Nos. 15-1503 and 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 PETITIONS FOR WRITS OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly declined to consider a murder committed by another person seven years after petitioners' trial in determining whether the government withheld material exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

2. Whether the court of appeals correctly applied this Court's precedents in rejecting petitioners' *Brady* claim.

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OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-78a) is reported at 116 A.3d 894.[1] The opinion of the trial court (Pet. App. 81a-131a) is unreported. A prior opinion of the D.C. Court

[1] All citations to the Pet. App. are to the appendix to Petition No. 15-1503, filed by petitioners Clifton E. Yarborough, Christopher D. Turner, Kelvin D. Smith, Charles S. Turner, Levy Rouse, and Timothy Catlett. That petition is referred to in this brief as Joint Pet. The separate petition filed by petitioner Russell L. Overton, No. 15-1504, is cited as Overton Pet.

of Appeals in petitioners' case is reported at 545 A.2d 1202.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2015. A petition for rehearing was denied on January 14, 2016 (Pet. App. 79a-80a). On March 24, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 13, 2016. On April 27, 2016, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including June 10, 2016, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Superior Court for the District of Columbia, petitioners were convicted of kidnapping, in violation of D.C. Code § 22-2101 (1981); armed robbery, in violation of D.C. Code §§ 22-2901 and 22-3202 (1981); and two counts of first-degree felony murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (1981). The trial court sentenced petitioners Timothy Catlett, Russell L. Overton, Charles S. Turner, Levy Rouse, Clifton E. Yarborough, and Kelvin D. Smith to 35 years to life imprisonment. The court sentenced petitioner Christopher Turner to 27-and-one-half years to life imprisonment. Gov't C.A. Br. 2. On appeal, the D.C. Court of Appeals held that petitioners' convictions for first-degree felony murder merged with their convictions for kidnapping and armed robbery and that petitioners could only be sentenced for one felony murder. 545 A.2d 1202, 1206, 1215, 1219, cert. denied, 488 U.S. 1017 (1989). On remand, the trial court resentenced

petitioners to the same amount of prison time. Gov't C.A. Br. 3.

In 2010, petitioners moved to vacate their convictions under D.C. Code § 23-110 (2001), and the Innocence Protection Act of 2004 (IPA), Pub. L. No. 108-405, Tit. IV, 118 Stat. 2278 (D.C. Code § 22-4135 (2001)). Following an evidentiary hearing, the trial court denied those motions. Pet. App. 81a-131a. The D.C. Court of Appeals affirmed. *Id.* at 1a-78a.

1. Shortly after 4:30 p.m. on October 1, 1984, Catherine Fuller left her home in Washington, D.C., to go shopping. Gov't C.A. Br. 3; see Pet. App. 4a-5a. Just after 6 p.m., Fuller's partially clad body was found in a garage off of an alley between 8th and 9th Streets, Northeast. She had died from massive blunt-force injuries. Gov't C.A. Br. 4-5, 14-15; see Pet. App. 4a.

A police investigation concluded that the crime had occurred as follows: On the afternoon of the murder, a large group of young people (including petitioners) congregated in a park south of H Street between 8th and 9th Streets, Northeast. Gov't C.A. Br. 3-6; see Pet. App. 4a-5a. Some members discussed "getting paid," *i.e.*, committing a robbery, and Calvin Alston suggested Fuller, who was walking across the street, as the victim. Gov't C.A. Br. 4, 7; see Pet. App. 5a. A group of assailants (including petitioners Levy Rouse and Charles Turner) followed Fuller to the entrance of an alley off of 8th Street while another group (including petitioners Kelvin Smith, Christopher Turner, Clifton Yarborough, and Russell Overton) circled around to the 9th Street entrance to the same alley. Gov't C.A. Br. 4, 7-8, 9 n.12; see Pet. App. 5a. Petitioner Charles Turner pushed Fuller into the alley, where he, Alston, Harry Derrick Bennett, petitioners

Christopher Turner, Rouse, Smith, and others punched and kicked her, and petitioner Rouse struck her on the head with a piece of wood. Gov't C.A. Br. 4, 8-9; see Pet. App. 5a. After Fuller fell to the ground, the group continued to hit and kick her and then carried her further into the alley near a garage. The assailants robbed Fuller of money and jewelry. Gov't C.A. Br. 9-11; see Pet. App. 5a. Eventually Fuller was dragged into the garage, where she was stripped nearly naked. Gov't C.A. Br. 4, 10; see Pet. App. 5a. While the group stood and watched, some members held Fuller's legs, and petitioner Rouse took a pipe-like object and shoved it approximately 10 to 11 inches up into Fuller's rectum. Gov't C.A. Br. 4, 10-11; see Pet. App. 5a. The group then dispersed. Gov't C.A. Br. 4, 12; see Pet. App. 5a. William Freeman, a street vendor, located Fuller's body when he walked through the alley around 6 p.m. Gov't C.A. Br. 13-14.

2. A grand jury returned an indictment charging petitioners and six others with kidnapping, in violation of D.C. Code § 22-2101 (1981); armed robbery, in violation of D.C. Code §§ 22-2901 and 22-3202 (1981); and two counts of first-degree felony murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202 (1981). Pet. App. 5a. At trial, cooperating co-defendants Alston and Bennett described the robbery plan and the attack on Fuller. Gov't C.A. Br. 5; see Pet. App. 5a-6a.[2] Melvin Montgomery described the events in the park, including the discussion about "getting paid" and the decision to target a woman passerby. Gov't C.A.

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[2] Alston pleaded guilty to second-degree murder. He was sentenced to 12 to 36 years of imprisonment. Bennett pleaded guilty to manslaughter and robbery. He was sentenced to 8 to 30 years of imprisonment. Gov't C.A. Br. 5 n.4.

