No. 15-1504

IN THE
Supreme Court of the United States

RUSSELL L. OVERTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

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The government argues that the array of exculpatory and impeachment evidence suppressed in this case is not material under *Brady v. Maryland*, 373 U.S. 83 (1963), because the evidence of Russell Overton's guilt at trial was overwhelmingly strong. The jury itself certainly did not see it that way. The jury declared it "impossible" to reach a unanimous verdict as to Overton, took another forty to fifty votes before ultimately returning a conviction, and acquitted another defendant squarely implicated by the government's two key witnesses. On that record, the government's assertion that the case against Overton was "overwhelming" is not just wrong—it is not even credible. The prosecution's case in fact had several glaring weaknesses, which would have been further exposed by the evidence prosecutors concealed from the defense and the jury. The suppressed evidence accordingly was *at least* reasonably likely to have made a difference in the jury's deliberations. There is hardly any good-faith argument to the contrary. Overton is entitled to a new trial, as the government should have acknowledged years ago.

ARGUMENT

A. The Prosecution's Case Against Overton Was Far From Overwhelming

Under *Brady* and its progeny, evidence is "material," and constitutional error results from its suppression, if "there is any reasonable likelihood it could have affected the judgment of the jury." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (quotations omitted). The materiality inquiry measures the po-

tential impact of the suppressed evidence in the context of the entire record. Where, as here, the government's case against a defendant is already weak, even suppressed evidence of "relatively minor importance" may be enough to change the outcome, and thus may be material. *Agurs v. United States*, 427 U.S. 97, 112-13 (1976); *accord Wearry*, 136 S. Ct. at 1006; *Smith v. Cain*, 132 S. Ct. 627, 630 (2012).

The government does not dispute that materiality is generally easier to establish in a relatively weak case. The government instead insists that principle has no application here, because the prosecution's case was not weak, but exceptionally strong. Whatever case the government may be imagining, it is not the actual case presented against Russell Overton.

The most obvious refutation of the government's assertion that its evidence was "overwhelming" (U.S. Br. 9, 22, 23, 39, 80, 83, 87) is the fact that, after deliberating for a week, acquitting two of Overton's co-defendants, and convicting six, the jury told the court it would be "impossible" to reach a unanimous verdict as to Overton. JA 246; *see* Overton Br. 31. The government does not even attempt to explain why the jury struggled to reach a verdict despite supposedly "overwhelming" evidence of Overton's guilt. Nor does the government acknowledge that it was only after forty to fifty more votes and further assertions of impasse that the jury ultimately convicted Overton. *See* Overton Br. 31-32 (describing further deliberations, including note asking to stop deliberating because the jury had taken more than ten votes and still could not reach a verdict); *cf.* Direct Appeal Br. App'x III (*Washington Post* article

reporting "there was 'more than one' juror holding out for acquittal in the two final cases" and if the jury "had not been sequestered, the deliberations 'would have gone on longer'"). The *only* thing the government has to say on the subject is that "the jury deliberated for two additional days before convicting Overton." U.S. Br. 83; *see id.* at 22, 45.

The obvious inference from the jury's struggle to reach a verdict is that, whatever the government's view, the *jury* did not find the prosecution's evidence against Overton "overwhelming." And it is the jury's assessment that matters—a new trial is required under *Brady* when there is "any reasonable likelihood" the suppressed evidence "could have affected the judgment of the jury." *Wearry*, 136 S. Ct. at 1006 (quotations omitted).[1]

The jury's deadlock, moreover, is easily explained by the evidence presented against Overton at trial, which even the government admits was weaker than that against other defendants. *See* U.S. Br. 62. With no physical evidence tying anyone to the crime, the government's case rested on testimony from purported eyewitnesses—in particular, Calvin Alston and Harry Bennett, two cooperating witnesses whose stories the government obtained through plea agreements. The government repeatedly emphasizes

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[1] The fact that the court of appeals also described the evidence as "overwhelming" (U.S. Br. 9, 22, 39, 83) does not make it so. The Fifth Circuit said the same thing about the government's case in *Kyles v. Whitley*, 5 F.3d 806, 807 (5th Cir. 1993), yet this Court nonetheless held that there was a reasonable probability the suppressed evidence could have changed the outcome, 514 U.S. 419, 421-22 (1995).

