NO. _____
(Capital Case)

In the
Supreme Court of the United States

JOHN HUMMEL, Petitioner

v.

LORIE DAVIS, Respondent

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

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PETITION FOR WRIT OF CERTIORARI

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Date: April 1, 2019

QUESTIONS PRESENTED

1. In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the trial court ruled as irrelevant the testimony of two jailers and a "regular visitor" that Skipper behaved well and "made a good adjustment" during 7.5 months of pretrial custody. This Court held that the exclusion of relevant mitigating evidence impedes the jury's ability to carry out its task of considering all relevant facets of a defendant's character and record. "[C]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing…and any sentencing authority must predict a (defendant's) probable future conduct when it engages in the process of determining what punishment to impose." In other words, the best predictor of future behavior is past behavior. Hummel was in pretrial incarceration for 19 months and the deputies who interacted with him daily were available and willing to testify that Hummel was a low-risk inmate who behaved very well. However, trial counsel did not bother investigating and adducing this critical mitigative evidence.

   Question: Under the Sixth Amendment, *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins*, and *Wong*, does a death penalty defendant receive ineffective assistance of trial counsel if trial counsel fails to investigate and adduce available evidence regarding the defendant's exceptional behavior during a lengthy pretrial incarceration, thereby impeding the jury's ability to carry out its task of considering all relevant facets of the defendant's character and record?

2. Under *Smith v. Robbins*, 528 U.S. 259 (2000), the Sixth and Fourteenth Amendments require the effective assistance of appellate counsel under the *Strickland* standard. Under *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), the Fourth Amendment applies to border-searches unless it is "routine" or agents, considering all facts surrounding the traveler and his trip, reasonably suspect that he is smuggling contraband. Under 8 U.S.C. § 1357(a)(5) and 8 C.F.R. § 235.1(b), once CBP confirms that a person is a U.S. citizen with no warrants or reason to hold him and he did not commit: (1) an offense against the U.S. in CBP's presence; or (2) any felony cognizable under federal law, CBP must allow immediate entry. After Hummel was confirmed immediately admissible, he was illegally held 3.5 hours until CBP received an arrest warrant. Thus, a prolonged border-detention occurred without probable cause. However, rather than raise the prolonged-stop as error, appellate counsel focused on the affidavit for the arrest warrant and stated that Hummel's subsequent confession was "the culmination and result of all of the previous unconstitutional state actions."

   Question: Under the Sixth and Fourteenth Amendments and *Strickland*, does a death penalty defendant receive ineffective assistance of appellant counsel if appellate counsel fails to raise a critical point of error or inadequately briefs it?

PARTIES TO THE PROCEEDING

John Hummel, Petitioner

Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner John Hummel respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit:

OPINIONS BELOW

The opinion of the Fifth Circuit ("Opinion") is in the Appendix. (App.001-010). The published citation is *Hummel v. Davis*, 908 F.3d 987 (5th Cir. 2018). This opinion was appealed from *Hummel v. Davis*, No. 4:16-CV-00133-O, 2018 U.S.Dist.LEXIS 735 (N.D.Tex. Jan. 3, 2018), also in the Appendix. (App.023-101).

STATEMENT OF JURISDICTION

On November 19, 2018, the Fifth Circuit issued its Opinion, holding that: (1) reasonable jurists could not debate the district court's decision not to grant habeas relief on the claim for ineffective assistance of trial counsel; and (2) the district court did not err by determining that the state court did not unreasonably conclude that state appellate counsel's strategy fell within the "wide range of reasonable professional assistance" and that any failures by appellate counsel did not prejudice Hummel.[1] (App.001.007). This Court has jurisdiction under 28 U.S.C. § 1254 (2019).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall…have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

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[1] The third issue raised in the Fifth Circuit is not raised here.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

The Fourteenth Amendment provides in relevant part: "…No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, §1.

FEDERAL STATUTES AFFECTED

28 U.S.C. § 2254(d) (2019) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Introduction

This case presents two important questions for review. First, in *Skipper v. South Carolina*, 476 U.S. 1 (1986), this Court held that the exclusion of relevant mitigating evidence impedes the jury's ability to carry out its task of considering all relevant facets of a defendant's character and record. *Id.* at 8. This Court observed

that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing…and any sentencing authority must predict a (defendant's) probable future conduct when it engages in the process of determining what punishment to impose." *Id.* at 5. In other words, and as observed by a prosecutor in another case, "the best predictor of future behavior is past behavior." In *Skipper*, the trial court ruled as irrelevant testimony of two jailers and a "regular visitor" that Skipper behaved well and "made a good adjustment" during 7.5 months of pretrial custody. *Id.* at 3. This Court rejected the trial court's ruling. *Id.*

Hummel was in pretrial incarceration for 19 months (compared to 7.5 months for Skipper) and the deputies who interacted with him daily were available and willing to testify that Hummel was a low-risk inmate who behaved very well. However, trial counsel did not bother investigating and adducing this critical mitigative evidence. Under *Wiggins v. Smith*, 539 U.S. 10, 534 (2003) and *Wong v. Belmontes*, 558 U.S. 15, 20 (2009), trial counsel was required to investigate and adduce such readily available mitigative evidence. Thus, under the Sixth Amendment, *Strickland*, *Wiggins*, and *Wong*, a death penalty defendant like Hummel receives ineffective assistance of trial counsel if trial counsel fails to investigate and adduce available evidence regarding the defendant's exceptional behavior during a lengthy pretrial incarceration, thereby impeding the jury's ability to carry out its task of considering all relevant facets of the defendant's character and record.

