No. 19-70020

IN THE

United States Court of Appeals for the Fifth Circuit

PATRICK HENRY MURPHY, JR.,
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,
Cause No. 4:19-CV-1106

MOTION TO VACATE STAY OF EXECUTION

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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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MOTION TO VACATE STAY OF EXECUTION

Plaintiff–Appellee, Patrick Henry Murphy, Jr., a member of the notorious "Texas Seven" and under a sentence of death, was scheduled to be executed after 6:00 PM CDT on November 13, 2019. Murphy had previously been scheduled to be executed on March 28, 2019, but two days prior to his first executing setting, Murphy filed suit against Defendants–Appellants (TDCJ) under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), generally alleging religious practice endorsements or impediments. Murphy also filed an accompanying motion for stay of execution. Both the district court and this Court declined to exercise their discretion to stay his execution, but the Supreme Court partially granted Murphy's motion, allowing his execution to proceed only if TDCJ allowed a Buddhist spiritual advisor to be present inside the execution chamber. TDCJ declined this condition, and Murphy was not executed.

TDCJ thereafter amended its execution procedure, in accordance with the Supreme Court's suggestion, to permit only TDCJ security personnel inside the execution chamber. Following that, Murphy amended his complaint before the district court, adding a claim faulting

TDCJ's pre-execution holding area procedures. After discovery was completed in the court below, the parties filed cross motions for summary judgment. The state trial court then entered an order setting Murphy's execution for November 13, 2019.

After the parties failed to reach an agreement in court-ordered mediation, the lower court ordered Murphy to file a motion for stay of execution. Three days after Murphy filed his motion, and less than twenty-four hours after TDCJ filed its opposition, the lower court denied the parties' motions for summary judgment and stayed Murphy's execution. Although the lower court cited to the four factors a court must consider in granting a stay, the court did not purport to analyze how any of those factors applied in Murphy's case. Rather, the lower court found that a stay was necessary to "allow the Court time to explore and resolve serious factual concerns about the balance between Murphy's religious rights and the prison's valid concerns for security." Order Staying Execution (Order) 9, *Murphy v. Collier*, No. H-19-1106 (S.D. Tex. Nov. 7, 2019), ECF No. 57. Notably, the court did not find that Murphy had demonstrated any likelihood of success on the ultimate merits of his claims. Indeed, Murphy has not done so, and the court therefore abused

its discretion in staying Murphy's execution. TDCJ now moves this Court to vacate that stay of execution.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a) and Fifth Circuit Local Rule 8.

STATEMENT OF THE ISSUE

May a federal court interfere with the execution of a valid state court conviction and sentence, when the convicted failed to act diligently and when he has not demonstrated—and the court did not find—a likelihood of success on the merits of the underlying claims?

STATEMENT OF THE CASE

I. Murphy's Offense and Postconviction Challenges

On December 13, 2000, Murphy and six other inmates escaped from a Texas prison. *Murphy v. Davis*, 737 F. App'x 693, 695 (5th Cir. 2018). On December 24, 2000, the "Texas Seven" robbed a sporting-goods store in Irving, Texas, killing Officer Aubrey Hawkins as they fled. *Id.* at 696–07. The escapees made their way to Colorado where they were eventually captured, save one who committed suicide, in January 2001. *Id.* at 697.

Murphy was convicted of capital murder and sentenced to death in November 2003. *Murphy v. State*, No. AP-74,851, 2006 WL 1096924, at

*1 (Tex. Crim. App. Apr. 26, 2006). He unsuccessfully sought relief in the state courts on appeal and through postconviction review. *Id.*; *Ex parte Murphy*, No. WR-63,549-01, 2009 WL 1900369, at *1 (Tex. Crim. App. July 1, 2009). Murphy turned to the federal forum, but collateral relief was denied by the district court. *Murphy*, 737 F. App'x at 699. On appeal, Murphy was unable to obtain a certificate of appealability, and his petition for writ of certiorari was subsequently denied. *Id.* at 709; *Murphy v. Davis*, 139 S. Ct. 568 (2018).

II. The Litigation Preceding His First Execution Setting

In late November 2018, the state district court set Murphy's execution for March 28, 2019. Order Setting Execution Date, *State v. Murphy*, No. F01-00328-T (283d Dist. Ct., Dallas County, Tex. Nov. 29, 2018). About two weeks before this execution date, Murphy moved the Court of Criminal Appeals (CCA) to reopen his direct appeal. Suggestion That the Court, On Its Own Motion, Reconsider Its April 26, 2006 Denial of Relief, *Murphy v. State*, No. AP-74,851 (Tex. Crim. App. Mar. 12, 2019). The CCA declined Murphy's request. Order, at 1, *Murphy v. State*, No. AP-74,851 (Tex. Crim. App. Mar. 20, 2019).

