No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Joseph C. Garcia,
Petitioner,

vs.

State of Texas,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-64,582-03

EX PARTE JOSEPH C. GARCIA, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. W01-00325-T(C) IN THE 283RD JUDICIAL DISTRICT COURT DALLAS COUNTY

***Per curiam*. ALCALA, J., filed a dissenting opinion. HERVEY and RICHARDSON, JJ., not participating.**

O R D E R

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a motion to stay applicant's execution.[1]

In February 2003, a jury found applicant guilty of the December 2000 capital

[1] Unless otherwise indicated, all future references to Articles are to the Texas Code of Criminal Procedure.

murder of a peace officer.[2] The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Garcia v. State*, No. AP-74,692 (Tex. Crim. App. Feb. 16, 2005)(not designated for publication).

In his initial post-conviction application for a writ of habeas corpus, applicant raised forty-six claims in which he challenged, among other things, the effectiveness of his counsel, whether the trial court erred in denying his challenges for cause to various venire members, and the constitutionality of Article 37.071. This Court denied applicant relief on those claims. *Ex parte Garci*a, No. WR-64,582-01 (Tex Crim. App. Nov. 15, 2006)(not designated for publication).

Applicant filed a subsequent application (our -02) in the trial court on November 12, 2007. In that application, applicant raised six allegations in which he asserted that his trial and appellate counsel rendered ineffective assistance, and his initial habeas counsel was not competent. We dismissed that application as an abuse of the writ. *Ex parte Garci*a, No. WR-64,582-02 (Tex Crim. App. Mar. 5, 2008)(not designated for publication).

On November 14, 2018, applicant filed in the trial court the instant writ application. In this application, applicant raises five claims in which he asserts that the State unknowingly presented false and misleading evidence, the newly discovered racial

[2] Alternatively, applicant was charged with intentionally causing the death of an individual while in the course of committing or attempting to commit a robbery.

animus of the trial judge deprived him of due process and a fair trial, he was denied the effective assistance of counsel during the punishment phase of his trial, and his execution would violate the Eighth Amendment because he neither killed nor intended to kill and because he has spent a number of years on death row.

We have reviewed the application and find that the allegations do not satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claims raised, and we deny his motion to stay his execution. Art. 11.071 § 5(c).

IT IS SO ORDERED THIS THE 30th DAY OF NOVEMBER, 2018.

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-64,582-03

EX PARTE JOSEPH C. GARCIA, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION CAUSE NO. W01-00325-T(C) IN THE 283RD JUDICIAL DISTRICT COURT DALLAS COUNTY

ALCALA, J., filed a dissenting opinion.

DISSENTING OPINION

The United States Supreme Court has recognized a categorical bar against executing individuals who were juveniles when they committed their capital offenses;[1] against executing intellectually disabled persons;[2] and against executing those whose offenses against another person did not result in the death of the victim.[3] The question presented by

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1 *Roper v. Simmons*, 543 U.S. 551 (2005).

2 *Atkins v. Virginia*, 536 U.S. 304 (2002).

3 *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

this case is whether the reasons underlying those decisions should also apply to categorically preclude the death penalty for a defendant convicted as a party to a capital offense in the absence of evidence showing that he actually killed or intended to kill another person. This argument is raised by Joseph C. Garcia, applicant, in his instant subsequent habeas application challenging the death sentence that was imposed against him as a result of his participation in an armed robbery of a store along with six co-defendants, several of whom shot and killed a peace officer during their flight from the scene. Applicant asserts that he was not present at the moment of the shooting and that he lacked any intent to kill the officer or anyone else. Furthermore, since the time of his last habeas application in 2007, applicant suggests that, in light of evolving standards of decency, a national consensus has now emerged against executing a defendant convicted of capital murder as a party who did not kill or have any intent to kill. Based on applicant's pleadings and the State's response opposing his application, I reach three conclusions at this juncture. First, I would stay applicant's impending execution to fully consider the merits of this complaint. Second, I would hold that applicant has alleged sufficient new facts that have emerged in the decade since his prior habeas application, and thus he has met the procedural requirements for consideration of his complaint in this subsequent habeas proceeding. Third, I would remand this case to the habeas court for factual findings and conclusions of law to substantively address applicant's complaint that the Eighth Amendment to the federal Constitution now categorically prohibits the execution of a defendant convicted as a party under certain

circumstances. Applicant presents colorable arguments that the reasons underlying the categorical prohibition against the death penalty in other circumstances also largely apply to a defendant convicted as a party who did not actually kill or intend to kill anyone. Because the Court declines to consider this issue and dismisses the application as subsequent, I respectfully dissent.[4]

I. Background

In 1996, after his conviction for murder, applicant was sentenced to fifty years in prison. In December 2000, while he was confined in Karnes County for that offense, applicant and six other prisoners, who later became known as "the Texas Seven," escaped from prison, injuring but not killing several people in the process. They took a large number of firearms and ammunition from the prison, and they committed various criminal offenses following their escape. Eleven days after their escape from prison, they committed an armed robbery of an Oshman's Sporting Goods store in Irving. During the robbery, one of the seven men remained outside the store as a lookout, while the rest of them, including applicant, each armed themselves with revolvers and entered the store as it prepared to close that evening. Inside the store, applicant and one or two other perpetrators gathered the employees into the break room at the back of the store and began tying them up. The other perpetrators stayed inside the store collecting merchandise and emptying the safes and cash

[4] The issue at this juncture is not whether applicant will ultimately prevail in his legal claim. Rather, the issue is whether he has pleaded facts to overcome the procedural bar, which he has, and whether his complaint should be addressed on its substantive merits, which it should.

registers. During these events, a witness outside the store suspected something was wrong and called 911. The lookout informed George Rivas, the group's leader, that the police were on their way. At that time, Rivas was in the process of moving the group's getaway vehicle to the store's back loading dock area. Over radio communication, Rivas notified his co-defendants in the break room, including applicant, that they were running out of time and needed to hurry up and get out of the store, but applicant and his co-defendants responded that they were not done tying up the employees. As this was occurring, Irving peace officer Aubrey Hawkins approached the back loading dock area of Oshman's. He pulled his patrol car behind the getaway vehicle. At Rivas's instruction, applicant and the other perpetrators guarding the employees left the break room. Within seconds, there were three quick volleys of gunfire resulting in Hawkins's death. Rivas and another perpetrator, Randy Halprin, were also shot but did not die. The group entered the getaway vehicle and escaped to Colorado, where six of them were arrested.[5] The seventh perpetrator, Larry Harper, committed suicide before he could be arrested.

