Nos. 18-6890, 18A570

IN THE

Supreme Court of the United States

In re JOSEPH C. GARCIA,
Petitioner.

On Original Petition for a Writ of Habeas Corpus

PROOF OF SERVICE

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

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

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QUESTION PRESENTED

Petitioner Joseph Garcia was found guilty and sentenced to death in 2003 for the murder of Irving, Texas police officer Aubrey Hawkins. During the intervening fifteen years, Garcia has filed numerous state habeas applications and fully litigated his federal habeas proceedings. His claims have been repeatedly rejected. Recently, Garcia filed a subsequent state habeas application in which he claimed his execution would violate his right under the Eighth Amendment to be free from cruel and unusual punishment due to his fifteen-years spent on death row awaiting execution. The state court dismissed the claim. Garcia now asks this Court to remand this case to the federal district court for evidentiary development on this Eighth Amendment claim.

This Court has never recognized an Eighth Amendment claim challenging a capital murderer's death sentence based on the length of time spent awaiting execution. After bypassing procedural obstacles to his federal habeas claim, Garcia now requests this Court to grant him the extraordinary remedy of a writ of habeas corpus by way of an original petition. These facts raise the following question:

> Should the Court exercise its original habeas corpus jurisdiction to recognize for the first time a claim challenging the constitutionality of a death sentence based on the length of time served awaiting execution where Garcia had an adequate remedy in state and federal court and has failed to demonstrate an entitlement to relief based on a non-existent constitutional rule?

BRIEF IN OPPOSITION

Petitioner Joseph Garcia was convicted and sentenced to death in 2003 for the murder of Irving, Texas police officer Aubrey Hawkins. He is scheduled to be executed **after 6:00 p.m. (Central Time) on Tuesday, December 4, 2018**. Garcia has unsuccessfully challenged his conviction and death sentence in both state and federal court. His initial federal habeas proceedings concluded when the Court denied his petition for a writ of certiorari. *Garcia v. Davis*, 138 S. Ct. 1700 (2018). Garcia recently filed his third state habeas application in which he claimed his execution would violate his Eighth Amendment right to be free from cruel and unusual punishment. The Texas Court of Criminal Appeals (CCA) dismissed the application as an abuse of the writ. *Ex parte Garcia*, No. 64,582-03 (Tex. Crim. App. Nov. 30, 2018) (unpublished order).

Garcia now seeks the extraordinary remedy of a writ of habeas corpus by way of an original petition. *See generally* Pet. Cert. He argues that the Court should grant his petition and remand to the district court for an evidentiary hearing to develop his Eighth Amendment claim.[1] Pet. Cert. iv. Garcia is not entitled to the extraordinary relief he requests.

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[1] Garcia also lists as a question presented whether he is actually innocent of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992), due to his fifteen-year stay on death row. Pet. Cert. i. He fails to brief this argument in any way and it is, therefore, not before the Court. Nonetheless, even if the question was before the

First, the Court has never recognized a constitutional challenge to a death sentence based on the length of time a petitioner has served on death row awaiting execution. Garcia fails to demonstrate any reason the Court should depart from its precedent. Second, Garcia fails to show why he is entitled to the relief he requests. Third, Garcia is essentially seeking to appeal the state court's dismissal of his Eighth Amendment claim through an original petition in an effort to avoid the limitations of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Consequently, Garcia is not entitled to a writ of habeas corpus or a stay of execution.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 2241(a).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

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

Court, it would be readily disposable. The Court in *Sawyer* explained that to show actual innocence of the death penalty, a petitioner must show that, but for a constitutional error, "no reasonable juror would have found the petitioner eligible for the death penalty under the applicable *state law*." *Id.* at 336 (emphasis added). Garcia's actual innocence of the death penalty does not rest on a claim that he is actually innocent of the death penalty under Texas law, nor does it allege constitutional error during his trial. Consequently, such a claim would be patently meritless.

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

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

Evidence presented at Garcia's trial showed that, during the prison escape, the escapees stole fourteen .357 revolvers, an AR-15 rifle, a 12-gauge shotgun, and more than 100 rounds of ammunition. 47 RR 50; 48 RR 24, 27.[2] On Christmas Eve, the escapees entered an Oshman's sporting-goods store in Irving, Texas armed with the stolen firearms. 45 RR 64. During the robbery, Garcia was armed with a gun, threatened an employee, and tied up employees in the break room. 45 RR 65–66 ("We have a tough guy here who wants to try something. Go ahead. Try something. I want you to try something."), 71, 81, 218 ("Don't do nothing stupid, if you want to see Christmas. If we have to shoot one of you, we'll have to shoot all of you.").

