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IN THE SUPREME COURT OF THE UNITED STATES

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CHARLES S. TURNER, ET AL., :

Petitioners : No. 15-1503

v. :

UNITED STATES, :

Respondent. :

- - - - - x

and

- - - - - x

RUSSELL L. OVERTON, :

Petitioner : No. 15-1504

v. :

UNITED STATES, :

Respondent. :

Washington, D.C.

Wednesday, March 29, 2017

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:08 a.m.

1 APPEARANCES:

2 JOHN S. WILLIAMS, ESQ., Washington, D.C.; on behalf of
3 the Petitioners in No. 15-1503.

4 DEANNA M. RICE, ESQ., Washington, D.C.; on behalf of
5 the Petitioner in No. 15-1504.

6 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
7 Department of Justice, Washington, D.C.; on behalf
8 of the Respondent.

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P R O C E E D I N G S

(10:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 15-1503, Turner v. United States, and the consolidated case, 15-504, Overton v. United States.

Mr. Williams.

ORAL ARGUMENT OF JOHN S. WILLIAMS

ON BEHALF OF THE PETITIONERS IN NO. 15-1503

MR. WILLIAMS: Thank you, Mr. Chief Justice, and may it please the Court:

In Brady v. Maryland, this Court established the now familiar principle that the prosecution must disclose to the defense all favorable and material information. This case involves a clear violation of that principle. Here the prosecution suppressed information that a serial assaulter of women had been seen acting suspiciously at the crime scene before police arrived. The prosecution further suppressed that this man's girlfriend was in the alley at the time, yet he did not speak to her and she did not speak to him. If this information had been available to Petitioners at trial, they would have presented an alternative perpetrator's theory that centered on this incredibly violent individual.

1 They would have told the jury that during
2 October 1984, in this neighborhood, this man committed
3 similar assaults against similar victims. They would
4 have then posited to the jury that the same person who
5 had accosted a D.C. councilwoman in an alley and
6 attacked her --

7 JUSTICE SOTOMAYOR: Counselor?

8 MR. WILLIAMS: Yes.

9 JUSTICE SOTOMAYOR: At the trial, the
10 witness, Mr. Freeman, indicated that there were two
11 people acting suspiciously. He raised an objection that
12 those names had not been disclosed. The prosecutor
13 explained his reasons for not disclosing the names, and
14 defense counsel chose to say, I'll get them on the --
15 I'll call the witness and get the names myself, and then
16 he dropped the ball.

17 What also occurred was that these -- this --
18 this name was given to him as a -- was given to him and
19 all defense counsel as a possibility within the
20 materials that were disclosed, that Mr. McMillan had
21 been on the scene and no follow-up was done.

22 How can we say that it was undisclosed or
23 not made available in light of those record facts?

24 MR. WILLIAMS: Sure. So let me begin with
25 what the prosecutor said during that colloquy, which is

1 at page 63 of the Joint Appendix. The prosecutor said
2 that his view was that this was not Brady, so he made
3 the -- the statement that this was not Brady information
4 and that he had adhered to his Brady obligations.

5 This Court made clear in *Banks v. Dretke*
6 that a rule that the prosecutor may hide and the defense
7 must seek is untenable under Brady. That's essentially
8 what happened here. In so doing, Justice Sotomayor, the
9 prosecutor went further and he made statements that
10 perhaps not deliberately, in fact, still did mislead the
11 defense counsel about the probative value of this
12 information, because he said first that Mr. McMillan had
13 no association with the garage. That's not true. And
14 the all -- and the information suggests that it wasn't.

15 And then further, he said that Mr. McMillan
16 was only at the scene approximately 90 minutes after the
17 crime occurred. And, of course, the prosecution was the
18 only entity in that colloquy that was aware of
19 information that this crime may have happened only 30
20 minutes after the crime occurred. The way we view this
21 evidence, Your Honor, is that really, the alternative
22 perpetrator theory depends on five pieces of suppressed
23 information. That's --

24 JUSTICE GINSBURG: But was the -- was the
25 name disclosed during the trial?

1 MR. WILLIAMS: It -- I don't think it was
2 ever disclosed during the trial, Justice Ginsburg. It
3 was only disclosed in the form of the statement of James
4 Michael Campbell, whose trial was severed and then --
5 and then he -- he pleaded guilty later.

6 James Michael Campbell gave a statement that
7 the prosecutor in this case has later described as the
8 most farfetched. I believe one of the detectives used a
9 more colloquial phrase that I shouldn't repeat at the
10 Court to describe the statement. It involved people
11 that nobody else put in the crime scene which, by the
12 way, includes Mr. McMillan. Nobody else, no witness,
13 put him in the crime scene. And people doing things
14 with golf clubs. Nobody else described a golf club.
15 Involving a gun. Nobody else described a gun. It was
16 just fantastical.

17 And so the -- defense counsel had no reason
18 to believe -- and this goes back, Justice Sotomayor, to
19 I think your initial point. Defense counsel had no
20 reason to believe that McMillan had been there acting
21 alone, that he was there without any members of this
22 purported group attack, and that's critical.

23 JUSTICE GINSBURG: But would all of the
24 defendants -- this -- this had what, something like 10
25 defense counsel?

1 MR. WILLIAMS: Yes.

2 JUSTICE GINSBURG: Would they all have to
3 agree to go this route if they had the information, if
4 it was turn -- turned over as Brady material? Some
5 might still say I'd rather go with, not me, maybe them,
6 instead of the alternate perpetrator.

7 MR. WILLIAMS: Yes -- yes, Justice Ginsburg.
8 First, let me say I don't think they would have all had
9 to do it. It would be enough if a substantial number
10 did it. But let me further add, I think they all would
11 have done it. And the best evidence for that is that
12 Michelle Roberts, who was a leading criminal defense
13 lawyer in the city at the time and was until very
14 recently, she also had one of the weakest cases against
15 her client, a case so weak that the government now says
16 it is perfectly logical that he was acquitted. And she
17 testified in our postconviction hearing that if she had
18 been aware of the McMillan information, she would have
19 pursued an alternative perpetrator defense.

20 So we think the evidence in this case
21 suggests that all of the Petitioners would have
22 developed this theory and run with it.

23 And if I may add, I think one of the reasons
24 why they would have done that is that it's not that much
25 of a difference from the not-me-maybe-them defense.

1 Surely, in any criminal case, when you have an eye -- a
2 purported eyewitness who does not identify your client,
3 in closing, any defense counsel will identify that to
4 the jury.

5 JUSTICE SOTOMAYOR: I'm sorry, but I -- I --
6 my greatest difficulty with Mr. McMillan is that clearly
7 his '92 crime, which was decades after this crime,
8 suggests a similarity that would have been very potent
9 at a trial. But the disclosure of this Brady, of
10 Mr. McMillan, wouldn't have led to the introduction of
11 that later-committed crime. So what we're left with as
12 an alternative theory is robberies of two women, neither
13 of which were in any way identical to this crime. All
14 of the defendants had crimes of violence and robberies,
15 so their criminal activity was just as bad, if not worse
16 in some cases, than Mr. McMillan, why would he have been
17 a likely source as an alternative perpetrator,
18 particularly as a sole perpetrator, when he was seen
19 with at least one other person? He wasn't alone when he
20 was seen. He was seen with another man. There's no
21 suggestion that the other man was involved.

