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: June 15, 2020

QUESTION PRESENTED

1. 18 U.S.C. § 3599 was enacted to provide high quality legal representation and reasonably necessary funding for experts to prisoners sentenced to death. It requires appointed counsel to investigate possible issues for clemency and represent the prisoner during clemency proceedings. To obtain funding, a prisoner need not prove that he will obtain relief, but only that the funding is "reasonably necessary." *Ayestas v. Davis*, 138 S.Ct. 1080, 1094 (2018). The "reasonably necessary" test requires only an assessment of the likely utility of the services requested. To obtain more than the statutory limit of $7,500 per 18 U.S.C. § 3599(g)(2), the prisoner must show that the requested services are of an "unusual character or duration." Attorney for Hummel identified two critical issues for clemency: (1) the investigation and preparation of a sociological report by an expert who has studied—and personally experienced—the military training to which Hummel was subjected in the Marines; and (2) a proper risk assessment about his "future dangerousness" by an expert qualified to conduct it and has worked with veterans and the other expert in a death-penalty case where the defendant—a veteran whose history is similar to Hummel's—received life instead of the death penalty. The district court authorized funding of up to the statutory limit $7,500 per 18 U.S.C. § 3599(g)(2), allowing the first expert's work, but far below what is reasonably necessary for the expert who was to perform the risk assessment.

   Question: When the appointed attorney for a death-sentenced inmate shows that expert services have likely utility—and are of unusual character or duration—but cost more than the statutory limit of $7,500 per 18 U.S.C. § 3599(g)(2), does a district court abuse its discretion by denying funding for the services?

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.

RELATED CASES

- *Hummel v. State*, No. AP-76,596, 2013 Tex.Crim.App.Unpub.LEXIS 1239 (Tex.Crim.App. Nov. 20, 2013) (unpublished) (Judgment of conviction and sentence affirmed)

- *Hummel v. Texas*, 135 S.Ct. 52 (2014) (petition for writ of certiorari denied)

- *Ex parte Hummel,* No. WR-81,578-01, 2016 Tex.Crim.App.Unpub.LEXIS 1152 (Tex.Crim.App. Feb. 10, 2016) (per curiam, Alcala, J. dissenting) (state writ of habeas corpus denied)

- *Hummel v. Davis*, No. 4:16-cv-00133-O, 2018 U.S.Dist.LEXIS 735 (N.D.Tex. Jan. 3, 2018) (federal writ of habeas corpus denied)

- *Hummel v. Davis*, 908 F.3d 987 (5th Cir. 2018) (motion for certificate of appealability denied)

- *Hummel v. Davis*, 140 S.Ct. 160 (2019) (petition for writ of certiorari denied)

- *Hummel v. Davis*, No. 4:16-cv-00133-O (N.D.Tex., ECF-51 Feb. 11, 2020; ECF-53, Feb. 20, 2020) (orders on motion for funding)

- *Hummel v. Davis*, No. 20-70002 (5th Cir. 2020) (per curiam) (March 15, 2020) (Opinion denying the appeal of the partial denial of the motion for funding, App.001-008)

- *In re Hummel*, No. WR-81-578-02, 2020 Tex.Crim.App.Unpub.LEXIS 132 (Tex.Crim.App. March 17, 2020) (unpublished) (order denying application for writ of mandamus and order staying Hummel's execution)

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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 at App.001-008. The unpublished citation is *Hummel v. Davis*, No. 20-70002, 2020 U.S.App.LEXIS 8347 (5th Cir. 2020) (per curiam). This opinion was appealed from *Hummel v. Davis*, No. 4:16-cv-00133-O (N.D.Tex., ECF-51 Feb. 11, 2020; ECF-53, Feb. 20, 2020) (orders on motion for funding), also in the Appendix. The *ORDER GRANTING IN PART MOTION FOR CLEMENCY FUNDING* (ROA.2204-2211) ("Order-51") is at App.009-016 and the *ORDER DENYING WITHOUT PREJUDICE MOTION TO RECONSIDER PARTIAL GRANT OF FUNDING FOR CLEMENCY FUNDING* (ROA.2336-2339) ("Order-53") is at App.017-020.

STATEMENT OF JURISDICTION

On March 16, 2020, the Fifth Circuit issued its Opinion, holding that the district court did not abuse its discretion by denying funding for expert services beyond the statutory limit per 18 U.S.C. § 3599(g)(2) (2020). (App.001.007). This Court has jurisdiction under 28 U.S.C. § 1254 (2020).

