

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN FRITZ - PETITIONER

vs.

SHERRY BURT - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

PETITION FOR WRIT OF CERTIORARI

Marvin Fritz #247851
Muskegon Correctional Facility
2400 S. Sheridan Drive
Muskegon, Mich 49442

STATEMENT OF QUESTION PRESENTED

I.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES, WHERE THE TRIAL COURT CLEARLY ERRED WHEN IT FOUND THAT MARVIN FRITZ HAD THE MENS REA FOR SECOND DEGREE MURDER?

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

[X] For cases from **Federal courts**:

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[] reported at _____; or
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

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

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or
[X] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appear at Appendix C to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Michigan Court of Appeals appears at Appendix D to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not reported; or,
[X] is unpublished.

JURISDICTION

[X] For cases from Federal courts:

The date on which the United States Court of Appeals decided my case was March 27, 2018.

[X] 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: _____, 201____, 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. § 1254(1).

[X] For cases from state courts:

The date on which the highest state court decided my case was March 21 2015.

A copy of that decision appears at Appendix C.

[] 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 Due Process Clause of the Fourteenth Amendment to the United States Constitution protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

CONSTITUTIONS

Fourteenth Amendment to the United States Constitution

17, 18, 23

MICHIGAN STATUTES

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STATEMENT OF THE CASE

The Wayne County Prosecutor charged Marvin Fritz with one count of First Degree Murder, Felony in Possession, and Felony Firearm, Second. The prosecution also filed a Second Habitual Offender Notice. MCL 750.316, MSA 28.548; MCL 750.224f, MSA 28.421 (6); MCL 750.227b, MSA 28.424(2).

The 36th District Court bound over the case after a preliminary exam to the Courtroom of the Honorable Bruce Morrow in the Wayne County Circuit Court.

Mr. Fritz waived his right to a jury trial. (TR 3/25/13, p 11). The trial court found Marvin Fritz guilty of Second Degree Murder, Felon in Possession, and Felony Firearm, Second. MCL 750.317, MSA 28.549; *supra*.

The witnesses testified that Marvin Fritz arrived at his stepfather's, Gregory Wheeler, house around 7 p.m. on September 25, 2012. Two witnesses stated that he parked recklessly. Mr. Wheeler lived next door to Toya Conley. The Complainant came to visit his daughter, Shamiya, at Ms. Conley's house. Several people accompanied the complainant: Danyale Smith, Tenisia Wolfe, complainant's brother, Bryant Dudley, nephew Darnell Dudley, and niece Taketa King. They had all been drinking except the driver, Danyale. Mr. Wheeler dated Secret Dudley, complainant's sister who was not present. Another girlfriend, Donna, was visiting Greg Wheeler. Marvin Fritz's uncle, Herbert Fossett, lived in Greg Wheeler's upstairs apartment.

Dr. Leigh Hlavaty, Deputy Chief Medical Examiner, testified that she examined the complainant who suffered from three gunshot wounds: One to the head which was fatal and two around the back of the complainant's lower left and right legs. The witness indicated that the fatal bullet struck the complainant's left eyebrow, went from left

to right, front to back, and slightly downward. The leg wounds could have been caused by one bullet. She also testified that the head wound suggested that the shot was taken at close range since there was gunpowder stippling around the wound. In addition, she testified that the stippling would not have occurred if there were something in between the shooter and the complainant. She determined that the complainant's blood alcohol level was .075 and that he also had multiple abrasions. (TR 3/25/13, PP 23-31).