At applicant's trial for capital murder, the State conceded that it could not prove beyond a reasonable doubt which of the perpetrators had fired their weapons at Hawkins. But the State emphasized that, even if he had not shot at Hawkins, applicant was nevertheless criminally liable for Hawkins's death pursuant to Texas's law of parties that permits a

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[5] Of the six defendants who were apprehended for this offense, all six of them received death sentences. Three have already been executed, while the remaining three, including applicant, remain confined on death row awaiting execution.

finding of guilt either as a principal-party or a conspirator-party.[6] The jury instructions at the guilt/innocence phase permitted applicant to be convicted as a direct actor or as a party, either as a principal or conspirator. Specifically, those instructions permitted applicant to be convicted of capital murder under one of several possible scenarios: (1) if the evidence showed that he shot Hawkins himself; (2) if the evidence showed that one of the other Texas Seven members shot Hawkins and applicant solicited, encouraged, directed, aided, or attempted to aid the other in that act; or (3) if the evidence showed that applicant entered into a conspiracy to commit robbery and one of his co-conspirators shot Hawkins in furtherance of the conspiracy in a manner that should have been anticipated as a result of carrying out the robbery, regardless of whether applicant had any intent to kill Hawkins.[7] The State's closing arguments emphasized the importance of the law of party liability, noting that the law of parties "is huge here" and that the law "holds them all responsible" for the group's conduct in killing Hawkins. After the jury found applicant guilty of capital murder, in addition to the future-dangerousness and mitigation special issues, the punishment phase instructions also included what is commonly referred to as the "anti-parties" special issue. That instruction asked the jury to determine whether applicant "actually caused the death of the deceased, [ ] or did not actually cause the death of the deceased but intended to kill the deceased or

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6 *See* TEX. PENAL CODE §§ 7.01-7.02.

7 For each of these three scenarios for liability, the State was permitted to prove capital murder for Hawkins's status as a peace officer or that the death occurred while in the course of a robbery.

anticipated that a human life would be taken[.]"[8] The jury answered "yes" to this question and the future-dangerousness special issue, and it answered "no" to the mitigation special issue. The trial court sentenced applicant to death.

This Court subsequently affirmed applicant's conviction and death sentence on direct appeal. *Garcia v. State*, No. AP-74,692, 2005 WL 395433, at *5 (Tex. Crim. App. Feb. 16, 2005) (not designated for publication). Applicant has filed two prior applications for post-conviction habeas relief, an initial application filed in 2004 and a first subsequent application filed in 2007, both of which were rejected by this Court. *Ex parte Garcia*, No. WR-64,582-01, 2006 WL 3308744, at *1 (Tex. Crim. App. Nov. 15, 2006) (per curiam) (not designated for publication); *Ex parte Garcia*, No. WR-64,582-02, 2008 WL 650302, at *1 (Tex. Crim. App. Mar. 5, 2008) (per curiam) (not designated for publication). The instant application is his second subsequent application.

In this second subsequent habeas application that was filed around eleven years after the prior subsequent application, applicant presents five claims asserting various constitutional violations.[9] Because of the limited window of time before applicant's impending execution for this crime, I will address only his third claim challenging the

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[8] *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2).

[9] Applicant's instant allegations include: (1) Due process violation based on the presentation of false and misleading evidence; (2) Due process violation based upon newly discovered evidence showing that the trial judge harbored racial animus towards non-whites; (3) Eighth Amendment violation based upon imposing the death penalty for defendants who neither killed nor intended to kill; (4) Sixth Amendment violation based upon the ineffective assistance of counsel; and (5) Eighth Amendment violation based upon execution occurring after fifteen years on death row.

constitutionality of his death sentence on Eighth Amendment grounds, which I conclude should be addressed on its merits rather than summarily dismissed and justifies a stay of execution in this case.

II. Whether the Eighth Amendment Prohibits the Execution of a Person who Neither Killed nor Intended to Kill

In his instant pleadings challenging his death sentence, applicant contends that the Eighth Amendment would now preclude his execution under these circumstances, which he suggests show that he neither killed nor intended to kill anyone during the commission of this offense. Applicant asserts that "this Court should hold that the evolving standards of decency embraced by the Eighth and Fourteenth Amendments to the U.S. Constitution no longer tolerate the execution of an individual convicted of capital murder without evidence that he killed or intended to kill the victim." I agree with applicant's contention that new facts have emerged since his previous subsequent application that support this claim, such that the claim should not be subject to the procedural bar on subsequent writs but should instead be resolved on its merits. Therefore, I would grant applicant a stay of his execution and remand this case to the habeas court for it to hear evidence and arguments on the issue of whether a national consensus has emerged against the execution of a person who did not directly cause the death of another or intend to kill another.

A. Substantive Arguments on the Merits of This Claim

The record in this case suggests that applicant was likely convicted as a party-conspirator to this offense, given the State's concession at his trial that it could not prove

which members of the group were directly responsible for Hawkins's death. The evidence adduced at applicant's trial showed that Hawkins had been shot eleven times by several different shooters, and the State suggested that applicant was at least in the loading dock area at the time of the shooting, but it presented no evidence to show that applicant fired any shots at Hawkins. As noted above, the State's closing argument emphasized that such evidence was unnecessary because Texas's law of parties would permit applicant's conviction as a party or conspirator to this capital offense. Applicant now contends that evidence from his trial, combined with evidence from his co-defendants' trials, conclusively shows that he was not one of the people who shot Hawkins. Specifically, applicant observes that the State's firearms and tool marks expert witness testified at his trial that "a total of five guns [] had bullets and/or cartridge cases that were fired from them" in the loading dock area where Hawkins was killed. Applicant further argues that the State presented evidence at his co-defendants' trials that identified the five members of the Texas Seven as those whose weapons were discharged: (1) George Rivas testified at his own trial that he initiated the gunfire and shot the peace officer multiple times, (2) Donald Newberry gave a statement to police indicating that he "fired three rounds" at the peace officer, (3) Larry Harper was identified as a shooter by co-defendant Randy Halprin who said Harper was shooting at the peace officer's car, (4) Randy Halprin was identified as a shooter by an investigating detective based on statements made by co-defendants who said Halprin shot co-defendant George Rivas and himself in the foot, and (5) Michael Rodriguez indicated in a statement

that his gun was wrapped in yellow electrical tape and that he dropped it when he grabbed the peace officer, and the State's firearms expert testified that a bullet recovered at the scene had been fired from this gun. In light of this evidence, applicant contends that it is now conclusively shown that he was not one of the individuals who directly caused Hawkins's death by shooting him, nor was it shown that he even attempted to shoot Hawkins by discharging a firearm.

