No. 18–8712

IN THE

Supreme Court of the United States

JOHN HUMMEL,
Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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This is a capital case.

QUESTIONS PRESENTED

Hummel sought federal habeas relief in the district court for an ineffective-assistance-of-trial-counsel (IATC) claim faulting counsel for failing to present sufficient mitigation evidence on punishment. He also lodged an ineffective–assistance–of–appellate–counsel (IAAC) claim arguing that counsel failed to raise arguments to support the suppression of his confession. The district court denied relief on both claims, finding the state court's application of *Strickland v. Washington*, 466 U.S. 668 (1984), reasonable in both instances. The district court and the Fifth Circuit denied a certificate of appealability (COA) on both issues. It is the denial of a COA that Hummel challenges in his request for certiorari review, raising the following questions:

1. Could reasonable jurists debate that the state habeas court reasonably applied *Strickland* in holding that a death penalty defendant did not receive ineffective assistance of trial counsel, where trial counsel did not develop and present to the jury punishment-phase evidence regarding the defendant's good behavior during his pre–trial detention?

2. Could reasonable jurists debate that the state habeas court reasonably applied *Strickland* in holding that a death penalty defendant does not receive ineffective assistance of appellate counsel if appellate counsel raises a claim on direct appeal, but fails to raise certain arguments in support of that claim?

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Petitioner John Hummel brutally murdered his pregnant wife, their five-year-old daughter, and his father-in-law as they slept in their beds so that he could pursue a sexual relationship with another woman and become a father figure to her six-year-old daughter. Hummel's attempt to obtain further review of his IATC and IAAC does not warrant certiorari review. The Fifth Circuit properly held that the state court's adjudication of these claim was a reasonable application of *Strickland* and was not debatable among jurists of reason.

STATEMENT OF THE CASE

I. Facts of Hummel's Capital Murder

On direct appeal, the Court of Criminal Appeals (CCA) summarized the evidence at trial establishing Hummel's guilt as follows:

> In Fall 2009, [Hummel] resided in a house on Little School Road in Kennedale with his pregnant wife, Joy Hummel; their five-year-old daughter, Jodi Hummel; and [Hummel's] father-in-law, Clyde Bedford. [Hummel] worked as an overnight security guard at Walls Hospital in Cleburne, and he often stopped at an E–Z Mart convenience store in Joshua on his way to and from work. He met Kristie Freeze, who worked as a clerk at the E–Z Mart, and he called and texted her numerous times between October and December 2009. Freeze testified that [Hummel] told her that he was married, but he was not in love with his wife. Freeze also informed [Hummel] that she was divorcing her husband and dating someone else. Although Freeze initially told [Hummel] that they could only be friends, they sent each other sexually explicit text messages and eventually had sexual intercourse on December 10. [Hummel] informed Freeze that his wife was pregnant a few days later. Freeze instructed [Hummel] not to contact her anymore, but he continued to call and text

her. On December 16, Freeze told [Hummel] that her divorce had become final.

Lorie Lewallen, a cook who worked the night shift at the Huddle House restaurant near the E–Z Mart, testified that [Hummel] regularly came into the restaurant on his way to and from work in December 2009. He usually wore his work uniform, sat in a booth that faced Lewallen, and talked to her while she cooked. However, when [Hummel] was there on the night of December 16, he sat facing away from Lewallen, wore "street clothes," and "reeked of cologne." Lewallen testified that [Hummel] was unusually quiet and seemed "like something was on his mind" that night.

Freeze testified that she permitted [Hummel] to visit her and her young daughter at their apartment in Joshua on the evening of December 17. [Hummel] arrived after dark wearing his security-guard uniform and stayed for about thirty minutes.

In the early morning hours of December 18, emergency personnel responded to a fire at [Hummel's] home. A passerby noticed that the house was on fire shortly after 12:00 a.m. and called 9-1-1. When police officer Joshua Worthy arrived at the scene approximately fifteen minutes later, he kicked open the front door and was unable to see anything but smoke and flames inside the house. He yelled to determine if anyone was inside, but no one responded. He also noticed that the back door to the residence was open. Firefighters later extinguished the blaze and discovered the burned bodies of Joy, Jodi, and Bedford, each inside of his or her bedrooms. Jodi and Bedford were found in their beds. Joy was located on the floor, with blood-soaked clothing nearby. Agent Steven Steele of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") investigated the scene and observed that Joy had injuries to her hands and upper body that appeared to be caused by some means other than the fire.

[Hummel] approached Officer Worthy outside the house at around 4:30 a.m. He asked Worthy what had happened and "if everyone had made it out[,]" Worthy replied that he did not know, and he accompanied [Hummel] to his minivan that was parked in a church parking lot across the street. Worthy and [Hummel] conversed while [Hummel] sat in his minivan and smoked a cigarette. [Hummel] told Worthy that he lived in the house with his pregnant wife, daughter, and father-in-law. Worthy testified that [Hummel] placed his "head down in his hands" a few times during their conversation, but he "wasn't crying" and was just "basically sitting there." When Captain Darrell Hull walked over to them and

asked [Hummel] what he had been doing that evening, he replied that he had gone to Walmart to check prices for Christmas presents. [Hummel] continued to ask "if everybody had made it out[,]" and the officers again responded that they did not know.

Hull testified that [Hummel] agreed to follow him to the Kennedale Police Department [KPD] in his own minivan, and they arrived around 5:15 or 5:30 a.m. Hull took [Hummel] to a room and asked [Hummel] to write a statement explaining what happened. He left [Hummel] alone in the room to write his statement and began recording [Hummel]. Hull testified that [Hummel] signed a witness statement that read,

> So I left my home around 9:00 p.m. I drove down to Joshua to visit a friend but [he] was not home. I drove around for awhile to wait and see if he would come home, but he didn't. I stopped and got gas, drove around some more. Then I began to visit Walmart to price things for Christmas. I came home a little after 5:00 a.m. and found it burned down, and firemen and police were still there.

[Hummel] also provided written consent for police to search his house and van.

During the interview with Detective Jason Charbonnet, Sergeant Eric Carlson, and Agent Steele, Steele noticed what appeared to be blood on [Hummel's] pants. Steele testified that [Hummel] agreed to give him the clothes [Hummel] was wearing in exchange for clothes provided by another officer. When [Hummel] changed clothes, Steele observed blood on the bottom of his sock and scratch marks on his back.

