19-6362

No._____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FERNANDO NUNEZ, JR.,
PETITIONER,

vs.

PHILADELPHIA DISTRICT ATTORNEYS OFFICE,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO

THE PENNSYLVANIA SUPERIOR COURT

PETITION FOR WRIT OF CERTIORARI

Fernando Nunez, Jr.
SCI @ Mahanoy, # FM 8959
301 Morea Road
Frackville, PA 17932

QUESTION PRESENTED

The question presented below leads many lower state and federal courts to differ or split on the following question:

ARE CRIMINAL DEFENDANTS' REQUIRED TO PLEAD AND PROVE THEIR DUE DILIGENCE AS AN ADDITIONAL ELEMENT UNDER BRADY v. MARYLAND, 373 U.S. 83 (1963), AND ITS PROGENY ?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Commonwealth v. Nunez,
905 A.2d 1047 (Pa.Super.Ct.2006)(Unpublished)

Commonwealth v. Nunez,
911 A.2d 934 (Pa.2006)(Unpublished)

Commonwealth v. Nunez,
46 A.3d 830 (Pa.Suepr.Ct.2012)(NO.2671 EDA 2009)

Commonwealth v. Nunez,
55 A.3d 523 (Pa.2012)(NO.280 EAL 2012)

Nunez v. Lamas,
2015 WL 787525 (E.D.Pa.Feb.24,2016)(Published).

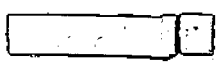
Nunez v. Garman, et al.
NO. 15-2717 (3d Cir.Feb.23,2016)(Unpublished)

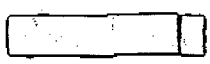
In re Fernando Nunez,
NO. 18-1217 (3d Cir.March 9,2018).

Nunez v. Garman
2016 U.S.LEXIS 6850 (Nov.14,2016)

TABLE OF CONTENTS

INDEX TO APPENDICES





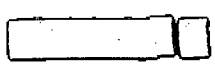


TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

CASES PAGE NUMBER

TABLE OF AUTHORITIES CITED

CASES

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Court of Common Pleas of Philadelphia County court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was July 2, 2019. A copy of that decision appears at Appendix C.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment To United States Constitution :

> ...[N]o State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 30, 2004 a jury convicted petitioner, Fernando Nunez,("Nunez"), of murder, arson, criminal conspiracy, and possessing instruments of crime, arising from the shooting death of Brian Scott. On September 22, 2004 the trial court sentenced him to an aggregate term of life, plus 10-20 years imprisonment. No post-sentence motions were filed. On June 14, 2006 the Superior Court of Pennsylvania affirmed his judgment of sentence, and the Pennsylvania Supreme Court denied discretionary review on November 1, 2006.[1] He did not seek further review in this court. His judgment of sentence therefore became final on January 30, 2007. On August 5, 2016 Nunez filed a petition under the Pennsylvania post-conviction-relief-Act (PCRA),[2] asserting that his prosecuting attorney, Edward Cameron, suppressed favorable, material , exculpatory impeachment evidence from him and his attorneys prior to and during trial and subsequent appeals in violation of Brady v. Maryland, 373 U.S. 83 (1963).

---

1. Commonwealth v. Nunez, 905 A.2d 1047 (Pa.Super.Ct.2006)(Unpublished Memorandum), appeal denied, 911 A.2d 934 (Pa.2006).

2. 42 Pa.C.S. §§ 9541-9546. Nunez first petition, filed in 2017, garnered no relief.

In support of his Brady claim, he attached a declaration from, Russel Chrupalyk, who asserted that after arriving to the same state prison as Nunez, he on June 6, 2016 allowed Nunez to look through his discovery documents and transcripts from his case - which Nunez later photo copied - after discovering that, April Velez, a key prosecuting witness in Nunez's case, was also criminally involved in Chrupalyk's case as a get-away driver who drove the victim, to a remote and secluded area with the killer and shot the victim dead in July of 2001. Nearly three years prior to Nunez's 2004 trial. Those facts were revealed and derived from two eyewitnesses, Alexis Gomez[3], and, Marilyn Colon[4], who both identified Velez from a photo line-up as the female they seen with the killer - who was not Nunez - before and after the victim, Mr.Rodriguez, was murdered. Although implicated and considered a suspect in the Rodriguez murder, Velez, was never charged. Rather she became a prosecuting witness who

