No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

In re DAVID GULBRANDSON, *Petitioner*

PETITION FOR WRIT OF HABEAS CORPUS

CAPITAL CASE

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QUESTION PRESENTED

This case presents a claim of innocence of the death penalty. The State of Arizona represented to this Court that the statutory aggravating factor it found to be facially vague in *Walton v. Arizona*, 497 U.S. 639, 654 (1991), especial heinousness or depravity under A.R.S. § 13-703(F)(6), would be narrowed by the state courts. *See* Respondent's Brief on the Merits, *Walton v. Arizona*, U.S. Sup. Ct. No. 88-7351, 1988 WL 409858 (Dec. 21, 1988), at 47-48.

The Arizona Supreme Court later held that it had not consistently narrowed the factor. *See State v. Bocharski*, 189 P.3d 403, 421 (Ariz. 2008). David Gulbrandson properly brought a successive state post-conviction petition alleging a significant change in state law under Arizona Rule of Criminal Procedure 32.1(g) in which he sought application of *Bocharski's* narrowing to void his death eligibility under the (F)(6) factor. The state trial court arbitrarily and capriciously misapplied *Bocharski*. The district court, on Gulbrandson's second-in-time petition pursuant to 28 U.S.C. § 2254, ruled that relief would lie for a claim that federal due process was violated where a state court arbitrarily and capriciously applied state law, but Gulbrandson could not bring that claim because he had not first obtained authorization from the Ninth Circuit to file a second or successive ("SOS") petition under 28 U.S.C. § 2244(b)(3). Subsequently, the Ninth Circuit summarily denied Gulbrandson authorization to file the SOS petition.

The Question Presented is:

> Whether transfer to the district court for a hearing pursuant to this Court's original habeas jurisdiction is warranted in this exceptional case where the district court acknowledged the existence of a colorable federal due process claim that the state court arbitrarily and capriciously applied state law in rejecting a second-in-time challenge to the sole statutory aggravating factor, but the Ninth Circuit denied authorization to file the meritable SOS petition without assignment of grounds.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

Special Verdict, *State v. Gulbrandson*, CR-1991-90974 (Maricopa Cty. Super. Ct. Feb. 19, 1993).

Reporter's Transcript of Proceedings, Sentencing Hearing, *State v. Gulbrandson*, CR-1991-90974 (Maricopa Cty. Super. Ct. Feb. 19, 1993).

Opinion (Convictions and Sentences Affirmed), *State v. Gulbrandson*, 906 P.2d 579 (Ariz. 1995).

Order (denying Petition for a Writ of Certiorari), *Gulbrandson v. Arizona*, 518 U.S. 1022 (1996).

Order (denying Post-Conviction Relief), *State v. Gulbrandson*, CR-1991-90974 (Maricopa Cty. Super. Ct. Jan. 30, 1998).

Order (denying Petition for Review on denial of Post-Conviction Relief), *State v. Gulbrandson* CR-98-0248-PC (Ariz. Oct. 20, 1998), Doc. 8.

Memorandum of Decision and Order (Addressing Procedural Bar and Motion for Discovery), *Gulbrandson v. Stewart*, CV-98-2024-PHX-SMM (D. Ariz. Aug. 30, 2000), ECF No. 46.

Memorandum of Decision and Order (denying Merits and Certificate of Appealability), *Gulbrandson v. Schriro*, CV-98-2024-PHX-SMM (D. Ariz. Mar. 31, 2007), ECF No. 87.

Judgment, *Gulbrandson v. Schriro*, CV-98-2024-PHX-SMM (D. Ariz. Apr. 2, 2007), ECF No. 88.

Order (denying Motion to Alter or Amend Judgment under Rule 59(e)), *Gulbrandson v. Schriro*, CV-98-2024-PHX-SMM (D. Ariz. Apr. 18, 2007), ECF No. 90.

Order (granting Certificate of Appealability), *Gulbrandson v. Schriro*, 07-99012 (9th Cir. Feb. 17, 2009), ECF No. 26.

Order and Amended Opinion (District Court's Denial of a Habeas Petition Affirmed, Request to File Second or Successive Petition denied), *Gulbrandson v. Ryan*, 738 F.3d 976 (9th Cir. 2013).

Order (denying Petition for a Writ of Certiorari), *Gulbrandson v. Ryan*, 573 U.S. 919 (2014).

Order (denying Petition for Rehearing of Petition for Writ of Certiorari), *Gulbrandson v. Ryan*, 573 U.S. 981 (2014).

