No. 19–7393

CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

IN RE DAVID GULBRANDSON,
PETITIONER,

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

BRIEF IN OPPOSITION

MARK BRNOVICH
ATTORNEY GENERAL

ORAMEL H. (O.H.) SKINNER
SOLICITOR GENERAL

LACEY STOVER GARD
CHIEF COUNSEL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
400 W. CONGRESS, BLDG. S-206
TUCSON, ARIZONA 85701-1367
LACEY.GARD@AZAG.GOV
CADOCKET@AZAG.GOV
TELEPHONE: (520) 628-6520

ATTORNEYS FOR RESPONDENTS

QUESTION PRESENTED

Should this Court transfer Gulbrandson's original petition for writ of habeas corpus to the district court for further development, where he has shown no exceptional circumstances, has not satisfied the Anti-terrorism and Effective Death Penalty Act's exceptions for second or successive habeas petitions, and raises only a state-law-based challenge to an aggravating factor which, in any event, fails on the merits?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

INTRODUCTION 6

STATEMENT OF THE CASE 8

REASON FOR DENYING THE WRIT 14

CONCLUSION 23

TABLE OF AUTHORITIES

CASES PAGE

Agostini v. Felton, 521 U.S. 203 (1997) ... 16

Bousley v. United States, 523 U.S. 614 (1992) ... 15

Calderon v. Thompson, 523 U.S. 538 (1998) ... 6

Cullen v. Pinholster, 563 U.S. 170 (2011) ... 16

Estelle v. McGuire, 502 U.S. 62 (1991) ... 18

Felker v. Turpin, 518 U.S. 651 (1996) ... 7, 19

Franzen v. Brinkman, 877 F.2d 26 (9th Cir. 1989) ... 18

Gerlaugh v. Stewart, 129 F.3d 1027 (9th Cir. 1997) ... 18

Gonzalez v. Crosby, 545 U.S. 524 (2005) ... 16

Gulbrandson v. Ryan, 738 F.3d 976 (2013) ... 6, 11, 17, 20, 21

In re Davis, 557 U.S. 952 (2009) ... 15

Johnson v. United States, 544 U.S. 295 (2005) ... 20

Langford v. Day, 110 F.3d 1380 (9th Cir. 1996) ... 18

Lewis v. Jeffers, 497 U.S. 764 (1990) ... 17

Magwood v. Patterson, 561 U.S. 320 (2010) ... 13

McQuiggen v. Perkins, 569 U.S. 383 (2013) ... 15

Panetti v. Quarterman, 551 U.S. 930 (2007) ... 13

Sawyer v. Whitley, 505 U.S. 333 (1992) ... 14, 15, 19

State v. Bocharski, 189 P.3d 403 (Ariz. 2008) ... 6, 7, 12, 16, 17, 20

State v. Gretzler, 659 P.2d 1 (Ariz. 1983) ... 10

State v. Medina, 975 P.3d 94 (Ariz. 1999) 21

State v. Rushing, 404 P.3d 240 (Ariz. 2017) 21

State v. Wallace, 151 Ariz. 362, 728 P.2d 232 (1986) 10

State v. Wallace (III), 191 P.3d 164 (Ariz. 2008) 12, 17, 20

State v. Wallace (IV), 272 P.3d 1046 (Ariz. 2012) 12, 16, 20, 21, 22, 23

Teague v. Lane, 489 U.S. 288 (1989) 16

Villafuerte v. Stewart, 111 F.3d 616, 632 n.7 (9th Cir. 1997) 18

CONSTITUTIONAL PROVISIONS

28 U.S.C. § 2241(b) 7

28 U.S.C. § 2241(c)(3) 17, 18

28 U.S.C. § 2242 14

28 U.S.C. § 2244(b) 13, 19

28 U.S.C. §§ 2244(b)(1) & (2) 12

28 U.S. C.§ 2244(b)(2)(A) 16

28 U.S. C.§ 2244(b)(2)(B) 7, 11, 14,19

28 U.S.C. § 2244(b)(3). 6, 13, 18

28 U.S.C. § 2244(b)(3)(C) 15

28 U.S.C. § 2244(b)(3)(E) 18

28 U.S.C. § 2254(a) 18

28 U.S.C. § 2255 20

STATUTES

A.R.S. § 13–703.01 (1994) 10

A.R.S. § 13–703(F)(6) (1991) 6, 9, 20

RULES

32.1(g), (h), Ariz. R. Crim. P. (2014) 12

60(b)(6), Federal Rule of Civil Procedure 16

Rule 10, Rules of the United States Supreme Court 15

Rule 20.4, Rules of the United States Supreme Court 14, 15

Rule 20.4(a), Rules of the United States Supreme Court. 7

INTRODUCTION

