"THE FEDERAL CORNER"

Domineque Hakim Marcelle Ray, a Muslim, is Executed Without an Imam Being Present to Attend to His Spiritual Needs

Buck Files

Domineque Hakim Marcelle Ray was convicted of a capital offense in the State of Alabama and was scheduled to be executed on February 7, 2019. Ten days before his death date, Mr. Ray filed a motion in the United States District Court for the Middle District of Alabama, seeking a stay of his execution. Judge W. Keith Watkins denied the stay. *Domineque Hakim Marcelle Ray v. Jefferson Dunn*, No. 2:19-CV-88-WKW, 2019 WL 418105 (M.D. Ala. Feb. 1, 2019). His Memorandum Opinion and Order reads, in part, as follows:

[The Issue Before the Court]

> Domineque Hakim Marcelle Ray is set to be executed on February 7, 2019 — punishment for robbing, raping, and murdering fifteen-year-old Tiffany Harville. This case is not about whether Ray may be executed; other courts have affirmed his death sentence. This case is instead about *when* the execution will take place, *who* will be inside the execution chamber, and *how* the execution will be carried out. To be specific, Ray seeks an eleventh-hour stay of his execution so that the court can resolve three issues. The first is whether Ray may have a private spiritual advisor inside the execution chamber during his execution. The second is whether Ray may exclude a state chaplain from the execution chamber. The third is whether Ray may elect to be executed by nitrogen hypoxia instead of by lethal injection.
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> [Factual Background and History of the Case]
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> In 1995, Ray robbed, raped, and murdered fifteen-year-old Tiffany Harville. He had previously murdered two teenaged brothers. He was convicted in Dallas County Circuit Court of both capital murder committed during first-degree rape and capital murder committed during first-degree robbery. The jury recommended a death sentence by a vote of eleven to one, and the judge sentenced Ray to death. The Alabama Court of Criminal Appeals affirmed on direct appeal.
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> After his direct appeal, Ray collaterally attacked his conviction in state court. The Dallas County Circuit Court denied Ray's petition after a three-day evidentiary hearing. The Alabama Court of Criminal Appeals affirmed.
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> * * *

Ray then filed a federal habeas petition under 28 U.S.C. § 2254. The Southern District of Alabama denied Ray's petition in its entirety. … It also denied a certificate of appealability, and a motion to alter or amend the judgment. … The Eleventh Circuit affirmed.

* * *

On November 6, 2018, the Supreme Court of Alabama set February 7, 2019, as Ray's execution date.

* * *

[An Alabama Death Row Inmate's Last Hours]

A death-row inmate in Alabama has religious rights during the days and hours approaching his execution. Executions are on Thursdays, starting at 6:00 p.m. An inmate may visit with family, friends, attorneys, and spiritual advisors of his choice on the Monday, Tuesday, and Wednesday before his execution. He may also visit with family, friends, attorneys, and spiritual advisors of his choice until 4:30 p.m. on the day of execution. These are all "contact visits," meaning no barrier is between the inmate and his guests.

When goodbyes are said at 4:30 p.m. on Thursday, the inmate is taken to a holding cell next to the death chamber. A private spiritual advisor may accompany the inmate to the holding cell to await the final walk to the chamber. But the State does not let the private spiritual advisor accompany the inmate into the execution chamber itself. Instead, the advisor must stay a few feet behind the glass wall of the chamber, in the viewing area reserved for the inmate's family and friends. There is no contact between the inmate and those in the viewing area.

A state-employed chaplain is a member of the execution team and is usually in the death chamber during executions. The current chaplain is a Christian. The state has never allowed an inmate's private spiritual advisor to be inside the chamber during an execution, regardless of the private spiritual advisor's religious affiliation. (Doc. # 20, at 12.)

