Nos. 18-6892 & 18A572

IN THE

Supreme Court of the United States

JOSEPH C. GARCIA,
Petitioner,

v.

BRYAN COLLIER; LORIE DAVIS; JAMES L. JONES; JOHN OR JANE DOES 1–50,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
and Application for Stay of Execution

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari in an untimely method-of-execution case founded upon hearsay, speculation, and dubious legal grounds?

2. Should this Court grant a stay of execution where there is no substantial likelihood of success on the merits, where there is extreme dilatoriness, and where the equities lie in favor of the State?

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BRIEF IN OPPOSITION

Bryan Collier, Lorie Davis, James L. Jones, and John or Jane Does 1–50, individuals holding various titles within the Texas Department of Criminal Justice (TDCJ), respectfully submit this brief in opposition to the petition for a writ of certiorari and application for stay of execution filed by Joseph C. Garcia.

STATEMENT OF THE CASE

I. Garcia's Offense and Postconviction Challenges

On December 13, 2000, Garcia and six other inmates escaped from a Texas prison. *Garcia v. Davis*, 704 F. App'x 316, 318 (5th Cir. 2017). On December 24, 2000, the group robbed a sporting-goods store in Irving, Texas, killing Officer Aubrey Hawkins as they fled. *Id.* at 319. The escapees made their way to Colorado where they were eventually captured, save one who committed suicide, in January 2001. *Id.*

Garcia was convicted of capital murder and sentenced to death in February 2003. *Garcia v. State*, No. AP-74,692, 2005 WL 395433, at *1 (Tex. Crim. App. Feb. 16, 2005). His conviction was affirmed on direct appeal in February 2005. *Id.* His initial state habeas application was

denied in November 2006. *Ex parte Garcia*, No. WR-64,582-01, 2006 WL 3308744, at *1 (Tex. Crim. App. Nov. 15, 2006).[1]

Garcia then turned to the federal forum, but collateral relief was denied by the district court. *Garcia*, 704 F. App'x at 319. On appeal, Garcia was unable to obtain a certificate of appealability or otherwise demonstrate reversible error. *Id.* at 327. A petition for writ of certiorari was denied earlier this year. *Garcia v. Davis*, 138 S. Ct. 1700 (2018).

II. Garcia's Recent Litigation

Garcia very recently filed another subsequent state habeas application. It too was dismissed. *Ex parte Garcia*, No. WR-64,582-03, slip op. (Tex. Crim. App. Nov. 30, 2018). Garcia is presently petitioning this Court for a writ of certiorari from that decision and seeking a stay of execution. Petition for Writ of Certiorari, *Garcia v. Texas*, No. 18-6891 (U.S. Nov. 30, 2018); Application for Stay of Execution, *Garcia v. Texas*, No. 18A571 (U.S. Nov. 30, 2018). A decision remains pending.

Also very recently, Garcia filed a civil rights action challenging Texas's executive clemency system. The requested injunctive relief was

[1] A subsequent state habeas application, filed during the pendency of federal habeas litigation, was dismissed in March 2008. *Ex parte Garcia*, No. WR-64,582-02, 2008 WL 650302, at *1 (Tex. Crim. Mar. 5, 2008).

denied and the suit dismissed with prejudice. Memorandum and Order, No. H-18-4503, slip op. (S.D. Tex. Nov. 30, 2018), ECF No. 4. Garcia appealed, but the United States Court of Appeals for the Fifth Circuit affirmed the dismissal and, consequently, dismissed the stay of execution as moot. *Garcia v. Jones*, No. 18-70031, slip op. (5th Cir. Dec. 2, 2018).

Garcia, even more recently, filed a motion for relief from the final judgment in his federal habeas case and moved the district court for a stay of execution. The district court found Garcia's motion to be a disguised second-or-successive habeas petition and transferred it and the motion to stay to the Fifth Circuit. Memorandum Opinion and Order Transferring Successive Petition, *Garcia v. Davis*, No. 3:06-CV-2185-M (N.D. Tex. Dec. 3, 2018). A decision remains pending.

And, even more recently, Garcia filed an original petition for writ of habeas corpus and an application for stay of execution with this Court. Petition for Writ of Habeas Corpus, *In re Garcia*, No. 18-6890 (U.S. Nov. 30, 2018); Application for Stay of Execution, *In re Garcia*, No. 18A570 (U.S. Nov. 30, 2018). A decision remains pending.

