No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Joseph C. Garcia,
Petitioner,

vs.

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

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

PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****
****NO EXECUTION DATE SCHEDULED****

QUESTION PRESENTED

Petitioner Joseph C. Garcia was convicted of capital murder under Texas's controversial law of parties. To guard against the imposition of an unconstitutional death sentence—a sentence not based on an individualized determination of culpability—jurors are not permitted to consider the law of parties during sentencing proceedings. Although the State emphasized the law of parties to the jury throughout Garcia's guilt/innocence and sentencing proceedings, Garcia's trial counsel inexplicably failed to request an instruction informing the jury that it was to make a sentencing decision based solely on Garcia's own actions and intents. Unaware of their duty to make an individualized sentencing determination, Garcia's jurors sentenced Garcia to death.

Garcia's death sentence thus raises a question of national significance: Could a jurist of reason conclude that a capital defendant's counsel provides ineffective assistance when counsel fails to request a jury instruction necessary to safeguard the defendant's Eighth and Fourteenth Amendment right to a sentencing decision based on the defendant's individual culpability?

LIST OF PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph C. Garcia, a Texas prisoner under a sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit denying a certificate of appealability (COA) on his petition for a writ of habeas corpus.

OPINIONS BELOW

The order, dated September 22, 2017, of the Court of Appeals for the Fifth Circuit denying panel rehearing is unreported and is attached in the appendix at A. 196. The opinion, dated July 21, 2017, of the panel of the Court of Appeals denying Garcia a COA and affirming the denial of an evidentiary hearing is reported at 704 F. App'x 316 and is attached at A. 1. The Memorandum Opinion and Order on Post-Judgment Motions, dated October 29, 2015, of the United States District Court for the Northern District of Texas granting in part and denying in part Garcia's motion to amend findings is available at 2015 WL 6561274 and is attached at A. 17. The Memorandum Opinion and Order, dated May 28, 2015, of the United States District Court for the Northern District of Texas denying Garcia's application for a writ of habeas corpus and denying a COA is unreported and is attached at A. 33.

The order, dated March 5, 2008, of the Texas Court of Criminal Appeals dismissing the subsequent application for writ of habeas corpus is available at 2008 WL 650302 and is attached at A. 57. The order, dated November 15, 2006, of the

Court of Criminal Appeals adopting the lower court's findings and conclusions and denying state habeas relief is available at 2006 WL 3308744 and is attached at A. 59. The trial court's Findings of Facts and Conclusions of Law, dated February 15, 2006, addressing Garcia's state habeas application is unreported and is attached at A. 61. Lastly, the opinion, dated February 16, 2005, of the Court of Criminal Appeals denying relief on direct appeal is available at 2005 WL 395433 and is attached at A. 186.

STATEMENT OF JURISDICTION

The Court of Appeals issued its judgment on July 21, 2017. On July 26, 2017, Garcia moved for an extension of 28 days, to September 1, 2017, to seek rehearing. The Court of Appeals granted Garcia's motion, and he timely filed a petition for panel rehearing on September 1, 2017. The Court of Appeals denied that petition on September 22, 2017.

On November 15, 2017, Garcia sought an extension of 60 days, to February 19, 2018, to file his petition for writ of certiorari before this Court. Justice Alito granted Garcia's application. As February 19, 2018, is a legal public holiday, *see* 5 U.S.C. § 6103(a), this petition is filed on February 20, 2018, in accordance with Supreme Court Rule 30.1.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional amendments.

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. VIII.

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

This case also involves Texas's "law of parties," which provides, in relevant part:

> (a) A person is criminally responsible for an offense committed by the conduct of another if: . . .
>
> > (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; or . . .
>
> (b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Tex. Penal Code. Ann. § 7.02 (West 1993). Finally, Texas's second special issue,

provided to jurors at the penalty phase of certain capital trials, asks

> whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(2) (West 1999).

STATEMENT OF THE CASE

I. Introduction

Personal culpability is the touchstone of capital sentencing. A defendant may be convicted of, for example, a murder committed by a party to the same crime, even if the defendant did not want or intend for that murder to occur. However, he cannot be sentenced to death unless his own actions and mens rea warrant such a sentence. This foundational principle of individualized sentencing has animated several of this Court's Eighth Amendment and due process cases limiting the application of the death penalty, notably *Enmund v. Florida*, 458 U.S. 782 (1982), and guarantees that only those who are sufficiently personally culpable to warrant the death penalty—"the worst of the worst"—are so sentenced. *See also Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (deeming North Carolina's death-penalty statute inconsistent with the Eighth and Fourteenth Amendments).

Because of his trial counsel's ineffective assistance, Joseph C. Garcia was denied this right. He participated with six other individuals, collectively dubbed the

"Texas Seven," in an armed robbery that ended in the death of a police officer. The State charged Garcia with capital murder. During the guilt/innocence phase of trial, the State repeatedly underscored Texas's law of parties—the law allowing conviction based on the acts and intents of others—and treated the Texas Seven as a single unit. Then, during Garcia's sentencing proceeding, the State again discussed the law of parties and hammered home the collective culpability of the Texas Seven.

Despite the State's efforts to direct the jury to focus on collective, rather than individual, culpability and on the law of parties, Garcia's counsel failed to request a simple jury instruction designed to ensure that the jury would determine Garcia's sentence based on his personal culpability, instead of on the culpability of the Texas Seven as one entity. The text of the sentencing issue submitted to the jury, which asked whether Garcia actually killed, intended to kill, or anticipated that a death would occur, did not make clear that the jury was to answer the question based on Garcia's own culpability, and counsel failed to clarify the jury's charge. Counsel thus failed to protect Garcia's right to an individualized sentencing. In order that Garcia may be sentenced based on his culpability alone, he respectfully petitions this Court for a writ of certiorari.

II. Capital Trial Proceedings

In 2001, Joseph C. Garcia and five other individuals were each charged with capital murder in connection with the shooting death of police officer Aubrey

Hawkins in Irving, Texas.[1] The indictment listed two forms of capital murder under Texas law: murder of a peace officer and murder in the course of a robbery. The State did not charge Garcia with any other crimes.

