No. 12-_____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

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. § 2254(d)(2) merely because the state court does not conduct an evidentiary hearing?

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The Ninth Circuit's panel opinion withdrawing and superseding a previous panel opinion is reported at *Hurles v. Ryan*, 706 F.3d 1021 (9th Cir. 2013) ("*Hurles IV*"). (Appx. C.) The withdrawn panel opinion is reported at *Hurles v. Ryan*, 650 F.3d 1301 (9th Cir. 2011) ("*Hurles III*"). (Appx. E.)

In a published order reported at *Hurles v. Schriro*, 709 F.3d 1317 (9th Cir. 2013), the Ninth Circuit panel deferred ruling on two motions—Petitioner's motion for a ruling on a motion to reconsider he filed after *Hurles III*, and Hurles' motion to remand to the district court for reconsideration of certain claims in light of *Martinez v. Ryan*, __ U.S. __, 132 S.Ct. 1309 (2012)—pending the court's forthcoming *en banc* opinion in *Detrich v. Ryan*, Ninth Cir. No. 08–99001.[1] (Appx. H.)

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[1] Petitioner petitioned for rehearing from the *Hurles III* opinion; the panel deemed that petition moot in *Hurles IV*, 706 F.3d at 1027. Petitioner disputed the mootness finding given that *Hurles III* and *Hurles IV* rested on the same erroneous application of AEDPA, and asked the panel to rule on his petition for rehearing. (Appx. I.) Petitioner obtained an extension of time to file the certiorari petition, in the hope that the Ninth Circuit would resolve the pending motions before the petition was due. The Ninth Circuit has not ruled on the motions, and Petitioner is compelled to proceed with the present certiorari petition, as his pending Ninth Circuit motion may not toll his filing period. *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).

The district court denied habeas relief in an unpublished decision reported electronically at *Hurles v. Schriro*, 2008 WL 4446691 (D. Ariz. Sept. 30, 2008). (Appx. J.) The district court denied Hurles' motion to alter or amend the judgment in an unpublished order reported electronically at *Hurles v. Schriro*, 2008 WL 4924780 (D. Ariz. Nov. 17, 2008). (Appx. F.)

The state post-conviction relief (PCR) court denied the PCR petition relevant to Hurles' present claim in an unpublished and unreported minute entry. (App. D.) The Arizona Supreme Court's summary order denying review of the PCR court's order is also unpublished. *See Hurles IV*, 706 F.3d at 1044.

The Arizona Supreme Court's opinion affirming Hurles' conviction and death sentence on direct appeal is reported at *State v. Hurles*, 914 P.2d 1291 (Ariz. 1996) ("*Hurles II*"). (Appx. B.) The Arizona Court of Appeals' decision in a pretrial special-action proceeding involving an issue related to the present claim is reported at *Hurles v. Superior Court (Hilliard)*, 849 P.2d 1 (Ariz. Ct. App. 1993) ("*Hurles I*"). (Appx. A.)

STATEMENT OF JURISDICTION

The Ninth Circuit filed its opinion reversing the district court's denial of habeas relief and remanding for an evidentiary hearing on January 18, 2013. *Hurles IV*, 706 F.3d at 1021. On April 12, 2013, Justice Anthony Kennedy extended Petitioner's time for filing a certiorari petition to and including June 17, 2013. *See* No. 12A970. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1) and Rule 13 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

28 U.S.C. § 2254(d) provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

SUMMARY OF ARGUMENT

The state PCR court rejected Hurles' judicial-bias claim on the merits. Without considering facts in

the state-court record that supported the PCR court's resolution of the claim, the Ninth Circuit's panel majority found the PCR court's adjudication unreasonable under 28 U.S.C. § 2254(d)(2), merely because the same state-court judge that Hurles accused of bias ruled on the claim, and did so without first conducting an evidentiary hearing. This decision contravenes AEDPA, this Court's habeas jurisprudence, and decisions from the United States Courts of Appeals, including other decisions from the Ninth Circuit. Further, the absence of a state-court evidentiary hearing was irrelevant in this case, as there is no material factual dispute for such a hearing to resolve.

STATEMENT OF THE CASE

On November 12, 1992, Hurles went into a public library in a residential neighborhood in Buckeye, Arizona.[2] *Hurles II*, 914 P.2d at 1293. Kay Blanton was the only person working in the library that afternoon. *Id.* After the last patron left the library shortly before 2:40 p.m., Hurles locked the doors, attacked Blanton in a back room, and tried unsuccessfully to rape her. *Id.* By the time the attack ended, he had stabbed her 37 times with a paring knife (which police later found at the scene) and kicked her so forcefully that he tore her liver. *Id.* During the attack, Blanton struggled unavailingly to reach a

[2] For a full discussion of the facts underlying Hurles' convictions, Petitioner refers this Court to the Arizona Supreme Court's decision in *Hurles II*.

telephone to call for help. *Id.* at 1299. The attack left 15 defensive stab wounds on her hands. *Id.* A jury convicted Hurles of first-degree murder, among other offenses, and a judge sentenced him to death for the murder conviction. *Id.* at 1293.

