No. 19-8792

IN THE
Supreme Court of the United States

JOHN HUMMEL,
Petitioner,
v.

BOBBY LUMPKIN,
Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Should this Court review the Fifth Circuit's straightforward and correct application of 18 U.S.C. § 3599, where the district court properly exercised its broad discretion in denying expert services funding in excess of the statutory cap on the basis that Hummel failed to show that the services of an out-of-state expert to conduct a limited, narrow risk assessment were reasonably necessary?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner John Hummel was convicted and sentenced to death for the capital murders of his pregnant wife, his five-year-old daughter, and his elderly father-in-law. Hummel unsuccessfully challenged his conviction and sentence in state and federal court. More than two months after the state trial court entered an order setting his execution date for March 18, 2020, Hummel sought $20,000 of expert services funding in the district court to assist in the preparation of a clemency petition. After the district court provided Hummel an opportunity to supplement his request with more specificity, the court granted Hummel the statutory cap of $7,500 but denied the remaining $12,500 without prejudice to Hummel adding more detail to support his request. Hummel moved the court to reconsider its denial of the $12,500 but the court, noting a laundry list of curable defects in Hummel's request, denied Hummel's motion again because of insufficient specificity.

Hummel appealed the district court's decision to the Fifth Circuit and sought a stay of his execution. Two days before he was scheduled to be executed, the Fifth Circuit affirmed the district court's funding orders

and declined to stay his execution. On that same day, however, the Texas Court of Criminal Appeals (CCA) granted, on its own motion, a stay of Hummel's execution because of the COVID-19 pandemic. No new execution date has been set.

Hummel now requests certiorari review of the Fifth Circuit's affirmance of the district court's denials of funding in excess of the statutory cap. However, Hummel provides no compelling reason that this Court should exercise its discretion to review the lower courts' straightforward, and correct, application of the law governing funding requests under 18 U.S.C. § 3599. Further, this case presents several vehicle problems in that the court of appeals decided Hummel's case in the specific context of an imminent execution date that no longer exists. Justiciability concerns—namely, that Hummel's current path to clemency relief is not presently viable and that the district court's orders were not final and appealable within the meaning of 28 U.S.C. § 1291—make this case a poor vehicle for reviewing the question presented. Although the State raised justiciability concerns in the court below, the court avoided them in light of Hummel's then-imminent execution and instead rejected Hummel's claim as meritless. But there is no longer an

imminent execution, so the Court would have to decide these issues before even reaching Hummel's substantive arguments. Thus, certiorari review is not warranted, and Hummel's request should be denied.

STATEMENT OF THE CASE

I. Facts of Hummel's Capital Murder

The Fifth Circuit summarized the facts of Hummel's capital murders as follows:

> Kennedale, Texas authorities responded to a fire at Hummel's house shortly after midnight on December 18, 2009. Hummel's pregnant wife, father-in-law, and five-year-old daughter were found dead inside. Hummel was not inside the house, and approached an officer outside around 4:30 a.m. He told police that he was away from the house the entire night because he was checking prices for Christmas presents. During the interview, police observed what appeared to be blood on his pants; they took his clothing for testing and observed more blood on one of his socks and scratch marks on his back. After leaving the police department, Hummel picked up a paycheck from his employer and subsequently went missing.
>
> Two days later, Hummel attempted to enter the United States on foot at a port of entry between Tijuana, Mexico, and San Ysidro, California, without a passport or other acceptable proof of citizenship. Upon entering his name and date of birth into the computer system, the Customs and Border Protection [(CBP)] officer was alerted that Hummel was a missing person and might be armed and dangerous. The alert stated that if Hummel was located, CBP should contact the Kennedale Police Department, but should not arrest or detain him. The officer called the Kennedale Police Department, which said to hold Hummel based on an arson arrest warrant, though no

> warrant had been approved at that point. CBP learned shortly after that there was no active warrant, but continued to detain Hummel until a warrant was issued later that day. After the warrant was issued, Kennedale police officers traveled to the San Diego jail where Hummel was being held, read him his Miranda rights, and interrogated him. Hummel confessed orally and in writing to killing all three victims, setting the house on fire, dumping the weapons he had used, and driving to several Walmart stores "to be seen on camera." Based on this information, authorities found several weapons in a dumpster that tested positive for DNA from Hummel and his family members. Hummel's clothing from that night tested positive for DNA from Hummel's wife.
>
> The prosecution presented this evidence at trial, in addition to testimony from Kristie Freeze, who had a relationship with Hummel while divorcing her husband. She said that she had told Hummel not to contact her after she learned his wife was pregnant, about a week before the murders, but he continued to call and text her. She also testified that she told Hummel on December 16 that her divorce became final—two days before the murders.

Hummel v. Davis, 908 F.3d 987, 989–90 (5th Cir. 2018).

II. Evidence Presented in Mitigation of Punishment

Hummel's counsel called eleven witnesses on his behalf. The first, Haila Scoggins, was Hummel's special education teacher at Jonesville High School in South Carolina. ROA.6338.[1] Scoggins testified that Hummel remained in her special education classes for all four years of high school, and Hummel had a learning disability. ROA.6338–39.

[1] "ROA" refers to the record on appeal filed in the court below.

Scoggins believed that, had Hummel received accommodations for his learning disability, he might have attended college. ROA.6342. Scoggins described Hummel as quiet, pleasant, cooperative, responsible, and never requiring discipline. ROA.6340. Scoggins recalled that Hummel enjoyed playing Dungeons and Dragons. ROA.6341.

