No. 18A815

IN THE
SUPREME COURT OF THE UNITED STATES

In re: COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS

DOMINEQUE HAKIM MARCELLE RAY,
Plaintiff-Appellant,
v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS
Defendant-Appellee

EXECUTION SCHEDULED FOR THURSDAY, FEBRUARY 7, 2019, AT 6 P.M. C.S.T.

OPPOSITION TO STATE'S EMERGENCY MOTION AND APPLICATION TO VACATE STAY OF EXECUTION

Christine A. Freeman, Executive Director
John Anthony Palombi*
Spencer J. Hahn
Federal Defenders, Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353
Email: john_palombi@fd.org

**Counsel of Record*

February 7, 2019

The Court of Appeals for the Eleventh Circuit granted a stay of execution for Mr. Ray to allow it to hear an appeal from the District Court's dismissal of his complaint and denial of his motion for stay of execution. Mr. Ray's complaint alleged that he was being denied his right to free exercise of his religion and that Alabama's policy of only allowing the Christian, non-Catholic, chaplain of the prison to be in the execution chamber at the time of an inmate's execution was an Establishment Clause violation.

The Commissioner has moved to vacate this stay, and in a desperate attempt to execute Mr. Ray this evening, has attempted to put new "evidence" before this Court. As will be addressed below, this evidence should be ignored. The State's argument for vacating the stay is nothing more than a continuation of its argument in the District Court. It does not address the Eleventh Circuit's opinion other than to disagree with it. The State's argument for vacating the Eleventh Circuit's stay of execution does not meet the exceedingly high standard required for this Court to vacate the stay. The Eleventh Circuit's stay should remain in place to allow the appeal from the District Court's ruling to proceed.

I. The State's attempt to place new evidence before this court.

The State has included an affidavit from the Commissioner of the Alabama Department of Corrections with its application to vacate the Eleventh Circuit's stay. It is axiomatic that appellate courts cannot take new evidence.[1] Neither the Court

[1] *See e.g. Waddleton v. Rodriguez.*, 2018 WL 4292175 *8 (5th Cir. 2018).

of Appeals for the Eleventh Circuit nor the District Court had this affidavit. It cannot be said that the Eleventh Circuit abused its discretion by not considering evidence that it did not have,[2] and should not be considered by the Court.[3]

II. Facts of the litigation prior to the Court of Appeals issuing a stay.

On January 23, 2019, Mr. Ray met with Warden Cynthia Stewart, of Holman Correctional Facility, concerning his impending execution. Mr. Ray is a devout Muslim. Mr. Ray had questions of Warden concerning certain parts of the execution process. He asked Warden Stewart if the Chaplain was required to be in the execution chamber when he was being executed. She said yes. He asked her if his imam could be in the execution chamber with him when he was executed, and she said no. He also asked that any post-execution autopsy be performed according to Islamic strictures, and she told him that she had no control over that.[4]

On Thursday, January 24, 2019, Mr. Ray met with counsel and informed them about the meeting with Warden Stewart. Counsel filed a complaint on Mr. Ray's behalf, along with a concomitant motion for stay of execution in the District Court for the Middle District of Alabama on Monday, January 28, 2019. That

---

[2] *See, e.g., Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) ("It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.").

[3] Further, the affidavit actually adds no new information. It merely repeats the security mantra offered by counsel for the Commissioner in the proceedings below, and provides the conclusory opinion that exclusion of all spiritual advisors other than Chaplain Summers is the least-restrictive means.

[4] Mr. Ray did not pursue the autopsy issue in his complaint, as Commissioner Dunn and the Alabama Department of Corrections have no control over the request.

