No. 14-_____

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

QUESTIONS PRESENTED

1. Under this Court's decision in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), can post-conviction counsel's ineffectiveness provide cause to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim, or is *Martinez* limited to excusing only the default of a claim of ineffective assistance of trial counsel?

2. Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), is a state-court adjudication of a judicial-bias claim *per se* unreasonable under 28 U.S.C. § 2254(d)(2) merely because the allegedly-biased judge rules on the claim based on facts within her knowledge without first conducting an evidentiary hearing, or must a federal court grant AEDPA deference to the judge's determination when the evidence in the state-court record supports it?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

INTRODUCTION 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION.....14

ARGUMENTS

I
MARTINEZ DOES NOT APPLY TO EXCUSE THE PROCEDURAL DEFAULT OF HURLES'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL 15

II
THE PANEL MAJORITY CONTRAVENED AEDPA BY CASTING ASIDE THE STATE COURT'S REASONABLE REJECTION OF HURLES'S JUDICIAL-BIAS CLAIM BASED EXCLUSIVELY ON A NON-EXISTENT PROCEDURAL ERROR.....24

CONCLUSION 35

APPENDIX A, NINTH CIRCUIT COURT OF APPEALS OPINION, MAY 2014 ..... A-1

APPENDIX B, ARIZONA COURT COURT OF APPEALS SPECIAL ACTION OPINION..... B-1

APPENDIX C, ARIZONA SUPREME COURT DIRECT-APPEAL OPINION C-1

APPENDIX D, NINTH CIRCUIT COURT OF APPEALS OPINION, JANUARY 2013 .....D-1

APPENDIX E, TRIAL COURT MINUTE ENTRY DENYING PETITION FOR POST-CONVICTION RELIEF E-1

APPENDIX F, NINTH CIRCUIT COURT OF APPEALS OPINION, JULY 2011 ..... F-1

APPENDIX G, DISTRICT COURT ORDER DENYING RULE MOTION TO ALTER OR AMEND JUDGMENT.....G-1

APPENDIX H, STATE'S RESPONSE TO PETITION FOR SPECIAL-ACTION.....H-1

APPENDIX I, DISTRICT COURT'S MEMORANDUM OF DECISION AND ORDER . I-1

APPENDIX J, TRIAL COURT'S ORDER DENYING MOTION TO RECUSE..... J-1

APPENDIX K, ARIZONA SUPREME COURT
ORDER DENYING PETITION
FOR REVIEW K-1

TABLE OF AUTHORITIES

CASES — PAGE

Ake v. Oklahoma, 470 U.S. 68 (1985) 8, 14-15
Banks v. Workman, 692 F.3d 1133 (10th Cir. 2012) 16
Buntion v. Quarterman, 524 F.3d 664 (5th Cir. 2008) 26, 28
Carranza v. Long, No. CV 13-155-R(JPR), 2104 WL 580240 (C.D. Ca. Feb. 12, 2014).....32
Cash v. Maxwell, 132 S. Ct. 611 (2012).....24
Cheney v. U.S. Dist. Ct. for the Dist. Of Columbia, 541 U.S. 913 (2004)..30
Coleman v. Thompson, 501 U.S. 722 (1991) 15, 17, 20, 22
Cullen v. Pinholster, 131 S. Ct. 1388 (2011)....29, 33
Dansby v. Hobbs, 133 S. Ct. 2767 (2013).....16
Dansby v. Norris, 682 F.3d 711 (8th Cir.).....16
Douglas v. California, 372 U.S. 353 (1963).....19
Dunn v. Swarthout, No. 2:11-CV-2731 JAM GGH P, WL 4654550 (E.D. Ca. Aug. 29, 2013) 32
Evitts v. Lucey, 469 U.S. 387 (1985) 19
Feminist Women's Health Center v. Codispoti, 69 F.3d 399 (9th Cir. 1995).....31
Getsy v. Mitchell, 495 F.3d 295 (6th Cir. 2007) 28
Gideon v. Wainwright, 372 U.S. 335 (1963).....21
Harrington v. Richter, 131 S. Ct. 770 (2011) 25- 27, 29
Hibbler v. Benedetti, 693 F.3d 1140 (9th Cir. 2012) 28-29
Hodges v. Colson, 727 F.3d 517 (6th Cir. 2013) 17
Hurles v. Ryan, 751 F.3d 1096 (9th Cir. 2014) *(Hurles V)*.....1, 22, 32-33

