Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD DEAN HURLES, *Petitioner-Appellant*, v. CHARLES L. RYAN, Warden; GEORGE HERMAN, Warden, Arizona State Prison - Eyman Complex, *Respondents-Appellees.*	No. 16-99007 D.C. No. 2:00-cv-00118-DLR OPINION

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted December 10, 2018
San Francisco, California

Filed February 1, 2019

Before: Sidney R. Thomas, Chief Judge, and Richard A. Paez and N. Randy Smith, Circuit Judges.

Per Curiam Opinion

SUMMARY*

Habeas Corpus

The panel affirmed the district court's judgment, on remand for an evidentiary hearing, dismissing a habeas corpus petition.

The panel could not say that the district court committed clear error in its determinations, after conducting an evidentiary hearing on remand, that there was no actual judicial bias.

The panel held that the petitioner's claim of ineffective assistance of appellate counsel is not viable in light of *Davila v. Davis*, 137 S. Ct. 2058 (2017), which held that the holding in *Martinez v. Ryan*, 566 U.S. 1 (2012) – that a successful claim of post-conviction ineffective assistance of counsel can excuse a procedurally defaulted claim of ineffective assistance of trial counsel – does not extend to procedurally defaulted claims of ineffective assistance of appellate counsel. The panel wrote that because *Davila* is clearly irreconcilable with this court's prior precedent, *Nguyen v. Curry*, 736 F.3d 1287 (9th Cir. 2013), *Nguyen* does not control the panel's decision, and a prior panel's pre-*Davila* decision applying *Nguyen* to this case does not bind this panel.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Emily Katherine Skinner (argued) and Natman Schaye, Associate Counsel, Arizona Capital Representation Project, Tucson, Arizona; Denise Young, Tucson, Arizona; for Petitioner-Appellant.

Julie Ann Done (argued), Assistant Attorney General, Capital Litigation Section; Lacey Stover Gard, Chief Counsel; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona; for Respondents-Appellees.

OPINION

PER CURIAM:

This appeal returns to us after a prior panel remanded the case to the district court for an evidentiary hearing. *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014). After considering the record, briefs, and arguments, we affirm. The factual record in the case was thoroughly discussed in our prior opinion, so we need not recount it here.

Because Hurles filed his federal habeas petition in 2000, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs. *Hurles*, 752 F.3d at 777. AEDPA "bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). Relief should not be granted unless the state court proceedings either "(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." 28 U.S.C. § 2254(d). Clearly established law is limited to the Supreme Court's holdings at the time of the state court decision. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). We review de novo the district court's dismissal of the petition and its findings of fact for clear error. *Brown v. Ornoski*, 503 F.3d 1006, 1010 (9th Cir. 2007).

1. The prior panel remanded the issue of judicial bias for an evidentiary hearing on 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.[1]

2. As to the question of ineffective assistance of appellate counsel, the prior panel excused the procedural default because it held that post-conviction relief counsel was ineffective in failing to raise the ineffective assistance of appellate counsel claim. *Hurles*, 752 F.3d at 781–83. In so holding, the panel applied *Ngyuen v. Curry*, 736 F.3d 1287 (9th Cir. 2013). *Ngyuen* is an extension of *Martinez v. Ryan*, 566 U.S. 1 (2012), where the Supreme Court held that a successful claim of post conviction ineffective assistance of counsel can excuse a procedurally defaulted claim of

[1] Pursuant to the jurisprudential doctrine of law of the case, we decline to reconsider matters pertaining to this issue which were decided in the prior appeal. *Jeffries v. Wood*, 114 F.3d 1484, 1488–89 (9th Cir. 1997) (en banc). The only question presented in this appeal is whether the district court's factual findings on remand were clearly erroneous.

ineffective assistance of trial counsel. In *Nguyen*, we held that the same reasoning applied to defaulted claims of ineffective assistance of appellate counsel. *Ngyuen*, 736 F.3d at 1289.

Subsequently, however, the Supreme Court decided *Davila v. Davis*, 137 S. Ct. 2058 (2017), in which it held that *Martinez* does not extend to procedurally defaulted claims of ineffective assistance of appellate counsel. *Id.* at 2065–66. Where intervening Supreme Court authority is "clearly irreconcilable" with prior circuit authority, the intervening authority binds the panel. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). Intervening authority is clearly irreconcilable if it "undercut[s] the theory or reasoning underlying the prior circuit precedent." *Rodriguez v. AT & T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (quoting *Miller*, 335 F.3d at 900). Because *Davila* is clearly irreconcilable with our prior circuit precedent, *Ngyuen* does not control our decision. Further, because *Davila* is intervening authority, the prudential law of the case doctrine does not bind this panel.[2] Under *Davila*, the petitioner's claim is not viable.[3]

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[2] *See Jeffries*, 114 F.3d at 1488–89 (noting that intervening controlling authority is one of the three exceptions to the law of the case doctrine).

[3] We are bound by our precedent emphasizing that "only the Supreme Court could expand the application of *Martinez* to other areas," and "further substantive expansion" of *Martinez* is "not . . . forthcoming." *Pizzuto v. Ramirez*, 783 F.3d 1171, 1176–77 (9th Cir. 2015) (refusing to apply *Martinez* to procedurally defaulted claims of judicial bias); *see also Hunton v. Sinclair*, 732 F.3d 1124, 1126–27 (9th Cir. 2013) (rejecting the argument that *Martinez* permitted resuscitation of a procedurally defaulted *Brady* claim). Even if *Davila* were construed to allow an exception to the general rule under *Coleman v. Thompson*, 501 U.S. 722, 752–54 (1991),

Given our resolution of the case, we need not, and do not, reach any other issues presented by the parties.

AFFIRMED.

such an exception would not apply here. Trial counsel requested funding for a Computer Assisted Topographic Mapping scan, which was then denied by the state court on procedural grounds. Hurles suggests that orders denied on procedural grounds should be considered as unpreserved trial errors within the meaning of the potential exception identified in *Davila*, but *Davila* does not draw that distinction and there is no other support for that proposition in Supreme Court jurisprudence. Hurles's interpretation would considerably broaden the "limited circumstances" meriting *Martinez*'s "highly circumscribed, equitable exception." *Id.* at 2066 (citing *Martinez*, 132 S. Ct. at 1320).

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Richard Dean Hurles,	)	
	)	
	)	
Petitioner,	)	
	)	**CV 00-118-PHX-DLR**
vs.	)	**Phoenix, Arizona**
	)	**January 29, 2016**
Charles L. Ryan, et al.,	)	**9:04 a.m.**
	)	
	)	
Respondents.	)	
	)	

BEFORE: THE HONORABLE DOUGLAS L. RAYES, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Evidentiary Hearing)

Official Court Reporter:

David C. German, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC-39
Phoenix, Arizona 85003-2151
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PROCEEDINGS TAKEN BY STENOGRAPHIC COURT REPORTER
TRANSCRIPT PREPARED BY COMPUTER-AIDED TRANSCRIPTION

APPEARANCES:

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I N D E X

E X H I B I T S

Phoenix, Arizona
January 29, 2016

(Proceedings convened at 9:04 a.m.)

THE COURT: Please be seated.

THE COURTROOM DEPUTY CLERK: Civil case Number 00-118, Hurles versus Ryan and others, on for evidentiary hearing. 09:05:02

Counsel, please announce for the record.

MR. SCHAYE: Good morning. Natman Schaye, Emily Skinner and Denise Young for the petitioner, Mr. Hurles, who is present at counsel table. 09:05:16

THE COURT: Good morning.

MS. DONE: Good morning, Your Honor. Julie Done, and I have with me attorney Andrew Reilly and paralegal Kimberly Carter, for respondents. 09:05:29

THE COURT: All right. Good morning.

Are you prepared to proceed or are we still waiting for a witness?

MR. SCHAYE: Well, we're still waiting on who we planned on being our first witness. 09:05:39

THE COURT: Well, while we're waiting let's talk about the *Ake* issue. I was -- I've gone back and forth on whether or not we should have an evidentiary hearing. I wasn't real clear from reading the opinion what they intended for us to do here, but from your memos I think you're in 09:05:54

agreement that the Ninth Circuit has ruled that Hurles had established cause for the default, meaning that the Court -- you haven't -- you don't agree with that?

MS. DONE: Your Honor, I'm not prepared to argue that part of the case. 09:06:19

THE COURT: Okay.

MS. DONE: I apologize. I didn't get a briefing on that. They just brought me in for this.

THE COURT: Well, I don't want to ambush you. What I'm getting to is this: I think we need an evidentiary 09:06:27 hearing, and I think the evidentiary hearing, as I perceive it, will be simply the testimony of Dr. Walter about how he would have testified regarding the outcome of the objective testing that he claimed he needed to have.

Now, the State may want to have an expert to testify 09:06:48 to the contrary, but I think that would be the focus of the evidentiary hearing on that.

Mr. Schaye, do you agree with that?

MR. SCHAYE: I don't know, but --

THE COURT: Okay. 09:07:02

MR. SCHAYE: My co-counsel says I do.

THE COURT: Let's do this, then: Why don't you both bone up on it. Let's have a status conference, telephonic, next week and set a date for the evidentiary hearing, because I do think we need an evidentiary hearing on that single 09:07:15

issue. The Ninth Circuit didn't -- I don't think it left it clear what we were going to do with that, but after carefully reviewing everything I think that's where we need to go. I'm pretty sure that's what we need to do.

I'd like to get that evidentiary hearing done rather quickly. Should be just a couple witnesses at most. 09:07:29

I assume you've been in contact with your expert on that, Mr. Walter, or Dr. Walter.

MS. SKINNER: We have been in contact with him, or at least at the time we were doing the briefing. 09:07:43

THE COURT: All right.

Okay. So let's have a telephonic conference next week to talk about that and see if there's -- what you understand the need for the hearing would be. That's my understanding. We'll set it for a hearing when we talk. I'm hoping to get that hearing set sometime in April or May. 09:07:59

THE COURTROOM DEPUTY CLERK: Thursday, February 4, at 1:30.

THE COURT: The 4th at 1:30, telephonic conference, simply to talk about the *Ake* issue and how we're going to finalize that and resolve it. 09:08:13

MR. SCHAYE: If I could just ask a question about Judge Fidel's testimony, we received the order, obviously, limiting it to the first opinion. Will the Court allow us to, as an offer of proof, elicit the testimony on the other? 09:08:53

THE COURT: Yes.

MR. SCHAYE: Okay. Thank you. I think we're -- I think we're ready.

MS. DONE: Your Honor, we would invoke the rule of witnesses, though. 09:09:05

THE COURT: Okay.

MR. SCHAYE: And I would ask that the experts be exempted from the rule.

MS. DONE: We would object to that, Your Honor.

THE COURT: Who are your experts? 09:09:16

MR. SCHAYE: Mark Harrison and Noel Fidel.

THE COURT: And the basis for the exemption?

MR. SCHAYE: Because their opinions may be influenced by the testimony that the first two witnesses, Colleen French and Ruth Hilliard, provide. It's going to be relevant to what they will opine. 09:09:34

THE COURT: Haven't they already been deposed and they know what they're going to say?

MR. SCHAYE: Well, the witnesses have been interviewed but I think their testimony that I intend to elicit here will go beyond what was covered in my interviews. They were interviewed by me, they were not deposed, so they were not -- they were only questioned very briefly by Miss Done. It wasn't a deposition for both parties. 09:09:48

MS. DONE: Those interviews were available to the 09:10:14

witnesses before they prepared their reports so we would object.

THE COURT: Okay.

All right. Well, I'm going to allow them to sit in here. I want the experts to be fully informed of what the evidence is and when they present their opinions I want them based on the facts that have been presented here, and this is a matter of a search for the truth today and I want to get to the bottom of it. 09:10:24

So I'm going to grant his request to allow them to sit in here. 09:10:37

Okay. Let's move forward. Do you have your witnesses ready to go?

MR. SCHAYE: Yes. We would call Colleen French.

THE COURT: Commissioner French, would you come forward and be sworn, please? 09:10:50

(Colleen French duly sworn.)

THE COURT: You may proceed.

MR. SCHAYE: Thank you, Your Honor.

COLLEEN FRENCH, 09:11:32

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCHAYE:

Q. Am I correct that you are licensed to practice law in 09:11:38

Arizona?
A. I am.
Q. And you were working as an attorney in the Arizona Attorney General's Office in 1993, is that correct?
A. That's correct. 09:11:52
Q. And you filed a special action response to a petition filed on behalf of Mr. Hurles?
A. I did.
Q. Do you have the exhibits in front of you?
A. I have some folders. Are these exhibits? 09:12:08
Q. Okay. Yes.
MR. SCHAYE: Your Honor, for the record, the parties have stipulated that Exhibits 1 through 12 and 20 and 21 be admitted for purposes of this hearing.
THE COURT: Okay. Exhibits 1 through 12, 20 through 21 are admitted. 09:12:25
BY MR. SCHAYE:
Q. Would you take a look at Exhibit 6, please?
I'm sorry. Exhibit 4.
A. Did you say 4? 09:12:48
Q. Yes.
Is that the response that you filed?
A. Looks to be, yes.
Q. Prior to filing that response you spoke to Judge Ruth Hilliard about the case? 09:13:11

MS. DONE: Objection, Your Honor. Leading.
MR. SCHAYE: Well, with --
THE COURT: Why don't you ask the question in a non-leading way.
Do you have a response? 09:13:22
MR. SCHAYE: Well, I do, Your Honor. In light of the fact that this witness represented the prosecution in this matter and under the circumstances of this hearing, I believe she should be deemed an adverse witness and I should be allowed to cross-examine. 09:13:43
THE COURT: No. I'm not going to allow that. Go ahead and treat her as your witness.
BY MR. SCHAYE:
Q. Do you recall speaking to Judge Hilliard?
MS. DONE: Objection, Your Honor. Leading. 09:13:56
THE COURT: Overruled.
THE WITNESS: Yes.
BY MR. SCHAYE:
Q. And what was the subject of the conversations?
A. I don't understand your question. 09:14:06
Q. What did you talk about?
A. Well --
THE COURT: Hang on. Let's put some -- a little bit of information first about foundation.
When did you have that conversation? 09:14:23

THE WITNESS: I don't remember.
THE COURT: Okay. Was it during the course of the time that you were preparing this response to the petition?
THE WITNESS: Yes, Your Honor, it was.
THE COURT: Okay. Go ahead. 09:14:33
MR. SCHAYE: Okay.
BY MR. SCHAYE:
Q. And what was the subject of the conversation?
A. The fact I was filing a response.
Q. In the Hurles special action? 09:14:41
A. Yes.
Q. And did you memorialize that conversation in any way?
A. You mean did I -- what do you mean?
Q. Did you take any notes?
A. Not that I recall, no. 09:15:01
Q. Keep track of what Judge Hilliard said to you in some fashion?
A. There wasn't anything to keep track of. I only spoke to her once. So, no. And I didn't write it down, no.
Q. All right. From 1983 to 1989 how were you employed? 09:15:18
A. I worked first as a staff attorney -- I'm sorry -- as a clerk at the Court of Appeals and then I worked for a civil law firm, Norton, Burke, Berry and French, for about three years, I think, and that firm disbanded, and then I worked for a firm called Ellis, Baker, Clark and Porter. And then I 09:15:48

worked for a firm called DeConcini McDonald, which became another firm, Harren Brochet, a Washington firm.
Q. Did you also do civil litigation for the last two firms?
A. I did civil litigation in my entire civil practice, yes.
Q. Okay. And represented clients, individual clients? 09:16:12
A. Of course.
Q. Now, I assume that you're familiar with the ethical rules for lawyers practicing in Arizona?
A. Yes.
Q. And those are part of the Rules of the Arizona Supreme Court, is that correct? 09:16:36
A. Yes.
Q. Okay. And would you agree that under the rules, and specifically 1.2, a lawyer shall abide by a client's decisions concerning the objectives of representation? 09:16:58
A. Do I agree with the ethical rule? Yes.
Q. And is that a rule that you would have abided in representing your clients?
A. Yes.
Q. And 1.28 continued, would you agree that a lawyer shall consult with the client as to the means by which their objectives are to be pursued? Is that a rule that -- 09:17:13
A. I'm sorry.
Q. -- you would follow?
A. Can you repeat that again? I don't have the rules 09:17:31

committed to memory so could you repeat that for me? I agree with what the rules say if that's what you're going to ask me about all the ethical rules. I agree with those rules, yes, I do.

Q. And as far as consulting with clients, that's a rule that you would follow or that you followed in representing clients; Is that right? 09:17:53

A. Yes.

Q. And under the rules a lawyer's also required to keep a client reasonably informed about the status of cases. 09:18:08

A. Yes.

Q. Did you comply with that in representing clients?

MS. DONE: Objection, Your Honor.

THE WITNESS: Is he talking about this case or in general? I think it's a little bit broad. 09:18:20

BY MR. SCHAYE:

Q. I'm speaking generally at this point, whether that was your practice.

A. It was my practice to comply with the ethical rules, yes.

Q. Okay. 09:18:35

Now, let me ask you, if a lawyer comes into court and says I represent plaintiff, to you does that communicate that the plaintiff is that lawyer's client?

A. Yes. Yes.

Q. Okay. Now, in the Hurles special action you represented 09:18:56

Judge Ruth Hilliard.

MS. DONE: Objection. Leading.

THE COURT: Overruled. He's just laying foundation.

THE WITNESS: I'm sorry. What was the question again? 09:19:20

BY MR. SCHAYE:

Q. Is it correct that you represented Judge Ruth Hilliard in the Hurles special action?

A. Well, it was my understanding that I was, in that situation, as with most special actions when I represented 09:19:30 Superior Court judges, that I was actually representing the Court, I was not representing actually the individual judge. That was the way my office perceived those special actions and that's the way I did as well. Because the judge is a nominal party only. 09:19:49

Q. As far as -- you said your office perceived it that way.

A. Right.

Q. You understand, do you not, that even as a subordinate you were required by the ethical rules to comply with the rules.

A. Of course. 09:20:06

Q. And would you look at Exhibit 12, please?

A. Okay.

Q. What is that?

A. It's called response to petitioner's motion to disqualify. 09:20:31

Q. Did you prepare that?
A. I did.
Q. Did you do that completely on your own?
A. I don't remember.
Q. And that's dated September 20th, 2000. Is that correct? 09:20:50
A. Correct.
Q. And you prepared that for the purpose of filing in this court, in the United States District Court for the District of Arizona?
A. Looks like I did. 09:21:13
Q. If you go to page 2 of Exhibit 12, line 9, correct me if I'm wrong, states petitioner, and that was Mr. Hurles, correct, was the petitioner?
A. Yes.
Q. And you were undersigned counsel? 09:21:35
A. Right.
Q. And I'm sorry. Going back, quote, petitioner correctly notes that undersigned counsel, as part of her duties as an Arizona Attorney General, represented Maricopa County Superior Court Judge Ruth Hilliard, parens, the, quote, trial judge, 09:21:54
end quote, end parens, in a pretrial special action in petitioner's case, end quote.
Is that what you wrote?
A. That's what it says here.
Q. And is that accurate? 09:22:08

A. Yes.
Q. Going down to line 19, quote, undersigned counsel filed a response to the petition for special action on behalf of the trial judge.
You wrote that, I take it. 09:22:22
A. Right.
Q. And is that accurate?
A. Yes.
Q. Going to page 4, line 20, it says -- well, starting at line 19, quote, undersigned counsel's representation of the 09:22:46
State on --
A. Sorry. Where are you reading from?
Q. Page 4.
A. Okay. Line 19. Okay.
Q. Undersigned counsel's representation of the State on 09:22:55
appeal and in the post-conviction proceedings after representing the trial judge in a special action, and it goes on from there.
So again -- did I read that correctly?
A. Yes. 09:23:11
Q. And again, it indicates that you represented Judge Hilliard, correct?
A. Right.
Q. And then on line 25, it says that you, quote, filed a response to that special action on her behalf, end quote. 09:23:27

That refers to Judge Hilliard as well, right?
A. Right.
Q. And is that also accurate?
A. It's accurate.
Q. And page 5, line 6, says undersigned counsel did not represent a private client when she represented the trial judge in the special action. That's what that says, correct? 09:23:40
A. That's what it says.
Q. And is that accurate?
A. Yes. 09:24:04
Q. And then at page 6, line 7 -- well, let me start on line 6.
Quote, additionally undersigned counsel's communication with the trial judge during the special action proceedings cannot be construed to have been ex parte because undersigned counsel represented the trial judge at the time they occurred, end quote. 09:24:24
Is that accurate?
A. Yes.
Q. And you were arguing there, were you not, that your communications with the trial judge were privileged because the trial judge was your client, right? 09:24:41
MS. DONE: Objection, Your Honor. Leading.
THE COURT: Overruled.
THE WITNESS: I don't remember what I was arguing. I 09:24:59

haven't read this. This is prepared in 2000. I don't remember what I was arguing at the time, but that's -- I -- pointing out individual lines doesn't really refresh my recollection about what this pleading was about, but...

