Nos. 18-6891, 18A571

IN THE
Supreme Court of the United States

JOSEPH C. GARCIA,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

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

PROOF OF SERVICE

I hereby certify that on the 3rd day of December, 2018, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari and Application for a Stay of Execution** was sent by mail and electronic mail to: Dale Baich, Federal Public Defender's Office, 850 W. Adams St., Suite 201, Phoenix, Arizona 85007, dale_baich@fd.org. All parties required to be served have been served. I am a member of the Bar of this Court.

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936–1400

Counsel for Respondent

Nos. 18-6891, 18A571

IN THE
Supreme Court of the United States

JOSEPH C. GARCIA,
Petitioner,

vs.

STATE OF TEXAS,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711–2548
(512) 936–1400
jay.clendenin@oag.texas.gov

Counsel for Respondent

QUESTION PRESENTED

Petitioner Joseph Garcia escaped from the Texas Department of Criminal Justice Connally Unit in December 2000 along with six other inmates. The inmates stole fourteen handguns, a shotgun, an AR-15 rifle, and ammunition during the escape. Garcia later actively participated in an armed robbery of an Oshman's sporting goods store where he threatened one employee, "[d]on't do nothing stupid if you want to see Christmas. If we have to shoot one of you, we'll have to shoot all of you." The robbery culminated in the murder of police officer Aubrey Hawkins. Garcia was convicted of capital murder and sentenced to death for the murder of Officer Hawkins.

Just weeks before his scheduled execution, Garcia filed a subsequent habeas application in state court in which he claimed his death sentence violates his right to be free from cruel and unusual punishment because he did not kill or intend to kill Officer Hawkins. The state court dismissed the claim without considering its merits. Garcia asks the Court to overrule *Tison v. Arizona*, 481 U.S. 137 (1987), and *Enmund v. Florida*, 458 U.S. 782 (1982), by holding that a death sentence may only be imposed against a defendant who kills or intends to kill the deceased. These facts raise the following question:

> Should the Court grant certiorari to review Garcia's claim where the state court dismissed the claim on non-merits procedural grounds and where Garcia posits a new, far-reaching constitutional rule that fails to adequately consider the penological justifications for the death penalty?

BRIEF IN OPPOSITION

Petitioner Joseph Garcia was convicted and sentenced to death in 2003 for the murder of police officer Aubrey Hawkins. He is scheduled to be executed after **6:00 p.m. (Central Time) on Tuesday, December 4, 2018**. Garcia has unsuccessfully challenged his conviction and death sentence in both state and federal court. His claims have been rejected in each instance. Garcia recently filed a subsequent state habeas application in which he claimed his death sentence violates the Eighth Amendment because he did not kill or intend to kill Officer Hawkins. The state court dismissed the application as an abuse of the writ without considering the merits of Garcia's claim. *Ex parte Garcia*, 64,582-03 (Tex. Crim. App. Nov. 30, 2018) (unpublished order).

Garcia now seeks review in this Court, just days before his scheduled execution, of the state court's dismissal of his subsequent state habeas application. *See generally* Pet. Cert. He argues that he did not kill or intend to kill Officer Hawkins and that a consensus has emerged against executing defendants who participate in a felony but do not kill or intend to kill. Garcia's claim does not warrant this Court's attention.

The state court's dismissal of Garcia's subsequent state habeas application rested on an adequate and independent procedural bar. Garcia's attempt to avoid the consequences of the procedural default of his claim is to no avail. Further, Garcia fails to demonstrate a consensus exists against the

execution of capital murderers like him who actively participate in a violent prison break followed by an armed robbery that culminates in the murder of an entirely foreseeable victim—a responding police officer. Garcia also fails to provide the Court a reason to revisit, much less overrule its precedent in *Enmund* and *Tison*. The penological underpinnings of this Court's precedent remain sound. Garcia's proposed rule would exempt from capital punishment defendants who participate in inherently dangerous felonies, exhibit reckless disregard for human life, and anticipate lethal force might be used. Moreover, Garcia would not benefit from his own proposed rule. Therefore, the Court should deny Garcia's petition for a writ of certiorari.

STATEMENT OF JURISDICTION

The Court does not have jurisdiction because the state court's dismissal of Garcia's subsequent habeas application rested on an adequate and independent state procedural bar. *Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

The Texas Court of Criminal Appeals (CCA) summarized the facts of the capital murder as follows:

> On December 13, 2000, seven inmates, including [Garcia], escaped from the Texas Department of Criminal Justice Connally Unit, taking with them a number of firearms stolen from the unit. On December 24th, the group committed a robbery at a sporting-goods store in Irving, killing Irving police officer Aubrey Hawkins as they fled. The escapees used the weapons they stole from the prison to commit the robbery and murder. The escapees then made their way to Colorado where they lived in an RV park until January 2001, when six were apprehended and one committed suicide.

Garcia v. State, 2005 WL 395433, at *1 (Tex. Crim. App. 2005).

Evidence presented at Garcia's trial showed that, during the prison escape, the escapees stole fourteen .357 revolvers, an AR-15 rifle, a 12-gauge shotgun, and more than 100 rounds of ammunition. 47 RR 50; 48 RR 24, 27.[1] On Christmas Eve, the escapees entered an Oshman's sporting-goods store in Irving, Texas armed with the stolen firearms. 45 RR 64. During the robbery, Garcia was armed with a gun, threatened an employee, and tied up employees in the break room. 45 RR 65–66 ("We have a tough guy here who wants to try something. Go ahead. Try something. I want you to try something."), 71, 81, 218 ("Don't do nothing stupid, if you want to see Christmas. If we have to shoot one of you, we'll have to shoot all of you.").

