BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 19-CF-902

EL HADJI TOURE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

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

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Cr. No. 2017-CF1-5232

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ISSUES PRESENTED

I. Whether the trial court correctly denied Toure's motion for a new trial based on the Department of Forensic Sciences's (DFS's) failure to turn over impeachment information for several of its employees before trial, where that failure did not prejudice Toure because (1) the impeachment did not involve the employees' work in this case, (2) a separate, independent laboratory found Toure's DNA in a semen stain on leggings used to bind the victim, and (3) the evidence of Toure's guilt was overwhelming even without the forensic evidence from DFS.

II. Whether the trial court abused its discretion in denying Toure's request to call a prosecutor as a witness to question him about the grand jury's investigation into the victim's website, where the defense failed to demonstrate a compelling need to do so, the court gave multiple remedial instructions to the jury, and the defense was able to present its failure-to-investigate theory to the jury via thorough cross-examination and argument, and where any conceivable error had no impact on the verdict.

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BRIEF FOR APPELLEE

INTRODUCTION

On a sunny Monday morning in March 2017, C.M. was packing her car to return home to North Carolina when appellant El Hadji Toure happened upon her. From a few houses away, Toure watched C.M. as she retrieved items from her temporary Capitol Hill apartment and put them into her car. Toure then approached C.M. and spent the next two-and-a-half hours raping and murdering C.M. and binding her body before driving away in her car. Later that day, Toure used C.M.'s debit and credit cards at several ATMs along Route 1 in the direction of Laurel, Maryland, where he had been living in his father's basement until two months before he attacked C.M. Toure later abandoned C.M.'s car but continued using her debit card to make withdrawals from C.M.'s checking account in the days that followed.

The trial court found that Toure had inflicted "such extreme . . . pain and suffering" upon C.M. that it was "unfathomable" (9/27/19 Transcript (Tr.) 39-40). The evidence of Toure's guilt for this heinous crime was overwhelming. DNA testing by Signature Science found Toure's DNA in a semen stain on an article of clothing used to bind C.M.'s ankles. DNA testing by the Department of Forensic Sciences (DFS) found Toure's DNA in sperm inside C.M.'s vagina and on swabs taken from her external genitalia, perianal buttock area, and thighs. DFS found C.M.'s DNA on a blood spot inside Toure's backpack. Toure's father identified him in videos of Toure using C.M.'s debit card at 3:00 a.m. on March 21—less than 24 hours after the murder—and again on March 24. In the March 21 video, Toure was wearing light-colored jeans with a large rip at the left knee. Toure was wearing the same distinctive jeans in numerous other videos, including one showing him walking toward C.M.'s apartment the morning she was murdered.

On appeal, Toure argues that he is entitled to a new trial due to the untimely disclosure of impeachment materials for some of the DFS witnesses and because the trial court refused to allow him to call the prosecutor as a witness. These arguments are meritless. The trial court correctly concluded that, notwithstanding DFS's failure to provide impeachment information, "even if DFS' work was to be completely discredited, other significant and compelling evidence establishing Mr. Toure's guilt in the rape and murder was presented," and thus "[t]here [wa]s no reasonable

probability that had the evidence been disclosed, the result of the proceeding would have been different" (Appendix 1122, 1124 (transcript)).[1] And the trial court did not abuse its discretion when it refused the defense's request to call the prosecutor as a witness. The defense did not establish a compelling need for the prosecutor's testimony, particularly given the alternative remedial actions taken by the trial judge. Even if the court somehow erred, the prosecutor's testimony would not have undermined the overwhelming evidence of Toure's guilt in any event.

COUNTERSTATEMENT OF THE CASE

On December 6, 2017, a grand jury charged Toure with first-degree premeditated murder while armed and first-degree felony murder while armed, D.C. Code §§ 22-2101, -4502; first-degree sexual abuse while armed, D.C. Code §§ 22-3002(a)(1), -4502; kidnapping while armed, D.C. Code §§ 22-2001, -4502; first-degree burglary while armed, D.C. Code §§ 22-801(a), -4502; robbery while armed, D.C. Code §§ 22-2801, -4502; first-degree theft, D.C. Code §§ 22-3211, -3212(a); unlawful use of a vehicle, D.C. Code §§ 22-3215; credit card fraud, D.C. Code §§ 22-3223(b)(1)(D)(2); and first-degree identity theft, D.C. Code §§ 22-3227.01,

[1] For the Record on Appeal (R.), Supplemental Record (S.R.), and Appendix (A.), the government cites to the PDF page number. For the Brief of Appellant El Hadji Toure (Br.), the government cites to the page number on the document. The citations identify the document being cited unless that information is apparent from context.

-3227.02(2)(A), -3227.03(a) (R.159-65 (Indictment)). The indictment alleged various aggravating circumstances, including that the murder was especially heinous, atrocious, or cruel, *see* D.C. Code § 22-2104.01(b)(4) (R.159-64).

On February 21, 2019, a jury trial began before the Honorable Juliet J. McKenna (R.37 (Docket p.37)). On March 20, the jury convicted Toure of all charges, including the aggravating circumstances (3/20/2019 Tr. 3-8). On September 27, 2019, Judge McKenna sentenced Toure to life in prison without release (A.476-78 (Judgment)). Toure timely appealed (R.1020-21 (Notice of Appeal)).

On March 4, 2020, while his appeal was pending, Toure filed a motion for a new trial, which he supplemented on June 2, 2020, and April 21, 2023 (see A.492 (Second Supplemental Brief in Support of Motion for New Trial p.1)). Judge McKenna denied Toure's motion on January 25, 2024 (A.1109-1124 (transcript)).

The Trial

The Government's Evidence

In March 2017, C.M. was an artist living in North Carolina who had come to the District to help install an exhibition at the Corcoran Gallery (2/25/19 Tr. 66, 74-75, 90-91). While here, C.M. was staying in a basement apartment at 631 14th Street Northeast (2/28/19 Tr. 8, 12-13). The weekend of March 17–19, C.M.'s boyfriend from North Carolina, Will Shepherd, visited D.C. to celebrate her birthday a few days early (3/4/19 Tr. 33-34, 54-59). He left Sunday afternoon (*id.* at 54-56). That

day, C.M. spoke with her father and told him that the installation was complete, the opening had been a success, and she intended to pack and return home the next morning (2/25/19 Tr. 66-67). Sunday evening, after Mr. Shepherd sent a photo of the freeway exit leading to her house in North Carolina, C.M. responded, "Tomorrow 😘" (3/4/19 Tr. 63-64; Government Exhibit (Exh.) 2033).

At 10:12 a.m. the next morning—Monday, March 20—video from a Metro bus captured C.M. packing her blue Prius where it was parked in the 600 block of 14th Street (2/28/19 Tr. 135-36; Exh. 320-1012-V1). The next day, after C.M. failed to respond to numerous text messages and e-mails, two of her colleagues went to the apartment where she had been staying (2/25/19 Tr. 82-83, 151-52, 155-56). The door was locked and nobody answered when they knocked, so C.M.'s colleagues drove around the area looking for her car, which they could not find (*id.* at 82-83, 156). Feeling "frantic" and "completely panic[ked]," C.M.'s colleagues tracked down a key to the apartment and went inside (*id.* at 83-84, 157). There, they found C.M.'s body on the bedroom floor (*id.* at 85-87, 159-60).

C.M.'s body was lying facedown, partially undressed, and bound with clothing and sheets (2/25/19 Tr. 89-90). Her neck had been cut at least 39 times, and it had a "large gaping wound" on the right side where both her carotid artery and jugular vein had been severed (3/7/19 Tr. 78, 83, 89-91). C.M. had stab wounds on her back and side, as well as defensive wounds on her hand (*id.* at 104-11). There

was evidence that C.M. had been choked (*id.* at 111). C.M.'s ankles and knees had been bound with clothing and a sheet, and her arms had been tied behind her back with additional clothing and a second sheet (*id.* at 43-45). These bindings were "very tight" (*id.* at 45). The ligature marks' color and a lack of bruising indicated that C.M. had not struggled (*id.* at 75-77). C.M. had two abrasions "relatively far up inside of her vagina" that were caused by a "digit, another body part, [or an] object" (*id.* at 64-66, 114-17). There were sperm inside C.M.'s vagina (*id.* at 62, 130-31).

Video from a house in the same block as C.M.'s apartment showed her car being driven away at 12:57 p.m. on March 20 (2/26/19 Tr. 157-59, 165-66; Exh. 320-1257-V-A). At approximately 2:45 p.m. that afternoon, someone used C.M.'s credit card at an ATM in College Park, Maryland, to obtain a $200 cash advance (3/4/19 Tr. 131-32; 2/28/19 Tr. 38-47; Exh. 320-1446-ATM2). Four hours later, someone used C.M.'s credit and debit cards at an ATM inside a 7-Eleven in Beltsville, Maryland, to attempt withdrawals (3/4/19 Tr. 112-13, 132; 3/6/19 Tr. 13-22; Exh. 320-1850-ATM). Less than 20 minutes later, someone used C.M.'s debit card at an ATM in an Exxon station in Beltsville to withdraw $200 from her checking account (2/28/19 Tr. 47-51; 3/4/19 Tr. 113-14, 132; Exh. 320-1909-ATM1).

