

**BEFORE THE GOVERNOR OF THE STATE OF TEXAS AND
THE TEXAS BOARD OF PARDONS AND PAROLES**

In Re

Abel Ochoa,

Petitioner

**PETITION FOR COMMUTATION OF DEATH SENTENCE TO LESSER PENALTY,
OR, IN THE ALTERNATIVE, A 90-DAY REPRIEVE AND
REQUEST FOR HEARING ON MATTER**

Execution date set for February 6, 2020

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I. PETITION FOR COMMUTATION OF DEATH SENTENCE TO A LESSER PENALTY AND REQUEST FOR HEARING ON MATTER

Every morning for the last 17 years, Abel Ochoa has awoken to the realization that he took the lives of those he loved most in the world. He wonders what his two beautiful daughters would be doing if they were still here today. He thinks of his wife, Cecilia, and her sister and father, and the devastation that his entire family has experienced since August 2002. And, he prays. Abel prays that his late family has found peace in the afterlife, that his surviving family finds happiness despite tragedy, that his fellow death row inmates find the Lord in even the darkest places, and that he may somehow be a positive influence on the people he encounters each day. And, of course, he prays for forgiveness.

Abel's story is undoubtedly heartbreaking, but it is also one of hope and redemption. It is the story of a man who went from being curled up in a paper gown on suicide watch in the Dallas County jail in 2002, to mentoring fellow inmates and positively impacting the lives of guards on death row today. In just a single visit with Abel, one can sense his importance to the prison. For every inmate who is escorted past the visitation booth, Abel pauses the interview to shout a kind word or short joke that brings a smile to the inmate's face as he's taken back to his cell. For every guard who passes by on her rounds, Abel offers a respectful greeting and asks how her day has been. It is as if Abel knows everyone at the Polunsky Unit and everyone knows him. Say what you will about the people on death row, but the fact is that it is its own community with its own culture. Inmates must find ways to get along with other inmates; guards must find ways to get along with other guards; and, of course, guards and inmates must find a way to safely coexist. Abel Ochoa is an essential part of the fabric that holds that community together, and makes it a safer, better place. This Board would be hard pressed to find a single person—inmate, guard, or other—who has a bad thing to say about Abel's behavior since he arrived on death row.

But, the question for this Board is whether any of that matters. If a person commits a terrible crime, but repents, builds a relationship with God, and spends every day overcoming the shame and depression that such a crime breeds, to spend his energy trying to improve the lives of others, should that be recognized? Ultimately, with this clemency petition, Abel submits that it *does* matter, and he respectfully requests the opportunity to continue his calling as a general population inmate with a sentence of life without the possibility of parole.

By the supplementation deadline, Mr. Ochoa will submit a video to the board for its review because a paper record inadequate to convey this story. Mr. Ochoa presents a particularly compelling case for commutation given his deep and sincere remorse for his crime, his personal story of redemption, and his remarkable faith and relationship with God. Mr. Ochoa has made great efforts to be a positive influence on other inmates, correctional officers, and others he has encountered during his 16 years on death row. He speaks in an eloquent and vulnerable manner about the greatest mistake of his life and his daily struggle for redemption—which he recognizes would not be possible without his sincere faith in God. This video contains critical information for the Board’s review.

A. Clemency was designed to allow this Board to recommend mercy in a case such as this one.

Clemency is a fundamental part of the justice system. The Supreme Court has recognized that when procedural rules prevent the courts from resolving a case correctly, the answer has always been clemency.¹ It is the “failsafe” for the courts. Because clemency is the last defense against systemic wrongs, it is not restrained by rigorous procedural barriers or rules. As such, it should not be denied because a person has received appellate review and failed to obtain relief. Rather, clemency is designed to provide the rigorous review that courts cannot. In fact, the power to grant clemency is vested in the executive branch precisely *because* it provides a holistic, compassionate, and non-

¹ *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

judicial review of the case. At its best, clemency is the ideal and often only method for “remedying many of the problems inherent in an imperfect, overloaded, and increasingly rigid system of criminal justice.”²

Abel’s case is the type the clemency process was meant to address.

