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 WRITS OF CERTIORARI
TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the petitioners' convictions must be set aside under *Brady* v. *Maryland*, 373 U.S. 83 (1963).

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STATEMENT

This case involves the brutal 1984 murder of a 48-year old wife and mother, Catherine Fuller, near her home in Northeast Washington, D.C. In 1985, following a jury trial in the Superior Court for the District of Columbia, petitioners Charles Turner ("Fella"), Christopher Turner ("Chrissie"), Levy Rouse, Clifton Yarborough, Kelvin Smith ("Hollywood"), Timothy Catlett ("Snotrag" or "Tim-Tim"), and Russell Overton ("Bo-Bo") were convicted of kidnapping, in violation of D.C. Code § 22-2101 (1981); armed robbery, in violation of D.C. Code §§ 22-2901, 22-3202 (1981); and

two counts of first-degree felony murder while armed, in violation of D.C. Code §§ 22-2401, 22-3202 (1981). The trial court sentenced Charles Turner, Rouse, Yarborough, Smith, Catlett, and Overton to 35 years to life imprisonment. The court sentenced Christopher Turner to 27-and-one-half years to life imprisonment. 545 A.2d 1202, 1219 & n.33, cert. denied, 488 U.S. 1017 (1989). On appeal, the D.C. Court of Appeals affirmed petitioners' convictions but remanded for resentencing. *Id.* at 1206, 1215, 1219; Nos. 86-314 & 90-630, Mem. Op. & Judgment 1 n.1 (Jan. 24, 1992) (Charles Turner). The trial court resentenced petitioners to the same amount of prison time. Pet. App. 82a n.2.[1]

Beginning 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)). The trial court denied those motions. Pet. App. 81a-131a. The D.C. Court of Appeals affirmed. *Id.* at 1a-78a.

A. Catherine Fuller's Murder And The Government Investigation

1. On October 1, 1984, Catherine Fuller was assaulted, robbed, sodomized, and murdered in an alley near her Washington, D.C. home. Mrs. Fuller lived

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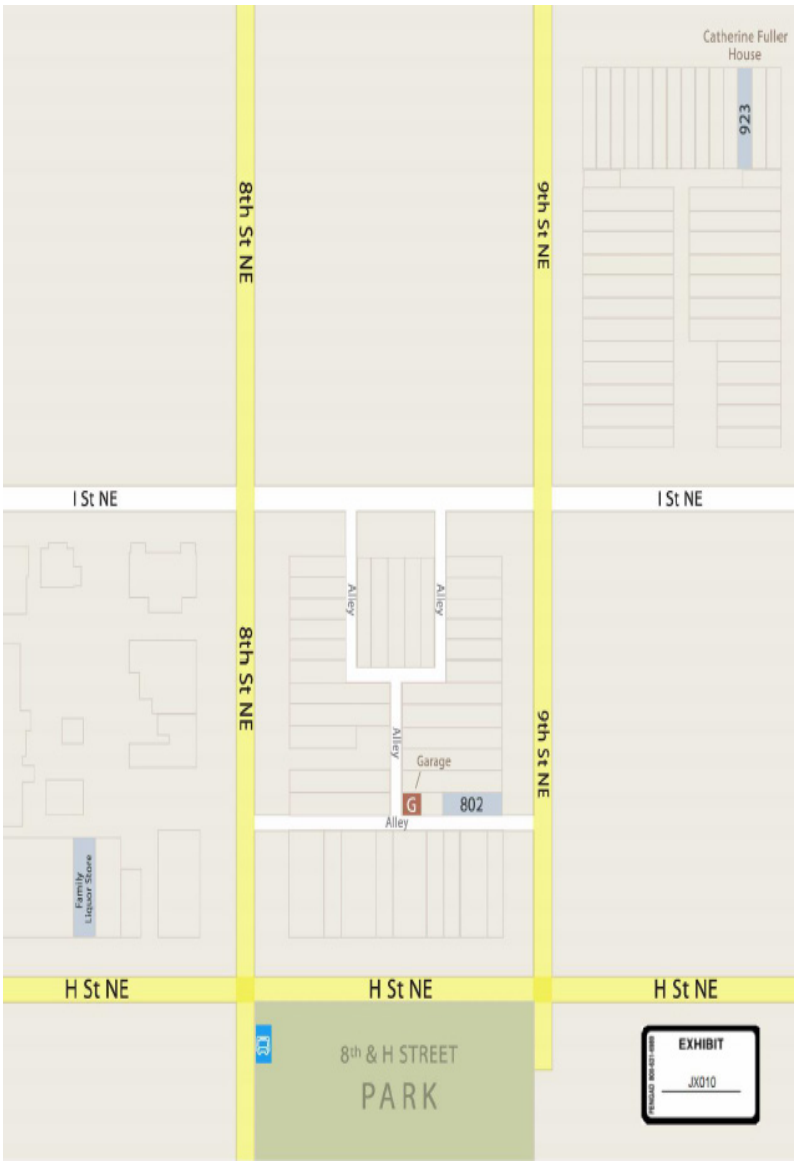
[1] Citations to "Pet. App." refer to the appendix to No. 15-1503. "J.A." refers to a 340-page joint appendix. The parties have moved to designate the ten-volume court of appeals appendix (A1-A2604) as additional volumes of the joint appendix. The record also includes full transcripts of petitioners' trial (A2918-A11655) and of the post-conviction hearing (A11656-A14374) in electronic format. For the Court's convenience, an appendix to this brief contains a glossary identifying the major participants in this case.

with her husband and children at 923 K Street, N.E. A5156-A5158; J.A. 29. She was 4' 11" tall and weighed 99 pounds. A7988. Fuller left her house sometime after 4:30 p.m., carrying $50 in a small purse that she concealed in her bosom area. A198, A5161-A5162, A5209. She had curlers in her hair, covered by a scarf, and wore a watch, rings, and necklaces. A5168-A5169, A5210. Because the day was rainy, Fuller wore a raincoat and carried an umbrella. A5168-A5172. Her family never saw her alive again.

That day, William Freeman worked at a vending stand on the northwest corner of Eighth and H Streets, N.E. A202-A205. Around 6 p.m., Freeman entered an alley running north of, and parallel to, H Street, around the corner from his vending stand. A207-A210; Pet. App. 81a. Freeman entered the alley from Eighth Street and headed to a garage where he had urinated earlier that day. A207-A209. This time, he saw blood near the garage door. A210-A211. Freeman went inside the garage and saw a woman lying motionless on the ground. A211-A212. After failing to rouse her, Freeman ran back to the vending stand and told his boss, James Robinson, what he had seen. A212-A213. Robinson and his girlfriend, Jackie Tylie, confirmed Freeman's discovery, and Tylie called the police. A213-A214.

Below is a map of the area from a trial exhibit (J.A. 29) (cropped):



Fuller's body was naked from the waist down, and her sweater and brassiere had been pulled up to her armpit area, exposing her breasts. A5062-A5063. Her jewelry was gone. A5140-A5141. Blood had flowed from Fuller's rectum underneath her body and under the garage door, and pooled on the ground. A5063. Fuller had four broken ribs, extensive damage to her liver, and multiple bruises, lacerations, and contusions to her face, head, and torso, including large patterned lacerations on her back indicating that she had been dragged. A5064, A7990-A7994, A7997-A8005. The wall of her rectum had been pierced, and Fuller had internal injuries along an 11-inch wound track. A8010-A8019.

2. Homicide detectives Ruben Sanchez-Serrano and Patrick McGinnis from the Metropolitan Police Department were assigned to the case. A13433-A13436. The detectives immediately began investigating Fuller's murder and received a major break the next day. On the afternoon of October 2, 1984, while Detective Sanchez-Serrano canvassed the area, a woman walking past the entrance to the alley on Ninth Street told him that around 5 p.m. the day before, she saw Yarborough standing at the end of the alley near Ninth Street, moving his head from side to side. A1368, A13442-A13446. The woman was scared and trembling, and gave the detective a false name. A13443-A13446.

On October 4, 1984, Yarborough agreed to come to the police station for questioning. A13872-A13875. Yarborough initially provided an alibi that detectives quickly proved false. A13875-A13878. He then gave a statement. A1178-A1185, A13878-A13885. Yarborough said that he was standing on Eighth and H Streets on

the day of the murder with some friends, and one of them said "that lady has some money, big money" and suggested that they "go get paid," meaning they should rob her. A1178, A1180, A1182. Yarborough described the woman as wearing a scarf and a dark-colored trench coat. A1182. He also recalled that it was raining and not quite dark outside. *Ibid.* Yarborough stated that eight people (including petitioners Rouse and Charles Turner) crossed the street and "went behind [the lady]" as she turned the corner at Eighth and H Streets, and the woman began to scream. A1178, A1183. Yarborough admitted "standing beside the alley at 9th Street," but claimed that he left and did not participate in the attack. A1179.

Based on Yarborough's statement, police arrested Alphonso Harris ("Monk"). A13888. Harris denied involvement and gave an alibi. A13973-A13974. Detectives continued to pursue leads with little cooperation until late November, when Detective Donald Gossage responded to a stabbing incident at the Washington Coliseum. A13733-A13734. There, a young woman named Carrie Eleby blurted out to Gossage that the "person that did this stabbing was the same person that killed the lady at 8th and H." A13734.[2] Gossage told Detective McGinnis, who questioned Eleby on November 28, 1984. A13735, A13890. Eleby said that Calvin Alston had admitted to her that he was involved in robbing Fuller and that Alston had also "put in" Catlett, Rouse, and Christopher Turner. A13890.

Alston was arrested on November 29, 1984, and on that day he gave a videotaped statement. A1145-

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[2] Police later determined that Catlett was involved in the Coliseum stabbing. A13738.

A1177 (transcript), A2914. Alston described a group attack that started in the park across from the 800 block of H Street. A1148-A1149. He said that Rouse and Charles Turner pushed Fuller into the alley from Eighth Street while others went toward Ninth Street. A1149, A1153. The group then proceeded to beat Fuller, undress her, steal her jewelry, and drag her into a garage, where Rouse sodomized her with a pole. A1149-A1167. Alston named petitioners and others as active participants, while describing himself as a lookout. A1149-A1153.

Yarborough was arrested on December 9, 1984, and he likewise gave a videotaped statement. A1028-A1070 (transcript), A2916, A13908-A13910. That statement resembled Yarborough's earlier written statement, but Yarborough now acknowledged that he had seen Fuller get dragged to "the cut" of the alley (an area where the alley is bisected by another alley that runs north and then forks off into two smaller alleys that connect to I Street (J.A. 29)), where she was slammed, stomped and hit by "the fellas," including petitioners. A1032-A1040. Yarborough also acknowledged that Rouse "stuck a pole in her." A1032. He saw people take Fuller's rings and chains when they ripped off her blouse. A1046-A1047. Yarborough recalled Fuller wearing a coat that came down to her thighs and carrying an umbrella. A1061-A1062.

3. An exhaustive police investigation, stymied at times by a code of silence and climate of fear, ultimately confirmed that multiple young men, including petitioners, had murdered Fuller while looking to "get paid." A1942, A7414, A13973.

a. Two participants in the attack—Alston and Harry Bennett ("Derrick"), whose own videotaped statement

described the group attack (A1071-A1144 (transcript), A2917)—pleaded guilty and agreed to testify at trial. Alston pleaded guilty to second-degree murder and was sentenced to 12 to 36 years of imprisonment. A6299-A6304, A12049. Bennett pleaded guilty to manslaughter and robbery and was sentenced to eight to 30 years of imprisonment. A5792-A5800; Gov't C.A. Br. 5 n.4.

b. Co-defendant Steven Webb told police how the attack unfolded in the park, with one group crossing the street and heading toward Eighth Street and another group heading toward Ninth Street. A14038-A14040. Webb twice became very upset when he described how the group accosted Fuller and said that he stood on the corner while others took her into the alley. *Ibid.*

c. James Michael Campbell ("Mike") gave a videotaped statement acknowledging that, although he did not participate, he watched and followed as the group left the park, pushed Fuller into the alley, and attacked and sodomized her. J.A. 306; A13261-A13262.

d. Roland Franklin ("Burt"), who ultimately was not indicted, Pet. App. 83a n.3, gave a videotaped statement describing events before and after the crime that implicated several petitioners. A2915.

e. Christopher Taylor, who testified at trial as a defense witness, previously gave a statement to police describing a group attack in the alley. See A10432-A10439, A10493, A10499-A10500, A10505-A10506.

f. Police located a witness who had watched petitioners planning the crime in the park and three witnesses who saw the attack in the alley, and many people later heard petitioners make incriminating remarks. See pp. 10-11, 13-18, *infra*.

4. All told, police gathered at least 11 independent accounts of a group leaving the park in pursuit of Fuller, the attack in the alley, or both. As the court of appeals later concluded, the investigation amassed "overwhelming" proof that petitioners participated in that attack. See 545 A.2d at 1206 n.2; see also Pet. App. 123a.

The evidence was not seamless: the brutal crime "happened quickly in a moving rush of bodies." A10952 (defense closing). Unsurprisingly, witnesses differed on certain details. And some made false statements before trial to minimize their culpability or protect friends. But the witnesses' accounts of the core event largely coincided and were unanimous on critical matters. Everyone present, for example, recalled that Rouse sodomized Fuller with a pipe. And many witnesses recalled telling details: A teenaged spectator noticed that Fuller's curlers, which had fallen on the ground, were pink. A7120. Yarborough knew what Fuller wore and that she concealed her purse "in her breast part." A1046. Alston knew that Fuller was wearing pantyhose, a coat, and "a rain thing tied around her head." A1150, A1168. These multiple cross-corroborating accounts, obtained in an investigation that the trial court later found free of taint from alleged police harm to witnesses, coaching of witnesses, feeding them information, or urging them to alter unconvincing details, Pet. App. 100a, formed the basis for petitioners' prosecution.

B. The Trial

A grand jury charged petitioners and five others with kidnapping, armed robbery, and two counts of first-degree felony murder while armed. A1718-A1720; Pet. App. 5a. In addition to petitioners, the grand

jury charged Alston, Webb, Campbell, Harris, and Felicia Ruffin.[3] Campbell's case was severed when his attorney became ill, and he later pleaded guilty to manslaughter and attempted robbery. *Id.* at 5a, 83a n.3.

1. The government's case

Assistant United States Attorneys Jerry Goren and Jeffrey Behm represented the government in a six-week jury trial before Judge Robert M. Scott of the D.C. Superior Court. The prosecution presented its case as follows.

a. The gathering in the park

Melvin Montgomery spent October 1, 1984, in and around a park on the south side of H Street, between Eighth and Ninth Streets. A265-A268, A274-A280, A283, A285-A286, A291; J.A. 68-69. There, he repeatedly saw Overton, Catlett, Rouse, and Charles Turner gathered with others. *Ibid.* By afternoon, the group became noisy. J.A. 68-71. Catlett jumped on and off a wall singing a popular Chuck Brown song, "We Need Some Money." J.A. 71-72. Alston, who arrived at the park shortly after 4 p.m., described the same scene and placed all of the petitioners in the group. A455-A457, A460-A464. Webb banged out a beat on a telephone as Catlett sang. A461-A462.