A witness outside the store called 911. 46 RR 7–8, 14–15. Officer Hawkins responded to the scene, pulling up behind the store to its loading dock

---

[1] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s).

while the escapees were preparing to leave. 45 RR 11, 19, 84–85, 147, 150, 175–76, 229; 46 RR 14, 16, 23; 47 RR 53, 60. George Rivas radioed the other escapees and said they "had company." 45 RR 83–84. Garcia then left the break room. 45 RR 84. Gunshots erupted about twenty seconds after Garcia left the break room, which was enough time for Garcia to have reached the loading dock before the gunfire began. 45 RR 84, 134. A witness who lived near the store testified he saw four people in the loading dock near the time of the gunshots. 46 RR 33, 52. Officer Hawkins was shot eleven times and died at the scene. 47 RR 113, 119–20, 131, 139–40.

After murdering Officer Hawkins, the escapees fled to Colorado where they lived in an RV park under the guise of traveling missionaries. 48 RR 28–36, 49–52, 57–58, 60–61; 49 RR 32–34, 44–45, 59, 74–75. Another resident at the park later recognized the escapees from the America's Most Wanted television show and alerted authorities. 48 RR 50. Garcia was carrying a loaded handgun stolen from Oshman's when he was arrested. 49 RR 36–37, 39, 41–42, 54–55, 61, 65–66, 68, 75–76, 83 (Garcia responded to an arresting officer asking for Garcia's name, "You know who the f—k I am"), 190.

B. Punishment facts

Patrick Moczygemba, an assistant supervisor from the Connally Unit maintenance department, testified as to Garcia's escape from prison. 55 RR 25–92. Six of the seven escapees, including Garcia, were working maintenance

on the day they escaped. 51 RR 31–36. Moczygemba was struck in the head and rendered unconscious. 51 RR 50. Moczygemba awoke to find escapee George Rivas restraining him. 51 RR 51. Garcia held a "shank" to his face and told Moczygemba to "[s]top struggling or we'll end it now." 51 RR 51. Garcia also said, "you can stop struggling because whatever happens to [you] is going to happen to everybody else." 51 RR 52. The escapees removed Moczygemba's clothing, bound and gagged him, and placed him in a small electrical storage room. 51 RR 52–55. Other prison employees were bound and placed in the room with him, the light turned out, and the door shut. 55 RR 56–59. In all, fourteen people were held by the escapees. 51 RR 61.

Alejandro Marroquin, Jr., was a security officer in the maintenance area when the escape occurred. 51 RR 93. Marroquin stated that he and a supervisor, Allen Camber, were in the office of the maintenance warehouse when Garcia, Patrick Murphy, Randy Halprin, Larry Harper, Donald Newbury, and George Rivas overpowered them, with Rivas struggling to control Marroquin and Garcia slamming the supervisor's head into the floor. 51 RR 97–99. The escapees took Marroquin's TDCJ uniform off, bound and gagged him, and forced him to crawl into the room where Moczygemba lay. 51 RR 101. Newbury then picked Marroquin up by his hair and struck him five or six times, breaking his nose. 51 RR 100–01. Garcia guarded the room. 51 RR 102–03. To Marroquin and others, who also testified that they were each laid

down in the storage room, Garcia would put a sharp point to the back of the neck or in an ear and tell them, “that was one pound of pressure now, two to three more pounds, and it would go straight into [his] brain and [he] would be dead.” 51 RR 102, 123, 147; 52 RR 17.

Mark Burgess, one of the civilian employees taken hostage and held by Garcia, testified that Garcia told him, “if anything goes wrong, we’re both going to get the needle. You’ll get yours now and I’ll get mine in five years, because the year 2050 doesn’t come soon enough.” 51 RR 123.

Several witnesses also testified to Garcia’s murder of Michael Luna in San Antonio in 1996.[2] After an evening of drinking and smoking marijuana at a club, Garcia, Luna, and Bobby Lugo went to the apartment of a friend where they continued to drink. 52 RR 137–42. After they left, Garcia and Luna got into a fight, and, according to a witness, Garcia sat on top of Luna and stabbed

---

[2] The intermediate appellate court summarized the facts of Garcia’s prior murder:

> On February 3, 1996, after a night and morning of heavy drinking, Garcia drove Luna home. During the drive home, Luna gave such poor directions that Garcia stopped the car. At that point, Luna attacked Garcia, grabbed Garcia’s keys and ran off. Garcia chased Luna, and attacked him. Witnesses to the altercation saw Garcia on top of Luna, stabbing him, and yelling “Die, motherf---er” as Luna begged for help. The medical examiner testified that Luna suffered 19 stab wounds, 16 of which were in his chest and back. Garcia asserts that he was acting in self-defense.

Garcia v. State, 1997 WL 731969, at *1 (Tex. App.—San Antonio Nov. 26, 1997, pet. ref’d).

him repeatedly while saying, "[d]ie, mother f---er, die." 53 RR 54–57. Luna was stabbed nineteen times by Garcia, sixteen of which were in his chest and back. 53 RR 123.

Garcia then drove to Lugo's house where he told Lugo he had been in a fight with Luna. 52 RR 147–49. Lugo observed some swelling on Garcia's cheek, but he did not see any marks, scratches, swollen eyes, or choke marks. 52 RR 151–52; 53 RR 42. At Garcia's trial for Lugo's murder, he testified that he acted in self-defense. DX 10-B at 90–151.[3]

Garcia was convicted of Luna's murder and sentenced to fifty years in prison. 53 RR 148. Garcia was serving this sentence when he escaped from the Connally Unit.

II. Procedural History

Garcia was convicted and sentenced to death for the murder of police officer Aubrey Hawkins. The CCA upheld Garcia's conviction and death sentence on direct appeal. *Garcia v. State*, 2005 WL 395433, at *1–5. Garcia then filed a state habeas application, which was denied. *Ex parte Garcia*, No. 64,582-01 (Tex. Crim. App. Nov. 15, 2006) (unpublished order).

Garcia next filed a federal habeas petition. He then moved for, and was granted, a stay to exhaust various claims. *Garcia v. Quarterman*, Civ. Act. No.

