

21-7545

No. 21A288

FILED

FEB 14 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Sloan Patrick Stanley — PETITIONER
(Your Name)

vs.

Jeffery Uttecht — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals for the Ninth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Sloan P. Stanley
(Your Name)

Mason County Jail, P.O. BOX 519
(Address)

Shelton, WA 98584
(City, State, Zip Code)

n/a
(Phone Number)

RECEIVED

FEB 23 2022

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

- 1.) Is Petitioner entitled to be found "in custody" for purposes of 28 USC § 2254, given the particular facts, in accord with Ninth Circuit Court of Appeals own precedent as well as the principles of equal protection?
- 2.) Is Petitioner entitled to have a certificate of appealability (COA) issued, given the particular set of issues and circumstances involved and the principles of equal protection?
- 3.) Can a 28 USC § 2201 action to challenge the constitutionality of a state statute be brought as a stand alone action in conjunction with 28 USC § 1331, or must it be coupled with, e.g., 28 USC § 2254, or 42 USC § 1983?
- 4.) Is Petitioner entitled, in the very least, to have his habeas corpus petition stayed and the habeas claim that originally started out as a motion for declaratory judgment under 28 USC § 2201, transferred back to a motion for declaratory judgment and heard on the merits, either stand alone or coupled with 42 USC § 1983, potentially allowing the actual innocence claim in the habeas petition to proceed?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix N/A to the petition and is

- ☐ reported at NO OPINION ISSUED; 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☐ is unpublished.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 A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished. *See 2021 WL 1946333*

☐ 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 Sep. 15, 2021.

☐ 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: Oct. 20, 2021, and a copy of the order denying rehearing appears at Appendix B.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including March 19, 2022 (date) on December 29, 2021 (date) in Application No. 21 A 288.

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

- First Amendment - U.S.C. - freedom of speech
- Fifth Amendment - U.S.C. - equal protection of the law and due process of the law
- Fourteenth Amendment - U.S.C. - equal protection of the law and due process of the law
- 28 U.S.C. § 2254, § 2201 & § 1331

STATEMENT OF THE CASE

At the heart of this habeas corpus action is a claim that the Washington state cyberstalking statute RCW 9A.61.260 is unconstitutionally overbroad and vague in violation of the First and Fourteenth Amendments of the U.S. Constitution. It is overbroad because the statute allows for convictions in threats prosecutions for mere negligent speech in violation of this Court's own precedent in Elonis v. U.S., 575 U.S. 723 (2015). Also, the way in which this state construes its mens rea of intent and knowing in the context of a threats prosecution does not give a person of ordinary intelligence a reasonable opportunity to know what speech is prohibited, so as to leave one guessing at its meaning, and it allows for arbitrary and discriminatory enforcement. Thus, leaving the statute vague.

I had been convicted of nine felony counts of cyberstalking in a jury trial, in which I represented myself, in 2015. I denied the offer of a misdemeanor, knowing I could prove that I never had any intent to intimidate as was required by the statute, and proceeded to a trial for nine felony counts. However, as I later found out at trial, intent to intimidate in the state of Washington only concerned an intent to say facially threatening words (reasonable person objective test, negligence std.), and it did not matter if I had intent to intimidate or not. Which, was at odds with the statutory language of RCW 9A.61.260, "with

intent to intimidate." Consequently, I was convicted on all nine counts, for mere negligent speech. I appealed, with the same basic contention as here, that the statute is over-broad and vague, all the way to the State Supreme Court, to no avail. I then submitted pro se, a writ of certiorari with this Court that was denied, see Stanley v. Washington, 200 L.Ed.2d 959 (April 30, 2018). I also submitted for a re-hearing that was subsequently denied as well.

At the time I submitted the pro se writ to this Court, I was in jail fighting new charges for more threats allegations (two separate threats statutes from the cyberstalking statute). The jail had no access to law library and the writ I submitted was based solely off of the Elonis v. U.S. case, that my attorney graciously provided for me.