Petitioner David Gulbrandson is in custody pursuant to a state-court judgment and death sentence. He has exhausted his of-right state appeals. The Ninth Circuit has affirmed the denial of his first habeas petition. *See Gulbrandson v. Ryan*, 738 F.3d 976 (2013); *see also* No. 13–9631 (denying certiorari). In this posture, Arizona's finality interests are paramount. *See, e.g.*, *Calderon v. Thompson*, 523 U.S. 538, 557 (1998).

Nonetheless, Arizona has spent years responding to Gulbrandson's repetitious attacks on his death-qualifying aggravating factor. *See* A.R.S. § 13–703(F)(6) (1991) (murder committed in a cruel, heinous or depraved manner). In multiple state and federal pleadings, Gulbrandson has alleged—universally without success—that the sentencing judge's 1993 finding of the (F)(6) factor was erroneous in light of a 2008 Arizona Supreme Court decision, *State v. Bocharski*, 189 P.3d 403, 421 (Ariz. 2008), which clarified the standard for proving the factor through gratuitous violence. Gulbrandson first attempted to file a second or successive (SOS) petition raising a challenge to the (F)(6)'s sufficiency while on appeal from his first petition's denial; the Ninth Circuit denied that application in 2013. *See Gulbrandson*, 738 F.3d at 996–97. The state post-conviction court rejected Gulbrandson's *Bocharski* claim on the merits the following year. Pet. App. A. In 2018, the district court refused Gulbrandson's attempt to challenge the state post-conviction court's ruling in a "second-in-time" habeas petition, instead concluding it was an SOS petition that had not been authorized by the Ninth Circuit. *See* 28 U.S.C. § 2244(b)(3). Pet. App. B; *see* No. 13–9631 (denying certiorari after Ninth Circuit denied a certificate of appealability).

Gulbrandson then asked the Ninth Circuit to authorize the SOS petition, but that court denied his request in September 2019. *See* Pet. App. C.

Undeterred, Gulbrandson filed the instant original habeas petition, in which he asks this Court to transfer to the district court. *See* 28 U.S.C. § 2241(b). Unfortunately for Gulbrandson, an original habeas "writ is rarely granted," and Gulbrandson "must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Rule 20.4(a), Rules of the United States Supreme Court. And because the Anti-terrorism and Effective Death Penalty Act's (AEDPA's) standards "inform [this Court's] consideration" of his petition, Gulbrandson must satisfy AEDPA's requirements for filing an SOS petition. *Felker v. Turpin*, 518 U.S. 651, 662–63 (1996) (citing U.S.C. §§ 2244(b)(1) & (2)).

Gulbrandson has shown no exceptional circumstances and (as the Ninth Circuit has already determined) has not satisfied the exceptions to AEDPA's bar on SOS petitions. Gulbrandson's claim arises from the hardly extraordinary occurrence that the Arizona Supreme Court—13 years after Gulbrandson's direct appeal—clarified (but did not change) the law governing Arizona's (F)(6) factor. He alleges that the state post-conviction court erroneously applied *Bocharski*, but that allegation of state-court error is not cognizable on habeas review. Finally, Gulbrandson has shown neither diligence nor actual innocence under 28 U.S.C. § 2244(b)(2)(B). In particular, his conduct proves the (F)(6) factor under the Arizona Supreme Court's clarified definition. This Court should dismiss Gulbrandson's petition.