22 So how -- how does he become such a potent
23 alternative in light of those facts? He's just like the
24 defendants. He is with another person, so being a
25 solo -- a solo perpetrator is not a natural conclusion.

1 So how do we get him to be the other person?

2 MR. WILLIAMS: Well, sure. And to be clear,
3 our -- our alternative perpetrator theory is an
4 alternative one or two perpetrator theory. We would not
5 fight the notion, and I don't think defense counsel at
6 trial would have fought the notion that it was McMillan
7 probably with the assistance of his confederate who was
8 seen in the alley with him.

9 But let me go back to the foundation of your
10 question, Justice Sotomayor, which is, what
11 differentiates McMillan from other people in this
12 neighborhood and from the -- and from the defendants.
13 McMillan's two other assaults of women were incredibly
14 violent. Specifically his assault of a D.C.
15 councilwoman which took place in an alley, was so
16 violent and so ferocious that the victim yelled murder,
17 and that -- and that was why people came to her aid.
18 She naturally thought -- and she told this to The
19 Washington Post -- she naturally thought that this
20 person wasn't just trying to take her purse, that he was
21 trying to kill her, and that would have been powerful
22 evidence that Petitioners could have used at trial.
23 They could have put this D.C. councilwoman on the stand
24 and had her testify to her opinion about what was
25 happening to her. Her lay opinion. That would have

1 been powerful evidence.

2 I'd note, just in regards to the
3 Petitioners' criminal histories, Your Honor, the
4 government never suggested that those criminal histories
5 were admissible at trial. They never suggested that
6 those crimes bore any resemblance to this crime. And
7 remember, the government's theory was that this was a
8 group attack. So individual crimes that individual
9 people may have done don't really speak to the
10 government's theory.

11 Here we have a very powerful theory based on
12 McMillan's own prior crimes.

13 JUSTICE ALITO: The alternative perpetrator
14 theory does seem completely inconsistent with the
15 defenses that were put on at trial. I -- I'm not sure
16 how you can say that they could have used both.

17 But in order to convince the jury to accept
18 the alternative perpetrator theory, wouldn't it have
19 been necessary to convince the jury that Alston and Bard
20 pled guilty and were sentenced to substantial prison
21 sentences for crimes that they didn't participate in at
22 all, and that all of the other witnesses who described
23 this group attack, including at least one who doesn't
24 seem to have the -- the 14-year-old boy, who doesn't
25 seem to have impeachment evidence, were perjuring

1 themselves on the stand. That -- that's a pretty
2 substantial burden to overcome, isn't it?

3 MR. WILLIAMS: We think that there is
4 definitely a reasonable probability that the jury would
5 have had reasonable doubt, and that's the -- that's the
6 standard, whether or not this jury would have had
7 reasonable doubt and whether or not there was a
8 reasonable probability that it would have had it, even
9 in light of these purported eyewitnesses.

10 Now, we started with Alston and Bennett, and
11 I'd like to talk about Thomas. Now, I'd like to go, if
12 I may, to the beginning of your question, Justice Alito,
13 because I think it speaks to the lack of incongruity
14 between these two defenses. I'll -- I'll get to that; I
15 promise I will get to that.

16 Let's start with Alston and Bennett. The
17 best reason that a jury would have to disbelieve Calvin
18 Alston is that Calvin Alston himself denied
19 participating in this crime for months. He wrote
20 letters to a judge, to a -- to a D.C. commissioner that
21 he had not been involved in this crime and that his
22 initial statement was false. He only pleaded guilty
23 after he, himself, was sexually assaulted in jail and
24 his motion to suppress was denied.

25 Harry Bennett received a similar deal. He

1 did not go through similarly awful circumstances, but
2 Harry Bennett was facing multiple other charges that
3 brought with them significant jail time. And he only
4 pleaded guilty to get rid -- well, to diminish those
5 other charges. So a jury would think relatively little
6 about those witnesses. What --

7 JUSTICE GINSBURG: In a different --
8 different case, not in this case.

9 MR. WILLIAMS: No. I think in this case,
10 the jury already did think relatively little of those
11 witnesses. The jury acquitted two defendants that these
12 witnesses put in the case.

13 Going to Mr. Thomas, I completely agree,
14 Justice Alito, that Mr. Thomas, unlike the other
15 purported eyewitnesses, does not have an immediately
16 obvious reason to lie, no immediately obvious reason to
17 fabricate testimony. But his testimony, A, differed
18 from every other purported eyewitness; B, changed
19 dramatically over time; and C, is inconsistent with the
20 objective crime scene evidence.

21 Mr. Thomas testifies to one of the
22 petitioners striking Mrs. Fuller and then seven
23 petitioners simultaneously attacking her. If you look
24 at the forensic evidence in this case, there's no reason
25 to think that she was simultaneously attacked by seven

1 people. I would direct you to A1191 in the hard copy
2 appendix. That is a diagram of the injuries to
3 Mrs. Fuller. Anybody looking at that diagram would not
4 think that a group attack had occurred.

5 Let me then return to the beginning of your
6 question, Justice Alito.

7 JUSTICE ALITO: But even so, wouldn't it
8 still be difficult to explain how Thomas came up with a
9 theory that would be a complete fabrication. It's not
10 just a -- wouldn't be just a question that he was
11 mistaken about things, or he might have exaggerated or
12 something like that. It would be a complete fabrication
13 with no obvious motive. Wouldn't that be true?

14 MR. WILLIAMS: Well, first, defendants at
15 trial did try to point to a motive, that Mr. Thomas was
16 a relatively unpopular kid who got him picked on quite a
17 bit. But I agree that there is no immediately obvious
18 motive for the fabrication.

19 What I would add, Justice Alito, is two
20 points: First, Mr. Thomas came to the defendants' --
21 came to detectives' attention and the prosecution's
22 attention very late in the day. There was a huge amount
23 of information available at this -- about this case by
24 that time. All of the petitioners had already been
25 arrested. So for him to stand up there and tell police,

1 oh, it was these seven or eight people, that's not
2 rocket science. That's saying what was already
3 available in the community.

4 I'd like to --

5 JUSTICE SOTOMAYOR: Did Mr. Thomas ever
6 recant?

7 MR. WILLIAMS: No. Mr. Thomas has not
8 recanted. Mr. Thomas has not recanted.

9 If I may, Justice Alito, I'd like to go back
10 to the very beginning of your question, because I would
11 like to explain how we don't think there is that much
12 difference between what -- a lot of what the defense
13 counsel tried to do, and also using the
14 alternative-perpetrator theory.

15 The one thing that defense counsel did in
16 their original trial -- which was devastating, by the
17 way -- but that they would not have done in the -- in --
18 if they had access to the suppressed information, is
19 they would not have actively bolstered the prosecution's
20 witnesses. They did that over and over again.

21 And the lead prosecutor took advantage of
22 that in his rebuttal closing. He said -- and I believe
23 this is at Joint Appendix page 185 -- something to the
24 effect of: Well, look at what these defense counsel
25 told you. They told you the believable witnesses are

1 the ones who say that my client wasn't there, and the
2 unbelievable ones are the ones who said that my client
3 was there.

