No. 18-6893, 18A573

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH C. GARCIA,
Petitioner,

vs.

CARMELLA JONES et. al.,
Respondent.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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

JON M. SANDS
Federal Public Defender
District of Arizona

Jennifer Y. Garcia (Arizona Bar No. 021782)
Counsel of Record
Edward Flores (Louisiana Bar No. 37119)
Assistant Federal Public Defenders
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
(602) 889-3960 facsimile
Jennifer_Garcia@fd.org
Edward_Flores@fd.org
Counsel for Petitioner Joseph C. Garcia

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In their Brief in Opposition ("BIO"), Respondents advance a number of arguments in opposition to Garcia's petition for a writ of certiorari ("Petition"), all of which must be rejected. As Garcia will demonstrate herein, Respondents' arguments fail to appreciate the character of Garcia's constitutional challenge to Texas's failure to adhere to its statutory clemency scheme in his case, as well as the importance—and heretofore unsettled nature—of the questions that he has presented before this Court.

I. This Court has jurisdiction over Garcia's claims.

The State repeats throughout its brief that Garcia's claims are "mere matters of state law" and that Garcia alleges "only state law violations." (BIO at 6.) But the heart of Garcia's claim is not State law, but rather the minimal due process guarantees that this Court has recognized exist in clemency proceedings. *See Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 289 (1998) (holding that the Court of Appeals correctly concluded that some minimal procedural safeguards apply to clemency proceedings"). As Garcia still has a life interest, *Woodard*, 523 U.S. at 288, he is still afforded minimal protections by the Due Process Clause of the Fourteenth Amendment. Those rights—not any State law right—have been transgressed by Texas. This case is no different than what Respondents cite to *Woodard* for—that is, that a State's rules and regulations related to clemency proceedings can come properly under a due process analysis. *See Woodard*, 523 U.S. at 290 ("The process

respondent received . . . *comports with Ohio's regulations* and observes whatever limitations the Due Process Clause may impose on clemency proceedings." (emphasis added)).

Respondents also mischaracterize the right Garcia is attempting to vindicate as a "constitutional right to a particular board composition . . . ." (BIO at 7.) As noted above, however, Garcia's claim is grounded—and has consistently been grounded—in the right to minimal due process safeguards during clemency proceedings. Garcia is *not* arguing that he is entitled to a particular board composition. Instead, Garcia has argued that Texas's clemency statutes, of which Texas Government Code section 508.032 is a part, are one mechanism that Texas has created to safeguard the process that is due to a death-sentenced prisoner in a clemency proceeding. A state is therefore not free, consistent with the Due Process Clause, to violate its own rules without also violating the rights that its laws are meant to protect. *See, e.g.*, *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998) (holding that "the minimal application of the Due Process Clause only ensures a death row prisoner that *he or she will receive the clemency procedures explicitly set forth by state law* . . . ." (emphasis added)); *Noel v. Norris*, 336 F.3d 648, 649 (8th Cir. 2003) ("[I]f the state actively interferes with a prisoner's access to the very system that it has itself established for considering clemency petitions, due process is violated.").

Respondents also attempt to argue that there is no violation of section 508.032 but rely on an incorrect interpretation of "representative" in section 508.032's

language that Board members "must be representative of the general public." (BIO at 8.) Respondents contend that representative simply means acting as a delegate or agent of the general public. (BIO at 8.) However, other Texas statutes demonstrate that Respondents' interpretation is incorrect. For example, one statute specifies that four members "must be *representatives of* the general public." Tex. Gov't Code § 511.004 (emphasis added). Another statute specifies that "[e]ach member of the commission must be *a* representative of the general public." Tex. Occ. Code § 51.053 (emphasis added). In other words, these statutes, by using "representatives" and "a representative" communicate the intended agent relationship between the member and the general public. *See*, *e.g.*, Tex. Gov't Code § 441.001 ("All seven members must be *representatives of* the general public." (emphasis added)); Tex. Fin. Code Ann. § 11.102(c) ("Six members of the finance commission must be *representatives of* the general public." (emphasis added)). If the Texas legislature had intended for Board members to merely be agents or delegates of the general public, then they would have included more precise language, as the statutes above demonstrate. *See Adams v. Tenneco Auto. Operating Co.*, 359 F. Supp. 2d 834, 836 (D. Neb. 2005) ("It is not for the courts to supply missing words or sentences to a statute to make clear that which is indefinite, or to supply that which is not there."). Furthermore, Respondents ignore that section 508.032 has a subsection limiting the number of former TDCJ employees to only three. Tex. Gov't Code § 508.032(c). If Board members were simply agents or delegates of the general public, then the statute itself would not have attempted to

limit Board membership based on specific professional and ideological backgrounds. Respondents' interpretation of section 508.032 should be rejected.

