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March 30, 2018

Mr. Scott Harris
Clerk, Supreme Court
Of the United States
1 First Street, NE
Washington, D.C. 20543

Re: Alice Vega Fiala
v. The State of Texas

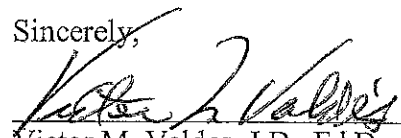
Dear Mr. Harris:

I have enclosed for filing an original and ten copies of the Petition for Writ of *Certiorari* and Petitioner's Motion for Leave to Proceed in *Forma Pauperis* in the above referenced cause.

I have also mailed a copy of this letter, a copy of the Petition for Writ of *Certiorari* and Petitioner's Motion for Leave to Proceed in *Forma Pauperis* to the Honorable Stacy Soule, State Prosecuting Attorney, P.O. Box 13046, Capital Station Austin, Texas 78744, Via Certified Mail No. 70060810000300989540 on this 30th day of March 2018 and to the Honorable Nicholas La Hood, Bexar County District Attorney, 101 W. Nueva, Suites 370, Paul Elizondo Tower, San Antonio, Texas 78205, Via Fax No. 210-335-2884 on this 30th day of March 2018.

Thank you for your attention to this matter.

Sincerely,


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Enclosure: a.s.
Cc: Honorable Stacy Soule
Honorable Nicholas La Hood

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALICE VEGA FIALA, Petitioner,

v.

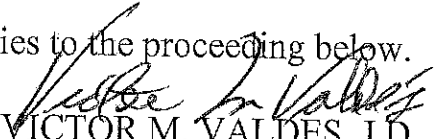
THE STATE OF TEXAS, Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE
TEXAS COURT OF CRIMINAL APPEALS**

Alice Vega Fiala respectfully asks that a *Writ of Certiorari* issue to review the opinion and judgment by the Texas Court of Criminal Appeals on 10 January, 2018.

PARTIES TO THE PROCEEDINGS

The caption of this case names all parties to the proceeding below.


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QUESTIONS PRESENTED FOR REVIEW

The defendant's history of multiple psychiatrist hospitalizations, sexual abuse by her father, and kept in a metal cage for years by her father, and the inability to assist her court appointed attorney in her defense, demanded the request for physical, competency, and insanity evaluations. In response to the defense motion for a mental health expert, the trial court appointed a psychologist who reported his findings simultaneously to the court, the prosecution, and the defense. After the psychologist's report, again, the defense requested, in an *ex-parte* motion a psychiatrist to evaluate the medical records and the defendant. The trial court denied the request and ruled that the same psychologist will conduct an evaluation the date of the trial. On the date of the trial, the defendant was "examined" by the psychologist and made a verbal report to the court, the prosecutor, and to the defense attorney that he was not going to change his findings. The defense attorney had no opportunity to consult with the expert. The appeal to the Texas Court of Criminal Appeals was denied.

The meaningless expert assistance violated Fiala's rights under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), which held that when an indigent defendant's mental health is a significant factor at trial, the state must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination

and assist in evaluation, preparation, and presentation of the defense”. The Texas Court of Criminal Appeals held that the defendant had no right to appeal. (Appendix A). However, in *Chapman & McConnell*, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1979 (2012) indicated that: “as originally understood, the principle of due process required, among other things that statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees be subject to judicial review”. Taking phrases from the *Amicus Curiae* in the *James Edmond McWilliams* case, No. 16-5294, Mr. Michael B. DeSanctis indicates that: “Even Justice Rehnquist’s dissent in *Ake* confirms that, at the very least, what the defendant should be entitled to under *Ake* is access to a psychiatrist who acts independently of the prosecutor’s office”. 470 U.S. at 92 (Rehnquist, J., dissenting); see also *Tuggle v. Netherland*, 516 U.S. 10, 12 (1995) (*per curiae*) (Due process requires that the State provide the defendant with the assistance of an independent psychiatrist”).

The questions presented are:

- (1) Whether, in light of the Court’s decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985) that an indigent defendant is entitled to meaningful expert assistance for the “evaluation, preparation, and presentation of the defense”, did the Texas Court of Appeal err in denying her appeal?

- (2) Whether, in light of *Ake*, the Texas Courts, relying on Article 46B.011 of the *Texas Code of Criminal Procedure* violated Petitioner's due process and equal protection rights.
- (3) Did the Texas Court violate Petitioner's constitutional right to a neutral judge when the trial judge, over the objections of the Petitioner, informed the jury that the psychologist was an expert that had examined the Petitioner, resulting in the comment on the weight of the evidence and bolstering the credibility of its own witness?
- (4) Did the Texas Courts unreasonably allow the prosecutor, during closing arguments, to attack the defense attorney? And alleging that the Petitioner was faking her hospital admission?
- (5) Did the Texas Court err when they sustained Petitioner's denial to a continuance to allow her to complete treatment in the psychiatric hospital?

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- 3- Appendix C- Refusal of Petition for Discretionary Review (PDR) by the Texas Court of Criminal Appeals, dated 10 January 2018.
- 4- Appendix D- Text of Article 46B.011
- 5- Appendix E- Motion *In Limine*
- 6- Appendix F- Copy of letter from the Court of Appeals delineating Petitioner's Appeal's Rights.

OPINION BELOW

The opinion of the Texas Fourth Court of Appeal denying Ms. Fiala's right to appeal is not reported, but is included as Appendix A. The denial of Ms. Fiala's Motion for Reconsideration to the Fourth Court of Appeals is not reported, but is included as Appendix B. The denial of Ms. Fiala's Petition for Discretionary Review (PDR) is not reported but is included as Appendix C. Appendix D includes a copy of the Article 46B.011 of the *Texas Code of Criminal Procedure*.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The denial of Appellant's Petition for Discretionary Review by the Texas Court of Criminal Appeals was rendered on 10 January 2018. This Petition is filed within 90 days after the denial of the Petition for Discretionary Review (PDR) by the Texas Court of Criminal Appeals. This Court has Jurisdiction to Grant *Certiorari* under 28 U.S.C., Section 1254 (1).

STATE OF TEXAS STATUTE INVOLVED

The text of Article 46B.011 of the *Texas Code of Criminal Procedure* is attached to this petition as Appendix D.

STATEMENT OF THE CASE

Petitioner Fiala, prior to the jury trial, filed an *Ex Parte* Motion requesting the appointment or funds to pay for an expert in the field of Psychiatry to assist in

the preparation and presentation of her defense, quoting. *Ake v. Oklahoma*, 105 S. Ct. 1087 (1985). The trial court denied Petitioner's request and, instead, appointed the only psychologist available in its list. Subsequently, Petitioner, after reading the court appointed psychologist report urged, again, her request for an independent psychiatrist. The court reviewed the court appointed psychologist's report, consulted with the prosecutor, and denied the request. He concluded that, his psychologist, on the date of the trial, will, again, examine the Petitioner and that he will render his report. The defense attorney objected, however the objection was denied. The trial proceeded as the magistrate judge ordered. However, prior to trial, Petitioner presented her Motion *In Limine*, which the court granted in part and denied the following Motion: "And, because it is a comment on the weight of the evidence and equally bolstering, the Defendant objects to any request to the Presiding Judge, by the State, to declare the testifying witness as an expert". (Appendix E).

