

No. _____

IN THE
Supreme Court of the United States

TAUNO WAIDLA, *Petitioner*,

v.

CHRISTOPHER PIERCE, WARDEN, *Respondent*.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

A Ninth Circuit jurist who participated in the decision-making process below has summarized how the circuit's variant procedures resulted in a shattering of appellate norms:

In this capital habeas appeal, a reconstituted panel of our court withdrew and replaced the original opinion—changing the disposition on grounds not requested by the state in its petition for rehearing. The original opinion affirmed the district court's grant of habeas relief based on Waidla's claim that his trial counsel was constitutionally defective at the penalty phase. The amended opinion flipped this result, concluding that Waidla did not suffer prejudice as a result of his counsel's constitutionally deficient assistance. The basis for this change was not a misapprehension of the facts or law, or the existence of intervening authority. Instead, a new panel member was selected to replace a retired panel member, and the new panel member disagreed with the original panel majority's application of the law. In other words, a change in the composition of the panel resulted in a change of disposition, after the original opinion was filed. This reversal resulted in the difference between life and death for Waidla.

(Pet. App. A–2.)

The question presented is: should the withdrawal of a panelist from an appellate court after that court has published a decision open the door, absent any other basis, for the appointment of a new panelist, a re-adjudication of the appeal, and reversal of the original result?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the court whose judgment is sought to be reviewed were Petitioner, Tauno Waidla, and Respondent Christopher Pierce, the warden of the prison where Waidla is currently confined. There are no associated stock ticker symbols.

LIST OF PRIOR PROCEEDINGS

United States Supreme Court

Tauno Waidla v. California, Case No. 00-6257, petition for writ of certiorari denied November 27, 2000

Tauno Waidla v. California, Case No. 05-5114, petition for writ of certiorari denied October 11, 2005

United States Court of Appeals for the Ninth Circuit

Tauno Waidla (Petitioner/Appellee) v. Ron Davis, Warden (Respondent/Appellant), Case No. 18-99001, judgment entered December 23, 2024

Tauno Waidla (Petitioner/Appellant) v. Ron Davis, Warden (Respondent/Appellee), Case No. 18-99002, judgment entered December 23, 2024, and en banc rehearing denied December 22, 2025

United States District Court for the Central District of California

Tauno Waidla v. Steven W. Ornoski, Warden, Case No. 2:01-cv-00650-AG, judgment entered on December 19, 2017

California Supreme Court

In re Tauno Waidla, Case No. S076438, petition denied November 10, 1999

People v. Tauno Waidla, Case No. S020161, judgment affirmed April 6, 2000

In re Peter Sakarias (S082299) and *In re Tauno Waidla* (S102401), petitions jointly decided March 3, 2005, with co-defendant Sakarias's petition granted as to relief from death sentence and Waidla's petition denied

Los Angeles County Superior Court

People v. Tauno Waidla, Case No. A711340, judgment entered March 8, 1991

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
LIST OF PRIOR PROCEEDINGS	iii
INDEX TO APPENDICES	vi
TABLE OF AUTHORITIES	ix
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	3
JURISDICTION	4
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	5
I. Waidla’s Appeal Was Adjudicated Twice, by Differently Constituted Three-Judge Panels.	5
II. The Ninth Circuit Did Not Grant the PFR, and the Changed Outcome Was Not Based on Any Assertion in the PFR.	12
III. The Outcome Was Reversed Based Only on the Appointment of a Replacement Judge with a Different Opinion on the Merits of the Claim.	13
REASONS FOR GRANTING THE WRIT	15
I. The Procedures Used to Decide this Case Anew Do Not Comport with the Judicial Code, Rule 40, the Procedures of Other Circuits, or the Ninth Circuit’s Own Internal Rules.....	15
A. The Ninth Circuit procedure violated the Judicial Code.....	15
B. The procedure below constituted an abuse of Rule 40.....	17
C. The circuits are split, and the Ninth Circuit’s minority approach causes instability of judicial decisions.	21

TABLE OF CONTENTS

	Page
D. The Ninth Circuit misapplied its own internal rules when it added a new judge to consider panel rehearing.	28
E. The Ninth Circuit is out of step with the law-of-the-circuit doctrine.	31
II. The Original Published Decision Should Be Reinstated.	33
CONCLUSION.	35

INDEX TO APPENDICES

1. Ninth Circuit Court of Appeals
Order Denying Petition for Rehearing En Banc,
Case No. 18-99001/18-99002,¹ December 22, 2025.....Pet. App. A 1-20
2. Ninth Circuit Court of Appeals
Respondent’s Response to Petitioner’s Petition for
Rehearing En Banc,
Case No. 18-99001/18-99002, April 14, 2025.....Pet. App B 21-40
3. Ninth Circuit Court of Appeals
Petitioner’s Petition for Rehearing En Banc,
Case No. 18-99001/18-99002, February 19, 2025.....Pet. App. C 41-62
4. Ninth Circuit Court of Appeals
Opinion, with Order Vacating 5/23/23 Opinion and
Denying Respondent’s PFR as Moot,
Case No. 18-99001/18-99002, December 23, 2024.....Pet. App. D 63-138
5. Ninth Circuit Court of Appeals
Docket Text, Case Argued and Submitted,
Case No. 18-99001/18-99002, January 25, 2024.....Pet. App. E 139
6. Ninth Circuit Court of Appeals
Order Scheduling Additional Oral Argument,
Case No. 18-99001/18-99002, November 21, 2023.....Pet. App. F 140
7. Ninth Circuit Court of Appeals
Petitioner’s Response to Respondent’s Petition for Rehearing,
Case No. 18-99001/18-99002, August 3, 2023.....Pet. App. G 141-157

¹ Note: all documents from the proceedings in the Ninth Circuit Court of Appeals are taken from the docket for Wailda’s cross-appeal, case no. 18-99002. The documents included in the dockets for the appeal and cross-appeal are identical in substance, though the docket numbers vary.

INDEX TO APPENDICES

8. Ninth Circuit Court of Appeals
Order Assigning Replacement Panelist,
Case No. 18-99001/18-99002, July 17, 2023.....Pet. App. H 158
9. Ninth Circuit Court of Appeals
Order Directing Response to PFR,
Case No. 18-99001/18-99002, July 13, 2023.....Pet. App. I 159
10. Ninth Circuit Court of Appeals
Respondent's Petition for Rehearing,
Case No. 18-99001/18-99002, July 6, 2023.....Pet. App. J 160-174
11. Ninth Circuit Court of Appeals
Opinion, as corrected 5/31/2023 (vacated 12/23/2024),
Case No. 18-99001/18-99002, May 23, 2023.....Pet. App. K 175-236
12. Ninth Circuit Court of Appeals
Docket Text, Case Argued and Submitted,
Case No. 18-99001/18-99002, March 1, 2023.....Pet. App. L 237
13. United States District Court
Order Granting in Part and Denying in Part Petition for
Writ of Habeas Corpus - Relevant Excerpts
Case No. CV-01-0650-AG, December 18, 2017.....Pet. App. M 238-334
14. California Supreme Court
Order Denying Petition for Writ of Habeas Corpus,
Case No. S076438, November 10, 1999.....Pet. App. N 335
15. California Supreme Court
Opinion,
Case No. S020161, April 6, 2000.....Pet. App. O 336-405

