No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

In re JUAN RAUL GARZA
Petitioner,

ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE.

JUAN RAUL GARZA IS SCHEDULED TO BE EXECUTED ON JUNE 19, 2001.

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated by the trial court's failure to instruct the sentencing jury that petitioner necessarily would be sentenced to life without the possibility of parole if he were not sentenced to death.

2. Whether the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) – which precluded review of petitioner's successive motion to vacate his sentence in the lower courts – prevents this Court from exercising its original habeas corpus jurisdiction to review petitioner's claim that Shafer v. South Carolina, ___ U.S. ___, 121 S. Ct. 1263 (2001), requires that he be provided a new sentencing hearing based on the failure of the trial court to properly instruct the jury at sentencing?

3. If AEDPA prevents this Court from reviewing the merits of petitioner's Shafer claim, whether petitioner will suffer an unconstitutional suspension of the Great Writ of Habeas Corpus?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The parties to the proceedings below were Juan Raul Garza and the United States of America.

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ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Juan Raul Garza, respectfully requests that this Court entertain his original petition for a writ of habeas corpus and grant relief from his unconstitutional sentence of death.

OPINIONS BELOW

The May 30, 2001 opinion of the Court of Appeals for the Fifth Circuit denying petitioner's motion for authorization to file a successive motion to vacate sentence is unreported. In re Garza, No. 01-40473 (5th Cir. May 30, 2001). A copy of the opinion is included in the Appendix hereto.

STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this original petition pursuant to 28 U.S.C. §§ 2241(a) and 2241(c)(3). See also Felker v. Turpin, 518 U.S. 651, 658-62 (1996).

In accord with Supreme Court Rule 20.4(a), Mr. Garza states that this application is not being made to the district court in which petitioner is held, the Southern District of Indiana, because 28 U.S.C. § 2255 requires that motions to vacate sentence be filed in the court which sentenced petitioner, here the Southern District of Texas. Section 2255 further requires an applicant to obtain certification from the Court of Appeals before filing a successive motion. Id. Mr. Garza's motion for authorization to file a successive motion was denied by the Court of Appeals for the Fifth Circuit on May 30, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory provisions involved are set out in the Appendix.

INTRODUCTION

Petitioner Juan Raul Garza is the only inmate on federal death row whose sentencing jury was not instructed that if it failed to recommend a sentence of death, the only available

sentence was life in prison without the possibility of release. In the sentencing phase of Mr. Garza's trial, the government argued that if Mr. Garza were not sentenced to death he could be released after only 20 years in prison. Mr. Garza objected at trial to the government's argument and to the failure of the district court properly to instruct the jury and raised the issue on direct appeal. But the Court of Appeals for the Fifth Circuit affirmed Mr. Garza's sentence over this claim of constitutional error.

The reasoning used by the Court of Appeals in affirming Mr. Garza's death sentence was completely rejected by this Court not three months ago in Shafer v. South Carolina, 121 S. Ct. 1263 (2001). In light of Shafer, Mr. Garza diligently moved the Court of Appeals for authorization to file a successive motion to vacate his sentence pursuant to 28 U.S. C. § 2255. Mr. Garza explained that Shafer demonstrates conclusively that the Court of Appeals erred in affirming his death sentence on direct appeal. The Court of Appeals denied Mr. Garza's motion for authorization on purely procedural grounds, finding that Mr. Garza had obtained full review of his claim on direct appeal – ignoring that in the course of that direct review, the Court of Appeals committed clear error as laid bare by this Court's decision in Shafer.

This petition thus presents the "exceptional circumstances [that] warrant the exercise of this Court's discretionary powers." S. Ct. Rule 20.4(a). This Court's opinion in Shafer, which is retroactively applicable to Mr. Garza's case on collateral review pursuant to Teague v. Lane, 489 U.S. 288 (1989), leaves no doubt but that the Court of Appeals erred in affirming Mr. Garza's death sentence and thus that Mr. Garza's execution would violate his due process rights. There is no question that Mr. Garza properly preserved this claim by raising it at trial and before the Court of Appeals on direct review, and that this Court is the only means for Mr. Garza to obtain relief on his claim. The Court of Appeals for the Fifth Circuit denied Mr. Garza's motion for authorization to file a successive motion to vacate sentence. And, on the same day, the District Court for the Southern District of Indiana, the district in which Mr. Garza is currently held, rejected a petition filed by Mr. Garza under 28 U.S.C. § 2241 – raising a claim based on an April 4, 2001 decision in his favor by the Inter-American Commission for Human Rights – and its opinion makes clear that any petition filed by Mr.

Garza in that court will be denied for lack of jurisdiction. Garza v. Lappin, No. THO-095-C-M/F (S.D. Ind. May 30, 2001) (attached in Appendix hereto) (App. 6-14).[1]

Mr. Garza therefore respectfully requests that this Court reach the merits of his Shafer claim, vacate his unconstitutional sentence of death, and remand to the district court for a new sentencing hearing.

STATEMENT OF THE CASE

On July 29, 1993, Mr. Garza was convicted after a jury trial in the United States District Court for the Southern District of Texas of drug trafficking, money laundering, engaging in a continuing criminal enterprise, and three counts of killing in furtherance of a continuing criminal enterprise. At Mr. Garza's sentencing hearing, the government contended that Mr. Garza posed a threat of dangerousness and argued that he could be released from prison in as little as 20 years if the jury did not sentence him to death. S.F. vol. 16 at 3625.[2]

Mr. Garza's counsel objected to this argument, and requested that the jury be instructed that if it did not make a binding recommendation of a death sentence for Mr. Garza, the only alternative sentence would be life in prison without the possibility of parole. See United States v. Flores, 63 F.3d 1342, 1367-68(5th Cir. 1995). The trial court rejected this request, and further prohibited Mr. Garza's counsel from informing the jury during closing arguments that life in prison without the possibility of parole was the only alternative sentence. See id. at 1368. On August 2, 1993, the jury recommended a sentence of death, and the district court sentenced Mr. Garza to death on August 10, 1993.