Order (denying Successive Petition for Post-Conviction Relief), *State v. Gulbrandson*, CR-1991-90974 (Maricopa Cty. Super. Ct. Nov. 10, 2014).

Order (denying Motion for Rehearing), *State v. Gulbrandson*, CR-1991-90974 (Maricopa Cty. Super. Ct. Apr. 9, 2015).

Order (denying Petition for Review from Denial of Rule 32 Relief), *State v. Gulbrandson*, CR-15-0196-PC (Ariz. 2016), Doc. 7.

Opinion (denying Petition for a Writ of Certiorari), *Gulbrandson v. Arizona*, 137 S. Ct. 1080 (2017) (Mem).

Order (denying Second-in-Time Habeas Petition and Certificate of Appealability), *Gulbrandson v. Ryan*, CV-17-01891-PHX-DLR (D. Ariz. Apr. 13, 2018), ECF No. 10.

Judgment in a Civil Case, *Gulbrandson v. Ryan*, CV-17-01891-PHX-DLR (D. Ariz. 2018), ECF No. 11.

Order (denying Motion for Certificate of Appealability), *Gulbrandson v. Ryan*, 18-15829 (9th Cir. 2018), ECF No. 12.

Order (denying Petition for a Writ of Certiorari), *Gulbrandson v. Ryan*, 139 S. Ct. 1171 (2019) (Mem).

Order (denying Application for Leave to File a Second or Successive Petition), *Gulbrandson v. Ryan*, 19-71578 (9th Cir. 2019), ECF No. 5.

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner David Gulbrandson respectfully requests that the Court, by virtue of its authority under 28 U.S.C. §§ 2241(b) & 1651(a), and Article III of the United States Constitution transfer his Petition for Writ of Habeas Corpus to the United States District Court for the District of Arizona for hearing and determination of the claim that the state post-conviction relief ("PCR") court arbitrarily and capriciously applied state law, in violation of the Due Process Clause of Fourteenth Amendment to the United States Constitution and *Lewis v. Jeffers*, 497 U.S. 764, 770-71 (1990), where it denied relief on a claim that a retroactive change in state law requires *vacatur* of the sole statutory aggravating factor that rendered Gulbrandson eligible for a sentence of death. In rejecting Gulbrandson's second-in-time petition brought pursuant to 28 U.S.C. § 2254, the district court indicated that such a due process claim would state a colorable claim but it needed to be brought in a second or successive ("SOS") petition - for which Gulbrandson had not obtained the Ninth Circuit's authorization under § 2244(b)(3) - and the Ninth Circuit, without assignment of grounds, denied Gulbrandson authorization to file the SOS petition.

DECISIONS BELOW

The Minute Entry in which the Superior Court of Arizona denied post-conviction relief and Gulbrandson exhausted the claim, is attached as Appendix A (*State v. Gulbrandson*, Maricopa Cty. No. CR 1991-090974 (Nov. 10, 2014)). The Order of the United States District Court in which it denied relief on the second-in-time petition filed pursuant to 28 U.S.C. § 2254 is attached as Appendix B (*Gulbrandson v. Ryan*, Dist. Ct. No. CV-17-01891-PHX-DLR (Apr. 13, 2018)). The Order of the Ninth Circuit in which it denied Gulbrandson authorization to file a second or

successive § 2254 petition in attached as Appendix C (Order, *Gulbrandson v. Ryan*, Ninth Cir. No. 19-71578 (Sept. 3, 2019)).

JURISDICTION

The Order of the Ninth Circuit in which it denied Gulbrandson's request for authorization to file a second or successive petition under 28 U.S.C. § 2244(b) was filed on September 3, 2019. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a), and Article III of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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. § 2244(b)(2):

A claim presented in a second or successive habeas application under section 2254 that was not presented in a prior application shall be dismissed – unless

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(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(3)

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

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(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF THE CASE

A. Guilt phase facts found by the Arizona Supreme Court.[1]

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 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.

Irene traveled to New Mexico the weekend of March 8, 1991, 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. 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.

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[1] The statement of relevant facts derives from the direct appeal opinion of the Arizona Supreme Court, *State v. Gulbrandson*, 906 P.2d 579, 586-88 (Ariz. 1995), which is attached to this Petition. *See* Appx. D at 1-3.

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. The police apprehended Gulbrandson in Montana on April 3, 1991.

B. Mental state evidence presented at the guilt phase.

Gulbrandson presented the defenses of insanity and lack of intent. Martin Blinder, M.D., a defense psychiatrist, 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.

C. 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.

D. Capital sentencing.

The trial court sentenced Gulbrandson to death, finding that he had committed the murder in an especially heinous and depraved manner.[2] 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."[3] 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.

