No. 19-10405-P

In the UNITED STATES COURT OF APPEALS
for the ELEVENTH CIRCUIT

DOMINIQUE RAY,[1]

Plaintiff/Appellant,

v.

JEFFERSON S. DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF
CORRECTIONS,

Defendant/Appellee.

On Appeal from the United States District Court
For the Middle District of Alabama,
No. 2:19-cv-00088-WKW-CSC

OPPOSITION TO RAY'S MOTION FOR A STAY OF EXECUTION

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February 4, 2019

1. The spelling of Ray's name has varied. He appears as "Dominique" in the Alabama Department of Corrections' records and on direct appeal, but as "Domineque" in this matter and as early as his state postconviction proceedings.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel certifies that the certificate of interested persons contained in the Amended Motion for Stay of Execution is complete to the best of undersigned counsel's knowledge, information, and belief.

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

OPPOSITION TO RAY'S MOTION
FOR A STAY OF EXECUTION

On a midsummer evening in 1995, fifteen-year-old Tiffany Harville was taken to a cotton field outside of Selma, Alabama, by Dominique Ray and Marcus Owden.[2] Regrettably, Tiffany did not know what sort of person Ray was. If she had known that Ray and Owden had previously murdered thirteen-year-old Reinhard Mabins and his eighteen-year-old brother Earnest, then perhaps the horrific events that occurred in that cotton field could have been avoided. But she did not know, and that night, Ray and Owden raped Tiffany and stabbed her repeatedly as she cried out her final prayer: "God, help me."[3] Then they left her abused body in that cotton field, where her bones would be found almost a month later.

This Court has previously addressed these "profound and compelling" facts.[4] As this Court found, Ray's crime was "heinous," as were his prior murders of the Mabins brothers.[5] "Tiffany Harville was killed by blunt force trauma to her head, with repeated stab-like punctures of her brain, while being raped and robbed. . . . [A]fter killing Tiffany, Ray audaciously went to Tiffany's house, spoke with her mother on multiple occasions, and pretended to assist in locating Tiffany."[6]

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2. C. 599–602.
3. C. 560, 603–04.
4. *See Ray v. Ala. Dep't of Corrs.*, 809 F.3d 1202, 1210–11 (11th Cir. 2016); *cert. denied*, 137 S. Ct. 417 (2016) (mem.).
5. *Id.*
6. *Id.*

Dominique Ray has been an Alabama death-row inmate for nearly twenty years, having been convicted of two counts of capital murder for Harville's robbery, rape, and murder in July 1999. As his federal habeas proceedings concluded in 2016,[7] it should have come as no surprise to Ray when the State of Alabama asked the Alabama Supreme Court to set his execution date on August 6, 2018. Indeed, Ray's counsel filed a meritless and time-barred successive state postconviction petition less than two months later. Still, Ray delayed in filing the present Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (hereinafter "RLUIPA"), complaint until January 28, 2019—a petition filed through *new* counsel a mere ten days before his scheduled execution.

According to his federal counsel, Ray has been a devout Muslim since at least 2006 and has had contact visits with an imam during his incarceration.[8] While Ray has been housed on death row, approximately forty-five inmates have been executed.[9] It is also evident that the interplay between Ray's faith and the mechanics of his execution were a subject that Ray had considered.[10] Yet Ray claims that only now, on the eve of his execution, has he learned that only members of the execution

7. *See Ray*, 809 F.3d 1202.
8. Memorandum Opinion and Order at 5, *Ray v. Comm'r, Ala. Dep't of Corrs.*, 2:19-cv-00088-WKW-CSC (M.D. Ala. Feb. 1, 2019), Doc. 21 (citing Docs. 1, 10, 12).
9. *Searchable Execution Database*, DEATH PENALTY INFO. CENTER, https://deathpenaltyinfo.org/views-executions (last visited Feb. 3, 2019).
10. Doc. 12 at 17.

team are permitted within the execution chamber. In his petition, he alleged that the State would substantially burden the exercise of his religious beliefs, in violation of RLUIPA and the First Amendment, by (1) having the prison chaplain present in the execution chamber and (2) not permitting Ray's imam to be present in the chaplain's stead.