B. For most of his life, Abel was a success story of a person who overcame the odds.

Abel was born into dire poverty in Durango, Mexico in 1974. His father was a soldier in the Mexican army, and his mother stayed home with the children. The family lived in a small plywood shack high in the mountains outside the military base where Abel’s father was stationed. The winters were long and cold, and the only heat they had was from the pieces of scrap that Abel’s mother burned in a large metal drum inside the shack. The family was hungry and malnourished—so much so that Abel’s mother lost one of her children during pregnancy.

When Abel was three years old, his family moved to the United States. His father took up work as a farmhand on a dairy farm in exchange for a \$1.50/day wage and free housing in a small, rundown home on the property. Abel’s father drank heavily. When he was drunk, he beat Abel and his siblings, as well as Abel’s mother, mercilessly. When he would finally pass out, Abel and his brother would go into the fields to complete their father’s work, so their family would not be kicked off the farm. This cycle continued throughout Abel’s childhood, with the family moving from one dairy farm to another in search of more work.

When Abel should have been in the 9th grade, his father kept him home from school for an entire school year so he could help the family make ends meet. That year Abel and his siblings took odd jobs, and when the season was right, collected pecans from trees around town to sell to passers-by. Abel returned to school the following year, and continued until he graduated from high school in

² Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 613 (1991).

1991. After graduation, he took a job at a steel mill in Dallas, where he worked for over a decade. In that time, he met his wife Cecilia, had two daughters, and bought a house. He was finally able to get out from under the shadow of his drunken, abusive father, and make his own life. Remarkably, through all the challenges of his childhood, Abel never once got in trouble with the police—no nights in jail, no arrests, not even so much as a traffic ticket.

Abel's kind and helpful demeanor was evident to all those around him. His friends and family remember his loving relationship with his wife and children. From the neighbors' perspective, Abel was a doting father to his two daughters—carrying one around the yard on his hip and teaching the other to ride her bike. 37 RR at 141-42. He was always willing to help a neighbor work on their car or clean up their yard. *Id.* at 138-39. He was a valued member of society and someone people enjoyed just being around.

C. When Abel's marriage began to deteriorate, he turned to drugs.

Unfortunately, Abel and Cecilia began to have marital problems around 1999, when Abel learned that a young boy who Cecilia had claimed to be her nephew was actually her son from a past relationship. Around that time, Abel began to go out and drink with a new group of friends. Once after a night of drinking, the friends offered Abel crack cocaine. He had never done drugs before, so he initially declined. Eventually he gave in and his life would never be the same after that. Abel spent the next few years chasing the feeling that he got from that first high, spending more and more money on the drug. At one point, he entered a faith-based rehabilitation program offered by a local church, but that was not enough to overcome his addiction. On August 4, 2002, Abel took his last hit of crack. He felt strange and disoriented, different from any high he had ever felt before. Shortly thereafter, he opened fire on several of his family members who were watching television in his house, killing five of them.

D. Abel was devastated and suicidal after his crime.

Abel was arrested minutes after the crime at a shopping center at the end of his street. As police took him into custody, he asked whether his family was okay. 33 RR at 108. When officers did not answer him, Abel began crying and said, “I can’t believe I did that.” *Id.* Jail staff placed Abel on suicide watch for two days after the crime. They took all of his clothing away, leaving him only a paper gown to wear. The cell was bare, with no furniture, no bed, and nothing on the walls. Abel slept on the concrete floor for two days under near-constant supervision from the guards, reflecting on his horrific mistake and how he could possibly continue to live in its wake.

It was there that Abel met Chris Bull, another inmate who was being held in the cell behind Abel’s. They were able to speak through the air vent, and though Abel was withdrawn and ashamed, Chris was persistent in getting to know him. Before long, Chris shared with Abel his close relationship with God, and began to teach Abel about the scripture. Each day, Abel and Chris held a Bible study through the air vent, taking turns reading verses and discussing their meaning. Over the course of the next eight months that Abel spent in county jail, he read the Bible three times from cover to cover. He became intimately familiar with the word of God and began to share it with those who would listen. For the first time since the crime, Abel began to see a purpose for his life.

