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NOTE: MAY I HOLD ON TO MY GOD AS I DIE?:

AN ANALYSIS ON A DEATH ROW INMATE'S RIGHT TO SPIRITUAL ADVISORS INSIDE THE EXECUTION CHAMBER

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I. ABSTRACT

This article analyzes the first amendment right of condemned prisoners to have their spiritual advisor with them up to the point of execution. It dives into a brief yet relevant historical background of the death penalty in the United States. Then it analyzes the specific protections awarded to death penalty inmates up to the point of their executions through R.L.U.I.P.A. At its core, it compares and contrasts two recent decisions by the U.S. Supreme Court: *Dunn v. Ray*, 139 S. Ct. 661 (2019) and *Murphy v. Collier*, 139 S. Ct. 1111 (2019), in which the Court reached two different conclusions regarding the matter of a prisoner's right to a spiritual advisor during execution. The comparison is made in the light of the Establishment Clause and Free exercise of religion, as established in the First Amendment of the Constitution. It concludes that denying condemned prisoners a right to have their spiritual advisor with them up to the point of execution is

a violation of their First Amendment rights, as guaranteed by the Constitution.

II. AN INTRODUCTION TO THE MODERN DEATH PENALTY IN THE UNITED STATES

On April 3, 2015, Anthony Ray Hinton walked out of the Alabama Death Row Unit after 30 years in a 5x7 cell. His first words, as his family and friends hugged him were, "[t]he sun does shine."[1] He had been arrested thirty years ago and charged with two capital murders. He asserted his innocence through his entire time on death row. The state prosecutors refused to re-examine the evidence in the case, despite persuasive and reliable evidence proving Mr. Hinton's innocence. Mr. Hinton was told several times that a ballistic analysis, which would take about an hour, and would exonerate him from the crime, would be "a loss of time and taxpayer's money."[2] Despite the overwhelming evidence brought to the Alabama courts by Mr. Hinton's legal team, it was not until the Supreme Court, by a 9-0 decision reversed the lower courts and a new trial was granted.[3] The Judge then finally dismissed the charges against him, after the ballistic report confirmed that the crime bullets did not match Hinton's weapon.

Walter McMillian, a black pulpwood worker, spent six years in the Alabama Death Row unit, charged with the killing of Ms. Ronda Morrison, a young, white woman. At the time of the murder, Mr. McMillian was at a church fry with dozens of witnesses. He was unlawfully tried with an all-white jury that convicted him to life in prison without parole. Judge Robert E. Lee Key, overrode the recommendation of life sentence and imposed the

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[1] *Anthony Ray Hinton,* EQUAL JUSTICE INITIATIVE, https://eji.org/anthony-ray-hinton-exonerated-from-alabama-death-row (last visited Nov. 13, 2019).

[2] *Id.*

[3] Hinton v. Alabama, 571 U.S. 263 (2014).

death penalty. After three years into the appellate process, the Court concluded that the State suppressed exculpatory and impeachment evidence that had been requested by the defense, thus denying the defendant due process of law.[4] He passed away in 2013, just ten years after his release from death row due to trauma-induced dementia.

"The death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, do we deserve to kill?"[5] With this striking statement, Bryan Stevenson, human rights attorney, law professor, and author, shakes the foundations of anyone who would listen. He has dedicated his career to fighting racial inequality in the United States. He was the appellate attorney of Mr. Ray and Mr. McMillian. The worrisome similarities in the stories of these two defendants are not random. They are both black, poor, uneducated and innocent, in a state where racism has evolved from the obvious evils of lynching and into the courtrooms. "You are treated better if you are rich and guilty than if you are poor and innocent."[6]

The death penalty in our country dates back to the times where we were not yet a country. European settlers brought this practice with them to the Americas, mainly from Britain. The first record of an execution in the colonies dates back to Jamestown in 1608.[7] The death penalty is currently legal in 29 states, and it is instituted at

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[4] McMillian v. State, 616 So. 2d 933, 935 (Ala. Crim. App. 1993).

[5] Bryan Stevenson, "We need to talk about an injustice," TED (March 2012), https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice/transcript?language=en#t-817040.

[6] *Id*.

[7] *See* DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/ (last visited Nov. 14, 2019).

both federal and state levels.[8] There is broad discretion as to how to apply the death penalty.[9] From legislators to prosecutors, the decision of whether or not to pursue the death penalty for a specific case is entirely discretionary.[10] The Constitution's Eighth and Fourteenth Amendments address the possible constitutionality issues that might arise from the death penalty. The Eighth Amendment protects against "cruel and unusual punishment."[11] The Fifth and Fourteenth Amendment states that no citizen of the United States shall be "deprived of life, liberty or property without due process of law;"[12]

In *Furman v. Georgia*, the Supreme Court addressed the constitutionality of the death penalty.[13] The case combined three black defendants who had been sentenced to the death penalty for separate crimes of murder and rape. Two of the three defendants had unusually low I.Q.s and education. The issue presented in the case was whether the respective death sentences constituted cruel and unusual punishment as prohibited by the Eighth and Fourteenth Amendments. In a five to four decision, the Court determined that in these cases, the death penalty constituted cruel and unusual punishment because it had been arbitrarily applied.[14] Justice Douglas' opinion focused on how the death penalty was being disproportionately imposed on disadvantaged groups,[15] violating the Equal Protection Clause. Justice Brennan and

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[8] *See Death Penalty Fast Facts*, CNN LIBRARY (July 26, 2019), https://www.cnn.com/2013/07/19/us/death-penalty-fast-facts/index.html.