[Hummel] thereafter left the police department and went to the office of his employer, Champion Security, in Arlington. He arrived at 8:00 a.m. He attended a meeting, then picked up his paycheck before leaving the office at 11:00 a.m. Co-workers who spoke to [Hummel] that morning were unaware that anything unusual had happened until people began calling and asking for him later that day. [Hummel's] co-workers and his friends from church were unable to reach him on his cell phone. Later, a concerned friend went to the police department to file a missing-person report on [Hummel].

Steele and other arson investigators ultimately determined that the fire at [Hummel's] home was an "incendiary fire," and they ruled out accidental causes. Steele testified that there were three separate and distinct fires, or "areas of origin," within the house. Shiping Bao, the

Deputy Medical Examiner who performed Joy's autopsy, testified that Joy was pregnant with a fourteen to fifteen week old fetus when she died. Joy had a total of thirty-five stab wounds, including ten to her chest, two to her abdomen, one to her right thigh, seven to her neck, and fifteen to her back. She suffered damage to her internal organs, including her heart, lungs, and liver. She had incised wounds on her hands that appeared to be defensive in nature. She also had six lacerations on her skull, which indicated that she had been struck multiple times with a hard object. Bao concluded that the cause of Joy's death was multiple stab wounds and the manner of her death was homicide. The lack of soot in her airways and the lack of carbon monoxide in her blood indicated that she was dead before the fire. Deputy Medical Examiner Gary Sisler testified that both Bedford and Jodi suffered extensive skull fractures. Sisler determined that the cause of their deaths was blunt-force injury, the lack of soot in their airways indicated that they were dead before the fire, and the manner of their deaths was homicide.

On December 20, Customs and Border Protection Officer ("CBP") Jorge Bernal encountered [Hummel] at the United States port of entry between Tijuana, Mexico, and San Ysidro, California. Bernal testified that [Hummel] approached his booth on foot and presented himself for entry into the United States at 5:48 a.m. When Bernal entered [Hummel's] name and date of birth into the computer system, an "armed and dangerous" notification "popped up on [the] screen." [Hummel] was handcuffed and taken to the Port Enforcement Team for further investigation. He was later transported to the San Diego County Jail.

That night, Kennedale officers Carlson and Charbonnet and Investigator James Rizy of the Tarrant County District Attorney's Office arrived at the San Diego County Jail. They mirandized [Hummel], conducted a videotaped interview with him, and obtained consent to search his minivan in San Ysidro and his hotel room in Oceanside, California. [Hummel] confessed his involvement in the instant offense both orally and in writing.

. . .

Officers collected video that confirmed [Hummel's] presence at Huddle House on December 16 and E–Z Mart on December 17. They also obtained video that confirmed [Hummel's] presence at Walmart stores in Burleson, Grand Prairie, and Arlington on December 18. Store receipts indicated that [Hummel] was present at the Burleson Walmart at 1:46 a.m. and the Grand Prairie Walmart at 4:33 a.m.

> In the early morning hours of December 21, officers searched a dumpster at an auto parts store in Arlington, Texas, and found a number of weapons including an aluminum baseball bat, a large sword and sheath, a small sword and sheath, a dagger, and a kitchen knife. The small sword, dagger, and kitchen knife were contained in a white plastic trash bag, and the handle of the dagger appeared to be broken. DNA testing was performed on these weapons and on [Hummel's] clothing that he gave to officers at the [KPD].
>
> [Hummel's] socks and pants had areas that tested positive for blood. Joy's DNA profile matched DNA profiles from [Hummel's] socks and pants, as well as the large sword, dagger, and kitchen knife. Bedford's DNA profile was the same as DNA profiles that were obtained from [Hummel's] pants and the white plastic trash bag. Jodi's DNA profile was the same as a DNA profile obtained from an area on the aluminum baseball bat that tested presumptively positive for blood. The DNA profile obtained from the dagger handle and the large sword sheath was the same as [Hummel's] DNA profile. Neither [Hummel] nor Joy could be excluded as contributors to a DNA mixture that was obtained from the small sword.

Hummel v. State, No. AP-76,596, 2013 WL 6123283, *1–4 (Tex. Crim. App. Nov. 20, 2013), *cert. denied*, *Hummel v. Texas*, 135 S. Ct. 52 (2014).

II. Evidence Presented During Punishment

A. The State's case

In addition to the heinous facts of the crime presented at guilt/innocence, the State also presented evidence establishing that, two weeks prior to the murders, Hummel accessed a doctor's computer at the hospital at which he worked as a security guard without permission and researched the effects of rat poison on humans. ROA.5659, 5700–01. Hummel told investigators that he then attempted to poison his family by putting rat poison in their dinner, but his plan was thwarted when his family threw the meal away, believing it had

gone bad. ROA.5608–09.

The State presented additional evidence showing that, after Hummel fled to California, Hummel went to a gentlemen's club. ROA.5610. Outside his hotel, he met Scott Matejka, with whom he smoked crack-cocaine. ROA.5610, 5613, 5628–29. Matejka and Hummel then traveled together to Tijuana in search of marijuana. ROA.5613, 5629. While in Mexico, Hummel and Matejka visited another gentlemen's club. ROA.5630. Although Matejka said he never saw Hummel obtain marijuana in the gentlemen's club, Hummel told investigators that he had drugs in his pockets when he attempted to cross the border back into California that he either swallowed or discarded in the bathroom. ROA.5613, 5630.

The State also presented other relevant evidence. On December 18, 2009, Hummel was counseled by his employer regarding infractions committed while on the job, including unauthorized computer use. ROA.5624. Hummel accessed 2,338 pornographic images during his unauthorized uses of the doctor's computer. ROA.5646, 5648, 5657, 5699. Hummel also accessed the website horneymatches.com, where he sought to solicit women to meet him for sexual encounters at the hospital while he was on-duty. ROA.5699. Hummel admitted to the infractions. ROA.5624. Also prior to the murders, Hummel contacted Gretchen Bow, a dancer at the Showtime, to visit him at the hospital while he was working so that they could "smoke weed and other things." ROA.5650.

The State also presented evidence concerning Hummel's victims. Melody Anderson, a friend of Hummel's wife Joy, testified that Joy and Hummel had financial problems. ROA.5788–89. After Hummel hurt his back and contracted Crohn's disease, Joy became a certified massage therapist. ROA.5789. A week before Joy was murdered, she had shown Anderson sonogram photographs of her nearly eleven-week-old baby. ROA.5789. Anderson observed that Jodi, Hummel's daughter, loved her father a lot and was very affectionate with him. ROA.5790.

