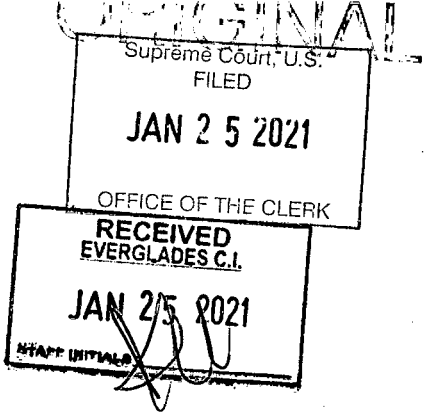

No. 20-7179

IN THE

SUPREME COURT OF THE UNITED STATES

NELSON VIERA– PETITIONER

vs.

MARK INCH, SEC. Fla. DEPT. OF CORRECTIONS – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

ELEVENTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Nelson Viera
(Your Name)

1599 SW 187th Avenue

Miami, Florida, 33194 – 2801

305-228-2000
(Phone Number) Warden

QUESTION(S) PRESENTED

1. Whether the lower Courts are properly interpreting and implementing the Supreme Court decree about jurisdiction and fraud upon the Court under Rule 60(d)(3)(1) Motion.

2. Whether the District Court where the fraud has occurred, has completed its decision making process, and whether the result of that process does not lead to a miscarriage of justice.

3. Whether a Court of Appeal abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a District Court from ever giving any adjudication of Petitioner's Rule 60(d)(3)(1) on the merits.

4. Whether the public has a right to have confidence that all lawyers who are members of the Bar are deserving of their trust in every transaction.

5. Whether the public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. *Hazel-Atlas*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) *Id.* at 322 U.S. 246.

LIST OF PARTIES

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

[X] 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:

Attorney for the Respondent

Assistant Attorney General – Magaly Rodriguez

Office of the Attorney General – Suntrust International Center, 1 S.E. 3rd Ave., Suite 900, Miami, Florida 33131

RELATED CASES

Hazel-Atlas, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944) at 322 U.S. 246.

Gonzalez v. Crosby, 545 U.S. 524, 162 L. Ed. 2d 480, 125 S. Ct. 2641 (2005)

Demjanjuk, 10 f. 3d 338 (6th Cir. 1993).

Bressman, 874 F. 3d 142 (3rd Cir. 2017).

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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

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

The opinion of the United States court of appeals 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 United States district 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.

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

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

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

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was June 11, 2020.

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

[X] A timely petition rehearing was denied by the United States Court of Appeals on the following date: August 27, 2020, and a copy of the order denying rehearing appears at Appendix C.

[ ] 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).

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

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix __.

[ ] A timely petition 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

No constitutional and/or statutory provisions involved. Petitioner is proceeding pursuant to Fed. R. Civ. P. 60(b)(d)(3)(1).

STATEMENT OF THE CASE

This case began according to Detective Nuñez from North Miami Beach Police Department one night when he received a call from his confidential informant (C.I.) telling him that he had just spoken (by phone) to a individual who wanted to sell 700 grams of heroin (there is no recall of that call). One day later, on September 22, 2005 the Petitioner Viera was arrested (and remains incarcerated until today) for count of felonious violations in the laws of Florida to wit: Count One: Illegal drugs/trafficking/28 grams or more F.S. § 893.135(1)(c)(1)(c) Fel. 1st deg., Count Two: Illegal drug/conspired to trafficking/armed F.S. § 893.135(5), 777.04(3) and 775.087 Life felony; and Count Three: Illegal drugs/trafficking/28 grams or more 893.135(1)(c)(1)(c) Fel. 1st Deg. plus an additional count for violation of probation. The jury found him guilty of Count 1. Count 2 and 3 were dropped during jury trial.

On or about May 24, 2007, Petitioner was taken to V.O.P. Hearing prior to jury trial and found guilty by Judge Bertila Soto and given an overall sentence of twenty five (25) years for various violations of the conditions of probation only depending on the new charge of conspiracy to trafficking in illegal drugs (Count 2) that was dropped during jury trial. Appeal was timely filed for V.O.P. and affirmed on February 27, 2009.

The trial in this matter was held on August 7, 2007 and sentencing was held

on December 12, 2007. The Petitioner was sentenced to forty (40) years DOC as habitual felony offender plus $500,000 dollars fine to run concurrent to his V.O.P. 25 years.

An appeal was timely filed, the Appellate Court reversed and remanded for resentencing by another Judge, maintaining that the 40 years sentence was in legal parlance vindictive. Upon resentencing the Honorable Judge Fernandez imposed a 25 year sentence upon the movant. The public defender office has provided all legal representation at all stages of defense in this case, including appellate process.

In this case, the Petitioner was set up by a one time fellow inmate who had done time with him at Desoto Correctional Institution, same dormitory, in fact he slept next to him within 3 feet. Jose Raul Gallardo slept in B Dorm, 1124 and Petitioner slept in B-Dorm, 1125.

