No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SUSAN JOY JACOBSON,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner was sentenced to natural life in prison following a jury's verdict finding her guilty of her live-in boyfriend's premeditated murder. Petitioner sought to present evidence of her PTSD diagnosis and general evidence of the pregnancy hormone cortisol's effects to bolster her claim of self-defense at trial.[1] The trial court precluded Petitioner's proffered testimony from two mental health professionals who evaluated Petitioner following the killing and diagnosed Petitioner with Post Traumatic Stress Disorder (PTSD). Additionally, the trial court precluded Petitioner's proffered evidence from an additional expert on the general psychological effects of the hormone cortisol during pregnancy.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the [United States] Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986), quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528 (1984).

This case presents the following questions:

Does preclusion of an accused citizen's PTSD diagnosis, proffered to support her self-defense claim, unconstitutionally impinge on her Due Process guarantee of a meaningful opportunity to present a complete defense?

[1] Petitioner was 9 months pregnant at the time of her boyfriend's fatal shooting.

Is a PTSD diagnosis proper "observation evidence", or does such a diagnosis constitute inadmissible "opinion testimony" under *Clark v. Arizona*, 548 U.S. 745, 126 S.Ct. 2709 (2006)?

Did the Arizona Court of Appeals err, and thus again violate Petitioner's Due Process right to present a complete defense, in categorizing Petitioner's proffered evidence of cortisol's effects as inadmissible diminished capacity evidence?

PARTIES TO THE PROCEEDING

Susan Joy Jacobson, Petitioner.

Mark Brnovich, Arizona Attorney General, Dominic Draye, Solicitor General, Joseph T. Maziarz, Chief Counsel Criminal Appeals, Michael T. O'Toole, Assistant Attorney General, Attorneys for State of Arizona.

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The opinion of the Arizona Court of Appeals, *State v. Jacobson,* 244 Ariz. 187, 418 P.3d 960 (2018), which is the subject of this petition, is included in the Appendix as A-1.

STATEMENT OF JURISDICTION

On July 23rd, 2015, the state secured an indictment charging Petitioner with Premeditated First Degree Murder. The state claimed that late in the night on February 26th, 2015, Appellant fatally shot her live-in boyfriend, Marvin James, in the head as he was on the couple's bed.

Arizona Revised Criminal Statute §13-415 reads: "If there have been past acts of domestic violence . . . against the defendant by the victim, the state of mind of a reasonable person . . .[when asserting a self-defense claim] shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence." Proving past acts of domestic violence perpetrated by a "victim" against the accused thus constitutes the crucial lynchpin in presenting a viable self-defense claim.

In order to corroborate and prove her past domestic violence victimization at the decedent's hands, Petitioner sought to admit evidence that two mental health professionals, who evaluated Petitioner shortly after the shooting, diagnosed Petitioner with PTSD. Petitioner asserts that such evidence was essential to adequately present her justification defense to the jury. During trial, Petitioner

presented evidence in the form of her interviews with detectives, *infra,* and third party testimony, that "she was the victim of domestic abuse and that [the decedent] was the perpetrator of the abuse." *State v. Jacobson, supra,* ¶23. Unfortunately, due to the preclusion of her PTSD experts, the court denied Petitioner the ability to corroborate evidence of her domestic violence victimization.

Petitioner additionally attempted to present expert evidence on the pregnancy hormone cortisol's general effects to prove her impulsiveness. Petitioner sought admission of this evidence to prove a character trait for impulsivity, as allowed by *State v. Christensen,* 129 Ariz. 32, 628 P.2d 580 (1981), to enable the jury to adequately assess the issue of premeditation.

The trial court precluded testimony from all three of Petitioner's proffered experts.

On Appeal, Petitioner argued that the trial court erred in precluding her proffered expert witnesses. The Appellate Court disagreed, affirming Petitioner's convictions. In affirming the trial court's evidence preclusion, the Appellate Court reasoned:

1) The PTSD diagnoses were based "solely upon Jacobson's post-arrest statements" - thus constituting impermissible vouching, (*Jacobson, supra,* ¶16);
2) PTSD testimony "is 'opinion testimony going to mental defect . . . and its effect on the cognitive or moral capacities on which sanity depends,' which,

'under the Arizona rule, is restricted.'" *Jacobson, supra,* ¶20, citing: *Clark v. Arizona*, 548 U.S. 745, 760, 126 S. Ct. 2709 (2006) and *State v. Mott*, 187 Ariz. 536,544, 931 P. 2d 1046 (1997); and

3) Cortisol evidence constituted impermissible evidence of "diminished capacity" precluded by *Mott, supra. Jacobson, supra,* ¶21.