As to the new charges I faced, they were based off of another inmates allegations that I had made threats, while I was celled with him for twelve days in the intake units in prison. He came forth with the allegations a year after we were celled together, and after he is released and picks up new charges, which coincided with my own release a near month away. I believe this inmate was a plant by the State in retaliation, because a month prior to meeting this person I had gone to the FBI

complaining my trial transcripts had been altered omitting highly prejudicial statements made by the prosecutor. To which I had circumstantial evidence showing that the statements were omitted. However, the FBI was not interested and my appellate attorney explained to me the record we have is the record we must deal with. It was three weeks after I went to the FBI that my community custody was revoked for frivolous reasons, for basically fighting my appeal and I was sent back to prison where I was to shortly meet this informant.

In a trial plagued with error and deception I was found guilty and sentenced to $33\frac{1}{2}$ years. And, once again, I had been offered a misdemeanor and because I exercised my right to go to trial, to prove my innocence, instead of take their deal, I was severely punished.

While this information is not necessarily relevant to the instant action it is complimentary to the main claim I have already detailed. That claim being that the cyberstalking statute is overbroad and vague. Similarly, these other threats statutes are also overbroad and vague for the same reasons, and the same argument from the habeas claim would apply. Consequently, this state is and has been for sometime now, convicting a substantial amount of people for mere negligent speech.

Fortunately, the conviction that gave way to the $33\frac{1}{2}$ year sentence for threats was overturned and remanded for a new trial, and the mandate issued on October of 2021, just recently. See State v. Stanley, 17 Wn. App. 2d 1012 (2021). Thus, the reason I am currently back in jail. Because of these unconstitutional statutes and my desire to prove my innocence, rejecting any deals, even misdeemeanor deals, I have lost the last eight years of my life and a budding career as a mechanical engineer, as well as many other things.

The conviction I challenge in the habeas claim, its sentence expired before I was able to exhaust all state court remedies and it carried no probation. As such, I did not think I could bring a habeas action from a preliminary reading of 28 USC § 2254, because I was no longer "in custody" on that conviction. By the time I was able to file anything in this matter, that is, when I was not busy researching and working on matters related to the current conviction/charges, I had determined that my only option was to file a motion for declaratory judgment in accordance with 28 U.S.C. § 2201, as this could potentially open other doors.

After filing the motion for declaratory judgment the magistrate judge responded with an order to show cause why the court had jurisdiction to hear the

motion. This order had explained that the proper vehicle was a habeas corpus petition, and even provided me a copy of one. Limited to my notes at the time, due to the law library being closed due to covid, I responded back explaining my dilemma, and that I could provide a limited response. In my response I reiterated the fact that 28 USC §1331 - federal question - gave the court jurisdiction to hear the motion, and that I could not satisfy the "in custody" requirement of §2254. The judge then responded with a second order to show cause explaining that §1331 was only used, for example, in conjunction with §2254, and that would essentially be the proper course to take. I thought this to be patently false given the plain language of §1331. Why would the judge respond with such subterfuge I thought.

In the mean time I was able to check out a book from the closed down law library. This book, "Habeas Corpus Checklists," by Ira Robbins, explained quite a bit about habeas corpus and gave me the insight I needed to fully (more or less) understand my options regarding habeas corpus actions. Armed with the new knowledge that there existed exceptions to the "in custody" requirement and because it seemed to me that the judge was steering me into doing a habeas corpus petition, I decided to bring the habeas action and provide supplemental

briefing why I was "in custody." After all, the "in custody" requirement was discretionary upon the courts.

The fact the judge was seemingly steering me in this direction, pushing for me to do a habeas petition, explaining the courts did not have jurisdiction when it certainly seemed they did, to me, this was a tacit recommendation to proceed with the habeas action, or so I thought. So that is what I did. I transferred to the habeas action from the motion for declaratory judgment, its claim. I then provided supplemental briefing to include a very viable "in custody" discussion.

I am still unclear whether a stand alone action can be brought under 28 U.S.C. § 2201. Congress did intend for it to be utilized to test the constitutionality of state criminal statutes. Perhaps, the proper course for me to have taken was to file a 42 USC § 1983 action coupled with § 2201. However, the judge never mentions anything about this and was somewhat coercive I bring the habeas action.

To meet the "in custody" requirement I initially claimed the exception that this Court in Lackawanna City D.A. v. Coss, 532 U.S. 394 (2001) adopted. This exception being that when a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired conviction, and that conviction is used to enhance his sentence for a later offense, he may challenge the

enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained. Id. at 405.

