**Nos. 19–7572 & 19A876**

IN THE

# Supreme Court of the United States

ABEL REVILLA OCHOA,
Petitioner,

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; MICHAEL BUTCHER, WARDEN,
Respondents.

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

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND APPLICATION FOR STAY OF EXECUTION

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## CAPITAL CASE
## QUESTIONS PRESENTED

Ochoa obtained the videotaped clemency interview at the heart of this lawsuit. Bearing this in mind, the district court refused to grant any stay of execution, finding that Ochoa had failed to demonstrate any of the stay factors. Instead, the district court found that the stay factors weigh heavily in favor of the Respondents. The Fifth Circuit repeated these results in a per curiam opinion that largely agreed with the district court's analysis and likewise held that no factor weighed in favor of granting a stay.

Ochoa's petition for a writ of certiorari and application for a stay of execution now present the following issues for review, all of which must be evaluated under the deferential abuse-of-discretion standard[1] applicable to stay motions:

1. Has Ochoa shown a strong likelihood of success when he either lacks standing or his lawsuit is moot, and his underlying claim is unexhausted, time-barred, and wholly fails to demonstrate any plausible constitutional violation?

2. Has Ochoa shown irreparable injury when he already obtained the videotaped clemency interview that forms the basis of his complaint?

3 Has Ochoa shown Texas will not be prejudiced and that the public interest lies in favor of a stay when he has already fruitlessly litigated his conviction and his sentence for sixteen years and neither are implicated by this lawsuit?

[1] *See*, *e.g.*, *Delo v. Stokes*, 495 U.S. 320, 322 (1990); *Delo v. Blair*, 509 U.S. 823 (1993).

## LIST OF ALL PROCEEDINGS

*The State of Texas v. Abel Revill Ochoa*, No. F–0253582–JM (194th Judicial District Court of Dallas County Apr. 23, 2003)

*Ochoa v. State*, No. AP–74,663 (Tex. Crim. App. Jan. 26, 2005)

*Ex parte Ochoa*, No. WR–67,495–01, –02 (Tex. Crim. App. Aug. 19, 2009)

*Ochoa v. Davis*, No. 3:09–CV–2277 (N.D. Tex. Sept. 21, 2016)

*Ochoa v. Davis*, No. 18–70016 (5th Cir. Oct. 18, 2018)

*Ochoa v. Davis*, No. 18–8845 (U.S. Oct. 7, 2019)

*Ochoa v. Collier*, *et. al*, No. H–19–4976 (S.D. Tex. Jan. 27, 2020)

*In re Abel Ochoa*, No. WR–67–495–03 (Tex. Crim. App. Feb. 3, 2020)

*Ochoa v. Collier*, *et. al*, No. 20–70001 (5th Cir. Feb. 4, 2020)

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## INTRODUCTION

Abel Ochoa was convicted and sentenced to death after slaughtering five members of his family—his wife, his sister-in-law, his father-in-law, and his two little daughters—after his wife refused to give him money to buy crack-cocaine. The trial court scheduled Ochoa to be executed sometime after 6:00 P.M. on February 6, 2020. With his execution looming, Ochoa filed a civil rights action alleging that the Respondents, in contravention of written prison policies, improperly refused to allow a videographer to film an interview with Ochoa to submit alongside his clemency application. ROA.5–22 (ECF No. 1).[2] Ochoa asserted that, while the videographer's visit was approved, his use of a video camera was not. ROA.18–19 (ECF No. 1 at 13–14). Ochoa argued that the Respondents' refusal to allow a camera into the prison deprived him of his right to access the courts, his right to professional representation under 18 U.S.C. § 3599, and his right to due process through interference with the clemency process. ROA.20–21 (ECF No. 1 at 15–16). But, after the filing of this action, the parties reached an agreement *permitting Ochoa's video interview to occur on January 13, 2020.*[3] ROA.63 (ECF No. 6). That videotaping—which was ultimately not

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[2] The Respondents use the following citation conventions: "ROA" refers to the record on appeal. "ECF No. __" refers to entries on the district court's electronic docket sheet. "CR" refers to the clerk's record of documents from Ochoa's trial. "RR" refers to the court reporter's trial transcript. "SX" refers to the State's trial exhibits. "SHCR–01, –02" refer to the clerk's record of documents filed in Ochoa's state habeas proceedings. Because the Texas Court of Criminal Appeals (CCA) did not label Ochoa's writs chronologically, Ochoa's initial writ bears the cause number WR–67,495–02 (referred to herein as SHCR–02), while Ochoa's subsequent writ bears the cause number WR–67,495–01 (referred to herein as SHCR–01). All references are preceded by volume number and followed by page number where applicable.

[3] Ochoa submitted an application for clemency on January 16, 2020. On February 4, 2020, the Board of Pardons and Paroles voted not to recommend a 90-day reprieve or a

court ordered—has rendered this lawsuit moot and deprived Ochoa of whatever standing he once had to bring this action.

Despite receiving substantive relief, Ochoa filed a motion for a stay of execution. ROA.127, 156 (ECF Nos. 11, 13). But the district court denied any stay. Appendix (App.) B at 12–13. The district court noted that Ochoa had "not met *any* of the factors required for staying an execution." *Id.* at 12 (emphasis added). In fact, the district court noted that the stay "factors weigh heavily in the Defendants' favor." *Id.* at 11. The Fifth Circuit affirmed the district court's denial of a stay of execution and independently denied Ochoa's motion to stay. *Ochoa v. Collier et. al.*, No. 20–70001, slip op. at 8 (5th Cir. Feb. 4, 2020) (unpublished); App. A at 8. In finding no abuse of discretion, the Fifth Circuit likewise held that Ochoa had failed to demonstrate any of the stay factors. *See generally id.*

Now, a mere day before his scheduled execution, Ochoa seeks certiorari review of the Fifth Circuit's decision. *See generally* Petition (Pet.). Ochoa's questions presented suggest that the issues before the Court are whether his execution can be considered in evaluating mootness and/or standing and whether Texas interfered with his clemency process by preventing the filing of his videotaped evidence.[4] Pet.ii. But, more properly framed, "[t]he issue before the Court [is] whether the lower courts

commutation of sentence. Ochoa has not complained that his video was not submitted, and it appears that the Board did not find it sufficiently compelling to recommend any relief.

[4] It is worth noting that no prevention ultimately happened—the video was filmed before the clemency application was filed.

abused their discretion in staying the execution." *See*, *e.g.*, *Price v. Dunn*, 139 S. Ct. 1533, 1537 (2019) (Thomas, J., concurring).

Here, the lower courts' denial of a stay was no abuse of discretion. Obvious mootness notwithstanding, Ochoa's claim is both procedurally and substantively defective. App. A at 6 ("We agree with the district court that Ochoa's claims are unlikely to succeed on the merits because they are procedurally defaulted and substantively weak."). Procedurally, Ochoa's lawsuit is subject to mandatory dismissal because it was brought prior to exhaustion. His facial challenge to prison policies is untimely under the applicable two-year statute of limitations. Substantively, Ochoa fails to state a claim for which relief may be granted because he has not been denied access to the courts, access to counsel, or due process through State interference with the clemency process. As the district court correctly noted, "[t]he Defendants have [ ] pointed out serious substantive weaknesses in Ochoa's constitutional challenges to prison policy, such as (1) no authority incorporates a constitutional right to present videotaped evidence into a State's clemency process; (2) counsel's representation in this instance is not constitutionally guaranteed but afforded by statutory law and thus limitations on videotaping do not offend a constitutional right to counsel; (3) Ochoa has experienced no deprivation of access to the courts; (4) only limited and narrow due process guarantees govern a State's clemency proceedings; and (5) differences between the access of media and attorneys to prison inmates are not a matter of constitutional dimension." App. B at 11–12. The

district court agreed that its "review of the pleadings and the law suggest that Ochoa has not shown a likelihood of success on the merits." *Id*. at 12.