Petitioner filed a Petition for Review of the Appellate Court's decision with the Arizona Supreme Court, (Appendix, A-16). The Arizona Supreme Court denied jurisdiction on May 9th, 2018. (Appendix, A- 17).

Petitioner timely filed this petition, pursuant to Supreme Court Rule 13.1, within 90 days after the Arizona Supreme Court denied review of this matter. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

PROVISIONS OF LAW INVOLVED

Fourteenth Amendment to the U.S. Constitution

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

STATEMENT OF THE CASE

Petitioner, who was nine months pregnant at the time she shot the deceased, asserted justification defenses (self-defense) to the homicide charge as to herself and her unborn fetus. The issues in this petition relate to the court's preclusion of three proffered defense experts that were crucial to Appellant's justification defenses and lack of premeditation defense.

On February 27th, 2015, Coconino County Sheriff's Deputy, Curtis, was informed that Petitioner had entered the Sheriff's Office lobby to report a domestic abuse situation against her. Petitioner reported that she had shot Marvin James, her live in companion, to prevent the immediate loss of her own life. (Trial Exhibit 171, taped conversation between Curtis and Petitioner, attached hereto as Appendix, A-2.)

In speaking with Curtis, Petitioner elucidated that she acted in self-defense in shooting James, and in doing so described suffering years of emotional, psychological and physical abuse at the decedent's hand.

Petitioner was next interviewed by Detective Barr. During this interview, also admitted during trial, Petitioner described abuse at the hands of James. Petitioner additionally described her justification for shooting James both in terms of her own self- defense and in defense of her unborn near-term fetus just as she explained the event to Curtis.[2]

Prior to trial, in support of her justification defenses, Petitioner noticed her intent to call psychiatrist Dr. Chris Linskey, psychologist Dr. Patricia Rose and Dr. Christina Hibbert. Petitioner sought to call Drs. Linskey and Rose to testify that they diagnosed Petitioner with Post Traumatic Stress Disorder (PTSD). Dr. Hibbert was a potential "cold expert"[3] whom Appellant proffered would offer general evidence "re: perinatal, pregnancy and postpartum mental health/emotional considerations."

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[2] Appellant's taped interview is part of the record on appeal – Exhibit 152A. Additionally, the interview is attached hereto as Appendix, A-3.

[3] A "cold" expert testifies as to general relevant case topics- typically without referring to the defendant or reviewing any information specific to the case at bar.

In July 2016, the state filed a Motion to Preclude regarding Dr. Hibbert's testimony, (Appendix, A-4), wherein the state claimed that Dr. Hibbert's testimony would constitute inadmissible "diminished capacity" evidence. Petitioner responded, emphasizing she was not attempting to assert diminished capacity, but wished to present evidence of the unique "behavioral characteristics of a woman in the ninth month of pregnancy." (Appendix, A-5)

In August 2016, the state filed an additional Motion to Preclude Irrelevant and Prejudicial Testimony by Drs. Linskey and Rose. (Appendix, A-6.) In its motion, the state claimed that Petitioner's PTSD diagnosis "may improperly invite the jury to believe Defendant acted with a diminished capacity. In other words, because Defendant was mentally ill and was vulnerable to impulsive behavior, she could not reflect upon her actions before she killed Marvin James." (*Id.*, p. 7.)

In her response to the motion to preclude Drs. Linskey and Rose, Petitioner averred the court should allow the doctors to present evidence of her PTSD diagnoses "as chronically inflicted by her partner." (Appendix, A-7) Appellant correctly noted that "a fair reading of both evaluations confirms that the PTSD was as a result of chronic domestic violence inflicted by the victim."[4] Additionally, in responding to the state's motion to preclude, Petitioner incorporated her Motion in Limine. In that motion, Petitioner noted she "has a fundamental right to present a full defense, pursuant to the due process clauses of the Fifth and Fourteenth amendments to the

[4] The reports of Drs. Linskey and Rose are part of the trial record as Exhibits 7 and 8 admitted during the October 30th, 2016, motions hearing and are attached hereto as a portion of Appendixes, A-8 and 9.

