

22-5201

FILED

JUL 22 2022

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JUREL DION ROBERTSON — PETITIONER
(Your Name)

ATTORNEY GENERAL ^{VS.} OF ARIZONA
AND DAVID SHUN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NINTA CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JUREL DION ROBERTSON
(Your Name)

P.O. Box 8909
(Address)

SAN LUIS, AZ 85349
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

WHEN THE STATE COURTS DENIED
PETITIONER HIS STATE CREATED
LIBERTY INTEREST, WAS IT ERROR
TO DENY THE CERTIFICATE OF
APPEALABILITY

When the state courts denied Petitioner
his state created liberty interest, was it
error to deny the Certificate of Appealability
in the Ninth Circuit?

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:

RELATED CASES

NONE, Petitioner is limited in finding this information.

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State v. McPhaul, 174 Ariz. 561, 851 P.2d 861-62

STATUTES AND RULES

- Heat of Passion / Provocation Manslaughter

A.R.S. § 13-1103(A)(2) -

Committing Second Degree Murder as prescribed in section 13-1104, subsection A upon sudden quarrel or heat of passion resulting from adequate provocation by the victim.

- Transferred Intent

A.R.S. § 13-203(B)(1) -

The actual result differs from that intended or contemplated only in ^{the} respect that a different person or different property is injured or affected or that the injury or harm intended or contemplated would have been more serious or extensive than that caused.

OTHER

Tharpe v. Sellers, 138 S.Ct. 545, 546-47 (2018) (per curiam)

(This is the closest thing Petitioner could find that is ~~similar~~ similar to his certiorari situation involving the state courts fact findings.)

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 B to the petition and is

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☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

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☒ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix E 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 MARCH 3, 2022

☐ 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: April 29, 2022, and a copy of the order denying rehearing appears at Appendix A.

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

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was 7/3/13 July 27, 2012.
A copy of that decision appears at Appendix E G.

☐ 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

- The Fourteenth Amendment of the United States Constitution, Due Process.
- Article 2 section 24 of the Arizona Constitution, Right to Appeal.

This case involves a state Created Liberty Interest based on the Arizona Court of Appeals' failure to determine whether transferred intent applies to heat of passion/ provocation manslaughter and rooting its findings on an unreasonable determination of the facts.

The state courts' fact findings and failure to decide the issue have deprived Petitioner of his Right to Appeal guaranteed by Article 2 section 24 of the Arizona Constitution and violates his 14th Amendment Due Process rights.

STATEMENT OF THE CASE

A. Introduction

This petition arises from an effort by a state prisoner to reopen appeal proceedings in his case after learning that state courts have denied Petitioner his state created Liberty Interest right to appeal by failing to review the applicability of Heat of Passion/Provocation Manslaughter jury instructions to all of the facts in his case and failing to decide whether transferred intent applies to Heat of Passion/Provocation Manslaughter in those proceedings.

Petitioner was convicted and sentenced to consecutive terms in Arizona in 2011, and the judgement was affirmed on appeal. Petitioner then pursued collateral review, filing a substantial habeas motion under 28 U.S.C. § 2254 and seeking an evidentiary hearing. The habeas motion was assigned to Judge Soto. Judge Soto terminated the proceedings and denied all relief without having an evidentiary hearing. The Ninth Circuit refused to authorize an appeal and denied COA.

Petitioner asked both the District Court and the Ninth Circuit about [a foot note in the Arizona Court of Appeals' Ruling stating that they were "not clear" whether the doctrine of transferred intent A.R.S. § 13-203(B)(1) applies to heat-of-passion manslaughter A.R.S. § 13-1103(A)(2). The foot note also stated "...because any error was not fundamental, we need not decide this question."] being

a violation of his constitutional rights. The District Court concluded, by way of Magistrate Judge Ferraro's Report and Recommendation, that the Arizona court of appeals was not unclear about the jury instruction despite the existence of the foot note. See Report and Recommendation pg. 16 lines 11-14. The Arizona Court of Appeals' failure to decide this question in Petitioner's case has denied Petitioner of his State Created Liberty Interest Right to Appeal.

