CAPITAL CASE
No. 17-1274

IN THE

Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ROBERT ALLEN POYSON,

Respondent.

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

BRIEF IN OPPOSITION

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INTRODUCTION

The State of Arizona seeks review of two issues: (1) whether the court of appeals erred in "withhold[ing] its mandate indefinitely … after this Court denied a petition for certiorari" and (2) whether the court below improperly "presume[d] constitutional error" by finding that the state courts applied an admittedly unconstitutional standard to bar consideration of Robert Poyson's mitigation evidence during capital sentencing. Pet. i. But neither issue is actually presented here, and both are directly contrary to positions Arizona took below. Arizona has thus forfeited or waived, or is judicially estopped from raising, claims at the core of both issues. Nor does the petition implicate any split of authority or any important and recurring issue.

Arizona first contends that the mandate in this case should have issued (i) in November 2013, when the court of appeals denied Mr. Poyson's petitions for panel and *en banc* rehearing, or (ii) "at the latest" in May 2014, when this Court denied Mr. Poyson's petition for writ of certiorari. But Arizona has forfeited or waived the first of these points: Below, it argued only and explicitly that the mandate should have issued after the denial of certiorari. And in opposing Mr. Poyson's petition for writ of certiorari in April 2014, Arizona did not argue that the mandate should have issued months before; instead, it urged this Court to deny review because, in light of "the Ninth Circuit's order … stay[ing] the ruling on the petition for panel rehearing pending the *en banc* resolution of *McKinney* [v. *Ryan*] … *there is no final Ninth Circuit decision to review*." Appendix 11a–12a ("App.") (emphasis added). That is precisely the opposite of Ari-

zona's newly minted claim that the court of appeals "subverted finality." Pet. 2.

In all events, Arizona is mistaken that there was any procedural impropriety in withholding the mandate during this brief period. Exercising its power under Federal Rule of Appellate Procedure 41(b) to "shorten or extend the time" to issue the mandate, the court of appeals followed its usual practice in capital habeas cases, which is codified in the local rules, and withheld the mandate pending resolution of Mr. Poyson's petition for writ of certiorari. Although Arizona is familiar with that practice and the local rule, the Petition makes no mention of either. Nor is the practice unique to the Ninth Circuit, as other courts of appeals have similar rules.

Arizona's claim that the mandate should have issued immediately upon the denial of certiorari is equally meritless. To be sure, in the "typical case" Rule 41(d)(2) requires the mandate to issue when this Court denies review. *Bell* v. *Thompson*, 545 U.S. 794, 806 (2005). But that "default rule" applies only "where the stay of mandate is entered *solely* to allow this Court time to consider a petition for certiorari." *Id.* (emphasis added); *accord Ryan* v. *Schad*, 570 U.S. 521, 524 (2013) (per curiam). Here, at the time this Court denied review, Mr. Poyson's petition for panel rehearing had been reinstated pending the outcome of *en banc* proceedings in *McKinney*. Thus, the mandate was stayed automatically "until disposition of" the reinstated "petition for panel rehearing," Fed. R. App. P. 41(d)(1), which the court of appeals confirmed by entering a stay order on the docket. That stay remained in effect—as required by Rule 41(d)(1)—until the *en banc* court decided *McKinney* and the panel in this case resolved Mr. Poyson's reinstated rehearing

petition. Rule 41(d)(2) has no application in that scenario.

For the same reason, Arizona identifies no conflict of authority. Cases construing Rule 41(d)(2) and any "extraordinary circumstances" exception thereunder (Pet. 12, 16) are inapposite here. Neither *Bell* nor *Schad* nor any court of appeals decision Arizona cites says anything about a court of appeals' power to continue appellate proceedings after the denial of certiorari where a rehearing petition is pending. Nor has Arizona made any showing that this issue is important or recurring.

Arizona's second issue is no stronger. Arizona claims that the court of appeals wrongly "presume[d] constitutional error" in concluding that the Arizona Supreme Court barred consideration of Mr. Poyson's mitigation evidence because it lacked a causal nexus to his crime. This is the same argument Arizona made in unsuccessfully seeking certiorari in *McKinney*, and it has not improved with age. The Ninth Circuit has adopted no such presumption, as other post-*McKinney* decisions denying relief on similar claims establish. Nor did the court below "disregard [the] state court's language"; rather, it parsed that language to conclude that the Arizona court applied the same unconstitutional test in this case that it applied in many others.

The state also cannot dispute that the Arizona Supreme Court applied an unconstitutional causal-nexus test in this case, because that is exactly what Arizona urged the court to do. The state's briefing in Mr. Poyson's appeal of his death sentence argued explicitly that his mitigation evidence could not "be found as a nonstatutory mitigating factor" absent "a nexus, or causal connection, between that [evidence] and the subsequent criminal act." App. 24a. This

test—which the state now concedes is unconstitutional, Pet. 23—is precisely the one Arizona argues was not applied below. That claim is meritless, and judicial estoppel stands squarely in the way of Arizona's effort to seek review.

RULES INVOLVED

In addition to the provisions cited in the petition, this case involves Ninth Circuit Rule 22-2(e), which governs circuit procedure for stays of execution or mandate in capital habeas cases. It provides, as relevant:

> When the panel affirms a denial or reverses a grant of a first petition or motion, it shall enter an order staying the mandate pursuant to FRAP 41(b).

STATEMENT

I. STATE COURT PROCEEDINGS.

In April 1996, when Mr. Poyson was nineteen years old, he joined a 58-year-old man and his 14-year-old girlfriend in planning and carrying out a triple murder. Pet. App. 7a. Mr. Poyson was convicted by a jury for the three murders. *Id.* at 9a.