E. Abel is a beloved figure on Texas death row.

Abel was sentenced to death on April 23, 2003. He did not receive a single disciplinary infraction in his eight months in the county jail, and his next sixteen years on death row would be largely the same.

Since moving to death row, Abel has taken on a role of as a calm and wise inmate. He is known to mentor newer inmates when they arrive to the row. He teaches them the basics of how to get by in prison—e.g., always be respectful of other inmates and guards, do not leave trash in the shower or dayroom, etc.—but he also provides life advice. He shares his own story and encourages

the new guys to look inside of themselves to identify who they are and who they want to be. Abel views life on death row as an opportunity to be a better person. He challenges other inmates to say no to drugs, alcohol, and other contraband that occasionally circulates around the prison. He encourages them to avoid gangs. He teaches them to think beyond “me, myself and I,” and to consider the feelings and intentions of others. He does all of this in the context of reminding the inmates that: though they have done something terrible, they are still God’s children; that God loves them; and that if they truly repent, God will forgive them.

Of course, jailhouse conversions are nothing new. There is nothing particularly extraordinary about a person claiming to turn to God after he has gotten in trouble. The difference here is that Abel’s transformation seems to be sincere and permeates everything he does on a day to day basis. Sgt. Barry Brown, the Divisional Director of Correctional Ministries for the Salvation Army in Texas, eloquently described Abel’s faith:

For 21 years, I have visited with incarcerated individuals throughout Texas. I have known many people of faith[,] especially of the Christian faith[,] both inside churches and correctional facilities. I have had the opportunity to witness Abel’s character during these past 4 ½ years. In addition, I have had many men who live on Death Row tell me how much they respect Abel and know that he is a committed Christian man. . . . **I share the following without any reservation or hesitation. Abel is one of the most committed Christian persons I have ever known.**

As former TDCJ Correctional Officer Birgit Loveall puts it, “Abel walks the walk.” CO Loveall recalls that Abel was the first person she ever handcuffed in her life. She had previously worked as a school bus driver for several years before taking a job with TDCJ. When she put the cuffs on, she accidentally closed them too tight, injuring Abel’s wrists. Normally, an inmate would complain or threaten to write a grievance about such a mistake, Loveall says. But not Abel. He told her he understood that she was new and that she should not feel bad. He even offered to let her practice putting handcuffs on him in the future if she needed a guinea pig. Loveall was taken aback by Abel’s kindness, but she learned over time that Abel was kind, polite, and understanding day in

and day out. He never caused problems for the guard, and she found him to be unlike any other inmate she met on death row. She also believed that Abel has fully accepted responsibility for his crime and expresses sincere remorse, which she attributes to Abel's deep faith in God.

Ms. Loveall is not the only correctional officer who Abel has positively impacted. Current TDCJ guard Leslie Jung also has wonderful things to say about him. From CO Jung's perspective, Abel is not only kind and God-fearing, but he also makes the prison a safer and easier place to work. Jung explains that there is another inmate on the same pod as Abel who some guards, including Jung, fear may do something to hurt them. The inmate often threatens violence and is uncooperative every chance he gets. According to CO Jung, Abel often shares kind words to the inmate to soothe him when he is upset. Jung has watched the inmate go from volatile to quiet in the snap of a finger, simply based on Abel speaking calmly to him and reminding him of God's love for all his children.

Other former TDCJ guards had similar stories to share about Abel, but feared speaking on the record due to potential backlash from friends, family or employers. One such guard was formerly a member of the escort team that walks a condemned inmate to the vehicle that takes him to Huntsville on the day of his execution. The guard was proud of being a part of that team and felt that he was doing the service to the community. He recalled Abel as exceptionally respectful of the guards and other staff. Abel struck him as a man of faith who was eager to share his relationship with God. Unlike other inmates, Abel noticed when someone was having a bad day and would check in with them asking, "Is everything okay?" He would even offer to pray for others who were struggling. The guard believed that Abel was truly genuine in his behavior. While some inmates pry into guards' lives to try to get information that they can use somehow, Abel really wanted to know how their kids or parents were doing. The guard also found that Abel expressed true remorse for his crime, and it was clear that Abel had spent a lot of time reflecting on what he had done. Based on Abel's insight and faith, the guard believed that if Abel's sentence was converted to life he would be placed on a

