October Term 2019
No.

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IN THE SUPREME COURT OF THE UNITED STATES

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RICHARD D. HURLES,
*Petitioner*,

vs.

DAVID SHINN,
*Respondent*.

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

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# CAPITAL CASE
# PETITION FOR WRIT OF CERTIORARI


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January 30, 2020

## CAPITAL CASE

## QUESTION PRESENTED

1. Are the Eighth and Fourteenth Amendments violated where a judge who has personally litigated against a defendant in the same case presides over his trial and sentences him to death?

## PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioner is Richard Hurles. Respondent is David Shinn, Director of the Arizona Department of Corrections, who has been substituted for Charles Ryan, former Director of the Arizona Department of Corrections who was the Respondent/Appellant below. No party is a corporation.

## RELATED PROCEEDINGS

This case arises from *State v. Hurles*, Maricopa County CR1992-009564, the trial which resulted in Mr. Hurles' conviction for first degree murder and death sentence. The direct appeal opinion can be found at *State v. Hurles*, 914 P.2d 1291 (Ariz. 1996).

Mr. Hurles filed his federal habeas petition in *Hurles v. Schriro*, CV-00-0118-PHX-RCB. He appealed the denial of the writ in *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014) and, after remand to the district court for a hearing, in *Hurles v. Ryan*, 914 F.3d 1236 (9th Cir. 2014).

This Court previously denied cert in *Ryan v. Hurles*, 134 S. Ct. 2722 (2014) (mem.) and *Ryan v. Hurles*, 135 S. Ct. 710 (2014) (mem.)

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Hurles respectfully requests that a writ of certiorari issue to review the February 1, 2019 judgement of the Ninth Circuit Court of Appeals, reversing the denial of the writ of habeas corpus and vacating Mr. Hurles' death sentence and convictions.

## OPINIONS BELOW

Mr. Hurles' direct appeal opinion can be found at *State v. Hurles*, 914 P.2d 1291 (Ariz. 1996). The Ninth Circuit published two opinions at *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014) and, after remand to the district court for a hearing, in *Hurles v. Ryan*, 914 F.3d 1236 (9th Cir. 2014).

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254. The final judgement of the Ninth Circuit Court of Appeals was entered on February 1, 2019. The petition for rehearing *en banc* was denied on August 26, 2019. Mr. Hurles timely requested, and Justice Kagan granted, an extension of time to file this petition until January 18, 2020.[1]

## CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and

[1] Because January 18 was a Saturday, this Petition was filed on the next date the Clerk's office was open—January 21, 2020—pursuant to Rule 30.

unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "nor shall any State deprive any person of life, liberty, or property without due process of law."

## INTRODUCTION

This capital case demands this Court's intervention and correction. Mr. Hurles was sentenced to death solely by a judge who *personally* litigated against him in his interlocutory appeal arising from the trial judge's denial of his request for the appointment of second counsel. In the special action, the judge was represented by the Assistant Attorney General who later represented the State in Mr. Hurles' proceedings, including on direct appeal, state post-conviction, and federal habeas proceedings. That Assistant Attorney General worked with the trial prosecutor to develop the theory of the judge's position on the denial of co-counsel—that this was a brutal murder case, but one that was simplistic and straightforward enough not to require the appointment of two counsel. In responding to the special action, the judge also suggested that if defense counsel could not represent Mr. Hurles on her own, she should withdraw from the case and from the list of attorneys contracted to provide indigent defense services. After an evidentiary hearing on the matter, the district court erroneously found the judge was simply a nominal party to the special action and there was no risk of bias.

## STATEMENT OF THE CASE

On the morning of November 12, 1992, Mr. Hurles drank large quantities of

alcohol. He walked to the Buckeye Public Library alone and returned children's books about dinosaurs he had checked out. RT 4/5/94 at 77. Witnesses testified that when they left the library between 2:00 and 2:30 p.m., Mr. Hurles was reading books in the children's section. RT 4/11/94 at 5. Sometime between 2:30 p.m. and 2:50 p.m., he repeatedly stabbed librarian Kay Blanton with a small paring knife the library kept to remove labels from books. *Id.* at 3-4; RT 4/4/94 at 62. She died from those injuries. RT 4/6/94 at 7.

