

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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LYNDALL DWAIN THOMPSON,

Petitioner,

v.

ARIZONA ATTORNEY GENERAL;  
CHARLES L. RYAN, WARDEN,  
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

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DATE SENT VIA UPS: March 12, 2018

## QUESTION PRESENTED

1. Whether Arizona's failure to follow its own procedure in adjudicating petitions for post-conviction relief without granting evidentiary hearings, constitutes an unreasonable determination of facts pursuant to 28 U.S.C. § 2254(d)(2) entitling petitioner to a hearing under 28 U.S.C. § 2254(e)(1).

## PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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The petitioner, Lyndall Dwaine Thompson, respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 27, 2017 and the Order denying Panel Rehearing entered on December 13, 2017.

### OPINIONS BELOW

The United States Court of Appeal's order denying panel rehearing; the Memorandum affirming the United States District Court's denial of the Petition for Writ of Habeas Corpus; the district court's Judgment and Order, and the Magistrate's Report and Recommendation are unreported and are reproduced in Appendix A, B, C and D respectively.

### JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 27, 2017. The court of appeals denied timely petition for panel rehearing on December 13, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY & CONSTITUTIONAL PROVISIONS

28 U.S.C. § 2254 provides in pertinent part:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

## STATEMENT OF THE CASE

Petitioner was charged with first degree murder in the shooting death of his brother during a verbal and physical altercation between the two. Petitioner claimed he shot his brother in self defense as he thought his brother was advancing upon him with a gun. There were no witnesses to the shooting. The State's main evidence was an altered/redacted recording of petitioner's custodial statements during a police interview conducted after he reported the shooting via a 911 call. After a jury trial, petitioner was found guilty of the lesser included offense of second degree murder.

Post-conviction, petitioner alleged violations of his federal constitutional rights to a fair trial, due process of law and the effective assistance of counsel. The crux of petitioner's claims was that the State presented false evidence by presenting the jury with an altered recording and an altered transcription of his statement to police. Petitioner submitted a transcript of his original statement to the post-conviction court, but did not have the audio in his possession. Thus, petitioner requested an evidentiary hearing at which the audio of his original unaltered statement could be compared with the audio played at trial and the transcript submitted to the jury. The state court instead compared the transcript submitted by petitioner to the transcript submitted to the jury and found (without any evidence to support it) that the two transcripts came from the same (original) recording and that they differed in nonmaterial ways. The state court also found Based on the State's argument) that to the extent the audio and transcript were altered by the state, it was done at petitioner's request to redact portions of the statement regarding undocumented immigrants. However, there was no affirmative evidence presented that petitioner had ever requested such redaction. Moreover, the state court found that the transcript prepared by the public defender's office was also marked as an exhibit but not admitted at trial. However, a review of the trial transcripts and exhibit list refutes that

finding by clear convincing evidence as the second transcript does not appear on it or anywhere else in the trial record .

On federal habeas, petitioner alleges that the state courts' findings constituted an unreasonable determination of facts that petitioner has been unable to refute without an evidentiary hearing. Petitioner objected to the magistrate's findings to the contrary and appealed the district court's decision adopting those findings.

Petitioner contended on appeal, inter alia, that the state court unreasonable determined the facts of his federal false evidence claim and that both the state and federal courts erred in denying his request for an evidentiary hearing to prove the claim. The Court of Appeals affirmed, echoing the state court's findings that petitioner's false evidence claim could be resolved on the record because the state court compared a transcript of the recording played at trial to a transcript of a recording made by the Public Defender's Office and that neither the state nor the federal court erred in denying an evidentiary hearing. Appx. B at 3-4.

Petitioner timely filed a petition for a panel rehearing which was denied on December 13, 2017.

## REASONS FOR GRANTING THE WRIT

1. Because the AEDPA does not provide any specific guidance on what sort of procedural deficiencies will render its fact-finding process unreasonable under 28 U.S.C. Section 2254 (d)(2) or how and when § 2254(e)(1) applies in challenges to a state court's factual determinations under § 2254(d)(2), this Court should give the lower courts guidance on those sections applications to create uniformity f decisions.

