

of the Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

Baze, *supra*, Petition For Writ Of Certiorari, Questions Presented. That same complaint has been raised by Payne.¹

4. The briefing in Baze will not be completed until December 28, 2007. See Exhibit 2, p. 8.

5. Without question, the Supreme Court's ruling in Baze will affect Pervis Payne's entitlement to relief on his lethal injection challenge. Similarly, a final ruling in Harbison will affect Payne's pending suit as well.²

6. Given these circumstances, the current December 12, 2007 execution date should be vacated for at least two reasons:

a. This Court has already vacated Harbison's execution date and reset it for January 9, 2008; and

b. Given the pending decision in Baze (which this Court did not address in its Harbison order), it quite clearly appears that the federal courts would not allow Payne to be executed before deciding Baze, where Payne's claims are identical to those in Baze.

7. In fact, under similar circumstances, this Court has refused to order an execution when there has been "ongoing federal litigation, . . . unsettled federal law on the issue involved in this litigation, and the potential for future rulings by the federal courts that could render ineffectual"

¹ Payne v. Bredesen, M.D.Tenn. No. 3:07-714, R. 1, ¶¶127-148.

² Harbison filed his complaint on December 19, 2006. Payne initially challenged lethal injection long before that, on August 21, 2006. Payne's initial complaint was dismissed as moot on April 26, 2007 after the Governor revoked the then-existing protocol. Payne filed a new complaint challenging Tennessee's new 2007 protocol on July 9, 2007. That case remains pending.

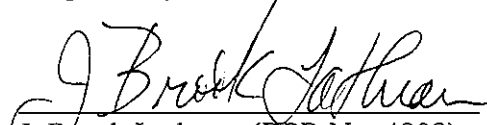
any execution date. See Exhibit 3 (Order in State v. Alley denying motion to set execution date, given pendency of federal litigation, uncertainty of federal law, and effect of future federal decisions upon issues presented). That is the precise situation here, given Payne's December 12, 2007 execution date, the federal court decision in Harbison, and the grant of certiorari in Baze.

8. Accordingly, as this Court did in Harbison (Exhibit 1) this Court should vacate the pending execution date to await the final resolution of Baze and Harbison by the federal courts. This best serves the "interests of judicial economy and finality." Id.

CONCLUSION

This Court should vacate the December 12, 2007 execution date in this matter.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 26th, 2007, a copy of the foregoing was sent via first-class mail to Joseph F. Whalen, 425 Fifth Avenue North, Nashville, Tennessee 37243.



DESIGNATION OF ATTORNEY OF RECORD

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Exhibit 1

State v. Harbison (Tenn. Sept. 25, 2007)

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. EDWARD JEROME HARBISON

No. M1986-00093-SC-OT-DD - Filed: September 25, 2007

ORDER

On July 17, 2006, this Court set an execution date of October 11, 2006, for Edward Jerome Harbison. On August 15, 2006, the Court re-set the execution date to February 22, 2007. On February 1, 2007, the Governor of Tennessee granted an executive reprieve to Harbison to allow the Commissioner of Correction to review the manner in which death sentences are administered in Tennessee and to provide new protocols and related written procedures for administering a sentence of death. Upon completion of the Commissioner's review and expiration of the reprieve, the Court re-set Harbison's execution for September 26, 2007.

On September 19, 2007, the United States District Court for the Middle District of Tennessee held that the Tennessee Department of Correction's "Execution Procedures for Lethal Injection" violate the Eighth and Fourteenth Amendments to the Constitution of the United States and enjoined the Warden of the Riverbend Maximum Security Institution from executing Edward Jerome Harbison under the current procedures for lethal injection. The Federal District Court, however, refused to grant a stay. See Harbison v. Little, Case No. 3:06-1206 (M.D. Tenn. 2007).

On September 24, 2007, the State of Tennessee filed a "Motion to Vacate Order Setting Execution Date" requesting that this Court vacate its order setting Harbison's execution date for September 26, 2007. The motion alleged that the Commissioner of Correction had represented to the Office of the Attorney General that additional time is needed to determine what course of action the Department will take in response to the injunction. Furthermore, the Motion stated that "the Department will not be in a position to go forward with the execution of Mr. Harbison on September 26, 2007."