4 That's not a defense.

5 JUSTICE KAGAN: Well, why wouldn't that have
6 happened anyway? I mean, even if you had this
7 alternative-perpetrator theory, there's still a lot of
8 defendants with a lot of lawyers with -- seems still a
9 strong incentive to point at the other folks and say it
10 was them, it wasn't me.

11 MR. WILLIAMS: Justice Kagan, it would not
12 have been a motive to go so far as to bolster the other
13 witnesses. The alternative-perpetrator theory centered
14 on McMillan would be powerful evidence to say: Look,
15 this is the story that we think you should consider
16 about what happened. This is the driver of reasonable
17 doubt to you, the jury. Here's an entirely different
18 alternative account of this crime that differs from what
19 the prosecution is telling you.

20 And they would use that to show, look, not
21 only is this a reason to disbelieve all of the
22 prosecution's witnesses, but this is also a reason to
23 disbelieve the specific witnesses that have identified
24 my client.

25 JUSTICE ALITO: Well, lawyers are used to

1 arguing in the alternative, but other people are not.
2 And I -- it's really hard to see how the -- the defense
3 argument could be: This was -- this crime was committed
4 by McMillan and another, and a confederate of his; but
5 if you don't believe that, it was committed by the
6 group, but I wasn't part of the group.

7 That's really hard to -- to do that; isn't
8 it?

9 MR. WILLIAMS: Right. And if I gave the
10 impression that that's what they would be arguing, I --
11 I apologize, because that's not the argument that I
12 think would be done here.

13 The argument would be McMillan is the most
14 likely alternative perpetrator. He is the reason that
15 you should have doubt about this prosecution's case.
16 These witnesses are flawed. These witnesses had
17 motivations to give testimony. There are reasons to
18 doubt them, and McMillan is the obvious reason why they
19 are all lying.

20 But it is still the government's burden to
21 prove guilt beyond a reasonable doubt. And if you look
22 at this government's case, if the government can only
23 point you to -- for example, the government can only
24 point you to Carrie Eleby, Harry Bennett, and Calvin
25 Alston, you should doubt their testimony for the same

1 reason that you would doubt that this crime committed
2 the way they described it at all, because of
3 Mr. McMillan's presence in the alley, Mr. McMillan's
4 suspicious behavior.

5 So that's the way we think that they would
6 all work together.

7 I would also add that the Court should
8 consider "without evidence" cumulatively. We not only
9 have the McMillan information. We not only have the
10 statements from Luchie and Watts that indicate that the
11 crime may have occurred only 30 minutes before the body
12 was found, but we further have information that
13 undermines the investigation. And this would have
14 further diminished the credibility of the prosecution
15 and the detectives. It would have given the jury
16 further reason to believe that these witnesses were
17 flawed and they were the result of a flawed
18 investigation.

19 JUSTICE KENNEDY: You have so much to cover,
20 I don't want to interrupt, but why, if McMillan was the
21 perpetrator, would he have been hanging around the
22 scene? That -- that -- that's really -- concerns me.
23 Why -- why -- if you commit a murder, you don't hang
24 around for an hour.

25 MR. WILLIAMS: Well, we think that there

1 would be two reasons. And first, he didn't hang around
2 for an hour. He was only at the crime scene for
3 approximately five minutes according to --

4 JUSTICE KENNEDY: But it was -- it was -- it
5 was 30 to 60 minutes later.

6 MR. WILLIAMS: We would say it was most
7 likely 30 minutes later that he came back in. We would
8 say that there are two apparent reasons why he would
9 have come back in. The first and most likely is,
10 remember, Mr. McMillan was hiding something under his
11 jacket. And the object used to commit the sodomy was
12 never found. Defense counsel would have argued to the
13 jury that what he was trying to do was come back to the
14 alley and deposit the object used to commit the sodomy
15 back in the garage.

16 The other reason he might have returned is
17 he mistakenly believed that he had left some identifying
18 information about himself inside that garage, and he
19 would have wanted to remove it.

20 But the last point, Justice Kennedy -- and I
21 think this is critically important -- if you ask any
22 criminal defense lawyer, especially one defending a case
23 involving a violent crime, if he's happy with a defense
24 that depends on his client being clever, they will tell
25 you they are not. Criminals are not clever. And this

1 Court reasoned in *Kyles v. Whitley* that you should not
2 minimize the importance of alternative-perpetrator
3 evidence merely because it would require you to believe
4 that the alternative perpetrator was shrewd and
5 sophisticated.

6 Mr. McMillan was not shrewd and
7 sophisticated, and our defense does not depend on it.
8 Instead, our view is that Mr. McMillan was the kind of
9 person who would commit this type of crime. He was an
10 incredibly violent person. His crimes at the time, even
11 in 1984, depict incredible violence. And that the jury
12 would have heard about that testimony, would have
13 wondered what he was doing in the alley at that time;
14 why, if he had an innocent reason for being in the alley
15 at that time, did he not speak to his own girlfriend who
16 was there? That's peculiar.

17 The jury would have instead really wondered
18 why was he there. And the answer would have been it
19 wasn't for an innocent purpose; it was for an illicit
20 purpose. It was for a criminal purpose.

21 JUSTICE ALITO: Okay. Could I ask you a
22 kind of a picky question that relates to the
23 Watts/Luchie evidence. Part of the argument there is
24 that only one or two people could fit in the garage, but
25 I don't see -- why would that be so? If it's big enough

1 for a car, it's big enough for more than one or two
2 people.

3 MR. WILLIAMS: So, if it's okay with the
4 court after I answer this question, I would like to
5 reserve the balance of my time. But to answer your
6 question if you look at JA30 in that diagram of the
7 crime scene you'll see that there is a large amount of
8 debris in that garage. I think it's not impossible that
9 there could only be -- there could have been more than
10 one or two people, but the idea that there could be
11 multiple people in there committing a crime at that time
12 along with Mrs. Fuller being on the ground, that is what
13 is unlikely.

14 And I point out that in the post conviction
15 hearing the lead prosecutor on the stand agreed with us
16 that it was highly unlikely that there was a large group
17 in the garage with the doors closed if the crime was
18 being committed at 5:30. Thank you you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Ms. Rice.

21 ORAL ARGUMENT OF DEANNA M. RICE

22 ON BEHALF OF THE PETITIONER IN NO. 15-1504

23 MS. RICE: Mr. Chief Justice, and may it
24 please the court:

25 The jury repeatedly deadlocked as to Russell

1 Overton telling the court it would be impossible to
2 reach a verdict and returning a conviction only after
3 multiple assertions of impasse, and 40 to 50 additional
4 votes.

5 In this incredibly close case the government
6 not only wrongfully suppressed evidence of two
7 alternative perpetrators, but also withheld critical
8 impeachment evidence concerning a key witness against
9 Overton Carrie Eleby. The case against Overton was
10 especially weak and Eleby's testimony played an
11 especially important role in that case. I'd like to
12 begin by briefly addressing the weaknesses in the
13 government's case here.