E. Initial state appellate and collateral review.

On direct appeal, the Arizona Supreme Court cited its earlier decision in *Wallace I*, *State v. Wallace*, 728 P.3d 232 (Ariz. 1986), in finding Gulbrandson eligible for a sentence of

[2] Bench sentencing occurred prior to the Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), which mandated that a jury determine the aggravating circumstances necessary to impose a sentence of death.

[3] 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. D at 13 (citing *State v. Gretzler*, 659 P.2d 1, 11-12 (Ariz. 1983)).

death because the murder of his paramour was especially heinous or depraved under A.R.S. § 13-703(F)(6). *See* Appendix D at 14-15. Although the court found that the prosecution failed to prove that Gulbrandson "relished the murder," one of five narrowing constructions of the (F)(6) factor enunciated by the Arizona Supreme Court in *Gretzler*, 659 P.2d at 11, 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." Appx. D at 14, 17.[4] 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. D at 14-15.

The court rejected Gulbrandson's claim that the infliction of injuries alone, without regard to his mental state, was insufficient to prove "gratuitous violence." *See* Appx. D at 14.

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

[4] Although the Court ruled in *Walton*, 497 U.S. at 652-56, 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 *Jeffers*, 497 U.S. at 770-71.

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.

F. 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 (9th Cir. 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.

G. Successive state and federal collateral review.

After denying Gulbrandson relief on direct appeal and discretionary review of the denial of Gulbrandson's initial state PCR petition, in another capital petitioner's case, the Arizona Supreme Court, conceded that it has not consistently applied the narrowing test for "gratuitous violence," which requires proof beyond a reasonable doubt not only that a defendant inflicted more injuries than necessary to kill, the test of *Wallace I* upon which the Arizona Supreme Court relief in finding Gulbrandson death-eligible based on the gratuitous violence aspect of (F)(6), but also that a defendant inflicted violence "after he knew or should have known that a fatal action had

occurred." *See Bocharski*, 189 P.3d at 421. 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*, 191 P.3d 164, 169 (Ariz. 2008), and her two minor children in *Wallace IV*, *State v. Wallace*, 272 P.3d 1046, 1061 (Ariz. 2012). Citing *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*, 272 P.3d at 1054.

Gulbrandson filed a successive state post-conviction petition that sought, pursuant to state retroactivity rules consistent with *Teague v. Lane*, 489 U.S. 288 (1989) (plurality), *see State v. Towery*, 64 P.3d 828, 831 (Ariz. 2003), application of the narrowing construction of *Bocharski*, 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. A at 3. That finding was consistent with *Bocharski's* first prong. However, the court abandoned *Bocharski's* mental state element where it found that Gulbrandson "knew or should have known that he had inflicted violence in excess of that needed to kill, satisfying *Bocharski*, *Wallace III*, and *Wallace IV*. Accordingly, he inflicted 'gratuitous violence,' supporting the (F)(6) finding." Appx. A 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*, 189 P.3d at 421. The state court concluded, "Defendant is therefore death eligible, and Claim 1 is not colorable." Appx. A at 4.

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 summarily denied discretionary review. *See* Order, *State v. Gulbrandson*, Ariz. Sup. Ct. No. CR-15-0196-PC (Jul. 13, 2016).

Gulbrandson filed a second-in-time § 2254 petition in the United States District Court for the District of Arizona, 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. *Gulbrandson v. Ryan*, Dist. Ct. No. CV-17-01891-PHX-DLR, Doc. No. 1. The district court denied relief on the basis that Gulbrandson's second-in-time § 2254 petition was actually SOS under § 2244(b)(2)(B) and required the Ninth Circuit's authorization for filing, *see* § 2253(c), which Gulbrandson had not obtained. *See* Dist. Ct. Doc. No. 10 at 4-7. The court further ruled that Gulbrandson's claim was not colorable because it failed to allege the state court's arbitrary and capricious application of state law. Dist. Ct. Doc. No. 10 at 7-8. The district court denied a certificate of appealability ("COA"). *See* Dist. Ct. Doc. No. 10 at 9.

The Ninth Circuit denied a COA on the basis 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." Order, *Gulbrandson v. Ryan*, Ninth Cir. No. 18-15829, Doc. No. 12 (Aug. 15, 2019) (attached as Appx. C). On February 2, 2019, this Court denied certiorari. *Gulbrandson v. Ryan*, U.S. Sup. Ct. No. 18-6766 (Feb. 19, 2019).