The conversation turned to "getting paid," and Alston suggested robbing someone. A466-A467. A group of about 15 people, including petitioners, said they were "game." A470-A471, A6425, A6432. Alston then spotted Fuller across H Street and suggested robbing

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[3] Bennett entered a guilty plea in April 1985 and was not charged in the indictment. A5792-A5794.

her. A471-A473. Bennett recalled Alston saying "Let's go get that lady." A368-A370, A5917. Montgomery likewise heard somebody say "they were going to get that one," and when he turned around to look, Montgomery saw Overton pointing in the direction of a woman standing near the corner. J.A. 77-79. At that point, the group began to leave the park. A376-A382 (Bennett); A473-A477 (Alston); J.A. 80-82 (Montgomery).

b. The attack in the alley

After petitioners left the park, a fast-moving, chaotic scene unfolded. Eyewitnesses diverged on details but agreed on the key points.

i. Everyone agreed that Fuller's assailants crossed to the north side of H Street and divided into two groups, with one group headed toward Eighth Street and the other toward Ninth Street. A376-A384 (Bennett); A473-A484 (Alston); J.A. 80-82 (Montgomery). A group including Alston and Rouse followed Fuller to the corner of Eighth and H Streets. A376-A380 (Bennett); A473-A474 (Alston). Alston testified that Charles Turner joined the group following Fuller up Eighth Street, A473-A474, and Montgomery recalled that Rouse and Charles Turner were "together" and headed toward Eighth Street, J.A. 80. Yarborough (who was headed toward Ninth Street) promised to "pay [Alston] later" for acting as a lookout. A475, A6440-A6441. The group following Fuller got "[r]eal close" and appeared to talk to her. A376-A380. Charles Turner said something to Fuller and, as she turned around, he shoved her into the alley. A477-A479, A6446. Alston briefly acted as a "lookout," then entered the alley himself. A480, A6454.

Fuller fought back by punching Charles Turner. A480. Charles Turner replied with a punch, and Rouse hit her head with a piece of wood. A480, A6452, A6455. Alston and others, who had appeared from Ninth Street (including Christopher Turner and Smith) joined in, pummeling and kicking Fuller as she cried out for help. A481-A485. The assailants shoved one another, "trying to get in a lick." A486. Bennett, who stopped at the corner to look for police, then entered the alley from Eighth Street and saw Catlett, Alston, Webb, and Rouse beating Fuller as she begged for help. A383-A386.

The group forced Fuller to the cut of the alley. A387, A487-A488. At that point, Overton, Christopher Turner, and Smith assaulted Fuller, knocking her to the ground as she kicked and swung her fists to fight back. A388-A389, A484. Alston recalled seeing Catlett, Overton, and Yarborough join in the beating in front of the garage, while Webb, Smith, Christopher Turner, and others struggled nearby. A490.

ii. Fuller's necklaces had come off during the struggle, and onlookers picked them up. A391, A400. Catlett and Yarborough fought over Fuller's change purse before Catlett dumped its contents in the alley. A408-A409, A494-A495. Overton dragged Fuller by the feet into a garage at the cut of the alley. A401-A402, A491-A493; J.A. 29. By this time, Fuller's clothing, including her raincoat, had been torn off. A406-A407, A493. Rouse removed a ring from Fuller's hand and gave it to Ruffin. A406. Bennett and others went into the garage, and although the scene was chaotic and people were moving "[i]n and out of the garage," it appeared to Bennett that Webb and Alston were holding Fuller's legs while Rouse prepared to sodomize her

with a pole. A402-A405, A409-A411. Alston said he stood right beside Charles Turner, who along with Overton held Fuller's legs while Rouse shoved a pole up her rectum. A497-A499. Through tears, Bennett testified that Fuller and Catlett implored Rouse to stop, but Alston and Webb urged him to "push it further up." A5897-A5898. Two days later, Yarborough gave Alston ten dollars. A505, A6367-A6368.

In describing the attack, Alston and Bennett divided on some details. Bennett recalled that Overton and Webb joined the group that followed Fuller, A376-A380, while Alston believed that Overton and Webb went toward Ninth Street, A473-A474; see J.A. 80 (Montgomery saw Overton and Catlett go toward Ninth Street). And they gave different accounts of who joined in the beating when, and who held Fuller's legs as Rouse shoved a pole in her rectum. See pp. 12-13, *supra*. But both described the same group attack in the alley, culminating in Rouse's act of sodomy.

iii. Onlookers witnessed Fuller's beating. A402-A406. Carrie Eleby and Linda Jacobs, 17 and 15 at trial, described what they saw. A6894, A7524. That afternoon, Eleby and Jacobs went to Eighth and H Streets looking for Smith, whom Eleby was dating. They walked around and smoked PCP. A534-A535, A7533-A7536. As they walked down Eighth Street toward the alley, they heard a scream and turned to see a "gang of boys" near the garage beating on somebody. A539-A541. They moved into the alley, and Eleby saw Christopher Turner, Smith, Catlett, Rouse, Overton, Alston, and Webb kicking Fuller while Yarborough stood near the garage. A544-A549. Jacobs likewise saw a "gang of people" fighting. A653. Both Eleby and Jacobs saw Rouse sodomize Fuller

with a pole, A553, A661, A7023-A7024, and Eleby recalled that Overton held Fuller's legs, A553-A554.

Again, the testimony of these onlookers differed on details. For example, Eleby said she stayed outside the garage while Jacobs testified that she and Eleby went inside. A550, A657-A659. Nevertheless, they described the same event as other eyewitnesses and participants. And tellingly, while recounting Rouse's "putting a pole" in Fuller, Jacobs began to sob. A658-A661; see A10861.

iv. Maurice Thomas, a 14-year-old student at the time of trial, also witnessed the crime. J.A. 106. Thomas went to eat at his Aunt Barbara's house that afternoon, at the corner of Eleventh and H Streets. J.A. 114-115. Aunt Barbara finished eating first, and she washed the dishes and grabbed her coat and an umbrella. J.A. 115-116. She left for Thomas's house (1012 Ninth Street, N.E.) and told Thomas to go home when he finished eating. J.A. 106, 116; A7262, A7264. Thomas left after Aunt Barbara and walked down H Street. J.A. 116-117. He turned at the corner of Ninth and H, and as he glanced into the alley between Eighth and Ninth Streets, he saw a group of people surrounding someone. J.A. 117-118. Catlett patted the person down and put something in his own pocket. J.A. 118-119. Catlett then hit the person, J.A. 119, and the rest of the group joined in the beating as the victim fell down and cried out for help, J.A. 119-120. Thomas was certain that he recognized Catlett, Yarborough, Rouse, and Charles Turner in the group. J.A. 123-125. He thought (but was less certain) that he recognized Christopher Turner, Smith, and Bennett. J.A. 125-126; A645, A7299-A7300. Thomas also

saw other people standing in the alley about 15 feet behind the group beating Fuller. J.A. 122-123; A7387.

Thomas took off running. He found his Aunt Barbara on the front porch of his house and told her what he had just seen. J.A. 120, 122. Aunt Barbara told Thomas not to tell anyone else. J.A. 120-121.

c. The discovery of Mrs. Fuller's body

William Freeman found Fuller's body around 6 p.m. when he went into the alley to urinate. A207-A212. He was alone in the alley at the time. A251-A252. The garage was a two-story brick structure with two metal doors on the front that slid on a track around to the sides of the garage. A5061; see J.A. 34-35. When Freeman arrived at the garage, one of its doors was open about three feet. A210, A245. Freeman ran back to the vending stand and told his boss, Robinson, what he had seen. A212-A213. Robinson's girlfriend Tylie called the police. A213-A214.

Freeman and Tylie returned to the alley to wait for the police. A214-A215. As they stood near the garage, two young men ran into the alley from Ninth Street. A215, A218-A219, A240-A243. The men stopped about four feet away from the garage, but they did not enter the garage or look inside. A215-A216, A219, A240-A244. One of the men had a small bulge in his coat, as if holding something underneath. A242-A243. The men stood in the alley for a few minutes until a police officer drove in from Eighth Street. A215-A216. Freeman heard one of the men say "Don't run" when the officer arrived, but the two men ran up the cut of the alley toward I Street. A218-A219, A256, A5275. Freeman had seen those two men earlier in the day, walking up and down Eighth Street. A236-A237. Because of the rain, the vendors spent most of

the day watching their plastic-covered merchandise from inside of Robinson's van, parked on H Street. A206-A207, A231-A237.

Officer Stephanie Ball arrived at about 6:16 p.m. A5278. Police officers found Fuller's body, naked from the waist down and badly beaten, inside the garage behind the closed left-side door. A5062-A5063, A5280-A5281. They collected evidence inside the garage, including Fuller's blue jeans, underpants, pantyhose, boots, change purse, and keys. A5064-A5065, A5069, A5071-A5072. The next day, with assistance from Fuller's sister, police recovered from the alley Fuller's raincoat, some of its missing buttons, her bent umbrella, a head scarf, and some pink hair rollers. A5194-A5196, A5198-A5207.

Dr. Michael Bray, the medical examiner, estimated that Fuller died between 4:30 and 6:30 pm. A7976-A7978. He emphasized that it was especially difficult to determine an exact time of death because Fuller was thin, almost naked, and died while lying on a concrete floor on a chilly night. *Ibid.* Dr. Bray testified that it was not possible to tell how many times Fuller was struck or how many people inflicted her injuries. A711-A712, A7995-A7996, A8006-A8008.

d. Other evidence introduced against petitioners

The prosecution introduced the following additional evidence:

- On the night of the murder, Maurice Thomas overheard Catlett tell another man in a store at Ninth and I Streets that "we had to kill her be-

cause she spotted someone [Catlett] was with." J.A. 126-128.[4]

- On the night of the murder, Rouse's girlfriend Catrina Ward saw blood spattered on the bottom of one of Rouse's pant legs. A755-A758.
- Later in October, Rouse confided in Ward that "one of his friends thought he was snitching." A758. He denied participating in the murder but said he knew that "the lady" had had a coin purse instead of a wallet because he had been in the alley. A759.
- On December 6, 1984, after Ward called Rouse a "nasty dog" for "d[oing] something nasty in [her] kitchen," Rouse replied that he had done worse things and said, "I did the worst thing to that lady in the alley." A760.
- On December 9, 1984, while Christopher Turner and Overton were in a holding cell, Detective Daniel Villars overheard Turner tell Overton that the police did not have enough to charge them because they did not touch the body. Overton replied that he knew the two people who "gave them up," Turner agreed and named one of them, and the two agreed that police knew where everybody was in the alley. A690-A691. When Overton noticed Villars, Turner told Over-

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[4] Catlett stated that Fuller had spotted Yarborough, a fact that was omitted at trial pursuant to *Bruton* v. *United States*, 391 U.S. 123 (1968). A1010, A7356-A7357. At the post-conviction hearing, Yarborough confirmed that he and Fuller knew each other. A11853-A11854.

ton not to worry because Villars "just came in" and "didn't hear anything." A692.

- The government admitted Yarborough's December 9, 1984, videotaped statement against him, redacted so as not to implicate his co-defendants. A715-A717, A11129.
- Sometime after Fuller's murder, Kaye Porter asked 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 Fuller "wasn't acting right." A7757-A7758.

2. The defense strategy

a. The government's witnesses left "considerable room for impeachment and extensive cross examination by the ten skilled defense attorneys." Pet. App. 82a. Alston and Bennett received plea bargains in exchange for their testimony, see pp. 7-8, *supra*, and Bennett received the additional benefit of release from prison pending sentencing, A5792-A5800. Both men had made prior statements minimizing or denying their participation in the murder, and Bennett had previously implicated Catrina Ward, his former girlfriend who was later dating Rouse, before retracting that claim. During trial, Ward and Bennett began dating once again. A761, A5798, A5905-A5910, A5937-A5940, A5960-A5961, A5963-A5967, A6014-A6016, A6029-A6033, A6073-A6074, A6106-A6107, A6371, A6582-A6583, A6585, A10348. Alston acknowledged that, after reporting his rape in prison, he had falsely recanted his accusations against one of the perpetrators after being threatened. A6590-A6598. Rouse testified that Bennett was angry at him for dating

Ward and that Alston was angry at him because Rouse had teased Alston about his prison rape. A9024-A9025.

The defense exposed credibility problems with other prosecution witnesses. Eleby admitted that she had lied before the grand jury about whether Smith and Christopher Turner were involved in the attack on Fuller—an admission that drew the trial court's express instruction that Eleby's testimony "should be received with caution and scrutinized with care." A856-A857, A6943-A6944, A7009-A7011, A7111-A7112. Eleby was impeached with other statements to the grand jury that conflicted with her trial testimony. See, *e.g.*, A6974, A6985-A6986, A7027-A7029. The jury also learned that Eleby initially told police that she had not been in the alley but had only heard what had happened from Alston. A8595-A8599.

Ward admitted that she did not tell the grand jury everything she knew about Rouse, who was the father of her child. A760-A761. Jacobs was impeached with her earlier denials that she witnessed the attack. A7673-A7674, A7707-A7708. Porter was impeached with grand jury testimony in which she said that Catlett told her "he didn't do nothing to the lady." A7776, A7780.

Attempts to impeach some government witnesses, however, largely fell flat. Petitioners noted that Montgomery originally told the police he did not know anything, and Montgomery testified that police said that if he refused to talk to them, he "would be involved." A322. And two witnesses testified that Thomas did not like Yarborough. A10169-A10171, A10184-A10185, A10189-A10191. But as defense attorney Michelle Roberts noted in her closing argu-

ment, Montgomery and Thomas had "no motive to lie, no skin to save, no deals with the Government." A10762-A10764. Overton echoed those points about Thomas, describing him as having "all the signs of being there and being an honest kid." A10819.

b. Catlett put on no defense. Yarborough's attorney claimed in his opening statement that the evidence would show Yarborough was at his girlfriend's house at the time of the murder. A5040-A5042. Yarborough's girlfriend testified at trial but provided no such alibi. A10184-A10191.

Overton, Smith, Christopher Turner, Charles Turner, and Rouse put on alibi defenses. Overton's alibi witnesses claimed that he left the park drunk before 3 p.m. and was asleep when Fuller died. A8608-A8764. The key witness to that story, Overton's grandmother Edna Adams, was substantially impeached with her contrary grand jury testimony. A8657-A8658, A8664, A8682-A8692. Ultimately, she acknowledged that her testimony could relate to an entirely different day, that her daughter and granddaughter had given her "alot of help" on what to say, and that she trusted their statements over her own memory. A8686-A8696. Overton's sister admitted that she and her family had discussed the details of October 1, 1984, after Overton was arrested and that she had told Overton's grandmother "some things about the truth" of what had happened that day. A8755-A8759, A8761, A8763.

Smith and Christopher Turner provided alibis for each other, stating that they were at Smith's house all day on October 1. Smith testified that he woke up at home around 4 p.m. and stayed there. A9421-A9425. Christopher Turner said he spent the night before the

murder at Smith's house and that he stayed there the entire next day, playing video games and watching television. A10053-A10066.

Rouse and Charles Turner had conflicting alibis. Rouse testified that he spent the afternoon with Charles Turner and a friend named Christopher Taylor at a recreation center, restaurants, and arcades. A9008-A9020, A9089-A9097. Rouse said that he only went to the alley around 7 p.m., after police were already there. A9020-A9023, A9151.

Christopher Taylor corroborated Rouse's alibi. A8829, A8838-A8845, A8850-A8851, A8869-A8870; A8875-A8876. But Taylor had previously told police that he was in the park and heard the group decide to assault Fuller and that he was in the alley and saw the murder. A8881, A8884-A8891, A8926-A8929. On cross-examination, Taylor claimed not to remember those statements, *ibid.*, but on rebuttal, Detectives Thomas Kaschak and Johnny Greene testified that Taylor had previously told police that he was in the alley when Fuller was murdered. A571, A10432-A10439, A10493, A10499-A10500, A10505-A10506.

Charles Turner contradicted Rouse's alibi by testifying that he was at home during the time of Fuller's murder and left there only when Rouse and a friend named Vincent Gardner came by and told him someone had been killed in the alley. A9703, A9713-A9714, A9735-A9737, A9767-A9784. He then went with Rouse and Gardner to the alley. A9710-A9713. Gardner, testifying as a rebuttal witness, denied going to Charles Turner's house or going anywhere with Rouse that night. A10239-A10240.

3. The jury's verdicts

After deliberating for seven days, the jury convicted Charles Turner, Rouse, Yarborough, Smith, Catlett, and Webb (now deceased) on all counts, while acquitting Harris and Ruffin. Pet. App. 10a-11a. Two days later, the jury convicted Overton and Christopher Turner on all counts. *Id.* at 11a.

