

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JERRY WIZAR — PETITIONER
(Your Name)

vs.

STU SHERMAN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Central District Court of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jerry Wizar
(Your Name)

P.O. Box 5242
(Address)

Corcoran, CA. 93212
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. May California's post conviction relief to file an ineffective assistance of counsel claim fall within this Court's decisions in *Matinez v Ryan* (2012) 132 SCt 1309 and *Trevino Thaler* (2013) 133 SCt 1911?
2. May a federal court be required to follow precedent by the state supreme court on the interpretation of its own laws while the case is being reviewed on federal habeas corpus on a claim of insufficient evidence?

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:

TABLE OF AUTHORITIES CITED

CASES

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Martinez v. Ryan (2012) 566 US 1	6,8-10
Missouri v. Frey (2012) 132 SCt 1383	8
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STATUTES AND RULES

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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☒ is unpublished.

The opinion of the United States district court appears at Appendix B-E 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☒ is unpublished.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 courts**:

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

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☐ is unpublished.

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

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☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 9-22-17.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 9-22-17, and a copy of the order denying rehearing appears at Appendix A.

☐ 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 for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment Due Process:

"No person shall [...] be deprived of life, liberty, or property, without due process [....]"

Fourteenth Amendment Due Process:

"No State shall [...] deprive any person of life, liberty, or property, without due process of law [...]"

Sixth Amendment Right to Counsel:

"In all criminal prosecutions, the accused shall enjoy the right [...] to have Assistance of Counsel for his defense."

Title 28 United States Code § 2254

STATEMENT OF THE CASE

On June 30, 2010, in a cause then pending in Superior Court of California, County of Los Angeles, entitled THE PEOPLE v JERRY WIZAR, criminal case number LA065270, Petitioner was found guilty by a jury on an indictment of two counts on charging violations of second degree murder under California Penal Code § 187 and personal use of a deadly weapon under § 12022(b)(1).

On December 14, 2011, the Superior Court entered judgment and Petitioner was sentenced to 15 years to life plus one year to run consecutively. This judgment and sentence was affirmed by the Court of Appeal, Second Appellate District, Division Seven, PEOPLE v WIZAR, case number B237886. A petition for review was denied by the State Supreme Court on November 20, 2013.

In July 2014, Petitioner filed a state habeas petition in the trial court to exhaust facts not included on direct appeal by appointed appellate counsel on the insufficient evidence claim. The District Attorney was ordered to file an informal brief to the petition. Without giving Petitioner an opportunity to file an informal reply, the trial court denied the petition in October 2014. In January 2015, Petitioner filed a habeas petition in the Court of Appeal raising: (1) trial court denied due process because the court did not allow an informal reply to be filed; (2) ineffective assistance of appellate counsel.

In February 2015, Petitioner filed a habeas petition in the State Supreme Court raising the same issues and it was denied on April 29, 2015.

On May 18, 2015, Petitioner filed his initial federal habeas under § 2254. The District Court dismissed the case with leave to amend directing Petitioner to use the standard form for that Court. The District Court accepted the Magistrate's Report and Recommendations (R&R) to dismiss the case for lack of prosecution. Petitioner objected and filed a First Amended Petition (FAP). On October 26, 2016, the District Court allowed the FAP to proceed, where Petitioner raised: (1) due process was violated for insufficient evidence to support the second degree murder conviction; (2) trial counsel was ineffective assistance of counsel (IAC) at the plea bargaining state where counsel failed to give any advice on a favorable plea deal to manslaughter with a sentence of 12 years.

With the objections to dismiss, Petitioner requested a Stay and Abeyance so that he may exhaust the second claim on trial counsel, which was filed simultaneously in a state habeas in the trial court. On November 19, 2015, the trial court denied the petition. On December 28, 2015, the same issue was raised in the Court of Appeal and it was denied on January 13, 2016. On February 9, 2016, the same issue was filed in the State Supreme Court and was denied on May 18, 2016.

