory based on an assessment of how that evidence might be explained away or discredited at trial, or ultimately rejected by the fact finder." (quotation and emphasis omitted)). And where, as here, the government's witnesses all had serious credibility problems of

Because Blue murdered Davis just prior to Overton's trial and Davis therefore would not have been available to testify, the court of appeals concluded that her statement would not have been admissible as evidence that Blue killed Mrs. Fuller. App. 41a. In its materiality analysis, the court of appeals therefore considered the Blue evidence only as evidence of an inadequate investigation. App. 40a-41a, 47a. But the government had a constitutional obligation to *timely* disclose Davis's statement to defense counsel so they could make meaningful use of it. *See Kyles*, 514 U.S. at 437. And had Davis's statement been turned over to the defense when it should have been (long before she was killed), defense counsel would have had an opportunity to investigate the statement and potentially develop other supporting evidence. *See, e.g.*, *United States v. Morales*, 746 F.3d 310, 314-15 (7th Cir. 2014) (inadmissible evidence can be material if it could have led to the discovery of admissible evidence). At a minimum, the defense could have located the woman Davis said she was with when she saw Blue kill Mrs. Fuller, App. 22a, who likely *would* have been able to testify at trial.

Even aside from the defense's lost opportunity to develop additional evidence, the government's failure to so much as follow up on Davis's identification of Blue for many months raises serious questions about the thoroughness of the government's investigation, and thus casts additional doubt on the gov-

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their own, *see supra* at 5-8, even a witness whose account might have been vulnerable on cross-examination could have created substantial doubts about the government's case.

ernment's theory of the crime. *See Kyles*, 514 U.S. at 445 (undisclosed statements material where they "would have raised opportunities to attack … the thoroughness and even the good faith of the investigation"). Together with the McMillan and Luchie evidence, the Blue evidence suggests a troubling pattern—once police and prosecutors developed their group-attack theory early in the investigation, they repeatedly ignored and suppressed evidence that did not fit that narrative.

Moreover, had the McMillan, Luchie, and Blue evidence been disclosed to the defense, it could have been combined with other evidence presented at trial that corroborated a "single-perpetrator" theory of the attack. For example, William Freeman, who discovered Mrs. Fuller's body, "testified at trial that throughout his day at 8th and H Streets, working as a street vendor, he never saw a large group of young people in the area, never saw anyone running towards or away from the vicinity of the garage, and never heard any shouts coming from the area of the garage." App. 53a n.79. And had defendants known there was additional evidence suggesting that a single perpetrator or much smaller group had committed the crime, they could have developed the type of analysis of the physical evidence presented at the postconviction evidentiary hearing in 2012. At that hearing, a forensic pathologist testified that Mrs. Fuller's "injuries were not as extensive or widely distributed as he would have expected to see from a large-group attack." App. 26a. Similarly, an experienced homicide investigator testified that, "based on the autopsy report, crime scene photos and other investigation records, ... the attack on Fuller was more

likely committed by a single offender than by a large group of individuals acting together." *Id.*

b. The evidence withheld in this case would have given the jury additional reasons to doubt Overton's involvement in the crime—the same type of doubt it had when it acquitted Harris—even if the jury believed other aspects of the government's case. The jury's decision to acquit Harris despite the fact that both Alston and Bennett identified him as a participant in the crime confirms that the jury questioned some aspects of the star witnesses' testimony, including their testimony about *who* was involved, even if they credited Alston and Bennett's general story about *how* the crime occurred. *See supra* at 22 & n.9.

The only purported eyewitness to the attack who testified against Overton but did *not* testify against Harris was Carrie Eleby. It is thus entirely possible that Eleby's testimony was the reason Overton was convicted while Harris was not. And the undisclosed evidence included evidence that Eleby had encouraged another witness to lie to investigators in this case, which would have "further diminished" her "already impugned" credibility. *Wearry*, 136 S. Ct. at 1006; *see Kyles*, 514 U.S. at 443 & n.14 (evidence can be material if it enables a more robust cross-examination). The suppressed evidence was of a fundamentally different kind than that with which Eleby was previously impeached: It indicated not merely that Eleby was an unreliable witness, but that she had *actively sought to fabricate evidence against the defendants in this case*. Because Eleby was one of only three witnesses who claimed to have

seen Overton participate in the attack—and because there is no question the jury did not fully credit the testimony of the other two—even an incremental erosion of her credibility could reasonably have affected the outcome of Overton's case. The impeachment evidence withheld here would have discredited her far more than that.

* * *

When viewed (as it must be) cumulatively and in light of the entire record, there is no serious question that the suppressed evidence would have further weakened the government's case and strengthened Overton's defense, erasing all confidence in his "impossibl[y]" close verdict. A893. Indeed, given the overall weakness of the government's case against him and the jury's struggle to reach a verdict, almost *any* additional evidence favorable to the defense might have tipped the balance. No more is required to show materiality.

C. The Question Presented Is Important

The question presented here is an important one that bears on the fundamental fairness of the criminal process. The "overriding concern" in *Brady* cases "is the defendant's right to a fair trial." *Agurs*, 427 U.S. at 116 (Marshall, J., dissenting). "One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him." *Id.*

The full promise of *Brady*, however, has yet to be realized. Fifty years after *Brady* was decided, prosecutors still routinely withhold exculpatory and impeachment evidence from defendants. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 688 (2006) ("Numerous studies have documented widespread and egregious Brady violations."); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN. ST. L. REV. 1133, 1148 (2005) ("Withholding favorable evidence … seems to be the norm."). This stubborn, pernicious problem is not localized. *See United States v. Olsen*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of reh'g en banc) (citing cases). And *Brady* violations occur in all sorts of criminal cases, from capital murder cases to those involving white collar offenses. *See* Tiffany M. Joslyn & Shana-Tara Regon, *Faces of Brady: The Human Cost of Brady Violations*, Champion, May 2013 (describing *Brady* violations in cases involving murder, bribery under the FCPA, cocaine trafficking, unlawful dispensation of prescriptions, and the like).

Brady violations have serious consequences for both individual defendants and the criminal justice system as a whole. They distort outcomes in criminal trials, and in many cases have contributed to wrongful convictions of innocent individuals. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23-24, 56-57 & tbl.6 (1987) (35 of 350 wrongful convictions studied involved prosecutorial suppression of evidence); *see also* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evi-*

dence and the Inference of Innocence, 100 J. CRIM. L. & CRIMINOLOGY 415, 429-30 & n.60 (2010) (citing additional research). As the statistics grimly illustrate, "[v]iolations of [criminal] discovery rules … cannot go uncorrected or undeterred without undermining the truthseeking process." *Taylor v. Illinois*, 484 U.S. 400, 419 (1988) (Brennan, J., dissenting).

"A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence." *Olsen*, 737 F.3d at 630 (Kozinski, C.J., dissenting from denial of reh'g en banc). Even prosecutors acting in good faith have a "natural tendency … to overlook evidence favorable to the defense." *Agurs*, 427 U.S. at 117 (Marshall, J., dissenting); *see* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2098 (2010) (because "prosecutors are ethically bound not to pursue a case if they believe a defendant is innocent … the prosecutor has already decided that the exculpatory evidence does not undermine the guilt of the defendant"). *Brady* serves as an essential external check on that predisposition to discount, and therefore not disclose, exculpatory or impeachment evidence.

Moreover, when courts excuse prosecutorial errors and willful abuses, they "cast[] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Brady*, 373 U.S. at 88. "Society wins not only when the guilty are convicted but when criminal trials are fair." *Id.* at 87. And when criminal trials are *not* fair, "[t]he very integrity of the judicial system and public confidence

in [it]" are undermined. *United States v. Nixon*, 418 U.S. 683, 709 (1974); *see Olsen*, 737 F.3d at 632 (Kozinski, C.J., dissenting from denial of reh'g en banc) ("When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law.").

Brady aims to help prevent these problems. But, in the words of Chief Judge Kozinski, "[s]ome prosecutors don't care about *Brady* because courts don't *make* them care." *Olsen*, 737 F.3d at 631 (Kozinski, C.J., dissenting from denial of reh'g en banc). Rigorous judicial review is necessary to ensure that *Brady*'s disclosure requirements are scrupulously observed, defendants' due process rights protected, and public confidence in the administration of justice maintained.

D. As An Alternative To Full Review, The Court Should Consider Summary Reversal

The court of appeals' error is so plain—and the constitutional interests at stake so significant—that the Court may wish to consider summary reversal.

Summary reversal is without question an "extraordinary remedy." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 512 (2001) (Stevens, J., dissenting). But the Court can and does use summary reversal to correct serious deviations from established precedent. *See Wearry*, 136 S. Ct. at 1007 (citing cases); *see also, e.g.*, *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam) (summarily reversing decision holding that state's

monitoring program did not constitute a Fourth Amendment "search" where lower court's theory was "inconsistent with this Court's precedents"); *Martinez v. Illinois*, 134 S. Ct. 2070, 2077 (2014) (per curiam) (summarily reversing state-court decision that, though "understandable," "r[an] directly counter to [the Court's] precedents and to the protection conferred by the Double Jeopardy Clause").

Indeed, earlier this Term, the Court summarily reversed a state court's decision that "r[an] up against settled constitutional principles" by improperly evaluating the materiality of suppressed evidence under *Brady*. *Wearry*, 136 S. Ct. 1006. Although that case, like this one, raised questions that required the Court to engage in a somewhat fact-oriented inquiry, the Court nonetheless recognized that it merited summary reversal because the lower court had reached a result that was impossible to square with well-settled law. *Id.* at 1007; *cf. Kyles*, 514 U.S. at 455 (Stevens, J., concurring) ("Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law."). And here, as in *Wearry*, the "alternative to granting review … is forcing [the defendant] to endure yet more time"—in this case, possibly the rest of his life—in prison "in service of a conviction that is constitutionally flawed." 136 S. Ct. at 1008.

To be sure, this Court cannot "correct every perceived error coming from the lower federal courts." *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (per curiam) (quotation omitted). But given the gravity of

the interests at stake and the obviousness of the court of appeals' misunderstanding of the materiality analysis set forth by this Court, the Court should consider doing so here as an alternative to granting full review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 10, 2016

APPENDIX

APPENDIX A - COURT OF APPEALS OPINION

District of Columbia Court of Appeals.

Nos. 12–CO–1362, 12–CO–1538, 12–CO–1539, 12–CO–1540, 12–CO–1541, 12–CO–1542, & 12–CO–1543.

Charles S. TURNER, Christopher D. Turner, Russell L. Overton, Levy Rouse, Clifton E. Yarborough, Kelvin D. Smith, & Timothy Catlett, Appellants,
v.
UNITED STATES, Appellee.

Appeals from the Superior Court of the District of Columbia
(FEL-8615-84, FEL-8513-84, FEL-8612-84, FEL-8613-84, FEL-8614-84, FEL-8616-84, & FEL-8617-84)

(Hon. Frederick H. Weisberg, Motions Judge)

(Argued April 29, 2014
Decided June 11, 2015).

John S. Williams, with whom Robert M. Cary, Cadence Mertz, Jennifer M. Sasso, and Frances Y. Walters were on the brief, for appellant Clifton Yarborough.

Kevin D. Feder, with whom Michael E. Antalics, Joana Nairn, and Meredith Garagiola, Washington, DC, were on the brief, for appellant Russell L. Overton.

Jennifer Wicks was on the brief for appellant Charles Turner.

Shawn Armbrust, Barry J. Pollack, Michael B. Bernstein, and Justin P. Hedge, Washington, DC, were on the brief for appellant Christopher Turner.

Veronice A. Holt, Washington, DC, was on the brief for appellant Levy Rouse.

Donald P. Salzman, Washington, DC, was on the brief for appellant Kelvin D. Smith.

Cory Lee Carlyle was on the brief for appellant Timothy Catlett.

Nicholas P. Coleman, Assistant United States Attorney, with whom Ronald C. Machen Jr., United States Attorney at the time the brief was filed, and Elizabeth Trosman, Suzanne Grealy Curt, James Sweeney, Kacie Weston, and Colleen Kennedy, Assistant United States Attorneys, were on the brief for appellee.

Robert B. Humphreys and Steven Schulman, Washington, DC, filed a brief on behalf of The Innocence Network as amicus curiae in support of appellants.

Stephen P. Braga filed a brief on behalf of The National Association of Criminal Defense Lawyers as amicus curiae in support of appellants.

John C. O'Quinn, Washington, DC, Savaria B. Harris, Traci M. Braun, Deborah S. Decker, and

Michael B. Potere filed a brief on behalf of False Confessor Exonerees as amicus curiae in support of appellants.

Julia M. Jordan, Lee Ann Anderson McCall, and Elizabeth A. Cassady, Washington, DC, filed a brief on behalf of Former Judges and Prosecutors as amicus curiae in support of appellants.

Aderson Bellegarde François filed a brief on behalf of Howard University School of Law Criminal Justice Clinic & Civil Rights Clinic as amicus curiae in support of appellants.

Douglas Baruch, Jessica P. Neiterman, and Sujata Jhaveri, Washington, DC, filed a brief on behalf of Former Law Enforcement Officers as amicus curiae in support of appellants.

Before GLICKMAN and BLACKBURNE–RIGSBY, Associate Judges, and NEBEKER, Senior Judge.

GLICKMAN, Associate Judge:

In 1985, appellants were tried and convicted for the kidnapping, armed robbery, and first-degree felony murder while armed of Catherine Fuller on October 1, 1984. This court affirmed their convictions on direct appeal. Some twenty-five years later, appellants returned to Superior Court with motions to vacate their convictions pursuant to D.C. Code § 23–110 (2012 Repl.) and the Innocence Protection Act ("IPA"), D.C. Code § 22–4135 (2012 Repl.). Appellants claimed that they did not receive a fair trial because the government withheld exculpatory and impeachment evidence in violation

of its obligations under *Brady v. Maryland,*[1] and that newly discovered evidence, including witness recantations, established their actual innocence of the crimes against Mrs. Fuller. Appellant Yarborough additionally claimed that his trial counsel was constitutionally ineffective in failing to investigate his intellectual disabilities as grounds for suppressing the videotaped statement he made when he was arrested, which the government used against him at trial.

Appellants' motions were assigned to the Honorable Frederick H. Weisberg. He presided over a three-week evidentiary hearing on their claims in mid–2012. Judge Weisberg thereafter denied the motions in a written order. Before us now are the appeals from that decision.

We affirm. As we shall explain, we conclude that appellants' *Brady* claims fail because appellants have not shown a reasonable probability that the outcome of their trial would have been different had the government disclosed the withheld evidence in timely fashion. Appellants' IPA claims fail because the motions judge found the witness recantations to be incredible and appellants therefore have not established their actual innocence by a preponderance of the evidence. Finally, we reject Yarborough's ineffective assistance claim because he has not shown that he was prejudiced by his trial counsel's allegedly deficient performance.

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[1] 373 U.S. 83 (1963).

* * *

I. THE MURDER OF CATHERINE FULLER AND APPELLANTS' 1985 TRIAL

Shortly after 4:30 p.m. on October 1, 1984, Catherine Fuller left her home on foot to go shopping. Around 6:00 p.m., William Freeman, a street vendor, discovered her lifeless body lying in a garage in the middle of an alley between 8th and 9th Streets Northeast, just north of H Street. One of the garage doors was open, enabling Freeman to catch sight of Fuller's body when he entered the alley to relieve himself. Mrs. Fuller had been badly beaten and violently sodomized, and had suffered massive blunt force injuries, including a ruptured liver and broken ribs. Her clothing and property were found strewn about the garage and the alley. The police were unable to find the object used to commit the sodomy or to recover any usable fingerprints or other physical evidence that could identify the perpetrators. The medical examiner could not determine from Fuller's injuries how many persons were involved in assaulting her.

After conducting more than 400 interviews, investigators developed the theory that Fuller was assaulted and killed by a large group of teenagers who initially set out, on the spur of the moment, to rob her. A total of thirteen individuals believed to have been members of that group were indicted. Two of them, Harry Bennett and Calvin Alston, pleaded guilty and agreed to testify for the government. A third defendant, James Campbell, whose case was severed for trial after his attorney became ill, eventually pleaded guilty as well. The remaining

defendants—the seven appellants before us now and their co-defendants Steven Webb, Alphonzo Harris, and Felicia Ruffin—went to trial in the fall of 1985.

A. THE GOVERNMENT'S CASE AT TRIAL

At the center of the government's case was the testimony of the two cooperating witnesses, Bennett and Alston. Bennett had pleaded guilty to manslaughter and robbery, Alston to second-degree murder. They provided similar accounts of the events leading to Fuller's death. According to them both, they were in a group of young men, including appellants, who were gathered in a park at 8th and H Streets Northeast on the afternoon of October 1, 1984, when they observed Fuller across the street. Alston admitted being the one who, after appellant Catlett sang a song about needing money, suggested that the group rob Fuller. Members of the group split into two bodies and crossed the street to attack Fuller at the alley between 8th and 9th Streets. Bennett, Alston, and others, including appellants, punched and kicked her, hit her with a stick or board, knocked her to the ground, and robbed her of her money and jewelry. Fuller then was dragged into a garage and stripped nearly naked. As some in the group held her legs and others stood and watched, appellant Rouse took a pole or pipe-like object and shoved it into her rectum. The group then dispersed.

Although Bennett and Alston agreed on the preceding outline of events, they differed on some important matters. Notably, while Bennett testified that appellant Yarborough did not accompany the group into the alley, Alston recalled that Yarborough actively participated in kicking Fuller as she lay on

the ground there. And while Bennett remembered that Alston and Webb held Fuller's legs as Rouse sodomized her, Alston thought appellants Overton and Charles Turner did so. In addition, Bennett and Alston each had made prior inconsistent statements to the police and the grand jury regarding who was present in the park and who participated in attacking Fuller.

Four witnesses to the crime corroborated Bennett and Alston's account. Two of them, Carrie Eleby and Linda Jacobs, testified that they came upon the attack when it was already in progress. Eleby implicated appellants Catlett, Overton, Christopher Turner, Smith, and Rouse, as well as Alston and Webb. She also put appellant Yarborough in the alley, but she did not remember seeing him attack Fuller. Jacobs saw Christopher Turner and Smith in the alley. Both witnesses saw Rouse sodomize Fuller.

Eleby and Jacobs had significant credibility problems. Both were PCP users. Eleby contradicted herself, could not keep names and dates straight, and claimed she did not remember anything she had told the police or the grand jury. Jacobs, too, was a difficult witness who contradicted herself on the stand and had trouble answering questions. Moreover, each witness's account was impeached or contradicted by other testimony. For example, contrary to her testimony at trial, Eleby told police that she and Jacobs arrived at the alley only after the police and the morgue staff were there, and she told the grand jury that appellant Smith did not hit or kick Fuller. In addition, Eleby testified that she and Jacobs were with their friend Tawana when

they heard a scream coming from the alley, turned around and saw a group attacking a woman. But Jacobs testified they were not with Tawana and did not hear a scream. She claimed they were prompted to enter the alley by their friend Annette Taylor. But Taylor denied this and testified that she was nowhere near the scene at the time.

The other two eyewitnesses were Melvin Montgomery and Maurice Thomas. Montgomery testified that he saw appellants Catlett, Charles Turner, Overton, and Rouse standing with others in the park. Montgomery heard Catlett singing a Chuck Brown song about needing money, saw Overton point across the street at Fuller, and watched as those four appellants and others crossed the street in her direction.[2]

Fourteen-year-old Maurice Thomas testified that he passed the alley and saw a group of people surrounding a woman. Those he saw included appellants Catlett, Yarborough, Rouse, Charles Turner, and Christopher Turner, and may have included appellant Smith and Harry Bennett.[3] Thomas saw Catlett pat down the woman and then place something in his pocket. Catlett then hit her and when she fell to the ground, the rest of the group assaulted her. Later that evening, Thomas heard Catlett tell someone that "we had to kill her because she spotted someone" Catlett was with.

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[2] Montgomery, who knew each of the appellants, also saw Yarborough in the park, but not until after the assault on Fuller was over.

[3] Thomas did not see Overton in the alley.

The government put on other important evidence of appellants' guilt in its case-in-chief. First, the jury was shown a redacted videotape of Yarborough's statement to the police, in which he placed himself in the park, the alley, and the garage before and during the attack on Fuller. (The statement was admitted only against Yarborough.)

Second, Kaye Porter testified that she had asked Catlett about the rumors she had heard concerning the Fuller murder. Catlett responded that "all he did was kick her and somebody else stuck the pole up in her" because "she wasn't acting right."[4] Finally, Detective Daniel Villars testified that he overheard Christopher Turner tell Overton that the police lacked sufficient evidence against them because they had not touched Fuller's body and so did not leave any fingerprints. Overton agreed that the police lacked evidence and commented that he knew the two people who gave them up. Turner replied that he knew one of the two, but that he wondered how the police knew he, Overton, and "everybody" were in the alley.

B. THE DEFENDANTS' ALIBIS AND THE GOVERNMENT'S REBUTTAL

Appellants Overton, Smith, Christopher Turner, Charles Turner, and Rouse put on alibi defenses.[5]

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[4] Porter was impeached with her grand jury testimony in which she said Catlett denied any involvement in the crime.

[5] Appellant Yarborough's attorney proffered in his opening statement that the evidence would show Yarborough was at his girlfriend's house at the time of Fuller's murder, but no such evidence was presented. (Yarborough's girlfriend,

Overton's alibi was supported by three witnesses. Marita Michaels testified that she was in the park at 8th and H Streets with Overton and others from about 10:00 a.m. to about 2:30 p.m. on October 1, drinking and smoking marijuana. Michaels said that she and Overton left the park together and that she saw him walking towards his house, appearing very drunk. Overton's grandmother Edna Adams, and his sister Lottie Overton, testified that he left the house that morning, and returned home drunk between 2:00 and 3:00 p.m. Adams said he remained home and slept until 7:30 p.m.; Overton's sister confirmed that he remained at home on October 1 until at least 5:00 p.m., when she left the house herself. Overton's family members admitted, however, that his grandmother's memory was weak and that his sister and mother had reminded her of many of the details in her testimony. Adams was impeached on various details with her grand jury testimony. Lottie Overton was impeached with her grand jury testimony that Overton had asked her to ask people he knew in the park to be witnesses for him, which was contrary to her trial testimony that he did not do so. Even after being presented with the transcript, she denied having said this to the grand jury. But Adams testified that Overton did tell Lottie and his mother to go ask certain people to be witnesses. Overton himself did not testify at trial.

Smith and Christopher Turner testified that they were at Smith's house on October 1. They said they first learned of Fuller's death later that night in

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Chandera Hill, did testify, but only to the fact that Maurice Thomas disliked Yarborough.)

a phone call from a girl named Renee Walker. Three of Smith's relatives corroborated his and Christopher Turner's alibis. Before the grand jury, however, they testified that Smith knew about Fuller's murder as early as 6:00 p.m. on October 1.

Rouse and Charles Turner had conflicting alibis. Rouse testified that he spent the afternoon of October 1 at a recreation center, restaurants and arcades with Charles Turner and a friend named Christopher Taylor, that he went to the alley at 8th and H Streets only after the police were already there, and that he then went at around 7:00 p.m. to the home of his girlfriend Catrina Ward. But Charles Turner testified he was at home at the time of Fuller's murder and left there only when Rouse and a friend named Vincent Gardner came by and told him someone had been killed in the alley behind H Street.

Christopher Taylor corroborated Rouse, but he was impeached with his admissions to police that he was in the park and heard the group decide to assault Fuller, and that he was in the alley and saw the murder. Catrina Ward confirmed that Rouse came to her house on the night of October 1. She also testified, however, that she saw blood splattered on the bottom of Rouse's pants leg, and that on later occasions Rouse told her he saw Fuller get killed and boasted that he "did the worst thing to that lady in the alley." Charles Turner was impeached with his statement to the police that Rouse and Gardner did not tell him about the crime. And Gardner, testifying as a rebuttal witness, denied going to Charles Turner's house or going anywhere with Rouse on the night of October 1.

