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Death Penalty Cases Expose Deep Divide on Supreme Court



By [Christopher Coble, Esq. \(https://www.findlaw.com/company/our-team.html\)](https://www.findlaw.com/company/our-team.html) on April 03, 2019 10:52 AM
We've always known the Supreme Court is a political institution. Justices are appointed by presidents representing political parties, and those appointments are coveted to the extreme. And we even refer to Justices as "conservative" or "liberal" based on their voting history. But the Court itself has taken great pains to keep the bitterness that can accompany political discourse behind closed doors.

Perhaps it's no surprise that a topic as controversial as the death penalty would [see the Supreme Court's split spill so acrimoniously into the public view \(https://www.nytimes.com/2019/04/01/us/politics/supreme-court-death-penalty.html\)](https://www.nytimes.com/2019/04/01/us/politics/supreme-court-death-penalty.html), but it's still a shock. Here's a look at three recent death penalty cases, and the battle lines that are forming in the Supreme Court.

[Dunn v. Ray \(https://www.supremecourt.gov/opinions/18pdf/18a815_3d9g.pdf\)](https://www.supremecourt.gov/opinions/18pdf/18a815_3d9g.pdf)

In February, the Court refused to stay the execution of a Muslim man whose request for an imam to be present at his execution was denied. According to the ruling, it was because Domineque Hakim Marcelle Ray waited until 10 days before his execution date to point out that the prison's policy of allowing Christian chaplains, but not ministers of other religions, to be present at executions was discriminatory. While the Eleventh Circuit Court of Appeals granted Ray a stay in order to consider his allegations, the Supreme Court overruled them 5-4, and ordered the execution to go forward. "The Eleventh

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Circuit wanted to hear that claim in full," Justice Elena Kagan pointed out in a fierce dissent. "Instead, this Court short-circuits that ordinary process – and itself rejects the claim with little briefing and no argument – just so the State can meet its preferred execution date."

[Murphy v. Collier](https://www.supremecourt.gov/opinions/18pdf/18a985_7148.pdf) (https://www.supremecourt.gov/opinions/18pdf/18a985_7148.pdf)

In a seemingly identical case just seven weeks later, the Supreme Court granted Patrick Henry Murphy's request to have a Buddhist spiritual advisor accompany him in the execution chamber. The [lone vote to switch](https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-pivots-as-supreme-court-allows-one-execution-stops-another/2019/03/29/26b28b32-5245-11e9-88a1-ed346f0ec94f_story.html?utm_term=.f2169a6ebcc4) (https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-pivots-as-supreme-court-allows-one-execution-stops-another/2019/03/29/26b28b32-5245-11e9-88a1-ed346f0ec94f_story.html?utm_term=.f2169a6ebcc4), in another 5-4 decision, Justice Brett Kavanaugh ruled the "government may not discriminate against religion generally or against particular religious denominations," but explained Murphy "made his request to the State in a sufficiently timely manner, one month before the scheduled execution." (In her dissent in the *Ray* case, Kagan noted that Ray had no idea that the prison would deny his request for an imam to be present until two weeks before his execution, and filed his claim for relief five days later.)

[Bucklew v. Precythe](https://www.supremecourt.gov/opinions/18pdf/17-8151_new_0pm1.pdf) (https://www.supremecourt.gov/opinions/18pdf/17-8151_new_0pm1.pdf)

And less than a week later, the Justices were still arguing over Ray's execution, this time in a decision regarding a death row inmate's request to be killed via the gas chamber rather than lethal injection. Russell Bucklew argued that, because he suffers from cavernous hemangioma (which causes vascular tumors to grow in his head, neck, and throat) Missouri's injection protocol would cause him severe pain. Justice Neil Gorsuch penned another 5-4 decision, ruling that the "[Eighth Amendment does not guarantee a prisoner a painless death](https://www.esquire.com/news-politics/politics/a27021021/supreme-court-execution-neil-gorsuch-eighth-amendment/)" (<https://www.esquire.com/news-politics/politics/a27021021/supreme-court-execution-neil-gorsuch-eighth-amendment/>) -- something that, of course, isn't guaranteed to many people, including most victims of capital crimes."

But Dominique Ray was still on the Court's mind. Justice Gorsuch brought him up as an example to allow executions to proceed despite last-minute appeals: "[W]e have vacated a stay entered by a lower court as an abuse of discretion where the inmate waited to bring an available claim until just 10 days before his scheduled execution for a murder he had committed 24 years earlier." (The relevance of when Ray committed the crime to his request for an imam at his execution is debatable.) Gorsuch then dedicates over 250 words in a footnote to defending the *Ray* decision.

Justice Stephen Breyer also referenced Ray in his dissent, addressing Gorsuch's argument against delaying executions: "And therein lies the problem. It might be possible to end delays by limiting constitutional protections for prisoners on death row. But to do so would require us to pay too high a constitutional price." And Justice Sonia Sotomayor used another footnote to her dissent to re-argue Ray's case:

"Even today's belated explanation from the majority rests on the mistaken premise that Domineque Ray could have figured out sooner that Alabama planned to deny his imam access to the execution chamber ... [but] the governing statute authorized both the inmate's imam and the prison's Christian chaplain to attend the execution, and that 'the prison refused to give Ray a copy of its own practices and procedures' that would have clarified the two clergymen's degrees of access."

The fact that Supreme Court justices are openly bickering about a case they all decided together displays the deep rifts regarding capital cases in general and [many justices' feelings on the matter specifically](https://slate.com/news-and-politics/2019/04/supreme-court-neil-gorsuch-sonia-sotomayor-death-penalty-feud.html) (<https://slate.com/news-and-politics/2019/04/supreme-court-neil-gorsuch-sonia-sotomayor-death-penalty-feud.html>). Considering the current conservative majority on the Court, these justices are not likely to overturn the death penalty. But the arguments about its application appear to only be heating up.

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