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

PETITION FOR WRIT OF CERTIORARI

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

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****CAPITAL CASE****

QUESTION PRESENTED

Whether the Eighth Amendment now forbids a State from executing a person when there is no evidence that he killed or intended to kill another person.

LIST OF PARTIES TO THE PROCEEDING

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph C. Garcia, a Texas prisoner under a sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals dismissing his subsequent application for a writ of habeas corpus.

OPINION BELOW

The order of the Texas Court of Criminal Appeals (CCA) dismissing as "an abuse of the writ" Garcia's November 14, 2018 application for a writ of habeas corpus and denying his motion for stay of execution was issued on November 30, 2018 and is attached at A. 1. Judge Alcala's dissent from the CCA's dismissal is attached at A. 4.

STATEMENT OF JURISDICTION

The CCA dismissed Garcia's subsequent application for post-conviction relief on November 30, 2018. In accordance with Supreme Court Rule 13.1, Garcia now timely files his petition for a writ of certiorari to review the CCA's judgment within 90 days of the entry of that judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional amendments.

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

U.S. Const. amend. VIII.

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

U.S. Const. amend. XIV.

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

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

Tex. Penal Code Ann. § 7.02 (1993).

Finally, the following statutes, laid out in relevant part in the Appendix, are referenced:

Ala. Code § 13A-5-40 (2018)

Ala. Code § 13A-2-23 (1975)

Kan. Stat. Ann. § 21-5401 (2017)

La. Rev. Stat. Ann. § 14:30 (2015)

Mo. Rev. Stat. § 565.020 (2016)

Mo. Rev. Stat. § 565.021 (2017)

Ohio Rev. Code Ann. § 2903.01 (2011)

Or. Rev. Stat. § 163.095 (2015)

18 Pa. Cons. Stat. Ann. § 2502 (2011)

Va. Code Ann. § 18.2-31 (2010).

STATEMENT OF THE CASE

I. Introduction

The cornerstone of the Eighth Amendment is the guarantee that individuals will not be subject to cruel and unusual punishments. *See* U.S. Const. amend. VIII. Whether a punishment—in particular a sentence of death—violates the Eighth Amendment depends in part on whether it is proportionate in light of the individual's personal culpability. While a defendant may be convicted of a crime committed, for example, by co-conspirators, he may not be sentenced to death based solely on the actions or intents of others. Instead, his sentence must reflect his own culpability. This foundational principle of individualized sentencing has animated several of this Court's Eighth Amendment and due process cases limiting the application of the death penalty, notably *Enmund v. Florida*, 458 U.S. 782 (1982). Further, this principle guarantees that only those who are sufficiently personally culpable to warrant the death penalty—"the worst of the worst"—are so sentenced. *See Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion) (deeming North Carolina's death-penalty statute inconsistent with the Eighth and Fourteenth

Amendments).

Joseph C. Garcia is not such an offender. He was sentenced to death after being convicted of capital murder in connection with the shooting death of a police officer under Texas's controversial "law of parties." That law allows an individual, based on the actions of co-conspirators, to be convicted—even of a crime such as capital murder—if the individual should have anticipated those actions. *See* Tex. Penal Code Ann. 7.02(b) (1993). He need not have committed the killing or intended that a killing occur; he need not even have actually anticipated such an outcome. *See id.* Moreover, an individual convicted of capital murder under the law of parties can be sentenced to death without any finding that he himself killed or intended to kill the victim. While Garcia participated in the armed robbery during which Officer Aubrey Hawkins was killed, Garcia neither killed Hawkins nor intended to do so. Indeed, there is no evidence placing Garcia in the vicinity of the shooting when it occurred.

Garcia was eligible for a death sentence because this Court, over three decades ago, determined that a sentence of death could be a proportionate punishment for a defendant who had neither killed nor intended to kill anyone during the capital crime. *Tison v. Arizona*, 481 U.S. 137 (1987). That ruling was supported by this Court's conclusion that a consensus existed at the time that a death sentence under such circumstances was acceptable and that "intent to kill" was an ineffective way of assessing personal culpability. *Id.* at 155–58.

In the intervening years, however, the tides have shifted. The consensus across

jurisdictions now is that a person who neither killed nor intended to kill should not face the penalty of death. Moreover, such a severe penalty for an individual who was unintentionally involved in a killing—an individual without extreme culpability—furthers no permissible penological interest and is inherently unreliable. Taking these considerations into account, this Court should conclude that imposing the death penalty on one who neither killed nor intended to kill violates the Eighth Amendment. This Court should recognize that an individual such as Garcia, who neither killed nor intended to kill, is not among "the worst of the worst" for whom capital punishment is meant to be reserved.

II. The Crime

On December 24, 2000, seven individuals coordinated an armed robbery of the Oshman's Sporting Goods store in Irving, Texas. They had recently escaped from prison and were trying to gather money and supplies. (RR 48 at 23–24.)[1] An Oshman's department manager, Wesley Ferris, later identified the six individuals inside the store as George Rivas, Michael Rodriguez, Larry Harper, Donald Newbury, Randy Halprin, and Joseph Garcia. (RR 45 at 41–42, 95–96.) Rivas, whom Ferris identified as "the commanding officer" of the group, was "doing all the ordering, all the talking, and telling [Ferris] what to do and when to do it and how to do it." (RR 45 at 103.)

