Nos. 15-1503 & 15-1504

In the Supreme Court of the United States

CHARLES S. TURNER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

RUSSELL L. OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR PETITIONERS CHARLES S. TURNER, CLIFTON E. YARBOROUGH, CHRISTOPHER D. TURNER, KELVIN D. SMITH, LEVY ROUSE, AND TIMOTHY CATLETT

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The government concedes that the prosecution suppressed numerous forms of favorable information from petitioners in their trial. It seeks to excuse that suppression through one principal contention—namely, that all of the information could not be material under *Brady* v. *Maryland*, 373 U.S. 83 (1963), because the prosecution presented numerous (albeit impeached) witnesses who testified to seeing or hearing about a group assault of Mrs. Fuller.

The proposition that the prosecution's case against petitioners was "overwhelming" (Br. 80, 87) cannot be squared with the jury's verdict or its deliberations; the lead prosecutor's statements to the jury or his post-trial statements; the prosecution witnesses' contradictions or the grounds on which they were impeached; or the objective crime-scene evidence. Indeed, relying on that crime-scene evidence, petitioners have already demonstrated (and the government does not dispute) that the prosecution's theory and witnesses were affirmatively wrong about one of the central facts of the case—where the sodomy of Mrs. Fuller occurred. Pet. Br. 38-39.

Once one dispenses with the notion that the prosecution's case was overwhelming, this is not a close case. The government suppressed a battery of favorable evidence that would have given rise to an alternative theory of the crime and a strong circumstantial case that someone else was guilty and that petitioners were innocent. Using the suppressed evidence, petitioners would have challenged the prosecution case on how, where, and even when the crime occurred.

That evidence, in conjunction with other suppressed evidence that would have undermined the government's investigation and further impeached several witnesses, gives rise to far more than a "reasonable probability" that the jury would have had a reasonable doubt. *E.g.*, *Cone* v. *Bell*, 556 U.S. 449, 470 (2009). Applying that standard, as it did recently in *Smith* v. *Cain*, 565 U.S. 73 (2012), and *Wearry* v. *Cain*, 136 S. Ct. 1002 (2016) (per curiam), the Court should hold that the evidence suppressed by the prosecution was material, and reverse the judgment of the District of Columbia Court of Appeals.

A. The Prosecution Suppressed Evidence Indicating That Someone Else Committed The Murder

Presumably because petitioners have not yet identified a witness who will testify that he saw James McMillan commit the murder, the government derides petitioners' alternative theory as a "skein of speculation." Br. 53-55, 76. But a lack of direct evidence of McMillan's having committed the crime is no obstacle to arguing his responsibility. See Pet. App. 34a.

The circumstantial evidence implicating McMillan would have been powerful. See *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90, 100 (2003); A850 (instructing jury that "the law doesn't make any distinction between circumstantial and direct evidence"). McMillan was assaulting and robbing other middle-aged women in the same neighborhood at the time of Mrs. Fuller's death. Those assaults were exceptionally violent; indeed, in one, the victim thought he was trying to murder her rather than rob her. Pets. Br. 34.[1] McMillan's criminal activity renders his behavior around the garage particularly inculpating. Mrs. Fuller was a middle-aged woman who was beaten and left in a garage. A jury would naturally infer that a person with a pattern of beating up middle-aged women was responsible for her death if it learned that the person ran towards the garage where her body was found, stood in front of it for several minutes without speaking to others, concealed something under his jacket, and then ran at the sight of police. J.A. 24, 26-28.

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[1] The government refers to the criminal records of some petitioners. Br. 56 n.7. But the government does not argue that any of those crimes resemble their theory of petitioners' involvement in the murder of Mrs. Fuller, or that the criminal histories would have been admissible at trial.

The government notes that petitioners did not use William Freeman's testimony regarding the presence of two men by the garage to mount an alternative-perpetrator defense. Br. 55-56. But that only serves to underscore the importance of the suppression of Freeman's identification of McMillan. Michele Roberts, the defense attorney most focused on Freeman's testimony, testified that she would have presented an alternative-perpetrator defense if McMillan's identity had been disclosed. A2254-A2261, 5/1/12 Tr. at 1177-1178 (A12549-A12550).