STATEMENT

Sometime during the night of March 10, 1991, Gulbrandson murdered his former girlfriend and business partner, Irene Katuran. Pet. App. D-2. The crime scene—Katuran's home—evidenced a protracted struggle that spanned several rooms. An arcadia door stood open in the family room; Gulbrandson's fingerprints were on the door. *Id.* Four bloody knives, one of which had hair on it, were in the kitchen sink, along with a bloody pair of scissors. *Id.* A soda can bearing Gulbrandson's bloody fingerprint sat on the kitchen counter. *Id.* A paper towel holder, stained with blood, also bore Gulbrandson's fingerprints. *Id.*

The bulk of the violence had occurred in Katuran's bedroom and an adjacent bathroom. Inside the bedroom was a blood-soaked nightshirt riddled with holes, along with a bloody banker's bag, a burned paper towel, and the broken stem of a wooden salad fork. *Id.* Clumps of Katuran's hair—some of which had been cut, some of which had been burned, and some of which had been torn out by the roots—littered the room. *Id.* The bedroom was "covered in what appeared to be blood." *Id.* Bloody drag marks led into the bathroom, where Katuran's body lay face-down, clad only in a pair of panties. *Id.* Her legs were bent behind her at the knee and her ankles were bound with an electrical cord; another cord was attached to her right wrist. *Id.* at 586–87. The tine of the broken salad fork protruded from her leg. *Id.* She had suffered at least 34 sharp-force injuries and several blunt-force injuries. *Id.* She died from the stab wounds and a blunt-force injury to the neck, resulting from either an impact or

strangulation, which fractured her thyroid cartilage. *Id.* Katuran's car was also missing. *Id.*

Officers entered Gulbrandson's apartment for a limited welfare check on the afternoon of March 11. *Id.* They did not find Gulbrandson, but they did observe blood-spattered papers on the kitchen counter and a blood-stained jacket hanging from a kitchen chair. *Id.* Later that evening, Gulbrandson called his mother and admitted having killed Katuran. *Id.* Gulbrandson's mother reported his statements to police, who obtained a warrant to search Gulbrandson's apartment more thoroughly. *Id.* They found items related to Gulbrandson's and Katuran's business, clothing, and a business card (located in a pants pocket), all of which had blood on them consistent with Katuran's type. *Id.* They also found Katuran's credit card in a jacket pocket. *Id.*

Meanwhile, Gulbrandson fled Arizona. He was seen gambling, under a false name, in Laughlin, Nevada, on March 12, 1991. Pet. App. D-3. He then went to Great Falls, Montana, where he attempted unsuccessfully to sell Katuran's car. *Id.* Montana authorities later found the car abandoned and bearing Canadian license plates, with an Arizona plate concealed under the driver's seat. *Id.* Gulbrandson was finally arrested in Montana on April 3, 1991. *Id.* A jury thereafter convicted him of first-degree murder and theft. Pet. App. D-1.

Following an aggravation and mitigation hearing, the sentencing judge found one aggravating factor: that Gulbrandson had killed Katuran in a heinous or depraved manner. *See* Pet. App. D-13; A.R.S. § 13–703(F)(6) (1991).[1] The judge found three of

[1] Arizona's (F)(6) factor has two disjunctive prongs: 1) cruelty and 2) heinousness or depravity. *See* Pet. App. D-14. The sentencing judge did not find cruelty. *Id.*

the five "*Gretzler* factors,"[2] which the Arizona Supreme Court has used to narrow the heinous-or-depraved prong: relishing, gratuitous violence, and helplessness. *See* Pet. App. D-13–D-15. After finding no mitigation sufficiently substantial to warrant leniency, the judge sentenced Gulbrandson to death for the murder conviction. Pet. App. D-1, D-15–D-17. The judge sentenced Gulbrandson to a consecutive term of 5 years imprisonment for theft. Pet. App. D-1.

On direct appeal, the Arizona Supreme Court independently reviewed the sentencing judge's finding of the (F)(6) factor. *See* A.R.S. 13–703.01 (1994). The court struck the judge's finding of relishing. Pet. App. D-14. However, the court affirmed the judge's findings of gratuitous violence and helplessness.[3] Pet. App. D-14–D-15. The court defined gratuitous violence as "violence in excess of that necessary to commit the crime." Pet. App. D-14. Regarding gratuitous violence, the court held:

> 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.

---

[2] *See State v. Gretzler*, 659 P.2d 1, 11 (Ariz. 1983).

[3] Helplessness alone cannot support a finding of the (F)(6) factor. *See* Pet. App. D-14.