Hurles v. Ryan, 706 F.3d 1021 (9th Cir. 2013) *(Hurles IV)* 1, 32
Hurles v. Ryan, 650 F.3d 1301 (9th Cir. 2011) *(Hurles III)* 1, 32
Hurles v. Schriro, 2008 WL 4446691, (D. Ariz. Sept. 30, 2008) 1
Hurles v. Schriro, 2008 WL 4924780, (D. Ariz. Nov. 17, 2008) 1
Hurles v. Superior Court (Hilliard), 849 P.2d 1 (Ariz. Ct. App. 1993) *(Hurles I)* 2
In Re Murchison, 349 U.S. 133 (1955) 34
Johnson v. Mississippi, 403 U.S. 212 (1971) 33
Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 9
Litekey v. United States, 510 U.S. 540 (1994) 34
Martinez v. Court of Appeal of Cal., Fourth App. Dist., 528 U.S. 152 (2000) 18
Martinez v. Ryan, 132 S. Ct. 1309 (2012) .... i, 3-4, 13-23, 35
Mayberry v. Pennsylvania, 400 U.S. 455 (1971) ... 34
Mendiola v. Schomig, 224 F.3d 589 (7th Cir. 2000) 28
Microsoft Corp. v. U.S., 530 U.S. 1301 (2000) 30
Miles v. Ryan, 697 F.3d 1090 (9th Cir. 2012) 30
Nguyen v. Curry, 736 F.3d 1287 (9th Cir. 2013) 14-17, 19-20, 22-23
Packer v. Superior Court, 161 Cal. Rptr. 3d 595 (Cal. Ct. App. 2013) 32
Packer v. Superior Court, 314 P.3d 487 (Cal. 2013) 32
Parker v. Matthews, 132 S. Ct. 2138 (2012) 36
People v. Scott, 75 Cal.Rptr.2d 315 (1998) 19
Perry v. Schwarzenegger, 630 F.3d 909 (9th Cir. 2011) 31

Reed v. Stephens, 739 F.3d 753 (5th Cir. 2014) 17
Renico v. Lett, 559 U.S. 766 (2010) 36
Rice v. Collins, 546 U.S. 333 (2006) 25
Saenz v. Van Winkle, No. CV 13-77-PHX-JAT, 2014 WL 2986690 (D. Ariz. July 2, 2014) 23
Schriro v. Landrigan, 550 U.S. 465 (2007) 29, 35
Sharpe v. Bell, 593 F.3d 372 (4th Cir. 2010) 28
State v. Hurles, 914 P.2d 1291 (Ariz. 1996) ..... *(Hurles II)* 1, 5
Suever v. Connell, 681 F.3d 1064 (9th Cir. 2012) .. 30
Teti v. Bender, 507 F.3d 50 (1st Cir. 2007) 28
Trevino v. Thaler, 133 S. Ct. 1911 (2013) 21
United States v. Ciavarella, 716 F.3d 705 (3rd Cir. 2013) 31
Valdez v. Cockrell, 274 F.3d 941 (5th Cir. 2001) 28
Wellons v. Warden Ga. Diagnostic and Classification Prison, 695 F.3d 1202 (11th Cir. 2012) 28
White v. Woodall, 134 S. Ct. 1697 (2014) 25

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 2, 17-20
U.S. Const. amend. XIV 2, 18-19

STATUTES

28 U.S.C. § 455 31
28 U.S.C. § 1254(b)(1)(A) 22
28 U.S.C. § 1254(d) 2, 10, 25, 32
28 U.S.C. § 1254(d)(1) 10, 13, 25, 33
28 U.S.C. § 1254(d)(2) ..... i, 2, 4, 10-13, 24-26, 29, 32
28 U.S.C. § 1254(1) 2
A.R.S. § 13–703(F)(6) 8

RULES

Ariz. R. P. Spec. Actions 1 5
Ariz. R. P. Spec. Actions 2(a)(1) 5
Ariz. R. P. Spec. Actions 3 5
U.S. Sup. Ct. R. 10 25
U.S. Sup. Ct. R. 13 2

OPINIONS BELOW

The Ninth Circuit's panel opinion withdrawing and superseding a previous panel opinion is reported at *Hurles v. Ryan*, 751 F.3d 1096 (9th Cir. 2014) (*"Hurles V"*). (App. A-1–A-76.) The withdrawn panel opinion, which itself withdrew and superseded a previous panel opinion, is reported at *Hurles v. Ryan*, 706 F.3d 1021 (9th Cir. 2013) ("*Hurles IV*"). (App. D-1–D-59.) The first withdrawn panel opinion is reported at *Hurles v. Ryan*, 650 F.3d 1301 (9th Cir. 2011) ("*Hurles III*"). (App. F-1–F-72.)

The district court denied habeas relief in an unpublished decision reported electronically at *Hurles v. Schriro*, 2008 WL 4446691 (D. Ariz. Sept. 30, 2008). (App. I-1–I-74.) The district court denied Hurles's 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). (App. G-1–G-7.)

The state post-conviction relief (PCR) court denied the PCR petition relevant to Hurles's present claim in an unpublished and unreported minute entry. (App. E-1–E-8.) The Arizona Supreme Court's summary order denying review of the PCR court's decision is also unpublished. (*See* App. K-1.)

The Arizona Supreme Court's opinion affirming Hurles's conviction and death sentence on direct appeal is reported at *State v. Hurles*, 914 P.2d 1291 (Ariz. 1996) ("*Hurles II*"). (App. C-1–C-20.) The Arizona Court of Appeals' decision in a pretrial special-action

proceeding involving an issue related to one of the present claims is reported at *Hurles v. Superior Court (Hilliard)*, 849 P.2d 1 (Ariz. Ct. App. 1993) ("*Hurles I*"). (App. B-1–B-10.)

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 May 16, 2014. (App. A-1–A-76.) 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 Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right … to have the assistance of counsel for his defense.

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; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d) provides, in pertinent 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.

