

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH C. GARCIA,
Petitioner,

vs.

BRYAN COLLIER, et al.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

****CAPITAL CASE****
Execution Scheduled for TUESDAY, DECEMBER 4, 2018

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*****CAPITAL CASE*****

*****EXECUTION SCHEDULED FOR AFTER 6 P.M. DECEMBER 4, 2018*****

QUESTIONS PRESENTED FOR REVIEW

News broke on November 28, 2018, that Texas has been obtaining its execution drug, pentobarbital, from a compounding pharmacy with a litany of safety violations. Several hours later, counsel for Petitioner Joseph Garcia sent a letter to state officials requesting, *inter alia*, the following important safety information about the pentobarbital to be used in Garcia's execution: the source, the date and means of preparation, chain-of-custody, and the method of storage.

Having received no response to his request, Garcia then moved to enjoin the State from executing him with the pentobarbital from the compounding pharmacy. He made the request based on information that had only just been publicly reported: that the pharmacy had a significant record of safety violations and it had provided compounded drugs to the Texas Department of Criminal Justice while its license was under probation for safety violations. Garcia alleged a "substantial risk of serious harm" in violation of the Eighth Amendment from the use of pentobarbital compounded by this pharmacy and proffered that the State could execute him using the same procedure, but with pentobarbital compounded by one of the nearly 200 sterile compounding pharmacies licensed in Texas that were not on probation at the time the drug would be compounded. Garcia also alleged that his right to access the courts or redress government grievances was violated by the State's failure to provide the critical information he requested.

On December 2, 2018, the State provided some information about the pentobarbital to be used in Garcia’s execution, such as the amount in stock and the purchase price, but did not provide any of the requested information that would address the safety and effectiveness of the drug. Nonetheless, Garcia’s Eighth Amendment claim was denied on the basis that he failed to provide enough proof of a risk of harm and that he did not name a specific alternate pharmacy to compound the pentobarbital for his execution. In turn, his access-to-courts claim was denied because he did not show he could prevail on his Eighth Amendment claim. The Fifth Circuit’s affirmance of the denial of the motion raises these important federal questions:

1. Whether the denial of the motion for preliminary injunction was improper where the State of Texas impeded a condemned prisoner from succeeding on an Eighth Amendment challenge to the State’s use of an execution drug from a specific source, known to have safety violations, by refusing to provide the prisoner with readily available information the prisoner needed to prove his claim.
2. Where the petitioner does not challenge the method of execution or any part of the execution procedure used by the State, but rather seeks to prevent the use of an execution drug from one, specific supplier known to have a litany of safety violations, must the petitioner plead “a known and available alternative method of execution,” pursuant to *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015)?

LIST OF PARTIES

The parties to the proceeding are listed below. The petitioner is not a corporation.

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Respondent

John or Jane Does, 1-50
(unknown executioners)
Respondent

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Joseph Garcia respectfully prays that a writ of certiorari issue to review the judgment and opinion below.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reproduced in Appendix A. The Memorandum & Order of the United States District Court for the Southern District of Texas is reproduced in Appendix B.

JURISDICTION

On November 30, 2018, Garcia filed a Complaint alleging violations of 42 U.S.C. § 1983 in the United States District Court for the Southern District of Texas. (Appendix D.) Simultaneously, Garcia filed a motion for preliminary injunction under Rule 65(a) of the Federal Rules of Civil Procedure. (Appendix C.) The district court denied the motion for preliminary injunction on December 1, 2018. (Appendix B.) Garcia appealed the denial of the motion to the United States Court of Appeals for the Fifth Circuit. On December 2, 2018, the Fifth Circuit issued an opinion affirming the lower court decision. (Appendix A.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND OTHER AUTHORITIES INVOLVED

This case involves a state criminal defendant's constitutional rights under the First, Eighth, and Fourteenth Amendments to the United States Constitution, as well as 42 U.S.C. § 1983.