On the morning of September 22, 2005, the Confidential Informant Jose Raul Gallardo went to the Petitioner's apartment and unknown to Petitioner Viera the C.I. was wired. After that the C.I. invited the Petitioner to eat something at McDonald's located at 88 st. 129 Ave. near Viera's apartment and the C.I. paid for lunch. They talked about several issues especially the fact that Viera was looking for employment. The C.I. claimed that a friend of his in North Miami Beach was looking to hire someone to assist him with his handyman business. The Petitioner,

in the hopes of a job, was lured into the C.I.'s vehicle and driven to North Miami Beach. About 3:00 p.m. that same day, the drive took approximately one hour and unbeknown to Viera the C.I. again had been wired. Later review of the recordings reveal that not one word is mentioned pertaining to drugs, heroin or illegal activity, not even slang. The Petitioner being in N.M.B. seize the opportunity to see two of his children at Joe Joe's Party Supply Store (co-defendant's place of work), who is ex wife and mother of Viera's children, and picked up Nike shoes, that, he had purchased for his son and needed to be returned due to the wrong size. Viera came out from the store carrying a bag with the shoes, and threw the bag in the back seat of the car. They drove approximately 5 or 6 blocks and stopped at the Sunoco gas station. As soon as the C.I. exited the car a man, Detective Ramirez (who does not appear on the witness list and is only mentioned two times by Detective Holleran in his deposition pg. 6) approached the car and after identifying himself and explaining that he was there because he had received a call that there were two suspicious individuals in the vicinity, he told the Petitioner to step out of the car and stand behind the vehicle while he searched it. After that the Petitioner saw Detective Ramirez move a package from the back area of the car and place it on the front floor board of the car where the Petitioner had been sitting (this package was unnoticed by the Defendant to have been there). A minute later another Detective Mr. Robert Holleran (Metro Dade Police Department, same squad as

Detective Ramirez) approached and identified the substance in the package to be a white powder substance (Holleran's depo pg. 5, 7). The Defendant was transported by himself to the back of the gas station for interrogation.

The police did not collect a gas station's surveillance video, which Viera later requested in the county jail. His public defender in response sent a letter to Petitioner stating "as I explained before, they don't have a video because this case is quite old. The gas station cannot say whether or not the video was available at the time of the incident. We cannot make anyone produce something they don't have. We can mention the lack of it in trial. (But she didn't). See Rule 60(b) Motion Exhibit F. This video could have cleared that any package was found at his feet. This exculpatory evidence could have provided his innocence if surveillance tapes had been pulled.

There was no traffic stop, it is further important to note this incident was in North Miami Beach, so why Metro Dade initiated contact is an interesting question. They don't testify at Petitioner Viera's trial. According to Detective Nuñez from North Miami Beach Police Department the Petitioner gave a sample to the C.I., but the alleged sample was never produced in none of the proceedings (Trial Transcripts pg. 289, lines 24, 25, pg. 290, lines 1-3) nor fingerprints recovered (Trial Transcripts pg. 187, lines 5-7, pg. 245, lines 14-25, pg. 246, lines 1-7) from the sample or from the 512 grams impounded at the arrest (T.T. pg. 190,

lines 14-16; 288, lines 1-10).

According to the transcripts conversation, supposedly between the C.I. and the Petitioner (who does not know if he really participated in that conversation as he has never heard the original recordings). The C.I. offered the Petitioner money for his participation (See transcript of audio tape, pg. 5, lines 8-13, not numbered) but, during trial the Detectives Nuñez and Perez changed the fact and said that it was the Petitioner instead of the C.I. who offered money (T.T. pg. 149, 239, 240).

Prior to the meetings arranged between Petitioner and the C.I., the police supposedly searched the C.I. and his car to make sure there was not contraband (T.T. pg. 184-185, 186, line 1). Sergeant Perez testified that he saw Petitioner's co-defendant hand him a plastic bag (T.T. pg. 237). This store does have very dark tinted windows on them and it is impossible to see inside from the outside specially from 10 feet. The Petitioner has some pictures from the Joe Joe's Party Store provided by his public defender. The police State's witness also said during trial that Petitioner told Sergeant Perez that Jessica De Garcia was the person that gave him the bag (T.T. 239), that Petitioner voluntarily waived his Miranda right (T.T. pg. 227-228, 292). When Perez interviewed him in an interview room (T.T. pg. 226, lines 19-25, pg. 227, line 1) but decided not to record the conversation (T.T. pg. 248-249, 292, 293) what did the Petitioner say? Whatever Sgt. Perez wanted to say against him, in fact, it is Sgt. Perez's word "under oath" against the

Defendant's word (a convicted felon). Also the prosecutor very worried about the purity of the drug (T.T. pg. 12), the Judge stated "That is not even an issue. One more thing no less important: the most experienced officer Detective Holleran found the alleged heroin in the C.I.'s car, and in his deposition (pg. 5, 7) alleged "I went to the passenger side door, I observed a plastic bag with a white substance in it." The Detective Holleran did not testify (T.T. pg. 165-166), but Detective Nuñez presented "brown heroin" as the supposed drug seized at the time of arrest (T.T. pg. 161). The Petitioner now asks, where is the original evidence confiscated by Detective Holleran on September 22, 2005?

Honorable Justices of the Supreme Court, Petitioner has never had an investigation of his case nor an evidentiary hearing requested in State Court and Federal proceeding as well. The Petitioner, Viera only would like to prove his innocence in a legal trial (T.T. pg. 3, 4, 5, 15). See Petitioner's Rule 60 Motion page 3-9 where the Petitioner detailed both fraud on the Court that agents of the government committed in his State Court proceedings as well at the time of Viera's § 2254 habeas corpus.

