No. 14-191

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN,

Petitioner,

vs.

RICHARD D. HURLES,

Respondent.

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

HURLES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Hurles objects to Petitioner's second question presented, as it misrepresents the holding of the Ninth Circuit. Mr. Hurles' re-phrased questions presented are below.

1. Whether the ineffective assistance of post-conviction counsel can provide cause to excuse the default of a claim of ineffective assistance of appellate counsel, where a defendant is prohibited from raising his claim of ineffective assistance appellate counsel until post-conviction proceedings.

2. Whether the state court fact-finding was objectively unreasonable under 28 U.S.C.A. §2254(e) where, under the highly unusual facts of this case, the trial judge acted as an adversary in capital case, was represented in her interests by the Attorney General's office, offered evidence into the record based on her untested version of events, and denied Mr. Hurles any opportunity to offer his own evidence.

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INTRODUCTION

The petition for writ of certiorari should be denied for several reasons, but particularly because the case presents a bad vehicle for certiorari. The Ninth Circuit panel has issued three opinions in Mr. Hurles' case. Appx. A, D, F. No judge has ever voted for panel rehearing or rehearing en banc.[1]

Although Petitioner has portrayed the Ninth Circuit's opinion as a complete abandonment of AEDPA and this Court's jurisprudence, that portrayal is drastically exaggerated. The Ninth Circuit did not render the opinion Petitioner attacks in Question 2. Rather, the Circuit applied the limitations of 28 U.S.C.§2254 to the unique facts of this case and found the state post-conviction court decision was based on an unreasonable determination of the facts. The court did not create a *per se* rule that post-conviction petitioners are always entitled to an evidentiary hearing.

In light of this Court's decision in *Martinez*, the Ninth Circuit further remanded a single claim of ineffective assistance of counsel "for consideration by the district court in the first instance" and an evidentiary hearing only "if one is warranted." Appx. A.

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[1] Petitioner Charles Ryan did not request rehearing after the third opinion.

STATEMENT OF THE CASE

Mr. Hurles presents the following statement of the case, which provides this Court with facts relevant to the case which were not included in the Petition.

Richard Hurles was the eighth of nine children born to migrant farm workers. ER 233. The family frequently lived in labor camps and traveled from Arizona to Oregon, Ohio, and West Virginia. *Id.* Mr. Hurles was born with a defective heart, which went untreated because his father "didn't want the doctors experimenting on his son." ER 236. Mr. Hurles fainted often as a toddler and was unconscious for long periods of time. ER 236, 245. He was often paralyzed and unable to speak. *Id.*

Mr. Hurles' childhood home was violent and unsafe. When Mr. Hurles was two years old, boiling water was accidentally spilled over Mr. Hurles' head, chest, and arms. ER 237, ER 262. He was hospitalized for about a month and he still bears scars from the incidents. *Id.* Mr. Hurles' alcoholic father, John Hurles, terrorized the family, beating Mr. Hurles with belts and other objects. ER 234, 242. John also inflicted sexual terror against his children – raping his own daughter routinely from age 10 until age 16, when she was removed from the home and placed in foster care. ER 271. John raped Mr. Hurles' first girlfriend and engaged in sexual relationships with his sons' wives and girlfriends. ER 243-44, 234.

At the age of nine, Mr. Hurles went to work in the fields with his parents and brothers. ER 233. When he was in school, Mr. Hurles was placed in special

education classes. ER 234. At age 14 and still in seventh grade, Mr. Hurles dropped out to work full-time as a migrant farm laborer. ER 234, 236.

At age 11, Mr. Hurles began to run away from home. ER 234. At age 12, he was picked up and sexually assaulted by an adult male. *Id.*

John fed alcohol to Mr. Hurles and his siblings when they were toddlers. ER 242. Mr. Hurles began sniffing paint, glue, and gasoline at age 9. ER 234. By age 13, he was using these substances on a daily basis. ER 353-54, 239. At age 15, Mr. Hurles was also smoking marijuana and injecting cocaine. ER 239. He began hearing voices. ER 275, ER 237.

In 1978, Mr. Hurles was arrested for a sex crime and was assessed by mental health experts Drs. Bendheim and Tuchler. He reported that he was depressed and had been hearing voices talking to him for several months. ER 276. The experts found that Mr. Hurles had low intelligence and was illiterate. ER 278, 280. Dr. Tuchler found Mr. Hurles' mental and emotional state "markedly deprived…in both social and cultural deprivation and…mentally retarded at the borderline level." ER 285.