United States Constitution and Art. 2, Sec. IV of the Arizona Constitution." (Appendix, A-10).

The trial court held a hearing on the state's two motions to preclude Petitioner's defense experts. Doctor Hibbert testified that levels of the stress hormone, cortisol, triple during the third trimester of pregnancy.[5] Dr. Hibbert explained "we know cortisol is a stress hormone. It's great for a short time because it helps us to get ready to fight or flight if we're faced with a bear or something. . . So you have high levels of cortisol and that would mean that a woman is feeling under stress even - - no matter what's going on in the outside, but when you add in environmental factors, that can feel even greater." (RT, August 30th, 2016, p. 28 – 29, Appendix, A-11.) Hibbert testified that due to increased hormone levels, a woman in late stage pregnancy could feel elevated senses of threat, need to defend and protective instincts. (*Id.*, p. 34) "Part of being pregnant for most women, is feeling hypervigilant, being, um, on guard, sort of watching for threats and feeling maybe more ramped up, especially with those cortisol levels. You'll find pretty much anybody that has high levels of cortisol will be hypervigilant. They'll have a - - more of a startle response . . .." (*Id.*, p. 35-36.)

Following Dr. Hibbert's testimony, defense counsel argued, "we all know that when we deal with the issue of premeditation, that the state of mind and circumstances associated with a person's behavior are relevant . . .. It's also important for the Court to consider in terms of defensive behavior . . . What affects

[5] Petitioner gave birth to her full term baby on February 28th, 2015, approximately two days following the incident at bar. **(RT, September 27th, 2016, p. 42.)**

self-defense? Well, pregnancy affects self-defense. How do we know that? We know that because Dr. Hibbert can explain it in a way that other people don't understand." (*Id.*, p. 74.) Counsel continued – "You said that, um, you think that it will confuse regarding diminished capacity. It is not impermissible to bring in and, in fact, I would submit that it's error to fail to bring in everything that's relevant to her thought process, in terms of what she perceived the threat to be, how she reacted to the threat and, again, pregnancy affects her threat perception, her defensive reaction." (*Id.*, p. 81.) "[I]t's completely necessary for a due process analysis of justification to let the jury know the affect of that [pregnancy hormones] on the person. . . .But it's not justification for purposes of saying she has diminished capacity. That does a disservice to that concept." (*Id.*, p. 85.) " . . [I]f you prevent this testimony, you're precluding the jury from understanding the process and the hormonal effects of pregnancy on a person that has nothing to do with diminished capacity and has everything to do with a person's perception, in terms of the need to defend, the reaction and the circumstances that are involved with that." (*Id.*, p. 89.)

In granting the state's motion to preclude, the court stated: "I mentioned the fact that Dr. Hibbert testified that there are hormonal changes during pregnancy that can affect cognition. . . The Court believes that this - - if the Court were to allow this type of testimony, it would be improper evidence of potential diminished capacity. Diminished capacity is not a defense that is allowed in the State of Arizona." (Appendix, A-12).

The parties also argued the state's motion to preclude Drs. Linskey and Ross from presenting evidence of Appellant's PTSD diagnosis. The court had before it transcripts of both doctors' testimony on the PTSD issue prepared during the severance trial relating to Appellant's children, previously held in the Coconino County Juvenile Court, (transcripts attached to Appendix, A-6), evaluations of Appellant prepared by each doctor, (Appendixes A-8 and 9) and the pleadings.

Drs. Linskey and Rose diagnosed Appellant with PTSD. (Appendixes, A-8, 9 and 6). The severance transcript reveals that PTSD "is an acknowledgement of a history of trauma that has a lasting impact on the individual's functioning." Appellant exhibited symptoms of "chronic" PTSD – meaning the symptoms have persisted for more than two years – "including flashbacks, intrusive memories, avoidance, triggers to intrusive memories, a heightened chronic anxiety with insomnia."