On June 21, 2019, Gulbrandson moved the Ninth Circuit for authorization to file the SOS § 2254 petition that alleged the federal due process claim that the state PCR court arbitrarily and capriciously applied state law in violation of the Fourteenth Amendment and *Jeffers*, 497 U.S. at 780-81 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)), in denying his successive PCR challenge to the (F)(6) statutory aggravating factor. *See* Application for Authorization to File a Second or Successive § 2254 Petition in the District Court, *Gulbrandson v. Ryan*, Ninth Cir. No. 19-71578, Doc. No. 1-2 (June 21, 2019), at 5. Gulbrandson further alleged that the state court's botch of the application of *Bocharski's* mental state element resulted in that court's finding of death-eligibility based on an un-narrowed statutory aggravating factor that violated the Eighth and Fourteenth Amendments and that Gulbrandson was denied a life interest in the state court's proper application of state post-conviction processes in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* After the parties submitted briefing, Ninth Cir. Doc. Nos. 3, 4, the court summarily denied the requested authorization on September 3, 2019. *See* Order, Ninth Cir. Doc. No. 5 (attached at Appx. C).

REASONS FOR GRANTING THE WRIT

Under the relevant provision of the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241 *et seq*, ("AEDPA"), the Order of the United States Court of Appeals, in which it declined Gulbrandson's request for authorization to file a SOS petition, "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." *See* 28 U.S.C. § 2244(b)((3)(E). That provision of AEDPA has not, however, repealed this Court's authority to consider original habeas petitions, *see Felker v. Turpin*, 518 U.S. 651, 660 (1996), nor does it bar

the Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. § 2241(b).

Under the Court's Rules, a petitioner who seeks a writ of habeas corpus must show: 1) "adequate relief cannot be obtained in any other form or in any other court;" 2) "exceptional circumstances warrant exercise of this power;" and, 3) the writ will be in aid of the Court's appellate jurisdiction." Supreme Court Rule 20. Pursuant to *Felker*, 518 U.S. at 662-63, the Court's authority is limited by 28 U.S.C. § 2254 and must be "informed" by § 2244(b).

Gulbrandson meets these statutory requirements as well as those articulated by the Court in *Felker*. Exceptional circumstances exist that warrant the exercise of the Court's discretionary powers.

I. Statement of Reasons for Not Filing in the District Court.

As required by Rule 20.4, Gulbrandson submits that he complies with the provisions of 28 U.S.C. §§ 2241 and 2242. In addition, as noted above, Gulbrandson did file a second-in-time petition pursuant to 28 U.S.C. § 2254 in the district court. *See* Petition for Writ of Habeas Corpus, *Gulbrandson v. Ryan*, Dist. Ct. No. CV-17-01891-PHX-DLR, Doc. No. 1 (June 16, 2017). The district court ordered the parties to brief whether it was a properly-filed second-in-time petition or was second or successive ("SOS") for which Gulbrandson needed to secure authorization from the Ninth Circuit in order to file it. The court denied relief on the basis that Gulbrandson's second-in-time § 2254 petition was actually SOS under § 2244(b)(2)(B) and required the Ninth Circuit's authorization for filing, *see* § 2253(c), which Gulbrandson had not obtained. *See* Appx. B at 4-7.

With respect to 28 U.S.C. § 2242, Gulbrandson further states that he did not file a SOS petition in the district court because the Ninth Circuit declined his application for authorization to

do so. *See* Order, Appx. C.

Also consistent with Rule 20.4. Gulbrandson submits that the claim was exhausted in state court for purposes of 28 U.S.C. § 2254(b) and the Court's precedents. The state successive PCR court's botch of the mental state element required by *Bocharski*, 189 P.3d at 421, constitutes the new factual predicate for the claim Gulbrandson asserts here.[5] The botched application of *Bocharski* supports the claim that the state PCR court arbitrarily and capriciously applied state law in violation of the Due Process Clause of the Fourteenth Amendment and *Jeffers*, 497 U.S. at 780-81 (quoting *Donnelly*, 416 U.S. at 642). Gulbrandson submits that transfer to the district court is required in order for him to demonstrate by clear and convincing evidence that no reasonable factfinder properly apprised of the meaning of gratuitous violence and thus properly instructed on especial heinousness or depravity under (F)(6) would find Gulbrandson eligible for a sentence of death.

