

No. 07-395

IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS D. ARTHUR, Petitioner,

v.

RICHARD F. ALLEN *et al.*, Respondents.

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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**CAPITAL CASE:**  
**Execution Scheduled for December 6, 2007, at 6:00 p.m. CDT**

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TO THE HONORABLE JUSTICE CLARENCE THOMAS:

**APPLICATION FOR STAY OF EXECUTION**

Petitioner Thomas D. Arthur applies to the Honorable Justice Clarence Thomas pursuant to 28 U.S.C. § 2101(f) for a stay of his execution, which is currently scheduled for **Thursday, December 6, 2007 at 6:00 p.m. CDT**. Section 2101(f) provides in relevant part:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

28 U.S.C. § 2101(f). Mr. Arthur seeks a stay of execution to allow the Court adequate time to consider his Petition for Writ of Certiorari, which is currently pending.

## BACKGROUND

On September 21, 2007, Mr. Arthur submitted his Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's dismissal of Mr. Arthur's complaint brought pursuant to 42 U.S.C. § 1983 challenging the constitutionality of Alabama's lethal injection protocol. Mr. Arthur also moved this Court for a stay of execution, which had been scheduled for September 27, 2007.

On September 25, 2007, this 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. Alabama apparently uses the same three-drug cocktail as Kentucky.

In light of *Baze*, on September 25, 2007, Mr. Arthur filed a supplemental brief with the Supreme Court in further support of his Petition and motion seeking a stay of execution. Since the grant of certiorari in *Baze*, executions in this country have effectively been suspended. Indeed, this Court has granted stays in four cases where lower courts declined to grant relief. *See Schwab v. Florida*, 07A383 (Nov. 15, 2007); *Berry v. Epps*, 07-7348/07A367 (Oct. 30, 2007); *Emmett v. Johnson*, 07A304 (Oct. 17, 2007); *Turner v. Texas*, 07A272 (Sept. 27, 2007).<sup>1</sup>

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<sup>1</sup> Several executions have been stayed by lower courts as well. 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. The Arizona Supreme Court halted the

Before the Supreme Court ruled on Mr. Arthur's motion for a stay of execution, the Governor of Alabama, Bob Riley, granted Mr. Arthur a 45-day reprieve. The day before Mr. Arthur's scheduled execution date, a representative from Governor Riley's office contacted Mr. Arthur's counsel and stated that Alabama would be instituting certain changes to its lethal injection protocol. According to Governor Riley's communications director, the Governor's decision to change Alabama's protocol came on the heels of a recent ruling by a federal judge that Tennessee's lethal injection protocol—which apparently is very similar to Alabama's protocol—is unconstitutional. Although Governor Riley initially refused to delay Mr. Arthur's execution until these changes were put into effect, on the morning of his scheduled execution, Governor Riley granted Mr. Arthur a 45-day reprieve to ensure that any changes would be implemented prior to Mr. Arthur's execution.

On September 28, 2007, the State of Alabama moved the Alabama Supreme Court to set a new execution date for Mr. Arthur. The day after this Court stayed the execution of Earl Berry, the Alabama Supreme Court scheduled Mr. Arthur's execution for December 6, 2007. *Ex parte Thomas Douglas Arthur*, 1951985 (Ala. Sup.

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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, Ark.), Oct. 12, 2007. The Nevada Supreme Court halted the execution of William Castillo, who had waived his appeals and volunteered to be executed. 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.

Ct. Oct. 31, 2007) (attached as Exhibit 1). On November 2, 2007, Mr. Arthur filed a motion to vacate the order setting the execution date (attached as Exhibit 2). On November 14, 2007, the Alabama Supreme Court, over a single dissent, denied Mr. Arthur's motion. *Ex parte Thomas Douglas Arthur*, 1951985 (Ala. Sup. Ct. Nov. 14, 2007) (attached as Exhibit 3).