C. Petitioners' Direct Appeals

1. Petitioners (excluding Charles Turner) took a consolidated appeal. Pet. App. 82a n.1. The court of appeals upheld the jury's verdicts but remanded for resentencing. 545 A.2d at 1202, 1219. The court found "overwhelming evidence that each of them was involved at one time or another." *Id.* at 1206 n.2; *id.* at 1217 (testimony against Overton was "overwhelming"). The court also affirmed the trial court's finding that Yarborough's videotaped statement did not result from coercion. *Id.* at 1207-1209 & n.5. The court of appeals rejected Catlett's claim that he was entitled to a missing-witness instruction on Maurice Thomas's Aunt Barbara, noting that defense counsel had Aunt Barbara's address but "chose to neither interview [her] nor call [her] to the stand." *Id.* at 1210 n.13. The court held, however, that petitioners' convictions for first-degree murder merged with their convictions for kidnapping and armed robbery and that each petitioner could only be sentenced for one felony murder. *Id.* at 1206, 1215, 1219. On remand, the trial court resentenced each petitioner to the same aggregate amount of prison time that he had received in the first sentencing. Pet. App. 82a n.2.

2. The court of appeals later upheld the jury's verdict in the separate appeal of Charles Turner and denied his ineffective assistance of counsel claims.

The court concluded that any deficiencies in counsel's performance did not prejudice Turner because the evidence against him was "so overwhelming." Mem. Op. & Judgment 2.

D. Post-Conviction Proceedings

Beginning in 2010, petitioners moved to vacate their convictions, or, in the alternative, for a new trial. Pet. App. 84a n.4. Petitioners raised claims under the IPA; Yarborough raised an ineffective-assistance claim; and petitioners claimed that the government had failed to disclose material exculpatory and impeachment information to the defense before trial, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). In 2012, D.C. Superior Court Judge Frederick H. Weisberg conducted a 16-day evidentiary hearing on petitioners' post-conviction motions. Pet. App. 2a, 84a n.4.

1. Innocence Protection Act claims

The basis for petitioners' actual-innocence claims was the purported recantations of Alston, Bennett, Jacobs, and Montgomery. Pet. App. 2a.

a. Alston claimed at the hearing that he was not in the park at Eighth and H Streets on October 1, 1984, and was not present in the alley during the murder. A11978. Alston testified that when he told detectives that he knew nothing about the murder, they became angry and suggested that Alston would get a more lenient sentence if he confessed. A11989-A11993. He further testified that the detectives told him what they believed happened, and he repeated that information back to them, believing that he would be released. See A11989-A12003, A12008-A12012.

Detective McGinnis confirmed that he told Alston that witnesses had placed him at the scene (which was

true), and that he told Alston he could help himself if he told his own account of what happened. A13894-A13899. Detectives McGinnis and Sanchez-Serrano denied telling Alston what to say, giving him any details of the crime, or promising his release. A13477-A13482, A13894-A13899.

b. Bennett likewise denied any involvement in or knowledge of the murder. A12145-A12147. Bennett testified that after he was arrested, he told detectives that he knew nothing about the murder, but after hours of questioning he started telling the detectives details he had heard on the news and repeated what they told him to say, "until they got [him] to say [he] was involved." A12143-A12146, A12150. Bennett claimed that during his videotaped statement, the police "would cut the tape off" at various points and tell him what to say. A12151-A12153.

Detective Sanchez-Serrano confirmed that after Bennett denied being present during Fuller's murder, the detective pressed him by repeatedly asking what happened and suggested that Bennett would help himself by admitting what really occurred. A13501-A13504. Both detectives denied stopping the videotape and telling Bennett what to say or whom to implicate. A13501-A13504, A13922-A13924.

c. Linda Jacobs initially did not recall at the hearing what she testified about at trial, but she nevertheless claimed it was a lie. A12576-A12578. Although Jacobs had signed a 2007 affidavit stating that she went into the alley on the day of the murder, Overton R. 4, Ex. 11 ¶ 7, she testified at the hearing that she never went into the alley and never saw what happened to Fuller. A12583. When the trial court asked her during the hearing about what happened to

Fuller, Jacobs broke down sobbing. A12610-A12611; Pet. App. 107a.

d. Montgomery, who had described at trial the events in the park immediately preceding the attack, testified that after he initially told police that he did not know anything about the murder, Detective Sanchez-Serrano yelled at him and threatened him with prosecution. A11931, A11935-A11936. Montgomery, however, reaffirmed the truthfulness of his trial and grand jury testimony. A11943. Montgomery disavowed an affidavit that he signed on June 1, 2009, which stated that Montgomery had not been in the park on the afternoon of October 1, 1984, and that he had lied at petitioners' trial (see Overton R. 4, Ex. 13). A11939. He testified that he told the person who brought him the affidavit in prison that it incorrectly stated that he had lied at trial, and asked her to take that out, but he signed it "so [he could] come tell the truth" at the hearing. A11941.

2. Yarborough's ineffective assistance claim

Yarborough claimed that his counsel had been ineffective for failing to investigate his intellectual disabilities as grounds for suppressing his videotaped statement. A3558-A3581, A3594-A3636; Pet. App. 2a. Yarborough testified that he did not participate in or have any knowledge of the murder. He claimed that he spent the afternoon and evening of October 1, 1984, at the home of his girlfriend, Chandra Hill. A11712, A11737-A11739. Although Hill had testified at trial and provided no alibi for Yarborough, A10184-A10191, she testified almost 30 years later that Yarborough was at her house during the afternoon and evening of October 1, 1984. A11924-A11926.

Yarborough denied giving the police an eight-page statement on October 4, 1984, and he claimed that police made him initial and sign the document without letting him read it. A11744-A11748, A11858-A11862, A11865, A11888. Yarborough further claimed that his videotaped statement was false and that it was the result of police brutality, including physical assault, threats of murder, and sticking his head in a toilet bowl. A11757-A11784. Yarborough further testified that police coached him for two or three hours before he gave the videotaped statement. A11790-A11800.

Detectives Sanchez-Serrano and McGinnis testified that Yarborough provided the information in his written statement. A13453-A13459, A13877-A13887. Sanchez-Serrano confirmed that he became "excited" during the later interview of Yarborough, and both detectives confirmed that they raised their voices. A13492, A13502, A13910-A13911. The detectives denied that Sanchez-Serrano ever physically abused Yarborough or that the detectives fed him information or told him what to say. A13496-A13501, A13629, A13912-A13919, A14004.

3. Claims under Brady *v.* Maryland

Finally, petitioners claimed that the government failed to disclose material exculpatory and impeachment information in violation of *Brady*. One piece of non-disclosed information was a statement implicating James Blue in the murder, which was discussed in a Washington Post article published almost a decade before the first post-conviction motion was filed. See Charles Turner R. 9, Ex. 1 (App. 97-112); Patrice Gaines, *A Case of Conviction*, Washington Post, May

6, 2001.[5] Additionally, as part of these post-conviction proceedings, the government provided petitioners with Goren's entire case file on the Fuller murder. Petitioners then alleged that the government had failed to disclose additional items of purportedly favorable exculpatory and impeachment information that were material to guilt.

a. Information about alternative perpetrators

i. James Blue

On October 26, 1984, Ammie Davis told Lieutenant Frank Loney that Fuller's killer was James Blue. See J.A. 56-58. After being arrested for disorderly conduct, Davis initially told Lieutenant Loney that she saw Blue beat Fuller to death in the alley off of H Street, but a few moments later said that she only saw Blue grab Fuller by the neck and pull her into the alley. J.A. 57-58. Davis refused to say more, but claimed that a girlfriend accompanied her and could corroborate Davis's story. J.A. 57. Davis would not provide her girlfriend's name and instead promised to call Lieutenant Loney with her girlfriend on Monday or bring the girlfriend to a later meeting. *Ibid.* Neither Davis nor the girlfriend ever contacted Lieutenant Loney again. A12320-A12321.

Notes that Goren wrote after the trial indicate his recollection that Davis's statement was "lost in the shuffle," A2308, and he did not learn about it until August 1985, about nine months after the statement

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[5] Although the article describes the author's "six-year crusade" to disprove the prosecution's theory of the Fuller murder, it ends by revealing that Rouse had recently taken a polygraph, whose results led the examiner to believe that he was probably involved in Fuller's death. Charles Turner R. 9, Ex. 1 (App. 100, 111-112).

was given, but 11 weeks before trial, J.A. 264. Goren promptly interviewed Davis on August 8 and 9, 1985. J.A. 266-267. She did not provide any more details, except that the girlfriend she had previously refused to identify was named "Shorty." J.A. 267-268. Police could not locate Shorty. J.A. 268, 271. On October 9, 1985, Blue murdered Davis in a drug dispute unrelated to petitioners' case. J.A. 272-273, 324-327; A1296-A1297; Pet. App. 22a & n.17.

Goren testified that he deliberately decided not to disclose Davis's statement because he found her to be "totally incredible" and he "believed completely and strongly that Ms. Davis had no evidence in this case." J.A. 269-270. Goren described Davis as "playful" when he interviewed her and said that she was "not serious" about her claims. J.A. 271. Detective Gossage recalled that Lieutenant Loney disbelieved Davis when he spoke to her in 1984. A13751-A13752.

Goren also knew that Davis had previously falsely accused Blue of a different murder. J.A. 271-272, 323-324. Prosecutor Behm explained at the hearing that he had first met Davis in February 1984, when he was investigating the unrelated murder of David Hider. J.A. 311-312. Davis told the Hider grand jury that Blue was one of the killers. J.A. 312-314. Based on Davis's testimony, police arrested Blue. J.A. 314. Police soon discovered inaccuracies in Davis's grand jury testimony, and Behm learned from another detective that Davis had falsely accused another individual in yet another murder. As a result, Behm ultimately dropped the charges against Blue for Hider's murder. J.A. 315-321.

ii. James McMillan

At trial, Freeman (who discovered Fuller's body) testified that while he was standing near the garage waiting for the police, he had observed two men run into the alley from Ninth Street and stop near the garage for a few minutes without entering or looking into the garage. He added that one of the men had a bulge in his coat as if he was hiding something. When Officer Ball arrived, he said, the men ran up the cut of the alley toward I Street. Before trial, Harris's counsel unsuccessfully sought the names of those two men, as later identified by Freeman. J.A. 284. After Freeman testified, Harris's counsel raised the issue with the trial court. Saying that she understood from Goren that Freeman had identified the people he saw in the alley, she argued that if Freeman had identified people other than her client, that information must be disclosed under *Brady*. J.A. 63.

Goren responded that he "did not consider [Freeman's] identifications to be *Brady*" information. J.A. 63. He explained that, "the people [Freeman] was talking about were people who were in the alley an hour and a half or so after Ms. Fuller was killed. * * * They never went in the garage. They never had any association with the garage. They ran when the police came into the alley, for whatever reason no one will ever know." *Ibid.* The trial court asked if it had to take up the issue at that moment, and Harris's counsel responded that she would instead call Freeman as a witness in her case and did not mind tabling the issue until then. J.A. 64. Freeman was not recalled to the witness stand in the defense case. J.A. 292.

From Goren's file, petitioners learned that Freeman had identified the men as Gerald Merkerson and James McMillan. J.A. 24, 277. McMillan was 18 years old at the time and lived at 825 Eighth Street, N.E., a house that backs up to a connecting alley. J.A. 290; A1324. A few weeks after Fuller's murder, McMillan assaulted and robbed two middle-aged women in the neighborhood, one on the street and one in an alley. McMillan struck one woman from behind and ran off with her purse. McMillan and another man approached the second woman, one of them punched her in the face, and they ran off with her plastic shopping bag. A1310-A1313, A13128-A13130, A13260-A13261; Pet. App. 18a & n.12.

Goren confirmed at the hearing that he did not disclose to the defense additional witnesses who saw McMillan in the alley just before the police arrived. A13116-A13118; J.A. 280-281. Charnita Speed told the government that when she and Juan Wigfall went into the alley, she saw McMillan and Merkerson there, that McMillan appeared to be putting something under his coat and Merkerson appeared to be stuffing papers under his shirt, and that the pair ran when the police arrived. A13115-A13116; J.A. 26-27. Tylie told the government that when she went into the alley after calling the police, she saw McMillan there, accompanied by two other people. A13117-A13118; J.A. 27.

Petitioners also presented evidence that more than seven years after the trial, on September 15, 1992, McMillan murdered A.M. in an alley behind 526 Eighth Street, N.E., about three blocks from where Fuller was killed. A1325, A2616, A2671, A11678; Pet. App. 18a. McMillan grabbed A.M. while she walked by the alley and dragged her near a parked car, re-

moving and discarding some of her personal items along the way. A2740. McMillan then beat A.M., stripped her naked from the waist down, pushed up her sweater, and sodomized her. A2740-A2741; see Pet. App. 18a-19a.

Consistent with his explanation at trial, Goren stated that he did not disclose the identities of McMillan or Merkerson because they came into the alley after Fuller's body was discovered and did not enter the garage or pay any attention to it. J.A. 287-288. Campbell, who was indicted along with petitioners and pleaded guilty after his trial was severed, see p. 10, *supra*, included McMillan among those present during the group attack in the statement he made to police. A13261-A13262. Campbell's statement was turned over to the defense before trial. *Ibid.*; Pet. App. 18a n.13.

iii. The Watts group

From Goren's case file, petitioners also learned that between 5:30 and 5:45 p.m. on the evening of the murder, a group of people walked through the alley on their way to a liquor store on H Street. J.A. 25, 27, 53-55; A992. Willie Luchie told investigators that a group including Luchie, his niece Jacqueline Watts, Ronald Murphy, and George ("Michael") Jackson walked through the alley that evening, and "as they passed the garage [Luchie] * * * heard several groans." J.A. 25. Goren's notes also state that Luchie "remembers the doors to the garage being closed." *Ibid.* Watts also reported "hear[ing] some moans" while walking through the alley. J.A. 27. Murphy told police that he did not hear anything unusual. J.A. 53. Jackson also heard nothing. A992. Murphy told po-

lice that nobody else was in the alley when the group walked through. J.A. 54.

This group came to the attention of the police when one of Fuller's daughters called police and told them that Watts visited the Fuller house on the day after the murder with a ring that Mr. Fuller recognized as his wife's. J.A. 27; A1371. Watts received the ring from Murphy, *ibid.*, who told police that he bought it on the night of the murder for five dollars from an unknown man and woman during another trip to the liquor store between 8:15 and 8:45 p.m. J.A. 53-54.

Goren believed that any groaning heard by Watts and Luchie fully accorded with the evidence that a large group had attacked Fuller and left her to die. A13113. During the post-conviction hearing, petitioners contacted Luchie, who was convicted in 1986 of second-degree murder of his step-son. See *Luchie* v. *United States*, 610 A.2d 248, 248-249 (D.C. 1992). Petitioners planned to call Luchie as a witness on April 30 and May 2, 2012, but stated that he was sick on both days. A12291, A12511-A12512. Petitioners ultimately gave up on his testimony, stating that Luchie was not necessary. A12511. They did not obtain a statement from him through a deposition or an affidavit.

Petitioners speculated that the groaning heard by Watts and Luchie suggested that a single perpetrator was killing Fuller when the group walked by the garage. In addition, because Freeman had testified that one garage door was open when he found Fuller's body, petitioners argued that Luchie's recollection about the closed doors supported the theory that the killer left the garage after this group passed through. See Joint Br. 37.

iv. Expert testimony

In support of their alternative-perpetrator theory, petitioners introduced expert testimony of Dr. Richard Callery and Larry McCann. Dr. Callery, a medical examiner and forensic pathologist, opined that Fuller's injuries were more likely caused by one to three assailants based on the number and location of her wounds. A12206-A12240. Dr. Callery agreed, however, with Dr. Bray (the 1985 medical examiner) that it was impossible to say how many people attacked Fuller. A12240.