14 At trial the government presented three key
15 witnesses against Overton who placed him in the alley
16 during the attack. The two corroborators, Alston
17 Bennett and Carrie Eleby. All of those witnesses had
18 serious credibility problems and their stories diverged
19 in several significant respects, including among other
20 things about who was involved and what role they
21 supposedly played.

22 At the same time, another purported eye
23 witness who the government later emphasized as the key
24 to its case, affirmatively denied seeing Overton in the
25 alley during the attack even though Overton is

1 exceptionally tall and witness knew him personally.

2 JUSTICE GINSBURG: Which one was that?

3 MS. RICE: That was Maurice Thomas. That is
4 not taken together a strong case, and the jury acquitted
5 a defendant, Alphonso Harris, who the two corroborators
6 squarely implicated in the crime confirming that the
7 jury had serious questions about their testimony even
8 without the suppressed evidence. Indeed even the lead
9 prosecutor recognized that Harris's acquittal meant the
10 jury simply was not willing to convict based on all
11 Alston and Bennett alone.

12 And that leaves Carrie Eleby as the only
13 additional witness who claimed to have seen Overton
14 participate in the attack as the center of the
15 government's case against Overton. And the government
16 wrongfully withheld evidence that Carrie Eleby had
17 persuaded another witness to lie to investigators to
18 implicate someone in the crime by falsely claiming to
19 have heard him confess.

20 That suppressed impeachment evidence is
21 distinct from any impeachment to which Eleby was subject
22 at trial because of what it indicates about her motives.
23 Lying to protect someone is understandable. But lying
24 to implicate someone in a horrific crime is malicious.
25 And Eleby's willingness to encourage someone else to lie

1 strongly suggests she would have been willing to lie to
2 implicate someone herself, and that she may have been
3 doing exactly that before the jury at trial.

4 JUSTICE GINSBURG: Ms. Rice --

5 JUSTICE KENNEDY: Did the government give
6 nothing at all to the defense about Eleby or did they
7 just give a truncated file or was there a separate file
8 they didn't give.

9 MS. RICE: And so the government did turn
10 over Eleby's grand jury testimony and the defense
11 cross-examined her on some inconsistencies between that
12 testimony and her testimony at trial. But the
13 government didn't turn over this piece of impeachment
14 evidence about her having persuaded another witness to
15 lie in the investigation.

16 JUSTICE KENNEDY: That wasn't redacted, but
17 it was on a separate notepad or something.

18 MS. RICE: It -- it was in the prosecutors
19 notes, yes, and the -- and the prosecutor at the
20 post-conviction hearing acknowledged that he had this
21 information, that it's the kind of thing he normally
22 would have brought out probably in the grand jury
23 testimony, and that it just slipped off his radar. And
24 that information was categorically distinct from the
25 type of impeachment to which Eleby was subject --

1 JUSTICE KAGAN: Ms. Rice --

2 MS. RICE: -- at trial.

3 JUSTICE KAGAN: The matter of Eleby that you
4 were talking about, this is what the government says
5 about that, and I just wondered whether, what your
6 reaction was to it. The government responds Eleby was
7 not fabricating evidence, rather she was creating false
8 corroboration for something that was true.

9 MS. RICE: Two points on that:

10 First there's a substantial question at
11 least as -- as it was before the jury about whether this
12 conversation she claimed to have had with Alston which
13 the other witness falsely corroborated to investigators
14 actually happened. She was asked about this in
15 cross-examination case, frankly her testimony on this is
16 quite confusing and self-contradictory. The prosecution
17 later said: Well we had other confirmation that that
18 conversation happened, but none of that was before the
19 jury. That was what the prosecutor himself knew from
20 having spoken with the witnesses about it. But what is
21 absolutely clear on the record here is that the other
22 witness, Kaye Porter, had absolutely no knowledge of
23 this supposed conversation. She had no independent
24 basis for knowing any of the facts that she claimed to
25 have heard in that conversation. It was completely

1 false. Both Kaye Porter and Carrie Eleby acknowledged
2 as much to investigators, and the investigators were
3 aware of that, and simply, didn't turn it over.

4 JUSTICE KAGAN: You're kind Ms. Rice, I
5 would have said creating false corroboration is
6 fabricating evidence.

7 MS. RICE: And -- and I would emphatically
8 be -- not agree -- agree with that.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Dreeben.

11 ORAL ARGUMENT OF MICHAEL R. DREEEBEN
12 ON BEHALF OF THE RESPONDENT

13 MR. DREEEBEN: Mr. Chief Justice, and may it
14 please the Court:

15 This Court can have confidence in the
16 integrity of these verdicts. The evidence of a group
17 attack was strong and was corroborated by multiple
18 sources who personally witnessed the planning, carrying
19 out, and culmination of the attack. The evidence of the
20 third-party perpetrator that petitioners have now put
21 before this Court is weak and speculative. There is no
22 reasonable probability that even if petitioners joined
23 hands and put on this evidence that a jury would have
24 occurred that no group attack happened at all.

25 Now the centerpiece of the government's

1 evidence of the attack consists of six witnesses: Two
2 of them all, Alston and Bennett, are participants in the
3 crime. They came before the jury. They pleaded guilty
4 to murder and attempt in manslaughter. They described
5 their roles in the attack. They described the roles of
6 the Petitioners. Their testimony was not one hundred
7 percent in accordance with each other. I think the
8 Court would be quite surprised if it was. This was a
9 fast-moving-chaotic event with mostly teenagers and
10 people in their young 20's, and the fact that memories
11 diverge is a sign that they were telling the truth as
12 they recalled it, not that they were fabricating
13 evidence. The group attack was further supported by the
14 testimony of two witnesses, who as -- was described in
15 closing by Alphonso Harris's lawyer had no motive to
16 lie, no skin in the game.

17 JUSTICE GINSBURG: Can we go back to your
18 first, to the -- the two who confessed and testified for
19 the prosecution. They placed two people that the jury
20 acquitted in the gang, is that not right?

21 MR. DREEBEN: That is correct.

22 JUSTICE GINSBURG: So the -- the jury, at
23 least to that extent, did not believe what these
24 witnesses said.

25 MR. DREEBEN: Well -- there -- there are two

1 separate questions, Justice Ginsburg: Whether the jury
2 believed everything that Alston and Bennett said, and
3 the question of whether they believed it that a group
4 attack occurred. Petitioners can only raise any
5 question about the verdict if they have a viable theory
6 that no group attack occurred at all. Their theory is
7 that, it's the guy who was never seen with the victim,
8 never seen in the garage. It's McMillan, not a group.

9 Now the question of who was in the group is
10 a different matter all together and the defendant who
11 was acquitted Alphonso Harris -- among Harris had a
12 variety of things going for him that the other
13 defendants did not. He presented five alibi witnesses
14 that the government was not as successful.

15 JUSTICE GINSBURG: Justice Alito suggested
16 earlier that a defense counsel might take the position,
17 there's evidence that indicates McMillan was the one who
18 did it. But at least my guy didn't, my guy was not part
19 of any gang. So it's not necessary to say this is it.
20 I'm putting all my marbles on McMillan. The defense
21 counsel could say, "McMillan is the most likely, but in
22 any event my client wasn't there".