[9] 28 C.F.R. § 26.

[10] Ariane M. Schreiber, Note, *States that Kill: Discretion and the Death Penalty – A Worldwide Perspective*, 29 CORNELL INT'L L.J. 263 (1996).

[11] U.S. CONST. AMEND. VIII.

[12] U.S. CONST. AMENDS. V, XIV.

[13] Furman v. Georgia, 408 U.S. 238 (1972).

[14] *Id*. at 239-40.

[15] *Id*. at 250.

Justice Marshall argued that the death penalty was unconstitutional in all cases because it was "excessive and unnecessary," and it "did not comport with human dignity."[16]

The questions raised by this decision are still lingering today. Studies have found that the modern death penalty still disproportionally affects disadvantaged groups, as Justice Douglas remarked. Capital punishment means, "they without the capital get the punishment."[17] Since 1973 more than 160 people have been exonerated from death row.[18] The so-called 'Bible Belt' region, composed of the southern states, accounts for over 80% of all executions.[19] This is significant, considering the history of bigotry and racism that still haunts this part of the country. In Louisiana, the odds of a death sentence were 97% higher for those whose victims were white than for those whose victims were black.[20] A comprehensive study of the death penalty in North Carolina found that the odds of receiving the death sentence rose by 3.5 times among those defendants whose victims were white.[21] In 96% of states where there have been reviews of race and the death penalty, there was a pattern of either race-of-victim or race-of-defendant discrimination, or both.[22]

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[16] *Id*. at 270, 359.

[17] *Id.*

[18] *See* R.C. Dieter, Abstract (1997) http://www.ncjrs.gov/App/publications/abstract.aspx?ID=171560.

[19] *See* DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/ (last visited Nov. 14, 2019).

[20] Glenn L. Pierce and Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 La. L. Rev. (2011).

[21] Issac Unah, "Race and the Death Penalty in North Carolina - An Empirical Analysis: 1993-1997," DEATH PENALTY INFORMATION CENTER (Apr. 16, 2001), https://deathpenaltyinfo.org/resources/publications-and-testimony/studies/race-and-the-death-penalty-in-north-carolina.

[22] "The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides," DEATH PENALTY INFORMATION CENTER (June 4, 1998),

Arguments in favor of the death penalty focus on the determent of crime. However, statistics show that the south remains the area of the country with the highest murder rate.[23] On average, the death penalty costs about three times what a non-capital case would, including life in prison sentences.[24] From 2013 to 2017, the United States was the only country in the American continents to legally carry out executions.[25] The United Nations has harshly condemned the death penalty and has been leading efforts to abolish it since it created the Universal Declaration of Human Rights in 1948, where they consider the abolition of the death penalty as "a goal for civilized nations."[26]

A. HISTORY AND APPLICATION OF THE FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[27]

The First Amendment is, quite possibly, the most protected right within our Constitution. What makes the United States a unique country in the world, is our, some would say, obsession, over individual freedoms. Individual freedoms are the foundation of the United

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https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/the-death-penalty-in-black-and-white-who-lives-who-dies-who-decides.

[23] *Id*.

[24] *See* "Facts about the Death Penalty," DEATH PENALTY INFORMATION CENTER (July 17, 2020) https://files.deathpenaltyinfo.org/documents/pdf/FactSheet.f1595023050.pdf

[25] "Death Penalty: How many countries still have it?," B.B.C NEWS (Oct. 14, 2018), https://www.bbc.com/news/world-45835584.

[26] *See* Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. G.A.O.R., 3d Sess., at 71, U.N. Doc. A/810 (1948).

[27] *See generally* U.S. CONST. AMEND. I.

States of America. The Constitution is laid out in a way that clearly demarks those rights and protects them from the State's over-intrusion that might threaten them. The First Amendment creates a right for Americans to exercise their religion freely. It guarantees the freedom to believe and freedom to act.[28] It also creates protections to the citizens from the State prohibiting the Establishment of religion through any agent of the government.[29] In order for the government to establish laws that are discriminatory on their face, upon a challenge, it has the burden of proving that the discrimination is justified under strict scrutiny.[30] That is, there must be a compelling government interest that cannot be achieved through any other means.[31] If the law is not discriminatory on its face, it can still violate the Establishment Clause.[32] According to the Lemon Test, a government action is unconstitutional under the Establishment Clause of the First Amendment unless it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive government entanglement with religion.[33]

Under the Establishment Clause, the government cannot single out a particular religious sect for special treatment.[34] There are three different approaches to avoid the Establishment of religion through governmental action: strict separation, neutrality, and accommodation.[35]

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[28] *Id*.