Philip W. King was a volunteer at the Kennedale Senior Center, where Joy would drop off her father Eddie every day. ROA.5791. King said that everybody at the center loved Eddie. ROA.5793. Cindy Gail Lee was the Director of the Kennedale Senior Center. ROA.5793. Lee recalled that, when she informed the members of the senior center that Eddie's house had burned down, several people cried and were upset. ROA.5794. Lee described Eddie as a fantastic guy who was laughing all the time and talked to everyone. ROA.5794–95.

Finally, the State presented evidence regarding Hummel's military service. Lieutenant Colonel (LTC) Michael John Doughtery testified that Hummel was an intelligence specialist under his command, with Top Secret security clearance. ROA.5859, 5862, 5865. LTC Doughtery described Hummel as a "pretty average, marginally effective" Marine who was not the best

performer. ROA.5860. LTC Doughtery remembered that he periodically counseled Hummel, warning him about the "inordinate amount" of off-duty hours he and Lance Corporal Wayne Matthias spent visiting strip clubs, drinking, and spending time with people who LTC Doughtery worried might lead them down the wrong path. ROA.5860, 5863. LTC Doughtery thought Hummel was a good-natured and happy-go-lucky type of person, but he could tell when Hummel was frustrated or angry because he would go silent and the muscles in his face would tense up. ROA.5861.

LTC Doughtery testified that, according to Hummel's military records, he received two violations for smoking when he was not allowed. ROA.5861. Hummel never received a good conduct medal during his service, which was awarded to those who served three uninterrupted years without any non-judicial punishments. ROA.5861. LTC Doughtery testified that, although Hummel received several medals and commendations, all were for the unit and not for Hummel specifically. ROA.5861–62, 5864. LTC Doughtery testified that Hummel's rifle marksman badge was the lowest qualification for marksmanship necessary for a Marine to pass basic training. ROA.5862.

On cross-examination, LTC Doughtery testified that Hummel was a good mechanic and was good with electronics, but if he was tasked with something he was not interested in, he required maximum guidance or supervision to ensure completion. ROA.5863. LTC Doughtery testified that Hummel also had

several infractions for failure to maintain his weight and failure to pass a physical fitness test. ROA.5865.

The State's final witness, Captain Sergio Ricardo Santos, testified that he was the intelligence officer that took over command of Hummel, and Hummel was not a very impressive Marine. ROA.5866. Captain Santos testified that Hummel did not appear to be within weight standards and did not pass the physical fitness test. ROA.5866. Captain Santos testified that, while Hummel was under his command, he had an unauthorized absence of under twenty hours. ROA.5866. Captain Santos had to revoke Hummel's security clearance after his unauthorized leave because he was no longer trustworthy. ROA.5866. Captain Santos testified that Hummel had lied to his superiors regarding whether he was cleaning his room, pressing his uniform, and other things that constituted a pattern of questionable integrity. ROA.5867. Hummel also disobeyed orders. ROA.5867.

Under cross-examination, Captain Santos testified that, at some point, Hummel had been promoted to Lance Corporal. ROA.5868. Hummel was still a Lance Corporal when he was honorably discharged. ROA.5868. Captain Santos testified that Hummel received only the nonjudicial punishment of his pay being docked $282 for his unauthorized leave. ROA.5868–69.

B. The defense's mitigation case

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.5704. Scoggins testified that Hummel remained in her special education classes for all four years of high school, and Hummel had a learning disability. ROA. 5704–05. Scoggins believed that, had Hummel received accommodations for his learning disability, he might have attended college. ROA.5708. Scoggins described Hummel as quiet, pleasant, cooperative, responsible, and never requiring discipline. ROA.5706. Scoggins recalled that Hummel enjoyed playing Dungeons and Dragons. ROA.5707.

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.5713. 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.5713. Hummel participated in ROTC while he was in school and received a second-place award in an art contest. ROA.5714. Hummel was absent sixteen days during his second-grade year and was tardy ten times during his fourth-grade year. ROA.5715.

Mark Pack, a family friend of Hummel's, testified that he had known Hummel since he was around nine years old. ROA.5717. Pack described Hummel as "an isolated person," who kept to himself and played video games. ROA.5718–19. 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.5719. Pack testified that he witnessed Hummel being physically punished once when he was a teenager. ROA.5719–20. Pack never saw Hummel get violent with anybody, although he did see Hummel get frustrated or mad. ROA.5719–20. Hummel would ball up and hold everything in when he was frustrated. ROA.5720. Pack thought Hummel was a slow learner. ROA.5721.

Christy Gregory Pack, who was married to Mark Pack, testified that she first met Hummel at church. ROA.5722. 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.5723. Christy testified that Hummel's mother was very generous with the Pack family but very strict with her own children. ROA.5723.

Linda Jean Petty Pack, Mark Pack's mother, was good friends with Hummel's mother, Jackie. ROA.5725. Linda recalls that Jackie was very strict with her kids, although she never saw her physically strike them. ROA.5726. Linda never saw Hummel back-talk or disobey his parents, and both Hummel children were quick to obey their parents. ROA.5726. Linda believed Jackie treated the Pack children better than her own children. ROA.5726–27.

Derrick Joe Parris, Linda Pack's nephew, was Hummel's childhood friend. ROA.5729. Parris witnessed Hummel's father hit Hummel twice, once with a belt and once with a broomstick. ROA.5729–30. Parris and Hummel

would play Nintendo games together. ROA.5730. Parris testified that Hummel was given the nickname "Bacon" at school because he would smell like bacon when he got to school. ROA.5730.

When Hummel came back from the military, he took Parris to bars and strip clubs, even though Parris was a minor. ROA.5730–31. Parris described Hummel as getting "a little too attached" to the girls dancing in the strip club. ROA.5731. Parris testified that Hummel was always behind in school. ROA.5731. Parris had never known Hummel to be violent with anybody. ROA.5731. Parris testified that it surprised him when Hummel joined the Marines because Hummel was overweight and not very athletic. ROA.5731. 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.5731. Parris never knew Hummel to use drugs before the Marines. ROA.5733.

Stephanie Bennett was Hummel's former high school girlfriend. ROA.5734. Bennett testified that they dated less than a year, and both she and Hummel were a little shy. ROA.5735. Bennett broke up with Hummel when he began to speak about getting married after high school. ROA.5735. Bennett never knew Hummel to be violent towards anybody, and Hummel always treated her appropriately. ROA.5736.

