

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

PROVIDED TO
SOUTH BAY CORRECTIONAL FACILITY
ON 3-2-18 FOR MAILING

DIEGO OMAR NUÑEZ,

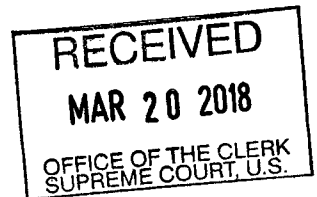
Petitioner,

VS.

JULIE JONES,

*Secretary, Florida Department of Corrections,
Attorney General, State of Florida,*

Respondents.



ON PETITION FOR A WRIT OF CERTIORARI TO
THE U.S. ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Diego Omar Nuñez DC#M02134
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SOUTH BAY, FLORIDA 33493

QUESTIONS PRESENTED

QUESTION ONE

1. Whether a *Brady* violation extends to the material evidence withheld prior the trial all the way through the § 2254 federal habeas proceedings preventing the habeas petitioner from adequately presenting a constitutional claim, allowing the § 2254 habeas petitioner to reopen his federal petition under Rule 60(b)?

QUESTION TWO

2. Whether pursuant to *McCarthy v. Bronson*, 500 US 136 (1991) and the Federal Magistrate's Act entitle a § 2254 habeas petitioner to a Magistrate Judge's evaluation as a component of the petitioner's one full round of federal review?

QUESTION THREE

3. Whether the Constitution was violated when a Federal District Judge to disqualify herself during the federal habeas proceedings for lack of impartiality under 28 USC § 455 (a) because the judge had personal knowledge from the initial investigation of disputed evidentiary facts concerning the proceedings?

LIST OF PARTIES

- ☒ 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:

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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 A to the petition and is

☐ reported at _____; or

☐ has been designated for publication but is not yet reported; or

☒ is unpublished.

☐ For cases from state court:

The opinion of the 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

☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was October 18, 2017. A copy of that decision appears at Appendix A.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeal on the following date: December 5, 2017 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. _____.

☐ For cases from state court:

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

☐ No petition for rehearing was timely filed in my case.

☐ 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. _____

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

The Fourteenth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV.

28 U.S.C. § 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate [magistrate judge] serving under this chapter [28 USCS 631 et seq.] shall have within the district in which sessions are held by the court that appointed the magistrate judge, at other places where that court may function, and elsewhere as authorized by law--

(b) (1) Notwithstanding any provision of law to the contrary--

(B) a judge may also designate a magistrate [magistrate judge] to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial [post-trial] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

28 U.S.C. § 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e) (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS 2254].

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate [magistrate judge]

(a) Any justice, judge, or magistrate [magistrate judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

STATEMENT OF THE CASE

Diego Nuñez is a Florida prisoner serving a 25-year sentence for conspiracy to traffic in heroin and trafficking in heroin. In 2007, Mr. Nuñez filed a *pro se* 28 U.S.C. § 2254 petition for a writ of habeas corpus, raising four claims of ineffective assistance of counsel. He claimed that counsel: (1) failed to interview and depose two of his codefendants; (2) failed to hire a certified drug expert to assist in explaining to the trial judge and the jury the effects of the heroin on a drug abuser in order to undermine the credibility of two of the state's witnesses; (3) conceded Mr. Nuñez's guilt to lesser offenses during closing arguments without advising him of such a strategy or obtaining his consent; and (4) failed to seek the suppression of illegal wiretap transcripts and evidence that was illegally seized from a hotel room. Mr. Nuñez also moved the district court for leave to proceed *in forma pauperis* ("IFP").

The district court denied Mr. Nuñez's motion for IFP status. After the state responded and Mr. Nuñez replied, the district court denied Mr. Nuñez's § 2254 petition in May 2009, determining that Mr. Nuñez failed to show that he was entitled to habeas relief on the merits of each claim. Mr. Nuñez appealed the denial of his § 2254 petition, and moved the Eleventh Circuit Court of Appeals for a COA. A judge of the Eleventh Circuit denied Mr. Nuñez's motion for a certificate of appealability ("COA") because he failed to make a substantial showing of the denial of a constitutional right.