The chaplain, who is a Christian, is an employee of the Alabama Department of Corrections ("ADOC") and a member of the execution team.[11] His role in the execution is to pray with the inmate during the inmate's last minutes if the inmate so desires.[12] The ADOC has never permitted an inmate's private spiritual advisor—nor any other person who is not a trained ADOC employee—to be present within the chamber during the execution.[13] Instead, an inmate may meet with his spiritual advisor up to the moment that he is moved to the execution chamber, and the advisor may witness the execution from a viewing room with the inmate's chosen

11. Doc. 21 at 5.
12. This role is in addition to the chaplain's responsibility for facilitating inmates' access to "free world" spiritual advisors, such as Ray's imam. Doc. 21 at 9.
13. Ray argues that a pleading following Doyle Hamm's aborted execution indicates otherwise because when the execution team had difficulty gaining access to Hamm's veins, "a man in a suit entered the room, accompanied by a woman with an ultrasound device," and "[a] man who had been watching from the foot of the gurney and talking on a cellphone . . . left the room several times, each time returning after a few minutes . . . [and eventually] stated that the execution was over." Petition for Writ of Habeas Corpus at 37–38, Hamm v. Dunn, 5:18-cv-00348-KOB (N.D. Ala. Mar. 5, 2018), Doc. 1. Beyond the fact that this is a *pleading*, Hamm failed to identify any of the people allegedly present, much less offer facts proving that they were not employed by the ADOC.

witnesses.[14] The ADOC does not limit inmates' spiritual advisors to practitioners of any particular faith. But just as the ADOC would prohibit a "free-world" Catholic priest, Protestant minister, Jewish rabbi, Buddhist monk, LDS bishop, Hindu priest, or Wiccan priest from witnessing an execution from within the chamber, so too does the ADOC refuse to allow Ray's imam to be inside the room. As a concession to Ray's beliefs, however, the ADOC volunteered to exclude the prison chaplain from the execution chamber during Ray's execution.

On February 1, 2019, the District Court for the Middle District of Alabama denied Ray's petition and motion for stay of execution. Ray appealed and filed an emergency motion to stay in this Court, which the State opposes.

I. Ray has failed to meet the requirements for a stay of execution.

This Court may grant the requested stay only if Ray's application 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."[15] The inmate must carry the burden of persuasion on all four

14. Doc. 21 at 4–5.
15. *Jones v. Comm'r, Ga. Dep't of Corrs.*, 811 F.3d 1288, 1291 (11th Cir. 2016) (citing *Powell v. Thomas*, 641 F.3d 1255, 1257 (11th Cir. 2011)).

requirements "by a clear showing."[16] Moreover, when an inmate files a motion for stay on the eve of his execution, the court must consider "the extent to which the inmate has delayed unnecessarily in bringing the claim."[17]

The State opposes the requested stay of execution on the basis that Ray has failed to establish a substantial likelihood of success on the merits when his claims are properly analyzed under AEDPA and the binding precedent of this Court, and because the stay, if issued, would be adverse to the public's interest.

A. Ray unreasonably delayed in bringing his federal cause of action and seeking a stay.

Courts considering a request for a stay should recognize the "'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.'"[18] There is no question that Ray, who has known of his impending execution since November 6, 2018,[19] waited until ten days before his scheduled execution to file his RLUIPA complaint. Ray's tactic is hardly novel in the history of death-row

16. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).
17. *Nelson v. Campbell*, 541 U.S. 637, 649 (2004).
18. *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650 (requiring district courts to consider whether an inmate unnecessarily delayed in bringing the claim before granting a stay "[g]iven the State's significant interest in enforcing its criminal judgments")).
19. Order, Ex parte Ray, No. 1001192 (Ala. Nov. 6, 2018).

litigation: file an eleventh-hour complaint, force the courts to expedite proceedings, then complain that the courts cannot possibly consider the issues in the limited time remaining, thereby necessitating a stay of execution.