Br. 5; see Pet. App. 7a. Juveniles Carrie Eleby and Linda Jacobs testified that they had watched a group of young men attack a woman in the alley and sodomize her with a pipe. Gov't C.A. Br. 12-13 n.21; see Pet. App. 6a. Maurice Thomas testified that, while walking home on 9th Street, he saw a group of people (some of whom he recognized) assault a woman. Gov't C.A. Br. 13 n.21; see Pet. App. 7a. Thomas further testified that, later that night, he overheard petitioner Timothy Catlett tell someone that they "had to kill [Mrs. Fuller] because she spotted someone Catlett was with." *Ibid.* The government introduced against petitioner Yarborough a videotaped statement in which he claimed to have witnessed a group rob, hit, and kick Fuller, and sodomize her with a pole. Gov't C.A. Br. 18; see Pet. App. 8a. Kaye Porter testified that she had asked petitioner Catlett why he "d[id] that to that lady," and Catlett replied that "[a]ll he did was kick her and somebody else stuck the pole up in her" because "she wasn't acting right." Gov't C.A. Br. 19; see Pet. App. 8a. Detective Daniel Villers testified that he overheard petitioner Christopher Turner tell petitioner Overton not to worry because they (Turner and Overton) did not touch the body and thus did not leave any fingerprints. The two men further discussed who "gave them up" and how the police knew that they and "everybody" were in the alley. *Ibid.*

Petitioners Overton, Rouse, Smith, Charles Turner, and Christopher Turner presented alibi defenses. Gov't C.A. Br. 20-32; see Pet. App. 8a-10a. During rebuttal, Catrina Ward testified that she saw blood splattered on petitioner Rouse's pants on the night of the murder. Pet. App. 10a. She also testified that Rouse told her in December 1984 that he "did the

worst thing to that lady in the alley." Gov't C.A. Br. 24 n.42; see Pet. App. 10a.

The jury convicted petitioners on all counts.[3] The trial court sentenced petitioners Catlett, Overton, Charles Turner, Rouse, Yarborough, and Smith to 35 years to life imprisonment. The court sentenced petitioner Christopher Turner to 27-and-one-half years to life imprisonment. Gov't C.A. Br. 2.

3. All petitioners except Charles Turner appealed. The D.C. Court of Appeals accepted the jury's verdicts but remanded for resentencing. 545 A.2d 1202, 1219. While noting some conflicting testimony about "exactly when each appellant joined in the beating," the court found "overwhelming evidence that each of them was involved at one time or another." *Id.* at 1206 n.2. The court held, however, that petitioners' convictions for first-degree felony murder merged with their convictions for kidnapping and armed robbery and that petitioners could only be sentenced for one felony murder. *Id.* at 1206, 1215, 1219. The court explained that this holding "would leave each appellant convicted of one count of felony murder and the noncorresponding felony." *Id.* at 1219. On remand, the trial court resentenced petitioners to the same amount of prison time. Gov't C.A. Br. 3.

4. In 2010, petitioners moved to vacate their convictions, or, in the alternative, for a new trial. They claimed that newly discovered evidence, including witness recantations and expert testimony, established

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[3] The jury acquitted Felicia Ruffin and Alphonzo Harris. Pet. App. 11a. James Campbell was granted a severance and later pleaded guilty to manslaughter and attempted robbery. *Id.* at 5a. Steven Webb, a co-defendant who was convicted at trial, died in prison. *Id.* at 83a n.3.

their actual innocence. Gov't C.A. Br. 33-34; see Pet. App. 2a. Petitioners also alleged that the government had failed to disclose material exculpatory information before trial, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), including information that:

- Ammie Davis had told a police officer that she had witnessed James Blue abduct and kill Fuller. Before petitioners' trial, Blue murdered Davis for unrelated reasons. Gov't C.A. Br. 46-48; see Pet. App. 21a-24a & n.17.
- A man whom Freeman had observed entering the alley after Freeman discovered Fuller's body and then fleeing when police arrived was nearby resident James McMillan. (Other witnesses confirmed Freeman's account.) Freeman saw McMillan concealing something under his coat. Gov't C.A. Br. 14 n.24, 49; see Pet. App. 17a-18a.[4] A few weeks after Fuller's murder, McMillan struck and robbed two women in the same area. Gov't C.A. Br. 49, 52; see Pet. App. 17a-18a. In 1992, after he was released from prison for those crimes, McMillan robbed, sodomized, and murdered a woman in an alley a few blocks away. Gov't C.A. Br. 49; see Pet. App. 18a-19a.
- When Jackie Watts and Willie Luchie walked through the alley between 5:30 p.m. and 5:45 p.m., they heard

[4] Although Freeman testified at trial about observing this man and a companion in the alley, the government did not disclose their identities before trial and no defense attorney asked Freeman who the two men were. Gov't C.A. Br. 50-51. After the trial judge declined to order the government to disclose the identities of the individuals Freeman had observed in the alley, defense counsel stated they would simply call Freeman as a defense witness, but the defense did not do so. Pet. App. 123a n.22. The judge's ruling was not challenged on appeal. *Ibid.*

a moan or groan coming from inside the garage. Gov't C.A. Br. 56-57, 99; see Pet. App. 16a. Luchie also recalled that both doors of the garage were closed. Gov't C.A. Br. 57; see Pet. App. 16a.

- Porter had falsely told police that she was present when Alston confessed to Eleby about robbing Fuller. Porter later admitted that she had lied about overhearing such a conversation at Eleby's request. Gov't C.A. Br. 61; see Pet. App. 22a.
- Although Thomas claimed to have told his Aunt Barbara about witnessing the attack on the day it occurred, Aunt Barbara told police she did not recall this conversation. Gov't C.A. Br. 62-63 & n.98; see Pet. App. 23a.