This is not the first time the Court has encountered this issue. The Court previously denied a stay of execution and a writ of certiorari in a similar case.[5] *Woods v. Livingston*, 558 U.S. 1073 (2009); *see also id*., 354 F. App'x 863, 863 (5th Cir. 2009) (an applicant "fails to demonstrate that his inability to supplement [a clemency] petition with video evidence entitles him to the equitable remedy of a stay of execution."); *id*., CIV.A.H-09-3780, 2009 WL 4251127, at *1–2 (S.D. Tex. Nov. 23, 2009); *id*., CIV.A H-09-3780, 2009 WL 4230276 at *2 (S.D. Tex. Nov. 25, 2009). And the Western District of Texas has forcefully noted that the courts are ill-suited to meddle in the prison system's administration of this matter. *Woods v. Thaler*, A-09-CA-789-SS (W.D. Tex. Nov. 6, 2009), ECF No. 7 at 2. Indeed, Ochoa wholly fails to show why this Court should employ its limited resources to micromanage the Texas prison system's policies on electronic devices. The prison's policies are plainly not intertwined with "questions of national importance." *See* Pet.10; Application for Stay (Appl.) at 2.

Ochoa's petition simply does not demonstrate any special or important reason for this Court to review the court of appeals' decision, and this Court typically does not engage in routine error correction. Judicial restraint is further warranted in this case because Ochoa does not show that a split exists among the circuit courts regarding any relevant issue. Ochoa asserts that the Fifth Circuit's opinion conflicts

[5] In fact, Ochoa has a much weaker case for a stay than Woods did, as it does not appear from the opinions that Woods ever got his interview. Ochoa did.

with the Eighth Circuit's opinion in *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000). But, as shown below, there is no circuit conflict here—only different courts coming to different conclusions regarding different underlying facts. Indeed, the Eighth Circuit (sitting en banc) itself limited *Young* to its facts in a subsequent case. *See Winfield v. Steele*, 755 F.3d 629, 630–31 (8th Cir. 2014).

Similarly, Ochoa's request for a stay is meritless. The strong interest of the State in the timely enforcement of Ochoa's sentence is not outweighed by the possibility that certiorari will be granted. Moreover, because Ochoa has had his video interview, he will suffer no harm if a stay is denied. App. A at 6–7. And the public interest clearly lies in seeing Ochoa's execution carried out after more than sixteen years of litigation. This is especially true where the instant lawsuit challenges neither Ochoa's conviction nor his sentence. *Id.* at 7. Ochoa killed five people. He murdered a child and a baby. The State has a compelling interest in seeing that its laws are enforced and in carrying out executions as scheduled. *Id.* at 7–8. Further unnecessary delay hinders that interest. *Id.*

Ochoa fails to demonstrate that he is entitled to a stay of execution under this Court's precedent, and his motion is merely a meritless attempt to delay imposition of his well-deserved sentence. *See Rhines v. Weber*, 544 U.S. 269, 277–78 (2005) (it is no secret that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death."). Ochoa received his videotaped interview, regardless of whether he was even entitled to it in

the first place. Yet, despite being severed from its raison d'être, this litigation inexplicably lumbers on.

Ochoa complains that he has acted diligently and therefore he is entitled to a stay. *See* Appl.2–3, 5. He asserts that the Respondents are wrong to fault him for lack of diligence in this matter. But Ochoa misapprehends the problem. The Respondents have not accused him of failing to file this suit fast enough. *See* ROA.106 (ECF No. 10 at 31); Appellee's Brief at 49. If anything, the suit is premature because Ochoa should have exhausted his remedies before filing. The Respondents' argument is more accurately that now that Ochoa has gotten his relief, further litigation serves no apparent purpose save to prevent the imposition of Ochoa's lawful punishment. It is the fact Ochoa sought a stay of execution even after the receipt of relief—coupled with his speculative theories and bypass of available remedies—that yields the improper delay.

Indeed, a stay of execution is an equitable remedy and, as such, it "must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–650 (2004)). Here, the equities favor the State. Ochoa had the burden of persuasion on his stay request, and he was required to make "a clear showing" that he is entitled to one. *Hill*, 547 U.S. at 584. Ochoa failed to make that showing. The Court should deny any stay of execution, find no abuse of discretion by the lower courts, and deny certiorari review.

## STATEMENT OF THE CASE

### I. Facts of the Crime

In describing the facts of Ochoa's crime, the federal and state courts have adopted the following findings:

> 1. [. . .][T]hirty-year-old Ochoa shot several family members after smoking crack cocaine on Sunday, August 4, 2002. [38.RR.112.] The record reflects that, twenty minutes after smoking a ten-dollar rock of crack, Ochoa entered his living room and systematically shot his wife Cecilia, their nine-month-old[6] daughter (Anahi), Cecilia's father (Bartolo), and Cecilia's sisters (Alma and Jackie). [33.RR.32–36.] Ochoa reloaded his []9mm Ruger and chased his 7–year-old daughter, Crystal, into the kitchen where he shot her four times. [SX.2A; RR-Examining Trial: 14]. Of the six victims, only Alma survived. [33.RR.40–41.]
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> 2. The record reflects that, minutes after the shooting, the police stopped Ochoa while driving his wife's Toyota 4Runner. [33.RR.97–98.] Ochoa told the arresting officer that the gun he used was at his house on the table, that he could not handle the stress anymore, and that he had gotten tired of his life. [33.RR.105–06.] In a search conducted after arrest, the police found a crack pipe, steel wool, and an empty clear baggie on Ochoa's person. [33.RR.109–10.] Ochoa gave the police a detailed written statement recounting his actions in the shootings. [34.RR.35–46; SX.2A.]

*Ochoa v. Davis*, 750 F. App'x 365, 367 (5th Cir. 2018), *cert. denied*, 140 S. Ct. 161 (2019); *see also Ochoa v. State*, AP–74,663, 2005 WL 8153976, at *1–4 (Tex. Crim. App. Jan. 26, 2005) (unpublished).

### II. Evidence Relating to Punishment

At punishment, the State introduced firearm and autopsy evidence concerning the killings of Ochoa's daughter Anahi, his sister-in-law Jackie, and father-in-law.

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[6] Anahi's age at the time of her death is inconsistently listed in the record as both nine and eighteen months. [footnote added]

35.RR.29–33, 42, 50, 57. The State also recalled Ochoa's other sister-in-law Alma Alvizo, who explained that she lost a kidney and was in the hospital for three months after Ochoa shot her. 35.RR.58. Alvizo stated that Ochoa had become aggressive towards Cecilia after finding out that Cecilia had previously had a son by another man and concealed the fact from him. 35.RR.58–60. In 1997, he threatened to shoot his wife. 35.RR.60. Alvizo also once witnessed Ochoa grab Cecilia by the hand and pull her toward him when she was trying to leave Alvizo's house. 35.RR.65–66. Alvizo suspected that Ochoa was the cause of bruising that she saw on Cecilia. 35.RR.88–89. Ochoa also pointed a gun at Cecilia three weeks before the murder. 35.RR.90. The State rested after Alvizo's testimony. 35.RR.96.

The state habeas court made the following factual findings relevant to the defense's case at punishment:

> 56. [. . .]Ochoa's defensive theory was that Ochoa committed this offense in a cocaine-induced delirium and had brain damage in his frontal lobes from cocaine abuse which affected his impulse control and made him more susceptible to a state of delirium. [36.RR.40–103; 39.RR.10–34].
>
> [. . .]
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> 58. [. . .][T]he defense presented sixteen witnesses at the punishment phase, including relatives, neighbors, coworkers, church acquaintances, and law enforcement personnel, to discuss Ochoa's difficult childhood, his relatively crime-free life prior to his addiction to crack, his mild brain damage from crack abuse, his work ethic, his lack of disciplinary problems in jail, and the conditions under which he would live if given a life sentence at TDCJ-ID.

> 59. [. . .][T]he defense had a well-presented theory of long-term crack addiction and rehabilitation attempts by an otherwise law-abiding person to offer in mitigation of punishment.