That same day, Murphy filed a petition for writ of prohibition, a motion for leave to file that petition, a motion for a stay of execution with the CCA, and a motion to reopen his habeas proceeding. Petition for Writ of Prohibition, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019); Motion for Leave to File Petition for Writ of Prohibition, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019); Motion for Stay of Execution, *Ex parte Murphy*, No. WR-63,549-02 (Tex. Crim. App. Mar. 20, 2019); Suggestion That the Court, On Its Own Motion, Reconsider Its July 1, 2009 Denial of Relief, *Ex parte Murphy*, No. WR-63,549-01 (Tex. Crim. App. Mar. 20, 2019). In a single order, the CCA declined to reopen his habeas proceeding and denied him leave to file his writ of prohibition. *Ex parte Murphy*, Nos. WR-63,549-01 to -02, 2019 WL 1379859, at *1 (Tex. Crim. App. Mar. 25, 2019).

III. The Course of Murphy's Present Lawsuit

Two days before his March execution setting, Murphy filed suit against TDCJ pursuant to 42 U.S.C. § 1983 and RLUIPA. ECF No. 1 (Complaint). He claimed an Establishment Clause violation because TDCJ permitted only TDCJ-employed chaplains to accompany condemned offenders in the execution chamber, none of whom were

Buddhist, Murphy's faith preference. Complaint 7–15. Murphy also alleged that TDCJ's execution protocol, barring non-TDCJ personnel from the execution chamber, violated his right to practice his faith and that, if this protocol did not violate the Free Exercise Clause, it violated RLUIPA. *Id.* at 15–17. Predicated on this suit, he sought a stay of execution. ECF No. 3. The lower court declined to grant him one. ECF No. 9. Murphy appealed, and this Court affirmed the lower court's decision and thus denied Murphy a stay. *Murphy v. Collier*, 919 F.3d 913, 914–16 (5th Cir. 2019).

On the day Murphy was to be executed, he moved the Supreme Court to stay his execution pending the filing and disposition of a petition for writ of certiorari. Mot. Stay Execution Pending Filing, Consideration, & Disposition Pet. Writ Cert. 7–10, *Murphy v. Collier*, 138 S. Ct. 1475 (2019). The Supreme Court partially granted Murphy's motion, allowing his execution to proceed only if TDCJ allowed him a Buddhist spiritual advisor inside the execution chamber. *Murphy*, 139 S. Ct. at 1475. TDCJ

declined this condition, so Murphy's execution warrant expired, and he was not executed.[1]

After that date, TDCJ accepted the Supreme Court's suggestion that Murphy's claim could be mooted by removing chaplains from the execution chamber, *see Murphy*, 138 S. Ct. at 1475, and amended the execution procedure to permit only TDCJ security personnel inside the execution chamber. *See* Defs. Ex. A, at 8, § V.F., ECF No. 39-2. Following that, Murphy amended his complaint in the court below. First Amended Complaint (Am. Compl.) 1–18, ECF No. 22. Murphy split his Establishment Clause claim in two—TDCJ's employee-only protocol is hostile to religion generally, and TDCJ still favors Christians and Muslims because its chaplains have greater access to the condemned in the hours prior to an execution. *See id.* at 11–14. The Free Exercise and RLUIPA claims remained essentially the same. *Compare id.* at 15–17, *with* Complaint at 15–17.

[1] Murphy also filed an original petition for writ of prohibition, a motion for leave to file the same, and a stay of execution. Orig. Pet. Writ Prohibition 9–29; Mot. Leave File Orig. Action 1–2; Mot. Stay Execution 1–2. The latter became moot when the Court stayed his execution, and the former were eventually denied by the Court. *In re Murphy*, 139 S. Ct. 1642 (2019).

After discovery ended in the district court, the parties filed competing motions for summary judgment.[2] ECF Nos. 38, 39. On August 12, 2019, the state trial court entered an order setting Murphy's execution for November 13, 2019. Order Setting Execution Date, *State v. Murphy*, No. F01-00328-T (283d Dist. Ct., Dallas County, Tex. Aug. 12, 2019).

