No. 14–191

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 PANEL BELOW APPLIED IMPROPER NINTH CIRCUIT PRECEDENT TO EXCUSE THE DEFAULT OF HURLES'S INEFFECTIVE-ASSISTANCE-OF-APPELLATE-COUNSEL CLAIM.

A. The split among the circuits is genuine and should be addressed.

Hurles contends that Petitioner "overstates" the circuit split created when the Ninth Circuit applied *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), to excuse the default of an appellate ineffectiveness claim. (Brief in Opposition (BIO), at 12–14); *see Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013). But the circuit split was obvious to the *Nguyen* court, which noted that "several of our sister circuits have held otherwise" on the issue and that "those courts are wrong in reading into *Martinez* the limitation to trial-counsel IAC." 736 F.3d at 1295–96. Thus, as demonstrated below, a genuine circuit split has arisen on the question of whether *Martinez* permits a federal habeas court to excuse the default of an appellate ineffectiveness claim, as the panel below did here after relying on *Nguyen*. (App. A-21.)

Contrary to Hurles's claim, the Tenth Circuit held (not in dicta) that *Martinez* permits only trial ineffectiveness claims to be excused by the ineffectiveness of post-conviction counsel. In *Banks v. Workman*, 692 F.3d 1133 (10th Cir. 2012), the Tenth

Circuit found two *independent* bases for finding that *Martinez* did not apply to excuse the default of an appellate ineffectiveness claim: (1) *Martinez* "applies only to 'a prisoner's procedural default of a claim of ineffective assistance at *trial*,' not to claims of deficient performance by appellate counsel"; and (2) "Oklahoma law permitted Mr. Banks to assert his claim of ineffective assistance of trial counsel on direct appeal." 692 F.3d at 1148, quoting *Martinez*, 132 S.Ct. at 1315. The Tenth Circuit did not reduce the first basis to dicta by finding the second basis for precluding application of *Martinez*.

Nor has the Tenth Circuit treated its holding in *Banks* as dicta. Instead, it has relied on *Banks* as establishing "that the ineffectiveness of post-conviction counsel may not be used to excuse a procedural default when the underlying claim is for something other than the ineffective assistance of *trial* counsel." *Decker v. Roberts*, 530 F. App'x 844, 845 (10th Cir. 2013) (unpublished); *see also Ponis v. Hartley*, 534 F. App'x 801, 805 (10th Cir. 2013) (unpublished) (same). And the *Nguyen* court acknowledged its conflict with the holding in *Banks*. 736 F.3d at 1296 ("The Eighth and Tenth Circuits also understood *Martinez* to be limited to claims of trial-counsel IAC." (citing *Banks*)).

Hurles also minimizes the circuit split by contending that only circuit opinions issued after this Court decided *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), are relevant to a determination of whether the circuits are split on this issue. (BIO, at 13.) But *Trevino* does not address whether *Martinez* applies to excuse the default of an appellate ineffectiveness claim, and

therefore the timing of the cases as pre- or post-*Trevino* is irrelevant. In any event, three circuits have held, post-*Trevino*, that *Martinez* does not apply to excuse the default of appellate ineffectiveness claims. The holdings from the Fifth and Sixth circuits are discussed in the petition and require no further elaboration. (*See* Petition, at 16–17.) With regard to the Eighth Circuit's position on the issue, Petitioner correctly notes that this Court vacated and remanded the decision in *Dansby v. Norris*, 682 F.3d 711 (8th Cir. 2012) (holding that *Martinez* does not apply to excuse the default of an appellate ineffectiveness claim), for reconsideration in light of *Trevino*. The Eighth Circuit has now issued its decision after remand and has again "declined to extend *Martinez* to claims alleging ineffective appellate counsel." *Dansby v. Hobbs*, ___ F.3d ___, 2014 WL 4378753, at *20 (8th Cir. Sept. 5, 2014) (noting that "[t]he right to appellate counsel has a different origin in the Due Process Clause, and even the right of appeal itself is of relatively recent origin, so a claim for equitable relief in that context is less compelling" (internal quotation marks and citations omitted)).

