CAPITAL CASE

No. 17-1274

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

REPLY BRIEF FOR PETITIONERS

The Ninth Circuit below withheld the mandate as long as necessary to invent a new rule of law in a different case and then apply that flawed rule to grant habeas corpus here. Respondent Poyson opposes certiorari on the basis that the Ninth Circuit did nothing unusual because it (almost) acted according to a local rule when it initially failed to issue the mandate and because the presumption from *McKinney v. Ryan*, 813 F.3d 798 (9th Cir. 2015), did not attract this Court's review at the time. Serial violations of AEDPA, however, are not a shield against certiorari. Instead, each of Poyson's arguments only emphasizes the need for this Court's involvement. What was anomalous in *McKinney* is now the entrenched practice in the Ninth Circuit and, as the amici States point out, poses a threat to state judiciaries around the nation.

I. The Ninth Circuit Violated Its Own Rules and The Federal Rules of Appellate Procedure by Withholding the Mandate Indefinitely.

Twice in this case the Ninth Circuit withheld the mandate in violation of Rule 41. First, Rule 41(b) required the court to issue the mandate within seven days of denying Poyson's petitions for rehearing, which occurred on November 7, 2013. Pet. App. 160. The court could have "extend[ed]" that deadline by order, but it did not. Fed. R. App. P. 41(b). Thus, on November 14, 2013, the mandate should have issued. Second, Rule 41(d)(2)(D) required the Ninth Circuit to issue the mandate "immediately" after this Court denied certiorari on May 11, 2014. Pet. App. 156. That deadline does not, unlike Rule 41(b), afford any discretion. Although this Court has twice declined to

decide whether Rule 41(d)(2)(D) is jurisdictional, Pet. 12, this case does not even present the "extraordinary circumstances" that would allow deviation under *Ryan v. Schad*, 570 U.S. 521, 525 (2013). No precedent from this Court or any other circuit permits a departure from Rule 41 for the bare purpose of allowing a circuit court to prolong its oversight of a capital case long enough to invent a new rule of law that would allow it to reverse a state supreme court in an AEDPA case.

1. Poyson asserts that a local rule sanctions multiple violations of Rule 41. Br. in Opp. 8, 13. Ninth Circuit Rule 22-2(e) is entitled "Stays of Execution." 9th Cir. R. 22-2(e). The many procedures outlined in Rule 22-2(e) all pertain to impending executions. From this context, Poyson impressively locates a single sentence that does not refer to executions but appears to refer to a general rule for staying the mandate: "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)." *Id.*; Br. in Opp. 8, 13. But the "first petition" and "motion" in question refer to a first petition for writ of habeas corpus and a motion to stay execution, as their usage in the preceding paragraph makes clear. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). They have nothing to do with a petition for rehearing or for certiorari. Indeed, if the quoted language applied to the latter petitions, its drafters would have placed it in Rule 41 rather than nestling it deep in a specialized rule.

The Ninth Circuit itself never referred to Rule 22-2(e) and did not comply with its provisions. Had the court intended to act pursuant to that rule, it would have honored the requirement that it "shall enter an order staying the mandate." 9th Cir. R. 22-2(e). That never occurred, underscoring that even the Ninth Circuit did not grasp the fig leaf that respondent now offers. Instead, Poyson's lawyers searched high and low to find a reason for this Court to deny review, and an inapplicable local rule was the best they could find.

Even if Rule 22-2(e) applied and even if the court below had followed its requirements, it cannot explain the failure to issue the mandate within seven days. By its terms, Rule 22-2(e) requires a stay "pursuant to FRAP 41(b)." *Id.* This requirement leads back to the issue on which Arizona seeks certiorari. Rule 41(b) prescribes that the mandate "must" issue seven days after denial of a petition for rehearing. Fed. R. App. P. 41(b). As explained in the Petition, the Ninth Circuit has made a practice of ignoring that requirement and ruling on cases long after it has refused rehearing and this Court has denied certiorari. Pet. 11–16. That was the pattern in *Schad* and in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014). The latter case, like this one, arose after *Schad* and "completely ignored controlling Supreme Court authority." *Id.* at 1070 (Tallman, J., dissenting). The Ninth Circuit has now made clear that it does not intend to follow *Schad*, even as other circuits faithfully apply that precedent. Pet. 14–16. This Court should grant certiorari to remedy the now-entrenched Ninth Circuit practice of flouting Rule 41(b).