Appendix E - Arizona Court of Appeals' Ruling

Appendix D - District Court's Report and Recommendation

Relevant evidence from Petitioner's trial that explains why Provocation/
Heat of Passion Manslaughter Jury Instructions should have been
given at his trial.

On November 2, 2007 Petitioner was asked by his friend Bell if he
could give him and his cousin, Payne, a ride to a night club.

Roberson testimony - trial day 4 pg. 62 lines 21-22.

Petitioner only planned to drop them off.

Roberson testimony - trial day 4 pg. 63 line 6.

When Petitioner went to pick up Bell and Payne they talked him into
going out with them.

Roberson testimony - trial day 4 pg. 63 lines 16-17

When they were ready to go Petitioner's car was messing up so he
called his girlfriend, Loggins, to see if she was using her car.
Loggins was riding with some of her girlfriends and they all met
up so petitioner could get her keys. Then Petitioner went to get
the other car.

Roberson testimony - trial day 4 pg. 63 line 15 - pg. 64 line 2

Loggins testimony - trial day 2 pg. 51 line 18 - pg. 52 line 24

Payne testimony - trial day 3 pg. 51 line 22 - pg. 52 line 2

1. When they switched cars Petitioner noticed a bag that he knew to

be his girlfriend's sister's stripper bag and he didn't know if she had money in it so he put it under the front seat and they went to the club.

Roberson testimony - trial day 4 pg. 65 line 16 - pg. 66 line 12

At some point in the night Petitioner's girlfriend showed up with her girlfriends and she pointed out one of her guy friends, Gilmer, who she had sex with a few months prior, to Petitioner.

Roberson testimony - trial day 4 pg. 67 lines 18-23, pg. 68 lines 6-13

Loggins testimony - trial day 3 pg. 47 lines 21 - pg. 48 line 11, pg. 54 lines 3-5

Loggins testified to telling police that Petitioner was angry when she told him that she had slept with Gilmer.

Loggins testimony - trial day 2 pg. 50 line 7 - pg. 51 line 17

Loggins said that when she pointed out Gilmer to Petitioner, Petitioner seemed upset and asked her, "Why him was I that bad of a person? Why him why him - was I that bad of a person to you?" And she told police that Petitioner was upset when she pointed Gilmer out.

Loggins testimony - trial day 2 pg. 53 line 18 - pg. 55 line 24

Loggins also made Petitioner promise not to do anything stupid by way of putting it on their child.

Loggins testimony - trial day 2 pg. 56 lines 7-12

Loggins testified that she didn't want to hear Petitioner keep talking about it so she left because Petitioner wouldn't let it go. She walked away, snuck out, and left.

Loggins testimony - trial day 2 pg. 56 line 13 - pg. 57 line 18

Loggins also testified that it still bothered Petitioner that she still texted and talked to Gilmer.

Loggins testimony - trial day 2 pg. 177 line 10 - pg. 119 line 8

Inside of the club, Petitioner noticed that Gilmer was watching him so he went over to talk to him.

Roberson testimony - trial day 4 pg. 69 line 16 - pg. 70 line 11

Gilmer testimony - trial day 3 pg. 122 line 25 - pg. 123 line 14

Petitioner's conversation with Gilmer didn't last long but they both shook hands and went about their own business.

Roberson testimony - trial day 4 pg. 70 line 22 - pg. 71 line 5

Gilmer testimony - trial day 3 pg. 124 - pg. 125 line 13 and pg. 154 line 23 - pg. 155 line 12

Petitioner believed that because he made a promise not to start any trouble with Gilmer he could keep his passions in check by befriending him.

Roberson testimony - trial day 4 pg. 70 lines 16-18

Gilmer also testified that Loggins also told him not to act crazy or nothing in relation to Petitioner when she pointed Petitioner out to him.

Gilmer testimony - trial day 3 pg. 121 lines 16-21

When the club was over, Petitioner left talking on his phone to his cousin and planning to meet up with him.