McCann, a crime scene reconstruction expert, added his view that Fuller was more likely murdered by a single offender because, *inter alia*, multiple offenders would have engaged in a "frenzied attack" resulting in stretching, tearing, and casting away her clothing. A12446-A12447; see also A12448, A12459 (opining that lack of abrasions on Fuller's ankles and wrists and the lack of multiple sexual assaults suggests a smaller group of assailants). McCann did not dispute, however, Dr. Bray's opinion at trial that multiple perpetrators could have attacked Fuller and that additional bruises on her body might not yet have appeared. A12466-A12472.

b. Additional impeachment information

i. Kaye Porter's lie about Alston's confession

During her first interview with homicide detectives, Eleby revealed that Alston had admitted to her that he was involved in robbing Fuller. A12943-A12945, A13589, A13890, A13977. Porter, who was present during this interview, agreed that she had also heard Alston's statement. J.A. 258, 298; A12943-A12945, A13589, A13891, A13977. Goren's file contains notes stating that when Porter came in later to talk to inves-

tigators, she told them that "she did not recall being in the car and hearing Calvin Alston say anything about the killing or a robbery," but "just went alon[g] with what [Eleby] said." J.A. 25-26; see J.A. 259, 298; A1004, A13589, A13891, A13977. Eleby likewise admitted to police that she had lied about Porter being present and had asked Porter to lie to support her. J.A. 299-300; A13278. Porter testified before the grand jury in August 1985, but she was not asked about this previous lie. J.A. 260-261.

Goren testified that his failure to disclose Porter's false claim was inadvertent. J.A. 260-261. He explained that although he typically would have asked Porter to admit to the earlier lie during her grand jury testimony, he likely overlooked it because Porter did not testify before the grand jury until eight months later. *Ibid.*

ii. Eleby's PCP use

A note in Goren's case file stated that Eleby "says she was smoking loveboat [*i.e.*, PCP] that night photos viewed on 1/9/85." A1004.

iii. Linda Jacobs

Goren's case file described an interview where Detective Sanchez-Serrano "question[ed] [Linda Jacobs] hard" after she denied knowing anything about the crime while also insisting that Smith and Christopher Turner "didn't have anything to do with the murder." A1009. At the hearing, Goren recalled that Sanchez-Serrano repeatedly challenged her, in a raised voice, "[h]ow do you know that?" and slapped his hand on a desk until she said, "Because I was there." A2298-A2299, A2479-A2480. Goren's notes further state that after Jacobs told them about what

she saw, she "tried to back out of telling us" and that, in subsequent interviews, she "vacil[l]ated back and forth." A1009.

iv. Interview with Aunt Barbara

Maurice Thomas testified at trial that, after he observed the attack on Fuller, he ran home and told his Aunt Barbara what he had seen. An entry in Goren's notes states that Aunt Barbara "(whose real name is Dorothy Jean Harris, and who we had talked to before) does not recall Maurice ever telling her anything such as this." A1010; see J.A. 295-296. Goren concluded that Aunt Barbara was "a bit of an alcoholic," A1010, and the government did not call her at trial. The defense made the same choice, even though Aunt Barbara's name and whereabouts were known and the trial court offered to hold the case while defense counsel interviewed her. A10574-A10576. Goren confirmed that he did not disclose this statement from Aunt Barbara to the defense, A13163, but that defense counsel nevertheless had been provided with Aunt Barbara's true name and address, J.A. 297.

E. The D.C. Superior Court's Findings

The D.C. Superior Court denied petitioners' post-conviction motions. Pet. App. 81a-131a.

1. The trial court rejected Yarborough's claims that police forced him to sign and initial a written statement without letting him read it and that his videotaped statement was the result of police abuse and coaching. Pet. App. 97a-101a. The court found the videotaped statement "was not the statement of a helpless mentally vulnerable young man being fed facts by the police and parroting them back to please his interrogators; it was the voluntary admission of a

conniving youthful offender trying to distance himself as far as possible from the crime while not denying that he was there, which he assumed the police already knew." *Id.* at 98a. The court concluded that Yarborough's hearing testimony was "patently incredible" and that Goren and the detectives had persuasively denied Yarborough's "outlandish allegations" of abuse. *Id.* at 98a, 100a.

2. The trial court rejected petitioners' actual-innocence claims. Pet. App. 101a-111a.

i. The trial court found that "the recantations of Calvin Alston and Harry Bennett are not worthy of belief." Pet. App. 103a. After considering the entire record, including the demeanor of Alston and Bennett at the post-conviction hearing and in their videotaped statements, the court found that "the current testimony of Alston and Bennett that they were not at 8th and H Streets on October 1, 1984, and that they were forced by the police to say they were there" was "nothing short of preposterous." *Ibid.* The court explained that "[t]he scene in the alley on October 1, 1984, was crowded and chaotic. Alston and Bennett may have gotten some facts wrong and may have left certain things out or distorted the truth to minimize their own involvement or to protect others, but the basic facts implicating these petitioners and describing a crime perpetrated by a large group were corroborated by too many other witnesses not to be believed." *Ibid.*

The hearing testimony of Jacobs, the trial court found, was "even less helpful to petitioners than Alston and Bennett." Pet. App. 104a. The court concluded that Jacobs's "insistence that she lied coupled with her inability to remember anything that she lied

about makes her current testimony relatively useless." *Id.* at 107a. The court also noted that, "[c]uriously, * * * whenever she was asked 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." *Ibid.*

Finally, the trial court explained that petitioners were unable to salvage the "bad turn of events" when Montgomery disavowed the parts of his affidavit that purportedly recanted his trial testimony and instead reaffirmed that his testimony was true. Pet. App. 109a.

ii. The trial court found that petitioners' expert testimony was neither newly discovered nor particularly persuasive. Pet. App. 110a-112a n.14. The court noted that neither Callery nor McCann "could definitively state that Mrs. Fuller was attacked by one to three individuals as opposed to a larger group," and it found that the evidence "does not begin to demonstrate that the petitioners are 'actually innocent.'" *Id.* at 110a-112a & n.14. The court further noted that "[p]etitioners could have presented testimony from experts similar to Dr. Callery and Mr. McCann at trial." *Id.* at 111a n.14.

3. Finally, the trial court rejected petitioners' *Brady* claims, Pet. App. 112a-129a, finding that "none of the undisclosed information was material. *Id.* at 130a.

a. The trial court acknowledged that Davis's statement implicating Blue was exculpatory. Pet. App. 116a-117a. Nevertheless, the court concluded that Davis's claim was not material under *Brady* because it "was thoroughly discredited" and it therefore "d[id] not undermine the court's confidence in the outcome of the trial." *Id.* at 117a. "For Ms. Davis'

account to be true," the court explained, "a jury would have to believe that James Blue, acting alone, attacked and murdered Mrs. Fuller, in the face of numerous eyewitness accounts and other evidence proving that crimes were committed by a large group of young men acting in concert." *Ibid.*

The trial court noted that Davis's statement would almost certainly have been inadmissible at trial because Davis died before trial and petitioners had identified no applicable hearsay exception. Pet. App. 117a-118a n.18. The court concluded, however, that even if Davis had provided testimony, "any reasonable jury, in light of all the evidence, would surely have rejected it." *Id.* at 117a-118a. The court noted that "[n]ot one of the approximately 400 other witnesses interviewed by the government mentioned James Blue as a possible perpetrator, either alone or with others." *Id.* at 118a. Davis's statement was also "riddled with problems," and if the statement had been admitted, the jury would have heard that Davis had previously leveled a different false accusation of murder against Blue. *Id.* at 118a-120a. The court acknowledged that the prosecutor's duty to turn over evidence favorable to the defense is not excused simply because the prosecutor does not believe the evidence, but the court also found it "understandable why, in context, this careful and fair-minded prosecutor did not believe this piece of evidence and did not consider it material." *Id.* at 120a.

b. The trial court found that McMillan's identity was "arguably not even favorable to the accused" because McMillan, who lived nearby, was only seen in the alley after the attack on Fuller. Pet. App. 123a. But in any event, the court concluded that the infor-

mation was "definitely not material" because even if McMillan was present during the murder or had the murder weapon under his coat, "it would not prove anything about the guilt of these petitioners." *Ibid.* "For the 'McMillan evidence' to be material," the court explained, "he would have had to have committed the crime by himself or with Merkerson to the exclusion of the petitioners, and that possibility flies in the face of all the evidence." *Ibid.* The court acknowledged that defense counsel could have tried to exploit "[t]he coincidence of McMillan's presence in the alley and his attacks on other women in that neighborhood around the same time." *Ibid.* But, the court concluded, "it does not override the overwhelming evidence of the guilt of these petitioners or undermine the court's confidence in the jury's determination of their guilt at trial." *Id.* at 123a-124a.

c. 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. The court saw "virtually no chance" that Porter's admission that she lied at Eleby's request would have mattered because "Porter was a relatively minor witness against one defendant [Catlett], and the cross examination of Eleby about other lies and inconsistent statements, all of which were disclosed, was very extensive." *Id.* at 125a. The court further concluded that "Eleby's use of PCP was the subject of cross examination at trial, and the government's failure to disclose * * * the extent of her PCP use was not material under *Brady*." *Id.* at 127a.

The trial court reached the same conclusion about the information that Jacobs had vacillated about

whether she had been in the alley. This "was not material given all that the government did disclose about her inconsistent statements, her extensive cross examination at trial based on her inconsistent statements, and the jury's up close opportunity to observe her demeanor." Pet. App. 127a. The court explained that, "[i]f the jury concluded that [Jacobs] was an eyewitness" to the attack, "there is no chance it would have concluded otherwise if it learned that on more than one occasion she had denied that she was there." *Ibid.*

The trial court further found that the undisclosed statement of Aunt Barbara was not material because Maurice Thomas had testified at trial that she told him to "forget" what he had seen. Pet. App. 126a. Accordingly, even if Thomas had been impeached with Aunt Barbara's statement to police that she did not recall Thomas telling her about an attack, Thomas had testified convincingly at trial, he was cross-examined extensively, and "no juror would have concluded that he was making it all up." *Ibid.*

d. The trial court concluded that "none of the undisclosed information," viewed separately or cumulatively, "would have made any difference in the outcome of the trial." Pet. App. 130a. The court explained that "[i]t is not enough to show that the defendants could have used the undisclosed evidence to construct a 'counter-narrative' (or, as here, two counter-narratives that were mutually exclusive of each other), which could have been supported by a possible reconstruction of the physical evidence that ignores all of the eyewitness testimony." *Ibid.* The court reiterated that, for the non-disclosed evidence to be material under *Brady*, petitioners must show a reasonable

probability that the undisclosed evidence would have produced a different verdict. *Ibid.* "Under that standard," the court concluded, "based on the entire voluminous record in this case, petitioners' *Brady* claims * * * must fail." *Ibid.*

F. The D.C. Court of Appeals Opinion

The court of appeals affirmed. Pet. App. 1a-78a.

1. The court of appeals found that the trial court did not abuse its discretion in denying petitioners' claims of actual innocence. Pet. App. 54a-62a. It saw "no basis on which to overturn the [trial] judge's finding that the recantations [of Alston and Bennett] were incredible," and "no error in [its] finding that the purported recantations of Montgomery and Jacobs were worthless." *Id.* at 59a-60a. As for petitioners' expert testimony purportedly showing that Fuller was attacked by one to three individuals, the court of appeals agreed with the trial court that petitioners "could have presented such testimony at their trial," and that it did not establish actual innocence. *Id.* at 61a.

2. The court of appeals further concluded that Yarborough's counsel did not render ineffective assistance in moving to suppress his videotaped statement. Pet. App. 62a-78a. After exhaustively reviewing the circumstances of Yarborough's statements and the evidence of his cognitive impairments, the court concluded that Yarborough's videotaped statement was not the result of police coaching or coercion. *Id.* at 76a-77a.

3. With respect to petitioners' *Brady* claims, the court of appeals expressed doubt about whether some of the evidence at issue was even favorable to petitioners. Pet. App. 28a. The court assumed, however, that all information identified by petitioners was fa-

vorable to the defense and held that the information was not material under *Brady*. *Id.* at 28a, 31a-54a.

a. The court of appeals found "reason to doubt that Ammie Davis's accusation of James Blue would have carried significant weight with the jury, given her lack of credibility and the complete absence of other evidence associating Blue in any way with Fuller's murder." Pet. App. 37a. But the court found it unnecessary to examine that question, because Davis's statement "would have been excluded at [petitioners'] trial pursuant to a routine and uncontroversial application of the basic rule against hearsay." *Id.* at 41a; see *id.* at 37a-43a & n.73.

The court of appeals further concluded that petitioners "have not demonstrated any likelihood that they would have located and obtained helpful testimony from the girlfriend Davis mentioned, or that they would have discovered any other admissible evidence implicating Blue in Fuller's murder." Pet. App. 38a; see *id.* at 44a-45a. Further, if Davis's statement had been 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.

b. The 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 Porter's testimony against Catlett, Porter was already impeached with contrary grand jury testimony, and the other evidence against Catlett was very strong. *Id.* at 45a-46a (summarizing evidence). Likewise, with respect to Eleby, "additional impeachment [of her] would [not] have made a differ-

ence to the jury's assessment of [her] credibility," and additional evidence of her PCP use would have been "of little consequence." *Id.* at 46a. Furthermore, Aunt Barbara's failure to recall Maurice Thomas's recounting 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. In a footnote, the court rejected petitioners' "somewhat vague[]" claim of undisclosed impeachment evidence for Jacobs, concluding that the defense knew that Jacobs had denied witnessing the acts because she was asked about it on cross-examination. *Id.* at 22a n.18.

c. The court of appeals concluded that the Watts and Luchie statements and McMillan's identity had "potential weight in a cumulative materiality analysis" in that they could have been used to construct a defense theory that Fuller was being killed behind closed garage doors by one or two perpetrators between 5:30 and 5:45 p.m., and then the killer or killers left a garage door open when they left. 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 33a-36a. As to the murder McMillan committed in 1992, however, 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, 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-37a.

The court of appeals next analyzed the cumulative materiality of all undisclosed evidence. Pet. App. 48a-

54a. Having already found that the undisclosed impeachment evidence and the limited use that petitioners could have made of Davis's statement had only a negligible impact, the court focused on petitioners' claim that the Watts and Luchie statements and the McMillan information would have enabled them to present an alternative single-perpetrator theory of the crime. *Ibid.* 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.

The court of appeals concluded that the Watts and 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 suggest 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.*

The 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 in a small-group attack (and falsely accused petitioners) while inexplicably shielding McMillan. *Id.* at 50a-51a.

The court of appeals clarified that its "conclusion [wa]s the same for each [petitioner] individually." Pet. App. 52a. Although the jury took longer to convict Overton and Christopher Turner, the court explained that all petitioners "are similarly situated" on the theory of a single-perpetrator attack. *Id.* at 53a. In sum, the court concluded that "[t]he withheld evidence cannot 'reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Id.* at 54a (quoting *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995)).

SUMMARY OF ARGUMENT

The government complied with its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Nondisclosures violate *Brady* only when withheld information is both favorable and material. The undisclosed information here does not meet that standard; it does not undermine confidence in petitioners' guilt of the brutal slaying of Catherine Fuller. Petitioners received a fair trial, and the verdicts should stand.

A. Petitioners' principal claim is that undisclosed evidence about James McMillan, and a group of people who walked past the garage where Fuller died, would have allowed petitioners to construct an "alternative

perpetrator" defense, capable of competing with the evidence of a group attack described by multiple government witnesses. But evidence of McMillan's identity would not have affected the outcome of petitioners' trial.

Initially, the evidence about McMillan fails to place him at the scene of Fuller's murder at the time it occurred. Petitioners rely on evidence that McMillan appeared in the public alley near the garage *after* the discovery of Fuller's body. But nobody placed him in the garage or had him participating in a solo or small-group attack.