Tenisia Wolfe testified that she went with the complainant to Toya Conley's house so that he could see his daughter. She described herself as an "associate" of Ms. Conley. She stated that she did not "know" Marvin Fritz but had seen him at Toya's house prior to the incident. She stated that Toya and Mr. Fritz had a sexual relationship. She stated that the complainant and Mr. Fritz had prior arguments. She went into Toya's house to ask if the complainant could see his daughter, Shamiya. She brought Shamiya out to the van to see the complainant. She stated that "Keta" went next door to borrow a cigarette. She saw Mr. Fritz and "Keta" fighting. She saw the complainant run up to the porch and into the fray. The complainant put Mr. Fritz in a chokehold. Mr. Wheeler said that he was going to get his gun. She tried to get the complainant to leave after she heard that. The complainant would not release his chokehold. Danyale pulled both the complainant and Mr. Fritz to the ground in an attempt to get the complainant to leave. They finally got them separated when she saw Deon remove his shirt. Marvin Fritz charged the complainant when the complainant removed his shirt. She heard the complainant state : "N..., you can get it again. I already beat your ass once. You want it again?". Marvin replied: "Come on, n.... Come on". The fights lasted 15-20 minutes. She testified that she and "Keta" fought with Greg Wheeler and his other girlfriend,

Donna. She said that Donna hit Danyale. She saw Wheeler hand Mr. Fritz the gun in the doorway. She got into the front passenger seat in the van. She heard the gunshots. Mr. Fritz then began beating on her with the gun. She testified that Mr. Fritz just went crazy and snapped. Mr. Fritz also hit Danyale with the gun and said that Danyale could "get it too". Mr. Fritz pointed the gun at her. Danyale's daughter screamed "Momma" and Mr. Fritz stopped pointing the gun at Danyale. Mr. Fritz then shot into the van. She drank beer that day, Danyale drank gin. She identified the glass in the driveway as coming from the window when Mr. Fritz shot the complainant and the bullet holes on the bottom of the door occurring when Mr. Fritz unloaded his gun in the door. (id, PP 32-80).

Danyale Smith testified that she drove the complainant to see his daughter at Toya Conley's house. She knew Greg Wheeler because he dated the complainant's sister. Mr. Fritz drove up to the house recklessly. The complainant grabbed his 2-year old daughter after she walked up to Marvin Fritz. She did not drink that day because she had a feeling that something was going to happen. Laketa went next door to borrow a cigarette from Greg Wheeler and Mr. Fritz stated "I'm tired of you bitches". She turned up the radio because she thought that they were just having words. Her friends piled out of the car and onto Greg Wheeler's porch including the complainant. She saw Mr. Fritz take a swing at Laketa. The complainant put Mr. Fritz in a choke hold. She described Marvin Fritz as the initial aggressor. Wheeler's girlfriend, Donna, took a swing at her. The witness kept telling the complainant that Wheeler was getting a gun and begging him to let go of Mr. Fritz. She finally dragged the complainant and Mr. Fritz off the porch. The complainant walked away. Mr. Fritz taunted him saying "you scared"; the complainant replied "I ain't scared" and removed his shirt. She stated that Mr. Fritz went into Greg

Wheeler's house prior to the shooting. Tenisia got the complainant into the van and away from Marvin Fritz. She heard 3 shots and saw the complainant slump over. (id, PP 81-108).

Bryant Dudley testified that the complainant was his brother. His niece, Laketa, went next door to borrow a cigarette. He saw Mr. Fritz swing at his niece. The complainant attacked Mr. Fritz getting him in a choke hold. He saw Tenisia kick Greg Wheeler and heard Wheeler state that he was going to get his gun. While sitting in the van, he saw Mr. Fritz and Mr. Wheeler hit Tenisia with the gun. He did not see Mr. Fritz point the gun and could not see outside the van. He sat next to the complainant in the van. He stated that the door was closed and the bullet shattered the window. The witness stated that the complainant drank beer that day and Tenisia, he, and the complainant also drank gin. He heard one shot and then someone unloaded the gun into the van. (id, PP 109-127).

Darnell Dudley testified that the complainant was his uncle. He saw Marvin Fritz swing at Laketa. The complainant started fighting with Marvin Fritz on Wheeler's porch. He saw Mr. Fritz throw paint cans at the complainant and run out of the house with a gun. He saw Mr. Fritz pistol-whip the complainant. The witness stated that the only two people he saw fighting were his uncle and Mr. Fritz. He heard Mr. Fritz tell Danyale that she could "get it too" after he shot the complainant. Mr. Fritz then struck Tenisia with the gun. (id, PP 127-142).