Letti Bandit Hubertz was homeless when she met Hummel in San Diego.

ROA.5738. Hubertz was pregnant when she and Hummel started dating a month before Hummel got out of the Marines. ROA.5738–39. When Hummel got out of the Marines, he and Hubertz moved back to South Carolina together. ROA.5739. They lived with Hummel's parents, and Hummel began working with his dad at Kohler. ROA.5739. 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.5739. 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.5738–40.

Hubertz testified that she thought their relationship was progressing well, until the day that Hummel's sister Neata 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.5740. Neata gave Hubertz one hour to pack and leave, as she had purchased a bus ticket back to California for them. ROA.5740. When Hubertz got to the bus station, she noticed that the ticket had been purchased two weeks earlier. ROA.5740. Hubertz testified that she never knew Hummel to frequent bars or strip clubs or use drugs. ROA.5741. Hubertz attempted to contact Hummel after she got to California but was repeatedly hung up on. ROA.5741.

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.5743–44. Neata said her parents were never affectionate with them. ROA.5744. Neata's mother was the disciplinarian in the family, often using a belt to dole out punishment. ROA.5744–46. It was common for the Hummel children to be left alone in the house, even before elementary school. ROA.5745. One time, Neata called the operator when she was scared while she and Hummel were home alone. ROA.5746.

Neata and Hummel could have friends visit them only if their parents approved. ROA.5746. Neata believes that her parents were abusive towards them. ROA.5746. Neata knew that Hummel was called "Bacon" at school because he smelled like the wood-burning stove that heated the house. ROA.5747. Neata testified that she and Hummel talked about his relationship with Hubertz, and he let her take care of it. ROA.5748. 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.5748.

Neata testified that Hummel joined the military when he was twenty-two years old. ROA.5747. 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.5749. Hummel wore a colostomy bag for a while after the surgery. ROA.5749. Hummel and his wife had financial problems. ROA.5749. Neata testified that, although she saw Hummel get angry, he was never violent towards anybody. ROA.5749. Neata said that

Hummel was nice to Joy and wonderful with Jodi. ROA.5754.

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.5802–04. 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.5804, 5815. 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.5805. Aubuchon admitted, however, that he did not know that Hummel had gone absent without leave while in the military. ROA.5805.

Dr. Antoinette Rose McGarrahan, the final defense witness, was a forensic psychologist, with a specialty in neuropsychology. ROA.5816. Dr. McGarrahan testified that she conducted a full neuropsychological, personality, and emotional evaluation of Hummel that lasted eleven hours. ROA.5817. Dr. McGarrahan used over twenty different tasks and instruments. ROA.5817. 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.5817. Dr. McGarrahan also interviewed Neata for two and a half hours and Hummel's mother for one hour. ROA.5817. 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.5817. Dr. McGarrahan performed a clinical interview with Hummel, which delved into his social history and the circumstances of the offense. ROA.5817.

Dr. McGarrahan found that Hummel suffered from a disorder of written expression, but his IQ was in the average to above-average range. ROA.5818. Dr. McGarrahan did not find that Hummel suffered from any severe mental disorders, although Hummel did show some mild depression and anxiety. ROA.5818. Dr. McGarrahan concluded that Hummel may have suffered from a combination of personality disorders, including narcissistic, antisocial, schizoid, and borderline personality disorders. ROA.5818.

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.5820. 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.5820. 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.5820. Dr. McGarrahan believed that Hummel's mother was a major contributing factor to his personality. ROA.5820. Although Hummel did feel emotions, he was unable to express them because he was controlled by his mother. ROA.5820–21.

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.5821. Hummel's emotional state was such that, even though he knew what he was doing was wrong, he was operating on pure emotion. ROA.5821, 5825. 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.5821. 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.5822. 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.5822.

Hummel also described his rapid infatuation with Kristie Freeze, despite knowing she did not reciprocate his feelings. ROA.5822. Dr. McGarrahan said

that this was common in Hummel's history whenever a woman would show interest. ROA.5822. Although Hummel sought relationships, he was unable to form any relationships with anyone, whether romantic or familial. ROA.5822. 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.5823. Dr. McGarrahan did testify, however, that Hummel had planned the murders. ROA.5824. Dr. McGarrahan said that Hummel was essentially the same person today that he was on December 17, 2009. ROA.5825.

Dr. McGarrahan testified that Hummel has done fairly well in structured environments and had received several commendations for his military service. ROA.5826. Dr. McGarrahan testified that Hummel did not receive any judicial punishment for leaving his military post without permission; instead, it was administratively handled. ROA.5826. Hummel admitted to her that he was wrong in carrying out the offense. ROA.5827.

III. Conviction and Postconviction Proceedings

Hummel was convicted of capital murder and, pursuant to the jury's answers to the special issues on future dangerousness and mitigation, sentenced to death. ROA.2754–57. The CCA affirmed Hummel's conviction on direct appeal. ROA.1909–56. While his direct appeal was pending, Hummel filed a state habeas application. ROA.8037–222. The trial court—the same trial judge who had presided over all trial proceedings—entered findings of fact and

conclusions of law recommending denial of relief. ROA.9474–611. The CCA denied relief. *Ex parte Hummel,* No. WR-81,578-01, 2016 WL 537608 (Tex. Crim. App. Feb. 10, 2016), *cert. denied*, *Hummel v. Texas*, 137 S. Ct. 63 (2016). Hummel then filed his federal habeas petition, which the district court denied. Pet.'s Appx. 23–101. The Fifth Circuit denied a COA. *Id*. at 1–10. The present petition followed.

REASONS FOR DENYING THE WRIT

Hummel fails to present any issue meriting this Court's attention. The lower courts properly adjudicated his claims that trial and appellate counsel were ineffective. For the reasons set out below, this Court should deny his petition for writ of certiorari.

I. The Lower Court Properly Held that Reasonable Jurists Would Not Debate the District Court's Denial of Federal Habeas Relief on Hummel's IATC Claim.