The First Amendment to the United States Constitution provides in relevant part:

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Eighth Amendment to the United States Constitution provides:

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

The Fourteenth Amendment to the United States Constitution, section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Finally, 42 U.S.C. § 1983, of the United States Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

STATEMENT OF THE CASE

Garcia is presently incarcerated and under a sentence of death at the Allan B. Polunsky Unit of the Texas Department of Criminal Justice (“TDCJ”) in Livingston, Texas. Garcia was convicted and sentenced to death in February 2003. *Garcia v.*

State, No. AP-74,692, 2005 WL 395433 (Tex. Crim. App. Feb. 16, 2005) (not designated for publication). He is scheduled to be executed by TDCJ on December 4, 2018 after 6:00 p.m. CST by lethal injection of “100 milliliters of solution containing 5 grams of Pentobarbital.” (App. C-43.)

This case arose after a news report was published on November 28, 2018 at 4:09 CST. (See App. C-50 to C-59 (Chris McDaniel, *Inmates said the drug burned as they died. This is how Texas gets its execution drugs.* BuzzFeedNews (Nov. 28, 2018 at 5:09 p.m. ET)¹ [hereinafter McDaniel article].) That is when the public, including Garcia, learned for the first time that TDCJ had been obtaining pentobarbital for use in executions from a pharmacy with a litany of safety violations.

Garcia became aware of the McDaniel article at approximately 4:30 p.m. CST on November 28, 2018. Within hours of the publication of that report, Garcia’s counsel contacted TDCJ requesting information about the source of the pentobarbital it intends to use in Garcia’s execution. (App. C-60 to C-65.) Garcia’s counsel requested, *inter alia*, the following critical information: “the name of the supplier[(s)],” “chain-of-custody information,” “information about the storage . . . from the time of dispensing to the current time,” and “the date and means of preparation.” (App. C-63, C-64.)

¹ Available at https://www.buzzfeednews.com/article/chrismcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas?utm_term=.pkxy4410jP#.pkxy4410jP.

On November 30, 2018, TDCJ had not responded, and given the impending execution date, Garcia filed a Complaint Pursuant to 42 U.S.C. § 1983 (App. D) and a Motion for Preliminary Injunction (App. C) in the United States District Court for the Southern District of Texas.

His Complaint raised four claims. (App. D-9 to D-15.) First, Respondents' (hereinafter "TDCJ Officials") use of compounded pentobarbital from a pharmacy that has a history of compounding unsafe drugs demonstrates deliberate indifference and creates a substantial risk of serious harm, violating Garcia's Eighth Amendment right to be free from cruel and unusual punishment. (App. D-9 to D-11.) Second, by deliberately concealing necessary information from Garcia, TDCJ Officials violated his First Amendment right to be informed about the manner in which the State implements the most serious penalty available in the criminal-justice system. (App. D-11 to D-12.) Third, TDCJ Officials' deliberate actions in hiding information regarding the source of the pentobarbital that they intend to use to execute Garcia denies him of his federal rights to due process and meaningful access to the courts. (App. D-12 to D-13.) Fourth, TDCJ Officials' disparate treatment of similarly situated condemned prisoners violates Garcia's right to equal protection under the law pursuant to the Fourteenth Amendment. (App. D-13 to D-15.) Garcia moved to enjoin his execution based on all four of these claims. (App. C1 to C3.)

On December 1, 2018, the district court issued an Order denying Garcia's Motion for Preliminary Injunction. (App. B.) The district court did not hold an

evidentiary hearing or argument and did not wait for TDCJ Officials to respond before the court denied the motion.

The district court held that Garcia was not entitled to a preliminary injunction or a stay of execution because he had not shown a likelihood of success on the merits. (App. B-8.) On December 2, 2018, Garcia appealed the denial of the motion to the United States Court of Appeals for the Fifth Circuit. That same day, the Fifth Circuit issued an opinion affirming the lower court decision. (App. A.) The court denied the appeal before any response was filed by the TDCJ Officials.

After the Fifth Circuit issued its opinion, TDCJ responded to Garcia's request from November 28, 2018. (App. E.) That response included six heavily redacted pages of documents related to the pentobarbital to be used (App. E-2 to E-7)², but failed to provide information that was requested by Garcia's counsel, including the source, the chain-of-custody, the storage information, and the date and means of preparation.

I. Greenpark Compounding Pharmacy, a source of Texas's execution drugs, has a litany of state and federal safety violations.

