Appendix A

SUPREME COURT OF THE UNITED STATES

PATRICK HENRY MURPHY *v.* BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.

ON APPLICATION FOR STAY

No. 18A985. Decided March 28, 2019

The application for a stay of execution of sentence of death presented to JUSTICE ALITO and by him referred to the Court is granted. The State may not carry out Murphy's execution pending the timely filing and disposition of a petition for a writ of certiorari unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber during the execution.

JUSTICE THOMAS and JUSTICE GORSUCH would deny the application for a stay of execution.

JUSTICE KAVANAUGH, concurring in grant of application for stay.

As this Court has repeatedly held, governmental discrimination against religion—in particular, discrimination against religious persons, religious organizations, and religious speech—violates the Constitution. The government may not discriminate against religion generally or against particular religious denominations. See *Morris County Bd. of Chosen Freeholders* v. *Freedom from Religion Foundation*, 586 U. S. ___, ___ (2019) (statement of KAVANAUGH, J., respecting denial of certiorari) (slip op., at 2); *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___, ___–___ (2017) (slip op., at 13–14); *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). In this case, the relevant Texas policy allows a Christian or Muslim inmate to have a state-employed Christian or Muslim religious adviser present either in the execution room *or* in the

adjacent viewing room. But inmates of other religious denominations—for example, Buddhist inmates such as Murphy—who want their religious adviser to be present can have the religious adviser present *only* in the viewing room and *not* in the execution room itself for their executions. In my view, the Constitution prohibits such denominational discrimination.

In an equal-treatment case of this kind, the government ordinarily has its choice of remedy, so long as the remedy ensures equal treatment going forward. See *Stanton* v. *Stanton*, 421 U. S. 7, 17–18 (1975). For this kind of claim, there would be at least two possible equal-treatment remedies available to the State going forward: (1) allow all inmates to have a religious adviser of their religion in the execution room; or (2) allow inmates to have a religious adviser, including any state-employed chaplain, only in the viewing room, not the execution room. A State may choose a remedy in which it would allow religious advisers only into the viewing room and not the execution room because there are operational and security issues associated with an execution by lethal injection. Things can go wrong and sometimes do go wrong in executions, as they can go wrong and sometimes do go wrong in medical procedures. States therefore have a strong interest in tightly controlling access to an execution room in order to ensure that the execution occurs without any complications, distractions, or disruptions. The solution to that concern would be to allow religious advisers only into the viewing room.

In any event, the choice of remedy going forward is up to the State. What the State may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room.*

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*Under all the circumstances of this case, I conclude that Murphy

made his request to the State in a sufficiently timely manner, one month before the scheduled execution.

SUPREME COURT OF THE UNITED STATES

PATRICK HENRY MURPHY *v.* BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.

ON APPLICATION FOR STAY

No. 18A985. Decided May 13, 2019

Statement of JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE joins, respecting grant of application for stay.

In light of JUSTICE ALITO's opinion dissenting from the Court's March 28 order, I write to respectfully add two points.

1. On March 28, the Court stayed Murphy's execution. Murphy is Buddhist and wanted a Buddhist minister in the execution room. Under Texas' policy at the time, inmates who were Christian or Muslim could have ministers of their religions in the execution room. But inmates such as Murphy who were of other religions could have ministers of their religions only in the adjacent viewing room and not in the execution room. That discriminatory state policy violated the Constitution's guarantee of religious equality.

On April 2, five days after the Court granted a stay, Texas changed its unconstitutional policy, and it did so effective immediately. Texas now allows all religious ministers only in the viewing room and not in the execution room. The new policy solves the equal-treatment constitutional issue. And because States have a compelling interest in controlling access to the execution room, as detailed in the affidavit of the director of the Texas Correctional Institutions Division and as indicated in the prior concurring opinion in this case, the new Texas policy likely passes muster under the Religious Land Use and

Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. §2000cc *et seq.*, and the Free Exercise Clause.

Put simply, this Court's stay facilitated the prompt resolution of a significant religious equality problem with the State's execution protocol and should alleviate any future litigation delays or disruptions that otherwise might have occurred as a result of the State's prior discriminatory policy.

2. I greatly respect JUSTICE ALITO's position that the Court nonetheless should have denied Murphy's stay application as untimely, although I ultimately disagree. In saying that the Court should have denied a stay in this case, JUSTICE ALITO points in part to the execution earlier this year of Domineque Ray in Alabama, where this Court did not approve a stay. But several significant differences between the two cases demonstrate why a stay was warranted in Murphy's case but not in Ray's case.

First, unlike Murphy, Ray did not raise an equal-treatment claim. Ray raised an Establishment Clause claim to have the State's Christian chaplain removed from the execution room. The State of Alabama then agreed to remove the Christian chaplain, thereby mooting that claim. Notably, in the District Court, Ray expressly agreed that his Establishment Clause claim would be moot if the State removed the Christian chaplain from the execution room, as the State subsequently agreed to do. Ray also raised a RLUIPA claim to have his Muslim religious minister in the execution room and not just in the viewing room. As noted above, however, the State has a compelling interest in controlling access to the execution room, which means that an inmate likely cannot prevail on a RLUIPA or free exercise claim to have a religious minister in the execution room, as opposed to the viewing room.

To be sure, in granting Ray a stay, the Eleventh Circuit

relied on an equal-treatment theory, on the idea that the State's policy discriminated against non-Christian inmates. But Ray did not raise an equal-treatment argument in the District Court or the Eleventh Circuit. The Eleventh Circuit came up with the equal-treatment argument on its own, as the State correctly pointed out when the case later came to this Court. Amended Emergency Motion and Application to Vacate Stay of Execution in *Dunn* v. *Ray*, O. T. 2018, No. 18A815, pp. 10–11, 17. Given that Ray did not raise an equal-treatment argument, the Eleventh Circuit's stay of Ray's execution on that basis was incorrect.

For present purposes, the bottom line is that Ray did not raise an equal-treatment claim. Murphy did.

Second, in response to the Eleventh Circuit's stay in Ray's case, Alabama indicated to this Court that an equal-treatment problem, if there were one, would typically be remedied by removing ministers of all religions from the execution room (as Texas has now done). *Id.*, at 17. That remedy would of course have done nothing for Ray, who wanted his religious minister *in the execution room*. That presumably explains why Ray raised a RLUIPA claim, but did not raise an equal-treatment claim. And that further explains why it was incorrect for the Eleventh Circuit to stay Ray's execution on the basis of an argument (the equal-treatment theory) that was not raised by Ray and that, even if successful, would not have afforded Ray the relief he sought of having his religious minister in the execution room.

Third, unlike Ray, Murphy made his request to the State of Texas a full month before his scheduled execution. Yet the State never responded to Murphy's request to have any Buddhist minister in the execution room. The timing of Murphy's request, when combined with the State's foot-dragging in response and the ease with which the State could have promptly responded and addressed this dis-

crete issue, was relevant to the assessment of the equities for purposes of the stay. See *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006). As we have now seen, moreover, it took Texas only five days to change its discriminatory policy after a stay was granted. Texas' prompt response in the wake of the stay further underscores that Murphy's request was made in plenty of time for Texas to fix its discriminatory policy before Murphy's scheduled execution. Moreover, unlike Alabama in Ray's case, Texas did not indicate to this Court whether it would remedy any unconstitutional discrimination by allowing all ministers into the execution room or by keeping all ministers out. (After this Court granted the stay, the State of Texas chose the latter option.)

* * *

In sum, this Court's stay in Murphy's case was appropriate, and the stay facilitated a prompt fix to the religious equality problem in Texas' execution protocol. That said, both the facts and the religious equality claim in Murphy's case were highly unusual. I fully agree with JUSTICE ALITO that counsel for inmates facing execution would be well advised to raise any potentially meritorious claims in a timely manner, as this Court has repeatedly emphasized. See generally *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*).

SUPREME COURT OF THE UNITED STATES

PATRICK HENRY MURPHY *v.* BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.

ON APPLICATION FOR STAY

No. 18A985. Decided May 13, 2019

JUSTICE ALITO, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting from grant of application for stay.

Patrick H. Murphy, who was convicted and sentenced to death in 2003, was scheduled to be executed at 7 p.m. on March 28. Murphy's attorneys waited until March 26 before filing this suit in Federal District Court. The complaint they filed challenges a feature of the Texas execution protocol that has been in place and on the public record since 2012. The complaint claims that the Texas protocol violates the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 114 Stat. 803, 42 U. S. C. §2000cc *et seq.*, insofar as it permits only a prison chaplain and not any outside cleric to be present in the room where executions are carried out. Murphy is a Buddhist, and none of the more than 100 Texas prison chaplains is a Buddhist priest.

In carefully reasoned opinions based squarely on precedents of this Court, both the District Court and the Court of Appeals rejected Murphy's request for a stay of execution due to his dilatory litigation tactics, see 919 F. 3d 913, 916 (CA5 2019); 2019 WL 1369001, *1 (SD Tex., Mar. 26, 2019). Then, on the afternoon of March 28, only hours before his execution was scheduled to occur, Murphy asked this Court to block his execution. And despite his inexcusable delay in raising his claims, the Court granted Murphy's request.

I did not agree with the decision of the Court when it was made. Because inexcusably late stay applications present a recurring and important problem and because religious liberty claims like Murphy's may come before the Court in future cases, I write now to explain why, in my judgment, the Court's decision in this case was seriously wrong.

I

In 2000, while serving a 55-year sentence for aggravated sexual assault, Murphy and six other inmates executed a well-planned, coordinated, and violent escape from a Texas prison. About two weeks later, on Christmas Eve, the group robbed a sporting goods store and killed Irving, Texas, police officer Aubrey Hawkins when he arrived at the scene. The escapees shot Hawkins 11 times, dragged him from his vehicle, drove over him, and dragged his body for some distance. Six of the seven were eventually captured, convicted of capital murder, and sentenced to death. See *Murphy* v. *Davis*, 737 Fed. Appx. 693, 696–697 (CA5 2018); *Murphy* v. *State*, 2006 WL 1096924, *1, *4 (Tex. Crim. App., Apr. 26, 2006). Murphy was convicted and sentenced in 2003, and his direct appeal ended in 2007. *Murphy* v. *Texas*, 549 U. S. 1119 (2007). During the next 11 years, he unsuccessfully pursued postconviction relief in state and federal court. See *Murphy* v. *Davis*, 737 Fed. Appx., at 695, 699, 709. In November 2018, the State obtained a death warrant setting Murphy's execution for March 28, 2019.