Mr. Hurles was convicted of the sex crime and served 13 years in prison. More than half of that time, he resided in the "Special Programs Unit for the mentally retarded and mentally ill…" ER 406. After his release from prison, Mr. Hurles moved in with his brother in Buckeye, Arizona.

On November 12, 1992, Mr. Hurles consumed large quantities of alcohol. ER 297. He walked to the public library alone to return the children's dinosaur books

he had checked out. ER 374. Witnesses testified they observed Mr. Hurles reading books in the children's section. ER 365. Tragically, Mr. Hurles stabbed the librarian with a small paring knife kept in the library to remove labels from books. RT 4/4/94 at 62; RT 4/11/94 at 3-4. The victim died as a result of those injuries. RT 4/6/94 at 7.

Mr. Hurles was arrested the following day and, shortly thereafter, was treated with Mellaril, "a major tranquilizer" used to "treat schizophrenia" and other "psychotic illnesses." RT 11/19/93 at 36; RT 11/23/93 at 10. Mr. Hurles had requested the medication because he was hallucinating. RT 11/19/93 at 36. Neuropsychological testing later showed Mr. Hurles' frontal lobe, the area of the brain responsible for executive functioning, is impaired. ER 390; RT 11/19/93 at 23. The medication the jail psychiatrists prescribed "blocked" many of the symptoms of Mr. Hurles' brain damage.

Based on Mr. Hurles' mental defects and history of hallucinations, trial counsel undertook an investigation to determine whether Mr. Hurles was sane at the time of the crime. Dr. Marc Walters was appointed to conduct an assessment. He recommended a "CTM" or "electrophysiological" test to confirm corroborate the finding of brain damage. RT 11/23/93 at 14-15. The State's expert, Dr. Alexander Don, agreed such testing was necessary to corroborate Mr. Hurles' brain impairments. *Id.* Nevertheless, the trial court refused funding for the testing until *after* Mr. Hurles was convicted of first degree murder. The testing revealed Mr. Hurles' brain contains "an abnormality in the left frontal region." *Id.*

Consistent with her refusal to adequately fund this capital case, the trial court refused the appointment of a second lawyer for Mr. Hurles' trial. Initially, the Maricopa County Public Defender represented Mr. Hurles and assigned two counsel as a matter of policy in a capital case. ER 411-15. That office withdrew due to a conflict of interest. *Id.* The court appointed Michelle Hamilton to replace the public defender. ER 422-430. Hamilton moved for the appointment of co-counsel, which Judge Hilliard, the trial judge, denied. ER 422-430. Hamilton filed an interlocutory appeal, known as a special action, requesting the appellate court reverse the trial court's decision. ER 422-430. The Maricopa County Attorney's Office, recognizing it lacked standing to contest matters of defense representation, declined to appear in the special action. *Hurles v. Superior Court*, 174 Ariz. 331, 332, 849 P.2d 1, 2 (Ariz. App. 1993).

Pursuant to Arizona law, the trial judge is named as a defendant and *nominal* party to a special action, in addition to the real parties in interest. 17B. Ariz.Rev.Stat., Rules of Procedure for Special Action 2(a)(1). Assistant Attorney General Colleen French nevertheless responded on the trial judge's "behalf defending her ruling." *Id.* Appx H. Judge Hilliard received copies of French's pleadings. Appx. H-18. In Judge Hilliard's response to the special action petition, French included a "Statement of the Facts," which detailed the state's theory of the case, including, *inter alia,* Hurles has been charged "with the brutal murder of a librarian," and other crimes; "filed an ex-parte motion requesting that *Respondent*

appoint co-counsel to assist her;" and "*Respondent* denied this motion by minute entry order…." *Id.*, at H-3-H-4.

Judge Hilliard's response did not stop there. French also argued that "Appointed Counsel has not, as of this date "noticed any defenses in the matter, nor has she disclosed the names of any witnesses she intends to call at trial," *id.*, at H-4, "and it is unknown whether Petitioner will present expert testimony regarding Petitioner's mental state at trial." *Id.* French noted as well that the "Real Party in Interest has listed a total of 22 witnesses to be called at trial," ten of whom "are law enforcement representatives, 1 is a medical examiner, and the remaining 10 are civilians." *Id.*,H-5. French announced, too, that "examination of the State's evidence illustrates that its case against Petitioner is very simple and straightforward, compared to other capital cases, contrary to Petitioner's assertions." *Id.*, H-5. And Attorney General French noted:

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

Id.