1. At his presentencing hearing, Mr. Poyson presented evidence of his traumatic childhood, mental health issues, and past substance abuse. *Id.* at 67–69a, 71–76a. With respect to his childhood, he established that he was "raised by his mother and a series of stepfathers, some of whom drank and used drugs and were physically abusive and one of whom, [Mr. Poyson's] favorite, committed suicide when [Mr. Poyson] was 10 or 11." *Id.* at 68a. In addition, "[s]hortly after his stepfather's suicide, [Mr. Poyson] was sexually abused by an acquaintance" and "[t]hereafter,

[Mr. Poyson's] behavior deteriorated." *Id.* Mr. Poyson "began abusing alcohol and drugs, skipping school, and getting into trouble with the law." *Id.*

The sentencing court found that Mr. Poyson had proved that he "suffered a dysfunctional childhood, that he was subjected to physical and sexual abuse, and that he was subjected to certain levels of mental abuse," *Id.* at 73a, but nonetheless excluded this evidence from the sentencing calculus because Mr. Poyson had not proven a "connection between that abuse, that loss, and his subsequent criminal behavior," *id.* at 75a.

With respect to his mental health issues, Mr. Poyson "submitted a psychological evaluation" that "noted factors in [Mr. Poyson's] life that predisposed him to substance abuse, delinquency, and crime." *Id.* at 67a–68a. "These [factors] included a chaotic home environment with no consistent father figure, childhood neglect, physical abuse, sexual assault, and a possible genetic link through his biological father." *Id.* at 68a. The doctor "diagnosed [Mr. Poyson] with adjustment disorder with depressed mood, mild intensity; antisocial personality disorder; alcohol abuse; and polysubstance dependence." *Id.*

While the sentencing court again agreed that Mr. Poyson "established that there were certain … personality disorders that [he] … in fact, may have been suffering from," it did "not find that they [rose] to the level of being a mitigating factor because [it was] unable to draw any connection whatsoever with such personality disorders and the commission of these offenses." *Id.* at 71a.

Finally, the sentencing court refused to consider the evidence of Mr. Poyson's history of substance abuse as a mitigating factor because Mr. Poyson had

not shown that substance abuse had impaired his ability to engage in goal-oriented behavior at the time of the crimes. *Id.* at 75a. The sentencing judge imposed the death penalty. *Id.* at 62a.

2. On appeal, Arizona urged the state high court to apply a causal-nexus test to bar consideration of Mr. Poyson's mitigation evidence as a matter of law, arguing that "[i]n order for a defendant's personal or familial background *to be found as a non-statutory mitigating factor, there must be a nexus, or causal connection, between that background, and the subsequent criminal act*." App. 24a (emphasis added); see also *id.* (collecting cases holding that such a nexus is "require[d]"). For example, Arizona cited *State* v. *Brewer* as holding that a "personality disorder [is] not mitigating without proof that it controlled defendant's conduct or so impaired his mental capacity as to warrant leniency." *Id.* (quoting 826 P.2d 783, 802 (Ariz. 1992)).

The Arizona Supreme Court agreed with the state and the sentencing court that Mr. Poyson had failed to prove any mitigating factors (apart from his age). Pet. App. 283–84a. The court thus refused to consider evidence that Mr. Poyson suffered from severe mental health issues. *Id.* at 285a. The court acknowledged that Mr. Poyson had been diagnosed with antisocial personality disorder, but relied on *Brewer* to reject this evidence because he failed to show that his antisocial personality disorder "controlled [his] conduct." *Id.* at 284a (quoting 826 P.2d at 802). In the same vein, the Arizona Supreme Court held that the evidence of Mr. Poyson's traumatic childhood, which included physical, mental, and sexual abuse, was "without mitigating value" because Mr. Poyson failed to demonstrate how this abuse and resulting trauma "rendered him unable to control his

conduct." *Id.* at 285a. And the court agreed with the trial court that Mr. Poyson's claims "that he had used drugs or alcohol in the past or was under the influence of drugs on the day of the murders [were] little more than 'vague allegations.'" *Id.* at 284a. The Arizona Supreme Court accordingly affirmed Mr. Poyson's death sentence. *Id.* at 288a.

II. FEDERAL HABEAS PROCEEDINGS.

Mr. Poyson filed a habeas petition in federal district court, arguing that the Arizona courts' causal-nexus test violated the rule that a "sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence," *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 (1982). Pet. App. 59a–149a. On appeal, a divided Ninth Circuit panel found the record ambiguous, stating that it "[did] not reveal whether the court applied a nexus test as an unconstitutional screening mechanism or as a permissible means of determining the weight or significance of mitigating evidence." *Id.* at 219a. Judge Thomas dissented in part, explaining that "[t]he Arizona Supreme Court unconstitutionally excluded mitigating evidence from its consideration because the evidence was not causally related to the crimes." *Id.* at 251a. He acknowledged the court's obligation not to presume constitutional error, *id.* at 255a, but explained that a federal court must "look to the substance of the record itself to determine whether the state court unconstitutionally excluded relevant mitigating evidence from consideration at sentencing." *Id.* at 257a–58a. That initial opinion was issued on March 22, 2013.