---

[3] Trial counsel offered into evidence the trial transcript from Garcia's prior murder trial. The transcript was admitted for record purposes. DX 10-A, 10-B, 10-C.

3:06-CV-2185, Order (N.D. Tex. Dec. 4, 2007). Garcia then filed a subsequent state habeas application, which was dismissed as an abuse of the writ. *Ex parte Garcia*, No. 64,582-02 (Tex. Crim. App. March 5, 2008) (unpublished order).

Thereafter, Garcia filed an amended federal habeas petition. Following this Court's opinions in *Martinez v. Ryan*[4] and *Trevino v. Thaler*,[5] the district court held an evidentiary hearing to provide Garcia the opportunity to show cause and prejudice for his defaulted ineffective-assistance-of-trial-counsel claims. After the evidentiary hearing, the district court denied habeas corpus relief and denied a certificate of appealability (COA). *Garcia v. Stephens*, Civ. Act. No. 3:06-CV-2185, Order (N.D. Tex. May 28, 2015). Garcia filed a post-judgment motion under Federal Rules of Civil Procedure 52(b), 59(a), and 59(e). The district court granted the motion in part, amending one portion of its prior findings. *Garcia v. Stephens*, 2015 WL 6561274, at *1–9 (N.D. Tex. Oct. 29, 2015).

Garcia then filed an Application for a COA, which the Fifth Circuit denied. *Garcia v. Davis*, 704 F. App'x 316, 318–27 (5th Cir. 2017). Garcia next filed a Petition for a Writ of Certiorari, which this Court denied. *Garcia v. Davis*, 138 S. Ct. 1700.

---

[4] 566 U.S. 1 (2012).

[5] 569 U.S. 413 (2013).

The state trial court scheduled Garcia's execution for August 30, 2018, later amending the date to December 4, 2018. On November 14, 2018, Garcia filed in state court a subsequent application for a writ of habeas corpus. *Ex parte Garcia*, No. 64,582-03. The CCA dismissed the application on November 30, 2018. *Id.*

On November 30, 2018, Garcia filed a civil rights lawsuit and a related motion for a stay of execution challenging the method of his execution. *Garcia v. Collier, et al.*, No. 4:18-CV-4521 (S.D. Tex.). The motion for a stay of execution was denied December 1, 2018. *Id.* On December 2, 2018, the Fifth Circuit affirmed the district court's denial of a preliminary injunction and it denied Garcia's motion for a stay of execution. *Garcia v. Collier, et al.*, 18-70032 (5th Cir.).

Garcia also filed a civil rights action and related motion for injunctive relief and a stay of execution on November 29, 2018, challenging the Texas Board of Pardons and Paroles clemency proceedings. *Garcia v. Jones, et al.*, No. 4:18-CV-4503 (S.D. Tex.). The district court dismissed Garcia's Complaint and denied the motion on November 30, 2018. Garcia then appealed the district court's judgment to the Fifth Circuit, which affirmed the district court. *Garcia v. Jones, et al.*, No. 18-70031 (5th Cir. Dec. 2, 2018).

On November 30, 2018, Garcia filed in the district court a motion for relief from judgment and a motion for a stay of execution. *Garcia v. Davis*, 3:06-CV-2185 (N.D. Tex.), Docket Entries 142, 144. The motions remain pending.

On November 30, 2018, Garcia filed in this Court an original petition for a writ of habeas corpus and a petition for a writ of certiorari. *In re Garcia*, No. 18-6891; *Garcia v. Texas*, No. 18-6890. The instant brief in opposition follows Garcia's petition for a writ of a writ of certiorari.

ARGUMENT

I. Certiorari Review Is Foreclosed Because Garcia's Claim Is Procedurally Defaulted.

Garcia's petition implicates nothing more than the state court's proper application of state procedural rules for collateral review of death sentences. The state court's dismissal of Garcia's claim, which relied upon an adequate and independent state procedural ground, forecloses certiorari review. *Walker v. Martin*, 562 U.S. 307, 315-16 (2011); *Long*, 463 U.S. at 1041–42. Specifically, when Garcia filed a subsequent state habeas application raising the claim presented in the instant petition, he was cited for abuse of the writ. *Ex parte Garcia*, No. 64,582-03 (unpublished order) (citing Tex. Code Crim. Proc. art. 11.071, § 5). The CCA dismissed the subsequent state habeas application "without considering the merits of the claim." *Id*. Nonetheless, Garcia argues

that the state court's dismissal of his subsequent application involved a merits determination of his claims. Pet. Cert. at 31–33. He is mistaken.

A. The CCA's dismissal of Garcia's subsequent state habeas application relied upon an adequate and independent state procedural bar.

The state court's dismissal of Garcia's subsequent state application creates an adequate and independent procedural bar. *See Balentine v. Thaler*, 626 F.3d 842, 854-57 (5th Cir. 2010); *Rocha v. Thaler*, 626 F.3d 815, 838 (5th Cir. 2010) (holding that the CCA's dismissal of claim does not constitute a merits determination and stating that, "absent an express indication otherwise, the CCA assesses the merits of a successive state habeas application only if it first concludes that the factual or legal basis for the claim was unavailable"); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("The [CCA] did not need to consider or decide the merits of Hughes's constitutional claims in reaching its decision to dismiss those claims as an abuse of the writ pursuant to Article 11.071, [§] 5."). The state court explicitly declined to address the merits of Garcia's claim. The claim is, therefore, procedurally barred in this Court.

Garcia cites to *Ex parte Blue* to argue that the state court's dismissal involved a merits determination of his Eighth Amendment claim. Pet. Cert. at 31 (citing *Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007)). That case is inapposite. The habeas applicant in *Ex parte Blue* claimed that he was

intellectually disabled and, therefore, ineligible under *Atkins v. Virginia*, 536 U.S. 304 (2002), for execution. *See Balentine*, 626 F.3d at 856. The CCA held in *Ex parte Blue* that "a state habeas applicant alleging [intellectual disability] for the first time in a subsequent writ application will be allowed to proceed to the merits of his application under the terms of Section 5(a)(3)"[6] if he presents clear and convincing evidence showing no rational factfinder would fail to find that he is intellectually disabled. 230 S.W.3d at 162. The holding was, of course, based on this Court's holding in *Atkins*.