Under § 2254(d)(2), a federal court is relieved of AEDPA deference when a state court's adjudication of a claim “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Hurles v. Ryan*, 752 F.3d 768, 778 (9th Cir.2014) (citing *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1401 (2011); see also *Johnson v. Finn*, 665 F.3d 1063, 1069 n. 1 (9th Cir.2011) (holding *Pinholster* did not preclude the district court from conducting an evidentiary hearing after concluding the state court of appeal's decision was contrary to clearly established law under § 2254(d)(1)); *Harris v. Haeberlin*, 752 F.3d 1054, 1057 (6th Cir.2014); *Smith v. Cain*, 708 F.3d 628, 635 (5th Cir.2013).

To show such an error occurred, the petitioner must establish that the state court's decision rested on a finding of fact that is “objectively unreasonable.” *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir.2004) (quoting

Miller–El v. Cockrell, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)).

The United States Court of Appeal for the Ninth Circuit has acknowledged that:

“[b]ecause AEDPA does not provide any specific guidance on what sort of procedural deficiencies will render a state court's fact-finding unreasonable, we have sometimes turned for guidance to cases considering a similar issue in a different context: when a federal district court considering a habeas petition must or should conduct an evidentiary hearing.”

Hibbler v. Benedetti, 693 F.3d 1140, 1147-48 (9th Cir. 2012). Recognizing that they owe “more deference” to a state court than to a federal court, the court further held that:

[T]he rules governing when a district court must grant an evidentiary hearing are informative: if a district court would be within its discretion in denying an evidentiary hearing, a state court's similar decision is probably not objectively unreasonable.

Hibbler at 1148. However, here the Arizona state court's factual findings were not entitled to any deference under §2254(d)(2) or (e)(1) because the fact-finding process was “defective,” e.g., when the state court made factual findings without holding an evidentiary hearing. Taylor v. Maddox, 366 F3d 992, 999 (9<sup>th</sup> Cir. 2004), abrogated on other grounds by Murray v. Schriro, 745 F.3d 984, 999–1000 (9th Cir. 2014); see, e.g., Hurles v Ryan, 752 F3d 768, 790 (9<sup>th</sup> Cir. 2014)(state court factual findings not entitled to presumption of

correctness when state court fact-finding process was fundamentally flawed).

The United States Court of Appeal for the Ninth Circuit has also acknowledged that:

The [Supreme] Court declined to address “any interpretive difference regarding the relationship between these provisions,” and left “for another day the questions of how and when § 2254(e)(1) applies in challenges to a state court's factual determinations under § 2254(d)(2).” *Wood v. Allen*, 558 U.S. 290, 304-05, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010).

*Murray v. Schriro*, 745 F.3d 984, 1000–01 (9th Cir. 2014).

In petitioner’s case, the Ninth Circuit affirmed both the Arizona court’s and the district court’s denial of petitioner’s writs of post-conviction relief and habeas corpus without a hearing – leaving petitioner with no way to meet his burden of proof for relief regardless of having met all the requirements to do so.

In Arizona, a person convicted of a criminal offense may file a notice of post conviction relief alleging that his conviction was obtained in violation of the United States Constitution. 16A A.R.S. Rule Crim.Proc. Rule 32.1(a). A court hearing a post conviction relief petition must grant a hearing on claims that present a material issue of fact or law. 16A A.R.S. Rule Crim.Proc. Rule 32.6. A defendant is entitled to a hearing to determine issues of material fact and has the right to be present and to subpoena witnesses to that hearing. 16A A.R.S. Rule Crim.Proc. Rule 32.8 (a). At the hearing, the defendant has

the burden of proving the factual allegations by a preponderance of evidence.

16A A.R.S. Rule Crim.Proc. Rule 32.8 (c).

