CAPITAL CASE

JAN 3 1 2008

EXECUTION DATE

No. 07A630

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES CALLAHAN,

Petitioner,

v.

RICHARD ALLEN, et al.,

Respondents.

CAPITAL CASE
EXECUTION SCHEDULED FOR JANUARY 31, 2008 AT 6PM CST

APPLICATION FOR STAY OF EXECUTION

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REQUEST FOR STAY OF EXECUTION

Petitioner, James Callahan, applies to this Court pursuant to 28 U.S.C. § 2201(f) for a stay of his execution, **currently scheduled for January 31, 2008 at 6:00 pm CST**. The Eleventh Circuit decision reversing the opinion and order of the United States District Court for the Middle District of Alabama that granted Mr. Callahan's Stay Motion is in *Re: Richard Allen v. Callahan*, No. 08-10100 (11th Cir. Jan. 29, 2008) (the "Eleventh Circuit Opinion"), and is attached to the Application as Appendix A. The decision of the United States District Court for the Middle District of Alabama in *McNair v. Allen, et al.*, Nos. 2:06-cv-695-WKW, 2:06-cv-WKW, 2007 WL 4463489, Mem. Op. and Order (M.D.Ala. Dec. 14, 2007) (opinion granting motion for stay of execution) ("District Court Opinion"), and is attached to the Application as Appendix B. In support of his application, Mr. Callahan states as follows.

Mr. Callahan filed this Eighth Amendment challenge to the constitutionality of lethal injection in Alabama over fifteen months ago. His execution date was set only after his case was days away from being tried, but had to be continued solely because the State announced, on the eve of trial, that it was revising its execution procedures. He promptly moved for a stay over 10 weeks ago, which was granted by the District Court on December 14, 2007. That stay has been in place since the middle of December. The State waited until December 28, 2007 to file a notice of appeal and until January 4, 2008 to file its main brief to the Eleventh Circuit. Mr. Callahan filed his opposing brief on January 18, 2008. At approximately 6:18 pm yesterday, just 48 hours before the execution date that had been set (and stayed), a divided panel of the Eleventh Circuit Court of Appeals (Judge Wilson, dissenting) ruled that Mr. Callahan's claim is barred by the "applicable" statute of limitations -- a claim that neither was before that Court on the State's appeal of the District Court Opinion granting the stay (indeed, the State did not even raise the statute of limitations in its arguments to the District Court opposing the stay), nor was pursued as

an interlocutory appeal by the State when the District Court denied summary judgment on statute of limitations grounds on November 16, 2007. Yesterday's Eleventh Circuit majority Opinion presents a novel theory, far from settled, that effectively will be shielded from review should the execution proceed tomorrow. The Opinion did not otherwise deal with the well-reasoned decision by Judge Watkins in the District Court and, putting aside the statute of limitation issue, left intact his findings that Mr. Callahan met all requirement for a stay, including a showing of a substantial likelihood of success on the merits of his lethal injection challenge.

Given this backdrop, Mr. Callahan respectfully seeks a stay of execution from this Court in order to enable him to timely file a petition of writ of certiorari from the Opinion vacating the stay. Given the exigencies created by the timing and circumstances of the decision, Mr. Callahan also attaches to this Application his Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (Exhibit C) and the District Court's November 16, 2007 Memorandum Opinion and Order denying summary judgment, inter alia, on statute of limitations grounds (Exhibit D), for further amplification of the statute of limitations arguments.

