

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

PATRICK HENRY MURPHY,
Petitioner,

v.

BRYAN COLLIER, ET AL.
Respondents.

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

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE

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Introduction

On March 28, 2019 this Court stayed Petitioner Patrick Murphy's execution, indicating the stay would be effective pending the disposition of a timely filed Petition for Writ of Certiorari ("Petition"). Murphy timely filed his Petition on June 25, 2019. On August 12, 2019, the trial court scheduled Murphy to be executed on November 13, 2019 notwithstanding this Court's order staying the execution until this Court disposes of his Petition. Respondents filed their Brief in Opposition ("BIO") on September 27, 2019. Petitioner now files this Reply to Respondents' Brief in Opposition, responding only to those arguments made by Respondents he deems merit a reply.

I. Respondents' Brief in Opposition focuses largely on an issue that has already been resolved: namely, whether Murphy was entitled to a stay of his execution.

Respondents are correct in stating that we do not know how many members of the Court believed Murphy was entitled to a stay on March 28. However, a stay requires five votes, not merely the four necessary to grant a petition for writ of certiorari. A stay required that Murphy's request be deemed timely. Because this Court issued that stay, it is disingenuous for Respondents to suggest a majority of the Court might not have believed Murphy's execution should be stayed. *See* BIO at 11. At least five (and perhaps six) members of this Court found Murphy was entitled to a stay. Respondents have devoted a full ten pages of their Brief in Opposition in an attempt to relitigate what has already been decided. *See* BIO at 9-19.

II. Because the State has scheduled Petitioner to be executed before proceedings pursuant section 1983 have been completed, the issue of what factors should be considered when determining whether he is entitled to a stay of his execution is not moot.

On March 26, 2019, Murphy filed his Complaint pursuant to section 1983 and a motion to stay his execution in the federal district court in cause number 4:19-cv-01106. The district court took no action on Murphy's Complaint and instead denied his motion for a stay of execution. Petition at a59-60. Immediately after this Court stayed Petitioner's execution on March 28, proceedings resumed in the district court. Discovery concluded soon after Murphy filed his Petition in this proceeding.

Weeks before discovery concluded, on June 3, the State made known it intended to ask the trial court to schedule Murphy to be executed on November 13.

If Counsel for Respondents was not aware of the State's intentions before June 3, he was made aware of it on June 3, when Undersigned Counsel copied him on an email to the State indicating Counsel believed it to be inappropriate to file such a motion (seeking an execution date) while proceedings were ongoing in the district court and while this Court's stay was still in place. Nevertheless, on July 30, the State filed the motion it had indicated it would file weeks earlier,¹ and on August 12, the trial court granted the State's motion.

The federal district court presiding over the section 1983 litigation has requested briefing addressing the effect of the Petition pending before this Court on its own jurisdiction. If the district court either (1) does not issue an order deciding the merits of Murphy's claim before November 13, (2) concludes it lacks jurisdiction pending this Court's ruling on the Petition, or (3) issues an order denying Murphy relief on his claims, then Murphy would again need to file a motion in either the district court or the court of appeals requesting his execution be stayed. The decision on whether to grant such a motion would undoubtedly involve consideration of whether Murphy's Complaint and original motion for stay (the filing of which commenced the ongoing proceedings) were timely. And that very question – the timing question – is the first question presented in Murphy's Petition, which asks this Court to issue an opinion delineating the factors that must be taken into consideration when deciding whether Murphy is entitled to a stay.

¹ Immediately after the State filed its motion, Counsel for Murphy filed a response informing the trial court of both this Court's stay and the ongoing litigation in the district court.

Any opinion from this Court summarily reversing the court of appeals would not be advisory but would instead dictate the proper analysis of Murphy's motion.

III. Petitioner's claims are meritorious.

Murphy's Petition recognizes the record before this Court is not yet adequate to resolve the merits of the First Amendment claims he has raised. Regarding the second and third questions presented in Murphy's Petition, Murphy asked this Court to "hold [his] Petition pending the completion of the ongoing section 1983 litigation in the district court addressing the constitutional and statutory issues raised by the TDCJ's current policy." Petition at 17.

In an effort to persuade this Court to permit Murphy's execution to occur in November despite the pending litigation, Respondents have misleadingly characterized the existing record. For example, Respondents' Brief in Opposition suggests that under their current policy, Murphy would be able to speak to his spiritual advisor on the phone until just before entering the execution chamber. *See* BIO at 32. In fact, he would not be allowed to speak to his spiritual advisor on the phone after 5:00 pm. Exhibit 8 at 14-15;² Exhibit 13 at 32-33, 48. At 5:00, phone calls cease and TDCJ's Christian chaplains engage in a dialogue with the condemned prisoner. Exhibit 8 at 14-15 ("And then after 5:00, we kind of have a standard thing. I have something that I say to all of them, kind of like, 'We can talk as much or as little as you want to,' you know, 'If you want to just rest,' whatever.").

² All citations to exhibits refer to those filed by Murphy and attached to his motion for summary judgment in the district court.

And while the TDCJ chaplains would be willing to discuss matters of faith regardless of faith preference, the content of that discussion would most certainly be affected by the person's religion. The chaplains would pray with a Christian inmate but would not recite the declaration of faith with a Muslim inmate. Exhibit 4 at 30-31; Exhibit 6 at 32; Exhibit 8 at 23. None would chant with Murphy in the way that he would, if allowed, chant with his spiritual advisor, or a different Buddhist minister. Exhibit 4 at 24-25; Exhibit 6 at 32; Exhibit 8 at 29-30.

Also, Respondents also suggest that Murphy would be able to hear his spiritual advisor chanting in the viewing room. *See* BIO at 39. However, not only does the existing record not support this assertion, but Respondents conceded last May that this assertion is untrue. *Murphy v. Collier*, No. 4:19:cv-01106, ECF No. 26 at 12 n.8 (“People in the viewing rooms can clearly hear the offender. The offender can hear only muffled sounds through the glass in the viewing rooms.”).

A week after the trial court entered its order scheduling Murphy to be executed on November 13, Respondents, through their spokesman, stated that in light of the amendment they made to their execution protocol on April 2, the issues raised by Murphy have “been settled.” 1200 News Radio WOAI, *Final ‘Texas Seven’ Escapee Gets Execution Date*, <https://woai.iheart.com/content/2019-08-20-final-texas-seven-escapee-gets-execution-date/>. Respondents are incorrect. The new policy, like the old policy, treats non-Christian inmates differently than Christian ones. By removing clergy of all faiths from the execution chamber, the new policy evinces a hostility toward religion generally. Moreover, the April 2 amendment had

no effect on Murphy's claims raised pursuant to the Free Exercise Clause and the RLUIPA. Holding this Petition pending the completion of the ongoing section 1983 litigation will maintain this Court's stay and thereby ensure that Murphy is not executed before this Court can consider Murphy's claims with the benefit of a full record, a record that reveals Murphy's claims are meritorious.

Conclusion and Prayer for Relief

Petitioner requests this Court either: (1) grant certiorari, summarily reverse the judgment of the court of appeals, and hold Murphy's application for stay of execution was timely made; or (2) hold this Petition pending the completion of the ongoing section 1983 litigation in the district court addressing the constitutional and statutory issues raised by the TDCJ's current policy.

DATE: October 14, 2019

Respectfully submitted,

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