INTRODUCTION

After this Court expressly found an equitable remedy for procedurally-defaulted claims of ineffective assistance of *trial* counsel, *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), every circuit court of appeals to consider the issue, save one, has followed the express holding of *Martinez* and rejected expanding it to claims of ineffectiveness of appellate counsel. Here, the Ninth

Circuit stands alone amongst its sister courts in applying *Martinez* to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim. This unreasonable expansion of *Martinez* to claims of *appellate* counsel's ineffectiveness will effectively open the floodgates to the merits review of numerous procedurally-defaulted substantive claims and will substantially weaken AEDPA's exhaustion requirement. This Court should grant certiorari to resolve the conflict within the circuits and ensure that AEDPA's exhaustion requirement continues to robustly safeguard federal-state comity.

In addition, the Ninth Circuit found that the state court had unreasonably determined the facts on Hurles's judicial-bias claim under 28 U.S.C. § 2254(d)(2) without acknowledging evidence in the record supporting the state court's resolution, let alone considering whether reasonable jurists could debate that ruling's accuracy. Instead, the court found § (d)(2) satisfied for strictly procedural reasons: the state judge's reliance on facts within her personal knowledge and her failure to conduct an evidentiary hearing to permit Hurles to "test" her recollection. Not only does this analysis contravene AEDPA and myriad authority from this Court and other federal circuits, but it also threatens to adversely affect the justice system by calling into question the manner in which many judges resolve recusal requests and laying the groundwork for habeas petitioners to evade AEDPA deference on judicial-bias claims. This Court should grant review to enforce the stringent limitations that AEDPA imposes on federal courts.

STATEMENT OF THE CASE

On November 12, 1992, Hurles went into a public library in a residential neighborhood in Buckeye, Arizona.[1] (App. C-2.) 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 front 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 had torn her liver. (App. C-1, C-4, C-18.) During the attack, Blanton struggled unavailingly to reach a telephone to call for help. (App. C-18.) The attack left 15 defensive stab wounds on her hands. (*Id.*)

1. *Special-action proceeding.*

Prior to trial, Hurles's attorney requested the appointment of second-chair counsel; the trial court, with Judge Ruth H. Hilliard presiding, denied the request. (App. A-3–A-4.) Hurles thereafter filed a petition for special action[2] in the Arizona Court of

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[1] For a full discussion of the facts underlying Hurles's convictions, Petitioner refers this Court to the Arizona Supreme Court's decision in *Hurles II*. (App. C-1–C-4.)

[2] 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. (Continued)

Appeals, arguing that Judge Hilliard violated his constitutional rights by refusing his request for second-chair counsel. (App. A-4.)

The Maricopa County Attorney's Office represented the State of Arizona and declined to take a position on the special action. (App. B-2.) However, the Arizona Attorney General's Office, which represents the superior court, filed a response on Judge Hilliard's behalf defending her ruling. (App. H-1–H-17.) The response noted that Hurles's counsel had disclosed no witnesses, had noticed no defenses, had not requested a competency evaluation, and had not made clear whether she intended to place Hurles's 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.*)

The response also addressed Hurles's 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.*) And it opined that appointed

(Continued).

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. P. Spec. Actions 2(a)(1) & State Bar Committee Note (a).

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 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. (App. B-2–B-8.) The Arizona Court of Appeals held that, although a trial judge is a requisite nominal party in a special action proceeding, she lacks standing to appear merely to assert that she ruled correctly. (App. B-7.) 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. (App. B-8.)

After resolving the standing issue, the court declined to accept jurisdiction over Hurles's petition. (App. B-9–B-10.) 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. (App. A-54–A-55.) In April 1994, a jury unanimously found Hurles guilty of both premeditated and felony first-degree murder, first-degree burglary, and attempted sexual assault. (App. C-1, C-4.) Judge Hilliard found that Hurles had killed Blanton in an especially cruel, heinous, or depraved manner. (App. C-18.) *See* A.R.S. § 13–703(F)(6) (West 1992). After finding two mitigating circumstances: 1) dysfunctional home environment and deprived childhood, and 2) good behavior while incarcerated, Judge Hilliard found the mitigation insufficiently substantial to warrant leniency and sentenced Hurles to death. (App. C-19–C-20.)

3. *Direct appeal and state PCR proceedings.*

On direct appeal, Hurles raised five claims of trial court error but did not raise a judicial-bias claim. (App. A-54–A-55.) He also did not challenge Judge Hilliard's imposition of a death sentence. (App. C-17.) Nor did he attack, under *Ake v. Oklahoma*, 470 U.S. 68 (1985), her denial of funding for neurological testing. (*See* App. A-18–A-19.) The Arizona Supreme Court rejected Hurles's trial-related claims. (App. C-4–C-17.) Despite Hurles's decision not to challenge his sentence, the court independently reviewed the record and the evidence of aggravating and mitigating circumstances

and found Hurles's mitigation insufficiently substantial to warrant leniency. (App. C-17–C-20.)

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. (App. A-54–A-55.)

In 2001, Hurles initiated a second PCR petition for the purpose of exhausting certain federal habeas claims. (App. A-7–A-8, A-55.) 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. (App. A-7–A-8, A-55.) The motion was referred to Judge Eddward Ballinger, Jr. (App. A-7–A-8, A-55.) 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. (App. J-1–J-2.)