INDEX TO APPENDICES

16. Relevant Unpublished Orders
Mexichem Fluor, Inc. v. EPA, No. 15-1328
(D.C. Cir. Jan. 26, 2018);
Feldman v. Pro Football, Inc., No. 09-1021
(4th Cir. Apr. 22, 2011);
Van Dyke v. Vill. of Alsip, No. 20-1041
(7th Cir. Oct. 19, 2020).....Pet. App. P 406-409
17. Relevant Statutes, Rules, and General Orders
28 U.S.C. § 46;
28 U.S.C. § 2254 (a), (d);
Federal Rules of Appellate Procedure, Rule 40;
Ninth Circuit General Order 3.2(h).....Pet. App. Q 410-417

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Allen v. Johnson</i> , 391 F.2d 527 (5th Cir. 1968)	15, 17
<i>Anderson v. Knox</i> , 300 F.2d 296 (9th Cir. 1962)	18
<i>Armster v. U.S. Dist. Ct.</i> , 806 F.2d 1347 (9th Cir. 1986)	18
<i>Arthrex v. Smith & Nephew</i> , 941 F.3d 1320 (Fed. Cir. 2019).....	32
<i>Bedgear, L.L.C. v. Fredman Bros. Furniture Co.</i> , 783 F. App'x 1029 (Fed. Cir. 2019)	32
<i>Carver v. Lehman</i> , 558 F.3d 869 (9th Cir. 2009)	27
<i>Chambers v. United States</i> , 22 F.3d 939 (9th Cir. 1994)	31
<i>Cox v. DOJ</i> , 111 F.4th 198 (2d Cir. 2024)	29, 30
<i>Delgado v. U.S. DOJ</i> , 979 F.3d 550 (7th Cir. 2020)	21
<i>Doebereiner v. Sohio Oil Co.</i> , 893 F.2d 1275 (11th Cir. 1990)	25
<i>Easley v. Reuss</i> , 532 F.3d 592 (7th Cir. 2008)	19
<i>Feldman v. Pro Football, Inc.</i> , 419 F. App'x 381 (4th Cir. 2011)	23
<i>Hodge v. Jordan</i> , 12 F.4th 640 (6th Cir. 2021).....	24
<i>Hodge v. Jordan</i> , 95 F.4th 393 (6th Cir. 2024).....	24
<i>Hodge v. Plappert</i> , 136 F.4th 648 (6th Cir. 2025).....	24
<i>Jaroslawicz v. M&T Bank Corp.</i> , 925 F.3d 605 (3d Cir. 2019).....	23
<i>Lair v. Bullock</i> , 798 F.3d 736 (9th Cir. 2015)	32

TABLE OF AUTHORITIES

	Page(s)
<i>Lara v. Comm’r Pennsylvania State Police</i> , 125 F.4th 428 (3d Cir. 2025)	23
<i>Lara v. Comm’r Pennsylvania State Police</i> , 130 F.4th 65 (3d Cir. 2025)	22, 23
<i>Martin Cnty. Coal Corp. v. Universal Underwriters Ins. Co.</i> , 727 F.3d 589 (6th Cir. 2013)	24
<i>Martin Cnty. Coal Corp. v. Universal Underwriters Ins. Co.</i> , 2013 U.S. App. LEXIS 22674 (6th Cir. Oct. 25, 2013)	23, 24
<i>Martin v. Singletary</i> , 965 F.2d 944 (11th Cir. 1992)	30, 32, 33
<i>Mexichem Fluor, Inc. v. Env’t Prot. Agency</i> , 866 F.3d 451 (D.C. Cir. 2017).....	22
<i>Miller v. Gammie</i> , 335 F.3d 889 (9th Cir. 2003)	31
<i>Missouri v. Jenkins</i> , 495 U.S. 33 (1990)	18
<i>Murray v. Nat’l Broad. Co.</i> , 35 F.3d 45 (2d Cir. 1994).....	22
<i>Novartis Pharms. Corp. v. Accord</i> 38 F.4th 1013 (Fed. Cir. 2022)	26
<i>N.Y. by Abrams v. 11 Cornwell Co.</i> , 718 F.2d 22 (2d Cir. 1983).....	22
<i>Perez v. City of Roseville</i> , 926 F.3d 511 (9th Cir. 2019)	27, 30
<i>Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.</i> , 2004 U.S. App. LEXIS 20914 (8th Cir. Oct. 6, 2004).....	24, 25
<i>In re Silicon Graphics Inc. Sec. Litig.</i> , 195 F.3d 521 (9th Cir. 1999).....	34
<i>Transaero, Inc. v. La Fuerza Aerea Boliviana</i> , 38 F.3d 648 (2d Cir. 1994).....	18, 19
<i>United States v. Am.-Foreign S. S. Corp.</i> , 363 U.S. 685 (1960)	29
<i>United States v. Doe</i> , 455 F.2d 753 (1st Cir. 1972).....	19
<i>United States v. Gomez-Lopez</i> , 62 F.3d 304 (9th Cir. 1995)	29, 32

TABLE OF AUTHORITIES

	Page(s)
<i>United States v. Mageno</i> , 786 F.3d 768 (9th Cir. 2015)	18
<i>United States v. Prout</i> , 529 F.2d 999 (5th Cir. 1976)	23
<i>United States v. Stokes</i> , 292 F.3d 964 (9th Cir. 2002)	28
<i>United States v. Vasquez</i> , 985 F.2d 491 (10th Cir. 1993)	19
<i>Van Dyke v. Vill. of Alsip</i> , 819 F. App'x 431 (7th Cir. 2020)	24
<i>W. Pac. R. Corp. v. W. Pac. R. Co.</i> , 345 U.S. 247 (1953)	15
<i>Wabakken v. California Dep't of Corr. & Rehab.</i> , 725 F. App'x 564 (9th Cir. 2018)	28
<i>Waidla v. Davis</i> , 68 F.4th 575 (9th Cir. 2023)	3
<i>Waidla v. Davis</i> , 126 F.4th 621 (9th Cir. 2024)	4
<i>Weaver v. Clark</i> , 540 F. App'x 668 (9th Cir. 2013)	18
<i>Williams v. Jones</i> , 583 F.3d 1254 (10th Cir. 2009)	25, 34
<i>Yovino v. Rizo</i> , 586 U.S. 181 (2019)	29
<i>In re Zermeno-Gomez</i> , 868 F.3d 1048 (9th Cir. 2017)	29
State Cases	
<i>People v. Waidla</i> , 22 Cal. 4th 690 (2000)	3
Federal Statutes	
28 U.S.C. § 46	5
28 U.S.C. § 46(c)	<i>passim</i>
28 U.S.C. § 46(d)	21, 22, 24, 26

TABLE OF AUTHORITIES

	Page(s)
28 U.S.C. § 1254(1)	4
28 U.S.C. § 1291	4
28 U.S.C. § 2241	4
28 U.S.C. § 2253	4
28 U.S.C. § 2254	4
28 U.S.C. § 2254(a)	5
28 U.S.C. § 2254(d)	5

Rules

5th Cir. R. 40.2	23
9th Cir. R. 25-4	30
11th Cir. R. 34.2	25
Fed. R. App. P. 40	<i>passim</i>
Fed. R. App. P. 40(b)(1)(A)	17
Fed. R. App. P. 40(c)	34
Fed. R. App. P. 40(d)(5)	19, 20
U.S. Sup. Ct. R. 44	26

Other Authorities

Ninth Cir. General Order § 3.2.h	28, 29
Ninth Cir. General Order § 9.1	30

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

In Respondent’s appeal of the district court’s grant of penalty-phase relief to Petitioner Tauno Waidla, a two-to-one published decision of the Ninth Circuit affirming the grant of relief was relitigated and overturned when a panelist on the majority retired. Aside from the judicial retirement, the only intervening event was Respondent’s filing of an unmeritorious petition for rehearing (PFR). The new judge appointed to consider the PFR ordered full reargument and then voted with the former minority on the basis of an issue not raised in the PFR. The result is that, without a PFR being granted, the same appeal was adjudged by a total of four judges sitting in two differently constituted panels reaching contrary outcomes.

