No. 18-6766

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

DAVID GULBRANDSON, *Petitioner*,

vs.

CHARLES L. RYAN, *Respondent.*

REPLY TO BRIEF IN OPPOSITION

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RESPONSE TO BRIEF IN OPPOSITION

Respondents submit that David Gulbrandson's petition should not be granted because he alleges only claims that are "fact-intensive and involve the application of well-defined legal principles," and the errors of which he complains "only affect Gulbrandson's case." BIO at 4, 8. Respondents also cite an array of cases that predate the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), for the proposition the lower federal courts' disposition of Gulbrandson's § 2254 petition on procedural grounds, rather than on the merits, should result in the denial of certiorari. Respondents ignore the Court's controlling precedent, *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court's decision that was cited by Gulbrandson in his Petition (at 11) and controls the post-AEDPA consideration of a petition for writ of certiorari where the habeas petition is dismissed on procedural grounds below. *Slack* explicitly rejected the argument advanced by Respondents here.

Respondents err in all other regards for reasons stated in the Petition for Writ of Certiorari and below. The Questions Presented themselves, reproduced here, track the requirements of *Slack* and dispel Respondents' mischaracterizations of Gulbrandson's arguments as seeking mere factfinding or the denial of his petition as the result of application of well-settled legal doctrine:

> (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 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* [*v. Arizona*, 497 U.S. 639 (1990)], *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.

The state court's 2014 botch of the Arizona Supreme Court's narrowing definition of the sole statutory aggravating factor, which applied retroactively to Gulbrandson in successive state post-conviction relief ("PCR") proceedings, effectively failed to find the facts relevant to proof of that factor. Moreover, Gulbrandson's claim in the successive PCR proceeding that a significant change in the law with respect to the narrowing definition of that sole statutory aggravator and the new state court judgment thereon gave rise to an issue of first impression that was blithely rejected on procedural grounds by the lower federal courts, to wit, whether there is a new judgment of death eligibility that may be attacked in an initial petition brought pursuant to 28 U.S.C. § 2254. *See* Petition for Writ of Certiorari, Appendix B-4 ("Defendant is therefore death-eligible and Claim 1 is not colorable."). Gulbrandson submits that the issue is also a significant matter of first impression here as well, but its contours are shaped by the Court's precedents.

A. Reasonable jurists would debate the correctness of the Ninth Circuit's procedural ruling that Gulbrandson's § 2254 petition was second or successive.

Gulbrandson has alleged an important question of federal law not yet settled by this Court: whether the lower federal courts were correct in ruling that a state court judgment on a successive PCR petition that found Gulbrandson eligible for a sentence of death in 2014, by application of the Arizona Supreme Court's new narrowing construction of the same statutory aggravating factor recognized to be facially vague in *Walton v. Arizona*, 497 U.S. 639 (1990), and applied to Gulbrandson in 1995, constitutes a *new judgment* that permits a federal habeas challenge that is second-in-time but not second or successive ("SOS") under 28 U.S.C. § 2244(b)(2). The language employed by the state court bespeaks the entry of a new judgment: "Defendant is therefore death-

eligible and Claim 1 is not colorable." Appx. B-4. The Court should grant certiorari and remand to the Ninth Circuit for initial development of the issue.

The same issues for which the Court granted certiorari in *Walton* and in *Lewis v. Jeffers*, 497 U.S. 639 (1990), have resurfaced. As the Court stated in *Proffitt v. Florida*, 428 U.S. 242, 255 n. 12 (1976), 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. Such abandonment occurred here.

Gulbrandson submits that Arizona's facially vague statutory aggravating factor that was applied to find Gulbrandson eligible for a sentence of death under the Arizona Supreme Court's new constitutional narrowing of that factor, A.R.S. § 13-703(F)(6), which requires proof beyond a reasonable doubt that a murder was especially heinous, cruel, or depraved, was simply not cured by the state PCR court in 2014 because it botched the application of that constitutional narrowing. The Arizona Supreme Court acknowledged in *State v. Bocharski*, 218 Ariz. 476, 494, 189 P.3d 403, 421 (2008), that the narrowing of heinousness or depravity that may be accomplished with a finding that a defendant inflicted "gratuitous violence" has not been consistently applied in its decisions. The inconsistent application of a narrowing definition of gratuitous violence, according to the Arizona Supreme Court, implicates the Eighth and Fourteenth Amendments and *Walton*. *See State v. Wallace* ("*Wallace IV*"), 229 Ariz. 155, 163, 272 P.3d 1046, 1054 (2012).