Hurles thereafter filed a PCR petition containing the present judicial-bias claim. (App. A-7–A-8, A-55–A-56.) In rejecting the claim, Judge Hilliard recognized that a judge should disqualify herself in a proceeding in which her impartiality may reasonably be questioned. (App. E-2.) 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." (App. E-2–E-3.) Citing Judge Ballinger's previous determination that no objective reason existed to question her impartiality, Judge Hilliard rejected Hurles's claim because she was not personally involved in the special-action proceeding and Hurles had offered no evidence calling into question her impartiality. (App. E-3–E-4.) In addition, she reiterated that no contact was made between her and the Attorney General's Office in the special action proceeding as she was simply a nominal party. (*Id.*) The Arizona Supreme Court affirmed this decision in an unpublished order. (App. K–1.)

4. *District court proceedings.*

Hurles included the present judicial-bias claim in his amended petition for writ of habeas corpus, and the district court reviewed it on the merits under 28 U.S.C. § 2254(d). (App. I-17–I-35.) 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's 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.'" (App. I-28–I-29.) In particular, the court noted that other portions of the record corroborated Judge Hilliard's recollection that there had not been contact between her and the

Attorney General's Office during the special action's preparation. (App. I-29–I-30.)

The court also rejected Hurles's 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.* (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. (App. I-29–I-30.)

5. *Ninth Circuit proceedings.*

In July 2011, a divided panel of the Ninth Circuit reversed the district court, finding that Judge Hilliard had employed a deficient fact-finding process to reject Hurles's judicial-bias claim, and that this process resulted in an unreasonable factual determination under 28 U.S.C. § 2254(d)(2). (App. F-14–F-45.) 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's due process rights. (*Id.*) The majority granted the habeas writ and ordered the state to resentence Hurles. (*Id.*) Judge Sandra Ikuta dissented, opining that the majority had improperly recast legal questions as factual ones to escape AEDPA deference. (App. F-45–F-72.)

Petitioner filed a petition for panel rehearing and rehearing *en banc*. (*See* App. D-1.)

After over 1 year of inaction, the panel *sua sponte* withdrew its opinion, filed a superseding one and deemed Petitioner's motion for rehearing moot. (*Id.*) The panel majority 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. (App. D-23–D-32.) Although the majority claimed to be "mindful of the limitations AEDPA place[d]" 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. (App. D-28–D-29.) 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's judicial-bias claim, the majority remanded to the district court for an evidentiary hearing. (App. D-32.)

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)." (App. D–32.) She observed that "[t]he correct application of AEDPA to this case is straightforward," and asserted that Hurles's 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. (App. D-45–D-59.) Judge Ikuta also rebutted the panel majority's (d)(2) analysis, observing that judges routinely rule personally on motions seeking their recusal, without conducting evidentiary hearings. (*Id.*) 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 D-57.)

Following the opinion, Petitioner filed a motion seeking a ruling on the petition for rehearing he had filed after the July 2011 opinion, and Hurles filed a motion to remand the case to the district court to reconsider the procedural default of several claims under *Martinez*. (Ninth Cir. Dkt. # 63, 66.) The Ninth Circuit delayed ruling on the motions until several pending cases were resolved. (Ninth Cir. Dkt. # 76, 83.)

On May 16, 2014, the panel again withdrew its opinion and issued a superseding one. (App. A-1–A-76.) The panel majority did not change its analysis of

the judicial-bias claim.[3] (App. A-33–A-42.) However, it granted Hurles's motion to remand, for consideration under *Martinez*, a procedurally-defaulted claim that appellate counsel was ineffective for failing to challenge the trial court's denial of neurological testing under *Ake*. (App. A-18–A-21.) The panel applied the Ninth Circuit's decision in *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), which extended *Martinez* to permit post-conviction counsel's ineffectiveness to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim. (App. A-16.)

Again, Judge Ikuta dissented, adopting her prior analysis of the judicial-bias claim. (App. A-56—A-68.) She also reluctantly accepted *Nguyen* as the law of the circuit, but recognized that it improperly expanded *Martinez*. (App. A-68–A-70 & n.6.) She further observed that Hurles had failed to state a colorable claim of appellate counsel's ineffectiveness because counsel could reasonably have decided not to raise an *Ake* claim and that, even if counsel had raised such a claim, the *Ake* error would have been found harmless. (App. A-68–A-74.)

[3] In a separate order, the court denied Petitioner's motion for a ruling on his prior motion for rehearing. (Ninth Cir. Dkt. # 87.)

REASONS FOR GRANTING CERTIORARI

I

MARTINEZ DOES NOT APPLY TO EXCUSE THE PROCEDURAL DEFAULT OF HURLES'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

This Court held in *Coleman v. Thompson*, 501 U.S. 722, 752–53 (1991), that the ineffective assistance of post-conviction counsel does not establish cause to excuse the procedural default of a federal claim on habeas review. This remained the law for more than 20 years, until this Court's decision in *Martinez* established a narrow exception to *Coleman*'s rule. "*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel *at trial*." *Martinez*, 132 S. Ct. at 1319 (emphasis added).