Q. Okay. 09:25:20

And again, line 12 refers to your representation of the trial judge. Is that correct?

A. It says --

Q. So --

A. Am I going to answer? I guess it's a yes. It says I 09:25:40 represented the trial judge. Right.

Q. Yes.

So would you agree that you represented to this Court that Judge Hilliard was your client?

A. Right. 09:25:55

Q. It also -- the -- at line 6 of page 6 you referred to communications with the trial judge regarding this matter.

A. Line 6?

Q. Yes.

A. Line -- right. 09:26:18

Q. And would you agree that's indicating to this Court that you had communications with Judge Hilliard about the special action?

A. Right, as I stated I did.

Q. If you would look at Exhibit 4, please, which is in 09:26:40

evidence.
A. Okay.
Q. That's the response that you filed in the Court of Appeals in the Hurles action? Is that correct? Hurles special action? Is that correct? 09:27:12
A. Yes, it is.
Q. On March 1st, 1993?
A. Yes.
Q. And you prepared that response.
A. Yes. Yes, I did. 09:27:22
Q. Do you recall, did you do that all alone? Did you have assistance?
A. Well, I -- I did it alone but there's a review process in the office where nothing gets filed without having been reviewed by a superior. So I wrote it but it was reviewed by 09:27:38 someone, probably my boss, before I filed it.
Q. And you prepared that to file in the Arizona Court of Appeals, correct?
A. Right. Yes.
Q. And? 09:27:53
A. Wait. Actually, it says the Supreme Court. Why does it say Supreme Court on this?
Q. That's a very good question. I hadn't noticed that before.
A. I filed the response in the Court of Appeals. I don't 09:28:09

know. Maybe that was my mistake in the pleading. I don't know. Or maybe this is the wrong response, because the exhibits also say Supreme Court. But I don't know why it says that.

Q. Okay. Well, if we look at Exhibit 3 in evidence -- I don't know. 09:28:31

MR. SCHAYE: Do we stipulate that's a typo?

MS. DONE: Yeah. We have no objection to that, Your Honor.

THE COURT: I'm sorry. I didn't hear what you said. 09:28:44

MR. SCHAYE: The parties are stipulating, because I didn't catch that, either, that Exhibit 4, although the top line says in the Supreme Court, was actually the response filed in the Court of Appeals. It was not filed in the Supreme Court. 09:29:01

THE COURT: Okay.

MS. DONE: Mr. Schaye, it does say -- on the file stamp it says Court of Appeals so...

MR. SCHAYE: Correct.

BY MR. SCHAYE: 09:29:07

Q. Okay. This is something that in any case you knew was going to be filed in court.

A. Oh, I filed it. Right.

Q. Okay. And the first line says respondent, Judge Hilliard, through her attorneys undersigned, hereby enters her response 09:29:31

to petitioner's petition for special action. Is that correct?
A. Right.
Q. And would you agree that that indicates that you were representing Judge Hilliard?
MS. DONE: Objection. Leading. 09:29:45
THE COURT: Overruled.
THE WITNESS: Well, the respondent's in the caption. One of them is also the Superior Court of the State of Arizona.
BY MR. SCHAYE: 09:29:56
Q. Sure. And you could have at the beginning said -- instead of respondent Judge Hilliard, you could have said respondent Superior Court?
A. I could have. Right.
Q. But you didn't do that. 09:30:07
A. No.
Q. And then would you take a look at Exhibit 6 in evidence, please?
A. Okay.
Q. What is that? 09:30:32
A. It's an order from the Court of Appeals.
Q. Dated March 9th, 1993?
A. Yes.
Q. And it's an order in the Hurles special action? Is that correct? 09:30:44

A. Correct.
Q. And it orders the parties, and looking at number 2, to brief whether a Superior Court judge who has no administrative interest in the case named as a respondent in a petition for special action has a right to appear through the Attorney 09:31:10
General and be represented in the proceedings. Is that correct?
A. Correct.
Q. And then Exhibit 8 in evidence.
A. Okay. 09:31:33
Q. Is that the supplemental memorandum that you prepared in response to that order?
A. Looks like it is. Let me check the date here.
Yes.
Q. The first line states, quote, respondent Judge Hilliard, 09:31:49
through her attorneys undersigned, and goes on from there, correct?
A. Correct.
Q. So again it does not say that -- it does not say respondent Superior Court. Is that correct? 09:32:08
A. Correct.
Q. And you did not indicate in the memorandum that you did not represent Judge Hilliard, did you?
A. I don't know. I haven't read the memorandum. I probably didn't. Because I did represent her. 09:32:28

Q. Okay. And she was your client.
A. Right.
Q. Now, as far as the application of the specific ethical rules we discussed earlier, did you in this case satisfy the ethical rule that you consult with your client about the case? 09:32:56
A. Well, I -- in my view, my client was the Superior Court of Arizona and Ruth Hilliard, Judge Hilliard, rather, and I consulted with both.
Q. And how did you consult with Judge Hilliard?
A. I called her -- before I prepared the response I called her at the direction of my boss. 09:33:23
Q. And gave her the opportunity for input?
MS. DONE: Objection, Your Honor. Leading.
THE COURT: Overruled.
THE WITNESS: I told her that I was filing a response on her behalf and I asked if she had any input. 09:33:38
BY MR. SCHAYE:
Q. Okay. And you don't recall exactly what she said at this point, do you?
A. I don't recall her exact words but she was not cooperative. 09:33:54
Q. Did she tell you -- did -- she objected to -- that you should not file a response on her behalf?
A. Did she say those words to me? No, she did not.
Q. Did she in some other words tell you not to file a 09:34:18

response on her behalf?
A. She did not tell me not to file a response.
Q. And she didn't say it would be improper for her to defend her order?
A. No, she did not. 09:34:36
Q. And do you recall whether you sent her a draft of the response before you filed it?
A. I don't recall specifically. I honestly don't know. I probably did but I just don't remember.
Q. And Exhibit 4, your response, indicates on page 11 that 09:35:00
your office sent a copy to Judge Hilliard. Is that correct?
A. Correct.
Q. After that, did Judge Hilliard ever contact you to object to the response or any aspect of it?
A. I had no contact with her after that at all, no. 09:35:33
Q. I take it if she would have called you you would have spoken with her.
A. Of course.
Q. And after you received Exhibit 6 in evidence, the order for supplemental briefing, did you have any contact with 09:35:55
Judge Hilliard?
A. No.
Q. So did you make any effort to contact her about specifically the issue regarding her right to appear through the Attorney General? 09:36:17

A. No.
Q. I know this was a long time that the special action was pending, and I feel like I have to ask this, and I apologize, but do you have any conditions or illnesses at this point that impair your memory? 09:36:43
A. No.
Q. You started with the Attorney General's Office when?
A. 1991.
Q. Do you recall when you started working on your first capital case? 09:37:00
A. I don't. I think it was before I filed this response in '93 but I honestly don't remember.
Q. Do you recall whether or not -- do you recall the name of that defendant?
A. I don't because he -- he died when oral argument was pending so all I ever did was file an answering brief. I don't remember his name. 09:37:18
Q. Do you know whether you were in the capital unit when you responded to the Hurles special action?
A. I don't think I was. 09:37:35
Q. Do you remember being assigned to represent Judge Hilliard in your office?
A. Do I remember being assigned?
Q. Yes.
A. Not specifically, no. 09:37:52

Q. And when -- you recall that we interviewed you about this matter back in July?
A. Yes.
Q. Do you recall seeing some handwritten notes at that time?
A. I do, and I remember my penmanship in those notes is embarrassingly bad. 09:38:08
Q. But other than recognizing that they were your writing, you didn't recognize -- you didn't recall having made them, is that correct?
A. I didn't recall directly, but, no, I didn't. They're the kind of notes I would have made in preparation for argument but I -- or for a brief but I don't remember specifically writing them, no. 09:38:23
Q. At the time you're preparing the response to this special action, do you recall speaking to Alfred Fenzel? 09:38:38
A. When was that? What was the question again?
Q. When you were preparing the response to the special action in this case do you recall speaking with Alfred Fenzel?
A. I remember speaking with Alfred Fenzel but I don't think it was in preparation of this response. It might have been later. Because I also did the direct appeal and I did the first PCR. I know I talked to Al Fenzel but I don't know that it was in preparation of this response. 09:39:00
Q. And who is -- who was he at the time?
A. I think he was the prosecutor on the case. 09:39:18

Q. On the underlying criminal case against Mr. Hurles?
A. Yes.
Q. Would you take a look at Exhibit 4 and Exhibit G --
A. G?
Q. -- to Exhibit 4? 09:39:46
A. Exhibit --
Q. G.
A. Okay.
Q. What is that?
A. Looks like an affidavit from Al Fenzel. 09:40:15
Q. When was it dated?
A. March 1st, 1993.
Q. And that's the same date that Exhibit 4 was filed in the Court of Appeals, correct?
A. Yes. 09:40:34
Q. Do you recall how you came into possession of that affidavit?
A. I don't know what you're asking me. I probably talked --
Q. Did --
A. I probably talked to Al before filing the response. Now 09:40:50
I know when I talked to him. It must have been before that.
Q. But you don't recall doing that?
A. Doing what?
Q. Having that conversation.
A. I recall having the conversation. I don't recall exactly 09:41:03

when.
Q. Okay.
A. But now this affidavit tells me when it probably was.
Q. Okay. But you don't have independent recollection that you talked to him about the special action; is that accurate? 09:41:17
A. I don't have an independent recollection of talking to him about the special action. I remember talking to Al Fenzel, yes.
Q. Okay. And Exhibit 8 in evidence is the supplemental memorandum that you filed in the Court of Appeals, correct? 09:41:36
A. Yes.
Q. And that's dated at March 10th, 1993?
A. Yes.
Q. And shows a copy going to Judge Hilliard, correct?
A. Yes. 09:42:11
Q. Did you have any contact with her after that was filed about this case?
A. Ever?
Q. Well, no, within, you know, say, weeks of that.
A. No. 09:42:27
Q. She didn't transmit any sort of objections to the supplemental memorandum to you?
A. Not that I recall, no.
Q. Do you remember writing this supplement?
A. I don't. 09:42:47

Q. Will you take a look at Exhibit 10 in evidence?
A. Okay.
Q. What is that?
A. A petition for special action.
Q. And that's a petition that you prepared? 09:43:23
A. Yes.
Q. And filed in the Arizona Supreme Court on April 20th, 1993?
A. Yes.
Q. And that's from the Hurles special action opinion by the 09:43:35
Court of Appeals, is that correct?
A. It's as a result of. Right.
Q. Do you recall preparing that?
A. No.
Q. Would you take a look at Exhibit 11. 09:43:53
What is that?
A. Petition for special action.
Q. You prepared that as well, is that correct?
A. Yes, I did.
Q. And that is dated April 20th, 1993 at page 7? 09:44:28
A. Yes.
Q. And that also was filed in the Arizona Supreme Court?
A. Yes.
Q. And is also a special action resulting from the Court of Appeals opinion in the Hurles special action. 09:44:47

A. Yes.
Q. Do you recall preparing that?
A. No, not really. Until you showed me these at our interview, I had no memory of filing these at all.
Q. And you represented the State on the direct appeal from Mr. Hurles' conviction and death sentence, is that correct? 09:45:03
A. Yes, I did.
Q. And you also represented the State in the first post-conviction proceeding brought from Mr. Hurles' conviction and death sentence, is that correct? 09:45:24
A. Yes, I did.
Q. And do you recall if you represented the State in the second petition for post conviction relief that he filed?
A. I might have when it was first filed but by the time a response was due I think I had already left the office. 09:45:42
Q. Okay. But you're not sure?
A. I know I didn't file a response but it might have come in the office while I was still there.
Q. And that would have been somewhere around 2000?
A. Right. 2000, 2001. 09:45:56
Q. But you did spend a lot of time working to uphold Mr. Hurles' conviction and death sentence.
A. Yes.
Q. And put a lot of energy into that?
A. Yes. 09:46:13

Q. And prior to our interview in July you read the Ninth Circuit opinion from 2014 in this case?
A. Portions of it, yes.
Q. Do you believe that Mr. Hurles should be executed?
MS. DONE: Objection, Your Honor. This isn't relevant. 09:46:32
THE COURT: Sustained.
MR. SCHAYE: I don't have anything else, Your Honor.
THE COURT: Okay. Miss Done?
CROSS-EXAMINATION 09:46:51
BY MS. DONE:
Q. Good morning, Commissioner French.
A. Good morning.
Q. Exhibit 4, the response to the special action, how did you get the task of responding to the special action? 09:47:06
A. I don't recall specifically but how it usually worked is my boss would --
MR. SCHAYE: Your Honor, I would object as non-responsive and also not relevant unless it relates to this case. 09:47:23
THE COURT: Overruled.
THE WITNESS: I don't recall specifically this case but as it usually worked, particularly in special actions, my boss would just walk down the hall and hand it to me and say prepare a response. 09:47:36

BY MS. DONE:
Q. And do you remember who your boss was at the time?
A. Paul McMurdie.
Q. And do you know how Mr. McMurdie got the assignment or was asked -- 09:47:48
A. Yes.
Q. -- to file a response?
A. I do know.
MR. SCHAYE: I would object to foundation.
THE COURT: Okay. Lay some foundation as to how she knew. 09:47:53
BY MS. DONE:
Q. Do you know how you knew he got the assignment? Did he tell you?
A. He told me. 09:48:01
Q. And how did he get the assignment?
A. He got it from --
MR. SCHAYE: I would object as hearsay.
THE COURT: Overruled.
A. He got a phone call from the presiding judge -- criminal presiding judge of Maricopa County asking that a response be filed. 09:48:10
Q. Do you remember who the presiding criminal judge was at the time?
A. Judge Ron Reinstein. 09:48:19

Q. And did you ever speak to the criminal presiding judge Ron Reinstein before you were given this assignment? Regarding this assignment.
A. Did I speak to him about the assignment before I got it?
Q. Uh-huh. 09:48:34
A. Before I got the assignment?
Q. Yes. Were you part of those conversations?
A. No.
Q. Okay.
If I could have you turn to Exhibit 9, which is the 09:48:42
Court of Appeals opinion in this case, and if you could turn to page 3 once you get there.
Could you read Footnote 2 from the opinion, please?
A. Out loud or to myself?
Q. Out loud, please. 09:49:12
A. Footnote 2.
The record does not indicate whether Judge Hilliard, the nominal respondent, actually authorized such a pleading to be filed. From the statement of the Attorney General at oral argument, the pleading was requested by the presiding 09:49:27
criminal judge, not Judge Hilliard, and there was no contact between Judge Hilliard and the Attorney General's Office as the pleading was prepared.
Q. So do you have any reason to doubt that this is what you told the Court at oral argument? 09:49:43

A. I don't have any reason to doubt it but I don't know that it correctly interprets what I might have said.
Q. Okay.
Do you recall what you told the Court?
A. I don't really recall that. Oral argument was very difficult because this particular issue came out of nowhere. I was not prepared to address this issue at all. It had not been briefed. Judge Hilliard did not assist me in preparing a response, and that's probably what I told them, because she didn't. 09:49:59 09:50:19
Q. Okay.
A. But I had had one phone call with her so I doubt I told them I had absolutely no contact with her, but -- I'd had one contact but she had not assisted in the response at all.
Q. If you were to interpret the Footnote 2 as saying, the very last line of that, that you had no contact as the pleading was prepared, could that be accurate if you contacted her before you were preparing the pleading? 09:50:29
A. That would be accurate. Right.
Q. Okay. So it's your recollection that when you did call Judge Hilliard it was right after you were given the assignment. 09:50:48
A. Right. Exactly.
Q. And not while you were preparing the response.
A. No, it was not. 09:50:59

Q. Okay. Do you recall if you spoke to anyone else at the Superior Court before you started preparing the response or during your preparation of the response?
A. I think I spoke to Judge Reinstein. It was at his insistence that we file the response. He felt very strongly about it. So I'm pretty sure I spoke to him about it. 09:51:14
Q. Could you have spoken to him when you were preparing the petition for special action to the Arizona Supreme Court?
A. I probably did. I was representing him so I probably did. I don't remember exactly. 09:51:32
Q. And you don't remember for sure if you spoke to him when you were preparing the response?
A. I don't remember exactly but I think I did.
Q. You think you did. Okay.
And you said on direct examination that you don't recall if you sent Judge Hilliard any drafts of the response. Could you have sent any response to Judge Reinstein? 09:51:43
A. I could have.
Q. But you don't recall that.
A. I don't. 09:52:15
Q. Okay. So it's possible you didn't send any drafts to the Court.
A. It's possible.
Q. Okay.
And did you ever speak with Judge Hilliard after the 09:52:22

oral argument in this case? Before any more pleadings were filed.
A. No.
Q. Okay. Did you ever get anything from Judge Hilliard to file in preparation with the response? Did you ever receive anything in the office that came from her? 09:52:37
A. No.
Q. What is your understanding of who your client was when you were preparing the response?
A. It was my understanding that it was the Superior Court at the request of the presiding criminal judge. 09:52:48
Q. So your response, Exhibit 4, Mr. Schaye pointed out that it begins, "Respondent, Judge Hilliard, through her attorneys undersigned, hereby enters her response to petitioner's petition for special action." 09:53:11
Would your response, in your opinion, have been any different if that line began respondent Superior Court of the State of Arizona through their attorneys or through its attorney? In your opinion, would your argument and your response have been any different if it was filed on behalf of the Superior Court? 09:53:27
MR. SCHAYE: I would object on relevance.
THE COURT: Overruled.
THE WITNESS: I think it was filed on behalf of the Superior Court, and no, my response would not have been any 09:53:36

different.
BY MS. DONE:
Q. Okay.
And you were asked on direct examination regarding a copy of the response, the very last page of the response -- 09:53:50
well, second to last page -- that it was deposited for mailing and one of the copies deposited was to the Honorable Ruth H. Hilliard.
Did you actually deposit it for mailing?
A. No. My secretary would have. 09:54:10
Q. That would have been your secretary?
And why did you send her a copy -- Judge Hilliard -- send her a copy of this response?
A. Because she was a party.
Q. Is that required by the rules? 09:54:22
A. I think so.
Q. And in the response, if I could take you to page 2, and that's Exhibit 4, the first line of the statement of facts states, "the real party in interest has charged petitioner with the brutal murder of a librarian in Buckeye, Arizona in 09:54:44
November 1992." Do you know where you got the term "brutal" from?
A. They're my own words so from my mind, I guess.
Q. Did Judge Hilliard ever tell you to refer to the murder as brutal -- 09:55:04

A. No.
Q. -- in your response?
Do you recall the facts of this case?
A. Yes.
Q. Do you recall how the victim died? 09:55:14
A. Yes.
Q. And how was that?
A. I believe she was stabbed 37 times, among other injuries.
Q. So in your opinion writing this brutal was an appropriate term for being stabbed 37 times? 09:55:29
A. In my view, yes.
Q. And if I could take you to page 3, it's the last paragraph on that page that starts with, "The real party in interest has listed a total of 22 witnesses."
A. Page 3 -- 09:55:46
Q. Of Exhibit 4. The response.
A. Okay. The last -- where am I looking at again?
Q. It's the last paragraph -- not full paragraph but it starts out the real party in interest --
A. Okay. 09:55:58
Q. -- has listed a total of 22 witnesses to be called at trial.
A. Yes.
Q. You go to the third line it says an examination of the State's evidence illustrates that its case against petitioner 09:56:07

is very simple and straightforward compared to other capital cases, contrary to petitioner's assertion.

