Appeal No. 19-CF-902

DISTRICT OF COLUMBIA COURT OF APPEALS

EL HADJI TOURE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CRIMINAL DIVISION

No. 2017-CF1-5232

Brief of Appellant El Hadji Toure

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PARTIES AND COUNSEL

On appeal, Appellant El Hadji Toure is represented by Steven Gordon and Sean Belanger of Holland & Knight LLP. Mr. Toure was represented at trial by Jason Clark, Jacqueline Cadman and Emily Stirba.

The United States was represented at trial by Assistant U.S. Attorneys Jeffrey Nestler, Jessica Brooks, and David Gorman. It was represented in post-conviction proceedings by James Sweeney and Thomas Stutsman.

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JURISDICTIONAL STATEMENT

This appeal is from the final judgment of conviction entered against Mr. Toure in Superior Court Case Number 2017-CF1-5232. Mr. Toure was sentenced on September 27, 2019. Notices of appeal were timely filed on September 30, 2019.

ISSUES PRESENTED

1. Whether the trial erred in denying Mr. Toure's motion for a new trial based on a *Brady* violation where the Government failed to disclose evidence the defense could have used to impeach the competence and credibility of five of the 11 Department of Forensic Sciences ("DFS") employees who testified at trial and where the forensic evidence was the cornerstone of the entirely circumstantial case against Mr. Toure.

2. Whether the trial court deprived Mr. Toure of his right to confrontation after it came to light that the prosecutor had smuggled inadmissible evidence into the trial via a coached police witness by refusing to allow the defense to call the prosecutor as a witness and cross-examine him.

3. Whether Mr. Toure's convictions for premeditated murder merges with his felony murder convictions and whether Mr. Toure's convictions for felony murder merge with the underlying felonies.

STATEMENT OF THE CASE

Mr. Toure was prosecuted for first degree murder and other offenses related to the death of C.M. (or "victim") in her Capitol Hill apartment on March 20, 2017. After a lengthy jury trial, he was convicted of 13 counts, including premeditated murder, first degree sexual abuse, four counts of felony murder, kidnapping while armed, first degree burglary while armed, armed robbery, first degree theft, unauthorized use of a vehicle, credit card fraud, and first degree identity theft. He was sentenced to life in prison without release in September 2019.

Thereafter, while this appeal was pending, Mr. Toure filed a motion for a new trial in the Superior Court after learning that the Government had not complied with its disclosure obligations regarding certain DFS witnesses. The proceedings on that motion were protracted and ultimately concluded with a hearing on January 25, 2024, at which the court denied the motion.

The issue here is whether Mr. Toure received a fair trial. The case against him was entirely circumstantial and, while the evidence was sufficient to support a conviction, the outcome might have been different if Mr. Toure had not been precluded from attacking that evidence in two key respects. First, *Brady* evidence was withheld which showed that five DFS witnesses who had collected or tested evidence in this case had been disciplined in other matters for violations of applicable DFS protocols for collecting, handling, or testing evidence. Second, at

the end of the Government's case, the lead prosecutor presented a police witness whom he had improperly coached to provide inadmissible hearsay testimony to rebut a line of defense challenging the adequacy of the investigation. When this blatant misconduct was exposed, the court gave inadequate curative instructions and refused to permit the defense to call the prosecutor as a witness and cross-examine him about these issues. These actions crippled the ability of the defense to effectively challenge the Government's case. Accordingly, this Court should vacate Mr. Toure's convictions and remand this case for a new trial.

In the alternative, if Mr. Toure's convictions are not vacated, this Court should remand to the trial court for resentencing because Mr. Toure cannot receive multiple convictions and punishments for the same crime. Here he has been convicted and sentenced for five different counts of first degree murder based on one death, and for four separate counts of felony murder as well as the predicate felonies.

STATEMENT OF FACTS

I. Overview

The victim's body was discovered in her Capitol Hill apartment on March 18, 2017, and the evidence indicated that she had been killed during the afternoon of the preceding day. Her car and some of her belongings were missing. Someone had started using her credit and debit cards at ATMs at gas stations and convenience stores in Maryland and Virginia. The police publicized some of the ATM videos

and ultimately arrested Mr. Toure on the morning of March 27, 2017, after a tip from a citizen.

Videos from security cameras showed a man who looked like Mr. Toure walking near the block where the victim resided on March 17, 2017, before her time of death.

Forensic evidence analyzed by DFS and an independent laboratory indicated that Mr. Toure's DNA was present on swabs that were recovered from the victim's body, and that her DNA was recovered from the pocket of Mr. Toure's backpack.

The jury trial in this matter began February 25, 2019, and concluded almost four weeks later, on March 20, 2019. There were no eyewitnesses to the offenses and the Government relied entirely on circumstantial evidence. It called more than sixty witnesses and its exhibit list ran over 40 pages. The Government argued that the video evidence placed Mr. Toure near the scene of the offense at the relevant time and showed him driving the victim's car and using her credit and debit cards after the offense. But the heart of the Government's case was the forensic DNA evidence. The defense argued that, under pressure to close a high profile case, the Government rushed to judgment and conducted a flawed investigation.

II. Pretrial Ruling on DFS Q-CARs

Prior to trial, and over the Government's objections, the trial court ruled that DFS must disclose to the defense all DFS Quality Corrective Action Reports ("Q-

CARs") naming "individuals who are involved in the evidence collection, maintenance, and testing in this case. " (App. 0011–15 (2/14/19 Transcript).)[1] The Court explained why the Q-CARs were relevant:

> to assess that individual's competency, assess their compliance with the rules and regulations and standard operating procedures of DFS, as well as secondarily, I think, knowing whether or not they have been the subject of any type of corrective or disciplinary action themselves and whether that may have impacted it in any way on the handling of the evidence in this particular case.

(*Id*. at 0005.)

The Government produced several Q-CARS for the DFS employees involved in collecting or testing evidence in Mr. Toure's case. However, as discussed below, the Government omitted 13 relevant Q-CARs, three relevant reprimands, and two relevant suspensions relating to five of the 11 testifying witnesses from DFS.

III. Trial

A. DFS Witnesses Testimony

At trial, the Government called 11 DFS employees to testify about the forensic evidence in Mr. Toure's case. These witnesses included: (1) Amanda Mendez (App. 0019–61 (3/4/19 Transcript)); (2) Samantha Bischof (App. 0062–85 (3/6/19 Transcript)); (3) Julie Ferragut (App. 0086–90 (3/6/19 Transcript)); (4) Andrew Feiter (App. 0016–19 (3/4/19 Transcript)); and (5) Shana Mills (App. 0091–0252

[1] Citations to pages of Mr. Toure's Court of Appeals Rule 30(f) Appendix are indicated by "App. ___."