Despite this (and more) evidence collected and identified, French continued to argue: "The State's case against Petitioner is relatively simple, and will not involve an inordinate amount of witness testimony," and as a result, second counsel was

unnecessary. *Id.* at H-13. Equally troubling, in French's pleadings, filed on Judge Hilliard's behalf, she announced:

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

Id., at G-16. Now appointed counsel's very livelihood was at stake.

The Arizona Court of Appeals issued an opinion admonishing Judge Hilliard for opposing Mr. Hurles' special action. *Hurles v. Superior Court*, 849 P.2d 1, 2 (Ariz. App. 1993). The court also dismissed the special action as unripe. *Id.* at 3.

At trial, Mr. Hurles presented an insanity defense without the benefit of the testing requested by defense counsel. The jury convicted him of first degree murder. At the capital sentencing hearing before Judge Hilliard[2], Mr. Hurles offered evidence of his terrifying childhood, low intelligence, history of substance abuse, and his severe brain damage and mental impairments. Dr. Stonefeld, a psychiatrist, testified to the significance of the fainting spells Mr. Hurles suffered as a toddler, as well as effects of chronic use of alcohol and toxic vapors to his brain. RT 9/30/94 at 77-79. Judge Hilliard found one aggravator, Ariz.Rev.Stat. §13-703(F)(6), but concluded that Mr. Hurles failed to demonstrate the mitigation was

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[2] Mr. Hurles was sentenced prior to this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) and, thus, he did not receive the benefit of his Sixth Amendment right to a jury sentencing.

sufficiently substantial to call for leniency. Special Verdict, 10/13/94. She sentenced Mr. Hurles to death. *Id.*

Colleen French represented the State during Mr. Hurles' post-conviction proceedings. In the district court, French responded to Mr. Hurles' motion to disqualify the Arizona Attorney General's Office conceding, for the first time, she did communicate with Judge Hilliard regarding the special action, but such communications "cannot be construed to have been ex parte because [she] represented the Trial Judge at the time they occurred." ER 187.

REASONS TO DENY THE PETITION

I. The Ninth Circuit Properly Applied *Martinez* to Excuse the Procedural Default of Mr. Hurles' Claim of Ineffective Assistance of Appellate Counsel, Where Post-Conviction was the First Opportunity to Litigate Such a Claim

A. The Ninth Circuit's Holding is Consistent with *Martinez* and is Not a Basis for this Court's Review

Petitioner asserts this Court should grant review because "*Martinez* does not permit excusing the default of ineffective-assistance-of-appellate-counsel claims." Pet. At 17. Petitioner claims that *Martinez* was very narrowly written to apply *solely* to defaulted IAC of trial counsel claims. *Id.* at 20-21. This is not a fair reading of *Martinez*.

First, ineffective assistance of appellate counsel, like ineffective assistance of trial counsel, cannot be raised in Arizona until state post-conviction proceedings. In *Martinez*, this Court recognized the importance of having competent post-conviction counsel to raise an IAC claim:

> Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.
>
> The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

132 S.Ct. at 1317 (citations omitted). This rationale applies with equal force to claims of IAC of appellate counsel. Without competent post-conviction counsel, Mr. Hurles had no opportunity to investigate appellate counsel's ineffectiveness and introduce extra-record evidence in support of that claim. Further, appellate counsel clearly cannot litigate her own ineffectiveness. Ariz.Sup.Ct. Rules, Rule 42, Ethical Rule 1.7(a). As Justice Scalia noted in his dissent from the majority opinion in *Martinez*, there is no difference "between cases in which the State *says* that certain claims can only be brought on collateral review and cases in which those claims *by their nature* can only be brought on collateral review, since they do not manifest themselves until the appellate process is complete," such as claims of ineffective assistance of appellate counsel. *Id.* at 1321 & n.1 (emphasis in original) (Scalia, J., dissenting).

Petitioner also relies on the fact that the right to effective assistance of appellate counsel is rooted in the Fourteenth Amendment, as opposed to the Sixth

Amendment right to effective trial counsel. Pet. at 20. It is not clear why this is relevant to the application of *Martinez* to defaulted IAC of appellate counsel claims or why a capital defendant's Due Process rights are less critical than his right to effective assistance of counsel. In *Evitts v. Lucey*, 469 U.S. 387, 399-400, 105 S.Ct. 830, 838 (1985), this Court reasoned that "[a] system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellate – the effective assistance of counsel – has been violated." *Compare with Martinez*, 132 S.Ct. at 1317 ("The right to effective assistance of counsel at trial is a bedrock principle in our justice system."). This Court further explained in *Evitts*,

> "[t]o prosecute the appeal, a criminal appellant must face an adversary proceeding that – like a trial - is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellate – like an unrepresented defendant at trial – is unable to protect the *vital interests at stake*."

