No. 14-_____

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTONS,

Petitioner

On Petition for Writ of Mandamus and/or Prohibition, or a Writ of Certiorari, to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF MANDAMUS AND/OR PROHIBITION, OR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Over 3 months ago, this Court denied certiorari review in *Henry v. Ryan*, No. 13-9512, rejecting Henry's claims that the state court did not consider mitigating evidence in imposing a death sentence, and that such error was structural. Instead of issuing its mandate immediately as required under Rule 41(d)(2)(D) of the Federal Rules of Appellate Procedure, a majority of the Ninth Circuit's judges voted to hear this claim en banc. They did so despite previously rejecting en banc review on this very claim.

Should this Court issue a writ of mandamus and/or prohibition ordering the United States Court of Appeals for the Ninth Circuit to issue the mandate, where there are no extraordinary circumstances warranting withholding the mandate?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. Graham S. Henry filed an appeal from the district court's denial of his petition for writ of habeas corpus.

2. Charles L. Ryan was the named respondent in the lower-court proceedings.

The following are parties to the proceeding in this Court:

1. Charles L. Ryan is the Petitioner.

2. The United States Court of Appeals for the Ninth Circuit is the Respondent.

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The Ninth Circuit Court of Appeals' published order granting en banc rehearing on Henry's motion to reconsider the denial of panel rehearing (the subject of the present petition) is reported at *Henry v. Ryan*, __ F.3d __, 2014 WL 4397948. (App. A-1–A-33.) The Ninth Circuit's published order denying Henry's motion to reconsider the denial of panel rehearing is reported at *Henry v. Ryan*, 748 F.3d 940 (9th Cir. 2014). (App. C-1–C-7.) The Ninth Circuit also issued several unreported and unpublished orders relevant to the present petition, which are appended hereto. (App. B-1; D-1–D-2; E-1.)

The Ninth Circuit's published opinion affirming the district court's denial of habeas relief is reported at *Henry v. Ryan*, 720 F.3d 1073 (9th Cir. 2013). (App. F-1–F-51.) The district court's unpublished orders denying habeas relief and denying Henry's motion to alter or amend the judgment are reported electronically at *Henry v. Ryan*, 2009 WL 692356 (D. Ariz. Mar. 17, 2009), and *Henry v. Ryan*, 2009 WL 890971 (D. Ariz. Apr. 2, 2009), respectively. (App. G-1–G-5; H-1–H-234.) The Arizona Supreme Court's published opinion affirming Henry's convictions is reported at *State v. Henry*, 863 P.2d 861 (Ariz. 1993), and its opinion affirming his death sentence after a resentencing proceeding is reported at *State v. Henry*, 944 P.2d 57 (Ariz. 1997); these opinions are not relevant to the present petition and are not appended.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its order granting en banc rehearing on September 4, 2014. (App. A-1.) This Court's jurisdiction is timely invoked under the All Writs Act, 28 U.S.C. § 1651, and Rule 20 of the Rules of the Supreme Court of the United States. Alternatively, this Court's certiorari jurisdiction is timely invoked under 28 U.S.C. § 1254(1) and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Federal Rule of Appellate Procedure 41 governs issuance of an appellate court mandate and provides, in pertinent part:

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

disposition of the petition or motion, unless the court orders otherwise.

(2) Pending Petition for Certiorari.

(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.

(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

(C) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

(D) The court of appeals must issue the mandate immediately

when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.

INTRODUCTION

This case presents the kind of extraordinary circumstances in which this Court exercises its discretionary authority to issue a writ of mandamus. The writ of mandamus should issue because the Ninth Circuit's refusal to issue a mandate contravenes a clearly applicable rule of procedure and effectively thwarts this Court's decision to decline review of Henry's petition for writ of certiorari.

The Ninth Circuit's refusal to issue the mandate was manifestly wrong and defied this Court's precedent. Only one year ago, in *Ryan v. Schad*, __ U.S. __, 133 S. Ct. 2548 (2013), this Court reversed the Ninth Circuit for withholding its mandate after this Court denied certiorari. There, as here, the Ninth Circuit withheld the mandate and ordered further proceedings in a capital case on a claim it had previously considered and rejected. Again, notwithstanding this Court's denial of certiorari, a majority of active Ninth Circuit judges have voted to hear en banc a claim that Henry had raised unsuccessfully on numerous occasions before that court. (App. A-1.) By so doing, the Ninth Circuit has again disregarded the Federal Rules of Appellate Procedure, ignored this Court's prior admonitions, and undermined the comity and finality goals of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"). Judge Richard Tallman summarized the court's

transgressions in his dissent from the order granting en banc rehearing:

> If one is remembered for the rules one breaks, then our court must be unforgettable. By taking this capital case en banc now—after certiorari has been denied by the Supreme Court and well after the deadline for en banc review by our court has passed—we violate the Federal Rules of Appellate Procedure and our own General Orders. We also ignore recent Supreme Court authority that has reversed us for doing the same thing in the past. No circuit is as routinely reversed for just this type of behavior.