SHCR–02.360–61. In rebuttal, the State presented Dr. Richard Coons, who "provided testimony from which a jury could infer that [Ochoa] would be a continuing threat to society. Coons also attributed the murders to [Ochoa]'s frustration and anger and not to a 'cocaine-induced delirium.'" *Ochoa*, 2005 WL 8153976, at *5. To counter Dr. Coons' testimony, the defense recalled expert Dr. Edgar Nace, who disputed Dr. Coons' opinions concerning drug-induced delirium, Ochoa's lack of a conscience, and the possibility that Ochoa's brain damage rendered him more violence prone. 39.RR.11–12, 19, 21–22.

## III. Conviction and Postconviction Proceedings

A Texas jury convicted Ochoa of capital murder for killing his wife and one of his daughters. CR.2, 390. Pursuant to the jury's answers to Texas' punishment-phase special issues, the trial court sentenced Ochoa to death. *Id*. The CCA upheld Ochoa's conviction and sentence on automatic direct appeal. *See generally Ochoa v. State*, 2005 WL 8153976; Tex. Code Crim. Proc. art. 37.071, § 2(h). Ochoa did not file a petition for writ of certiorari.

Ochoa sought state habeas review of his conviction, filing an initial habeas application, to which he added a pro se supplement. SHCR–02.2–55, 158–62. Ochoa also filed a subsequent pro se application. SHCR–01.2–13. With respect to Ochoa's initial application, the CCA adopted the trial court's findings and conclusions and denied relief. *Ex parte Ochoa*, Nos. WR–67,495–01, –02, slip op. at 2, 2009 WL

2525740, at *1 (Tex. Crim. App. Aug. 19, 2009) (per curiam) (unpublished). With respect to Ochoa's subsequent pro se application, the CCA denied it as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, Section 5. *Id.*

Ochoa then filed a federal habeas petition. The district court denied habeas relief in a memorandum opinion and order. *Ochoa v. Davis*, 3:09–CV–2277–K, 2016 WL 5122107 (N.D. Tex. Sept. 21, 2016). The district court also denied a COA (certificate of appealability). *Id.* Following oral argument, the Fifth Circuit likewise denied COA on all of Ochoa's claims and upheld the district court's denial of habeas relief. *Ochoa*, 750 F. App'x 365. Ochoa petitioned for rehearing en banc, but the Fifth Circuit denied his request. Certiorari review was denied. *Ochoa v. Davis*, 140 S. Ct. 161 (2019).

On September 24, 2019, the 194th Judicial District Court of Dallas County, Texas, scheduled Ochoa's execution for February 6, 2020. Ochoa filed his instant civil rights suit on December 23, 2019. ROA.22 (ECF No. 1 at 17). A telephone conference was held on January 7, 2020, and the Court instructed that the parties "submit an agreed order" or "submit an agreed resolution" concerning a video interview by the end of the day on January 9th. *See* ROA.3 (ECF Minute Entry (Jan. 7, 2020)). The parties filed a joint advisory on January 9th, explaining that they had reached an agreement permitting Ochoa's videotaped interview to occur on January 13th. ROA.63 (ECF No. 6). No court order was required. Further negotiations to resolve the lawsuit were unsuccessful. Accordingly, the TDCJ filed a motion to dismiss, to which Ochoa responded. ROA.69, 183 (ECF Nos. 10, 14). Ochoa also filed a motion to stay,

to which the TDCJ responded. ROA.127, 156 (ECF Nos. 11, 13). The lower court denied the stay and took the motion to dismiss under advisement. App. B. Ochoa appealed and moved for a stay; the Respondents opposed; and Ochoa replied.[7] The Fifth Circuit affirmed the district court's decision and declined to issue any stay of its own. App. A. The instant petition for a writ of certiorari followed.

Concurrently with his civil rights lawsuit, Ochoa filed a motion to withdraw the execution date in the state trial court. That motion was denied on January 30, 2020. Ochoa filed a motion for leave to file a petition for mandamus in the CCA on the same day, and the State responded on February 3, 2020. The CCA denied any stay of execution and refused leave to file without written order on February 3, 2020.

## REASONS FOR DENYING THE WRIT

The question that Ochoa presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." An example of such a compelling reason would be if the court of appeals below entered a decision on an important question of federal law that conflicts with a decision of another court of appeals or with relevant decisions of this Court. Ochoa fails to offer a genuine circuit conflict, and he fails to show that the Fifth Circuit's

[7] In his Fifth Circuit reply, Ochoa asserted that the Respondents laughed at the possibility of agreeing to Ochoa's videotaping. *See* Appellant's Reply at 1, 7. He repeats the assertion here. Appl.4; Pet.5, 13. The Respondents dispute this ad hominem attack; however, they will not waste the Court's time further contesting an irrelevant and fallacious argument and will instead focus on material issues.

decision conflicts with the relevant holdings of the Court. Pursuant to Supreme Court Rule 10, Ochoa provides no basis to grant his petition for a writ of certiorari.

## I. The Standard Governing Stay Requests

"Filing an action that can proceed under § 1983[8] does not entitle the [plaintiff] to an order staying an execution as a matter of course." *Hill*, 547 U.S. at 584. "It is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id. (*citing *Nelson*, 541 U.S. at 649–50). "It is well-established that petitioners on death row must show a "reasonable probability" that the underlying issue is "sufficiently meritorious" to warrant a stay and that failure to grant the stay would result in "irreparable harm." *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), superseded on other grounds by 28 U.S.C. § 2253(c)(2). Indeed, "[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted." *Id*. To demonstrate an entitlement to a stay, a petitioner must demonstrate more than "the absence of frivolity" or "good faith" on the part of petitioner. *Id*. at 892–93. Rather, the petitioner must make a substantial showing of the denial of a federal right. *Id*. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Id*. at 893. The State's "powerful and legitimate interest in punishing the guilty," as well as its interest in

[8] Ochoa's citation to 28 U.S.C. § 2251(a)(1) as a basis for a stay is misplaced, as this is a § 1983 suit and no habeas corpus proceeding is pending. *See* Appl.5.

finality, must also be considered, especially in a case such as this where the State and victims have for years borne the "significant costs of federal habeas review." *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring); *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (both the State and the victims of crime have an important interest in the timely enforcement of a sentence).

Thus, in deciding whether to grant a stay of execution, the Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).

## II. Ochoa Has Not Made a Strong Showing That He Will Succeed on the Merits.

Ochoa fails to show that there is any significant possibility that he will succeed on the merits. As noted by the district court, "[t]he January 13, 2020, videotaped interview mooted much of Ochoa's lawsuit. To the extent Ochoa argues that his constitutional attack on prison policy remains viable, the Defendants have identified serious procedural defects in Ochoa's claims." App. B at 11. Specifically, "the Defendants argue that any remaining claims concerning prison policy suffer from various procedural defects. The Defendants argue that Ochoa lacks standing to challenge the prison procedures, has not exhausted administrative remedies, improperly seeks mandamus relief, and has not complied with the applicable

limitations period." App. B. at 10. The Fifth Circuit largely agreed. App. A at 4–6. This Court should likewise find that Ochoa's lawsuit has no possibility of success.

### A. Ochoa has already received relief, and his case is moot or he lacks standing or both.

Initially, this Court—like the district court and Fifth Circuit—should recognize that the prison allowed the videotaped interview to take place on January 13, 2020. ROA.63 (ECF No. 6). As argued in the Defendants' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6), Ochoa's claims are now moot, he lacks standing to bring this suit, or both; he lacks standing to challenge the prison's policies on behalf of other capital murderers; and he improperly requests mandamus relief. ROA.88–91 (ECF No. 10 at 13–16). The district court agreed that much of Ochoa's lawsuit was moot. App. B. at 11.

"Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014). "A case becomes moot . . . 'when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.'" *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam)); *cf. Spencer v. Kemna*, 523 U.S. 1, 7–17 (1998) (holding that challenge to termination of parole status did not present live case or controversy after expiration of sentence imposed on revocation).