Mr. Poyson timely petitioned for panel rehearing and rehearing *en banc*. On November 7, 2013, the court of appeals denied his petitions, the latter over a dissent by twelve judges. *Id.* at 163a–64a. At that point, Local Rule 22-2(e) dictated that the mandate

be stayed to allow time for the filing and disposition of a petition for writ of certiorari. See 9th Cir. R. 22-2(e) ("When the panel affirms a denial … of a first [habeas] petition … it shall enter an order staying the mandate pursuant to FRAP 41(b)."). Although the panel did not enter a formal stay order on the docket, the court withheld the mandate as required by the Local Rule, which is its routine practice. Arizona did not move for the mandate's issuance at any time.

On March 7, 2014, Mr. Poyson timely filed a petition for writ of certiorari. Pet. App. 159a. On March 12, just five days later, the Ninth Circuit granted *en banc* review in *McKinney* v. *Ryan* to consider the same causal-nexus issue presented by Mr. Poyson's appeal and petition. Accordingly, on April 2, 2014, the court of appeals amended its November 7, 2013 order denying Mr. Poyson's rehearing petitions. The amended order reinstated Mr. Poyson's panel rehearing petition (but not his *en banc* petition) and "stay[ed] proceedings on the petition for panel rehearing pending resolution of *en banc* proceedings in *McKinney*." *Id.* at 158a. The court also directed the clerk to "stay the mandate." *Id.*

Arizona responded to the amended order by urging this Court to deny Mr. Poyson's petition for writ of certiorari "as premature," because the pending rehearing petition meant "there is no final Ninth Circuit decision to review." App. 11a–12a. Alternatively, Arizona asked this Court to hold the petition "pending the Ninth Circuit's *en banc* decision in *McKinney*." *Id.* at 15a. Arizona attached to its brief in opposition the April 2, 2014 order in which the Ninth Circuit extended the stay of the mandate. *Id.* at 16a–18a. Mr. Poyson likewise asked this Court to defer consideration of his petition. *Id.* at 1a–4a.

In May 2014, this Court denied Mr. Poyson's petition and issued a notice of the denial to the Ninth Circuit. Pet. App. 156a. Mr. Poyson's panel rehearing petition remained pending and thus the mandate remained stayed, as required by the Ninth Circuit's April 2 order and Rule 41(d)(1).

The Ninth Circuit issued an *en banc* opinion in *McKinney* in December 2015. 813 F.3d 798 (9th Cir. 2015) (en banc). Arizona then petitioned for a writ of certiorari in *McKinney* in March 2016, raising the same presumption-of-error argument it makes here. Petition for Writ of Certiorari at ii, *Ryan* v. *McKinney,* No. 15-1222 (Mar. 28, 2016), 2016 WL 1358973 ("*McKinney* Pet."). The court of appeals accordingly extended the stay in Mr. Poyson's case on May 13, 2016, "pending resolution of Supreme Court proceedings in" *McKinney*. Pet. App. 154a. This Court denied Arizona's *McKinney* petition on October 3, 2016. The court of appeals therefore ordered supplemental briefing in Mr. Poyson's case on "the impact of *McKinney*" and again extended the stay pending "further order of this court." *Id*. at 152a–53a. The supplemental briefing was completed in mid-January 2017. See Order, *Poyson* v. *Ryan*, No. 10-99005 (9th Cir. Jan. 13, 2017).

In January 2018, Mr. Poyson's original panel granted the petition for panel rehearing and filed an amended opinion reversing the district court's denial of Mr. Poyson's habeas petition. Pet. App. 1a–52a. The court held that the Arizona Supreme Court had violated Mr. Poyson's Eighth Amendment right to individualized sentencing by applying a causal-nexus test to his mitigating evidence of a troubled childhood, abuse, and mental health issues. *Id.* at 27a–32a. The court of appeals concluded that the state court rejected Mr. Poyson's mitigation evidence "be-

cause the evidence bore no causal connection to the crimes." *Id.* at 27a–28a. In particular, the state court said that Mr. Poyson's traumatic childhood was "without mitigating value" because he "did not show" that it "somehow rendered him unable to control his conduct." *Id.* at 28a. The court of appeals also noted that the Arizona Supreme Court relied explicitly on precedents "applying an unconstitutional causal nexus test," and that its decision came "in the midst of the 15-year period during which that court consistently articulated and applied its causal nexus test." *Id.* at 29a.

Finally, the panel held that the state court's error had substantial and injurious effect, and therefore granted habeas relief on this claim. *Id.* at 32a–35a. The panel denied relief on Mr. Poyson's claim that the Arizona courts failed to consider his history of substance abuse as a mitigating factor, concluding that the state courts had considered the evidence but found Mr. Poyson's factual showing insufficient to overcome the aggravating factors present. *Id.* at 35a–38a.

REASONS FOR DENYING THE PETITION

I. REVIEW OF ARIZONA'S RULE 41 CLAIM IS NOT WARRANTED.

Arizona's first claim rests on two basic contentions: (1) that the Ninth Circuit should have issued its mandate in November 2013 when it denied Mr. Poyson's petitions for panel and *en banc* rehearing, or (2) that Rule 41(d)(2) required the mandate to issue "at the latest, after the denial of certiorari on May 19, 2014." Pet. 16. These claims do not warrant review, either individually or in combination. The first is forfeited or waived, and both are mistaken. And Arizona cannot show that a court's power to resolve a

pending rehearing petition after the denial of certiorari is a disputed, important, or recurring issue.

