No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

DAVID S. RENTERIA

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

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

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EMERGENCY APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

****Execution scheduled for Thursday, November 16, 2023, at 6 p.m.****

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APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Samuel Alito, Associate Justice, and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

INTRODUCTION

On November 16, 2023, David Renteria is scheduled to be executed by an injection of compounded pentobarbital that has unnecessarily and been left to degrade so that non-lethal degradants, some known to cause pain, can precipitate into the solution. Mr. Renteria argued that the executioner's unnecessary adulteration of the lethal injection drug violates his Eighth Amendment right to be free from cruel and unusual punishment and his right not to be deprived of life outside the due process of law.

Mr. Renteria supported his claims with uncontested evidence showing the following regarding the mental state and actions of the Director of Texas's prison system, the state official given discretion over execution procedures: (1) the Director uses *compounded* pentobarbital that (2) he knows is inherently unstable and (3) quickly degrades into non-lethal substances if it is not kept cold. Petitioner's uncontested evidence showed the Director is aware that (4) some of those degradants are crystalline

and can cause severe pain at injection sites, and (5) others are viscous and can cause quantities of the lethal substance to leak into surrounding tissue. The State did not dispute (6) that it is unnecessary for the Director to stockpile compounded pentobarbital, or (7) that it is unnecessary for the Director to store the drug at room temperature, as he does. Texas also did not dispute (8) that every other State similarly situated to Texas has abandoned the use of stockpiled, unrefrigerated drugs because of the risks they entail. Finally, it was uncontested that (9) Petitioner and others similarly situated fear the pain associated with those non-lethal degradants.

The Texas Court of Criminal Appeals (TCCA) rejected these claims on the merits, concluding that Mr. Renteria's uncontested evidence failed to state a prima facie case under this Court's decision in *Glossip v. Gross*, 576 U.S. 863, 877 (2015), because he did not show "that *any* condemned inmate has been subjected to cruel and unusual punishment from the use of pentobarbital, much less that Applicant himself will be." Op. 5. The requirement that an inmate present evidence that an Eighth Amendment violation has already occurred or that he "will be" harmed is in direct conflict with this Court's holding that "an inmate challenging a protocol bears

the burden to show, based on evidence presented to the court, that *there is a substantial risk of severe pain*." *Glossip*, 576 U.S. at 882 (emphasis added). [1]

The TCCA's order raises significant questions this Court should consider. First, the order does not account for the Director's failures to follow the law in carrying out Texas executions. "Due process of law is process due according to the law of the land." *Walker v. Sauvinet*, 92 U.S. (2 Otto) 90, 93 (1875); *see also Hurtado v. People of California*, 110 U.S. 516, 540-541 (1884) (equating "by the law of the land" with "due process of law"). This Court's Eighth Amendment analysis thus holds that the degree of punishment to be inflicted "for specific crimes involves a substantive penological judgment that … is properly within the province of legislatures." *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991).

Texas law delegates to the director of the State's prison system (the Director) the discretion and responsibility to "determine and supervise"

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[1] The TCCA also plainly violated the rule of *Hansberry v. Lee*, 311 U.S. 32 (1940), when it upheld the purported adjudication of Mr. Renteria's claims in an order that merely copied verbatim the text of an order from a different case in which Renteria was not a party, was not served with either the petition or the response, and that raised different claims under different legal theories and with different facts and evidence. Op. 4 (finding no error "Although the trial court may have worded its order somewhat inartfully and *included a recitation of some claims not actually raised in Applicant's writ application*.") (emphasis added).

the selection of a "lethal substance or substances of sufficient quantity to cause death" and the procedure the substance's use. Tex. Code Crim. P. art. 43.14(a).

The Director adopted and published an execution procedure that calls for the use of a lethal dose of pentobarbital. But the uncontested evidence Mr. Renteria presented showed the Director's procedure—in practice but not as written and publicized—requires the use of degraded pentobarbital.

