No. ________________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

DAVID GULBRANDSON, *Petitioner*,

v.

CHARLES L. RYAN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

In *Jurek v. Texas*, 428 U.S. 262, 272 (1976), this Court upheld Texas' capital sentencing statute against a challenge of facial vagueness on representations by the Court of Criminal Appeals that it would interpret a special question sufficiently broadly to allow a sentencing jury to consider the full breadth of mitigating evidence offered. When that promise was not fulfilled in a later case, this Court reversed a death sentence. *See Penry v. Lynaugh*, 492 U.S. 302, 328 (1989). Similarly, the State of Arizona represented to this Court in its brief in *Walton v. Arizona*, 497 U.S. 639 (1990), that the facially vague statutory aggravating factor at issue here would be narrowed. The Arizona Supreme Court later held that it had not consistently narrowed that factor. *See State v. Bocharski*, 218 Ariz. 476, 494, 189 P.3d 403, 421 (2008). In *Gulbrandson*, in a successive collateral relief proceeding, the state court misapplied the narrowing required by *Bocharski*, leaving the sole statutory aggravator un-narrowed. The district court denied relief, and that court and the Ninth Circuit denied a certificate of appealability. The questions presented for review are:

> (1) Whether reasonable jurists would debate the correctness of the district court's procedural ruling that Gulbrandson's second-in-time § 2254 petition was second or successive for purposes of 28 U.S.C. § 2244(b)(2)(B), where its factual predicate was a new merits judgment of death eligibility under A.R.S. § 13-703(F)(6), in a successive post-conviction relief proceeding, and, therefore, the claim was unripe at the time he filed his the initial § 2254 petition; and,
>
> (2) Whether reasonable jurists would debate whether Gulbrandson pleaded a substantial Eighth Amendment claim where the state court failed to apply a narrowing construction to the "especially heinous or depraved" statutory aggravating factor found to be facially vague in *Walton*, *see* A.R.S. § 13-703(F)(6), by failing to apply the crucial curative mental state element prescribed by *Bocharski* to prescribe when the infliction of injuries is "gratuitous," itself a narrowing definition of (F)(6), which resulted in Gulbrandson's being found eligible for death based solely on the finding of an un-narrowed statutory aggravator.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed on the cover of this document. Respondent is not a corporation.

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The Arizona Supreme Court affirmed Gulbrandson's convictions and death sentence on direct appeal. Opinion, *State v. Gulbrandson*, 184 Ariz. 46, 906 P.2d 579 (1995) (Appendix A). The Superior Court of Arizona in and for the County of Maricopa denied Gulbrandson's successive petition for post-conviction relief. Minute Entry, *State v. Gulbrandson*, Maricopa Cty. Super. Ct. No. CR 91-90974, Nov. 10, 2014 (Appendix B). Gulbrandson filed a second-in-time petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, which the United States District Court for the District of Arizona denied as second or successive for which Gulbrandson had not sought the Ninth Circuit's authorization under § 2244(b)(2)(B) and denied a certificate of appealability ("COA"). Order, *Gulbrandson .v Ryan*, U.S. Dist. Ct. No. CV 17-01891-PHX-DLR (Apr. 13, 2018) (Appendix C). The Ninth Circuit also denied a COA. Order, *Gulbrandson v. Ryan*, Ninth Cir. No. 18-15829 (Aug. 15, 2018) (Appendix D).

JURISDICTION

The United States District Court for the District of Arizona filed an order on April 13, 2018, in which it denied post-conviction relief under 28 U.S.C. § 2254 and a COA. Appx. C. The Ninth Circuit similarly denied a COA on August 15, 2018. Appx. D. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

U.S. Const. Amend. XIV, in pertinent part:

"[N]or shall any State deprive any person of life, liberty or property, without due process of law."

28 U.S.C. § 2253(c), in pertinent part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

* * *

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. The federal questions were presented in a successive state court PCR petition, in a petition for review to the Arizona Supreme Court, in a second-in-time § 2254 petition in the district court, and in the Ninth Circuit.

The Arizona Supreme Court cited its earlier decision in *State v. Wallace*, 151 Ariz. 362, 728 P.3d 232 (1986) ("*Wallace I*"), in finding David Gulbrandson eligible for a sentence of death because the murder of his paramour was especially heinous or depraved under A.R.S. § 13-703(F)(6). *See State v. Gulbrandson*, 184 Ariz. 46, 68, 906 P.2d 579, 601 (1995) (attached as Appendix A). The court rejected Gulbrandson's claim that the infliction of injuries alone, without regard to his mental state, was insufficient to prove "gratuitous violence," which the Arizona Supreme Court had ruled provided constitutional narrowing of the (F)(6) statutory aggravator. *See Gulbrandson*, 184 Ariz. at 67-69, 906 P.2d at 600-02 (1995) (citing *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983)). Although the Court ruled in *Walton v. Arizona*, 497 U.S. 639, 652-56 (1990), that Arizona's (F)(6) statutory aggravating factor is facially vague and requires

constitutional narrowing, the Court also found Arizona's narrowing to satisfy Eighth Amendment scrutiny in *Lewis v. Jeffers*, 497 U.S. 764, 770-71 (1990).