And if I could -- if you can keep your hand on that page and then turn to Exhibit G of that same exhibit.

A. I have it. Yes. 09:56:31

Q. Okay. And Exhibit G is the affidavit by Alfred Fenzel.

A. Yes.

Q. Okay. And if you could compare that paragraph with paragraph 4 from the affidavit, and you can just do this to yourself and then I'll have a question for you after you're 09:56:47 done.

A. Okay. I haven't read the whole thing. It's kind of hard to go back and forth here.

Q. In that paragraph on page 3 it continues on to page 4 --

A. Okay. 09:57:37

Q. -- of the response.

And you said earlier, based on your memory of this affidavit, you probably spoke to Mr. Fenzel before filing this response, correct?

A. I must have. 09:57:52

Q. Okay. And the evidence that's listed on page 3 of the response and then also continues on to page 4, is it possible that you got that evidence and that information from Mr. Fenzel's affidavit?

A. I didn't get it from his affidavit. I probably got it 09:58:09

from Mr. Fenzel.
Q. Mr. Fenzel. Okay.
Does it, for the most part, the evidence that's listed on page 3 and 4 of the response match the information that's in Mr. Fenzel's affidavit? 09:58:21
A. Yes.
Q. So do you have any memory of getting any of that information regarding the State's evidence from Judge Ruth Hilliard?
A. I didn't get anything from Ruth Hilliard. 09:58:34
Q. It likely came from Mr. Fenzel.
A. It did come from Mr. Fenzel.
Q. Okay.
And Mr. Fenzel, in his affidavit, the first line, page 4 of the affidavit, paragraph 4, says the State's 09:58:48 evidence in this case is simple and includes but is not limited to the following. And you used the terms that the case against petitioner is very simple and straightforward on page 3.
Could your use of the terms very simple and 09:59:06 straightforward have come from your conversations with Mr. Fenzel?
A. Yes.
Q. Okay. Do you know if you ever saw the grand jury transcript in this case? 09:59:27

A. I didn't.
Q. Is it possible that Mr. Fenzel got some of this information from the grand jury proceedings?
MR. SCHAYE: I would object to that as irrelevant and speculative. 09:59:37
THE COURT: Sustained.
BY MS. DONE:
Q. Do you recall who asked you to draft and file the petitions for special action that were filed in the Supreme Court? 09:59:50
And those are Exhibits 10 and 11.
A. I don't recall specifically, no. Probably my boss but I don't know. I didn't usually -- I couldn't file something without his consent so it was probably my boss.
Q. Okay. 10:00:07
And did you speak to Judge Hilliard about either one of those petitions for special action that were filed in the Supreme Court?
A. No.
Q. So you never got any input from Judge Hilliard for the response for the special action. 10:00:17
A. Correct.
Q. You didn't receive any documents from her.
A. Correct.
Q. Did you receive authorization from her to file this? 10:00:28

A. No.
Q. In the contact that you had with her -- that you said you had with her right after you got the assignment, do you recall what she told you?
A. Not specifically, no. 10:00:44
Q. What was the gist of the conversation?
A. She was not particularly pleased, if I recall, that there was a response being filed and she gave me no information.
Q. Do you recall whether she was aware that a special action had been filed? 10:01:01
A. I don't know. She must have been. I don't know, though.
Q. Okay. You could have told her that there was one filed and you were going to be responding but you don't know if she knew before you talked to her whether one had been filed?
A. I don't know but I -- the judge knows when a special 10:01:19 action is filed before the attorney who is supposed to file a response knows so I know she probably knew about it but she didn't say she knew about it already.
Q. She didn't indicate how much she knew about it?
A. No. 10:01:36
Q. Okay.
MS. DONE: If I could have just a moment, Your Honor?
THE COURT: Okay.
BY MS. DONE:
Q. I just have one more question regarding the response to 10:02:14

the special action, Exhibit 4, if you could go to page 10 of Exhibit 4, please.
A. Okay.
Q. And the paragraph that starts out the state's interest, line 2, if you could read line 2 through line 16, please. 10:02:37
You can just read it to yourself. That's fine.
A. Okay.
Q. Okay. Those two paragraphs, that argument, is that your argument? Did you write this?
A. Yes, I wrote it. 10:03:15
Q. Did Judge Hilliard give you any input on either one of those paragraphs?
A. No.
Q. Tell you what to write?
A. No. 10:03:22
Q. From your recollection, did Judge Reinstein give you any input on either one of these paragraphs?
A. No.
Q. Tell you what to write here?
A. I'm sorry? 10:03:31
Q. And tell you what to write here?
A. No.
MS. DONE: Thank you, Your Honor. I have no further questions.
THE COURT: Okay. Redirect. 10:03:37

REDIRECT EXAMINATION

BY MR. SCHAYE:

Q. Miss Done asked you a series of questions about the contents of the response, Exhibit 4. I am correct that Judge Hilliard never told you that she objected to any of the language that you used in the response? 10:04:07

A. I never spoke to her again, so no.

Q. And as far as you're saying that judges know about special actions, that's because petitions for -- under the rules, petitions for special action have to be served on the trial judge, correct? 10:04:35

A. Yes.

Q. And the trial judge's named as a nominal party in special actions; is that right?

A. Yes. 10:04:50

Q. And the response, Exhibit 4, at page 11, the certificate of service is signed by Donna Lynn Fuller. Is that correct?

A. Signed by -- hold on a second. Signed by who?

Q. Looks like Donna Lynn Fuller.

A. Uh-huh. 10:05:15

Q. Was she an employee of the Attorney General's Office?

A. I think so. I don't remember specifically, but yes, she was.

Q. Okay. You don't have any reason to believe that this was not sent to Judge Hilliard, do you? 10:05:28

A. No.
Q. As far as Judge Reinstein goes, just to make sure we're clear, Exhibit 4, the response that you filed, was filed on behalf of Judge Hilliard. Is that right?
A. And the Superior Court. Exactly. 10:05:48
Q. And then the petition for special action to the Supreme Court, Exhibit 11 in evidence, was filed on behalf of specifically Judge Reinstein.
A. And the Superior Court, yes.
Q. So if you spoke to him it was likely before -- after the 10:06:13
Court of Appeals opinion came down?
MS. DONE: Objection, Your Honor. Foundation.
THE COURT: I'm sorry. What's your objection?
MS. DONE: Foundation.
THE COURT: Overruled. 10:06:30
THE WITNESS: If I spoke to him which time? I don't know what you're talking about.
BY MR. SCHAYE:
Q. About this case.
A. About the Hurles case in general? 10:06:36
Q. Well, the Hurles special action, yes.
A. Which special action?
Q. These proceedings, the ones that went from Superior Court to the Supreme Court.
A. The original special action? 10:06:50

Q. Well --
A. Because you just pointed me to Exhibit 11, which is another special action.
Q. Right. You -- if I understood what you were saying, you thought you had spoken to Judge Reinstein somewhere along the line between -- during your representation in this case. 10:07:04
A. Yes.
Q. And do you believe that was after the Court of Appeals opinion came out?
A. The only time I spoke to him? 10:07:32
Q. During that period about this case.
A. That was not my testimony.
Q. That's what I'm trying to understand. When do you think --
A. Ask me a question. 10:07:43
Q. Do you think you spoke to Judge Reinstein?
A. I know I did. I -- I suppose I did. I don't remember exact conversations but I'm sure that I did speak to him.
Q. But you don't have any recollection of the conversation, the contents of the conversation? 10:07:59
A. It would have been about the response to special action but I don't know the specifics of what was said. I don't remember, no.
Q. Okay. Or when that occurred.
A. Well, there's two special actions you're talking about. 10:08:13

Actually, there's three. So --
Q. Right.
A. Which one are you asking me about?
Q. Well, I'm asking if you talked to him before the Court of Appeals issued their opinion. 10:08:29
A. In the first special action?
Q. That's the only Court of Appeals decision, right?
A. Right. Did I speak to him before that? I think I did, yes. It's very likely that I did.
Q. Okay. Do you recall when you were interviewed on July 8th -- and I'm now referring to the transcript that is marked as Exhibit 13. Do you have that there? 10:08:51
A. Yes.
Q. Look at page 37.
Actually, let's go back to the bottom of page 36, line 23. 10:09:29
I was asking you about filing two special actions in the Supreme Court on April 20th, 1993. Is that right?
A. Yes.
Q. And one of them was on behalf of the Attorney General, right? 10:09:52
A. Right.
Q. And the other was on behalf of Judge Reinstein and the Superior Court.
A. Right. 10:10:02

Q. And then on line 18 of page 37 I asked you, "Did you have any conversation with Judge Reinstein before you filed that petition?" And you answered, "Probably." Is that right?
A. Right.
Q. Is that the conversation that you're referring to today? 10:10:23
A. I have to read what you're asking me. I don't know what you asked me here at the interview.
Let's see. You asked me about the -- in the interview you asked me about the petition for special action on behalf of Judge Reinstein, right? Okay. 10:10:41
Right. So --
Q. Doesn't it make sense that you would have talked to him in preparing the petition on his behalf?
A. Right. I would have. Right.
Q. Thank you. 10:11:05
MR. SCHAYE: I don't have anything else.
THE COURT: I've got one last question.
When you filed your response to the petition for special action and listed Judge Hilliard as the client, why didn't you identify Judge Reinstein as the client? 10:11:20
THE WITNESS: I guess we just didn't think about it. Didn't think of it.
THE COURT: All right. Thank you. You're excused.
THE WITNESS: Am I free to go?
THE COURT: Yes. 10:11:43

This witness is excused, right?

MR. SCHAYE: Yes. Thank you.

THE COURT: Mr. Schaye, you may call your next witness.

MR. SCHAYE: We would call Ruth Hilliard. 10:11:55

THE COURT: We'll go until about 10:30 and then we'll take a short recess.

THE COURTROOM DEPUTY CLERK: Mr. Schaye, are you going to need the same exhibits?

MR. SCHAYE: Well, yes. 10:12:24

THE COURT: Judge Hilliard, would you come up, please, and be sworn?

MR. SCHAYE: Let's add 1 and 2 and 12 and 14.

(Ruth Hilliard duly sworn.)

THE COURT: You may proceed. 10:13:13

MR. SCHAYE: Thank you.

RUTH HILLIARD,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION 10:13:15

BY MR. SCHAYE:

Q. Good morning.

A. Good morning.

Q. You are a lawyer, is that correct?

A. Yes. 10:13:22

Q. And graduated from law school in 1977?
A. Yes.
Q. And then you practiced law for about seven years. Is that correct?
A. Go back and count. 10:13:34
Actually, it was eight before I became a commissioner.
Q. Okay. And what did you do? What was your job?
A. I did civil litigation.
Q. Okay. Represented clients, I take it. 10:13:51
A. Yes.
Q. And you became a commissioner in January of '85?
A. I did.
Q. With Maricopa County Superior Court?
A. Yes. 10:14:04
Q. And then became a judge about a year later?
A. I was appointed by Governor Babbitt on December 26, 1985 and began the judge position, I think, right after the new year.
Q. Okay. And how long did you remain a judge? 10:14:19
A. 26 years.
Q. That was at Maricopa County Superior Court?
A. Yes.
Q. You presided over the trial in Mr. Hurles' case, is that correct? 10:14:35

A. I did.
Q. Do you recall when the trial was? What year?
A. It was maybe '93, '94. I just don't recall. It's over 20 years.
Q. And you imposed sentence in the case? 10:14:49
A. Yes.
Q. And that was a death sentence?
A. Yes, it was.
Q. And did you preside over post-conviction proceedings in the case? 10:15:02
A. Yes.
Q. Do you recall how many?
A. I do not.
Q. You've been retired for about four years?
A. Let's see. 10:15:16
Q. Let me just ask you when you retired.
A. That's a good question.
It was June 30th, 2011.
Q. Did you retire from the legal field completely?
A. No. No. I still do settlement conferences one day a week for the Superior Court. I also act as special master in cases. I do private mediations. 10:15:31
Q. Okay. So all of your practice is kind of in a judge slash mediator role?
A. Yes. I do not represent clients at this time. 10:15:48

Q. Okay.

Now, I take it as a judge you had hundreds, if not thousands, of cases in front of you.

A. Over 26 years?

Q. Yes. 10:16:07

A. Absolutely.

Q. In the vast majority of those, I assume, both parties were represented by counsel?

A. That is not correct. In family court the vast number of litigants were self-represented. 10:16:21

Q. Okay. And how much of the 26 years was in family court?

A. You probably know better than I do because you probably have my record, but let's see, my last assignment at Northeast was family, and I think that was three years, and I think I was on it -- I don't know. Maybe five, six years altogether. I just don't recall. 10:16:39

Q. So if we assume you spent 20 years in other assignments --

A. Approximately. Yes.

Q. -- in those cases were both parties typically represented by counsel? 10:16:57

A. Certainly in criminal, and for the most part in civil as well, yes.

Q. And lawyers came in and appeared for clients, they spoke on their clients' behalves, is that correct?

A. Of course. 10:17:16

Q. And counsel stand in the stead of their clients when they're speaking in court. Is that -- would you agree with that?
A. Counsel speak on behalf of their clients, yes.
Q. And in the cases that the lawyers bind their clients, in other words, if a lawyer makes a representation on behalf of a client, that's considered to be the client's representation. 10:17:35
A. In a general sense I suppose that's correct.
Q. Because lawyers are agents for their clients under the law of agency, aren't they? 10:18:01
A. I'm not sure what you're trying to find out here. In general legal practice when a lawyer makes a statement on behalf of a client is he speaking for the client? Yes.
Q. Okay. And that's accepted as the client's statement unless and until the client says otherwise. 10:18:22
MS. DONE: Your Honor, I'm going to object. She's not been called as an expert in this case. She's a fact witness in this case.
THE COURT: Mr. Schaye?
MR. SCHAYE: Well -- 10:18:33
THE COURT: I don't know that you need to lay this kind of evidence in front of me. I mean, I understand it.
MR. SCHAYE: Okay.
BY MR. SCHAYE:
Q. And I take it you're familiar with the ethical rules that 10:18:43

apply in Arizona?
A. For lawyers?
Q. Yes.
A. Yes.
Q. Okay. And they're part of -- and when you were presiding you would expect that the lawyers would consult with their clients. Is that a fair statement? 10:18:56
A. Tell me, please, a specific type of case that you're speaking about. You mean in a general sense before a lawyer makes a statement should he or she have spoken with his or her client? 10:19:31
Q. Yes.
A. I would assume so, unless there was some agreement that had been entered into previously that would address whatever representation was being made. 10:19:43
Q. Okay. And lawyers have a duty to keep their clients informed about their case. Is that a fair statement?
MS. DONE: Objection, Your Honor. She's not been called as an expert witness.
THE COURT: Overruled. 10:19:57
THE WITNESS: Would I expect an attorney to be keeping his or her client updated as to what was happening? I would expect that, yes.
BY MR. SCHAYE:
Q. Okay. And if you were a client or if -- I'm sorry. If a 10:20:10

lawyer was a client in a matter, would you still expect the lawyer to follow the ethical rules?
A. If a lawyer were a client in a civil case --
Q. Yes.
A. -- you're asking? 10:20:33
I would expect everyone to be following ethical rules.
Q. If you were a client would you expect your lawyer to talk with you about the objectives of the representation?
A. Since I have not been in litigation, it's hard for me to 10:20:53
project that, but I would assume that anyone I hired would be following ethical rules, yes.
Q. Okay. Certainly you would expect lawyers who appeared before you to make -- to not make -- not to lie to you.
A. Say that again, please. I'm sorry. 10:21:27
Q. You expect lawyers in front of you to tell the truth.
A. Yes.
Q. And if someone was speaking for you in court if you had a lawyer you would want them to get the facts right as you provided them? 10:21:51
A. Yes. And if that person did not I would make sure that the person knew that he or she was not being accurate.
Q. Okay. And if the person made -- provided inaccurate information, false information to the Court, you would correct that, wouldn't you? 10:22:11

A. If I knew it were false?
Q. Yes.
A. If someone were -- if a lawyer was making a presentation to me that was incorrect, that I knew was incorrect, would I question that lawyer about it? 10:22:28
Q. If you were the client and your lawyer made false statements, would you correct him?
A. I would. But that's my --
Q. Sure.
A. -- personality. Yes. 10:22:43
Q. And you would expect the lawyer to represent your position, to present your position.
A. You're asking me a theoretical question.
Q. Yes.
A. Yes, I would. 10:22:57
Q. And you would not want your lawyer to do anything that would be prejudicial to the administration of justice, would you?
MS. DONE: Objection, Your Honor. Leading.
THE COURT: You know, this isn't really very helpful. 10:23:09
MR. SCHAYE: Okay.
THE COURT: So why don't we move on and get to the facts of the case.
BY MR. SCHAYE:
Q. Well, let me just ask you, and I'm sorry to have to ask 10:23:16

this question before I do, but do you suffer from any illness or condition that impairs your memory?
A. No.
Q. During your 26 years on the bench you had many, many trials. Is that a fair statement? 10:23:40
A. Yes.
Q. And is it difficult to remember particulars about individual trials?
A. Of course. But some things stand out very clearly in certain cases. 10:24:01
Q. Okay. Do you recall whether Mr. Hurles' trial was the first capital trial before you?
A. I don't believe it was.
Q. Okay. Do you recall when I interviewed you -- when we interviewed you on August 5th, 2015 about this matter? 10:24:14
A. I recall the interview, yes.
Q. Okay. And would you take a look at Exhibit 14, please?
A. Yes. I was never provided a copy of this transcription, of course, but I have it.
Q. Okay. Could you take a look at page 9? 10:24:43
And just -- if you would just read it a bit and see if it appears to you to be an accurate transcript or transcript of that interview?
A. On that page?
Q. Well, if you would want to take a minute and -- 10:25:03

A. I'm not going to read the whole transcript. It says 32 pages. So --

THE COURT: What are you asking her?

MR. SCHAYE: Okay.

BY MR. SCHAYE: 10:25:16

Q. If you would look at page 9 -- maybe I --.

MR. SCHAYE: Can we stipulate that it is a transcript of the interview?