Complaint had three counts: a RLUIPA challenge to the presence of the chaplain in the execution chamber; a RLUIPA challenge to the refusal to allow Mr. Ray a spiritual advisor of his faith to be in the chamber during his execution; and an Establishment Clause challenge to the fact that Alabama requires a Christian, non-Catholic chaplain to be in the execution chamber but no spiritual advisor of any other faith.[5]

On January 29, the District Court ordered that the parties appear at a hearing on January 31, and that the parties answer certain questions for the court before that hearing.[6] Prior to the hearing, the Commissioner conceded one of the counts in the complaint by agreeing to "waive" the requirement that the Chaplain be present in the execution chamber during Mr. Ray's execution.[7] The Commissioner also argued that the complaint should be dismissed.[8]

No evidence was presented at the hearing, and on February 1, 2019, the District Court concluded that Mr. Ray's suit was not brought in a timely manner.[9] The District Court granted the State's motion to dismiss Counts Two and Three of the Complaint as moot, denied the motion to dismiss on the other two counts, and

---

[5] Mr. Ray also amended his complaint to add a fourth count, concerning a change to Alabama's execution protocol and whether Mr. Ray could opt to be executed by a different method. That is not an issue on appeal.

[6] *Ray v. Comm'r*, No. 19-cv-00088 (M.D. Ala. 1/29/19), Doc. 8.

[7] *Id.,* Doc. 11 at 2.

[8] *Id.*

[9] *Id.*, Doc. 21 at 9.

denied the motion to stay execution.[10] Within minutes, Mr. Ray filed a notice of appeal to the Court of Appeals for the Eleventh Circuit, and within hours, he filed a motion for stay of execution pending appeal in that court.

III. The Court of Appeals opinion granting a stay.

On February 6, 2019, the Court of Appeals for the Eleventh Circuit granted Mr. Ray's Emergency Motion for a Stay of Execution. In a unanimous published order, the court found that Mr. Ray met all of the requirements for the court to grant a stay of execution, and that the equities weighed in his favor.

The Eleventh Circuit specifically began its analysis with whether Mr. Ray had a substantial likelihood of success on the merits of his appeal. With respect to Mr. Ray's Establishment Clause claim, which was dismissed by the District Court, the Eleventh Circuit held:

> What we can say with some confidence based on what little we have seen is that Holman prison will place its Christian Chaplain in the execution chamber; that it has done so nearly uniformly for many years; that the Christian Chaplain will offer to minister to the spiritual needs of the inmate who is about to face his Maker, and that the Chaplain may pray with and touch the inmate's hand as a lethal cocktail of drugs is administered; and that only a Christian chaplain may go into the death chamber and minister to the spiritual needs of the inmate, whether the inmate is a Christian, a Muslim, a Jew, or belongs to some other sect or denomination. What is central to Establishment Clause jurisprudence is the fundamental principle that at a minimum neither the states nor the federal government may pass laws or adopt policies that aid one religion or prefer one religion over another. And that, it appears to us, is what the Alabama Department of Corrections has done here.[11]

---

[10] *Id.*, Doc. 21 at 18.

[11] *Ray v. Comm'r*, No. 19-10405, (11th Cir. 2/6/19) at 12-13.

With respect to Mr. Ray's RLUIPA claims, the Eleventh Circuit concluded that the burden would be on the state to demonstrate that its policy was narrowly tailored to further the compelling governmental interest.[12] The Eleventh Circuit then found that the District Court did not address any of the principles surrounding RLUIPA and improperly shifted the burden concerning compelling interest from the Commissioner to Mr. Ray.[13] The court concluded by holding: "Faced with this substantial Establishment Clause claim, and with precious little in the record to support the government's interests and the fit between those interests and the state's policy, we are required to conclude, as we do, that Ray is substantially likely to succeed on the merits."[14]

In weighing the equitable factors for granting a stay, the Eleventh Circuit found that "[i]n the absence of a stay, Ray will die without the benefit, available to Christian inmates, of sharing his final moments with a cleric who shares his faith and who will be able to provide prayer, spiritual support and comfort at the moment of death. Moreover, the public has a serious interest in the proper application and enforcement of the Establishment Clause and RLUIPA."[15]

The Eleventh Circuit then turned to whether Mr. Ray was dilatory in filing his suit. The court pointed out that Mr. Ray could not have known from the publicly available statutes that the Chaplain was required to be in the execution chamber

---

[12] *Id.* at 21.