Beyond that, petitioners had ample opportunity and incentive to construct such an alternative-perpetrator defense at trial, but did not pursue it. They knew that two individuals ran into the alley and stood near the garage, that one had something hidden in his coat, and that both ran from police. But petitioners did not develop a theory based on that evidence. And knowing that McMillan later robbed two middle-aged women in the vicinity would add little. Whatever that revealed about McMillan's violent tendencies, it did nothing to suggest that he attacked Fuller alone or with a single accomplice. Nor would it have countered the government's proof, from multiple sources including two cooperating participants, of a group attack launched by petitioners.

Petitioners are not helped by evidence that two people heard groaning in the garage at about 5:30 to 5:45 p.m. and one person saw its doors closed. That information does nothing to suggest that Fuller's attack was ongoing or that McMillan was inside. The brutality of the assault on Fuller makes soft groaning an implausible response to an ongoing attack. And it

is sheer speculation that McMillan was assaulting her at that time.

The expert testimony that petitioners offered below cannot bridge the evidentiary gap. It is highly unlikely that petitioners would even have developed that evidence at trial if they had known McMillan's identity. Petitioners had far more plausible suspects for a small-group attack—Alston and Bennett, who admitted culpability—yet did not present crime-scene experts to cast doubt on a large group attack. In any event, petitioners' experts admitted that they could not exclude a group attack based on the physical evidence.

Nor is it plausible that petitioners would have embraced a "McMillan did it alone" theory. Given the multiple witnesses describing the group attack, the damning admissions by several petitioners, and the incentives for each to disassociate himself from the group attack, a joint defense was entirely improbable. This is especially true for Overton, who in closing argument embraced Maurice Thomas as an "honest kid" with "no ax[e] to grind," who happened to walk by the alley "when the very crime itself is proceeding" and "sees the very beginnings of the murder in progress."

Finally, petitioners cannot rely on McMillan's murder of A.M. in 1992 to support a *Brady* claim. A murder committed years after trial has no relevance to the government's disclosure obligations at trial.

Overton alone suggests that Ammie Davis's statement that James Blue murdered Fuller provided another third-party perpetrator defense. But Davis was dead by the time of trial, her statement was inadmissible, and her cursory, shifting, and uncorroborated accusation lacked any credibility. It was not material.

B. Petitioners' reliance on undisclosed impeachment evidence also fails. The delay in transmitting Davis's accusation against Blue would not have undercut the diligence or thoroughness of the investigation —the prosecution did investigate it well before trial. Information that Carrie Eleby was high on PCP when she met with investigators would have been cumulative, given her thorough impeachment. Kaye Porter's lie to the police about overhearing Alston admit to his involvement in the attack on Fuller, and Eleby's prompting of the lie, would have done little, given that Alston himself corroborated Eleby's statement.

Petitioners rely on the manner in which a detective questioned Linda Jacobs as undisclosed impeachment evidence. But given Jacobs's vacillation and initial concealment of some of petitioners' roles, that evidence would have had negligible effect. So too would the undisclosed statement of Maurice Thomas's Aunt Barbara that she did not recall his report of the attack. Given Thomas's testimony that his aunt told him not to tell anyone what he saw, the jury would have given little weight to her statement.

C. The cumulative consideration of the undisclosed evidence does not change the conclusion. The additional impeachment evidence would have had little incremental effect, and, for the reasons described above, would not have undermined the government's case. And the undisclosed McMillan evidence does not undermine confidence in the trial's outcome.

Petitioners weave a speculative theory that McMillan alone, or perhaps with one accomplice, killed Fuller. This theory would be material only if it "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles* v. *Whitley*, 514

U.S. 419, 435 (1995). But to accept that theory, the jury would have had to reject eyewitness testimony from two cooperators who participated in the attack, the credible testimony of Montgomery on the attack's origins in the park, Maurice Thomas's testimony describing the attack in the alley, and the testimony of Eleby and Jacobs about seeing the brutal sodomy in the garage. It would also have had to discard the multiple admissions by petitioners to third parties, including Yarborough's videotaped statement describing a group attack; Catlett's statement, which Thomas overheard, explaining that Fuller was killed because she recognized an assailant; Catlett's statement that he only kicked Fuller, while someone else "stuck the pole up in her"; and Rouse's admission of doing the "worst thing" to the lady in the alley. It also would have had to set aside Overton's and Christopher Turner's incriminating conversation overheard in jail.

If the jury learned that McMillan was seen in the alley after Fuller's death; that groans were heard in the garage at about 5:30 to 5:45 p.m.; that a garage door was closed, but later opened; and that McMillan committed nearby robberies of middle-aged woman, it would not have had reason to doubt the government's case. The "mere possibility" of an alternative-perpetrator defense is insufficient to establish a *Brady* violation, *United States* v. *Agurs*, 427 U.S. 97, 109-110 (1976), and petitioners fare no better than that.

D. Overton's individual *Brady* claim equally lacks merit. Suggesting that Eleby was the pivotal witness against him, Overton emphasizes the additional impeachment he could have conducted based on her PCP use and her prompting Porter to lie. But Overton overlooks substantial and compelling evidence against

him from Melvin Montgomery, who saw him in the park pointing toward Fuller, and his incriminating conversation with Christopher Turner in jail. He also ignores the manner in which his alibi was discredited at trial. Overton, like the joint petitioners, provides nothing that undermines confidence in the jury's verdict.

ARGUMENT

NO REASONABLE PROBABILITY EXISTS THAT THE OUTCOME OF PETITIONERS' TRIAL WOULD HAVE BEEN DIFFERENT IF THE INFORMATION IDENTIFIED BY PETITIONERS HAD BEEN DISCLOSED TO THE DEFENSE BEFORE TRIAL

In *Brady* v. *Maryland*, 373 U.S. 83 (1963), this Court held that the Due Process Clause of the Fifth Amendment requires the government to disclose favorable evidence to the accused where such evidence is "material" either to guilt or to punishment. *Id.* at 87. 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* v. *United States*, 405 U.S. 150, 154 (1972); see *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012). The failure to disclose material, favorable evidence violates due process "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87, and without regard to whether the evidence was actually known to the individual prosecutor, or merely to "others acting on the government's behalf in the case, including the police," *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995).

A *Brady* violation entails three showings: (1) the information not disclosed must be "favorable to the accused, either because it is exculpatory * * * or

impeaching," (2) the information must have been suppressed or withheld by the prosecution, and (3) the information must be "material" to guilt or punishment. *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999). The "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *United States* v. *Agurs*, 427 U.S. 97, 109-110 (1976). Evidence is material "only 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). That inquiry requires the Court to evaluate whether favorable evidence not disclosed by the prosecution "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 434-435.

In the post-conviction hearing, petitioners claimed actual innocence based on recantations of trial testimony that the trial court concluded were "nothing short of preposterous." Pet. App. 103a. The court further rejected Yarborough's "outlandish allegations" of police abuse and concluded that petitioners' claims that police manipulated people into implicating themselves and others in a police-created story about Fuller's murder were credibly denied by the detectives and prosecutors who conducted the investigation. *Id.* at 100a; see *id.* at 60a n.96. Petitioners' remaining claim in this Court arises only under *Brady*; they do not challenge the rejection below of the recantations or Yarborough's testimony.

Petitioners need not show that a different outcome is more likely than not if the information they have identified from Goren's case file had been disclosed to the defense, but they must show that the undisclosed evidence undermines confidence in the outcome. *Kyles*, 514 U.S. at 434. That inquiry requires the Court to consider the entire case presented by the prosecution at trial, including:

- Montgomery's eyewitness testimony describing how plans for the attack unfolded in the park
- Alston and Bennett's confessions to the crime and testimony that they participated in a group attack on Fuller with petitioners
- The testimony of three eyewitnesses—Thomas, Eleby, and Jacobs—who corroborated Alston and Bennett's description of a group attack in the alley
- Yarborough's videotaped statement describing a group attack in the alley
- Incriminating statements made by several of the petitioners after the crime, and
- The severely discredited alibis offered by the defense.

Against that backdrop, no reasonable probability exists that the result of petitioners' trial would have been different if the information that forms the basis for their *Brady* claim had been disclosed before trial. *Bagley*, 473 U.S. at 682. Examining petitioners' alternative-perpetrator evidence and their additional impeachment evidence, first separately and then cumulatively, the undisclosed information cannot reasonably be said to "put the whole case in such a differ-

ent light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

A. No Reasonable Probability Exists That Presentation Of An Alternative-Perpetrator Defense Would Have Changed The Outcome Of Petitioners' Trial

All petitioners claim that McMillan's identity would have catalyzed a viable third-party perpetrator defense that would have altered the trial narrative. Overton alone makes the same claim for James Blue. Neither of those claims can be reconciled with the full trial record.

1. Petitioners' presentation of James McMillan as an alternative perpetrator could not plausibly have affected the outcome

Petitioners contend (Joint Br. 33-44; Overton Br. 34-40) that *Brady* required the government to disclose that witnesses had identified James McMillan as one of the men seen running into the alley from Ninth Street shortly before police arrived and hiding something under his coat, and then fleeing when police appeared. They contend that this information, combined with groans heard by Watts and Luchie and expert testimony claiming that the attack was committed by a small number of people, would have enabled them to present a convincing defense that McMillan—who by the time of petitioners' trial had been imprisoned for committing two non-fatal robberies of women in the same neighborhood—had killed Fuller by himself or maybe with an accomplice. Petitioners' contention fails for multiple reasons.

a. Initially, McMillan's identity and the observations of Watts and Luchie provide scant reason to believe that he—alone or with Merkerson—killed

Fuller. No witness saw McMillan target Fuller before the attack; no witness saw him in the garage—or out of it—attacking Fuller by himself or with an accomplice; and no witness saw him with any items obtained from the robbery.[6] He was seen running into the alley and standing outside of the garage after the discovery of Fuller's body. Any link between McMillan and a single-perpetrator attack on Fuller is entirely speculative.

Petitioners' McMillan-based theory requires stringing together inference upon strained inference. A jury would have to surmise that he returned to the garage (but did not enter) because he previously killed Fuller there (although no one saw this). The information provided by Watts and Luchie would not have helped. That Watts and Luchie heard groaning in the garage (which others with them did not hear) hardly suggests that an attack was ongoing at that time. Goren explained that if Watts and Luchie heard groans between 5:30 and 5:45 p.m., that would mean the attack was over and Fuller was groaning because of her injuries. A13113. Fuller left her home after 4:30 p.m. and was attacked not long after in a "fast-moving

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[6] McMillan and others who were not charged were alleged by some to have been part of the group attack with petitioners, but that information was disclosed to defendants through Campbell's statement. See p. 31, *supra*. Bennett, however, knew McMillan and confirmed that he was not present, and the government concluded that it did not have enough information to charge him. J.A. 277, 280, 294-295; A1113-A1114; Pet. App. 51a, 122a n.21. In any event, information that McMillan participated in the group attack is not exculpatory as to petitioners. See *Strickler*, 527 U.S. at 292 ("[T]he strong evidence that Henderson was a killer is entirely consistent with the conclusion that petitioner was also an actual participant in the killing.").

event." Pet. App. 50a. The vicious nature of the attack on Fuller makes it incredible that groans or moans would be the extent of the victim's audible response. And Luchie's observation that the garage door was closed and Freeman's that it was partially open does nothing to put McMillan in the garage attacking her.

Against these speculative claims, a defense based on McMillan would have to compete with the numerous eyewitnesses who corroborated that Fuller was killed in a group attack launched by petitioners earlier—including testimony by two participants who pleaded guilty. Nothing in the McMillan evidence, or the Watts and Luchie information, contradicted or undermined the group attack that these witnesses recounted, or explained the incriminating admissions of some petitioners. McMillan's identity was not material in the context of this trial.

b. A powerful indication that disclosure of McMillan's identity would not have resulted in a plausible alternative-perpetrator defense is that petitioners did not pursue that form of defense, even though virtually all of the evidence supporting it was introduced at trial.

Joint petitioners contend (Br. 34) that McMillan's behavior at the crime scene was "self-evidently suspicious" because he had been seen throughout the day walking up and down H Street, he and another man ran into the alley after Fuller's body was discovered and stopped near the garage, McMillan appeared to be hiding something under his coat, and the men ran out of the alley when police arrived. They speculate (*ibid.*) that "[a] jury would have seen this behavior as strongly tending to inculpate McMillan" and that "it

may well have surmised that McMillan had the object used to assault Mrs. Fuller under his jacket." But, aside from McMillan's identity, petitioners and the jury knew all of this information through Freeman's testimony at trial. See pp. 15-16, *supra*. Petitioners nonetheless never suggested that those two suspicious men were potential alternative perpetrators. Harris's counsel was interested in the information to make the point that neither man was identified as her client, but she did not pursue the *Brady* issue at trial after bringing it to the court's attention. See p. 29, *supra*.

Petitioners contend (Joint Br. 33-34; Overton Br. 35) that McMillan's robbery of two other women a few weeks later would have made the difference in the jury's eyes. See A13134 (defense counsel explaining at post-conviction hearing that the defense would have been "it's not these defendants, it's Mr. McMillan, he's a far more likely suspect, he's committed other assaults in the area"); Overton Br. 35 (McMillan evidence was significant because he was "a known criminal who had violently assaulted other women in the same neighborhood") (emphasis omitted).[7] But McMil-

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[7] Notably, McMillan's criminal history was not very different from multiple petitioners, many of whom had convictions for robberies, including robberies of women. A9601, A11527-A11529 (Charles Turner had four prior convictions and numerous arrests); A11446-A11449 (Catlett had a prior conviction for armed robbery of a 55-year-old woman at knifepoint and assault with intent to commit robbery); A11500 (by sentencing, Overton had three robbery convictions and an outstanding armed robbery warrant); A11472-A11474 (Webb's juvenile record included conviction for pulling a woman into an alley and robbing her); A11571-A11572 (Smith was awaiting trial on a different robbery case at sentencing); A11620 (at time of Fuller's murder, Yarborough was on probation for assault with a dangerous weapon and had earlier

lan's crimes against other women, in other factual contexts, would not have undercut the strong evidence of the group attack witnessed by many and participated in by two government witnesses. Nor would it explain the incriminating admissions by Catlett, Rouse, Overton, Christopher Turner, and Yarborough. And it would not even have placed McMillan in the garage, in a solo attack on Fuller, or put any robbery proceeds in his hands. The evidence would have had little force in undermining the government's case.

c. Petitioners contend (Joint Br. 35-37; Overton Br. 35-40) that their alternative-perpetrator theory would have been bolstered with information that two members of a group that walked through the alley between 5:30 and 5:45 p.m. heard groans coming from the garage, and one member of that group (Luchie) recalled the garage doors being closed. Asserting repeatedly (Joint Br. 3, 10, 27, 35, 51) that the time of death was 5:30 p.m.,[8] joint petitioners contend (Br. 36) that the "natural inference" from those observations "is that the group heard Mrs. Fuller being attacked." From that premise, petitioners reason (*id.* at 36, 51) that because a large group could not have been inside of the garage with the doors closed, the observations of the group walking through the alley "directly suggest that Mrs. Fuller was not killed by a group." See Overton Br. 2 (statements of Watts group "suggested the government's large-group theory * * * was

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been arrested for attempting (along with others) to rob a man by force).

[8] In fact, Dr. Bray, who conducted the autopsy, testified that Fuller had been dead for perhaps two or three hours before his examination, and thus the time of death could have been about 5:30 p.m. "give or take an hour either way." A7976, A7978.

incorrect"). There are several glaring problems with that argument.

First, that two members of a four-or-more-person group heard groans coming from the garage when they walked past between 5:30 and 5:45 p.m. does not lead to a "natural inference" that Fuller was being attacked at that moment. The groans were inaudible to at least two members of the group, see J.A. 53; A992 (Murphy and Jackson heard nothing), and it is highly unlikely that an ongoing attack of the type Fuller sustained—including being sodomized with a pipe that pierced the wall of her rectum and left internal injuries along an eleven-inch wound track—A8010-A8019, would have resulted only in faint groans. Any groaning that Watts and Luchie heard is far more consistent with the idea that Fuller lay dying in the garage from her severe injuries than with the idea that her attacker was violently yet silently sodomizing her with a pipe.

