

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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