IN THE

District of Columbia Court of Appeals

Nos. 12-CO-1362 (Lead), (Consolidated with 12-CO-1538, 12-CO-1539, 12-CO-1540, 12-CO-1541,12-CO-1542, 12-CO-1543)

CHARLES S. TURNER, CHRISTOPHER D. TURNER, RUSSELL L. OVERTON, LEVY ROUSE, CLIFTON E. YARBOROUGH, KELVIN D. SMITH, TIMOTHY CATLETT,

Petitioners-Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Superior Court Case No. FEL8615-84
(Consolidate Case Nos. FEL8513-84, FEL8612-84, FEL8613-84, FEL8614-84, FEL8616-84, FEL8617-84)

AMICI CURIAE BRIEF OF FORMER JUDGES AND PROSECUTORS SUPPORTING APPELLANTS AND REVERSAL

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IDENTITY AND INTEREST OF THE *AMICI CURIAE*[1]

The following private persons comprise a group of individual *Amicus Curiae* who will hereafter be referenced as "*Amici*":

1. James S. Brady, Former United States Attorney, Western District of Michigan (1977-1981);

2. W. Thomas Dillard, Former United States Attorney, Northern District of Florida (1983-1987); United States Attorney, Eastern District of Tennessee (1981); Assistant United States Attorney, Eastern District of Tennessee (1967-1976, 1978-1982);

3. John J. Gibbons, Former Judge, United States Court of Appeals for the Third Circuit (1970-90) (Chief Judge (1987-90));

4. Nathaniel R. Jones, Former Judge, United States Court of Appeals for the Sixth Circuit (1979-2002); Assistant United States Attorney, Northern District of Ohio (1962-68);

5. Redding Pitt, Former United States Attorney, Middle District of Alabama (1994-2001);

6. Richard J. Pocker, Former United States Attorney, District of Nevada (1989-90); and

7. James J. West, Former United States Attorney, Middle District of Pennsylvania (1985-93).

Amici are former prosecutors and judges who maintain an active interest in the fair and effective functioning of the criminal justice system. This interest is derived from a desire that criminal defendants receive fair and just treatment, and to protect the integrity of, and public confidence in, the justice system.

This brief focuses on the essential constitutional safeguard recognized by the U.S. Supreme Court fifty years ago in *Brady* v. *Maryland*, 373 U.S. 83 (1963), specifically, that the prosecution must disclose to a criminal defendant all material, favorable evidence in its possession. *Brady* requires prosecutors to share with the accused important exculpatory

[1] Counsel for all parties have consented to the filing of this brief. *See* D.C. App. R. 29(a).

evidence, including eyewitness testimony that is inconsistent with the central theory of the prosecution or otherwise shows that the crime was committed by individuals other than the defendants. If left to stand, the Superior Court's decision would be contrary to *Brady* and its progeny, and would cast doubt regarding the appropriate rules that prosecutors should use in considering whether this type of evidence should be disclosed under *Brady*.

After reviewing this case, *amici* are convinced that if the government had properly discharged its obligation under *Brady*, the petitioners would have received a fundamentally different trial. Accordingly, *amici* submit this brief supporting the petitioners to ensure that each petitioner has the benefit of the critical procedural safeguards recognized in *Brady*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For over fifty years, the U.S. Supreme Court has recognized that "the suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). The focus of the well-established *Brady* doctrine is fairness. *See Curry* v. *United States*, 658 A.2d 193, 197 (D.C. 1995) ("*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation."). At its root, the *Brady* doctrine imposes a "special role" on the prosecution to "search for the truth in criminal trials." *Leka* v. *Portuondo*, 257 F.3d 89, 98 (2d Cir. 2001).

While the prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). The question under *Brady* is not whether the defendant would more likely than not have received a different verdict if suppressed evidence had been disclosed, but whether in its absence he received a fair trial. *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995). Because *Brady* is designed to prevent miscarriages of justice, its principles "must [ ] be conscientiously applied." *Miller* v. *United States*, 14 A.3d 1094, 1107 (D.C. 2011).