The Arizona Supreme Court has since conceded that it has not consistently applied the test for "gratuitous violence," which requires proof not only that a defendant inflicted more injuries than necessary to kill, the test of *Wallace I*, but also a temporal element that he inflicted violence "after he knew or should have known that a fatal action has occurred." *State v. Bocharski*, 218 Ariz. 476, 494, 189 P.3d 403, 421 (2008). The Arizona Supreme Court abrogated its decision in *Wallace I* and employed *Bocharski's* mental state element to vacate death sentences for the murders of a mother in *Wallace III, State v. Wallace*, 219 Ariz. 1, 6, 191 P.3d 164, 169 (2008), and two minor children in *Wallace IV, State v. Wallace*, 229 Ariz. 155, 163, 272 P.3d 1046, 1061 (2012). Acknowledging *Walton*, the Arizona Supreme Court held in *Wallace IV*, that "*Bocharski's* clarification and narrowing of the concept of gratuitous violence for establishing heinousness or depravity under (F)(6) were thus constitutionally required, as is our application of *Bocharski's* two requirements in this case." *Wallace IV*, 229 Ariz. at 163, 272 P.3d at 1054.

Gulbrandson filed a successive state post-conviction petition that sought, pursuant to state retroactivity rules, application of the narrowing construction of *Bocharski*, 218 Ariz. at 494, 189 P.3d at 421, to the (F)(6) statutory aggravator, the sole statutory aggravating factor in his case. After identifying the two-pronged test of *Bocharski*, the trial court ruled on the merits that Gulbrandson inflicted more injuries than were necessary to kill. *See* Appx. B at 3. That finding was consistent with *Bocharski's* first prong. However, the court abandoned *Bocharski's* intent requirement where it found that Gulbrandson "knew or should have known that he had inflicted violence in excess of that needed to kill, satisfying *Bocharksi*, *Wallace III*, and *Wallace IV*. Accordingly, he inflicted 'gratuitous violence,' supporting the (F)(6) finding." *Id.* at 4. The court

failed to find that Gulbrandson inflicted violence after he knew or should have known that a fatal action had occurred, as *Bocharski* requires. *Bocharski*, 218 Ariz. at 494, 189 P.3d at 421.

Gulbrandson brought the error and resultant violation of the Eighth and Fourteenth Amendments to the trial court in a Motion for Rehearing, *State v. Gulbrandson*, Maricopa Cty. Super. Ct. No. CR-91-90974 (Dec. 1, 2014), but the court summarily denied rehearing on April 10, 2015. The Arizona Supreme Court denied discretionary review. *See* Order, *State v. Gulbrandson*, Ariz. S. Ct. No. CR-15-0196-PC (Jul. 13, 2016).

Gulbrandson filed a second-in-time § 2254 petition based on *Magwood v. Patterson*, 561 U.S. 320, 331 (2010), alleging that the PCR court entered a new judgment *in his own case* that left (F)(6) un-narrowed and violative of the Eighth and Fourteenth Amendments. The district court denied relief on the basis that Gulbrandson's second-in-time § 2254 petition was actually second or successive ("SOS") under § 2244(b)(2)(B) and required the Ninth Circuit's authorization for filing, *see* § 2253(c), which Gulbrandson had not obtained. The district court denied a certificate of appealability ("COA") on that basis. Appx. C at 9. The Ninth Circuit denied a COA, finding that "[n]o reasonable jurist would debate the district court's ruling that Petitioner's claim is successive and therefore, by statute, authorization is required from the court of appeals." Appx. D.

B. Statement of relevant facts.[1]

1. Guilt phase facts found by the Arizona Supreme Court.

In 1990, Gulbrandson and the victim, Irene Katuran, became partners in a photography business, Memory Makers, which they operated out of Irene's home. For about one year, during

[1] The statement of relevant facts derives from the direct appeal opinion of the Arizona Supreme Court. *See* Appx. A at 1-3.

1990, Irene and Gulbrandson were also romantically involved. Gulbrandson lived with Irene and her two children until January 1991 when Irene asked him to move out. After the romantic relationship ended, the business relationship continued, but Gulbrandson suspected that Irene was trying to steal the business from him. Irene did in fact wish to sever the business relationship and wanted to "buy out" Gulbrandson by paying him for his proportionate share of the business. From about January to March 1991, Irene resumed dating Evan Shark, with whom she had been involved before her relationship with Gulbrandson.