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[1] The issues raised by that petition are not directly addressed herein, as petitioner intends to appeal that decision to the Court of Appeals for the Seventh Circuit, and, on June 5, 2001, pursuant to the Southern District of Indiana's suggestion, filed a Motion for Authorization to file a Successive Motion to Vacate Sentence with the Fifth Circuit.

[2] References to the transcript volume of Mr. Garza's trial are cited as "R. [page]." References to the court reporter's statement of facts are cited as " S.F. vol. [number] at [page]."

The Court of Appeals for the Fifth Circuit affirmed the conviction and sentence, rejecting Mr. Garza's argument that pursuant to this Court's decision in Simmons v. South Carolina, 512 U.S. 154 (1994), the district court had erred in refusing to instruct the jury that the only alternative sentence to death was a sentence of life in prison without the possibility of parole. Flores, 63 F.3d at 1367-68. The Court of Appeals denied a motion for rehearing, United States v. Garza, 77 F.3d 481 (5th Cir. 1995). This Court denied Mr. Garza's petition for writ of certiorari, and for rehearing. Garza v. United States, 519 U.S. 825, reh'g denied, 519 U.S. 1022 (1996).

On December 1, 1997, Mr. Garza filed a motion in the district court for the Southern District of Texas to vacate his sentence pursuant to 28 U.S.C. § 2255. On April 9, 1998, the district court denied the motion to vacate and denied a certificate of appealability. On January 14, 1999, the Court of Appeals denied Mr. Garza's petition for leave to appeal the district court's decision, United States v. Garza, 165 F.3d 312 (5th Cir. 1999), and on April 4, 1999, it denied Mr. Garza's petition for a rehearing. On November 15, 1999, this Court denied certiorari. Garza v. United States, 528 U.S. 1006 (1999).

On May 7, 2001, Mr. Garza filed in the Court of Appeals for the Fifth Circuit a Motion for Authorization to File a Successive Motion to Vacate Sentence pursuant to 28 U.S.C. § 2255. Mr. Garza argued that this Court's March 20, 2001 opinion in Shafer, 121 S.Ct. 1263, demonstrates conclusively both that the trial court erred in failing to give the jury a Simmons instruction and that the Court of Appeals erred in affirming his sentence over this objection. Mr. Garza argued that he met the prima facie requirements for filing a successive motion to vacate his sentence, because, among other things, pursuant to this Court's decision in Teague, 489 U.S. 288, Shafer applies retroactively to his case, allowing him to present his Shafer claim in a successive section 2255 motion.

On May 30, 2001, the Court of Appeals denied Mr. Garza's Motion for Authorization. The Court of Appeals held that:

> Shafer does not create a new rule of constitutional law. Neither does it expressly declare the rule retroactively applicable to cases on collateral review or apply the rule in a collateral proceeding. In addition, the rule Garza seeks to apply was not "previously unavailable." Garza has already been afforded full review in his original direct appeal of the Simmons claims he seeks to present in this successive motion.

In re Garza, No. 01-40473 (5th Cir. May 30, 2001). (App.3)

REASONS FOR GRANTING THE WRIT

This Court's decision in Shafer demonstrates conclusively that Mr. Garza's death sentence was imposed in violation of his constitutional right to due process. This Court must provide a mechanism for this claim – which prior to this Court's Shafer decision, Mr. Garza had no opportunity to present – to be heard for the very first time. While this Court's jurisdiction to consider an original motion for habeas corpus under 28 U.S.C. § 2241 is "inform[ed]" by the provisions of AEDPA, Felker, 518 U.S. at 663, Mr. Garza's Shafer claim falls within the successive motion provisions of 28 U.S.C. § 2255.

Even if this Court were to conclude that Mr. Garza's Shafer claim falls outside the successive motion provisions of section 2255, it should nonetheless reach the merits of the claim pursuant to the "savings clause" of section 2255. The Courts of Appeals have adopted different standards for applying the savings clause, and if Mr. Garza's motion for authorization had been filed in the Second Circuit, rather than the Fifth Circuit, he likely would have been allowed to proceed with his claim. This Court's guidance is sorely needed as to the proper construction of the savings clause, given the conflicting tests employed by the Courts of Appeals. Finally, any construction of AEDPA that would preclude this Court from reaching the merits of Mr. Garza's Shafer claim risks subjecting Mr. Garza to an unconstitutional suspension of the writ of habeas corpus.

This petition presents the exceptional circumstance in which a supervening decision of this Court – which is retroactively applicable on collateral review pursuant to this Court's decision in Teague – has squarely overruled a holding of the Court of Appeals on direct review rejecting a condemned inmate's valid claim of constitutional error in the process leading to his death sentence. This petition presents the further exceptional circumstance that the decision of the Court of Appeals rejecting petitioner's attempt to file a successive motion

relied on a questionable construction of a provision of AEDPA identical to the provision that this Court is currently considering in Tyler v. Cain, No. 00-5961.

I. This Court's Decision in Shafer Demonstrates that Mr. Garza's Sentence was Obtained in Violation of his Constitutional Due Process Rights

Shafer fatally undermines the decision by the Court of Appeals rejecting Mr. Garza's Simmons claim on direct appeal. Simmons held that where the capital defendant's future dangerousness is placed at issue and the only available alternative to a death sentence is a sentence of life without parole, due process demands that the jury be informed that the defendant will be sentenced to life without parole if he is not condemned. Simmons, 512 U.S. at 156. The Court of Appeals rejected Mr. Garza's Simmons claim using reasoning that was squarely rejected by this Court in Shafer. Shafer undeniably both applies to Mr. Garza's case and confirms the unconstitutionality of his death sentence.

A. Mr. Garza attempted to provide accurate information about parole eligibility to his sentencing jury, and unsuccessfully raised his Simmons claim on direct appeal.

On direct appeal, Mr. Garza challenged the trial court's failure to instruct the jury in the sentencing phase that the only alternative to a death sentence was life in prison without parole. The Court of Appeals held that Mr. Garza was not entitled to a Simmons instruction because if the jury had not recommended death the trial judge could have imposed a sentence less than life without the possibility of release under the Sentencing Guidelines. Flores, 63 F. 3d at 1367-68.

