

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH C. GARCIA,
Petitioner,

vs.

BRYAN COLLIER, et al.,
Respondents.

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

APPLICATION FOR STAY OF EXECUTION

****CAPITAL CASE****

Execution Scheduled for TUESDAY, DECEMBER 4, 2018

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APPLICATION FOR STAY OF EXECUTION

To The Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(f) and Supreme Court Rule 23, Petitioner Joseph C. Garcia respectfully requests a stay of his execution currently scheduled for after 6:00 p.m. CST on Tuesday, December 4, 2018. Concurrent with this document, Garcia is filing a petition for writ of certiorari asking this Court to review the judgment¹ of the United States Court of Appeals for the Fifth Circuit. That court denied Garcia's motion to stay his execution and dismissed his appeal from the United States District Court for the Southern District of Texas's denial of his motion for preliminary injunction against Respondents. Important questions of whether a state may impede a condemned prisoner from succeeding on an Eighth Amendment challenge by refusing to provide him with the information needed to prove the claim, and whether a petitioner must plead a known and available alternative method of execution where the petitioner seeks only to prevent the use of an execution drug from a specific troubled supplier, will become moot if Garcia is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring).

¹ The order of the United States Court of Appeals for the Fifth Circuit and the order from the United States District Court for the Southern District of Texas are appended to Garcia's concurrently filed Petition for Writ of Certiorari.

ARGUMENT

To obtain a stay of execution, a death-row prisoner must show that four factors, balanced together, weigh in favor of a stay: (1) a likelihood of success on the merits; (2) a likelihood of suffering irreparable harm without a stay; (3) the balance of hardships tips in his favor; and (4) a stay is in the public interest. *See Rhoades v. Blades*, 661 F.3d 1202, 1203 (9th Cir. 2011) (citing *Beatty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011)); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009); *In re Campbell*, 750 F.3d 523, 534 (5th Cir. 2014).

In this case, Garcia has presented a strong showing that he is likely to succeed on the merits of his claims regarding his constitutional rights to access the courts and petition the government for redress, and to ensure that his execution is not in violation of the Eighth Amendment. Garcia seeks only to prevent being executed with drugs from a disreputable compounding pharmacy, which poses a substantial risk of serious harm to him. The balance of factors weighs in his favor, and as explained in Garcia's concurrently filed petition, his First, Eighth, and Fourteenth Amendment rights will be violated if relief is not granted.

The questions whether (1) the State may impede Garcia's access to information that the courts maintain is necessary to plead his claim; and (2) whether he must plead a known and available alternative where he does not challenge his method of execution, are issues that must be resolved to prevent the unconstitutional application of the death penalty where unresolved constitutional challenges remain and there is a substantial risk of cruel and unusual punishment, in violation of the Eighth Amendment.

1. **Garcia has presented a strong showing that he is likely to succeed on the merits on his claim that the State may not deliberately prevent a prisoner from obtaining information essential to proving that it intends to execute him in violation of the Eighth Amendment, and that he need not plead a known and available alternative when he does not challenge the method of execution.**

Garcia's petition for certiorari asks the Court to resolve the issues of whether the State may execute him using drugs from a disreputable source, which poses a substantial risk of serious harm, in violation of his Eighth Amendment right to be free from cruel and unusual punishment, and prevent him from vindicating this right by deliberately concealing information he needs to prove his claim. Further, he has asked the Court to resolve whether he needs to plead a known and available method of execution where he does not challenge his method of execution. This Court should grant Garcia's petition for writ of certiorari to resolve these serious questions going to the constitutionality of Garcia's planned execution, to the State's power to violate the United States Constitution and cloak its violations in secrecy, and to the core of the First, Eighth and Fourteenth Amendments. Accordingly, this factor weighs in favor of granting a stay of execution.

2. **Garcia will suffer irreparable harm absent a stay of execution.**

It is evident that Garcia will suffer irreparable harm without a stay of execution. The death penalty is "unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). If Garcia is executed as scheduled, then his death sentence will be carried out in violation of the First, Eighth, and Fourteenth Amendments. His execution would moot his appeal,

and leave the serious questions raised in his petition for writ of certiorari unresolved. Thus, this factor also weighs in favor of a stay of execution.

3. The balance of hardships tips in Garcia's favor.

Garcia will suffer irreparable harm if he is executed in violation of his First, Eighth, and Fourteenth Amendment rights. Garcia is not asking the State to be forbidden from executing him. Rather, he asks for a stay long enough to allow for plenary consideration of his petition.

Should this Court ultimately affirm the United States Court of Appeals for the Fifth Circuit, the State's executioners presumably will be available to carry out Garcia's execution. The State will not suffer prejudice if it must wait a short time before carrying out Garcia's execution. Garcia only learned of the information giving rise to his claims on November 28, 2018, as the result of a news investigation, and has not had an opportunity to vindicate his constitutional rights. The State has not thus far responded to any of the pleadings that Garcia has filed. Insofar as failing to grant a stay of execution imposes an irreparable hardship only on Garcia and not on the State, the third factor favors Garcia as well.

4. A stay of execution is in the public interest.

Finally, a stay of execution is in the public interest. In general, the public interest is served by enforcing constitutional rights. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005).

This appeal focuses on a death-sentenced prisoner's right to access the courts and receive adequate information to ensure that he is not executed using drugs from a source repeatedly cited by state and federal regulators for unsafe practices. Further,

this appeal considers whether the petitioner must plead an alternative method of execution when he does not challenge his method of execution.

The public interest is not served by a state's deliberate indifference to its citizens' right to be free from cruel and unusual punishment. The public interest is not served by the State executing people using drugs from an unsafe and unsanitary source that will result in severe pain, in violation of the Eighth Amendment right to be free from cruel and unusual punishment. It is also not served by a state refusing to disclose information about its source of execution drugs, such that the public in general and a person facing a death sentence does not have sufficient information to ensure that he does not needlessly suffer unconstitutional pain. *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)). And, the public has an interest in being informed about how the State implements its most serious penalty.

The public is not served by denying a death-sentenced prisoner his rights to access the courts, due process, and freedom from cruel and unusual punishment. *See Gregg*, 428 U.S. at 188 (joint opinion of Stewart, Powell, and Stevens, JJ.) (recognizing that "death is different in kind from any other punishment imposed under our system of criminal justice"). Moreover, the public has an interest in ensuring that the State of Texas carries out only lawful executions, and does not cloak its unconstitutional actions in secrecy. Accordingly, this factor also weighs in favor of granting a stay of the execution currently scheduled for December 4, 2018.

CONCLUSION

For the foregoing reasons, the considerations for granting a stay of execution weigh in Garcia's favor, and thus Garcia requests that Your Honor or this Court enter

a stay of execution to permit the Court to fully consider this petition without it becoming moot by virtue of his execution.

Respectfully submitted:

December 3, 2018

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