No. 17-7865

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender
District of Arizona

Karen S. Smith
Counsel of Record
Mridula S. Raman
Jessica M. Salyers
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
Karen_Smith@fd.org
Counsel for Petitioner Joseph C. Garcia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Statutes

ARGUMENT

Petitioner Joseph C. Garcia was denied effective assistance of counsel at his capital-sentencing proceeding when his counsel failed to request a jury instruction that would have secured Garcia's Eighth and Fourteenth Amendment right to be sentenced based upon his own actions and intents, rather than those of other individuals. Respondent contends that this Court should deny Garcia's Petition for Writ of Certiorari for, in effect, two reasons: (1) Garcia was not entitled to the jury instruction in question; and (2) Garcia suffered no prejudice from the absence of such an instruction. (Brief In Opposition at 14–19, 21–27.)[1] As explained in Garcia's Petition and below, Respondent errs on both fronts.

Garcia was entitled under state law to an instruction telling his jurors not to apply Texas's law of parties at his penalty phase, and his trial counsel performed deficiently in failing to request that instruction. Further, had the jurors been properly instructed to consider only Garcia's own intents and actions when deciding his sentence, there is a reasonable likelihood that at least one of them would have decided the "anti-parties" special issue differently, thereby precluding a death sentence. Trial counsel's failure thus constituted ineffective assistance of counsel. Because this ineffective-assistance claim was substantial, post-conviction counsel was ineffective for failing to raise it. And because this claim implicates Garcia's

[1] The Brief in Opposition will hereinafter be referred to as "BIO." Other citations follow the same format used in Garcia's Petition for Writ of Certiorari ("Petition").

constitutional right to be sentenced based on his own culpability—a central pillar of the criminal-justice system—this Court should accept review of this case.

I. Under Texas law, Garcia was entitled to an instruction at the penalty phase directing the jury to consider his own actions and intents, separate from those of his associates.

Texas law provides that when a jury is instructed on the law of parties at the guilt/innocence phase of a trial, the jury should be instructed at the penalty phase to limit its consideration to the defendant's personal culpability. *See, e.g.*, *Martinez v. State*, 899 S.W.2d 655, 657 (Tex. Crim. App. 1994). While the Court of Criminal Appeals has not mandated any particular language beyond statutory requirements, the instruction must be adequate to alert jurors—jurors who have previously been instructed to treat the defendant and his associates interchangeably—that the rules have changed and that the law of parties does not apply to sentencing. *See, e.g.*, *id.*; *Belyeu v. State*, 791 S.W.2d 66, 71–73 (Tex. Crim. App. 1989).

In arguing that Garcia was not entitled to any instruction beyond the statutory special issues, Respondent cites a string of cases. (BIO at 17 & n.6.) However, these cases reaffirm Garcia's right to have his jurors properly instructed to confine themselves to considering his actions and mental state alone when answering the penalty-phase special issues.

More specifically, several of these cases espouse instructions that make clear to the jury that it must make an individualized determination of culpability; but on

its own and without modification, the statutory second special issue does not ensure such a determination. For example, in *Varga v. State*, the Texas Court of Criminal Appeals approved the second special issue as adequate to protect the right to an individualized sentencing when the trial court also offered the jury the following clarification: "[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." No. 73990, 2003 WL 21466926, at *11 (Tex. Crim. App. June 25, 2003) (alteration in original). Relatedly, in *Belyeu*, the court recognized that in answering the special issues, the jury might get confused and answer based on "the deliberate conduct of another for whom the defendant was criminally responsible as a party." The court accordingly determined that when there was a possibility of jury confusion, a clarifying instruction was required if requested. 791 S.W.2d at 73.

Similarly, the court accepted in *McFarland v. State* the statutory second special issue, modified for clarity and emphasis to include the additional phrase "the defendant himself," as sufficient to protect the defendant's right to an individualized sentencing determination. 928 S.W.2d 482, 516–17 (Tex. Crim. App. 1996) (per curiam), *abrogated on other grounds by Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998). The trial court had ultimately given the following

instruction:

> Do you find from the evidence beyond a reasonable doubt that [appellant], *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?