Because Mr. Hurles was indigent, the court appointed an attorney to represent him. *Hurles v. Ryan*, 752 F.3d 768, 775 (9th Cir. 2014). Due to the fact that the State was seeking the death penalty and the high degree of complexity in the case, defense counsel sought co-counsel. *Id.* Trial judge Ruth Hilliard summarily denied the request. *Id.*

Mr. Hurles sought review of the trial court decision by filing an interlocutory appeal (designated a "petition for special action" under Arizona law[2]). *Id.* The State of Arizona, correctly recognizing its lack of standing in the matter, declined to file a response. *Id.* (citing *Hurles v. Superior Court*, 849 P.2d 1, 2 (Ariz. App. 1993). Judge Hilliard, however, represented by Assistant Attorney General Colleen French, filed a substantive response. In special actions such as this, the trial judge is named as a nominal defendant. *See* 17B. Ariz. Rev. Stat., Rules of Procedure for Special Actions, Rule 2(a)(1) ("[t]he complaint shall join as a defendant the body, officer, or person against whom relief is sought. If any public body, tribunal, or officer is named as a

[2] *See* 17B Ariz. Rev. Stat., Rules of Procedure for Special Actions, Rules 1(a), 7.

defendant, the real party or parties in interest shall also be joined as defendants.")

In her response, Judge Hilliard defended her ruling, arguing that any question regarding Mr. Hurles' guilt would be easily resolved, "[A]n examination of the State's evidence illustrates that its case against Petitioner is very simple and straight forward." App. Cat 3. In support of that characterization, she argued:

> [T]he State's evidence at this point includes, but is not limited to the following: eyewitness statements indicating that Petitioner was seen running from the Buckeye 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.* (footnote omitted). That statement reveals that, before Mr. Hurles' capital trial, the judge had evaluated the state's evidence and concluded that it would render the outcome of the case "simple and straightforward." *Id.*

Judge Hilliard's response also threatened appointed counsel with professional consequences if she persisted in challenging the judge's ruling on the second counsel issue:

> [I]f appointed counsel believes that 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 as well. Clearly there are other attorneys who provide contract services for Maricopa County who would be able to provide competent representation in a case as simple as this.

*Id.* at 10.

On April 1, 1993, the Arizona Court of Appeals published an opinion admonishing Judge Hilliard for opposing Mr. Hurles' petition for special action. *Hurles v. Superior Court*, 849 P.2d at 2 (citing Rules of Procedure for Special Actions, Rule 2(a)). The appellate court reminded the judge that her status as a party was nominal and a mere formality. *Id.* Relying on its earlier decisions, *State ex rel. Dean v. City Court*, 598 P.2d 1008 (Ariz. App. Div. 2 1979), and *Dunn v. Superior Court*, 772 P.2d 1164 (Ariz. App. Div. 1 1989), the court held that it is improper for a trial judge to defend the merits of a decision in an individual case. 849 P.2d at 3. The court also held that Judge Hilliard's responsive brief was of this improper kind:

> Judges, of course, generally hope their rulings are affirmed . . .[ they] are presumed to recognize that they must do the best they can, ruling by ruling, with no personal stake . . . in whether they are ultimately affirmed or reversed. This principle, which is essential to impartial adjudication, does not change from direct appeal to special action, merely because the judge is a nominal respondent in the latter.

*Id.* Earlier, the court described this impropriety in even stronger terms: "when 'the trial judge, that impartial dispenser of justice... stands before the appellate tribunal to defend his ruling and his honor, the trial judge is no longer impartial. He is an adversary and an advocate." *Id.* at 3 (quoting *Dean*, 598 P.2d at 1010) (ellipses removed). Ultimately, the appellate court dismissed the appeal as unripe, but made clear that it published its opinion to address the extremely untoward actions of the trial judge. *Id.* at 1 ("This petition for special action presents a significant threshold question of standing, which we publish this order to address.").