Roberson testimony - trial day 4 pg. 71 line 24 - pg. 72 line 15

On the road (November 3rd, 2007 some time after 2 a.m.), Petitioner was driving west bound on Speedway in the right hand curb lane with Bell and Payne as his passengers.

Roberson testimony - trial day 4 pg. 74 lines 8-10

At a red light Petitioner noticed the car next to him had a t.v. in the dash board and discussed it with his passengers.

Roberson testimony - trial day 4 pg. 74 lines 12-24

When the light changed Petitioner continued to drive west and the car with the t.v. pulled on the side of Petitioner and rolled down its front passenger window. The front seat passenger, Glenn, started pointing at Petitioner in his face and confirming Petitioner's identity with the other occupants of their vehicle. Then the car with the t.v. sped ahead of petitioner's vehicle.

Roberson testimony - trial day 4 pg. 75 lines 9-17

Gilmer testimony - trial day 3 pg. 173 lines 16-18

Payne testimony - trial day 3 pg. 64 lines 9-25, pg. 65 lines 16-20

Bell testimony - trial day 2 pg. 152 line 10 - pg. 153 line 19

As soon as they got ahead of Petitioner, the car with the t.v. got into the same lane as Petitioner and started to ~~drive~~ really slow causing all of the other cars that were traveling in the same direction to pass them both up.

Roberson testimony - trial day 4 pg. 75 lines 19-23

Petitioner was wondering what the car with the t.v. was doing in creating a separation of their two cars from the rest of the traffic because everything to the right of them was closed.

Roberson testimony - trial day 4 pg. 76 lines 2-6

Payne testimony - trial day 3 pg. 74 lines 14-22

Petitioner put on his signal light and attempted to drive around the car with the t.v. but it merged in front of him and prevented him from passing. Petitioner got back into the curb lane as did the car with the t.v., still in front of Petitioner.

Roberson testimony - trial day 4 pg. 76 line 23 - pg. 77 line 3

Shortly after that, the car with the t.v. got back into the middle lane but at this point Petitioner refused to attempt to pass the car on its passenger side because they refused to let him

pass on their driver's side. Petitioner also considered that the occupants of the car with the t.v. knew his identity because they were pointing at him "and stuff" which made him feel it would be unsafe to put himself on the side of that vehicle so he kept driving slow to avoid them.

Roberson testimony - trial day 4 pg. 77 lines 4-23

Petitioner kept watching them and hoping that they would just keep driving and leave him and his passengers alone, but instead of speeding up and going on about their business they pumped their brakes and placed themselves directly beside Petitioner's car again.

Roberson testimony - trial day 4 pg. 77 line 24 - pg. 78 line 3

Two weeks prior to this incident, on October 19, 2007, Petitioner was jumped by a group of men inside of this same night club. These men got Loggins' phone number from one of her girlfriends and called shortly after the fight and told Petitioner that they were going to shoot him with the AK's and SK's that they kept in their trunk the next time they seen him.

Roberson testimony - trial day 4 pg. 56 line 19 - pg. 60 line 3

Loggins testimony - trial day 2 pg. 106 line 18 - pg. 109 line 6

Gilmer testimony - trial day 3 pg. 151 lines 1-17

A couple days after the fight and the threatening phone calls Loggins informed Petitioner that that one of the men who

jumped him had been arrested for running up on someone at a gas station with their weapons out, believing them to be Petitioner. She told him that the clerk of the store had seen all of this and called the police.

Roberson testimony - trial day 4 pg. 62 lines 1-4

Petitioner testified to believing that the people in the car with the t.v. had to be the men who jumped him and made the threats on his life because of the way Harris was driving and Glenn was reaching into the back of the car like he was trying to get into the trunk. This was the only thing that made sense to explain why the people in the car with the t.v. were pointing at him, cutting in front of Petitioner, preventing him from driving past, lining up their windows, and confirming his identity and reaching because Petitioner did not do anything to provoke them.

