No. 17-7865

IN THE

Supreme Court of the United States

JOSEPH C. GARCIA,
Petitioner,

v.

LORIE DAVIS, DIRECTOR TDCJ-CID,
Respondent.

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

PROOF OF SERVICE

I hereby certify that on the 26th day of March, 2018, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari** was sent by mail and electronic mail to: Karen Smith, Federal Public Defender's Office, 850 W. Adams St., Suite 201, Phoenix, Arizona 85007, karen_smith@fd.org. All parties required to be served have been served. I am a member of the Bar of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Joseph Garcia escaped from the Texas Department of Criminal Justice Connally Unit in December 2000 along with six other inmates. The inmates stole fourteen handguns, a shotgun, an AR-15 rifle, and ammunition during the escape. Garcia later actively participated in an armed robbery of an Oshman's sporting goods store where he threatened one employee, "[d]on't do nothing stupid if you want to see Christmas. If we have to shoot one of you, we'll have to shoot all of you." The robbery culminated in the murder of Irving police officer Aubrey Hawkins. Garcia was convicted of capital murder and sentenced to death for the murder of Officer Hawkins.

Garcia's jury received an anti-parties instruction at the punishment phase of trial, which required it to determine beyond a reasonable doubt whether Garcia killed Officer Hawkins, intended to kill him, or anticipated a human life would be taken. Garcia was not entitled under clearly established federal or state law to any further instruction. Garcia defaulted an ineffective-assistance-of-trial-counsel (IATC) claim alleging that counsel failed to request an additional anti-parties instruction. These facts raise the following question:

> Should the Court grant certiorari to review Garcia's defaulted IATC claim where he received an anti-parties instruction, he was entitled to no further jury instruction, and the evidence overwhelmingly showed that Garcia killed Officer Hawkins, intended to kill him, or anticipated a death would be taken during the armed robbery?

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BRIEF IN OPPOSITION

In his amended federal habeas petition Garcia raised several procedurally defaulted IATC claims, among them a claim alleging that trial counsel failed to request that an anti-parties instruction be included in the punishment-phase jury instructions. In light of the Court's decisions in *Martinez v. Ryan*[1] and *Trevino v. Thaler*[2] creating an equitable exception to the procedural default of certain substantive IATC claims, the district court provided Garcia the opportunity to prove at an evidentiary hearing that his defaulted IATC claims fell within this new exception. In rejecting Garcia's IATC claim, the district court observed that federal habeas counsel provided "no factual or legal basis . . . for requiring that the jury instructions include a separate anti-parties charge in addition to the special issues that were given." *Garcia v. Davis*, Civ. Act. No. 3:06-CV-2185, Order (N.D. Tex. May 28, 2015). Rather, federal habeas counsel argued only that trial counsel and state habeas counsel should have preserved an objection to the jury instructions "in the hopes of . . . trying to change the case law on that." *Id*. Consequently, the district court determined that Garcia's IATC claim did not meet the standard

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1 566 U.S. 1 (2012).

2 569 U.S. 413 (2013).

under *Martinez*. The Fifth Circuit denied a certificate of appealability (COA). *Garcia v. Davis*, 704 F. App'x 316, 320–22 (5th Cir. 2017).

Garcia now seeks certiorari review of the Fifth Circuit's denial of a COA. Garcia's IATC claim is not worthy of this Court's attention because the Fifth Circuit's denial of a COA was compelled by controlling state and federal law. Garcia also fails entirely to show that state habeas counsel was ineffective in failing to raise the IATC claim. Further, Garcia's claim does not implicate any split among the federal courts. Therefore, the Court should deny Garcia's petition for a writ of certiorari.

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

The Court of Criminal Appeals (CCA) summarized the facts of the capital murder as follows:

> On December 13, 2000, seven inmates, including [Garcia], escaped from the Texas Department of Criminal Justice Connally Unit, taking with them a number of firearms stolen from the unit. On December 24th, the group committed a robbery at a sporting–goods store in Irving, killing Irving police officer Aubrey Hawkins as they fled. The escapees used the weapons they stole from the prison to commit the robbery and murder. The escapees then made their way to Colorado where they lived in an RV park until

> January 2001, when six were apprehended and one committed suicide.

Garcia v. State, 2005 WL 395433, at *1 (Tex. Crim. App. 2005).

B. The State's punishment case

Patrick Moczygemba, an assistant supervisor from the Connally Unit maintenance department, testified as to Garcia's escape from prison. 55 RR 25–92.[3] Six of the seven escapees, including Garcia, were working maintenance on the day they escaped. 51 RR 31–36. Moczygemba was struck in the head and rendered unconscious. 51 RR 50. Moczygemba awoke to find escapee George Rivas restraining him. 51 RR 51. Garcia held a "shank" to his face and told Moczygemba to "[s]top struggling or we'll end it now." 51 RR 51. Garcia also said, "you can stop struggling because whatever happens to [you] is going to happen to everybody else." 51 RR 52. The escapees removed Moczygemba's clothing, bound and gagged him, and placed him in a small electrical storage room. 51 RR 52–55. Other prison employees were bound and placed in the room with him, the light turned out, and the door shut. 55 RR 56–59. In all, fourteen people were held by the escapees. 51 RR 61.