Pet. App. D-14–D-15 (some citations omitted). Gulbrandson then unsuccessfully sought state post-conviction relief and, later, federal habeas relief. *See Gulbrandson*, 738 F.3d at 985–86.

In 2008, the Arizona Supreme Court decided *Bocharski*, clarifying the standard for proving gratuitous violence under Arizona law. The court reiterated that the factor focuses on the killer's intent as proven by his actions. 189 P.3d at 421, ¶ 85. "The fact finder must consider the killer's intentional actions to determine whether he acted with the necessary vile state of mind." *Id.* The court explained that the factor requires a showing 1) that the defendant used more violence than necessary to kill, and 2) that he knew or should have known that he had fatally wounded the victim and yet continued to inflict violence. *Id.* at 421–22, ¶¶ 85–91.

At the time *Bocharski* was decided, Gulbrandson's appeal from his first habeas petition's denial was pending in the Ninth Circuit. *See* Ninth Cir. No. 07–99012. In August 2009, Gulbrandson sought authorization from that court to file an SOS petition arguing, among other things and based on a new expert report concerning his mental health, that there was insufficient evidence to support the mental state for heinousness and depravity. *See* Ninth Cir. No. 09–7279, Dkt. # 1. The application, however, did not mention *Bocharski*. *Id.*

The Ninth Circuit denied the request. *Gulbrandson*, 738 F.3d at 998. The court found that Gulbrandson's proposed claim "fail[ed] to meet the high standards of § 2244(b)(2)(B)" because the expert's report could have been discovered earlier with

reasonable diligence. *Id.* at 998. In addition, the court found that Gulbrandson had not proven his actual innocence:

> Gulbrandson fails to make a prima facie showing that "no reasonable factfinder would have found" that the murder was committed in a heinous, cruel, or depraved manner. § 2244(b)(2); *see Pizzuto [v. Blades]*, 673 F.3d [1003,] 1010 [(9th Cir. 2012)]. A reasonable factfinder could determine that his use of "several knives, scissors, and a wooden salad fork" on Irene and the "particularly gruesome, brutal, and protracted" fashion of the murder, *[State v.] Gulbrandson*, 906 P.2d [579,] 601, 604 [(Ariz. 1995)], were sufficient to show that Gulbrandson "should have known he had inflicted a fatal wound but continued nonetheless to inflict more violence," *Bocharski*, 189 P.3d at 422 (explaining that murders committed in a brief burst of rage with single weapons were less likely to involve gratuitous violence and citing *Gulbrandson* as an example to the contrary). This "unchallenged evidence provides a sufficient basis on which a reasonable factfinder could find [Gulbrandson] guilty" of using gratuitous violence and thus committing the murder in an especially heinous, cruel, or depraved manner. *Pizzuto*, 673 F.3d at 1009.

Id. The Ninth Circuit affirmed the district court's denial of habeas relief. *Id.* This Court then denied certiorari. *See* No. 13—9631.

Gulbrandson subsequently filed a successive petition for post-conviction relief in state court, arguing that *Bocharski* and its progeny, *State v. Wallace (IV)*, 272 P.3d 1046 (Ariz. 2012), and *State v. Wallace (III)*, 191 P.3d 164 (Ariz. 2008), constituted changes in the law and that he was "actually innocent" of the death penalty based on the absence of a valid eligibility factor. *See* Pet. App. A; Ariz. R. Crim. P. 32.1(g), (h) (2014). The state post-conviction court found that Gulbrandson's claims were not colorable because his conduct constituted gratuitous violence, even under *Bocharski*'s standards, and dismissed the petition. Pet. App. A-2–A-9. The Arizona Supreme Court

denied discretionary review, *see* Pet. App. B-3, and this Court denied Gulbrandson's petition for writ of certiorari. *See* No. 16–7083.