Roberson testimony - trial day 4 pg. 79 line 21 - pg. 80 line 18, pg. 125 lines 10-13

Bell testimony - trial day 2 pg. 175 lines 2-5

Payne testimony - trial day 3 pg. 96 line 8 - pg. 98 line 13

Harris testimony - video deposition pg. 45 lines 14-16 (trial day 3)

Petitioner sped up to get away from the other car believing that his life and the lives of his passengers were in danger. He testified to trying to avoid the other car, but the car with the t.v. kept trying to keep pace with him and keep

their windows lined up. Petitioner seen front seat passenger, Glenn, tell driver, Harris, to slow down because he was having trouble accessing what ever he was looking for and they eventually slowed down.

Roberson testimony - trial day 4 pg. 80 line 21 - pg. 80 line 16

Petitioner heard one of his passengers yelling, "They're coming, they're coming" and he could see the car with the t.v. gaining on them in his mirrors. Petitioner started freaking out in his mind trying to figure out what, if anything, he could do and he remember the stripper bag and rummaged through it finding a gun. Petitioner chambered a round and in his driver side mirror he could see the front seat passenger of the car with the t.v., Glenn, with his head and right arm out of the window as if charging with a rifle standing in his lap. When the car with the t.v. entered Petitioner's blind spot Petitioner started firing believing ^{Glenn} Glenn was going to raise a weapon and start firing.

Roberson testimony trial day 4 pg. 81 line 19 - pg. 83 line 10

Bell testimony - trial day 2 pg. 151 lines 9-11, pg. 167 lines 17-18

Petitioner was charged with first degree murder and the states theory at trial was that Petitioner was in a jealous rage and intended to kill Gilmer for sleeping with his girlfriend. The jury was also instructed on transferred intent so the jury could consider

if they believed Petitioner intended to kill Gilmer but ultimately killed Glenn they could find him guilty of first degree murder. No instructions on Heat of Passion/Provocation Manslaughter were given for the proper consideration of the evidence in Petitioner's trial even though the facts alleged by the state in the charging document necessarily require commission of the lesser offense.

In addition, the driver of the car with the t.v., Harris, testified that he and the occupants of his vehicle were drunk, upset, and irritated that Petitioner looked at their car. Harris even admits that they were being suspicious. Harris testimony - video deposition pgs. 36, 37, 40, 43-48, and 55 (trial day 3)

All of the evidence shows that everyone in Petitioner's car was worried and afraid.

Roberson testimony - trial day 4 pg. 78 lines 3-17

Payne testimony - trial day 3 pg. 97 lines 4-14, pg. 98 line 21 - pg. 99 line 11

Bell testimony - trial day 2 pg. 173 lines 18-23, pg. 145 lines 22-24, and pg. 146 line 8

Harris also testified that if he were in Petitioner's car would have believed that his own actions were suspicious.

Harris testimony - video deposition pg. 44 line 19-21 (trial day 3)

In light of all of the evidence the jury could have reasonably determined that Petitioner being on the same road way as Gilmer, the guy who had sex with Loggins, Petitioner's girlfriend of four years and mother of his child caused Petitioner to experience passions. Evidence shows that Petitioner tried to avoid the other car in order to keep his promise that he wouldn't start any trouble with Gilmer and there was no real cool down time between Loggins showing Petitioner who Gilmer was, Petitioner's brief conversation with Gilmer in the night club, and their two cars winding up next to each other on the road. The jury could have reasonably determined that the evidence of the victims being drunk, upset, and irritated that Petitioner looked at their car caused them to behave suspiciously, taunting Petitioner about the sexual encounter for miles and miles until their provocation caused Petitioner to loose control even though his defense at trial was self-defense/Justification.

This evidence from the trial record is clear and convincing to the contrary of the state court's fact finding. The state court was not there and the state court's factual determination is wrong.

B. Prior Proceedings

1. State Level Determinations

(a) The Arizona Court of Appeals determined that the provocation requirement for Heat of Passion/Provocation Manslaughter can only be satisfied by the provocation of the deceased victim alone. They added a foot note in their ruling explaining that the Manslaughter statute A.R.S. §13-1103(A)(2) is unclear whether the doctrine of transferred intent as codified in A.R.S. §13-203(B) applies to heat of passion/provocation manslaughter. To justify not reviewing the applicability of heat of passion/provocation manslaughter jury instruction to the facts of Petitioner's case the foot note declares, "because any error was not fundamental, we need not decide this question."

