

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

APPENDIX

MARLIN CHIN,

and

PATRICK LEE

v.

UNITED STATES OF AMERICA

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**DISTRICT OF COLUMBIA COURT OF APPEALS**

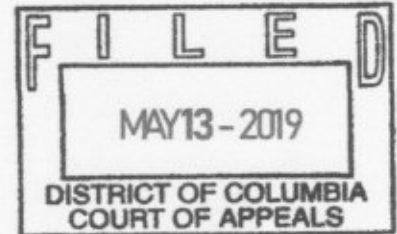
Nos. 16-CO-1249 & 16-CO-1259

MARLON (A/K/A MARLIN) CHIN AND PATRICK E. LEE, APPELLANTS,

v.

UNITED STATES, APPELLEE.

Appeals from the Superior Court  
of the District of Columbia  
(Nos. FEL-1201-89 & FEL-4749-89)



(Hon. Henry F. Greene, Trial and Motions Judge)

(Submitted March 1, 2018

Decided May 13, 2019)

Before GLICKMAN and THOMPSON, *Associate Judges*, and NEBEKER, *Senior Judge*.

**MEMORANDUM OPINION AND JUDGMENT**

PER CURIAM: Appellants Chin and Lee were tried in 1989 and convicted of multiple counts of first-degree murder and other offenses. This court affirmed their convictions on direct appeal.<sup>1</sup> The present appeal is from the trial judge's denial, after a hearing in 2016, of their motions for a new trial pursuant to D.C. Code §§ 23-110 and 22-4135 (2012 Repl.). We affirm the judge's ruling.

**I.**

The prosecutor at appellants' 1989 trial was Assistant United States Attorney G. Paul Howes. In March 2012, this court disbarred Mr. Howes for his misconduct in other, unrelated felony prosecutions that he conducted between 1993 and 1995 (four to six years after he prosecuted appellants). The misconduct in these later

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<sup>1</sup> *Lee v. United States*, 699 A.2d 373 (D.C. 1997).

prosecutions included Mr. Howes's issuance of witness vouchers to make unlawful payments to prosecution witnesses and their friends and relatives, in order "to help the witnesses maintain their 'resolve' to testify for the government"; and his concealment of those vouchers and failure to disclose the payments to the defense as potential impeachment evidence.<sup>2</sup>

Appellants moved for a new trial on the suspicion that Mr. Howes might have engaged in the same sort of misconduct in their earlier prosecution. Their counsel proceeded to conduct an extensive investigation, in the course of which the United States produced over 465 pages of witness vouchers and related documentation from the government's trial files for appellants' case. Counsel sought additional witness fee records from the Superior Court and the U.S. Marshals Service, but no other records could be found. The trial judge held an evidentiary hearing on the new trial motions at which Mr. Howes testified and denied having issued improper vouchers in appellants' case. He testified that, when he issued a voucher, he would retain a copy in his trial file. He did not recall to whom he transferred his trial file in this case after it was over, though "if there was an appellate issue," he said, "someone else handled it."

Appellants uncovered no evidence of improper witness vouchers issued prior to or in connection with their trial. They focused on vouchers issued to four persons who, under subpoena, attended their sentencing in February 1990 but did not testify. Two of these persons were surviving victims of appellants' offenses; the third person, who was the three-year-old daughter of appellant Chin and one of the murder victims, was an eyewitness to the murders and, obviously, an (indirect) victim herself; and the fourth person was that victim's aunt, who had become the child's caretaker. Mr. Howes testified that it was the policy of the United States Attorney's Office to involve victims and their families at sentencing.

The judge denied appellants' new trial motions on the grounds that they had failed to establish that Mr. Howes did anything improper in their case, or that "anything that [Mr. Howes] did that arguably was improper in any way affected the testimony of any witness at trial in this case" – i.e., that any undisclosed information was material to appellants' guilt or punishment. The judge specifically refused to draw the "speculative" inference that Mr. Howes had issued improper witness vouchers in this case from the fact that he had done so several years later in other, unrelated cases. The judge further found that appellants had failed to show that there

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<sup>2</sup> *In re Howes*, 52 A.3d 1, 8-9 (D.C. 2012).

was any “missing evidence here” warranting a missing-evidence inference adverse to the government.

## II.

Appellants’ precise claim on appeal is somewhat difficult to discern. In essence, however, we understand them to contend that the trial judge should have inferred that Mr. Howes concealed his issuance in their case of improper vouchers that would have constituted impeachment evidence materially favorable to their defense – a due process violation<sup>3</sup> – from the facts that (1) Mr. Howes issued improper witness vouchers in other cases several years later, (2) the Superior Court and the U.S. Marshals Service were no longer able – more than two decades later – to produce records relating to the vouchers issued in their case; and (3) Mr. Howes issued vouchers for a three-year-old child and her caretaker to attend their sentencing proceeding, apparently without intending to have them testify at that proceeding. Appellants suggest that given the government’s “general duty to preserve discoverable evidence,”<sup>4</sup> an adverse inference may be drawn that missing evidence would have been unfavorable to the government.<sup>5</sup>

We agree with the trial judge, however, that appellants have not borne their burden of showing that the prosecution suppressed or lost any improper vouchers or voucher-related evidence favorable to their defense, or that the government violated its duty to preserve discoverable evidence. The facts on which appellants rely simply do not support such an inference. As the government points out, “[a]ppellants have not identified a single voucher missing from the United States’ production.”<sup>6</sup> Mere speculation that Mr. Howes *could* have issued improper witness vouchers in this

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<sup>3</sup> See *Turner v. United States*, 116 A.3d 894, 913 (D.C. 2015). We note that appellants advance no claim that the hypothesized improper vouchers could have been evidence of actual innocence supportive of their request for a new trial under the Innocence Protection Act.

<sup>4</sup> *Koonce v. United States*, 111 A.3d 1009, 1013 (D.C. 2015) (internal quotation marks and citations omitted).

<sup>5</sup> See *Tyer v. United States*, 912 A.2d 1150, 1164 (D.C. 2006).

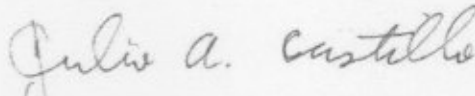
<sup>6</sup> Brief for Appellee at 28.



case because he did so in other cases years later is not enough; nor, where the United States Attorney's Office actually did preserve and turn over hundreds of pages of documents relating to witness payments, can any adverse inference be drawn from the fact that the Superior Court and the Marshals Service no longer have relevant records after more than two decades have elapsed. Furthermore, the vouchers issued to the child eyewitness and her caretaker to attend the sentencing were not shown to be improper. In any event, since neither one testified at the sentencing, any impropriety in connection with those vouchers – including, specifically, any failure to inform the defense of them – could not have amounted to prosecutorial suppression of impeachment evidence or otherwise prejudiced appellants; nor have appellants suggested otherwise.

For the foregoing reasons, we hereby affirm the order of the Superior Court denying appellants' motions for a new trial.

ENTERED BY DIRECTION OF THE COURT:



JULIO A. CASTILLO  
Clerk of the Court

Copies to:

Honorable Henry F. Greene

Director, Criminal Division

Copies e-served to:

Steven R. Kiersh, Esquire

Elizabeth Trosman, Esquire