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[3] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). "CR" refers to the "Clerk's Record," the transcript of pleadings and documents filed in the trial court, followed by the internal page number(s). "SHCR" refers to the Clerk's Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Garcia*, Nos. 64,582-01, -02.

Alejandro Marroquin, Jr., was a security officer in the maintenance area when the escape occurred. 51 RR 93. Marroquin stated that he and a supervisor, Allen Camber, were in the office of the maintenance warehouse when Garcia, Patrick Murphy, Randy Halprin, Larry Harper, Donald Newbury, and George Rivas overpowered them, with Rivas struggling to control Marroquin and Garcia slamming the supervisor's head into the floor. 51 RR 97–99. The escapees took Marroquin's TDCJ uniform off, bound and gagged him, and forced him to crawl into the room where Moczygemba lay. 51 RR 101. Newbury then picked Marroquin up by his hair and struck him five or six times, breaking his nose. 51 RR 100–01. Garcia guarded the room. 51 RR 102–03. To Marroquin and others, who also testified that they were each laid down in the storage room, Garcia would put a sharp point to the back of the neck or in an ear and tell them, "that was one pound of pressure now, two to three more pounds, and it would go straight into [his] brain and [he] would be dead." 51 RR 102, 123, 147; 52 RR 17.

Mark Burgess, one of the civilian employees taken hostage and held by Garcia, testified that Garcia told him, "if anything goes wrong, we're both going to get the needle. You'll get yours now and I'll get mine in five years, because the year 2050 doesn't come soon enough." 51 RR 123.

A series of witnesses testified to Garcia's murder of Michael Luna in San Antonio in 1996. After an evening of drinking and smoking marijuana at a

club, Garcia, Luna, and Bobby Lugo went to the apartment of a friend where they continued to drink. 52 RR 137–42. After they left, Garcia and Luna got into a fight, and, according to a witness, Garcia sat on top of Luna and stabbed him repeatedly while saying, "[d]ie, mother f---er, die." 53 RR 54–57. Luna was stabbed nineteen times by Garcia, sixteen of which were in his chest and back. 53 RR 123. Garcia was convicted of Luna's murder and sentenced to fifty years in prison. 53 RR 148.

C. Garcia's punishment evidence

The defense presented nine witnesses: Garcia's relatives or former in-laws, a Child Protective Servies (CPS) caseworker, a psychiatrist, a psychologist, a Dallas County Sheriff's sergeant, and a former chairman of the TDCJ Classification Committee.

Virginia Nerone, Garcia's mother's cousin, was deposed prior to trial as her illness left her unable to travel. 53 RR 198–257. She testified in detail about Garcia's home life. Nerone testified that Garcia's mother, Sofia, was not a good mother; she abandoned her children for days at a time and was addicted to drugs. 53 RR 228–31. Garcia was his sister Arlene's primary caregiver; she was in a wheelchair and suffered from cancer at a young age. 53 RR 232–33. Garcia experienced the same living conditions in which Sofia grew up: dirty dishes piled in the kitchen sink and on the counters, roaches everywhere, dirty

clothes in corners and boxes, mattresses on the floor, and utilities cut off from time to time. 53 RR 235.

Garcia's grandmother, Frances, was verbally abusive and would "whack" Garcia. 53 RR 235. His Aunt Sylvia was even more verbally abusive. 53 RR 235. She cursed at him, screamed that she did not want him in the house, and constantly abused him. 53 RR 235. Sylvia called the police to come get Garcia when he was fourteen years old, and they took him to CPS. 53 RR 236. Nerone testified that she wanted to adopt Garcia—to remove him from the homelife he had—but she was a single mother and could not afford to do it. 53 RR 249–50.

Garcia met and married Debra Garza and later graduated from high school. 53 RR 238. Soon after, Garcia joined the U.S. Coast Guard, and he and Debra had a daughter who they named Arlene after Garcia's sister. 53 RR 238.

Elizabeth Venecia was Garcia's caseworker for one of the years he was in CPS's care. 54 RR 5. Her testimony about Garcia's homelife echoed that of Nerone's and provided detail about Garcia's experience in foster care. 54 RR 8–42. Venecia's report summarized Garcia's homelife as one of chronic poverty, a chaotic home environment, and with questions about possible violence among family members, suicidal tendencies, alcohol and drug problems, and criminal behavior. 54 RR 34. She stated that Garcia suffered emotional abuse and neglect. 54 RR 34–35.

Bridget Garza testified that Garcia and Debra came to see her the day after the Luna murder seeking her advice. 55 RR 6–13. She stated that Garcia told her about the murder but claimed he stabbed Luna in self-defense and that he was distraught about it. 55 RR 11.

Martha Pavalicek, Garcia's former mother-in-law, testified that Garcia was not violent and was a very good person. 55 RR 106. She stated that he was very respectful, loving, and understanding. 55 RR 107.