RELEVANT CONSTITUTIONAL PROVISIONS

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

18 U.S.C. § 3599 (2020) requires a court-appointed attorney to represent a death-sentenced client in clemency proceedings and seek funding for expert-assistance that is "reasonably necessary." Under § 3599(e):

> "…each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including…all available post-conviction process…applications for stays of execution and other appropriate motions and procedures…proceedings for executive or other clemency as may be available to the defendant."

Under 18 U.S.C. § 3599(f):

> "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under (§ 3599)(g)."

Under 18 U.S.C. § 3599(g)(2),

> "Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under [§ 3599)(f)] shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court…if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge."

STATEMENT OF THE CASE

Introduction

18 U.S.C. § 3599 was enacted to provide high quality legal representation and reasonably necessary funding for experts to prisoners sentenced to death. *Martel v. Clair*, 565 U.S. 648, 650-651 (2012). It requires appointed counsel to investigate possible issues for clemency and represent the prisoner during clemency proceedings. To obtain funding, a prisoner need not prove that he will obtain relief, but only that the funding is "reasonably necessary." *Ayestas v. Davis*, 138 S.Ct. 1080, 1094 (2018). The "reasonably necessary" test requires only an assessment of the likely utility of the services requested. To obtain more than the statutory limit of $7,500 per 18 U.S.C. § 3599(g)(2), the prisoner must show that the requested services are of an "unusual character or duration." *Id.*

Attorney for Hummel identified two critical issues for clemency: (1) the preparation of a sociological report by Dr. William Brown, an expert who has studied—and personally experienced—the military training to which Hummel was subjected in the Marines; and (2) a proper risk assessment about his "future dangerousness" by Dr. Robert Stanulis, who is qualified to conduct it and has worked with veterans and Dr. Brown in a death-penalty case where the defendant—a veteran whose history is similar to Hummel's—received life instead of the death penalty.

The district court authorized funding for up to the statutory limit $7,500 per 18 U.S.C. § 3599(g)(2): $4,000 for Dr. Brown's work, and $3,500 for "a qualified mental health professional to obtain the risk assessment described in (Hummel's) Response

to this Court's Show Cause Order." (ROA.2211). However, $3,500 is far below what is "reasonably necessary" for Dr. Stanulis's work—in fact, it is far below what is "reasonably necessary" for **any** qualified expert to perform the risk assessment.

Hummel did **not** seek funding to "turn over every stone" but merely to investigate and present findings of the two critical issues that after a thorough investigation he determined are relevant and critical to Hummel's clemency petition. Hummel showed that the requested funding over the $7,500 statutory limit is reasonably necessary, has "likely utility," and is of unusual character. Thus, the district court abused its discretion by denying reasonable funds for expert assistance from Dr. Stanulis. His work is critical because of Hummel's lack of criminal history before the crime and excellent behavior while incarcerated since his arrest in 2009.

Procedural History

1. Hummel is convicted of Capital Murder

On June 22, 2011, a jury convicted Hummel of Capital Murder—multiple victims per Tex. Penal Code § 19.03(a)(7) (2009), finding that on or about December 17, 2009, during the same criminal transaction, Hummel killed his wife Joy Hummel and her father, Clyde Bedford. (ROA.155-159, 1757-1758).[1] On June 28, 2011, the same jury answered "Yes" to Special Issue 1, finding that the evidence shows beyond a reasonable doubt that there is a probability that Hummel would commit criminal acts of violence that is a continuing threat to society, and "No" to Special Issue 2, that

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

considering all the evidence—including circumstances of the offense, Hummel's character and background, and Hummel's moral culpability—the jury found that there was **not** sufficient mitigating circumstances or circumstances to warrant that Hummel be sentenced to life in prison rather than death. (ROA.1757-1758). On June 29, 2011, Hummel was sentenced to death per the Judgment. (ROA.1757-1759).

2. The Judgment and sentence of death are affirmed

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). On October 6, 2014, Hummel's petition for writ of certiorari was denied. *Hummel v. Texas*, 135 S.Ct. 52 (2014).

3. The state-habeas application is denied

On June 5, 2013, Hummel filed an application for writ of habeas corpus under Tex. Code Crim. Proc. Art. 11.071 (2013). (ROA.161-346). On January 21, 2015, the convicting court signed findings of fact and conclusions of law, recommending that relief be denied. (ROA.620-757). 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 curiam, 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. The federal habeas petition is denied

On February 4, 2017, Hummel filed a petition for writ of habeas corpus under

28 U.S.C. § 2254 (2017) (ROA.33-151) with an Appendix (ROA.152-1486). On January 3, 2018, the district court denied the petition. (ROA.1629-1707). *Hummel v. Davis*, No. 4:16-cv-00133-O, 2018 U.S.Dist.LEXIS 735 (N.D.Tex. Jan. 3, 2018). Hummel filed a motion for a certificate of appealability ("COA") in the Fifth Circuit, which was denied on November 19, 2018. (ROA.1711-1720). *Hummel v. Davis*, 908 F.3d 987 (5th Cir. 2018). On October 17, 2019, this Court denied Hummel's petition for writ of certiorari. *Hummel v. Davis*, 140 S.Ct. 160 (2019).