Four circuits (the Fifth, Sixth, Eighth, and Ninth) have now weighed in on the issue since *Trevino* was decided. The Tenth Circuit also decided the matter prior to *Trevino*.[1] Of these five circuits, the Ninth stands alone in holding that the default of a claim of ineffective assistance of appellate counsel may be excused by the ineffectiveness of post-conviction

[1] The unpublished decisions relying on the Tenth Circuit holding were issued post-*Trevino*, indicating that *Trevino* has no effect on the issue.

counsel. This irreconcilable conflict among the circuits requires resolution by this Court.

B. *Martinez* does not permit the default of an appellate ineffectiveness claim to be excused by the ineffectiveness of post-conviction counsel.

In order to justify the remand of his appellate ineffectiveness claim, Hurles observes that a claim of ineffective assistance of appellate counsel, like an ineffective-assistance-of-trial-counsel claim, may not be raised on direct appeal but instead must wait until post-conviction proceedings. (BIO, at 8.) This fact, he argues, means that *Martinez* should apply to excuse the procedural default of an appellate counsel claim as well as a trial counsel claim. But the mere fact that a defendant must initially raise a claim in post-conviction relief proceedings cannot be sufficient to excuse a default under *Martinez* because *Martinez* would no longer be the "narrow exception" to the rule in *Coleman v. Thompson*, 501 U.S. 722, 757 (1991), that ineffective assistance of post-conviction counsel does not provide cause to excuse the procedural default of claims raised in habeas proceedings. *See, e.g., Martinez*, 132 S.Ct. at 1321 (Scalia, J., dissenting) (noting other types of claims that must initially be brought in collateral proceedings).

This Court did not express in *Martinez* an intention to excuse the default of *every* claim that must initially be raised in a state collateral proceeding; its holding is explicitly limited to trial counsel ineffectiveness claims based on the role trial counsel

plays in defending an accused's rights and testing the prosecution's case. *Martinez*, 132 S.Ct. at 1317 ("Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged."). While the right to effective appellate counsel is also important, as are other rights afforded to defendants, this Court singled out trial counsel's role in the trial process as the reason for creating the exception in *Martinez*. It did not leave room for courts to extend *Martinez* to excuse the default of other claims. *See, e.g., id.* at 1320 ("[T]he limited nature of the qualification to *Coleman* adopted here reflects the importance of the right to the effective assistance of trial counsel . . . .").

Hurles also questions the relevance of Petitioner's argument that the right to appellate counsel stems from the Fourteenth, rather than the Sixth, Amendment. (BIO, at 9–10.) The Ninth Circuit made this distinction important when it concluded that *Martinez* applies to excuse "Sixth Amendment claims of appellate-counsel IAC." *Nguyen,* 736 F.3d at 1296. Petitioner merely noted that there can be no "Sixth Amendment claim[] of appellate-counsel IAC" because the right to appellate counsel is rooted in the Fourteenth Amendment. *See Dansby*, 2014 WL 4378753, at *20 ("The right to appellate counsel has a different origin in the Due Process Clause."). Thus, if the *Nguyen* Court is correct that *Martinez* applies to excuse the default only of a "Sixth Amendment ineffective-assistance claim," then only the default of trial ineffectiveness claims can be excused under *Martinez*. *Nguyen*, 736 F.3d at 1296.

The *Nguyen* Court's faulty reasoning let to its internally inconsistent result that *Martinez* extends to excuse the default of appellate ineffectiveness claims. The panel below applied *Nguyen*'s improper construction of *Martinez* to excuse the procedural default of Hurles's ineffective-assistance-of-appellate-counsel claim. (App. A-21.) This Court should correct the Ninth Circuit's improper application of *Martinez* and confirm that its holding in that case applies only to excuse the default of trial ineffectiveness claims.

II

THE PANEL MAJORITY IMPROPERLY CONDITIONED AEDPA DEFERENCE ON WHETHER THE STATE COURT CONDUCTED AN EVIDENTIARY HEARING.