Gulbrandson then filed a second habeas petition in district court, raising the same, *Bocharski*-based challenge to the aggravating factor and specifically contesting the post-conviction court's ruling on the ground that it failed to narrow the factor. *See* Pet. App. B. Gulbrandson argued that his petition was second-in-time but was not SOS because his claim did not ripen until the state court resolved the second Rule 32 petition. *Id*; *see generally Magwood v. Patterson*, 561 U.S. 320, 330 (2010); *Panetti v. Quarterman*, 551 U.S. 930, 944, 947 (2007). The district court disagreed and dismissed the petition for lack of jurisdiction, finding that it was an SOS petition that the Ninth Circuit had not authorized under 28 U.S.C. § 2244(b)(3). Pet. App. B-4–B-7. The court also concluded that Gulbrandson's claim alleged a state-law error and was therefore not cognizable on habeas review. Pet. App. B-7–B-8. The court denied a certificate of appealability, 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.*

Gulbrandson sought a certificate of appealability from the Ninth Circuit on the question whether the petition was second-in-time or SOS. *See* Ninth Cir. No. 18–15829, Dkt. # 7. That court denied his motion, concurring with the district court that no reasonable jurist could debate that the petition was SOS and that the district court lacked jurisdiction to consider it. *Id.* at 12. Gulbrandson filed a petition for writ of certiorari, which this Court denied on February 19, 2019. *See* No. 18–6766.

Gulbrandson next returned to the Ninth Circuit and applied for leave to file an SOS petition, raising the *Bocharski* claim. *See* Pet. App. C. That court denied his application on September 3, 2019. *Id.* The present original petition followed.

REASONS FOR DENYING THE WRIT

Gulbrandson alleges that the state post-conviction court misapplied *Bocharski* and that, under a correct application of that case, there is insufficient evidence to support the (F)(6) factor. Pet. 1–26. Because the lone aggravating factor fails, Gulbrandson continues, he is innocent of the death penalty. *Id.*; *see Sawyer v. Whitley*, 505 U.S. 333 (1992). This Court should deny Gulbrandson's petition because he has not shown exceptional circumstances warranting the extraordinary relief he seeks, his claim is one of state law that is not cognizable on habeas review, and he has not shown diligence or actual innocence under 28 U.S.C. § 2244(b)(2)(B), such that AEDPA would permit an SOS petition.

As a threshold matter, Rule 20.4 of the Rules of the United States Supreme Court requires Gulbrandson to explain why he did not make his application to the district court in the first instance. *See also* 28 U.S.C. § 2242. This requirement presupposes that a prisoner show valid reasons for invoking this Court's original jurisdiction. Gulbrandson's explanation is that he attempted to file what he believes was a second-in-time petition. Pet. 13–14. The district court, however, disagreed with Gulbrandson's characterization of the petition as second-in-time, concluded that it was instead an unauthorized SOS petition, and enforced AEDPA by dismissing it. Pet. App. B. Likewise, the Ninth Circuit fulfilled its gatekeeping function under 28 U.S.C. §

2244(b)(3)(C) by denying Gulbrandson's subsequent request to file an SOS petition. These circumstances are common in AEDPA cases, and they are not sufficient reasons to seek original habeas relief directly from this Court. Concluding otherwise would convert this Court's original habeas jurisdiction into a vehicle for circumventing AEDPA's restrictions on SOS petitions.

I. Gulbrandson has proffered no exceptional circumstances warranting an original habeas writ.

As discussed above, original habeas relief is a remedy rarely granted, and a defendant must show exceptional circumstances warranting such relief. *See* Rule 20.4, Rules of the United States Supreme Court. Gulbrandson contends that *Bocharski* changed Arizona law in a way necessary to satisfy the Eighth Amendment's narrowing requirement, and he proposes that exceptional circumstances exist merely because, in his view, the state post-conviction court misapplied *Bocharski*'s standard. Pet. 14–16.

But a mere misapplication of the law (assuming one occurred) is insufficient to warrant certiorari, *see* Rule 10, Rules of the United States Supreme Court, let alone satisfy the more exacting exceptional-circumstances standard contained in Rule 20.4.[4] Likewise, a mere change in the law—especially a change in *state* law, *see* § II, *infra*—does not constitute an exceptional circumstance. Even a change in federal

