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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

David Gulbrandson,

Petitioner,

V.

David Shinn, et al.,

Respondents.

No. CV-22-00276-PHX-DLR

ORDER

DEATH PENALTY CASE

Petitioner David Gulbrandson, an Arizona death row inmate, has filed a petition for writ of habeas corpus. (Doc. 1.) The Court ordered Respondents to file a brief addressing Gulbrandson’s argument that the petition, while second-in-time, is not a second or successive petition for purposes of 28 U.S.C. § 2244(b), which requires the Ninth Circuit’s authorization for filing. (Doc. 3.) Respondents filed their brief and Gulbrandson filed a reply. (Docs. 6, 7.)

BACKGROUND

In 1992 Gulbrandson was convicted of first-degree murder for the killing of his former girlfriend and business partner. The trial court sentenced him to death after finding the murder was committed “in an especially heinous, cruel or depraved manner,” an aggravating factor under the former A.R.S. 13–751(F)(6). The Arizona Supreme Court affirmed. *See State v. Gulbrandson*, 184 Ariz. 46, 906 P.2d 579 (1995).

1 After unsuccessfully pursuing state post-conviction relief (“PCR”), Gulbrandson
2 filed a petition for writ of habeas corpus in this Court (Case No. 98-cv-2024-PHX-SMM).
3 The court denied relief. (*Id.*, Docs. 87, 88.)

4 While appealing that decision, Gulbrandson sought authorization from the Ninth
5 Circuit to file a successive habeas petition, arguing that new neuropsychological evidence
6 showed that he could not have known the point at which the victim was dead, as required
7 for the “gratuitous violence” component of the (F)(6) factor. The Ninth Circuit denied
8 Gulbrandson’s request for leave to file a successive habeas petition. *Gulbrandson v. Ryan*,
9 738 F.3d 976, 996–97 (9th Cir. 2013).

10 Gulbrandson then brought a successive PCR petition in state court, claiming that
11 there was insufficient evidence to support the (F)(6) aggravating factor. The PCR court
12 denied the claim and dismissed the petition. (*See* Case No. 17-cv-1891-DLR, Doc. 1,
13 App'x A at 4.) The Arizona Supreme Court denied review. (*See id.*, Doc. 6-1, Ex. B.) The
14 United States Supreme Court denied Gulbrandson's petition for certiorari. (*Id.*, Ex. C.).

15 Gulbrandson then filed a habeas petition in this Court. (*Id.*, Doc. 1.) He challenged
16 the PCR court’s denial of his successive petition, specifically its application of the (F)(6)
17 aggravating factor. (*Id.*) This Court dismissed the petition, finding that it was second or
18 successive, and therefore the Court lacked jurisdiction, and that the claim was non-
19 cognizable because it alleged only an error of state law. (*Id.*, Doc. 10.) On appeal the Ninth
20 Circuit found that the claim was successive and required authorization from the court of
21 appeals, which the court denied. *Gulbrandson v. Ryan*, No. 18-15829 (9th Cir. 2018).

22 On February 22, 2022, Gulbrandson filed the pending petition for writ of habeas
23 corpus. (Doc. 1.)

DISCUSSION

25 Gulbrandson raises one claim in his habeas petition: that his execution would violate
26 the Double Jeopardy Clause of the Fifth Amendment. (Doc. 1 at 3.) He contends that he
27 received alternative sentences—life in prison with the possibility of parole after 25 years,

1 and the death penalty—and having now served the former, his execution would constitute
 2 an impermissible “double punishment.” (Doc. 1 at 3.)

3 Respondents contend that the petition is second or successive and the Court
 4 therefore lacks jurisdiction to consider it. (Doc. 6.) The Court agrees.