Withdrawals from C.M.'s checking account continued over the next four days. Around 3:00 a.m. on March 21, someone withdrew $400 using an ATM at Lucky's Food and Deli in Elkridge, Maryland (3/4/19 Tr. 94-104, 114-15, 132; Exh. 321-

0301-ATM). The next day, at approximately 5:10 a.m., someone withdrew $500 using an ATM at a Gulf station in Laurel, Maryland (3/4/19 Tr. 116, 132; 3/6/29 Tr. 126-34; Exh. 322-0508-ATM). At 7:55 p.m. the day after that, March 23, someone withdrew $500 using an ATM at Presidential Bank in Rosslyn, Virginia (3/4/19 Tr. 117, 132, 197-202; Exh. 323-1956-ATM). And at approximately 1:00 a.m. on March 24, someone withdrew $500 using an ATM at Navy Federal Credit Union in Laurel (3/4/19 Tr. 117-18, 132; 2/27/19 Tr. 141-42, 152-63; Exh. 324-0058-ATM). At no point during any of those transactions did the person making them enter the wrong PIN (e.g., 3/4/19 Tr. 99, 107, 202).

On March 27, an MPD detective executed a search warrant at Toure's father's house in Laurel (3/5/19 Tr. 84-86). While there, the detective showed Toure's stepmother a still shot from a video of the man using C.M.'s debit card on March 24 (*id.* at 85-92; Exh. 324-0058-V2.3). She identified the man as Toure (*id.*). Toure was wearing a black backpack in the photo, a backpack he carried "a lot" (3/5/19 Tr. 60). At trial, after watching the video from which that photo had been obtained, Toure's father testified, "It looks like El Hadji" (*id.* at 41-42; Exh. 324-0058-V2). Although Toure's father denied having previously seen a March 21 video from Lucky's taken at the time someone used C.M.'s debit card there, and claimed it was "hard . . . to identify" the person in it, he had testified in the grand jury that the person in the video "looks like El Hadji" (3/5/19 Tr. 42-48; 2/26/19 Tr. 20-27; Exhs. 2011; 321-

0301-V). In the Lucky's video, Toure was wearing, among other things, light-colored blue jeans with a large rip at the left knee (Exh. 321-0301-V).

In January 2017, Toure was living in his father's basement when the two had an argument and Toure left without his belongings (3/5/19 Tr. 34-40). Except for five nights in late February, from the night of January 27 to the morning of March 18, Toure stayed in a shelter in D.C. run by Catholic Charities (3/11/19 Tr. 181). The nights of March 18 and 19, Toure stayed in a separate emergency shelter in D.C. that was also run by Catholic Charities (*id.* at 181-82). Catholic Charities had no record of Toure staying in any of its shelters after the night of March 19 (*id.* at 182-83).

Between October 2016 and March 2017, Toure occasionally worked for Trojan Labor, which supplied temporary workers to contractors (3/7/19 Tr. 95-103; Exh. 2502). When Trojan paid Toure, it did so by depositing money onto a debit card (3/7/19 Tr. 96; 2/28/19 Tr. 91-95; Exhs. 154.5A; 2507). That debit card was used to buy a SmarTrip card on February 15, 2017 (2/26/19 Tr. 205-19; 2/28/19 Tr. 96-97; Exhs. 2507; 2520-21). The last day Toure worked for Trojan was March 3, 2017 (*id.*). Toure received public assistance that March and was issued an EBT card (2/27/19 Tr. 189-99; Exh. 2506).

When Toure was arrested on March 27, officers searched him and found, among other things, his SmarTrip card, EBT card, and Trojan debit card (3/5/18 Tr. 125-42; Exhs. 152.6B; 152.7A; 154.5A). Using a record of Toure's SmarTrip card

transactions, the government obtained videos of him using various Metro buses and stations in the days surrounding C.M.'s murder (2/28/19 Tr. 123-70). The government likewise obtained videos of Toure using his EBT card, which required a PIN (2/27/19 Tr. 194-99; Exh. 2506), and C.M.'s credit and debit cards, which also required a PIN (3/4/18 Tr. 106-07). Piecing together its documentary and video evidence, the government established the following timeline of Toure's movements in the days before and after he murdered C.M. (3/11/19 Tr. 183-204; Exh. 1505).[2]

- **March 19-20**

On March 19, Toure used his EBT card at a 7-Eleven at 407 8th Street Northeast (2/27/19 Tr. 194-99; Exh. 2506). Video from the 7-Eleven showed Toure carrying a black backpack and wearing a black hoodie, a black stocking cap, and light-colored jeans with a large rip at the left knee (3/4/19 Tr. 18-23; Exhs. 319-1454-V1, -V2, -V3; 319-1502-V1, -V2). Toure was wearing the same jeans in the March 21 video in which his father identified him (supra at 7-8). Video from Metro Center the evening of March 18 also showed Toure carrying a black backpack and wearing the same outfit (2/28/19 Tr. 141-48; Exhs. 318-2103-V1, -V2, -V3).

The night of March 19, Toure stayed at an emergency shelter at Seventh and O Streets Northwest (3/11/19 Tr. 181-82; Exh. 1505, slides 21-22; 319-2100). At

[2] Exhibit 1505 was shown to the jury but not admitted into evidence. Embedded within it were excerpts from videos and other exhibits that had been admitted.

approximately 7:30 a.m. the next morning, March 20, Toure used his EBT card at the same 7-Eleven on 8th Street Northeast, which was six blocks west and two blocks south of C.M.'s apartment on 14th Street Northeast (Exhs. 1505, slides 26-30; 2506). Video from the 7-Eleven showed Toure wearing the same outfit that he had been wearing each of the two days before, including the same distinctive ripped jeans (3/4/19 Tr. 23-26; Exhs. 320-0731-V1, -V2, -V3; 320-0736-V; 320-0740-V1, -V2).

At 10:12 a.m., C.M. was packing her car on the east side of the 600 block of 14th Street Northeast (Exhs. 1505, slides 31-52; 320-1012-V1). Three minutes later, video captured Toure walking up that block in the direction of C.M.'s apartment (Exh. 1505, slides 54-58). Toure was carrying a black backpack and wearing a long-sleeve black top, a black head covering, and the same light-colored blue jeans with a large rip at the left knee (Exhs. 1505, slide 57; 320-1012-V-A, -B). Toure crossed from the west side of the street to the east side, where C.M.'s apartment and car were located, and then stopped and stared in her direction for over a minute (Exh. 320-1012-V-A). Toure then continued walking north on 14th Street toward C.M. (*id.*).

Over the next two-and-a-half hours, Toure raped and murdered C.M., tying her up in the process. Although there were no witnesses to the crime, Toure left behind his DNA in multiple locations. C.M.'s ankles were bound with, among other things, a pair of black leggings (3/7/19 Tr. 43-44, 54-56). There was a semen stain on a piece of the leggings; Toure was the major contributor to the DNA found in the

semen (2/27/19 Tr. 62-75). There were sperm inside C.M.'s vagina; the mixture of DNA in the sperm sample included Toure's (3/7/19 Tr. 62; 3/11/19 Tr. 58-62).[3] Testing of a swab from C.M.'s external genitalia likewise resulted in a mixture that included Toure's DNA (3/11/19 Tr. 70-72). Toure's DNA was also in the mixtures on the swabs taken from C.M.'s perianal buttock area and thighs (*id.* at 74-90).

At 12:57 p.m., the same video camera that had captured Toure approaching C.M.'s apartment showed her blue Prius being driven away (Exhs. 1505, slide 60; 320-1257-V-A). Roughly three hours later, video captured a blue car leaving the location of an ATM that someone had just used to obtain a $200 cash advance from C.M.'s credit card (Exhs. 1505, slides 65-70; 320-1448-V). Around four hours after that, video captured Toure using C.M.'s credit and debit cards to make balance inquires and to attempt to make withdrawals from an ATM in a 7-Eleven a couple of miles up Route 1 (Exh. 1505, slides 72-74). Toure was wearing a long-sleeve black shirt, a black stocking cap, and the same light-colored blue jeans with a large rip at the left knee (Exhs. 320-1848-V; 320-1849-V; 320-1856-V). Fifteen minutes later and a half mile away, Toure used C.M.'s debit card to withdraw $200 from an

[3] For the DNA mixtures, the DFS analyst reported her findings as a likelihood ratio. For example, "the mixture DNA profile obtained from the vaginal cervical sperm fraction[wa]s at least 335 quadrillion times more likely if it originated from [C.M.], [her boyfriend] Will Shepherd, and El Hadji Toure than if it originated from [C.M.], Will Shepherd and one unknown, unrelated individual" (3/11/19 Tr. 62).