C. VERDICTS AND DIRECT APPEAL

The case was submitted to the jury on December 9, 1985. On the morning of December 16, the jury asked to see the videotape of Yarborough's incriminating statement to the police. That afternoon, after seven days of deliberations, the jury returned guilty verdicts against Catlett, Rouse, Smith, Charles Turner, Yarborough, and Webb; at the same time, the jury found their co-defendants Harris and Ruffin not guilty. The jury deliberated for an additional two days before returning its verdicts of guilty against the remaining defendants, appellants Overton and Christopher Turner.

This court affirmed the convictions on direct appeal.[6] In doing so, we acknowledged "some conflict in the testimony of the government's witnesses regarding exactly when each appellant joined in the beating," but stated that "there was overwhelming evidence that each of them was involved at one time or another."[7] For the most part, appellants' claims on direct appeal do not bear directly on the claims now before us.[8]

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[6] *See Catlett v. United States*, 545 A.2d 1202 (D.C. 1988); *Turner v. United States*, Nos. 86–314 & 90–530 (D.C. 1992) (Mem. Op. & J.).

[7] *Catlett*, 545 A.2d at 1206 n. 2; *see also id.* at 1209–10, 1217 (discussing the evidence against Christopher Turner and Overton, respectively).

[8] The exception is Yarborough's argument on direct appeal that the trial court erred in denying his motion to suppress his videotaped statement without considering his age, education, and experience with the criminal justice system. *Id.* at 1207. We discuss this below in connection with Yarborough's ineffective assistance claim.

II. APPELLANTS' POST–CONVICTION MOTIONS: *BRADY* AND IPA CLAIMS

In support of their Brady and IPA claims, appellants presented witness recantations, expert witness testimony, and other evidence at the hearing on their post-conviction motions in 2012 in an effort to show that the government withheld materially exculpatory and impeachment evidence from them at trial, and that they were actually innocent of Fuller's robbery, kidnapping, and murder. Appellant Yarborough also testified and presented evidence in support of his ineffective assistance claim. In opposition, the government presented testimony from the investigating detectives and the prosecutors who worked the case in 1984 and 1985. This section of our opinion discusses the evidence relevant to appellants' Brady and innocence claims; we discuss the evidence particularly relevant to Yarborough's ineffective assistance claim in a later section.

A. WITNESS RECANTATIONS

1. Calvin Alston and Harry Bennett

Alston and Bennett had finished serving their sentences when they took the stand in 2012 to recant their trial testimony. Each maintained that he knew nothing about Fuller's murder but had been pressured by police into making a false confession and, ultimately, testifying falsely at trial.

Alston was arrested and questioned by Detectives McGinnis and Sanchez about the murder for two-and-a-half hours on November 29, 1984. According to Alston, the detectives yelled at him, accused him of lying, and threatened him with a life sentence if he did not admit his complicity in the

murder. They accused him of acting as a lookout for Rouse, Yarborough, Overton, Smith, and others they named. Eventually, Alston testified, he "gave in to their drilling" and falsely admitted to being the lookout and witnessing the attack on Fuller from the end of the alley.

This, Alston said, did not satisfy his interrogators. Detective Sanchez angrily told Alston he could not have seen or heard what was going on in the alley if he merely stood at the end of it. The detectives insisted that he had witnessed Fuller being beaten and sodomized in the garage and urged him to "come all the way clean" and put himself "in the case." Ultimately, Alston testified, he acquiesced and concocted a story of having participated in the crime using the information the detectives provided concerning what happened and who did it. (Nevertheless, Alston still did not admit to personally assaulting Fuller or being the one who proposed robbing her, and he steadfastly denied having received any money from the robbery.) After rehearsing his story with the detectives, they turned on the video camera and recorded his statement.

Bennett, who was interrogated for about four hours after he was arrested on February 6, 1985, similarly claimed that the detectives refused to believe his denials, threatened him with a life sentence, and "kept hammering" at him until he eventually "started saying what was on the news" and repeating whatever the detectives said to him "until they got me to say I was involved." The detectives pressed him to incriminate others, including several of the appellants here, and he did so. Bennett's interrogation also culminated in a

videotaped statement. During the videotaping, Bennett testified, the detectives turned the camera off to correct details in his story. At one point, Bennett claimed, he told them that everything he had said was a lie, and the detectives became angry, rewound the tape, and recorded over that portion. Later on, Bennett testified, he was shown part of Yarborough's videotaped statement and given documents pertaining to the case so that he could further tailor his testimony.

Alston and Bennett also claimed that the lead prosecutor in the Fuller case, Jerry Goren, instructed them to alter their testimony at trial. Alston asserted that Goren told him he needed "to put my actual self in the violence that took place" to make his testimony more credible, and to "change the scenario" when other evidence conflicted with his account of the attack on Fuller. Alston said he complied with Goren's demands when, for example, he testified at trial that he himself came up with the idea to rob Fuller.[9] Bennett made comparable allegations. For example, in his videotaped statement, Bennett said he did not see Christopher Turner enter the alley or Catlett hit Fuller; at trial, he testified both of them participated in the beating. He changed his story, he claimed, "because that's what they told me to say."[10]

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[9] Similarly, Alston retreated at trial from his previous statement that he saw Rouse hit Fuller in the back of the head with a two-by-four, and testified instead that he did not see where Rouse hit her, because Goren told him there was no evidence that Fuller was injured in the back of the head

[10] To support the credibility of Alston's and Bennett's recantations, appellants presented other witnesses who

To rebut Alston's and Bennett's recantations and repudiate their allegations of misconduct, the government called Jerry Goren and Detectives McGinnis and Sanchez, among other witnesses. The detectives denied threatening Alston and Bennett with life sentences or telling them what to say or whom to name as Fuller's assailants.[11] They similarly denied Alston's claim that they rehearsed with him what he would say on camera and Bennett's claims that they interrupted the taping of his statement to excise his declaration that his confession was a lie, and that they showed him Yarborough's taped statement and documents containing information about the investigation. Goren likewise categorically denied telling Alston and Bennett what to say, or that they needed to change their testimony.

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testified to the detectives' heavy-handed interrogation tactics. In addition, over the government's objection, appellants called an expert on the subject of false confessions. The witness, Dr. Richard Leo, opined that certain features of the interrogations of Alston and Bennett, such as the detectives' use of deception, yelling, and threats or promises, were associated with a heightened risk of inducing false confessions. According to Dr. Leo, the errors and incongruities in the confessions of Alston and Bennett could be taken as "indicia of unreliability."

[11] The detectives admitted, however, to playing good-cop-bad-cop, yelling, pointing, and slamming their hands on desks. They also acknowledged telling Alston and Bennett they would face greater consequences if they did not come clean and finger others.

2. Melvin Montgomery and Linda Jacobs

Appellants also called Melvin Montgomery and Linda Jacobs to testify at the 2012 hearing. Their testimony proved to be unhelpful to appellants. Montgomery signed an affidavit in 2009 stating he lied on the stand in 1985 and that he saw appellants in the park at 8th and H Streets on October 1 only in the morning, not in the late afternoon (when Fuller was murdered). At the 2012 hearing, however, Montgomery disavowed the affidavit and denied perjuring himself at trial.

Linda Jacobs professed not to remember her trial testimony or much of anything else, but she insisted that she knew everything she said at trial was a lie because she was never in the alley on October 1. She vaguely claimed the police told her she was in the alley and "fed [her] information" about the murder, which she repeated to avoid being returned to her parents or accused of the crime herself. When the judge asked her what the government told her to say in 1985, she broke down emotionally and struggled to articulate how Fuller's murder made her feel.

B. Evidence Not Disclosed to the Defense

Appellants contended that the government withheld evidence that the defense could have used (1) to construct an alternative-perpetrator defense premised on the theory that Fuller was attacked and killed by a single individual (or at most a very small number of persons); and (2) to impeach the prosecution witnesses who identified appellants as the perpetrators.

1. Undisclosed Alternative–Perpetrator Evidence

a. The Witnesses in the Alley

According to information contained in the files of the police and the prosecutors, three people—Jackie Watts, Willie Luchie, and Ronald Murphy—told investigators that at around 5:30 p.m. on October 1, they happened to be walking through the alley and by the garage where Fuller was murdered. Luchie and Watts heard the sound of groans coming from inside the garage. (Murphy recalled Watts saying she heard something like a groan, though he did not claim to have heard anything himself.) According to Luchie, both doors of the garage were closed at this time. The trio continued on their way without investigating the source of the groans. This information was not disclosed to the defense. At the 2012 hearing, Goren agreed that if the witnesses heard groaning at 5:30 p.m., it meant Fuller was still alive at that time. He also agreed that if (counterfactually, in his view) the assault was still in progress at that time, it could not have involved more than one or a very few assailants.

b. James McMillan

James McMillan is one of two persons appellants claim they could have argued at trial was the likely alternative, sole perpetrator of Fuller's murder had the government not withheld information about him.

At trial in 1985, William Freeman, the street vendor who discovered Fuller's body, testified that as he waited for the police to come, he saw two men run into the alley from 9th Street and stand very close to

the garage for a few minutes. Freeman earlier had seen the two men walking up and down 8th Street. One of the men appeared to be concealing an object under his coat. When the police arrived, the two men ran away up the alley towards I Street.

What Freeman saw was, of course, known to the defense. What the defense did not know, and the government did not disclose, was who the two men were. Freeman had identified them to the police as James McMillan and Gerald Merkerson. It was McMillan who appeared to be hiding something under his coat.

McMillan was a potential suspect in the police investigation. Two other witnesses told police they saw him at the alley at the same time Freeman did, and they confirmed Freeman's observations of his suspicious behavior. (These witnesses also were not disclosed to the defense.) In addition, the police knew that McMillan lived on 8th Street about three doors down from the alley and that he had violently assaulted and robbed two other middle-aged women walking in the vicinity three weeks after Fuller's death.[12] But although the police included McMillan's photograph in the album they showed witnesses to try to identify the persons responsible for Fuller's

[12] McMillan committed the first of these robberies on October 24, 1984, in an alley behind the 1100 block of K Street Northeast. He approached the victim from behind, knocked her to the ground, grabbed her purse and fled. The next day, McMillan and a companion assaulted a woman in the 600 block of 12th Street Northeast. One of the two struck her in the face, breaking her nose, and stole the bag she was carrying.

murder, the government did not obtain sufficient evidence to indict him.[13]

At the motions hearing in 2012, appellants presented information about McMillan's subsequent activities following his conviction of the two robberies that he committed in October 1984. McMillan was sentenced to serve eight to twenty-five years in prison. Two months after he was released from prison in July 1992, he killed a 22–year–old woman ("A.M.") in an alley behind the 500 block of 8th Street Northeast, only a few blocks from where Fuller was murdered. This crime had some striking similarities to the attack on Fuller: McMillan abducted A.M. as she walked down the street and dragged her to a secluded spot in the alley, ransacking her personal belongings and leaving them strewn along the path of abduction. After forcing A.M. into a narrow space behind a parked car, McMillan stripped off her underwear, beat her ferociously, and sodomized her. A.M. suffered grievous injuries and died three days later.

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[13] With two exceptions, no one directly implicated McMillan in the murder. The exceptions were as follows. First, as appellants were aware, James Campbell (the co-defendant whose case was severed) gave a videotaped statement to the police, and in it he named McMillan as one of several individuals congregating in the park at 8th and H Streets who participated in the attack on Fuller. Second, when Christopher Taylor (whom Rouse called at trial to support his alibi) was interviewed by police, he identified McMillan from his photograph as having been part of the group that accompanied Rouse into the alley. Campbell and Taylor subsequently disavowed their statements, and the government realistically could not have used them to prosecute McMillan.

McMillan was convicted of her murder and remains incarcerated.

Appellants argued that this was powerful evidence supporting the thesis that it was McMillan who murdered Fuller. In support of that thesis, they presented Dr. Richard Callery, a forensic pathologist, who testified that the cause of death for both Fuller and A.M. was blunt force trauma to the head and torso, and that each victim had suffered a traumatic anal sodomization resulting in severe internal injuries. Dr. Callery could not say the two murders were "signature crimes," but he testified that, in his experience, anal sodomy with an object occurred in considerably less than one percent of homicide cases. In addition to Dr. Callery's testimony, appellants presented a stipulation that, if he were called, an expert in sexual dysfunctions would testify that someone who commits an act of violent anal sodomy is likely to commit the act more than once.

c. James Blue

Other information not disclosed to the defense concerned an accusation against a man named James Blue, a habitual criminal who, by 1984, had served time for assault and had a record of arrests for rape, sodomy, and armed robbery. On October 26, 1984, a police lieutenant named Frank Loney happened to be interviewing a woman named Ammie Davis, who was alleging police misconduct in connection with her arrest for disorderly conduct. According to Loney's written report of the interview, Davis inquired what would happen if she gave the officer "something on a homicide." Insisting that she

did not want to get involved and would not testify in court, Davis proceeded to state that someone who just got out of jail on October 1 killed a woman that same day "for just a few dollars" in an alley off of H Street. At first Davis said she was present when the man committed the murder; she then said she was not "with" him and only saw him grab the woman by the back of the neck and pull her into the alley.[14] Davis said she was with her girlfriend "shooting stuff" when this happened and that her girlfriend saw it too. Davis refused to divulge her girlfriend's name but said she and her girlfriend would call the lieutenant the following week. At this point in the conversation, Lieutenant Loney asked Davis to tell him the man's name. After hesitating and saying she did not want to talk about it, Davis responded that "James Blue did it."

Davis was reluctant to say anything more. She refused to give a written or recorded statement and declared that she would not "go to court." Acknowledging that she was afraid of Blue, she brought the interview to a close with the assurance that she would call Lieutenant Loney and let him talk to her girlfriend. Davis never did call back, however.

Lieutenant Loney filed his report of Davis's statement without bringing it directly to the attention of the detectives who were investigating Fuller's murder. It did not come to their attention

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[14] When asked whether the man used a weapon, Davis said "he beat the f**k out of her."

until August 1985.[15] Goren then proceeded to interview Davis on August 8 and 9. At the hearing in 2012, he recalled her as being "not serious" and "very playful" in their meeting and having nothing to add to what she previously had said about Blue.

Goren testified that he ultimately decided not to inform the defendants in the Fuller case of Davis's allegation because he "believed completely and strongly that Ms. Davis had no evidence in this case and that she was totally incredible." Goren came to that conclusion because Davis had given Loney two different versions of her story; she was unable to provide any further details or any information that could be corroborated; the only information she could provide about the girlfriend who purportedly would have confirmed her account was that her nickname was "Shorty"; Davis previously had accused Blue of another, unrelated murder and provided information that was determined to be false[16]; and the prosecutors were confident in their body of evidence pointing elsewhere, i.e., at appellants and the other charged defendants. No other evidence implicated Blue in Fuller's murder. Goren admitted, though, that Davis accurately stated that Blue was released from prison on October 1, and that she evidently knew where Fuller was murdered and that she was not attacked with a knife or a gun.

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[15] Detective McGinnis recalled asking Loney why he had not alerted them. Loney told him he did not believe what Davis had said.

[16] Goren learned about Davis's prior accusation of Blue in another homicide investigation from an Assistant United States Attorney who had conducted that investigation and who was assisting Goren with the Fuller case.

On October 9, 1985, prior to the start of appellants' trial, James Blue shot and killed Ammie Davis. He was convicted of her murder and died in prison in 1993.[17]

2. Impeachment Evidence

The government failed to turn over four types of impeachment evidence.[18] First, the government inadvertently did not disclose that Kaye Porter lied to the police at Carrie Eleby's behest. During one of Eleby's early interviews with the police in November, in which she denied having witnessed Fuller's murder, she claimed that Alston had confessed his involvement in the crime to her. Porter, who accompanied Eleby to the interview, corroborated this claim. Porter later admitted to the police that she did not witness the conversation between Eleby and Alston, and that she had lied about it at Eleby's request. Neither Porter's lie nor Eleby's suborning of it were disclosed to the defense.

Second, the government did not disclose its knowledge of Eleby's extensive PCP use. At trial, she testified that she smoked PCP on October 1, but

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[17] Goren testified that he reviewed the homicide file relating to Davis's murder and determined that it was unrelated to her accusation of Blue in the Fuller case.

[18] Appellants (somewhat vaguely) charge that the government failed to turn over a fifth category of impeachment evidence, to the effect that Carrie Eleby and Linda Jacobs initially denied witnessing the attack on Fuller and stood by their denials for months. But Goren testified that he gave the defense Eleby's grand jury testimony in which she acknowledged her denials, and the trial record suggests that the defense knew of Jacobs's denials, because she was asked about it on cross-examination.

never before or since. Goren and other members of the investigation and prosecution team knew this was not the truth. Eleby was actually under the influence of PCP even when she viewed photos and identified persons who were in the alley, and Goren's notes indicate that she "had started using PCP again" later in the investigation.

Third, the government did not disclose grand jury testimony supporting the alibi of a man named Lamont Bobbitt, who Alston testified was present in the park and in the alley when Fuller was murdered. Bobbitt told the police he was elsewhere that evening, and in testimony before the grand jury, six witnesses corroborated his alibi. (The prosecutors did not believe the alibi because of contradictions in the testimony, but they decided they nonetheless lacked sufficient evidence to charge Bobbitt with Fuller's murder.)

Finally, the government did not disclose evidence that could have been used to impeach Maurice Thomas. At trial, Thomas testified that after he witnessed the attack in the alley, he ran home and told his aunt "Barbara" what he had seen. He claimed that Barbara told him not to say anything to anyone else. The police interviewed Barbara (whose real name was Dorothy Harris), and she said that she did not recall Thomas ever telling her anything about the attack.

C. EXPERT TESTIMONY

Two expert witnesses testified in 2012 in support of the theory that Fuller probably was killed by one to three attackers rather than a large group, though they both admitted it was possible a larger group

was involved. Dr. Callery (who also testified to the similarities between the murders of Fuller and A.M.) examined the autopsy report and opined that Fuller's injuries were not as extensive or widely distributed as he would have expected to see from a large-group attack, even if some members of the group merely held the victim and did not inflict injury themselves. Dr. Callery agreed, however, with the 1985 medical examiner's conclusion that it was impossible, from looking at the autopsy report, to say specifically how many people assaulted Fuller.

The second witness was Larry McCann, an experienced homicide investigator who testified as an expert in violent crime analysis and crime scene reconstruction. It was McCann's opinion, based on the autopsy report, crime scene photos and other investigation records, that the attack on Fuller was more likely committed by a single offender than by a large group of individuals acting together. Had there been multiple offenders, McCann testified, he would have expected to see the victim's clothing stretched, torn, or ripped, grab marks or abrasions on her ankles, legs, and wrists, more injuries, and multiple sexual assaults rather than the one. McCann conceded that, even in a group attack, some assailants might only strike minor glancing blows.

D. THE MOTIONS JUDGE'S DECISION

Judge Weisberg rejected appellants' IPA and *Brady* claims. As to the former, the motions judge found that appellants had "not come close to demonstrating actual innocence" because the witness recantations on which appellants relied were not credible. Beyond that, the judge also found "not

particularly persuasive" the expert opinion testimony that Fuller likely was beaten by only one or a very few assailants, and appellants' argument that the similarities between the murder of Fuller and McMillan's murder of A.M. proved that McMillan was Fuller's sole assailant.

Turning to appellants' *Brady* claims, the motions judge concluded there was no reasonable probability that the undisclosed evidence would have changed the outcome of the trial. This was so for three basic reasons: First, the judge noted, Ammie Davis's hearsay accusation against James Blue "was almost certainly inadmissible," and, in any event, it was "thoroughly discredited" and would not have convinced the jury to disbelieve the numerous eyewitness accounts of an attack by a large group of young men. "Not one of the approximately 400 other witnesses interviewed by the government mentioned James Blue as a possible perpetrator," the judge pointed out, "either alone or with others."

Second, the judge reasoned, the evidence pertaining to James McMillan was not material because no witness put him in the alley during the attack, and because even if he was present then, "it would not prove anything" about appellants since McMillan could have been a participant in the attack with them or merely a bystander. "For the 'McMillan evidence' to be material in the *Brady* sense," the judge added, "he would have had to have committed the crime by himself or with Merkerson to the exclusion of the petitioners, and that possibility flies in the face of all the evidence."

Third, the judge found the undisclosed impeachment evidence to be of little significance even when viewed cumulatively. While Kaye Porter's admission that she lied about hearing Alston's confession, at Eleby's request, could have been used to impeach Porter and Eleby, the nondisclosure was not material because Porter was a "relatively minor" witness at trial and Eleby was extensively impeached at trial with her prior inconsistent statements and her admitted lies before the grand jury. Similarly, Eleby was cross-examined at trial about her use of PCP and additional evidence on that score would not have made a difference. Alibi testimony contradicting Alston's claim that someone other than appellants was present in the park likewise would have been of little help to appellants, the judge concluded, particularly since the alibi "may or may not have been truthful."[19] Lastly, the judge acknowledged that Maurice Thomas was "an important eyewitness because he was able to identify several of the [appellants] and had no apparent bias or motive to fabricate," and he thought it "at least arguable" that the government should have disclosed that Thomas's aunt did not recall his telling her that he had just seen someone attacked in the alley. Nevertheless, finding *inter alia* that Thomas testified convincingly at trial despite being cross-

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[19] Citing *Wu v. United States*, 798 A.2d 1083, 1089–90 (D.C. 2002), the judge also held that appellants were procedurally barred from raising a Brady claim based on the government's non-disclosure of alibis offered by witnesses whom Alston or Bennett claimed were present during the murder, because the trial judge had ruled that the government did not have to disclose such evidence and appellants did not appeal that ruling.

examined extensively, and that his aunt's denial could be explained by Thomas's testimony that she told him to forget what he had seen,[20] the judge concluded that even if Thomas had been impeached by his aunt's statement, "no juror would have concluded that he was making it all up."

III. ANALYSIS OF APPELLANTS' *BRADY* CLAIMS

A. BRADY AND THE APPLICABLE STANDARD OF REVIEW

Appellants invoke a constitutional duty of governmental disclosure in criminal cases that the Supreme Court recognized in *Brady v. Maryland*[21] over two decades before their trial: "The Due Process Clause of the Fifth Amendment requires the prosecution to disclose to the defense, upon request, material evidence—including impeachment evidence—that is favorable to the accused."[22] The purpose of this duty "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."[23] The failure to disclose materially favorable evidence constitutes a due process violation "irrespective of the good faith or

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[20] The judge also cited Goren's impression, recorded in his contemporaneous case notes, that Thomas's aunt was "a bit of an alcoholic."

[21] 373 U.S. 83, 87 (1963).

[22] *Miller v. United States*, 14 A.3d 1094, 1106 (D.C. 2011). It is now clear that the suppression of materially favorable evidence is a violation of due process "regardless of [defense] request." *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (citing *United States v. Bagley*, 473 U.S. 667, 682, 685 (1985)).

[23] *Bagley*, 473 U.S. at 675.

bad faith of the prosecution"[24] and without regard to whether the evidence was actually known by the individual prosecutor, or merely by "others acting on the government's behalf in the case, including the police."[25]

"To determine on appeal whether the government, through its representatives in the trial court, has violated its obligations under *Brady,* we consider: (1) whether the information in question is favorable to the accused; (2) whether this information was possessed and suppressed by the government, either willfully or inadvertently; and (3) whether that information was material" to guilt or punishment.[26] Appellants have the burden of proving a *Brady* violation.[27] In this case, although we think it may be doubted whether some of the undisclosed evidence in question was truly favorable to appellants, we need not linger over such doubts. The primary and dispositive question with respect to all of appellants' *Brady* claims is the question of materiality.

Evidence is material within the meaning of *Brady* "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[28]

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[24] *Brady*, 373 U.S. at 87.

[25] *Kyles*, 514 U.S. at 437.

[26] *Vaughn v. United States*, 93 A.3d 1237, 1254 (D.C. 2014) (internal quotation marks omitted).

[27] *Mackabee v. United States*, 29 A.3d 952, 959 (D.C. 2011).

[28] *Miller*, 14 A.3d at 1115 (quoting *Bagley*, 473 U.S. at 682).

Materiality is "not a sufficiency of the evidence test."[29] Rather, evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[30] *Brady* materiality must be assessed in terms of the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item.[31] The cumulative effect of a collection of suppressed evidence may undermine confidence in the outcome of the trial even where each piece of evidence, viewed in isolation, would be insufficient. Of course, just as the trial court did, "[w]e evaluate the tendency and force of the undisclosed evidence item by item; there is no other way. We evaluate its cumulative effect for purposes of materiality separately and at the end of the discussion[.]"[32]

Some past decisions of this court have reviewed a trial court's ruling on *Brady* materiality for "reasonableness."[33] Our more recent cases, following the reasoning of the dissent in *Farley v. United*

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[29] *Kyles*, 514 U.S. at 434.

