No. 19–7541

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD D. HURLES,
PETITIONER,
-vs-

DAVID SHINN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Should this Court grant certiorari to review the Ninth Circuit's decision affirming the district court's fact-specific determination that there was no unconstitutional risk of judicial bias?

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INTRODUCTION

Petitioner Richard Hurles fails to present a compelling reason for this Court to grant certiorari in this aging capital case. He has not established that the Ninth Circuit Court of Appeals' decision conflicts with a decision from another United States court of appeals or a state court of last resort, that the Ninth Circuit decided an important question of federal law not yet settled by this Court, or that the Ninth Circuit "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. SUP. CT. R. 10.

Hurles' claim is based on alleged district court errors that, if determined to be errors at all, affect only his case. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *Butler v. McKellar*, 494 U.S. 407, 429 (1990) (Brennan, J., dissenting) ("[The] Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous.") (quotations omitted); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.").

STATEMENT OF THE CASE

In June 1992, Hurles was released on parole after serving nearly 15 years in prison for sexually assaulting two young boys. *State v. Hurles*, 185 Ariz. 199, 201, 914 P.2d 1291, 1293 (1996). Less than six months after his release, Hurles walked into the Buckeye Public Library and, after the last patron exited, locked the front doors and attacked the only employee in the building, Kay Blanton. *Id.* During the attack, Hurles stripped Blanton of her underwear in an attempt to rape her; he violently kicked Blanton with enough force to tear her liver; and he stabbed her with a paring knife thirty-seven times, killing her. *Id.* Hurles then ran from the library to his nephew's house where he changed clothes and asked for a ride to Phoenix. *Id.* at 201–202. On the drive to Phoenix, Hurles threw a bundle of clothes out the window, which was later discovered and contained blood matching Blanton's blood type. *Id.* at 202. Hurles eventually attempted to take a bus to Las Vegas, but law enforcement officers intercepted the bus and arrested Hurles for the murder. *Id.*

The State of Arizona charged Hurles with burglary, first-degree murder, first-degree felony murder and attempted sexual assault. *Hurles v. Ryan*, 752 F.3d 768, 775 (9th Cir. 2014). The State sought the death penalty and Hurles was appointed an attorney to represent him. *Id.* Defense counsel requested a second attorney be appointed to assist with the defense but the trial court denied the request. *Id.* Defense counsel challenged the trial court's denial of her request for co-counsel by filing a petition for special action with the Arizona Court of Appeals. *Id.* As required by law, Hurles' petition named the trial judge, Judge Ruth Hilliard, as the

respondent, although she was only a nominal party. *Id.* (citing Ariz. R. P. Spec. Actions 2(a)). The real party in interest was the State of Arizona, which was represented by the Maricopa County Attorney. *Hurles v. Superior Court, In & For Cty. of Maricopa*, 174 Ariz. 331 (Ct. App. 1993). Due to a lack of standing on the issue of appointment of counsel, the Maricopa County Attorney declined to file a response. *Id.* (citing *Knapp v. Hardy*, 111 Ariz. 107 112, 523 P.2d 1308, 1313 (1974) discussing the prosecution's lack of standing on the issue of defense counsel selection). However, the presiding criminal judge, Judge Ron Reinstein, requested the Arizona Attorney General file a response on the court's behalf. *Id.* at 334. The Arizona Court of Appeals ruled that the trial court lacked standing to file a response, and declined to even consider the pleading filed at the behest of Judge Reinstein. *Id.* at 334. As to the issue of appointment of second counsel, the court declined to take jurisdiction finding that the issue was premature because defense counsel did not make a "particularized showing" on the need for co-counsel, and the trial court's order did not preclude defense counsel from attempting to make a particularized showing in the future. *Id.* at 334.