Mr. Garza explained that the Sentencing Guidelines do not permit a downward departure if the defendant caused death intentionally. The Sentencing Guidelines therefore precluded a sentence of less than life without parole for Mr. Garza because the jury unanimously found the statutory aggravating factor that Mr. Garza had intentionally killed three victims. Rejecting Mr. Garza's claim, the Court of Appeals stated:

> [A]ssuming without deciding that the jury's findings of intentional killing would be binding on the sentencing judge and therefore could prevent a downward departure, the court could not predict before the jury begins its deliberation whether it is going to find the necessary intent. Thus, when the

> attorneys make their final arguments in the penalty phase and when the court gives its penalty instructions, no one would know whether life imprisonment would be the only permissible sentence.

Id.

On December 1, 1997, Mr. Garza filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255. However, because his Simmons claim had been denied on direct appeal, Mr. Garza could not include that claim in his initial section 2255 motion. See, e.g., Reed v. Farley, 512 U.S. 339, 358 (1994) (Scalia, J., concurring in part and concurring in the judgment) ("[C]laims will ordinarily not be entertained under § 2255 that have already been rejected on direct review.").

B. Shafer shows that the Court of Appeals erred in rejecting Mr. Garza's Simmons claim.

On March 20, 2001, this Court, in Shafer, 121 S. Ct. 1263, emphatically rejected reasoning by the South Carolina Supreme Court that is identical to the reasoning that the Court of Appeals applied to Mr. Garza's Simmons claim. The South Carolina Supreme Court had held that Simmons did not apply, because when a South Carolina capital jury begins its punishment phase deliberations, like the federal capital jury in Mr. Garza's case, the possibility of a sentence of less than life without parole is available if (but only if) the jury does not find a statutory aggravating circumstance. State v. Shafer, 531 S.E.2d 524, 528 (S.C. 2000). In support of its erroneous holding, the South Carolina Supreme Court expressly relied on the Court of Appeals' decision in Mr. Garza's case. Id. ("This interpretation is supported by decisions from other jurisdictions.") (citing Flores, 63 F.3d 1342)) (additional citations omitted).

Shafer's jury, like Mr. Garza's, made findings of specific aggravating circumstances that rendered him ineligible for a sentence of less than life imprisonment without the possibility of parole. See Shafer, 121 S. Ct. at 1272. In both cases, the jury was actively

misled to believe that if it did not impose a death sentence the defendant might actually receive a sentence of less than life.

Further, both in Mr. Garza's case and in Shafer, the prosecution argued to the jury that the defendant's supposed future dangerousness warranted imposition of a death sentence. At Mr. Garza's sentencing, the Government alleged, and the jury found, that Mr. Garza "represents a continuing danger to the lives of others based on this pattern of violent and brutal acts." R. 260. For example, the Government argued that Mr. Garza would kill future victims if not sentenced to death. S.F. vol. 16 at 3641. In Shafer, the prosecution introduced evidence of Shafer's "propensity for [future] violence and unlawful conduct," see Shafer, 121 S. Ct. at 1267, and the South Carolina Supreme Court "apparently assumed, arguendo, that future dangerousness had been shown at Shafer's sentencing proceeding." Id. at 1274.

In Shafer, the trial judge told the jury that it could not consider parole, potentially leading the jury to believe "'that parole was available but that the jury, for some unstated reason, should be blind to this fact.'" Id. at 1274 (quoting Simmons, 512 U.S. at 170). Similarly, in Mr. Garza's case, the Government told the jury that it was not clear Mr. Garza would "die in prison," and that the sentencing judge could impose a sentence of as little as 20 years. S.F. vol. 16 at 3625. In both cases, these statements were false and gravely misleading – neither Shafer nor Mr. Garza could have received a sentence of less than life, because, by the time the jury came to consider its capital sentencing decision, it had necessarily already made findings of statutory aggravating factors that eliminated the availability of any sentence less than life without the possibility of release.

This Court held that the South Carolina Supreme Court had misinterpreted Simmons. Shafer, 121 S. Ct. at 1271-73. [3]

[3] / The Court noted that a South Carolina capital jury may not impose a sentence of life without the possibility of parole in any case in which it does not unanimously find a statutory aggravator. But in this situation, death also is not a permissible sentence and Simmons has no

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[3] / This Court's decision earlier this month in Penry v. Johnson, ___ U.S. ___, No. 00-6677, slip op. at 19-20 (June 4, 2001), suggests that the South Carolina Supreme Court's interpretation of Simmons was, moreover, "objectively unreasonable."

relevance because the choice of sentence is taken out of the jury's hands and transferred to the judge. Only if the jury finds an aggravating circumstance may it consider a death sentence; and at that point its choice is limited to the two options of death or life without parole. This Court explained:

> The South Carolina Supreme Court was no doubt correct to this extent: At the time the trial judge instructed the jury in Shafer's case, it was indeed possible that Shafer would receive a sentence other than death or life without the possibility of parole. That is so because South Carolina, in line with other States, gives capital juries, at the penalty phase, discrete and sequential functions. Initially, capital juries serve as factfinders in determining whether an alleged aggravating circumstance exists. Once that factual threshold is passed, the jurors exercise discretion in determining the punishment that ought to be imposed.
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> * * * *
>
> In sum, when the jury determines the existence of a statutory aggravator, a tightly circumscribed factual inquiry, none of Simmons' due process concerns arise. There are no misunderstandings to avoid, no false choices to guard against. The jury, as aggravating circumstance factfinder, exercises no sentencing discretion itself. If no aggravator is found, the judge takes over and has sole authority to impose the mandatory minimum. . . . It is only when the jury endeavors the moral judgment whether to impose the death penalty that parole eligibility may become critical. Correspondingly, it is only at that stage that Simmons comes into play, a stage at which South Carolina law provides no third choice, no 30-year mandatory minimum, just death or life without parole.

Id. at 1272-73.