Second, petitioners' theory places critical weight on a notation from Goren's notes that Luchie "remembers the doors to the garage being closed." J.A. 25. That evidence lacks detail and was not tested in any hearing. Although petitioners were in contact with Luchie during the post-conviction hearing and represented twice that they would call him as a witness, they stated he was sick and that his testimony was not necessary. A12291, A12551-A12512. The Court is left with a vague discrepancy between a single statement by Luchie and Freeman's testimony, which provides a frail basis for inferring that an attack was ongoing when Luchie passed by and that the real perpetrator left the door open on his way out.

Third, the implausible assumptions required to surmise that Watts and Luchie heard Fuller being attacked only gets petitioners as far as showing that the evidence *could* be viewed as exculpatory. Joint petitioners contend (Br. 36) that the court of appeals' dismissal of the Watts and Luchie observations as carrying little weight were "circular" because the court's analysis "depends on the assumption that Mrs. Fuller died from a group attack." Petitioners note (*ibid.*) that if a court were to suspend that assumption, then "what Watts and Luchie heard is completely consistent with an assault having been in progress." But the court is not required to suspend its consideration of inculpatory evidence (not assumptions) when it analyzes whether undisclosed information is material to petitioners' guilt. The materiality analysis requires the Court to evaluate whether favorable evidence withheld by the prosecution "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. The court was thus required to evaluate the Watts and Luchie observations in the context of the extensive evidence of a group attack presented at trial.

d. Petitioners further contend (Joint Br. 38-40; Overton Br. 19-21, 39) that, had they known McMillan's identity and the observations of Watts and Luchie, they would have developed "objective crime-scene evidence" showing that the attack was most likely committed by only a few people. That argument does not assist them.

First, petitioners' expert testimony can be weighed in the *Brady* analysis only if petitioners would have actually developed such testimony for use at trial had

they received the undisclosed information. See *United States* v. *Gale*, 314 F.3d 1, 4 (D.C. Cir.) (courts "must consider the non-disclosure dynamically, taking into account the range of predictable impacts on trial strategy"), cert. denied, 540 U.S. 986 (2003); *Davis* v. *State*, 928 So. 2d 1089, 1115 (Fla. 2005) (per curiam) (no *Brady* violation where suppressed statements from witnesses would not have been presented to the jury even if they had been disclosed), cert. denied, 549 U.S. 895 (2006).

The record provides objectively strong reasons to doubt that petitioners would have developed expert testimony supporting their small-group attack theory, even if the McMillan information had been disclosed. As it was, defense counsel already questioned the notion that Fuller died from a large group attack. Smith's counsel told the jury that "the physical impossibility of seventeen people standing around a little woman" should give them pause. A10939. Overton's counsel argued that too many people had been charged. A10816 ("[H]ow many people would the government ask to convict" of one murder?). Charles Turner's counsel suggested that five people participated. A10975. And Rouse's counsel argued the most obvious small-group theory—that Alston and Bennett committed the crime—and noted that the medical examiner could not say how many people caused Fuller's injuries. J.A. 173-179. Nothing about the crime scene was withheld from petitioners. Yet petitioners presented no expert testimony to suggest a small-group attack. Because it is so unlikely that petitioners would have developed their belated expert testimony in support of a different single-perpetrator or small-group theory, it should not be considered in

the *Brady* analysis. See *Morris* v. *Ylst*, 447 F.3d 735, 740-742 (9th Cir. 2006) (failure to disclose a letter that would have revealed a credible, independent witness was not a *Brady* violation where the defendant's lawyers and investigator already had an incentive to speak to the witness and did not do so), cert. denied, 549 U.S. 1125 (2007).

The court of appeals specifically noted (Pet. App. 61a) that this expert testimony could have been presented at trial, in support of a far more likely alternative-perpetrator theory available to petitioners—*i.e.*, that Alston and Bennett committed the crime and implicated petitioners to diffuse responsibility. Petitioners contend (Joint Br. 39 n.12) that this defense would have been "implausible" because Alston and Bennett did not know each other or have criminal histories of assault. But Alston and Bennett *confessed to the crime*. Petitioners' current theory that McMillan was the perpetrator requires the jury to accept the far more implausible scenario that Alston and Bennett both pleaded guilty to homicide without having participated in Fuller's murder, and that other eyewitnesses corroborated those false confessions, while McMillan —by himself or with an accomplice—was the "real" perpetrator.

In any event, even if the Court concludes that the expert testimony would have been developed as a result of the undisclosed McMillan information, the testimony that petitioners presented at the post-conviction hearing was not "unrebutted" (Joint Br. 38) and contributes little to petitioners' *Brady* claim. On cross-examination, both experts admitted that they could not dispute the opinion of Dr. Bray, who conducted the autopsy in 1985 and concluded that it was

not possible to tell how many people attacked Fuller. See pp. 16, 33, *supra*. The trial court specifically found that petitioners' expert testimony was not persuasive in that neither expert "could definitively state that Mrs. Fuller was attacked by one to three individuals as opposed to a larger group." Pet. App. 111a n.14.

e. Petitioners suggest that, armed with the undisclosed evidence, they would have joined hands in a common "alternative perpetrator" defense that directly challenged the government's theory of the case at trial, rather than accepting the existence of a group attack and saying "but not me." Overton Br. 37-38; Joint Br. 14; see Nat'l Ass'n of Criminal Def. Lawyers Amicus Br. 5-12. In fact, the prospect of such a unified defense was nil. Numerous witnesses—including two cooperators—testified that a large group attacked Fuller, so each defendant had a strong incentive to extricate himself from that group.

Moreover, the government's evidence "firmly impaled" Rouse, Overton Direct Appeal Br. 25; see Webb Direct Appeal Br. 17 (testimony of government witnesses "left no doubt about Rouse's participation in the murder of Mrs. Fuller"), and Yarborough's videotaped statement likewise made his conviction nearly inevitable (A715-A717). Given that reality, no other defendant would have tied his own prospects for acquittal to any theory positing the innocence of those two. Indeed, the claim that all defendants would have joined together in fingering McMillan is particularly unconvincing as to Overton. Overton's experienced trial counsel deemed the possibility that "the alley was pretty well deserted at the time of the murder" to be "absurd." Overton Direct Appeal Br. 25. And even

now, when petitioners are trying to persuade this Court that McMillan's identity would have fundamentally changed the trial by allowing petitioners to present "an overarching, unified defense" that McMillan killed Fuller (Joint Br. 15), Overton cannot bring himself to criticize Maurice Thomas—an eyewitness to a group attack who did not see Overton in the alley. Compare Joint Br. 13, 48-49 (challenging various aspects of Thomas's trial testimony), with Overton Br. 33 (noting without dispute the government's description of Thomas as "an important eyewitness with no apparent bias or motive to fabricate" and declining to join in the argument that Aunt Barbara's statement to police was *Brady* material) (citation omitted). Indeed, at trial, Overton embraced Thomas as an "honest kid," with "no ax[e] to grind"—who happened to walk by the alley "when the very crime itself is proceeding" and "sees the very beginnings of the murder in progress." A10817-A10819.

f. Finally, joint petitioners note (Joint Br. 49-50) that McMillan committed a "disturbingly similar murder" in 1992, and they contend that this evidence "confirms" the materiality of the prosecution's non-disclosure of McMillan's identity. See Innocence Network Amicus Br. 24-32. McMillan's 1992 murder of A.M. has no role in a *Brady* analysis. The government could not have disclosed McMillan's 1992 murder to petitioners before trial, because their trial occurred in 1985 and 1986. The court of appeals correctly held that "[a] *Brady* violation cannot be predicated on the government's failure to * * * disclose evidence that does not yet exist," and the 1992 murder therefore "has no bearing on the question of the materiality of

any evidence that the government actually did withhold." Pet. App. 36a.

Petitioners contend (Joint Br. 50) that the 1992 murder should be considered in the materiality analysis because *Brady*'s overriding concern is that a conviction is just. But *Brady* is not a general method for challenging the justness of a conviction after trial. The District of Columbia provides an actual-innocence remedy for that purpose. Petitioners invoked that remedy and failed. See Pet. App. 110a ("[P]etitioners have not come close to demonstrating actual innocence."); *id.* at 112a n.14 (petitioners' expert could not characterize Fuller and A.M.'s murders as signature crimes). The court of appeals correctly concluded that *Brady* is the "wrong framework" for evaluating McMillan's 1992 murder. *Id.* at 37a (quoting *District Att'ys Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009)).

2. Ammie Davis's statement was inadmissible and would have been rejected by the jury

Although joint petitioners have abandoned James Blue as an alternative perpetrator, Overton contends (Br. 43-46) that the defense could have presented Blue in that light if the government had timely disclosed Davis's statement accusing Blue of the murder. Davis's statement is favorable (it is exculpatory), and it was not disclosed to the defense before trial. Pet. App. 116a. No reasonable probability exists, however, that the result of the trial would have been different had the statement been disclosed.

a. As an initial matter, Davis could not have appeared as a witness at petitioners' trial because she was deceased. See A1296-A1301. Overton does not challenge (Br. 44) the court of appeals' conclusion that

Davis's statement would not have been admissible at trial to show that Blue killed Fuller because it does not even arguably fall within any hearsay exception. Pet. App. 37a, 41a; see *id.* at 117a-118a n.18. Instead, Overton contends (Br. 45) that if the government had disclosed Davis's statement in August 1985, when it turned over other *Brady* material, defense counsel could have prevented Davis's death. The trial court correctly found that speculation "dubious," especially considering that Davis was killed for reasons unrelated to this case. See p. 28, *supra*.

Overton further contends (Br. 45) that the defense would have done everything in its power to locate "Shorty," Davis's friend who allegedly witnessed Blue attack Fuller, and that Shorty could have testified at trial. That proposition is equally dubious. Goren testified (and his notes indicate) that he sent police to locate Shorty after he interviewed Davis in August 1985, but such a person could not be located. J.A. 266-268, 271. Nor has Overton located Shorty or proffered any favorable testimony that she would have given, if she exists. Pet. App. 44a-45a. As the court of appeals concluded, Overton "ha[s] not demonstrated *any likelihood* that [he] would have located and obtained helpful testimony from the girlfriend Davis mentioned, or that [he] would have discovered any other admissible evidence implicating Blue in Fuller's murder." *Id.* at 38a (emphasis added).

b. Even if Overton could have prevented Davis's death or located Shorty (and assuming that Shorty would have corroborated Davis's statement), Davis's statement would not have affected the outcome of petitioners' trial. Goren interviewed Davis, and she could not add any further information to the vague,

uncorroborated, and internally inconsistent statement that she gave to Lieutenant Loney. See pp. 27-28, *supra*. Overton contends (Br. 13, 44) that Davis's statement was credible because she accurately stated the date and location of the murder, knew that Fuller was not attacked with a gun or a knife, and knew that Fuller had been robbed of a small amount of money. See J.A. 56 (Davis stating that Blue had "killed her for just a few dollars"). But Davis was not correct that Fuller was robbed of "just a few dollars"—in addition to cash, she was robbed of gold chain necklaces, at least four rings, and a watch. See A5165-A5166, A5168-A5169. And her skeletal information about Fuller's murder would have been common knowledge to anyone following the news of this high-profile case. Furthermore, the jury would have heard that Davis had previously accused Blue of another murder and presented false information to the grand jury, ultimately causing prosecutors to bring and then dismiss charges against Blue. See p. 28, *supra*.

As the trial court explained, Davis's bare-bones account that Blue, acting alone, attacked and murdered Fuller contradicted "numerous eyewitness accounts and other evidence proving that crimes were committed by a large group of young men acting in concert." Pet. App. 117a. Not one other person interviewed in this investigation mentioned Blue as a possible perpetrator, either alone or as part of the group. *Id.* at 118a. Accordingly, "[e]ven if * * * Davis had lived to tell her story, any reasonable jury, in light of all the evidence, would surely have rejected it." *Id.* at 117a-118a.

B. No Reasonable Probability Exists That Disclosure Of Additional Impeachment Evidence Would Have Affected The Outcome Of Petitioners' Trial

Impeachment evidence that is favorable to the defense falls within the government's disclosure obligations under *Brady*. *Giglio*, 405 U.S. at 154. "[E]vidence impeaching an eyewitness may not be material," however, "if the State's other evidence is strong enough to sustain confidence in the verdict." *Smith*, 132 S. Ct. at 630 (citing *Agurs*, 427 U.S. at 112-113 & n.21). The courts below correctly concluded that the undisclosed impeachment evidence "had little prospect of changing the result at trial." Pet. App. 45a.

1. Petitioners contend (Joint Br. 44-45; Overton Br. 46-48) that they could have used the delay in transmission of Ammie Davis's statement to the lead prosecutor to impeach the competency of the government's investigation. The court of appeals correctly concluded that if Davis's statement had been admitted for that limited purpose, "its impact would have been negligible." Pet. App. 43a-44a.

Although transmission of the report to Goren was delayed, the prosecution received it almost three months before petitioners' trial began and had ample time for investigation. See pp. 27-28, *supra*. Goren did not ignore the report; he promptly followed up by interviewing Davis for any further information implicating Blue. That interview, in which Davis was "playful" and "not serious" about her accusation, proved fruitless except for the additional information that Davis's girlfriend who could supposedly corroborate her story was named Shorty. J.A. 266-268, 271. Goren sent detectives to look for Shorty with no success. J.A. 268, 271.

No reasonable jury would have doubted the thoroughness of the government's investigation based on the delayed transmission of this report or any of the other criticisms of a year-long police investigation leveled by petitioners. See, *e.g.*, Joint Br. 48; Overton Br. 48-49 (noting that police allowed Eleby and Porter to be interviewed together for a short period of time before separating them). "In an investigation this complex and extensive," which took nearly a year and involved more than 400 interviews in a high-profile murder, "it is almost inconceivable that mistakes would not be made." Pet. App. 113a. The courts below correctly concluded that evidence of a minor slip-up in this massive investigation did not have any possibility of affecting the outcome of petitioners' trial. *Id.* at 44a, 113a.

2. Information that Eleby was high on PCP when she met with investigators is favorable to the defense and could have been used to impeach Eleby. But the absence of that specific impeachment does not undermine confidence in the outcome of petitioners' trial.

Joint petitioners argue (Br. 47) that "[a] jury would have had doubts about Eleby's entire testimony if it learned that she was high on PCP when she met with investigators." But the jury was well aware of Eleby's PCP use. Jacobs testified that Eleby used PCP at nightclubs. A7644-A7645. The parties stipulated that Eleby was twice admitted to the hospital in 1985 for PCP abuse. A9497. Catlett's counsel derided Eleby and Jacobs in his closing as "the PCP twins." A10741. Charles Turner's counsel told the jury that Eleby may be a PCP junkie. A10926. Furthermore, the jury was already aware from Eleby's own testimony that she had smoked PCP *shortly before she witnessed the*

attack on Fuller in the alley. A535-A536, A561-A562. Goren candidly admitted this in his closing rebuttal. J.A. 193 ("You have to take into consideration the fact that Carrie Eleby and Linda Jacobs said that they were using PCP that day and how that affected their ability to perceive this event.").

Overton points out (Br. 18) that information about Eleby's PCP use was inconsistent with her trial testimony that she had only used PCP once, on the day of Fuller's murder. See A564-A565. But the defense made maximum use of that lie at trial. Overton's counsel argued in closing that Eleby's testimony about her PCP use was "absolutely false," pointing to the stipulations. A10801-A10802; see A10926-10930 (Ruffin's counsel pointing out Eleby's lie about PCP use). He told the jury that Eleby was "obviously heavily into PCP" and reminded them that they had seen her "testify[] in this spacey way," causing a lawyer to question her competency. A10802. The government did not dispute any of that in its rebuttal. Information about Eleby's PCP use was cumulative, and the lower courts correctly concluded that disclosure of additional information on this subject would have been "of little consequence" and "certainly would not have changed the outcome" of the trial. Pet. App. 46a, 127a.

