

No. 18A-815  
CAPITAL CASE  
**EMERGENCY PETITION; EXPEDITED CONSIDERATION REQUESTED**

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**In the SUPREME COURT of the UNITED STATES**

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*In re:* COMMISSIONER, Alabama Department of Corrections

DOMINEQUE HAKIM MARCELLE RAY,

Plaintiff–Appellant,

v.

COMMISSIONER, Alabama Department of Corrections

Defendant–Appellee.

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**STATE’S RESPONSE TO OPPOSITION TO EMERGENCY MOTION  
AND APPLICATION TO VACATE STAY OF EXECUTION**

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February 7, 2019

**EXECUTION SCHEDULED THURSDAY, FEBRUARY 7, 6:00 P.M. C.S.T.**

Counsel for Domineque Ray having filed their opposition to the State’s emergency motion and application to vacate the Eleventh Circuit’s stay of Ray’s execution, currently scheduled for 6 p.m. this evening, the State offers a brief response.

**I. The affidavit of Jefferson S. Dunn should be considered as a matter of equity.**

Ray argues that the affidavit of Commissioner Jefferson S. Dunn should not be considered by this Court in evaluating the State’s motion to lift the stay of execution imposed by the Eleventh Circuit Court of Appeals.<sup>1</sup> But as the State explained in its initial motion and explains further below, the Eleventh Circuit’s last-minute stay should be vacated, regardless whether this Court also considers Commissioner Dunn’s affidavit. Ray never satisfied his initial burden as to Claims 1 and 2 of his petition, which were that RLIUPA required the State to (1) exclude the Holman chaplain (an ADOC employee) from the execution chamber and (2) allow Ray to bring his own non-ADOC-employee spiritual adviser into the execution chamber. And Ray’s third claim—that the Establishment Clause requires the State to exclude the Holman chaplain from the execution chamber—was mooted before the Eleventh Circuit ever granted its stay because the State has agreed to exclude the Holman chaplain from the execution chamber.

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1. Opposition to State’s Emergency Motion at 2–3.

In any event, the Court has the discretion and should consider Commissioner Dunn's affidavit. Stays of execution are matters of equity, and as shown in the State's motion, the Eleventh Circuit improperly held the State to an evidentiary burden not imposed on the Petitioner when it determined that Ray was "substantially likely to succeed on the merits" of his claims. As argued in the State's motion, the State's inability to offer the full evidentiary basis for its compelling governmental interests in maintaining the safety and security of execution proceedings was dictated by Ray's delay raising what is, in effect, a challenge to the procedures surrounding his execution.

Further, because this Court is making an equitable determination when evaluating the propriety of the stay imposed by the Eleventh Circuit and the State's motion to lift that stay, it is not improper for this Court to consider the certain fact that had Ray's action been brought in a timely manner, the State would have been able to offer substantial evidence supporting the necessity of strictly regulating access to the one place in Holman Prison where the State's most solemn, serious, and sensitive duties are carried out. During the initial motions hearing in district court, held less than seventy-two hours after the State received service of Ray's RLUIPA action, the district court noted the "strong equitable presumption that arises when you wait to raise a substantial issue in an execution case that cannot be resolved

without a full hearing prior to the execution.”<sup>2</sup> Ray’s late filing deprived the State of a reasonable opportunity to present the district court with the present affidavit just as it deprived the State of a reasonable opportunity for “a full hearing and a full trial.”<sup>3</sup> In weighing the equities in this matter, there is no impropriety in this Court considering the affidavit, if not for its substance then for the purpose of determining whether the State would have been able to offer the requisite evidentiary support absent the urgency created by Ray’s delay in bringing this action.

Moreover, to the extent that Ray relies on *Cullen v. Pinholster*<sup>4</sup> for the proposition that this Court should not consider the State’s affidavit, his reliance is misplaced. In *Cullen*, this Court was reviewing a state court’s merits determination; pursuant to AEDPA and this Court’s precedent, review “under § 2254(d)(1) focuses on what a state court knew and did.”<sup>5</sup> Thus, in *Cullen*, it made perfect sense to restrict the federal court’s review to matters that were placed before the state courts. But that is not the case here. Here, this Court is called on to review not a finding of fact by a state court, but rather an equitable determination by a federal court. Moreover, in granting equitable relief in the present case, the Eleventh Circuit improperly held the State to an evidentiary standard that it did not apply to Ray. Finally, Ray’s RLUIPA

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2. Hearing Transcript at 8, *Ray v. Dunn*, 2:19-cv-00088-WKW-CSC (M.D. Ala. Jan. 31, 2019).