Ochoa cites to a case from the Eighth Circuit in support of his argument against mootness, but that case is easily distinguishable on the facts and does not indicate a circuit split. *See* Pet.15 (citing *Young*, 218 F.3d 850). In *Young*, the Circuit

Attorney for the City of St. Louis threatened to fire one of the lawyers under her supervision if she provided information to the Governor of Missouri in connection with Young's clemency petition. The Circuit Attorney argued that the case was moot after withdrawing her objections and the lawyer submitted an affidavit for filing with Young's clemency petition. However, the Eighth Circuit explained "at least one good reason remains why the case is not moot. The affidavit covers only one of the two subjects that [the lawyer] initially agreed to testify about." *Young*, 218 F.3d at 852. Apparently, the lawyer's affidavit failed to include a previous assertion that that the Circuit Attorney's office had acted in a racially discriminatory manner. *Id*. The Eighth Circuit also noted that the Circuit Attorney may have committed the crime of witness tampering under state statute. *Id*. Thus, it appears that Young did not receive all substantive relief requested. Here, Ochoa has received the entirety of the substantive relief he requested in the form of a videotaped interview. And the prison authorities have committed no crime.

Ochoa has argued that the Respondents cannot moot this case based on their voluntary cessation of a challenged practice. *See* Pet.15. However, the prison can easily meet its burden showing "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already*, *LLC*, 568 U.S. at 91 (citing *Friends of the Earth*, *Inc. v. Laidlaw Environmental Services (TOC)*, *Inc.*, 528 U.S. 167, 190 (2000)). Ochoa has already had his videotaped clemency interview. His clemency application was submitted and proved uncompelling. Pet.2 n.2. With his execution within hours, the possibility of the allegedly wrongful behavior recurring

is nonexistent. The Respondents simply have no opportunity "to return to their old ways"—as Ochoa put it. *See* Appellant's Brief at 34. Ochoa's argument only holds water if he admits that he is really litigating on behalf of his fellow capital murderers, whom he believes may be harmed in the future. But such is impermissible as those inmates have their own attorneys and can press their own individual cases. *See Kowalski v. Tesmer*, 543 U.S. 125, 129–32 (2004).

Ochoa may imply that the parties' independent efforts to reach a settlement after the videotaping somehow constitutes a tacit admission that the videotaping did not moot his case. *See* Appl.4–5 ("the parties [. . .] continued to negotiate complete relief"). However, the Respondents' professional and good-faith effort to find a resolution for this case without the need for additional litigation was nothing more than that. The Respondents never conceded—or believed—that the case was not mooted. In fact, among the reasons for agreeing to entertain a proposal from Ochoa was the Respondents' genuine confusion over what further relief Ochoa wanted.[9] Likewise, Ochoa's claim that Respondents "refused to engage in attempts to resolve the issues related to their unlawful policies and practices" makes little sense in light of the fact that Respondents ultimately arranged for his interview without a court order and willingly participated in independent efforts to reach accommodations to alleviate the need for further litigation. *See* Appl.5.

But even if the case is not moot, "[t]he district court likely lacks jurisdiction because Ochoa cannot present an injury in fact." *See* App. A at 5; *see also Spokeo*, *Inc*.

[9] While Respondents' counsel agreed to review Ochoa's proposal with their client—and did so—there was no agreement to make counterproposals.

*v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Ochoa prematurely filed his lawsuit before his clemency application was due, and the claimed injury never occurred due to the subsequent videotaping. ROA.20 (ECF No. 1 at 15) ("Ochoa suffered an actual injury in not being able to present this video as part of his clemency application"). Ochoa states now "that the injury occurred when Respondents interfered with his ability to film the interview," Pet.17, but that does not mesh with the allegation in his Complaint. Or with reality; after all, Respondents ultimately *facilitated* the interview.

The Fifth Circuit noted in its opinion that it has previously upheld a dismissal of a case where, as here, the plaintiff had not yet applied for clemency when he filed his action.[10] App. A at 5 (citing *Sepulvado v. La. Bd. of Pardons & Parole*, 114 F. App'x 620, 621 (5th Cir. 2004) (per curiam) (unpublished)). Specifically, the Fifth Circuit held that the plaintiff lacked standing to bring suit "[b]ecause, prior to filing this action, [plaintiff] had not filed an application for clemency, his claims of injury based on any alleged constitutional defects in the clemency process were speculative." *Sepulvado*, 114 F. App'x at 621–22. Here, Ochoa's substantive complaint was resolved prior to the submission of his clemency application. Thus, Ochoa's speculative claim of "not being able to present this video as part of his clemency application" never came to pass. ROA.20 (ECF No. 1 at 15). Ochoa never had standing to bring this lawsuit, and any possibility of gaining it has now been lost.

[10] Ochoa is not directly challenging the clemency process, but his lawsuit clearly tethers his "right" to a videotaped interview to the necessity of filing a clemency application.

Ochoa has suggested a "capable of repetition, yet evading review" basis for jurisdiction, *see* Pet.12 (citing *Roe v. Wade*, 410 U.S. 113 (1973)), but the Fifth Circuit held that "Ochoa has not made the requisite showing that '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.'" *See* App. A at 5 (quoting *Turner v. Rogers*, 564 U.S. 431, 439–40 (2011) (alterations in original)). Ochoa's lawsuit itself (with attendant relief secured thereby) demonstrates that there is adequate time to litigate the matter at hand. Furthermore, there is no reasonable expectation that the same complaining party will be subject to the same action again. While it is theoretically possible that other capital murderers will be subject to misapplication of TDCJ policies concerning video cameras, Ochoa himself has already had his video interview. *See Turner*, 564 U.S. at 440–41. Again, there is no basis for Ochoa to urge the rights of others in this respect. Other capital inmates, if similarly aggrieved, will be able to pursue their own remedies. Finally, even if Ochoa could mount a capable-of-repetition-but-evading-review defense to mootness, "[s]tanding admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition, yet evading review will not entitle the complainant to a federal judicial forum." *Friends of the Earth, Inc.*, 528 U.S. at 170.

It is telling that Ochoa's petition (Pet.12) omits the very next sentence of *Roe*, namely, that "[p]regnancy often comes more than once to the same woman." 410 U.S. at 125. Now that clemency has been denied, Ochoa obviously will not have a second

clemency proceeding that will require another videotaped clemency interview. In the same vein, Ochoa's complaint that the Respondents permitting his videotaped interview constitutes a "one-off" event, Pet.6, 8, 13, ignores that submitting a video in support of clemency is only necessary once.[11]

In any event, Ochoa has not identified any other inmate who was denied the ability to bring a camera into the prison for the purpose of filming a clemency interview. The Respondents' legal research has only located one other—from more than a decade ago. *See Woods*, 354 F. App'x at 863. The trend piece that Ochoa cited below makes no mention of additional refusals and, in fact, alludes to several other inmates who successfully navigated the prison rules to film their own videos. ROA.142 (ECF No. 11 at 11) (citing Keri Blakinger, *Texas Death Row Inmates Go High-Tech in Longshot Bid for Clemency*, Hou. Chron., July 9, 2018). Ochoa can offer nothing but baseless speculation that future capital murderers will find themselves precluded from bringing in cameras for clemency interviews.