III. The Course of Garcia's Present Lawsuit

Most recently, Garcia filed another civil rights action, this one challenging Texas's execution protocol, and he sought a preliminary injunction and a stay of execution. Garcia's requests for injunctive relief and a stay of execution were denied. Memorandum and Order, *Garcia v. Collier*, No. H-18-4521, slip op. (S.D. Tex. Dec. 1, 2018), ECF No. 5; Pet'r App. B, at 1–8. Garcia appealed, but the Fifth Circuit affirmed the denial of injunctive relief and denied his request for a stay of execution. *Garcia v. Collier*, No. 18-70032, slip op. (5th Cir. Dec. 2, 2018); Pet'r App. A, at 1–3.

REASONS FOR DENYING THE PETITION AND A STAY

I. The Standard Governing Requests for Preliminary Injunction.

To be entitled to a preliminary injunction, a plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."

Id. at 22. It is "never awarded as of right." *Id*. at 24. On appeal, a decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion. *See Munaf v. Geren*, 553 U.S. 674, 690 (2008).

II. The Standard Governing Stay Requests.

"Filing an action that can proceed under [28 U.S.C.] § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009). In utilizing that discretion, 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 proceeding; and (4) where the public interest lies.

Id. at 434 (citations omitted) (internal quotation marks omitted). "[I]nmates seeking time to challenge the manner in which the State plans to execute them must satisfy *all* of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill*, 547 U.S. at 584 (emphasis added). "Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Id.*

And courts "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* Indeed, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585.

III. Garcia Failed to Show Any Likelihood of Success on the Merits, Let Alone the Required Substantial Showing.

Garcia raised four claims in his suit challenging TDCJ's execution protocol: (1) that the use of compounded pentobarbital violates the Eighth Amendment; (2) that he has a First Amendment right to know the details of Texas's execution protocol; (3) that the concealment of execution information denies him access to the courts in violation of the Fourteenth Amendment's Due Process Clause; and (4) that he is being denied equal protection under the law. Pet'r App. C, at 20–28. In his petition for writ of certiorari, he focuses only on the first three. Pet. Writ Cert. at 17–23. Because Garcia failed to introduce competent evidence that went beyond mere speculation of harm, and because all of his claims are untimely, he failed to show a likelihood of success on the merits.

A. Garcia's Eighth Amendment claim

1. The claim is untimely.

The Court has held that § 1983 cases are best characterized as personal injury actions and should therefore be subject to a state's personal injury statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 279 (1985). The Fifth Circuit has taken this determination and applied it to § 1983 cases challenging a state's method of execution. *Walker v. Epps*, 550 F.3d 407, 412–14 (5th Cir. 2008).[2] Texas's personal-injury-limitations period is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (West 2017). A method-of-execution claim accrues on the later of two dates: when direct review is complete or when the challenged protocol was adopted. *Walker*, 550 F.3d at 414–15.

The basis of Garcia's Eighth Amendment claim is that, at bottom, the compounding process is potentially unsafe and less safe than large scale pharmaceutical manufacturing. *See* Pet'r App. C, at 6–15. TDCJ first purchased compounded pentobarbital for use in executions in September 2013. *See Whitaker v. Livingston*, 732 F.3d 465, 466 (5th Cir.

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[2] This is in accord with other circuits to have considered the issue. *See Johnson v. Precythe*, 901 F.3d 973, 980–81 (8th Cir. 2018); *Getsy v. Strickland*, 577 F.3d 309, 310–11 (6th Cir. 2009); *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008).

2013) (*Whitaker I*). But that is not even the right accrual date because "the 2013 change to compounded pentobarbital is not substantial" so as to restart the accrual date. *Whitaker v. Collier*, 862 F.3d 490, 496 (5th Cir. 2017) (*Whitaker II*). Rather, the change in the execution protocol from three drugs to only pentobarbital occurred in July 2012. Pet'r App. C, at 37, 43; *see Trottie v. Livingston*, 766 F.3d 450, 452 n.1 (5th Cir. 2014) ("The only difference between the July 9, 2012 Execution Procedure and the procedure we considered in *Raby v. Livingston*, 600 F.3d 552 (5th Cir. 2010), is a change from the use of three drugs to a single drug."). Thus, more than six years passed since Garcia should have raised this claim.

Garcia will no doubt retort that a recent online article should restart the accrual date. Pet'r App. C, at 51–56. That argument holds no water. More than five years ago, Texas death row inmates complained "that compounding pharmacies are not subject to stringent FDA regulations, that the active ingredients are obtained from a global grey market, and that there is a chance of contamination." *Whitaker I*, 732 F.3d at 468. Garcia's present complaint, founded on a hearsay article that fails to show its work, is no different. And thus, Garcia is not entitled to a new accrual date.