After a 16-day evidentiary hearing in 2012, the trial court denied petitioners' motions. Pet. App. 81a-131a.[5] The court rejected petitioner Yarborough's ineffective assistance of counsel claim relating to his videotaped statement, *id.* at 86a-101a;[6] and petitioners' claims of innocence under the IPA, *id.* at 101a-111a. With re-

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[5] The post-trial motions were heard by a judge different from the judge who presided at the original trial. See Gov't C.A. Br. 1-2, *United States* v. *Catlett, et al.* (D.C. Court of Appeals Nos. 86-208, 86-295, 86-315, 86-392, 86-393, 86-421, 86-505, filed June 24, 1987) (Judge Robert M. Scott presided over the trial).

[6] Although Yarborough claimed that his statement resulted from physical assaults by the police, the trial court found that it was "the voluntary admission of a conniving youthful offender trying to distance himself as far as possible from the crime." Pet. App. 98a-101a (deeming Yarborough's claims of police abuse "patently incredible"); see *id.* at 100a (noting that the trial court in 1985 had found Yarborough's waiver of *Miranda* rights and ensuing statement to be entirely voluntary).

spect to the latter, the court concluded that petitioners had not "come close to demonstrating actual innocence," *id.* at 110a, and that "the totality of evidence pointing to [their] guilt * * * remains * * * 'overwhelming,'" *id.* at 129a.

The trial court further rejected petitioners' *Brady* claims. Pet. App. 112a-129a. "To make out a claim under [*Brady*]," the court explained, "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." *Id.* at 113a-114a (quoting *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999)). The court explained that "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.'" *Id.* at 114a (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). The court further explained that "[m]ateriality is shown if, in the context of the entire case, the non-disclosure undermines the court's confidence in the outcome of the trial." *Ibid.* (citing *Kyles* v. *Whitley*, 514 U.S. 419, 434-437 (1995)).

The trial court concluded that "none of the undisclosed information was material under *Brady*." Pet. App. 130a. The court found that the information suggesting that either Blue or McMillian had murdered Fuller was not material. *Id.* at 117a-124a. As for Blue, Davis's claim that she saw Blue commit the crime "was thoroughly discredited," would have "almost certainly [been] inadmissible" because Davis died before petitioners' trial, and would have been rejected by the jury in any event. *Id.* at 117a-120a &

n.18 (noting, *inter alia*, that Davis had previously made a different "false and vindictive accusation" of murder against Blue and "[n]ot one of the approximately 400 other witnesses interviewed * * * mentioned [Blue] as a possible perpetrator"). With respect to McMillan, the court found that the undisclosed information was "definitely not material" because no witness put McMillan in the alley during the attack and, assuming he was present, "[h]e could have been a participant with these petitioners or one of the many bystanders." *Id.* at 123a; see *id.* at 124a (the theory that McMillian "committed the crime * * * to the exclusion of the petitioners * * * flies in the face of all the evidence").

With respect to the potential impeachment information, the trial court concluded that "[n]one of these non-disclosures, separately or together, is material under *Brady*." Pet. App. 124a; see *id.* at 124a-129a. Porter's admission that she lied at Eleby's request was not material because "Porter was a relatively minor witness against one defendant [Catlett], and the cross examination of Eleby about other lies and inconsistent statements * * * was very extensive." *Id.* at 125a; see *id.* at 125a n.23 (jury was already told Eleby's testimony "should be received with caution and scrutinized with care"). And Aunt Barbara's failure to recall Thomas telling her that he had witnessed an assault was not material because Thomas had testified that Aunt Barbara had told him to "forget" what he had seen, and even if Thomas had been impeached with her statement, "no juror would have concluded that [Thomas] was making it all up." *Id.* at 126a.

5. The D.C. Court of Appeals affirmed. Pet. App. 1a-78a. Applying *de novo* review, *id.* at 29a-31a, the

court agreed that any information not disclosed before trial was not material under *Brady*, *id.* at 31a-54a. The court emphasized that "[m]ateriality is 'not a sufficiency of the evidence test'" and that "*Brady* materiality must be assessed in terms of the cumulative effect of all suppressed evidence favorable to the defense." *Id.* at 28a (quoting *Kyles*, 514 U.S. at 434).

The D.C. Court of Appeals analyzed the undisclosed information on an "item-by-item basis," Pet. App. 31a, and concluded that some information "adds little to any cumulative materiality analysis," *id.* at 47a. In particular, it found that Davis's accusations against Blue would not have been admissible for their truth at trial, nor had petitioners shown any reasonable probability that they would have led to the discovery of other admissible evidence. *Id.* at 37a-45a. Further, if admitted to show that the government's investigation was not diligent, the impact would have been "negligible" because the investigation was "quite a thorough one overall." *Id.* at 43a-44a.

The D.C. Court of Appeals placed all of the undisclosed impeachment evidence in the same category. Pet. App. 45a, 47a. Although Porter's false claim about hearing Alston confess to Eleby could have been used to impeach her testimony at trial (that petitioner Catlett admitted kicking Fuller), that testimony was already impeached with Porter's contrary grand jury testimony, and the other evidence against Catlett was very strong. *Id.* at 46a (summarizing evidence). Likewise, with respect to Eleby, "additional impeachment [of her] would [not] have made a difference to the jury's assessment of [her] credibility." *Ibid.* Furthermore, Aunt Barbara's failure to recall Thomas having told her about the attack on Fuller "was unlikely to

have discredited Thomas in any significant way," because, *inter alia*, having urged Thomas not to report the assault, Aunt Barbara had "every reason to deny their conversation when she spoke to the police." *Id.* at 47a.