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

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

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

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

B. Punishment facts

1. The State's punishment case

Patrick Moczygemba, an assistant supervisor from the Connally Unit maintenance department, testified as to Garcia's escape from prison. 55 RR

25–92. Six of the seven escapees, including Garcia, were working maintenance on the day they escaped. 51 RR 31–36. Moczygemba was struck in the head and rendered unconscious. 51 RR 50. Moczygemba awoke to find escapee George Rivas restraining him. 51 RR 51. Garcia held a "shank" to his face and told Moczygemba to "[s]top struggling or we'll end it now." 51 RR 51. Garcia also said, "you can stop struggling because whatever happens to [you] is going to happen to everybody else." 51 RR 52. The escapees removed Moczygemba's clothing, bound and gagged him, and placed him in a small electrical storage room. 51 RR 52–55. Other prison employees were bound and placed in the room with him, the light turned out, and the door shut. 55 RR 56–59. In all, fourteen people were held by the escapees. 51 RR 61.

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

102–03. To Marroquin and others, who also testified that they were each laid down in the storage room, Garcia would put a sharp point to the back of the neck or in an ear and tell them, "that was one pound of pressure now, two to three more pounds, and it would go straight into [his] brain and [he] would be dead." 51 RR 102, 123, 147; 52 RR 17.

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

Several witnesses also testified to Garcia's murder of Michael Luna in San Antonio in 1996.[3] After an evening of drinking and smoking marijuana at a club, Garcia, Luna, and Bobby Lugo went to the apartment of a friend where they continued to drink. 52 RR 137–42. After they left, Garcia and Luna got

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[3] The intermediate appellate court summarized the facts of Garcia's prior murder:

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

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

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

Garcia then drove to Lugo's house where he told Lugo he had been in a fight with Luna. 52 RR 147–49. Lugo observed some swelling on Garcia's cheek, but he did not see any marks, scratches, swollen eyes, or choke marks. 52 RR 151–52; 53 RR 42. At Garcia's trial for Lugo's murder, he testified that he acted in self-defense. DX 10-B at 90–151.[4]

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

2. Garcia's punishment evidence

The defense presented nine witnesses: Garcia's relatives or former in-laws, a Child Protective Servies (CPS) caseworker, a psychiatrist, a psychologist, a Dallas County Sheriff's sergeant, and a former chairman of the TDCJ Classification Committee.

Virginia Nerone, Garcia's mother's cousin, was deposed prior to trial as her illness left her unable to travel. 53 RR 198–257. She testified in detail

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

about Garcia's home life. Nerone testified that Garcia's mother, Sofia, was not a good mother; she abandoned her children for days at a time and was addicted to drugs. 53 RR 228–31. Garcia was his sister Arlene's primary caregiver; she was in a wheelchair and suffered from cancer at a young age. 53 RR 232–33. Garcia experienced the same living conditions in which Sofia grew up: dirty dishes piled in the kitchen sink and on the counters, roaches everywhere, dirty clothes in corners and boxes, mattresses on the floor, and utilities cut off from time to time. 53 RR 235.

Garcia's grandmother, Frances, was verbally abusive and would "whack" Garcia. 53 RR 235. His Aunt Sylvia was even more verbally abusive. 53 RR 235. She cursed at him, screamed that she did not want him in the house, and constantly abused him. 53 RR 235. Sylvia called the police to come get Garcia when he was fourteen years old, and they took him to CPS. 53 RR 236. Nerone testified that she wanted to adopt Garcia—to remove him from the homelife he had—but she was a single mother and could not afford to do it. 53 RR 249–50.

Garcia met and married Debra Garza and later graduated from high school. 53 RR 238. Soon after, Garcia joined the U.S. Coast Guard, and he and Debra had a daughter who they named Arlene after Garcia's sister. 53 RR 238.

Elizabeth Venecia was Garcia's caseworker for one of the years he was in CPS's care. 54 RR 5. Her testimony about Garcia's homelife echoed that of Nerone's and provided detail about Garcia's experience in foster care. 54 RR

8–42. Venecia's report summarized Garcia's homelife as one of chronic poverty, a chaotic home environment, and with questions about possible violence among family members, suicidal tendencies, alcohol and drug problems, and criminal behavior. 54 RR 34. She stated that Garcia suffered emotional abuse and neglect. 54 RR 34–35.