REASONS FOR GRANTING THE PETITION

The lower Courts' decision erred in failing to correct a manifest injustice, where the Petitioner shown that his conviction was obtained by fraud on the Court. The lower Courts' decision conflict with the relevant decisions of this Honorable Court in *Gonzalez,* [1] *Hazel-Atlas*, [2] and with other Circuit Courts' decisions in *Demjankjuk*, [3] *Bressman*, [4] and the view of one Justice of this Court, in a confused area of law. Additionally, the issue that is addressed here is of great public importance.

Petitioner is presenting an important federal issue of jurisdictional dimension in which the lower Courts did not reasonably extend the standard prescribed by this Court in *Gonzalez*, *Hazel-Atlas*, appropriately to the facts and laws of the Petitioner's case.

The Circuit Court as well as the District Court declined to resolve the claim of fraud that Petitioner brought to the attention of the Court where the fraud occurred and for whatever reason let take to this Court's authority, prudence and wisdom the disposition that should be made in such cases. The Petitioner is not asking for special treatment, only what is required, entitled as a matter of law.

In 2005, the Supreme Court in *Gonzalez v. Crosby*, stated "A Rule 60 Motion that attacks a defect in the integrity of the federal habeas proceeding itself, is permissible and will not be construed as a second or successive habeas petition." See Appendix A, pg. 5-6. The Supreme Court also added "fraud on the federal

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[1] *Gonzalez v. Crosby*, 545 U.S. 524,. 162 L. Ed. 2d 480, 125 S. Ct. 2641 (2005)
[2] *Hazel-Atlas*, 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250 (1944)
[3] *Demjanjuk*, 10 F. 3d 338 (6th Cir. 1993).
[4] *Bressman*, 874 F. 3d 142 (3rd Cir. 2017)

habeas Court is one example of such a defect." See generally *Rodriguez v. Mitchell*, 252 F. 3d 191, 199 (CA2, 2001)(A witness allegedly fraudulent basis for refusing to appear at a federal habeas hearing "relate[d] to the integrity of the federal habeas proceeding, not to the integrity of the State criminal trial.") We note that an attack based on the movant's own conduct, or his habeas counsel's omission. See e.g., supra at 530-531, 162 L. Ed. 2d at 491-492, ordinarily does not go to the integrity of the proceeding, but in effect ask for a second chance to have the merits determined favorably." *Id.* at 532 & n.5 125 S. Ct. at 2648 * n.5.

As an example of such a Rule 60 Motion that beyond any doubt attack a defect in the integrity of the federal habeas corpus proceeding itself is Petitioner Viera's Rule 60(b)(d)(3)(1) Motion. This Court should note that Petitioner's attack is only based on the Assistant Attorney General Magaly Rodriguez's misconduct, and not on his own conduct, or his habeas counsel's omission (Petitioner is indigent and pro se from the onset). Consequently, his attack ordinarily does go to the integrity of the federal habeas proceeding.

Petitioner Viera is calling into question the very legitimacy of the judgment obtained by fraud upon the Court that agents of the government perpetrated on the federal Court which led to the denial of the habeas petition. Rule 60 Motion, pg. 3, 8-20.

In Petitioner's case, a key exculpatory witness did not appear or were presented during federal habeas corpus proceeding for one reason: the State's habeas counsel Ms. Rodriguez (fraudulent basis) who's having a sneering disbelief in sincerity, integrity or a vicious disregard of the rights or concern of other "knowingly" reaffirmed. Supported and continued her prior State Attorney's misleading position that "the Confidential Informant (C.I.) was unavailable to

testify at trial as he had been deported," even if she found no evidence in the record to support the State misleading statement. Even so, she maliciously denied that the C.I. claimed by the Petitioner was a C.I. that worked in this case, disguising her assertions and blaming the lack of record that she ironically she herself controlled and manipulated (See DE# 13, pg. 54-55) and in this way prevented the District Court and Petitioner be aware that the C.I. Jose Raul Gallardo claimed by Petitioner was at the time of trial as well at the time of habeas corpus proceeding in State's custody on a modified 15 year probation monitoring sentence reporting monthly to the Court. The Petitioner timely and consistently objected to the State misleading response only to be told he was wrong. As it turns out, he was right. See Appendix A, pg. 2-3)

This critical information (material exculpatory evidence) along with others pertinent to this case as an extensive C.I.'s prior drug trafficking record of 19 cases (impeaching evidence that could have possibly led to a conviction of him) *Demjanjuk*, 10 F. 3d 338 (6th Cir. 1993) *Id*, at 338, that the C.I. was available for deposition, and not in I.N.S. custody as the State fraudulently claimed was documented on C.I.'s Jose Raul Gallardo criminal cases, Court docket sheet which Petitioner presented as support of his undeniable allegations. See Rule 60 Motion pg. 4 at the top, pg. 5 at the bottom, and Exhibit A.