The Court should not grant certiorari review of an IATC claim that was soundly rejected by the state court. The court of appeals denial of a COA reflects the extreme difficulty in obtaining federal habeas relief on this type of claim. Hummel needed to surmount not only AEDPA's deferential review scheme, but also the deference *Strickland* affords to trial counsel's strategic choices. Counsel made a reasonable strategic decision regarding the mitigation evidence based on information provided to him by Hummel. Regardless, the unpresented evidence would not have reduced Hummel's moral

blameworthiness for this particularly calculated and brutal set of murders. According, Hummel to demonstrate that the state court's adjudication of his IATC claim was unreasonable, or that the issue is debatable among jurists of reason. The court of appeals' denial of a COA on his IATC claim does not warrant certiorari review.

A. To obtain federal habeas relief on an IATC claim adjudicated on the merits by the state court, Hummel must satisfy the highly deferential standards of both *Strickland* and AEDPA.

The familiar *Strickland* standard governs IATC claims. *Strickland v. Washington*, 466 U.S. 668, 668 (1984). To demonstrate ineffectiveness, an inmate must establish deficient performance and resultant prejudice. *Id*. at 687. A failure to prove either requirement results in the denial of the claim. *Id*. at 697.

To establish deficient performance an inmate must show that "counsel's representation fell below an objective standard of reasonableness," but there is a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Strickland*, 466 U.S. at 688–89. This presumption requires that courts not simply "give [an inmate's] attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [an inmate's] counsel may have had for proceeding as they did." *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (internal quotation marks and citations

omitted).

Counsel has a duty to make reasonable investigations—"[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. But "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). Rather, the question of the effectiveness of pretrial investigation is one of degree, not subject to precise measurement. *Strickland*, 466 U.S. at 680. "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

Concerning prejudice, an inmate must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. And it is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687.

The prejudicial impact of unpresented mitigating evidence must be assessed by reweighing the aggravating evidence against the totality of the mitigating evidence adduced both at trial and in the habeas proceedings. *Wiggins*, 539 U.S. at 536. In doing this, a reviewing court must "consider *all* the relevant evidence that the jury would have had before it if [the inmate] had pursued a different path—not just the ... evidence [the inmate] could have presented, but also the ... evidence that almost certainly would have come in with it." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

"Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). "Even under de novo review, the standard for judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). And, under § 2254(d), "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). As such, "[e]stablishing that a state court's application of *Strickland* was unreasonable ... is all the more difficult. The standards created by *Strickland* and [AEDPA] are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted).[1]

[1] Hummel asserts that AEDPA does not apply here because he did not receive a full and fair opportunity to litigate the facts of this claim in the state habeas

B. The state court's decision denying relief on Hummel's IATC claim was a reasonable application of *Strickland* and is not debatable.

Hummel claims that counsel was ineffective for failing to discover and present the jury with testimony during his punishment hearing from 1) three Tarrant County Sheriff deputies who interacted with him for nineteen months while he awaited trial, and who would testify that he had behaved well in jail and was considered a "low-risk inmate;" and 2) Dr. Susan Hardesty, a forensic psychiatrist who would testify that Hummel's long-term risk of future violence is low to moderate in a general prison setting. He contends that *Skipper v. South Carolina*, 476 U.S. 1 (1986) compels the presentation of this evidence because "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of

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proceeding. Petition at 23. In particular, he complains that his IATC claims were adjudicated on trial counsel's affidavit, and that he was denied a live evidentiary hearing to cross–examine counsel. But a state court "hearing" does not necessarily mean a live evidentiary hearing, and the Court has "not mean[t] to imply that the state courts are required to hold hearings." See *Townsend v. Sain*, 372 U.S. 291, 313 (1963) n.9 (discussing federal evidentiary hearings pre-AEDPA), overruled in part by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) (superseded by AEDPA). Moreover, Article 11.071, § (9)(a) explicitly permits trial judges to resolve controverted, previously unresolved material facts by "affidavits, depositions, interrogatories, and hearings, as well as using personal recollection." And in the federal habeas context, the Fifth Circuit has "repeatedly found that a paper hearing is sufficient to afford a petitioner a full and fair hearing on the factual issues underlying the petitioner's claims." *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000); *Morrow v. Dretke*, 367 F.3d 309, 315 (5th Cir. 2004) (citing *Valdez v. Cockrell*, 274 F.3d 941, 950–51 (5th Cir. 2001)). Hummel fails to demonstrate that the failure to hold a live hearing implicates the constitution in a way that compels certiorari review.

criminal sentencing … and any sentencing authority must predict a (defendant's) probably future conduct when it engages in the process of determine what punishment to impose." Petition at 19 (quoting *Skipper*, 476 U.S. at 8). He further maintains that counsel's failure to present the testimony of these witnesses resulted in prejudice under *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Wong v. Belmontes*, 558 U.S. 15 (2009), because the evidence before the jury failed to portray "an accurate picture of the issue of future–dangerousness." Petition at 21.

The lower court in considering this claim held that trial counsel was not deficient in the manner alleged because

> …counsel presented extensive evidence from expert and lay witnesses that Hummel was unlikely to be a future threat, including evidence of his good behavior while in jail and his nonviolent and non-criminal history. Counsel made a reasonable strategic decision not to seek testimony from jail personnel, as Hummel had indicated he had no especially positive relationships with anyone at the jail, and a similarly reasonable decision not to present specific expert testimony based on methods that could have opened the door to powerful rebuttal testimony from the state's expert.

Pet.'s Appx. at 5–6. The Court further concluded that Hummel's assertion that this evidence should have been presented essentially "boils down to a matter of degree … a difficult route by which to demonstrate ineffective assistance." *Id*. at 6. Hummel cannot fault the state habeas court for denying relief on that basis because it is fully consistent with *Strickland*. Hummel asserts no

compelling argument otherwise. That alone is enough reason to uphold the denial of a COA.

Furthermore, Hummel essentially ignores the strategic considerations the state habeas court was required to consider under *Strickland*. Trial counsel called two disinterested experts and multiple lay witnesses to testify that Hummel "had no disciplinary issues in jail, lacked a violent or criminal history, and would likely adapt well to prison life." *See* Statement of the Case, Section II.B, *supra*. Hummel argued in his COA application that his contention "is *not* that trial counsel failed to present a 'specific defense-theory," but that counsel failed to present critical evidence support the defense theory that was readily available." Application for COA at 51. His argument then is not about counsel presenting different evidence, but rather counsel's failure to present more, or better, evidence of the same kind. The lower court did not err, therefore, in characterizing Hummel's IATC claim "as a matter of degree," and in noting the relative difficulty of proving that counsel was ineffective under these circumstances. *See Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000) ("We must be particularly way of 'argument[s] [that] essentially come[] down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigation evidence? Those questions are less susceptible to judicial second–guessing.").