---

3. Gomez gave a police statement to homicide detectives in the Rodriguez murder on July 10, 2003

4. Colon gave her police statement to homicide detectives in the Rodriguez murder on September 5, 2003.

testified against Chrupalyk, claiming that Chrupalyk, solicted (paid) Nunez to murder the victim [redacted] Mr.Rodriguez. An alleged fact she claimed to have learned from Nunez when confessing to her that he (Nunez) killed Mr.Rodriguez. That assertion was known to be false because the prosecuting attorney knew that Gomez and Colon had identified someone other than Nunez who they seen shoot and kill, Mr.Rodriguez. But Nunez and his defense attorneys were oblivious to all of this because the prosecutor suppressed Gomez and Colon's police statements from them prior to, during and after Nunez's trial and subsequent appeals. Nunez was Not charged or prosecuted along side Chrupalyk[5] in the Rodriguez murder and therefore did not have access to the discovery documents relevant to that case. June 6, 2016 was the first time he knew that his prosecuting attorney suppressed the Brady evidence noted above because thats when he learned of it.

---

5. Chrupalyk, was ultimately tried and convicted for the 2001 Rodriguez murder in October of 2005. A year after Nunez's 2004 trial for the death of Brian Scott.

Within his PCRA petition Nunez argued that a reasonable probability exists that the outcome of his trial would have been different had the suppressed Brady evidence at issue had not been suppressed during the time of his trial because his trial attorney could have used the favorable Brady material during his cross examination of Velez as exculpatory impeachment evidence to undermine her credibility, by way of demonstrating, Velez falsely accused Nunez in an unrelated murder (Chrupalyk's case) - just as she was doing in this case - with the hope to curry favor with the prosecutor and not be prosecuted as an accomplice along side Chrupalyk in his murder trial. The state trial court disagreed with Nunez and reasoned:

> [I]n the context of the PCRA, [Nunez] is reqquired to show that the alleged Brady violation so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place. [Nunez] has failed to demonstrate that the lack of the speculative information contained in the police statements of Alexis Gomez and Marilyn Colon in an unrelated homicide case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place, particularly in light of the other evidence produced at trial. Accordingly the claim fails.

See Appendix (B)(May 18, 2017, Lower Court Decision, at 6.).

On appeal, the Pennsylvania Superior Court affirmed the lower court's decision, albeit, on different grounds. Reasoning:

> [O]ur review...reveals [Nunez] failed to plead and prove that he could not have obtained the information upon which his claim is based with the exercise of due diligence. In fact, in his Petition, [Nunez] conceded that his trial attorney may have been aware of the witness statements implicating Ms.Velez in an unrelated crime, but [Nunez] failed to describe the process he undertook to unearth this alleged impeachment evidence after his trial. Consequently, we find [Nunez] has failed to prove he acted with due diligence in discovering these allegedly new facts and governmental interference. Accordingly, we lack jurisdiction to consider the issues raised in [Nunez's] untimely PCRA Petition and affirm the order dismissing his PCRA petition as untimely.

See Appendix(A)(November 27, 2018 Pennsylvania Superior Court decision, at 10)(Citations omitted). However, in the same breath, the Pennsylvania Superior Court also agreed with the Lower Court's substantive review of Nunez's Brady claim and also found that his Brady claim lacked merit in a footnote. Id at 10, Footnote 14. Nunez, ultimately sought discretionary review with the Pennsylvania Supreme Court, but was unsuccessful. See Appendix (C)(July 2, 2019 Pennsylvania Supreme Court Per Curiam order denying allowance of appeal.). This petition for writ of certiorari now follows.

REASONS FOR GRANTING THE PETITION

In total, there are three general variations of the defendant due diligence rule[6] being applied in State and Federal Courts across the nation, albeit, this Court has never embraced such a rule in its Brady jurisprudence. Under each version of the rule, the burden of disclosing exculpatory evidence shifts from the state to the defendant. Rather than disclose exculpatory evidence, the State can - under the defendant due diligence rule - sit on otherwise exculpatory evidence, assuming that the defendant could obtain the same information on his own. Stated differently, a defendant must establish that he was diligent to perfect any Brady claim. In this way, the defendant due diligence rule has evolved from, at best, a narrow exception to the prosecutions' Brady obligation into an exception that - in practice - completely swallows the rule.