(3/11/19 Transcript)). As discussed below in the section on post-trial proceedings, it later developed that potential impeachment evidence regarding each of these witnesses had been withheld from the defense.

1. Amanda Mendez processed Mr. Toure's vehicle for DNA and other evidence in the DFS garage area. (*See generally* App. 0019–61 (3/4/19 Transcript).) In the vehicle's trunk, Ms. Mendez found a black backpack with a single spot of the victim's blood inside one of the backpack's pockets. (*Id*.) Ms. Mendez collected and packaged all the evidence obtained from Mr. Toure's car and transported it to the Central Evidence Unit ("CEU") located two floors above the garage area. (*Id*. at 0052–53.) At trial she testified that the items collected from Mr. Toure's vehicle never left her possession and were not "contaminated or tampered with in any way." (*Id*.) However, on cross examination, the defense established that Ms. Bischof was processing the victim's car adjacent to her while Ms. Mendez was processing Mr. Toure's car. (*Id*. at 0057–60.) When asked on re-direct what steps she took to avoid cross-contamination between the two vehicles, Ms. Mendez acknowledged that processing two vehicles at the same place and at the same time was "not normal." (*Id*. at 0060.) But she failed to identify any specific steps she took to avoid cross-contamination in such circumstances. (*Id*.) The defense also questioned Ms. Mendez about a cooler that was in the trunk of Mr. Toure's car and was not collected

by her, but which was no longer in the vehicle when a defense investigator later examined the car. (*Id.* at 0056–57.)

2. Samantha Bischof processed the victim's car in the same garage and at the same time Ms. Mendez was processing Mr. Toure's car and testified that she took steps to maintain the integrity of the evidence collected. (*See generally* App. 0062–85 (3/6/19 Transcript).) However, during cross-examination, Ms. Bischof admitted that she was not aware that Mr. Toure's car was being process at the same time and in close proximity to where she was processing the victim's car. (*Id*. at 0081–82.) On redirect, Ms. Bischof shrugged off any implication that there could have been cross-contamination between the victim's and Mr. Toure's cars, but she did not identify any special effort she made to prevent cross-contamination given the close proximity of the vehicles. (*Id*. at 0085.)

3. Julie Ferragut was the DFS employee who performed DNA and serological testing on, inter alia, the victim's blood card and the swabs taken from the victim's intimate area (i.e., the sperm fractions from the external genitalia, the perianal buttock area, and the thighs), as well as buccal swabs from Mr. Toure. (App. 0086–90 (3/6/19 Transcript).) At trial, she briefly testified about the steps she performed with respect to these swabs.

4. Andrew Feiter was the DFS employee who performed DNA and serological testing on two different areas of Mr. Toure's backpack. (App. 0016–19 (3/4/19

Transcript).) At trial, he briefly testified about the steps he took to complete this "capillary electrophoresis CE setup" for Mr. Toure's case.

5. Shana Mills was qualified as an expert in DNA analysis and accompanying statistics and served as the "reporting analyst" summarizing the relevant results of the DNA and Serological testing performed on the intimate swabs from the victim and the samples from Mr. Toure's backpack. (*See* App. 0091–0252 (3/11/19 Transcript).) In order to qualify as an expert, Ms. Mills explained that she received specialized training, underwent routine competency tests, and was familiar with all DFS standard operating procedures. (*Id*.) Ms. Mills explained how she relies on DFS's quality assurance procedures to ensure that her test results are reliable. (*Id*. at 0111–12.) She emphasized that, for her conclusions to be reliable, all individuals involved in handling evidence must follow standard operating procedures. (*Id*.) After explaining the evidence collection and testing processes employed in this case, Ms. Mills testified that there was an extremely high probability that Mr. Toure's DNA was present in the intimate swabs that were recovered from the victim's body (*id*. at 0167–69) and that the victim's DNA was in a sample recovered from one of the pockets of Mr. Toure's backpack (*id*. at 0162–67, 0169).

During cross examination, the Defense questioned Ms. Mills about the presence of male DNA in the victim's reference sample and whether this fact could be indicative of contamination between evidence samples and reference samples.

(*Id*. at 0216–25.) Ms. Mills was flustered by this line of questioning but maintained that DFS's procedures would have protected against contamination. (*Id*.)

B. Keith Batton Testimony

The Government's final witness was Keith Batton, a detective sergeant at the Homicide Branch. (App. at 0253 (3/12/19 Transcript).) He supervised the squad of six detectives who investigated C.M.'s murder. (*Id*. at 0253–56.) He testified about various steps that the police had taken during the course of the investigation, tying together or explaining evidence that the Government had introduced during the course of its case.

Of note here, he testified that he and his colleagues had learned that C.M. had a web site and had viewed that site in order to learn more about her. (App. 0269.) One item on the web site was C.M.'s 2013 art project entitled "All The Clothes." Sgt. Batton was shown a particular photograph from the project that depicted C.M., nude, lying face down on the floor with a pile of clothes next to her left side and some clothes on top of her. (*Id*. at 0270; *see also id*. at 0385 (3/13/19 Transcript) (describing the image depicted in the photograph).) He testified that he and his colleagues had seen this picture early in their investigation and "it was striking to us" because of the resemblance to how C.M.'s body was found at the crime scene. (App. 0271–72 (3/12/19 Transcript).) At this point, the prosecutor elicited the following testimony:

Q And so after seeing the web site did detectives take any efforts to contact the domain, the web hosting service that hosted this web site?

A They did.

Q What kind of information was this domain, Format.com, able to provide, if you're aware?

A They provided a number of mobile links that had viewed it.

Q Like mobile IP addresses?

A Correct.

Q Were those mobile IP addresses able to lead to any useful leads in terms of figuring out actual people who viewed the web site?

A They were not.

(*Id*. at 0272–73.)

At a bench conference upon the conclusion of Sgt. Batton's direct examination, defense counsel flagged the testimony about the web site and objected that no pretrial discovery about this issue had been provided to the defense. Defense counsel argued that although the defense had located this photograph through its own investigation, the defense "should have been given the information that the detectives looked into this, that they found it striking, that they then looked at IP addresses, and they did some sort of investigation to see if they could find out the mobile IPs that had viewed it . . . ." (*Id*. at 0295–96.) The defense argued that the Government's failure to disclose its investigation into the photograph adversely affected the presentation of the Defense because its theory of the case was that the

Government failed to investigate other leads. (*Id*. at 0296.) Accordingly, the defense requested an opportunity to question Sgt. Batton outside the presence of the prosecutors about the scope of its investigation. (*Id*. at 0308.) The trial court agreed with the defense that the Government should have disclosed these details on the significance and scope of its investigation into the photograph. (*Id*. at 0304, 0309.)