Herbert Fossett testified that he lived upstairs in the Wheeler home. He stated that he knew that something was brewing prior to the fights. Mr. Fossett testified that the complainant did not like it when his daughter called Marvin Fritz "Daddy". The

complainant would say: He's not your Daddy, I'm your Daddy. Laketa King walked into the house, without asking, to borrow a cigarette. Mr. Wheeler's girlfriend, Donna, became angry and told her not to just walk into her house. King hit Donna, knocking her to the floor. Mr. Fossett heard the shots after he went back upstairs. (id, PP 144-157).

Officer Daniel McKinley testified that he found Laketa King at the liquor store near the scene. He then went to the Hospital where the complainant was taken. He also went to the house and talked to Greg Wheeler who was watering his driveway. Wheeler did not provide any information. The officer noticed broken glass that day in the driveway next door. (id, PP 158-167).

The evidence technician testified that he found a spent bullet in a backpack on the driver's side second row of the van. The van had 3 rows. The back window had been shattered. He did not remove the panels from the van to look for bullets but saw bullet strikes. (id, PP 169-177).

Laketa King knocked on Greg Wheeler's door to buy a cigarette. According to Ms. King, Mr. Fritz stated that he was "tired" of you "bitches" and swung at her. She never met Marvin Fritz before the incident. She hit back. Her uncle, the complainant, Deon Dudley, attacked Mr. Fritz. The two fought on the porch. The complainant put Marvin Fritz into a head lock and refused to let go. Tensia began fighting with Mr. Wheeler. Donna was also grabbing. She stated that 6 people fought on Wheeler's porch. Mr. Wheeler announced that he was going to get his gun and went inside the house. Danyale and Tensia tried to pull the complainant off Mr. Fritz when they heard what Mr. Wheeler said. When they separated, Marvin Fritz suggested that the complainant was afraid of him. The complainant removed his shirt and threatened to attack Marvin Fritz

again. The girls managed to pull him away to the van in Toya Conley's driveway. The driveway was next door to Wheeler's house but separated by a wire fence. King ran across the street and hid. She claimed to have seen Marvin Fritz look into the van and shoot the complainant in the head. Mr. Fritz then assaulted Tenisia and Danyale. She saw Mr. Fritz take aim at Danyale with the gun before Danyale's daughter screamed "mama" which caused Marvin Fritz to "snap to". She ran to the liquor store where she first encountered the police and then went to the hospital with Darnell Dudley. (id, PP178-198).

The parties stipulated that Marvin Fritz had been convicted previously of a felony and was not eligible to possess a firearm. (id, P 198).

The parties stipulated that if Corporal Ki Sobol testified he would state that he pulled Marvin Fritz's jail calls with his stepfather. (id, P 200).

Eric Kimble testified that the bullet retrieved from the complainant was copper-jacketed and deformed. He also testified that he tried to get Mr. Wheeler to court on several occasions and was unable to locate Toya Conley (Mr. Wheeler's neighbor and mother to the complainant's daughter). He stated that he would continue looking for them. (id, PP 200-208; TR 3/26/13).

Mr. Fritz told Mr. Wheeler to make sure that Toya Conley "keeps" him "in the yard." Mr. Fritz also made statements indicating what he thought the outcome of case would be. (TR 3/25/13, PP 205-208).

In its opinion, the trial court stated:

[O]ne person going next door and asking to buy a cigarette, and if that's what can start this off, Heaven help us. Because what could be more simple than that, more

non-offensive than that? I mean, if that's what starts it off, do we have a prayer to ever co-exist peacefully?

This wasn't about the Hatfields and the McCoys feuding. It wasn't about an allegation that somebody assaulted sexually a child and so they're going over. It wasn't about, you know, you slapped my mama. Or we were playing the dozens and you called my mama a filthy name. Nothing. Nothing but a cigarette.

And I imagine, as with most things, if we had it do to over again I'm hoping that everybody would say we would have done it differently. Now, I know some of you all probably say, I didn't do nothing, so I wouldn't change nothing. But sometimes we don't change because of what we do. We change for the reaction that it has.