### **MR. ARTHUR'S PETITION FOR WRIT OF CERTIORARI**

As more fully set forth in the Petition, this case raises important issues about the limitations on a death row inmate's right to bring a method-of-execution claim under 42 U.S.C. § 1983, as recognized by this Court in *Hill v. McDonough*, 126 S. Ct. 2096 (2006), outside of the so-called "eve-of-execution" or "eleventh-hour" context, including an issue on which there is a conflict among various circuit courts of appeals. In light of this Court's grant of certiorari in *Baze*, the issue of timeliness is likely to become more relevant as the number of inmates bringing alleged "last minute" lethal injection challenges increases.

Mr. Arthur brought suit to challenge the constitutionality of Alabama's lethal injection protocol on May 14, 2007. He alleges that the execution procedures used by the Respondents, in violation of the Eighth and Fourteenth Amendments, lack the medically necessary safeguards to ensure that he will remain fully anaesthetized throughout the execution. As such, Mr. Arthur alleges that there is a grave and substantial risk that he will be conscious of suffocation during the execution and will suffer excruciating pain as the injection of potassium chloride travels through his bloodstream. On Respondent's motion to dismiss pursuant to Rule 12 of the Federal

Rules of Civil Procedure, the district court dismissed Mr. Arthur's § 1983 action as untimely. The Eleventh Circuit affirmed, with one judge dissenting.

The Eleventh Circuit has adopted an "unreasonable delay" standard that mandates dismissal of all method-of-execution § 1983 claims if they cannot, in the trial court's view, be fully litigated without entry of a stay. The Eleventh Circuit's standard, which the Fifth and Eighth Circuits have similarly adopted, would bar claims that are brought even before an execution date is set or before certiorari review of a federal habeas petition has been completed. Here, Mr. Arthur filed his § 1983 action over four months before his scheduled execution date. The Ninth Circuit has rejected the approach of the Eleventh, Fifth and Eighth Circuits, and instead has adopted a fact-specific inquiry. To assess the timeliness of a method-of-execution claim, the Sixth Circuit has adopted a statute of limitations rule. Unless this Court resolves this conflict regarding the appropriate measure for timeliness, whether a death-row inmate can proceed with his § 1983 method-of-execution claim will depend entirely on the Circuit in which he files his complaint.

Even assuming *arguendo* that this Court determines that the Eleventh Circuit's "unreasonable delay" rule should govern § 1983 method-of-execution claims, this case raises the question of whether that test, as applied here, violates the case or controversy requirement of Article III, § 2 of the U.S. Constitution by requiring death-row inmates to file premature and unripe § 1983 claims that, depending upon the eventual outcome of their habeas appeals, may turn out to be moot. As the dissenting Circuit Judge recognized, Mr. Arthur's method-of-execution claim did not become ripe until at least the conclusion of his federal habeas review or until an execution date had been set.

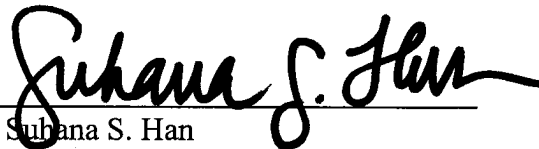
Finally, the balance of equities warrants substantive review of Mr. Arthur's § 1983 complaint. Mr. Arthur's complaint was summarily dismissed without either the district court or the Eleventh Circuit undertaking a meaningful and individualized assessment of the equities unique to Mr. Arthur's circumstances.

Mr. Arthur respectfully requests a stay of his execution by the State of Alabama so that the Court is able to give full and fair consideration to the complex legal and factual issues presented here.

### CONCLUSION

In accordance with § 2101(f), this Court should stay Mr. Arthur's execution so as to afford itself a reasonable time to review, consider, and take action on his Petition.

Respectfully submitted,



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*Counsel for Petitioner*

November 26, 2007

# **EXHIBIT 1**

IN THE SUPREME COURT OF ALABAMA  
October 31, 2007

1951985

Ex parte Thomas Douglas Arthur. PETITION FOR WRIT OF  
CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Thomas  
Douglas Arthur v. State of Alabama) (Jefferson Circuit  
Court: CC-87-577; Criminal Appeals: CR-91-0718).