The McDaniel article revealed that Texas obtains execution-related pentobarbital from a pharmacy located in Texas called Greenpark Compounding Pharmacy ("Greenpark"). (See App. C-52.) The United States Food and Drug Administration ("FDA") and the Texas State Board of Pharmacy ("TBP") have cited this pharmacy for multiple safety violations. (See App. C-52 to C-56.)

² The remainder of the response was simply a copy of the execution procedure (App. E-8 to E-17).

The news report tied Greenpark to a declaration submitted to the United States District Court for the Southern District of Texas under the pseudonym Pharmacy X. (See App. C-46 to C-49, C-54.) In the declaration, Greenpark averred that it “has supplied lethal injection chemicals to the Texas Department of Criminal Justice for use in executions of death row inmates.” (App. C-48.) Greenpark stated that its decision to supply lethal-injection chemicals “was and is” contingent on its identity remaining a secret, and that it would end its business with TDCJ if its identity were revealed. (App. C-48.)

In recent years, Greenpark has been cited for safety violations related to its compounding practices, and its license was on probationary status from November 2016 until December 1, 2018, because the TBP discovered Greenpark compounded the wrong drug for three children. (See App. C-66 to C-71.)

TBP found that Greenpark either failed to verify or incorrectly verified the identity of an ingredient used in compounding a batch preparation, which resulted in the children receiving compounded lorazepam instead of lansoprazole. (See App. C-67.) Lansoprazole, which the children were supposed to receive, is used to treat high levels of stomach acid,³ but lorazepam, which they incorrectly received, is a benzodiazepine used to treat seizures and anxiety.⁴ After taking the compounded

³ See U.S. Nat'l Library of Medicine, DailyMed: Lansoprazole, <https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=9cf54748-80da-428d-86f1-2a17f1160bc2>.

⁴ See U.S. Nat'l Library of Medicine, DailyMed: Lorazepam, <https://dailymed.nlm.nih.gov/dailymed/drugInfo.cfm?setid=ae274b1f-27c3-483b-99f1-9a9249dc2459>.

drug with lorazepam, one of the children was hospitalized after experiencing adverse effects, including drowsiness, lack of coordination, and irritability. (*See App. C-68.*) TBP also found that an employee of Greenpark forged a quality-control document for the compounded batch preparation mentioned above. (*See App. C-68.*) As a result, TBP placed Greenpark's license on probation for a period of two years, beginning thirty days after the entry of its order on November 1, 2016. (*See App. C-69.*)

TBP also issued several Warning Notices to Greenpark for violations of rules governing practices for producing sterile drug products.

On March 27, 2017, Greenpark received three Warning Notices for, *inter alia*, the failure to: "conduct and document filter integrity tests on all filters used to sterilize high risk or batch preparations"; certify its hood since June 2015, compromising pre-sterilization procedures for high risk sterile compounding; conduct and document results of viable sampling to be performed at least every six months as part of the recertification of facilities and equipment; and complete and maintain documentation of initial technology training for all pharmacy technologists and technology trainees. (*See App. C-27 to C-75.*)

As part of its inspection of Greenpark's Houston facilities in March 2017, TBP also noted additional failures on its Inspection Report Checklist, and advised Greenpark to ensure that the temperature of its cleanroom was consistently 68 degrees Fahrenheit or cooler, and to ensure that antiseptic hand cleansing is performed using waterless alcohol-based surgical scrub once inside the buffer area prior to putting on sterile gloves. (*See App. C-79 to C-80.*)

Additionally, Greenpark was issued two Warning Notices by TBP on June 23, 2015, for several safety issues including the “failure to remove and quarantine out of date drugs from dispensing stock until drugs can be destroyed properly,” and the failure to have all supervising personnel involved in compounding sterile preparations do gloved fingertip and media-fill challenge tests. (See App. C-84 to C-85.)

Greenpark was also issued two Warning Notices by TBP on May 1, 2014. Amongst the warnings were one for the failure to “to weigh/mix chemicals in at least ISO 8 air quality” for which Greenpark was ordered to “[c]ease this practice now and comply,” as well as one for the failure to indicate beyond use date (“BUD”) on prescription labels. (See App. C-87.) Additionally, Greenpark was in violation for failing to calibrate and verify the accuracy of its automated compounding device, and Greenpark was ordered to have the device removed, replaced or repaired immediately. (See App. C-88.)