This Court's rule in Shafer applies with equal force to the federal capital sentencing scheme under which Mr. Garza was sentenced.[4]

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[4] In 1994, after Simmons was decided, Congress amended the federal death penalty statute so that juries in federal capital cases not only would obtain accurate sentencing information regarding life in prison without the possibility of parole but also would have the authority to impose that sentence. See 18 U.S.C.§§ 3593(e),3594. These provisions apply to the Federal Death Penalty Act, in which Congress expanded the number of federal death-eligible crimes. See Federal Death Penalty Act of 1994, 108 Stat. 1959 (1994). No federal death row prisoner other than Mr. Garza has been denied a jury properly informed that the only alternative sentence to death was life in prison without the possibility of release. Moreover, Congress is currently considering legislation that would codify this sentencing practice in drug kingpin statute cases tried after 1994. Section 304 of the Innocence Protection Act of 2001, entitled "Alternative of Life Imprisonment without Possibility of Release," states that:

> The purpose of this section is to clarify that juries in death penalty prosecutions brought under the drug kingpin statute – like juries in all other Federal death penalty prosecutions – have the option of recommending life imprisonment without possibility of release.

S. 486 (Innocence Protection Act of 2001) § 304 (emphasis added).

/ Under 21 U.S.C. § 848(k), the jury first must find a statutory aggravating factor under Section 848(n)(1) (e.g., the defendant intentionally caused the victim's death), then also find a second statutory aggravating factor under Section 848(n)(2)-(12), before it may consider whether to make a recommendation of death. See 21 U.S.C. § 848(k). If the jury finds the existence of the statutory aggravating factors but does not recommend a death sentence, the judge has no discretion to make a downward departure to a sentence less than life without parole. See U.S.S.G. § 2A1.1 comment n.1 ("If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted."); see also United States v. Fortier, 180 F.3d 1217, 1227-28 (10th Cir. 1999) (finding that the Application Note's language "leads to the ineluctable conclusion the discretionary departure only applies when a court selects Section 2A1.1 by means of the felony-murder rule"); United States v. Prevatte, 66 F.3d 840, 844 (7th Cir. 1995) (holding that Application Note 1 provides that, "when the conviction of first degree murder is predicated on a theory other than premeditated killing, life imprisonment is not necessarily the appropriate sentence and that, in such circumstances, a downward departure 'may be warranted'") (quoting U.S.S.G. § 2A1, comment n. 1)[5]
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In Mr. Garza's case, the jury found the requisite aggravating factors, then turned to the life-or-death decision. [6]

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[5] / The Fourth Circuit has, in a recent flawed decision, similarly determined that a Simmons instruction is not required for a federal capital defendant prosecuted under the Drug Kingpin Act. United States v. Stitt, No. 99-2 (4th Cir., May 25, 2001). Stitt is wrong for several reasons. First, the Stitt Court relied upon the Fifth Circuit's denial of Mr. Garza's Simmons claim on direct appeal in support of its holding that the Sentencing Guidelines permit a downward departure for an intentional killing. Stitt, slip op. at 17 (citing United States v. Flores, 63 F.3d at 1368). This Court's decision in Shafer, however, clearly rejects the reasoning employed by the Fifth Circuit on direct appeal, and has completely undermined the precedential value of Flores on the Simmons issue. Second, the Fourth Circuit held that "the Guidelines do not eliminate all of the district court's discretion in sentencing." Stitt, slip op. at 17. The Fourth Circuit did not address, however, whether a defendant can relitigate his intent to kill after an adverse factual determination by a capital sentencing jury, and it would be inconceivable that a district judge could freely disregard such a jury finding where it is supported by the evidence.

[6] / Mr. Garza's sentencing jury found the following statutory aggravating factors listed in Section 848(n). The defendant: intentionally killed the victim; intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim; procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; and committed the offense after substantial planning and premeditation. See R. 254-57 (special findings).

/ Just as in the sentencing scheme at issue in Shafer, at that point only two options remained: (1) a binding recommendation of death by the jury; or (2) if the jury did not recommend death, a sentence, imposed by the judge, of life imprisonment without the possibility of release. 21 U.S.C.§ 848(l). In this situation, Simmons requires that in making its decision, the jury not be left to believe that any other sentencing option remains available. The trial court refused to so instruct Mr. Garza's jury, and the Court of Appeals affirmed that error on direct appeal. Now, however, Shafer has made absolutely clear that those decisions were wrong, and that Mr. Garza's death sentence is unconstitutional.

II. Mr. Garza's Shafer Claim Falls within the Successive Motion Provisions of Section 2255

This Court must consider the merits of Mr. Garza's Shafer claim because his claim meets AEDPA's gatekeeping provisions for successive motions, which "inform" this Court's consideration of this original petition. See Felker, 518 U.S. at 663. Paragraph 8(2) of 28 U.S. C. § 2255 provides that a successive motion to vacate sentence may be filed only under certain limited circumstances. One such circumstance is when the newly-raised claim is based on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255¶ 8(2). Mr. Garza's Shafer claim falls within this provision, as construed consistent with Teague, and this Court therefore must consider his claim on the merits.

A. Paragraph 8(2) of Section 2255 codifies the Teague analysis.

AEDPA amended 2 8 U.S.C. § 2255 to restrict a federal prisoner's ability to file a successive motion to vacate his conviction and sentence. In pertinent part, section 2255 now reads:

> A second or successive motion must be certified as provided in section 2 244 by a panel of the appropriate court of appeals to contain –
>
> (1) newly discovered evidence . . or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. §2255 ¶8.

In amending section 2255 to add the "gatekeeping" provisions set out above, Congress inartfully codified the retroactivity analysis of Teague. Teague and its progeny stand for the proposition that, "[s]ubject to two exceptions, a case decided after a petitioner's conviction and sentence became final may not be the predicate for federal habeas corpus [or § 2255] relief unless the decision was dictated by precedent existing when the judgment in question became final." Stringer v. Black, 503 U.S. 222, 227 (1992) (emphasis added); see Teague, 489 U.S. at 310-11.

Teague requires courts to perform a three-step analysis:

> First, the court must ascertain the date on which the defendant's conviction and sentence became final for Teague purposes. Second, the court must survey the legal landscape as it then existed and determine whether a state court considering [the defendant's] claim at the time his conviction [and sentence] became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution. Finally, even if the court determines that the defendant seeks the benefit of a new rule, the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Caspari v. Bohlen, 510 U.S. 383, 390 (1994) (internal quotation marks omitted).