Garcia claims that the CCA must have undertaken the same review of his claim as it does in reviewing a successive *Atkins* claim. In so arguing, Garcia attempts to bootstrap his defaulted claim in order to avoid the consequences of his default of that claim by arguing the merits of the claim. Pet. Cert. at 32–33. His argument is circular. This Court has never held that the execution of defendants who participate in a felony but do not kill or intend to kill may not be executed. Consequently, Garcia's reliance on *Ex parte Blue* is entirely misplaced because, unlike the petitioner in *Ex parte Blue*, Garcia is absolutely unable to demonstrate the merit of his underlying constitutional

[6] Texas Code of Criminal Procedure Article 11.071 § 5(a)(3) provides that a court may not consider the merits of a claim presented in a subsequent habeas application unless the applicant shows by clear and convincing evidence that, "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."

claim. Additionally, the CCA has never applied the rationale of *Ex parte Blue* to a claim like Garcia's.

Indeed, the Fifth Circuit explicitly and conclusively dismissed Garcia's argument nearly a decade ago: "the fact that § 5(a)(3) incorporates a federal standard for determining when a procedural default should be excused . . . does not empower this Court . . . to review the merits of the federal constitutional claim that has been procedurally defaulted." *Rocha*, 626 F.3d at 839. A claim of actual innocence is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits. *Id.* at 824. When the CCA rejects a claim that a prisoner is actually innocent of the death penalty, it does not simultaneously decide the merits of some other claim. *Id.* at 839. As a result, the CCA's determination that Garcia is not actually innocent of the death penalty did not open up his *Enmund/Tison* claim for merits review. The *Rocha* court noted that this view is in accord with seven other circuits. *Id.* at 826 n.44.

Garcia's attempt to avoid his procedural default of his Eighth Amendment claim presupposes the existence of a holding of this Court that prohibits the execution of the class of defendants he proffers. No such holding exists. Consequently, Garcia necessarily could not meet the standard of Tex. Crim. Proc. Art. 11.071 § 5(a)(3) because no constitutional violation occurred at Garcia's trial. Unlike a petitioner claiming intellectual disability, Garcia is

unable to rely on any constitutional rule that prohibits his execution. Therefore, he cannot avoid his procedural default by showing that he is "actually innocent of the death penalty." Garcia's claim is foreclosed by an adequate and independent state procedural bar and certiorari review should, therefore, be denied.

B. Garcia's claim was previously available at the time he filed his initial state habeas application.

Garcia argued in the court below that his Eighth Amendment claim was "unavailable" to him at the time he filed his most recent state habeas application in November 2007 because the factual (i.e., legislative enactments and judicial decisions) and legal bases of the claim were not available. *Ex parte Garcia*, No. 64,582-03 (citing Tex. Code Crim. Proc. Art. 11.071 § 5(a)(1)),[7] Subsequent Application at 95. But Garcia failed to show his claim was previously unavailable. His failure to meet the standard provided an additional adequate and independent state-law basis on which the CCA dismissed his subsequent application.

Garcia cites to a number of states' legislative enactments and judicial opinions to support his claim that his execution would violate the Eighth

[7] Texas Code of Criminal Procedure Article 11.071 § 5(a)(1) provides that a court may not consider the merits of a claim presented in a subsequent habeas application unless the claim has not and could not have been presented previously because the factual or legal basis for the claim was unavailable when the applicant filed the previous application.

Amendment because he did not kill or intend to kill. But the bulk of the precedent Garcia cites predates his November 2007 subsequent state habeas application and, for that matter, his December 2004 initial state application.[8] Further, Garcia relies on the purported rarity of executions of those "who did not directly kill the victim" as support for his claim.[9] But such evidence was plainly available when Garcia filed his earlier state applications—most of the cases relied upon occurred in the 1990s. The purported rarity of such executions could have proffered as a basis for his claim long ago. Garcia does not clearly delineate any emerging "trend" that has developed since the time he filed his initial state habeas application that supports the categorical constitutional prohibition he now seeks. Garcia's claim is, therefore barred by an adequate and independent state bar and certiorari review should be denied.

---

[8] Pet. Cert. at 25 n.5 (citing Ala. Code § 13A-2-23 (1975); *Ex parte Woodall*, 730 So.2d 652, 657 (Ala. 1998)), n.7 (citing *Clark v. La. State Penitentiary*, 697 F.2d 699, 700–01 (5th Cir. 1983); *State v. Brown*, 478 So. 2d 600, 606–07 (La. Ct. App. 1985)), n.8 (citing *State v. O'Brien*, 857 S.W.2d 212, 217–18 (Mo. 1993)), n.9 (citing *Vernon Kills on Top v. State*, 928 P.2d 182, 200–07 (Mont. 1996)), n.10 (citing *State v. Williams*, 2002 WL 1594013, at *3 (Ohio Ct. App. July 15, 2002); *State v. Taylor*, 612 N.E.2d 316, 325 (Ohio 1993)), n.11 (citing *State v. Ventris*, 96 P.3d 815, 822 (Or. 2004)), n.13 (citing *Watkins v. Commonwealth*, 331 S.E.2d 422, 434–35 (Va. 1985)).

[9] Pet. Cert. at 25 (citing https://deathpenaltyinfo.org/those-executed-who-did-not-directly-kill-victim).

II. Garcia's Eighth Amendment Claim is Barred by Principles of Non-Retroactivity.

Garcia argues that the Court should overturn its holdings in *Enmund* and *Tison* to create a new rule prohibiting the execution of defendants who participate in a felony but do not kill or intend to kill. Garcia's petition does not present a compelling reason justifying the Court's exercise of certiorari review because, in addition to being procedurally barred, his claim is barred by principles of non-retroactivity, as *Teague v. Lane*, 489 U.S. 288 (1989), prohibits the retroactive application of such rules. Therefore, the Court should decline certiorari review.

