

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-70032

United States Court of Appeals
Fifth Circuit

FILED

December 2, 2018

Lyle W. Cayce
Clerk

JOSEPH C. GARCIA,

Plaintiff - Appellant

v.

BRYAN COLLIER; LORIE DAVIS; JAMES L JONES; JOHN OR JANE
DOES, 1-50,

Defendants - Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-4521

Before DENNIS, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Death row inmate Joseph C. Garcia filed this 42 U.S.C. § 1983 action on November 30, 2018, seeking to stay his execution scheduled for December 4, 2018. Garcia alleges that the drug the Texas Department of Criminal Justice (TDCJ) will use in his execution—compounded pentobarbital—was obtained from an unsafe pharmacy, and that executing him using the drug obtained from this pharmacy would violate his Eighth and Fourteenth Amendment

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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rights. Garcia's complaint asserts four claims related to the use of compounded pentobarbital allegedly obtained from a pharmacy in Houston that has been cited for violations of state and federal regulations: (1) that the TDCJ's use of pentobarbital from an unsafe pharmacy violates his Eighth Amendment right to be free from cruel and unusual punishment; (2) that TDCJ violated his First Amendment "right to be informed about the manner in which the State implements" executions by concealing necessary information; (3) that this alleged concealment by TDCJ also violates his rights to due process and access to the courts; and (4) that the TDCJ's use of pentobarbital from other pharmacies on other death row inmates violates his right to equal protection.

The district court denied injunctive relief and declined to stay Garcia's execution, finding that none of his claims demonstrated a likelihood of success on the merits. It first concluded that Garcia's Eighth Amendment claim was merely hypothetical because he did not cite to evidence establishing that the pentobarbital "carrie[d] a demonstrated risk of causing severe pain." Regarding Garcia's allegations about TDCJ's concealment of information, the district court held that both his First Amendment access to courts and Fourteenth Amendment due process claims failed because they were "dependent on the existence of a valid underlying Eighth Amendment claim." Finally, the court concluded that Garcia's equal protection claim was unlikely to succeed on the merits because (1) "using pentobarbital obtained from a compounding pharmacy does not implicate the Eighth Amendment"; and (2) Garcia had not established that the drug obtained from the identified pharmacy carried an unconstitutional risk not present in other pharmacies' versions of the drug. Accordingly, he had not demonstrated that he was subject to disparate treatment in violation of the Fourteenth Amendment. For essentially the reasons stated by the district court, with which we agree, we are not persuaded of the likelihood of Garcia's success on the merits. We

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therefore AFFIRM the district court's denial of Garcia's motion for a preliminary injunction and DENY his motion for stay of execution.