Although the reference in paragraph 8 (2) to rules "made retroactive to cases on collateral review" manifestly incorporates the Teague concept, the word "new" cannot sensibly be read as requiring that a claim be based upon a "new rule" in the Teague sense in order to support a successive motion. This would have the absurd result of allowing a successive motion based upon a supervening Supreme Court precedent that creates a "new rule" falling within one of Teague's two exceptions to the general principle of collateral non-retroactivity, while disallowing a successive motion based upon a supervening Supreme Court precedent that falls completely outside the general principle of collateral non-retroactivity because it worked no change in the law in the first place. A more coherent reading of subdivision (2) of paragraph 8 is that the word "new" states the condition which triggers the requirement that a previously unavailable rule of constitutional law be made retroactive to cases on collateral review, not an additional requirement. Thus, a successive motion is authorized when it invokes a collaterally retroactive rule that was previously unavailable to the movant; and if this is a new rule, its collateral retroactivity must have been declared by the

Supreme Court. This is consistent with the interpretation in Williams v. Taylor, 529 U.S. 362, 379-80 (2000):

> Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under Teague – which remains the law – and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress had congruent concepts in mind. It is perfectly clear that AEDPA codifies Teague to the extent that Teague requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.

Congress must be supposed to have understood the preexisting Teague doctrine when it borrowed the language of that doctrine in crafting the restrictions on successive motions found in Section 2255, paragraph 8, subdivision (2). See Flowers v. Walter, 239 F.3d 1096, 1102-04 (9th Cir. 2001); West v. Vaughn, 204 F.3d 53, 61-63 (3d Cir. 2000). Congress's choice to use that language signals an intention to authorize successive petitions containing claims that would qualify for collateral retroactivity under traditional Teague analysis. 7/

B. Under the familiar Teague analysis, Shafer applies retroactively to cases on collateral review.

Application of Teague's three-step retroactivity analysis to Mr. Garza's Shafer claim compels the conclusion that Shafer applies retroactively to Mr. Garza's case. First, Mr. Garza's conviction and sentence became final in 1996, two years after this Court decided Simmons. See Garza v. United States, 519 U.S. 1022 (1996). Second, Simmons applied to Mr. Garza's case, as it was "clearly established" precedent when this Court decided his direct appeal. In Shafer, this Court left no doubt but that its decision flowed necessarily from Simmons, and that the South Carolina Supreme Court simply had misapprehended and misapplied Simmons. Shafer, 121 S. Ct. at 1267. Indeed, this Court has characterized the South Carolina Supreme Court's interpretation of Simmons (which mirrored that of the Court

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7/ In Part III, infra, Mr. Garza addresses the specific question whether the use in subdivision (2) of the language "made retroactive to cases on collateral review by the Supreme Court" requires that this Court expressly declare each of its precedents collaterally retroactive under Teague before a lower federal court may find that the Court has "made" it so. This is an issue which has divided the Circuits and is now before this Court for resolution in Tyler v. Cain. The Courts of Appeals on both sides of the divide agree that the question whether a previously unavailable rule of constitutional law is collaterally retroactive refers to the pre-AEDPA Teague doctrine; they disagree only about how explicitly this Court must establish a particular rule's Teague status in order to warrant a lower-court finding of collateral retroactivity.

of Appeals in Mr. Garza's case) as "objectively unreasonable." Penry, supra, slip op. at 19. Third, Shafer's rule was dictated by existing precedent and therefore must apply retroactively to Mr. Garza's case. Accordingly, Teague, as codified in 28 U.S.C. § 2255, does not bar this Court from reaching the merits of Mr. Garza's Shafer claim.

Shafer displays none of the characteristics of a change in the law that is denied retroactive application to cases on collateral review. It does not overrule any prior decision from this Court. It does not break new ground. It imposes no new obligation on the States or the federal government. It does not apply a settled precedent in a novel way. Shafer's holding was clearly dictated by Simmons, a precedent existing at the time Mr. Garza's conviction and sentence became final. In rejecting Mr. Garza's motion for a Successive Motion to Vacate Sentence, the Court of Appeals below did not disagree, stating that "Shafer clarified the application of the Supreme Court's earlier decision in Simmons." In re Garza, App. 2-3. Although this Court did not explicitly state in Shafer that its decision applies to cases on collateral review, its reasoning necessarily brought the decision within Teague's conditions for such retroactive application.

In Simmons, this Court held that where the only sentencing alternative to death available to the jury is life imprisonment without the possibility of parole, and the State raises the issue of the defendant's future dangerousness, due process requires that the jury be informed of the defendant's parole ineligibility, either by a jury instruction or in arguments by counsel. See Simmons, 512 U.S. at 156. Simmons was ineligible for parole under South Carolina law because of prior convictions for violent crimes. Id. After the Simmons decision, South Carolina eliminated parole for all capital defendants sentenced to life in prison. See Shafer, 121 S. Ct. at 1270 n.3.

In Shafer, this Court made clear from the outset of its decision that it was not announcing a change in constitutional law or extending Simmons to a novel factual setting:

> [This case] presents the question whether the South Carolina Supreme Court misread our precedent when it declared Simmons inapplicable to South Carolina's current sentencing scheme. We hold that South Carolina's Supreme Court incorrectly limited Simmons and therefore reverse that court's judgment.

Id. at 1267; see id. at 1271 (concluding that South Carolina Supreme Court had "misinterpreted Simmons"). Thus, Shafer simply clarifies the due process rule articulated in Simmons.

For purposes of Teague, the ruling in Shafer was compelled by Simmons and is retroactively applicable on collateral review. In light of Shafer, Mr. Garza asks only for a correction of the misapplication of Simmons by the district court and the Court of Appeals in his case. As in Shafer, once Mr. Garza's sentencing jury had found the requisite aggravating factors, it had to decide whether or not to recommend death. At this stage, no sentence less than life imprisonment without the possibility of parole was available under the Sentencing Guidelines. Under these circumstances, as Simmons held and Shafer reiterated, due process demanded that Mr. Garza's sentencing jury be informed that if sentenced to life, Mr. Garza would never be released.