The Judicial Code provides that “[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges . . . unless a hearing or rehearing before the court in banc is ordered [.]” 28 U.S.C. § 46(c) (Pet. App. Q–410-411). Here, the appeal was heard in full by four panel judges, two of whom decided to affirm the grant of penalty relief, and two of whom voted to reverse. Thus, counting the lower court, three federal judges found a basis for penalty relief—but two others determined the

outcome, and put Waidla back on death row after nineteen months with a life sentence. And this reversal was instituted without a finding of a basis for rehearing under the rules of appellate procedure.

Among the circuits, only the Ninth and Federal Circuits allow the appointment of a new judge to consider rehearing where a member of the original panel departs. In most circuits, if one member of a three-judge panel becomes unavailable after a case has been decided but before a decision is reached on a PFR, the two remaining judges decide whether to rehear the case, and a third judge may be appointed only if necessary after rehearing is granted. This practice places reasonable guardrails on panel rehearing.

The practices in the Ninth Circuit, however, as in Waidla's case, effectively allow for a non-prevailing party to argue the entire appeal anew to a fourth judge without a showing of an overlooked or misapprehended point of law or fact, as the Rules require for panel rehearing. These procedures undermine the principle of finality. They result in gross judicial inefficiency, open the floodgates to judge-shopping, and diminish the reliability and legitimacy of all the federal courts' opinions.

Petitioner Tauno Waidla thus respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The California Supreme Court affirmed Waidla's conviction and death sentence on April 6, 2000, in a published opinion reported at *People v. Waidla*, 22 Cal. 4th 690, 745 (2000). (Pet. App. O-336-405.)

On December 18, 2017, in an unpublished opinion, the district court granted relief on Waidla's claim of ineffective assistance of counsel at the penalty phase of his trial, and denied relief as to his remaining claims. (Pet. Appx. M-238-334.)

Respondent appealed the grant of penalty relief to the Ninth Circuit Court of Appeals, under case no. 18-99001. Waidla cross-appealed the denial of other relief in case no. 18-99002. The Ninth Circuit jointly reviewed the appeal and cross-appeal.

On May 23, 2023,² the Ninth Circuit affirmed the district court's judgment in a published decision reported at *Waidla v. Davis*, 68 F.4th 575 (9th Cir. 2023). (Pet. App. K-175-236.) Respondent filed a Petition for Rehearing on July 6, 2023. (Pet. App. J-160-174.)

On December 23, 2024, the opinion published on May 23, 2023 was vacated, and the district court's grant of penalty relief was reversed, in an

² A correction on a matter not at issue herein was entered to the published opinion on May 31, 2023.

opinion reported at *Waidla v. Davis*, 126 F.4th 621 (9th Cir. 2024). (Pet. App. D–63-138.) At the same time, Respondent’s Petition for Rehearing was denied as moot.

Waidla’s Petition for Rehearing En Banc was denied on December 22, 2025. (Pet. App. A–1-20.)

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253. The Ninth Circuit’s second and superseding opinion reversing the district court’s grant of habeas penalty relief was filed on December 23, 2024, and Waidla filed a timely petition for rehearing en banc, which was denied on December 22, 2025. He is filing this petition within the deadline after a 60-day extension of time was granted by Justice Kagan on March 3, 2026. *See* Supreme Court Rules 13.1, 13.3, and 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 46; 28 U.S.C. § 2254(a), § 2252(d); Federal Rules of Appellate Procedure, Rule 40; and Ninth Circuit General Order 3.2(h) are all reproduced in the Appendix to this petition. (Pet. App. Q–410-417.)

STATEMENT OF THE CASE

I. Waidla’s appeal was adjudicated twice, by differently constituted three-judge panels.

Waidla was convicted and sentenced to death in 1991 for the killing of Viivi Piirisild. Though neither side presented any evidence at Waidla’s penalty trial, the jury deliberated over his penalty during nine court days, twice sending notes expressing difficulty reaching unanimity. When polled on the fifth day of deliberations as to whether there was a reasonable probability that the jury could reach a unanimous verdict, ten of the jurors answered “no,” one answered “not sure,” and only one said “yes.” After the court ordered deliberations to continue, on the ninth day, the jury returned a death verdict. (Pet. App. O–398.)

In 2017, the district court granted Waidla penalty relief upon concluding, with the requisite deference due under 28 U.S.C. § 2254(d), that defense counsel’s performance was constitutionally ineffective. The district court found that no mitigation investigation, even of a preliminary nature, was ever carried out, but that an investigation would have revealed

mitigating evidence about Waidla's upbringing, the mistreatment and fear he endured while a conscript in the Soviet military, and his positive adjustment during incarceration. (Pet. App. M-327-328, 331.) Noting the jury's lengthy deliberations and the jurors' statements about difficulty in reaching a unanimous verdict, the district court found a reasonable probability that, had counsel conducted an investigation and presented mitigation at penalty, the jury would not have voted for death; thus the court granted relief. (Pet. App. M-328-330.)

In January of 2018, Respondent filed a notice of appeal of the grant of penalty relief, and Waidla cross-appealed the denial of guilt and special circumstance claims. The Ninth Circuit granted Waidla a certificate of appealability in January of 2020. Briefing was completed on April 25, 2022.

The panel assigned to hear the appeal and cross-appeal consisted of Ninth Circuit Judges Kim McLane Wardlaw, Paul J. Watford, and Eric D. Miller. (Pet. App. L-327.) Oral argument was held on March 1, 2023. (*Id.*)

The panel published its opinion on May 23, 2023, with a corrected opinion (correction not relevant here) issued on May 31, 2023. (Pet. App. K-175-236.) The panel affirmed the district court's grant of habeas relief on Waidla's claim of ineffective assistance of counsel (IAC) at the penalty phase. (Pet. App. K-222.) A majority on the original panel explained:

The jury delivered a death sentence knowing very little about Waidla's background and positive qualities. Even so, it took the jury nine days of deliberation and two bouts of deadlock to reach a verdict. No fairminded jurist considering a jury so closely divided could discount the prejudicial effect of failing to present even modest evidence of Waidla's background and good character.

(Pet. App. K-206.)

The original published opinion thus held that “the jury’s uncertainty, the extremely minimal mitigation evidence originally presented, and the missed opportunity to rebut various aspects of the State’s aggravation argument, which was itself modest,” required affirmance of the district court’s grant of penalty relief. (Pet. App. K-211.) The panel also denied Waidla’s claim of an unconstitutionally-derived confession and claims of IAC in the guilt phase. (Pet. App. K-211.) Judge Miller concurred in the denial of Waidla’s challenges to his conviction, but dissented from the grant of penalty phase relief, largely on the basis of deference to the California Supreme Court. (Pet. App. K-235-236.)

Meanwhile, Judge Watford had publicly announced that he would be resigning from the Court as of May 31, 2023. (*See* Letter from Paul J. Watford to President Joseph R. Biden, Jr. (Jan. 5, 2023), *available at* https://fingfx.thomsonreuters.com/gfx/legaldocs/dwpkdaqbvm/watford_letter.pdf.) Thus, when the panel issued its opinion on May 23, 2025, the parties

were aware that one of the two judges in the majority would be retiring from the court. Although the mandate had not yet issued, no judge was appointed to replace Judge Watford in this matter at the time of his resignation.

