No. 18-6891, 18A571

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

****CAPITAL CASE****
Execution scheduled for TUESDAY, DECEMBER 4, 2018

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Petitioner Joseph C. Garcia was convicted of capital murder under Texas's law of parties and sentenced to death, despite the absence of evidence that he killed or intended to kill the victim, Officer Aubrey Hawkins. As detailed in the Petition for Writ of Certiorari ("Petition" or "Pet."), the strong majority of jurisdictions reject capital punishment in such circumstances. (Pet. at 21–26.) Moreover, a death sentence in such circumstances furthers no cognizable penological interest and is inherently unreliable. (Pet. at 27–31.) Accordingly, the Eighth Amendment prohibits the death penalty for one who neither killed nor intended to kill—and it flatly forbids Garcia's execution. Respondent's arguments to the contrary in the Brief in Opposition ("BIO") are unavailing.

I. This Court has jurisdiction over Garcia's claim.

Respondent errs in asserting that the state-court decision below rests on an independent and adequate state-law ground and thus cannot be considered by this Court. (BIO at 10–15.) First, Respondent argues that *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007), is inapposite because it concerned a claim of intellectual disability instead of one for a categorical exemption from the death penalty for those who did not kill or intend to kill. (BIO at 11–13.) That is true so far as it goes, but *Ex parte Blue* concerned a categorical prohibition on execution of a certain class of offenders, like here. And the court there made clear that its ruling was not constrained only to those who were ineligible for the death penalty under *Atkins v.*

Virginia, 536 U.S. 304 (2002). Instead, the court held that if there is a federal constitutional prohibition on the execution of a class of offenders, then section 5(a)(3) is necessarily satisfied because "no rational juror would answer the special issues in favor of execution because no rational juror *could*, consistent with the Eighth Amendment." *Id.* at 161. Respondent's attempt to limit the scope of section 5(a)(3) by cabining *Ex parte Blue* to concern only *Atkins* claims is therefore unavailing.

In further attempting to distinguish *Ex parte Blue*, Respondent argues that this Court has not yet announced the rule Garcia here asks it to consider. (BIO at 12.) In making this distinction, Respondent contends that because Garcia cannot win on the merits of his claim, the Texas Court of Criminal Appeals' ("CCA") procedural ruling could not have been interwoven with a federal question. But in so arguing, Respondent effectively concedes as correct Garcia's argument as to the dependence of the CCA's ruling. Garcia argued that "the CCA must have concluded that the evolving standards of decency embraced by the Eighth Amendment do not preclude the execution of one who both did not kill and lacked the intent to kill." (Pet. at 33.) Respondent retorts that "unlike the petitioner in *Ex parte Blue*, Garcia is absolutely unable to demonstrate the merit of his underlying constitutional claim. . . . Garcia necessarily could not meet the standard of Tex. Crim. Proc. Art. 11.071 § 5(a)(3) because no constitutional violation occurred at Garcia's trial." (BIO at 12–13.) In attempting to distinguish Garcia's case and show that the procedural dismissal of his claim was not interwoven with federal law, Respondent thus instead highlights how

the determination that Garcia did not satisfy the requirements of section 5(a)(3) relied on a federal question. Indeed, as the Fifth Circuit has explained, the determination under section 5(a)(3), as articulated in *Ex parte Blue*, is "necessarily dependent on a substantive analysis of the federal question in light of the factual allegations." *Busby v. Davis*, 892 F.3d 735, 743 (5th Cir. 2018).

Critically, Respondent hangs its argument on *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010). But *Rocha* clearly supports Garcia's assertion that the state-court decision is not independent of federal law. As the Fifth Circuit explained in *Rocha*:

> the federal constitutional claim of a habeas petitioner who argues that the Constitution renders him ineligible for the death penalty is, in substance, a claim that the petitioner is actually innocent of the death penalty. In cases presenting such claims, the gateway issue and the underlying constitutional issue largely merge into a single inquiry.

Id. at 815. In other words, when the issue is categorical exemption from the death penalty, then the state-court decision under section 5(a)(3) is interwoven with—and thus not independent of—federal constitutional law. This is just what happened here: Garcia argued that the federal Constitution renders him ineligible for the death penalty. In his case, then, the state court's decision on state procedural and federal constitutional grounds "merge[d] into a single inquiry," and the decision was not independent from federal constitutional law.[1] *Id. ; see also Coleman v. Thompson*, 501

[1] Respondent focuses on *Rocha*'s statement that "the fact that § 5(a)(3) incorporates a federal standard for determining when a procedural default should be excused . . . does not empower this Court . . . to review the merits of the federal constitutional claim that has been procedurally defaulted." (BIO at 13 (quoting *Rocha*, 626 F.3d at 839).) However, that discussion concerned only whether the

U.S. 722, 735 (1991).