The Magistrate Judge in his Report (DE# 21, pg. 27-28) recommended denial of Petitioner's § 2254 petition, Ground Five, stating "Other than Petitioner's unsupported allegations, there is no competent evidence of record that the C.I. would have provided exculpatory testimony and/or was available to testify as a witness at the time of trial. See also Appendix A, pg. 2-3. The District Court adopted the recommendation and denied Petitioner's § 2254 petition. The State habeas counsel Ms. Rodriguez knew or should have known before she filed her

"Response" (DE# 13) everything abut the C.I. The Petitioner let her know where, when and how he befriended C.I. Jose Raul Gallardo. See (DE# 1, pg. 9-10) and especially detailed in his Reply Brief (DE# 19, pg. 21-28). She had the opportunity and ample time to verify Petitioner's true assertions about C.I.'s identity and whereabouts. And so this question is why Ms. Rodriguez denied that the C.I. that was claimed by the Petitioner worked in his case? Perhaps to deviate the Magistrate Judge's attention in the hope to avoid any possibility of the Court's disposition of this contradictory material exculpatory evidence uncovering Ms. Rodriguez's fraudulent activities. Other question no less important is why the Petitioner's public defender trial counsel did not locate these documents in public record? The District Court reasoned that trial counsel adequately and properly investigated the facts and whether the C.I. was available to testify at trial (Appendix A, pg. 2-3). But at the same time the Magistrate Judge requested competent evidence about C.I.'s availability to testify as a witness at trial and exculpatory evidence and this competent evidence is documented on the C.I. Jose Raul Gallardo's Court docket sheet and his criminal "drug" 19 cases presented by the Petitioner in his Rule 60 Motion Exhibit "A." Perhaps these documents at that time were available with faulty information and not disclosing the full extent of the situation. But one thing is true, if Petitioner's family located those documents (in public record) at 2017, there is no reason to think that the State's habeas counsel could not have done so as well at the time of habeas corpus proceeding. To be honest, the Petitioner was surprised to learn of the existence of the C.I.'s Court docket sheet in the public records with the information requested by Magistrate Judge during Viera's habeas corpus proceeding, which uncovered two fraud instead of one (one in State Court and the other during all the proceedings of his § 2254 petition). Of course, Court docket was not available while the State Attorney's fraudulent events and the State's habeas counsel was taking a

fraudulent position against Petitioner.

In few words when Ms. Rodriguez chose not to disclose and intentionally concealed from Magistrate Judge and Petitioner the competent evidence that the C.I. was in State custody during all the proceedings, even at the time the Magistrate Judge filed his Report (DE# 21) recommending denial of Petitioner's § 2254 petition and adopted by the District Court, his extensive prior drug trafficking record of 19 cases, (impeaching evidence that could have possibly led to a conviction of him), misrepresented material facts, arguments, and presented bogus evidence in support of State fraudulent position in her Response (DE# 13 pg. 54, 55) She directly impacted the administration of justice. The State's habeas counsel Ms. Rodriguez never allowed the District Court to rely upon the truth. The District Court's reliance on Ms. Rodriguez's Response (DE# 13) impugned its integrity. It was a total fraud on the Court. One wonders, did Ms. Rodriguez ever think that her fraud upon the federal Court might be uncovered?

The Petitioner would like to clarify the Circuit Court's misinterpretation of the Magistrate Judge's words given in his "Report" (DE# 21) recommended denial of his § 2254 petition, Ground 5. See Appendix "A" pg. 2-3 where the Circuit Court stated: "Viera failed to produce competent evidence..." Report of Magistrate Judge (DE# 21, pg. 27-28) said: "Other than Petitioner's unsupported allegations, there is not competent evidence of record... ." Petitioner Viera did not fail in to produce competent evidence of record due to the following:

See *William v. Taylor*, 529 U.S. 420, 146 L. Ed. 2d 435, 120 S. Ct. 1479 (2000) at 529 U.S. 432 (See also Black's Law Dictionary 594 (6th Ed. 1990)(defining "fail" as [f]ault, negligence, or refusal"). To say a person has failed in a duty implies he did not take the necessary steps to fulfill it. He is, as a

consequence, at fault and bears responsibility for the failure. In this sense, a person is not at fault when his diligent efforts to perform an act are thwarted (as occurred in Viera's case), for example, by the conduct of another (State's habeas counsel misconduct in Viera's case) or by happenstance. Fault lies, in these circumstances, either with the person who interfered with the accomplishment of the fact (Ms. Rodriguez in Viera's case) or with no one at all. We conclude Congress used the word "failed" in the sense just described.

The person who beyond any doubt "knowingly" failed in to present competent evidence (exculpatory and showing the C.I.'s availability to testify as a witness at the time of trial) was the Assistant Attorney General Magaly Rodriguez, who made no attempt to then disclose that evidence requested by Magistrate Judge, nor did she take any measures whatsoever to introduce this critical evidence. Ms. Rodriguez, yet it is failing to do so. See *Rozier v. Ford Motor*, 573 F. 2d 1332 (5th Cir. 1978) *Id.* at Footnote 10. *Fords* duty (Ms. Rodriguez's duty in Petitioner Viera's case) to amend its/her inaccurate Response is based on Rule 26(e)(2), Fed. R. Civ. P.: "A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) she knows that the Response though correct when made is no longer true and the circumstances are such that a failure to amend the Response is in substance a knowing concealment." See *Havenfield Corp. v. H&R Block, Inc.*, 509 F. 2d 1263 (8th Cir. 1975), cet. denied 421 U.S. 999, 95 S. Ct. 2395, 44 L. Ed. 2d 665.