During the trial, and in order to preserve the error, the attorney for the Petitioner objected to the magistrate's judge, recognizing its own witness, and the only witness, as an "expert". At the trial, the magistrate judge informed the jury that Petitioner had been indicted, and an objection was made because that was

misleading, she had not even been charged with any crime, not even by information; it was only a complaint. It was misleading and a motion for mistrial was denied.

The magistrate judge ordered the bailiff to go to the Nix Hospital, where the Petitioner was hospitalized, and to bring her to court for the trial. The Attorney for Petitioner objected and requested a continuance which was denied. The judge concluded that the expert was available and that he had to pay him and that the jury was ordered and waiting. That he was not going to waste the money for the expert. The Petitioner was brought to court, by the bailiff, accompanied by a nurse assistant. The Court appointed psychologist, and, while the jury was waiting, examined Petitioner and testified that she was competent to stand trial. There was no opportunity for the psychologist to consult with the hospital psychiatrist or to review the medical records. However, he testified that she was taking several medications, prescribed by her psychiatrist. In closing arguments, the prosecutor made reference to the relationship between the Petitioner and her Attorney. That even her own attorney did not believe her. That the Petitioner was faking her conditions and that she did not need hospitalization. Petitioner was returned to the hospital, at the end of each trial day. Petitioner attorney's objections were denied. The jury found Petitioner competent.

The Fourth Court of Criminal Appeals of Texas denied the appeal in an unpublished decision. The Court concluded that under Article 46B.011 of the *Texas Code of Criminal Procedure* it lacks jurisdiction to hear the case. Hence, according to the Texas Courts, Petitioners rights can be violated, without impunity at the trial court level. There is no remedy to the violations of her rights.

REASONS FOR GRANTING THE WRIT

The Court should grant Certiorari to provide Guidance on the Right of an indigent defendant to an expert, at state expense to assist in the preparation and presentation of her defense and to ensure a fair trial. Furthermore, whether the Fifth Circuit was correct when it held that the *Fourteenth Amendment* required the appointment of experts far enough in advance of a state court trial to allow a reasonable time for investigatory examinations and the preparation of defense that the results of such examinations may support. *Hintz v. Beto*, 379 F. 2d 937 (5th Cir. 1967).

It is well established that a state court is required to follow this Court's rulings particularly when it relates to Federal Constitutional Rights. Petitioner's case falls squarely under the guidance of *Ake v. Oklahoma*, 470 U.S. 68 (1985). In *Ake* this Court held that: "an indigent criminal defendant's constitutional right to a psychiatry's assistance in preparing insanity defense is not satisfied by court

appointment of a "neutral" psychiatrist-i.e., one whose report is available to both the defense and prosecution".

The Appellate Court erred when it concluded that it did not have jurisdiction. A final decision is one that "ends the litigation on the merits and leaves nothing more for the court to do...." *Green Tree Fin. Corp v. Randolph*, 531 U.S. 79, 86, (2000). And that is exactly what occurred in Petitioner's case, there was nothing else for the trial court to do. *Ake* granted her the right to a separate psychiatrist and the trial court denied her due process of law.

In addition, this Court should Grant *certiorari* to provide guidance as to the neutrality of the trial court magistrate when he, over the objections of the defense attorney, instructed the jury that the psychologist, the only witness in the trial and appointed by the court, was an expert in the area of psychology. Such comments amounted to comment on the weight of the evidence and bolstering the credibility of the witness. The judge was in violation of the *Texas Rule of Evidence* 605, and of Rule 605 of the *Federal Rules of Evidence*. Both rules are identical; however, the *Federal Criminal Code and Rules*, by Thompson, provide some guidance as to the importance of the Rule as follows: "Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one

side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality?" *Ibid.*

To prevent the "seal of approval on one side in the eyes of the jury", attorney for the Petitioner filed a Motion *in Limine* to avoid partiality and prevent the trial judge to promote his witness, the only, and the court appointed witness, to be labeled as an "expert".

Petitioner presented multiple issues in her appellate brief. The appeal was denied by the Court of Appeals under the erroneous impression that it lacks jurisdiction. It concluded that the applicable law was Article 46B.011 of the *Code of Criminal Procedures*. Under that Article, Petitioner has no right to interlocutory appeal. (Appendix A).

Petitioner met all the requirements of Rule 33.1, of Rules Appellate Procedure, with an effective date of July 1, 2017. The record will show that the objections were properly made and that the trial court ruled on all the motions and objections. In compliance with Appendix A, the Petitioner filed a response brief to Appendix A, however, the Court of Appeals, without a determination as to the merits of the issues presented, again, ruled that it does not have jurisdiction.

The Court of Appeals' opinion erroneously interpreted Petitioner's arguments on appeal. The trial court appointed, the only psychologist recognized

by the court, to conduct an evaluation of the Petitioner. The "expert" report was submitted to the trial court, both the prosecutor, and the defense attorney, received copies of the report. The trial court denied the Petitioner's constitutional right to have the assistance of a psychiatrist in preparation of her defense. The right of an indigent defendant to an independent mental health expert to assist in the preparation of her defense is not satisfied by the court appointed "neutral" psychiatrist. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

The *Sixth Amendment's* compulsory process guarantee was designed to ensure that "a Defendant should have a meaningful opportunity, at least on par with that of the prosecution, to present a case in his favor through witnesses." *United States v. Morrison*, 535 F. 2d 223 (3d Cir-1976).

This Court explained:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witness for the purpose of challenging their testimony he has the right to present his own witnesses to establish a defense. This right is a fundamental right of due process of law.

Texas v. Washington, 388 U.S. 14, (1967). "Few rights are more fundamental than that of an accused to present witnesses in his own defense". *Chambers v.*

Mississippi, 410 U.S. 284, (1973). This right is made explicit in the *Sixth Amendment's* compulsory process clause, but its roots are not limited to that clause. This court has expressly recognized that: "a party's right to present his own witnesses in order to establish a defense is a fundamental element of due process." *United States v. Foster*, 128 F. 3d 949, (6th Cir. 1997). (Citing *Washington*, 388 U.S. at 19).

Because the Petitioner was, and still is, indigent at the time of the commencement of the proceedings, the undersigned attorney was appointed to represent her. Please see *Guideon v. Wainwright*, 372 U.S. 335 (1963); *Douglas v. California*, 372 U.S. 358 (1963); *Draper v. Washington*, 372 U.S. 487 (1963). **In *Draper*, this Court rejected the screening procedures used to reduce frivolous appeals by indigents.** In *Mayer v. City of Chicago*, 404 U.S. 189 (1971) the Supreme Court held that non-felons were entitled to free transcripts on appeal. Hence, the holding in *Ake v. Oklahoma* was an expansion of proceeding due process cases that had gradually but consistently expounded upon the "elementary principle" that the *Due Process Clause* protects the rights of indigent defendants to have the same opportunity for fair representation as affluent defendants, 470 U.S. at 76. By the time the court decided *Ake*, it had "long recognized that when a state brings its judicial power to bear on an indigent defendant in a criminal proceeding,

it must take steps to assure that the defendant has a fair opportunity to present his defense.” *Ibid*, see also, e.g., *Medina v. California*, 505 U.S. 437, 444-45 (1992).