Following that, the lower court ordered that the parties attend mediation before Magistrate Judge Andrew M. Edison on October 28, 2019. ECF Nos. 47–49. The parties attended the mediation but were unable to reach an agreement. ECF Nos. 50, 51. After a telephonic status conference, the lower court ordered that Murphy file a motion for stay of execution by November 4, 2019, which he did. ECF No. 54; Motion 1–9. TDCJ filed its opposition on November 6, 2019. ECF No. 56. One day later, the lower court entered an order denying the parties' motions for summary judgment, denying Murphy's motion to compel, and granting

[2] Simultaneous to these proceedings, the parties also continued to litigate Murphy's petition for writ of certiorari in the Supreme Court, culminating in that Court's denial of Murphy's petition on November 4, 2019. *See Murphy v. Collier*, --- S. Ct. ---, 2019 WL 5686483 (Nov. 4, 2019) (No. 18-9832).

Murphy a stay of execution. Order 14. TDCJ noticed its intent to appeal the lower court's granting of a stay, ECF No. 58. This proceeding follows.

STANDARD OF REVIEW

A district court's legal conclusions are reviewed de novo. *Filer v. Donley*, 690 F.3d 643, 646 (5th Cir. 2012); *Buntion v. Quarterman*, 524 F.3d 664, 670 (5th Cir. 2008). A district court's grant of a stay of execution is reviewed for abuse of discretion. *Adams v. Thaler*, 679 F.3d 312, 318 (5th Cir. 2012).

ARGUMENT

I. The Standard Governing Stay Requests.

"Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course." *Hill v. McDonough*, 547 U.S. 573, 583–84 (2006). A stay of execution is an equitable remedy that is not available as a matter of right. *Id.* at 584. "[E]quity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Id.* Indeed, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Id.*

Thus, "inmates seeking time to challenge the manner in which the State plans to execute them must satisfy *all* of the requirements for a

stay, including a showing of a significant possibility of success on the merits." *Id.* (emphasis added). Those requirements include:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 434 (2009) (citations omitted) (internal quotation marks omitted). "The first two factors of the traditional standard are the most critical." *Id.* And "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion." *Id.* at 433–34 (2009). *Id.* Indeed, "[t]he federal courts can and should protect States from dilatory or speculative suits." *Id.* at 585. And "[a] court considering a stay must also apply 'a 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.'" *Hill*, 547 U.S. at 584. To be sure, as this Court reads *Hill*, "a plaintiff cannot wait until a stay must be granted to enable him to develop facts and take the case to trial—not where there is no satisfactory explanation for the delay." *Sepulvado v. Jindal*, 729 F.3d 413, 420 (5th Cir. 2013).

II. The District Court Abused its Discretion in Granting a Stay Because Murphy Has Failed to Exercise Due Diligence.

The lower court addressed Murphy's diligence only in a footnote, finding that the Supreme Court's earlier stay in this case suggests that Murphy was diligent. But, to whatever extent the Supreme Court's earlier stay does represent a finding of diligence—which TDCJ does not concede—it applies only to the claims that were then before it, i.e., those related to the execution chamber itself, and has no bearing on the holding area claim presently at issue. As to the latter, it cannot be said that Murphy was diligent in pursuing it; therefore, the lower court abused its discretion in granting the stay of execution.

Indeed, Murphy initially inquired as to religious accommodations on February 28, 2019, one month prior to his initial execution setting. *See* Complaint Ex. 1, at 21. However, all of Murphy's requests related only to the execution chamber itself, and he did not make any requests as to the pre-execution holding area. *See id*. And, while TDCJ's execution protocol is silent as to whether a TDCJ-employed chaplain is present in the holding area in the final hours immediately preceding the execution, both versions of the protocol provided that visits with a minister or spiritual advisor shall occur between 3:00 p.m. and 4:00 p.m. on the day

of the execution unless exceptional circumstances exist. *Compare* Defs. Opp'n Stay Exec. Ex. C, at 8, *with* Am. Compl. Ex. 1, at 8. Thus, Murphy could have exercised due diligence in inquiring as to whether he could visit with his spiritual advisor in the time between 4:00 p.m. and the start of the execution at 6:00 p.m. Had he requested such accommodation, he would have certainly learned that only a TDCJ-employed chaplain would be present in those final hours. To be sure, Murphy surmised from the above language in his later-filed amended complaint that "[t]here is no such restriction on visits with a TDCJ chaplain, who appears to have access to an inmate until the minute he enters the execution chamber." Am. Compl. 13.