This case presents exactly the kind of miscarriage of justice *Brady* was designed to prevent. In 1984, there was a gruesome murder of a forty-eight year old mother of six, Catherine Fuller. Her severely beaten body was found in a garage off an alley near a busy corner in the neighborhood. The community pressure to find Mrs. Fuller's killer was enormous. A theory emerged—from conflicting and ever changing eyewitness testimony—that a mob of young people committed the murder. Sometime well after the seven petitioners here were convicted, it came to light that the government failed to disclose to the defense several

significant pieces of favorable evidence, including eyewitness statements that this gruesome murder was ***not*** committed by a group, but rather one or two perpetrators. Specifically, the government failed to disclose, among other things:

(1) A statement by a witness, Ammie Davis, that she had witnessed her friend James Blue, acting alone, abduct and murder Catherine Fuller in the alley behind H Street on October 1, 1984 (hereinafter, the "Davis Statement"). (Op. at 25, 28.)[2]

(2) The statements of three witnesses who identified James McMillan—who had been responsible for at least two other attacks on women in alleys in the same neighborhood—"as one of two men seen in the alley shortly after Mrs. Fuller's body was discovered and said he appeared to be concealing something under his jacket." (*Id.* at 31.) These witnesses reported that Mr. McMillan and this other man "fled when the police arrived." (*Id.*) (hereinafter, the "McMillan Evidence"). Significantly, Mrs. Fuller "had been brutally sodomized by a hard object that had been shoved approximately a foot into her rectum," and that object was never located by the police. (*Id.* at 1.)

(3) The fact that four witnesses walked through the alley sometime between 5:30 p.m. and 5:45 p.m., (the estimated time of Ms. Fuller's death) and did not see a group attack or any group of individuals at all; two of those witnesses heard groans coming from the garage; and one, Willie Luchie, observed that the doors to the garage where Mrs. Fuller's body was found were closed when they walked by (hereinafter, the "Luchie Evidence"). (*See* Br. of Appellants Clifton Yarborough, Charles Turner, Levy Rouse, and Timothy Catlett at 29, 39, *Turner et al.* v. *United States*, Nos. 12-CO-1362, 12-CO-1541 (D.C. May 13, 2013).)

(hereinafter, the "Suppressed Evidence").

Individually and cumulatively, this evidence suggested that the murder was committed by individuals other than the defendants, and undermined the central underpinning of the prosecution—that each of the petitioners participated in a group attack on Mrs. Fuller. As a

[2] Notably, Ms. Davis was shot by Mr. Blue about one year later, and died two weeks before the start of appellants' first trial. (Op. at 28.)

result of the government's failure to disclose the Suppressed Evidence, the defense did not have an adequate basis to question the group mob theory at trial.

Despite the significance of this evidence, the Superior Court found—after acknowledging that "petitioners' *Brady* claims are not so easily dismissed" (*id*. at 24)—that the Suppressed Evidence was not material under *Brady*. That decision is at odds with established case law and the fundamental purpose of *Brady*. Eyewitness testimony of an alternate perpetrator has long been considered by the courts as quintessential *Brady* material. Indeed, we are not aware of a single case that has found that an undisclosed eyewitness identification of an alternate perpetrator was immaterial under *Brady*.

In its analysis, the Court made three critical errors in its application of the *Brady* materiality test. *First*, by finding that the Suppressed Evidence was not material because the evidence presented at trial was otherwise sufficient to support the petitioners' convictions, the Court did not properly consider the effect of the Suppressed Evidence. *Second*, the Court failed to conduct an independent materiality analysis in light of the entire record, instead inappropriately relying on the pre-trial materiality and credibility determinations made by the prosecution and the police based on the then existing record. *Finally*, the Court failed to conduct a cumulative analysis of the Suppressed Evidence, as required by *Brady*.