The alternative, second accrual date does not save the claim. Garcia's direct appeal was decided on February 16, 2005. *Garcia v. State*, No. AP-74,692, 2005 WL 395433 (Tex. Crim. App. Feb. 16, 2005). Even assuming finality ninety days later—the time for seeking a writ of certiorari from this Court—Garcia's direct appeal ended more than a decade ago. As such, the conclusion of direct review does not render this claim timely. *See Walker*, 550 F.3d at 415. Because Garcia filed outside of the two-year limitations period based on either accrual date, his Eighth Amendment claim is untimely. Thus, neither the district court nor the Fifth Circuit, although they did not decide the timeliness question, abused their discretion in denying a preliminary injunction.

2. The claim fails as a matter of law.

To make out an Eighth Amendment method-of-execution claim, an inmate must establish that the chosen method creates "a risk that is '*sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.'" *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)). This requires showing "'a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were

'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* (quoting *Baze*, 553 U.S. at 50). An inmate must also provide a "'feasible, readily implemented'" execution-method alternative that is not "'slightly or marginally safer,'" but "'significantly reduce[s] a substantial risk of severe pain.'" *Id.* (quoting *Baze*, 553 U.S. at 51–52).

Garcia's list of compounding horribles is the same type of speculative harm that has been repeatedly rejected by circuit courts. *See, e.g.*, *Whitaker II*, 862 F.3d at 499 (rejecting "concerns about potency, sterility, and stability of pentobarbital" as speculation "that is insufficient even at the motion-to-dismiss stage"); *Zink v. Lombardi*, 783 F.3d 1089, 1098–99 (8th Cir. 2015) (en banc) ("The prisoners' allegations are limited to descriptions of hypothetical situations in which a potential flaw in the production of pentobarbital or in the lethal-injection protocol could cause pain."). The only new allegation Garcia musters is the identification of a compounding pharmacy in an online article. Pet'r App. C, at 52. This does nothing to advance his cause.

First, the article is hearsay and inadmissible. *See Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 618 (1974) (noting that newspaper article was "double hearsay"); *Dallas Cty. v. Commercial*

Union Assurance Co., 286 F.2d 388, 391–92 (5th Cir. 1961) ("Of course, a newspaper article is hearsay, and in almost all circumstances is inadmissible."). Second, even then, the pharmacy identification is tentative. Pet'r App. C, at 52. ("But documents obtained by BuzzFeed News *indicate* that one source is . . . ." (emphasis added)). Third, assuming a correct identification, there is yet another assumption that the identified pharmacy is the one that compounded the pentobarbital to be used in Garcia's execution. Fourth, assuming all the above facts to make the online article relevant to Garcia's execution, it still boils down to speculation—that the pentobarbital to be used was compounded incorrectly and will possibly lead to unconstitutional pain. "This speculation is insufficient to state an Eighth Amendment claim." *Zink*, 783 F.3d at 1101 ("The prisoners' allegations are limited to descriptions of hypothetical situations in which a potential flaw in the production of the pentobarbital or in the lethal-injection protocol could cause pain.").

Even if these harms were anything more than conjecture, Garcia entirely ignores that TDCJ has its compounded pentobarbital tested for identity, potency, and sterility. *See Whitaker v. Livingston*, No. H-13-2901, 2016 WL 3199532, at *7 (S.D. Tex. June 6, 2016). Indeed, TDCJ

has done so here. Pet'r App. E, at 7.[3] This recent report shows that TDCJ is using pentobarbital in a reported concentration of 50mg/mL, with an actual concentration of 49mg/mL thereby yielding 98% potency, and it is sterile. Pet'r App. E, at 7. Thus, whatever errors might occur during the compounding process, TDCJ's testing regimen would ensure—and is ensuring here—that a subpar drug would not be administered. In other words, Garcia's strained speculation builds a bridge to nowhere.

Accepting again that the online article is applicable to Garcia's execution, the harm identified there is that certain inmates said they experienced a burning sensation seconds before being rendered unconscious. Pet'r App. C, at 52. Assuming that statements made by a group of highly antisocial murderers were reliable, and accepting a highly speculative causal link between the compounding process and these complaints, Garcia does not prove that this temporary discomfort is constitutionally intolerable. Indeed, executions need not be pain free. *See, e.g.*, *Baze*, 553 U.S. at 47 ("Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect

[3] This testing report was provided to Garcia in response to his Public Information Act request because it is of the batch of compounded pentobarbital to be used during his execution.

of error in following the required procedure."); *In re Ohio Execution Protocol*, 860 F.3d 881, 890 (6th Cir. 2017). And, despite some complaints of burning sensation, such executions have been described as "without incident." *Wood v. Collier*, 836 F.3d 534, 540 (5th Cir. 2016) (*Wood I*); *see* Defendants' Opposition to Plaintiffs' Motion for Discovery Exhibit A, *Whitaker v. Livingston*, No. H-13-2901, 2016 WL 3199532 (S.D. Tex. June 6, 2016), ECF No. 77-1 (listing descriptions of pentobarbital executions, including two with complaints of a burning sensation, one with manufactured and one with compounded pentobarbital). A burning sensation that lasts a few seconds preceding unconsciousness is not the serious harm that the Eighth Amendment aims to prohibit. *Cf. Raby*, 600 F.3d at 558 ("Raby's claim is not based on any minor pain involved in multiple attempts to find an adequate vein, . . .").