Moreover, the prosecution suppressed evidence that would have made McMillan an even more attractive suspect to the jury. McMillan's girlfriend observed him by the garage, and thought he was "acting suspiciously." J.A. 26-28. Worse yet, McMillan did not act as most people would upon seeing someone with whom they were romantically involved. He did not talk to his girlfriend—or ask her what she was doing by the garage, or ask her why a group was waiting around the garage. A natural inference from that behavior is that McMillan did not ask because he already knew what had happened in the garage.

The suspicious circumstances surrounding McMillan's presence in the alley would not have been lost on the jury. It would have caused the jury to suspect that McMillan was responsible for Mrs. Fuller's death.

B. The Prosecution Suppressed Witness Statements Indicating Mrs. Fuller Was Killed By One Or Two People

The circumstantial case against McMillan would have been strengthened by evidence that at around 5:30 p.m., Willie Luchie and Jackie Watts heard "several groans" coming from the garage. J.A. 25, 27, 53-54. Neither they nor anyone with them saw a group by the garage. And Luchie saw that both doors to the garage were closed. Notably, when Freeman discovered Mrs. Fuller's body

shortly after 6 p.m., one of the doors was open. Pet. App. 4a. This evidence itself suggests that Mrs. Fuller was being assaulted by someone inside the garage approximately 30 minutes before McMillan's suspicious behavior by the garage. The government's efforts to explain away that evidence are unavailing.

1. The government suggests that what witnesses saw and heard in the alley at 5:30 p.m. is irrelevant because the attack on Mrs. Fuller occurred "not long after" she left her house around 4:30 p.m. Br. 54-55. But that contention does not explain why both garage doors were shut when Luchie looked at them. That fact alone suggests someone was in the garage, most likely assaulting Mrs. Fuller, when the groans were heard.

The government complains that the lead prosecutor's statement regarding Luchie "lacks detail and was not tested in any hearing." Br. 58. Leaving aside the irony in the government complaining that suppressed evidence was not tested, the statement that Luchie "remembers the doors to the garage being closed" (J.A. 25) is hardly "vague," and the government never explains what additional "detail" would be useful. Br. 58. The meaning of what Luchie told investigators prior to petitioners' trial is both plain and plainly significant.

The government next asserts that one would expect to hear more noise if Mrs. Fuller was being assaulted. Br. 58. But that argument fails to account for the nature of Mrs. Fuller's injuries. Mrs. Fuller sustained significant injuries to her head, including hemorrhaging in her brain and around her skull. A1190, A1197-A1198. Those injuries likely would result in her being dazed or semi-conscious, and thus only capable of groaning during the assault.

2. Rather, what is implausible is the government's contention that Mrs. Fuller was attacked "not long after"

leaving her house "after 4:30 p.m." Br. 54. As the government admits, that would mean Mrs. Fuller did not lose consciousness between the attack and Luchie's and Watts's observations at approximately 5:30 p.m. Br. 58. But Mrs. Fuller had suffered a brain hemorrhage and lost so much blood that it had collected in a pool around her. A1193, A1197-A1198. It is highly unlikely, to say the least, that a 4' 11", 99-pound, middle-aged woman could sustain those injuries and remain conscious for any substantial period of time. A1194.

Indeed, the government's timeline fails to account for other objective evidence. Mrs. Fuller's blood-alcohol content was measured at 0.20 after her death and, although it could not be definitively linked to her, a vodka bottle was found with her belongings in the alley. A2226-A2228. Notably, her son told detectives that she had not been drinking "that day." A1362. Because she evidently purchased and drank alcohol before the attack, it is unlikely that she was attacked soon after leaving her house. Br. 54.

Accordingly, the suppressed statements by Luchie and Watts indicate not only that Mrs. Fuller was killed by one or two people, but also that the prosecution's timeline at trial was incorrect.

C. The Suppressed Evidence Regarding A Different Perpetrator And From Witnesses Who Had Been In The Alley Supports An Alternative Theory Of The Crime

Petitioners would have used the evidence regarding McMillan and supported it with the evidence from Luchie and Watts as well as the objective crime-scene evidence to present to the jury an alternative theory of the crime. That theory would have been at least as credible as the prosecution's theory, which had only its flawed witnesses to sustain it.