A. This case is ideally situated for certiorari review.

Hurles contends that this case is a "bad vehicle" for this Court to consider the application of 28 U.S.C. § 2254(d)(2) when a state court does not allow factual development. (BIO, at 16–17.) He first observes that it is rare for a habeas petitioner to satisfy 28 U.S.C. § 2254(d)(2). (*Id.*) But this fact weighs in favor of granting certiorari: Section (d)(2) is an exacting standard seldom met. *See Wood v. Allen*, 558 U.S. 290, 301 (2010) (recognizing that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance," and that habeas relief

is inappropriate where reasonable minds could differ on a factual finding). This Court should not permit § 2254(d)(2) to be used, as it was here, to circumvent AEDPA deference. Instead, this Court should grant certiorari, reverse the panel majority's decision, and ensure that AEDPA remains, as Congress intended, a robust limitation on the federal courts' power to grant habeas relief. *See Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) ("If [AEDPA's] standard is difficult to meet, that is because it was meant to be.").

Second, Hurles incorrectly contends that the Ninth Circuit's decision will not affect other cases because the facts underlying his *substantive judicial-bias claim* are unique and unlikely to recur. (BIO, at 17.) But the question presented here involves the panel majority's decision to condition AEDPA deference on a state-court evidentiary hearing, at least in certain circumstances. (Petition, at i.) This case squarely presents that issue. Further, as stated in the certiorari petition (and not addressed by Hurles), courts and parties have interpreted the majority decision broadly and cited it for the proposition that a state-court evidentiary hearing is a prerequisite to AEDPA deference.[2] (Petition, at 32 & App. A-66.) These interpretations follow logically from the majority's express determination that Judge Hilliard's fact-finding process was "fundamentally flawed"

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[2] Since Petitioner filed his certiorari petition, yet another defendant has argued that the majority's analysis requires a state-court evidentiary hearing as a prerequisite to deference. *See People v. Peyton*, __ Cal. Rptr. 3d __, 2014 WL 4585769, *4 (Sept. 16, 2014).

merely because she "did not hold an evidentiary hearing or provide another mechanism for Hurles to develop evidence" and found facts "based on her untested memory." (App. A-31–A-40.) Nothing in the opinion limits this language to the particular facts of this case. Without this Court's intervention, lower courts will continue to construe the majority opinion to require state courts to conduct evidentiary hearings before their decisions receive deference in proceedings under 28 U.S.C. § 2254(d).[3] This Court should grant certiorari.

B. The panel majority failed to defer to the state court's decision.

Relying on the majority's citation to portions of AEDPA, Hurles argues that the majority gave significant deference to the state court's adjudication of Hurles' claim. (BIO, at 1, 18.) But despite the majority's acknowledgment of AEDPA's language, its review of Hurles's claim reveals no deference to the state court. *See Rice v. Collins*, 546 U.S. 333, 337–38 (2006) ("Though it recited the proper standard of review, the panel majority improperly substituted its evaluation of the record for that of the state trial court."). Instead, the majority found § 2254(d)(2) satisfied for purely procedural reasons: because Judge Ruth Hilliard did not conduct an evidentiary hearing

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[3] For largely the same reasons, Hurles errs in alleging that the panel majority opinion "has not changed the way judicial bias claims are reviewed" because its opinion is limited to this case's unique facts. (BIO, at 22–23.) Again, the majority did not confine its holding to this case's fact pattern.

to allow Hurles to "contest" her memory of events. (App. A-37–A-40.)