[30] *Id.* at 435.

[31] *Id.* at 421.

[32] *Kyles*, 514 U.S. at 436 n.10.

[33] *E.g.*, *Davies v. United States*, 476 A.2d 658, 661 (D.C.1984) ("Where, as here, the trial court has determined that asserted Brady material would not have materially affected the verdict, the reviewing court is limited to a determination of whether that decision was reasonable. *United States v. Agurs*, 427 U.S. 97, 114 (1976). An independent review is precluded. *Id.* It cannot be said that the trial court's ruling on the Brady-based new trial motion was unreasonable.").

States,[34] have questioned the aptness of that standard.[35] As Judge Ruiz pointed out in her *Farley* dissent, the Supreme Court has consistently reviewed *Brady* rulings *de novo*,[36] and a *de novo* standard of review "is consistent with the origin of the *Brady* materiality test, which is derived from the prejudice prong for ineffective assistance of counsel—an inquiry which the [Supreme] Court has held presents a mixed question of law and fact."[37] Consequently, without resolving the issue of the proper standard of review, we latterly have "avoided applying the lesser 'reasonableness' standard [ ] where we have been able to conclude instead that even under *de novo* review, no material violation occurred."[38]

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[34] 767 A.2d 225, 233 (D.C. 2001) (Ruiz, J., dissenting).

[35] *See Zanders v. United States*, 999 A.2d 149, 162 (D.C. 2010); *Watson v. United States*, 940 A.2d 182, 187 (D.C. 2008); *Powell v. United States*, 880 A.2d 248, 254–55 (D.C.2005); *see also Miller*, 14 A.3d at 1120; *id.* at 1129 n. 11 (Fisher, J., dissenting).

[36] *See Farley*, 767 A.2d at 233 ("No other conclusion can be reached from the Supreme Court's opinions in *Kyles, Bagley, Wood* [*v. Bartholomew*, 516 U.S. 1 (1995)] or *Strickler* [*v. Greene*, 527 U.S. 263 (1999)], all of which exhaustively review the evidence, without expressing a deferential standard or, in fact, affording any deference to the lower courts' determinations.") (footnotes omitted). This seems to be one of the respects in which *Agurs*, the case that this court cited in Davies as mandating a deferential "reasonableness" standard of review, has been superseded.

[37] *Farley*, 767 A.2d at 233.

[38] *Zanders*, 999 A.2d at 162.

Notwithstanding our general adherence to *stare decisis,* we are not obligated "to follow, inflexibly, a ruling whose philosophical basis has been substantially undermined by subsequent Supreme Court decisions."[39] We think the proper approach is to recognize that a pure "reasonableness" standard of review is imprecise and does not meet the needs of the due process inquiry at stake in *Brady* cases. It is more accurate and appropriate to say, as we and other courts have said, that whether appellants have established a violation of *Brady* is a mixed question of fact and law.[40] "In that circumstance, we review the trial court's legal conclusions on a *de novo* basis and its factual findings under the clearly erroneous standard."[41] Materiality—defined as whether the government's failure to disclose exculpatory evidence undermines our confidence in the verdict—is, in the end, a legal conclusion.[42] Therefore, while we defer in this case to the motions judge's assessments of credibility, evaluations of the weight of the evidence and the inferences to be drawn therefrom, and findings of historical fact, so long as they have record

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[39] *Frendak v. United States*, 408 A.2d 364, 379 n.27 (D.C. 1979).

[40] *Miller*, 14 A.3d at 1120; *see also Farley*, 767 A.2d at 234 n.6 (Ruiz, J., dissenting) (citing federal cases).

[41] *Id.* (quoting *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993) (alteration omitted)); *accord Vaughn*, 93 A.3d at 1254.

[42] Whether we choose to characterize materiality as a question of law or of "ultimate fact" is of little moment. *See Miller*, 14 A.3d at 1120 n.32 ("We also generally review de novo so-called findings of 'ultimate fact' ..., since they are really conclusions of law.").

support, we respect, but we do not accord comparable deference to, the judge's determination of the ultimate question of *Brady* materiality. With due appreciation for the fact-bound nature of that ultimate question, we must review it *de novo* on appeal.

Pursuant to the foregoing principles, we now proceed to discuss the significance of the undisclosed evidence at issue in this appeal—first on an item-by-item basis, and then cumulatively.

B. THE WITNESSES IN THE ALLEY

The statements of Watts, Luchie, and Murphy had the potential to advance appellants' single-perpetrator theory.[43] The groans heard by Watts and Luchie tend to show that Fuller was still alive between 5:30 and 5:45 p.m. And the fact that Luchie saw *both* garage doors closed, while one of the doors was open when William Freeman came by around 6:00 p.m. and discovered Fuller's body, could be taken to suggest that the attack was then-occurring and that the true killer(s) opened one of the doors and fled in the interim. If the attack was in progress when Watts, Luchie, and Murphy walked by the garage, then as Goren acknowledged, it could not have been committed by a large group of people.

As the government argues, if Fuller was being assaulted when Watts, Luchie, and Murphy passed next to the garage, one might think they would have heard more noise; the fact that they heard only the

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[43] Appellants contend that one, two, or at most three people killed Mrs. Fuller, but for ease of discussion, we shall refer to their view of the case as the single-perpetrator theory.

sounds of groans would seem to imply that the attack was over by then and that Fuller's assailants were gone. Moreover, Luchie might have been mistaken in recalling that both garage doors were closed (Watts and Murphy did not say that), and even if they were, there was time for someone unknown to open one of the doors and depart before Freeman arrived and found Fuller's body. Despite these considerations, we agree with appellants that the alley witness evidence has potential weight in a cumulative materiality analysis.[44]

C. JAMES MCMILLAN EVIDENCE

The government had reason to suspect James McMillan of having participated in Fuller's murder. He was a violent criminal prone to assaulting and robbing vulnerable women in the area; he was seen in the alley shortly after Fuller's murder, acting suspiciously and concealing an object under his coat; he fled when the police arrived; and James Campbell and Christopher Taylor identified him as having joined in the attack (though Campbell's hearsay identification could not have been introduced in evidence at appellants' trial, Taylor presumably would have denied or disavowed it had he been asked, and their identifications of McMillan would not have supported a single-perpetrator theory). That McMillan committed a similarly heinous sexual assault and murder some years later only heightens the suspicion of his involvement. The parties disagree, however, as to whether the evidence of

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[44] *See Manson v. Brathwaite*, 432 U.S. 98, 116 (1977) ("[E]vidence with some element of untrustworthiness is customary grist for the jury mill.").

McMillan's other crimes is relevant to the *Brady* analysis.

1. The October 1984 Robberies

The parties disagree as to whether evidence of the two robberies McMillan committed in October 1984 would have been admissible at trial. Appellants and the government agree that the robberies did not amount to "reverse *Drew* evidence," i.e., "evidence of a recent similar crime with a distinct modus operandi—which the defendant could be shown not to have committed."[45] The two robberies, in which the perpetrator attacked the victims, robbed them, and then fled without causing further harm, do not share a sufficiently "distinct modus operandi" with the assault on Fuller to justify the inference that the same person must have committed all three crimes.

Appellants contend, however, that evidence of the robberies committed by McMillan would have been admissible in support of a third-party perpetrator defense under *Winfield v. United States.*[46] Setting aside for the time being the separate question of whether evidence fairly implicating McMillan in the attack on Fuller would have raised sufficient doubts about appellants' participation in the attack to show a *Brady* violation,

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[45] *Bruce v. United States*, 820 A.2d 540, 543 (D.C. 2003) (quoting *Newman v. United States*, 705 A.2d 246, 253 (D.C.1997)).

[46] 676 A.2d 1 (D.C. 1996) (en banc). On the distinction between reverse *Drew* evidence and *Winfield* evidence, *see Bruce*, 820 A.2d at 543–45. "Admissibility under the *Winfield* standard ... is broader" than under the standard for reverse *Drew* evidence. *Id.* at 545.

we think appellants are correct that McMillan's robberies would have been admissible in support of such a defense.

"*Winfield* evidence" is evidence offered to show that someone other than the defendant committed the crime. For such evidence to be admissible,

> there must be proof of facts or circumstances which tend to indicate some reasonable possibility that a person other than the defendant committed the charged offense. The focus of the standard is not on the third party's guilt or innocence, but on the effect the evidence has upon the defendant's culpability, and in this regard it need only *tend* to create a reasonable doubt that the defendant committed the offense.[47]

Winfield evidence is not limited to proof of the third party's motive and "practical opportunity" to commit the crime;[48] it also may include evidence that the third party committed "another crime like the one before the court."[49] The crimes "need not be identical" for such evidence to be admissible, if "the totality of the circumstances demonstrates a

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[47] *Winfield*, 676 A.2d at 4 (internal quotation marks omitted). There is "no requirement that the proffered evidence must prove or even raise a strong probability that someone other than the defendant committed the offense." *Id.* (quoting *Johnson v. United States*, 552 A.2d 513, 517 (D.C. 1989)).

[48] *Winfield*, 676 A.2d at 5.

[49] *Bruce*, 820 A.2d at 543 (quoting *Newman*, 705 A.2d at 254).

reasonable probability that the same person committed both offenses."[50] Conversely, "the trial court should exclude *Winfield* evidence if it 'is too remote in time and place, completely unrelated or irrelevant to the offense charged, or too speculative with respect to the third party's guilt.' "[51] And even if the proffered *Winfield* evidence satisfies the threshold requirement of relevance, the trial court has discretion to exclude it based on a determination that its marginal probative value is substantially outweighed by the risk of unfair prejudice, confusion of the jury, or similar considerations.[52] However, "[c]lose questions of admissibility should be resolved in favor of inclusion, not exclusion."[53]

Here, we think it reasonable to conclude that McMillan's commission of two other robberies in October 1984 would have corroborated the other evidence that he joined in the October 1 attack on Fuller. The government principally argues that the probative value of that corroboration would have been minimal, and substantially outweighed by the risk of unfair prejudice, because there were few similarities between the two robberies and Fuller's murder.[54] We disagree, inasmuch as the three crimes

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[50] *Bruce*, 820 A.2d at 544 (alteration and citation omitted).

[51] *Thomas v. United States*, 59 A.3d 1252, 1264 (D.C. 2013) (quoting *Resper v. United States*, 793 A.2d 450, 460 (D.C. 2002)).

[52] *Winfield*, 676 A.2d at 5.

[53] *Bruce*, 820 A.2d at 544 (citing *Winfield*, 676 A.2d at 6–7).

[54] The government also argues that McMillan would not still have been hanging around the garage when the police

all involved violent assaults and robberies of middle-aged women who were walking alone on the street, and all took place in the same neighborhood in a span of less than a month. That the attack on Fuller was far more vicious and severe than the other two robberies does not negate these points of similarity. We therefore are satisfied that a trial judge would be safely within her discretion in admitting the evidence of McMillan's robberies under *Winfield;* accordingly, they are relevant to the *Brady* materiality analysis.

2. The 1992 Murder of A.M.

We reach a different conclusion with respect to McMillan's murder of A.M. seven years after appellants' trial. Because evidence of this murder obviously could not have been presented at appellants' trial, it is not relevant to whether the government violated its *Brady* obligations. A *Brady* violation cannot be predicated on the government's failure to do the impossible and disclose evidence that does not yet exist. McMillan's murder of A.M. likewise has no bearing on the question of the materiality of any evidence that the government actually did withhold from the defense. This is so because materiality under *Brady* turns on a retrospective assessment of whether a past trial might have had a different outcome had available evidence not been kept from the defendant—not on whether new, previously unobtainable evidence not kept from the defendant might lead to a different

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arrived had he been one of the assailants, but this is not entirely persuasive; appellants Catlett and Overton were still in the park across the street when the police came to the scene.

result in a new trial. There are other procedures available for exploring whether new evidence calls for a new trial—for example, the procedures of the Innocence Protection Act that appellants employed in this case—but they are subject to different standards; simply put, "*Brady* is the wrong framework" to use for obtaining post-conviction relief based on new evidence.[55]

D. AMMIE DAVIS'S ACCUSATION OF JAMES BLUE

There is reason to doubt that Ammie Davis's accusation of James Blue would have carried significant weight with the jury, given her lack of credibility and the complete absence of other evidence associating Blue in any way with Fuller's murder. But we need not examine that question. Davis, having been murdered prior to the start of appellants' trial, was unavailable to testify at it. Her out-of-court statements accusing Blue did not fall within any exception to the rule against hearsay. Hence her statements would have been inadmissible as evidence that Blue killed Fuller. Evidence that is inadmissible cannot be material for *Brady* purposes unless there is a reasonable probability that its disclosure would have resulted in a different trial outcome because it is likely to have led to the discovery of other, admissible evidence favorable to the defense.[56] No such probability has been shown

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[55] *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009) (holding that the *Brady* right of pretrial disclosure does not provide a post-conviction right of access to evidence for newly available DNA testing).

[56] *See Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (holding that undisclosed polygraph results were not material where

here. Appellants have not demonstrated any likelihood that they would have located and obtained helpful testimony from the girlfriend Davis mentioned, or that they would have discovered any other admissible evidence implicating Blue in Fuller's murder.

Appellants, citing *Chambers v. Mississippi*,[57] contend that due process would have required the trial court to admit Davis's statement for its truth in spite of the rule against hearsay. We disagree. As the Supreme Court has explained, the "fundamental" right of an accused in a criminal case "to present witnesses in his own defense"[58] is not "an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."[59] "Evidentiary rules excluding evidence from criminal trials violate the constitutional right to present a defense only if they

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they were "inadmissible under state law, even for impeachment purposes," and the possibility that disclosure "might have led respondent's counsel to conduct additional discovery that might have led to some additional evidence that could have been utilized" was "mere speculation"); *United States v. Morales*, 746 F.3d 310, 314–15 (7th Cir. 2014) (finding the majority view in the federal courts of appeals, that inadmissible evidence may be material if it could have led to the discovery of admissible evidence, to be "more consistent" with Wood than "a rule that restricts Brady to formally admissible evidence") (citing cases); *United States v. Derr*, 990 F.2d 1330, 1335–36 (D.C. Cir. 1993) (rejecting *Brady* claim based on government's failure to disclose inadmissible hearsay of declarant who would be unavailable to testify at trial).

[57] 410 U.S. 284 (1973).

[58] *Id.* at 302.

[59] *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

'infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve.' "[60]

In *Chambers,* the Supreme Court confronted two such dubious evidentiary rules. The defendant in that case was charged with murder. At trial, he sought to prove that another man named McDonald had confessed to the crime orally and in writing, but he was stymied by two Mississippi rules of evidence. First, he was prevented from cross-examining McDonald (who had repudiated his written confession) by Mississippi's common law "voucher" rule prohibiting a party from impeaching his own witness.[61] In addition, he was unable to present the testimony of three credible witnesses to whom McDonald had confessed orally, because Mississippi applied its hearsay exception for declarations against interest only to statements against pecuniary interest, and not to statements against the declarant's penal interest, regardless of their trustworthiness.[62]

The Supreme Court reversed Chambers's conviction, holding that "under the facts and circumstances of this case the rulings of the trial court [in combination] deprived Chambers of a fair

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[60] *Heath v. United States*, 26 A.3d 266, 276 (D.C. 2011) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, (2006)); *see, e.g.*, *United States v. Scheffer*, 523 U.S. 303, 309 (1998) (rejecting a constitutional challenge to a rule excluding lie detector results because the rule was not arbitrary or disproportionate to the ends it was designed to serve).

[61] *Chambers*, 410 U.S. at 291–92.

[62] *Id.* at 292–94, 299.

trial" by unjustifiably interfering with his fundamental right to defend himself.[63] As the Court explained, while an accused exercising that right "must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence,"[64] the evidentiary restrictions imposed on Chambers were not designed or implemented to serve those purposes.

The rule that a party may not impeach his own witness was, in the Court's words, "a remnant of primitive English trial practice" that "bears little present relationship to the realities of the criminal process" in the present day.[65] The rule "has been condemned," the Court added, "as archaic, irrational, and potentially destructive of the truth-gathering process."[66] In addition, while the Court acknowledged that the "materialistic limitation" of the declaration-against-interest hearsay exception to statements against pecuniary interest "might serve some valid state purpose by excluding untrustworthy testimony" in some cases, "[t]he hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability."[67] Each confession was made "spontaneously to a close acquaintance shortly after

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63 *Id.* at 303.

64 *Id.* at 302.

65 *Id.* at 296.

66 *Id.* at 296 n.8.

67 *Id.* at 299–300.

the murder had occurred"; "each one was corroborated by some other evidence in the case"; "each confession here was in a very real sense self-incriminatory and unquestionably against [the declarant's] interest"; and "[f]inally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath" and subject to cross-examination and observation by the jury.[68] Given also that McDonald's out-of-court confessions were "critical" to Chambers's defense, implicating his "constitutional rights directly affecting the ascertainment of guilt," the Court concluded that Mississippi's "hearsay rule may not be applied mechanistically to defeat the ends of justice."[69]

It is plain that this case is nothing like *Chambers.* Davis's statement implicating Blue in Fuller's murder would have been excluded at appellants' trial pursuant to a routine and uncontroversial application of the basic rule against hearsay; unlike the statements against penal interest in *Chambers,* it did not even arguably fall within any of the recognized hearsay exceptions for statements "made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination."[70] The Supreme Court cast no doubt in *Chambers* on the constitutionality of excluding such

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[68] *Id.* at 300–01. "McDonald's presence," the Court observed, "deprives the State's argument for retention of the penal-interest rule of much of its force." *Id.* at 301 n.21.

[69] *Id.* at 302.

[70] *Id.* at 299.

ordinary hearsay evidence when offered by the defendant in a criminal trial. On the contrary, the Court acknowledged that "perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay," and it agreed that criminal defendants "must comply" with such established rules.[71] As the Court said, the rule against hearsay is

> grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury.[72]

Every one of the Court's enumerated reasons why hearsay is excluded as untrustworthy applies to Davis's statement. In short, the exclusion of that statement on hearsay grounds would not have been arbitrary or disproportionate to the purposes that the rule against hearsay is designed to serve. It therefore would not have violated appellants' due

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[71] *Id.* at 302.

[72] *Id.* at 298.

process rights. The Constitution does not displace the hearsay rule in this case.[73]

Arguably the fact that Davis accused Blue of complicity in Fuller's murder would have been admissible for the non-hearsay purpose of showing that the government's investigation of the crime was (in this one respect at least) less than diligent. Suppressed evidence of an inadequate investigation is potentially material.[74] Although the government is

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[73] Appellants argue that if the government had disclosed Davis's statement when the prosecutors first learned of it in August 1985, her "transience and drug use could have caused defense counsel to procure an admissible statement from her in the event she became unavailable." We do not see how appellants would have accomplished this. Depositions to preserve testimony for trial are disfavored in criminal cases, and the burden is on the party seeking a deposition to demonstrate "exceptional circumstances" necessitating it. *See* Super. Ct. Crim. R. 15(a); *United States v. Kelley,* 36 F.3d 1118, 1124 (D.C.Cir.1994). Among other things, this normally calls for a showing that the witness will be unavailable to testify at trial, *id.* at 1125—a showing appellants could not have made prior to Davis's death.

Appellants suggest they could have asked Davis to prepare a statement about Blue's involvement in Fuller's murder that would have been admissible at trial in case of her unavailability through another witness under the hearsay exception for past recollection recorded. *See Mitchell v. United States,* 368 A.2d 514, 517–18 (D.C. 1977). But appellants could not have satisfied the requirements for admission under that exception because such a statement would not have been made at or near the time of the putative assault by Blue on Fuller, and because it does not appear appellants could have called a witness who would have been able to vouch for the accuracy of the statement from personal knowledge of that event. *See id.*

[74] *See Kyles v. Whitley,* 514 U.S. 419, 445 (1995) (holding statements material because they "would have raised

correct that Davis's statement might nevertheless have been excluded as more prejudicial than probative, it is enough to say that the trial judge would have had discretion to admit it for this limited purpose. On the other hand, if the evidence had been admitted for this limited purpose, we think its impact would have been negligible absent any showing either that more diligent investigation of Blue would have been productive, or that a lack of thoroughness went beyond the belated follow-up with Ammie Davis and infected the investigation in other ways so as to undermine the charges against appellants. Neither showing would have been made.[75] And evidence that the government performed a less than thorough investigation of the allegation against Blue would have had little likelihood of persuading the jury that a *different person*—i.e., James McMillan—was the true killer. To the contrary, the government would have been able to demonstrate that the investigation was indeed quite a thorough one overall, involving over four hundred interviews, and that McMillan's culpability was examined.

Appellants further argue that even if Davis's statement itself was inadmissible, it might have led them to discover admissible evidence that could have

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opportunities to attack ... the thoroughness and even the good faith of the investigation").

[75] We presume, of course, that the jury would obey a limiting instruction and not consider Davis's statement as evidence that Blue himself murdered Fuller. *See, e.g., Knight v. Georgetown Univ.*, 725 A.2d 472, 483 (D.C. 1999).

affected the outcome of the trial in their favor.[76] However, appellants have not identified any such evidence that might affect our evaluation of the materiality of the undisclosed evidence at issue. We note that appellants did not proffer that timely disclosure of Davis's statement would have enabled them to find and present favorable testimony from the girlfriend who supposedly could have corroborated Davis's accusation against Blue.

In sum, the evidence concerning James Blue contributes to the cumulative materiality of the undisclosed evidence only to the very limited extent it would have had value in demonstrating a slip-up in the government's investigation.

E. IMPEACHMENT EVIDENCE

We agree with Judge Weisberg that the withheld impeachment evidence, whether considered piece-by-piece or in conjunction with the other undisclosed evidence, had little prospect of changing the result at trial. Although "impeaching information does not

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[76] *Cf. United States v. Bagley,* 473 U.S. 667, 683 (1985) ("[T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond [to a *Brady* request] might have had on the preparation or presentation of the defendant's case."); *Miller v. United States,* 14 A.3d 1094, 1108 (D.C. 2011) ("An important purpose of the prosecutor's obligations under *Brady* is to allow defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense.") (internal quotation marks omitted); *Boyd v. United States,* 908 A.2d 39, 61 (D.C. 2006) ("[T]he prosecutor must make the materiality determination ... with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense.").

have a lesser standing in the context of the government's *Brady* disclosure obligations" than affirmatively exculpatory information,[77] it "can be immaterial ... if it is cumulative and the witness has already been impeached by the same kind of evidence."[78] That principle applies to some of the impeachment evidence at issue here.

The fact that Kaye Porter initially lied to the police at Carrie Eleby's behest, to corroborate Eleby's story that she had not seen the assault and that Alston had confessed his involvement to her, could have been used to impeach both Porter and Eleby. But Porter provided evidence at trial only against appellant Catlett—she testified to a conversation in which she asked him about Fuller's murder, and he responded that he "didn't do nothing to her" and that "all he did was kick her and somebody else stuck the pole up in her" because "she wasn't acting right." This testimony was impeached with Porter's grand jury testimony that Catlett simply told her he "didn't do nothing to that lady." Moreover, the other evidence against Catlett was second only to that against Rouse: among other things, Alston, Bennett, Eleby, and Thomas all testified that they saw Catlett physically attack Fuller; Montgomery saw him in the park before the murder and watched him cross the street and head toward Fuller; Thomas also recalled

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[77] *Vaughn v. United States,* 93 A.3d 1237, 1254 (D.C. 2014).

[78] *Watson v. United States,* 940 A.2d 182, 187 (D.C. 2008); *see also Williams v. United States,* 881 A.2d 557, 562–63 (D.C. 2005).

hearing Catlett tell someone why he and Fuller's other assailants killed her; and Catlett had no alibi.

Eleby too was impeached with her prior false statements to the police and to the grand jury and contradicted by other witnesses, and as described above, her inability to remember and keep her facts straight also undermined her credibility. It is hard to see why the additional impeachment would have made a difference to the jury's assessment of Eleby's credibility.