And from all the testimony, the environment just was crazy out there. He drove up crazy. That's what we heard. Was not at the scene at first. And what did we hear about, as weird as this might sound, about Gregory Wheeler? Gregory Wheeler was described as the senior person there. That when a person is older than everybody, we would like to think that they possess a little wisdom with that age. Because why get old? If you still going to be a fool, why even bother.

But everybody has their own way of what they believe should be and how the life should operate. And certainly, everything that we heard from all of the witnesses indicated that Mr. Wheeler was the one who decided to elevate the agitation out on the porch. He took it to a whole 'nother level, a level that everybody thinks that shouldn't have even come into being. But I'm thinking even the level that it was at was a whole 'nother level.

There are some people that when they try to achieve peace, they don't do it through violence.

Everybody out there believed that violence was a way to achieve peace. That's why everybody was fighting. Nobody wanted to back down. Everybody was eager to fight as a way to settle something, even Mr. Dudley. I'm going to take off my shirt. You want to throw down? You want to get your butt whipped again? Fine. No problem. You dialed

the right number. I'm down with that. To prove what? To show what?

I reiterate. Nobody was interested in peace. Because the method that was used was a method that everyday living says leads to death. Ya'll was going to fight to the death. Because that's what that behavior leads to.

I am reminded, Mr. Powell and Ms. Reed, that when one reflects on the Westerns of the olden days how they called their guns peacemakers. Because the wild, wild west that's alluded to sometimes in terms of peoples behavior, the weapons got the nicknames of I'm going to go get my piece. And while they might have spelled it P-I-E-C-E, back in the day it was spelled P-E-A-C-E. And still our country believes in putting armed forces in different countries to keep peace.

There are places that are patrolled by peace officers without weapons. And there are other places that believe a show of weapons or a show of force people will get peaceful.

Well, as you all know, that wasn't about to happen on this day, whether it was Danyale Smith, Ms. Wolfe, Bryant Dudley, Darrell [sic] Dudley, LaKeta King, Mr. Fossett, it didn't matter who testified. Everybody agreed that there was only one thing that was happening out there and that folks were willing to knock heads, to hit each other, to call each other out of their names. And nobody was interested in peace.

For every encounter, it went up a higher level, every level, and more people added to it. And then it would escalate some more. And more people would add to it. An accepted lifestyle? An acceptance that whoever it was that you were having a beef with, they deserved to be slapped, they deserved to be hit, that they had done something so offensive that calling them out of their name was easy to do? To smack them like they were a dog was easy to do? That somehow what they had done justified what your reaction was? It appeared to be.

Because that's what leads to, as some might say, the difference between testimony and hard evidence and soft evidence. A thing of interest. Trying to explain glass on the outside of the Windstar.

Now, if there was no force coming from the inside pushing the glass outside, it would seem to defy some sort of logic that you would have most of the glass on the outside.

Also, Ms. Hlavaty, Dr. Hlavaty testified about the close-range firing and how she wouldn't suspect that there would be any if you had to shoot through something. But really, the testimony was is it was the first shot through that window that killed Mr. Dudley. It wasn't, you know, the window got open and then he fired a second shot and it hit him in the same place. Mr. Dudley wouldn't be sitting there if the first one broke the window.

But it contradicts their opinion as to how the stippling got on Mr. Dudley. Because if Ms. Hlavaty is true, then the physical evidence doesn't support her conclusion. So, she can't be right. And for all the people that think, oh, well, you know, the stippling wouldn't be there if there was something intervening like clothing or glass, well, in this case there was. And in this case, I think it was the first shot that killed Mr. Dudley.

And there's no question that he was sitting in the seat based on where the entrance wound was. It was right near the corner of the left eye. And we know that he wasn't shot outside because what's inconsistent with that evidence is, okay. Explain the wounds on my man's calves then. If he was outside, explain how the left one went through-and-through and the right one got grazed. And it might have been the same, but what kind of position was he in to get shot in the head and then get that left through out on the inside of the left calf and the graze on the right. Now, that defies explanation. You've got to be creative to come up with how that occurred out in the street.