---

6. For a comprehensive overview of common features of the "defendant due diligence rule" and where it emerged, See Kate Weisberg, Prosecutors Hide, Defendants See: The Erosion of Brady Through the Defendant Due Diligence Rule, 60 UCLA L.Rev. 138, 141, 147-156 (2012). Common features include: (1) the evidence was equally available to the prosecution and the defense: (2) the evidence was known by the defendant, and; (3) the relevant facts were accessible by the defendant. Id. 153-156.

All federal Court[] of Appeals, except the Third, Tenth and D.C. Circuits, apply some form of the defendant due diligence rule.[7] With no explanation or citation to other diligence cases, however, the Seventh, and Ninth Circuits vacillate between applying and not applying some form of the defendant due diligence rule.[8]

---

7. See, United States v. Rodriguez, 162 F.2d 135, at 147 (1st Cir.1998); United States v. Payne, 63 F.3d 1200, at 1208 (2nd Cir.1995); United States v. Wilson, 901 F.2d 378, at 381 (4th Cir.1990); United States v. Skilling, 554 F.3d 529, at 574 (5th Cir.2009); Spirko v. Mitchell, 368 F.3d 603, at 611 (6th Cir.2004); Boss v. Price, 263 F.3d 734, at 740 (7th Cir.2001); United States v. Coplen, 565 F.3d at 1097 (8th Cir.2009); Raley v. Ylst, 470 F.3d 792, at 804 (9th Cir.2006); LeCroy v. Sec'y Fla. Dep't of Corr.,421 F.3d 1237, at 1268 (11th Cir.2005). But see, Dennis v. Sec'y of Dep't of Corr.,834 F.3d 263, at 291-92 (3rd Cir.2016)(en banc); In re Sealed Case, 185 F.3d 887, 897 (D.C. Cir.1999), and; Banks v. Reynolds, 54 F.3d 1508, at 1517 (10th Cir.1995).

8. Compare, United States v. Fuller, 421 F.App'x 642 (7th Cir.2011); Holland v. City of Chicago, 643 F.3d 248 (7th Cir.2011); United States v. Are, 590 F.3d 499, at 510 (7th Cir.2009); Rhoades v. Henry, 596 F.3d 1170, at 1181 (9th Cir.2010); Raley, 470 F.3d at 804 (applying the defendant due diligence rule), with, Boss, 263 F.3d at 740 ; Grant v. Roe, 389 F.3d 908, at 913 (9th Cir.2004), and United States v. Howell, 231 F.3d 615, at 625 (9th Cir.2000)(rejecting defendant due diligence rule).

State Courts and Federal District Courts are similarly split.[9] The application of the rule has also prompted a handful of strongly worded dissents.[10] Looking at the various definitions, a few common themes can be identified. As an initial matter, most lower courts define the rule as the First Circuit does: "The government has no Brady burden when the necessary facts for impeachment are readily available to a diligent defendant."[11]

---

9. Compare, State v. Skakel, 888 A.2d 985, at 1035 (Conn.2006); Alford v. State, 667 S.E.2d 680, 683 (Ga.Ct.App.2008); Davis v. State, 43 So.3d 1116, 1123 (Miss.2010); State v. Parrish, 241 P.3d 1041, 1044 (Mont.2010); Jones v.State, 2010 WL 3295708 (Nev.Apr.16,2010), and Commonwealth v. Ligons, 971 A.2d 1125, 1146 (Pa.2009)(applying the defendant due diligence rule), with, Parker v. Herbert, 2009 WL 2971575, at 47 (W.D.N.Y. May 28,2009); Garnett v. Morgan, 2010 WL 5058524 (W.D.Wash. Dec.3,2010); Hallford v. Culliver, 379 F.Supp.2d 1232, 1250 (M.D.Ala.2004); Prewitt v. State, 819 N.E.2d 393, 407 (Ind.Ct.App.2004); Commonwealth v. Tucceri, 589 N.E.2d 1216, 1221-22 (Mass.1992); State v. Williams 896 A.2d 973, 992 (Ms.2006), and State v. Parker, 198 S.W.3d 178, 193 (Mo.Ct.App.2006)(rejecting the defendant due diligence rule).