As former prosecutors and judges, *amici* are concerned about the far-reaching effects of the lower court's decision. Failure to reverse the Superior Court's decision would upend decades of *Brady* precedent, and would leave this important area of the law unsettled. Evidence suggesting an alternative perpetrator has long been considered textbook *Brady* material. If *Brady* requires anything, it requires that this type of evidence be disclosed to the defense. Here, the prosecution hinged its case against all seven petitioners on the theory that the

murder was committed by a mob, and then withheld the critical evidence that would have undermined that theory by suggesting, instead, that it was committed by one or two others. As *Brady* itself makes clear, the reversal of this decision is necessary to preserve confidence not only in this matter, but in the larger criminal justice system: "The principal . . . is . . . avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87. In addition, when alternate perpetrator evidence is wrongfully suppressed, it not only affects the fairness of a trial, but risks letting the true perpetrator walk free. It is imperative that *Brady's* principles be conscientiously and consistently applied, and the legal standards upon which prosecutors and the courts rely be clear in order to prevent potential miscarriages of justice.

ARGUMENT

THE LOWER COURT ERRED IN DETERMINING THAT THE SUPPRESSED EVIDENCE WAS NOT MATERIAL UNDER *BRADY*.

Under *Brady*, the prosecution must disclose to the defense all favorable, material evidence. There are three elements the defense must prove to establish a *Brady* violation: (1) the evidence at issue was favorable to the accused; (2) the evidence was suppressed by the government, either willfully or inadvertently; and (3) the information was "material" to guilt or punishment. *Strickler* v. *Greene*, 527 U.S. 263, 281-82 (1999). The first two criteria are unquestionably met here; only the third is at issue on this appeal.[3]

[3] The lower court found that there was "little question" that the Davis Statement met the first two criteria. (Op. at 27.) Although the Court stated that the McMillan Evidence "[wa]s arguably not even favorable to the accused," (*id.* at 32), the Court ultimately did not decide that issue and instead hinged its analysis on whether the evidence was material.

Under *Brady*, information is considered "material" "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith* v. *Cain*, 132 S. Ct. 627, 630 (2012). A "reasonably probability" is a "probability sufficient to undermine confidence in the outcome." *United States* v. *Bagley*, 473 U.S. 667, 674 (1985). The defense can prove the materiality of a *Brady* violation by showing that "the favorable evidence 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.

A. Eyewitness Testimony of Alternative Perpetrators Is Textbook *Brady* Material.

Eyewitness identification of an alternate perpetrator "is the type of exculpatory information that courts have long recognized as core *Brady* material, where the danger of a denial of due process of the law is great." *See Watkins* v. *Miller*, 92 F. Supp. 2d 824, 846 (S.D. Ind. 2000) (citing, *inter alia, United States ex rel. Meers* v. *Wilkins*, 326 F.2d 135, 138 (2d Cir. 1964)); Benchbook for U.S. District Court Judges, Section 5.06, Appendix C (6th ed.) (listing "any information that links someone other than the defendant to the crime (*e.g.* a positive identification of someone other than the defendant)" as a type of material that may be discoverable under *Brady*.)

Plainly, alternate perpetrator evidence is powerful evidence to the defense. Such evidence can be used by the defense to, among other things:

- Uncover other leads and defense theories, *see Banks* v. *Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995);
- Lay a foundation for the possibility that someone else committed the offense, *see Case* v. *Hatch*, 773 F. Supp. 2d 1070, 1084 (D. New Mexico 2011) *vacated*, 708 F.3d 1152 (10th Cir. 2013) (vacating decision based on procedural grounds);

- Question the certainty of prosecution witnesses on cross-examination, *id.* at 1088;
- Undermine the jury's confidence in the adequacy of the State's investigation, *see Mendez* v. *Artuz*, 202 F.3d 411, 415 (2002); and
- Impeach the credibility of the prosecution's witnesses by presenting contradictory evidence, *see Jamison* v. *Collins*, 100 F. Supp. 2d 647, 695 (S.D. Ohio 2000), *aff'd* 291 F.3d (6th Cir. 2002).

Accordingly, the Courts, including this one, have consistently found withheld alternate perpetrator evidence to be material under *Brady*. *See Miller*, 14 A.3d at 1108 (evidence that shooter was left-handed was material, exculpatory evidence under *Brady*); *Williams* v. *Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (evidence about a second suspect to a crime is "classic Brady material"); *Cannon* v. *Alabama*, 558 F.2d 1211, 1215-16 (5th Cir. 1977) (evidence of an eyewitness who would positively identify an alternate perpetrator was material, exculpatory evidence under *Brady*).