Garcia's ex-wife Debra testified about their marriage and breakup and what she witnessed of Garcia's prior homelife. 55 RR 136–44. She testified that Garcia was in the Coast Guard for two years but left with an honorable discharge due to his chronic seasickness. 55 RR 146–47. Soon thereafter, Garcia was convicted of the murder of Michael Luna. 55 RR 155–64.

Psychiatrist Judy Stonedale was called to testify as to Garcia's future dangerousness. 55 RR 40–100. She stated that Garcia had no distinct psychiatric abnormalities but suffered from mild depression. 55 RR 63–64. She testified Garcia had a horrible childhood. 55 RR 66–67. Further, she was surprised that he concluded his education, given "lots of disruptions, constant address changes, [and] periods of absenteeism." 55 RR 67. Everyone she interviewed described Garcia as "particularly nonviolent." 55 RR 68–69.

The final defense witness, clinical psychologist Gilda Kessner, was also called to give a risk assessment of Garcia's potential for future dangerousness.

Kessner calculated Garcia's risk for committing a serious act of violence while in administrative segregation to be .001. 56 RR 37–41. Dr. Kessner further stated that, based on Garcia's CPS and prison records prior to December 13, 2000, he had not given any indication that he was any kind of a management problem or that he would behave aggressively toward anyone. 56 RR 36.

II. Procedural History

Garcia was convicted and sentenced to death for the murder of police officer Aubrey Hawkins. The CCA upheld Garcia's conviction and death sentence on direct appeal. *Garcia v. State*, 2005 WL 395433, at *1–5. Garcia then filed a state habeas application, which was denied. *Ex parte Garcia*, No. 64,582-01 (Tex. Crim. App. Nov. 15, 2006) (unpublished order).

Garcia next filed a federal habeas petition. He then moved for, and was granted, a stay to exhaust various claims. *Garcia v. Quarterman*, Civ. Act. No. 3:06-CV-2185, Order (N.D. Tex. Dec. 4, 2007). Garcia then filed a subsequent state habeas application, which was dismissed as an abuse of the writ. *Ex parte Garcia*, No. 64,582-02 (Tex. Crim. App. March 5, 2008) (unpublished order).

Thereafter, Garcia filed an amended federal habeas petition. Following an evidentiary hearing, the district court denied habeas corpus relief and denied a COA. *Garcia v. Stephens*, Civ. Act. No. 3:06-CV-2185, Order (N.D. Tex. May 28, 2015). Garcia filed a post-judgment motion under Federal Rules of Civil Procedure 52(b), 59(a), and 59(e). The district court granted the motion

in part, amending one portion of its prior findings. *Garcia v. Stephens*, 2015 WL 6561274, at *1–9 (N.D. Tex. Oct. 29, 2015).

Garcia then filed an Application for a COA, which the Fifth Circuit denied. *Garcia v. Davis*, 704 F. App'x at 318–27. Garcia next filed a Petition for a Writ of Certiorari. The instant Brief in Opposition follows.

ARGUMENT

I. The Court Should Deny Certiorari Because Garcia's Defaulted IATC Claim Is Unworthy of this Court's Attention.

Garcia claims he was denied constitutionally effective assistance because his trial counsel failed to request during the punishment phase of trial an additional anti-parties instruction. Pet. Cert. at 18–33. He argues such a charge would have focused the jury on the conduct and actions of Garcia and not the actions of his cohorts when considering the special issues. Garcia first raised this claim in a subsequent state habeas application, which the state court dismissed as procedurally defaulted. *Ex parte Garcia*, No. 64,582-02 (Tex. Crim. App. March 5, 2008) (unpublished order). Garcia argued in the district court that the procedural default of the claim was excused under *Martinez* by his having received ineffective assistance of state habeas counsel who failed to raise the IATC claim during the initial state habeas proceedings. The district court, after allowing Garcia the opportunity to develop this claim at an evidentiary hearing, concluded that Garcia failed to show cause and prejudice

for his default of the IATC claim and that the claim was, alternatively, without merit. The Fifth Circuit later denied a COA as to the claim. For the reasons discussed below, the Fifth Circuit properly concluded that reasonable jurists could not debate the district court's rejection of Garcia's run-of-the-mill IATC claim.[4]

A. Standard of review

The Sixth Amendment guarantees a defendant the right to effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 684–86 (1984). A petitioner's claim that he was denied constitutionally effective assistance of counsel requires him to prove both that: (1) counsel rendered deficient performance, and (2) counsel's actions resulted in actual prejudice. *Id*. at 687–88, 690. Failure to prove either deficient performance or prejudice will defeat an IATC claim, making it unnecessary to examine the other prong. *Id*. at 687.

To demonstrate deficient performance, Garcia must show that in light of the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," i.e.,

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[4] Garcia makes a conclusory assertion that the Fifth Circuit's denial of a COA on this issue "eviscerate[d] the Eighth Amendment's guarantee of an individual sentencing determination for a defendant facing the death penalty." Pet. Cert. at 19. The Director does not construe Garcia's assertion to constitute an independent ground for relief but rather an assertion that the Fifth Circuit erred in denying his application for a COA. To the extent Garcia's assertion constitutes a ground for relief, the claim is entirely conclusory, unsupported, and never raised below.

