CAPITAL CASE

No. _____

In the Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS, *et al.*,
Petitioners,

v.

ROBERT ALLEN POYSON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the Ninth Circuit err in interpreting Federal Rule of Appellate Procedure 41(d)(1) to permit an appellate court to withhold its mandate indefinitely and thereby retain jurisdiction long after this Court denied a petition for certiorari?

2. Did the Ninth Circuit err in holding that the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, permits a federal court to disregard a state court's language and instead presume constitutional error based on the federal court's perception of state-court error in other cases?

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PETITION FOR WRIT OF CERTIORARI

Respondent Robert Poyson is a triple murderer who has spent nearly two decades on Arizona's death row. His brutal acts included driving a bread knife through the head of a 15-year-old boy after beating him for 45 minutes, shooting a woman as she slept, and pummeling a man to death with a cinder block after a prolonged struggle. App. 265–66. This appeal concerns the Ninth Circuit's seemingly bottomless well of delay tactics in capital cases.

In 2013, a three-judge panel of the Ninth Circuit rejected Poyson's claim that the Arizona Supreme Court excluded evidence of mitigating circumstances not causally connected to Poyson's crimes when reviewing his death sentences. App. 219–20. *See Eddings v. Oklahoma*, 455 U.S. 104 (1982) (recognizing requirement that sentencer not be precluded from considering relevant mitigation). In 2018, however, the same three-judge panel reversed course and granted the habeas writ on Poyson's *Eddings* claim, based on the identical record it had previously found insufficient to warrant relief. App. 23–38.

The panel achieved this result by manipulating the Federal Rules of Appellate Procedure and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Nearly five months after denying rehearing on the *Eddings* claim, and several days after Poyson filed a petition for certiorari raising that same claim, the panel *sua sponte* resurrected Poyson's petition for panel rehearing and belatedly stayed its mandate pending the resolution of en banc proceedings in a different capital case, *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015). App. 157–58. The panel continued its

stay even after this Court denied certiorari, extending the Ninth Circuit's oversight of this case by nearly *four years*.

When the court finally parted with the case, it did so in an opinion that eschewed AEDPA deference. App. 23–35. Relying on *McKinney*'s conclusion that the Arizona Supreme Court had violated *Eddings* in other cases, the panel presumed that the Arizona Supreme Court had also done so in this case. Despite acknowledging that the Arizona Supreme Court's decision could be read to comply with *Eddings*—which should have ended the analysis under AEDPA, *see Harrington v. Richter*, 562 U.S. 86, 101–02 (2011)—the court worked backward from its presumption of *Eddings* error, relying on *McKinney* to interpret the state court's language in a way that supported that presumption. App. 23–35.

The panel's conduct here has subverted finality in this unending capital case and undermined the shared goals of the mandate rules and AEDPA: promoting comity, finality, and federalism. *See Bell v. Thompson*, 545 U.S. 794, 812 (2005). This Court should grant certiorari and affirm the district court and 2013 Ninth Circuit holdings denying habeas relief.

OPINIONS AND ORDERS BELOW

The order and amended opinion of the Ninth Circuit's three-judge panel is reported at *Poyson v. Ryan*, 879 F.3d 875 (9th Cir. 2018). App. 1–52. The Ninth Circuit's orders extending its stay of the mandate are unreported. App. 154–55, 157–58. This Court's order denying both Poyson's petition for certiorari and his request to defer consideration of that

petition is reported at 134 S. Ct. 2302 (Mem) (2014). App. 156.

The Ninth Circuit's April 2, 2014, stay of the mandate is unreported. App. 157–58. The Ninth Circuit's November 7, 2013, order and amended opinion denying Poyson's petition for panel rehearing and rehearing en banc is reported at *Poyson v. Ryan*, 743 F.3d 1185 (9th Cir. 2013). App. 160–215. The Ninth Circuit's March 22, 2013, ruling affirming the district court's denial of habeas relief is reported at *Poyson v. Ryan*, 711 F.3d 1087 (9th Cir. 2013). App. 216–62.

The district court's order denying habeas relief is unreported. App. 59–149. The Arizona Supreme Court's opinion affirming Poyson's convictions and sentences is reported at *State v. Poyson*, 7 P.3d 79 (Ariz. 2000). App. 263–88.

JURISDICTION

The Ninth Circuit filed its order and amended opinion on January 12, 2018. App. 1–52. This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Eighth Amendment to the United States Constitution provides, in pertinent part, that "cruel and unusual punishments [shall not be] inflicted."

