No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

In re Joseph C. Garcia, Petitioner

PETITION FOR WRIT OF HABEAS CORPUS

CAPITAL CASE

****EXECUTION DATE: DECEMBER 4, 2018****

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December 3, 2018

QUESTIONS PRESENTED

In *In re Davis*, 130 S. Ct. 1 (2009), this Court transferred a death row prisoner's Petition for Writ of Habeas Corpus to the district court "for hearing and determination" of a late claim of actual innocence that might have barred Davis' execution. Although the Court had not previously recognized a right not to be executed if actually innocent, *see House v. Bell*, 547 U.S. 518, 554 (2006); *Herrera v. Collins*, 506 U.S. 390, 411-12, 417 (1993), its decision in *Davis* signaled that the time was right to consider a claim that had long percolated in the state and federal courts.

Similarly, a claim that excessive stays on death row might violate the Eighth and Fourteenth Amendments has been recognized by individual justices of the Court for a period that spans more than two decades, *see Lackey v. Texas*, 514 U.S. 1045, 115 S. Ct. 1422 (1995) (em.) (Stevens, J, respecting the denial of certiorari); *Glossip v. Gross*, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting), but has not been addressed in a holding of the Court. The questions presented are:

1. Whether Joseph Garcia's extended stay on Texas' death row for nearly 16 years has resulted in his suffering additional severe psychological stress that exceeds the punishment of death determined by the jury and imposed by the trial court, and amounts to an additional punishment that the Court should find proscribed by the Eighth and Fourteenth Amendments; and,

2. Whether Mr. Garcia is actually innocent of the death penalty, as that term is defined in *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992), because his excessively-long incarceration, with extreme deprivation on Texas' death row, makes him part of a class of offenders whose executions should be circumscribed by the Eighth and Fourteenth Amendments, and renders him not eligible for a sentence of death.

PARTIES TO THE PROCEEDINGS BELOW

Joseph C. Garcia, a Texas death row prisoner, was the Petitioner-Appellant in the habeas corpus proceedings below. William Stephens, formerly the Director of the Texas Department of Criminal Justice, Corrections Institutions Division, was the Respondent in the district court proceedings and the Appellant at the outset of Mr. Garcia's appellate proceedings in the Fifth Circuit until he retired from that position. On May 9, 2016, the Fifth Circuit notified Mr. Garcia's counsel that the caption should be updated to reflect that Lorie Davis had succeeded Mr. Stephens as the Respondent-Appellee-Director of Texas Department of Criminal Justice, Corrections Institutions Division, due to Mr. Stephens' retirement. *See* Letter of the Fifth Circuit, *Garcia v. Davis*, Fifth Cir. No. 15-70039 (May 9, 2016).

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Joseph C. Garcia respectfully requests that this Court transfer the present application "for hearing and determination" to the United States District Court for the Northern District of Texas in accordance with its authority under 28 U.S.C. § 2241(b), so that the district court may, consistent with the practice set forth by this Court in *In re Davis*, 130 S. Ct. 1 (2009), make findings of fact and conclusions of law with respect to his claim that his extended stay on Texas' death row while awaiting his court-approved execution constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

Concurrently with the filing of this Petition, Mr. Garcia has filed a Motion for Stay of Execution, which is scheduled for December 4, 2018.

OPINIONS BELOW

To be clear, there is no opinion below from which Mr. Garcia appeals. Federal constitutional claims unrelated to the claim brought here were brought in the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 2254. The claims were denied on May 28, 2015. *See* Memorandum Opinion and Order Accepting and Modifying Findings, Conclusions, and Recommendation of the United States Magistrate Judge, and Denying a Certificate of Appealability, *Garcia v. Stephens*, Dist. Ct. No. 3:06-CV-2185-M, Dkt. 103, which is attached here as Appendix A. The United States Court of Appeals for the Fifth Circuit denied a certificate of appealability ("COA") as to five federal constitutional claims and denied a COA as to the district court's denial of an evidentiary hearing with which to prove two additional

claims. *See* Opinion, *Garcia v. Davis*, Fifth Cir. No. 15-70039 (July 21, 2017) (unpublished), which is attached as Appendix B.