Because the continued viability of the "failure to investigate" defense might depend on what Sgt. Batton said, the next day, the trial court conducted a voir dire of Sgt. Batton on this issue, outside the presence of the jury, as well as the trial prosecutors. (App. 0310–16 (3/13/19 Transcript).) During the voir dire, Sgt. Batton testified that he personally had seen the "striking" photo on C.M.'s website the day that her body had been found. (*Id*. at 0317–18.) However, Sgt. Batton explained that he had not conducted any investigation of this photo nor was he aware of any member of law enforcement conducting an investigation into the website. (*Id*. at 0321–22.) Rather, on the evening before he testified, AUSA Nestler (the lead prosecutor) told him that the U.S. Attorney's Office's had investigated the IP addresses that had visited C.M.'s web site. (*Id*. at 0323–24.) Sgt. Batton further explained that his testimony to the jury on this topic was based entirely on what AUSA Nestler told him—that these IP addresses were not useful. (*Id*. at 0325–29.) Sgt. Batton did not know what steps, if any, AUSA Nestler took to investigate the IP addresses and Sgt. Batton did not take any steps to independently verify the

information AUSA Nestler told him. Nor was he aware of any other member of law enforcement that independently verified AUSA Nestler's investigation of C.M.'s website. (*Id*.)

At the conclusion of the voir dire, the Court found that everything Sgt. Batton had testified to about the web site was based upon hearsay. She also found that the jury could have been misled by Sgt. Batton's testimony because:

> [AUSA Nestler] pos[ed] the questions to Sergeant Batton in such a way that frankly I was left with the impression, and I'm sure the jury was left with the impression, that members of the Metropolitan Police Department actively sought out these IP addresses. They followed up on those IP addresses and they led nowhere.

(*Id*. at 0331–32.)

The parties then debated the issue of the appropriate remedy for this misconduct. The defense requested either that the court declare a mistrial and a dismissal with prejudice or issue an instruction that would advise the jury "that Mr. Nestler deliberately elicited inadmissible evidence to counteract the Defense's theory and argument about the case." (*Id.* at 0332–34.)

The court did not grant either request but allowed the defense an opportunity "to explore with Sergeant Batton on cross exactly what it was that happened with some type of an instruction to the jury that omits any conclusion that what was done here was prosecutorial misconduct." (*Id*. at 0341.) The defense countered that "we

still need to hear testimony from Mr. Nestler." (*Id*.) The Court rejected this request, and explained:

> I am prepared to preclude the Government from introducing any evidence about any investigative steps that they may have taken, whether that be in the grand jury or other detectives or officers who Sergeant Batton was unaware of who may have followed up on those IP addresses.
>
> I think that squarely addresses any prejudice that the defense may have suffered, and I believe that that completely alleviates the need at least within the four corners of this trial to take testimony from Mr. Nestler. The Government is not going to be able to gain any sort of strategic advantage as a result of the conversation with Sergeant Batton.

(*Id*. at 0343.)

Subsequently, Sgt. Batton resumed his testimony before the jury and was cross-examined by the defense on all aspects of his direct testimony, including his testimony about the investigation of the web site. (*Id*. at 0358.) He recounted his meeting with AUSA Nestler and admitted that the only information he had about the investigation of the IP addresses came from AUSA Nestler. (*Id*. at 0385–88.) Immediately after that testimony, the court gave the jury the following instruction:

> Ladies and gentlemen, yesterday the Government elicited testimony from Sergeant Batton about investigating IP addresses related to [C.M.'s] web site. You have just heard evidence that, in fact, Sergeant Batton did not have personal knowledge of any investigation into IP addresses for [C.M.'s] web site.
>
> Instead the Government told this information to Sergeant Batton during a meeting the night before Sergeant Batton testified. The Government then elicited this information during Sergeant Batton's direct

> examination as if Sergeant Batton knew the information about the IP addresses personally.
>
> A witness may only testify to information that is within his or her personal knowledge. A lawyer cannot tell information to a witness and then elicit that information from the witness as if it came from the witness' own personal knowledge.
>
> You may consider this evidence, along with all of the other evidence in the case, and give it as much weight as in your judgment it deserves in determining whether the Government has proven the charges in this case beyond a reasonable doubt.

(*Id*. at 0388–89.)

On re-direct examination, the Government sought to introduce evidence about the grand jury process and the defense objected to this request. (*Id*. at 0390–91.) The court limited the Government to introducing a copy of the grand jury subpoena for the IP address information. The Court explained its ruling as follows:

> What I'm prepared to allow the Government to establish, because I understand that this is an established fact that the defense is not in a position to dispute, is that these IP addresses or the IP records associated with the domain for [C.M.'s] web site, those were subpoenaed by the Government.
>
> But it's my understanding based on Sergeant Batton's testimony that … law enforcement, did not follow-up on that. As I also indicated in the conversation, I'm not interested in making Mr. Nestler a witness in this case and I am concerned that eliciting any testimony about what may have happened in the grand jury that was under the supervision of Mr. Nestler would fall right into that pitfall.

(*Id*. at 0391–92.) Ultimately, the subpoena was admitted and the parties stipulated that "after reviewing the data received from Format, which was the subject of the

subpoena, the Government took no further steps to identify the accountholders of the IP addresses." (*Id*. at 0400.)

Upon concluding Sgt. Batton's testimony, the Government rested its case. (*Id*. at 0408.) That same day, the defense presented its case[2] and the Government presented brief rebuttal.

The next day, the defense moved to reopen its case for the purpose of questioning AUSA Nestler. Defense counsel noted that Sgt. Batton's improper testimony had been elicited by the Government to counteract the defense argument that a potentially significant clue, the photograph from the web site, had not been adequately investigated. The defense argued this evidence was especially important because:

> [a]s the evidence stands now, the Government has essentially won that point without proffering or putting forward any legitimate evidence because, at present, the Government has left the jury with the impression that it hoped to leave it with, that there was an investigation into [C.M.'s] website, counter the defense's argument, that the Government did look into this photograph, that the Government did obtain IP information received, there was just no way to follow-up on the information or investigate further.

[2] The defense presented testimony from the MPD lead homicide detective that the Government had not investigated several leads, several items of evidence were missing, and there were gaps in the chain of custody of the victim's I-pad, laptop, and I-phone. (*See* 3/13/19 Tr. at 120:5–139:20.) It also presented testimony from a PDS investigator about a cooler that Ms. Mendez observed in Mr. Toure's car, but which was no longer there when the investigator inspected the car. (3/13/19 Tr. at 155:17–158:4.)