(App. A-20.)

Petitioner seeks a writ of mandamus and/or prohibition to compel the Ninth Circuit to issue its mandate and to prevent it from further adjudication in this matter. Its refusal to comply with Federal Rule of Appellate Procedure 41 and this Court's unambiguous precedent constitutes an exceptional circumstance warranting this Court's intervention, and Petitioner has no other avenue for relief.

Alternatively, Petitioner asks this Court to grant certiorari to exercise its supervisory power, as set forth in Supreme Court Rule 10(a), because the Ninth Circuit has grossly and unjustifiably departed from ordinary judicial procedures. This Court's intervention is critical to ensure the integrity of the appellate

process and to curtail the Ninth Circuit's willful refusal to comply with this Court's rules and precedent.

STATEMENT OF THE CASE

This is a 28-year-old capital murder case. Graham Henry was convicted in 1987 and sentenced to death, initially in 1988 and again upon resentencing in 1995. *Henry*, 944 P.2d at 59. Henry's federal habeas corpus proceedings have been pending for over twelve years.

In June, 1986, Henry and an accomplice kidnapped their disabled victim from Las Vegas and drove him to Arizona, where they murdered him.[1] (App. F-5–F-8.) *See Henry*, 863 P.2d at 865–66. A jury convicted Henry of first degree murder and the court sentenced him to death. *Henry*, 944 P.2d at 60. Following a direct appeal and three state post-conviction proceedings, Henry filed a petition for writ of habeas corpus in 2002. (App. F-7–F-8.) The district court denied relief (App. H; App. I), and Henry appealed to the United States Court of Appeals for the Ninth Circuit alleging, among other perceived errors, that the state courts had refused to consider his purported history of alcohol abuse because it lacked a causal nexus to the offense. (App. F-33–F-41.) *See Eddings v. Oklahoma*, 455 U.S. 104 (1982).

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[1] The Ninth Circuit set forth the facts of Henry's offense in its opinion. (Appx. F-5–F-8.) Because they are not relevant to the present response, Petitioner omits them here.

The Ninth Circuit's three-judge panel held that, even assuming Henry could satisfy AEDPA's standards for relief and prove an Eighth Amendment violation, he had failed to show that the error substantially or injuriously affected the sentencing verdict under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). (*Id.*) Specifically, the panel observed that the state courts had found a causal connection between Henry's intoxication and the offense and had considered that evidence in mitigation, and that Henry's historical alcohol abuse would have carried minimal additional mitigating weight: "If the state courts concluded that intoxication *with* a causal connection to the crime was not sufficient to call for leniency, it is highly doubtful that they would have considered alcoholism without a causal nexus to be sufficient." (*Id.*)

The panel further found that "the Arizona courts would not have given [the alcohol-abuse] evidence significant weight under any circumstances" and that, unlike other cases where a defendant's substance-abuse history has been found significantly mitigating, Henry's evidence was similar to other mitigation already considered, the evidence had minimal probative value, and Henry presented little other mitigation. (*Id.*; *see also* App. F-40, n.11 ("Henry's historical alcoholism might have been considered aggravating as well as mitigating, depending on the perspective of the sentencing court").) The panel affirmed the denial of habeas relief. (App. F-51.)

A. *November 2013 petition for panel rehearing and rehearing en banc.*

After obtaining two extensions of time totaling 37 days, Henry filed a combined petition for panel rehearing and rehearing en banc. (Ninth Cir. Dkt. # 86–92.) In the relevant part of his petition, Henry argued that the panel erred by applying *Brecht* to his *Eddings* claim because such error, he argued, is structural and requires automatic reversal. (Ninth Cir. Dkt. # 92, at 7–11.) The Ninth Circuit denied the petition on November 1, 2013, with *no judge calling for a vote* on whether to rehear the case en banc. (App. E-1.) *See* Fed. R. App. P. 35(a); Ninth Cir. R. 35–3 & Circuit Advisory Committee Note 2. After the denial of his motion for rehearing, Henry obtained a 60-day extension of time until March 31, 2014, to file a certiorari petition in this Court. (*See* Sup. Ct. No. 13A748.)

