No. 12-1472

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,

Petitioner,

vs.

RICHARD D. HURLES,

Respondent.

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

HURLES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Capital Case

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATEMENT OF THE CASE

Before turning to the facts supporting the relief the circuit court below properly ordered in this capital case—an evidentiary hearing where Respondent Hurles can present and prove the facts demonstrating the sentencing judge's bias that arose when the judge and her then counsel, assistant Attorney General Colleen French, engaged in an *ex parte* meeting to discuss Mr. Hurles' pending proceedings, Hurles must first address a misrepresentation in Petitioner's question presented. That question-"Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), are state court adjudications *per se* unreasonable and not entitled to deference under 28 U.S.C. Sec. 2254(d)(2) merely because the state court does not conduct an evidentiary hearing?"-- is neither presented here nor supported by the facts. Instead, as addressed below, the court below held that on these extraordinary facts including:

1) The trial judge's participation in special action proceedings that the state Court of Appeals later found to be "of the inappropriate 'I-ruled-correctly' sort";

2) The trial judge's participation in Hurles' capital trial and sentencing;

3) An *ex parte* meeting between the trial judge and an assistant attorney general who represented the judge in the special action proceedings;[1] and

[1] Hurles has never been provided the opportunity to depose the witnesses and discover all the facts supporting his judicial-bias claim. But as addressed more below, then assistant attorney General Colleen French, who represented the trial judge, "later admitted to having had some communications with Judge Hilliard about this matter." Attorney General French, however, "did not describe their nature and content." As a result, as the court below correctly found the "record is

4) The assistant attorney general's continued participation as state's counsel in the postconviction and district court proceedings,

the state court's fact-finding process rejecting Hurles' judicial bias claim was unreasonable.[2] The circuit court did not create a new rule that a state court's failure to hold an evidentiary hearing is *per se* unreasonable, but rather applied the appropriate AEDPA deference under 28 U.S.C. §2254(d)(2), and found that the state court's fact finding was objectively unreasonable. Petitioner's Question Presented does not accurately recite the holding of the circuit court.

As addressed below, the proceedings here implicate "the most basic tenet of our judicial system"—a system that "helps to ensure both the litigants' and the public's confidence that each case has been adjudicated fairly by a neutral and detached arbiter."[3] That key safeguard to which Mr. Hurles was entitled—"a fair trial in a fair tribunal," a "basic requirement of due process,[4] was denied here. As a result, Hurles was sentenced to death, not by a neutral arbiter, but by an adversary.

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ambiguous as to the nature and extent of those communications." *Hurles v.* Ryan,706 F.3d 1021, 1028(9th Cir. 2013).

[2]These proceedings took place before this Court's announcement in *Ring v. Arizona*, 536 U.S. 584 (2002), that "[c]apital defendants, no less than noncapital defendants," "are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589.

[3]*Hurles v. Ryan*,706 F.3d at 1036.

[4] *In Re Murchison*, 349 U.S. 133, 136 (1955). As the Court explained: "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Hurles*, 706 F.3d at 1036.

One more point is needed as well. Petitioner's petition for writ of certiorari here is premature. Based on the facts before it, the court below ordered only an evidentiary hearing. It did not grant Hurles relief. The court properly found that on these extraordinary facts unlikely to recur, Hurles was entitled to an evidentiary hearing to prove his fundamental due process rights to fairness were violated when the trial judge who presided over his trial, sentencing and first and second postconviction proceedings, after opposing Hurles in the special action proceedings, and the assistant attorney general who represented her in the special action proceedings the trial judge's counsel initiated, met *ex parte*. The contents of that meeting (or meetings) remain undisclosed.

The Special-Action Proceedings

Petitioner described the basic facts surrounding the special-action proceedings Hurles initiated when his request to trial Judge Ruth Hilliard for appointment of second counsel to aid her in representing Hurles was denied. Petition, pp. 4-5. Petitioner agrees that Hurles' counsel requested, and the state court Judge denied, Hurles' request for second counsel to assist her in the trial and sentencing proceedings. *Id.*, p. 5. Petitioner agrees as well that the Maricopa County Attorney's Office, representing the State, acknowledged that it lacked standing to challenge the matter of defense resources and therefore refused to take a position on Hurles' counsel's request for second counsel. But Judge Hilliard, through assistant Arizona Attorney General Colleen French, did. *Id.*, pp. 6-7.

French responded on the trial judge's "behalf defending her ruling." *Id.* Appx G-1-40.[5] Judge Hilliard received copies of French's pleadings. Appx. G-42. In Judge Hilliard's response to the special action petition, French included a "Statement of the Facts," which detailed the state's theory of the case, including, *inter alia,* Hurles has been charged "with the brutal murder of a librarian," Supp. Appx. A-38[6], and other crimes, and: "the Real Party in Interest filed a notice of its intent to seek the death penalty," Appx. G-6; "Appointed Counsel requested the contract administrator for the Maricopa County Superior Court to appoint another attorney to assist her in representing Petitioner in this matter, and this request was denied," appointed counsel "filed an ex-parte motion requesting that Respondent appoint co-counsel to assist her;" and Respondent denied this motion by minute entry order...." *Id.*, at G-7.

Judge Hilliard's response did not stop there. French also argued that "Appointed Counsel has not, as of this date "noticed any defenses in the matter, nor has she disclosed the names of any witnesses she intends to call at trial," *id.*, at G-8, "and it is unknown whether Petitioner will present expert testimony regarding Petitioner's mental state at trial." *Id.* French noted as well that the "Real Party in Interest has listed a total of 22 witnesses to be called at trial," ten of whom "are law

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[5] "Appx." refers to Petitioner's Appendix to the Petition for Writ of Certiorari, "Supp.Appx." refers to Hurles' Supplemental Appendix, "ER" refers to the Excerpts of Record filed in the Ninth Circuit and "D.Ct. Dkt." refers to the District Court's docket.