Despite this, his accommodation requests related only to the execution chamber procedures. And Murphy's initial complaint—filed only two days before his prior execution date—still did not include the claim related to the pre-execution holding area he now presses and upon which the lower court granted the stay. *See generally* Complaint (all claims relating only to execution chamber itself). It was only *after* TDCJ changed the execution procedures to remove all non-security personnel from the chamber itself that Murphy finally sought to amend his

complaint, moving the goalposts from the execution chamber to the pre-execution holding area. *See* Am. Compl. 11–13. It cannot be said that Murphy was in any way diligent in pursuing this claim. Indeed, the Supreme Court has *not* said or implied otherwise, given that this claim was not before it when it granted Murphy a stay of execution.

And this Court has routinely denied stays, or vacated injunctive relief, for filings that dilatory. *See Berry v. Epps*, 506, F.3d 402, 403–04 (5th Cir. 2007) (denying stay filed twelve days before execution); *Summers v. Tex. Dep't Criminal Justice*, 206 F. App'x 317, 318 (5th Cir. 2006) (same but fifteen days before execution); *Kincy v. Livingston*, 173 F. App'x 341, 343 (5th Cir. 2006) (same but twenty-seven days before execution); *Harris v. Johnson*, 376 F.3d 414, 416–17 (5th Cir. 2004) (vacating TRO based on suit filed ten weeks before execution). This Court, in a published opinion, specifically did so here, finding that Murphy's delay in litigating his execution chamber claims was "unacceptable under the circumstances." *Murphy*, 919 F.3d at 916. Indeed, as this Court noted, "Murphy's counsel has received [multiple warnings] in the past for filing last-minute motions." *Murphy*, 919 F.3d at 916. And if Murphy was dilatory with respect to his execution chamber

claims, he is even so with respect to a pre-execution holding area claim that he did not even raise until *after* his execution was stayed. "The federal courts can and should protect States from dilatory or speculative suits," and "[r]epetitive or piecemeal litigation" raises the same concern. *See Hill*, 547 U.S. at 585.

Finally, as indicated below, that Murphy's claims are barred by the statute of limitations further highlights the fact that Murphy could have brought this suit long ago. TDCJ's policies related to chaplains in the pre-execution holding area have not changed. *See* Argument III.A.2, *infra*. Thus, Murphy's claims could have been brought, at worst, a decade ago. Murphy's claims "could have been brought [long] ago [and t]here is no good reason for this abusive delay." *Gomez v. U.S. Dist. Ct. N. Dist. Cal.*, 503 U.S. 653, 654 (1992). As such, the lower court abused its discretion when it granted Murphy a stay of execution with respect to his holding area claim, and this Court should vacate the lower court's order.

III. The District Court Abused Its Discretion in Granting a Stay of Execution Because Murphy Has Not Demonstrated a Likelihood of Success on the Merits of his Claims.

In his amended complaint before the lower court, Murphy alleged four claims for relief, three under § 1983 and one under RLUIPA. *See*

Statement of the Case III, *supra*; Am. Compl. 11–17. The lower court correctly noted that these claims relate to two separate periods in the execution process: "(1) [Murphy's] pre-execution access to a spiritual advisor of his choice, rather than a TDCJ-employed chaplain and (2) the presence of his spiritual advisor in the execution chamber." Order 9. Effectively disposing of the claims related to presence in the chamber itself, the lower court noted that Texas had "resolved the concerns which led to [the Supreme Court's] stay" of Murphy's previous execution. *Id.* The court then focused its attention almost exclusively on Murphy's Establishment Clause claim related to TDCJ's alleged religious viewpoint discrimination in the pre-execution holding area.[3] *Id.* at 9–14.

[3] The lower court makes two passing references to Murphy's RLUIPA claim. *See* Order 9–10 ("Yet his lawsuit, like many brought by prisoners seeking to protect their rights under the First Amendment and RLUIPA, sits across a balance between an inmate's religious belies and penological practice."), 12 n.6 (citing standard for RLUIPA claims). But Murphy's RLUIPA claim did not change between his original complaint and his first amended complaint. *Compare* Am. Compl. at 15–17, *with* Complaint at 15–17; *see also* Pl. Mot. Summ. J. 21 ("Prohibiting Murphy from being guided at the time of death by a Buddhist reverend is an explicit and substantial burden on religious exercise."). Therefore, it is not clear that Murphy has raised an RLUIPA complaint with respect to the pre-execution holding area. Moreover, cursory references to RLUIPA are a far cry from a finding that Murphy has demonstrated a likelihood of success on the merits of that claim; thus, the reasons discussed above that the district court abused its discretion with respect to the Establishment Clause claim apply with equal force to the RLUIPA claim, and a stay should not have been granted.