* * *

[Mr. Ray's Position]

Ray is a devout Muslim. According to his attorneys, he has been a Muslim since at least 2006. (Doc. # 10.) Ray has had contact visits with a Muslim spiritual advisor (an imam) during his incarceration, including a contact visit this week. (Doc. # 1, at 7; Doc. # 12, at 7.)

Because Ray is Muslim, he objects to the presence of a Christian chaplain in the death chamber during his execution. The State agrees not to require its chaplain to be in the chamber. Ray, however, requests more accommodations than that. He wants his private spiritual advisor with him in the death chamber during the execution. He also wants to be executed by nitrogen hypoxia instead of by lethal injection. (Doc. # 1, at 8–12; Doc. # 12, at 14–15.) The State has denied both

requests. Ray claims the State's denials substantially burden his religious exercise, that the State lacks a compelling interest, and that the State could further any interests it does have in a less-restrictive manner.

* * *

[Motions for a Stay of an Execution]

A motion for a stay filed by a death-row inmate who challenges the method of his execution is treated the same as any other motion for a stay. Before a court may issue a stay, the inmate must show that: '(1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest.'

* * *

Finally, when a motion for a stay of execution is filed on the eve of execution, 'the extent to which the inmate has delayed unnecessarily in bringing the claim' must be considered.

* * *

[The Court's Conclusion]

Based on these principles, a stay of execution is not warranted. Ray is guilty of inexcusable delay, and he has not surmounted the 'strong equitable presumption' against granting a stay. Moreover, Ray has not shown he has a substantial likelihood of success on the merits and that a stay would not harm the State's interests.

* * *

But to obtain a stay of execution, Ray must establish that he has a substantial likelihood of prevailing on the merits of his RLUIPA claim. That means Ray must show that it is substantially likely that the State cannot justify its policies. In other words, it is not enough for Ray to show the existence of a substantial burden; he must show it is substantially likely that the State would lose if this case went to trial. Ray has not done so for any of his claims.

[Mr. Ray Appeals to the Eleventh Circuit]

After being denied relief in the district court, Mr. Ray petitioned the United States Court of Appeals for the Eleventh Circuit, seeking an emergency stay of his execution. A panel of the Circuit held that Mr. Ray was substantially likely to succeed on the merits of his First Amendment claim; and, that the equities weighed in favor of granting a stay. *Ray v. Commissioner, Alabama Department of Corrections*, ___F.3d___, 2019 WL 454529 (11th Cir., Feb. 6, 2019). [Panel: Circuit Judges Marcus, Wilson and Martin. (Opinion by Judge Marcus).]

Judge Marcus' opinion reads, in part, as follows:

[Mr. Ray's Request for a Stay]

Petitioner Domineque Ray has moved this Court for an emergency stay of his execution, scheduled to take place at 6:00 p.m. (CST) on February 7, 2019 at the Holman Correctional Facility ('Holman') in Atmore, Alabama, for the 1995 rape, robbery, and murder of fifteen-year-old Tiffany Harville. He also appeals from the determination of the district court denying his emergency motion for a stay and dismissing two of his claims under the Religious Land Use and Institutionalized Persons Act of 2000 ('RLUIPA'), 42 U.S.C. § 2000cc et seq., and under § 1983 and the Establishment Clause of the First Amendment.

* * *

[What is Required for the Court to Grant a Stay]

'It is by now hornbook law that a court may grant a stay of execution only if the moving party establishes that: (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest.'

* * *

[The Standard of Review]

'[W]e review the denial of a stay of execution only for abuse of discretion.'

* * *

[The Issue Before the Court]

We begin, as we must, with 'the first and most important question' concerning a stay of execution: whether Ray is substantially likely to succeed on the merits of his claims.

* * *

[The First Amendment]

The First Amendment to the United States Constitution commands that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' U.S. Const., amend. I. The Supreme Court has long since made this command binding on the states as well.