[1] Transcripts from Garcia's 2003 capital trial before the 283rd Judicial District Court in Dallas County, cause number F01-00325-T, are cited as "Reporter's Record" ("RR"), followed by the relevant volume and page number(s), using the transcripts' original pagination. The full Reporter's Record is available on the docket of the United States District Court for the Northern District of Texas in *Garcia v. Stephens*, No. 3:06-cv-02185-M, starting at ECF No. 121.

Rivas was also in radio communication with the seventh associate, Patrick Murphy, who was outside the store. (RR 45 at 69.)

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

While Garcia remained in the breakroom, Rivas directed Ferris, the department manager, back to the customer-service area and to other parts of the store. Rivas had Ferris empty the store's cash registers and money safe, but Rivas declined to take money from the fund belonging to employees. (RR 45 at 73–76, 120.) Rivas also took the keys to Ferris's Ford Explorer, but assured Ferris he would get his car back. (RR 45 at 74.) Next, Rivas had Ferris open the gun safe and directed Newbury, who had been in the main area of the store, to collect the guns inside. (RR 45 at 77–79.) Rivas escorted Ferris back to the breakroom. Garcia and at least one other associate were still there with the other employees, and Rivas said they should stay with the employees while he got Ferris's vehicle. (RR 45 at 80–82.) Rivas then

went outside. According to witness Misty Simpson, who was in the parking lot with her friend at the time, Rivas spoke briefly to one individual and then tried to speak to Simpson before climbing into a Ford Explorer and driving toward the back of Oshman's. (RR 46 at 12–14, 22–23.) Concerned by the odd occurrence, Simpson's friend called 911. (RR 46 at 14–15.)

Shortly thereafter, in response to the 911 call, police officer Aubrey Hawkins approached Oshman's by car. He pulled his patrol vehicle into Oshman's back loading dock area, behind the Explorer. (RR 47 at 22–24.) Murphy, who had not entered Oshman's, warned Rivas by radio of the policeman's approach, and Rivas told his associates to hurry because they were running out of time. (RR 45 at 83.) One of the men in the breakroom said they were not done tying up the employees, but Rivas told them to get out of the building. (RR 45 at 83.) Garcia and the associate(s) with him left the breakroom. (RR 45 at 83–84.)

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

evidence that he was even in the vicinity of the loading dock when the gunfire broke out.

Afterward, the associates left in the Explorer. (RR 46 at 36–37.) Six were arrested in January 2001 in Colorado. (RR 49 at 189–90.) The seventh individual, Larry Harper, committed suicide before he could be arrested. (RR 49 at 40–41.)

III. The Law of Parties

Garcia and his five surviving associates were each charged in Dallas County, Texas with capital murder in connection with the shooting death of Hawkins. The indictment listed two forms of capital murder under Texas law: murder of a peace officer and murder in the course of a robbery. The State did not charge Garcia with any other crimes.

In trying the case against Garcia, the State relied heavily on the law of parties, which provides in part as follows:

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

(A. 39); *see also* Tex. Penal Code Ann. § 7.02(b) (1993). As a result of this law, and as noted earlier, to secure a conviction for capital murder, the State did not have to prove that Garcia had actually killed Hawkins or that Garcia had intended that he be killed.

The State capitalized on that law from the outset, making clear even during jury selection, both (1) the breadth of the law of parties, and (2) that it allowed Garcia to be convicted for the murder of Hawkins even if Garcia had neither fired a gun nor intended that anyone be killed. During voir dire, the State guided venireperson after venireperson through the law of parties and examples of that law in action, emphasizing its expansive reach. For example, the prosecutor explained:

> Another theory is that if we all agree or have, the law calls it conspiracy, but if we agree to commit one offense, and while we're committing it, one of us commits another, such as . . . murder, in the furtherance of that offense, then everyone could be held responsible, if the evidence shows that they should have anticipated that a life would be taken, okay? And that's the law of parties. So they can be held responsible and ultimately could get the death penalty, depending on the facts in each case. . . . But the theory is people other than the triggerman could ultimately receive the death penalty.

(RR 25 at 32–35; *see also, e.g.*, RR 24 at 35–38; RR 25 at 100–03, 110–12, 161–62.) Later, during its opening statement, the State reminded the jurors, "You will come to understand why we spent so much time during voir dire on the law of parties." (RR 45 at 13.)

During Garcia's guilt phase, numerous witnesses for the State detailed for the jury what occurred during the armed robbery and shooting at Oshman's. (*See, e.g.*, RR 45 at 41–255.) Not one witness testified that Garcia discharged his weapon. (*See* RR 45 at 32–255; RR 46 at 3–71; RR 47 at 4–220; RR 48 at 10–201.) Not one witness

even placed him in the back loading dock area during the gunfire. (*See* RR 45 at 32–255; RR 46 at 3–71; RR 47 at 4–220; RR 48 at 10–201.)

At the close of evidence, the court instructed the jury on the law applicable to its guilt/innocence-phase deliberations. (RR 50 at 5.) Those instructions included the definition of the law of parties. (A. 39.) The instructions also laid out how the law of parties applied to the charges in the indictment. (A. 41–43.) According to those instructions, if Hawkins's death "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." (A. 43.)

