Nos. 15-1503 & 15-1504

IN THE

Supreme Court of the United States

CHARLES S. TURNER, ET AL.,
Petitioners,

v.

UNITED STATES,
Respondent.

RUSSELL L. OVERTON,
Petitioner,

v.

UNITED STATES,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL wishes to emphasize to the Court that a court assessing the materiality of suppressed evidence should consider how that evidence would have shaped the narrative that defense counsel presented at trial. Academic studies and scholarship stress the importance of defense counsel's ability to present a coherent narrative to the jury, including the narrative that someone else committed the crime. The evidence suppressed here would have permitted the various defense attorneys to present a common narrative exonerating all of the defendants of the Fuller murder and pointing to an alternative perpetrator, and it

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Both parties have submitted letters of consent to the filing of all *amicus* briefs with the Clerk of the Court pursuant to Rule 37.3 (a).

is reasonably likely that the result would have been the petitioners' acquittal.

SUMMARY OF THE ARGUMENT

As the petitioners have argued, the court of appeals misstated and misapplied the *Brady* standards that this Court has articulated. The lower court further erred in failing to appreciate how defense counsel would have used the suppressed evidence to build an alternative narrative to counter the prosecution's case, and how defense counsel developed conflicting strategies in its absence.

ARGUMENT

I. THE STRENGTH AND COMPLETENESS OF A CRIMINAL DEFENDANT'S NARRATIVE IS CRITICAL TO HIS SUCCESS AT TRIAL.

Scholarship suggests that a party's presentation of a narrative at trial plays a key role in jurors' decision-making processes; it follows that the defense attorney's ability to tell a "plausible and complete story" establishing his client's innocence plays a critical role in influencing the jury's verdict. John H. Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 Am. Crim. L. Rev. 1069, 1100 (2007); see also David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev. 337, 341 (2016) ("Jury research has long established that jurors tend to base decisions on the presentation of a persuasive story, the strength of which is judged in part on the completeness of key story elements") (citing Blume, *supra*, at 1087–88; Nancy Pennington & Reid Hastie, *A Cognitive Theory*

of Juror Decision Making: The Story Model, 13 Cardozo L. Rev. 519 (1991)).

This Court has recognized the importance of presenting coherent narratives in criminal trials. In *Old Chief* v. *United States*, 519 U.S. 172, 191 (1997), this Court acknowledged the importance of a party (there, the government) presenting the most compelling story that it can given the available evidence, noting that evidence "has force beyond any linear scheme of reasoning, and as its pieces come together, a narrative gains momentum." *Id*. at 187 (specifically discussing the principle that the government may present its case as it sees fit). Stressing that the best advocates "tell[] a colorful story with descriptive richness," the Court explained, "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it." *Id*. at 187, 189.

This Court again addressed the importance of presenting coherent narratives in criminal trials in *House* v. *Bell*, 547 U.S. 518 (2006). In *House*, the petitioner sought habeas relief on the grounds that new evidence had been uncovered exculpating him, namely DNA evidence establishing that the semen on the victim's clothing belonged to the victim's husband and not to the petitioner. *Id*. at 540. Even though sexual contact was not an element of the offense charged, the Court sided with the petitioner, recognizing how important the evidence of sexual assault had been to the prosecution's narrative at trial. *Id*. Without such evidence, the Court found, "a central theme in the State's narrative linking [the petitioner] to the crime" would have been lost, and the jury's view of the case may very well have differed. *Id.* at 541 (noting that the other evidence against the peti-

tioner, "while still potentially incriminating, [may have] appear[ed] less suspicious").

In short, it is clear that juries expect and respond to narratives in criminal cases. It follows that when a prosecutor withholds exculpatory evidence and as a result significantly alters the narrative that the defendant is able to present at trial, the reviewing court's confidence in the verdict should be shaken, and it should thus strongly suspect a *Brady* violation. See John B. Mitchell, *Evaluating* Brady *Error Using Narrative Theory: A Proposal for Reform*, 53 Drake L. Rev. 599, 621 (2005) (arguing that a case should be "on the path to reversal" where the defense would have presented either a "plausible, different story" or a "significantly more persuasive" story with evidence that the prosecution withheld); see also *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 678 (1985)) (favorable evidence is material under *Brady* where its suppression "undermines confidence in the outcome of the trial").