* * *

[Mr. Ray's Claim]

The claim presented by Domineque Ray touches at the heart of the Establishment Clause. Indeed, we can think of no principle more elemental to the Establishment Clause than that the states and the federal government shall not favor one religious denomination over another. In the words of the Supreme Court: 'The

clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'

* * *

[The Establishment Clause Limits State Action]

…the Supreme Court 'has adhered to the principle, clearly manifested in the history and logic of the Establishment Clause, that no State can "pass laws which aid one religion" or that "prefer one religion over another." '

* * *

'[T]his principle of denominational neutrality has been restated on many occasions. In Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952), [the Supreme Court] said that "[t]he government must be neutral when it comes to competition between sects." '

* * *

In Epperson v. Arkansas, …[the Supreme Court] stated unambiguously: "The First Amendment mandates governmental neutrality between religion and religion. ... The State may not adopt programs or practices ... which 'aid or oppose' any religion. ... This prohibition is absolute."

* * *

And Justice Goldberg cogently articulated the relationship between the Establishment Clause and the Free Exercise Clause when he said that "[t]he fullest realization of true religious liberty requires that government ... effect no favoritism among sects ... and that it work deterrence of no religious belief."

* * *

[Alabama's Procedure Appears to Violate the Establishment Clause]

We are exceedingly loath to substitute our judgment on prison procedures for the determination of those officials charged with the formidable task of running a prison, let alone administering the death penalty in a controlled and secured manner. Nevertheless, in the face of this limited record, it looks substantially likely to us that Alabama has run afoul of the Establishment Clause of the First Amendment.

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.

* * *

[Mr. Ray Is Likely to Succeed on the Merits]

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.

* * *

[The Court Grants the Stay]

Based on the foregoing analysis, Ray's petition for an emergency stay of execution is granted. The Clerk of Court is directed to expedite this appeal so that we may promptly resolve these claims.

[Alabama Appeals to the Supreme Court]

The attorney general of the State of Alabama filed an application to vacate the stay of execution of the sentence of death entered by United States Court of Appeals for the Eleventh Circuit. In a 5-4 opinion, the Supreme Court vacated the stay of execution. Justice Kagan joined by Justices Ginsburg, Breyer and Sotomayor dissented from the granting of the application to vacate the stay. *Jefferson S. Dunn v. Domineque Hakim Marcelle Ray*, ___S.Ct.___, 2019 WL 488293 (Feb. 7, 2019).

[The Court's Decision]

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.

* * *

The application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit on February 6, 2019, presented to Justice Thomas and by him referred to the Court, is granted.

* * *

Justice Kagan's dissenting opinion reads as follows:

[Alabama's Death Row Procedure]

Holman Correctional Facility, the Alabama prison where Domineque Ray will be executed tonight, regularly allows a Christian chaplain to be present in the execution chamber. But Ray is Muslim. And the prison refused his request to have an imam attend him in the last moments of his life. Yesterday, the Eleventh Circuit concluded that there was a substantial likelihood that the prison's policy violates the First Amendment's Establishment Clause, and stayed Ray's execution so it could consider his claim on its merits. Today, this Court reverses that decision as an abuse of discretion and permits Mr. Ray's execution to go forward. Given the gravity of the issue presented here, I think that decision profoundly wrong.

[The Establishment Clause]

'The clearest command of the Establishment Clause,' this Court has held, 'is that one religious denomination cannot be officially preferred over another.' Larson v. Valente, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). But the State's policy does just that. Under that policy, a Christian prisoner may have a minister of his own faith accompany him into the execution chamber to say his last rites. But if an inmate practices a different religion—whether Islam, Judaism, or any other—he may not die with a minister of his own faith by his side. That treatment goes against the Establishment Clause's core principle of denominational neutrality. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ('[Government] may not ... aid, foster, or promote one religion or religious theory against another'); Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952) ('The government must be neutral when it comes to competition between sects').