Although trial counsel's investigation did not uncover the three jail

guards or lead to Dr. Hardesty's testimony, the mitigation investigation was reasonable, as was any decision not to pursue *further* investigation on the future dangerousness issue. Regarding the jail guards, trial counsel reasonably believed, based on his experience, that the testimony of jail personnel is not typically favorable to the defense without evidence of a "personal relationship with, or affinity for," the defendant. *See* SHCR 1414 (ROA 9490); 28 U.S.C. § 2254(e)(1) (presuming state court fact-findings to be correct).[2] And when counsel asked, Hummel did not identify—and in fact discouraged trial counsel from investigating—the existence of any jail personnel with whom he might have developed any relationship. SHCR 1414–15 (ROA 9490–91). The district court held that "[t]rial counsel therefore made a strategic determination not to investigate possible witnesses among jail personnel." Pet.'s Appx. at 54.

Hummel presents nothing in his petition that undermines the lower's court determination that counsel's investigation was reasonable. His conclusory assertion that the jailer's testimony was readily available to trial counsel is belied by the facts in this case. Hummel cannot hinder counsel's attempts to investigate mitigation evidence and then complain when that evidence goes undiscovered. *See Schriro v. Landrigan*, 550 U.S 465, 476–77 (2007) (finding that where the defendant interferes with counsel's attempts to

[2] "SHCR" refers to the State Habeas Clerk's Record, followed by page number. "ROA" refers to the court of appeal's Record on Appeal.

present a case in mitigation, he cannot later claim ineffective assistance). Hummel takes issue with the lower court's determination that the omitted evidence was cumulative of other mitigation evidence presented. As discussed below, the evidence was cumulative of punishment evidence before the jury. But in any event, as to deficient-performance, that argument elides the relevant strategic considerations facing trial counsel, as discussed above.

Regarding Dr. Hardesty's testimony, counsel reasonably relied on the opinions and recommendations of Dr. McGarrahan, a well-qualified forensic psychologist and neuropsychologist. Dr. McGarrahan testified at trial regarding the mitigation she found based on her comprehensive evaluation of Hummel. *See* Statement of the Case, Section II.B, *supra*. Trial counsel stated in his post–conviction affidavit that he considered having Dr. McGarrahan present her opinion on Hummel's future dangerousness, but strategically chose not to do so because such testimony would open the door to powerful rebuttal testimony from State's expert Dr. Price. SHCR 532–34 (ROA.9493). Indeed, trial counsel "heartily dispute[d]" the assertion that they should have obtained a mental health expert to testify as to Hummel's lack of future dangerousness, and the state court. *See* ROA. 1661, 8600–019493 (finding that trial counsel and Dr. McGarrahan strategically decided that it was not in Hummel's best interest to perform a formal violence risk assessment). The district found "[t]hese actions are 'sound trial strategy' that 'fall[ ] within the wide range of

reasonable professional assistance.'" Appendix at 56–57 (quoting *Strickland*, 466 U.S. at 689).

Again, Hummel fails to demonstrate that this decision is debatable among jurists of reason. The mere fact that he managed to secure a new expert offering a different, or even contrary, opinion to the expert used at trial does not render counsel's performance deficient. *See Hinton v. Alabama*, 571 U.S. 263, 275 (2014) ("The selection of an expert witness is a paradigmatic example of the type of 'strategic choic[e]' that, when made 'after a thorough investigation of [the] law and facts,' is virtually unchallengeable.'" (quoting *Strickland*, 466 U.S. at 690); *see also Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (explaining that counsel "should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses").[3]

Finally, even assuming counsel was deficient for failing to present testimony from Dr. Hardesty and the jail guards, there is no reasonable

[3] Additionally, trial counsel stated that he did not believe that calling Dr. Hardesty would have been effective trial strategy given the doubts that exist as to Dr. Hardesty's credibility. ROA.8602–03. Indeed, as noted by both trial counsel Moore and the state habeas court, Dr. Hardesty does not rely on any risk assessment measures or any scientific or statistical comparisons to arrive at her diagnosis. ROA.8602–03, 9494. In fact, Dr. Hardesty acknowledged that her diagnosis of C-PTSD cannot be found within the two major diagnostic manuals and, in trial counsel's experience, diagnoses for disorders outside the diagnostic manuals are subject to attack on that basis alone. ROA.9062. Thus, the state court reasonably found that Dr. Hardesty's proffered opinions do not satisfy the reliability requirements of Texas Rule of Evidence 702, and trial counsel was reasonable to rely on Dr. McGarrahan to testify solely as to mitigation and to not call an expert on future dangerousness.

probability this evidence would have changed the jury's answer to the future dangerousness question. As noted by the district court,

> Given the calculated brutality, personal cruelty, and cold–bloodedness of this particular crime, as well as the number of victims, any unreasonably omitted mitigation evidence must be more than run–of–the–mill. The omission of mitigating evidence would only prejudice [Hummel] if it reduced [his] moral culpability in a manner proportionate to the depravity of his crime.

Pet.'s Appx. at 58.

The impact of the evidence Hummel faults trial counsel for not presenting is also negligible here because it is cumulative of other mitigation already before the jury. Trial counsel presented ample evidence that Hummel would not constitute a future danger based on his lack of violent history and his good behavior in prison. It is extremely unlikely that more mitigation evidence of the same kind would have outweighed the State's aggravating evidence of Hummel's heinous murder of his family. Accordingly, the lower courts correctly found that prejudice has not been proven in this case, a finding that reasonable jurists would not debate. This Court should deny certiorari review.

II. The Court of Appeal Properly Denied a COA on Hummel's Claim that Appellate Counsel was Constitutionally Deficient.

Hummel fails to demonstrate that his IAAC claim warrants certiorari review. The state court reasonably determined that appellate counsel's failure to raise additional arguments in support of Hummel's suppression claim did

not constitute ineffective representation. As such, the lower court properly affirmed the district court's denial of federal habeas relief and denied a COA.