On September 24, 2007, Donald Dawson of the Post-Conviction Defender's Office, who is representing Harbison, filed a letter in response to the State's Motion, in which he stated that Harbison has no objection to the State's Motion.

Upon due consideration of the Motion and the letter in response, the Motion is GRANTED. The Order of May 22, 2007, setting the execution date for September 26, 2007, is hereby VACATED.

It is hereby ORDERED, ADJUDGED and DECREED that the execution date shall be re-set and that the Warden of the Riverbend Maximum Security Institution, or his designee, shall execute

the sentence of death as provided by law on the ninth day of January, 2008, unless otherwise ordered by this Court or other appropriate authority.

Counsel for Edward Jerome Harbison shall provide a copy of any order staying execution of this order to the Office of the Clerk of the Appellate Court in Nashville. The Clerk shall expeditiously furnish a copy of any order of stay to the Warden of the Riverbend Maximum Security Institution.

IT IS SO ORDERED.

PER CURIAM

J. Koch dissents

Exhibit 2

Baze v. Rees (Sept. 25, 2007)

(ORDER LIST: 551 U.S.)

TUESDAY, SEPTEMBER 25, 2007

ORDERS IN PENDING CASES

06-43 STONERIDGE INVESTMENT V. SCIENTIFIC-ATLANTA, INC., ET AL.

The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted. Justice Breyer took no part in the consideration or decision of this motion.

06-713) WASHINGTON STATE GRANGE V. WA REPUBLICAN PARTY, ET AL.

06-730) WASHINGTON, ET AL. V. WA REPUBLICAN PARTY, ET AL.

The motion of petitioners for divided argument is denied.

06-856 LaRUE, JAMES V. DeWOLFF, BOBERG & ASSOC., INC.

The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted. The motion of respondents to dismiss the writ of certiorari is denied.

06-984 MEDELLIN, JOSE E. V. TEXAS

The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

06-7949 GALL, BRIAN M. V. UNITED STATES

The motion of petitioner for appointment of counsel is granted. Jeffrey T. Green, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.

06-8273 DANFORTH, STEPHEN V. MINNESOTA

The motion of Kansas for leave to participate in oral

argument as *amicus curiae* and for divided argument is denied.

06-9130 ALI, ABDUS-SHAHID M. S. V. FED. BUREAU OF PRISONS, ET AL.

The motion of petitioner for appointment of counsel is granted. Jean-Claude Andre, Esquire, of Los Angeles, California, is appointed to serve as counsel for the petitioner in this case.

CERTIORARI GRANTED

06-937 QUANTA COMPUTER, INC., ET AL. V. LG ELECTRONICS, INC.

06-1037 KENTUCKY RETIREMENT SYS., ET AL. V. EEOC

06-1082 VIRGINIA V. MOORE, DAVID L.

The petitions for writs of certiorari are granted. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

06-1181 DADA, SAMSON T. V. KEISLER, ACTING ATT'Y GEN.

The petition for a writ of certiorari is granted limited to the following Question: "Whether the filing of a motion to reopen removal proceedings automatically tolls the period within which an alien must depart the United States under an order granting voluntary departure." The brief of petitioner is to be

filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

06-1321 GOMEZ-PEREZ, MYRNA V. POTTER, POSTMASTER GEN.
06-1346 ALI, AHMED V. ACHIM, DEBORAH, ET AL.
06-1413 MEADWESTVACO CORP. V. IL DEPT. OF REVENUE, ET AL.
06-1431 CBOCS WEST, INC. V. HUMPHRIES, HEDRICK G.

The petitions for writs of certiorari are granted. The briefs of petitioners are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. Reply briefs, if any, are to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

06-1457) MORGAN STANLEY CAPITAL GROUP V. PUBLIC UTILITY DIST. 1, ET AL.
06-1462) CALPINE ENERGY SVCS., ET AL. V. PUBLIC UTILITY DIST. 1, ET AL.

The motion of Golden State Water Company for disqualification of counsel in No. 06-1457 is denied. The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioners' brief is filed. The Chief Justice and Justice Breyer took no part in the consideration or decision of this motion and these petitions.

06-1463 PRESTON, ARNOLD M. V. FERRER, ALEX E.

The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be

filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

06-1498

WARNER-LAMBERT CO., ET AL. V. KENT, KIMBERLY, ET AL.