In the instant matter, my prior conviction's sentence expired before I was finished exhausting state remedies so as I could obtain federal habeas review. Thus, to no fault of my own, I was precluded from obtaining federal habeas review. However, the current conviction being enhanced by the prior expired conviction, through this exception, should allow me to be found "in custody" for § 2254 purposes. The prior conviction enhanced the time structure of the current sentence substantially and was used in part to raise four counts of the current offenses to felony, as well as prove other elements of the current offenses, and also to apply aggravators.

The general contentions I raised regarding this exception, were - 1) that I was denied a full and fair opportunity to litigate in a prior forum - this raised multiple questions; and - 2) an actual innocence gateway claim, which required the main habeas claim to be accepted before the required "new evidence" could even be considered. Both of these fell under the general exception adopted by this Court in Lackawanna.

I was then able to discover another exception that applied. The Ninth Circuit in Zichko v. Idaho, 247 F.3d 1015 (9th Cir. 2001) espoused a Fifth Circuit

holding that a habeas corpus petitioner meets the statutory "in custody" requirement when, at the time he files the petition he is in custody pursuant to another conviction that is positively and demonstrably related to the conviction he attacks. This exception applied for multiple reasons, such as the fact that four of the current counts were raised to felony predicated on the fact of the prior conviction, and the prior conviction was used to establish various other elements as well as aggravating factors in the current offenses. Therefore, this exception most certainly applied, and it alone qualified me to be found "in custody."

However, the district court found that none of the claims I raised were applicable. The district court judge actually ignored facts that I raised showing the prior conviction was a necessary predicate to the current one, which in accord with Ninth Circuit precedent would have allowed for me to be found "in custody." The district court judge then denied any COA.

I then appealed to the Ninth Circuit Court of Appeals requesting a COA. Subsequently, I was denied any relief. Both of the courts effectively denied me equal protection of the law. This will be shown as to each of the claims with supporting law in what follows.

REASONS FOR GRANTING THE PETITION

In what follows I will detail the reasons why this petition should be granted. For one, it poses multiple questions that this Court could answer providing useful insight for many others. In general this petition will demonstrate that both the district court and the Ninth Circuit Court of Appeals have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Rule 10(a). Also, the main habeas claim involves Washington state's highest court deciding on "an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). The following will discuss the relevant issues.

A. Certificate of Appealability (COA)

This Court in Slack v. McDaniel held that "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. This construction gives meaning to Congress'

requirement that a prisoner demonstrate substantial underlying constitutional claims and is in conformity with the meaning of the 'substantial showing' standard provided in Barefoot [v. Estelle, 463 U.S. 880, 893 n.4 (1983)], and adopted by Congress in AEDPA." 529 U.S. 473, 484 (2000).

In Barefoot this Court cogently summing up the "substantial showing" standard averred the following:

"In requiring a question of some substance, or a substantial showing of the denial of [a] federal right, obviously the petitioner need not show that he should prevail on the merits. He has already failed at that endeavor. Rather, he must demonstrate that the issues are debatable amongst jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." 463 U.S. at 893 n.4 (internal quotation marks and citations omitted) (alteration in original).

With the foregoing in mind it will serve to illuminate whether the facts and authority in what follows are deserving of the issuance of a COA.

B. Merit of the Underlying Habeas Claim

As previously stated the underlying claim calls attention to the fact that Washington state's cyberstalking

statute, RCW 9A.61.260 is unconstitutionally overbroad and vague in violation of the First and Fourteenth Amendments to the U.S. Constitution.

It is overbroad in violation of the First Amendment in as much as it allows for convictions of negligent speech. The way this state construes it mens rea of intent and knowing in the context of a threats prosecution allows for the convictions of negligent speech. This is at odds with this Court's holding in Elonis v. U.S., 575 U.S. 723 (2015), that negligence was not sufficient to sustain a threats conviction, explaining essentially that a subjective intent requirement is necessary to distinguish criminal from innocent conduct. See State v. Trey M., 186 Wn.2d 884, 383 P.3d 474 (2016) (The Washington State Supreme Court rejecting Elonis and denying a subjective intent requirement as laid forth in Elonis.)