The Respondent opposed the request to stay and the District Court ruled that Petitioner failed to show good cause under *Rhines v Webber* (2005) 544 US

269, and a stay under Kelley v Small (9th Cir 2003) 315 F3d 1063, was untimely and ordered the Respondent to file an Answer to the insufficient evidence claim. (Filed on June 27, 2016)

On July 19, 2016, Petitioner filed a Motion to Alter of Amend Judgment (FRCP 59(e)) and raised that he was not being allowed to show "good cause" under the Martinez v Ryan (2012) 566 US 1 holding that would allow his IAC claim to heard. On August 1, 2016, the District Court denied the motion without addressing the facts and Martinez application.

On August 23, 2016, Petitioner filed a "Martinez Motion" and raised that there was no counsel to file the IAC claim in conjunction to the direct appeal. On September 13, 2016, the District Court denied the Martinez Motion and ruled that the claim was not constructively filed until after the time bar and did not explain why the Martinez holding did not apply.

Meanwhile, on September 8, 2016, the Respondent filed the Answer to the insufficient evidence claim. On October 2, 2016, Petitioner filed his Traverse to the Answer. On December 1, 2016, the Magistrate filed its R&R to deny relief. On December 27, 2016, Petitioner filed his objections to the R&R raising that the state and federal courts were acting contrary to Jackson v Virginia (1979) 443 US 307 because neither courts were following the controlling case in People v Beltran (2013) 56 Cal4th 935. On January 12, 2017, the District Court accepted the R&R and denied Petitioner relief.

On February 2, 2017, Petitioner filed a Notice of Appeal and simultaneously filed a Motion for Certificate of Appealability. Petitioner then filed a Request for Judicial Notice of a recent ruling by that Court in Dixon v Baker (9th Cir 2017) 847 F3d 714 regarding the application of Martinez decision that would be in his favor. The Court of Appeals made a summary denial to the COA request on September 22, 2017.

REASONS FOR GRANTING THE PETITION

I. GOOD CAUSE SHOULD HAVE BEEN GRANTED TO ALLOW THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PLEA BARGAINING STAGE CLAIM TO BE HEARD IN FEDERAL COURT SINCE PETITIONER WAS WITHOUT APPOINTED APPELLATE COUNSEL DURING THE INITIAL COLLATERAL REVIEW.

Under California law appellate counsel is required to raise ineffective assistance of counsel claims on collateral review (habeas corpus) in conjunction to the direct appeal. See *In re Clark* (1993) 5 Cal4th 750, 783-84 fn20; also Appellate Defenders Inc., CA. Criminal Appellate Practice Manual (July 2007 rev) §§ 8.2 - 8.3 (appointed counsel are "expected to pursue remedies outside of the four corners of the appeal, including habeas corpus, when reasonably necessary to represent the client appropriately")

In 2012, this Court ruled in sister cases in *Lafler v Cooper* 132 SCt 1376, and *Missouri v Frey* 132 SCt 1383. When these two cases were decided, Petitioner's case was on direct appeal. Appointed counsel never contacted Petitioner in regards to these new cases and how they affected his case on appeal since there had been a favorable plea deal for 12 years for lesser charges offered by the prosecution that was not accepted by the defense when Petitioner was facing a life sentence by going to trial. Appointed appellate counsel did not file an ineffective assistance of counsel at the plea bargaining stage ("Lafler claim") in a habeas corpus petition in conjunction to the direct appeal nor notify him of the possible claim to raise on his own.

Without assistance from appellate counsel, Petitioner prepared his own habeas petition to raise the Lafler claim, acting with due diligence to investigate

the claim, attempting to contact trial counsel to inquire why trial counsel had not advised Petitioner to accept the favorable plea deal when it was mandated at that point under state law under *In re Alvernaz* (1992) 2 Cal4th 924. Trial counsel never responded to the questions nor Petitioner's request for the case files where such information should have been noted. The State Courts did not grant any relief to the Lafler claim raised by Petitioner in pro se.