(App. 0410 (3/14/19 Transcript).) The problem was that "this is entirely unconfronted evidence and evidence we are powerless to rebut without the actual people involved taking the stand." (*Id*.)

Defense counsel identified two separate confrontation issues in the existing record. The first was that "we have no information whatsoever about why the Government decided not to pursue the information in these records because this is what's entirely unconfronted." (*Id*. at 0411.) As a result, a series of highly relevant questions had been left unanswered and unexplored:

> We don't know what parts of the records Mr. Nestler reviewed. We don't know how Mr. Nestler obtained the information about the IP and what they meant. We don't know what the nature of those IP records meant for future investigative steps; or whether, in fact, any of that is true, whether any of that is, in fact, what the IP addresses really mean. We don't know what steps, if any, that USA [sic] took to further address these IP addresses and, importantly, why the USAO decided not to pursue this further.

(*Id*.)

The second issue was that "we have been completely unable to confront the impression that's been left with the jury that the Government obtained these records for the purpose of investigating this photograph on [C.M.'s] website because we don't know if that was the real purpose or even primary purpose." (*Id*. at 0411.) Instead, "[b]ased on the proffer from the Government a couple of days ago, it actually seems that it wasn't to investigate alternative possible suspects who may have been accessing this IP address on this website, but, in fact, to see if there was a

link between Mr. Toure and the March 3rd [rape] case, given that in the March 3rd case, that assailant accessed the victim's personal website information and was Googling her." (*Id*. at at 0411–12.) The suspicion that it was for the latter purpose "seems to be confirmed by the [grand jury] subpoena" because it sought information covering the period March 2 to March 23, i.e., the time frame encompassing both offenses. (*Id*. at 0412.)

The Court denied the defense motion to reopen, reasoning that "I don't see that any additional evidence is going to be -- any additional relevant evidence is going to be gleaned by placing Mr. Nestler under oath in order to inquire further on the matter." (*Id*. at 0415.)

IV. Closing Arguments

During closing arguments, the Government emphasized the evidence collected, processed, and analyzed by DFS as the primary evidence the jury should look to in determining whether Mr. Toure was guilty. (App. 0417 (3/18/19 Transcript).)

The defense argued that the Government's case against Mr. Toure was not the product of a careful or thorough investigation. (*See id*. at 0422–70.) Citing Sgt. Batton's testimony about the police failure to investigate the IP addresses, the defense asserted that the Government's investigation had suffered from tunnel vision and zeroed in on Mr. Toure without investigating other leads and tips. (*Id*. at 0439–

44.) The defense also attempted to highlight irregularities in DFS's collection, processing, and analysis of forensic evidence, but was unable to directly attack the competency of DFS without the undisclosed Q-CARs. (*See id*. at 0451–55, 0459–61.)

V. Verdict and Sentence

The jury convicted Mr. Toure of all 13 counts in the indictment: five counts of first degree murder (premeditated murder plus four different counts of felony murder), first degree sexual abuse, kidnapping while armed, first degree burglary while armed, armed robbery, first degree theft, unauthorized use of a vehicle, credit card fraud, and first degree identity theft. The trial court sentenced Mr. Toure on all 13 counts, imposing a term of imprisonment plus a $100 fine as to each count. The court imposed a term of life in prison without release for each of the murder counts, and for the sexual abuse count, all to run concurrent with each other, and terms ranging from 8 to 30 years' imprisonment on the remaining counts, to run concurrent with each other. (*See* App. 0471–75 (9/27/19 Transcript); *see also* App. 0476–78 (Judgment).)

VI. Post trial proceedings

Approximately five months after Mr. Toure was sentenced, the U.S. Attorney's Office ("USAO") disclosed to this Court and the defense bar on February 11, 2020, that DFS was being investigated. (*See* App. 0507–44 (February 11, 2020

Letter from USAO to Court and Defense Bar Re: January 31, 2020, Report of Referral to the D.C. Office of the Inspector General).) Documents related to this investigation revealed that the Government failed to comply with its disclosure obligations regarding testifying witnesses' Q-CARs and disciplinary history. (*See* App. 0546–0927 (May 6, 2020 DFS Letter to USAO re Alleged Misconduct).)

On March 4, 2020, Mr. Toure filed a Motion For A New Trial And Discovery which was supplemented on June 2, 2020. Proceedings on this motion were delayed by the pandemic and because the the Government ultimately produced a very large volume of DFS documents, relating to this case and others, that had to be reviewed.

The DFS materials belatedly produced by the Government established that it had violated the court's pretrial order and *Brady* by failing to disclose impeachment evidence relating to five of the 11 DFS witnesses who testified at trial. The withheld evidence consisted of 13 Q-CARs, three reprimands, and two suspensions. (*See* App. 0479–0503 (Defendant's Second Supplemental Brief in Support of Motion for New Trial).)

A. Samantha Bischof

The Government (DFS) failed to disclose four Q-CARs, two official reprimands, and one suspension letter for Samantha Bischof.

a) Q-CAR-15-030

On July 2, 2015, DFS issued a Q-CAR because Ms. Bischof lost evidence

(ammunition components), which was not discovered for two weeks. (App. 0939–43 (Q-CAR-15-030).) As part of its investigation into this incident, DFS interviewed Ms. Bischof who indicated that she was unfamiliar with DFS's standard protocol for packaging ammunition components. (*Id*. at 0940.)

b) Q-CAR-17-050 and Corresponding Health and Safety Reprimand

In 2017, DFS issued another Q-CAR because Ms. Bischof violated DFS procedure by failing to render safe a weapon that was in evidence. (App. 0945–51 (Q-CAR-17-050).) This Q-CAR was of sufficient seriousness to warrant a Health and Safety Reprimand, which she received on September 6, 2017. (App. 0953–63 (September 6, 2017 Samantha Bischof Reprimand).)

c) Q-CAR-18-015 and Corresponding Reprimand

On April 26, 2018, DFS issued another Q-CAR because Ms. Bischof placed her own blood on crime scene evidence and then falsified examination notes. (App. 0965–77 (Q-CAR-18-015).) The Q-CAR noted that "the application of one's own blood would result in contamination of the evidence, through the possible introduction of their DNA and deposition of friction ridge detail, potentially compromising any additional testing requested." (*Id*. at 0967.)