MS. DONE: This is not the transcript we have so -- we have a different transcript, so -- are you trying to 10:25:29 refresh her recollection or -- I mean, what --

BY MR. SCHAYE:

Q. Do you recall, in going back to page 9, line 3, being asked whether you recall whether Mr. Hurles was your first capital trial? 10:25:55

A. Well, it says did I have any capital cases prior to Mr. Hurles' case and I said I think I did.

Q. Okay.

A. That's what I just said. I believe --

Q. You said -- 10:26:04

A. -- I had others.

Q. -- you weren't positive. It's not a fact that would have stayed in your mind?

A. Pardon me? Was it --

Q. Was -- 10:26:14

A. Would I have remembered if Mr. Hurles was the first capital case I had? That's not something I would remember. I'm sorry. I know I had multiple capital cases. Mr. Hurles was the only case in which I imposed the death penalty.
Q. Do you recall the names of any of the other capital defendants that were before you? 10:26:27
A. That is not a fact or something that I would ever remember.
Q. Do you recall how many capital trials you presided over?
A. Not really. I mean, I know that there were -- I think I was on a criminal assignment over nine years. I just cannot recall. But I do recall that -- I recall the facts of at least two. One happened up near Bumble Bee and the other was out west. I just don't remember the names. I remember at least those. There may have been more. But I just don't remember. There were cases -- I'm sorry. Those are -- there are at least two others that I can recall. 10:26:46 10:27:10
Q. And in the Hurles case do you recall that there was a special action filed before the trial?
A. No. 10:27:30
Q. You don't --
A. I don't remember that. I -- you know, I just haven't gone back to look at any of this. I just don't recall it. This is over 20-some-odd years ago.
Q. Okay. But after you were interviewed in July did that 10:27:42

refresh your recollection?
A. You mean August?
Q. I'm sorry. August.
A. Did it refresh my recollection?
Q. That there had been a special action. 10:27:55
A. I really have not thought about this and I have not gone back to look at any of the documents. I -- if you tell me there's a special action, I believe there was, but I have to say that there have been so many other cases since Mr. Hurles it's hard to remember the specifics. I know you all have 10:28:13 gone back and looked at all this very carefully but I have not.
Q. Okay. So am I safe in saying you don't recall whether you spoke with Colleen French while that special action was going on? 10:28:42
MS. DONE: Objection. Leading.
THE COURT: Overruled.
THE WITNESS: I have no recollection of speaking with Colleen French during the special action.
BY MR. SCHAYE: 10:28:48
Q. Okay.
A. Because I don't remember the special action and I just don't remember ever speaking with Colleen French about anything related to this case, other than in the courtroom, and that was not speaking with her, that was in the 10:29:05

litigation process. There was no outside --
Q. You said -- I didn't hear your last --
A. What I'm saying is we never had any conversations that I recall about anything; only in the courtroom when we were in litigation. 10:29:20
Q. Okay.
A. And that would not be a conversation. So...
Q. Right. And that would have not been before the trial, would it?
A. I don't recall any discussion with Miss French. 10:29:34
Q. Okay. I'm saying when she -- if she appeared in court on this case it would have been sometime after the trial, wouldn't it?
A. I don't recall. I just don't recall. I'm sorry.
Q. Okay. No. That's fine. 10:29:54
THE COURT: This a good place for a break?
MR. SCHAYE: Sure.
THE COURT: Okay. Let's recess until 10:45.
(Proceedings recessed at 10:30 a.m.)
(Proceedings reconvened at 10:45 a.m.) 10:41:02
THE COURT: Please be seated.
Mr. Schaye, you may continue.
MR. SCHAYE: I'm sorry, Judge?
THE COURT: You may continue.
MR. SCHAYE: Thank you. 10:45:30

BY MR. SCHAYE:
Q. Prior to our interview in August of last year, did you read the Ninth Circuit opinion in this case from 2014?
A. I think I may have skimmed it.
Q. Have you looked at it since? 10:45:50
A. No, I have not.
Q. Okay.
Now, if you would take a look at Exhibit 4 in evidence.
You see the first line begins, "Respondent, 10:46:23
Judge Hilliard, through her attorneys undersigned"? Is that correct?
A. I see that.
Q. Okay. I just want to make sure. You don't have any recollection of seeing this document back in 1993? 10:46:37
A. I did not request that any special action be submitted. I have no recollection of this.
Q. And at page 11 it indicates that a copy was sent to your chambers. Is that correct?
A. That's what it says. It probably was. I just -- 10:47:07
Q. Okay.
A. -- don't recall.
Q. Do you know if you read the response, Exhibit 4, at that time?
A. Say that again, please. I'm sorry. 10:47:23

Q. Do you recall if you read the response, read Exhibit 4 back in March of '93?
A. Absolutely no recollection.
Q. Okay. If you saw that a -- well, let me ask you. Was it your understanding that the Attorney General represented the named judge in all special actions? 10:47:47
A. Yes.
Q. And special actions were relatively common?
A. I don't know what relatively common means but there were special actions filed, and any time there was a special action I would notify the presiding criminal judge, who would then refer it on to the Attorney General's Office. 10:48:10
Q. Okay. And so it was your understanding -- and I'm sorry if I'm going back -- but that the Attorney General represented judges in all special actions in criminal cases? 10:48:31
A. I think you just asked me that.
Q. Okay. I just want to make sure.
A. It was my understanding at the time.
Q. And if we take as a proposition that that was not the case, that it was extremely rare for the Attorney General to do so, would that have made it more likely that you would have read the response? 10:48:53
A. I have no recollection of reading the response. And your hypothetical is not consistent with my recollection of what happened when a special action was received. 10:49:14

Q. Okay. If you -- when you were a judge, if you saw -- well, actually, strike that.

If you saw a pleading or brief filed under your name, would you be concerned about its contents?

A. You mean a response to the special action? 10:49:40

Q. Well, just in general. If you saw a pleading that said Ruth Hilliard through counsel says X, Y and Z.

A. Well, if --

MS. DONE: Objection, Your Honor. Vague.

A. -- it's a special action -- 10:49:54

THE COURT: Hold on a second.

What was your objection?

MS. DONE: Vague. The question was vague.

THE COURT: Overruled.

THE WITNESS: If it was a special action and a standard procedure was to have the Attorney General represent me, I did not -- it would not cause me to read a response. 10:50:02

BY MR. SCHAYE:

Q. Okay. If it was not a special action, say you just saw a pleading filed in a court in an unusual situation under your name. 10:50:21

A. Please be more specific because that's just too hypothetical. I can't imagine a situation where that would happen.

Q. All right. Let me try it this way. If you received a 10:50:43

pleading in state versus Jones that's a Maricopa County Superior Court case and it said intervening Ruth Hilliard through counsel says the following, would you be concerned with whatever was contained in that?

A. I cannot imagine that situation where I'd be intervening in something as a judge. 10:51:21

Q. Okay.

So you would agree that the rules require that the canons -- the judicial canons require judges to be unbiased.

MS. DONE: Objection. Leading. 10:51:50

THE COURT: Overruled.

A. Yes.

Q. And to avoid the appearance of bias?

A. To avoid the appearance of impropriety, is that what you said, or bias? 10:52:00

Q. Yes.

A. Yes.

Q. I'm sorry?

A. I answered yes.

Q. Okay. I'm sorry. I didn't hear you. 10:52:25

A. I was waiting for the next question.

Q. I just want -- regardless of how common it was, I just want to make sure I'm clear.

So if the Attorney General filed a brief that said the Honorable Ruth Hilliard, through counsel, makes the 10:52:45

following factual allegations, you wouldn't feel it necessary to read that?
A. I -- I'm sure I did not read every response to a special action filed on my behalf.
Q. Okay. If you read it and it contained statements of fact that were not accurate, what would you do? 10:53:05
A. You're asking me a hypothetical question. If something were incorrect in a response, if I read it, I would probably bring it to someone's attention, but I am fairly comfortable that I did not read every response ever filed to a special action. 10:53:28
Q. I understand.
And if it made -- if you read it -- read a response in your name and for whatever reason thought it should -- it was improper for it to even be filed, would you have taken action? 10:53:48
A. Say that again, please.
Q. If you read a response filed under your name and believed that it was improper under the ethical rules for it even to be filed, what would you do? 10:54:06
MS. DONE: Objection. Calls for speculation.
THE COURT: Overruled.
THE WITNESS: I'm hard-pressed to find a situation where finding a response would be unethical so I -- I can't answer that. I'd have to see something specifically to be 10:54:21

able to answer.
BY MR. SCHAYE:
Q. Do you think it appropriate for a trial judge to defend his or her own rulings in an appellate court?
A. It's not something I have done so I -- I -- I don't know the situation. You have to be very specific. I don't know. 10:54:47
Q. Do you think it would have been appropriate for you to defend your ruling denying second counsel in the Hurles case?
A. In what setting? I'm not sure what you're --
Q. In a special action. 10:55:16
A. I didn't file a response to the special action individually, personally, so are you asking is it inappropriate for the Attorney General's response to have done that?
Q. Under your name, yes. 10:55:32
A. I don't know. I -- I don't even recall the special action so...I'm struggling to be able to answer your question.
Q. And at the time you retired you had notes regarding the trial and sentencing processes in this case. 10:55:50
MS. DONE: Objection. Leading.
Q. Is that correct?
THE COURT: Overruled.
A. I have no idea. That was in 199 -- in the 1990s. I retired in 2011. I -- I have no idea. I don't -- I don't 10:56:10

recall keeping Mr. Hurles' notes after the Arizona Supreme Court affirmed the sentence and very specifically saying if there was ever a case for death penalty it was this one. I just don't recall keeping them. I had many, many notes on many, many cases. I just don't recall. 10:56:39

Q. Okay.

Could I ask you to look at Exhibit 14, the transcript of August 5th?

A. Sure.

Q. Page 14. 10:56:50

A. It says I got rid of everything.

Q. You read the first six lines?

A. I guess I disposed of them. I just don't recall. I don't have any in my possession that I'm aware of.

Q. Okay. And do you recall at the time saying that you 10:57:15 retired -- "I retired four years ago and got rid of anything. I had no reason to believe there would be any need. I don't even know if I had -- I mean, I'm sure I had notes of the trial process but I -- and sentencing but I'm sure I disposed of them when I retired." 10:57:33

A. And I well may have disposed of them prior to retirement because I had to when I changed assignments; I could not be dragging all of my notes from the many years all around. I just am not positive.

Q. Okay. 10:57:47

MR. SCHAYE: I don't have anything else.
THE COURT: Okay. Miss Done?
MS. DONE: Does she have Exhibit 21 up there?
THE WITNESS: I do not.
MS. DONE: Okay. 10:58:36
Thank you.

CROSS-EXAMINATION

BY MS. DONE:
Q. Good morning.
A. Good morning. 10:58:47
Q. Do you remember Mr. Hurles' case?
A. I do. Not every specific instance but I certainly recall the trial and sentencing.
Q. Is there any specific reason why you remember this case versus other cases or -- 10:59:00
A. I remember this case so specifically because I never before that imposed a death penalty and I do not support the death penalty and did everything possible in my analysis to not impose the death penalty and I recall it very clearly because I did impose it. 10:59:20
Q. This is the only --
A. I recall the sentencing so clearly.
Q. Okay. So this was the only case you ever sentenced a defendant to death?
A. Yes. 10:59:29

Q. Okay.
A. Hesitantly, because I hesitate to ever impose a death penalty, not based on the facts of this case.
Q. Okay. Thank you.
Do you recall in this case that the special action 10:59:43
came from a request for second counsel that you denied?
A. I don't recall anything about the special action.
Q. In general, I guess, since you don't recall specifically about this case, if someone had requested second-chair counsel
would you have conferred with anybody else in the court before 11:00:05
making a decision on that request?
A. Absolutely. I checked on almost every criminal issue that I had concern about with either Mike Ryan, Ron Reinstein, Mike Wilkinson, Greg Martin, other judges who had
a lot of experience in criminal cases, and I'm sure on 11:00:29
something like that I would have checked with multiple people.
Q. So do you have any reason to believe based on your experience and what you just testified to that you would have
spoken to somebody about the request for second-chair counsel 11:00:45
before you denied the request?
A. I am sure I would have because I did that on a lot of issues in criminal.
Q. Okay. Do you recall if there was any policies or even if they weren't written understandings at the court at that time 11:01:00

regarding second-chair counsel appointments?
A. Gosh, you're going back over 20 years. As I recall, there was some financial issues going on when I was on criminal and I know -- I mean, I vaguely recall there was some question about available funds for that, but I -- it's all just a vague recollection. I have not gone back to talk to anyone about anything and I -- I can't answer any more details than that. 11:01:21
Q. Okay. Do you know whether or not it was commonplace for counsel to ask first for second-chair counsel from the contract administrator? 11:01:45
A. I have no recollection.
Q. Okay. And were you involved in that process at all?
A. No. That would have been referred to -- I can't remember who the administrator was. I just can't remember who it was, but they would go directly to them, as I recall. 11:01:58
Q. Okay. And you weren't involved in that part?
A. No.
Q. Okay.
Do you recall when you learned a special action had been filed in Mr. Hurles' case? 11:02:10
A. I don't.
Q. Do you recall -- do you know if you learned about it at the time it was filed?
A. I assume we would have gotten a copy of a special action, 11:02:24

and as routine my judicial assistant would have then contacted the presiding criminal judge, who would have referred to it the Attorney General's Office. I didn't read special actions necessarily that came in.

Q. In your experience -- how long did you have your judicial assistant, do you know, that you had at the time? 11:02:43

A. Well, she -- how long had she been with me at that point?

Q. Yes.

A. I don't know. I don't remember. But she stayed with me until I retired. 11:02:58

Q. Did you guys have a routine at all in general, like did she know how you wanted things done?

A. If a special action came in, I'd say notify the presiding criminal judge. The presiding criminal judge took care of it. 11:03:14

Q. Could she have notified the presiding criminal judge about the special action without telling you it came in?

A. She could have.

MR. SCHAYE: Objection. It's speculative.

THE COURT: Sustained. 11:03:30

BY MS. DONE:

Q. Do you recall -- have you ever read the special action?

A. I don't recall.

Q. Okay. Do you recall if you've ever read the response to the special action? 11:03:44

A. I just don't recall.
Q. At this point maybe you've never read it?
A. I just don't recall reading it.
Q. Okay. You haven't read it recently, have you?
A. No. 11:03:54
Q. Okay. And you testified that you generally didn't read special action petitions?
A. Correct.
Q. Would there have been a particular instance you remember reading one and a reason why you read it, like what would have 11:04:05
made it more common for you to read it than not read it, I guess?
A. Honestly, I can't remember reading a special action. I mean, I may have read this one because it was, you know, a first degree murder case, but I just don't recall it. 11:04:22
Q. Okay.
A. Frankly, calendars are very busy and I just -- I can't remember.
Q. Okay.
And do you recall ever receiving the reply in the 11:04:35
special action?
A. I don't -- I don't recall it, and if it shows it was delivered to my office, I'm sure it was received, but I don't rememberer sitting down and reading it.
Q. Okay. And is that the same -- it wasn't common for you to 11:04:51

read replies for special actions?
A. It wasn't because I -- this was an issue that was up before the Court of Appeals. It was the Court of Appeals' decision that was then going to be deciding the issue and I frequently didn't have the time to do it. I may have. I just don't recall. 11:05:09
Q. Did you feel like you needed to read it because you needed to do something with it? Ever?
A. I don't.
Q. Did you ask to be represented in the special action? 11:05:21
A. Individually personally?
Q. Yes.
A. No. 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 11:05:35
Office would then take care of it.
Q. Would the presiding criminal judge have called you and said do you want me to send this over to the Attorney General's Office?
A. No. 11:05:45
Q. Okay. So then it's fair to say you didn't solicit a response to the special action?
A. No. No, no, no.
And I think I misspoke before when I was questioned by Mr. Schayes about whether I spoke with Colleen French. I 11:05:58

don't remember ever speaking with Colleen French in the courtroom or not about anything related to this. I just want to clear that up. Because I think I said in the courtroom I may have spoken with her but we didn't do that.
Q. So there was just pleadings but no -- 11:06:14
A. There was no face-to-face, no, not at all.
Q. So you don't recall Commissioner French ever contacting you about the response?
A. I don't.
Q. If she's testified that she contacted you but you gave her 11:06:28 nothing in the contact, is that possible?
A. Possible.
Q. Okay. Do you recall ever receiving any drafts of the response to the special action?
A. No. 11:06:47
Q. Okay. Did you provide any input in any format for the response to the special action?
A. I can't imagine.
Q. Meaning did you have your JA send any documents over to Commissioner French or -- 11:07:08
A. I have absolutely no recollection of anything of that sort.
Q. Okay. And based on your testimony that you just gave, you didn't provide any input on the oral argument, either, to Commissioner French? 11:07:24

A. Oh, no.
Q. Okay. I'm talking about the oral argument for the special action.
A. Yes. I understand. I absolutely did not.
Q. Okay. And if there was supplemental briefing ordered in this case after the oral argument did you ever provide any input to Commissioner French regarding that supplemental briefing? 11:07:32
A. No.
Q. Okay. 11:07:43
A. I have no recollection of anything of that sort.
Q. Okay.
In your opinion, did you authorize their response to the special action?
A. Individually? 11:07:54
Q. Yes, individually or personally authorize.
A. No. It was just -- I mean, we followed the procedure and I expected that a response would be filed because that's typically what happens, if the Attorney General deems it appropriate to file a response. 11:08:11
Q. Okay.
A. But I didn't contact anyone and say, yeah, go ahead and do this for me.
Q. Okay.
So you didn't read the special actions -- 11:08:25

A. Not that I recall.
Q. -- or the responses generally. You weren't a part of them at all. So your presumption that the Attorney General always entered an appearance on your behalf is -- that's just what you presume based on the procedures that happened in your court. 11:08:42
A. Yes.
Q. But you don't know that specifically if that's what happened in every case?
A. Well, I'm not aware of any special action where that didn't happen, but I don't remember having that many special actions. 11:08:55
Q. But you didn't always read them.
A. No.
Q. Or the responses. 11:09:04
A. I didn't.
Q. So is it possible that the real party in interest, the State, could have filed the response and not the Attorney General?
MR. SCHAYE: Objection. Calls for speculation. 11:09:13
THE COURT: Overruled.
A. I guess anything is possible, but I don't know.
Q. Okay.
And Mr. Schaye showed you Exhibit 4, which is the response to the petition for special action, which you said 11:09:35

you don't recall if you've ever seen it.

So is it fair to say you don't recall if you ever read the first line of that response to the petition for special action?

A. Right. 11:09:49

Q. Which says respondent Judge Hilliard through her attorneys undersigned hereby enters her response to petitioner's petition for special action.

