

Supreme Court justices battle over execution delays

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Recriminations among the nine United States Supreme Court justices over delaying executions became public last week in three extraordinary opinions issued on May 13 addressing rulings made earlier in the year. It is highly unusual for justices to file opinions on matters already adjudicated.

With executions occurring at the rate of about two a month, principally in southern states, lawyers for the condemned are filing petitions in lower courts raising a variety of legal challenges, including the manner in which their clients will be killed, frequently seeking to delay execution so that the inmates are not put to death before their claims can be adjudicated.

The party who loses in the lower court, usually but not always the inmate, is entitled to appeal all the way to the Supreme Court, where petitions seeking to stay execution or vacate lower court stays are frequently filed shortly before the scheduled state killing.

These petitions have clearly infuriated the three most blood-thirsty justices, Clarence Thomas, Samuel Alito and Neil Gorsuch, who make no effort to hide their anger over any delay in state killings. They want no slowdown on the conveyor belt to the death chamber.

On April 1, the Supreme Court voted 5-4 to deny the stay requested by Missouri inmate Russell Bucklew, who is facing execution by lethal injection, which, if carried out, will cause him excruciating pain due to a rare medical condition that will cause him to suffocate on blood from ruptured throat tumors. Trump appointee Neil Gorsuch's opinion rejecting the stay request can best be described as medieval, gutting the constitutional prohibition against "cruel and unusual punishment." At the same time, Gorsuch set his sights on undermining the legal procedure that allowed Bucklew to raise his "cruel and unusual punishment" challenge in the first place.

"Courts should police carefully against attempts to use such challenges as tools to interpose unjustified delay," Gorsuch wrote for the right-wing bloc, which includes Chief Justice John Roberts and Justice Brett Kavanaugh. "Last-

minute stays should be the extreme exception, not the norm, and the last-minute nature of an application that could have been brought earlier may be grounds for denial," Gorsuch said.

According to the Supreme Court majority, condemned inmates with valid legal challenges to their execution, or the manner in which it will be carried out, should be put to death before the challenge can be decided if the inmate's attorneys, who are often overworked and underpaid, failed to act quickly enough.

Ten days later, on April 11, the Alabama attorney general filed a petition three hours before the midnight expiration of a death warrant to overturn a stay of execution issued by two lower courts at the request of inmate Christopher Price, who asserted a right to die from relatively painless "nitrogen hypoxia" rather than an excruciating lethal injection. By a 5-4 vote, the right-wing bloc vacated the stay, but too late for the execution to proceed. Price's execution has been rescheduled for May 30.

Justice Stephen Breyer, joined by the three other more moderate justices, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan, rebuked the majority on the court in his dissent. "Should anyone doubt that death sentences in the United States can be carried out in an arbitrary way," Breyer wrote, he or she should review "the circumstances as they have been presented to our Court this evening."

After summarizing the legal issues and case history, Breyer explained, "Shortly before 9 p.m. this evening, the State filed an application ... I requested that the Court take no action until tomorrow, when the matter could be discussed" at the Court's regularly scheduled conference. "I recognized that my request would delay resolution of the application and that the State would have to obtain a new execution warrant, thus delaying the execution by 30 days," Breyer added. "But in my judgment, that delay was warranted, at least on the facts as we have them now."

On May 13, the Supreme Court rejected Price's petition for *certiorari*, which sought formal review of whether his impending execution using a more painful method

constitutes “cruel and unusual punishment” in violation of the Eighth Amendment to the US Constitution, part of the Bill of Rights. Four votes are required to accept review, so one or more of the moderates voted against Price. That ruling has likely ended any possibility that Price will avoid death by lethal injection later this month.

Typically, no opinion on a denial of *certiorari* is issued unless a dissenting justice feels strongly that the Supreme Court should have granted review. But in this instance, Justice Thomas filed an opinion, joined by Gorsuch and Alito, “to set the record straight regarding the Court’s earlier orders vacating the stays of execution entered by the District Court and the Court of Appeals.”

After giving a detailed description of Price’s crime, which occurred in 1991, Thomas questioned whether Breyer’s dissent was “serious,” calling the modest proposal to discuss the stay at conference the following morning “disingenuous at best” and “without a shred of legal support.”

Thomas bemoaned the fact that the final order was not made in time for the execution to go forward, pointing his finger at Breyer. “Of course, the dissent got its way by default,” Thomas wrote, asserting that the “strategy is no secret, for it is the same strategy adopted by many death row inmates with an impending execution: bring last-minute claims that will delay the execution.”

Because of Breyer’s “dallying,” the Supreme Court “failed to issue an order before the expiration of the warrant at midnight, forcing the State to call off the execution.” As a result, Thomas concluded, the victim’s widow “waited for hours with her daughters to witness petitioner’s execution, but was forced to leave without closure.”

That same day, May 13, Alito released a dissent, joined by Thomas and Gorsuch, to a 6-3 order issued on March 28 that stayed the execution of Texas inmate Patrick Henry Murphy, a Buddhist who claimed that a prison rule allowing only prison chaplains (none Buddhist) inside the execution chamber discriminated against adherents of Buddhism and violated his First Amendment right to freedom of religious expression.

Acknowledging that Murphy’s religious discrimination claim had merit, Alito still slammed the majority, which included Roberts and Kavanaugh. “This Court receives an application to stay virtually every execution; these applications are almost all filed on or shortly before the scheduled execution date; and in the great majority of cases, no good reason for the late filing is apparent,” Alito wrote. “By countenancing the dilatory litigation in this case, the Court, I fear, will encourage this damaging practice.”

Kavanaugh, joined by Roberts, released his explanation for supporting the stay for Murphy despite having voted earlier to vacate a lower court stay in a case raising the same issue.

At 8:00 p.m. on February 7, the Supreme Court had voted 5-4 to allowed the execution of Alabama inmate Domineque Ray, a Muslim whose request for an Imam in the execution chamber had been denied. Ray was put to death two hours later.

Kavanaugh strained to distinguish the two cases on the basis that Murphy raised an “equal treatment” claim, while Ray “did not raise an equal treatment argument in the District Court or the Eleventh Circuit. The Eleventh Circuit came up with the equal treatment argument on its own.” In other words, one inmate died and another is still alive, at least for the time being, because of the way lawyers framed the legal issues.

Kavanaugh added that five days after the stay in Murphy’s case, Texas eliminated the religious discrimination claim by barring all clergy, including both prison chaplains and Buddhist priests, from the execution chamber. He added, “I fully agree with Justice Alito that counsel for inmates facing execution would be well advised to raise any potentially meritorious claims in a timely manner, as this Court has repeatedly emphasized.”

The crime for which Murphy is to be executed occurred 19 years ago. Why the rush to kill him before his claim can be heard and decided? Thomas, Alito and Gorsuch reflect the views of powerful sections of the ruling class, exemplified by president Donald Trump, intent on strengthening the terror apparatus of the state to combat and intimidate rising working class opposition to increasing social inequality.

Roberts and Kavanaugh have no fundamental disagreement with this perspective, but evince some concern that the Supreme Court will be further discredited, as following its decision to shut down vote-counting in Florida in 2000 and hand the White House to George W. Bush, who had lost the popular vote Democrat Al Gore. The response of the Democrats and the entire corporate media to this brazen theft of an election was to demand that the population obey the Court and submit to its diktat.



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