

No. \_\_\_\_\_

**IN THE SUPREME COURT OF THE UNITED STATES**

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Joseph C. Garcia,  
Petitioner,

vs.

Lorie Davis, Director,  
Texas Department of Criminal Justice  
Correctional Institutions Division,  
Respondent.

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

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**APPLICATION FOR STAY OF EXECUTION**

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**\*\*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*  
Jessica M. Salyers  
Arizona Bar No. 032702  
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

*Counsel for Petitioner Joseph C. Garcia*

## **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 judgment<sup>1</sup> of the United States Court of Appeals for the Fifth Circuit. That court denied Garcia's motion to stay his execution and dismissed his motion for remand to the United States District Court for the Northern District of Texas to grant Garcia's Rule 60(b) motion to re-open his federal habeas corpus proceedings. This important issue of whether Garcia's federal habeas proceedings suffered from a procedural defect resulting in a loss of meaningful federal habeas corpus review of his unconstitutional convictions and sentences will become moot if Garcia is executed as scheduled. *See Wainwright v. Booker*, 473 U.S. 935, 936 (1985) (Powell, J., concurring).

### **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

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<sup>1</sup> The order of the United States Court of Appeals for the Fifth Circuit and the order and judgment from the United States District Court for the Northern District of Texas are appended to this application.

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 *Beaty v. Brewer*, 649 F.3d 1071, 1072 (9th Cir. 2011)). Instead of showing a likelihood of success on the merits, a petitioner may demonstrate that “serious questions going to the merits” of his claims are presented in his appeal, and he may obtain a stay as long as the other three factors weigh in his favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). In this case, Garcia has presented a serious question about whether he received meaningful federal habeas corpus review of his convictions and death sentence as contemplated by 18 U.S.C. § 3599. As explained in Garcia’s concurrently filed petition, the failures of his appointed federal habeas counsel prevented him from raising four meritorious constitutional challenges to his conviction and sentence. The question whether the death penalty can properly be applied to one who has been denied the ability to meaningfully challenge his state-imposed death sentence in the federal courts must be resolved to forestall the arbitrary application of this ultimate penalty in cases where unresolved federal constitutional challenges remain because it furthers no permissible penological purpose and is inherently unreliable. This is especially true when the United States Court of Appeals for the Fifth Circuit applied an incorrect standard in denying Garcia’s appeal.

- 1. Garcia has presented serious questions about whether the death penalty may constitutionally be imposed on an offender who neither killed nor intended to kill.**

Garcia’s petition for certiorari asks the Court to resolve the issue of whether the Fifth Circuit applied an incorrect and unduly burdensome standard in denying the

merits of Garcia's Rule 60(b) motion, and the accompanying issue as to whether the denial of meaningful representation by counsel can constitute a defect in the integrity of federal habeas proceedings sufficient to justify reopening the prior judgment. As explained in detail in Garcia's petition, his previous federal habeas counsel failed to perform reasonably in their representation of him, and as a result he has meritorious claims regarding the ineffective assistance of his trial counsel that have never been properly raised to and decided by any court. Accordingly, Garcia has presented a serious question whether his execution is constitutionally permissible when meritorious federal constitutional claims remain unresolved. Further, the Fifth Circuit has continued to apply an incorrect standard when evaluating motions for certificates of appealability, furthering the injustice of Garcia's situation. This Court should grant Garcia's petition for writ of certiorari to resolve these serious questions going to the substantive constitutionality of Garcia's conviction and sentence. 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 on one who neither killed nor intended to kill, and who is therefore not "the worst of the worst," in violation of the Eighth Amendment. 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 Eighth and Fourteenth Amendment rights. Conversely, the State suffers no injury should this Court enter a stay to allow for plenary consideration of Garcia's 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. 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 Garcia's statutory right to the meaningful assistance of federal habeas counsel in presenting his constitutional claims for relief to the federal courts. The public interest is not served by executing those with unresolved, meritorious constitutional claims for relief, because the punishment then serves no legitimate penological interest. The public interest weighs especially in favor of addressing this issue in a case involving the most serious of penalties. *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 interest is served by ensuring that Garcia's sentence is constitutional before it is carried out by the State of Texas. 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 appeal without it becoming moot by virtue of his execution.

Respectfully submitted:

December 4, 2018

JON M. SANDS  
Federal Public Defender

s/ Jennifer Y. Garcia

Jennifer Y. Garcia

*Counsel of Record*

Jessica M. Salyers  
850 West Adams Street, Suite 201  
Phoenix, Arizona 85007  
(602) 382-2816 telephone  
(602) 889-3960 facsimile  
Jennifer\_Garcia@fd.org