Among the narratives that a defense attorney could use to create reasonable doubt, the defense that someone other than the defendant committed the crime in question is particularly compelling. In a 2009 academic study where 253 college students participated as mock jurors, researchers' findings indicated that jurors were significantly more likely to acquit a defendant who could point to a specific alternative perpetrator than one who simply argued his innocence. Elizabeth R. Tenney et al., *Unpacking the Doubt in 'Beyond a Reasonable Doubt': Plausible Alternative Stories Increase Not Guilty Verdicts*, 31 Basic & Applied Soc. Psychol. 1.[2] The notion that an

[2] Notably, the study's findings also suggested that presenting more than one alternative perpetrator made acquittal marginally more likely than presenting only one alternative perpetrator.

alternative-perpetrator defense can sway jurors is also supported by precedent finding alternative-perpetrator evidence material under *Brady*. See *Kyles*, 514 U.S. at 445–49 (1995) (suppressed inconsistent statements by a police informant suggesting that the informant sought to frame the defendant and had committed the crime himself material); see also, *e.g.*, *Williams* v. *Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (quoting *Boyette* v. *Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001)) (acknowledging that alternative-perpetrator evidence is "classic *Brady* material"). Notably, while many jurisdictions have rules restricting the use of alternative-perpetrator evidence, this Court has indicated that defendants have a constitutional right to raise this defense without arbitrary interference by the state. See *Holmes* v. *South Carolina*, 547 U.S. 319, 330–31 (2006) (quoting *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986)) (reversing as unconstitutional an "arbitrary" state supreme court ruling which effectively barred defendants from presenting alternative-perpetrator evidence where the state's evidence was particularly strong, holding that the ruling violated defendants' right to "a meaningful opportunity to present a complete defense"). The prosecution's decision to withhold evidence in this case prevented the petitioners from advancing an effective alternative-perpetrator theory, and this was likely decisive in the trial's outcome.

II. DEFENSE COUNSEL WOULD HAVE CRAFTED A COMPELLING COMMON NARRATIVE TO REBUT THE PROSECUTION'S CASE WITH THE EVIDENCE SUPPRESSED HERE.

In dismissing the evidence suppressed here as immaterial, the court of appeals speculated about how jurors could have discounted it without properly con-

sidering how defense counsel would have presented it. Petition for a Writ of Certiorari at 51a–59a, *Overton* v. *United States*, No. 15-1504 (June 10, 2016) (finding the withheld evidence immaterial because the evidence, "in its entirety, and however appellants would have developed it," would not have "led the jury to doubt *virtually everything* that the government's eyewitnesses said about the crime") *id.* at 58a. The court's analysis treated each piece of withheld evidence as an inconvenient footnote in the government's case that the prosecution would have rebutted without pushback, and failed to appreciate the obvious effect of having ten sets of defense counsel assemble them into a coherent, common narrative. See *id.* at 51a–59a. The suppressed evidence would have specifically indicated that: one or more perpetrators other than the defendants murdered Mrs. Fuller, the government's investigation was incomplete, and there were very few assailants. In turn, it would have supported a narrative that all of the defendants were innocent and that James McMillan (with or without an accomplice) was the perpetrator.

A. McMillan Evidence.

The defendants knew at trial that witness William Freeman had seen two men enter the alley after Freeman found Mrs. Fuller's body, linger for several minutes, and then flee when police arrived. They also knew that neither man was a defendant, that one of the men (according to Freeman) was carrying an unknown object, and that Freeman had seen both men loitering suspiciously on a street near the alley earlier that day. However, the prosecution suppressed the fact that Freeman (and two other witnesses) could identify one of these men as James McMillan, along