At this juncture, I do not make any ultimate determination regarding whether the evidence conclusively establishes what applicant suggests. That is a factual question that is more properly resolved by the habeas court on remand, rather than by this Court based on pleadings alone. The more pressing question at this juncture is whether, assuming the evidence would show that applicant was not one of the shooters, his death sentence is nevertheless constitutionally permissible because he either intended to kill Hawkins or anticipated that a human life would be taken during the commission of the robbery. As noted above, the anti-parties special issue submitted to the jury asked it to determine "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. art. 37.071, § 2(b)(2). Assuming, as applicant suggests, that the jury could not have reasonably concluded that he directly caused Hawkins's death by shooting him, the jury was left with the options of finding that applicant, acting as a party as a principal or as a conspirator, either intended to kill Hawkins or anticipated that a life

would be taken. Applicant concedes that, if the evidence were to show that he intended to kill, then the Eighth Amendment would not preclude his execution under these circumstances, but he asserts that no such evidence was presented at his trial. Thus, applicant's arguments are limited to contending that the Eighth Amendment now prohibits the execution of one who, as a party-conspirator to a capital offense, merely anticipated that a human life would be taken but lacked any intent to kill.

As applicant suggests, the contours of the Eighth Amendment are defined by "the evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). An inquiry regarding the evolving standards of decency must be informed by "objective evidence," including legislative enactments and actual sentencing practices. *Id.* at 312. Other considerations, including the penological purposes served by the death penalty, may also bear on the inquiry. *Id.* at 318-19. When the prevailing evidence shows that standards of decency have shifted on a national level, the Supreme Court has not hesitated to recognize corresponding changes in the dictates of the Eighth Amendment. *See, e.g., id.* at 310, 317 (taking note of a "dramatic shift in the state legislative landscape," as well as noting rarity of actual executions of intellectually disabled persons, in support of holding recognizing a categorical bar against such executions).

Applicant acknowledges that the Supreme Court has already spoken on the issue before us today, over thirty years ago in *Tison v. Arizona,* 481 U.S. 137, 138, 158 (1987). In *Tison*, the Supreme Court held that the death penalty is constitutionally permissible for a

party who neither killed nor intended to kill a victim when the party was a major participant in the felony committed and displayed reckless indifference to human life. *Id.* at 158. As part of its explanation for permitting the death penalty under these circumstances, the Supreme Court in *Tison* noted that "the majority of American jurisdictions clearly authorize[d] capital punishment" for defendants who were major participants in a felony and who exhibited a reckless disregard for human life. *Id.* at 155. Applicant, however, asserts that this is no longer a true statement in light of more recent legislative and policy developments that have emerged in the decades since *Tison* was decided. Applicant notes that more than thirty jurisdictions (of fifty-two, counting the federal government and Washington, D.C.) have made legislative or judicial decisions disallowing the death penalty for non-triggermen who lacked the intent to kill. *See* Joseph Trigilio & Tracy Casadio, *Executing Those Who Do Not Kill: A Categorical Approach to Proportional Sentencing*, 48 AM. CRIM. L. REV. 1371, 1400-01 (2011). This includes twenty-one jurisdictions that have outlawed the death penalty altogether, combined with thirteen other jurisdictions that permit the death penalty but disallow that punishment for parties to a capital offense who lacked any intent to kill.[10] Comparing this majority of states that oppose the death penalty for non-

[10] The authors of this article identified the following death-penalty jurisdictions as having legislative or judicial decisions against use of the death penalty for non-triggermen who lacked the intent to kill: Alabama, Georgia, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Ohio, Oregon, Pennsylvania, Virginia, and Wyoming. In addition, applicant noted the following jurisdictions that do not employ the death penalty: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and the District of Columbia. As applicant notes, in evaluating the scope of Eighth Amendment protections, the

triggermen to the Supreme Court's reliance on a national consensus against the death penalty in other specific contexts, applicant contends that this "clear majority is more than enough to establish a national consensus against the execution of an individual who neither killed nor intended to kill." Applicant suggests that, in other contexts, the Supreme Court has recognized that thirty states' pronouncements against a particular sentencing practice constituted a "national consensus" for purposes of gauging the evolving standards of decency against the imposition of the death penalty. *See Atkins*, 536 U.S. at 314-16; *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

Applicant also notes that, in recent decades, even in states that technically allow the death penalty for conspirators who lacked any intent to kill, such executions are rarely carried out, with only a handful of such executions being carried out in recent years. The Death Penalty Information Center reports that, in approximately the past decade, no state has executed an individual who was convicted as a conspirator without evidence of an intent to kill, and only ten such individuals have been executed nationwide in the period since 1985.[11] Of those ten individuals, five were executed in Texas.[12] I agree with applicant's suggestion

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Supreme Court has looked to the practices of active death-penalty jurisdictions as well as those jurisdictions that preclude the practice altogether. *See, e.g., Roper*, 543 U.S. at 564-65 (including states that had abolished the death penalty in determining that a national consensus existed against execution of juveniles).

[11] Death Penalty Information Center, *Those Executed Who Did Not Directly Kill the Victim,* available at https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim, last visited Nov. 28, 2018.

[12] As applicant points out, commentators in the public media have recently noted that Texas is among a minority of jurisdictions that permit capital punishment for those convicted of capital

that the fact that executions of such individuals are carried out so infrequently provides additional persuasive evidence to support the existence of a national consensus against the practice. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (confirming consensus against capital punishment in cases of rape of a child by looking at the rarity of death sentences and executions for that crime); *Atkins*, 536 U.S. at 316 (noting that only five states had executed an intellectually disabled person in the thirteen years prior to that decision).