A. Right.

Q. Okay. So it's possible you never saw that -- 11:09:57

A. Very possible.

Q. -- at the time this was filed?

A. Very possible.

Q. In your opinion, was the Attorney General's Office representing you personally in this response? 11:10:08

A. Would have been representing my position --

Q. Your --

A. -- as the judge who was presiding over the case.

Q. Okay.

And you didn't write this, correct? Exhibit 4. 11:10:26

A. No.

Q. Do you feel responsible for what was written in this response?

A. No.

Q. So if the term "brutal" is used to describe the murder, is 11:10:36

that your term?
A. I didn't have input into it so that wouldn't have been my term.
Q. And if the term "very simple" -- terms "very simple" and "straightforward" was used to describe the State's evidence against Mr. Hurles, that wasn't your term, correct, or terms? 11:10:55
A. I don't believe so.
Q. Okay.
Did Mr. Hurles' attorney filing this special action have any effect on your subsequent rulings in this case? 11:11:19
MR. SCHAYE: Objection, Your Honor. I don't think that's relevant.
THE COURT: Yeah. I'm going to sustain the objection.
BY MS. DONE: 11:11:34
Q. You said you don't recall how many PCRs were filed in this case. Post-conviction relief petitions.
A. I remember PCRs. No. I don't recall how many there were.
Q. Okay. Do you recall in the second PCR a motion for disqualification being filed for you? 11:11:53
A. I really don't, but if so, that would have gone to the presiding criminal judge.
Q. Okay. Do you recall that judge being Judge Ballinger? And I hope I'm saying his name right. 11:12:15

A. You're saying it correctly.
Q. Okay.
A. I don't recall. It may have been.
Q. If a motion to disqualify you had been filed and referred to Judge Ballinger, would you have spoken to Judge Ballinger about that motion before he ruled on it? 11:12:27
A. Absolutely not.
Q. Given him any input on how he should rule on it?
A. Absolutely not.
Q. And why? 11:12:39
A. Because I don't think that's appropriate; it's his decision to make without any input from me.
Q. And if I could have you turn to Exhibit 21, that's the one she gave you last.
A. Yes, I have it. 11:12:53
Q. If you just want to glance through it and tell me if you recognize that and know what it is.
A. Well, it looks like it's a minute entry of mine, a ruling on a post-conviction relief. Yes.
Q. And the first line of the minute entry, does it refer to defendant's second petition for post-conviction relief? 11:13:17
A. Yes.
Q. So based on this document, it's a ruling that you made on his second PCR, correct?
A. Apparently, yes. 11:13:33

Q. Okay. And the first headnote under that judicial disqualification, does that refresh your recollection at all about what one of the issues was that was in this PCR petition?
A. Well, I can read it, but I just don't remember. I'll be honest. 11:13:49
Q. Yeah. If you could read starting with "judicial qualification" to about halfway down page two, just to yourself.
A. (Doing so.) 11:14:16
You want me to read the whole section on judicial disqualification?
Q. No, just through the first paragraph is fine on page two that ends with the health services acquisition that --
A. Hold on. Let me just take a second to look at this, because it's been -- 11:14:29
Q. Sure?
A. -- many years since this was done.
All right. Go ahead, please.
Q. The last line on page 1 that continues on to page 2 that says defendant argues that because the Court of Appeals determined that the response filed on behalf of this judge, parens, without her input, end parens, was wrong. This judge is thereby precluded from hearing any further matters in this case. 11:15:03 11:15:22

Did you write this?
A. I assume I did.
Q. Would you have had anybody else write your minute entries --
A. Oh, no. 11:15:30
Q. -- at that time?
Okay.
A. At any time.
Q. At any time. You always authored them yourself.
A. Yes. 11:15:36
Q. Okay. The parens part that says without her input, do you remember writing that?
A. I assume I did.
Q. Okay. Can you tell us what that means?
A. Only what it says. 11:15:49
MR. SCHAYE: Your Honor, if the witness doesn't recall writing it I don't think it's appropriate for her to now interpret it.
THE WITNESS: I must have written but --
THE COURT: Hold on. 11:16:03
Overruled.
You can answer now.
THE WITNESS: I'm sorry. I don't recall -- recall what -- I don't recall all of the thought processes that went into this ruling, but it was my minute entry so it was my 11:16:18

ruling.
BY MS. DONE:
Q. But am I correct in reading this to say that the response that was filed on your behalf in the special action in those parentheses where -- 11:16:32
MR. SCHAYE: I would object. This has been asked and answered.
THE COURT: Overruled.
BY MS. DONE:
Q. Am I correct in reading this that it says that the response that was filed on your behalf in the special action that it was filed without your input? Is that what you're trying to say there? 11:16:43
A. Yes.
Q. Okay. And this was filed in 2002. 11:16:55
A. Yes.
Q. So approximately nine years after the special action. Correct?
A. That is correct.
Q. And was your memory regarding whether you had input in that response better back then nine years after than it is now? 11:17:18
A. Anything would be better than it is right now. Yes, it would have been better then.
Q. Okay. Thank you. 11:17:32

And if I could have you go to the very next paragraph there, it starts off the trial judge...
A. (Coughing.)
Q. And I was going to have you read that out loud, that paragraph, but I'd be happy to do it if you'd prefer me to with your cough. 11:17:51
MR. SCHAYE: My additional objection would be that the Ninth Circuit has already found that this minute entry was based on an unreasonable determination of fact. So I don't believe it's an appropriate basis for testimony at this hearing. 11:18:08
THE COURT: So your objection is relevance?
MR. SCHAYE: Yes.
THE COURT: Okay. I haven't heard the question yet. Let me hear the question first and then you can state an objection. 11:18:19
Where are you going with this?
MS. DONE: Well, I just want to have that paragraph part of the record because the Ninth Circuit said --
THE COURT: Well, it is part of the record because it's an exhibit that's been admitted, isn't it? 11:18:29
MS. DONE: Yes. But there's a specific sentence in it that I want to ask her about --
THE COURT: Okay.
MS. DONE: -- in that second paragraph. 11:18:38

THE COURT: Go ahead.
BY MS. DONE:
Q. That starts out, "The trial judge is presumed to be impartial and the party who seeks recusal must prove the grounds for disqualification by a preponderance of the evidence." 11:18:45
So you wrote this, correct?
A. Yes.
Q. Okay.
"The facts here do not support disqualification, and another judge, Judge Ballinger, so determined. In the special action in this case, the Attorney General filed a response on this judge's behalf without any specific authorization of such pleading." 11:18:52
Again, you wrote that, correct? 11:19:06
A. Yes.
Q. And your memory back then, nine years after the special action, is probably better than it is now, correct?
A. Yes, but I'm sure specific authorization meant I did not specifically contact anyone to say file this on my behalf. 11:19:17
Q. Where it says, "No contact was made by this judge with the Attorney General and this judge was a nominal party only," that was your belief at the time?
A. Yes.
Q. And are you aware of any further special actions that were 11:19:37

filed in this case with the Arizona Supreme Court?
A. I'm not.
Q. Did you have any input that you recall in those?
A. No.
Q. Okay. You don't even remember them. 11:19:50
A. I do not.
Q. Okay.
If I could just have a moment, Your Honor?
THE COURT: Okay.
MS. DONE: I have nothing further, Your Honor. 11:20:15
THE COURT: Okay. Redirect.

REDIRECT EXAMINATION

BY MR. SCHAYE:
Q. Miss Done asked you about you may have spoken to others about -- other judges about rulings before you made them. 11:20:32
A. About legal issues regarding criminal cases, yes.
Q. Yes. But once you made the ruling, that was your ruling, correct?
A. Yes.
Q. And just to make sure I'm clear, as far as this special action goes, the Hurles special action, you just don't recall if you received or read the response. 11:20:50
A. I have no recollection. I assume it was received if it was said that it was delivered to my office, to my chambers, but I have no recollection of reading it. 11:21:16

Q. Might have, might not have.
A. I have no recollection of reading it.
Q. Okay. Or of any draft that was sent.
A. What? Are you suggesting I may have received a draft? I have never received, as I recall, a draft of any special action or response ever. 11:21:36
Q. In Exhibit 21 --
A. Just a moment. Let me get it. Thank you.
Q. Page 2.
In the middle of the second paragraph Miss Done asked you about the statement that the Attorney General filed a response on this judge's behalf but without any specific authorization. 11:22:02
Would that also indicate or refresh your recollection that it was not over an objection by you? 11:22:20
MS. DONE: Objection. Leading.
THE COURT: Overruled.
THE WITNESS: I don't understand. Would you ask that again?
BY MR. SCHAYE: 11:22:32
Q. When you say this response was filed without specific authorization from you --
A. Yes.
Q. -- are you also indicating that it was not -- if you had objected to it, would you have said you objected to it? 11:22:44

MS. DONE: Your Honor, that assumes that she read this, the response to the special action.

THE COURT: Overruled.

THE WITNESS: Yeah, what I -- as I explained during cross, I did not specifically request anyone or authorize anyone to file this other than the routine procedure. I don't have any recollection of reading and no basis and therefore would not haven objected. I hope that answers your question. I'm not sure I understood it. 11:23:01

BY MR. SCHAYE: 11:23:25

Q. Yes.

A. Okay.

Q. Did you have a policy in your chambers of when mail came in that was either pleadings or briefs, did that all end up on your desk? 11:23:42

A. All mail went through my judicial assistant. I did not look through mail first.

Q. I understand, but was your judicial assistant required to give you any mail that was in the form of a pleading or court document? 11:24:02

A. Sure, but it would probably be -- I mean, she would process all of the mail that came in. If something was awaiting a response, she would keep that with all of the other documents until everything was ready to submit to me for a ruling. 11:24:17

As far as response to special actions, I just don't recall. I don't recall any set procedure for responses to special actions because typically if there was an action that was up before the Court of Appeals I would wait until the Court of Appeals ruled and I would just follow whatever the 11:24:35
Court of Appeals indicated. Whatever the ruling was, I would then incorporate that into the trial.
Q. Your judicial assistant would at some point, whether it was when it came in or when a response was due.
A. You mean did she give it to me? 11:24:53
Q. Yes.
A. Maybe. I mean, I just don't recall. I just don't recall. She may have but I may have said just put it with everything else. Probably, if she did give it to me, I would have said put it with the special action, let's wait to see 11:25:12
what the Court of Appeals does.
Q. Okay. But you would expect, would you not, as a judge. For at least you to see it?
A. Yeah, I'm sure it would have crossed my in basket.
Q. And what about if it was an order from the Court of 11:25:26
Appeals?
A. If it was a ruling from the Court of Appeals I would have looked at it, of course.
Q. Okay. And would you look at Exhibit 6 in evidence, please? 11:25:40

A. Yes.
Q. Number 2. The Court wanted supplemental memorandum on whether a Superior Court Judge who has no administrative interest in the case named as a respondent in a petition for special action has a right to appear through the Attorney General and be represented in the proceedings. 11:26:06
A. Okay.
Q. You have no recollection of that?
A. I have no recollection of it.
Q. Okay. Do you think it would have caught your attention? 11:26:19
A. I can only speculate. I don't know.
Q. And --
A. But again, I would not have filed a response. I would have -- if I noted it, it would have just been noted.
Q. Miss Done asked you if your recollection would have been better in the early 2000s. If you had your notes, your contemporaneous notes, those would have been likely to be able to help refresh your recollection, wouldn't they? 11:26:40
A. I have no recollection of whether I had notes at that time. 11:27:02
Q. But if you did you destroyed them?
A. Yeah. I mean, when I retired I got rid of a lot of stuff.
MR. SCHAYE: That's all.
THE COURT: Okay. You can step down. 11:27:11

Appendix C

IN THE SUPREME COURT
STATE OF ARIZONA

RICHARD HURLES,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF ARIZONA, in and for Maricopa County, THE HONORABLE RUTH H. HILLIARD, Judge,

Respondents,

and

THE STATE OF ARIZONA, ex rel., RICHARD ROMLEY, Maricopa County Attorney,

Real Party in Interest.

No. SA 93-046

Maricopa County Superior Court No. CR92-09564

RESPONSE TO PETITION FOR SPECIAL ACTION

Respondent Judge Hilliard, through her attorneys undersigned, hereby enters her response to Petitioner's petition for special action.

JURISDICTIONAL STATEMENT

Rule 1(a), Rules of Procedure for Special Actions, provides that this Court's special action jurisdiction is appropriately invoked only where there is no equally plain, speedy, and adequate remedy available to the petitioner by appeal. The acceptance of jurisdiction of a petition for special action is highly discretionary with this Court. *King v. Superior Court*, 138 Ariz. 147, 149, 673 P.2d 787, 789 (1983). Jurisdiction is usually accepted only in these cases where the issues raised are such that justice cannot be served by other means. *Id.* Jurisdiction should be refused when there is an adequate remedy available to petitioner by appeal. *Id.*

In the instant case, as will be discussed below, Petitioner's claim that Respondent's denial of his motion for appointment of additional counsel to represent him

denied him his constitutionally guaranteed right to assistance of counsel and to equal protection of the laws is, at best, premature. The question of whether Respondent violated Petitioner's constitutional rights by denying his request for additional counsel can be most fully and effectively analyzed in light of the actual performance rendered by his appointed counsel in the event that Petitioner is, in fact convicted of the crimes charged and sentenced to death. Whether the Respondent's denial of Petitioner's request for additional appointed counsel rendered the representation rendered by his sole appointed counsel ineffective can fully and effectively be explored by this Court upon a petition for post-conviction relief filed by Petitioner alleging ineffective assistance of counsel. By his petition, Petitioner is requesting this Court, based upon mere speculation, to rule that his current appointed counsel will render ineffective assistance if she does not have another counsel appointed to assist her. Such speculation should not be a basis upon which this Court exercises its special action jurisdiction.

Thus, Respondent respectfully requests this Court to refuse to exercise its special action jurisdiction in this matter.

STATEMENT OF THE ISSUE

Whether the Respondent's denial of Petitioner's request for the appointment of an additional attorney to represent Petitioner, a defendant in a capital murder case, denied Petitioner his right to the assistance of counsel, or to equal protection of the law, as guaranteed by the United States and Arizona constitutions.

STATEMENT OF THE FACTS

The Real Party in Interest has charged Petitioner with the brutal murder of a librarian in Buckeye, Arizona in November, 1992. Specifically, on November 20, 1992, the Real party in Interest charged Petitioner, by indictment, with Count I, first degree murder; Count II, attempted sexual assault; and Count III, first degree burglary. (Exhibit A.) The Real Party in Interest amended the indictment to allege the dangerous nature of counts II and III. (Exhibit B.) On December 8, 1992, the Real Party in Interest filed a notice of its intent to seek the death penalty. (Exhibit C.) Pursuant to Petitioner's request and showing of indigence, Respondent appointed the Maricopa County Public Defender's Office to represent Petitioner on November 20, 1992. On January 4, 1993, Respondent granted the Maricopa County Public Defender's motion to

withdraw from representing Petitioner based upon a conflict of interest in that one of its attorneys had previously represented Petitioner's brother, who was to testify for the Real Party in Interest in this case. Respondent then appointed Michelle Hamilton (hereinafter referred to as Appointed Counsel) to represent Petitioner at public expense. (Exhibit D.)

Appointed Counsel requested the contract administrator for the Maricopa County Superior Court to appoint another attorney to assist her in representing Petitioner in this matter, and this request was denied. Thereafter, Appointed Counsel filed an ex-parte motion requesting that Respondent appoint co-counsel to assist her. (Exhibit E.) Respondent denied this motion by Minute Entry order dated January 25, 1993. (Exhibit F.)

Appointed Counsel has not, as of this date, noticed any defenses in this matter, nor has she disclosed the names of any witnesses she intends to call at trial, as required by Rules 15.2(b),and (c), Ariz. R. Crim. P. (See affidavit of Deputy County Attorney Alfred Fenzel, attached as Exhibit G.) Petitioner's counsel has not requested an examination of Petitioner pursuant to Rule 11, Ariz. R. Crim P., and it is unknown whether Petitioner will present expert testimony regarding Petitioner's mental state at trial.

The Real party in Interest has listed a total of 22 witnesses to be called at trial. (Exhibit H.) Ten of those witnesses are law enforcement representatives, 1 is a medical examiner, and the remaining 10 are civilians. (Id.) An 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. The 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[1], 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

1. The State is also having DNA tests performed on the blood found on Petitioner's pants and shirt, but that testing is incomplete as of this date.

him at the scene a the time of the murder. (Exhibit G.) The only scientific evidence that will be presented by the State at trial is testimony regarding the analysis of the blood found on Petitioner's clothing, and at the scene, testimony to show that the bloody footprint at the scene was made by someone wearing Petitioner's shoe, and testimony indicating that Petitioner's fingerprints were found on books dropped in the return slot at the library at the time of the murder. (Id.)

ARGUMENT

Petitioner argues that he is entitled to be represented by two court appointed attorneys based upon a presumption articulated by the California Supreme Court in *Keenan v. Superior Court*, 31 Cal.3d 243, 180 Cal. Rptr. 489, 640 P.2d 108 (1982), to the effect that a capital defendant is entitled to two court appointed attorneys upon a showing of a "genuine need." A thorough study of *Keenan* clearly illustrates, however, that the presumption articulated therein is inapplicable to Arizona cases.

The Court in *Keenan* indeed held that:

> If it appears that a second attorney may lend important assistance in preparing for trial or presenting the case, the court should rule favorable on the request. Indeed, in general, under s showing of genuine need, and certainly in circumstances as pervasive as those offered by the attorney in this case, a presumption arises that a second attorney is requires. The trial court should have found that the presumption was not rebutted here.

31 Cal.3d at 254. This holding has very limited applicability outside of the state of California, however, because it is based upon an interpretation of a California statute.

Section 987.9 of the California Penal Code[2] provides for appointment of investigators, experts, "and others" at public expense, for the preparation of an indigent capital defendant's defense. Appointments under § 987.9 are based upon a reasonableness standard, and the need to provide the defendant with a "full and

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2. §987.9, Ca. Penal Code provided as follows, in pertinent part, at the time *Keenan* was decided:

> In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application shall be by affidavit and shall specify that the funds are reasonable necessary for the preparation or presentation of the defense. . . . Upon receipt of an application, a judge of the court, other than the trial judge presiding over the capital case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to defendant's attorney. . . . In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

complete" defense. Section 987.9 was interpreted by the *Keenan* court, in light of its legislative history and the defendant's state and federal constitutional right to effective legal counsel, to provide ample authority for appointment of an additional attorney if it is shown to be reasonably necessary for a defense in a capital case.

The right to additional counsel pursuant to §987.9 is not absolute, however, as the *Keenan* court recognized that the decision whether to appoint additional counsel remains with the trial court. 3 Cal.3d at 250. This discretion must be exercised in light of the United States Supreme Court's recognition that death is a unique form of punishment, which mandates increased sensitivity on the part of state courts in order to insure that every safeguard designed to guarantee a defendant a full defense be observed. *Keenan*, 3 Cal.3d at 250, citing *Gardner v. Florida,* 430 U.S. 349, 357, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977); and *Gregg v. Georgia,* 428 U.S. 153, 187, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

Unlike the California Legislature, neither the Arizona Legislature, by enactment of a statute, nor this Court, by enactment of a rule of procedure, has not seen fit to differentiate between capital and non-capital defendants for purposes of appointment of counsel. Rule 6.1(b), Ariz. R. Crim. P., concerns appointment of counsel, and provides simply that:

> An indigent defendant shall be entitled to have an attorney appointed to represent him in any criminal proceeding which may result in punishment by loss of liberty and in any other criminal proceeding which the court concludes that the interests of justice so require.

Rule 6.5(c), which concerns the manner in which counsel are appointed when the public defender cannot represent an indigent defendant, provides:

> If the public defender is not appointed, a private attorney shall be appointed to the case. All criminal appointments shall be made in a manner fair and equitable to the members of the bar, taking into account the skill likely to be required in handling a particular case.

The failure by the Arizona Legislature and by this Court to differentiate between capital and non-capital defendants for purposes of appointment of counsel is indicative of an intent to treat them equally in this area. This is particularly true given that fact that both the Arizona Legislature and this Court has seen fit to specifically differentiate between capital and non-capital defendants in several other procedural areas, such as regarding the number of peremptory strikes (Rule 18.4), the increased time allotted a

capital defendant to prepare for the aggravation/mitigation hearing after conviction (Rule 26.3), the capital defendant's automatic appeal (Rules 26.15 and 31.2(b)), the capital defendant's right to extended briefing on appeal (Rule 31.13(f)), the capital defendant's right to counsel and his right to extended briefing and additional time in post-conviction relief proceedings (Rule 32.4(c)), the aggravation\mitigation hearing requirements in a capital case (A.R.S. § 13-703), and the capital defendant's right to the appointment of such investigators and expert witnesses as are reasonably necessary to present his defense, at public expense (A.R.S. § 13-4013(B)). See, *Gardner v. State*, 733 S. W.2d 195, 207 (Tex. Cr. App. 1987) (Without statutory authorization, the *Keenan* presumption was inapplicable to Texas cases; the lack of authorization for special treatment of capital defendants that would enable them to obtain additional appointed counsel was particularly apparent given the fact that the Texas Legislature had differentiated between capital and non-capital defendants in other procedural areas.)