Respondent also argues that the CCA could have made a procedural ruling independent of federal law under section 5(a)(1). But here the question under section 5(a)(1) was necessarily intertwined with federal law. As the Fifth Circuit has explained, the state courts under (a)(1) first determine whether the factual or legal basis of the claim was previously unavailable and then "whether the specific facts alleged rise to a constitutional violation." *In re Davila*, 888 F.3d 179, 188 (5th Cir. 2018). The second inquiry is necessarily a federal question. As to the first inquiry, Respondent again effectively concedes the issue by arguing that "Garcia does not clearly delineate any emerging 'trend' that has developed since the time he filed his initial state habeas application that supports the categorical constitutional prohibition he now seeks." (BIO at 15.) But that is precisely the federal question—whether there is now a consensus against the imposition of the death penalty for those who did not kill or intend to kill. Moreover, Respondent incorrectly minimizes the change in the landscape since Garcia's 2007 application for state habeas relief. For example, Garcia's argument relied on seven states that have abandoned or abolished the death penalty since November 2007. (Pet. at 24 n.4.) This is important evidence of a national consensus that was not previously available.

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state court's consideration of "the federal actual-innocence-of-the-death-penalty standard announced in *Sawyer* [*v. Whitley*, 505 U.S. 333 (1992)]" meant that the decision was interwoven with federal law. *Rocha*, 626 F.3d at 839. This determination depended on the fact that there is no federal constitutional claim that innocence of the crime necessitates habeas relief. *Rocha*, 626 F.3d at 824. Garcia, of course, has not suggested that he is innocent of the crime as charged.

Accordingly, despite Respondent's arguments to the contrary, the state court's decision was dependent on federal law, and there is no jurisdictional bar to this Court's consideration of Garcia's Eighth Amendment claim. *See Coleman*, 501 U.S. at 735.

II. Garcia is requesting that this Court reconsider only *Tison v. Arizona*, and such a decision would be retroactive.

Preliminarily, the State mischaracterizes Garcia's Petition as a request that this Court revisit not only *Tison v. Arizona*, 481 U.S. 137 (1987), but also *Enmund v. Florida*, 458 U.S. 782 (1982). As his Petition makes clear, Garcia has not requested that this Court reconsider *Enmund*, and he relies on the reasoning of *Enmund*. (*See, e.g.*, Pet. at 27–28.) Respondent seeks to broaden *Enmund*'s holding to have permitted the death penalty for anyone who even "'contemplated that lethal force will be employed by others' during the course of a felony." (BIO at 27 (quoting *Enmund*, 458 U.S. at 799).) However, *Enmund*'s question presented was clear: "We granted Enmund's petition for certiorari . . . presenting the question whether death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." 458 U.S. at 787.

This Court has described *Enmund* as follows:

> *Enmund* explicitly dealt with two distinct subsets of all felony murders in assessing whether Enmund's sentence was disproportional under the Eighth Amendment. At one pole was Enmund himself: the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state. . . . *Enmund* also clearly dealt with the other polar case: the felony murderer who actually killed, attempted to

kill, or intended to kill.

Tison, 481 U.S. at 149–50. Even though the Tison brothers "both subjectively appreciated that their acts were likely to result in the taking of innocent life," *id.* at 152, and contemplated that someone might use lethal force, their "case falls into neither of these neat categories" discussed in *Enmund*, *id.* at 150. This Court has thus rejected Respondent's reading of *Enmund*, and Garcia does not request that this Court revisit that holding.[2]

Moreover, should this Court revisit *Tison*—as Garcia *has* requested—then its holding would be retroactive, despite Respondent's unsupported assertion to the contrary. (BIO at 16.) Under *Teague v. Lane*, 489 U.S. 288 (1989), new substantive rules of constitutional law warrant retroactive application. *Montgomery v. Louisiana*, 136 S. Ct. 718, 728 (2016). A substantive rule "forbids criminal punishment of certain primary conduct." *Id.* at 732 (internal quotation marks omitted). New categorical exemptions from the death penalty or other punishments based on the nature of the crime are paradigmatic substantive rules demanding retroactive application. *See, e.g., id.* at 734. A bar to the death penalty based on the defendant's conduct—the absence of evidence that he killed or intended to kill—is just such a substantive rule that demands retroactive application, and Respondent's contention otherwise is

[2] For this reason, there is no merit to Respondent's assertion that "Garcia does not attempt to cabin in any meaningful way the category of offenders who would qualify for the categorical exemption he seeks to have the Court create." (BIO at 30.) Garcia advocates the same limitation that the Eighth Amendment imposed for nearly five years between *Enmund* and *Tison*.

incorrect.