Irene traveled to New Mexico on business the weekend of March 8, 1991, accompanied by Shark, to sell photographs. She returned on Sunday, March 10, about 7:00 p.m. with cash and checks from the business trip. The next morning, March 11, 1991, Irene's daughter went to her mother's bedroom to awaken her and found the bedroom door locked. Her daughter knocked on the door but heard no response; she then noticed a dark stain on the wall leading to her mother's bedroom. Suspecting that something was wrong, the daughter telephoned her grandmother who called the police. The police found Irene dead in the bathroom adjacent to her bedroom, and her car, a 1987 Saab Turbo, was missing.

The police found her face down dressed in only a pair of panties with her legs bent up behind her at the knee and her ankles tied together by an electrical cord attached to a curling iron. Her right wrist was bound with an electrical cord attached to a hair dryer. Her bedroom was covered in what appeared to be blood. From the bedroom to the bathroom were what appeared to be drag marks in blood. Clumps of her hair were in the bedroom; some of the hair had been cut, some burned, and some pulled out by the roots.

Four knives and a pair of scissors were in the kitchen sink and appeared to have blood on them; hair appeared to be on at least one of the knives. There also was what appeared to be blood

on a paper towel holder in the kitchen; a burnt paper towel was in Irene's bedroom. A Coke can with what appeared to be a bloody fingerprint on it was on the kitchen counter; this fingerprint was later identified as Gulbrandson's. At trial, the state's criminalist testified that the knives, scissors, paper towel holder, and Coke can had human blood on them, although the police did not determine the blood type. Gulbrandson's fingerprints were found on the paper towel holder and on an arcadia door at Irene's home, which was open in the family room the morning after the crime. A blood-soaked night shirt with holes in it was in Irene's bedroom; the blood on the nightshirt was consistent with Irene's blood type. A banker's bag was also in her bedroom with what appeared to be blood on it.

The autopsy revealed that Irene suffered at least 34 sharp-force injuries (stab wounds and slicing wounds), puncture wounds, and many blunt force injuries. The most serious stab wound punctured her liver, which alone was a fatal injury. Her nose was broken, as were 2 ribs on the back of the chest and 5 ribs in front on the same side of her trunk. The tine from a wooden salad fork was embedded in her leg; a broken wooden fork was found in the bedroom. On her left buttock was an abrasion that appeared to be from the heel of a shoe. The thyroid cartilage in front of her neck was fractured, which could have been caused by squeezing or by impact with a blunt object. She died from the multiple stab wounds and the blunt neck injury. The neck injury may have resulted in asphyxiation. The pathologist believed that most, if not all, of the injuries were inflicted before death.

The police immediately suspected Gulbrandson. While making a welfare sweep of Gulbrandson's apartment, an officer saw some apparently blood-splattered papers on the kitchen counter and a jacket apparently stained with blood hanging on the back of a kitchen chair.

Early in the evening of March 11, Gulbrandson called his mother, Dorothy Riddle, and told her that "he thought he had done a terrible thing. He thought he had killed Irene." Gulbrandson also said that he was going to kill himself. Ms. Riddle called the police and told them about this conversation.

The police searched Gulbrandson's apartment on March 11. The police found checks from New Mexico, payable to Memory Makers, and other business papers relating to Memory Makers; black clothing (shoes, shirt, pants, and a jacket); and a business card in the back pocket of the black pants. All these items had human blood on them consistent with Irene's blood type. The police also found a credit card of Irene's in the pocket of the black jacket.

Witnesses saw Gulbrandson gambling in Laughlin, Nevada, in the early morning of Tuesday, March 12, 1991. *Id.* at 3. On April 1, 1991, a police officer in Montana found Irene's car abandoned with Canadian license plates attached; the officer found an Arizona license plate under the driver's seat. The police apprehended Gulbrandson in Montana on April 3, 1991.

2. Mental state evidence presented at the guilt phase.

Gulbrandson presented the defenses of insanity and lack of intent. Martin Blinder, M.D., Gulbrandson's psychiatric expert, testified about Gulbrandson's abusive childhood, history of depression and alcoholism, past psychiatric treatment and past history of familial, financial, and personal failure. He further testified to four diagnoses of Gulbrandson's psychiatric condition: dissociative episode and fugue state, bipolar disorder, alcoholism, and personality disorder. Consistent with state law, the trial court sustained the state's objections to any testimony regarding Gulbrandson's mental state at the time of the offense because Dr. Blinder could not testify that Gulbrandson was *M'Naghten* insane. Gulbrandson's sisters testified regarding Gulbrandson's poor relationship with his father and prior mental problems. They both testified that if

Gulbrandson murdered Irene, he did not know what he was doing, nor did he understand the consequences of his act.