10. Bell v. Bell, 512 F.3d 223, at 250-51 (6th Cir.2008) and Spirko, 368 F.3d at 614-618.

11. Rodriguez, 162 F.3d at 147.

In this way, courts extend the language of "unkown to the defendant" not just to situations where the defendant had actual knowledge, but also to situations where the defendant could have obtained the knowledge through due diligence.[12]

Only three Circuits - the Third, D.C., and Tenth - recognize the conflict between Brady and the defendant due diligence rule.[13] Since Brady was first decided, this Court has relied on the same three factors to establish a Brady violation: (1) the evidence is favorable to the defendant; (2) it is suppressed by the State (either willfully or inadvertently), and; (3) it is material either to guilt or to sentencing. This Court has never added a fourth prong requiring that the evidence be unknown to the diligent defendant, nor has the court ever stated that the government is relieved of its disclosure duties if the defendant or his lawyer knows of the evidence or could learn of it.

---

12. See, Commonwealth v. Paddy, 800 A.2d 294, 305 (Pa.2001)(holding no Brady violation occurs if the evidence is available to the defense, or if the defendant knew, or with reasonable diligence could have known).

13. E.g.,Dennis,834 F.3d at 291-92 ; In re Sealed Case, 185 F.3d 887, 897 (D.C. Cir.1999); Douglas v. Workman, 560 F.3d 1156, 1181 (10th Cir.2009), and Banks, supra.

The dedendant due diligence rule, is contrary to Brady because it inserts a new element into the definition of Brady evidence and more fundamentally because it is contrary to the very principles on which Brady is based.

THE EMERGENCE OF THE DEFENDANT DUE DILIGENCE RULE

In two seminal Brady cases, United States v. Agurs,[14] and Kyles v. Whitley,[15] this Court referred to evidence that was "unkown to the defense".[16] Those four short words were part of the Court's larger discussion about the definition of materiality. Nonetheless, lower courts took the phrase "unkown to the defense" out of context and expanded the definition of Brady evidence to include evidence that is material to the defense and that is undiscoverable by the defendant. It is useful to examine both Agurs and Kyles to better understand the context in which the Court used this phrase and how lower courts proceeded to misapply it.

---

14. 427 U.S. 97 (1976).
15. 514 U.S. 419 (1995).
16. Id. at 437; Agurs, 427 U.S. at 103.

Professor Barbara Babcock has noted "In spite of its short lenghth and simple facts, Agurs is a difficult opinion."[17] At its core Agurs is about which materiality standard to apply to a Brady claim in pos‡conviction, and whether the standard is different when the defendant makes a specific request, a general request, or no request at all. In discussing the differfent types of requests, the Court noted that each type of case "involves the discovery, after trial, of information which had been known to the prosecution but unkown to the defense." This is the only instance when the Court refers to the phrase "unkown to the defense".[18] The Agurs holding was problematic for defendants because it placed the burden on the defendant to put the prosecutor on notice that certain evidence could be exculpatory. In his dissent in Agurs, Justice Marshall pointed out that under the rule announced by the majority, defendants who made no request or just a general request would be at a severe disadvantage because

---

17. Barbara Allen Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 STAN.L.REV. 1133, 1145 (1982).

18. Agurs, 427 U.S. at 103.

"[t]he rule creates little, if any incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense.[19]

Nine years later, in United States v. Bagley,[20] the Court explicitly eliminated the distinction between the three types of requests in favor of a "reasonsble probability" standard[21] that would apply regardless of whether the defendant made a request. By removing the distinction between requests, the Bagley, court also removed the corresponding burden that it had placed on defense lawyers to make specific requests for Brady evidence and shifted the burden back to the government.

The only other case by this court to use the phrase "unkown to the defense" is Kyles v. Whitley which was decided twenty years after Agurs. In concluding that the government violated Brady, the Court addressed the very concerns Justice Marshall

---

19. Agurs, 427 U.S. at 117 (Marshall, J.,dissenting).

20. 473 U.S. 667 (1985).

21. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id at 682; See also kyles, 514 U.S. at 434.

identified in his Agurs dissent:

> While the definition of...materiality...must ...be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.[22]

This is the only portion of the Kyles opinion that uses the phrase "unkown to the defense". It is worth noting that the court used the phrase in the context of discussing the prosecutor's duty to evaluate materiality. In this way, Kyles reflected the Court's exclusive concern with the prosecutor's duty. There was no mention, much less discussion, of the defendant's burden.

It is therefore paradoxical that lower courts isolated the phrase "unkown to the defense" from both Agurs and Kyles and used it as justification to impose a burden on the defendant to discover Brady material.

