No. 19-70020

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK HENRY MURPHY,
Plaintiff-Appellee

v.

BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; BILLY LEWIS, Warden,
Defendants-Appellants

On Appeal from the United States District Court for the Southern District of Texas, Houston Division, USDC No. 4:19-cv-01106

PLAINTIFF-APPELLEE'S RESPONSE IN OPPOSITION TO MOTION TO VACATE STAY OF EXECUTION

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CERTIFICATE OF INTERESTED PERSONS

PATRICK HENRY MURPHY,

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BRYAN COLLIER, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; BILLY LEWIS, Warden,

Defendants-Appellants

The undersigned counsel of record certifies that the following listed persons and entities as described by Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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On November 7, 2019, the district court entered its Order staying Patrick Henry Murphy's execution, which had been scheduled for November 13. ECF No. 57.[1] That same day, Defendants-Appellants filed

[1] Because an electronic record on appeal is not available in this case, Counsel is unable to cite the Record as required by Rule 28.2.2. Accordingly, in this Response, Counsel for Murphy cite to the Record according to the district court's clerk's stamp at the top of each page of the record in the following format: ECF. No. [document number] at [page number]. If this Court does not otherwise have access

their Notice of Appeal. ECF No. 59. On November 8, this Court ordered Defendants to file their pleading by November 8 at 9:00 pm and Murphy to respond by November 10 at 4:00 pm. Pursuant to this Court's briefing schedule, Defendants filed their Motion to Vacate ("Motion") on November 8, and Murphy now files this Response in Opposition to Defendants' Motion.

I. Introduction

On the eve of Murphy's scheduled execution last March, the Supreme Court granted a stay. The Supreme Court's stay followed a decision by the United States District Court to deny the stay, a denial which was upheld by this Court.

The district court's stated basis for refusing the stay in March was that Murphy had waited too long to seek to compel the Texas Department of Criminal Justice to permit Murphy's spiritual advisor to accompany him during the execution. (Murphy is a Buddhist.) In affirming the district court's decision, this Court too based its decision on its conclusion Murphy had waited too long. Murphy had initiated

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to the district court pleadings, most of the documents cited in this Response are included in Defendants' Appendix, including ECF Nos. 22, 26, 38, 39, and 57.

efforts to be accompanied by a Buddhist reverend one month before his then-scheduled execution.

By a vote of six-to-three, the Supreme Court reversed this Court's judgment. Because Murphy was seeking a stay of execution, and because a stay is an equitable remedy, and because a party is not entitled to the equitable remedy unless he has acted in a timely manner, the Supreme Court's decision to grant the stay necessarily rejected this Court's (and the district court's) view that Murphy had waited too long to take action to protect his right to religious liberty. If there could have been any doubt or ambiguity, however, Justice Kavanaugh's concurring statement, joined by the Chief Justice, erased it. Justice Kavanaugh wrote: "Murphy's request was made in plenty of time for Texas to fix its discriminatory policy before Murphy's scheduled execution." *Murphy v. Collier*, 139 S. Ct. 1475, 1477 (2019) (Kavanaugh, J., concurring).

Following the Supreme Court's decision, the district court correctly apprehended that it had been reversed on the sole question it had addressed, i.e., the issue of timing. Accordingly, four days after the Supreme Court granted the stay, the district court commenced to

preside over the merits of Murphy's action arising under 42 U.S.C. § 1983. That suit raised three distinct claims of religious liberty, one under the Establishment Clause, one under the Free Exercise Clause, and one under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc-2000cc-5.

Discovery commenced on May 17, 2019. Since that time, the parties have taken depositions, served and answered interrogatories, and filed other motions in connection with the merits-based litigation. That discovery remains ongoing.[2]

Nevertheless, notwithstanding the Supreme Court's action to issue the stay, and the prompt commencement of litigation on the merits in the U.S. District Court, the State of Texas elected to interfere with the ongoing federal court action by, on August 12, 2019, setting Murphy's execution for November 13, 2019. Murphy opposed the setting of an execution date, and stressed to the state trial court the ongoing nature of these proceedings. Murphy argued the state court's action of setting a date during the midst of this § 1983 litigation would be

[2] While the district court's order granting Murphy a stay of execution denied his motion to compel discovery, it do so without prejudice. ECF No. 57 at 14. Counsel intend to refile the motion.

tantamount to disregarding the Supreme Court's March order and would interfere with the ongoing federal court proceedings, which had commenced precisely because the Supreme Court's stay had effectively authorized them to proceed. The District Attorney and the Attorney General and the state court nevertheless moved forward.[3]