1. The government contends that petitioners at trial would not have pursued this alternative theory, and instead adhered to their original strategy of accepting the prosecution's theory of the crime and simply trying to establish doubt as to themselves—that is, a defense of "not me, maybe them." Br. 62-63. That contention again cannot be reconciled with Ms. Roberts's testimony. Ms. Roberts was counsel to Alphonso Harris, against whom the prosecution's case was sufficiently weak that the government now claims his acquittal was "perfectly logical and not surprising." Br. 86 (internal quotation marks and alterations omitted). Nevertheless, she testified in the post-conviction proceeding that she "certainly" would have used the alternative-perpetrator evidence to present the jury with an alternative theory of the crime. 5/1/12 Tr. at 1177-1178 (A12549-A12550). If Ms. Roberts would have pursued the theory, other defense counsel would have as well.

The government ignores Ms. Roberts's testimony and instead draws on statements from Russell Overton's brief in his direct appeal. Br. 62-63. But, in determining what strategies lawyers would choose if they had been given all of the evidence, it is unhelpful to use statements from a lawyer who is engaging in zealous advocacy using the defense left available to him. It is also unbecoming. Having tilted the playing field by suppressing evidence, the government should not gloat that the ball rolled downhill.

To be sure, if a prosecution witness had not named their client, competent defense counsel would likely note that fact in closing. But that is not inconsistent with affirmatively presenting the jury with an alternative theory of the crime. What defense counsel would not have done is affirmatively *bolster* the prosecution's witnesses, as some counsel did in the original trial as a result of the government's suppression. See Pet. Br. 14-15.

2. a. The government further suggests that, if petitioners had pursued a common, alternative theory, they would not have developed the objective crime-scene evidence. Br. 59-61. But that evidence is obviously part of the evidentiary record against which the materiality of the suppressed evidence is measured. *United States* v. *Agurs*, 427 U.S. 97, 112 (1976). In any event, the government's argument is profoundly counterintuitive; it asks the Court to accept that, if petitioners had presented an alternative theory that the crime was committed by one or two people (McMillan and perhaps an accomplice), they would not have used objective evidence indicating the crime was committed by one or two people.

The government again draws on statements made in support of the "not me, maybe them" defense as evidence of how petitioners would have argued the alternative theory to the jury. Br. 60. Those statements are particularly unrevealing in this context, because lawyers using that defense embraced that a large group attacked Mrs. Fuller, arguing only that the jury should doubt whether the group was so large as to include their client. With the exception of the argument advanced by counsel to Levy Rouse, that is all that was done in the statements identified by the government. *Ibid.* And, as to the argument on behalf of Rouse that Alston and Bennett committed the crime together, counsel did not develop that argument before closing and the argument was improbable given that Alston and Bennett did not know each other at the time of the murder. Pets. Br. 39 n.12.

b. Petitioners would have developed the objective crime-scene evidence if they had presented the alternative theory because such evidence would have affirmatively supported that the crime was committed by one or two people. It also would have devastated the prosecution's case in numerous respects:

- *Where the group attack occurred.* The government's evidence at trial was that the group and Mrs. Fuller entered the alley on the 8th Street side and the attack began soon thereafter. Br. 11-12. But the objective crime-scene evidence indicated that the assault took place on the *9th Street side* of the alley, where Mrs. Fuller's coat, hair curlers, and umbrella were found. A2224-A2226.

- *The number of participants in the group attack.* The government describes a "chaotic scene" where first a set of seven defendants physically attacked Mrs. Fuller and then a second set of five defendants did so. Br. 11-12. In the second attack, the government claims, Mrs. Fuller defended herself by kicking and swinging her fists. That account is flatly contradicted by the physical evidence. If so many people had attacked Mrs. Fuller and she had fought back, one would expect to "see global injuries to the victim," as well as restraint marks. A2240, A2244; see A2142. Mrs. Fuller had no restraint marks, and her injuries were localized. A2143-A2144, A2169, A2177-A2178, A2240-A2241, A2244.