Washington state claims it requires a subjective intent in its threats statutes because one must subjectively intend or know they are saying threatening words. However, one need not intend nor know the recipient of the threat will feel threatened. This is of course directly at odds with what this Court expressed and held in its majority opinion in Elonis. Not to mention, it is also contrary to this Court's decision in Virginia v. Black, 538 U.S. 343 (2003), requiring subjective intent in threats

prosecutions. This has also consistently been denied by Washington Courts, see Trey M., 186 Wn.2d at 899-902, regarding Virginia v. Black as unpersuasive and denying it has any affect in Washington state courts. See also, U.S. v. Cassel, 408 F.3d 622, 631-33 (9th Cir. 2004) (the Ninth Circuit recognizing Black's subjective intent requirement for federal threats prosecutions)

An additional point, and a corollary to all this, is the "true threat" definition, also known as the reasonable person objective test (a negligence standard), allows for conclusive presumption of intent and knowing from the predicate fact of finding a "true threat," or in other words negligence. This would be a due process violation. See Franks v. Franklin, 471 U.S. 307 (1985).

It is this confusion just noted above that gives way to the fact that the statute does not give a person of ordinary intelligence an opportunity to know what speech is prohibited and allows for arbitrary and discriminatory enforcement. The statute requires "an intent to intimidate," however, this is not true. All that is really required is an intent to say facially intimidating words. These are not the same things and thus, renders the statute in violation of the constitution. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (explaining void-for-vagueness principles)

I believe this provides sufficient showing of merit to deserve encouragement to proceed further. Thus, this part of the COA requirement should be satisfied. Now to address if the district court was correct in its procedural rulings, and if the court of appeals got it wrong when they failed to issue a COA.

C. Court's Procedural Rulings Debatable

1.) Positively and Demonstrably Related - Claim

The denial of this claim, beyond being debatable amongst jurists of reason, is clearly in error as I will demonstrate in the following. And, I will show that this claim alone entitles me to be found "in custody."

In Zichko v. Idaho, 247 F.3d 1015 (9th Cir 2001) the Ninth Circuit espoused a Fifth Circuit holding that "[i]t is well settled that a habeas corpus petitioner meets the statutory 'in custody' requirements when, at the time he files the petition [...]... he is in custody pursuant to another conviction that is positively and demonstrably related to the conviction he attacks." Id at 1019 (quoting Carter v. Proctor, 755 F.2d 1126, 1129 (5th Cir. 1985)). The Zichko Court held that a habeas petitioner is "in custody" for the purposes of challenging an earlier

expired conviction, when petitioner is currently incarcerated and the expired conviction "is a necessary predicate" to the current conviction for which he is currently serving time for. *Id.*

See also, *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994) (Holding that the habeas petitioner could challenge an earlier expired conviction while involuntarily committed for treatment, because the prior conviction was in part a predicate to his current incarceration.); *Lowery v. Young*, 887 F.2d 1309 (7th Cir. 1989) (Constitutional challenge to enhanced sentence requires showing that there is a "positive and demonstrable nexus" between prior conviction and current custody.); *Sinclair v. Blackburn*, 599 F.2d 673, 676 (5th Cir. 1979) cert denied, 444 U.S. 1023 (1980) (Jurisdiction exists if there is a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration. (citing, *Cappetta v. Wainwright*, 406 F.2d 1238, 1239 (5th Cir.) cert. denied, 396 U.S. 846 (1969))).

These cases provide insight for what qualifies as a "necessary predicate" and also for what qualifies as "positively and demonstrably related," in this context. And, in this context it would appear that a prior conviction is a "necessary predicate" and is "positively and demonstrably related" to the current incarceration/conviction, if the

prior conviction either: 1) is a basis for the current conviction in part or whole (e.g., satisfies an element of the offense); or 2) enhanced the sentence of the current conviction in specific ways that are positively and demonstrably related to the prior conviction. Which, in the instant case both these scenarios are present as I will now demonstrate.