Assuming that a burning sensation was constitutionally impermissible, Garcia still failed to adequately plead his Eighth Amendment claim. Entirely lacking from his briefing is a "'feasible, readily implemented'" execution-method alternative that is not "'slightly or marginally safer,'" but "significantly reduce[s] a substantial risk of severe pain.'" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 51–

52). As this Court has recognized, the failure to plead an alternative is dispositive. *See id.* at 2738 ("Because petitioners failed to [plead and prove a known and available alternative], the District Court properly held that they did not establish a likelihood of success on their Eighth Amendment claim."); *Whitaker II*, 862 F.3d at 499; *Zink*, 783 F.3d 1103.

Garcia, however, claims he did not need to plead an alternative because he is only challenging the source of the compounded pentobarbital, not the use of pentobarbital generally. Pet. Writ Cert. 21–23. Garcia's purported distinction is without a difference. The plaintiffs in *Whitaker II*, as an alternative, contended that an "FDA-approved barbiturate[] . . . could be administered with appropriate safeguards." *Whitaker II*, 862 F.3d at 499. This is tantamount to Garcia's complaint that a "better" pharmacist could be utilized in the compounding of pentobarbital. But this was not enough for the *Whitaker II* plaintiffs as "[t]he allegation that there are available drugs that could be handled properly is little more than a concession that there are constitutional ways for TDCJ to carry out executions." *Id.* And it is not enough to substitute the term "pharmacists" for "drugs" in the above sentence. Rather, Garcia's argument comes down to bare disagreement with a

decision rendered just a few terms ago. *See Glossip*, 135 S. Ct. at 2739 (rejecting argument that the plaintiffs "need not identify a known and available method of execution that presents less risk"). But bare disagreement with this Court's precedent is hardly a reason to grant a writ of certiorari.

In sum, Garcia failed to identify a substantial risk of severe pain or an available alternative execution method, so he failed to show a likelihood of success on the merits—which "is arguably the most important" factor in the preliminary injunction context. *See Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005). The district court did not abuse its discretion in denying a preliminary injunction, nor did the court below error in affirming such denial.

B. Garcia's First Amendment and due process claims

1. The claims are untimely.

As mentioned above, § 1983 cases generally, and method-of-execution cases specifically, are subject to a state's personal injury statute of limitations. *See supra* Argument III(A)(1). Complaints regarding the failure to provide execution-protocol information fall within this rule. *See Wood v. Collier*, 678 F. App'x 248, 249 (5th Cir. 2017) (*Wood II*).

In *Wood II*, it was alleged that "Texas's death penalty protocol injures Plaintiffs' rights under the First, Eighth, and Fourteenth Amendments by failing to disclose information regarding the injection drug and by concealing certain information about how the executions will be performed." *Id.* at 249 n.2. That claim was found untimely *assuming* a September 2013 accrual date, when TDCJ switched from manufactured to compounded pentobarbital. *Id.* at 250. But that assumption does not control here as there has not been substantial change to TDCJ's execution protocol since May 2008, save for the transition from three drugs to one in July 2012. *See Trottie*, 766 F.3d at 452 n.1. Therefore, May 2008 is the proper accrual date and, as shown above, the alternative accrual date—the termination of Garcia's direct appeal—occurred well before then, so it does not present a later accrual date. *See supra* Argument III(A)(1).

The secrecy-related claims alleged by the *Wood II* plaintiffs are substantially similar to those made by Garcia. *See Wood II*, 678 F. App'x at 249 n.2. They are therefore similarly untimely—here, by about eight years using the May 2008 accrual date and Texas's applicable two-year

statute of limitations. Given this untimeliness, denying a preliminary injunction was not an abuse of discretion.

2. The claims fail as a matter of law.

There is no broad due-process right to obtain every detail[4] about a state's execution process—an inmate's "assertion of necessity—that [a state] must disclose its protocol so he can challenge its conformity with the Eighth Amendment—does not substitute for the identification of a cognizable liberty interest. . . . There is no violation of the Due Process Clause from the uncertainty that [the state] has imposed on [the inmate] by withholding the details of its execution protocol." *Sepulvado v. Jindal*, 729 F.3d 413, 419 (5th Cir. 2013); *see Zink*, 783 F.3d at 1109; *Wellons v. Comm'r Ga. Dep't Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014) ("Neither the Fifth, Fourteenth, or First Amendments afford Wellons the broad right 'to know where, how, and by whom the lethal injections drugs will be manufactured, as well as 'the qualifications of the person or persons who will manufacture the drugs, and who will place the catheters.'").