[29] *Id*.

[30] Larson v. Valente, 456 U.S. 228, 246 (1982).

[31] *Id*.

[32] Lemon v. Kurtzman, 403 U.S. 602 (Douglas, J. and Black, J., concurring) (1971).

[33] *Id*.

[34] Board of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 509 U.S. 938, [709-710] (1993).

[35] *Separation of Church and State*, THE BOISI CENTER PAPERS ON REGULATION IN THE UNITED STATES

The strict separation approach is compared to a wall between church and state, and it was first proposed by Thomas Jefferson and Roger Williams, who believed religion was better served away from government control. The neutrality theory which is less widely applied and focuses on "not utilizing religion as a standard of action or inaction from a hypothetical, neutral observer point of view.[36] The accommodation theory recognizes the importance of religion and tries to accommodate its presence in the government. This theory is the most widely used in modern jurisprudence, and the one that can be best applied to the Court's decisions discussed herein.

B. CONSTITUTIONAL RIGHTS OF DEATH ROW INMATES

The First Amendment of the Constitution protects the constituents of the United States against the Establishment of religion by governmental action and the prohibition of the free exercise thereof.[37] The Religious Land Use and Institutionalized Person's Act, which will be referred to as R.L.U.I.P.A., significantly enhanced prisoners' right to religious exercise, above the minimum provided by the First Amendment.[38] Under federal law, a prison or jail cannot substantially burden a prisoner's exercise of religion unless it can demonstrate that it has a compelling interest that cannot be achieved through any other less restrictive means.[39] Congress defines "religious

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https://www.bc.edu/content/dam/files/centers/boisi/pdf/bc_papers/BCP-ChurchState.pdf (last visited Nov. 14, 2019).

[36] *Id*.

[37] *See* U.S. CONST. AMEND. I.

[38] Lewis M. Wasserman, John P. Connolly, & Kent R. *Kerley, Religious Liberty in Prisons under the Religious Land Use and Institutionalized Persons Act Following Holt v. Hobbs: An Empirical Analysis*, RELIGIONS (July 7, 2018).

[39] *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat 803 (codified as amended at 42 U.S.C.S. § 2000cc et seq.).

exercise" capaciously to include any exercise of religion, whether or not compelled by, or central to, a system of religious belief.[40] Under R.L.U.I.P.A., the challenging party bears the initial burden of proving that his religious exercise is grounded on sincerely held religious belief and that the government's action substantially burdens his religious exercise.[41]

III. THE STORIES

On November 6, 2018, the State of Alabama scheduled Dominique Ray's execution date for February 7, 2019.[42] He had been on death row since 1999 after he was tried for the rape and murder of 15-year-old-girl, Tiffany Harville.[43] The inmate, through counsel, filed an emergency stay of execution, on January 28, 2019.[44] Under the state's policy, a Christian prisoner may have a minister of his faith accompany him into the execution chamber to say his last rites, but not so for inmates of other faiths.[45] Mr. Ray was a devout Muslim and wished to have his Imam present at the execution chamber to pronounce his last rites.[46]

According to the Alabama Department of Corrections (A.D.O.C.), a death-sentenced inmate is permitted to meet with their spiritual advisor until shortly before the inmate is taken to the chamber.[47] However, only the prison Chaplin—a Christian, non-Catholic—is allowed to be present in the execution chamber during the

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[40] Holt v. Hobbs, 135 S. Ct. 853, 856 (2015).

[41] 42 U.S.C 2000cc; *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[42] Dunn v. Ray, 139 S. Ct. 661, 661 (2019).

[43] Ray v. State, 809 So. 2d 875 (Ala. Crim. App. 2001).

[44] *Dunn*, 139 S. Ct. at 661.

[45] *Id*. at 662 (Kagan, J., dissenting).

[46] *Id*. at 661 (Kagan, J., dissenting).

[47] *Id.* at 662 (Kagan, J., dissenting).

execution.[48] The plaintiff argued that this posed a violation of the Establishment Clause by preferencing the Christian religion over other religions. The Eleventh Circuit concluded that there was a substantial likelihood that Mr. Ray would succeed on the merits of his claim.[49] Mr. Ray also argued that prohibiting the presence of his Imam at the execution chamber, substantially burdened his free exercise of religion.[50] Nonetheless, the Supreme Court ruled in a 5-4 decision against Mr. Ray.[51] He would be executed as scheduled, without his Imam present. He was pronounced dead at 10:12 p.m. His Imam was not allowed to be present. Mr. Ray's last words at the execution chamber were an Islamic statement of his faith, in Arabic.[52]

Patrick Henry Murphy was scheduled for execution on March 28, 2019, for the murder of police officer Aubrey Hawkins on December 24, 2000.[53] While in prison, he became a Pure Land Buddhist.[54] He converted nearly a decade ago and had been visited by a Buddhist priest, Rev. Hui-Yong Shih, for the past six years.[55] In Texas, like Alabama, any of the prison system chaplains, but no other cleric may enter the execution chamber with

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[48] *Id*.