5. Hummel's execution was set for March 18, 2020. Hummel obtains approval for the statutory limit for expert-assistance. Hummel's execution is stayed by the TCCA

On November 19, 2019, the state-habeas court signed the *Order Setting Execution Date* and set the execution for March 18, 2020. (ROA.1768-1774). After a thorough investigation, on February 4, 2020, Hummel filed the Amended Motion for Funding (ROA.2156-2185). On February 11, 2020, the district court allowed funding of up to $7,500, split $4,000 for Dr. Brown and $3,500 for "a qualified mental health professional to obtain the risk assessment described in (Hummel's) Response to this Court's Show Cause Order." (ROA.2204-2211) (Order-51). On February 19, 2020, Hummel filed a Motion for Rehearing of Order-51 (ROA.2212-2221), which was denied on February 20, 2020. (ROA.2336-2339) (Order-53). On March 16, 2020, the Fifth Circuit affirmed Order-51 and Order-53, holding that the district court did not abuse its discretion by denying funding beyond $7,500 per 18 U.S.C. § 3599(g)(2). (App.001.007).

On March 10, 2020, Hummel filed a petition for writ of mandamus in the

TCCA, arguing that the trial court committed a clear abuse of discretion and left Hummel with **no** clear and adequate remedy at law: (1) by refusing to disqualify the Tarrant County District Attorney's Office since Larry Moore represented Hummel during trial, and Moore's job now as head of the Office's Criminal Division—one step below the elected DA—while the DA's Office seeks Hummel's execution creates a serious conflict of interest and appearance of impropriety; and (2) because it refused to withdraw the Order Setting Execution Date and Death Warrant that are facially void. Hummel also filed a motion to stay the execution. On March 16, 2020, the TCCA denied Hummel's requested relief, but stayed the execution. *In re Hummel*, No. WR-81-578-02, 2020 Tex.Crim.App.Unpub.LEXIS 132 (Tex.Crim.App. March 17, 2020) (unpublished).

Facts

1. Attorney for Hummel began researching issues for clemency and identified two issues that had not been presented before

After the State filed a motion for an order to set the execution on October 21, 2019, Attorney for Hummel began to search for probative evidence to present to the Clemency Section of the Texas Board of Pardons and Parole ("TBPP"). (ROA.2219). After a thorough investigation, Attorney for Hummel determined that the best issues were the Military Total Institution ("MTI") to be presented by Dr. Brown and the risk assessment to be performed and presented by Dr. Stanulis.

During the trial, the State focused on Hummel's "propensity for violence" based on the crime, arguing he is without a "single solitary internal restraint" (to refrain from committing future acts of violence) (ROA.6513): "…under Special Issue 1, it's

about (his) character for violence…no matter who the victim is, it's all relevant when you're deciding whether… he's going to be a continuing threat to society. And you know that he is. It's not about what type of restraints that can be put on him (by TDCJ)…It's about who is he is…his character for violence…"

Dr. Brown has a B.A. in Social Work, and an M.A. and PhD in Sociology with an emphasis in Criminology. (ROA.1775). His expertise is academic **and** practical through extensive personal and professional experience: he is a Vietnam combat veteran who served as an infantryman in the 173rd Airborne Brigade, a Drill Sergeant at Ft. Lewis, and a Leadership Honor Graduate from Officer Candidate School at Ft. Benning, where he received a commission in Infantry and later as Platoon Leader in B-Company, 75th Rangers. (ROA.1775).

Dr. Brown argued that the issue is far more complex than merely that Hummel is a future-danger without a "single solitary internal restraint" because of the crime. Dr. Brown highlights the significance of Hummel's military service and problems Hummel experienced as he attempted to reintegrate into civilian culture. (ROA.1775-1776). Hummel's inability to cope was not explained at trial or the state-habeas proceeding. Dr. Brown provided a sociological report discussing Hummel's problems after his honorable discharge from the Marines. (ROA.1776-1782). Dr. Brown's report discusses Hummel's premilitary, military, and postmilitary history and a comprehensive explanation of the influence of the MTI on Hummel's postmilitary behavior and experiences after he became entangled in the criminal justice system. (ROA.1780-1785). This report explains the effects that military sociocultural

influences and experiences had on Hummel at the time of the crime and the potential impact of these influences on his behavior and state of mind. (ROA.1785-1793). Dr. Brown explains the influence of the MTI when Hummel killed his family and provides context for considering the relationship of the posttraumatic stress-disorder Hummel suffered to his crime in the content and dynamics of his military training and experiences. (ROA.1793-1794).