ATM in an Exxon station (Exh. 1505, slides 76-79). Video showed Toure parking C.M.'s car, walking into the Exxon station, using the ATM, and then exiting and driving away (Exhs. 320-1908-V; 320-1909-V1, -V2; 320-1914-V; 320-1915-V).

- **March 21**

Later that night, at 12:18 a.m., a license plate reader took a photo of C.M.'s Prius being driven into D.C. on 14th Street Southwest (Exh. 1505, slides 85-86; 3/6/19 Tr. 144-49; Exh. 321-0018-LPR). Three hours later, at around 3:00 a.m., video captured Toure using C.M.'s debit card to withdraw $400 from the ATM in Lucky's (Exh. 1505, slide 88-90; 3/4/19 Tr. 94-104, 114-15, 132; Exhs. 321-0301-ATM; 321-0301-V). In the video, Toure was still wearing a long-sleeve black shirt, a black stocking cap, and light-colored blue jeans with a large rip at the left knee (Exh. 321-0301-V). After watching the video in the grand jury, Toure's father testified that it "looks like El Hadji" (3/5/19 Tr. 42-48; Exh. 2011).

Three hours later, at 5:52 a.m., video recorded Toure getting on a Metro bus at Rhode Island Avenue and 10th Street Northeast (Exh. 1505, slides 92-94; Exh. 321-0552-V). The bus stop was about eight blocks from the 700 block of Irving Street Northeast, where C.M.'s Prius received a parking ticket two days later and was then seized by the police (Exh. 1505, slides 97-102; 3/5/19 Tr. 81-84, 103; 3/6/19 Tr. 26; Exhs. 1010-11). Toure traveled by bus and Metrorail to a Shoppers store in Laurel, where he used his EBT card at 9:12 a.m. and 9:57 p.m. (Exhs. 1505,

slides 106-18; 2506; 2520; 2/28/19 Tr. 150-55). That day, Toure checked into a Motel 6 in Laurel, paying $117.50 in cash for a two-night stay (3/6/19 Tr. 135-41; Exh. 321-1500). The Motel 6 was a short walk from Shoppers (3/6/19 Tr. 141).

- **March 22**

At approximately 5:10 a.m. the next morning, Toure used C.M.'s debit card to withdraw $500 from an ATM at a Gulf station in Laurel (Exh. 1505, slides 129-34; 3/4/19 Tr. 116, 132; 3/6/29 Tr. 126-34; Exh. 322-0508-ATM). The Gulf station was walking distance from Motel 6 (3/6/19 Tr. 141-42). In the Gulf station video, Toure can be seen wearing a black hoodie and a pair of jeans with no tear (Exh. 322-0507-V). Two hours later, Toure used his EBT card to make another purchase at the Shoppers in Laurel (Exhs. 1505, slides 136-37; 2506).

- **March 23**

Between 4:00 p.m. and 7:45 p.m. on March 23, Toure traveled by bus and Metrorail from Laurel to Rosslyn, Virginia (Exh. 1505, slides 143-60; 2520; 2/28/19 Tr. 155-63). In the bus and metro station videos, Toure was carrying his black backpack and wearing a long-sleeve white shirt under a black t-shirt and jeans with no tear (Exhs. 323-1635-V; 323-1654-V; 323-1903-V1, -V2; 323-1946-V1, -V2). Nine minutes after Toure exited the Rosslyn station, which was captured on video, someone used C.M.'s debit card to withdraw $500 from an ATM at Presidential Bank, located in the same block as the station exit (Exh. 1505, slides 157-62; 3/4/19

Tr. 117, 132, 197-202; Exh. 323-1956-ATM). Video showed Toure reentering the station 11 minutes later (Exh. 1505, slides 164-66; 323-2016-V1, -V2). Toure then traveled back toward Laurel (Exh. 1505, slides 167-75; 2520; 2/28/19 Tr. 163-67).

- **March 24**

At 12:58 a.m. on March 24, Toure used C.M.'s debit card to withdraw $500 from an ATM at Navy Federal Credit Union in Laurel (Exh. 1505, slides 178-81; 3/4/19 Tr. 117-18, 132; 2/27/19 Tr. 141-42, 152-63; Exh. 324-0058-ATM). Video of the transaction showed Toure carrying his black backpack and wearing a black stocking cap, a long-sleeve white shirt with a short-sleeve shirt over it, and unripped blue jeans (Exhs. 324-0058-V1, -V2). Toure's father identified him in the video, and Toure's stepmother identified him in a still taken from it (3/5/19 Tr. 41-42, 85-92; Exh. 324-0058-V2.3). Later in the day on March 24, Toure went to JTR Automotive in Cottage City, Maryland, where he paid $1,328 in cash for a used Ford Taurus and insurance (Exh. 1505, slides 202-04; 3/5/19 Tr. 194-206).

- **March 27**

Toure was arrested on March 27 and his Taurus was seized (Exh. 1505, slides 222-23; 3/4/19 Tr. 181-82; 3/6/19 Tr. 62-67). When officers searched Toure, they found his black stocking cap, SmarTrip card, EBT card, Trojan debit card, and $426 cash (3/5/18 Tr. 125-42; Exhs. 152.6B; 152.7A; 154.5A). There was a switchblade knife in the driver's side door of Toure's car and a pair of gloves in the center console

(3/4/19 Tr. 161-66, 168; Exhs. 1053-55, 1077, 1088). Toure's black backpack was in the trunk near another pair of gloves (3/4/19 Tr. 160-66, Exhs. 1063-65). There was a third pair of gloves inside Toure's backpack (3/4/19 Tr. 164-65, 182-83).

After inspecting the knife found in Toure's car, the medical examiner opined that "the wounds that [she] found on [C.M.]'s body [were] consistent with wounds that would have been caused by th[e] knife" (3/7/19 Tr. 79). The medical examiner also opined that the "large gaping wound" on C.M.'s neck was "comprised of more than one cutting event" (*id.* at 83). That wound was on the right side of C.M.'s neck (*id.* at 88-89); Toure wrote with his left hand (3/12/19 Tr. 148-49; Exh. 2801.9).

There was no evidence that C.M. and Toure knew one another. C.M.'s best friend had never heard Toure's name (2/28/19 Tr. 19, 24). Neither Toure's name nor his phone numbers were in C.M.'s phone, iPad, or computer (3/12/19 Tr. 80-83), and there were no references to C.M. or her phone number in Toure's phone (*id.* at 41-42). A chemical test of Toure's backpack gave a positive reaction inside a pocket for material consistent with human blood (3/11/19 Tr. 91, 93-94). DNA testing of that area resulted in a mixture that included C.M.'s DNA (*id.* at 91-93, 97).

The Defense Evidence

Jonathan Shell was the lead detective investigating C.M.'s murder (3/13/19 Tr. 117-18). After receiving a tip that "someone . . . believed to be Corry Bryant had been sneaking into" the apartment above C.M.'s, MPD went inside that unit on

March 29, 2017 (*id.* at 120-21). The unit was empty and there was no interior connection between the two apartments (*id.* at 122, 145-46). A woman named Christina Sloat left a note at the crime scene saying that "neurotechnology . . . was likely involved in [C.]'s murder," and then called MPD; Detective Shell did not investigate Ms. Sloat's whereabouts on the day of the murder because his conversation with her "sounded like ramblings of a person that was mentally ill" (*id.* at 125-30). MPD theorized that the man captured on video crossing to C.M.'s side of 14th Street and staring in her direction "came in with [C.M.] or behind her and that is how they made entry into the apartment" (*id.* at 147-50). Detective Shell did not follow up on some tips that were inconsistent with this theory (*id.* at 153).

When DFS processed Toure's car for evidence in March 2017, the technician left an empty blue cooler in the trunk (3/4/19 Tr. 189-91). The cooler was gone when a defense investigator went to view the car at MPD's Blue Plains facility in February 2019 (3/13/19 Tr. 156-57).

The defense read a stipulation about a sexual assault that had occurred on March 3, 2017 (3/13/19 Tr. 172). The court explained to the jury that, "[p]rior to Mr. Toure's arrest[,] police identified apparent similarities between" the two offenses, but that "Toure denies that he committed the rape on March 3rd, and the Government has not gathered evidence to contradict that claim" (*id.*). The stipulation, which was lengthy, described the facts of the March 3 assault (*id.* at 172-76).