The undisclosed evidence of Eleby's extensive PCP use was also of little consequence. Eleby's claim that she smoked PCP for the first and last time on October 1 was unbelievable on its face. Jacobs testified that she saw Eleby use PCP at other times, and even if the jury disbelieved most of Jacobs's testimony, it had no reason to doubt her assertion, otherwise unrelated to the case, that her close friend was a drug user.

We likewise are not persuaded that disclosure of the evidence contradicting Alston's assertion that Lamont Bobbitt was one of the persons present in the park and alley at the time of Fuller's murder (i.e., the evidence supporting Bobbitt's alibi, which several witnesses corroborated in testimony before the grand jury) would have made a difference with respect to the jury's evaluation of Alston's credibility. The jury was willing to acquit Harris even though Alston testified that he was an active participant in the murder. We do not see how knowing that one other person (who was not another defendant at trial) whom Alston named as present was not actually there would have swayed the jury.

Finally, although Maurice Thomas's testimony may have been an important factor in the jury's verdicts, his aunt's statement (that she did not recall Thomas having told her about the attack on Fuller) was unlikely to have discredited Thomas in any significant way. One of the strengths of his trial testimony was his candid acknowledgement of what he could not remember, namely whether or not Christopher Turner and Smith were present in the alley. Because he never claimed excellent recall of every detail of what he saw, it was not significant that his aunt could not corroborate a relatively minor part of his testimony. And if, as Thomas testified, she had told him not to report what he saw, she had every reason to deny their conversation when she spoke to the police. Moreover, the jury was willing to convict even where it did disbelieve Thomas, for it found Overton guilty despite Thomas's claim that he was not in the alley.

In sum, we think none of the impeachment evidence was material individually, and that it adds little to any cumulative materiality analysis.

F. CUMULATIVE MATERIALITY OF THE UNDISCLOSED EVIDENCE

We may turn now to the question of the cumulative materiality of the undisclosed exculpatory and impeachment evidence. To reiterate, the question is whether there exists a reasonable probability that the result of appellants' trial would have been different had the evidence been disclosed to the defense. We have concluded that, in addressing this question, our primary focus must be on the potential value to the defense of (1) the

testimony of Watts and Luchie that they walked past the garage where Fuller lay dying at around 5:30 p.m. and heard groans coming from inside, and that the garage doors were closed; and (2) the identification of James McMillan as the person seen acting suspiciously in the vicinity of the garage sometime after the murder. While we do not ignore the potential value to the defense of the impeachment evidence and the limited non-hearsay use that appellants could have made of Davis's accusation of James Blue, we think the contribution of that evidence would have been negligible for the reasons we have already given.

Appellants argue that the undisclosed evidence was valuable not because it exculpated any of them directly, but because it would have enabled them to present an alternative single-perpetrator theory of the crime (with expert witness support) as a counter-narrative to the prosecution's case: Watts and Luchie may have overheard the assault being committed by only a limited number of persons—perhaps only one—rather than the large group described by the prosecution witnesses; and McMillan, given his presence on the scene and criminal history, plausibly may have been one of that limited number of assailants, though no prosecution witness named him as such. The physical (as opposed to the eyewitness) evidence of the attack adduced at trial arguably supported, or at least was not inconsistent with, a single-perpetrator

theory, and there was some other evidence at trial to corroborate it.[79]

The fact remains that the government presented the testimony of several eyewitnesses, including two participants who admitted their own guilt, who did implicate appellants in a group attack. No witness to the attack who testified at trial disputed their overall description of how the crime was committed, and the eyewitnesses were corroborated by evidence of incriminating admissions by some of the appellants. It is true that the prosecution witnesses contradicted themselves and each other on various points, and some of them had potential motives to lie or other problems with their testimony. Moreover, no fingerprint, DNA, or other forensic evidence implicated any defendant.[80] But the undisclosed evidence (other than the impeachment evidence that we have discounted) did not take advantage of those weaknesses; it did not, for example, contradict the government witnesses' accounts, demonstrate their bias, or incorporate contrary forensic evidence

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[79] Notably, perhaps, William Freeman testified at trial that throughout his day at 8th and H Streets, working as a street vendor, he never saw a large group of young people in the area, never saw anyone running towards or away from the vicinity of the garage, and never heard any shouts coming from the area of the garage.

[80] In 1985, when this case was tried, DNA analysis was in its infancy. In 2011, the trial court ordered DNA testing of swabs taken from Fuller's body, a semen sample from her pantyhose, various articles of her clothing, and a metal pole found at the scene, but the tests did not result in a derivable DNA profile.

pointing to perpetrators other than the defendants on trial.

Nor, we conclude, did the undisclosed evidence truly provide substantial support for a single-perpetrator theory of the crime, or any theory that excluded appellants as the perpetrators. The groans, undoubtedly Fuller's, that Watts and Luchie heard coming from the garage between 5:30 and 5:45 p.m. did not mean the assault was still occurring or that any assailant was still present. On the contrary, the fact that Watts and Luchie heard nothing else and saw no signs of any activity more likely indicated that the assault was over and that the assailants were gone. This was entirely consistent with the government's evidence, and provided no reason to doubt it, inasmuch as Fuller left her house around 4:30 p.m. and all of the witnesses described a fast-moving event lasting, in all probability, no more than a few minutes. Luchie's observation that both garage doors were closed shortly before Freeman found one of them open would have raised a question, but it too does not mean anyone was still in the garage with Fuller when Luchie passed by. It surely would not have been enough to turn a jury that found the government's witnesses credible, as this jury did. It is far more likely, in our view, that the jury would have believed that Luchie was mistaken, or that someone came upon the scene and opened the garage door in the interval between Luchie's departure and Freeman's arrival, than that the jury would have thought it plausible that all the government's witnesses were lying and that Luchie had stumbled upon an assault in progress.

The evidence regarding James McMillan perhaps could have led the jury to suspect that he participated in the attack on Fuller, notwithstanding the fact that he was not charged and no eyewitness said he was involved. Alternatively, the jury might have suspected that McMillan arrived on the scene only after Watts and Luchie departed (but before Freeman arrived), and that he and his companion Merkerson looked in the garage—providing an explanation for Luchie's and Freeman's observations of the garage door that did not rely on the supposition that the assailants were still present when Luchie was there.[81] But we think the jury, even if it had heard from Watts and Luchie, would have had no substantial reason to suspect McMillan was the *sole* perpetrator of Fuller's murder, or that he was one of only a few assailants. Even if he was involved in it, his involvement was entirely consistent with the government's evidence that a large group including Alston, Bennett, and appellants committed the crime; McMillan simply could have been another member of that group. (Indeed, had there been a focus on McMillan at trial, the jury presumably would have learned what the government did to investigate his involvement, and perhaps also that Christopher Taylor had implicated him as a participant in the large group attack.)

Moreover, a theory that McMillan could have been the sole perpetrator of the attack on Fuller, or only one of two or three perpetrators, would have

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[81] It is not implausible that McMillan heard about the attack and decided to look in out of curiosity; nor that he carried away something from the garage, explaining his suspicious behavior.

been exceedingly implausible and difficult for the jury to accept—and not only because of the dearth of any evidence inculpating him. To think McMillan could have committed the crime himself, the jury would have had to think not only that all the government witnesses were lying or mistaken about every defendant at trial, but that Alston and Bennett, the government's two cooperating witnesses, were innocent even though they had each pleaded guilty to homicide and continued to admit their guilt. That would not have been a plausible claim to make to the jury. It would have been about as daunting for the defense to contend that McMillan committed the crime with just one or two accomplices. Those accomplices would surely have to have been Alston and Bennett (which begs the question of Merkerson's involvement), but if they were going to admit their own guilt and cooperate as part of their plea bargains, there was no apparent reason why they would have shielded McMillan.[82]

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[82] A far more plausible contention that the attack on Fuller was committed by a small group (one that excluded the defendants on trial) would have been that Alston and Bennett were the sole perpetrators. The government's withholding of evidence did not prevent appellants from raising such a defense at trial. Virtually all the evidence appellants have marshaled against the prosecution's claim of a large group attack—e.g., the expert testimony of Dr. Callery and McCann, Freeman's trial testimony that throughout his day at 8th and H Streets, he never saw a group of young people congregating in the park or engaging in any attack—was available to the defense in 1985. In addition, Alston and Bennett's plea bargains furnished them an identifiable motive to falsely implicate others, and every prosecution witness was vulnerable to impeachment or other challenge on cross-examination in one way or another. Perhaps the testimony of Watts and Luchie would have lent

Our conclusion is the same for each appellant individually. Overton and Christopher Turner point to the fact that the jury found it most difficult to convict them. It is true that in some ways the evidence against these two was weaker than that against their co-defendants. Maurice Thomas could not remember whether Christopher Turner was in the alley and affirmatively denied seeing Overton there, and Vincent Gardner did not contradict these two defendants' alibis the way he did those of other defendants. But Overton, Christopher Turner, and the other appellants are similarly situated with respect to the way in which appellants contend the undisclosed evidence regarding the number of assailants and McMillan's possible involvement could have undermined the government's case against them. The evidence either would have provided significant ammunition in support of a single-perpetrator defense or not (and we conclude not). It had no bearing on whether any one individual defendant was part of a large group attack.

This case is not like *Kyles* or *Miller,* the two cases on which appellants principally rely. In those cases, there was no dispute as to how the crime occurred, only a dispute as to the identity of the perpetrator. In each case, the *Brady* violation was based on the suppression of substantial evidence that directly undercut the prosecution's proof of

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additional support to a theory that Alston and Bennett were the only perpetrators; but for the reasons we have discussed, it would have been slight support at most.

identity and supported the most plausible third-party perpetrator claim by the defense.[83]

Here, the undisclosed evidence (aside from the inconsequential impeachment evidence) 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. Rather, what is at issue is the basic structure of how the crime occurred. This makes the burden on appellants to show materiality quite difficult to overcome, because it requires a reasonable probability that the withheld evidence (in its entirety, and however appellants would have developed it) would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime. It would be different, for example, if the government had suppressed evidence of the kinds of allegations Alston and Bennett made in their later recantations. That, if believed, would have given the jury a basis on which to doubt the government's entire case. The same might be true if the government had suppressed credible and admissible evidence directly

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[83] In *Kyles,* the prosecution concealed statements by eyewitnesses to a murder that contradicted their identification of the defendant, and statements by the putative alternative perpetrator (along with other evidence) suggesting he had framed the defendant and was himself guilty of the crime. *See* 514 U.S. 419, 441–49 (1995). In *Miller,* where the defendant was charged with assault with intent to kill, timely disclosure of the *Brady* material—an eyewitness's grand jury testimony indicating that the perpetrator of a shooting was left-handed (unlike the defendant)—would have helped the defendant establish the guilt of an alternative suspect. *Miller v. United States,* 14 A.3d 1094, 1116 (D.C. 2011).

contradicting the accounts of the crime provided by the eyewitnesses. Here, however, the sum of the undisclosed evidence did not rise to that level of significance. We agree with the motions judge that, even if all that evidence had been disclosed in a timely and appropriate fashion, appellants have not demonstrated a reasonable probability that the result of their trial would have been different. The withheld evidence cannot "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[84]

IV. ANALYSIS OF APPELLANTS' IPA CLAIMS

The IPA[85] allows a convicted person to move for a new trial or vacatur of his conviction at any time "on grounds of actual innocence based on new evidence."[86] "Actual innocence" means "the person did not commit the crime of which he or she was convicted."[87] "New evidence," as relevant here, is evidence that was "not personally known and could not, in the exercise of reasonable diligence, have been personally known to the movant at the time of the trial."[88] In hearing a claim brought under the IPA, the court "may consider any relevant evidence," but must consider, *inter alia,*

> (A) The new evidence; (B) How the new evidence demonstrates actual

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84 *Kyles,* 514 U.S. at 435.

85 D.C. Code §§ 22–4131 to 4135 (2012 Repl.).

86 *Id.* § 22–4135(a).

87 *Id.* § 22–4131(1).

88 *Id.* § 22–4131(7)(A).

> innocence; (C) Why the new evidence is or is not cumulative or impeaching; [and] (D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial.[89]

A defendant is entitled to a new trial if he can show his actual innocence by a preponderance of the evidence.[90] If he can demonstrate his actual innocence by clear and convincing evidence, the court must vacate the conviction with prejudice.[91]

We review the denial of a motion to vacate a conviction or for a new trial under the IPA for abuse of discretion.[92] In doing so, "we must give great deference to the trial court's role as the trier of fact on the ultimate issue of 'actual innocence' under the IPA, and thus we apply the clearly erroneous standard of review to the trial judge's rejection of

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[89] *Id.* § 22–4135(g)(1).

[90] *Id.* § 22–4135(g)(2).

[91] *Id.* § 22–4135(g)(3).

[92] *Richardson v. United States,* 8 A.3d 1245, 1248 (D.C. 2010); *see also Mitchell v. United States,* 80 A.3d 962, 971 (D.C. 2013) ("To the extent that the statute affords the trial court discretion in its application of the IPA, we review for abuse of discretion.") (quoting *Veney v. United States,* 936 A.2d 811, 822 (D.C. 2007), *as modified,* 936 A.2d 809 (D.C. 2007)).

alleged newly discovered evidence offered to prove 'actual innocence.'"[93]

Appellants' claims of actual innocence depend on the credibility of the recantations by four witnesses who testified against them at trial, and in particular on the recantations by Alston and Bennett. The motions judge concluded that appellants "have not come close to demonstrating actual innocence" because he found the recantations to be "not worthy of belief." Such a credibility determination, made after the judge had the opportunity to hear the recanting witnesses' live testimony and observe their demeanor, may be overturned only if "it is wholly unsupported by the evidence."[94]

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[93] *Richardson,* 8 A.3d at 1249 (internal citation omitted); *see also* D.C. Code § 17–305 (2012 Repl.) (setting out the standard of review of bench verdicts).

[94] *Godfrey v. United States,* 454 A.2d 293, 301 (D.C. 1982); *see also Johnson v. United States,* 33 A.3d 361, 371 (D.C. 2011) (Where a motion for a new trial is based on the recantation of a witness, "[i]f the trial court determines that the recantation is not credible, that determination ends the inquiry.") (citation omitted); *Bell v. United States,* 871 A.2d 1199, 1201 (D.C. 2005) (same, under the IPA). This accords with the usual rule in an appeal from a bench trial that "[a]n appellate court will not redetermine the credibility of witnesses where, as here, the trial court had the opportunity to observe their demeanor and form a conclusion." *In re S.G.,* 581 A.2d 771, 775 (D.C. 1990) (quoting *WSM, Inc. v. Hilton,* 724 F.2d 1320, 1328 (8th Cir. 1984)); *accord David v. United States,* 957 A.2d 4, 8 (D.C. 2008) ("This court will not 'substitute its judgment for that of the fact-finder when it comes to assessing the credibility of a witness ... based on factors that can only be ascertained after observing the witness testify.' ") (quoting *Robinson v. United States,* 928 A.2d 717, 727 (D.C. 2007)).

As the motions judge noted, witness recantations in general are "properly viewed with great suspicion" because they are "very often unreliable and given for suspect motives,"[95] among other reasons. Alston and Bennett's recantations in particular were suspect, the judge observed, for to accept them "one must begin by suspending one's disbelief that a person would plead guilty to murder (Alston) and manslaughter and robbery (Bennett) and accept a sentence of many years in prison, all based on lies the police pressured them to tell against themselves and their close friends who, based on those lies, would be convicted and spend the rest of their lives in prison." Beyond that, the judge explained the evidentiary basis for his refusal to credit Alston and Bennett as follows:

> The court had an opportunity to hear their testimony under oath, observe their demeanor, compare it to their demeanor on their videotaped

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[95] *Dobbert v. Wainwright,* 468 U.S. 1231, 1233–34 (1984); *see also, e.g., Meade v. United States,* 48 A.3d 761, 766 (D.C. 2012) ("It has long been established that recanting affidavits and witnesses are looked upon with the utmost suspicion by the courts.") (quoting *United States v. Kearney,* 682 F.2d 214, 219 (D.C.Cir. 1982); internal quotation marks and brackets omitted); *V.C.B. v. United States,* 37 A.3d 286, 291 (D.C. 2012) ("[C]ourts often view recantations of previous accusatory statements with suspicion or skepticism, in part because witnesses offering recantations are often facing radically different pressures than ... they were at the time of the initial trial.") (internal citations and quotation marks omitted); *Godfrey*, 454 A.2d at 300 n.26 ("[W]itnesses may recant for numerous reasons that have nothing to do with furthering truth or justice.").

interrogations on November 29, 1984 (Alston), and February 6, 1985 (Bennett), review their trial testimony under oath, and compare their testimony to the testimony of all the other witnesses at trial who placed some or all of the petitioners at the scene. In this context, the current testimony of Alston and Bennett that they were not at 8th and H Streets on October 1, 1984, and that they were forced by the police to say they were there and to name the others who were there is nothing short of preposterous. The scene in the alley on October 1, 1984, was crowded and chaotic. Alston and Bennett may have gotten some facts wrong and may have left certain things out or distorted the truth to minimize their own involvement or to protect others, but the basic facts implicating these petitioners and describing a crime perpetrated by a large group were corroborated by too many other witnesses not to be believed. The notion that Alston and Bennett were not present and made it all up cannot be credited when juxtaposed with their videotaped statements, their guilty pleas, Alston's admissions to other witnesses, Alston's trial testimony and Bennett's grand jury and trial testimony. Both witnesses were extensively cross examined at trial by ten seasoned

defense counsel over the course of several days about the many discrepancies and inconsistencies in their respective versions of events. It is exceedingly unlikely that any juror would have concluded that Alston and Bennett were not on the scene or that they were not accurately reporting at least most of what they saw, heard, and did that day. Their motives for now coming forward cannot be known. Both are now out of prison and no longer seeking release from the parole board, where their current lack of remorse might be held against them. Back in their communities, perhaps even this many years later they are still burdened with guilt from having benefitted themselves by sending their friends to prison. Whatever their current motivation may be, the court does not credit their recantations, and their attempt at exculpation does not help the petitioners meet their burden of proving actual innocence.

In short, the judge evaluated the recantations of Alston and Bennett in light of the entire evidentiary record, taking into account their demeanor both on the witness stand and during their allegedly coerced confessions, and weighing their recantations against their previous sworn testimony and other evidence of their guilt and

> petitioners' guilt.[96] We have no basis on which to overturn the judge's finding that the recantations were incredible.

We also perceive no error in the judge's finding that the purported recantations of Montgomery and Jacobs were worthless. We need not belabor this point. As to Jacobs, the judge fairly concluded that her recantation was unreliable because it "did not indicate with any specificity or clarity just which parts of her prior account were untrue."[97] As for Montgomery, who disavowed his recanting affidavit and reaffirmed the truth of his trial testimony, the judge certainly did not err in concluding that his testimony at the 2012 hearing lent no support to petitioners' IPA claim.

Without the discredited recantations, appellants' remaining new evidence was clearly not enough to overcome the government's proof of their guilt and show their actual innocence by a preponderance of

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[96] It should be noted that the judge credited the detectives and prosecutors who denied having coerced witness testimony. In that connection, the judge did not ignore the expert opinion testimony of Dr. Leo. But as the judge pointed out, the most this expert testimony could show was that the interrogators in this case employed techniques that heightened the risk of a false confession; it did not establish that the confessions were false.

[97] *Meade*, 48 A.3d at 767. In addition to insisting that she lied about the petitioners at trial but did not remember anything she said, Jacobs also testified that she never went into the alley where Fuller was attacked. The judge found it striking, however, that "whenever [Jacobs] was asked if she saw any of the attack or the act of sodomy against Mrs. Fuller, Ms. Jacobs broke down sobbing just the way she did when she was confronted with that visual image at trial."

the evidence, let alone by clear and convincing evidence. Appellants argued that the "unrebutted scientific evidence," i.e., the expert opinion testimony of Dr. Callery and McCann, showed them to be innocent. We agree with the motions judge that this does not qualify as "new evidence" under the IPA, because appellants, in the exercise of reasonable diligence, could have presented such testimony at their trial.[98] But even assuming otherwise, the motions judge had ample reason to discount the expert testimony proffered by appellants, for as he explained,

> neither Dr. Callery nor Mr. McCann could definitively state that Mrs. Fuller was attacked by one to three individuals as opposed to a larger group. While both testified that, in their opinion, it was more likely that a small number of individuals inflicted the injuries on Mrs. Fuller, both admitted that it was possible that a greater number of persons were involved.[99] Given the court's rejection of the recantations and the other trial evidence pointing to an attack by ten or more assailants, petitioners' "unrebutted scientific evidence," even if it were new, is not particularly

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[98] *See* D.C. Code § 22–4131(7); *Bouknight v. United States,* 867 A.2d 245, 254–56 (D.C. 2005).

[99] Moreover, the medical examiner who testified in 1985 concluded that he could not say with specificity how many people attacked Fuller, a conclusion with which Dr. Callery agreed.

> persuasive and does not begin to demonstrate that the petitioners are "actually innocent."

Finally, McMillan's horrific murder of A.M. in 1992 may tend to make it more likely that he was involved in the attack on Fuller eight years earlier. Nevertheless, we agree with the motions judge that "these two brutal murders could not be characterized as signature crimes," and that "[w]hatever may be said of the similarities between the two crimes, they certainly do not prove that James McMillan murdered Mrs. Fuller to the exclusion of [appellants], when all of the credible evidence points the other way."

V. YARBOROUGH'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

In the videotaped statement he gave following his arrest, appellant Yarborough admitted having been present at the alley and witnessing appellants' attack against Fuller, though he denied participating in the attack himself. Yarborough's motion to suppress the videotaped statement as involuntary was denied, and the statement was introduced in evidence against him at trial. In his § 23–110 motion, Yarborough claimed that his trial counsel pursued suppression of his statement ineffectively, in violation of his duties to Yarborough under the Sixth Amendment, because he neglected to investigate Yarborough's mental disabilities and rely on them as additional grounds for finding the statement involuntary. In rejecting this claim, the motions judge concluded that Yarborough failed to show either that his counsel's performance was

deficient or that the alleged deficiency prejudiced him at trial. We find it unnecessary to reach the question of deficient performance, because we agree with the motions judge that Yarborough has not carried his burden of showing the requisite likelihood of prejudice.

A. BACKGROUND

1. Yarborough's Statements to Police

On October 4, 1984, three days after Fuller's murder, Yarborough was interviewed as a witness to the incident by Detectives McGinnis and Sanchez. Their questions and Yarborough's answers were recorded in an eight-page typewritten statement.[100] In this initial interview, Yarborough told the detectives he was present at 8th and H Streets when a number of his friends (including several of the appellants here) decided to rob a lady crossing the street there. Yarborough said he did not join them or participate in the attack, but he watched the others follow the lady to the alley. He said he walked away after hearing the lady's screams.

Yarborough was not arrested until the morning of December 9, 1984. On that occasion, he again waived his *Miranda* rights and agreed to be

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[100] At the outset, Yarborough acknowledged understanding that he was not under arrest and was free to leave at any time, and he waived his *Miranda* rights. When asked whether he could read and write, Yarborough answered, "I can write but I can't read real good." Yarborough then was asked whether he would like Detective Sanchez to read his statement over to him, and he requested this be done. Yarborough proceeded to sign every page of the statement and initial every one of his answers.

questioned by Detectives McGinnis and Sanchez. His interrogation culminated in an hour-long videotaped statement. At the outset of that statement, Yarborough confirmed that he understood and had waived his Fifth Amendment rights in writing, that no promises had been made to him in return for his statement, and that no force had been used against him.[101] Then, beginning with McGinnis's open-ended request to "tell us everything you know about" the death of Fuller, Yarborough described how he saw appellants and others attack, rob, hit, and stomp Fuller in the alley at 8th and H Streets, sodomize her with a pole just outside the garage, and then drag her into the garage there. Although Yarborough continued to deny having participated in this attack in any way (which was contrary to other evidence the police had obtained since his earlier interview), he now admitted his presence at the scene from start to finish. A version of Yarborough's videotaped statement, redacted to eliminate his identification of several of his co-defendants, was admitted in evidence against him at trial and played for the jury.