Bridget Garza testified that Garcia and Debra came to see her the day after the Luna murder seeking her advice. 55 RR 6–13. She stated that Garcia told her about the murder but claimed he stabbed Luna in self-defense and that he was distraught about it. 55 RR 11.

Martha Pavalicek, Garcia's former mother-in-law, testified that Garcia was not violent and was a very good person. 55 RR 106. She stated that he was very respectful, loving, and understanding. 55 RR 107.

Garcia's ex-wife Debra testified about their marriage and breakup and what she witnessed of Garcia's prior homelife. 55 RR 136–44. She testified that Garcia was in the Coast Guard for two years but left with an honorable discharge due to his chronic seasickness. 55 RR 146–47. Soon thereafter, Garcia was convicted of the murder of Michael Luna. 55 RR 155–64.

Psychiatrist Judy Stonedale was called to testify as to Garcia's future dangerousness. 55 RR 40–100. She stated that Garcia had no distinct psychiatric abnormalities but suffered from mild depression. 55 RR 63–64. She testified Garcia had a horrible childhood. 55 RR 66–67. Further, she was

surprised that he concluded his education, given "lots of disruptions, constant address changes, [and] periods of absenteeism." 55 RR 67. Everyone she interviewed described Garcia as "particularly nonviolent." 55 RR 68–69.

The final defense witness, clinical psychologist Gilda Kessner, was also called to give a risk assessment of Garcia's potential for future dangerousness. Kessner calculated Garcia's risk for committing a serious act of violence while in administrative segregation to be .001. 56 RR 37–41. Dr. Kessner further stated that, based on Garcia's CPS and prison records prior to December 13, 2000, he had not given any indication that he was any kind of a management problem or that he would behave aggressively toward anyone. 56 RR 36.

II. Procedural History

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

Garcia next filed a federal habeas petition. He then moved for, and was granted, a stay to exhaust various claims. *Garcia v. Quarterman*, Civ. Act. No. 3:06-CV-2185, Order (N.D. Tex. Dec. 4, 2007). Garcia then filed a subsequent state habeas application, which was dismissed as an abuse of the writ. *Ex parte Garcia*, No. 64,582-02 (Tex. Crim. App. March 5, 2008) (unpublished order).

Thereafter, Garcia filed an amended federal habeas petition. Following this Court's opinions in *Martinez v. Ryan*[5] and *Trevino v. Thaler*,[6] the district court held an evidentiary hearing to provide Garcia the opportunity to show cause and prejudice for his defaulted ineffective-assistance-of-trial-counsel (IATC) claims. After the evidentiary hearing, the district court denied habeas corpus relief and denied a COA. *Garcia v. Stephens*, Civ. Act. No. 3:06-CV-2185, Order (N.D. Tex. May 28, 2015). Garcia filed a post-judgment motion under Federal Rules of Civil Procedure 52(b), 59(a), and 59(e). The district court granted the motion in part, amending one portion of its prior findings. *Garcia v. Stephens*, 2015 WL 6561274, at *1–9 (N.D. Tex. Oct. 29, 2015).

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

The state trial court scheduled Garcia's execution for August 30, 2018, later amending the date to December 4, 2018. On November 14, 2018, Garcia filed in state court a third application for a writ of habeas corpus. *Ex parte*

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5 566 U.S. 1 (2012).

6 569 U.S. 413 (2013).

Garcia, No. 64,582-03. The CCA dismissed the application on November 30, 2018. *Id.*

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

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

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

On November 30, 2018, Garcia filed in this Court an original petition for a writ of habeas corpus and a petition for a writ of certiorari. *In re Garcia*, No.

18-6891; *Garcia v. Texas*, No. 18-6890. The instant brief in opposition follows Garcia's original petition for a writ of habeas corpus.

ARGUMENT

Garcia asks the Court to recognize for the first time a claim under the Eighth Amendment that the length of a capital murderer's stay on death row awaiting execution can render his death sentence unconstitutional (i.e., a "*Lackey* claim"). *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari). But Garcia fails to justify the extraordinary remedy he seeks.