When Garcia's conviction became final this Court had not categorically restricted the states' ability to execute capital defendants in the manner Garcia now proposes. Accordingly, Garcia's argument that he is categorically exempt from the death penalty seeks the creation of a new rule of constitutional law and relief must be denied under *Teague*.

III. Garcia's Claim Is Unsupported and Unsupportable.

The Court has recognized categorical exemptions from capital punishment for the intellectually disabled,[10] capital murderers who were under the age of eighteen when he or she committed the murder,[11] and the

---

[10] *Atkins*, 536 U.S. at 321.

[11] *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

insane.[12] In *Enmund* and *Tison*, the Supreme Court addressed the culpability required for assessing the death penalty in felony-murder convictions. In both, the Court applied a proportionality measurement under the Eighth Amendment, which prohibits "'punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'" *Enmund*, 458 U.S. at 788 (citations omitted); *Tison*, 481 U.S. at 152. The Court held in *Enmund* that the death penalty may not be imposed on one who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." 458 U.S. at 790–91. But the Court created an exception in *Tison*, expressly holding that the concerns of *Enmund* are *not* implicated where an accomplice was a major participant in the felony and displayed a "reckless indifference to human life." 481 U.S. at 158.

Critically, the Court did not establish any procedural guidelines or instructions on how to implement *Enmund*. Later, in *Cabana*, the Court expressly left discretion to the states: "*Enmund* does not impose *any* particular form of procedure upon the States." *Cabana v. Bullock*, 474 U.S. 376, 386 (1986). Rather, "[t]he Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under *Enmund*." *Id.* at 386.

---

[12] *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

Requisite culpability, then, can be made at any point in the proceedings—and it can be made by a jury, a judge, or an appellate court. *Id.* at 386–87; *see also Hopkins v. Reeves*, 524 U.S. 88, 99–100 (1998) (states can comply with *Enmund* requirement at sentencing or on appeal); *Foster v. Quarterman*, 466 F.3d 358, 370 (5th Cir. 2006).

In *Enmund*, the petitioner was sentenced to death for his role as the getaway driver for two other individuals who robbed and killed an elderly couple. 458 U.S. at 785. In considering Enmund's individualized culpability, the Court held that the imposition of the death penalty violated the Eighth Amendment where Enmund himself did not kill, attempt to kill, or, as found by the state court, where no evidence demonstrated any intent of participating in or facilitating a murder. *Id.* at 797–98. The Court found instead that Enmund's culpability was "plainly different from that of the robbers who killed." *Id.* at 798. Even so, the Court noted that "[i]t would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony." *Id.* at 799.

The Court then confronted that issue in *Tison*. 481 U.S. at 152. In *Tison*, two brothers brought an arsenal of weapons into a prison, where they aided in their prisoner father's and his cellmate's—both convicted murderers—escape from prison. *Id.* at 151. One of the brothers stated that he was prepared to kill

if necessary during the prison break. *Id.* Once successful, the brothers participated in the robbery of a family to further the escape. *Id.* And, although they did not "intend to kill" in the "traditional" sense, they stood by while the escapees killed the family and subsequently continued in criminal endeavors. *Id.* at 150–51. In holding that, contrary to *Enmund*, a death sentence is constitutional where the defendant was a major participant in the robbery who exhibits a reckless disregard for human life, the Court explained that reckless disregard for human life is "implicit in knowingly engaging in criminal activities known to carry a grave risk of death" and represents a highly culpable mental state when that conduct "causes its natural, though also not inevitable, lethal result." *Id.* at 157–58.

The Court has never held that capital defendants who participate in a felony but do not kill or intend to kill are exempt from capital punishment, and there is no consensus in favor of creating such an exemption. Additionally, Garcia provides no reason for the Court to depart from its holdings in *Enmund* and *Tison*. Garcia's Eighth Amendment claim is, therefore, unsupported and unsupportable.

A. The lack of any consensus or emerging consensus in favor of categorically overruling *Enmund* and *Tison* renders Garcia's claim meritless.

The Eighth Amendment draws its meaning from "the evolving standards of decency that mark the progress of a maturing society." *Atkins*, 536 U.S. at

311–12. In considering whether to impose a categorical bar to the death penalty, the Court's "beginning point" is "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham v. Florida*, 560 U.S. 48, 61 (2010) (quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005)). The Court relies on these objective factors "to the maximum possible extent." *Atkins*, 536 U.S. at 312.

In *Atkins*, the Court revisited its earlier decision in *Penry*, in which the Court had determined that there was no national consensus against executing an intellectually disabled individual. *Id.* at 314 (citing *Penry v. Lynaugh*, 492 U.S. 302, 334 (1989)). The Court noted in *Atkins*, "[m]uch has changed since" *Penry* was decided. 536 U.S. at 314. Only two state legislatures had enacted prohibitions against executing intellectually disabled individuals at the time *Penry* was decided, but eighteen states had banned such executions and similar legislation was pending in several other states at the time the Court decided *Atkins*. *Id.* at 314–15. The Court noted that it was "not so much the number of these States that [was] significant, but the consistency of the direction of change," *id.* at 315, and further noted that its conclusion was bolstered by the increasingly infrequent execution of such individuals even in states without bans. *Id.* at 316.

In *Simmons*, the Court likewise relied on a "national consensus" to determine the scope of the categorical ban on the execution of a juvenile capital offender. 543 U.S. at 574. The Court described the national consensus against the death penalty for juveniles as "similar, and in some respects parallel" to the national consensus relied upon in *Atkins*. *Id.* at 565. The Court summarized that,

> the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles . . . as categorically less culpable than the average criminal.

Id. at 567 (internal quotation marks omitted).