This principle of “fundamental fairness” developed out of the Court’s “belief that justice cannot be equal where simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.” *Ake*, 470 U.S. at 76. The State has an obligation to “provide the defendant with the basic tools of an adequate defense.” *Johnson v. Oklahoma*, 484 U.S. 878 (1987). Under *Ake*, those “basic tools” must include the assistance of a mental health expert when one is necessary. 470 U.S. at 82-83.

Indeed, *Ake* tells us that in order to protect a defendant’s due process rights, a mental health professional must be made available to the defendant for the purpose of providing assistance to the defendant for the defense. *Ake*, 470 U.S. at 83. As Justice Marshall wrote several years after writing for the Court in *Ake*, an indigent defendant’s **“right to psychiatric assistance is not satisfied by provision of a psychiatrist who must report to both parties and the court.”**

Gaviel v. Texas, 495 U.S. 963, 965 (1990).

What took place in Petitioner’s case was what Justice Marshall was warning us about. Petitioner was denied that right “... access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation

and presentation of the defense.” *Ibid.*

This Court has previously recognized the harm that results when a mental health assessment by the State goes unbalanced or unchallenged. In *Tuggle v. Netherland*, 516 U.S. 10 (1995), for example, the failure to provide an indigent defendant with the assistance of an independent psychiatrist “prevented the defendant from developing his own psychiatric evidence to rebut the prosecution’s evidence and to enhance his defense.” 516 U.S. at 13. *Ake* consistently discusses a system of “psychologists for each” – the defense and the prosecution – who present their “differences in opinion” for the jury to resolve. 470 U.S. at 81.

Petitioner was deprived of her constitutional rights as ordered by *Ake*. The appointed defense expert, thus, serves the role of, among other things: “offering a well-informed... opposing view, and raising in the jurors’ minds questions about the state’s proof of aggravating factors.” *Id* at 84.

Indeed, the *Due Process Clause* “speaks to the balance of forces between the accused and her accuser,” *Wardius v. Oregon*, 412 U.S. 470, 474 (1973), because “our adversary system presupposes that accurate and just results are most likely to be obtained through the equal contest of opposed interest,” *Lassiter v. Department of Social Services*, 452 U.S. 18, 28 (1981).

Petitioner requested, and the trial court denied, the appointment to obtain the

service of an expert on the area of psychiatry.¹ Petitioner requested, from the trial court, the list of “experts” from which the psychologist who “evaluated” Petitioner was chosen. The trial court never answered our request. Obviously, there is only one person from which the trial court selects and appoints to “evaluate” all defendants.

The conclusions by the court appointed psychologist are “bizarre.” He indicates that: “When I offered tutorial about the plea bargain process, she announced, I feel I need to go back to the hospital.” (Page 4 of the psychologist report). However, there is no indication as to what was the explanation of “plea bargain” explained by him. He, obviously, became a prosecutor trying to convince Petitioner to enter into a plea of guilty, obviously, clear violations of his duties as a neutral psychologist. It also invades the duties of the attorney client privilege. It is also incomprehensible when the psychologist states that: “she also recognized the finder of fact may rely on videotaped evidence....” She is not aware what the term “finder of fact may rely on videotaped evidence” means. *Id.* There is no doubt that the psychologist was “tilting the scale” against the Petitioner.

When the court appointed psychologist indicates that: “she should continue with treatment... that could call to question her trial competency....” *Id.* That: “...

¹ At the hearing, the trial court ruled that only the court appointed psychologist was needed and that there will be another “evaluation” the day of the trial. There was not a written report of such evaluation, or recording of any kind. Petitioner was taken from the hospital to the court; the psychologist never contacted the treating psychiatrist.

information is rephrased as needed to assist memory and concentration. *Id.* Hence, she has problems with memory and concentration. Therefore, he recommends that “Ms. Fiala take psychoactive medications as prescribed to maintain trial competency.” *Id.* at 6.

It is important to point out that, at the trial, the psychologist testified that he did not contact Petitioner’s treating psychiatrist. Furthermore, that he has no license to prescribe psychoactive medications. In addition, that he did not call the Nix Hospital to speak with the treating psychiatrist. So, the psychologist described the severity of Petitioner’s mental illness which began many years earlier. Taken together, these factors make clear that the question of Petitioner’s competency, and, even her sanity, was likely a significant factor in her defense.

In Summary, the trial court erred in denying Petitioner motion for a separate expert to assist in the preparation of her defense in violation of Petitioner’s *Due Process Rights*.

Furthermore, Petitioner filed a Motion *In Limine* requesting from the trial court an order limiting the prosecutor from asking the court, in front of the jury, to recognize the psychologist appointed by the court, as an “expert.”

The recognition by the trial court, that its own court appointed psychologist was, an “expert” in the area under scrutiny at the trial, amounted to bolstering and

comment on the weight of the evidence. "Proper bolstering occurs when one item of evidence is improperly used to add credence or weight to some earlier unimpeached piece of evidence offered by the same party." *Plezz v. State*, 576 S.W. 2d.83 (1978). In the present situation, the trial judge bolstered the credibility of his own witness, the only witness.

In *Menefee v. State*, 614 S.W. 2d. 167 (1981) the Court of Criminal Appeals of Texas reversed a conviction when the prosecutor in the closing argument bolstered the credibility of a witness by saying: "And verse, I don't believe I have ever seen anybody that I thought was any more honest than he is."

In *United States v. Sullivan*, 85 F. 3d 743, (1st Cir. 1996) the court held that "counsel should not ask one witness to comment on the veracity of testimony of another witness." This was improper comment by the trial court and the trial judge became a witness and bolstered the credibility of his own witness. "Determinations of the credibility are for the jury." *United States v. Richter*, 826 F, 2d 206. And, because you cannot object to bolstering for the first time on appeal, the Motion *In Limine* is of extreme importance, *Johnson v. State*, 803 S.W. 2d 272 (1992).

The present *Code of Criminal Procedure* provides that the juries "are the exclusive judges of the facts and of the weight to be given to the testimony; that the judge shall not comment when deciding on the admissibility of evidence, nor

shall express any opinion upon the weight of evidence”. However, the trial judge infringed on the jury’s responsibilities and, he instructed the jury to accept the court appointed psychologist as the ultimate truth.