- *The sexual assault in the garage.* The government embraces the trial testimony that two people held down Mrs. Fuller's legs (although the witnesses described different people) while Rouse sodomized her with an object. Br. 12-13. At trial, the prosecution sought to reconcile that testimony with the crime-scene evidence by asserting that Mrs. Fuller's body was moved after she was sodomized. J.A. 156. But the

> crime-scene evidence belies the proposition that the victim was moved, and the government has conceded as much. *E.g.*, Pets. Br. 22. The government now offers no explanation whatsoever as to how the key event in the murder can be squared with its account of the crime—that is, how numerous people participated in the sodomy of Mrs. Fuller in the cramped corner of the garage. Pets. Br. 3-4, 38-39.

The government acknowledges that "no physical evidence linked petitioners to the crime" except for Catrina Ward's testimony that she saw blood on Rouse's pants, Br. 83—which is not physical evidence at all, but rather testimony from an impeached witness. See pp. 12-13, *infra*. The government also notes that petitioners' experts agreed with the medical examiner at trial that it was impossible to say the exact number of people who attacked Mrs. Fuller. Br. 61-62. That is a red herring; petitioners' experts agreed that, although they could not give an *exact* number of participants in the assault, it was, within a reasonable degree of certainty, one to three assailants and certainly not a large group. Pets. Br. 22. Indeed, when asked what his opinion would be if the Archbishop of Washington had testified that he saw eight or ten people attacking Mrs. Fuller, petitioners' crime-scene expert answered, "If he said he saw kicking and punching of this victim I would say he's incorrect." A2251.

3. Especially in light of the objective crime-scene evidence, the government's contention that the evidence against petitioners at trial was overwhelming lacks merit. See, *e.g.*, Br. 52, 76, 80, 87.

a. Even without the alternative theory and objective crime-scene evidence, the prosecution did not present an overwhelming case. To begin with, the evidence could not have been overwhelming if, as the government argues, the

acquittal of two defendants "was 'perfectly logical.'" Br. 86 (quoting A1738). The length of the jury's deliberations itself suggests that it struggled with the evidence. Before returning any verdicts, the jury deliberated for seven days and even then it remained deadlocked as to two defendants. Br. 22. While the government notes that the trial itself was lengthy, Br. 78, seven-day jury deliberations are uncommon even in serious criminal cases. See Thomas Brunell, et al., *Factors Affecting the Length of Time a Jury Deliberates: Case Characteristics and Jury Composition*, 5 Rev. of Law & Economics 555, 568 (2009).

It is unsurprising that the jury apparently had reservations. As the lead prosecutor told the jury, the prosecution's witnesses were not appealing. J.A. 193, 238-239. And, while the government seeks to impose order on those witnesses' conflicting accounts, Br. 11-15, the government's narrative omits disagreements about "important matters" and the witnesses' contradictions of their prior statements. Pet. App. 6a-8a; Pets. Br. 11-14.

The government does not dispute the lead prosecutor's observation that the jury was not willing to convict anyone based only on the testimony of Alston and Bennett, the government's star witnesses. A1741; see Br. 13. And two other purported eyewitnesses, Eleby and Jacobs, were subject to "extensive impeachment"—especially Eleby, whose testimony the trial court instructed the jury to "scrutinize[] with care." Br. 71, 75.[2]

Indeed, the prosecution's case was so weak that the lead prosecutor later described the testimony of a single

[2] The government claims that Jacobs's testimony was "believable" because she displayed emotion when asked about the sexual assault. Br. 75. But a jury would not overlook Jacobs's "significant credibility problems" because she displayed emotion, just as the original jury did not overlook Alston's and Bennett's credibility problems because they displayed similar emotion. Pet. App. 6a; Pet. Br. 16.

witness, Maurice Thomas, as being the "turning point" in the trial. A1737. Notably, however, Thomas's testimony diverged dramatically from every other account. Compare Br. 12 with Br. 14. Instead of Rouse and Charles Turner striking Mrs. Fuller, Thomas said it was Timothy Catlett. And, instead of Mrs. Fuller fighting back, Thomas's testimony suggests Mrs. Fuller did not resist as she was patted down. Thomas's testimony also changed over time. Although the government seeks to argue away those changes, Br. 73-74 n.9, his testimony was unambiguous: Thomas told the grand jury that he was by the alley on the other side of 9th Street. *Ibid.* At trial, however, Thomas said that he "wasn't standing right on the alley part where the fence [was] at." A630. Thomas also told the grand jury that a group watched the attack on Mrs. Fuller from close to a house that is on "9th and I." A1953. But at trial, Thomas put the observing group "closer to Eighth Street," on the far side of the attacking group. A641.