[49] *Dunn*, 139 S. Ct. at 551 (Kagan, J., dissenting).

[50] Ray v. Dunn, 2:19-CV-88-WKW, 2019 WL 418105, at *2 (M.D. Ala. Feb. 1, 2019).

[51] Dunn v. Ray, 139 S. Ct. 661 (2019).

[52] Kim Chandler, *Dominique Ray, Muslim Inmate, Executed After Appeal Over Spiritual Adviser Fails*, HUFFPOST (Feb. 7, 2019), https://www.huffpost.com/entry/dominique-ray-muslim-inmate-supreme-court-execution_n_5c5cf494e4b0a502ca3401a7.

[53] Murphy v. Collier, 139 S. Ct. 1475, 1478 (2019).

[54] *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat 803 (codified as amended at 42 U.S.C.S. § 2000cc et seq.).

[55] *Murphy*, 139 S. Ct. at 1479.

the prisoner.[56] Texas has more than 100 chaplains who are either employees or under contract with the prison system, but none is a Buddhist priest.[57] After failing to solve the matter through the Texas prison system and courts, the petitioner files for a stay of execution of the sentence of death.[58] Murphy raised an equal treatment claim, under the Fourteenth Amendment.[59] The Court granted a stay.[60] Five days afterward, Texas changed its unconstitutional policy, effective immediately.[61] Texas now allows all religious ministers only in the viewing room and not in the execution room.

These two cases with practically identical issues were decided within a month of each other. While it might seem that the decisions were significantly different one from the other, in reality, neither of them addresses the issue; they do not provide the appropriate relief that best protects the prisoner's First Amendments rights. One decision portrays absolute disregard and inaction, while the other correctly identifies the matter, but the resolution far from solves the issue at hand.

A. THE COURT IN *DUNN V. RAY*

Through a very short and vague majority opinion, the Court in *Dunn v. Ray* did not act regarding his petition to have his Imam present at the execution chamber with him by simply saying that, it was a last-minute request.[62] "Because Ray waited until January 28, 2019, to seek relief, we grant the State's application to vacate the stay entered by the United States Court of Appeals for the Eleventh

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[56] *Id*.

[57] *Id*.

[58] *Id*. at 1475.

[59] *Id*.

[60] *Id*.

[61] *Id*.

[62] *Dunn*, 139 S. Ct. at 661 (Kagan, J., dissenting).

Circuit."[63] The majority did not reach a decision regarding the matter. Instead, they did not address the issue under the blanket of lack of timeliness. While the Court has discretion on whether to review a capital case based on timeliness, to avoid "dilatory litigation tactics,"[64] as Justice Kagan points out in her descent, this should not be an issue in this case. Ray brought this case in a timely manner. The warden denied Ray's request to have his Imam by his side on January 23, 2019, and Ray filed his complaint five days later on January 28. Justice Kagan rightfully points out that "the relevant statue in Alabama would not have placed Ray on notice that the prison would deny his request,"[65] as the statute provides that "both the chaplain of the prison and the inmate's spiritual adviser of choice may be present at the execution chamber."[66]

The statue itself is vague. It makes no distinction between persons who may be present within the execution chamber and those who may enter only the viewing room.[67] The statue does not distinguish between a prison's employees or non-employees, which is the State's reasoning for not allowing Mr. Ray's Imam to be present at the execution chamber. The Alabama statute reads:

> (a) The following persons may be present at an execution and none other:
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> . . .
>
> (4) The spiritual advisor of the condemned.
> (5) The Chaplain of Holman Prison.[68]

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[63] *Id.*

[64] *Murphy*, 139 S. Ct. at 1478.

[65] *Id.*

[66] Ala. Code § 15-18-83(a) (2018).

[67] *Dunn*, 139 S. Ct. at 661 (Kagan, J., dissenting).

[68] Ala. Code § 15-18-8.

Mr. Ray timely requested to the execution warden three accommodations based on his religious beliefs, all of which were denied.[69] The first, that his spiritual advisor be present with him at the execution chamber.[70] The second request, that the Christian Chaplain not be present during the execution.[71] The third request, that no autopsy be performed on his body.[72] The warden denied the first two requests, and said he had no power over the third request.[73]

The State said in the court filing that the execution could proceed without the Christian Chaplain in the room. However, it could not allow Mr. Ray's spiritual advisor in its place, because he was not an employee of the prison.[74] The code does not reference where exactly a spiritual advisor other than the Chaplain would be allowed during the execution. It only mentions that the inmate's spiritual advisor, other than the Christian Chaplain, may be present during the execution.[75]

In practice, a spiritual advisor is to be present as one of the inmates' designated execution witnesses, in a small room behind a large, partially-opaque window to the inmate's left, outside the execution chamber,[76] not in place, or next to, the prison's Christian Chaplain. Once in the execution chamber, a death-sentenced inmate who wishes to have physical contact with a religious leader

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[69] Ray v. Comm'r, Alabama Dep't of Corr., 915 F.3d 689, 693 (11th Cir. 2019).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 694.