By this time, Murphy had become a Pure Land Buddhist. According to his papers, he converted nearly a decade ago and has been visited by a Buddhist priest, Rev. Hui-Yong Shih, for the past six years.[1] In 2012, Texas made publicly available its policy regarding the presence

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[1] See Pet. for Prohibition in *In re Murphy*, No. 18–8615, pp. 12–13.

of a member of the clergy in the room where an execution by lethal injection is carried out. Under that policy, any of the prison system's chaplains, but no other cleric, may enter this room. Texas has more than 100 chaplains, who are either employees of or under contract with the prison system. These chaplains include Christians, Muslims, Jews, and practitioners of a Native American religion, but no Buddhist priest. The inadequate record compiled in this case does not explain the reason for this omission. It does not tell us how many Texas prisoners are Buddhists, whether any Texas prisoners ever requested a Buddhist chaplain, whether Texas made any effort to recruit such a chaplain, or whether any Buddhist priest is willing to do whatever is needed to serve as a chaplain. Nor do we know anything about the vetting of potential chaplains, any general training that chaplains receive, and any special orientation provided to a chaplain who accompanies a prisoner during the process of execution. And we also do not know what a chaplain is permitted to do during an execution or whether there are specific restrictions on movements or sounds that might interfere with the work of those carrying out an execution.

On February 28, 2019, about three months after Murphy's execution date was set, his attorneys wrote to the general counsel of the Texas Department of Criminal Justice and inquired whether Rev. Shih would be permitted to enter the execution room with their client, and on March 5, the department responded that only a chaplain is permitted in the room. Two days later, Murphy's attorney responded and said that he believed Murphy would be satisfied with a Buddhist chaplain but that he assumed none of Texas's chaplains were Buddhists. Texas did not respond and Murphy's attorneys never renewed their inquiry.

After receiving Texas's response, Murphy's attorneys waited 15 days—until March 20—before challenging this

decision in state court. The state court rejected the claim as untimely late in the evening of March 25, see *In re Murphy*, No. WR–63,549–02 (Tex. Crim. App., Mar. 26, 2019), p. 3, and on March 26, Murphy's lawyers filed this lawsuit in federal court. They asked the District Court to grant a stay of execution, but the District Court refused, citing the well-established rule that a stay of execution is an equitable remedy that should not be granted to an applicant who engages in inexcusably dilatory litigation tactics. 2019 WL 1369001, *1, *5. On March 27, the Court of Appeals for the Fifth Circuit likewise refused to grant a stay, holding that the District Court had not abused its discretion in denying that relief. See 919 F. 3d, at 916.

On March 28, at about 1 p.m.—six hours before the scheduled time of Murphy's execution—his attorneys brought his religious liberty claims to this Court. They filed, among other things, an application for a stay of execution pending the filing of a petition for a writ of certiorari.[2] At about 4 p.m., Texas filed a response, and shortly after 9 p.m., more than two hours after the time scheduled for Murphy's execution, the Court issued an order staying Murphy's execution unless the State allowed Rev. Shih "or a Buddhist reverend of the State's choosing" to accompany Murphy during the execution. *Ante*, p. ___. Murphy's death warrant was set to expire at midnight on March 28, and Texas announced that Murphy's execution would not proceed. Under Texas law, a new death warrant may be issued, but such a warrant may not set a date less than 90 days in the future. Tex. Code Crim. Proc. Ann., Art. 43.141(c) (Vernon 2018).

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[2] They also filed a petition for a writ of prohibition and an application for a stay pending the consideration of that petition.

II

"[A] stay of execution is an equitable remedy. 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." *Hill* v. *McDonough*, 547 U. S. 573, 584 (2006). An applicant for a stay of execution must satisfy all the traditional stay factors and therefore must show that there is "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari," that there is "a fair prospect that a majority of the Court will vote to reverse the judgment below," and, in a close case, that the equities favor the granting of relief. *Hollingsworth* v. *Perry*, 558 U. S. 183, 190 (2010) (*per curiam*).

A court must also apply "a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson* v. *Campbell*, 541 U. S. 637, 650 (2004); see also *Gomez* v. *United States Dist. Court for Northern Dist. of Cal.*, 503 U. S. 653, 654 (1992) (*per curiam*) (noting that the "last-minute nature of an application" or an applicant's "attempt at manipulation" of the judicial process may be grounds for denial of a stay).

Thus, in granting a stay in this case, the Court must have concluded that there is a reasonable probability that we will grant review of the question whether the District Court abused its discretion in finding that Murphy's delay in raising his religious liberty claims disentitled him to the equitable remedy of a stay. We do not generally grant review of such factbound questions. See this Court's Rule 10. But in death penalty matters, it appears, ordinary procedural rules do not apply, see *Madison* v. *Alabama*, 586 U. S. ___, ___ (2019) (ALITO, J., dissenting) (slip op., at 2). And in light of the dissent in *Dunn* v. *Ray*, 586 U. S. ___ (2019)—about which I will say more later—I do not

contest the Court's prediction about the probability of certiorari (as opposed to its propriety).

The likelihood of review, however, is not enough to justify a stay, so the Court's decision must also mean that, in its view, there is a significant likelihood that Murphy will succeed in showing that the District Court abused its discretion. And that I do contest. It is established that "[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief," *Gomez*, *supra*, at 654, and the District Court's decision—and the Fifth Circuit's affirmance—cannot reasonably be thought to represent anything other than the careful and measured consideration of that matter. It is particularly remarkable to conclude that the District Court abused its discretion by ruling exactly as we had less than two months earlier. Compare 2019 WL 1369001, *3 (relying on *Gomez* to deny untimely stay application), with *Dunn* v. *Ray*, *supra*, at ___ (same).

By granting a stay in this case, the Court disregards the "strong equitable presumption" against the grant of such relief when the applicant unreasonably delayed in raising the underlying claims. This presumption deserves greater respect because it serves many important interests.

First, it honors a State's strong interest in the timely enforcement of valid judgments of its courts. See *In re Blodgett*, 502 U. S. 236, 239 (1992) (*per curiam*). In this case, direct review of the judgment ended more than a decade ago. Moreover, if a State is pressured to modify a rule adopted for security reasons, the State has a legitimate claim to be given sufficient time to consider whether acceptable modifications are possible.

Second, eleventh-hour stay requests can impair valid interests of the federal courts. When courts do not have adequate time to consider a claim, the decisionmaking process may be compromised. And last-minute applications may disrupt other important work.

Third, the hasty decisionmaking resulting from late applications may harm the interests of applicants with potentially meritorious claims. Attorneys do not serve such clients well by unduly delaying the filing of claims that hold a real prospect of relief.

Finally, the cancellation of a scheduled execution only hours before (or even after) it is scheduled to take place may inflict further emotional trauma on the family and friends of the murder victim and the affected community.

In the present case, Murphy cannot overcome the presumption against last-minute applications. As I will explain, see Part III, *infra*, his religious liberty claims are dependent on the resolution of fact-intensive questions that simply cannot be decided without adequate proceedings and findings at the trial level. Those questions cannot be properly resolved in a matter of hours on a woefully deficient record. But that is precisely what Murphy asked of the lower courts and this Court.

As of at least 2013, Murphy and his attorneys knew or had reason to know everything necessary to assert the claim that the First Amendment and RLUIPA entitled him to have Rev. Shih at his side during his execution. By that date, Murphy had converted to Pure Land Buddhism, had begun to see Rev. Shih, and should have been aware of the Texas policy now at issue. Had Murphy begun to pursue his claims at that time, they could have been properly adjudicated long ago.

Even if Murphy is not held responsible for failing to act in 2013 or shortly thereafter, he and his attorneys certainly should have been spurred to action when, in November of last year, his execution date was set. Instead, his lawyers waited three months before writing to the Texas Department of Criminal Justice. How can that be justified?

Then, after receiving word on March 5 that Texas would adhere to its long-established policy, the attorneys waited three more weeks before filing suit. While they blame

Texas's failure to respond to their second e-mail for their delay, that is simply untenable. If they could not act without further communication from Texas, why did they fail to follow up with the State? Why did the attorneys decide they could file on March 20 in state court without further response from Texas but not before? What justified that delay? And why didn't the attorneys file in federal court at the same time?

By the time they got around to filing in federal court, it was March 26, two days before the scheduled execution date. And by the time they filed in this Court, the scheduled execution time and the time when the death warrant would expire were only hours away. If the tactics of Murphy's attorneys in this case are not inexcusably dilatory, it is hard to know what the concept means.

This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent. By countenancing the dilatory litigation in this case, the Court, I fear, will encourage this damaging practice.[3]

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[3] In my judgment, the tactics in this case are just as unjustified as those that led the Court to vacate a stay of execution a few weeks ago in *Dunn* v. *Ray*, 586 U. S. ___ (2019). In that case, Ray, a Muslim, objected to Alabama's refusal to allow an imam to be present in the execution room. Ray filed suit in Federal District Court 10 days before his execution date. The District Court refused to issue a stay of execution, holding, among other things, that the application was untimely, *Ray* v. *Dunn*, 2019 WL 418105, *1 (MD Ala., Feb. 1, 2019), but on February 6, the Eleventh Circuit granted a stay on the ground that Alabama's policy of allowing only its official chaplain, a Christian minister, to enter the execution room likely violated the Establishment Clause. *Ray* v. *Commissioner, Ala. Dept. of Corrections*, 915 F. 3d 689, 695–701, 703 (2019). The State asked us to vacate this stay, and we did so based on Ray's delay in raising his religious liberty claims. See *Ray,* 586 U. S., at ___. In both *Ray* and this case, the Court was presented at the last minute with claims that raised complicated issues that cannot be

III

While I strongly disagree with the decision to grant a stay in this case, I recognize that Murphy, like Ray, raises serious questions under both the First Amendment and RLUIPA. Murphy argues, among other things, that Texas's policy of admitting only authorized chaplains illegally discriminates on the basis of religion. That is the argument embraced by both the concurrence in this case and the dissent in *Ray*. Both of those opinions seem to see this religious discrimination claim as one that is easily resolved under our Establishment Clause precedents, but that is simply not so.