"prevailing professional norms." *Id*. at 689–90. This Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight." *Id*. at 689–90; *see Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'") (citations omitted); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003). Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. If there is *any* "reasonable argument that counsel satisfied *Strickland*'s deferential standard," the state court's denial will be upheld. *Richter*, 562 U.S. at 105.

Even if deficient performance can be established, Garcia must still affirmatively prove prejudice that is "so serious as to deprive him of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This requires him to show a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different. *Id*. at 694. "A reasonable probability" is one sufficient to undermine confidence in the outcome. *Id*. "[T]he question in conducting *Strickland*'s prejudice analysis is *not* whether a court can be certain [that] counsel's performance had no effect on the outcome or whether it is possible [that] a reasonable doubt might have been established [had] counsel acted differently." *Richter*, 562 U.S. at 111 (emphasis added).

Rather, the "likelihood of a different result must be substantial, not just conceivable." *Id*. at 112.

In his federal habeas petition, Garcia raised a procedurally defaulted IATC claim. With regard to the defaulted claim, Garcia can only obtain merits review if he shows "cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10. It is Garcia's burden to establish cause and prejudice for the default. *Id*. at 14; *McCleskey v. Zant*, 499 U.S. 467, 494–95 (1991).

In determining whether Garcia has met his burden under *Martinez*, this Court must first determine whether Garcia's state habeas counsel was ineffective by applying the strictures of *Strickland* and its progeny to counsel's performance during the initial state habeas proceedings. *Martinez*, 566 U.S. at 14. Consequently, Garcia must show "that [state habeas counsel] was objectively unreasonable . . . in failing to" raise the particular claim he argues should have been raised. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). But while it is "possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, . . . it is difficult to demonstrate that counsel was incompetent." *Id*. at 288; *see Jones v. Barnes*, 463 U.S. 745, 751–53 (1983). Counsel's deliberate choice to not raise a particular claim does not constitute cause for the procedural default of that claim. *Smith v. Murray*, 477 U.S. 527, 533–34 (1986). Importantly, a petitioner may fail to satisfy *Martinez* even if he

raises a substantial, defaulted IATC claim if he does not show that state habeas counsel was ineffective for failing to bring it. 566 U.S. at 9.

The Court also must determine whether Garcia's underlying claim is "substantial," i.e., "has some merit." *Id*. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). The substantiality of the underlying IATC claim is based on the same standard for granting a COA. *Id*. at 14.

Lastly, the Court must determine whether Garcia was prejudiced by state habeas counsel's failure to raise the claim, i.e., whether the state habeas court would have granted Garcia relief on the underlying IATC claim if it had been raised. *See Strickland*, 466 U.S. at 694. Finally, if the Court finds that Garcia was prejudiced, the Court will conduct a merits review of the IATC claim. *Martinez*, 566 U.S. at 17.

B. Factual background

Garcia's jury was instructed at the guilt/innocence phase that it could find Garcia guilty of capital murder as a principal, party, or conspirator. CR 289–92. Therefore, at the punishment phase of trial, Garcia's jury received the following charge:

> **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 anticipated that a human life would be taken?

CR 302. The jury answered Special Issue No. 2 in the affirmative. CR 302.

During the evidentiary hearing in district court, trial counsel testified that they did not request any further anti-parties instruction because Garcia was not entitled to any further instruction. Transcript of Evidentiary Hearing at 47, 71, *Garcia v. Davis*, Civ. Act. No. 3:06-CV-2185 (N.D. Tex. Aug. 14, 2014). State habeas counsel Richard Langlois testified that he did not raise a claim in Garcia's initial state habeas application alleging that Garcia's trial counsel were ineffective for failing to request an anti-parties instruction because such a request by trial counsel would not have been granted. Transcript at 130–32.

C. Garcia's defaulted IATC claim is unworthy of this Court's attention because it is premised on a matter of state law that the state court resolved adversely to Garcia.

Garcia's IATC claim is based almost entirely on state law. Pet. Cert. at 20–24 (citing *McFarland v. State*, 928 S.W.2d 482, 516 (Tex. Crim. App. 1996), *abrogated on other grounds by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998); *Martinez v. State*, 899 S.W.2d 655, 657 (Tex. Crim. App. 1994); *Johnson v. State*, 853 S.W.2d 527, 536 (Tex. Crim. App. 1992); *Green v. State*, 682 S.W.2d 271, 287 (Tex. Crim. App. 1984); *Varga v. State*, 2003 WL 21466926, at *11 (Tex. Crim. App. 2003)). Indeed, Garcia's argument rests on the assertion that he was entitled to an additional anti-parties instruction because Texas law required a specific, additional instruction. Pet. Cert. at 25 ("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."). But the state habeas court rejected such an argument when it addressed Garcia's claim that his jury instructions regarding co-conspirator liability were infirm because the instruction "allowed a lesser burden of proof of intent to secure a conviction for capital murder." SHCR-01 at 404.

