No. 12–1472

IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioner,

VS.

RICHARD D. HURLES,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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I

THE NINTH CIRCUIT PANEL MAJORITY FOUND THE STATE COURT'S FACTUAL DETERMINATIONS UNREASONABLE MERELY BECAUSE THAT COURT DECLINED TO CONDUCT AN EVIDENTIARY HEARING.

The Ninth Circuit panel majority found an unreasonable factual determination under 28 U.S.C. § 2254(d)(2) and remanded for an evidentiary hearing *only* because state-court Judge Ruth Hilliard rejected Hurles' judicial-bias claim based on her own recollection, without first conducting an evidentiary hearing. The panel effectively created a requirement that state courts conduct evidentiary hearings, at least on judicial-bias claims, before their decisions are entitled to deference under the Anti-terrorism and Effective Death Penalty Act ("AEDPA"). This reasoning contravenes both AEDPA and this Court's precedent construing it, and presents a compelling reason to grant certiorari. *See* U.S. SUP. CT. R. 10; *see also Cash v. Maxwell*, __ U.S. __, 132 S.Ct. 611, 616–17 (2012) (Scalia, J., dissenting from the denial of certiorari) (collecting cases in which the Supreme Court has reversed habeas decisions from the Ninth Circuit).

Hurles responds only minimally to the arguments in the certiorari petition. However, he attempts to defend the majority opinion by arguing—without citing any particular portion of the decision—

that the panel limited the evidentiary-hearing requirement it created to the "unusual facts" of the present case: when a trial judge relies on her own recollection of extra-record events to make factual findings on a judicial-bias claim. (Brief in Opposition ("BIO"), at 24–25.[1]) But the panel expressly deemed Judge Hilliard's "fact-finding *process*" "fundamentally flawed" because she "*did not hold an evidentiary hearing* or provide another mechanism for Hurles to develop evidence." *Hurles v. Ryan* (*"Hurles IV"*), 706 F.3d 1021, 1038 (9th Cir. 2013) (emphasis added). The panel also faulted Judge Hilliard for finding facts "based on her untested memory." *Id.* And it stated, "We have held repeatedly that where a state court makes factual findings *without an evidentiary hearing* or other opportunity for the petitioner to present evidence, the fact-finding process itself is deficient and not entitled to deference." *Id.* at 1038–39 (emphasis added and quotations omitted). The panel thus explicitly required a state-court evidentiary hearing as a prerequisite to AEDPA deference. Nothing in the opinion limits this requirement to the particular facts of this case.[2]

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[1] Except for its last page, Hurles' Brief in Opposition is not paginated. For citation purposes, Respondents have paginated the brief, beginning with the page containing the Statement of the Case as page 1.

[2] Like Petitioner, dissenting Judge Sandra Ikuta also interpreted the majority opinion to impose an evidentiary-hearing requirement, at least with respect to recusal issues. *See Hurles IV*, 706 F.3d at 1049–50
(Continued)

And even assuming that the evidentiary-hearing requirement is, as Hurles posits, limited to the precise fact pattern presented here, it is still inappropriate. AEDPA does not require states to conduct evidentiary hearings as a prerequisite for their decisions receiving deference. *See* 28 U.S.C. § 2254(d)(2). At least five United States Courts of Appeals—including the Ninth Circuit—have so concluded. *See Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012); *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010); *Teti v. Bender*, 507 F.3d 50, 56–57 (1st Cir. 2007); *Valdez v. Cockrell*, 274 F.3d 941, 942, 951 (5th Cir. 2001); *Mendiola v. Schomig*, 224 F.3d 589, 592–93 (7th Cir. 2000). More specific to the present issue, two circuits have applied AEDPA deference when reviewing judicial-bias claims resolved without a state-court evidentiary hearing, s*ee Wellons v. Warden. Ga. Diagnostic and Classification Prison*, 695 F.3d 1202, 1211–12 (11th Cir. 2012); *Getsy v. Mitchell*, 495 F.3d 295, 309–13 (6th Cir. 2007), and one has applied deference where, as here, the same state judge accused of bias rejected the claim. *See Buntion v. Quarterman*, 524 F.3d 664, 669 n.1 (5th Cir. 2008).

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(Ikuta, J., dissenting) (characterizing majority opinion as holding "that no reasonable jurist could decide a recusal issue without holding an evidentiary hearing" and stating that "[t]his case is a particularly bad springboard for imposing *a new evidentiary hearing requirement*" because of the absence of disputed material facts) (emphasis added).