Defendants' Motion to Vacate makes clear their motivation for scheduling Murphy to be executed while discovery in the district court was ongoing: Defendants were attempting to interfere with Murphy's right to have the merits of his claims decided in the course of orderly litigation by forcing the proceedings to occur in an accelerated manner. To survive Defendants' Motion for Summary Judgment (which Murphy

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[3] While it was the District Attorney's Office that filed the motion asking the trial court to schedule Murphy to be executed on November 13, 2019, Counsel for Defendants was aware of the District Attorney's intention. On June 3 (only two weeks after discovery commenced), the District Attorney emailed Counsel and copied Counsel for Defendants. Exhibit A (June 3 email from ADA Brian Higginbotham). The District Attorney wrote,

> My office intends to file a motion to set Murphy's execution date for Wednesday, November 13, 2019. We do not intend to await the resolution of the cert petition or the conclusion of civil litigation. If you have any scheduling conflicts specific to that date, please advise.

Exhibit A. As a publication from the Attorney General's Office (OAG) pertaining to executions (and obtained through a request for public information) makes clear, at a minimum, that office "coordinat[es] with the district attorney's office regarding the scheduling of an execution." Exhibit B (Excerpt of OAG records obtained through PIA request).

has, ECF No. 57 at 15), Murphy needed only show there are genuine issues of material fact which have yet to be resolved. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). To have his execution stayed, Murphy had to demonstrate he is likely to succeed on the merits of his claims. ECF No. 57 at 8. Notwithstanding Defendants' gamesmanship, the district court held Murphy made this showing even at this early stage of the proceedings. Defendants' Motion presents no argument that should cause this Court to find the district court abused its discretion.

II. Statement of Jurisdiction

The State's action in scheduling Murphy to be executed while litigation was pending and proceeding as scheduled in the district court was not only an attempt to interfere with Murphy's due process right to obtain a merits determination on the claims raised in his Amended Complaint, but it was effectively an effort to artificially create jurisdiction which would not exist otherwise.

When the state trial court granted the State's motion to set an execution date and, on August 12, scheduled Murphy to be executed on November 13, the parties' motions for summary judgment had been

filed in the U.S. District Court for less than a month. In that context, it is impossible to view the State's action as anything other than an attempt to derail or otherwise interfere with Murphy's right to have his compelling claims of religious liberty addressed in an orderly manner. Even had the district court granted the State's pending motion for summary judgment, the act of setting a date would have forced this Court to accelerate the hearing of Murphy's appeal.

But the district court denied both parties' dispositive motions, finding there are disputed questions of material fact germane to Murphy's claims.

Ordinarily, of course, a district court decision denying a motion for summary judgment (outside the context of a case raising a question of qualified immunity) would not even be appealable. As Judge Smith explained in *Galiano v. Harrah's Operating Co.*, 416 F.3d 411 (5th Cir. 2005), "[d]enials of summary judgment are typically not final orders and are generally appealable only as provided in 28 U.S.C. 1292(b), which requires a district court's designation." 416 F.3d at 422.

Through gamesmanship, the State has attempted to use an execution date – set during the midst of ongoing federal court

proceedings – to create jurisdiction in this Court which would not otherwise exist. To be sure, this Court has jurisdiction over orders granting stays of execution pursuant to 28 U.S.C. § 1292, but the only reason Murphy was compelled to seek a stay is because the State, by setting a date prematurely, has manipulated this Court's jurisdiction.

This Court has recognized that it has a "duty to not allow manipulation of [its] jurisdiction." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004); *see also Bass v. Tex. Power & Light Co.*, 432 F.2d 763, 766 (5th Cir. 1970) (addressing improper or collusive joining of parties to create diversity jurisdiction where there would otherwise be none). This Court has been explicitly dismissive of efforts by parties to manipulate proceedings and cause disorder in a naked effort to create jurisdiction. *See, e.g.*, *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 219 (5th Cir. 1998) (rejecting a doctrine that would "create incentives for defendants to subvert the orderly scheme for removing cases by acting opportunistically" and thereby "manufacture a convoluted theory of federal subject-matter jurisdiction"). And perhaps most relevant to the present case, in a capital case from Mississippi, Judge Haynes stressed: "'A state cannot avoid review of the

constitutionality of its procedures by creating [an] artificial crisis through its discretionary scheduling orders.'" *Turner v. Epps*, 460 F. App'x 322, 332 (5th Cir. 2012) (Haynes, J., dissenting).