Poyson's references to Rule 41(d)(1) are a red herring. Br. in Opp. 12, 15. The parties do not dispute that Rule 41(d)(1) imposed an automatic stay during the pendency of Poyson's petitions for rehearing. When the court denied those petitions on November 7, 2013, however, Rule 41(b) took effect, and the mandate was required to issue within seven days. The Tenth Circuit case Poyson cites to support the Ninth Circuit's contrary approach backfires spectacularly. Br. in Opp. 19 (citing *Planned Parenthood Ass'n of Utah v. Hebert*, 839 F.3d 1301, 1308 n.1 (10th Cir. 2016) (Gorsuch, J., dissenting)). *Herbert* involved a *sua sponte* call for the en banc poll. When it failed, the mandate issued. *Id*. at 1302. That is precisely what *did not* occur here. If a court has misgivings about its decision after the mandate issues, it can recall the mandate if "manifest injustice" would otherwise result. *E.g., Thompson v. Nixon*, 272 F.3d 1098, 1100 (8th Cir. 2001). Poyson does not identify any case in which any circuit followed a procedure akin to the Ninth Circuit below.

2. Just as Rule 41(b) required the mandate to issue seven days after the denial of a petition for rehearing, Rule 41(d)(2)(D) required the Ninth Circuit to issue the mandate "immediately" after this Court denied certiorari. Fed. R. App. P. 41(d)(2)(D).

Nothing in the language of this rule allows a circuit court to withhold the mandate by resurrecting a previously denied petition for rehearing. This point is all the more clear after *Schad*, notwithstanding Poyson's cramped reading of that precedent. Br. in Opp. 16. In *Schad*, as here, the Ninth Circuit withheld the mandate following denial of certiorari. This Court explained: "Even assuming a court of appeals has

authority to do so, it abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the petition, unless extraordinary circumstances justify that action." *Schad*, 570 U.S. at 525. Similarly, *Bell v. Thompson*, 545 U.S. 794, 804–05 (2005), assumed that Rule 41 might allow a stay following denial of certiorari but confined it to "a short period of time," which the five-month delay in that case exceeded. Here, four years have passed since this Court denied certiorari. As explained by the victims' rights amici, this is anything but a "short period of time." Br. of Amicus Ariz. Voice for Crime Victims ("AVCV") 7–10, 13–15.

3. Poyson's response to the Second Circuit's understanding of *Schad* is a distinction without a difference. While it is true that *Rosa v. United States*, 785 F.3d 856 (2d Cir. 2015) arose in the context of an AEDPA statute of limitations keyed to the denial of certiorari, the court nevertheless relied on *Schad* to explain why issuance of the mandate was compulsory. In fact, as *Rosa* points out, eight circuits apply the same rule in that analogous context. *Id.* at 857. In considering that rule post-*Schad*, the Second Circuit gleaned the correct lesson: "the Ninth Circuit had abused its discretion by refusing to issue its mandate while it reconsidered an argument it had rejected months earlier." *Id.* at 860. That same pattern repeated itself here, and the Second Circuit's understanding of *Schad* would have produced a different outcome below.

Poyson also argues that the Ninth Circuit has a fellow traveler in the Fourth Circuit. Br. in Opp. 18–19; Pet. App. 22a n.5 (citing *Alphin v. Henson*, 552

F.3d 1033 (4th Cir. 1977). Even if correct, that only deepens the split and underscores the need for this Court's review.

