

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

MARLIN CHIN

and

PATRICK LEE

Petitioners

v.

UNITED STATES OF AMERICA

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United States

QUESTION PRESENTED

I. Whether the trial court erred in denying a Motion for New Trial when witness vouchers issued for payment of witness fees in a decades old case could not be located and there existed a basis to presume that improper witness vouchers may have been issued.

PARTIES TO THE PROCEEDING

1. **Petitioner Marlin Chin:** Marlin Chin is an individual and resident of the State of West Virginia. He was convicted before the Superior Court of the District of Columbia. Petitioner is currently serving a life sentence at a United States Penitentiary. His convictions were affirmed by the District of Columbia Court of Appeals.

2. **Petitioner Patrick Lee:** Marlin Chin is an individual and resident of the State of Georgia. He was convicted before the Superior Court of the District of Columbia. Petitioner is currently serving a life sentence at a United States Penitentiary. His convictions were affirmed by the District of Columbia Court of Appeals.

3. **United States of America:** The United States prosecuted Petitioners in the Superior Court of the District of Columbia before the trial court and the District of Columbia Court of Appeals.

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Opinion Below

On May 13, 2019 the District of Columbia Court of Appeals affirmed the denial of the Motion for New Trial. A copy of the opinion is attached in the Appendix

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked pursuant to Supreme Court rule 10 (b). This petition seeks review of an opinion from the District of Columbia Court of Appeals which is the jurisdiction's court of last resort. The opinion of the District of Columbia Court of Appeals is in conflict with decisions of this Court. The direct appeal was affirmed on May 13, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner relies upon the Due Process Clause of the Fifth Amendment to the United States Constitution in arguing that the District of Columbia Court of Appeals erred in its ruling. Petitioner further asserts that the opinion of the District of Columbia Court of Appeals is in contradiction with other opinions of the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

1. Underlying Indictment

Petitioners were charged in the Superior Court of the District of Columbia in with two counts of first degree premeditated murder while armed, two counts of assault with intent to kill while armed, one count of mayhem while armed, multiple counts of first degree felony murder while armed, one count of armed robbery, two counts of first degree burglary while armed and one count of assault with a dangerous weapon. Following a trial that lasted approximately three weeks, Petitioners were found guilty of all charges with the exception of an assault count for which the jury returned a verdict of not guilty. The trial court imposed life sentences on both defendants.

The government's case was principally based upon the testimony of the two surviving victims, Christine Brown and Carmetta Dean. The testimony was that on February 20, 1988 defendant Chin called Ms. Brown's apartment and asked if he could come over. Defendant later arrived at the apartment in the company of defendant Patrick Lee and two other men known only as "Prince and "Butter." A woman, Urcella O'Connor, went into a bedroom and told Brown that Chin had a gun and that three

other people were with him. Defendant then entered Ms. Brown's bedroom with a weapon and told Brown and another woman to get down on the floor. Lee came into the room and shoved Brown knocking her to the floor and stomped on her chest.

"Prince" then entered the room armed with a weapon. Prince asked where Owen Brown was and whether there was anything of value in the house. Defendant left the bedroom and went to the kitchen and pointed his gun at Carmetta Dean and told her to go to the bedroom. Defendant Chin stepped away from Dean and ordered the three other men tie the women up. The four men left the room and one person returned. He shot Carmetta Dean, Urcella O'Connor, Christine Brown and Shardeen Britt. O'Connor and Britt died at the scene while Christine Brown and Carmetta Dean survived and were able to call the police.

Mr. Chin was arrested on January 6, 1989 and extradited to the United States.

