No. _____

In the Supreme Court of the United States

LESLIE CHIN,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to precedent in the Eleventh Circuit, in order to succeed on a motion for new trial based on newly discovered evidence, a movant is entitled to establish that: "(1) the evidence was discovered after trial, (2) the failure of the defendant to discover the evidence was not due to a lack of due diligence, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material to issues before the court, and (5) the evidence is such that a new trial would probably produce a different result." *United States v. Hilel,* 429 Fed. Appx. 835 (11th Cir. 2011) (citing *United States v. Jernigan*, 341 F.3d 1273, 1287 (11th Cir. 2003)). The question presented is:

Whether the Equal Protections Clause is violated when there is a conflict amongst the federal circuit courts of appeal dealing with what a defendant is required to show in order to receive a new trial after newly discovered evidence is found, because a defendant in one circuit has a lower burden of proof than a defendant in another circuit, even though the rest of the circumstances are the same?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Leslie Chin respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on May 31, 2018, affirming the judgment of the United States District Court for Middle District of Florida, Fort Myers Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished and appears at *United States v. Chin*, 736 Fed. Appx. 785 (11th Cir. 2018). It is also attached as **Appendix A.**

The judgment of the United States District Court for the Middle District of Florida, Fort Myers Division, is unpublished and is attached at **Appendix C.** The district court's findings on this matter, also unpublished, appear in the record attached as **Appendix D.**

JURISDICTION

The court of appeals entered its opinion on May 31, 2018. Pursuant to Federal Rule of Appellate Procedure 35 and 11th Circuit Rule 35, a timely petition for rehearing and rehearing *en banc* was filed on June 20, 2018. Ultimately, the United States Court of Appeals for the Eleventh Circuit denied the petition on August 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of the Fourteenth Amendment to the United States Constitution, providing that: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court's Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Leslie Chin, faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered judgment on June 29, 2016. Mr. Chin filed a timely notice of appeal on June 29, 2016. The Eleventh Circuit exercised jurisdiction over Mr. Chin's appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

This case concerns an important issue surrounding testimony of a material government witness that was later recanted, and the appropriate legal standard that is applied in determining whether a new trial should be granted. Currently, federal courts of appeals apply a standard of review that requires the party raising the issue of newly discovered evidence to satisfy several elements. The conflict amongst these courts of appeal lies in the fact that two circuits do not require proof of two elements, which are required by the remaining circuits. This case concerns the question of whether the conflict amongst the federal courts of appeal results in a violation of the

Equal Protection Clause, where some defendants are required to meet an additional burden of proof before receiving relief after newly discovered evidence surfaces.

B. Factual Background.

The government's case against Mr. Chin centered around the theory that Mr. Chin, Andrew Chin (the Petitioner's brother), and Jerome Vaughn were involved in a drug distribution conspiracy. At trial the government presented testimony from law enforcement officers and agents, and introduced evidence in support of the conspiracy. The government offered the testimony of three cooperating witnesses to "tie up" their case against Mr. Chin. Absent the testimony from these cooperating witnesses, the government's case was focused solely on Andrew Chin and Jerome Vaughn.

The first cooperating witness was Harold Coleman. Mr. Coleman admitted that he had previously testified against another individual, and hoped to receive further time off of his sentence by testifying against Mr. Chin, whom he identified as "Bless." (Doc. 232 at 78). Mr. Coleman alleged that he made a trip to Atlanta, Georgia, in March of 2012 with the purpose of meeting with Mr. Chin and buying cocaine. However, there were no drugs when he arrived. Mr. Coleman testified that about a week later, Mr. Chin came to Sumter, South Carolina, and brought Mr. Coleman one "key" of cocaine (approximately 36 ounces). (Doc. 232 at 88-89). Over the next six to eight months, Mr. Coleman alleged that Mr. Chin made two or three more trips to Sumter and brought two to three kilos of cocaine with him each time. (Doc. 232 at 90-91). Mr. Coleman also testified that in addition to the trips to Sumter, he also made

several trips to Atlanta, Georgia, over the next year, and Mr. Chin was present during several of those trips. (Doc. 232 at 92).