In addition to arguing that he is entitled to additional appointed counsel according to *Keenan*, Petitioner argues that he is constitutionally entitled to such counsel according to the Sixth Amendment and Arizona Constitution Article 2, Sections 4 and 24, and according to the Equal Protection Clause of the Fourteenth Amendment and Arizona Constitution Article 2 Sections 2, 4, 13, and 24. These arguments are erroneous.

The Sixth Amendment indeed provides that a person accused of a crime has the right to have counsel appointed to represent him if retained counsel cannot be obtained. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This right exists in order to protect the fundamental right to a fair trial. 466 U.S. at 685. Arizona courts have adopted the federal standard for determining whether the an accused's constitutional right to effective assistance of counsel has been violated. *State v. Nash,* 143 Ariz. 392, 694 P.2d 222 (1985).

The right to counsel is the right to effective assistance of counsel. *McMann v. Richardson,* 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970). The United States Supreme Court recognized, in *Strickland,* that government can deny a defendant this right when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. *Strickland*, 466 U.S. at 687. The Court cited several examples of the kind of governmental interference that might

result in deprivation of the defendant's right to effective assistance of counsel, specifically, where a trial court prohibited attorney-client consultations during an overnight recess, (*Geders v. United States,* 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976)); where defense counsel was prohibited from presenting closing argument in a bench trial, (*Herring v. New York,* 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)); where trial court required that defendant be the first witness, (*Brooks v. Tennessee,* 406 U.S. 605, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972)); and where the trial court prohibited direct examination of a defendant, (*Ferguson v. Georgia,* 365 U.S. 570, 81 S. Ct. 756, 5 L. Ed. 2d 783 (1961). *Strickland*, 466 U.S. at 687.

Unlike in the cases cited by the Court in *Strickland,* Petitioner has not demonstrated that Respondent's denial of his motion for additional appointed counsel was the type of governmental "interference" that deprived Appointed Counsel of her ability to make independent decisions about how to conduct Petitioner's defense. Petitioner's Appointed Counsel claims that preparation for Petitioner's trial will require:

> [a]n investigation of the conduct and acts of the various parties on the date of the crime but also over an extensive period extending both before and after the date of the crime. This will require the accumulation of information from a wide range of sources and will necessitate both conducting interviews of numerous witnesses whose whereabouts may be difficult to trace and locating and organizing records from numerous agencies. These interviews must be conducted by an attorney familiar with the facts of the case.

(Petition at 7.) Clearly, what Petitioner cites as being required to prepare for trial in this case is exactly what is required of defense counsel in any criminal case. The number of State's witnesses are relatively few, and it is unknown how many witnesses Appointed Counsel will call in her case-in-chief because she has yet to provide a list of such witnesses or even inform the State of her anticipated defenses, if any. The simple fact that Petitioner might be sentenced to death is not alone enough to make this case too involved or complicated to be defended by one attorney, or to render Respondent's denial of the motion for additional counsel the type of governmental interference that deprived Petitioner defendant of his right to effective assistance of counsel. In fact, it would be easy to imagine a racketeering case, a conspiracy case, or even a sexual assault case that would involve the testimony of many more witnesses and/or experts than will be involved in trial of this matter, and indigent defendants in those cases are usually, if not always,

represented by only one appointed attorney.

Appointed Counsel alleges that the fact that there is a separate penalty phase in a capital case mandates appointment of separate counsel in order to properly prepare for both aspects of the case at one time, while preserving the "requisite client rapport throughout the guilt phase." (Petition at 7.) This argument, while valid in California, is groundless in Arizona. In *Keenan*, the defendant alleged that one of the reasons additional counsel was needed was so that the guilt and penalty phases of the trial could be prepared for simultaneously. This need to prepare for the penalty phase while preparing for the guilt phase is extremely important in California, because, after conviction, the sentencing proceedings must commence within 20 judicial days after the verdict. See, §1191, California Penal Code. In contrast, Rule 26.3, Ariz. R. Crim P. provides that a capital defendant in Arizona has up to 90 days after the verdict within which to prepare for sentencing, and the rule specifically states that such time may be enlarged upon a showing of good cause. Thus, there is no real and pressing need to spend time and resources preparing for sentencing while preparing for trial in a capital case in Arizona.

The State's case against Petitioner is relatively simple, and will not involve an inordinant amount of witness testimony, and Appointed Counsel has not shown that the preparation and presentation will be unduly burdensome for one attorney. Therefore, Appointed Counsel has not shown, by any measure of evidence, that Respondent's denial of her motion for additional appointed counsel deprived her of her ability to make decisions regarding Petitioner's defense.

Petitioner's Appointed Counsel also claims that Respondent's denial of her motion for additional appointed counsel denied Petitioner equal protection of the laws because, if the Public Defender's Office had not declared a conflict and been permitted to withdraw, he would have been represented by two attorneys because the Public Defender assigns two attorneys to defend capital cases as a matter of course. This argument must fail.

At the outset it must be noted that Arizona's constitutional equal protection guarantee has the same effect as the federal guarantee; therefore Respondent's argument regarding the federal equal protection guarantee is applicable to the state claim as well.

Valley National Bank of Phoenix v. Glover, 62 Ariz. 538, 159 P.2d 292 (1945).

Petitioner's Appointed Counsel has not presented any competent evidence indicating that the Public Defender's Office, always, as a matter of an articulated policy, assigns two attorneys to represent every capital defendant. Appointed Counsel's bare assertion that this is the case is insufficient grounds upon which to successfully claim that Petitioner was denied equal protection. Thus, Petitioner has not presented sufficient evidence demonstrating that Respondent's denial of his motion for additional appointed counsel even resulted in any sort of classification of Petitioner that could have denied him equal protection of the laws.

Even if this Court finds that Petitioner has presented sufficient evidence that, by denying his motion for additional appointed counsel, Respondent classified Petitioner in any way, his argument still must fail as he has not shown that such classification denied him equal protection. The Equal Protection Clause does not guarantee "absolute equality or precisely equal advantages." *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 24, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). In the context of a criminal proceeding the equal Protection Clause requires only an "adequate opportunity to present [one's] claims fairly. . . . " *Ross v. Moffitt,* 417 U.S. 600, 616, 94 S. Ct. 2437, 41 L. Ed. 2d 41 (1974)

Even if this Court determines that Respondent's of Petitioner's motion for additional counsel placed him in a class, the classification was not inherently suspect, nor did it involve a fundamental right. See, *People v. Jackson*, 28 Cal.3d 264, 168 Cal. Rptr. 603, 618 P.2d 149, 157-58. (1980) (The right to have two attorneys appointed to represent a defendant in a capital offense was held not to involve a fundamental right for purposes of application of the compelling state interest test rather than the rational basis test to determine the validity of an equal protection claim.) Therefore the compelling state interest test would be inappropriate to determine the validity of Petitioner's equal protection claim, and this Court must employ, instead, the rational basis test in evaluating the claim. *San Antonio Independent School Board,* 411 U.S. 18-24, 31-35. The rational basis test entails an evaluation of whether the classification rationally furthers some legitimate, articulated state purpose. 411 U.S. at 18. If such is the case, the classification does not result in the type of "invidious discrimination" prohibited by the

Equal Protection Clause. *Id.*

The State's interest in refusing to appoint a second attorney to represent Petitioner, as furthered by Respondent's order, is rationally related to the State's duty to preserve its resources in order to assure that funds are available to appoint counsel for ***all*** indigent criminal defendants in this State. As neither Petitioner nor his Appointed Counsel has shown that Petitioner's case is any more complex or difficult to prepare than almost any other criminal case, Respondent did not abuse her discretion in denying Petitioner's motion for additional counsel.

ER 1.1 of the Rules of Professional Conduct promulgated by this Court provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Based upon this Rule, 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 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.

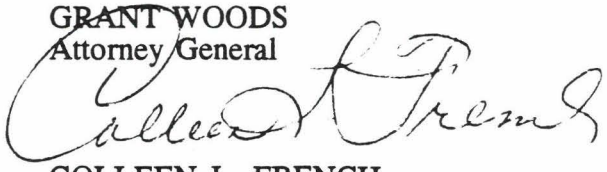
CONCLUSION

Post-conviction relief proceedings would provide adequate relief to Petitioner from Respondent's denial of his motion for appointment of counsel, if it can be shown that Appointed Counsel's representation of Petitioner was, in fact, rendered ineffective by that order. Thus, this Court should refuse to exercise its special action jurisdiction in this matter. If this Court elects to exercise its special action jurisdiction in this matter, it should deny the relief requested. Respondent Judge Hilliard's order denying Petitioner's motion for additional appointed counsel did not result in a denial of Petitioner's constitutional right to effective assistance of counsel nor his right to equal protection of the laws.

DATED this 1st day of March, 1993.

Respectfully submitted,

GRANT WOODS
Attorney General



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DONNA LYNN FULLER
CRM93-0272
cr930272.bk

Appendix D

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Richard Dean Hurles,

Petitioner,

v.

Charles L. Ryan, et al.,

Respondent.

No. CV-00-0118-PHX-DLR

ORDER

On January 21, 2015, this case was remanded by the Ninth Circuit Court of Appeals. (Doc. 118.) On January 29, 2016, pursuant to the remand order, the Court held an evidentiary hearing on Hurles' claim of judicial bias.

The Ninth Circuit also ordered this Court to reconsider, in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), Hurles' claim that appellate counsel performed ineffectively by failing to raise a claim under *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014). The parties briefed this issue. (Docs. 137, 141, 148, 188, 190, 194.)

This order addresses both remanded issues. For the reasons set forth below, the judicial bias claim is denied. The Court also finds that Hurles is not entitled to relief on his ineffective assistance of appellate counsel claim and that an evidentiary hearing on the claim is not necessary.

JUDICIAL BIAS

I. Background

The following facts are taken from the opinion and order remanding the case, *Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014), the Arizona Supreme Court's opinion affirming Hurles' conviction and sentence, *State v. Hurles*, 914 P.2d 1291 (Ariz. 1996) (en banc), and this Court's review of the record.

A. Trial

Hurles, on parole after serving nearly fifteen years in prison for sexually assaulting two young boys, went to the library in Buckeye, Arizona, on the afternoon of November 12, 1992. After the last patron left, Hurles locked the front doors and attacked librarian Kay Blanton in the back room. He attempted to rape her, stabbed her thirty-seven times, and kicked her so violently that he tore her liver. She later died of her injuries.

Hurles left the library and proceeded to the home of his nephew, Thomas. He told Thomas that he had been in a fight with a Spanish man at the library. After changing his clothes and cleaning up, Hurles asked Thomas for a ride to Phoenix. On the way to Phoenix, Hurles had Thomas pull over so he could discard his bloody clothes. Thomas dropped Hurles off at the bus station in Phoenix, where Hurles purchased a ticket to Las Vegas. Thomas returned to Buckeye and contacted the police. Police intercepted the bus and arrested Hurles.

Hurles was charged with burglary, first-degree murder, first-degree felony murder, and attempted sexual assault. A jury found him guilty of all charges.

The court then conducted an aggravation and mitigation hearing to determine the appropriate sentence. Hurles offered mitigating evidence about his dysfunctional family background, cognitive deficiencies, long-term substance abuse, mental illness, good behavior while incarcerated, and an expert opinion that he suffered from diminished capacity at the time of the crime.

The court found one statutory aggravating factor: that Hurles committed the crime in an especially cruel, heinous or depraved manner. The court found two nonstatutory mitigating circumstances: that Hurles suffered a deprived childhood in a dysfunctional

home and that he had behaved well in prison prior to the underlying crime. The court concluded that these circumstances did not warrant leniency and sentenced Hurles to death. The Arizona Supreme Court affirmed. *Hurles*, 914 P.2d 1291.

B. Special Action

Prior to trial, Hurles moved for appointment of a second attorney to assist in his defense. (SA at 30-34.)[1] The trial judge, Maricopa County Superior Court Judge Ruth Hilliard, summarily denied the motion. (*Id.* at 36.) Hurles sought interlocutory relief in the Arizona Court of Appeals, filing a petition for special action challenging the trial court's ruling and asserting that defendants in capital cases are entitled to two lawyers. (*Id.* at 38.) The named parties were Richard Hurles, Petitioner; Maricopa County Superior Court and Judge Hilliard, Respondents; and Maricopa County Attorney Richard Romley as the "Real Party in Interest." (SA at 64.)

The Maricopa County Attorney's Office, which was prosecuting the case, declined to respond to the special action because under state law it lacked standing in the selection of defense counsel. *See Hurles v. Super. Ct. in and for the Cty. of Maricopa*, 849 P.2d 1, 2 (Ariz. Ct. App. 1993). At the request of the Presiding Criminal Judge of the Maricopa County Superior Court, Ronald Reinstein, the Arizona Attorney General filed a response. *Id.*

The response was prepared by Assistant Attorney General Colleen French. The response began, "Respondent Judge Hilliard, through her attorneys undersigned, hereby enters her response to Petitioner's petition for special action." (S.A. at 64.) In its "Statement of the Facts," the response described the murder as "brutal" and characterized the State's case against Hurles as "very simple and straightforward, compared to other capital cases." (*Id.* at 65, 66.) The response then addressed Hurles' legal arguments, including his request that the Arizona Court of Appeals follow California law, which presumed the necessity of second chair counsel in death-penalty cases, and his contention

[1] "SA" refers to documents filed in Petitioner's Special Action Proceeding before the Arizona Court of Appeals (Case No. CV-93-0134-SA). Copies of these records as well as the original trial transcripts and appellate briefs were provided to this Court by the Arizona Supreme Court on August 24, 2000.

that the lack of second counsel would violate his Sixth Amendment and equal protection rights. (*Id.* at 67-73.) Finally, the response suggested that appointed counsel was ethically bound to withdraw from the case, and possibly the Maricopa County list of contract defense lawyers, if she believed herself incapable of competently representing Hurles. (*Id.* at 73.)

The Arizona Court of Appeals ordered supplemental briefing on the issue of Judge Hilliard's standing. French authored the response, arguing that judges had an interest in retaining discretion with respect to the appointment of counsel in capital cases. (*Id.* at 78.) Specifically, French argued that it was appropriate for Judge Hilliard and the superior court bench to defend their interest in the bench's authority to make case-by-case determinations in the appointment of capital counsel because the Real Party in Interest did not have standing to litigate the case. (*Id.*)

In a published decision, the Arizona Court of Appeals declined to accept jurisdiction on the merits, concluding it was premature in light of Hurles' failure to make a particularized showing on the need for second counsel in his case. *Hurles v. Super. Ct.*, 849 P.2d at 2. However, the court addressed Judge Hilliard's standing, holding that a responsive pleading from a trial judge may be filed only if the purpose is to explain or defend an administrative practice, policy, or local rule, not simply to advocate the correctness of the judge's individual ruling. *Id.* at 3. Because the response filed by the Arizona Attorney General on behalf of Judge Hilliard fell into the inappropriate "I-ruled-correctly" category, the appellate court declined to consider the pleading.[2] *Id.* at 4. As to Judge Hilliard's involvement in the filing of the responsive pleading, the court observed:

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[2] French, representing the Maricopa Superior Court and Judge Reinstein as presiding criminal judge, subsequently filed a special action in the Arizona Supreme Court, naming as Respondents the judges of the Arizona Court of Appeals. (CV-93-01335-SA at 1.) The special action contested the court of appeals' ruling that judges who are named as respondents in special actions challenging their rulings do not have standing to appear and respond. (*Id.* at 2.) The Attorney General also filed a special action on the question of whether it was entitled to represent judges in special actions on the issue of appointment of counsel. (SA at 1.) The Attorney General attached to its reply an affidavit from Judge Reinstein attesting that, due to budget cuts and an increased number of requests, the Maricopa County Superior Court addressed requests for additional counsel on a case-by-case basis. (*Id.* at 105.) The special actions were consolidated. (*Id.*

> The record does not indicate whether Judge Hilliard, the nominal respondent, actually authorized such a pleading to be filed. From the statement of the Attorney General at oral argument, the pleading was requested by the presiding criminal judge, not by Judge Hilliard, and there was no contact between Judge Hilliard and the Attorney General's office as the pleading was prepared.

Id. at 2 n.2.

Judge Hilliard continued to preside in the case through trial, sentencing, and the first post-conviction relief ("PCR") proceeding.

C. Second PCR Proceeding

In his second PCR petition, Hurles raised a claim alleging that his Fourteenth Amendment rights had been violated when Judge Hilliard failed to recuse herself from his case after becoming a party in the special action proceedings. (Doc. 72, PCR at 24-45, 163-72.)[3] Hurles also filed an accompanying Motion to Recuse Judge Hilliard. (*Id.* at 129-44.) Judge Hilliard referred the matter to the Presiding Judge, who appointed Judge Eddward Ballinger, Jr., to rule on the motion. (*Id.*, ME at 1-2.) Judge Ballinger denied the motion, stating that "[w]ith respect to the objective evaluation of the judge's actions in this matter, the Court finds no basis to transfer this case." (*Id.*, ME at 3.)

Judge Hilliard ultimately denied relief on Hurles' second PCR petition. With respect to his judicial bias claim, the court ruled:

> Defendant argues in claim 2 that this Judge should have recused herself from consideration of the first Petition for Post-Conviction Relief based on the Court of Appeals' ruling in *Hurles v. Superior Court*, 174 Ariz. 331, 849 P.2d 1 (App. 1993). Defendant argues that because the Court of Appeals determined that the response filed on behalf of this judge, (without her input) was wrong, this judge is thereby precluded from hearing any further matters in this case. However, Rule 81 of the Arizona Rules of the Supreme Court, Canon 3(E)(1) provides that "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." The test is an objective one: whether a

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at 93.) The Arizona Supreme Court declined to accept jurisdiction. (*Id.* at 106.)

[3] "Doc. 72" consists of separately indexed and paginated PCR documents, minute entries ("ME"), and petition for review ("PR") documents from Petitioner's second PCR proceeding (Case No. CR-05-0118-PC).

> reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality. *State ex rel Corbin v. Superior Court*, 155 Ariz. 560, 748 P.2d 1184 (1987); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L.Ed.2d 855 (1988).
>
> The trial judge is presumed to be impartial and the party who seeks recusal must prove the grounds for disqualification by a preponderance of the evidence. *State v. Carver*, 160 Ariz. 167, 771 P.2d 1382 (1989); *State v. Salazar*, 182 Ariz. 604, 898 P.2d 982 (App. 1995). The facts here do not support disqualification and another judge, Judge Ballinger, so determined. In the special action in this case, the Attorney General filed a response on this judge's behalf but without any specific authorization of such a pleading. No contact was made by this judge with the Attorney General and this judge was a nominal party only. The special action was resolved five years before the first PCR was filed. Based on the circumstances of this case, the Court finds that a reasonable and objective person would not find partiality.
>
> As in *Carver*, Hurles simply alleges bias and prejudice but offers no factual evidence to support his allegations. There is no allegation of partiality during the trial or that rulings or conduct during the first PCR demonstrated any bias. "Appearance of interest or prejudice is more than the speculation suggested by the defendant. It occurs when the judge abandons the judicial role and acts in favor of one party or another." Hurles has failed to overcome the presumption of impartiality.

(*Id.*, ME at 17-18.)

Judge Hilliard further held that, even if it was error not to recuse herself, such error was harmless in light of the overwhelming evidence of Hurles' guilt and the absence of any risk that injustice would occur in other cases or that public confidence in the judicial process would be undermined. (*Id.* at 19.) The Arizona Supreme Court summarily denied review.