Although *Bocharski* was ruled to apply retroactively to Gulbrandson in his successive PCR proceeding, the state court misapplied *Bocharski*, which requires proof beyond a reasonable doubt that an accused not only inflicted violence in excess of that required to kill, but also, in contradistinction to *Wallace I*, *State v. Wallace*, 151 Ariz. 362, 367-68, 728 P.3d 232, 237-38 (1986), that he *intended* to inflict gratuitous violence. That intent is proved by showing that the

accused "inflicted violence after he knew or should have known that a fatal action had occurred." *See Bocharski*, 218 Ariz. at 494, 189 P.3d at 421. The temporal element that an accused inflict violence *after* knowing that a fatal action has occurred is what distinguishes especial heinousness or depravity under the (F)(6) aggravator from all other murders in which multiple injuries are inflicted. As noted in the Petition for Writ of Certiorari, the state PCR court correctly applied the first prong of *Bocharski*, but inexplicably found Gulbrandson "intended to inflict more violence than necessary to kill" instead of the required mental state that requires proof that Gulbrandson "inflicted violence after he knew or should have known a fatal action had occurred." *See* Petition for Writ of Certiorari at 3-4, 13-14. Violence that is gratuitous occurs *after* infliction of a fatal injury. The sole statutory aggravator in Gulbrandson's case thus remains un-narrowed – in violation of the Eighth and Fourteenth Amendments.

Contrary to Respondent's reframing of the Questions Presented, rather than attacking the sufficiency of the evidence that supported "gratuitous violence" as it was defined 23 years ago in *State v. Gulbrandson*, 184 Ariz. 46, 67, 906 P.2d 579, 600 (1995), BIO at 6, Gulbrandson brought in the federal district court an Eighth Amendment challenge to his death eligibility based on a new judgment of the state superior court that purported to apply the *Bocharski* definition of gratuitous violence to him after the state court agreed that Gulbrandson was entitled to retroactive application of the significant change in the law of *Bocharski* in a successive PCR petition under Arizona Rule of Criminal Procedure 32.1(g). The former definition of gratuitous violence that had been applied to Gulbrandson in 1995, 184 Ariz. at 67, 906 P.2d at 600, the pre-*Bocharski* definition of gratuitous violence stated in *Wallace I*, 151 Ariz. at 237-38, 362 P.3d at 367-368, that less violent means could have been used to kill, was later abrogated by the Arizona Supreme Court, which relied on *Bocharski* to vacate Wallace's three death sentences. *See State v. Wallace* ("*Wallace III*"), 219

Ariz. 1, 7-8, 191 P.3d 164, 170-71 (2008) (death eligibility for the murder of the mother vacated), and *Wallace IV*, 229 Ariz. at 160-61, 272 P.3d at 1051-52 (death eligibility for the murders of the two minor children vacated).

Also contrary to Respondents' argument, Gulbrandson could not have brought the challenge to his eligibility under (F)(6) pursuant to *Bocharski* in his first § 2254 petition. *See* BIO at 7 (*citing Brown v. Muniz*, 889 F.3d 661, 672-73 & n.8 (9th Cir. 2018)). The 2014 state court judgment that purported to apply the significant change in the law of *Bocharski* and render Gulbrandson eligible for a sentence of death under (F)(6) constituted a factual predicate that did not exist when Gulbrandson filed his first § 2254 petition in 1999. *See* Petition for Writ of Habeas Corpus *Ad Subjiciendum*, *Gulbrandson v. Stewart*, Dist. Az. No. CIV-98-2024-PHX-SMM (May 5, 1999), Dkt. 27. Respondents' reliance on *Brown* is misplaced because, in *Brown*, the *Brady* material upon which the petitioner's second-in-time § 2254 petition relied actually existed at the time he filed his first § 2254 petition but it was unknown to him due to the prosecution's suppression of it. As such, the Ninth Circuit ruled the petitioner was required to pass through the second or successive ("SOS") gateway of 28 U.S.C. § 2244(b)(2)(B) in order to file a successive petition bearing the *Brady* claim in the district court.

Here, in contrast, the 2014 state PCR order constituted a new state court judgment of eligibility under (F)(6) that did not require Gulbrandson to meet the SOS gateway provisions of § 2244(b)(2)(B). *See Magwood v. Patterson*, 561 U.S. 320, 331 (2010) (where there is a new sentencing judgment intervening between the filing of two habeas petitions, "an application challenging the resulting new judgment is not 'second or successive' at all."); *Johnson v. United States*, 544 U.S. 295 (2005) (*vacatur* of a state court conviction employed to enhance a sentence on a federal conviction constitutes a "fact" that permits the petitioner to bring a new § 2255 petition

so long as he was diligent in seeking the state court *vacatur*). *Magwood* and *Johnson* provide the jurisprudential underpinnings for the claim for which Gulbrandson sought relief in the district court.

In addition, apart from the significance of whether a new state court judgment gives rise to a claim that is second-in-time but not SOS under § 2244(b), *Bocharski* has wider import than Respondents concede. Numerous Arizona death row prisoners have been adjudicated eligible for a sentence of death based on the *Wallace I* conception of gratuitous violence that was found to violate *Walton* and the Eighth and Fourteenth Amendments in *Wallace IV*. *See State v. Tucker*, 215 Ariz. 298, 315, 160 P.3d 177, 190 (2007) (pre-*Bocharski* case in which gratuitous violence was established based merely on infliction of injuries in excess of those necessary to kill); *State v. Sansing*, 206 Ariz. 232, 237, 77 P.3d 30, 35 (2003) (same); *State v. Rienhardt*, 190 Ariz. 579, 595, 951 P.2d 454, 465 (1997) (same); *State v. Hyde*, 186 Ariz. 252, 281, 921 P.2d 655, 684 (1996) (same); *State v. Jones*, 185 Ariz. 471, 477-78, 917 P.2d 200, 217-18 (1996) (same); *State v. Murray*, 184 Ariz. 9, 38, 906 P.2d 542, 571 (1995) (same); *State v. Greenway,* 170 Ariz. 155, 166, 823 P.2d 22, 33 (1991) (same).