The state called in rebuttal Alexander Don, M.D., and John Scialli, M.D., who both performed psychiatric evaluations of Gulbrandson. Dr. Don testified that Gulbrandson told him that the last memory Gulbrandson had before Irene's murder was going to her home that night to get a key to his apartment because he had locked himself out. Gulbrandson further told Dr. Don that he remembered talking to Irene in the kitchen and that she had thrown a pair of scissors at him. The next thing Gulbrandson said he remembered was driving through Wickenburg, Arizona, and then to Laughlin, Nevada, to gamble. Gulbrandson said he saw a report about Irene's murder on television and only then believed he had committed the crime.

Dr. Don testified that Gulbrandson was not *M'Naghten* insane at the time of the killing. Further, he testified that a person's ability to remember an incident has nothing to do with that person's knowledge regarding what he was doing while he was doing it. Dr. Scialli also testified that in his opinion Gulbrandson was legally sane at the time of the alleged offense because he knew the nature and quality of his acts and the difference between right and wrong.

3. Guilt phase verdict.

The jury was instructed on premeditated first-degree murder, second-degree murder, manslaughter, theft, and the insanity defense. The jury convicted Gulbrandson of premeditated first-degree murder and theft of property having a value of a minimum of $8,000.

4. Capital sentencing.

The trial court sentenced Gulbrandson to death, finding that he had committed the murder in an especially heinous and depraved manner. The court found "heinousness" or "depravity" based on: 1) Gulbrandson's "relishing of the murder"; 2) his having inflicted "gratuitous violence";

and, 3) the "helplessness of the victim." *Id.*[2] The trial court found that Gulbrandson failed to prove by a preponderance of the evidence that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution, as required by A.R.S. § 13-703(G)(1), to establish a statutory mitigating factor.

5. Initial state appellate and collateral review.

The Arizona Supreme Court affirmed the convictions and death sentence on November 2, 1995. Appx. A. Although the court found that the prosecution failed to prove that Gulbrandson "relished the murder" and vacated the trial court's finding of that aggravating factor, it reweighed the aggravation and mitigation and affirmed the trial court's imposition of the death penalty based on "gratuitous violence and helplessness." *Id.* at 14, 17. With respect to gratuitous violence, the court found:

> Defendant apparently used numerous instruments to inflict injury to Irene: namely, several knives, scissors, and a wooden salad fork. *See State v. Wallace*, 151 Ariz. 362, 367-68, 728 P. 2d 232, 237-38 (1986) (defendant's use of several instruments when less violent alternatives available to accomplish murder constitutes heinous or depraved state of mind). Irene suffered 34 stab wounds and slicing wounds, puncture wounds, and many blunt force injuries. Her nose was broken, and there was evidence that defendant had kicked or stomped on her. There was compelling evidence that defendant had strangled Irene, and the autopsy revealed that she died from asphyxiation and multiple stab wounds. We conclude that these facts prove beyond a reasonable doubt that defendant inflicted gratuitous violence on the victim, and this shows an especially heinous or depraved state of mind. *See State v. Brewer*, 170 Ariz. 486, 502-03, 826 P. 2d 783, 799-800 (1992); *State v. Hinchey*, 165 Ariz. 432, 439, 799 P. 2d 352, 359 (1990).

Appx. A at 14-15.

[2] As a matter of state law, helplessness of the victim, without one of the other factors that comprise the (F)(6) aggravator, does not constitute proof of that statutory aggravating factor. Appx. A at 14 (citing *Gretzler*, 135 Ariz. at 52, 659 P.2d at 11).

On April 11, 1997, Gulbrandson filed a first, pre-*Bocharski* petition for post-conviction relief in the superior court. *See* Petition for Post-Conviction Relief and Incorporated Memorandum of Points and Authorities, *State v. Gulbrandson*, Maricopa Cty. No. CR 91-90974. He alleged ineffective assistance of trial counsel based, *inter alia*, on counsel's failure to recall Dr. Blinder at the capital sentencing hearing to undercut the prosecution's proof of the sole statutory aggravator, A.R.S. § 13-703(F)(6), including the "gratuitous violence" theory of (F)(6). The superior court denied the petition on January 30, 1998. *See* Order, *State v. Gulbrandson*, Maricopa Cty. No. CR 91-90974. On October 22, 1998, the Arizona Supreme Court summarily denied the Petition for Review from denial of post-conviction relief. *See* Order, *State v. Gulbrandson*, Ariz. S. Ct. No. CR-98-0248-PC.

6. Initial federal collateral review.

Gulbrandson petitioned for relief in federal court pursuant to 28 U.S.C. § 2254. The Ninth Circuit affirmed the district court's denial of relief in an Amended Opinion filed on October 28, 2013. *See Gulbrandson v. Ryan*, 738 F.3d 976 (2013). This Court denied certiorari on June 16, 2014, and a petition for rehearing of the denial of certiorari on August 11, 2014. *See Gulbrandson v. Ryan*, U.S. Sup. Ct. No. 13-9631.