The D.C. Court of Appeals found that the Watts/Luchie statements and the McMillan information did have "potential weight in a cumulative materiality analysis." Pet. App. 31a-32a. The court noted that information McMillan had robbed two women after Fuller's murder was potentially admissible at trial and relevant. *Id.* at 36a. The court "reach[ed] a different conclusion," however, as to the murder committed by McMillan in 1992. *Id.* at 36a-37a. The court held that "[a] *Brady* violation cannot be predicated on the government's failure to * * * disclose evidence that does not yet exist" and, therefore, that the 1992 murder "ha[d] no bearing on the question of the materiality of any evidence that the government actually did withhold." *Id.* at 36a. While "other procedures" existed to decide claims based on "new evidence," the court observed, *Brady* provided the "'wrong framework.'" *Id.* at 37a (quoting *District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009)).

The D.C. Court of Appeals addressed "the cumulative materiality" of the undisclosed evidence, focusing primarily on petitioners' claim that the Watts/Luchie statements and the McMillan information "would have enabled them to present an alternative single-perpetrator theory of the crime." Pet. App. 48a; see *id.* at 48a-54a. The court emphasized the strength of the government's evidence, observing that several eyewitnesses, including two participants who pleaded

guilty to homicide, had implicated petitioners in a group attack, and that their testimony was corroborated by admissions some petitioners had made. *Id.* at 48a-52a. Moreover, no trial witness had disputed this "overall description of how the crime was committed." *Id.* at 49a. Although the government's evidence had certain weaknesses (*i.e.*, problems with witness consistency and credibility, and a lack of physical evidence), the court concluded that the Watts/Luchie statements and the McMillan information "did not take advantage" of these weaknesses because it did not "contradict the government witnesses' accounts, demonstrate their bias, or incorporate contrary forensic evidence." *Ibid.*

The D.C. Court of Appeals further concluded that the Watts/Luchie statements and the McMillan information failed to "provide substantial support" for "any theory that excluded [petitioners] as the perpetrators." Pet. App. 50a. That Watts and Luchie heard groans (but did not see any activity or hear anything else) did not prove that the assault was still occurring at 5:30 p.m. and was "entirely consistent" with the government's evidence. *Ibid.* As for Luchie's observation that both doors of the garage were closed shortly before Freeman found one open, that claim "surely would not have been enough to turn a jury that found the government's witnesses credible, as this jury did," given other possible explanations for the discrepancy. *Ibid.*

With respect to the McMillan information, the D.C. Court of Appeals concluded that it "perhaps could have led the jury to suspect that he participated in the attack on Fuller," or, alternatively, that he arrived on the scene after Watts and Luchie had left and that he

looked in the garage, leaving a door open. Pet. App. 50a-51a. But the court concluded that the jury would have had no substantial reason to believe that McMillan "was the *sole* perpetrator * * * or that he was one of only a few assailants." *Id.* at 51a. Instead, "McMillan simply could have been another member of [the large] group," as witness Christopher Taylor had alleged to police. *Ibid.*

The D.C. Court of Appeals concluded that a theory that McMillan committed the crime alone (or with one or two others) would have been "exceedingly implausible and difficult for the jury to accept." Pet. App. 51a-52a. In addition to "the dearth of any evidence inculpating [McMillan]," such a theory would have required the jury to conclude that "all the government witnesses were lying or mistaken about every defendant at trial"; and that Alston and Bennett had either pleaded guilty to homicide while innocent, or admitted their own culpability while inexplicably shielding their collaborator McMillan. *Id.* at 50a-51a. The court clarified that its "conclusion [wa]s the same for each [petitioner] individually." *Id.* at 52a.

The D.C. Court of Appeals distinguished *Kyles*, *supra*, as a case where the parties had agreed on how the crime occurred, disputing only the identity of the perpetrator, and the government suppressed substantial evidence supporting the defense theory. Pet. App. 53a & n.83 (citing *Kyles*, 514 U.S. at 441-449). Here, however, "the undisclosed 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 [petitioner] was misidentified. Rather, what is at issue is the basic structure of how the crime occurred." *Id.* at 53a-54a. In the court's view, those

observations "make[] the burden on [petitioners] to show materiality quite difficult to overcome, because it requires a reasonable probability that the withheld evidence (in its entirety, and however [petitioners] would have developed it) would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Id.* at 54a. After distinguishing cases where the government withheld evidence that the police had coerced confessions or credible evidence directly contradicting eyewitness accounts, the court concluded that "the sum of the undisclosed evidence did not rise to that level of significance" and that petitioners did not demonstrate a reasonable probability that, "even if all [of the] evidence had been disclosed in a timely and appropriate fashion," the result of the trial would have been different. *Id.* at 54a.[7]

ARGUMENT

Joint petitioners contend (Joint Pet. 16-20) that the D.C. Court of Appeals should have considered McMillan's 1992 murder of another woman in deciding whether the government withheld material exculpatory information before their 1985 trial. The court of appeals correctly rejected that argument and its decision does not conflict with any decision of this Court, a federal court of appeals, or another state court of last resort. Petitioners further contend (Joint Pet. 20-28; Overton Pet. 15-30) that the D.C. Court of Appeals

[7] The D.C. Court of Appeals further concluded that the trial court did not abuse its discretion in denying petitioners' claims of actual innocence under the IPA, Pet. App. 54a-62a, and that Yarborough's counsel did not render ineffective assistance in moving to suppress his videotaped statement, *id.* at 62a-78a.

departed from this Court's precedents applying *Brady* v. *Maryland*, 373 U.S. 83 (1963), in rejecting their *Brady* claim. The D.C. Court of Appeals correctly applied this Court's precedents and petitioners' disagreements with the court's analysis do not present any issue worthy of this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