23 MR. DREEBEN: Sure Justice Ginsburg, the
24 defense counsel can run alternative arguments, but to
25 the extent that they depend on saying no event happened

1 and any event if you believe the government's witnesses
2 my guy wasn't one of them is weaker, but I don't even
3 think that's the issue for the Court to decide. The
4 issue for the Court to decide is whether the undisclosed
5 evidence about McMillan, if it had been disclosed, would
6 create a reasonable probability that the jury would have
7 said no group attack at all, these defendants were
8 really -- you know, there's a reasonable doubt whether
9 any group attack occurred. It really was this one guy
10 doing it.

11 And I want to --

12 JUSTICE SOTOMAYOR: Mr. Dreeben, it's a hard
13 case about whether it was one or more perpetrators.
14 More than likely more than one. The question is which
15 ones. We know they acquit two, the jury, and on two of
16 them they deliberate longer, and they, I believe, report
17 not being able to reach a verdict on Overton and Turner.
18 So something was holding them up with respect to those
19 two defendants.

20 If that's the case, why would it take very
21 little to say that at least with those two defendants,
22 all of the cumulative effect of the withheld evidence
23 reasonably could have made a difference?

24 MR. DREEBEN: Justice Sotomayor, let me
25 start first with what actually happened in the

1 deliberations because you can't understand what's going
2 on with Turner, Chris Turner and Overton, unless you
3 understand that the jury deliberated carefully,
4 convicted six defendants and acquitted two defendants
5 after going through an elaborate process of considering
6 the evidence in a six-week trial, sending out a variety
7 of notes that all required consideration of evidence and
8 culminating in a request to see Yarborough's videotaped
9 statement, which he gave early on in the investigation
10 in which he describes the group attack as a pincer
11 movement with two groups of people moving out of the
12 park, surrounding the alley, 8th Street and 9th Street,
13 and commencing the attack. So by the time that the jury
14 had convicted after watching the Overton -- the
15 Yarborough video again, they had concluded that a group
16 attack occurred. They had found evidence sufficient to
17 convict beyond a reasonable doubt on six of the
18 defendants. Two of them, Lisa Ruffin, Monk Harris, they
19 said there's not enough evidence to tie them in. I
20 think the evidence against Lisa Ruffin was particularly
21 attenuated, and the evidence against Alphonso Harris was
22 just different as we describe in our brief.

23 So by the time the jury is deliberating
24 about Overton and Chris Turner, they've already decided
25 beyond a reasonable doubt that a group attack exists.

1 JUSTICE KAGAN: Well, Mr. Dreeben, of course
2 that's right because that was the only theory in the
3 case. And the question is, what would have happened if
4 the prosecutors had given over this evidence such that
5 an alternative theory of the case could have been
6 proposed?

7 I mean, one of the things that you get when
8 you read these briefs and when you read the transcripts
9 is, this was kind of guaranteed to be bad for the
10 defendants in the sense that, without any alternative
11 theory, it was -- it was a circular firing squad, and it
12 was, you know, you should believe the guy who doesn't
13 incriminate me, but of course you should believe him as
14 to everybody else. And all ten of these people saying
15 this, it created the worst of all possible worlds for
16 the defendants. And I think what they are saying now is
17 as compared to that, of course we would have run with
18 this alternative theory and it would have been an -- a
19 completely different trial.

20 MR. DREEBEN: So, Justice Kagan, it's not
21 actually accurate that they had no alternative theory.
22 Rouse, who was the -- the defendant who committed the
23 culminating act and has four separate people testifying
24 that he did it, ran the most obvious alternative
25 perpetrator defense, the one that was readily available

1 to all of the Petitioners. Alston and Bennett are
2 getting up on the stand and saying, I participated in
3 this attack, so did all these other people. That's a
4 classic defense strategy is to say, they've admitted
5 their guilt. Now they're trying to spread the blame in
6 order to diminish their culpability. And Rouse's
7 counsel got up at closing argument and said, the way the
8 crime unfolded is that Harry Bennett, Calvin Alston, and
9 Gerald Merkerson did this on their own. They
10 thrown my -- throwing my client in in order to mitigate
11 their own culpability. So they had the most obvious
12 alternative perpetrator defense.

13 What they're now talking about is one that
14 would require the jury to disbelieve Melvin Montgomery
15 about the way that the attack originated in the park;
16 Maurice Thomas, a 14-year-old which they admit today had
17 no reason to lie about what he saw. One of the defense
18 counsel described him as walking by, looking in the
19 alley and seeing the beginning of a murder in progress.

20 Counsel stated today that Maurice Thomas
21 changed his testimony from the grand jury to trial about
22 where he stood. That is not true. If you look at the
23 record, he always described the group that was attacking
24 the victim who he did not know until he heard her call
25 out, help, somebody help me, when the Petitioners

1 attacked her.

2 There was a group standing behind it in the
3 alley further back who he could not see, and this is one
4 of the reasons why I think, to return to Justice
5 Sotomayor's question about Overton and Chris Turner,
6 Chris Turner is not making any individualized argument
7 here at all. He -- for him, it's alternative
8 perpetrator McMillan or nothing.

9 Now, Overton is making a separate argument
10 that I wouldn't have been convicted because Maurice
11 Thomas who knows me didn't see me in the alley, and I'm
12 6-6, and he surely would have seen me.

13 But what Maurice Thomas is describing as a
14 7th grader walking by an alley and seeing seven people
15 begin to beat on someone who's screaming for help, is
16 that, I looked at it, my attention was drawn. His
17 credibility, I think, is enhanced by the fact that he
18 says I identified four of them positively. Three of
19 them, Chris Turner, Smith, Hollywood, and Derrick, Harry
20 Bennett, I think that was them but I'm not sure. He
21 stuck to that testimony throughout. He didn't
22 embellish. He didn't enhance. He described what he
23 saw. And he was there for only a short period of time,
24 so naturally, he was not able to recognize everybody
25 that possibly was on the scene.

1 So I think, Justice Kagan, what you have
2 here is a case where yes, the defendants did point the
3 finger at each other. They really had no choice.
4 Yarborough has a videotaped confession that's going to
5 come in in which he tries to distance himself from the
6 events that occur in the alley, but he describes the
7 same unfolding of the attack that Alston and Bennett and
8 Montgomery described.

9 They're standing in the park. They're
10 singing the Chuck Brown song. Catlett is singing it.
11 Steve Webb is banging out the beat. They're talking
12 about getting paid, which is a euphemism for robbery.
13 Someone points across the street. Alston testifies it's
14 him. Montgomery isn't able to say who it was. Says
15 let's go get that one.

16 Montgomery, who, by the way, is -- is kind
17 of connected to Overton because Overton is the godparent
18 of his daughter. Montgomery testifies, I saw Overton
19 point across the street, and I looked in the direction
20 that he was pointing and I saw a woman there. He
21 doesn't say -- he doesn't exaggerate and say I know who
22 Overton was pointing at, but he describes what happens.
23 Then he described Overton and Catlett leaving towards
24 the 9th Street side of the alley, while Rouse and
25 Charles Turner, Fella, leave towards the 8th Street side

1 of the alley. That is entirely consistent with the
2 testimony about the way that the crime unfolded of
3 Alston and Bennett. So I think for Overton to say that
4 there's no other evidence besides Carrie Eleby, against
5 whom the incremental impeachment was not significant, is
6 wrong. There's Melvin Montgomery describing how he's
7 there in the park.