While the State offered theories of principal and conspiracy liability in addition to party liability, its closing argument underscored the extent to which the State was relying on party liability for a conviction. The State was explicit: "[P]arties is huge here." (RR 50 at 6.) The State submitted that the jury could infer that Garcia killed Hawkins, but offered as its basis the bare possibility that he had made it to the loading dock area all the way from the breakroom by the time the burst of gunfire occurred. (RR 50 at 8–9.) The prosecutor knew full well he could not prove beyond a reasonable doubt that Garcia was guilty of capital murder either as a principal or a conspirator, which required either that Garcia actually shot Hawkins or that he solicited, encouraged, or aided in the shooting. (A. 41–43.) He acknowledged for the jury, "[W]e cannot tell you which gun fired some of these shots." (RR 50 at 9.) Instead,

the State stressed the law of parties for the jury, arguing that the only way the jury could *not* convict Garcia of capital murder was "to ignore the law of parties." (RR 50 at 6.) The State further argued:

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

(RR 50 at 6–7.)

During the rebuttal argument, the State reminded the jurors, "[W]e talked with each of you, each and every one of you, about the law of parties and all of you agreed that it was a good law. It's a law that keeps gangs of ruthless outlaws from terrorizing citizens. . . . [Y]ou all saw the logic in the law." (RR 50 at 49–50.) And, ultimately, when describing Hawkins's death, the State urged the jurors to treat the Texas Seven as one entity:

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

(RR 50 at 54; *see also, e.g.*, RR 50 at 10 ("In the course of committing that robbery . . . did they kill Aubrey Hawkins? There's no question about that.").) The State chose its

words carefully, and it chose "they"—"they swarmed," "they ambushed," "they made sure," "they kill[ed]"—because it could not prove that "he," Garcia, was guilty, except under a theory of party liability.

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

The same jury then heard the State's and the defense's penalty-phase presentations. (RR 50 at 57–58.) Then, during closing arguments, the State once again reminded the jury of the law of parties, even though that law does not apply in penalty-phase proceedings. The State noted, "We also talked to you at great length about the law of parties. Each and every one of you told us after we explained it to you that, yes, you agreed with the law of parties and we gave some examples." (RR 56 at 123–24.) The State told the jurors at sentencing that they could "see the wisdom of the law of parties once [they] reflect[ed] on this case. This [was] the type of case it[] [was] made for." (RR 56 at 125.)

Texas law required the jury to consider three "special issues" before determining the appropriate sentence. Tex. Code Crim. Proc. Ann. art. 37.071, § 2 (1999). The court accordingly instructed the jurors that they would consider the first and second special issues and, if they determined unanimously that the State had proven beyond a reasonable doubt that the answer to each issue was "yes," then the jurors would consider a third special issue. (A. 48–49.) The three special issues were as follows:

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

(A. 53–55.) The jury did not have to conclude that Garcia himself killed or intended to kill in order to answer the second special issue in the affirmative.

After deliberating, the jury answered special issues one and two in the affirmative and special issue three in the negative. (RR 56 at 147–48.) In accordance with the jury's verdict, the court sentenced Garcia to death. (RR 56 at 149–50.)

IV. The Proceedings Below

On November 14, 2018, Garcia filed a subsequent application for post-conviction relief in the CCA. In that application, he argued that sentencing to death an individual convicted under Texas's law of parties—with no showing that the individual killed or intended to kill—violates the Eighth Amendment and Fourteenth

Amendments to the U.S. Constitution. More specifically, Garcia contended that the evolving standards of decency that define the Eighth Amendment's proscription on cruel and unusual punishment no longer tolerate the execution of an individual absent evidence that he killed or intended to kill. *See Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958))). In light of this constitutional prohibition, Garcia argued that his death sentence could not stand.

Garcia further explained why his claim for relief satisfied the statutory requirements for cognizability in a successor application for state habeas relief. Under Texas law, "a court may not consider the merits of or grant relief based on [a] subsequent application [for a writ of habeas corpus] unless" one of the following conditions is satisfied:

> (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 . . . .

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

Garcia argued first that his claim (1) had not previously been presented, and (2) could not have been presented at the time of his previously filed application,[2] as several of the legislative and judicial pronouncements on which he relied as evidence of the Eighth Amendment's contours post-dated that application. *See id.* § 5(a)(1); (*see also* Subsequent Appl. for Post-Conviction Writ of Habeas Corpus at 95–96, *Ex parte Garcia*, No. WR-64,582-03 (Tex. Crim. App. Nov. 14, 2018) [hereinafter "Appl."]). He further submitted that his claim was cognizable in the successor application under section 5(a)(3) because no rational juror could have come to the conclusion that a death sentence was appropriate if there existed a categorical exemption to the capital punishment in cases, such as this one, where the State had not proven beyond a reasonable doubt that the defendant himself killed or intended to kill the victim. (*See* Appl. at 96); *Ex parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007) (concluding that section 5(a)(3) of Article 11.071 "is broad enough on its face to accommodate an absolute constitutional prohibition against, as well as statutory ineligibility for, the death penalty").

In a three-page order, the CCA dismissed Garcia's subsequent application for

[2] Before his November 14, 2018 application, Garcia's most recent application for state habeas relief was filed in 2007. (*See* Subsequent Appl. for Writ of Habeas Corpus Pursuant to Article 11.071 § 5, *Ex parte Garcia*, No. WR-64,582-02 (Tex. Crim. App. Nov. 12, 2007).)

a writ of habeas corpus as "an abuse of the writ" and denied his motion for a stay of execution. (A. 1.)

