

IN THE SUPREME COURT OF ALABAMA

EX PARTE THOMAS D. ARTHUR)
)
In re: STATE OF ALABAMA,)
)
 Petitioner,) Case No. 1951985
 v.)
)
THOMAS D. ARTHUR,)
)
 Respondent.)
)

**THOMAS D. ARTHUR'S MOTION TO VACATE THE ORDER SETTING
AN EXECUTION DATE OF DECEMBER 6, 2007**

In light of the United States Supreme Court's recent decision to stay the execution of Earl Berry, a Mississippi death row inmate, Thomas D. Arthur, through counsel, respectfully requests that this Court vacate its order setting Mr. Arthur's execution date for December 6, 2007.

BACKGROUND

On September 25, 2007, the United States Supreme Court granted a writ of certiorari to the Kentucky Supreme Court in *Baze v. Rees*, 07-5439, 217 S.W.3d 307 (Ky. 2006), *cert. granted*, 2007 U.S. LEXIS 9066 (U.S. Sept. 25, 2007) (No. 07-5439) to address important constitutional questions, including among

others, the proper standard for determining whether a method of execution violates the Eighth Amendment to the United States Constitution. This ruling could drastically change the lethal injection procedures by which death-sentenced inmates are executed in the 37 states, including Alabama, that currently use this method. With its decision in *Berry v. Epps*, 07-7348/07A367, the United States Supreme Court has confirmed that no executions should take place until after the Court decides *Baze*, and lower courts have followed suit.

United States Supreme Court Stays

On October 30, 2007, the United States Supreme Court stayed the execution of Mississippi death row inmate Earl Berry, pending the Court's review of an appeal filed by Mr. Berry earlier this week, "thus [giving] a nearly indisputable indication that a majority intends to block all executions until the Court decides a lethal injection case from Kentucky next spring." Linda Greenhouse, *Justices Stay Execution, A Signal to Lower Courts*, N.Y. Times, Oct. 30, 2007.

That the Supreme Court stayed Mr. Berry's execution in light of the procedural posture of his case is noteworthy. Mr. Berry did not file his lethal injection challenge until October 18, less than two weeks before his execution and three weeks after certiorari was granted in *Baze*. Indeed, in affirming the lower court's dismissal of Mr. Berry's action, the Fifth Circuit Court of Appeals stated that, under its own precedent, a late-filed challenge to a method of execution warranted automatic dismissal. The pending Supreme Court case was irrelevant to its determination, the appeals court said, adding that if the Justices had a different view of the matter, they should say so. *Berry v. Epps*, No. 07-70042, 2007 U.S. App. LEXIS 25219, at *7 (5th Cir. Oct. 26, 2007) ("fifth circuit precedent remains binding until the Supreme Court provides contrary guidance") (internal quotations omitted). The Supreme Court's stay of Mr. Berry's execution is a clear signal that courts should postpone executions in their jurisdictions until the Court resolves the important issues presented in *Baze*.

Berry is not the first opportunity the Supreme Court has taken to stay an execution since granting certiorari in *Baze*. On September 27, 2007, in *Turner v. Texas*, 07A272, the Supreme Court granted a stay of execution to Carlton Turner, Jr., a Texas inmate who was scheduled to be executed that same day. Like Mr. Arthur, Mr. Turner challenged the constitutionality of his state's lethal injection protocol. The Supreme Court granted Mr. Turner the full period to file his petition for a writ of certiorari, and the stay will be in effect until the Supreme Court decides his petition.

The United States Supreme Court also stayed the execution of Virginia death row inmate Scott Emmett, "pending final disposition of the appeal by the U.S. Court of Appeals for the Fourth Circuit or further order of this court." James Vicini, *Virginia Death Row Inmate Gets Stay of Execution*, Reuters, Oct. 17, 2007.

Lower State and Federal Court Stays

Other state and federal courts have followed this approach. The Texas Court of Criminal Appeals stayed the execution of Heliberto Chi, originally set for October 3, 2007. See Ralph Blumenthal, *Texas Ruling*

Signals Halt to Executions Indefinitely, N.Y. Times, Oct. 2, 2007 ("Tuesday's ruling by the Texas court was seen as a sign that judges in the nation's leading death penalty state were taking guidance from the Supreme Court and putting off imminent executions".)

The Arizona Supreme Court halted the execution of Jeffrey Landrigan pending the outcome of *Baze*. See Michael Keifer, *Execution Delayed for Ariz. Killer*, Arizona Republic, Oct. 12, 2007. The Eighth Circuit Court of Appeals likewise granted a stay to Arkansas death row inmate Jack Jones, Jr. pending *Baze*. See Jon Gambrell, *Death Row Inmate Receives Stay As Supreme Court Case Looms*, Morning News (Little Rock, Ar.), Oct. 12, 2007.

The Nevada Supreme Court halted the execution of William Castillo, who had waived his appeals and volunteered to be executed. During an hour-long emergency hearing, members of the Court asked lawyers for the Attorney General's Office and the Department of Corrections what harm would be caused by a delay while questions about the use of lethal injection were more thoroughly reviewed. See Sean Whaley, *State's High*

Court Stays Execution of Castillo, Las Vegas Review Journal, Oct. 16, 2007.

The Georgia Supreme Court stayed the execution of Jack Alderman, in light of *Baze* and the United States Supreme Court's decision to stay Mr. Emmett's execution. See Matthew Bigg, *Georgia Death Row Inmate Gets Stay of Execution*, Reuters, Oct. 18, 2007.

Attorney General Stay

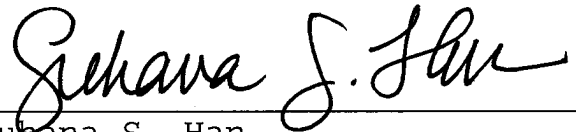
Furthermore, citing judicial prudence, Oklahoma Attorney General W.A. Drew Edmondson asked the Oklahoma Court of Criminal Appeals to defer scheduling executions in Oklahoma until the Supreme Court defines what constitutes cruel and unusual punishment with respect to lethal injection procedures. See *Oklahoma Attorney General Asks Hold on Executions*, Reuters, Oct. 3, 2007.

CONCLUSION

In light of the United States Supreme Court's clearly expressed intention—as confirmed in *Berry*—to stay all executions pending resolution of the issues presented in *Baze*, this Court should vacate the Order setting Mr. Arthur's execution date.

Dated: November 2, 2007

Respectfully submitted,



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