After requesting and receiving an extension, on July 6, 2023, Respondent submitted a petition for panel rehearing (“PFR”). (Pet. App. J–160-174.) The PFR asserted error in a single footnote of the original published decision. (Pet. App. J–166 *et seq.*) The challenged footnote stated that Respondent had forfeited any objection to the district court granting relief without relying on a new evidentiary hearing and also that Waidla had presented admissible evidence of his good conduct in jail. (Pet. App. K–203 n.1.) As detailed below, the matters discussed in the PFR had no impact on the ultimate outcome of this case.

The two remaining members of the panel “ordered a response to the state’s PFR, and because Judge Miller and [Judge Wardlaw] disagreed on the merits of the case itself, [they] formally requested that the clerk’s office draw a new judge pursuant to [Ninth Circuit] General Order 3.2(h).” (Pet. App. A–5.) As explained by Judge Wardlaw, the appointment of a fourth circuit court judge was not prompted by any assessment of whether Respondent had met the standards for panel rehearing; instead, a new judge was appointed due to the filing of a PFR and the fact that Judge Miller had dissented “on the

merits of the case itself[.]” (Pet. App. A–5.) The Ninth Circuit appointed Judge Morgan B. Christen to the panel. (Pet. App. H–158.)

On August 23, 2023, Waidla filed his opposition to panel rehearing and urged the Ninth Circuit “to adopt the procedure generally used in circuits outside the Ninth and Federal Circuits, in which panel rehearing is only granted upon a vote of both remaining members of the initial panel.” (Pet. App. G–155 n.6.) Waidla argued that it would be consistent with Federal Rules of Appellate Procedure, Rule 40 (“Rule 40”) and 28 U.S.C. § 46(c) for “the members of the original panel . . . to assess whether the panel has ‘overlooked or misapprehended’ a point of law or fact.” (Pet. App. G–155 n.6.)

On November 21, 2023, the panel issued the following order: “In light of the fact that Judge Morgan Christen has replaced Judge Paul Watford on the three-judge panel, the court has agreed to schedule additional argument” (Pet. App. F–140.) The Court’s Order did not specify whether the “additional argument” would relate to the petition for rehearing, or to other matters. The argument was requested by Judge Christen. (*See* Pet. App. D–64-65 n.*.)

At the second oral argument, held on January 25, 2024 and lasting over one hour, the claimed error brought to the Court’s attention in the PFR was raised briefly, but most of the questions from the panel focused closely on penalty-phase prejudice—an issue not raised by Respondent’s PFR. (*See*

Second Oral Argument, *Waidla v. Davis*, Ninth Cir. case no. 18-99002, Jan. 25, 2024, https://www.youtube.com/watch?v=SzKE_D1gx6s (“2nd Oral Arg.”).) Regarding the sole issue presented by the PFR, counsel for Respondent asserted that the Court had erred “by not reviewing de novo after finding 2254(d) satisfied. . . . A de novo review would have seriously undermined petitioner’s claims especially as to the performance prong.” (2nd Oral Arg. at :35.) Judge Christen asked, “How would it have changed the prejudice prong?” (*Id.* at :45.) Respondent: “It would not have. The record would have been the same.” (*Id.* at 1:00.)

On December 23, 2024, the reconstituted panel issued a new per curiam opinion reversing the district court’s grant of penalty-phase relief and vacating the prior published opinion that had affirmed penalty-phase relief. (Pet. App. D–63-138.) Judge Christen and Judge Miller joined the per curiam opinion in full. (Pet. App. D–69 n.2.)

Without addressing the issue of deficient performance as to the failure to present mitigation, the new per curiam holding was that the California Supreme Court could reasonably have rejected the penalty phase IAC claim on the prejudice prong the *Strickland* analysis. (Pet. App. D–108.)

Judge Christen authored a separate concurrence “to avoid minimizing the requirement that counsel investigate a capital defendant’s available options before deciding not to pursue them.” (*Id.* at 50.) She found that trial

counsel's failures and choices at penalty "fell below an objective standard of reasonableness." (Pet. App. D-113.) Based on the California Supreme Court's summary denial, however, she concluded that its "prejudice analysis was not unreasonable." (Pet. App. D-113.)

Judge Wardlaw concurred in the portion of the judgment denying the guilt phase claims. (Pet. App. D-118.) She dissented, however, from the judgment as to the penalty phase ineffective assistance of counsel claim. The text of her dissent was "drawn largely from the original per curiam opinion" that was joined by both Judge Wardlaw and Judge Watford. (Pet. App. D-119 n.1.) Thus, the basis for her conclusions regarding both deficient performance and prejudice are the same as in the original opinion, and focus, for prejudice, on the long-drawn-out struggle by the jury to reach a penalty verdict even in the absence of any mitigation presentation. The issue of the jury's nine-day effort with multiple assertions of deadlock was not, however, addressed in the majority portion of the revised opinion.

Waidla filed a petition for rehearing en banc ("PFREB") challenging the procedures by which the reconstituted panel's decision returned Waidla to death row. (Pet. App. C-41-62.) On December 22, 2025, the Ninth Circuit denied the PFREB. (Pet. App. A-1.) Judge Wardlaw wrote separately, "reluctantly concurring in the order denying rehearing en banc" to explain her disagreement with the rehearing procedures in this case, though she did

not “make what in [her] experience would most certainly be a futile en banc call.” (Pet. App. A–2, 4.)

II. The Ninth Circuit did not grant the PFR, and the changed outcome was not based on any assertion in the PFR.

After Judge Watford left the bench, Respondent filed a PFR that complained only about a single footnote. (Pet. App. J–166 *et seq.*) In that note, the Court had opined that the State had forfeited any objection to the district court granting relief without relying on a new evidentiary hearing at the de novo review stage of its analysis. (Pet. App. K–203 n.1.) The PFR misconstrued the footnote it attacked, and focused on reiterating Respondent’s argument that some of the evidence of Waidla’s good conduct in jail while awaiting trial should have been found inadmissible. (Pet. App. J–166 *et seq.*)

The reconstituted panel’s reconsideration was not based on this putative error. Two of three judges in the reconstituted panel found Waidla demonstrated his good behavior in jail, and the new member of the panel expressly found sufficient *admissible* evidence to support Waidla’s subclaim about his good conduct in jail. (Pet. App. D–117 (Christen, J., concurring) (“The record does not suggest a strategic reason for failing to investigate and present this admissible, mitigating evidence of Waidla’s adjustment to incarceration.”); D–129-130 (Wardlaw, J., dissenting).) Thus, a majority of

the reconfigured panel *rejected* the argument that formed the basis of the PFR. In fact, the same footnote on which Respondent based his PFR reappears in the text of Judge Wardlaw’s dissent to the second opinion (Pet. App. D–130 n.2), with no commentary or objection by the majority.

In the replacement opinion, Judge Christen agreed with the original majority that trial counsel’s *performance* was constitutionally deficient at penalty. Thus, the changes from the original opinion to the replacement were not predicated on the PFR or any of its assertions about the type of evidence to be considered regarding the *performance* prong of IAC. The reversal of the original grant of relief was, instead, triggered by Judge Christen joining the panel and reaching a different conclusion regarding the *prejudice* prong of IAC. (See Pet. App. D–113.)

Without addressing the arguments in the PFR and without any modification of the footnote discussed in the PFR, in its order vacating the original published decision, the Ninth Circuit denied the PFR as “moot.” (Pet. App. D–63, 69 n.1.)

III. The outcome was reversed based only on the appointment of a replacement judge with a different opinion on the merits of the claim.