Dr. Rose, in addition to interviewing Petitioner, observing her behavior and reviewing records, administered a battery of clinically appropriate standardized psychometric tests to Petitioner, including: Formal Mental Status Examination; Wechsler Adult Intelligence Scale-IV; Severity Measure for Generalized Anxiety Disorder; Severity Measure for Depression-Adult; Severity of Posttraumatic Stress Symptoms; Alcohol Use Disorder Inventory Test; Parent Stress Index; and the Minnesota Multiphasic Personality Inventory. The evaluation lasted thirteen hours over two days. Significantly, the severity of Petitioner's PTSD scores went down substantially during her incarceration following James's death. Her PTSD

scores were a full point higher during most of February, 2015, while exposed to the chronic torment at the decendent's hands. (Appendixes, A-6,8 and 9.)

In arguing against the preclusion of Drs. Linskey and Rose, defense counsel emphasized "that there had been complete and thorough evaluations done not by one but by two doctors, used normal protocol, used objective metric testing. . . . [T]he battery of tests that were administered are all the tests that are administered to determine a diagnosis of PTSD. . ." (Appendix, A-13). Counsel averred "PTSD is admissible because in this case it backs up and corroborates what she is saying in terms of her concerns about the need for self- defense and the need to protect her fetus." (*Id.*) "What we want to do is to be able to bring in Doctors Rose and Linskey . . . who independently, objectively, using normal protocol and testing, came to the conclusion that she suffered from PTSD." (*Id.*)

The court, citing *State v. Mott*, 187 Ariz. 536, 931 P. 2d 1046(1997), granted the state's motion to preclude both Drs. Linskey and Rose from testifying to Petitioner's PTSD diagnosis. (Appendix, A-14.) Petitioner argued that the PTSD diagnosis was "admissible pursuant to A.R.S. 13-415 . . Um, and it's behavioral evidence that's admissible that I believe the Court confuses the distinction between behavioral evidence and diminished capacity. The evidence is not submitted for purposes of diminished capacity." (*Id.*)

During trial, Petitioner offered substantial evidence of her good character for peacefulness, abusive behavior of Mr. James against her and Mr. James character for abusiveness. (Appendix, A-15.)

The state attempted to negate any evidence of James's abuse of Petitioner. The state presented evidence that James was not killed in self-defense due to Petitioner's reasonable perception based on her domestic violence victimization; but rather, Petitione shot James to acquire control of the couple's children. The state elicited testimony from various witnesses that they had never seen James hit Petitioner or observed injuries on Petitioner. Whether James abused Petitioner constituted the major contested issue crucial to Petitioner's self-defense assertion under A.R.S. §13-415 in Petitioner's trial.

REASONS CERTIORARI SHOULD BE GRANTED

The trial court's exclusion of Petitioner's PTSD diagnosis prevented her from presenting a completed defense in violation of the Due Process Clause of the 14th Amendment. *Crane, supra, California v. Trombetta, supra.* As stated above, evidence of whether the decedent perpetrated prior acts of domestic violence against Petitioner was a highly contested issue. Petitioner's PTSD diagnoses, the etiology of which was that very abuse inflicted upon her, strongly corroborate Petitioner's evidence of past acts of domestic violence abuse, and consequently the reasonableness of her self-defense actions under A.R.S. §13-415.

Additionally, precluded evidence of cortisol driven impulsiveness, deprived Petitioner's jury of adequately considering whether Petitioner premeditated the killing.

I.

Review is Warranted as the *Jacobson* PTSD Preclusion Conflicts With Decisions of Another State Court of Last Resort

Petitioner never attempted to admit her PTSD diagnosis to show "diminished capacity." Arizona precludes "diminished capacity" evidence – evidence of the lack of capacity to form *mens rea* - in all cases not involving an insanity defense. *Mott, supra.* Petitioner never came close to arguing or suggesting she lacked the capacity to form the requisite mental state for the charged offense based on PTSD. Petitioner simply desired to present her PTSD diagnoses to the jury to corroborate her stance on the contested evidence of past spousal abuse.

In *Ward v. Commonwealth,* 264 Va. 648, 570 S.E.2d 827 (2002), the defendant appealed the trial court's admission of the victim's PTSD diagnosis during his rape trial. The licensed clinical psychologist in *Ward,* "testified that, *based upon what the victim had told her* [6], the victim was suffering from post-traumatic stress disorder (PTSD). *Id.,* 651, 829 (emphasis supplied). In affirming the trial court's admission of the victim's PTSD diagnosis, the *Ward* court stated: "Dr. Wenzel simply testified about the victim's mental condition, which was proper . . . Dr. Wenzel's testimony merely tended to corroborate the victim's testimony, in the same way that a doctor's testimony describing a rape victim's physical injuries tends to corroborate the victim's testimony." *Id.,* 653, 831.