In one respect, *Turner* is quite different from Murphy's case, for in *Turner*, this Court determined the plaintiff there did not have any viable legal claims. In contrast, in Murphy's case, the Supreme Court and the lower court have already recognized that Murphy has indeed raised viable legal claims; this indisputable fact makes Judge Haynes' warning especially appropriate: Texas cannot "avoid review" of the First Amendment and statutory concerns with its execution protocol by setting a date in the midst of litigation and thereby creating "an artificial crisis" through such a "discretionary scheduling order[]."

In short, while this Court has jurisdiction over motions to vacate stays of execution pursuant to 28 U.S.C. § 1292, this Court should not exercise that jurisdiction in this proceeding because to do so would be to reward the State's effort to manipulate this Court's jurisdiction. (Should the Court instead decide to issue an order on the State's motion (rather than dismissing for want of jurisdiction), it should deny the motion for the reasons set forth below.)

III. Statement of the Legal Issue

May the State curtail review of its execution protocol by scheduling an inmate to be executed while proceedings on his action raising constitutional and statutory claims related to that protocol is pending in the district court and when he has shown not only that there are genuine issues of material fact which have yet to be resolved but also that there is a substantial likelihood he will prevail on the merits of his claims?

IV. Statement of the Case

The current proceedings before this Court originated last March when Murphy attempted to be accompanied during his then-scheduled execution by a Buddhist reverend. As this Court is probably aware from prior proceedings, on February 28, 2019, a month before Murphy's previously-scheduled execution date of March 28 – undersigned Counsel contacted Defendants' General Counsel, Sharon Howell. ECF No. 1-1. Counsel informed Ms. Howell of Murphy's desire to have his spiritual advisor present in the execution chamber instead of one of TDCJ's Christian chaplains. The lawyers exchanged emails (see ECF Nos. 1-1, 1-2, 1-3), but Murphy's final email to Ms. Howell, indicating

Murphy would be satisfied with any Buddhist reverend (i.e., including someone who was not his usual advisor), was never answered.

As Murphy's Counsel indicated to this Court last March, Counsel was not certain (and still cannot be certain) what this silence meant. Ms. Howell's decision not to reply seems to have meant either that TDCJ, at that time, employed no Buddhist priests or that it intended to deprive Murphy of his right to be accompanied by an advisor of his own faith for some other reason. While Counsel previously believed TDCJ employs no Buddhist chaplains, it was revealed in discovery that belief might be incorrect. As Chaplain Timothy Jones, who is involved in hiring TDCJ's chaplains, explained during his deposition, he never asks what faiths new hires adhere to and he could not say for certain whether TDCJ employed any Buddhist chaplains. ECF No. 38-4 at 11-13. While Jones might not know, however, Defendants do know the faiths of all the chaplains they employ because that information is contained on their applications. *Id.* In proceedings in the district court, Defendants denied Murphy's assertion that they employ only Christian and Muslim chaplains, but did not elaborate on the faiths of these other chaplains. ECF No. 26 at 11. In any case, it appears the choice for

Murphy was to have one of the TDCJ-employed chaplains who regularly worked in the execution chamber at that time – who are all Christian, ECF No. 38-6 at 33 – present in the execution chamber on March 28, 2019, or to have no member of the clergy present.

In any event, when Murphy sought relief from the U.S. District Court last March, that court, without addressing the merits of Murphy's claims, denied Murphy's motion for stay of execution. ECF No. 9 at 11. On appeal, this Court affirmed the district court's order. *Murphy v. Collier*, 919 F.3d 913, 915-16 (5th Cir. 2019).

Murphy then appealed to the Supreme Court and asked that Court to stay his execution pending the timely filing, consideration, and disposition of his petition for a writ of certiorari. By a vote of six-to-three, the Supreme Court issued a stay of execution shortly after 8 o'clock p.m. central time.[4] As it had in the district court and in this Court, the State had taken the position Murphy was engaging in last-minute litigation, and the State asserted Murphy had waited too long to

[4] The Court ordered the State could "not carry out Murphy's execution pending the timely filing and disposition of a petition for a writ of certiorari unless the State permits Murphy's Buddhist spiritual advisor or another Buddhist reverend of the State's choosing to accompany Murphy in the execution chamber. *Murphy*, 139 S. Ct. at 1475.

raise the issue and his claims were not exhausted. The Supreme Court unequivocally rejected those claims. Because Murphy was not entitled to a stay of execution if the Court believed he had waited too long to raise his claims or that they were not exhausted, the Supreme Court, in granting a stay, necessarily found that he had acted in a timely fashion and had exhausted his claims. *See Murphy*, 139 S. Ct. at 1477 (Kavanaugh, J., concurring).