A. Arizona's Argument That The Mandate Should Have Issued In November 2013 Is Forfeited, Waived, Or Both.

Arizona contends that the court of appeals "was required to issue the mandate on November 14, 2013—seven days after its order denying panel and en banc rehearing." Pet. 13. Arizona thus argues that the "belated" stay in April 2014 came too late, because the court was "already in violation of Rule 41(b)." *Id.* at 13–14. As explained below, this assertion is mistaken and implicates no split of authority. But this claim also fails for a more basic reason: It is forfeited, waived, or both.

In its supplemental briefing below, Arizona did not argue that the mandate should have issued in November 2013. It argued only and explicitly that, under Rule 41(d)(2), the mandate should have issued *in May 2014*, "immediately []after" this Court "denied both Poyson's motion to defer consideration and his petition" for writ of certiorari. Respondents-Appellees' Supplemental Br. at 3, *Poyson* v. *Ryan*, No. 10-99005 (9th Cir. Dec. 30, 2016). As a result, the Ninth Circuit addressed Arizona's argument only on those terms, Pet. App. 22a n.5, and this Court in turn lacks the benefit of the Ninth Circuit's explanation of its own conduct from November 2013 to May 2014 or its analysis of Arizona's current argument. What is more, Arizona told this Court in successfully opposing Mr. Poyson's petition for writ of certiorari that review should be denied because the reinstatement of Mr. Poyson's rehearing petition meant the original panel decision in this case was "no[t] final." App. 12a. Arizona said nothing suggesting that the mandate should already have issued. See *id.*

Because this is "a court of review, not of first view," *McWilliams* v. *Dunn*, 137 S. Ct. 1790, 1801 (2017), Arizona cannot pursue any contention that the mandate should have issued in November 2013. See *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 398 (2015) ("Absent unusual circumstances … we will not entertain arguments not made below.").

B. The Ninth Circuit's Stay Of The Mandate Was Authorized By Rule 41 And The Local Rules.

Forfeiture aside, the court of appeals' stay of the mandate, while lengthy, was entirely proper.

Rule 41(d)(1) provides that the "timely filing of a petition for panel rehearing … stays the mandate until disposition of the petition." This stay is automatic: No order must be entered for the stay to take effect. Pet. 14. Likewise, Rule 41(b) provides that the mandate need not issue until "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 … whichever is later." Fed. R. App. P. 41(b). "The court may shorten or extend the time." *Id.*

These provisions, not Rule 41(d)(2), controlled (and authorized) the stay of the mandate in this case. The original panel decision rejecting Mr. Poyson's claims issued on March 22, 2013. Under Rule 41(b), the mandate did not issue immediately, to give Mr. Poyson time to petition for rehearing. See Fed. R. App. P. 35(c), 40(a)(1). On April 12, 2013, he did so, seeking both panel and *en banc* rehearing. Those petitions were denied on November 7, 2013. This took seven months presumably because the issues were hotly contested; twelve judges dissented from the denial of the *en banc* petition. Pet. App. 163a–64a.

The Ninth Circuit then held its mandate as required by Local Rule 22-2(e), which dictates that "[w]hen the panel affirms a denial … of a first [habeas] petition" in a capital case, "it shall enter an order staying the mandate pursuant to FRAP 41(b)." Here, although the panel did not enter a formal stay order on the docket, the clerk's office followed the Local Rule and withheld the mandate, "as it routinely does in all capital cases." See *Henry* v. *Ryan*, 766 F.3d 1059, 1062 (9th Cir. 2014) (W. Fletcher, J., concurring). Rule 22-2(e) is a valid exercise of the court of appeals' power, conferred by Rule 41(b), to "shorten or extend the time" to issue the mandate. See *id.* Arizona does not contend otherwise, or even mention the Local Rule.[1]

The stay under Local Rule 22-2(e) remained in effect from November 7, 2013 (when Mr. Poyson's rehearing petitions were denied) until April 2, 2014 (when the court reinstated Mr. Poyson's panel rehearing petition). Withholding the mandate during this time was not some underhanded "delay tactic[]" (Pet. 1), but rather allowed Mr. Poyson time to prepare and file a petition for writ of certiorari, as capital defendants invariably do. Mr. Poyson did so too: After obtaining a 30-day extension from Justice Ken-

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[1] Arizona cannot claim ignorance of Rule 22-2(e); the Ninth Circuit's rehearing *en banc* order in *Henry* (which Arizona cites five times, Pet. 11–16), explains the court's "routine[]" practice under the Rule, 766 F.3d at 1062 (W. Fletcher, J., concurring), and Arizona's filings in this Court in *Henry* discussed it too, see Petition for Writ of Mandamus and/or Prohibition, or Writ of Certiorari 17 n.4, *In re Ryan*, No. 14-375 (Sept. 24, 2014), 2014 WL 4925005; Reply Brief 2 & n.1, *In re Ryan*, No. 14-375 (Nov. 21, 2014), 2014 WL 6663067. In *Henry*, Arizona attempted to dismiss Rule 22-2(e) as "ambiguous" because it "appears under a heading relating to stays of execution," *id.*, but the Rule refers explicitly to "staying the mandate pursuant to FRAP 41(b)."

nedy, Mr. Poyson filed his petition in this Court on March 7, 2014. That petition was still pending—and thus the stay was still in place—when the Ninth Circuit reinstated Mr. Poyson's panel rehearing petition roughly a month later. At that point, the automatic Rule 41(d)(1) stay resumed, which the Ninth Circuit confirmed through the entry of three express stay orders. Pet. App. 152a–54a, 158a; see *id.* at 22a n.5.