Article 43.24 of the Texas Code of Criminal Procedure aligns with the Eighth Amendment's Cruel and Unusual Punishments Clause by prohibiting the Director and his supervisees from inflicting "torture, ill treatment, or unnecessary pain" on a person sentenced to death by lethal injection. *Id*. art. 43.24. *Cf. Bucklew v. Precythe*, 139 S. Ct. 1112, 1126-27 (2019).

However, the State did not dispute Petitioner's evidence that the Director omitted Article 43.24 from the statutes he considered when adopting the execution procedure. Practically, this means, for example, that the procedure does not require or permit testing for the presence of

non-lethal adulterants in the stockpiled, unrefrigerated vials of compounded pentobarbital.

The State also did not dispute Petitioner's evidence that the Director's published procedure misleads the public about the stockpiling by stating that pentobarbital will be "mixed" in lethal quantity at the time of an execution. The record below also contains undisputed evidence the Director and his supervisees deviate from the procedure in other ways, for example, by releasing vials of pentobarbital to third-parties for undefined, unsupervised testing, and by failing to have back-up vials on hand if degradants cause leakage such that the first vial's contents were not sufficient to cause death.

Finally, Texas did not dispute that the Director conceals the gratuitousness of the terror and pain induced through this process by misleading courts to believe the room-temperature stockpiling is unavoidable.But, as Mr. Renteria demonstrates in his petition for certiorari, the Director has not complied with these laws. Instead, even in the fact of evidence available in late 2022 that his practices risk causing significant pain and are certainly causing extreme psychological suffering, he has

flouted the very laws that would prevent both. In doing so, he violates Mr. Renteria's right to due process of law.

The TCCA's mere citation of *Glossip* in support of its ruling does not account for the Director's intentional and malicious indifference to the harm he is causing. When prison officials act unnecessarily and wantonly they violate the Eighth Amendment—"whether or not significant injury is evidence." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). Here, the Director is certainly aware that he violates the law in his procurement compounded pentobarbital. And, as of late 2022, he was aware of the significant risk of physical pain that his actions created. Further, the Director could not have been unaware that his continued refusal to bring his actions into compliance with the law and to even provide information that could assure persons to be executed that they would not suffer pain was causing severe psychological distress. *See State of La., ex rel Francis v. Resweber*, 329 U.S. 459, 464 (1947) (wanton infliction of psychological pain beyond what is inherent in the method of execution violates the Eighth Amenment).

Mr. Renteria's case thus presents the important, and novel, question whether the TCCA's failure to account both for the maliciousness of

the Director's actions and the infliction of psychological suffering in its decision that the Director's actions do not violate the Eighth Amendment—a question that, given this Court's precedent, is likely to be answered in Mr. Renteria's favor.

Mr. Renteria respectfully requests a stay of his execution, currently scheduled for today, November 16, 2023, at 6. p.m. Central Standard Time, pending its disposition of his petition for writ of certiorari. As set out below, this case satisfies each consideration relevant to that determination.

RENTERIA IS ENTITLED TO A STAY

The standard for granting a stay of execution is well-established. This Court will consider the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). There must be "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and "a significant possibility of reversal of the lower court's decision," in addition to irreparable harm. *Barefoot v. Estelle*, 463 U.S. 880,

895 (1983) (citation omitted). These factors weigh in favor of staying Mr. Renteria's execution pending this Court's review of the issues raised in his petition for certiorari.

I. A reasonable probability exists that the Court will grant certiorari because Mr. Renteria has presented significant issues on which he is likely to prevail in this Court.

Mr. Renteria makes an as-applied challenge nor a facial challenge to Texas' method of execution. Instead, Mr. Renteria challenges the pervasive lawlessness of Texas' executioner. Mr. Renteria has accumulated an extraordinary and unrebutted body of evidence that the Texas state official with the statutory duty to ensure lawful executions, the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, refuses to follow the statutes that define that duty.

As a death-row inmate in Texas with an execution date pending, Mr. Renteria has a Fourteenth-Amendment liberty interest in the Texas statutes that ensure lawful executions in Texas. The Director has established a pattern of violating those statutes and of deceiving the public and the courts about those illegal practices. There is a reasonable probability that this Court will grant certiorari in this case because, on the

facts establishing Mr. Renteria's liberty interests and the Director's lawless indifference to violating them, Mr. Renteria presents "an important federal question that has not been, but should be, settled by this Court[.]" Supreme Court Rule 10(c).