Judge Alcala dissented from the dismissal of Garcia's claim that his death sentence was unconstitutional under the Eighth Amendment. (A. 4–5.) She wrote that she would (1) grant the stay of execution, (2) "hold that applicant has alleged sufficient new facts that have emerged in the decade since his prior habeas application, and thus [that] he has met the procedural requirements for consideration of his [claim]," and (3) remand Garcia's case. (A. 5.) Judge Alcala deemed it "likely [that Garcia was] convicted as a party-conspirator to this offense [under the law of parties], 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." (A. 10–11.) The dissent then turned to whether "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." (A. 13.) Judge Alcala reviewed the evidence of a national consensus against the death penalty for offenders who neither killed nor intended to kill; she further remarked 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." (A. 16.) Finally, she asserted that the "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." (A. 16.)

This petition for a writ of certiorari follows.

REASONS FOR GRANTING WRIT

I. The Eighth Amendment no longer tolerates the execution of those who neither killed nor intended to kill.

It has been over 30 years since this Court last addressed the question whether an individual may be punished by death even though he himself neither killed nor intended to kill. *See Tison v. Arizona*, 481 U.S. 137 (1987). Since that time, a consensus has emerged against the death penalty in such cases. Moreover, the death penalty for such a person fails to measurably further any permissible penological interest and is not certain to be based on that person's own conduct and mental state. In the past, this Court has not hesitated to recognize a constitutional exemption from the death penalty when a shift in the standards of decency so warranted, and it should not hesitate to do so now.

A. This Court last considered what degree of culpability is required before a non-triggerman can face the death penalty in the 1980s.

The Cruel and Unusual Punishments Clause of the Eighth Amendment precludes "all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged." *Weems v. United States*, 217 U.S. 349, 371 (1910) (quoting *O'Neil*, 144 U.S. at 339–40 (Fields, J., dissenting)). Of course, no penalty is nearly as drastic as the penalty of death. *Gregg v. Georgia*, 428 U.S. 153,

188 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (recognizing that "death is different in kind from any other punishment imposed under our system of criminal justice"). The proportionality of the sentence in a capital case is thus a matter of particular constitutional concern.

In a pair of decisions dating back to the 1980s, this Court assessed the proportionality (and therefore the constitutionality) of the death penalty for individuals who were unintentionally involved in killings. First, in *Enmund v. Florida*, this Court considered the situation of a defendant who had served as the getaway driver for two robbers who, during the course of the robbery, had shot and killed two victims. 458 U.S. 782, 784, 788 (1982). The Court determined that only "a small minority of jurisdictions" would permit a defendant such as Enmund to be executed, and moreover that capital juries rarely sentenced such defendants to death. *Id.* at 792–95. The Court further concluded that putting Enmund to death served neither the social purpose of retribution nor that of deterrence. *Id.* at 798–800. Enmund had to be sentenced based on his own conduct; he "did not kill or intend to kill and thus his culpability [was] plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims]. This was impermissible under the Eighth Amendment." *Id.* at 798. Ultimately, this Court held more broadly that the death penalty "for one who neither took life, attempted to take life, nor intended to take life" was "inconsistent with the Eighth and Fourteenth Amendments." *Id.* at 787–88.

Just five years later, this Court narrowed its holding in *Enmund*. In *Tison*, this Court re-assessed the proportionality of the death penalty for individuals who neither killed, attempted to kill, nor intended to kill, but who (1) were major participants in the felony that led to the killing, and (2) showed reckless indifference to human life. 481 U.S. at 158. Ricky and Raymond Tison, along with another Tison brother, had helped their father escape from prison, where he was serving a life sentence for having killed a guard during a prior escape attempt. *Id.* at 139. Raymond expressed a willingness to kill in furtherance of the prison break. *Id.* at 151. The Tison brothers entered the prison with a number of guns, which they used to arm their father and his cellmate, who was also a convicted murderer. *Id.* at 139. When they needed a vehicle, the brothers, their father, and the cellmate flagged down a passing car with a family in it, took the four occupants captive, and stole their belongings. *Id.* at 140–41. Ricky and Raymond then watched as their father and his cellmate shot the four family members. *Id.* at 141. All four died. *Id.* Both Ricky and Raymond Tison were convicted of capital murder and sentenced to death for their roles in the killing of the four victims. *Id.* at 141–43.

This Court took the case to consider a category of defendants whose culpability exceeded that of "the felony murderers for whom *Enmund* explicitly held the death penalty disproportional: [defendants whose] degree of participation in the crimes was major rather than minor, and [whose] culpable mental state [was one] of reckless indifference to human life." *Id.* at 151. Both Ricky and Raymond "subjectively

appreciated that their acts were likely to result in the taking of innocent life." *Id.* at 152. The Court looked to States' judgments and found a "substantial and recent legislative authorization of the death penalty" in such circumstances, as well as state-court decisions interpreting *Enmund* to allow the imposition of the death penalty in cases of aggravated felony murder. *Id.* at 154. The Court "accept[ed] . . . as true" that neither Tison brother had exhibited any intent to kill, but dismissed "intent to kill" as "a highly unsatisfactory means of identifying the most culpable and dangerous of murderers." *Id.* at 150, 157. The Court concluded that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state." *Id.* at 157. It then held that the death penalty was not a disproportionate punishment for a defendant who was a major participant in the felony and who exhibited such reckless disregard. *Id.* at 158.

Notably, in describing reckless disregard for human life, the Court highlighted examples of those who killed but who did so unintentionally, not of those who did not kill at all. The Court cited as potentially "among the most dangerous" the individual "who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of a robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property." *Id.* at 157.