The state court found that the co-conspirator instruction did not "excuse the State altogether from proving a culpable mental state." SHCR-01 at 405. The court went on to find that "Texas's capital-punishment scheme does not unconstitutionally allow an individual to be put to death for merely being a party to a murder." SHCR-01 at 405. The court discussed Texas's statutory anti-parties instruction (i.e., the instruction Garcia received),[5] and it stated that the instruction "ensures that a capital defendant convicted as a party or co-conspirator will not be sentenced to death unless he is found to bear personal moral culpability for the victim's death." SHCR-01 at 405–06 (citing *Prystash v. State*, 3 S.W.3d 522, 540 (Tex. Crim. App. 1999)). "The Court [found] that [Garcia's] jury was given this 'anti-parties' special issue instruction in the charge." SHCR-01 at 406. Consequently, Garcia's claim does

[5] Tex. Code Crim. Proc. art. 37.071 § 2(b)(2) (West 2000).

not raise a cognizable federal habeas claim to the extent his IATC claim is premised on a disagreement with the state court as to state law.

Nonetheless, Garcia fails to show that he was entitled under state law to any additional anti-parties instruction. Necessarily then, he cannot show that trial counsel were deficient for failing to request an additional instruction. Again, Garcia's jury was required, as mandated by state law, to answer whether it found "beyond a reasonable doubt that [Garcia] actually caused the death of the deceased, Aubrey Hawkins, or did not actually cause the death of the deceased by intended to kill the deceased or another or anticipated that a human life would be taken?" CR 302; *see* Tex. Code Crim. Proc. art. 37.071 § 2(b)(2).

In the case most heavily relied upon by Garcia, *Martinez v. State*, the CCA stated that it had "never held that any particular language must be used before an instruction will be deemed an anti-parties charge." 899 S.W.2d at 657. "Rather, an instruction qualifies as an anti-parties charge if it accomplishes the purpose for which it is intended—namely, if it protects the defendant's constitutional rights by ensuring that a jury's punishment-phase deliberations are based solely upon the conduct of that defendant and not that of another party." *Id.* As noted above, the state habeas court *in this case* held that Garcia received an anti-parties charge. Garcia provides no support for his argument that state law mandated any specific, additional instruction. Indeed,

the CCA has repeatedly held that the statutory anti-parties charge, which Garcia received, is sufficient.[6] *Solomon v. State*, 49 S.W.3d 356, 369 (Tex. Crim. App. 2001); *Wood v. State*, 18 S.W.3d 642, 648–49 (Tex. Crim. App. 2000); *Ladd v. State*, 3 S.W.3d 547, 570 (Tex. Crim. App. 1999); *McFarland*, 928 S.W.2d at 516–17; *Belyeu v. State*, 791 S.W.2d 66, 71–72 (Tex. Crim. App. 1989); *Varga*, 2003 WL 21466926, at *11 ("The statutory anti-parties charge was sufficient, and the trial court did not abuse its discretion by refusing the appellant's requested charge [to consider only the appellant's conduct and state of mind in answering the special issues]."); *Fuller v. State*, 2000 WL 35432767, at *3 (Tex. Crim. App. 2000).

Garcia proffers an example of an instruction that trial counsel should have requested. Pet. Cert at 14 n.5 ("You will confine yourselves, in answering the following special issues, to considering the conduct and mental state of the defendant standing alone."). But the CCA has squarely held that such an instruction is not required where the statutory instruction was provided. *McFarland*, 923 S.W.2d at 516–17; *see Solomon*, 49 S.W.3d at 369. Garcia's assertion that the trial court would have granted a request for an additional instruction is refuted by the CCA's precedent. Pet. Cert. at 24.

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[6] Notably, the CCA rejected the same claim in another case involving a member of the Texas Seven. *See Halprin v. Davis*, 2017 WL 4286042, at *19 (N.D. Tex. 2017) (describing state court's rejection of the petitioner's claim that trial counsel were ineffective for failing to request an additional anti-parties charge).

Garcia cannot show that trial counsel were constitutionally deficient for failing to request a specific anti-parties instruction where he received an anti-parties instruction, controlling state law stated that no specific punishment-phase instruction was required to constitute an anti-parties instruction, and controlling state law approved the statutory anti-parties instruction. During the evidentiary hearing in district court, Garcia's counsel did not suggest that any additional instruction was required under state law. Rather, counsel asserted "I think the issue boils down to, . . . Special [Issue] Number 2 [ ] exists, and everyone knows that. And our issue is, you know, why—why would [trial counsel] not preserve something via an objection in the hopes of change—trying to change the case law on that."[7] Transcript at 152. In light of Garcia's

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[7] Garcia asserts that trial and state habeas counsels' testimony at the evidentiary hearing that Garcia was not entitled to an additional instruction was based on a "mistake of law." Pet. Cert. at 24. As described above, counsel were entirely correct as to their understanding of the law. Notably, federal habeas counsel's representation to the district court reflected the same (correct) understanding of the existing law that Garcia now frames as mistaken. Transcript at 152–53. When the district judge noted that she could not find trial counsel ineffective for failing to request an instruction to which Garcia was not entitled, federal habeas counsel stated, "I understand what you're saying. I do not have additional case law to offer you." Transcript at 153.