28 U.S.C. § 2254(d) provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States . . . .

Federal Rule of Appellate Procedure 41 governs appellate mandates and provides, in pertinent part:

> (b) When Issued**.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.
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> ***
>
> (d) Staying the Mandate.
>
> > (1) On Petition for Rehearing or Motion**.** The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.
> >
> > (2) Pending Petition for Certiorari.

> (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.
>
> ***
>
> (D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

STATEMENT OF THE CASE

Over 20 years ago, in April 1996, Leta Kagen, her 15-year-old son Robert Delahunt, and her companion Roland Wear allowed Poyson to reside with them in their trailer in rural Arizona. App. 264. Several months later, Kagen and her family permitted Frank Anderson and Anderson's minor girlfriend, Kimberly Lane, to move into the trailer. *Id.* Soon after they moved in, Poyson, Anderson, and Lane decided to travel to Chicago but lacked transportation. *Id.* To solve this problem, they conspired to murder Kagen, Delahunt, and Wear, merely to steal Wear's pickup truck. *Id.*

The trio executed their plan on August 13, 1996. App. 265. First, Lane lured 15-year-old Delahunt to a small travel trailer on Kagen's property, where Anderson was waiting. *Id.* Anderson slit Delahunt's throat with a bread knife, but Delahunt survived. *Id.* Poyson, who had been waiting outside the trailer,

heard Delahunt's screams and rushed to help Anderson. *Id.* For the next 45 minutes, Anderson and Poyson attempted to kill Delahunt in various clumsy and ineffective ways. *Id.* Anderson held Delahunt down as Poyson repeatedly bashed Delahunt's head against the floor, pummeled Delahunt's head with his fists, and struck Delahunt's head with a rock. *Id.* When Delahunt did not die, Poyson drove the bread knife into Delahunt's ear with such force that it emerged from his nose. *Id.* Delahunt still did not die, and Poyson resumed bashing his head on the floor, finally killing him. *Id.*

Poyson and Anderson cleaned themselves up and located Wear's rifle. *Id.* Poyson obtained ammunition from a neighbor under a ruse that he needed it to save Delahunt from snakes. *Id.* Poyson hid the rifle on the property, after spending 5 minutes testing it; he then cut the telephone line to Kagen's trailer, and waited for Kagen and Wear to go to sleep. *Id.* Poyson and Anderson entered Kagen and Wear's bedroom, where Poyson shot Kagen in the head, killing her. App. 266. Poyson also shot Wear in the mouth, shattering his teeth. *Id.* Wear rose from the bed and struggled with Poyson as Poyson struck him in the head repeatedly with the rifle. *Id.* The struggle moved outside, where Anderson threw a cinder block at Wear and knocked Wear to the ground. *Id.* Poyson then kicked Wear in the head twice and repeatedly threw the cinder block at his head until he died. *Id.* Poyson took Wear's wallet and the keys to his truck, and covered his body with debris. *Id.* He then left for Chicago in Wear's truck with Anderson and Lane. *Id.*

Based on the foregoing, a jury convicted Poyson of three counts of first-degree murder, as well as other charges related to the incident. App. 263–64. The sentencing judge found three death-qualifying aggravating circumstances: (1) the commission of multiple homicides, Ariz. Rev. Stat. § 13–703(F)(8) (1996); (2) all three murders were committed for pecuniary gain, Ariz. Rev. Stat. § 13–703(F)(5); and (3) Poyson killed Delahunt and Wear in an especially cruel manner, Ariz. Rev. Stat. § 13–703(F)(6). App. 275. The sentencing judge found no mitigation sufficiently substantial to warrant leniency and sentenced Poyson to death for each murder. App. 278, 286–87.

The Arizona Supreme Court affirmed Poyson's convictions and sentences. App. 264. In independently reviewing Poyson's death sentences, the court found that Poyson's proffered mitigation based on a difficult childhood was "without mitigating value" because it did not affect his ability to control his behavior. App. 285. For the same reason, the court also gave Poyson's mental-health evidence "no mitigating weight." App. 284–85.

The district court subsequently denied Poyson's habeas petition, concluding that the Arizona Supreme Court had complied with *Eddings* in considering Poyson's proffered mitigation. App. 84–101. A three-judge panel of the Ninth Circuit affirmed the district court's ruling on March 22, 2013. App. 216–62. The panel concluded that the state court had applied a causal-nexus test to Poyson's mental-health and troubled-childhood evidence, but that the record "does not reveal whether the court considered the absence of

a causal nexus as a permissible weighing mechanism . . . or as an unconstitutional screening mechanism." App. 240. The court then correctly concluded that, under AEDPA, "[t]his ambiguity precludes us from granting habeas relief." *Id.* Judge Thomas dissented, expressing his belief that the Arizona court had committed *Eddings* error by failing to give weight to Poyson's proffered mitigation. App. 251–62.