Lastly, Ochoa has not demonstrated standing regarding his facial challenge to prison policies because he improperly seeks mandamus relief. "[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke jurisdiction must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990). Standing requires: (1) that the plaintiff establish that he has

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[11] Ochoa's hyperbole about torture is similarly specious. Pet.12. Torture constitutes a repeatable, intentionally inflicted physical injury that may be instantaneous or ongoing. Each instance is actionable regardless of any respite that follows. Ochoa had but one chance to present a video interview of himself with his clemency petition. He did so and clemency was denied. There is no comparison.

suffered an "injury in fact"; (2) that there is a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court"; and (3) that it is "likely," as opposed to merely "speculative," the injury will be "redressed by a favorable decision." *Lujan*, 504 U.S. 560–61. To establish the third prong of standing, a plaintiff must plead redressability—the injury complained of must be redressable by the relief sought. *Id*. In addition to his now-moot video interview, Ochoa's Complaint asked the district court to order the prison to create new policies or accommodations that grant counsel as much access to inmates as media. ROA.21 (ECF No. 1 at 16). "But, federal courts do not have jurisdiction to issue the writ [of mandamus] against a state actor or state agencies." App. A at 5 (citing *Moye v. Clerk, Dekalb Cnty. Superior Court*, 474 F.2d 1275, 1276 (5th Cir. 1973)). "Instead, if relief is available to [Plaintiff], he must obtain it through a mandamus action or other appropriate action in the state courts." *See Norton v. Enns*, 2:14-CV-0040, 2014 WL 3947158, at *3 (N.D. Tex. Aug. 12, 2014); *cf. Holiday v. Stephens*, 136 S. Ct. 387, 388 (2015) (Sotomayor, J., concurring) ("this Court, unlike a state court, is likely to have no power to order Texas to reconsider its clemency decision with new attorneys representing Holiday."). Here, Ochoa is affirmatively seeking to compel the TDCJ to draft and enforce policy—mandamus relief. However, the district court lacked jurisdiction to compel TDCJ officials by writ of mandamus. *See, e.g., Waters v. Texas*, 747 F. App'x 259, 260 (5th Cir. 2019)

(affirming a jurisdictional dismissal where the plaintiff sought mandamus relief against "Texas state officials to deregister her as a Tier I sex offender").

Ochoa has previously asserted that the Respondents' contentions in this respect are misplaced. He stated "[t]he premise for the argument, as originally presented by [Respondents], is that Mr. Ochoa supposedly requests this Court to order [Respondents] to put specific policies into place. That is simply not the case." *See* Appellant's Brief at 39 (citation omitted). However, Ochoa's Complaint clearly asked that the lower court to "[o]rder [Respondents] to create accommodations and policies for legal counsel to film inmates that provide at least as much access to inmates as the accommodations applied to members of the media[.]" ROA.21 (ECF No. 1 at 16). Such a request is plainly in the nature of mandamus.

In sum, Ochoa's claim lacks constitutional footing, either from mootness or lack of standing or both.

### B. Ochoa's claim is subject to mandatory dismissal because he failed to exhaust administrative remedies.

Even if Ochoa could evade mootness, there are still significant additional hurdles to reaching the merits of Ochoa's claim. To begin, Ochoa did not exhaust administrative remedies prior to bringing suit as required under the Prison Litigation Reform Act (PLRA). *See*, *e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). Section 1997(e) of the PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA

"mandate[s] exhaustion . . . regardless of the relief offered through administrative procedures." *Booth v. Churner*, 532 U.S. 731, 741 (2001). Indeed, Ochoa had two opportunities to seek an administrative resolution to this matter—grievances and appeal to the Director's Review Committee—and he fails to demonstrate in either his Complaint or application for stay that he completed either before filing his suit. Accordingly, his claim "cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007).

The Fifth Circuit has stated, "there can be no doubt that pre-filing exhaustion of [the] prison grievance processes is mandatory." *Gonzalez v. Seal*, 702 F.3d 785, 788 (5th Cir. 2012) (citations omitted). "District courts have no discretion to excuse a prisoner's failure to properly exhaust the prison grievance process before filing their complaint. It is irrelevant whether exhaustion is achieved during the federal proceeding." *Id.* The PLRA's exhaustion requirement has been previously applied to a substantially similar claim. *Woods*, 2009 WL 4230276, at *1–2 ("Woods has not exhausted his administrative remedies, as required by federal law.").

Thus, Ochoa must exhaust his claim via TDCJ's grievance process. Tex. Gov't Code § 501.008. And to properly exhaust, a prisoner must "pursue the grievance remedy to conclusion." *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001). This requires completion of both steps of the two-step Texas grievance process before a complaint may be filed. *Id.*; *but see Murphy v. Collier*, 942 F.3d 704, 709 (5th Cir. 2019) (refusing to vacate stay because this Court had implicitly rejected exhaustion defense in granting previous stay in same case where grievances had not been filed).

Despite Ochoa's failure to apprise the Respondents or the district court of the fact, the Respondents determined that a grievance was filed immediately before the filing of this lawsuit. ROA.93–94 (ECF No. 10 at 18–19). To the extent that the grievance relates to the issues at hand—and Ochoa has not disputed that characterization—that grievance remained under investigation at the time that Ochoa filed his lawsuit. This is an apparent acknowledgment by Ochoa that exhaustion was both possible and required and that the two-step grievance process was the proper avenue of accomplishing it. But because it was still pending when the lawsuit was filed, this grievance fails to constitute adequate exhaustion.

Moreover, the policy appended to Ochoa's Complaint suggests that Ochoa could have appealed this issue to the Director's Review Committee. ROA.35–36 (ECF 1-1 at 13–14). Ochoa does not contend that he complied with this provision, and the Respondents confirmed while in the district court that the Director's Review Committee has nothing on file. Ochoa has complained that the Respondents have not provided any additional support that such an appeal is possible. Instead, he previously contended that the structure and language of the policy suggests that appeals to the Director's Review Committee are limited to restrictions on attorneys and designees who violate visitation regulations. *See* Appellant's Brief at 37–38. However, Ochoa's argument is based only on inferences. There is no language in this provision that explicitly limits it to the preceding paragraph, and the provision is contained within the same section (Section V) as the provisions at issue in this lawsuit. ROA.33, 35–36 (ECF 1-1 at 11, 13–14). Ochoa does not allege that his legal

team tried to confirm that no appeal was possible by contacting the Director's Review Committee, and prudence would dictate that they at least try. Regardless, even if Ochoa is correct and appeal to the Director's Review Committee would not be appropriate here, he was still obliged to complete the grievance process.[12]

Ochoa appears to recognize that exhaustion of the grievance process is required but instead argues that his legal team was told by prison staff that there was no appeal of the decision to disallow a camera. *See* Appl.3–4. Ochoa thus seems to imply that he was therefore not required to exhaust because he was misled by the prison authorities. However, Ochoa's cited Fifth Circuit precedent is easily distinguishable in that both lawsuits were filed by inmates who were pro se. *Davis v. Fernandez*, 798 F.3d 290, 293 (5th Cir. 2015) ("Davis is pro se"); *Dillon v. Rogers*, 596 F.3d 260, 265 (5th Cir. 2010) ("In July 2006, Dillon filed this section 1983 suit alleging violations of his civil rights during his incarceration. He proceeded pro se until late March 2007."). Ochoa is not proceeding pro se; he is well-represented by able attorneys. In fact, he is represented by the Capital Habeas Unit of the Northern District of Texas—an office of subject-matter experts who are necessarily familiar with death row and prisons. Ochoa's very own precedent explains:

> We do not imply that jail staff misrepresentations necessarily always render grievance procedures unavailable. If Davis actually knew that the grievance process had a second step, then, despite the jail staff misrepresentation otherwise, we doubt there would be a basis to deem the second step unavailable. Or, if there were factual circumstances such that Davis reasonably should have known—despite the jail staff

[12] Ochoa offered a handwritten request to the Warden and the Warden's response to show that further efforts on his part would be unavailing. ROA.213 (ECF No. 14-1). But, as shown above, an inmate request to the Warden is not the correct way to exhaust prison remedies.

> misrepresentation otherwise—that the grievance process had a second step, then this, too, would present a different case than the one we consider today.

*Davis*, 798 F.3d at 296 n.2 (citing *Dillon*, 596 F.3d at 268–69).

It cannot be plausibly argued that the Capital Habeas Unit did not know about the grievance process or that it would be reasonable for its attorneys to credulously rely on a staffer's interpretation of their client's administrative remedies. And such an argument would be *particularly* questionable given that a grievance was actually filed, *see supra*. Here, Ochoa had actual knowledge or should have reasonably known that the grievance remedy was available to him.