Both opinions invoke precedents involving the constitutional rights of persons who are not incarcerated, see *Ray*, 586 U. S., at ___ (slip op., at 2); *ante,* at 1, and there is no question that, if Murphy were not in prison, Texas could not tell him that the only cleric he could have at his side in the moments before death is one who is approved by the State. But this Court's precedents hold that imprisonment necessarily imposes limitations on a prisoner's constitutional rights. See *Turner* v. *Safley*, 482 U. S. 78, 90 (1987); *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 348–350 (1987). Under those cases, it is not enough for a prisoner to assert a claim that would succeed in the outside world. Instead, we must consider the following four factors: (1) whether a prison rule bears a "valid, rational connection to a legitimate governmental interest"; (2) "whether alternative means are open to inmates to exercise the asserted right"; (3) "what impact an accommodation of the right would have on guards, inmates, and prison resources"; and (4) "whether there are ready alternatives to the regulation." *Overton* v. *Bazzetta*, 539 U. S. 126, 132 (2003) (quoting *Turner*, *supra*, at 89–91; internal quotation marks omitted). Neither the *Ray* dissent nor

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adequately decided with hasty briefing and an inadequate record.

the concurrence in this case even mentions these precedents. Indeed, the *Ray* dissent is based on strict scrutiny, 586 U. S., at ___ (slip op., at 2), even though *Turner* specifically and emphatically rejected the use of that test in prisoner cases, 482 U. S., at 89.

On the flimsy record now before us, I would not presume to apply the *Turner* factors to Murphy's First Amendment claims, but there can be no doubt that *Turner* presents a serious obstacle. Here, Texas argues that it must be able to regulate the members of the clergy who are allowed in the execution room in order to ensure that these individuals do not intentionally or unintentionally engage in any conduct that might interfere with an execution. Murphy responds that Texas has failed to show that this is a real concern in his case because Rev. Shih has visited him in prison without incident and because Texas had sufficient time to do whatever additional vetting and training it thinks is needed. But on the present record, we cannot tell whether this is true. Visiting a living prisoner is not the same as watching from a short distance and chanting while a lethal injection is administered. And Texas may have an interest that goes beyond interference with Murphy's execution, namely, that allowing members of the clergy and spiritual advisers other than official chaplains to enter the execution room would set an unworkable precedent.

Specifically, Texas may be concerned that if it admits any cleric other than an official chaplain, every prisoner will insist on the presence of whichever outside cleric he prefers. Although the Court's order in this case permitted Texas to proceed with Murphy's execution if *any* Buddhist priest was allowed in the execution room, such a limited accommodation would not be acceptable in the outside world. There, Texas surely could not successfully defend a policy of admitting to the side of a dying patient only a state-approved cleric. Texas could not force a dying Bap-

tist to settle for a Catholic priest; it could not tell an Orthodox Jew that only a Reform rabbi would be allowed at his side; it could not force a Shi'ite to accept a Sunni imam; and so forth. I am aware of no single authoritative tally of the number of religions and denominations that exist in the United States, but the number is certainly very large. And of course, even within a particular religion or denomination, all clerics are not fungible. Moreover, I assume that, in the world outside prison walls, a State could not discriminate between clerics and any other person whose presence a dying patient might want at his side for spiritual or emotional support.

In permitting Murphy's execution to go forward provided that *some* Buddhist priest was allowed in the execution room, the Court may perhaps be understood to have concluded that a prison need not afford a prisoner facing execution the same array of choices that he would enjoy in the outside world. But if that is the Court's reasoning, what it shows is that the prison setting justifies important adjustments in the rules that apply outside prison walls. Determining just how far those adjustments may go is a sensitive question requiring an understanding of many factual questions that cannot be adequately decided on the thin record before us.[4]

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[4] I have discussed the constitutional claim set out in the concurrence in this case and in the *Ray* dissent, namely, an Establishment Clause claim based on discrimination among religions. But Murphy also asserts Free Exercise Clause and RLUIPA claims, which, as he frames them, do not depend on disparate treatment of different religions or denominations. If States respond to the decision on Murphy's stay application by banning all clerics from the execution room, that may obviate any conflict with the Establishment Clause, but a prisoner might still press free exercise claims. A claim under the Free Exercise Clause of the First Amendment would have to contend with both *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), and *Turner*. Under RLUIPA, such a claim would present issues similar to those discussed below. See *infra*, at 12–13.

So far, I have discussed the prospects of Murphy's Establishment Clause claim, but even if that claim cannot succeed, he might still prevail under RLUIPA, which was enacted by Congress to provide greater protection for religious liberty than do this Court's First Amendment precedents. To prevail under RLUIPA, Murphy would have to show at the outset that excluding Rev. Shih would impose a substantial burden on his exercise of religion. See 42 U. S. C. §2000cc–1(a).

We have not addressed whether, under RLUIPA or its cousin, the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. §2000bb *et seq.*, which contains an identical threshold requirement, §2000bb–1(b), there is a difference between a State's interference with a religious practice that is compelled and a religious practice that is merely preferred. In past cases, we have assessed regulations that compel an activity that a practitioner's faith prohibits. See, *e.g., Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U. S. 682, 725–726 (2014); *Holt* v. *Hobbs*, 574 U. S. 352 (2015). And, while some Members of this Court have been reluctant to find that even a law compelling individuals to engage in conduct *condemned by their faith* imposes a substantial burden, see *Hobby Lobby*, 573 U. S., at 758–760 (GINSBURG, J., joined by BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (arguing that it is not a substantial burden to require Christian-owned businesses to facilitate the acquisition of abortifacients), a majority of this Court has held that it is not for us to determine the *religious* importance or rationality of the affected belief or practice. See *id.,* at 723–726. Similarly, it may be that RLUIPA and RFRA do not allow a court to undertake for itself the determination of which religious practices are sufficiently mandatory or central to warrant protection, as both protect "any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief." §2000cc–5(7)(A) (emphasis added).

But this does not answer what results when the State offers a prisoner an alternative practice that, in terms of religious significance, is indistinguishable from the prohibited practice. Persons of many faiths may *desire* the support of a cleric in the moments before death, but not every religion would draw a distinction between a meeting with a clergyman shortly before death and one precisely at the moment of death. Murphy's situation, however, may be different because he believes that he will be reborn in the Pure Land only if he succeeds in remaining focused on Buddha while dying and that the chants of a Buddhist priest will help him in this endeavor. See Pet. for Prohibition in *In re Murphy*, No. 18–8615, pp. 12–17.

I will assume for present purposes that a policy like Texas's imposes a substantial burden on *any* prisoner who seeks the presence of a cleric other than one of the official chaplains, but that does not necessarily mean that the prisoner's RLUIPA claim would prevail. The State claims that its policy furthers its compelling interest in security and that the policy is narrowly tailored to serve that interest, see Brief in Opposition 20–23, 29, and in deciding whether its policy can be sustained on that basis, we would face unresolved factual questions that are similar to those discussed above. The RLUIPA standard, §2000cc–1(a)(2), to be sure, would be more favorable to the prisoner, but the nature of the underlying issues would be similar.

IV

The claims raised by Murphy and Ray are important and may ultimately be held to have merit. But they are not simple, and they require a careful consideration of the legitimate interests of both prisoners and prisons. See *Holt* v. *Hobbs*, *supra*. Prisoners should bring such claims well before their scheduled executions so that the courts can adjudicate them in the way that the claims require

and deserve and so that States are afforded sufficient time to make any necessary modifications to their execution protocols.

In this case, however, Murphy egregiously delayed in raising his claims. By countenancing such tactics, the Court invites abuse.

For these reasons, Murphy's stay application, like Ray's, should have been denied.

Appendix B

the case that the BIA overlooked." *Zhao*, 404 F.3d at 301. He arguably did one of those things. Qorane complained—then and now—the BIA overlooked his CAT claim in its decision denying his motion to reopen. But the BIA duly corrected that oversight in response to his motion to reconsider: "While our order mistakenly neglected to specifically mention this claim, the respondent's failure to establish material changed conditions requires us to deny this aspect of his claim as well." Exactly right. Qorane did not point to new facts suggesting his fear of persecution was more realistic than it had been a year before. He certainly did not point to new facts suggesting the Somali government would single him out for torture.

* * *

The petition for review is DENIED.

Patrick Henry MURPHY, Plaintiff-Appellant,

v.

Bryan COLLIER, Executive Director, Texas Department of Criminal Justice; Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division; Billy Lewis, Warden, Defendants-Appellees.

No. 19-70007

United States Court of Appeals, Fifth Circuit.

FILED March 27, 2019

Background: State prisoner convicted of murder of a police officer and sentenced to death filed § 1983 action and motion for stay of his scheduled execution, seeking to prohibit his execution until the state allowed his preferred spiritual advisor, a Buddhist priest, to be physically present in the execution chamber at the time of execution. The United States District Court for the Southern District of Texas, Sim T. Lake, III, J., 2019 WL 1369001, denied the motion. Prisoner appealed.

Holding: The Court of Appeals held that denial of motion for stay was warranted as untimely.

Affirmed.

1. Sentencing and Punishment ⚿1789(7)

The Court of Appeals reviews a district court's decision to deny a stay of execution for abuse of discretion.

2. Sentencing and Punishment ⚿1798

A stay of execution is an equitable remedy.

3. Sentencing and Punishment ⚿1798

A stay of execution 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.

4. Sentencing and Punishment ⚿1798

To be eligible for a stay of execution, a prisoner must demonstrate: (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any harm that will result if the stay is granted; and (4) that the stay will not disserve the public interest.

5. Sentencing and Punishment ⚿1798

A court considering a prisoner's motion for a stay of execution must apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.

6. Sentencing and Punishment ⚿1798

Timeliness is important when moving for a stay of execution.

7. Sentencing and Punishment ⚿1798

Denial of motion for stay of execution filed by state prisoner convicted of murder, seeking to prohibit his execution until the state allowed his preferred spiritual advisor, a Buddhist priest, to be physically present in the execution chamber at the time of execution, was warranted as untimely; although prisoner's counsel knew or should have known about state's policy of only allowing prison-employed chaplains in execution chamber, which had been in place for years before prisoner's execution was scheduled, the motion was not filed in the state's highest court until eight days before the scheduled date of execution, and it was not filed in the federal District Court until two days before the scheduled date.

Appeal from the United States District Court for the Southern District of Texas, Sim T. Lake, III, U.S. District Judge

David R. Dow, University of Houston, Law Center, Houston, TX, for Plaintiff-Appellant.

Matthew Dennis Ottoway, Assistant Attorney General, Office of the Attorney General Criminal Appeals Division, Gwendolyn Suzanne Vindell, Assistant Attorney General, Office of the Attorney General Financial Litigation & Charitable Trusts Division, Austin, TX, for Defendants-Appellees.

Before SMITH, ELROD, and HIGGINSON, Circuit Judges.