It is irrelevant that Hummel did **not** serve in combat. (ROA.1776-1777). For over three years, Hummel worked as intelligence specialist. (ROA.1776). Hummel's service could have involved significant stress. (ROA.1776-1777). Intelligent specialists are involved in classified operations, so Hummel may be downplaying or concealing his involvement in special operations. (ROA.1777). That Hummel went to strip-clubs or briefly left base for about 20 hours is **not** relevant to issues that Dr. Brown believes should have been raised. (ROA.1777). The evidence shows that Hummel's actions on December 17, 2009 was likely a "one-off incident of extreme violence." (ROA.1777).

Dr. Brown testified in the death penalty case of *State v. Erbie Lee Bowser*, No. F16-00688 (363rd Dist. Ct. Dallas Co.). Like Hummel, Bowser was in the military (Army) and experienced issues with the MTI. (ROA.1830-1845). As Dr. Brown testified in Bowser, it is irrelevant whether a veteran was engaged in direct combat. (ROA.1920-1921). Like Hummel, Bowser was charged with the capital murder of multiple persons. Hummel killed his wife, their daughter, and his father-in-law. Bowser killed his wife, her daughter, his girlfriend, and her daughter. (ROA.2194).

Both committed terrible crimes against persons with whom they had close intimate relationships or persons who were close to those with whom they had close intimate relationships. (ROA.2194). Both served in the military in noncombat roles. (ROA.2194). Bowser was a staff sergeant in the Army from 1991 to 2000. (ROA.1907, 2194). Both went through the MTI—and upon discharge—were expected to assimilate into civilian life without support. (ROA.2194).

Dr. Stanulis also testified in *Bowser*. Dr. Stanulis has been qualified as an expert on future dangerousness in Oregon since 1995. (ROA.2023). Oregon's death-penalty statute was modeled after Texas. (ROA.2023). Oregon recently modified its statute and eliminated future dangerousness. (ROA.2023). Forensic psychologists like Dr. Stanulis who specialize in risk assessments in death-penalty cases provide valuable information based on empirical research. (ROA.2225). Issues regarding military veterans in death-penalty cases is a sub-specialty of neuropsychology. (ROA.2225).

Dr. Stanulis disagrees with the State's argument that Hummel did **not** have a "single solitary internal constraint" because of the crime, and could testify that Hummel's history, military service, and prison record contradicts this argument. (ROA.2023). Most importantly, the difficulties in predicting future dangerousness through a risk assessment were **not** presented because there was **no** risk assessment done. (ROA.2023). The jury was misled to believe that the determination of future dangerousness can easily be made. (ROA.2023).

Dr. McGarrahan was the court-appointed expert for the defense during trial, and Dr. Price was the state's expert during the state-habeas proceeding. The record, McGarrahan's casefile, and Price's affidavit showed that **no** risk assessment was performed. (ROA.2223). McGarrahan did **not** address the methodology of risk assessment. (ROA.2223). Rather, her testimony was based on a clinical assessment and did **not** utilize risk assessment tools. (ROA.2223).

The risk assessment that Dr. Stanulis would perform requires knowing the base-rate of the risk being assessed. (ROA.2224). Risk varies by where the individual lives. Further, (1) personal and situational variables must be addressed, (2) risk and protective factors must be assessed, (3) Static and Dynamic factors must be assessed, (4) the strengths and limitations of the tools used must be communicated, (5) the validity and accuracy of various tools in the target population and environment must be addressed, and (6) the strengths and limitations of the assessment must be communicated. (ROA.2223). Risk assessment in death-penalty cases has a large research base that is utilized and communicated to the finder of fact. (ROA.2223).

Many methods used for risk assessment to determine future dangerousness are invalid. (ROA.2224). One invalid method is basing a violence-risk prediction by the method of intuition as a valid measure of assessment. (ROA.2224). Another problem with predicting future dangerousness is using the anamnestic method of "the best predictor of violence is looking at the past behavior of the person," a method useful only if there is sufficient data to analyze and the context does not change (i.e., the method relies on the person remaining in the environment in which they

committed the crime). (ROA.2224). If the death-sentenced inmate were not going to prison, the method would be valid, but it is **not** since he will spend the rest of his life in prison. (ROA.2224).