Supreme Court Rule 20.4(a) provides that, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted." *See Felker v. Turpin*, 518 U.S. 651, 665 (1996) (explaining that Rule 20.4(a) delineates the standards under which the Court grants such writs). For the reasons explained below, Garcia fails to advance a compelling or exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

I. Garcia Is Not Entitled to the Extraordinary Remedy He Seeks.

First, Garcia is not entitled to the extraordinary remedy of a writ of habeas corpus by way of an original petition because he had a remedy in state

and federal court. That this Court has never recognized a *Lackey* claim does not reflect that Garcia lacked an adequate remedy in the courts below—it simply reflects that Garcia's claim is patently meritless and unworthy of review. Consequently, Garcia fails to show that "adequate relief [could] not be obtained in any other forum or from any other court" and he is not entitled to the extraordinary relief he seeks in this Court. *Felker*, 518 U.S. at 652.

Second, Garcia fails to address how the new constitutional rule he seeks could be applied despite the non-retroactivity doctrine recognized in *Teague v. Lane*, 489 U.S. 288, 309–10 (1989). Unless a new constitutional rule falls within a *Teague* exception, the "new constitutional rules . . . will not be applicable *to cases which have become final before the new rules are announced*." *Teague*, 489 U.S. at 310 (emphasis added). And *Teague* defines a non-final case as one "'pending on direct review or not yet final.'" *Id.* at 305–6 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Garcia's conviction has long been final for purposes of *Teague*, hence, any new constitutional rule recognized by this Court could not be applicable to him unless he meets a *Teague* exception. *See Jones v. Davis*, 806 F.3d 538, 552 (9th Cir. 2015) (finding that petitioner's *Lackey* claim was *Teague*-barred and his argument that he proposed a new substantive rule was an "expansive description of this exception [that] finds no support in the cases. Nor is it supported by logic"); *White v. Johnson*, 79 F.3d 432, 437–38 (5th Cir. 1996). In other words, because

an invocation of original habeas corpus jurisdiction in this Court would have the same impact upon the finality of Garcia's conviction as a federal habeas petition, the Court is bound to consider the issues raised only in light of clearly established constitutional principles dictated by precedent as of the time Garcia's conviction became final. Consequently, Garcia's Petition presents no important questions of law to justify this Court's exercise of its original jurisdiction.

Third, as noted above, the Court has never recognized a constitutional claim challenging a petitioner's death sentence based on the length of time the petitioner served on death row, and Garcia fails to demonstrate a reason the Court should do so in this case. Relying entirely on numerous dissenting opinions on the issue, Garcia contends that his prolonged confinement on death row subjected him to psychological trauma such that carrying out his sentence would no longer serve the dual purposes of the death penalty—retribution and the deterrence of further capital crimes. Despite the lack of any supporting case law, he invites the Court to determine whether there are limits to the amount of time a properly convicted defendant can spend on death row before

his sentence becomes unconstitutional. The Court should decline the invitation for the same reasons it has repeatedly done so in the past.[7]

In *Lackey v. Texas*, the petitioner asked the Court to resolve whether his execution after a seventeen-year confinement on death row constituted cruel and unusual punishment under the Eighth Amendment. 514 U.S. at 1045. Acknowledging the importance and novelty of the issue, Justice Stevens issued an invitation to state and lower courts to study the viability of such a claim before it was addressed by the Court. *Id*. However, since *Lackey*, the lower courts have "resoundingly rejected" such claims as meritless. *Knight v. Florida*, 528 U.S. 990 (1999) (Thomas, J., concurring). In fact, as the Fifth Circuit has explained, Garcia confronts "a wall of cases uniformly rejecting the claim." *Ruiz v. Davis*, 850 F.3d 225, 230 (5th Cir. 2017).

Specifically, in the federal courts of appeal, several circuits have outright rejected the idea that a lengthy stay on death row violates a defendant's Eighth Amendment rights. *See, e.g*., *Reed v. Quarterman*, 504 F.3d 465 (5th Cir. 2007) (twenty-four years on death row); *ShisInday v. Quarterman*, 511 F.3d 514, 526

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[7] *See*, *e.g*., *Sireci v. Florida*, 137 S. Ct. 470 (2016) (forty years of death row confinement); *Correll v. Florida*, --- S. Ct. ---, 2015 WL 6111441 (2015) (twenty-nine years); *Valle v. Florida*, 132 S. Ct. 1 (2011) (thirty-three years); *Johnson v. Bredesen*, 558 U.S. 1067 (2009) (twenty-nine years); *Thompson v. McNeil*, 129 S. Ct. 1299 (2009) (thirty-two years); *Smith v. Arizona*, 552 U.S. 985 (2007) (thirty years); *Knight v. Florida*, 528 U.S. 990 (1999) (nearly twenty years or more); *Elledge v. Florida*, 525 U.S. 944 (1998) (twenty-three years); *Lackey v. Texas*, 514 U.S. 1045 (1995) (seventeen years).