But the court did not analyze whether, much less conclude that, Murphy had met his burden of showing "a significant possibility of success on the merits." *See Hill*, 547 U.S. at 584. To be sure, Murphy has not met that burden, because, contrary to the lower court's holding, Order 5–6 n.1, the claim is unexhausted and untimely. Nor can Murphy establish a likelihood of success on the substance of his claim. The district court therefore abused its discretion in staying Murphy's execution, and this Court should vacate the lower court's judgment.

A. Murphy cannot establish any likelihood of success because the claim is unexhausted and untimely.

Relegating the discussion to only a footnote, the lower court found that TDCJ "unpersuasively raise[d] various procedural arguments." Order 5 n.1. The lower court then rejected, as relevant here, TDCJ's exhaustion and statute of limitations defenses. *Id.* But the lower court's determinations that "Murphy has effectively satisfied the spirit of the exhaustion rule[]" and that the parties have not provided sufficient briefing on the statute of limitations do not satisfy the burden of proof necessary to establish a substantial likelihood of success on the claim. Moreover, the findings are erroneous. Therefore, the district court abused its discretion in granting a stay of Murphy's execution.

1. Murphy's claim is unexhausted.

Murphy is a prisoner proceeding in forma pauperis, ECF No. 10, and is thus subject to the Prison Litigation Reform Act of 1995 (PLRA). *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 81, 85 (2006). As such, he "must now exhaust administrative remedies even where the relief sought . . . cannot be granted by the administrative process." *Id.* (citing *Booth v. Churner*, 532 U.S. 731, 734 (2001)). And the "exhaustion of available administrative remedies is required for any suit challenging prison conditions, not just for suits under § 1983." *Id.* (citing *Porter v. Nussle*, 534 U.S. 516, 524 (2002)); *see also Nelson v. Campbell*, 541 U.S. 637, 643 (2004) (stating that the restrictions imposed by the PLRA apply to a method-of-execution claim). Indeed, "[t]here is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court." *Jones v. Bock*, 549 U.S. 199, 211 (2007).

"In Texas, prison grievances involve a two-step process." *Moussazadeh v. Tex. Dep't of Justice*, 703 F.3d 781, 788 (5th Cir. 2012); *see also* Defs. Opp'n Stay Exec. Ex. B, at 73–75, ECF No. 8-2 (TDCJ's "Offender Orientation Handbook" setting out the grievance process). To properly exhaust, a prisoner must complete both steps of TDCJ's

grievance process before a complaint may be filed. *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001).

Here, Murphy did not engage TDCJ's grievance process concerning any of the claims he now raises. *See* Defs. Opp'n Stay Exec. Ex. A, at 1–5, ECF No. 8-1; *see also* Defs. Mot. Summ. J. 9–11, ECF No. 39. Rather, the latest—and only—grievance Murphy filed was in late 2011.[4] Defs. Opp'n Stay Exec. Ex. A, at 2–5. Hence, Murphy's Establishment Clause claim is unexhausted and must be dismissed.

In its order granting the stay, the lower court acknowledged that the Supreme Court has emphasized "that exhaustion of all administrative procedures is mandatory before an inmate can file any suit." Order 5 n.1 (citing *Jones v. Bock*, 549 U.S. 199, 212 (2007)). The lower court also noted that the Supreme Court "has not recognized a futility exception to the exhaustion requirement." *Id.* (citing *Booth v.*

[4] Despite TDCJ having raised the exhaustion defense repeatedly in this litigation, upon information and belief, Murphy has not yet filed a grievance. And, notably, the one grievance Murphy did file concerned a request for a religious accommodation. Defs. Opp'n Stay Exec. Ex. A, at 2. Thus, he cannot possibly claim that TDCJ's grievance procedure is not an appropriate and required administrative process necessary to exhaust his present claims—also requesting religious accommodation—under the PLRA.

Churner, 532 U.S. 731, 741 n.6 (2011)). But then the court, paradoxically, held that, because "[t]here is no indication in the record that filing a prison grievance for review by a warden and then administrative staff would be productive when they have no ability to change TDCJ execution protocol[,]" Murphy "has effectively satisfied the spirit of the exhaustion rule." *Id*. "Dismissing this action for failing to file prison grievances when the issues have already been passed upon by the TDCJ director and the state courts would prioritize hollow formality over the religious rights of a man condemned to die soon." *Id*. at 5–6. However, these findings are not only erroneous, they wholly fail to establish a strong likelihood of success.