Mr. Callahan seeks a stay of execution from this Court on either of two alternative grounds. First, pending the filing, consideration, and disposition of a petition for a writ of certiorari before judgment to review the Eleventh Circuit Opinion. *See* 28 U.S.C. 1257(a). Second, to preserve this Court's jurisdiction to review the petition for a writ of certiorari under the ordinary time frame, rather than in a matter of hours, a situation created by the delay of the State (in taking a notice of appeal and briefing) and the Eleventh Circuit (in ruling) on the appeal of the District Court's stay. Again, it bears emphasis that Mr. Callahan filed his motion for stay *over two months ago*, and filed this lethal injection suit *over fifteen months ago*, long before an execution date was sought or set. For these reasons and because, as the District Court found, the

rest of the traditional factors for granting a stay of execution favor Mr. Callahan, the Court should stay Callahan's execution pending the filing of and disposition of a petition of writ of certiorari, or in the alternative, stay his execution pending this Court's decision in *Baze*.

PROCEDURAL HISTORY

1. On October 11, 2006 -- over fifteen months ago -- Mr. Callahan filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court, Middle District of Alabama, Northern Division, challenging the constitutionality of Alabama's method of execution by lethal injection. Mr. Callahan alleges violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

2. The District Court aptly summarized the highlights of the subsequent procedural history:

> The trial in this matter was scheduled to begin on October 3, 2007. Eight days before the trial date, on September 25, 2007, defense counsel announced that the defendants would be making changes to the State's execution protocol – the constitutionality of which comprises the subject matter of this litigation. On the same date, the United States Supreme Court granted certiorari in the *Baze* case. *Baze v. Rees*, ___ U.S. ___, 128 S. Ct. 34 (2007).[1] On September 27, 2007, Governor Bob Riley granted a forty-five day reprieve to another condemned prisoner "to allow the Alabama Department of Corrections sufficient time to make modifications to its lethal injection protocol." (Doc. # 124-2.)
>
> The parties were ready for trial, but on September 28, 2007, the court was compelled to continue the case. (Doc. # 130.) A new trial date was tentatively set because it was not known when the State would complete the modification to its protocol, whether the plaintiffs would agree that the modification alleviated any constitutional violation, and, frankly, what effect the grant of certiorari in *Baze* would or should have on pending challenges to lethal injection.
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> On October 26, 2007, the defendants filed a revised lethal injection protocol. Five days later, on October 31, 2007, the Alabama Supreme Court set Callahan's execution date for January 31, 2008. After holding a status conference with the

[1] The questions presented in *Baze* include the correct standard by which the constitutionality of methods of execution should be adjudged and whether Kentucky's three-drug protocol, which is similar to Alabama's lethal injection protocol at issue here, violates that standard.

parties, the trial was continued generally in anticipation of additional limited discovery and the filing of the instant motion.

(District Court Opinion at 1-3.)

3. On November 13, 2007, Mr. Callahan filed with the Alabama Supreme Court a motion to vacate the execution date order entered by that court. He filed a supplemental brief in support thereof on November 16, 2007. To date, the Alabama Supreme Court has not ruled on that motion.

4. On November 19, 2007, two and a half months before yesterday's decision, Mr. Callahan filed a motion for stay of execution with the District Court and requested, in the alternative, a hearing on, and determination of, the merits, without the need of a stay.

5. On December 14, 2007, the District Court issued an order granting Mr. Callahan's motion for stay.

6. Two weeks later, on December 28, 2007, the State of Alabama filed a notice of appeal.

7. On January 4, 2008, the State of Alabama filed in the Eleventh Circuit a Brief of Appellants.

8. On January 18, 2008, Mr. Callahan filed Appellee's Brief in Opposition.

9. On January 24, 2008, one week later, the State filed its reply brief.

10. Yesterday (January 29, 2008), the Eleventh Circuit reversed the District Court and vacated the stay of execution, solely on the grounds that Mr. Callahan's claim is barred by a two-year statute of limitation. Counsel received this opinion yesterday after the close of business by electronic mail at 6:18 pm EST.

RELIEF SOUGHT

11. Mr. Callahan seeks an Order from this Court for a stay of execution pursuant to 28 U.S.C. § 2201(f), which provides in 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.

12. Mr. Callahan asks this Court to stay his presently scheduled execution to allow him to timely file a petition for writ of certiorari.