On April 15, 1994, a jury found Hurles guilty of first-degree burglary, attempted sexual assault, and first-degree murder. *Hurles*, 185 Ariz. at 201. At the time, Arizona law permitted the trial court to weigh aggravation and mitigation, and determine whether to impose the death penalty. *Hurles*, 752 F.3d at 776 (citing *Ring v. Arizona*, 536 U.S. 584, 588 (2002) holding that capital defendants are entitled to a jury finding on issues of fact that would support imposition of a death sentence). At sentencing, Judge Hilliard determined that the mitigation was

insufficient to warrant leniency and imposed a death sentence for the murder conviction. *Hurles*, 752 F.3d at 777.

Hurles appealed his convictions to the Arizona Supreme Court, but that court affirmed his convictions and sentences on April 16, 1996. *Hurles*, 185. Ariz. at 208. Hurles did not raise a judicial bias claim in his direct appeal. *Hurles*, 752 F.3d at 777. Following the direct appeal, Hurles petitioned for post-conviction relief ("PCR") in 1999 and it was denied by Judge Hilliard. *Id.*

In 2000, Hurles initiated habeas corpus proceedings in federal court. *Id.* However, while his habeas proceeding was pending he returned to state court and initiated a second PCR petition where he argued judicial bias for the first time. *Id.* Judge Hilliard presided over this second PCR proceeding and Hurles moved to recuse her. *Id.* Judge Hilliard referred the recusal motion to the presiding judge, Judge Edward Ballinger, Jr., who reviewed and denied it. *Hurles v. Ryan*, 188 F. Supp. 3d 907, 913 (D. Ariz. 2016), *aff'd*, 914 F.3d 1236 (9th Cir. 2019). Judge Hilliard denied the second PCR petition on August 9, 2002, and the Arizona Supreme Court affirmed. *Hurles*, 752 F.3d at 777, 790.

Hurles returned to federal court and amended his habeas petition to include his judicial bias claim. *Id.* at 777. The district court dismissed all of his claims finding they were either procedurally barred or meritless. *Id.* Hurles then petitioned the Ninth Circuit to review the district court's denial of his habeas petition. *Id.* The Ninth Circuit accepted jurisdiction and considered several issues raised on appeal, including the judicial bias claim. *Id.* at 788. In reviewing this claim, the court questioned "whether the average judge, in Judge Hilliard's position, was likely to sit

as a neutral, unbiased arbiter or whether there existed an unconstitutional risk of bias." *Id.* at 792 (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)). The court determined that, under the Anti-Terrorism and Effective Death Penalty Act of 1996, there was an unreasonable determination of the facts by the state court in denying the motion to recuse, and the Ninth Circuit remanded to the district court with instructions to hold an evidentiary hearing on whether there was an unconstitutional risk of judicial bias.[1] *Id.* at 777, 791.

On January 29, 2016, an evidentiary hearing was held in U.S. District Court in Phoenix, Arizona. *Hurles*, 188 F. Supp. 3d at 910. Hurles called Judge Hilliard to testify concerning the petition for special action and the State's response.[2] Pet. for Writ of Cert., App. B, Pg. 49 (January 21, 2020). Judge Hilliard testified that she did not personally ask to be represented on Hurles' special action and did not request that a response be filed. *Id.* at 74. Judge Hilliard testified that when she received petitions for special action she would advise her judicial assistant to notify the presiding criminal judge who would then handle the petition. *Id.* at 72. She further testified that this procedure was followed in this case and that the presiding criminal judge contacted the Attorney General's Office to request a response. *Id.* at 74. Judge Hilliard also testified that, generally, she didn't read special action petitions, and does not remember whether she reviewed Hurles' petition or the response. *Id.* at 72–73. Judge Hilliard further testified that she did not assist in drafting the response or provide any input for supplemental briefing or oral

[1] The Ninth Circuit also remanded an ineffective assistance of counsel issue to the district court. *Hurles,* 752 F.3d at 784.

[2] Judge Hilliard retired from the bench in June 2011.

arguments, and she did not personally authorize the Attorney General's response to the special action. *Id.* at 75–76.