Garcia cites to the Court's opinion in *Hinton v. Alabama* for the proposition that counsel's mistake of state law may form the basis of an IATC claim. 134 S. Ct. 1081, 1088 (2014). At issue in *Hinton* was whether trial counsel was deficient for failing to request additional funding because of his mistaken belief that state law did not permit additional funding. But in that case, trial counsel's mistake was evident from the controlling statute and it does not appear that the state court had found that state law did not permit additional funding. *See Hinton v. State*, 172 So.3d 355, 358 (Ala. Crim. App. 2013).

concession during the evidentiary hearing, he cannot show that trial counsel were constitutionally deficient in failing to lodge a meritless objection or request. The reasonableness of trial counsels' decision not to request an additional instruction was confirmed by the state habeas court's finding that Garcia received an anti-parties instruction. Consequently, Garcia's defaulted IATC claim is meritless. For the same reason, the claim is insubstantial and the Fifth Circuit properly denied a COA.

D. Garcia's defaulted IATC claim is meritless under federal law.

To the extent Garcia's claim is based on federal law, Garcia has pointed to no clearly established Supreme Court precedent on which his trial counsel could have relied in requesting any further anti-parties instruction. *See Ramirez v. Dretke*, 398 F.3d 691, 697 n. 6 (5th Cir. 2005) (holding that anti-parties instruction identical to that submitted to Garcia's jury was adequate and noting that no Supreme Court precedent required any additional instruction). Indeed, the statutory anti-parties instruction provided to Garcia's jury has repeatedly been upheld as being sufficient under federal law because it directs a jury to limit its punishment-phase deliberations to the conduct of the defendant. *See id.*; *Westley v. Johnson*, 83 F.3d 714, 723 (5th Cir. 1996); *Nichols v. Scott*, 69 F.3d 1255, 1268 (5th Cir. 1995); *Belyeu v. Scott*, 67 F.3d 535, 542–44 (5th Cir. 1995); *Halprin*, 2017 WL 4286042, at *19; *Johnson v.*

Quarterman, Civ. Act. No. 4:05-CV-3581, 2007 WL 2891978, at *8 (S.D. Tex. 2007) (unpublished); *Fuller v. Dretke*, Civ. Act. No. 1:03-CV-1416, 2005 WL 4688015, at *7 (S.D. Tex. 2005) (unpublished).

Garcia cites to *Enmund v. Florida*, 458 U.S. 782 (1982), for support. Pet. Cert. at 20. He argues that *Enmund* prohibits imposition of the death penalty where the defendant was involved in a crime but did not take a life, attempt to take a life, nor intend to take a life. Pet. Cert. at 20. To the extent Garcia argues that trial counsel were deficient for failing to request an additional anti-parties charge because such an additional instruction was required under *Enmund*, the argument fails.

The Court held in *Enmund* that the Eighth Amendment prohibits imposition of the death penalty where the defendant is a party to a felony in the course of which a murder is committed by others but where the defendant himself does not kill, attempt to kill, or intend that a killing take place or that lethal force would be employed. 458 U.S. at 797. In light of *Enmund*, Texas adopted its statutory anti-parties instruction. *See Prystash v. Davis*, 854 F.3d 830, 840 (5th Cir. 2017) (citing Tex. Code Crim. Proc. art. 37.071 § 2(b)). The statutory anti-parties instruction tracks *Enmund*'s holding by precluding a jury from imposing the death penalty on a defendant who does not kill, intend to kill, or anticipate a killing. CR 302. Garcia proffers no basis on which to find that the anti-parties instruction provided to his jury contravenes *Enmund*.

Consequently, Garcia cannot show that trial counsel were deficient for failing to request an additional anti-parties charge, and his IATC claim fails.

E. Garcia cannot show prejudice in light of his own threats during the armed robbery to kill Oshman's employees.

Garcia argues that he was prejudiced by trial counsels' failure to obtain an additional anti-parties instruction. Pet. Cert. at 26–33. He argues that the State's guilt/innocence-phase closing arguments, the evidence against Garcia, and the lack of an additional anti-parties instruction created a likelihood that the jury imposed the death penalty because trial counsel failed to request such an instruction. Garcia also asserts there was a "genuine question" as to whether Garcia anticipated a human life would be taken in the course of the armed robbery of the Oshman's sporting goods store. Pet. Cert. at 27–28. In support, Garcia points to the facts that the armed assailants carefully zip-tied the Oshman's employees (indicating a lack of intent to harm the employees) and the assailants did not want to steal the employees' money. Pet. Cert. at 27–28. Garcia's effort to avoid the import of the evidence against him is to no avail.