To begin, I ask that this Court please take judicial notice of the jury instructions (see Appendix C) from the trial that led to my current conviction of the current charges for multiple counts of felony harassment and intimidating a judge. F.R.E. Rule 201; see also, In re Indian Palms Associates, Ltd., 61 F.3d 197 (3rd Cir. 1995) (Judicial notice may be taken at any stage of proceeding, including appeal.); In the matter of Lisre, 905 F.3d 495 (7th Cir. 2018) (Right place to take judicial notice, once case is in court of appeals, is in a brief.) These jury instructions from the trial of the current conviction/charges gives conclusive support to the contentions of this issue, as I will now explain.

First, four of the five counts of felony harassment, BCW 9A.46.020, were elevated to felony in part due to the fact of the prior convictions. See, jury instruction no. 9, in Appendix C (NOTE: this instruction is duplicated for four victims, however, only one copy is provided). This "to convict"

instruction, for felony harassment, lists as a required element to qualify as a felony: "(3)(a)- That the threat to cause bodily injury consists of a threat to kill the threatened person;" or "(3)(b)- the defendant was previously convicted of the crime of cyberstalking against the threatened person," (the prior conviction involved these same four victims). Further, at the end of the first page continuing on to the second page of this instruction, it states: "To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (3)(a) or (3)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one of the alternatives (3)(a) or (3)(b) have been proved beyond a reasonable doubt."

There is no way to tell which alternative the jury based the conviction on. This is conclusive proof that the prior conviction was a necessary predicate to the current conviction. There can be no denying this, and this alone should be enough that according to Ninth Circuit precedent, I am entitled to be found "in custody." However, there are other instances that I feel also qualify as "necessary predicates."

The next instance has to do with the intimidating a judge, RCW 9A.172.160, conviction/charge. In jury instruction no. 29, in Appendix C, the "to convict" instruction for intimidating a judge, it is a required

element, no.(2): "That the defendant directed the threat because of a ruling or decision in an official proceeding." The official proceeding would be the prior convictions trial. This most certainly establishes a "positive and demonstrable nexus" between the two convictions, and is arguably a "necessary predicate."

The next instance has to do with the fact that the prior conviction and the evidence of threats (404(b) evidence) were used in large part to establish the element of reasonable fear a threat would be carried out in the current harassment conviction. See instruction no. 9, Appendix C, whereas it requires in element no.(2): "That the words or conduct of the defendant placed [victim] in reasonable fear that the threat would be carried out." See also, instruction no. 6, Appendix C, that limits the evidence from the prior trial for the sole purpose of this element of reasonable fear. Together this evidence from the prior conviction along with the prior conviction were used to establish this element. Therefore, it can be concluded that these things together formed a "necessary predicate" for this element.

Aside from the fact that Washington state uses a point system for its sentencing structure, so as any prior felony convictions necessarily enhance any subsequent convictions, my sentence was enhanced by the use of

aggravators. To which, allowed for all the counts to be ran consecutive, totaling a sentence of $33\frac{1}{2}$ years. Those aggravators, "egregious lack of remorse" - RCW 9A.535(3)(g) and "criminal justice participant" - RCW 9A.535(3)(x), were both predicated on the prior conviction.

The "egregious lack of remorse" aggravator was based off the fact that apparently I have shown no remorse as to the prior conviction in committing the current offenses, for the four previous/current victims. Thus, qualifying the prior conviction as a "necessary predicate" for this aggravator. See instruction no. 31, Appendix C.

As to the "criminal justice participant" aggravator, it was based off the fact, the offense was committed against an officer of the court, in retaliation for their duty to the criminal justice system. Being that one of the current victims was the prosecutor for the prior conviction and the offense was related to this particular function. The prior conviction thus, arguably forms a "necessary predicate" to this aggravator.

With all of the instances given, there is enough to conclude that beyond being debatable amongst jurists of reason, it is fully conclusive, that the district court made an error in its procedural ruling, as did the court of appeals in not recognizing the error. Thus, a COA should positively issue for this claim.

2.) Full and Fair Opportunity Issue

In Dubrin v. California, 720 F.3d 1095 (9th Cir. 2013) the Ninth Circuit espoused this Court's plurality holding of an exception to the general rule denying untimely habeas review that was also adopted for § 2254 in Lackawanna Cty. D.A. v. Coss, 532 U.S. 394 (2001). This exception provided, "that when a defendant cannot be faulted for failing to obtain timely review of a constitutional challenge to an expired prior conviction, and that conviction is used to enhance his sentence for a latter offense, he may challenge the enhanced sentence under § 2254 on the ground that the prior conviction was unconstitutionally obtained." 720 F.3d at 1099 (citing Lackawanna, 532 U.S. at 405) Thus, allowing a petitioner to be "in custody" to challenge the constitutionality of the prior conviction under these circumstances.