STATEMENT OF JURISDICTION

The United States District Court for the Northern District of Texas filed a Memorandum Opinion and Order Accepting and Modifying Findings, Conclusions, and Recommendation of the United States Magistrate Judge, and Denying a Certificate of Appealability. *See* Appx. A. That Opinion denied capital habeas corpus relief on several claims brought in Mr. Garcia's § 2254 petition. The United States Court of Appeals for the Fifth Circuit denied a COA as to five federal constitutional claims and denied a COA as to the district court's denial of an evidentiary hearing on two additional claims. *See* Appx B. In neither the district court nor the Fifth Circuit did Mr. Garcia raise a claim that his extended stay on Texas' death row and related claim of actual innocence of the death penalty violated the Eighth and Fourteenth Amendments, nor could he, as the claim has not been recognized in a holding of this Court as clearly established federal law for purposes of § 2254(d)(1). The Court's original jurisdiction is invoked pursuant to 28 U.S.C. § 2241, 2254(a), 1651(a), and Article III of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VIII:

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

/ /

U.S. Const. Amend. XIV, in pertinent part:

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

28 U.S.C. § 2244(b)(2):

> A claim presented in a second or successive habeas application under section 2254 that was not presented in a prior application shall be dismissed – unless
>
> ***
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found applicant guilty of the underlying offense.

STATEMENT OF THE CASE

The following facts were admitted at trial and led to Mr. Garcia's conviction for capital murder:

1. Garcia was a member of the Texas Seven, which was a group of seven TDCJ inmates who escaped from the Connally Unit on December 13, 2000, and subsequently killed Dallas Police Officer Aubrey Hawkins on Christmas Eve during their robbery of an Oshman's sporting goods store.

2. Garcia was charged with capital murder for the murder of Aubrey Hawkins. CR 2. Garcia was convicted of capital murder on February 6, 2003, and sentenced on February 13, 2003, to death in Dallas County Cause No. F01-00325-T. CR 295, 301-03, 308.

Respondent's Proposed Findings of Fact and Conclusions of Law, *Garcia v. Stephens*, Dist. Ct. No. 3:06-CV-2185-M, Dkt. 93 (Aug. 25, 2014) (adopted by the district court in its Memorandum Opinion and Order Accepting and Modifying Findings, Conclusions, and Recommendation of the United States Magistrate Judge, and

Denying a Certificate of Appealability, *Garcia v. Stephens*, Dist. Ct. No. 3:06-CV-2185-M, Dkt. 103 at 2 n. 1 (May 28, 2015) (attached here at Appx. A).

REASONS FOR GRANTING THE WRIT

A. Statement of unavailability of relief from the lower federal and state courts.

By statute and Supreme Court rule, Mr. Garcia is required to show that relief is not available in either the United States District Court for the Northern District of Texas or the Fifth Circuit in order that the Court may invoke its original jurisdiction over his Petition. *See* 28 U.S.C. § 2242; Supreme Court Rule 20.4(a). Supreme Court Rule 20.4 also requires a showing that Mr. Garcia exhausted the claim in the state courts or was precluded from doing so under the provisions of § 2254(b)(1)(B)(ii or iii). Mr. Garcia makes the requisite showings that relief was unattainable in the lower federal courts and the state courts of Texas.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2241 *et seq.*, constrains the jurisdiction of the lower federal courts over Mr. Garcia's claims in a manner that this Court has stated did not limit its jurisdiction over habeas corpus actions. *See Felker v. Turpin*, 518 U.S. 651, 660 (1996). Mr. Garcia has not made application for relief in the district court because the claim for which he seeks relief has not been recognized as clearly established federal law as determined by this Court for a grant of the writ under the AEDPA, § 2254(d)(1). *See Lackey*, 514 U.S. 1045 (mem. of Stevens, J, respecting the denial of certiorari); *Glossip*, 135 S. Ct. at 2764 (Breyer, J, dissenting). An application for authorization

from the Fifth Circuit to file a second or successive ("SOS") § 2254 petition is also foreclosed by § 2254(d)(1).

In addition, circuit precedent forecloses an application for authorization to file a second or successive ("SOS") petition because the claim Mr. Garcia brings here is, in essence, that Mr. Garcia's extended stay on Texas' death row constitutes a claim that he is innocent of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992). The Fifth Circuit has held, as did the Eleventh Circuit prior to this Court's invocation of its original jurisdiction in *In re Davis*, 130 S. Ct. 1, that an application for authorization to file a successive § 2254 petition, that brings only a claim of innocence, with no additional constitutional claim, may not be sought pursuant to 28 U.S.C. § 2244(b)(2)(B)(ii). *See In re Warren*, 537 Fed. App'x. 457, 458 (5th Cir. 2013) (Mem.); *In re Davis*, 565 F.3d 810, 823 (11th Cir. 2009) (Per curiam). Mr. Garcia brings no additional federal constitutional claim and is therefore barred from applying to the Fifth Circuit for authorization to file a SOS petition in the district court.