A. Voir Dire and Guilt/Innocence Phase Proceedings

At Garcia's trial, the State wasted little time before drilling into jurors the import of Texas's law of parties to the case. As the jury was later instructed, the law of parties provides, in part, as follows:

> If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, then all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

(A. 202); *see also* Tex. Penal Code. Ann. § 7.02(b) (West 1993).[2] During voir dire, the State guided venireperson after venireperson through the law of parties and examples of that law in action, making clear its expansive reach. (*See, e.g.*, RR 24 at 35–37; RR 25 at 32–35, 100–03, 110–12.)[3] Later, during the opening statement, the

[1] A seventh individual committed suicide before he could be arrested.

[2] Momentum has recently been building, in both the public and in the Texas legislature, to re-examine and limit the application of the law of parties in the capital context. *See, e.g.*, Editorial, *Texas Needs to Reform Its 'Law of Parties,' Which Allows Death Penalty for People Who Haven't Killed Anyone*, Dallas Morning News (Feb. 9, 2017), https://www.dallasnews.com/opinion/editorials/2017/02/09/texas-needs-reform-law-parties-allows-death-penalty-people-killed-anyone.

[3] Transcripts from Garcia's 2003 capital trial before the 283rd Judicial District Court in Dallas County are cited as "Reporter's Record" ("RR"), followed by the relevant volume and page number(s), using the transcript's original pagination. The full Reporter's Record is available on the docket of the United States District Court for the Northern District of Texas in this case, *Garcia v.*

State reminded the jurors, "You will come to understand why we spent so much time during voir dire on the law of parties." (RR 45 at 13.)

Numerous witnesses for the State detailed for the jury what occurred on the December 2000 evening when the Texas Seven robbed an Oshman's Sporting Goods store in Irving. The State's chief witness, Wesley Ferris, was a department manager at Oshman's on the night of the robbery. (RR 45 at 41–42.) As the business was closing, six individuals inside the store coordinated an armed robbery. Ferris later identified the individuals inside, using a photo line-up, as George Rivas, Michael Rodriguez, Larry Harper, Donald Newbury, Randy Halprin, and Joseph Garcia. (RR 45 at 95–96.) Rivas, whom Ferris identified as "the commanding officer" of the group, was "doing all the ordering, all the talking, and telling [Ferris] what to do and when to do it and how to do it." (RR 45 at 103.) Rivas was also in radio communication with a seventh individual, who was outside the store. (RR 45 at 69.)

Rivas announced that the robbery was occurring and directed the seventeen people in the store, all employees, to place their hands on the customer-service desk. (RR 45 at 62–65.) Rivas and his associates, each of whom was armed with a revolver and several of whom made threats, searched the employees and then steered them to the employee breakroom at the back of the store; they stopped en route to remove the zip ties that were hurting one employee. (RR 45 at 65–71.) Two or three of Rivas's associates remained in the breakroom, securing the employees. (RR 45 at

Stephens, No. 3:06-cv-02185-M, starting at ECF No. 121.

71.) Garcia was one of the individuals left in the breakroom to watch the employees. (RR 45 at 71.)

While Garcia remained in the breakroom, Rivas directed Ferris back to the customer-service area and other parts of the store. There, Rivas had Ferris empty the store's cash registers and money safe, but Rivas declined to take money from the fund belonging to employees. (RR 45 at 73–76, 120.) Rivas also took the keys to Ferris's Ford Explorer, but assured Ferris he would get his car back. (RR 45 at 74.) Next, Rivas had Ferris open the gun safe and directed Newbury, who had been in the main area of the store, to collect the guns inside. (RR 45 at 77–79.) Rivas escorted Ferris back to the breakroom. Garcia and Rodriguez were still there with the other employees, and Rivas said the two should stay with the employees while he got the vehicle. (RR 45 at 80–82.) Then Rivas went outside. According to witness Misty Simpson, who was in the parking lot at the time, Rivas spoke briefly to one individual and then tried to speak to Simpson before climbing into a Ford Explorer and driving toward the back of Oshman's. (RR 46 at 12–14, 22–23.) Concerned, Simpson's friend called 911. (RR 46 at 14–15.)

Shortly thereafter, in response to the 911 call, police officer Aubrey Hawkins approached Oshman's. He pulled his patrol car into the back loading dock area, behind the Explorer. (RR 47 at 22–24.) The associate who had not entered Oshman's warned Rivas by radio of the policeman's approach, and Rivas told his associates to hurry because they were running out of time. (RR 45 at 83.) One of the

men in the room said they were not done tying up the employees, but Rivas told them to hurry up. (RR 45 at 83.) Garcia and Rodriguez left the breakroom. (RR 45 at 83–84.)

As little as 15 seconds later, Ferris heard three quick volleys of gunfire. (RR 45 at 84–85.) A witness from a nearby apartment complex testified that the shooting occurred in the loading dock area behind Oshman's (RR 46 at 27–33), where Hawkins had pulled in behind Rivas. Within seconds, Hawkins was shot repeatedly, and he died quickly. (RR 47 at 85, 119–20, 130–31.) Rivas and Halprin also suffered gunshot wounds. (RR 49 at 192–93.) The apartment witness confirmed that four people were moving around the loading dock area during the course of the shooting. (RR 46 at 34–36, 64–66.) There was no evidence that Garcia fired any shots in this exchange. In fact, there was no evidence that he was even in the vicinity of the loading dock when the gunfire broke out.

Afterward, the associates left in the Explorer. (RR 46 at 36–37.) Six were later arrested in Colorado. (RR 49 at 189–90.) The seventh individual, Larry Harper, committed suicide before he could be arrested. (RR 49 at 40–41.)

At the close of evidence, the court instructed the jury on the law applicable to its guilt/innocence-phase deliberations. (RR 50 at 5.) Those instructions, as noted earlier, included the definition of the law of parties. (A. 202.) The instructions also laid out how the law of parties applied to the charges in the indictment. (A. 204–06.)

While the State offered theories of principal and conspiracy liability in addition to party liability, its closing argument underscored the great extent to which its case against Garcia hinged on party liability. (*See, e.g.*, RR 50 at 6–7.) The State submitted that the jury could infer that Garcia killed Hawkins, but offered as its basis the bare possibility that he had made it to the loading dock area all the way from the breakroom by the time the burst of gunfire occurred. (RR 50 at 8–9.) But the prosecutor knew full well he could not prove beyond a reasonable doubt that Garcia was guilty of capital murder either as a principal or a conspirator, which required either that Garcia actually shot Hawkins or that he solicited, encouraged, or aided in the shooting. (A. 204–06.) "[W]e cannot tell you which gun fired some of these shots." (RR 50 at 9.) Instead, the State stressed the law of parties for the jury, arguing that the only way the jury could get to the lesser-included offense of aggravated robbery was "to ignore the law of parties" (RR 50 at 6), and, further, that

> parties is huge here. . . . You understand why we talked about it. Why we give [sic] you examples, the vault example . . . [t]he bank robbery scenario. Why we went over those in such detail. Those of you who are sitting here today would not be here if you didn't tell us that you believed in the law of parties, that you could follow the law of parties. And we're going to hold you to that.

