



Clarence Thomas blasts Stephen Breyer as death penalty divides Supreme Court

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Justice Clarence Thomas wanted to make sure there was no doubt about the heinous crime of Christopher Lee Price, whose attack on an Alabama minister nearly scalped the man, leaving him to a slow and painful death.

In an opinion Monday, Justice Thomas defended the Supreme Court's decision to approve Price's execution and blasted fellow Justice Stephen G. Breyer, who had tried to erect roadblocks on the path to the execution chamber last month.

It was the latest skirmish over the death penalty, which during an otherwise hum-drum year for the high court has emerged as a surprising source of division for the justices, some of whom have signaled deep skepticism of continued use of the extreme penalty.

Left without a broad case to deliver an outright ban, they instead have settled for trying to chip away at how and when the states can carry out the death penalty.

"There appears to be four votes to find the death penalty unconstitutional, if not as a matter of doctrine then as a matter of practice," said Ilya Shapiro, a legal scholar at the libertarian Cato Institute.

The divide is playing out in key cases about how and when it can be administered and what accommodations a state owes to someone who is about to die.

One inmate was allowed to be executed in February despite not having a clergy member of his Muslim faith in the chamber with him. But the court stayed another execution in Texas in March after a Buddhist inmate brought a similar challenge.

Even deeper challenges have come over the method of execution.

In Price's case, Alabama was poised to execute him last month for the 1991 murder of Bill Lynn, the minister, and an attack on his wife, Bessie.

Price, after losing years of appeals, mounted one last attempt to stop his execution. While he was awaiting death, Alabama added asphyxiation by nitrogen hypoxia as an alternative to lethal injection. But Price failed to pick the method in time.

As his execution approached, however, he lodged a challenge, saying injection was too painful for him, violating his constitutional rights against cruel and unusual punishment.

It turned out Alabama had yet to set up the nitrogen hypoxia protocols, which would have delayed his death.

With the execution time looming, Alabama asked the Supreme Court for permission to proceed.

Justice Breyer mounted an objection, saying he wanted a delay so the entire court could talk the case over, aware that would push the matter beyond the expiration of Alabama's death warrant for the lethal injection.

In the end, the court overruled Justice Breyer 5-4 — but his delay ended up busting Alabama's deadline anyway, forcing the state to start over in scheduling a new execution.

“To proceed in this way calls into question the basic principles of fairness that should underlie our criminal justice system,” Justice Breyer wrote in scolding his colleagues.

That prompted Justice Thomas's rebuke Monday.

He recounted Price's crime and the lengthy chances he had already had to argue his case. And Justice Thomas said the delay affects more than Price. He pointed to Ms. Lynn, the widow who was also attacked the night her husband was murdered, who had waited hours with her daughter to witness the execution, only to “leave without closure.”

He said Justice Breyer got his “way by default” in forcing the delay and said death-row inmates are counting on the court's anti-death penalty minority to stymie executions.

“To the extent the court's failure to issue a timely order was attributable to our own dallying, such delay both rewards gamesmanship and threatens to make last-minute stay applications the norm instead of the exception,” Justice Thomas wrote.

The public sparring exposed the strong divide on the court.

Adam Feldman, the author of the Empirical SCOTUS blog, said the dispute was “mostly procedural” and not necessarily “jurisprudential.”

“They are typically very far apart when it comes to the death penalty, so this dispute is mostly interesting because it has to do with the timing of the court's decision rather than the merits of the decision,” Mr. Feldman said.

Yet Mr. Shapiro said those procedural questions can be powerful tools.

“No process leading up to execution is good enough for certain justices,” Mr. Shapiro said. “That's why we see these skirmishes, and apparently will continue to see them for some time, without any real change in the law.”

Another skirmish played out in another death row case last month when the court ruled 5-4 against a Missouri inmate who requested to be executed by gas, saying he had tumors in his throat that would cause him to choke on his own blood should he be given the state's injection cocktail.

In that case, too, the court's conservative wing said inmates were filing appeals to delay their punishment instead of fighting their claims during the decades they sat on death row.

Justice Neil M. Gorsuch, writing for the majority, said judges need to be careful of trying to impose their own death penalty beliefs.

“Of course, that doesn't mean the American people must continue to use the death penalty,” he wrote. “The same Constitution that permits states to authorize capital punishment also allows them to outlaw it. But it does mean that the judiciary bears no license to end a debate reserved for the people and their representatives.”

Yet the Republican appointees on the court did spar among themselves Monday over the court's decision to block the execution of the Buddhist inmate who wanted to have someone of his faith present for his execution.

Justice Brett M. Kavanaugh defended the delay, saying Texas treated Muslims and Christians one way, allowing them to have a clergy member in the execution chamber, while other faiths could have someone only in the viewing room.

“What the state may not do, in my view, is allow Christian or Muslim inmates but not Buddhist inmates to have a religious adviser of their religion in the execution room,” he wrote.

Justice Samuel A. Alito Jr., though, criticized the delay, saying once again an inmate had used a last-minute challenge to stave off his death. Justice Alito called that “seriously wrong.”

Robert Blecker, a professor at New York Law School, said the division in the conservative side of the court isn't surprising when it comes to the dicey issue regarding the process by which someone is put to death.

“They have it tougher. Their answer is sometimes. An abolitionist answer is never. Never is a much easier solution than sometimes. Only the yahoos say always,” Mr. Blecker said.

He also said the exhaustive death penalty challenges that come before the high court lead to a situation analogous of the boy who cried wolf.

“What happens when the wolf finally shows up?” he said. “You tend to be more skeptical.”