While not under oath, the presiding judge became a witness, in violation of *Rule of Evidence* 605. There was no need to make an objection to preserve the point. *Ibid.* Furthermore, by declaring his own expert as qualified the trial court took judicial notice of a fact that was in controversy. Furthermore, Article 46B.011 is unconstitutional, as it violates Petitioner’s constitutional rights to due process of law, and to a fair trial. The Article does not allow for any discretion to the Appellate Court. According to the Fourth Court of Appeals, the Appellate Court, *ipso facto*, cannot review any aspect of the case, whether the case is *meritorious* or not. The Petitioner provided to the Court of Appeals with multiple issues of constitutional dimensions, however, the court, summarily and without addressing a single issue, concluded that the court did not have jurisdiction. All the issues presented to the Court of Appeal were extensively argued at the trial and the trial judge ruled on them. In addition, the Fourth Court of Appeals, denied Petitioner’s motion for the official Court Reporter, to transcribe the trial proceeding. The court found that the motion was “moot”, however, it did not Explain why the motion was “moot”. The legislature cannot deprive the Petitioner Of her Constitutional Rights.

Article 46B.011, is unconstitutional in that it, deprives the Appellant Court of the authority of reviewing all cases, regardless the relevancy or merits of the factors before. The Petitioner is entitled to a determination, by the Appellant Court whether the appeal is *meritorious* or is *frivolous*. These factors should include:

- (1) The right to present a defense;
- (2) The right to an expert witness'
- (3) The bolstering of the credibility of the witness;
- (4) Comment on the weight of evidence by trial court
- (5) The prosecutorial misconduct, and
- (6) Others issues to include infringement on the Appellant's Constitutional right and to a fair trial.

The *Fourth Amendment* to the United States Constitution states as follows:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated an no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search and the person or things to be seized.

While there are various exception to the warrant requirement, there is no exception to the warrant requirement of a hospitalized patient. For example, while searches and seizures inside a home without a warrant are presumptively unreasonable, *Payton v. New York*, 445 U.S. 573 (1980); there are exceptions, for

example, an officer is given consent to search; *Davis v. United States*, 328 U.S. 582 (1946).

Also, an officer may briefly stop a person under the doctrine of *Terry v. Ohio*, 392 U.S. 1 (1968). Under certain circumstances, school officials may search a student following *New Jersey v. TLO*, 469 U.S. 325 (1985). An officer may conduct a traffic stop if he has reasonable suspicion that a traffic violation has occurred or that criminal activity is afoot. *United States v. Arvizu*, 534 U.S. 266 (2002). However, when there are exigent circumstances an exception to the warrant requirement is justified. But not in the Petitioner's situation. She has not committed a crime; there were no exigent circumstances to justify the trial court's action ordering her arrest and seizure, and abuse of discretion on the part of the trial court.

Normally, there is an affidavit, prior to the issuance of a search warrant, prepared by a credible witness; such document is missing, never prepared, and, hence, if there was a warrant, it violates the most basic constitutional principle.

In summary, Petitioner's arrest was a violation of her constitutional rights, the interrogation by the trial court psychologist amounted to a violation of the *Fifth* and *Sixth Amendment* of the constitution and the deprivation of her rights to an attorney under the *Sixth Amendment* to the United States Constitution.

Petitioner was never charged, as the trial court instructed the jury, that she had been charged by indictment. Furthermore, she was never charged by information with any crime. These instructions were misleading and violated Petitioner's *Fourteenth Amendment Due Process Rights*. The trial court, casually, instructed the jury that what I said about the charge by indictment did not apply. The trial court did not provide a reasonable explanation as to the erroneous instructions. The jury was misled by the instructions and it was not a harmless error, and it is *per se* reversible.

In addition, the trial court, over the objections of Petitioner's counsel allowed the prosecutor to use inflammatory, irrelevant and inadmissible argument. The prosecutor may not introduce testimony which is purely inflammatory, irrelevant and otherwise inadmissible. For example, a prosecutor may not attempt to delve into subjects in order to prejudice the jury. Nothing could be more unfairly prejudicial than the suggestive innuendos in the trial made by the prosecutor that the defendant admitted herself to the hospital to delay the trial. The Prosecutor may not introduce evidence of other crimes irrelevant to the crime charged against the defendant. Rule of Evidence 404(b) and 609(a)(b).

Another example of prosecutorial misconduct was when he targeted the defense attorney by saying that the defense attorney should have testified. The

defense attorney objected, however, the trial court denied his objections.

This Court has clearly condemned prosecutorial misconduct during argument, or “forensic misconduct” stating that: “While Prosecutors may strike hard blows, a prosecutor is not at liberty to strike foul ones.” *Berge v. U.S.*, 295 U.S. 78, (1935).

The Summation by the state was improper and requires a new trial. *U.S. v. Eltayib*, 88 F. 3d 157, (2d Cir. 1996). Because defendants have a *Sixth Amendment* right to effective assistance of counsel, personal attacks on defense counsel may rise to the level of constitutional error. *Bruno v. Rushen*, 721 F. 2d 1193 (9th Cir. 1983), Cert. denied 469 U.S. 920 (1984).

The prosecution should not impugn, either directly or by implication, the integrity or the institutional role of defense counsel. *U.S. v. Bennett*, 75 F. 3d 40 (1st Cir. 1996). A prosecutor may not suggest to the jury that the defense lawyer believes his client is guilty and thus is deceiving the jury. *U.S. v McDonald*, 620 F. 2d 559 (5th Cir. 1980). Prosecutors commit misconduct when in the course of their professional duties they act in ways that are inconsistent with ethical mandates they are obliged to obey. Such misconduct exists at and near the intersection of two sets of rules: One is the legal rules that bind prosecutors so as to ensure due process- the state and federal constitution, statutory law, rules of

criminal procedure, judicial orders, and the like. The other, is the ethical standards of the legal profession as expressed in each state bar's rules of professional responsibility and similar professional codes.

There are multiple instance of Prosecutorial misconduct. For example, failure to disclose exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963). Also, *ABA Model Rules* 3.4, 3.8 and 8.4. The introduction of false evidence is a frequently encounter example of prosecutorial misconduct. In several cases including *Napue v. Illinois*, 260 U.S. 264 (1959) this Court has held that the U.S. Constitution prohibits prosecutors from introducing false evidence, including false testimony, and requires prosecutors to correct falsehoods. Such behavior may also violate professional rules which prohibit attorneys from offering evidence the lawyer knows to be false, assisting or introducing a witness to testify falsely, or eliciting false testimony without taking measures to correct it.

Improper argument is another frequently tactic utilized by the prosecutor in opening and closing statements at trial, a prosecutor's use of certain types of of prohibited modes of argument may constitute prosecutorial misconduct. For example, a prosecutor may not: assert facts not in evidence, misstate the law, vouch for the credibility of a witness, mischaracterize evidence, criticize the defendant for exercising his constitutional right not to testify, or engage in other

similar prohibited behavior. State and Federal constitutions prohibit these behavior, (*ABA Model Rules* 3.3 and 3.4).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court addressed the issue of prosecutorial misconduct when selecting a jury prosecutors are prohibited from excluding potential jurors based on certain characteristics, including race, sex, ethnicity, religion, and other similar characteristics. When prosecutors do this, they violate the defendant's constitutional rights as well as the constitutional rights of the prospective juror. This comes to light most commonly when African American or Latino prospective jurors are struck because the prosecution assumes that such jurors will be more sympathetic to a similar race defendant, more skeptical of authorities, or more lenient generally.