(RR 50 at 6–7.)

The State doubled down on the law of parties during its rebuttal argument:

> [W]e talked with each of you, each and every one of you, about the law of parties and all of you agreed that it was a good law. It's a law that keeps gangs of ruthless outlaws from terrorizing citizens. It holds them all responsible and you all saw the logic in the law.

(RR 50 at 49–50.) And, ultimately, when describing Hawkins's death, the State urged the jurors to treat the Texas Seven as one entity:

> Joseph Garcia, I think clearly made some choices out there. Obviously, the first choice he made was to go with them to that Oshman's, stay with them, stay in their company, and be a part of the plan. He made a choice to take a loaded gun into that Oshman's . . . . Aubrey Hawkins stood between him and freedom and he wasn't about to give up his gun, his money, or his freedom. . . . And they swarmed on him and they ambushed him and they made sure he was dead. And that's the choice Joseph Garcia made out there.

(RR 50 at 54; *see also, e.g.*, RR 50 at 10 ("In the course of committing that robbery . . . did they kill Aubrey Hawkins? There's no question about that.").) The State chose its words carefully, and it chose "they"—"they swarmed," "they ambushed," "they made sure," "they kill[ed]"—because it could not prove that "he," Garcia, was guilty, except under a theory of party liability.

The jury deliberated and found Garcia guilty of capital murder. (RR 50 at 56.)

B. Penalty Phase Proceedings

Four days after the verdict, the trial proceeded to the penalty phase before the same jury. (RR 50 at 57–58; *see also* RR 51 at 8.) During the penalty phase, both

the State and the defense presented evidence to help the jury answer Texas's three statutory "special issues," which were to guide the jury's sentencing decision.

During its closing argument, the State once again focused on conflating Garcia's actions and mens rea with that of the Texas Seven as a whole. Over and over, the State treated Garcia and the Texas Seven as interchangeable when discussing the murder: "When those shots started coming, when they started shooting, their intent was clear. Their anticipation was clear. What they wanted was clear. They wanted Aubrey Hawkins dead. Dead. And they accomplished it." (RR 56 at 79.) "[T]hey were ready, they were armed, and they made choices, and they made decisions, and now they are going to be held accountable." (RR 56 at 87–88.)

The State even reminded the jury of the law of parties during its penalty-phase rebuttal argument, despite the fact that the law does not apply in penalty-phase proceedings. The State noted, "We also talked to you at great length about the law of parties. Each and every one of you told us after we explained it to you that, yes, you agreed with the law of parties and we gave some examples." (RR 56 at 123–24.) Notwithstanding that a death sentence could be based only on personal culpability, the State told the jurors at sentencing they could "see the wisdom of the law of parties once [they] reflect[ed] on this case. This [was] the type of case it[]

[was] made for." (RR 56 at 125.)[4] And again, the State prompted the jurors to treat Garcia and the Texas Seven as interchangeable: "[W]e know beyond all doubt they were out there. They were circling his car. They were shooting over and over again. And there's no doubt what they wanted as a group and their intent and there's no doubt in this case what Joseph Garcia's intent was . . . ." (RR 56 at 125.) Among the last remarks the jury heard before sentencing deliberations began were that "there's no doubt he anticipated someone would die, because Aubrey Hawkins stood between him and freedom and *they* had to get rid of Aubrey Hawkins. *They* didn't hesitate. *They* didn't hesitate." (RR 56 at 136 (emphasis added).)

The court instructed the jurors that they would consider the first and second special issues and, if they determined unanimously that the State had proven beyond a reasonable doubt that the answer to each issue was "yes," then the jurors would consider a third special issue. (A. 211–12.) The court provided the following three special issues, the second of which is referred to as the "anti-parties special issue":

> Special Issue No. 1[:] Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, JOSEPH C. GARCIA, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> . . .

[4] Trial counsel failed to object to the State's insinuation that the law of parties applied at the penalty phase, and the trial court failed to correct the error.

> Special Issue No. 2[:] Do you find from the evidence beyond a reasonable doubt that the defendant, JOSEPH C. GARCIA, actually caused the death of the deceased, Aubrey Hawkins, or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken?
>
> . . .
>
> Special Issue No. 3[:] Do you find . . . that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

(A. 216–18.)

The court further instructed the jurors that they "shall consider all evidence admitted during the guilt or innocence stage and the punishment stage." (A. 212.) The court gave the jury no instruction on whether to continue to consider the law from the guilt/innocence phase, including the law of parties, during penalty-phase deliberations. Despite the State's earlier emphasis on the law of parties and its continued focus on collective culpability, and despite the fact that Garcia's culpability, standing alone, should have been the issue during the penalty phase, the defense failed to request an "anti-parties instruction."[5] Such an instruction would have made clear for the jury that it was to decide special issue two based on Garcia's conduct and mens rea alone—that the law of parties no longer applied. But the jury was not so informed.

[5] An example of such an instruction is the following: "You will confine yourselves, in answering the following special issues, to considering the conduct and mental state of the defendant standing alone."

During deliberations, the jury asked several questions of the court; one question, to which the court did not give a substantive response, concerned how long Garcia would spend in prison with a life sentence. (Jury Questions & Ct. Resps (Feb. 13, 2003), ECF No. 120 at 729–31.)[6] Subsequently, the jury answered special issues one and two in the affirmative and special issue three in the negative. (RR 56 at 147–48.) In accordance with the jury's verdict, the court sentenced Garcia to death. (RR 56 at 149–50.)