But again, this stuff is inconsistent. She came in as an expert and testified, explained the glass on the outside, almost like the evidence tech. What was that young lady's name? McNairy. Remember how she explained how you could not find a spent bullet? How she said sometimes they can just explode on impact. They can make the mark, but then explode so that you can't find them.

Because the question's asked, okay. If they penetrated the outside, how come you didn't find it? Did you pull the panel to see if it hit and fell down on the inside to actually see how many bullets actually penetrated.

And, you know -- So, all we know is that evidence would support that there were two that were fired that made it in. And that was the one that was in the backpack and then the other one was the one that killed Mr. Dudley. But we know, just based on the physical evidence, that there had to be another one that she didn't find that went through his leg.

So, you can talk about, well, you know, what kind of job did they do? I don't know. But I see two inconsistencies with people who are qualified as experts, which only tells me that acting in my capacity as a finder of fact, just because somebody testifies as an expert don't mean they right. I mean, you know, they could be right in what they believe, but wrong in what they believe [sic]. And so that stuff is inconsistent with the physical evidence as I find it.

I find that there is nobody else, but Mr. Fritz, who possessed that gun, whether you believe the witnesses, whether you believe the tape recordings that were made from the jail, it doesn't matter what theory you base it on, even the theory that was argued at the time of the closing by the defense. It was all an admission that, okay. Mr. Fritz had the gun. Okay. He shot Mr. Dudley. But Judge, consider the circumstances.

And that's what the prosecution argued. He did it and consider the circumstances. Yes. Consider the circumstances. Find that Mr. Fritz caused the death of Mr. Dudley. Find that the defendant, Mr. Fritz, intended to kill Mr. Dudley and that this intent was premeditated. Find that it was deliberate, meaning he thought about the pros and cons. Find that we've proven all of that beyond a reasonable doubt. Find that it was not justified, excused or done under circumstances that would reduce it to a lesser crime, almost find that it was cool and calculated. **Except out there it wasn't cool. It wasn't calculated.**

Mr. Fritz didn't ask anybody to go get the gun. He didn't have it in his back pocket and after he was getting beat by Mr. Dudley then ask for some help. And certainly there was no other weapon that was out there that was used. It was,

based on the evidence, just fists and slaps and a lot of cursing.

Even Mr. Dudley had some abrasions on him that let you know that he had been in a scuff on his way getting in the case. The physical evidence supports that. Find that. Say that, you know, the prosecution is arguing that the time that he had that Mr. Wheeler gave him the gun until he started the pursuit that that was done and was sufficient for him to think about the pros and cons of his actions.

Now, I imagine that it couldn't have been more chaotic than it was out there. Nobody had a cool head. Anybody have a cool head out there? No. Everybody was reacting to something that somebody else was reacting. And when people react, what is the tendency? To overreact.

Most people when they're upset, they ain't cool, calm and collective [sic]. And look at the things that started this powder keg, as we talked about. How in anybody's mind can some people get so upset about a cigarette? How can it lead to death?

How drunk does somebody have to be? How high does somebody have to be? And nobody was drunk. Nobody had ingested enough alcohol so that they could have gotten a ticket for driving under the influence of alcohol. So, nobody was like oiled out of their mind. Everybody's gauge was just set to violence.

How could it be so out of control that everybody got up here and said he was acting crazy? It was just nobody was thinking clearly. And for first degree murder to apply, it has to be deliberate. It has to be premeditated. You have to have time to reflect. And it has to be real and substantial.

How many people are given a gun and can say: Oh. Okay. Let me think about what I'm supposed to do with this gun? Think about what was happening at the time that Mr. Fritz got that gun. Nobody wanted to back down. **At least Mr. Dudley wasn't backing down.**

And look how he acted after he used the gun. He was so enraged that he and Mr. Wheeler going to beat an unarmed young lady on the hood of a car and then threaten somebody else, still not able to contain himself, until, as

everybody heard, it was a child's voice that restored everybody's common sense.

The innocent voice of a child, I would say sent there specifically on that day by our Creator. The innocent voice of a child that brought reason back, that restored everybody's focus. And then everybody was left to deal with the damage. There was no excuse or justification for any of this.