A common occurrence is when there is an interference with a defendant's right to representation. Prosecutors have positions of authority, however, prosecutors are not neutral, they are participants in adversarial proceedings against criminal defendants. Prosecutors and their agents are also sophisticated, repeat players in a criminal justice system that may be foreign, confusing and terrifying to defendants. If a prosecutor knows that a defendant is represented, the prosecutor may not speak to a defendant about his case without the defendant's attorney present. (*ABA Model Rules* 3.8(b), 3.8(c), 4.2, and 4.3).

There are many other examples of prosecutorial misconducts. In our case, the prosecutor violated Rule 3.3, Candor Toward the Tribunal of the *ABA*, when he, over the objections of the defense attorney argued that Appellant was faking the hospital admission to evade the trial. This Rule sets for the special duties of lawyers and officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's cases with persuasive force. Performance of that duty while maintaining confidence of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false. The trial court charged the jury that the Appellant had been charge by indictment and, subsequently by information. The Prosecutor, knowing that it was not true, adamantly argued that Appellant had been charged by information.

The trial court allowed the prosecutor to use inflammatory, irrelevant, and inadmissible evidence.

CONCLUSION

Fiala, an indigent defendant, denial of the assistance of a psychiatric expert, to assist in the preparation of her defense denies her the ability to participate meaningfully in the criminal proceedings. The trial court magistrate improperly imparted his opinion as to the weight of the evidence, bolstering the credibility of his one and only witness, and became a witness in the case, in violation of *Texas Rule of Evidence* 605. In *Miller v. Alabama*, 567 U.S. 460 (2012) in foot note 3, Justice Kagan refers to the request for funds to hire one's own mental expert for the transfer hearing of the juvenile to the adult courts. The practice in Alabama is to deny funds. Subsequently, Justice Kagan observed that Judge Cobb, of the Alabama Supreme Court, had a change of heart and urged the State Supreme Court to revisit the issue. She concluded that: "Although later mental evaluation as an adult affords some semblance of procedural due process, it is, in effect, too little, too late". *Ibid.* In Petitioner's case the Texas Court of Criminal Appeals denied any "semblance of procedural due process". There were no funds to hire her own mental expert.

PRAYER

For these reasons, Fiala asks that this Honorable Court Grant a writ of *Certiorari* and review the refusal of the Texas Court of Criminal Appeals to review her Petition in light of *Ake*, and find that Article 46B. 011, as applied to Petitioner, is unconstitutional.

Respectfully Submitted,



VICTOR M. VALDES, J.D., Ed. D.

Texas Bar No. 20424500

Counsel of Record

Law Office of Victor M. Valdes

111 Soledad, Suite 300

San Antonio, TX. 78205

Tel: (210) 229-9652

Fax: (210) 590-6713

vvaldes@satx.rr.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of Petitioner's brief was delivered to the District Attorney's Office Bexar County, Appellate Section, via fax (210)335-2884, 300 De La Rosa Street, San Antonio, Texas 78205 and to Stacy Soule, P.O. Box 13046, Austin, Texas 78711, the State's Attorney on this the 30 day of March 2018.



VICTOR M. VALDES, J.D., Ed. D.

APPENDIX-A

ALICE VEGA FIALA,

Petitioner,

v.

The State of Texas,

Respondent.

First ORDER Opinion of The Fourth Court of Appeals of Texas,

dated May 5, 2017. Cause No. 04-17-00170-CR



COURT OF APPEALS

FOURTH COURT OF APPEALS DISTRICT
CADENA-REEVES JUSTICE CENTER
300 DOLOROSA, SUITE 3200
ANTONIO, TEXAS 78205-3037
WWW.TXCOURTS.GOV/4THCOA.ASPX

SANDEE BRYAN MARION
CHIEF JUSTICE
KAREN ANGELINI
MARIALYN BARNARD
REBECA C. MARTINEZ
PATRICIA O. ALVAREZ
LUZ ELENA D. CHAPA
IRENE RIOS
JUSTICES

KEITH E. HOTTLE
CLERK OF COURT

TELEPHONE
(210) 335-2635

FACSIMILE NO.
(210) 335-2762

May 5, 2017

Nicholas LaHood
Bexar County District Attorney's
Office
101 W. Nueva, Suite 370
San Antonio, TX 78205
* DELIVERED VIA E-MAIL *

Alice V. Fiala
8611 Waters Edge
San Antonio, TX 78245-2566

Victor Manuel Valdes
Attorney At Law
111 Soledad, Suite 300
San Antonio, TX 78205
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 04-17-00170-CR
Trial Court Case Number: 308410
Style: Alice V. Fiala
v.
The State of Texas

Enclosed please find the order which the Honorable Court of Appeals has
issued in reference to the above styled and numbered cause.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,
KEITH E. HOTTLE, CLERK

Jamie Osio
Deputy Clerk, Ext. 53262

cc: Roxanne F. Pena (DELIVERED VIA E-MAIL)
Anthony Cantu (DELIVERED VIA E-MAIL)



Fourth Court of Appeals
San Antonio, Texas

May 5, 2017

No. 04-17-00170-CR

Alice V. FIALA,
Appellant

v.

The STATE of Texas,
Appellee

From the 187th Judicial District Court, Bexar County, Texas
Trial Court No. 308410
Honorable Andrew Carruthers, Judge Presiding

O R D E R

Appellant filed a notice of appeal on March 24, 2017. In her notice of appeal, appellant states she is appealing "the denial of her CONSTITUTIONAL RIGHTS" and references a jury trial that was held on March 22 through March 23 of 2017. The clerk's record includes a judgment of competency dated March 23, 2017. The judgment indicates a jury found appellant competent to stand trial. The clerk's record does not include any other judgment or order.¹

In general, we have jurisdiction to consider an appeal in a criminal case only when there has been a judgment of conviction. *Taylor v. State*, 268 S.W.3d 752, 755-56 (Tex. App.—Waco 2008, pet. ref'd); *Ahmad v. State*, 158 S.W.3d 525, 527 (Tex. App.—Fort Worth 2004, pet. ref'd). Appellate courts do not have jurisdiction to review interlocutory orders unless that jurisdiction has been expressly granted by law. *Apolinar v. State*, 820 S.W.2d 792, 794 (Tex. Crim. App. 1991); *Taylor*, 268 S.W.3d at 755-56. Article 46B.011 provides that a defendant may *not* "make an interlocutory appeal relating to a determination or ruling under Article 46B.005." TEX. CODE CRIM. PROC. art. 46B.011 (West 2006). Here, the judgment appellant is attempting to appeal appears to relate to a determination or ruling under Article 46B.005, outlining when a trial court must hold a hearing to determine whether a defendant is incompetent to stand trial. *id.*; see also *Queen v. State*, 212 S.W.3d 619, 622 (Tex. App.—Austin 2006, no pet.) (stating interlocutory appeal may not be had from orders entered under

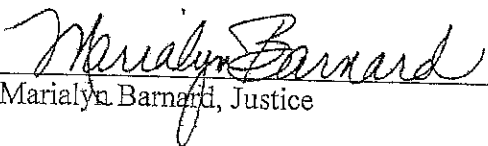
¹ The judgment also includes a trial court certification in which the trial court indicates this matter "is a determination of competency to stand trial rendered by a jury and the defendant has no right to an interlocutory appeal – 46B.011 C.C.P."

chapter 46B, subchapter D, i.e., articles 46B.071-.090, of the code of criminal procedure). Therefore, it appears we do not have jurisdiction to review this determination as it is not subject to immediate appeal.