III. State Habeas Proceedings

While Garcia's direct appeal was pending before the Court of Criminal Appeals, Garcia's state habeas counsel filed an application for writ of habeas corpus. State habeas counsel failed to conduct any investigation, and his communication with Garcia was apparently limited to two letters. (Am. Pet. for Writ of Habeas Corpus (Apr. 2, 2008), ECF No. 20 at 6–12.) The state habeas petition included various claims about jury instructions, but it did not assert a claim that trial counsel were ineffective for failing to request an anti-parties instruction. *See* Appl. for Post-Conviction Writ of Habeas Corpus, No. F01-00325-T-W1 (283rd Jud. Dist. Ct. Dallas Cty. Dec. 14, 2004).

As no claim of ineffectiveness for failure to request an anti-parties instruction was before the state habeas court, that court did not address the issue. (*See* A. 61–

[6] All "ECF" citations refer to the docket of the United States District Court for the Northern District of Texas in this case. *See Garcia v. Stephens*, No. 3:06-cv-02185-M.

185.) In ruling on an entirely different claim, the court did note that Garcia's jury had been given the anti-parties special issue to decide. The court was considering the claim that the trial court erred in instructing the jury on co-conspirator liability at the guilt/innocence phase of proceedings, thereby lessening the State's burden of proof with regard to intent. (A. 107.) The court rejected that claim, observing that Texas's law on co-conspirator liability "does not excuse the State altogether from proving a culpable mental state." (A. 108.) In support of its holding, the court noted that the jury was asked to decide the anti-parties special issue. (A. 109.) The court further noted that the application of the law of parties at sentencing is unconstitutional (A. 108), but at no point did the court consider whether Garcia was entitled to an additional instruction so informing the jury, nor did it consider whether his trial counsel were ineffective for failing to request such an instruction (*see* A. 107–10).

The Court of Criminal Appeals adopted the lower court's findings of fact and conclusions of law and denied Garcia relief. (A. 59–60.)

IV. Federal Habeas Proceedings

In an amended habeas petition before the federal district court, Garcia alleged that his trial counsel were ineffective for failing to request an anti-parties instruction at the penalty phase of trial.[7] (Am. Pet. for Writ of Habeas Corpus (Apr.

[7] Before filing the amended petition in federal court, Garcia returned to state court to attempt to exhaust certain claims for relief, including this claim of ineffective assistance of trial

2, 2008), ECF No. 20 at 68.) The habeas petition asserted that the law of parties may not be applied to sentencing, citing *Martinez v. State*, 899 S.W.2d 655 (Tex. Crim. App. 1994), and *Green v. State*, 682 S.W.2d 271 (Tex. Crim. App. 1984). To prevent the improper application of the law of parties, trial counsel should have requested "[f]or example, a charge instructing the jury '[to] confine yourselves, in answering the following issues, to the conduct and acts of the defendant *standing alone*.'" (Am. Pet. for Writ of Habeas Corpus (Apr. 2, 2008), ECF No. 20 at 69 (second alteration in original) (quoting *Martinez v. State*, 899 S.W.2d at 657).)

After this Court issued its decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), the district court held a hearing on this claim. At that hearing, "[t]rial and state habeas counsel testified that the existing law did not require any such separate instruction." (A. 49.) The court noted that "[t]he failure to make a meritless objection is not ineffective assistance of counsel," and concluded that Garcia had not overcome the procedural default of this claim. (A. 49.)

Garcia then sought a COA from the Fifth Circuit Court of Appeals on this and other claims. *See* Am Appl. for Certificate of Appealability, *Garcia v. Davis*, No. 15-70039 (5th Cir. Feb. 10, 2017). The Fifth Circuit stated that, "[i]n denying Garcia's state habeas application, the [Court of Criminal Appeals] held that the

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counsel. *See* Subsequent Appl. for Writ of Habeas Corpus, *Ex parte Garcia*, No. AP-74,962, at 31 (Tex. Crim. App. Nov. 12, 2007). The Court of Criminal Appeals dismissed his state-court application on procedural grounds. (A. 57–58.)

second special issue provided a sufficient anti-parties charge under Texas state law. Thus, to the extent that Garcia's claim is based on state law, its lack of merit is not debatable among jurists of reason." (A. 6.) In so doing, the panel credited the state court with findings it had not made. The panel further held that Fifth Circuit precedent foreclosed any such claim based on federal law. (A. 6–7.) The court then denied Garcia a COA on his claim that trial counsel were ineffective for failing to request an anti-parties charge, thereby denying him the individualized culpability finding guaranteed to him by the Eighth Amendment. (A. 7.)

REASONS FOR GRANTING WRIT

I. Jurists of reason could debate whether trial counsel provided ineffective assistance by failing to request an anti-parties instruction.

In light of the emphasis on the law of parties and collective culpability at Garcia's trial, jurists of reason could debate whether trial counsel were ineffective for failing to request an instruction that would have ensured Garcia an individualized sentencing determination. Such an instruction serves to protect Eighth and Fourteenth Amendment rights, and Garcia was entitled to the instruction under Texas law upon request. Trial counsel performed deficiently in failing to seek the instruction, thereby prejudicing Garcia, and state habeas counsel performed ineffectively in failing to raise the ineffective-assistance claim. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (discussing analysis under Sixth Amendment of claims of ineffective assistance of trial counsel); *see also Martinez v.*

Ryan, 566 U.S. 1, 17 (2012) (ruling that inadequate assistance by post-conviction counsel could establish cause to excuse procedural default of claim of ineffective assistance of trial counsel); *Trevino v. Thaler*, 569 U.S. 413, 429 (2013) (holding that equitable exception from *Martinez v. Ryan* applies to Texas cases). That the Fifth Circuit rejected even a COA on this issue eviscerates the Eighth Amendment's guarantee of an individualized sentencing determination for a defendant facing the death penalty. *See Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003) (in evaluating a petitioner's COA application, the sole question is "the debatability of the underlying constitutional claim, not the resolution of that debate").

A. State-court precedent entitled Garcia to an anti-parties instruction, had his counsel requested one.

Texas law regarding the anti-parties special issue and anti-parties jury instructions derives from this Court's Eighth and Fourteenth Amendment jurisprudence. That jurisprudence requires "individualized consideration as a constitutional requirement in imposing the death sentence." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (holding that Ohio's death-penalty statute violated the Eighth Amendment because it failed to permit full and individualized consideration of mitigating circumstances); *see also, e.g.*, *Eddings v. Oklahoma,* 455 U.S. 104, 105 (1982) (reversing a death sentence imposed without the type of individualized consideration required by the Eighth and Fourteenth Amendments); *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (deeming North Carolina's

death-penalty scheme unconstitutional for "fail[ing] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death").