Second, *Smith v. Robbins*, 528 U.S. 259 (2000) and the Sixth and Fourteenth Amendments require the effective assistance of appellate counsel under the *Strickland* standard. Per *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), the Fourth Amendment applies to border-searches unless it is "routine" or agents, considering all facts surrounding the traveler and his trip, reasonably suspect that he is smuggling contraband. And under 8 U.S.C. § 1357(a)(5) and 8 C.F.R. § 235.1(b), once Customs and Border Patrol ("CBP") confirms that a person is a U.S. citizen with no warrants or reason to hold him and he did not commit: (1) an offense against the U.S. in CBP's presence; or (2) any felony cognizable under federal law, CBP must allow immediate entry.

After Hummel was confirmed immediately admissible, he was illegally held 3.5 hours until CBP received an arrest warrant. Thus, a prolonged border-detention occurred without probable cause. However, rather than raise the prolonged-stop as error, appellate counsel focused on the affidavit for the arrest warrant and stated that Hummel's subsequent confession was "the culmination and result of all of the previous unconstitutional state actions."

Prolonged border-searches are illegal, and it is counsel's duty under *Strickland* and *Robbins* to raise and litigate this issue whether at trial or on appeal. Thus, under the Sixth and Fourteenth Amendments and *Strickland*, a death penalty defendant receives ineffective assistance of appellant counsel if appellate counsel fails to raise a critical point of error or inadequately briefs it.

Hummel raised these issues in his application for a certificate of appealability ("COA") but was denied. Hummel will show that he: (1) made a substantial showing of the denial of constitutional rights, (2) showed that reasonable jurists would find the district court's resolution of these issues debatable or wrong, and (3) showed that the issues are "adequate to deserve encouragement to proceed further." *See Slack*, 529 U.S. at 484. And, Hummel will show that a COA should have been granted if a proper a threshold examination of an overview of his claims and a general assessment of the merits of each claim had been done. *Miller-El*, 537 U.S. at 338; *Buck*, 137 S.Ct. at 773. Finally, Hummel will show that the district court's rulings were: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by this Court; and (ii) based on an unreasonable determination of the facts considering the evidence presented in state court. Hummel will ask this Court to reverse the Opinion and grant the application for the COA.

Procedural History

1. Indictment and trial

Under Tex. Penal Code § 19.03(a)(7) (2009), a grand jury indicted Hummel for Capital Murder (multiple victims), alleging that on or about December 17, 2009 during the same criminal transaction, Hummel caused the deaths of two persons. *Id.* (ROA.158-159).[2] On June 22, 2011, a jury found Hummel guilty as charged in the indictment. (ROA.5589). On June 28, 2011, the jury answered "Yes" to Special Issue

[2]The record on appeal from the Fifth Circuit is cited as "ROA.___" and will be made available to the Court upon demand.

One ("Do you find from the evidence beyond a reasonable doubt that there is a probability that (Hummel) would commit criminal acts of violence that would constitute a continuing threat to society?") and "No" to Special Issue Two ("Taking into consideration all of the evidence, including the circumstances of the offense, (Hummel's) character and background and the personal moral culpability of the (Hummel), do you find that there is sufficient mitigating circumstances or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?"). (ROA.5879-5880). Hummel was sentenced to death, and the Judgment was signed on June 29, 2011. (ROA.2754-2756.5880).

2. The Judgment and sentence are affirmed on direct appeal

On November 20, 2013, the Texas Court of Criminal Appeals ("TCCA") affirmed the Judgment and sentence. *Hummel v. State*, No. AP-76,596, 2013 Tex.Crim.App.Unpub.LEXIS 1239 (Tex.Crim.App. Nov. 20, 2013) (unpublished). Hummel filed a petition for writ of certiorari in this Court, which was denied on October 6, 2014. *Hummel v. Texas*, 135 S.Ct. 52 (2014).

3. The state writ application is denied

On June 5, 2013, Hummel filed the application under Tex. Code Crim. Proc. Art. 11.071 (2013) (ROA.8037-8222.8223-8532). The convicting court signed findings recommending that relief be denied. On February 10, 2016, the TCCA adopted the findings and denied relief. *Ex parte Hummel, No. WR-81,578-01*, 2016 Tex.Crim.App.Unpub.LEXIS 1152 (Tex.Crim.App. Feb. 10, 2016) (per curium, Alcala,

J. dissenting). On October 3, 2016, this Court denied the petition for writ of certiorari. *Hummel v. Texas*, 137 S.Ct. 63 (2016).

4. Proceedings in federal court

On February 4, 2017, Hummel filed the petition for writ of habeas corpus under 28 U.S.C. § 2254. (ROA.32-150). On January 3, 2018, the district court entered the Opinion and judgment denying the petition. (ROA.1628-1706). On November 19, 2018, the Fifth Circuit denied Hummel's application for a COA. (App.001-010); *Hummel v. Davis*, 908 F.3d 987 (5th Cir. 2018).

Facts

1. Facts regarding Question 1

The readily available evidence that trial counsel failed to investigate and adduce regarding Petitioner's incarceration behavior during pretrial and trial

Hummel was incarcerated pretrial and during trial in the Tarrant County Jail from December 31, 2009 until July 28, 2011. (ROA.407.454.573.819). In that Jail, "high-risk" inmates are those who: (1) are charged with capital offenses, (2) commit assault, (3) are an escape-risk, or (4) are notorious. (ROA.407.454.565.573-575). Outside the cell, the high-risk inmate is placed in handcuffs and leg-irons and is accompanied by two officers. (ROA.456.575). Low-risk inmates, on the other hand, are not restrained. (ROA.407.454).