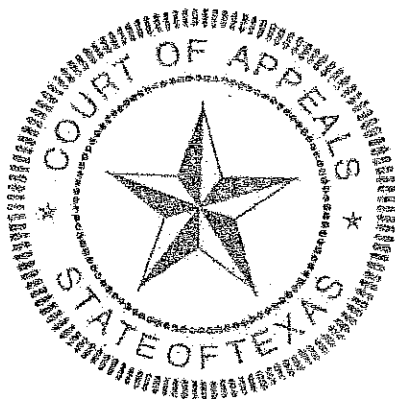
We therefore **ORDER** appellant to file in this court, on or before **June 5, 2017**, a response showing cause why this appeal should not be dismissed for want of jurisdiction. If appellant fails to satisfactorily respond within the time provided, the appeal will be dismissed.

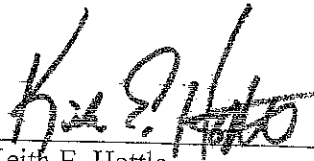
TEX. R. PP. P. 42.3(c). If a supplemental clerk's record is required to establish this court's jurisdiction, appellant must ask the trial court clerk to prepare one and must notify the clerk of this court that such a request was made. All deadlines in this matter are suspended until further order of the court.

We further order the clerk of this court to serve a copy of this order on the trial court, all counsel, appellant, and the court reporter.


Marialyn Barnard, Justice

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 5th day of May, 2017.




Keith E. Hottle
Clerk of Court

APPENDIX-B

ALICE VEGA FIALA,

Petitioner,

v.

The State of Texas,

Respondent.

Second Opinion of The Fourth Court of Appeals of Texas, dated July 26, 2017.

Cause No. 04-17-00170-CR



COURT OF APPEALS

FOURTH COURT OF APPEALS DISTRICT
CADENA-REEVES JUSTICE CENTER
300 DOLOROSA, SUITE 3200
ANTONIO, TEXAS 78205-3037
WWW.TXCOURTS.GOV/4THCOA.ASPX

SANDEE BRYAN MARION
CHIEF JUSTICE
KAREN ANGELINI
MARIALYN BARNARD
REBECA C. MARTINEZ
PATRICIA O. ALVAREZ
LUZ ELENA D. CHAPA
IRENE RIOS
JUSTICES

VACANT, CLERK OF THE COURT

TELEPHONE
(210) 335-2635

FACSIMILE NO.
(210) 335-2762

Wednesday, July 26, 2017

Nicholas LaHood
Bexar County District Attorney's Office
300 Dolorosa, Suite 4025
San Antonio, TX 78205
* DELIVERED VIA E-MAIL *

Victor Manuel Valdes
Attorney At Law
111 Soledad, Suite 300
San Antonio, TX 78205
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 04-17-00170-CR
Trial Court Case Number: NM 308410

Style: *Alice Vega Fiala v. The State of Texas*

Enclosed please find the opinion which the Honorable Court of Appeals has issued in reference to the above styled and numbered cause.

If you should have any questions, please do not hesitate to contact me.

Very truly yours,
LUZ ESTRADA, CLERK


Lynn Domangue
Legal Assistant, 335-3207



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00170-CR

~~Alice Vega~~ **HALA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 187th Judicial District Court, Bexar County, Texas
Trial Court No. NM 308410
Honorable Andrew Carruthers, Judge Presiding

PER CURIAM

Sitting: ~~Marialyn Barnard~~, Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: July 26, 2017

DISMISSED FOR WANT OF JURISDICTION

Appellant filed a notice of appeal on March 24, 2017. In her notice of appeal, appellant states she is appealing "the denial of her CONSTITUTIONAL RIGHTS" and references a jury trial that was held on March 22 through March 23 of 2017. A review of the clerk's record shows appellant was charged by complaint with theft under \$2,500 enhanced. The record also shows the trial court granted a motion for a psychiatric examination to determine appellant's competency. The clerk's record includes a judgment of competency dated March 23, 2017. The judgment

indicates a jury found appellant competent to stand trial. The clerk's record does not include any other judgment or order, and it appears the theft charge remains pending.¹

In general, we have jurisdiction to consider an appeal in a criminal case only when there has been a final judgment of conviction. *See Taylor v. State*, 268 S.W.3d 752, 755–56 (Tex. App.—Waco 2008, pet. ref'd); *Ahmad v. State*, 158 S.W.3d 525, 527 (Tex. App.—Fort Worth 2004, pet. ref'd). Appellate courts do not have jurisdiction to review interlocutory orders unless that jurisdiction has been expressly granted by law. *Apolinar v. State*, 820 S.W.2d 792, 794 (Tex. Crim. App. 1991); *Taylor*, 268 S.W.3d at 755–56. Article 46B.011 of the Texas Code of Criminal Procedure (“the Code”) expressly provides that a defendant may *not* “make an interlocutory appeal relating to a determination or ruling under Article 46B.005.” TEX. CODE CRIM. PROC. ANN. art. 46B.011 (West 2006). Article 46B.005 of the Code outlines when a trial court must hold a hearing to determine whether a defendant is incompetent to stand trial. *See id.* art. 46B.005. A hearing held to determine competency is ancillary to prosecution of the criminal case, and a trial court's order of competency is not a final, appealable judgment. *See Ortega v. State*, 82 S.W.3d 748, 749 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *see also Queen v. State*, 212 S.W.3d 619, 622 (Tex. App.—Austin 2006, no pet.) (stating interlocutory appeal may not be had from orders entered under chapter 46B, subchapter D, i.e., articles 46B.071–.090, of the code of criminal procedure); *Hart v. State*, 173 S.W.3d 131, 143 (Tex. App.—Texarkana 2005, no pet.) (stating jury's determination of competency to stand trial is not final, appealable judgment).

Based on the foregoing, it appeared from the record before us that the judgment appellant is attempting to appeal relates to a determination of competency, which is a ruling under Article

¹ The clerk's record also includes a trial court certification in which the trial court indicates this matter “is a determination of competency to stand trial rendered by a jury and the defendant has no right to an interlocutory appeal – 46B.011 C.C.P.”

