

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

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In the Supreme Court of the United States

October Term 2023

**DAVID SANTIAGO RENTERIA,**

Petitioner,

v.

**STATE OF TEXAS,**

Respondent.

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

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**PETITION FOR WRIT OF CERTIORARI**

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**\*\*EXECUTION SCHEDULED FOR NOV. 16, 2023**

**AT 6:00 PM CST\*\***

**CAPITAL CASE**  
**QUESTIONS PRESENTED**

1. Does a State deprive a person of life without due process of law when it delegates to its executioner unchecked discretion to ignore a state law prohibiting torture, ill treatment, or unnecessary pain, and permits him to inject prisoners with non-lethal substances in violation of a state law authorizing him to use only lethal substances in sufficient quantity to cause death?
  
2. Does uncontroverted evidence that an executioner is acting outside his lawful authority, or wantonly and unnecessarily, in a manner that causes terror and a risk of severe pain demonstrate that the executioner has *superadded* terror or pain to the execution process?

## **CORPORATE DISCLOSURE STATEMENT**

Petitioner is David Santiago Renteria, a death-sentenced Texas inmate scheduled for execution on November 16, 2023, at 6:00 pm CST.

Respondent is the State of Texas.

## LIST OF PROCEEDINGS

*Ex parte Renteria*, 20020D00230 (327th Dist. Ct., El Paso County, Tex. Nov. 2, 2023) (Application for Writ of Habeas Corpus)

*Texas v. Renteria*, 20020D00230 (327th Dist. Ct., El Paso County, Tex. Nov. 13, 2023) (Order Denying Application for Writ of Habeas Corpus)

*Ex parte Renteria*, No. AP-77,118 (Tex. Crim. App. Nov. 14, 2023) (Motion for Stay Pending Appeal)

*Ex parte Renteria*, No. AP-77,118 (Tex. Crim. App. Nov. 14, 2023) (Motion to Complete the Record)

*Ex parte Renteria*, No. AP-77,118 (Tex. Crim. App. Nov. 15, 2023) (Brief of Applicant-Appellant)

*Ex parte Renteria*, No. AP-77,118 (Tex. Crim. App. Nov. 16, 2023) (Order Denying Motion to Stay and Affirming Denial of Application for Writ of Habeas Corpus)

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, David S. Renteria, is a condemned prisoner in the custody of the Texas Department of Criminal Justice, Correctional Institution Division. His execution is scheduled for November 16, 2023, at 6 p.m. at the State Penitentiary at Huntsville.

He seeks certiorari review of two federal questions related to the way the State of Texas intends to carry out his execution. The trial court denied relief. The Texas Court of Criminal Appeals affirmed the denial.

### **OPINIONS BELOW**

The November 13, 2023, Order of the 327th District Court of El Paso County, Texas denying relief is not reported. A copy is attached.

The November 16, 2023, Order of the Texas Court of Criminal Appeals in Austin, Texas affirming denial is not reported. A copy is attached.

### **JURISDICTION**

The 327th District Court had jurisdiction over the claims under Article I, § 12 of the Texas Constitution and Texas Code of Criminal Procedure Article 11.05.



The Texas Court of Criminal Appeals had jurisdiction over appeal of the trial court's denial under Article I, § 12 of the Texas Constitution and Texas Code of Criminal Procedure Articles 11.05 and 11.071.

The judgment of the Texas Court of Criminal Appeals was entered on November 16, 2023.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution states: “No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]” U.S. CONST. amend. XIV, § 1.

Texas Code of Criminal Procedure Article 43.14(a), “Execution of Convict,” states: “[T]he sentence shall be executed . . . by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice.” Tex. Code Crim. Proc. art. 43.14(a).