Although inmates charged with capital offenses are usually deemed "high-risk," during his pretrial incarceration in the jail from December 31, 2009 until July 28, 2011, Hummel was deemed "low-risk." (ROA.407.454.573.819). The deputies who dealt with Hummel each day stated in the habeas proceeding that: (1) Hummel was

quiet, respectful, pleasant, and never caused trouble (ROA.407.454.455.457); (2) Hummel complied with all rules and had no disciplinary infractions while at the jail (ROA.400.457.577); and (3) had they been subpoenaed, they would have testified that Hummel would do well in prison and adjust well to a general-population setting. (ROA.408.455). But the deputies were not contacted by trial counsel. (ROA.408.455).

Other evidence of Hummel's lack of future dangerousness that trial counsel failed to investigate and adduce

Dr. Hardesty is a board-certified forensic psychiatrist and the Vice President and Medical Director for The Menninger Clinic in Houston, one of the nation's leading inpatient psychiatric hospitals that provides 24-hour psychiatric care. (ROA.68.69.346). Dr. Hardesty stated that although Hummel committed a violent crime, his long-term risk of future violence is low to moderate in the general prison-setting because Hummel: (1) did not have a history of violence until the crime; (2) had a coping style (before the crime) that was passive-acceptance and involved denial of the circumstances or escape into games, movies, and books; (3) is unlikely to have the extreme set of financial and familial stressors that were the antecedents to the crime; (4) will be in a contained-environment where his needs are met, but there is not a relational model that would be iterative of attachment; (5) established a more informed religious attachment than previously, providing greater personal stability; and (6) discussed coping with prison and the idea of being in general population, and has a perspective of acceptance of responsibility for his offense while maintaining the best possible use of the remainder of his life in a confined setting. (ROA.363-364).

Evidence adduced during trial that would have been corroborated by evidence that trial counsel failed to investigate and adduce

Frank AuBuchon, a former classifications officer for the Texas Department of Criminal Justice ("TDCJ") testified that: (1) TDCJ has Level-1-minimum to Level-5-maximum security levels, and the minimum security-level for an inmate serving life-without-parole is "G3," which is permanent, and the inmate will never attain a lower classification (ROA.5796-5797.5802-5803); (2) G3-inmates must remain in Level-5 (maximum-security) prisons (ROA.5802); (3) G3-inmates may reside only in two-inmate cells and may not reside in dormitories (ROA.5802); (4) G3-inmates are not allowed to have jobs that permit them to leave the premises of the prison or approach loading docks without an armed officer (ROA.5803.5814); (5) G3-inmates may be reclassified as G4 if they become noncompliant with work, grooming, or following orders (ROA.5803); and (6) an inmate may be placed in administrative segregation if he attempts or succeeds in an escape or assaults staff (ROA.5803).

AuBuchon had reviewed police reports, military records, medical records, offense reports, jail records during trial, and Hummel's criminal background. (ROA.5804). AuBuchon concluded that Hummel would be classified at G3 if given life-without-parole, would be placed in a maximum-security prison, and would function well based on his good behavior and military history. (ROA.5804-5805).

Other evidence that trial counsel failed to investigate and adduce

Laura Smith investigated and made findings about Hummel's life-history and its elements that impacted Hummel's development and decision-making, showing Hummel's inability to manage stress, multiple serious illnesses like Crohn's disease

and a severely injured back, severe financial distress, child-abuse by his father, emotional abuse by both parents, failure to develop socially, academically, or emotionally, inability to understand the difference between reality and fantasy, and failure to advance in the Marines. (ROA.366-403). There were also multiple lay witnesses, including Marines, who could have provided strong, mitigative evidence but that were not investigated or called by trial counsel. (ROA.412-417.421-436.442-446.452.453). Instead, trial counsel's investigation focused mainly on possible sexual-abuse and Hummel's immediately family, which turned up nothing. (ROA.433.441.4753-5756).

On future-dangerousness, the State focused on the crime

The State based its argument about Hummel's "propensity for violence" entirely on the crime and an allegation that two days before the crime, Hummel attempted to poison his family, portraying him as one who has not a "single solitary internal restraint" to refrain from committing future acts of violence: "It's not about what type of restraints that can be put on him by the penitentiary system. It's about who is he as a person. His character for violence. Not about restraints in the penitentiary system. It's about his internal restraints. Does he have a single solitary internal restraint?" (ROA.5607-5613.5879). This was the only evidence of "violence" committed by Hummel prior to the crime. The State also called Hummel a "monster" and an "animal." (ROA.5872-5879).

2. Facts regarding Issue 2

On December 20, 2009, at 5:48 a.m. PST, while entering the U.S. from the San Ysidro Port of Entry, Hummel was stopped by CBP because he had only his Texas driver's license, which was insufficient for immediate entry under the Western Hemisphere Travel Initiative. (ROA.461.3268). CBP Agent Bernal saw a warning on NCIC that Hummel might be "armed and dangerous." (ROA.3268). At 6:03 a.m., Agent Enriquez saw that the NCIC showed:

> **OLN/22576933 OLS/TX OLY/2011**
> **MNP/MP DLC/20091218 OCA/0900017596**
> **VLD/20091219**
>
> **LAW ENFORCEMENT SENSITIVE SUBJECT POSSIBLY MENTALLY UNSTABLE PERSON OF INTEREST IN HOMICIDE CONSIDER ARMED AND DANGEROUS APPROACH WITH CAUTION SUBJECT HAS MILITARY BACKGROUND DO NOT ARREST OR DETAIN BASED ON THIS RECORD**
>
> **IF LOCATED CONTACT KENNEDALE PD 8174785416 ADVISE LOCATION AND DIRECTION**
>
> **TRAVEL LIC/VLR144 LIS/TX LIY/2010 LIT/PC**
> **VIN/2FMDA5141WBA54391 VYR/1998**
> **VMA/FORD VMO/WIN VST/SD VCO/MAR**

(ROA.462). Based on this, at 6:49 a.m., Enriquez called the Kennedale, Texas Police Department to confirm Hummel as a "missing person," telling the dispatcher that he was holding Hummel "[j]ust for this…report..." (ROA.462.472). The dispatcher contacted Captain Hull, who directed her to tell Enriquez, "[w]e want to put a hold on him for a warrant for arson." (ROA.474.3311). Hull called other officers to meet him "…to start the process of the warrant." (ROA.3311).