On April 2, 2019, five days after the Supreme Court stayed Murphy's execution, Defendant Davis amended Texas's execution protocol, purportedly in an effort to address the concern expressed by Justice Kavanaugh in his March 28, 2019 opinion concurring in the decision to stay Murphy's March 28 execution. Under TDCJ's new protocol, no religious cleric is allowed in the execution chamber during an execution. ECF No. 39-2 at 10. In point of fact, however, this new protocol probably does not satisfy Justice Kavanaugh's concern, and it certainly does not comply with the constitutional requirements of the First Amendment or applicable statutory law. In particular, Murphy's execution pursuant to the amended protocol would still violate his rights protected by the Establishment Clause. As has been revealed

during discovery, Christian inmates continue to receive preferential treatment under the new policy during the hours immediately preceding an execution before the inmate enters the execution chamber. Furthermore, with respect to its provision concerning who is now allowed in the execution chamber, the new policy evinces a hostility toward religion generally, which the Establishment Clause will not permit. In addition, Murphy's claims pursuant to the Free Exercise Clause and the RLUIPA were unaffected by Defendant's change in policy.

Because being executed pursuant to the amended protocol would violate Murphy's rights pursuant to the First Amendment and RLUIPA, on April 18, 2019, Plaintiff filed his First Amended Complaint pursuant to § 1983, ECF No. 22, addressing the April 2d protocol. Importantly, this amended complaint, which also raised claims of religious liberty pertaining the TDCJ's disparate treatment of prisoners awaiting execution in the holding cell, was filed well in advance of the setting of any execution date. The parties conducted discovery throughout May and June and filed motions for summary judgment July 19.

As detailed above, on August 12, less than a month after the parties filed their dispositive motions, and while discovery remained ongoing, the state trial court scheduled Murphy to be executed on November 13. Two weeks later, the proceeding in the federal district court was reassigned. ECF No. 42. On October 7, the district court ordered the parties to file briefing by October 18, which the parties did. ECF Nos. 45, 50, 51. On October 17, the district court convened a teleconference. ECF No. 47. During the teleconference, the court ordered the parties to attend mediation, which they did on October 28. ECF Nos. 48-49. During an October 30 teleconference, undersigned Counsel informed the court they would file a motion for stay of execution by November 4, which Counsel did. ECF Nos. 54, 55. Defendants opposed the motion on November 6. The following day, the district court entered an order denying both parties' motions for summary judgment and staying Murphy's execution. ECF No. 57. Later that day, Defendants noticed their appeal to this Court. ECF No. 59

V. Standard of Review

This Court reviews a "district court's grant of a stay of execution for abuse of discretion." *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012) (citing *Delo v. Stokes*, 495 U.S. 320, 322 (1990)).

VI. Argument

A. The district court found Murphy demonstrated a likelihood of success on the merits of one of his claims.

The State's argument that the district "court did not find that Murphy had demonstrated any likelihood of success on the ultimate merits of his claims," Motion at 2, is foreclosed by this Court's opinion in *Adams v. Thaler*, 679 F.3d 312 (5th Cir. 2012). In that case, Adams had filed three documents in the district court shortly before he was to be executed: a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, a second-in-time federal habeas petition, and a motion for stay of execution. *Adams*, 679 F.3d at 316-17. The district court issued two orders ten days after Adams filed his three pleadings. The first order transferred the second-in-time petition to this Court. *Id.* at 317. The second – a one-page order – granted Adams' motion for stay of execution pending the court's disposition of his Rule 60(b) motion. *Id.*

The order did not address the merits of Adams' Rule 60(b) motion. *Id.* at 318. This Court held that because one of the factors a district court is required to consider when determining whether to grant a motion to stay an execution is whether the applicant has made a showing he is likely to succeed on the merits, "in granting the stay, the district court made an implicit determination that it was reasonably likely" Adams would prevail on the merits. *Id.* at 318. In short, according to this Court's opinion in *Adams*, it is impossible for a district court to do what the State alleges the district court has done in this case because every federal district court order granting a stay of execution pending the disposition of some proceeding includes a finding that the applicant is likely to prevail on the merits of his claim raised in that proceeding.

