No. 18-6890, 18A570

IN THE

SUPREME COURT OF THE UNITED STATES

In re Joseph C. Garcia, Petitioner

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

CAPITAL CASE

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

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REPLY TO BRIEF IN OPPOSITION

A. Relief is unavailable in the state and lower federal courts.

Respondent would reframe the first Question Presented to ask whether the Court should exercise its original habeas corpus jurisdiction "to recognize for the first time a claim challenging the constitutionality of a death sentence 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." (Respondent's Brief in Opposition (hereinafter "BIO") at i.)

Contrary to the Question reframed by Respondent, and in the subsequent argument (BIO at 13), it is precisely because the Court has not held that an Eighth Amendment claim lies for those held for extended periods on death row prior to execution that no adequate remedy lies in the state courts of Texas or in federal habeas corpus. The same, however, was true for claims of actual innocence when the Court granted a Georgia death-row prisoner's petition pursuant to the Court's original jurisdiction in *In re Davis*, 130 S. Ct.1 (2009), and transferred the matter to the district court for hearing and determination. The Court had not yet held that actual innocence of a capital murder rendered a capital defendant ineligible for a sentence of death when it ordered *Davis* transferred. *See House v. Bell*, 547 U.S. 518, 554 (2006); *Herrera v. Collins*, 506 U.S. 390, 411-12, 417 (1993).

The absence of a holding that the Eighth Amendment bars the execution of those who have been required to anticipate their executions over an extended period on death row necessarily means that the claim sought to be prosecuted by Mr. Garcia here could not have been brought pursuant to 28 U.S.C. § 2254. As the Court has

made clear, only federal rights expressed in a holding of the Court, as opposed to dicta, qualify as "clearly established Federal law" for purposes of conferring jurisdiction on the federal courts to grant the writ. *See Williams (Terry) v. Taylor*, 529 U.S. 362, 412 (2000). In the absence of a holding from this Court that the extended stay on death row prior to execution violates the Eighth Amendment, the Texas Court of Criminal Appeals has declined to find the existence of such a right. *See Ex Parte Ruiz*, 543 S.W.3d 805, 827 (Tex. Crim. App. 2016) (citing *Smith v. State*, 74 S.W.3d 868, 874 Tex. Crim. App. 2002) ("We therefore look to the Supreme Court to determine whether the length of the delay *per se* has violated his Eighth Amendment rights.")).

Thus, Respondent's assertion that Mr. Garcia merely seeks to avoid the limitations of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2241 *et seq*., by pursuing relief through the Court's original habeas corpus jurisdiction is unfounded. (BIO at 2.) Relief is foreclosed in the lower federal courts under § 2254(d)(1) and, because the Texas Court of Criminal Appeals appears to be in lockstep with this Court's *Lackey* jurisprudence, circumstances exist that render state court process ineffective to protect the Eighth Amendment right Mr. Garcia seeks to vindicate here. *See* § 2254(b)(1)(B)(ii).

B. The claim is not barred by the *Teague* doctrine.

Respondent posits that Mr. Garcia cannot demonstrate "that 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). (BIO at 14.) Reliance on *Teague* is misplaced because *Teague* barred application of a new rule of criminal

procedure to a petitioner whose conviction was final, that is, he was no longer on direct appeal, at the time the new rule was announced. Mr. Garcia, on the other hand, alleges a violation of his *substantive* constitutional rights were he to be executed after his nearly 16 years on Texas's death row. Although Respondent cites *Jones v. Davis*, 806 F.3d 538, 552 (9th Cir. 2015), for the proposition that the Ninth Circuit has barred a *Lackey* claim based on *Teague*, it is only a panel majority that would find the claim *Teague*-barred, as a concurring judge pointed out that the *Lackey* claim presented a *substantive* Eighth Amendment claim that is not foreclosed by *Teague*, but that judge would have affirmed due to the petitioner's non-exhaustion of the claim in state court. *Id.* at 553 (*citing Schriro v. Summerlin*, 542 U.S. 348, 352 n. 4 (2004) (Watford, J., concurring)).

The claims for which Mr. Garcia requests hearing and determination in the district court sound in substance rather than procedure. In the first Question Presented, Mr. Garcia would have the Court remove death eligibility due to his having experienced heightened anxiety while contemplating his death for an extended period of nearly 16 years on Texas's death row. A capital defendant's subjective state of mind is relevant to his death-eligibility, including, for example, where his death eligibility in a felony murder case requires that the prosecution 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)). Mr. Garcia has

demonstrated in his Petition (Pet. at 11) facts in his social history and Texas prison experience that support his claim that he has suffered from heightened anxiety as he has long awaited execution. Mr. Garcia seeks to have the Court circumscribe the class of offenders eligible for the death penalty based on similar subjective mental state characteristics such as those possessed by Mr. Garcia. The stress and anxiety suffered by Mr. Garcia while on death row has been heightened by the fact that Mr. Garcia has been threatened with extreme violence dating to his childhood, as well as while he was incarcerated in the Connally Unit of the Texas state prison system.