Petitioner's Rule 60 Motion provides clear evidence of State's habeas counsel Ms. Rodriguez's misconduct or prohibited behavior, such as plots to deceive or unduly influence the judiciary.

The Petitioner filed his Rule 60 Motion in the District Court where the

conspired fraud occurred. See *Abdur' Rahman*, 537 U.S. 98, 154 L. Ed. 2d 501, 123 S. Ct. 594 (2002) In Justice Steven's views, "Correct procedure requires that the merits of the Rule 60(b) Motion be addressed in the first instance by the District Court." *Id.* at 537 U.S. 97. The Honorable Judge who at the time of Petitioner's habeas corpus proceeding was misled, mocked and deceived by the State's habeas counsel Ms. Rodriguez, aware of Petitioner's undenied allegations along with an undisputed evidence presented, held "The Motion to Set Aside is dismissed for lack of jurisdiction." See Appendix B, pg. 1 and "The present Motion to Set Aside is in truth a successive section § 2254 petition and also fails on the merits." *Id.* at pg. 5. The Circuit Court of Appeals in an ample abuse of discretion affirmed.

The Supreme Court has repeatedly held that Federal Courts possess the inherent power "to vacate {their} own judgments upon proof that a fraud has been perpetrated upon the Court." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 115 L. Ed. 2d 27, 111 S. Ct. 2123 (1991) (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L. Ed. 1250, 645 S. Ct. 997 (1944)). The power to grant "equitable relief against fraudulent judgments is not of statutory creation." *Hazel-Atlas*, 322 U.S. at 248. This equitable power was "firmly established in English practice long before the foundation of our Republic." *Id.* at 244.

Petitioner relies on the decision in *Hazel-Atlas*, supra, believing that this action should be maintained as an independent action within the savings clause of Rule 60(b). See Rule 60 Motion pg. 2, 15, 16.

In *United States v. Beggerly*, 524 U.S. 38, 141 L. Ed. 2d 32, 118 S. Ct. 1862 (1998) where the District Court dismissed the complaint for lack of jurisdiction, this Court stated "The government is therefore wrong to suggest that an

independent action brought in the same Court as the original lawsuit requires an independent basis for jurisdiction." [524 U.S. 46].

In *Beggerly*, supra, this Court stated "Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata." *Hazel-Atlas*, 322 U.S. 238, 244, 88 L. Ed. 1250, 64 S. Ct. 997 (1944).[524 U.S. 47] Such a case was *Marshall v. Holmes*, 141 U.S. 589, 35 L. Ed. 870, 12 S. Ct. 62 (1891), in which the Plaintiff alleged that judgment had been taken against her in the underlying action as a result of a forged document. The Court said:

"According to the averments of the original petition for injunction...the judgments in question would not have been rendered against Mrs. Marshall but for the use in evidence of the letter alleged to be forged. The case evidently intended to be presented by the petition is one where, without negligence, lashes or other fault upon the part of Petitioner [respondent] has fraudulently obtained judgments which he seeks, against conscience, to enforce by execution." *Id.*, at 596, 35 L. Ed. 870, 12 S. Ct. 62 (This occurred in Petitioner Viera's case as well).

"The sense of this expressions is that, under the Rule an independent action should be available only to prevent a grave miscarriage of justice."

In *Abdue' Rahman*, supra, Justice Steven's also said... "In, for example, a death row inmate could show that the State indeed committed fraud upon the District Court during <*pg. 506> his habeas corpus proceeding (as Petitioner Viera did so) it would be a miscarriage of justice if we turned a blind eye to such abuse of the judicial process." *Id.* at 537 U.S. 96.

Mr. Justice Roberts said: "No fraud is more odious than an attempt to subvert the administration of justice. The Court is unanimous in condemning the transaction disclosed by the record. Our problem is how best the wrong should be righted and the wrongdoer pursued. See *Hazel-Atlas*, supra at *Id.* 322 U.S. 251.

If a convincing case of palpable fraud on the Court were presented, it is hard to justify a holding that it would not be considered. *Kenner*, 387 F. 2d 689, 691 (7th Cir. 1968).

See *United States v. MacDonal*, 1998 U.S. App. Lexis 22073, No. 97-7297, 1998 WL637184 (4th Cir. Sept. 8, 1998). The Court concluded that the AEDPA does not bar a Rule 60(b) Motion premised upon fraud on the Court. *Id.* at #3. The Court reached this conclusion, in part, because "actions alleging fraud upon the Court...attack the validity of a prior judgment, based on the theory that 'a decision produced by fraud on the Court is not in essence a decision at all and never becomes final." *Id.* (quoting 11 Wright and Miller, Federal Practice and Procedure § 2870 at 409 (1995) (quoting *Kenner v. Commissioner of Internal Revenue*, 387 F. 2d 689, 691 (7th Cir. 1968)).

