

IN THE SUPREME COURT OF ALABAMA

EXECUTION DATE SCHEDULED FOR SEPTEMBER 27, 2007

EX PARTE THOMAS D. ARTHUR)	
)	
In re: STATE OF ALABAMA,)	
)	
Petitioner,)	Case No. 195-1985
v.)	
)	
THOMAS D. ARTHUR,)	
)	
Respondent.)	

EMERGENCY MOTION OF THOMAS D. ARTHUR
FOR A STAY OF EXECUTION

Petitioner, Thomas D. Arthur, now incarcerated on death row at Holman State Prison in Atmore, Alabama, by and through his attorney, Suhana S. Han, petitions this Court for a stay of execution. Mr. Arthur's execution is scheduled for September 27, 2007 at 6 p.m. C.D.T. Mr. Arthur currently has two petitions for certiorari under review before the United States Supreme Court. In light of the fact that the Supreme Court granted a writ of certiorari today in *Baze v. Rees*, 07-5439, Mr. Arthur files this motion for a stay

of execution. In support of his motion, Mr. Arthur submits the following:

GROUNDNS SUPPORTING A STAY OF EXECUTION

This morning, the United States Supreme Court granted a writ of certiorari to the Kentucky Supreme Court in *Baze v. Rees*, 07-5439, to address the important constitutional questions raised in the petition for writ, including, among others, the proper standard for determining whether a method of execution violates the Eighth Amendment to the United States Constitution. The answers to these questions could drastically change the procedures by which death-sentenced inmates are executed by lethal injection in the 37 states that currently use this method. Because the three-drug cocktail at issue in *Baze v. Rees* in Kentucky is identical to the three drug cocktail Mr. Arthur understands is used in Alabama, this Court should grant Mr. Arthur's motion for a stay of execution, pending the United States Supreme Court's ruling regarding the proper standard for determining the constitutionality of lethal injection.

I. The Equities Militate in Favor of a Stay

The issues at stake here are unquestionably important to Mr. Arthur, who stands to be executed pursuant to a protocol that he believes will result in an excruciatingly painful death - as confirmed by numerous courts. See, e.g., *Harbison v. Little*, No. 3:06-CV-01206 (M.D. Tenn. Sept. 19, 2007) (finding Tennessee's lethal injection protocol in violation of the Eighth Amendment); *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046-48 (N.D. Cal. 2006). Not since 1879 has the United States Supreme Court addressed on the merits a constitutional test over a method of execution. See *Wilkerson v. Utah*, 99 U.S. 130 (1878) (execution by firing squad is not unconstitutional). The number of lethal injection challenges percolating in the state and federal courts across the country demonstrates the real need for the Supreme Court to provide some guidance on the appropriate standard of review. Until the Supreme Court answers the questions presented in *Baze v. Rees* and determines the constitutionality of a particular means for effecting the ultimate punishment, it

is unconscionable for the State of Alabama to execute Mr. Arthur by lethal injection.

In *Baze v. Rees*, although the Kentucky Supreme Court held that Kentucky's lethal injection procedure, which is apparently identical to Alabama's, does pass muster under the Eighth Amendment of the United States Constitution, the Supreme Court's clarification of the appropriate standard of review could alter that holding, as well as other similar holdings around the country. See, e.g., *Walker v. Johnson*, 448 F. Supp.2d 719, 723 (E.D. Va. 2006). Executing Mr. Arthur two days after the Supreme Court granted certiorari in *Baze v. Rees* and one week before the issue of the constitutionality of Alabama's lethal injection protocol proceeds to trial in the United States District Court of the Middle District of Alabama flies in the face of both fairness and common sense. Without a stay, if this Court - or the Alabama district court - were to determine that lethal injection as practiced around the country or in Alabama is unconstitutional, Mr. Arthur will have been executed in violation of the Eighth Amendment. There is no clearer example of irreparable harm. It is only

through a stay that Mr. Arthur can be afforded the protections the United States Supreme Court may determine are required under the United States Constitution.

II. Mr. Arthur's Claim Has a Strong Likelihood of Success on the Merits

Mr. Arthur has demonstrated - and can demonstrate further with discovery - a strong likelihood that Alabama's lethal injection protocol requires modifications in order to pass constitutional muster. Courts around the nation have granted a variety of forms of relief on similar claims brought by death row inmates, and the Supreme Court's grant of certiorari in *Baze v. Rees* will provide much needed guidance for future decisions. See, e.g., *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1046-48 (N.D. Cal. 2006); *Anderson v. Evans*, No. CIV-05-0925-F, 2006 WL 83093 (W.D. Okla. Jan. 11, 2006); *Brown v. Beck*, No. 5:06-CT-3018-H, 2006 U.S. Dist. LEXIS 60084, at *25 (E.D.N.C. Apr. 7, 2006), *aff'd*, 445 F.3d 752 (4th Cir. 2006). In addition, lethal injection is currently or was previously suspended in California, Delaware,

Florida, Maryland, Missouri, North Carolina, South Dakota and Tennessee. See *Morales v. Tilton*, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006); *Jackson v. Taylor*, No. 06-300-SLR, 2006 WL 1237044 (D. Del. May 9, 2006) (enjoining execution until further order); *Jackson v. Danberg*, 240 F.R.D. 145 (D. Del. 2007) (certifying a class of all current and future death-sentenced prisoners in the custody of the Delaware Department of Corrections); Fla. Exec. Order No. 260 (Dec. 15, 2006) (no further death warrants will be signed until after a commission on lethal injection issues findings and the Department of Corrections makes necessary revisions); *Taylor v. Crawford*, 457 F.3d 902, 903-04 (8th Cir. 2006) (detailing finding by district court that Missouri's lethal injection protocol was unconstitutional), *appeal after remand*, No. 06-3651, 2007 U.S. App. LEXIS 12851 (8th Cir. June 4, 2007) (concluding revised lethal injection protocol is constitutional); *Berger Again Calls on Governor to Act*, US Fed. News, Apr. 3, 2007, available at 2007 WLNR 6835155 (de facto moratorium in North Carolina); Katie Brown, *Death Penalty Measure Signed*, Rapid City J.,

Feb. 27, 2007 (referencing South Dakota's new death penalty law, effective July 1, 2007, after which executions may resume); Order, *Harbison v. Little*, No. 3:06-CV-01206 (M.D. Tenn. Sept. 19, 2007) (finding Tennessee's lethal injection protocol in violation of the Eighth Amendment). With appropriate guidance from the Supreme Court, Mr. Arthur, along with the assistance of experts, will be able to demonstrate that lethal injection as currently practiced in Alabama is unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should GRANT Mr. Arthur's Emergency Motion for a Stay of Execution, and order that no execution date be set until the United States Supreme Court issues a decision in *Baze v. Rees*.

Dated: New York, New York
September 25, 2007

Respectfully submitted,

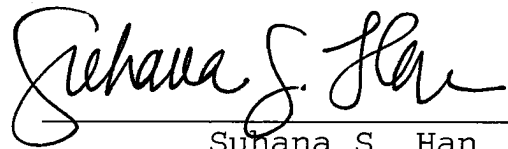


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of September, 2007, I caused to be served by email and by United States Postal Service Express Mail a copy of the attached Emergency Motion of Thomas D. Arthur for a Stay of execution on:

J. Clayton Crenshaw, Esq.
Office of the Attorney General
Capital Litigation Division
Alabama State House
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Suhana S. Han