1. A prosecutor's constitutional duty of disclosure stems primarily from the Supreme Court's decisions in *Brady* and *Giglio* v. *United States*, 405 U.S. 150 (1972). In those cases, the Court held that the government has a constitutional duty to disclose favorable evidence to the accused where such evidence is "material" either to guilt or to punishment, *Brady*, 373 U.S. at 87, and that favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness, *Giglio*, 405 U.S. at 154. See *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012). In subsequent decisions, the Court has explained that 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); see *Cone* v. *Bell*, 556 U.S. 449, 469-470 (2009). As the Court further explained in *Kyles* v. *Whitley*, 514 U.S. 419 (1995), undisclosed evidence is material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

a. Joint petitioners contend (Joint Pet. 16-20) that the D.C. Court of Appeals should have considered McMillan's 1992 murder of another woman as part of its materiality analysis. See Innocence Network Ami-

cus Br. 17-25; Former Prosecutors Amicus Br. 15-18. The court correctly rejected that argument. *Brady* claims involve "the discovery, after trial of information *which had been known to the prosecution* but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (emphasis added). Because the 1992 murder had not yet occurred at the time of petitioners' trial, it was not "know[n] to the prosecution" and thus could not constitute material undisclosed information under *Brady*. See, *e.g.*, *United States* v. *Diaz*, 176 F.3d 52, 107, 109 (2d Cir.) (government did not suppress evidence of events occurring after trial), cert. denied, 528 U.S. 875 and 528 U.S. 957 (1999). As the court below explained, "[a] *Brady* violation cannot be predicated on the government's failure to do the impossible and disclose evidence that does not yet exist." Pet. App. 36a.

Nor does the 1992 murder shed useful light on the materiality of other information not provided to the defense before trial, including McMillan's identity as one of the men who appeared in the alley after the murder and his subsequent assaults on two women. Joint petitioners suggest (Joint Pet. 19) that the 1992 murder tends to prove that, had the government disclosed what it knew about McMillan in 1984, the defense "could have investigated [him] and uncovered and introduced evidence relating to his propensity towards sexual violence and sodomy." But the information the government possessed in 1985 did not suggest that McMillan had a propensity towards sexual violence and sodomy, nor have petitioners identified any other such evidence they might have uncovered before their trial. "[M]ere speculation" about the existence of exculpatory evidence cannot sustain a

valid *Brady* claim. *Wood* v. *Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam). Joint petitioners likewise contend (Joint Pet. 19) that McMillan's 1992 crime shows that he could have murdered Fuller "without the participation of a large group." But there was never any question that a large group was not *necessary* to attack, sodomize, and murder a middle-aged woman who was 4' 11" and weighed 99 pounds. See Gov't C.A. Br. 9, *United States* v. *Catlett, et al.* (D.C. Court of Appeals Nos. 86-208, 86-295, 86-315, 86-392, 86-393, 86-421, 86-505, filed June 24, 1987).

b. Joint petitioners contend (Joint Pet. 16-17) that the decision below "deepens a conflict * * * concerning whether post-trial information can shed light on the materiality of suppressed evidence." Contrary to petitioners' claim (*id.* at 18-19), the D.C. Court of Appeals did not "adopt[] a categorical rule that post-trial events and evidence" can never shed light on the materiality of suppressed evidence under *Brady*. Instead, the court held that a defendant does not raise a *Brady* claim when he asserts that "new, previously unobtainable evidence not kept from the defendant might lead to a different result in a new trial." Pet. App. 36a-37a. That holding is unremarkable. See, *e.g.*, *Apanovitch* v. *Bobby*, 648 F.3d 434, 437 (6th Cir. 2011) ("[n]ew, non-*Brady*, evidence is enlightening as to whether a petitioner is—seen as of now—actually innocent" but is not relevant to the *Brady* inquiry), cert. denied, 132 S. Ct. 1742 (2012).

The D.C. Court of Appeals' holding does not conflict (see Joint Pet. 17) with *Leka* v. *Portuondo*, 257 F.3d 89 (2d Cir. 2001), which involved a fundamentally different use of post-trial information. Leka was convicted of murder based on the testimony of two eye-

witnesses, after the prosecution failed to disclose a police officer's differing account of the crime. *Id.* at 90-95, 104. When confronted with the officer's account after trial, the two eyewitnesses recanted. *Id.* at 106. The Second Circuit considered those recantations in its materiality analysis because they demonstrated the "seismic impact" that the officer's testimony would have had at trial. *Id.* at 106-107 (officer's account rendered other eyewitness testimony "untenable"). Unlike the arguments petitioners advance here, that particular use of "post-trial information" comports with *Brady*'s materiality inquiry because it focuses on how the trial would have unfolded if the government had disclosed known favorable information to the defense. See, *e.g.*, *Wood*, 516 U.S. at 7 (relying on defense counsel's admission that withheld polygraph results "would not have affected" witness's cross-examination at trial, as well as post-trial cross-examination of the same witness using the polygraph results that "obtained no contradictions or admissions"); *Kyles*, 514 U.S. at 448 (post-trial statements by prosecutor and detective "confirm[]" that undisclosed witness statement might have supported claim that evidence was planted at the scene).