AEDPA does not bar a successive petition for habeas corpus based upon fraud upon the Court. See *Workman v. Bell*, 245 F. 3d 849, 852 (6th Cir. 2001)("IN our equally divided opinion denying further relief for the Petitioner ...all of the Judges agreed that the Court can reconsider the petition if there was a fraud upon the Court.") The Supreme Court has held similarly with respect to a recall of the mandate. The appellate equivalent of a 60(b) order. *Calderon*, 523 U.S. at 556-57 (Applying AEDPA in general to recall of the mandate because a "State's interests in finality are compelling when a Federal Court of Appeals issues a mandate denying federal habeas relief," but exempting cases of "fraud upon the Court,

calling into question the very legitimacy of the judgment.") *Buell*, 48 Fed. Appx. 491 (6th Cir. 2002) *Id.* at 499..

A saving clause in Rule 60(b) provides: "This rule does not limit the power of a Court to entertain an independent action...to set aside a judgment for fraud upon the Court." See *Dausel v. Dausel*, 90 U.S. App. DC275, 195 F. 2d 774 (1952).

The Petitioner Viera's case is an example of cases in which the true facts could not have been discovered, whether there was diligence or not, because the evidence was illegally and fraudulently suppressed by the State Attorney's and Attorney General, therefore was not available at the time of the earlier proceedings an on. See *William v. Taylor*, 529 U.S> 420, 146, L. Ed. 2d 435, 120 S. Ct. 1479 (2000) *Id.* at 529, U.S. 435.

The competent evidence requested by Magistrate Judge which shows the improper influence exerted on the Court by a State's habeas counsel Ms. Rodriguez, was known only to the government as of the time of trial, and to Ms. Rodriguez during Petitioner's § 2254 petition proceeding and in the absence of the government's disclosure yields the conclusion that such a claim is not second or successive.

The Petitioner asserted, that his petition is not successive because it is based on a claim that was not available to him at the time of his prior petition. If he is correct, the stringent requirements of § 2244 for obtaining authorization would not apply. 28 U.S.C. § 2244(b)(3)(A). See also *Burton v. Steward*, 549 U.S. 147, 152, 127 S. Ct. 793, 166 L. Ed. 2d 628 at 153 (2007); *United States v. Key*, 205 F. 3d 773, 774 (5th Cir. 2000).

The Petitioner Viera asserts that due to the unique facts and circumstances of this case, along with the cases of law cited by him which would be applied to his case, the District Court has jurisdiction to entertain his Rule 60 Motion which is not second or successive petition.

The Petitioner pointed out that the Eleventh Circuit has long held that when considering filing by a pro se prisoner, the Court should "look behind the label" and determine whether the filing is cognizable under a different legal approach. See Rule 60 Motion, pg. 3. The District Court perhaps agrees with Petitioner stated' The Motion to Set Aside fares no better under Rule 60(b)(6)...A Petitioner "must demonstrate a justification so compelling that the [District] Court was required to vacate its order." See Appendix B, pg. 3, and also said "Petitioner does not point to a significant" defect in the integrity of the Federal habeas proceedings" to entitle him to relief under Rule 60(b)(6) *Id.* at pg. 5. To be honest, thanks to the District Court Petitioner realize that he could be entitled to relief under Rule 60(b)(6) as well.

In *Demjanjuk*, 10 F. 3d 338 (6th Cir. 1993) the Court ruled: "Acting pursuant to Fed. R. Civ. P. 60(b)(6) and All Writs Act, 28 U.S.C. § 1651, we reopened the habeas corpus case in which we denied relief from the extradition order to determine whether that proceeding had been tainted by fraud on the Court or prosecutorial misconduct (both occurred in Petitioner Viera's case) that required our intervention." See *Harris v. Nelson*, 394 U.S. 286, 299-300, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969). We also acted pursuant to our inherent power to protect the integrity of the judicial process within this Circuit. *Id.* at 356.

Demjunjuk's Court ruled: "Upon a final determination the Court vacated defendant's extradition order on the grounds that Plaintiff's withholding of

evidence, regardless of whether it was knowingly accomplished, amounted to a severe fraud on the Court." Outcome: Defendant was granted his Motion to Vacate an Extradition Order, where Plaintiff engaged in misconduct by not disclosing information that could possibly lead to a conviction of another party. The Court held that, although Plaintiff's withholding of such information was not proven to be intentional, it still amounted to fraud on the Court. *Id.* at 338.

This is what occurred in Petitioner Viera's case with the only difference being that in this case the State's habeas counsel's abhorrent misconduct is proven to be intentional and deliberate.

"In simple English," the Rule 60(b)(6) "vests power in Courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). It "reflects and confirms the Courts' own inherent and discretionary power 'firmly established in English, practice long before the foundation of our Republic, to set aside a judgment whose enforcement would work inequity.'" *Plaut*, 514 U.S. at 233-34 (quoting *Hazel-Atlas*, 322 U.S. 238, 244 (1944)). See also *Liljeberg v. Health Services Acquisition Corp.* 486 U.S. 847, 863-64 (1988).

Ms. Rodriguez as State's habeas counsel did not show respect for other human beings' lives, when we find up and we realize how heinous and harsh and unusual such a State habeas attorney's misconduct is.

See *Publicker v. Shallcross*, 106 F. 2d 949, 952 (3d Cir. 1939), cert. denied, 308 U.S. 624, 60 S. Ct. 379, 84 L. Ed. 521 (1940))"We believe truth is more important than the trouble it takes to get it.") Ms. Rodriguez "Justice is late but prevails."