C. AEDPA's legislative history demonstrates that the amendments to Section 2255 were not designed to bar claims like Mr. Garza's Shafer claim from collateral review.

AEDPA's "gatekeeping" restrictions on successive petitions were enacted primarily to prevent federal courts from undermining the authority of state courts, governors, and

legislators over the administration of the death penalty in their own states. See, e.g., Calderon v. Thompson, 523 U.S. 538, 555-56 (1998) (explaining that limitations on habeas jurisdiction "reflect our enduring respect for the State's interest in the finality of convictions that have survived direct review within the state court system" and that "[f]ederal habeas review of state convictions frustrates both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights.") (citations and internal quotations omitted). This case raises no such comity concerns, since Mr. Garza is a federal prisoner seeking to bring to the attention of the federal courts the fundamental constitutional error committed when his sentencing jury was not instructed that he could receive no sentence less than life without parole.

In enacting AEDPA, Congress also sought to promote finality of judgments and to prevent prisoners from "abusing the writ" by filing repetitive habeas petitions in an attempt to stave off execution indefinitely. See Felker, 518 U.S. at 664 ("The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'"); Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 518, 104th Cong. (2d Sess. 1996) reprinted in 1996 U.S. C.C.A.N. 944 (1996). (Stating that Congress enacted habeas corpus reforms "to curb the abuse of the statutory writ of habeas corpus"). Denying Mr. Garza the opportunity to seek an initial postconviction review of his Simmons claim, which he was barred from including in his prior section 2255 motion and which Shafer demonstrates is meritorious, promotes no such finality interest. Nothing in AEDPA's legislative history indicates that Congress sought to preclude a federal prisoner from presenting for collateral review a constitutional claim he could not have included in his initial motion, and which a supervening decision from this Court confirms was wrongly decided on direct appeal. In short, Mr. Garza's Shafer claim satisfies the criteria for a successive section 2255 motion based on a retroactively-applicable Supreme Court decision, and this Court therefore should reach the merits of Mr. Garza's

Shafer claim and vacate his sentence with an order that the district court conduct a new sentencing hearing.

III. This Petition Should Be Held for This Court's Decision in Tyler v. Cain

In rejecting Mr. Garza's argument that his Shafer claim met the procedural requirements for a successive motion under section 2255, the Court of Appeals noted that "Shafer . . . does [not] expressly declare the rule retroactively applicable to cases on collateral review or apply the rule in a collateral proceeding." In re Garza, App. 3 (citation omitted). This holding by the Court of Appeals raises the issue of whether AEDPA's successive motion provisions require that this Court expressly declare a rule to be retroactively applicable, and therefore directly implicates this Court's anticipated decision in Tyler v. Cain, No. 00-5961.

At issue in Tyler is the meaning of the phrase "rule made retroactive" in AEDPA's gatekeeping provisions. Seven circuits, including the Fifth Circuit, have concluded that the language of the statute requires an explicit announcement by this Court that a particular rule must be applied retroactively. [8] The Third and Ninth Circuits, however, have held that the Supreme Court need not make an explicit announcement that a rule will be applied retroactively. See, e.g., Flowers, 239 F.3d at 1102-04; West, 204 F.3d at 61-63.

This Court will likely soon resolve this split in authority by interpreting the language in 28 U.S.C. § 2244(b) that mirrors that found in paragraph 8(2) of section 2255. [9] This Court granted the petition for writ of certiorari in Tyler on two questions:

> 1. Does a petition for a writ of habeas corpus asserting a claim of error under Cage v. Louisiana, 498 U.S. 39 (1990) rely on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," within the meaning of 28 U.S.C. § 2244(b)(2)(A)?

[8] See, e.g., In re Smith, 142 F.3d 832, 835 (5th Cir. 1998); Browning v. United States, 241 F.3d 1262, 1265-66 (10th Cir. 2001); Rodgers v. United States, 229 F.3d 704, 706 (8th Cir. 2000); Talbott v. Indiana, 226 F.3d 866, 868-69 (7th Cir. 2000); In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000); Rodriguez v. Superintendent, Bay State Correctional Ctr., 139 F.3d 270, 275 (1st Cir. 1998); In re Vial, 115 F.3d 1192, 1197 (4th Cir. 1997).

[9] Section 2255, paragraph 8(2) applies to federal prisoners seeking permission to file a successive section 2255 motion to vacate, while the identical language found in section 2244(b)(2)(A) applies to state prisoners who wish to file a successive petition for writ of habeas corpus under 28 U.S.C. § 2254.

> 2. Should the new rule of constitutional law announced by this Court in Cage v. Louisiana . . . be made retroactively applicable to petitioners seeking collateral review of their convictions?

121 S. Ct. 654 (2000). The second Question Presented would be superfluous to the first if the Court did not intend to determine whether a decision that is implicitly retroactive may satisfy AEDPA's gatekeeping provisions. 10/ Because this Court's resolution of this issue may affect the disposition of Mr. Garza's claims, Mr. Garza requests, at a minimum, that this Petition be held and that this Court stay his execution until an opinion is issued in Tyler v. Cain and the parties have had the benefit of that decision in reframing their arguments.

IV. If Mr. Garza's Shafer Claim does Not Fall Within the Successor Provisions of Section 2255, This Court Should Reach the Merits of Mr. Garza's Claims Pursuant to the Savings Clause of Section 2255

Even if this Court concludes that Mr. Garza's Shafer claim does not fall within the requirements for a successive motion under section 2255, it should nonetheless reach the merits of this claim because it falls within the "savings clause" of section 2255. Section 2255 provides in relevant part:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. §2255 (emphasis added).