After the special action opinion was issued, Judge Hilliard continued to preside over Mr. Hurles' case. After the jury convicted him of first degree murder, Judge Hilliard found that an aggravator was proven. A.R.S. §13-703(F)(6). She found Mr. Hurles had not proved any statutory mitigating factors under A.R.S. §13-703(G), although she agreed Mr. Hurles is borderline intellectually disabled, suffers from a learning disability, and had consumed alcohol in the hours prior to the crime. Judge Hilliard found as non-statutory mitigation Mr. Hurles' deprived childhood, dysfunctional family, his father's physical and sexual abuse, and Mr. Hurles' good behavior in prison. Regardless, Judge Hilliard concluded that Mr. Hurles had "not shown that any of the proven mitigating circumstances are sufficiently substantial to call for leniency," and sentenced him to death.

Mr. Hurles, represented by new counsel, appealed his conviction and sentence to the Arizona Supreme Court. *State v. Hurles*, 914 P.2d 1291 (Ariz. 1996). The State was represented by Assistant Attorney General Colleen French, the same attorney who represented Judge Hilliard in the special action.

Mr. Hurles sought timely post-conviction relief (hereafter "PCR"). Judge Hilliard again presided. Colleen French again represented the State, and opposed Mr. Hurles's request for relief or a hearing. Judge Hilliard, summarily dismissed Mr. Hurles' petition. The Arizona Supreme Court affirmed Judge Hilliard's order.

While habeas proceedings were pending, Mr. Hurles filed a second petition for post-conviction relief. *Hurles v. Ryan*, 752 F.3d at 777. Mr. Hurles also moved to recuse Judge Hilliard because of her arguing against the merits of Mr. Hurles'

special action in 1993, the ethical conflict created by French's involvement in the first PCR proceeding in 1999, and the likelihood Judge Hilliard's testimony would be required. *Id.* The motion to recuse was referred to another state superior court judge, Hon. Edward Ballinger, who denied the motion with little explanation. *Id.* As a result, Judge Hilliard presided over a post-conviction proceeding in which she was required to examine her own conduct for evidence of judicial bias.

Judge Hilliard rejected Mr. Hurles' argument that her involvement in the special action and French's subsequent representation of the State required the court to exempt Mr. Hurles from the state rules governing preclusion of claims in successive post-conviction petitioners. 752 F.3d at 790. In reaching this conclusion, Judge Hilliard relied on her own recollection of events, stating "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." *Id.* Judge Hilliard denied the post-conviction petition. *Id.*

In September 2008, the district court dismissed Mr. Hurles' habeas petition. *Hurles v. Schriro*, 2008 WL 4446691 (D.AZ. September 30, 2008). Mr. Hurles appealed to the Ninth Circuit Court of Appeals, which found the state court denial of Mr. Hurles' judicial bias claim was objectively unreasonable under 28 U.S.C. §2254(d)(2). *Hurles v. Ryan*, 752 F.3d at 790. The court remanded the case to the district court to hold a hearing on the merits of the judicial bias claim. *Id.* at 792.

The district court held an evidentiary hearing on Mr. Hurles' judicial bias

claim on January 19, 2016. App. B. The court denied relief. Mr. Hurles appealed to the Ninth Circuit, which denied relief on February 1, 2019. App. D, *Hurles v. Ryan*, 914 F.3d 1236 (9th Cir. 2019). The Ninth Circuit denied the petition for rehearing *en banc* on August 26, 2019.