Further, as stated in Petitioner's certiorari petition—and not persuasively rebutted by Hurles, who simply points to the facts he claims show Judge Hilliard's bias (BIO, at 23)—there is no "fundamental flaw" in permitting a judge to personally rule on a claim that she is biased. In fact, judges routinely deny such motions without evidentiary hearings, and based on matters within their own knowledge. *See Cheney v. U.S. Dist. Ct. for the Dist. Of Columbia*, 541 U.S. 913, 914–29 (2004); *Microsoft Corp. v. U.S.*, 530 U.S. 1301, 1301–02 (2000); *Miles v. Ryan*, 697 F.3d 1090, 1090 (9th Cir. 2012); *Suever v. Connell*, 681 F.3d 1064, 1065 (9th Cir. 2012); *Perry v. Schwarzenegger*, 630 F.3d 909, 910–16 (9th Cir. 2011); *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399, 400–01 (9th Cir. 1995). Judge Hilliard's failure to conduct a hearing therefore was not "so lacking in justification that [it] was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Harrington v. Richter*, __ U.S. __, 131 S.Ct. 770, 786–87 (2011). This Court should grant certiorari.

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II

THE PANEL MAJORITY CONTRAVENED AEDPA BY FOCUSING SELECTIVELY ON EVIDENCE FAVORABLE TO HURLES AND IGNORING EVIDENCE THAT SUPPORTED JUDGE HILLIARD'S RULING.

AEDPA requires a federal court, when reviewing a state court conviction, to uphold that decision unless objectively unreasonable. *See* 28 U.S.C. § 2254(d). The panel in this case, myopically focused on the absence of an evidentiary hearing, failed to do so here. Instead, it selectively highlighted evidence that supported Hurles' claim, ignored contravening evidence showing the reasonableness of Judge Hilliard's findings, and improperly "substituted its evaluation of the record for that of the state trial court." *Rice v. Collins*, 546 U.S. 333, 337–38, 342 (2006).

In its analysis, the panel majority referred to Hurles' state-court contentions that Judge Hilliard failed to "object to the tone or content of the [special-action] pleadings" filed on her behalf, that she "repeatedly denigrated defense counsel," and that, following this allegedly improper conduct, she presided over Hurles' trial and ultimately sentenced him to death. *Hurles IV*, 706 F.3d at 1038. The majority also accused Judge Hilliard of "offering testimony" in the PCR proceeding, which Hurles "had no opportunity to contest." *Id.* And it stated that the tenor of the special action pleading filed in Judge Hilliard's name

"suggest[s] strongly that the average judge in her position could not later preside over Hurles's guilt phase, penalty trial and post-conviction proceedings" in a fair and impartial manner. *Id.* at 1040.

The majority's analysis is devoid of any mention of Assistant Attorney General Coleen French's statement, during oral argument in the special-action proceeding, that the Judge did not participate in drafting the special-action response, which corroborated Judge Hilliard's recollection during the PCR proceeding.[3] *See Hurles v. Superior Court*, 849 P.2d 1, 2 n.2 (App. 1993) ("*Hurles I*"). Also absent from the analysis is any reference to another judge's finding—prior to Judge Hilliard's rejection of the judicial-bias claim—that there was no objective reason to question Judge Hilliard's impartiality."[4] (Petition, at Appx. K.)

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[3] Hurles contends, without citation to any portion of the record, that Judge Hilliard "did not consider [this] statement" in denying post-conviction relief. (BIO, at 27.) But the statement is part of a published opinion resolving the special-action proceeding that formed the basis for Hurles' judicial-bias claim. *See Hurles I*, 849 P.2d at 2 n.2. It was therefore part of the record before Judge Hilliard. *See* 28 U.S.C. § 2254(d)(2) (reasonableness of state factual findings are evaluated "in light of the evidence presented in the State court proceeding").

[4] The majority acknowledged French's statement and the other judge's ruling in its factual overview,
(Continued)

The presence in the state-court record of the foregoing evidence—ignored by the panel majority—defeats any suggestion that Judge Hilliard unreasonably determined the facts in rejecting Hurles' judicial-bias claim. Hurles mistakenly suggests that the existence of a factual dispute during post-conviction proceedings renders any resulting state court's decision unreasonable. (BIO, at 21–22.) Even assuming that conflicting evidence existed here, or that the evidence presented in state court was susceptible to different inferences, AEDPA required that the majority deny habeas relief. *See Gill v. Ayers*, 342 F.3d 911, 920 (9th Cir. 2003) ("It is logical to conclude that if a case presents an issue close enough for reasonable minds to differ, then a state court's decision resolving that issue, even if incorrect, would not be objectively unreasonable.") *Garvin v. Farmon*, 258 F.3d 951, 957 (9th Cir. 2001) ("Though perhaps [the] statements [at issue] could be interpreted otherwise, the state court's interpretation … is well supported by the record"); *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (declining to grant habeas relief based on arguments that "shed some doubt on the credibility of certain witnesses and give interpretations of conflicting evidence that differ from the interpretations of the state court"). The majority's failure to follow

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separate from its § 2254(d)(2) analysis, but minimized French's statement by juxtaposing it against a purportedly contradictory statement French made in a district court pleading. *Hurles IV*, 706 F.3d at 1028–29.

this directive constitutes a compelling reason for certiorari review.

III

THE PETITION FOR WRIT OF CERTIORARI IS NOT PREMATURE, AND GRANTING CERTIORARI WOULD PREVENT THE EXPENDITURE OF TIME AND RESOURCES ON A NEEDLESS EVIDENTIARY HEARING THAT WOULD RESOLVE NO MATERIAL FACTUAL DISPUTE.