PER CURIAM:

Patrick Murphy is scheduled for execution on March 28, 2019, for the murder of police officer Aubrey Hawkins on December 24, 2000. His execution date was set on November 29, 2018. Murphy complains that the state of Texas permits only religious clerics who are employees of the Texas Department of Criminal Justice (TDCJ) to be physically present in the execution chamber at the time of an execution. He further complains that the TDCJ at present only employs chaplains who are Christian or Muslim, while acknowledging that the TDCJ contracts to bring chaplains and spiritual advisors of other religions into the prison facilities. Under the state's procedures, chaplains and spiritual advisors who are not employees of the TDCJ may meet with an inmate on the execution date prior to entering the execution chamber and they may watch the execution from a viewing room, but they may not physically enter the execution chamber itself.

On March 20—eight days before his scheduled execution—Murphy petitioned the Texas Court of Criminal Appeals for a writ of prohibition seeking to prohibit his execution until the state allowed his preferred spiritual advisor—a Buddhist priest—to be physically present in the execution chamber at the time of execution. That petition was denied on March 25. On March 26—two days before his scheduled execution—Murphy filed a 42 U.S.C. § 1983 complaint and a motion for stay of execution with the federal district court, again seeking to prohibit his execution until the state allows his preferred spiritual advisor to be physically present in the execution chamber. His Section 1983 complaint alleged violations of the Establishment Clause, the Free Exercise Clause, and the Religious Land Use and Institutionalized Persons Act (RLUIPA). In a well-reasoned eleven-page Memorandum Opinion and Order, the district court denied the motion for a stay of execution as untimely. Murphy appeals the district court's determination that he is not entitled to a stay of execution, filing his appeal

with this court on March 27—one day before his scheduled execution.

[1–6] "[W]e review a district court's decision to deny a stay of execution for abuse of discretion." *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013). "[A] stay of execution is an equitable remedy. 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." *Hill v. McDonough*, 547 U.S. 573, 584, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006). To be eligible for a stay of execution, Murphy must demonstrate: (1) a likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury outweighs any harm that will result if the stay is granted; and (4) that the stay will not disserve the public interest. *See Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012) (citing *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)). However, "[a] court considering a stay must also apply a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Hill*, 547 U.S. at 584, 126 S.Ct. 2096 (internal citation and quotation marks omitted). *See also Gomez v. U.S. Dist. Court for N. Dist. of Cal.,* 503 U.S. 653, 654, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."). The Supreme Court recently emphasized, yet again, the importance of timeliness when moving for a stay of execution. *See Dunn v. Ray*, —— U.S. ——, 139 S.Ct. 661, 661, 203 L.Ed.2d 145 (2019) (vacating a stay of execution granted by a circuit court when the applicant waited until ten days before the scheduled execution to file his claim).

[7] As the district court rightfully recognized, the proper time for raising such claims has long since passed. Murphy's execution date was set on November 29, 2018. By his counsel's admission, he waited until February 28 to first request that the state allow Murphy's preferred spiritual advisor to not just meet with him prior to entering the chamber and watch from the viewing room, but actually enter the execution chamber with him. He then waited until March 20—eight days before the scheduled execution—to raise his First Amendment and RLUIPA claims with the Texas Court of Criminal Appeals. Those claims were not raised before the federal district court until March 26—two days before the scheduled execution—and an appeal was not brought before this court until March 27—the day before the scheduled execution.

Murphy asserts that his allegations underlying this case are almost identical to those recently addressed by the dissenting Justices in *Ray*. *See* 139 S.Ct. at 661–62 (Kagan, J., dissenting). However, in making that assertion, without having timely sought factual development of his allegations and the state's execution chamber procedures, Murphy fails to acknowledge at least one significant difference. Unlike the situation described by the dissenting Justices in *Ray*, the policy of only permitting TDCJ-employed chaplains into the execution chamber at issue in this case has been in place since at least 2012 and is not ambiguous about presence in the execution chamber as distinct from in the adjacent viewing area. The district court determined that the policy is not confidential and that Murphy's counsel is an experienced death penalty litigator who knew, or should have known, about the policy well before the weeks immediately preceding the scheduled execution. However, even if we were to accept Murphy's current representation that he and his counsel did not

have access to the text of that policy, his counsel was definitively notified of that provision by an email from the TDCJ's general counsel on March 5. Nonetheless, Murphy waited until March 20 to raise any related claims before the Texas Court of Criminal Appeals, and until March 26 to raise any such claims before the federal courts. Such delays are unacceptable under the circumstances.

This court also takes note, as did the district court, of the multiple warnings that Murphy's counsel has received in the past for filing last-minute motions. *See In re Dow,* No. WR-57,060-03, 2010 WL 2332420 (Tex. Crim. App. Jun. 9, 2010) (finding Dow failed to show cause for his untimely filing and warning that further untimely filings could result in sanctions). *See also In re Dow*, 481 S.W.3d 215 (Tex. 2015) (noting that the Texas Court of Criminal Appeals held Dow in contempt for his untimely filings and barred him from practicing before that court for one year).

"In response to systemic abuses by prisoners bringing dilatory claims, the federal courts—and this circuit in particular—have been forced to develop extensive jurisprudence resisting those requests for long-available claims presented, for the first time, on the eve of execution." *Ruiz v. Davis*, 850 F.3d 225, 229 (5th Cir. 2017). *See also* 5th Cir. R. 8.10; *Bible v. Davis*, 739 F. App'x 766, 770 (5th Cir. 2018) (unpublished); *Preyor v. Davis*, 704 F. App'x 331, 344 (5th Cir. 2017) (unpublished); *In re Edwards*, 865 F.3d 197, 209–10 (5th Cir. 2017); *In re Paredes*, 587 F. App'x 805, 826 (5th Cir. 2014) (unpublished); *Sepulvado v. Jindal*, 729 F.3d 413, 420–21 (5th Cir. 2013); *Brown v. Livingston*, 457 F.3d 390, 391 (5th Cir. 2006); *Reese v. Livingston*, 453 F.3d 289, 290–91 (5th Cir. 2006); *White v. Johnson*, 429 F.3d 572, 573–74 (5th Cir. 2005). As such, the district court did not abuse its discretion and Murphy's motion for a stay of execution is DENIED.

BANK OF LOUISIANA; G. Harrison Scott; Sharry Scott; Johnny Crow, Plaintiffs - Appellants

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, Defendant - Appellee

No. 17-30044

United States Court of Appeals, Fifth Circuit.

March 28, 2019

Background: Bank brought action in federal district court against Federal Deposit Insurance Corporation (FDIC), alleging that FDIC denied bank equal protection by targeting bank's president due to president's age for enforcement proceedings, and violated due process by preventing bank from proffering certain evidence and by preventing president from talking with his counsel at certain points during enforcement proceedings, and seeking a declaratory judgment. The United States District Court for the Eastern District of Louisiana, Martin L. C. Feldman, 2017 WL 3849340, granted FDIC's motion to dismiss for lack of subject matter jurisdiction. Bank appealed.

Holdings: The Court of Appeals, Stuart Kyle Duncan, Circuit Judge, held that:

(1) administrative review scheme would not have foreclosed all meaningful judicial review;

Appendix C

to Rico, and each territory and possession of the United States;

(3) the term ''demonstrates'' means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term ''exercise of religion'' means religious exercise, as defined in section 2000cc–5 of this title.

(Pub. L. 103–141, §5, Nov. 16, 1993, 107 Stat. 1489; Pub. L. 106–274, §7(a), Sept. 22, 2000, 114 Stat. 806.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 103–141, Nov. 16, 1993, 107 Stat. 1488, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2000bb of this title and Tables.

AMENDMENTS

2000—Par. (1). Pub. L. 106–274, §7(a)(1), substituted ''or of a covered entity'' for ''a State, or a subdivision of a State''.

Par. (2). Pub. L. 106–274, §7(a)(2), substituted ''term 'covered entity' means'' for ''term 'State' includes''.

Par. (4). Pub. L. 106–274, §7(a)(3), substituted ''religious exercise, as defined in section 2000cc–5 of this title'' for ''the exercise of religion under the First Amendment to the Constitution''.

§ 2000bb–3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub. L. 103–141, §6, Nov. 16, 1993, 107 Stat. 1489; Pub. L. 106–274, §7(b), Sept. 22, 2000, 114 Stat. 806.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 103–141, Nov. 16, 1993, 107 Stat. 1488, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2000bb of this title and Tables.

AMENDMENTS

2000—Subsec. (a). Pub. L. 106–274 struck out ''and State'' after ''Federal''.

§ 2000bb–4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the ''Establishment Clause''). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term ''granting'', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub. L. 103–141, §7, Nov. 16, 1993, 107 Stat. 1489.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 103–141, Nov. 16, 1993, 107 Stat. 1488, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2000bb of this title and Tables.

CHAPTER 21C—PROTECTION OF RELIGIOUS EXERCISE IN LAND USE AND BY INSTITUTIONALIZED PERSONS

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a

religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

(Pub. L. 106–274, § 2, Sept. 22, 2000, 114 Stat. 803.)

SHORT TITLE

Pub. L. 106–274, § 1, Sept. 22, 2000, 114 Stat. 803, provided that: ''This Act [enacting this chapter and amending sections 1988, 2000bb–2 and 2000bb–3 of this title] may be cited as the 'Religious Land Use and Institutionalized Persons Act of 2000' ''.

§ 2000cc–1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

(Pub. L. 106–274, § 3, Sept. 22, 2000, 114 Stat. 804.)

§ 2000cc–2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

(Pub. L. 106–274, § 4, Sept. 22, 2000, 114 Stat. 804.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning Pub. L. 106–274, Sept. 22, 2000, 114 Stat. 803, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 2000cc of this title and Tables.

The Prison Litigation Reform Act of 1995, referred to in subsec. (e), is Pub. L. 104–134, title I, § 101(a) [title VIII], Apr. 26, 1996, 110 Stat. 1321, 1321–66, as amended. For complete classification of this Act to the Code, see Short Title of 1996 Amendment note set out under section 3601 of Title 18, Crimes and Criminal Procedure, and Tables.

CODIFICATION

Section is comprised of section 4 of Pub. L. 106–274. Subsec. (d) of section 4 of Pub. L. 106–274 amended section 1988(b) of this title.