Hurles also called former Assistant Attorney General Colleen French who responded to the petition for special action at the request of Judge Reinstein. *Id.* at 8. French later handled the direct appeal and first post-conviction proceedings against Hurles. *Id.* at 26. French testified that when she filed her response to the special action, it was her understanding she was representing the Superior Court, because Judge Hilliard was a nominal party only. *Id.* at 14. French also testified that Judge Reinstein requested the Attorney General file a response to Hurles' petition for special action. *Id.* at 32. French testified that she contacted Judge Hilliard while preparing the response and Judge Hilliard was not cooperative, see *Id.* at 23, did not seem pleased that a response was being filed, and did not provide any information to French. *Id.* at 42. French testified that Judge Hilliard did not assist in the preparation of the response. *Id.* at 34.

Following the hearing, the district court made several factual findings in its order regarding Judge Hilliard's involvement in the filing of the special action response by French:

> (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.
>
> (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.

Hurles, 188 F. Supp. 3d at 916. The district court judge concluded that "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 'so embroiled in a running, bitter controversy' with Hurles or his counsel." *Id.* at 918. The district court concluded that Judge Hilliard was able to sit as a neutral, unbiased arbiter and there was no unconstitutional risk of bias. *Id.* at 918. The Ninth Circuit affirmed the district court's decision. *Hurles,* 914 F.3d 1236 (9th Cir. 2019). Hurles now appeals the Ninth Circuit's opinion and requests intervention from this Court.

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. SUP. CT. R. 10. Accordingly, this Court grants certiorari "only for compelling reasons." *Id.* Hurles has not established that there is a conflict among courts on the issue of judicial bias; that the Ninth Circuit decided an important question of federal law that is not yet settled by this Court; or that the Ninth Circuit decided an important federal question in a way that conflicts with Supreme Court precedent. *Id.* Hurles claims that the district court committed error in reaching its factual findings and legal conclusions. The record from the evidentiary hearing, however, supports the district court's factual findings and legal conclusions. Therefore, this case does not provide a compelling reason for this Court's intervention and does not warrant this Court's review.

I. This Court Should Not Grant Certiorari to Review the Ninth Circuit's Case-Specific and Fact-Bound Decision Denying Relief on Hurles' Judicial Bias Claim.

Hurles contends that the Ninth Circuit Court "failed to fulfill its duty to accurately review [the] lower court's decision[,]" and asks this Court to intervene and find that the district court's factual findings were clearly erroneous. Pet. for Writ of Cert. at 12–13. Hurles' argument for clear error, however, is based on a re-interpretation of the facts over the district court's interpretation. This Court interprets "clearly erroneous" to mean that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City,*

N.C., 470 U.S. 564, 573–74 (1985) (c*iting United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1982). If there are two possible views of the evidence, the view adopted by the fact finder cannot be clearly erroneous. *Id.* This Court has previously stated that it will not "lightly overturn" a trial court's factual findings when those findings were reviewed and affirmed by an intermediate court. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (citing *Neil v. Biggers*, 409 U.S. 188, 193, n. 3 (1972)).

This Court's review of this case is unwarranted because Hurles is asking this Court to correct a perceived factual error, which is not a compelling reason for review. But in any event, the findings are supported by the evidence and plausible in light of the record viewed in its entirety

Hurles challenges three of the seven factual findings of the district court. First, Hurles challenges the finding that Judge Hilliard was a nominal party to the special action. As a matter of Arizona law, Judge Hilliard was a nominal party and the Maricopa County Attorney's Office was the real party in interest. *Hurles,* 174 Ariz. at 332 (citing Ariz. R. P. for Spec. Actions 2(a)).

Judge Hilliard was a nominal party by law, and her involvement, or lack thereof, did not cause her to be a real party in interest. As the district court found, Judge Hilliard never requested a response be filed to the special action, she did not seem pleased that a response was being filed by French, and she did not cooperate or participate in the drafting of the special action response. Judge Hilliard also testified that it was very common for her not to read special actions or their responses, and she had no memory of reading the special action or response in this

case. Judge Hilliard was a nominal party and her lack of involvement in the special action supports that finding.