Tommy Jeffrey Stribble, the Director of Special Services for Union County Schools in South Carolina, testified that Hummel's school records showed that he failed the fourth grade. ROA.6347. The records also showed that Hummel failed the writing portion of his exit exams three times, only passing on his fourth attempt after special accommodations were made. ROA.6347. Hummel participated in ROTC while he was in school and received a second-place award in an art contest. ROA.6348. Hummel was absent sixteen days during his second-grade year and was tardy ten times during his fourth-grade year. ROA.6349.

Mark Pack, a family friend of Hummel's, testified that he had known Hummel since he was around nine years old. ROA.6351. Pack described Hummel as "an isolated person," who kept to himself and played video games. ROA.6352–53. Pack said that Hummel's mother would do anything for Pack and his siblings but would not do the same

for her own children. ROA.6353. Pack testified that he witnessed Hummel being physically punished once when he was a teenager. ROA.6353–54. Pack never saw Hummel get violent with anybody, although he did see Hummel get frustrated or mad. ROA.6353–54. Hummel would ball up and hold everything in when he was frustrated. ROA.6354. Pack thought Hummel was a slow learner. ROA.6355.

Christy Gregory Pack, who was married to Mark Pack, testified that she first met Hummel at church. ROA.6356. Christy said that, whenever they would go over for Sunday dinners, Hummel would be very quiet and stay in his bedroom playing video games. ROA.6357. Christy testified that Hummel's mother was very generous with the Pack family but very strict with her own children. ROA.6357.

Linda Jean Petty Pack, Mark Pack's mother, was good friends with Hummel's mother, Jackie. ROA.6359. Linda recalls that Jackie was very strict with her kids, although she never saw her physically strike them. ROA.6360. Linda never saw Hummel back-talk or disobey his parents, and both Hummel children were quick to obey their parents. ROA.6360. Linda believed Jackie treated the Pack children better than her own children. ROA.6360–61.

Derrick Joe Parris, Linda Pack's nephew, was Hummel's childhood friend. ROA.6363. Parris witnessed Hummel's father hit Hummel twice, once with a belt and once with a broomstick. ROA.6363–64. Parris and Hummel would play Nintendo games together. ROA.6364. Parris testified that Hummel was given the nickname "Bacon" at school because he would smell like bacon when he got to school. ROA.6364.

When Hummel came back from the military, he took Parris to bars and strip clubs, even though Parris was a minor. ROA.6364–65. Parris described Hummel as getting "a little too attached" to the girls dancing in the strip club. ROA.6365. Parris testified that Hummel was always behind in school. ROA.6365. Parris had never known Hummel to be violent with anybody. ROA.6365. Parris testified that it surprised him when Hummel joined the Marines because Hummel was overweight and not very athletic. ROA.6365. Parris and his friends laughed when Hummel told them he was an intelligence analyst in the Marines because they did not believe Hummel was smart. ROA.6365. Parris never knew Hummel to use drugs before the Marines. ROA.6367.

Stephanie Bennett was Hummel's former high school girlfriend. ROA.6368. Bennett testified that they dated less than a year, and both

she and Hummel were a little shy. ROA.6369. Bennett broke up with Hummel when he began to speak about getting married after high school. ROA.6369. Bennett never knew Hummel to be violent towards anybody, and Hummel always treated her appropriately. ROA.6370.

Letti Bandit Hubertz was homeless when she met Hummel in San Diego. ROA.6372. Hubertz was pregnant when she and Hummel started dating a month before Hummel got out of the Marines. ROA.6372–73. When Hummel got out of the Marines, he and Hubertz moved back to South Carolina together. ROA.6373. They lived with Hummel's parents, and Hummel began working with his dad at Kohler. ROA.6373. Hummel always treated her with respect, showed great concern for her while she was pregnant, and was never abusive towards her in any way. ROA.6373. Hummel and Hubertz eventually moved into their own trailer shortly before Hubertz gave birth to her child, to whom she gave Hummel's last name. ROA.6372–74.

Hubertz testified that she thought their relationship was progressing well, until the day that Hummel's sister Neata Woody showed up at their trailer and handed Hubertz a letter purportedly from Hummel, in which he said he was not ready to be a father and had left

for Texas. ROA.6374. Neata gave Hubertz one hour to pack and leave, as she had purchased a bus ticket back to California for them. ROA.6374. When Hubertz got to the bus station, she noticed that the ticket had been purchased two weeks earlier. ROA.6374. Hubertz testified that she never knew Hummel to frequent bars or strip clubs or use drugs. ROA.6375. Hubertz attempted to contact Hummel after she got to California but was repeatedly hung up on. ROA.6375.

Neata testified that she took care of Hummel when they were children, even though their mother did not work outside the home, because she was told to. ROA.6377–78. Neata said her parents were never affectionate with them. ROA.6378. Neata's mother was the disciplinarian in the family, often using a belt to dole out punishment. ROA.6378–80. It was common for the Hummel children to be left alone in the house, even before elementary school. ROA.6379. One time, Neata called the operator when she was scared while she and Hummel were home alone. ROA.6380.

Neata and Hummel could have friends visit them only if their parents approved. ROA.6380. Neata believes that her parents were abusive towards them. ROA.6380. Neata knew that Hummel was called

"Bacon" at school because he smelled like the wood-burning stove that heated the house. ROA.6381. Neata testified that she and Hummel talked about his relationship with Hubertz, and he let her take care of it. ROA.6382. Neata said that when Hummel got off work, he went to his parents' house, and Neata picked Hubertz up and told her that Hummel did not want to be with her anymore. ROA.6382.