This Court identified two prudential considerations justifying the general rule adopted in Lackawanna: "the need for finality of convictions and ease of administration." 532 U.S. at 402. With respect to the first consideration this Court stressed that a state-court judgment of conviction "is subject to review in multiple forums," including direct appeal, state post-conviction review, and federal habeas review, and noted that these vehicles for review

cannot remain available "indefinitely and without limitation." Id. at 402-03. (internal quotation marks omitted); see also Dubrin, 720 F.3d at 1097-98.

The Ninth Circuit in Dubrin pointed out regarding the finality of judgments that "the experience drawn from other contexts suggests that the general interest in protecting the finality of judgment will not be undermined by recognizing an exception for circumstances in which a party was denied a full and fair opportunity to litigate in a prior forum. See Kremer v. Chem. Constr. Corp., 456 U.S. 461, 480-81 n.22 (1982) (claim preclusion); Allen v. McCurry, 449 U.S. 90, 95 (1980) (issue preclusion)." 720 F.3d at 1098. See also Montana v. U.S., 440 U.S. 147, 164 n.11 (1979) ("Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.")

"The federal courts reach varying results when a state court affords a petitioner full access to a facially fair procedure but reaches a conclusion on the merits that clearly is wrong as a matter of federal law. This situation may be viewed as yet another one in which the state procedure is theoretically adequate but its application in the individual case was not 'full and fair.' The Tenth Circuit has held that state courts withhold the requisite opportunity for full and fair litigation when

they fail to apply 'the correct constitutional standard.'" Bandy Hertz & James S. Liebman, Federal Habeas Corpus Practice & Procedure, 7th ed., § 27.3[d] n. 47 (Matthew Bender)

Clearly, there is some issues open to debate regarding "full and fair" litigation. The questions raised would be: 1) does "full and fair" litigation require the ability or opportunity for review in all forums, including the federal habeas forum; 2) is "full and fair" litigation denied when the state court reaches a clearly erroneous decision. In regards to the second question posed, when a federal question is raised, the federal habeas forum may actually be the only effective forum available for review. Clearly there is room for debate here amongst jurists of reason.

In Lackawanna this Court explained, regarding the exceptions to the general rule they adopted, that "this case does not require us to determine whether or under what precise circumstances, a petitioner might be able to use a § 2254 petition in this manner. Whatever such a petitioner must show to be eligible for review, the challenged prior conviction must have adversely affected the sentence that is the subject of the habeas petition." 532 U.S. at 406.

Thus, this Court in Lackawanna left the door open to further debate regarding this exception. This

is further proof that this issue presented is debatable amongst jurists of reason, and is a conclusive reason, along with the other reasons presented here, why a COA should issue.

3.) Actual Innocence Gateway Issue

"'[A]ctual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim heard on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993); Schlup v. Delo, 513 U.S. 298, 315 (1995). "In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims [] on the merits notwithstanding the existence of a procedural bar to relief." McQuiggin v. Perkins, 569 U.S. 383, 392 (2013).

"To be credible" a gateway claim requires "new reliable evidence... that was not presented at trial." Schlup, 513 U.S. at 324. Further to this point, the Schlup Court explained, "[t]he meaning of actual innocence... does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to

whether reasonable doubt exists that the standard address; rather the standard requires the district court to make a probabilistic determination about what reasonable properly instructed jurors would do." 513 U.S. at 329 (emphasis mine)

In House v. Bell this Court explained that, "the Schlup standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to ~~show~~ demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." 547 U.S. 518, 538 (2006). Similarly, the Ninth Circuit has said, "where post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, but not affirmatively proving innocence, that can be enough to pass through the Schlup gateway to allow consideration of otherwise barred claims." Carriger v. Stewart, 132 F.3d 463, 478-79 (9th Cir. 1997) (en banc).