5 The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes
 6 significant burdens on petitioners who try to raise new claims in “second or successive”
 7 habeas petitions. *See Burton v. Stewart*, 549 U.S. 147, 152–53 (2007) (per curiam)
 8 (observing that 28 U.S.C. § 2244(b), as amended by AEDPA, established a stringent set of
 9 procedures a prisoner must follow before filing a second or successive federal habeas
 10 corpus petition challenging the same conviction). First, a district court must dismiss any
 11 claim presented in a second or successive habeas petition that was presented in a prior
 12 petition. 28 U.S.C. § 2244(b)(1). Second, a new claim not raised in a prior petition also
 13 must be dismissed unless (1) the claim rests on a new, retroactive rule of constitutional law
 14 or (2) the factual basis of the claim was not previously discoverable through due diligence
 15 and these new facts establish by clear and convincing evidence that no reasonable
 16 factfinder would have found the applicant guilty of the underlying offense. 28 U.S.C. §
 17 2244(b)(2). Even in the latter circumstance, leave of the court of appeals is required before
 18 the successive petition may be pursued in a district court. 28 U.S.C. § 2244(b)(3) (A).
 19 These requirements are jurisdictional and cannot be waived. *Burton*, 549 U.S. at 157.

20 It is undisputed that the instant petition is a “second-in-time” petition, challenging
 21 the same conviction on which Gulbrandson previously sought federal habeas relief. It is
 22 also undisputed that Gulbrandson has neither sought nor obtained permission from the
 23 Ninth Circuit to file a second or successive petition. However, this does not end the inquiry.

24 The Supreme Court “has declined to interpret ‘second or successive’ as referring to
 25 all § 2254 applications filed second or successively in time, even when the later filings
 26 address a state-court judgment already challenged in a prior § 2254 application.” *Panetti*
 27 v. *Quarterman*, 551 U.S. 930, 944, 947 (2007). *Panetti* held that competency-to-be-
 28 executed claims are exempt from AEDPA’s limitation on second or successive petitions

1 because such claims generally are not ripe until after the time has run to file a first habeas
 2 petition. The Ninth Circuit has acknowledged that the reasoning of *Panetti* is not limited
 3 to competency-for-execution claims. In *United States v. Buenrostro*, the court observed
 4 that “[p]risoners may file second-in-time petitions based on events that do not occur until
 5 a first petition is concluded” if the claims raised therein “were not ripe for adjudication at
 6 the conclusion of the prisoner’s first federal habeas proceeding.” 638 F.3d 720, 725 (9th
 7 Cir. 2011) (“A prisoner whose conviction and sentence were tested long ago may still file
 8 petitions relating to denial of parole, revocation of a suspended sentence, and the like
 9 because such claims were not ripe for adjudication at the conclusion of the prisoner’s first
 10 federal habeas proceeding.”); *see also United States v. Lopez*, 577 F.3d 1053, 1063–64 (9th
 11 Cir. 2009).

12 In *Magwood v. Patterson*, 561 U.S. 320, 330 (2010), the Court addressed “when a
 13 claim should be deemed to arise in a second or successive habeas corpus application” under
 14 § 2244(b). Noting that “second or successive” is a term of art in the habeas context, the
 15 Court examined the phrase’s statutory context and concluded that “second or successive”
 16 refers to the state court judgment being challenged. *Id.* at 332–33. The petitioner in
 17 *Magwood* had successfully obtained resentencing in a first habeas proceeding. *Id.* at 326.
 18 After he was re-sentenced and had exhausted his state court remedies, he filed a new federal
 19 habeas petition under § 2254 challenging his new sentence. *Id.* at 327–28. The Court held
 20 that Magwood’s second-in-time petition challenged a new or intervening judgment for the
 21 first time and was therefore not a second or successive petition. *Id.* at 341–42.

22 Gulbrandson contends that his new habeas petition is not successive because his
 23 double jeopardy claim was not ripe until he had served more than 25 years in prison and
 24 Respondents had announced that, after a pause of several years, they intended to seek the
 25 execution of death row inmates who have exhausted their appeals, Gulbrandson among
 26 them. (Doc. 1 at 17.)