After the Court denied rehearing, Gulbrandson filed the successive state post-conviction petition described above that alleged that he was entitled to retroactive application of *Bocharski* and *Wallace III* and *IV*, and *vacatur* of the (F)(6) factor and his death sentence. As was noted above, the superior court denied relief, Appx. B, the Arizona Supreme Court declined review, and Gulbrandson proceeded to file the second-in-time petition in the United States District Court for the District of Arizona. The petition was denied as second or successive and the court denied a COA. Appx. C. The Ninth Circuit also denied the COA. Appx. D.

REASONS FOR GRANTING THE WRIT

Under *Slack v. McDaniel,* "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." 529 U.S. 473, 484 (2000). Gulbrandson makes both the "threshold showing" of the denial of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments required under this Court's decision *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003), one that "does not require full consideration of the factual or legal bases adduced in support of the claim[ ]," and that reasonable jurists would debate the correctness of the district court's procedural ruling that the second-in-time petition was second or successive.

A. The finding of Gulbrandson's death-eligibility violates the Eighth and Fourteenth Amendments.

In sentencing Gulbrandson to death, the Arizona Supreme Court, in its *de novo* review of statutory aggravating factors, cited *Wallace I,* 151 Ariz. at 367-68, 728 P.2d at 237-38, in finding Gulbrandson death eligible because he, like Wallace, employed several instruments to cause death when less violent alternatives were available. *See Gulbrandson,* 151 Ariz. at 237-38, 728 P.2d at 367-68. In *Bocharski,* the Arizona Supreme Court ruled its construction of gratuitous violence in *Wallace I* to suffer from constitutional overbreadth and, therefore, required proof beyond a reasonable doubt that, in addition to inflicting injuries in excess of those required to kill, a defendant must also possess a critical mental state, to wit, that he inflict violence "after he knew or should have known that a fatal action has occurred. *See id.*, 218 Ariz. at 494, 189 P.3d at 421. Based on the rule of *Bocharski,* Wallace was then ruled ineligible for the death penalty, first as to

a mother and, then in a subsequent opinion as to her two minor children. *See Wallace III* (*State v. Wallace*, 219 Ariz. 1, 6, 191 P.3d 164, 169 (2008)); *Wallace IV* (*State v. Wallace*, 229 Ariz. 155, 163, 272 P.3d 1046, 1061 (2012)).

The State of Arizona repeatedly represented to this Court in the Respondent's Brief on the Merits in *Walton v. Arizona*, U.S. Sup. Ct. No. 88-7351, 1988 WL 409858, at 47-48, that the Arizona Supreme Court had consistently applied the (F)(6) statutory aggravating factor in its prior cases, implying it would continue to do so in the future. The Court decided *Lewis v. Jeffers*, 497 U.S. 764 (1990), on the same date as *Walton*, 497 U.S. 639. In *Jeffers*, this Court ruled that the Arizona Supreme Court had "consistently" applied the *Gretzler* factors, including gratuitous violence, so as to have "sufficiently channeled sentencing discretion to prevent arbitrary and capricious capital sentencing decisions." *Id.* at 777.

Significantly, in *Bocharski*, the Arizona Supreme Court acknowledged that "*our cases have not always been entirely consistent in describing the showing needed to establish gratuitous violence*." 218 Ariz. at 494, 189 P.3d at 421 (emphasis added). That concession is critical because, as this Court has indicated, in order to assess whether a state court's narrowing construction of a vague factor passes constitutional muster, the court looks at how the provision in question has been construed by the state supreme court. *See Proffitt v. Florida*, 428 U.S. 242, 255 (1976) ("These [especially heinous, atrocious and cruel] provisions must be considered as they have been construed by the Supreme Court of Florida.").

In *Proffitt*, this Court further indicated that it reviews later decisions to insure that the state court has not "abandoned" its narrowing construction of an aggravator that was required to ensure the provision's constitutionality. *Id.* at 255 n. 12. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court invalidated a sentence of death where the statutory aggravating factor required proof that

the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." A plurality of the Court ruled that the Georgia courts had applied a valid narrowing construction to the aggravator *in prior cases* but omitted to do so in Godfrey's case. *Id.* at 432. The result of that inconsistency meant that "[t]here [was] no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not," which violated the Eighth and Fourteenth Amendments. *Id.* at 433.