[6] Appendix C does not include the correct panel opinion, reported at 706 F.3d 1021 (9th Cir. 2013). In addition to numerous typographical errors, the appendix omits language from the opinion. Respondent has attached the correct opinion as Supplemental Appendix A.

enforcement representatives, 1 is a medical examiner, and the remaining 10 are civilians." *Id.*, G-8-9. French announced, too, that "examination of the State's evidence illustrates that its case against Petitioner is very simple and straightforward, compared to other capital cases, contrary to Petitioner's assertions." *Id.*, G-9; Supp.Appx. A-38. And Attorney General French noted:

> [T]he State's evidence includes, but is not limited to the following: eyewitness statements indicating Petitioner was seen running from the library after a witness saw a woman bleeding profusely inside the locked library building, Petitioner's statement to his brother that he had stabbed someone at the library, Petitioner's shirt and pants stained with blood of the same PGM type as the victim's, Petitioner's footprint in the victim's blood at the scene, and the fact that books returned by Petitioner in the return slot at the library place him at the scene of the murder.

Id., G-9-10.

Despite this (and more) evidence collected and identified, French continued to argue: "The State's case against Petitioner is relatively simple, and will not involve an inordinate amount of witness testimony," and as a result, second counsel was unnecessary. *Id.* G-30. Equally troubling, in French's pleadings, filed on Judge Hilliard's behalf, she announced:

> []If Appointed Counsel believes because of her caseload, personal competence, or otherwise, that she is incapable of rendering 'competent representation" of the Petitioner, she is ethically bound to withdraw from this case, and, quite possibly, to withdraw her name from the list of lawyers who contract to provide defense services on behalf of Maricopa County would be able to provide competent representation in a case as simple as this.

Id., at G-38-39. Now appointed counsel's very livelihood was at stake.

The Arizona Supreme Court, aware of the impropriety of a trial judge acting as an adversarial party in litigation, allowed the parties to file supplemental

briefing on the judge's standing. Appx. A-5. Assistant Attorney General French's supplemental response reaffirmed her position that she represented Judge Hilliard against Hurles and such an arrangement was appropriate under the law:

> "Respondent Judge Hilliard, through her attorneys undersigned, and pursuant to the court's order, hereby supplements her response with the following memorandum addressing this court's concerns on the issues of Respondent's standing to defend her choice of counsel."

Supplemental Memorandum (3/10/03) at 1.

At oral argument before the state court of appeals on Hurles' petition for special action, French claimed that the presiding criminal judge had requested the responsive pleading be filed, but that "there was no contact between Judge Hilliard and the Attorney General's office as the pleading was prepared." A-4 n. 2. As was discovered in federal court, this statement was untrue. However, even if it were true, it is undisputed that Judge Hilliard, the very judge who presided over Hurles' trial and sentenced him to death, allowed the State to file pleadings in her name and on her behalf, which placed her in a position adversarial to Hurles.

These critical facts were not known until many years later when Hurles moved to disqualify assistant Attorney General French from continuing to represent the state in the pending habeas proceedings before the district court. Only then (and in response to Hurles' motion to disqualify French), did French finally admit her statement to the state court had been untrue: she and trial Judge Hilliard had

indeed communicated with one another during the special action proceedings. Supp.Appx. A-7.[7]

In early 1993, the Arizona Court of Appeals issued its opinion on the special action proceedings, denying Judge Hilliard standing and concluding "at every level of the judiciary, judges are presumed to recognize that they must do the best they can, ruling by ruling, with no personal stake – and surely no *justiciable* stake – in whether they are ultimately affirmed or reversed." A-16 (emphasis in original). As the court below explained:

> Thus, the Court of Appeals found that Judge Hilliard was neither a standard nominal party, nor an appropriate active party. Instead, it agreed with the *Dean* [8]court's assessment that participation such as Judge Hilliard's in the special action transformed the trial judge into 'an adversary and an advocate.'" *Hurles, supra*, 849 P.2d at 3; E-45.

Appx. E-45.

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[7] Petitioner also suggests that the circuit court inappropriately considered French's admission to *ex parte* communications in determining the state court fact-finding process was unreasonable under §2254(d)(2). Petition, p. 22, n. 5. ("[T]his statement [that French engaged in *ex parte* communications with the judge] has no bearing on the (d)(2) analysis because it was presented for the first time in federal court."). As an initial matter, French's admission was made *prior* to the state court's ruling, as the federal proceedings took place concurrently with the second postconviction proceedings. Compare ER 182-196 (September 20, 2000), *with* Appx. D (August 9, 2002). Furthermore, the circuit court did *not* consider French's admission in its (d)(2) analysis. Supp. Appx. A27-28.

[8] *State v. ex rel. Dean v. City Court*, [] 598, P.2d 1008, 1010 (App. 1979); App. E, 44-45.

The State Postconviction Proceedings

During state postconviction proceedings in 2001,[9] and before Hurles filed his second postconviction petition, Hurles moved to recuse Judge Hilliard so he could allege a judicial bias claim based on her actions during the special action proceedings. Petition, pp. 8-9. Judge Hilliard first ruled that the test for disqualification was an objective one, "the trial judge is presumed to be impartial," *Id.*, p. 9, and she had provided the motion to another judge, Judge Ballinger, who, too, determined Judge Hilliard's disqualification was not supported. *Id.*

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[9] Petitioner notes that Hurles did not assert his judicial bias claim at trial or sentencing, or challenge the judge's imposition of his death sentence. Petition, p. 8. Hurles did not assert his judicial bias claim because he had no basis to do so -- he had yet to discover the secret meetings held between Judge Hilliard and assistant Attorney General French. As for Petitioner's contention that Hurles did not challenge his death sentence, Hurles was represented by court-appointed counsel, James Kemper, who abandoned Hurles in his key direct appeal. Kemper did not argue, much less provide supporting facts to show a death sentence was not supported given Hurles' horrific and tragic background of trauma and abuse. Kemper did not even challenge Arizona's then existing (and unconstitutional) rule that required a defendant prove a causal connection between the crime and his mitigation evidence before the Arizona courts would find the evidence mitigating. *See e.g., State v. Reinhardt*, 951 P.2d 454, 467 (Ariz. 1997)(despite record "reveal[ing] substantial ... evidence of" drug and alcohol abuse, court "has rejected" such evidence as mitigation when "no evidence of causal connection between the substance abuse and the crime" established); *State v. Jones*, 917 P.2d 200, 219-20 (Ariz. 1996)("A difficult family background is not necessarily a mitigating circumstance unless defendant can show that something in his background had an effect of his behavior that was beyond his control."); *State v. Bible*, 858 P.2d 1154, 1209 (Ariz. 1993)(defendant must establish causal connection between the alleged mitigation, here difficult family history, and the murder before mitigation considered); *State v. Wallace*, 773 P.2d 983, 986 (Ariz. 1989)("A difficult family background is a relevant mitigating circumstance if a defendant can show something in that background had an effect or impact on his behavior that was beyond the defendant's control).