This incident ultimately led to Ms. Bischof's Suspension for "Failure/Refusal to follow Instructions." (App. 0979–85 (August 20, 2018 Samantha Bischof Suspension).) The suspension letter noted that Ms. Bischof's actions "raise[d]

concerns about evidence integrity, given that the bloody object to which you added your own blood was a piece of evidence. Adding your own blood to a piece of evidence is a serious issue, no matter how inconspicuous a location you choose to make your contamination." (*Id*. at 0980.) The suspension letter asserted that Ms. Bischof's actions damaged management's confidence in her ability to perform her duties and that her actions were of such seriousness as to impugn public confidence in the agency as a whole. (*Id*. at 0981.)

Although this suspension was ostensibly for a "Failure/Refusal to follow Instruction[,]" additional documents indicate that the original disciplinary charge was for "False Statements/Records." (App. 0800–12.) These documents reveal that the charge may have been reduced after DFS's then-General Counsel indicated that a charge for False Statements/Records is "a tough one to shake" implying such a charge could lead Ms. Bischof to be placed on the Lewis List.[3] (*Id*. at 0804.)

d) Q-CAR-19-007

In March of 2019, DFS issued yet another Q-CAR because Ms. Bischof failed to properly search and inventory evidence. (App. 0987–0991 (Q-CAR-19-007).) Specifically, Ms. Bischof had failed to spot, collect, and document $390 in currency

[3] The "Lewis List" is a confidential list maintained by the USAO of law enforcement personnel against whom there have been integrity allegations, which may trigger credibility concerns or discovery obligations. The moniker "Lewis List" was derived from the case *Lewis v. United States*, 408 A.2d 303 (D.C. 1979).

and a D.C. lottery ticket that were located in clothing that she had processed in November 2016 as the lead scientist in another homicide investigation. (*Id*. at 0987.)

Ms. Bischof was reprimanded on July 18, 2019, for this incident. (App. 0993–1002 (July 18, 2019 Samantha Bischof Reprimand).) In its reprimand, DFS stated that Ms. Bischof's "[c]onduct undermines confidence in the employee's ability to do [her] job." (*Id*. at 0998.) DFS further noted that "FS Bi[s]chof's failure to properly search evidence items (clothing) for secondary evidence could have resulted in a loss of confidence in DFS as an agency." (*Id*.)

B. Amanda Mendez

On October 16, 2018, DFS issued a Q-CAR because Amanda Mendez failed to properly inspect and render safe a firearm she had recovered from a crime scene. (App. 1004–07 (Q-CAR-18-046).) On January 30, 2019, Ms. Mendez received a reprimand and suspension, shortly before the trial of this case, for this episode. (App. 1009–17 (January 30, 2019 Amanda Mendez Reprimand).) The reprimand noted that Ms. Mendez's actions could have led to an injury and could have damaged DFS's reputation. (*Id*. at 1015.) The Agency further determined that this was a breach of one of her "core responsibilities," and that it "undermines confidence in [her] ability to do [her] job." (*Id*. at 1013–14.)

C. Julie Ferragut

On January 18, 2017, DFS issued a Q-CAR because Ms. Ferragut incorrectly

reversed epithelial-cell fraction and sperm fraction samples during a test she was performing, which led to additional testing and time spent to complete the work on the affected cases. (*See* App. 1019–22 (January 1, 2017 Email between DFS employees discussing Q-CARs 17-004 through 17-006); App. 1024–29 (Q-CAR-17-004).) Later that year, on November 13, 2017, DFS issued another Q-CAR because Ms. Ferragut and other DFS employees failed to quality-check reagents that were used in casework requiring those tests to be rerun for affected casework. (App. 1036–41 (Q-CAR-17-058).) On August 17, 2018, DFS issued a third Q-CAR because Ms. Ferragut had made an administrative error on a report. (App. 1031–34 (Q-CAR-18-032).) Thus, Q-CARs were issued to Ms. Ferragut on three separate occasions within the past two years before she testified in this case, including both before and after her work on this offense.

Prior to trial, the Government had disclosed two other Q-CARs involving Ms. Ferragut: one where her actions led to the contamination of a sperm fraction sample, (App. 1084–86 (Q-CAR-14-004)), and an error in the chain of custody caused by her improperly containerizing a blood sample (App. 1088–94 (Q-CAR-16-142)). The defense, being unaware of the other Q-CARs involving her and the withheld evidence regarding the other DFS witnesses, had not cross-examined her about these two Q-CARs at trial.

D. Andrew Feiter

The Government (DFS) failed to disclose four separate Q-CARs addressing nonconformities caused by Andrew Feiter. On July 15, 2016, DFS issued a Q-CAR because Mr. Feiter performed an amplification procedure[4] incorrectly. (*See* App. 1019–22 (January 1, 2017 Email between DFS employees discussing Q-CARs 17-004 through 17-006); App. 1043–48 (Q-CAR-17-005).) On September 22, 2016, DFS issued a Q-CAR because Mr. Feiter confused samples, leading to tests being performed improperly. (*See* App. 1019–22; App. 1050–55 (Q-CAR-17-006).) On September 1, 2017, DFS issued another Q-CAR because Mr. Feiter switched DNA samples while performing an amplification procedure. (App. 1057–62 (Q-CAR-17-051).) Finally, on January 18, 2018, DFS issued a Q-CAR because Mr. Feiter contaminated a DNA sample so that additional testing was not possible. (App. 1064–69 (Q-CAR-18-002).) Thus, he had received Q-CARs on four separate occasions within the three years before he testified in this case, including Q-CARs for confusing samples and contaminating a DNA sample.

[4] At trial, Ms. Mills described the amplification process as "Amplification is where we're going to make a lot of copies of each of the DNA for each sample. So we're not changing the DNA but it's kind of like a xerox machine where we're going to make lots of copies." (App. 0098 (3/11/19 Transcript).)

E. Shana Mills

On January 19, 2017, DFS issued a Q-CAR because Ms. Mills mishandled evidence in a manner which led to a break in the chain of custody. (App. 1071–74 (Q-CAR-17-003).) Ten months later, on November 13, 2017, DFS issued another Q-CAR because Ms. Mills, along with Julie Ferragut and other DFS employees, failed to quality-check reagents that were used in casework, requiring those tests to be re-run for all affected casework. (App. 1036–41 (Q-CAR-17-058).)

