No. 18–6766

IN THE SUPREME COURT OF THE UNITED STATES

DAVID GULBRANDSON,
PETITIONER,

-vs-

CHARLES L. RYAN, et. al.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

1) Should this Court grant certiorari to review the Ninth Circuit's order affirming the dismissal of Petitioner's second habeas petition for being a successive petition that was not authorized by the court of appeals, as required by statute, where Petitioner seeks only to correct a perceived error that is specific to his case and fails to identify a circuit split or other compelling reason to review the Ninth Circuit's order?

2) Should this Court grant certiorari to consider, in Petitioner's successive habeas proceeding, whether the Arizona state courts erred in applying state law and finding gratuitous violence to support the death-qualifying aggravator, where Gulbrandson seeks only to correct a perceived error in the state courts' application of state law to the facts of his case?

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OPINION BELOW

On August 15, 2018, the United States Court of Appeals for the Ninth Circuit summarily affirmed the Arizona District Court's ruling that no reasonable jurist would debate that Gulbrandson's second petition for writ of habeas corpus is a successive petition that was not authorized by the court of appeals, as required by statute. *See* Pet. App. D.

STATEMENT OF JURISDICTION

Gulbrandson timely filed the instant Petition for Writ of Certiorari on November 9, 2018. *See* U.S. SUP. CT. R. 13.1, 13.3, & 13.5. This Court has jurisdiction under Article III, Section 2 of the United States Constitution; 28 U.S.C. § 1254(1); and Rule 10 of the Rules of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2244(b) provides, in pertinent part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(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 the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

STATEMENT OF THE CASE

A jury found Petitioner, David Gulbrandson, guilty of the premeditated first-degree murder of his former girlfriend and business partner, Irene Katuran. *State v. Gulbrandson*, 906 P.2d 579, 586 (Ariz. 1995). Following an aggravation and mitigation hearing, the trial court sentenced Gulbrandson to death after finding that he had committed the murder in an especially heinous or depraved manner, which is a death-qualifying aggravator under Arizona law. *Id.* at 588–89. *See* Ariz. Rev. Stat. § 13–751(F)(6). "The trial court found the following factors supported the finding of especially heinous or depraved: (1) relishing of the murder, (2) gratuitous violence, and (3) helplessness of the victim." *Id.* at 600. The court's specific findings were guided by *State v. Gretzler*, 659 P.2d 1, 10–13 (Ariz. 1983), which identified five factors that could establish the especially heinous or depraved aggravator. *Id.* at 600–01.

On appeal, the Arizona Supreme Court overruled the trial court's finding that Gulbrandson relished the murder, but affirmed the conclusion that he committed the

murder in an especially heinous or depraved manner based on the trial court's findings of gratuitous violence and helplessness of the victim. *Id.* Specifically, the state supreme court confirmed that the murder was "a brutally savage attack of shocking proportions." *Id.* at 601. Gulbrandson had used "several knives, scissors, and a salad fork" to inflict "34 stab wounds and slicing wounds, puncture wounds, and many blunt force injuries." *Id.* Gulbrandson also kicked or stomped Irene and strangled her, ultimately causing her death by asphyxiation and multiple stab wounds. *Id.* Accordingly, the supreme court correctly found that the facts proved beyond a reasonable doubt that Gulbrandson inflicted gratuitous violence and showed an especially heinous or depraved state of mind. *Id.*

More than 12 years after Gulbrandson's case became final, the Arizona Supreme Court decided *State v. Bocharski*, 189 P.3d 403, 421 (Ariz. 2008), which Gulbrandson contends provided different guidance for finding gratuitous violence under Arizona law to support the state's especially heinous or depraved aggravator. At the time, Gulbrandson's first habeas petition was pending review in the Ninth Circuit, and he sought authorization from that court to file a second or successive habeas petition, arguing that there was insufficient evidence to support the gratuitous-violence finding under state law in accordance with the supposed new guidance of *Bocharski*. *See Gulbrandson v. Ryan*, 738 F.3d 976, 996–99 (9th Cir. 2013). The Ninth Circuit denied the request, however, and affirmed the district court's denial of habeas relief. *Id.* This Court then denied Gulbrandson's petition for writ of certiorari. *Gulbrandson v. Ryan*, 134 S. Ct. 2823 (2014).