Given the undisputed facts about the *ex parte* contact between Judge Hilliard and Attorney General French, and the fact that French represented Judge Hilliard in special action proceedings against Hurles, a "basis to transfer this case" to a different judge was fully supported. But in the absence of the hearing the court below granted to allow Hurles to finally discover all the facts, including Judge Ballinger's knowledge about the *ex parte* meetings between Judge Hilliard and Attorney General French, if any, these important facts remain unknown. *Id.*; *see Hurles, supra*, 650 F.3d at n. 4.

Hurles filed a second petition for postconviction relief in the Arizona state court, alleging judicial bias and requesting Judge Hilliard recuse herself, citing Ariz.R.Crim.P. 32.4(e) that provided "[i]f it appears that the sentencing judge's testimony will be relevant, that that judge shall transfer the case to another judge." Petition, pp. 8-9. *See also*, Arizona Code of Judicial Conduct, rule 2.11(A)(2)(d); A.R.S. §12-409(B)(4);[10] Ariz.R.Evid. 605 ("The judge presiding at trial may not testify as a witness at the trial. A party need not object to preserve the issue.)(Amd. Sept. 8, 2011). Based on these facts supporting his claim, Judge Hilliard's testimony was needed to develop and support his record. *See* 28 U.S.C. Section 2255(e)(2).

Despite that Assistant Attorney General French had already admitted to *ex parte* contacts with Judge Hilliard in contemporaneous proceedings in District

[10] Although the statute refers only to civil actions the Arizona Supreme Court holds these principles apply with equal force to criminal cases. *Marsin v. Udall*, 279 P.2d 721, 724 (1955).

Court, *see infra*, Judge Hilliard denied any contact between the two of them. ER 79. Judge Hilliard claimed:

> In the special action in this case, the Attorney General filed a response on this judge's behalf but without any specific authorization of such a pleading. No contact was made by this judge with the Attorney General and this judge was a nominal party only.

Id.

Judge Hilliard not only declined to recuse herself, she adjudicated the claim on the merits, without a hearing or presentation of any witnesses, and alone determined (and announced) the facts of Hurles' judicial bias claim. As Petitioner notes, Judge Hilliard stated, in part:

> Defendant argues ... that this Judge should have recused herself from consideration of the first Petition for Post-Conviction Relief based on the Court of Appeals' ruling in *Hurles v. Superior Court*, 174 Ariz. 331, 849 P.2d 1 (App. 1993). Defendant argues that because the Court of Appeals determined that the response filed on behalf of this judge, (without her input) was wrong, this judge is thereby precluded from hearing any further matters in this case. However, rule 81 of the Arizona rules of the Supreme Court, Cannon 3 (E)(1) provides that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned..." The test is an objection one: whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality (citations omitted).
>
> ....

Appx. D-2-5.

> In the special action in this case, the Attorney General filed a response on this judge's behalf but without any specific authorization of such pleading. No contact was made by this judge with the Attorney General and this judge was a nominal party only (emphasis added). The special action was resolved five years before the first PCR was filed. Based on the circumstances of this case, the Court finds that a reasonable and objective person would not find partiality. As in *Carver* [ ], Hurles simply alleges bias and prejudice but offers no factual evidence to support his allegations. There is no allegation of

> partiality during the trial or that rulings or conduct during the first PCR demonstrated any bias. "Appearance of interest or prejudice is more than the speculation suggested by defendant. It occurs when the judge abandons the judicial role and acts in favor of one party or another." 160 Ariz. at 173. Hurles has failed to overcome the presumption of impartiality.

Id.

The Arizona District Court Proceedings

Hurles turned next to the Arizona District Court to present his judicial bias claim. Petition, pp. 10-12; Supp.Appx. B.[11] Hurles also moved to disqualify the Office of the Arizona Attorney General, based on that office's representation of Judge Hilliard. *Id.* In responding to the motion, Assistant Attorney General French confessed to *ex parte* communications with Judge Hilliard. In an attempt to legitimize these contacts, French argued her private "communications with the Trial Judge during the special action proceedings cannot be construed to have been *ex parte* because [she] represented the Trial Judge at the time they occurred." ER 187.

Hurles requested an evidentiary hearing where he could conduct additional discovery and present the facts supporting his colorable claim of judicial bias. Supp.Appx. B-7. Entitlement to an evidentiary hearing requires a petitioner present only a colorable claim for relief. *See Williams v. Taylor*, 529 U.S. 420, 437 (U.S. 2000) ("Diligence will require in the usual case that the prisoner, at a minimum,

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[11]Petitioner's Appendix J does not include the district court order at issue here, but omits some text while including other text that does not appear in the filed version of the order. Respondent has included the correct, filed version of the district court's order as Supplemental Appendix B. Appendix F includes the district court's order denying Hurles' Motion to Alter or Amend Judgment. Appendix F-1-10.

seek an evidentiary hearing in state court in the manner prescribed by state law.). Hurles met that standard. As addressed above, Hurles asserted the facts supporting his judicial bias claim in his second petition for postconviction relief. Supp.Appx. B-12.