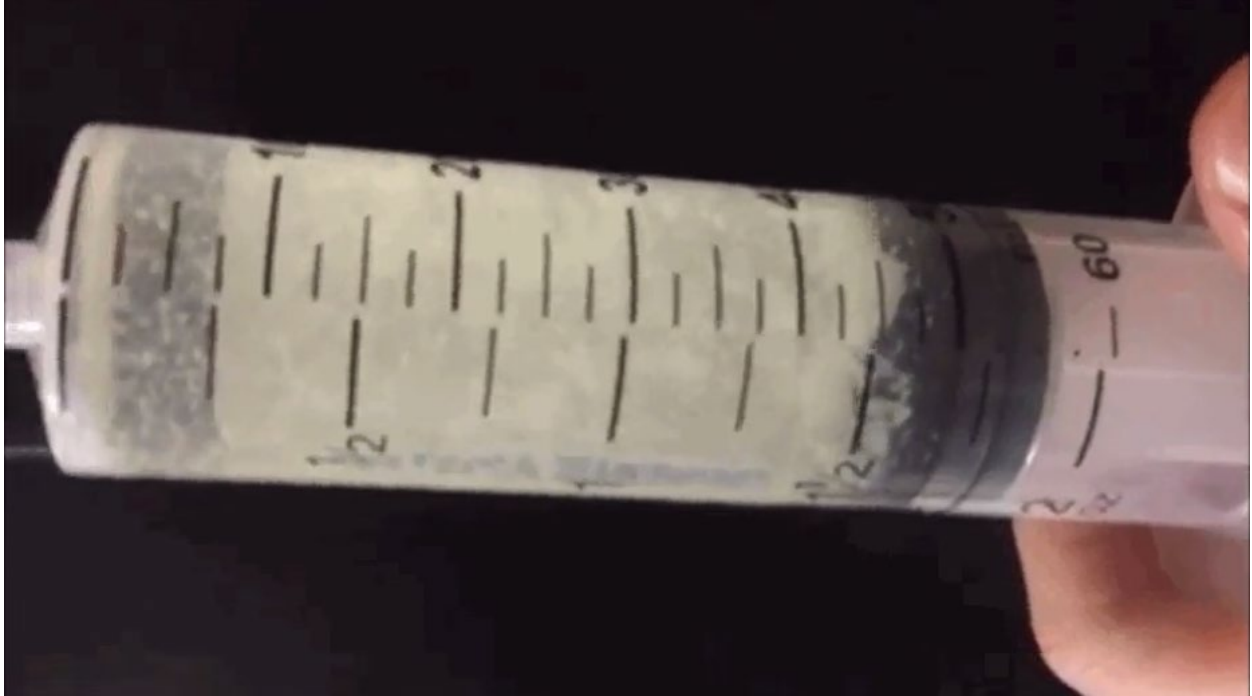
Texas Code of Criminal Procedure Article 43.24, “Treatment of Condemned,” states: “No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of law.” Tex. Code Crim. Proc. art. 43.24.

### **STATEMENT OF THE CASE**

The image below, taken by the Georgia Department of Corrections, shows what happens to compounded pentobarbital when it degrades due to improper handling by corrections personnel.<sup>1</sup> Texas plans to execute Mr. Renteria with degraded pentobarbital.

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<sup>1</sup> This image was taken from an article about the events in Georgia. Chris McDaniel, *Georgia Says "Cloudy" Execution Drug Was Just Too Cold, But Expert Gave a Second Possible Cause*, BuzzFeedNews.com (May 11, 2015). Available at <https://www.buzzfeednews.com/article/chrismcDaniel/georgia-says-cloudy-execution-drug-was-just-too-cold-but-exp>.



Mr. Renteria filed an original application for writ of habeas corpus under Article I, § 12 of the Texas Constitution and Texas Code of Criminal Procedure Article 11.05 in the trial court on November 2, 2023. 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).<sup>2</sup>

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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<sup>2</sup> 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 face 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 Amendment).

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.

## REASONS FOR GRANTING THE WRIT

### **I. The Texas Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.**

Mr. Renteria presented the state court with an issue this Court has discussed but not settled regarding the relationship between duly enacted law and the Cruel and Unusual Punishment Clause. Under the Constitution, 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). Where an executioner exceeds his statutory authority, as Mr.

Renteria demonstrated and the State did not dispute below, and that results in terror for the prisoner and a risk of severe pain beyond what the legislature's method entails, has the prisoner established the requisite mental state under this Court's Eighth Amendment cases; is terror or pain "superadd" because it accrues from the executioner's discretionary actions under color of state law?

Mr. Renteria alternatively presents the question whether the executioner's extra-legal actions violate the Due Process of Laws Clause of the Fourteenth Amendment.

The decision below held that Mr. Renteria failed to state a prima facie case under this Court's Eighth Amendment cases 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).<sup>3</sup>

Additionally, the TCCA saw no difference between a challenge to the execution procedure enacted by the State legislature, which is covered by *Glossip*, whether challenged on its face or as applied, *Bucklew*, *supra*, and Mr. Renteria’s claim which satisfies *Glossip* but in part by showing that the Texas executioner is acting far outside his statutory authority and deceiving the public about what he’s doing. Mr. Renteria contends that extra-legal conduct evinces wantonness. Under this Court’s cases, when a prison official inflicts harm “maliciously and sadistically,” as the Director does through the use of adulterated substances, an Eighth Amendment violation will be found “*whether or not significant injury is evident.*” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992) (emphasis

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<sup>3</sup> 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).

added). The TCCA's requirement that a petitioner show evident injury is in further conflict with this Court's intentional-harm cases.

This case presents an excellent vehicle for deciding an issue this Court has not yet been called upon to decide but that undoubtedly will recur in Texas, the Nation's most frequent executioner. Neither the trial court nor the TCCA in Mr. Renteria's case made specific findings of fact. The closest is the obvious makeweight that Mr. Renteria offered only "speculation." That obviously refers to the TCCA's erroneous belief that an Eighth Amendment claimant must show proof of previous violations to state a prima facie case. It cannot refer to the mountains of evidence from the Texas Department of Criminal Justice, and an evidentiary hearing in which a doctor of pharmacy explained how degraded pentobarbital causes severe pain at injection sites. Also, neither the trial court nor the TCCA relied upon any procedural rule.

### **CONCLUSION**

The Court of Criminal Appeals holding that an inmate must prove prior executions actually violated the Eighth Amendment regardless of the lawlessness of the executioner or the evidence of wantonness should be reviewed and reversed.

Respectfully submitted,

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DATED: November 16, 2023.