

No. _____

I N T H E
SUPREME COURT OF THE UNITED STATES
October Term, 2017

JAVIER YEBRA,

Petitioner

-vs-

**LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,**

Respondent

**PETITION FOR WRIT OF CERTIORARI
T O T H E
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

**JAVIER YEBRA, pro se
Robertson Unit, TDCJ No. 1642491
12071 FM 3522
Abilene, Texas 79601-8799**

Petitioner

QUESTIONS PRESENTED

1. Did the Fifth Circuit err when it refused to follow precedent that had been established by the Supreme Court of the United States, and Fifth Circuit precedent, and extend the benefit of Trevino v. Thaler, 569 U.S. ___, 133 S.Ct. 1911 (2013), and Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309 (2012), to the procedural default regarding Petitioner's new evidence, in the form of an affidavit executed by an expert forensic pathologist, that had been presented for the first time in federal court, in support of his ineffective-assistance-of-counsel claim, when the Fifth Circuit had already recently done so in a case that had been remanded by the Supreme Court, on this very same question now being presented herein?

Did Petitioner obtain all of the available federal review on his ineffective-assistance-of-counsel claim under the authority established by this Court in Trevino and Martinez?

2. As a question to consider res nova, where a State's case relies primarily on the testimony and opinion of an expert witness regarding a crucial fact of consequence; that is subject to varying expert opinion, should the trial court judge be required to appoint an expert for the defense, sua sponte, to satisfy the principle of an "appearance of justice," and to avoid any "appearance of partiality," where any failure to do so might raise questions of bias, running afoul of the Due Process Clause of the Fourteenth Amendment requiring a fair trial, in a fair tribunal, before an impartial judge?

LIST OF PARTIES

All the parties in this action appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
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JAVIER YEBRA, Petitioner

-vs-

LORIE DAVIS, Director, T.D.C.J., C.I.D.,

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW Javier Yebra ("Yebra"), pro se, and respectfully petitions this Honorable Court for a writ of certiorari to review the correctness of the United States Court of Appeals for the Fifth Circuit's refusal to grant Petitioner a certificate of appealability for appealing the district court's denying Petitioner's petition for habeas relief.

OPINIONS BELOW

1. The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished, but a copy is attached hereto at APPENDIX A.
2. The opinion of the United States district court is unpublished, but a copy is attached hereto at APPENDIX B.

JURISDICTION

1. The date on which the United States Court of Appeals denied my Petition for a Certificate of Appealability was _____, 2017.
2. A timely petition for rehearing was denied by the United States Court of Appeals on _____, 2017, and a copy of the order denying rehearing appears at APPENDIX C.
3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. UNITED STATES CONSTITUTION, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to having a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

B. UNITED STATES CONSTITUTION, Amendment XIV

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that:

No State shall ... 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

The Petitioner, Javier Yebra ("Yebra"), and the Complainant, Darlene Flores ("Flores"), met at a bar in Cactus, Texas. After the bar closed, Yebra and Flores ended up on her front porch where, after being informed through a telephone call from her boyfriend informing Flores that he was on his way over, she told Yebra that he had to leave. Yebra did not want to leave because he was so drunk that he was unable to drive himself home, and wanted to ask Flores' aunt, with whom Flores lived, if she would let him spend the night to sober up. Flores got mad and began hitting Yebra, and they both slipped and fell from the porch, with Flores landing on a pile of empty beer bottles, with Yebra on top of her. Flores picked up a beer bottle and busted it over Yebra's head, and raked the broken end of the bottle down the side of Yebra's head, slicing his earlobe, and then swung the bottle and cut open Yebra's left hand. Yebra panicked because he could not see due to the blood running into his eyes, and he began punching Flores with his fists in efforts to stop her from hitting and cutting him. Flores ran from Yebra towards a car parked in the yard, and Yebra chased after her. She ran around and around the parked car, with Flores always keeping the car between her and Yebra. Yebra gave up the chase when he realized that he was bleeding profusely, and decided that he had better drive himself to the hospital to get medical attention. On his way to the hospital, he was pulled over by a police officer and taken into custody. Flores had sustained bodily injuries as a result of her falling atop the pile of beer bottles, some of which were broken.

Yebra had not had any type of knife or cutting instrument whatsoever during his altercation with Flores, nor had any been found at the scene, or in Yebra's car. In trial testimony, the three witnesses to the fight, Flores' aunt and two cousins, stated that they had never seen any knife, and Flores herself stated that she had never seen Yebra holding a knife. Yet, Yebra was convicted, solely on the ipse dixit opinion of a forensic pathologist testifying for the State, a

doctor who had never examined Flores, and had never even seen her or talked to her prior to the trial. Specifically, the doctor had never examined Flores' injuries and wounds, but surmised that they had "most likely" been caused by either "a knife or knife-like object," by merely looking at photographs.