[13] *Id.* at 22.

[14] *Id.* at 23.

[15] *Id.*

and that he couldn't have an imam in the chamber.[16] It also held that the Commissioner provided no evidence to support any inference that Mr. Ray knew any of the procedures surrounding who was required to be in the chamber—or that a reasonable accommodation would be denied—until January 23, when he asked the warden to remove the chaplain and replace him with his imam, and was denied.[17] In concluding that Mr. Ray was not dilatory in filing suit, the court said: "The long and short of it is 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."[18]

IV. Standard of review for motions to vacate stays of execution.

"The standard under which [this Court] consider[s] motions to vacate stays of execution is deferential, and properly so. Only when the lower courts have clearly abused their discretion in granting a stay should [this Court] take the extraordinary step of overturning such a decision."[19] A lower court decision granting a stay is "deserving of great weight,"[20] and the Court should only grant a motion to vacate a

---

[16] *Id.* at 25-26.

[17] *Id.* at 26-27.

[18] *Id.* at 28.

[19] *Dugger v. Johnson*, 485 U.S. 945, 947 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting). *Accord, Barefoot v. Estelle*, 463 U.S. 880, 896 (1983); *Wainwright v. Spenkelink*, 442 U.S. 901, 905 (1979) (Rehnquist, J., dissenting).

[20] *Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.,* 434 U.S. 1316, 1319 (1977) (Marshall, J., Circuit Justice).

stay under "exceptional circumstances."[21] Here, those exceptional circumstances do not exist, and there was no such abuse of discretion.

V. The Court of Appeals did not clearly abuse its discretion in granting a stay of execution to Mr. Ray.

The Court of Appeals issued an extensive opinion explaining why Mr. Ray is entitled to a stay of execution. The Commissioner has attacked the Eleventh Circuit's opinion, but the bases for that attack consist primarily of quoting the District Court's opinion, and do not meet the standard it must satisfy in order to vacate a stay entered by an appellate court.

A. The Eleventh Circuit properly found that he had a likelihood of success on the merits of his Establishment Clause claim.

Stripped to its core, the Commissioner's argument for vacating Mr. Ray's stay is that the Establishment Clause count of Mr. Ray's complaint was properly dismissed. However, the State's argument does not address the basis of the Eleventh Circuit's reasoning on why it was not properly dismissed. The Eleventh Circuit held Mr. Ray would have a likelihood of success on the merits of his Establishment Clause claim. The Commissioner merely argues here that the Count is moot. The Eleventh Circuit explained in detail why the claim is not moot.

First, the alleged concession was nothing of the sort. As the Eleventh Circuit explained, jurisdiction is for the court to determine, not the parties. Further, Mr. Ray asked for three remedies, and he only received part of one – barring the Chaplain from the execution chamber for his execution only.

---

[21] *Wainwright v. Booker*, 473 U.S. 935, 938 (1985) (Marshall, J., dissenting).

Second, the doctrine of voluntary cessation shows that Mr. Ray's lawsuit is not moot. The Commissioner, after suit was filed, said he would not require the Chaplain to be in the execution chamber during Mr. Ray's execution. However, a defendant's voluntary cessation of an illegal act does not normally act to moot a case.[22] Voluntary cessation of a challenged practice does not moot a case unless it is clear that the allegedly wrongful behavior cannot be reasonably expected to recur.[23]

The pleadings presented to this Court and the Department of Corrections' actions over the last 24 hours also indicate that the Department will continue their behavior after Mr. Ray's execution. The first pleading presented to this Court from the Commissioner contained an unsupported statement that Alabama's execution protocol would be changed to bar all spiritual advisors, including the chaplain from the execution chamber during an execution. Two hours later, the Commissioner filed an amended pleading, with that statement removed. Therefore, Alabama's execution protocol continues to require that the Chaplain be present in the execution chamber. Without a definitive court ruling on this question, Alabama could continue to change and un-change its execution protocol at whim. Maintenance of Mr. Ray's suit will prevent that from occurring.