Here, it is difficult to imagine evidence that could have been any more material to the defense of the petitioners. The government suppressed evidence that showed one or two individuals—other than the seven petitioners—committed the crime. That evidence, among other things, included statements from three separate eyewitnesses that showed an individual (James McMillan)—who was arrested by the end of October 1984 for robbing and beating two women in the very same neighborhood as where the murder occurred and who lived near the alley where the murder was committed—was seen fleeing the murder scene when the police arrived and putting some object—possibly the missing murder weapon—in his jacket. (Op. at 26.) One does not have to be Perry Mason to develop a defense that would have placed the case in a substantially different light with that type of exculpatory evidence. *See Kyles*, 514 U.S. at 441 (disclosure to "competent counsel" would have made a difference).

Nevertheless, the Superior Court said it did not find this evidence material, in part, because "even if [McMillan] was present at the time of the murder, it would not prove anything about the guilt of these petitioners. He could have been a participant with these petitioners." (Op. at 32.) However, none of the three eyewitnesses saw Mr. McMillan with any of the petitioners or with a group of people. (*See id*.) Moreover, as the Superior Court found, petitioners offered expert evidence that "offered a plausible explanation of the physical evidence that would support a theory that Mrs. Fuller was murdered by one or two persons . . . ."[4] (*Id.* at 30.) As a result, the Superior Court's theory that Mr. McMillan "could" have been found by the jury to be just one more perpetrator is impermissible speculation and misses the analytical mark.[5] In finding that alternate perpetrator evidence was not material under *Brady*, the Court applied the wrong analysis and did not give sufficient weight to the Suppressed Evidence.

B. The Superior Court Did Not Properly Consider the Effect of the Suppressed Evidence When Evaluating Petitioners' *Brady* Claims.

To show that suppressed evidence is material under *Brady* "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed

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[4] In considering whether suppressed evidence undermines confidence in the verdict, and thus, is material under *Brady*, courts must consider the "cumulative effect" of the suppressed evidence, *see Kyles*, 514 U.S. at 421, which should encompass evidence the defense would have developed had the suppressed evidence been disclosed. *See Miller*, 14 A.3d at 1107 (recognizing that disclosure must be made "at such a time as to allow the defense to *use* the favorable material effectively in the preparation and presentation of its case") (emphasis added); *Leka*, 257 F.3d at 100-01 (finding that disclosure was "too little, too late" when the suppressed material "could have led to specific exculpatory information only if the defense undertook further investigation.").

[5] *See, e.g., Smith*, 132 S.Ct. at 630 (rejecting the state's "various reasons why the jury might have discounted" undisclosed statements of the government witness which just "leaves [the court] to speculate about which of [the witness'] contradictory declarations the jury would have believed.").

evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434-35. Put another way:

> [T]he touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, ***but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence***. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. at 434 (citing *Bagley*, 473 U.S. at 678) (emphasis added).

Although the Court recites the proper legal standard for assessing materiality (*see* Op. at 25, 28), in analyzing whether the Suppressed Evidence undermined its confidence in the verdict, the Court effectively applied a sufficiency of the evidence test.[6] (*See id*. at 25 (noting that if the court had credited the recantations of some of the witnesses presented to it in the context of Petitioners' Innocence Protection Act claims, then the *Brady* violations could be material); *id.* at 28 (James Blue accusation not material "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"); *id.* ("[A]ny reasonable jury, in light of all the evidence, would surely have rejected" Ms. Davis' story); *id.* at 30 ("[T]he credible evidence at trial . . . is much more consistent with the guilt of these seven petitioners"); *id.* at 32 (The possibility that McMillan