Hurles argues that Judge Hilliard took affirmative steps to ensure a response would be filed on her behalf and was therefore more than a nominal party, but this argument is contrary to the testimony at the evidentiary hearing. The only "affirmative steps" Judge Hilliard took was delivering the petition for special action to Judge Reinstein, which was the common procedure. Judge Hilliard testified that it was common for her to receive a special action and, without reading it, tell her judicial assistant to "notify the presiding criminal judge[,]" and "the presiding criminal judge took care of it." Pet. for Writ of Cert., App. B at 72. Judge Hilliard's involvement was nothing more than being labeled a nominal party on the pleadings – a designation required by law. Therefore, the district court's finding that Judge Hilliard was a nominal party is supported by the record and cannot be clearly erroneous.

Hurles also argues that the district court erred in finding that Judge Reinstein had strong feelings about the issue raised in the special action and requested the Attorney General file a response. Both Judge Hilliard and French testified that it was Judge Reinstein who requested a response from the Attorney General, which is sufficient to support this finding. Even if it was error to find that Judge Reinstein had "strong feelings" about the issue, this fact alone is so insignificant in the analysis that removing it from the findings of fact would not alter the conclusion. The subjective intent of Judge Reinstein is irrelevant in this case. The undisputed, relevant fact is that Judge Reinstein requested the response and not Judge Hilliard.

Therefore, the district court did not commit clear error because the factual finding is supported by the record.

Lastly, Hurles' argument that the district court erred when it found that "French understood she was representing the presiding criminal judge and the superior court at the behest of the criminal presiding judge[]" is unpersuasive because it is inconsistent with the record. Pet. for Writ of Cert. at 12. French testified that she believed she represented the Superior Court and that Judge Hilliard was only a nominal party:

> 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 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.

Pet. for Writ of Cert. App. B at 14. French testified that Judge Reinstein requested the response and she believed she was representing the Superior Court, not specifically Judge Hilliard. Therefore, this finding is supported by the record and not erroneous.

Hurles argues this factual finding is contradicted by the fact French listed Judge Hilliard as the respondent on the response to the special action. This argument fails because the trial judge is required to be listed as a nominal party in a petition for special action pursuant to Arizona law. Ariz. R. P. Special Actions (2)(a). In the petition for special action, Hurles also listed Judge Hilliard as a respondent and the Maricopa County Attorney's Office as the real party in interest. French's response

mirrored the petition by including Judge Hilliard, and also listed the county attorney's office as the real party in interest. Pet. for Writ of Cert. App. C. If listing a judge as a respondent in a special action automatically created an unconstitutional risk of bias in the trial judge, all defendants would have unlimited opportunities to remove a judge from their case by filing petitions on pre-trial rulings with the hope of getting a more favorable judge. Merely placing a judge's name in the caption of a case as a nominal party neither reflects nor creates bias against the opposing party. French listed Judge Hilliard as a respondent because it was required by law, but the record supports the finding that she believed she represented the superior court at the request of Judge Reinstein. Therefore, Hurles' argument is unpersuasive and the factual finding was not clearly erroneous.

II. This Court Should Not Grant Certiorari to Review the Ninth Circuit's Legal Conclusions Because that Court Applied the Correct Standard and This Issue Does Not Warrant This Court's Intervention.