In addition, after the Commissioner filed his application to vacate stay with this Court, Mr. Ray's attorneys learned that the Department of Corrections was refusing to allow Mr. Ray to have a copy of Q'uran with him in the "death cell." He

---

[22] *Friends of the Earth*, *Inc. v. Laidlaw Envtl. Servs.*, *Inc.*, 528 U.S. 167, 175 (2000).

[23] *Trinity Lutheran Church of Columbia*, *Inc. v. Comer*, 137 S.Ct. 2012, 2019 n.1 (2017) (citing *Friends of the Earth*).

filed, late last night, a motion with the District Court to require the Department of Corrections to allow him to have a copy of the Q'uran with him in the cell.[24] It is counsel's understanding that as of this morning, he was finally permitted to have a copy of the Q'uran.

The actions of the Commissioner and the Department further indicate that it is reasonable to believe that the Department's illegal actions will continue after Mr. Ray's execution if he is not permitted to continue to litigate his suit against the Commissioner. The Eleventh Circuit found that Mr. Ray has a substantial likelihood of success on the merits of his appeal from the dismissal of his Establishment Clause claim, and the Commissioner has not provided any extraordinary reasons for this Court to vacate that order.

B. Mr. Ray has a substantial likelihood of success on the merits of his RLUIPA claim.

The Eleventh Circuit also found that Mr. Ray had a substantial likelihood of success on the merits of his RLUIPA claims in his complaint. The Commissioner's argument is that the Eleventh Circuit improperly shifted the burden to the State to show that an outright ban is the least restrictive alternative to further a compelling governmental interest. This was not improper, this is exactly what is required by this Court's precedent in *Holt v. Hobbs*.[25] The State has placed a substantial burden on Mr. Ray's freedom of religion by refusing to allow him to have an imam present at the time of his execution when non-Catholic Christian inmates may have the

---

[24] *Ray v. Comm'r*, No. 19-cv-00088, (M.D. Ala. Feb. 6, 2019) Doc. 34.

[25] 135 S. Ct. 853 (2015).

prison chaplain present. The Eleventh Circuit concluded that Mr. Ray had a substantial likelihood of success on the merits of that claim (it was not dismissed by the District Court) because the Commissioner had not put on evidence to show that a complete ban on all persons other than the prison chaplain was the least restrictive means of accomplishing their compelling interest of security:

> At the end of the day, it is possible that there are no less restrictive means, but the government must show us how and why that is so. Whether Ray's claim is framed as arising under the Establishment Clause or RLUIPA, the burden rests with Alabama, not Ray, to show a compelling interest and the adoption of means closely fitted to that interest.[26]

This accurate statement of the law is in direct contrast to the District Court's incorrect statement that "Ray has not shown that it is substantially likely that the State lacks a compelling interest or that the State could use a less-restrictive means of furthering its interest."[27]

The State has not provided this court with the "extraordinary circumstances" necessary to overturn the Eleventh Circuit's conclusion that a stay was appropriate because Mr. Ray has a substantial likelihood of success on the merits of his appeal

C. Mr. Ray did not unduly delay in filing his lawsuit.

The Commissioner argues to this Court that Mr. Ray is not entitled to a stay of execution because he unduly delayed in filing his lawsuit. However, the Commissioner does nothing more than block quote the District Court's opinion and

---

[26] *Ray v. Comm'r*, No. 19-10405 (11th Cir. Feb. 6, 2019) at 22.