SUMMARY OF ARGUMENT

The trial court correctly found that DFS's failure to turn over impeachment information for several of its employees did not warrant a new trial. The evidence of Toure's guilt was overwhelming even without the evidence introduced through the DFS witnesses: testing by a different laboratory found Toure's DNA in a semen stain on the leggings he used to bind C.M.'s ankles, Toure was captured on video approaching C.M.'s apartment the morning she was raped and murdered, and other videos captured Toure driving C.M.'s Prius and using her credit and debit cards within hours of her murder and in the days that followed. Moreover, the impeachment information would not have caused the jury to discredit the DFS witnesses entirely. The information was unrelated to the witnesses' conduct in this case, did not involve a lack of candor or the falsification of evidence, and generally showed a minimal number of inadvertent errors over a four-year time frame, none of which resulted in the reporting of incorrect DNA testing results.

The trial court did not abuse its discretion when it refused the defense's request to call the prosecutor as a witness. The defense did not establish a compelling need for the prosecutor's testimony, particularly given the remedial actions taken by the trial court. Even without the prosecutor's testimony, the defense was able to argue in closing both that (1) MPD had failed to investigate the similarity between the crime scene and a photo that C.M. had used in one of her art projects, and (2) the

government had attempted to manipulate the evidence so that the jury would ignore MPD's failure. The prosecutor's testimony was not vital to either of these arguments; to the contrary, it would have undermined them. And even if the trial court erred by refusing to require the prosecutor to testify, any error was harmless given the overwhelming evidence of Toure's guilt.

ARGUMENT

I. The Trial Court Correctly Concluded that DFS's Failure to Disclose Impeachment Information Did Not Require a New Trial Given the Overwhelming Evidence of Guilt.

Before trial, DFS's then-General Counsel assured both the prosecutors and the court that DFS had produced the impeachment information in its possession for the DFS witnesses in this case. That was not true. After trial, under the auspices of a new General Counsel, DFS provided additional impeachment information about its employees, which the government quickly provided to the defense.

For purposes of this appeal, the government does not dispute that the information was favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and that it was suppressed. Given the overwhelming evidence of Toure's guilt, however, Toure cannot show that he was prejudiced by the untimely disclosure of the DFS materials. The only question in this case was the identity of the person who raped and murdered C.M.

The evidence overwhelmingly established that person was Toure. Testing by Signature Science found Toure's DNA in a semen stain on the leggings used to bind C.M.'s ankles, which conclusively linked Toure, a stranger, to C.M.'s rape and murder. And videos showed Toure approaching C.M.'s apartment the morning she was murdered and repeatedly using her credit and debit cards in the hours and days after the murder, powerful evidence of Toure's guilt even without DNA evidence. The trial court thus correctly concluded that the undisclosed information did not warrant a new trial.

A. Additional Background.

1. Trial Proceedings.

Before trial, the defense asked the government to produce all quality corrective action reports (QCARs) from DFS for "anybody involved in the handling or testing of the evidence in this case" (R.197 (10/11/18 *Rosser* letter p.1)). A QCAR is issued after an "action or event not conforming to the policies and/or procedures of the Department of Forensic Sciences (DFS) or the quality standards required by our accrediting bodies." DFS Operations Manual, *Practices for Quality Corrective Action*, § 1.1 (July 8, 2019), *available at* https://dfs.dc.gov/sites/default/files/dc/sites/dfs/publication/attachments/DOM%20-%20Practices%20for%20Quality%20Corrective%20Actions.pdf. "When quality corrective action is needed, a root cause analysis will be performed and select action steps will be implemented, in order to

eliminate the problem and to prevent recurrence." *Id.* § 1.3. A QCAR "is not considered punitive in nature[.]" *Id.*

Because DFS's QCARs were not in the prosecutors' possession, they sent the defense's request to DFS's then-General Counsel, Rashee Raj (A.798 (e-mail chain)). Ms. Raj told the prosecutors that "Q-CARs are not routinely sent out because QCARs document systemic issues" (*id.*). The prosecutors provided this information to the defense (R.207 (12/20/18 discovery letter p.3)).

The defense subsequently repeated its request, explaining its "understanding that the personnel involved in a QCAR would be documented in Part A" (R.586 (Motion to Compel p.3)). The prosecutors again sent this information to Ms. Raj (A.796 (e-mail chain)). Ms. Raj responded by stating, among other things, that DFS provides prosecutors with impeachment information "for each testifying witness," including findings or pending allegations that an employee "fail[ed] to follow . . . Agency requirements for the collection and handling of evidence" or "fail[ed] to follow mandatory protocols with regard to the forensic analysis of evidence" (A.793). "The purpose" of a QCAR, according to Ms. Raj, "is to address systemic issues. By the very nature of that purpose, systemic issues very rarely involve one person, one case or anything singular." (A.794.) Moreover, QCARs "are not kept [by name]" (A.793-94). Ms. Raj informed the prosecutors that "DFS objects to the production of any QCARs in this case and will appear in court on this if needed"

(A.794). The prosecutors again provided this response to the defense, explaining that "DFS did not review every QCAR in its possession to determine whether a particular employee's name was present" (R.574-76 (2/8/19 discovery letter pp.1-3)).

The defense moved to compel (R.584-90). The government did not file an opposition. Instead, Ms. Raj appeared at the motion hearing to defend DFS's position (A.4 (transcript)). She told the court that "DFS doesn't generally turn over quality corrective action reports because those generally deal with systemic issues and are not related to one particular case" (A.5). According to Ms. Raj, QCARs generally "use[] the position title" rather than the individual's name (*id.*). Ms. Raj noted that the prosecutors had made a *Giglio* request and asserted that DFS had "turned over everything that falls within those types of categories" (A.5; see S.R.252-58 (Opposition to Defendant's Motion for New Trial, Exhs. 9-10 (*Giglio* request and response))).[4] She asserted that, "if there w[ere] a corrective or disciplinary action," it would be "reported [as] *Giglio* because those are personnel file matters" (A.9). Likewise, "noncompliance with [standard operating procedures] or rules of DFS . . . [would] be included" (*id.*).

After hearing from Ms. Raj, the trial court ordered DFS to produce QCARs that named any of the "individuals who [we]re involved in the evidence collection,

[4] Together with this brief, the government has filed a motion to supplement the record with trial court filings made after the record on appeal was prepared.

maintenance, and testing in this case" (A.16). Before trial, Ms. Raj e-mailed 15 QCARs to the court, the defense, and the prosecutors (S.R.246-51 (Opposition to Defendant's Motion for New Trial, Exhs. 8 & 8a)). Those QCARs involved eight DFS witnesses; none related to the witnesses' work in this case. At trial, the government called 13 witnesses from DFS. The defense did not question any of the DFS witnesses about the QCARs. As relevant here:

- Julie Ferragut

Ms. Ferragut worked on a team that conducted DNA testing (3/6/19 Tr. 107). For various pieces of evidence, Ms. Ferragut performed "extraction, microcon, amplification [or] capillary electrophoresis (CE) set up" (*id.* at 108-09; Exh. 2902). For extraction, a sample is put into a tube and then reagents are added to "extract the DNA" (3/11/19 Tr. 26). Microcon is "a laboratory procedure which helps . . . concentrate the DNA" (3/6/19 Tr. 109). Amplification "make[s] a lot of copies of each of the DNA" (3/11/19 Tr. 26). And capillary electrophoresis involves putting the samples in a "machine[,] and that detects any profiles that may be present" (*id.* at 25). The defense did not ask Ms. Ferragut any questions (3/6/19 Tr. 110).

- Andrew Feiter

Mr. Feiter conducted capillary electrophoresis set up for two areas of Toure's backpack that were tested for DNA (3/4/19 Tr. 150-53; Exh. 2900). The defense did not ask Mr. Feiter any questions (3/4/19 Tr. 153).

- Shana Mills

Ms. Mills testified as an expert (3/11/19 Tr. 23). She took samples from some items of evidence, preformed serology testing, and did some of the lab work (*id.* at 24). She was the "reporting analyst" for DFS, meaning that she "gathered all of the data, did the interpretations, and wrote the report" (*id.*). Ms. Mills opined that Toure's DNA was contained in the mixtures found on the swabs taken from inside C.M.'s vagina and from her external genitalia, perianal buttock region, and thighs (*id.* at 95-97). Ms. Mills also opined that C.M.'s DNA was contained in the mixture obtained from the presumptive blood stain inside Toure's backpack (*id.* at 97).

The defense cross-examined Ms. Mills on various issues, including the existence of male DNA in C.M.'s reference sample (3/11/19 Tr. 149). Ms. Mills explained that the level of male DNA in the sample was "extremely, extremely, extremely low and it's sub picogram. So we may not even consider that as true male DNA." (*Id.*) The "extremely small" level of male DNA did "not change the profile that [Ms. Mills] obtained for [C.M.]" (*id.* at 153). On redirect, Ms. Mills testified that she was unaware of any evidence of contamination in this case (*id.*).