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[6] The *Kyles* Court was faced with a similar situation in which a lower court correctly cited the standards but then misapplied them to the facts. *See* 514 U.S. at 458-59 (Scalia, J., dissenting). The parallels with *Kyles* do not end there. The Superior Court's attempts to harmonize the suppressed McMillan Evidence with the prosecution's evidence is also the type of analysis undertaken by the dissent in *Kyles*, which the majority described as an improper sufficiency of the evidence analysis. *See* 514 U.S. at 435 n.8 (criticizing the dissent's rationale that the "possibility that [someone other than the defendant] planted evidence 'is perfectly consistent' with Kyles's guilt"). The *Kyles* Court noted, "[N]one of the Brady cases has ever suggested that sufficiency of the evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." *Id.*

alone or with Merkerson committed the crime "flies in the face of all the evidence"); *id*. (McMillan evidence "might have provided useful ammunition in the hands of ten clever defense counsel at trial, but it does not override the overwhelming evidence of the guilt of these petitioners or undermine the court's confidence in the jury's determination of their guilt at trial."); *id*. at 38 ("It is not enough to show that the defendants could have used the undisclosed evidence to construct a "counter-narrative (or, as here, two counter-narratives that were mutually exclusive of each other), which could have been supported by a possible reconstruction of the physical evidence that ignores all of the eyewitness testimony."). Courts have rejected this type of analysis, and for good reason.

As the D.C. Circuit artfully has explained:

> [A] sufficiency-of-the-evidence test would require appellate courts to usurp the function of the jury, for judges would be forced to *guess*, based on a cold record, how the jury might have weighed the remaining evidence, standing alone, in a hypothetical error-free trial. Because such an inquiry would be inherently unreliable, *Kyles* rightly focuses attention instead on the potential impact the undisclosed evidence might have had on the fairness of the proceedings. ***Thus, the amount of additional evidence indicating guilt is not dispositive of our inquiry.***

United States v. *Smith*, 77 F.3d 511, 515 (D.C. Cir. 1996) (emphasis added). This approach is consistent with, and relies on, the U.S. Supreme Court's view in *Kyles* that, "[o]ne does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could be taken to put the whole case in such a different light as to undermine confidence in the verdict." 514 U.S. at 435.

By its nature, the type of analysis applied by the Superior Court here, cannot identify a *Brady* violation such as this one, where the government entirely suppresses alternate perpetrator evidence. In this case, the constitutional harm does not concern the sufficiency of the evidence presented at trial, but rather evidence that was never presented to the jury. The failure

of the government to disclose the Suppressed Evidence prevented the petitioners from being able to construct a defense by showing that the crime was (a) committed by someone else; and (b) was not committed by all seven petitioners, as alleged by the government. By considering only whether the Suppressed Evidence sufficiently weakened the evidence presented by the prosecution at trial, the Court failed to give enough weight to the full force of this evidence.

Indeed, in *Holmes* v. *South Carolina*, 547 U.S. 319, 331 (2006), the Supreme Court overturned a state evidentiary rule that prohibited defendants from introducing evidence of third party guilt where there is strong forensic evidence to the contrary. In doing so, the Supreme Court stated that the probative value of evidence of third-party guilt simply cannot be evaluated by only looking at the case put forth by the prosecution. *Id*. at 329-31. Specifically, the *Holmes* Court stated: "Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case." *Id*. at 330. Yet, that appears to be exactly what the Superior Court did here. (*See supra* at 13-14.)

The Court did not properly consider that the Suppressed Evidence contradicted the prosecution's evidence and would have led the defense to develop a different theory of the case. In its item by item *Brady* analysis, the Superior Court concluded that the Davis Statement and McMillan Evidence were each separately immaterial precisely because they contradicted the prosecution's evidence.[7] The Court failed to consider that the Suppressed Evidence could be material *because* it contradicted the government's theory of the case. *See Boyd* v. *United States*,

[7] (*See* Op. at 28 (finding that the Davis Statement regarding alternative perpetrator James Blue was not material "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"); *id.* at 32 (The possibility that McMillan alone or with Merkerson committed the crime "flies in the face of all the evidence").)

908 A.2d 39, 55 (D.C. 2006) ("if the government had information from witnesses who saw fewer than four people [ ] *in the alley*, that information contradicted the government's case with respect to a key material issue and, in our view, constituted *Brady* material.").