AEDPA, however, sets a higher bar: a federal court *must deny habeas relief* on a claim adjudicated on the merits in state court *unless* the state court's decision is unreasonable in light of the facts before that court. 28 U.S.C. § 2254(d)(2). The panel majority here, myopically focusing on the absence of an evidentiary hearing, failed to comply with AEDPA's dictate. Instead, the majority selectively highlighted evidence that supported Hurles's 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." *Collins*, 546 U.S. at 337–38, 342. In particular, the majority's analysis is devoid of any mention of Assistant Attorney General Colleen French's statement, during oral argument in the special-action proceeding, that Judge Hilliard did not participate in drafting the special-action response, which corroborated Judge Hilliard's recollection during the post-conviction proceeding.[4] (App. B-2.) Also absent from the analysis is any reference to Judge Eddward Ballinger's finding—prior to Judge Hilliard's rejection of the judicial-bias claim—that there was no objective

[4] Hurles contends that Judge Hilliard "did not rely on French's statement" when ruling on the judicial-bias claim. (BIO, at 22.) But the statement is part of the published opinion resolving the special-action proceeding that formed the basis for Hurles' judicial-bias claim. (App. B-2.) It was therefore part of the record before Judge Hilliard. *See* 28 U.S.C. § 2254(d)(2).

reason to question Judge Hilliard's impartiality."[5] (App. J–2.) The presence in the state-court record of evidence supporting Judge Hilliard's ruling—ignored by the panel majority—defeats any suggestion that Judge Hilliard unreasonably determined the facts in rejecting Hurles' judicial-bias claim. *See Wood*, 558 U.S. at 301. This Court should grant certiorari.

C. "The remand is erroneous and a waste of judicial resources."[6]

Hurles attacks Petitioner's observation that the facts, if true, do not entitle Hurles to relief, contending that he is "entitled" to develop the facts of his claim in district court because Judge Hilliard's conduct indicates her bias. (BIO, at 23–24.) Hurles is not "entitled" to evidentiary development in federal court at all, *see* 28 U.S.C. § 2254(e)(2), let alone where, as

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[5] Although Judge Ballinger's ruling may not be the last reasoned state court decision on Hurles's claim, it is relevant. (BIO, at 21.) As Judge Ikuta observed, Judge Ballinger's finding demonstrates that Judge Hilliard's failure to conduct a hearing 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." *Richter*, 131 S.Ct. at 786–87. (App. A-65–A-66.) Further, Judge Hilliard adopted and relied on Judge Ballinger's ruling. (App. E-3.) Nor is Judge Ballinger's failure to permit factual development material because he conducted an *objective* assessment to which factual development was irrelevant. (BIO, at 21; App. J-2.) And Judge Ballinger's alleged lack of awareness of purported *ex parte* contact between Judge Hilliard and French (BIO, at 22) is of no moment because that allegation did not emerge until the federal habeas proceeding and therefore is not properly considered in the § 2254(d)(2) analysis.

[6] App. A-68.

here, the state-court record is sufficient to resolve his claim. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

Judge Hilliard did not, as Hurles alleges, initiate a conflict with Hurles or become his adversary by appearing in the special-action proceeding—she instead appeared simply to defend the adequacy of her ruling. "This sort of pleading is fully consistent with impartial adjudication." (App. A-61.) As argued at length in the certiorari petition, Judge Hilliard's conduct did not approach that which this Court has found to require recusal, which involves judges accusing persons of wrongdoing and sitting in judgment of them. (Petition, at 33–36.) *See, e.g., Johnson v. Mississippi*, 403 U.S. 212, 212–16 (1971) (per curiam); *Mayberry v. Pennsylvania*, 400 U.S. 455, 455–66 (1971); *In re Murchison*, 349 U.S. 133, 133–39 (1955).

Finally, Hurles asks this Court to deny certiorari because the panel majority did not grant *habeas relief*, but simply remanded for an *evidentiary hearing*. (BIO, at 17–18, 23.) But given the absence of *material disputed facts*, granting certiorari and reversing the Ninth Circuit's decision would further 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. The forthcoming proceedings are sure to further delay finality in this nearly 22-year-old capital case, frustrating AEDPA's intent. *See Rhines v. Weber*, 544 U.S. 269, 276 (2005) (AEPDA is designed to reduce

delay). This Court should grant certiorari to prevent this needless additional delay and waste of resources on an evidentiary hearing where Hurles's proffered facts, even if true, would not entitle him to relief.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, this Court should grant certiorari and reverse the Ninth Circuit's decision.

Respectfully submitted,

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