Citing principles of judicial economy, Hurles asks this Court to deny certiorari because the Ninth Circuit majority panel did not grant *habeas relief*, but simply remanded for an *evidentiary hearing*. (BIO, at 3.) In a related argument, he contends that this Court should deny certiorari because the Ninth Circuit has deferred ruling on two motions pending its decision in *Detrich v. Ryan*, Ninth Cir. No. 08–99001. (*Id.* at 30–32.) Hurles' arguments fail. Principles of judicial economy counsel in favor of *granting* certiorari, not *denying* it.

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A. "*The remand is erroneous and a waste of judicial resources.*"[5]

Given the absence of material disputed facts, granting certiorari would further—not impede, as Hurles asserts—the interests of judicial economy. If the Ninth Circuit's decision stands, the parties will engage in what promises to be a protracted evidentiary hearing delving into facts that, even if true, would not entitle Hurles to relief. This Court should grant certiorari to prevent this needless waste of resources.

Hurles asserts that a hearing is necessary to "discover the content and extent of the communications and meetings between Judge Hilliard and assistant Attorney General French." (BIO, at 28.) But the purpose of an evidentiary hearing is to *resolve disputed facts* necessary to resolve a claim, not to determine whether a factual basis exists for the claim in the first place. Here, as Judge Ikuta stated in her dissent,[6] Hurles could not state a constitutional violation even assuming that Judge Hilliard personally

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[5] *Hurles IV*, 706 F.3d at 1050 (Ikuta, J., dissenting).

[6] According to Hurles, Judge Ikuta "agrees" in her dissent that Judge Hilliard was enmeshed in a personal controversy with Hurles. (BIO, at 28–29.) Hurles is incorrect. *See Hurles IV*, 706 F.3d at 1047 (Ikuta, J., dissenting) ("[T]he record here does not show that Judge Hilliard was enmeshed in matters involving Hurles, or that someone in her position would likely have a personal animus toward him.") (quotations omitted).

authored the special action pleading. *Hurles*, 706 F.3d at 1048 (Ikuta, J., dissenting). Hurles responds to Judge Ikuta's observation simply by asserting, in conclusory fashion, that her view "unfairly and artificially limit[s]" this Court's decision in *Johnson v. Mississippi*, 403 U.S. 212, 212–16 (1971) (per curiam), to contempt proceedings, where, in reality, it "stands for the proposition that a judge must recuse himself where he becomes an adversary to the defendant." (BIO, at 29.) But Judge Hilliard did not here become an *adversary* to Hurles; at most, she appeared in the special-action proceeding to defend the adequacy of her ruling. This sort of pleading is fully consistent with impartial adjudication." *Hurles IV*, 706 F.3d at 1047 (Ikuta, J., dissenting). This Court should therefore grant certiorari and prevent the needless waste of resources the Ninth Circuit's panel majority ordered.

B. *The en banc ruling in* Detrich *does not affect this case's disposition.*

Hurles also contends that the certiorari petition is premature because two substantive motions—Petitioner's motion for a ruling on a previously-filed petition for rehearing and suggestion for rehearing *en banc*, and Hurles' motion to remand to district court in light of *Martinez v. Ryan*, __ U.S. __, 132 S.Ct. 1309 (2012)—remain pending in the Ninth Circuit. (BIO, at 30–32.) The Ninth Circuit stayed these motions pending its anticipated *en banc* opinion in *Detrich v. Ryan*, Ninth Cir. No. 08–99001. (Petition, at Appx. I.)

As explained in the certiorari petition, the above two motions did not toll Petitioner's deadline for filing

a certiorari petition. *See* U.S. SUP. CT. R. 13(2) ("The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time."); 13(3) (petition for rehearing tolls time for filing certiorari petition). Petitioner obtained from this Court an extension of his filing deadline in the hope that the Ninth Circuit would resolve the motions; when it did not, Petitioner was compelled to file the petition to ensure that this Court retained jurisdiction to consider it.

In any event, the Ninth Circuit's *en banc* panel has, since the Brief in Opposition's filing, decided *Detrich* in a manner that does not affect the issues presented in the certiorari petition. *See Detrich v. Ryan*, __ F.3d __, 2013 WL 4712729 (9th Cir. Sept. 3, 2013). Petitioner's pending motion presumably will be denied in the near future. And Hurles pending *Martinez* motion does not relate to the judicial-bias claim and its pendency has no bearing on the certiorari petition. The pending Ninth Circuit motions thus do not warrant denying certiorari.

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CONCLUSION

As stated in the petition for writ of certiorari, the Ninth Circuit panel majority has, once again, cast aside AEDPA deference and substituted its judgment for that of the state court. *Hurles IV*, 706 F.3d at 1050–51 & n.5 (Ikuta, J., dissenting) (collecting cases and stating, "The Supreme Court has harshly criticized our noncompliance with AEDPA deference."). This Court should grant certiorari.

Respectfully submitted,

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