III. The current national consensus is that capital punishment is inappropriate for an offender such as Garcia who neither killed nor intended to kill.

Next, contrary to Respondent's argument (*see* BIO at 22–24), the objective evidence does reflect a national consensus against the death penalty in circumstances such as the ones in this case. Respondent ignores altogether the 21 jurisdictions that have abandoned the death penalty. (*See* BIO at 22–24.) But this Court has counted such jurisdictions in determining whether a national consensus exists. *See Roper v. Simmons*, 543 U.S. 551, 564 (2005) (explaining that in both *Atkins* and *Simmons* the Court considered both the states that "had abandoned the death penalty altogether" and those states that maintained it but provided categorical exemptions in determining whether national consensus existed). As laid out in Garcia's Petition, 21 jurisdictions no longer have the death penalty at all, and at least nine more jurisdictions appear to prohibit the execution of one who neither killed nor intended to kill anyone. (Pet. at 23 n.5.) In both *Simmons* and *Atkins*, this Court recognized that an agreement across approximately 30 jurisdictions is compelling evidence of a consensus. *See Simmons*, 543 U.S. at 564.

Respondent incorrectly argues that Garcia cannot show a national consensus because, according to Respondent, he has not shown that a substantial number of states that do have the death penalty have specifically prohibited executing those who neither kill nor intend to kill. (*See* BIO at 23–24.) To the contrary, as

acknowledged by Respondent (*see* BIO at 22), Garcia has identified nine states that have not outlawed capital punishment altogether but have prohibited imposing the death penalty for offenders who neither killed nor intended to kill. (Pet. at 24–25 nn.5–13.) As Respondent apparently acknowledges (*see* BIO at 23–24), this Court in *Graham v. Florida*, 560 U.S. 48, 62 (2010), determined that a national consensus existed against allowing life without parole sentences for juvenile offenders who did not commit homicide, despite the fact that at the time of the Court's decision, six states prohibited life-without-parole sentences for any juvenile offenders, seven jurisdictions allowed juveniles to be sentenced to life without parole but prohibited the sentence in non-homicide cases, and 37 states and the District of Columbia permitted juveniles to receive life-without-parole sentences for non-homicide offenses in some circumstances. Under Respondent's analysis, the nine jurisdictions cited by Garcia are too few to allow the Court to find a consensus, while the seven in *Graham* were not. This distinction is untenable.

More striking is the rarity of executions of those who neither killed nor intended to kill, and the fact that only five jurisdictions have carried out such executions. *See Those Executed Who Did Not Directly Kill the Victim, Death Penalty Information Center*, https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim (last visited Dec. 3, 2018).[3] This Court has repeatedly emphasized

[3] Respondent criticizes Garcia for relying on information aggregated by the Death Penalty Information Center (DPIC), because DPIC is "an anti-death penalty organization." (*See* BIO at 22

that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Graham*, 560 U.S. at 62 (citing, *inter alia*, *Enmund*, *Atkins*, *Simmons*, and *Kennedy v. Louisiana*, 554 U.S. 407 (2008)); *see also Simmons*, 543 U.S. at 564–65 (taking into account infrequency of executions of juveniles and that only six States had executed juvenile offenders since the Court had last considered the constitutional of such punishment).

Garcia faces execution in Texas even though a similar offender would not be death eligible in most other jurisdictions and is exceedingly unlikely to face execution in nearly all jurisdictions. That discrepancy reflects a serious Eighth Amendment concern that justifies this Court's review in Garcia's case.

IV. Executing an individual like Garcia, who neither killed nor intended to kill, furthers no valid penological interest and undermines the reliability of capital punishment.

Respondent acknowledges that deterrence and retribution are the accepted penological justifications for the death penalty. (BIO at 25.) But in answering Garcia's argument that these purposes are not served in cases like his, Respondent first