II. Mr. Renteria will suffer irreparable harm absent a stay.

Irreparable harm is indisputably present when a stay of execution is sought. As this Court has explained, "death is different"—"execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases.").

In this capital case, Mr. Renteria's irreparable injury would be a by-product of the State's unconstitutional behavior. Mr. Renteria—like others recently subjected to execution in Texas—has diligently gathered evidence of the State's willful indifference to the condition of its pentobarbital supply and presented that evidence to state courts. The Director has simply refused to store and administer pentobarbital in a manner that comports with the Eighth Amendment. And, the courts have refused to

require the Director to do so. This Court should not allow Mr. Renteria to be executed—likely suffering intense and unnecessary pain—without affording him the opportunity to have his removal claim meaningfully heard.

In weighing the equities, the State's undoubted interest in carrying out the sentence must yield to the public interest in seeing that a condemned man is not put to death in a manner that violates the Eighth Amendment. The right protected by that Amendment are uniquely responsive to public will. *See Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992) (the objective component of the Eighth Amendment is "responsive to 'contemporary standards of decency'" (citation omitted)). A stay of execution, in fact, will serve the strong public interest—an interest the State of Texas shares—in administering capital punishment in a manner consistent with the Constitution.

III. Mr. Renteria has not delayed seeking a stay.

Mr. Renteria received the TCCA's decision at 1:57 p.m. on this date of filing. Mr. Renteria's petition is not a "last-minute attempt[ ] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quotation marks and citation omitted). In January 2022, a Texas

civil district judge found that the Directors' actions in procuring, selecting, storing, and administering pentobarbital violate Texas law and are likely to result in unnecessary pain. *See* Temporary Injunction of Travis County Civil Dist. Court, *Ruiz et al. v. TDCJ et al.* (Jan. 10, 2023). Based on these findings, the court issued a temporary injunction against the administration of adulterated pentobarbital. *Id.*

The court's findings gave Mr. Renteria reason to believe his eventual execution would violate the Eighth Amendment. However, the *Ruiz* proceedings did not present a promising avenue for vindicating his rights. Arguing that the injunction effectively and impermissibly stayed already-scheduled executions, the Attorney General convinced the TCCA to lift it, at least as to the defendants for whom an execution had been scheduled—something, the TCCA found, only it could do. *See* Director's Mandamus Petition, *Ruiz et al. v. TDCJ et al.* Thus, had Mr. Renteria filed a civil suit, he would have risked being unable to take advantage of any injunctive relief granted if his execution date were set—which it was, in May 2023.

In addition, it was not until after the *Ruiz* hearing that Mr. Renteria learned of evidence that, in January 2023, the Director had deliberately withheld evidence from the *Ruiz* court that it had, in fact, possessed unexpired pentobarbital—because the state "want[ed] to be able to continue to preserve the ability to use any of the drugs in our inventory because we believe they are still viable to be used in executions[.]"[2] In his petition, Mr. Renteria relies on evidence of the Director's duplicitousness to support his claim that Texas is willfully and maliciously acting in disregard of likely pain its practices will cause Mr. Renteria.

Research suggested § 11.05, an infrequently relied upon provision allowing habeas relief, provided a possible vehicle for relief in claims regarding the Director's Eighth Amendment violations to the attention of the TCCA, and, when Renteria had gathered the evidence necessary to raise his claims, he did so expeditiously. That the Director and the courts have sought to preclude Mr. Renteria from vindicating his claims should not be used against him as evidence of delay.

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[2] *See* Jolie McCullough, The Texas Tribune, *Texas executes Wesley Ruiz despite ongoing fight over state's use of old lethal injection drugs* (Feb. 1, 2023), at https://www.texastribune.org/2023/02/01/texas-execution-drugs-wesley-ruiz/.

CONCLUSION

For these reasons, this Court should enter an order staying Mr. Renteria's execution pending resolution of the issues raised in his petition for writ of certiorari.

Respectfully submitted,

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