Shortly after the Ninth Circuit reinstated Mr. Poyson's panel rehearing petition, Arizona filed its brief in opposition to his petition for writ of certiorari in this Court. If there was a time to sound the alarm about an improperly "resurrected" rehearing petition, a "belatedly stayed … mandate," or a "departure from well-established mandate procedures" (Pet. 1, 11), this was it. Instead, Arizona *endorsed* the Ninth Circuit's decision to reopen the case and await the result in *McKinney*, urging this Court to dismiss the petition, or at least defer consideration "pending the [Ninth Circuit's] *en banc* resolution of *McKinney*," because "*there is no final Ninth Circuit decision to review*." App. 11a–12a (emphasis added). Far from asserting any procedural impropriety, Arizona recognized then what it refuses to admit now: "'[W]hile [a] petition for rehearing is pending,' or while the court is considering, on its initiative, whether rehearing should be ordered," the case remains pending in the court of appeals and the mandate should not issue. *Id.* at 12a (quoting *Missouri* v. *Jenkins*, 495 U.S. 33, 46 (1990)).

The remainder of the delay is easily explained: From April 2, 2014 through the panel's final decision in January 2018, Mr. Poyson's panel rehearing petition remained pending. To be sure, that is a long time. But the court of appeals was not idle. Initially, the panel in this case was awaiting the resolution of

the *McKinney en banc* proceedings, which seemed likely to (and ultimately did) influence the outcome of Mr. Poyson's reinstated petition. The *McKinney en banc* opinion issued in December 2015. 813 F.3d 798. The next ten months were taken up by the filing and disposition of Arizona's unsuccessful petition for writ of certiorari in *McKinney*. After this Court denied that petition in October 2016, the Ninth Circuit promptly ordered supplemental briefing in this case, Pet. App. 152a–53a, which was completed in roughly two months. The panel issued its revised decision one year later—not an unusual amount of time to resolve a complex capital case in a busy court where a typical appeal takes almost 15 months to resolve.[2]

Consequently, the Ninth Circuit's stay was authorized by (i) Rules 41(b) and (d)(1) from March to November 2013; (ii) Rule 41(b) and Local Rule 22-2(e) from November 2013 to April 2014; and (iii) Rules 41(b) and (d)(1) from April 2014 through the end of the case.

C. There Is No Conflict With Rule 41(d)(2) Or Any Decision Of This Court Or Any Court Of Appeals.

Because the stay in this case was governed by Rules 41(b) and (d)(1) and Local Rule 22-2(e), Arizona's petition presents a controversy not supported by the record. Regardless, Arizona fails to identify any conflict with Rule 41(d)(2), this Court's decisions in *Bell* and *Schad*, or any court of appeals decision.

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[2] See Admin. Office of the U.S. Courts, *U.S. Courts of Appeals—Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2016*, http://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2016.pdf.

1. Arizona focuses heavily on Rule 41(d)(2), which deals with stays pending a petition for writ of certiorari. That Rule commands that "[t]he court of appeals must issue the mandate immediately" after this Court denies review. Fed. R. App. P. 41(d)(2)(D). As just explained, however, the mandate in this case was not stayed under Rule 41(d)(2), but rather under Rules 41(b) and (d)(1). See Pet. App. 22a n.5 ("we issued our stay under [Rule] 41(d)(1), rather than [Rule] 41(d)(2)").

Arizona's reliance on Rule 41(d)(2) is therefore misplaced. As this Court has explained: "In the typical case, where the stay of mandate is entered *solely* to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default" by requiring the mandate to issue immediately. *Bell* v. *Thompson*, 545 U.S. 794, 806 (2005) (emphasis added); see also *Ryan* v. *Schad*, 570 U.S. 521, 524 (2013) (per curiam) ("The reason for this Rule is straightforward: '[T]he stay of mandate is entered solely to allow this Court time to consider a petition for certiorari.'"). But where, as here, the stay was *not* "entered solely" for that purpose, Rule 41(d)(2) does not require immediate issuance of the mandate. See *Bell*, 545 U.S. at 806. And Arizona's apparent view that Rule 41(d)(2) should be read as implicitly limiting the duration of a stay under Rule 41(d)(1), see Pet. 15–16, finds no support in *Bell* or the Rule's text.

In short, "continued appellate proceedings after this Court denie[s] certiorari" (Pet. 11), while surely rare, are neither far-fetched nor improper. And in such non-"typical case[s]," Rule 41(d)(2)'s "default" is inapplicable. *Bell*, 545 U.S. at 806.

2. For the same reasons, the decision below does not conflict with *Bell* or *Schad*. In *Bell*, the mandate was stayed under Rule 41(d)(2) "pending the disposi-

tion of Thompson's petition for certiorari" and then "until the Supreme Court disposes of the case," 545 U.S. at 800; crucially, there was no pending petition for rehearing in the court of appeals when this Court denied Thompson's petition and his request for rehearing, see *id.*, and thus Rule 41(d)(2)'s default rule applied, *id.* at 805–06. Moreover, the most "[p]rominent" of this Court's concerns in *Bell* was "the length of time between this Court's denial of certiorari and the Court of Appeals' issuance of its amended opinion" accepting arguments it had previously rejected—all of which passed without any notice to the parties that the court of appeals was not done with the case. *Id.* at 804–05. Tennessee had actually scheduled an execution date in reliance on the reasonable assumption that the case was over, prompting "various proceedings in state and federal court to determine Thompson's present competency to be executed." *Id.*

Here, by contrast, when this Court denied Mr. Poyson's petition for writ of certiorari, the stay was not "entered solely" to allow him to pursue that petition; because Mr. Poyson's panel rehearing petition had been reinstated below, the mandate was stayed both by the Ninth Circuit's explicit order, Pet. App. 158a, and by operation of Rule 41(d)(1). Nor was there any unfair surprise of the sort in *Bell*. Arizona had received the Ninth Circuit's stay order and had even attached the order to its opposition to Mr. Poyson's petition in this Court. See App. 17a. At no time could Arizona have believed it was free to commence execution proceedings against Mr. Poyson: the Ninth Circuit explicitly reinstated his rehearing petition and stayed the mandate *before* this Court denied review. There was thus "no final Ninth Circuit decision" on which Arizona could rely. *Id.* at 12a.