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[4] It should be noted that Garcia only requested information regarding his execution six days ago, and only four business days ago. Pet'r App. C, at 61 (an email on November 28, 2018, at 7:30 PM). While he claims that the inquiry was triggered by publication of the online article, challenges to the supposed risks using compounded drugs in executions have existed for years. *See supra* Argument III(A)(1). This belies any argument that the suit was brought in a timely fashion.

Thus, as a matter of law, due process cannot support Garcia's secrecy claim.

The same is true under the First Amendment. While a state inmate has a "right of access to the courts" under the First Amendment, that right does not encompass the ability "to *discover* grievances, and to *litigate effectively* once in court." *Lewis v. Casey*, 518 U.S. 343, 350, 354 (1996) (emphasis removed from initial quotation). "One is not entitled to access to the courts merely to argue that there might be some remote possibility of some constitutional violation." *Whitaker I*, 732 F.3d at 467. And the inability to discover execution-protocol information is, as a matter of law, insufficient to state a First Amendment access-to-courts claim. *See Whitaker II*, 862 F.3d at 501; *Zink*, 783 F.3d at 1108; *Wellons*, 754 F.3d at 1267 (denying an access-to-courts claim based on a lack of execution-protocol information); *Williams v. Hobbs*, 658 F.3d 842, 851–52 (8th Cir. 2011) ("The prisoners do not assert that they are physically unable to file an Eighth Amendment claim, only that they are unable to obtain the information needed to discover a potential Eighth Amendment violation.").

Because neither constitutional underpinning supports the secrecy-related claims raised by Garcia, he failed to show a substantial likelihood of success in the courts below. Accordingly, there was no abuse of discretion in denying Garcia's preliminary-injunction request.

IV. Garcia Did Not Prove That He Is Likely to Suffer Irreparable Harm.

Next, Garcia failed to demonstrate that he will likely suffer irreparable harm absent a preliminary injunction. The harm at issue is not Garcia's death, but whether it will be accompanied by constitutionally-impermissible pain. But Garcia made no showing that the present execution protocol or the use of compounded pentobarbital would inflict such pain. *See supra* Argument III(A)(2). This is especially true since the potential failings he identifies in the compounding process—e.g., use of the wrong drug, improper concentration, or contamination—are remedied by the quality control process utilized by TDCJ. Pet'r App. E, at 7.

Moreover, the current execution protocol, save changes to the drug used for lethal injection, has been used since at least 2008, and compounded pentobarbital has been used in at least thirty-two executions in Texas "without issue." *Wood I*, 836 F.3d at 540. Since *Wood*

I, compounded pentobarbital has been used in an additional nineteen executions, bringing the total to fifty-one. *Compare Whitaker*, 2016 WL 3199532, at *1 (listing thirty-two compounded pentobarbital executions as of June 6, 2016), *with* Texas Department of Criminal Justice, *Executed Offenders*, https://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last updated Nov. 15, 2018) (showing nineteen executions since June 6, 2016). These nineteen inmates are:

- Barney Fuller. *See* Michael Graczyk, *Texas Man Who Killed Neighbor Couple Executed*, San Antonio Express-News (Oct. 5, 2016, 9:06 PM), https://www.expressnews.com/news/local/article/Texas-man-who-killed-neighbor-couple-executed-9818981.php ("[Barney Fuller] took a couple of breaths, then began snoring. Within 30 seconds, all movement stopped.").

- Christopher Wilkins. *See* Michael Graczyk, *Texas Executes Convicted Killer in First U.S. Execution of 2017*, USA Today (Jan. 11, 2017, 10:12 PM ET), https://www.usatoday.com/story/news/nation/2017/01/11/texas-execution-christopher-wilkins/96470784/ ("Christopher Wilkins, 48, was declared dead at 6:29 p.m., 13 minutes after a lethal injection of pentobarbital.").

- Terry Edwards. *See* Michael Graczyk, *Texas Executes Man Convicted of Killing 2 in Subway Shop Holdup*, KXAS-NBC 5 (Jan. 26, 2017, 10:39 PM CST), https://www.nbcdfw.com/news/local/Man-Convicted-of-Killing-2-in-Dallas-Subway-Shop-Holdup-Set-to-Die-411846415.html ("As the lethal dose of pentobarbital was administered, [Terry Edwards] began snoring quickly. Within about 30 seconds, all movement stopped.").