1. *Special-action proceeding.*

Prior to trial, Hurles' counsel requested the appointment of second-chair counsel; the trial court, with Judge Ruth H. Hilliard presiding, denied the request. *See Hurles IV*, 706 F.3d at 1027. Hurles thereafter filed a petition for special action[3] in the Arizona Court of Appeals, arguing that Judge Hilliard violated his constitutional rights by refusing his request for second-chair counsel. *See id.*

The Maricopa County Attorney's Office represented the State of Arizona, and declined to take a position on the special action. *See Hurles I*, 849 P.2d at 2. However, the Arizona Attorney General's Office, which represents the Superior Court, filed a response on Judge Hilliard's behalf defending her ruling. *Id.* (Appx. G.) The response noted that Hurles' counsel had disclosed no witnesses, had noticed no defenses,

[3] A special-action proceeding is an interlocutory appellate proceeding available only "where there is [not] an equally plain, speedy, and adequate remedy by appeal." Ariz. R. P. Spec. Actions 1. Acceptance of jurisdiction is highly discretionary. Ariz. R. P. Spec. Actions 3, State Bar Committee Note. A party seeking special-action review of a judge's ruling must list the judge as a nominal respondent to the proceeding. Ariz. R. Spec. Actions 2(a)(1) & State Bar Committee Note (a).

had not requested a competency evaluation pursuant to Arizona Rule of Criminal Procedure 11, and had not made clear whether she intended to place Hurles' mental state at issue at trial. (*Id.*) Conversely, the response continued, the State's case was "very simple and straightforward" compared to other capital cases, as it consisted of eyewitness testimony, blood and shoeprint evidence connecting Hurles to the murder scene, and evidence that Hurles had returned books to the library that day. (*Id.* at G-9–G-10.)

The response also addressed Hurles' legal arguments, including his request that the Arizona Court of Appeals follow California law (which presumed the necessity of second chair counsel in death-penalty cases), and his contention that the absence of second counsel would violate the Constitution. (*Id.* at G-11–G-37.) And it opined that appointed counsel was ethically-bound to withdraw from the case, and possibly the Maricopa County list of contract defense lawyers, if she believed herself incapable of competently representing Hurles. (*Id.* at G-37–G-40.)

At oral argument, Assistant Arizona Attorney General ("AAG") Colleen French informed the Arizona Court of Appeals that she had filed the response on the presiding criminal judge's request, and that there had been no communication between her and Judge Hilliard during the response's preparation. *Hurles I*, 849 P.2d at 2 & n.2. The Arizona Court of Appeals found that, although a trial judge is a required nominal party in a special action proceeding, she lacks standing to appear merely to assert that she ruled

correctly. *Id.* at 2–4. Given that the response filed in Judge Hilliard's name simply defended her ruling, the court concluded that she lacked standing to appear in the special action. *Id.*

After resolving the standing issue, the court declined to accept jurisdiction over Hurles' petition. *Id.* at 4. The court determined that the petition was premature because Hurles had failed to make a "particularized showing on the need for second counsel," had failed to submit evidence to the trial judge regarding "customary practice in defense of capital cases," and had failed to ask the trial judge whether second counsel could be appointed for a particular phase of the trial. *Id.* The court further observed that Judge Hilliard had not "preclude[d] counsel from attempting such a showing." *Id.*

2. *Conviction and sentence.*

Hurles raised no allegation at trial or sentencing that Judge Hilliard was biased. *See Hurles IV*, 706 F.3d at 1046. In April 1994, a jury unanimously found Hurles guilty of both premeditated and felony first-degree murder, first-degree burglary, and attempted sexual assault. *Hurles II*, 914 P.2d at 1293–94. Judge Hilliard found that Hurles had killed Blanton in an especially cruel, heinous, or depraved manner. *Id.* at 1299; *see* A.R.S. § 13–703(F)(6) (1992).

Judge Hilliard found two mitigating circumstances: 1) Hurles was raised in a dysfunctional home environment and had a deprived childhood, and 2) Hurles behaved well while incarcerated. *Hurles II*,

914 P.2d at 1299–1300. Judge Hilliard found the mitigation insufficiently substantial to warrant leniency and sentenced Hurles to death. *Id.* at 1294.