But, as noted above, the District Court, too, denied Hurles relief on his judicial bias claim. Petition, pp. 8-10; Supp.Appx. B-10-22.[12] Recognizing that Hurles is "entitled to a fair trial in a fair tribunal, free from judicial bias," citing *In re Murchison*, 349 U.S. 133, 136 (1955), the District Court stated:

> There is a presumption that judges are unbiased, honest, and have integrity. Similarly there is a presumption that judicial officials have "properly discharged their official duties."

Supp.Appx. B-14, citing *Schweicker v. McClure*, 456 U.S. 188, 195 (1982); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)(quoting *United States v. Armstrong*, 517 .S. 456, 464 (1996)). That, of course, is true. But a presumption, like all presumptions, may be overcome where the facts show otherwise, as they do here. Here, the District Court relying on *Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007), identified "three circumstances in which an appearance of bias—as opposed to evidence of actual bias—necessitates recusal":

> (1) "when the judge has a direct, substantial pecuniary interest in the outcome of the case;
>
> (2) "when the judge becomes embroiled in a running, bitter controversy with one of the litigants"; and

[12] *Williams v. Taylor*, 529 U.S. 420, 432 (2000).

(3) "when the judge acts as part of the accusatory process,"

Supp.Appx. B-15 citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971), and *In re Murchinson*, 349 U.S. 133, 137 (1955).

The district court identified one other circumstance warranting recusal as well: when "it is plain that [the judge] was so enmeshed in matters involving the petitioner as to make it appropriate for another judge to sit." *Id.*, citing *Mississippi v. Johnson*, 403 U.S. 212, 215-16 (1971). That is the very circumstance presented here, and required Judge Hilliard's recusal. Judge Hilliard engaged in *ex parte* communications with her counsel, assistant Attorney General French, and following those communications continued to preside over and issue rulings in Hurles' legal proceedings, including ruling on, and denying, Hurles' second petition for postconviction relief that asserted, among other issues, Judge Hilliard's bias. As addressed above, Hurles did all he could to prove his entitlement to a hearing where he could present his evidence supporting his claim of bias. He filed a motion requesting Judge Hilliard recuse herself based on these facts, but she declined to do so. Instead Judge Hilliard held, without a hearing where the facts and evidence could be presented, that she had no contact with French.[13] ER79.

In denying Hurles relief, the district court agreed that when a judge becomes "so enmeshed in matters involving the petitioner as to make it appropriate for

[13] Judge Hilliard made this finding, despite that, in concurrent proceedings in district court, Assistant Attorney General French had already confessed to *ex parte* proceedings between herself and Judge Hilliard. ER 187.

another judge to sit," due process requires recusal. Supp.Appx. B-15 citing, *inter alia*, *Mississippi v. Johnson*, 403 U.S. 212, 215-16 (1971). But then the district court quickly rejected that, and other "situations" were present here, and ruled instead that "nothing in the record indicates the judge was personally involved in the proceedings or in the preparation of that [special action] brief." Supp.Appx. B-17. The district court noted, too, that "Judge Hilliard specifically stated in her order that the actions by the Attorney General in response to the special action petition were made without her input and that 'no contact was made by [her] with the Attorney General' and she was a nominal party only." *Id.* Based on what it believed the facts to be: "the nominal role" of Judge Hilliard as a respondent "in the special action" proceedings, *id.*, Judge Hilliard's statement in her order that she made "[n]o contact... with the Attorney General [French]," and Attorney General French's statement at oral argument before the Arizona Court of Appeals that "there was no contact between Judge Hilliard and the Attorney General's office as the pleading was prepared," *id.*, the district court concluded, without a hearing:

> [N]othing in the record contradicts the assurances of Judge Hilliard and Assistant Attorney General French that the judge played no role in the preparation and filing of the special action brief.

Supp.Appx. B-18. The district court also stated, again without a hearing, that French's statements during the special action proceeding that there was "no contact between Judge Hilliard and the Attorney General's office" during the pleading's preparation:

> do not assert that Judge Hilliard had no communication of any kind with the Arizona Attorney General at any point during the special

> action proceedings, and thus are not inconsistent with the statement made by Ms. French in response to Petitioner's Motion to Disqualify.

Id. at 19. The district court's attempted rationale is nonsensical. As noted above, French had already confessed to her *ex parte* contacts with the Judge. But to determine the facts, content and extent of the communications that took place between Judge Hilliard and her counsel, Assistant Attorney General French, a hearing is required.

The district court's factfinding process, made without a hearing, and not subjected to "the crucible of an adversary proceeding and cross-examination" is plainly defective. *Caperton v. A.T. Massey Coal Co.*, Inc., et al., 556 U.S. 868, 883 (U.S. 2009). In emphasizing "the need for objective rules in an inquiry into actual bias, this Court emphasized that a "judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review..." *Id.* This Court noted, too:

> In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards, the Court has asked whether 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id., at 883-884, citing *Tumey, supra*, 273 U.S. at 532 (internal citations omitted). Yet that is just what happened here. Judge Hilliard was the sole factfinder into her potential bias, that process was plainly defective, and as a result, Hurles was denied the due process to which he was entitled.

The Ninth Circuit Court of Appeals Proceedings

Hurles appealed the district court's order denying relief to the Ninth Circuit Court of Appeals, asserting, among other claims not at issue here, Hurles' constitutional right to be tried by an unbiased factfinder, and the trial judge's failure to recuse herself from Hurles' trial, sentencing and postconviction proceedings. Supp.Appx. A-24.[14] Unsurprisingly given these facts, the majority circuit court agreed the trial judge's fact-finding process applied to deny Hurles' relief on his judicial bias claim was indeed deficient. The court explained:

> We cannot grant relief unless the state court came to a decision that was objectively unreasonable. *Williams* [*v. Taylor*], 529 U.S. [362], 410 [(2000)].

Supp.Appx. A-11. The circuit court described the task before it:

> We cannot find that the state court made an unreasonable determination of the facts simply because we would reverse in similar circumstances if this case came before us on direct appeal. *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004). Instead, we must be "convinced that an appellate panel, applying the normal standards of appellate review, could not reasonably conclude[] that the finding is supported by the record" before that state court. *Id.* To find the state court's fact finding process defective in a material way, or, perhaps, completely lacking, "we must more than merely doubt whether the process operated properly. Rather, we must be satisfied that any appellate court to whom the defect is pointed out would be unreasonable in holding that the state court's fact-finding process was adequate.

