

IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE

STATE OF TENNESSEE )  
 )  
VS. ) No. M1988-00096-SC-DPE-DD  
 )  
PERVIS T. PAYNE )

**SECOND SUPPLEMENT IN SUPPORT OF  
MOTION TO VACATE EXECUTION DATE**

Since Pervis Payne filed his previous supplement in support of his motion to vacate a pending execution date, there have been additional developments in courts throughout the country, confirming that this Court should vacate the execution date while the Supreme Court addresses the constitutionality of lethal injection in Baze v. Rees, U.S.No. 07-5439. In particular, Nevada and Arizona have stayed lethal injection executions pending Baze, and Florida has indicated that no lethal injections will take place until Baze is decided:

1. **Arizona:** Last week, in State of Arizona v. Landrigan, No. CR-90-323-AP (Exhibit 1), the Arizona Supreme Court stayed the execution warrant of Landrigan, which had been issued the same day certiorari was granted in Baze. The Arizona Supreme Court specifically ordered the stay “in light of the grant of certiorari in Baze v. Rees.” Id.

2. **Nevada:** On October 15, 2007, in American Civil Liberties Union v. Skolnick, No. 50354 (Exhibit 2) the Nevada Supreme Court entered a stay of all pending executions to allow consideration of the constitutionality of lethal injection, where Nevada uses the same three-drug protocol used in Tennessee.

3. **Florida:** Last Thursday, the Florida Supreme Court heard arguments on the constitutionality of the three-drug lethal injection protocol, and at argument, “the justices suggested that the state would not be executing any inmates anytime soon, as the U.S. Supreme Court considers

a Kentucky case over whether the three-drug lethal-injection cocktail used there, in Florida and 35 other states violates the Eighth Amendment's safeguards against cruel and unusual punishment." *Court Weighs Fairness Of Death Penalty Steps*, Miami Herald, Oct. 12, 2007, p. B6 (Exhibit 3).<sup>1</sup>

4. Arizona, Nevada, and Florida have thus joined the United States Supreme Court and Texas in awaiting the decision in Baze before proceeding with any lethal injection. See First Supplement In Support Of Motion To Vacate Execution Date.

5. Tennessee should appropriately follow suit. As in Arizona, Pervis Payne's execution date should be vacated in light of certiorari grant in Baze, subject to being re-set following a decision in Baze.

#### CONCLUSION

This Court should vacate the current execution date pending the Supreme Court's decision in Baze.

Respectfully submitted,



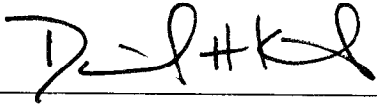
J. Brook Lathram (BPR No. 4808)  
Todd Rose (BPR No. 15012)  
Daniel H. Kiel (BPR 24544)  
BURCH, PORTER, AND JOHNSON,  
PLLC  
130 North Court Avenue  
Memphis, Tennessee 38103  
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<sup>1</sup> In addition, in Oklahoma, the Oklahoma Attorney General has, in the case of Terry Lyn Short, "suggest[ed] that an execution date not be set pending resolution of Baze and that the appropriateness of setting an execution date be revisited when Baze has been decided by the United States Supreme Court." Terry Lyn Short v. State Of Oklahoma, No. D-97-540, State's Notice Of Exhaustion Of State And Federal Appeals, p. 11 (Oct. 3, 2007).

CERTIFICATE OF SERVICE

I certify that on October 16, 2007, a copy of the foregoing was sent via first-class mail to Joseph F. Whalen, 425 Fifth Avenue North, Nashville, Tennessee 37243.

  
\_\_\_\_\_

# Exhibit 1

*State v. Landrigan*, No. CR-90-323-AP  
(Ariz. 2007)

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, )  
 ) Arizona Supreme Court  
 ) No. CR-90-0323-AP  
 Appellee, )  
 ) Maricopa County Superior  
 v. ) Court  
 ) No. CR-90-00066  
 JEFFREY TIMOTHY LANDRIGAN aka )  
 JEFFREY DALE PAGE, )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

O R D E R

On September 25, 2007, this Court issued a warrant of execution in the captioned case. On that same day, the United States Supreme Court granted certiorari in *Baze v. Rees*, No. 07-5439, 2007 WL 2075334 (Sept. 25, 2007), to consider whether the use of a lethal injection procedure to conduct an execution violates the Eighth Amendment to the United States Constitution.

Defendant filed a Motion to Stay Execution on September 28, 2007, contending that the United States Supreme Court's grant of certiorari review of one of the issues raised by Defendant, among other reasons, provides a basis sufficient to justify a stay of execution. The State has filed a response to that motion.