(5th Cir. 2007) (twenty-five-year stay on death row); *Carter v. Johnson*, 131 F.3d 452, 466 (5th Cir. 1997) (fourteen years); *Lackey v. Johnson*, 83 F.3d 116, 117 (5th Cir. 1996) (nineteen years); *Free v. Peters*, 50 F.3d 1362 (7th Cir. 1995) (twenty years); *Johns v. Bowersox*, 203 F.3d 538, 547 (8th Cir. 2000) (fifteen years); *Smith v. Mahoney*, 611 F.3d 978, 998 (9th Cir. 2010) (twenty-five years); *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir. 1995) (twenty years); *Richmond v. Lewis*, 948 F.2d 1473, 1492 (9th Cir. 1990) (sixteen years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (fifteen years).

Similarly, numerous state courts have also rejected the claim. *Smith v. State*, 74 S.W.3d 868, 869, 875–76 (Tex. Crim. App. 2002) (thirteen years); *Bell v. State*, 938 S.W.2d 35, 53 (Tex. Crim. App. 1996) (twenty years); *Ruiz v. State*, 771 N.E.2d 46, 54–55 (Ind. 2002) (twenty years); *People v. Sims*, 736 N.E.2d 1092, 1040–41 (Ill. 2000) (fifteen years); *State v. Ruiz*, 591 N.W.2d 86, 93-95 (Neb. 1999) (twenty years); *Hitchcock v. State*, 578 So.2d 685, 693 (Fla. 1990) (twelve years), rev'd on other grounds, 505 U.S. 1215 (1992); *People v. Fry,* 959 P.2d 183, 262 (Cal. 1998) (seven years); *Ex parte Bush*, 695 So.2d 138, 140 (Ala. 1997) (sixteen years); *State v. Schackart*, 947 P.2d 315, 336 (Ari. 1997).

Despite the fact that over two decades have passed since Justice Stevens's invitation to evaluate the claim, Garcia has not identified a single court, state or federal, that has accepted the merits of his Eighth Amendment claim. Some courts have gone even further than simply dismissing the claim

and have rejected it in the strongest of terms. *See*, *e.g.*, *Felder v. Johnson*, 180 F.3d 206, 215 (5th Cir. 1999) (finding that defendant's claim that his twenty-year stay on death row constituted cruel and unusual punishment bordered on the "legally frivolous"); *Turner v. Jabe*, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) (describing a similar claim as a "mockery of our system of justice, and an affront to law[ ]abiding citizens"). And courts have done so for good reason—most of the delays are a result of the inmate having availed himself of the right to direct appeal and to seek collateral relief.

As the Fifth Circuit explained in *White v. Johnson*:

> [T]here are compelling justifications for the delay between conviction and the execution of a death sentence. The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years. White has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights. Throughout this process White has had the choice of seeking further review of his conviction and sentence or avoiding further delay of his execution by not petitioning for further review or by moving for expedited consideration of his habeas petition.

79 F.3d 432, 439–40 (5th Cir. 1996); *see also Coleman v. Balkcom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari) ("However critical one may be of . . . protracted post-trial procedures, it seems inevitable

that there must be a significant period of incarceration on death row during the interval between sentencing and execution.").

Garcia makes a brief reference to this Court's action in *In re Davis*, 557 U.S. 952 (2009), arguing that the Court should remand his case for an evidentiary hearing as it did in *In re Davis*. In *Davis*, the petitioner filed an original petition for writ of habeas corpus. He presented seven recantations by the State's key witnesses, several of whom implicated a State's witness as the actual murderer, in support of his claim of actual innocence.[8] *Id.* at 953 (Stevens, J., concurring). Critical to the Court's decision there, several justices cast doubt on whether the petitioner's actual innocence claim would be barred under AEDPA. *Id.* Further, the Court was seemingly animated by the potential that the petitioner was actually innocent. *Id.* But Garcia does not allege he is actually innocent of Officer Aubrey Hawkins's murder, nor could he. Further, Garcia failed to brief his conclusory assertion that his fifteen-year stay on death row renders him actually innocent of the death penalty. In short, Garcia raises none of the concerns that were present in *In re Davis*, and he fails to justify the extraordinary remedy he requests.