In its Notice of Inspection from May 1, 2014, TBP noted additional failures on its Inspection Report Checklist, including the fact that the balance could not be calibrated to verify accuracy during inspection, and that the law book, general reference, and handbook on injectable drugs were all outdated. (See App. C-93.) TBP also advised Greenpark to “[r]emove all expired/improperly labeled drugs, compounds, chemicals from the dispensing stock,” and to “make all quantities clear on controlled substance inventory.” (See App. C-93.)

More recently, on October 26, 2018, Greenpark was also the subject of a Warning Letter from the FDA. (See App. C-94 to C-100.) From October 16, 2017, to October 27, 2017, an FDA investigator inspected Greenpark's facilities in Houston and noted serious deficiencies in their practices for producing sterile drug products, putting patients at risk. (See App. C-96.)

The FDA investigator noted that drug products intended or expected to be sterile were prepared, packed, or held under insanitary conditions, whereby they may have become contaminated with filth or rendered injurious to health, causing Greenpark's drug products to be adulterated according to statute. (App. C-96.)

Specifically, the FDA investigator noted problems with sterility practices, because “[p]ersonnel [who] were engaged in aseptic processing” had “partially exposed skin and [were] wearing non-sterile garb,” “[p]ersonnel were observed re-sanitizing gloved hands with non-sterile [redacted] before resuming aseptic processing,” and “wipes used for disinfecting” sterile preparation areas were “not sterile.” (App. C-96.)

After allowing Greenpark to respond to the issues discovered in the 2017 inspection, the FDA issued its warning letter in 2018, informing Greenpark that its responses were insufficient and, in addition to putting its patients at risk, the pharmacy had violated the Federal Food Drug and Cosmetic Act by selling adulterated drugs. (App. C-97.) The letter, issued a little over a month ago, emphasized, “FDA strongly recommends that your management undertake a comprehensive assessment of operations, including facility design, procedures,

personnel, processes, maintenance, materials, and systems. In particular, this review should assess your aseptic processing operations.” (App. C-98.)

II. Improperly compounded pentobarbital creates a variety of significant health risks.

The integrity, potency, and sterility of compounded pentobarbital are affected by: the quality of the “Active Pharmaceutical Ingredient” (API) used to make the drug; the qualifications and licensure of the persons compounding, and the conditions of the laboratory or pharmacy in which the drug is compounded; the time between compounding and use; the assigned BUD and the qualifications of the person assigning same; and the conditions under which the drug is stored after compounding.

Given the nature of compounded pentobarbital, its source—and the safety standards of that source—is essential information. Compounded pentobarbital is classified as a high-risk sterile injectable. *See United States Pharmacopeia (“USP”)* General Chapter <797>, Pharmaceutical Compounding – Sterile Preparations. Compounded preparations are assigned a BUD intended to prevent degradation of a compound that the USP has calculated is likely to occur after a set timeframe. Absent extended sterility testing, USP <797> sets the BUD for high-risk compounded sterile preparations at a short timeframe.

Substandard compounded pentobarbital has a risk of forming visible, solid precipitate. Visible chemical precipitates, when injected into the vasculature, can travel rapidly through the heart and into the pulmonary capillary vasculature. Given the size of the particles, they could occlude these capillaries and lead to rupture and

hemorrhage of blood into the lungs. This is clinically referred to as pulmonary embolus and pulmonary hemorrhage. A person experiencing this condition is substantially likely to feel exceptional physical pain. (App. C-107 (citing Gupta, VD, *Stability of pentobarbital sodium after reconstitution in 0.09% sodium chloride injection and repackaging in glass and polypropylene syringes*, Int. J. Pharm. Comp. 2001, 5(6): 482-4).)

Additionally, impurities or particulates in the injectable solution would lead to extreme venous irritation. Chemical imbalances in compounded pentobarbital leading to pH levels outside human blood parameters would also cause extreme pain upon injection. Moreover, the administration of sub-potent drugs, such as those used after their BUDs, would prolong the procedure and lead to suffering at the time of an execution. (App. C-107.)