After recognizing the right to individualized consideration at sentencing, this Court addressed in *Enmund v. Florida* one facet of that consideration: whether the Eighth Amendment precluded the death penalty for an individual who was involved in a crime, but "who neither took life, attempted to take life, nor intended to take life." 458 U.S. 782, 787 (1982). This Court concluded that for such an individual, a sentence of death was an excessive punishment and was accordingly irreconcilable with the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Id.* at 788. In so deciding, this Court "insist[ed] on [the] 'individualized consideration'" it had previously demanded. *Id.* at 798 (quoting *Lockett*, 438 U.S. at 605). For the petitioner in *Enmund*, "[t]he focus [had to] be on *his* culpability," not on the culpability of his associates. *Id.*

Guided by the Eighth Amendment dictates in *Enmund*, Texas courts recognized that the law of parties could not extend to capital-sentencing proceedings. In 1984, the Court of Criminal Appeals explicitly held that, in the wake of *Enmund*, the law of parties could not be applied at the penalty phase of a capital trial. *Green v. State*, 682 S.W.2d 271, 287 (Tex. Crim. App. 1984); *see also, e.g.*, *Johnson v. State*, 853 S.W.2d 527, 536 (Tex. Crim. App. 1992).

To vindicate the right to individualized sentencing, capital defendants needed

a mechanism to enforce *Green* and ensure that the law of parties would not infect the sentencing proceedings. To that end, the Court of Criminal Appeals declared that the jury could be instructed to limit its penalty-phase considerations to the defendant's own conduct: "[W]here a law of parties charge is given during the guilt/innocence phase of a capital case a prophylactic instruction should be given, if requested, which would instruct the jury to limit its consideration of punishment evidence to conduct shown to have been committed by the defendant." *Belyeu v. State*, 791 S.W.2d 66, 72 (Tex. Crim. App. 1989).

The Court of Criminal Appeals has reaffirmed the right to such an anti-parties instruction on several occasions. For example, in *Martinez v. State*, that court noted that the "omission of a law of parties instruction during the punishment phase is an insufficient protection of the defendant's Eighth Amendment rights" and confirmed that the defendant was entitled to an affirmative instruction safeguarding against the improper application of the law of parties. 899 S.W.2d 655, 657 (Tex. Crim. App. 1994). The court then approved of an anti-parties instruction wherein the trial court ordered the jurors to "confine [them]selves, in answering the following [special] issues to the conduct and acts of the defendant *standing alone*." *Id.* Similarly, the court in *Johnson* specifically agreed that a trial court should give the jury an anti-parties instruction upon request. 853 S.W.2d at 536.

That noted, the Court of Criminal Appeals has declined to prescribe the precise form an anti-parties instruction must take. *See, e.g.*, *Martinez v. State*, 899

S.W.2d at 657. In some cases, the court has even approved the anti-parties special issue as sufficient protection on its own, when its wording made clear that the jury could consider only the defendant's personal culpability. For example, in *McFarland v. State*, the court found the second special issue sufficient to guarantee an individualized sentencing, when it was given as follows:

> Do you find from the evidence beyond a reasonable doubt that [defendant], *the defendant himself*, actually caused the death of Kenneth Kwan, the deceased, on the occasion in question, or if he did not actually cause Kenneth Kwan's death, that he intended to kill Kenneth Kwan or another, or that he anticipated that a human life would be taken?

928 S.W.2d 482, 516 (Tex. Crim. App. 1996) (per curiam), *abrogated on other grounds by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998). The court even highlighted the words "the defendant himself"—words selected to emphasize personal culpability—to demonstrate that the trial court did not abuse its discretion in denying an additional anti-parties instruction. *Id.* at 517. As another example, in *Varga v. State*, the court again approved the second special issue as adequate protection of the right to an individualized sentencing; this time, the special issue was accompanied by a specific directive from the trial court to the jury not to consider the law of parties during the penalty phase. No. 73990, 2003 WL 21466926, at *11 (Tex. Crim. App. June 25, 2003). The second special issue in Garcia's case included no such directive or emphasis to properly guide the jury's determination.

Finally, trial counsel must request an anti-parties instruction. Absent such a

request, no particular instructions beyond those mandated by statute are required. *See, e.g.*, *Belyeu*, 791 S.W.2d at 72–73.

At the very least, then, had defense counsel requested an anti-parties instruction for Garcia, at whose trial the law of parties played a pivotal role, Garcia would arguably have been entitled to such an instruction.

B. Trial counsel performed deficiently in failing to request an anti-parties instruction.

Trial counsel performed deficiently in failing to request an anti-parties instruction. *See Strickland*, 466 U.S. at 687 (identifying deficient performance as the first of two prongs of the ineffective-assistance analysis). Counsel were well aware that Garcia's case turned on the law of parties, both from the State's emphasis on that law and from the evidence itself. (*See, e.g.*, RR 50 at 27 (trial counsel arguing in closing that "[t]here is no evidence which puts Joseph Garcia in that parking lot, back parking lot there, at the time Officer Hawkins was murdered"); RR 50 at 6 (prosecutor declaring that "[t]hose of you who are seated here now would not be seated here, if there was any question that you could follow the law of parties. . . . Because parties is huge here").) Accordingly, trial counsel were obligated to ensure that the jury understood that its charge at sentencing, unlike its charge during the guilt/innocence phase, was to assess Garcia's conduct and mens rea, standing alone. In particular, trial counsel had to make certain that the jurors did not treat Garcia and the Texas Seven as interchangeable when

answering the second special issue, as the jurors effectively had been permitted to do earlier. Counsel's failure to do so would ensure that the jury answered that second special issue in the affirmative, increasing the likelihood of a death sentence. Still, counsel did not fulfill their obligation.

Trial counsel's failure to make clear to the jury its duty—counsel's failure to request an anti-parties instruction—stemmed from a mistake of law. In a hearing before the federal district court, counsel asserted that Garcia was not entitled to an anti-parties instruction to supplement the anti-parties special issue, and so counsel did not request one. (Evid. Hr'g Tr. (Aug. 14, 2014), ECF No. 92 at 44–45.) However, as detailed above, Garcia was in fact entitled to an anti-parties instruction upon counsel's request. *See, e.g.*, *Martinez v. State*, 899 S.W.2d at 657. While the trial court may not have approved counsel's particular choice of words, courts in other party-liability cases have given instructions such as, "[I]n this punishment phase of trial you should not consider the instructions given you in the first phase . . . of trial that relate to the law of parties and the responsibility of parties for the acts of others in determining what your answers to the Special Issues shall be." *Varga*, 2003 WL 21466926, at *11 (alteration in original). Courts have, alternatively, inserted words such as "the defendant himself" into the second special issue, thereby clarifying its focus on individualized culpability. *See McFarland*, 928 S.W.2d at 516. As noted previously, had Garcia's counsel requested such an anti-parties instruction or clarification, the trial court would have given it.

