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

APPLICATION FOR STAY OF EXECUTION

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

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APPLICATION FOR STAY OF EXECUTION

To The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23, Petitioner Joseph C. Garcia respectfully requests a stay of his execution currently scheduled for after 6:00 p.m. CST on Tuesday, December 4, 2018. Concurrent with this document, Garcia is filing a petition for writ of certiorari asking this Court to review the judgment[1] of the Texas Court of Criminal Appeals. That court, over the dissent of Judge Alcala, denied Garcia's motion to stay his execution and dismissed his subsequent application for a writ of habeas corpus challenging his unconstitutional death sentence, which is disproportionate to his culpability for the offense and inconsistent with the current consensus that offenders who neither killed nor intended to kill should not be punished with death. This important issue of whether Garcia's sentence comports with the Eighth Amendment will become moot if Garcia is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring).

ARGUMENT

To obtain a stay of execution, a death-row prisoner must show that four factors, balanced together, weigh in favor of a stay: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm without a stay; (3) the balance of

[1] The order of the Texas Court of Criminal Appeals and Judge Alcala's dissent are appended to this application.

hardships tips in his favor; and (4) a stay is in the public interest. *See Rhoades v. Blades*, 661 F.3d 1202, 1203 (9th Cir. 2011) (citing *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011)). Instead of showing a likelihood of success on the merits, a petitioner may demonstrate that "serious questions going to the merits" of his claims are presented in his appeal, and he may obtain a stay as long as the other three factors weigh in his favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). In this case, Garcia has presented a serious question about whether his death sentence, following a conviction of capital murder under Texas's controversial "law of the parties," violates the Eighth Amendment, where he neither killed nor intended to kill the victim, Officer Aubrey Hawkins. As explained in Garcia's concurrently filed petition, this Court's evolving Eighth Amendment jurisprudence dictates that a sentence of death under these circumstances is no longer constitutionally permissible. The question whether the death penalty can properly be applied to one who neither killed nor intended to kill must be resolved to forestall the arbitrary application of this ultimate penalty in cases where it furthers no permissible penological purpose and is inherently unreliable.

1. Garcia has presented serious questions about whether the death penalty may constitutionally be imposed on an offender who neither killed nor intended to kill.

Garcia's petition for certiorari asks the Court to resolve the issue of whether, under the Court's evolving Eighth Amendment jurisprudence, a death sentence can constitutionally be imposed on an individual where there is no evidence that person killed or intended to kill. As explained in detail in Garcia's petition, since this Court last considered this issue over thirty years ago in *Tison v. Arizona*, 481 U.S. 137

(1987), a national consensus has emerged against sentencing such offenders to death. Accordingly, under this Court's Eighth Amendment precedent, Garcia has presented a serious question whether his execution is constitutionally permissible under the evolving standards of decency. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Graham v. Florida*, 560 U.S. 48, 60 (2010). Further, the rarity with which juries actually impose death sentences on offenders who neither killed nor intended to kill—and moreover the rarity of such executions—advises against the constitutionality of capital punishment under these circumstances. *See Enmund v. Florida*, 458 U.S. 782, 794–95 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 (1977). This Court should grant Garcia's petition for writ of certiorari to resolve these serious questions going to the substantive constitutionality of Garcia's sentence and to the core of the Eighth Amendment. Accordingly, this factor weighs in favor of granting a stay of execution.

2. Garcia will suffer irreparable harm absent a stay of execution.

It is evident that Garcia will suffer irreparable harm without a stay of execution. The death penalty is "unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). If Garcia is executed as scheduled, then his death sentence will be carried out on one who neither killed nor intended to kill, and who is therefore not "the worst of the worst," in violation of the Eighth Amendment. His execution would moot his appeal, and leave the serious questions raised in his petition for writ of certiorari unresolved. Thus, this factor also weighs in favor of a stay of execution.

3. The balance of hardships tips in Garcia's favor.

Garcia will suffer irreparable harm if he is executed in violation of his Eighth and Fourteenth Amendment rights. Conversely, the State suffers no injury should this Court enter a stay to allow for plenary consideration of Garcia's petition. Should this Court ultimately affirm the Texas Court of Criminal Appeals, the State's executioners presumably will be available to carry out Garcia's execution. Insofar as failing to grant a stay of execution imposes an irremediable hardship only on Garcia and not on the State, the third factor favors Garcia as well.

4. A stay of execution is in the public interest.

Finally, a stay of execution is in the public interest. In general, the public interest is served by enforcing constitutional rights. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). This appeal focuses on Garcia's Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment and to due process of law. Garcia's petition raises the question whether executing someone who neither killed nor intended to kill serves any permissible penological interest. *See Simmons*, 543 U.S. at 571; *Enmund*, 485 U.S. at 798–99. The public interest is not served by a punishment that serves no legitimate penological interest. The public interest weighs especially in favor of addressing this issue in a case involving the most serious of penalties. *See Gregg*, 428 U.S. at 188 (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"). Moreover, the public interest is served by ensuring that Garcia's sentence is constitutional before it is carried out by the State of Texas. Accordingly, this factor also weighs in favor of granting a stay of the execution currently scheduled for December 4, 2018.

CONCLUSION

For the foregoing reasons, the considerations for granting a stay of execution weigh in Garcia's favor, and thus Garcia requests that Your Honor or this Court enter a stay of execution to permit the Court to fully consider this appeal without it becoming moot by virtue of his execution.

Respectfully submitted: November 30, 2018

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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

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[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

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[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-

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[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.

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