Respondents assert that Garcia's interpretation of section 508.032 would create a conflict with Texas Government Code section 508.031(b), "[a]ppointments to the board must be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointed members." As Garcia acknowledged in the Fifth Circuit Court of Appeals, it is clear that the two sections are in tension with one another, as section 508.032—by requiring that the Board be representative of the general public—appears to invite consideration of that which section 508.031(b) prohibits. However, these two sections can be reconciled. The categories in section 508.031(b) are generally highlighted to identify discrimination based on those categories. *Cf. Donaldson v. Tex. Dep't of Aging & Disability Servs.*, 495 S.W.3d 421, 449 (Tex. App. 2016). Put differently, consideration of race, color, sex and other categories cannot be considered to discriminate against an applicant. The statutes can be read as allowing, for example, sex as one factor to be considered in order to comply with section 508.032, but prohibiting the consideration of sex to discriminate against women in the appointment process. This aspect of Respondents' argument must also be rejected.

The question of what minimal due process entails during a clemency proceedings was left open by *Woodard*, and Circuit Court of Appeals, including the Fifth Circuit below, have answered that question divergently. Given the unsettled

nature of these due process rights and the life or death consequences attendant to it, this Court should grant Garcia's petition for a writ of certiorari.

II. Garcia's Petition presents important, and heretofore unresolved, questions of federal constitutional law and has made a strong showing that he is likely to prevail on their merits.

While Respondents acknowledge that the criteria set forth by this Court's decision in *Nken v. Holder*, 556 U.S. 418, 433–34 (2009), governs the question of whether this Court should grant Garcia's request for equitable relief (BIO 10), they contend that Garcia has failed to show that he is likely to succeed on the merits of his claim because it "is a state law matter" (BIO at 10–11). Respondents' strawman argument must be rejected. For as set forth *supra* and in Garcia's Petition for a Writ of Certiorari, the question that Garcia raised in the United States District Court for the Southern District of Texas, in the Fifth Circuit Court of Appeals, and in this Court is, unequivocally, an important and heretofore unresolved question of federal constitutional law.

Rather than engage with the myriad cases out of the Circuit Courts of Appeal that Garcia's Petition cites, and which document the existence of a widespread split among the Circuits on the very federal questions that Garcia asks this Court to now answer, Respondents simply ignore them. Indeed, *nowhere* in Respondents' Brief in Opposition is the confusion among the Circuits on the very questions that Garcia's Petition presents even acknowledged. *See, e.g.*, *Gissendaner v. Comm'r. Ga. Dep't Corrs.*, 794 F.3d 1327, 1330 (11th Cir. 2015) ("[T]he Due Process clause does not

require the States to comply with state-created procedural rules . . . Instead, it requires them to adhere to a certain minimal level of process."); *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998) ("Because clemency proceedings involve acts of mercy that are not constitutionally required, the minimal application of the Due Process Clause only ensures a death row prisoner that he or she will receive the clemency procedures explicitly set forth by state law."); *Newman v. Beard*, 617 F.3d 775, 783–84 (3d Cir. 2010) (citing *Block v. Potter*, 631 F.2d 233, 240 (3d Cir. 1980) ("[T]he Board applied standards that are divorced from the policy and purpose of parole, . . . violating [the inmate's] right to due process of law.")); *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (stating that a clemency petitioner's minimal due process may be violated where "the Governor's procedures are 'infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence.'" (quoting *Woodard*, 523 U.S. at 290–91 (Stevens, J., concurring and dissenting in part)); *Bowens v. Quinn*, 561 F.3d 671, 675–76 (7th Cir. 2009) (finding that minimal due process protections do not entitle clemency petitioners to impose time limitations on the Governor's consideration of a clemency application where state law imposed no such time requirement); *Workman v. Summers*, 111 F. App'x. 369, 371 (6th Cir. 2004) (suggesting that because there is no constitutional right to clemency proceedings in the first instance, there can be no minimal due process violation attendant to clemency proceedings short of flipping a coin to determine the outcome, or arbitrarily denying a prisoner access to an otherwise available process altogether);

Faulder v. Texas Board of Pardons and Paroles, 178 F.3d 343, 344 (5th Cir. 1999) (reading *Woodard*, and the minimal due process protections applicable to clemency proceedings that it recognized, as prohibiting only "an arbitrary clemency proceeding akin to the flip of a coin or a complete denial of access to the clemency process").

Only by mischaracterizing Garcia's due process claim and ignoring a widespread Circuit split are Respondents able to contend that "Garcia fails to provide a compelling reason to grant a writ of certiorari." (BIO at 5.) In so doing, Respondents also ignore the very Rules of this Court. *See* Sup. Ct. R. 10(a) (including among the considerations governing review on certiorari where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"). Respondents' argumentative fallacy must be rejected.

CONCLUSION

Respondents have advanced no meritorious argument against this Court granting Garcia's Petition for a Writ of Certiorari and his request for equitable relief. Garcia thus asks that this Court take up the important, and unresolved, federal constitutional questions that his Petition presents, and stay his impending execution.

Respectfully submitted: December 4, 2018.

JON M. SANDS
Federal Public Defender

s/ Jennifer Y. Garcia
Counsel of Record
Edward Flores
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816 telephone
(602) 889-3960 facsimile
Jennifer_Garcia@fd.org
Edward_Flores@fd.org