Although Respondent’s PFR was never granted, it opened the door for a revised set of judges to be impaneled. Waidla later filed his PFREB on the basis that his sentence changed from life to death upon the appointment of a

fourth judge for reasons unrelated to Respondent's PFR. In its opposition to the PFREB, Respondent asserted that he filed the PFR in "good faith" and could not "preordain which replacement judge would be assigned to the panel, or that one would be assigned at all." (Pet. App. B-32-33 n.4.) However, Respondent has never disputed that the outcome of the case changed from a life sentence to a death sentence for reasons unrelated to the PFR. (*Compare* Pet. App. C (PFREB) *with* Pet. App. B (Response to PFREB).)

On December 22, 2025, the PFREB was denied. (Pet. App. A-1.) Judge Wardlaw's concurrence acknowledges that the "reconstituted panel" changed "the disposition on grounds not requested by the state" in the PFR, and explained:

The amended opinion flipped th[e] result [of the Ninth Circuit's original published opinion], concluding that Waidla did not suffer prejudice as a result of his counsel's constitutionally deficient assistance. The basis for this change was not a misapprehension of the facts or law, or the existence of intervening authority. Instead, a new panel member was selected to replace a retired panel member and the new panel member disagreed with the original panel majority's application of the law. In other words, a change in the composition of the panel resulted in a change of disposition, after the original opinion was filed. This reversal resulted in the difference between life and death for Waidla.

(Pet. App. A–2.) The evidence is thus irrefutable that the reversal of the original outcome was based solely on a disagreement on the merits of the claim between an original panelist and his replacement.

REASONS FOR GRANTING THE WRIT

I. The Procedures Used To Decide This Case Anew Do Not Comport With The Judicial Code, Rule 40, The Procedures Of Other Circuits, Or The Ninth Circuit’s Own Internal Rules.

A. The Ninth Circuit procedure violated the Judicial Code.

The Judicial Code provides that “[c]ases and controversies shall be heard and determined by a court or panel of *not more than three judges* . . . unless a hearing or rehearing before the court in banc is ordered [.]” *See* 28 U.S.C. § 46(c) (emphasis added) (Pet. App. Q–410-411). The legislative history explained this “provision continues the tradition of a three-judge appellate court and makes the decision of a division, the decision of the court, unless rehearing in banc is ordered.” *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 256 n.13 (1953) (quoting Reviser’s Notes, 28 U.S.C., Cong. Serv. 1948, pp. 1707-08). “[T]he Court has to sit either in panels of three judges or all the judges. Any opportunity or possibility of the outcome being affected by a choice of more than three but less than all, whether fortuitous or purposeful, was thereby avoided.” *Allen v. Johnson*, 391 F.2d 527, 532 (5th Cir. 1968).

While a *grant* of rehearing would have meant the case was no longer “determined,” the appointment of a fourth judge to consider this case anew with no basis for rehearing cannot be squared with 28 U.S.C. § 46(c) and its requirement of three-judge panels. In the replacement decision, Judge Watford’s name was dropped to a footnote referencing only the date of his retirement without acknowledging his role in the preparation of the original per curiam decision—much of which remains virtually unchanged in the replacement decision.³ But, the participation of four judges is undeniable. For seventeen months between July 17, 2023, when Judge Christen was appointed, through December 23, 2024, when the replacement decision was issued, the published decision of Judges Watford, Wardlaw, and Miller continued to be binding precedent in the Ninth Circuit. At any time during this period, there could have been a vote to deny rehearing, and the decision in which Judge Watford participated would have stood. During this same seventeen-month period, the reconstituted panel that included Judge Christen heard argument and continued to work on the case without

³ Many pages of text from the original per curiam decision in which Judge Watford participated still appear in substantively identical or near-identical form in replacement per curiam decision. (*Compare* Pet. App. K–179-183 *with* Pet. App. D–69-73; *compare* Pet. App. K–185-191 (Sections C & D) *with* Pet. App. D–77-85 (sections C & D); *compare* Pet. App. K–212-222 (section titled “Guilt Phase Claims”) *with* Pet. App. D–89-101 (section titled “Waidla’s Cross-Appeal”).)

granting—or even addressing—panel rehearing. Thus, four Ninth Circuit judges were simultaneously involved in the disposition of this case for seventeen months.

This state of affairs violated the requirement of 28 U.S.C. § 46(c) that “[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges.” (Pet. App. Q–410.) The Ninth Circuit improperly created the “opportunity or possibility of the outcome being affected by a choice of more than three but less than” an en banc panel of its judges. *See Allen*, 391 F.2d at 532. And, under the Ninth Circuit’s peculiar approach, the two-two split between the four judges resulted in a reversal of the district court—due only to the timing of Judge Watford’s retirement.

B. The procedure below constituted an abuse of Rule 40.

In the last decision below, Judge Wardlaw wrote: “[I]n my view, the practice of allowing new panel members to substitute their own judgment for one of their colleagues is in deep tension with the text and spirit of Federal Rule of Appellate Procedure Rule 40.” (Pet. App. A–10.) Petitioner submits that it is an abuse of Rule 40 for a PFR to become the ostensible basis to appoint a new judge to overturn a published opinion without any preliminary finding that the PFR presents a proper ground for rehearing.

Rule 40 refers to matters “overlooked or misapprehended” by the panel. *See Fed. R. App. P. 40(b)(1)(A)* (Pet. App. Q–412). “A petition for rehearing is

designed to bring to the panel’s attention points of law or fact that it may have overlooked.” *Missouri v. Jenkins*, 495 U.S. 33, 47 n.14 (1990). The Ninth Circuit has emphasized this “very limited purpose” of a petition for panel rehearing. *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962). Limiting a PFR to addressing a “controlling matter of law or fact which a party claims was overlooked” serves to “protect th[e] court against the commonly attempted effort to argue anew cases which it has once decided.” *Id.* at 297-98 (internal quotation marks and citations omitted). “A party ‘abuse[s] . . . the privilege of making such a petition’ when it seeks review of a scope greater than the limited confines of Fed. R. App. P. 40.” *Armster v. U.S. Dist. Ct.*, 806 F.2d 1347, 1356 (9th Cir. 1986) (citing *Anderson*, 300 F.2d at 297); *Weaver v. Clark*, 540 F. App’x 668, 669 (9th Cir. 2013) (failure to petition for rehearing held not IAC absent any basis to conclude the court overlooked claims).

Both the parties and the Court are bound by the limited scope of PFRs. The Ninth Circuit has explained: “Our authority under Rule 40 . . . extends only to those situations in which we have ‘overlooked or misapprehended’ a ‘point of law or fact.’” *United States v. Mageno*, 786 F.3d 768, 774 (9th Cir. 2015).

Other circuits likewise restrict the scope of panel rehearing in accordance with the express terms of Rule 40. *See, e.g., Transaero, Inc. v. La Fuerza Aerea Boliviana*, 38 F.3d 648, 650 (2d Cir. 1994) (declining to consider

the preclusive effects of a related D.C. Circuit judgment entered after the panel’s decision because the “petition for rehearing did not assert that we had overlooked or misapprehended any aspect of its contention”); *Easley v. Reuss*, 532 F.3d 592, 593 (7th Cir. 2008) (“[P]etitions for panel rehearing should alert the panel to specific factual or legal matters that the party raised, but that the panel may have failed to address or may have misunderstood.”). It is well accepted that “F.R.A.P. 40 was not promulgated as a crutch for dilatory counsel, nor, in the absence of a demonstrable mistake, to permit reargument of the same matters.” *United States v. Doe*, 455 F.2d 753, 762 (1st Cir. 1972) (internal citation omitted), *vacated on other grounds sub nom. Gravel v. United States*, 408 U.S. 606 (1972); *United States v. Vasquez*, 985 F.2d 491, 497 (10th Cir. 1993) (same).