27 Gulbrandson’s double jeopardy claim, however, is based on a false premise. He was
 28 not given alternative sentences. He was sentenced to death. *See Gulbrandson*, 184 Ariz. at

1 55–56, 906 P.2d at 588–89. His case is therefore distinguishable from *Ex Parte Lange*, 85
 2 U.S. 163 (1873), upon which Gulbrandson relies. The defendant in *Lange* was convicted
 3 of stealing federal mail bags, a crime punishable by either a fine *or* a prison term. *Lange*,
 4 however, was both fined and sentenced to prison. The Supreme Court reversed, explaining
 5 that once *Lange* suffered one of the two alternative punishments permitted under the
 6 statute, “the power of the court to punish further was gone.” *Id.* at 176.

7 The statute under which Gulbrandson was sentenced, former A.R.S. § 13-1105,
 8 authorized two punishments: death or life without the possibility of parole for 25 years.
 9 The trial court imposed only one of the possible sentences—death—not both sentences as
 10 in *Lange*. The Arizona Supreme Court affirmed. *Gulbrandson*, 184 Ariz. 46, 906 P.2d 579.
 11 Gulbrandson has not completed a sentence of life with the possibility of parole after 25
 12 years because he never received a sentence of life without the possibility of parole after 25
 13 years.

14 However, even if Gulbrandson had received alternative sentences, he is contesting
 15 the same judgment he challenged in his first petition. *See Magwood*, 561 U.S. at 338–39.
 16 There has been no intervening judgment. *Id.*; *see also Burton*, 549 U.S. at 156. A
 17 “double jeopardy claim . . . attacks [petitoner’s] underlying conviction. Thus, it is a prime
 18 example of a ‘second or successive’ petition under § 2244(b).” *Hill v. State of Alaska*, 297
 19 F.3d 895, 899 (9th Cir. 2002).

20 Gulbrandson’s petition is second or successive under 28 U.S.C. § 2244(b). This
 21 Court does not have jurisdiction to hear it without authorization from the Ninth Circuit. 28
 22 U.S.C. § 2244(b)(3)(A).

23 **CERTIFICATE OF APPEALABILITY**

24 Rule 11(a) of the Rules Governing Section 2254 Cases provides that the district
 25 judge must either issue or deny a certificate of appealability when it enters a final order
 26 adverse to the applicant. If a certificate is issued, the court must state the specific issue or
 27 issues that satisfy 28 U.S.C. § 2253(c)(2). A certificate of appealability may issue only
 28 when the petitioner “has made a substantial showing of the denial of a constitutional right.”

1 This showing can be established by demonstrating that “reasonable jurists could debate
2 whether (or, for that matter, agree that) the petition should have been resolved in a different
3 manner” or that the issues were “adequate to deserve encouragement to proceed further.”
4 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

5 The Court finds that reasonable jurists could not debate its conclusion that the
6 pending habeas corpus petition is second or successive under 28 U.S.C. § 2244(b).
7 Therefore, the Court declines to issue a certificate of appealability.

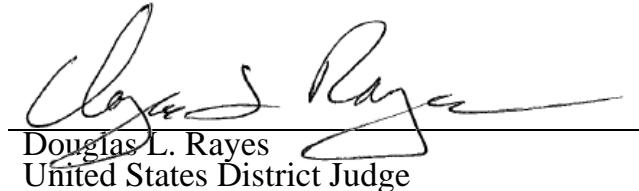
8 Accordingly,

9 **IT IS HEREBY ORDERED** dismissing Gulbrandson’s petition for writ of habeas
10 corpus (Doc. 1). The Clerk of Court shall enter judgment accordingly.

11 **IT IS FURTHER ORDERED** denying a certificate of appealability.

12 Dated this 12th day of April, 2022.

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Douglas L. Rayes
United States District Judge