Yebra was deprived of having a fair trial with a reliable result because of not having a medical forensics expert to assist with his defense.

SUMMARY OF THE ARGUMENT

I. On appeal, among other things, Yebra claimed that he had received ineffective assistance of counsel during his trial as the result of his attorney's complete failure to investigate, or his unreasonable investigation, into the medical records and photographs of Flores' injuries; counsel's failure to consult with and obtain the assistance of an expert witness to assist in his defense and for rebutting the State's expert witness. Due to his poverty during his State habeas proceeding, Yebra had no counsel to help him secure the medical records and digital photo images of Flores' injuries, for presenting to an expert witness who could then develop favorable evidence in support of his ineffective assistance of counsel claim. As a result of his inability, Yebra did not present any expert affidavits in State court to support his claim, and the State habeas court denied relief.

During federal habeas proceedings in the United States District Court, with the assistance of the Director of the Taylor County Law Library, Yebra was able to purchase the complaint's medical records and digital copies of the images of her injuries that had been entered as evidence during trial, and present them to an expert who executed an affidavit in support of Yebra's defense. Before the District Court ruled on the merits of Yebra's ineffective assistance of counsel claim, he attempted to supplement his federal habeas petition with the expert's affidavit, urging that Trevino v. Thaler excused his failure to exhaust the affidavit in State court. The District Court ruled that Trevino v. Thaler did not apply to excuse the default of new evidence presented for the first time in federal court. Without the affidavit, the District Court found Yebra's ineffective assistance claim to be "only conclusory," and denied relief.

On appeal, the Fifth Circuit refused to acknowledge its recent holding in Newbury v. Thaler that Trevino and Martinez excuses a failure to exhaust new evidence presented for the first time in federal court, and denied Yebra's appli-

cation for a certificate of appealability, effectively affirming the District Court's procedural ruling, ignoring Supreme Court precedent. Consequently, Yebra was not afforded review of the merits of his ineffective assistance of counsel claim.

II. Both, the federal district court and the Fifth Circuit construed Yebra's claim that he had been deprived of the benefit of a forensic pathologist for his defense as being a claim that the State trial court judge erred by not appointing an expert sua sponte. Accordingly, Yebra urges this Honorable Supreme Court of the United States to take up the issue, res nova, that its precedents regarding "the appearance of justice," in conjunction with Ake v. Oklahoma, require a trial judge to, on its own motion, appoint an expert to assist the defense when it is seen that the trial will largely turn on the testimony of an expert that the state has retained to urge its theory. In the absence of doing so, it may appear that the judge is unfairly partial to the state for allowing the trial to proceed on such an unfair and unequal playing field.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S MISAPPLICATION OF THE CAUSE STANDARD OF TREVINO AND MARTINEZ WARRANTS THIS COURT'S ATTENTION.

The Fifth Circuit and District Court misapplied the Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309 (2012), and Trevino v. Thaler, 569 U.S. ___, 133 S.Ct. 1911 (2013), holdings regarding cause for excusing a procedural default in regard to an ineffective assistance of counsel claim. First, Yebra points out that the issue he now presents to this Honorable Court in this petition, has already been presented to this Court in a prior case, and the Court granted certiorari in that case. See Newbury v. Thaler, 133 S.Ct. 2765 (2013).

In Newbury v. Thaler, the Fifth Circuit held that Newbury's ineffective assistance of counsel claim, that had been presented for the first time in federal court, was procedurally barred. 437 Fed.Appx. 290, 295 n.2. This Court vacated the Fifth Circuit's judgment and remanded for further consideration in light of Trevino v. Thaler. In Yebra's case, both the District Court and the Fifth Circuit has again misapplied the test required in Trevino. Instead, so as to deny Yebra federal review of the merits, both held that Trevino and Martinez did not apply to excuse Yebra's failure to present his new evidence, the expert affidavit, to the state court. See Doc. No. 50. The District Court and Fifth Circuit, guided by this Court's instructions in Trevino, and its own holding in Newbury v. Stephens, 756 F.3d 850, 872-73 (5th Cir. 2014), had been required to first verify whether or not Yebra had been assisted by counsel during his State habeas action, then, considering the new evidence, determine whether his ineffective assistance claim was meritorious or not.

Because Yebra has not yet received all the federal review on his ineffective assistance of counsel claim available to him under the authority of this Court's Martinez decision, this Court should grant this instant petition and remand to the Fifth Circuit for further consideration in light of Trevino and Newbury.