2. Yarborough's Suppression Motion

Prior to trial, Yarborough moved to suppress his videotaped statement. His sole contention at the suppression hearing was that the detectives had employed threats and physical abuse to coerce him into waiving his rights and admitting he was present when Fuller was murdered. The detectives denied it. Yarborough's only evidence of mistreatment—he did

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[101] McGinnis asked Yarborough if he was injured. Yarborough said, "not really," and went on to explain that he had a "bad leg" from an injury he had received before that day.

not take the stand and testify to it—was the fact that, after his statement was videotaped, the police took him to the hospital, where he was treated for pain and swelling in his left knee and released. The hospital records reflected that Yarborough reported his leg had been injured in the course of his arrest. In his videotaped statement, however, Yarborough said he had hurt his leg sometime before he was arrested, and Detective McGinnis testified that Yarborough told him he had injured his knee playing sports. After taking this evidence and viewing the videotape, the trial judge found that Yarborough did not sustain his knee injury during his interrogation, that his claims of abuse were unsubstantiated, and that he voluntarily waived his *Miranda* rights.

On direct appeal, Yarborough argued that the trial judge erred in denying his motion without taking into consideration "his age, education, and experience with the criminal justice system."[102] Because Yarborough had presented no evidence with respect to those factors, we held that the trial court "properly based its decision upon the important factors brought to its attention," and that "[u]nder the totality of the circumstances, the trial court's conclusion had substantial support in the evidence."[103] We affirmed the denial of Yarborough's motion to suppress.

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[102] *Catlett v. United States,* 545 A.2d 1202, 1207 (D.C. 1988).

[103] *Id.* at 1209.

3. The Hearing on Yarborough's Ineffective Assistance Claim

Yarborough took the stand for the first time at the 2012 hearing on appellants' post-conviction motions. He did so in part to present evidence relevant to his ineffective assistance of counsel claim (namely, that he took special education classes in junior high and high school and could not read well), but principally to assert his innocence and reiterate, this time in his own words, his previous claim that the detectives coerced him by means of physical violence and threats of violence into waiving his rights and falsely incriminating himself. Contradicting the statements he gave to the police on October 4 and December 9, 1984 (and other evidence adduced at trial), Yarborough asserted that he spent the afternoon and evening of October 1, 1984, at his girlfriend's house, was not at 8th and H Streets when Fuller was attacked, and did not witness the crime at all.[104]

Yarborough claimed that the eight-page question-and-answer statement of October 4 was a total sham: The police, he said, wrote it in advance of his interview without his knowledge, and Detective McGinnis directed him to initial virtually every line and sign every page while covering it with his hand to prevent Yarborough from reading it.

As to the December 9 videotaped statement, Yarborough claimed it was the product of extensive

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[104] Yarborough's girlfriend at the time, Chandera Hill, corroborated his alibi but was impeached with her 1985 grand jury testimony that she did not remember what she or Yarborough were doing on the day of the murder.

physical abuse by Detective Sanchez, threats of violence by both detectives, and prolonged coaching by McGinnis. Yarborough testified that before the videotaping, in response to his initial refusal to waive his *Miranda* rights, Sanchez threw him across the table, screamed that he could not write "no" on the waiver form, and then slammed him back into his chair. Only then, Yarborough said, did he agree to waive his rights. Next, Yarborough testified, after he insisted he knew nothing about Fuller's murder, Sanchez threw him around the room and into a filing cabinet (allegedly injuring his left knee), dragged him to a bathroom and flushed his by now bloodied head in the toilet bowl. At one point, the detective dramatically ripped off his own t-shirt and threatened to kill Yarborough if he did not confess. McGinnis allegedly warned Yarborough that Sanchez had killed two other people for lying, expressed the hope that Yarborough would not be the third, and read him several statements about the attack on Fuller to instruct him what he needed to say. During the videotaping that followed this abusive treatment, Yarborough testified, Sanchez menacingly held a slapjack in his hand to keep him in line while McGinnis signaled to him with his eyes to guide his testimony and help him avoid straying from the script. (The videotape does not reveal any such behavior on the part of either detective, or any signs that Yarborough had been mistreated or injured.)

What he said on tape about the crime, Yarborough testified, came in part from what McGinnis told him to say (off-camera, just before the videotaping commenced), and in part from his own

imagination. Because he did not admit to having participated in the robbery and assault of Fuller, Yarborough expected to be released after the videotaping.[105]

Both detectives testified at the hearing and contradicted Yarborough's account of his interrogations. They denied ever physically abusing Yarborough or threatening him in any way, telling him he could not invoke his rights, feeding him information, or directing him what to say or sign. The detectives averred that Yarborough himself provided the information in his eight-page statement on October 4; McGinnis described Yarborough as being able to understand and answer their questions in a responsive, "cogent" manner. The detectives acknowledged that on December 9, when they questioned Yarborough after he waived his rights and before he agreed to give a videotaped statement, they sometimes yelled at him, accused him of lying, and told him he would be better off if he would just tell the truth. They admitted playing a "good cop/bad cop" routine in which Sanchez pretended to be enraged, McGinnis ushered him out of the room, and Sanchez then banged on the door, demanding to be let back in. At one point, Sanchez either pretended to or actually did tear off his t-shirt for dramatic effect. But Yarborough did not appear to be intimidated by these tactics. He continued to deny any personal involvement in the attack on Fuller, and he adhered to certain details of his story that the detectives

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[105] He remained in custody, however, and was taken to the hospital for his leg injury. He testified that he told hospital personnel that the police had beaten him.

questioned (notably, whether he received money taken from Fuller, which Yarborough firmly denied).

Two witnesses at the 2012 hearing testified in support of Yarborough's claim that an investigation by his trial counsel of his cognitive impairments would have yielded support for a motion to suppress his videotaped statement on voluntariness grounds. First, Dr. Michael O'Connell, a forensic psychologist, testified that Yarborough had an adjusted full scale I.Q. score of 69.5, placing him at the high end of the range for mild mental retardation, and that Yarborough's low scores on the Gudjonsson Suggestibility Scales indicated he was more suggestible than 99% of the population.[106] Dr. O'Connell opined that a person with these characteristics would struggle in an interrogation setting because he would tend to overemphasize short-term benefits at the expense of long-term consequences and be acquiescent and eager to please his interrogators.[107]

Second, Chandera Hill (Yarborough's girlfriend in 1984) testified that she regularly helped Yarborough with his homework, often doing it for him because he had trouble with reading, comprehension, and pronunciation.[108] She also

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[106] There also was documentary evidence, referenced in Yarborough's presentencing report, that a psychological evaluation performed in May 1984 found Yarborough to be "functioning intellectually in the mentally deficient to borderline range."

[107] Yarborough "didn't do badly," however, on a test to determine whether he understood his *Miranda* rights.

[108] Yarborough was sixteen years old in 1984.

testified that Yarborough's trial counsel spoke to her but never asked her about Yarborough's I.Q., comprehension, reading, or homework abilities.

In rejecting Yarborough's ineffective assistance claim, and concluding that evidence of his mental impairments would not have changed the outcome of the motion to suppress his videotaped statement, the motions judge found, *inter alia,* that Yarborough's testimony at the hearing was "patently incredible," and that the evidence did not "bear out any of [his] extraordinary claims" of physical abuse, threats, and other misconduct by the detectives who obtained his statements.[109] The judge credited the detectives' testimony to the contrary. In addition, and "most importantly," the judge found that

> [Yarborough's] demeanor on the videotape of his interrogation shows him to be entirely relaxed, spontaneous, and in no distress. Many of the things Yarborough said on the videotape seem unlikely when compared with other evidence, but there is no indication that the facts he chose to include came from the police or from any source other than him. For example, when the detectives tried to get him to admit that he received money that was part of the proceeds of the robbery of Mrs. Fuller, he adamantly insisted that the two dollars he received from petitioner Catlett was a loan that came from other

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[109] Yarborough does not challenge these factual findings on appeal.

> money Catlett had in his pocket, not from the proceeds of the robbery.

In sum, the judge found that Yarborough's videotaped statement

> was not the statement of a helpless mentally vulnerable young man being fed facts by the police and parroting them back to please his interrogators; it was the voluntary admission of a conniving youthful offender trying to distance himself as far as possible from the crime while not denying that he was there.... No amount of psychological testing or social science research was likely to convince the court that this false exculpatory statement should be suppressed, particularly where the judge did not believe the defendant's claim about physical coercion in the first place.

B. ANALYSIS

A claim of ineffective assistance of counsel has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's

> errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[110]

The performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.[111] On appeal, we accept the motions judge's findings of fact unless they lack evidentiary support, and we review the judge's legal conclusions *de novo.*[112]

As the Supreme Court has said, "there is no reason" for an appellate court to address both components of the ineffectiveness inquiry if it determines that the defendant has made an insufficient showing on one of them. "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."[113] We think it appropriate to confine our discussion here to the prejudice component of Yarborough's claim. We therefore shall assume, without deciding, that trial counsel performed deficiently in failing to investigate and learn of Yarborough's mental limitations in anticipation of moving to suppress his

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[110] *Strickland v. Washington,* 466 U.S. 668, 687 (1984).

[111] *Id.* at 698.

[112] *Cosio v. United States,* 927 A.2d 1106, 1123 (D.C. 2007) (en banc).

[113] *Strickland,* 466 U.S. at 697.

videotaped statement as involuntary.[114] The question then is whether it is likely that this failure of investigation was prejudicial to Yarborough.

To satisfy the prejudice component of the ineffectiveness inquiry, a defendant's burden is to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[115] In this case, that necessary showing has multiple steps. First, Yarborough must show a reasonable probability that a competent attorney, having investigated and become aware of his intellectual limitations and susceptibility to police pressure and suggestion, would have relied on those facts as a basis for moving to suppress his videotaped statement as involuntary.[116] Second, Yarborough must show that it is reasonably probable the trial court would have granted a motion to suppress based on this theory.[117] And third, Yarborough also must show a reasonable probability that the jury's verdict would have been different—that the jury would have acquitted him on at least some counts—had his statement been

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[114] It should be noted that Yarborough's claim is that his statement was involuntary, not that he lacked the necessary understanding to waive his Fifth Amendment rights knowingly and intelligently.

[115] *Strickland,* 466 U.S. at 694.

[116] *See Cosio,* 927 A.2d at 1132.

[117] *Howerton v. United States,* 964 A.2d 1282, 1290 (D.C.2009) (citing *Taylor v. United States,* 603 A.2d 451, 459 (D.C.1992)).

suppressed.[118] We shall focus on the first two of these steps.[119]

At the pretrial suppression hearing, the government bore the burden of proving that Yarborough's videotaped statement was voluntary by a preponderance of the evidence.[120] "The test for determining the voluntariness of specific statements is whether, under the totality of the circumstances, the will of the suspect was overborne in such a way as to render his confession the product of coercion."[121] The presence of official compulsion—"coercive police activity" or "police overreaching"—is "a necessary

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[118] *See Kimmelman v. Morrison,* 477 U.S. 365, 375 (1986) (holding that where a claim of ineffectiveness is predicated on defense counsel's failure to litigate an evidence suppression motion competently, the defendant must prove that the motion "is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice").

[119] We think Yarborough has made the showing required in the third step, a reasonable probability that the jury would have acquitted him had it not had his videotaped statement to consider. The evidence introduced at trial of Yarborough's complicity in the attack on Fuller without that statement was not overwhelming. Although Alston and Thomas implicated him in the attack, Bennett testified that Yarborough remained in the park when the group accosted Mrs. Fuller, and Montgomery only remembered seeing Yarborough there after the murder, not before. The importance of Yarborough's videotaped statement is suggested by the fact that it was the last thing the jury asked to see before returning its first round of verdicts, in which it found Yarborough guilty.

[120] *Graham v. United States,* 950 A.2d 717, 735 (D.C.2008) (citing, *inter alia, Lego v. Twomey,* 404 U.S. 477, 484 (1972)).

[121] *Id.* at 735–36 (internal quotation marks and brackets omitted).

predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause."[122] That said, "[i]n determining whether a defendant's will was over-borne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."[123] Relevant personal characteristics include "the suspect's age, education, prior experience with the law, and physical and mental condition"; "relevant details of the interrogation include its duration and intensity, the use of physical punishment, threats or trickery, and whether the suspect was advised of his rights."[124]

Because Yarborough's intellectual limitations and suggestibility could have impaired his effective assertion of his rights and rendered him vulnerable to police coercion, they unquestionably were relevant to the voluntariness inquiry in this case. But that is

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[122] *Id.* at 736 (quoting *Colorado v. Connelly,* 479 U.S. 157, 166–67 (1986)).

[123] *Id.* at 736 (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 226 (1973)).

[124] *Id.*; *see also, e.g., In re M.A.C.,* 761 A.2d 32, 36 (D.C. 2000) (recognizing that where "young persons" are involved, the factors bearing on voluntariness include "the juvenile's age, experience, education, background and intelligence, the circumstances under which the statement was given, and whether the juvenile 'has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights,' " as well as any "evidence of physical abuse, the length of the detention, the use of trickery, mental or emotional stability, mental capacity, and physical illness or injury") (quoting *Fare v. Michael C.,* 442 U.S. 707, 725 (1979)).

not the end of the inquiry[125]; despite Yarborough's cognitive weaknesses, there is insufficient evidence to show a reasonable probability that he actually was coerced into waiving his rights and providing the statement used against him. The evidence is to the contrary.

First, the contention that Yarborough's videotaped statement was the product of his intellectual limitations and consequent vulnerability to police suggestion is flatly inconsistent with Yarborough's own testimony at the 2012 hearing and what he apparently told his trial counsel in 1985—that the detectives coerced him into waiving his rights and making a false statement against his will by force and violence. This assertion by Yarborough means that his putative vulnerability to police suggestion had nothing to do with his waiver and statement. Indeed, so far as appears, Yarborough has never maintained that his statement and incriminating admissions were the product of undue suggestion or trickery by his interrogators, or of his own suggestibility, confusion, naïve desire to please the police, inability to appreciate the gravity of his situation, or the like. As the motions judge observed in his decision, Yarborough claimed "the police beat

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[125] *Cf. In re M.A.C.,* 761 A.2d at 38–39 (upholding determination that mildly mentally retarded fifteen-year-old's confession was voluntary; "[a] low I.Q., standing alone, will not render an otherwise voluntary and knowing confession inadmissible .... [t]he youth's intelligence, as measured by testing, is only one of many factors for consideration"); *Robinson v. United States,* 928 A.2d 717, 725–27 (D.C. 2007) (holding videotaped confession voluntary notwithstanding defendant's mild mental retardation).

the statement out of him under circumstances that would have caused the strong as well as the weak to succumb to the pressure." This is devastating to Yarborough's alternative claim that his intellectual limitations could have persuaded the trial court to suppress his statement as involuntary, since it means the argument would have been vitiated and frustrated by Yarborough's inability to support it with his own testimony.

In addition, the other evidence in its totality refutes the claim that the detectives took advantage of Yarborough's low intelligence and suggestibility to coerce his videotaped statement. That hour-long exchange with the detectives is itself compelling evidence otherwise. Whatever pressure Yarborough was under to confess his participation in the attack on Fuller, he did not yield to it.[126] Nor was he notably compliant in other respects. As the motions judge pointed out, Yarborough did not acquiesce in the detectives' effort to get him to admit that he received some of Fuller's money from appellant Catlett after the murder. That a number of other details Yarborough provided about the assault were contrary to what the police had learned from other sources further undercuts the claim that Yarborough was induced to spout what the detectives wanted to hear even though he did not know it to be true. In point of fact, Yarborough's serious cognitive

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[126] Indeed, that Yarborough professes to have believed he was going to be released after the videotaping because he had not admitted participating in the attack provides additional reason to conclude his statement was voluntary.

limitations themselves make it hard to credit the idea that his videotaped statement was the product of a rehearsal in which he learned the lines the detectives fed him; one would think the degree of concentration and memory required for that to succeed would have been beyond his mental capabilities.

There is no indication of coercion or lack of voluntariness on the videotape. It can be seen that Yarborough is not handcuffed. He sits at a table, facing the two detectives. He has a can of soda to drink. The motions judge accurately described his demeanor as relaxed, spontaneous, and evincing no sign of distress or discomfort. Yarborough does not appear to be injured or tired. He was not deprived of sleep, nor had he been in custody for more than a few hours. He had been advised, repeatedly, of his *Miranda* rights, and he had agreed to waive them. There is no reason to doubt that he adequately understood his rights and what it meant to waive them.

In short, due to his intellectual limitations, Yarborough may have been highly suggestible, compliant, and prone to making faulty judgments about his own best interests—but that does not mean the police obtained his videotaped statement by taking advantage of those vulnerabilities. The evidence to the contrary convinces us that there is no reasonable probability that a motion to suppress his statement as involuntary based on his intellectual limitations would have succeeded, or that competent counsel aware of Yarborough's mental disabilities would have thought such a motion worth pursuing under the circumstances of this case. We therefore

hold that Yarborough has not shown the necessary prejudice from his trial counsel's failure to investigate his mental limitations to prevail on his claim of ineffective assistance of counsel.

VI. CONCLUSION

For the foregoing reasons, we affirm the order of the Superior Court denying appellants' motions for relief from their convictions under D.C. Code §§ 22–4135 and 23–110.

So ordered.

APPENDIX B - SUPERIOR COURT DECISION AND ORDER

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

TIMOTHY CATLETT RUSSELL OVERTON LEVY ROUSE KELVIN SMITH CHARLES TURNER CHRISTOPHER TURNER CLIFTON YARBOROUGH, Petitioners, v. UNITED STATES OF AMERICA, Respondent.	CRIM NO. 8617-FEL-84 8613-FEL-84 8614-FEL-84 8616-FEL-84 8513-FEL-84 8612-FEL-84 8615-FEL-84

INTRODUCTION

On October 1, 1984, at approximately six in the evening, the lifeless body of Catherine Fuller, a forty-eight year old mother of six, was found in a filthy garage in an alley that ran behind the north side of the 800 block of H Street, N.E. Mrs. Fuller had been beaten to death. Her bones were broken, her liver was shattered, and she had been brutally sodomized by a hard object that had been shoved approximately a foot into her rectum, tearing tissues and organs in its path. On December 16 and 18, 1985, a jury found these seven petitioners guilty of first degree felony murder for their roles in the robbery and killing of Mrs. Fuller. Petitioners appealed, raising numerous issues.[1] The Court of Appeals affirmed all convictions. *Catlett v. United States*, 545 A.2d 1202 (D.C. 1988).[2] Acknowledging conflicts in the testimony, the appellate court

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[1] For reasons not clear from the record, petitioner Charles Turner did not appeal.

[2] The jury convicted defendants of first degree felony murder (kidnapping while armed), first degree felony murder (armed robbery), kidnapping, and armed robbery. The Court of Appeals held that the defendants could not be sentenced for both felony murder and the predicate felony, or for more than one felony murder for the killing of a single victim. *Catlett v. United States*, 545 A.2d 1202, 1219 (D.C. 1988). On remand, Judge Robert Scott vacated the convictions of first degree felony murder (kidnapping while armed) and armed robbery and resentenced all petitioners except Christopher Turner to consecutive prison terms of twenty years to life and fifteen years to life on their remaining convictions of felony murder (armed robbery) and kidnapping. Mr. Turner was sentenced to concurrent terms of twenty years to life and seven and a half years to life and he is currently on parole.

characterized the government's evidence as "overwhelming." *Id.* at 1206 n.2.

The government's evidence at trial relied heavily on two cooperating witnesses, who had pled guilty to reduced charges in return for their testimony, and several other eyewitnesses, many of whom had various motives to testify falsely and had made numerous inconsistent statements, which left considerable room for impeachment and extensive cross examination by the ten skilled defense attorneys. Ultimately, the jury believed the prosecution's witnesses, convicting eight of the ten defendants and acquitting two.[3]

More than twenty-five years later, the seven petitioners are back before the court pursuant to the

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[3] The government originally charged seventeen people in the murder of Catherine Fuller: Calvin Alston, Harry Derrick Bennett, Lamont Bobbitt, James Campbell, Timothy Catlett, Roland Franklin, Alphonso Harris, Darryl Murchison, Russell Overton, Levy Rouse, Felicia Ruffin, Kelvin Smith, Charles Turner, Christopher Turner, Steven Webb, Gregory Williams, and Clifton Yarborough. The jury convicted Catlett, Overton, Rouse, Smith, Charles Turner, Christopher Turner, Webb, and Yarborough of kidnapping, armed robbery, and two counts of first degree (felony) murder. Ruffin and Harris were acquitted. Campbell's case was severed when his attorney became ill during voir dire, and he eventually pleaded guilty to manslaughter and attempted robbery in May 1986. Alston and Bennett cooperated with the government, pleaded guilty to second degree murder (Alston) and manslaughter and robbery (Bennett), and testified at trial. Franklin, Murchison, Bobbitt, and Williams were not indicted, and the government ultimately dismissed the charges against them. Steven Webb died in prison. The other seven convicted defendants are the petitioners before the court. Christopher Turner is the only petitioner who is no longer in prison.

Innocence Protection Act, D. C. Code § 22-4135, asserting a claim that they are actually innocent of all crimes relating to the murder of Catherine Fuller. In addition, petitioners contend that the government withheld from the defendants at trial numerous items that were favorable to them and material to guilt, in violation of their due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Finally, petitioner Yarborough alone moves to vacate his conviction on the ground that he was denied effective assistance of counsel because his trial attorney did not present evidence at his motion to suppress statements or at trial to show that Yarborough's low intellectual functioning and poor education allowed police to manipulate him into giving involuntary and false incriminating statements.[4]

In recent years, particularly since the advent of forensic use of DNA, tragic cases of wrongful convictions of innocent persons have been uncovered. This case is not one of them. Petitioners have no DNA or other scientific evidence exonerating them.[5]

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[4] Petitioner Christopher Turner filed his first motion to vacate his conviction or in the alternative for a new trial on January 6, 2010, and filed an amended motion on April 6, 2010. The other petitioners joined his amended motion in early 2011. Petitioner Yarborough filed his own amended motion to vacate on February 3, 2012, which included a claim for relief pursuant to D.C. Code § 23-110 based on ineffective assistance of counsel. The court held an evidentiary hearing from April 23 to May 15, 2012, at which it took testimony relating to all of petitioners' claims.

[5] Unlike the recent highly publicized exonerations of Donald Gates, Santae Tribble, and Kirk Odom, petitioners do not claim that the government relied on flawed or discredited

What they have are witnesses who testified against them at their trial in 1985 – including two

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forensic evidence to obtain their convictions. Gates was convicted of rape and murder in 1982 based in part on now-discredited hair sample analysis. He was exonerated in 2009 when DNA tests conclusively excluded him as the source of the semen found on the victim's body. Tribble was convicted of armed robbery and first degree murder in 1980. At his trial, an FBI hair expert testified that a hair found in a stocking mask at the scene came from Tribble or from an individual of the same race whose hair had the same characteristics as Tribble's. The government also introduced ballistics evidence tying Tribble to the scene and testimony from two witnesses who claimed that he confessed to them. His conviction was vacated in May 2012 after the government conceded that DNA from the hair did not match Mr. Tribble. Because the government was "not in a position – 34 years after the murder was committed – to develop additional evidence that could be used at trial," the government agreed that the court should vacate defendant's conviction with prejudice. Gov. Resp. to Def. Mot. to Vacate Conviction, *United States v. Santae Tribble*, 1978-FEL-004160, Apr. 27, 2012, at 2. Similarly, Odom was convicted of a 1981 rape based in part on the same type of flawed and overstated expert testimony based on microscopic hair analysis. He was exonerated in July 2012 after DNA testing showed that the hair left by the rapist on the victim's clothing could not have come from Odom and the semen recovered from the victim actually matched the DNA of another convicted sex offender. By contrast, in petitioners' trial, the government did not introduce forensic evidence and instead relied primarily on eyewitness testimony and on the medical examiner's autopsy findings. On May 25, 2011, the court ordered DNA testing on oral, vaginal and rectal swabs taken from Mrs. Fuller's body; hairs recovered from Mrs. Fuller's body; a semen sample from Mrs. Fuller's pantyhose; a metal pole found at the scene; and various articles of Mrs. Fuller's clothing. Petitioners' counsel represented at the March 9, 2012, status hearing that none of the items contained enough biological material to enable the laboratory to derive a DNA profile from them.

accomplices who pled guilty and were sentenced to lengthy prison terms – who now claim that their testimony was false, that it was based entirely on news reports, rumors, and facts that were fed to them by police and prosecutors, and that the police used threats and other coercive interrogation techniques to force them to tell lies against themselves and these petitioners.