Id. at 516 (alteration and emphasis in original). The court then cited the phrase "the defendant himself" a second time to demonstrate that the charge sufficed to inform the jury that it was to consider the defendant's actions and intents alone. *Id.* at 516–17.

The remainder of Respondent's cases rely on *McFarland*, thereby acknowledging that additions to the second special issue are necessary to ensure that the jury does not apply the law of parties at the penalty phase. (*See* BIO at 17 & n.6); *see also, e.g.*, *Wood v. State*, 18 S.W.3d 642, 648–49 (Tex. Crim. App. 2000) (citing *McFarland* and highlighting the critical phrase "the defendant himself"); *Fuller v. State*, No. AP-73106, 2000 WL 35432767, at *3 (Tex. Crim. App. Dec. 20, 2000) (citing *McFarland*); *Ladd v. State*, 3 S.W.3d 547, 570 (Tex. Crim. App. 1999) (same).

In sum, under state law, Garcia was at least debatably entitled to a jury instruction, beyond the statutory special-issue language, that would have guaranteed him an individualized sentencing determination as required by the

Eighth and Fourteenth Amendments. Jurists of reason could accordingly debate whether trial counsel were ineffective for failing to request such an instruction, as well as whether post-conviction counsel was ineffective for failing to raise trial counsel's ineffectiveness.

II. Trial counsel's failure to request an adequate anti-parties instruction prejudiced Garcia, especially in light of the focus on the law of parties in his case.

Had the jury been properly instructed, there is a reasonable likelihood that at least one juror would have answered "no" to the second statutory special issue, thereby precluding a sentence of death. In other words, if the jury knew not to apply the law of parties, at least one juror would have found it not proven beyond a reasonable doubt that Garcia himself had anticipated that a life would be taken during the Oshman's robbery.[2]

Preliminarily, whether Garcia anticipated that a life *would* be taken is different than whether he anticipated that one *could* be taken. *Cf., e.g.*, *Cook v. Baker Equip. Eng'g Co.*, 582 F.2d 862, 864 (4th Cir. 1978) ("There is no proof that Cook was aware that a short circuit could be set up . . . . It is one thing to say that Cook knew that a short circuit Could occur, it is completely another argument,

[2] Respondent does not assert that the State could prove beyond a reasonable doubt that Garcia killed or intended to kill Officer Aubrey Hawkins. (*See* BIO at 21–27 (arguing only that some testimony suggested Garcia had sufficient time to get to the site of the shooting before it began, not that Garcia shot or intended to shoot Hawkins).) The only remaining question for the second special issue, then, is whether Garcia anticipated that a life would be taken. *See* Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(2) (West 1999).

however, to say that Cook knew . . . that a [short] circuit Would occur."). Here, "could" means anticipating the possibility of a death; "would"—the operative word—involves anticipating that a death *will* occur. *Cf., e.g.*, *Rodriguez v. Akal Sec., Inc.*, No. 12-20550-CIV, 2013 WL 435947, at *5 (S.D. Fla. Feb. 4, 2013) ("Even if it might be foreseeable that some injury could occur, . . . it is certainly not foreseeable that [it] would occur."); *Thomas v. Evenflo Co.*, No. 2:02CV2001-VEH, 2005 WL 6133409, at *13 (N.D. Ala. Aug. 11, 2005) ("[T]he tests do not prove that an event would occur, only that they *could* occur."). Given the statutory text of the second special issue, the State thus had to prove to the jury beyond a reasonable doubt that Garcia anticipated that a death would occur with certainty.