Gulbrandson subsequently filed a second petition for post-conviction relief in state court, claiming that there was insufficient evidence to support the finding of gratuitous violence under state law pursuant to *Bocharski*. *See* Pet. App. B, at 2. The state post-conviction court found that Gulbrandson's claim was not colorable and dismissed the petition. *Id.* at 2–4. The Arizona Supreme Court denied discretionary review, and this Court denied Gulbrandson's petition for writ of certiorari. *Gulbrandson v. Arizona*, 137 S. Ct. 1080 (2017).

Gulbrandson then filed a second habeas petition, again raising the claim that insufficient evidence supported the trial court's gratuitous-violence finding under state law in *Bocharski*. *See* Pet. App. C, at 1. The district court dismissed the petition for lack of jurisdiction after concluding that it was a second or successive petition and that Gulbrandson had failed to obtain permission from the Ninth Circuit to bring the petition, as required by 28 U.S.C. § 2244(b)(3). *Id.* at 4–7. The district court further concluded that Gulbrandson's claim alleged only an error of state law and was therefore not cognizable on federal habeas review. *Id.* at 7–8. The court denied a certificate of appealability ("COA"), finding that "reasonable jurists could not debate its conclusion that the pending habeas corpus petition is second or successive under 28 U.S.C. § 2244(b)." *Id.* at 9. Gulbrandson appealed to the Ninth Circuit, which summarily affirmed the denial of a COA, *see* Pet. App. D, and this petition followed.

REASON FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. SUP. CT. R. 10. As a result, this Court grants certiorari "only for compelling

reasons." *Id.* Gulbrandson presents no such reason. He has not even alleged—let alone established—that the Ninth Circuit's decision to affirm the district court's dismissal of his successive petition, and to deny a COA on the issue, conflicts with a decision from another United States Court of Appeals, that the Ninth Circuit decided an important question of federal law not yet settled by this Court, or that the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.*

To the contrary, Gulbrandson's claims are fact-intensive and involve the application of straightforward and well-defined legal principles. The alleged errors only affect Gulbrandson's case and do not warrant this Court's intervention. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting) ("[This Court's] burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous.") (Quotations omitted); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."). This Court should therefore deny Gulbrandson's petition.

I. THIS COURT SHOULD NOT GRANT CERTIORARI TO CORRECT PERCEIVED ERRORS IN THE NINTH CIRCUIT'S ORDER AFFIRMING THE DISTRICT COURT'S RULING THAT NO REASONABLE JURIST WOULD DEBATE THAT GULBRANDSON'S SECOND HABEAS PETITION IS SUCCESSIVE UNDER 28 U.S.C. § 2244(B).

Gulbrandson argues the Ninth Circuit erroneously denied a COA on his claim that his habeas petition is second-in-time but not a successive petition subject to 28 U.S.C. § 2244(b). Pet., at 19–20. *See Panetti v. Quarterman*, 551 U.S. 930, 944, 947 (2007) (declining "to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application"); *see also Magwood v. Patterson*, 561 U.S. 320, 341–42 (2010) (stating that a second habeas petition is not considered a successive petition if there is a "new judgment intervening between the two habeas petitions") (quoting *Burton v. Stewart*, 549 U.S. 147, 156 (2007)). Gulbrandson's argument is meritless. The Ninth Circuit correctly denied his request for a COA because no reasonable jurist would debate, and the application of straightforward and well-defined legal principles plainly demonstrate, that Gulbrandson's petition is a successive petition subject to 28 U.S.C. § 2244(b). *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

A prisoner may not file a second or successive habeas petition unless he first obtains an order from the circuit court authorizing the district court to consider the petition. *See* 28 U.S.C. § 2244(b). However, habeas petitioners "may file second-in-time petitions based on events that do not occur until a first petition is concluded" if the claims raised "were not ripe for adjudication at the conclusion of the prisoner's first

federal habeas proceeding." *See, e.g., United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) (collecting cases).