Counsel performs deficiently under the Sixth Amendment when he acts based on a mistake of law. *See Williams v. Taylor*, 529 U.S. 362, 395 (2000) (concluding that counsel performed deficiently in a capital case in failing to unearth relevant records, "not because of any strategic calculation but because they incorrectly thought that state law barred access to such records"); *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam) (determining that trial counsel performed deficiently when he failed to seek additional funding for an expert, when that failure was based on a mistaken belief that state law capped the available funding at $1,000). Here, because trial counsel's failure to request an anti-parties instruction was based on the mistaken belief that, following state-court precedent, the court would not give such an instruction, counsel performed deficiently.[8] *See Luchenburg v. Smith*, 79 F.3d 388, 392–93 (4th Cir. 1996) (per curiam) (ruling trial counsel ineffective for failing to request a clarifying jury instruction to which the petitioner was entitled under state law).

In sum, trial counsel misunderstood relevant state-court precedent and were at least arguably deficient in their failure to request a jury instruction that would have protected Garcia's Eighth and Fourteenth Amendment rights to an individualized sentencing determination.

[8] Trial counsel testified before the federal district court that counsel had no other reason not to request the anti-parties instruction. (Evid. Hr'g Tr. (Aug. 14, 2014), ECF No. 92 at 47–48.)

C. Trial counsel's failure to request an anti-parties instruction caused prejudice.

Trial counsel's deficient performance imperiled Garcia's constitutional right to an individualized sentencing determination. Especially given the particulars of Garcia's trial—the State's evidence, the State's arguments, and the court's jury instructions at both phases—trial counsel's error caused harm. And, as there is reasonable likelihood that at least one juror would have made a different sentencing determination had the jury been properly instructed, trial counsel's performance prejudiced Garcia. *See Strickland*, 466 U.S. at 687 (identifying prejudice as the second prong of the ineffective-assistance analysis); *see also Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (noting that *Strickland* prejudice exists when "there is a reasonable probability that at least one juror would have struck a different balance" in the penalty phase).

At the penalty phase, the trial court presented the jury with three special issues, the second of which was the anti-parties special issue. The anti-parties issue asked the following:

> Do you find from the evidence beyond a reasonable doubt that the defendant, JOSEPH C. GARCIA, actually caused the death of the deceased, Aubrey Hawkins, or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken?

(A. 217.) To answer that question in the affirmative, and ultimately to impose a sentence of death, the jurors had to determine unanimously that the State had

proven beyond a reasonable doubt that Garcia had (1) actually killed, (2) intended to kill, or (3) "anticipated that a human life would be taken." (A. 211–12, A. 217.) And, of course, the jury was supposed to make that determination based on Garcia's own conduct and mens rea.

In this case, however, even the State did not forcefully contend that it had proven beyond a reasonable doubt that Garcia himself had killed or intended to kill Hawkins. The closest the State came was arguing that Garcia was armed and that the jury could potentially infer that he had had enough time to reach the loading dock area from the breakroom before the shooting started (RR 50 at 8–9)—a far cry from proof beyond a reasonable doubt that he had actually killed or had intended to kill Hawkins. The State acknowledged that it could not prove who actually shot Hawkins. (RR 50 at 9 ("Based on the autopsy results of Aubrey Hawkins, we cannot tell you which gun fired some of these shots. We can't tell you.").) The evidence did not even prove that Garcia was in the vicinity of the shooting, let alone that he fired a gun. The jury could not have found beyond a reasonable doubt that Garcia had killed or intended to kill Hawkins. Accordingly, the operative question for the second special issue was whether Garcia anticipated that a life would be taken—not whether one *could* be taken, but whether one *would* be taken. *See* Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(2) (West 1999).

Here, there was a genuine question as to whether Garcia in fact anticipated that a life would be taken. He and Rivas's other associates took control of the

Oshman's store by holding weapons and making threats, but there was no evidence that they caused any significant physical harm to any Oshman's employee. In fact, when one Oshman's employee indicated that the zip ties on her fingers were hurting her, the ties were removed so that she would no longer be in pain. (RR 45 at 68–70.) And when Rivas was having department manager Wesley Ferris help collect cash, Rivas specified that he did not want to take anything from the employee fund (RR 45 at 120–21), suggesting that the plan was not to steal from anyone at Oshman's, let alone injure or kill them. Meanwhile, in the employee breakroom, Garcia and Rodriguez were securing the employees (RR 45 at 71, 81), which would not have been necessary had Garcia anticipated one or more of their deaths. None of the actions taken inside the store establishes any intent to kill the employees. Again, that Garcia and his compatriots were armed could well have meant that he anticipated that a life *could* be taken, but the circumstances do not support beyond a reasonable doubt the conclusion that he anticipated that a life *would* be taken.

Indeed, even without the necessary anti-parties clarification, the jury was at least contemplating a life sentence. During penalty-phase deliberations, the jury submitted to the court multiple questions, including one asking how long Garcia would spend in prison if given a life sentence. (Jury Questions & Ct. Resps. (Feb. 13, 2003), ECF No. 120 at 729–31.) Such a question suggests that at least one juror was considering deciding in favor of a life sentence. *Cf. Carpenter v. Vaughn*, 296 F.3d 138, 156–59 (3d Cir. 2002) (recognizing that jury question about the practical

effect of imposing a life sentence reflected willingness to consider such a sentence, such that counsel's failure to object to the court's erroneous response was prejudicial under *Strickland*).