An appropriate risk assessment that Dr. Stanulis would conduct considers the base-rate—how often future violence occurs—in estimating risk. The base-rate of violence is low in prison, as one study shows that only 5% of inmates engaged in seriously assaultive behavior, while 20% had **no** record of disciplinary infractions at all. (ROA.2224). This information would have been critical for the Board to consider when deciding whether to recommend to the governor to grant Hummel a commutation to a lesser penalty, i.e., to life in prison.

A risk assessment by Dr. Stanulis would perform is also critical because Hummel's behavior has been exemplary since his arrest in December 2009, and he had **no** violent history before the crime. During the punishment-phase, two Marine officers testified that Hummel was "an average Marine" who was counseled about going to strip-clubs, was reprimanded for smoking once, failed to maintain proper weight or pass a fitness test, and because he was "absent" for less than 20 hours, he lost his security clearance. (ROA.6494-6497, 6500).

During the state-habeas proceeding, three Marines who knew Hummel well because they served with him at Camp Pendleton—Chaidez, Emmer, and Matthias—testified that Hummel was a good guy, stayed out of trouble, was a good Marine, dependable, was distraught became when he lost his security clearance, that they all

went to strip-clubs, and were shocked that Hummel could have committed the crime. (ROA.419-421, 424-426, 438-440).

Former Texas Department of Criminal Justice ("TDCJ") classifications officer Frank AuBuchon discussed the security features of Texas prisons and evaluated Hummel's classification if sentenced to life. (ROA.6429-6450). TDCJ-units have up to Level 5 (maximum security) prisons. (ROA.6430-6431). The minimum-security level for an inmate serving life-without-parole is "G3," which is permanent, and the inmate cannot attain a lower classification. (ROA.6436-6437). G3-inmates must remain in Level 5 prisons. (ROA.6436). They are **not** assigned jobs that allow them in loading docks or outside prison walls without armed guard. (ROA.6437, 6448). They may be reclassified to G4 if they become noncompliant with any issue. (ROA.6437).

AuBuchon reviewed police, military, medical, jail, and criminal-background records and concluded that Hummel would be classified G3. (ROA.6438). He placed in a Level 5 prison and would function well based on his good behavior and military history. (ROA.6438-6439).

In the Tarrant County Jail—where Hummel was incarcerated after his arrest for 19 months—inmates are divided based on high-risk—who wear red uniforms—and low-risk—who wear green uniforms. (ROA.455, 566). High-risk inmates are those who commit assault, are an escape-risk, or high-profile. (ROA.573-574). A high-risk inmate **cannot** leave his cell without handcuffs, leg irons, and escort by two officers. (ROA.455, 574). Low-risk inmates are **not** restrained and are escorted by one officer. (ROA.408, 455). Although most inmates charged with capital offenses wear red

uniforms—and after receiving a sentence of death are classified "high-risk" regardless of their prior classification—during his incarceration in Tarrant County, Hummel always wore a green uniform and was always "low-risk." (ROA.408, 455, 574, 820). The Tarrant County Sheriff deputies who dealt with Hummel daily stated that he was quiet, respectful, pleasant, never caused trouble, complied with rules, and had **no** disciplinary infractions. (ROA.408, 455-456, 458, 578). The deputies believed that Hummel would **not** be a future danger in prison and would adjust well to a general population setting. (ROA.409, 456).

After his transfer to death row, Hummel has had **no** relevant issues. Records from TDCJ's Use of Force department (ROA.2068) show that at least since November 2012—as far back as the records are available—Hummel has **never** been involved in a use of force. Records from TDCJ's Central Grievance Office (ROA.2069-2072) reflect that in late 2012, Hummel filed one grievance because he was freezing and asked for heat and a blanket. Records from TDCJ's Records and Classifications (ROA.2073-2100) show **no** disciplinary issues. And, records from TDCJ's Property department (ROA.2101-2155) show restrictions about **not** possessing nail-clippers or tweezers—which are standard—and confiscation of minor items like a malfunctioning hot-pot, envelopes, or books.

Other evidence reflects that although Hummel committed the single violent crime, his history and level of adaptation to prison shows that risk of further violence is low-to-moderate because Hummel: (1) before the crime did **not** have a significant history of violence and coped through passive acceptance, denial of circumstances, or

escape into games, movies, and books; (2) is unlikely to experience extreme financial and familial stressors in prison; (3) will have his needs met; (4) established an informed religious attachment, providing greater personal stability; and (5) discussed coping with prison in general population and has perspective of acceptance of responsibility while making the best use of the rest of his life. (ROA.2364-2365).