469 U.S. at 396. *Compare with Martinez*, 132 S.Ct. at 1317 ("Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged.")(internal citation omitted). As the Ninth Circuited noted in *Nguyen v. Curry*, 736 F.3d 1287, 1294 (9th Cir. 2013):

> There is nothing in our jurisprudence to suggest that the Sixth Amendment right to effective counsel is weaker or less important for appellate counsel than for trial counsel. The Court in *Coleman* made clear that the dividing line between cases in which the state-court

> procedural default should, or should not, be forgiven was the line between constitutionally ineffective and merely negligent counsel: Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails.

Relying on *Martinez*, *supra*, *Nguyen* recognized a "substantial" claim of ineffective counsel "deserves one chance to be heard on initial review in a state post conviction proceeding." That is because, as we now know all too well, "[w]hen an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim"….[unless cause can be established to excuse the procedural default in federal habeas proceedings]. *Id.*

Furthermore, this Court has held that a defendant does not have a constitutional right to represent himself on direct appeal. *Martinez v. Court of Appeal of California*, 528 U.S. 152, 120 S.Ct. 684 (2000). This leaves an indigent defendant at the mercy of his appointed counsel. Where a defendant, such as Mr. Hurles, has the misfortune of being assigned incompetent appellate and post-conviction counsel, he loses any opportunity to challenge whether he has been "validly convicted." *Evitts*, 469 U.S. at 399.

The Ninth Circuit's ruling was consistent with *Martinez* and this Court should deny certiorari.

B. It is Premature for this Court to Grant Review of this Issue in Light of a) the Very Few Circuit Court Opinions on the Application of *Martinez* to Defaulted Ineffective Assistance of Appellate Counsel Claim and b) Petitioner's Overstatement of the Circuit Split

Petitioner urges the Court to grant the petition due to an alleged circuit split. Pet. At 16-17. However, most of the cases cited by Petitioner were decided prior to *Trevino v. Thaler*, 133 S.Ct. 1911 (2013) or address the application of *Martinez* to IAC of appellate counsel claims only in dicta.

In *Banks v. Workman*, 692 F.3d 1133, 1147 (10th Cir. 2012), the Tenth circuit stated, "*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." quoting *Martinez*, 132 S.Ct. at 1315) (emphasis in *Banks*). However, the court went on, "[n]one of this applies here, because Oklahoma law permitted Mr. Banks to assert his claim of ineffective assistance of trial counsel on direct appeal." (citation omitted). The *Banks* case was not decided on the basis that *Martinez* does not apply to defaulted ineffective assistance of appellate counsel claims and does not contribute to any alleged circuit split. Likewise, the Fifth Circuit case cited by Petitioner, *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir. 2014) was also not decided on the basis that *Martinez* does not provide cause to overcome procedural default of an ineffective assistance of appellate counsel claim. Rather, the habeas petitioner in *Reed* did "not appear to challenge the district court's procedural ruling other than through his assertion of actual innocence under *Schlup*…" *Id.* at 778. The court noted, in dicta, "to the extent Reed suggests that his ineffective-

assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so." *Id.* at 778 n.16 (citations omitted).

The Eighth Circuit case Petitioner relies upon in support of the circuit split was decided prior to this Court's decision in *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), in which the Court overturned an improperly narrow application of its *Martinez* rule. *Dansby v. Norris*, 682 F.3d 711, 729 (8th Cir. 2012). In fact, this Court vacated the judgment in *Dansby* and remanded for reconsideration in light of *Trevino*. *Dansby v. Hobbs*, 133 S.Ct. 2767 (2013)(mem.). Since the *Trevino* opinion, the application of *Martinez* to defaulted IAC of appellate counsel claims has not had sufficient time to work through the federal circuit courts.

In general, the circuit courts of appeal have applied *Martinez* and *Trevino* in a uniform manner. The courts, including the Ninth Circuit, have not opened the floodgates and expanded *Martinez* beyond what this Court intended it would cover. *See Hunton v. Sinclair*, 732 F.3d 1124 (9th Cir. 2013) (*Martinez* does not apply to defaulted *Brady* claims); *McKinney v. Ryan*, 370 F.3d 903 (9th Cir. 2013) (*Martinez* does not apply to "dual jury" claims). Indeed, the Ninth Circuit rejected most of Mr. Hurles' *Martinez* allegations. Appx. A-23-A-33.