## REASONS FOR GRANTING THE PETITION

### I. THE FACTS DEVELOPED IN DISTRICT COURT DEMONSTRATE THAT JUDGE HILLIARD'S PARTICIPATION IN THE SPECIAL ACTION CREATED AN UNCONSTITUITONAL RISK OF BIAS

Judge Hilliard's presiding over Mr. Hurles case and sentencing him to death after litigating against him in this very case violated Mr. Hurles' rights to due process and to be free from cruel and unusual punishment. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The demand for due process is even more significant here than in the usual criminal case because of the Eighth Amendment requirement that a capital defendant be afforded heightened due process. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

A "fair and impartial tribunal" guaranteed by the Eighth and Fourteenth Amendments requires more than "an absence of actual bias" because "even the probability of unfairness" offends due process. *Murchison*, 349 U.S. at 135. As this Court recognized in *Caperton v. Massey Coal Co.*, 556 U.S. 868 (2009), "Under our precedents, there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47

(1975)). Recently, this Court reaffirmed the need for an objective test, as necessary because:

> Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present.

*Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). The objective standard requires recusal where there is "a possible temptation to the average man as a judge...not to hold the balance nice, clear and true between the State and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Importantly, this Court's objective standard may "sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136. The evidence developed in the trial court and special action, the second post-conviction, and the remanded district court proceedings demonstrate an unconstitutional risk that Judge Hilliard could not "hold the balance nice, clear and true" between the State of Arizona and Mr. Hurles.

### A. THE DISTRICT COURT'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS

In 2014, a panel of the Ninth Circuit remanded Mr. Hurles' case to the district court, concluding that the district court abused its discretion in denying his judicial bias claim without an evidentiary hearing. *Hurles v. Ryan*, 752 F.3d at 792. In remanding the claim, the 2014 panel exhaustively considered this Court's judicial bias jurisprudence and explained:

> We must ask whether the average judge, in Judge Hilliard's position, was likely to sit as a neutral, unbiased arbiter or whether there existed

> an unconstitutional risk of bias. *Caperton* [*v. A.T. Massey Coal Co.*,] 556 U.S. [868,] 883-84 [(2009)]... But to consider fairly the potential for bias, we must consider the average reasonable judge in the particular circumstances in which Judge Hilliard found herself. [*In re*] *Murchison*, 349 U.S. [133,] 136 [(1955)]... (noting that the probability of unfairness "cannot be defined with precision. Circumstances and relationships must be considered.")

752 F.3d at 792. Further, the panel gave specific guidance to the district court on how to determine whether there was an unconstitutional risk of bias:

> The tenor of Judge Hilliard's responsive pleading in the special action proceeding, by itself, strongly suggests 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. *Tumey*, 273 U.S. at 532. But proof that Judge Hilliard participated in the special action proceeding 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 that Judge Hilliard became "so enmeshed in matters involving [Hurles] as to make it appropriate for another judge to sit," *Johnson*, 403 U.S. at 215-16, or that Judge Hilliard became "embroiled in a running, bitter controversy" with Hurles and his counsel, *Mayberry*, 400 U.S. at 465. *See Murchison*, 349 U.S. at 137; *Johnson*, 403 U.S. at 215. Such evidence would certainly show an unconstitutional risk of bias.

*Id.* (alteration in original). Finally, the panel recognized that Mr. Hurles need not prove "actual bias," although "as the risk of actual bias or prejudgment goes up, so, too, does the strength of his judicial bias claim." *Id.* (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *Caperton*, 556 U.S. at 883-84).

At the evidentiary hearing in district court, both Judge Hilliard and former Assistant Attorney General Colleen French[3] testified. According to Judge Hilliard, she initiated the filing of the response to the special action by forwarding it to the

[3] By the time of the evidentiary hearing, French had become a commissioner of the Maricopa County Superior Court.

presiding judge so that he would arrange for the Arizona Attorney General's office to file a response. App. B at 72 ("If a special action came in, I'd say [to my judicial assistant] notify the presiding criminal judge. The presiding criminal judge took care of it."); App. B at 74 ("We followed the procedure: Sent it to the presiding criminal judge, the presiding criminal judge would then send it to the Attorney General's Office, the Attorney General's Office would then take care of it."). Judge Hilliard also testified that she was "hard-pressed to find a situation where filing a response would be unethical." App. B at 66.