State ex rel. Griffin v. *Denney*, 347 S.W.3d 73 (Mo. 2011), cert. denied, 132 S. Ct. 1859 (2012), and *State ex rel. Woodworth* v. *Denney*, 396 S.W.3d 330 (Mo. 2013), also do not conflict with the opinion in this case. As joint petitioners note (Joint Pet. 17-19), those cases evaluated the materiality of evidence withheld before trial in conjunction with other evidence that subsequently came to light. *Griffin*, 347 S.W.3d at 77 ("When reviewing a habeas petition premised on an alleged *Brady* violation, this Court considers all available

evidence uncovered following the trial."); *Woodworth*, 396 S.W.3d at 345 (same). Neither case, however, held that *Brady* dictated that approach. To the contrary, *Griffin* cited *State ex rel. Engel* v. *Dormire*, 304 S.W.3d 120, 126 (Mo. 2010), which considered evidence discovered after trial as a matter of state habeas corpus practice. *Griffin*, 347 S.W.3d at 77.[8] Accordingly, no clear dispute exists between Missouri and the District of Columbia over the meaning of federal constitutional law.

2. Petitioners contend (Overton Pet. 14) that the D.C. Court of Appeals failed to correct a *Brady* violation in a manner "irreconcilable with this Court's *Brady* precedents." See Joint Pet. 4 (decision is "flatly inconsistent with *Kyles* and other decisions of this Court"); *id.* at 16 (same). Petitioners claim that the D.C. Court of Appeals (1) wrongly held that, under *Brady*, "withheld evidence must call into question the testimony of all prosecution witnesses," *id.* at 16, 25-28; Overton Pet. 14-20; (2) improperly speculated about why a jury could have disregarded the undisclosed information, Joint Pet. 22-23; Overton Pet. 18-20; and (3) committed other errors, including failing to consider the cumulative effect of the information withheld, Joint Pet. 21, 23-24; Overton Pet. 30. Those contentions lack merit. The D.C. Court of Appeals correctly applied this Court's *Brady* precedents, and

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[8] *Griffin* also cited *Kyles*, 514 U.S. at 436-437, for the proposition that "courts must consider the cumulative effect of excluded evidence." 347 S.W.3d at 77. Its use of a "see also" signal, however, tacitly acknowledged that cumulating all evidence the government withheld before trial is not equivalent to cumulating withheld evidence with evidence discovered later.

the court's factbound conclusions do not warrant review by this Court.

a. Petitioners acknowledge that the D.C. Court of Appeals correctly identified and stated *Brady*'s materiality standard. See Joint Pet. 22 (court "inton[ed] the proper standards"); Overton Pet. 17 (court "recited many of these well-settled constitutional principles"). Contrary to their contentions, the court also carefully and correctly applied those principles from *Brady* in evaluating the materiality of the undisclosed information.

Contrary to petitioners' claim (Joint Pet. 25-26; Overton Pet. 3, 14), the D.C. Court of Appeals did not hold that, under *Brady*, material exculpatory evidence must contradict all of the government's evidence at trial. Rather, the court recognized that undisclosed information can undermine portions of the government's case. Pet. App. 49a, 54a (providing examples). The court concluded, however, that the Watts/Luchie statements and the McMillan information lacked that potential because they "would not have directly contradicted the government's witnesses or shown them to be lying, and did not tend to show that any given [petitioner] was misidentified." *Id.* at 53a. Instead, that evidence would have assisted the defense only in challenging "the basic structure of how the crime occurred," *i.e.*, the theory of a large group attack. *Id.* at 54a. Because all the eyewitnesses had described such an attack, the undisclosed information could have given rise to reasonable probability of a different outcome only if it "would have led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime." *Ibid.*

That analysis, which addressed the exculpatory potential of particular information in the context of petitioners' trial, did not deviate from the "materiality standard" or "distort[ ] * * * this Court's *Brady* materiality jurisprudence." Overton Pet. 15, 18. Instead, it represented the only logical way in which the undisclosed evidence could have undermined confidence in the outcome of the trial. While petitioners criticize the D.C. Court of Appeals' opinion, they fail to identify any subset of the eyewitnesses to the crime whose testimony was consistent with a single perpetrator or small group theory. Accordingly, petitioners provide no factual basis for disputing the court's assessment that their alternative theories do in fact conflict with "*virtually everything* that the government's eyewitnesses said about the crime." Pet. App. 54a.

Because the D.C. Court of Appeals did not hold that, to be material, exculpatory evidence must necessarily contradict all eyewitness testimony, its opinion does not conflict with *Kyles*. See Overton Pet. 17-18. In *Kyles*, prosecutors withheld prior inconsistent statements from some of its eyewitnesses that would have "substantially reduced or destroyed" the value of their testimony. 514 U.S. at 441-445. This Court found those statements, combined with other withheld exculpatory evidence, to be material. *Id.* at 454. This case is not analogous because the Watts/Luchie statements and the McMillan information did not cast any doubt upon the testimony of any particular eyewitness. Pet. App. 53a-54a. Rather, it (weakly) would have suggested an alternative-perpetrator theory (while also remaining consistent with the government's evidence on the nature of the crime). *Id.* at

50a. Nor does this case resemble *Smith*, where a witness's undisclosed prior statements suggesting that he could not identify any of the perpetrators undermined "the *only* evidence [at trial] linking [the defendant] to the crime." 132 S. Ct. at 630.

b. Petitioners contend (Joint Pet. 26) that when "[e]vidence of a credible alternative perpetrator" is withheld, a new trial will "practically always" be required. See Overton Pet. 25 ("[A]lternative-perpetrator evidence is quintessential *Brady* material."); see also Innocence Network Amicus Br. 12-15; Former Prosecutors Amicus Br. 7-9. Regardless of whether that is true, McMillan was not a "credible alternative" perpetrator in this case.[9] Given the lack of evidence placing McMillan in the alley during the crime and the "overwhelming evidence" of a large group attack, blaming McMillan (or McMillan and one or two co-conspirators) "would have been exceedingly implausible and difficult for the jury to accept." Pet. App. 51a. Under similar circumstances, courts have found evidence implicating a third party not material. See, *e.g.*, *Hammond* v. *Hall*, 586 F.3d 1289, 1317-1319 (11th Cir. 2009) (withheld evidence of alternative perpetrators, including a serial killer who confessed to the crime and the victim's boyfriend, did not require new trial), cert. denied, 562 U.S. 1145 (2011); *United States* v. *Perez*, 280 F.3d 318, 350 (3d Cir.) (undisclosed statement of