At 7:09 a.m., the dispatcher told Enriquez that Kennedale PD wants CBP "to place a hold on (Hummel)." (ROA.475). Enriquez knew that the report did not authorize detention, that Kennedale PD was merely to be notified of Hummel's location (ROA.3277), and the report showed Hummel only as a "missing-person" (ROA.3274-3275). However, the dispatcher told Enriquez that Hummel had an arrest warrant for arson, which was false, and without confirming the warrant, Enriquez referred the case to CBP Agent Kandal for processing based only on his conversation with the dispatcher. (ROA.3277-3279). If Kennedale PD had not "suggested" the nonexistent warrant for arson, CBP would have released Hummel upon verifying his U.S. citizenship. (ROA.3342). However, because he told about a nonexistent warrant, Enriquez directed Kandal to begin processing Hummel. (ROA.3276).

At 7:16 a.m., Kandal called Kennedale PD for information about the warrant, to which the dispatcher replied, "[w]e just have him filed as a missing person, and he has a 'pending' warrant for arson." (ROA.478). Kandal asked, "[s]o you don't have an active warrant outstanding on him then, right?" to which the dispatcher replied, "[I] believe it's being processed as we speak. I'm going to need you to probably contact our captain because I don't have any more information than that. Can I give you that number?" (ROA.478). Kandal responded, "[W]ell, part of the problem with it is that he's an otherwise admissible person. He's actually a citizen in the country, and we can't hold him on something that hasn't been processed yet. Let me go ahead and get his number." (ROA.478).

At 7:34 a.m., the dispatcher told Hull, "He (Kandal) is trying to call you. He is saying that he can't hold (Hummel) if there is no…active warrant…It's something about being an admissible person and a U.S. citizen…[H]e said he was going to call you as soon as I got off the phone with him because he was asking me a lot of questions that I didn't have the answers to. He want to know if he was a no bail full extradite, and he needed the number for the warrant. I told him that it was probably being processed as we were speaking, and he said that's not good enough, that he had to have it active or he couldn't hold him because of (Hummel's) rights." (ROA.479). Hull responded, "[O]h, I believe he's right. I was hoping they would just hold him, to be honest with you." (ROA.479).

Kandal thus knew a warrant did **not** exist for Hummel and CBP learned that Hummel was a U.S. citizen shortly before his 7:30 a.m. call with the dispatcher, 3.5 hours before the arrest warrant was finalized. (ROA.3325-3326). Kandal claimed that CBP had the authority to hold a person and detain, fine, and even imprison him for failing to provide proper entry documentation under the Western Hemisphere Travel Initiative and that a person is not free to enter until CBP is satisfied of their right to do so. (ROA.3319). However, **not** later than 7:17 a.m., CBP verified that Hummel was a U.S. Citizen with the right to immediate entry. (ROA.3325-3326).

Hull instructed the dispatcher to call Kennedale Detective Charbonnet and request that he help draft the warrant. (ROA.480). Hull spoke to Kandal over the next few hours, but the conversations were not recorded. (ROA.3311-3316). As of 9:12 a.m., the NCIC-report showed "no identifiable record" or warrant for Hummel.

(ROA.465). On pages 90-92 of Volume 8 of the trial record, the exchange between trial counsel and Kandal verified Hummel's right of immediate entry. (App.011; ROA.3326). At 10:48 a.m., an affidavit was signed, and an arrest warrant was issued. (ROA.466-468). CBP received the warrant at 10:52 a.m., 3.5 hours after CBP confirmed that Hummel was admissible. (ROA.484).

At 10:20 p.m. that evening, Officer Charbonnet read Hummel his *Miranda* rights and interrogated him. (ROA.6016-6151). On December 21, 2009 at 12:28 a.m., Hummel confessed to the crime in writing. (ROA.6014-6015). Based on this confession, police also located the weapons described by Hummel, which were admitted as evidence at trial. (ROA.5034).

Trial counsel filed motions to suppress, arguing that statements made by Hummel to CBP and Kennedale PD should be suppressed because CBP illegally detained Hummel and this illegal border-seizure tainted subsequent statements Hummel made thereafter. (ROA.2326.2335). The trial court denied the motions. (App.012; ROA.3477).

In the Appellant's Brief, points 14-17, appellate counsel raised claims regarding the denial of the motion to suppress the confession. (App.014-020; ROA.612-618.1880-1886). However, these arguments focused entirely on the affidavit used to secure Hummel's arrest warrant. (ROA.612-618.1880-1886). Regarding the detention by CBP, appellate counsel argued only that Hummel's confession was "the culmination and result of all of the previous unconstitutional state actions." (ROA.613.1881).

STANDARD OF REVIEW

Because this petition involves the interpretation of federal constitutional law and prior holdings of this Court, the standard of review is *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231-232 (1991).

REASONS FOR GRANTING THE WRIT

1. Under the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984), a death penalty defendant receives ineffective assistance of trial counsel if trial counsel fails to investigate and adduce available evidence regarding the defendant's exceptional behavior during a lengthy pretrial incarceration, thereby impeding the jury's ability to carry out its task of considering all relevant facets of the defendant's character and record.