The petition for a writ of certiorari is granted. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioners' brief is filed. The Chief Justice took no part in the consideration or decision of this petition.

06-1509

BOULWARE, MICHAEL H. V. UNITED STATES

The petition for a writ of certiorari is granted limited to the following Question: "Whether the diversion of corporate funds to a shareholder of a corporation without earnings and profits automatically qualifies as a non-taxable return of capital up to the shareholder's stock basis, see 26 U.S.C. §301(c)(2), even if the diversion was not intended as a return of capital." The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be

filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

06-1646

UNITED STATES V. RODRIQUEZ, GINO G.

The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

06-11543

BEGAY, LARRY V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday,

December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

06-11612

GONZALEZ, HOMERO V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted limited to the following Questions: "1) Must a federal criminal defendant explicitly and personally waive his right to have an Article III judge preside over voir dire? 2) Did the court of appeals err when it reviewed petitioner's objection for plain error?" The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioner's brief is filed.

07-21) CRAWFORD, WILLIAM, ET AL. V. MARION CTY. ELECTION BD., ET AL.
07-25) IN DEMOCRATIC PARTY, ET AL. V. ROKITA, IN SEC. OF STATE, ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the petitioners' brief is filed.

07-5439 BAZE, RALPH, ET AL. V. REES, COMM'R, KY DOC, ET AL.

The motion of petitioners for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, November 5, 2007. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Monday, December 3, 2007. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 2 p.m., Friday, December 28, 2007. Briefs of *amici curiae* are to be filed with the Clerk and served upon counsel for the parties on or before 2 p.m., 7 days after the brief for

the party supported is filed, or if in support of neither party,
within 7 days after the petitioners' brief is filed.

CERTIORARI DENIED

07-5058 CHI, HELIBERTO V. QUARTERMAN, DIR., TX DCJ

07-5425 TURNER, CARLTON A. V. QUARTERMAN, DIR., TX DCJ

The petitions for writs of certiorari are denied.

Exhibit 3

State v. Alley (Tenn. Jan. 6, 2005)

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE V. SEDLEY ALLEY

No. M1991-00019-SC-DPE-DD - Filed January 6, 2005

ORDER

On January 16, 2004, upon the completion of Sedley Alley's three-tiered appellate review and on motion of the State, this Court entered an order setting June 3, 2004, as the date for Alley's execution. On May 19, 2004, the United States District Court for the Western District of Tennessee issued an order staying the execution. On December 14, 2004, relying on the decision in In re Abdur'Rahman, Nos. 02-6547/6548 (6th Cir. December 13, 2004)(en banc), a panel of the United States Court of Appeals for the Sixth Circuit vacated the entry of the stay of execution and remanded the case to the District Court for further proceedings.

On December 14, 2004, the State filed a Motion to Reset Date of Execution pursuant to Supreme Court Rule 12.4(E). The State requested that the date be set no more than twenty-one days from the date of the order setting the execution date. On December 23, 2004, Sedley Alley filed a Response to the State's Motion in which he asserted that the Motion was premature and that resetting an execution date was impermissible for several reasons: (1) the stay entered by the district court remains in full effect until mandate issues from the Sixth Circuit Court of Appeals; (2) the State is judicially estopped from seeking an execution date; and (3) a petition for writ of certiorari in another case, involving the trial court's refusal of DNA analysis of certain evidence in Alley's capital case, has been filed in the United States Supreme Court. On December 30, 2004, the State filed a Reply to Sedley Alley's Response.

Having considered the Motion to Reset Date of Execution, the Response, the State's Reply to the Response, and the authorities cited by the parties, the Court concludes that a date for execution should not be set at the present time. Alley alleges that he intends to file a petition for rehearing en banc in the Sixth Circuit Court of Appeals. Furthermore, the State of Tennessee has announced its intention to file a petition for writ of certiorari in the United States Supreme Court from the decision of the Sixth Circuit in In re Abdur'Rahman, supra. In light of the ongoing federal litigation, the unsettled federal law on the issue involved in this litigation, and the potential for further rulings by the federal courts that could render ineffectual any date set, this Court concludes that the interests of judicial economy and finality militate against setting an execution date at this time. It is therefore ordered that the State's Motion to Reset Date of Execution is DENIED.

PER CURIAM