In *Jeffers*, 497 U.S. 764, the Court was asked to determine whether Arizona's (F)(6) statutory aggravator, which was found to be vague on its face in *Walton*, 497 U.S. at 654, could nevertheless be applied in a constitutional manner. This Court stated:

> Our decision in *Walton* makes clear that if a state had adopted a constitutionally narrow construction of a facially vague aggravating circumstance, and if the state has applied *that construction* to the facts of the particular case, then the "fundamental constitutional requirement" of "channeling and limiting . . . the sentencer's discretion in imposing the death penalty," [*Maynard v. Cartwright*, 486 U.S. 356, 362 (1988)], has been satisfied.

Id. at 779 (emphasis added).

Here, in its post-*Bocharski* judgment, the Superior Court absolutely did not apply "that [constitutionally narrow] construction" to the facts of Gulbrandson's case. So, while the Arizona Supreme Court has clarified the "gratuitous violence" aspect of the (F)(6) statutory aggravator in a manner that might pass constitutional muster, *see Bocharski*, 218 Ariz. at 494, 189 P.3d at 421, the superior court applied its own definition of "gratuitous violence" that omitted the critical temporal element that required proof that Gulbrandson inflicted violence *after* he knew or should have known a fatal action had occurred. It is the temporal element that renders the actions subsequent to the fatal one "gratuitous" for purposes of (F)(6). Without it, there would be nothing to distinguish the gratuitous violence element applied in *Gulbrandson*, Appx. B at 14, which relied

on Gulbrandson's simply inflicting more violence than necessary to kill, from the narrowed definition of gratuitous violence described in *Bocharksi*, *Wallace III*, and *Wallace IV*.

Significantly, the Arizona Supreme Court's opinion in *Gulbrandson* cited *Wallace I*, 151 Ariz. 362 at 367-68, 728 P.2d at 237-38, in which the Arizona Supreme Court initially affirmed the trial court's finding of gratuitous violence and imposition of three death sentences for the murders of a mother and her two minor children. *See supra* p. 9 (quoting Appx. A at 14-15). The Arizona Supreme Court only belatedly vacated all three death sentences on the basis that the prosecution had not proved that Wallace inflicted violence after he knew or should have known that he had already committed a fatal action, consistent with *Bocharski's* second prong. In *Wallace III*, 219 Ariz. at 6, 191 P.3d at 169, the court vacated the death sentence imposed for the murder of the mother, noting that it "attempted in *Bocharski* to clarify the principles governing this [gratuitous violence] theory of heinousness and depravity," and finding unproved the mental state requirement in *Bocharski*. In *Wallace IV*, 229 Ariz. at 163, 272 P.3d at 1054, the court vacated death sentences imposed for the murder of the minor children, again on the basis that the prosecution had not proved the mental state required under the *Bocharski* clarification.

Here, the superior court's abandonment of the narrowing construction of *Bocharski* and the *Wallace* cases did not end with its misapplication of *Bocharski's* intent requirement. An essential part of the analysis of the *Bocharski* intent requirement is whether the testimony of a pathologist can identify when in a succession of injuries the fatal one occurred and, therefore, what subsequent violence was "gratuitous" for (F)(6) purposes. In *Bocharski*, *Wallace III*, and *Wallace IV*, the Arizona Supreme Court assessed the testimony of prosecution medical examiners to determine when in a succession of injuries the fatal one was inflicted, whether the accused actually

understood that to have been the fatal injury, and whether the accused inflicted violence *after he knew or should have known – beyond a reasonable doubt – that he had inflicted a fatal injury.*

In *Bocharski*, the Arizona Supreme Court found that 24 stab wounds, eight of which penetrated the head and caused death, likely supported a finding that the defendant inflicted more injuries than necessary to kill. 218 Ariz. at 494, 189 P.3d at 421. While the sheer number of injuries might have been sufficient to prove (F)(6) based on gratuitous violence under past precedents, as it did in *Gulbrandson*, Appx. B at 14-15, the injuries, standing alone, were insufficient to prove the (F)(6) factor in the absence of proof "that the defendant continued to inflict violence *after he knew or should have known that a fatal action had occurred.*" 218 Ariz. at 494, 189 P.3d at 421 (emphasis in original). The *Bocharski* Court noted that the medical examiner

> speculated that the fatal wound "probably" occurred early in the sequence of wounds because it would have caused [the victim] to lose consciousness very quickly and thus would explain both the absence of any struggle and why all the injuries occurred in the same general area on one side of the face. The doctor, however, expressed some uncertainty about *when in the sequence the fatal wound occurred.*

Id. (emphasis added).

In *Wallace III*, with respect to the *vacatur* of the death sentence imposed for murder of the mother, the court ruled that although the defendant struck the mother in the head four or five times with a pipe wrench, the blows occurred in a relatively brief period and were struck by the same instrument that caused death. 219 Ariz. at 7, 191 P.3d at 170. The court noted:

> The medical examiner, although suggesting that any of the blows that struck [the mother] "might have" been fatal, was unable to opine as to which blow was fatal, let alone whether sufficient injury to kill had already been inflicted before the final blow. But even if we assume that to be the case, the evidence would not allow a jury reasonably to conclude that Wallace possessed the requisite mental state.