3. *Direct appeal and state PCR proceedings.*

On direct appeal, Hurles raised five claims of trial court error. *See id.* at 1294–99. He did not raise a judicial-bias claim. He also did not challenge Judge Hilliard's imposition of a death sentence. *Id.* at 1299. The Arizona Supreme Court rejected Hurles' trial-related claims. *Id.* at 1294–99. Despite Hurles' decision not to challenge his sentence, the court independently reviewed the record and the evidence of aggravating and mitigating circumstances "to determine whether the sentence is justified." *Id.* at 1299. The Court found "overwhelming" evidence of the A.R.S. § 13–703(F)(6) cruelty factor and found Hurles' mitigation insufficiently substantial to warrant leniency. *Id.* at 1299–1300.

Following the Arizona Supreme Court's direct-appeal opinion, Hurles filed two state post-conviction relief (PCR) petitions. Hurles did not raise a claim of judicial bias in his first petition, over which Judge Hilliard presided and at the end of which she denied relief. *Hurles IV*, 706 F.3d at 1029, 1044.

In 2001, Hurles initiated a second PCR petition for the purpose of exhausting certain federal habeas claims. *Id.* at 1029, 1044–45. Before filing his petition, Hurles moved to recuse Judge Hilliard, as he intended to raise a judicial-bias claim based on her

purported involvement in the special-action proceeding. *Id.* at 1029, 1045. The motion was referred to Judge Eddward Ballinger, Jr. *Id.* at 1029, 1045. Judge Ballinger denied the motion, finding, after an objective evaluation of Judge Hilliard's conduct, "no basis to transfer this case" to a different judge for the PCR proceeding. (Appx. K.)

Hurles thereafter filed a PCR petition containing the present judicial-bias claim. *Id.* at 1029, 1045. In rejecting the claim, Judge Hilliard recognized that a judge should disqualify herself in a proceeding in which her impartiality may reasonably be questioned. (Appx. D at D-2–D-4.) Citing this Court's decision in *Liljeberg. v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), and Arizona law, Judge Hilliard stated, "The test is an objective one: whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality." (*Id.*) Judge Hilliard rejected Hurles' claim because she was not personally involved in the special-action proceeding and Hurles had offered no evidence calling into question her partiality:

> The trial judge is presumed to be impartial and the party who seeks recusal must prove the grounds for disqualification by a preponderance of the evidence. The facts here do not support disqualification and another judge, Judge Ballinger, so determined. 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. 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.
>
> … 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 by the defendant. It occurs when the judge abandons the judicial role and acts in favor of one party or another. Hurles has failed to overcome the presumption of impartiality.

(*Id.* at D-4–D-5; citations omitted.) The Arizona Supreme Court affirmed this decision in an unpublished order. *See Hurles IV*, 706 F.3d at 1044.

4. ***District court proceedings.***

Hurles included the present judicial-bias claim in his amended petition for writ of habeas corpus, and the district reviewed it on the merits under 28 U.S.C. § 2254(d). (Appx. J, at J-27–J-58.) The court analyzed opinions in which this Court had found that an

appearance of bias required recusal and found Judge Hilliard's decision not unreasonable in light of those opinions. (*Id.*) *See* 28 U.S.C. § 2254(d)(1).

The district court further rejected Hurles' contention that Judge Hilliard unreasonably determined the facts under 28 U.S.C. § 2254(d)(2) because she "'relied on her untested personal recollection of the underlying events' which 'are not supported anywhere in the record.'" (*Id.* at J-47–J-50.) In particular, the court noted that other portions of the record "corroborate [Judge Hilliard's] statement that she played no active role in [the special-action] proceeding":

> Years before [the judicial-bias] issue was raised in the second PCR, [an Assistant Attorney General] told the Arizona Court of Appeals that the pleading filed by the Attorney General's Office in the special action was not requested by Judge Hilliard and that there was no contact between her office and Judge Hilliard "as the pleading was prepared." For these reasons, Petitioner's contention that Judge Hilliard's recollection was untested and not supported in the record is without merit.

(*Id.* at J-50.) The court also rejected Hurles' assertion that AAG French's statement in a district-court pleading that she had had "'communications with the Trial Judge during the special action proceedings'" cast doubt upon Judge Hilliard's rejection of the judicial-

bias claim. (*Id.* at J-47–J-48 (quoting Dist. Ct. Dkt. # 27, at 6).) The court found that neither French's statements at oral argument, nor Judge Hilliard's findings in her minute entry, "assert that Judge Hilliard had no communication of any kind with the Arizona Attorney General at any point during the special action proceedings, and are thus not inconsistent" with French's district-court statements. (*Id.* at J-49.)