The next cooperating witness was Antonio Hill. (Doc. 233 at 32). Mr. Hill testified that he started buying drugs from Jerome Vaughn when he was 15 years old and continued buying cocaine from him for over 9 years. (Doc. 233 at 34-35). In 2011, Mr. Vaughn advised Mr. Hill that he had a new source for cocaine and that someone was known as "Bless." (Doc. 233 at 36-37). Mr. Hill testified that on one occasion when "Bless" came to town he brought some quantity of cocaine to the house, Mr. Vaughn tested it out, and they smoked marijuana before they left. (Doc. 233 at 38). On that occasion, "Bless" was with one other individual and they stayed for approximately one hour. (Doc. 233 at 39). About a week later, "Bless" came back to the house and brought more cocaine. The second visit lasted only about thirty minutes. (Doc. 233 at 39). Mr. Hill testified that "Bless" brought nine ounces of cocaine each time. (Doc. 233 at 40).

The last cooperating witness, Gary Russell Williams, did not provide testimony about any encounters with Mr. Chin involving the distribution of cocaine. Instead, his testimony focused on alleged conversations he had with Mr. Chin while in the Charlotte County Jail. Ultimately, Mr. Chin was found guilty.

On June 22, 2016, only days prior to the scheduled sentencing, trial counsel received an email from Attorney Douglas Molloy, counsel for co-defendant Jerome Vaughn, that included two original letters written by Mr. Hill. The letters were received by Attorney Molloy prior to the start of Mr. Chin's trial in February of 2016.

However, trial counsel had not been aware of or viewed either letter written by Mr. Hill until on or after June 22, 2016 when Attorney Molloy emailed and later mailed them to trial counsel. On June 27, 2016, Mr. Chin was sentenced to a term of 188 months imprisonment as to both counts, followed by sixty-months supervised release on Count One and thirty-six months supervised release on Count Two. (Doc. 213).

After Mr. Chin was sentenced, trial counsel verified that Antonio Hill wrote each letter and mailed each letter to Attorney Molloy prior to the start of Mr. Chin's trial on February 22, 2016. The letters written by Mr. Hill in February of 2016 revealed that Mr. Hill unequivocally perjured himself during Mr. Chin's trial. In the first letter, Mr. Hill wrote that he did not know Mr. Chin, either by his name or by his nickname "Bless," that he mistook Mr. Chin for a different person, that his drug dealings with Jerome Vaughn occurred prior to the start date of the indictment of Mr. Chin, and that he never saw Jerome Vaughn with Mr. Chin. (Doc. 239 at 8). In the second letter, Mr. Hill wrote that he was brought to Fort Myers, Florida to testify against Jerome Vaughn, who was Mr. Chin's co-defendant, and was at the time scheduled to go to trial with Mr. Chin. Mr. Hill wrote that the information he provided case agents prior to trial was a mistake. Mr. Hill wrote that he did not know Mr. Chin and when interviewed by the case agent he became confused. (Doc. 239 at 8-9).

C. Procedural History in the District Court.

On December 3, 2014, a federal grand jury returned in the Middle District of Florida, Ft. Myers Division, a three-count indictment charging Mr. Chin and two co-defendants with various offenses. Mr. Chin was charged with one count of Conspiracy

to Possess with Intent to Distribute Five or More Kilograms of Cocaine, and one count of Possession with Intent to Distribute a Quantity of Cocaine. (Doc. 1).

On September 22, 2016, Mr. Chin filed a Motion for New Trial Based on Newly Discovered Evidence. Mr. Chin argued that due to the newly discovered evidence, a new trial was required under the law. Mr. Chin further argued that an evidentiary hearing was required before the district court could make a ruling on the motion.

On October 21, 2016, the government filed a Response to the Motion for New Trial. (Doc. 246). The government conceded that the newly discovered evidence was discovered after trial, that due diligence was used in discovering the evidence, and the evidence was material to issues before the district court. However, the government argued that the newly discovered evidence was "impeaching at best and is not of such a nature that a new trial would reasonably produce a new result." (Doc. 246 at 3). Further, the government argued that the rulings by the Court of Appeals as to the necessity of a hearing was not an umbrella rule, but instead, each ruling was unique to each case. (Doc. 246 at 16).