Alston and Bennett's testimony as the centerpiece of the prosecution's "overwhelming" case, declaring that it is highly unlikely the jury would have disbelieved them. U.S. Br. 44, 45, 46, 55, 61, 79. But the jury *did* disbelieve Alston and Bennett in one critical respect—it *acquitted* Overton's co-defendant Alphonso Harris despite Alston and Bennett's testimony squarely implicating him in the attack. Overton Br. 32-33; *see also* Direct Appeal Br. App'x III ("[t]he jury … was skeptical of the government's key witnesses—two young men who had pleaded guilty to Fuller's murder"). It is thus impossible to conclude that the jury placed such unshakable faith in Alston and Bennett that it would have been immune to the suppressed exculpatory evidence. Overton accordingly need not establish that the suppressed evidence would have led the jury to doubt "*virtually everything*" witnesses like Alston and Bennett said to show that the suppressed evidence is material. U.S. Br. 81 (quoting Pet. App. 58a). Because the jury *already* rejected some of the purported eyewitness testimony, the suppressed evidence need only create enough *additional* doubt about the government's case to undermine confidence that the jury would have reached the same verdict with the suppressed evidence before it.

The government insists Harris's acquittal says nothing about the jury's more general view of the evidence, because the case against Harris was weaker than that against Overton. *Id.* at 86. But what matters is that Harris was acquitted *even though Alston and Bennett squarely implicated him in the attack*—a point the government does not dispute. *Id.*; *see*

A484-85, A490, A493 (Alston testimony that Harris kicked Mrs. Fuller and was in the garage); A389-90 (Bennett testimony that Harris hit and kicked Mrs. Fuller). Alston, in fact, testified that, while one of the other defendants was sodomizing Mrs. Fuller with a pipe, Harris encouraged him to "[s]hove it some more." A502. As even the lead prosecutor recognized, Harris's acquittal in the face of that evidence indicated that the jury was unwilling to convict based on Alston and Bennett's testimony alone. A1738; A1741.

The prosecution's case against Overton, predicated largely on Alston and Bennett's testimony, was therefore anything but "overwhelming," even assuming it was marginally stronger than the case against Harris. Other than Alston and Bennett, only one other witness, Carrie Eleby, claimed to have seen Overton participate in the attack. Overton Br. 33. Accordingly, while the government protests that this case is "nothing like" *Smith* or *Wearry* because those cases turned on a single key witness (U.S. Br. 80-81), the same is effectively true for Overton here. And even without the suppressed impeachment evidence to further discredit her, Eleby suffered from serious credibility problems. Indeed, the lead prosecutor described her as presenting "a number of problems" for the government, A1001, and confessed that he was "very skeptical" of her story, A2417.

At the same time, other evidence presented at trial gave the jury concrete reasons to doubt Overton's involvement in the attack. Perhaps most significant is the testimony of Maurice Thomas, who claimed to have seen many of the defendants assault

a woman in the alley. The lead prosecutor labeled Thomas's testimony "[t]he turning point in the trial," A1737-38, and the government described him as "a very, very important witness" in its closing at the 2012 evidentiary hearing, A14336-37; *see also* Br. in Opp. 29 n.12. This "very, very important witness," however, "affirmatively denied" seeing Overton in the group of perpetrators he described. Pet. App. 57a; *see, e.g.*, A7388-89; A7439. The supposedly "overwhelming" case against Overton, in other words, was contradicted by the government's star witness.[2]