I think that the People have shown beyond a reasonable doubt that at the time that Mr. Fritz shot him that he intended to do great bodily harm less than the crime of murder. And I'll find him guilty of murder in the second degree and felony firearm at the time that he committed the murder of Mr. Dudley.

That's the verdict of the Court.

(Emphasis added)(TR 3/26/13, pp 23-32).

Mr. Fritz's timely filed an application for leave to appeal, raising the following claims:

1. The trial court clearly erred when it found that Marvin Fritz had the mens rea for second degree murder.
2. The trial court reached an impermissible inconsistent second degree murder verdict when it emphasized that the shooting occurred during a chaotic scene where Marvin Fritz was egged on by the complainants and suddenly given a gun.

On August 21, 2014, the Michigan Court of Appeals affirmed the convictions. **People v. Marvin Lavell Fritz**, Mich App No. 315851. (Appendix D).

The Michigan Supreme Court denied leave to appeal on March 31, 2015 in **People v. Marvin Fritz**, Mich No. 15017. (Appendix C).

Mr. Fritz writ of habeas corpus was denied in abeyance pending Michigan Supreme Court's decision. Thereafter, the writ of habeas corpus was amended to reflect the same claims not relevant here.

The United States District Court denied habeas relief in **Marvin Fritz v. Sherry Burt**, Docket No. 16-cv-10504, on July 28, 2017. (Appendix B).

The United States Court of Appeals for the Sixth Circuit claim "reasonable jurists would not find it debatable whether the district court erred in denying Fritz's insufficient-evidence claim on March 27, 2018 in **Marvin Fritz v. Sherry Burt, Warden**, Docket No. 17-2049."(Appendix A).

REASONS FOR GRANTING THE WRIT

Pursuant to Supreme Court Rule Number 10, Petitioner states the United States Court of Appeals for the Sixth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this court, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

Mr. Fritz's is in custody in violation of the Due Process Clause of the 14th Amendment to the United States Constitution where his conviction was obtained by the State "inferred malice not found by the Jury beyond a reasonable doubt of each and every fact necessary to constitute Second Degree Murder" in accordance with both *In re Winship*, 397 U.S. 358; 90 S.Ct 1068; 25 L.Ed.2d 368 (1970) and *Jackson v. Virginia*, 443 U.S. 307; 99 S.Ct 2781; 61 L.Ed.2d 560 (1979). Under Michigan law, "[T]he elements of provocation ... characterizes the offense of manslaughter [and] separates it from murder." The State's brief does little more than quote the opinions of the lower courts, and it fails to address Mr. Fritz's argument explaining why his rights were violated and why the trial court's error therefore resulted in a decision that was either contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent.

For these reasons, this Court should remand this action to the Sixth Circuit Court of Appeals with instructions to grant Mr. Fritz's Writ of Habeas Corpus.

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES, WHERE THE TRIAL COURT CLEARLY ERRED WHEN IT FOUND THAT MARVIN FRITZ HAD THE MENS REA FOR SECOND DEGREE MURDER.

Mr. Fritz conviction is constitutionally deficient and must be vacated. U.S. Const. Am XIV; *In re Winship*, 397 U.S. 358; 90 S.Ct 1068; 25 L.Ed.2d 368 (1970). The prosecution has the burden of proving a reasonable doubt each and every element of an offense. *People v. Gadson*, 38 Mich 307; 38 NW2d 227 (1967). In reviewing the sufficiency of the evidence, the Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt. *People v. Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "[T]he relevant question is whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)(emphasis in original). Under the amended version of 28 U.S.C. § 2254(d)(1), a federal habeas court must consider whether the court of appeals' application of the Jackson standard was reasonable, see *Gomez v. Acevedo*, 106 F.3d 192, 198-200 (7th Cir. 1997), vacated on other grounds sub nom. Gomez v. DeTella, 522 U.S. 801 (1997).