Moreover, I agree with applicant's suggestion that imposition of the death penalty against a party to a capital offense who neither killed nor intended to kill is on tenuous ground with respect to the underlying penological purposes of the death penalty. The Supreme Court has recognized two principal social purposes of capital punishment: retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Insofar as deterrence, the Supreme Court has recently recognized that capital punishment "can serve as a deterrent only when murder is the result of premeditation and deliberation." *Atkins*, 536 U.S. at 319. And regarding the retributive

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offenses as conspirators. *See* Hooman Hedayati, *Texas "law of parties" needs to be revamped*, HOUSTON CHRONICLE (July 22, 2016), https://www.houstonchronicle.com/opinion/outlook/article/Hedayati-Texas-law-of-parties-needs-to-be-8404266.php ("Texas is not the only state that holds co-conspirators responsible for one another's criminal acts. However, it is one of few states that applies the death sentence to them."); *Texas needs to reform its 'law of parties,' which allows death penalty for people who haven't killed anyone*, DALLAS NEWS (Feb. 9, 2017), https://www.dallasnews.com/opinion/editorials/2017/02/09/texas-needs-reform-law-parties-allows-death-penalty-people-killed-anyone ("To date, 10 people who did not commit the actual killing have been executed in the U.S. under 'parties' or similar laws. Half of them have been in Texas. In some cases, the actual killer received a lesser sentence than the accomplice who was put to death.").

goals underlying the death penalty, the Supreme Court has emphasized that that punishment may be imposed only against offenders whose "extreme culpability makes them the most deserving of execution." *Roper*, 543 U.S. at 568 (internal quotations omitted). The instant case illustrates the possible difference between a record that does meet the *Tison* test's requirement that a defendant be a major participant who had a reckless indifference to human life, but that would not be adequate under applicant's proposed test that would require proof of his intent to kill, which is the type of evidence that is more consistent with the Supreme Court's descriptions of the death penalty as appropriate for deaths caused by premeditation, deliberation, and extreme culpability. Here, there is at least some evidence in the record that would support the view that, even though applicant was a major participant in the offense and he had reckless indifference to human life, he did not have the intent to kill Hawkins or act in a premeditated or deliberate manner in causing Hawkins's death, given the evidence that he was armed with a firearm and declined to shoot at Hawkins. Given this, I agree with applicant's suggestion that the retribution and deterrence goals underlying the death penalty may not be measurably advanced in the context of one who lacks any intent to kill, thereby providing an additional consideration weighing against the permissibility of a death sentence under these circumstances.

In sum, I agree with applicant that, in view of the emerging evidence that suggests a possible shift in societal standards, he has presented colorable arguments indicating that the execution of one who neither killed nor intended to kill does not comport with the Eighth

Amendment's prohibition on cruel and unusual punishment. I would stay his execution to permit further proceedings on this issue.

B. Applicant Has Overcome the Procedural Bar

In spite of applicant's persuasive arguments on this issue, this Court holds that it may not consider the merits of this claim at this juncture, and it dismisses the application as subsequent. I disagree with this approach and would instead hold that applicant has alleged sufficient facts to show that his claim relies on a new factual basis, thereby entitling him to consideration of his claim on its merits.

The Court's majority order summarily concludes that applicant cannot overcome the statutory bar on subsequent writs because he has failed to show that he meets any of the exceptions that would permit consideration of his claim, including reliance on new facts. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5. But, as noted above, applicant has cited various sources that are newly available since his prior application that was filed over a decade ago. Furthermore, because of the particular nature of this claim which asserts a recent shift in societal views as reflected by recent legislation and current sentencing practices in other jurisdictions, this is the type of factual inquiry that is better addressed through a hearing in the habeas court, rather than summarily rejected based on pleadings alone. I would hold that applicant has alleged sufficient facts to show that his claim relies on a new factual basis, and I would permit him to litigate this claim on its merits.

C. This Case Should Be Remanded to the Habeas Court

At this juncture, the only matters before this Court are applicant's motion to stay his execution and his pleadings underlying his second subsequent habeas application and the State's response. The habeas court has not heard any evidence or made any findings of fact and conclusions of law. For all of the reasons described above, I would remand this case to the habeas court so that it may receive applicant's evidence on this issue and make findings of fact and conclusions of law.

I recognize that, even assuming that the law would prohibit the death penalty for someone who did not kill or intend to kill, there are aspects of this record that appear to support opposite conclusions as to whether applicant had the intent to kill. As noted above, on the one hand, the jury instructions permitted the jury to assess the death penalty based solely on a determination that applicant anticipated that a human life would be taken, and the jury that convicted him may have believed that he did not have the intent to kill because he did not fire his weapon at Hawkins. On the other hand, the jury instructions also permitted the jury to assess the death penalty based on a determination that applicant intended to kill Hawkins, and the jury may have believed that he did have that intent based on the totality of applicant's violent conduct. In the event that this Court were to ultimately hold that the Eighth Amendment prohibits the death penalty for a party to a capital offense who did not intend to kill, it would be possible that another jury would still sentence applicant to death under the theory that the totality of the evidence supports the reasonable inference that he intended to kill Hawkins. I do not reach that issue at this juncture. Rather, because the jury instructions here permitted applicant to be sentenced to death on a bare finding that he

anticipated a human life would be taken, without any required showing of an intent to kill, applicant is entitled to further proceedings on the constitutionality of his death sentence that was imposed pursuant to these instructions.

III. Conclusion

The Supreme Court has held that the death penalty must be imposed only against those who have engaged in the worst criminal conduct and who exhibit extreme moral culpability for their crimes. Over time, the Court has erected barriers to carrying out executions against categories of offenders who do not exhibit the type of extreme culpability that justifies this ultimate punishment. As it is this Court's unwavering obligation to uphold the federal Constitution and to ensure that executions are carried out in compliance with the requirements of the Eighth Amendment, I would not summarily dismiss applicant's complaint but would instead grant him a stay of his execution and permit further proceedings on the issue of whether he may lawfully be executed for his participation in this offense as a party-conspirator. Because the Court does not do so and permits applicant's execution to go forward without considering these issues, I respectfully dissent.

Filed: November 30, 2018

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Additional Statutory Provisions Involved

The following statutes referenced in this pleading are quoted below in relevant part:

Alabama

> A person is legally accountable for the behavior of another constituting a criminal offense if, with the intent to promote or assist the commission of the offense:
>
> > (1) He procures, induces or causes such other person to commit the offense; or
> >
> > (2) He aids or abets such other person in committing the offense; or
> >
> > (3) Having a legal duty to prevent the commission of the offense, he fails to make an effort he is legally required to make.