The government admits that Thomas denied seeing Overton, but tries to minimize his denial with a jury argument: "At best," the government urges, the fact that Thomas did not see Overton assaulting Mrs. Fuller "suggest[s] only that Overton was not assaulting Fuller during the moment when Thomas looked in." U.S. Br. 85. No. At *best*, the jury could have inferred from Thomas's testimony that *Overton was not in the alley and did not assault Mrs. Fuller at all*. The government's effort to dismiss Thomas's testimony as "neutral" (*id.*) ignores both the actual record and the government's obligation to accept reasonable inferences jurors could have drawn in favor of the defense if prosecutors had not concealed

[2] The suppressed evidence, of course, would have given the jury substantial new reasons to doubt Thomas's testimony describing a large-group attack. *See infra* at 8-14. But taken on its own terms, Thomas's testimony confirms how extensive the flaws in the government's case were even *without* the suppressed evidence—so extensive that a witness the government has emphasized as the key to the case *denied* seeing one of the defendants participate in the crime.

exculpatory evidence. *Cf. Kyles*, 514 U.S. at 453 (reviewing what "[t]he jury would have been entitled to find" had the suppressed evidence been disclosed).

A fully informed jury also could have credited Overton's three alibi witnesses. Overton Br. 11. The government cites Overton's direct appeal brief as proof that his alibi had no force (U.S. Br. 85-86), but it is hardly surprising that Overton's counsel was unenthusiastic about the merits of the alibi defense when the jury had just convicted Overton despite it. The fact that the jury ultimately did not accept Overton's alibi *absent the suppressed evidence*, however, says nothing about whether that evidence would have made the jury more inclined to credit the alibi. Nor do the vulnerabilities in Overton's alibi highlighted by the government (*id.*) establish that it did nothing to counter the government's case. To be sure, cross-examination exposed imperfections in the testimony supporting Overton's alibi, but none of the questions it raised actually showed that testimony to be false. *See* Pet. App. 10a (describing impeachment). And even the court of appeals agreed that the case against Overton was weaker than that against his co-defendants in part because Overton's alibi was not "contradict[ed]" like some other defendants' alibis were. *Id.* at 57a.

The prosecution's case against Overton, in short, was nowhere close to "overwhelming." On this record, even a slight shift in the balance of the evidence was reasonably probable—if not entirely certain—to result in a different outcome. And the evidence withheld here would have shifted the balance not

slightly, but dramatically, in Overton's favor, as the next section shows.

B. The Host Of Evidence Suppressed By The Prosecution Creates At Least A Reasonable Likelihood Of A Different Outcome For Overton

In this extremely close case, the government withheld evidence of not one, but *two*, credible potential alternative perpetrators, along with other evidence that, if credited, would have established that a single perpetrator—not a large group—committed the crime. The government also withheld evidence that Eleby, whose testimony may well have been decisive in the jury's decision to convict Overton after multiple assertions of impasse and dozens of votes, had induced another witness to lie to investigators to implicate someone in the crime. The government offers no persuasive basis for concluding that the evidence prosecutors concealed was not reasonably likely to have changed the outcome of Overton's trial.

1. *The Jury Could Have Relied On The Suppressed Evidence To Reject The Government's Group-Attack Theory Of The Crime*

The government does not dispute that alternative-perpetrator evidence is quintessential *Brady* material. *See* U.S. Br. 82. It instead contends that the suppressed McMillan evidence is immaterial here because that evidence did not place James McMillan at the crime scene at the precise moment Mrs. Fuller was killed, *id.* at 46, 54, rendering its connection to any alternative-perpetrator theory "entirely speculative," *id.* at 54, 83. The suppressed ev-

idence, however, would have given the jury more than enough basis for rejecting the prosecution's group-attack theory of the crime. Indeed, while the government now suggests there is no reason to think someone lingering in the alley around the time Mrs. Fuller's body was found had anything to do with her murder, the lead prosecutor testified at the 2012 hearing that the police put Harris (the only person who had been arrested for Mrs. Fuller's murder at the time) in a line-up to determine whether he was one of the people seen fleeing the scene as the police arrived. A2329. In other words, even the police thought the person who committed the crime might have been in the alley when Freeman saw McMillan there. The jury might well have thought the same thing.