In January 2017, Mr. Nuñez filed a motion for relief from the district court's

judgment denying his § 2254 petition, pursuant to Fed. R. Civ. P. 60(b). Mr. Nuñez argued that there was a “complete catastrophe to the integrity of the criminal justice system” during his habeas proceeding because the district court did not first have a magistrate judge review his § 2254 petition before issuing its ruling. He asserted that he was entitled to “one full round of federal habeas corpus review,” which included review by a magistrate judge. He also argued that the state prevented him from adequately showing that he was entitled to relief on Claim 4 of his § 2254 petition because the state withheld the affidavit in support of the wiretap. He also argued that the police destroyed the search warrant for his hotel room and falsified a number of documents presented during his criminal proceeding. He argued that these documents constituted newly discovered evidence, and that, based on this new evidence, it was more likely than not that no reasonable juror would have convicted him. Mr. Nuñez relied on *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), which held that a state prisoner may show cause to overcome a procedural default on a claim raised in federal habeas proceedings through a claim of ineffective assistance of counsel, to support his newly-discovered-evidence argument, and noted that he did not have counsel during his post-conviction proceedings in state or federal court.

Mr. Nuñez further argued that (1) the district court judge should have disqualified herself from reviewing his § 2254 petition because she authorized the government’s application for a wiretap in the criminal investigation of Nuñez and his codefendant, (2) he should be permitted to raise procedurally defaulted claims

for the first time in a second or successive § 2254 petition, (3) the court's order denying his § 2254 petition was a "grave miscarriage of justice," and (4) he had diligently pursued his rights. Thus, he argued he was entitled to relief from the court's judgment denying his § 2254 petition under Rule 60(b)(6). Mr. Nuñez also requested an evidentiary hearing on his Rule 60(b) motion.

The district court denied Mr. Nuñez's Rule 60(b) motion, finding that Mr. Nuñez had not filed his motion within a reasonable time because he filed it almost eight years after the entry of the court's order denying his § 2254 petition. Additionally, the court determined that Mr. Nuñez failed to provide support for the relief requested and failed to show there were extraordinary circumstances warranting relief under Rule 60(b).

In May 2017, Mr. Nuñez filed a motion for rehearing of his Rule 60(b) motion. He argued that he raised extraordinary circumstances that warranted relief under Rule 60(b)(6). He also argued that the court misapprehended the permissible time frame for filing a Rule 60(b)(6) motion because *Martinez* constituted a change in law with regard to Claim 4 of his § 2254 petition. Finally, he argued that the court misapprehended the significance of the state's withholding of the affidavit in support of the wiretap warrants. Mr. Nuñez also moved to have the district judge disqualified from the remainder of his habeas proceedings and moved the court for a COA. The district court denied Mr. Nuñez's motion for rehearing, for disqualification of the district judge, and a COA.

Mr. Nuñez then moved the court for leave to appeal *in forma pauperis*, which

the district court denied. Nuñez then sought to appeal the district court's orders denying his Rule 60(b) motion, and his motions for rehearing, for disqualification of the district court judge, and for a COA.

ISSUES PRESERVED ON APPEAL

On appeal, Mr. Nuñez raised the following two issues to the Eleventh Circuit Court of Appeals:

- (1) The State deprived Mr. Nuñez of material evidence, which prevented him from adequately presenting his ineffective-assistance-of-counsel claims in the § 2254 federal habeas proceedings.
- (2) Second, Mr. Nuñez argued that habeas petitioners are entitled to a Magistrate Judge as part of full round of federal review of their § 2254 habeas petitions.
- (3) Mr. Nuñez alleged that District Judge Ann Conway should have been disqualified under 28 U.S.C. § 455 because she was the same judge, who had personal knowledge, on the wiretap warrant and the § 2254 habeas proceedings.

On October 18, 2017, the Eleventh Circuit Court of Appeals issued a opinion denying Mr. Nuñez's Rule 60(b) Motion for Relief from Judgment.

This appeal to the Supreme Court of the United States follows...

REASONS FOR GRANTING THE PETITION

This case presents questions that would address issues concerning fundamental fairness of criminal prosecutions and review of § 2254 federal habeas corpus proceedings.