5. *Ninth Circuit proceedings.*

In July 2011, a divided panel of the Ninth Circuit reversed the district court, finding that the Judge Hilliard had employed a deficient fact-finding process to reject Hurles' claim, and that this process resulted in an unreasonable factual determination under 28 U.S.C. § 2254(d)(2). *Hurles III*, 650 F.3d at 1311–14. Perceiving itself relieved of AEDPA deference, the panel majority reviewed the claim's merits *de novo* and concluded that Judge Hilliard's apparent bias violated Hurles' due process rights. The majority granted the habeas writ and ordered the state to resentence Hurles. *Id.* at 1322. Judge Sandra Ikuta dissented, opining that the majority had improperly recast legal questions as factual ones to escape AEDPA deference. *Id.* at 1323–34. Petitioner filed a petition for panel rehearing and rehearing *en banc*.

After over 1 year of inaction, the panel *sua sponte* withdrew its opinion, filed a superseding one and, as previously noted, deemed Petitioner's motion for rehearing moot. *Hurles IV*, 706 F.3d at 1027. The majority panel adopted much of its previous reasoning

and again found 28 U.S.C. § 2254(d)(2) satisfied, but changed the relief it awarded Hurles from a resentencing to a federal-court evidentiary hearing. *Id.* at 1036–40. Although the majority claimed to be "mindful of the limitations AEDPA placed" on its review, it did not apply AEDPA's deferential standards. *Id.* Rather, it identified what it perceived as a defective fact-finding process and stated—in conclusory fashion—that it could not "conclude, nor could any appellate panel, that the record supports Judge Hilliard's factual findings." *Id.*

The panel majority specifically cited Judge Hilliard's reliance "on her untested memory and understanding of the events" during the special-action proceeding to reject the claim, and her failure to conduct an evidentiary hearing. *Id.* at 1038–39. After finding that "proof 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" Hurles' judicial-bias claim, the majority remanded to the district court for an evidentiary hearing. *Id.* at 1040.

Judge Ikuta again dissented, observing that the panel majority had found "a new way to evade AEDPA deference: make an unsupported—and unsupportable—assertion that the state court's fact finding process is 'unreasonable' for purposes of § 2254(d)(2). *Id.* at 1040. She observed that "[t]he correct application of AEDPA to this case is straightforward," and asserted that Hurles' claim failed regardless whether reviewed under 28 U.S.C.

§ 2254(d)(1) or *de novo*, and even assuming that Judge Hilliard had personally participated in drafting the special-action response. *Id.* at 1040–48. Judge Ikuta also rebutted the panel majority's (d)(2) analysis, observing that judges routinely rule personally, without conducting evidentiary hearings, on motions seeking their recusal. *Id.* at 1048–52. Given the foregoing, and that Hurles had identified no disputed material facts, Judge Ikuta opined that "the remand [for an evidentiary hearing] is erroneous and a waste of judicial resources." *Id.* at 1052.

REASONS FOR GRANTING CERTIORARI

In this AEDPA case, the Ninth Circuit's panel majority disregarded a reasonable state-court decision based on an illusory procedural error: the state-court judge's reliance on facts within her personal knowledge to reject Hurles' judicial-bias claim, and her failure to conduct an evidentiary hearing to permit Hurles to "test" her recollection. Without acknowledging (let alone deferring to) evidence in the state-court record that supported the judge's factual determinations, the majority found those determinations unreasonable under 28 U.S.C. § 2254(d)(2) and remanded for an evidentiary hearing on, and *de novo* consideration of, Hurles' claim. This reasoning conflicts with AEDPA, this Court's jurisprudence interpreting that Act, and opinions from the federal circuit courts of appeals, including other panels of the Ninth Circuit.

A state court is not required, as the panel majority implicitly held, to conduct an evidentiary hearing before its decisions are entitled to deference. And both federal and state judges rule routinely,

without first conducting evidentiary hearings, on allegations that they are biased; accordingly, the procedure followed in this case was not objectively unreasonable. Further, any defect in the state court's fact-finding process was not material because Hurles cannot prove a due process violation, even assuming the truth of his factual allegations. Given these compelling reasons, *see* SUP. CT. R. 10, this Court should grant certiorari and reverse the Ninth Circuit's opinion.

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THE PANEL MAJORITY FAILED TO CONSIDER EVIDENCE IN THE STATE-COURT RECORD THAT SUPPORTED THAT COURT'S MERITS ADJUDICATION. INSTEAD, IT FOUND—CONTRARY TO ITS OWN PRECEDENT, THIS COURT'S AEDPA JURISPRUDENCE, AND THE DECISIONS OF OTHER FEDERAL CIRCUITS—THAT THE STATE COURT'S DECISION WAS UNWORTHY OF AEDPA DEFERENCE MERELY BECAUSE THAT COURT DID NOT CONDUCT AN EVIDENTIARY HEARING.