Id. The circuit court explained as well that if it determines, "considering only the evidence before the state court, that the adjudication of a claim on the merits resulted in a decision contrary to or involving an unreasonable application of clearly

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[14] Petitioner's discussion of the circuit court's earlier withdrawn opinion is not relevant here, and for that reason Hurles does not address it. Petition, p. 12.

established federal law, or that the state court's decision was based on an unreasonable determination of the facts, "we evaluate the claim *de novo*, and we may consider evidence properly presented for the first time in federal court," *id.*, at 11-12, citing [*Cullen v.*] *Pinholster*, __U.S. __ 131 S.Ct. 1388, 1401 (2011).

REASONS TO DENY THE PETITION

1. The Ninth Circuit, Applying the Deference Required by 28 U.S.C. §2254, Properly Found the State Court Decision was Based on an Unreasonable Determination of the Facts

Addressing Hurles' constitutional claim that he suffered prejudice when the trial judge failed to recuse herself from Hurles' trial, sentencing and postconviction proceedings after engaging in *ex parte* communications with the assistant Attorney General and taking an adversarial position to Hurles, the circuit court agreed "the state court came to an unreasonable determination of the facts" in denying Hurles' claim and remanded for an evidentiary hearing. Supp.Appx. A-24.

In reaching its decision, the circuit court first reviewed longstanding Supreme Court caselaw, including *In re Murchinson, supra*, 349 U.S. at 136 (1955), holding that "Fairness of course requires an absence of actual bias in the trial cases. But our system of law has always endeavored to prevent even the probability of unfairness." Supp.Appx. A-24. On these facts, the circuit court, too, adopted this Court's holding in *Bracy, supra,* 520 U.S. at 904, that "the Due Process Clause " establishes a constitutional floor, not a uniform standard," citing *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828 (1986). "But the floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal,'" citing *Withrow, supra,* 421

U.S. at 46, "before a judge with no actual bias against the defendant or interest in the outcome of his particular case,'" Supp.Appx. A-24, citing *Aetna, supra*, at 821-822, and *Tumey, supra,* at 523. Also, as the circuit court below made clear: "The Constitution requires recusal where 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." Supp.Appx. A-25, citing *Withrow, supra,* at 47. The Court asks not "whether Judge Hilliard actually harbored subjective bias" but instead "whether the average judge in her position was likely to be neutral or whether there existed a unconstitutional potential for bias," explaining:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the [accused] due process of law.

Supp.Appx. A-25, citing *Tumey, supra* 273 U.S. at 532.

But the panel noted, too, that "due process mandates a 'stringent rule' that may sometimes requires recusal of judges 'who have no actual bias and would do their very best to weigh the scales of justice equally," if a "probability of unfairness" exists. Supp.Appx. A-26, citing *Murchison, supra,* 349 U.S., at 136.

Based on the extraordinary facts presented here, the court below, following review of this Court's "clearly established judicial bias" law and "mindful" of AEDPA's limitations, focused on Judge Hilliard's last reasoned decision on Hurles judicial bias claim: her denial of Hurles' second postconviction petition. The circuit court stated that "[o]rdinarily, we cloak the state court's factual findings in a

presumption of correctness." Supp.Appx. A-27, citing 28 U.S.C. §2254(e)(1). The court continued:

> However, we afford such deference only if the state court's fact-finding process survives our intrinsic review pursuant to AEDPA's "unreasonable determination" clause. *See Taylor* [*v. Maddox*], 336 F.3d [992,] 1000 [9th Cir. 2004]. Here, the state court's fundamentally flawed fact-finding process, to the extent it constitutes a process, fails our intrinsic review.

Supp.Appx. A-27. Specifically, the circuit court found the fact-finding process was deficient because an evidentiary hearing was required to reconcile the conflicting facts offered by the parties. Supp.Appx. A-27-28. The circuit court recognized that where a defendant is denied "a fair trial in a fair tribunal," his due process rights have been violated. Supp.Appx. A-25-26.

The circuit court explained:

> In his second PCR, Hurles alleged judicial bias. He argued that Judge Hilliard responded to his special action petition, received contemporaneous copies of each pleading filed in her name, knew the pleadings were framed in terms of her personal opposition to his request for relief, did not object to the tone or content of the pleadings and repeatedly denigrated defense counsel. Second PCR at 1-3 – 1-5.
> ...
> Judge Hilliard did not hold an evidentiary hearing or provide another mechanism for Hurles to develop evidence in support of his claim, despite her conclusion that Hurles "offer[ed] no factual evidence to support his allegations." Minute Entry, Aug. 9, 2002, at 2, *Hurles v. Schriro*, No. CIV-00-0118-PHX-RCB (D. Ariz. 2008), ECF 7201 at 19 ("Minute Entry").

Supp.Appx. A-28. That was not all.

> Even worse, she found facts based on her untested memory of the events, putting material issues of fact in dispute. Judge Hilliard concluded that she did not specifically authorize a pleading to be filed on her behalf, did not provide any input on the responsive brief, that

> she was a nominal party only and that she did not have any contact with the Arizona Attorney General's Office. In effect, she offered testimony in the form of her order denying Hurles' second PCR.

Id.

In light of the factual dispute in postconviction proceedings, the court below properly found the state court judge's denial of Hurles' judicial bias claim was based "on an unreasonable determination of the facts." *Id.* The court identified abundant circuit law holding that where a state court makes fact-finding without an evidentiary hearing or providing petitioner an opportunity to present evidence, "the fact-finding process itself is deficient," and not entitled to deference. Supp.Appx. A-28; *see also, Murchison, supra*, 349 U.S. at 625. The circuit court explained:

> The tenor of Judge Hilliard's responsive pleading in the special action, by itself, suggest strongly that the average judge in her position could not later preside over Hurles' guilt phase, penalty trial, and post-conviction proceedings while holding 'the balance nice, clear and true" between the state and Hurles.