While Ray argues that he did not know that his imam would not be allowed in the chamber with him until January 23, 2019,[20] the district court correctly concluded that "Ray is guilty of inexcusable delay, and he has not surmounted the "strong equitable presumption" against granting a stay."[21] [22] As the court explained:

> Ray has been a death-row inmate at Holman Correctional Facility since 1999. Since Ray has been confined at Holman for more than nineteen years, he reasonably should have learned that the State allows only members of the execution team, which previously has included a state-

20. Amended Motion for Stay of Execution at 1.

21. Doc. 21 at 8.

22. To the extent that Ray argues that the District Court erred by its "reliance on its own presumptions" about what Ray knew, he misstates the law. (Amended Motion for Stay of Execution at 2.) This Court has long recognized that it is proper to consider whether an inmate "knew, or should have known, all of the facts necessary to pursue a cause of action" when considering an inmate's delay in bringing the action. *See, e.g.*, *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003). Moreover, as this Court has held:

> for § 1983 claims seeking prospective relief from a future injury, a claim accrues when the litigant knows, or should have known, all of the facts necessary to pursue a cause of action, and death-sentenced inmates plainly know enough to challenge the state's method of execution well before their execution date.

Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 873 (11th Cir. 2017) (holding that method of execution challenge accrued when direct appeal was final), *cert. denied sub nom. Boyd v. Dunn*, 138 S. Ct. 1286, 200 L. Ed. 2d 502 (2018). Ray does not suggest any reason that actions brought pursuant to RLUIPA should be treated differently.

> employed chaplain, inside the execution chamber. Indeed, it was the state-employed chaplain who facilitated Ray's involvement with an imam for spiritual advice regarding his impending execution. Assuming that Ray "has been a committed Muslim since at least 2006" (Doc. # 10, at 1), and it being clear that Ray has had the assistance of legal counsel since at least 2003. Ray has had ample opportunity in the past twelve years to seek a religious exemption, instead of waiting until the eleventh hour to do so.
>
> Once the denial of his federal habeas petition became final in 2017, Ray knew (or should have known) that the execution clock had started ticking. Yet there is no indication that Ray took any action for over two years to ensure that the State would honor his desire for a private spiritual advisor to be in the execution chamber with him. On November 6, 2018, the Alabama Supreme Court set his execution date for February 7, 2019. Even then, Ray sat silent, doing nothing for more than two months, waiting until ten days prior to his execution before filing an action.
>
> 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* [*v. Allen*, 491 F.3d 1318, 1321, 1325 (11th Cir. 2007)] (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).[23]

In other words, Ray's eleventh-hour filing smacks of gamesmanship, suggesting that the timing of his lawsuit and stay request were a strategic move to delay his case and "leav[ing] little doubt that the real purpose behind [his] claim is

23. Doc. 21 at 8–10.

to seek a delay of [his] execution, not merely to effect an alteration of the manner in which it is carried out."[24] For this reason alone, his request should be denied.

B. Ray has not shown a substantial likelihood of success on the merits.

Putting aside issues of timeliness, Ray's motion for stay of execution is due to be denied because Ray has not, nor can he, show a substantial likelihood of success on the merits of his RLUIPA claim. As this Court has held:

> Although the RLUIPA protects, to a substantial degree, the religious observances of institutionalized persons, it does not give courts carte blanche to second guess the reasoned judgments of prison officials.[25]

Instead, RLUIPA is intended to address "frivolous" or "arbitrary" burdens of a type not at issue here.[26]

As discussed above, the chaplain of Holman Correctional Facility is an ADOC employee and, in addition to being responsible for facilitating access to volunteer "free world" clergy like Ray's chosen spiritual advisor, he is also a trained member of the execution team. He is not merely a random clergyman pulled in off the street for executions. Ray having made his position on the chaplain's presence clear, however, the ADOC has agreed to exclude the chaplain from the execution chamber

24. *Jones v. Allen*, 485 F.3d 635, 640 (11th Cir. 2007). The fact that Ray also waited until January 29, 2019, to elect to be executed by nitrogen hypoxia—an election he knew he was required to make prior to July 1, 2018—does not make his current complaint seem any sincerer. *See* Doc. 21 at 5, 15–17.
25. *Knight v. Thompson*, 797 F.3d 934, 943 (11th Cir. 2015).
26. *Id.*

as an accommodation to Ray's religious beliefs. But that said, neither those beliefs, no matter how sincerely held, nor RLUIPA entitles Ray to have the spiritual advisor of his choice present in the chamber.