This Court should not grant certiorari on this issue and should instead allow the circuit courts to address the application of *Martinez*. *See U.S. v. O'Malley*, 383 U.S. 627, 630, 86 S. Ct. 1123, 1125 (1966) (granting certiorari to resolve "conflicting decisions" among appellate courts). "We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse

opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23, n. 1, 115 S. Ct. 1185, 1198 (1995) (Ginsberg, J., dissenting) (citing *McCray v. New York,*461 U.S. 961, 961, 963, 103 S. Ct. 2438, 2439 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) ("…[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.")

C. Application of *Martinez* to this Case Does Not Eliminate AEDPA's Exhaustion Requirement

Once again, Petitioner overstates the breadth of the *Hurles* opinion and its application of AEDPA. Citing a single memorandum district court case,[3] Petitioner complains that *Nguyen* demands courts in the Ninth Circuit "ignore AEDPA's exhaustion requirement" and "this Court's established law," and "improperly excuse the procedural default of ineffective-assistance-of-appellate-counsel claims." *Id.*, at p. 22. It does nothing of the kind. As explained above, the *Hurles* opinion does not eliminate the requirement that a habeas petitioner exhaust his claims in state court. Rather, *Hurles* applies *Nguyen* and *Martinez* in holding *one* of Mr. Hurles' defaulted IAC claims is excused from procedural default due to post-conviction counsel's ineffectiveness. The *Nguyen* case simply recognized a "substantial" claim of ineffective counsel "deserves one chance to be heard on initial review in a state post conviction proceeding." That is because, this Court knows all too well, "[w]hen

[3] *Saenz v. Van Winkle*, No. CV 13-77-PHX-JAT, 2014 WL 2986690 at *3 (D. Ariz. July 2, 3014)(mem.).

an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim." *Nguyen v. Curry*, 736 F.3d 1287, 1294, (9th Cir. 2013). It is the grievous risk of a habeas petitioner, particularly a capital petitioner, not being able to present his claims for relief that led to the *Martinez* decision.

There can be, and is, no excuse for counsel's failure to assert a substantial claim of appellate counsel's ineffectiveness. Mr. Hurles' appeal was his first opportunity to present his appellate counsel's ineffectiveness, and as a result, it was vital that he present a substantial, supportable and strong claim demonstrating that but for appellate counsel's ineffectiveness, Mr. Hurles "would have prevailed" on appeal.

There also was no barrier erected for appellate counsel to overcome in asserting counsel's ineffectiveness on appeal. *Nguyen* explains:

> The question asserted in *Martinez*: whether a federal habeas court may excuse a procedural default of an ineffective assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding," "was not limited to a claim of ineffective assistance by trial counsel. It encompassed, without qualification, 'an ineffective assistance claim." We therefore conclude that the *Martinez* standard for 'cause' applies to all Sixth Amendment ineffective-assistance-claims, both trial and appellate, that have been procedurally defaulted by ineffective counsel in the initial-review state-court collateral proceeding.

Nguyen, *supra*, at 1295 (emphasis added).

Here, Mr. Hurles' available ineffective appellate counsel claims were, as noted above, both substantial and compelling. Appellate counsel knew, or should have known had she only looked at the plain trial court record, that the trial judge erred in denying Mr. Hurles' request for funding to conduct neurological testing central to Mr. Hurles' defense against a first degree murder conviction. Testing Judge Hilliard finally approved, and conducted by Dr. Drake Duane, before Mr.

Hurles' sentencing proceedings, and reviewed by Judge Hilliard, revealed an "abnormality in the left front region" of the brain and "associated with 'processing difficulties.'" Appx. A-19.

AEDPA's exhaustion requirement remains intact after *Nguyen* and *Hurles*. Nevertheless, this Court's *Martinez* opinion allows a habeas petitioner to overcome procedural default under very limited circumstances, including those presented in this case.