2. Why the combination of Drs. Brown and Stanulis is critical to Hummel's representation under § 3599

Drs. Brown and Stanulis are a unique team since they are familiar with issues regarding veterans in death-penalty cases. They both testified in *Bowser*, who received life in prison instead of death. (ROA.2225). Dr. Brown is the only known MTI-expert in death-penalty cases. (ROA.2225). Dr. Brown—a sociologist—**cannot** make a DSM-V diagnosis. **Nor** can he diagnose Hummel with an injury or affliction with his frontal lobe. But Dr. Stanulis—a neuropsychologist who has worked with death-sentenced veterans—can make a DSM-V diagnosis. Each may testify to things the other **cannot**.

Like any expert, Dr. Stanulis can diagnose only those he has met and evaluated. He must review the necessary documents and evaluate Hummel. Only then can he conduct an appropriate risk assessment that addresses future dangerousness. Evaluations for future dangerousness through a risk assessment are a distinct sub-specialty that few neuropsychologists or psychologists have the skills for. (ROA.2223). An extensive search for a "local" neuropsychologist showed that the

only neuropsychologists who have worked this sub-specialty and are competent to perform the risk assessment are **no** longer in Texas. (ROA.2217).

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. When the appointed attorney for a death-sentenced inmate shows that expert services have likely utility—and are of unusual character or duration—but cost more than the statutory limit of $7,500 per 18 U.S.C. § 3599(g)(2), a district court abuses its discretion by denying funding for the services.

18 U.S.C. § 3599 requires a court-appointed attorney to represent a death-sentenced inmate in clemency proceedings and seek funding for expert-assistance that is reasonably necessary

18 U.S.C. § 3599(e) requires a court-appointed attorney to represent a death-sentenced inmate in clemency proceedings and seek funding for expert-assistance that is "reasonably necessary." Under § 3599(f), upon a finding that expert services are reasonably necessary, a district court may authorize the attorney to obtain such services and "shall" order the payment of fees and expenses under § 3599(g). And under § 3599(g)(2), "Fees and expenses paid for...expert...services authorized under [§ 3599)(f)] shall not exceed $7,500...unless payment in excess of that limit is certified by the court…as necessary to provide fair compensation for services of an unusual character or duration..." *See Harbison v. Bell*, 556 U.S. 180, 184-194 (2009) (explaining the requirements under 18 U.S.C. § 3599(e)); *see also Rosales v. Quarterman*, 565 F.3d 308, 311 (5th Cir. 2009) ("once federally funded counsel is

appointed to represent a state prisoner in § 2254 proceedings, she 'shall also represent the defendant in such…proceedings for executive or other clemency **as may be available** to the defendant.' (emphasis added by district court)"). The 5th Circuit concluded that the emphasis on "as may be available" indicates that the motions were denied because state clemency relief was no longer available because the deadline to file an application with the TBPP had passed. *Id.*

A court-appointed attorney for a death-sentenced inmate has an "unquestioned…obligation to conduct a thorough investigation of the defendant's background." *Porter v. McCollum*, 558 U.S. 30, 39 (2009). Like the inmate in *Porter*, Hummel is a military veteran who was sentenced to death. As part of the investigation into Hummel's background, Attorney for Hummel determined the issues that should be presented to the TBPP and filed the motion for funding.

"Reasonably necessary" means "convenient, useful, appropriate, suitable, proper, or conducive to the end sought"

To effectively represent Hummel, his attorney requires funding for expert-assistance beyond $7,500 for a clemency proceeding, which under § 3599 is not assigned less importance than other proceedings. *McFarland v. Scott*, 512 U.S. 849, 858 (1994) ("…the right to counsel...includes a right (of)...counsel meaningfully to research and present a defendant's habeas claims. Where this opportunity is **not** afforded, 'approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper."). An attorney representing a death-sentenced inmate has a duty to "conduct a reasonable and diligent investigation aimed at

including all relevant claims and grounds for relief…" for a habeas-petition. *McCleskey v. Zant*, 499 U.S. 467, 498 (1991).

Clemency is an important stage of the proceedings and considers issues of mercy and questions about the failings of the judicial system. "[C]lemency is deeply rooted in our Anglo-American tradition of law and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. Far from regarding clemency as a matter of mercy alone, we have called it "the 'fail safe' in our criminal justice system." *Harbison*, 556 U.S. at 192 (citations omitted); *see also Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting) ("Among its benign if too-often ignored objects, the clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider.").