4. Finally, Poyson attempts two procedural arguments that both fail. First, he faults the State for not discussing Rule 41(b) in its supplemental brief *in 2016*. Br. in Opp. 11. By that time, this Court had denied certiorari and the State was pleading for the mandate under Rule 41(d)(2)(D). Poyson raised Rule 41(b) as a defense of the Ninth Circuit's refusal to issue the mandate. Supp. Reply, No. 10-99005, at 2, 6. The State responded at oral argument. Nothing about this sequence of events amounts to waiver. Second, Poyson faults the State for arguing against his petition for certiorari because, *inter alia*, the Ninth Circuit had by that time entered a stay. Br. in Opp. 11, 14. Here, he conflates two distinct issues in a way that has become routine in the court below: "Withholding issuance of the mandate is not the same as entering a stay order." *Henry*, 766 F.3d at 1067 (Tallman, J., dissenting). The question presented in this Petition addresses the lower court's withholding of the mandate—without a stay—in order to buy time to invent a new rule of law and on that basis grant Poyson's petition for habeas corpus. The court's actions were an abuse of discretion, and certiorari is necessary to prevent the Federal Rules of Appellate Procedure from subverting AEDPA.

II. The Ninth Circuit Contravened AEDPA and this Court's Precedent by Presuming Constitutional Error.

Poyson opposes certiorari on two grounds: that a "preclusive vehicle issue" exists and that the Ninth Circuit did not presume the Arizona Supreme Court

violated *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Br. in Opp. 3–4, 20–27. These arguments lack legal and factual support, but more telling is Poyson's silence on a key argument in the Petition: AEDPA required the Ninth Circuit to deny relief because that court *admitted* it could construe the state court opinion to use a causal-nexus approach to mitigation evidence "as a permissible weighing mechanism." Pet. App. 30; *see* Pet. at 24–25; Br. of Amici Nevada, *et. al*, 3–4, 10–12. The possibility of construing the state court decision to comply with *Eddings* resolves "the only question that matters under § 2254(d)(1)." *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *accord Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (federal courts presume state courts knew and followed federal law and, under AEDPA, must give "the benefit of the doubt"). The Ninth Circuit's admitted disregard for AEDPA warrants certiorari, if not summary reversal.

A. The Ninth Circuit Presumed Constitutional Error.

Poyson denies that the Ninth Circuit presumed constitutional error. Br. in Opp. 21–22. This argument ignores Judge Ikuta's concurring opinion acknowledging that the circuit court presumed a constitutional error, just as it had in *McKinney*. Pet. App. 46 (after *McKinney*, "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"). The same presumption animated a five-judge dissent in *McKinney* itself. 813 F.3d at 842 (Bea, J., dissenting). There, the dissenting judges explained what the concurrence below admits: "[T]he *Visciotti*

presumption is automatically rebutted in this case and every other *Eddings* case coming out of Arizona within that time period. In its place, the majority suggests the presumption is flipped . . . with the burden of proof as to *Eddings* compliance on the Arizona courts." *Id.* This is not how AEDPA works in this Court or any other circuit. The Court should grant certiorari to correct a hardening error in the nation's largest circuit.

The lower court's error begins by replacing the *Visciotti* presumption with the contrary presumption from *McKinney*. Pet. App. 27. *McKinney* presumed that the Arizona courts barred all mitigation evidence lacking a causal connection to the crime for a 16-year period, notwithstanding cases during that timeframe in which the state court expressly used the lack of a causal nexus only to assess weight. *Id.* For the court below, it was enough that Poyson's case was decided in the midst of *McKinney*'s 16-year period. Pet. App. 29. Poyson dismisses this portion of the opinion as stating only that the Arizona Supreme Court was not "lawless" and did not deviate from its precedent. Br. in Opp. 22–23. That gloss makes little sense because the state court must have deviated from its precedent at least at the beginning and end of the 16-year window (without ever saying so, incidentally). And, more importantly, the Ninth Circuit is the source of the 16-year timeframe. That the current decision now uses this criterion as a reason to rebut *Visciotti*, Pet. App. 27, is the definition of a presumption against the state court. Indeed, there was no need to identify a timeframe in *McKinney* other than to create a presumption for future cases.