§ 2000cc–3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

Appendix D

From: **Dow, David R** DDow@Central.UH.edu
Subject: spiritual advisor for patrick murphy
Date: February 28, 2019 at 2:09 PM
To: Sharon.Howell@tdcj.texas.gov
Cc: Newberry, Jeff jrnewber@Central.UH.EDU

sharon --

you may be aware that i represent patrick murphy, who is scheduled to be executed on march 28. i am writing about the issue of a spiritual advisor.

murphy is a buddhist. his spiritual advisor is reverend hui-yong shih. murphy would like hui-yong to be present with him in the execution chamber because murphy's faith teaches that, in order to enter into what he understands to be the "pure land," he must focus on the buddha at the time of death, and reverend shih's presence in the chamber would make that possible.

murphy's religion also dictates that the body of a deceased person not be disturbed for seven days after the person has died. we realize asking this of TDCJ is a long shot (but i am nevertheless asking anyway), but, as a fallback position, reverend shih has advised murphy it would suffice to honor this tradition for his body not to be disturbed for seven minutes after he is killed. murphy's believes that the chaplain who is ordinarily present in the execution chamber during executions holds the toe of the person who is being killed until he dies. however, because being touched at the time he dies would violate his belief that his body should not be disturbed, murphy also requests that the chaplain, if present, not touch him.

i am happy to arrange a time to chat about these requests. i think they are reasonable and hope we can address them administratively rather than through litigation.

my usual thanks for your attention,

-- drd

David R. Dow
Cullen Professor, University of Houston Law Center
Rorschach Visiting Professor of History, Rice University
4604 Calhoun Rd., Houston, TX 77204-6060
713-743-2171, DDow@UH.edu
www.davidrdow.com, @drdow
assistant: Lillian A. White, LAWhite@central..uh.edu, 713-743-7674

Appendix E

From: **Sharon Howell** Sharon.Howell@tdcj.texas.gov
Subject: RE: spiritual advisor for patrick murphy
Date: March 5, 2019 at 9:35 AM
To: Dow, David R DDow@Central.UH.edu
Cc: Newberry, Jeff jrnewber@Central.UH.EDU, Marshall, Edward Edward.Marshall@oag.texas.gov

David –

The presence of the TDCJ chaplain is entirely an inmate's choice, so your request that the chaplain not touch Mr. Murphy is fine. The chaplain does not even need to be present in the chamber if Mr. Murphy would prefer that. We also do not have a problem with the body resting for seven minutes after his death. That timing is consistent with what happens with every execution performed in Texas. We will not agree to let the body rest undisturbed for seven days after death.

We do not permit a non-TDCJ employee be present in the execution chamber during the execution, which precludes Mr. Murphy's spiritual advisor from being present. Mr. Murphy should place his spiritual advisor on his witness list, and that way the spiritual advisor can observe through the window in the witness room. If Mr. Murphy would like to visit with his spiritual advisor prior to the execution, we can provide a time beginning at 3 pm and ending no later than 4 pm on the day of the execution, as we have done for other inmates.

Please let me know if you have any questions or if you have any arrangements that you would like to make.

Sharon Felfe Howell
General Counsel
Phone: 936.437.2141

From: Dow, David R [mailto:DDow@Central.UH.edu]
Sent: Thursday, February 28, 2019 2:09 PM
To: Sharon Howell <Sharon.Howell@tdcj.texas.gov>
Cc: Newberry, Jeff <jrnewber@Central.UH.EDU>
Subject: spiritual advisor for patrick murphy

sharon --

you may be aware that i represent patrick murphy, who is scheduled to be executed on march 28. i am writing about the issue of a spiritual advisor.

murphy is a buddhist. his spiritual advisor is reverend hui-yong shih. murphy would like hui-yong to be present with him in the execution chamber because murphy's faith teaches that, in order to enter into what he understands to be the "pure land," he must focus on the buddha at the time of death, and reverend shih's presence in the chamber would make that possible.

murphy's religion also dictates that the body of a deceased person not be disturbed for seven days after the person has died. we realize asking this of TDCJ is a long shot (but i am nevertheless asking anyway), but, as a fallback position, reverend shih has advised murphy it would suffice to honor this tradition for his body not to be disturbed for seven minutes after he is killed. murphy's believes that the chaplain who is ordinarily present in the execution chamber during executions holds the toe of the person who is being killed until he dies. however, because being touched at the time he dies would violate his belief that his body should not be disturbed, murphy also requests that the chaplain, if present, not touch him.

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-- drd

David R. Dow
Cullen Professor, University of Houston Law Center
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713-743-2171, DDow@UH.edu
www.davidrdow.com, @drdow
assistant: Lillian A. White, LAWhite@central..uh.edu, 713-743-7674

Appendix F

From: **Dow, David R** DDow@Central.UH.edu
Subject: RE: spiritual advisor for patrick murphy
Date: March 7, 2019 at 1:57 PM
To: Sharon Howell Sharon.Howell@tdcj.texas.gov
Cc: Newberry, Jeff jrnewber@Central.UH.EDU, Marshall, Edward Edward.Marshall@oag.texas.gov

sharon --

thanks for getting back to me. i am assuming from your email TDCJ, so far as you are aware, does not have a buddhist priests on its staff; however, if i am mistaken, and there is such a buddhist on the TDCJ staff, then i believe murphy would be content to have him in the chamber.

as i am sure you (and ed, who is also on this thread) are aware, the eleventh circuit faced a similar question in the dominique ray case. i am attaching its opinion to this email. of course, the supreme court ultimately vacated the ca11 case, but only because ray waited too long to raise the issue. we, on the contrary, have raised it in what i believe is ample time for TDCJ to insure there are no security issues presented by a religious figure of murphy's faith accompanying him during the execution.

i think that the current TDCJ policy, as was the case in the ca11 ray case, suggests an establishment clause violation, and as well interferes with murphy's right to the free exercise of religion. so i am hoping there is a solution to this issue short of litigation.

thanks.

-- drd

From: Sharon Howell [mailto:Sharon.Howell@tdcj.texas.gov]
Sent: Tuesday, March 5, 2019 9:35 AM
To: Dow, David R <DDow@Central.UH.edu>
Cc: Newberry, Jeff <jrnewber@Central.UH.EDU>; Marshall, Edward <Edward.Marshall@oag.texas.gov>
Subject: RE: spiritual advisor for patrick murphy

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observe through the window in the witness room. If Mr. Murphy would like to visit with his spiritual advisor prior to the execution, we can provide a time beginning at 3 pm and ending no later than 4 pm on the day of the execution, as we have done for other inmates.

Please let me know if you have any questions or if you have any arrangements that you would like to make.

Sharon Felfe Howell
General Counsel
Phone: 936.437.2141

From: Dow, David R [mailto:DDow@Central.UH.edu]
Sent: Thursday, February 28, 2019 2:09 PM
To: Sharon Howell <Sharon.Howell@tdcj.texas.gov>
Cc: Newberry, Jeff <jrnewber@Central.UH.EDU>
Subject: spiritual advisor for patrick murphy

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nevertheless asking anyway), but, as a fallback position, reverend shih has advised murphy it would suffice to honor this tradition for his body not to be disturbed for seven minutes after he is killed. murphy's believes that the chaplain who is ordinarily present in the execution chamber during executions holds the toe of the person who is being killed until he dies. however, because being touched at the time he dies would violate his belief that his body should not be disturbed, murphy also requests that the chaplain, if present, not touch him.

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Appendix G

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. WR-63,549-01 and WR-63,549-02

EX PARTE PATRICK HENRY MURPHY, JR., Applicant

and

IN RE PATRICK HENRY MURPHY, JR., Relator

ON SUGGESTION TO RECONSIDER APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS, MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION, AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. F01-00328-T IN THE 283RD JUDICIAL DISTRICT COURT DALLAS COUNTY

***Per curiam*. RICHARDSON, J., filed a concurring opinion on -02 with which KEASLER, HERVEY, and WALKER, JJ., joined.**

O R D E R

We have before us a suggestion that we, on our own motion, reconsider Murphy's initial application for a writ of habeas corpus. Also before us are a motion for leave to file a petition for a writ of prohibition, a petition for a writ of prohibition, and a motion to

stay Murphy's execution.

In November 2003, a jury found Murphy guilty of the December 2000 capital murder of a police officer. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set Murphy's punishment at death. This Court affirmed Murphy's conviction and sentence on direct appeal. *Murphy v. State*, No. AP-74,851 (Tex. Crim. App. April 26, 2006).

In his initial application for a writ of habeas corpus, applicant raised eight claims, including evidentiary sufficiency claims and claims that the application of Texas Penal Code § 7.02(b) in his case was unconstitutional. After reviewing the merits of the claims, this Court denied relief. *Ex parte Murphy*, No. WR-63,549-01 (Tex. Crim. App. July 1, 2009)(not designated for publication).

The trial court has set Murphy's execution for March 28, 2019. On March 13, Murphy filed in this Court a suggestion that this Court on its own motion reconsider his direct appeal. We denied that suggestion on March 20, 2019. On that same day, Murphy filed in this Court a suggestion that this Court on its own motion reconsider the claims raised in his initial habeas application, a motion for leave to file a petition for a writ of prohibition, a petition for a writ of prohibition, and a motion to stay his execution.

In his suggestion to reconsider his initial habeas application, Murphy requests, among other things, that we re-open his writ application and consider a claim never raised therein. This is not proper. We deny Murphy's suggestion.

In his motion for leave to file a petition for a writ of prohibition, Murphy complains that the Texas Department of Criminal Justice's policy regarding who may be in the execution chamber denies him his rights under the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution. Specifically, he asserts that his Buddhist spiritual advisor should be allowed to accompany him into the execution chamber.

Prohibition relief is only available if a relator shows that he has a clear right to the relief sought and no other adequate legal remedy. *See State ex rel. Lykos v. Fine*, 330 S.W.3d 904, 907 (Tex. Crim. App. 2011). But Murphy has not shown that he meets either requirement for prohibition relief in this case. Accordingly, we deny him leave to file his petition. Murphy's motion to stay his execution is also denied.

IT IS SO ORDERED THIS THE 25th DAY OF MARCH, 2019.

Do not publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-63,549-02

IN RE PATRICK HENRY MURPHY, JR., Relator

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. F01-00328-T IN THE 283RD JUDICIAL DISTRICT COURT DALLAS COUNTY

RICHARDSON, J., filed a concurring opinion with which KEASLER, HERVEY, and WALKER, JJ., joined.

CONCURRING OPINION

Relator, Patrick Henry Murphy, Jr., seeks a stay of execution pursuant to a motion for leave to file a petition for a writ of prohibition he filed with this Court on March 20, 2019, just eight days before his execution. Relator's execution date was set on November 29, 2018 almost four months in advance of his execution and he now claims he is entitled to a stay based on claims made in his pleadings. Relator acknowledges he could file a 42

U.S.C. § 1983 cause of action in federal court. The petition for writ of prohibition is not the appropriate vehicle for seeking relief in this Court. Moreover, Relator has had four months to raise this issue before this Court.