The government notes that witnesses also testified about incriminating statements purportedly made by petitioners. Br. 16-18. But there is good reason to think the jury put little stock in that testimony. For example, a detective testified that he overheard Christopher Turner and Overton make ambiguous statements after they were arrested. Br. 17-18; Overton Br. 10. But those are the two petitioners as to whom the jury could not reach a verdict for two additional days. Br. 22.

Most of the testimony of purported incriminating statements comes from impeached witnesses like Kaye Porter. See Br. 18, 75. For example, the government points to three inculpatory statements that Ward testified Rouse had made. Br. 17. But Ward did not testify about those statements before the grand jury, when she was dating Rouse. Br. 18. By the time of trial, she was dating

Bennett; and she had inculpated Bennett before the grand jury, only to exculpate him at trial. Br. 17, 19; A762-A764. Ward's about-face crystallizes the weaknesses of the prosecution's witnesses.

In explaining to a reporter years later why this case "easily could have gone the other way," the lead prosecutor said: "[L]ook at the witnesses we had. * * * They were inarticulate, they were drug-involved, they were not very well-educated. They weren't that smart." A1758. In fact, the lead prosecutor was concerned that the witnesses would "make things up" when speaking with investigators, because they were "unconcerned, cold and cold-hearted, * * * * [and] did not see the consequences of their lying in some ways." A1737.

The government suggests that the lead prosecutor had that view only early in the investigation, Br. 78, but he described the witnesses to the jury in the same terms, and acknowledged with regret the lies they had told and the deals the prosecution had struck to secure their testimony. J.A. 193, 238-239. An experienced trial lawyer does not belittle his witnesses before the jury for no reason; the lead prosecutor no doubt did so because he perceived that the jury had similar reservations.

b. The jury's reservations about the prosecution's case would only have grown if it had heard petitioners' alternative theory. See, *e.g.*, *Kyles*, 514 U.S. at 449 n.19. In petitioners' original trial, petitioners did not question that a group attack had occurred. The evidence implicating McMillan would have called the very notion of a group attack into question. It accordingly would have created doubts regarding any witness who claimed to see one. And, as the jury considered those doubts, the contradictions in the testimony from the prosecution's witnesses would have loomed even larger than they did in petitioners' original trial.

The jury's doubts would have been further deepened by the objective crime-scene evidence, which contradicts the testimony from the prosecution's witnesses that a large group attacked Mrs. Fuller. See p. 9-10, *supra*. The objective evidence further contradicts specific points in the witnesses' testimony. See, *e.g.*, Pets. Br. 23. For example, multiple witnesses testified that the perpetrators forcibly restrained Mrs. Fuller, but she had no injuries consistent with having been restrained. Compare, *e.g.*, A2240-A2242 with, *e.g.*, A410-A411, A497-A488, A553-A554. Yarborough's videotaped statement, on which the government also relies, contained that error as well as numerous others. See A1044-A1045, A1054-A1055; Pets. Br. 7-8.

When confronted with objective evidence illustrating the problems with the testimony of the prosecution's witnesses, the jury would have harbored doubts about whether the witnesses were testifying falsely. Indeed, as to the vast majority of the prosecution's witnesses, who the lead prosecutor described as "cold-hearted," a motive for false testimony was readily apparent: the witnesses had decided to "make things up" in an effort to extricate themselves or their friends. A1737. Many witnesses, like Melvin Montgomery, were trying to extricate themselves from an arrest or threat of arrest. *E.g.*, A322 (Montgomery); 12/3/85 Tr. at 574 (A10433) (Taylor). Others, like Jacobs, were trying to extricate their friends. See, *e.g.*, A2298-A2299 (Jacobs claiming to have witnessed crime when challenged on why her friends were innocent); A1025 (Eleby making similar claims). And most witnesses were subjected to aggressive interrogations from which they would want to extricate themselves. Pet. App. 15a n.11; A2282-A2283, A2298-A2299, A2594-A2595.