The procedures here permitted exactly what Rule 40 prohibits—reargument and rehearing without demonstrable mistake by the original panel. Rule 40 permits the panel to schedule reargument *only after* it concludes that it has overlooked or misapprehended a point of law or fact. Rule 40 states that “[o]ral argument on whether to grant the petition is not permitted.” Fed. R. App. P. 40(d)(5) (Pet. App. Q–415).⁴ The circuit court may

⁴ Although Rule 40 was amended in certain respects effective December 1, 2024, during the seventeen months while the PFR was still pending, the rule’s prohibition on oral argument predates Respondent’s PFR. *See* Advisory Committee Notes, 2024 Amendments (“The amended Rule 40(d)(5) extends to

“order additional . . . argument” only “[i]f a petition for panel rehearing or rehearing en banc is granted[.]” Fed. R. App. P. 40(e)(2) (Pet. App. Q–415). Thus, Rule 40 reflects an understanding that the panelists have already heard the parties’ argument and can determine, without further argument, whether they overlooked or misapprehended any point of law or fact.

The reconstituted panel did not find—nor even suggest—that the original panel overlooked or misapprehended the relevant facts and legal standards as to the *Strickland* prejudice prong; instead, the new majority simply looked at the same legal standards and same information, but reached a different conclusion. Rule 40 required the panel to address the PFR before proceeding with reargument. *See* Fed. R. App. P. 40(d)(5), (e)(2) (Pet. App. Q–415). But the reconstituted panel ignored the PFR and simply scheduled reargument and considered the case anew.

In sum, the panel lacked any basis to grant rehearing under Rule 40 and did not do so. Instead, it scheduled an argument in violation of Rule 40, which focused on permitting a newly appointed judge to consider all aspects of the case anew. *See* Fed. R. App. P. 40(d)(5) (Pet. App. Q–415); (Pet. App.

rehearing en banc the existing prohibition (previously found in Rule 40(a)(2)) on oral argument on whether to grant a petition for panel rehearing.”).

D–64-65 n.* (“Judge Christen asked for oral argument and this appeal was reargued[.]”)).

C. The circuits are split, and the Ninth Circuit’s minority approach causes instability of judicial decisions.

After Judge Watford retired, the panel retained a quorum and the authority to rule on Respondent’s petition for rehearing. *See, e.g., Delgado v. U.S. DOJ*, 979 F.3d 550, 552 n.* (7th Cir. 2020) (amendment of panel decision after petition for rehearing, with amended decision issued by the remaining two members of the original panel acting as a quorum after Justice Barrett joined this Court); 28 U.S.C. § 46(d) (Pet. App. Q–411) (“A majority of the number of judges authorized to constitute a court or a panel thereof . . . shall constitute a quorum.”). The remaining quorum could have followed the procedures for addressing a petition for panel rehearing, which are set forth in Rule 40.

Except for the Ninth and the Federal Circuits, the circuit courts *do not* appoint a replacement judge upon the filing of a petition for panel rehearing, even where one of the two remaining panelists dissented from the original decision. Authority for a quorum of two deciding a PFR includes:

D.C. Circuit: *Mexichem Fluor, Inc. v. EPA*, No. 15-1328 (D.C. Cir. Jan. 26, 2018) (Pet. App. P-406) (denying rehearing of published decision⁵ “as the current panel is equally divided” following retirement of Judge Brown, with then-Judge Kavanaugh voting to deny panel rehearing and Judge Wilkins voting to grant rehearing).

Second Circuit: *N.Y. by Abrams v. 11 Cornwell Co.*, 718 F.2d 22, 23-24 (2d Cir. 1983) (granting rehearing en banc due to the significance of the issues after the two “remaining members of the panel were divided” on panel rehearing); *see also Murray v. Nat’l Broad. Co.*, 35 F.3d 45, 48 (2d Cir. 1994) (addressing whether to enlist a third judge for rehearing, and finding that the need for three judges is “somewhat reduced by virtue of the narrow focus of a rehearing petition, submitted after plenary consideration of an appeal. . . . On balance, we conclude that the remaining two members of the panel, explicitly authorized to constitute a quorum eligible to act, see 28 U.S.C. § 46(d), should adjudicate the petition without a third judge.”).

Third Circuit: *Lara v. Comm’r Pennsylvania State Police*, 130 F.4th 65, 66 & n.† (3d Cir. 2025) (denying panel rehearing after the author of majority

⁵ *Mexichem Fluor, Inc. v. Env’t Prot. Agency*, 866 F.3d 451 (D.C. Cir. 2017).

opinion in a published decision⁶ retired, on the ground that “no judge who concurred in the decision . . . asked for rehearing”); *Jaroslawicz v. M&T Bank Corp.*, 925 F.3d 605, 606 (3d Cir. 2019) (mem.) (petition for rehearing was “submitted to the remaining judges who participated in the decision of this Court,” and only after grant of rehearing was panel “reconstituted in light of the retirement” of a panelist).

Fourth Circuit: *Feldman v. Pro Football, Inc.*, No. 09-1021 (4th Cir. Apr. 22, 2011) (Pet. App. P-407-408) (after divided decision,⁷ panel rehearing was determined by the remaining two judges, including judge who dissented from the original decision).

Fifth Circuit: See 5th Cir. R. 40.2 (“Petitions for rehearing of panel decisions are reviewed by panel members only.”); *United States v. Prout*, 529 F.2d 999 (5th Cir. 1976) (mem.) (“Judge Bell was a member of the original panel but resigned from the Court of March 1, 1976 and, therefore, did not participate in the denial of the petition for rehearing.”).

Sixth Circuit: *Martin Cnty. Coal Corp. v. Universal Underwriters Ins. Co.*, Nos. 11-5773/11-5793, 2013 U.S. App. LEXIS 22674 (6th Cir. Oct. 25,

⁶ *Lara v. Comm’r Pennsylvania State Police*, 125 F.4th 428 (3d Cir. 2025).

⁷ *Feldman v. Pro Football, Inc.*, 419 F. App’x 381 (4th Cir. 2011).

2013) (denial of rehearing by divided panel of remaining two judges who decided underlying published decision⁸ after the intervening retirement of a judge in the majority).⁹

Seventh Circuit: *Van Dyke v. Vill. of Alsip*, No. 20-1041 (7th Cir. Oct. 19, 2020) (Pet. App. P-409) (denial of panel rehearing by a “quorum of the panel pursuant to 28 U.S.C. § 46(d)” after the confirmation of Justice Barrett to this Court, although one of the remaining panelists had partially dissented in underlying decision¹⁰).

Eighth Circuit: *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, No. 02-2462, 2004 U.S. App. LEXIS 20914 (8th Cir. Oct. 6, 2004)

⁸ *Martin Cnty. Coal Corp. v. Universal Underwriters Ins. Co.*, 727 F.3d 589 (6th Cir. 2013).

⁹ Another Sixth Circuit case bears mention. *Hodge v. Jordan*, 12 F.4th 640 (6th Cir. 2021), was superseded on panel rehearing by a reconstituted panel in *Hodge v. Jordan*, 95 F.4th 393 (6th Cir. 2024). En banc review was granted after the respondent questioned the unusual panel rehearing process. *See Hodge v. Plappert*, 136 F.4th 648, 657 (6th Cir. 2025). There were questions in the case about the timing of one panelist’s retirement. *See Hodge*, 12 F.4th at 641 n.* (initial decision, noting that a judge in the majority “took inactive senior status on August 27, 2021[,]” a date two weeks earlier than the decision); *but see Hodge*, 95 F.4th at 395 (stating that Judge Cook took inactive status after the initial decision was issued). In any case, rehearing by the en banc court superseded any impact from the irregular procedure.