II. The Ninth Circuit Held that *in Mr. Hurles' Case*, the State Court Decision was Based on an Unreasonable Determination of the Facts

A. This Case Presents a Bad Vehicle for this Court to Consider Whether a State Court Decision is Unreasonable under 28 U.S.C. §2254(d)(2)

Petitioner urges this Court to grant certiorari because of what Petitioner perceives to be the Ninth Circuit's "nonapplication…of AEDPA deference." As addressed below, Petitioner is incorrect and the Ninth Circuit did defer to the state court's decision. Furthermore, Mr. Hurles' case is a bad vehicle for this Court to consider the application of 28 U.S.C. §2254(d)(2) where there are facts in dispute and the state court fails to allow factual development. First, a remand to the district court for a hearing where the state court decision was unreasonable under §2254(d)(2) is *exceedingly* rare. Since the passage of AEDPA, the Ninth Circuit has twice remanded a capital case[4] under such circumstances, including Mr. Hurles' case. In the second case, *Earp v. Ornoski*, 431 F.3d 1158, 1169 (9th Cir. 2005), *cert. denied Ornoski v. Earp*, 547 U.S. 1159 (2006), the Ninth Circuit remanded to the

[4] In addition, the Ninth Circuit has remanded one non-capital case under such circumstances. *Davis v. Grigas*, 443 F.3d 1155 (9th Cir. 2006).

district court, finding the habeas petitioner "has never received an opportunity to develop his claim of prosecutorial misconduct." These rare remands for evidentiary development present a far different picture than that claimed by Petitioner in its urging this Court to "condemn[ ]" the Ninth Circuit.

Moreover, the facts underlying Mr. Hurles' judicial bias claim are so absurd they are unlikely to be repeated. Arizona's special action rules, which specify that a trial judge is a *nominal* party and not an actual party with an interest in the case, are well established. Ariz. R. P. Special Actions 2(a); *State ex rel. Dean v. City*, 598 P.2d 1008, 1000-11 (Ariz.App. 1979). Further, since this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), Arizona now requires jury sentencing and, therefore, a biased judge has no authority to impose death. Given the unlikelihood of these facts ever being repeated, it would be a waste of this Court's limited judicial resources to take up the matter.

Importantly, the Ninth Circuit has not found that Mr. Hurles is entitled to a new trial or sentencing hearing on the basis of judicial bias. The court merely found the state court findings of fact were objectively unreasonable and Mr. Hurles was entitled to an evidentiary hearing in federal court under 28 U.S.C. §2254(e)(2) and *Townsend v. Sain*, 372 U.S. 293, 313 (1963). Appx. A-40. Rather than find for Mr. Hurles on the merits of the judicial bias claim, the court only went so far as to find "[t]he tenor of Judge Hilliard's responsive pleading…suggest strongly that the average judge in her position could not later preside over Hurles's guilt phase, penalty trial and post-conviction proceedings while holding 'the balance nice, clear

and true' between the state and Hurles." Appx. A-41, quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927). Though the Ninth Circuit found that AEDPA does not pose a bar to relief in his case, Mr. Hurles must prevail in the district court in order to be entitled to relief.

In light of the above, Mr. Hurles cases is not a proper vehicle for this Court to consider what is an unreasonable determination of facts under §2254(d)(2).

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

Petitioner wrongly asserts "the panel majority here effectively conditioned AEDPA deference, at least for judicial-bias claims, on the petitioner receiving an evidentiary hearing in state court." Pet. At 28. In truth, the Ninth Circuit remanded Mr. Hurles' case to the district court after acknowledging that "[o]rdinarily, we cloak the state court's factual findings in a presumption of correctness." Appx. A-36, citing 28 U.S.C. §2254(e)(1). Where the fact-finding was unreasonable, the state court decision is no longer entitled to deference. *Id.* This analysis is consistent with this Court's own interpretation of §2254(d)(2). *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029 (2003) ("Deference does not by definition preclude relief. A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable.") It is also consistent with the Ninth Circuit's own jurisprudence, which holds that the denial of an evidentiary hearing *may* render state court fact-finding objectively unreasonable. *See, e.g. Hibler v. Benedetti*, 693 F.3d 1140, 1147

(9th Cir. 2012) ("In some limited circumstances, we have held that the state court's failure to hold an evidentiary hearing may render its fact-finding process unreasonable under §2254(d)(2)"); *Perez v. Rosario*, 459 F.3d 943, 950 (9th Cir. 2006) ("In many circumstances, a state court's determination of the facts without an evidentiary hearing creates a presumption of unreasonableness.") (citation omitted); *Taylor v. Maddox*, 366 F.3d 992, 1001 (2004) ("If…a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an unreasonable determination of the facts.")(quotation omitted).