Although *Martinez* was clear that the ineffective assistance of post-conviction counsel could excuse only the default of ineffective-assistance-of-trial-counsel claims, the Ninth Circuit held in *Nguyen* that *Martinez* applies to excuse the procedural default of claims that *appellate* counsel was ineffective. The panel below applied *Nguyen* here to excuse the default of Hurles's claim that his appellate counsel was ineffective in failing to raise a due process claim pursuant to *Ake*. (App. A-21.) Because every other

circuit to consider the issue has held that *Martinez* is inapplicable to excuse the default of an appellate ineffective-assistance claim, *Nguyen* created a split in the circuits. This Court should grant this petition to resolve the conflict between the circuits and to clarify that only a claim of ineffective assistance of *trial* counsel may be excused under the limited circumstances identified in *Martinez*.

A. The Ninth Circuit stands alone in holding that *Martinez* applies to excuse the default of appellate ineffectiveness claims.

Every other circuit court of appeals to consider this question has determined, consistent with this Court's express language, that *Martinez* does not apply to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim. The Tenth Circuit held that "*Martinez* was equally clear about what it did *not* hold" and found that "*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." *Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012) (quoting *Martinez*, 132 S. Ct. at 1315, 1320).

The Eighth Circuit agreed that "the narrow exception of *Martinez* is limited to claims of ineffective assistance of *trial* counsel and does not extend to alleged ineffectiveness of appellate counsel." *Dansby v. Norris*, 682 F.3d 711, 729 (8th Cir. 2012), *vacated on other grounds by Dansby v. Hobbs*, 133 S. Ct. 2767 (2013). The Sixth Circuit likewise held that "[u]nder

Martinez's unambiguous holding our previous understanding of *Coleman* in this regard is still the law—*ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel*." *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013) (emphasis added). The Fifth Circuit indicated its agreement, relying on this statement in refusing to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim under *Martinez*. *See Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014) (noting the circuit split on this issue).

Martinez is a narrow holding allowing the ineffective assistance of post-conviction counsel to supply, in some circumstances, cause to excuse the procedural default of an ineffective-assistance-of-trial-counsel claim. Four circuits uniformly glean this obvious intent from the plain language of *Martinez*. No other circuit agrees with the Ninth that *Martinez* applies to excuse the procedural default of a claim of ineffective assistance of appellate counsel. Guidance is needed from this Court to resolve this circuit split.

B. *Martinez* does not permit excusing the default of ineffective-assistance-of-appellate-counsel claims.

In holding that *Martinez* applies to excuse the default of ineffective-assistance-of-appellate-counsel claims, the *Nguyen* court reasoned that *Martinez* applies to excuse the default of all Sixth Amendment ineffective-assistance-of-counsel claims. *Nguyen*, 736 F.3d at 1296 ("The fundamental principle of *Martinez*

is that a criminal defendant deserves a chance to assert a Sixth Amendment claim of ineffective-assistance of counsel."). Wrongly concluding that the right to counsel on appeal is secured by the Sixth Amendment, the court reasoned that defaulted ineffective-assistance-of- appellate-counsel claims may also be excused under *Martinez*. *See id.* at 1293 ("The Sixth Amendment right to effective counsel applies equally to both trial and appellate counsel.") In fact, this Court has established that the right to counsel on appeal is secured not by the Sixth Amendment, but by the due process and equal protection clauses of the Fourteenth Amendment.

1. *The Sixth Amendment does not guarantee the right to counsel on appeal.*

At the time the Sixth Amendment was adopted, no federal right to appeal existed:

> Appeals as of right in federal courts were nonexistent for the first century of our Nation, and appellate review of any sort was rarely allowed. . . . *The Sixth Amendment does not include any right to appeal.* As we have recognized, the right of appeal, as we presently know it in criminal cases, is purely a creature of statute.

Martinez v. Court of Appeal of Cal., Fourth App. Dist., 528 U.S. 152, 159–60 (2000) (emphasis added; internal citations, alterations, and quotation marks omitted).

Accordingly, "the Sixth Amendment does not apply to appellate proceedings." *Id.* at 161. Instead, when appeals are permitted, the due process and equal protection clauses of the Fourteenth Amendment, and not the Sixth Amendment, guarantee a criminal defendant the right counsel on appeal. *Id.* at 155 (quoting *People v. Scott*, 75 Cal.Rptr.2d 315, 318 (1998)); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) ("A first appeal as of right . . . is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."); *Douglas v. California*, 372 U.S. 353, 357–58 (1963) ("There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of [counsel on appeal], while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.").[4]

The *Nguyen* court held that "[t]he *Martinez* rule is limited to an underlying *Sixth Amendment* ineffective-assistance claim, and to a procedural default by ineffective counsel in an initial-review collateral proceeding." 736 F.3d at 1296 (emphasis added). On its own, this statement is not particularly objectionable because effective appellate counsel is not guaranteed by the Sixth Amendment. The error in the *Nguyen* court's reasoning emerges when it holds that the right to counsel on appeal is promised by the Sixth

[4] The *Nguyen* court inexplicably cited *Evitts* and *Douglas* as establishing a Sixth Amendment right to counsel. 736 F.3d at 1293–94.

Amendment and that *Martinez* "extends to Sixth Amendment claims of appellate-counsel [ineffective assistance]." *Id.* Because the Sixth Amendment does not secure the right to counsel on appeal, there are no "Sixth Amendment claims of appellate-counsel [ineffective assistance]" to which *Martinez* can be extended. Thus, even under *Nguyen*'s reasoning, *Martinez* must be limited to excusing the default of ineffective-assistance-of-*trial*-counsel claims—the only ineffective assistance of counsel claims arising under the Sixth Amendment.