III. TDCJ deliberately conceals any information about the provenance of its execution drugs.

TDCJ plans to use compounded pentobarbital but refuses to disclose information regarding the provenance of the pentobarbital it uses in executions. TDCJ has gone to great lengths to keep information about the source of its execution drugs a secret. *See, e.g., Jolie McCullough, After loss at state Supreme Court, Texas keeps fighting to conceal its execution drug supplier*, Texas Trib., (Jul. 23, 2018).⁵ The

⁵ Available at <https://www.texastribune.org/2018/07/23/texas-supreme-court-execution-drug-rehearing/>.

source of Texas's pentobarbital has only come to light recently, due to the publication of the McDaniel article. (See App. C-50 to C-59.)

Given that compounding pharmacies are not subject to the same stringent standards as large pharmaceutical manufacturers, the shorter shelf life and higher failure rate of compounded drugs, and the documented pain experienced by multiple people recently executed in Texas (App. C-52), attorneys representing prisoners on death row in Texas have sought to determine the provenance of the drugs the State uses to execute people. *See, e.g.*, Second Am. Compl., *Whitaker v. Livingston*, CV No. H-13-2901, at 6-7 (S.D. Tex. Sept. 11, 2015), ECF No. 109. However, TDCJ Officials have refused to disclose this information, as well as other information about the pentobarbital it uses. Keri Blakinger, *As lethal injection lawsuit continues, Texas replenishes execution drug supplies*, Houston Chron. (Aug. 18, 2017, updated Jan. 9, 2018)⁶; *see also* App. E and App. F.

As a result, prisoners, including Garcia, have been unable to obtain information regarding the quality (or lack thereof) of the drugs being used to execute them, and the serious constitutional risks they pose. This refusal prevents Garcia from discovering the source of the drug, which he believes to be Greenpark. Greenpark has committed a host of safety violations and as a result, was on probation for two years, as discussed above. TDCJ Officials have prevented Garcia from determining whether the drug it uses is degraded or contaminated, which would

⁶ Available at <http://www.houstonchronicle.com/news/houston-texas/article/As-lethal-injection-lawsuit-continues-Texas-11943467.php>.

cause intolerable pain. The lack of transparency has impeded Garcia's ability to exercise his constitutional right not to be put to death in a manner that has a substantial risk of serious harm.

IV. Texas has a history of obtaining execution drugs from illicit and unsafe sources.

Past actions on the part of Texas and its supplier have raised concerns about the sanitation practices of the supplier of Texas's pentobarbital. For example, Texas had eight doses of pentobarbital that were set to expire on July 20, 2017. State logs list eight doses received that day as "return from supplier" and set to expire a year out, July 20, 2018. *See Keri Blakinger, As lethal injection lawsuit continues, Texas replenishes execution drug supplies, Houston Chronicle (Aug. 18, 2018).*⁷ TDCJ's spokesperson would not clarify whether those were new drugs, or merely a new expiration date assigned to the already expired drugs. *Id.* TDCJ informed Garcia yesterday that the BUD for the pentobarbital to be used in his execution is June 27, 2019. (App. E-1.) However, TDCJ has not provided information on how that BUD was determined, and Garcia does not know if the BUD was simply remarked by Greenmark from June 27, 2018 to June 27, 2019. Also, because TDCJ has not provided information on how the drug was stored, Garcia has not seen any evidence that the BUD is acceptable under accepted pharmaceutical standards, i.e., USP <797>, which have specific storage requirements to achieve certain BUDs.

⁷ Available at <http://www.houstonchronicle.com/news/houston-texas/article/As-lethal-injection-lawsuit-continues-Texas-11943467.php>.

Additionally, a series of public information requests has revealed that the drugs that Texas uses to execute people do not meet safety and sanitation regulations. USP <797> says that compounded injectable sterile preparations (CSPs) should maintain their labeled strength within monograph limits, and the monograph for pentobarbital allows for 2% standard deviation, meaning that pentobarbital has to be between 98% and 102%. (See App. C-109.) Public records produced by TDCJ have revealed that the pentobarbital used by Texas to execute people often fell outside this range, including 109%, 103%, 94.6%, and 97%. (See App. C-114 to C-118.)