Arizona Court of Appeal's Ruling pg. 4 (Appendix E)

The Arizona Court of Appeals also failed to consider that the state placed a great deal of emphasis on Loggins' testimony in its closing arguments indicating that Petitioner became upset that night when she pointed out Gilmer.
Prosecutor's closing Argument - Trial day 4 pg. 168-170

Instead of weighing the existing evidence, the Arizona Court of Appeals focused on a very ineffective statement

by Petitioner's trial counsel during his closing argument saying, "he wasn't inflamed... and wasn't... in a state of mind where heat of passion or anything was coming up." Yet they agreed that Petitioner could present inconsistent defenses and still be entitled to an instruction.

Arizona Court of Appeals' Ruling pg. 5

The Arizona Court of Appeals also determined, despite acknowledging evidence of provocation by Gilmer and Harris, that Petitioner's defense of self-defense is inconsistent with the findings that he was provoked by Gilmer or Harris such that a reasonable person in his situation would have been deprived of self control because he claimed not to have recognized the individuals in the other car even though he believed they intended to harm him.

Arizona Court of Appeals' Ruling pg. 4

The Arizona Court of Appeals failed to realize that in Arizona there is no requirement that Petitioner must admit any element of either the greater or lesser offense to be entitled to receive a lesser-included offense instruction.

State v. Dugan, 125 Ariz. 194, 608 P.2d at 772-73

State v. McPhaul, 174 Ariz. 561, 851 P.2d 861-62

Petitioner was actually found guilty of Reckless Second Degree Murder. Based on the trial judges statement, the jury in Petitioner's case was never given Heat of Passion/Provocation Manslaughter jury instructions to consider in their deliberations of all of the evidence - ~~in the case of~~ More specifically, a situation where jurors may have believed that Petitioner did not intend to cause death though they believed that Petitioner may have recognized the occupants of the other vehicle as the trial judge hinted "even though he had conversed with one of them earlier in the evening..."

In this situation the jury would have to consider all of the evidence with a different set of instructions than those given in Petitioner's trial. Evidence such as: Petitioner's promise not to start any trouble with Gilmer and the victims provoking Petitioner by being suspicious/taunting him about their friend sleeping with the mother of his child for miles down the road while he was trying to avoid them until he lost control.

(C) The Arizona Court of Appeals' failure to review the applicability of Heat of Passion/Provocation manslaughter jury instructions to all of the facts in Petitioner's case before denying his state appeal, along with their failure to determine whether transferred intent applies to heat of passion/provocation manslaughter have deprived Petitioner of his right to appeal

guaranteed by Article 2 section 24 of the Arizona Constitution, in violation of his U.S. Constitutional 14th Amendment Due Process Rights. The Arizona Court of Appeals has failed to see all of the evidence as a whole making their fact finding determinations unreliable because, based on all of the evidence, heat of passion/provocation manslaughter is an available defense.

C. Prior Proceedings

1. Federal Level Determinations - How Questions presented were raised and decided

(a) In the District Court Petitioner explained in his § 2254 motions that his conviction was based on an unreasonable determination of the facts based on the evidence presented in his trial. In Ground 2 of Petitioner's Habeas Corpus Petition Petitioner asked:

"Whether in violation of the fifth, sixth, and fourteenth amendments, of the United States Constitution, Petitioner was deprived of his due process rights because the trial court failed to instruct the jury on matters vital to proper consideration of the evidence?"

and stated as supporting facts:

"In May of 2011 Petitioner was taken to trial on first degree murder charges and his defense at trial was self-defense/justification. The jury was instructed on first degree murder, second degree murder, reckless manslaughter, and transferred intent pertaining to the first degree murder charge. On direct appeal Petitioner raised an issue because the trial court failed to instruct the jury on heat of passion manslaughter as a lesser included offense of first degree murder. In its ruling, the court of appeals noticed the

omission of an instruction on intent, a deciding factor in self-defense. The court of appeals also noted that they were unclear whether the instruction of transferred intent could be applied to the lesser heat of passion manslaughter charge as it was applied to the greater first degree murder charge. Petitioner's convictions and sentences were affirmed even though the court of appeals was unclear about the instructions."