French testified that she was aided in drafting the response by the trial prosecutor, who described the case against Mr. Hurles as "very simple and straightforward." App. B at 39. The trial prosecutor also provided the description of the crime as brutal—language Judge Hilliard later used when she sentenced Mr. Hurles to death. *Compare* RT 10/13/1994 at 13; *with* App. B at 37-40.

French further testified that "[i]n my view, my client was the Superior Court of Arizona and Ruth Hilliard, Judge Hilliard, rather, and I consulted with both. App. B at 24, 45 (the response was filed on behalf of Judge Hilliard and the Superior Court). Likewise, Judge Hilliard testified that she, too, believed that the response did not simply represent the position of the Superior Court, but also "represent[ed] my position...as the judge who was presiding over the case." App. B at 78.

Though Judge Hilliard did not testify that she aided in drafting the response, she took no action to withdraw the response or disavow it, because she believed the

filing was appropriate and it accurately represented her position on the case. App. B at 66, 78.

The district court's factual findings—specifically that Judge Hilliard was simply a nominal party to the special action—was clearly erroneous, as it was not supported by the record before it. App. D, *Hurles v. Ryan*, 188 F.Supp.3d 907, 916 (D.Ariz. 2016). Judge Hilliard took affirmative steps to ensure a response would be filed on her behalf and continues to maintain that she was actually represented in the special action by the Assistant Attorney General.

The district court also erred in finding that the presiding judge of the superior court "had strong feelings about the issue raised in the special action. He made the decision to request that the Arizona Attorney General respond." App. D at 10. The presiding judge did not testify. This finding is based on pure hearsay. App. B at 32-35.[4] The district court further found that "French understood she was representing the presiding criminal judge and the superior court at the behest of the criminal presiding judge." App. D at 10. This finding is directly contradicted by French's own testimony that "in my view, my client was the Superior Court of Arizona and Ruth Hilliard, Judge Hilliard, rather, and I consulted with both." App. B at 23. The finding is also contradicted by French's response to the special action, which identifies "Judge Hilliard" as the respondent and as her client. App. C.

The district court's factual findings were not supported by the record before it. The Ninth Circuit failed to fulfill its duty to accurately review this lower court's

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[4] The district court judge allowed the testimony over Mr. Hurles' objection.

decision. This Court should correct the error and find that the district court clearly erred and that the record demonstrates Judge Hilliard's litigation against Mr. Hurles created an unconstitutional risk of bias.

## II. THE DISTRICT COURT'S LEGAL CONCLUSIONS WERE DISGUISED AND TREATED AS FACTUAL FINDINGS

In its 2019 panel opinion, the Ninth Circuit's entire analysis of this claim was contained in a single paragraph:

> The prior panel remanded the issue of judicial bias for an evidentiary hearing on the risk of actual bias. The district court conducted a thorough hearing on that issue and made factual findings that no bias occurred. After reviewing the record, the briefs, and considering the arguments of counsel, we cannot say that the district court committed clear error in its factual determinations.

App. A at 4. As an initial matter, the district court did not make "factual findings that no bias occurred," *id.*, as that was not the question before the court. As explained thoroughly above and in the 2014 panel opinion, the question before the district court was whether there was an unconstitutional *risk* of bias, as there is no reliable way to determine whether actual bias existed. Moreover, the district court's finding that "no unconstitutional risk of bias arose from the fact that the response to Hurles' special action was filed on her behalf," 188 F.Supp.3d at 918, was a *legal* conclusion and not subject to clear error review.

The 2014 panel opinion found that Judge Hilliard's response to the special action alone "strongly suggests" there was an unconstitutional risk of bias. 752 F.3d at 792. Nevertheless, the panel remanded to the district court to allow Mr. Hurles to develop "evidence [that] would certainly show an unconstitutional risk of bias." *Id.*

As explained above, the district court's findings of fact were clearly erroneous. However, even assuming the findings of fact were not clearly erroneous, the 2019 panel of the Ninth Circuit failed to recognize it owes no deference to the district court's ultimate legal conclusion. *Lambert v. Blodgett*, 393 F.3d 943, 946 (9th Cir. 2004) (the district court's denial of the writ of habeas corpus is reviewed *de novo*).