[75] Ala. Code § 15-18-8.

[76] Complaint at 51, Burton v. Dunn, 2:19-cv-242-ECM, 2019 WL 6173502 (M.D. Ala. Apr. 4, 2019).

while making a final prayer may only do so with the prison chaplain.[77]

The prison's justification for this accommodation, or lack thereof, is that the Christian Chaplin is an employee of the prison. A private spiritual advisor may accompany the inmate to the holding cell to await the final walk to the chamber.[78] However, the State does not let the private spiritual advisor accompany the inmate into the execution chamber itself.[79] A state-employed chaplain is a member of the execution team and is usually in the death chamber during executions.[80] The current Chaplain is a Christian.[81] The state has never allowed an inmate's private spiritual advisor to be inside the chamber during an execution, regardless of the private spiritual advisor's religious affiliation.[82]

The State argued that this policy is justified under R.L.U.I.P.A. because it has a compelling interest and, based on the record, it appears that there are no less-restrictive means of furthering the State's interests.[83] These interests are the "moral obligation to carry out executions with the degree of seriousness and respect that the state-administered termination of human life demands."[84] The state Chaplin is a trained member of the execution team, who has witnessed dozens of executions, is trained on how to respond if something goes wrong, and if he disobeys orders, he would face disciplinary actions.[85]

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[77] *Ray v. Dunn*, 2019 WL 418105, at *2.

[78] *See Ray v. Dunn*, 2019 WL 418105, at *2.

[79] *Id.*

[80] *Id*

[81] *Id.*

[82] *Id.*

[83] *Id.* at *4-*5.

[84] Jackson v. Danberg, 594 F.3d 210, 230 (3d Cir. 2010); *Ray v. Dunn*, 2019 WL 418105 at *5.

[85] *Ray v. Dunn*, 2019 WL 418105 at *6.

Understandably, a prisoner's execution is a solemn moment that must be performed with the utmost seriousness and respect. Precisely because of the solemnity and seriousness of death itself is why the decision of the Court in this case is, as Justice Kagan lays out in her dissent, "profoundly wrong."[86] Her dissent expresses the frustration about the fact that the Court simply ignored the issue at hand. She addresses that while the circuit court thought that there was a substantial likelihood that the prison's policy violated Mr. Ray's First Amendment rights, the Supreme Court did not even address this issue, and instead denied relief on the grounds of timeliness.[87]

The Supreme Court agreed with the Alabama court that the prisoner delayed bringing the action.[88] Justice Roberts, delivering the majority opinion of the Court, granted the State's application to vacate the stay by the Eleventh Circuit because he waited until January 28, 2019, to seek relief.[89] The Alabama District Court used the same reasoning in denying the motion for stay. The Court references that, because he had been on death row 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-employed chaplain, inside the execution chamber."[90]

The Court's opinion about this matter shows, if anything, the disconnection that exists between them and the realities of inmates like Mr. Ray. While they correctly point out, that he has had legal representation since at least 2003,[91] this fact does not make his claim less valid or urgent. The circumstances of legal representation for

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[86] *Dunn*, 139 S. Ct. at 661 (Kagan, J., dissenting).

[87] *Id.* at 662.

[88] *Id.* at 661.

[89] *Id.* at 661.

[90] *Ray v. Dunn*, 2:19-CV-88-WKW,2019 WL at *4.

[91] *Id.* at *4.

prisoners like Mr. Ray are generally, at best, adequate, both during trial and appeal procedures. Inadequate representation is the main reason why death penalty cases are reversed.[92] In 2003, the American Bar Association (ABA), published its revised *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*.[93] These include requiring the attorneys to have abilities, expertise, and skills in representing clients in capital cases; providing two attorneys, an investigator, and a mitigation specialist in every case, as well as full funding for the defense.[94] According to the ABA, no state has yet established standards that meet these minimum requirements.[95] Studies conducted in Tennessee revealed that in one-fourth of capital cases, attorneys offer no mitigation at trial.[96] In Philadelphia, 60 percent of all capital cases went without proper investigation or an experienced attorney.[97] In Louisiana, death penalty inmates have faced a waitlist for an attorney since 2017, due to state budget cuts that led the public defenders' offices to a depletion of money.[98] In Alabama, where Mr. Ray was tried and executed, it is no different. One study of four Alabama counties suing contract attorneys revealed that in 72.5 percent of felony cases the attorney did not file a single motion, and in 99.4 percent of cases the attorney did not request the funds for experts or