This Court has repeatedly condemned the Ninth Circuit's misapplication—or nonapplication—of AEDPA deference.[4] Once again, in this case, "it is not apparent how the Court of Appeals' analysis would have been

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[4] *See 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 and stating, "The only way this Court can ensure observance of Congress's abridgment of [the] habeas power is to perform the unaccustomed task of reviewing utterly fact-bound decisions that present no disputed issues of law. We have often not shrunk from that task, which we have found particularly needful with regard to decisions of the Ninth Circuit."); *Hurles IV*, 706 F.3d at 1050 & n.5 (Ikuta, J., dissenting) (collecting cases and stating, "The Supreme Court has harshly criticized our noncompliance with AEDPA deference.").

any different without AEDPA." *Harrington v. Richter*, __ U.S. __, 131 S.Ct. 770, 786 (2011). As set forth below, the panel majority "opinion misreads the law, distorts the record, and casts off AEDPA deference on the basis of a non-existent fact-finding flaw." *Hurles IV*, 706 F.3d at 1041 (Ikuta, J., dissenting).

A. *The panel majority created a novel requirement that state courts conduct evidentiary hearings as a prerequisite to their decisions receiving AEDPA deference. This decision conflicts with this Court's jurisprudence, opinions from other federal circuits, and opinions of other Ninth Circuit panels.*

As dissenting Judge Ikuta recognized, the panel majority "failed to weigh the evidence in the record that made the state court's fact-finding process and factual conclusions reasonable, relying instead on an unprecedented view that judges must hold evidentiary hearings on recusal motions." *Hurles IV*, 706 F.3d at 1050–51. The majority found that Judge Hilliard's failure to conduct an evidentiary hearing rendered her factual findings *per se* unreasonable, regardless of evidence in the state-court record supporting those findings. In so doing, it imposed a new rule, which is inconsistent with precedent from this Court, from other jurisdictions, and from other Ninth Circuit panels: that a state-court evidentiary hearing is a mandatory prerequisite to AEDPA deference. This faulty reasoning is worthy of certiorari review. *See* SUP. CT. R. 10.

The idea that a state court must conduct an evidentiary hearing as a prerequisite to its decisions receiving AEDPA deference, regardless whether the record before the state court was satisfactory to resolve the petitioner's claim without a such a proceeding, finds no support in this Court's precedent. In fact, it is plainly irreconcilable with this Court's recent habeas jurisprudence. *See Schriro v. Landrigan*, 550 U.S. 465, 471, 476–77 (2007) (state court's factual findings reasonable under 28 U.S.C. § (d)(2) despite absence of state-court evidentiary hearing); *see also Richter*, 131 S.Ct. at 783–85 (state court's summary denial of claim entitled to deference under AEDPA). By dictating how state courts resolve claims brought before them, the opinion also frustrates AEDPA's goals of promoting "comity, finality, and federalism." *Cullen v. Pinholster*, __ U.S. __, 131 S.Ct. 1388, 1401 (2011) (quotations omitted).

The panel majority's suggestion that AEDPA deference is conditioned on a state-court evidentiary hearing also conflicts with the weight of authority from other federal circuits—including the Ninth Circuit—which recognizes to the contrary. *See Hibbler v. Benedetti*, 693 F.3d 1140, 1147 (9th Cir. 2012) ("[W]e have never held that a state court must conduct an evidentiary hearing to resolve every disputed factual question; such a per se rule would be counter not only to the deference owed to state courts under AEDPA, but to Supreme Court precedent."); *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010) (although state-court procedures may be relevant to the 28 U.S.C. § 2254(e)(1) analysis, "AEDPA does not make deference to state court fact-finding dependent on the adequacy

of the procedures followed by the state court"); *Teti v. Bender*, 507 F.3d 50, 56–57 (1st Cir. 2007) ("§ 2254(d) applies regardless of the procedures employed or the decision reached by the state court, as long as a substantive decision *was* reached; the adequacy of the procedures and of the decision are addressed through the lens of § 2254(d), not as a threshold matter."); *Valdez v. Cockrell*, 274 F.3d 941, 942, 951 (5th Cir. 2001) ("We hold that a full and fair hearing is not a prerequisite to the application of 28 U.S.C. § 2254's deferential scheme."); *Mendiola v. Schomig*, 224 F.3d 589, 592–93 (7th Cir. 2000) ("The foundation of [the petitioner's] position—that only trial judges may make factual findings, and then only after hearings dedicated to the contested issue—is unsound. … What is more, § 2254(e)(1) does not require findings to be based on evidentiary hearings. … [I]f the state court's finding is supported by the record, even though not be a hearing on the merits of the factual issue, then it is presumed to be correct.") (quotations and alterations omitted).

