19-674

No. _____

In The

Supreme Court of the United States

JAMES L. MARTIN,

Petitioner,

v.

NATIONAL GENERAL ASSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Delaware

PETITION FOR A WRIT OF CERTIORARI

JAMES L. MARTIN,
Attorney and Petitioner *pro se*
805 West Twenty-First Street
Wilmington, Delaware 19802-3818
(302) 652-3957

November 21, 2019

QUESTION PRESENTED

Does the Fourteenth Amendment Due Process Clause guarantee a civil litigant, in a state court, an appellate justice who did not oversee the same issue during his tenure as counsel to Delaware's Governor?

RELATED PROCEEDINGS

Martin v. National General, N18C-01-107 CEB, Superior Court of Delaware, Judgment entered 7-2-18, App. 7.

Martin v. National General, 401, 2018, Supreme Court of Delaware, Judgment entered 6-5-19, App. 1 – App. 6.

Martin v. Nixon, N17C-08-152 CEB, Superior Court of Delaware, Jury Verdict mostly favorable to petitioner on liability only, entered 9-18-19.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS AND ORDERS IN THE COURT BELOW

In an Order filed on 6-5-19, at App. 1 – App. 6, the Supreme Court of Delaware affirmed the decision from the Superior Court, at App. 7. In an Order filed on 6-25-19, at App. 8, the Court denied the Motion for Rehearing *en banc*. Justice Sotomayor granted a sixty-day extension application, to 11-22-19. Justice Alito is not eligible to rule on this case.

STATEMENT OF THIS COURT'S JURISDICTION

This Court's jurisdiction for review is at 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment 14, Sec. 1. . . . nor shall any state deprive any person of . . . property, without due process of law; nor deny . . . the equal protection of the laws.

STATEMENT OF CASE

Stage in proceedings where the federal questions were raised and preserved. The federal question about the recusal issue was raised and preserved in the court below on 9-7-18, when Martin's Motion to Recuse and

to Disqualify Chief Justice Leo E. Strine, Jr. was filed. The Motion says,

> 1. In view of the ruling in *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), issued after the previous Motions to Recuse were filed in the prior cases, Chief Justice Strine should grant the Motion to Recuse in view of his serving as then Governor Carper's attorney when overlapping issues arose but were not fairly resolved after the Supreme Court of Delaware was unable to convene a quorum following the recusal orders of four (4) member justices.
>
> * * *
>
> 4. The opinion noted no specific test for recusal when a judge had prior involvement as a prosecutor, but due process was deemed to be invoked where an impermissible risk of bias occurred through involvement in a prior decision on the issues presented. The Court found an objective standard that requires recusal when the likelihood of bias on the part of a judge, even on an appellate panel, "is too high to be constitutionally tolerable," quoting *Withrow v. Larkin*, 421 US 35, 47 (1975). Many of the prior cases cited in support of the decision were from civil, rather than from criminal, proceedings.

The issue was again preserved in the Motion for Panel Reargument, and Motion for Rehearing *en banc*, filed on 6-19-19, in para. 6: "The recusal motion directed to Chief Justice Strine, filed on 9-7-18, has not been ruled upon."

FACTS

Petitioner Martin was cycling in Wilmington, Delaware on 10-10-15 when motorist Nixon committed at least five traffic offenses, including a U-turn into Martin's right-of-way. The crash caused serious injuries, and Martin underwent major surgery to put his right shoulder back on after it was torn off. He is continuing with physical therapy more than four years later, and anticipates additional medical treatment. Because Nixon had only minimal no-fault coverage, Martin claimed coverage under his own car insurance policy, from respondent National General, and retained attorney Ben Castle to advance personal injury claims against motorist Nixon. Ben Castle passed away two months before the scheduled jury trial, and Martin was unable to find a successor attorney, despite having prepaid all attorney's fees and costs for the trial. Another attorney, who worked at the same law office, appeared in the trial court after purporting to be representing Martin, but he had conflicts of interest and knew nothing about the case. He was permitted to withdraw, retain funds for legal work that was not done, and avoid liability for missing deadlines to preserve testimony from witnesses, among other deficiencies. As a result, Martin was the only person permitted to testify on his behalf, and was involuntarily rendered *pro se* by default.