Mr. Nuñez presents compelling questions, if answered, would change the way that § 2254 federal habeas petitions are reviewed. The scope of his argument would prevent the States from obtaining an upper hand in habeas proceedings by withholding material evidence against the accused for habeas purposes. This Court has the opportunity to address concerns about § 2254 federal habeas proceedings.

This case gives an illuminating look into habeas proceedings, which delves into a constitutional aspect to promote dignity and fairness in judicial proceedings:

Question One: Whether a *Brady violation* extends to the material evidence withheld prior the trial all the way through the § 2254 federal habeas proceedings preventing the habeas petitioner from adequately presenting a constitutional claim, allowing the § 2254 habeas petitioner to reopen his federal petition under Rule 60(b)?

The instant case respectfully requests the Supreme Court to implement a constitutional rule to maintain the integrity and dignity of habeas proceedings by disclosing all material evidence to criminal defendants' so they can properly present their constitutional claims to the federal court.

Mr. Nuñez was deprived of his Fourteenth Amendment due process rights when the State government withheld the Affidavit in Support of the wiretap warrant. He was prevented from properly presenting his Ineffective Assistance of Trial Counsel claim in his § 2254 federal habeas petition because the prosecution

team withheld important material, which would have allowed him to adequately glean constitutional issues and delineate and marshal the facts and present a persuasive legal argument for the habeas court to obtain federal habeas relief.

After a diligent investigation, the Affidavit in Support of the Wiretap was discovered for the first time on August 11, 2015. This material evidence demonstrates that Mr. Nuñez was not named in the **Affidavit in Support** and was never supposed to be under surveillance by any agency. When the police realized that his name was not in the affidavit in support, he alleges the police engaged in misconduct by *manufacturing probable cause* to arrest Mr. Nuñez make him the target of any investigation. Mr. Nuñez contends that the police/prosecution team withheld this information so that they would have the advantage in court and he would be unable to defend himself. Alternatively stated, the State engaged in an unconscionable plan or scheme that was designed to improperly influence the court in its decision, when government agents claimed they had probable cause, when in fact they did not have probable cause.

Furthermore, Mr. Nuñez asserts that the police destroyed the search warrant for the hotel room because he was not the subject of the investigation and he was the incorrect suspect. The police believed that if they hide the fact that, in reality, they did not have authority to search his hotel room then he would be unable to suppress the evidence obtained in the illegal search. It is Nuñez's position that this newly discovered evidence vitiates the convictions imposed on him.

Mr. Nuñez asserts that the State violated *Brady* by failing to provide him

with exculpatory or impeaching evidence in the possession of the police in respect to **Affidavit in Support**, the destruction of the alleged search warrant, all of which handicapped Nuñez ability to investigate or present other aspects of the case. Under *Brady*, the government's suppression of favorable evidence violates a defendant's due process rights under the Fourteenth Amendment. See *Brady*, 373 U.S. at 86 (suppression of confession is violation of Due Process Clause of Fourteenth Amendment).

Mr. Nuñez argues that a Brady violation does not only apply to material evidence withheld prior to trial, but impeaching or exculpatory evidence that had not been disclosed all throughout postconviction and § 2254 federal habeas proceedings as well. This is unfair to the habeas petitioner because throughout the trial and postconviction proceedings the State withheld pertinent documentation and this prejudiced the ability of the § 2254 habeas petitioner from presenting meaningful constitutional claims.

Question Two: Whether pursuant to *McCarthy v. Bronson*, 500 US 136 (1991) and the Federal Magistrate's Act entitle a § 2254 habeas petitioner to a Magistrate Judge's evaluation as a component of the petitioner's one full round of federal review?

Mr. Nuñez raises a compelling constitutional question regarding the Magistrate's role in § 2254 federal habeas proceedings.

Mr. Nuñez insists that habeas petitioners are entitled to review of their § 2254 petitions by a Magistrate Judge prior to a ruling by the United States District Court Judge. He contends that since a habeas petitioner is entitled to one full round

of federal habeas review, this includes the benefit of a Magistrate Judge.