[4] To the extent Gulbrandson raises a freestanding actual-innocence claim (a type of claim that this Court has never recognized as cognizable on habeas review, *see McQuiggen v. Perkins*, 569 U.S. 383, 392 (2013)), that claim fails. *See* Pet. i,15. Gulbrandson does not claim to be factually innocent but legally innocent, which does not suffice. *See Bousley v. United States*, 523 U.S. 614, 623–24 (1992) ("'[A]ctual innocence' means factual innocence, not mere legal insufficiency.") (citing *Sawyer*, 505 U.S. at 339). For this reason, *In re Davis*, 557 U.S. 952 (2009), is distinguishable. *See* Pet. 15. There, this Court transferred a habeas petition to the district court for resolution of Davis' claim based on new evidence that he was factually innocent. Gulbrandson, in contrast, alleges that a change in the law invalidates the aggravating factor.

constitutional law does not warrant habeas relief unless it is so significant to warrant retroactive application. *See* 28 U.S.C. § 2244(b)(2)(A); *Teague v. Lane*, 489 U.S. 288, 311 (1989). And in the analogous context of motions arising under Federal Rule of Civil Procedure 60(b)(6), a change in the law typically does not qualify as an extraordinary circumstance. *See Gonzalez v. Crosby*, 545 U.S. 524, 536–37 (2005) (new decision concerning statute of limitations did not qualify as an extraordinary circumstance under Fed. R. Civ. P. 60(b)(6)); *Agostini v. Felton*, 521 U.S. 203, 239 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)."). Permitting a change in the law to qualify as an exceptional circumstance warranting original habeas relief would enable an end-run around these provisions and frustrate the finality interest AEDPA safeguards. *See, e.g.*, *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

But even assuming that a misapplication of, or a change in, the law could constitute an exceptional circumstance, it does not here. First, *Bocharski* did not change Arizona law—it clarified Arizona law. The Arizona Supreme Court has since regarded *Bocharski* as a clarification of the gratuitous-violence standard.[5] *See Wallace IV*, 272 P.3d at 1049, ¶ 10 ("In *State v. Bocharski*, this Court clarified the standard for gratuitous violence, recognizing that our 'prior cases ha[d] not been entirely consistent in describing the showing needed to establish' that factor.") (quoting *Bocharski*, 189 P.3d at 421, ¶ 85); *id.* at 1054, ¶ 37 (referring to *Bocharski*'s "clarification and

[5] Because *Bocharski* did not announce a new rule, Gulbrandson's discussion of retroactivity is irrelevant. Pet. 14–15; *see also* Pet App. A-3 (state post-conviction court assuming but not deciding that *Bocharski* and *Wallace* constituted retroactive changes in the law and concluding that Gulbrandson's claim failed on the merits).

narrowing"); *Wallace III*, 191 P.3d at 169, ¶ 28 ("Recognizing that 'our prior cases have not been entirely consistent in describing the showing needed to establish gratuitous violence,' we attempted in *Bocharski* to clarify the principles governing this theory of heinousness and depravity.") (quoting *Bocharski*, 189 P.3d at 421, ¶ 85).

Second, for the reasons discussed in § III, *infra*, the facts establish gratuitous violence under *Bocharski*'s standard. In fact, the Arizona Supreme Court cited Gulbrandson's case as an example of one in which gratuitous violence was correctly found. *See Bocharski*, 189 P.3d at 495, ¶ 90 (contrasting facts of *Bocharski*, in which defendant inflicted all wounds rapidly with same the instrument, with Gulbrandson's conduct in using multiple instruments to inflict different types of injuries); *see also Gulbrandson*, 738 F.3d at 998 (noting *Bocharski*'s citation to Gulbrandson's case). This Court should deny Gulbrandson's petition.

II. Gulbrandson's claim is not cognizable on habeas review.

Not only has Gulbrandson failed to proffer an exceptional circumstance warranting an original writ, but he has also failed to state a cognizable habeas claim. Gulbrandson alleges that the state post-conviction court misapplied the *Bocharski* decision but, as the district court has already concluded, that question is beyond the federal courts' habeas jurisdiction because it does not state a violation of the Constitution or any other federal law.[6] Pet. App. B-7–B-8; *see* 28 U.S.C. § 2241(c)(3);

---

[6] Gulbrandson erroneously states that the district court held that habeas relief is available when a state court arbitrarily and capriciously applied state law. Pet. i. The court instead correctly summarized the holding of *Lewis v. Jeffers*, 497 U.S. 764, 780–81 (1990), which limits review of a state court's aggravating factor to sufficiency of the evidence. Pet. App. B-7–B-8. To the extent Gulbrandson suggests otherwise, the district court did not decline to address the claim *only* because Gulbrandson had not