- Rolando Ruiz. *See* Michael Graczyk, *San Antonio Hit Man Apologizes Before Execution: "May This Bring You Peace,"* WOAI-News 4 (Mar. 7, 2017, 11:50 PM), https://news4sanantonio.com/new

s/local/sa-hit-man-executed-after-several-hours-delay ("As the lethal dose of pentobarbital was administered, [Rolando Ruiz] took several deep breaths, then began snoring quietly. All movement stopped within about 30 seconds.").

- James Bigby. *See* Michael Graczyk, *Texas Executes Man Who Killed 2 and Tried to Attack Judge: "I Promise, I'm Sorry,"* Chicago Tribune (Mar. 14, 2017, 8:23 PM), https://www.chicagotribune.com/news/nationworld/ct-texas-execution-james-bigby-20170314-story.html ("As the lethal dose of pentobarbital began, [James Bigby] prayed and said several times: 'I promise, I'm sorry.' He was singing 'Jesus Loves Me' as the drug took effect, took a few breaths, started snoring and then stopped all movement.").

- TaiChin Preyor. *See* Michael Graczyk, *Texas Executes Man for Killing Woman in 2004 after Break-In, Chicago Tribune* (July 27, 2017, 11:25 PM), https://www.chicagotribune.com/news/nationworld/ct-texas-execution-20170727-story.html ("As the lethal dose of pentobarbital began taking effect, [TaiChin Preyor] took several deep breaths, then began snoring, each sound decreasing in volume. Within a minute, all movement stopped.").

- Robert Pruett. *See* Michael Graczyk, *Inmate Executed in Texas for Corrections Officer's Death*, Associated Press (Oct. 12, 2017), https://apnews.com/39d4a94edac74c6687d5d9e41e226119 ("As the lethal dose of the powerful sedative pentobarbital began to flow, [Robert Pruett] started to chant: 'Love. Light. It's forever.' His voice rose as he repeated the phrase. He added obscenities and soon was yelling. He started to slur his words before slipping into unconsciousness. He was pronounced dead at 6:46 p.m. CDT, 29 minutes after being given the drug.").

- Ruben Cardenas. *See* Michael Graczyk, *Mexican Citizen Executed in Texas for Cousin's 1997 Slaying*, KXAS-NBC 5 (Nov. 8, 2017, 11:08 PM), https://www.nbcdfw.com/news/local/Mexican-Citizen-Executed-in-Texas-for-Cousins-1997-Slaying-456279483.html ("As the lethal dose of pentobarbital began, [Ruben Cardenas] took a couple of breaths and then began snoring. After less than a minute, all movement stopped.").

- Anthony Shore. *See* Michael Graczyk, *"Tourniquet Killer Executed in Texas for 1992 Strangling*, U.S. News & World Report (Jan. 18, 2018, 8:21 PM), https://www.usnews.com/news/us/articles/2018-01-18/texas-tourniquet-killer-set-to-be-1st-us-execution-in-2018 ("As the lethal dose of pentobarbital began, [Anthony] Shore said the drug burned. 'Oooh-ee! I can feel that,' he said before slipping into unconsciousness.").

- William Rayford. *See* Michael Graczyk, *Texas Executes Dallas Man for Killing Ex-Girlfriend in 1999*, USA Today (Jan. 30, 2018, 11:05 PM ET), https://www.usatoday.com/story/news/nation/2018/01/30/texas-executes-dallas-man-killing-ex-girlfriend-1999/1081621001/ ("As the lethal dose of pentobarbital began taking effect, [William Rayford] lifted his head from the pillow on the death chamber gurney, repeated that he was sorry and then said he was 'going home.' He began to snore. Within seconds, all movement stopped.")

- John Battaglia. *See* Michael Graczyk, *Texas Executes Man Who Killed His Daughters while Their Mother Was on Speaker Phone*, Chicago Tribune (Feb. 1, 2018, 11:13 PM), https://www.chicagotribune.com/news/nationworld/ct-texas-execution-20180201-story.html ("The powerful sedative pentobarbital began to take effect. 'Oh, I feel it,' [John Battaglia] said. He gasped twice and started to snore. Within the next few seconds, all movement stopped.").

- Rosendo Rodriguez. *See* Michael Graczyk, *Texas Executes Man Who Stuffed Woman's Body into Luggage*, Associated Press (Mar. 27, 2018), https://apnews.com/8d8327e39a984062ae020fabed261e72 ("[Rosendo] Rodriguez, who turned 38 Monday, received a lethal dose of the powerful sedative pentobarbital, injected by Texas prison officials. Twenty-two minutes later, at 6:46 p.m. CDT, he was pronounced dead.").