Mr. Garza argued to the Court of Appeals that if it found that his Shafer claim did not satisfy the requirements for a successive motion under section 2255, it should then interpret

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10/ Aside from this case, this Court may never have an opportunity to declare explicitly the retroactivity of Shafer, because that decision flows necessarily from Simmons and therefore applies retroactively under Teague. Moreover, prior to Shafer, only two states that provided for life-without-parole as the sole sentencing alternative to capital punishment refused to inform capital juries of that fact. See Shafer, 121 S. Ct. at 1271 n.4 (noting that only Pennsylvania has capital sentencing procedure similar to that in South Carolina). Even the federal capital sentencing scheme has since been amended so that juries in federal capital cases are informed of the defendant's ineligibility for a sentence of less than life without parole and are advised of their authority to impose such a sentence instead of death. See n.5, supra.

the savings clause of section 2255 to allow him to file a petition pursuant to section 2241 raising those claims in the district court. The Fifth Circuit did not address Mr. Garza's argument on this issue below, but its precedent concerning the interpretation of section 2255 provides that the savings clause:

> applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a nonexistent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion.

Reyes-Requena v. United States, 243 F.3d 893,904 (5th Cir. 2001) (emphasis added).

Because Mr. Garza does not allege that he may have been convicted of a non-existent offense, his Shafer claim would not fall within the savings clause under the Fifth Circuit's rule in Reyes-Requena. At least three of the Courts of Appeals have adopted a similar test for application of the savings clause, requiring a petitioner to show that the conduct of which he was convicted is no longer criminal before obtaining relief through the savings clause. See In re Jones, 226 F.3d 328, 333-34 (4th Cir. 2000); Wofford v. Scott, 177 F.3d 1236, 1244 (11th Cir. 1999); In re Dorsainvil, 119 F.3d 245, 251 (3d Cir.1997). 11

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Other of the Courts of Appeals, however, do not require a petitioner to show that he may have been convicted of a non-existent offense in order to obtain relief under the savings clause. In these circuits, Mr. Garza's Shafer claim would fall within the savings clause, allowing him to proceed with a section 2241 petition. For example, the Second Circuit has interpreted the savings clause to encompass claims for which "the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions." Triestman v. United States, 124 F.3d361, 377 (2d Cir.

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/ It is unclear how the Eleventh Circuit would apply the savings clause to Mr. Garza's motion. While adopting a test that requires the petitioner to show he "was convicted for a nonexistent offense," Wofford, 177 F.3d at 1244, the Eleventh Circuit went on to state that it "need not decide whether the savings clause extends to sentencing claims . . . . It is enough to hold, as we do, that the only sentencing claims that may conceivably be covered by the savings clause are those based upon a retroactive applicable Supreme Court decision overturning circuit precedent." Id. at 1244-45 (emphasis added). Of course Mr. Garza's claim is that claim envisioned by the Eleventh Circuit.

1997). Similarly, the Seventh Circuit has interpreted the savings clause to allow a petitioner "to seek habeas corpus only if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence because the law changed after his first 2255 motion." In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998). Thus, had Mr. Garza proceeded in the Second or the Seventh Circuits, his claim likely would have fallen within the savings clause and he would have been allowed to pursue his Shafer claims by way of a petition under section 2241.

Should the successive motion provisions of section 2255 be deemed to block this Court from reaching the merits of Mr. Garza's Shafer claim, it is clear that "the remedy by [a successive section 2255] motion is inadequate or ineffective to test the legality of [the petitioner's] detention." 28 U.S.C. § 2255. Mr. Garza does not claim that section 2255 is inadequate or ineffective merely because he fails to fit within the successive motion provisions. Here, where a decision by this Court – rendered after decision of Mr. Garza's appeal and initial section 2255 motion – is retroactively applicable and demonstrates conclusively that the Court of Appeals erred in affirming Mr. Garza's sentence over a constitutional challenge, Mr. Garza must be provided an avenue for substantive review of his claim. 12

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Moreover, as a result of the error by the Court of Appeals on his direct appeal, Mr. Garza has never had "an unobstructed procedural shot" at presenting his Shafer claim under section 2255 – or otherwise – to attempt to vacate his unconstitutional death sentence. See In re Davenport, 147 F.3d at 609. Thus, if Mr. Garza is now precluded from presenting his Shafer claim by the requirements of section 2255, his claim must fall within the savings clause, entitling him to a review of the merits of his claim by this Court pursuant to section 2241.

At a minimum, this Court should examine this case to determine whether the savings clause of section 2255 extends to fundamental constitutional errors in sentencing or whether it

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/ Filing motion for relief under 28 U.S.C. § 2241 in the Southern District of Indiana, where Mr. Garza is currently held, would be futile. See n.1, supra, and accompanying text.

must be more narrowly construed as available only where a petitioner can show that the conduct of which he was convicted has been rendered non-criminal by a change in the law. Without further guidance from this Court, the Courts of Appeals will continue to apply differing standards resulting in unfair application of AEDPA across the country.

V. A Decision that Mr. Garza Cannot Obtain Relief for his Valid Shafer Claim Under Either Section 2241 or Section 2255 Would Unconstitutionally Suspend the Writ of Habeas Corpus

Finally, if petitioner is without any access to federal substantive review of his Shafer claim this case will create an extraordinary procedural quagmire that threatens an unnecessary confrontation between the statutory terms of AEDPA and the Suspension Clause of the Constitution. 13

/ After Mr. Garza's direct appeal challenging the trial court's application of Simmons failed, and after he sought timely collateral review of his sentence pursuant to section 2255, Shafer established that Mr. Garza's capital sentence is unconstitutional. Despite the obvious applicability of Shafer to Mr. Garza's claims, however, and despite Mr. Garza's timely efforts to raise the issue now pursuant to section 2255 or 2241, the Fifth Circuit has interpreted section 2255 as preventing Mr. Garza from obtaining any federal review of his Shafer claim. Such a ruling cannot be correct, as Mr. Garza must be allowed to seek relief either by motion under section 2255 or by petition for a writ of habeas corpus under section 2241. To hold otherwise would violate the Suspension Clause. See Felker, 518 U.S. at 663-65.

The availability of the "Great Writ" holds a special place in American jurisprudence. Parisi v. Davidson, 405 U.S. 34, 47 (1972) (Douglas, J., concurring). It was "[c]onsidered by the Founders as the highest safeguard of liberty," Smith v. Bennett, 365 U.S. 708, 712 (1961), and it is "one of the decisively differentiating factors between our democracy and totalitarian

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13 / The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art I, § 9, cl. 2 (emphasis added).

government[ ]." Brown v. Allen, 344 U.S. 443, 512 (1953) (Frankfurter, J., concurring). Access to the writ has been guaranteed by statute since passage of the Judiciary Act of 1789, 1 Stat. 81-82, and despite considerable changes to the procedural mechanisms associated with federal collateral review, [14] / the fundamental right to test the constitutionality of a conviction and sentence has remained constant throughout the history of the Republic.