[The State Must Show a Compelling Interest]

To justify such religious discrimination, the State must show that its policy is narrowly tailored to a compelling interest. I have no doubt that prison security is an interest of that kind. But the State has offered no evidence to show that its wholesale prohibition on outside spiritual advisers is necessary to achieve that goal. Why couldn't Ray's imam receive whatever training in execution protocol the Christian chaplain received? The State has no answer. Why wouldn't it be sufficient for the imam to pledge, under penalty of contempt, that he will not interfere with the State's ability to perform the execution? The State doesn't say. The only evidence the State has offered is a conclusory affidavit stating that its policy 'is the least restrictive means of furthering' its interest in safety and security. That is not enough to support a denominational preference.

[There Is No Reason for the Court toReject
the Eleventh Circuit's Findings]

I also see no reason to reject the Eleventh Circuit's finding that Ray brought his claim in a timely manner. The warden denied Ray's request to have his imam by his side on January 23, 2019. And Ray filed his complaint five days later, on

> January 28. The State contends that Ray should have known to bring his claim earlier, when his execution date was set on November 6. But the relevant statute would not have placed Ray on notice that the prison would deny his request. To the contrary, that statute provides that both the chaplain of the prison and the inmate's spiritual adviser of choice 'may be present at an execution.' Ala. Code § 15–18–83(a) (2018). It makes no distinction between persons who may be present within the execution chamber and those who may enter only the viewing room. And the prison refused to give Ray a copy of its own practices and procedures (which would have made that distinction clear). So there is no reason Ray should have known, prior to January 23, that his imam would be granted less access than the Christian chaplain to the execution chamber.
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> [The Court Has Short-Circuited the Ordinary Process]
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> This Court is ordinarily reluctant to interfere with the substantial discretion Courts of Appeals have to issue stays when needed. See, e.g., Dugger v. Johnson, 485 U.S. 945, 947, 108 S.Ct. 1127, 99 L.Ed.2d 405 (1988) (O'Connor, J., joined by Rehnquist, C.J., dissenting). Here, Ray has put forward a powerful claim that his religious rights will be violated at the moment the State puts him to death. The Eleventh Circuit wanted to hear that claim in full. Instead, this Court short-circuits that ordinary process—and itself rejects the claim with little briefing and no argument—just so the State can meet its preferred execution date. I respectfully dissent.

The Rest of the Story

Mr. Ray was executed on February 7, 2019, as originally ordered. What we will never know is how long it would have taken for the State of Alabama to have arranged for an Imam to be with Mr. Ray in the death chamber.

Three days later, there was an op-ed piece by Alan Cross in the *New York Times* entitled "Does Alabama Support Religious Liberty?" Mr. Cross was identified as the pastor and missional strategist for the Montgomery Baptist Association. The article reads, in part, as follows.

> Mr. Ray was a Muslim. The state had accommodated his faith during his many years on death row, and he believed that accommodation would continue at his execution. But in January the warden told him that only prison workers could be present at the moment of execution; since the prison employed solely Christian chaplains, they were his only option.
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> I am not a Muslim. I am an evangelical Christian minister in Alabama. But my religious freedom – everyone's religious freedom – took a hit when my state decided that instead of slowing down to accommodate religious difference, the execution, which is final and irrevocable, had to go on as scheduled.

My Thoughts

In yet another 5-4 opinion, the Justices of the Supreme Court have decided a case with an important Constitutional issue. Chief Justice Roberts now seems to be wearing two hats during this term of Court – one as Chief Justice and the other as the swing vote on the Court. In the past, he has worked diligently with a goal of having the Justices find consensus in their positions, when possible. May he continue to do so.

Buck Files is a member of TDCLA's Hall of Fame and a former President of the State Bar of Texas. In May, 2016, TDCLA's Board of Directors named Buck as the *author transcendent* of the Texas Criminal Defense Lawyers Association. This is his 228th column or article. He practices in Tyler with the law firm of Bain, Files, Jarrett and Harrison, P.C., and can be reached at bfiles@bainfiles.com.