Ala. Code. § 13A-23 (1975).

> (a) The following are capital offenses:
>
> > (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.
> >
> > (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant.
> >
> > (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant.

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant.

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an officer or guard on duty, or because of some official or job-related act or performance of such officer or guard.

(6) Murder committed while the defendant is under sentence of life imprisonment.

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire.

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant.

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion.

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity.

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft.

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction.

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(15) Murder when the victim is less than fourteen years of age.

(16) Murder committed by or through the use of a deadly weapon fired or otherwise used from outside a dwelling while the victim is in a dwelling.

(17) Murder committed by or through the use of a deadly weapon while the victim is in a vehicle.

(18) Murder committed by or through the use of a deadly weapon fired or otherwise used within or from a vehicle.

(19) Murder by the defendant where a court had issued a protective order for the victim, against the defendant, pursuant to Section 30-5-1 et seq., or the protective order was issued as a condition of the defendant's pretrial release.

(20) Murder by the defendant in the presence of a child under the age of 14 years at the time of the offense, if the victim was the parent or legal guardian of the child. For purposes of this subsection, “in the presence of a child” means in the

physical presence of a child or having knowledge that a child is present and may see or hear the act.

. . .

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of Section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

Ala. Code § 13A-5-40 (2018).

Kansas

(a) Capital murder is the:

(1) Intentional and premeditated killing of any person in the commission of kidnapping, as defined in K.S.A. 21-5408(a), and amendments thereto, or aggravated kidnapping, as defined in K.S.A. 21-5408(b), and amendments thereto, when the kidnapping or aggravated kidnapping was committed with the intent to hold such person for ransom;

(2) intentional and premeditated killing of any person pursuant to a contract or agreement to kill such person or being a party to the contract or agreement pursuant to which such person is killed;

(3) intentional and premeditated killing of any person by an inmate or prisoner confined in a state correctional institution, community correctional institution or jail or while in the custody of an officer or employee of a state correctional institution, community correctional institution or jail;

(4) intentional and premeditated killing of the victim of one of the following crimes in the commission of,

> or subsequent to, such crime: Rape, as defined in K.S.A. 21-5503, and amendments thereto, criminal sodomy, as defined in K.S.A. 21-5504(a)(3) or (4), and amendments thereto, or aggravated criminal sodomy, as defined in K.S.A. 21-5504(b), and amendments thereto, or any attempt thereof, as defined in K.S.A. 21-5301, and amendments thereto;
>
> (5) intentional and premeditated killing of a law enforcement officer;
>
> (6) intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or
>
> (7) intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping, as defined in K.S.A. 21-5408(a), and amendments thereto, or aggravated kidnapping, as defined in K.S.A. 21-5408(b), and amendments thereto, when the kidnapping or aggravated kidnapping was committed with intent to commit a sex offense upon or with the child or with intent that the child commit or submit to a sex offense.

Kan. Stat. Ann. § 21-5401 (2018).

Louisiana

> A. First degree murder is the killing of a human being:
>
> > (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated or first degree rape, forcible or second degree rape, aggravated burglary, armed robbery, assault by drive-by shooting, first degree robbery, second degree robbery, simple robbery, terrorism, cruelty to juveniles, or second degree cruelty to juveniles.

(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman, peace officer, or civilian employee of the Louisiana State Police Crime Laboratory or any other forensic laboratory engaged in the performance of his lawful duties, or when the specific intent to kill or to inflict great bodily harm is directly related to the victim's status as a fireman, peace officer, or civilian employee.

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim who is under the age of twelve or sixty-five years of age or older.

(6) When the offender has the specific intent to kill or to inflict great bodily harm while engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedules I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

(7) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the activities prohibited by R.S. 14:107.1(C)(1).

(8) When the offender has specific intent to kill or to inflict great bodily harm and there has been issued by a judge or magistrate any lawful order prohibiting contact between the offender and the victim in response to threats of physical violence or harm which was served on the offender and is in effect at the time of the homicide.

(9) When the offender has specific intent to kill or to inflict great bodily harm upon a victim who was a witness to a crime or was a member of the immediate family of a witness to a crime committed on a prior occasion and:

(a) The killing was committed for the purpose of preventing or influencing the victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced; or
(b) The killing was committed for the purpose of exacting retribution for the victim's prior testimony.

(10) When the offender has a specific intent to kill or to inflict great bodily harm upon a taxicab driver who is in the course and scope of his employment. For purposes of this Paragraph, "taxicab" means a motor vehicle for hire, carrying six passengers or less, including the driver thereof, that is subject to call from a garage, office, taxi stand, or otherwise.

(11) When the offender has a specific intent to kill or inflict great bodily harm and the offender has previously acted with a specific intent to kill or inflict great bodily harm that resulted in the killing of one or more persons.

(12) When the offender has a specific intent to kill or to inflict great bodily harm upon a correctional facility employee who is in the course and scope of his employment.

La. Rev. Stat. Ann. § 14:30 (2015).

Missouri

1. A person commits the offense of murder in the first degree if he or she knowingly causes the death of another person after deliberation upon the matter.

Mo. Rev. Stat. § 565.020 (2016).

1. A person commits the offense of murder in the second degree if he or she:

(1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or

(2) Commits or attempts to commit any felony, and, in the perpetration or the attempted perpetration of such felony or in the flight from the perpetration or attempted perpetration of such felony, another person is killed as a result of the perpetration or attempted perpetration of such felony or immediate flight from the perpetration of such felony or attempted perpetration of such felony.

Mo. Rev. Stat. § 565.021 (2017).

Ohio

Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, trespass in a habitation when a person is present or likely to be present, terrorism, or escape.

(C) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.
(D) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or

who breaks that detention shall purposely cause the death of another.

(E) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:

(1) The victim, at the time of the commission of the offense, is engaged in the victim's duties.
(2) It is the offender's specific purpose to kill a law enforcement officer.

Ohio Rev. Code Ann. § 2903.01 (2011).

Oregon

Aggravated Murder

. . .

(d) Notwithstanding ORS 163.115 (1)(b), the defendant personally and intentionally committed the homicide under the circumstances set forth in ORS 163.115 (1)(b).

Or. Rev. Stat. § 163.095(2) (2015).