Indeed, the lower court's finding appears to be predicated on the idea that only Director Lorie Davis "has signature authority to change TDCJ policy." Order 5 n.1. But, while it is true that TDCJ's policy with respect to chaplains *inside* the execution chamber "was changed through consultation between her, TDCJ general counsel, and Bryan Collier[,]" *see id*., the issue with respect to the pre-execution holding area has *not* been "passed upon by the TDCJ director and the state courts." *See id*. at 5–6. Further, while it may be true that changes to TDCJ's *written* policy

require Lorie Davis's signature, TDCJ's policy regarding the TDCJ-employed chaplains' presence in the hours immediately preceding the execution is not formalized in the written execution protocol. *See generally* Defs. Opp'n Stay of Execution Ex. C, ECF No. 8-3. Thus, there is no indication that Murphy could not have resolved his complaint with respect to the pre-execution holding area through the normal administrative procedure. Indeed, although Murphy was not ultimately able to secure the presence of his spiritual advisor *in* the execution chamber with him, TDCJ accommodated many of Murphy's requests through informal—albeit improper—means. *See* Complaint Ex. 2, at 23. Consequently, neither of the two rationales relied on by the district court—i.e., the futility of the administrative process or the, in effect, substantial compliance with the exhaustion rule—applies to Murphy's pre-execution holding area claim such that they somehow serve as exceptions to the mandatory-exhaustion rule.

2. Murphy's claim is untimely.

Claims challenging an execution protocol and raised in a civil rights action are subject to a state's personal-injury statute of limitations. *Walker v. Epps*, 550 F.3d 407, 412–14 (5th Cir. 2008); *see Wilson v.*

Garcia, 471 U.S. 261, 276 (1985) (determining that a state's personal-injury statute of limitations applies to § 1983 actions). Texas's personal-injury-limitations period is two years. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a). A claim concerning execution protocol accrues on the later of two dates: when direct review is complete or when the challenged protocol was adopted. *Walker*, 550 F.3d at 414–15.

As explained above, Argument III.A.1, *supra*, TDCJ's policy regarding the use of chaplains in the pre-execution holding area is not formalized in its execution protocol; therefore, the latter accrual date does not apply in this case. As such, Murphy's claim accrued when direct review of his conviction was completed. Murphy's direct appeal was decided by the CCA on April 26, 2006. *Murphy*, 2006 WL 1096924, at *1. Assuming that the denial of a writ of certiorari marks the point of finality for limitations purposes, Murphy's direct appeal ended more than a decade ago. *Murphy v. Texas*, 549 U.S. 1119 (2007). His claim is therefore untimely. *See Walker*, 550 F.3d at 415. The district court's conclusion that the briefing on this issue was insufficient, *see* Order 5–6 n.1, was thus not only incorrect, but fails to establish the requisite showing of a likelihood of success.

B. Murphy has not established a likelihood of success on the substance of his claim.

The Establishment Clause provides in relevant part that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. This clause applies to the states through the Fourteenth Amendment. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). Claims of religious-government entanglement are normally reviewed under a three-prong test: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) "the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

The Establishment Clause prevents governments from officially preferring one religion over another. *See Larson v. Valente*, 456 U.S. 228, 244 (1982). Where a denominational preference is claimed to exist, "the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, [courts] proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon*[.]" *Hernandez v. Comm'r*, 490 U.S. 680, 695 (1989). However, the usefulness and continuing viability of the *Lemon* test is questionable. *See Am.*

Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2079–82 (2019) (plurality opinion); *see also id.* at 2092 (Kavanaugh, J., concurring) ("[T]his Court no longer applies the old test articulated in *Lemon*[.]").

Although claims alleging religious viewpoint discrimination are normally reviewed under strict scrutiny, *see Larson*, 456 U.S. at 251, the correctional setting requires that additional deference be given to prison officials, *see Turner v. Safley*, 482 U.S. 78, 89–90 (1987); *see also Murphy*, 139 S. Ct. at 1482–83 (Alito, J., dissenting from stay). The *Turner* reasonableness test proceeds as follows:

> First, is there a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"? Second, are there "alternative means of exercising the right that remain open to prison inmates"? Third, what "impact" will "accommodation of the asserted constitutional right . . . have on guards and other inmates, and on the allocation of prison resources generally"? And, fourth, are "ready alternatives" for furthering the governmental interest available?

Beard v. Banks, 548 U.S. 521, 529 (2006) (quoting *Turner*, 482 U.S. at 89–90).