Supp.Appx. A-31, citing *Tumey, supra*, 273 U.S. at 53.

The court noted, too:

> [P]roof that Judge Hilliard participated in the special action proceedings as more than a nominal party, had contact with French, commissioned or authorized the responsive pleading or provided any input on the brief, would help establish that Judge Hilliard became 'so enmeshed in matters involving [Hurles] as to make it appropriate for another judge to sit, or that Judge Hilliard became "embroiled in a running, bitter controversy" with Hurles and his counsel. Such evidence certainly would show an unconstitutional risk of actual bias.

Supp.Appx. A-31-32, citations omitted. On these facts, the court below properly remanded the proceedings for a hearing where Hurles can finally present his evidence supporting relief. *Id.* at 32.

2. The Circuit Court's Remand is Proper, a Hearing is Needed to Determine the Facts and, as a Result, Petitioner's Petition for Certiorari is Premature

Petitioner requests this Court grant certiorari based on its contention that the circuit court below erred in granting Hurles an evidentiary hearing where he can present the facts supporting his judicial bias claim. Petition, p. 14-15. Petitioner's contention that the circuit panel remand conflicts with the Anti-Terrorism and Effective Death Penalty Act (AEDPA), is erroneous. An evidentiary hearing is necessary to allow Hurles to present his facts and witnesses to prove his claim. Neither the circuit court below nor Hurles contended (much less "implicitly held")[15] that a state court is required to conduct a hearing "before its decisions are entitled to deference." *Id.* The Court below held only that on these unusual (and unlikely to recur) facts-where a state court judge met *ex parte* with the Arizona assistant attorney General opposing Hurles in his postconviction (and later habeas) proceedings, and then continued to preside over Hurles' trial, capital sentencing, and postconviction proceedings, a hearing was needed to determine the facts of Hurles' judicial bias claim. Supp.Appx. A-31-32.

Petitioner next relies on Circuit Judge Ikuta's dissent where she contends the circuit majority:

> failed to weigh the evidence in the record that made the state court's factfinding process and factual conclusions reasonable, relying instead on an unprecedented view that judges must hold evidentiary hearings on recusal motions.

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[15] Petition for Certiorari, p. 13.

Petition, p. 16-17, citing *Hurles IV*, 706 F.3d at 1059-1051. As noted above, that is not what the panel majority did. The fact that judges "routinely resolve challenges to their impartiality by themselves, based on matters within their own knowledge, without conduct evidentiary hearings," *id.*, at 19-20, does not answer the question at issue here. Unlike *Cheney v. U.S. Dist.Ct for the Dist. Of Columbia*, 541 U.S. 913, 914-29 (2004), and *Microsoft Corp. v. U.S.*, 530 U.S. 1301 (2000), and the other cases Petitioner cites where justices of this Court declined to recuse themselves, the facts here are different. Here, Judge Hilliard, the sole state trier of fact and the person solely responsible for sentencing Hurles to death, violated Hurles' right to due process when it:

1. Assumed an adversarial posture against the petitioner in the same case over which it presided as his judge;

2. Expressed opinions in the special action litigation regarding the brutality of the crime and the strength of the state's case – although such evidence had yet to be tested in an adversarial setting at trial;

3. Intimidated and denigrated Hurles' counsel in its special action argument by suggesting that defense counsel should be removed from the panel of appointed counsel;

4. Allowed her own special action counsel, Assistant Attorney General French, to appear before her on behalf of the state as opposing counsel to petitioner; and

In spite of these facts, which obviously create, at the very least, the appearance of impropriety, Judge Hilliard denied evidentiary development on the matter. Based on <u>these</u> unusual facts unlikely to be repeated, an evidentiary hearing is both needed and appropriate, and in its absence, the state court fact-finding was plainly

unreasonable. *See e.g., Williams v. Taylor*, 529 U.S. 420, 442 (2000)("omissions as a whole disclose the need for an evidentiary hearing"); *Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012) (Ikuta, J.) (Recognizing circumstances under which a state court's failure to hold an evidentiary hearing may render the fact finding process unreasonable under §2254(d)(2)).

Hurles does not contend, as the dissent argues, that "a state court must conduct an evidentiary hearing as a prerequisite to its decisions receiving AEDPA deference." Petition, pp. 18-20. Hurles' contention is both simple and reasonable: under these unusual facts unlikely to be replicated where the state court judge who presided over Hurles' capital trial, sentencing and postconviction proceedings, takes an adversarial position to the defendant and met *ex parte* with the assistant Attorney General who also represented the judge in special action proceedings against Hurles, and later appeared against Hurles in his habeas corpus proceedings, is a hearing needed to resolve the facts supporting Hurles' constitutional claim alleging bias?

Petitioner's citation to other cases asserting judicial bias claims where the court denied a hearing does not defeat the panel's order granting Hurles an evidentiary hearing here. Petition, p. 20, citing *e.g., Wellons v. Warden. Ga. Diagnositic and Classification Prison*, 695 F.3d 1202, 12-11-12 (11th Cir. 2012)("reviewing judicial-bias claim under AEDPA deferential standard even though state court denied evidentiary hearing and finding no unreasonable application of federal law."). Petition, pp. 20-21. Hurles does not contend "an

evidentiary hearing is *required* to resolve a judicial bias-claim," Petition, p. 20 (emphasis in original). Hurles contends, and the court below found on these facts, a hearing is the appropriate mechanism to resolve Hurles' constitutional judicial bias claim here.[16] Supp.Appx. A-32.

Petitioner's next contention—that the panel majority created a "*per se* rule requiring a state-court evidentiary hearing as a prerequisite to AEDPA deference" and as a result "conflicts with this Court's jurisprudence," and other circuit court decisions is erroneous. Petition, p. 21. The panel created no such rule. The panel was clear that on these unusual facts-where the judge was the sole fact-finder on whether Hurles lived or died, and the sole fact-finder on the merits of his judicial bias claim, relying on her own recollection of events that took place outside the courtroom, and which was undermined by the court record,-the judge's fact-finding cannot be either a reliable product of a full and fair proceedings or a reasonable determination of the facts within 28 U.S.C. section 2254(d)(2).