I join in the Court's decision to deny leave to file the petition. Relator is seeking to *prohibit* his execution based on his asserted right to *compel* TDCJ to allow a Buddhist priest into the execution chamber with him. The Court correctly denies relator leave to file because he does not have a "clear and indisputable" entitlement to such relief, whether it be via "prohibition" or "mandamus." *State ex rel. Wade v. Mays*, 689 S.W.2d 893 (Tex. Crim. App. 1985) (citing *Will v. United States*, 389 U.S. 90, 96 (1967)); *In re Simon v. Levario*, 306 S.W.3d 318 (Tex. Crim. App. 2009) (It is improper to order a "judicial function" in a particular way unless the relator has a "clear right to the relief sought."). Mandamus or prohibition will not lie where the relief sought is based on an uncertain and unsettled issue of law. *Id.* at 320. The legal basis for relator's request is clearly unsettled. *See Dunn v. Ray*, 139 S.Ct. 661 (Feb. 7, 2019) (overturning the Eleventh Circuit Court of Appeals's decision to stay Ray's execution).

Additionally, relator provides no authority to support the claim that TDCJ has a ministerial duty to allow anyone other than a thoroughly vetted TDCJ employee into the execution chamber. Relator may certainly meet with the religious clergy of his choice just before his execution, and that clergy is allowed into the viewing room to observe the execution. There has been no "wholesale prohibition on outside spiritual advisors" here.

See Dunn v. Ray, (Justice Kagan dissenting). However, there could be a security risk posed by relator's request for an unvetted person to be allowed to have close proximity to him inside the execution chamber. As in *Dunn v. Ray*, the time to be able to accommodate that request has passed. Relator's execution date has been set since November 29, 2018.

It is not surprising that this never-been-raised-before First Amendment claim by relator was made only *eight* days before the execution date. "Day eight" was the last possible day to file his writ application without it being considered "untimely."[1] *See In re David Dow*, No. WR-57,060-03, 2010 WL 2332420 (Tex. Crim. App. June 9, 2010) (The Court issued an Order on Show Cause and Contempt Hearing for Untimely Filed Documents. David Dow filed an untimely pleading and failed to show good cause for the violation); *In re David Dow and Jeffrey R. Newberry*, Nos. WR-61,939-01, WR-61,939-02, and WR-61,939-03, 460 S.W.3d 151 (Tex. Crim. App. April 1, 2015) (In that case Dow filed four pleadings within the seven day period preceding the scheduled execution.

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[1] This Court's Miscellaneous Rule 11-003 provides,

> Inmates sentenced to death who seek a stay of execution or who wish to file a subsequent writ application or other motion seeking any affirmative relief from, or relating to, a death sentence must exercise reasonable diligence in timely filing such requests. A motion for stay of execution, or any other pleading relating to a death sentence, must be filed in the proper court at least seven days before the date of the scheduled execution date (exclusive of the scheduled execution date). A pleading shall be deemed untimely if it is filed in the proper court fewer than seven days before the scheduled execution date.

The Court found that Dow failed to show good cause and found him in contempt of this Court). Relying on *Alabama v. Ray* that was issued over six weeks ago on February 7, 2019, relator now claims the State is in violation of the U.S Constitution in spite of his last minute filings and the holding in *Ray*. *Ray* does not stand for that proposition. For these reasons, I concur in the Court's decision to deny relator leave to file.

Do not publish
Filed: March 25, 2019

Appendix H

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PATRICK HENRY MURPHY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-19-1106
	§	
TDCJ EXECUTIVE DIRECTOR BRYAN COLLIER, et al.,	§	
	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

The plaintiff, Patrick Henry Murphy, is scheduled to be executed on Thursday, March 28, 2019, after 6 o'clock p.m., pursuant to his conviction and sentence entered in the 283rd District Court of Dallas County, Texas. On Tuesday, March 26, 2019, Murphy filed the instant complaint pursuant to 42 U.S.C. § 1983. (Complaint Filed Pursuant to 42 U.S.C. § 1983, Docket Entry No. 1) Murphy has also submitted a Motion for Stay of Execution Pending Disposition of Plaintiff's Complain Filed Pursuant to 42 U.S.C. § 1983. (Docket Entry No. 3) Murphy challenges Texas Department of Criminal Justice ("TDCJ") procedures that specify which individuals may accompany an inmate during the execution of his death sentence. Because Murphy has unreasonably delayed in bringing this action the court will deny his motion for a stay of execution.

I. Background

On December 13, 2000, seven inmates serving long sentences for violent crimes, including Murphy, escaped from a Texas state prison in Kenedy, Texas.[1] This group has come to be known as the "Texas Seven." The group eventually killed a police officer during a robbery in Irving, Texas. The men fled to Colorado where they were apprehended. Murphy was taken back to Texas. In 2003 he was tried for capital murder and sentenced to death. Murphy has challenged his conviction and sentence in both state and federal court.

Murphy has committed himself to the teachings of Buddha almost a decade ago.[2] Rev. Hui-Yong Shih, also known as Gerald Sharrock, has been Murphy's TDCJ-approved spiritual advisor for six years.

The State set an execution date in December of 2018.

On February 21, 2019, Murphy "made known to Counsel his desire to have his spiritual advisor . . . present in the execution chamber when he is executed on March 28 instead of the TDCJ Christian chaplain who is ordinarily present in the execution chamber during executions." (Docket Entry No. 1, p. 3) On

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[1] The brief factual summary of Murphy's crime and legal proceedings is taken from the Fifth Circuit's opinion on federal habeas review. See Murphy v. Davis, 737 F. App'x 693 (5th Cir. 2018).

[2] The court takes the factual summary relating to the instant complaint from the pleadings in this case and the pleadings filed with Murphy's Writ of Prohibition in the Texas Court of Criminal Appeals. In re Patrick Henry Murphy, Jr., WR-63,549-02, at 3 (Tex. Crim. App. March 26, 2019).

February 28, 2019, counsel sent an email to Sharon Howell, TDCJ General Counsel, stating that the presence of Murphy's spiritual advisor is necessary to "focus on the buddha at the time of death . . . ." (Docket Entry No. 1-1, Exhibit 1) Counsel's email also requested that TDCJ not disturb his body for seven days following the execution or, in the alternative, for seven minutes.[3]

On March 5, 2019, Ms. Howell responded by email and informed counsel that the presence of the TDCJ chaplain "is entirely an inmate's choice . . . ." (Docket Entry No. 1-2, Exhibit 2) Ms. Howell stated that the prison would also allow Murphy's body to rest for seven minutes after the execution. However, Ms. Howell provided the following response to Murphy's request for the presence of his spiritual advisor:

> We do not permit a non-TDCJ employee be present in the execution chamber during the execution, which precludes Mr. Murphy's spiritual advisor from being present. Mr. Murphy should place his spiritual advisor on his witness list, and that way the spiritual advisor can observe through the window in the witness room. If Mr. Murphy would like to visit with his spiritual advisor prior to the execution, we can provide a time beginning at 3 pm and ending no later than 4 pm on the day of the execution, as we have done for other inmates.

(Docket Entry No. 1-2, Exhibit 2)

Ms. Howell based her email on TDCJ execution procedure that

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[3] Additionally, counsel's email asked that, if the TDCJ chaplain who is normally attendant is present at his execution, he not touch him during the process.

was adopted in July of 2012.[4] In relevant part, the TDCJ execution protocol reads, "the Huntsville Unit Chaplain or a designated approved TDCJ Chaplain shall accompany the offender while in the Execution Chamber."[5] While the protocol appears to be mandatory, in practice TDCJ permits an offender to forgo the presence of a TDCJ employee chaplain should he so choose.[6]

On March 7, 2019, counsel sent Ms. Howell an email stating: "i am assuming from your email TDCJ, so far as you are aware, does not have a buddhist priests on its staff; however, if i am mistaken, and there is such a buddhist on the TDCJ staff, then i believe murphy would be content to have him in the chamber." (Docket Entry No. 1-3, Exhibit 3) The record does not contain a response to this email.

On March 20, 2019, Murphy filed a Petition for a Writ of Prohibition in the Texas Court of Criminal Appeals. The petition raised two issues:

1. TDCJ's policy demonstrates a clear preference for one religion (Christianity) over all others. Murphy has a clear right to relief pursuant to the First Amendment's

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[4] Texas adopted its lethal-injection protocol in 2008. Texas revised its execution protocol in 2012, but without any change to its core procedures. See Trottie v. Livingston, 766 F.3d 450, 453 (5th Cir. 2014).

[5] See Respondents' Opposition to Relator's Motion for Leave to File Petition for Writ of Prohibition and Motion for Stay of Execution, In re Patrick Henry Murphy, Jr., WR-63,549-02, at 3 (Tex. Crim. App.), Exhibit A.

[6] See id. at 11, n.2.

Establishment Clause.

2. TDCJ's policy unjustifiably interferes with Murphy's ability to practice his religion and therefore violates his First Amendment right to the Free Exercise of religion.

Petition for Writ of Prohibition, In re Patrick Henry Murphy, Jr., WR-63,549-02, at 3 (Tex. Crim. App.) at iv.

On March 26, 2019, the Court of Criminal Appeals denied the petition for a writ of prohibition. The Court of Criminal Appeals stated: "[p]rohibition relief is only available if a relator shows that he has a clear right to the relief sought and no other adequate legal remedy." In re Patrick Henry Murphy, Jr, WR-63,549-02, at 3 (Tex. Crim. App. March 26, 2019). The Court of Criminal Appeals found that "Murphy has not shown that he meets either requirement for prohibition in this case." Id.

Murphy filed this action under 42 U.S.C. § 1983. Murphy's complaint raises three arguments: (1) TDCJ's execution protocol violates the First Amendment's Establishment Clause because it is not neutral between religions; (2) the protocol violates his First Amendment right to Free Exercise of religion by interfering with his ability to practice his religion; and (3) the policy violates the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, et seq. ("RLUIPA").