Even though the Court's examples of reckless disregard focused on actual killers, since 1987 the class of defendants considered in *Tison*—people who neither killed anyone nor intended that anyone get killed—has been deemed among "the worst of the worst," *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 568 (2005), and has faced a penalty that is "unique in its severity and irrevocability," *Gregg*, 428 U.S. at 187 (joint opinion of Stewart, Powell, and Stevens, JJ.).

B. A consensus has now emerged against the execution of individuals who neither killed nor intended to kill.

This Court, however, has not hesitated to reverse course in Eighth Amendment matters when the available evidence of the evolving societal standards of decency required such action. For example, in *Simmons*, this Court addressed "for the second time in a decade and a half" the constitutionality of executing a juvenile offender. 543 U.S. at 555. After "reconsider[ing]" the issue, the Court broke from its precedent and deemed such executions unconstitutional. *Id.* at 574–75. Similarly, this Court in *Atkins v. Virginia* revisited an issue decided 13 years earlier—the constitutionality of executing a person with intellectual disability—because of the newly formed consensus against such executions. 536 U.S. 304, 306 (2002). Over 30 years have passed since *Tison*, and this Court should reassess the constitutionality of executing an individual who neither killed nor intended to kill, just as it returned to the Eighth Amendment concerns in *Simmons* and *Atkins*.

As noted earlier, executing an offender violates the Eighth Amendment if the

execution is disproportionate to the crime in light of the "evolving standards of decency." *Atkins*, 536 U.S. at 312. The "beginning point" to determine proportionality in the context of those evolving standards "is a review of objective indicia of consensus" against the punishment at issue, which include "enactments of legislatures that have addressed the question," both "by express provision [and] judicial interpretation." *Simmons*, 543 U.S. at 564. Also highly relevant is the frequency with which juries actually return death verdicts or with which executions actually occur in such cases. *See Enmund*, 458 U.S. at 794–95 (considering the rarity of death verdicts for and executions of non-triggermen in the analysis of objective indicia of consensus); *see also Coker v. Georgia*, 433 U.S. 584, 596 (1977) ("[I]t is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried.").

In *Atkins*, the evidence "held sufficient to demonstrate a national consensus" against the death penalty for intellectually disabled individuals was that 30 states prohibited executions in such circumstances, including 12 states that had abolished the death penalty. *Simmons*, 543 U.S. at 564 (discussing national consensus in *Atkins*). "[T]he consistency of the direction of change" was likewise a key consideration. *Atkins*, 536 U.S. at 315. Similarly, in *Simmons*, 30 states again prohibited capital punishment for juveniles—"comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial

interpretation, exclude juveniles from its reach." 543 U.S. at 564. While the rate of change across jurisdictions "ha[d] been slower" than the change flagged in *Atkins*, the Court took particular note of the infrequency with which juveniles were in fact executed. *Id.* at 564–65. Even more recently, this Court considered the indicia of consensus with regard to the imposition of life-without-parole sentences for juvenile offenders who had committed non-homicide crimes. *Graham v. Florida*, 560 U.S. 48, 62 (2010). Even though a strong majority of jurisdictions allowed such sentences in theory, the inquiry did not end there, as "an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute disclose[d] a consensus against its use." *Id.* There were "only 109 juvenile offenders" serving such sentences for non-homicide crimes, making such "sentences most infrequent." *Id.* at 62–63.

Similarly, a clear national consensus has developed against the death penalty for those who neither killed nor intended to kill. To start, at least 30 jurisdictions prohibit by statute or judicial ruling the practice of sentencing those, like Garcia, who did not kill and did not intend to do so. Here, as in *Atkins* and *Simmons*, the analysis starts with the jurisdictions that have abandoned the death penalty altogether. There are 21 such jurisdictions.[3] Notably, eight of those jurisdictions have abolished or

[3] The jurisdictions that no longer have capital punishment are 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, Washington, D.C., and Wisconsin. *States With and Without the Death Penalty, Death Penalty Information Center* (last updated Oct. 11, 2018).

overturned the death penalty in the decades since *Tison* was decided.[4] Next, it appears that at least nine jurisdictions prohibit the execution of one who neither killed nor intended to kill, either because capital punishment in the jurisdiction is reserved for those who kill and/or because such punishment requires a showing of intent to kill. These jurisdictions include Alabama,[5] Kansas,[6] Louisiana,[7] Missouri,[8]

[4] The eight jurisdictions that have abolished or overturned the death penalty since 1987 are Connecticut (2012), Delaware (2016), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), New York (2007), and Washington (2018). *States With and Without the Death Penalty*, *supra*.

[5] *See* Ala. Code § 13A-5-40(a)–(c) (2018) (defining capital murder as requiring intent to kill); Ala. Code § 13A-2-23 (1975) (allowing capital punishment for accomplice to an offense only when accomplice has "the intent to promote or assist the commission of the offense"); *Ex parte Woodall*, 730 So. 2d 652, 657 (Ala. 1998) ("No defendant can be found guilty of a capital offense unless he had an intent to kill, and that intent cannot be supplied by the felony-murder doctrine. . . . '[T]he accomplice liability doctrine may be used to convict a non-triggerman accomplice if, but only if, the defendant was an accomplice in the intentional killing as opposed to being an accomplice merely in the underlying felony.'" (alteration in original) (quoting *Ex parte Raines*, 429 So. 2d 1111, 1112 (Ala. 1982))).