II. Exceptional Circumstances Warrant the Exercise of the Court's Jurisdiction.

A. Gulbrandson was deprived of the vehicle with which to vindicate claims under the Eighth and Fourteenth Amendments.

David Gulbrandson is not eligible for a sentence of death under a change in state law, to wit, *Bocharski*, 189 P.3d at 421, which narrows the statutory aggravating factor found by this Court in *Walton*, 497 U.S. at 654, to be facially vague. The constitutional narrowing of that vague factor

[5] The Arizona Supreme Court denied discretionary review of the denial of post-conviction relief. *See* Order, *State v. Gulbrandson*, Ariz. Sup. Ct. No. CR-15-0196-PC (Jul. 13, 2016). As such the Arizona Supreme Court did not even enter a judgment in the matter and it is the decision of the state superior court that is scrutinized for a claimed violation of the United States Constitution. *See Ylst v. Nunnemaker*, 501 U.S. 797, 805-06 (1991).

applies retroactively pursuant to the Arizona Supreme Court's decision in *Towery*, 64 P.3d at 831, which applies the now well-established retroactivity jurisprudence a plurality of the Court announced in *Teague*, 489 U.S. 288. The facts admitted at trial demonstrate that, had the state court faithfully applied the mental state element announced in *Bocharski* in rendering what Gulbrandson alleges to be the new factual predicate that "could not have been discovered previously through the exercise of due diligence," no reasonable factfinder would have found by clear and convincing evidence that he is eligible for the death penalty. *See* 28 U.S.C. § 2244(b)(2)(B). Consistent with the Court's decision in *Johnson v. United States*, 544 U.S. 295, 305-06 (2005), the new state court judgment in Gulbrandson's own case, which was the product of a timely petition for post-conviction relief, constitutes that new factual predicate.

Gulbrandson notes that his claim of innocence does not require the Court to announce a freestanding claim of innocence under *Herrera v. Collins*, 506 U.S. 390, 396 (1993), as the petitioner sought in the original jurisdiction habeas corpus petition filed in *In re Davis*, U.S. Sup. Ct. No. 08-1443. There the Court transferred the petition filed by a Georgia death row prisoner to the United States District Court for the Southern District of Georgia for "hearing and determination" as to whether evidence that witnesses recanted their trial testimony "clearly establish[ed] petitioner's innocence." *In re Davis*, 557 U.S. 952 (2009).

Gulbrandson merely seeks to demonstrate, consistent with the provisions set for in 28 U.S.C. § 2244(b)(2)(B), that he is not guilty of the death penalty as the term is defined in *Sawyer v. Whitley*, 505 U.S. 303, 348 (1992), and he is entitled to relief under that provision or, in the alternative, an evidentiary hearing in which he can prove his ineligibility for a sentence of death under the especially heinous or depraved statutory aggravating factor, A.R.S. § 13-703(F)(6),

which was narrowed by *Bocharski*. He does not seek a remedy that the Court has not yet clearly established. *Bocharski*, 189 P.3d at 421, had it not been arbitrarily and capriciously applied, presented him with a vehicle for the Arizona state courts to vacate his death sentence.

B. Gulbrandson establishes by clear and convincing evidence he is not eligible for a sentence of death.

1. Gratuitous violence ruling on direct appeal.

The Arizona Supreme Court affirmed the convictions and imposed a death sentence in its independent review of aggravating and mitigating factors on November 2, 1995. *See* Appx. D. The court found, consistent with its pre-*Bocharski* precedents that the prosecution had proven that Gulbrandson inflicted "gratuitous violence":

> ii. *Gratuitous violence*
>
> Gratuitous violence, as that term is used in making a finding of especially heinous or depraved, is violence in excess of that necessary to commit the crime. *See*, *e.g.*, *State v. Hinchey*, 165 Ariz. 432, 439, 799 P.2d 352, 359 (1990) (finding especially heinous or depraved circumstance where defendant used more force than necessary to kill victim by using multiple instruments to inflict wounds). Defendant argues that the mere fact that the victim suffered multiple wounds does not establish a heinous or depraved state of mind, but instead shows that defendant was out of control. *See Hinchey*, 165 Ariz. at 441-42, 799 P.2d at 361-62 (Kleinschmidt, J., dissenting).
>
> In the special verdict, the trial court characterized the murder "as a brutally savage attack of shocking proportions." 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); *Hinchey*, 165 Ariz. at 439, 799 P.2d at 359.

Appx. D at 14-15. After finding "relishing" to be an invalid factor, the Arizona Supreme Court reweighed the aggravation and mitigation, and found death to be the appropriate punishment. Appx. D at 17.

2. Gulbrandson's Successive State PCR Petition.

a. Genesis of the *Bocharski* claim.