---

22. Id. at 437 (emphasis added).

Nonetheless, in the years after Kyles and Agurs were decided lower courts began to narrow the definition of Brady evidence to cover only evidence that is "unkown" to the defense.[23] Beyond citing either case, none of the decisions from the lower courts offer much in the way of a doctrinal justification for the rule. For example, the Pennsylvania Supreme Court in Commonwealth v. Paddy, have expanded the scope of the term "unkown to the defense" to include evidence that is either available to the defense, or the defendant knew, or with reasonable diligence could have known.[24] In short lower courts took the term to mean something this Court never said - namely, the defendants have to discover or obtain Brady evidence.

---

23. See, e.g.,United States v. Johnson, 264 F.App'x 388, 389 (5th Cir.2008); Mark v. Altur, 498 F.3d 775, 787 (8th Cir.2007)(describing Kyles as addressing only evidence "unkown to the defense" as a basis for a potential Brady violation (quoting Kyles, 514 U.S. at 434)); Apanovitch v. Houk, 466 F.3d 460, 474 (6th Cir.2006)(holding Brady "only applies to evidence that was known to the prosecution, but unkown to the defense"(citing Agurs, 427 U.S. at 10)), and Spicer v. Roxbury Corr. Inst.,194 F.3d 547, at 557 (4th Cir.1999)(Same).

24. 800 A.2d 294, at 805 (Pa.2001).

At least one state court has recognized that the phrase was taken out of context. In State v. Williams,[25] the Maryland Court of Appeals addressed the exact phenomenon described above. There, the state court rejected the governments argument that Kyles stood for the posistion that Brady evidence be unkown to the defendant: "This position [unkown to the defense] is taken out of context...and in any event, does not fully convey the Kyles Court's analysis or holding."[26] In an en banc decision the Third Circuit of Appeals in Dennis v. Sec'y Dep't of Corr.,[27] also commented on the issue and noted:

> Subjective speculation as to defense counsel knowledge or access may be inaccurate, and it breaths uncertainty into an area that should be certain and sure...Prosecutor's... cannot accurately speculate about what a defendant or defense lawyer could discover through due diligence. Prosecutors are not privy to the investigation plan or the investigation resources of any given defendant or defense lawyer.

---

25. 896 A.2d 973 (M.D.2006).

26. Id. at 994.

27. 834 F.3d 263, at 293 (3rd Cir.2016).

By shifting the burden of disclosure away from the government, lower state and federal courts have ensured that the "prosecutor may hide, and the defendant must seek"[28] Brady evidence. As a result, Brady itself is undermined, as is the "public respect for the criminal process" that focuses on the underlying fairness of the trial.[29] To the extent that prosecutors are asked to speculate about what a defendant or his attorney knows or should know, the truth-seeking purpose of criminal trials is jeopardized and the due process rights of criminal defendants are violated.

Under the facts of this case, the state court arbitrarily shifted the burden of discovering the Brady evidence upon Nunez and then faulted him for not discovering it sooner. Precluding his second subsequent post-conviction petition from being properly filed.

---

28. Banks v. Dretke, 540 U.S. 668, 699 (2004)
29. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

Clearly, applying the defendant due diligence rule to any Brady case is contrary to Brady and directly undermines Brady's truth-seeking goal to such an extent as to condone a miscarriage of justice.[30]

CONCLUSION

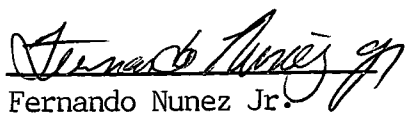
The Pennsylvania state courts have taken a contrary stance to Brady and its progeny, by applying a defendant due diligence rule to Brady violations, which conflicts with, inter alia, the Third Circuit Court of Appeals decision in, Dennis v. Sec'y of Dep't of Corr., which has rejected the defendant due diligence rule[31] on an important question of federal law. Moreover, state courts and federal courts are split on the the important question of federal law now at issue that has not been, but should be, settled by this court. Nunez has satisfied Rule 10 (b)-(c) and this petition should be respectfully granted.

---

30. United States v. Bagley, 473 U.S. 667, 675 (1985)("The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

31. 834 F.3d at 291-292 (3rd Cir.2016)(en banc).

Respectfully submitted,



Fernando Nunez Jr.
(Pro se petitioner)

Date: September 29, 2019