A. *Strickland*'s familiar two-prong test applies to Hummel's claim that appellate counsel was ineffective.

The standard set out in *Strickland* to prove that counsel rendered unconstitutionally ineffective assistance applies equally to both trial and appellate attorneys. *Smith v. Robbins*, 528 U.S. 259, 285 (2000)). Thus, to obtain relief, Hummel must demonstrate that his appellate counsel's performance was deficient and that such deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687. Regarding deficient performance, an attorney's decision not to pursue a certain claim on appeal after considering the claim and believing it to be without merit falls within the "wide range of professionally competent assistance" demanded by *Strickland*. *Smith v. Murray*, 477 U.S. 527, 536 (1986). Indeed, the process of "'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Id*. (quoting *Jones v. Barnes*, 463 U.S. 745, 751–52 (1983)); *see also Robbins*, 528 U.S. at 288. The Supreme Court has indicated that a petitioner is able to satisfy this first prong of *Strickland* by showing that a particular non-frivolous issue neglected by counsel was "clearly stronger" than those issues actually presented. *See Robbins*, 528 U.S. at 288. That is, to prove that

counsel's performance was deficient, Hummel must demonstrate that the unraised points of error were clearly stronger in posture than those counsel actually brought on direct appeal. Regarding prejudice, the petitioner must demonstrate a reasonable probability that he would have prevailed on appeal. *Robbins*, 528 U.S. at 285–86.

B. The district court accurately summarized the facts relating to the present claim.

The district court, in its opinion denying relief on this claim summarized the relevant "background fact" as follows:

> At trial, Petitioner moved to suppress his confession as the fruit of an illegal detention, and the trial court denied the motion. 10 RR 61–64.8 Petitioner's appellate counsel challenged this ruling on direct appeal and argued in his brief before the CCA:
>
> > On December 20, 2009, [Petitioner] was detained at the Port of Entry at San Ysidro California by officers of the U.S. Customs and Border Protection Service while returning to the United States from Mexico. The sole reason for the detention was a missing persons report initiated by the Kennedale Police Department. When told by Officer E. Enriquez that [Petitioner] was going to be released, Kennedale Police Officers lied and told Officer Enriquez that an arrest warrant had been issued for [Petitioner] for the offense of arson. In truth, no arrest warrant had been issued and [Petitioner] would have been released except for the lies of the Kennedale Police Officers....
> >
> > When the Customs agents learned that they had been lied to and that no arrest warrant had been issued, Agent Paul Kandal told the Kennedale Police Department that [Petitioner] was going to be released. At this point in time, the only legal authority used to

> detain [Petitioner] was the missing persons report which specifically noted that [Petitioner] was not to be detained nor arrested. Despite the lack of authority to detain [Petitioner], he was detained by the Custom Agents until an arrest warrant was issued at 1248 P.M. (Central Standard Time)—four hours after [Petitioner] was originally unlawfully detained.
>
> [Petitioner's] detention and arrest at the San Ysidro Border Crossing was illegal because it was based on lies and falsehoods of the Kennedale Police Department to the U.S. Customs Officers intended to induce them into keeping [Petitioner] in custody....

Appellant's Brief at 10–11 (citations omitted) (emphasis added). Appellate counsel claimed that his "illegal detention" violated the Fourth Amendment, "tainted the ensuing searches, interrogations, and conviction," and harmed Petitioner by causing the trial court to admit his confession. Id. at 37–38, 40. Appellate counsel specifically argued that Petitioner's confession was "fruit of the poisonous tree." Id. at 8, 51.

The CCA affirmed the trial court's ruling, but did so without fully analyzing appellate counsel's Fourth Amendment argument:

> To the extent that [Petitioner] is arguing that these particular statements were the fruits of an illegal detention at the border, his claim is without merit. [Petitioner] contends that, at the time he arrived at the border crossing, there was a missing person report, but no warrant for his arrest. He asserts that Kennedale police officers lied to border-protection agents "about the existence of an arrest warrant with the intent of keeping [him] in custody," and that he "would have been release[d] except for the lies of the Kennedale police department." Based on the evidence presented at the suppression hearing, the trial court found otherwise....
>
> The trial court's ruling is supported by the record of the suppression hearing. CBP agents Jorge Bernal,

> Ernesto Enriquez, and Paul Kandal testified that they were following their policies and procedures when they detained [Petitioner] for further identification and verification of his status.... Kandal confirmed that he knew [Petitioner] did not initially have an arrest warrant and that Kennedale police officers were working to obtain one. Because the trial court's findings are supported by the record, they will not be disturbed on appeal.

Hummel, 2013 WL 6123283, at *17–18 (emphasis added).

Pet.'s Appx. at 83–84.

The district court then set out the state habeas court's adjudication of the *Strickland*'s deficiency prong with respect to this claim:

> Petitioner then complained to the state habeas court that his appellate counsel was ineffective because appellate counsel did not "sufficiently appeal the [trial] court's failure to grant the Defense motion to suppress" the confession. 1 SHCR 138. Specifically, Petitioner argued that "appellate counsel focused his arguments on the affidavit used to secure [Hummel's] arrest warrant," and only briefly "allud[ed]" to the "false statements made by the Kennedale police to the Border Patrol officers and the Border Patrol's detention of Hummel." *Id*. at 139. He argued that instead of focusing on the affidavit, "[a]ppellate counsel should have more clearly argued that [Hummel's] confession should have been suppressed based on the actions of the Kennedale Police and Border Patrol Officers." *Id*.
>
> The state habeas court disagreed and found that, "[b]ased on his research and experience, [Hummel's] appellate counsel presented appellate issues challenging the denial of [Hummel's] motion to suppress in an appropriate manner that [he believed] w[ere] calculated to obtain relief on appeal." 4 SHCR 1491 (quotation marks omitted). The state habeas court concluded that Petitioner's allegations "amount[ed] to nothing more than an impermissible second-guessing of appellate counsel's strategic decisions made based on counsel's experience and research," and accordingly

rejected Petitioner's IAAC claim. *Id*. at 1492–95

Pet.'s Appx. at 84–85.

C. Hummel fails to demonstrate that reasonable jurists would debate whether he was entitled to federal habeas relief on this claim.

Hummel's petition does not provide a reason to grant of certiorari review. He quibbles with the lower court's finding that he failed to "point to federal law clearly prohibiting CBP from detaining him upon learning that there was no active warrant for Hummel's arrest," *see* Pet.'s Appx. at 8–9, and merely reasserts his contention that, had appellate counsel asserted the arguments Hummel makes here, counsel "could have … made a strong argument that evidence obtained from Hummel after 7:17 a.m. was illegal and subject to the fruit-of-the-poisonous-tree doctrine." Petition at 28. This is not enough to show that this claim is reasonably debatable, let alone overcome the "doubly" deferential standard that applies to the adjudication of Hummel's IAAC claim on federal habeas review.