Relying on *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005), Gulbrandson claims his petition is second-in-time but not a successive petition subject to 28 U.S.C. § 2244(b). Pet., at 19–20. *Shannon* is inapposite, however, because it addressed whether a state court's decision may constitute a new factual predicate that can be used to extend the statute of limitations period for a first-in-time habeas petition under 28 U.S.C. § 2254(d)(1)(D). 410 F.3d at 1088–91. Instead, the relevant issue is whether Gulbrandson's constitutional claim was ripe—that is, could the claim have been properly raised and considered during his first-in-time habeas petition—if the answer is yes, then any subsequent petition raising the claim is a successive petition and governed by 28 U.S.C. § 2244(b). *See Panetti*, 551 U.S. at 945–47.

Gulbrandson claimed in his second petition that insufficient evidence supported a finding of gratuitous violence under state law and therefore did not support the sole death-qualifying aggravator that was found by the trial court. Pet., at 11–18. Gulbrandson could have raised that very claim in his first habeas petition, and, in fact, he attempted to raise the claim during his first habeas proceeding when it was pending review before the Ninth Circuit. *Gulbrandson*, 738 F.3d at 996–99. As a result, the claim was ripe during Stewart's initial habeas proceeding, and his second petition is governed by 28 U.S.C. § 2244(b) and barred as successive. *See Panetti*, 551 U.S. at 947 ("In the usual case, a petition filed second in time and not otherwise permitted by the terms of § 2244 will not survive AEDPA's 'second or successive' bar.").

Nonetheless, Gulbrandson maintains the claim was "not yet ripe" when he filed his first habeas petition because the Arizona Supreme Court had not yet clarified what constitutes gratuitous violence under state law in *Bocharski*. Pet., at 19–20. Gulbrandson, however, misunderstands the distinction between unripe claims and unknown claims when determining whether a second-in-time petition is governed by 28 U.S.C. § 2244(b). *See Brown v. Muniz*, 889 F.3d 661, 672–73 & n.8 (9th Cir. 2018) (citing *Panetti* and *Magwood* and explaining that a constitutional claim becomes ripe when the alleged violation occurs—not when a petitioner subjectively becomes aware that a violation may have occurred). Thus, while Gulbrandson's claim that there was insufficient evidence to support the death-qualifying aggravator may have been unknown to him prior to *Bocharski*, the claim was certainly ripe at the time of his first habeas petition.[1] *See id.*

The Ninth Circuit, therefore, correctly found that no reasonable jurist would debate that Gulbrandson's petition is a successive petition and governed by 28 U.S.C. § 2244(b). Gulbrandson's reliance on *Shannon* is entirely misplaced and does not provide a compelling reason for this Court to grant review. He also does not point to a novel legal issue that the Ninth Circuit resolved, identify a point of law from this Court that was overlooked or misapprehended, or establish a conflict between the court's ruling and other existing precedent. *See* U.S. SUP. CT. R. 10. Accordingly, this Court should not grant certiorari to review the Ninth Circuit's order denying a COA.

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[1] Gulbrandson also appears to argue that his petition is not successive pursuant to *Magwood* because the state court issued a new "judgment" in his case when it rejected his *Bocharski* claim in his second post-conviction-relief proceeding. Pet. at 4, 19–20. The state court, however, merely rejected Gulbrandson's *Bocharski* claim in a collateral post-conviction proceeding; it did not issue a new "judgment." *See*

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE WHETHER THE ARIZONA STATE COURTS ERRONEOUSLY APPLIED STATE LAW WHEN HOLDING THAT SUFFICIENT EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING OF GRATUITOUS VIOLENCE.

Gulbrandson further fails to establish that reasonable jurists could debate the district court's determination that the sole claim raised in his successive petition is not cognizable on habeas review. As an initial matter, the Ninth Circuit did not address this question in its order denying a COA on the district court's ruling that Gulbrandson's second habeas petition is successive and governed by 28 U.S.C. § 2244(b). Pet. App. D. And because the Ninth Circuit did not consider whether Gulbrandson's claim was cognizable, this Court should not grant certiorari to consider that issue. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Wood v. Strickland*, 420 U.S. 308, 327 (1975) (noting that "it would be preferable" to have the court of appeals consider in the first instance an issue it had not reached). Gulbrandson's argument is also fact-bound and specific to his case, and it does not carry any importance or implications for other litigation. *See* U.S. SUP. CT. R. 10; *Butler*, 494 U.S. at 429; *Layne & Bowler Corp.*, 261 U.S. at 393. For these procedural and practical reasons alone, this Court should deny certiorari on the issue.