The alternative, single-perpetrator narrative of the crime would have been strengthened by evidence that at least two witnesses, Jackie Watts and Willie Luchie, reported hearing groans coming from the garage where Mrs. Fuller's body was later found when they passed through the alley around 5:30 p.m. JA 25; JA 27. Luchie recalled that the garage doors were closed at the time, JA 25, while Freeman stated that one of the doors was open when he discovered Mrs. Fuller's body roughly thirty minutes later, A210. As the court of appeals recognized, the jury could have inferred from that evidence that the crime was "not … committed by a large group of people" (Pet. App. 34a-35a) because Mrs. Fuller was killed inside the closed garage.

The government disputes that inference, arguing that the Luchie evidence does not support a single-

perpetrator or small-group theory at all, because Luchie and Watts heard only "groans," and the assault would have been much louder while it was occurring. U.S. Br. 54-55, 58. There is no question Mrs. Fuller was brutally attacked, but the jury easily could have inferred that she groaned at some point during the assault, especially if she had already been badly beaten and was partially incapacitated by that time. And the jury certainly could have concluded that when Luchie and Watts heard groans, the assault was substantially completed, yet the assailant(s) remained in the garage.

The government also dismisses Luchie's observation that the garage doors were closed as a "vague discrepancy." *Id*. at 58. But there is nothing "vague" about the prosecutor's notes regarding Luchie's statement. *See* JA 25. Nor does the fact that Luchie was unable to testify at the post-conviction hearing due to illness (U.S. Br. 58) undermine the significance of his statement, which speaks for itself. And the lead prosecutor *was* asked about the Luchie evidence at the hearing, where he "agreed that if the witnesses heard groaning at 5:30 p.m., it meant Fuller was still alive at that time" and 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." Pet. App. 18a.

Despite the obvious significance of the suppressed evidence, the government speculates that the defendants probably would not have pursued a defense based on it if given the chance, because they already "had ample opportunity and incentive to construct … an alternative-perpetrator defense at

trial, but did not pursue it." U.S. Br. 46; *see id.* at 55-56. Yet again, the government considers the record *without* the suppressed information. At the time of the trial, the defendants knew only that Freeman saw *someone* in the alley shortly before the police arrived. They did not know—because prosecutors hid from them—*who* Freeman saw, let alone that the person was a known criminal who had violently assaulted two other women in the same neighborhood within weeks of Mrs. Fuller's death.[3] Nor was the defense aware that multiple other witnesses also saw McMillan in the alley "acting suspiciously" (JA 27-28). It is obviously far more persuasive for a defendant to identify a specific, "suspicious" individual with a relevant criminal record as the actual perpetrator than merely to suggest the vague possibility that some other, unidentifiable figure might be responsible. And while the defense theoretically could have attempted to convince the jury that Alston and

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[3] The government remarkably argues that McMillan's criminal history "did nothing to suggest that he attacked Fuller alone or with a single accomplice." U.S. Br. 46. Of course it did: neither of McMillan's robbery/assaults in the weeks following Mrs. Fuller's murder was committed with more than one accomplice. Overton Br. 15 n.8. And the government's argument that "McMillan's criminal history is not very different from multiple petitioners" (U.S. Br. 56 n.7) is both wrong and irrelevant. McMillan's criminal history was significant not merely because he had committed other robberies, but because he had *violently assaulted multiple middle-aged women in the same neighborhood where Mrs. Fuller was killed within weeks of her death*. Overton Br. 15, 35. Those facts made McMillan a highly credible alternative perpetrator, even if some of the defendants might also have been plausible *separate* suspects in light of their criminal history.

Bennett committed the crime alone (*see* U.S. Br. 61), there would have been little more than speculation to support that theory—certainly nothing akin to the multiple witnesses who would have testified to McMillan's activities in the alley and the Luchie evidence that would have bolstered a single-perpetrator theory of the crime.