Hall v. Florida reaffirmed that *Atkins* "did not give the States unfettered discretion to define the full scope of the constitutional protection." 572 U.S. 701, 719 (2014). *Hall* made clear that the "national consensus" identified in *Atkins* defined that scope. Thus, in assessing whether Florida's strict cutoff of a seventy I.Q. in identifying capital offenders with intellectual disability was permissible, the Court once again looked to state legislatures to determine the prevailing "national consensus." *Id.* at 714–18. Finding that *only one other state* imposed a strict I.Q. cutoff, the Court concluded, "[t]he rejection of the strict [seventy] cutoff in the vast majority of States and the 'consistency in the trend' toward recognizing the [standard error of measurement] provide strong

evidence of consensus that our society does not regard this strict cutoff as proper or humane." *Id*. at 718 (quoting *Simmons*, 543 US at 572). Thus, each of the Court's decisions adopting a categorical ban on the death penalty has done so based on a clearly identifiable objective indicia of a national consensus that executions of a person in that particular category should be prohibited.

Garcia fails to demonstrate through objective indicia that a national consensus currently exists against imposing the death penalty on the proffered class of defendants. Garcia asserts that only *nine* states that permit capital punishment prohibit the execution of a defendant who did not kill or intend to kill.[13] Pet. Cert. at 24. This is significantly fewer than the number of jurisdictions that had prohibited capital punishment against the classes of

---

[13] Even then, Garcia asserts only that "it appears that at least nine jurisdictions" have such a prohibition. Pet. Cert. at 24. It should be noted that Garcia asserts, based on information gathered by an anti-death penalty organization, that only ten individuals who did not directly kill the victim have been executed since 1985. Pet. Cert. at 25. While a comprehensive survey at this late date is not possible due to the extremely dilatory nature of Garcia's claim, it should be noted that Michael Rodriguez, another member of the Texas Seven and who was with Garcia in the breakroom at Oshman's shortly before Officer Hawkins was killed, was executed in 2008. 45 RR 83–84, 134. Further, in *Clark v. Johnson*, the petitioner was sentenced to death and eventually executed where he was tried as a party and the prosecution argued in his co-defendant's trial that the co-defendant had committed the killing. 227 F.3d 273, 278–79 (5th Cir. 2000). Such an example belies the purported need for a rule exempting from execution a defendant who asserts he did not kill or intend to kill the victim. Further, Kenneth Foster was sentenced to death where he was the driver for armed robbers. *Foster v. Quarterman*, 466 F.3d 359, 363 (5th Cir. 2006). Foster's challenges to his death sentence based on arguments similar to Garcia's were rejected. Foster's death sentence was ultimately commuted but on the basis that he had been tried jointly with a co-defendant. https://abcnews.go.com/TheLaw/story?id=3541391&page=1.

people at issue in *Atkins* and *Simmons* (eighteen in each). Yet Garcia acknowledges that *fifteen* jurisdictions permit capital punishment for defendants like Garcia. Pet. Cert. at 25. In *Tison*, the Court concluded there was no consensus against the execution of a defendant who was a major participant in a felony and exhibited reckless disregard where "only [eleven] States authorizing capital punishment forb[ade] imposition of the death penalty in such circumstances."[14] 481 U.S. at 154. The Court referred to the evidence contradicting the existence of a consensus "substantial." *Id*. Garcia's evidence of a consensus in favor of the rule he proposes is even less compelling than that in *Tison*. Consequently, Garcia has not demonstrated that a national consensus exists in favor of prohibiting the execution of defendants who participate in a felony but do not kill or intend to kill.

While the Court has taken into account states that have prohibited capital punishment altogether when assessing the number of states that have prohibited a particular punishment, the Court has not found a consensus unless a number of states that permit capital punishment *also* specifically prohibited the particular punishment at issue. *See Graham*, 560 U.S. at 62

---

[14] In *Hall*, only two states employed a strict IQ score cut-off, leading the Court to find a consensus against such a rule. In *Coker v. Georgia*, the Court found a consensus against the execution of individuals convicted of rape where only three states provided for such punishment. 433 U.S. 584, 594 (1977). In *Enmund*, eight states allowed the execution where the defendant only participated in a robbery in the course of which a murder was committed. 458 U.S. at 792.

("Six jurisdictions do not allow life without parole sentences for any juvenile offenders."); *Simmons*, 543 U.S. at 564 (noting that eighteen states banned the execution of the intellectually disabled at the time *Atkins* was decided and eighteen states banned the execution of juveniles at the time *Simmons* was decided). Also, important to the Court in *Atkins* and *Simmons* was the rate of change in which states had prohibited the execution of the intellectually disabled and juveniles since the time the Court had upheld those punishments. But here, no similar change has occurred. Consequently, Garcia has not demonstrated that the Eighth Amendment prohibits the execution of individuals who are a major participant in a felony but who do not kill or intend to kill, and the issue is not worthy of the Court's attention. Certiorari review should, therefore, be denied.

B. The penological justifications underlying *Enmund* and *Tison* remain in full force today.

Even assuming Garcia demonstrated a consensus in favor of prohibiting the execution of defendants who participate in a felony but do not kill or intend to kill, he has nonetheless failed to show that the penological purposes of capital punishment are not served through such punishment of those who fall under *Enmund* and *Tison*. *Graham*, 560 U.S. at 67 (stating that, in addition to finding objective indicia of a consensus, the Court considers in the exercise of its independent judgment whether the particular sentence at issue is cruel and

unusual when applied to certain defendants based on their culpability and whether the sentence serves legitimate penological goals). Garcia has failed entirely to demonstrate that the penological purposes of capital punishment are not served by permitting the execution of individuals who participate in a felony, anticipate lethal force will be used during the felony, and demonstrate reckless disregard for human life.