Examining the unusual facts of Mr. Hurles' case, the Ninth Circuit found

> Judge Hilliard did not hold an evidentiary hearing or provide another mechanism for Hurles to develop evidence in support of his claim, despite her conclusion that Hurles 'offer[ed] no factual evidence to support his allegations.' Minute Entry, Aug. 9, 2002, at 29, *Hurles v. Schriro,* No. CIV-00-0118-PHX-RCB (D. Ariz. 2008), ECF 72-1 at 19 ("Minute Entry"). Even worse, she found facts based on her untested memory of the events, putting material issues of fact in dispute. Judge Hilliard concluded that she did not specifically authorize a pleading to be filed on her behalf, did not provide any input on the responsive brief, that she was a nominal party only and that she did not have any contact with the Arizona Attorney General's Office. In effect, she offered testimony in the form of her order denying Hurles's second PCR Minute Entry at 2. Hurles had no opportunity to contest Judge Hilliard's version of events that took place years before. Instead, Judge Hilliard accepted her factual assertions as true and relied on them to conclude that 'a reasonable and objective person would not find partiality.' *See* Minute Entry, Aug. 9, 2002 at 2, *Hurles v. Schriro*, No. CIV-00-0118-PHX-RCB (D. Ariz. 2008), ECF 72-1 at 19 ('Minute Entry').

Appx. A-37-A-38 Given that Judge Hilliard's fact-findings were related to *her* conduct, the judge's failure to permit factual development was unreasonable.

Appx. A-39, citing *Buffalo v. Sunn*, 854 F.2d 1158, 1165 (9th Cir. 1988) (finding error when the court relied on "personal knowledge" to resolve disputed issue of fact); *In re Murchison*, 349 U.S. 133, 138, 75 S.Ct. 623, 626 (1955) ("Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.")

D. The Panel Majority Properly Relied on Evidence from the State Court Record

Citing *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011), Petitioner contends "the panel majority disregarded evidence supporting the state court's rejection of Hurles's judicial bias claim." Pet. at 26. Petitioner's reliance on, and interpretation of *Harrington*, is erroneous. *Richter* held that unexplained determinations, such as summary affirmances, may still quality as adjudications on the merits for purposes of §2254(d) and should not be presumed to be procedural dismissals, absent some indication to the contrary. "By its terms, *Harrington* applies '[w]here a state court's decision is unaccompanied by an explanation…'" *Woolley v. Renour*, 702 F.3d 411, 422 (7th Cir. 2012), quoting *Richter*, 131 S.Ct. at 784. Here, the state postconviction court provided explicit reasoning for its disposition of Mr. Hurles' judicial bias claim. The circuit court need not speculate. *Cannedy v. Adams*, 706 F.3d 1148, 1159 (9th Cir. 2013) ("The critical inquiry under §2254(d) is whether, in light of the evidence before…the last state court to review the claim…it would have been

reasonable to reject Petitioner's allegation of deficient performance for any of the reasons expressed by the [lower state] court…")

Petitioner further asserts "[e]ven 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.*" Pet. At 26, citing Appx. J (emphasis in Petition). As an initial matter, Judge Ballinger's ruling is not the last reasoned state court decision, to which the Ninth Circuit was required to look. *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590 (1991). Second, Judge Ballinger's decision was *also* made without providing Mr. Hurles' the opportunity to develop the facts related to his claim. Judge Ballinger's decision that Judge Hilliard did not have to recuse herself from a case in which she had appeared as an adversary is entitled to no more deference than Judge Hilliard's own ruling. Further, the Petitioner's reliance on Judge Ikuta's point that Judge Ballinger's ruling indicates not "*all* jurists would agree that the state court made an unreasonable determination of the facts," Pet. At 27, citing Appx. A65-66, is unavailing. This Court and the circuit courts have granted habeas relief in innumerable cases where the habeas petitioner was denied relief in state court and in either the district court, the circuit court, or both. A federal court may grant relief under AEDPA, even where a lower court judge has denied relief. Furthermore, no evidence suggests, much less confirms, that Judge Ballinger knew about the fact and content of the *ex parte* contact between Judge Hilliard and assistant Attorney General French when he undertook review of Judge Hilliard's

ruling at Judge Hilliard's request. The majority did not err in finding an unreasonable factual determination.

Petitioner further complains that the panel majority "failed to acknowledge that the record corroborated [Judge Hilliard's recollection" because "years before Hurles raised his judicial-bias claim, Assistant Attorney General French informed the Arizona Court of Appeals that Judge Hilliard *did not participate* in drafting the special-action response." Pet. At 26, citing Appx. A37-39, Appx. B2 n. 2, B8. French, however, made that statement when acting as Judge Hilliard's attorney in opposing Mr. Hurles' legal claims. Her statements under such circumstances are suspect. Further, Judge Hilliard did not rely on French's statement when ruling on Mr. Hurles' bias claim.