3. a. Information that Kaye Porter lied to police at Eleby's request, by confirming that she was present when Alston told Eleby that he participated in robbing Fuller, is favorable to the defense and could have been used to impeach Porter. This impeachment, however, would not have made any difference in the outcome of petitioners' trial. Porter was a minor witness who testified only about Catlett's partial confes-

sion to her months after the crime. Pet. App. 125a; see A7757-A7758 (Catlett told Porter "[a]ll he did was kick [Fuller] and somebody else stuck the pole up in her," because she "wasn't acting right"). And Porter was impeached, even about Catlett's confession, with grand jury testimony in which she related a much less incriminating version of that confession. A7776, A7780.

Furthermore, the evidence against Catlett was quite strong. Pet. App. 46a. As summarized by the court of appeals, "Alston, Bennett, Eleby, and Thomas all testified that they saw Catlett physically attack Fuller; Montgomery saw him in the park before the murder and watched him cross the street and head toward Fuller; Thomas also recalled hearing Catlett tell someone why he and Fuller's other assailants killed her; and Catlett had no alibi." *Ibid.* The lower courts correctly found "virtually no chance" that disclosure of Porter's previous lie would have affected the verdict. *Id.* at 125a.

b. The information about Porter's lie also could have been used to impeach Eleby. But in light of how extensively Eleby was impeached at trial, the trial court was correct in concluding that the additional impeachment value of Eleby's lie would have had a negligible impact on the jury's assessment of her credibility. Pet. App. 46a. Eleby admitted at trial that she had lied before the grand jury about whether Smith and Christopher Turner were involved in the attack, and she was further impeached with other statements she made to the grand jury that were inconsistent with her trial testimony. See p. 19, *supra*. Eleby testified as an eyewitness to the crime, but the jury also learned that she initially told police that

she was not in the alley, but had only heard about what happened from Alston. A8595-A8599. And the jury was expressly instructed that Eleby's testimony in particular "should be received with caution and scrutinized with care" because she had admitted to having perjured herself before the grand jury. A856-A857.

Overton contends (Br. 51-52) that Eleby's request for Porter to lie would have provided grounds for a "fundamentally different kind" of impeachment because it showed that she "actively sought to fabricate evidence." (emphasis omitted). The impeachment of Eleby at trial, however, involved a significantly more serious false statement than the one Eleby asked Porter to make. Porter's false statement was an unsworn statement during a police interview. But Eleby admitted at trial that she had previously lied under oath. Furthermore, multiple witnesses—including Alston—corroborated that Alston had indeed made an incriminating statement to Eleby in a car. J.A. 301, 303, 307-308. Eleby was thus not "fabricat[ing] evidence" (Overton Br. 52) (emphasis omitted), but creating false corroboration for something that was true. Pet. App. 124a-125a.

As Overton notes (Br. 52-53), a witness who has already been thoroughly impeached by one means may still be further discredited by others. But cases where such additional impeachment is material are unusual and do not compare to this one. In *Wearry* v. *Cain*, 136 S. Ct. 1002 (2016) (per curiam), the government's case was built on the jury crediting one witness's account, and the government withheld evidence that (1) one of the witness's claims was physically impossible; (2) the witness had coached another witness to lie

about the murder; and (3) the witness may have implicated the defendant to settle a personal score. *Id.* at 1006-1007. That evidence, combined with other undisclosed information of significance, required reversal. Likewise, in *Kyles*, the government failed to disclose that one of its two best witnesses had earlier provided a "vastly different" account of the murder that "would have fueled a withering cross-examination, destroying confidence in [that witness's] story and raising a substantial implication that the prosecutor had coached him." 514 U.S. at 442-443. Here, by contrast, Eleby's effort to get Porter to confirm her (true) account of the car ride with Alston, which had two other witnesses (plus Alston) to corroborate it, had no similar potential to undermine the prosecution. J.A. 303, 307-308.

4. Joint petitioners (but not Overton) contend (Br. 21) that the prosecution should have disclosed that police "question[ed] [Linda Jacobs] hard" after she denied knowing anything about the crime while insisting that Smith and Christopher Turner "didn't have anything to do with the murder." A1009. Hearing testimony revealed that, in response to Jacobs's contradictory claims, Detective Sanchez-Serrano repeatedly asked her, in a raised voice, "[h]ow do you know that?" and slapped his hand on a desk. A2298-A2299, A2479-A2480.

That a detective "changed [his] tone with [Jacobs]" during an interview is not favorable evidence under *Brady*. A2479; *Agurs*, 427 U.S. at 109 (prosecution need not give the defense a detailed accounting of all police investigatory work on a case). Furthermore, although petitioners contend (Joint Br. 46-47) that "Jacobs immediately recanted having seen the crime," Goren's notes state only that, after admitting she had

been in the alley and seen something, Jacobs tried "to back out of telling us," not that she recanted. A1009. Jacobs did more clearly "vacil[l]ate[ ] back and forth" in subsequent interviews before her grand jury testimony. *Ibid.* But, as Jacobs informed the grand jury, she did this because she had recently been accused of "snitching" and threatened with a knife. A1973-A1978 (Jacobs was "scared because they found out so quickly that [she was] down here at court."). The trial court agreed to withhold that portion of Jacobs's grand jury testimony at trial, A7519-A7522, and given the underlying circumstances, petitioners would not likely have exposed this event to the jury if it had been disclosed. In any event, as the court of appeals noted, Jacobs was impeached with her denial of witnessing the attack before acknowledging that she was there, so the jury was aware that she had vacillated. A7673-A7674, A7707-A7708; Pet. App. 22a n.18.

5. Aunt Barbara's statement to police that she did not recall Maurice Thomas telling her about an attack in the alley could have been used to impeach Thomas's trial testimony that, after witnessing the attack, he ran home and told his Aunt Barbara what he saw. See A1010. Aunt Barbara's statement to police, however, would have been totally unsurprising to the jury, given Thomas's trial testimony that she told him, "don't say nothing to no one else." J.A. 121; see Pet. App. 47a.

Joint petitioners (but not Overton) attempt (Br. 13, 48-49) to identify inconsistencies between Thomas's grand jury testimony and his trial testimony to show that his testimony was weak to begin with.[9] But peti-

[9] Joint petitioners contend (Br. 13, 48) that Thomas told the grand jury he had witnessed the attack from an impossible vantage

tioners had all of that information before trial and used it to extensively cross-examine Thomas about what he saw. Nonetheless, the defense never found any effective way to discredit this junior high school student with "no motive to lie, no skin to save." A10762-A10764; Pet. App. 47a (noting strength of Thomas's trial testimony). As the court of appeals concluded, Aunt Barbara's statement that she did not recall Thomas having told her about the attack on Fuller "was unlikely to have discredited Thomas in any significant way." Pet. App. 47a.

Moreover, as described above, p. 35, *supra*, petitioners were aware that Thomas claimed to have told his Aunt Barbara about the assault in the alley, and the defense noticed that the government had not called her as a witness to corroborate Thomas's account. See A10574-A10576 (Catlett's counsel asks for a missing-witness instruction for Aunt Barbara, but

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point. He did not. The alley where Fuller died runs to the west side of Ninth Street and, across the street, a second alley runs from Ninth to Tenth. Because the second alley starts further south, a person standing in that alley could not see far into the alley where Fuller died. J.A. 50. But Thomas never testified that he stood in the second alley. Instead, he told the grand jury that he was "like by" and "near" that alley, A1929, A1944, and that he was "standing by that fence where the Doberman Pinscher is," A1943. Thomas's trial testimony was entirely consistent: Thomas said he stood on the east side of Ninth Street in front of a house with a fence and a dog, "just a little bit more up" from the second alley. A7271-A7274; see A613-A614, A7373-A7380; J.A. 128-130. That location, which was both "by" and "near" the second alley, had a clear view to the alley across the street. See J.A. 50. Nor did Thomas alter his testimony about the group of observers. Thomas told the grand jury that this group was "behind" the people assaulting Fuller, A1955-A1956, and his trial testimony was the same, A620-A621, A640-A641, A7281-A7282, A7386.

the trial court finds that defense counsel "had plenty of time" to interview her and could have called her to dispute Thomas's account); 545 A.2d at 1210 n.13 (court of appeals rejecting Catlett's missing-witness argument on direct appeal). The defense's decision not to pursue Aunt Barbara's testimony shows that petitioners did not view the missing corroboration to be an important part of their defense.

6. Joint petitioners contend (Br. 47) that, to the extent the government relies on heavily impeached witnesses, such as Eleby, Jacobs, and Porter, "additional impeachment of them is hardly inconsequential." But extensive impeachment is the very reason why cumulative lines of impeachment often have little additional force. Jacobs, for example, was impeached with her earlier denials of having witnessed the crime, and further evidence that she had "vacillated" would have been immaterial. See pp. 72-73, *supra*. Nevertheless, Jacobs's testimony was both admissible and believable. In particular, Jacobs's emotional breakdown when asked to describe Rouse's assault on Fuller supported her claim that she saw a group attack in the alley. Pet. App. 107a. Her testimony was therefore probative even though Jacobs was "young," "inarticulate," "not very smart," and initially hesitant to reveal what she had seen. J.A. 193; A658-A663; see A12611 (Judge Weisberg describes Jacobs's trial testimony as "pretty convincing").

C. The Undisclosed Evidence Considered Cumulatively Does Not Raise A Reasonable Probability That Petitioners Would Have Been Acquitted

1. The court of appeals correctly concluded that no reasonable probability exists that the undisclosed evidence, considered cumulatively, would have changed

the outcome of petitioners' trial. Pet. App. 48a-54a. Even with the additional impeachment information identified by petitioners, the government's case looks almost no different than it did at trial. The jury would have learned of a delay in transmitting Ammie Davis's statement to Goren—an isolated misstep that would have cast no doubt on the comprehensiveness of the investigation, especially because Goren immediately investigated Davis's story. The jury would have heard some additional impeachment of Eleby and Jacobs, who were thoroughly impeached at trial yet still provided remarkably consistent accounts of witnessing a group attack. It would have heard incremental impeachment of Porter, a minor witness against Catlett. And it would have heard that Aunt Barbara did not recall Thomas's telling her that he witnessed an attack in the alley (which she had told him not to report to anyone). The court of appeals correctly concluded that this information would have had a negligible impact on the jury's consideration of the case. *Id.* at 48a.

Although petitioners have tried to construct a persuasive alternative-perpetrator theory that they could have presented to the jury in an attempt to raise a reasonable doubt about their guilt, the undisclosed evidence is not material unless it "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 434-435. But against petitioners' skein of speculation, "the government presented the testimony of several eyewitnesses," including two cooperators who confessed their own guilt and implicated petitioners in a group attack on Fuller. Pet. App. 49a. Moreover, no witness (aside from the incredible Ammie Davis) has ever disputed the overall description of the

prosecution's witnesses about how the attack occurred. Montgomery credibly testified to having seen the events leading up to the attack unfold in the park; Thomas described seeing the beginning of the attack in the alley as he walked by; and Eleby and Jacobs witnessed the attack culminate in the sodomy in the garage. This testimony corroborated Alston and Bennett's description of a group attack planned in the park and carried out in the alley. See pp. 10-15, *supra.* And each petitioner failed to present a convincing alibi.

The eyewitness testimony was further corroborated by incriminating admissions from some of the petitioners, including Yarborough's videotaped statement describing a group attack (p. 7, *supra*); Catlett's statement on the night of the attack (overheard by Thomas) that the group had to kill Fuller because she recognized someone (J.A. 126-128); Catlett's statement to Porter that "[a]ll he did was kick her and somebody else stuck the pole up in her" (A7757-A7758); Rouse showing up at Ward's house that night with blood on his pants (A755-A758) and his later statement to her that he "did the worst thing to that lady in the alley" (A760); and the incriminating conversation between Overton and Christopher Turner overheard by Detective Villars (A690-A692).

Against all of that evidence, petitioners theorize that Fuller's faint groans, heard by only two members of a group that walked through the alley between 5:30 and 5:45 p.m., would have given rise to a credible alternative theory that Fuller was being attacked at that time by one or two perpetrators other than Alston, Bennett, or any of the petitioners. As the court of appeals found, that would have been "exceedingly

implausible and difficult for the jury to accept." Pet. App. 51a-52a.

Petitioners rely (Joint Br. 42) (citation omitted) on a reporter's notes from a 1997 interview with Goren to claim this case was a "close one" that "easily could have gone the other way." This was not a close case. Ten different judges in the District of Columbia have examined petitioners' convictions, and every one of them has been thoroughly convinced of petitioners' guilt. See, *e.g.*, A9041 (trial judge); 545 A.2d at 1206 n.2 (direct appeal); Mem. Op. & Judgment 2 (Charles Turner's direct appeal); Pet. App. 123a, 129a (post-conviction hearing); Pet. App. 51a (post-conviction appeal). The reporters notes are, in fact, consistent with the lower courts' assessment. Goren noted 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. A1734, A1758. And he testified at the hearing that the government "ended up with a strong case," that "everything sort of fell [the prosecution's] way" during the trial, and that "[i]t ended up being a much stronger case than it was when it began." A1735, A1751. Nor does the length of deliberations show any deficit of proof given the jury's need to individually assess the culpability of ten defendants after a six-week trial and three days of closing arguments.

Petitioners must present more than the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial." *Agurs*, 427 U.S. at 109-110. They must demonstrate a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been differ-

ent." *Bagley*, 473 U.S. at 682. They have not come close to making that showing.

2. Petitioners contend (Joint Br. 32-33, 37; Overton Br. 40-43) that the court of appeals speculated about what the jury *could have* done with the non-disclosed evidence, rather than focusing on what the jury *would have* done with it. That is not an accurate description of the court's analysis.

Because *Brady* asks whether "a reasonable probability" exists that withheld evidence would have affected the verdict, *Strickler*, 527 U.S. at 281, some hypothesizing is inevitable. But even though the court of appeals considered what the jury might have thought about the previously undisclosed evidence, the court unquestionably concluded the jury *would have* rejected it. The court explained that petitioners' theory had to be weighed against the testimony of several eyewitnesses, including two cooperators, which was corroborated by several incriminating statements made by petitioners. Pet. App. 49a. The court concluded it was "far more likely * * * that the jury would have" rejected petitioners' alternative-perpetrator theory "than that the jury would have thought * * * all the government's witnesses were lying." *Id.* at 50a. The court explained that the alternative-perpetrator theory "would have been exceedingly implausible and difficult for the jury to accept" because it would have to conclude "not only that all the government witnesses were lying or mistaken about every defendant at trial, but that Alston and Bennett, the government's two cooperating witnesses, were innocent even though they had each pleaded guilty to homicide." *Id.* at 51a-52a. That

"would not have been a plausible claim to make to the jury." *Id.* at 52a.

In that respect, this case is nothing like *Smith*, in which the Court refused to entertain reasons why a jury "might" have discounted undisclosed favorable statements of a witness who provided "the *only* evidence linking [the defendant] to the crime." 132 S. Ct. at 630. Here, overwhelming evidence established petitioners' guilt, and the court of appeals confidently concluded that the jury would have disbelieved petitioners' alternative-perpetrator theory in light of that evidence.

Nor is petitioners' case anything like *Wearry*, where the Court described the State's capital-murder case against the defendant as a "house of cards" built on the jury crediting the account of an eyewitness over the defendant's alibi. 136 S. Ct. at 1006. The Court had no confidence that various items of undisclosed impeachment evidence would have been rejected by the jury and criticized the state post-conviction court for "emphasiz[ing] reasons a juror might disregard new evidence while ignoring reasons she might not." *Id.* at 1007. The court of appeals here, however, reviewed the multiple corroborating sources supporting the verdict and found it implausible that a jury would conclude that Fuller was attacked by an alternative perpetrator in light of the strong evidence that petitioners had launched a group attack.

