Nos. 18-6893 & 18A573

IN THE

Supreme Court of the United States

JOSEPH C. GARCIA,
Petitioner,

v.

CARMELLA JONES; ED ROBERTSON; DAVID GUTIERREZ; FRED RANGEL; BRIAN LONG; FRED SOLIS; JAMES LAFAVERS; GREGORY W. ABBOTT,
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

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE McFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

MATTHEW OTTOWAY
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
matthew.ottoway@oag.texas.gov

Counsel for Respondents

CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari in a case presenting an untimely challenge to Texas's clemency process, purportedly on the basis of due process, but really on state law 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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF IN OPPOSITION

Carmella Jones, Ed Robertson, David Gutierrez, Fred Rangel, Brian Long, Fred Solis, and James LaFavers, the chair and members of the Texas Board of Pardons and Paroles (the Board), and Gregory W. Abbott, the governor of Texas, 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.

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

[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).

stay of execution. The district court found Garcia's motion to be a disguised second-or-successive habeas petition and transferred it to the Fifth Circuit, but also found insufficient reasons for reopening the case if the motion were truly one for relief from final judgment. Memorandum Opinion and Order Transferring Successive Petition, *Garcia v. Davis*, No. 3:06-CV-2185-M (N.D. Tex. Dec. 3, 2018). The Fifth Circuit affirmed the dismissal, denied authorization to proceed on a second-or-successive petition, and denied a stay of execution. *In re Garcia*, No. 18-11546, slip op. (5th Cir. Dec. 4, 2018).

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.

Most recently, Garcia filed a civil rights action 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. 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). Garcia is petitioning this Court for a writ a certiorari from this decision and requests a stay of execution. Petition for Writ of Certiorari, *Garcia v. Collier*, No. 18-6892 (U.S. Dec. 3, 2018); Application for Stay of Execution, *Garcia v. Collier*, No. 18A572 (U.S. Dec. 3, 2018). A decision remains pending.

III. The Course of Garcia's Present Lawsuit

Also very recently, Garcia filed a civil rights action challenging Texas's executive clemency system. The requested injunctive relief was 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; Pet'r App. A, at 7–11. 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); Pet'r App. A, at 1–5.

REASONS FOR DENYING THE PETITION AND STAY

Garcia's challenge to the composition of the Board of Pardons and Paroles does not sound in due process, but is rather an attempt to constitutionalize a state statute that, in any event, he erroneously reads.

But even if the composition of the Board were a constitutional matter, due process has been satisfied. Garcia's claim, which is fundamentally a state law matter, presents no reason to grant a writ of certiorari.

Nor should this disguised state law claim be the foundation for a stay of execution because there is no likelihood of success on the merits as this Court does not address insular matters of state law, the suit was not brought in a timely manner, and the equities favor Texas.

I. Garcia Fails to Provide a Compelling Reason to Grant a Writ of Certiorari.

Garcia asks the Court to address what he calls an "unsettled" question—"whether the State's failure to provide a death-sentenced prisoner with a clemency proceeding that comports with state law violates the minimal due process rights to which the Fourteenth Amendment entitles him." Pet. Writ Cert. 13. No writ of certiorari should be granted because Garcia's claim sounds in state law, not the Constitution and, even if this state statute granted Garcia a right, he misreads it.

In district court, Garcia claimed that the Board's "current composition . . . violates Texas Government Code [§] 508.032" because six of the seven members had "law-enforcement backgrounds" and "therefore

[were] not representative of the general public, in violation of Garcia's right to due process." Pet'r App. A, at 75–79. Garcia used the same legal framework for his second claim, the factual basis being that six of the seven board members are men. *Id.* at 79–80. In his third claim, Garcia alleged that § 508.032 is "a procedural safeguard intended to protect death-sentenced prisoners in clemency, and Texas's arbitrary violation of the statute violates due process." *Id.* at 80–82. The fourth and final claim was that, "[b]ecause the Board has denied Garcia's due process rights," it would violate the Eighth Amendment to execute Garcia. *Id.* at 82.

Garcia's complaints are mere matters of state law. Indeed, he *explicitly* alleged violations of § 508.032, a state statute. Pet'r App. A, at 75–80. However, 28 U.S.C. § 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). And a "[v]iolation of local law does not necessarily mean that federal rights have been invaded." *Screws v. United States*, 325 U.S. 91, 108 (1945). Because Garcia's claims allege only state law violations, they are not fit for a § 1983 suit, *see, e.g.*, *Sw. Bell Tel., LP v. Houston*, 529 F.3d 257, 260 (5th

Cir. 2008); *Cornejo v. Cty. of San Diego*, 504 F.3d 853, 855 n.3 (9th Cir. 2007), or this Court's review, *see Rivera v. Illinois*, 556 U.S. 148, 158 (2009) ("'[A] mere error of state law,' we have noted, 'is not a denial of due process.'" (alteration in original) (quoting *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982))).