A death-sentenced inmate need **not** state a viable "claim"—or even show that there are **no** procedural defenses that preclude consideration of the claim—to prove that funding for expert-assistance is "reasonably necessary" under § 3599(f) in a clemency proceeding. *See, e.g., Wood v. Thaler*, A-09-CA-789-SS, 2009 U.S.Dist.LEXIS 103787, at *13-14 (W.D. Tex., Nov. 6, 2009), *citing Fuller v. Johnson*, 114 F.3d 491 (5th Cir. 1997) and *Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000) for cases limiting the "reasonable necessity" requirement and noting that "in the context of clemency proceedings, their holdings are not squarely on point"). The expert-assistance that Hummel seeks is important in the clemency proceeding on the issue of whether his life should be spared. *Harbison*, 556 U.S. at 193-194 (discussing virtue of continued representation given the mitigation development in federal habeas and

its ostensible value to clemency). Thus, Hummel must show that the requested expert-assistance is "reasonably necessary."

In the Opinion, the district court summarily dismissed Hummel's need for funding for Dr. Stanulis by finding that "...a showing that two experts complement one another is not a showing that their services are reasonably necessary. Given the broad deference afforded the district court, especially given the effect of the statutory cap and the additional steps required of a district judge who wishes to exceed it, we find no abuse of discretion." (App.006). The Fifth Circuit ignored *Ayestas* and effectively applied the outdated "substantial-need" test. *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004) ("Reasonably necessary" means that the inmate must demonstrate "substantial need" for the requested assistance).

In *Ayestas*, this Court defines "reasonably necessary" as "convenient, useful, appropriate, suitable, proper, or conducive to the end sought." *Ayestas*, *id*. at 1093. To help with his claims, Ayestas filed a motion under § 3599(f) asking for $20,016 in funding to conduct a search for evidence supporting the petition. The district court denied the motion, and the Fifth Circuit affirmed. This Court reversed, finding that to satisfy § 3599(f), a petitioner need only show that "a reasonable attorney would regard the services as sufficiently important." *Id*. at 1093. Under § 3599(f), "Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such

services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor." *Ayestas*, *id*. at 1087.

Ayestas also held that a death-sentenced inmate need **not** to prove that he will win relief if given the funding sought: "To be clear, a funding applicant must not be expected to prove that he will be able to win relief if given the services he seeks. But the 'reasonably necessary' test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone." *Id*. at 1094. And, "reasonably necessary" means "convenient, useful, appropriate, suitable, proper, or conducive to the end sought." *Id*. at 1093.

Unless he is allowed funding beyond the $7,500 statutory limit, Hummel will be left without reasonably necessary expert-assistance to present a critical claim to the TBPP

Without the requested funding beyond the $7,500 statutory limit, Hummel cannot investigate and present a proper risk assessment to explain why he is **not** a "future danger." Denial of the requested funding is a circular trap because Order-51 (App.009-016) and Order-53 (App.017-020) require Hummel to prove that Dr. Stanulis's expert-assistance is "reasonably necessary" before funding is allowed. This is impossible. To prove that the assistance of an expert like Dr. Stanulis is "reasonably necessary," Hummel must prefund the assistance. If Hummel could do this, he would **not** be indigent. Prefunding expert-assistance is **not** contemplated by § 3599, which was enacted to ensure that potentially meritorious claims are investigated and litigated. Otherwise, such claims will "never be heard," and

Congress "did not intend for the express requirement" of investigative services "to be defeated in this manner." *McFarland*, 512 U.S. at 856. This creates a substantial risk that the issues will never be presented, and violates Hummel's right to quality legal representation under 18 U.S.C. § 3599. *McFarland*, 512 U.S. at 856; *see also Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) ("The right of access to the courts…is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.").

A district court should grant some deference to competent attorneys it appoints

A district court should also grant **some** deference to competent attorneys it appoints. In *Christeson v. Roper*, 135 S.Ct. 891, 894 (2015), this Court observed that § 3599 "…leaves it to the court to select a properly qualified attorney." An attorney appointed under § 3599 in should be trusted to act reasonably. This Court further discusses this in *Ayestas* under the reasonable-attorney standard:

> "§ 3599 appears to use…"necessary" to mean something less than essential. (It) applies to services that are "reasonably necessary" but…makes little sense to refer to something as being "reasonably essential." What the statutory phrase calls for, we conclude, is a determination by the district court, in the exercise of its discretion, as to whether a **reasonable attorney would regard the services as sufficiently important...**"

Ayestas, 138 S.Ct. at 1093 (emphasis supplied). The district court appointed the attorney as the advocate for the inmate, so the attorney should be given some deference. *Ayestas* accommodates uncertainty inherent to the investigation-phase of

a proceeding in which services under § 3599 are often sought by disclaiming the existence of any duty by the party to demonstrate they will be entitled to relief. *See Ayestas*, 138 S.Ct. at 1094: "(a petitioner) must not be expected to prove that he will be able to win relief if given the services he seeks." Instead, the petitioner should show only that he has identified a "plausible" issue and there exists a "credible chance"—not a guarantee—that procedural obstacles may be overcome. When this burden is met, the district court should provide the funding under § 3599.