Schad is distinguishable for the same reasons. When this Court denied review in *Schad*, there was no pending rehearing petition in the court of appeals and no express order staying the mandate. The question in *Schad* was thus whether "Rule 41(d)(2)(D) admits of any [unwritten] exceptions," 570 U.S. at 522—a question that has no bearing here. And *Schad*, like *Bell*, involved a sudden *sua sponte* reconsideration of previously rejected arguments as execution loomed, *id.* at 526–27—not a rehearing petition reinstated (and ultimately granted) on the basis of pending *en banc* proceedings in another case of which the parties were well aware.

3. Nor is there a conflict with any other court of appeals. *Rosa* v. *United States,* the only decision Arizona identifies as conflicting (Pet. 14), does not relate to Rule 41 or stays of mandate at all; the issue there was "whether the timeliness of a habeas corpus petition under the one-year statute of limitations of … AEDPA … runs from the Supreme Court's denial of a writ of certiorari or from the denial of a petition for rehearing of the denial of certiorari." *Rosa* v. *United States*, 785 F.3d 856, 857 (2d Cir. 2015) (citation omitted). The Second Circuit's one-sentence description of *Schad* as distinguishable, *id.* at 860, hardly establishes a conflict.

Conversely, Arizona fails to distinguish *Alphin* v. *Henson*, which *Bell* cited approvingly, 545 U.S. at 806, and on which the court below relied, Pet. App. 22a n.5. See 552 F.2d 1033, 1035 (4th Cir. 1977) (per curiam) ("We disagree with defendants that Rule 41[(d)] … required that our mandate issue on … the date that the Supreme Court denied certiorari."). Arizona says *Alphin* "was not a habeas case governed by AEDPA" and involved a change in law (Pet. 15), but that has nothing to do with the requirements of Rule

41, which governs issuance of the mandate in all cases, including habeas appeals. And insofar as Arizona believes there is something improper about a court of appeals commencing rehearing proceedings *sua sponte* (Pet. 13), it identifies no conflict, and "any suggestion that *en banc* proceedings should only come by way of motion from the parties, or that *sua sponte en banc* polls and proceedings ... are somehow irregular, would be quite mistaken." *Planned Parenthood Ass'n of Utah* v. *Herbert*, 839 F.3d 1301, 1308 n.1 (10th Cir. 2016) (Gorsuch, J., dissenting from the denial of rehearing *en banc*).[3]

In sum, Rule 41(d)(2) does not apply here, and Arizona has no credible claim that it lacked "notice … that the court was reconsidering its earlier opinion." See *Bell*, 545 U.S. at 804. Arizona not only knew full well what the Ninth Circuit was doing, it acquiesced, recognizing that "the Ninth Circuit may modify its judgment and alter the parties' rights." App. 12a. That is a far cry from *Henry*, where Arizona petitioned this Court for mandamus to require the mandate to issue. See Pet. 13. Arizona's belated com-

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[3] Moreover, the Ninth Circuit's Local Rule and practice is broadly consistent with those of other circuits, which have similarly adopted rules and procedures for death penalty cases to allow individual judges to request rehearing and to delay release of the mandate. 2d Cir. R. 47.1.c.3 (when there is a pending petition for rehearing *en banc* in death penalty cases, the Second Circuit permits a stay of execution based on the affirmative vote of two judges); 6th Cir. I.O.P. 22(d) (in any habeas corpus proceeding, a single judge may issue a stay for the time "necessary to allow the court to rule on a petition for en banc review or a judge's request for en banc review"); 7th Cir. R. 22(f) (permitting one judge to withhold the mandate and poll the court for *en banc* consideration); 11th Cir. I.O.P. 35-5, 35-10 (allowing any active judge to both request rehearing *en banc* and to withhold the mandate following a panel decision).

plaint that the court of appeals' "conduct here has subverted finality in this unending capital case," *id.* at 2, is meritless.

II. REVIEW OF THE PANEL'S *EDDINGS* HOLDING IS NOT WARRANTED.

Having tried and failed to obtain review of *McKinney* based on a supposed presumption of *Eddings* error, Arizona repackages the same argument here. Compare Pet. i, with *McKinney* Pet. ii; see *Ryan* v. *McKinney*, 137 S. Ct. 39 (2016) (denying review). It is no more persuasive the second time around. The Ninth Circuit has not adopted a presumption of constitutional error, but has merely concluded in some cases, including this one—but not in others—that the Arizona court has applied an unconstitutional standard. At most, then, Arizona is seeking error correction in a fact-bound case that implicates no split of authority. And there was no error in any event: As Arizona's own arguments below confirm, the state high court applied an unconstitutional test.

A. Arizona Successfully Urged The State Court To Apply A Causal Nexus Test.

Arizona's argument falters at the outset because, again, it is directly contrary to what Arizona argued in the lower courts. That fact presents a preclusive vehicle issue this Court would have to resolve before reaching the merits of this claim.