Given these facts, there is a grave risk that the lack of clarity about whether the law of parties applied at the penalty phase, and to the second special issue in particular, caused acute harm. As noted previously, much of the guilt/innocence phase focused on the law of parties. The State informed the jury of the law over and over; the theme emerged during voir dire and continued right through the State's rebuttal closing argument. The State reviewed examples of party liability with venirepersons and later, during the opening statement, reminded the jurors of the discussions of the law of parties during voir dire. (*See, e.g.*, RR 24 at 35–37; RR 45 at 13.) In closing, the State declared that the only way to consider the lesser-included offense was "to ignore the law of the parties" and that "parties is huge here." (RR 50 at 6.) The State further recalled for the jurors that they had all "agreed that [the law of parties] was a good law," a law that "keeps gangs of ruthless outlaws from terrorizing citizens." (RR 50 at 50.)

Moreover, the State consistently treated Garcia and the Texas Seven as wholly interchangeable when describing the crime. The State conflated Garcia's conduct with that of the entire Texas Seven. (*See, e.g.*, RR 50 at 54 ("Joseph Garcia, I think clearly made some choices out there. . . . Aubrey Hawkins stood between

him and freedom . . . . And they swarmed on him and they ambushed him and they made sure he was dead. And that's the choice Joseph Garcia made out there.").)

Compounding the State's emphasis on the law of parties, the guilt/innocence-phase jury instructions both defined the law of parties and explained how to apply that law. The instructions informed the jurors that, once they determined Garcia had entered a conspiracy to commit robbery, he could be held criminally liable for the actions of all of his co-conspirators, irrespective of his own intent. (A. 202, A. 204–06.) In other words, the jurors could equate Garcia with the entire Texas Seven during their guilt/innocence-phase deliberations; they did not have to disaggregate Garcia's individual culpability from that of the group.

After convicting Garcia of capital murder, the same jury returned just four days later to hear Garcia's penalty phase. (*See* RR 50 at 57–58; RR 51 at 8.) Once the penalty-phase evidence had been presented, the court affirmatively instructed the jury to consider all of the evidence that had come in during the guilt/innocence phase. However, the court did not tell the jury it could no longer consider the guilt/innocence-phase instructions—in particular the instruction on the law of parties. (A. 211–18.) And the State continued to discuss and apply the law of parties during closing arguments, with no objection from the defense or correction from the court, even though the law had no place in penalty-phase proceedings: "Each and every one of you told us after we explained it to you that, yes, you agreed with the law of parties . . . ." (RR 56 at 124.) The State further told the jurors they could "see

the wisdom of the law of parties once [they] reflect[ed] on this case. This [was] the type of case it[] [was] made for." (RR 56 at 125; *see also, e.g.*, *id.* at 136 ("[T]here's no doubt [Garcia] anticipated someone would die, because Aubrey Hawkins stood between him and freedom and *they* had to get rid of Aubrey Hawkins. *They* didn't hesitate. *They* didn't hesitate." (emphasis added)).)

In addition, the anti-parties special issue on its own does not, and did not in this case, make clear that the jury is to consider only personal culpability. Indeed, nothing in the text of the special issue puts jurors on notice that the law of parties no longer applies, or that the defendant can no longer be equated with his co-conspirators. The second special issue asks whether the defendant "actually killed" the victim, but that question is directed to jurors who have just found that the defendant was "actually" guilty of capital murder under the law of parties. The wording of the second special issue does not suffice to protect the right to an individualized sentencing determination. *See Belyeu*, 791 S.W.2d at 73 (recognizing that when answering former special issue about "the conduct of the defendant that caused the death," the jury could be misled and answer based "NOT [on] any deliberate conduct of the defendant himself, but [on] the deliberate conduct of another for whom the defendant was criminally responsible as a party").

The inadequacy of the second special issue in enforcing individualized consideration is particularly clear in Garcia's case. The second special issue, as provided to Garcia's jury, did not say "Joseph C. Garcia, standing alone," or "Joseph

C. Garcia, the defendant himself," or "the law of parties no longer applies." (*See* A. 217.) At the guilt/innocence phase the week prior to Garcia's sentencing, the jury had been instructed that it could treat Garcia and the Texas Seven as interchangeable for purposes of criminal liability; nothing in the wording of the anti-parties special issue suggested that was no longer true. *See id.* As such, the second special issue on its own did not ensure an individualized sentencing determination.

In light of these circumstances, trial counsel's failure to request an anti-parties instruction caused significant harm. "The point of [such an instruction] is to direct the jury's focus to the conduct or mental state of the defendant *as opposed to that of a co-defendant or accomplice*." *Solomon v. State*, 49 S.W.3d 356, 371 (Tex. Crim. App. 2001) (Meyers, J., concurring). But Garcia's jury was not so directed. Rather, the jurors were left free to conclude that Garcia had caused, intended, or anticipated Hawkins's death based on the fact that other members of the Texas Seven had done so.

In a case (1) in which the law of parties, touted by the State at both phases of trial, featured prominently; (2) in which there was at best speculative evidence that Garcia himself anticipated that a death would occur; and (3) in which the jury was apparently considering a life sentence, that error was prejudicial. Had the jury been given an anti-parties instruction, there is a reasonable probability that at least one juror would have understood that the prosecutor was attempting to paint

"anticipation" with a broad brush because he did not have sufficient evidence that Garcia himself actually anticipated someone's death. At a bare minimum, jurists of reason could debate whether there is a reasonable probability that one juror would have answered "no" to the second special issue, thereby precluding a death sentence.

D. The ineffective assistance of state habeas counsel provides cause to excuse the procedural default of the claim of ineffective assistance of trial counsel.

Following *Martinez v. Ryan* and *Trevino*, the procedural default of a claim of ineffective assistance of trial counsel can be overcome. More specifically, when state habeas counsel is ineffective, procedural default will not bar federal habeas review of a substantial claim of ineffective assistance of trial counsel. *Martinez v. Ryan*, 566 U.S. at 17; *Trevino*, 569 U.S. at 429.