Of course, the order granting Murphy a stay of execution in this case is a far cry from the unexplained, one-page order at issue in *Adams*. In this case, the district court issued a well-reasoned fourteen-page order, the last six pages of which address the merits of Murphy's claims. ECF No. 57 at 9-14. The order reflects the district court has spent a considerable amount of time reading the voluminous pleadings and discovery that have been generated in this proceeding (a portion of

which is contained in the State's 1000-page appendix to its Motion) in the two months since the case was reassigned to the court.

And while *Adams* forecloses the State's argument, it is not necessary in this case to rely on the holding of *Adams* to find the order implicitly includes a finding that Murphy is likely to succeed on the merits. That is because with respect to the portion of Murphy's Establishment Clause claim pertaining to the disparate treatment during the time before he will enter the execution chamber, the district court explicitly wrote "[t]he concerns raised by the amended complaint's focus on the pre-execution procedure are as compelling as those in the original complaint." ECF No. 57 at 13. The Supreme Court granted Murphy a stay of execution when presented the claims raised in his original complaint. The Court could not have granted the stay unless it believed Murphy would likely succeed on the merits of at least one of his claims. The district court's stating it believes one of Murphy's present claims is as compelling can be viewed as nothing less than a belief that there is a likelihood Murphy will prevail on the merits of that claim.

B. Murphy has been diligent.

1. The State's argument that Murphy has failed to exercise diligence is foreclosed by the Supreme Court's opinion granting him a stay of execution.

The spuriousness of Defendant's argument related to diligence could not be any clearer. According to Defendants' Motion, they do not concede the Supreme Court found Murphy acted diligently. Motion at 11. The Supreme Court could not have granted Murphy a stay of execution unless it believed he acted in a timely fashion. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006). Four of the six justices who voted in favor of granting a stay implicitly found Murphy was diligent. *Murphy*, 139 S. Ct. at 1475. Two did so explicitly. *Murphy*, 139 S. Ct. at 1477. The district court did not abuse its discretion in finding the Supreme Court's stay suggests the Court believes Murphy acted diligently.[5] *See* ECF No. 57 at 5 n.1.

That Murphy amended his Establishment Clause claim to respond to Defendants' amendment to their policy does not make him less diligent. The claims raised in Murphy's original complaint can be

[5] To the extent Defendants are suggesting Plaintiff should have taken additional administrative action, the failure of the parties to reach an accommodation at court-ordered mediation would seem to conclusively demonstrate that any additional administrative appeals would have been futile.

summarized in one sentence: Murphy should not be prohibited from freely exercising his religion in the moments before he is executed and his ability to practice his religion during that time should not be less than those adhering to faiths different than his. The same sentence accurately summarizes the claims in his amended complaint. The only change between the two complaints is that his Establishment Clause claim now contains two parts. In light of Defendants' April 2d amendment to the protocol, it is no longer correct to argue Murphy is treated differently in the execution chamber than inmates who adhere to a different religion because no clergy of any faith are allowed in the execution chamber under the provisions of the amended protocol. But Murphy continues to be treated differently in the time immediately before entering the chamber, so the focus of his disparate treatment claim is now on that time. Because the policy pertaining to inside the execution chamber is now hostile toward religion generally, that portion of Murphy's Establishment Clause claim argues the new policy violates the Establishment Clause for that reason.

Murphy's desire has always been to be in the presence of his spiritual advisor as close as possible to the moment he dies. That desire is reflected in both complaints.

2. It has become clear during this proceeding that one cannot know whether his request to have a chaplain of his faith accompany him during the time immediately before he is executed (either inside the chamber or outside of it) will be granted until TDCJ informs that person before his execution whether it employs any chaplains of his faith.

When this case was last before this Court, undersigned Counsel believed that Defendants employed only Christian and Muslim chaplains. Defendants have, in the course of this proceedings, stated Counsel's belief was incorrect. ECF No. 26 at 11. During their pre-hiring interviews, prospective chaplains are not asked about their religious affiliation. ECF No. 38-4 at 11-13. Consequently, not even the members of TDCJ's chaplaincy know the faiths of all the chaplains employed by TDCJ. *See id.*

The only way for an inmate to know whether there is a TDCJ employed chaplain who adheres to the same faith as does he and, if so, whether TDCJ would permit that person to accompany him in the moments before his execution is for that inmate to ask TDCJ officials

(who could then consult the applications completed by the chaplains before they were hired). This is precisely what Counsel did on Murphy's behalf on March 7 – three weeks before Murphy was to be executed. Because Defendants do not publish a list of the faiths to which those employed in their chaplaincy division adhere, asking shortly before one is to be executed is the only way to know whether one's request will be denied.