“God pod” in general population where he could lead Bible study for other inmates. The guard had no doubt that Abel would continue to be a model inmate. In fact, he went so far as to say that if Abel were ever released from prison, he would be fine if Abel moved in next door to him. That is how much he trusts this death row inmate. Although the guard generally supports the death penalty, he believes that executing Abel would be an “injustice.”

That former guard’s wife also worked at the Polunsky Unit. In fact, they met each other in front of Abel’s cell. She recalled a time when she escorted Abel to the shower and was waiting outside the shower cell for him to finish. The cell had a defective lock on it and at some point during the shower, the door popped open. With any other inmate, the guard would have rushed to put the inmate on the ground and secure her safety. But Abel just quickly reached out and closed the door again, saying, “Sorry!” She was not worried about her safety at all with Abel and he was apologetic even though it was not his fault that the lock came undone. She and Abel would also talk about Bible passages. Abel would suggest a verse and then she would go home and read it. The next day they would discuss the meaning and how they could incorporate it into their lives.

Yet another former TDCJ guard recalled Abel as “a Christian man.” She remembered that it seemed like Abel was always smiling. She never saw him angry with anyone on death row, and it was hard for her to even imagine a situation where Abel would lose his temper. Instead, he was supportive of other inmates and guards, and tried to cheer them up when they needed it. The guard recalled that if she was having a bad day, Abel would say, “It’ll be okay, Ms. [Name]. I’ll pray for you, Ms. [Name].” She did not think there would be a single person at the Polunsky Unit who would have a bad thing to say about Abel. And, if Abel were granted a lesser sentence, the guard “100%” believed Abel would continue to be a model inmate.

Abel’s legacy at TDCJ is remarkable. Faced with a hopeless situation, he is still devoted, disciplined, kind-hearted, thoughtful, and most of all remorseful. He has touched the lives of guards

and inmates alike. He is a valued and beloved member of the prison community and TDCJ is well-served to have him around. Given how many lives he has touched in his sixteen years on the row, it is uplifting just to imagine all the lives he could affect if he were commuted to a lesser sentence.

CONCLUSION

One thing that all of these witnesses agree on is that there is something special about Abel Ochoa. He overcame long odds to build a decent and respectable life. Unfortunately, he turned to drugs at a difficult time. And, tragically, that led him to make a monumental mistake—one that he takes full responsibility for and lives with every day. Since that day, he has made a sincere commitment to build his relationship with God and do anything he can to improve the lives of others. As one guard put it, if the prison were full of people like Abel, it would be a much better place.

II. APPLICATION FOR NINETY-DAY REPRIEVE FROM EXECUTION AND REQUEST FOR HEARING ON MATTER

For the reasons articulated above, Mr. Ochoa seeks the Board's recommendation to the Governor of commutation of the death sentence to a lesser penalty. In the alternative, however, Mr. Ochoa requests a ninety-day reprieve from execution for the reasons stated in this section.

On December 23, 2019, Mr. Ochoa filed a Complaint Pursuant to 42 U.S.C. § 1983 against the Texas Department of Criminal Justice in the U.S. District Court for the Southern District of Texas, alleging among other things that TDCJ's policies and practices regarding the filming of inmates for clemency purposes violates the United States Constitution and federal law. Although Mr. Ochoa made a good faith effort to settle the suit with TDCJ, the parties recently reached an impasse. Pursuant to Texas Administrative Code Chapter 37, § 143.42, Mr. Ochoa requests a ninety-day reprieve from execution to allow the court sufficient time to rule on the important matters before it. By this application, Mr. Ochoa is not asking this Board to address the legal issues raised in that filing. Instead, Mr. Ochoa merely asks for a limited amount of additional time to allow the court to issue a reasoned decision on the filing. Additionally, Mr. Ochoa requests a hearing on this matter under Chapter 37, § 143.43(f)(3) of the Texas Administrative Code.