1. Factual disputes do not meet the burden of proof necessary to warrant a stay of a just and proper execution.

In denying the parties' motions for summary judgment and granting a stay, the lower court did not find that Murphy had established

a likelihood of success on the merits of his Establishment Clause claim; indeed, it did not even purport to analyze the claim under the first of the *Nken* stay factors. Rather, it found that a stay was necessary to "allow the [c]ourt to explore and resolve serious factual concerns about the balance between Murphy's religious rights and the prison's valid concerns for security." Order 14. The lower court specifically identified several issues it believed would require further briefing and factual development before the merits of the claim could be ruled on: a) the mission of the TDCJ-employed clergies and how that mission was to be carried out, "specifically in relation to inmates not of their faith[,]" *id.* at 10; b) "the relationship between the State's secular purpose and its use of prison-employed chaplains[,]" *id.* at 12; c) "whether the State's procedures are the least restrictive means or whether ready alternatives exist to the policy[,]" *id.*; d) whether the condemned inmate could be held in a location where his spiritual advisor would be unable to view execution preparations, *id.* at 13; and e) whether TDCJ's policy "is the only, or even best, way[,]" *id.* at 14. Noting that Murphy's "'claims are dependent on the resolution of fact-intensive questions that simply cannot be decided without adequate proceedings and findings at the trial

level,'" *id*. (quoting *Murphy*, 139 S. Ct. at 1481 (Alito, J., dissenting)), the court concluded that "[a]nswering those questions can only be done by staying the impending execution date." *Id*.

But in finding that these factual disputes warranted a stay of Murphy's execution, the lower court conflated the standard for motions for summary judgment with the standard for justifying a federal court's interference in the execution of a presumptively valid state court conviction and sentence. Indeed, mere factual disputes do not establish that Murphy has satisfied *all* the requirements for a stay, "*including a showing of a significant possibility of success on the merits*." *See Hill,* 547 U.S. at 584 (emphasis added)). "It is not enough that the chance of success on the merits be 'better than negligible.'" *Nken*, 556 U.S. at 434. And, importantly, it is *Murphy's* burden to show that likelihood of success. *See Nken*, 556 U.S. at 433–34. But a conclusion that the court requires further briefing or development on factual issues before it can even rule on the merits—and, even more notably, the denial of Murphy's motion for summary judgment—necessarily means that Murphy has *not* met his burden to show any likelihood of success on the merits, let alone the required substantial showing. Therefore, in granting Murphy a stay of

his execution on this lower threshold, the lower court abused its discretion, and this Court should vacate the lower court's order.

2. Murphy's claim is without merit because he fails to meet the remaining factors under the *Turner* test.

Even if the Establishment Clause is implicated,[5] TDCJ's limitations on civilians in the secure area of the prison where executions take place—the Huntsville Unit—passes constitutional muster under *Turner*. On an execution day, the scene outside the Huntsville Unit is often frenzied. Ex. I, at 1–2.[6] Media arrive, as do protestors. *Id*. Friends and family of the victim arrive, as do those for the condemned. *Id*. TDCJ works inside and outside the prison to ensure the safety of all visitors and staff and to prevent any disruptions in operations. *Id*. at 2.

Once the condemned is transferred to the Huntsville Unit, he or she may meet with their spiritual advisor from 3:00 to 4:00 PM. Ex. C, at 8,

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[5] Indeed, even assuming arguendo that there is a genuine issue of material fact as to the nature of the TDCJ chaplains' role in the pre-execution holding area—which TDCJ does not concede—the following reasons, in addition to the procedural defenses discussed herein, *see* Argument III.A, clearly demonstrate why Murphy still cannot establish a likelihood of success warranting a stay of his execution.

[6] All following citations to exhibits refer to those filed by TDCJ and attached to its motion for summary judgment in the court below unless otherwise stated.

§ V.C. The execution process is intense, and emotions are heightened. Ex. C, at 1. "Security concerns peak in the hours before an execution, and the introduction of contraband that could be used to harm staff or for the offender to harm himself is a great concern." Ex. R, at 1. When an outside visitor enters the pre-execution area, TDCJ cannot strip search them absent some level of suspicion. *Id.* at 1–2; *see Thorne v. Jones*, 765 F.2d 1270, 1276 (5th Cir. 1985) (requiring reasonable suspicion to strip search a prison visitor). A less thorough pat down search is therefore conducted, creating concerns about contraband. Ex. R., at 2. This concern does not disappear just because the visitor is a religious one. *Id.* at 1 (listing incidents where religious volunteers have smuggled contraband into TDCJ facilities). Permitting unfettered access—unlimited time and fewer barriers—increases the opportunity for contraband exchange, and therefore the risk to all involved. *Id.* Thus, in order to limit that risk, this final in-person visitation with the spiritual advisor is observed, and contact is physically limited. *Id.* at 2.