Because Mr. Garcia challenges the judgment of a state court, to wit, the imposition of a death sentence, Rule 20.4 requires that he demonstrate "how and where [Mr. Garcia] has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b)." Preliminarily, Mr. Garcia notes the Texas Court of Criminal Appeals has rejected the claim out of hand because, in its view, contemporary standards of decency fail to suggest that delay occasioned by the defendant as he pursues appeals and collateral relief renders his punishment

cruel or unusual. *See Ex Parte Ruiz*, 543 S.W.3d 805, 827 (Tex. App. 2016).

Notwithstanding, once an execution date was set and the claim became ripe, Mr. Garcia presented the instant claim in a Subsequent Application for Post-Conviction Writ of Habeas Corpus to the Texas Court of Criminal Appeals and the 283rd Judicial District Court of Dallas County, *Ex Parte Joseph C. Garcia*, Nos. WR-64, 583-03 & W-01-00325-T(C) (Nov. 14, 2018). On November 30, 2018, the Court of Criminal Appeals denied the claim as procedurally defaulted without reaching its merits. *See* Order, Tex. Crim. App. No. WR-64, 582-03 (Nov. 30, 2018). Thus, the Court's jurisdiction lies to entertain Mr. Garcia's Petition because Mr. Garcia could not exhaust the claim in state court because the court, like this one, has not found the claim to be cognizable. Moreover, his good faith effort to allow the state courts to again consider the merits of the claim resulted in a procedural default ruling. Because "there is an absence of available State corrective process," *see* § 2254(b)(1)(B)(i), this Court must grant the writ and transfer the matter to the district court "for hearing and determination." *See* § 2241(b).

B. Exceptional circumstances warrant the Court's exercise of its original jurisdiction over Mr. Garcia's petition for writ of habeas corpus.

In his memorandum respecting the denial of certiorari in *Lackey*, Justice Stevens framed the question as "whether executing a prisoner who has already served some 17 years on death row violated the Eighth Amendment's prohibition against cruel and unusual punishment." 514 U.S. 1045. Justice Stevens believed the claim to be sufficiently important and novel that it warranted review, but he also stated the "a denial of certiorari on a novel issue will permit the state and federal courts to 'serve

as laboratories in which the issue receives further study before it is addressed by this Court.'" *Id.* (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)). Given that the AEDPA restricts the jurisdiction of the federal courts and allows them to consider, in pertinent part, only a state court adjudication of a claim that "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *see* 28 U.S.C. § 2254(d)(1), the federal courts have not been permitted to become the laboratories to address this claim that Justice Stevens envisioned. *See, e.g., Allen v. Ornoski*, 435 F.3d 946, 959 (9th Cir. 2005). The question remains sufficiently important that the Court should transfer the matter to the district court for full factual development of the claim so that the Court may decide the Eighth Amendment questions presented.

1. The justices' recognition of the Eighth Amendment claim.

Various members of the Court have recognized that execution after a prisoner has spent an excessive amount of time on death row raises serious Eighth Amendment concerns. *See, e.g., Lackey*, 115 S. Ct. at 1421 (Stevens, J., mem. respecting denial of certiorari). Justice Kennedy stated that solitary confinement of the type endured by inmates sentenced to death prior to execution constitutes an "added punishment" and that "[y]ears on end of near-total isolation exact a terrible price" - one that the justice took to mean was in addition to the punishment of death itself. *See Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

Justice Stevens noted that the death penalty has been found to be constitutional because it was found to be permissible by the Framers of the

Constitution and had been held to satisfy the twin penological goals of retribution and deterrence. *Lackey*, 115 S. Ct. 1421. He stated that it was unlikely that either penological goal would retain any force "for prisoners who have spent 17 years under a sentence of death," a length of pre-execution delay that would have been rare in 1789 and, so, would not have barred Lackey's claim. *Id.* He further stated that retribution had already been accomplished in Lackey's case because of "the severe punishment already inflicted." *Id.*

Moreover, Justice Stevens noted the horrific psychological effects of extended stays on death row. He quoted the Court's 100-year-old case *In re Medley*, 134 U.S. 160, 172 (1890), for the proposition that "when a prisoner sentenced by the court to death is confined to the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *Id.* Justice Stevens included in a footnote descriptions of state courts and the Supreme Court of the mental toll that the lengthy wait for execution exacts, including: it is "dehumanizing"; "[p]enologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture"; it is "frightful"; and, that the onset of insanity during the wait is not rare. *Id.* fn. (citations omitted).

