

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

STATE OF TENNESSEE)
)
v.) **No. M1988-00096-SC-DPE-DD**
)
PERVIS T. PAYNE) **Filed: October 5, 2007**

RESPONSE TO MOTION TO VACATE EXECUTION DATE

On May 22, 2007, this Court re-set the date for execution of Pervis Payne’s death sentence to December 12, 2007. On September 27, 2007, Payne moved this Court to vacate the December 12 date, pointing to the judgment of the United States District Court for the Middle District of Tennessee in *Edward J. Harbison v. George Little*, No. 3:06-1206 (M.D.Tenn. Sept. 19, 2007), and this Court’s subsequent re-setting of Harbison’s September 26 execution date. In *Harbison*, the federal court held unconstitutional Tennessee’s current three-drug lethal injection protocol and enjoined the State from executing Harbison’s sentence under that protocol. Payne also points to the United States Supreme Court’s recent grant of a writ of certiorari in *Baze v. Rees*, No. 07-5439 (U.S.) (Sept. 25, 2007), which involves a challenge to a three-drug lethal injection protocol like the one challenged in *Harbison*. Payne argues that, since this Court has already vacated Harbison’s September 26 date, and because “it quite clearly appears that the federal courts would not allow Payne to be executed before deciding *Baze*,” this Court should likewise vacate and re-set the date for execution of his sentence. But Payne’s motion is both premature and not well taken; it should therefore be denied.

First, Payne’s current circumstance is unlike that of Harbison when the execution of his

sentence was re-set. This Court re-set that execution on September 25, 2007 — *one day* before it was to be carried out. And it did so at the State’s request, on the basis that the Commissioner of Correction had represented that additional time was needed to determine what course of action the Department would take in response to the September 19 injunction in *Harbison*. The Commissioner had further represented that the Department would not be in a position to go forward with the execution on September 26. *See State v. Harbison*, No. M1986-00093-SC-OT-DD (Tenn. Sept. 25, 2007).

Payne’s motion, in contrast, comes a full two and a half months prior to the currently scheduled date for execution of his sentence. Moreover, Payne’s sentence is currently scheduled to be executed on December 12 — a mere twenty-eight days before the January 9, 2008, date for which *Harbison*’s execution has been re-set. In short, Payne has presented this Court with no basis, at this time, for anticipatorily staying the execution of his sentence.¹

Second, the grant of a writ of certiorari by the United States Supreme Court in *Baze* is not a reason for this Court to vacate its own order that Payne’s sentence be lawfully executed. Indeed, when this Court first re-set the date for execution of Payne’s sentence on May 22, 2007, it did so over Payne’s assertion that there was “litigation currently pending in the state and federal courts that may affect the State’s ability to execute him and the procedure used at his execution.” *State v. Payne*, No. M1988-00096-SC-DPE-DD (Tenn. May 22, 2007). Payne is now making much the same

¹In a supplement to his motion, Payne points to the grant of a stay of execution in *Turner v. Texas*, ___ S.Ct. ___ (No. 07A272) (Sept. 27, 2007), and in *Ex Parte Heliberto Chi*, No. WR-61,600-02 (Tex.Crim.App. Oct. 2, 2007). But neither case negates the fact that his motion is premature, as both involved the issuance of a stay of execution *one day* prior to the scheduled execution date.

assertion in support of his motion to vacate this Court's May 22 order. To the extent Payne relies on this Court's order in *State v. Alley*, No. M1999-00019-SC-DPE-DD (Tenn. Jan. 6, 2005), in which the Court denied the State's motion to re-set an execution date, his reliance is misplaced. It is one thing for this Court to decline, in the exercise of its discretion, to set an execution date in the face of "ongoing federal litigation . . . that could render ineffectual any date set"; but it is quite another thing for this Court to vacate, and thus itself render ineffectual, a previously set execution date based on Payne's speculation that ongoing federal litigation might impact that date.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been delivered by first class mail, postage prepaid, and by facsimile, to J. Brook Lathram, BURCH, PORTER, AND JOHNSON, PLLC, 130 North Court Avenue, Memphis, Tennessee 38103, on this the _____ day of October, 2007.

JOSEPH F. WHALEN
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