These recantations, including petitioner Yarborough's hearing testimony denying any involvement in the crime, are at the heart of all of petitioners' claims. Unless the court credits the recantations, petitioners cannot meet their burden of showing that they are actually innocent, they cannot demonstrate that any of the information that was not disclosed to them at the time of their trial meets the test for "materiality" under *Brady v. Maryland*, and petitioner Yarborough cannot show that he was prejudiced by any negligence of his lawyer in the litigation of his motion to suppress. For the reasons that follow, the court rejects each of petitioners' claims.

I. Petitioner Yarborough's Ineffective Assistance Claim

Petitioner Yarborough gave two inculpatory statements to the police: a typewritten statement on October 4, 1984, and a videotaped statement on December 9, 1984. His trial attorney moved to suppress both statements, arguing that they were involuntary and taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The trial judge denied the motion, and a redacted version of the December 9 statement was introduced against Yarborough at

trial.[6] On appeal, the District of Columbia Court of Appeals affirmed the trial judge's denial of the motion to suppress, pointing out that Yarborough "presented no evidence regarding either his educational level or juvenile record." *Catlett*, 545 A.2d at 1209. Petitioner Yarborough now claims that his lawyer's failure to introduce that type of evidence in support of his motion to suppress and at trial constituted ineffective assistance of counsel.

The theory of defendant Yarborough's motion to suppress was that the police had literally beaten the December 9 statement out of him until he eventually admitted that he was present when Mrs. Fuller was murdered. The trial judge heard the evidence and rejected it. For instance, the trial judge specifically found that the knee injury Yarborough claimed to have suffered when the police roughed him up during the interrogation did not occur during the interrogation. The judge generally credited the testimony of the prosecution witnesses at the hearing on the motion. The Court of Appeals affirmed the trial judge's ruling. Petitioner Yarborough still maintains that he was physically beaten and abused by the interrogating detectives; but that claim was fully litigated and decided against him, and it cannot be re-litigated on

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[6] Yarborough did not testify at trial. His statement implicated several of his codefendants, including Overton, Harris, Charles and Christopher Turner, Catlett, and Rouse. The court ordered that all references to the codefendants be redacted to comply with *Bruton v. United States*, 391 U.S. 123 (1969). The redacted statement was introduced with instructions that the jury could consider it only as to defendant Yarborough.

collateral attack. *See Doepel v. United States*, 510 A.2d 1044, 1045-46 (D.C. 1986). In his current motion he contends that his lawyer was constitutionally ineffective by failing to develop and introduce evidence that Yarborough was too feebleminded to resist the coercive interrogation tactics of the police and simply repeated what they told him to say about the crime, all of which he asserts was false.

A. Yarborough's ineffective assistance claim is procedurally barred as a successive motion and an abuse of the writ.

On April 28, 1995, Yarborough filed a *pro se* motion pursuant to D.C. Code § 23-110, alleging ineffective assistance of counsel based on, *inter alia*, his lawyer's incompetent presentation of the motion to suppress his videotaped statement. That claim had not been raised when the case was on direct appeal, but it was not procedurally defaulted because *Shepard v. United States*, 533 A.2d 1278 (D.C. 1987), had not yet been decided at the time of Yarborough filed his direct appeal and because Yarborough was represented on appeal by the same lawyer who represented him at trial. *See Little v. United States*, 748 A.2d 920, 923 (D.C. 2000); *Sullivan v. United States*, 721 A.2d 936, 937 (D.C. 1998). Yarborough's section 23-110 motion specifically argued that his lawyer failed to introduce any evidence to show that he was poorly educated and had no experience with the legal system, echoing what the Court of Appeals had noted in its opinion affirming the trial court's denial

of his motion to suppress. Judge Brook Hedge denied the motion by written order on September 25, 1995, ruling that the alleged failures of defendant's trial attorney would not have had any effect on the outcome of the motion to suppress or on the outcome of the trial and therefore did not satisfy the prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984).[7] Yarborough did not appeal that ruling.

This is now Yarborough's second section 23-110 motion alleging ineffective assistance of counsel in connection with his lawyer's preparation and presentation of his motion to suppress. As such, it is a "successive motion" and it is procedurally barred, absent a showing of cause and prejudice. *See* D.C. Code § 23-110 (e); *Richardson v. United States*, 8 A.3d 1245, 1250 (D.C. 2010); *Bradley v. United States*, 881 A.2d 640, 645-46 (D.C. 2005) ("Without a showing of cause and prejudice, [a defendant] is entitled to no more than one bite at the ineffective assistance apple. [He], like any other convicted defendant, cannot keep presenting new claims of ineffective assistance of counsel, basing each new claim on different acts or omissions by counsel that were not mentioned in a previous motion."); *Washington v. United States*, 834 A.2d 899, 903-04

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[7] Petitioner Yarborough argues, erroneously, that Judge Hedge denied his *pro se* motion on the ground that his allegations were "vague and conclusory" and that she did not reach the merits of his ineffective assistance claim. Petitioner's Proposed Findings of Fact and Conclusions of Law (hereinafter "Pet. Brief") at 159. To the contrary, Judge Hedge expressly ruled that Yarborough could not show prejudice under *Strickland* with respect to his allegations relating to the motion to suppress.

(D.C. 2003); *Matos v. United States*, 631 A.2d 28, 30 (D.C. 1993) (unless a defendant shows both cause for his failure to raise an available challenge earlier and prejudice as a result of that failure, "'abuse of writ' doctrine generally bars subsequent consideration of 'claims not raised, and thus defaulted, in the first [collateral] proceeding'" (quoting *McCleskey v. Zant*, 499 U.S. 467, 489 (1991))).

In an attempt to show "cause," Yarborough argues that he did not have a lawyer when he filed his first collateral attack and that he could not effectively litigate his *pro se* motion because of his low intelligence, citing *McClurkin v. United States*, 472 A.2d 1348, 1362 n.19 (D.C. 1984) and *Dantzler v. United States*, 696 A.2d 1349, 1350 n.3 (D.C. 1997). However, those cases do not hold that a petitioner who has already filed *a pro se* collateral attack can establish "cause" by obtaining a lawyer and filing another nearly identical claim. At most, *McClurkin* and *Dantzler* stand for the proposition that it was not error for the trial court to address the merits of the defendant's successive collateral attack when his earlier motion was *pro se.* Later decisions like *Bradley* and *Washington*, *supra*, suggest that *pro se* status will not excuse a procedurally defaulted claim on collateral attack, and several federal decisions have so held. *See*, *e.g.*, *United States v. Roberson*, 194 F.3d 408, 415 n. 5 (3d Cir. 1999); *Whittemore v. United States*, 986 F.2d 575, 579 (1st Cir. 1993); *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993). Moreover, at least on federal habeas,[8] cause

[8] Several circuits have held that the *McCleskey* "cause and prejudice" standard for excusing an "abuse of the writ" applies to both state habeas petitions brought under 28 U.S.C.

to excuse a procedural default or abuse of the writ must be based on some objective factor external to the defense, which prevented the petitioner from raising the issue. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *see also McCleskey*, 499 U.S. at 493. Such things as *pro se* status, ignorance of the court system, and low education level or intelligence will not suffice. *See Harris v. McAdory*, 334 F.3d 665,

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§ 2254 and federal collateral attacks brought under 28 U.S.C. § 2255. *See, e.g., United States v. Flores*, 981 F.2d 231, 234-35 (5th Cir. 1993); *Andiarena v. United States*, 967 F.2d 715, 717 (1st Cir. 1992); *see also United States v. Palmer*, 353 U.S. App. D.C. 128, 137-38 and n.10, 296 F.3d 1135, 1144-45 and n. 10 and 11 (2003) (successive section 2255 petitions filed after 1996 are governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (as codified at 28 U.S.C. §§ 2244(b) and 2255), which bars successive petitions unless authorized by order of the circuit court). D.C. Code § 23-110 is the functional equivalent of 28 U.S.C. 2255, and the jurisprudential rules governing motions brought under the two provisions are generally the same. *See Porter v. United States*, 37 A.3d 251, 269 (D.C. 2012) ("Where [a] D.C. statute, rule or the like, is substantially identical to a federal counterpart, [the D.C. Court of Appeals looks] to the federal counterpart as persuasive authority. ... In construing D.C. Code § 23-110 [the D.C. Court of Appeals relies] on federal jurisprudence construing 28 U.S.C. § 2255." (citing *United States v. Little*, 851 A.2d 1280, 1282 n.1 (D.C. 2005))); *Williams v. United States*, 878 A.2d 477, 480 (D.C. 2005) ("Since the two statutes are nearly identical, 'and § 23-110 is the functional equivalent of the federal statute,' [the D.C. Court of Appeals] will look to federal cases interpreting § 2255 in interpreting § 23-110." (quoting *Snell v. United States*, 754 A.2d 289, 292 n.3 (D.C. 2000))). Moreover, several decisions have expressly applied the federal "abuse of the writ" principles to section 23-110 motions. *See Bradley v. United States*, 881 A.2d 640, 646 (D.C. 2005); *Washington v. United States*, 834 A.2d 899, 902-903 (D.C. 2003); *Matos v. United States*, 631 A.2d 28, 30 (D.C. 1993).

668-69 (7th Cir. 2003), *cert. denied*, 541 U.S. 992 (2004); *Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993); *Flores*, 981 F.2d at 236; *Cornman v. Armontrout*, 959 F.2d 727, 729 (8th Cir. 1992); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988).

Ordinarily the court would decline to consider petitioner Yarborough's ineffective assistance claim as a successive motion under D.C. Code § 23-110 (e) and an abuse of the writ. However, because the question is not entirely free from doubt and because the court would entertain even a procedurally barred motion if it were necessary to prevent a fundamental miscarriage of justice, such as the conviction of an innocent person, the court will address the merits of the motion. *See McCleskey*, 499 U.S. at 494 (citing *Murray*, 477 U.S. at 485).

B. Yarborough was not denied effective assistance of counsel.

To succeed on a claim of ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) the deficient performance was so prejudicial that, but for the errors of counsel, the result of the proceeding would probably have been different. *Long v. United States*, 36 A.3d 363, 373 (D.C. 2012) (citing *Strickland*, 466 U.S. at 687-88, 694).

In evaluating trial counsel's performance, the court should "strongly presume" that counsel "rendered adequate assistance and made all significant decisions in the exercise of professional judgment." *Cullen v. Pinholster*, 563 U.S. ___ ___, 131 S.Ct. 1388, 1403 (2011) (quoting *Strickland*, 466

U.S. at 690); *Long*, 36 A.3d at 373. The court may not second-guess the judgments and tactical decisions of counsel and order a new trial simply because the court or another attorney, with hindsight, might have chosen a different course. *Strickland*, 466 U.S. at 690-91; *Leftridge v. United States*, 780 A.2d 266, 272 (D.C. 2001); *Curry v. United States*, 498 A.2d 534, 540 (D.C. 1985). Rather, trial counsel must be given "sufficient latitude to make tactical decisions and strategic judgments involving the exercise of professional *abilities*." *Woodward v. United States*, 738 A.2d 254, 257 (D.C. 1999) (citing *Strickland*, 466 U.S. at 689); *Ginyard v. United States*, 816 A.2d 21, 36 (D.C. 2003). "A reasonable tactical decision will not support a claim of ineffective assistance of counsel." *Wu v. United States*, 798 A.2d 1083, 1091 (D.C. 2002). Regarding an attorney's obligation to consult experts, "[a]n attorney can avoid activities that appear 'distractive from more important duties,'" and is "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, 562 U.S. __ __, 131 S.Ct. 770, 789 (2011) (quoting *Bobby v. Van Hook*, 558 U.S. __ __, 130 S.Ct. 13, 19 (2009) (*per curiam*)).

To establish prejudice under the second prong of *Strickland*, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996) (quoting *Strickland*, 466 U.S. at 694). "A reasonable

probability is a probability sufficient to undermine confidence in the outcome," and requires "a 'substantial,' not just 'conceivable,' likelihood of a different result." *Cullen*, 131 S.Ct. at 1403 (quoting *Harrington*, 131 S.Ct. at 792). On a claim that counsel failed to file an appropriate motion to suppress evidence or, as in this case, filed a motion but failed to litigate it effectively, the defendant's burden to prove prejudice under *Strickland* would require a showing that the motion, if properly litigated, would have been granted and, had the evidence been suppressed, it is probable that the outcome of the trial would have been different. *See Howerton v. United States*, 964 A.2d 1282, 1290 (D.C. 2009) ("[A]n attorney's failure to file a particular motion will not be regarded as ineffective assistance unless the motion, if filed, would in all likelihood have been granted." (quoting *Taylor v. United States*, 603 A.2d 451, 459 (D.C. 1992))); *Little v. United States*, 851 A.2d 1280, 1289 (D.C. 2004) (a petitioner must show a "reasonable probability that the trial's outcome would have been different had [the suppression] motion been timely filed"). Petitioner Yarborough has not shown either deficient performance or prejudice under the *Strickland* standard.

In support of his present claim, Yarborough offers the testimony of Dr. Michael O'Connell, Ph.D., and Dr. Richard Leo, Ph.D., J.D. The court accepted Dr. O'Connell as an expert in forensic psychology. He testified that he performed various tests on Mr. Yarborough and determined that Yarborough had an adjusted full scale IQ score of 69.5, which is at the

high end of the scale for mild mental retardation.[9] Dr. O'Connell noted that Yarborough ranked in the bottom 1% of the population on the Gudjonsson suggestibility scale ("GSS"), meaning that he is more suggestible than 99% of the population, and he opined that low GSS scores have been linked to a propensity to give a false confession. According to Dr. O'Connell, petitioner's low intelligence likely prevented him from appreciating the long-term consequences of confessing to police, and would have caused him to be highly suggestible to information allegedly provided by police and to misunderstand certain words and phrases used by police when they interrogated him. *See* Transcript of Post-Conviction Proceeding (hereinafter "Hearing Tr."), Apr. 24, at 267-390.

Over the government's objection, the court allowed Dr. Leo to testify as an expert in social psychology and criminology, with particular emphasis on police interrogation and false confessions. The gist of his testimony is as follows: A relatively small number of confessions have been proven to be false. Because some confessions have been proven false, there are presumably other false confessions, but it is not possible to know how many or which ones they are. The proven false confessions have certain common features, among which are harsh interrogation techniques, threats if the person does not confess or promises of leniency or other reward if the person does confess, and particularly

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[9] Dr. O'Connell testified that Yarborough's actual IQ score was 71, which would be considered borderline, but Dr. O'Connell adjusted it downward to account for the passage of time.

susceptible or vulnerable persons, such as juveniles or persons who are mentally ill or mentally retarded. Therefore, according to Dr. Leo, when these factors are present, as they are in this case, there is a heightened risk of a false confession. Hearing Tr., May 1, at 1248-1369; May 2, at 1378-1533.

Of course, a heightened risk of a false confession is not the same as a likelihood that the confession is false. Indeed, as Dr. Leo himself conceded, since the vast majority of confessions are true, even when these same risk factors are present, it is much more likely that the confession is true. Moreover, even if one were to accept Dr. Leo's premise that certain practices create a risk of eliciting a false confession, it is impossible to quantify the risk. For example, Dr. Leo offered no evidence, short of his own intuition, that the risk of a false confession is heightened in proportion to the aggressiveness of the interrogation or the severity of any threat or the perceived value of any promise of leniency. In this particular case, Dr. Leo readily admitted that he cannot say whether Mr. Yarborough's 1984 admissions were false, nor can he say which of his statements were true and which ones were false. Thus, while his testimony and the testimony of Dr. O'Connell might have been marginally helpful to the judge or jury in 1985, the question of whether Mr. Yarborough made false inculpatory statements would have been answered in 1985 the same way it would be today, based on Yarborough's demeanor and behavior, whether the statements had the ring of truth, whether he had any motive to falsify, and whether the statements were corroborated by other credible evidence.

Reasonably competent representation in 1985 did not require every defense attorney to develop the kind of sophisticated psychological testimony petitioner now relies on, much less the largely inadmissible expert testimony on false confessions.[10]

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[10] Had the question been presented at a jury trial, it is unlikely that this court would have permitted Dr. Leo to testify. Petitioners made little effort to show that Dr. Leo's methods for assessing the likelihood of a false confession were "sufficiently established to have gained general acceptance in the particular field" of social psychology and criminology. *See Pettus v. United States*, 37 A.3d 213, 217 (D.C. 2012) (citing *Frye v. United States*, 54 App. D.C. 46, 47, 293 F. 1013, 1014 (1923)). More importantly, most of his opinions are not "beyond the ken of the average layman" and would not materially "aid the [jury] in the search for truth." *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977). To the contrary, such testimony from an "expert" (or a battle of experts) would run a significant risk of confusing a jury, and any possible benefit would likely be outweighed by "the potential for … supplanting [the jurors'] customary role in evaluating testimony." *Green v. United States*, 718 A.2d 1042, 1051 (D.C. 1998); *see Dorsey v. United States*, 2 A.3d 222, 234 n.10 (D.C. 2010) (holding that it was not an abuse of discretion to exclude Dr. Leo's testimony because the "'factors and conditions' that Dr. Leo would discuss 'are the same factors and conditions that jurors traditionally consider in evaluating challenges to custodial statements by individuals suspected of having committed a criminal offense.'"). Permitting him to testify before a jury would create a risk that his own conclusions might supplant the jury's independent assessment of the truthfulness of a witness' testimony or confession. *See Blocker v. United States*, 110 U.S. App. D.C. 41, 51, 288 F.2d 853, 863 (1961) ("The hazards in allowing experts to testify in precisely or even substantially the terms of the ultimate issue are apparent. This is a course which, once allowed, risks the danger that lay jurors, baffled by the intricacies of expert discourse and unintelligible technical jargon may be tempted to abdicate independent analysis of the facts on which the opinion rests; this is also likely where the opinion giver is a skilled forensic performer.").

This is particularly true where the thrust of Yarborough's motion to suppress was that the police beat the statement out of him under circumstances that would have caused the strong as well as the weak to succumb to the pressure and make a false

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Several other courts have excluded expert testimony regarding false confessions for similar reasons. *See, e.g., State v. Polk*, 942 N.E. 2d 44, 47-56 (Ill. App. Ct. 2010) (not an abuse of discretion to exclude Dr. Leo's testimony because the proffered testimony was not beyond the common knowledge of ordinary citizens); *Vent v. State*, 67 P.3d 661, 667-70 (Alaska Ct. App. 2003) (no abuse of discretion where the trial court determined that the science of false confessions was not sufficiently refined under the standard of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and that the testimony would not appreciably aid the jury); *State v. Free*, 798 A.2d 83, 95-96 (N.J. Super. Ct. App. Div. 2002) (false confession testimony inadmissible under *Frye* because it has not gained general acceptance in the scientific community and is not beyond the ken of the average juror); *State v. Cobb*, 43 P.3d 855, (Kan. App. 2002) (Dr. Leo's testimony inadmissible because it "invades the province of the jury."); *State v. Davis*, 32 S.W.3d 603, 608-09 (Mo. Ct. App. 2000) (trial court properly excluded Dr. Leo's testimony because it would have "encroache[d] upon the jury's duty to determine the reliability of defendant's statement."); *see also* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L & PUB. POL'Y 523 (1999).

To the extent that Dr. O'Connell went beyond reporting on his psychological testing of Mr. Yarborough and strayed into the "science" of false confessions, his testimony would have been similarly excludable for many of the foregoing reasons. *See Michigan v. Kowalski*, No. 141932, 2012 Mich. LEXIS 1225, at *41 n.64, and accompanying text (Mich. July 30, 2012) (en banc) (proposed expert testimony that went beyond psychological testing excluded inasmuch as it "relied on the same unreliable foundation that [the court] rejected with respect to [Dr.] Leo's testimony.").

statement. Assuming additional evidence of the defendant's low intellectual functioning and educational level might have marginally aided the presentation of the motion, it cannot be said that an otherwise competent defense attorney in 1985 was performing below the constitutional minimum standard by focusing on the heavy handed police interrogation techniques rather than on his client's individual vulnerability.

Nor would such evidence have changed the outcome on the motion to suppress. Mr. Yarborough did lie in his statement to the police, but he did not lie about being present at the scene of the Fuller murder. The evidence overwhelmingly put him there.[11] He lied when he claimed that he was a mere observer and played no role in the attack, robbery and murder of Mrs. Fuller. This was not the statement of a helpless mentally vulnerable young man being fed facts by the police and parroting them back to please his interrogators; it was the voluntary admission of a conniving youthful offender trying to distance himself as far as possible from the crime while not denying that he was there, which he assumed the police already knew. No amount of

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[11] For example, in addition to Yarborough's own admission on October 4, 1984, Melvin Montgomery testified at the hearing and at trial that he was certain that Yarborough was at 8th and H Streets that afternoon, *see* Hearing Tr., Apr. 24, at 485-86; Trial Tr., Nov. 4, 1985, at JX1:2621-22; and Yarborough's own brother told the grand jury that when he confronted Yarborough about his role in the crime, Yarborough admitted that he was in the area, and claimed that the group asked him to join them but he declined right before the group descended on Mrs. Fuller. Grand Jury Tr., GX 112, Apr. 29, 1985, at 38-40, 43.

psychological testing or social science research was likely to convince the court that this false exculpatory statement should be suppressed, particularly where the judge did not believe the defendant's claim about physical coercion in the first place. *See* Trial Transcript, *United States v. Catlett*, (hereinafter "Trial Tr."), Oct. 22, 1985, at JX1:718-19.

In addition, Mr. Yarborough's testimony at the hearing on his current motion was patently incredible.[12] He testified that he was at his girlfriend's house at the time of the murder; but when he first talked to the police on October 4, 1984, three days after the murder, he claimed that he was at a basketball practice on Maryland Ave. that afternoon. Hearing Tr., May 10, at 2476-79, 2565-66 (testimony of Det. McGinnis). Only after the police were able to discredit that alibi did he admit that he was at the scene of the murder at the time it occurred, though he continued to deny he had anything to do with it. Yarborough Statement, Oct. 4, 1984, JX 9. He testified that he had no memory of saying any of the things attributed to him in the October 4 statement. Although he admitted placing his initials after each line of the eight page typewritten statement, he claims that the police typed the entire statement before they began questioning him and that the detective covered over the text with his hand so Yarborough could not see what was written when they told him to initial it. He testified that after he was arrested on December

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[12] Mr. Yarborough did not testify in 1985, either at the hearing on his motion to suppress or at the trial itself.

9, 1984, the detectives interrogating him literally threw him around the room forcefully enough to break his knee on a cabinet, and that one detective stuck his head in a toilet causing an injury to his head, which was supposedly treated by an unidentified female police officer. Hearing Tr., Apr. 23 at 60-242; Apr. 24, at 249-67.

The evidence fails to bear out any of these extraordinary claims. Though Yarborough did complain of an injury to his knee and was treated briefly at an emergency room, he told Det. McGinnis that the injury was the result of a sports accident.[13] No witness observed any injury to his head. And, most importantly, his demeanor on the videotape of his interrogation shows him to be entirely relaxed, spontaneous, and in no distress. Many of the things Yarborough said on the videotape seem unlikely when compared with other evidence, but there is no indication that the facts he chose to include came from the police or from any source other than him. For example, when the detectives tried to get him to admit that he received money that was part of the proceeds of the robbery of Mrs. Fuller, he adamantly insisted that the two dollars he received from petitioner Catlett was a loan that came from other money Catlett had in his pocket, not from the proceeds of the robbery. Yarborough Video Statement, Dec. 9, 1984, JX 4.

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[13] Although the trial judge considered a medical record, which included a statement attributed to Yarborough that he injured his knee "during Ethel arrest," the judge credited Det. McGinnis, who testified that Yarborough told him he injured his knee playing sports. Trial Tr. Oct. 22, 1985, at JX1:718.