As discussed at length earlier, *see supra* pp. 24–34, trial counsel performed deficiently and prejudiced Garcia by failing to request an anti-parties instruction. The underlying ineffectiveness claim is therefore substantial. *See Martinez v. Ryan*, 566 U.S. at 16 (explaining that an ineffectiveness claim is not substantial when "it does not have any merit or . . . it is wholly without factual support"). Moreover, state habeas counsel performed below constitutional standards in neglecting this substantial claim for the same reason that trial counsel erred: a mistake of state law. State habeas counsel testified before the district court that Garcia was not entitled to an anti-parties instruction apart from the second special issue, and that

"the Court [of Criminal Appeals] ha[d] never authorized an anti-parties charge other than Special Issue Number 2." (Evid. Hr'g Tr. (Aug. 14, 2014), ECF No. 92 at 130–32.) But state habeas counsel was wrong. The Court of Criminal Appeals had previously authorized anti-parties instructions or modifications to the second special issue that clarified its focus on the defendant's actions and mens rea, independent of the conduct of his cohorts. *See, e.g.*, *Varga*, 2003 WL 21466926, at *11; *McFarland*, 928 S.W.2d at 516. As with trial counsel, state habeas counsel's mistake of law constituted deficient performance. *See, e.g.*, *Hinton*, 134 S. Ct. at 1088; *Williams*, 529 U.S. at 395. And, because the underlying claim state habeas counsel failed to raise is substantial, counsel's deficient performance prejudiced Garcia.

Accordingly, Garcia can overcome the procedural default of his claim of ineffective assistance of trial counsel. Certainly, at least, jurists of reason could debate whether his state habeas counsel's ineffectiveness provides cause to excuse the default of a substantial claim.

E. The Court of Criminal Appeals did not rule that, had counsel requested an anti-parties instruction in this case, Garcia would not have been entitled to it.

Nothing in the decision denying state habeas relief by the Court of Criminal Appeals suggests that Garcia would not have been entitled to an anti-parties instruction if his trial counsel had sought one.

The Court of Criminal Appeals adopted the findings of fact and conclusions of

law set forth by the state habeas court. (A. 59–60.) The state habeas court had found that Garcia's jury had been given the statutory anti-parties special issue. (A. 109.) However, the state habeas court did not make that finding when considering a claim about whether Garcia's counsel were ineffective for failing to request an anti-parties instruction. In fact, that court was not even considering a claim about party liability, or a claim about penalty-phase instructions. Instead, that court made its finding when deciding a guilt/innocence-phase claim alleging that the trial court erred in instructing the jury on co-conspirator liability. (A. 107.)

State habeas counsel did not allege that trial counsel were ineffective for failing to request an anti-parties instruction. *See* Appl. for Post-Conviction Writ of Habeas Corpus, No. F01-00325-T-W1 (283rd Jud. Dist. Ct. Dallas Cty. Dec. 14, 2004). As counsel did not raise the claim, the state habeas court had no occasion to consider it. That court accordingly did not consider, and did not rule on, whether Garcia would have been entitled to an anti-parties instruction had his counsel sought one. (*See* A. 61–185.) By extension, the Court of Criminal Appeals did not do so either.

II. The question raised by this petition goes to the core of the Eighth Amendment's guarantee against cruel and unusual punishment.

The crux of Garcia's case is a question of singular import: To what extent does our criminal justice system allow individuals to be sentenced to death based on the culpability of others?

Since the post-*Furman* resurrection of the death penalty, individualized sentencing has been a centerpiece of this Court's capital-sentencing jurisprudence under the Eighth and Fourteenth Amendments. This Court struck down mandatory death-penalty statutes from Louisiana and North Carolina because they did not contemplate a determination of individual circumstances and blameworthiness for the capital crime. *See Roberts v. Louisiana*, 431 U.S. 633, 637–38 (1977) (per curiam); *Woodson*, 428 U.S. at 303–05. Shortly thereafter, the Court embraced a full-bodied understanding of what it means to have individualized consideration in a death-penalty case, reversing death sentences imposed by sentencers who did not have adequate freedom to consider the full breadth of mitigating circumstances. *See, e.g.*, *Eddings,* 455 U.S. at 105; *Lockett*, 438 U.S. at 605. The Court then followed with *Enmund*—the precedent underlying the anti-parties issue—and its progeny, cementing the sentencer's focus on the defendant's *own* culpability, independent of that of his associates. 458 U.S. at 798; *see also Tison v. Arizona*, 481 U.S. 137, 157–58 (1987).

But guarantees of individualized sentencing mean little if they cannot be enforced. And so this Court has enforced them. For example, this Court has rejected jury instructions that do not allow jurors to freely give effect to mitigation, *Smith v. Texas*, 543 U.S. 37, 46–49 (2004) (per curiam), and has dismissed attempts to impose a causal-nexus requirement limiting the consideration of mitigation, *Tennard v. Dretke*, 542 U.S. 274, 289 (2004). Further, when it is uncertain whether

a jury could reliably make an individualized sentencing determination, this Court has precluded the death penalty. *See Roper v. Simmons*, 543 U.S. 551, 573–75 (2005) (eliminating death penalty for juvenile defendants, in part because juries might not sufficiently consider the inherently mitigating nature of youth, or might instead consider youth aggravating); *Atkins v. Virginia*, 536 U.S. 304, 320–21 (2002) (eliminating death penalty for intellectually disabled defendants, in part because of the "lesser ability of [such] defendants to make a persuasive showing of mitigation" for the jury).

Texas's statutory anti-parties special issue does not on its own protect the right to an individualized consideration at sentencing. It does not include simple phrases—"on his own," "standing alone," "disregarding the law of parties"—that would clarify for the jurors the scope of their inquiry. The special issue is at best a weak and ineffectual mechanism for ensuring that people convicted based on the actions and intents of others are not also sentenced on that basis. And that special issue, without additional clarification, did not suffice to protect Garcia's rights.

This case presents an opportunity to enforce the right to an individualized determination of the defendant's personal culpability. Garcia's trial counsel were (at least debatably) ineffective for failing to take a simple measure to protect Garcia's right to be sentenced based on his own conduct and intentions, rather than on the actions of the Texas Seven collectively. The Fifth Circuit's COA denial—its ruling that Garcia's claim did not have any merit—constituted a flat-out rejection of the

Eighth Amendment's promise of individualized sentencing consideration. By granting a writ of certiorari, this Court could ensure that the focal point of capital sentencing remains the defendant's personal culpability, instead of the culpability of others. The Eighth Amendment tolerates no less.

CONCLUSION

For all of the foregoing reasons, Garcia was denied effective assistance of counsel at his penalty phase, and his post-conviction counsel provided ineffective assistance in failing to argue as much. At a minimum, reasonable jurists could so conclude, and so a COA must issue. This Court's review is warranted to ensure that the constitutional guarantee of individualized sentencing is not a guarantee in name only—that courts will not allow someone to be executed when there has been no determination that his personal culpability warrants such punishment.

Respectfully submitted: February 20, 2018.

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