Henry did not move the Ninth Circuit to stay its mandate pending this Court's resolution of the certiorari petition, as required by Federal Rule of Appellate Procedure 41(d)(2)(A). Nonetheless, the Ninth Circuit failed to issue the mandate within 7 days of its denial of rehearing. *See* Fed. R. App. P. 41(b) (requiring court to issue mandate 7 days after an order denying a timely petition for panel or en banc rehearing). That was the Ninth Circuit's first of two plain and uncorrected errors that compelled Petitioner to seek extraordinary relief.

B. *March 2014 motion for reconsideration.*

On March 12, 2014, shortly before Henry's certiorari petition was due, the Ninth Circuit ordered en banc rehearing in another Arizona capital case that presents, among other issues, the question whether *Eddings* error is subject to harmless-error review. (*See McKinney v. Ryan*, Ninth Cir. No. 09–99018, Dkt. # 51, at pp. 13–14; Dkt. # 57.) Two days later, Henry filed an "Expedited Motion for Full-Court Reconsideration of Order Denying Petition for Rehearing En Banc in light of *McKinney v. Ryan*." He noted that his case presented the same issue as McKinney's, argued that *Eddings* error is structural, and posited that equitable principles militated in favor of reconsideration because this Court was likely to deny Henry's certiorari petition and, if McKinney succeeds with the en banc panel, McKinney could be spared while Henry would be executed. (Ninth Cir. Dkt. # 97.) Henry therefore asked the Ninth Circuit to reconsider its November 1, 2013, order denying en banc rehearing and either grant rehearing or hold the decision in abeyance pending *McKinney*. (*Id.*)

The Ninth Circuit construed Henry's motion as a petition for rehearing en banc before the full court and denied it as not cognizable because "a petition for rehearing by the full court can only be filed after a decision issued by a limited en banc panel rehearing a panel opinion en banc after a successful en banc call." (App. D-1–D-2.) *See* Ninth Cir. R. 35–3 ("In appropriate cases, the Court may order a rehearing by the full court following a hearing or rehearing en banc."). Because no judge had requested a vote on

whether to rehear the panel opinion en banc, and no limited en banc panel had been convened, the rules did not permit Henry's petition for rehearing before the full court en banc. (*Id.*) Henry subsequently filed his petition for writ of certiorari, arguing that *Eddings* error is not subject to harmless-error analysis. (*See* Petition for Writ of Certiorari, Supreme Court No. 13–9512.)

C. *April 2014 motion for reconsideration.*

On April 2, 2014, in a third Arizona capital case involving an *Eddings* issue, a three-judge panel of the Ninth Circuit amended its November 7, 2013, order denying panel rehearing and rehearing en banc. (*Poyson v. Ryan*, Ninth Cir. No. 10–99005, Dkt. # 79.) The panel again denied en banc rehearing, but held that Poyson's petition for panel rehearing "remained pending" and stayed that motion's resolution pending *McKinney*.[2] (*Id.*) The same day, Henry filed a pleading entitled "Motion for Panel Reconsideration of Order Denying Petition for Panel Rehearing in Light of *McKinney v. Ryan* and *Poyson v. Ryan*." (Dkt. # 99.) Henry argued, again, that his case presented the same issue as *McKinney*, and proposed that it would be inequitable for McKinney and Poyson, to whom he claimed to be similarly situated, to obtain relief while Henry did not. (*Id.*)

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[2] *Poyson* does not present the question whether *Eddings* error is structural. (*See Poyson v. Ryan*, Ninth Cir. No. 10–99005, Dkt. # 69.) And unlike the present case, this Court had not yet denied certiorari when the panel in *Poyson* entered its order. (*See* Dkt., Supreme Court No. 13–9097.)

Citing concerns of finality, comity, and federalism, a majority of the three-judge merits panel denied Henry's motion in a published order. (App. C-1–C-4.) The majority found Henry's motion untimely. (*Id.*) It also noted that Henry's crimes were nearly 28 years old; that it had considered and rejected Henry's *Eddings* claim; and that Henry had presented his claim to this Court, which provided the "swiftest and most efficient means" of addressing the alleged error. (*Id.*) The majority acknowledged the perceived inequity in denying Henry's motion in light of the ruling in *Poyson*, but found that the "'profound interests in repose'" outweighed such concerns. (*Id.* (quoting *Schad*, 133 S. Ct. at 2551).) Judge Raymond Fisher dissented, highlighting concerns of equity. (App. C-5–C-7.)

D. *September 2014 order.*

On April 11, 2014, an active judge requested a vote on whether to hear the denial of Henry's April 2, 2014, motion en banc. (App. B-1.) In the meantime, on June 9, 2014, this Court denied certiorari in Henry's case (App. I-1) and filed its order with the Ninth Circuit on June 10, 2014. (Ninth Cir. Dkt. # 108.) The Ninth Circuit did not issue the mandate immediately, as required under Rule 41(d)(2)(D), and has never filed the mandate. That is the second of the Ninth Circuit's plain, uncorrected errors compelling Petitioner to seek extraordinary relief from this Court.