Regardless of the reason, the jury would have considered whether the "not very smart" witnesses had made a

short-sighted decision to falsely claim they had seen either a group discuss committing a robbery or some portion of an attack. J.A. 193. The witnesses would have been given unwitting assistance from the detectives and prosecutors, who admit that they used information from other sources when questioning witnesses. A2427, A2569-A2570. Accordingly, in making a statement, witnesses were able to draw on what they learned, and their friends had previously learned, from the detectives' questions as well as their own knowledge of Mrs. Fuller and the neighborhood.

The jury would have also doubted whether the testimony from the two cooperating witnesses was truthful. Both Alston and Bennett gave statements after being arrested that were contradicted by the objective crime-scene evidence. *E.g.*, Pets. Br. 5-8.[3] And both thought their statements would extricate them from the case. After giving his statement, Alston asserted that he "didn't have nothing to do with" the murder and wanted to "live [his] life like a free man." A1175. And Bennett told detectives that his statement "[m]ore likely [is] gonna help me than * * * help you." A1078-A1079. Although both later pleaded guilty, the jury would have considered whether they had made "all-too-rational" decisions under aggravating circumstances. CWCY Br. 10. Alston had been raped in prison, and Bennett had been arrested for drug dealing and robbery. A419-A426; Pets. Br. 11.

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[3] The same is true for Yarborough's videotaped statement. See p. 14, *supra*. And a jury would have had similar reasons to question Yarborough's prior transcribed statement. After being threatened with arrest and enduring hours of interrogation, Yarborough implicated Harris, Rouse, and Charles Turner, all of whom were already subjects of the investigation. A1178-A1180; Pets. Br. 4-5; see A1375. Yarborough also identified at least five other people who were never indicted. Br. 6.

In short, petitioners would have used the suppressed evidence to present an alternative theory that McMillan was responsible for the crime. To a jury that heard that theory, and the objective crime-scene evidence that would have supported it, the prosecution's case would have been anything but overwhelming.

D. The Prosecution Suppressed Additional Information That Cast Doubt On The Investigation And Impeached Its Witnesses

As to the suppressed information petitioners identified as casting doubt on the investigation and impeaching the prosecution's witnesses, the government does not dispute that practically all of that information was favorable. Instead, the government principally seeks to downplay the relevance of that information. But especially to a jury considering petitioners' alternative theory of the crime, that evidence would have deepened their doubts regarding the prosecution's case.

1. The government does not dispute that detectives' mishandling of Davis's statement identifying Blue as the murderer was favorable to the defense. Br. 67. It argues only that the jury would have considered the error to be a "minor slip-up" because investigators interviewed 400 other people (the vast majority of which did not inculpate petitioners). Br. 68. What makes an error "minor" is not the number of other steps taken, but rather the character of the error and its effect on the "reliability of the investigation." *Kyles*, 514 U.S. at 446. Davis's statement provided a strong lead. Yet the statement was misplaced for nine months, during which time investigators developed what would become the prosecution's case. Petitioners would have argued that the flaws in how the case was investigated resulted in the flawed testimony of the prosecution's purported eyewitnesses.

2. The prosecution also suppressed information that would have further impeached Eleby, Porter, and Jacobs and further undermined the reliability of the investigation. The government's responses concerning that information lack merit.

a. The government concedes that all of the suppressed information except that pertaining to Jacobs's harsh interrogation was favorable to the defense. Br. 72. As to Jacobs's interrogation, the government cannot deny that "the probative force of evidence depends on the circumstances in which it was obtained." *Kyles*, 514 U.S. at 446 n.15. It surely impacts the probative force of Jacobs's testimony that she claimed to witness the crime only after an interrogation that the lead prosecutor, who witnessed it, described as "very dramatic and shocking." A2299. The lead prosecutor's testimony was equally clear that Jacobs immediately recanted her statement—that is, after Jacobs stated she saw the crime, "she said she didn't see it." A2299. The prosecution should have informed petitioners of the means by which the statement was taken and that Jacobs immediately recanted it. See *United States* v. *Rodriguez*, 496 F.3d 221, 225-227 (2d Cir. 2007).