2. *This Court's limiting language in* Martinez *precludes its application to excuse the default of an appellate* ineffective-assistance-of-counsel *claim.*

Nevertheless, even if the right to counsel on appeal were rooted in the Sixth Amendment, the Ninth Circuit would not be justified in applying *Martinez* to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim because this Court expressly limited the application of *Martinez* to defaulted claims of ineffective assistance of *trial* counsel. In addition to the Court's "unusually explicit" statements regarding its narrow ruling in *Martinez*, its intent is obvious in its repeated (and almost exclusive) references to ineffective-assistance-of-*trial*-counsel claims. The Court explained that the reason for this narrow exception to *Coleman*'s rule was the importance of effective trial counsel to protect a defendant's rights:

> The right to the effective assistance of counsel *at trial* is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963). . . . *Effective trial counsel preserves claims to be considered on appeal*.

Martinez, 132 S. Ct. at 1317 (emphasis added). Thus, this Court emphasized the importance of effective trial counsel, never mentioning appellate counsel, and clearly limited *Martinez* to excuse only the default of ineffective-assistance-of-trial-counsel claims.

This Court reiterated *Martinez*'s limited applicability in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which expanded the number of States in which *Martinez* would apply, but left in place *Martinez*'s limitation that only the default of ineffective-assistance-of- trial-counsel claims could be excused by *Martinez*'s holding. *See id.* at 1921 ("The right involved—adequate assistance of counsel at trial—is similarly and critically important."). There can be no mistaking that the Court intended exactly what it said in *Martinez*: the ineffective assistance of PCR counsel may be grounds to excuse *only* the procedural default of a claim of ineffective assistance of *trial* counsel. Thus, the panel below improperly applied *Martinez* to excuse the default of Hurles's ineffective-assistance-of-appellate-counsel claim.

C. Application of *Nguyen* to excuse the procedural default of appellate ineffective-assistance claims violates AEDPA's exhaustion requirement.

AEDPA requires that a petitioner fully exhaust a claim in the state courts before presenting it in the federal courts for habeas review. 28 U.S.C. § 2254(b)(1)(A). *Coleman* precludes the ineffectiveness of PCR counsel from being used to excuse the default of any claims. *See* 501 U.S. at 752 ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." (internal citations omitted)). *Martinez* establishes a narrow exception to *Coleman*'s rule, allowing the ineffective assistance of PCR counsel to excuse the default of ineffective-assistance-of-trial-counsel claims. *See* 132 S. Ct. at 1320 ("The rule of *Coleman* governs in all but the limited circumstances recognized here.").

Nevertheless, courts in the Ninth Circuit must now ignore AEDPA's exhaustion requirement and this Court's established law and, as happened here, improperly excuse the procedural default of ineffective-assistance-of-appellate-counsel claims. At least one district court has reluctantly applied *Nguyen* and *Hurles* to consider whether the default of ineffective-assistance-of-appellate-counsel claims may be excused. Although the court did not find the claims of ineffective assistance of appellate counsel to be substantial, it noted that the wide-reaching practical effect of *Nguyen*

is the end of AEDPA's exhaustion requirement. *Saenz v. Van Winkle*, No. CV 13-77-PHX-JAT, 2014 WL 2986690, at*3 (D. Ariz. July 2, 2014) (mem.). The Ninth Circuit's extension of *Martinez* contravenes AEDPA's requirement that petitioners exhaust their claims as a necessary requirement to obtain habeas relief.

II

THE PANEL MAJORITY CONTRAVENED AEDPA BY CASTING ASIDE THE STATE COURT'S REASONABLE REJECTION OF HURLES'S JUDICIAL-BIAS CLAIM BASED EXCLUSIVELY ON A NON-EXISTENT PROCEDURAL ERROR.

This Court has repeatedly condemned the Ninth Circuit's misapplication—or nonapplication—of AEDPA deference.[5] Once again, in this case, the panel majority refused to defer to a reasonable state-court merits

[5] *See Cash v. Maxwell*, 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."); *see also* App. A-74 & n.8 (collecting cases and stating, "The Supreme Court has harshly criticized our noncompliance with AEDPA deference.").

adjudication, this time misapplying 28 U.S.C. § 2254(d)(2) to find—without considering the totality of evidence in the state-court record—that the state court unreasonably determined the facts on Hurles's judicial-bias claim merely because the same judge accused of bias ruled on the claim without first conducting an evidentiary hearing. In addition to contravening AEDPA, the majority's decision casts doubt on the manner in which judges nationwide rule on recusal motions and other challenges to their impartiality, and lays the groundwork for habeas petitioners to circumvent AEDPA and obtain federal evidentiary hearings on judicial-bias claims. This Court should grant certiorari to address the issues of nationwide importance this case presents. *See* SUP. CT. R. 10.

A. Evidence in the state-court record supported that court's merits adjudication and precluded a finding that Hurles had satisfied 28 U.S.C. § 2254(d)(2).

"Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). Habeas relief is appropriate *only* if the error was so well-understood as to be "beyond any possibility for fairminded disagreement." *Id.* at 786–87. 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." *Id.* at 786; *see also White v. Woodall*, 134 S. Ct. 1697, 1707 (2014) (noting, in reversing the Sixth Circuit's grant of habeas relief, that there were "reasonable arguments on both sides [of the issue]—which is all [the State] needs to prevail in [an] AEDPA case"); *Rice v. Collins*, 546 U.S. 333, 337–38, 342 (2006) (Ninth Circuit erred by "substitut[ing] its evaluation of the record for that of the state trial court," and us[ing] a set of debatable inferences to set aside the conclusion reached by the state court.").

Here, as in *Richter*, the panel majority disregarded evidence supporting the state court's rejection of Hurles's judicial-bias claim and found 28 U.S.C. § 2254(d)(2) satisfied not "in light of the evidence presented in the State court proceeding," as the statute directs, but for purely procedural reasons. The majority faulted Judge Hilliard's reliance on facts within her "untested" knowledge, but failed to acknowledge that the record corroborated her recollection. (App. A-37–A-39.) Specifically, years before Hurles's raised his judicial-bias claim, AAG French informed the Arizona Court of Appeals that Judge Hilliard *did not participate* in drafting the special-action response.[6] (App. B-2 n.2, B-8.)

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[6] The panel majority believes that French made a contradictory statement in a district-court pleading. (App. A-5.) 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. I-29–I-30.)

Even more significant, before Judge Hilliard ruled on Hurles's judicial-bias claim, Judge Ballinger reviewed Hurles's motion to recuse her and found *no objective basis to question her impartiality*. (App. J-1–J-2.) Judge Ballinger's determinations—which the panel majority did not discuss, let alone find unreasonable—are also entitled to AEDPA deference and are sufficient to defeat Hurles's claim. *See Buntion v. Quarterman*, 524 F.3d 664, 669 n.1 (5th Cir. 2008) ("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.").[7] And "[i]n 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," as *Richter* requires, "that *all* jurists would agree that the state court made an unreasonable determination of the facts." (App. A-65–A-66.)

Given the above evidence supporting the state court's adjudication, the majority erred by finding an unreasonable factual determination. *See, e.g., Richter*, 131 S. Ct. at 786–87. By casting aside AEDPA deference so capriciously, the majority opinion contravenes this Court's AEDPA jurisprudence, much of it generated by the Ninth Circuit's habitual defiance

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[7] 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. (App. K-1.)

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

B. A state-court evidentiary hearing is not a prerequisite to AEDPA deference.

This Court has never required, as a prerequisite to its decision receiving AEDPA deference, that a state court conduct an evidentiary hearing on a petitioner's claim. In fact, numerous federal circuits (including the Ninth Circuit) have recognized, in general, that a state-court evidentiary hearing *is not a mandatory prerequisite to AEDPA deference*. *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, 951–52 (5th Cir. 2001); *Mendiola v. Schomig*, 224 F.3d 589, 592–93 (7th Cir. 2000). Nonetheless, the panel majority here effectively conditioned AEDPA deference, at least for judicial-bias claims, on the petitioner receiving an evidentiary hearing in state court.

But other federal circuits have reviewed judicial-bias claims deferentially under AEDPA, regardless whether the state court conducted an evidentiary 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). And at least one circuit has deferred to a state court's resolution of a judicial-bias claim where, as here, the *same judge* accused of bias rejected the claim on state collateral review and did so without first conducting an evidentiary hearing. *See Buntion*, 524 F.3d at 669 n.1 ("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 authority outlined above is consistent with this Court's recent habeas jurisprudence, which establishes beyond question that AEDPA deference does not depend on an evidentiary hearing in state court. *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). In fact, even a state court's *summary dismissal* of a claim is entitled to deference. *Richter*, 131 S. Ct. at 783–85. Paradoxically, under *Richter*, if Judge Hilliard had simply denied Hurles's claim, without finding any facts or interpreting any law, the Ninth Circuit could not have reached the decision it reached here.

The panel majority's finding that the state court's decision was per se unreasonable because of its failure to conduct an evidentiary hearing is plainly

inconsistent with the authority set forth above.[8] Moreover, by dictating how state courts resolve claims brought before them, the panel majority also frustrates AEDPA's "goals of promoting comity, finality, and federalism." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) (quotations omitted). This Court should grant certiorari and reverse the Ninth Circuit's decision.

C. The panel majority decision casts doubt on the manner in which judges nationwide resolve challenges to their impartiality and lays the foundation for frivolous habeas claims.

By suggesting that a judge must subject her memory to adversarial "testing" by an aggrieved party, the majority calls into question the routine practice among judges of resolving recusal requests based on matters within their own knowledge, without conducting evidentiary hearings. (*See* App. A-64–A-66.) *See, e.g., 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,

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[8] Further, the state court's failure to hold an evidentiary hearing was reasonable because, for the reasons discussed in Argument II(D), below, Hurles's claim fails on the merits, even assuming the truth of his factual allegations. *See Hibbler*, 693 F.3d at 1149 (state court could have "reasonably determined that an evidentiary hearing would have been fruitless").

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).