28 U.S.C. § 2254(a); *see also Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (federal habeas court may not reexamine state court's determination of state law); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1045 (9th Cir. 1997) (errors committed during state post-conviction proceedings are not cognizable in a federal habeas action); *Villafuerte v. Stewart*, 111 F.3d 616, 632 n.7 (9th Cir. 1997) (claim that prisoner "was denied due process in his state habeas corpus proceedings" not cognizable on habeas review); *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989) ("[A] petition alleging errors in the state postconviction review process is not addressable through habeas corpus proceedings."). As the district court further noted, Gulbrandson's mere invocation of federal law does not "transform this state-law issue into a federal claim." Pet. App. B-8 (citing *Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir. 1996)); *see generally* Pet. 25–26 (arguing federal due process violation).

Second, state-law issue aside, Gulbrandson appears to contest the Ninth Circuit's order denying his application to file an SOS petition challenging the state post-conviction court's ruling. Pet. 24–25. That decision, however, is not appealable. *See* 28 U.S.C. § 2244(b)(3)(E). Nor can it be a basis for original habeas relief; at a minimum, it does not itself allege that Gulbrandson is in custody pursuant to a violation of federal law. *See* 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a). For these reasons, Gulbrandson has failed to state a cognizable habeas claim.

---

obtained the Ninth Circuit's authorization under 28 U.S.C. § 2244(b)(3). *Id.* Rather, the court also expressly found that Gulbrandson alleged a pure state-law error. *Id.*

III. Gulbrandson's claim does not satisfy AEDPA's limitations on SOS petitions.

As previously discussed, while AEDPA does not divest this Court of jurisdiction to consider original habeas petitions, the statute guides this Court's review. *See Felker*, 518 U.S. 662–63. There is no dispute that Gulbrandson failed to raise his claim in his first habeas petition. Under AEDPA, "[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," as relevant here:

> (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.

28 U.S.C.A. § 2244(b)(2)(B) (emphasis added). As applied to capital sentencing, § 2244(b)(2)(B)(ii) requires a showing that no reasonable factfinder would have found the prisoner eligible for the death penalty. *Sawyer*, 505 U.S. at 336. In other words, the prisoner must show that no reasonable factfinder would have found an aggravating factor.

Gulbrandson cannot meet § 2244(b)'s standards. First, Gulbrandson could have challenged the aggravating factor earlier with reasonable diligence. The claim's *factual* predicate consists of the facts underlying the aggravating factor—not the *legal* error the post-conviction court purportedly made. *See* Pet. 15 (arguing that post-

conviction court's application of *Bocharski* constitutes new factual predicate).[7] As previously discussed, *Bocharski* was a clarification of—not a change in—Arizona law. *See Wallace IV*, 272 P.3d at 1049, 1054, ¶¶ 10, 37; *Wallace III*, 191 P.3d at 169, ¶ 28. Gulbrandson could therefore have made the same arguments Bocharski did, and Gulbrandson could have applied those arguments to the facts of his case at any point during the state court proceedings.

Second, as both the state post-conviction court and the Ninth Circuit have already determined, *see* Pet. App. A; *Gulbrandson*, 738 F.3d at 998, Gulbrandson cannot show that no reasonable factfinder would have found the A.R.S. § 13–703(F)(6) (1991) factor proven through gratuitous violence. *See* 28 U.S.C. § 2244(b)(2)(B)(ii). "'[T]o prove gratuitous violence, the State must first show that the defendant 'inflicted more violence than that necessary to kill.'" *Wallace III*, 191 P.3d at 169, ¶ 28 (quoting *Bocharski*, 189 P.3d at 421, ¶ 86). "Gratuitous violence requires a specific mental state: 'The state must also show that the defendant continued to inflict violence after he knew or should have known that a fatal action had occurred.'" *Wallace III*, 191 P.3d at 169, ¶ 28 (quoting *Bocharski*, 189 P.3d at 421, ¶ 87) (emphasis deleted).