[27] *Id.*

claim that it is correct and the Eleventh Circuit's decision is incorrect. At no point does the Commissioner address any of the Eleventh Circuit's conclusions or findings as to why Mr. Ray did *not* delay in filing this suit.

The Eleventh Circuit first stated that merely filing a suit close to an execution date, does not make the suit dilatory.[28] It then noted that there is no way Mr. Ray could tell from the statute that the Chaplain is required to be in the execution chamber and no way to tell that the ADOC would not allow Mr. Ray to have a spiritual advisor of his choice in the room rather than the Chaplain of Holman Correctional Facility.[29]

The Eleventh Circuit then concluded that there was a reasonable explanation for why Mr. Ray filed the suit when he did.[30] The Commissioner's argument to this Court does nothing to explain why that decision was incorrect. It merely argues that the District Court's decision was correct.

Mr. Ray filed his suit five days (two of which were an intervening weekend) after being told that the Chaplain would be present in the execution chamber and he could not have his imam in the execution chamber when he was executed. The Eleventh Circuit rejected the Commissioner's claim that Mr. Ray must have known he couldn't have an imam in the execution chamber because he had been on death row. The State presented no evidence to support this supposition, instead relying on

---

[28] *Id.* at 24.

[29] *Id.* at 25-26.

[30] *Id.* at 27.

the old shibboleth of "gamesmanship." What the State fails to mention to this court is that the protocol and policies that it relies on in this case are kept secret from inmates, a fact of significance to the Eleventh Circuit in making its findings and reaching its conclusion.[31]

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."[32] This conclusion is supported by the record in this case and the Commissioner has provided no "extraordinary" reasons for vacating the stay.

D. Staying Mr. Ray's lawsuit does no damage to the public interest.

The Commissioner's final claim is that there is a greater public interest in executing Mr. Ray in violation of his First Amendment and RLUIPA rights than there is in vindicating them. Mr. Ray does not dispute that the State has an interest in enforcing its judgments. But it does not have an interest in doing so unconstitutionally.

In order to minimize any delay, the Eleventh Circuit ordered that Mr. Ray's appeal be expedited. Mr. Ray's initial brief to the Eleventh Circuit is due on February 27, and all briefing is due to be completed by March 13. The brief delay necessary to resolve the serious constitutional issues in this case is an appropriate

---

[31] *Id.* at 26.

[32] *Id.* at 27.

way of balancing the State's interest in enforcing its criminal judgments and Mr. Ray's interest in religious freedom.

CONCLUSION

The Court of Appeals stayed Mr. Ray's execution only after careful consideration of the record before it and making findings that Mr. Ray has a substantial likelihood of success on the merits of his appeal, and that the equities of this situation are in his favor. Mr. Ray challenged Alabama's practice of allowing the Christian chaplain of Holman Correctional Facility to be at the side of someone while they are being executed, but not allowing a condemned inmate of a different faith to have the same spiritual comfort at the moment of his death. The Eleventh Circuit found that Mr. Ray has a substantial likelihood of success on the merits of this challenge. The State has not provided this Court with the extraordinary circumstances necessary to vacate the Eleventh Circuit's stay of execution, and the State's application should be denied.

Respectfully submitted,

/s/ John Palombi

Christine A. Freeman, Executive Director
John Anthony Palombi*
Spencer J. Hahn
Federal Defenders, Middle District of Alabama
817 S. Court Street
Montgomery, Alabama 36104
Telephone: 334.834.2099
Facsimile: 334.834.0353
Email: john_palombi@fd.org

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2019, I filed this Opposition using the Court's electronic filing system and served a copy of this Opposition on Counsel for Movant by electronic mail at the following email address:

Richard Anderson
randerson@ago.state.al.us

/s/ John Palombi
Assistant Federal Defender
Federal Defenders, Middle District of Alabama
817 South Court Street
Montgomery, Alabama 36104
Telephone: 334-834-2099