II. Standard for Staying Execution in 1983 Litigation

Murphy asks the court to stay his execution. "[A] stay of execution is an equitable remedy, and an inmate is not entitled to

a stay of execution as a matter of course." Hill v. McDonough, 126 S. Ct. 2096, 2104 (2006). In deciding whether to issue a stay of execution, a court must consider: (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 party interested in the proceeding; and (4) where the public interest lies. See Nken v. Holder, 129 S. Ct. 1749, 176 (2009). However, a motion for a stay depends on the operation of equity. See Hill, 126 S. Ct. at 2104 In the balance of equity, "dilatory behavior" may weigh heavily against a plaintiff. Ramirez v. McCraw, 715 F. App'x 347, 351 (5th Cir. 2017).[7]

III. Timing of Murphy's Complaint

Murphy filed this lawsuit only two days before his scheduled execution. This case can only proceed if the court issues a stay. Equitable relief should be denied when Murphy is dilatory in bringing his action so as to delay execution of his sentence. "Equity must take into consideration the State's strong interest in

[7] When inmates file motions requesting a preliminary injunction, a TRO, and a stay of execution, courts generally consider all the requests under either the preliminary-injunction or stay-of-execution standard. See Wood v. Collier, 836 F.3d 534, 538 (5th Cir. 2016); Trottie, 766 F.3d at 451; Sells v. Livingston, 561 F. App'x 342, 343 (5th Cir. 2014). The requirements for a preliminary injunction are substantially similar to those for a stay of execution. See Sells, 561 F. App'x at 344. The court would deny a preliminary injunction for the same reasons it will not stay Murphy's execution.

proceeding with its judgment . . . A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief." Gomez v. United States District Court for Northern District of Calif., 112 S. Ct. 1653, 1653 (1992).

Murphy points to recent litigation concerning the execution of Domineque Hakim Marcelle Ray in Alabama. Ray requested the presence during his execution of a spiritual advisor who was not authorized according to prison policy. Ray brought suit under § 1983 raising similar complaints under the Establishment Clause and RLUIPA. After reviewing Ray's significant litigation history and his previous opportunities to challenge the prison policy, the federal district court found that he did not merit a stay:

> In short, Ray has been dilatory in filing this action. He has shown no just or equitable reason for his delay, which cuts against a stay of execution. His complaint came "too late to avoid the inevitable need for a stay of execution," so a stay is not granted. Williams v. Allen, 496 F.3d 1210, 1213 (11th Cir. 2007) (affirming denial of stay when inmate waited to sue until the State requested an execution date); see also, e.g., Grayson, 491 F.3d at 1321, 1325 (affirming denial of stay when inmate sued before execution date was set); Henyard v. Secretary, 543 F.3d 644, 647-49 (11th Cir. 2008) (affirming denial of stay when inmate waited months to sue).

Ray v. Dunn, 2019 WL 418105, at *4 (M.D. Ala. 2019).

The Eleventh Circuit reversed, finding that "[t]he district court makes much of the fact that Ray's claims have been brought too close to the scheduled date for Ray's execution." Ray v. Commissioner, Alabama Department of Corrections, 915 F.3d 689, 702-

03 (11th Cir. 2019). The Eleventh Circuit emphasized that Alabama statutory law did not make clear that Ray's requested spiritual advisor could not be present in the execution. Also, the relevant prison policies were confidential and not available for review earlier. Without some evidence that Ray knew or should have known of the prison policy, the Eleventh Circuit found that "Ray has provided an altogether plausible explanation for why the claims were not filed in district court sooner and the state has neither argued nor produced any evidence that the petitioner was aware that the claims were available at an earlier date." Ray, 915 F.3d at 703. The Eleventh Circuit, therefore, stayed his execution.

In a short order, however, the Supreme Court vacated the stay of execution. The Supreme Court order reads as follows:

> On November 6, 2018, the State scheduled Domineque Ray's execution date for February 7, 2019. Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay entered by the United States Court of Appeals for the Eleventh Circuit. See Gomez v. United States Dist. Court for Northern Dist. of Cal., 503 U.S. 653, 654, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (per curiam) ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.").

Dunn v. Ray, 139 S. Ct. 661 (Mem) (2019).

Murphy presents two arguments to differentiate his case from the Supreme Court's action in Ray. First, Murphy sent an email request to TDCJ a month, rather than only days, before his execution. Second, Murphy alleges that he "began seeking relief in the state courts even before TDCJ expressly denied his request."

(Docket Entry No. 1, p. 14)[8]

The Ray case, however, did not focus only on the number of days remaining before execution when the inmate filed suit. The district court stayed his execution because he knew, or should have known, that he needed to file suit much earlier. Murphy knew, or should have known, of the policy long before he sent TDCJ general counsel an email.

Murphy has been on death row since 2003. He has been a follower of Buddha for several years and has associated with the same spiritual advisor for some time. Since 2012, at least, TDCJ policy has only allowed for the presence of TDCJ employees during the execution process. Murphy alleges that "TDCJ's policy is identical to Alabama's in all relevant aspects . . . ." (Docket Entry No. 1, p. 13) He fails, however, to acknowledge a crucial difference. TDCJ execution policy is not confidential. Murphy had reason to know since its adoption that TDCJ policy would not allow the presence of his spiritual advisor.[9]

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[8] In the state court litigation involving Murphy's petition for a writ of prohibition, the parties debated whether counsel's March 7, 2019, email amounted to a request for TDCJ to find an approved Buddhist priest. That is of no moment. Murphy has not shown that TDCJ could diverge from its protocol at that point or earlier. And, at any rate, Murphy should have raised his concerns much earlier.

[9] Counsel, an experienced death penalty litigator, has represented Murphy for a decade throughout legal challenges to his conviction and sentence. The concurrence to the denial of his petition for a writ of prohibition recounted counsel's history of bringing last-minute litigation. In re Patrick Henry Murphy, Jr.,

In November of 2018 the United States Supreme Court denied the petition for certiorari review from the Murphy's federal habeas action. The state district court set his execution date a month later. Murphy did nothing to communicate to TDCJ his desire for the presence of his spiritual advisor until 29 days remained before his execution. Murphy gave TDCJ little time to decide whether to vary its policy. And Murphy gave TDCJ little time to litigate any legal challenge that would follow. Once informed that TDCJ would not deviate from its policy, Murphy waited over two weeks to file litigation in state court. He filed this action only two days before his execution.

"Given the State's significant interest in enforcing its criminal judgments . . . there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." Nelson v. Campbell, 541 U.S. 637, 650 (2004). "In response to systemic abuses by prisoners bringing dilatory claims, the federal courts — and [the Fifth Circuit] in particular — have been forced to develop extensive jurisprudence resisting those requests for long-available claims presented, for the first time, on the eve of execution." Ruiz v. Davis, 850 F.3d 225, 229 (5th Cir. 2017); see also Bible v. Davis, 739 F. App'x

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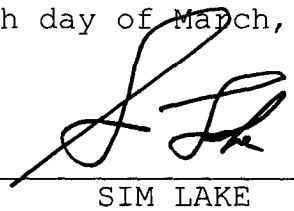
WR-63,549-02 (Tex. Crim. App. March 26, 2019) (Richardson, J., concurring).

766, 770 (5th Cir. 2018) (finding that a lawsuit brought nineteen days before execution was dilatory); Sepulvado v. Jindal, 729 F.3d 413, 420-21 (5th Cir. 2013) (vacating a stay where inmate challenged a procedure he had known about for two years); Brown v. Livingston, 457 F.3d 390, 391 (5th Cir. 2006) (denying equitable relief where "[a]lthough [the prisoner's] direct appeal has been final for seven years, he did not file the instant complaint until six days before his scheduled execution"); Reese v. Livingston, 453 F.3d 289, 291 (5th Cir. 2006) (denying stay of execution because "a plaintiff cannot wait until a stay must be granted to enable him to develop facts and take the case to trial — not when there is no satisfactory explanation for the delay"). Applying that governing law, the court finds that Murphy either knew or should have known about his potential claims and had ample opportunity to bring suit, but waited until the eve of his execution. The court finds that equity requires the denial of his motion to stay.

IV. Conclusion

The Court does not address the substance of Murphy'S complaint because has not brought this action with sufficient time remaining to develop his claims. Murphy's motion for a stay of execution (Docket Entry No. 3) is **DENIED**.

SIGNED at Houston, Texas, on this 26th day of March, 2019.



SIM LAKE
UNITED STATES DISTRICT JUDGE

Appendix I

TEXAS DEPARTMENT OF CRIMINAL JUSTICE

Correctional Institutions Division

EXECUTION PROCEDURE

April 2019

ADOPTION OF EXECUTION PROCEDURE

In my duties as Division Director of the Correctional Institutions Division, I hereby adopt the attached Execution Procedure for use in the operation of the Texas Department of Criminal Justice Death Row housing units and perimeter functions. This Procedure is in compliance with Texas Board of Criminal Justice Rule §152.51; §§492.013(a), 493.004, Texas Government Code, and Article 43.14 – 43.20, Code of Criminal Procedure.

Lorie Davis
Director, Correctional Institutions Division

4.2.19
Date

EXECUTION PROCEDURES

PROCEDURES

I. Procedures Upon Notification of Execution Date

A. The clerk of the trial court pursuant to Tex Code of Criminal Procedure art. 43.15 shall officially notify the Correctional Institutions Division (CID) Director, who shall then notify the Death Row Unit Warden, and the Huntsville Unit Warden of an offender's execution date. Once an execution date is received, the Death Row Unit Warden's office shall notify the Unit Classification Chief, and the Death Row Supervisor.

B. The Death Row Supervisor shall schedule an interview with the condemned offender and provide him with the Notification of Execution Date (Form 1). This form provides the offender with a list of the information that shall be requested from him (2) two weeks prior to the scheduled execution.

C. The condemned offender may be moved to a designated cell. Any keep-on-person (KOP) medication shall be confiscated and administered to the offender as needed by Unit Health Services staff.

II. Stays of Execution

A. Official notification of a stay of execution shall be delivered to the CID Director, the Death Row Unit Warden, and the Huntsville Unit Warden through the Huntsville Unit Warden's Office. **Staff must not accept a stay of execution from the offender's attorney.** After the official stay is received, the Death Row Unit Warden's office shall notify the Unit Classification Chief and Death Row Supervisor.

B. Designated staff on the Death Row Unit shall notify the offender that a stay of execution has been received.

III. Preparation of the Execution Summary and Packet

A. Two Weeks (14 days) Prior to the Execution

1. The Death Row Unit shall begin preparation of the Execution Summary. The Execution Summary (Form 2) and the Religious Orientation Statement (Form 3) shall be forwarded to the Death Row Supervisor or Warden's designee for completion. A copy of the offender's current visitation list and recent commissary activity shall also be provided.

2. The Death Row Supervisor shall arrange an interview with the condemned offender to gather the information necessary to complete the Execution Summary and Religious Orientation Statement.

3. An offender may request to have his body donated to the Texas State Anatomical Board for medical education and research. The appropriate paperwork shall be supplied to the offender upon request.

4. The Execution Summary must be completed and returned by the Death Row Supervisor or Warden's designee in sufficient time to be forwarded to the CID Director's Office by noon of the 14th day. After approval by the CID Director, the summary shall be forwarded to the Death Row Unit Chaplain, the Huntsville Unit Warden's Office, and the Communications Department.