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[8] Even then, the petitioner failed to substantiate his claim of actual innocence after the petition was transferred to the district court. *See Davis v. Terry*, 625 F.3d 716, 718 (11th Cir. 2010).

Garcia is also not entitled to the extraordinary relief he seeks because his original petition is, in effect, an effort to circumvent AEDPA's restriction on successive habeas petitions. But knowing he is statutorily precluded from appealing the Fifth Circuit's denials of authorization,[9] he has sought relief through an original petition. Garcia's attempt to circumvent AEDPA should not be condoned. Indeed, the Court in *Felker* held that while 28 U.S.C. § 2244(b)(3)(E) did not repeal the Court's authority to entertain original habeas petitions, § 2244(b)(1) "inform[s] [the Court's] consideration of original habeas petitions. *Felker*, 518 U.S. at 662–63. Consequently, the fact that Garcia's claim raised in the original petition is subject to dismissal as successive "inform[s]" the Court's consideration of Garcia's original petition. *Id.*

Rule 20.4(a) and 28 U.S.C. § 2242 state that an original habeas petition in the Supreme Court must set forth "reasons for not making application to the district court." In this case, the reasons are clear: Garcia's original habeas petition is actually a successive habeas petition.

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[9] *See Allen v. Ornoski*, 435 F.3d 946, 957 (9th Cir. 2006) (finding that a petition was successive because petitioner "could have brought his *Lackey* claim in his first habeas petition in 1988, when he had already been on death row for six years, in his first amended habeas petition, when he had been on death row for nine years, or at some other point during the course of the proceedings on his first habeas petition in federal court from 1993 to 2005."); 28 U.S.C. § 2244(b)(3)(E). Garcia's district court proceedings did not conclude until 2015, at which point Garcia had been on death row for twelve years. He posits no reason he could not have raised his *Lackey* claim during those proceedings.

Moreover, Garcia's request that the Court should transfer his petition to the district court is erroneous. While the Court ordinarily has the statutory authority to transfer a petition for a writ of habeas corpus to a district court, 28 U.S.C. § 2241(b), as noted above, Garcia's claim could now only be presented to the circuit court because it is plainly successive. 28 U.S.C. § 2244(b)(3)(A). The relief Garcia requests is, consequently, statutorily impermissible. And even if Garcia were permitted to seek permission of the Fifth Circuit to raise his claim in the district court, permission would be denied. *See Allen*, 435 F.3d at 957; 28 U.S.C. § 2241(b)(1).

II. Garcia Fails Entirely to Demonstrate He Would Be Entitled to Relief Under the New Constitutional Rule He Seeks.

Garcia attempts to differentiate his assertion from the continuously expanding body of case law rejecting such claims; however, his arguments fail to convert his allegation into something distinguishable from these unsuccessful claims. Specifically, Garcia alleges that his case, in particular, deserves this court's attention because his fear and anxiety while on death row has been heightened by his history of trauma. Pet. Cert. at 11–13. However, there is no law indicating that these factors are relevant to a *Lackey* analysis. In fact, courts have consistently rejected *Lackey* claims in similar circumstances, even in cases where there was significant reversible error during the inmate's proceedings. *See*, *e.g.*, *Lackey v. Johnson*, 83 F.3d 116, 117

(5th Cir. 1996) (denying petitioner's Eighth Amendment claim after he had spent over seventeen years on death row, his execution date had been reset multiple times, and he required a retrial on punishment due to trial court error); *Chambers v. Bowersox*, 157 F.3d 560, 569 (8th Cir. 1998) (denying a *Lackey* claim when a conviction had been twice overturned, once due to trial court error and once by a federal court due to ineffective assistance of trial counsel).