46.005. It therefore appeared that we lacked jurisdiction over this appeal. As a result, we ordered appellant to file in this court, on or before June 5, 2017, a response showing cause why this appeal should not be dismissed for want of jurisdiction. In our order, we advised appellant that if no satisfactory response was filed within the time provided, the appeal would be dismissed for want of jurisdiction. *See* TEX. R. APP. P. 42.3(c). On June 2, 2017, appellant requested an extension of time to file her response, and we granted appellant's request, ordering appellant to file her response on or before July 7, 2017. Thereafter, appellant timely filed a response, arguing the Texas Code of Criminal Procedure as applied is unconstitutional and "deprives appellant of equal protection and due process of law." In her response, appellant explains why the trial court erred in rendering an order declaring her competent to stand trial. However, at no point does appellant show why the order declaring her competent to stand trial is a final and appealable order.

Because appellant has not been finally convicted and sentenced, we therefore dismiss the appeal for want of jurisdiction.

PER CURIAM

Do Not Publish



Fourth Court of Appeals
San Antonio, Texas

July 26, 2017

No. 04-17-00170-CR

Alice Vega **FIALA**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 187th Judicial District Court, Bexar County, Texas
Trial Court No. NM 308410
Honorable Andrew Carruthers, Judge Presiding

ORDER

In accordance with the court's opinion of this date, the appeal is **DISMISSED FOR WANT OF JURISDICTION**.

It is so **ORDERED** on July 26, 2017.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 26th day of July, 2017.



Luz Estrada, Chief Deputy Clerk

APPENDIX-C

ALICE VEGA FIALA,

Petitioner,

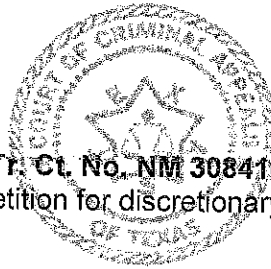
v.

The State of Texas,

Respondent.

PD-0887-17 The Petition For Discretionary was filed in The Texas Court of
Criminal Appeals on 11/14/2017 and refused on 1/10/2018.

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711



1/10/2018

FIALA, ALICE VEGA

Tr. Ct. No. NM 308410

COA No. 04-17-00170-CR

PD-0887-17

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

VICTOR M. VALDES

111 SOLEDAD

SUITE 300

SAN ANTONIO, TX 78205

* DELIVERED VIA E-MAIL *

APPENDIX-D

ALICE VEGA FIALA,

Petitioner,

v.

The State of Texas,

Respondent.

PD-0887-17 Copy of Article 46B.011 of the Texas Code of Criminal Procedure
used by the Fourth Court of Appeals to Deny Petitioner's Right to Appeal.

ment program under Subchapter D or E, the maximum period of restoration is two years beginning on the date of the initial order for outpatient treatment program participation was entered.

(b) On expiration of the maximum restoration period under Subsection (a), the defendant may be confined for an additional period in a mental hospital or other inpatient or residential facility or ordered to participate for an additional period in an outpatient treatment program, as appropriate, only pursuant to civil commitment proceedings.

Enacted effective Sept. 1, 2007 (SB 867, §2). See effective note following Art. 46B.009.

ART. 46B.010. MANDATORY DISMISSAL OF MISDEMEANOR CHARGES

If a court orders the commitment of or participation in an outpatient treatment program by a defendant who is charged with a misdemeanor punishable by confinement and the defendant is not tried before the date of expiration of the maximum period of restoration under this chapter as described by Article 46B.0095, the court on the motion of the attorney representing the state shall dismiss the charge.

Amended effective Sept. 1, 2007 (SB 867, §2). See effective note following Art. 46B.009.

ART. 46B.011. APPEALS

Neither the state nor the defendant is entitled to make an interlocutory appeal relating to a determination or ruling under Article 46B.005.

ART. 46B.012. COMPLIANCE WITH CHAPTER

The failure of a person to comply with this chapter does not provide a defendant with a right to dismissal of charges.

ART. 46B.013. USE OF ELECTRONIC BROADCAST SYSTEM IN CERTAIN PROCEEDINGS UNDER THIS CHAPTER

(a) A hearing may be conducted using an electronic broadcast system as permitted by this chapter and in accordance with the other provisions of this code if:

(1) written consent to the use of an electronic broadcast system is filed with the court by:

(A) the defendant or the attorney representing the defendant; and

(B) the attorney representing the state;

(2) the electronic broadcast system provides for a simultaneous, compressed full motion video, and interactive communication of image and sound between the judge, the attorney representing the state, the attorney representing the defendant, and the defendant; and

(3) on request of the defendant or the attorney representing the defendant, the defendant and the attorney representing the defendant are able to communicate privately without being recorded or heard by the judge or the attorney representing the state.

(b) On the motion of the defendant, the attorney representing the defendant, or the attorney representing the state or on the court's own motion, the court may terminate an appearance made through an electronic broadcast system at any time dur-

ing the appearance and require an appearance by the defendant in open court.

(c) A recording of the communication shall be made and preserved until any appellate proceedings have been concluded. The defendant may obtain a copy of the recording on payment of a reasonable amount to cover the costs of reproduction or if the defendant is indigent, the court shall provide a copy to the defendant without charging a cost for the copy.

Subchapter B. Examination

ART. 46B.021. APPOINTMENT OF EXPERTS

(a) On a suggestion that the defendant may be incompetent to stand trial, the court may appoint one or more disinterested experts to:

(1) examine the defendant and report to the court on the competency or incompetency of the defendant; and

(2) testify as to the issue of competency or incompetency of the defendant at any trial or hearing involving that issue.

(b) On a determination that evidence exists to support a finding of incompetency to stand trial, the court shall appoint one or more experts to perform the duties described by Subsection (a).

(c) An expert involved in the treatment of the defendant may not be appointed to examine the defendant under this article.

(d) The movant or other party as directed by the court shall provide to experts appointed under this article information relevant to a determination of the defendant's competency, including copies of the indictment or information, any supporting documents used to establish probable cause in the case, and previous mental health evaluation and treatment records.

(e) The court may appoint as experts under this chapter qualified psychiatrists or psychologists employed by the local mental health authority or local mental retardation authority. The local mental health authority or local mental retardation authority is entitled to compensation and reimbursement as provided by Article 46B.027.

(f) If a defendant wishes to be examined by an expert of the defendant's own choice, the court on timely request shall provide the expert with reasonable opportunity to examine the defendant.

ART. 46B.022. EXPERTS: QUALIFICATIONS

(a) To qualify for appointment under this subchapter as an expert, a psychiatrist or psychologist must:

(1) as appropriate, be a physician licensed in this state or be a psychologist licensed in this state who has a doctoral degree in psychology; and

(2) have the following certification or experience or training:

(A) as appropriate, certification by:

(i) the American Board of Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or

(ii) the American Board of Professional Psychology in forensic psychology; or

(B) experience or training consisting of:

(i) at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations;

APPENDIX-E

ALICE VEGA FIALA,

Petitioner,

v.

The State of Texas,

Respondent.

Petitioner's Motion *In Limine*

Yumil Rojas
FILED
DONNA KAY HEKINNEY
DISTRICT CLERK
BEXAR COUNTY

CAUSE NUMBER NM 308410

2017 MAR 22 P 1:30

DEPUTY

THE STATE OF TEXAS

IN THE DISTRICT COURT

V.