B. Gulbrandson has stated a claim cognizable under the Eighth Amendment.

Respondents ignore this Court's holding in *Slack*, 529 U.S. 473, by suggesting that certiorari be denied because the Ninth Circuit denied a COA on a procedural ground without addressing whether Gulbrandson stated a claim that was cognizable in federal habeas. BIO at 8. This Court contemplated that habeas petitions might be dismissed on procedural grounds and affirmatively rejected the State of Nevada's argument that the failure of the lower federal courts to reach the merits of a substantive claim defeated the Court's consideration of a petition for writ of certiorari in the matter. *See Id.* at 483.

Slack makes clear that, where a post-AEDPA claim is dismissed by the district court on procedural grounds, in order to obtain a COA, the petitioner must show that reasonable jurists would debate not only the correctness of the district court's procedural ruling, but also that the substantive claim for which relief was denied is cognizable in habeas. *Id.* at 484. Gulbrandson clearly has done that here, where, as noted in the Questions Presented and in argument, he has made the substantive allegation that the state court's employment of an un-narrowed (F)(6) statutory aggravating factor has resulted in a death sentence that violates the Eighth and Fourteenth Amendments.

In a moment of fleeting logic, Respondents assert that "Gulbrandson does not contend that *Bocharski's* supposed clarification of the [(F)(6)] aggravator violates *Walton*, nor could he reasonably do so. He merely argues instead that the state court misapplied state law when it upheld the trial court's gratuitous violence finding after *Bocharski*." BIO at 10. Gulbrandson actually argues that it is *Bocharski* that saves (F)(6) from unconstitutional vagueness, at least where it is faithfully applied by the state courts. In the absence of such faithful application, (F)(6) is facially vague and its application, unconstitutional. The violation of *Walton* occurred here precisely because the state superior court botched the application of *Bocharski*, resulting in the state court's ruling that "Defendant is therefore death-eligible." Appx. B-4. Gulbrandson remains on Arizona's death row based on a new state court judgment that derived from application of an un-narrowed (F)(6) especial heinousness or depravity aggravator that, without constitutional narrowing, was found to be facially vague in *Walton*.

Finally, Respondents advocate that the Court deny certiorari because Gulbrandson's case was cited by the *Bocharski* Court as "an example of when the evidence satisfies the necessary elements for gratuitous violence under state law." BIO at 10 (*quoting* the Arizona Supreme Court's

direct appeal recitation of injuries inflicted by Gulbrandson on his paramour, as contained in the earlier Ninth Circuit habeas opinion, *Gulbrandson v. Ryan*, 738 P.3d 976, 998 (9th Cir. 2013)). Of course that recitation of injuries supported only the pre-*Bocharski* finding of gratuitous violence under *Wallace I* in *Gulbrandson* and did not purport to apply *Bocharski's* second prong, or mental state requirement, to Gulbrandson. It must be recalled that the Arizona Supreme Court initially found especial heinousness or depravity as to all three murder victims in *Wallace I*, 151 Ariz. at 367, 728 P.2d at 237. As noted above, gratuitous violence was later vacated with regard to the murder of the mother in *Wallace III* and the murders of the two minor children in *Wallace IV*. No court, including the *Bocharski* Court, has ever found proof beyond a reasonable doubt *Bocharski's* mental state element as to Gulbrandson. No court, including the successive PCR court in 2014, has ever determined whether Gulbrandson inflicted violence on his paramour after he knew or should have known he had inflicted a fatal injury.

CONCLUSION

Gulbrandson respectfully requests that the Court grant the Petition for Writ of Certiorari to review the Ninth Circuit's denial of a certificate of appealability on the issue whether Gulbrandson's petition was second or successive under 28 U.S.C. § 2244(b), rather than merely second in time, based on the state PCR court's new judgment of death eligibility under the especially heinous or depraved provision of A.R.S. § 13-703)(F)(6) in a successive PCR petition. *See* Appx. B-4 ("Defendant is therefore death-eligible and Claim 1 is not colorable."). In the alternative, Gulbrandson respectfully requests that the Court grant the writ, perhaps in a *per curiam* order, and direct the Ninth Circuit to grant the COA so that the issue of first impression may be fully developed in the appellate briefing.

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Respectfully submitted this 10th day of January, 2019.

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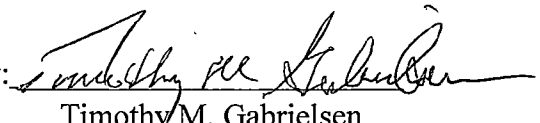
By: 
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