Texas has a history of obtaining execution drugs from unreliable and likely dangerous sources. In 2015, the FDA seized from TDCJ an imported shipment of execution drugs because the drugs were not approved for human use and were misbranded. Mike Tolson, *FDA will not give seized execution drugs back to Texas*, Houston Chron. (Apr. 21, 2017).⁸

In addition, TDCJ Officials are inconsistent approach in their efforts to ensure the safety and effectiveness of their pentobarbital. For example, TDCJ Officials agreed to test the compounded pentobarbital intended for use in the executions of Thomas Whitaker and Perry Williams for potency, purity, and sterility shortly before those executions. *Whitaker v. Livingston*, No. H-13-2901, 2016 WL 3199532, at *3 (S.D. Tex. June 6, 2016). But TDCJ has refused to do the same testing shortly before the executions of other condemned prisoners, including Garcia.

⁸ Available at <https://www.houstonchronicle.com/news/houston-texas/houston/article/FDA-will-not-give-seized-execution-drugs-back-to-11090050.php>.

This year alone, five condemned prisoners who were executed complained of a burning sensation as pentobarbital was injected into their veins in the beginning moments of their executions. (App. C-52.) Another condemned prisoner “writhed and shook on the gurney after the drug began to flow into him.” (App. C-52.)

V. The decisions below

The district court denied Garcia’s preliminary-injunction motion because it determined that Garcia was “unlikely to prevail on the merits of any of his [four] claims.” (App. B- 8.) The court reasoned that to succeed on the access-to-courts claims under the First and Fourteenth Amendments, or on his equal-protection claim, first Garcia must show that he is likely to succeed on his Eighth Amendment claim that the use of pentobarbital compounded by Greenpark creates a substantial risk of serious harm. (App. B-6 to B-8.)

The district court found that Garcia was unlikely to succeed on his Eighth Amendment claim for two reasons. The court first held that Garcia failed to demonstrate a substantial risk of serious harm because he showed “merely a hypothetical risk” that the compounded pentobarbital from Greenpark would cause him “undue suffering.” (App. B-5.) The court also found that success on this claim was unlikely because it rejected Garcia’s pleaded alternative to TDCJ’s use of compounded pentobarbital from Greenpark. (App. B-5 to B-6.) Garcia alleged that TDCJ could obtain compounded pentobarbital from “one of the other hundreds of sterile compounding pharmacies licensed in Texas that is not on probationary status and does not have safety citations.” (App. D-10 to D-11.)

The Fifth Circuit affirmed, stating that “[f]or essentially the reasons stated by the district court, with which we agree, we are not persuaded of the likelihood of Garcia’s success on the merits.” (App. A-2.)⁹

REASONS FOR GRANTING WRIT

Garcia moved to enjoin TDCJ Officials from using an execution drug compounded by a pharmacy that has a litany of safety violations for its sterile compounding practices. He does not challenge the method of execution or any parts of TDCJ’s execution procedure. He simply wants to prevent TDCJ from using a drug sourced from Greenpark because of its documented poor safety record. TDCJ has other options: one of nearly 200 sterile compounding pharmacies licensed in Texas and TDCJ has previously sourced compounded pentobarbital to use in executions from another compounding pharmacy. (See App. C-55)

The lower courts’ rejection of Garcia’s motion is based on an interpretation of *Glossip* that “permits States to immunize their methods of execution—no matter how cruel or how unusual—from judicial review and thus permits state law to subvert the Federal Constitution.” *Arthur v. Dunn*, 135 S. Ct. 725, 729 (2017) (mem.) (Sotomayor, J., dissenting from denial of certiorari) (making this observation regarding the courts’ interpretations of the known-and-available alternative requirement in *Glossip*); *accord Zagorski v. Haslam*, 139 S. Ct. 20, 21 (2018).

⁹ Because the Fifth Circuit essentially adopted the district court’s reasoning and did not provide its own separate reasoning, Garcia will refer primarily to the district court’s opinion in his argument below.

I. Writ of certiorari should be granted because the district court’s decision ensures that TDCJ has an unchecked and unassailable ability to execute Garcia with adulterated pentobarbital by cloaking the provenance and safety information of its dubious drugs under unnecessary secrecy in violation of his First, Fourteenth, and Eighth Amendment rights.

Garcia alleged that TDCJ Officials will violate his Eighth Amendment right to be free from cruel and unusual punishment by using Greenpark’s compounded pentobarbital. The use of pentobarbital from a pharmacy with such a checkered safety record creates “a ‘substantial risk of serious harm,’” in violation of the Eighth Amendment. *Baze v. Rees*, 553 U.S. 35, 50 (2008) (quoting *Farmer v. Brennan*, 511 U.S. 825, 846 & n.9 (1994)).