In *Enmund*, the Court considered whether the death sentence was a proportionate punishment for a defendant who only participated in a robbery and evinced no intent to kill. 458 U.S. at 786 (quoting the state court's explanation that the only inference regarding the petitioner's participation was that "he was the person in the car by the side of the road near the scene of the crimes"). In so doing, the Court considered whether the principal penological purposes of capital punishment—deterrence and retribution—were served in such a case. *Id.* at 598. The Court concluded that the death penalty would not measurably deter a person from committing such conduct where he or she "does not intend that life be taken or contemplate that lethal force will be employed by others." *Id.* at 799. The possibility of execution would not enter the person's "cold calculus that precede[d] the decision to act." *Id.* As for retribution, the Court concluded capital punishment was not commensurate with the petitioner's "intentions, expectations, and actions" where he was merely the getaway driver. *Id.* at 800. Consequently, his

punishment had to be limited to his participation in the robbery. *Id.* at 801. The Court concluded that capital punishment was impermissible unless the defendant killed, attempted to kill, or anticipated that lethal force would be used.[15] *Id.* at 788, 801.

In *Tison*, the Court considered whether the death sentence was permissible for defendants who fall outside of *Enmund* (because they did not specifically intend to kill the victim) but who are major participants in a felony and exhibit reckless disregard to human life. 481 U.S. at 151. The Court determined that "[a] narrow focus on the question of whether or not a given defendant 'intended to kill' . . . [was] a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers."[16] *Id.* at 157. Instead, the Court concluded that capital punishment is a commensurate punishment for individuals who are major participants in a felony and exhibit reckless disregard to human life. *Id.* at 158. Such culpability, the Court found, fell "well within" the bounds of culpability warranting capital punishment. *Id.* at 157.

---

15 Specifically at issue in *Enmund* was whether the petitioner "anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape." 458 U.S. at 788.

16 Garcia asserts that the Court's description of "the most dangerous" individuals included only those who actually killed the victim. Pet. Cert. at 20. This is hardly helpful to Garcia. The Court ultimately concluded that the petitioners in *Tison* were deserving of capital punishment absent evidence that they killed or intended to kill the victims. 481 U.S. at 157–58.

To be clear, Garcia is asking the Court to overrule both *Enmund* and *Tison*. He calls for a new rule exempting defendants from capital punishment absent evidence they killed or intended to kill. But *Enmund* specifically permitted capital punishment in cases where the defendant "anticipated that lethal force might be used." 458 U.S. at 788. Garcia's proffered rule would exempt such defendants from capital punishment. Garcia also proposes that the Court overrule entirely the rule in *Tison* permitting the execution of defendants who are major participants in a felony and exhibit reckless disregard to human life. Garcia's proposed rule is entirely overbroad and unjustifiable.

As the Court recognized in *Enmund*, capital punishment of defendants who "contemplate that lethal force will be employed by others" during the course of a felony are the types of defendants who *can* be deterred by the possibility of execution. 458 U.S. at 799. As for retribution, the Court stated that the appropriate punishment "very much depends on the degree of [a defendant's] culpability—what [the defendant's] intentions, expectations, and actions were." *Id*. at 800. As illustrated below, Garcia poses no reason to believe that the penological justifications in *Enmund* and *Tison* has changed. Indeed, they have not and Garcia's own case proves the wisdom of the Court's precedent.

Garcia was no idle tagalong or simple getaway driver. Garcia was actively involved in the Texas Seven's crime spree from the beginning. Garcia attacked prison employees to effectuate the Texas Seven's prison escape, slamming the victims' heads against the floor and holding a shank to their ears, threatening to ram the shank into their brain if they resisted. 51 RR 51, 97–99, 102, 123, 147; 52 RR 17. Garcia and the other escapees stole fourteen handguns, an AR-15 rifle, a shotgun, and ammunition during the escape. 47 RR 50; 48 RR 24, 27. Garcia and the others put those weapons to use during the Oshman's robbery. 45 RR 64. The escape predictably set off a massive manhunt.

Garcia armed himself with a handgun during the Oshman's robbery. 45 RR 65–66. He menacingly threatened employees not to resist or else all of the employees would be killed. 45 RR 65–66, 71, 81, 218. "Don't do nothing stupid, if you want to see Christmas. If we have to shoot one of you, we'll have to shoot all of you." 45 RR 218. Garcia's threat evinced both his intent to kill in order to effectuate his escape and his anticipation that the other escapees would use lethal force do so as well. *See Enmund*, 458 U.S. at 788 (noting the lack of evidence that the petitioner "anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape"). The escapees stole an additional forty-four additional guns during the Oshman's robbery. 49 RR 190.

When Officer Hawkins arrived at the store, he was gunned down by several shooters. 47 RR 113, 119–20, 131, 139–40. Evidence showed that Garcia had left the tied-up store employees in the breakroom about twenty seconds before gunfire erupted. 45 RR 84, 134. In the immediate aftermath, Garcia effectuated the escape by moving Officer Hawkins's patrol car so that the escapees' could drive away. *Newbury v. Thaler*, 2010 WL 3704028, at *4 (N.D. Tex. 2010) ("I later learned that Rodriguez had pulled [Officer Hawkins] out of the car, took his gun, and Garcia got into the car and backed it up.").[17] After Officer Hawkins's murder, Garcia stuck with his confederates, eventually masquerading as a traveling missionary in Colorado. 48 RR 35. Garcia was eventually arrested while riding in a car along with Rivas and Rodriguez. 49 RR 65. Garcia was carrying a gun that was stolen from Oshman's and a wallet that was stolen from an Oshman's employee. 49 RR 36–37, 39, 41–42, 54–55, 61, 65–66, 68, 73 75–76, 83, 190. Garcia brazenly responded to an arresting officer asking for identification, "[y]ou know who the f—k I am." 49 RR 83.