As noted above, the Arizona Supreme Court, in affirming the gratuitous violence aggravator on independent review, relied primarily on *Wallace I*, 728 P.2d 232, and its application of a test that asked if less violent alternatives were available to the defendant to kill the victim than the ones he employed. In *Wallace I*, the court found the existence of the especially heinous or depraved statutory aggravator as to all three first degree murder victims, a mother and her two minor children, but remanded for a new penalty trial with respect to the sentence imposed for the murder of the mother because the court vacated the pecuniary gain statutory aggravating factor. 728 P.2d at 237-38. After Wallace was again sentenced to death for the murder of the mother, Arizona Supreme Court affirmed the death sentences imposed for the murders of all three victims, again finding sufficient proof of gratuitous violence. *Wallace II*, *State v. Wallace*, 773 P.2d 983 (Ariz. 1989).

After the federal district court denied habeas corpus relief, the Ninth Circuit ordered an evidentiary hearing on a claim of ineffective assistance of counsel at capital sentencing. *See Wallace v. Stewart*, 184 F.3d 1112 (9th Cir. 1999). The district court granted the writ of habeas corpus as to the death sentence. As the Arizona Supreme Court noted in *Wallace III*, 191 P.3d at 166-67, the State again sought the death penalty, and a jury sentenced Wallace to death in 2005 for each of the three murders.

Wallace III noted the intervening decision in *Bocharski*, which "clarified" the court's earlier pronouncements on the meaning of gratuitous violence. *Id.* at 169. As the court noted,

Bocharski requires a showing that the defendant inflicted more violence than was necessary to kill and the mental state that "the defendant continued to inflict violence *after he knew or should have known that a fatal action had occurred*." *Id*. (underlining added, italics in original). The Arizona Supreme Court determined that Wallace did not meet the conditions for death eligibility under gratuitous violence as to the mother, whom Wallace struck in the head four or five times with an 18-inch pipe wrench, but ruled that a remand was required for resentencing and the application of the *Bocharski* standard to determine whether Wallace inflicted gratuitous violence on the two minor children. *Id.* at 170-71.

In 2009, a jury again sentenced Wallace to death for the murders of the two children, with especial heinousness or depravity based on gratuitous violence as the sole proof of the (F)(6) statutory aggravating factor. On independent review in *Wallace IV*, the Arizona Supreme Court found the factor not to have been proved, based on application of the *Bocharski* standard, and vacated Wallace's death sentence with respect to the two minor children. 272 P.3d 1046.

The court noted that Anna, the daughter, had been beaten at least ten times in the head with a baseball bat and then stabbed through the neck with a jagged piece of bat after the bat had broken. The court found the stabbing to constitute "more injury on Anna than necessary to kill" under the first prong of *Bocharski*, but vacated the death sentence because the medical examiner was unable to determine whether she was still alive when Wallace "drove the bat through her neck" and, therefore, the prosecution failed to prove Wallace knew or should have known he "already had inflicted fatal wounds upon Anna before committing his final assault." *Id.* at 1052-53.

Due to his difficulty in inflicting death on the first minor child, Wallace changed weapons. He discarded the bat in favor of the pipe wrench described above that was later used to kill the mother. The court similarly found eleven blows to the son's head demonstrated beyond a reasonable doubt "that Wallace inflicted more injury than necessary to kill." *Id.* at 1053. The medical examiner testified that it was the last two blows, struck in rapid succession, that likely

caused death. *Id*. at 1053-54. Therefore, the prosecution failed to establish the prong of *Bocharski* that required proof that Wallace knew or should have known he inflicted gratuitous injury beyond that which was necessary to kill. *Id.* at 1054.

Given the court had already vacated Wallace's death sentence for the murder of the mother, the court imposed a sentence of life in prison without possibility of parole for each of the murders of the children, to be served consecutively to the life sentence imposed for the murder of the mother. *Id.* at 1054.

b. State PCR court's erroneous application of *Bocharski* to Gulbrandson's successive state PCR petition.

Gulbrandson alleged in the successive state petition that *Bocharski* required proof beyond a reasonable doubt of a mental state not previously required under state law and, because the change circumscribed the class of offenders eligible for a sentence of death based on gratuitous violence and the (F)(6) factor, *Bocharski* effected a substantive change of the law. Claim 1, Successive Petition for Post-Conviction Relief, *State v. Gulbrandson*, CITE at 15-26. Under state retroactivity rules that derive from *Teague*, 489 U.S. 288, *see Towery*, 64 P.3d at 831, Gulbrandson submitted *Bocharski* was to be applied retroactively and he was entitled to relief due to the lack of proof that he inflicted violence after he knew or should have known a fatal action had occurred.