Several years after defendants' trial, disciplinary proceedings were instituted against former Assistant U.S. Attorney G. Paul Howes who prosecuted defendants before the trial court. The allegation against Howes were that he wrongfully distributed more than \$42,000.00 worth of witness

vouchers in several felony prosecutions to individuals who were ineligible to receive them pursuant to 28 U.S.C. § 1821, as implemented by 28 C.F.R. § 21 (1986). Howes, in violation of District of Columbia Rule of Professional Conduct 3.8 (e), failed to disclose the voucher payments to opposing counsel. Howes' conduct was also a violation of *Brady v. Maryland*, 337 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). Howes additionally "intentionally misrepresented to the court that such disclosures had not been made. His egregious conduct resulted in the substantial reduction of sentences for at least nine convicted felons and violated District of Columbia Rules of Professional Conduct 3.3 (a); 3.4 (c); 3.8 (e); 8.4 (a); 8.4 (b), 8.4 (c) and 8.4 (d)." *In Re G. Paul Howes*, District of Columbia Court of Appeals, No. 10-BG-938, page 2 (2012).¹

Howes misused witness vouchers in D.C. Superior Court Case No.: F-7682-91, *United States v. Javier Card*; D.C. Superior Court Case No, F-6601-92, *United States v. Rice*; U.S. District Court Case No.: Cr-92-284, *United States v. Hoyle*, U.S. District Court Case No.: Cr-92-284, *United States v. McCollough*; United States District Court Case No.: Cr-92-284, *United States v. Goldston*; and United States District Court Case No.: 92-

¹ Petitioners note that it has not been concluded that Howes committed any of his serious infractions in this case.

284, *United States v. Harris*. Each of the defendants in the United States District Court cases filed Motions for New Trials and the government agreed not to oppose the motions stipulating to reduced sentences. Javier Card, in D.C. Superior Court, also filed a Motion for New Trial. His motion, similar to those in U.S. District Court, was not opposed by the United States and Card also received a reduction in his sentence.

In considering the ethical digressions raised against Howes, the District of Columbia Court of Appeals described the situation as follows:

The United States Department of Justice Office of Professional Responsibility conducted an internal investigation from March 1996 to February 1998 of respondent's conduct in the Newton Street case. OPR examined 719 vouchers, 684 of which were signed by or on behalf of G. Paul Howes, entailing total payments to government witnesses in the amount \$140,918.14. OPR determined that many individuals received payments that could not be explained adequately by anyone (OPR) interviewed, finding strong evidence that [respondent] intentionally abused the witness voucher system in several ways. OPR concluded that this evidence gave rise to a strong inference that many of *the vouchers were issued improperly in that they did not compensate a witness for an appearance to prepare for or give trial testimony, or even provide the sort of intelligence information provided by informants*. OPR determined that that any mitigating factors were outweighed by aggravating factors....

In Re Howes, 52 A.3d at 6-7, emphasis supplied.

The Hearing Committee of the Board of Professional Responsibility found Howes committed multiple Rule violations. Of particular note is that Howes stipulated to the Rule violations. The relevant violations to this matter include as follows:

1. Issuing witness voucher to friends and family members of government witnesses;
2. Miscalculation of witness vouchers;
3. Issuing witness vouchers to two detectives for lengthy periods even though they only testified for one to three days;
4. Failing to disclose the improper vouchers as potentially exculpatory evidence.

This Court disbarred Howes, finding that “a prosecutor...had a duty to act as a minister of justice and [has] an obligation to see that the defendant is accorded procedural justice.” *Id.* 31. In imposing the most severe of sanctions, it was held that Howes’ conduct, “made it more difficult for defense counsel to discover the extent of payments to cooperating government witnesses and their relatives, girlfriends, and the like.” *Id.* 42,

emphasis supplied.

Counsel was appointed by the trial for Marlin Chin on March 6, 2013 to analyze whether there existed any impropriety on Howes' part that occurred in defendant's cases.² As part of counsel's responsibilities, the entire trial record and transcripts were reviewed in order for counsel to familiarize himself with the witnesses and other evidence introduced at trial. This included reviewing relevant pleadings and reviewing the evidence introduced during the course of trial.

The United States produced a series of documents to defendants that were addressed in defendant's Motion for Leave to Depose G. Paul Howes. The documents were produced under seal and therefore cannot be made a part of the public record.