- Amanda Mendez

Ms. Mendez processed Toure's car for evidence (3/4/19 Tr. 154). No useful forensic evidence was found. Ms. Mendez recovered physical evidence such as the

switchblade knife in the driver's side door and Toure's backpack in the trunk (3/4/19 Tr. 160-68). She also searched Toure's backpack (3/4/19 Tr. 164-65, 182-83).

The defense cross-examined Ms. Mendez about the fact that she processed Toure's car in the DFS garage while C.M.'s Prius was being processed by Samantha Bischof (3/4/19 Tr. 193). Ms. Mendez knew that Ms. Bischof was processing a car related to this case but did not know where in the garage that car was (*id.*). On redirect, Ms. Mendez testified that this kind of thing "happens," but is "not normal" (*id.* at 194). The cars were not in contact, and the examiners were "very focused in on [their] own vehicle and [their] own job" (*id.*).

- Samantha Bischof

Ms. Bischof processed C.M.'s Prius for evidence (3/6/19 Tr. 26). No useful forensic evidence was found. On cross-examination, Ms. Bischof testified that she had "no memory" of another car related to this case being processed at the same time (*id.* at 44). On redirect, Ms. Bischof testified that it is "not at all" unusual for there to be more than one car in DFS's processing center (*id.* at 47).

- Signature Science

A separate, private laboratory named Signature Science also conducted DNA testing (2/27/19 Tr. 13). C.M.'s body was recovered from the crime scene by a forensic investigator who transported it to the Office of the Chief Medical Examiner (3/5/19 Tr. 163, 166, 177-79). An assistant medical examiner removed the bindings

that had been used to tie C.M.'s extremities (3/7/19 Tr. 46-47). The bindings were packaged, sealed, and tagged with a bar code by two DFS employees, and then sent to Signature Science (2/27/19 Tr. 47-48, 165-72, 174-77, 183-84). When Signature Science received the bindings, there was no evidence of tampering or contamination (*id.* at 21, 47). Nicole Kaye, an expert from Signature Science, performed DNA testing on the bindings and other evidence (*id.* at 19, 47-49). She found semen on a piece of the black leggings that had been used to tie C.M.'s ankles (*id.* at 63-64; 3/7/19 Tr. 43-44, 54-56). Toure was the major contributor to the DNA found in the semen (2/27/19 Tr. 67-75).

2. Post-Trial Disclosures.

On November 1, 2019, in response to a *Giglio* request in a separate case, DFS's then-Acting General Counsel, Todd Smith, informed the U.S. Attorney's Office about "three internal disciplinary matters" involving Ms. Bischof (S.R.77-79 (Defendant's Motion for a New Trial, Exh. D)). Mr. Smith stated that DFS had not disclosed these matters in response to earlier *Giglio* requests (*id.*). The government provided this information to the defense in February 2020 (S.R.5 (Motion for a New Trial p.1)). In May 2020, after obtaining additional documents from DFS, the government disclosed more disciplinary reports and QCARs (S.R.88- (Defendant's Supplemental Brief in Support of Motion for New Trial, Exh. A)). None of the documents related to the witnesses' work in this case. As relevant here:

- Julie Ferragut

Ms. Ferragut was the subject of three QCARs. In July 2016, Ms. Ferragut reversed the sperm fraction and epithelial fraction while conducting the quantitation stage of DNA testing (A.1037; see A.1033 (e-mail)). When reviewing the results, she realized her possible mistake, discussed it with her team leader, and retested the samples (A.1037). No erroneous results were reported (*id.*). In July 2018, Ms. Ferragut identified an error in the language she used when reporting DNA results and fixed that error (A.1044). Correcting the error caused "minimal impact" (A.1044-45). Finally, in October 2017, an analyst discovered that non-quality-controlled reagents had been used in some testing (A.1049). Ms. Ferragut and other team members had not checked the lot numbers on the reagent tubes to ensure that they had been quality controlled (A.1050). Some testing had to be redone, but no reports were issued using the initial results (A.1049).

- Andrew Feiter

Mr. Feiter was the subject of three QCARs. In July 2016, Mr. Feiter switched a DNA sample with the blank reagent at the amplification stage (A.1056; see A.1033-35 (email)). The error was discovered and caused a delay in the testing process, but no erroneous results were issued (A.1056). In September 2016, Mr. Feiter amplified a reference sample "at two different extract volumes" (A.1063). The two resulting profiles did not match, most likely because Mr. Feiter used the

incorrect tube for the second amplification (*id.*). This error caused a delay in reporting, but no incorrect results (*id.*). Finally, in January 2018, Mr. Feiter accidentally contaminated an item (A.1077-78). This was discovered when testing resulted in a match with Mr. Feiter's DNA (A.1078). The result of that testing was reported as "unsuitable for comparisons due to quality control issues" (A.1079).

- Shana Mills

Ms. Mills was the subject of two QCARs. First, in October 2016, Ms. Mills listed an item of evidence as being located on a shelf when in fact she put it in the freezer, which was a "chain of custody documentation error" (A.1084-87). Second, like Ms. Ferragut, in October 2017, Ms. Mills did not check the lot numbers on reagent tubes to ensure that they had been quality controlled (A.1049-50).

- Amanda Mendez

In September 2018, Ms. Mendez failed to clear a cartridge from the chamber of a firearm, resulting in a loaded firearm being submitted for analysis and testing (A.1025). She was suspended for one day (A.1022-23).

- Samantha Bischof

Ms. Bischof was the subject of four QCARs, two of which led to written reprimands and one of which led to a one-day suspension. In June 2015, Ms. Bischof packaged ammunition in a plastic bag instead of a paper bag, which resulted in a cartridge falling out of the bag into a rack, where it remained hidden for two weeks

(A.953). In November 2016, Ms. Bischof failed to find cash and a lottery ticket in the pockets of clothing that had been seized as evidence (A.1009). When this was discovered in 2019, Ms. Bischof received a written reprimand (A.1006-08). In August 2017, Ms. Bischof failed to ensure that there was no cartridge in the chamber when she attempted to render a weapon safe (A.969-70). She received a written reprimand (A.966-67). Finally, in May 2018, Ms. Bischof put her own blood on the bottom of a brick that had been seized as evidence to perform a quality-control check of a reagent (A.979-80, 992-93). She was suspended for one day (A.992).

3. Toure's Motion for a New Trial.

Toure filed a motion for a new trial, which he supplemented twice, arguing that the government's untimely disclosure of the QCARs and disciplinary records violated *Brady* (see A.502-14 (Second Supplemental Brief in Support of Motion for New Trial pp.11-23)). In response, the government argued that Toure had not shown a reasonable probability of a different verdict had the documents been produced before trial (S.R.277-308 (Response to Second Supplemental Brief pp.18-49)).

After hearing argument on Toure's motion, the trial court denied it in an oral ruling (A.1109-1124 (transcript)). The court noted that "the government d[id] not meaningfully dispute" that it had failed to disclose evidence favorable to the defense (A.1111). "Notwithstanding an explicit order to do so, the Department of Forensic Sciences failed to disclose relevant personnel-related documents" (*id.*). This

information "could have been used by the defense to impeach the[DFS employees'] testimony and argue to the jury that the accuracy of their work in connection with the collection and analysis of the forensic evidence in this case should be questioned" (A.1112). The court found, however, that the undisclosed information was not material "for several reasons" (A.1115).

First, none of the undisclosed records "directly impacted upon the evidence collection or forensic analysis conducted in this case" (A.1115). Second, except for Ms. Bischof, the undisclosed information "was either completely unrelated to the tasks that the[witnesses] completed in connection with Mr. Toure's investigation . . . or was of such a minor nature that it neither resulted in any erroneous forensic results or reports being generated or in any formal reprimand or sanction" (A.1116). For example, as to Ms. Mills, the two QCARs relating to her performance involved "very minor incidents that [n]either negatively impacted her work in other cases [n]or resulted in any reprimand" (A.1117). And although Ms. Bischof had been reprimanded twice and suspended once, her involvement in this case was "minimal": she processed C.M.'s Prius, "from which she recovered no DNA or other biological material or any other evidence linking Mr. Toure to the vehicle" (A.1118). "Even when viewed cumulatively," the court found, the undisclosed materials did not "undermin[e] the validity of the DFS DNA analysis, particularly in the absence of any evidence of contamination or errors in this particular case" (A.1118-19).

Third, the court found, "even if DFS' work was to be completely discredited, other significant and compelling evidence establishing Mr. Toure's guilt in the rape and murder was presented" (A.1122). DNA testing by Signature Science "conclusively link[ed] Mr. Toure to [C.M.]'s rape and murder" (A.1121). Although two DFS employees packaged the evidence sent to that lab, "neither of these individuals w[as] the subject of undisclosed personnel records" (A.1120). There was also "other overwhelming evidence" of Toure's guilt, including video "placing Mr. Toure in immediate proximity to [C.M.'s] vehicle and home shortly before her rape and murder," and video and other evidence "showing [Toure] in possession of not only [C.M.]'s bank cards, but also her PIN, enabling him to withdraw substantial sums of cash in the hours and days after her murder" (A.1122-23).