In the instant case for the "new evidence" to be considered, the habeas claim that subjective intent is required in a threats prosecution to establish guilt must first be accepted. Thus, in this unusual case the constitutional claim and the "new evidence" must be evaluated simultaneously. Only then can the "new evidence" be considered for this type of a claim. As it stands now, according to

Washington state courts, any evidence of a subjective intent in a threats prosecution is irrelevant, and thus was not allowed nor ever introduced at trial. It should have been required in some fashion, and in a jury instruction as well, then discussed throughout the entire trial as evidence was presented.

In Carella v. Car., 491 U.S. 263 (1989) this Court explained, "[t]he Due Process Clause of the Fourteenth Amendment denies states the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. In re Winship, 378 U.S. 358, 364 (1970). Jury instructions relieving states of this burden violate a defendant's due process rights. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases." Id. at 265.

This is true where as here the jury never had to find subjective intent. The jury instructions mandated the jury to presume intent from the predicate fact of finding a "true threat" guided by the reasonable person objective test that effectively reduces intent to that of negligence. Thus, relieving the state of the burden of proving every element beyond a reasonable doubt, i.e., "intent to intimidate."

This Court in Calderon v. Coleman agreeing with the reasoning that the Ninth Circuit had come to conclude in an earlier en banc decision, explained "that if there was a reasonable likelihood that the jury had applied an invalid instruction in a way that prevented the consideration of constitutionally relevant evidence, the error necessarily satisfies the Brecht test." 525 U.S. 141, 150 & n.4 (1998) See also, Boyde v. CA, 494 U.S. 370, 380 (1990) (With an ambiguous instruction the proper inquiry is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.)

While, asides from the presumption of intent from the predicate fact of finding a "true threat" (i.e., negligence), the issue here is more about a nonexistent instruction. That being of the requirement of subjective intent. Nevertheless, the foregoing cases highlight the conflict and add support to any harmless error analysis in my favor. In the least an evidentiary hearing should be required to fully demonstrate the "new evidence" of the lack of subjective intent. Of course the habeas claim would still have to be accepted before the "new evidence" can be evaluated, which makes this a type of reverse gateway claim, for lack of a better term. No doubt it poses an unusual actual innocence gateway claim.

It should be clear that regarding this issue

there are facts and cases presented that would give jurists of reason room to debate whether the denial of this claim was correct or not. Therefore a COA should issue.

D. Original Motion for Declaratory Judgment

As previously explained I started this action by the filing of a motion for declaratory judgment under 28 USC § 2201. The court then explained they did not have jurisdiction and strongly encouraged me to file a habeas corpus petition, to which I ultimately did. However, the court should have had jurisdiction all along under 28 USC § 1331 - federal question.

I have asked both the district and appellate courts, in the very least, that they transfer the habeas claim back to a motion/petition for declaratory judgment, and then evaluate the merits of the claim. Both courts ignored this request. A favorable outcome to this motion would then certainly allow me to bring an actual innocence claim.

I still am unclear if I can or can't bring a stand alone motion/petition for declaratory judgment - 28 USC § 2201, with 28 USC § 1331 giving the court jurisdiction. Does § 2201 have to be brought in conjunction with another action such as 28 USC § 2254 or 42 USC § 1983? Can it not be brought stand alone to challenge a state statute

that is in conflict with the U.S. Constitution, as is here?

This Court in Steffel v. Thompson, 415 U.S. 452, (1974) explained that Congress intended declaratory judgment procedure to be utilized to test the constitutionality of state statutes; see also Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974). If one has standing and can show a controversy exists, shouldn't they be allowed to use 28 USC § 2201 to test the constitutionality of a state statute that is in conflict with the U.S. Constitution? Does not 28 USC § 1331 invest the federal courts with jurisdiction to hear such a motion/petition?

In the very least, is petitioner entitled to have the habeas petition stayed, then the habeas claim transferred back to a motion/petition for declaratory judgment as a stand alone action or coupled with 42 USC § 1983 naming the state's Attorney's General as the defendant? A favorable ruling would then allow the court to reevaluate the actual innocence claim in the habeas petition. The court would most certainly be able to address the "new evidence" if the courts first found the underlying claim to be valid.

I feel what I ask here is reasonable and it would seem to align with the principles of equity of which undergirds the writ of habeas corpus.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Stowen P. Stanley

Date: February 14, 2022