On November 7, 2016, the district court entered an order, denying Mr. Chin's motion. Pet. App. A32. In denying the motion, the district court found that, "the [g]overnment is correct that the evidence against Chin was substantial. Chin has failed to establish that a new trial with this new evidence would probably produce a different result." Pet. App. A35.

D. Eleventh Circuit's Consideration of the Matter.

On appeal, a three-judge panel of the Eleventh Circuit held that Mr. Chin was not entitled to a new trial because he could not establish the third and fifth elements. Pet. App. A17. The panel first found that the fifth element, whether a new trial would produce a different result, was not shown because the evidence against Mr. Chin was substantial and came from different types of physical evidence and several witnesses. Pet. App. A17. As to the third element, the panel found that the new evidence was both merely impeachment evidence and cumulative. Pet. App. A18.

> When read literally, as the district court correctly found, the letters say that Hill never saw Chin with Vaughn, but they do not say that he never saw someone by the name of "Bless" with Vaughn. This is actually consistent with Hill's testimony at trial: Hill was unable to identify Chin as "Bless." Nor do these letters show that Chin had no ties to Vaughn, just because Hill personally did not see them together.
>
> Accordingly, this new evidence would have served only to impeach Hill. But Hill had already been impeached on multiple grounds. As a result, the new evidence would also have been cumulative. *See United States v. Diaz*, 190 F.3d 1247, 1255 (11th Cir. 1999) (newly discovered sworn statement of co-conspirator contradicting his testimony at trial was merely impeaching evidence); *United States v. Champion*, 813 F.2d 1154, 1171 (11th Cir. 1987) (new evidence was merely impeaching and cumulative where the defense had already impeached the witness at trial).

Pet. App. A18.

Mr. Chin moved for a Petition for Rehearing and Rehearing *En Banc* after the Eleventh Circuit rendered its decision. Mr. Chin argued that the panel's decision was contrary to the cited opinion of *United States v. Diaz,* 190 F.3d 1247 (11th Cir. 1999). However, Mr. Chin's petitions were ultimately denied. No Judge in regular active

service on the Eleventh Circuit panel requested that the Court be polled on rehearing en banc. Pet. App. A24-25.

REASONS FOR GRANTING THE PETITION

A. There is a Conflict Amongst Appellate Courts on What Elements a Defendant Must Prove Before a Court Will Grant Him a New Trial Based on Newly Discovered Evidence.

In the early eighteenth and nineteenth centuries, motions for new trials based on newly discovered evidence were highly disfavored. In an attempt to address the feelings behind said motions, it was determined that motions based on newly discovered evidence would be subject to very strict regulations. This attitude led courts to adopt a nearly uniform test to evaluate a motion for new trial that was often referred to as the "Berry rule" or the "Berry test." *See, Berry v. State,* 10 Ga. 511 (1851). In *Berry*, the Supreme Court of Georgia laid out requirements for a successful motion for new trial, and deemed that as the appropriate test.

> Upon the following points there seems to be a pretty general concurrence of authority . . . that it is incumbent on a party who asks for a new trial, on the ground of newly discovered evidence, to satisfy the Court, 1st. That the evidence has come to his knowledge since the trial. 2d. That it was not owing to the want of due diligence that it did not come sooner. 3d. That it is so material that it would probably produce a different verdict, if the new trial were granted. 4th. That it is not cumulative only--viz; speaking to facts, in relation to which there was evidence on the trial. 5th. That the affidavit of the witness himself should be produced, or its absence accounted for. And 6th, a new trial will not be granted, if the only object of the testimony is to impeach the character or credit of a witness.

Id. at 527. Following *Berry*, courts in both federal and state jurisdictions adopted a similar version of the test. In *United States v. Owen*, 500 F.3d 83 (2d Cir. 2007), the

court discussed the similarity amongst the federal courts of appeals when evaluating a defendant's motion for new trial pursuant to Rule 33.

> "[A] majority has articulated a nearly uniform test. Each essentially requires that: (1) the evidence be newly discovered after trial; (2) facts are alleged from which the court can infer due diligence on the part of the movant to obtain the evidence; (3) the evidence is material; (4) the evidence is not merely cumulative or impeaching; and (5) the evidence would likely result in an acquittal."

