

No. _____

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, CORRECTIONAL
INSTITUTIONS DIVISION, TEXAS DEPARTMENT OF CRIMINAL JUSTICE;
MICHAEL BUTCHER, WARDEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPLICATION FOR STAY OF EXECUTION

*Mr. Ochoa's execution is scheduled for February 6, 2020,
after 6:00 p.m. CDT*

February 5, 2020

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

Mr. Ochoa's case comes before this Court with a 42 U.S.C. § 1983 action still
pending in district court. Over two months before his scheduled execution date, Abel
Ochoa contacted Texas prison officials requesting permission to film an interview to

submit as part of his request for clemency. (R.10–11).¹ Because the prison routinely grants requests from members of the media to film Texas death row inmates, he had no reason to believe his request would be denied. (R.12–15). Yet, Texas prison officials refused to allow Mr. Ochoa to make his final plea for life in a filmed clemency interview unless he first secured a court order. Mr. Ochoa sued under 42 U.S.C. § 1983, alleging that the prison’s policies and practices interfered with his clemency process in violation of his constitutional and statutory rights. (R.5–22). To remedy these violations, Mr. Ochoa requested declaratory and injunctive relief, and a court order to permit the filming. (R.21).

Mr. Ochoa has not received complete relief on these claims and an active case or controversy exists. A stay here is justified to allow the litigation of two questions of national importance, as outlined in Mr. Ochoa’s simultaneously filed petition for writ of certiorari. These questions ask this Court to resolve whether state actors can evade judicial review of unconstitutional policies or practices that impact condemned individuals nearing their execution date and whether the State’s intentional interference in the clemency process can violate an individual’s due process rights.

Mr. Ochoa’s handling of this suit exemplifies a model of diligent litigation. He quickly moved to remedy the issue and the Respondents had multiple opportunities to resolve the instant action with no stay of execution—yet they refused to take the opportunities. While this Court may punish dilatory litigants by denying a stay of execution, it should not punish diligent litigants, such as Mr. Ochoa, who have a

¹ “R.” refers to the electronic record on appeal in this case from the United States Court of Appeals for the Fifth Circuit. “App.” refers to the Appendix submitted with the petition for writ of certiorari.

strong likelihood of success on their underlying claims. Mr. Ochoa has gone above and beyond to remedy this suit before the scheduled execution date of February 6, 2020, and it is Respondents' actions, not Mr. Ochoa's, that necessitate a stay of execution.

BACKGROUND

Mr. Ochoa began trying to film his clemency video approximately November 20, 2019—well over two months before his scheduled execution. (R.15). Due to the routine and frequent approval for media members to film Texas death row inmates, he had no reason to believe that his request would be denied. (R.12–15). He contacted both the TDCJ's Public Information Office *and* the Warden's Office at the death row unit to inquire about the appropriate procedure to secure the filmed interview for his clemency petition—both pointed to the other as the proper channel due to their apparent confusion over their own policies.²

Three weeks after Mr. Ochoa initially inquired, Respondents finally denied his request to film. (R.18–19). This interference with the clemency process constituted an injury in fact. TDCJ staff then refused to provide Mr. Ochoa with written confirmation of the denial and informed him there was no process to appeal the decision, which Mr. Ochoa reasonably relied upon. (R.19); *see Davis v. Fernandez*, 798 F.3d 290, 295 (5th Cir. 2015) (“Grievance procedures *are* unavailable to an inmate if the correctional facility's staff misled the inmate as to the existence or rules of the

² Director of Communications, Jeremy Desel, instructed counsel to pursue the request through the Warden's Office. (R.16). Yet, Warden Michael Butcher informed Mr. Ochoa in writing that the proper channel was through Mr. Desel's office. (R.215).

grievance process so as to cause the inmate to fail to exhaust such process.”) (emphasis in original); *see also Dillon v. Rogers*, 596 F.3d 260, 268 (5th Cir. 2010) (“[P]rison officials’ statements concerning administrative remedies can render such remedies unavailable.”).