Defendants' counsel embarked on an independent effort to locate records related to financial payments and assistance made in this matter. Specifically, counsel attempted to locate financial records related to any

² Counsel was initially appointed to represent Marlin Chin. Patrick Lee subsequently filed a pro se a Motion for New Trial on the same grounds. Trial judge Henry Green asked counsel if he would represent both defendants as the legal issue was the same and there was no conflict in the joint representation. Counsel went to visit Mr. Lee in a prison in Georgia and Mr. Lee agreed to the joint representation. Mr. Chin also consented to the joint representation on the single issue related to the conduct of Mr. Howes. Notices of Appeal were filed on behalf of both appellants and counsel was appointed to represent both appellants before the District of Columbia Court of Appeals.

and all payments made to all individuals in connection with the prosecution of this case. This included records of payments made to any person, or friends and family members of any person related to subpoenas for appearances at the Office of the United States Attorney and/or at grand jury appearances, and at trial and at sentencing hearings.

Counsel's efforts on behalf of the defendants to locate relevant records related to this matter included as follows:

- a. Serving a subpoena on and meeting with Karen Cooper, D.C. Superior Court Finance Officer. Ms. Cooper informed counsel that she did not have records related to a 1989 case and they are not archived in any location to her knowledge.
- b. Service of a subpoena on the United States Marshal's Service with a schedule of documents to be produced. The United States Marshal's service was not able to produce any documents.
- c. Meeting with Dana A. Friend, Chief Financial Officer of the District of Columbia Courts. Mr. Friend had counsel meet with Mr. Cyril Erugo of his office and assigned Mr. Erugo the task of researching records to determine whether any financial records related to this matter could be found. Mr. Erugo undertook the requested task and subsequently informed

counsel that he could not locate any records related to this 1989 prosecution.

Defendant's efforts in serving subpoenas on the D.C. Superior Court finance office, as well as the U.S. Marshall's office, and his efforts in meeting with the D.C. Chief Financial Officer, produced no documentation due to the age of this case.

Documents provided by the United States produced the following information directly relevant to the allegations raised herein.

a. Certificate of Payment to Charlese Hammond for February 9, 1990 sentencing from 8:00 am to 2:30 pm. Ms. Hammond was not a witness at the trial. Rather, she was a caretaker for defendant's daughter who was 3.5 years old in 1990.

b. Certificate of Payment to Kolleen Britt for February 9, 1990. Kolleen Britt was 3.5 years old on February 9, 1990.

c. Certificate of Payment to Carmetta Dean who resided at 114-38th Street, 200th Street, St Albans, New York for February 9, 1990.

d. Certificate of Payment to Christine Brown, 2319 Calhoun Street,

Barnwell, South Carolina for February 9, 2009.³

With respect to both Ms. Dean and Ms. Brown, defendants sought to learn additional information regarding why these individuals were subpoenaed for a sentencing hearing. The trial court conducted a series of status conferences to ascertain the efforts that counsel was making to locate information related to payments made by the Office of the U.S. Attorney, or any other entity, during the pendency of the trial proceedings.

³ February 9, 1990 was defendant's sentencing date. The guilt/innocence part of the proceedings had concluded by that date.

REASONS FOR GRANTING THE PETITION

I. The opinion of the District of Columbia Court of Appeals Is in conflict with other opinions from the District of Columbia Court of Appeals

23 D.C. Code § 110 states:

A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, [and] the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside or correct the sentence

22 D.C. Code § 4135, the Innocence Protection Act, states in relevant part:

(a) A person convicted of a criminal offense in the Superior Court of the District of Columbia may move the court to vacate the conviction or to grant a new trial on grounds of actual innocence based on new evidence.

The Innocence Protection Act was designed to ensure that those who obtain new evidence establishing innocence after the three year limit set out in Superior Court Criminal Rule 33 are not precluded from attaining post conviction relief. See *Bouknight v. United States*, 867 A. 2d 245, 251 (D.C. 2005).

Pursuant to 28 U.S.C. § 1821, witnesses in federal court are to be

paid a fee only for attending court or a deposition. By statute, “the fees...to be paid any witness attending a criminal case in the Superior Court of the District of Columbia shall be the same as those paid to witnesses who attend before the United States District Court for the District of Columbia.” D.C. Code § 15-714 (a) (2001).” *Perez v. United States*, 968 A. 2d 39, 61 (D.C. 2009).