Most tellingly, Garcia's anticipation that lethal force would be used during the armed robbery was thoroughly proven through his own threat, while armed with a gun, to John Lindley during the robbery of the Oshman's store: "Don't do nothing stupid if you want to see Christmas. If we have to shoot

one of you, we'll have to shoot all of you." 45 RR 215. Garcia's threat is dispositive of his IATC claim. His anticipation that a human life would be taken or that lethal force would be employed during the course of the armed robbery could not be more plainly stated. Garcia fails to acknowledge his own words let alone explain how he could have been prejudiced by the absence of an additional, superfluous anti-parties instruction in light of his threat to the store employee. Contrary to Garcia's assertion that there exists a genuine question as to whether he anticipated a life being taken and that there was no evidence that he intended to injure or kill the store employees, his active participation in the armed robbery and his threat belie the notion that "[n]one of the actions taken inside the store establishes any intent to kill the employees." Pet. Cert.at 28.

Garcia's anticipation was also proven through the evidence that he actively participated in the elaborate and violent prison escape during which fourteen handguns, a shotgun, an AR-15 rifle, and ammunition were stolen and then used during the Oshman's robbery and murder of Officer Hawkins. 49 RR 191. All of the stolen weapons, other than one that was left at the scene of Officer Hawkins's murder, were found with the escaped inmates when they were arrested in Colorado. 49 RR 191–92. Forty-four additional guns were stolen during the Oshman's robbery. 49 RR 190. During the prison escape, Garcia assaulted guards and prison employees, holding a shank to the ear or

throat of several of the victims and threatening to kill them if they were not quiet. 51 RR 51, 55–57. Garcia threatened one prison employee, "[i]f something goes wrong, if anything goes wrong, we're both going to get the needle. You'll get yours now and I'll get mine in five years, because the year 2050 doesn't come soon enough." 51 RR 123. This evidence overwhelmingly showed Garcia's intent and anticipation.

Garcia asserts that he was prejudiced by a lack of an additional anti-parties instruction because it was not established that he was in the loading dock when Officer Hawkins was killed. Pet. Cert. at 27. But witnesses testified that Garcia left the breakroom in which the hostages were being held and that Garcia had enough time to get to the loading dock where Officer Hawkins was killed before the shots began. 45 RR 134. Moreover, the jury could properly answer the anti-parties special issue affirmatively by finding that he anticipated a human life would be taken. *Enmund*, 458 U.S. at 797.

Garcia also argues he was prejudiced by a lack of an additional anti-parties charge because the State in its closing arguments encouraged the jury to rest its answers to the special issues on the actions of Garcia's cohorts and not Garcia himself. But Garcia cites primarily to the State's closing arguments during the guilt/innocence phase of trial. Pet. Cert. at 29–30. The State's punishment-phase closing arguments appropriately focused on Garcia's

actions, intent, and anticipation. For example, prosecutor Tom D'Amore argued,

> Special Issue No. 2, I submit to you, I submit you already know the answer to that from the evidence. Did he intend to kill or did he anticipate that somebody would die or did he cause the death? Yes, beyond all reasonable doubt.
>
> Remember we talked about that. Most of you, if not all of you, I think, told us, if you take a loaded gun into a robbery, then you anticipate you are going to use it. Yeah, you anticipate that.
>
> And bless her heart, Dr. Stonedale yesterday, I'm sure she's a nice lady, but even she said that. Remember, Mr. Shook asked her, do you think he anticipated when he had that loaded gun in there what would happen, at that robbery? And she said yes to that. Even she said yes.

56 RR 83. Mr. D'Amore also quoted Garia's threat to prison employees: "They threaten with a shank in his ear on the ground, this is one pound of pressure, two more and you're dead. Two more and you get the needle now and I get it five years from now. Did he anticipate? Did he know? Did he intend to kill, if needed?" 56 RR 80.

Prosecutor Toby Shook later argued in closing,

> We talked to you at great length about crimes being committed by groups of people, what they knew, how much they participated in it. And that under the law it proves people commit crimes, capital murder, that they can be held responsible and ultimately receive the death penalty, even if they are not the actual triggerman or the killer, if they helped commit that act and each of you agreed that, yes, that's how the law should be and that, yes, those individuals should receive the death penalty in those situations.

> And when we asked you what types of fact situations you were thinking of, you all had similar answers. How actively involved they were. Did they know a gun was going to be used? Did they themselves have a gun?
>
> And we talked about some other examples about a bank vault that sometimes because of the murder that occurs, you don't have an eyewitness that can come to the courtroom, but you know these people were actively involved in the murder of this person. Who exactly did it, we don't know. The bank vault example. And each and every one of you said, yes, of course. Both of those people should be prosecuted for the death penalty.
>
> See, we don't reward the criminal again for murdering the victim. Aubrey Hawkins can't come in here and tell you which one shot him. But we 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 in this case.