Standards under 28 U.S.C. § 2254(d)

Under 28 U.S.C. § 2254(d), a state prisoner may **not** obtain relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in decisions that were: (1) contrary to, or involved an unreasonable application of clearly established Federal law as determined by this Court; or (2) based on an unreasonable determination of the facts considering the evidence presented in the state court proceeding, or both. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011). A state court's ruling must be so lacking in justification that "there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103; *see Shoop v. Hill*, 586 U.S. ____, 2019 U.S.LEXIS 13 (Jan. 7, 2019).

Under 28 U.S.C. § 2254(d)(1), a reviewing court must consider whether the "state-court decision…correctly identifie[d] the governing legal rule…[and] applie[d] it reasonably to the facts (of the) case." *Harrington*, 562 U.S. at 102 ("[u]nder §

2254(d), a (federal) court must determine what arguments or theories supported or could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."). "[A] legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding (and not dicta of the SCOTUS)." *Carey v. Musladin*, 549 U.S. 70, 74, 77 (2006). §2254(d)(1)-review is limited to "the record that was before the state court that adjudicated the claim on the merits" unless a petitioner establishes cause to excuse a procedural default as to an ineffective-counsel-claim by showing: (1) state-habeas-counsel was constitutionally deficient in failing to include the claim in the state-habeas application, and (2) the ineffective-counsel-claim is "substantial" (has "some merit."). *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011); *Trevino v. Thaler*, 133 S.Ct. 1911, 1921 (2013); and *Martinez v. Ryan*, 132 S.Ct. 1309, 1318 (2012).

Under 28 U.S.C. § 2254(d)(2), an unreasonable determination of the facts considering the evidence presented in the state court proceeding means that although a factual issue determined by the state habeas court is presumed to be correct, the petitioner may rebut it by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (2017); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (Standard "is demanding but not insatiable," and "deference does not by definition preclude relief.").

Standards for obtaining a certificate of appealability

To obtain a COA, an Appellant "must make a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). The movant "must

demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This includes showing that reasonable jurists could debate or agree that the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Id*. In determining whether to grant a COA, the inquiry is limited to a threshold examination that "[r]equires an overview" of the applicant's claims and "[a] general assessment of (the merits of the claims)." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *Buck v. Davis*, 137 S.Ct. 759, 773 (2018).

Standards for ineffective assistance of trial counsel

Under *Strickland v. Washington*, 466 U.S. 668, 687-691 (1984), to show ineffective assistance of trial counsel ("IATC"), a petitioner must prove by a preponderance of the evidence that: (1) trial counsel's performance was deficient (counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment); and (2) the deficient performance prejudiced the defense (errors were so serious as to deprive the defendant of a fair trial, a trial whose result is not reliable).

To satisfy the deficient-performance-prong, the petitioner must show that counsel's representation "fell below an objective standard of reasonableness," which requires overcoming a strong presumption that the conduct of trial counsel falls within a wide range of reasonable professional assistance. *Wiggins v. Smith*, 539 U.S. 510, 521-523 (2003). To satisfy the prejudice-prong, a petitioner must establish a

reasonable probability that, but-for the objectively unreasonable misconduct of trial counsel, the result of the proceeding would have been different. *Wiggins*, 539 U.S. at 534; *Strickland*, 466 U.S. at 694 (A reasonable probability is one sufficient to undermine confidence in the outcome of the proceeding).

To determine whether a petitioner was prejudiced during the punishment-phase of a capital trial, a reviewing court must reweigh all the evidence in aggravation against the totality of available mitigating evidence had the petitioner's trial counsel chosen a different course. *Wiggins*, 539 U.S. at 534; *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (same). Petitioner must show a "reasonable probability" that the result of the punishment phase of would have been different. *Wong*, 558 U.S. at 27. If an ineffective-counsel-ground was **not** addressed on its merits by the state court, review is de novo. *Wiggins*, 539 U.S. at 534 and *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (same).

> ***Skipper* and its progeny are clear that evidence of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing, and highly critical to the jury's function of predicting a defendant's probable future conduct.**

In *Skipper v. South Carolina*, 476 U.S. 1 (1986), Skipper sought to introduce testimony of two jailers and a "regular visitor" to testify that he behaved well and "made a good adjustment" during the 7.5 months he spent in pretrial custody. *Id.* at 6. The trial court, however, ruled that such evidence is irrelevant. *Id.* at 6-7. This Court held that the exclusion by the court of relevant mitigating evidence impeded the jury's ability to carry out its task of considering all relevant facets of Skipper's

character and record. *Id*. at *8. This Court also observed that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing…and any sentencing authority must predict a (defendant's) probable future conduct when it engages in the process of determining what punishment to impose." *Id*. at 5. In other words, "The best predictor of future behavior is past behavior." *See*, *e.g.*, *Hartsfield v. Dir.*, 2011 U.S.Dist.LEXIS 124662, *17 (E.D.Tex. Sep. 6, 2011) (During closing arguments, the prosecutor said that "the best predictor of future behavior is past behavior, when do you want him out on your streets?").

Hummel was in pretrial incarceration for 19 months and the deputies who interacted with him every day were ready and available to testify that Hummel was a low-risk inmate who behaved very well. However, trial counsel did not bother investigating and adducing this critical mitigative evidence.