Justice Breyer quoted *In re Medley*, 134 U.S. at 172, in his dissent in *Foster v. Florida*, 537 U.S. 990, 123 S. Ct. 470 (2002) (Mem.), for the additional proposition that "the uncertainty of death and long delay" is arguably "cruel" because it

contributes "an immense mental anxiety amounting to a great increase of the offender's punishment." 123 S. Ct. at 471. Justice Breyer concluded by stating that, if executed, Foster "will have been punished both by death and also by more than a generation spent in death's twilight." *Id.* at 472. While "death row syndrome" or "death row phenomenon" has not yet been recognized as a distinct diagnosis in the Diagnostic and Statistical Manual of Mental Disorders ("DSM"), the mental health symptomatology associated with it, including extremely heightened anxiety, fear, and stress, was described in scholarship published just after Justice Stevens' *Lackey* memorandum and traced its development over the prior 20 years of the modern death penalty. *See* Kathleen M. Flynn, *The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 Wash. & Lee L. Rev. 291, 294-98 (1997), at 2-3 & nn. 25-38.

Other courts and justices have recognized that the stress of living under threat of death for lengthy periods is so oppressive that, on its own, it can constitute cruel and inhuman treatment violating the Eighth Amendment. Conditions of confinement on death row can be "so degrading and brutalizing to the human spirit as to constitute psychological torture." *People v. Anderson*, 493 P.2d 880, 894 (Cal. 1972), *superseded on other grounds as stated in Strauss v. Horton*, 207 P.3d 48, 90 (Cal. 2009); *see also Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("[T]he onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."). "Whatever one believes about the cruelty of the death penalty itself, this violence done to the prisoner's mind must afflict the conscience of enlightened government

and give the civilized heart no rest." *Dist. Att'y for the Suffolk Cty. Dist. v. Watson*, 411 N.E.2d 1274, 1291 (Mass. 1980) (Liacos, J., concurring).

Tension lies within the Court as to whether the claim Mr. Garcia posits here may properly be described as implicating the Eighth Amendment. On one hand, Justice Thomas has found no constitutional support for the proposition that "a defendant can avail himself of the full panoply of appellate and collateral procedures and then complain when his execution is delayed." *Thompson v. McNeil*, 556 U.S. 1114, 129 S. Ct. 1299, 1300 (2009) (Mem.) (Thomas, J., concurring in denial of certiorari) (*quoting Knight v. Florida*, 528 U.S. 990, 120 S. Ct. 459 (1999) (Mem.). On the other hand, Justice Breyer has cited instances where the delay between judgment and execution clearly cannot be attributed to the death row prisoner. Justice Breyer cited in *Thompson* the delay caused by the sentencing court's refusal to allow a capital defendant to present compelling non-statutory mitigation and the resultant reversal of the death sentence and remand for resentencing, describing the trial court's reversible error as "fair" to consider in whether delay not attributable to the defendant supports an Eighth Amendment claim. 129 S. Ct. at 1302-04 (Breyer, J, dissenting from denial of certiorari). Justice Breyer has also noted a state agency's report that the state's system of capital punishment was "dysfunctional," including where the case took 14 years to "wend its way through [the state's] appellate process," as describing delay not attributable to the defendant in the Eighth Amendment calculus. *Boyer v. Davis*, 136 S. Ct. 1446 (2016) (Mem.) (Breyer, J., dissenting from denial of certiorari).

Justice Stevens agreed in *Lackey* that "a petitioner's abuse of the judicial system by escape or repetitive, frivolous filings" should be "excluded from the calculus" of whether the extensive delay implicates the Eighth Amendment. *See Lackey*, 115 S. Ct. at 1422. That has not occurred here. Surely the Court can fashion a formula for determining whether and when excessive delay on death row will violate the Eighth Amendment.

2. Facts supporting Mr. Garcia's subjective fear and anxiety while awaiting execution.

The heightened fear and anxiety felt by Mr. Garcia as he has awaited his execution is not speculative or theoretical: he has been threatened with death previously. Moreover, he has suffered violence and threats of violence. Mr. Garcia notes preliminarily that it is proper, for purposes of determining whether his execution would violate the Eighth and Fourteenth Amendments, to also consider the fear and anxiety experienced by him as he spent more than 15 years contemplating his intentional death at the hands of the state, in light of his history. After all, a capital defendant's subjective state of mind is relevant to his death eligibility in a felony murder case, where the prosecution is supposed to prove beyond a reasonable doubt that the defendant was a major participant in the homicide and acted with "subjective reckless indifference to human life" in order to be eligible for the death penalty. *See Ex Parte Wood*, 498 S.W.3d 926, 928 (Tex. Crim. App. 2016) (Mem.) (*citing Tison v. Arizona*, 481 U.S. 137, 158 (1987)).