On October 4, 2007, Defendant filed a Petition for Post-Conviction Relief in the Maricopa County Superior Court, pursuant to Arizona Rule of Criminal Procedure 32. Defendant then filed his Second Supplement to Motion to Stay Landrigan's Execution with this Court on October 5, 2007.

The Court has considered all documents filed in this matter. Therefore,

**IT IS ORDERED** treating Defendant's October 5, 2007 Second Supplement to Motion to Stay Landrigan's Execution as an application for stay filed pursuant to Arizona Revised Statutes section 13-4234.J (2000 & Supp. 2006).

**IT IS FURTHER ORDERED**, in light of the grant of certiorari in *Baze v. Rees*, granting Defendant's application for stay of execution. The stay will remain in effect until further Order of this Court.

DATED this \_\_\_\_\_ day of October, 2007.

\_\_\_\_\_  
Ruth V. McGregor  
Chief Justice

TO:

Kent E Cattani, Chief Counsel, Capital Litigation Section, Arizona  
Attorney General's Office

Jon M Sands, Federal Public Defender's Office, Phoenix Office

Sylvia J Lett, Federal Public Defender's Office, Tucson Office

Jeffrey Timothy Landrigan, ADOC 82157, Arizona State Prison,  
Florence - Eyman Complex-SMU #2 Unit

Dale A Baich, Federal Public Defender's Office, Phoenix Office

Jennifer Bedier, Arizona Capital Representation Project

Diane Alessi, Capital Case Staff Attorney, Arizona Death Penalty  
Judicial Assistance Program

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## Exhibit 2

*American Civil Liberties Union v. Skolnik*, No. 50354  
(Nev. Oct. 15, 2007)

IN THE SUPREME COURT OF THE STATE OF NEVADA

AMERICAN CIVIL LIBERTIES UNION  
OF NEVADA; MARIO DE LA ROSA;  
AND AHORA NEWSPAPER,  
Petitioners,

vs.  
HOWARD SKOLNIK, DIRECTOR,  
NEVADA DEPARTMENT OF  
CORRECTIONS; AND NEVADA  
DEPARTMENT OF CORRECTIONS,  
Respondents.

No. 50354

**FILED**

OCT 15 2007

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Chavira*  
CHIEF DEPUTY CLERK

ORDER GRANTING STAY AND ORDERING BRIEFING

This original petition for writ of mandamus or prohibition seeks an order of this court "enjoining the Director of the Nevada Department of Corrections" from carrying out all executions "under the Director's present lethal injection protocol," including the execution presently scheduled for this date, Monday, October 15, 2007, at 8:30 pm.

This court having conducted an emergency hearing on the matter, and determined that further briefing and consideration is warranted, we hereby stay all pending warrants of execution, including the execution of William Castillo, currently scheduled for tonight, Monday, October 15, 2007, at 8:30 p.m., pending this court's consideration and resolution of this writ petition.<sup>1</sup>

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<sup>1</sup>We note that the only currently pending warrant of execution is the Castillo execution. Although Chief Justice Maupin, Justice Gibbons and Justice Saitta all sat in district court proceedings involving Castillo's underlying judgment of conviction, the court has determined that all three justices have a duty to sit in this matter and that their recusal from

*continued on next page . . .*



Petitioners shall have 20 days from the date of this order within which to file and serve an opening brief. In addition to the issues raised in the petition, petitioners shall address whether they have standing to bring the instant petition. Respondents shall have 20 days from the filing and service of the opening brief within which to file and serve an answering brief. Petitioners shall have 20 days from the service of the answering brief within which to file and serve a reply brief. Upon completion of briefing, the clerk of this court shall schedule oral argument before the en banc court on the next available oral argument calendar.

It is so ORDERED.

Maupin C.J.  
Maupin

Gibbons J.  
Gibbons

Hardesty J.  
Hardesty

Parraguirre J.  
Parraguirre

Douglas J.  
Douglas

Cherry J.  
Cherry

Saitta J.  
Saitta

... continued

consideration of this original writ proceeding is not warranted. See Ham v. District Court, 93 Nev. 409, 566 P.2d 420 (1977).

cc: Hon. Jim Gibbons, Governor, State of Nevada  
ACLU of Nevada  
Allen Lichtenstein  
Lee B. Rowland  
Howard Skolnik, Director, Nevada Department of Prisons  
Attorney General Catherine Cortez Masto/Carson City

## Exhibit 3

*Court Weighs Fairness Of Death Penalty Steps*  
Miami Herald, Oct. 12, 2007, p. B6