This evidence was critical and not "cumulative" as the lower courts erroneously found. The Fifth Circuit even erroneously found that "…[t]rial 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." (App.005) (emphasis supplied). As noted in footnote 13 of the Opinion (App.005), the "evidence of good behavior while in jail" was merely the testimony of AuBuchon, who the Opinion claimed testified "that based on Hummel's lack of disciplinary issues while in jail and other factors, Hummel would likely adjust well to life in prison and be classified at the minimum level an inmate

could receive for a life sentence without parole." AuBuchon never met with Hummel or interviewed those who dealt with Hummel every day in the Jail, who would have told AuBuchon that Hummel was a model inmate who was considered low-risk. (ROA.645). AuBuchon's assignment was to review police reports, military records, medical records, offense reports, jail records, and criminal background. (ROA.5804). AuBuchon's conclusion dealt with Hummel's prison-classification if he sentenced to life-without-parole. (ROA.5804-5805).

Here, Hummel's supposed future-dangerousness was the central theme of the State's punishment-case. Per the State, "Hummel…has not a 'single solitary internal restraint' to refrain from committing future acts of violence…It's not about what type of restraints that can be put on him by the penitentiary system. It's about who is he as a person. His character for violence. Not about restraints in the penitentiary system. It's about his internal restraints. Does he have a single solitary internal restraint?" (ROA.5607-5613.5879). The State also called Hummel a "monster" and an "animal." (ROA.5872-5879).

Contrast the State's focus on Hummel's supposed future-dangerousness to a case like *Jenkins v. Allen*, 2016 U.S.Dist.LEXIS 116977 (N.D.Ala. Aug. 31, 2016), where the petitioner argued that his trial counsel was ineffective for failing to investigate and introduce evidence of his good conduct while he was incarcerated in the county jail awaiting trial. Id. at *174. However, the district court found that the petitioner's future dangerousness in prison was not suggested as an aggravating factor. *Id*. at *179. The only aggravating factors argued by the prosecution were that

the murder was committed during the course of robbery and during a kidnapping. *Id.* Thus, the petitioner's good behavior during pretrial incarceration could not have been mitigating in this regard, as was the evidence at issue in Skipper. *Id*. Thus, the district court concluded that the state court's finding that the petitioner was not prejudiced by trial counsel's failure to present this evidence to the jury was neither contrary to nor an unreasonable application of clearly established Federal law, as determined by this Court's opinion in *Skipper*. *Id*.

As argued below, this Court made it clear in *Wiggins* that a complete picture of relevant facts are critical in a death penalty case. And under *Wiggins*, 539 U.S. at 534, and *Wong*, 558 U.S. at 20, to determine whether a petitioner was prejudiced during the punishment phase of a capital trial, a reviewing court must reweigh all the evidence in aggravation against the totality of available mitigating evidence had the petitioner's trial counsel chosen a different course. The burden is on the petitioner to show a "reasonable probability" that the result of the punishment phase of a capital murder trial would have been different. *Wong*, 558 U.S. at 27. Hummel has done so. AuBuchon's testimony did not **not** meet the standard under *Wiggins* and *Wong* and failed to give the jury an accurate picture of the issue of future-dangerousness. It is reasonable to conclude that the best and most critical evidence on the issue of future-dangerousness where the State focused so much on it would have been the testimony of the deputies who spent every day with Hummel for 19 months.

See, *e.g.*, *Waidla v. Davis*, 2017 U.S.Dist.LEXIS 209365, at *292 (C.D.Ca. Dec. 18, 2017) (Death sentence reversed where "trial counsel completely failed to

investigate Petitioner's positive behavior in custody, which had been unmistakably identified by the U.S. and California Supreme Courts as an easy source of relevant and potentially powerful mitigation evidence."); *see also, e.g.*, *People v. Davis*, 706 N.E.2d 473, 485-487 (Ill. 1998) (under *Skipper*, the evidence at issue in this case concerns defendant's good behavior in jail and his positive adjustment to incarceration); *Commonwealth v. Losch*, 535 A.2d 115, 122-123 (Pa. 1987) (Under *Skipper*, the trial court's refusal to consider evidence relating to the appellant's good behavior during pretrial incarceration is reversible error.); and *State v. Johnson*, 494 N.E.2d 1061, 1067-1070 (Ohio 1987) (death sentence reversed where trial counsel failed to present important mitigative evidence including evidence of the defendant's good behavior during pretrial incarceration); *see* (Celebrezze, J. concurring) ("…it would be a rare case where presentation of mitigation evidence, no matter how meager, would be inappropriate. For example, assuming arguendo that appellant had demonstrated a spirit of cooperation with authorities during his pretrial incarceration, this fact would have been appropriate for consideration by the jury during the penalty phase.").

This was not "[a]n impermissible second-guessing of the manner in which his experienced trial counsel chose to present evidence that Hummel would not constitute a future danger if he were sentenced to life without parole instead of death" as the state court concluded (ROA.645), but a violation under *Wiggins* and *Wong*.

Hummel did not receive a full and fair opportunity to litigate the facts in the state habeas proceeding

The Opinion notes that "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," but this was based on trial counsel's affidavit on which the convicting court refused to allow examination since the court refused Hummel a hearing in the habeas proceedings despite repeated requests by state habeas counsel. (ROA.9109.9111.9112).