Hurles' second contention is that the Ninth Circuit erroneously applied the clear error standard of review to the district court's legal conclusion that there was no unconstitutional risk of bias. Not so. The Ninth Circuit recognized the appropriate standards of review and stated it in their opinion: "We review de novo the district court's dismissal of the petition and its findings of fact for clear error." *Hurles*, 914 F.3d at 1237 (citing *Brown v. Ornoski*, 531 F.3d 1006, 1010 (9th Cir. 2007)). The court then affirmed the district court's dismissal of the petition in its entirety. *Id.* at 1238. While the Ninth Circuit may not have discussed its application of *de novo* review, it was certainly inherent in its decision because it could not have affirmed the dismissal of the habeas petition without applying *de novo* review. Moreover, the

district court's factual findings support the conclusion that there was no unconstitutional risk of bias. Judge Hilliard did not request a response be filed on her behalf, did not participate in drafting the response, and did not authorize the response to be filed on her behalf. Thus, the Ninth Circuit's acceptance of the district court's factual findings supported its *de novo* affirmance of the district court's legal conclusions. For those reasons, the district court correctly applied *de novo* review and concluded that Judge Hilliard did not pose an unconstitutional risk of bias.

Hurles argues that Judge Hilliard became part of the accusatory process which created an unconstitutional risk of bias, but his cited authority does not support his argument. Hurles first cites *In re Murchison*, which involved a judge who sat as a one-man grand jury and charged two witnesses who appeared in front of him with contempt. *In re Murchison*, 349 U.S. 133, 134–35 (1955). The judge then tried the men on the charges, convicted and then sentenced them. *Id.* This Court found that the judge became part of the accusatory process when he acted as a prosecutor and tried the men on the contempt charges, which deprived them of their due process rights. *Id.* at 137–39.

Here, Judge Hilliard never stepped outside of her judicial role and into the shoes of the prosecutor. Judge Hilliard was named as a nominal party in a response to a special action which she did not request, participate in, or authorize. More importantly, the response that Hurles contends put Judge Hilliard in an adversarial position to him was not even considered by the court of appeals because that court found that the judge lacked standing. *In re Murchison* is instructive on what it

takes to become a part of the accusatory process, and Judge Hilliard's involvement in the special action did not inject her into the accusatory process and create an unconstitutional risk of bias.

Hurles also relied on *Crater v. Galaza* where the Ninth Circuit determined there was no appearance of bias after the trial judge, who was familiar with the facts of the case, encouraged the defendant to accept the state's plea offer and told the defendant he expected he would be convicted at trial. 491 F.3d 1119, 1330–32 (9th Cir. 2007). This Court determined those comments did not show an appearance of bias, and nothing said or done by Judge Hilliard meets, much less exceeds, those comments.

Hurles argues that the language used in the State's response, that the case was "brutal," "simple" and "straightforward," demonstrates Judge Hilliard adopted the prosecutor's view and put Judge Hilliard in an adverse position to Hurles. However, Judge Hilliard did not draft or review the response prior to it being filed, and she did not have input in the response. Those statements, therefore, cannot be attributed to Judge Hilliard. Hurles asserts Judge Hilliard adopted those statements due to her status as a nominal party to the special action, but her involuntary status as a nominal party cannot justify that attribution. There are no statements attributable to Judge Hilliard that suggest she had any bias against Hurles. Therefore, in light of *Crater*, there was no appearance of bias.

Lastly, Hurles' reliance on *Withrow v. Larkin* to support his argument that Judge Hilliard participated in the accusatory process is misguided. 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975). In *Withrow*, an abortion doctor argued that he

was denied due process by the state's medical examining board which performed both investigative and adjudicative functions. *Id.* at 37. This Court found no due process violation and stated that the administrators were "assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the bases of its own circumstances." *Id.* at 55 (quoting *U.S. v. Morgan*, 313 U.S. 409, 421, 61 S.Ct. 999, 1004 (1941)). Here, Judge Hilliard's status as a nominal party in a special action does not equate to performing investigative or prosecutorial functions. She is assumed to have presided fairly and to have judged Hurles' case on its merits. The Ninth Circuit was correct in affirming the district court's dismissal of the habeas petition because the record shows there was no unconstitutional risk of bias.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to deny Hurles' petition for writ of certiorari.

Respectfully submitted,

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