"The applicability of the reasonable doubt standard ... has always been dependent on how a State defines the offense that is charged in any given

case." **Petterson v. New York**, 432 U.S. 197, 211 n. 42 (1977). In other words, "[a] federal court must look to state law to determine the elements of the crime." **Quarteraro v. Henslmeier**, 186 F.3d 91, 97 (2nd Cir. 1999).

The United States District Court agrees with Respondent and held: "The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **In re Winship**, 397 U.S. 358, 364; 90 S.Ct 1068; 25 L.Ed.2d 368 (1970). The question on a sufficiency of the evidence claim is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319; 99 S.Ct 2781; 61 L.Ed.2d 560 (1979). The **Jackson** standard must be applied "with explicit reference to the substantive elements of the criminal offense as defined by state law." **Brown v. Palmer**, 441 F.3d 347, 351 (6th Cir. 2006)(quoting **Jackson**, 443 U.S. at 324 n. 16). (Appendix B p. 4).

Mr. Fritz states, according to Michigan law, malice is not established where a defendant recognizes that his or her actions could result in death or great bodily harm. Michigan law, rather, requires a recognition that the actions would likely result in such harm. **Dykhouse**, 418 Mich at 495; 355 NW2d at 151. The trial court did not find this in its findings of fact.

First, Fritz's Fourteenth Amendment right to due process was violated when the State trial court convicted him of Second Degree Murder, after inferring that Marvin Fritz had the mens rea for second degree murder.

The district court found both the trial court's verdict and the Michigan Court of Appeals' decision affirming the verdict were reasonable. The evidence at trial, viewed in a light favorable to the prosecution, establishing beyond a reasonable doubt that Petitioner committed second degree murder. (Appendix B p

10).

Under Michigan law, the common law crime of murder is defined as second degree murder. See Mich. Comp. Laws § 750.317. To establish second degree murder, the prosecution must establish that the defendant killed a human being with malice aforethought, with a showing of one of three mental states on the part of the defendant at the time of the killing: (1) intent to kill; (2) intent to inflict great bodily harm; or (3) intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result. See *People v. Dykhouse*, 418 Mich 488, 495; 345 NW2d 150, 151 (1984); *People v. Aaron*, 409 Mich 672, 713-14; 299 NW2d 304, 319-20 (1980).

On the other hand, it is well settled that the presence of any of these mental states does not automatically result in a finding of malice. In order to establish a murder conviction, the malice must be established from facts or circumstances that do not constitute excuse or justification, or mitigate the offense to manslaughter. *People v. Neal*, 201 Mich App 650, 654; 506 NW2d 618, 620 (1993). Indeed, "[m]anslaughter is murder without malice." *People v. Mendoza*, 468 Mich 527, 534; 664 NW2d 685, 689 (2003). "[T]he element of provocation ... characterizes the offense of manslaughter [and] separates it from murder." *People v. Pouncey*, 437 Mich 382, 388; 471 NW2d 346, 350 (1991). Under Michigan law, "[v]oluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool and reason to resume its habitual control." *People v. Fortson*, 202 Mich App 13, 19; 507 NW2d 763, 767 (1993)(emphasis added)

The United States Court of Appeals found: "reasonable jurists would not find it debatable whether the district court erred in denying Fritz's

insufficient-evidence claim. When reviewing insufficient-evidence claims, a court must first determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319 (1979). And on habeas review, even if the federal court concludes that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, the court must defer to a state appellate court's sufficiency determination if it is not unreasonable. **Brown v. Konteh**, 567 F.3d 191, 205 (6th Cir. 2009). Michigan law provides that malice may be inferred when there is evidence that a defendant "intentionally set in motion a force likely to cause death or great bodily harm." **People v. Roper**, 777 NW2d 483, 490 (Mich. Ct. App. 2009)(quoting **People v. Mayhew**, 600 NW2d 370, 379 (Mich. Ct. App. 1999)). While Fritz asserts that there was insufficient evidence of malice to support his second-degree murder conviction, the evidence in this case included testimony that Fritz and the victim were involved in a fight and that Fritz shot the victim three times at close range while the victim was seated in the backseat of a car as he was preparing to leave the scene of the altercation. **Fritz**, 2014 WL 4160435, at *2. In light of this evidence, it was plainly reasonable for the state appellate court to conclude that a reasonable trier of fact could convict Fritz of second degree murder. Accordingly, reasonable jurists would not debate the district court's resolution of this claim. (Appendix A pgs' 2 & 3).