219 Ariz. at 708, 191 P.3d at 170-71.

In *Wallace IV*, the Arizona Supreme Court vacated the death sentences imposed for the murders of the two minor children. The court found with respect to the murder of the daughter that the defendant inflicted more injuries than necessary to kill where he struck the victim in the head at least ten times with a small wooden baseball bat and, when that did not kill the victim, stuck the broken bat through her neck. 229 Ariz. at 157, 160, 272 P.3d at 1048, 1051. "The more difficult question," the court asserted, "is whether the State proved beyond a reasonable doubt that Wallace continued to inflict injury after he knew or should have known that he inflicted a fatal wound." *Id.* The court credited Wallace's post-arrest confession in which he said he struck the bat through the girl's neck to "put her out of her misery" when the attack with the bat did not appear to him to kill her. 229 Ariz. at 161, 272 P.3d at 1052. The medical examiner testified he was unable "to determine whether [the girl] was still alive when Wallace drove the bat through her neck" and that she may still have been moving "such that 'the person inflicting the blows would not realize that the person was, in fact, fatally injured.'" *Id.* The court concluded:

> On this record, we cannot find beyond a reasonable doubt that *Bocharski's* actual or constructive knowledge requirement was met. Viewed as a whole, the evidence casts reasonable doubt on whether Wallace knew or should have known a fatal wound had been inflicted when he stabbed [the victim] in the neck.

Id.

With respect to the murder of the son, the court found that Wallace employed more violence than necessary to kill him where he struck the 102 pound child as many as 11 times in the head with the pipe wrench. 229 Ariz. at 162, 272 P.3d at 1053. The court, however, vacated the death sentence because the medical examiner determined that "the most obviously fatal and gruesome wound that caused [the victim's] skull to split open could have been the final blow." 229 Ariz. at 163, 272 P.3d at 1054. The court found that the prosecution failed to prove beyond a reasonable doubt that Wallace "continued to inflict violence on [the son] *after he knew or should have known*

that a fatal action had occurred." *Id.*, *citing Bocharski*, 218 Ariz. at 494, 189 P.3d at 421 (emphasis in original).

Here, the superior court performed no similar analysis and this constitutionally-indispensable finding of intent is simply lacking in the state court's ruling. *See* Appx. A at 4. As a factual matter, the pathologist's testimony at Gulbrandson's trial would not have proved *Bocharski* intent. The Maricopa County Medical Examiner, Fred Walker, M.D., testified to all of the blunt force injuries, stab wounds and incised wounds he observed at the autopsy. Appx. E at 13-20. He testified that the cause of death was "multiple stab wounds and blunt neck injury." *Id.* at 17. When asked to specify which wounds were fatal, Dr. Walker testified as follows:

> Well, the stab wounds which went through the liver would certainly have been fatal without medical attention and possibly would have been fatal even with very prompt medical attention. The stab wounds to the scalp, although I could not demonstrate that they had interrupted any major blood vessels, scalp wounds are well-known to cause considerable bleeding.
>
> There were also wounds - there was an incised wound of the left wrist which was gaping, and although not terribly deep, might have interrupted one or more large blood vessels. There was also a gaping wound, stab wound on the right wrist which I see in one of the photographs, although I don't think I spoke of it in my report.
>
> But, in any case, there were several stab wounds which individually could have caused death, and collectively I felt would justify including that as part of the cause of death.

Id. Dr. Walker also testified to asphyxiation as a possible cause of death. *Id.* at 21.

When asked whether any of the injuries occurred after death, a point critical to the gratuitous violence determination as described in *Bocharski* and the *Wallace* cases, Dr. Walker testified:

> Well, it's very difficult to distinguish and, perhaps, impossible to distinguish between wounds that occur shortly before death and wounds that occur shortly after death. I would say that the overall picture, *taking all of the wounds together and taking the other information that was available to me, photographic information*

about the scene where the body was discovered, led me to think that most, if not all of the wounds were inflicted before death.

Id. at 25 (emphasis added). Significantly, that "most, if not all" of the wounds were inflicted prior to death, necessarily means that the prosecution could not prove beyond a reasonable doubt that Gulbrandson inflicted violence after he knew or should have known a fatal action had occurred.