Contrasted with Mr. Yarborough's version of the interrogation is the credible testimony of the interrogating detectives and the prosecutor who observed parts of the interrogation. Unfortunately, because of age and the passage of time, Detective Sanchez-Serrano appears to have certain memory deficits, but he does confidently remember that he engaged in none of the extreme tactics of which Mr. Yarborough accused him – no slamming into the wall, no head in the toilet, none of it. He did admit to raising his voice and simulating anger at Mr. Yarborough for lying to him, once pretending to rip off his shirt or his jacket, but this was bland compared to the kind of third degree Mr. Yarborough described. Hearing Tr., May 8, at 2060-2161; May 9, at 2166-2355. Detective McGinnis has a better memory of the Yarborough interrogation than detective Sanchez-Serrano, and he credibly denied virtually all of Mr. Yarborough's outlandish allegations. Hearing Tr., May 10, at 2509-21. In addition, Assistant United States Attorney Goren observed Yarborough before and during the interrogation, and he too saw no evidence of physical abuse or violent tactics that might lend credence to Mr. Yarborough's claims. Hearing Tr., May 2, at 1609-11. Finally, all of this was litigated at trial in 1985, and the trial judge found that Yarborough's waiver of *Miranda* rights and ensuing statement were entirely voluntary and not the product of police coercion or abuse. Trial Tr., Oct. 22, 1985, at JX1:718-19. The Court of Appeals accepted those findings in affirming the denial of Yarborough's suppression motion. *Catlett*, 545 A.2d at 1209. For these reasons, Mr. Yarborough's testimony cannot be credited, and the type of evidence he now faults his

lawyer for not putting on would not have changed the outcome of the motion to suppress or the outcome of the trial.

II. Innocence Protection Act

For a conviction to be vacated and a criminal charge dismissed with prejudice under the Innocence Protection Act ("IPA"), a petitioner must prove by clear and convincing evidence that he or she is "actually innocent" of the crime. D.C. Code § 22-1435 (g)(3). To obtain a new trial, a petitioner must prove that it is more likely than not that he or she is actually innocent of the crime. D.C. Code § 22-4135 (g)(2); *Richardson v. United States*, 8 A.3d 1245, 1247-48 (D.C. 2010). In assessing a petitioner's claim, the court "may consider any relevant evidence," but must consider:

> (A) The new evidence;
> (B) How the new evidence demonstrates actual innocence;
> (C) Why the new evidence is or is not cumulative or impeaching; [and]
> (D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial.

D.C. Code § 22-4135 (g)(1)(A-D).

Petitioners offer no new scientific evidence. They rely entirely on the recantations of several witnesses who testified against them at their trial in

1985. In addition to Mr. Yarborough himself – who repudiated his two statements to the police and denied being present when Mrs. Fuller was murdered, claiming that he remembers being with his girlfriend at her house several blocks away – petitioners offer the testimony of four recanting witnesses: Calvin Alston, Harry James "Derrick" Bennett, Linda Jacobs, and Melvin Montgomery.

To accept petitioners' claim with respect to Mr. Alston and Mr. Bennett, one must begin by suspending one's disbelief that a person would plead guilty to murder (Alston) and manslaughter and robbery (Bennett) and accept a sentence of many years in prison, all based on lies the police pressured them to tell against themselves and their close friends who, based on those lies, would be convicted and spend the rest of their lives in prison. Further, as with any recantation, the court is necessarily confronted with a witness who has demonstrated a willingness to lie under oath. The sanction of the oath that might otherwise lend credence to the recantation is nullified by the fact that the former testimony the witness is recanting was also under oath. If either version is true, the other must necessarily be false, yet both were given under the sanction of the same oath. For this reason, courts are uniformly skeptical of witnesses who come forward long after their testimony to say that everything they previously said under oath was a lie. *See, e.g.*, *Dobbert v. Wainwright*, 468 U.S. 1231, 1233-34 (1984) ("Recantation testimony is properly viewed with great suspicion. It upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most

often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction."); *V.C.B. v. United States*, 37 A.3d 286, 291-92 (D.C. 2012) ("[C]ourts often view recantations of previous accusatory statements with suspicion or skepticism ... in part because 'witnesses offering recantations are often facing radically different pressures than [*sic*] they were at the time of the initial trial'" (citing *Wadlington v. United States*, 428 F.3d 779, 784 (8th Cir. 2005) and quoting *Higgs v. United States*, 711 F. Supp. 2d 479, 513 (D. Md. 2010))); *Johnson v. United States*, 33 A.3d 361, 371 (D.C. 2011) ("Recanting affidavits and witnesses are looked upon with the 'utmost suspicion... .'" (quoting *United States v. Kearney*, 220 U.S. App. D.C. 379, 384, 682 F.2d 214, 219 (1982))).

Even if one were to get past the inherent reasons for skepticism that cast doubt on any recantation, the recantations of Calvin Alston and Harry Bennett are not worthy of belief. The court had an opportunity to hear their testimony under oath, observe their demeanor, compare it to their demeanor on their videotaped interrogations on November 29, 1984 (Alston), and February 6, 1985 (Bennett), review their trial testimony under oath, and compare their testimony to the testimony of all the other witnesses at trial who placed some or all of the petitioners at the scene. In this context, the current testimony of Alston and Bennett that they were not at 8th and H Streets on October 1, 1984, and that they were forced by the police to say they were there and to name the others who were there is nothing short of preposterous. The scene in the alley on October 1, 1984, was crowded and chaotic. Alston

and Bennett may have gotten some facts wrong and may have left certain things out or distorted the truth to minimize their own involvement or to protect others, but the basic facts implicating these petitioners and describing a crime perpetrated by a large group were corroborated by too many other witnesses not to be believed. The notion that Alston and Bennett were not present and made it all up cannot be credited when juxtaposed with their videotaped statements, their guilty pleas, Alston's admissions to other witnesses, Alston's trial testimony and Bennett's grand jury and trial testimony. Both witnesses were extensively cross examined at trial by ten seasoned defense counsel over the course of several days about the many discrepancies and inconsistencies in their respective versions of events. It is exceedingly unlikely that any juror would have concluded that Alston and Bennett were not on the scene or that they were not accurately reporting at least most of what they saw, heard, and did that day. Their motives for now coming forward cannot be known. Both are now out of prison and no longer seeking release from the parole board, where their current lack of remorse might be held against them. Back in their communities, perhaps even this many years later they are still burdened with guilt from having benefitted themselves by sending their friends to prison. Whatever their current motivation may be, the court does not credit their recantations, and their attempt at exculpation does not help the petitioners meet their burden of proving actual innocence. *See Godfrey v. United States*, 454 A.2d 293, 300 n. 26 (D.C. 1982) ("The trial court should not have to grant a new trial on the basis of an

unsubstantiated recantation, since witnesses may recant for numerous reasons that have nothing to do with furthering truth or justice.").

The testimony of Linda Jacobs is even less helpful to petitioners than Alston and Bennett. Ms. Jacobs was, to say the least, an uncooperative witness for the prosecution at trial. Eventually, after much coaxing and cajoling, she admitted she was present at the murder scene and related what she saw. At trial she managed to get through most of her testimony, but when she got to the part where she was asked to describe the brutal rectal sodomy of Mrs. Fuller, she broke down sobbing. Trial Tr., Nov. 14, 1985, at JX1:4626-32. At the post-conviction hearing, all she could remember is that everything she said at trial was a lie. She does not remember what she said or why she said it, she just knows it was a lie. The following excerpt is illustrative:

BY MS. WESTON [THE PROSECUTOR]

Q. Do you remember testifying at trial in this case?
A. Yes.
Q. So, you do remember testifying in front of a jury that was sitting in a jury box like this?
A. But I don't remember that, ma'am. I know I went to court because I lied.
Q. I'm not talking about what you said right now. I'm talking about being present?
A. Like I said, I don't remember.
Q. So, you don't remember being present at a trial?

A. Okay. If that's what you want to say.

THE COURT: What do you want to say?
THE WITNESS: I told her I don't remember. She keep asking the same question.
THE COURT: No, you said you did remember. Now you say you don't remember.
THE WITNESS: No, I don't remember. She said in front of the jury. I don't remember.
THE COURT: Now, she's talking about the trial itself.
THE WITNESS: I said I did because I remember lying.
THE COURT: How do you remember lying if you don't remember being there?
THE WITNESS: Because I lied on them guys.
THE COURT: That's all you remember?
THE WITNESS: Yep, that's all I remember was lying. I been dealing with that all my life; that I lied.
THE COURT: Okay.

BY MS. WESTON:

Q. So, ma'am is it your testimony that you don't remember anything you said at all?

A. All I know is I lied. That's all I remember.
Q. So, you don't know what you said, but you know it was a lie?
A. Yep.

Hearing Tr., May 1, at 1222-23.

Ms. Jacobs testified that she did not even remember saying in her affidavit dated September 20, 2007, that everything she said at trial was a lie except for the part about the girl telling her to go into the alley to find petitioner Kelvin Smith, nor does she remember today whether that part of her affidavit is true. *Id.* at 1208-09. In her affidavit she stated that she did go into the alley but that she did not see the attack on Mrs. Fuller or any of the petitioners. Jacobs Aff., Sept. 26, 2007, at JX156:002 ¶ 7. At the hearing she testified that she did not go into the alley at all that day. She does not remember where she was; she just knows she was not there. Curiously, however, whenever she was asked if she saw any of the attack or the act of sodomy against Mrs. Fuller, Ms. Jacobs broke down sobbing just the way she did when she was confronted with that visual image at trial. Hearing Tr., May 1, at 1238-39. As with Alston and Bennett, her motives for trying to help the petitioners after all these years are unclear. She was a recalcitrant witness from the beginning, and perhaps she has simply flipped back to her pretrial denial mode. Regardless of her motives, however, her insistence that she lied coupled with her inability to remember anything that she lied about makes her current testimony relatively useless and adds nothing to

petitioners' claims of innocence. Hearing Tr., May 1, at 1204-41; *see Meade v. United States*, No. 09-CO-1425, slip op. at 14 (D.C. July 26, 2012) (a witness' purported recantation was particularly unreliable because it "did not indicate with any specificity or clarity just which parts of her prior account were untrue.").

Melvin Montgomery was to have been petitioners' fourth recanting witness, but his testimony at the hearing actually supported the government. Mr. Montgomery did not see the assault on Mrs. Fuller, but he was in the park at 8th and H Streets on October 1, 1984. In his detailed trial testimony, Montgomery explained that he spent the majority of that day either at the park or in the various shops on H Street. He was able to account for all of his activity that day, including every store he visited and every friend he had a conversation with, even remembering such seemingly mundane details as a game he watched at the arcade on H Street. Trial Tr., Nov. 4, 1985, at JX1:2569-2639. He specifically remembered seeing several petitioners in the park that morning when he was walking to pick up his daughter from school, and again that afternoon when he returned to 8th and H Street with his friends. *Id.* at JX1:2577-85. He also distinctly recalled seeing Clifton Yarborough near the park later in the afternoon, trying to break up a fight between two younger boys. *Id.* at JX1:2620-22. And he watched as the petitioners spotted Mrs. Fuller walking across the street, targeted her as a robbery victim, and crossed the street to begin the assault that wound up taking her life. *Id.* at JX1:2610-17.

Petitioners submitted an affidavit from Mr. Montgomery dated June 1, 2009, which purported to say that his entire trial testimony was a lie. Montgomery Aff., JX 157:1-3. According to the affidavit, he saw petitioners in the park on the morning of October 1, 1984, but not in the afternoon. In fact, based solely on the affidavit, one might conclude that Mr. Montgomery was not even at the park that afternoon: in paragraph nine he states that he went back to the park around 3:15 p.m. and did not see anyone he knew other than Yarborough, but in paragraph seventeen, he claims that "I wasn't even at the park in the afternoon."

When called as a witness, Mr. Montgomery disavowed parts of his affidavit, stated emphatically that he did not tell the person who prepared the affidavit that he had lied in his prior testimony, and testified on cross examination that everything he said before the grand jury and at trial was the truth. Hearing Tr., Apr. 24, at 433-86. In response to a question from the court regarding how confident he was that he saw Clifton Yarborough at the park that afternoon, Montgomery replied without hesitation, "I'm certain I seen Clifton Yarborough. He wasn't in the park. He was on the side of H Street coming toward government [sic] Street because it was a fight. And I was trying to tell him to go ahead on because somebody was going to call the police. It had to be after -- I know it was after 3:00." *Id.* at 485-86. This testimony parallels Montgomery's trial testimony, in which he claimed that he saw Yarborough trying to break up a fight between two boys. Responding to a question from petitioner's counsel regarding whether he (Montgomery) was

confused as to what time he picked up his daughter, Montgomery confidently asserted, "She got picked up at noon." *Id.* at 468.

In an effort to salvage a bad turn of events, petitioners called the investigator who interviewed Mr. Montgomery in connection with the preparation of his affidavit; but she only served to muddy the waters further by testifying that although she took a statement from Mr. Montgomery at a prison, someone else drafted the affidavit, apparently based on her notes. When confronted with the glaring inconsistency between paragraphs nine and seventeen of Montgomery's affidavit, the investigator could only say, "Unfortunately, I did not catch that." Hearing Tr., Apr. 25, at 508. Whatever else can be said of Mr. Montgomery's "recantation," it certainly cannot be said that his testimony helps petitioners to meet their burden of proving actual innocence.

After considering all of the evidence, both at trial and at the hearing, the court concludes that petitioners have not come close to demonstrating actual innocence. *See Bell v. United States*, 871 A.2d 1199, 1202 (D.C. 2005) ("[I]f the judge reasonably finds the recantation [in an IPA case] to be not credible, that determination properly 'ends the inquiry' ... into whether the movant has met his burden of showing that he was in fact innocent." (quoting *United States v. Herbin*, 683 A.2d 437, 441 (D.C. 1996))). Unquestionably, they have not proved by clear and convincing evidence that they are actually innocent, and just as surely they have not established their innocence by a preponderance of the evidence. Accordingly, petitioners are not

entitled to relief under the Innocence Protection Act.[14]

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[14] Although petitioners' IPA claim begins and ends with the recanting witnesses, they offer two additional arguments in support a finding of "actual innocence" under the IPA: (1) "unrebutted scientific evidence" proves that Mrs. Fuller was beaten by one to three attackers, and statements by government trial witnesses to the contrary must have been false; and (2) "factual and scientific similarities" between the murder of Mrs. Fuller and James McMillan's murder and sodomy of a young woman in 1992 suggest that both crimes were likely committed by the same person. Pet. Brief at 176-80. Petitioners' "unrebutted scientific evidence" consists of the testimony of Dr. Richard Callery, a forensic pathologist, who reviewed Mrs. Fuller's 1984 autopsy and concluded that she was probably attacked by fewer than three assailants, and Larry McCann, a retired police officer and crime scene reconstruction expert, who reviewed photos and diagrams of the crime scene and the injuries described in the autopsy report and similarly concluded that the pattern of injuries on the victim was most consistent with a crime committed by one person. Hearing Tr., Apr. 26, at 757-59 (testimony of Dr. Callery); Hearing Tr., Apr. 30, at 1083 (testimony of Mr. McCann). This testimony does not qualify as "new evidence" under the IPA. *See* D.C. Code § 22-4131 (7). "The new evidence provision of the IPA is broader and more inclusive than the judicial test for newly discovered evidence under Super. Ct. Crim. R. 33, as the IPA specifically provides for evidence that was known at the time of trial but could not be produced, and for consideration of evidence that could not be compelled or otherwise obtained. However, the diligence requirements in the IPA and Rule 33 are the same, as both require 'reasonable' or 'due' diligence." *Bouknight v. United States*, 867 A.2d 245, 255 (D.C. 2005). Petitioners could have presented testimony from experts similar to Dr. Callery and Mr. McCann at trial. Neither expert used any type of new evidence or scientific testing to reach his conclusions: Dr. Callery relied on the 1984 autopsy report, and Mr. McCann evaluated police reports, crime scene photographs and diagrams, and other documents related to Mrs. Fuller's

murder. While they apparently developed different opinions than those of Dr. Bray, the medical examiner who testified at trial, the IPA does not permit a defendant to reopen his case simply because he finds a new expert to look at old evidence and come to a different conclusion. *See United States v. Ugalde*, 861 F.2d 802, 806 (5th Cir. 1988) (noting that due diligence "requires that the evidence itself, not merely the legal implications of the evidence, be 'newly discovered.'"). In any event, neither Dr. Callery nor Mr. McCann could definitively state that Mrs. Fuller was attacked by one to three individuals as opposed to a larger group. While both testified that, in their opinion, it was more likely that a small number of individuals inflicted the injuries on Mrs. Fuller, both admitted that it was possible that a greater number of persons were involved. Hearing Tr., Apr. 26, at 778-83; Hearing Tr., Apr. 30, at 1094-99. Given the court's rejection of the recantations and the other trial evidence pointing to an attack by ten or more assailants, petitioners' "unrebutted scientific evidence," even if it were new, is not particularly persuasive and does not begin to demonstrate that the petitioners are "actually innocent." D.C. Code § 22-4135(g).

In 1993, a jury convicted James McMillan of murdering and sexually assaulting a young woman in 1992. Judgment & Commitment Order, *United States v. McMillan*, F 10635-92, at JX52:29-30. According to petitioners. because both Mrs. Fuller and McMillan's victim were attacked in an alley near 8th St. N.E., both were robbed and violently beaten about the face and torso and brutally sodomized, and both died of blunt force trauma, the two crimes were so similar that they must have been committed by the same perpetrator. Pet. Brief. at 179-80. James McMillan's role in this case is addressed in more detail in the discussion of petitioners' *Brady* claims. However, petitioners' own witness, Dr. Callery, admitted that the injuries to McMillan's 1992 victim were more extensive than those inflicted upon Mrs. Fuller, and noted that these two brutal murders could not be characterized as signature crimes. Hearing Tr., Apr. 26, at 789-90. Whatever may be said of the similarities between the two crimes, they certainly do not prove that James McMillan murdered Mrs. Fuller to the exclusion of

III. *Brady v. Maryland*

Unlike petitioner Yarborough's claim and petitioners' IPA claims, petitioners' *Brady* claims are not so easily dismissed. Although *Brady v. Maryland* was decided in 1963, our understanding of its implications has evolved over time. Information that would be disclosed today under Justice Department guidelines and relatively recent caselaw would not have been routinely turned over to the defense in 1985. If one were to pick the bones of almost any murder case litigated around the time of the Fuller murder, one would inevitably discover in the police or prosecutor's files pieces of information that, in retrospect, were arguably favorable to the accused, would likely be turned over if the case were tried today, but were not turned over at the time through inadvertence or a narrow, though prevalent, understanding of the government's obligations under *Brady*. And the Fuller case was not just "any murder." The brutality of the killing, the vulnerability of the diminutive victim, and the pack mentality of the assailants inflamed the passions of the entire community. First one, and later two, Assistant United States Attorneys worked on the case full time, together with a dedicated team of nine detectives and police officers. The investigation took nearly a year, even after the arrest of most of the accused. More than four hundred witnesses were interviewed, many of whom were put into the grand jury. In all, seventeen young people were arrested,

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these seven petitioners, when all of the credible evidence points the other way.

thirteen were indicted, and ten were taken to tria1.[15] In an investigation this complex and extensive, it is almost inconceivable that mistakes would not be made. In addition, because of the passage of time in this case, it is difficult for the parties to ascertain precisely what was disclosed and what was not.[16]

To make out a claim under *Brady v. Maryland*, petitioners must establish three elements: (1) the information not disclosed must be "favorable" to the defendant, (2) the information must have been suppressed or withheld by the prosecution, and (3) the information must be "material" to guilt or punishment. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). In this context, evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Materiality is shown if, in the context of the entire

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[15] See n.3, *supra.*

[16] For example, in his April 2010 motion, Christopher Turner claimed that the government never disclosed information that it recovered Mrs. Fuller's rings from a man and woman who claimed to have purchased the rings from another man and woman, whose descriptions did not match any of the defendants. *See* Amended Memorandum and Points of Authorities in Support of Motion to Vacate Conviction or in the Alternative for a New Trial, *United States v. Christopher Turner*, Apr. 6, 2010, at 38-39. The petitioners did not address this claim at the post-conviction hearing, presumably because, as AUSA Goren explained in his testimony, information about the rings was disclosed to defense attorneys prior to the 1984 trial. Hearing Tr., May 3, at 1654-55. In any event, petitioners have wisely abandoned this point in their post-hearing brief. Pet. Brief at 126 n.7.

case, the nondisclosure undermines the court's confidence in the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995). Of course, if the court had credited the recantations in this case, nondisclosure of favorable evidence could be sufficient to undermine the court's confidence in the outcome, even though petitioners are unable to meet their burden of proving actual innocence. However, having rejected the recantations as incredible, including Mr. Yarborough's own self-serving testimony, the court must decide petitioners' *Brady* claims in light of all the evidence supporting the verdict, including the trial testimony of witnesses Alston, Bennett, Jacobs, and Montgomery.

Petitioners assert a number of discrete *Brady* claims, but they focus primarily on two strands of potentially favorable evidence the government failed to disclose. First, a woman named Ammie Davis, under arrest for a minor offense on October 26, 1984, asked to speak to the officer in charge and told Fifth District Lieutenant Frank Loney that she witnessed her friend James Blue, acting alone, abduct and murder Catherine Fuller in the alley behind H Street on October 1, 1984. JX 20. Lt. Loney took her statement and passed it on the Homicide Branch, but he does not recall how he transmitted it or who may have received it at Homicide. In any event, the statement did not resurface in the Fuller investigation until August of 1985, many months after the arrest of the petitioners and the development of the prosecution's theory of the case as the work of a large group of young men who regularly hung out in the park at 8th and H Streets, N.E. Assistant United States Attorney Goren, upon

learning of the statement, interviewed Ammie Davis and Lt. Loney, although he testified that he does not remember the details of his conversation with Loney, and Loney testified that he does not even remember the meeting. For a variety of reasons, Goren did not credit Ammie Davis and did not believe she was a witness to any part of the Fuller murder. He did not disclose her identity or her statement to the defense. James Blue shot Ammie Davis in October of 1985, and she died of her injuries two weeks before the start of petitioners' trial. Gov. Sentencing Mem., *United States v. Blue*, F7848-85, July 16, 1987, JX 38.

The second significant non-disclosure relates to statements of three witnesses who were in the alley shortly after the murder and saw two men acting suspiciously, one of whom appeared to be placing or concealing an object under his coat. The witnesses reported that the two men fled the alley just as the police arrived in response to the 911 call reporting the discovery of Mrs. Fuller's body in the garage. The two men were identified as James McMillan and Gerald Merkerson. McMillan lived in a house that backed up to the alley. He had been recently charged with two purse snatching assaults in that same neighborhood. The government disclosed to the defense that a street vendor named Freeman, who was the first person to discover Mrs. Fuller's body, had observed two men in the alley who fled when the police arrived, but the government did not disclose the identity of the two men, the names of the two other witness who saw them in the alley, or the other assaults McMillan was alleged to have

committed against women in the same neighborhood.

Petitioners contend that the Ammie Davis/James Blue tip and the James McMillan evidence would have offered the defense a "counter-narrative," from which they would have been able to construct a defense that Catherine Fuller was not murdered by a mob of young men, as the prosecution alleged, but by one perpetrator, or perhaps two, who were not arrested or charged. In an effort to establish this alternative theory, petitioners introduced expert testimony of Dr. Richard Callery and Larry McCann.[17]

A. Ammie Davis

"For there to be a true *Brady* violation, '(1) the evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching; (2) [the] evidence must have been suppressed by the [government], either willfully or inadvertently; and (3) prejudice must have ensued,' meaning that the suppressed evidence must have been material." *Mackabee v. United States*, 29 A.3d 952, 959 (D.C. 2011) (quoting *Fortson v. United States*, 979 A.2d 643, 662 (D.C. 2009)); *Strickler*, 527 U.S. at 281-82. There is little question that Ammie Davis' statement meets the first two elements. The government concedes that the statement was

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[17] See n.14, *supra.* In support of their "counter-narrative" pinning the crime on James McMillan, petitioners also presented a stipulation that Dr. Fred Berlin, if called, would have testified as an expert in sexual dysfunctions that an individual who commits an act of violent anal sodomy is likely to commit the act more than once. Hearing Tr., Apr. 27, at 805.

favorable to petitioners and that it would voluntarily disclose such a statement today under current Justice Department policies. *See* Government's Hearing Summary and Proposed Conclusions of Law (hereinafter "Gov. Brief") at 34 n. 19. However, petitioners must also show that the statements were material, meaning that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. __, __, 132 S. Ct. 627, 630 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 469-70 (2009)). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the verdict.'" *Smith*, 132 S. Ct. at 630 (quoting *Kyles*, 514 U.S. at 434.