Furthermore, the Court's analysis simply ignores that the "materiality determination" must be made "with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense." *Boyd* v. *United States*, 908 A.2d 39, 61 (D.C. 2006). "An important purpose of the prosecutor's obligations under *Brady* is to allow defense counsel an opportunity to investigate facts of the case and, with the help of the defendant, craft an appropriate defense." *Miller*, 14 A.3d at 1108 (internal quotations omited); *see also Banks* v. *Reynolds*, 54 F.3d 1508, 1519 (10th Cir. 1995) (recognizing that the suppressed evidence "in the hands of a competent defense attorney may be used to uncover other leads and defense theories") (citing *Bowen* v. *Maryland,* 799 F.2d 593, 612 (10th Cir. 1986)). Plainly, the suppression of the alternate perpetrator evidence here unfairly prevented the defense from being able to do so. Indeed, the Court expressly recognized that the McMillan Evidence "might have provided useful ammunition in the hands of ten clever defense counsel at trial," but nevertheless stated that 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." (Op. at 32.)

Further supporting that the Court improperly discounted the full significance of the Suppressed Evidence and effectively conducted a sufficiency of the evidence test is the Court's conclusion that:

> It is not enough to show that the defendants could have used the undisclosed evidence to construct a "counter-narrative" (or, as here, two counter-narratives that were mutually exclusive of each other), which could have been supported by

> a possible reconstruction of the physical evidence that ignores all of the eyewitness testimony.[8] (Op. at 38.)

To the contrary, eyewitness testimony and a possible reconstruction of the physical evidence that *contradicts* the evidence presented by the prosecution is *exactly* the type of evidence that should be sufficient to "put the whole case in such a different light as to undermine confidence in the verdict." *See Kyles*, 514 U.S. at 435. When considered together with the Court's statements that any evidence concerning the possibility that the crime was committed by McMillan alone or with Merkerson "flies in the face of all the evidence," (Op. at 38), the Court's improper use of a sufficiency of the evidence test is apparent. The analysis undertaken by the Superior Court has been expressly rejected by the U.S. Supreme Court and should be rejected by this Court as well.

C. The Lower Court Failed to Conduct an Independent Assessment of Materiality In Light of the Entire Record.

While the prosecution "will necessarily have to exercise some discretion in determining whether evidence in its possession is exculpatory, and therefore subject to disclosure under *Brady*," *Banks*, 54 F.3d at 1517, the court has an obligation to consider whether the suppressed evidence, ***when viewed in light of the entire record***, cast the whole case in such a different light as to undermine confidence in the verdict. *See Kyles*, 514 U.S. at 434; *United States* v. *Agurs*, 427 U.S. 97, 112 (1976) ("the omission must be evaluated in the context of the entire record")*; State ex rel. Woodworth* v. *Denney*, No. SC 91021, 2013 WL 85427, at *12 (Mo. Jan. 8, 2013) (en banc) ("the courts should consider the effect of all of the suppressed evidence along with the totality of the other evidence uncovered following the prior trial.") The Court, however, did not undertake such an analysis here.

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[8] The conflicts in the eyewitness testimony and the inconsistent prior statements of the eyewitnesses are outside the scope of this brief.

Instead, the Court focused its *Brady* analysis on the reasonableness of the government's pre-trial determination that the Suppressed Evidence was immaterial and incredible. (Op. 28-30.) In doing so, the Court acknowledged that "the prosecutor's duty to turn over evidence favorable to the accused is not excused simply because the prosecutor does not believe the evidence." (*Id.* at 29 (citing *Zanders* v. *United States*, 999 A.2d 149, 163-64 (D.C. 2010).) Nevertheless, the Court then addressed in detail the "context" for the non-disclosure of one piece of suppressed evidence, the Davis Statement, ultimately concluding that it was "understandable why, in this context, this careful and mindful prosecutor did not believe this piece of evidence and did not consider it material." (Op. at 29.)