Mr. Nuñez affirmatively asserts that one full round of federal habeas corpus review includes a full and fair evaluation by a Magistrate Judge. In turn, the deprivation of a Magistrate affected Mr. Nuñez's ability to articulate and preserve issues for appellate review. As a matter of equity, Mr. Nuñez argues that the majority of other prisoners under 28 U.S.C. § 2254 are afforded a Magistrate Judge to evaluate their habeas petitions and justice would require that each prisoner be treated equally as they all are entitled to *one full round of federal habeas review*.

Mr. Nuñez submits and contends that there was a defect in the habeas proceedings, which undermined the integrity of the order and judgment rendered on May 13, 2009 and May 14, 2009, respectively, by the Chief Judge Anne C. Conway, where she denied the Mr. Nuñez to his entitlement of one full round of habeas review by completely circumventing or entirely bypassing the job of the Magistrate Judge and depriving the habeas petitioner of the opportunity to object to the findings of the District Court when the Magistrate Judge was excluded from the most crucial part of the habeas proceedings. The Chief Judge arbitrarily and surreptitiously subverted the power of the Magistrate Judge by denying the Magistrate Judge Gregory J. Kelly from evaluating the § 2254 federal habeas petition and allowing the Magistrate to have an opportunity to provide the District Court with a report and recommendation.

This would have given Mr. Nuñez an opportunity to provide the District Court with his objections and a *de novo* review of the merits of the constitutional

claims raised in the § 2254 habeas petition. It is Mr. Nuñez's position that the Due Process Clause of the Fourteenth Amendment protects against the arbitrary actions of the Federal District Court; in this case, the District Court assigned a Magistrate Judge and then inextricably emasculated the Magistrate Judge of their duties to review and render an opinion on the instant habeas petition. The arbitrary and covert action of eradicating the Magistrate Judge from the instant habeas proceedings deprived Mr. Nuñez of the capability of preserving issues for appeal.

Mr. Nuñez avers that Congress intended that a Magistrate Judge participate in the review of a § 2254 Habeas Corpus petition and is a meaningful component of the habeas proceedings. He asserts that a Magistrate Judge is an integral part of his one full round of habeas proceedings. *See McCarthy v. Bronson*, 500 U.S. 136, 140 (1991) ("Congress intended to include in their entirety" in category of matters that district court may refer to magistrate judge for recommended disposition on merits of underlying suit "the two primary categories of suits brought by prisoners—applications for habeas corpus relief pursuant to 28 U.S.C. §§ 2254 and 2255 and actions for monetary or injunctive relief under 42 U.S.C. § 1983").

The Federal District Court initially designated a Magistrate Judge to review the instant § 2254 habeas petition. The Magistrate Judge issued orders on November 19, 2007; January 8, 2008; January 17, 2008, and March 5, 2008, prior to Mr. Nuñez submitting his Reply brief to the response from the State of Florida. However, the Magistrate was never afforded an opportunity to make his own determinations of the constitutional violations raised herein; thus denying Mr.

Nuñez a fair opportunity to make his objections to any report and recommendations, prior to the Chief Judge making her own determination. The District Court emasculated the constitutional court of a Magistrate Judge.

The legislative history of the 1979 Act that Congress intended that § 636(c) reach habeas corpus or § 2255 proceedings—or even that it considered that such a situation might occur. Instead, the history expresses concern for the plight of private civil litigants. See, e.g., *Id.* (“The bill recognizes the growing interest in the use of magistrates to improve access to the courts for all groups, especially the less-advantaged. The latter lack the resources to cope with the vicissitudes of adjudication delay and expense. If their civil cases are forced out of court as a result, they lose all their procedural safeguards.”)

Although the Supreme Court has not squarely addressed the question regarding the constitutional duties of Magistrate Judges, it has indicated that § 636 (c) is constitutional as applied to run-of-the-mill civil cases. *See Roell v. Withrow*, 538 U.S. 580, 590, 123 S. Ct. 1696, 1703, 155 L. Ed. 2d 775 (2003) (reasoning that a rule allowing for implied consent under § 636(c) is preferable because “[j]udicial efficiency is served; the Article III right is substantially honored.”).

Mr. Nuñez contends that a Magistrate Judge would make the process of reviewing prisoners habeas petitions more efficient and would clear up any potential misunderstandings with their constitutional claims to simplify the rigorous appellate review for the Federal Circuit Court Judges.