While the ADOC has no interest in unduly burdening the free exercise of religion among the inmate population, it must also consider matters of safety and security within its facilities—particularly Holman, where most of the death-row inmates are housed. The existence of this compelling governmental interest is "beyond dispute."[27] A condemned inmate is given ample time during the days before his execution to meet with his chosen spiritual advisor. Indeed, the last visit an inmate receives before going to the execution chamber is a contact visit with his spiritual advisor, if the inmate so desires.[28] At the inmate's request, his spiritual advisor may witness the execution from the viewing room reserved for the inmate's

27. *Id.* at 944.

28. Doc. 21 at 4. Ray attempts to position the presence of his imam in the execution chamber as equivalent to the denied sweat lodge ceremony in *Rich v. Woodford*, 210 F.3d 961 (9th Cir. 2000), which Judge Reinhardt deemed "the equivalent to him of other religions' last rites." Supplement to Appellant's Amended Emergency Motion for Stay of Execution at 4 (quoting *Rich*, 210 F.3d at 961–62 (Reinhardt, J., dissenting from denial of rehearing en banc)). This is a false comparison. Ray may meet with his imam in the holding cell immediately prior to his execution. He may have a Koran and pray at that time. His last words in the execution chamber may be a prayer, and he may look through the viewing window and see his imam sitting nearby. The only thing he may not have is the imam, who is not a trained ADOC employee, within the chamber. Perhaps more importantly, there was no suggestion in the *Rich* dissent that the sweat lodge ceremony had to take place **within the execution chamber**.

family and friends and members of the media, situated to the inmate's left and within his line of vision from the gurney.[29] If Ray wishes to meet with his imam or have his imam witness his execution, then the ADOC will allow it. But the ADOC will not permit a non-ADOC employee, someone unfamiliar with the execution protocol and with the practices and safety concerns of the prison, to be in the chamber in the chaplain's place. Ray has directed this Court to no controlling federal authority requiring that an inmate be allowed the spiritual advisor of his choice—or any witness of his choice—*within* the execution chamber. Indeed, allowing non-ADOC employees within the execution chamber would be incompatible with the compelling governmental interest in maintaining the safety and security of prison operations.

The ADOC and the State of Alabama have a compelling governmental interest in maintaining safety and security in prison operations, including executions. Prison safety and security is a well-recognized compelling governmental interest.[30] A prison is free to deny inmate religious requests predicated on RLUIPA if they "jeopardize the effective functioning of an institution."[31] The ADOC's compelling

29. *See* Doc. 21 at 5.
30. *See, e.g.*, *Muhammad v. Sapp*, 388 F. App'x 892, 895 (11th Cir. 2010) (applying RLUIPA); *Knight*, 797 F.3d at 943 (applying RLUIPA); *Fawaad v. Jones*, 81 F.3d 1084, 1086 (11th Cir. 1996) (applying the Religious Freedom Restoration Act).
31. *Singson v. Norris*, 553 F.3d 660, 663 (8th Cir. 2009) (denial of Wiccan inmate's request to keep Tarot cards in his cell did not violate RLUIPA), *citing Cutter v. Wilkinson*, 544 U.S. 709, 726, (2005).

government interest in maintaining prison security is furthered by its policy of not allowing persons who are not ADOC employees and who do not have the requisite experience or security clearances into the execution chamber prior to the completion of the execution. This policy is the least restrictive means by which the ADOC can maintain the security and integrity of the execution chamber and the execution proceedings.

The ADOC is willing to reasonably accommodate Ray's religious beliefs by allowing his imam to witness his execution in the same manner that other inmates have been allowed to have witnesses of their choice—whether spiritual advisors, relatives, or friends—attend executions. These witnesses are subject to the same security precautions as other witnesses, including any representatives of the victim. Among those precautions is the sequestration of all witnesses in rooms adjacent to the execution chamber, but with two-way windows looking onto the chamber. This policy protects the State's "compelling interests 'of the highest order' in maintaining the solemnity, safety, and security of Ray's execution."[32] As the district court concluded:

> Ray has not shown that it is substantially likely that the State could further its interest while allowing untrained, "free world" spiritual advisors be in the death chamber. Instead, based on the record, it appears there is no less-restrictive means of furthering the State's interests. The State's interests in solemnity, safety, and security are so