ORDER

The State of Alabama having filed a renewed motion to set an execution date, and the same having been submitted and duly considered by the Court, it is considered that the renewed motion to set an execution date is due to be granted.

IT IS NOW ORDERED that December 6, 2007, be fixed as the date for the execution of the convict, Thomas Douglas Arthur, who is now confined in the William C. Holman Unit of the Prison System at Atmore, Alabama.

IT IS, THEREFORE, ORDERED that the Warden of the William C. Holman Unit of the prison system at Atmore in Escambia County, Alabama, execute the order, judgment and sentence of law on December 6, 2007, in the William C. Holman Unit of the prison system, by the means provided by law, causing the death of such convict.

IT IS FURTHER ORDERED that the Marshal of this Court shall deliver, within five (5) days from this date, a certified copy of this order to the Warden of the William C. Holman Unit of the prison system at Atmore, in Escambia County, Alabama, and make due return thereon to this Court.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit forthwith a certified copy of this order to the following: the Governor of Alabama, the Clerk of the Court of Criminal Appeals, the Attorney General of Alabama, the Commissioner of the Alabama Department of Corrections, the attorney of record for Thomas Douglas Arthur and the Clerk of the Circuit Court of Jefferson County, Alabama by United States mail, postage prepaid.

IT IS FURTHER ORDERED that the Attorney General of


Alabama is directed, forthwith, to notify the United States District Court for the Northern District of Alabama of this order.

\* \* \* \* \*

I, Robert G. Esdale, Clerk of the Supreme Court of Alabama, do hereby certify the foregoing is a full, true and correct copy of the judgment and order of the Supreme Court of Alabama directing the execution of the death sentence of Thomas Douglas Arthur as the same appears of record in this Court.

Given under my hand and the seal of this Court on this date, October 31, 2007.



  
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Robert G. Esdale  
Clerk  
Supreme Court of Alabama

# **EXHIBIT 2**

**IN THE SUPREME COURT OF ALABAMA**

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

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

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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**

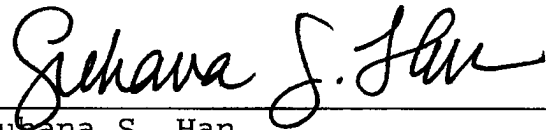
Furthermore, citing judicial prudence, Oklahoma Attorney General W.A. Drew Edmondson asked the Oklahoma Court of Criminal Appeals to defer scheduling executions in Oklahoma until the Supreme Court defines what constitutes cruel and unusual punishment with respect to lethal injection procedures. See *Oklahoma 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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(212) 558-3588 (facsimile)

*Counsel for Respondent*  
*Thomas D. Arthur*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2nd day of  
November, 2007, I caused to be served by United States  
Express Mail a copy of the foregoing Supplemental  
Memorandum in Opposition to the State of Alabama's  
Motion to Set an Execution Date on:

J. Clayton Crenshaw, Esq.  
Office of the Attorney General  
Capital Litigation Division  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130-1052

  
Suhana S. Han

# **EXHIBIT 3**

IN THE SUPREME COURT OF ALABAMA  
November 14, 2007

1951985

Ex parte Thomas Douglas Arthur. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Thomas Douglas Arthur v. State of Alabama) (Jefferson Circuit Court: CC-87-577; Criminal Appeals: CR-91-0718).

ORDER

The petitioner having filed a motion to vacate order setting execution date, and the same having been duly submitted to the Court,

IT IS ORDERED that the motion to vacate the execution date is denied.

See, Lyons, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

Murdock, J., dissents.

Cobb, C.J., recuses.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 14<sup>th</sup> day of November, 2007

*Robert G. Esdale, Sr.* MO  
Clerk, Supreme Court of Alabama