The state court assumed that *Bocharski* was a significant change in the law for purposes of conferring jurisdiction on the court pursuant to Ariz. R. Crim. P. 32.1(g) and was to be applied retroactively, but the court found "no colorable claim." Appx. A at 3. The court found, consistent with *Bocharski's* first prong that Gulbrandson inflicted more violence than was necessary to kill, stating:

> In this case, defendant inflicted multiple physical wounds – the victim suffered 34 stab wounds and slicing wounds, puncture wounds, and blunt force injuries. The defendant inflicted the wounds using multiple instruments – several knives, scissors and a wooden salad fork. The victim's nose was broken and there was evidence she had been stomped on. This was violence beyond that necessary to kill.

Id.

The court erred when it attempted to apply the mental state requirement of *Bocharski*, to wit, whether Gulbrandson inflicted violence on Ms. Katuran after he knew or should have known that a fatal action had occurred. The court began by repeating what it had found as to *Bocharski's* first prong:

> As the Arizona Supreme Court noted nearly two decades ago:
>
> > [T]he trial court characterized the murder "as a brutally savage attack of shocking proportions." Defendant apparently used numerous instruments to inflict injury to Irene: namely, several knives, scissors, and a wooden salad fork. 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.
>
> *Gulbrandson*, 906 P.2d at 901 (internal citation omitted).

Appx. A at 3-4. The court concluded with respect to *Bocharski's* second prong:

> Here, defendant knew or should have known that he inflicted violence in excess of that needed to kill, satisfying *Bocharski*, *Wallace III* and *Wallace IV*. Accordingly, he inflicted "gratuitous violence," supporting the (F)(6) finding.
>
> Defendant is therefore death-eligible, and Claim 1 is not colorable.

Appx. A at 4. The court erroneously found that Gulbrandson knew he inflicted violence beyond that necessary to kill, in essence applying a mental state to *Bocharski's* first prong, but omitting entirely the critical temporal element that describes precisely *when* violence becomes gratuitous for (F)(6) purposes.

c. The state court's failure to consider the medical examiner's testimony with respect to *Bocharski's* temporal element.

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. 189 P.3d at 421. While that may have been sufficient to prove

(F)(6) based on gratuitous violence under past precedents, the injuries, standing alone, were insufficient to prove the (F)(6) factor because the prosecution failed to prove "that the defendant continued to inflict violence *after he knew or should have known that a fatal action had occurred*." 189 P.3d at 421 (emphasis in original). The 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*, the court vacated the death sentence as to the mother but indicated that it was appropriate to submit the murders of her two minor children to the jury for application of the (F)(6) aggravator. With respect to the *vacatur* of the death sentence imposed for the 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. 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.

191 P.3d at 170-71.

As noted above, in *Wallace IV*, the opinion that vacated on independent review the death sentences imposed on Wallace 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. 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 had 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. 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. 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." *Id.* 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*, 189 P.3d at 421 (emphasis in original)).

Ignored by the state trial court in its ruling on the successive PCR petition was Gulbrandson's submission that he was entitled to relief based on the guilt phase testimony of Dr. Fred Walker, M.D., the Maricopa County, Arizona, Medical Examiner. On direct examination, Dr. Walker identified blunt force injuries, stab wounds and incised wounds he observed at the autopsy. Appx. E at 10-17. He testified that the cause of death was "multiple stab wounds and

blunt force trauma." Appx. E 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.

Appx. E at 17. Dr. Walker also testified to asphyxiation as a cause of death. Appx E. 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 discussed above, 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). While Dr. Walker testified that any of three knife wounds and asphyxiation may have combined to contribute to the victim's death, he gave no testimony as to the timing or sequence of those acts.

Significantly, that "most, if not all" of the wounds were inflicted prior to death necessarily means that no wounds were inflicted after death and, therefore, no wound was gratuitous under the *Wallace*/*Bocharski* calculus. That testimony leads to the inescapable conclusion that no

reasonable factfinder would find by clear and convincing evidence that Gulbrandson is eligible for a sentence of death under A.R.S.§ 13-703(F)(6).

III. The Court of Appeals Erred in Barring the SOS Petition.

The Ninth Circuit failed to assign grounds in denying Gulbrandson's Application for Authorization to File a Second or Successive § 2254 Petition in the District Court, *Gulbrandson v. Ryan*, Ninth Cir. No. 19-71578, Doc. No. 1-2 (June 21, 2019). *See* Appx. C. Yet, the claim met the test for colorability set forth by the district court for the claim to be decided on its merits, and the second-in-time petition was found to be lacking only because it was SOS and Gulbrandson had failed to obtain the Ninth Circuit's authorization to file it.