The government further argues that Overton was particularly unlikely to join any unified single-perpetrator defense because the evidence against some of the other defendants was much stronger and Overton's attorney emphasized Thomas's testimony—which implicated several other defendants—in his closing at trial. U.S. Br. 62-63.[4] Overton can hardly be faulted for pursuing a "maybe them, not me" defense strategy at the time, given that prosecutors withheld the evidence that most powerfully would have fueled a common alternative-perpetrator defense. Although the evidence placing Overton in the group of alleged assailants was unquestionably weaker than that against some of his co-defendants, the government's *only theory of guilt* was based on a group attack, giving Overton every incentive to challenge that theory if given a compelling evidentiary basis for doing so. Indeed, Harris's lawyer, Michele Roberts, testified at the post-conviction hearing that

[4] The government criticizes Overton for not now attempting to discredit Thomas based on suppressed impeachment evidence (U.S. Br. 63), but regardless of the potential value of that evidence in the abstract, evidence undermining Thomas's testimony would not likely have changed the jury's verdict *as to Overton*, because Thomas affirmatively denied seeing Overton in the alley.

she "certainly" would have used the suppressed evidence had it been disclosed (A12549-50) even though the case against Harris was so weak he was *acquitted*.[5] And there would have been no inconsistency in Overton highlighting an important hole in the government's case against him personally—Thomas's testimony—while more broadly suggesting that the government's entire theory of the crime was incorrect.

At bottom, the government's argument that the McMillan and Luchie evidence is not material depends on the premise that the evidence supporting the prosecution's group-attack theory was so ironclad the jury could not possibly have rejected it. U.S. Br. 46, 55-57; *see also id.* at 79 (arguing that court of appeals concluded the jury "*would have*" rejected the suppressed evidence in light of the prosecution's case). That argument simply ignores significant vulnerabilities in the evidence supporting the prosecution's theory, which depended on testimony from "young," "inarticulate" witnesses with serious credibility problems. Overton Br. 39 (quoting JA 193). Those weaknesses were not lost on the jury, which clearly harbored doubts about the government's case, acquitting Harris and struggling to reach a verdict as to Overton and Christopher Turner. *Cf.* Direct Appeal Br. App'x III (the "jury … was skeptical of … testimony that 'so many people' were involved").

Against that backdrop, it is precisely *because* "no

[5] Like Overton's attorney, Roberts also emphasized Thomas's testimony in her closing statement. A10764; *see* U.S. Br. 19-20.

trial witness … disputed" the government's "overall description of how the crime was committed" (U.S. Br. 44 (quotation omitted)) that the suppressed evidence would have been so powerful for the defense—it would have provided the jury an overarching explanation for the inconsistencies in the government's evidence that was otherwise missing. The suppressed evidence also would have made sense of Freeman's testimony that "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." Pet. App. 53a n.79.

Because the suppressed McMillan and Luchie evidence, on its own, "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, it suffices to warrant a new trial.

2. *Ammie Davis's Eyewitness Statement Identifying James Blue As The Lone Perpetrator Would Have Significantly Weakened The Prosecution's Case And Strengthened The Defense*

a. The government does not dispute that the prosecution also suppressed evidence of *another* potential alternative perpetrator—James Blue, a "habitual criminal" with a record of arrests for rape, sodomy, and armed robbery (Pet. App. 21a), who Ammie Davis told investigators she had seen attack Mrs. Fuller. U.S. Br. 64. Instead, the government contends that Davis's statement is immaterial because it is "dubious" that Overton would have been able to develop admissible evidence pointing to Blue,

and the jury would not have credited such evidence in any event. *Id.* at 64-65. The government is wrong on both points.

As to the first, the government urges that its own inability to locate Davis's friend "Shorty," who Davis said she was with when she saw Blue attack Mrs. Fuller, establishes that the defense would not have been able to find her either. *Id.* at 65. The government, however, does not dispute that the defense would have been far more motivated than the government to find Shorty, especially because the government did not believe Davis and did not even begin to investigate her statement until roughly two months before Overton's trial, when its group-attack theory of the crime was firmly entrenched. Nor does the government dispute that it was able to locate Linda Jacobs after months of searching based on little more than her nickname, "Smurfette," confirming that it is entirely plausible that highly motivated defense counsel could have found Shorty based on similarly limited information. That Overton was not able to locate Shorty after Davis's statement came to light *decades later* and Davis was long dead (*id.*) says nearly nothing about the likelihood Overton could have found Shorty *in 1985*, when his investigators still had a chance to talk to Davis.