b. Although the government elides the effect of the suppressed evidence regarding Eleby, Porter, and Jacobs on the reliability of its investigation, Br. 68-72, the jury surely would have attached weight to it in its deliberations. As to each witness, the prosecution suppressed evidence that should have given prosecutors pronounced pause about the witness. The lead prosecutor knew that Eleby was high on PCP while meeting with investigators and identifying suspects; that Porter had accompanied Eleby to Eleby's initial meeting with investigators to lie to them about witnessing a suspect confess (which was particularly troubling because Porter was to testify at trial that another defendant confessed to her); and Jacobs

only claimed to witness the crime after a heated interrogation. This information revealed that the prosecution had a "remarkably uncritical attitude" regarding its witnesses, even in the face of the obvious flaws in their testimony. *Kyles*, 514 U.S. at 445.

c. This suppressed evidence would have also further undermined the credibility of Eleby, Porter, and Jacobs. Although the government is correct that these three witnesses were subjected to "extensive impeachment" at trial, Br. 75, additional impeachment of a witness whose credibility is "already impugned" is, if anything, more relevant to the jury and thus likely to be material. *Wearry*, 136 S. Ct. at 1006-1007.

3. Finally, as to the suppressed information concerning Thomas, the government claims that the jury would have assumed Thomas's aunt was lying when she told investigators that she did not recall being told about the assault, because Thomas testified that she told him not to discuss what he saw. Br. 73. But there is no indication that the investigators themselves thought she was lying. A1010. The inability of Thomas's aunt to corroborate his testimony would have been useful to petitioners in further undermining Thomas's credibility.

E. When Considered Cumulatively, The Suppressed Information Was Material

Petitioners' case is unusual in the breadth of evidence suppressed by the prosecution. As is often the case when *Brady* violations arise in cases built on witness testimony, the prosecution suppressed evidence impeaching its witnesses. See *Wearry*, 136 S. Ct. at 1006-1007; *Smith*, 565 U.S. at 76. Here, however, the prosecution also suppressed information of an altogether different kind—evidence identifying an alternative perpetrator and witness

statements consistent with that perpetrator having committed the crime.

1. The familiar *Brady* materiality asks only whether the suppressed evidence gives rise to "a reasonable probability" of "a different result." *E.g.*, *Kyles*, 514 U.S. at 422. The government acknowledges that a "reasonable probability" is a lower probability than more likely than not, and that a "different result" merely requires that the jury possess a reasonable doubt. Br. 52, 76, 81. Applying that standard, this Court has found suppressed evidence to be material even in the face of substantial evidence of guilt. See *Smith*, 565 U.S. at 76; *id.* at 79, 81-83 (Thomas, J., dissenting); *Wearry*, 136 S. Ct. at 1003-1006; *id.* at 1010-1011 (Alito, J., dissenting); *Kyles*, 514 U.S. at 431, 452-454.

Under this Court's *Brady* precedents, suppressed evidence is material if a reviewing court is not confident the jury "*would*" reject inferences that could be drawn in the defendant's favor from the suppressed evidence. *Smith*, 565 U.S. at 76 (emphasis in original); *Kyles*, 514 U.S. at 453. The Court cannot have confidence that a jury would have done so here. Petitioners' alternative theory implicating McMillan is not only plausible, it actually better aligns with the objective crime-scene evidence.

To be sure, the prosecution offered the testimony of many witnesses, including one (Thomas) who did not have an obvious motive to lie. Br. 76-77. And although those witnesses gave varying accounts and were impeached, even a jury that heard petitioners' alternative theory may still have wondered why numerous witnesses would testify to a group having attacked Mrs. Fuller if such an attack had not occurred. But the jury would also have had significant questions about the prosecution's case:

- Why did McMillan, with his history of assaulting middle-aged women, run into the alley only to linger by the garage approximately 30

minutes after groans were heard coming from the garage?