Ammie Davis' accusation of James Blue was thoroughly discredited, and its nondisclosure does not undermine the court's confidence in the outcome of the trial. For Ms. Davis' account to be true, a jury would have to believe that James Blue, acting alone, attacked and murdered Mrs. Fuller, in the face of numerous eyewitness accounts and other evidence proving that crimes were committed by a large group of young men acting in concert, playing different roles. Even if Ms. Davis had lived to tell her story,[18]

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[18] James Blue murdered Ammie Davis in October of 1985, and she would not have been available as a witness for the defense. Her statement to Lt. Loney was almost certainly inadmissible. Petitioners make the dubious argument that if the government had turned over her statement in August 1985, when it turned over other *Brady* evidence, "defense counsel...

any reasonable jury, in light of all the evidence, would surely have rejected it. Not one of the approximately 400 other witnesses interviewed by the government mentioned James Blue as a possible perpetrator, either alone or with others. Moreover, Ms. Davis' account, even as told to Lt. Loney, was riddled with problems. She first told Lt. Loney that she saw James Blue murder Mrs. Fuller, but later in

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could have – and likely would have – warned Ms. Davis to avoid the man she was implicating in the crime in advance of trial, raising the possibility that she would not have been murdered by Mr. Blue on the eve of trial" and therefore would have been available to testify. Pet. Brief at 145. However, AUSA Behm testified that Mr. Blue did not kill Ms. Davis because she had, one year earlier, accused him of murdering Mrs. Fuller, but because on the day he shot her, she refused to give him some of her heroin. Hearing Tr., May 8, at 1991-92. Under these circumstances, it is fanciful to suggest that defense counsel could have prevented Ms. Davis' death. Petitioners argue further that even without Ms. Davis' live testimony, her statement to Lt. Loney could have been admitted under exceptions to the rule against hearsay. The only cases cited by petitioners for this novel point are inapposite. *Chambers v. Mississippi*, 410 U.S. 284 (1973), involved a much more reliable and highly corroborated confession by someone that he, not Chambers, committed the murder for which Chambers was tried. The Court carved out a very narrow exception for the admissibility of hearsay statements when "circumstances ... provid[e] considerable assurance of their reliability." 410 U.S. at 312. The "forfeiture by wrongdoing" exception recognized in *Devonshire v. United States*, 691 A.2d 165, 168-69 (D.C. 1997), the other decision cited by petitioners, has nothing to do with this *case*. *See Giles v. California*, 554 U.S. 353, 367 (2008) ("'[T]he forfeiture by wrongdoing exception "applies only if the defendant has in mind the particular purpose of making the witness unavailable." (quoting 5 C. Mueller & L. Kirkpatrick, Federal Evidence § 8:134, p 235 (3d ed. 2007))).

the same statement claimed that she only saw him abduct the lady and pull her into the alley. Her story contained very few details, even when prompted. She claimed that she witnessed the events with her girlfriend, whom she identified only as "Shorty." She promised to have Shorty call the Leiutenant, but she never did. In part because he did not believe Ms. Davis, Loney did not rush her statement to Homicide, but he did send it there.[19] When the statement finally surfaced in August of 1985, the government tried to find Shorty without success. By that time, the prosecution team had five co-defendants and five eyewitnesses, all of whom described, in one way or another, an attack on Mrs. Fuller by a large group of young men. None of them

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[19] In 2012, Lt. Loney did not remember his impressions of Ms. Davis, but Det. Donald Gossage, who worked under Lt. Loney at the Fifth District and in 1985 was detailed to the Fuller investigation, recalled having a conversation about Davis with Loney:

> "Gossage: Well, I asked him [Loney] why he just didn't call somebody, and he said, well, he didn't believe what Ammie Davis had indicated in the statement; that she had changed her story several times, and he decided that it was just best for him to go ahead and take the statement, just so that they have that information, and send it down to the homicide unit.
>
> Q: Now, did she indicate to Lieutenant Loney – or did he indicate to you his assessment of her emotional state?
>
> A: He indicated he didn't – she was upset and she was scared, and he just felt that she kept changing her story around and that he didn't believe what she was saying."
>
> Hearing Tr. May 9, at 2379-80.

mentioned James Blue, and, while there were inconsistencies between the various statements, there was also significant overlap as to the names of the young men who were on the scene and participating in the attack, including these seven petitioners.

Notwithstanding his skepticism, AUSA Goren interviewed Ammie Davis. He testified that he found her "playful" and not serious or forthcoming, and he did not believe she was a witness to anything. Hearing Tr., May 3, at 1646-48. The petitioners are certainly correct that the prosecutor's duty to turn over evidence favorable to the accused is not excused simply because the prosecutor does not believe the evidence, *see Zanders v. United States*, 999 A.2d 149, 163-64 (D.C. 2010); but it is also understandable why, in context, this careful and fair-minded prosecutor did not believe this piece of evidence and did not consider it material.

Finally, the jury would have heard that earlier in 1984, Ms. Davis had accused James Blue of another murder, which the grand jury investigated and which turned out to be a false and vindictive accusation. By coincidence, AUSA Jeffrey Behm, who had joined the Fuller prosecution team by August of 1985 when the Ammie Davis statement came to light, had been assigned to investigate the murder of James Hider in February of 1984. Based on the false accusation of Ammie Davis in that case, he initiated the arrest of James Blue and argued successfully for his pretrial detention for several months. As the investigation wore on and he and the investigating detective completely lost faith in Ms. Davis' veracity, Behm eventually dismissed the

case against James Blue and he was released. When Ms. Davis' name turned up in the Fuller case a year later, AUSA Behm was another voice in the room warning the members of the team that her accusation of James Blue could not be credited. Hearing Tr., May 8, at 1974-93.

For all of these reasons, the report of Ammie Davis was not material under the *Brady* definition. While it probably would be disclosed today under Justice Department policies that were not in effect in 1985, due process would not compel its disclosure today and petitioners' due process rights were not violated by its non-disclosure in 1985.[20] Even in its best light, it does not undermine the court's confidence in the outcome of the trial. Petitioners' expert witnesses have offered a plausible explanation of the physical evidence that would support a theory that Mrs. Fuller was murdered by one or two persons, but the credible evidence at trial, including the eyewitness testimony and the testimony of the medical examiner about the extent of Mrs. Fuller's injuries, is much more consistent

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[20] The United States Attorney's Office's current policy requires prosecutors to disclose information inconsistent with the crime as charged as well as impeachment evidence "regardless of whether it is likely to make the difference between conviction and acquittal." U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-500 (2008). This type of disclosure is without question beyond what *Brady* requires. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.").

with the guilt of these seven petitioners, and perhaps several more.

B. James McMillan

Petitioners' second major *Brady* claim suffers from many of the same defects as the first. Unlike James Blue, the name of James McMillan did come up during the investigation of the Fuller murder. Three witnesses identified McMillan as one of two men seen in the alley shortly after Mrs. Fuller's body was discovered and said that he appeared to be concealing something under his jacket. According to these witnesses, McMillan and the other man fled when the police arrived. The police knew that McMillan lived in a house bordering on that alley and knew that he had been responsible for at least two other attacks on women in that vicinity. He was a person of interest in the Fuller investigation, and the police included his picture in the photo album it used with witnesses to try to identify the persons responsible for the murder. No one identified him.[21]

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[21] One of the co-defendants, James Michael Campbell, made an incriminating statement naming McMillan as one of the perpetrators, which he later disavowed. Until the first morning of trial, Campbell was joined with the others for trial. His statement would have been admissible against him but, under *Bruton*, the government could not have used it to prosecute McMillan. The government attempted, without success, to develop other evidence against McMillan in the nine months leading up to the indictments, but the statements of the three witnesses who saw him in the alley after the murder were not enough to obtain a conviction, and Campbell was the only one who placed him at the scene of the murder. For these reasons, McMillan was not indicted with the others. Campbell's lawyer became ill during voir dire of the jury. His case was severed and he eventually pled guilty to reduced charges.

The government disclosed before trial that a street vendor named Freeman had discovered Mrs. Fuller's body when he went back to urinate in the alley and that he later saw two men acting suspiciously in the alley near the garage who fled when the police arrived. The government did not disclose that Freeman had identified James McMillan as one of the two men, nor did it disclose that two other witnesses had also identified McMillan and Gerald Merkerson as the two men in the alley who fled when the police arrived. Petitioners contend that the government had a duty to disclose this information under *Brady* and, had it been disclosed, the defense could have developed an alternative theory that McMillan – alone or possibly with Merkerson – killed Mrs. Fuller, using as evidence his concealment of what may have been the murder weapon under his jacket, bolstered by "other crimes" evidence of McMillan's other assaults against women in the neighborhood.[22] Pet. Brief at 139-42.

In terms of proving a *Brady* violation, the "McMillan evidence" is arguably not even favorable to the accused, and it is definitely not material for the same reason the James Blue evidence was not material. Although McMillan, who lived nearby, was seen in the alley after the attack on Mrs. Fuller,

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[22] The issue of whom Mr. Freeman identified came up at petitioners' trial. Defense counsel asked the judge to order the government to disclose the information. The judge declined. Defense counsel stated that they would simply call Mr. Freeman as a witness in their own case. They did not do so. Trial Tr., Nov. 1, 1985, at JX1:2323-25. The issue of the judge's ruling was not raised on appeal. It is at least arguable that the issue is waived.

no witness put him in the alley during the attack. Based on a reconstructed timeline of the relevant events, he could have been in the alley as short as fifteen minutes or as long as ninety minutes after the fatal attack. Hearing Tr., May 3, at 1668-73 (testimony of AUSA Goren). Moreover, even if he was present at the time of the murder, it would not prove anything about the guilt of these petitioners. He could have been a participant with these petitioners or one of the many bystanders. For the "McMillan evidence" to be material in the *Brady* sense, he would have had to have committed the crime by himself or with Merkerson to the exclusion of the petitioners, and that possibility flies in the face of all the evidence. The coincidence of McMillan's presence in the alley and his attacks on other women in that neighborhood around the same time might have provided useful ammunition in the hands of ten clever defense counsel at trial, but it does not override the overwhelming evidence of the guilt of these petitioners or undermine the court's confidence in the jury's determination of their guilt at trial.

C. Petitioner's other *Brady* claims

Petitioners make a number of other subsidiary *Brady* claims, most of which can be addressed without extensive discussion. In brief, petitioners claim that the government withheld evidence that Kaye Porter lied to police at the behest of another government witness, Carrie Eleby; that Ms. Eleby was a habitual PCP user; that Linda Jacobs, discussed in section II, *supra*, told government agents she was not present at the murder after having admitted that she was there; that the aunt of

witness Maurice Thomas did not recall him telling her about having just witnessed an attack on a person in the alley behind the 800 block of H Street, N.E.; that Anita Hicks told the grand jury that she did not see blood on petitioner Levy Rouse's pants on the evening of the murder; that three witnesses claimed to have been in the park prior to the murder and did not mention seeing the petitioners; and that both Alston and Bennett named certain individuals who were present at the scene, but those same individuals denied being present or offered credible alibis. Pet. Brief. at 146-51.

None of these non-disclosures, separately or together, is material under *Brady*. The government concedes that its failure to disclose Kaye Porter's admission that she lied, at Carrie Eleby's request, about having been in a car with Calvin Alston and hearing him admit his participation in the murder of Mrs. Fuller was inadvertent and that the information should have been disclosed. Gov. Brief at 38. AUSA Goren explained that other witnesses corroborated Eleby's report of Alston's admission in the car, Alston himself acknowledged that it was true, and that, by the time Goren made *Brady* disclosures, Kaye Porter's role as a witness related solely to an admission by petitioner Timothy Catlett at a different time and place; because he disassociated the two events, he simply forgot to disclose her lie about having heard Alston's incriminating statement in the car. Hearing Tr., May 2, at 1575-76. This information could have been used to impeach both Eleby and Porter. However, Kaye Porter was a relatively minor witness against one defendant, and the cross examination of Eleby

about other lies and inconsistent statements, all of which were disclosed, was very extensive.[23] There is virtually no chance that disclosure of this additional matter would have led to a different verdict, and its nondisclosure does not undermine the court's confidence in the outcome.[24]

Similarly, it is at least arguable that the government should have disclosed the statement from Maurice Thomas' Aunt Barbara that she did

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[23] During cross-examination, Ms. Eleby admitted that she lied before the grand jury, leading the court to give the jury the following perjury instruction: "With regard to the testimony of Ms. Eleby, the Court wishes to instruct you that the testimony of a witness who has admitted that she has previously not told the truth when she was under oath before the Grand Jury should be received with caution and scrutinized with care." Trial Tr., Dec. 9, 1985 at JX1:8235-36.

[24] Petitioners argue that evidence that Ms. Porter lied about Alston "is particularly significant because Ms. Porter later gave trial testimony about a *different defendant*, Timothy Catlett... that was strikingly similar to that which she had admittedly fabricated during her first interview with police." Pet. Brief at 147 (emphasis in original). This argument mischaracterizes Ms. Porter's testimony. With regard to Alston, she claimed that while in a car with him, Eleby, and several others, she overheard Alston tell Eleby that he was involved in the murder. *See* Hearing Tr., May 3, at 1796-98. By contrast, Porter's brief trial testimony was that while she and Catlett were sitting outside of a library, she asked him why did that to Mrs. Fuller, and he responded that "[a]ll he did was kick her and somebody else stuck the pole up in her." Trial Tr., Nov. 15, 1985, at JX1-04841. These two instances are not "strikingly similar." In the first, Porter claimed to have overheard a conversation while in a cramped car with several others present; in the second, she directly asked a good friend about his involvement in the murder, and she was extensively cross-examined about the veracity of her claim.

not remember him telling her that he had just witnessed a group of young men assaulting a person in the alley. Maurice Thomas was an important eyewitness because he was able to identify several of the petitioners and had no apparent bias or motive to fabricate. He testified that while walking by the alley on the afternoon of the murder, he witnessed a large group of young men, including most of the petitioners, surround someone, pat her down, and begin to hit her. Trial Tr., Nov. 13, 1984, at JX1:4305-09. He ran home and told his aunt what he saw, and she told him to forget about it and keep quiet. *Id.* at JX1:4309-10. AUSA Goren's contemporaneous notes corroborate that Thomas did not tell his aunt that he witnessed a brutal murder, but that he saw a group of people beating someone up, and also reveal Goren's impression that Aunt Barbara was a "bit of an alcoholic." Goren Notes, JX2:62. Those facts, coupled with Maurice's testimony that she told him to forget what he had seen, might have provided a complete explanation for her failure to "remember" what Maurice told her. In any event, Maurice Thomas testified convincingly as to what he witnessed on October 1, 1984, he was cross examined extensively and, even if he had been impeached by testimony that Aunt Barbara did not remember him telling her that he saw someone being robbed in the alley, no juror would have concluded that he was making it all up.

Carrie Eleby's use of PCP was the subject of cross examination at trial, and the government's failure to disclose its knowledge or opinion of the extent of her PCP use was not material under *Brady* as it certainly would not have changed the outcome.

Similarly, the government's failure to disclose that Linda Jacobs had gone back and forth several times before finally admitting that she had been in the alley and was a witness to the events surrounding the murder was not material given all that the government did disclose about her inconsistent statements, her extensive cross examination at trial based on her inconsistent statements, and the jury's up close opportunity to observe her demeanor and assess her credibility. If the jury concluded that she was an eyewitness to the events on October 1, 1984, there is no chance it would have concluded otherwise if it learned that on more than one occasion she had denied that she was there.

Anita Hicks was the aunt of Gail Hicks, who had a child by petitioner Levy Rouse. Rouse lived with her family. She testified at the Grand Jury that Rouse was not at home between 4:00 p.m. and 8:00 p.m. on October 1, 1984, but that shortly after 8:00 p.m., he came home and told her that police found a girl in the alley. Grand Jury Tr., GX112, May 21, 1984 at 10-11. Near the end of her testimony, a juror asked her whether she "recall[ed] seeing anything unusual that night about the way Levy was dressed or seeing any blood on his clothes," and she replied, "No." *Id.* at 14. Petitioners argue that Hicks' testimony would have impeached Katrina Ward, who was called to rebut Rouse's alibi testimony that he went to see Ward shortly after 6:30 p.m. on October 1 and stayed for several hours. Ward testified that Rouse visited her around 8:30 or 9:00 p.m., and that he had some blood on the bottom of his pant leg. Trial Tr., Dec. 2, 1985, at JX1:7426-27. Hicks' testimony that she did not notice any

blood on Rouse's pants when she saw him briefly in the middle of a chaotic evening at home would not have effectively impeached Ward. In fact, her testimony would have bolstered Ward's damaging testimony that Rouse did not visit her until 8:30 or 9:00 p.m., further undermining Rouse's alibi.

Finally, the non-disclosure of denials by witnesses whom Alston or Bennett placed on the scene, and the alibis offered by some of those witnesses, cannot be the basis of a *Brady* claim. The trial judge ruled that these statements did not need to be disclosed, and the prosecutors relied on those rulings. The defense at trial was aware of the judge's rulings and they did not raise the issue on appeal. Therefore it is procedurally defaulted. *Wu v. United States*, 798 A.2d 1083, 1089-90 (D.C. 2002) (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). Even if the issue were not defaulted, the information is not favorable to the accused except in the most far reaching interpretation of *Brady*, and it is certainly not material in the sense that it might have changed the outcome at trial. The fact that some of the named individuals had alibis, which may or may not have been truthful, did not exculpate any of the defendants and does not undermine the court's confidence in the jury's determination of the guilt of these petitioners. The same can be said of witnesses who knew the petitioners but did not mention seeing them in the park or in the alley on October 1, 1984. The trial judge ruled that the government must disclose a witness who knew a particular defendant and said that defendant was **not** on the scene, but need not disclose any witness who simply neglected to mention seeing one of the defendants, even if the

witness knew that defendant. Here, too, the defense was aware of that ruling did not raise it as error on appeal.[25] Moreover, like the other category, the omission of a defendant in a witness' description of events does not prove the defendant was not part of this chaotic scene; and given all of the other evidence establishing beyond doubt that each of these petitioners was present and participating in the robbery and murder of Catherine Fuller, the non-disclosure of this category of information does not undermine the court's confidence in the outcome of the trial.

CONCLUSION

Petitioners' claims are based almost entirely on the recantations of Calvin Alston, Harry Bennett, Linda Jacobs, and Melvin Montgomery. For the reasons stated above, not one of those recantations is credible, and the best reading of Montgomery's testimony is that he is not recanting at all. Having heard the "new" evidence, the court is convinced that the totality of evidence pointing to the guilt of these seven petitioners, and others, in the abduction and murder of Catherine Fuller on October 1, 1984, remains – as the Court of Appeals first characterized it – "overwhelming." Because petitioner Clifton Yarborough was not denied effective assistance of counsel, he is not entitled to post-conviction relief independent of the claims of the other petitioners.

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[25] Petitioner Overton did raise a similar *Brady* issue on appeal with respect to a witness who testified at trial, which the Court of Appeals rejected without deciding whether the information should have been disclosed earlier. *Catlett*, 545 A.2d at 1216.

Moreover, although Yarborough's videotaped statement on December 9, 1984, implicating the other petitioners was not admissible against his co-defendants at trial because of the strictures of *Bruton v. United States*, in the present context his statement is further evidence of the guilt of the other six petitioners, as are the statements of other co-defendants. Altogether, at least ten witnesses, including several of the charged defendants, described the events that led to the robbery and murder of Mrs. Fuller and identified these petitioners as having participated in one way or another. Their statements corroborated each other and were corroborated by other evidence. Against this background, petitioners cannot carry their burden of proving that they are "actually innocent" of the crimes of which they stand convicted. By the same token, although the government should have disclosed certain pieces of information back in 1985 that were arguably favorable to the accused, none of the undisclosed information was material under *Brady v. Maryland* because none of it – viewed separately or cumulatively – would have made any difference in the outcome of the trial. It is not enough to show that the defendants could have used the undisclosed evidence to construct a "counter-narrative" (or, as here, two counter-narratives that were mutually exclusive of each other), which could have been supported by a possible reconstruction of the physical evidence that ignores all of the eyewitness testimony. For evidence to be material under *Brady*, petitioners need to show a "reasonable probability" that the undisclosed evidence would have produced a different verdict. *See Strickler*, 527 U.S. at 281; *Heath v. United States*, 26 A.3d 266, 280

(D.C. 2011) ("[I]t must be reasonably probable (and not merely possible) that the jury would have harbored a reasonable doubt regarding the defendant's guilt if the evidence had not been suppressed."). Under that standard, based on the entire voluminous record in this case, petitioners' *Brady* claims, like their innocence claims, must fail.

For all of the foregoing reasons, it is this 6th day of August, 2012,

ORDERED that petitioner Yarborough's motion to vacate his convictions based on ineffective assistance of counsel, pursuant to D.C. Code § 23-110, be, and it hereby is, denied; and it is further

ORDERED that all petitioners' motions to vacate their convictions or, in the alternative, for a new trial, pursuant to D.C. Code § 22-4135, be, and they hereby are, denied; and it is further

ORDERED that all petitioners' motions to vacate their convictions or, in the alternative, for a new trial based on violations of *Brady v. Maryland*, 373 U.S. 83 (1963), pursuant to D.C. Code § 23-110, be, and they hereby are, denied.

s/Frederick H. Weisberg
JUDGE FREDERICK H. WEISBERG

SIGNED IN CHAMBERS

APPENDIX C - ORDER DENYING PETITIONS FOR REHEARING

FILED
JAN 14 2016
DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA
COURT OF APPEALS

NO. 12-CO-1362		
CHARLES. S. TURNER,	Appellant,	**FEL8513-84**
NO. 12-CO-1538		
CHRISTOPHER D. TURNER,	Appellant,	**FEL8612-84**
NO. 12-C0-1539		
RUSSELL L. OVERTON,	Appellant,	**FEL8613-84**
NO. 12-C0-1540		
LEVY ROUSE,	Appellant,	**FEL8614-84**
NO. 12-CO-1541		
CLIFTON E. YARBOROUGH,	Appellant,	**FEL8615-84**

NO. 12-CO-1542		
KELVIN D. SMITH,	Appellant,	**FEL8616-84**
NO. 12-CO-1543		
TIMOTHY CATLETT,	Appellant,	**FEL8617-84**
v.		
UNITED STATES	Appellee.	

BEFORE: Washington, Chief Judge; Glickman*, Blackburne-Rigsby*, Thomson, and Easterly, Associate Judges; Nebeker*, Senior Judge.

ORDER

On consideration of appellants Clifton Yarborough, Kelvin Smith, Levy Rouse, Charles Turner, Christopher Turner, and Timothy Catlett's petition for rehearing or rehearing *en banc*, appellant Russell L. Overton's petition for rehearing or rehearing *en banc*, appellant Christopher Turner's joinder of Russell L. Overton's petition for rehearing or rehearing *en banc*, and appellee's response thereto, it is

ORDERED by the merits division* that appellants Clifton Yarborough, Kelvin Smith, Levy Rouse, Charles Turner, Christopher Turner, and Timothy Catlett's petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on appellants' petition for rehearing *en banc*, it is

FURTHER ORDERED by the merits division* that appellants Russell Overton and Christopher Turner's petition for rehearing is denied; and it

appearing that no judge of this court has called for a vote on appellants' petition for rehearing *en banc*, it is

FURTHER ORDERED that appellants Clifton Yarborough, Kelvin Smith, Levy Rouse, Charles Turner, Christopher Turner, and Timothy Catlett's petition for rehearing *en banc* is denied. It is

FURTHER ORDERED that appellants Russell Overton and Christopher Turner's petition for rehearing *en banc* is denied.

PER CURIAM

Associate Judges Fisher, Beckwith and McLeese did not participate in these appeals.