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[9] As both lower courts explained, Blue was also not a "credible alternative perpetrator." See Pet. App. 37a-45a, 117a-120a & n.18; see also Gov't C.A. Br. 46-48, 87-91. Overton's suggestion that Davis's claims might have led to the discovery of admissible evidence pointing to Blue is unsupported by the record. See Gov't C.A. Br. 47, 87 (noting that the government's effort to locate a witness who could corroborate Davis's claims was fruitless).

co-conspirator inculpating someone other than defendant not material) (citing additional cases), cert. denied, 537 U.S. 859 (2002); *United States* v. *Zuno-Acre*, 44 F.3d 1420, 1426-1430 (9th Cir.) (undisclosed evidence suggesting that murder was instigated by victim's romantic rival, while exculpatory as to defendant, was not material in light of other evidence at trial), cert. denied, 516 U.S. 945 (1995); see also *Evans* v. *Nevada*, 28 P.3d 498, 510 (Nev. 2001) (to undermine confidence in trial's outcome, undisclosed information must not only link others to the crime but exclude defendant); see generally *Canales* v. *Stephens*, 765 F.3d 551, 575-576 (5th Cir. 2014) ("there is not a *Brady* violation every time the government does not disclose an alternative suspect, especially when the other suspect was not a particularly plausible one").

c. Petitioners err in suggesting (Joint Pet. 22; see Overton Pet. 15, 17, 20) that the D.C. Court of Appeals employed "sufficiency-of-the-evidence" review in lieu of a *Brady* materiality analysis. See also Former Prosecutors Amicus Br. 9-13. The court neither endorsed nor applied sufficiency of the evidence review. See, *e.g.*, Pet. App. 28a ("Materiality is 'not a sufficiency of the evidence test.'") (citing *Kyles*, 514 U.S. at 434). Instead, it applied this Court's materiality test under *Brady* and rejected petitioners' claim because "even if all [of the undisclosed evidence] had been disclosed in a timely and appropriate fashion, [petitioners] have not demonstrated a reasonable probability that the result of their trial would have been different." *Id.* at 54a; see *ibid.* ("The withheld evidence cannot reasonably be taken to put the whole case in such a different light as to undermine confi-

dence in the verdict.") (citation and internal quotation marks omitted).

d. Petitioners contend (Joint Pet. 2-23; Overton Pet. 18-20) that the D.C. Court of Appeals erred by speculating about how a jury might have viewed certain information. See Former Prosecutors Amicus Br. 13-14. That argument misapprehends materiality analysis. Because *Brady* asks whether there is a "reasonable probability" that withheld evidence would have affected the verdict, *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999), some hypothesizing is inevitable. See, *e.g.*, *id.* at 294 (concluding, after a review of the record, that "petitioner would have been convicted * * * even if [a critical eyewitness] had been severely impeached [with withheld evidence]"). Moreover, while *Wearry* v. *Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam), and *Smith*, 132 S. Ct. at 630, criticized lower courts for "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not," *Wearry*, 136 S. Ct. at 1006-1007; see *Smith*, 132 U.S. at 630, the Court has elsewhere stressed that "[t]he mere possibility that an item of undisclosed information might have * * * affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 U.S. at 109-110; see also *Kyles*, 514 U.S. at 437 ("[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more."). Accordingly, in deciding a *Brady* claim, courts must evaluate the "reasonable probability" of a different outcome—the probative potential of undisclosed information at trial—which is precisely what the court did here.

Petitioners nevertheless contend (Joint Pet. 23) that the D.C. Court of Appeals engaged in "wild hypothesizing" to "explain away exculpatory evidence." See *id.* at 22 (opinion is "rife with speculation"); Overton Pet. 19-20. That factbound attack on the lower court's materiality analysis does not warrant this Court's review. In any event, the court correctly rejected as implausible petitioners' theories about how the Luchie/Watts statements and the McMillan information might have influenced the jury.

As for the former, the D.C. Court of Appeals correctly noted that a groaning sound coming from the garage (unaccompanied by any other activity or noise) does not tend to prove that the assault was still in progress when Luchie and Watts passed by. Pet. App. 50a. Further, that Luchie recalled both doors of the garage being closed, while Freeman testified that one was open when he found the body around 6 p.m., would have provided minimal support to a single perpetrator theory. The court identified two plausible explanations for this discrepancy (*i.e.*, Luchie was mistaken, or someone else later opened the door, *ibid.*), and several more exist,[10] so it was exceedingly unlikely that the jury would have rejected overwhelming eyewitness testimony—including from two participants in the crime—about a large group attack based on such a minor inconsistency. See *id.* at 52a n.82

[10] Additional possibilities include that Luchie was lying, that Freeman was either mistaken or lying, that a partially opened door was perceived as open by one witness and closed by another, or that, after Luchie and Watts had passed through, one of the petitioners returned to the garage to search for valuables and then departed.

(Watts/Luchie evidence provided "slight support at most" to lone perpetrator or small group theories).

As for the McMillan evidence, the D.C. Court of Appeals noted the possibility that McMillan might have visited the garage after Luchie and Watts departed, and, further, that he might have entered it or carried something away. Pet. App. 50a-51a & n.81; see Joint Pet. 22-23. But contrary to petitioners' claims (Joint Pet. 22-23; Overton Br. 19), the court did not reject their *Brady* claim because the jury "might have suspected" such events. Pet. App. 50a. Instead, the court found the McMillan information not material because, even if it would have cast some suspicion on McMillan, the jury "would have had no substantial reason to suspect McMillan was the *sole* perpetrator" or "one of only a few assailants," rather than "another member" of petitioners' group. *Id.* at 51a. Petitioners provide no basis to question that reasoning, which comports with this Court's analysis in *Strickler*. See 527 U.S. at 292 ("the strong evidence that Henderson was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing").