Victoria Reynolds, Ph.D., a clinical psychologist with experience in the assessment and treatment of patients suffering from trauma, evaluated Mr. Garcia

for 17 hours at the Polunsky Unit in September 2017. Her report is attached as Appendix C. She also considered voluminous court, military, medical and school records, as well as declarations executed by acquaintances of Mr. Garcia. Her opinions support the Eighth and Fourteenth Amendment claims brought here.

Of critical significance to understanding how Mr. Garcia's extended wait for execution has affected him, the court must view the history unearthed by Dr. Reynolds that demonstrates numerous instances where Mr. Garcia has been traumatized by personal physical and sexual abuse, threats of violence and death, and exposure to violence that has befallen family members and friends. Mr. Garcia suffered extreme physical abuse by his mother, grandparents, aunts, uncles, and various husbands and boyfriends of his mother, beginning when he was seven years of age and extending well into his teenage years. *Id.* at 12. Mr. Garcia received beatings of his back, legs, arms and face with fists and hands, and with objects such as belts. *Id.* at 12-16. When he raised his hands to attempt to stop one of his mother's beatings of him with a belt, she took him by both wrists and burned his hands over a kitchen stove, saying, "Don't you ever raise your hand to me again or I'll kill you. I'll take you out of this world." *Id.* at 13. His mother's neglect and abandonment of him also caused Mr. Garcia to become "so emotionally overwhelmed with loneliness, worry, and desperation . . . that he simply couldn't tolerate being alone any longer and wished he could die." *Id.* at 20. As a result, around the age of ten, Mr. Garcia started dissociate. *Id.* & nn. 34, 35. Mr. Garcia was also sexually assaulted including

a rape, at least three times by adult men when he was between the ages of nine and 12. *Id.* at 26-30.

The "indifference, physical pain, helplessness, anger, fear, and betrayal" Mr. Garcia experienced in childhood persisted into his adulthood, where Mr. Garcia's "symptoms, adaptations, and behaviors typified those of a highly traumatized child." *Id.* at 3. Those symptoms included "anxiety and hyperactivity prompted by intrusive memories of abuse and loss; hypervigilance for perceived danger; sad moods and repeated thoughts of wanting to die; [and,] profound mistrust of adults in power and need for control to manage feelings of fear and helplessness[.]" *Id.* The anxiety Mr. Garcia continues to experience as he awaits execution could only be magnified by his having suffered an attempted rape by his cellmate while in the Connally Unit of the Texas prison system in Karnes County at the age of 27 or 28. *Id.* at 30.

3. Extreme deprivation faced by Texas death row inmates while awaiting execution.

The adverse impact of Mr. Garcia's history on his mental health is exacerbated by the conditions of confinement, including extreme deprivation and isolation, he has endured for nearly 16 years. Mr. Garcia, like all other Texas death row inmates, spends 22–23 hours per day, alone, locked in an 8' x 12' foot cell. The cell has only a sink, toilet, and a steel thirty-inch-wide bunk with a thin plastic mattress. Report, Human Rights Clinic at the University of Texas School of Law, *Designed to Break You: Human Rights Violations on Texas' Death Row* at 14-16 (April 2017), https://law.utexas.edu/wp-content/uploads/sites/11/2017/04/2017-HRC-DesignedToBreakYou-Report.pdf (last uploaded Nov. 29, 2018). The cells on death

row do have tiny slivers of windows, but inmates are only able to look out of them by rolling up their mattresses and standing on them. *Id.* Extremely detrimental to Mr. Garcia's mental health is the fact that he can have no physical contact with other human beings. *Id.* at 16.

