NO. _____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 2019

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CRAIG A. LEE

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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# PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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## QUESTIONS PRESENTED FOR REVIEW

Whether the DC Court of Appeals' decision directly conflicts with established legal precedent in federal circuits, in particular *Drew v. United States*, 331 F.2d 85, 89 (D.C. Cir. 1964), where it held that evidence of other crimes, that is, prior sexual conduct exhibiting an "unusual sexual preference," is admissible *solely to prove the criminal propensity* of a defendant on trial for sexual assault.

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## PETITION FOR WRIT OF CERTIORARI

Craig A. Lee respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals ("DCCA") in this case.

## CITATION TO OPINIONS BELOW

The DCCA issued an unpublished *Memorandum Opinion and Judgment* ("MOJ") in *Craig A. Lee v. United States*, 17-CO-262 (DCCA August 20, 2018). *See,* Appendix A. Petitioner filed a petition for rehearing, which was denied on March 29, 2019. *See*, Appendix B.

## JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254. The DCCA issued its final decision in this matter on March 29, 2019. Pursuant to Supreme Court Rule 13.3, this petition has been timely filed within 90 days of March 29, 2019.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Sixth Amendments to the United States Constitution.

## STATEMENT OF THE CASE

Petitioner was charged with First Degree Child Sexual Abuse with Aggravating Circumstances. Pre-trial the government moved to introduce evidence that in 1996 Petitioner sexually assaulted a 12-year old girl, the daughter of his then-girlfriend, in their home in the middle of the night. It proffered that "unusual sexual preference is an exception in and of itself to the `other crimes' evidence rule," and that such evidence is admissible "for the sole purpose of showing that a defendant has a previous disposition to commit the charged offense" (11/21/14: 5). According to the government, "the facts are probative of. . .his *willingness to exploit an opportunity to gratify his predilection*. . ." and "the jury may properly infer that the defendant had the *desire or compulsion* to engage in the charged acts. Also see (11/21/14: 23)(the prior assault "shows [defendant's] preference. . .[for] close female relatives who [he] has access to through his girlfriend's house. . .")

The trial court correctly noted, however, "That seems more like an argument for opportunity as opposed to preference." *Id*. The court also understood that "motive [and]

intent are really not an issue" in this case, and the prosecutor agreed that "intent doesn't matter. .." *Id*. at 25. The court cautioned that "motive is fraught with danger,"and it "would not be inclined" to allow evidence that appellant was living with the mother of the 1996 victim and "what [the government] calls similarities" "because I do think that evidence is too dangerous with regard to an inference of preference." *Id*. at 26. The defense objected, asserting that the evidence was "strictly propensity" evidence and inflammatory under the principles announced in *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964), there was minimal probative value because of different ages of the victims and the fact that the current victim was sexually active, the length of time between the past and current conduct was too great (18 years), other crimes evidence was not needed, and the danger of unfair prejudice was substantial and could not be cured by a jury instruction.

The court ruled that the evidence was admissible to show an "unusual sexual preference," commenting however, that

> [E]ven our Court of Appeals has recognized that the so-called *Drew* exception for peculiar sexual preferences is subject to criticism and to me, it becomes even more subject to criticism in light of *Harrison* [*v. United States*, 30 A.3d 169 (D.C. 2011)]. . . but our Court of Appeals does recognize that as an exception to other crimes evidence, and I do think that because of the age of the alleged victim in this case the prior incident would be probative of that issue.

(2/6/15: 5-6). Still, to the court it seemed "a common sense analysis that that's another way of saying general motive," which is forbidden by *Harrison* (2/6/15: 7-8). The court found, however, that the prior conduct was inadmissible as to identity, motive and intent. *Id*. at 6.

The evidence was introduced by stipulation. The government told jurors in opening statements that they would hear evidence that would explain how a grown man could rape a 15 year old; in closing, that the evidence showed an "unusual sexual preference for underage girls"; and in rebuttal, that the charged incident is explained because "you're dealing with somebody who [] has a preference for underage females." After a jury note prompted supplemental closing arguments as to the lesser-included offense of Attempted First Degree Child Sexual Abuse, the government told jurors that "certainly there can be no question that he at least came dangerously close if, in doing this act when he had an unusual sexual preference for this particular type of underage female, and he had the intent to do this. . ." Petitioner was convicted of Attempted First Degree Child Sexual Abuse. As stipulated, the trial court subsequently determined that there were aggravating circumstances.