D. Habeas Review

On habeas review, this Court denied the judicial bias claim on the merits. The Court found that:

> [N]othing in the record contradicts the assurances of Judge Hilliard and Assistant Arizona Attorney General French that the judge played no role in the preparation and filing of the special action brief. Petitioner has cited no

> evidence to contradict their statements regarding the judge's role, or lack thereof, in preparation of the brief. Nor is there any evidence to refute the conclusion that the positions raised in the brief were anything other than the positions of the Arizona Attorney General.

(Doc. 99 at 17.)

In remanding the case, the Ninth Circuit found that Judge Hilliard came to an unreasonable determination of the facts in denying Hurles' judicial bias claim, and that this Court abused its discretion by denying the claim without holding an evidentiary hearing. *Hurles*, 752 F.3d at 792. The Ninth Circuit explained that "this case presents an especially troubling example of defective fact-finding because the facts Judge Hilliard 'found' involved her own conduct, and she based those 'findings' on her untested memory and understanding of the events." *Id.* at 791.

The Ninth Circuit directed this Court to hold an evidentiary hearing to determine "whether the probability that Judge Hilliard harbored actual [bias] against Hurles is too high to be constitutionally tolerable." *Id.* at 792 (quoting *Bracy v. Gramley*, 520 U.S. 899, 904 (1997)). To answer that question, after noting the "tenor of Judge Hilliard's responsive pleading in the special action," the Ninth Circuit listed the following factors for this Court to consider: (1) whether Judge Hilliard participated in the special action proceedings as more than a nominal party; (2) had contact with French; (3) commissioned or authorized the responsive pleading; or (4) provided any input on the brief. *Id.*

E. Evidentiary Hearing Testimony

The Court held an evidentiary hearing on January 29, 2016. Hurles called four witnesses: Colleen French; Judge Hilliard; Mark Harrison, a judicial ethics expert; and Noel Fidel, a former Maricopa County Superior Court and Arizona Court of Appeals judge.

Colleen French testified that she was assigned to file the response to Hurles' special action by her supervisor, Paul McMurdie, who was asked to respond to the special action by Presiding Judge Reinstein, not by Judge Hilliard. (RT 1/29/16 at 32.) It was at

Judge Reinstein's "insistence" that she filed the response. (*Id.* at 35.) He felt "very strongly" about the issue involved. (*Id.*)

French testified that, right after she was assigned the case, she called Judge Hilliard to inform the judge that she was filing a response to the special action. (*Id.* at 34.) Judge Hilliard was "not cooperative," but she did not tell French not to file the response. (*Id.* at 23.) Judge Hilliard provided no assistance in preparing the brief. (*Id.* at 34.) French possibly sent a draft of the response to Judge Hilliard. (*Id.* at 35.) She sent a copy of the filing to Judge Hilliard, as required by the rules. (*Id* at 24.) She received nothing from Judge Hilliard. (*Id.* at 36.) French spoke with Judge Hilliard only once. (*Id.* at 34.) She felt her client was the Superior Court as well as Judge Hilliard. (*Id.* at 25, 36.) Judge Hilliard did not authorize the response and provided no input. (*Id.* at 41.) The language in the response was French's, and the characterization of the State's evidence came from the prosecuting attorney. (*Id.* at 37-40.) French testified that Judge Hilliard was "not pleased" that the response was filed. (*Id.* at 42.)

Judge Hilliard testified that she had no recollection of the special action, nor did she recall ever speaking with French. (*Id.* at 60.) She testified that she did not request a special action be filed or solicit a response. (*Id.* at 74.) She did not recall reading the response, and it was possible she never saw it. (*Id.* at 72.) She did not dispute that her chambers received a copy of the response. (*Id.* at 62.)

Judge Hilliard testified that she offered no input and received no drafts of the response. (*Id.* at 75, 83.) She testified that, although the Attorney General represented her position, she was not responsible for the language in the response. (*Id.* at 78-79.)

She also testified that appearing in a special action to defend one of her rulings is "not something I have done." (*Id.* at 67.) As a matter of policy, she generally did not read special actions, but forwarded them to the presiding judge. (*Id.* at 73.) Judge Hilliard believed that judges were represented by the Attorney General's Office as a matter of course in all special actions. (*Id.* at 63, 77.)

Judge Hilliard testified that it was her practice to rule on motions, such as the motion for second counsel, after consulting with other more experienced criminal judges

or the presiding criminal judge. (*Id.* at 70.) She is sure that on such a motion she would have consulted with multiple other judges. (*Id.*) She recalled that at the time of Hurles' trial there were financial issues that might have affected the appointment of second-chair counsel. (*Id.* at 71.)

Finally, Judge Hilliard testified that she did not recall whether she had notes on the case. (*Id.* at 68.) However, she disposed of whatever notes she did have when she retired from the bench. (*Id.*)

Mark Harrison, Petitioner's expert witness on judicial ethics, testified that Judge Hilliard violated the Arizona Code of Judicial Conduct, Canons 1 and 3, by becoming personally involved in the defense of her order and continuing to preside over the case, such that her impartiality might reasonably have been questioned. (*Id.* at 102.)

Noel Fidel, a former Maricopa County Superior Court and Arizona Court of Appeals judge, testified, in contradiction of Judge Hilliard's belief, that it was extraordinarily rare for judges to appear and be represented in special actions. (*Id.* at 132.) He testified that the Attorney General represented only judges who were actual, rather than nominal, parties. (*Id.* at 132-33.) However, in closing arguments, counsel for Hurles conceded that he was not challenging the veracity of Judge Hilliard or her testimony. (*Id.* at 142-43.)

II. Analysis

The Court finds that an average judge, sitting in Judge Hilliard's position, was likely to sit as a neutral, unbiased arbiter. Although the filing of a response in her name and the tenor of the response arguably suggested that Judge Hilliard was enmeshed and embroiled in controversy with Hurles and his counsel, the facts do not bear that out.

A. Findings of Fact

Taking into account the concerns raised by the Ninth Circuit in its remand order, the Court makes the following findings of fact based on the testimony at the evidentiary hearing and the record as a whole:

(1) Judge Hilliard ruled on the motion for second counsel after consulting with other more experienced criminal judges. When she was served with the special action,

Judge Hilliard followed the court protocol, as she understood it, by forwarding the complaint to the presiding criminal judge, Judge Reinstein.

(2) Judge Reinstein had strong feelings about the issue raised in the special action. He made the decision to request that the Arizona Attorney General respond.

(3) The case was assigned to French by her supervisor. From the time she was assigned the case, French understood she was representing the presiding criminal judge and the superior court at the behest of the criminal presiding judge. She understood she was not representing Judge Hilliard but it never crossed her mind to respond in the name of the presiding judge.

(4) French filed the response in the name of Judge Hilliard because Judge Hilliard was the named nominal defendant. French did not recognize the potential for the appearance of a conflict created by responding in the trial judge's name.

(5) Though it was not settled, Arizona law at the time arguably could have been interpreted to support French's position that the trial judge had an unequivocal right to respond to a special action. *Hurles v. Super. Ct.*, 849 P.2d at 3.

(6) Judge Hilliard did not participate in the special action proceedings as more than a nominal party. Although she was provided copies of the briefs, she did not read them or provide French with any input.

(7) Judge Hilliard had contact with French concerning the special action on one occasion. On that occasion, French phoned Judge Hilliard to advise her that French would be preparing and filing a response. Judge Hilliard expressed disapproval that a response was going to be filed on her behalf.

B. Conclusions of Law

The Due Process Clause guarantees a criminal defendant the right to a fair and impartial judge. *See In re Murchison*, 349 U.S. 133, 136 (1955); *Rhoades v. Henry*, 598 F.3d 511, 519 (9th Cir. 2010) ("Due process requires that trials be conducted free of actual bias as well as the appearance of bias."). An appearance of bias—as opposed to evidence of actual bias—necessitates recusal when the judge becomes embroiled in a running, bitter controversy with one of the litigants. *Crater v. Galaza*, 491 F.3d 1119,

1131 (9th Cir. 2007) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Due process also requires a judge to recuse herself when "it is plain that [s]he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge to sit." *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971). The inquiry is objective. "We do not ask whether [the judge] actually harbored subjective bias. Rather, we ask whether the average judge in her position was likely to be neutral or whether there existed an unconstitutional potential for bias." *Hurles*, 752 F.3d at 788.

Hurles alleges bias arising from Judge Hilliard's role as a responsive party in the special action. However, Judge Hilliard was named only as a "nominal" party under the state rules for special actions. *See Hurles v. Super. Ct.*, 849 P.2d at 2. Although the Arizona Attorney General filed a brief in the judge's name, the evidence presented at the hearing is consistent with the record that Judge Hilliard was not involved in the proceedings or in the preparation of that brief.

Judge Hilliard testified that she presently has no recollection of the special action. However, French's testimony about the judge's lack of involvement in the special action is supported elsewhere in the record. Judge Hilliard noted in her order during the second PCR proceedings in 2002 that the actions by the Attorney General in response to the special action petition were made without her input, that "[n]o contact was made by [her] with the Attorney General," and that she was a "nominal party only." (*See* Doc. 72, ME 8/13/02 at 2.) Likewise, at the time the special action was being litigated, the Arizona Court of Appeals noted French's statement at oral argument that "the [Attorney General's] pleading was requested by the presiding criminal judge not by Judge Hilliard, and there was no contact between Judge Hilliard and the Attorney General's office as the pleading was prepared." *Hurles v. Super. Ct.*, 849 P.2d at 2 n.2. At the evidentiary hearing, French testified that her single contact with Judge Hilliard occurred before she prepared the response. Finally, again during the second PCR proceedings, an independent judge performed an "objective evaluation" and denied Hurles' motion to recuse Judge Hilliard. (Doc. 72, ME at 3.)

There is no evidence of personal antagonism between Hurles and Judge Hilliard that could be viewed as compromising the judge's impartiality. There were no personal attacks on the judge, and Judge Hilliard was not personally embroiled in a controversy with Hurles. Judge Hilliard was not enmeshed in matters involving Hurles, and the question at issue in Hurles' special action—whether under state law he was entitled to appointment of a second attorney—did not touch upon any substantive issues relating to Hurles' guilt or innocence.

The facts in *Crater* are particularly instructive. There, the defendant alleged the trial judge was biased because at an in-camera pretrial conference the judge told him he should accept a plea deal offered by the State. The judge, who had presided over the trial of Crater's co-defendant, stated that "based upon what I've heard about this case, I'm real sure that you're going to be convicted of all of those robberies, that you're going to be convicted of shooting the first robbery victim." *Crater*, 491 F.3d at 1130. The judge also told Crater that "[a] jury is not going to like you" and "most judges . . . would throw the book at you." *Id.* at 1130-31. The Ninth Circuit found no constitutional violation. It concluded that "the judge's predictions did not suggest bias," explaining that "opinions 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." *Id.* at 1132 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

The circumstances here contrast sharply with those in *Crater*. Judge Hilliard personally said nothing about the merits of the case against Hurles. The response filed on her behalf does not suggest any belief about Hurles' guilt remotely akin to the remarks made by the trial judge in *Crater*—remarks that the Ninth Circuit found insufficient to compromise Crater's due process rights in the absence of that judge's recusal. Neither the tenor nor the contents of the response are attributable to Judge Hilliard.

Ultimately, Hurles argues that Judge Hilliard participated in the special action simply by referring it to Judge Reinstein, knowing or expecting that he would direct a

response to be filed, and that she knew the response was filed in her name but did not stop it. But this is insufficient to establish judicial bias. Judge Hilliard was not personally invested in the issue raised by the special action. It was Judge Hilliard's practice to rule on motions, such as the motion for second counsel, after consulting with other more experienced criminal judges or the presiding criminal judge. She is sure she would have followed that practice with the motion for second counsel. The preservation of the discretion of trial judges to decide when to appoint a second defense attorney in a capital case was an issue of concern for the Presiding Criminal Judge, and it was Judge Reinstein who pursued the defense of the special action. Judge Hilliard herself had little or no interest in that issue and paid no attention to the filings. She was merely a nominal party. Judge Hilliard's tenuous involvement in the special action did not affect her ability to sit as an unbiased judge.

III. Conclusion

Judge Hilliard's nominal participation in the special action did not cause her to become "so enmeshed in matters involving [Hurles] as to make it appropriate for another judge to sit" or become "embroiled in a running, bitter controversy" with Hurles or his counsel. *Hurles*, 752 F.3d at 792. Under the facts established at the evidentiary hearing, which confirmed Judge Hilliard's findings during the second PCR proceeding, no unconstitutional risk of bias arose from the fact that the response to Hurles' special action was filed on her behalf. In sum, the average judge in Judge Hilliard's position was likely to sit as a neutral, unbiased arbiter and there was no unconstitutional risk of bias.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The Ninth Circuit directed this Court to reconsider, pursuant to *Martinez*, Hurles' claim that his appellate counsel performed ineffectively by failing to raise a claim challenging the trial court's denial of funds for neurological testing, in violation of *Ake*. *Hurles*, 752 F.3d at 792. This Court had found the claim, included in Claim 6 of Hurles' amended habeas petition, procedurally defaulted because Hurles did not raise it in state court. (Doc. 73 at 8-9.)

I. Background

Hurles' trial counsel filed notice of an insanity defense and moved for a competency hearing. (ROA 52, 53.) The court granted the motion. (ME 5/6/93.)

At the pre-trial competency hearing, Hurles' expert, neuropsychologist Dr. Marc Stuart Walter, testified that his testing suggested Hurles had "areas of the brain that are dysfunctional." (RT 11/19/93 at 42-43.) Dr. Walter did not know the extent of the brain damage. (*Id.* at 43.) He was "fairly certain" that "further neurological studies, such as sophisticated brain mapping" would show brain damage but could not "guarantee" it. (*Id.*)

Dr. Walter explained that diagnosing such an injury would require more sophisticated testing than MRI and CAT scans. (*Id*. at 43-44.) He recommended a "Beam [Brain Electrical Activity Mapping] Study or a Computerized Topographic Mapping [CTM] Test which is a more sensitive test of brain dysfunction." (*Id*. at 45.) Dr. Walter was not qualified to perform these neurological studies. (*Id*. at 48.)

The State's expert, psychiatrist Dr. Alexander Don, agreed that some objective neurological investigation, like a CTM scan or electroencephalogram, would be useful in detecting brain impairment. (RT 11/23/93 at 14.) He recommended "either a CT scan or an MRI. The computer EG scan is not regarded as a useful tool in psychiatric testing at this time." (*Id*.) However, from his interview with Hurles, Dr. Don did not see any type of organic impairment warranting a CT scan or MRI. (*Id*. at 16.)

The court found Hurles competent to stand trial. (ME 11/23/93.)

On December 6, 1993, Hurles' trial counsel filed an *ex parte* request with the trial court for funds to pay Dr. Drake Duane, a behavioral neurologist, to perform "Electrophysiological studies" on Hurles. (Doc. 137-1 at 2.) Counsel's request had previously been denied by the Maricopa County Superior Court Contract Administrator. (*Id.* at 6.) In January 1994, counsel supplemented her *ex parte* request with information concerning the "scientific acceptability" of the CTM "brain mapping procedure." (Doc. 141, Ex. C at 1.)

On February 14, 1994, the trial court ruled that it could not consider counsel's

request on an *ex parte* basis.[4] The court ordered that, "[i]f defendant chooses to assert the Motion and Request, a copy must be sent to the State and the State must have an opportunity to respond." (Doc. 141, Ex. D.) As Respondents note, the record does not reflect that Hurles ever renewed his request for brain mapping before trial.

After the trial commenced, there was further discussion about the *ex parte* request for funding. (RT 3/18/94 at 3-7.) Hurles' trial counsel thought she had filed a motion to reconsider, but the court believed it had ruled on everything and no motions were pending. (*Id*. at 4.) The court then reiterated that "[s]o the record is clear, there cannot be any further *ex parte* motions of any sort." (*Id*.) The record shows that the only ruling concerning the request for funds to conduct a CTM examination was the court's February 14, 1994 order. (Doc. 141, Exs. D, F.)

At trial, Dr. Walter testified about the neuropsychological tests he performed on Hurles. (RT 4/12/94 at 13-23.) Based on these test results, together with Hurles' dysfunctional family background and history of substance abuse, Dr. Walters testified that Hurles suffered from mild brain damage, which nevertheless can have "very serious consequences." (*Id.* at 36.) He also diagnosed Hurles with organic mental disorder, with a thought disorder (learning disability), and with organic personality disorder. (*Id.* at 52.)

Dr. Walter testified that Hurles was in a "psychotic state of mind" at the time of the murder. (*Id.* at 43.) He testified that Hurles did not know what he was doing or that it was wrong. (*Id.*)

Dr. Don, testifying for the State, discussed testing that could be done to determine whether a person suffered from mild brain damage. (RT 4/13/94 at 27-29.) He then explained that the correlation between a finding of brain damage and its effect on a person's functionality is "quite tenuous, meaning that there aren't really good correlations between what is found on neuropsychological testing or what is found on an EEG or what is found on a CAT scan and an individual's ability to function." (*Id*. at 30-31.)

Dr. Don testified that Hurles was not insane at the time of the murder. (*Id.* at 15.)

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[4] The court relied on a recent Arizona Supreme Court decision, *State v. Apelt (Michael)*, 861 P.2d 634, 650 (Ariz. 1993).

He "wasn't suffering from a mental illness that affected him at the time the crime occurred such that he knew neither the nature or quality or the wrongfulness of his conduct." (*Id.*)

After the guilt phase of trial but before sentencing, the court approved funds for a brain scan. *See Hurles*, 752 F.3d at 782. Dr. Duane conducted the CTM scan. He summarized his findings as follows:

> The routine electroencephalogram shows a mild and nonspecific abnormality in the left frontal region. The date of its development is indeterminate. The risk for epileptogenesis would appear to be low. The differential factors include developmental deviation of cerebral organization, prior head injury versus focal infection. Structural disease, such as neoplasm, is improbable.
>
> The FFT analysis confirms the above observations to be valid. There is no evidence of epileptogenesis. *The N-100/P-300 yield a slightly long latency for the N-100 which may represent developmental anomalous cognition as is common in attention deficit disorder.* A mood disorder would appear to be absent. The visual evoked potential studies yield no definitive evidence of dysfunction within the visual system nor additional evidence of cerebral dysfunction.
>
> In summary, *the data reveal subtle nonspecific abnormalities in the left frontal areas, associated with mild processing difficulty* which may be developmental or acquired without risk for epileptogenesis and no evidence of intercurrent anxiety or depression. These data provide a physiologic baseline against which future comparison may be made. *These studies supplement, but do not replace clinical judgments.*

(Doc. 25, Ex. 1 (emphasis added).)

At the sentencing hearing, Hurles presented an expert, Dr. Donald Stonefeld, who diagnosed Hurles as suffering from the following conditions: dysthymic disorder, mild retardation, learning disorder NOS, substance-induced persisting dementia, and substance-induced psychotic disorder with hallucinations. (RT 9/30/94 at 66-77.) Dr. Stonefeld reviewed the "brain mapping data" in reaching his opinions. (*Id.* at 85.) Nonetheless, although he opined that Hurles had brain damage, Stonefeld testified that his opinion was not based on any imaging tests but on Dr. Walter's neuropsychological

testing. (*Id.* at 73, 88-89.) Dr. Stonefeld did not discuss the results of the brain mapping test.

Despite Dr. Stonefeld's testimony, the trial court found that the statutory "diminished capacity" mitigating factor, set forth in A.R.S. § 13-751(G)(1), was not proved. The Arizona Supreme Court affirmed the death sentence on independent review. *Hurles*, 914 P.2d at 1299-1300. Appellate counsel did not raise an *Ake* claim challenging the trial court's initial denial of funds for a CTM scan.