- Erick Davila. *See* Michael Graczyk, *Texas Gang Member Executed for Killing Girl, Grandmother*, U.S. News & World Report (Apr. 25, 2018, 8:25 PM), https://www.usnews.com/news/best-states/texas/articles/2018-04-25/fort-worth-gang-member-to-die-for-killing-girl-gr

andmother ("[Erick Davila] was pronounced dead at 6:31 p.m. CDT, 14 minutes after the lethal dose of the powerful sedative pentobarbital was administered.").

- Juan Castillo. *See* Michael Graczyk, *Inmate Executed for San Antonio Lovers' Lane Killing*, Star Tribune (May 16, 2018, 7:55 PM), http://www.startribune.com/inmate-to-be-executed-for-san-antonio-lovers-lane-killing/482758111/ ("As the powerful sedative took effect, [Juan Castillo] lifted his head off the gurney and used an expletive to say he could taste the drug and that it burned. He took several quick breaths that became snores and then stopped all movement.").

- Danny Bible. *See* Michael Graczyk, *Texas Inmate Executed for 1979 Rape, Murder in Houston*, Associated Press (June 27, 2018), https://www.apnews.com/5a037aa61bc7460e9cd75f269d8983b1 ("[Danny Bible's] head was shaking slightly as the lethal dose of the sedative pentobarbital began. His attorneys said Parkinson's disease was among his ailments. As the drug started to take effect, Bible started taking quick breaths, muttered at one point that it was 'burning' and that it 'hurt.' His breaths then became snores and about a minute after the procedure began, all movement stopped.").

- Christopher Young. *See* Michael Graczyk, *Texas Executes Man for 2004 Slaying of Store Owner*, Associated Press (July 17, 2018), https://www.apnews.com/091ed5622711473dbf8e93190882a8c3 ("As the lethal dose of the sedative pentobarbital began taking effect, [Christopher Young] cursed twice and said the drug burned his throat. 'I taste it in my throat,' he said. Then he slipped into unconsciousness, saying something incomprehensible. He started taking shallow breaths. Within about 30 seconds, he stopped moving and was pronounced dead at 6:38 p.m. CDT.").

- Troy Clark. *See* Juan A. Lozano & Michael Graczyk, *Texas Executes Tyler Man in the Torture, Drowning of Ex-Roommate*, Tyler Morning Telegraph (Sept. 27, 2018), https://tylerpaper.com/news/local/texas-executes-tyler-man-in-the-torture-drowning-of-ex/article_bb86339c-c25f-11e8-9e3b-7726c09cd69e.html ("As the lethal dose of the sedative pentobarbital was administered, [Troy] Clark was

laughing and remarked that the drug 'burned going in.' 'I feel it,' he said. Then he grunted, gasped and began to snore. Seconds later, all movement stopped.").

- Daniel Acker. *See* Juan A. Lozano & Michael Graczyk, *Texas Inmate Executed for Killing Girlfriend in 2000*, U.S. News & World Report (Sept. 27, 2018, 7:39 PM), https://www.usnews.com/news/us/articles/2018-09-27/2nd-texas-inmate-set-for-execution-this-week-wants-it-halted ("[Daniel Acker] closed his eyes, took a breath, then slightly exhaled as the lethal dose of the sedative pentobarbital began taking effect. There was no additional movement. He was pronounced dead 14 minutes later at 6:25 p.m.").

- Roberto Ramos. *See* Juan A. Lozano & Michael Graczyk, Mexican Citizen Executed in Texas for Killings of Wife, Kids, U.S. News & World Report (Nov. 14, 2018, 11:45 PM), https://www.usnews.com/news/us/articles/2018-11-14/mexican-man-who-killed-wife-2-children-set-to-die-in-texas ("As the lethal dose of the powerful sedative pentobarbital began taking effect, the 64-year-old [Roberto] Ramos took a couple of deep breaths, sputtered once and began snoring. Within seconds, all movement stopped.").

None of the above executions differ substantially from those considered in *Wood I* such that they can be labeled anything other than "without incident." Consequently, Garcia failed to prove that he will very likely experience unconstitutional pain during the execution process such that he demonstrated the necessary level of irreparable harm for a preliminary injunction. There was no abuse of discretion.

V. The Balance of Equities Favored the State.

Garcia claimed that the equities favored him because he should not be executed without having the opportunity to vindicate his

constitutional rights. Pet'r App. C, at 29–30. Such a general aspirational statement provides no concrete example of why a constitutionally-imposed sentence should be delayed by a suit that could have been raised long ago. Indeed, every inmate engaged in last-minute litigation could make the same claim Garcia does. It is so generic as to be without weight.

In contrast, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 548. Garcia's challenges to his death sentence have persisted for more than fifteen years. *See Garcia v. State*, No. AP-74,692, 2005 WL 395433 (Tex. Crim. App. Feb. 16, 2005) (noting that Garcia was sentenced in February 2003). Garcia's unjustifiable delay in filing suit does not weigh in his favor.