¹⁰ *Van Dyke v. Vill. of Alsip*, 819 F. App’x 431 (7th Cir. 2020).

(denial of panel rehearing by divided panel of two judges following death of Judge Arnold, who was in the majority in the underlying decision).

Tenth Circuit: *Williams v. Jones*, 583 F.3d 1254, 1256 n.1 (10th Cir. 2009) (Gorsuch, J., dissenting) (explaining vote for en banc rehearing but not for panel rehearing, given that “a vote among the remaining two panel members would likely result in a tie”).

Eleventh Circuit. See 11th Circuit, Cir. R. 34-2 (“Following the issuance of an opinion by a panel of three judges, if a judge of the panel recuses or is disqualified, the two remaining judges, whether or not they are both judges of this court, may proceed by quorum to take such further actions as are deemed appropriate.”); *Doebereiner v. Sohio Oil Co.*, 893 F.2d 1275, 1276 (11th Cir. 1990) (“Judge Robert S. Vance was a member of the panel which heard oral argument and participated in the initial decision in this case, but due to his death on December 16, 1989, did not participate in this order on petition for rehearing.”).

The effect of the majority approach to panel rehearing is that the judges who participated in the initial decision are the same judges who evaluate whether they misapprehended or overlooked any point of law or fact; and rehearing generally requires that a judge who concurred in the holding conclude it is appropriate. This practice comports with Section 46(c),

with Rule 40, and with the goals of finality and public confidence in the judiciary.

The approach taken by the majority of circuits is akin to the procedures followed by this Court, where rehearing can be granted only “at the instance of a Justice who concurred in the judgment or decision.” U.S. Sup. Ct. R. 44.

Outside of the Ninth Circuit,¹¹ it appears that only the Federal Circuit’s procedures provide appointment of a replacement judge to consider a PFR when a member of the panel has become unavailable; but even there, the Federal Circuit has only modified a published decision after concluding there was a basis to grant the petition for rehearing. *See Novartis Pharms. Corp. v. Accord Healthcare, Inc.*, 38 F.4th 1013, 1018 (Fed. Cir. 2022). Unlike here, the *Novartis* court found the PFR was meritorious, because it alerted the court to a material “misquotation” of the claim specification by a testifying expert. *Id.* The changed outcome in *Novartis* related directly to the subject matter of the PFR granted by the court. *See id.* The Ninth Circuit

¹¹ Undersigned counsel have not located any First Circuit cases in which a PFR was considered (a) while a member of the original majority was unavailable, and (b) after the issuance of a divided opinion. However, there are multiple examples within the First Circuit of a PFR being decided by a quorum. *See, e.g., Goldman v. First Nat’l Bank*, 985 F.2d 1113, 1115 n.** (1st Cir. 1993) (“Judge Higginbotham did not participate in the consideration of the petition for rehearing. The remaining two panelists therefore issue the order denying rehearing pursuant to 28 U.S.C. Section 46(d).”).

remains unique in allowing a judge who was appointed for the purpose of addressing a PFR to bypass the PFR altogether.

The Ninth Circuit's minority procedure has been criticized from within. Judge Reinhardt explained the problems inherent in the Ninth Circuit's variant practices in language that could apply here as well:

In the case before us, it is not necessary for the new majority to undo the original majority's constitutional ruling, even if it disagrees with it. The constitutional question is a close one, and substantial arguments can be made for either position. Under these circumstances, the more important consideration, in my view, is maintaining the stability and legitimacy of the court's decisions. . . . [En banc rehearing] can be invoked if any single judge on the court, including either member of the majority, elects to make a call. Relying on this process would, in my view, be in the better interest of the court and the judicial system; increasing the extent to which judicial decisions depend on chance and subjectivity is not a wise alternative.

Carver v. Lehman, 558 F.3d 869, 880-81 (9th Cir. 2009) (Reinhardt, J., concurring in the judgment); *see also Perez v. City of Roseville*, 926 F.3d 511, 526 (9th Cir. 2019) (Molloy, J., dissenting) (asserting that “the substitution of a judge who legitimately disagrees with the original opinion should not change the outcome except as part of an en banc court decision”). Thus, the Ninth and Federal Circuits are alone, and are out of step with the other circuits, in undermining the stability and legitimacy of their own decisions in

exchange for increased influence for judges external to the original decision-making process.

D. The Ninth Circuit misapplied its own internal rules when it added a new judge to consider panel rehearing.

The Ninth Circuit does not automatically appoint a new judge to a panel when one member of a panel retires after the issuance of an opinion and before the mandate issues. Here, more than a month passed after Judge Watford's retirement and before the appointment of a new judge to the panel.

While a new judge was added to the panel shortly after the filing of Respondent's PFR, the Ninth Circuit frequently permits two judges to consider panel hearing as a quorum when the third member of the original panel is no longer available. *See, e.g., Wabakken v. California Dep't of Corr. & Rehab.*, 725 F. App'x 564, 566 n.* (9th Cir. 2018) ("Due to the death of Judge Reinhardt, the petition for panel rehearing and amended memorandum disposition were voted upon only by Judges Fletcher and Owens."); *United States v. Stokes*, 292 F.3d 964, 965 n.* (9th Cir. 2002) ("Due to the death of Judge Politz on May 25, 2002, the order amending opinion and petition for rehearing was voted upon only by Judges Canby and Kleinfeld.").

In appointing a new judge in Waidla's case, the Ninth Circuit stated it was acting pursuant to General Order § 3.2.h. (Pet. App. H-158.) However, this application of General Order § 3.2.h. contradicts its plain text, which

only permits a new judge to be selected if a member of the panel becomes unavailable “after a matter is under submission to a three-judge panel,” unless the remaining judges are in agreement and elect to “decide the matter as a quorum.” (See G.O. § 3.2.h (Pet. App. Q–416-417).) This case was not under submission when Judge Watford retired; it was already *decided* in a binding published opinion. See *In re Zermeno-Gomez*, 868 F.3d 1048, 1052 (9th Cir. 2017) (holding that, despite a stay of mandate, “a published decision of this court constitutes binding authority which must be followed unless and until overruled by a body competent to do so.” (internal quotation marks and citations omitted)); *United States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995) (“The government first urges us to ignore *Armstrong* since we have stayed the mandate to allow filing of a petition for certiorari; this we will not do, as *Armstrong* is the law of this circuit.”); see also *Yovino v. Rizo*, 586 U.S. 181, 185 (2019) (reaffirming this Court’s earlier holding that “[a] case or controversy is “determined” when it is decided” (quoting *United States v. Am.-Foreign S. S. Corp.*, 363 U.S. 685, 688 (1960) (superseded on other grounds)).

Courts outside the Ninth Circuit have similarly recognized that a case is decided once the decision is published, even where the mandate has not yet issued. See, e.g., *Cox v. DOJ*, 111 F.4th 198, 201 (2d Cir. 2024) (“We join our sister circuits in holding that a published opinion becomes binding precedent

when it is decided, regardless of whether the mandate has issued or of any pending petitions for rehearing or for writ of certiorari.”); *Martin v.*

Singletary, 965 F.2d 944, 945 (11th Cir. 1992) (“Although the mandate in Johnson has not yet issued, it is nonetheless the law in this circuit.”).