The District Court determined, by way of an adopted magistrate Report and Recommendation, that "Petitioner is not entitled to habeas relief on the claims alleged in Ground 2. No evidentiary hearing was ever conducted and the magistrate judge's Report and Recommendation just reiterated the Arizona Court of Appeal's findings and concluded that the Arizona Court of appeals was not unclear about the transferred intent jury instruction in relation to the vague heat of passion/provocation manslaughter statute, despite the footnote.

Report and Recommendation pg. 16 lines 11-14 (Appendix D)

The district court acknowledged that an instruction on transferred intent was given but they never decided the question of whether it applies to heat of passion manslaughter in Petitioner's case or if heat of passion/provocation manslaughter

jury instructions should have been given in his trial based on all of the evidence as a whole.

The district court's decision reflects its reliance on the integrity of the Arizona Court of Appeals' factual determinations yet they both failed to decide vital matters in Petitioner's case based on all of the evidence.

(b) In Petitioner's motion for Certificate of Appealability, filed in the Ninth Circuit Court of Appeals following denial of COA Request by the district court, Petitioner asked:

"Whether the District Court properly determined that the failure to give Provocation/Heat of passion manslaughter jury instruction does not violate Due Process where the evidence warranted the giving of self-defense/Justification jury instructions?"

It was Petitioner's hope that the Ninth Circuit would fully review his records and find the connection between Heat of Passion/Provocation Manslaughter and self-defense/Justification being that they are the only two defenses of homicide that deal with provoked responses. In Arizona, self-defense/Justification has a slightest evidence of self-defense requirement that must

be met before the jury can be given the instruction. At trial, Petitioner has met that requirement and asked the Ninth Circuit:

"If the slightest evidence of self-defense requirement is met, does that same evidence meet the adequate provocation of the victim requirement of Heat of Passion/Provocation Manslaughter? For what is the slightest evidence of self-defense if not a showing of provocation?"

Logically speaking, if the evidence presented is enough to award the jury the option of justifying Petitioner and finding him criminally liable - how could that same evidence not award the jury the option of considering guilt of a lesser crime in any and all self-defense cases?

In his motion for COA Petitioner attempted to further explain how his conviction is based on an unreasonable determination of the facts in hopes that the Ninth Circuit Court of Appeals would see all of the connections of a reasonable juror based on all of the evidence. Reasonable jurist could have easily determined that Petitioner being on the same roadway with Gilmer, the guy who had sex with Logging (Petitioner's girlfriend of four years and mother of his child) caused him to experience passions. Evidence shows

Petitioner made a promise on the life of his daughter not to start any trouble with Gilmer and he even testified to trying to avoid the people in the other car. The evidence also shows that Gilmer and his buddies, Harris and Glenn kept taunting Petitioner for miles down the road because they were drunk, upset, and irritated that Petitioner looked at their car. Harris even testified to being suspicious. As reasonable jurist the Ninth Circuit failed to see this evidence as provocation that fueled the flames of Petitioner's passions and ultimately caused him to lose control. Petitioner even went as far as introducing himself to Gilmer and he tried to befriend him to keep his passions in check. There is also the evidence of Gilmer shaking Petitioner's hand, accepting a peace treaty of sorts, in the night club and once they got on the road everything changed up and Gilmer and his friends started being suspicious and provoking Petitioner because he looked at their car. These are the facts!