It is also important to consider that Hummel seeks to present issues that were **not** previously presented to a trier of fact. **No** presentation about the MTI was previously presented to any court or other trier of fact. **No** risk assessment was previously done and presented to any court or other trier of fact. The 5th Circuit does **not** claim that either issue was previously presented. Compare with *Fautenberry v. Mitchell*, 572 F.3d 267, 269-271 (6th Cir. 2009), where the Sixth Circuit held that a new neuropsychological assessment was **not** "reasonably necessary" to assist the inmate's clemency petition because he did **not** argue that the results of the prior evaluation were outdated due to advancements in the science or changes in his condition. And, the inmate did **not** attempt to show that the new neuropsychologist's expertise or methods would lead to a different diagnosis. *Id*. at 270.

The requested funding over the $7,500 statutory limit is reasonably necessary, has "likely utility," and is of unusual character

The district court allowed $4,000 for Dr. Brown and $3,500 for "a qualified mental health professional to obtain the risk assessment described in Petitioner's

Response to this Court's Show Cause Order." (ROA.2211). Attorney for Hummel originally asked for $20,000 for Drs. Brown and Stanulis combined. Dr. Brown discounted his fee to a maximum of $4,000—16 hours billed—even though he normally spends 30-40 hours on cases like this. (ROA.2197). Dr. Stanulis agreed to provide his services capped of $16,000, billed at $250/hour, inclusive of travel. (ROA.2183, 2198). This is a significant discount from his usual fee of $20,000-25,000 plus expenses—60-80 hours at $250/hour meeting with Hummel, analyzing documents, and working on his evaluation, plus 20 hours total travel portal-to-portal. (ROA.2198). Attorney for Hummel could **not** find a qualified expert near the Polunksy Unit to perform this work. If he had, he would have asked the district court to appoint that expert.

Further, the $16,000 requested for Dr. Stanulis included work on behalf of Dr. Brown in conducting Dr. Brown's interview schedule with Hummel, since Brown could **not** travel due to a medical conduction. (ROA.2225). This would have saved the district court money while Hummel received services under § 3599. Ultimately, Texas-based mitigation investigator Toni Knox traveled to death row to handle Dr. Brown's interview schedule. (ROA.2215).

Neither Hummel **nor** Dr. Stanulis asserted that Dr. Stanulis "can now complete a streamlined version of the services (Hummel) originally proposed within 4 to 8 hours" as the district court erroneously concluded. (ROA.2336). A proper risk-assessment on future dangerousness **cannot** be completed in 4-8 hours. **Nor** could Hummel do as the district court suggested by using Dr. Stanulis's work in *Bowser*

instead of performing an independent evaluation of Hummel: "Nor has Petitioner explained why a new independent neuropsychological assessment of (Hummel) is necessary when the records from (Hummel's) trial and state habeas corpus proceeding reveal that (Hummel) was evaluated by a defense expert (Dr. McGarrahan) prior to trial **and the information Dr. Stanulis proposes to offer in Petitioner's clemency proceeding appears to be almost identical to the information he previously furnished in sworn testimony in another capital murder case.**" (emphasis supplied).

Dr. Stanulis **cannot** conclude that all the issues he identified and discussed in Bowser also apply to Hummel. (ROA.2225). Some aspects of their histories are similar, but they are different persons. The evaluation that Dr. Stanulis must perform risk requires the specialized risk-assessment and knowledge of future dangerousness literature that Dr. Stanulis possesses, and he cannot "train" a local psychologist to perform the evaluation in a reasonable amount of time. (ROA.2225).

Thus, Hummel showed not only that the requested funding was "reasonably necessary" and has "likely utility," but also that it was of unusual character. Denying the requested funding was an abuse of discretion.

CONCLUSION

When the appointed attorney for a death-sentenced inmate shows that expert services have likely utility—and are of unusual character or duration—but cost more than the statutory limit of $7,500 per 18 U.S.C. § 3599(g)(2), a district court abuses its discretion by denying funding for the services. 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, summarily reverse the Opinion, and order the district court to provide the requested funding beyond the statutory limit under per 18 U.S.C. § 3599(g)(2) so that Dr. Stanulis can perform a proper risk assessment on Hummel's "future dangerousness." In the alternative, Hummel asks this Court to set the case for briefing and oral argument.

Respectfully submitted,

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