It does not matter whether Ochoa must exhaust one or both of the above remedies; he failed to exhaust neither. Because Ochoa did not exhaust administrative remedies prior to bringing his claims in federal court, the PLRA mandates dismissal of his lawsuit.

Moreover, this Court has cautioned that:

> the ability to bring a § 1983 claim, rather than a habeas application, does not entirely free inmates from substantive or procedural limitations. The [PLRA] imposes limits on the scope and duration of preliminary and permanent injunctive relief, including a requirement that, before issuing such relief, "[a] court shall give substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief." 18 U.S.C. § 3626(a)(1); *accord*, § 3626(a)(2).

*Nelson*, 541 U.S. at 650. Giving "substantial weight to any adverse impact on . . . the operation of a criminal justice system caused by the relief," this Court should refuse to interfere with the TDCJ's lawful responsibility to carry out the trial court's order with respect to Ochoa's sentence by issuing any injunction against his execution.

### C. Ochoa's facial challenge to prison policy is time-barred.

Although the Fifth Circuit did not address this issue specifically, claims brought via § 1983 are best characterized as personal injury actions and are therefore subject to a state's personal injury statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 279 (1985); *Walker v. Epps*, 550 F.3d 407, 412–14 (5th Cir. 2008); *see also Bible v. Davis*, 739 F. App'x 766, 772 (5th Cir.), *cert. denied* 138 S. Ct. 2700 (2018) (applying limitations to a civil rights action in last-minute litigation). The limitations period in Texas is two years. Tex. Civ. Prac. & Rem. Code § 16.003(a).

Here, the Respondents do not contend that Ochoa's as-applied challenge is time-barred. That challenge, arising from the alleged misapplication of prison policy to Ochoa's request to bring a video camera in, occurred on or about November or December of 2019. However, Ochoa's facial challenge to the policies themselves is time-barred. Ochoa's own documents show that prison policy BP-03.81 (governing access to counsel and the courts) is dated August 21, 2019, and supersedes a previous version released on December 15, 2017. ROA.23 (ECF No. 1-1 at 1). The 2017 version appears to be substantially similar for the purposes of this lawsuit.[13] ROA.110 (ECF No. 10-2). The media policy is dated March 27, 2017. ROA.40 (ECF No. 1-2 at 1). Ochoa's lawsuit was filed on December 23, 2019—more than two years after either 2017 policy. ROA.22 (ECF No. 1 at 17). Therefore, Ochoa's facial challenge to prison policies should be dismissed because it is barred by limitations.

[13] The Respondents have not determined whether earlier versions contain the same language. The language may well be older.

Ochoa has previously argued that he should not be time-barred because he only challenged the implementation of the prison's policies. He explained that the "TDCJ's policies regarding legal team members bringing camera equipment into the prison, as they are currently drafted, could potentially be applied in a constitutional manner. However, in practice, those policies are interpreted in an unconstitutional manner, requiring legal teams to obtain a court order before bringing camera equipment into the prison." *See* Appellant's Brief at 41–42. However, Ochoa is sacrificing both his mootness and merits arguments to save himself from the statute of limitations. If the policies are facially constitutional, and Ochoa has received the entitlement that he is due under them (without any court order), then there is nothing left for Ochoa to obtain for himself by this lawsuit. Instead, he is just impermissibly litigating on behalf of unascertained capital murderers who may or may not be harmed by application of these policies in the future.

### D. Ochoa fails to raise a valid constitutional claim.

#### i. There is no right to a videotaped clemency interview.

As the district court correctly observed, "[t]he Defendants have also pointed out serious substantive weaknesses in Ochoa's constitutional challenges to prison policy." App. B. at 11. Indeed, there is no constitutional right (based either on access to courts, the right to counsel, or due process via interference with clemency) to have a videotaped interview submitted alongside a clemency application. Even in the court of appeals, Ochoa "still fail[ed] to tie his right to videotape an interview to submit to

the Clemency Board to any constitutional right. Establishing this constitutional right is crucial to Ochoa's success." App. A at 6.

Ochoa relies on 18 U.S.C. § 3599, but it is quite a leap from this statute to a constitutional right to a videotaped clemency interview. Generally, § 3599 provides for the appointment of counsel to indigent, death-sentenced inmates. *See Harbison v. Bell*, 556 U.S. 180, 183–86 (2009). This includes state inmates under a sentence of death seeking federal habeas relief. § 3599(a)(2). If appointed, such counsel is to represent the state-sentenced inmate in "all post-conviction process," including "stays of execution," "competency proceedings and proceedings for executive or other clemency." § 3599(e).

But § 3599 says nothing about a right to a videotaped interview for clemency purposes. In fact, § 3599 "provides a federal court with no jurisdiction to issue any order beyond the authorization of funds." *Baze v. Parker*, 632 F.3d 338, 345 (6th Cir. 2011). Thus, while a federal court may provide attorney funding for an indigent state inmate, it cannot mandate access to the inmate for videotaping.

Moreover, precedent suggests that an inmate must demonstrate a constitutional right to counsel to complain of counsel's absence. *See Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) ("Since [he] had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel. . ."). The Fifth Circuit has explained that "[t]he Sixth Amendment right to counsel only 'extends to the first appeal of right, and no further.'" *Whitaker v. Collier*, 862 F.3d 490, 501 (5th Cir. 2017) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)); *see also Murray v.*

*Giarratano*, 492 U.S. 1, 8–10 (1989) (rejecting claim that "a death sentence [cannot] be carried out while a prisoner is unrepresented").[14]

Ochoa's access-to-courts claim fails for similar reasons as his right-to-counsel claim. A claim based on access to courts is premised on there being an underlying basis for relief. The Fifth Circuit has noted that when "plaintiffs have not succeeded in pleading an underlying claim, their access-to-the-courts assertion fails as well." *Whitaker*, 862 F.3d at 501 (citing *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013)). Besides, as demonstrated by the existence of this lawsuit, Ochoa has already accessed the courts and obtained the substantive relief sought. And clemency is an executive function, not a judicial one. *See* Tex. Const. art. IV, § 11. In truth, Ochoa is making an "access-to-the-executive" argument.

Clemency via due process likewise does not provide any constitutional right to a videotaped clemency interview. "[P]ardon and commutation decisions are rarely, if ever, appropriate subjects for judicial review." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (Rehnquist, C.J., with three justices joining and four justices concurring in result) (citing *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)). Nevertheless, in her concurring *Woodard* opinion, in which she was

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[14] Ochoa's previous reliance on *Battaglia v. Stephens*, 824 F.3d 470, 473–74 (5th Cir. 2016), is misplaced. *See* Appellant's Brief at 24, 45–46. *Battaglia* involved a plaintiff who was "effectively unrepresented for critical periods of time" due to counsel's abandonment. *Battaglia*, 824 F.3d at 476. The inability to submit a videotaped clemency interview is not remotely comparable to abandonment by counsel. Section 3599 may require the appointment of an attorney to be vindicated; however, it cannot be plausibly read to create a federal statutory entitlement for that counsel to videotape a clemency interview. And *Battaglia* certainly does not hold that 18 U.S.C. § 3599 creates a *constitutional* right to that taping. Ochoa would have the courts take the entitlements in § 3599 and *Battaglia* far beyond what they actually provide.

joined by three other justices,[15] Justice O'Connor stated that "some *minimal* procedural safeguards apply to clemency proceedings." *Id.* (emphasis in original). Those minimal safeguards are not specified, except to cite flipping a coin or arbitrarily denying *any* access to the clemency process as examples of situations warranting judicial intervention. *Id.* Even applying her due process standard, however, Justice O'Connor found that Ohio's clemency procedure, including the notice of hearing and the opportunity to interview, comported with due process. *Id.* at 290. The Fifth Circuit has also interpreted the due process requirements in clemency cases narrowly. The Circuit has consistently applied the Court's standards to find a lack of due process problems with state clemency procedures. *See Faulder v. Johnson*, 178 F.3d 343, 344–45 (1999); *Tamayo v. Perry*, 553 F. App'x 395, 400 (5th Cir. 2014); *Turner v. Epps*, 460 F. App'x 322, 331 (5th Cir. 2012) (per curiam); *Roach v. Quarterman*, 220 F. App'x 270, 275 (5th Cir. 2007); *Sepulvado v. La. Bd. of Pardons & Parole*, 171 F. App'x 470, 472–73 (5th Cir. 2006) (per curiam).