In addition, as Judge Ikuta observed, the panel majority's requirement that courts conduct evidentiary hearings on judicial-bias claims is unprecedented, and contrary to common national practice. Judges routinely resolve challenges to their impartiality by themselves, based on matters within their own knowledge, without conducting evidentiary hearings. *See Cheney v. U.S. Dist. Ct. for the Dist. Of Columbia*, 541 U.S. 913, 914–29 (2004) (Justice Antonin Scalia denying motion to recuse himself because he attended a hunting trip with the Vice President); *Microsoft Corp. v. U.S.*, 530 U.S. 1301, 1301–02 (2000) (statement of Chief Judge

Rehnquist, declining to recuse himself because of son's legal representation of a party before the Court); *Miles v. Ryan*, 697 F.3d 1090, 1090 (9th Cir. 2012) (Judge Susan Graber denying motion to recuse herself because of her father's murder); *id.* (joint statement of Judges Richard Tallman and Marsha Berzon) ("Under this Circuit's procedures … each judge may decide for himself or herself whether recusal is appropriate."); *Suever v. Connell*, 681 F.3d 1064, 1065 (9th Cir. 2012) (statement of Judge Dorothy W. Nelson, declining to recuse herself from class action because she belonged to putative class and recognizing "the practical costs that unnecessary recusal entails") (quotations omitted); *Perry v. Schwarzenegger*, 630 F.3d 909, 910–16 (9th Cir. 2011) (Judge Stephen Reinhardt denying motion to recuse himself because of wife's involvement in interest group); *Feminist Women's Health Center v. Codispoti*, 69 F.3d 399, 400–01 (9th Cir. 1995) (Judge John Noonan denying motion to recuse himself because of religious beliefs).

This procedure makes sense, because the facts material to resolving an allegation of a judge's partiality are uniquely within the judge's personal knowledge. In testimony to the regularity of the procedure Judge Hilliard followed, the panel majority cited no authority for the proposition that an evidentiary hearing is *required* to resolve a judicial-bias claim. And other federal circuits have reviewed judicial-bias claims deferentially, regardless of the presence of a state-court hearing. *See Wellons v. Warden. Ga. Diagnostic and Classification Prison*, 695 F.3d 1202, 1211–12 (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); *Getsy v. Mitchell*, 495 F.3d 295, 309–13 (6th Cir. 2007) (reviewing Ohio Supreme Court's rejection of judicial-bias claim with AEDPA deference, where trial court did not conduct evidentiary hearing on claim).

Further, at least one federal circuit has, contrary to the panel majority here, afforded deference to a state court's resolution of a judicial-bias claim where the same judge accused of bias rejected the claim on state collateral review. *See Buntion v. Quarterman*, 524 F.3d 664, 669 n.1 (5th Cir. 2008) ("Although [the petitioner] challenges the fact that deference should be given to the 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.").

The panel majority's creation of a *per se* rule requiring a state-court evidentiary hearing as a prerequisite to AEDPA deference thus conflicts with this Court's jurisprudence and the decisions of other circuits. In light of the panel majority opinion, Ninth Circuit law now *requires* a state-court evidentiary hearing before a federal court may apply AEDPA deference to a state court's merits adjudication of a federal claim. Given the foregoing compelling reasons, this Court should grant review.

B. *By focusing on the absence of an evidentiary hearing, the panel majority failed to consider evidence in the state-court record supporting that court's merits adjudication.*

In *Richter*, this Court chastised the Ninth Circuit for, among other errors in its 28 U.S.C. § 2254(d)(1) analysis, "overlook[ing] arguments that would otherwise justify the state court's result." 131 S.Ct. at 786. Here, as in *Richter*, the panel majority disregarded evidence supporting the state court's rejection of Hurles' judicial-bias claim. In finding an unreasonable factual determination, the majority cited Judge Hilliard's exclusive reliance on facts within her "untested" knowledge. *Hurles IV*, 706 F.3d at 1039. But the majority ignored the fact that, years before Hurles' raised his judicial-bias claim, AAG French corroborated Judge Hilliard's recollection: she informed the Arizona Court of Appeals that the judge did not participate in drafting the special-action response, and the Court of Appeals accepted that statement.[5] *See Hurles I*, 849 P.2d at 2 n.2.