II. THE COURT SHOULD GRANT THIS PETITION SO THAT IT CAN CONSIDER THIS IMPORTANT ISSUE RES NOVA, AS IT CONCERNS AN IMPORTANT POINT OF CONSTITUTIONAL LAW THAT HAS NEVER BEEN CONSIDERED BY ANY COURT, AND IT IS IMPERATIVE THAT IT NOW BE DETERMINED BY THE SUPREME COURT OF THE UNITED STATES.

In 1985 this Court rendered its opinion in Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1097, in which it held that a defendant is entitled to the appointment of an expert witness to assist the defense where the state intends to offer the testimony and opinion of an expert witness pertaining to evidence that is critical to the conviction, and subject to varying expert opinion. However, the Court was silent on whether or not a trial court judge should appoint that expert for the defense on its own initiative. In light of the fact that virtually ALL criminal trials in this day and age of scientific advancement in the areas of forensics turn on the testimonies and opinions of expert witnesses, it is now time for the Court to consider such a requirement.

In the instant case, the federal District Court and the Fifth Circuit both construed Yebra's claim that he had been deprived of the expertise of an expert witness, as being a complaint that the trial judge had erred by not appointing an expert to assist the defense sua sponte. The District Court and the Fifth Circuit each denied Yebra's request for a certificate of appealability on the ground that there was no requirement for a judge to do so. Since this specific issue was raised by the courts below, Yebra now presents the question to this Honorable Court.

Before the trial, when certifying the State's forensic pathologist as an expert, the trial court judge was plainly made aware that the State intended to offer an opinion of an expert witness pertaining to evidence that was critical to obtaining a conviction, and subject to varying expert opinion. When a trial judge realizes that the State's case will most likely turn on the testimony of its expert witness, it raises a question of partiality when the judge allows a trial to go forward on such an uneven and unfair playing field. In such an in-

stance, it can be said that there is an appearance of bias on the part of the trial court judge, by showing partiality to the State. Though the Sixth Amendment only specifically requires that it is the "jury" that must be impartial, it has long been recognized by the federal courts that the due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal, before a judge who is unbiased. See, e.g., Bigby v. Dretke, 402 F.3d 551, 558 (5th Cir. 2005), cert. denied, 126 S.Ct. 239. The Second Circuit put it more succinctly, concerning the question Yebra now presents:

Where issues that implicate questions of the "appearance of justice" arise, constitutional concerns are not satisfied where a judge's lack to act raises the possibility of the denial of a fair trial as the judge's impartiality might reasonably be questioned.

United States v. Diaz, 797 F.2d 99, 100 (2nd Cir. 1986). This Honorable Court long, long ago held that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954). The bedrock of our principles of justice, is that, under our adversarial process, a defendant is to be accorded a fair trial, on a reasonably level playing field. This does not happen when a trial court judge is fully aware that the State's case hinges upon the testimony and opinion of an expert it has retained to present a theory that is subject to varying expert opinion, and does not appoint an expert in instances in which the defendant's counsel fails to request one.

The question presented herein -- does Ake v. Oklahoma and the Fourteenth and Sixth Amendments require that an expert be appointed for the defense, sua sponte where the ultimate question, a fact of consequence, turns on the opinion of the State's expert witness? -- can be affirmatively answered through a prior opinion of this Court:

[I]t is normally within the power of the State to regulate procedures under which its laws are carried out ... and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

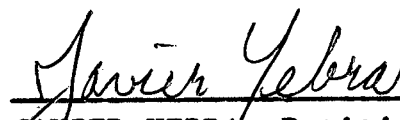
Patterson v. New York, 432 U.S. 197, 201-02, 97 S.Ct. 2319, 2322-23 (1977)

Again, it is "fundamental" to our system of jurisprudence that a defendant is to receive a "fair trial," before a "fair tribunal," with an impartial and "unbiased judge." In this day and age of advanced forensic sciences, this can only be achieved by appointing an expert to assist an indigent defendant with his or her defense, when the State relies on an expert to sway the jurors concerning an important and crucial fact of consequence. A court is required to avoid even the appearance of partiality. See Liljeberg v. Health Services Acquisition Corp. 486 U.S. 847, 860, 865 n.12, 108 S.Ct. 2194, 2202, 2205 n.12 (1988). This can only be accomplished by requiring a trial court judge to see that the State and defendant is going to trial on a reasonably level playing field.

C O N C L U S I O N

Yebra respectfully prays that this Honorable Court will grant this petition and will remand the case to the Fifth Circuit for further consideration, or will order the parties to submit briefing on the issues herein presented.

Most respectfully submitted,



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