The improper absence of a mandate enabled Henry to move the Ninth Circuit to stay its mandate pending the court's vote on whether to hear his case en

banc. (Ninth Cir. Dkt. # 107, 110.) Petitioner opposed the motion, noting that *Schad* and Federal Rule of Appellate Procedure 41(d)(2)(D) required the court to issue the mandate immediately. (Ninth Cir. Dkt. # 109.) To date, the Ninth Circuit has not ruled on the motion, and has entered no order staying the mandate. But the court has not refrained from taking further action in Henry's case.

After nearly 5 months of inaction, and notwithstanding this Court's instructions in *Schad* to issue the mandate immediately upon the denial of certiorari, a majority of active, nonrecused judges voted to rehear en banc the three-judge panel's April 8, 2014, order denying Henry's motion to reconsider. (App. A-1.) In a concurring opinion, Judge William Fletcher announced for the first time—and despite the absence of any order staying the mandate—that the clerk of the court had silently entered a stay "pursuant to Rule 41(b), as it routinely does in all capital cases." (App. A-7–A-8.) Judge Fletcher's concurrence concluded that Rule 41(d)(2)(D) applies only to "stays of mandate entered for the sole purpose of allowing the Supreme Court to consider a petition for certiorari"; attempted to distinguish *Schad* and *Bell v. Thompson*, 545 U.S. 794 (2005) on the ground that those cases apply only to stays entered under Rule 41(d)(2)(D); and suggested that the present case's circumstances were "far from ordinary" because *McKinney might* result in a change in the law, which in turn *might* require that Henry be resentenced. (App. A-2–A-19.)

Judge Tallman, joined by four other judges, dissented, observing that the court's order granting en

banc rehearing violated the Federal Rules of Appellate Procedure, the Ninth Circuit's General Orders, and this Court's authority, including *Schad*. In particular, Judge Tallman observed that neither the panel nor the clerk's office had ordered the mandate stayed and opined that, even if a stay had been entered, it should have been lifted and the mandate immediately issued after this Court denied Henry's petition for writ of certiorari. (*Id.*) The dissenters also observed that even if Rule 41(d)(2)(D) actually permitted a court to withhold the mandate when extraordinary circumstances exist (a question this Court did not resolve in *Schad* or *Bell*), Henry failed to make any such showing. (*Id.*)

REASONS FOR GRANTING THE PETITION

Petitioner recognizes that the writ of mandamus is an extraordinary remedy reserved for extraordinary circumstances. Those circumstances exist here, where a lower court has disregarded two separate rules of procedure that required it to issue a mandate. Federal habeas corpus proceedings should have ended, conclusively and at the latest, "immediately" after this Court denied Henry's petition for writ of certiorari on June 9, 2014. Instead, the Ninth Circuit intends to convene en banc to rehear a claim that is no longer before that court. Petitioner has no other means to compel the Ninth Circuit to follow the rule of procedure under which this case should have concluded. Under these circumstances, the grounds for issuing the writ are clear and indisputable, and the record fully supports this Court's exercise of its discretion to issue the writ.

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Issuance of an extraordinary writ, such as a writ of mandamus or prohibition, "is not a matter of right, but of discretion sparingly exercised" and, to justify granting such a writ, "the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." SUP. CT. R. 20.1.

A writ of mandamus or prohibition is appropriate where a lower court's action constitutes a "judicial usurpation of power" or amounts to a "clear abuse of discretion." *Cheney v. U.S. Dist. Ct. for D.C*, 542 U.S. 367, 380 (2004) (quotations omitted); *see also, e.g., Mallard v. U.S. Dist. Ct. for S.D. of Iowa*, 490 U.S. 296, 309 (1989). This Court considers three factors when determining whether to grant such a petition: 1) the party seeking the writ must "have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process"; 2) the party seeking the writ must show a "clear and indisputable" right to the writ's issuance; and 3) this Court must decide, in its discretion, that the writ is appropriate under the case's circumstances. *Cheney*, 542 U.S. at 380–81 (quotations and citation omitted); *see also Kerr v. U.S. Dist. Ct. for the N.D of Cal.*, 426 U.S. 394, 403 (1976).

Alternatively, this Court may construe a petition for an extraordinary writ as a petition for writ of certiorari.[3] *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 549 (1998). This Court will grant a petition for writ of certiorari only "for compelling reasons." Sup. Ct. R. 10. One such reason is that a lower court "has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a).