Gulbrandson indeed met the filing requirements for filing a SOS petition under 28 U.S.C. § 2244(b)(2)(B). Under the Court's precedent, he must be found to have acted diligently unearthing the new factual predicate for the claim. In *Johnson*, 544 U.S. at 306-07, this Court ruled that so long as a state post-conviction petitioner complies with his state's statute of limitation in seeking to undo the predicate state court conviction, he will be deemed to have acted diligently for purposes of § 2244(b)(2)(B)(i).

Moreover, the facts underlying the claim, to wit, the trial testimony of the prosecution's medical examiner described above, which no reasonable factfinder could find by clear and convincing evidence established that Gulbrandson inflicted violence after he knew or should have known he had inflicted a fatal injury, necessarily prove - as required by § 2244(b)(2)(B)(ii) - that Gulbrandson is innocent of the death penalty. He did not inflict gratuitous violence, as the term is defined in *Bocharski*, 189 P.3d at 421, which means he is not eligible for a sentence of death under

A.R.S. § 13-703(F)(6) and, because no other statutory aggravating factor was found to have been proved, he is susceptible only to a sentence of life in prison under Arizona law.

IV. Gulbrandson Meets the Requirements of 28 U.S.C. § 2254.

The Court has held that although 28 U.S.C. § 2244(b)(3)(E) prevents the Court from reviewing a circuit's order denying leave to file a second habeas petition by appeal or by writ of certiorari, the AEDPA has not repealed its authority to entertain "original habeas petitions." *Felker*, 518 U.S. at 660. Where this Court's jurisdiction is invoked in federal habeas corpus, the provisions of 28 U.S.C. § 2254 apply. *Id.* at 662. Consistent with § 2254(b)(1)(A), Gulbrandson demonstrates that the constitutional violation complained of here occurred when the state PCR court arbitrarily and capriciously applied state law where it failed to apply the mental state required by *Bocharski* to narrow the otherwise-vague statutory aggravating factor consistent with the requirements of the Eighth and Fourteenth Amendments. The Arizona Supreme Court left that judgment intact when it denied Gulbrandson its discretionary review of that decision. It is thus the superior court's judgment that is subject to attack in federal habeas. *See Ylst*, 501 U.S. at 805-06. Gulbrandson has continuously and diligently sought relief in the federal courts since the state court denied relief on the successive state court petition. In any event, he seeks *vacatur* of the sole statutory aggravating factor in his case and, thus, alleges a claim of innocence of the death penalty that obviates any argument that he has not complied with the AEDPA's one-year statute of limitations, 28 U.S.C. § 2244(d). *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

Gulbrandson establishes that the superior court arbitrarily and capriciously misapplied *Bocharski* and, thus, violated the Fourteenth Amendment's Due Process Clause. The Due Process Clause requires the state courts to faithfully apply appropriate constitutional narrowing of facially-

vague statutory aggravating factors. *See Lewis*, 497 U.S. at 770-71. The state superior court failed to do so here in denying Gulbrandson the PCR relief to which he was clearly entitled. As such that court unreasonably applied clearly established federal law as established by this Court, which conferred jurisdiction on the federal courts under 28 U.S.C. § 2254(b)(1) to reach the merits of Gulbrandson's due process claim.

Finally, as Gulbrandson noted *supra* ppg. 20-22, *Bocharski*, *Wallace III* and *Wallace IV* require consideration of the prosecution medical examiner's testimony as to the sequence of injuries inflicted, or some other indicia of the defendant's mental state, before the court can make the determination that a defendant inflicted violence after he knew of should have known that a fatal action had occurred. The state PCR court never considered that evidence and failed to cite any other record evidence other than the mere fact of the quantum of injuries inflicted, which, as was true in *Bocharski* and the *Wallace* cases, failed to prove *Bocharski's* temporal mental state element. The state PCR court's failure "to engage with" the facts of the prosecution medical examiner's testimony at trial in determining whether Gulbrandson inflicted gratuitous violence under former A.R.S. § 13-703(F)(6) also constituted the arbitrary application of federal law. *See Porter v. McCollum*, 558 U.S. 30, 44 (2009).

/ /

/ /

/ /

V. Conclusion.

The petition for writ of habeas corpus should be transferred to the United States District Court for the District of Arizona for hearing and determination.

Respectfully submitted:

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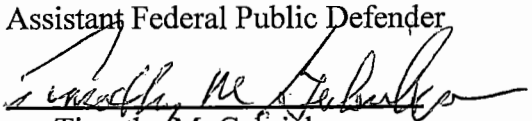

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