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[16] Petitioner relies as well on *Buntion v. Quarterman*, 524 F.3d 665, 669 n.1 (5th Cir. 2008), where the circuit court held: "Although [the petitioner] challenges the fact that deference should be given to state court findings when [the judge] was essentially approving his own behavior, this court has held that it is generally proper for the trial judge to preside over the state habeas claim." Petition, p. 21. As explained above, on these facts , "when the judge becomes embroiled in a running, bitter controversy with one of the litigants," this Court has found otherwise. See e.g,. *Mississippi v. Johnson*, 403 U.S. 212, 215-16 (1971); *In Re Murchison*, 349 U.S. 133, 136 (1955).

3. The Panel Majority Properly Considered Evidence from the State Court Record

Citing *Harrington v. Richter*, 131 S.Ct. 770 (2011), Petitioner contends that the court below "[i]n finding an unreasonable factual determination" disregarded evidence supporting the state court's rejection of Hurles' judicial-bias claim, and in finding "an unreasonable factual determination," cited "Judge Hilliard's exclusive reliance on facts within her 'untested' knowledge." Petition, p. 22, citing *Hurles IV*, *supra*, 706 F.3d at 1039. The circuit court did not. These are the facts supporting Hurles' claim, and the circuit court did not err in relying on them. Judge Hilliard engaged in *ex parte* communications with the assistant Attorney General during the special action proceedings, and those communications continued after those proceedings ended but Hurles has yet to discover the content and extent of those communications. Supp.Appx. A-31-32. Furthermore, this Court "chastised" the Ninth Circuit for "overlook[ing]arguments" in support of the state court's decision, where the state court issued an *unreasoned* decision on the merits. "By its terms, *Harrington* applies '[w]here a state court's decision is unaccompanied by an explanation...'" *Wooley v. Rednour*, 702 F.3d 411, 422 (7th Cir. 2012) (quoting *Richter*, 131 S.Ct. at 784). Here, the state postconviction court provided explicity reasoning for its disposition of Hurles judicial bias claim. The circuit court need not speculate. *Cannedy v. Adams*, 706 F.3d 1148, 1159 (9th Cir. 2013) ("The critical inquiry under §2254(d) is whether, in light of the evidence before...the last state court to review the claim...it would have been reasonable to reject Petitioner's

allegation of deficient performance for any of the reasons expressed by the [lower state] court...")

Petitioner also suggests that the circuit court inappropriately considered French's admission to *ex parte* communications in determining the state court fact-finding process was unreasonable under §2254(d)(2). Petition, p. 22 n. 5 ("[T]his statement [that French engaged in *ex parte* communications with the judge] has no bearing on the (d)(2) analysis because it was presented for the first time in federal court.") As an initial matter, French's admission was made *prior* to the state court's ruling, as the federal proceedings took place concurrently with the second postconviction proceedings. *Compare* ER 182-196 (September 20, 2000), *with* Appx. D (August 9, 2002). Furthermore, the circuit court did *not* consider French's admission in its (d)(2) analysis. Supp. Appx. A 27-28.

Petitioner complains, too, the "majority ignored the fact that, years before Hurles' raised his judicial bias claim, French corroborated Judge Hilliard's recollection": she told "the Arizona Court of Appeals that the judge had not participated in drafting the special-action response, and that court accepted that statement." *Id.* The panel properly ignored that statement because it is not at issue here because Judge Hilliard did not consider that statement when ruling on Hurles' second postconviction petition.

Lastly, Judge Ballinger's order denying the motion to recuse Judge Hilliard is irrelevant because it is not the last reasoned state court decision. Supp.Appx. A-28 (identifying Judge Hilliard's order as the last reasoned state court decision).

Further, the Petitioner's reliance on Judge Ikuta's point that Judge Ballinger's ruling indicates not "*all* jurists would agree that the state court made an unreasonable determination of the facts." Petition, p. 23 (citing *Hurles IV*, 706 F.3d at 1049) is unavailing. This Court and the circuit courts have granted habeas relief in innumerable cases where the habeas petitioner was denied relief in state court and in either the district court, the circuit court, or both. A federal court may grant relief under AEDPA, even where a lower court judge has denied relief. Furthermore, no evidence suggests that Judge Ballinger knew about the fact and content of the *ex parte* contact between Judge Hilliard and assistant Attorney General French. The majority did not err in finding an unreasonable factual determination. Petition, p. 23.

4. On These Extraordinary Facts, the Hearing the Ninth Circuit Granted is Proper

The dissent contends that a hearing is not needed because Hurles has not identified any material evidence that could be developed. Petition, p. 26. But he has. Hurles seeks to discover the content and extent of the communications and meetings between Judge Hilliard and assistant Attorney General French. Contrary to the dissent's contention, the second circumstances where an appearance of bias requires recusal—when the judge "becomes 'embroiled in a running bitter controversy' with one of the litigants"-- applies here. Hurles alleged "that Judge Hilliard had become enmeshed in a personal controversy" with one of the litigants...." *Id.* Judge Ikuta agrees, but then contends that this Court's precedents only allows recusal "when a judge becomes involved in a personal

controversy with a litigant ... in the context of contempt proceedings," citing *Johnson v. Mississippi*, 403 U.S. at 212-16 (1971)(per curiam); *Mayberry v. Pennsylvania*, 400 U.S. 455, 455-66 (1971). Petition, pp. 26-27. This unfairly and artificially limits the *Johnson* holding. *See, e.g. Republican Party of Minnesota v. White*, 536 U.S. 765, 776 (Describing holding of *Johnson* as: "judge violated due process by sitting in a case in which one of the parties was previously a successful litigant against him.) Rather, *Johnson* stands for the proposition that a judge must recuse himself where he becomes an adversary to the defendant, even where the judge has taken such a role through no affirmative action of his own. *Johnson*, 403 U.S. at 215. *Smith v. Lockhart*, 923 F.2d 1314, 1322 n. 12 (8th Cir. 1991) (defendant as part of a class action §1983 lawsuit against the judge; "[h]ad the trial judge conducted a 'thorough hearing' into Smith's allegation of a conflict of interest, he would have discovered a serious question of possible bias on the part of the trial judge himself.")