The government next argues that the jury "surely would have rejected" any evidence identifying Blue as Mrs. Fuller's lone killer. *Id.* at 65-66. Yet none of the purported flaws in Davis's statement—such as the fact that she neglected to mention that Mrs. Fuller was robbed of jewelry in addition to a small amount of money (*id.* at 66)—renders it inherently

non-credible. It is especially unconvincing for the government now to cite potential credibility problems as conclusive proof that jurors would not have credited a witness given the litany of witnesses with serious credibility problems the *government itself* proffered. If the jury had been allowed to assess Davis's story, the jury certainly could have credited it—or at least given it enough weight to create reasonable doubt. By refusing to disclose Davis's statement, the prosecution improperly usurped the jury's key function—weighing the evidence to "ascertain[] the truth about criminal accusations." *Kyles*, 514 U.S. at 440.

b. The government also does not dispute that the defense could have used Davis's statement to challenge the "thoroughness" and "reliability of the investigation," *id.* at 445-46, but speculates that its impact would have been "negligible," U.S. Br. 67. The government again simply fails to consider the full implications of the suppressed evidence.

It is no "minor slip-up" (*id.* at 68) for police and prosecutors to misplace, for *nine months*, an eyewitness statement identifying a habitual criminal unconnected to any of the defendants as Mrs. Fuller's lone assailant. It is gross negligence. Davis claimed to have *actually witnessed the crime* and told investigators *who she had seen commit it*, yet her statement was mysteriously "lost in the shuffle" for many months while the government was investigating the crime and developing its case. Overton Br. 47-48. And the statement's potential to alter the jury's view of the case is especially pronounced precisely *because* Davis was the lone witness who directly contradicted

the government's group-attack theory (U.S. Br. 66, 76), and the jury was falsely assured it had heard all the "witnesses who came forward" (JA 239 (government's closing)).

Nor can the government's mishandling of Davis's statement fairly be characterized as an "isolated misstep." U.S. Br. 76. The government also withheld evidence that Eleby was high on drugs when she met with investigators, and that Eleby and Porter were for a time interviewed together by the police. Overton Br. 48. And, of course, the government also suppressed the McMillan and Luchie evidence, which together with its treatment of Davis's statement reveals a pattern in which police and prosecutors marginalized, ignored, and withheld from the defense evidence that did not fit their large-group-attack narrative. *Id.* at 46-47. All of that evidence would have provided ample reason for the jury to question the government's approach to the investigation, and to wonder what else the prosecution might have overlooked.

3. *There Is A Substantial Likelihood The Suppressed Eleby Impeachment Evidence Could Have Altered The Outcome For Overton*

Finally, the government also suppressed evidence that could have been used to impeach Carrie Eleby, the *only* purported eyewitness to the attack who testified against Overton but not Harris, whom the jury acquitted. *Id.* at 49-53. As a matter of basic logic, Eleby's testimony alone may well explain the jury's decision to convict Overton. Indeed, Eleby's testimony is by far the most plausible explanation. *Id.* at 50. And the government knew, but did not disclose,

that Eleby had persuaded another witness to lie to investigators to implicate someone in the crime. *Id.* at 51-52. That information suggests an affirmative effort to manufacture false evidence—a powerful and wholly different type of impeachment that alone reasonably could have resulted in Overton's acquittal.

a. To avoid the obvious significance of the Eleby impeachment evidence as to Overton, the government attempts to downplay the importance of her testimony to the government's case against him.[6] Specifically, the government suggests it is not Eleby's testimony that accounts for Overton's conviction, but that of two other witnesses who supposedly corroborated Alston and Bennett's testimony against him—Melvin Montgomery and Detective Daniel Villars. *See* U.S. Br. 83-84. That argument is wholly unconvincing, not least because, unlike Eleby, neither of those witnesses claimed to have *seen Overton participate in the attack on Mrs. Fuller*. Indeed, jurors presented with a complete record easily could have viewed both witnesses' testimony as consistent with Overton's innocence.