In a letter dated 1-5-16, the insurer denied liability to pay because "The bicycle [Martin was riding when Nixon turned into his path] does not meet the definition of a covered auto under our insured's Personal

Automobile Policy." Despite clear case law, stipulated to in the trial court, that mandates no-fault coverage for a cyclist or for a pedestrian injured in a collision with a motor vehicle, the insurer persisted with arguing this policy exclusion is lawful: "[no coverage for] a pedestrian injured by an accident with, [sic] any motor vehicle other than your covered auto." Because the unlawful policy exclusion is unambiguous, Martin argued that *contra proferentem*, "against [the] offeror," or "interpretation against the drafter," does not control this disposition of this issue. The court below, at App. 5, ascribed an argument to Martin that he did not advance. Instead, Martin relied on settled case law that says the unlawful portion of the policy fails for unenforceability. The remaining, enforceable part of the no-fault policy reads: "D. No one will be entitled to receive duplicate payments for the same elements of damage." The insurer's policy with Martin was founded upon tiered coverage under more than one policy, with secondary coverage serving as an excess policy to the extent compensable losses are not fully paid under the primary limit, which was quickly exhausted in view of the nature and extent of Martin's injuries, and of his continuing medical care more than four years later.

The bad-faith claim arose when insurer National General issued a notice on 10-4-17 that reads:

> Delaware law requires that we notify you of the statute of limitations regarding your Uninsured/Underinsured Motorist claim(s). As such, the statute of limitations for this/these claim(s) expire(s) on October 10, 2018.

This claim does not mature until after a settlement or verdict against David Nixon, the motorist, in the parallel case, and only if the tortfeasor's bodily injury policy were insufficient to cover the verdict or settlement. The parallel case was tried before a jury of twelve, with a verdict rendered in Martin's favor on 9-18-19, although not by an overwhelming percentage, as to liability only. The investigating police officer conceded that Martin was the subject of a malicious prosecution, but blamed it on his superiors, based on a misinformed belief that Martin had filed a complaint against someone in the police department for misconduct. No such complaint was filed, even though the police did not prosecute motorist Nixon for any offense. Delaware does not allow private criminal action, so Nixon paid no fine despite causing a serious crash, despite his testimony about his "foolish" driving. The issues involving National General should have been stayed pending disposition of the underlying personal injury case against motorist David Nixon, but they were not stayed.

An insurer who moves to dismiss a complaint based on an insurance policy must file the insurance policy with the trial court, but National General did not do so. Martin, the insured-claimant, filed part of the policy to rebut the insurer's claims about what the policy said, and about how it was later changed through endorsements. The four-page endorsement the insurer relied on in the trial court was issued on 2-1-2004, and it was not in effect when the crash occurred. The insurer filed the effective endorsement for the first

time on appeal to the state appeals court, so it was the subject of petitioner's Motion to Strike, noted in a footnote at App. 1. Neither the trial court nor the appeals court considered the insurance contract, despite their issuance of judgments about its content.

Chief Justice Strine served as former Governor Carper's counsel when Martin petitioned the Governor under the Delaware Constitution for appointment of a temporary appeals court after four of the five member justices were recused in a case where the Supreme Court exercised both original and exclusive jurisdiction. Martin presented evidence that proved his identity had been compromised when he was misclassified as having been in military training, even though he had no such history. Further, medical records attributed to him alleged he only imagined himself to be a cyclist, but was not. The Motion to Recuse should have been granted in view of the recited conflict. No decision was issued on the Motion, and the case was closed.

REASONS FOR GRANTING THIS WRIT

In *Williams v. Pennsylvania*, decided on 6-9-16, the question presented was whether the appellate justice's denial of a recusal motion and his subsequent judicial participation violated the Due Process Clause. Both the majority as well as the dissenting opinion recognized that a judge with a direct, personal, substantial, pecuniary interest could not preside over the same

case. Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality.

Chief Justice Strine's failure to issue a decision gives the appearance of partiality. His denial of a similar recusal motion, on 3-31-14, contains this reasoning:

> Indeed, I [Chief Justice Strine] had no recollection of the 1996 correspondence [when he was counsel to the Governor] under Mr. Martin's motion brought it up, and even reviewing the letter now did not restore any memory of it. I am therefore satisfied that I can hear this matter free of bias.

He wrote that his memory was not restored, even after reviewing his own decision, bearing his own signature. Perhaps his announced resignation is quite appropriate in view of this admitted lapse, but it does not excuse recusal and disqualification.

CONCLUSION

Certiorari should be granted in view of the recent decision in *Williams v. Pennsylvania*, 15-5040. The case should be summarily reversed and remanded in accord with Rule 16.1, and reassigned to a disinterested appeals court to be heard anew.

Respectfully submitted,

JAMES L. MARTIN, ESQ., Petitioner