A. *Petition for writ of mandamus and/or prohibition.*

This Court should grant the writ of mandamus and/or prohibition. First, Petitioner has a "clear and indisputable" right to the requested writ and exceptional circumstances justify its issuance. *Cheney*, 542 U.S. at 380; *see also* SUP. CT. R. 20.1. The Ninth Circuit has failed to comply with the Federal Rules of Appellate Procedure and this Court's precedent and, as a result, has guaranteed significant additional delay in this 28-year-old capital case. Second, granting the petition would aid this Court's appellate jurisdiction by preserving the integrity of appellate procedure, ensuring that Rule 41 remains robust, and reaffirming that this Court's denial of certiorari is not merely an academic exercise. Third,

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[3] Petitioner here has not combined a certiorari petition with another pleading in violation of United States Supreme Court Rule 12.4. He simply asks, in the alternative, that the petition be construed as one for certiorari if it fails under the standards for mandamus and prohibition. Parties often file petitions for certiorari in the alternative to petitions for an extraordinary writ. *See In re Whitehead*, 519 U.S. 1107 (1997) (mem.).

Petitioner lacks an alternative forum to seek relief because a majority of active Ninth Circuit judges have effectively rejected his position, and because he will have suffered irreparable harm by the time en banc proceedings conclude.

1. The Ninth Circuit abused its discretion by failing to issue its mandate after this Court denied certiorari.

Under Federal Rule of Appellate Procedure 41(b), an appellate court's mandate "*must* issue … 7 days after entry of an order denying a timely petition for panel rehearing [or] petition for rehearing en banc," unless the court extends this time. (Emphasis added). Likewise, Rule 41(d)(2) permits the court to stay its mandate upon request pending a writ of certiorari, but requires the court to "issue the mandate *immediately* when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." (Emphasis added). *See Schad*, 133 S. Ct. at 2550 (describing Rule 41(d)(2)(D) as "the default rule" after denial of certiorari); *accord Bell*, 545 U.S. at 806. Regardless which of these rules applies, the Ninth Circuit abused its discretion by withholding the mandate and ordering further proceedings after this Court denied certiorari. No compelling or extraordinary circumstances justify belated en banc consideration of what amounts to Henry's *third* motion for reconsideration on an issue that is not dispositive of his case. This abuse of discretion warrants this Court's intervention.

As a preliminary matter, Judge Fletcher asserts that the clerk of the court, in fact, stayed the mandate

under Rule 41(b), purportedly "as it routinely does in all capital cases." (App A-7–A-8.) But if a stay is in place, the court did not notify the parties of it and no record of it appears on the docket. *See Bell*, 545 U.S. at 805 ("Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the court had stayed the mandate or simply made a clerical mistake."). Nor is Petitioner aware of any "routine" practice by the Ninth Circuit Clerk of staying mandates in capital cases without an order or notice to the parties.[4] And any such "routine" would render superfluous Rule 41(d)(2)(D). Further, although Judge Fletcher identified the unannounced stay as having been entered on behalf of the three-judge panel that decided the case (App. A-8), Judge Tallman, who belongs to that panel, believes the mandate has not been stayed and Judge Callahan, who also belongs to the panel, joined his opinion. (App. A-21–A-29.) Thus, whether some informal, unannounced stay is in place under Rule 41(b) is, at best, unclear from the record.

In any event, the Ninth Circuit has, by its failure to publicly act on the mandate one way or

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[4] Judge Fletcher cites Ninth Circuit Rule 22–2(e) for the clerk's authority to stay the mandate. (App. A-7.) Judge Tallman reasonably considers this rule ambiguous, as it appears under a heading relating to stays of execution. (App. A-21, n.1.) But even if the Rule applies, it expressly requires an order from the three-judge panel and gives the clerk no power to stay the mandate without notice to the parties. *See* Ninth Cir. R. 22–2(e) ("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).") (emphasis added).

another, effectively stayed its issuance. "It is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction." *Bell*, 545 U.S. at 805. It is likewise an open question whether Rule 41 allows any exceptions; however, assuming it does, only extraordinary circumstances justify an appellate court withholding its mandate after the denial of certiorari.[5] *See Schad*, 133 S. Ct. at 2551 (assuming that court of appeals has the power to withhold the mandate under Rule 41(d)(2)(D), "it abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the [certiorari] petition, unless extraordinary circumstances justify that action"); *Bell*, 545 U.S. at 803–804 (assuming, without deciding, that Rule 41(b) "authorizes a stay of the mandate following the denial of certiorari and also that a court may stay the mandate without entering an order," but finding court of appeals abused its discretion by staying mandate); *id.* at 806 ("[T]he circumstances where … a stay [under Rule 41(b) after certiorari] would be warranted are rare").