That Gulbrandson used more force than necessary to kill Katuran is not disputed. Instead, Gulbrandson relies on the medical examiner's testimony to argue that the sequence of injuries is unclear, as is whether any injuries were inflicted after death, and thus Gulbrandson lacked the mental state for gratuitous violence. Pet. 20–

[7] *Johnson v. United States*, 544 U.S. 295, 305–06 (2005), is inapposite because that case involves the statute of limitation under 28 U.S.C. § 2255. *See* Pet. 15. In addition, that case involved a change in the factual circumstances—the invalidation of a prior felony conviction—not a clarification of the law defining an aggravating factor.

24. But *Bocharski* does not require that wounds be administered post-mortem for gratuitous violence to exist—in fact, such an act would likely constitute mutilation, *not* gratuitous violence. *E.g. State v. Medina*, 975 P.3d 94, 104, ¶ 38 (Ariz. 1999). Rather, *Bocharski* requires that a defendant continue using violence after he has actual or constructive knowledge that the victim is fatally wounded.

Here, as the Ninth Circuit observed, this was a protracted murder involving multiple instruments. *Gulbrandson*, 738 F.3d at 998. Gulbrandson delivered at least two fatal injuries: a deep stab wound to the abdomen and a blunt-force injury to the neck, which was likely caused by strangulation. Pet. App. D-15; Pet. App. E. These fatal wounds were administered by separate means and necessarily at separate times. In addition, Katuran suffered a number of additional injuries, caused by various implements, and her residence bore signs of an intense and prolonged struggle. This evidence supports a finding that Gulbrandson possessed the requisite mental state. *See Wallace III*, 191 P.3d at 170, ¶ 31; *see also State v. Rushing*, 404 P.3d 240, 249, ¶ 35 (Ariz. 2017) (finding sufficient evidence of gratuitous violence where defendant severed victim's penis after fatal injury, "[c]onsidering the damage inflicted and the time it must have taken to switch weapons").

Gulbrandson's reliance on *Wallace* is unavailing because the facts of that case are markedly different. Pet 17–24. Wallace beat to death his girlfriend and her two children, using a pipe wrench on the mother and the male child and a baseball bat on the female child. *Wallace III*, 191 P.3d at 165, ¶¶ 2–7. On appeal from Wallace's sentencing proceeding, the Arizona Supreme Court concluded that the trial court had

erred by instructing the jurors that they could find gratuitous violence based on Wallace's deliberate avoidance of a faster and less-violent means of killing (a handgun). *Id.* The court further found insufficient evidence of gratuitous violence in the mother's murder, as she had died rapidly after only a few blunt-force impacts, but remanded for another resentencing on the counts involving her children. *Id.* at 169, ¶¶ 26–37. After a jury again imposed death, the Arizona Supreme Court found insufficient evidence of gratuitous violence for either victim because Wallace had killed the minor male victim quickly and had continued striking the minor female victim (ultimately stabbing her with the broken baseball bat) because he believed additional injuries were necessary to kill her. *Wallace IV*, 272 P.3d at 1051–54, ¶¶ 17–55.

The Arizona Supreme Court's concern in *Wallace* was that Wallace's assault on the female victim constituted "a clumsy and escalating attack" that furthered his intent to kill but did not show his intent to use more violence than necessary to kill. *Wallace IV*, 272 P.3d at 1052, ¶ 27. Likewise, the evidence established that Wallace had struck the male victim repeatedly with a heavy object because he had found it difficult to kill the female victim and wanted to ensure that his next killing was efficient. *Id.* at 1053–54, ¶¶ 34. Gulbrandson, in contrast, inflicted at least two fatal injuries, using different weapons, during a protracted struggle. Gulbrandson points to no evidence that his use of additional force against Katuran reflected a clumsy or escalating attempt to kill her. Under *Bocharski*, "cases involving prolonged assaults and multiple weapons," like Gulbrandson's, "allow[] an inference that the defendant

possessed the requisite mental state." *Wallace IV*, 191 P.3d at 170, ¶ 31. Gulbrandson has failed to show his actual innocence, and this Court should deny his petition.

CONCLUSION

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

Respectfully submitted,

MARK BRNOVICH
Attorney General

ORAMEL H. (O.H.) SKINNER
Solicitor General

s/LACEY STOVER GARD
Chief Counsel
(Counsel of Record)

Attorneys for RESPONDENTS

APPENDIX A

*