- Why was McMillan acting suspiciously, hiding something under his jacket, and not talking to his girlfriend?
- Why were the doors to the garage closed when Mrs. Fuller's groans were heard coming from the garage but open a half-hour later?
- And why did the accounts of the prosecution's witnesses contradict the objective, crime-scene evidence regarding the injuries to Mrs. Fuller and the location of her body?

This Court can have no confidence that a jury would have resolved all of those questions in the prosecution's favor, as would have been necessary to eliminate reasonable doubt. Indeed, one could resolve those questions in the government's favor only by impermissibly "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not." *Wearry*, 136 S. Ct. at 1007; see Pet. App. 49a-54a.

When considering suppressed evidence in a case with an alternative-perpetrator defense, a court "[p]erhaps" could retain confidence in a guilty verdict if the physical evidence of guilt was "above suspicion" or if purported eyewitnesses "were free of impeachment." *Kyles*, 514 U.S. at 454. But neither option is available to the government here. Unlike in *Kyles*, no physical evidence inculpates the defendants. To the contrary, the objective crime-scene evidence actually contradicts the prosecution's case. And the prosecution's witnesses were never "free of impeachment," and certainly would not have been in a trial in which petitioners used the objective crime-scene evidence and suppressed impeachment evidence to further attack the witnesses' credibility.

2. If the suppressed information had been available to petitioners, they would have presented a radically different defense. In place of the "not me, maybe them" defense, petitioners would have presented an alternative theory that McMillan was responsible for Mrs. Fuller's death. And, instead of acquiescing to the prosecution's theory of the crime, petitioners would have contradicted the prosecution's proof regarding where Mrs. Fuller was attacked, how many people participated, where the sodomy occurred, and even when the crime took place. The D.C. Court of Appeals was entirely correct when it observed that petitioners would have challenged the prosecution's theory of "the basic structure of how the crime occurred." Pet. App. 54a.

That is a virtue of petitioners' claim, however, not a vice. Here, the suppressed evidence, taken cumulatively, "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

F. The Court Should Clarify That Evidence Developed After Trial May Be Considered In Evaluating The Materiality Of Evidence Suppressed Before Trial

The similarities between the murder of Mrs. Fuller and the murder McMillan committed in 1992 are staggering. Both victims were attacked in alleys, "dragged" to where they were assaulted, had items of clothing removed along the way, and were beaten. Br. 31-32. Most disturbingly, McMillan and Mrs. Fuller's killer "stripped [both victims] naked from the waist down, pushed up [their] sweater[s], and sodomized [them]." Br. 32. Those similarities are relevant to the Court's consideration of the suppression of evidence regarding McMillan's presence at the crime scene, for two reasons.

First, the similarities show how petitioners' original trial would have been different. Br. in Opp. 19. The government does not challenge that McMillan's subsequent murder indicates that petitioners would have been able to develop evidence that McMillan had a proclivity for sodomy and sexual violence and that he was capable of inflicting injuries similar to those sustained by Mrs. Fuller by himself. Pets. Br. 49-50.

Second, the similarities themselves point to McMillan's responsibility for Mrs. Fuller's murder. If *Brady*'s "overriding concern" is to remain "the justice of the finding of guilt," *Agurs*, 427 U.S. at 112, but see Br. 64, the Court should make explicit that in considering materiality through the lens of how the retrial would proceed, post-trial evidence that bears on the materiality of withheld evidence should be considered. See *Wood* v. *Bartholomew*, 516 U.S. 1, 8 (1995) (per curiam); *Kyles*, 514 U.S. at 453 n.22.

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"'[F]airness' cannot be stretched to calling this a fair trial." *Kyles*, 514 U.S. at 454. The prosecution suppressed evidence that would have given rise to a defense theory that someone else was responsible for the crime. In presenting that alternative theory to the jury, petitioners would have challenged the prosecution's case on practically every aspect of the crime. There is accordingly not just a "reasonable probability," but a pronounced likelihood, that the result of petitioners' trial would have been different if petitioners had been able to pursue that theory. *E.g.*, *id.* at 422. The District of Columbia Court of Appeals erred when it rejected petitioners' *Brady* claim, and its judgment should accordingly be reversed.

Respectfully submitted.

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