And before Judge Hilliard ruled on Hurles' judicial-bias claim, Judge Ballinger reviewed Hurles'

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[5] The panel majority believes that French made a contradictory statement in a district-court pleading. *Hurles IV*, 706 F.3d at 1028. But this statement has no bearing on the (d)(2) analysis because it was presented for the first time in federal court. *See* 28 U.S.C. § 2254(d)(2) (precluding habeas relief unless state-court decision was unreasonable in light of the evidence before it). Moreover, as the district court correctly found, the statement is not contradictory in the first place. (Appx. J, at J-49.)

motion to recuse Judge Hilliard and found *no objective basis to question her impartiality*. (Appx. K.) In light of the above evidence supporting the state court's adjudication, the majority erred by finding an unreasonable factual determination. *See Richter*, 131 S.Ct. at 786–87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."); *Hurles IV*, 706 F.3d at 1049 (Ikuta, J., dissenting) ("In light of Judge Ballinger's review of the record and determination that Judge Hilliard's impartiality could not be reasonably questioned, it seems impossible to conclude that *all* jurists would agree that the state court made an unreasonable determination of the facts.").

This Court has previously reversed the Ninth Circuit for "substitut[ing] its evaluation of the record for that of the state trial court," and use[ing] a set of debatable inferences to set aside the conclusion reached by the state court." *Rice v. Collins*, 546 U.S. 333, 337–38, 342 (2006). The panel majority's transgression here was far worse: it found 28 U.S.C. § 2254(d)(2) satisfied for purely procedural reasons, without considering evidence "that would otherwise justify the state court's result." *Richter*, 131 S.Ct. at 786. omitted). The majority opinion here frustrates AEDPA's goals and contravenes this Court's AEDPA jurisprudence, much of it generated by the Ninth

Circuit's habitual defiance of that Act's deferential standards. This Court should grant certiorari.

C. *Even assuming that a state-court evidentiary hearing may be a mandatory prerequisite to AEDPA deference in some cases, this is not one of them.*

Even assuming circumstances exist in which a state court's failure to conduct an evidentiary hearing renders its factual determinations *per se* unreasonable under AEDPA, this case is not one of them. First, the panel majority faults Judge Hilliard for referring to facts within her knowledge—in effect "offer[ing] testimony"—to reject Hurles' claim. *Hurles IV*, 706 F,3d at 1038. But as previously discussed, both federal and Arizona judges routinely rule on requests that they recuse themselves. *Id.* at 1048–49 (Ikuta, J., dissenting) (citing 28 U.S.C. § 455(a) & Ariz. Code of Jud. Conduct R. 2.11(A) (2009)). In light of the common national practice of judges consulting matters within their exclusive knowledge to resolve challenges to their impartiality, Hurles cannot show that Judge Hilliard's decision to do so was "an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Richter*, 131 S.Ct. at 786–87.[6]

Further, as previously stated, before Judge Hilliard ruled on the PCR petition, Judge Ballinger

[6] At a minimum, any evidentiary-hearing requirement should exempt judicial-bias claims, as the facts material to those claims are often within the judge's exclusive knowledge, making an evidentiary hearing unnecessary.

independently *found no appearance of impropriety* requiring her disqualification. "If anything, [this] fact-finding process … was more careful and reasonable than those engaged in … on a regular basis." *Hurles IV*, 706 F.3d at 1049 (Ikuta, J., dissenting). And Judge Ballinger's determinations—which the majority did not find unreasonable—are also entitled to AEDPA deference and are sufficient to defeat Hurles' claim. *See Buntion*, 524 F.3d at 669 n.1 ("Even if [the judge's rejection of a challenge to his own partiality] was suspect, it does not support the grant of habeas in this case because the findings of the recusal hearings [which occurred before different judges] are also entitled to AEDPA deference."). Finally, the Arizona Supreme Court subsequently denied review of Judge Hilliard's ruling on the judicial-bias claim, providing a second independent review of Judge Hilliard's alleged partiality. The state court's fact-finding process was more than reasonable.

Second, Judge Ikuta correctly observed that this case presents "a particularly bad springboard for imposing a new evidentiary hearing requirement" because Hurles has failed to identify any *material* evidence that could be developed at an evidentiary hearing. *Hurles IV*, 706 F.3d at 149–50. In fact, the panel majority erroneously treated an evidentiary hearing as a vehicle for Hurles to *develop a basis* for his claim, rather than to resolve a material factual dispute. *See Hurles IV*, 706 F.3d at 1041 (reciting facts that, *if* proved at an evidentiary hearing, "would help establish" Hurles' judicial-bias claim). And no such dispute exists here because Hurles' claim fails,

regardless of Judge Hilliard's degree of participation in the special-action response.[7]

This Court's "'precedent reveals only three circumstances in which an appearance of bias—as opposed to actual bias—necessitates recusal.'" *Hurles IV*, 706 F.3d at 1046 (Ikuta, J., dissenting) (quoting *Crater v. Galaza*, 491 U.S. 1119, 1131 (9th Cir. 2007)). Specifically, a judge must recuse herself when she 1) has a direct and substantial pecuniary interest in the case's outcome, 2) becomes "embroiled in a running, bitter controversy" with one of the litigants, or 3) becomes part of the accusatory process. *Hurles IV*, 706 F.3d 1046 (Ikuta, J., dissenting) (internal quotations omitted). In the district court, Hurles alleged only the second circumstance: that Judge Hilliard had become enmeshed in a personal controversy with him. (Appx. J, at J-48–J-49.)