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[92] *Inadequate Representation*, A.C.L.U., https://www.aclu.org/other/inadequate-representation (last visited August 10, 2020).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Eli Hager, *Where the Poor Face the Death Penalty Without a Lawyer*, THE MARSHALL PROJECT (Nov. 28, 2017, 10:00 PM), https://www.themarshallproject.org/2017/11/28/where-the-poor-face-the-death-penalty-without-a-lawyer.

investigators.[99] Unlike every other state with the death penalty, Alabama does not provide legal assistance to condemned inmates for preparing and filing postconviction claims.[100]

This crisis is worrisome and the issue one of life or death. Adequate and timely representation for death row inmates is a luxury. While one cannot correctly point out that these were Mr. Ray's particular circumstances, it is unlikely that he received above-average representation during the entire process, which would substantially affect the timeliness with which the issues were brought. Focused on the timeliness, or apparent lack thereof, the Court ignored the bigger problem. Like Judge W. Keith Watkins correctly pointed out in the Alabama District Court Opinion, this case was not about whether the execution would take place, but about when and who will be allowed inside the execution chamber.[101] This case was about a condemned man's right to have an execution no less "solemn," as the state points out in their response, than any other inmate before him. He was claiming the rights that he would have had, had he been Christian instead of Muslim. The right to say a final prayer and the right to hold the hand of your spiritual advisor as you die; these are not extraordinary or burdensome requests. At least, it had not been before, not when it came from Cristian inmates. For them, a Chaplain was readily available and authorized to remain with them inside the execution chamber and during their passing. However, for any other inmate, one like Mr. Ray, who practiced a different, and widely condemned religion in America, it becomes no longer a right, but an accommodation. According to the Court's decisions in these cases, the solemnity of an inmate's death is not a compelling interest for the state;

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[99] *The Crisis of Counsel in Alabama*, EQUAL JUSTICE INITIATIVE (Nov. 12, 2019), https://eji.org/alabama-inadequate-counsel-death-penalty-cases.

[100] *Id.*

[101] *Ray v. Dunn*, 2:19-CV-88-WKW,2019 WL at *1.

therefore, the Court may not grant inmates from minority religions equal protections of the law. Mr. Ray's freedom of worship right was killed by the Court before he ever was. So was his integrity as a person and believer of the Muslim faith.

B. THE CASE FOR AMENDS THAT DID NOT CREATE ANY

Murphy v. *Collier* was decided about two months after *Ray*. Justice Kavanaugh delivers a concurring opinion that attempts to highlight distinctions between this case and *Ray*, and why the Court ruled differently in this instance.[102] The first point Justice Kavanaugh makes is that *Murphy*, unlike *Ray*, made a distinction for equal protection, and not Establishment. Second, he points out that if there would have been an equal treatment issue pointed out, then it would have been resolved, as it was in this case. Third, he says that *Murphy*, unlike *Ray*, raised the issue in a timely manner.

Texas and Alabama share a similar policy when it comes to who can be present in the chamber with the prisoner at the time of execution.[103] Mr. Murphy, through counsel, made several requests to the Texas Department of Criminal Justice (T.D.C.J.) General Counsel, Collier, regarding the desire to have his T.D.C.J. approved spiritual advisor, a Buddhist priest that had visited him for the past six years, instead of the T.D.C.J. Christian chaplain who is ordinarily present during the executions.[104] He said that this was necessary to "focus on the buddha at the time of death . . . ."[105] He also requested for his body not to be moved for seven minutes after the

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[102] *Murphy v. Collier*, 139 S. Ct. 1111 (2019).

[103] Murphy v. Collier, 376 F. Supp. 3d 734, 736 (S.D. Tex. 2019), *aff'd*, 919 F.3d 913 (5th Cir. 2019).

[104] *Murphy,* 376 F. Supp. 3d at 736.

[105] *Id.*

execution.[106] Five days after submitting his request, he received a response from T.D.C. General Counsel.[107] They would honor his request of not moving his body for seven minutes after the execution.[108] The Christian Chaplain would not be present during the execution.[109] However, he was denied the presence of his spiritual advisor in the execution chamber because he was not an employee of the prison.[110] The counselor of Mr. Murphy then said that he would be satisfied with any Buddhist chaplain.[111] There was no Buddhist priest employed or contracted by the Texas prison system, among the over 100 chaplains employed.[112] Mr. Murphy had been a devout Buddhist for over a decade, and on March 20, 2019, he filed a petition for Writ of Prohibition in the Texas Court of Criminal Appeals raising two issues: violation of the Establishment Clause and Free Exercise of religion.[113]

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.* at 736-37.