F. January 25, 2024 Hearing on Defendant's Motion For A New Trial

After uncovering all of these materials, Mr. Toure again supplemented his motion for a new trial on April 21, 2023. The Government filed an opposition on October 24, 2023. On January 25, 2024, the Superior Court held a hearing on the motion and denied it. The court found that Mr. Toure had satisfied the first two prongs of *Brady*: (1) the withheld evidence was favorable and admissible, and may have led to a different defense strategy if disclosed, and (2) the evidence was in possession of Government. (*See* App. 1095–99 (1/25/24 Transcript).) However, the court found that Mr. Toure had not established that this evidence was material because: (1) the undisclosed disciplinary records were related to other cases; (2) the most serious Q-CARs affected witnesses that played "minor roles" like Samantha Bischof; (3) more crucial witnesses like Shana Mills were only affected by Q-CARS reflecting "minor incidents"; and (4) the cumulative impact of the Q-CARS did not

meaningfully undermine the Government's case because the other evidence of guilt remained unaffected. (*See* App. 1099–1110 (1/25/24 Transcript).)

SUMMARY OF ARGUMENT

1. The trial court erred in finding that the Government's *Brady* violations were not material. The cornerstone of the Government's case against Mr. Toure was forensic evidence that was collected, processed, and analyzed by DFS. But the Government withheld evidence that five of the 11 DFS witnesses who testified had been disciplined for violations of DFS's standards and procedures, some of which were very serious. Consequently, the Government was able to leave the jury with the misimpression that these DFS witnesses possessed impeccable credentials and the defense was left without an effective attack on the forensic evidence. The withheld evidence would have provided a solid basis for the defense to challenge and question the reliability of the forensic evidence as well as the credibility of the DFS witnesses. In the hands of skilled defense counsel, this undisclosed evidence could have created reasonable doubt in the minds of the jury about the reliability of the forensic evidence and, hence, about the sufficiency of the circumstantial proof. Mr. Toure is entitled to a new trial at which his counsel can present this evidence to the jury.

2. Mr. Toure was deprived of his right to confrontation after the prosecutor deliberately smuggled inadmissible evidence into the trial through the coached

testimony of Sgt. Batton. The steps the trial court took to remedy this deliberate prosecutorial misconduct were inadequate. While it would have disrupted the trial to place the prosecutor on the stand so that he could be examined by the defense, Mr. Toure had a constitutional right to do so. Because Mr. Toure was deprived of this right, he is entitled to a new trial.

3. Because the Double Jeopardy Clause does not permit multiple convictions and sentences for the same offense, four of the five sentences for first degree murder imposed on Mr. Toure must be vacated. In addition, if the non-vacated conviction is for felony murder, then the conviction for the underlying felony must be vacated.

ARGUMENT

I. Reversal Is Required Because the Government Withheld From the Defense Material Impeachment Evidence Relating to the DFS Witnesses

The *Brady* issue in this case turns on whether the withheld impeachment evidence regarding the DFS witnesses is material. The trial court found that the other elements of a reversible *Brady* violation are established: (1) the undisclosed Q-CARS, suspensions, and reprimands are favorable to Mr. Toure and (2) they were possessed and suppressed by the Government.

"[S]ince *Brady* is a rule of fairness, the materiality threshold is met if, in the absence of proper disclosure, we question whether the defendant received a fair trial and our 'confidence' in the outcome of the trial is thereby 'undermine[d].'" *Vaughn v. United States*, 93 A.3d 1237, 1262 (D.C. 2014) (quoting *Kyles v. Whitley*, 514

U.S. 419, 434 (1995)). "Evidence is material if the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict[.]" *United States v. Oruche*, 484 F.3d 590, 597 (D.C. Cir. 2007). "[T]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 596–97 (quoting *United States v. Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996)).

Furthermore, "*Brady* materiality must be assessed in terms of the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item. The cumulative effect of a collection of suppressed evidence may undermine confidence in the outcome of the trial even where each piece of evidence, viewed in isolation, would be insufficient." *Turner v. United States*, 116 A.3d 894, 913–14 (D.C. 2015). "Cumulative analysis of the force and effect of the undisclosed pieces of favorable evidence matters because the sum of the parts almost invariably will be greater than any individual part." *Johnson v. Folino*, 705 F.3d 117, 131 (3d Cir. 2013) (citation omitted).

As the Fourth Circuit recently explained, evidence is not independent; instead, it is interrelated and is integrated by jurors through a coherence-based reasoning method:

> [J]urors use a coherence-based reasoning method, in which they integrate the whole of the evidence that they receive. That is, a piece of strong inculpatory evidence can make the entire evidence set appear inculpating. By the same token, including an *exculpating* item can push the evidence towards a conclusion of innocence. Critically, evidence is not independent: it is related, and thus the exclusion of evidence of innocence can make an entire case against a defendant seem far more compelling than it is.

Long v. Hooks, 972 F.3d 442, 464–64 (4th Cir. 2020) (quoting amicus brief filed by forensic science scholars) (emphasis in the original).

The withheld Q-CARs and disciplinary records are classic impeachment evidence relating to the competence and credibility of the DFS witnesses. That is why the trial court ordered the Government to disclose this information to the defense before trial.

The Government's case against Mr. Toure was entirely circumstantial and its cornerstone was the forensic evidence. The reliability of that evidence is dependent on careful, error-free work, both by the technicians who collected and preserved it and then by the experts who tested it. So far as appeared to the jury, the personnel who collected and analyzed the forensic evidence in this case all possessed unimpeachable skill and integrity.

But this was not true. The defense was prevented from showing that five of the 11 DFS witnesses have mishandled evidence on multiple occasions including deliberately contaminating evidence, and arguing that this constitutes reason to doubt the reliability of the forensic evidence that was presented in this case.

For example, the jury was unaware that Ms. Bischof had intentionally contaminated a piece of evidence in another case with her own blood, a violation so serious that DFS had suspended her for it. Both the Q-CAR and the suspension letter noted that Ms. Bischof's handling of the material "raises concerns about evidence integrity, given that the bloody object to which you added your own blood was a piece of evidence." (App. 0980 (August 20, 2018 Samantha Bischof Suspension).) In fact, this misconduct was so damning that the DFS General Counsel had changed the nature of the charge in order to preserve Ms. Bischof's viability as a witness. (App. 0804 (May 6, 2020 DFS Letter to USAO re Alleged Misconduct).) In the hands of skilled defense counsel, this episode would not have only raised questions about Ms. Bischof's individual competency and credibility, but that of DFS as a whole. Indeed, when Ms. Bischof was confronted about having placed her own blood on a piece of evidence, she said it was a common practice at DFS. (App. 0975, 0979–85.)

While the withheld impeachment evidence regarding the four other DFS witnesses was less dramatic, it revealed significant and repeated errors on their part which could have caused the jury to discredit their testimony. This evidence showed that DFS had determined that Ms. Mendez's misconduct was a breach of one of her "core responsibilities," "undermines confidence in [her] ability to do [her] job[,]"

and could have damaged DFS's reputation. (App. 1009–17 (January 30, 2019 Amanda Mendez Reprimand).)