A *Brady* violation, however, is not excused by the reasonableness of the government's pre-trial materiality or credibility decisions. As stated in the Benchbook for U.S. District Court Judges, the "definition of 'materiality' necessarily is ***retrospective***. It is used by an appellate court after trial to review whether a failure to disclose on the part of the government was so prejudicial that the defendant is entitled to a new trial." Section 5.06(B)(3)(a) (emphasis added); *see also Boyd*, 908 A.2d at 61 ("[T]he trial court must take into account the reality that the prosecutor has no crystal ball, and must review the exercise of prosecutorial discretion accordingly."). Indeed, the U.S. Supreme Court has strongly warned of the dangers in assessing materiality before trial. In *Agurs*, the Court observed that "there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge." 427 U.S. at 108. Because "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.*

By focusing on the reasonableness of the government's pre-trial conduct, the Court failed to analyze the suppression in light of the entire record, as required under *Brady*. *See id*. That record reflected, among other things, that: (1) there was "no physical evidence linking any of the Petitioners to Mrs. Fuller's death" presented at trial (Petr.'s Proposed Findings of Fact and Conclusions of Law at 129, *United States* v. *Turner et al*., No. 1984-FEL-8615-84, (D.C. Super. Ct. June 15, 2013); (2) every one of the government's witnesses had credibility issues (*id.*); and (3) the jury deliberated for days before reaching its verdict, (*id.*at 130). This evidence casts the significance of the Davis Statement in a very different light and is precisely why the U.S. Supreme Court has held that materiality must be a retrospective analysis by the reviewing court.

Indeed, in the context of addressing the materiality of the Davis Statement, the Court referred to the "approximately 400 other witnesses interviewed by the government" who did not mention James Blue as a possible perpetrator. (Op. at 28.) But those 400 statements were before the government—not the jury—and cannot be properly weighed *against* petitioners. Perhaps even more important, it is far from clear how many of these witnesses even claimed to have had any personal information about the crime or pointed to any perpetrator. The jury, in stark contrast, heard from 7 principal witnesses whom the Court acknowledged provided inconsistent statements. (Op. at 2; *see also id*. at 34-35 (noting that one of those witnesses was cross-examined "extensive[ly] . . . based on her inconsistent statements").)[9] Indeed, only 5 of the 7 principal witnesses gave directly inculpatory testimony. As the Court itself stated, it "must decide petitioners' *Brady* claims in light of all the evidence supporting the verdict." (Op. at 25);

[9] Notably, four of those seven witnesses offered recantations of their testimony, but the Superior Court found those "recantations . . . incredible." (Op. at 16, 25.) A fifth, Carrie Eleby, is deceased.

see also Leka, 257 F.3d at 104 ("[M]ateriality is assessed in light of the evidence adduced against the defendant at trial.")

The opinion also repeatedly refers to the government's determinations of credibility during its investigation. For instance, the Court recounts that "for a variety of reasons, [AUSA] Goren did not credit Ammie Davis and did not believe she was a witness to any part of the Fuller murder" (Op. at 26); Lt. Loney "did not believe Ms. Davis" (Op. at 28-29); and AUSA Behm "was another voice in the room warning the members of the team that [Ammie Davis's] accusation of James Blue could not be credited," based on his interactions with her in a separate case (Op. at 29-30). The Court then immediately concludes—apparently based on these statements—that "[f]or all of these reasons, the report of Ammie Davis was not material under the *Brady* definition." (Op. at 30.)

But it is a bedrock of the American legal system that credibility is a question for the fact-finder—in this case, the jury. *See Jackson* v. *Denno*, 378 U.S. 368, 386 n.13 (1964) ("[Q]uestions of credibility, whether of a witness or a confession, are for the jury."). This too goes directly to the Due Process concern at the heart of *Brady*. It is well settled that a prosecutor's role in the criminal justice system is decidedly not to determine what witnesses to identify to the defense based on its own credibility determinations. *See Zanders*, 999 A.2d at 164; *see also Lindsey* v. *King*, 769 F.2d 1034, 1040 (5th Cir. 1985) ("It was for the jury, not the prosecutor, to decide whether the contents of an official police record were credible."). As the U.S. Supreme Court stated in *Brady*, this would "cast[] the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." 373 U.S. at 88.