8 Now, Overton also offered an alibi that was
9 completely discredited at trial. He testified that a
10 woman named Maria Michaels was with him in the park at
11 around 2:30, that he got very drunk and he decided to go
12 home with her and he went home. And at home, his
13 grandmother and his sister saw him. His grandmother's
14 testimony at trial was basically eviscerated by the fact
15 that she admitted that her daughter had to tell her what
16 to say. And Overton's sister did back up the -- the
17 alibi, but she's a family member, and the testimony that
18 they offered is directly contradictory to the way that
19 Montgomery describes Overton's behavior in the park.

20 Overton also was put in a jail cell with
21 Chris Turner, and the two of them are talking and a
22 detective testified about what they are saying. Chris
23 Turner later took the stand and corroborated.

24 JUSTICE SOTOMAYOR: So, Mr. Dreeben, why did
25 it take the jury longer?

1 MR. DREEBEN: Well, I think that this is
2 a -- this is a six-week trial with ten defendants as
3 Your Honor pointed out. The evidence was extremely
4 compelling against defendants like Rouse and Catlett and
5 Yarborough. Even still, the jury did what you wanted a
6 jury to do. They asked to see testimony. They asked
7 for clarification on instructions. They deliberated
8 carefully. They returned an initial verdict acquitting
9 two of them, convicting six of them.

10 JUSTICE GINSBURG: But we don't know how the
11 trial would have shaped up and how the jury would have
12 reacted if the defendants had put on this alternative
13 theory. You can say well, it probably would have
14 failed, but the test is only could a jury believe this
15 scenario. Not would they, but could they.

16 MR. DREEBEN: So the test, Justice Ginsburg,
17 is whether there is a reasonable probability of a
18 different outcome defined as an outcome in which this
19 Court's confidence is undermined that the jury would
20 have convicted. The Court has made clear in Agurs and
21 in Strickler that it's not "might" have reached a
22 different verdict; it's not that low of a standard.
23 It's also not a preponderance of the evidence; it's not
24 that high of a standard.

25 But if you read Strickler very carefully, I

1 think this is the best case that really illustrates it.
2 Sure, various pieces of exculpatory evidence, had they
3 been offered by the defendants, I submit they never
4 would have offered the McMillan theory, and I'll explain
5 why. But had they offered that, you can speculate that
6 perhaps some juror might have had a reasonable doubt,
7 but that is not the same thing as having your confidence
8 undermined that the jury still would have concluded that
9 a group attack occurred.

10 I've talked about four of the witnesses who
11 saw it. The two cooperators who pleaded guilty
12 described their own acts. I've talked about Maurice
13 Thomas, the seventh-grader who walks by, sees the
14 beginning of the crime unfolding in the alley. That's
15 what Overton's counsel said to the jury at closing. And
16 I've talked about Melvin Montgomery, who's in the park,
17 who describes how this pincer movement unfolded and --
18 and began.

19 The Carrie Eleby, Linda Jacobs, two girls
20 who are looking for Smith Hollywood because Carrie Eleby
21 is seeing Smith, go into the alley. They see the
22 attack. They describe --

23 JUSTICE KAGAN: Mr. Dreeben, can I ask about
24 the facts of this? And it's a -- it's a similar
25 question on the other side to the one Justice Alito

1 asked about the garage. Just when I sort of think of
2 the fact it -- it's 5 o'clock on a Monday, it's on H
3 Street, a busy thoroughfare. There -- in -- in the
4 prosecution's view of this there are 15 or 20 people
5 carrying out this pincer movement, as you describe it.
6 There's an alleyway, but it's backed up by houses on
7 both sides.

8 Why is it that in the end, the government's
9 witnesses were two people who were charged and were
10 making a deal with the government and who had reasons to
11 make a deal with the government, a couple of really
12 drug-addled people and a 14-year-old boy? I mean, you
13 would think that in this community there would be so
14 many people who would see the kind of attack that the
15 government suggests happened here, and why wasn't that
16 the case?

17 MR. DREEBEN: So first of all, Justice
18 Kagan, the government looked as hard as it could for
19 witnesses. Not all of the buildings that back up on
20 this alley are residential buildings. There's a bank.
21 It doesn't have windows. There's brick walls.

22 But I think that probably the best
23 explanation of why nobody came forward or saw it or
24 heard it is community fear. There was a gang that
25 existed in the park at 8th and H Street. It engaged in

1 a fair amount of crime. If you look at the Petitioners'
2 criminal histories, you'll see that for many of them,
3 this was not their only robbery in the area. And the
4 government worked as hard as it could to try to get
5 witnesses.

6 The way that the government actually found
7 out that a group attack occurred was because a woman
8 anonymously approached a police officer on the night of
9 the crime and said she he saw Clifton Yarborough
10 standing by the alley on 9th Street, turning his head
11 back and forth like a lookout. And the police picked up
12 Clifton Yarborough and they interviewed him, and you can
13 see, this is on October 4th.

14 This is the very first time that the
15 government gets any inkling that this is a group attack
16 with a large number of people. The crime scene doesn't
17 tell you that. They learn it for the first time from
18 Clifton Yarborough, who's distancing himself, naturally,
19 and saying I wasn't really part of it. But he's
20 describing the same thing: We wanted to get paid.
21 Let's go get that one. She's got big money.

22 And then later when he gives his videotaped
23 confession, he says the same thing. Now he's attempting
24 to extricate himself, of course, saying he wasn't really
25 involved in any of the violence, but he's describing the

1 same group attack.

2 So I think the community here was basically
3 under siege. This was a crisis. And witnesses don't
4 come forward necessarily when they may have fear about
5 it or they just don't want to get involved. Remember
6 Maurice Thomas. He's the seventh-grader. No motive to
7 lie, no skin in the game, no deals with the government.
8 His family doesn't really want him involved in this. He
9 goes home and he tells his aunt: I just saw a beating
10 in the alley.

11 She says: Don't tell anybody else about
12 what you saw.

13 His family doesn't bring him forward when he
14 knows that the prosecution is evidence -- seeking
15 evidence about the crime.

16 Eventually, the prosecution has heard that
17 there's a kid named Maurice who knows something about
18 this crime. They're interviewing other members of a
19 family and they discover one of the people who lives in
20 the house is Maurice. They bring him down; he tells the
21 same story that he told at trial.

22 So it is regrettable, I think, that the
23 government doesn't have civilian witnesses, but in
24 criminal activity, it's frequently the case that the
25 only people who can really tell you what happened are

1 those who participate. And so they make deals, and
2 those deals are exposed in cross-examination. At trial
3 the jury has the chance to develop impressions of their
4 credibility. Maybe, if all we had was Alston or Bennett
5 alone, this would be a different case, but we have
6 Alston, we have Bennett, we have Montgomery, we have
7 Maurice Thomas, and the two girls --

8 JUSTICE BREYER: Is -- was the judge -- the
9 superior court judge who decided the post-trial motions,
10 the Brady motion, the same judge as the judge who
11 presided over --

12 MR. DREEBEN: It was not. Judge Scott
13 presided over the trial. Judge Weisberg provided --
14 presided over the postconviction motions. Judge
15 Weisberg listened to all the evidence. He reviewed it
16 in detail, the recantations, the allegations of police
17 abuse. He heard from the detectives. He heard from
18 Yarborough. He heard from Alston and Bennett, and he
19 concluded that Alston and Bennett's current recantations
20 are nothing short of preposterous.