Neata testified that Hummel joined the military when he was twenty-two years old. ROA.6381. Hummel was in the Marines for four years, and after Hummel got out of the Marines, he had colitis and underwent surgery to remove some of his intestines. ROA.6383. Hummel wore a colostomy bag for a while after the surgery. ROA.6383. Hummel and his wife had financial problems. ROA.6383. Neata testified that, although she saw Hummel get angry, he was never violent towards anybody. ROA.6383. Neata said that Hummel was nice to Joy and wonderful with Jodi. ROA.6388.

Finally, the defense called two expert witnesses. The first, Frank G. Aubuchon, testified that, based on his review of Hummel's military, medical, offense, and jail classification records, he believed that Hummel would be classified as general population Level 3, which is the minimum

level a life-sentenced-without-parole inmate could receive. ROA.6436–38. Aubuchon relied on several observations supporting his conclusion: other than Hummel's crime, he was a very unremarkable person; Hummel lacked a criminal record; Hummel was honorably discharged from the military; and Hummel had no disciplinaries while in jail. ROA.6438, 6449. Aubuchon believed that Hummel would adjust well to life in prison, based on Hummel's good behavior during the year he spent incarcerated in Tarrant County Jail and based on his good behavior in the military, which is a similarly highly-structured environment. ROA.6439. Aubuchon admitted, however, that he did not know that Hummel had gone absent without leave while in the military. ROA.6439.

Dr. Antoinette Rose McGarrahan, the final defense witness, was a forensic psychologist, with a specialty in neuropsychology. ROA.6450. Dr. McGarrahan testified that she conducted a full neuropsychological, personality, and emotional evaluation of Hummel that lasted eleven hours. ROA.6451. Dr. McGarrahan used over twenty different tasks and instruments. ROA.6451. Dr. McGarrahan also reviewed numerous records, including military, medical, school, and Tarrant County Jail records, as well as his video-recorded statements, statements from Neata

and her husband, and various cards, letters, and correspondence. ROA.6451. Dr. McGarrahan also interviewed Neata for two and a half hours and Hummel's mother for one hour. ROA.6451. Dr. McGarrahan reviewed Hummel's mother's medical records and subsequently reviewed psychological test data obtained by the State's expert, Dr. Randy Price. ROA.6451. Dr. McGarrahan performed a clinical interview with Hummel, which delved into his social history and the circumstances of the offense. ROA.6451.

Dr. McGarrahan found that Hummel suffered from a disorder of written expression, but his IQ was in the average to above-average range. ROA.6452. Dr. McGarrahan did not find that Hummel suffered from any severe mental disorders, although Hummel did show some mild depression and anxiety. ROA.6452. Dr. McGarrahan concluded that Hummel may have suffered from a combination of personality disorders, including narcissistic, antisocial, schizoid, and borderline personality disorders. ROA.6452.

Dr. McGarrahan testified that she believed that both genetic, but largely environmental, factors played a major role in the development of Hummel's personality. ROA.6454. Dr. McGarrahan testified that, based

on her discussions with Hummel's mother, his sister, and a review of the records, Hummel's mother's caregiving was inconsistent, not nurturing, unaffectionate, and neglectful. ROA.6454. Dr. McGarrahan testified that an individual's ability to learn reciprocity and form attachments is a direct result of the involvement of the primary caregiver. ROA.6454. Dr. McGarrahan believed that Hummel's mother was a major contributing factor to his personality. ROA.6454. Although Hummel did feel emotions, he was unable to express them because he was controlled by his mother. ROA.6454–55.

Dr. McGarrahan testified that she believed Hummel committed the murders "in a flood of emotional rage" that was caused by thirty years of repressed emotions. ROA.6455. Hummel's emotional state was such that, even though he knew what he was doing was wrong, he was operating on pure emotion. ROA.6455, 6459. Dr. McGarrahan believed that Hummel acted blunt and unaffected in his interviews because, once the flood of emotions ended, he was "back to expressionless difficulty showing what he's feeling and what he's experiencing." ROA.6455. When Dr. McGarrahan asked Hummel why he committed the crime, he explained that he had been ruminating on all the wrongs done to him over his

lifetime, and this rumination built up into an explosive rage. ROA.6456. Hummel described his own wife and father-in-law as having been consistently critical of his unemployment, his inability to work around the house, and his medical problems. ROA.6456.

Hummel also described his rapid infatuation with Kristie Freeze, despite knowing she did not reciprocate his feelings. ROA.6456. Dr. McGarrahan said that this was common in Hummel's history whenever a woman would show interest. ROA.6456. Although Hummel sought relationships, he was unable to form any relationships with anyone, whether romantic or familial. ROA.6456. Dr. McGarrahan agreed that the issues regarding Hummel's personality and the genesis of his childhood played a big role in the commission of the offense. ROA.6457. Dr. McGarrahan did testify, however, that Hummel had planned the murders. ROA.6458. Dr. McGarrahan said that Hummel was essentially the same person today that he was on December 17, 2009. ROA.6459.

Dr. McGarrahan testified that Hummel has done fairly well in structured environments and had received several commendations for his military service. ROA.6460. Dr. McGarrahan testified that Hummel did not receive any judicial punishment for leaving his military post without

permission; instead, it was administratively handled. ROA.6460. Hummel admitted to her that he was wrong in carrying out the offense. ROA.6461.