While the Lafler claim was being reviewed by the State Courts, the Respondent argued in Federal Court that the claim was time barred by the AEDPA. Petitioner objected the time bar by raising good cause per *Martinez v Ryan*, Supra. (See Petitioner's Reply to Respondent's Opposition to Stay and Abeyance; and Petitioner's Objections to Magistrate's R&R to Deny Stay and Abeyance) The District Court would not address the facts raised by Petitioner to show the good cause requirements, so he raised a "Martinez Motion". Again, the District Court ignored the good cause facts and diverted to the time bar, pointing out that the Lafler claim was 30 days late. (Ord. Denying Martinez Motion, at 4:21-24)

In *Dixon v Baker* (9th Cir 2017) 847 F3d 714, the petitioner in that matter had filed his claim against counsel ten (10) months late and was allowed to proceed under the good cause of *Martinez*. Petitioner filed a Motion to Reconsider (FRCP 60(b)(6)) in the District Court to raise and distinguish his case with the newly published *Dixon v Baker* case. The District Court refused to hear the motion and ruled that it could not review a case on appeal. At the same time, Petitioner requested the Court of Appeals to take Judicial Notice of its recent ruling in deciding on his Motion for COA. The

Court of Appeals made a summary denial to the motion for COA even though it had granted the request for Judicial Notice of the Dixon v Baker case. Petitioner filed for a rehearing en banc to raise the oversight of its own rulings and to point out the Jackson v Virginia contrary to ruling by that Court.

It is of great importance for this Court to grant certiorari here because the Ninth Circuit Court of Appeals is not applying the good cause announced in Martinez v Ryan to California cases and the District Courts are ignoring the fact that good cause supersedes the AEDPA time bar.

II. STATE COURTS ACTED CONTRARY TO Jackson v Virginia WHEN THEY FAILED TO FOLLOW THE PROPER STANDARD TO REVIEW A SECOND DEGREE MURDER CONVICTION.

The District Court simply repeated the State Appellate Court opinion without questioning the case law it was citing to affirm the conviction of second degree murder in Petitioner's case. This alone was contrary to Jackson v Virginia (1979) 443 US 307, 322 fn16, where this Court held that federal courts must look to state law for the substantive elements of the criminal offense. Petitioner acknowledges that under AEDPA the state court is given deference on its interpretation of state law. That is not the case here where the Appellate Court cited case law to simple assault and domestic violence cases on self-defense.

In People v Beltran (2013) 56 Cal4th 935, the State Supreme Court explained that when a defendant presents evidence of provocation by the victim to act in self-defense or heat of passion, that the prosecution is required to prove that sufficient provocation was lacking, and that the proper inquiry is "whether or not

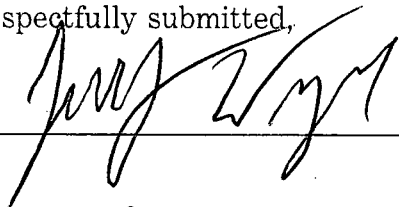
the defendant's reason was at the time of his act, so disturbed or obscured by some passion [] to an extent as would render an ordinary man of average disposition liable to act rashly or without due diligence or reflection, and from this passion rather from judgment". 56 Cal4th at 951. In this case, Petitioner's defense presented evidence of provocation by the victim in the form of threats to kill Petitioner and Petitioner's family and corroborating testimony from witnesses on the victim's violent history. The prosecution was then required to prove that this evidence was lacking sufficient provocation. Id. The prosecution never made this showing and the Appellate Court never made the review for such a showing to proof beyond reasonable doubt.

Now, the Beltran case was not published by the time Petitioner's case was being reviewed on direct appeal. However, the cases that it was relying on were, and the Court there pointed out that the issue was not being properly reviewed by the lower courts when it came to provocation by the victim in self-defense cases. The question here pertains to issues that may be answered by the State Courts while the case is on federal habeas review. Petitioner is of the opinion that the State Appellate Court in his case, and any other case for the matter, should not have the deference under the AEDPA when the State High Court clarifies the question in law. For that reason this Court should grant certiorari to give deference to the State High Court precedent and not just the Appellate Courts opinion when an insufficient of evidence claim is reviewed in federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Jury 2/21", is written over a horizontal line.

Date: 12-18-17