Hummel did not have a full and fair opportunity to litigate his claims in the trial court proceeding. (ROA.1610-1620). The relitigation bar of 28 U.S.C. § 2254(d) is a form of issue preclusion *See Montana v. United States*, 440 U.S. 147, 153 (1979) (discussion of issue preclusion). Issue preclusion does not apply to state-court adjudications "where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Allen v. McCurry*, 449 U.S. 90, 100 (1980); *see also Montana*, 440 U.S. at 164 n.11 ("[R]edetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation). And if a litigant in the prior proceeding did not have a meaningful opportunity to be heard due to the lack of the quality, extensiveness, or fairness of procedures in the prior proceeding, then it violates due process for a federal district to apply issue preclusion to the prior adjudication. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940) (The absence of fairness in apply issue preclusion violates the due process clauses of the Fifth and Fourteenth

Amendments). Thus, because Hummel did not have a full and fair opportunity to litigate the issues decided by the state court, the relitigation bar of 28 U.S.C. § 2254(d) should not have been applied. Although a habeas petitioner does not enjoy the same liberty interests as a person not convicted, *Herrera v. Collins*, 506 U.S. 390, 399 (1993), a habeas petitioner has the "fundamental requisite of due process of law [that] is the opportunity to be heard." *Ford v. Wainwright*, 477 U.S. 399, 413 (1986). Otherwise, the rule that the availability of habeas corpus relief "presupposes the opportunity to be heard, to argue and present evidence" under *Townsend v. Sain*, 372 U.S. 293, 312 (1963) is rendered meaningless.

As this Court explained in *Morgan v. United States*, 298 U.S. 468, 480-481 (1936), a 'hearing' means "[t]he taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings" (is what a judicial proceeding means). And, "[T]he fundamental requisite of due process of law is the opportunity to be heard," and "the hearing must be 'at a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). Although a hearing in a habeas proceeding is less formal than a trial on the merits, it requires a formal process, which includes a process for admitting, objecting to, and challenging the substance of evidence offered by a party. *Id.*; *Ford*, 477 U.S. at 427 (Powell, J., concurring) ("The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination.").

Because there is a reasonable probability that at least one juror would have found that the evidence presented through the deputies combined with Dr. Hardesty's evaluation negated the State's argument that Hummel would present a continuing threat to society, Hummel was entitled to a COA and is entitled to a new punishment hearing. *See Wiggins*, 539 U.S. at 536.

2. Under the Sixth and Fourteenth Amendments and Strickland, a death penalty defendant receives ineffective assistance of appellant counsel if appellate counsel fails to raise a critical point of error or inadequately briefs it.

Standards for ineffective assistance of appellate counsel

The standard for evaluating a claim of ineffective assistance of appellate counsel ("IAAC") is the same as in *Strickland*, 466 U.S. at 687-691: the petitioner must show: (1) appellate counsel was objectively unreasonable in failing to discover nonfrivolous issues and to file a merits brief raising them; and (2) prejudice, which is a reasonable probability that, but for the appellate counsel's unprofessional errors, the result of the proceeding would have been different. *Smith v. Robbins*, 528 U.S. 259, 285 (2000) (*Strickland* standard is applied to claims of attorney error on appeal), *Evitts v. Lucey*, 469 U.S. 387, 396-397 (1985) (Fourteenth Amendment requires the effective assistance of counsel to appellants for direct appeals).

The federal law prohibiting CBP from detaining a confirmed U.S. citizen who has no holds or warrants is clear and was argued below

The Opinion concludes that "Hummel does not point to federal law clearly prohibiting CBP from detaining him upon learning that there was no active warrant for Hummel's arrest, given that he had attempted to enter the United States without

a passport. He similarly does not present clearly established law undercutting the state court's conclusion that his confession was sufficiently attenuated from any illegality in the detention." (App.008-009). However, Hummel did point to the relevant federal law and showed why the confession was sufficiently attenuated from the illegal detention.

It is not disputed that CBP: (1) knew a warrant did not exist for Hummel, and (2) learned at 7:17 a.m. verified that Hummel was a U.S. Citizen with the right to immediate entry. (ROA.3325-3326). And, the federal law is clear: CBP's jurisdiction per 8 C.F.R. § 1.1 (2009) is limited to regulating the entry, detention, removal, and naturalization of aliens. 8 U.S.C. § 1101(a)(23) (2009), 8 U.S.C. § 1103(a)(1) (2009), & 8 U.S.C. § 1231(a) (2009). Under 8 U.S.C. § 1101(a)(3) (2009), an "alien" is any person not a citizen or national of the United States.

Under 8 U.S.C. § 1101(a)(22) (2009), once a person establishes that he is a U.S. citizen, he cannot be treated as an alien and must be released. 8 U.S.C. § 1226 (2009); 8 C.F.R. §§ 236.1-236.7 (2009). Under 8 U.S.C. § 1357(a)(5) (2009), CBP may arrest or detain a U.S. citizen only for any: (1) offense against the U.S. if the offense is committed in CBP's presence; (2) felony cognizable under federal law if CBP has reasonable grounds to believe that the citizen has committed the felony and if there is a likelihood of the citizen escaping before an arrest warrant can be obtained. Neither condition under § 1357(a)(5) or any other law existed for CBP to continue holding Hummel past 7:17 a.m. Contrary to Kandal's assertions, CBP did not have authority to hold Hummel after 7:17 a.m. or to detain or fine him merely for failing

to provide proper entry documentation. (ROA.3319). Once CBP confirmed Hummel's U.S. citizenship at 7:17 a.m., CBP was "satisfied" of Hummel's right to enter, and CBP lost jurisdiction over him and was required to release him. *See Nadal-Ginard v. Holder*, 558 F.3d 61, 66 (1st Cir. 2009) (A person claiming U.S. citizenship must establish that fact to the examining officer's satisfaction, only if the person fails to show that he is a U.S. citizen may he be "inspected as an alien."). As this Court held in *Montoya de Hernandez*, 473 U.S. at 538, "routine" border-searches are not subject to the Fourth Amendment. (ROA.1693-1694). "Routine" searches are those not involving a body-cavity, strip, or x-ray search. *Id.* at 547-548. Nor are detentions of U.S. citizens if agents, considering all facts surrounding the traveler and his trip, reasonably suspect that the traveler is smuggling contraband. *Id.* at 536-544. Hummel was not carrying contraband. Hummel was not committing any crime when he attempted to reenter. There were no issues outside of a "routine" search. The facts and law cannot be any clearer.