III. Conviction and Postconviction Challenges

Hummel was convicted of capital murder and sentenced to death. ROA.3388–91. The CCA affirmed Hummel's conviction on direct appeal. ROA.2543–90; *Hummel v. State,* No. AP-76,596, 2013 WL 6123283, *1–4 (Tex. Crim. App. Nov. 20, 2013), *cert. denied*, 135 S. Ct. 52 (2014). The CCA denied Hummel's state habeas application. *Ex parte Hummel,* No. WR-81,578-01, 2016 WL 537608 (Tex. Crim. App. Feb. 10, 2016), *cert. denied*, 137 S. Ct. 63 (2016). Hummel then filed his federal habeas petition, which the district court denied. ROA.33–151, 1629–1706. The Fifth Circuit denied Hummel a certificate of appealability, *Hummel v. Davis*, 908 F.3d 987 (5th Cir. 2018), and this Court denied Hummel's petition for writ of certiorari, 140 S. Ct. 160 (2019).

IV. The Course of Hummel's Present Appeal

Following this Court's denial, the state trial court set Hummel's execution for March 18, 2020. Order Setting Execution Date, *State v. Hummel*, No. 1184294D (432nd Dist. Ct., Tarrant County, Tex. Nov. 19, 2019). With little more than six weeks remaining before his execution—

and little more than three weeks before his clemency petition was due—Hummel filed in the district court a motion requesting funding under 18 U.S.C. § 3599 in the amount of $20,000 for the appointment of two experts to assist in clemency proceedings. ROA.2156–85. Specifically, Hummel requested $4,000 for the retention of Nevada-based Dr. William Brown, who would evaluate Hummel and prepare a report explaining the effect of the Military Total Institution on Hummel's offense, and $16,000 for Oregon-based Dr. Robert Stanulis, who would perform a risk assessment on Hummel for the purpose of addressing Hummel's future dangerousness, an assessment which Hummel alleged would take four days. ROA.2176–84. The following day, the district court issued a show-cause order asking Hummel to provide more specific information as to why two out-of-state experts were reasonably necessary to assist Hummel with his clemency proceedings. ROA.2186–87. Hummel filed his response on February 8, 2020. ROA.2188–2202.

On February 11, 2020, the district court issued an order partially granting Hummel's request. ROA.2204–11. Namely, the district court granted Hummel the statutory cap of $7,500: $4,000 to secure the services of Dr. Brown and $3,500 to secure a qualified mental health

professional who could conduct the limited risk assessment Hummel proposed that Dr. Stanulis would complete. ROA.2207–08, 2211. But because Hummel had not yet explained with sufficient detail why a local mental health expert was unavailable to conduct that risk assessment, the district court found that Hummel had failed to show that Dr. Stanulis's services were reasonably necessary and thus denied Hummel the remaining $12,500 without prejudice. ROA.2208–11.

More than a week later, Hummel filed a motion asking the district court to reconsider its denial of the remaining $12,500. ROA.2212–20. In that motion, Hummel indicated that he had used the court's initial grant of $7,500 to pay Dr. Brown to start his work and to pay mitigation investigator Toni Knox to travel to Huntsville to administer evaluations required by Dr. Brown to complete his report. ROA.2215. Hummel did not ask the court to reconsider its partial grant; rather, he sought the court's reconsideration of its order regarding Dr. Stanulis. ROA.2215–16. Hummel argued that, to his knowledge, only two other experts in the United States could conduct the risk assessment Hummel requires, and both are also out-of-state. ROA.2217–18. Hummel also argued that, due to the hiring of Ms. Knox, Dr. Stanulis would now require only one day

to complete his evaluation, but Hummel did not amend his request to account for the decreased travel expenses. ROA.2216–17. The next day, the district court denied Hummel's motion to reconsider without prejudice, finding that Hummel had not carried his burden to provide the court with detailed information justifying expert assistance nearly three times the statutory cap. ROA.2336–39. Hummel noticed his intent to appeal the district court's denials. ROA.2340–43.

Two days before his execution, the Fifth Circuit affirmed the district court's orders and denied Hummel a stay of his execution. Pet'r.App.001–008; *Hummel v. Davis*, 807 F. App'x 282 (5th Cir. 2020). On that same day, however, the CCA granted Hummel a stay of his execution for a period of sixty days due to the COVID-19 pandemic. Order 2, *In re Hummel*, No. WR-81,578-02 (Tex. Crim. App. Mar. 16, 2020) (unpublished).[2] Hummel is not presently scheduled for execution. This proceeding follows.

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[2] While he was litigating the funding issue in federal court, Hummel also filed a motion for leave to file a petition for writ of mandamus in the CCA, arguing that the state trial court erred in refusing to: 1) disqualify the Tarrant County District Attorrney's Office due to an alleged conflict of interest; and 2) withdraw the execution warrant due to alleged defects. In the same order that it granted Hummel a stay of his execution, it denied him leave to file the petition for writ of mandamus against the trial court and denied the concomitant request for a stay of execution. The Court then stayed his execution on its own motion.

REASONS FOR DENYING THE WRIT

I. Hummel Provides No Compelling Reason to Expend Limited Judicial Resources on This Case.

The question Hummel presents for review is unworthy of the Court's attention. The Court requires those seeking a writ of certiorari to provide "[a] direct and concise argument *amplifying* the reasons relied on for allowance of the writ." Sup. Ct. R. 14.1(h) (emphasis added). The Court, however, would be hard pressed to discover any such reason in Hummel's petition, let alone amplification thereof. Indeed, Hummel makes no allegations of circuit or state-court-of-last-resort conflict, no allegation of direct conflict between the lower court and this one, and no important question. *See* Sup. Ct. R. 10(a)–(c).