However, because there has never been a decision specifically outlining the exact elements that a reviewing court should apply, a difference in application has appeared, creating a conflict amongst the federal courts of appeals.

The Eleventh Circuit currently sits with a majority of the federal courts of appeals, and applies a test that requires a defendant to establish five things, including that the newly discovered evidence be material, and that the evidence is not merely cumulative or impeaching. Amongst the Circuit Courts that do not follow the same five-element tests are the First Circuit and the Tenth Circuit. The First Circuit does not require that the newly discovered evidence lack impeachment value, and the Tenth Circuit excludes the requirement that the evidence not be cumulative. *See, United States v. Carpenter*, 781 F.3d 599 (1st Cir. 2015) (requiring that a defendant bear the burden of proving that the evidence was (1) unknown or unavailable at the time of trial; (2) despite due diligence; (3) material; and (4) likely to result in an acquittal upon retrial); *United States v. LaVallee*, 439 F.3d 670 (10th Cir. 2006) (finding that "defendant must show (1) the evidence was discovered after trial, (2) the failure to learn of the evidence was not caused by [his] own lack of diligence, (3) the new evidence is not merely impeaching, (4) the new evidence is

material to the principal issues involved, and (5) the new evidence is of such a nature that in a new trial it would probably produce an acquittal") (internal citations omitted).

Ironically, all Circuits have adopted the perspective that the "failure to satisfy any one of these [ ] elements is fatal to a motion for new trial." *United States v. Lee*, 68 F.3d 1267 (11th Cir. 1995); *see also, United States v. Hernandez-Rodriguez*, 443 F.3d 138 (1st Cir. 2006); *United States v. Forbes*, 790 F.3d 403 (2d Cir. 2015); *United States v. Jackson*, 427 Fed. Appx. 109 (3d Cir. 2011); *United States v. Swinson*, 243 Fed. Appx. 760 (4th Cir. 2007); *United States v. Wall*, 389 F.3d 457 (5th Cir. 2004); *United States v. Olender*, 338 F.3d 629 (6th Cir. 2003); *United States v. Kamel*, 965 F.2d 484 (7th Cir. 1992); *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991); *United States v. Harrington*, 410 F.3d 598 (9th Cir. 2005) and *United States v. Sinclair*, 109 F.3d 1527 (10th Cir. 1997).

In light of the fact that a defendant bears a heavy burden to satisfy **all** elements in a motion for new trial, regardless of whether the number of elements is four or five, the question becomes whether defendants in the First and Tenth Circuits have one foot in the door in comparison to defendants in the remaining circuits? Although the difference in standards of review appear minimal on their face, the application of those standards creates not only a conflict, but a violation of equal protection amongst all defendants.

Only this Court's review can establish a national rule that eliminates inconsistent views about what a defendant is required to show in order to establish

he is entitled to a new trial upon receiving newly discovered evidence. Until this Court establishes said rule, defendants in different circuits will continue to receive inconsistent and unequal holdings.

B. In Light of the First and Tenth Circuit Precedent, The Eleventh Circuit's Opinion in The Instant Case Would Be Erroneous.

The Eleventh Circuit opinion held that Mr. Chin was not entitled to relief because he failed to satisfy all five requirements associated with his motion for new trial. Specifically, he failed to satisfy the third and fifth elements. The third element in the Eleventh Circuit is that the evidence is not merely cumulative or impeaching. *United States v. Hilel*, 429 Fed. Appx. 835 (11th Cir. 2011) (*citing United States v. Jernigan*, 341 F.3d 1273, 1287 (11th Cir. 2003)). In its opinion the panel held that the new evidence was both merely impeachment evidence and cumulative. Although Mr. Chin opposed the panel's factual determination in his Motion for Rehearing, the legal basis for that determination is what's at issue before this Court. Mainly, if Mr. Chin's case were in the First or Tenth Circuit his appeal would have been decided otherwise.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982). Pursuant to the Equal Protection Clause, all defendants who are convicted and then file a motion for new trial based on newly discovered evidence should be treated alike. This means that a defendant in one circuit should not be held to a higher burden than a defendant in another circuit. This is precisely what is

happening right now, and why the Eleventh Circuit's opinion in the instant case is erroneous.