We are keenly aware that the State's habeas counsel Ms. Rodriguez fraudulent activities strikes at the heart of the District Court's truth finding function, and we can find the best evidence of it in the Magistrate's Report (DE# 21, pg. 27-28) recommended denial of Petitioner's § 2254 petition Ground Five.

The District Court refused to consider Petitioner's Rule 60(d)(3)(1) in the mistaken belief that "the Eleventh Circuit addressed, and rejected, all arguments Petitioner raises in the Motion to Set Aside under Rule 60(b)." See Appendix B, pg. 5. The Circuit Court decision (Appendix A, pg. 6) stated "The record shows that the substantive issues raised in Viera's Rule 60 Motion are nearly identical to those raised in this 2013 petition and again in his 2019 Motion for Leave to file a second or successive petition."

The lower Courts in Viera's case has overlooked, or ignored that in order "to prevent a manifest injustice and a denial of due process, relief may be afforded even to a litigant raising a successive claim." *Stephens v. State*, 974 So. 2d 455, 457 (Fla. 2nd DCA 2008).

In Justice Steven's words: "After all, a claim of prosecutorial fraud does not rely on 'a new rule of constitutional law' and may not 'establish by clear and convincing evidence that...no reasonable fact finder would have found the applicant guilty of the underlying offense.' 28 U.S.C. 2244(b)(2) [28 U.S.C.S 2244(b)(2)] See *Abdur' Rahman*, supra at 537 U.S. 96. It is a claim that nonetheless must be recognized." *Mobley v. Head*, 306 F. 3d 1096, 1100-1105 (CA 11 2002) (dissenting opinion). Perhaps is necessary to compare Circuit Court's denial of Petitioner's § 2244(b) petition (See Rule 60 Motion, pg 5 and Appendix A, pg. 3) with Justice Steven's opinion before mentioned to determine that Petitioner's Rule 60(d)(3)(1) was the correct vehicle to present his claim of fraud

on the Court during his habeas corpus proceeding, (See Rule 60 Motion, pg. 1-3, 8-20) a defect beyond doubt in its integrity.

Under the broader standard, an allegation of fraud against the State trial prosecutors could be sufficient to mandate an evidentiary hearing on whether the State's habeas counsel committed the same fraud on the habeas Courts. See *Buell*, 48 Fed. Appx 500 (6th Cir. 2002). Here, there is not any misconduct on part of the State's Federal habeas counsel, because the misconduct alleged by *Buell* is that of Judge Wiest, who was not an officer of the Federal Court. But Viera alleges that in his case the State's habeas counsel Ms. Rodriguez, during habeas corpus proceeding was engaged with her colleagues of the State Courts in this evil adventure (conspired master plan) described as a deliberately planned and carefully executed scheme designed to subvert the integrity of the judicial process, and/or with their obstruction of the justice, to exert improper influence on the Court so that the integrity of the Court and its ability to function impartially was directly impinged.

Every element of the fraud here disclosed demands the exercise of the historic power of equity to set aside fraudulently begotten judgments. *Hazel-Atlas*, supra, *Id.* at 245, 64 S. CT. at 1001. This is not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury. Here....we find a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals. Proof of the scheme and of its complete success up to date, is conclusive. *Id.* at 245-46. These statements are applicable to Petitioner's case.

In *Browning*, 826 F. 2d 335 (5th Cir. 1987) where the Court affirmed in part,

reversed in part and remanded to allow consideration of Defendant debtor's claim that the trial Court judgment was procured by fraud, the Court reasoned {826 F. 2d 344}...Although *Hazel-Atlas* presents facts more akin to the elements of common law fraud, i.e., misrepresentation {1987 U.S. App. LEXIS 25} and reliance (as Petitioner Viera's case presents as well), than we have before us, it involves an additional element that is alleged here: The involvement of parties' attorneys. Indeed, *Hazel-Atlas* might be read to suggest that once the determination is made that officers of the Court have corruptly abused the judicial process, the Court is not required to examine the effect that such conduct might have had on the ultimate judgment, but rather the Court may rely on such conduct alone to set aside the judgment. We make this observation because... *Hazel-Atlas* allowed a judgment to be attacked on the basis of intrinsic fraud that results from corrupt conduct by officer of the Court. See Footnote 12 as applicable to Viera's case.

In *Bressman*, 874 F. 3d 142 (3rd Cir. 2014) *Bressman's* counsel argued (as Petitioner Viera did so) that "If the were ever a case to vacate a judgment based upon fraud on the Court, its this case. There is no question that Mr. Folkenflik (as Ms. Rodriguez in Petitioner's case) intentionally concealed and affirmatively {2017 U.S. App. LEXIS 9} misrepresented critical facts to this Court in an effort to obtain undescrved {874 F. 3d 148} double recovery for his clients and enormous fees for himself."

Petitioner believes that, there is a possibility Ms. Rodriguez was bribed when she had engaged with her State Attorney colleagues in this misadventure in Court. It is clear that not any lawyer would risk his/her attorney's license if something is not recovered or it is beneficial, and, no one is so ignorant in to proceed as Ms. Rodriguez did so, especially in the fact that she did not find evidence in the record to support State Attorney's misleading position. There is

something (bribery, favors, friendship) that convinced Ms. Rodriguez in continuing to advance a State's fraudulent position during the Federal habeas corpus proceeding.