B. Applicable Legal Principles and Standard of Review.

For a defendant to be entitled to a new trial based on the government's failure to produce favorable evidence, "prejudice must have ensued from the non-disclosure." *Mackabee v. United States*, 29 A.3d 952, 962 (D.C. 2011) (quotation marks omitted). To establish prejudice, the defendant must show "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009). This Court "evaluate[s] the tendency and force of the undisclosed evidence item by item[.]"

Turner v. United States, 116 A.3d 894, 914 (D.C. 2015), *aff'd*, 582 U.S. 313 (2017) (quotation marks omitted). It evaluates "its cumulative effect for purposes of materiality separately[.]'" *Id.* (quotation marks omitted). The Court "defer[s]" to the trial court's "assessments of credibility, evaluations of the weight of the evidence and the inferences to be drawn therefrom, and findings of historical fact," but reviews the ultimate question of materiality de novo. *Id.* at 915.

C. Discussion.

The trial court correctly concluded that, even if DFS had produced the relevant impeachment information before trial, there was no reasonable probability of a different result. This is true for several reasons.

First, the evidence of Toure's guilt was overwhelming even without the evidence introduced through DFS witnesses. Although Toure and C.M. were strangers, Toure's DNA was found in a semen stain on the leggings he used to bind C.M.'s ankles. Those leggings were removed by an assistant medical examiner, and the serology and DNA testing were done by an independent laboratory. As the trial court correctly recognized, this DNA evidence, by itself, "conclusively link[ed] Mr. Toure to [C.M.]'s rape and murder" (A.1121). Additionally, Toure was captured on video approaching C.M.'s apartment the morning she was raped and murdered, further linking him in time and place to the crimes. Other videos captured Toure driving C.M.'s Prius and using her credit and debit cards within hours of her murder,

which also established that he was the one who had committed it. And Toure, who was unemployed, living in a shelter, and receiving public assistance in March 2017, paid $117.50 in cash for a two-night stay at Motel 6 on March 21 and bought a car and insurance with $1,328 in cash on March 24, further confirming he was the one using C.M.'s credit and debit cards just after she was killed. Given this powerful evidence of Toure's guilt, the trial court committed no error when it concluded that Toure had failed to show a reasonable probability that, had the QCARS and other documents been disclosed before trial, the result would have been different. *See, e.g.*, *Farley v. United States*, 767 A.2d 225, 231 (D.C. 2001) (finding no reasonable probability of a different result where the evidence of guilt "was overwhelming"); *Wint v. United States*, 285 A.3d 1270, 1282 (D.C. 2022) (finding error harmless where, among other things, genetic evidence linked defendant to murder location).

Second, even if the trial court had allowed it all to be introduced (but see infra at 34-35), the undisclosed information regarding the DFS witnesses' past errors would not have caused the jury to disregard their testimony entirely. The QCARS and other disciplinary records spanned at least four years and generally showed a minimal number of inadvertent errors over that time frame. None of the information involved the witnesses' conduct in this case. None involved a lack of candor or the falsification of evidence. Instead, with the exception of Ms. Bischof, the undisclosed information "was either completely unrelated to the tasks that the[witnesses]

completed in connection with Mr. Toure's investigation . . . or was of such a minor nature that it neither resulted in any erroneous forensic results or reports being generated or in any formal reprimand or sanction" (A.1116).

Specifically, Ms. Mendez, who recovered evidence from Toure's car, was the subject of a single QCAR for failing to clear a cartridge from the chamber of a firearm before submitting it for analysis. Ms. Mills, who played a significant role in the DNA testing and testified as an expert, was the subject of just two minor QCARs, one for incorrectly identifying the place she had stored an item of evidence and one for failing to check the lot numbers on reagent tubes to ensure that they had been quality controlled. Ms. Ferragut and Mr. Feiter, who performed some DNA lab work for some of the evidence, were the subjects of three QCARs each for mistakes they made while conducting DNA testing, all of which were corrected and none of which resulted in the reporting of erroneous test results. And Ms. Bischof, who was reprimanded twice and suspended once, had "minimal" involvement in this case: she processed C.M.'s Prius, "from which she recovered no DNA or other biological material or any other evidence linking Mr. Toure to the vehicle" (A.1118).

None of these QCARS, whether individually or taken together, suggest that DFS would have planted evidence in Toure's car (such as the backpack that had a spot of blood with C.M.'s DNA), falsified the DNA analysis, or reported incorrect results. *Cf. Turner*, 116 A.3d at 926 (finding undisclosed evidence not material

where it "would not have directly contradicted the government's witnesses or shown them to be lying"). To the contrary, the evidence introduced through DFS was corroborated by other independent evidence. For example, numerous videos showed Toure carrying a black backpack—including the video of him approaching C.M.'s apartment the morning of the murder. The DNA testing by DFS, which found Toure's DNA in semen in C.M.'s vagina, was corroborated by the testing done by Signature Science, which found Toure's DNA in a semen stain on C.M.'s leggings. "[T]he tendency and force of the undisclosed evidence," *Turner*, 116 A.3d at 914, thus would not have caused the jury to completely disregard the DFS witnesses' testimony. And even if the jury may have discounted that testimony slightly, Toure cannot establish a reasonable probability of a different result given the overwhelming evidence of his guilt.

Third, and finally, the impact of any impeachment would have been further reduced because cross-examination with the QCARs and other disciplinary records would not have been unlimited. In denying Toure's motion, the trial court asserted that it would not have precluded cross-examination on the QCARs entirely, but "it is possible that the scope of such cross may have been limited" (A.1112). Indeed, this Court has repeatedly held that "[a] witness may be cross-examined on a prior bad act that has not resulted in a criminal conviction *only* where (1) the examiner has a factual predicate for the question, and (2) the bad act bears directly upon the

veracity of the witness in respect to the issues involved [i]n the trial." *Austin v. United States*, 64 A.3d 413, 421 (D.C. 2013) (quotation marks omitted) (emphasis added). But none of the QCARs or other disciplinary information bore directly upon the veracity of the DFS witnesses with respect to the issues involved in this case. As the trial court recognized, "none of the undisclosed QCARs or other personnel disciplinary materials directly impacted upon the evidence collection or forensic analysis conducted in this case" (A.1115). For example, the fact that Ms. Mendez was once suspended for failing to remove a cartridge from the chamber of a firearm says nothing about whether she was telling the truth about recovering items from Toure's car. Likewise, Ms. Mills's chain-of-custody tracking mistake and one-time failure to check reagents had no relationship to the truthfulness of her testimony about the DNA testing and analysis she conducted. So too for the other witnesses.

Toure argues that the undisclosed impeachment information was material because it "revealed significant and repeated errors on the[witnesses'] part which could have caused the jury to discredit their testimony" (Br. at 30). As an example, Toure asserts that cross-examination of Ms. Bischof about the incident in which she used her own blood to test a reagent "would not have only raised questions about Ms. Bischof's individual competency and credibility, but that of DFS as a whole" (*id.*). In other words, Toure claims that the impeachment materials could have been used to show that DFS has a propensity for making errors. But "[u]se of prior bad

acts evidence to show propensity is impermissible[.]" *Austin*, 64 A.3d at 422. "Although a witness may be impeached by inquiries into prior bad acts relevant to credibility, '[g]enerally speaking, a party cannot present evidence that a person acted in a certain fashion on a prior occasion in order to show conformity with that behavior in a later setting.'" *Id.* (quoting *Brown v. United States*, 726 A.2d 149, 153 (D.C. 1999)). For this reason, too, the QCARs were not material.[5]

Toure's remaining arguments largely consist of generalities untethered to the specific evidence in this case. He overstates the impeachment value of the QCARs, asserting, for example, that Mr. Feiter "incorrectly performed forensic tests similar to those he performed here" (Br. at 31), and that Ms. Ferragut "had violated DFS protocols in the same or similar testing procedures that she performed in Mr. Toure's case" (*id.*), without recognizing that all of these mistakes were identified and corrected before any erroneous results were issued. More significantly, Toure claims that the impeachment materials "could have created reasonable doubt in the minds

[5] Toure has not asserted any other basis on which the witnesses could have been permissibly cross-examined with the QCARs and other documents, and the government is not aware of any. None of the documents evidenced a witnesses' "willingness to obstruct the discovery of the truth by manufacturing or suppressing testimony or otherwise to thwart the ascertainment of truth in a judicial proceeding." *Smith v. United States*, 180 A.3d 45, 58 (D.C. 2018) (quotation marks omitted). Moreover, because QCARs are "not considered punitive in nature," and none involved potentially criminal conduct, they would not have established that the witnesses were "motivated to curry favor by testifying favorably for the government." *Cunningham v. United States*, 974 A.2d 240, 246 (D.C. 2009).

of the jury about the reliability of the forensic evidence and, hence, about the sufficiency of the evidence against Mr. Toure" (Br. at 32-33), without explaining how that is so. Toure never acknowledges the DNA testing by Signature Science that found his DNA in semen on the leggings used to bind C.M.'s ankles. He nowhere addresses the myriad videos showing him approaching C.M. the morning of the murder or driving her car and using her credit and debit cards in the hours and days after the crime. He proffers no theory how, even if presented with only this evidence, a jury could possibly have acquitted him. The trial court thus correctly denied his motion for new trial.