[6] *See* Kan. Stat. Ann. § 21-5401(a) (2017) (limiting capital murder to intentional and premeditated killings); *State v. Overstreet*, 200 P.3d 427, 435–36 (Kan. 2009) (concluding that the foreseeability of a murder is an inappropriate basis for convicting an accomplice of premeditated murder; the accomplice "must have the same specific intent to commit the crime as the principal").

[7] *See* La. Rev. Stat. Ann. § 14:30 (2015) (defining first-degree murder as requiring "specific intent to kill or inflict great bodily harm"); *Clark v. La. State Penitentiary*, 697 F.2d 699, 700–01 (5th Cir. 1983) (on pet. for rehr'g & suggestion for rehr'g en banc) (noting that because first-degree murder requires specific intent to kill, defendant must have that specific intent to be found guilty as a conspirator); *see also State v. Brown*, 478 So. 2d 600, 606–07 (La. Ct. App. 1985).

[8] *See* Mo. Rev. Stat. §§ 565.020, 565.021 (2016–17) (requiring premeditation for first-degree murder and defining felony murder as second-degree murder); *State v. O'Brien*, 857 S.W.2d 212, 217–18 (Mo. 1993) (construing Mo. Rev. Stat. § 565.020 and noting that to be found guilty of first-degree murder, even under theory of accomplice liability, defendant must have had intent to kill and must have premeditated killing).

Montana,[9] Ohio,[10] Oregon,[11] Pennsylvania,[12] and Virginia.[13] And, of the jurisdictions that would nominally allow the death penalty under these circumstances, seven have not had an execution in over a decade.[14]

Accordingly, there are only 15 jurisdictions in which Garcia could even potentially face execution for his role in the offense. Tellingly, outside the context of murder for hire, there have been only ten executions of individuals nationwide who did not directly kill the victims since 1985—and none at all since 2009.[15] *Those Executed Who Did Not Directly Kill the Victim*, Death Penalty Information Center (last visited Nov. 25, 2018), https://deathpenaltyinfo.org/those-executed-who-did-not-

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[9] *See Vernon Kills On Top v. State*, 928 P.2d 182, 200–07 (Mont. 1996) (rejecting *Tison* standard in favor of *Enmund* on state constitutional grounds and concluding that defendant who neither killed nor intended to kill cannot be subjected to the death penalty).

[10] *See* Ohio Rev. Code Ann. § 2903.01 (2011) (defining aggravated murder as requiring purposeful conduct); *State v. Williams*, No. 1-01-63, 2002 WL 1594013, at *6 (Ohio Ct. App. July 15, 2002) (noting that jury instructions on complicity in aggravated murder were acceptable when they "ma[d]e clear that the jury must find purpose to kill in order to convict"); *see also State v. Taylor*, 612 N.E.2d 316, 325 (Ohio 1993) (holding that death-penalty eligibility under felony-murder aggravating circumstance requires that defendant either be the actual killer or have intent to kill).

[11] *See* Or. Rev. Stat. § 163.095(2)(d) (2015) (felony murder can only be aggravated murder if the defendant "personally and intentionally committed the homicide"); *State v. Ventris*, 96 P.3d 815, 822 (Or. 2004) ("To find defendant guilty of aggravated murder, of course, the trial court necessarily had to find that defendant 'personally and intentionally' had killed the victim.").

[12] *See* 18 Pa. Cons. Stat. Ann. § 2502(a), (b) (2011) (limiting first-degree murder to intentional killing and making felony murder second-degree murder).

[13] *See* Va. Code Ann. § 18.2-31 (2010) (stating that capital murder requires "willful, deliberate, and premeditated killing"); *Watkins v. Commonwealth*, 331 S.E.2d 422, 434–35 (Va. 1985) (noting that the Commonwealth must prove that defendant actually killed the victim for the defendant to be convicted of capital murder).

[14] These jurisdictions include California, Colorado, Nevada, New Hampshire, North Carolina, Wyoming, and the U.S. Government. *See Executions by State and Year*, Death Penalty Information Center (last visited Nov. 28, 2018), https://deathpenaltyinfo.org/Executions_by_State_ and_Year.

[15] At least one of the individuals who was executed fired his gun at the victim and thereby exhibited an intent to kill, though he did not fire the fatal shot. *Those Executed Who Did Not Directly Kill the Victim*, *supra*.

directly-kill-victim. Moreover, these executions took place in only six states, *see id.*, the outlier jurisdictions on this issue. That the execution of such offenders is "most infrequent" reflects a consensus against the death penalty for those who neither killed nor intended to kill. *See Graham*, 560 U.S. at 62–63.

Even Ricky and Raymond Tison—in whose case this Court determined that offenders may have sufficient culpability to warrant a death sentence despite the fact that they were not intentionally involved in killings—were not ultimately executed. The Tison brothers' death sentences were set aside by the Arizona Supreme Court in 1989, and the two were sentenced to life in prison in 1992. *See State v. Tison*, 774 P.2d 805, 805–06 (Ariz. 1989) (per curiam) (vacating death sentences and remanding for hearing on whether defendants showed reckless indifference); Richard Ruelas, *The Story of Gary Tison's Fateful Final Escape—from Those Who Were There*, AZ Central (Sept. 19, 2017), https://www.azcentral.com/story/news/local/arizona-bestreads/2017/ 09/19/arizona-tison-gang-spree-prison-escape-1978/660262001/.