This admission by Defendants – that they hire chaplains of other faiths – renders untenable any opinion which holds that an inmate like Murphy should know whether his request will be granted based on what is printed in Defendant's execution protocol, including this Court's previous opinion.[6] *See Murphy*, 919 F.3d at 915. The protocol makes no mention of the faiths of TDCJ's chaplains.[7]

[6] Undersigned Counsel acknowledge that their previously held mistaken belief that TDCJ employs only Christian and Muslim chaplains might have been at least partially responsible for this Court's belief that Murphy should have known his request would be denied.

[7] Moreover, neither the 2012 nor the 2019 version of Defendants' execution protocol contains any information related to what members of the clergy are allowed to interact with an inmate between 4:00 pm and the moment he enters the execution chamber. See ECF Nos. 39-2 at 9-10, 39-3 at 9.

C. Murphy's claims are exhausted.

The Supreme Court is well aware of its 2007 opinion issued in *Jones v. Bock*, 549 U.S. 199 (2007). The Court is well aware that, in *Jones*, it held exhaustion is mandatory before an inmate can file suit. *Jones*, 549 U.S. at 212. At every stage of the March 2019 proceedings Defendants argued Murphy's claims were unexhausted. Defendants advanced that argument in: 1) their March 2019 opposition to Murphy's request for a stay filed in the district court, ECF No. 8 at 3-4; 2) their March 2019 Brief in this Court, Brief at 13-14; and 3) their Brief in Opposition filed in the Supreme Court, Exhibit C (Defendants' March 2019 Brief in Opposition) at 13-15. Despite being well aware that Murphy had not filed grievances related to his claims, the Supreme Court allowed his case to proceed. The Court could not have allowed Murphy's case to proceed unless it believed his claims were exhausted. Defendants exhaustion argument is foreclosed by the Supreme Court's March 2019 action on Murphy's claims. The issue of exhaustion has been decided and decided in Murphy's favor.

Defendants do not argue that they were unaware of Murphy's claims before he filed his Complaint. That is because through emails

sent by undersigned Counsel to Ms. Howell, Murphy made Defendants aware of his claims and gave them an opportunity to resolve the dispute before he filed suit. In so doing, Counsel's emails satisfied the purpose of the exhaustion doctrine. *See Jones*, 549 U.S. at 204.

Moreover, during these proceedings it has been revealed how untenable it is to require strict adherence to the two-step grievance process in cases where an execution is imminent. During her deposition, Defendant Davis testified that there is no rule that would prevent her from amending TDCJ's execution protocol as soon as two days before a scheduled execution. ECF No. 38-7 at 66. Completing both steps of TDCJ's two-step grievance process could take eighty days or longer. ECF No. 8-2 at 87. Strict adherence to the two-step grievance process in cases where an execution is imminent would leave an inmate without the ability to have his constitutional claims heard by a federal court when those claims arise from an amendment to the State's execution procedure made within eighty days of his scheduled execution.

D. Murphy's claims were timely made.

The Supreme Court is well aware of its 1985 opinion issued in *Wilson v. Garcia*, 471 U.S. 261 (1985), in which it held that a state's

personal-injury statute of limitations applies to section 1983 actions. 471 U.S. at 276. At every stage of the March 2019 proceedings Defendants argued Murphy's claims were not timely. Defendants advanced that argument in: 1) their March 2019 opposition to Murphy's request for a stay filed in the district court, ECF No. 8 at 5-6, 16-17; 2) their March 2019 Brief in this Court, Brief at 14-16; and 3) their Brief in Opposition filed in the Supreme Court, Exhibit C (Defendants' March 2019 Brief in Opposition) at 15-17. Despite being presented this argument, the Supreme Court allowed Murphy's case to proceed. The Court could not have allowed Murphy's case to proceed unless it believed his claims were timely. Defendants' timeliness argument is foreclosed by the Supreme Court's March 2019 action on Murphy's claims. The issue of timeliness has already been decided and decided in Murphy's favor.

Moreover, as explained in greater detail above, *see supra* Part VI.B.2, given that it is impossible to know what faiths will be represented in the chaplaincy department on the day one is scheduled to be executed until shortly before his execution, a request for a TDCJ-employed chaplain of the inmate's faith to accompany him in the time

before he is executed should be considered timely if it is made within a reasonable amount of time before the scheduled execution. If the inmate were to make his request far ahead of his execution date, any chaplain of his faith who was employed by TDCJ when he made his request might no longer be employed by TDCJ.