3. Petitioners and their amici contend (Joint Br. 26; Overton Br. 22; Cato Institute Amicus Br. 4-10; Former Prosecutors Amicus Br. 19-21) that the court of appeals applied a heightened *Brady* standard that required petitioners to show that the jury would have

doubted "virtually everything" offered by the government's witnesses. That argument lacks merit.

The 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 that the alternative-perpetrator information lacked that potential because it would have assisted the defense only in challenging "the basic structure of how the crime occurred," *i.e.*, the theory of a group attack. *Id.* at 54a. Because all eyewitnesses had described such an attack, the undisclosed information could have given rise to a 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 did not deviate from this Court's well-established materiality standard. It represented the only logical way in which the undisclosed evidence could have undermined confidence in the outcome of petitioners' trial. See also *id.* at 123a (trial court concluding that petitioners' alternative-perpetrator theory was "definitely not material" because the possibility that McMillan killed Fuller to the exclusion of petitioners "flies in the face of all the evidence").

Petitioners essentially acknowledge (Joint Br. 43-44) that their alternative-perpetrator evidence would only be material if it caused the jury to doubt all of the government's eyewitnesses. Petitioners' theory of how the undisclosed evidence would create reasonable doubt is that the jury would hear the alternative-perpetrator theory and it would cause them to "seri-

ously consider that [the prosecution's] witnesses" were perjuring themselves by "attempting to describe something that they had not seen." *Ibid.* Indeed, throughout their briefs, petitioners include references (*id.* at 17, 23-24, 43-44; Overton Br. 19; see Center on Wrongful Convictions of Youth Amicus Br. 14-25) to the recantations of supposedly perjured testimony from Alston, Bennett, and others. Those recantations have no role whatsoever in the materiality analysis. The recantations of Alston and Bennett were rejected by the trial court as "nothing short of preposterous," Pet. App. 103a; Jacobs's hearing testimony was dismissed as useless, *id.* at 104a; Montgomery did not actually recant but instead reaffirmed the truth of his testimony, *id.* at 109a; and the court rejected Yarborough's testimony trying to disavow his videotaped statement as "patently incredible," *id.* at 98a. And post-verdict recantations in any event cannot affect the analysis of whether undisclosed evidence was material—*Brady* must focus on prosecutorial decisions at the time of trial and cannot be based on future events that the jury could not have heard about.

4. Finally, petitioners' amici contend (Innocence Network Amicus Br. 17-21; see Joint Br. 39; Overton Br. 32) that third-party perpetrator information is presumptively material under *Brady* absent strong physical evidence of guilt. None of the cases cited by amici support that general proposition. Each applies a usual *Brady* analysis evaluating all the evidence to determine whether a reasonable probability exists that the undisclosed information would have affected the outcome of trial. The absence of substantial physical evidence linking a defendant to the crime, an otherwise weak case, and compelling evidence that

another person committed the crime are all factors that obviously support a finding of materiality. But, as demonstrated above, the case against petitioners is not weak, and the alternative-perpetrator evidence is entirely speculative. And although no physical evidence linked petitioners to the crime (other than Ward's testimony that she saw blood on Rouse's pant leg on the night of the murder), none of the cited cases involves testimony from accomplices who accepted criminal responsibility.

D. Nothing Justifies A Different Conclusion For Overton

Overton contends (Br. 23, 49-53) that Eleby's testimony was the linchpin of the "flimsy" case against him, and that further impeachment of her would have triggered his acquittal. As proof that "Eleby's testimony alone explains why [he] was convicted," Overton notes that the jury acquitted Harris, against whom Eleby did not testify. *Id.* at 50; see *id.* at 8, 23, 32-33, 39. That argument is misguided.

Although the jury deliberated for two additional days before convicting Overton, the evidence against him was "overwhelming." 545 A.2d at 1217. As Overton notes (Br. 7, 23), Alston, Bennett, and Eleby testified that Overton was a major participant in Fuller's murder. Critically, Montgomery substantially corroborated that testimony. Montgomery testified that Overton spent the entire afternoon in the park and returned to the park with Catlett after news of the crime began to spread, thereby refuting Overton's alibi. A360, A5529, A5542-A5543, A5549, A5677-A5678. Even more significantly, Montgomery testified that, after "[s]omebody said they were going to get that one," Montgomery saw Overton pointing in the direction of a lady standing on the corner of

H Street. A302-A304. Overton then left the park along with Catlett, Rouse, Charles Turner, and several others. A305-A306, A324-A325.

That testimony did not, as Overton suggests (Br. 23), "plausibly suggest[] that Overton was not a participant in the attack." To the contrary, it strongly corroborated Alston and Bennett's testimony that, after agreeing to commit a robbery, Overton joined the others in pursuit of Fuller. A366-A380, A466-A475. Nor did Overton head "in a different direction" or "away from the location where Mrs. Fuller's body was later found." Overton Br. 10; *id.* at 33. Montgomery testified that Overton (and others) appeared headed toward Ninth Street, a direct route to the alley where Fuller died. A305-A306. And although Overton lived on Ninth Street, no one (including Overton) testified that he separated himself from the group or went home. A447.

Montgomery's testimony about Overton was therefore devastating. Nor has Overton, who was godfather to Montgomery's child, A5585, ever explained why Montgomery would falsely implicate him. Indeed, although Overton now characterizes Montgomery's testimony as "consistent" with his innocence (Overton Br. 9), at trial he argued that Montgomery must have been remembering a different day. A10829-A10831. And on appeal, Overton conceded that Montgomery's testimony "did lend strength" to the case against him. Overton Direct Appeal Br. 29.

Overton's statements to Christopher Turner while in custody further bolstered the case against him. Detective Villars testified that Overton said he "knew of the two persons that gave them up" and agreed with Turner that the police knew where everyone was

in the alley. A690-A691. Although not a direct confession, those statements were substantially incriminating, as Turner effectively acknowledged when, after noticing Detective Villars, he assured Overton not to worry as Villars "just came in." A692.[10]

Although Thomas knew Overton and did not see him in the alley, A610, A7389-A7390, his testimony was "somewhat neutral" as to Overton. 545 A.2d at 1217. Thomas watched the attack only briefly and was focused on the group surrounding Fuller. A640. Although he saw other people standing further back, he did not see any of their faces. A620, A7386-A7388, A7427-A7428; see A7401 (Thomas knew Jacobs but did not see her in the alley). At best, therefore, Thomas's testimony suggested only that Overton was not assaulting Fuller during the moment when Thomas looked in. It did not disprove the testimony from others that Overton was in the alley and participated in the attack, A430, A5872; dragged Fuller into the garage, A5885-A5886; and held her legs while she was sodomized, A497, A553-A554.

As for Overton's alibi, it thoroughly undermined his case, and "could very well have been the key to [Overton's] conviction." Overton Direct Appeal Br. 30. Overton had two previous robbery convictions and did not testify. See A11500.[11] His grandmother, the key

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[10] In 1993, a court found that Detective Villars had provided false testimony in another case. A1722, A2287-A2288. Although troubling, that incident occurred after petitioners' trial and does not constitute *Brady* evidence in this case.

[11] By sentencing, Overton had three robbery convictions and an outstanding armed robbery warrant. A11500. His sentence in this case was made consecutive to his most recent robbery sentence of five to 15 years of imprisonment. A11501.

witness to the story that Overton came home drunk at 3 p.m. and was asleep when Fuller was killed, essentially admitted that her testimony was coached and not her own recollection. See p. 20, *supra*. On appeal, Overton described his own alibi as "deadly," "bad," "seemingly false," and "devastated." Overton Direct Appeal Br. 1, 27, 29; see 545 A.2d at 1217 (Overton's alibi "discredited").

In short, the jury did not convict Overton because Eleby's extensive cross-examination was insufficient. Indeed, Overton admitted on appeal that Eleby was "no real factor" in his conviction because of, *inter alia*, her "total impeachment which was as varied and far-reaching as you will ever find in a criminal trial." Overton Direct Appeal Br. 29. Nor was Eleby's failure to see Harris in the alley the key to Harris's acquittal. In fact, the government had a substantially weaker case against Harris, wholly apart from Eleby's testimony. Harris took the stand in his own defense, A8487-A8577, and he presented five alibi witnesses, none of whom was thoroughly discredited. A8305-A8480; see 545 A.2d at 1217. Furthermore, Montgomery, who knew Harris, testified that he did not see Harris in the park on the day of the murder. A5605-A5609. Although Alston and Bennett testified that Harris participated in the crime, in his initial statement to police, Bennett claimed that he did not know Harris or Harris's name, and said that if Harris was in the alley, he did not do anything. A5965-A5967. Accordingly, Harris's acquittal was "perfectly logical" and "[not] surpris[ing]," while a similar result for Overton would have thrown "logic" "out the window." A1738 (Goren's post-trial comments).

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The focus of a materiality analysis under *Brady* is whether, in the absence of the undisclosed information, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434-435. The evidence of petitioners' guilt is overwhelming, and no reasonable probability exists that the undisclosed information at issue would have changed the outcome of petitioner's trial. The Court should have confidence in petitioners' convictions.

CONCLUSION

The judgment of the D.C. Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Glossary

Petitioners

Timothy Catlett ("Snotrag" or "Tim-Tim"). Catlett was seen dancing and singing "I need some money" in the park; Thomas later saw Catlett striking Fuller and overheard him saying they had to kill her.

Russell Overton ("Bo-Bo" or "Bo"). Montgomery saw Overton pointing in Fuller's direction and then crossing H Street with numerous co-defendants; Detective Villars overheard Overton and Christopher Turner discussing Fuller's murder.

Levy Rouse. Numerous witnesses saw Rouse sodomize Fuller with a pipe, and he later made damaging admissions to his girlfriend Catrina Ward.

Kelvin Smith ("Hollywood"). Smith was dating Carrie Eleby, and Eleby and Jacobs were searching for him when they entered the alley and saw Fuller's murder.

Charles Turner ("Fella"). Alston testified that Turner shoved Fuller into the alley and held one of her legs while she was sodomized.

Christopher Turner ("Chrissie"). Charles Turner's younger brother; Detective Villars heard Christopher Turner and Overton discussing Fuller's murder.

Clifton Yarborough. Yarborough gave both written and videotaped statements and, in the latter, admitted that he was present in the alley while others assaulted and sodomized Fuller.

Other Defendants

Calvin Alston. Alston gave a videotaped statement claiming that he acted as a lookout; by trial, Alston had pleaded guilty to second-degree murder and admitted that he targeted Fuller for robbery.

Harry Bennett ("Derrick"). Bennett gave a videotaped statement, entered a guilty plea to manslaughter and robbery, and testified for the government at trial.

James Michael Campbell ("Mike"). Campbell, who gave a videotaped statement, was severed before trial and later pleaded guilty to manslaughter and attempted robbery.

Alphonso Harris ("Monk"). Alston and Bennett testified against Harris at trial but he presented an alibi defense and was acquitted.

Felicia Ruffin ("Lisa" or "Luncheon Lisa"). Bennett testified that Ruffin (who was acquitted) was bending down and picking things up in the alley and that she took one of Fuller's rings from Rouse.

Steven Webb. Webb was convicted at trial and later died in prison.

Police and Prosecutors

AUSA Jeffrey Behm. Behm was the second chair prosecutor at trial and had personal knowledge from an earlier prosecution that Ammie Davis had falsely accused James Blue of a different murder.

AUSA Jerry Goren. Goren became the lead prosecutor in late November 1984 after Alston's videotaped statement; he testified at the post-conviction hearing about, *inter alia*, interrogation techniques and evidence not turned over to the defense.

Detective Donald Gossage. Gossage knew everyone in the Eighth and H Street area and learned from Eleby that Alston had made admissions to her about the crime.

Detective Patrick McGinnis. See below.

Detective Ruben Sanchez-Serrano. Sanchez-Serrano was partners with McGinnis and the two interviewed many of the defendants and witnesses, including Eleby.

Officer Melvin Scott. Scott was detailed to the Fuller investigation and participated in some of the interviews, including Webb.

Key Prosecution Witnesses

Calvin Alston. See above.

Harry Bennett ("Derrick"). See above.

Dr. Michael Bray. Bray, a forensic pathologist, testified that Fuller died from a combination of injuries and estimated the time of death between 4:30 and 6:30 p.m.

Carrie Eleby. Eleby, a teenage PCP user, was looking for her boyfriend Smith when she viewed Fuller's murder in the alley and recalled seeing her pink hair curlers on the ground.

William Freeman. Freeman discovered Fuller's body when he went to the garage to urinate and then saw two men run into the alley from Ninth Street and run towards I Street when the police arrived.

Vincent Gardner ("Boo"). Gardner went to the Eighth Street entrance to the alley after he heard about a murder and saw Charles Turner, Rouse, Catlett, and Smith there.

Linda Jacobs ("Smurfette"). Jacobs, a friend of Eleby, smoked PCP with her and then watched a large group attack and murder Fuller in the alley.

Detective Patrick McGinnis. McGinnis reported to the crime scene and later interviewed numerous defendants and witnesses, including Yarborough.

Melvin Montgomery. Montgomery observed a group of people (including Charles Turner, Overton, Catlett, and Rouse) planning Fuller's robbery in the Eighth and H Street park, and then saw the assailants depart in two groups towards the alley.

Kaye Porter. Porter informed AUSA Goren that Eleby had asked her to claim that she (Porter) had overheard Alston admit to robbing Fuller; at trial, Porter testified that Catlett told her that he just kicked the victim and that someone else stuck the pole up her.

Maurice Thomas. From the Ninth Street sidewalk, Thomas saw Fuller being assaulted by a large group and later overheard Catlett explain to another man that they had to kill her because she recognized someone.

Detective Daniel Villars. Villars overheard Christopher Turner and Overton make incriminating remarks while in custody.

Catrina Ward. Ward, who was in a love triangle with Bennett and Rouse, testified that Rouse had blood on his pants on the night of the murder and that he later told her that he "did the worst thing to that lady in the alley."

Other Trial Witnesses

Christopher Taylor. Taylor, who testified in support of Rouse's alibi, was impeached with his statements to police officers that he heard people talk about "getting paid"; saw Rouse and others cross H Street towards a woman who met Fuller's description, and then watched the murder in the alley.

Others

Roland Franklin ("Burt"). Franklin gave a videotaped statement describing events before and after the crime that implicated several petitioners.

Dorothy Jean Harris ("Aunt Barbara"). Thomas testified that Aunt Barbara, a family friend, warned him not to tell anyone else about having seen an assault in the alley.

James Blue. Accused by Ammie Davis of murdering Fuller; Blue later murdered Davis for unrelated reasons.

Ammie Davis. Davis told Lieutenant Loney that she had seen James Blue pull a woman into the alley on the day of the murder and beat her, and that her friend "Shorty" was also there.

Willie Luchie. Luchie told investigators that he walked through the alley with others that evening, heard "several groans" as they passed the garage, and remembered the doors to the garage being closed.

James McMillan. McMillan, who lived on Eighth Street, was identified by Freeman and others as one of the two men who entered the alley while Freeman was waiting for police; McMillan subsequently robbed and assaulted two women and, upon his release from prison, sodomized and murdered another woman in a nearby alley in 1992.

Gerald Merkerson. Merkerson was identified as the second person who entered the alley from Ninth Street after the murder and ran away when the police arrived.

Ronald Murphy. Murphy walked through the alley with Luchie, Watts, and others at around 5:30-5:45 p.m. and heard nothing unusual; Murphy told police he purchased Fuller's ring later that evening at the liquor store for $5 from an unknown man and woman.

Charnita Speed. Speed saw McMillan and Merkerson in the alley and said that McMillan appeared to be putting something under his coat and Merkerson appeared to be stuffing papers under his shirt.

Jackie Tylie. Tylie went into the alley with Freeman after he discovered Fuller's body and told police that she saw McMillan there, accompanied by two other people.

Jacqueline Watts. Watts walked through the alley with Luchie, Murphy, and others and reported hearing some moans; Watts later received one of Fuller's rings from her boyfriend Murphy.