Pennsylvania

(a) Murder of the first degree.--A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) Murder of the second degree.--A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

18 Pa. Cons. Stat. Ann. § 2502 (2011).

Texas

> Sec. 5. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> > (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> >
> > (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
> >
> > (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

Tex. Code Crim. Proc. Ann. art. 11.071, § 5 (2015).

> (d) The court shall charge the jury that:
>
> > (1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;
> >
> > (2) it may not answer any issue submitted under Subsection (b) of this article

"yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

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

Virginia

The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9.1-101, a fire marshal appointed pursuant to § 27-30 or a deputy or an assistant fire marshal appointed pursuant to § 27-36, when such fire marshal or deputy or assistant fire marshal has police powers as set forth in §§ 27-34.2 and 27-34.2:1, an auxiliary police officer appointed or provided for pursuant to §§ 15.2-1731 and 15.2-1733, an auxiliary deputy sheriff appointed pursuant to § 15.2-1603, or any law-enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States, when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of more than one person within a three-year period;

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation;

10. The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing

criminal enterprise as defined in subsection I of § 18.2-248;

11. The willful, deliberate, and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth;

12. The willful, deliberate, and premeditated killing of a person under the age of fourteen by a person age twenty-one or older;

13. The willful, deliberate, and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in § 18.2-46.4;

14. The willful, deliberate, and premeditated killing of a justice of the Supreme Court, a judge of the Court of Appeals, a judge of a circuit court or district court, a retired judge sitting by designation or under temporary recall, or a substitute judge appointed under § 16.1-69.9:1 when the killing is for the purpose of interfering with his official duties as a judge; and

15. The willful, deliberate, and premeditated killing of any witness in a criminal case after a subpoena has been issued for such witness by the court, the clerk, or an attorney, when the killing is for the purpose of interfering with the person's duties in such case.

Va. Code Ann. § 18.2-31 (2010).

CAUSE NUMBER F01-00325-T

THE STATE OF TEXAS	§	IN THE 283RD JUDICIAL
	§	
V.	§	DISTRICT COURT OF
	§	
JOSEPH C. GARCIA	§	DALLAS COUNTY, TEXAS

JURY CHARGE

The defendant, Joseph C. Garcia, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about December 24, 2000, in Dallas County, Texas. The defendant has pleaded not guilty.

Our law provides that I submit the following charge to you in this case. This charge contains all the law necessary to enable you to reach a verdict. If any evidence was presented to raise an issue, the law on that issue must be provided.

PENAL OFFENSES IN TEXAS

Our law provides that a person commits murder when he intentionally or knowingly causes the death of an individual.

Such offense is, however, capital murder when committed upon a peace officer who is acting in the lawful discharge of an official duty and whom the person knows is a peace officer.

The offense of capital murder is also committed if the person commits murder, as defined above, and the person intentionally commits the murder in the course of committing or attempting to commit robbery. Robbery is a felony offense.

A person commits the offense of aggravated robbery, if he commits the offense of robbery, as defined below, and he (1) causes serious bodily injury to another or (2) uses or exhibits a deadly weapon.

A person commits robbery if, in the course of committing theft, as that term is herein defined, and with intent to obtain and maintain control of property of another, he intentionally or knowingly (a) causes bodily injury to another or (b) threatens or places another in fear of imminent bodily injury or death.

"In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or in immediate flight after the attempt or commission of theft.

A person commits "theft" if he unlawfully appropriates personal property with the intent to deprive the owner of said property.

DEFINITIONS

"Attempt" to commit an offense occurs if, with specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended.

"Appropriation" and "appropriate" mean to acquire or otherwise exercise control over property other than real property. Appropriation of property is unlawful if it is without the owner's effective consent.

"Bodily injury" means physical pain, illness, or any impairment of physical condition.

A "deadly weapon" is (a) a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury, or (b) anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

"Deprive" means to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.

"Effective consent" means assent in fact, whether express or apparent, and includes consent by a person legally authorized to act for the owner. Consent is not effective if induced by deception, coercion, threats, force, or fraud.

A "firearm" means any device designed, made or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.

An "indictment" is the charging instrument and is no evidence of guilt. Therefore, you shall not consider the indictment in this case as any evidence of guilt, if any.

"Individual" means a human being who has been born and is alive.

"Owner" means a person who has title to the property, possession of the property, or a greater right to possession of the property than the person charged.

A "peace officer" means a person elected, employed, or appointed as a police officer.

"Possession" means actual care, custody, control, or management of property.

"Property" means tangible or intangible personal property including anything severed from the land, or a document, including money that represents or embodies anything of value.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

DEFINITIONS OF CULPABLE MENTAL STATES

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Intent may be inferred from the surrounding facts and circumstances including but not limited to acts done and words spoken.

CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or both.

A person is criminally responsible for an offense committed by the conduct of another if, 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. Mere presence alone will not constitute one a party to an offense.

"Conspiracy" means an agreement between two or more persons, with intent that a felony be committed, that they, or one or more of them, engage in conduct that would constitute the offense. An agreement constituting a conspiracy may be inferred from acts of the parties.

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. Murder and robbery are felony offenses.

CONSTITUTIONAL RIGHTS

All persons are presumed to be innocent, and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for or otherwise charged with the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless you are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt. This burden rests upon the State throughout the trial and never shifts to the defendant. If the State fails to meet its burden, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not guilty."

You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him or prejudice him in any way. The defendant has elected not to testify in this phase of the trial, and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

APPLICATION OF THE LAW AND FACTS

CAPITAL MURDER

Now bearing in mind the foregoing instructions,

(1) If you believe from the evidence beyond a reasonable doubt, that on or about December 24, 2000, in Dallas County, Texas, the defendant, Joseph C. Garcia, intentionally or knowingly caused the death of Aubrey Hawkins, an individual, by shooting Aubrey Hawkins with a firearm, a deadly weapon, and that Aubrey Hawkins was a peace officer, namely: a City of Irving police officer, acting in the lawful discharge of an official duty, and the defendant knew Aubrey Hawkins to be a peace officer, then you will find the defendant, Joseph C. Garcia, guilty of capital murder;