The Circuit Court is apparently of the view that if they would have found in the record any evidence that Ms. Rodriguez knowingly misrepresented and failed to disclose pertinent facts, then they would have granted Petitioner's Rule 60(b) Motion. See Appendix A, pg. 7. With all due respect to the Circuit Court, the record is replete with evidence that the State's Federal habeas counsel knowingly misled, deceived, and misrepresented facts to the Court and also failed to disclose critical exculpatory evidence requested by District Court and Petitioner.

One thing to always keep in mind is the evidence or the type of evidence presented in any litigation. After analyzing Petitioner's true arguments and the evidence presented in support of said arguments named C.I.'s Court docket sheet and his criminal cases (Rule 60 Motion, Exhibit A), the Court documents known by every officer of every Court, remains the question:

Can a Judge, prosecutor, lawyer, clerk and etc. say that Ms. Rodriguez as an officer of the Court was not aware that the C.I. in her case was under State supervision at the time nor that the existence of the C.I.'s Court docket sheet? She was fully aware (There is not precedent in facts or law directed to the contrary) of C.I. true information and whereabouts because she maliciously questioned both issues.

When we see that the District Court relied on misleading information to deny Petitioner's § 2254 petition, Ground Five (See Appendix A, pg. 2-3), and the State's habeas counsel committed extrinsic fraud on the Court that prevented the Petitioner from fully and fairly presenting the arguments made here before his

original Federal habeas petition was denied in 2013, we see also that the best course this Court could take would be simply to punish the wrongdoers because the evidence presented in this case indicates a need to correct a clear defect in habeas corpus proceeding that seriously affected the fairness, integrity and public reputation of judicial proceeding, and a grave miscarriage of justice suffered by the Petitioner.

Petitioner Viera is entitled to a fair trial. He has not had it. Certainly the undenied facts alleged here along with the undenied exculpatory evidence in support presented justify setting aside the order and final judgment denying Petitioner's 28 U.S.C. § 2254 petition. Fair hearings are in accord with elemental concepts of justice and the language of the "other reason" clause of 60(b) is broad enough to authorize the Court to set aside an above mentioned final judgment and grant Petitioner a fair hearing. See *Klapprott v. United States*, 335 U.S. 601 at 615.

This Court should bear in mind that risk that the denial of relief in this case will produce injustice in other cases. There simply no reason to permit this to happen to other Courts and other inmates, and the risk of undermining the public's confidence in the judicial process. This Court must continuously bear in mind that "to perform its high function in the best way justice must satisfy the appearance of justice." See In re *Murchison*, 349 U.S. 133, 136, 99 L. Ed 942, 75 S. Ct. 623 (1955) (citation omitted).

Again, there is simply no reason to permit this to happen to other inmates by subjecting them to a lawyer's abuse of power. State's habeas counsel Ms. Rodriguez was allowed the privilege of a license to practice law and to provide good representation as the public deserves, and she has blatantly abused and misused that license and the trust that must be attached to that privilege.

Dishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members. This Court should be severe enough to deter others who might be prone or tempted to become involved in like misconduct.

After some years of success, Ms. Rodriguez frustrated due to the discovery of her flagrant fraud on the Court brought by Petitioner to the knowledge of the Court through the judicial process afforded by the Rules of Civil Procedure under Rule 60(b), she appealed to technicalities in hope that Petitioner's Rule 60(b) Motion will be barred due to the fact that she cannot deny what she did, so this Court should expressly hold that in this case technicalities do not overcome a serious pattern of misconduct.

In *Hael-Atlas*, supra, *Id.* at 322 U.S. 250 <*pg. 1258> the question remains as to what disposition should be made of this case. Hartford's fraud (representing Ms. Rodriguez's fraud and her colleagues in Petitioner Viera's case), hidden for years but now admitted (uncovered in Viera's case) had its genesis in the plan to asserting mislead information concerning the C.I.'s identity, whereabouts, and involvement in this case for the deliberate purpose of deceiving the State Courts, District Federal Court and the like. The plan was executed and the State prosecutor's misleading statement was put to fraudulent use during all the proceeding contrary to law. From there the trial of fraud continued, without break through State Courts and up to the District Court. Had the District Court learned of the fraud on the State Court, it would have been warranted in reversal of Petitioner's case for at the minimum a new trial. So, also, could the District Court have dismissed Petitioner's conviction had it been aware of Ms. Rodriguez's corrupt activities in suppressing the truth concerning the C.I. requested by Magistrate Judge. The total effect of all this fraud, practiced both on the State Courts and the District Court during habeas proceedings, calls for nothing less than

a complete grant of relief to Petitioner Viera.

CONCLUSION

The Petitioner Viera maintains his innocence and so contends that had it not been for State's habeas counsel's egregious misconduct and fraud upon the Court, when looked at through the totality of circumstances, this conviction would not had been possible and the outcome of his § 2254 proceeding would had been different. The Petitioner respectfully prays that this Honorable Court grants his Petition for a Writ of Certiorari.

Respectfully submitted,

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Date: January 25, 2021.