Mr. Feiter had received Q-CARs relating to four separate matters that occurred both before and after the offense in this case. In three of the four instances, he incorrectly performed forensic tests similar to those he performed here. (App. 1043–61 (Q-CARs 17-005, 17-006, and 17-051).) In the fourth instance, Mr. Feiter contaminated evidence beyond repair. (App. 1064–69 (Q-CAR-18-002).)

Ms. Ferragut had received three separate Q-CARs which had not been disclosed to the defense. These Q-CARs demonstrate that she had violated DFS protocols in the same or similar testing procedures that she performed in Mr. Toure's case. (App. 1019–1041 (Q-CARs 17-004, 17-058, 18-032).) Moreover, there were two additional Q-CARs involving Ms. Ferragut which the Government had disclosed: one where her actions led to the contamination of a sperm fraction sample, (App. 1084–86 (Q-CAR-14-004)), and an error in the chain of custody caused by her improperly containerizing a blood sample (App. 1088–94 (Q-CAR-16-142)). While the defense chose not to raise these two disclosed Q-CARs at trial, the calculus would have been entirely different had all of the *Brady* material regarding Ms. Ferragut and the other DFS witnesses been disclosed. Additional impeachment evidence can be material even if other impeachment evidence was available to defense counsel. *See United States v. Cuffie*, 80 F.3d at 517 (citations omitted).

Shana Mills testified as an expert witness who summarized the results of the DNA and serological testing performed on Mr. Toure's backpack and the intimate swabs taken from the victim. She testified that following DFS protocols was a foundational element of reliable analysis. But the jury was not aware that, during the same time period Ms. Mills was working on Mr. Toure's case, she had (1) carelessly failed to quality check reagents that were used in her casework and (2) mishandled evidence in a manner which led to a break in the chain of custody. (App. 1036–41 (Q-CAR-17-058); App. 1071–74 (Q-CAR-17-003).) This evidence could have been used by the defense to impeach her competence and credibility. Moreover, because she was an expert witness, she could have been cross-examined about the effect of mistakes or misconduct by other DFS employees, thereby reinforcing the impact of any impeachment of Ms. Bischof, Ms. Mendez, Mr. Feiter, and Ms. Ferragut.

Furthermore, prior to trial the Government had disclosed Q-CARs for two additional DFS witnesses—Erin Daniels and Laurel Hassberger. The defense did not pursue these disciplinary actions during the trial. However, had the Government complied with its *Brady* obligations, the defense—and the jury—would have been apprised that the competence and credibility of seven of the 11 DFS witnesses who testified was questionable.

The cumulative impact of the withheld *Brady* evidence in this case cannot be underestimated. In the hands of skilled defense counsel, this evidence could have

created reasonable doubt in the minds of the jury about the reliability of the forensic evidence and, hence, about the sufficiency of the evidence against Mr. Toure. The withheld evidence "could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict[.]" *United States v. Oruche*, 484 F.3d at 597.

By withholding this *Brady* material, the Government usurped credibility determinations that are squarely within the purview of the jury. *See, e.g., Jackson v. Denno*, 378 U.S. 368, 386 n.13 (1964) ("[Q]uestions of credibility, whether of a witness or a confession, are for the jury."). This Court has noted that "a defendant's actual use of [evidence] for impeachment at trial before the jury decides is a better test of materiality than a retrospective inquiry" by a court after the fact. *Lewis v. United States*, 408 A.2d 303, 308 (D.C. 1979). "In short, the defendant, not the post-trial reviewing court, should have control over materiality to outcome." *Id*.

The materiality of the withheld *Brady* evidence in this case should be decided by a jury and not this Court. The wrongfully withheld evidence was significant, and the Court cannot be confident that Mr. Toure received a fair trial despite being deprived of this material.

II. Mr. Toure Was Denied His Right of Confrontation After the Prosecutor Smuggled Inadmissible Evidence Into the Trial Via a Coached Witness

The issues presented by Sgt. Batton's testimony about the investigation of C.M.'s web site lie at the intersection of several areas of law, including prosecutorial

misconduct, the Confrontation Clause, and the prosecutor as a witness (advocate-witness rule).

First, there is no question that AUSA Nestler engaged in prosecutorial misconduct in coaching Sgt. Batton and then presenting his false and misleading testimony that the MPD had investigated C.M.'s web site. In preparing a witness to testify, "[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it." *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976). "[A] lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading." D.C. Bar Op. No. 79 (Dec. 18, 1979). "A *Napue* [due process] violation occurs when the government presents or fails to correct testimony it knows to be, or should know to be, false or misleading." *Jones v. United States*, 202 A.3d 1154, 1166 (D.C. 2019).

Likewise, prosecutors' questions to law enforcement agents regarding steps taken during their investigation constitute prosecutorial misconduct where they are designed to elicit otherwise inadmissible hearsay testimony. *See United States v. Johnston*, 127 F.3d 380, 393–94, 398 (5th Cir. 1997); *see also Edelen v. United States*, 627 A.2d 968, 972 (D.C. 1993) (expressing concern with "prosecution's improper attempt to elicit potentially damaging but patently inadmissible hearsay testimony").

"A conviction obtained through the use of false evidence, known to be false by the prosecutor, denies a defendant liberty without due process of law." *Bruce v. United States*, 617 A.2d 986, 992 (D.C. 1992) (citations omitted). "It is of no consequence that the falsehood [does not bear] directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) (quoting *People v. Savvides*, 1 N.Y.2d 554, 557 (1956)).

In this case, the falsity of Sgt. Batton's testimony was eventually exposed but the associated issues created by the prosecutorial misconduct were not fully or satisfactorily resolved. Sgt. Batton's testimony about the investigation of C.M.'s web site was a premeditated violation of Mr. Toure's rights under the Confrontation Clause, which "prohibits 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination.'" *Best v. United States*, 66 A.3d 1013, 1017 (D.C. 2013) (quoting *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004)). In order to uphold Mr. Toure's conviction in the face of this calculated constitutional violation, the impact must have been harmless beyond a reasonable doubt. *Id*. at 1019.

As the issue played out at trial, Sgt. Batton ultimately admitted that he knew nothing about any investigation of C.M.'s web site and had simply repeated information that was provided to him by AUSA Nestler. The trial court then instructed the jury that "[a] lawyer cannot tell information to a witness and then elicit that information from the witness as if it came from the witness' own personal knowledge." But the trial court did not instruct the jury that the information improperly conveyed to them through Sgt. Batton was inaccurate or unreliable. Given the inherent credibility that a prosecutor enjoys by virtue of his office, the jury was unlikely to discredit or ignore the substance of Sgt. Batton's improper testimony. Moreover, the trial court then permitted the Government to introduce into evidence a copy of the grand jury subpoena to confirm that it had, in fact, obtained the IP records associated with the domain for C.M.'s web site.