This Court has always been careful to interpret changes to habeas corpus law (such as those enacted by AEDPA) as consistent with the fundamental constitutional mandate that the writ not be suspended. See Stewart v. Martinez-Villareal , 523 U.S. 637, 645 (1998) (refusing to construe AEPDA's "second or successive" petition language as applicable to claims previously dismissed for failure to exhaust state remedies on grounds that "implications for habeas practice would be far reaching and seemingly perverse"); Felker, 518 U.S. at 659 (holding that AEDPA's amendments to section 2255 do not diminish this Court's authority to hear original habeas corpus petitions pursuant to section 2241); Lonchar v. Thomas, 517 U.S. 314, 322 (1996) (noting that throughout evolution of habeas corpus, changes to procedural rules have always "maintain[ed] the courts' freedom to issue the writ"); United States v. Hayman, 342 U.S. 205, 210-19 (1952) ("Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions."); Ex Parte Yerger, 68 U.S. (8 Wall.) 85(1869) (upholding statutory bar to Supreme Court review of circuit court's refusal to permit successive habeas petition on grounds that Court maintained power to hear original habeas petitions).

This is, of course, not the first time that the AEDPA's "gatekeeper" requirements have threatened a defendant's ability to obtain collateral review. Unlike the Court of Appeals below, however, most courts facing similar issues are careful to avoid a confrontation between section 2255's procedural requirements and the Suspension Clause. For example,

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[14] / See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385; 28 U.S.C. § 2241(c)(3); McCleskey v. Zant, 499 U.S. 467 (1991).

relying upon the well-settled proposition that a statute should be construed to avoid constitutional issues, 15

/ the Second Circuit has recognized that " serious constitutional questions would arise if a person who . . . could not have effectively raised his claim . . . at an earlier time had no access to judicial review." Triestman, 124 F.3d at 363. 16

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The Seventh Circuit also has explained that denying collateral review can raise sensitive constitutional questions that should, if possible, be avoided:

> There remains the possibility that a claim in no sense abusive, because it could not have been raised earlier, yet not within the dispensation that [AEDPA's gatekeeping provision] grants for the filing of some second or successive petitions, would have sufficient merit that the barring of it would raise an issue under the clause of the Constitution that forbids suspending federal habeas corpus other than in times of rebellion or invasion.

In re Page, 179 F.3d 1024, 1026 (7th Cir. 1999), cert. denied, 528 U.S. 1162 (2000); see also In re Davenport, 147 F.3d at 611 (a "federal prisoner should be permitted to seek habeas corpus . . if he had no reasonable opportunity to obtain earlier judicial correction of a fundamental defect in his conviction or sentence").

Refusing to address Mr. Garza's claim on the merits creates an unavoidable confrontation between AEDPA and the Suspension Clause. In Felker, this Court avoided a similar conflict by holding that AEDPA's gatekeeper requirements do not prevent a prisoner from petitioning for an original writ of habeas corpus. 518 U.S. at 664-65. Unlike the petitioner in Felker, however, Mr. Garza has never had an opportunity to present his Shafer

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/ See Legal Servs. Corp. v. Velasquez, __ U.S. __, 121 S. Ct. 1043, 1051 (2001) ("[W]hen there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.") (citation omitted).

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/ The Triestman court interpreted Hayman to suggest that the "inadequate and ineffective" language of § 2255 operated as a sort of judicial pressure release that allows courts to avoid difficult constitutional questions that would arise if a petitioner were left with no procedural path down which to bring a claim. 124 F.3d at 377 ("[Hayman] has thus indicated that the 'inadequate or ineffective' clause can serve to protect the constitutionality of § 2255 and, indeed, that it can help avoid premature resolution of serious constitutional questions if, by interpreting that clause to allow resort to habeas corpus, those issues are kept from arising.").

claim to any court, and without relief from this Court he will be executed without ever having obtained a ruling on the merits. 17

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Permitting Mr. Garza's execution without any review of the merits of his Shafer claim creates other constitutional problems as well. Interpreting AEDPA in a way that results in the denial of review to claims based on some collaterally retroactive decisions, but not to claims based on other collaterally retroactive decisions, violates the Due Process Clause of the Fifth Amendment to the Constitution. See Bolling v. Sharpe, 347 U.S. 497, 500 (1954). Such an obviously unjust interpretation of AEDPA cannot be permitted to stand, particularly since it would allow the choice between life and death to turn on an arbitrary distinction that is almost surely the result of poor legislative drafting. See Part II.A., supra.

If Mr. Garza is prevented from presenting the merits of his Shafer claim to the courts, the legality of his execution – as well as the constitutionality of the AEDPA's gatekeeper provisions – will be called into question. The Fifth Circuit's rejection of Mr. Garza's application to file a motion under section 2255 – and its refusal to permit a habeas corpus action pursuant to section 2241 – threatens to permit Mr. Garza to be executed despite clear precedent from this Court indicating that the execution is unconstitutional. The court's decision also creates another, separate constitutional violation by suspending the writ of habeas corpus. This Court can avoid such a constitutional violation by reviewing the merits of Mr. Garza's claim under Shafer.

CONCLUSION

For the foregoing reasons, Mmr. Garza respectfully requests that his petition be granted, his sentence vacated and the district court ordered to provide him a new sentencing hearing.

Respectfully submitted,

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17 / Concurring in Daniels v. United States, __ U.S. __, 121 S. Ct. 1578 (2001), Justice Scalia recently noted in a related postconviction context: "Perhaps precepts of fundamental fairness inherent in 'due process' suggest that a forum to litigate challenges . . . must be made available somewhere for the odd case in which the challenge could not have been brought earlier." Id. at 1586 (Scalia, J., concurring in part)(emphasis in original).

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