Here, the Arizona court's fact finding process was fundamentally flawed because petitioner presented a false evidence claim which rested on a disputed material issue of fact, i.e., whether the State presented false evidence to the jury affecting the verdict, without granting petitioner a hearing at which he could have proved his factual allegations by a preponderance of the evidence. Rather, the Arizona court only considered evidence from the trial record and the evidence petitioner was able to submit of his own accord. The court never granted petitioner a hearing at which he could have subpoenaed the original recording to be played in court and questioned the people who altered the recording and transcribed it. Thus, by failing to grant a hearing on the material issue of fact, i.e., whether the state presented false evidence by improperly altering petitioner's original statement to police, the state court failed to follow its own process, which should constitute an unreasonable determination of fact under 28 U.S.C. § 2254(d)(2).

Recently, the Ninth Circuit explained in *Atwood v. Ryan*, 870 F.3d 1033, 1050 (9<sup>th</sup> Cir. 2017):

A state court does not have to “conduct an evidentiary hearing to resolve every disputed factual question.” *Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9<sup>th</sup> Cir. 2012). The “ultimate question” is whether a state court was “unreasonable in holding that an evidentiary hearing

was not necessary in light of the state court record.” *Id.* at 1148 (emphasis omitted). We have held that a state court's failure to hold an evidentiary hearing is not unreasonable under § 2254(d)(2) “where the allegations are said to be incredible in light of the record,” or where the “petitioner's factual allegations are entirely without credibility.” *Perez v. Rosario*, 459 F.3d 943, 950–51 (9th Cir. 2006). Nor does a state court's failure to hold an evidentiary hearing make its factual findings unreasonable “when the record already before the court is said to establish a fact conclusively,” or “there is no likelihood that an evidentiary hearing would have affected the determination of the state court.” *Id.* *Atwood v. Ryan*, 870 F.3d 1033, 1050 (2017).

Here, there was no finding by any court that petitioner's claims were either incredible in light of the record or entirely without credibility. Further, the record already before the court did not establish the fact conclusively, nor could it, since the original audio was never presented to either the state or federal court to be compared with the audio submitted as an exhibit and played at trial.

In evaluating whether a state court erred in its fact-finding process, the Ninth Circuit looks to the rules governing when a district court must conduct an evidentiary hearing, because “if a district court would be within its discretion in denying an evidentiary hearing, a state court's similar decision is probably not objectively unreasonable.” *Atwood* at 1050, quoting, *Hibbler*, 693 F.3d at 1148. Nevertheless, the Ninth Circuit's review of a state court's decision not to conduct an evidentiary hearing is much more deferential. “[W]e may not ‘second-guess a state court's fact-finding process’ unless we determine ‘that the state court was not merely wrong, but actually unreasonable.’” *Id.* (quoting *Taylor v. Maddox*,

366 F.3d 992, 999 (9<sup>th</sup> Cir. 2004).

However, this Court has explained that deference does not mean abdication:

“We may not characterize these state-court factual determinations as unreasonable “merely because [we] would have reached a different conclusion in the first instance.” *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference. If “‘[r]easonable minds reviewing the record might disagree’ about the finding in question, ‘on habeas review that does not suffice to supersede the trial court’s ... determination.’” *Ibid.* (quoting *Rice v. Collins*, 546 U.S. 333, 341–342, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006)). As we have also observed, however, “[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,” and “does not by definition preclude relief.” *Miller–El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Here, our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable.”

*Brumfield v. Cain*, 135 S. Ct. 2269, 2277, 192 L. Ed. 2d 356 (2015).

As in *Brumfield*, “the record before the state court contained sufficient evidence to raise a question” as to whether the audio played for the jury, as well as the accompanying transcription, were improperly altered as to constitute false evidence. The state court failed to order a hearing to adjudicate this material issue of fact. The Ninth Circuit seemingly ignored the failure of the state of Arizona to follow its own process for granting evidentiary hearings and instead analogized the ruling to the standard for a federal evidentiary hearing, while applying more deference. The Ninth Circuit’s application of 2254(d)(2) and (e)(1)

appears to be in conflict with the law of this Court. In order to create uniformity of decisions in the lower federal courts as to how to properly apply 2254(d)(2) and (e)(1), this Court must grant certiorari.

## CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on March 12, 2018.

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