3. Petitioners raise a number of additional challenges to the D.C. Court of Appeals' resolution of their *Brady* claim. Each challenge lacks merit and none presents an important legal issue worthy of certiorari review.

Petitioners contend (Joint Pet. 23) that the D.C. Court of Appeals "failed to meaningfully engage in a cumulative analysis of the withheld evidence in the context of the existing record." See *id.* at 8, 21, 23-25; see Overton Pet. 30. In fact, the court considered the cumulative effect of all the withheld evidence on peti-

tioners' trial. See, *e.g.*, Pet. App. 28a ("*Brady* materiality must be assessed in terms of the cumulative effect of all suppressed evidence favorable to the defense"); *id.* at 31a (undisclosed evidence will be discussed "first on an item-by-item basis, and then cumulatively"); *id.* at 48a-54a (section entitled "Cumulative Materiality of the Undisclosed Evidence").

Petitioners also suggest (Joint Pet. 24) that their convictions should have been reversed because "the case was a weak one" that "easily could have gone the other way." See Innocence Network Amicus Br. 15-17. To the contrary, three appellate judges and a trial judge (who did not handle the original proceeding) have found the evidence against petitioners at trial "overwhelming," and petitioners offer no supported reason to question that assessment. 545 A.2d at 1206 n.2; Pet. App. 129a.[11]

Petitioners contend (Joint Pet. 25; Overton Pet. 28) that withheld evidence deprived them of any opportunity to argue that no group attack occurred at all. That is incorrect. Evidence about McMillan's presence in the alley was admitted at trial and petitioners could have fingered him as an alternative perpetrator without knowing his name. See Gov't C.A. Br. 94-95. Petitioners also could have called Freeman as a wit-

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[11] Petitioners rely on a reporter's notes of a 1997 interview with the lead prosecutor to claim that the trial evidence was weak. Joint Pet. 8 (citing Joint C.A. Br. 61 (citing C.A. App. 1734, 1751)); *id.* at 24; Overton Pet. 3, 23. In fact, those notes are consistent with the lower courts' assessment. C.A. App. 1734, 1758 (prosecutor notes that while the case seemed "[n]ot a good one" at times during the investigation, "[i]t ended up being a much stronger case" at trial). Nor does the length of deliberations show any deficit of proof given the jury's need to individually assess the culpability of ten defendants.

ness and asked him to identify the individuals he saw in the alley, but they declined to do so. See note 4, *supra*. In addition, petitioners also could have advanced a "far more plausible" "small group" theory that "Alston and Bennett were the sole perpetrators." Pet. App. 52a n.82. Petitioners likewise contend (Joint Pet. 25) that "objective, crime-scene evidence," principally the size of the garage, proves that an attack by a large group would have been impossible. See Overton Pet. 28. Although its merit is doubtful, see Gov't C.A. Br. 102 (noting that most of the beating was inflicted on Fuller outside the garage); see also Pet. App. 110a-112a n.14 (finding that petitioners' "scientific evidence" that Fuller was assaulted by one to three people was neither "newly discovered" nor "particularly persuasive" and did not "begin to demonstrate that the petitioners are 'actually innocent'") (citation omitted), nothing prevented petitioners from raising that theory at trial.[12]

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[12] Without renewing their claims of innocence, petitioners contend (Joint Pet. 13; see Overton Pet. 13) that Alston, Bennett, Jacobs, and Montgomery all "took the stand [at the post-trial hearing] and recanted their trial testimony." Although Alston and Bennett recanted, the trial court found that their recantations and testimony that they were not present during the crime was "nothing short of preposterous." Pet. App. 102a-104a. The trial court further concluded that Jacobs's hearing testimony was "relatively useless" because, *inter alia*, "whenever she was asked [at the hearing] if she saw any of the attack or the act of sodomy against [Fuller], [Jacobs] broke down sobbing just the way she did when she was confronted with that visual image at trial." *Id.* at 107a. Montgomery did not recant. *Id.* at 108a-109a, 129a (stating that Montgomery's hearing testimony "actually supported the government"). Further, Thomas, an important eyewitness with "no apparent bias or motive to fabricate," has never recanted. See *id.* at 126a.

Noting that the jury's deliberations over his guilt were protracted, Overton contends (Overton Pet. 30) that "almost *any* additional evidence favorable to the defense might have tipped the balance" in his particular case. The D.C. Court of Appeals rejected that claim because, although the evidence against Overton was "in some ways * * * weaker" than the evidence against others, Overton is "similarly situated" to the others with respect to the chief exculpatory potential of the undisclosed information, *i.e.*, the single perpetrator defense, and that undisclosed evidence "had no bearing on whether any one individual defendant was part of a large group attack." Pet. App. 52a-53a. That factbound conclusion does not merit further review.

Overton also contends (Overton Pet. 29-30) that additional impeachment of Eleby with information that she had encouraged Porter to lie might have made a difference in his case. He identifies no reason, however, why this Court should question the lower courts' factbound conclusion that further impeachment of Eleby would have been unproductive. Pet. App. 46a, 125a.

4. Finally, petitioners suggest (Joint Pet. 28; Overton Pet. 33-35) that this Court may wish to consider summarily reversing the decision below. No basis for summary reversal exists because the D.C. Court of Appeals, after a careful and detailed review of the trial evidence, correctly adhered to this Court's *Brady* precedents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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