Importantly, when the findings of fact made during a non jury trial are insufficient to support a murder conviction, but do sustain a conviction for manslaughter, the appropriate remedy is for the appellate court to vacate the murder conviction and remand for an entry of judgment for manslaughter. **People v. Bryant**, 43 Mich App 659, 664; 204 NW2d 746, 748 (1972). Accordingly, no

rational trier of fact could have found Fritz guilty of second degree murder. More importantly, the Michigan Court of Appeals' review of the case was objectively unreasonable, and the district court subsequently erred in denying Fritz's habeas petition.

Where the proofs, viewed in a light most favorable to the prosecution, presents no more than competing probabilities, a verdict of acquittal must be entered. In other words, "to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passion." *Mendoza*, 468 at 535-36; 664 NW2d at 690.

"The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason." *Pouncy*, 437 Mich at 389; 471 NW2d at 350.

In the case at bar, Marvin Fritz acted in the heat of passion with sufficient provocation. The trial court acknowledged that the scene was chaotic. Witnesses testified that 6 people fought on Greg Wheeler's porch. One witness stated that the fight last 15-20 minutes. The fight between Mr. Fritz and King got out of control with numerous people becoming involved. It was Greg Wheeler who, as the trial court stated, took the situation to a whole "nother" level by going to get his gun. Several witnesses also testified that Mr. Fritz "snapped."

The prosecution witness admitted that there was an altercation that blew up after Mr. Fritz came to visit his stepfather, Greg Wheeler. Laketa King stated that the fight began when she tried to borrow a cigertte from Wheeler. She had never met Marvin Fritz. King stated that Mr. Fritz swung at her and missed. She swung back and they fell down the stairs. The complainant came after Mr. Fritz. Mr. Wheeler and his other girlfdriend, Donna, got involved in the

argument as well as Tenisia. Six people ended up fighting on Wheeler's porch. The witness testified that Mr. Wheeler stated that he was going to get his gun. The complainant continued to fight with Marvin Fritz despite the girl's efforts to get him back to the van. She stated that Greg Wheeler went into the house and when he came back handed the gun to Marvin Fritz. Several people ran to the van. (TT p. 179, 181). King testified she ran to the side of the house across the street and saw Mr. Fritz walk up to the van in the driveway, look in, and shoot the complainant in the head. Then Mr. Fritz hit Danielle in the head with the gun. Finally, Mr. Fritz took a step back and aimed with the gun at Danyale when her daughter screamed "Mama". Mr. Fritz appeared to snap out of it. Mr. Fritz shot off bullets at he van. These witnesses testified that everyone was drinking except the driver, Danyale.

In *People v. Oster*, 97 Mich App 122; 294 NW2d 253 (1980), the Court of Appeals found sufficient provocation to support a charge of voluntary manslaughter, based on evidence which mirrors a rational view of the evidence presented in the case at bar. Ronald Charles Oster and his girlfriend Diane were standing in the foyer of a home where Diane's sister was hosting a party. Oster at 128. Suddenly, and without provocation, Alen Goodman initiated an argument with Mr. Oster, resulting in Mr. Oster being thrown back and knocked down. Id. At this point, even though Mr. Goodman was unarmed and the two were in a crowded place, Mr. Oster pulled out a concealed knife, ran over to Mr. Goodman, and stabbed Mr. Goodman five times. Id. At trial, Mr. Oster was charged with open homicide, but convicted of voluntary manslaughter; the Court of Appeals affirmed on a challenge to the sufficiency of the evidence. Oster at 135-36.

Thus, Mr. Fritz is in custody in violation of the Due Process Clause of the Fourteenth Amendment of the United States.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Marvin Fritz
Marvin Fritz #247851
Miskegon Correction Facility
2400 S. Sheridan Drive
Muskegon, Mich 49442

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