The court denied Poyson's petitions for panel and en banc rehearing on November 7, 2013. App. 160–215. The panel simultaneously amended its opinion, once again finding, under AEDPA's standards, that the state courts did not apply an unconstitutional causal-nexus test to Poyson's proffered mitigation. App. 184–92. Once again, Judge Thomas dissented. App. 200–15. Inexplicably, the court did not issue the mandate within seven days as required by Federal Rule of Appellate Procedure 41(b). Nor did it stay the mandate pending certiorari as permitted by Rule 41(d)(2).

Poyson filed a petition for writ of certiorari in this Court. *Poyson v. Ryan*, No. 13–9097 (filed Mar. 7, 2014). Within days, the Ninth Circuit's three-judge panel *sua sponte* revived Poyson's long-dismissed petition for panel rehearing. App. 157–58. The panel also stayed the mandate for the first time, citing the forthcoming en banc proceedings in *McKinney*. *Id.* On May 19, 2014, this Court denied Poyson's petition for certiorari. App. 156. Additionally, the Court denied Poyson's request to delay its consideration of the petition for certiorari until the Ninth Circuit acted on his resuscitated petition for rehearing en banc. *Id.* The latter denial reflects the fact that courts of appeals

are powerless under the Rules to revive rehearing petitions after months have passed. Even after the denial of certiorari, the Ninth Circuit refused to issue its mandate.

In late 2015, the reason for the Ninth Circuit's delay became apparent: the court held in *McKinney* that the Arizona Supreme Court had secretly applied—but never announced, and affirmatively disclaimed—a rule limiting mitigation evidence between 1989 and 2005. 813 F.3d at 802–27. Specifically, the court held that the Arizona Supreme Court had, in violation of *Eddings*, silently excluded from its consideration mitigation that lacked a causal nexus to the offense. *Id.* The State sought certiorari, but this Court declined review. *See Ryan v. McKinney*, No. 15–1222.

Returning to the present case, the Ninth Circuit seized on the denial in *McKinney* and ordered supplemental briefing addressing that case's impact on Poyson's case. App. 152–53. In its brief, the State asked the panel to issue the mandate without further delay because "once this Court has denied a petition, there is generally no need for further action from the lower courts." *Ryan v. Schad*, 570 U.S. 521, 524–25 (2013); *see* Ninth Cir. No. 10–99005, Dkt. # 91 at 2–7.

The panel rejected Petitioner's request and, in January 2018, granted Poyson relief on the same *Eddings* claim it previously rejected on the same record and under the same AEDPA standard. App. 1–52. The panel determined, based on *McKinney*, that the Arizona Supreme Court had silently refused to consider Poyson's non-causally-connected troubled-childhood and mental-health mitigation evidence in violation of *Eddings*. App. 25–32. Because it considered Poyson's

sentencing profile similar to McKinney's, and because the en banc court had found prejudice in *McKinney*, the panel also found prejudice here. App. 32–35. Judge Ikuta wrote a separate concurring opinion, agreeing that *McKinney* bound the panel but arguing that that case was wrongly decided and that it had engaged in an incorrect *Brecht v. Abrahamson*, 507 U.S. 619 (1993), analysis. App. 44–52. Her criticism tracked the five-judge en banc dissent in *McKinney*. 813 F.3d at 827–50 (Bea, J., dissenting).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has become America's Research & Development department for delaying justice. Its latest innovation entrenches the error in *McKinney* of presuming that a state court has failed to follow federal law despite identifying the correct standard and never endorsing the mistaken standard ascribed to it by the Ninth Circuit. This approach contradicts precedent from this Court and at least two circuits. Compounding the problem, the court below accomplished its application of *McKinney* through an interpretation of the Federal Rules of Appellate Procedure that no other circuit has embraced and one has expressly rejected. These failures demand this Court's attention—either in the form of certiorari or summary reversal—lest America's largest circuit continue to thwart the purposes of AEDPA, drive up the cost of law enforcement for the States, and inflict pain on victims awaiting justice.

I. The Ninth Circuit Violated the Mandate Rules in Contradiction of Precedent from this Court and Others by Continuing Proceedings after this Court Denied Certiorari.