Garcia submitted evidence documenting Greenpark’s inability to pass FDA safety inspections, its inability to cure violations once notified of them, the formal discipline issued by the TPB, and evidence showing the safety problems prevalent in Greenpark’s substandard compounding. (See App. C-8 to C-12.) He presented proof that the substandard compounded pentobarbital is substantially likely to cause a person to feel extreme physical pain. (See App. C-12 to C-15.) Garcia also submitted evidence that Texas prisoners recently executed using compounded pentobarbital have experienced burning pain and one writhed on the gurney. (See App. C-52.)

Nonetheless, the district court held that Garcia failed to demonstrate a substantial risk of serious harm because he showed “merely a hypothetical risk” that the compounded pentobarbital from Greenpark would cause him “undue suffering.” (App. B-5.)

The evidence Garcia presented was enough establish a likelihood of success on the merits of his claim that Greenpark's compounded pentobarbital causes substantial risk of serious harm. *See Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011) (requiring a showing of "a substantial likelihood of success on the merits" to prevail on a motion for preliminary injunction). Garcia demonstrated that something was wrong with the compounded pentobarbital in previous executions, causing prisoners to complain about the injection burning or to writhe on the gurney, that a source for the compounded pentobarbital has a safety record that would create a substantial risk that the pentobarbital was substandard, and that substandard pentobarbital would cause excruciating pain. The court held no hearing TDCJ has not refuted any of these facts.

The reasoning of the district court demonstrates it erroneously required Garcia not to prove a risk, but to provide an actual demonstration of harm, misapplying *Glossip*. The court assumed, without evidence, that Greenpark provided the pentobarbital in every one of Texas's 32 executions since 2015 and that those executions did not involve unconstitutionally excessive levels of pain. (App. B-5.) It was improper to do so without a hearing or even a contention by TDCJ that this was the case.

The district court also improperly faulted Garcia for failing to demonstrate actual unconstitutional pain in past executions. The court had no basis to find that those previous executions did not involve an unconstitutionally excessive level of pain. The only way to determine the level of pain actually experienced would be to

interview the deceased. Moreover, for the court to expect Garcia to prove those executions were unconstitutionally painful sets an impossible standard for him to meet.

The use of the term “hypothetical risk” by the district court underscores its confusion as to the *Glossip* standard. A risk is by definition a possibility or a chance, i.e., a hypothetical. See Merriam-Webster, Definition of risk, <https://www.merriam-webster.com/dictionary/risk> (last visited Dec. 1, 2018). To show a risk that something will happen is necessarily showing less than a certainty of that event occurring.

Obligating Garcia to present more evidence in the two days he had to prepare his claims and in the face of the refusal of TDCJ to respond to his requests for information, sets an impossible-to-meet standard. While Garcia would like to have more evidence regarding the pentobarbital to be used in his execution, the only way he could have more evidence is if TDCJ responded to the critical aspects of his requests for information about the compounded pentobarbital. But TDCJ has refused.

Accordingly, Garcia brought claims under the First and Fourteenth Amendment alleging that the refusal to provide him with information about the execution drugs denies his constitutional access to courts. “[P]risoners have a constitutional right of access to the courts.” *Bounds v. Smith*, 430 U.S. 817, 821 (1977). “[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.” *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, (1983).

To succeed on the access-to-courts claim, Garcia “must plead sufficient facts to state a cognizable [underlying Eighth Amendment] claim.” *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013) (per curiam) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The district court concluded that Garcia was not likely to prevail on these access claims because he had shown only “a hypothetical possibility of an Eighth Amendment violation.” (App. B-6.) The court once again held Garcia to a higher standard than required. He need only plead facts sufficient to state a plausible Eighth Amendment claim. He did so.