E. The Ninth Circuit's Opinion Has Not Changed the Way Judicial Bias Claims are Reviewed

Again, Petitioner attempts to portray the Ninth Circuit's opinion as much broader and wide-sweeping than it actually is. Petitioner claims the Hurles opinion "calls into question the routine practice among judges of resolving recusal requests based on matters within their own knowledge, without conducting evidentiary hearings." Pet. at 30 (citations omitted). The majority does not require evidentiary hearings in all judicial bias claims. Rather, the majority ruled *in this case*, Mr. Hurles was entitled to factual development of his claim, where Judge Hilliard had demonstrated bias against Mr. Hurles by litigating against him. This was not simply a situation where Judge Hilliard's background, family, or religion *may*, in some way, bear minor relation to the case before her. Judge Hilliard actively

litigated against Mr. Hurles and then presided over his murder trial and sentenced him to death. This is precisely the sort of bias this Court has not tolerated. *Murchison*, 349 U.S. 133, 137, 75 S.Ct. 623, 626 (1955); *Mayberry*, 400 U.S. 455, 465, 91 S.Ct. 499, 505 (1971) (recusal required where judge "becomes embroiled in a running, bitter controversy" with a litigant); *Johnson v. Mississippi*, 403 U.S. 212, 215-16, 91 S.Ct. 1778, 1780 (1971) (recusal required where judge becomes "so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit. Trial before an 'unbiased judge' is essential to due process.") (citations omitted). Lastly, the Ninth Circuit *did not* grant Mr. Hurles relief on the merits his judicial bias claim. Rather, the court only found the state court decision was objectively unreasonable and Mr. Hurles was entitled to an evidentiary hearing to prove the merits of his claim. Appx. A-42. The *Hurles* opinion does not affect the jurisprudence of judicial bias claims.

F. Mr. Hurles is Entitled to Develop the Merits of his Claim in the District Court

Petitioner argues that "even if Judge Hilliard had *personally authored* the special action response, Hurles could not state a colorable judicial-bias claim" because this Court's judicial bias cases arise in the contempt context. Pet. At 32-33. Petitioner takes too limited a view of this Court's jurisprudence. Rather, where there is even a "probability of actual bias," due process requires the judge's recusal. *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456 (1975); *see also Murchison*, 349 U.S. at 136. Further, in *In re Murchison*, 349 U.S. 133, which did arise out of contempt proceedings, this Court stated "no man is permitted to try cases where he

has an interest in the outcome." *Id.* at 136. If Judge Hilliard did not have an interest in the outcome of Judge Hurles' case, she would not have taken up as his adversary in the special action proceedings.

Judge Hilliard's response to the special action was not, as Petitioner claims, "no different than those a judge might make on the record when denying a motion." Pet. At 33-34. Judge Hilliard denied Mr. Hurles' motion for co-counsel and then took up litigation against him when the prosecutor refused to do so. This action, in contrast to simply denying a defendant's motion, puts the judge in an adversarial position to the defendant, in violation of his right to due process. The Ninth Circuit properly found that Mr. "Hurles's allegation of judicial bias would, if proved, entitle him to federal habeas relief." Appx. A-42. In light of this, the district court abused its discretion in denying a hearing below. *Id.*, citing *Stanley v. Schriro*, 598 F.3d 612, 626 (9th Cir. 2010).

CONCLUSION

This case presents a unique and unlikely-to-recur scenario. The trial judge, who was solely responsible for sentencing Hurles to death, participated in his litigation as an *adversary*, in addition to trier of law and trier of fact, when the Attorney General filed briefs on her behalf in Hurles' special action proceedings. Despite the obvious risk of bias, Judge Hilliard refused to recuse herself from Hurles' case and denied Hurles any opportunity for evidentiary development and instead entered facts into the record on the basis of her own memory of the events. Such fact-finding was objectively unreasonable and Hurles is, therefore, entitled to

an evidentiary hearing to develop the merits of his claim. Additionally, because post-conviction counsel performed well below the standard of care in waiving a meritorious claim for relief, Mr. Hurles is entitled to an evidentiary hearing on his claim of ineffective assistance of appellate counsel.

Respectfully submitted this ___ day of September, 2014

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