For the third time in five years, the Ninth Circuit has refused to relinquish jurisdiction over an Arizona death-penalty case and has continued appellate proceedings after this Court denied certiorari. *See Schad*, 570 U.S. at 521–28; *In re Charles L. Ryan*, No. 14–375. The Ninth Circuit's latest departure from well-established mandate procedures, if permitted to stand, will serve as a blueprint for courts to endlessly second-guess their own judgments, as well as those of state courts, thereby undermining both finality and this Court's role in the appellate process. *See Henry v. Ryan*, 766 F.3d 1059, 1072 (9th Cir. 2014) (Tallman, J., dissenting from grant of rehearing en banc) (decision to initiate en banc proceedings after denial of certiorari "lay[s] flame to orderly case-processing rules, comity due to state court judgments, and principles of finality"). This pattern, already rebuked by this Court in *Schad*, is worthy of summary reversal.

A. Rule 41 and this Court's Precedent Forbid the Procedure the Ninth Circuit Created Here.

"[W]hen state-court judgments are reviewed in federal habeas proceedings, 'finality and comity concerns,' based in principles of federalism, demand that federal courts 'accord the appropriate level of respect to' state judgments by allowing them to be enforced when federal proceedings conclude." *Schad*, 570 U.S. at 525 (quoting *Bell*, 545 U.S. at 812–13). To this end, "[a] court's discretion under Rule 41 must be

exercised . . . in a way that is consistent with the State's interest in the finality of convictions that have survived direct review within the state court system." *Bell*, 545 U.S. at 812–13.

This Court has twice declined to resolve whether Rule 41 is subject to *any* unwritten exceptions. *See Schad*, 570 U.S. at 521; *Bell*, 545 U.S. at 803–04. It has, however, assumed that such deviation "is a power of last resort, to be held in reserve against grave, unforeseen contingencies." *Schad*, 570 U.S. at 525 (quotations omitted). And, absent "extraordinary circumstances," a court "abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the petition." *Id.*

Unfortunately, the Ninth Circuit's "defiance" of these principles "is well and recently practiced." *Henry*, 766 F.3d at 1070 (Tallman, J., dissenting). In *Schad*, the Ninth Circuit stayed its mandate on the eve of execution—after this Court denied certiorari—and *sua sponte* reconsidered a motion it had previously rejected. 570 U.S. at 521–28. This Court granted certiorari and reversed in a *per curiam* opinion, finding no extraordinary circumstances justifying the Ninth Circuit's departure from Rule 41 in order to revisit arguments it had previously rejected. *Id.* at 525–27. The *Schad* Court relied heavily on *Bell*, in which it had found an abuse of discretion in the Sixth Circuit's post-certiorari stay because that court had delayed notifying the parties of the stay, had relied on a previously-rejected argument to issue the stay, and had disregarded comity and federalism concerns. *Id.*; *see Bell*, 545 U.S. at 795–814.

None of these decisions have impressed the Ninth Circuit. Even after *Schad*, the Ninth Circuit ordered that *Henry* be reheard en banc, *after* it had already denied panel and en banc rehearing and *after* this Court had denied certiorari. *Henry*, 766 F.3d at 1059. Supported by a dissent from Judge Tallman and four others, *see id.* at 1067–72, Arizona filed a petition for a writ of mandamus and/or prohibition asking this Court to compel the Ninth Circuit to issue its mandate. *In re Charles Ryan*, Supreme Court No. 14–375. This Court took the extraordinary action of directing the circuit court to respond to Arizona's petition. *See id.* Rather than explain itself, the Ninth Circuit issued the mandate shortly thereafter. *Henry v. Ryan*, 775 F.3d 1112 (9th Cir. 2014).

Unfortunately, the Ninth Circuit has reverted to its former ways. The procedure that court should have followed is simple: because it did not enter a stay, the court was required to issue the mandate on November 14, 2013—seven days after its order denying panel and en banc rehearing. *See* Fed. R. App. P. 41(b). Instead, the Ninth Circuit held its mandate without explanation for nearly five months, only to *sua sponte* revisit Poyson's petition for panel rehearing shortly after receiving notice from this Court that Poyson had filed a petition for certiorari. *See* Ninth Cir. No 10–99005, Dkt. # 78; App. 157–58. Making matters worse, the Ninth Circuit then left its belated stay in place notwithstanding this Court's May 19, 2014, denial of certiorari and continued proceedings for nearly four additional years.