The best that Hummel musters is a conclusory statement that the Fifth Circuit ignored this Court's opinion regarding § 3599 funding in *Ayestas v. Davis*, 138 S. Ct. 1080, 1092 (2018). Petition 19. But the Fifth Circuit appropriately applied *Ayestas*, and Hummel's protestations to the contrary are no more than mere disagreement with the outcome, which is, at best, simply a request for error correction. *See* Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."); *see also Cavazos v.*

Smith, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) ("Error correction is 'outside the mainstream of the Court's functions.'" quoting Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007))). Hummel's petition should be denied for this reason alone. *Cf.* Sup. Ct. R. 14(h).

Further, even if his plea for error correction were not meritless, this case is a poor vehicle to address the question on which Hummel seeks review because it presents serious justiciability concerns. First, Hummel's appeal has been rendered moot by the CCA's stay of his then-imminent execution and the subsequent expiration of his death warrant. He therefore has no current path to the clemency he seeks, and any new request for clemency is unripe. Second, given the ongoing opportunity the district court gave Hummel to cure the defects in his request, the district court's decisions were not final, appealable orders within the meaning of 28 U.S.C. § 1291. Importantly, the court of appeals decided Hummel's case in the posture of a then-imminent execution date, and the lower court therefore did not have the opportunity to consider these questions in its current posture. Respondent therefore respectfully suggests that certiorari be denied.

II. The Fifth Circuit's Straightforward and Correct Application of 18 U.S.C. § 3599 Does Not Warrant This Court's Review.

The lower court's affirmance of the district court's denial of funding was a straightforward and proper application of § 3599 that does not warrant review. Under § 3599, if a petitioner can show that expert services are "'reasonably necessary,'" "a court 'may authorize the [petitioner's] attorneys to obtain such services on [his] behalf.'" *Ayestas*, 138 S. Ct. at 1092 (second alteration in original) (quoting 28 U.S.C. § 3599(f)). "[D]istrict courts have *broad* discretion in assessing requests for funding." *Id.* at 1094 (emphasis added). Indeed, there "may even be cases in which it would be within a court's discretion to 'deny funds after a finding of reasonable necessity.'" *Id.*

"Proper application of the 'reasonably necessary' standard thus requires courts to consider [1] the potential merit of the claims that the applicant wants to pursue, [2] the likelihood that services will generate useful and admissible evidence, and [3] the prospect that the applicant will be able to clear any procedural hurdles standing in the way." *Id.* "[I]t would not be reasonable—in fact, it would be quite unreasonable—to think that services are necessary to the applicant's representation if, realistically speaking, they stand little hope of helping him win relief."

Id. Further, if a petitioner is asking for more than the $7,500 presumptive cap on funds, he or she must also prove that they were "for services of an unusual character or duration." § 3599(g)(2).

Preliminarily, Hummel could not make out a case of abuse of discretion where the district court held open the matter for future consideration. *See* Argument III.B, *infra*. The district court did not close off all avenues of funding; it only requested additional information, which Hummel failed to provide (likely because he was dilatory in seeking funding, as the district court noted, ROA.2210). Where the district court's decision on funding is not a final one, that court can hardly be accused of abusing its discretion. Similarly, the district court's discretion cannot be challenged on the basis of a funding request that changed on appeal—Hummel decreased his over-the-cap request, the very type of action that could have made such a request reasonable had he presented it, and explained it, to the district court. *See* Appellant's Br. 52–53, *Hummel v. Davis*, 807 F. App'x 282 (5th Cir. 2020) (No. 20-70002) (reducing his request by $5,000 to $6,000). But he did not and he cannot now show that the district court abused its discretion in denying a funding request that was not before it.

Nevertheless, the district court did not abuse its discretion. Hummel's claim of reasonable necessity boils down to this—only this *one* expert can conduct the future dangerousness assessment necessary for Hummel's representation. *See, e.g.*, Petition 15–16. But the very premise of the argument is faulty. Hummel tries to make technical what is not—future dangerousness is "neither complex nor technical. It require[s] only that the [factfinder] make logical connections of the kind a layperson is well equipped to make." *Wong v. Belmontes*, 558 U.S. 15, 24 (2009) (per curiam); *see Jurek v. Texas*, 428 U.S. 262, 275–76 (1976) (plurality opinion) ("The task that a Texas jury must perform in answering the [future dangerousness] question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice."). Thus, clemency authorities do "not need expert testimony to understand [future dangerousness] evidence; [they] could use [their] own common sense or own sense of mercy" in evaluating Hummel's request for grace. *Wong*, 558 U.S. at 24.

Hummel proves this point over and over. For example, in arguing against future danger, Hummel claims that he "had no violent history before" he slaughtered his family. Petition 12. He asserts that, after his

arrest, his "behavior has been exemplary." *Id*. He also has witnesses who say that he was well-behaved in the Marines and "would function well [in prison] based on his good behavior and military history." *Id*. at 12–14. And while incarcerated awaiting trial for capital murder, jail officials considered him low risk and Hummel acted appropriately in his interactions with them. *Id*. at 13–14. This is not complicated evidence that needs expert elucidation. And because expert testimony is not necessary for his representation in this instance, *see Harrington v. Richter*, 562 U.S. 86, 106–07 (2011); *Wong*, 558 U.S. at 23–24, it is not reasonably necessary to provide funding for such services.