After 4:00 p.m., TDCJ personnel remain behind in the secure areas so that final preparations may be made. Ex. D, at 4:4–15. This includes a last meal, and an opportunity for the condemned to shower and dress.

Id. at 4:6–12. It also includes the preparation of the execution chamber and drugs by the confidential drug team. *Id.* at 4:11–15. When an outsider arrives and departs from the holding area, he must be escorted through corridors in which he may cross paths with members of the drug team; thus, permitting an outsider to remain in the area would disrupt or delay these preparations, as the drug team must remain confidential. Tex. Code of Crim. Pro. art. 43.14; *Tex. Dep't of Crim. Just. v. Levin*, 572 S.W.3d 671, 680–85 (2019) (concluding that disclosing the identity of people or companies involved in the execution-drug process would cause them a substantial risk of harm). The exclusion of individuals who have not earned the trust and confidence of TDCJ through experience in corrections from the pre-execution holding area serves to minimize the risk of jeopardizing the execution process. Ex. C, at 2–3. The condemned, however, may continue to speak with a spiritual advisor by phone if he wishes. Ex. E, at 15:17–21.

Thus, the district court correctly noted that "[t]he State's interests at this stage are compelling." Order 13. Indeed, there is a strong governmental interest in restricting pre-execution access to the condemned "because there are operational and security issues associated

with an execution by lethal injection. Things can go wrong and sometimes do go wrong in executions, as they can go wrong and sometimes do go wrong in medical procedures. States therefore have a strong interest in tightly controlling access" during an execution. *Murphy*, 139 S. Ct. at 1475–76 (Kavanaugh, J., concurring in grant of stay). The limited time during which an inmate cannot receive in-person visits is rationally related to ensuring an execution process "without any complications, distractions, or disruptions." *Id.* at 1476.

And, under *Turner*, there is an alternative accommodation—the inmate may personally meet with his or her spiritual advisor for an hour, and then may continue to converse with that person over the phone. Not having this civilian visitation limitation would strain an already overworked security force dealing with the most scrutinized and fraught aspect of their job, and it would introduce uncertainty where there can be none. Murphy has not carried his burden to prove that his interest outweighs the interests underlying TDCJ's policy; therefore, he has not established a substantial likelihood of success on the merits of his claim. The lower court did not even hold him to that burden and, thus, abused its discretion in granting him a stay of execution.

IV. The Balance of Equities Favor the State, and The Public's Interest Lies in The Timely Administration of Justice.

"Both the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 548. Murphy has challenged his conviction and death sentence for more than fifteen years. *See Murphy*, 2006 WL 1096924, at *1 (noting that Murphy was sentenced in November 2003). The public's interest therefore lies in executing a sentence duly assessed and for which more than a decade's worth of judicial review has terminated without finding reversible error. This Court should not further delay justice. *See Martel v. Clair*, 565 U.S. 648, 662 (2012) ("Protecting against abusive delay *is* an interest of justice."). Indeed, Plaintiff seeks further unjustifiable delay through his litigation here, a request for religious accommodation that notably occurred, coincidentally, only after the Eleventh Circuit issued its opinion in *Ray*. *Compare* Pl.'s Ex. 1 (Feb. 24, 2019), *with Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 691 (11th Cir. 2019) (Feb. 6, 2019). And TDCJ's interest in the security and safety of the execution process is a compelling governmental interest that outweighs Plaintiff's interests. *See* Argument III.B.2, *supra*. To be sure, the public interest lies in an orderly execution process that minimizes harm to prison staff and

witnesses. Here, the equities favor the State, and this Court should vacate the lower court's order granting a stay of execution.

CONCLUSION

For the above reasons, TDCJ respectfully requests that this Court vacate the district court's order staying Murphy's execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on November 8, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the electronic case-filing (ECF) system of the Court. The ECF system sent a "Notice of Electronic Filing" (NEF) to the following attorney of record, who consented in writing to accept the NEF as service of this document by electronic means:

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CERTIFICATE OF COMPLIANCE

Defendants–Appellants file this extra-length motion contemporaneously with a motion for leave to file an extra-length motion.

s/ Gwendolyn S. Vindell
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ELECTRONIC CASE FILING CERTIFICATIONS

I do hereby certify that: (1) all required privacy redactions have been made; (2) this electronic submission is an exact copy of the paper document; and (3) this document has been scanned using the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with counsel for Plaintiff–Appellee Patrick Murphy and Plaintiff–Appellee is opposed to the relief requested in this motion.

s/ Gwendolyn S. Vindell
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