The issue in this matter relates to vouchers that the record established were provided to a caregiver of a child and a child for a sentencing hearing. Neither the caregiver nor the child testified at trial or at sentencing. The vouchers were issued by then Assistant U.S. Attorney G. Paul Howes who was subsequently disbarred for wrongful issuance of vouchers in unrelated cases. Defendants unsuccessfully attempted to locate financial records detailing the full scope of vouchers issued to any witness prior to and during the course of the trial

The District of Columbia Court of Appeals has repeatedly recognized that the “government has a general duty to preserve evidence....” *Koonce v. District of Columbia*, 111 A.3d 1009, 1011, (D.C. 2015) citing *Williams v. United States*, 77 A.3d 425, 437 (D.C.2015). In determining “whether the

government's failure to preserve the evidence was error, the court should consider (1) the circumstances occasioning the loss; (2) systemic steps taken toward preservation; and (3) the magnitude of demonstrated evidentiary materiality." *Allen v. United States*, 623 A.2d 601, 605 (D.C. 1993). The threshold for materiality is "not a high one, the defendant need only establish a reasonable indication that the requested evidence will either lead to other admissible evidence...." *United States v. Curtis*, 755 A.2d 1011, 1014 (D.C. 2000), internal quotations omitted.

D.C. Superior Court Criminal Jury Instruction 2.41 states in relevant part as follows:

If [evidence material to]...an issue in this case was peculiarly Within the power of one party to produce, was not [produced] ...by that party, and [its]...absence has not been sufficiently accounted for or explained, then you may, if you deem it appropriate, infer that the [evidence] would have been unfavorable to the party which failed to [produce it].

In interpreting a missing witness/evidence instruction, the District of Columbia Court of Appeals has noted that "Over eighty years ago, the Supreme Court enunciated a rule that if a party has it peculiarly within its power to produce witnesses [or as in this case evidence] whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.." *Dent*

v. United States, 404 A.2d 165, 169 (D.C. 1979).

The Court of Appeals has specifically addressed the significance of missing evidence.

Thus, in assessing whether the government has met its burden in proving guilt beyond a reasonable doubt, the jury may properly consider not only the evidence presented but also the lack of any evidence that the government, in the particular circumstances of the case, might reasonably be expected to present.

Greer v. United States, 697 A. 2d 1207, 1210 (D.C. 1997).⁴

Petitioners submit before this Court, as they did before the appellate court, that they had a solid factual foundation for claiming impropriety on the part of Mr. Howes and that the claim regarding his actions is particularly unique.

- G. Paul Howes was the lone trial attorney for this case;
- G. Paul Howes was disbarred for abuse of vouchers in both the Superior Court and the United States District Court for both trial and post-trial proceedings’
- G. Paul Howes issued vouchers for a caretaker and a three year old in this matter for a sentencing proceeding where there was no

⁴ Petitioners appreciate that *Greer* involved an instruction not provided to a jury. The distinction here, where appellants claim that the trial judge did not consider missing evidence, is not a distinction of any legal significance because the principle of the evaluation of missing evidence remains the same.

intention to have them testify;

- There are missing records related to all the vouchers that were issued in this case;
- Defendant checked with the Marshall's Office, the Court Finance Division as well as the Court Chief Financial Officer and there were no documents located to confirm the existence of records pertaining of vouchers.

The trial court expressed skepticism concerning the testimony of Howes related to preservation of records of issued vouchers. "I mean, he said everybody kind of did this, and it is well known. That's a pretty sad indictment of the office, if that's so. And I suspect it's not." Tr. 8/16/16, 56.

The combination of the documented improprieties of Howes resulting in his disbarment for conduct following the trial of this case, the failure to preserve records of vouchers issued during the pendency of the case, and the suspicious established practice of issuing vouchers to non-witnesses for the sentencing hearing clearly suggests that an impropriety occurred in this case.

CONCLUSION

Petitioners were denied their constitutional right to a fair trial. Their rights to due process of law may have been violated by the conduct of government counsel. In addition, the opinion from the District of Columbia Court of Appeals is in contradiction to other opinions from the District of Columbia Court of Appeals. Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted

_____/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served, via U.S. Mail, postage prepaid, on this the 8th day of August, 2019 upon the Office of the Solicitor General, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530.

_____/s/_____
Steven R. Kiersh