56 RR 124–25. Further,

> the evidence shows it was well planned and they thought about it. And the one man that they used all the time with the shank was this man. He couldn't wait to start cutting these people's throats. He couldn't wait to stick them in the ears when they are bound and gagged.
>
> You know, they talked about when he was 14 that he's a bully. Those character traits stayed with him his whole life. Sticking knives in people's ears, threatening to shove it in their brains. And do you not think for one second, if he had to, if that was what stood between him and freedom, he wouldn't have killed these people from what you know about him? There's no doubt about it, no doubt about it at all.
>
> And then once he gets out, once he gains his precious freedom, he didn't go off on his own. He chooses to stay with these men. Chooses to stay with them because there's a plan. They are going to hit an Oshman's together. And he goes in there with a weapon

> and you already know, we've been over this in guilt/innocence, he was actively participating in that robbery.
>
> And he's the one, as Wes Ferris said, shows how well he recognized this, he wanted to hurt somebody. Wes Ferris told you. He wanted to. He was looking for an opportunity. It's those threats, that bullying, still coming out.
>
> And when he got his opportunity and he knew Aubrey Hawkins [w]as coming around there, he and the others went out there and they executed Aubrey Hawkins. There's no doubt about their intent. You can look at those photographs of that car. They surrounded, they shot, and they were in a frenzy to murder Aubrey Hawkins. You can look at this exhibit and there's no doubt of his intent or any of their intent. They wanted him dead.
>
> So when you consider question No. 2, there's no doubt at all what his intent was or what he anticipated. Even Dr. Stonedale said that. You think about the weapons they brought, their objective, and how they murdered Aubrey Hawkins, 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.

56 RR 134–36.

Trial counsel, Brad Lollar, argued in closing there was no evidence that Garcia killed Officer Hawkins. 56 RR 100–01. Consequently, the jury had to consider whether Garcia anticipated that a human life would be taken during the armed robbery. 56 RR 101. Mr. Lollar argued there was no evidence that Garcia had reason to anticipate his cohorts would commit a murder during the robbery in light of the fact that the State had not proven Garcia fired a shot during Officer Hawkins's murder. 56 RR 102, 108–09. The closing arguments

of both the State and trial counsel appropriately focused on the evidence of Garcia's intent and anticipation.

Garcia's IATC claim fails because he cannot show resultant prejudice from the lack of an additional anti-parties instruction to which he was not entitled. The evidence of his intent and anticipation was overwhelming. His active participation in a uniquely well-coordinated prison escape and armed robbery plainly demonstrated that Garcia killed Officer Hawkins, intended to do so, or anticipated that lethal force would be used during the armed robbery. Consequently, Garcia fails to raise a substantial IATC claim or a compelling issue that warrants this Court's attention.

II. Garcia Fails to Show that State Habeas Counsel Was Ineffective.

To establish cause and prejudice for the default of this IATC claim, Garcia must show the claim is substantial *and* that his initial state habeas counsel was ineffective for failing to raise it. *Martinez*, 566 U.S. at 18. Garcia argues that state habeas counsel was ineffective for failing to raise this IATC claim and that the failure to do so was based on a mistake of law, i.e., Garcia's disentitlement to an additional anti-parties instruction. Pet. Cert. at 33–34. Garcia's argument fails for the reasons discussed above.

First, as discussed at length above, Garcia did not have an entitlement under either state or federal law to an additional anti-parties instruction. State habeas counsel testified at the district court's evidentiary hearing that he did

not present this IATC claim in Garcia's initial state habeas application because a request by trial counsel for an additional anti-parties charge would have been futile. Transcript at 130–31. State habeas counsel's decision in that regard was correct, and the fact that the state habeas court, district court, and Fifth Circuit found that Garcia received an anti-parties instruction and was entitled to no more confirms the reasonableness of that decision. For the same reason, Garcia cannot show that his state habeas application would have been granted if this claim had been presented. State habeas counsel could not be ineffective for failing to raise a meritless claim during Garcia's initial state habeas proceedings. Consequently, this claim does not satisfy the standard under *Martinez* and is procedurally defaulted.

For these reasons, the Fifth Circuit properly determined that reasonable jurists could not debate the district court's rejection of Garcia's IATC claim as being procedurally defaulted and without merit. Consequently, his petition for a writ of certiorari should be denied.

III. Garcia's Freestanding Eighth Amendment Claim Is Unworthy of this Court's Attention Because It Is Waived and Unexhausted.

Lastly, Garcia argues that the jury instructions violated the Eighth Amendment because they did not protect his right to individualized sentencing. Pet. Cert. at 35–38. He argues the lack of an additional anti-parties instruction including a phrase such as "on his own" would have satisfied the

requirements of the Eighth Amendment. Pet. Cert. at 37. But for the reasons discussed above, Garcia's jury instructions satisfied this Court's precedent as set forth in *Enmund*, and Garcia was entitled to no further jury instruction. Moreover, Garcia's freestanding challenge to Texas's statutory anti-parties instruction is waived and unexhausted. He did not raise such a claim in state court in either his initial or subsequent state habeas applications nor in his federal habeas petition or application for a COA. Consequently, Garcia has forfeited his Eighth Amendment claim, and he does not present a compelling issue that warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

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