Twenty-one days before he was scheduled to be executed Murphy, through Counsel, inquired as to whether TDCJ employed any Buddhist chaplains. Defendants' Counsel never answered this inquiry. Murphy's request was never expressly denied. Having filed his claims before his request was denied, those claims, *a fortiori*, were not untimely.

E. The district court did not abuse its discretion in finding Murphy will likely prevail.[8]

Under TDCJ's revised execution protocol, after being transported to the Huntsville Unit, a condemned prisoner can have visits with a

[8] In this section, Counsel briefly summarize the arguments raised in the district court related to the merits of Murphy's Establishment Clause claim and, specifically, the portion of that claim pertaining to disparate treatment during the time before an inmate enters the execution chamber because that claim is the one the district court found to be compelling (and because Counsel are working to keep the number of words in this response comparable to the number in Defendants' Motion). Accordingly, that claim is the one that is most relevant to this pleading responding in opposition to Defendants' Motion to Vacate. Counsel believes Murphy will likely ultimately prevail on all of his claims once he is given the opportunity to further develop his claims in district court. For a more complete argument on the merits of all of Murphy's claims, see ECF No. 38 at 15-27.

TDCJ Chaplain, a minister or spiritual advisor who has the appropriate credentials, and his attorney. ECF No. 38-1 at 8. Attorney visits and visits with approved ministers and spiritual advisors can take place only between 3:00 and 4:00 pm. *Id.* at 9. There is no such restriction on visits with a TDCJ chaplain, who apparently has access to an inmate until the very moment he enters the execution chamber. (As Defendants acknowledge, the policy is silent on what contact chaplains can have with the inmate after 4:00.)

Under the current system, the same three TDCJ chaplains are ordinarily present in the area where a condemned inmate is housed during the afternoon of his execution. These three men are all Christians. ECF No. 38-6 at 33. Throughout the day, the chaplains who are assigned to work in the death house on the day of an execution provide secular services to the inmate, including facilitating his phone calls and providing him food. ECF Nos. 38-2 at 18; 38-8 at 14-15. These tasks are all completed by 5:00 pm, at which time all phone calls stop so the chaplains talk to the inmate, as much or as little as the inmate would like. ECF Nos. 38-8 at 14-15; 38-13 at 48. If an inmate asked a chaplain to pray with him during this time, the chaplain would. ECF

Nos. 38-4 at 24-25; 38-6 at 30-31; 38-8 at 21. However, the Chaplains would not do anything during this time that they believed to be inconsistent with their personal religious faith. *See* ECF Nos. 38-4 at 32; 38-6 at 31-32; 38-8 at 23. A chaplain is neither required nor expected to do anything that does not accord with his personal religious faith. ECF Nos. 38-9 at 2; 38-4 at 10-11; 38-6 at 12-13. Because all three of the men who currently work in the holding area outside of the execution chamber are Christians, this policy favors Christian inmates. While all three of the Christian chaplains who currently work in the death house on the day of an execution would pray with a Christian inmate, none of the three would recite the declaration of faith with a Muslim inmate if asked to do so because each believes doing so would violate their faith. ECF Nos. 38-4 at 30-31; 38-6 at 32; 38-8 at 23. None of the three chaplains who regularly work in the death house would chant with Murphy in the way that he would, if allowed, chant with his spiritual advisor, or a different Buddhist minister. ECF Nos. 38-4 at 24-25; 38-6 at 32; 38-8 at 29-30.[9] No TDCJ chaplain would be expected to

[9] While Chaplain Moss did not testify definitively he would not chant with Murphy, he also would not definitively state he would. *See* ECF No. 38-8 at 29-30.

recite the declaration of faith with a Muslim inmate or chant with a Buddhist inmate if that chaplain believed doing so would violate his or her faith. ECF Nos. 38-9 at 2; 38-4 at 10-11; 38-6 at 12-13.

While Defendants have not yet expressly stated whether TDCJ employs any Buddhist chaplains, it seems unlikely they do. (If TDCJ employed a Buddhist chaplain, it seems Defendants would likely have executed Murphy on March 28. Doing so would not have run afoul of the Supreme Court's March 28 Order or TDCJ's then policy of allowing only employees in the execution chamber. In any event, Murphy cannot be held responsible for Defendant's still not answering the question of whether they employ any Buddhists as chaplains when Counsel asked that question over nine months ago.) Regardless of whether Defendants employ Buddhist chaplains, because Defendants will not allow Murphy to have the same contact with a Buddhist reverend (either TDCJ employed or not) as Christian inmates have with the three Christian chaplains who usually work in the holding are, TDCJ's policy is not neutral between religions.