The prison's purported interference with Ochoa's clemency application hardly compares with reducing the clemency process to a coin flip. *See Duvall v. Keating*, 162 F.3d 1058, 1061 (10th Cir. 1998) ("the minimal application of the Due Process Clause only ensures a death row prisoner that he or she will receive the clemency procedures explicitly set forth by state law, and that the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin"). Besides, even assuming arguendo that the prison

[15] In his dissent, Justice Stevens provided the fifth vote in favor of due process applying to clemency proceedings; however, he would go further than "minimal" procedures.

had wholly denied the videotaped interview, Ochoa was permitted an in-person interview with a member of the clemency board. *See* 37 Tex. Admin. Code § 143.57(e)–(f). Clearly, an in-person interview would have afforded Ochoa comparable advantages to a videotaped one.

Ochoa again relies on *Young v. Hayes* in support of his merits argument and assertion of a circuit split.[16] *See* Pet.16-17. But the Eighth Circuit (en banc) has itself subsequently distinguished *Young* based on its facts in a subsequent case alleging interference with clemency, denying relief based on largely the same interpretation of this Court's clemency precedent as set forth by the Respondents'. *See Winfield*, 755 F.3d at 630–31. Ochoa's case is also factually distinguishable, as explained *supra*.

Indeed, *Young* and *Ochoa* are merely the product of different facts yielding different results. But even if there were a conflict, the Fifth Circuit's opinion below was unpublished and is thus not binding on future panels. The Fifth Circuit cannot be in true opposition to the Eighth until the Fifth Circuit issues its definitive opinion in published format. Or, at very least, the conflict is not ripe, and this case is a poor vehicle for exploring any difference of opinion.

Nevertheless, to whatever extent there is some vague constitutional right to a videotaped clemency interview or an ill-defined constitutional entitlement requiring counsel's parity with media, the prison's policies are entirely permissible. The correctional setting requires that deference be given to prison officials. *Turner v.*

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[16] The Eleventh Circuit has found the logic of *Young* "cannot be squared with what Justice O'Connor's [concurring] opinion [in *Woodard*] actually says[.]" *Gissendaner v. Comm'r, Georgia Dept. of Corr.*, 794 F.3d 1327, 1333 (11th Cir. 2015).

*Safley*, 482 U.S. 78, 89–90 (1987). To determine whether "a prison regulation impinges on inmates' constitutional rights" the Court must ask whether the regulation "is reasonably related to legitimate penological interests." *Id*. The *Turner* reasonableness test proceeds as follows:

> First, is there a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"? Second, are there "alternative means of exercising the right that remain open to prison inmates"? Third, what "impact" will "accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally"? And, fourth, are "ready alternatives" for further the governmental interest available?

*Beard v. Banks*, 548 U.S. 521, 528–29 (2006) (quoting *Turner*, 482 U.S. at 89–90). Under that test and based simply on the Ochoa's pleadings and attached policies, the prison's regulations pass constitutional muster. The prison has an obvious security interest in regulating the admission of electronic devices into highly secure areas such as death row, where they can potentially be misused by convicted criminals.

As the Respondents explain further below, the prison permits both attorneys and media to bring in the respective tools of their trades, and those tools are not identical. Given that video cameras are not regularly used by attorneys or their staff, it is not unreasonable to expect that counsel should have to give advance notice of their intent to bring a camera as well as a justification for doing so. This notice allows the prison to screen for potential misuse of a non-standard item, prepare an area for the filming, and allocate guards or staff or both to facilitate and safeguard the visit. A Texas death row inmate has been found by a jury to constitute a danger to others,

Tex. Code Crim. Proc. art. 37.071 § 2(b), and therefore requires guards and staff to manage and secure anything that he does.

But even when counsel cannot obtain videotaping through the procedures outlined in the attorney guidelines, it nevertheless appears that alternative methods exist, as demonstrated by the examples in Ochoa's newspaper article. And Ochoa was also allowed to have an in-person interview with a member of the clemency board. *See* 37 Tex. Admin. Code § 143.57(e)–(f).

Ochoa has noted that resources are already allocated for media interviews, but media interviews are limited to a short time period once a week. ROA.31–32, 42–43 (ECF No. 1-1 at 9–10; ECF No. 1-2 at 3–4). Counsel visits are not so limited, *see id*., and presumably Ochoa is not requesting that the prison restrict counsel's access to the same abbreviated timeframe. To the extent that Ochoa is complaining that the prison policy improperly requires an inmate to have a court order to obtain videotaping, the Respondents have already conceded that an order is not required under the policy, ROA.100–01 (ECF No. 10 at 25–26), and, in fact, afforded Ochoa his videotaped interview without the necessity of a court order. ROA.163 (ECF No. 6). The argument that TDCJ policy requires a court order for videotaping has been refuted by actual events and there is no evidence for it in TDCJ's written policies.

**ii. Ochoa has no constitutional right to require that the prison provide counsel superior access to inmates than the media, although prison policy already does so.**

In the lower court, Ochoa stated that "whether legal team members have a constitutional right to greater access to inmates than members of the media has no

effect on the merits of this suit" and what he is actually doing is comparing "the access of legal team members to members of the media for purposes of the *Turner* test." *See* Appellant's Brief at 48–49. In this Court, he has also stated that he merely pointed to media policies to show that the prison's policies are unreasonable and not security-related. Pet.4–5. However, this does not seem to square with what Ochoa proposed in the district court. Specifically, Ochoa asked the lower court to:

> 3. Declare any TDCJ's video camera policies that favor media representatives over legal counsel, whether de facto or de jure, unconstitutional or in violation of federal law;
>
> 4. Enjoin Defendants from creating or enforcing policies that provide media representatives greater access to inmates than the inmates' own counsel;
>
> 5. Order Defendants to create accommodations and policies for legal counsel to film inmates that provide at least as much access to inmates as the accommodations applied to members of the media[.]

ROA.21 (ECF No. 1 at 16). Likewise, in his motion before the Fifth Circuit to stay the execution, Ochoa acknowledges that he asked the lower court to "order that Appellees no longer provide media representatives with greater access to inmates than their own counsel[.]" *See* Appellant's Motion for Stay at 3. The idea that his counsel is entitled to parity with media members thus appears to be at the heart of Ochoa's issue with the prison's policies.

Assuming he continues to rely on this argument, Ochoa fails to demonstrate why counsel's ability to bring a camera into the prison should be exactly equivalent or superior to the media's. Ochoa couched his Complaint in the fashion of an equal protection claim, but he is not being treated differently than any other capital

murderer, and capital murderers are not a protected class. *Gibson v. Tex. Dep't of Ins.-Div. of Workers' Comp.*, 700 F.3d 227, 238 (5th Cir. 2012) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must either allege that (a) a state actor intentionally discriminated against [him] because of membership in a protected class[,] or (b) he has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment.") (citations and quotations omitted). Ochoa does not allege that he was not allowed to have Dr. Phil or a similar TV personality visit him under the same conditions as Rodney Reed. *See* Pet.3. And Ochoa has not argued that Reed's counsel was allowed to bring a camera into the prison whereas his counsel was not. *Id.*

Ochoa has alleged that he was told that a court order was required to bring a camera into the prison, and the Respondents agree that such an order does not appear to be required by the policies attached to his Complaint. Indeed, after consulting with their counsel following the lower court's telephone conference, the prison agreed to permit the videotaping without a court order. Prison policies were not retracted or amended to facilitate this resolution. ROA.163 (ECF No. 6). In other words, ultimately, Ochoa was permitted the videotaping under the current policy. Not as an exception, but as a matter of discretion.