Respondent contends that Garcia cannot show prejudice and deems "[m]ost telling[]" that Garcia, while armed, purportedly threatened Oshman's employee John Lindley during the robbery. (BIO at 21–22.) However, a threat is not very probative, let alone dispositive, of what will happen. Instead, it is at most probative of what might happen. *Cf. Holloway v. United States*, 526 U.S. 1, 11 (1999) (recognizing that a threat may be "an empty threat, or [an] intimidating bluff"). Further, even if Garcia did make the threat cited by Respondent, the statement was immediately followed by the removal of zip ties from a store employee's hands so as not to hurt the employee—evidence of a desire not to physically harm the people in the store. (RR 45 at 218–20.)

Respondent further offers details of the Texas Seven's escape from prison as evidence that Garcia, beyond a reasonable doubt, anticipated that a death would occur at Oshman's. (BIO at 22–23.) However, such evidence is immaterial to the question whether he "anticipated that lethal force would be used during the armed robbery." (BIO at 27.) The purpose of the second special issue is to assess personal culpability during the capital crime, not at some other time. As explained in the Petition, anti-parties instructions follow from this Court's ruling in *Enmund v. Florida*, 458 U.S. 782 (1982). (Pet. at 19–21); *see also, e.g.*, *Green v. State*, 682 S.W.2d 271, 287 (Tex. Crim. App. 1984) (recognizing that after *Enmund*, the law of parties could not apply to capital-sentencing proceedings). Further, this Court concluded in *Enmund* that "[f]or purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt." 458 U.S. at 801. In so holding, this Court did not consider Enmund's conduct or intents during, for example, the prior armed robbery for which he had been convicted. *See id.*; *see also id.* at 805 (O'Connor, J., dissenting). Enmund's actions during that separate crime had no bearing on his culpability during the capital crime, and it was only his culpability during the capital crime that mattered for his capital sentencing. *See id.* at 801.

Here, Garcia was not charged with any crime in conjunction with the prison escape. (*See* RR 45 at 10–11 (indictment read aloud to jury).) No aspect of the escape constituted part of the capital crime. (*See* RR 45 at 10–11.) Nothing that happened during the escape is probative of whether, many days later, at a different location and under entirely different circumstances, Garcia anticipated that a life would be taken.

Finally, Respondent argues that the focus of the penalty phase was on Garcia's individual conduct and mens rea, as opposed to those of his associates. (BIO at 23–27.) That is incorrect: the State expressly discussed the law of parties with the jury during the penalty-phase rebuttal argument. (*See* RR 56 at 123–25.) The State reminded the jurors, "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.) The State went so far as to tell the jury *at the penalty phase* that this case demonstrated "the wisdom of the law of parties. . . . This [was] the type of case it[] [was] made for." (RR 56 at 125.) Even Respondent's quoted passage from the State's penalty-phase closing reflects how heavily the State emphasized the actions of the Texas Seven as a whole—"they"— when discussing the capital crime. (*See, e.g.*, BIO at 26 (quoting RR 56 at 135–36 ("There's no doubt about their intent. . . . 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.")).)

The State proved beyond a reasonable doubt that the Texas Seven, treated as one entity, killed, intended to kill, or anticipated that life would be taken during the Oshman's robbery. The State did not prove the same for Garcia as an individual, and so Garcia was prejudiced by his counsel's failure to ensure that his jury was properly instructed to make an individualized sentencing determination.

CONCLUSION

Garcia was denied effective assistance of counsel when his counsel failed to protect his Eighth and Fourteenth Amendment right to a capital-sentencing determination based on his personal culpability. In order that Garcia may vindicate his right to effective assistance of counsel, and moreover his right to be sentenced based solely on his own actions and intents, he respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted: April 9, 2018.

JON M. SANDS
Federal Public Defender

s/ Karen S. Smith
Karen S. Smith
Counsel of Record
Mridula S. Raman
Jessica M. Salyers
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 voice
(602) 889-3960 facsimile
Karen_Smith@fd.org

Counsel for Petitioner Joseph C. Garcia