Further, the Ninth Circuit did not, as Poyson contends, focus exclusively on the state court's "own words" to find error. Br. in Opp. 21–23. If it had, its inquiry would have stopped when it recognized language demonstrating the state court's permissible use of a causal-nexus weighing test. Pet. App. 30. Rather, the Ninth Circuit looked beyond the decisions' plain meaning and turned to *McKinney* for translation: "*McKinney* makes clear that the court instead applied an unconstitutional causal nexus test, treating the evidence as irrelevant or nonmitigating *as a matter of law*." *Id.* This analysis—combined with the simple fact that the Ninth Circuit relied only on *McKinney* to reverse its initial finding of no causal-nexus error—establishes that the court presumed error, contrary to *Visciotti*, AEDPA, and every other circuit in the country.

Finally, Poyson points to cases in which the Ninth Circuit did not presume error to contend that *McKinney*'s impact has been minimal. Br. in Opp. 23–24. But the fact that three earlier panels complied with *Visciotti* and AEDPA does not make the en banc court's more recent decision unworthy of review. *See* Pet. 23–24; Br. of Nevada, *et. al* 12–13. In fact, two of the panel decisions Poyson cites underscore the need for this Court's intervention. In *Clabourne*, a judge dissented from the denial of rehearing, citing as a basis for granting relief *McKinney*'s conclusion that the Arizona Supreme Court regularly violated *Eddings*. *See Clabourne v. Ryan*, 868 F.3d 753, at 754–58 (9th Cir. 2017) (Berzon, J., dissenting). Further, the Federal Public Defender sought certiorari in both *Greenway* and *Clabourne*, citing *McKinney*'s finding that the Arizona Supreme Court applied a causal-nexus

test. *See Greenway v. Ryan*, No. 17–8369, Pet. i, 11–17; *Clabourne v. Ryan*, No. 17–7257, Pet. i, 9–12. *Greenway* remains pending before this Court. Thus, despite Poyson's arguments that this Court should not review his case, the parties appear to be in general agreement that this Court should consider the accuracy and impact of *McKinney*.

B. This Case Is an Ideal Vehicle for Clarifying the Deference Due to State Courts.

1. Poyson asserts a "preclusive vehicle issue" on the theory that Arizona is judicially estopped from asserting that the Arizona Supreme Court complied with *Eddings* because the State asked that court on direct appeal to exclude non-causally connected mitigation. Br. in Opp. 3–4, 20–21, 25–27.

Poyson overlooks that judicial estoppel applies only where a party successfully advances inconsistent positions. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Regardless of what Arizona may have *asked* the state court to do, the present litigation focuses on what the state court *actually did*. And what it did was reduce the mitigation evidence's "weight" or "value," but it did not exclude the evidence. Pet. at 2, 24–25; *see* Br. of Amici Nevada, *et. al*, at 4–12. The state court did not adopt Arizona's argument, eliminating a prerequisite for judicial estoppel. *Compare* Resp. App. 24a *with* Pet. App. 284–85; *New Hampshire*, 502 U.S. at 750–51. Judicial estoppel presents no "vehicle issue" militating against review.

2. Poyson further contends that review is unwarranted because the Ninth Circuit's erroneous analysis is confined to this case or, at worst, a "dozen-

odd" capital cases. Br. in Opp. 24–25. As a preliminary matter, a "dozen-odd" capital cases is a significant number, particularly where many of them involve victims waiting for resolution, sometimes through decades of painful litigation. *See* Br. of Amicus AVCV.

But the opinion below, both alone and in conjunction with *McKinney*, reaches beyond the current case. The 10-State amicus brief explains how *Poyson* and *McKinney* threaten to spread to AEDPA's application in other contexts. Br. of Amici Nevada, *et. al*, 12–13. Likewise, the sizeable bank of dissenting *McKinney* judges predicted that the majority's erroneous reasoning would infect the Ninth Circuit's already battered AEDPA jurisprudence. *McKinney*, 813 F.3d at 850–51 (Bea, J., dissenting) ("[T]he majority's reliance on other Arizona Supreme Court cases will spread to all § 2254(d)(1) cases. . . . We will be flooded with string citations claiming to show how state appellate courts have misapplied the federal Constitution in past cases. And petitioners will rely on those cases to argue we cannot presume those courts applied the law correctly. This cannot be how AEDPA operates."). The dissent's prediction has come true in this case. The Court should intervene before it comes true in others.

CONCLUSION

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

Respectfully Submitted,

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