with other information related to McMillan[3]. Without the suppressed evidence, the defendants could not effectively present these other men as plausible alternative suspects; the prosecution's closing dismissed Freeman's failure to identify these men as defendants, calling it a "[a] smokescreen" that had "[n]othing" to do with Mrs. Fuller's death. Transcript of Proceedings at 462, *United States* v. *Catlett* (Dec. 6, 1985) (hereinafter "Dec. 6, 1985 Tr."). The evidence suppressed was actually critical, because with it defendants would not have presented McMillan as a faceless, nameless bystander who happened to flee when the police arrived. Each defense attorney could have approached the jury with an alternative suspect who lived in the area, had been identified at the scene by several adult witnesses, had violently assaulted and robbed two other middle-aged women in the area (by himself and with one other person, respectively) within a month of the attack, and had been approached by investigators. While McMillan was not identified as an attacker by any prosecution witness, this could have cast doubt on these witnesses had the defendants introduced McMillan as an alternative perpetrator based on the facts above. These facts combined would likely have made McMillan a credible suspect in the eyes of the jury and sowed doubt about the petitioners' guilt.

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[3] Namely that McMillan had a record of violent crimes, that he lived in the area, that he violently assaulted two other middle-aged women in the area in the month following the Fuller murder, that he had been approached by investigators and declined to be interviewed, and that one of the other witnesses confirmed that he was acting suspiciously at the crime scene and had an object under his coat.

B. Blue Evidence.

Witness Ammie Davis' statement implicating a man named James Blue in the murder, and the government's lack of diligence in investigating Blue, would have permitted defendants to attack the thoroughness of the government's investigation. Davis identified Blue to police in October 1984 as Fuller's sole attacker and described a number of specific details about the crime. Blue was unconnected to the defendants, had served time in jail for assault and had arrests for rape, armed robbery and forcible sodomy. Investigators took no action with respect to Davis' statement until August 1985, when the prosecution finally interviewed her and dismissed her statement as lacking credibility. Blue killed Davis for unrelated reasons prior to trial, and the prosecution declined to notify any defendant of Davis' account.

As the petitioners have argued, the disclosure of Davis' statement would at the very least have given the defendants the opportunity to discredit the investigation and the prosecution's failure to diligently pursue any evidence not supporting its group attack narrative.

C. Luchie Evidence.

The prosecution withheld other evidence that would have directly undercut the group attack theory at the core of its case: the statements of witnesses Willie Luchie, Ronald Murphy and Jackie Watts, who passed through the alley only a half hour before Fuller's body was discovered in the garage. Not only did these witnesses apparently not see any group in the alley, but Luchie and Watts heard the sound of groans coming from behind the closed doors of the garage – a garage too small to occupy more than a few people. Every defendant could have used this ev-

idence to undermine the prosecution's theory that Mrs. Fuller was attacked by a large group, and thus establish that at least most of the defendants were innocent. This in turn would have suggested that all of the defendants were innocent, given that a single-perpetrator or small-group theory was incompatible with the prosecution's purported eyewitness testimony.

D. Cumulative Effect

Armed with all of this suppressed evidence, defense counsel would have presented a coherent, common narrative: that James McMillan killed Mrs. Fuller, that none of the defendants were guilty, and that the government's investigation had led it in the wrong direction. This narrative would have given the defendants a perpetrator to point to other than one-another or a cooperating witness; thus, defense counsel could have avoided relying on any part of the prosecution's evidence (and any part of the prosecution's narrative), and instead invited the jury to question all of it. This narrative would have been complemented by the evidence that undermined the prosecution's case in the actual trial.

Importantly, the prosecution's own story clearly lacked narrative integrity. Despite the court of appeals' conclusion that the jury found the prosecution's witnesses credible, the jury (after a week of deliberations) acquitted two defendants and deadlocked on two others (ultimately convicting them only after dozens of additional votes). Especially in this context, it is reasonably likely that presenting the above narrative would have left the jury with reasonable doubt as to every petitioner's guilt. The court of appeals

erred in concluding otherwise where the jury did not even hear this narrative.[4, 5]

III. THE PROSECUTION'S *BRADY* VIOLATIONS FORCED DEFENDANTS TO ADOPT STRATEGIES THAT SUPPORTED THE PROSECUTION'S NARRATIVE.