The Arizona Supreme Court's inconsistency in applying its definition of gratuitous violence is best seen by comparing the court's description of the defendant's behavior in *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983), with the court's description of Gulbrandson's conduct here. In *Jeffers*, the court ruled that Arizona prosecutors proved the gratuitous violence prong of (F)(6) beyond a reasonable doubt where "the defendant climbed on top of the *dead* victim and hit her in the face several times which eventually resulted in additional wounds and bleeding." 135 Ariz. at 430, 661 P.2d at 1131 (emphasis added). This Court relied on that fact in finding that gratuitous violence had been sufficiently narrowed. *Jeffers*, 497 U.S. at 770. As this Court noted, an eyewitness to the offense, a former nurse, testified that she told Jeffers after she watched him strangle the victim that the victim had no pulse, but he inflicted additional injuries afterwards that caused "wounds and bleeding" nonetheless. *Id.* at 767.

The Arizona Supreme Court's description of Gulbrandson's conduct, on the other hand, which came exclusively from Dr. Walker's testimony concerning the autopsy, failed to identify facts from which it could be inferred that Gulbrandson inflicted violence on a "dead" victim, *Jeffers, id.*, or after he knew or should have known that a fatal action had occurred under *Bocharski*, 218 Ariz. at 494, 189 P.3d at 421. In any event, no Arizona court has yet engaged in that analysis.

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B. Reasonable jurists would debate the correctness of the district court's ruling that Gulbrandson's second-in-time claim was SOS so as to require the Ninth Circuit's authorization to file the successive petition.

Gulbrandson's second-in-time § 2254 petition was filed subsequent to a state court *judgment* of November 11, 2014, that denied relief on the merits of a properly filed successive PCR petition. Gulbrandson sought to have the decision of the Arizona Supreme Court in *Bocharski*, 218 Ariz. 476, 189 P.3d 403, applied retroactively to his case. *Bocharski* determined that the Arizona courts had not consistently applied to capital defendants the constitutionally-required narrowing of "gratuitous violence," itself a narrowing of the sole statutory aggravating factor that rendered Gulbrandson eligible for a sentence of death, A.R.S. § 13-703(F)(6). Because the state court applied *Bocharski in Gulbrandson's own case*, the state court's judgment constituted a new "factual predicate" for purposes of § 2244(d)(1)(D), which allowed Gulbrandson to seek relief on that state court judgment in a second-in-time § 2254 pertition. *See Shannon v. Newland*, 410 F.3d 1083, 1088 (9th Cir. 2005), and without applying for authorization to file a new § 2254 petition under § 2244(b).

The district court failed to analyze Gulbrandson's second-in-time petition under *Shannon*, controlling Ninth Circuit precedent. The court cited out-of-circuit decisions that bar a § 2254 petitioner from filing a second-in-time petition without authorization where he alleges only a change in state law *in some other inmate's case* and has failed to have that change applied retroactively in his own case in the state courts. Appx. C at 6-7. The court raised a canard that "under Gulbrandson's view of § 2244(b), the district court could hear a second-in-time habeas claim arising from a change in state law, but a second-in-time claim based on a change in constitutional law would be considered successive and require authorization from the Court of Appeals. This anomalous outcome can't be right." *Id.* at 7 (citing *In re Page*, 179 F.3d 1024,

1056 (7th Cir. 1999). The authority cited by the district court was inapt. The district court omitted the crucial requirement of *Shannon* that the petitioner must return to state court, as Gulbrandson did, and have the state court apply, *retroactively*, that change in state law to his case. The district court and, later, the Ninth Circuit, should have granted the COA as to the procedural ruling that Gulbrandson's petition was SOS and not simply second-in-time where the present claim was not yet ripe when Gulbrandson brought his initial § 2254 petition.

Finally, the district court denied relief on the basis that Gulbrandson sought § 2254 relief on the basis of an error of state law. Appx. C at 8. The district court misapprehended the nature of Gulbrandson's claim. He sought relief on the basis that the state court entered a new judgment of death eligibility under A.R.S. § 13-703(F)(6) but failed to narrow that factor as this Court ruled it must in *Walton* and the Court found the Arizona state courts to have done in *Lewis*. What is clear from *Penry* and *Proffitt* is that this Court and the lower federal courts may reassess to determine whether the state courts have abandoned promised narrowing constructions of facially-invalid state capital sentencing statutes.

CONCLUSION

For the foregoing reasons, David Gulbrandson respectfully requests that the Court grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and order it to review the decision of the United States District Court for the District of Arizona in which it denied Gulbrandson's claim that his eligibility for a sentence of death rests on an un-narrowed (F)(6) statutory aggravating factor in violation of the Eighth and Fourteenth Amendments.

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Respectfully submitted this 9th day of November 2018.

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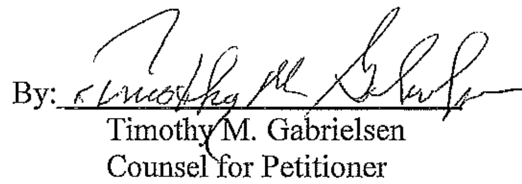

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November 9th, 2018