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n.13). But at least two Justices of this Court have cited information gathered by DPIC. *See Glossip v. Gross*, 135 S. Ct. 2726, 2757 (2015) (Breyer, J., joined by Ginsburg, J., dissenting). Respondent also appears to argue that the information cited is inaccurate, citing the cases of Michael Rodriguez (also a member of the "Texas Seven") and Kenneth Foster as examples. (*See* BIO at 22 n.13.) However, as Garcia explained in his successor petition in the CCA, the State presented evidence in the trials of four of Garcia's co-defendants—Rodriguez, Rivas, Newbury, and Halprin—establishing that Rodriguez was one of the five individuals who did discharge his weapon. *See Ex Parte Garcia*, 64,582-03, Subsequent Application at 85–87. Accordingly, unlike in the case of Garcia, the State did present evidence that Rodriguez either killed or intended to kill in the course of the Oshman's robbery. And the State's reliance on the case of Kenneth Foster is even less availing: as acknowledged by the State, Foster's sentence was commuted and he now faces a sentence of life imprisonment. (*See* BIO at 22 n.13.)

misconstrues Garcia's argument. As discussed above, Garcia is not asking this Court to overrule *Enmund*. The question, therefore, is not whether there is no penological justification to support the execution of those who fit within the parameters of *Enmund*, but only whether there is no penological justification for executing those who neither killed nor intended to kill.[4] (*See* BIO at 24.)

Indeed, Garcia relies on the reasoning of *Enmund* to argue that there is no legitimate deterrence interest here. In *Enmund*, this Court explained that "it seems likely that capital punishment can serve as a deterrence only when murder is the result of premeditation and deliberation." 458 U.S. at 799 (internal quotation marks and citation omitted). The Court repeated this reasoning in *Atkins*. 536 U.S. at 319–20. Respondent makes no real argument to the contrary, relying only on its misreading of *Enmund* discussed above. (*See* BIO at 25, 27, 32.)

Nor does Respondent rebut Garcia's argument that retribution cannot justify a death sentence for those like Garcia who neither killed nor intended to kill. The State argues that "Garcia's case clearly calls for retribution," relying on facts it asserts show his moral culpability. (BIO at 28–32.) But Garcia did not argue that retribution does not support any punishment. A categorical prohibition on the

[4] Respondent also incorrectly defines the question as whether there should be a categorical exemption to the death penalty "for individuals who participate in felonies, exhibit a willingness to use lethal force to effectuate their escape, and *know* (let alone anticipate) that lethal force may be used by others." (BIO at 30 (emphasis in original).) But the jury here did not find that Garcia knew others would use lethal force. Nor was a willingness to use lethal force proven. Instead, it is clear that the jury only found that Garcia "anticipated that a human life would be taken." (*See* A. 54.) Respondent's attempts to skew the issue are entirely unfounded.

execution of those who neither killed nor intended to kill does not mean such offenders escape severe punishment. The question is whether the retribution doled out in the form of a death sentence is commensurate to the moral culpability of those like Garcia. And there must be a distinction in the "culpability or blameworthiness" of one who intends to kill and one who does not. *Simmons*, 543 U.S. at 571. As this Court acknowledged in *Tison*, "[d]eeply ingrained in our legal tradition is the idea that the more purposeful [] the criminal conduct, . . . the more severely it ought to be punished." 481 U.S. at 156. As Judge Alcala noted in dissent from the CCA's opinion, proof of intent to kill "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." (A. 17.)

The death penalty for those who neither killed nor intended to kill serves no deterrent or retributive purpose, and Respondent's arguments to the contrary fail.

Moreover, as Garcia explained in his Petition, this Court has foreclosed capital punishment in circumstances likely to produce unreliable assessments of individual culpability. (Pet. at 29–30.) The same principle calls for proscribing capital punishment in circumstances like Garcia's. Where a jury is not asked to evaluate a defendant's culpability based on his own intent, its determination will likely be affected by the collective culpability of his co-defendants. This spillover effect dilutes the individualized sentencing decision the Eighth Amendment demands.

In a footnote, Respondent answers that the "anti-parties" special issue required the jury to "make the requisite finding of culpability[.]" (BIO at 31 n.18.) That instruction, however, charged the jury only with assessing whether Garcia "anticipated that a human life would be taken." (A. 54.) The instruction did not require the jury to evaluate whether Garcia intended to kill Hawkins. It therefore did not cure the problem of jurors inferring Garcia's intent based on the conduct of his co-codefendants and then punishing Garcia more harshly as a result. *Cf. Tison*, 481 U.S. at 156 ("[T]he more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). That is hardly the reliable, individualized sentencing determination this Court's precedents require.

V. Garcia was convicted of capital murder under the law of parties, without evidence that he killed or intended to kill.

There is no evidence establishing that Garcia shot or killed Hawkins, and the State does not argue otherwise. Respondent only argues that there is evidence that Garcia intended or contemplated a killing. (*See*, *e.g.*, BIO at 32 (arguing that Garcia "contemplated that lethal force would be employed by others") (internal citations and alterations omitted).) The State acknowledged as much at trial, when the prosecutor admitted during closing argument, "[W]e cannot tell you which gun fired some of these shots." (RR 50 at 9.) As Judge Alcala of the CCA recognized, this was a "concession" by the State that "it could not prove which members of [the Texas Seven] were directly responsible for Hawkins's death." (A. 10–11.)