Applying the well-established meaning of “under submission” as it appears in the text of Ninth Circuit General Order 3.2(h), one Ninth Circuit judge concluded that it was *error* to employ General Order 3.2(h) to appoint a replacement judge for consideration of panel rehearing, because “[o]nce the case is decided by a quorum of the panel judges it is no longer under submission.” *See Perez v. City of Roseville*, 926 F.3d 511, 527 (9th Cir. 2019) (Molloy, J., dissenting). Here, Judge Wardlaw appears to agree that the case was not “under submission” when a replacement judge was appointed, and therefore, that General Order 3.2(h) was applied in error. (Pet. App. A–10 (“Waidla persuasively argues that his case was no longer ‘under submission,’ i.e., being considered, when Judge Christen was drawn to replace Judge Watford—it had already been decided.”).) Judge Wardlaw points to other rules of the Ninth Circuit that use the phrase “under submission” to refer to a period “distinct from” and prior to “the filing of a disposition.” (Pet. App. A–11 (discussing 9th Cir. R. 25-4 and General Order 9.1).)

In sum, in addition to breaking from the requirements of the 28 U.S.C. § 46(c), the Federal Rules of Appellate Procedure, and the procedures of its

sister circuits, the Ninth Circuit’s appointment of a replacement judge in a case that was no longer “under submission” was inconsistent with its own internal rules.

E. The Ninth Circuit is out of step with the law-of-the-circuit doctrine.

In its effort to reconcile the procedures here with the dictates of 28 U.S.C. § 46(c), Respondent asserts that Judge Christen did not act as a fourth judge on the same panel, but instead joined to create a “newly constituted three-judge panel.” (Pet. App. B–36.) But framing these proceedings as separate adjudications before two separately-constituted three-judge panels does not render the procedures lawful. Instead, it presents an additional problem with the practice in that it violates the law-of-the-circuit doctrine.

A published decision of any panel of the Ninth Circuit binds all future three-judge panels, unless the decision is “clearly irreconcilable with the reasoning or theory of intervening higher authority.” *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). One three-judge panel of the Ninth Circuit is bound by the published decision of another three-judge panel addressing the same issue—irrespective of whether the mandate has issued. *Chambers v. United States*, 22 F.3d 939, 942 n.3 (9th Cir. 1994) (“We reject the government’s argument that *X-Citement Video* is not binding precedent until the mandate issues in that case. In this circuit, once a published opinion

is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an en banc court.”), *vacated on other grounds* by 47 F.3d 1015 (9th Cir. 1995); *Gomez-Lopez*, 62 F.3d at 306 (“The government first urges us to ignore Armstrong since we have stayed the mandate to allow filing of a petition for certiorari; this we will not do, as Armstrong is the law of this circuit.”).

The Ninth Circuit has expressly applied the law-of-the-circuit doctrine to a published opinion rendered by a different panel in the same case, explaining that “a motions panel’s published opinion binds future panels” in the same case “the same as does a merits panel’s published opinion.” *Lair v. Bullock*, 798 F.3d 736, 747 (9th Cir. 2015). Thus, if Judge Christen is considered not as a fourth judge but instead as a member of a newly-constituted three-judge panel, this new panel would have to be bound by the original published opinion, unless and until the published opinion was withdrawn by grant of rehearing.

Other circuits that have considered whether published cases become law of the circuit before issuance of a mandate have concluded that they do. *See, e.g., Bedgear, L.L.C. v. Fredman Bros. Furniture Co.*, 783 F. App’x 1029, 1030 (Fed. Cir. 2019) (applying *Arthrex v. Smith & Nephew*, 941 F.3d 1320 (Fed. Cir. 2019), as binding precedent before mandate issued, despite the panel’s disagreement with the outcome of *Arthrex*); *Martin*, 965 F.2d at 945

n.1 (“Although the mandate in *Johnson* has not yet issued, it is nonetheless the law in this circuit . . . unless and until it is reversed, overruled, vacated, or otherwise modified by the Supreme Court of the United States or by this court sitting en banc.”).

The Ninth Circuit’s failure to comply with its own rules and precedent concerning the law-of-the-case doctrine is an independent ground for vacating the opinion of the reconstituted panel and reinstating the original opinion of a three-judge panel.

II. The Original Published Decision Should Be Reinstated.

The procedures in the Ninth Circuit bypassed the PFR entirely. (*See* Pet. App. A–6 (“The reconstituted panel denied the state’s PFR as moot but otherwise did not explicitly address the state’s PFR.”).) The Ninth Circuit does not invariably appoint a replacement judge upon the filing of a PFR, and Judge Christen was appointed because Judges Wardlaw and Miller “disagreed on the merits of the case itself”—not because either of them had formed an opinion on the merits of the PFR. (*See* Pet. App. A–5.)

A faithful application of Federal Rule of Appellate Procedure 40 and 28 U.S.C. § 46(c) required Judges Wardlaw and Miller to resolve the PFR before the published opinion was withdrawn. Had the panel actually adjudicated the PFR, the record makes clear that it would have been denied, as Judge Wardlaw has reported her view that the original panel majority did not

overlook or misconstrue any point of law or fact. (*See, e.g.*, Pet. App. A–2 (“The basis for this change [in result] was not a misapprehension of the facts or law, or the existence of intervening authority.”).)

Because the reconstituted panel bypassed the PFR, Judge Miller was never called upon to state whether he believed Judge Watford and Judge Wardlaw overlooked or misconstrued any point of law or fact. It is not a foregone conclusion that he would so conclude. *Cf. Williams v. Jones*, 583 F.3d 1254, 1256 n.1 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of *en banc* rehearing) (“I surely believe the panel got it wrong. But, I cannot say, as I must to request panel rehearing, that my panel colleagues ‘overlooked or misconstrued’ any argument or evidence presented to them.” (citing 10th Cir. Rule 40.1(A)). Even if Judge Miller would have voted for panel rehearing, an equally divided vote for and against rehearing should result in denial of rehearing—the same result that applies to a circuit court’s decision to grant rehearing *en banc*. *See* Fed. R. App. P. 40(c) (Pet. App. Q–413) (permitting rehearing *en banc* only upon an order of “a majority of the circuit judges who are in regular active service and who are not disqualified”); *see also In re Silicon Graphics Inc. Sec. Litig.*, 195 F.3d 521, 524 (9th Cir. 1999) (Reinhardt, J., dissenting) (urging the court to publicly disclose when *en banc* rehearing is denied “because the court was equally divided”).

Had the reconstituted panel that included Judge Christen addressed the PFR before considering the entire case anew, the PFR would still have been denied. The PFR pertained only to the performance prong of *Strickland*, and Judge Christen's concurrence in the replacement opinion expressly "conclude[s] that some aspects of Waidla's counsel's performance fell below an objectively reasonable standard." (Pet. App. D-113.) Thus, Judge Christen necessarily found that the PFR itself did not provide an adequate grounds for reversal of the district court's grant of penalty phase relief.

CONCLUSION

In this capital case, the Circuit's unique interpretation of the rules of appellate procedure allowed a losing party to reverse the outcome by filing a meritless PFR upon the retirement of a panel judge. Should this Court deny review and leave the Ninth Circuit's procedures as they stand, then going forward, the non-prevailing party in any case where a judge becomes unavailable will be motivated to burden that Court with a PFR. A more pernicious effect on the federal judicial system is that the principle of finality is undermined. The Ninth Circuit's procedures result in gross judicial inefficiency, open the floodgates to judge-shopping, and diminish the reliability and legitimacy of all the Ninth Circuit's opinions, with potential ripple effect on the authority of all federal courts of review.

Waidla thus respectfully requests that this Court grant the petition
and any other appropriate relief.

Respectfully submitted,

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