The heart of his access-to-courts claims is that through secrecy, TDCJ Officials have prevented Garcia from prevailing on his Eighth Amendment claim. The district court erroneously required Garcia to demonstrate actual harm in order to show a likelihood of success on the merits of his Eighth Amendment claim, and thereby created a catch-22 in its denial of Garcia’s claims. The court held that Garcia cannot win his Eighth Amendment claim because he does not have enough evidence of harm. To prove harm with more certainty, Garcia needs access to information that TDCJ refuses to provide. (See App. C-61 to C-65.) As a result, Garcia brings his Fourteenth and First Amendment claims for access to this information. But the court denied his claims for access because Garcia purportedly lacked sufficient evidence to prove his Eighth Amendment claim, thus ensuring that Garcia will never be able to succeed on his First, Eighth, or Fourteenth Amendment claims.

TDCJ’s violations of Garcia’s constitutional rights should not be unenforceable because of TDCJ’s own obstructionism. States should not be able to shield their

unconstitutional actions by cloaking critical information about the execution drugs in secrecy.

II. Writ of certiorari should be granted because the district court erroneously applied *Glossip* by requiring that Garcia identify an alternative when he is not challenging the method or means of his execution, but requested only that one specific source for the execution drugs not be used.

The district court alternatively denied Garcia’s request for relief on his Eighth Amendment claim because Garcia purportedly failed to “identify any other pharmacy willing and able to provide execution drugs to TDCJ.” (App. B-6.) Both the district court and the Fifth Circuit ignored Garcia’s contention that he need not plead an alternative because he is not challenging compounded pentobarbital as the method of execution—he is challenging only the source of the drug. (App. D-10.) *Glossip* does not obligate Garcia to plead an alternative under the circumstance. The plaintiffs in *Glossip* challenged the method of execution, specifically, the three-drug combination using midazolam as the first drug. 135 S. Ct. at 2731. This Court held under that circumstance, a condemned prisoner must “identify a known and available alternative method of execution.” *Id.* But that is not the challenge here and so Garcia need not plead an alternative. Here, Garcia is not challenging the protocol or even the use of compounded pentobarbital. He is challenging only the use of pentobarbital from Greenpark pharmacy, which has numerous documented violations that create a significant risk of pain and suffering.

Assuming *Glossip* required a “known and available” alternative in this case, however, the district court further erred by concluding that it was insufficient for Garcia to plead that TDCJ could use one of the two hundred other licensed sterile

compounding pharmacies without the checkered safety record of Greenpark. Garcia provided evidence that there are nearly 200 other licensed sterile compounding pharmacies in Texas and only eight have had their licenses put on probation or revoked. (App. C-55.) TDCJ also delivered shipments of the active ingredient used to make compounded pentobarbital to two different pharmacies, 100 grams to Greenpark in 2015 and 2016, and 80 grams to another still-unidentified pharmacy, in August 2015. (See App. C-55.)¹⁰ If that other pharmacy meets the safety requirements, it is a viable alternative.

The district court also incorrectly assumed that TDCJ would contest that it had another, safer compounding pharmacy available to compound its execution drugs. TDCJ has not yet responded to Garcia's allegations, either in the district court or Fifth Circuit, and no hearing was held. It is improper, and outside the province of the court, to make that assumption without a hearing or even a contention by TDCJ Officials that Garcia is incorrect. Garcia has thus shown that pentobarbital compounded by Greenpark "creates a demonstrated risk of severe pain and that the risk is substantial when compared to the known and available alternatives." *Glossip*, 135 S. Ct. at 2737.

¹⁰ The full article is at https://www.buzzfeednews.com/article/chrismcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas?utm_term=.pkxy4410jP. For some reason, the version of the article printed as a .pdf file and attached to Garcia's motion (App. C-50 to C-59) is missing the first part of the first sentence on page C-55 of the article. Garcia provided a link to the full article in his motion (App. C-4), which shows the full sentence as: "The other pharmacy that the documents indicate received shipments of the ingredient (80 grams of it in August 2015) remains unidentified."

The district court's insistence that Garcia plead not only an alternative, but name a specific pharmacy willing to compound the pentobarbital goes well beyond *Glossip*. This wide reading of *Glossip* "permits States to immunize their methods of execution—no matter how cruel or how unusual—from judicial review and thus permits state law to subvert the Federal Constitution." *Arthur*, 135 S. Ct. at 729; *accord Zagorski*, 139 S. Ct. at 21.

CONCLUSION

For the foregoing reasons, Garcia asks that this Court grant his petition for a writ of certiorari.

Respectfully submitted:

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