A. Grounds for reprieve.

Mr. Ochoa requests a reprieve to allow the U.S. District Court for the Southern District of Texas to hear his § 1983 civil rights suit against TDCJ.

B. Case information.

In compliance with the requirements of the Texas Administrative Code, Chapter 37, § 143.42, Mr. Ochoa makes the following statements:

C. Identification of Applicant

The applicant is Abel Revilla Ochoa, TDCJ # 999450, currently incarcerated at the Polunsky Unit in Livingston, Texas. Mr. Ochoa's execution is scheduled for February 6, 2020.

D. Identification of Applicant's Agents

Mr. Ochoa is currently represented by the Office of the Federal Public Defender for the Northern District of Texas, 525 S. Griffin St., Ste. 629, Dallas, TX 75202.

E. Certified Copies

Certified copies of the indictment, judgment, verdict of the jury, and sentence in the case, including official documentation verifying the scheduled execution date, are attached to this application.

F. Brief Statement of Offense

On August 4, 2002, Mr. Ochoa shot and killed five members of his family, including his wife, two children, father in law and sister in law. Mr. Ochoa has never contested his guilt for this offense.

G. Brief Statement of Appellate History

The Texas Court of Criminal Appeals affirmed Mr. Ochoa's conviction and sentence on direct appeal. *Ochoa v. State*, No. AP-74,663 (Tex. Crim. App. Jan. 26, 2005).

Mr. Ochoa filed an Application for Writ of Habeas Corpus pursuant to Article 11.071, Tex. Code Crim. Proc. on February 11, 2005. The Texas Court of Criminal Appeals denied relief on August 19, 2009. *Ex parte Ochoa*, No. WR-67,495-01 & WR-67,495-02 (Tex. Crim. App. Aug. 19, 2009).

On August 19, 2010, Mr. Ochoa filed his original petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. On September 21, 2016, the United States District Court for the Northern District of Texas denied the habeas petition and refused to certify any issues for appeal. *Ochoa v. Davis*, No. 3:09-CV-2277-K (ECF Doc. 59). On December 14, 2017, Mr. Ochoa filed an Application for Certificate of Appealability with the United States Court of Appeals for the Fifth

Circuit, seeking leave to appeal three issues. The Fifth Circuit denied the application on October 18, 2018. *Ochoa v. Davis*, No. 17-70016 (5th Cir. Oct. 18, 2018) (unpublished). The United States Supreme Court denied certiorari on October 7, 2019. *Ochoa v. Davis*, No. 18-8845, 140 S. Ct. 161 (Oct. 7, 2019).

As of today's date, Mr. Ochoa's only pending litigation is a Complaint Pursuant to 42 U.S.C. § 1983, filed with the U.S. District Court for the Southern District of Texas on December 23, 2019.

H. Brief Statement of Legal Issues Previously Raised

During his direct appeal and post-conviction pleadings, Mr. Ochoa raised a variety of legal issues, including, but not limited to: challenges to hearsay testimony improperly admitted at trial, destruction of evidence in violation of the Due Process Clause, and whether he received effective assistance of counsel at the punishment phase of his trial.

I. Requested Length of Reprieve

Ninety days.

PRAYER FOR RELIEF

For the reasons stated above, Mr. Ochoa requests the commutation of his death sentence to a lesser penalty. Since the day he was arrested, Mr. Ochoa has proven himself to be a model inmate and an asset to the prison system. Guards and inmates hold Mr. Ochoa in especially high regard for his kindness and compassion, as well as his constant push to improve the lives of those around him. For this reason, Mr. Ochoa seeks the Board's recommendation to the Governor of commutation of the death sentence to a lesser penalty.

In the alternative, Mr. Ochoa requests a ninety-day reprieve from execution for the reasons stated herein. Moreover, Mr. Ochoa requests a hearing on these matters.

Respectfully submitted, this 16th day of January, 2020.

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