Hummel received ineffective assistance of appellate counsel

Because the federal law prohibiting CBP from detaining a confirmed U.S. citizen who has no holds or warrants is clear, the question is whether appellate counsel was ineffective in failing to raise it or adequately brief it. As reflected in the Appendix, in points 14-17, appellate counsel raised claims regarding the denial of the motion to suppress the confession but focused entirely on the affidavit used to secure Hummel's arrest warrant. (App.014-020; ROA.612-618.1880-1886). Appellate

counsel's briefing of six substantive pages covering four points of error other than the critical one argued here (App.014-020) shows that appellate counsel was ineffective.

The arguments raised by Hummel here should have been made on appeal but were not. Appellate counsel did not raise these arguments at all, directly or "obliquely" as the district court concluded. (ROA.1692). Stating merely that Hummel's confession was "the culmination and result of all of the previous unconstitutional state actions" (ROA.613.1881) is not adequate briefing when the facts and law were so clear.

And, had appellate counsel made these arguments could he have also 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," which prohibits the use of direct and indirect evidence obtained following an illegal arrest. *Wong Sun v. United States*, 371 U.S. 471, 487-488 (1963); *Segura v. United States*, 468 U.S. 796, 804 (1984).

Regarding the attenuation-doctrine, evidence "tainted" because of the "fruit-of-the-poisonous-tree doctrine" may be admissible where the relationship between the illegal conduct and the discovery of the challenged evidence is "so attenuated as to dissipate the taint." *Brown v. Illinois*, 422 U.S. 590, 598-599 (1975). There was no "intervening circumstance" between the unconstitutional conduct of CBP and Kennedale PD and the confession. *See Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (The attenuation doctrine evaluates the causal link between the government's unlawful act and the discovery of evidence, which often has nothing to do with a defendant's actions), citing *Hudson v. Michigan*, 547 U. S. 586, 593 (2006)

(The attenuation doctrine provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance.).

Thus, appellate counsel was ineffective for his failure to identify these readily available issues and adequately brief them. *Strickland*, 466 U.S. at 687-691. And because suppression of all statements after the illegal prolong border-search would have prevented the confession from being admitted, Hummel was harmed.

Appellate counsel's failures led to the confession, the most damning type of evidence, so Hummel was harmed

A confession is the most damning type of evidence. Its taint cannot be removed, so appellate counsel's inaction harmed Hummel. *Bruton v. United States*, 391 U.S. 123, 139-140 (1968) (A defendant's confession "…[i]s probably the most probative and damaging evidence that can be admitted against the defendant." *See also Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (plurality op.) (A confession "is like no other evidence"); *Brown v. Illinois*, 422 U.S. 590, 604-605 (1975) (Court excluded a confession "so tainted by a previous coerced confession" so to be coerced itself); *e.g., Loden v. McCarty*, 778 F.3d 484, 495-496 (5th Cir. 2015) (The confession was one of the "most damning" pieces of evidence); *Maxwell v. Roe*, 628 F.3d 486, 507 (9th Cir. 2010) (Defendant's alleged jailhouse confession was the "centerpiece of the prosecution's case."); *La France v. Bohlinger*, 499 F.2d 29, 33 (1st Cir. 1974) (While an impeaching statement is not substantive evidence of guilt, a confession, on the other hand, "is the most damning evidence against a defendant and therefore

deserving, perhaps, of greater care before it is admitted."); *Terrell v. Pfister*, 443 Fed.Appx. 188, 194 (7th Cir. 2011) (unpublished) ("The most damning evidence against (petitioner) was his signed confession to police…");

See also, *e.g.*, *Commonwealth v. Ardestani*, 736 A.2d 552, 557 (Pa. 1997), citing *Commonwealth v. Bullard*, 350 A.2d 797, 801 (Pa. 1976) (Because a confession is the most damning of all evidence, erroneous admission of confession **not** harmless error); *State ex rel. A.S.*, 999 A.2d 1136, 1149 (N.J. 2010) (The defendant's confession "…was by far the most damning piece of evidence against (the defendant)," and the court "could not say that there was no reasonable possibility that its introduction into evidence contributed to the delinquency adjudication), citing *State v. McCloskey*, 446 A.2d 1201, 1208 (N.J. 1982) ("[t]he improper use of incriminating statements made by a criminal defendant has great potential for prejudice."); *see also*, *e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 922 (2004) (Juries will treat confession as most probative type of evidence); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 476 (1988) (Juries find confession evidence as most damning); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 Harv. C.R.-C.L. L. Rev. 105, 138-139 (1997) (Juries do not believe that an innocent person would confess).

CONCLUSION AND PRAYER

Hummel: (1) made a substantial showing of the denial of constitutional rights, (2) showed that reasonable jurists would find the district court's resolution of these issues debatable or wrong, and (3) showed that the issues are "adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 484. A threshold examination of an overview of Hummel's claims and a general assessment of the merits of each claim show that the COA should have be granted. *Miller-El*, 537 U.S. at 338; *Buck*, 137 S.Ct. at 773. The district court's rulings were: (i) contrary to or involved an unreasonable application of clearly established Federal law as determined by this Court; and (ii) based on an unreasonable determination of the facts considering the evidence presented in state court. Thus, the Fifth Circuit decided important federal constitutional questions in ways that conflict with relevant decisions of this Court. Hummel respectfully asks this Court to issue a writ of certiorari to the Fifth Circuit on the issues presented in this petition and grant the application for the COA.

Respectfully submitted,

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