Source: [Command Searching](#) > News, All (English, Full Text) Terms: "lethal injection" and florida and date=2007 ([Edit Search](#) | [Suggest Terms for My Search](#)) Select for FOCUS™ or Delivery

*Court weighs fairness of death penalty steps; The state Supreme Court is considering the fairness of both the lethal injection process and of keeping secret the identities of officials who carry out the process. The Miami Herald October 12, 2007 Friday*

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## The Miami Herald

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The Miami Herald

October 12, 2007 Friday

**SECTION:** B; Pg. 6

**LENGTH:** 693 words

**HEADLINE:** Court weighs fairness of death penalty steps;  
The state Supreme Court is considering the fairness of both the **lethal injection** process and of keeping secret the identities of officials who carry out the process.

**BYLINE:** MARC CAPUTO, [mcaputo@MiamiHerald.com](mailto:mcaputo@MiamiHerald.com)

**BODY:**

In the windowless death chamber of stone-faced wardens, hidden executioners and moon-suited medical officials, no sun shines in when gurney-strapped convicted killers are lethally injected.

It will likely remain that way, judging by the questions asked by **Florida's** Supreme Court justices during oral arguments Thursday. They indicated they'll likely uphold **Florida's** death penalty and rules that shield the identities and records of those doing the injections.

However, the justices suggested that the state would not be executing any inmates anytime soon, as the U.S. Supreme Court considers a Kentucky case over whether the three-drug **lethal-injection** cocktail used there, in **Florida** and in 35 other states violates the Eighth Amendment's safeguards against cruel and unusual punishment.

That means killer-pedophile Mark Dean Schwab, scheduled for a Nov. 15 execution, and Ian Deco Lightbourne will wait longer on Death Row, regardless of the **Florida** justices' decisions in the cases, both of which were argued Thursday.

**Florida's** leading death penalty case, Lightbourne, didn't focus on the lethal cocktail he would be injected with, but on records and abilities of those giving the injections -- an issue that came to the forefront with the botched execution of Miami killer Angel Diaz, who took 34 minutes to die Dec. 13.

Lightbourne's attorney, Susan Myers Keffer, said other states have less secrecy and that **Florida** should be more open about who's sticking needles into inmates.

"We don't know these people's personnel records and their employment. We don't know if they are making mistakes in their employment, if they've been cited for problems in their work file," she said. "We don't know what any of their background is, if they've ever had any complaints filed against them." But Justice Harry Lee Anstead repeatedly said he had trouble understanding the thrust of her arguments. He said he was "having a lot of difficulty" with the idea that the court could "impose that kind of supervision," or order that Keffer could take depositions and inspect the files of the injectors, because it could intrude on the powers of the executive branch.

## CHANGES TO PROCESS

The justices seemed content that the state Department of Corrections had changed its procedures for **lethal injections** after the needles were improperly inserted in Diaz's arms. And though **Florida** shoots enough anesthetic to knock an inmate out -- and perhaps kill him -- it still took the grimacing Diaz twice as long to die than any other condemned prisoner. In the wake of that execution, DOC announced changes.

The first part of the procedure remains the same: The injector -- called a "sticker" by Justice Charlie T. Wells -- puts the needles in, and the executioner then injects the first drug, sodium pentothal, to knock the inmate out.

Now, however, the executioner must pause as a warden then approaches the condemned, brushes his eyelids for a reaction, jostles him and yells his name -- a period called the "shake and shout."

If the inmate is determined to be knocked out, the paralytic drug pancuronium bromide is then injected, followed by potassium chloride to stop his heart.

"My only concern, and I don't know if it's a constitutional concern . . . is the process of assessing consciousness has not been formalized in any document," said Justice Barbara Pariente. "How do we ensure that that process is going to be competently performed?"

## STATE'S POSITION

The state's lawyer, Kenneth S. Nunnally, said the warden is trained in CPR and that the "shake and shout" can competently be performed by a layperson.

Nunnally added that "**Florida's** procedures will meet any standards [the U.S. Supreme Court] may possibly choose to apply." Asked Anstead: "What is the urgency in having an execution when we know the U.S. Supreme Court is going to shed light on this and there is at least some possibility that we may be out of kilter?"

Nunnally pushed for executions to proceed, noting **Florida** was "in front of other states" on proper death-sentence procedures.

Said Anstead: "We're in front of other states apparently after what has been termed a botched execution."

**LOAD-DATE:** October 12, 2007

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Terms: "**lethal injection**" and **florida** and **date=2007** ([Edit Search](#) | [Suggest Terms for My Search](#))

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Date/Time: Tuesday, October 16, 2007 - 2:12 PM EDT