On appeal Petitioner asserted that the trial court had erred in introducing evidence of appellant's prior crime solely to prove his criminal propensity because evidence of another crime, even one that demonstrates an "unusual sexual preference," could not be introduced *solely* to prove criminal propensity. The DC Court of Appeals ("DCCA") wrote in its decision:

> Whatever we might think of this argument as an original matter, the argument was rejected by a division of this court in *Howard v. United States*, 633 A.2d 524 (D.C. 1995)("[A] number of decisions. . . apply the `lustful disposition' or `unusual sexual preference' exception as permitting `other crimes' evidence for the sole purpose of showing that a defendant had a predisposition to commit the charged offense.")(footnotes omitted). We are bound to follow the holding of *Howard*.

*Craig Lee v. United States*, 16-CF-611, *Memorandum Opinion and Judgment* ("*MOJ*") at 3-4 (D.C. App. August 20, 2018).

Petitioner filed a petition for rehearing or rehearing *en banc* challenging the appellate court's decision. The court ordered the government to respond to the petition. Ultimately, the appellate court denied the petition.

## REASONS FOR GRANTING THIS WRIT

### I THE DC COURT OF APPEALS' AFFIRMANCE OF THE TRIAL COURT'S ADMISSION OF EVIDENCE OF A PRIOR SEXUAL ASSAULT ALLEGATION AGAINST PETITIONER SOLELY TO PROVE CRIMINAL PROPENSITY CONFLICTS WITH LONG-ESTABLISHED PRECEDENT IN FEDERAL CIRCUITS.

Petitioner submits that long-established legal precedent has never and does not now support admission of other crimes evidence solely to prove criminal propensity and that this Court should reverse the DCCA's decision and re-affirm the "long-standing" principle that "evidence of one crime is *inadmissible to prove disposition* to commit crime, from which the jury may infer that the defendant committed the crime charged." *Drew v. United States*, 331 F.2d 85, 89 (D.C. Cir. 1964)(emphasis added).

The DCCA also neglected to address a critical component of Petitioner's claim that even if "unusual sexual preference" is an exception to the rule on other crimes evidence, the government was required to establish, but did not, that evidence of the prior sexual assault was admissible "for some substantial, legitimate purpose," *see, Drew* at 90, "directed to a genuine, material and contested issue in the case" and "logically relevant to prove this for a

reason other than its power to demonstrate criminal propensity." *Roper v. United States*, 564 A.2d 726, 731 (D.C. 1989). Rather, it introduced the propensity evidence under the guise of proving motive—a purpose which *Harrison v. United States*, 30 A.3d 169 (D.C. 2011), has expressly disallowed to be shown "via evidence that is merely evidence of propensity." *Id*. at 178. This Court should rehear this case to fully consider Petitioner's claim in the context of established legal precedent. *See, MOJ* at 4-5.

Lastly, Petitioner submits that the DCCA erroneously conflated the test for admission of other crimes evidence with the test for prejudice, resulting in sanctioning admission of otherwise inadmissible propensity evidence if the government's case is too weak without it. *MOJ* at 4-5. The DCCA's reasoning is flawed and this Court should rehear this case to assure clarity and uniformity in this Court's analysis of these important legal concepts.

### A. Long-established Legal Precedent Has Never And Does Not Now Support Admission of Other Crimes Evidence Solely To Prove Criminal Propensity.

*Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964), reiterated the "long-standing" principle that "evidence of one crime is inadmissible to prove *disposition* to commit crime, from which the jury may infer that the defendant committed the crime charged." *Id*. at 89 (emphasis in original). Such evidence is admissible *only* "for some substantial, legitimate purpose," *and* when relevant to (1) motive; (2) intent; (3) absence of mistake or accident; (4) common scheme or plan; and (5) identity. *Id.* at 90.

Both pre-*Drew* and post-*Drew* cases in the District of Columbia closely followed the

principle that other crimes evidence is inadmissible solely to prove propensity. In *Dyson v. United States*, 97 A.2d 135 (D.C. 1953), discussing what evidence of another sexual act was relevant to, the Court noted that "it is incumbent upon the prosecution to show that the [charged] act of defendant was not accidental and that he had the necessary criminal intent" *id*., and that under the circumstances presented in that case, evidence of prior conduct was relevant to show criminal intent and that the charged crime was not accidental.[1] *Calaway v. United States*, 408 A.2d 1220 (D.C. 1979), reasoned that admission of a prior heterosexual rape "under the `sexual predisposition' exception would have served only to prove that appellant was likely to commit rape," *id*. at 1227 n. 12, and instead, upheld admission as relevant to prove motive and intent. *Ali v. United States*, 520 A.2d 306 (D.C. 1987), reiterated the importance of "[i]dentification of the contested issue" and found that evidence that the defendant previously unlawfully touched F.W. was relevant to the charged offenses "only by means of one inference: because appellant did so with F.W., he did so with S.S," and "[t]hat is precisely the `propensity' inference forbidden by *Drew*." *Id*. at 311. *Pounds v. United States*, 529 A.2d 791 (D.C. 1987), involving incest, upheld admission of past