"As a practical matter, a decision by this Court denying discretionary review usually signals the end of

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[5] Judge Fletcher contends that extraordinary circumstances are not required to stay the mandate here because *Schad* and *Bell* concerned only Rule 41(d)(2)(D), while the present case purportedly involves a stay under Rule 41(b). (App. A-11–A-18.) But in *Bell*, the petitioner specifically argued that the court properly withheld the mandate under Rule 41(b). 545 U.S. at 803–04, 806. And *Schad* relied heavily on *Bell*, applying that case's reasoning to Rule 41(d)(2)(D). Thus, in the present context, there is no meaningful distinction between the two rules.

litigation," and a litigant's ability to correct errors in the court of appeals immediately through panel or en banc rehearing "ensure[s] that litigation following the denial of certiorari will be infrequent." *Bell*, 545 U.S. at 805–06; *see also Schad*, 133 S. Ct. at 2550 ("[O]nce this Court has denied a [certiorari] petition, there is generally no need for further action from the lower courts."). Because of the "profound interests in repose" the mandate rule protects, "[d]eviation from normal mandate procedures is a power of last resort, to be held in reserve against grave, unforeseen contingencies." *Schad*, 133 S. Ct. 2551 (quotations omitted).

The present case is indistinguishable from *Bell* and *Schad*, in which this Court found an abuse of discretion in withholding the mandate. First, as in *Bell*, significant time—nearly three months—elapsed between this Court's denial of certiorari and the Ninth Circuit's order granting en banc rehearing. (App. A-1; I-1.) The time lapse is even more striking—five months—when measured from the date a judge requested an en banc vote to the date the court granted rehearing. (App. A-1; B-1.) *See Bell*, 545 U.S. at 804 (finding abuse of discretion in withholding mandate where five months elapsed between Supreme Court's denial of petition for rehearing and court of appeals' filing of amended opinion); *Calderon*, 523 U.S. at 552 (finding, where two judges waited four months to request en banc vote to correct a purported oversight, which led to court recalling judgment, that "[t]he Court of Appeals for all practical purposes lay in wait while this Court acted on the petition for certiorari" and the State commenced execution and clemency procedures). There is no compelling reason to afford five months for

taking an en banc vote. *See Calderon*, 523 U.S. at 552 ("The promptness with which a court acts to correct its mistakes is evidence of the adequacy of its grounds for reopening the case."). Even if the court could have "effect[ed] a stay for a short period of time by withholding the mandate, a delay of five months is different in kind." *Bell*, 545 U.S. at 805.

Second, as in both *Bell* and *Schad*, the Ninth Circuit withheld the mandate based on an argument it had previously considered and rejected. *See Schad*, 133 S. Ct at 2551–52 (Ninth Circuit abused its discretion by declining to issue the mandate "based on an argument it had considered and rejected months earlier"); *Bell*, 545 U.S. at 806 (the Ninth Circuit's "opportunity to consider these arguments at the rehearing stage is yet another factor supporting our determination that the decision to withhold the mandate was in error"). In fact, Henry has unsuccessfully raised the claim that *Eddings* error is structural on at least *four separate occasions*: in his supplemental brief, in his petition for panel and en banc rehearing, in his March 2014 motion to reconsider, and in his April 2014 motion to reconsider, the latter of which is the subject of the en banc order.

This Court "presume[s] that the Ninth Circuit carefully considers each motion a capital defendant presents on habeas review." *Schad*, 133 S. Ct. at 2552. Henry had ample opportunity to raise his structural-error argument, the Ninth Circuit dutifully considered that argument on more than one occasion, and no valid reason exists for the court to delay its mandate to consider the issue again now. *See Schad*, 133 S. Ct. at

2551 ("The Ninth Circuit had a full 'opportunity to consider these arguments' but declined to do so, which 'support[s] our determination that the decision to withhold the mandate was in error.'") (quoting *Bell*, 545 U.S. at 806–07) (citations omitted).

Third, as in *Bell*, the nature of the error Henry alleges "is not of such a character as to warrant the Court of Appeals' extraordinary departure from standard appellate procedures." *Bell*, 545 U.S. at 808–09. Essentially, Henry and Judge Fletcher both speculate that, in *McKinney*, the en banc court *might* find *Eddings* error to be structural, which *might* result in Henry receiving a new sentencing. But setting aside the dubious theory that a *potential* change in the law can constitute an extraordinary circumstance,[6] a decision in *McKinney* favorable to Henry would not change the outcome of his case. Judges Tallman and Callahan have confirmed that "the panel majority *does not believe that there was Eddings error at all* in Henry's case." (App A-31, n.6 (emphasis added).) And, in its April 8, 2014, order denying reconsideration, the panel majority acknowledged that it had resolved the case on harmless-error grounds simply to secure a unanimous decision. (App. C-3, n.2.)