II. The Trial Court Properly Denied Toure's Request to Call a Trial Prosecutor as a Witness Because Toure Demonstrated No Compelling Need to Do So.

Toure argues (at 33-40) that the trial court reversibly erred when it refused his request to call one of the trial prosecutors as a witness. Not so. The law is clear that a defendant may call a prosecutor as a witness only when he demonstrates a compelling reason to do so. Toure has shown no such reason here. And even if he could, any error was harmless given the overwhelming evidence of Toure's guilt.

A. Additional Background.

One theme of Toure's defense was that the police "fel[t] pressure to make an arrest, jump[ed] to conclusions and rush[ed] to judgment" (2/25/19 Tr. 49). Among other things, Toure faulted the police for failing to investigate whether "the person

who killed [C.M.] was someone known to her or someone who knew her art" (3/18/19 Tr. 101). The basis for this argument was the similarity between the crime scene and a photo C.M. used in an art project called "All the Clothes" (*id.* at 99-102). In the art project, C.M. was lying face down on the floor, naked, covered by a large pile of clothes (Def. Exh. 1). After she was murdered, C.M.'s body was found lying face down on the floor, partially naked, with clothes strewn on top (Exh. 1125).

As the last of its 65 witnesses, the government called Sergeant Keith Batton, who testified about numerous topics and summarized aspects of the investigation (e.g., 3/12/19 Tr. 118-24 (Will Shepherd); 132-37 (use of C.M.'s debit card)). Sergeant Batton was the supervisor of the squad of six detectives, including lead detective Jonathan Shell, responsible for investigating C.M.'s murder (*id.* at 113). Sergeant Batton testified that, early in the investigation, detectives had seen the photo from C.M.'s art project and "[i]t was striking to us about the pile of clothing next to the nude body" (*id.* at 129-30). The following colloquy then occurred:

> 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 130-31.)

After the government finished questioning Sergeant Batton, defense counsel objected that they had not been told that detectives had tried to figure out who had viewed C.M.'s website (3/12/19 Tr. 153-54). Although the defense had received mobile IP addresses from Format.com in discovery, they assumed those addresses related to something else (*id.* at 154). In response, the government explained that the grand jury had subpoenaed Format for IP addresses that accessed C.M.'s website and that the investigation into those addresses "didn't go anywhere" (*id.* at 156).

The court allowed the defense to speak to Sergeant Batton (3/12/19 Tr. 168). After doing so, counsel asserted that his testimony about the IP addresses was based on information that had been provided to him the day before by one of the prosecutors (3/12/19 Sealed Tr. 2-3). The court recessed overnight (3/12/19 Tr. 169).

That evening, the government sent the court the subpoena to Format, Format's response, a spreadsheet the government created using the data provided by Format, and the letter providing these materials to the defense before trial (R.937-38). The government explained that, using the data provided by Format, an analyst had "created a comprehensive, more-user-friendly spreadsheet," which had been provided to the defense (R.937). One of the spreadsheet's tabs "list[ed] the IP

addresses accessing [C.M.'s] website during the likely time of the murder" (R.937-38). There were "five unique IP addresses" that had done so: one "belonging to the City of New York," and four "mobile IP addresses," which are "shared by many different devices and users" and thus "would not easily allow an investigator to determine which particular device or user . . . accessed the website" (R.938).

The next morning, the court allowed the defense to question Sergeant Batton outside the trial prosecutors' presence (but with their supervisor present) (3/13/19 Tr. 7-14). Sergeant Batton testified that he had not conducted an investigation into C.M.'s website and was not aware of any other person from MPD having conducted such an investigation (*id.* at 17-19). The night before he testified, a prosecutor showed Sergeant Batton documents with IP addresses and "a request for the domain's information" (*id.* at 20-21). Sergeant Batton had not seen the documents before, and his "knowledge about what the[] IP addresses mean[t] c[ame] purely from what [the prosecutor] told [him]" (*id.* at 20-25).

Finding that Sergeant Batton's trial testimony about the investigation into the IP addresses "was based upon hearsay," and given its "obligation . . . to ensure that Mr. Toure receives a fair trial," the court suggested that it could strike the relevant portion of Sergeant Batton's testimony and instruct the jury "that, in fact, MPD did not request these IP addresses and did not track down any leads" (3/13/19 Tr. 28-29). The defense instead asked to cross-examine Sergeant Batton, and for the court

to instruct the jury that there was no "investigation into these IP addresses" and that the prosecutor had committed "intentional misconduct to bolster the Government's case against Mr. Toure because the Government felt its case is weak" (*id.* at 31).

The prosecutors' supervisor responded that this request "would require the Court to lie to the jury" (3/13/19 Tr. 31). Witnesses "can testify in summary at times about an entire investigation. That investigation would include the grand jury investigation in certain appropriate times." (*Id.* at 33.) And "law enforcement" includes not just MPD, but "also the grand jury and the U.S. Attorney's Office" (*id.* at 32). It was "very clear that someone in law enforcement, mainly [the trial prosecutor], was pushing this issue at that time. So it is misleading to let this jury think that MPD is asleep at the switch and no one is doing anything." (*Id.* at 36.) Although the prosecutor's questions may have been "[p]oorly worded" insofar as they left the impression that detectives, rather than the grand jury, investigated the IP addresses, this distinction was not significant in terms "of what the defense [wa]s trying to put before the jury," which was a failure to investigate (*id.* at 37).

The trial court concluded that it would "preclude the Government from introducing any evidence about any investigative steps that [it] may have taken," whether "in the grand jury" or by "other detectives or officers . . . who may have followed up on those IP addresses" (3/13/19 Tr. 40). The court believed this ruling "squarely addresse[d] any prejudice that the defense may have suffered" and

"completely alleviate[d] the need . . . to take testimony from" the prosecutor (*id.*). Indeed, its ruling "[a]rguably . . . put[] the defense in a better position" than it would have been otherwise, because the defense was "allowed to elicit that in fact the Metropolitan Police Department did not follow-up on any of these IP addresses," and the government was "precluded from seeking to introduce any investigative steps that were taken in connection with the IP addresses" (*id.* at 40-41).

Ultimately, on cross-examination, the defense elicited testimony from Sergeant Batton that MPD had not investigated C.M.'s website; the first time he learned anything about IP addresses was two nights before, when the prosecutor showed him a document; and all he knew about what the document meant came from the prosecutor (3/13/19 Tr. 82-85). The trial court then instructed the jury:

> Ladies and gentlemen, yesterday the Government elicited testimony from Sergeant Batton about investigating IP addresses related to Ms. 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 Ms. 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.

(3/13/19 Tr. 85-86.)

The government sought to question Sergeant Batton on redirect about how a grand jury works, but the trial court denied that request (3/13/19 Tr. 88-91). However, because it was "an established fact," the court allowed the government to show that the grand jury had subpoenaed the IP records associated with C.M.'s website (*id.* at 88-89). After the government introduced into evidence the grand jury subpoena, the court instructed the jury 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" (3/13/19 Tr. 97; Exh. 3005). The defense put on its case and rested later that day (3/13/19 Tr. 177).

The next morning, the defense asked to reopen its case to call the prosecutor as a witness (3/14/19 Tr. 2). Defense counsel asserted that only the prosecutor could explain "why the Government decided not to pursue the information in these records," and whether "investigating this photograph on Ms. M[.]'s website . . . was the [subpoena's] real purpose or even primary purpose" (*id.* at 4). The defense speculated that the subpoena may have been issued "to see if there was a link between Mr. Toure and the March 3rd case" (*id.*).

The trial court denied the defense's request. The court noted that it had given Toure a choice between striking Sergeant Batton's testimony and cross-examining him followed by an instruction from the court (3/14/19 Tr. 7-8). Toure's concerns had been "squarely addressed" by Sergeant Batton's "very candid" testimony "that he didn't have any personal knowledge" of the IP addresses, "combined with the instruction that Sergeant Batton was furnished this information by the Government, and that this is not permissible behavior by an attorney" (*id.* at 8). Nothing more would "be gleaned by placing [the prosecutor] under oath" (*id.*). And although the government introduced the grand jury subpoena into evidence, the court told the jury that "the Government took no further steps to identify the account holders of the IP addresses," which fell "squarely within the defense theory . . . and was specifically crafted in such a way as to minimize any prejudice" to Toure (*id.* at 8-9).