[1] *Dyson* cited *Bracey v. United States*, 142 F.2d 85 (D.C. Cir. 1944), where the court recognized that evidence of prior sexual conduct "is admissible if it is so related to or connected with the crime charged as *to establish a common scheme or purpose* so associated that proof of one tends to prove the other, or if both are connected with *a single purpose and in pursuance of a single object*; [footnote omitted] as well as to establish *identity, guilty knowledge, intent* and *motive*." *Id*. at 88 (emphasis added). *Bracey* also recognized another exception to the general propensity rule in cases involving incest, such as *Hodge v. United States*, 126 F.2d 849 (D.C. 1942). Of course, *Harrison* later rejected use of propensity evidence to prove motive.

conduct with the *same* complainant but "caution[ed] against embracing an expansion of the exception. . ." *Id*. at 794 n. 3.

Sidestepped by the DCCA is that *Howard* correctly understood *Dyson* as connecting prior conduct showing a "lustful disposition" "to the absence of mistake or the presence of `criminal intent,'" which was "in line with" *Drew*. *Howard*, 663 A.2d at 529. *Howard* noted that "subsequent interpretations of the *Dyson* decision do raise some questions when compared to the *Drew* decision and its progeny" because they "apply the `lustful disposition' or `unusual sexual preference' exception [footnote omitted] as permitting `other crimes' evidence for the *sole purpose* of showing that a defendant had a predisposition to commit the charged offense." *Id*. *Id*. (emphasis in original) (citing *Adams v. United States*, 502 A.2d 1011, 1015 (D.C. 1986)(discussing *Dyson* and "unusual sexual preference" as showing "criminal disposition" as exception); *Johnson v. United States*, 610 A.2d 729, 730 n.4 (D.C. 1992)(considering whether *Drew* exception for "unusual sexual preference" should be "limited to prior misconduct involving the same victim); and *Pounds, supra* (history of prior sexual abuse of same complainant admitted solely to show a `predisposition to gratify special desires with that particular victim").[2]

Still, *Howard* declined to clarify whether other crimes evidence involving different victims could ever be used *solely* to prove predisposition to commit the charged crime,

[2]*Also see, Koonce v. United States*, 993 A.2d 544 (D.C. 2010)(recognizing the "narrow exception to the inadmissibility of propensity evidence," when it found inadmissible evidence of prior sexual contact with the same victim. *Id*. at 554, citing *Pounds*, 529 A.2d at 794).

instead finding that it was "binding precedent." *Id*. at 529. The DCCA in the present case, in turn, felt "bound to follow *Howard*." *MOJ* at 4.

Petitioner submits that *Drew,* upon which federal courts have heavily relied for decades, does *not* permit introduction of evidence exhibiting an "unusual sexual preference" where that evidence is relevant only by means of one inference: that because a defendant engaged in that conduct previously, he did so now. As the *Howard* court recognized, it is not *Dyson* that took the first step in allowing admission of such evidence for that purpose, for *Dyson* and *Drew* appear "reconcilable." *Howard*, 663 A.2d at 529. *Dyson* permitted introduction of other crimes evidence of the defendant's "mental disposition" as relevant to criminal intent and to prove that the charged conduct was not accidental. *Dyson*, 97 A.2d at 137. *Dyson* did not give blanket authority to introduce evidence of an unusual sexual preference *solely* for criminal predisposition.

It is long-standing legal principle that admission of *any* other crimes evidence *solely* to prove predisposition is strictly forbidden. Every decision from the DCCA involving admission of other crimes evidence has for decades begun with recognition of *Drew*'s important premises. "This exclusionary principle. . .is of ancient origin." *Thompson v. United States*, 546 A.2d 414, 418 (D.C. 1988). The reason is that evidence of other crimes "is said to weigh too much with the jury and to so overpersuade them. .." *Id*., quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

The exclusionary principle was ignored by *Howard* and has been ignored by the

DCCA. Even if other crimes evidence of "unusual sexual preference" is an additional *Drew* exception, a ruling such as the one in the present case that such evidence is admissible solely to prove criminal propensity cannot be reconciled with the requirement that the evidence *also* have "some substantial, legitimate purpose." *Drew*, 331 F.2d at 90, that it must be "directed toward a genuine, material and contested issue in the case," *and* that it must be "logically relevant to prove this issue for a reason *other than its power to demonstrate criminal propensity*." *Roper*, 564 A.2d at 731. Under no contorted analysis of *Drew* or *Roper* can evidence of an "unusual sexual preference" be admitted solely to prove criminal propensity. This Court should clearly say so and reverse Petitioner's conviction.