Regardless, the district court correctly determined that Gulbrandson's claim alleged only an error in the state court's application of state law and was therefore not cognizable on habeas review. Again, as discussed, Gulbrandson alleges the state court misapplied state law, as articulated in *Bocharski*, and erroneously rejected his

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Magwood, 561 U.S. at 341-42 (holding that a defendant receives a new judgment when the defendant is resentenced).

argument that insufficient evidence supported the gratuitous-violence finding and, therefore, the sole death-qualifying aggravator that was found in his case. Pet., at 11–18. The district court, however, correctly concluded that the claim is not cognizable on habeas review because a state court's alleged errors in applying state law do not give rise to federal habeas corpus relief. Pet. App. C, at 7–8.

Federal courts may grant habeas relief "only on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treatises of the United States." 28 U.S.C. § 2254(a). "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law grounds." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991); *see also Gilmore v. Taylor*, 508 U.S. 333, 348–49 (1993) ("[M]ere error of state law, one that does not rise to the level of a constitutional violation, may not be corrected on federal habeas."); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."). And a petitioner may not "transform a state law issue into a federal one merely by" couching their attack on state law in constitutional terms. *Poland v. Stewart*, 169 F.3d 573, 584 (9th Cir. 1999) (quoting *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996)); *see also Engle v. Isaac*, 456 U.S. 107, 119–21 (1982) ("While they attempt to cast their first claim in constitutional terms, we believe that this claim does no more than suggest that the instructions at respondents' trials may have violated state law.").

In *Walton v. Arizona*, this Court held that the Arizona Supreme Court had construed the especially cruel, heinous, and depraved aggravator in a constitutionally narrow manner. 497 U.S. 639, 655 (1990), *overruled on other grounds by Ring v.*

Arizona, 536 U.S. 584, 589 (2002). Gulbrandson does not contend that *Bocharski*'s supposed clarification of that 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*. Pet., at 13–15. However, Gulbrandson's attack on the state court's application of state law has "no part [in] a federal court's habeas review of a state conviction." *Estelle*, 502 U.S. at 67. Gulbrandson's challenge to the state court's application of state law is therefore not cognizable on habeas review and was correctly dismissed by the district court.

Moreover, as the district court correctly noted, it is arguable whether *Bocharski* narrowed the state-law definition of "gratuitous violence," as Gulbrandson contends, because prior cases by the Arizona Supreme Court required a showing that the defendant knew or should have known that the victim was dead and still inflicted additional violence. Pet. App. C, at 7–8. And even if it did narrow the state-law definition of gratuitous violence, *Bocharski* itself cited to Gulbrandson's case as an example of when the evidence satisfies the necessary elements for gratuitous violence under state law. 189 P.3d at 422, ¶ 90. Furthermore, as the Ninth Circuit held when it denied Gulbrandson's request to file a successive petition to raise this very claim, a reasonable factfinder could conclude that using "several knives, scissors, and a wooden salad fork" on Irene, and the "particularly gruesome, brutal, and protracted" manner in which he killed her, were sufficient to show that Gulbrandson "should have known he had inflicted a fatal wound but continued nonetheless to inflict more violence." *Gulbrandson*, 738 P.3d at 998 (citing *Bocharski*, 189 P.3d at 422).

As a result, even assuming Gulbrandson's second habeas petition is not a successive petition that is barred under 28 U.S.C. § 2244(b)—which it is—and even assuming Gulbrandson is raising a claim that is cognizable on habeas review—which he is not—the claim would still not undermine the death-qualifying aggravator found in his case and entitle him to habeas relief. *See, e.g.*, *Jeffers*, 497 U.S. at 783 ("A state court's finding of an aggravating circumstance in a particular case—including a *de novo* finding by an appellate court that a particular offense is 'especially heinous or depraved'—is arbitrary or capricious if and only if no reasonable sentencer could have so concluded."). This Court should deny certiorari.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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