The Ninth Circuit's attempts to distinguish *Schad* are unconvincing. It attempts to justify its actions by

explaining, for the first time, that it had ordered its stay under Rule 41(d)(1) (which provides for an automatic stay of the mandate upon a rehearing petition's timely filing), not under Rule 41(d)(2) (which provides for a stay pending certiorari). App. 22 n.5. The court then concludes that *Schad*, which involved a stay pending certiorari, did not prohibit its actions. *Id.* This is a distinction without a difference. By the time the Ninth Circuit stayed the mandate, it was already in violation of Rule 41(b), which required the court to issue the mandate nearly five months earlier, after it denied Poyson's petitions for rehearing. *See Bell*, 545 U.S. at 805 ("Even assuming, however, that a court could effect a stay for a short period of time by withholding the mandate, a delay of five months is different in kind."); *accord Henry*, 766 F.3d at 1071 (Tallman, J., dissenting from grant of rehearing) (describing concurrence's position as "the principle that by doing nothing (e.g., by failing to enter a stay as well as failing to issue the mandate), the court can do whatever it wants"). Finally, Rule 41(d)(1) does not authorize an appellate court to order a stay of the mandate at all—it provides for an *automatic* stay based on the timely filing of a petition for rehearing.

Most circuits have little trouble following the non-discretionary standards in Rule 41. If this case were decided in the Second Circuit, for example, the federal appellate court would have issued a timely mandate in 2014. In *Rosa v. United States*, 785 F.3d 856, 860 (2d Cir. 2015), the Second Circuit described *Schad* as a case in which "the Ninth Circuit had abused its discretion by refusing to issue its mandate while it reconsidered an argument it had rejected months earlier." *Id.* The *Rosa* court's understanding of *Schad*

is entirely correct and mirrors the text of the Rule. Had the Second Circuit adjudicated the current case, it would have arrived at a different outcome.

The Ninth Circuit below cites only the Fourth Circuit as a fellow-traveler in treating this Court's precedent as allowing circuit courts to retain the mandate through disposition of a petition for certiorari. App. 22 n.5 (citing *Alphin v. Henson*, 552 F.2d 1033, 1034–35 (4th Cir. 1977)). According to the Ninth Circuit, *Bell*'s favorable citation to *Alphin* confirms the course of action taken below. *Id.* *Bell* in fact cited *Alphin* as an example of a "rare" circumstance where a post-certiorari stay might be appropriate under Rule 41(b). 545 U.S. at 806. But *Alphin* involved an award of attorneys' fees in a civil case—it was not a habeas case governed by AEDPA. 552 F.2d at 1034–36. Moreover, in *Alphin*, Congress enacted a statute affecting the case's outcome before the court of appeals received notice that this Court had denied certiorari. *Id.* These distinctions undermine the analogy to the present case, which is to say nothing of the post-*Alphin* decisions from this Court that Petitioner seeks to vindicate. But even if the Ninth Circuit is correct and *Alphin* shows an agreement with the Fourth Circuit, that agreement only makes this Court's review more essential.

There is little logic in permitting stays based on Rule 41(d)(1) to continue in perpetuity while stays based on Rule 41(d)(2) must terminate immediately with the denial of certiorari: all delay impedes finality, regardless of the Rule on which it is based. *See Schad*, 570 U.S. at 525–26; *Bell*, 545 U.S. at 813. Likewise, all post-certiorari litigation renders this Court's review

meaningless, regardless of the appellate court's excuse for continuing proceedings. The Ninth Circuit therefore acted contrary to Rule 41 and this Court's recent precedent interpreting it. Certiorari or summary reversal is needed to confirm that the mandate should have issued on November 14, 2013 or, at the latest, after the denial of certiorari on May 19, 2014.

B. Contrary to this Court's Requirement, No Extraordinary Circumstances Justified the Ninth Circuit Withholding Its Mandate.

Schad and *Bell* make clear that, if courts may deviate from Rule 41 at all, they may do so only in extraordinary circumstances. *Schad*, 570 U.S. at 525. No such circumstances exist here—in fact, the circumstances of this case mirror those in *Bell* and *Schad*, where this Court found the appellate courts had abused their discretion by failing to issue their mandates after this Court denied certiorari.

In *Bell*, this Court compared the extraordinary circumstances necessary to withhold a mandate after certiorari to the exacting miscarriage-of-justice standard required to recall a mandate. 545 U.S. at 812. The Sixth Circuit erred, this Court concluded, "[b]y withholding the mandate for months" based on factual evidence providing "some support" for the previously-rejected claim. *Id.* at 812–13. Here, the Ninth Circuit's expectation of a development in the law, namely its own holding in *McKinney*, is far less extraordinary than the presentation of additional factual evidence. Evolution in the law is routine. *Henry*, 766 F.3d at 1072 (Tallman, J., dissenting) ("The

law changes all the time. Nothing so ordinary could be extraordinary.").