Accordingly, even if the court in *McKinney* finds that *Eddings* error is structural, and even if the en banc court here sends the case back to the merits panel for rehearing, it would not affect the outcome of

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[6] As Judge Tallman observed, "[t]he law changes all the time. Nothing so ordinary could be extraordinary." (App. A-32.)

Henry's case because two of the three panel judges would find *no error at all* and affirm the judgment. *See Stokley v. Ryan*, 705 F.3d 401, 403 (9th Cir. 2012) ("To constitute an exceptional circumstance, an intervening change in law must require a significant change in result for the parties."); *Adamson v. Lewis*, 955 F.3d 614, 620–21 (9th Cir. 1992) (denying motion to stay mandate after denial of certiorari based on newly-decided opinions where the new opinions' application would not have changed the result of the court's en banc opinion).[7]

Fourth, as in both *Schad* and *Bell*, "federalism concerns, arising from the unique character of federal habeas review of state-court judgments, and the policies embodied in [AEDPA] require[] an additional presumption against recalling the mandate." *Bell*, 545 U.S. at 812; *accord Schad*, 133 S. Ct. at 2551. Accordingly, a "court's discretion under Rule 41 must be exercised … in a way that is consistent with the State's interest in the finality of convictions that have survived direct review within the state court system." *Bell*, 545 U.S. at 813 (quotations omitted); *see generally Panetti v. Quarterman*, 551 U.S. 930, 945

[7] Further, issuing the mandate would not, as Judge Tallman observed, "necessarily result in [Henry's] execution," or leave him without a remedy. (App. A-27.) Henry could, for example, seek relief in state court or attempt to meet the criteria for a second or successive habeas petition. *See* 28 U.S.C. § 2244(b). "Granting an untimely petition for rehearing based on potential future changes in the law in unrelated cases interferes with the ordinary processes for habeas petitions, which provide adequate alternatives for a defendant to raise meritorious issues." (*Id.*)

(2007) ("[AEDPA's] design is to 'further the principles of comity, finality, and federalism.'") (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003)); *Rhines v. Weber*, 544 U.S. 269, 276 (2005) (AEPDA is designed to reduce delay).

Henry's federal habeas corpus proceedings concluded with the denial of certiorari on June 9, 2014. (App. I-1.) Reopening Henry's proceeding in the Ninth Circuit three months after this Court denied certiorari, and nearly a year after the Ninth Circuit denied rehearing—based on arguments that both courts have rejected or declined to review—would frustrate AEDPA's interests and unnecessarily add months or years of delay to this aging capital case. As the panel observed in denying Henry's April 2014 motion for reconsideration, "[t]he perceived friendlier waters of the Ninth Circuit cannot harbor all boats indefinitely." (App. C-4.) By permitting Henry to return to its "perceived friendlier waters" to litigate a previously-rejected argument, the Ninth Circuit has abused its discretion and created exceptional circumstances warranting mandamus and/or prohibition. This Court should grant the petition.

2. Issuing the writ would aid this Court's appellate jurisdiction.

"'The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction.'" *Schlagenhauf v. Holder*, 379 U.S. 104, 109–10 (1964) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21,

26 (1943)). For example, a writ of mandamus is appropriate where a party seeks to enforce an appellate court judgment in a lower court or to prevent a lower court from obstructing the appellate process. *See Will v. United States*, 389 U.S. 90, 95–96 (1967); *United States v. U.S. Dist. Ct. for S.D. of N.Y.*, 334 U.S. 258, 263 (1948). The writ is likewise proper where, as here, a party seeks to forestall a lower court's persistent disregard of procedural rules promulgated by this Court. *See Will*, 389 U.S. at 90, 96, 100 & n.10; *Roche*, 319 U.S. at 31; *see also La Buy v. Howes Leather Co.*, 352 U.S. 249, 313–14 (1957) ("Where the subject concerns the enforcement of the rules which by law it is the duty of this court to formulate and put in force, mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked.") (quotations and alterations omitted).

Here, as set forth above, Petitioner seeks an order requiring the Ninth Circuit to fulfill its duty to issue the mandate under Federal Rule of Appellate Procedure 41. "By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle." *Hollingsworth v. Perry*, 558 U.S. 183, 196–97 (2010). The systemic violation of procedural rules can "compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments. These considerations, too, are part of the reasons leading to the decision to grant extraordinary relief." *Id.* at 197. The court's conduct in withholding the mandate in this case based on dubious grounds dilutes Rule 41's force

and threatens the integrity of the appellate process. *See Schad*, 133 S. Ct. at 2551 ("Deviation from normal mandate procedures is a power of last resort, to be held in reserve against grave, unforeseen contingencies.") (quotations omitted).