Justice Kavanaugh makes a distinction between the cases based on the claims that were brought to the Court[114]:

> First, unlike Murphy, Ray did not raise an equal treatment claim. Ray raised an Establishment Clause claim to have the State's Christian chaplain removed from the execution room. The State of Alabama then agreed to remove the Christian Chaplin, thereby mooting the claim. Ray also raised a R.L.U.I.P.A. claim to have his Muslim religious minister in the execution room and not just in the viewing room.[115]

Both Alabama and Texas policies violate the Establishment Clause by "preferring one official religious denomination over another."[116] The Texas statute is, on its face, discriminatory because it only allows for inmates of two religions, Christians and Muslims, to have their spiritual advisor present during their execution.[117] The Alabama statute is not on its face discriminatory, as it does not make a statutory distinction among inmates' religions. However, in its application, it does, because the prison only employs a Christian chaplain.

Justice Kavanaugh then says that the Establishment Clause issue was resolved in *Murphy* because, effective immediately, Texas changed its unconstitutional policy, and did so immediately.[118] Texas now allows all religious ministers only in the viewing room.[119] He says that the Establishment claim in *Ray* became moot the moment that

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[114] *Murphy*, 139 S. Ct. 1111 (2019).

[115] *Id.*

[116] *See generally Murphy,* 139 S. Ct.(2019); *Dunn*, 139 S. Ct.

[117] *Murphy*, 139 S. Ct. at 1112.

[118] *Id.*

[119] *Id.*

Alabama agreed to remove the Chaplain from the execution chamber per the prisoner's request; therefore, the Court had no reason to review his claims.[120] The idea that the Equal Treatment issue was properly resolved in Murphy shows a profound disconnect from the Court to the heart of the issue at hand. As Justice Kagan remarks in her descent in *Ray*, "[t]he clearest command of the Establishment Clause, this Court has held, is that one religious denomination cannot be officially preferred over another."[121] While *Ray* could have successfully raised an Equal Protection claim, there is no doubt that the Establishment Clause issue was equally present. Had the Establishment Clause issue been appropriately solved, it would have also solved the Equal Protection violation, as it came as a direct consequence of the Establishment clause violation. The reason that Mr. Ray and Mr. Murphy raised these claims was not to reduce the rights of other prisoners but to equalize their own to the level of where others had been before. Prisoners before have had their legitimate right of holding the hand of their spiritual advisor before being executed. Having their spiritual advisor present at the execution chamber is just a right of dignity that should not be abridged to everyone but instead extended to those who could not have it because of discriminating policies. The Equal Protection of the law should move toward extending rights and not diminishing them. The Equal Protection clause was not established to go backward but forward. It was not established to take away rights in the name of equality but to grant them.

This moves us toward the next point in Justice Kavanaugh's opinion. He referenced that "the State has a compelling interest in controlling access to the execution room, which means that an inmate likely cannot prevail on a R.L.U.I.P.A. or free exercise claim to have a religious minister in the execution room and not just the viewing

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[120] *Id.*

[121] *Dunn*, 139 S. Ct. at 661-62.

room."[122] In American constitutional law, governmental actions that infringe fundamental rights must survive strict judicial scrutiny.[123] That is, reviewing courts will require the government to prove that the infringing action serves a compelling governmental interest by narrowly tailored means.[124]

Holt v. Hobbs[125] lays the foundation for the Court's most recent interpretation of R.L.U.I.P.A. as it applies to confined inmates. The Court ruled in favor of a prisoner who requested to be able to grow a short beard, as part of his practice of the Muslim faith.[126] The Arkansas Department of Correction prohibits its prisoners from growing beards, with the exception of ¼ inch beards for inmates with skin conditions, for security purposes. While he believed that he should not trim his beard at all, according to his religious practice, he agreed to compromise to grow a ½ inch beard.[127] Prison officials denied his request, at the reasoning that "the beards compromised prison safety because they could be used to hide contraband and because an inmate could quickly shave his beard to disguise his identity."[128] The petitioner's claim was dismissed by the District Court and Eighth Circuit.[129] The Court found that the prohibition to the inmate constituted a violation of his First Amendment rights under R.L.U.I.P.A.[130]

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[122] *Murphy*, 139 S. Ct. at 1112.

[123] *See* Robert T. Miller, *What is a Compelling Governmental Interest?* (March 9, 2018), JOURNAL OF MORALITY AND MARKETS, (Forthcoming); U Iowa Legal Studies Research Paper No. 2018-21.

[124] *Id.*

[125] *Holt*, 135 S. Ct. at 856.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

Holt exemplifies the proper accommodations that should be made for prisoners under R.L.U.I.P.A. Justice Kavanaugh does not consider any possible alternatives or accommodations to the R.L.U.I.P.A. claim. While a consensus can be made that an execution is a solemn and serious matter and that there is a compelling government interest to safeguard the safety of the prisoner, as well as the integrity of the process, other possible solutions exist. The main issue that can be spotted in both cases is that the statutes are vague, and that leaves room for discriminatory practices.