The prosecution's actions left the evidence in a state that fractured the defense. Unable to effectively build a common narrative amongst themselves, some attorneys relied-on and attacked different witnesses, undermined their client's codefendants, and suggested that while a group of attackers may have existed, his or her own client was not part of it. This is apparent from a cursory review of the defendants' closing arguments. See, *e.g.*, Dec. 6, 1985 Tr. at 359–61 (petitioner Charles Turner's counsel stresses conflicts between his alibi and petitioner Rouse's and attacks Rouse's credibility), *id*. at 365 (Turner's counsel suggests in his closing that even if the jury can find five perpetrators guilty "in five minutes," this group should not include Turner); *id*. at 398–99 (defendant Webb's counsel asserts that prosecution witnesses Melvin Montgomery and Maurice Thomas are credible); Transcript of Proceedings at 125–27, 133–41, *United States* v. *Catlett* (Dec. 4, 1985) (hereinafter

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[4] While certain defense counsel seemed to challenge the government's group-attack theory in their closings as nonsensical, *see infra*, at 11, they lacked the evidence to build this challenge into an effective alternative narrative.

[5] As defendant Harris' trial counsel, Michele Roberts, later testified during the petitioners' post-conviction hearing, the suppressed evidence pointing to alternative perpetrators "'would have been particularly helpful, especially given how the community at large and presumably the jury as well emotionally responded' to the crime." Brief for Petitioners at 22, *Turner* v. *United States*, Nos. 15-1503 & 15-1504 (Jan. 27, 2017).

"Dec. 4, 1985 Tr.") (petitioner Catlett's counsel attacks both Montgomery and Thomas' credibility); *id.* at 151–55, 160 (defendant Harris' counsel notes that Montgomery implicated other defendants but not her client, notes that generally more evidence exists against the others than against her client, and accepts that cooperating witness Bennett killed Mrs. Fuller "with the assistance of others"); Dec. 6, 1985 Tr. at 390–94 (Webb's counsel accepts that cooperating witnesses Bennett and Alston truthfully testified to killing Mrs. Fuller, declaring Alston's involvement "absolute fact.")[6]; see also Saundra Saperstein & Elsa Walsh, *Ten Defendants Complicate Trial: Murder Case Attorneys Often Find Themselves at Cross-Purposes*, Wash. Post, Nov. 17, 1985, at A1 (describing defense counsel in the case objecting during each other's examinations and otherwise acting adversely to their clients' codefendants). Even those defense attorneys who challenged the group attack theory lacked the evidence to build an alternative narrative of their own. Transcript of Proceedings at 244, *United States* v. *Catlett* (Dec. 5, 1985) (Rouse's counsel states that "the illusion of a gang killing, a group effort" does not "make any sense").

Exploiting a situation that it helped create, the prosecution stressed the defendants' disunity and lack of a common narrative in its closing argument. The prosecution characterized their "ten arguments" as each stating, "[T]he believable witnesses are the witnesses who didn't say my client was there. The unbelievable witnesses are the witnesses who say my client was there." Joint Appendix at 185, *Turner* v.

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[6] *Amicus* contends that, armed with the withheld evidence, defense counsel would not have even accepted that cooperating witnesses Alston and Bennett were involved in the murder, as certain defense counsel did.

United States, No. 15-1503 & *Overton* v. *United States*, No. 15-1504 (Jan. 27, 2017). Over the objections of defense counsel, the prosecution specifically emphasized how different defendants' closing arguments attacked and defended the credibility of different prosecution witnesses. Dec. 6, 1985 Tr. at 428–30. It is difficult to conclude that the withheld evidence was immaterial where the prosecution's own closing cited a problem directly fostered by its absence.

Amicus urges the Court to consider how the various defense attorneys' closing arguments would have changed had they been armed with the evidence that the prosecution suppressed. See Mitchell, *supra*, at 620–21 (proposing that appellate courts applying *Brady* should compare the best closing argument that a defense attorney could have given with the evidence he had with the best closing argument he could have given with the withheld evidence). Had this evidence been disclosed, defense counsel would have harmonized their trial strategies and crafted an alternative narrative that likely would have left jurors with reasonable doubt as to all of the petitioners.

CONCLUSION

For the foregoing reasons, the judgment of the D.C. Court of Appeals should be reversed.

Respectfully submitted,

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