First, reasonable jurists would not debate the actual appellate-counsel-performance issue before the Court, which is different from the argument that Hummel presents. Hummel wishes to relitigate the underlying validity of his CBP seizure in the first instance. But that is not the relevant question. The lower court set out the proper inquiry with respect to the present claim:

The federal courts' task is not to establish whether CBP had

> authority to detain Hummel, whether the state court reasonably concluded that CBP had authority to detain Hummel, or whether Hummel's appellate counsel was unconstitutionally deficient in failing to straightforwardly raise this specific argument on direct appeal. We must instead determine whether the district court erred in determining that the state court did not unreasonably conclude that Hummel's appellate counsel's strategy fell within the "wide range of reasonable professional assistance" and that any failures by appellate counsel did not prejudice Hummel.

Pet.'s Appx. at 9–10.

Second, the court of appeals held that "[n]one could debate [the district court's] holding that the state court was not unreasonable" in concluding that appellate counsel was constitutionally effective. *Id*. at 10. Nothing Hummel asserts here demonstrates otherwise.

Appellate counsel challenged both Hummel's detention—arguing specifically that CBP would have released him but for KPD's representations—and the admission of the confession. *See* ROA.1868–73, 1880–86. Although he did not specifically identify the theory that CBP lost jurisdiction under immigration law once they realized KPD had misrepresented the state of the arrest warrant to them, counsel clearly argued that CBP officials had no authority to detain Hummel but for their reliance on KPD's assertion. Thus, Hummel criticizes appellate counsel, not for wholly omitting a claim based on his allegedly illegal detention, but for not raising the claim in the particular *manner* that he wishes.

Showing there were additional arguments to support the suppression of

Hummel's confession that counsel did not assert does not establish deficiency under *Strickland*. *Barnes*, 463 U.S. at 751–52. Rather, Hummel must demonstrate that the arguments counsel did not raise were "clearly stronger" than those he did raise. *See Robbins*, 528 U.S. at 288. But even this is not enough to obtain relief here. He must further establish that the state habeas court was unreasonable for reaching, as it did it this case, the opposite conclusion.

To be sure, the arguments Hummel wishes appellate counsel had raised are not "clearly stronger" than those asserted. The state court reasonably found that "[t]here is no legal or factual basis for the Court to suppress [Hummel]'s confessions or the evidence found as a result of the confessions." ROA.9570. Indeed, the state court found that the CCA had addressed Hummel's claim that he was unlawfully detained at the border based on intentional lies and falsehoods from KPD and found that the trial court's determination that the detention was lawful was supported by the record. ROA.9566. As summarized by the state court:

> Kandal was required to continue holding [Hummel] in order to determine what Kennedale wanted to do about [Hummel] being a missing person. Kandal was not bound by the language of the Kennedale Police Department's missing-person report instructing agencies not to detain or arrest [Hummel] because Kandal operates under the policies and directives of the [Border Patrol] to contact the jurisdiction, verify the information, and find out what the agency wants done with the individual who has been reported missing.

ROA.9565. Although Hummel points to various immigration statutes and provisions to demonstrate counsel's ineffectiveness he is unable to point to anything controversial about those statues—much less clear Supreme Court precedent that would compel a state appellate court to find that Hummel's detention was unconstitutional, as he is required to do under AEDPA. And any contrary holding here would violate *Teague v. Lane*, 499 U.S. 299 (1989).

Third, even assuming that Hummel could demonstrate that his detention was illegal, the district court properly found that Hummel has not cited any clear Supreme Court authority in which: "1) the original legal authority to hold the detainee disappeared; 2) police subsequently obtained an arrest warrant for the detainee; and 3) the evidence gathered by police after they obtained the warrant was fruit of the poisonous tree." ROA.1691.[4] Rather, as Hummel acknowledges, the Supreme Court has made clear that a confession obtained after a petitioner was illegally arrested may still be voluntary if his confession resulted from an "intervening independent act of a free will." *Brown v. Illinois*, 422 U.S. 590, 598 (1975). Factors to be considered in determining whether a confession if given voluntarily include: 1) whether police gave

[4] Notably, Hummel's argument merely quibbles with the lower court's resolution of this claim. He does not cite to a circuit split, or any other difficulty in the lower courts that would warrant this Court's attention. For this reason alone, certiorari review of this claim should be denied.

Miranda[5] warnings; 2) the temporal proximity of the arrest and the confession; 3) the presence of intervening circumstances; and 4) the purpose and flagrancy of the official misconduct. *Id*. at 603–04.

Here, the record demonstrates that CBP agents continued to hold Hummel even after they discovered no arrest warrant had been issued because they believed that federal law and agency polices authorized them to do so. ROA.3319, 3322–23, 3328. KPD then obtained an arrest warrant, and after the warrant was issued, Hummel was transferred to the San Diego County Jail, where he received *Miranda* warnings and subsequently confessed. ROA.3230–32, 3323–24, 3326, 3328. Hummel was in lawful custody for over ten hours before he voluntarily confessed. *See* ROA.3230–31 (confession obtained at 11:20 p.m.), 3328 (warrant issued at 10:48 a.m.). As held by the district court, these facts together—"the acquisition of a warrant, the length of time between the warrant issuing and [Hummel] confessing, the change of environs from the border crossing to the jail, the *Miranda* warning, the apparent good faith of the arresting officers, and the lack of any flagrant official misconduct"—demonstrate that, even if the BP illegally held Hummel at any time, his subsequent confession was voluntary. ROA.1695; *cf. United States v. Cantu*, 426 F. App'x 253, 259 (5th Cir. 2011) (unpublished) (finding attenuation where

[5] *Miranda v. Arizona*, 384 U.S. 436 (1966).

seven hours passed from an unlawful search to a *Mirandized* confession).

In light of that legal background, and the ultimate voluntariness of Hummel's confession, appellate counsel cannot be faulted for declining to raise the argument on which Hummel relies. Hummel cannot show that, even if he could demonstrate that the detention was illegal—which no clear Supreme Court authority establishes that it was—his appellate counsel failed to raise "a clearly stronger" issue on appeal. As such, he cannot demonstrate appellate counsel was deficient or that he was prejudiced by any such deficiency. Because the state court's adjudication of this claim was entirely reasonable, and the court of appeals properly denied a COA on the issue, there is no basis to grant certiorari review.

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