Even assuming the district court's interpretation of the facts to be correct, Mr. Hurles was entitled to a finding that there was an unconstitutional risk of bias. The district court record demonstrates that Judge Hilliard and Colleen French formed an attorney-client relationship in the preparation of the response to the special action and that, even if Judge Hilliard did not request the response be prepared and did not want it prepared, she nevertheless believed at the time of Mr. Hurles' trial and today that it represented her position as the judge on the case. App. B at 78. This uncontradicted testimony from the trial judge demonstrates that she was "'so enmeshed in matters involving [Hurles] as to make it appropriate for another judge to sit.'" 752 F.3d at 792 (quoting *Johnson*, 403 U.S. at 215-16).

Judge Hilliard adopted the prosecutor's view of this case as her own—that it was simple and straightforward and that Mr. Hurles brutally murdered the victim—before any evidence was presented. This created an adversarial position between Mr. Hurles and Judge Hilliard, and established an unconstitutional risk of bias. *In re Murchison*, 349 U.S. at 137 (recusal required where judge acts as "part of the accusatory process"); *Crater v. Galaza*, 491 F.3d 1119, 1131 (9th Cir. 2007). In short, the evidence presented in the district court demonstrates that the Arizona

Attorney General, working in cooperation with the trial prosecutor, represented Judge Hilliard in litigation against Mr. Hurles.

Adding to the risk of bias, Judge Hilliard's response to the special action,

> referenced the rules of professional conduct and stated that if defense counsel believed that she could not render competent representation, she was bound to withdraw and, quite possibly, to withdraw her name from the list of attorneys who contracted with the county to serve as appointed counsel. Judge Hilliard concluded, "Clearly there are other attorneys who provide contract services for Maricopa County who would be able to provide competent representation in a case such as this."

752 F.3d at 776. The clear implication—that defense counsel's career and reputation were at risk if she continued to request resources from Judge Hilliard—likely had a chilling effect on counsel's representation of Mr. Hurles. This worsened the threat to Mr. Hurles' Eighth and Fourteenth Amendment rights arising from Judge Hilliard's litigation against him.

As explained above, in *Withrow v. Larkin*, 421 U.S. 35, 47 (1975), this Court held that the Constitution requires recusal where "the probability of actual bias on the judge or decision maker is too high to be constitutionally tolerable." This Court has recently recognized the particular danger that arises when the line between judge and prosecutor is blurred.

> No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position."

*Williams*, 136 S. Ct. at 1906 (quoting *Withrow*, 421 U.S. at 57). Here, the State developed, on behalf of Judge Hilliard, a theory of the case that Mr. Hurles was responsible for a brutal murder and the case was so simplistic that only a single defense lawyer was necessary to represent Mr. Hurles. *Williams* recognizes the grave risk that Judge Hilliard would hold on to that position throughout the capital trial and as she alone sentenced Mr. Hurles to death.

Even assuming the district court's fact findings were not clearly erroneous, the district court should have concluded that Mr. Hurles was nevertheless entitled to a new trial and sentencing due to the unconstitutional risk of bias. This Court has acknowledged that its focus on the *risk* of bias is "a stringent rule [that] may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The risk here is simply too great, particularly when the removal of the risk could have been easily accomplished by assigning the case to another judge. Justice was denied Mr. Hurles by Judge Hilliard presiding over his trial and sentencing him to death despite participating in the litigation against him. The panel wrongly stated that "[t]he only question presented in this appeal is whether the district court's factual findings on remand were clearly erroneous." Exhibit A at 4, n. 1.

## CONCLUSION

This Court should grant certiorari, find that Mr. Hurles' Eighth and Fourteenth Amendment rights were violated, and reverse the Ninth Circuit's decision.

Respectfully submitted,

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