OR

(2) If you believe from the evidence beyond a reasonable doubt, that on or about December 24, 2000, in Dallas County, Texas, George Rivas, Donald Keith Newbury, Michael Anthony Rodriguez, Randy Halprin, Patrick Murphy, or Larry Harper, hereinafter referred to as "the others," or any combination of the others, knowing Aubrey Hawkins was a peace officer, did intentionally or knowingly cause the death of Aubrey Hawkins, an individual and a peace officer, namely a City of Irving police officer, acting in the lawful discharge of an official duty, by shooting him with a firearm, a deadly weapon, and if you further find from the evidence beyond a reasonable doubt that the defendant, Joseph C. Garcia, acting as a party, as that term is here in before defined, did, with the intent to promote or assist the commission of the offense of murder, solicit, encourage, direct, aid, or attempt to aid the others, or any one or combination of the others, in intentionally or knowingly causing the death of Aubrey Hawkins, then you will find the defendant, Joseph C. Garcia, guilty of capital murder;

OR

(3) If you believe from the evidence beyond a reasonable doubt, that on or about December 24, 2000, in Dallas County, Texas, the defendant, Joseph C. Garcia, entered into a conspiracy with one or more of the following persons: George Rivas, Donald Keith Newbury, Michael Anthony Rodriguez, Randy Halprin, Patrick Murphy, or Larry Harper, hereinafter referred to as "the others," to commit the felony offense of robbery, and that in the attempt to carry out this conspiracy, if any, one or more of the others, knowing Aubrey Hawkins was a peace officer, did intentionally or knowingly cause the death of Aubrey Hawkins, an individual and a peace officer, namely a City of Irving police officer, acting in the lawful discharge of an official duty, by shooting him with a firearm, a deadly weapon, and if you further find that intentionally or knowingly causing the death of Aubrey Hawkins was committed in furtherance of the unlawful purpose to commit robbery and should have been anticipated as a result of carrying out the conspiracy to commit robbery, whether or not the defendant, Joseph C. Garcia, had the intent to cause the death of Aubrey Hawkins, then you will find the defendant, Joseph C. Garcia, guilty of capital murder;

OR

(4) If you believe from the evidence beyond a reasonable doubt, that on or about December 24, 2000, in Dallas County, Texas, the defendant, Joseph C. Garcia, intentionally caused the death of Aubrey Hawkins, an individual, by shooting Aubrey Hawkins with a firearm, a deadly weapon, while in the course of committing or attempting to commit the offense of robbery of Wesley Ferris, then you will find the defendant, Joseph C. Garcia, guilty of capital murder;

OR

(5) If you believe from the evidence beyond a reasonable doubt, that on or about December 24, 2000, in Dallas County, Texas, George Rivas, Donald Keith Newbury, Michael Anthony Rodriguez, Randy Halprin, Patrick Murphy, or Larry Harper, hereinafter referred to as "the others," or any combination of the others, did intentionally cause the death of Aubrey Hawkins, an individual, by shooting him with a firearm, a deadly weapon, while in the course of committing or attempting to commit the offense of robbery of Wesley Ferris, and if you further find from the evidence beyond a reasonable doubt that the defendant, Joseph C. Garcia, acting as a party, as that term is here in before defined, did, with the intent to promote or assist the commission of the offense of murder, solicit, encourage, direct, aid, or attempt to aid the others, or any one or combination of the others, in intentionally causing the death of Aubrey Hawkins, in the course of the commission or attempted commission of the offense of robbery of Wesley Ferris, then you will find the defendant, Joseph C. Garcia, guilty of capital murder;

OR

(6) If you believe from the evidence beyond a reasonable doubt, that on or about December 24, 2000, in Dallas County, Texas, the defendant, Joseph C. Garcia, entered into a conspiracy with one of more of the following persons: George Rivas, Donald Keith Newbury, Michael Anthony Rodriguez, Randy Halprin, Patrick Murphy, or Larry Harper, hereinafter referred to as "the others," to commit the felony offense of robbery of Wesley Ferris, and that in the attempt to carry out this conspiracy, if any, one or more of the others did intentionally cause the death of Aubrey Hawkins by shooting Aubrey Hawkins with a firearm, a deadly weapon, and if you further find that intentionally causing the death of Aubrey Hawkins was committed in furtherance of the unlawful purpose to commit the robbery of Wesley Ferris, and that intentionally causing the death of Aubrey Hawkins was an offense that should have been anticipated as a result of carrying out the conspiracy to commit robbery, whether or not the defendant had the intent to cause the death of Aubrey Hawkins, then you will find the defendant, Joseph C. Garcia, guilty of capital murder.

If you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and proceed to consider whether the defendant is guilty of the lesser included offense of aggravated robbery.

AGGRAVATED ROBBERY

(1) If you believe from the evidence beyond a reasonable doubt, that on or about December 24, 2000, in Dallas County, Texas, the defendant, Joseph C. Garcia, while in the course of committing theft of property and with intent to obtain or maintain control of the property of Wesley Ferris, namely, current money of the United States of America, guns, or ammunition, without the effective consent of Wesley Ferris and with intent to deprive Wesley Ferris of said property, did intentionally or knowingly cause serious bodily injury to Aubrey Hawkins by shooting him with a firearm, a deadly weapon, then you will find the defendant, Joseph C. Garcia, guilty of aggravated robbery.

OR

(2) If you believe from the evidence beyond a reasonable doubt, that on or about December 24, 2000, in Dallas County, Texas, the defendant, Joseph C. Garcia, while in the course of committing theft of property and with intent to obtain or maintain control of the property of Wesley Ferris, namely, current money of the United States of America, guns, or ammunition, without the effective consent of Wesley Ferris and with intent to deprive Wesley Ferris of said property, did use or exhibit a deadly weapon, namely, a firearm, then you will find the defendant, Joseph C. Garcia, guilty of aggravated robbery.

If you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant, and say by your verdict, "not guilty".

If you should find from the evidence beyond a reasonable doubt that the defendant is either guilty of capital murder or aggravated robbery, but you have a reasonable doubt as to which offense he is guilty of, then you should resolve that doubt in the defendant's favor and find the defendant guilty of the lesser included offense.

EVIDENTIARY RULINGS

At times throughout the trial, the Court has been called upon to pass on the question of whether or not certain offered evidence might properly be admitted. Do not be concerned with the reasons for such rulings and draw no inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you of course must not consider the same. As to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection.

JURY GUIDELINES

You are charged that it is only from the witness stand that the jury is permitted to receive evidence regarding the case, and no juror is permitted to communicate to any other juror, or consider during deliberations, anything he may have heard regarding the case from any source other than the witness stand.

In deliberating on this case, you are not to refer to or discuss any matter or issue not in evidence before you, and you are not to talk about this case to anyone not of your jury.

Mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling is to play no part in your deliberations.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony. But you are bound to receive and be governed by the law from the Court, which is herein given you.

After you have retired to consider the verdict, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with this Court in writing, signed by your foreman, through the officer who has you in charge. Do no attempt to talk to the officer, the attorneys, or the Court concerning any question you may have.

After argument of counsel, you will retire and select one of your members as your foreman. It is the duty of your foreman to preside at your deliberations and to vote with you in arriving at a verdict. Your verdict must be unanimous, and after you have arrived at your verdict, you may use one of the forms attached hereto by having your foreman sign the particular form that conforms to your verdict.

Vickers L. Cunningham, Sr.
Judge, 283rd Criminal District Court

VERDICT FORMS

We, the jury, find the defendant guilty of capital murder, as charged in the indictment.

Donald R Fowler

Foreman Donald R Fowler

We, the jury, find the defendant guilty of aggravated robbery, as included in the indictment.

_____

Foreman

We, the jury, find the defendant not guilty.

_____

Foreman

CAUSE NUMBER F01-00325-T

THE STATE OF TEXAS	§	IN THE 283RD JUDICIAL
	§	
V.	§	DISTRICT COURT OF
	§	
JOSEPH C. GARCIA	§	DALLAS COUNTY, TEXAS

PUNISHMENT CHARGE

MEMBERS OF THE JURY:

By your verdict in this case you have found the defendant, Joseph C. Garcia, guilty of the offense of capital murder, alleged to have been committed on or about December 24, 2000, in Dallas County, Texas. It is now your duty to determine, from all the evidence in the case, answers to certain questions called special issues.

You are instructed that the punishment for the offense of capital murder in this State is either death or confinement for life in the Institutional Division of the Texas Department of Criminal Justice.

Three special issues, numbered one, two, and three, are included in this charge. You are instructed to answer the first two special issues either "Yes" or "No" in accordance with the instructions given in this charge. Special Issue No. 3 should be answered only if you have answered "Yes" to both Special Issue No. 1 and Special Issue No. 2. If you have not answered "Yes" to both Special Issue No. 1 and Special Issue No. 2, then you shall not proceed to answer Special Issue No. 3.

In deliberating on your answers to both Special Issue No. 1 and Special Issue No. 2, you are instructed that the State has the burden of proving beyond a reasonable doubt that Special Issue No. 1 and Special Issue No. 2 should be answered "Yes."

You shall consider all evidence admitted during the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

You may not answer either Special Issue No. 1 or Special Issue No. 2 "Yes" unless the jury agrees unanimously, and you may not answer either Special Issue No. 1 or Special Issue No. 2 "No" unless 10 or more members of the jury agree. The members of the jury need not agree on what particular evidence supports a negative answer to either Special Issue No. 1 or Special Issue No. 2.

If you do not find and believe from the evidence beyond a reasonable doubt that the answer to either Special Issue No. 1 or Special Issue No. 2 should be "Yes," or if you have a reasonable doubt thereof, then you shall answer that special issue "No."

If you have answered either Special Issue No. 1 or Special Issue No. 2, or both, "No," then you shall cease your deliberations. If you have found beyond a reasonable doubt that the answers to both Special Issue No. 1 and Special Issue No. 2 are "Yes," then you shall next consider Special Issue No. 3.

In deliberating on your answer to Special Issue No. 3, you are instructed that you may not answer Special Issue No. 3 "No" unless the jury agrees unanimously, and you may not answer Special Issue No. 3 "Yes" unless 10 or more members of the jury agree. The members of the jury need not agree on what particular evidence supports an affirmative answer to Special Issue No. 3. In arriving at your answer, you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

You are further instructed that if the jury returns an affirmative finding on both Special Issue No. 1 and Special Issue No. 2 and a negative finding on Special Issue No. 3, the Court shall sentence the defendant to death. If the jury returns a negative finding on either Special Issue No. 1 or Special Issue No. 2 or an affirmative finding on Special Issue No. 3, the Court shall sentence the defendant to confinement in the Institutional Division of the Texas Department of Criminal Justice for life.

If the jury's answers are unanimous to the special issues answered, then the Foreman may sign each special issue for the entire jury. If any answer or answers are not unanimous, but agreed to by at least 10 members of the jury, as set out above, then the 10 or more jurors who agree shall individually sign the special issue.

You are instructed that, if there is any testimony before you in this case regarding the defendant having committed offenses or acts other than the offense alleged against him in the indictment, you cannot consider said testimony, unless you first find and believe beyond a reasonable doubt that the defendant committed such other offenses or acts, if any were committed; but if you do not so believe, or if you have a reasonable doubt thereof, you will not consider such testimony for any purpose.

You are instructed that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life.

Under the law applicable in this case, if the defendant is sentenced to imprisonment in the Institutional Division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

You are instructed that the defendant may testify in his own behalf if he chooses to do so, but if he elects not to do so, that fact cannot be taken by you as a circumstance against him or prejudice him in any way. The defendant has elected not to testify, and you are instructed that you cannot and must not refer to or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever.

Mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling should not play a part in your deliberations.

Your verdict must be by a unanimous vote of all members of the jury. In arriving at your verdict, it will not be proper to fix the same by lot, chance, or any other method than by a full, fair, and free exercise of the opinion of the individual jurors under the evidence admitted before you.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the Court, which is given you, and be governed thereby.

Vickers L. Cunningham, Sr.
Judge, 283rd Judicial District Court
Dallas County, Texas

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?

Answer: Yes

Donald R Fowler

Donald Ray Fowler, Foreman

If your answer to this special issue is "No," and is not unanimous, then the 10 or more jurors who agree should sign individually below:

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?

Answer: Yes

Donald R Fowler

Donald Ray Fowler, Foreman

If your answer to this special issue is "No," and is not unanimous, then the 10 or more jurors who agree should sign individually below:

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If your answers to both Special Issue No. 1 and Special Issue No. 2 are "Yes," you shall proceed to answer Special Issue No. 3.

If either or both of your answers to Special Issue No. 1 and Special Issue No. 2 are "No," you shall cease your deliberations.

SPECIAL ISSUE NO. 3

Do you find, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Answer: NO

Donald R Fowler

Donald Ray Fowler, Foreman

If your answer to this special issue is "Yes," and is not unanimous, then the 10 or more jurors who agree should sign individually below:

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