### B. Even If "Unusual Sexual Preference" Is A *Drew* Exception, Here The DCCA Failed to Address The *Roper* Requirements And Erroneously Found That The Evidence Was Admissible Solely Because It Proved Criminal Propensity.

Petitioner asserted in his briefs not only that the prior sexual conduct did not establish that he had an "unusual sexual preference" but that the government failed to show that the evidence was "directed to a genuine, material and contested issue in the case," and was "logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity." *Roper*, 564 A.2d at 731. Petitioner's defense at trial was a general denial that the charged crime occurred. Period. He did not assert mistaken identity. He did not assert that the incident was accidental or that he lacked intent. Even the trial court found that evidence of unusual sexual preference was inadmissible to show identity, intent or motive ("motive" was already expressly rejected by *Harrison*). All that the government

promoted pre-trial was that "unusual sexual preference" is a *Drew* exception and is admissible solely to prove predisposition, and, despite the trial court's ruling regarding intent and motive, the record shows that the government also proffered both of those reasons to jurors in their closing arguments.

The DCCA, however, focused solely on whether the prior conduct exhibited an unusual sexual preference. *See, MOJ* at 4-5 (rejecting Petitioner's arguments that the crimes were not similar and finding that the two victims shared physical attributes, the assaults were similar, and that the sexual activity of the 15-year old was insignificant). Because the DCCA relied on *Howard* to conclude that the other crimes exception for "unusual sexual preference" is admissible for the sole purpose of showing a defendant's predisposition to commit the charged offense, *MOJ* at 3-4, it failed entirely to address Petitioner's arguments that even if his past conduct showed an "unusual sexual preference," evidence of unusual sexual preference was not directed to any genuine, material or contested issue in the case, it was merely inadmissible evidence of predisposition and motive, and its only purpose was to permit the improper inference that if he previously sexually abused another child, he did so in this case.

This Court should reverse Petitioner's conviction because the government failed to show that the prior evidence was "directed to a genuine, material and contested issue in the case," and was "logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity." *Roper*, 564 A.2d at 731.

### C. The DCCA Erroneously Conflated The Test For Admission of Evidence With the Test for Undue Prejudice.

Having failed to address Petitioner's critical arguments, the DCCA then erroneously conflated the test for admission of the evidence with the test for whether the probative value outweighed the prejudicial effect. *MOJ* at 5 (citing *Legette v. United States*, 69 A.3d 373 (D.C. 2013)). According to the DCCA, "the United States had a legitimate need for the evidence, given that— as Mr. Lee himself argues— the government's case was not overwhelming." *MOJ* at 5 (citing "lack of definitive medical evidence," "shortcomings of the detective's investigation," and the complainant's "credibility issues"). In other words, the DCCA says that because the government had a weak case it "needed" to admit evidence of Petitioner's past conduct, from which the only inference the jury could make was that if he sexually assaulted a child previously he must have done so here. *See, MOJ* at 5. Essentially, the DCCA's ruling sanctions admission of evidence otherwise inadmissible under *Roper* if the government's case is so weak that it could not possibly convict without that inadmissible evidence. This Court should not permit such a contorted, erroneous analysis of prejudice.

Once evidence of a prior crime is deemed inadmissible because it is not "directed to any genuine, material or contested issue in the case," and is not "logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity," *Roper*, 564 A.2d at 731, the inquiry ends and the evidence is inadmissible. It does not magically become admissible merely because the government's case is too weak without it. This Court should

not permit the DCCA's reasoning to stand. It should hear this case to apply the proper test for admission, and only if the evidence meets the *Roper* requirements (which Petitioner still asserts it does not), then apply the proper test for determining whether the probative value outweighs potential prejudice.

**D. Conclusion.**

Petitioner submits that this Court should hear his case, reverse the DCCA's decision, and re-affirm the "long-standing" principle" that "evidence of one crime is *inadmissible to prove disposition* to commit crime, from which the jury may infer that the defendant committed the crime charged." *Drew,* 331 F.2d at 89 (emphasis added). This Court should also hear Petitioner's case because the DCCA, relying on the flawed ruling in *Howard*, failed to address Petitioner's arguments that the government did not demonstrate critical factors under *Roper*. Lastly, this Court should hear this case because the DCCA erroneously conflated the test for admission of evidence with the prejudice test. Petitioner requests that this Court reverse his conviction.

## CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Honorable Court grant his Petition.

Respectfully submitted,

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