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[6] In that vein, the government argues that Overton "admitted on appeal" that Eleby was "no real factor" in his conviction. U.S. Br. 86 (quoting Direct Appeal Br. 29). The government does not, however, argue that Overton waived his contention that evidence further impeaching Eleby might have made a difference to the outcome, nor could he have given that he had no idea additional Eleby impeachment evidence existed at the time. Overton's point then, as now, was that neither Eleby's testimony nor the other evidence against him was so powerful it could not have been overcome if Overton had been able to present a stronger defense using evidence the prosecution suppressed. *See* Direct Appeal Br. 29-30.

At trial, Montgomery testified that he saw Overton and some of the other defendants in the park at Eighth and H Street on October 1 and heard someone—he did not know who—say they were going to "get" someone. Overton Br. 9. Montgomery said that he then saw Overton point toward H Street, but Montgomery did *not* say he saw Overton "pointing *toward Fuller*," as the government asserts. U.S. Br. 50 (emphasis added). Montgomery stated only that he saw a woman in that direction; he did not know who she was or what she looked like. Nor did Montgomery even claim Overton was necessarily pointing at the unidentified woman. Overton Br. 9-10. Montgomery then saw two groups leave the park—one walking toward Eighth Street and another, including Overton, heading toward Ninth Street, where Overton lived. *Id.*

Thus, while the government hyperbolically declares Montgomery's testimony against Overton "devastating" (U.S. Br. 84), Montgomery did not describe Overton doing anything more incriminating than pointing at something. Indeed, even if the jury had been able to set aside Montgomery's substantial credibility problems (*see* Overton Br. 10) and credited *absolutely everything* he said, the jury still could have concluded that Overton was not in the alley when Mrs. Fuller was killed.[7]

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[7] Montgomery's testimony "lend[s] strength" to the government's case (U.S. Br. 84) insofar as, if credited, it places Overton in the park with others the prosecution claimed were involved in the attack. But what matters is whether Montgomery's testimony gave the jury an overwhelming basis for conviction *if it did not credit Eleby*. The answer obviously is no, given

Further, while it is not impossible for the jury to have inferred that Overton, after leaving the park, entered the alley from Ninth Street (*see* U.S. Br. 84), a fully informed jury certainly could have concluded, consistent with Montgomery's testimony, that Overton instead simply walked to his home on Ninth Street. The government reads Montgomery's testimony to indicate that Overton left the park "in pursuit of Fuller" (*id.*), but by the government's own account, it was the group that walked toward *Eighth Street* that accosted her (*id.* at 11). And the government states an outright falsehood in asserting that fully informed jurors could not possibly have inferred that Overton was in the park but not involved in the attack, because "no one … testified that [Overton] … went home." *Id.* at 84. In fact, *three* witnesses testified that Overton was home when the attack occurred. Overton Br. 11.

The government's reliance on Detective Villars's testimony is equally indefensible. In emphasizing that testimony, the government virtually ignores the fact that Villars was subsequently found to have provided false testimony in another case and was categorically barred from testifying in any case. *See* A1722; A2287-88. After citing Villars's testimony multiple times, U.S. Br. 17-18, 77, the government at last faintly observes in a footnote on page eighty-five of its brief that Villars's proven perjury is "troubling," *id.* at 85 n.10. Not too troubling, apparently, because the government nonetheless freely invokes

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that Montgomery did not see Overton or anyone else attack Mrs. Fuller.

his testimony as part of its "overwhelming" case against Overton, insisting that his later perjury "does not constitute *Brady* evidence in this case." *Id.* Overton has never argued otherwise. The point is not that Villars's later perjury is *Brady* evidence, but that if anything is "troubling," it is the government's effort to defend a conviction based on testimony from a witness the government *knows* to be fundamentally unreliable—so unreliable that the *government itself* barred him from testifying in any case.