Mr. Nuñez affirmatively asserts that one full round of federal habeas

corpus review includes a full and fair review by a Magistrate Judge. In turn, the deprivation of a Magistrate affected Mr. Nuñez's ability to articulate and preserve issues for appellate review. As a matter of equity, Mr. Nuñez argues that the majority of other prisoners under 28 U.S.C. § 2254 are afforded a Magistrate Judge to review their habeas petitions and justice would require that each prisoner be treated equally as they all are entitled to *one full round of federal habeas review*.

Question Three

Whether the Constitution was violated when a Federal District Judge to disqualify herself during the federal habeas proceedings for lack of impartiality under 28 USC § 455 (a) because the judge had personal knowledge from the initial investigation of disputed evidentiary facts concerning the proceedings?

This question brings the debate whether the same judge who presided over the Wiretapping proceeding on October 4, 1999 can preside on the later-filed § 2254 federal habeas corpus petition in 2009. This is a debatable question that will determine the fairness of judicial proceedings when a judge has personal knowledge of a case and later presides over every court proceeding involving a habeas petition, without permitting another judge to review the nature of the constitutional claims and with a usurpation of the Magistrate Judge's review of the habeas claims. *Whether a habeas petitioner is entitled to a fair review of his habeas proceedings with the fresh eyes of a new judge without being prejudiced by the same judge who initiated the pre-arrest investigation into the criminal defendant's alleged practices?*

The Chief Judge Anne C. Conway, who presided over the instant habeas petition in the U.S. District Court for the Middle District of Florida in Case #6:07-

cv-1836-Orl-22GSK, was the same arbiter who presided over the Wiretap proceeding in Case # 6:99-mc-0096-ACC. Judge Conway had a conflict of interest where she had personal knowledge over the instant case and the issue that Mr. Nuñez presented in his §2254 petition regarding the search warrant/order that happens to have been withheld from him throughout this postconviction process. This federal judge should have been disqualified from acting in the instant proceeding in which the judge's impartiality "might reasonably be questioned."

Under 28 U.S.C. § 455, a party may request the recusal of a judge not only if he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding, 28 U.S.C.S. §455(b)(1), but also when his impartiality might be reasonably be questioned. 28 U.S.C.S. § 455 (a). These provisions afford separate, though overlapping, grounds for recusal. 28 U.S.C.S. §455(b)(1) pertains to specific instances of conflicts of interest, while 28 U.S.C.S. § 455 (a) deals with the appearance of partiality generally. Further, whenever a judge's partiality might reasonable be questioned, recusal is required 28 U.S.C. § 455 (a), irrespective of whether the circumstance is covered by 28 U.S.C. § 455(b).

In determining whether a judgment should be vacated for a violation of § 455, it is appropriate to consider (a) the risk of injustice to the parties in the particular case, (b) the risk that the denial of relief will produce injustice in other cases, and (c) the risk of undermining the public's confidence in the judicial process; (5) a court, in making such a determination, must continuously bear in mind that, in order to

perform its function in the best way, justice must satisfy the appearance of justice.

It is Mr. Nuñez's position that the Chief Judge Anne Conway should not have proceeded over his § 2254 federal habeas petition because she had personal knowledge from the October 4, 1999 wiretap proceedings regarding specific facts in his case. Judge Conway was previously involved in a separate federal investigation of Mr. Nuñez and his co-defendants. The merits of the underlying litigation suggest that there is a greater risk of unfairness in upholding the judgment than in allowing a new judge to take a fresh look.

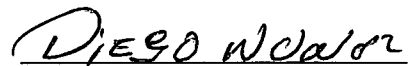
Mr. Nuñez avers that District Judge Conway reviewed and investigated an application by former federal prosecutor Paul Byron (now a United States District Judge for the Middle District of Florida). As a matter of fairness, Mr. Nuñez submits that his habeas petition must be reviewed by an objective and impartial arbiter who will see the case for the first time.

CONCLUSION

The petition for a writ of certiorari should be granted. Mr. Nuñez requests that this court accept jurisdiction of his certiorari to promulgate rules in accordance with the questions presented for fair § 2254 federal habeas proceedings.

Dated this 2 day of March 2018.

Respectfully Submitted,



Diego Omar Nuñez

DC# M02134

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