C. This Case Squarely Presents a Likely Recurring Issue of Substantial Legal and Practical Importance.

Cooperating government witnesses are used in almost every prosecuted federal case. As helpful as these witnesses are to the government, research has shown that the use of cooperating witnesses has the potential for abuse. *See,* R. Michael Cassidy, *"Soft Words of Hope": Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 N.W.U.L. Rev. 1129, 1130 (2004) (acknowledging that it is widely accepted that where the prosecution has conditioned leniency on cooperation in criminal case, the situation is ripe with the potential for abuse). Abuse is precisely what took place in the instant case, and will continue to happen in the future.

In cases where the accused was convicted but later exonerated because he was innocent, false testimony "is a surprisingly common feature" of the underlying trials that led to the conviction. Samuel R. Gross et al., Exonerations in the United States: 1989 Through 2003, 95 J. Crim. L & Criminology 523, 543 (2005) (discussing false testimony using the term "perjury"). Already a generation ago, a study of 350 erroneous convictions in "potentially capital cases" revealed that there was "perjury by prosecution witnesses" in approximately one- third of the cases. *See,* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stanford L. Rev. 21, 60 (1987). Indeed, false testimony by prosecution witnesses was "twice as frequent a cause of error as are the next most important factors." *Id.* at 61 n.184. Contemporary study of exonerations illustrates that through and including the

present, this continues to be the case. *See, e.g.*, Gross et al., 95 J. Crim. L. & Criminology at 544 (noting that in 43% of the 340 exonerations studied, "at least one sort of perjury" is reported).

When dealing with careless, misleading, and patently false testimony offered by the government against the accused, the court must protect another interest in addition to the rights of the accused - the integrity of the criminal justice system. Thus, the due process protection is even broader, with a violation occurring even where the false testimony of the witness does not involve the facts of the case and is only relevant to the credibility of the witness, and even if the prosecutor trying the case does not know that the witness is perjuring himself. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction . . . does not cease to apply merely because the false testimony goes only to the credibility of the witness."); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (finding due process violation where prosecutor trying case did not know state witness was lying and perjury undermined the witness' credibility). And the bar for proving prejudice to the accused, or "materiality," is set relatively low: "A new trial is required if the 'false testimony could . . . in any reasonable likelihood have affected the judgment of the jury," and the accused meets this standard "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Giglio*, 405 U.S. at 154 (1972) (*citing Napue*, 360 U.S. at 271); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). These standards have been

established because, in addition to the fact that perjured testimony causes great harm to the defendant, "[p]erjury or the possibility of perjury strikes at the heart of the judicial system in its role as finder of truth." 74 Yale L.J. at 138.

In a law review article written about the unreliability of "snitches" and their contribution to wrongful convictions, the motivation behind their testimony was discussed.

> But informants do not generate wrongful convictions merely because they lie. After all, lying hardly distinguishes informants from other sorts of witnesses. Rather, it is how and why they lie, and how the government depends on lying informants, that makes snitching a troubling distortion of the truth-seeking process. Informants lie primarily in exchange for lenience for their own crimes, although sometimes they lie for money. In order to obtain the benefit of these lies, informants must persuade the government that their lies are true. Police and prosecutors, in turn, often do not and cannot check these lies because the snitch's information may be all the government has. Additionally, police and prosecutors are heavily invested in using informants to conduct investigations and to make their cases. As a result, they often lack the objectivity and the information that would permit them to discern when informants are lying. This gives rise to a disturbing marriage of convenience: both snitches and the government benefit from inculpatory information while neither has a strong incentive to challenge it. The usual protections against false evidence, particularly prosecutorial ethics and discovery, may thus be unavailing to protect the system from informant falsehoods precisely because prosecutors themselves have limited means and incentives to ferret out the truth.

Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107, 108 (2006) (internal citations omitted).

There is no dispute that wrongful convictions happen in large part because of untruthful testimony. However, the dispute appears when determining whether a defendant should be entitled to relief once it becomes known that untruthful

testimony was presented to a jury. Unfortunately, governmental witnesses will continue to lie when made promises of leniency, less time, or money. As a result, it is imperative that this Court determine this likely recurring and important legal issue. This is the ideal opportunity to resolve said issue.

CONCLUSION

For the reasons stated above, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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