D. The Suppressed Evidence Must Be Considered Cumulatively.

In assessing whether suppressed evidence is "material" for purposes of *Brady*, the impact of the suppressed evidence must be considered cumulatively, not item by item. *Kyles*, 514 U.S. at 421, 436 (stating that the state's obligation to disclose evidence favorable to the defense "turns on the cumulative effect of all such evidence suppressed by the government"). This requirement is significant because "the sum of the parts almost invariably will be greater than any individual part." *Smith* v. *Secretary, Dep't of Corrections*, 572 F.3d 1327, 1347 (11th Cir. 2009). A cumulative assessment is critical to determining whether, in the absence of the suppressed evidence, a defendant received a fair trial.

Here, the Court made two cursory references to conducting a cumulative assessment (*see* Op. at 33, 38), but the opinion only analyzed petitioners' "discrete *Brady* claims" individually. (*See id.* at 25; 27-30 (concluding that "the report of Ammie Davis was not material under the *Brady* definition."); *id*. at 32 (finding the McMillian Evidence was not material "for the same reason the James Blue evidence was not material."); *id*. at 33 (concluding "Petitioner's other *Brady* claims"—impeachment evidence with respect to several witnesses—was not material).) Notably, the Court *did not even consider* the suppressed Luchie evidence, only further demonstrating that it did not—and could not have—considered the cumulative effect of the Suppressed Evidence. The opinion is simply devoid of any analysis as to whether the Suppressed Evidence, taken as a whole, was sufficient to cast the case "in such a different light as to undermine confidence in the verdict." *See Kyles*, 514 U.S. at 435.

Similarly, in *Kyles*, the U.S. Supreme Court stated that the Court of Appeals issued a decision that was "compatible with a series of independent materiality evaluations, rather than the [required] cumulative evaluation," even though the Court of Appeals expressly stated "that [it] was not persuaded of the reasonable probability that Kyles would have obtained a

favorable verdict *if the jury had been exposed to any or all of the undisclosed materials*." *Id.* at 440-41 (emphasis added). The *Kyles* Court found that such an "analysis" was insufficient. This Court should do the same.

As discussed above, the defense could have used all of the Suppressed Evidence to substantially undermine the central underpinning of the government's case—that the murder was committed by a mob, and to show that the murder was committed by others. Moreover, aside from showing the actual innocence of the petitioners, the evidence also could have been used to undermine the integrity of the police investigation and government witnesses. *See id.* at 445-49 (finding the suppressed evidence material because it could have been used to impeach the witness and the police investigation).

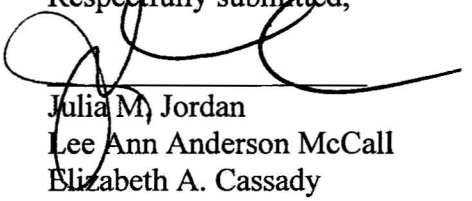
The Court's failure to undertake a cumulative analysis is particularly significant in cases like this one where there is a lack of forensic and scientific evidence and the conviction rests primarily on eyewitness testimony. "What might be considered insignificant in a strong case might suffice to disturb an already questionable verdict." *Banks* v. *Reynolds*, 54 F.3d 1508, 1518 (10th Cir. 1995). The Court acknowledged that the government's evidence at trial "relied heavily on two cooperating witnesses, who had pled guilty to reduced charges in turn for their testimony." (Op. at 2.) Courts have recognized that a conviction only supported by the prosecution's inconsistent eyewitness testimony is "significant[ly] weak[ ]' and the verdict is 'already questionable.'" *Case* v. *Hatch*, 773 F. Supp. 2d at 1084 (citing *Banks*, 54 F.3d at 1518). Furthermore, when the government impermissibly withholds *Brady* material, "its case [i]s much stronger, and the defense case much weaker, than the full facts would . . . suggest [ ]." *Kyles*, 514 U.S. at 429.

CONCLUSION

For the foregoing reasons, the Superior Court's decision should be reversed.

Dated: June 3, 2013

Respectfully submitted,



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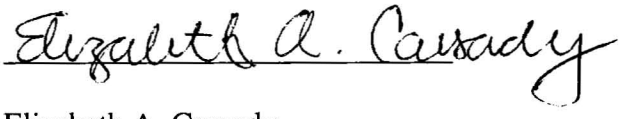

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