Moreover, Garcia also contends that the conditions of his confinement on death row, including periods of solitary confinement, have inordinately affected him. Notably, the Fifth Circuit has rejected such an argument, explaining that the specific conditions of a petitioner's confinement on death row did not affect the court's analysis of his *Lackey* claim. The court reasoned, "[the petitioner's] accent on his conditions of confinement is common to the *Lackey* claim; every court that has rejected it has done so against the backdrop of the conditions of confinement of death row prisoners." *Ruiz v. Davis*, 850 F.3d 225, 230 (5th Cir. 2017). Indeed, Garcia fails to show exposure to specific prison conditions that differ from the experiences of other inmates on death row—including those whose *Lackey* claims have been rejected. But no court has considered individualized psychological or anecdotal evidence relating to the inmate's experience in prison relevant to an analysis of a *Lackey* claim.

In this regard, the Fifth Circuit has explained that "[t]o the extent that [the petitioner's] conditions of confinement violate his right to due process or his substantive rights under the Eighth Amendment, Congress has created a specific throughway to the federal courts to redress such wrongs: a timely [42 U.S.C.] § 1983 suit." *Id.* 239. Indeed, Garcia's assertions challenge general death row prison conditions—complaints typically reserved for § 1983 actions—and do not address the concerns about delay articulated by Justice Stevens. *See Lackey v. Texas*, 514 U.S. at 1045. Instead of raising these complaints in that context where he could have had an opportunity to develop them, Garcia waited just days before his execution to assert these complaints here and in state court.

In sum, the history of this case confirms that both state and federal courts have taken care to review Garcia's case, even giving him the opportunity to develop procedurally defaulted IATC claims (an opportunity Garcia now seemingly resents). Garcia's last-minute attempt to challenge his death sentence, if successful, could serve to discourage courts from subjecting inmates' cases in the future to the same rigorous review he sought and received. And, ironically, the relief he seeks would "further prolong collateral review by giving virtually every capital prisoner yet another ground on which to challenge and delay his execution." *Knight*, 528 U.S. at 990 (Thomas, J., concurring).

Ultimately, Garcia has availed himself of the multiple mechanisms for obtaining review of the constitutionality of his sentence; he and the state and federal courts have ensured that his claims have been subjected to the utmost scrutiny and investigation. However, more than a decade's worth of judicial review has ended without a finding of constitutional error. He now seeks a permanent bar to his execution on the basis that this comprehensive review necessarily resulted in his prolonged confinement on death row. But when faced with the question he presents, federal and state courts have consistently rejected this same argument, and this Court should decline to grant Garcia's attempt to further delay his execution simply to develop evidence to support a non-existent constitutional challenge to his death sentence. Because Garcia provides no support for his claim, his allegation requires no further review from this Court.

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

A request for a stay "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Rather, the inmate must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id.* (citing *Barefoot v. Estelle*, 463 U.S. 880,

895–96 (1983)). When the requested relief is a stay of execution, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceed; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

Importantly, a federal court must consider "the State's strong interest in proceeding with its judgment" and "attempt[s] at manipulation," as well as "the extent to which the inmate has delayed unnecessarily in bringing the claim." *Nelson*, 541 U.S. at 649–50. Indeed, "there is a strong presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* at 650.

As demonstrated above, Garcia presents no occasion for this Court to recognize for the first time an Eighth Amendment challenge to a death sentence based on the length of time served on death row. Thus, Garcia cannot demonstrate the likelihood of success on the merits of his claim; nor can he demonstrate that his ground for relief amounts to a substantial case on the merits that would justify the granting of relief.[10]

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[10] For the same reason, Garcia fails to show that he would suffer irreparable harm if denied a stay of execution. As the Fifth Circuit has explained, "the merits of

Further, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill v. McDonough*, 547 U.S. 573, 584 (2006). Garcia's challenges to his death sentence have persisted since 2003, and he seeks further unjustifiable delay through his litigation here. Moreover, as this Court recognized in *Hill*, "[r]epetitive" litigation raises the same concerns as where a petitioner files a speculative or dilatory suit. Each concern is present here. As discussed above, Garcia has repeatedly challenged the validity of his conviction and death sentence, and he has been properly rejected in each instance. His current claim is based on a non-existent constitutional right that has never been recognized. Garcia filed his original petition only days before his scheduled execution. Consequently, equity does not favor a stay of execution.

CONCLUSION

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

Respectfully submitted,

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[the movant's] case are essential to [the court's] determination of whether he will suffer irreparable harm if a stay does not issue." *Walker v. Epps*, 287 F. App'x 371, 375 (5th Cir. 2008). As discussed above, Garcia's Eighth Amendment claim is plainly without merit. Consequently, he cannot show that he would be irreparably harmed if denied additional process to which he has no entitlement.

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