On December 23, 2019—within seven business days of the denial, and approximately six weeks before his scheduled execution—Mr. Ochoa filed this suit under 42 U.S.C. § 1983. (R.5–22). On January 7, 2020, the district court held a telephonic conference regarding the suit. Despite the district court giving Respondents the opportunity to explain their objection to Mr. Ochoa’s legal team filming him for clemency, Respondents could not offer any basis for the objection. (R.245). The district court then signaled that it intended to order Respondents to allow the filming if the parties did not reach an agreed resolution on allowing the videographer to bring camera equipment into the prison. (R.253–54). Apparently the Respondents found this amusing; the district court noted that they were “over there laughing like that’s some impossibility to come up with an agreed order.” (R.252). The district court was less amused and made it clear that it intended on entering an order to permit filming unless an agreement was reached. (R.253).

On Thursday, January 9, the parties informed the district court through a Joint Advisory they had reached an agreement on the videographer but continued to negotiate complete relief in the case. (R.63–64). The following Monday, January 13, Mr. Ochoa sent Respondents a proposed settlement agreement, requesting that Respondents amend their policies and practices, or issue a directive clarifying such,

to avoid this issue in the future. (R.134–35). On January 15, Respondents rejected the proposal in its entirety. (R.135). The following day, Mr. Ochoa asked whether Respondents intended to offer any counterproposals to resolve the suit. Respondents did not respond, and the following day filed a 30-page Motion to Dismiss the lawsuit. (R.76–108). Minutes after filing the Motion to Dismiss, Respondents informed Mr. Ochoa they would be offering no counterproposals. (R.135).

Had Respondents taken reasonable steps throughout this process, a stay would not be necessary. Instead, they have refused to engage in attempts to resolve the issues related to their unlawful policies and practices, and now accuse Mr. Ochoa of dilatory tactics intended to delay his execution. Their argument is wholly unsupported by the facts. It is the actions of Respondents—not of Mr. Ochoa—that necessitate a stay of execution.

Mr. Ochoa sought a stay of execution from both the district court and United States Court of Appeals for the Fifth Circuit regarding his pending § 1983 action. Both courts denied his request. (App.A; App.B).

JUSTIFICATIONS FOR STAY

28 U.S.C. § 2251(a)(1) provides that “[a] justice or judge of the United States before whom a habeas corpus proceeding is pending, may, . . . pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.” This Court should exercise its equitable powers here to stay Mr. Ochoa’s execution and allow his pending § 1983 action to proceed. *See Bucklew v. Precythe*, 138 S. Ct. 1323

(2018) (granting a stay of execution pending disposition of a petition for writ of certiorari related to a § 1983 claim); *Skinner v. Switzer*, 569 U.S. 1033 (2010) (same). A stay is warranted to consider the weighty issues raised and to allow the orderly adjudicative process of the federal courts to take place. *Lonchar v. Thomas*, 517 U.S. 314, 320–21 (1996); *Barefoot v. Estelle*, 463 U.S. 880, 893–94 (1983).

In his simultaneously filed petition for writ of certiorari, Mr. Ochoa presents two questions for review to this Court:

1. Whether a state actor can insulate unconstitutional policies and practices from judicial review by asserting that the upcoming execution of the plaintiff serves as an irrefutable endpoint to any harm, rendering the state actor's policies and practices non-justiciable.
2. Whether a state actor violates a death row inmate's due process rights when it interferes in the clemency process by preventing the condemned individual from submitting evidence to support his request for clemency.

Both questions present important issues of national significance, which merit this Court's review. This Court should stay Mr. Ochoa's execution pending disposition of the petition for writ of certiorari.

CONCLUSION AND PRAYER FOR RELIEF

Mr. Ochoa asks that the Court grant this application, stay his execution, and grant any other relief that the Court may find just.

Respectfully submitted this 5th day of February, 2020,

JASON D. HAWKINS
Federal Public Defender

by

/s/ Jeremy Schepers
Jeremy Schepers (#304861)
Supervisor, Capital Habeas Unit
Counsel of Record
jeremy_schepers@fd.org

Derek VerHagen
Assistant Federal Public Defender

Northern District of Texas
525 S. Griffin St., Ste. 629
Dallas, TX 75202
214-767-2746

Paul Mansur
Attorney at Law
P.O. Box 1300
Denver City, TX 79323
(806) 592-2797
Paul@PaulMansurLaw.com

Attorneys for Petitioner