ALICE V. FIALA

187TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

§
§
§
§
§
§

DEFENDANT'S MOTION IN LIMINE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, **ALICE V. FIALA**, in the above - style and numbered cause and through her Attorney of record, Victor Manuel Valdes, and moves the Court to instruct the Assistant District Attorney not to inquire, question or solicit answers from any witnesses in the following without first approaching the bench:

I.

1. Hearsay statements of the complainant. *✓*

II.

2. The citizenship status of any witness, and any immigration consequences to a witness.

III.

3. The alleged existence of any previous misconduct or offenses, R. Evid. 404(b), *Granted*
concerning the Defendant.

IV.

4. References to the police contacting or attempting to contact the defendant. — GRANTED.

V.

BOLSTERING

That the prosecutor also has the tendency to bolster the credibility of the witnesses at all stages of the trial. "Proper bolstering occurs when one item of evidence is improperly used to add credence or weight to some earlier unimpeached piece of evidence offered by the same party." Pless vs. State, 576 S.W. 2d 83.

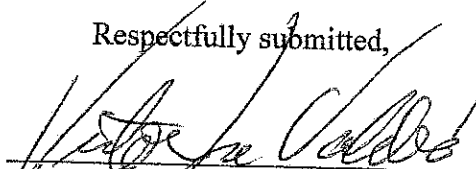
In Menefee V. State, 576 S.W. 2d. 167, the Court of Criminal Appeals of Texas reversed a conviction when the prosecutor in closing argument bolstered the credibility of the witness by saying: "And virse, I don't believe I have ever seen anybody that I thought was any more honest than she is." In United States V. Sullivan, 85 F. 3d 743, (1st Cir.1996), the Court held that: "counsel should not ask one witness to comment on the veracity of testimony of another witness." This is improper cross-examination. "Determinations of credibility are for the jury." United States V. Richter, 826 F 2d 206.

VI.

And, because it is a comment on the weight of the evidence and equally bolstering, the Defendant objects to any request by the to the Presiding Judge by the State representative to declare that the witness testifying is an "expert".

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that this Motion will in all things be granted.

Respectfully submitted,


VÍCTOR M. VALDÉS, J.D., Ed, D.

111 Soledad, Suite 300

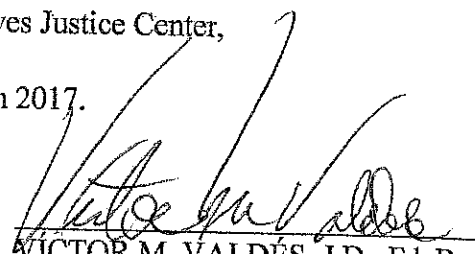
San Antonio, TX 78205

Ph: (210) 229-9652

State Bar No. 20424500

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Defendant's Motion in Limine has been delivered to Assistant District Attorney, Cadena Reeves Justice Center, , San Antonio, Texas, 78205 on this the 22 day of March 2017.


VÍCTOR M. VALDÉS, J.D., Ed, D.

CAUSE NO. NM308410

THE STATE OF TEXAS

VS.

ALICE V. FIALA

§
§
§
§
§

IN THE DISTRICT COURT

187TH DISTRICT COURT

BEXAR COUNTY, TEXAS

ORDER

On this the ____ day of MARCH 2017, came on to be considered the above and foregoing Motion in Limine. After consideration of the same, it is the opinion of the Court that Defendant's Motion be:

☐ GRANTED.

☐ DENIED, to which ruling the Defendant excepts.

☐ Partially granted as indicated, and otherwise denied:

☐ as to Item No. 1

☐ as to Item No. 2

☐ as to Item No. 3

☐ as to Item No. 4

☐ as to Item No. 5

☒ as to Item No. 6

SIGNED AND ORDERED on this the ____ day of March 2017.

JUDGE PRESIDING

APPENDIX-F

ALICE VEGA FIALA,

Petitioner,

v.

The State of Texas,

Respondent.

Cause No. 04-17-00170-CR Letter from the Fourth Court of Appeals dated, August, 12, 2017, which reminds us the holding in *Douglas v. California*, 373 U.S. 353 (1963), in which the Court expands the right of indigents, continuing the trend of ensuring poor defendants protection similar to those available to the wealthy. The Court holds that “there can be not equal justice where the kind of trial a man gets depends on the amount of money he has”. *Ibid*. The court held unconstitutional a system in which counsel was appointed in the sole appeal of right only if the appellate court first examined the record and determined that counsel would be helpful to the appellant or to the court. Writing for the majority, Justice Douglas emphasized the inequality in treatment between those who had their own counsel and those who were too poor to retain their own. *Ibid* at 357-58. In *United States v. Ewell*, 383 U.S. 116 (1966) Justice Fortas with whom Justice Douglas joined in dissenting refers to the denial of the right to appeal as follows: “In the present case it appears that the purpose as well as the effect of the Government’s action was to discourage the exercise of the right, conferred by statute, to seek review of criminal convictions... but the right to direct and collateral review is granted by law. The prosecutor may not consistently with the Due Process Clause booby-trap this right, either to punish or to frighten”.



COURT OF APPEALS

FOURTH COURT OF APPEALS DISTRICT
CADENA-REEVES JUSTICE CENTER
300 DOLOROSA, SUITE 3200
ANTONIO, TEXAS 78205-3037
WWW.TXCOURTS.GOV/4THCOA.ASPX

SANDEE BRYAN MARION
CHIEF JUSTICE
KAREN ANGELINI
MARIALYN BARNARD
REBECA C. MARTINEZ
PATRICIA O. ALVAREZ
LUZ ELENA D. CHAPA
IRENE RIOS
JUSTICES

VACANT, CLERK
OF THE COURT

TELEPHONE
(210) 335-2635

FACSIMILE NO.
(210) 335-2762

August 15, 2017

Nicholas LaHood
Bexar County District Attorney's
Office
300 Dolorosa, Suite 4025
San Antonio, TX 78205
* DELIVERED VIA E-MAIL *

Victor Manuel Valdes
Attorney At Law
111 Soledad, Suite 300
San Antonio, TX 78205
* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 04-17-00170-CR
Trial Court Case Number: NM 308410

Style: Alice Vega Fiala
v.
The State of Texas

Our records reflect that you are the attorney who represents the appellant in the referenced appeal. Rule 48.4 of the Texas Rules of Appellate Procedure requires you to send the appellant a copy of this court's opinion and judgment by certified mail, return receipt requested within five days of the date this court's opinion issues and to notify the appellant of the appellant's right to file a *pro se* petition for discretionary review under Rule 68. Rule 48.4 further requires you to send this court a letter certifying your compliance with the rule and attaching a copy of the return receipt within the time for filing a motion for rehearing.

Our records do not reflect that you have sent this court a letter certifying your compliance with Rule 48.4. Please send the letter to the court no later than ten days from the date of this order.

Very truly yours,
LUZ ESTRADA, CHIEF DEPUTY CLERK

A handwritten signature in cursive script, appearing to read "Jamie Osio", written over a horizontal line.
Jamie Osio
Deputy Clerk, Ext. 53262