5. If the offender wishes to change the names of his witnesses, and it is less than fourteen (14) days prior to the scheduled execution, the offender shall submit a request in writing to the CID Director through the Death Row Unit Warden, who shall approve or disapprove the changes.

6. The Death Row Unit is responsible for completion of the Execution Packet which shall include:
    a. Execution Summary;
    b. Religious Orientation Statement;
    c. Copy of the Offender Travel Card;
    d. Current Visitation List;
    e. Execution Watch Notification;
    f. Execution Watch Logs;
    g. I-25 Offender's Request for Trust Fund Withdrawal;
    h. Offender Property Documentation (PROP-05 and PROP-08); and
    i. Other documents as necessary.

7. The Death Row Supervisor or the Warden's designee shall notify staff (Form 4) to begin the Execution Watch Log (Form 5).

8. The Execution Watch Log shall begin at 6:00 a.m. seven (7) days prior to the scheduled execution. The seven (7) day timeframe shall not include the day of the execution. The offender shall be observed, logging his activities every 30 minutes for the first six (6) days and every 15 minutes for the remaining 36 hours. The Communications Department may request information from the Execution Watch Log on the day of execution.

9. The original Execution Packet and the offender's medical file shall be sent with the condemned offender in the transport vehicle to the Huntsville Unit or the Goree Unit for a female offender. The Death Row Unit Warden shall maintain a copy of the Execution Packet on the Death Row Unit.

10. If there are any changes necessary to the Execution Packet, staff shall notify the CID Director's Office and the Huntsville Unit Warden's Office.

B. The Day of Execution

1. On the morning of the day of the execution prior to final visitation, all of the offender's personal property shall be packed and inventoried. The property officer shall complete an "Offender Property Inventory" (PROP-05) detailing each item of the offender's property. The property officer shall also complete a "Disposition of Confiscated Offender Property" (PROP-08) indicating the offender's choice of disposition of personal property.

    a. If disposition is to be made from the Huntsville Unit a copy of the property forms should be maintained by the Death Row Unit Property Officer and the originals forwarded to the Huntsville Unit with the property.

    b. If disposition is to be made from the Death Row Unit a copy of the property forms will be placed in the Execution Packet and the original forms maintained on the Death Row Unit through the completion of the disposition process.

    c. The Mountain View Unit Warden shall ensure that a female offender brings personal hygiene and gender-specific items to the Huntsville Unit as appropriate.

2. Designated staff shall obtain the offender's current Trust Fund balance and prepare the Offender's Request for Trust Fund Withdrawal (I-25) for completion by the offender.

    a. The following statement should be written or typed on the reverse side of the I-25, "In the event of my execution, please distribute the balance of my Inmate Trust Fund account as directed by this Request for Withdrawal." The offender's name, number, signature, thumbprint, date, and time should be below this statement. Two (2) employees' names and signatures should be below the offender's signature as witnesses that the offender authorized the form.

    b. This Request for Withdrawal form shall be delivered to the Inmate Trust Fund for processing by 10:00 a.m. CST the next business day following the execution.

3. A female offender may be transported to the Goree unit prior to the day of the execution. The Execution Transport Log for Female Offenders (Form 7) shall be initiated at the Mountain View Unit. The Goree Unit staff will initiate the Execution Watch Log upon arrival on the Goree Unit, permit visitation as appropriate and transport the offender to the Huntsville Unit.

The Transport Log shall resume when the offender departs the Goree Unit.

4. The condemned offender shall be permitted visits with family and friends on the morning of the day of the scheduled execution. No media visits shall be allowed at the Goree Unit.

   NOTE: Special visits (minister, relatives not on the visitation list, attorney, and other similar circumstances) shall be approved by the Death Row or Goree Unit Warden or designee. Exceptions may be made to schedule as many family members to visit prior to the offender's scheduled day of execution. These are considered to be special visits. No changes shall be made to the offender's visitation list.

5. The Execution Watch Log shall be discontinued when the Execution Transport Log for Male Offenders (Form 6) is initiated.

6. When appropriate the offender shall be escorted to 12 building at the Polunsky or the designated area at the Mountain View or Goree Unit and placed in a holding cell. The appropriate Execution Transport Log shall be initiated and the offender shall be prepared for transport to the Huntsville Unit. The offender shall be removed from the transport vehicle at the Huntsville Unit and escorted by Huntsville Unit security staff into the execution holding area.

7. Any transportation arrangements for the condemned offender between units shall be known only to the Wardens involved, the CID Director, as well as those persons they designate as having a need to know. No public announcement shall be made concerning the exact time, method, or route of transfer. The CID Director's Office and the Communications Department shall be notified immediately after the offender arrives at the Huntsville Unit

8. When the offender enters the execution holding area the Execution Watch Log shall immediately resume. The restraints shall be removed and the offender strip-searched.

9. The offender shall be fingerprinted, placed in a holding cell, and issued a clean set of TDCJ clothing.

10. The Warden shall be notified after the offender has been secured in the holding cell. The Warden or designee shall interview the offender and review the information in the Execution Packet.

11. Staff from the Communications Department shall also visit with the offender to determine if he wishes to make a media statement and to obtain authorization, if necessary, to release the statement.

12. The offender may have visits with a TDCJ Chaplain(s), a Minister/Spiritual Advisor who has the appropriate credentials and his attorney(s) on the day of execution at the Huntsville Unit; however, the Huntsville Unit Warden must approve all visits.

13. There shall be no family or media visits allowed at the Huntsville Unit.

IV. Drug Team Qualifications and Training

A. The drug team shall have at least one medically trained individual. Each medically trained individual shall at least be certified or licensed as a certified medical assistant, phlebotomist, emergency medical technician, paramedic, or military corpsman. Each medically trained individual shall have one year of professional experience before participating as part of a drug team, shall retain current licensure, and shall fulfill continuing education requirements commensurate with licensure. Neither medically trained individuals nor any other members of the drug team shall be identified.

B. Each new member of the drug team shall receive training before participating in an execution without direct supervision. The training shall consist of following the drug team through at least two executions, receiving step-by-step instruction from existing team members. The new team member will then participate in at least two executions under the direct supervision of existing team members. Thereafter, the new team member may participate in executions without the direct supervision of existing team members.

C. The Huntsville Unit Warden shall review annually the training and current licensure, as appropriate, of each team member to ensure compliance with the required qualifications and training.

V. Pre-execution Procedures

A. The Huntsville Unit Warden's Office shall serve as the communication command post and entry to this area shall be restricted.

B. Inventory and Equipment Check

1. Designated staff on the Huntsville Unit are responsible for ensuring the purchase, storage, and control of all chemicals used in lethal injection executions for the State of Texas.

2. The drug team shall obtain all of the equipment and supplies necessary to perform the lethal injection from the designated storage area.

3. An inventory and equipment check shall be conducted.

4. Expiration dates of all applicable items are to be checked on each individual item. Outdated items shall be replaced immediately.

C. Minister/Spiritual Advisor and attorney visits shall occur between 3:00 and 4:00 p.m. CST unless exceptional circumstances exist. Exceptions may be granted under unusual circumstances as approved by the Huntsville Unit Warden.

D. The offender shall be served his last meal at approximately 4:00 p.m. CST.

E. The offender shall be afforded an opportunity to shower and shall be provided with clean clothes at some time prior to 6:00 p.m. CST.

F. Only TDCJ security personnel shall be permitted in the execution chamber. The CID Director or designee and the Huntsville Unit Warden or designee shall accompany the offender while in the Execution Chamber. TDCJ Chaplains and Ministers/Spiritual Advisors designated by the offender may observe the execution only from the witness rooms.

VI. Set up Preparations for the Lethal Injection

A. One (1) syringe of normal saline shall be prepared by members of the drug team.

B. The lethal injection drug shall be mixed and syringes shall be prepared by members of the drug team as follows:

Pentobarbital - 100 milliliters of solution containing 5 grams of Pentobarbital.

C. The drug team shall have available a back-up set of the normal saline syringe and the lethal injection drug in case unforeseen events make their use necessary.

VII. Execution Procedures

A. After 6:00 p.m. CST and after confirming with the Office of the Attorney General and the Governor's Office that no further stays, if any, will be imposed and that imposition of the court's order should proceed, the CID Director or designee shall give the order to escort the offender into the execution chamber.

B. The offender shall be escorted from the holding cell into the Execution Chamber and secured to the gurney.

C. A medically trained individual shall insert intravenous (IV) catheters into a suitable vein of the condemned person. If a suitable vein cannot be discovered in an arm, the medically trained individual shall substitute a suitable vein in another part of the body, but shall not use a "cut-down" procedure to access a suitable vein. The medically trained individual shall take as much time as is needed to properly insert the IV lines. The medically trained individual shall connect an IV administration set, and start a normal saline solution to flow at a slow rate through

one of the lines. The second line is started as a precaution and is used only if a potential problem is identified with the primary line. The CID Director or designee, the Huntsville Unit Warden or designee, and the medically trained individual shall observe the IV to ensure that the rate of flow is uninterrupted.

D. Witnesses to the execution shall be brought into the appropriate viewing area ONLY AFTER the Saline IV has been started and is running properly, as instructed by the Huntsville Unit Warden or designee.

E. The CID Director or designee shall give the order to commence with the execution.

F. The Huntsville Unit Warden or designee shall allow the condemned person to make a brief, last statement.

G. The Huntsville Unit Warden or designee shall instruct the drug team to induce, by syringe, substances necessary to cause death.

H. The flow of normal saline through the IV shall be discontinued.

I. The lethal dose of Pentobarbital shall be commenced. When the entire contents of the syringe have been injected, the line shall be flushed with an injection of normal saline.

J. The CID Director or designee and the Huntsville Unit Warden or designee shall observe the appearance of the condemned individual during application of the Pentobarbital. If, after a sufficient time for death to have occurred, the condemned individual exhibits visible signs of life, the CID Director or designee shall instruct the drug team to administer an additional 5 grams of Pentobarbital followed with a saline flush.

K. At the completion of the process and after a sufficient time for death to have occurred, the Warden shall direct the physician to enter the Execution Chamber to examine the offender, pronounce the offender's death, and designate the official time of death.

L. The body shall be immediately removed from the Execution Chamber and transported by a coordinating funeral home. Arrangements for the body should be concluded prior to execution.

VIII. Employee participants in the Execution Process shall not be identified or their names released to the public. They shall receive an orientation with the Huntsville, Goree, Polansky, or Mountain View Unit Wardens, who shall inform the employees of the TDCJ ED-06.63, "Crisis Response Intervention Support Program" (CRISP). The employees shall be encouraged to contact the Regional CRISP Team Leader following the initial participation in the execution process.