Contrary to the dissent, "The degree of Judge Hilliard's involvement" in the special action proceedings and her interactions with attorney assistant Attorney General French, are indeed material to the sentence Judge Hilliard imposed. Petition, p. 28. But to discover those facts, as the court below properly concluded, requires an evidentiary hearing where Hurles can present his evidence before an unbiased factfinder. Hurles requests this Court grant that hearing.

5. Because the Ninth Circuit Has Not Yet Ruled on Substantive Matters Before it, Granting Certiorari Does Not Serve the Interests of Judicial Economy

This Court should also deny certiorari in the interests of judicial economy. As Petitioner correctly notes in the Petition for Writ of Certiorari, p. 1 n.1, the Ninth Circuit Court of Appeals has yet to resolve two pending substantive motions, pending the outcome of the unrelated, but relevant Ninth Circuit case of *Detrich v. Ryan*, No. 08-99001. Because the Ninth Circuit's final disposition of Mr. Hurles' claims hinges on the outcome of *Detrich*, this Court should deny the Petition for Writ of Certiorari as an unnecessary use of judicial resources at this time.

In 2011, the Ninth Circuit issued its opinion granting the writ of habeas corpus and ordering a new sentencing hearing for Mr. Hurles. *Hurles v Ryan*, 650 F.3d 1301 (9th Cir. 2011) (*Hurles III*) (Petioner's Appx. E). Petitioner filed a combination Petition for Rehearing and Rehearing *En Banc* (2011 Petition for Rehearing). Dkt. 54. On order from the panel, Mr. Hurles responded to the 2011 Petition for Rehearing. Dkt. 56. In January 2013, the Ninth Circuit *sua sponte* vacated the *Hurles III* opinion and issued a new opinion, reported at *Hurles v. Ryan*, 706 F.3d 1021 (9th Cir. 2013) (*Hurles IV*) (Supp.Appx. A). In *Hurles IV*, the panel ordered that the 2011 Petition for Rehearing was moot and the parties could petition for rehearing with respect to *Hurles IV*.

Despite that the 2011 Petition for Rehearing had been denied as moot and despite the Ninth Circuit's clear instructions, 706 F.3d at 1027, Petitioner Charles Ryan did not petition for rehearing with respect to *Hurles IV*, but instead filed a

Motion for Ruling on Respondents-Appellees' Petition for Rehearing En Banc. Dkt.63. Mr. Hurles did not petition for rehearing, but instead filed a Motion to Remand, pursuant to this Court's opinion in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). In a published order, the Ninth Circuit ordered that it would defer ruling on the Motion to Remand and the Motion for Ruling on Respondent-Appellees' Petition for Rehearing En Banc pending the resolution of *Detrich v. Ryan*, No. 08-99001.[17] Appx. H.

This Court's rules recognize, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." U.S.Sup.Ct. Rule 10. Where a petitioner may still be entitled to relief in the lower court, this Court should decline to exercise that discretion. Although the judgment has been issued in this case, substantive matters remain before the Ninth Circuit, which may result in a new judgment, as has already occurred in this case when the Ninth Circuit withdrew its first opinion and issued a revised opinion. *Hurles III*, *Hurles IV*. This case is therefore akin to Petitioner seeking review of a case before judgment has been entered. U.S.Sup.Ct. Rule 11; 28 U.S.C.A. §2101(e). In such circumstances, cert should only be granted "upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Such compelling reasons have included the constitutionality of military trials during World War II and the discoverability of the Watergate tapes. *Ex parte*

[17] *Detrich v. Ryan*, No. 08-99001 was argued and submitted to an *en banc* panel of the Ninth Circuit on December 10, 2012. The case was reheard *en banc* on Respondent-Appellee's petition.

Quirin, 317 U.S. 1 (1942), order modified 63 S.Ct. 22 (1942); *U.S. v. Nixon*, 418 U.S. 683 (1974). In the instant case, Petitioners have offered no compelling reason to seek certiorari prior to the conclusion of the litigation below. Though Mr. Hurles agrees with Petitioner that the pending litigation does not toll the statute of limitations to seek certiorari, Petition at 1 n. 1, there is simply no reason for this Court to squander its very limited resources on Mr. Hurles' case, when the final outcome hinges on the 9th Circuit's decision in the yet-to-be-decided *Detrich v. Ryan*, No. 08-99001.

According to this Court's website, it dockets more than 10,000 cases per term. The Court only has the capacity, however, to review approximately 100 cases per term, with an additional 50-60 cases being disposed of without plenary review. http://www.supremecourt.gov/about/justicecaseload.aspx (accessed July 9, 2013). Given the small percentage of docketed cases this Court may review, it is a waste of judicial resources to grant certiorari in a case such as this, where the Petitioner may still obtain the relief he seeks in the lower court. *Cf. Estelle v. Gamble*, 420 U.S. 97, 114-15 (1976) (Stevens, J. dissenting) (the Court's decision to grant interlocutory review, "in violation of its normal practice...ill serves the interest of judicial economy.")(citation omitted). In the interests of judicial economy, Mr. Hurles requests this Court deny the petition.

CONCLUSION

This case presents a unique and unlikely-to-recur scenario. The trial judge, who was solely responsible for sentencing Hurles to death, participated in his

litigation as an *adversary*, in addition to trier of law and trier of fact, when the Attorney General filed briefs on her behalf in Hurles' special action proceedings. Despite the obvious risk of bias, Judge Hilliard refused to recuse herself from Hurles' case and denied Hurles any opportunity for evidentiary development and instead entered facts into the record on the basis of her own memory of the events. Such fact-finding was objectively unreasonable and Hurles is, therefore, entitled to an evidentiary hearing to develop the merits of his claim.

Respectfully submitted this 19th day of July, 2013,

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