Even setting all that aside, Villars's testimony cannot bear the great weight the government assigns to it. The government now labels the conversation described by Villars "substantially incriminating" (*id.* at 85) and repeatedly lumps it together with statements that, if credited, could be taken as *actual admissions* (*see, e.g.*, *id.* at 57, 77). Yet the lead prosecutor himself on multiple occasions conceded that what Villars described was *not* an admission, and could reasonably be understood as a *denial* of involvement in the crime. A1755; A13240. Christopher Turner's testimony at trial strongly supported that interpretation. A739-40. And the *only* two defendants as to whom the jury deadlocked were the two defendants involved in the conversation Villars recounted—Overton and Turner. If the jury had interpreted that conversation as the confession the government now portrays it to be, the jury would not have struggled to convict them. The far more likely explanation is that the jury, like the lead prosecutor, recognized that the statements Villars described were *not* admissions of guilt and in fact were consistent with Overton and Turner's innocence.

In sum, Eleby's testimony remains by far the most likely basis for the jury's decision to convict Overton—such that the withheld evidence further impeaching her very well could have changed the outcome of Overton's case.

b. The government also discounts the value of the Eleby impeachment evidence on its own terms, insisting that because Eleby was heavily impeached at trial, the prosecution's concealment of the fact that she persuaded Kaye Porter to lie to investigators "would have had a negligible impact on the jury's assessment of her credibility." U.S. Br. 70. In particular, the government notes that "Eleby admitted at trial that she had lied before the grand jury about whether Smith and Christopher Turner were involved in the attack" (*id.*), which the government says was "a significantly more serious false statement than the one Eleby asked Porter to make," because it was made under oath (*id.* at 71). What Eleby admitted at trial, however, was that she had lied before the grand jury to *exclude* Smith (who she believed was the father of the child she was pregnant with at the time) and Turner (who she described as "a friend") from the group she said committed the crime. A557-58; A579-81; A7111-12. That is very different from encouraging another witness to lie to *implicate* someone in a brutal attack.

Next, in a startling turn, the government *defends* Eleby's conduct on the ground that she was not "fabricating evidence," but merely "creating false corroboration" for an ostensibly true fact. U.S. Br. 71. On this side of the looking-glass, however, fabricating "corroboration" evidence *is* "fabricating evidence."

And corroborating statements of course can have a powerful effect on the course of an investigation or trial—indeed, the premise that corroboration is a significant factor in deciding whether any individual account should be believed underlies much of the government's brief. *See id.* at 9, 36, 44, 52, 55, 61, 77, 79, 80, 83, 84.

Porter's claim that she overheard Alston confess was by her own admission (and Eleby's) false. By inducing Porter to give that false statement, Eleby demonstrated her blithe willingness to disregard the profound consequences of implicating someone in an unimaginable crime. *Cf.* A1736 (lead prosecutor explaining "it was very hard to get [Eleby] to see how serious this was, that what [she was] going to say really affected the lives of people"). The jury might have understood why Eleby would lie to protect the father of her child or try to distance herself from a horrific attack by denying she saw it happen, but the jury would have had a much harder time accepting Eleby's trial testimony had it known she was willing to encourage another witness to lie to investigators to *implicate* someone—and had succeeded in getting that witness to do so. Given Eleby's significance in the government's case against Overton and the jury's struggle to reach a verdict even without the suppressed evidence, that additional, serious blow to Eleby's credibility alone easily could have changed the outcome.

* * *

In this extraordinarily close case, there is far more than a "reasonable likelihood" Overton would have been acquitted had the assortment of crucial

exculpatory and impeachment evidence suppressed by the prosecution been timely disclosed. Overton's due process rights were violated, and he is entitled to a new trial.

CONCLUSION

The judgment of the court of appeals below should be reversed.

Respectfully submitted,

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