In closing argument, defense counsel asserted that "the Government knew that th[e] photograph [from C.M.'s art project] [wa]s a reason to doubt, and so they tried to . . . manipulate the evidence so that you would pay it no mind, you wouldn't worry about the investigation into this photograph" (3/18/19 Tr. 102). Counsel argued that Sergeant Batton had testified falsely that detectives investigated the photo, when in fact he had gotten the information from the prosecutor the night before his testimony (*id.* at 103). Defense counsel urged that "[t]his photograph, this manipulation of the evidence, this lack of investigation into the photograph is reasonable doubt" (*id.* at

104). In rebuttal, the government pointed out that the grand jury had subpoenaed Format for all IP addresses that had accessed C.M.'s website (*id.* at 144-45).

B. Discussion.

Toure argues (at 33-40) that the trial court committed reversible error when it refused his request to reopen the defense case to call the trial prosecutor as a witness. The law is clear that "a defendant who wishes to call a prosecutor as a witness must demonstrate a compelling and legitimate reason to do so." *United States v. Regan*, 103 F.3d 1072, 1083 (2d Cir. 1997); *see also, e.g.*, *United States v. Ortero*, 37 F.3d 739, 746 (1st Cir. 1994); *United States v. Roberson*, 897 F.2d 1092, 1098 (11th Cir. 1990); *United States v. Prantil*, 764 F.2d 548, 554 (9th Cir. 1985); *Gatlin v. United States*, 925 A.2d 594, 604 (D.C. 2007) (citing "compelling need" standard). "Requests for such testimony are disfavored, and the party seeking such testimony must demonstrate that the evidence is vital to his case, and that his inability to present the same or similar facts from another source creates a compelling need for the testimony." *United States v. Ziesman*, 409 F.3d 941, 950 (8th Cir. 2005) (quotation marks omitted); *see also, e.g.*, *United States v. Wooten*, 377 F.3d 1134, 1143 (10th Cir. 2004); *United States v. Ashman*, 979 F.2d 469, 494 (7th Cir. 1992); *United States v. Atman*, 1998 WL 211767, at *4 (6th Cir. Apr. 22, 1998).

The trial court did not abuse its discretion when it denied Toure's request to reopen his case to call the prosecutor as a witness. *See generally Ziesman*, 409 F.3d

at 950 (applying abuse of discretion standard); *Wooten*, 377 F.3d at 1143 (same); *Ashman*, 979 F.2d at 494 (same). As the trial court correctly recognized, Toure identified no compelling need to do so. Sergeant Batton's initial inaccurate testimony that MPD had investigated C.M.'s website—which, the court noted, was "a very brief portion of [his] direct testimony" (3/13/19 Tr. 33)—was "squarely addressed" by his subsequent "very candid" testimony "that he didn't have any personal knowledge" of any such investigation, "combined with the instruction that Sergeant Batton was furnished this information by the Government, and that this is not permissible behavior" (3/14/19 Tr. 7-8). Specifically, Sergeant Batton admitted on cross-examination that MPD had not investigated C.M.'s website; the first time he learned about IP addresses was two nights before, when the prosecutor showed him a document; and his knowledge of what the document meant came from the prosecutor (3/13/19 Tr. 82-85). The 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" (*id.* at 85-86). And, after the government introduced the grand jury subpoena into evidence, the court told the jury that "after reviewing the data received from Format . . . the Government took no further steps to identify the accountholders of the IP addresses" (*id.* at 97).

This evidence allowed the defense to argue in closing not only that MPD had failed to investigate whether "the person who killed [C.M.] was someone known to

her or someone who knew her art," but also that the government "tried to . . . manipulate the evidence so that . . . you wouldn't worry about the investigation into this photograph" from C.M.'s website (3/18/19 Tr. 101-02). In other words, after the trial court's corrective actions, the defense was able both to assert its failure-to-investigate defense and also to urge that the government had improperly manipulated evidence to make its case appear stronger. Under these circumstances, the court acted well within its discretion when denied Toure's request to call the prosecutor as a witness.

On appeal, Toure concedes that "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" a trial prosecutor, and he acknowledges that the trial court instructed the jury this was improper (Br. at 36). Toure claims, however, that he needed to question the prosecutor in front of the jury about the steps the prosecutor took to investigate the IP addresses that accessed C.M.'s website (*id.* at 37). There was no need for that inquiry, however, because the defense obtained the best possible outcome through the trial court's court instruction to the jury that, "after reviewing the data received from Format . . . the Government took no further steps to identify the accountholders of the IP addresses" (3/13/19 Tr. 97). Given this instruction, Toure is incorrect that the government somehow "left the jury with the impression that it hoped to leave it with, that there was an investigation into [C.M.'s]

website" (Br. at 36 (quotation marks omitted)). In fact, had the prosecutor testified, his answers would have only undermined Toure's failure-to-investigate defense: the prosecutor would have explained that the government had, in fact, attempted to identify who accessed C.M.'s website at the time of the murder (see R.937-38).

Toure's suggestion that he needed to call the prosecutor to investigate whether the IP records were "simply an effort to tie Mr. Toure to the March 3 rape" (Br. at 37) is likewise meritless. It is unclear how the prosecutor's reason for subpoenaing the IP records is relevant to Toure's guilt of raping and murdering C.M. And even if the prosecutor had been attempting to investigate Toure's guilt of a different crime, that motivation would in no way establish Toure's innocence in this case. In any event, the prosecutor explained to the court that "the focus of the grand jury investigation" was identifying who had accessed C.M.'s website "during the likely time of the murder" (R.937-38). The spreadsheet the government's analyst created backed that up (*id.*). Toure's speculation that the prosecutor might testify to a different motivation hardly establishes a vital need for the prosecutor's testimony.

Moreover, as Toure admits, requiring the prosecutor "to take the stand and then to withdraw from the case would have created a commotion" (Br. at 38). Contrary to Toure's claim (at 38), there was no "reflexive refusal" to deny his request to put the prosecutor on the witness stand. Rather, the trial court allowed additional cross-examination and issued appropriate jury instructions—remedial steps often

taken by judges in similar circumstances. *See, e.g.*, *Crawford v. United States*, 932 A.2d 1147, 1158-59 (D.C. 2007) ("the traditional remedy for a violation of a court order prohibiting witnesses from discussing their testimony with anyone else is cross-examination") (citing *Geders v. United States*, 425 U.S. 80, 89-90 (1976)).

Even if the trial court somehow erred by refusing the defense's request to call the prosecutor as a witness, that error was harmless. *See generally Smith v. United States*, 809 A.2d 1216, 1223 (D.C. 2002) (applying harmless-error analysis). The prosecutor's testimony would not have helped the defense: unlike Sergeant Batton, he would have testified from firsthand knowledge about the government's investigation, through the grand jury and other detectives, into who accessed C.M.'s website at the time of her murder, thus undermining Toure's failure-to-investigate defense. And even if the prosecutor's testimony could have somehow theoretically helped Toure, the overwhelming evidence of Toure's guilt previously discussed—including his DNA found in semen on the leggings use to bind C.M.'s ankles and in C.M.'s vagina, video showing him approaching C.M. the morning she was murdered, and videos showing him using C.M.'s credit and debit cards hours after the murder and in the days that followed—rendered any error harmless under any possible standard of review. *See, e.g.*, *United States v. Milles*, 363 F. App'x 506, 508-09 (9th Cir. 2010) (even where prosecutor improperly provided a script to a testifying witness, a new trial was not warranted given the "substantial evidence of

Milles's guilt without [the] testimony"); *United States v. Rivera-Hernandez*, 497 F.3d 71, 80 (1st Cir. 2007) ("[E]ven assuming that the meeting between the AUSA and the cooperating witnesses was improper, it was not prejudicial because it did not so poison [ ] the well as to have likely affected the trial's outcome.") (quotation marks omitted).[6]

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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[6] The government agrees that Toure's felony murder convictions merge with his conviction for first-degree premeditated murder, and the felony murder convictions merge with the underlying felonies (see Br. at 40). *See Young v. United States*, 305 A.3d 402, 440 (D.C. 2023); *Thacker v. United States*, 599 A.2d 52, 63 (D.C. 1991). The Court should thus "remand for the limited purpose of merging [Toure's] convictions and resentencing" as necessary. *Young*, 305 A.3d at 441.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Sean Belanger, Esq., sean.belanger@hklaw.com, on this 4th day of October, 2024.

/s/
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