Justice Alito rightfully points out in his dissent, "the record in this case is very inadequate to show the reason for the omission of chaplains of other religions."[131] It does not show what is needed to serve as a chaplain, the vetting of potential chaplains, general training that chaplains receive, any special orientation provided to a chaplain who accompanies a prisoner during the process of execution or whether there are specific restrictions on movements or sounds that might interfere with the work of any of those carrying out the execution.[132] These omissions are critical because they make it harder to determine what exactly would be a possible solution to allow a prisoner's spiritual advisor to be present in the execution chamber. What is clear is that accommodations could be possible without risking the State's interest in the prisoner's security and the integrity of the execution process.

Justice Alito raises the concern that it "is not enough for a prisoner to assert a claim that would succeed in the outside world."[133] Instead, four factors must be considered, according to *Overton v. Bazzetta*[134]: (1) whether a prison rule bears a "valid rational connection with a

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[131] *Murphy*, 139 S. Ct. at 1112.

[132] *Id.*

[133] *Id.* at 1112.

[134] *Overton* v. *Bazzetta*, 123 S. Ct. 2162, 2164 (citing Turner v. Safley, 482 U.S. 78, 89 (1987); *Murphy*, 139 S. Ct. at 1112.

legitimate government 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, inmates and prison resources"; (4) "whether there are ready alternatives to the regulation." We have established through this analysis that, there is a legitimate government interest. The next steps would be to explore alternative means to the existing policies, their impact, and ready alternatives to the existing regulations.

The approach should be a state-by-state approach that analyzes individual policies and how they need to change to accommodate inmates of minority religions adequately. The prisons' policies need to be clear about who is allowed in the death chamber at the moment of the execution, as well as requirements to become an authorized chaplain. Generally, surveys can be conducted in prisons to help establish a need for chaplains of different religions who are not currently employed by the prison. Not all spiritual advisors need to be employed by the prison. They can be independent contractors who receive the execution training and are available at request, as needed. A protocol can be established, clarifying the precise steps to be taken by each prisoner to have their request for a specific spiritual advisor available at the time of their execution. Executions are lengthy, intricate processes that take years, even decades. It is hard to believe that with such a timeline, it would be burdensome to create such accommodations for prisoners.

The final distinction Justice Kavanaugh makes in his concurrence is that the issue in *Murphy* was raised in a timely manner.[135] The timeline in *Murphy* is similar to the one in *Ray*. However, in *Murphy,* the majority said that the claim was raised in a timely manner. Justice Alito descents on this specific matter, pointing out that the timeline in *Murphy*, if anything, is more dilatory than the timeline in *Ray*. In *Murphy,* the Federal District Court suit was filed two days before the execution date. Justice Alito raises the

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[135] *Murphy*, 139 S. Ct. at 1112 (2019).

concern that "while these claims are important and may ultimately be held to have merit . . . they are not simple and require careful consideration of the interests of both prisoners and prison."[136] He details how the late filing in *Murphy* should constitute a dilatory litigation tactic because the attorney should have been aware of the execution protocol in Texas, as it has been in place on the public record since 2012. The alleged R.L.U.I.P.A. violation then could have been challenged in a timelier manner as opposed to two days before the execution. In Justice Kagan's dissent in *Ray*, she rightfully points out that in this case, "the relevant statue would not have placed Ray on notice that the warden may deny his request."[137] The timeline issue then bounces back to the vagueness of the statutes, the lack of consistency in policies, and the availability of counselors to raise the claims with anticipation. The bottom line is that one case unfairly denied review based on grounds consistent with one who was reviewed by the Court. The Court chose to focus on possible technicalities to avoid addressing the issue of the First Amendment violations that existed.

I. CONCLUSION

Both Texas and Alabama statues violate the Establishment Clause, the Equal Protection Clause, and the Free Exercise Clause. While there is a legitimate, compelling interest in the safety and integrity of the execution procedure, accommodations can also be done to ensure that each prisoner's First Amendment rights are intact through the process. It should be a state-by-state approach that analyzes existing policies, identifies current existing statutory and practice violations to the inmates' First Amendment rights within the context of execution, and creates a detailed protocol that allows for timely, reasonable accommodations as needed.

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[136] *Id.*

[137] *Dunn*, 139 S. Ct. at 662.

The State should not abridge the right of an individual to a dignified death. Dedicated to those whose freedom of worship right was killed before they ever were. May we do better next time. Let us remember that, the true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned.[138]

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Dedicated to Bryan Stevenson, the Martin Luther King of our generation. Your work and legacy continue to inspire rising attorneys into believing a fairer, and better justice system is not just necessary, but possible.

Special thanks to Duncan School of Law professor Stewart Harris, whose passion for the Constitution inspired this note, and to the wonderful editor of LMU's Law Review, and good friend, Jessica Gardner.

[138] Bryan Stevenson, "We need to talk about an injustice," TED (March 2012), https://www.ted.com/talks/bryan_stevenson_we_need_to_talk_about_an_injustice/transcript?language=en#t-817040.