Finally, Texas has already addressed Garcia's concern that executions occur in a constitutional manner—Texas has executed fifty-one inmates using compounded pentobarbital without any constitutionally-impermissible pain. *See supra* Argument IV; *Wood I*, 836 F.3d at 540. Accordingly, the public's interest aligns with TDCJ's interests, and this too favored denial of Garcia's motion for preliminary injunction. Again, there was no abuse of discretion.

VI. Garcia Failed to Show Diligence in His Litigation.

Garcia claimed he did not delay in brining suit because he did not know the details included in the online article. Pet'r App. C, at 30–31. But an online article that identifies no legitimate tie between Garcia's upcoming execution and some complaints regarding a single pharmacy, and that ignores completely TDCJ's quality control procedures for compounded pentobarbital, is not justification for waiting until now to raise this challenge. Garcia's argument has never had merit, and the online article does nothing to change that analysis or merit raising the claim at the last minute.

"A court considering a stay must also apply 'a strong equitable 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.'" *Hill*, 547 U.S. at 584. Garcia's suit was filed four days (two business days) before his scheduled execution. The Fifth Circuit has routinely denied stays, or vacated injunctive relief, for filings this dilatory. *See Berry v. Epps*, 506, F.3d 402, 403–405 (5th Cir. 2007) (denying stay filed twelve days before execution); *Summers v. Tex. Dep't Criminal Justice*, 206 F. App'x 317, 318 (5th Cir. 2006) (same but fifteen

days before execution); *Kincy v. Livingston*, 173 F. App'x 341, 343 (5th Cir. 2006) (same but twenty-seven days before execution); *Harris v. Johnson*, 376 F.3d 414, 416–17 (5th Cir. 2004) (vacating temporary restraining order based on suit filed ten weeks before execution).

And Garcia could have brought this suit long ago. TDCJ's execution protocol, save the drug used, has been in place since 2008. *See Trottie*, 766 F.3d at 452 n.1. The use of a single dose of pentobarbital has been in place since July 2012. *Id*. at 452. The switch to compounded pentobarbital occurred in September 2013. *See Whitaker I*, 732 F.3d at 466. Thus, Garcia's claims could have been brought, at worst, more than five years ago. But instead of bringing this suit in a timely manner, Garcia is doing "the very thing he is not entitled to do . . . namely, to wait until his execution is imminent before suing to enjoin the state's method of carrying it out." *Harris*, 376 F.3d at 417. Specifically,

> [b]y waiting until the execution date was set, [Garcia] left the state with a Hobbesian choice: It could either accede to his demands and execute him in the manner he deems most acceptable, even if the state's methods are not violative of the Eighth Amendment; or it could defend the validity of its methods on the merits, requiring a stay of execution until the matter could be resolved at trial. Under [Garcia's] scheme, and whatever the state's choice would have been, it would have been the timing of [Garcia's] complaint, not its substantive merit, that would have driven the result.

Id. "By waiting as long as he did, [Garcia] leaves little doubt that the real purpose behind his claim[s] is to seek a delay of his execution, not merely to affect an alteration of the manner in which it is carried out." *Id.* Garcia's claims "could have been brought [long] ago [and t]here is no good reason for this abusive delay." *Gomez v. U.S. Dist. Ct. N. Dist. Cal.*, 503 U.S. 653, 654 (1992). As such, it was not an abuse of discretion to deny a preliminary injunction given Garcia's dilatory tactics.

VII. This Court Should Deny Garcia a Stay of Execution.

All of the above argument is relevant to whether this Court should exercise its discretion regarding a stay of execution. In brief, and as discussed more thoroughly above, Garcia has failed to prove a substantial likelihood of success on any of his claims; indeed, they would all be subject to dismissal on the pleadings had he raised them in a timely manner. *See supra* Argument III. He fails to prove irreparable harm in the form of constitutionally-impermissible pain; his complaints of pain are no more substantiated by a hearsay article than had he simply raised them without exhibits, and they ignore TDCJ's quality control process that has resulted in fifty-one constitutional executions. *See supra* Argument IV. Additionally, the State's interest in executing a violent

escapee and cop killer in a timely fashion outweighs Garcia's sweeping, non-specific assertion of constitutional vindication of what are, at bottom, meritless claims. *See supra* Argument V. And Garcia's severe delay in raising these claims heavily weighs against him. *See supra* Argument VI. Like the district and circuit courts properly did, this Court too should refuse Garcia a stay of execution.

CONCLUSION

Garcia has failed to show that the denial of a preliminary injunction was an abuse of discretion, and he fails to show independent entitlement to a stay of execution by this Court. A writ of certiorari and a stay of execution should be denied.

Respectfully submitted,

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