Arizona urged the state high court to apply precisely the unlawful causal-nexus test it now claims was not applied: "In order for a defendant's personal or familial background to be found as a nonstatutory mitigating factor, there must be a nexus, or causal connection, between that background, and the subsequent criminal act." App. 24a. The state did not argue that such evidence may be given little or no

weight; it argued that, absent "a nexus, or causal connection," this evidence cannot "be found as a non-statutory mitigating factor," period. *Id.*

What is more, Arizona cited numerous cases it described as holding that the court "*require[s] a causal connection to justify considering evidence* of a defendant's background as a mitigating circumstance," or that a "history of substance abuse is *only a mitigating factor when a causal connection exists*," or that a "personality disorder *[is] not mitigating without proof that it controlled defendant's conduct*." *Id.* (emphasis added) (citing *State* v. *Sharp*, 973 P.2d 1171 (Ariz. 1999); *State* v. *Rienhardt*, 951 P.2d 454, 467 (Ariz. 1997); *State* v. *Brewer*, 826 P.2d 783, 802 (Ariz. 1992)). As the Ninth Circuit observed, Pet. App. 29a–30a, the Arizona Supreme Court relied on some of these same cases in rejecting Mr. Poyson's mitigation evidence, see *id.* at 284a (quoting *Brewer*, 826 P.2d at 802). And Arizona now concedes that disregarding mitigation evidence because it lacks a causal nexus to the defendant's offense is unconstitutional. Pet. 23 (noting that a causal-nexus-based "ban" would be "unlawful"); see *Eddings*, 455 U.S. at 113–15. That should be enough to end this case, both on the merits and because, having prevailed on this argument below, Arizona is judicially estopped from contradicting it now. See *infra* § III.

B. The Ninth Circuit Did Not Presume, But Correctly Found, That The State Court Applied A Causal Nexus Test.

1. The Ninth Circuit's decision was correct, and rested on no improper presumption of error. Rather, the panel below recognized and applied the "presumption that state courts know and follow the law." Pet. App. 27a. "But that 'presumption is rebutted … where we know, based on its own words, that the Ari-

zona Supreme Court did not "know and follow" federal law.'" *Id.* The court accordingly examined the state court's "own words" in Mr. Poyson's case to determine why it refused to consider his mitigating evidence.

Those words revealed that the state court rejected Mr. Poyson's mitigation evidence "because the evidence bore no causal connection to the crimes." *Id.* at 27a–28a. For example, the Arizona Supreme Court said that because Mr. Poyson "did not show that his traumatic childhood somehow rendered him unable to control his conduct," his childhood evidence was "without mitigating value." *Id.* at 28a; see also *id.* at 283a–84a. On its face, that is a straightforward exclusion of evidence because it lacks a causal nexus. So is the state court's application of *Brewer*—a case Arizona argued establishes a causal-nexus test, App. 24a—to hold that, because there was "no indication in the record that 'the disorder controlled [Mr. Poyson's] conduct or impaired his mental capacity to such a degree that leniency is required,'" the evidence could not be mitigating. Pet. App. 28a–29a.

To be sure, the panel also observed that the decision in Mr. Poyson's case came in the middle of a period when the Arizona Supreme Court consistently and concededly applied the unconstitutional causal-nexus test.[4] *Id.* at 29a. But that does not establish an

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[4] The Arizona Supreme Court has acknowledged that "Arizona case law is replete with the use of a 'causal connection' or 'nexus' test," Arizona Supreme Court, *Capital Sentencing Guide* (Feb. 2010), https://bit.ly/2K2CM7W, and that "[a]t times, the court has expressly stated that a difficult family background is not relevant or mitigating *at all* unless it is causally linked to the defendant's conduct at the time of the crime," Arizona Supreme Court, *Capital Sentencing Guide* (Apr. 2018), https://bit.ly/2Il2OWQ. Again, it did so at the state's repeated

improper presumption of error; it means only that the court of appeals recognized that the Arizona Supreme Court is not lawless, and thus consistently applies the same rules of law in different cases. The contrary position requires assuming that the Arizona Supreme Court acts inconsistently with its own precedent, which is the opposite of the presumption of regularity AEDPA requires. In all events, the Arizona Supreme Court's opinion in this case was properly the focus of the Ninth Circuit's decision. See *id.* at 27a–29a.

2. Looking beyond the opinion below, Arizona tries to establish the "presumption of error" by arguing that *McKinney* marked a sea change in the Ninth Circuit's jurisprudence. Pet. 20–25. That is incorrect. Prior to *McKinney*, the Ninth Circuit had "repeatedly ordered habeas petitioners resentenced when the death penalty rested upon Arizona courts' use of this unconstitutional test." *Williams* v. *Ryan*, 623 F.3d 1258, 1271 (9th Cir. 2010) (discussed approvingly at Pet. 20). In many other cases, the court denied relief. Pet. 20.