Assuming that a constitutional right is implicated here, it is under the Due Process Clause, which imposes "*some* minimal procedural safeguards. . . [in] clemency proceedings." *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring). Justice O'Connor did not specify what those minimal safeguards entail, other than to suggest that flipping a coin to decide clemency or arbitrarily denying access to the available clemency process, would warrant judicial intervention. *Id.* In reviewing Ohio's clemency process, including its timing, notice, and opportunity-to-be heard rules, Justice O'Connor found that it comported with her view of due process. *Id.* at 289–90.

Garcia has never provided any court with an explanation about where his constitutional right to a particular board composition comes from. This absence is telling—and that is because it does not exist, like the right to an entitlement of clemency. *See Conn. Bd. of Pardons v.*

Dumschat, 452 U.S. 458, 464 (1981) ("[A]n inmate has 'no constitutional or inherent right' to commutation of his sentence." (quoting *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979))). A challenge to how a clemency board is selected is simply not the type of arbitrary action that Justice O'Connor believed the due process protected.

But even if due process has a role to play in the selection of clemency board members, the statute Garcia relies upon does not provide him the right he contends. Rather, § 508.032 states that "Board members must be representative of the public." Tex. Gov't Code § 508.032. "Representative," in this sentence, could mean a board member must "act as an official or delegate or agent" of the general public. *The American Heritage Dictionary of the English Language* 1490 (5th ed. 2016).

Indeed, this is likely the correct interpretation of "representative" given that another statute actually deals with "[c]omposition of [the] Board," Tex. Gov't Code § 508.031, while § 508.032 deals with "[r]equirements for [m]embership," Tex. Gov't Code § 508.032. Moreover, Garcia's interpretation of § 508.032 would create conflict given that "[a]ppointments to the [B]oard must be made without regard to the race,

color, disability, sex, religion, age, or national origin of the appointed members." Tex. Gov't Code § 508.031(b). In other words, Garcia is asking this Court to grant review in a case based on a purported state law violation which, if relief were granted, would create another state law violation lending itself to an entirely new round of challenges. Whether the Court should grant such a spurious request answers itself.

And because there is no violation of state law here, there can be no violation of the Fourteenth Amendment or the Eighth Amendment under Garcia's rationale, because those claims are predicated on a violation of § 508.032. And, fundamentally, the composition of a clemency board is no more the subject of the Due Process Clause or the Eighth Amendment than a claim alleging that a jury must reflect the population of the community in which it sits. That is not a constitutional requirement at the time of trial, *see Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."), the constitutional zenith in our criminal justice system, *see Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017) ("The criminal trial enjoys pride of place in our criminal justice system."). But "clemency [is] a prerogative

granted to executive authorities" and "it is not for the Judicial Branch to determine the standards for this discretion." *Cavazos v. Smith*, 565 U.S. 1, 8–9 (2011). Because Garcia's complaints do not make out a constitutional violation at the time of trial, they certainly do not at the time of clemency.

II. A Stay of Execution Should Be Denied.

"Filing an action that can proceed under § 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.

For the reasons above—because Garcia's claim is a state law matter, because he fails to show a state law violation, and because the Constitution does not protect the right he claims—he fails to make a strong showing of likely success on the merits. *See supra* Argument I.

Relatedly, Garcia also fails to prove irreparable harm because he fails to show either a state or constitutional violation in the makeup of the Board. In other words, the Board's *vote* did not harm him because the Board was not illegally comprised.

Further, the balance of equities favors Texas here. "Both 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 unfounded claims of constitutional violations in the clemency process are no reason to delay his execution any longer. *See Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice.").

Finally, "[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 execution was set five months ago, yet his current suit was filed only five days before his execution. And he could have filed long ago because the Board's current "membership has been in place for more than five months." Pet'r App. A, at 9. Because 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), he should not be granted a stay of execution.

CONCLUSION

Garcia has failed to show that there are compelling grounds for a writ of certiorari, and he fails to show entitlement to a stay of execution. Both should therefore be denied.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

ADRIENNE MCFARLAND
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Criminal Appeals Division

MATTHEW OTTOWAY
Assistant Attorney General
State Bar No. 24047707
Counsel of Record

Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400
matthew.ottoway@oag.texas.gov

Attorneys for Respondents