32. Doc. 21 at 12 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (further quotation omitted)).

> strong that the State cannot permit even a slight chance of interference with an execution. Though a state chaplain is usually in the death chamber, he is also a trained member of the execution team. He has witnessed dozens of executions and trained on how to respond if something goes wrong. If the chaplain disobeys orders, he will face disciplinary action. (Doc. # 20, at 15–16.) In contrast, Ray's private spiritual advisor is untrained, inexperienced, and outside the State's control. Allowing a private spiritual advisor in the execution chamber would also *double* the number of people (other than members of the execution team) that the State would have to account for in the event of an emergency: the inmate *and* his private spiritual advisor. This not only burdens the State's interest, but it places Ray himself at risk. It is not substantially likely that a private spiritual advisor could overcome these obstacles in a way that did not harm the State's interests. Ray has shown no authority otherwise.[33]

Because Ray has not shown a substantial likelihood of success on the merits, his stay request should be denied.

C. Ray will not suffer irreparable injury without a stay of execution.

Ray claims that if he is denied a stay of execution, "then he will be executed in violation of his rights under RLUIPA and under a practice that violates the

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33. Doc. 21 at 12–13. Subsequent events have shown that the State's concerns are not baseless. After the order issued, Ray's chosen spiritual advisor, Yusuf Maisonet, spoke to a reporter about the decision. The article noted:

> Maisonet said he was asked not to comment to the media, but he agreed to an interview with AL.com.
>
> "They want to treat me like an employee without benefits," Maisonet said. "They want to control me. I do what I want to do."

Greg Garrison, *Muslim Chaplain: Death Row Inmate Needs Imam at Execution*, AL.COM (Feb. 2, 2019), https://bit.ly/2UDQu6i.

Indeed, Maisonet is not an ADOC employee, and because he is not subject to the regulations and training of ADOC employees, he will not be permitted in the execution chamber.

Establishment Clause insofar as it confers a benefit on one set of believers (non-Catholic Christians) but not on those of other religions."[34] As Ray has shown no actual violation of RLUIPA or of his constitutional rights, this claim is unsupported and baseless. Moreover, as the district court correctly noted, "the fact that Ray will die by execution is not itself a cognizable constitutional injury."[35]

D. The requested stay would substantially harm the public and the State's interest in a timely enforcement of criminal judgments.

As with all requests for stay of execution, the Court must consider the State's strong interest in seeing the timely enforcement of Ray's death sentence and the ADOC's duty to carry out this judgment.[36] Granting the requested stay would substantially harm the State's ability to fulfill its statutory duties under Alabama law and would be adverse to the public's interest in having criminal sentences enforced.[37]

The district court correctly noted that the State "has an interest in protecting the freedom of religion."[38] To accommodate Ray's stated beliefs, the ADOC has agreed to exclude the prison chaplain from the execution chamber. Like any other inmate, Ray has been and will be given opportunities to speak to his spiritual advisor,

34. Amended Motion for Stay of Execution at 5.
35. Doc. 21 at 17 (citing *Baze v. Rees*, 553 U.S. 35, 47 (2008)).
36. *Hill*, 547 U.S. at 584.
37. *See also Jones*, 485 F.3d at 641 (noting that State, victims, and victims' children had strong interest in seeing lawful punishment imposed).
38. Doc. 21 at 17.

including up the moment that he is taken to the chamber. His spiritual advisor will be allowed to be present, if Ray wishes, albeit in the adjacent viewing room. In no way does this substantially burden Ray's freedom of religion.

Ray has been on death row for nearly two decades. His jury recommended death by a vote of 11–1, and the trial court properly accepted that recommendation. His conviction is valid, and a competent state court with jurisdiction over his case properly set his execution date according to Alabama law. At a minimum, this Court should strongly consider Alabama's interest in enforcing its criminal judgment in weighing the equities against the grant of a stay.

CONCLUSION

Wherefore, for the foregoing reasons, the Appellee respectfully requests that this Court deny Ray's motion for stay of execution.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 27(d)(2)(A)

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CERTIFICATE OF SERVICE

I certify that on February 4, 2019, I filed this brief electronically using the Court's CM/ECF system, which will send notification to the following:

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