Hummel developed, and has access to, the type of evidence that clemency officials would consider regarding his future dangerousness, including the testimony of two experts at trial. *See* Pet'r.App.005 ("Thus, the district court concluded that Hummel's military record was on full display at trial, as were expert opinions assessing the effect of that service—and of Hummel's other experiences and tendencies—on Hummel's behavior."); *see also* Statement of the Case II, *supra*. Hummel's attempt to show that he is not a future danger through *additional* expert testimony is not likely to carry weight in his clemency proceedings—

while future danger might be a requirement for the jury to make, executive clemency is not a retrial; it is an act of mercy. *See Brown v. Stephens*, 762 F.3d 454, 460 (5th Cir. 2014) ("[T]he petitioner must show that the requested services are reasonably necessary to provide the Governor and the Board of Pardons and Paroles the information they need to determine whether to exercise their discretion to extend grace to the petitioner in order to prevent a miscarriage of justice.").

Where two prior experts have opined that Hummel will not be a danger in prison, and where Hummel claims to have evidence proving those predictions correct, adding an additional expert to this pile of information is not reasonably necessary. This is especially true because Hummel was ostensibly non-violent right up to the point he stabbed his pregnant wife to death and beat to death his five-year-old daughter and his father-in-law before setting all their bodies alight. *See* Statement of the Case I, *supra*. There was no abuse of discretion here. *See Brown*, 762 F.3d at 460 ("As the district court observed, there can be little doubt that the facts of Brown's crime will weigh heavily in his clemency proceedings.").

Moreover, Hummel's disagreements with the district court's denials of funding appear predicated on fundamental misunderstandings of the law governing funding requests. First, he argues that the district court's denials were "circular trap[s]" because they "require[d] Hummel to prove that Dr. Stanulis's expert-assistance is 'reasonably necessary' before funding is allowed." Petition 20. But the district court's "trap" is actually what the statute requires—a petitioner must show reasonable necessity *before* he receives funding. § 3599(f). Hummel's disagreement is thus with the statute, not the court's application of it.

Second, Hummel appears to believe that the mere request for funding satisfies the reasonable necessity test. *See, e.g.*, Petition 20 ("To prove that the assistance of an expert like Dr. Stanulis is 'reasonably necessary,' Hummel must prefund the assistance."). But, here, Hummel presents the circular trap he warned of, turning discretion into command, contrary to the language of the statute. *See Ayestas*, 138 S. Ct. at 1094 ("Congress changed the verb 'shall' to 'may,' and thus made it perfectly clear that determining whether funding is 'reasonably necessary' is a decision as to which district courts enjoy broad discretion."). And this lack of discretion would authorize fishing expeditions, also contrary to

precedent. *See Jones v. Davis*, 927 F.3d 365, 374 (5th Cir. 2019) ("*Ayestas* did not disturb the long-settled principle that district courts have discretion to separate 'fishing expedition[s]' from requests for funding to support plausible defenses."), *cert. denied*, 140 S. Ct. 2519 (2020). To be sure, petitioners "cannot invoke clemency to end-run *Ayestas*'s emphasis on the 'utility' of further investigation and expert involvement." *Crutsinger v. Davis*, 898 F.3d 584, 587 (5th Cir. 2018).

Third, Hummel purports that, because the district court appointed his counsel as a properly qualified and competent attorney, the court should view any funding requests that attorney makes as inherently reasonable. *See* Petition 21–22. But, again, Hummel would make mandatory what is expressly discretionary. Indeed, Hummel would read out the discretionary language of § 3599(f) whenever counsel is appointed under § 3599(a). This is also contrary to the expert services funding statute. *See Ayestas*, 138 S. Ct. at 1094. Hummel does not show that the district court's denials of funding were an abuse of its broad discretion.

Finally, it must be remembered that Hummel bore an additional burden in seeking more than the statutory cap on funding—that the excess funding was "necessary to provide fair compensation for services

of an unusual character or duration." § 3599(g)(2). But he surely failed in this task. Predictions of future danger occur regularly in the criminal justice system, *see Jurek*, 428 U.S. at 275–76, and such predictions are not limited to expert hypothesis, *see Barefoot v. Estelle*, 463 U.S. 880, 896–97 (1983). Moreover, the fact that he has twice presented expert opinion on his purported lack of dangerousness in prison underscores how mundane such opinions are. *See* Statement of the Case II, *supra*. A brief review of the lower court's jurisprudence confirms the ubiquity of these opinions. *See, e.g.*, *Hernandez v. Davis*, 750 F. App'x 378, 381 (5th Cir. 2018) ("He has testified numerous times on the subject of future dangerousness."). Even though the lower court would have been well within its discretion to refuse *any* funding for Dr. Stanulis, it certainly did not abuse its discretion when Hummel failed to prove the "unusual character" of his proposed testimony. *See Jones*, 927 F.3d at 374 (affirming denial of funding where the petitioner "wholly failed to address" the additional burden for above-the-cap funding).

III. This Case Presents Multiple Vehicle Problems Making Review Unwarranted.

Even if there were some arguable merit to Hummel's § 3599 arguments, this case is a poor vehicle to address the question presented.

The court of appeals decided Hummel's case in the context of his then-imminent execution. Hummel's death warrant, however, has expired, and Hummel's execution is no longer imminent. To even address the court of appeals' (correct) application of § 3599, the Court would have to decide whether Hummel still has a live, appealable case in light of the cancelled execution—questions the court of appeals never had the opportunity to consider.

Hummel faces two main obstacles in this respect. First, because Hummel's death warrant has expired, he presently has no path to the clemency he seeks and any relief he may seek when his execution is rescheduled is unripe. Second, given the ongoing opportunity the district court gave Hummel to cure the defects in his request, the district court's decisions were not final, appealable orders within the meaning of 28 U.S.C. § 1291, and the lower court therefore lacked jurisdiction over Hummel's appeal.