[6] In addition to a lengthy clinical interview of Petitioner, Dr. Rose administered a complete psychometric test battery to Petitioner in diagnosing Petitioner with PTSD. Appendixes 6, 8 and 9. This makes Petitioner's diagnosis far more reliable than the diagnosis in *Ward.*

The PTSD decisions in *Ward* and *Jacobson* are diametrically opposed. Unfortunately, Arizona's incorrect decision on the issue unconstitutionally deprived Petitioner of presenting her defense.

II.

The Arizona Supreme Court in *Jean* has Decided an Important Federal Question in a Way That Conflicts with a Relevant Decision of this Court.

A. PTSD Evidence

In *Clark v. Arizona,* 548 U.S. 735, 126 S.Ct. 2709, 2716 (2011), this Court considered whether "Arizona violates due process in restricting consideration of defense evidence of mental illness and incapacity to its bearing on a claim of insanity, thus eliminating its significance directly on the issue of . . . [*mens rea*]. The *Clark* Court ruled that Arizona may indeed preclude this "diminished capacity" evidence.

In reaching its decision, this Court, at 2725, separated proffered evidence into three categories.

> First, there is 'observation evidence' in the everyday sense, testimony from those who observed what Clark did and heard what he said; this category would also include testimony that an expert witness might give about Clark's tendency to think in a certain way and his behavioral characteristics. This evidence may support a professional diagnosis of mental disease and in any event is the kind of evidence that can be relevant to show what in fact was on Clark's mind when he fired the gun.

> Second, there is 'mental-disease evidence' in the form of opinion testimony that Cark suffered from a mental disease with features described by the witness. . . The thrust of this evidence was that, based on factual reports, professional observations, and tests, Clark was psychotic at the time in question, with a condition that fell within the category of schizophrenia.

> Third, there is evidence we will refer to as 'capacity evidence' about a defendant's capacity for cognition and moral judgment (and ultimately also his capacity to form *mens rea*). This too is opinion evidence. . ..

The *Clark* Court, 2726, noted that "observation evidence" is admissible under *Mott, supra,* and "only opinion testimony going to mental defect or disease, and its effect on the cognitive or moral capacities on which sanity depends under the Arizona rule, is restricted."

In the present case, Petitioner sought to present PTSD diagnoses in the form of observation evidence to show her tendency to think in a certain way and her behavioral characteristics. Essentially, based on the past abuse perpetrated on her, she reasonably thought deadly force was necessary in self-defense. In this regard, PTSD evidence showed what was on Petitioner's mind when she fired the gun.

Petitioner never posited, nor could she, that her diagnoses prevented her from forming the requisite mental state for the crime. Not only did she have the mental capacity to intentionally shoot the decedent, it was undisputed that she intentionally did so. The only issue was whether her actions were justified under Arizona's reasonable person standard as modified by A.R.S. §13-415. "Diminished capacity" was never an issue. The *Jacobson* court thus excluded evidence crucial to Petitioner's defense which evidence is admissible under this Court's decision in *Clark.*

B. Cortisol Evidence

Similarly, Dr. Hibbert's proffered general testimony on cortisol's effects constituted important "observation" evidence of Petitioner's behavioral characteristic to act impulsively. Just as Arizona allows this type evidence to negate premeditation, *Christensen, supra,* the testimony is admissible under *Clark.* As the evidence was not offered to show "diminished capacity", *Clark* mandates its admissibility.

CONCLUSION

In affirming Petitioner's conviction, the Arizona Court of Appeals unconstitutionally denied Petitioner her Due Process guarantee of a meaningful opportunity to present a complete defense. This is true in respect to both evidence of PTSD and effects of cortisol preclusion. In denying Petitioner Due Process, the Arizona Court of Appeals decision is at odds with both another state court of last resort and this Court's ruling in *Clark.*

In unconstitutionally affirming the trial court's gutting of Petitioner's self-defense claim and lack of premeditation evidence, the Court of Appeals assured Petitioner will serve the remainder of her life in prison without having had the opportunity to adequately defend herself at trial. Petitioner respectfully requests this Court accept review of the Arizona Court of Appeals' decision in her matter and

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rectify the injustice perpetrated upon her.

Respectfully submitted,

/S/

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