The same holds true after *McKinney*. In a few cases, including this one, the court has found, based on the specific state-court opinion at issue, that *Eddings* was violated. See *Hedlund* v. *Ryan*, 854 F.3d 557, 586–87 (9th Cir. 2017); *McKinney*, 813 F.3d at 827. In just as many others, the Ninth Circuit has reached the opposite conclusion, again based on the specific opinion at issue. *Greenway* v. *Ryan*, for example, explained that *McKinney* "resolved only the 'precise question' whether the state court had applied the causal-nexus test in that specific case" and had not

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urging. See App. 50a, 61a–64a, 72a, 76a, 83a–85a, 94a, 106a–107a (collecting excerpts of briefs in which Arizona argued that a causal nexus is required before the court can consider mitigation evidence).

found that "Arizona had always applied it." 866 F.3d 1094, 1095–96 (9th Cir. 2017) (per curiam), *cert. filed*, No. 17-8369 (Apr. 5, 2018). After "examin[ing] the state court decisions in Greenway's case to determine whether they took into account all mitigating factors," the panel concluded that "[n]either the Arizona Supreme Court nor the trial court applied an impermissible causal-nexus test to exclude mitigating evidence." *Id.* at 1096, 1100. Likewise, *Clabourne* v. *Ryan* said that *McKinney* did not "alter our assessment" that the "'Arizona Supreme Court's decision under review was not contrary to federal law, because it considered Clabourne's mental health condition as mitigating evidence.'" 868 F.3d 753, 754 (9th Cir. 2017). And *Apelt* v. *Ryan* concluded that the defendant had "not shown that the Arizona courts failed to follow established federal law because it appears that the Arizona Supreme Court did consider all the proffered mitigation evidence." 878 F.3d 800, 840 (9th Cir. 2017).

As these cases illustrate, the Ninth Circuit has not presumed *Eddings* error, either before or after *McKinney*. Arizona tries to brush aside these various decisions as "chaotic," Pet. 21, but that is just a tacit concession that they do not apply the clear "presumption" Arizona's petition attempts to erect. In truth, these decisions do exactly what Arizona asks: They find *Eddings* error—or not—"based on case-specific language." *Id.* at 20.

3. In turn, Arizona is requesting, at most, error correction. In the absence of a presumption applied by the court of appeals, the most Arizona can say is that the Ninth Circuit erred in finding *Eddings* error on the facts of this case. But "[a] petition for a writ of certiorari is rarely granted when the asserted error

consists of … the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Nor does Arizona succeed in establishing a conflict between the decision below and any other court of appeals' ruling. Arizona argues that this case would have been decided differently in the Tenth or Eleventh Circuits because those courts "will not presume that a state court misapplied federal law." Pet. 22 (citing *Kokal* v. *Secretary, Dep't of Corr.*, 623 F.3d 1331, 1346 (11th Cir. 2010); *Eizember* v. *Trammell*, 803 F.3d 1129, 1142 (10th Cir. 2015)). As just explained, neither will the Ninth Circuit. Pet. App. 27a. Moreover, neither of these cases involved the use of a causal nexus to bar mitigation evidence, neither suggests it is inappropriate to consider a state court's application of precedent in rebutting the AEDPA presumption, and neither even mentions *Eddings*. There is no conflict here.

The causal-nexus issue also does not present an important, recurring question. Arizona now agrees the causal-nexus test is unconstitutional, and the state courts appear to have stopped applying it over a decade ago. *McKinney,* 813 F.3d at 817; see *State* v. *Anderson*, 111 P.3d 369, 391, *supplemented*, 116 P.3d 1219 (Ariz. 2005). This issue is thus relevant only in the dozen-odd cases from before 2005 working their way through the court system (Pet. 23–24), after which it may never arise again. Review is not warranted.

III. THIS CASE IS NOT A GOOD VEHICLE TO ADDRESS THE QUESTIONS PRESENTED.

As explained above, this case does not present the issues Arizona asks this Court to decide. Because Mr. Poyson's rehearing petition was reinstated before this Court denied his petition for writ of certiorari,

Arizona's arguments regarding Rule 41(d)(2) and any exceptions thereto are beside the point. And because the Ninth Circuit did not "disregard [the] state court's language and instead presume constitutional error" (Pet. i), the second issue is absent as well.

Arizona also faces preclusive vehicle issues. As already explained, *supra* § I.A, Arizona's claim that the mandate in this case should have issued in November 2013 is forfeited (because it was not raised below) and waived (because Arizona chose to oppose Mr. Poyson's petition for writ of certiorari by arguing that the initial panel decision was not final). That fact is crucial, because this argument is Arizona's primary basis for challenging everything that happened thereafter. See Pet. 14 ("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."). With Arizona unable to make this argument on the merits, there is no sound way for this Court to address its other (erroneous) contentions regarding the stay of the mandate.

Similarly, before reaching the second issue, the Court would have to decide whether Arizona is barred by judicial estoppel from pursuing its presumption-of-error claim here. As explained above, Arizona argued in the state high court (as it had in many other cases) that "a defendant's personal or familial background" could "be found as" a mitigating factor *only* where the defendant demonstrated "a nexus, or causal connection, between that background, and the subsequent criminal act." App. 24a, 33a–37a; *supra* § II.A. That argument was successful: The Arizona Supreme Court disregarded Mr. Poyson's mitigation evidence and affirmed his death sentence. In an effort to preserve that victory, Arizo-

na has now reversed positions and insists that the state court did not apply the very test Arizona successfully urged it to apply. This a party may not do. Judicial estoppel prevents Arizona from "relying on a contradictory argument to prevail in [a subsequent] phase" of litigation. *Zedner* v. *United States*, 547 U.S. 489, 504 (2006) (quoting *Pegram* v. *Herdrich,* 530 U.S. 211, 227, n.8 (2000)); see also *State* v. *Towery,* 920 P.2d 290, 304 (Ariz. 1996) (en banc) (in criminal cases, "judicial estoppel would preclude the state from changing its version of the facts in separate proceedings involving the same matter to protect the defendant's right to due process"). At the very least, then, this case presents a thorny threshold question of judicial estoppel that this Court would need to resolve before reaching the merits of Arizona's (ultimately mistaken) claim.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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