If anything, this case is easier than *Bell* and *Schad* based on the amount of time elapsed. In *Bell*, this Court found a delay of only five months between this Court's denial of rehearing and the Ninth Circuit's issuance of the mandate to weigh in favor of finding an abuse of discretion. *Bell*, 545 U.S. at 804; *Cf. Calderon v. Thompson*, 523 U.S. 538, 552 (1998) (finding, in recall-of-mandate case, that Ninth Circuit had "for all practical purposes lay in wait while this Court acted on the petition for certiorari" and California commenced execution and clemency procedures). Here the delay is an order of magnitude greater: nearly four years elapsed between the denial of certiorari and the Ninth Circuit's amended opinion.

Further, as in *Bell* and *Schad*, the Ninth Circuit below delayed the mandate to address an argument it had previously considered and rejected. *See Schad*, 570 U.S. at 526–27 (finding abuse of discretion when mandate stayed to consider "an argument [the Ninth Circuit] had considered and rejected months earlier"); *Bell*, 545 U.S. at 806 (court's "opportunity to consider these arguments at the rehearing stage is yet another factor supporting our determination that the decision to withhold the mandate was in error"). Poyson argued in his 2010 opening brief that the Arizona Supreme Court had erred under *Eddings* by refusing to consider evidence of mitigation that was not causally connected to his crimes. Br. of Appellant, No. 10–99005, at 27–54. After the Ninth Circuit denied relief on this claim in 2013, Poyson unsuccessfully raised the same argument in his petitions for panel and en banc

rehearing and in his petition for certiorari. *See Poyson v. Ryan*, No. 13–9097.

Ultimately, Poyson enjoyed every opportunity for the Ninth Circuit to review his claims. This Court "presume[s] that the Ninth Circuit carefully considers each motion a capital defendant presents on habeas review." *Schad*, 570 U.S. at 527. For the orderly functioning of the judicial system, this presumption is essential. Therefore, "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice . . . ." *Calderon*, 523 U.S. at 558. This Court should grant certiorari or summarily reverse the Ninth Circuit with instruction to issue the mandate on its November 2013 opinion.

II. The Ninth Circuit Departed from this Court's Precedent and Precedent in the Tenth and Eleventh Circuits by Presuming Constitutional Error.

Even if the Ninth Circuit's continued exercise of jurisdiction over this case were appropriate, its resolution of the *Eddings* claim contravened AEDPA and this Court's jurisprudence. AEDPA sets forth a "difficult to meet and highly deferential standard" for evaluating state-court rulings, which "demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quotations and citations omitted); *see also Richter*, 562 U.S. at 102 ("If [AEDPA's] standard is difficult to meet, that is because it was meant to be.").

The reasons for this high bar are rooted in comity and federalism concerns—after all, habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 562 U.S. at 102–03 (quotations omitted). Here, the Ninth Circuit disregarded this Court's instructions on AEDPA deference by adopting a presumption that the Arizona Supreme Court violated *Eddings*. This notwithstanding the fact that the Ninth Circuit had previously found no violation on the same record.

Under 28 U.S.C. § 2254(d)(1), a federal court may only grant habeas relief if the state court's decision was "contrary to . . . clearly established Federal law." In considering whether a prisoner has met this standard, a federal court must presume "'that state courts know and follow the law.'" *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). If, after considering all arguments that "could have supported" the state court's ruling, the federal court concludes that "fairminded jurists could disagree on the correctness of the state court's decision," it *must* deny relief. *Richter*, 562 U.S. at 101–02.

Eddings' holding is simple: a court may not, as a matter of law, refuse to consider any relevant mitigating evidence. 455 U.S. at 113–14. A state court may, however, determine the appropriate "weight to be given relevant mitigating evidence," and may rely on the absence of a causal nexus for that purpose. *Id.* at 114–15; *see also Harris v. Alabama*, 513 U.S. 504, 512 (1995) ("[T]he Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation").