3. *Id.* at 21.

4. 563 U.S. 170, 182 (2011).

5. *Id.*

action was delayed until the last moment, impairing the State’s ability to respond with an affidavit, or any other evidentiary showing, in district court. This Court has condemned “last-minute attempts to manipulate the judicial process” and held that “[a] court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.”<sup>6</sup> Under the present circumstances, this Court’s consideration of the State’s affidavit, if only as an indication of what the State would have been able to show in district court absent the eleventh-hour nature of this action, is not improper.

## **II. The Eleventh Circuit improperly shifted the burden to the State.**

Ray fails to address the State’s argument that the Eleventh Circuit improperly shifted the burdens in this matter. Pursuant to RLUIPA, Ray’s initial burden was to demonstrate that the ADOC’s policy of restricting access to the execution chamber resulted in a “substantial burden” on his religious exercise. In the district court, Ray offered nothing beyond mere assertions that this was so. Perhaps more importantly, the Eleventh Circuit also shifted Ray’s burden onto the State by effectively requiring the State to show that it was substantially likely to succeed on the merits of Ray’s RLUIPA claim. Instead of holding Ray to his burden, the Eleventh Circuit mistakenly applied the State’s burden to disprove a substantive claim at an

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6. *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992).

evidentiary hearing and granted the stay because “Alabama has presented us with nothing in support of its claims.”<sup>7</sup> But when considering the stay request, it was **Ray** who had the burden of demonstrating a substantial likelihood of success, not the State. The district court, on the other hand, properly held that to obtain a stay of execution, Ray had to establish a substantial likelihood that he would prevail on the merits. Ray also failed in this regard because he did not show that it was substantially likely that the State could not justify its policies.

Nonetheless, in granting Ray’s motion to stay, the Eleventh Circuit waived Ray’s threshold burden, noting merely that it “need not decide” whether Ray’s assertions were sufficient. The Court then proceeded to grant Ray the requested equitable relief **because the State also relied on assertions** in responding to Ray’s eleventh-hour RLUIPA action. Thus, the Eleventh Circuit relieved Ray of his **threshold** burden under RLUIPA but held the State to its **responsive** burden. This impermissible burden shifting was an abuse of the Eleventh Circuit’s discretion. As the district court properly held, Ray failed to sustain his burden of proving a substantial likelihood of success on the merits of his RLUIPA claim. This Court should therefore grant the State’s motion to vacate the stay entered by the Eleventh Circuit.

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7. *Ray v. Comm’r*, No. 19-10405, at 18, 22 (11th Cir. Feb. 6, 2019).

**III. The Holman chaplain will not be present in the execution chamber during Ray's execution, and Ray has received a Qur'an.**

Ray draws this Court's attention to language inadvertently included in the State's original motion due to a scrivener's error and removed in the amended motion concerning whether the chaplain of Holman Correctional Facility will be present during his execution.<sup>8</sup> The removed language is *not* the position of the Alabama Department of Corrections, which is why the State filed an amended motion. There has been no change to the ADOC's policy. As the ADOC made plain in the district court, however, because of Ray's religious beliefs, the ADOC has agreed to exclude the chaplain from the execution chamber for Ray's execution.

Ray also mentions a motion filed late last night regarding the ADOC's alleged refusal to allow him to have a copy of the Qur'an in his holding cell.<sup>9</sup> It is the State's understanding that a copy of the Qur'an was available to Ray—who, incidentally, had been permitted to bring his prayer mat into the holding cell—but that Ray had not requested the Qur'an. Instead, he filed a motion, which was quickly resolved this morning. The motion has since been withdrawn.

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8. Opposition to State's Emergency Motion at 9.

9. *Id.* at 9–10.

**CONCLUSION**

The State respectfully requests that this Honorable Court vacate the stay of execution.

Respectfully submitted,

Steve Marshall  
*Alabama Attorney General*

**s/Richard D. Anderson**  
Richard D. Anderson  
*Assistant Attorney General*

## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February 2019, I did serve a copy of the foregoing on the attorneys for Domineque Ray by electronic mail, addressed as follows:

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