Thus, as the defense justifiably complained,

> [a]s the evidence stands now, the Government has essentially won that point without proffering or putting forward any legitimate evidence because, at present, the Government has left the jury with the impression that it hoped to leave it with, that there was an investigation into [C.M.'s] website, counter the Defense's argument, that the Government did look into this photograph, that the Government did obtain IP information received, there was just no way to follow-up on the information or investigate further.

(App. 0410 (3/14/19 Transcript).) The solution to this problem of the Government's creation was to allow the defense to confront and cross-examine the person who had actually conducted the investigation of C.M.'s web site—AUSA Nestler.

But the trial court refused to permit the defense to do so. It asserted that no "additional relevant evidence" would be obtained by calling AUSA Nestler to the witness stand. This assessment was incorrect. The importance of the web site issue is underscored by the lengths to which the Government went in an improper effort to quell that issue in the jury's mind. The defense laid out a series of highly relevant questions it wanted to ask AUSA Nestler, which would have illuminated the full nature and extent of the Government's investigation of the web site: What parts of the subpoenaed records had he reviewed? How did he obtain information about the IP addresses and what they meant? What steps did he or others take to investigate those addresses? Why did the government decide to curtail this investigation? What was the purpose of reviewing these records—an open-minded inquiry into whether they might identify C.M.'s assailant or, instead, simply an effort to tie Mr. Toure to the March 3 rape in addition to the assault upon C.M.? (*See* App. 0409–12 (3/14/19 Transcript).)

The trial court's reluctance to have AUSA Nestler testify is understandable. "[T]he federal courts have almost universally frowned upon the practice of a Government prosecutor testifying at the trial of the case he is prosecuting . . . . Where the prosecutor's appearance as witness is unavoidable, the courts have stated that, in general, the prosecutor should withdraw from participation in the trial." *United States v. Birdman*, 602 F.2d 547, 553 (3d Cir. 1979). As one court recently observed,

"a violation of the advocate-witness rule infects the truth-finding process by confusing the fact-finder, whether judge or jury." *Queen v. Schultz*, No. CV 11-871, 2015 WL 13680823, at *1 (D.D.C. May 7, 2015). And, in this case, the issue arose at the end of a lengthy, complex trial in which AUSA Nestler had participated as the lead prosecutor. Requiring him to take the stand and then to withdraw from the case would have created a commotion.

Nonetheless, the trial court's reflexive refusal to countenance this outcome was reversible error. The court denied Mr. Toure the only effective remedy for the Government's deliberate violation of his constitutional right to confront all of the evidence offered against him. The court's error requires reversal of Mr. Toure's convictions unless it was harmless beyond a reasonable doubt. This demanding standard "entails a veritable hair trigger for setting aside the conviction." *Jones v. United States*, 202 A.3d at 1166.

There is no way to reliably quantify or predict what would have happened had Mr. Toure not been deprived of his right to confront and cross-examine AUSA Nestler. The evidence implicating Mr. Toure was entirely circumstantial. "[T]he government's case, though strong, left a lot of questions unanswered," *Coles v. United States*, 36 A.3d 352, 359 (D.C. 2012), and unanswered questions regarding the web site could have been highly significant. Indeed, the prosecutor's willingness to engage in misconduct in an effort to "answer" those questions is compelling

evidence that this issue could have affected the outcome of the trial. *See Shelton v. United States*, 26 A.3d 216, 231–33 (D.C. 2011) (appendix to concurrence of Ruiz, J.) (a prosecutor's breach of duty can be used to infer his belief that the government's case was vulnerable, as a way of proving that the case was, in fact, vulnerable). "[T]his court has held that '[a prosecutor's] own estimate of his case, and of its reception by the jury at the time, is . . . a highly relevant measure . . . of the likelihood of prejudice.'" *Gardner v. United States*, 999 A.2d 55, 62–63 (D.C. 2010) (quoting *United States v. DeLoach*, 164 U.S.App.D.C. 116, 122, 504 F.2d 185, 192 (1974)). "The gravity of the prosecutors' misconduct . . . may shed light on the materiality of the infringement of the defendants' rights; it may support . . . an inference that the prosecutors resorted to improper tactics because they were justifiably fearful that without such tactics the defendants might be acquitted. If the prosecutors did not think their case airtight (and so they tried to bolster it improperly), this is some indication that it was indeed not airtight." *United States v. Boyd*, 55 F.3d 239, 241–42 (7th Cir. 1995) (citations omitted). Thus, it cannot be concluded that the constitutional deprivation at issue here was harmless.

"The perception that confrontation is essential to fairness has persisted over the centuries because there is much truth to it," and "the right to face-to-face confrontation ... 'ensur[es] the integrity of the fact-finding process.'" *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 736

(1987)). The Government deliberately deprived Mr. Toure of that right with respect to a potentially key issue. Accordingly, Mr. Toure is entitled to a new trial.

III. The Double Jeopardy Clause Requires That Several of Mr. Toure's Convictions and Sentences Be Vacated

The Double Jeopardy Clause of the Fifth Amendment "prohibits 'multiple punishments for the same offense.'" *Taylor v. United States*, 138 A.3d 1171, 1180 (D.C. 2016) (quoting *Lennon v. United States*, 736 A.2d 208, 209 (D.C. 1999)).

Where murder convictions concern the same homicide, those offenses merge. Felony murder convictions also merge with their underlying felonies. *Thacker v. United States*, 599 A.2d 52, 63 (D.C. 1991). Sentences that run concurrently are still punishment because of potential collateral consequences. *Doepel v. United States*, 434 A.2d 449, 459 (D.C. 1981).

Mr. Toure was convicted and sentenced for one count of premeditated murder and four counts of felony murder based on a single killing. Four of those convictions and sentences must be vacated. Mr. Toure was also convicted and sentenced for the felonies underlying each of the felony murder counts. If one of the felony murder convictions is preserved, then the conviction and sentence for the underlying felony must be vacated.

Therefore, if this Court does not reverse Mr. Toure's convictions and remand for a new trial, it must remand this case to the trial court with instructions to vacate Mr. Toure's duplicative convictions and sentences.

CONCLUSION

For the foregoing reasons, Mr. Toure respectfully requests that this Court reverse his convictions and remand for a new trial, or alternatively, remand for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on May 1, 2024, a true and correct copy of the foregoing was served through the Court's e-filing system to Chrisellen R. Kolb.

s/ Sean Belanger
Sean Belanger