A. Because the execution warrant from which Hummel sought clemency relief has expired, there is presently no relief available to him.

Hummel requested funding for executive clemency from a warrant of execution that has expired, and he no longer has an execution date

pending. His case is therefore moot. "A case becomes moot . . . 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). This occurs "when it is impossible to grant 'any effectual relief whatever' to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quoting *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000)). A plaintiff must maintain "a concrete interest . . . in the outcome of the litigation" to avoid mootness. *Id.* at 307–08 (alteration in original) (quoting *Ellis v. Ry. Clerks*, 466 U.S. 435, 442 (1984)).

In Texas, after the completion of postconviction review, a trial court must enter an order setting an execution date to effectuate a capital sentence. Tex. Code Crim. Proc. art. 43.141(a). That order triggers the issuance of a warrant of execution authorizing the Texas Department of Criminal Justice (TDCJ) to carry out sentence after 6:00pm on a specific date. *Id.* art. 43.15. That date, in turn, then triggers the deadlines for executive clemency. *See* 37 Tex. Admin. Code § 143.43(a) (clemency application by offender seeking thirty-day reprieve from execution must be delivered no later than the twenty-first day before the execution is

scheduled); *id*. § 143.57(a)(2), (b) (a written request of the offender for a commutation of sentence must set forth the execution date and be delivered no later than twenty-one days before that date).

And though there are two types of executive clemency that are *not* triggered by the setting of an execution date, Hummel has never insinuated that he is seeking clemency under those provisions. Nor could he, as they rely on external parties and sources that are not present here. *See* 37 Tex. Admin. Code § 143.2(a) (allowing consideration of a pardon for innocence upon receipt of the written recommendations of at least two of the current trial officials of the sentencing court, with evidence of actual innocence, or upon receipt of a certified court order finding actual innocence); *id*. § 143.57(a)(1) (allowing consideration of a commutation of death sentence upon receipt of a request from the majority of trial officials).

As such, by statute, the clemency process terminated at midnight on the date of execution. *See* Tex. Code Crim. Proc. art. 43.14 (providing that an inmate may not be executed before 6:00pm and no later than 11:59pm on the date chosen by the trial court). Thus, by operation of Texas law, TDCJ lost the power to execute Hummel pursuant to the

November execution order at midnight on March 18, 2020, and Hummel can no longer be executed pursuant to that warrant. *Cf. Burke v. Barnes*, 479 U.S. 361, 363–64 (1987) (holding as moot a challenge to a bill that expires by its own terms prior to landing on the Court's docket); *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353, 353 (2017) (applying same rule to self-expiring executive orders losing effect before the Court can issue an opinion on the merits). Because Hummel has no current execution setting, he has nothing from which he can seek clemency under state law.

And without the ability to seek clemency on his own behalf, he cannot seek expert services funding in federal court for a remedy that is not presently available to him. *Cf. Nelson v. Campbell*, 541 U.S. 637, 648 (2004) (declining to address issues related to a prior stay of execution because "the execution warrant has now expired"); *Rosales v. Quarterman*, 565 F.3d 308, 311 (5th Cir. 2009) (noting that a district court seemingly denied motions to appoint new counsel for clemency purposes "because the court concluded that state clemency relief was no longer available because Rosales's deadline to file an application with the Clemency Board had passed").

Below, the State also asserted mootness on the basis that Hummel's deadline for filing the clemency application or supplementing that application had passed. *See* 37 Tex. Admin. Code § 143.43(b) (requiring supplemental information supporting a reprieve request to be submitted no later than the fifteenth day before the execution); *id*. § 143.57(c) (same but for request for commutation of sentence). The court of appeals declined to address issues of Texas clemency procedure because Hummel's arguments were "wholly without merit." Pet'r.App.005. But now that Hummel's execution date has expired, the Court cannot decide the question presented without first determining that a live controversy exists.

Indeed, were Hummel to seek executive clemency on a future date, it would be based on a new execution order and warrant, and the facts will necessarily be different than those presented to the Fifth Circuit five months ago. *See Nelson*, 541 U.S. at 648 (noting that, "[i]f the State reschedules the execution while this case is pending on remand and petitioner seeks another . . . stay, the District Court will need to address" future issues). Thus, any arguments for funding a clemency request that was denied prior to an execution setting that has expired are moot, while

any arguments for clemency funding related to an execution that has not yet been set are not ripe. The Court should deny Hummel's petition because "federal courts may not 'give opinions upon moot questions or abstract propositions.'" *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

B. Hummel's case is a poor vehicle for the question presented because the lower court's decision was not final.

Hummel claims jurisdiction via 28 U.S.C. § 1254. Petition 1. That statute facially provides jurisdiction to consider his question presented because the Fifth Circuit's affirmance of the district court's denial of funding is a *judgment* by a court of appeals (though it is now moot). § 1254(1). But the Fifth Circuit did not have before it a final order within the meaning of 28 U.S.C. § 1291 to review.

Absent express statutory language, Congress has granted courts of appeals jurisdiction to review "final decisions" of the district courts. § 1291. Whether a decision by a district court is a final order depends on the effect of that order, not just the language. *See LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 603 (5th Cir. 1976) (citing *Carr v. Grace*, 516 F.2d 502, 503 n.1 (5th Cir. 1975)). Thus, merely because an order is dismissed

"without prejudice" does not strip an order of its finality. *See Koke v. Phillips Petroleum Co.*, 730 F.2d 211, 216–17 (5th Cir. 1984) ("These orders are therefore analogous to a dismissal without prejudice. Such dismissals are clearly appealable as final orders."). Rather, the "general test for a final decision is one 'that ends the litigation on the merits and leaves nothing for the district court to do but execute the judgment.'" *Id.* at 215 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)).