II. Applicable Law

Federal review generally is not available for a state prisoner's claims when those claims have been denied pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In such situations, federal habeas review is barred unless the petitioner can demonstrate "cause" for his failure to follow the state procedural rule, and prejudice or a fundamental miscarriage of justice. *Id.* *Coleman* further held that ineffective assistance of counsel in post-conviction proceedings does not establish cause for the procedural default of a claim. *Id.*

In *Martinez*, however, the Court announced a new, "narrow exception" to the rule set out in *Coleman*. The Court explained:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

132 S. Ct. at 1320; *see also Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013) (noting that *Martinez* may apply to a procedurally defaulted trial-phase ineffective assistance of counsel claim if "the claim . . . was a 'substantial' claim [and] the 'cause' consisted of there being 'no counsel' or only 'ineffective' counsel during the state collateral review proceeding" (quoting *Martinez*, 132 S. Ct. at 1320)).

The Ninth Circuit has expanded *Martinez* to include procedurally defaulted claims of ineffective assistance of appellate counsel. *Nguyen v. Curry*, 736 F.3d 1287, 1294-96

(9th Cir. 2013); *see Hurles*, 752 F.3d at 781.

Accordingly, under *Martinez* a petitioner may establish cause for the procedural default of an ineffective assistance claim "by demonstrating two things: (1) 'counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland* . . .' and (2) 'the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.'" *Cook v. Ryan*, 688 F.3d 598, 607 (9th Cir. 2012) (quoting *Martinez*, 132 S. Ct. at 1318); *see Clabourne v. Ryan*, 745 F.3d 362, 377 (9th Cir. 2014), *overruled on other grounds by McKinney v. Ryan*, 813 F.3d 798, 818 (9th Cir. 2015) (en banc); *Dickens v. Ryan*, 740 F.3d 1302, 1319-20 (9th Cir. 2014) (en banc); *Detrich v. Ryan*, 740 F.3d 1237, 1245 (9th Cir. 2013) (en banc).

The Ninth Circuit has elaborated on the cause standard set out in *Martinez.* In *Clabourne*, the court explained that "to establish 'cause,' [the petitioner] must establish that his counsel in the state postconviction proceeding was ineffective under the standards of *Strickland.* *Strickland*, in turn, requires him to establish that both (a) post-conviction counsel's performance was deficient, and (b) there was a reasonable probability that, absent the deficient performance, the result of the post-conviction proceedings would have been different." *Clabourne*, 745 F.3d at 377 (citations omitted). Determining whether there was a reasonable probability of a different outcome "is necessarily connected to the strength of the argument that trial counsel's assistance was ineffective." *Id.*

Under *Martinez*, a claim is substantial for prejudice purposes if it meets the standard for issuing a certificate of appealability. *Martinez*, 132 S. Ct. 1318-19. According to that standard, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Detrich*, 740 F.3d at 1245 (citing *Martinez*, 132 S. Ct. at 1318-19).

Ineffective assistance of appellate counsel claims are evaluated under the standard set forth in *Strickland*. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *see Moormann v.*

Ryan, 628 F.3d 1102, 1106 (9th Cir. 2010). First, Hurles must show that appellate counsel's performance was objectively unreasonable, which requires him to demonstrate that counsel acted unreasonably in failing to discover and brief a meritorious issue. *Id.* Second, Hurles has the burden of showing prejudice, which in this context means he must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the *Ake* claim, he would have prevailed in his appeal. *Id.*

The Ninth Circuit has explained that in applying *Strickland* to a claim of ineffective assistance of appellate counsel:

> [t]hese two prongs partially overlap. . . . In many instances, appellate counsel will fail to raise an issue because she foresees little or no likelihood of success on that issue; indeed, the weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. . . . Appellate counsel will therefore frequently remain above an objective standard of competence (prong one) and have caused her client no prejudice (prong two) for the same reason—because she declined to raise a weak issue.

Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (citations and footnotes omitted); *see Bailey v. Newland*, 263 F.3d 1022, 1028-29 (9th Cir. 2001). The salient question in analyzing a claim of ineffective assistance of appellate counsel is whether the unraised issue, if raised, would have "led to a reasonable probability of reversal." *Id.* at 1434-35.

In *Ake*, the Supreme Court held that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense." 470 U.S. at 83. Failure to appoint an expert under *Ake* is subject to harmless error analysis. *See Chaney v. Stewart*, 156 F.3d 921, 924 (9th Cir. 1998).

III. Analysis

In remanding for reconsideration of this ineffective assistance of appellate counsel claim, the Ninth Circuit explained:

> Here, the sole defense at guilt was insanity, and Hurles's expert

> offered testimony in support of that defense. The state offered a contrary opinion, resulting in a battle of the experts. Both experts agreed that objective testing could show brain damage, but the trial court denied funding for this test until after the guilt phase concluded. The state used the absence of such an objective test to its advantage, tipping the scales of the battle of the experts in its favor.
>
> Appellate counsel's failure to raise this claim on appeal was deficient. Appellate counsel "unreasonably failed to discover nonfrivolous issues" to appeal, and Hurles's *Ake* claim was "clearly stronger than those presented" on appeal. *Smith v. Robbins*, 528 U.S. 259, 285, 288, 120 S. Ct. 746, 145 L.Ed.2d 756 (2000) (internal quotation marks omitted). Hurles also can show prejudice from this error, as the brain scan conducted after trial showed brain damage. The Supreme Court held in *Martinez* that "[a]llowing a federal habeas court to hear a claim of ineffective assistance of [appellate] counsel when an attorney's errors . . . caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken . . . with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Martinez*, 132 S. Ct. at 1318. We find cause sufficient to excuse the procedural default of Hurles's *Ake* claim and remand.

Hurles, 752 F.3d at 783. The court then considered Hurles' remaining ineffective assistance of appellate counsel claims before concluding:

> We remand for consideration by the district court in the first instance Hurles's claim that appellate counsel failed to raise the *Ake* claim on appeal. The district court should afford Hurles an evidentiary hearing on this issue if one is warranted and shall enter a new judgment on the remanded claim.

Id. at 784.

The Court draws several conclusions from these passages. First, in finding cause for the default, the Ninth Circuit has implicitly determined that PCR counsel's performance in failing to raise the appellate ineffective assistance of counsel claim was both deficient and prejudicial. *See Martinez*, 132 S. Ct. at 1318; *Clabourne*, 745 F.3d at 377.

Next, although the first passage refers to the "procedural default of Hurles's *Ake* claim," i.e. the claim that the trial court erred by denying Hurles' pre-trial request for

neurological testing, *Hurles*, 752 F.3d at 783, it is clear that this Court is tasked with "consideration of appellate counsel's failure to raise" an *Ake* claim. *Id.* at 792; *see id.* at 784. Hurles raised the *Ake* claim in Claim 1 of his amended habeas petition, and the Court found it procedurally defaulted and barred from review. (Doc. 73 at 7.) Its default cannot be excused under *Martinez*, which applies only to defaulted claims of ineffective assistance of trial or appellate counsel.[5] *See Pizzuto v. Ramirez*, 783 F.3d 1171, 1177 (9th Cir. 2015) (explaining that the Ninth Circuit has "not allowed petitioners to substantially expand the scope of *Martinez* beyond the circumstances present in *Martinez*"); *Hunton v. Sinclair*, 732 F.3d 1124, 1126-27 (9th Cir. 2013) (denying petitioner's claim that *Martinez* permitted the resuscitation of a procedurally defaulted *Brady* claim, holding that only the Supreme Court could expand the application of *Martinez* to other areas). Therefore, contrary to Hurles' argument, (Doc. 188 at 8), at issue is Hurles' claim of ineffective assistance of appellate counsel in failing to raise the *Ake* claim, not the *Ake* claim itself.

Finally, the Ninth Circuit's discussion of whether appellate counsel's performance was deficient under *Strickland* must have been intended only to support its determination that the ineffective assistance of appellate counsel claim was "substantial" for purposes of *Martinez*, because otherwise remand would serve no meaningful purpose. Accordingly, the Court will undertake *de novo* review of Hurles' claim of ineffective assistance of appellate counsel.

A. Ineffective Assistance of Appellant Counsel

In assessing the viability of an *Ake* claim, appellate counsel first was faced with the fact that a motion for a brain mapping expert was not denied on its merits by the trial court. Trial counsel abandoned her request for a neurological examination by failing to file a non-*ex parte* motion as directed by the trial court. *See McKinley v. Smith*, 838 F.2d

[5] Because the Court finds that Hurles' claim of ineffective assistance of appellate counsel for failing to raise the *Ake* claim is defaulted and barred, the Court need not revisit its determination that the *Ake* claim itself is defaulted and barred. *See Edwards v. Carpenter*, 529 F.3d 446, 453 (9th Cir. 2000) (holding that "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted.").

1524, 1528 (11th Cir. 1988) (explaining that under *Ake* the defendant must show that he made a timely request to the trial court for expert assistance and that the request was improperly denied). There is no suggestion that there was error in the trial court's ruling that the motion for a brain mapping expert was not appropriate for *ex parte* filing. Therefore, on appeal the Arizona Supreme Court would have reviewed the *Ake* claim under a fundamental error standard. *See State v. Gendron*, 812 P.2d 626, 627 (Ariz. 1991) (explaining that failure to raise an issue at trial waives the issue on appeal absent fundamental error). To be fundamental, the error "must be clear, egregious, and curable only via a new trial." *Id.* at 628. Appellate counsel would have factored in the difficulty of proving fundamental error when deciding which claims to raise. *See Miller*, 882 F.2d 1434.

Second, although the Supreme Court in *Ake* held that the State must, at a minimum, assure the defendant access to a competent psychiatrist, it "limited the right" to expert assistance to "the provision of one competent psychiatrist." 470 U.S. at 79. The Ninth Circuit has acknowledged this limitation. *See Pawlyk v. Wood*, 248 F.3d 815, 823 (9th Cir. 2001) (explaining that under *Ake* "due process guarantees a defendant access to a single, competent psychiatrist"); *cf. Vickers v. Stewart*, 144 F.3d 613, 615 (9th Cir. 1998) (noting open question as to "whether the Constitution requires a State to provide an indigent defendant access to diagnostic testing necessary to prepare an effective defense"). As the Ninth Circuit explained in *Leavitt v. Arave*, 646 F.3d 605 (9th Cir. 2011):

> By its own terms, *Ake* "limit[ed] the right [it] recognize[d]" to "provision of *one* competent psychiatrist." *Ake*, 470 U.S. at 79 (emphasis added). Given this unambiguous language, we've held that the defendant "lacks the right to appointment of a *second* psychiatrist," *Pawlyk v. Wood*, 248 F.3d 815, 824 (9th Cir. 2001), even where the first psychiatrist is alleged to be incompetent or reaches a diagnosis unfavorable to the defense. We've recognized that *Ake's* "limitation to a single, independent psychiatrist is critical given that '[p]sychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently . . . on the appropriate diagnosis.'" *Pawlyk*, 248 F.3d at 823 (quoting *Ake*, 470 U.S. at 80). Accordingly, neither we, nor the Supreme Court, has ever held that a trial court violated *Ake* by

refusing to appoint a second, let alone third, mental health expert.

Id. at 610 (additional citations omitted).

Citing *Pawlyk* and *Leavitt*, the Northern District of California recently rejected a petitioner's argument that "because there was insufficient funding for the two court-appointed psychiatrists to conduct additional neurological or neuropsychological testing to confirm their opinions that Petitioner was incompetent, the examinations that the psychiatrists did conduct were not 'appropriate' under *Ake*." *Marks v. Davis*, 112 F. Supp.3d 949, 962-63 (N.D. Cal. 2015). The district court reiterated that under *Ake* the petitioner was entitled to *one* competent psychiatrist. *Id.* The court also noted that "the Ninth Circuit has expressed doubt that a right to an 'appropriate examination' even exists." *Id.* at 963 (citing *Leavitt*, 646 F.3d at 610); *see also Allen v. Mullin*, 368 F.3d 1220, 1236-37 (10th Cir. 2004) (finding state trial court's refusal to appoint neuropsychologist to assist petitioner charged with murder did not violate due process where court had already appointed expert).

Here, the trial court provided Hurles with a competent psychologist, Dr. Walter, who examined Hurles and testified at trial, thus vindicating Hurles' due process rights under *Ake*. *See Leavitt*, 646 F.3d at 610 ("Due process does not require a state to fund every technologically conceivable test to rule out the possibility of an organic mental disorder.") Given the holding in *Ake* and its progeny, appellate counsel reasonably could have determined that no legitimate *Ake* claim arose from the trial court's failure to provide funding for an additional expert to conduct brain mapping procedures.

Finally, appellate counsel would have been aware of the limited utility of the brain mapping results obtained by Dr. Duane, which showed only that Hurles suffered from a "subtle and nonspecific abnormality" consistent with attention deficient disorder. Although Hurles' expert at sentencing reviewed the brain mapping, he did not testify about its results, and counsel did not present the abnormality as a mitigating circumstance. (*See* ROA 222, 226.)

Accordingly, although the Ninth Circuit found that Hurles raised a substantial

ineffective assistance of counsel claim, this Court finds based on these factors that appellate counsel's decision not to raise an *Ake* claim fell within the "exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Hurles has not shown that appellate counsel's failure to raise the *Ake* claim on appeal was objectively unreasonable.

Moreover, even if appellate counsel's performance was deficient, the Court finds no prejudice resulting from the failure to raise the *Ake* claim. The factors discussed above figure into the Court's analysis of prejudice, which requires an assessment of whether there was a reasonable probability relief would have been granted if appellate counsel had raised the *Ake* issue.

In assessing such a claim, the Arizona Supreme Court would have applied *Ake*'s "own terms," *Leavitt*, 646 F.3d at 610, and found that Hurles' due process rights were satisfied by the appointment of Dr. Walter as a defense expert. Under any standard of review, particularly fundamental error, there is not a reasonable probability that the Arizona Supreme Court would have found the *Ake* claim meritorious.

As noted, Dr. Duane prepared a CTM report before the sentencing hearing. He found "subtle nonspecific abnormalities in the left frontal area," which were "associated with mild processing difficulty." (Doc. 25, Ex. 1.) At sentencing, the trial court held in its special verdict:

> As to statutory mitigating circumstances, number one set out in Arizona Revised Statutes 12-703(G)(1), that is, the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law, was significantly impaired, but not so impaired as to constitute a defense to prosecution has not been proved and does not exist.

(Ex. H, at 15-16.) The evidence was not sufficient to satisfy even the preponderance of evidence burden with respect to the (G)(1) factor, which by definition is less burdensome than the insanity standard.

In addition, the Arizona Supreme Court on appeal conducted "a thorough and independent review of the record and of the aggravating and mitigating evidence to determine whether the sentence is justified." *Hurles*, 914 P.2d at 1299. The court held

that the mitigation was insufficient to warrant leniency in light of the "quality of the aggravating circumstances." *Id*. at 1300.

Because the Arizona Supreme Court found that the (G)(1) mitigating factor was not proved, there is no reasonable probability that, if appellate counsel had raised the *Ake* claim, the court would have found that the lack of additional testing affected the guilt-phase verdict. To establish an insanity defense, Hurles was required to prove by clear and convincing evidence that he suffered from a mental disease or defect such that he did not know the nature and quality of his act or did not know that what he was doing was wrong. A.R.S. § 13-502(A). Arizona law does not provide for a diminished capacity defense. *See Clark v. Arizona*, 548 U.S. 735, 753 (2006) (rejecting challenge to the constitutionality of Arizona's "abbreviated" version of the *M'Naghten* standard). Having determined, like the trial court, that the mitigating information was not sufficient to satisfy the (G)(1) factor by a preponderance of the evidence, the Arizona Supreme Court would not have found that it proved insanity by the higher standard of clear and convincing evidence.

If it had been presented with an *Ake* claim, the Arizona Supreme Court would have evaluated "the probable value of additional testing" and the "risk of erroneous deprivation" of Hurles' rights from denial of the testing. *State v. Vickers*, 768 P.2d at 1177, 1181-82 (Ariz. 1989) (citing *Ake*, 470 U.S. at 74). As already described, the brain scan prepared for Hurles' sentencing showed only that he suffered from a "subtle and nonspecific abnormality" consistent with attention deficient disorder and mild processing difficulties. These bran scan results were not helpful to Hurles' insanity defense, and the denial of such testing did not deprive Hurles of his rights. Evidence that Hurles suffered only from the "subtle and nonspecific abnormality" identified by the CTM would not have been consistent with Dr. Walter's testimony that Hurles was psychotic at the time of the crimes due to brain impairment. Moreover, given the circumstances of the crime, including Hurles' efforts to evade capture, the evidence did not support a finding that Hurles was in a psychotic state and did not know that what he was doing was wrong.

In sum, given the weakness of the evidence of brain damage revealed by the CMT,

together with the fact that Hurles' rights were satisfied by the appointment of a competent expert, there is no reasonable probability that the Arizona Supreme Court would have reversed Hurles' conviction if appellate counsel had raised an *Ake* claim.

B. Evidentiary hearing

Hurles asserts that the Ninth Circuit's opinion "*strongly* suggests" that the court ruled on the merits of the ineffective assistance appellate counsel claim. (Doc. 188 at 9.) He argues, therefore, that this Court either should grant relief or order an evidentiary hearing on the *Ake* issue. (*Id.* at 10.) Respondents contend that an evidentiary hearing is not required to resolve the ineffective assistance of appellate counsel claim. (Doc. 190 at 11-12.) The Court agrees.

The Ninth Circuit held that "[t]he district court should afford Hurles an evidentiary hearing on this issue if one is warranted." *Hurles*, 752 F.3d at 784. An evidentiary hearing is not warranted here because the record is complete with respect to appellate counsel's performance. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) (explaining that an evidentiary hearing is not necessary where claim can be resolved on state court record); *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998) (finding petitioner not entitled to evidentiary hearing where ineffective assistance claim could be "resolved by reference to the state court record"). "When a claim of ineffective assistance of counsel is based on failure to raise issues on appeal, . . . it is the exceptional case that could not be resolved on an examination of the record alone." *Gray v. Greer*, 800 F.2d 644, 647 (7th Cir. 1986).

Hurles contends an evidentiary hearing is necessary to allow him "to present the evidence he was wrongly denied from presenting at trial." (Doc. 188 at 10.) The CTM brain mapping results are in the record, however, and Hurles has not identified any disputed facts that would be relevant to a review of appellate counsel's performance.

CERTIFICATE OF APPEALABILITY

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, an applicant cannot take an appeal unless a certificate of appealability has been issued by an appropriate judicial officer. Rule 11(a) of the Rules Governing Section 2254 Cases

provides that the district judge must either issue or deny a certificate of appealability when it enters a final order adverse to the applicant. If a certificate is issued, the court must state the specific issue or issues that satisfy 28 U.S.C. § 2253(c)(2).

Under § 2253(c)(2), a certificate of appealability may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." This showing can be established by demonstrating that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner" or that the issues were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Court finds that reasonable jurists could debate its resolution of Hurles' judicial bias claim and his ineffective assistance of appellate counsel claim.

CONCLUSION

Based on the foregoing,

IT IS ORDERED that Petitioner Hurles' claim of judicial bias is **DENIED**.

IT IS FURTHER ORDERED that Hurles' claim of ineffective assistance of appellate counsel is **DENIED**.

IT IS FURTHER ORDERED granting a certificate of appealability on Hurles' judicial bias claim and his ineffective assistance of appellate counsel claim.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment accordingly.

Dated this 19th day of May, 2016.

Douglas L. Rayes
United States District Judge