The trial court never instructed the jury on heat of passion/ provocation manslaughter and the Arizona Court of Appeals never determined the important element of whether transferred intent can be applied in heat of passion manslaughter in Petitioner's direct appeal. Reasonable jurist could've determined that Petitioner had been denied his right to appeal in the state of Arizona, contrary to the district court's determination. Reasonable jurist could also have determined that Heat of Passion/Provocation

turning on him by displaying provocation on the roadway with his friends with no real cool down time make it more than clear that heat of passion/provocation manslaughter jury instructions should have been given to the jury for the proper consideration of all of the evidence.

In denying COA, the Ninth Circuit Court of Appeals held, "The request for a certificate of appealability is denied because appellant has not shown 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. (Appendix B)

The ninth circuit fails to consider that the district court based their determinations on the state court's factfinding, but the state courts refused to decide vital elements of Petitioner's Direct Appeal when making their determination. Both the Ninth Circuit and the District Court have failed to consider the violation of Petitioner's state created Liberty Interest Right to appeal guaranteed by Article 2 Section 24 of the Arizona Constitution which ultimately violates Petitioner's Fourteenth Amendment Due Process Rights.

Reasonable jurists could find it debatable whether Petitioner's habeas corpus could have been resolved differently in the district court because his Petition states a valid claim of the denial of a constitutional right. The Ninth Circuit never allowed Petitioner the opportunity to appeal beyond COA. In addition, the federal court's decisions are deeply rooted in the state court's fact finding but Petitioner presents clear and convincing evidence, from the trial record, to the contrary. Based on this evidence that contradicts the state court's factual determinations, jurists of reason could also debate whether Petitioner has shown by clear and convincing evidence that the state court's factual determination was wrong and the Ninth Circuit erred by concluding otherwise.

• *Tharpe v. Sellers*, 138 S.Ct. 545, 546-47 (2018)

(This is the only case Petitioner could find that relates to this stage in the process due to his being limited in his materials and his ability to research recent decisions and relevant information.)

Petitioner also asked the Ninth Circuit for counsel to help him due to the complexity of his issues but he was denied COA, rehearing, and rehearing en banc. (Appendix A) (Appendix B)

REASONS FOR GRANTING THE PETITION

This court's intervention is necessary to resolve the matter of Petitioner's State Created Liberty Interest claim because the Ninth Circuit Court of Appeals' decision is rooted in the state court's factfinding.

- The state courts refused to decide whether the doctrine of transferred intent applies to heat of passion/provocation manslaughter in Petitioner's case when deciding argument one of his direct appeal:

"The trial court's failure to instruct the jury on the necessarily lesser-included offense of Heat of Passion Manslaughter amounted to fundamental error."

The failure to give heat of passion/provocation manslaughter jury instructions in Petitioner's trial has massively violated Petitioner's right to a fair trial.

The Arizona Court of Appeals' failure to decide vital issues has denied Petitioner his Right to Appeal guaranteed by Article 2 Section 24 of the Arizona Constitution resulting in a state created Liberty Interest violation of Petitioner's Fourteenth Amendment Due Process rights guaranteed by the Constitution of the United States.

The state courts have denied Petitioner his right to appeal and they have cause the federal courts to base their rulings on an unreasonable determination of the facts. Here Petitioner has shown clear and convincing evidence to the contrary that jurist of reason could debate whether the state court's factual determination was wrong based on all of the evidence in his trial as a whole, namely Petitioner's promise not to start any trouble with Gilmer (the guy who had sex with Petitioner's girlfriend of four years and mother of his child), Petitioner's attempts to avoid the people in the other car, and Gilmer and his friends taunting Petitioner for miles down the road by being suspicious due to their being drunk, upset, and irritated that Petitioner looked at their car. Petitioner even introduced himself to Gilmer trying to befriend him to keep his passions in check and they shook hands in the club. On the road Gilmer and his friends betrayed Petitioner by changing up and provoking him by being suspicious.

The Ninth Circuit erred when it concluded otherwise and this court's guidance is required in the interest of justice and the relief it requires.

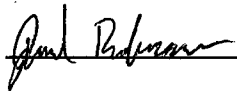
Please and thank you,

One more thing, the Arizona Supreme Court neglected to review Petitioner's state appeal as to the merits. ~~There is no state appeal at all.~~

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: July 21, 2022