But where a dismissal without prejudice approximates a stay, *Carr*, 516 F.2d at 503–04, and a litigant may be able to refile their claim or otherwise cure defects, that dismissal is not a final order. *See, e.g.*, *id.* at 503 n.1 ("Initially, some question might be raised concerning the appealability of a dismissal 'without prejudice.' Under the peculiar circumstances of this case, we have no difficulty in concluding that a dismissal even 'without prejudice' after the statute of limitations has run is a final order for purposes of appeal."); *see also Maddox v. Love*, 655 F.3d 709, 716 (7th Cir. 2011) ("A dismissal without prejudice normally does not qualify as an appealable final judgment because the plaintiff is free to re-file the case."); *Young v. Nickols*, 413 F.3d 416, 418 (4th Cir. 2005) ("Generally, an order dismissing a complaint without prejudice is

not an appealable order under 28 U.S.C. § 1291 when 'the plaintiff could save his action by merely amending his complaint.'").

Here, both of the district court's funding orders were denials "without prejudice." *See* ROA.2211, 2339. The Fifth Circuit found these orders, "viewed in the context of the ultimate finality of death," to be final, appealable orders. Pet'r.App.004. The Fifth Circuit held that the district court's framing of its decisions as without prejudice "was no more than an unwillingness to foreclose correction of any error in its ruling given" Hummel's impending execution. *Id*. The court of appeals explained that "appellate review was in fact Hummel's only remaining recourse" in light of "imminent execution." *Id*. Because Hummel's execution is no longer imminent, the Court cannot even reach Hummel's substantive arguments without determining that there is, in fact, a final, reviewable order under 28 U.S.C. § 1291.

Moreover, if the district court was willing to allow—and, in fact, invited—correction of any error *before* appellate remedies had to be taken, then neither the substance of the denials nor their effect demonstrated finality. To be sure, the "district court engaged with Hummel three times[,]" and "[a]ll three reasoned writings noted various

deficiencies and unanswered questions in Hummel's requests." Pet'r.App.005. In denying Hummel's initial funding request, the district court made explicit: "The issue remaining before this Court is not the reasonableness of the proposed mental health services per se; it is rather whether the services of a highly compensated out-of-state expert are reasonably necessary to perform the type of limited-scope risk assessment [Hummel] identifies." ROA.2210. The district court elucidated several defects that Hummel could remedy with more information: he had made no effort to show why a local mental health expert was unavailable to conduct the limited evaluation he sought, ROA.2208; he had not proven that his trial expert, Dr. McGarrahan, had failed to conduct the evaluation he now seeks, ROA.2209; and he provided no hard data as to the cost of the services, much less why they would cost $16,000 to perform, ROA.2210.

Similarly, in declining to reconsider the denial of funding, the district court again pointed to a myriad of specific deficiencies: Hummel had still not provided "reasonable detail" on exactly what the risk assessment entailed, ROA.2337; he had not specified what documentation Dr. Stanulis would review as part of his evaluation,

ROA.2337; he gave no explanation for the cost of Ms. Knox's services, ROA.2337; he did not accompany his request with a proposed order specifying exactly how much money above the statutory cap he now required, ROA.2337; and he provided no proposed budget for how he planned to spend the money already authorized, much less any additional funds, ROA.2338. Rather than end Hummel's litigation on the merits, the district court did the opposite—it invited him to explain further, with concrete detail, what he sought. This is more than a mere "unwillingness to foreclose correction of any error." Pet'r.App.004.

"'[I]f the *grounds of the dismissal* make clear that *no amendment* could cure the defects in the plaintiff's case, the order dismissing the complaint is final in fact,' and appellate jurisdiction exists." *Young*, 413 F.3d at 418 (emphasis added). But the district court's denials were a far cry from making evident that no amendment could have cured the defects in his request. Indeed, that Hummel reduced the amount of his request on appeal, *see* Appellant's Br. 52–53, *Hummel v. Davis*, 807 F. App'x 282 (5th Cir. 2020) (No. 20-70002), proves that further amendment and information could have been provided to the district court, thus undermining any argument that the court's order was final.

Importantly, the last of the district court's orders was issued on February 20, 2020. *See* ROA.2336–39. But Hummel's clemency application was not due until February 26 and supplementation was not due until March 3. *See* 37 Tex. Admin. Code § 143.43(a)–(b) (clemency applications are due twenty-one days prior to the scheduled execution and supplementation due fifteen days prior). Thus, Hummel's case is unlike those where a dismissal without prejudice was effectively final as a result of the statute of limitations having run. *See Carr*, 516 F.2d at 503 n.1.

To the contrary, Hummel had ample time to correct his requests and to benefit from any funding he was granted. It was thus not clear in either the district court's language or the effect of its orders that "appellate review was in fact Hummel's only remaining recourse," Pet'r.App.004, especially "given the reality of the imminent execution," *id*. As such, the orders cannot properly be considered final under § 1291. But even if the orders could be considered final, Hummel's failure to follow through on the remedies that were available to him makes this case a poor vehicle to address the district court's exercise of discretion.

CONCLUSION

Hummel fails to present a compelling reason to grant certiorari review. For all the reasons discussed above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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