As the legislative and judicial pronouncements and actual sentencing practices—including for the Tison brothers themselves—across the country make clear, there has emerged a consensus against capital punishment for an individual when there is no evidence that he killed or intended to kill. *Cf. Atkins*, 536 U.S. at 311–17.

C. Other judicial considerations likewise counsel against the death penalty for those who neither killed nor intended to kill.

Beyond considering the objective evidence reflecting the evolving standards of decency, this Court also takes into account its "own judgment . . . on the question of the acceptability of the death penalty under the Eighth Amendment." *Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 597). The ultimate question for this Court is "whether there is reason to disagree with the judgment reached by the citizenry and its legislators." *Id.* at 313.

When bringing its own judgment to bear, this Court has first considered whether the death penalty, in the context in question, serves a permissible penological interest. This Court has recognized that the death penalty may serve "two principal social purposes: retribution and deterrence." *Enmund*, 458 U.S. at 798 (quoting *Gregg*, 428 U.S. at 183 (joint opinion of Stewart, Powell, and Stevens, JJ.)). "Unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." *Id.* (quoting *Coker*, 433 U.S. at 592.)

When applied to an individual who neither killed nor intended to kill, the death penalty serves no deterrent value. As *Tison* did not overturn *Enmund*, this Court's pronouncement in *Enmund* still holds true:

> We are quite unconvinced . . . that the threat that the death penalty will be imposed for murder will measurably deter

> one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrence only when murder is the result of premeditation and deliberation."

Id. at 798–99 (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)); *see also Atkins*, 536 U.S. at 319–20. The *Tison* Court took no issue with this position. 481 U.S. at 148–49. Indeed, it is difficult to conceive of how one could be deterred from an action one neither took or intended to take. *Cf. Kennedy v. Louisiana*, 554 U.S. 407, 445 (2008) (noting that "to justify [a] penalty on the grounds of deterrence," one must "[a]ssum[e] the offender behaves in a rational way"). As Justice White reasoned, "[w]hatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders—and that debate rages on—its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful." *Lockett v. Ohio*, 438 U.S. 621, 625 (1978) (White, J., concurring in part and dissenting in part). The lack of deterrent value is especially pronounced when the death penalty is so empirically rare for such offenders.

Similarly, the death penalty does not measurably advance the goal of retribution in circumstances such as these. This Court has previously held that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished." *Simmons*, 543 U.S. at 571. Moreover, this Court in *Tison* acknowledged that "[d]eeply ingrained in our legal

tradition is the idea that the more purposeful is the criminal conduct, . . . the more severely it ought to be punished." 481 U.S. at 156. But now, a defendant can be penalized in the exact same way if he is unintentionally involved in a killing as if he engaged in deliberate murderous conduct. When the death penalty is permitted for so broad a swath of conduct, then it is no longer reserved only for "the worst of the worst"—only those "the most deserving of execution." *Atkins*, 536 U.S. at 319; *see also State v. Gerald*, 549 A.2d 792, 815 (N.J. 1988), *superseded by constitutional amendment*, N.J. Const. art. I, ¶ 12, *as stated in State v. Bey*, 736 A.2d 469 (N.J. 1999) ("The failure to distinguish, for purpose of punishment, those who intend the death of their victim from those who do not does violence to the basic principle stated above that 'the more purposeful the conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.'" (quoting *Tison*, 481 U.S. at 156)).

Finally, this Court should consider that the capital-sentencing process is unreliable in the case of an individual who neither killed nor intended to kill. In the past, this Court has considered "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty'" as a justification for a categorical limitation on capital punishment. *Atkins*, 536 U.S. at 320 (quoting *Lockett*, 438 U.S. at 605). In *Atkins*, that risk was created by the difficulty defendants with intellectual disability might have "mak[ing] a persuasive showing of mitigation" or "meaningfully assist[ing] their counsel." *Id*. In *Simmons*, a comparable risk arose because the "likelihood exists that the brutality of cold-blooded nature of any

particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." 543 U.S. at 572–73.

There exists an unacceptable risk that a defendant will be sentenced to death based not on his own culpability parsed out from that of his co-defendants, but on their collective culpability. This is particularly true in a case such as Garcia's, where during the penalty-phase closing arguments the State (1) conflated Garcia's actions and intents with those of his associates, and (2) continued to argue liability under the law of parties, even though that law did not apply to sentencing proceedings. (*See, e.g.*, RR 56 at 125 (the State contending during sentencing proceedings that the jurors could "see the wisdom of the law of parties once [they] reflect[ed] on this case"); RR 56 at 136 ("[T]hey had to get rid of Aubrey Hawkins. They didn't hesitate. They didn't hesitate.").) In cases where a defendant is sentenced to death for a killing committed by another that he did not intend to occur, there is too great a risk that the jury will struggle to make the individualized sentencing decision demanded by the Eighth Amendment. There is too great a risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *See Atkins*, 536 U.S. at 320 (quoting *Lockett*, 438 U.S. at 605).

The absence of measurable deterrent or retributive value, compounded by the risk of an unreliable sentence, confirms that the national consensus against the death

penalty for those who neither killed nor intended to kill developed for good reason. It has been over three decades since this Court last confronted this issue of exceptional importance. So that the contours of the Eighth Amendment may continue to reflect the evolving standards of decency, this Court should recognize that the Constitution forbids the execution of an individual who neither killed nor intended to kill.

II. This case presents a fitting vehicle to address the exceptionally important question whether it is constitutional to execute someone who neither killed nor intended to kill.