21 He examined carefully the way that the
22 evidence that they are currently saying matched against
23 the evidence that they gave in the videotapes, and the
24 videotapes are in the record.

25 And I would urge the Court to look at the

1 videotape of Alston's statement to the police in late
2 November. Look at the videotape of Bennett's statement
3 to the police in February. Bennett, when he's
4 describing this crime and he gets to the culminating
5 act, breaks down. He can't even talk about it. Alston
6 similarly has an emotional reaction to it.

7 They do not think that they are implicating
8 themselves in the crime by describing the way that it
9 unfolded and that it culminated in the alley, because
10 they are not admitting what they actually did. They
11 eventually realize that, in the face of evidence that
12 would be overwhelmingly likely to result in a conviction
13 and a very long sentence, it was in their interest to
14 cooperate.

15 Defendants are perfectly able to, and they
16 did, cross-examine at length to attempt to show that
17 these motives to lie resulted in false testimony. But
18 what they had incredible difficulty in doing is
19 explaining why is it that all these people are telling
20 stories from their own perspective of a group attack if
21 it didn't happen, and that's what they would be
22 confronted with if they tried to say it's this McMillan
23 guy. He ran into the alley later.

24 He has two snatch-and-grab purse snatchings.
25 These crimes were nothing like the murder of Mrs. Fuller

1 that occurred in the garage. Yes, he hit people, but
2 they are a light years' different from the crime that
3 actually occurred. They are so different, that if the
4 government had attempted to introduce those criminal
5 convictions as 404(b) evidence, we would have been shut
6 down.

7 They would come in only as propensity
8 evidence under a very generous interpretation of
9 third-party perpetrator defense in a case called
10 Winfield by the D.C. Court of Appeals that lay a decade
11 in the future. At the time of trial, there was no
12 reason to think that those criminal convictions even
13 would have come into evidence.

14 JUSTICE ALITO: What about the attack that
15 Mr. Williams described? The McMillan's attack on the
16 council woman.

17 MR. DREEBEN: Yes. I mean, she certainly
18 was terrified, as I would be too, if somebody came up
19 and hit me in the face and grabbed, you know, a
20 briefcase and ran off with it. But they were
21 snatch-and-grab purse snatchings. They did involve
22 violence, but they didn't involve somebody sticking
23 around to beat somebody the way that Mrs. Fuller was
24 beaten. Mrs. Fuller ended up --

25 JUSTICE KAGAN: Of course, the prosecutors

1 did not know this, but in the end McMillan commits a
2 crime very much like this.

3 MR. DREEBEN: Well, I think the crime
4 actually quite different. Yes, there are some
5 similarities. It's the neighborhood. He does drag
6 somebody into the alley. But that crime, unlike this
7 one which involved an act with a pole, that crime
8 resulted in McMillan being convicted of murder and
9 sodomy, sodomy defined as a crime involving use of the
10 sexual organ to commit the act, and he was seen running
11 away from the victim pulling up his pants.

12 So I don't think that -- these are both
13 horrible crimes and horrific acts, but they are very
14 different in nature. I mean, what -- what Levy Rouse
15 was witnessed doing by four different people to Mrs.
16 Fuller is more accurately described as torture. And
17 therefore, I don't think that the Court should reach the
18 conclusion that because McMillan's crime was somehow a
19 signature crime, he actually is the one, even if the
20 evidence at the time wouldn't show that. Even the
21 defense expert at the postconviction hearing conceded
22 that these were not signature crimes.

23 So what you really have here is speculative
24 evidence that could have been deployed by a defendant.
25 I doubt it would have been deployed by a defendant

1 because they had such an obvious small-group theory of
2 the crime, Alston and Bennett; and only one of them
3 argued it and that was Rouse.

4 And you can see why Rouse would do it. He
5 had four eyewitnesses putting him right there in the
6 scene committing the act. What else is he supposed to
7 do? He also got on the stand and testified to an alibi
8 that directly contradicted Charles Turner's alibi.
9 Rouse has him being with Turner at a time when Turner
10 says he's not with Rouse.

11 JUSTICE KAGAN: Why does Michelle Roberts,
12 who has a client who the evidence is quite weak against,
13 say that she certainly would have run with this
14 evidence. And she's -- you know, when you read some
15 aspects of this transcript again, you see that although
16 the ten lawyers had ten different sets of interests, to
17 the extent that there is a lead lawyer in this case,
18 it's Michelle Roberts who was the PDS lawyer, who was a
19 woman of incredible skill and experience, and says she
20 clearly would have gone with this evidence.

21 MR. DREEBEN: Well, her client was
22 acquitted. She's not before the Court as a petitioner,
23 and I agree with you that Michelle Roberts is a superb
24 lawyer and perhaps she would have tried to deploy it,
25 but it would have been a very difficult sell to the rest

1 of the defendants, and I think that the -- the defense
2 would have had considerably less force than the even
3 very diminished force I think it would have had any way.

4 If somebody like Yarborough is not going
5 along with, how is Yarborough supposed to say to a jury,
6 "yes, I -- I said to the police in a videotaped
7 interview that there was a group of people in the park
8 and I was one of them and then many of the petitioners
9 are among them and they left the park in order to follow
10 a woman saying, let's get paid that one she's got big
11 money". How is she supposed to do that defense?

12 And you -- also would be asking the jury to
13 say, it's basically this mystery guy. No one has seen
14 her with Mrs. Fuller. No one has seen her -- seen him
15 with any of her property, and to answer Justice
16 Kennedy's question: What is he doing back there in the
17 alley? He lives on the alley on eighth street. This is
18 a shortcut to his house. He's running in from the alley
19 on ninth street that what people have referred to as the
20 "cut in the alley" is a North/South route so he takes
21 the East/West alley. He goes up the cut of the alley.
22 That's where he lives. What was he doing in the alley
23 at the time? I -- I think the prosecutor at trial said:
24 All we will ever know. We don't know. No one will ever
25 know why he was running back and forth there. But --

1 JUSTICE GINSBURG: Why was his name not
2 given to the defense?

3 MR. DREEBEN: At the time Justice Ginsburg
4 the policy of the Department of Justice was that we
5 comply with our obligations under Brady. We complied
6 with our obligations understand the rules of discovery,
7 and if it is not required to disclose information we
8 will not provide it.

9 I think that as Justice Sotomayor mentioned
10 this was raised by Michelle Roberts with the court. She
11 said that she would pursue it later. What she was
12 interested in determining was that the two guys that
13 were seen by Freeman in the alley, Freeman being the one
14 who discovered the body, were not her client. And she
15 later argued that to the jury cause there was no
16 evidence they were her client.