Likewise, as explained in the Petition and contrary to Respondent's assertion, there is no evidence proving that Garcia himself intended to kill Hawkins. As explained further below, none of the evidence cited by Respondent goes to this critical point of eligibility for the death penalty—which is the narrow issue raised in this Petition—as opposed to the jury's ultimate sentencing decision.

"Traditionally, 'one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.'" *Tison v. Arizona*, 481 U.S. 137, 150 (1987) (quoting W. LaFave & A. Scott, Criminal Law § 28, p. 196 (1972)); *see also* Tex. Penal Code § 6.03 (1994) (defining "intent" as having "the conscious objective or desire to engage in the conduct or cause the result"). In *Tison*, Raymond Tison "brought an arsenal of lethal weapons" to a prison, entrusted the weapons to convicted murders to facilitate an escape, expressed that "he was prepared to kill," robbed victims and then "guarded the victims at gunpoint," and then "stood by and watched" as they were killed without aiding them. *Tison*, 481 U.S. at 151. Brother Ricky acted similarly. Even so, this Court noted that neither brother "took any act which he desired to, or was substantially certain would, cause death." *Id.* at 150. This Court therefore "accept[ed] . . . as true" that neither brother demonstrated an intent to kill. *Id.* That "[h]e could have foreseen that lethal force might be used" was not exhibitive of intent, when "there [was] no evidence that [he] took any act which he desired to, or was substantially certain would, cause death." *Id.* at 150, 152.

Here, there is evidence that Garcia was armed during the robbery of Oshman's, that he made threats, and that he tied up Oshman's employees. (*See, e.g.*, RR 45 at 65–71; *see also* BIO at 3–4, 29.) Respondent also cites evidence that Garcia left the break room "about twenty seconds before gunfire erupted," suggesting the possibility that Garcia may have been able to reach the area of the loading dock. (BIO at 4, 29). Those actions, however, fall far short of demonstrating an intent to kill anyone.[5] *See Tison*, 481 U.S. at 150–52. Any *willingness* to kill that the State may infer from Garcia's actions—which have not been proven beyond a reasonable doubt—is entirely distinct from evidence that Garcia *intended* to kill in the course of the Oshman's robbery. *See id.* That the State at trial relied so heavily on the law of parties only reconfirms that the State could not prove that Garcia killed or intended to kill. (*See, e.g.*, RR 45 at 13; RR 50 at 6.)

VI. This Court should stay Garcia's execution.

As demonstrated above and in his Petition, Garcia has presented serious

[5] Respondent elaborates the details of Garcia's prior conviction and prison escape (*see, e.g.*, BIO at 4–7), suggesting that an intent to kill can be inferred from those actions. Indeed, Respondent goes so far as to recast the issue presented by Garcia's Petition as whether a "consensus exists against the execution of capital murderers like [Garcia] who *actively participate in a violent prison break* followed by an armed robbery that culminates in the murder of an entirely foreseeable victim." (BIO at 1–2 (emphasis added).) These facts are beyond the scope of the capital crime, however, which was charged based solely on what transpired at Oshman's. The indictment against Garcia identified two forms of capital murder under Texas law: murder of a peace officer and murder, in the course of a robbery. The jury could not find Garcia guilty of capital murder and therefore eligible for a death sentence, based on any other conduct, including that he had been convicted of a previous murder or that he had escaped from prison. Garcia's conviction for capital murder arising solely out of events at Oshman's was not and cannot be based on extraneous, preceding events.

questions about whether the Eighth Amendment bars the execution of those who neither killed nor intended to kill, and Respondent has not shown to the contrary. Because Garcia's attempt to vindicate the unconstitutional imposition of the death penalty in his case would be rendered moot by his execution, this Court should grant a stay of his execution to allow the Court to fully consider the issue. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *In re Campbell*, 750 F.3d 523, 534 (5th Cir. 2014).

CONCLUSION

Garcia's death sentence violates his rights under the Eighth and Fourteenth Amendments to a sentence proportionate to his personal culpability, as opposed to the culpability of the "Texas Seven" as an entity. In the 30 years since this Court decided *Tison*, the consensus regarding the proportionality of the death penalty for an offender such as Garcia has shifted, and this Court should consider whether the Eighth Amendment no longer tolerates the execution of such an offender.

Respectfully submitted: December 4, 2018.

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