Because of *Eddings*' clarity, the Ninth Circuit before *McKinney* had little difficulty applying that precedent in AEDPA cases. Twelve panel opinions (in addition to Poyson's) rejected *Eddings* claims, appropriately applying AEDPA deference and reviewing only the language the state court used in the particular case at issue. *Hedlund v. Ryan*, 750 F.3d 793, 813–20 (9th Cir. 2014), *opinion withdrawn and superseded*, 815 F.3d 1233 (9th Cir. 2016), *and amended and superseded*, 854 F.3d 557 (9th Cir. 2017); *Murray (Roger) v. Schriro*, 746 F.3d 418, 454–56 (9th Cir. 2014), *opinion amended and superseded*, __ F.3d __, 2018 WL 891266 (9th Cir. Feb. 14, 2018); *Clabourne v. Ryan*, 745 F.3d 362, 371–74 (9th Cir. 2014); *Murdaugh v. Ryan*, 724 F.3d 1104, 1122 (9th Cir. 2013); *McKinney v. Ryan*, 730 F.3d 903, 916–21 (9th Cir. 2013), *reversed on rehearing en banc*, 813 F.3d at 802; *Hurles v. Ryan*, 706 F.3d 1021, 1034–36 (9th Cir. 2013), *withdrawn and superseded*, 752 F.3d 768 (9th Cir. 2014); *Stokley v. Ryan*, 705 F.3d 401, 404–05 (9th Cir. 2012); *Towery v. Ryan*, 673 F.3d 933, 944–47 (9th Cir. 2012); *Schad v. Ryan*, 671 F.3d 708, 722–25 (9th Cir. 2011); *Greenway v. Schriro*, 653 F.3d 790, 807–08 (9th Cir. 2011); *Lopez (Samuel) v. Ryan*, 630 F.3d 1198, 1202–04 (9th Cir. 2011); *Lopez (George) v. Schriro*, 491 F.3d 1029, 1036-38 (9th Cir. 2007). In only two cases did the panels find *Eddings* error—and they did so based on case-specific language. *See Williams v. Ryan*, 623 F.3d 1258 (9th Cir. 2010); *Styers v. Schriro*, 547 F.3d 1026 (9th Cir. 2008). This practice was consistent with the rules announced by this Court and observed in every other circuit.

McKinney changed the landscape. There, a 6–5 en banc majority surveyed the Arizona Supreme Court's death-penalty jurisprudence and concluded that the

state court had violated *Eddings* between 1989 and 2005 by refusing to consider mitigation not causally connected to the crime. 813 F.3d at 818–19. The Ninth Circuit acknowledged that the Arizona Supreme Court had never announced such a test. *Id.* And, as the five dissenting judges observed, the Arizona Supreme Court's purported application of an unlawful test was anything but consistent—in fact, the Ninth Circuit itself had upheld the state court's application of *Eddings* in myriad cases during the same time period. *See id.* at 842–46 (Bea, J., dissenting) (collecting cases).

The ensuing body of habeas precedent has been chaotic. Some panels have read *McKinney* to apply only to "that specific case," *Greenway v. Ryan*, 866 F.3d 1094, 1095–96 (9th Cir. 2017), while the present panel embodies the opposite extreme. The panel below stretched *McKinney* further than any panel to date, interpreting it to require a presumption that the Arizona Supreme Court committed *Eddings* error. App. 46 (Ikuta, J., concurring) ("[*McKinney*] held that we must presume the Arizona Supreme Court applied the unconstitutional causal nexus test between 1989 and 2005, even when, as here, the court expressly discussed the weight of the evidence."). In fact, three of the four reasons the court cited for finding causal-nexus error (including the mere fact that the Arizona Supreme Court decided Poyson's appeal in 2000) derive directly from *McKinney* and not from the record in this case. App. 28–30.

Presuming that a state court erred in one case merely because it erred in another is irreconcilable with both AEDPA and this Court's jurisprudence. *See Visciotti*, 537 U.S. at 24 ("[R]eadiness to attribute error

is inconsistent with the presumption that state courts know and follow the law."). And setting aside the AEDPA/*Visciotti* presumption, a federal habeas court must conduct a case-specific assessment to determine whether the decision under review—not decisions in other cases—violates federal law. *See* 28 U.S.C. § 2254(d)(1) (requiring showing that "a decision" was contrary to law); *accord Pinholster*, 563 U.S. at 182.

Unsurprisingly, the Ninth Circuit's departure from this Court's precedent puts it at odds with other circuit courts of appeals. The Eleventh Circuit, for example, has held that it "will not presume that a state court misapplied federal law." *Kokal v. Secretary, Dep't of Corrections*, 623 F.3d 1331, 1346 (11th Cir. 2010) (quotation omitted). Like the present case, *Kokal* involved a state supreme court's weighing of mitigation evidence. Unlike the present case, the Eleventh Circuit appropriately afforded AEDPA deference to a state-court opinion.