A. There is no jurisdictional bar to this Court's consideration of the Eighth Amendment question presented here.

In its order denying Garcia relief on this claim, the CCA determined that his subsequent application for relief constituted "an abuse of the writ." (A. 3.) Garcia had argued that he satisfied Texas's statutory bar on successor applications for state post-conviction relief in two distinct ways: (1) his claim relied on a legal and factual basis that was previously unavailable, i.e., the new objective evidence of a national consensus, *see* Tex. Code Crim. Proc. Ann art. 11.071, § 5(a)(1); (A. 5); and (2) if the CCA had agreed that the Eighth Amendment precluded the execution of one, such as Garcia, who neither killed nor intended to kill, then he would fit within a categorical exemption to the death penalty, *see id.* § 5(a)(3); *Blue*, 230 S.W.3d at 161 (discussing scope of section 5(a)(3)). In dismissing Garcia's claim on procedural grounds, the CCA determined that he could overcome neither procedural bar.

In order for a state-court decision to constitute a jurisdictional bar to this Court's consideration of a judgment, that decision must rest on independent and adequate state-law grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) ("In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional."). When the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," then the reviewing federal court will "presume there is no independent and adequate state ground for a state court decision." *Id.* at 735 (quoting *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983)).

Here, in order to dismiss this claim on procedural grounds, the CCA had to conclude that the claim did not satisfy the requirements of section 5(a)(3). *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a); (Appl. at 95–96). To do that, the court had to determine that Garcia had not made the "threshold showing" that he neither killed nor intended to kill, or the court had to determine that the Eighth Amendment to the U.S. Constitution does not presently forbid the execution of one who neither killed nor intended to kill. *See Blue*, 230 S.W.3d at 163. The State did not even contend below that Garcia had personally killed Hawkins. (State's Mot. to Dismiss at 24–27, *Ex parte Garcia*, No. WR-64,582-03 (Tex. Crim. App. Nov. 26, 2018) [hereinafter "State's Mot."]; *see also* RR 50 at 9 ("[W]e cannot tell you which gun fired some of these shots."); A. 10–11.) And while the State submitted that Garcia had sufficient

culpability to make him death eligible, the State did not argue that Garcia himself possessed the intent to kill the victim. (State's Mot. at 24–27 (contending that the Texas Seven "evinced their willingness to use lethal force" and "clearly contemplated" the use of lethal force, but not that Garcia personally intended to kill)); *see also Tison*, 481 U.S. at 150–52 ("accept[ing] . . . as true" that the Tison brothers did not intend to kill, when "there [was] no evidence that either [brother] took any act which he desired to, or was substantially certain would, cause death"). Accordingly, 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. That question is not merely interwoven with federal law; it is at its core a matter of federal constitutional law. Therefore, there was no independent state ground for the CCA's dismissal of this claim, and there is no jurisdictional bar to this Court's consideration thereof. *See Coleman*, 501 U.S. at 735.

B. Garcia's case offers a compelling opportunity to resolve this critical Eighth Amendment issue.

As noted previously, this Court has made clear that the Eighth Amendment must draw its meaning from society's evolving standards of decency. *See Atkins*, 536 U.S. at 311. But in order for that to remain true, this Court cannot pass over opportunities to revisit the contours of the Eighth Amendment to ensure that they in fact reflect those shifting standards. More than thirty years after *Tison*, the time has come for this Court to reconsider the question whether, for someone who neither

killed nor intended to kill, the death penalty is still widely accepted; whether it serves any cognizable purpose; and whether it is sufficiently reliable to pass constitutional muster.

Moreover, that Garcia's case is not an "easy" case makes it an ideal vehicle to reconsider the evolving standards of decency discussed by *Tison*. The offenses in *Simmons* and *Atkins* were premeditated, vicious murders, but even so the culpability of the juvenile and intellectual disabled perpetrators, respectively, was insufficient to justify capital punishment. *Simmons*, 543 U.S. at 556–57; *Atkins*, 536 U.S. at 308. Here, Garcia's conduct in participating in the armed robbery of Oshman's was egregious. However, at the end of the day, there is no evidence that he himself killed Hawkins, that he intended for anyone to be killed during the robbery in which he was involved, or that he was even in the vicinity when the killing occurred. Garcia was culpable, but his culpability is meaningfully less than that of an intentional murderer or a nonintentional killer. *See Kennedy*, 554 U.S. at 428 (identifying intentional first-degree murder as the most terrible of crimes); *Tison*, 481 U.S. at 157 (deeming "some nonintentional murderers" as "among the most dangerous and inhumane," including someone who tortures another person and is indifferent to whether the victim survives). This Court has insisted that the death penalty be applied with "restraint and moderation." *Kennedy*, 554 U.S. at 426. Garcia was culpable, but the question that remains for this Court—and the broader question that has continued to percolate

since *Tison*—is whether his culpability truly warrants labeling Garcia as among "the worst of the worst" and taking his life.

CONCLUSION

For all of the foregoing reasons, this Court should reevaluate *Tison* and recognize that the Eighth Amendment no longer permits the execution of one, such as Garcia, who neither killed nor intended to kill. This Court's review is warranted to ensure that the Eighth Amendment continues to reflect the evolving standards of decency and to ensure that Texas does not execute an individual whose personal culpability in the offense at issue—as opposed to the collective culpability of his co-defendants—was insufficient to justify a death sentence.

Respectfully submitted: November 30, 2018.

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