A law or policy that is not neutral between religion and non-religion or among various religions, like TDCJ's policy, is inherently

suspect, and strict scrutiny must be applied when determining whether the policy violates the First Amendment's Establishment Clause. *Larson v. Valente*, 456 U.S. 228, 246 (1982). The policy can only survive this level of scrutiny only if it is narrowly tailored to a compelling interest. *Id.* at 247. While TDCJ has a compelling interest in maintaining security throughout the execution protocol, there is no evidence or reason to conclude TDCJ's discriminatory policy serves this interest. Defendants have asserted that a non-employee might be able to discover the identity of members of the drug team if allowed to stay in death house beyond 4:00 pm. ECF 38-2 at 6. But Defendants are undoubtedly able to move members of the drug team as needed without risking their identities being discovered by the inmate, and Defendants have offered no explanation regarding why these same procedures would be insufficient to ensure a spiritual advisor visiting the inmate would also be unable to discover the identities of the member of the drug team.

Murphy should prevail on this claim even under the standard applied to prisoners' First Amendment claims under *Turner v. Safley*, 482 U.S. 78, 90 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342,

348-50 (1987). As a threshold matter the Supreme Court has "found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated in a *neutral* fashion, without regard to the content of the expression." *Turner*, 482 U.S. at 90 (emphasis added). In addition, a court is to consider four factors:

> (1) whether the challenged restrictions bear a "valid, rational connection" to a legitimate governmental interest";
>
> (2) whether alternative means are open to inmates to exercise the asserted right;
>
> (3) what impact an accommodation of the right would have on guards and inmates and prison resources; and
>
> (4) whether there are "ready alternatives" to the regulation.

Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (citing *Turner*, 482 U.S. at 89-91) (internal quotations omitted).

As demonstrated in greater detail above, Defendants' amended policy is not neutral between religions. While Defendants have asserted the amended policy is related to their security interests, they have failed to offer any evidence as to why the security measures in place in the death house are not sufficient to preserve those same interests if a non-employee spiritual advisor were allowed to visit with an inmate

after 4:00 pm. The same three security officers who monitor the spiritual advisor from 3:00 – 4:00 pm remain in the death house from 4:00 until the time the inmate is taken to the execution chamber. Murphy believes he can be reborn in the Pure Land and work towards enlightenment only if he is able to remain focused on Buddha while dying. Being able to chant with his spiritual advisor until the moment he enters the execution chamber would greatly assist him in maintaining this focus. Allowing Murphy's spiritual advisor to remain in the death house after 4:00 pm would have no impact on prison resources. The security officers who are present in the death house from 3:00 to 4:00 pm already remain there until the inmate is transported to the execution chamber.

As this Court surely noticed, the preceding six pages of this pleading address the merits of Murphy's claims. Similarly, eight pages in the Defendants' motion to vacate, and most of the pages of its 1,000-page Appendix address the merits of Murphy's claims.[10] But the district court has not issued any final order addressing those underlying claims.

[10] Most of the Defendants' Appendix consists of the voluminous motions for summary judgment filed by the parties in the district court (ECF Nos. 38, 39).

Rather, that court simply denied competing motions for summary judgment. Murphy is entitled to a stay so the consideration of his claims can proceed in an orderly manner, and this Court should reject the State's effort to use an execution date to subvert the orderly litigation in the § 1983 litigation.

VII. Conclusion

Patrick Henry Murphy prays that the Court provide relief as follows:

1. Deny Defendants-Appellants' Motion to Vacate Stay of Execution; and
2. Remand this case to the district court for further proceedings.

Respectfully submitted,

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Certificates of Service and
Compliance with ECF Filing Standards

I certify that on November 10, 2019, this Response was served, via the Court's CM/ECF Document Filing System upon the following registered CM/ECF user:

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Counsel further certifies that (1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus-scanning program and is free of viruses.

/s/ David R. Dow
_____
David R. Dow

Certificate of Compliance with Rules 27(d) and 32(a)

1. This Response does not comply with Fed. R. App. P. 27(d)(2) because it contains 6,774 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Contemporaneously with this Response, Counsel are filing a motion for leave which asks the Court to grant leave to file an extra-length Response.

2. This Response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.16.15 in 14 point Century Schoolbook font and 12 point Century Schoolbook font for footnotes.

s/ David R. Dow

_____

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