17 Now today, the Department of Justice has
18 adopted a different discovery policy that exceeds what's
19 required under Brady and this Courts cases interpreting
20 it. That was adopted in the United States Attorneys
21 Manual in 2006, and the Department devotes considerable
22 resources to given guidance, training, and supervision
23 to prosecutors to go above and beyond Brady and disclose
24 information that a defendant might wish to use even if
25 it's not.

1 JUSTICE KENNEDY: But -- but if you had --
2 you had been asked you would have told the prosecutor at
3 the time that this is not Brady material, so far as,
4 McMillan is concerned? That's -- that's the advice you
5 would have given the prosecutor, don't turn it over.

6 MR. DREEBEN: Well -- I -- Justice Kennedy,
7 I don't know that is the advice that I would have given
8 him because, unless the government has a good
9 countervailing reason, which it often does, such as
10 witness safety or concerns about obstruction of justice,
11 providing that information to a defendant about the
12 crime scene, about the general timeframe, in which it
13 occurred, would be good practice and it's the practice
14 today.

15 The question for this Court is whether there
16 is a reasonable probability that the jury would have
17 reached a different verdict if it had had turned over
18 the McMillan evidence and the defendants had presented
19 that McMillan evidence to the court. That is the same
20 legal question that occurs both ex ante and ex post. Ex
21 ante is harder for the government to know what the
22 defense will do with information and that's why a
23 generous policy of discovery is good for the finality of
24 criminal convictions as well as the fairness of the
25 process. This Court encouraged it in *Kyles v. Whitley*

1 in 1995. It specifically said, prosecutor anxious about
2 tacking too close to the wind. We'll turn things over
3 in close cases that is the better advice. That's the
4 Department of Justice's advice today, but at the time,
5 the prosecutor looking at the tenuous connection of
6 McMillan to the crime, the only evidence that we had
7 were some statements from witnesses which were not
8 enough to prosecute that McMillan was actually involved
9 in the group attack. Wasn't enough to prosecute him,
10 but there was certainly nothing that suggested that he
11 alone secreted in the garage was somehow engaging in the
12 crime that six different witnesses told the jury had
13 occurred as a group attack. And that was what he said
14 to the judge. Michelle Roberts could have challenged
15 that and asked for a ruling on it. It wouldn't resolve
16 the Brady question because the Brady obligation is the
17 prosecutors, it's not the responsibility of the judge.

18 But the fact that the defendants didn't
19 press forward on that shows that they had very little
20 interest, I think, in trying to identify a mystery man
21 as the person who had committed this crime alone rather
22 than taking the government's evidence as it seemed to
23 be, which was a strong case of a group attack, and the
24 question was: Which defendants were inculcated in it?

25 And if the Court has no further questions,

1 we submit that the Court should affirm.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 Mr. Williams, four minutes.

4 REBUTTAL ARGUMENT OF JOHN S. WILLIAMS

5 ON BEHALF OF THE PETITIONERS

6 IN NO. 15-1503

7 JUSTICE SOTOMAYOR: Mr. Williams could you
8 list for me the legal errors the court made below?

9 MR. WILLIAMS: Absolutely. There are three
10 principle legal errors that the court made below:

11 First, it emphasized the reasons why a juror
12 might disregard the evidence while ignoring reasons why
13 the juror might not disregard the suppressed evidence.
14 I think the best place to find that in the courts record
15 is Petition Appendix, pages 49A to 45A. Second, the
16 court below criticized the evidence here because it goes
17 to the basic structure of how the crime occurred.
18 That's in page 54A. My --

19 JUSTICE SOTOMAYOR: I'm sorry go through
20 that one again.

21 MR. WILLIAMS: Sure. The court criticized
22 the suppressed evidence because it goes to quote, "the
23 basic structure of how the crime occurred". Our
24 response is exactly. And that makes it particularly
25 probative. It shows how this whole case would have been

1 cast in a different light if Petitioners had -- had
2 access to that information. It would have presented an
3 alternative theory. And third, there is an assumption
4 running through the courts decision below that the jury
5 found the government's witnesses creditable. Well,
6 that's because the jury only heard half of the evidence.
7 And even then, the jury deliberated for a week before
8 returned any verdict, and it was a split verdict.

9 CHIEF JUSTICE ROBERTS: Was that -- is that
10 a legal error? Sounds like a factual error.

11 MR. WILLIAMS: Well, no I think it is a
12 legal error, Your Honor, if you look at Parker v.
13 Gladden, which is a case from this Court in 1966. It's
14 a per curiam opinion. But this Court held in that case,
15 that the length of jury deliberations suggests that the
16 jurors have doubts about the guilt of the accused. So
17 yes, we would submit that that is in fact a legal error.

18 But if you want to consider it an error of
19 analysis so be it. We think those are the three
20 principle errors in the decision below. If I may, I'd
21 like to make four quick points before I step down.

22 First, in answer to your question Justice
23 Kagan, there was a civilian witness, it was William
24 Freeman, and he was standing at the corner of eighth and
25 H all day. He said that there was no group attack -- he

1 did not see any group cross the alley. He did not hear
2 any screams from the alley. He had no reason to think
3 that this group attack had occurred. That was testimony
4 in the record from the only civilian witness the only
5 person who did not have reason to fabricate testimony,
6 as a young inarticulate witness, who was -- who was
7 being pressured by police to inculcate himself or his
8 friends.

9 Second, the government focused a great deal
10 on Mr. Montgomery. Mr. Montgomery is a perfect example
11 of these types of witness. Mr. Montgomery was a drug
12 dealer, who spoke to police only after being threatened
13 with arrest, and then admitted on the stand that he only
14 named people already been arrested. That would weigh on
15 the mind after jury. They would think that is -- that
16 all of that testimony is the reason why he might
17 fabricate -- fabricate evidence.

18 Third, the government focused on
19 Mr. Yarborough's statement. I would remind the Court
20 that the jury was instructed to weigh that evidence with
21 caution. That's at page 859 of the hardcopy appendix,
22 A859. And the fact, that after deliberating for seven
23 days the jury asks to look at that information, shows
24 that the prosecution's theory here that there was clear
25 evidence of guilt against some people isn't true because

1 they keep on pointing to Mr. Yarborough, but after seven
2 days of deliberation the jury wants to look at evidence
3 regarding Mr. Yarborough. And last thing they do
4 before they return any verdict.

5 Last, overall, the one thing you did not
6 hear Mr. Dreeben mention very much was the objective
7 crime scene evidence. The objective crime scene
8 evidence, in addition to the alternative perpetrator
9 theory would have presented an overwhelmingly powerful
10 case of innocence. It certainly would have been enough
11 to be a reasonable probability of the jury finding
12 reasonable doubt and that's all the information needs to
13 establish.

14 As we pointed out in our brief, the
15 purported eye witnesses got the injuries to the victim
16 wrong. If you look at page A1191 as I asked you to look
17 at before it makes that clear. They got the location of
18 the sodomy in the garage, wrong. The government's
19 theory at trial on that was wrong. The government has
20 never sought -- thank you -- let me just finish the
21 sentence.

22 CHIEF JUSTICE ROBERTS: You can finish your
23 answer, sure.

24 MR. WILLIAMS: Yes. The government has never
25 sought to explain how it has -- it can correctly explain

1 where the sodomy occurred.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:08 a.m., the case in the
6 above-entitled matter was submitted.)

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