In his second Question Presented, Mr. Garcia seeks to have the Court circumscribe the class of offenders eligible for a sentence of death, as this Court has done with respect to those with intellectual disabilities in *Atkins v. Virginia*, 536 U.S. 304 (2002), and those under the age of 18 in *Roper v. Simmons*, 543 U.S. 551 (2005), based on objective factors. Those offenders who have served an extended stay on Texas's death row, who along with Mr. Garcia have experienced generalized conditions of privation and isolation that include an absence of human contact over a prolonged period. (*See* Pet. at 13.) As Justice Breyer has noted, "[t]he 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). Mr. Garcia and those of his circumscribed class are actually innocent of the death penalty, as that term was defined in *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992), because a favorable judgment of this Court in habeas would render them ineligible for a sentence of death.

C. Extraordinary circumstances require the grant of the writ.

That the Court has never recognized a so-called *Lackey* claim, does not mean that the Court should fail to do so here. (BIO at 14-15.) It must be recalled that this Court initially and for many years rejected a categorical bars on the imposition of the death penalty for those suffering from mental retardation. *See Penry v. Lynaugh*, 492 U.S. 302, 328-30 (1989), *abrogated by Atkins*, 536 U.S. at 320. The Court also refused for a period of years to proscribe the death penalty for those who were under the age of 18 at the time of the murder. *See Stanford v. Kentucky*, 492 U.S. 361, 370-71 (1989), *abrogated by Simmons*, 543 U.S. at 568. With respect to both classes of offender, the Court ultimately acknowledged, as Chief Justice Warren explained in his opinion in *Trop v. Dulles,* 356 U.S. 86, 100-01 (1958), that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *See Atkins*, 536 U.S. at 311; *Simmons*, 543 U.S. at 561.

The questions Mr. Garcia presents here ask whether his extended stay on Texas's 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, whether Mr. Garcia is actually innocent of the death penalty because his excessively-long incarceration, with extreme deprivation and isolation on Texas's death row, makes

him part of a class of offenders whose executions should be circumscribed by the Eighth and Fourteenth Amendments.

In addition, individual justices have acknowledged that the death penalty has been found to be constitutional because it advanced the penological goals of retribution and deterrence. *See Lackey v. Texas*, 506 U.S. 1045 (1990) (mem. of Stevens, J., respecting the denial of certiorari); *Glossip v. Gross*, 135 S. Ct. 2726, 2769 (2015) (Breyer, J., dissenting). 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 punishment." *Atkins*, 536 U.S. at 319 (internal quotation marks and citation omitted). As Justice Breyer has noted, the "longer the delay, the weaker the justification for imposing the death penalty in terms of punishment's basic retributive or deterrent purposes." *Knight v. Florida*, 120 S. Ct. 459, 462 (1999) (mem.) (Breyer, J., dissenting from denial of cert.); *Lackey*, 115 S. Ct. 1421 (Stevens, J., mem. respecting denial of cert.) ("It is arguable that neither [retribution nor deterrence] retains any force for prisoners who have spent some 17 years under a sentence of death.").

An execution that occurs after the convicted individual has spent nearly 16 years on death row, as Mr. Garcia has, furthers no retributive or deterrent ends and are, for the reasons set forth above, of dubious Eighth Amendment validity. Moreover, the questions presented are susceptible to the Court's resolution and not so amorphous that the Court would be unable to fashion an appropriate Eighth Amendment remedy.

Respondent counsels the Court not to grant the writ in this matter because, as the Fifth Circuit has explained in another habeas case that implicates the Eighth Amendment due to an extended stay on Texas's death row, Garcia confronts "a wall of cases uniformly rejecting the claim." (BIO at 16 (citing *Ruiz v. Davis*, 850 F.3d 225, 230 (5th Cir. 2017)).) Yet, the full measure of the Fifth Circuit's reasoning and quote in *Ruiz* nearly invites this Court to intervene in such a case where the lower federal courts cannot:

> One might suggest that the very developmental movement of this body of law, with the accent upon the Eighth Amendment's sometimes-look to evolving standards, compels here the answer to the questions posed by an application for a COA—whether the petitioner has made a substantial showing of the denial of a constitutional right, even when faced, not by want of law, but a wall of cases uniformly rejecting the claim—a wall which only the High Court can breach in a case that reaches it while abiding the rules essential to the entire process.

Ruiz, 850 F.3d at 230. The Court may breach the procedural barriers to consideration of the Eighth Amendment claim here in its exercise of its original habeas corpus jurisdiction just as it transferred a habeas matter to the district court in *In re Davis*, 130 S. Ct. 1, for hearing and determination.

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). He further requests that the Court stay his execution that is set for December 4, 2018.

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Respectfully submitted this 4th day of December, 2018.

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