Contrary to the panel's implication, it make sense for a judge to personally rule on a recusal motion because the facts material to resolving such a motion are uniquely within the judge's personal knowledge. *See United States v. Ciavarella*, 716 F.3d 705, 720 (3rd Cir. 2013) (28 U.S.C. § 455, which governs disqualification of district judges, entrusts judge with discretion "in the first instance to determine whether to disqualify himself because the judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion") (quotations omitted). And in testimony to the

regularity of the procedure Judge Hilliard followed, the panel majority here cited no authority for the proposition that an evidentiary hearing is *required* to resolve a judicial-bias claim, or that a party must be permitted to "test" a judge's memory of events. The panel majority's imposition of such a requirement in this case thus calls into question a practice exercised routinely by judges in this country.

Further, as Judge Ikuta observed, the panel majority opinion "lays the groundwork for other frivolous challenges to trial judges' impartiality." (App. A-76.) Habeas petitioners may now, citing *Hurles V*, obtain *de novo* habeas review of their judicial-bias claims merely by showing that the state judge being accused of bias ruled on the claim, without first conducting an evidentiary hearing. Worse still, petitioners may obtain *de novo* review regardless whether the judge's resolution of the claim is reasonable in light of the totality of evidence before her, as the majority in *Hurles V* sidestepped that question entirely. *See* 28 U.S.C. § 2254(d)(2).

Indicative of the majority opinion's potential reach, at least one habeas petitioner has cited *Hurles III* outside the context of a judicial-bias claim to argue against applying AEDPA deference simply because the state court did not conduct an evidentiary hearing. *Carranza v. Long*, No. CV 13–1555–R(JPR), 2104 WL 580240, * 1 (C.D. Ca. Feb. 12, 2014). Similarly, a federal district court has interpreted *Hurles IV* (which does not differ from *Hurles V* on the judicial-bias issue) to require a state-court evidentiary hearing as a prerequisite to AEDPA deference, even outside the

context of judicial-bias claims. *See, e.g., Dunn v. Swarthout*, No. 2:11–CV–2731 JAM GGH P, 2013 WL 4654550, * 8 (E.D. Ca. Aug. 29. 2013). And at least one *state-court* defendant has cited *Hurles IV* in support of his request for an evidentiary hearing, suggesting that he will ultimately receive one in federal court. *Packer v. Superior Court*, 161 Cal. Rptr. 3d. 595, 605 (Cal. Ct. App. 2013), *review granted and opinion superseded*, 314 P.3d 487 (Cal. 2013).

The expansion of habeas law *Hurles V* threatens to create will dilute 28 U.S.C. § 2254(d)'s force, frustrate the interests AEDPA is designed to protect, and undermine this Court's recent decision in *Pinholster*. This Court should grant certiorari to forestall the *Hurles* opinion's unavoidable adverse impact on federal habeas jurisprudence.

D. Hurles claim fails on the merits even assuming the truth of his factual allegations, and a federal court evidentiary hearing serves no purpose.

Finally, even if Judge Hilliard had *personally authored* the special-action response, Hurles's could not state a colorable judicial-bias claim.[9] The panel majority, however, nonetheless remanded this case for

[9] As Judge Ikuta observed in her dissent, Hurles's claim would have been more appropriately analyzed under 28 U.S.C. § 2254(d)(1). (App. A-56–A-63.) For the reasons set forth above, it would not only fail under that standard, but would also fail on *de novo* review.

a needless evidentiary hearing that "is erroneous and a waste of judicial resources." (App. A-68.)

Hurles alleges that recusal was required because Judge Hilliard was enmeshed in a personal controversy with him. (App. I-24–I-25.) *See* App. A-57–A-60 (enumerating situations under which Supreme Court precedent requires recusal). But this Court's precedent requiring recusal based on a personal controversy arises in the context of criminal 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. 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, 133–39 (1955) (violation of due process where judged charged defendants with contempt and subsequently presided over their contempt hearings). These cases illustrate that "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." (App. A-60.)

Judge Hilliard did not accuse Hurles of wrongdoing and then sit in judgment of him, or otherwise become entangled in a personal controversy with him. At most, the comments in the special action response defend Judge Hilliard's ruling and are no

different than those a judge might make on the record when denying a motion. *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, or of prior 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."). Likewise, the response's statements about Hurles's counsel were, at most, mildly disparaging and, because they did not derive from an extrajudicial source and do not reveal a high level of antagonism, they do not support a judicial-bias claim. *See id.* ("[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 of Hurles's due-process claim, and the Ninth Circuit erred by remanding for what promises to be a time-consuming evidentiary hearing. *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."). This Court should grant certiorari and reverse its decision.

CONCLUSION

The panel majority applied *Martinez* far beyond its intended reach—to excuse the procedural default of an ineffective-assistance-of-appellate-counsel claim. In so construing *Martinez*, the Ninth Circuit stands alone among the federal circuits which, when given occasion to consider the question, have universally limited that decision to claims of trial counsel's ineffectiveness.

The panel majority's resolution of Hurles's judicial-bias claim constitutes 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*, 132 S. Ct. 2138, 2149 (2012) (per curiam) (quoting *Renico v. Lett*, 559 U.S. 766, 779 (2010)). Without considering evidence in the record supporting the judge's ruling, the majority created a per se rule that a state judge's factfinding on a judicial-bias claim is unreasonable if made without the benefit of an evidentiary hearing. This reasoning contravenes AEDPA and threatens to adversely affect the justice system. This Court should grant certiorari on both issues stated above, and reverse the Ninth Circuit's opinion.

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