The severity of these physical conditions is not the only punishment Mr. Garcia has faced during his years on death row. "The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out." *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting); *see also Ex Parte Murphy*, 495 S.W.3d 282, 290 (Tex. Crim. App. 2016) (Alcala, J., concurring in part and dissenting in part) (recognizing that prolonged death-row confinement is an "aspect of Texas's death-penalty scheme that cries out for closer examination"). As Mr. Garcia notes above, this Court has recognized the toll that waiting for execution can take on a prisoner, writing—about a delay of just four weeks—that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *Medley*, 134 U.S. at 172; *see also Valle v. Florida*, 564 U.S. 1068, 132 S. Ct. 1 (2011) (Mem.) (Breyer, J., dissenting from denial of stay); *Knight*, 120 S. Ct. at 462 (Breyer, J., dissenting from denial of certiorari); *Furman v. Georgia*, 408 U.S. 238, 288–89 (1972) (Brennan, J., concurring). Mr. Garcia has been and continues to be severely punished, and exacting the additional punishment of execution would be excessive.

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4. There is no retributive or deterrent purpose to executing Mr. Garcia.

Retribution and deterrence are the "valid penological" justifications for the death penalty. *Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting); *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). But when these aims can no longer be advanced, an execution "is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional suffering." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (internal quotation marks and citation omitted); *see also Furman*, 408 U.S. at 279–80 (Brennan, J., concurring). An execution that occurs after the convicted individual has spent nearly 16 years on death row, as Garcia has, furthers no retributive or deterrent ends. *See, e.g.*, *Knight*, 120 S. Ct. at 462 (Breyer, J., dissenting from denial of certiorari) (observing that the "longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes"); *see also Lackey*, 115 S. Ct. 1421 (Stevens, J., dissenting from denial of certiorari) ("It is arguable that neither [retribution nor deterrence] retains any force for prisoners who have spent some 17 years under a sentence of death.").

Executing Mr. Garcia would provide little, if any, deterrent effect that is not achieved by a lifetime of imprisonment. *See Valle*, 132 S. Ct. at 2 (Breyer, J., dissenting from denial of stay) ("It is difficult to imagine how an execution following so long a period of incarceration could add significantly to that punishment's deterrent value."); *Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Mem.) (Stevens, J.,

concurring in denial of certiorari) ("[T]he deterrent value of incarceration during that period of uncertainty [confined under a death sentence] may well be comparable to the consequences of the ultimate step itself."); *Lackey*, 514 U.S. 1045 (Stevens, J., memorandum respecting denial of certiorari). Studies on the question of the death penalty's deterrent value are contradictory and inconclusive, and therefore insufficient to justify Mr. Garcia's execution. *See Glossip*, 135 S. Ct. at 2767–68 (Breyer, J., dissenting) (comparing sources); *Baze v. Rees*, 553 U.S. 35, 79 (2008) (Stevens, J., concurring); *Ring v. Arizona*, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring). Mr. Garcia's actual execution would be so remote from the offense as to make it improbable that a potential offender, considering whether to commit a capital crime, would "contemplate[]" the penalty "in advance" and be "swayed from his course" of conduct. *Trop v. Dulles*, 356 U.S. 86, 112 (1958); *see also Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (statement of Stevens, J.) (reasoning that for punishment to have deterrent value, there must be a "likelihood" that, based on the imposition of punishment in other cases, offenders would make "the kind of cost-benefit analysis that attaches any weight to the possibility of execution"). That Mr. Garcia's execution would have any deterrent value is even more unlikely given that high reversal rates and society's increasing reluctance to resort to the death penalty have an "offsetting effect on a potential perpetrator's fear of a death penalty." *Glossip*, 135 S. Ct. at 2768 (Breyer, J., dissenting).

Nor would retribution be a sufficient justification for Mr. Garcia's execution. As Justice Breyer recently explained, "[t]he relevant question here, however, is

whether a community's sense of retribution can often find vindication in a death that comes, if at all, only several decades after the crime was committed." *Id.* at 2769 (Breyer, J., dissenting) (internal quotation marks and citation omitted). The substantial passage of time erases the retributive value of capital punishment as a means to heal the community victimized by a particular crime. Mr. Garcia's execution is not required for society to "restor[e] . . . the moral imbalance caused by the offense." *Graham v. Florida*, 560 U.S. 48, 72 (2010). The nearly 16 years Mr. Garcia has spent on death row severely attenuates the link between the actual punishment and a community's call for death. In Mr. Garcia's case, "the acceptable state interest in retribution has . . . been satisfied by the severe punishment already inflicted." *Lackey*, 115 S. Ct. at 1421 (Stevens, J.) (mem. respecting the denial of certiorari).

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CONCLUSION

Joseph C. Garcia respectfully requests that the Court grant the writ and transfer this matter to the United States District Court for the Northern District of Texas for hearing and determination pursuant to 28 U.S.C. § 2241(b).

Respectfully submitted this 3rd day of December, 2018.

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