Garcia was the subject of a massive manhunt following his escape from prison. An armed confrontation with police was inevitable, especially in light

[17] In the court below, Garcia attempted to bolster his claim with reference to excerpts from transcripts of four of his cohorts. *Ex parte Garcia*, No. 64,582-03, Subsequent Appl., Ex. 21–24.

of the fact that Garcia and the other escapees armed themselves to the teeth. Indeed, Garcia was armed when he was arrested. Garcia, himself, evinced an intent and willingness to kill to effectuate his escape. Contrary to Garcia's assertion, there is nothing "arbitrary" about imposition of capital punishment in such a case. Garcia's proposed rule would write out *Enmund*'s provision for the death penalty where a defendant "contemplates that lethal force will be employed," which specifically took into account cases in which a felon anticipates lethal force being used to effectuate an escape. 458 U.S. at 799. Garcia provides no reason to depart from that precedent and, indeed, his case provides every reason not to do so. His insistence that his "culpability is meaningfully less than that of an intentional murderer or a nonintentional killer" holds no water. Pet. Cert. at 34.

In the end, Garcia seeks the creation of an overbroad, categorical exemption from capital punishment defendants who do not kill or intend to kill. While Garcia makes broad judgments regarding the culpability of defendants who do not kill or intend to kill, he fails to justify an exemption for individuals who participate in felonies, exhibit a willingness to use lethal force to effectuate their escape, and *know* (let alone anticipate) that lethal force may be used by others. Garcia does not attempt to cabin in any meaningful way the category of offenders who would qualify for the categorical exemption he seeks to have the Court create. That being the case, Garcia necessarily cannot

demonstrate that the proposed class of murderers are categorically less culpable than other capital murderers.

Garcia argued at trial that he did not kill Officer Hawkins, intend to kill him, or anticipate that lethal force would be used. 50 RR 36; 56 RR 100–01. His jury was rightly free to consider the evidence presented and determine whether Garcia exhibited sufficient culpability for Officer Hawkins's murder. The "anti-parties" special issue provided to his jury tracked this Court's precedent and properly narrowed the scope of individuals who could be sentenced to death.[18] Garcia's categorical rule would have taken that function away from his jury.

---

[18] Garcia's jury was permitted to find him guilty of capital murder as a co-conspirator to the felony offense of robbery, which resulted in the death of Officer Hawkins, or as a party to the capital murder of a peace officer acting in the lawful discharge of an official duty. *See* Tex. Penal Code §§ 7.01, 7.02(b). Because the charge permitted the jury to find Garcia guilty upon the belief that he was a party to the murder, the jury was given the "anti-parties" special issue. The anti-parties special issue requires juries to find, at the very least, that the defendant "anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071 § 2(b)(2). The CCA has found such inquiry indicative of "a highly culpable mental state, at least as culpable as the one involved in *Tison v. Arizona*," and therefore held that, "according to contemporary social standards, the death penalty is not disproportionate for defendants with such a mental state." *Ladd v. State,* 3 S.W.3d 547, 573 (Tex. Crim. App. 1999). Garcia makes a related argument that imposition of capital punishment where the defendant does not kill or intend to kill creates "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." Pet. Cert. at 30. But as noted above, Garcia's jury received instructions that required them to make the requisite finding of culpability before sentencing him to death. Indeed, the Fifth Circuit rejected such an argument in Garcia's case. *Garcia*, 704 F. App'x at 321–22.

Critically, Garcia's threat during the armed robbery evinced an intent and willingness to use lethal force to effectuate his escape. Garcia has argued that "there was no plan to harm anyone at Oshman's." *Ex parte Garcia*, 64,582-03, Subsequent Application at 87. But that assertion is belied by Garcia's menacing threats during the robbery as well as his threats and use of force during the prison escape. While Garcia would obviously have liked his jury to infer that he did not intend to harm anyone during the robbery, his jury was rightly able to draw the opposite (and better supported) inference that Garcia was willing to kill to effectuate his escape and anticipated the other escapees were willing to do the same.

The evidence presented in Garcia's trial plainly showed he "contemplate[d] that lethal force [would] be employed by others." *Enmund*, 458 U.S. at 799. His threats to kill prison staff and Oshman's employees to effectuate his escape do more than demonstrate that fact. Further, his threats demonstrate that "the possibility that the death penalty" could be imposed as a result of his actions *did* enter into his "cold calculus." *Id.*; 51 RR 123 (Garcia's threat to a prison employee, "if anything goes wrong, we're both going to get the needle. You'll get yours now and I'll get mine in five years, because the year 2050 doesn't come soon enough."). Garcia's case clearly calls for deterrence. Garcia's threats and actions also plainly demonstrate his "intentions" and "expectations." *Enmund*, 458 U.S. at 800. Garcia intended to escape and knew

lethal force could and would be used by himself and his confederates in order to do so. Garcia's case clearly calls for retribution.

The jury is the proper arbiter in a case like this to weigh the evidence and make the determination of whether the death penalty is warranted. Garcia has failed to show that the penological purposes served by the death penalty do not apply to him or generally to individuals who are major participants in a felony and exhibit reckless disregard to human life or anticipate lethal force will be used. This Court's precedent remains as wise now as it was when it issued *Enmund* and *Tison*. For these reasons, Garcia fails to justify a blanket and categorical ban on executions of individuals who do not kill or intend to kill. He does not present an issue worthy of the Court's attention.

IV. Garcia Is Not Entitled to a Stay of Execution.

Garcia is not entitled to a stay of execution because he cannot demonstrate that a substantial denial of a constitutional right would become moot if he were executed. *See McFarland v. Scott*, 512 U.S. 849, 856 (1994). Further, a stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). "It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id*. As demonstrated above, Garcia's claim is procedurally barred, barred by principles of non-retroactivity, and entirely without merit. Thus, Garcia cannot demonstrate the

likelihood of success on the merits of his claim; nor can he demonstrate that his claim amounts to a substantial case on the merits that would justify the granting of relief. Under the circumstances of this case, a stay of execution would be inappropriate.

CONCLUSION

The petition for a writ of certiorari and application for a stay of execution should be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
for Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
Tel: (512) 936-1800
Fax: (512) 320-8132
e-mail: jay.clendenin@oag.texas.gov

Counsel for Respondent