This Court's precedent requiring recusal when a judge becomes involved in a personal controversy with a litigant arises in the context of contempt proceedings. *See Johnson v. Mississippi*, 403 U.S. 212, 212–16 (1971) (per curiam) (holding that appearance of bias required recusal where judge presided over contempt trial of defendant who had previously obtained an injunction against the judge for racial and gender discrimination); *Mayberry v. Pennsylvania*, 400 U.S.

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[7] As Judge Ikuta observed in her *Hurles III* dissent, Hurles' claim would have been more appropriately analyzed under 28 U.S.C. § 2254(d)(1). For the reasons set forth above, it would not only fail under that standard, but would also fail on *de novo* review.

455, 455–66 (1971) (judge was required to recuse himself from contempt trial where contempt charge was based on defendant repeatedly berating judge); *In re Murchison*, 349 U.S. 133, 134–39 (1955) (violation of due process where judged charged defendants with contempt and subsequently presided over their contempt hearings). This fact "is instructive because [it] highlights the circumstances where the probability of actual bias … is too high to be constitutionally tolerable." *Hurles IV*, 706 F.3d at 1047 (Ikuta, J., dissenting) (quotations omitted). "Specifically, the probability of bias reaches constitutional proportions when a judge is in a position to first accuse an individual of wrongdoing and then sit in judgment of whether any wrong was in fact committed." *Id.*

Here, even if Judge Hilliard had *personally authored* the special-action response, Hurles' could not state a colorable judicial-bias claim. Judge Hilliard did not accuse Hurles of wrongdoing and then sit in judgment of him during the special action, or otherwise become entangled in a personal controversy. The statements in the response do not express an opinion about the proper sentence Hurles should receive.[8] Rather, at most, they merely defend Judge Hilliard's ruling and are no different than those a judge might make on the record when denying a motion.

For example, the response's description of the State's case as "simple" is matter-of-fact, and accurate given the overwhelming evidence against Hurles. And

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[8] Hurles does not seek a retrial; only a resentencing. *See Hurles III*, 650 F.3d at 1322.

its description of the crime as "brutal" is an inescapable conclusion from the facts. *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings … do not constitute a basis for a bias or partiality motion, unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.") In short, "[t]his sort of pleading is fully consistent with impartial adjudication." *Hurles IV*, 706 F.3d at 1047 (Ikuta, J., dissenting).

Nor do the response's comments about Hurles' counsel, and its observations of her ethical duties to withdraw if, as her request for second counsel suggested, she was not competently able to represent Hurles, evidence Judge Hilliard's bias. At worst, these comments are "mildly disparaging." *Hurles IV*, 706 F.3d at 1057 (Ikuta, J., dissenting). Mildly disparaging comments, which do not derive from an extrajudicial source and do not reveal a high level of antagonism, do not support a judicial-bias claim. *See Liteky*, 510 U.S. at 555 ("[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."). The degree of Judge Hilliard's involvement in the special-action proceeding is thus not material to the outcome, and the state court was not required to hold an evidentiary hearing to develop those facts. *See Hibbler*, 693 F.3d at 1149 (state court could have "reasonably determined that an evidentiary hearing would have been fruitless"); *see generally* 28 U.S.C. § 2254(d)(2)

(specifying that state-court adjudication be "based on" the unreasonable factual determination).

For the same reasons, even if the panel majority appropriately found 28 U.S.C. § 2254(d)(2) satisfied and AEDPA deference lifted, the evidentiary hearing the district court ordered in this case serves no purpose. *See Landrigan*, 550 U.S. at 474 ("[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."); *id.* at 475 ("If district courts were required to allow federal habeas applicants to develop even the most insubstantial factual allegations in evidentiary hearings, district courts would be forced to reopen factual disputes that were conclusively resolved in the state courts."). As Judge Ikuta succinctly stated, the majority's remand for an evidentiary hearing "is erroneous and a waste of time." *Hurles*, 706 F.3d at 1050.

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CONCLUSION

The panel majority's opinion provides yet another "textbook example of what [AEDPA] proscribes: 'using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts.'" *Parker v. Matthews*, __ U.S. __ 132 S.Ct. 2138, 2149 (2012) (per curiam) (quoting *Renico v. Lett*, 559 U.S. 766, __, 130 S.Ct. 1855, 1866 (2010)). This Court should grant certiorari to reverse the Ninth Circuit's opinion.

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