In any event, Ochoa's attachments to his Complaint show that the prison already privileges counsel's access over media's. To begin, media is limited to visits on Wednesdays from 1:00 p.m. to 3:00 p.m. ROA.42 (ECF No. 1-2 at 3). Counsel or designees, however, are permitted to visit on any business day between 8:00 a.m. and

5:00 p.m. ROA.31 (ECF No. 1-1 at 9). Counsel and designees are also allowed to visit on non-business days at the warden's discretion if a reasonable explanation is offered. *Id*. Media visits are limited to one hour, whereas counsel and designee's visits have no limit. ROA.31–32, 43 (ECF No. 1-1 at 9–10; ECF No. 1-2 at 4). Media must submit notice of a visit to death row no later than noon on the Monday before the visit; counsel must only notify the prison by 3:30 p.m. the day before. ROA.31, 46 (ECF No. 1-1 at 9; ECF No. 1-3 at 1). Furthermore, the warden may exercise his discretion to curtail media visits for a wide variety of reasons, whereas it appears counsel's visits may only be limited for security reasons. ROA35, 42 (ECF No. 1-1 at 13; ECF No. 1-2 at 3). Reporters are also generally limited to one interview every ninety days. ROA.47 (ECF No. 1-3 at 2). There is a mechanism for appeal built into prison policy for attorney complaints about visitation restrictions. ROA.35–36 (ECF No. 1-1 at 13–14). It does not appear that there is a similar appeal policy for media. Attorneys, designees, and media must all submit documentation to the prison.[17] ROA.31–32, 42, 46 (ECF No. 1-1 at 9–10; ECF No. 1-2 at 3; ECF No. 1-3 at 1). Counsel and media are both presumptively allowed to bring in the tools of their trades. ROA.33 (ECF No. 1-1 at 11) (counsel and representatives may bring briefcases, attaché cases, laptops, personal digital assistants, and voice or audio recorders); ROA.46–47 (ECF No. 1-3 at 1–2) (reporters may bring recording devices, wireless microphones, notepads, writing instruments, and camera equipment). Counsel is also allowed to bring in camera

[17] Referring to the I-164 form, Ochoa's Complaint asserted that the prison requires disclosure of various personal information and then does a background check on counsel designees but not media. He did not attach the form.

equipment, but counsel must submit a justifiable reason for the equipment to the warden for consideration. ROA.33 (ECF No. 1-1 at 11).

Thus, save for fact that reporters are presumed to be allowed to carry camera equipment into the prison and allegedly provide less information than required by the I-164 form, the prison's policies favor counsel's access to inmates over the media's. Of course, Ochoa's counsel's designee was ultimately allowed to bring a camera into the prison, meaning any complaint about this issue is moot.

## III. Ochoa Will Not Suffer Any Harm, Let Alone Irreparable Harm.

Ochoa argues that his execution constitutes irreparable harm. In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but "the severity of the penalty does not in itself suffice." *Barefoot*, 463 U.S. at 893. Moreover, this is a § 1983 case, which means that Ochoa necessarily does not challenge the validity of his sentence (otherwise, he would simply be filing a prohibited successive habeas petition). If Ochoa dies, his sentence has only been fulfilled. Whether or not Ochoa may be executed is simply not the subject of this lawsuit and not germane to a harm analysis.

Rather, the harm that Ochoa himself has identified is the deprivation of a videotaped clemency interview. ROA.20 (ECF No. 1 at 15) ("Ochoa suffered an actual injury in not being able to present this video as part of his clemency application"). Of course, Ochoa has already had his video interview, meaning that he has already availed himself of the substantive relief sought in this lawsuit. The Board of Pardons and Paroles has also already declined to recommend commutation or a reprieve.

Ochoa has no more opportunities or need to submit videos to the Board. He can no longer suffer any injury under the prison's purportedly unconstitutional policies. Ochoa himself accrues no tangible benefit from winning his lawsuit and suffers no personal harm from losing it. Only anonymous future inmates may potentially be harmed by any purported defect in prison policy or its application, not Ochoa. As the district court correctly observed, "the possibility of irreparable injury does not weigh in Ochoa's favor. Even if merit exists to Ochoa's argument that prison policies violate the Constitution, those policies no longer pose any concern for him individually. The Defendants have already accommodated his request for a videotaped interview. Any continuing constitutional problem with the prison videotaping policy will not injure Ochoa personally." App. B. at 12. The Fifth Circuit likewise emphasized that because Ochoa's claim lacked any merit, because he had already received substantive relief, and because he did not challenge his conviction and sentence, any link between this lawsuit and the execution had been severed. App. A at 7 ("[Ochoa's] pending § 1983 claim is now not just unlikely to succeed on the merits, but unrelated to his impending execution.").

## IV. The State and the Public Have a Strong Interest in Seeing the State Court Judgment Carried Out.

The State, as well as the public, has a strong interest in carrying out Ochoa's sentence. *See Hill*, 547 U.S. at 584. The public's interest lies in executing sentences duly assessed, and for which years of judicial review have failed to find reversible error. Indeed, Ochoa has already passed through the state and federal collateral review process. The public's interest is not advanced by postponing Ochoa's execution,

and the State opposes any action that would cause further delay. Ochoa killed five people. Most of his victims were defenseless women and children, whom he callously executed. Even by the standards of capital cases, Ochoa's crime was appalling. After sixteen long years of litigation,[18] justice should no longer be denied. Accordingly, the district court correctly found that:

> The remaining two *Nken* factors weigh strongly in the Defendants' favor. A stay would prejudice the Defendants because Texas has a "strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Crutsinger v. Davis*, 936 F.3d 265, 272–73 (5th Cir. 2019). The public interest more greatly lies in allowing the State to carry out its otherwise-valid judgment because "protecting against abusive delay is an interest of justice." *Martel v. Clair*, 565 U.S. 648, 662 (2012).

App. B. at 12. The Fifth Circuit agreed that "that states have a strong interest in enforcing their valid judgments without delay or undue interference from our court." App. A at 7.

Moreover, it bears repeating it is no secret that "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death." *Rhines*, 544 U.S. at 277–78. And "[t]he federal courts can and should protect States from dilatory or speculative suits[.]" *Hill*, 547 U.S. 585. The Respondents have repeatedly conceded that Ochoa acted with relative

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[18] Ochoa has previously downplayed this lengthy period, noting that "[t]his is Mr. Ochoa's first execution date, and he only recently completed his initial post-conviction process." *See* Appellant's Brief at 51. But there is no authority for the proposition that a first setting is a mere practice run. Ochoa has no entitlement to multiple execution dates before the imposition of capital punishment. And Ochoa has already resided on death row more than five years beyond the average time on Texas death row prior to execution. Death Row Information, https://tdcj.texas.gov/death_row/dr_facts.html (last visited Jan 31, 2020) ("Average Time on Death Row prior to Execution: 10.87 years").

speed after the denial of his requests in November/December 2019. However, the bypass of his administrative remedies and Ochoa's decision to seek a stay of execution even after getting his videotaped interview suggests that this litigation now only exists as vehicle for obtaining a stay. And Ochoa's failure to find even a single case that explicitly supports his entitlement to a videotaped clemency interview illustrates that his theories for relief are uncertain and conjectural. This is precisely the sort of "dilatory tactic" or "speculative suit" that the Court has suggested that the judiciary not entertain. *See also* App. A at 7–8. The lower courts did not abuse their discretion, and any stay should be denied.

## CONCLUSION

For the reasons set forth above, Ochoa's petition for a writ of certiorari should be denied. Moreover, the State's strong interest in the timely enforcement of a sentence is not outweighed by the unlikely possibility that Ochoa's petition for certiorari will be granted. Thus, his motion for a stay of execution should be denied as well.

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