In addition, the court's decision to continue appellate proceedings despite this Court's denial of certiorari, which marked the end of Henry's habeas litigation, *see Schad*, 133 S. Ct. at 2550; *Bell*, 545 U.S. at 805–06, constitutes, for all practical purposes, a refusal to enforce this Court's judgment. This is particularly true where this Court declined to review the very claim Henry now seeks to litigate. In light of the Ninth Circuit's emasculation of this Court's procedural rules and its failure to enforce this Court's order denying certiorari, granting the writ of mandamus and prohibition would aid this Court's appellate jurisdiction.

3. Petitioner lacks an adequate alternative means to challenge the Ninth Circuit's order.

Petitioner cannot obtain the relief he seeks from another court. SUP. CT. R. 20.1; *Cheney*, 542 U.S. at 380–81. Petitioner lacks a clear procedural vehicle to challenge the Ninth Circuit's order in that court. Moreover, even if such a vehicle exists, pursuing relief in the Ninth Circuit would be futile. Petitioner has opposed both the motion for reconsideration that the court has agreed to hear en banc and Henry's motion to stay the mandate pending the court's vote whether to take the case en banc. (Ninth Cir. Dkt # 103, 107, 109,

110.) In his response to Henry's motion to stay the mandate, Petitioner argued that *Schad* required the court to issue the mandate immediately. (Dkt. # 109.) A majority of active Ninth Circuit judges necessarily rejected Petitioner's position when they agreed to hear this matter en banc.

Petitioner also lacks an adequate remedy through the ordinary appellate process. The Ninth Circuit previously rejected the claim it has now agreed to hear en banc. This Court likewise denied certiorari review of that claim, and Henry's habeas proceeding concluded with this Court's denial of review. *Schad*, 133 S. Ct. at 2550; *Bell*, 545 U.S. at 805–06. Nonetheless, Petitioner now faces what is likely to be years of additional litigation on the same claim that was previously rejected, and has no adequate means of relief to challenge the court of appeals' improper actions here. Moreover, by the time the litigation is complete, the interests in finality, federalism and comity that AEDPA safeguards will be irreparably damaged. *See generally Panetti*, 551 U.S. at 945; *Rhines*, 544 U.S. at 276; *Miller-El*, 537 U.S. at 337. For these reasons, Petitioner has no adequate, alternative remedy to mandamus or prohibition.

4. The circumstances warrant granting the petition.

Finally, the circumstances here warrant this Court's intervention to grant the petition for writ of mandamus and/or prohibition. *See Cheney*, 542 U.S. at 380–81. The Ninth Circuit has repeated the identical mistake it made in *Schad*, in the process disregarding this Court's pointed directives to issue the

mandate and relinquish jurisdiction after the denial of certiorari. Unfortunately, the Ninth Circuit's actions here are consistent with its pattern of failing to apply AEDPA, failing to follow this Court's precedent, and erroneously granting relief to habeas corpus petitioners in capital cases. *See Cash v. Maxwell*, __ U.S. __, 132 S. Ct. 611, 616–17 (Mem. 2012) (Scalia, J., dissenting from the denial of certiorari) (collecting cases in which the Supreme Court has reversed habeas corpus decisions from the Ninth Circuit and stating, "The only way this Court can ensure observance of Congress's abridgment of [the] habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task, which we have found particularly needful with regard to decisions of the Ninth Circuit."); *Hurles v. Ryan*, 752 F.3d 768, 806 & n.8 (9th Cir. 2014) (Ikuta, J., dissenting) (collecting cases and stating, "The Supreme Court has harshly criticized our noncompliance with AEDPA deference."). (*See* App. A-28 ("Our defiance is well and recently practiced.").) This Court's intervention is necessary to ensure the Ninth Circuit's compliance with its rules and precedent. This Court should exercise its discretion to grant the requested writ.

B. *Alternative petition for writ of certiorari.*

In the alternative, for the reasons previously stated, compelling reasons exist for this Court to exercise its supervisory powers and grant certiorari under Rule 10(a). "This Court … has a significant interest in supervising the administration of the judicial system," and its "interest in ensuring

compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Hollingsworth*, 558 U.S. at 196 (citing Rule 10(a)). For the reasons set forth above, the Ninth Circuit's willful noncompliance with this Court's rules threatens the integrity of the judicial process. This Court should grant certiorari.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of mandamus and/or prohibition or, in the alternative, should grant the petition for writ of certiorari.

Respectfully submitted,

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