Likewise, the Tenth Circuit has relied on the presumption of state courts' obedience to federal law—*i.e.,* the presumption opposite the *McKinney* rule applied below—when the state court "both correctly identified and reasonably applied" this Court's precedent. *Eizember v. Trammell*, 803 F.3d 1129, 1142 (10th Cir. 2015) (Gorsuch, J.). The precedent at issue in *Eizember* was *Wainwright v. Witt*, 469 U.S. 412 (1985), but the presumption of state courts' competence and fairness applies equally to Arizona's application of *Eddings* during the 16 years in question. During that time, including in this case, the state court "both correctly identified and reasonably applied" the mitigation rule from *Eddings*. *E.g.,* App. 284–85

(discussing "weight" and "value" of Respondent's mitigation evidence). Even the Ninth Circuit admitted that the Arizona Supreme Court's reasoning "suggest[ed] the possibility that the court applied a causal nexus test as a permissible weighing mechanism" rather than as a constitutionally impermissible bar to certain evidence. App. 30. In the Tenth Circuit and every other circuit that follows the presumption affirmed in *Eizember*, the Arizona Supreme Court would have enjoyed the benefit of any doubt about its "possibl[e]" use of a "weighing mechanism" rather than an unlawful ban.

Had this case been decided by the Tenth or Eleventh Circuits, a different presumption would have applied and a different result would have followed. In fact, nothing proves the importance of the presumption better than the Ninth Circuit panel's own course reversal between 2013 and 2018, during which time the only change was the arrival of *McKinney*.

The Ninth Circuit's presumption of error has already led it to grant habeas relief in two cases besides this one, *see Hedlund v. Ryan*, 854 F.3d 557, 586–87 (9th Cir. 2017); *McKinney*, 813 F.3d at 827, and threatens numerous other Arizona capital cases. In the Ninth Circuit, twelve inmates have raised causal-nexus claims, either standing alone or as part of ineffective-assistance claims. *See Djerf v. Ryan*, No. 08–99027, Dkt. # 75 at 108–18; *Kayer v. Ryan*, No. 09–99027, Dkt. # 44, at 26–38; *Lee v. Schriro*, No. 09–99002, Dkt. # 14, at 87–101 (stayed pending remand to district court); *Martinez v. Ryan*, No. 08–99009, Dkt. # 118 at 80–82; *Ramirez v. Ryan*, No. 10–99023, # 30, at 52–55; *Rienhardt v. Ryan*, No. 10–99000, Dkt. # 23 at 113–19

(stayed pending remand to district court); *Salazar v. Ryan*, No. 08–99023, Dkt. # 36 at 90–93 (stayed pending remand to district court); *Sansing v. Ryan*, No. 13–99001, Dkt. # 51 at 75–91; *Spears v. Ryan*, No. 09–99025, Dkt. # 22 at 90–94 (stayed pending remand to district court); *Spreitz v. Ryan*, No. 09–99006, Dkt. # 92; *White v. Ryan*, No. 15–99011, Dkt. # 19 at 116–123; *see also Apelt v. Ryan*, No. 15–99015, Dkt. # 61 (petition for panel and en banc rehearing). And in five cases remanded to the district court under *Martinez v. Ryan*, 566 U.S. 1 (2012), the Ninth Circuit has expanded the scope of the remands to include *McKinney*'s impact on the case. *See Detrich v. Ryan*, No. CV–03–00229–TUC–DCB, Dkt. # 447; *Doerr v. Ryan*, No. CV–02–00582–PHX–JTT, Dkt. # 184; *Greene v. Schriro*, No. CV–03–00605–TUC–FRZ, Dkt. # 128; *Smith v. Ryan*, No. CV–03–01810–PHX–SRB, Dkt. # 95, 96; *see also Walden v. Ryan*, No. CV–99–00559–TUC–RCC, Dkt. # 208 (rejecting argument that *McKinney* affected sentence but granting certificate of appealability).

By refusing to construe the Arizona Supreme Court's decision in a manner that complies with the Constitution and instead distorting the decision in search of a constitutional violation, the Ninth Circuit has again defied this Court's AEDPA jurisprudence. This is particularly true because the Ninth Circuit acknowledged that the state-court decision could be read to employ a causal-nexus test only as a constitutionally permissible weighing mechanism, thereby confirming that, at a minimum, "fairminded jurists could disagree" about whether the decision was contrary to *Eddings*. App. 30; *Richter*, 562 U.S. at 101 (quotations omitted). This Court has frequently

granted certiorari to address misapplications of AEDPA, often by the Ninth Circuit. *See, e.g., Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam) ("The Court of Appeals in this case substituted its judgment for that of a California jury on the question whether the prosecution's or the defense's expert witnesses more persuasively explained the cause of a death. For this reason, certiorari is granted and the judgment of the Court of Appeals is reversed."); *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) (per curiam) (Ninth Circuit decision in AEDPA case was "as inexplicable as it is unexplained"); *Schriro v. Smith*, 546 U.S. 6, 8 (2005) (per curiam) (finding that Ninth Circuit had "exceeded its limited authority on habeas review"). The Court should grant certiorari in this case and correct the Ninth Circuit's inversion of the presumption that state courts know and follow the law.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully Submitted,

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