13. Callahan's petition for a writ of certiorari will present the following questions:

A. Did the Eleventh Circuit err in vacating an otherwise presumptively valid stay of execution on the basis that, even where it must be presumed that the method of execution would otherwise be found to be unconstitutional, an execution may proceed because the entire claim was barred by a rigid rule that a 42 U.S. § 1983 claim challenging a method-of-execution is barred by a two-year state based statute of limitations that begins to run at the conclusion of state direct review (or, as in this case, at a later date when a new method of execution applies), regardless of any other factors.

B. Should a statute of limitations defense be available in a § 1983 method of execution challenge despite the otherwise fully applicable equitable doctrines governing the timeliness of such claims.

C. Can the statute of limitations ever run on a 42 U.S.C. § 1983 claim that is not ripe for review because the plaintiff is challenging the future harm that would be caused by an unconstitutional execution method the implementation of which remains uncertain?

STANDARDS ATTENDANT TO GRANTING OF A STAY OF EXECUTION

14. The authority of the courts below to enter a stay of execution has been analyzed under the following four-part test:

> (1) whether there is a substantial likelihood of success on the merits;
> (2) whether the requested action is necessary to prevent irreparable injury;
> (3) whether the threatened injury outweighs the harm the stay or injunction would inflict upon the non-movant; and
> (4) whether the requested action would serve the public interest.

Rutherford v. McDonough, 466 F.3d 970, 979 (11th Cir. 2006) (Rutherford II) (Wilson, J., dissenting); *Hill v. McDonough*, __ U.S. __, 126 S. Ct. 2096, 2104 (2006); Fed. R. Civ. P. 65 (internal quotations omitted).

15. None of the traditional four factors that must be considered on a stay motion, universally applied by every circuit, necessarily outweighs the other. As a general matter, some circuits consider that "[t]he irreparable harm to the plaintiff and the harm to the defendant are the two most important factors," *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991), to the degree such that if the balancing of hardships favor the plaintiff, a lesser showing on the merits is required. "In determining whether the plaintiff should prevail, the court balances the evidence proffered for each element. Hence, a heavier showing on one or more of the criteria will reduce the weight of proof required for the other factors." *Mark Dunning Indus., Inc.*, 890 F. Supp. at 1510. The greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party. *See Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).

16. Mr. Callahan meets the standards attendant to the granting of a stay of his execution. Each of the criteria is satisfied in this case.

ARGUMENT

I. There Is a Substantial Likelihood That Mr. Callahan Will Show That The Statute of Limitations Holding of The Eleventh Circuit Is Wrong

17. As mentioned above, all of the requirements for a stay of execution have presumptively been met by Mr. Callahan, as determined by the District Court, because the Eleventh Circuit did not address any of the well-reasoned findings to that effect, including the fact that Mr. Callahan has made the requisite showing of probable success on the merits. *McNair v. Allen*, 2007 WL 4463489, at *2 (M.D. Ala. Dec. 14, 2007) Judge Watkins' findings as to these elements are at this stage presumptively correct, because the divided Eleventh Circuit (Judge Wilson dissenting) found an "abuse of discretion" solely on the basis that he supposedly erred in not denying the stay on statute of limitations grounds. Thus, this application for a stay is made on behalf of an applicant who has for these purposes presumptively shown that the method of execution the State intends to subject him to tomorrow violates the Eighth Amendment. If this Court does not grant a stay, the presumptively unconstitutional execution will take place tomorrow. But as Judge Wilson's dissent below and other cases show, the new statute of limitations holding is clear error and contrary to established law. Therefore, the interests of justice demand that a stay of execution be issued at least until Mr. Callahan has had an opportunity to file, and this Court consider, a petition for writ of certiorari fully addressing the erroneous Eleventh Circuit decision. (This is particularly so in light of this Court's decision to consider the lethal injection issue in granting certiorari in Baze v. Rees, ____ U.S. ____, 128 S. Ct. 34 (2007), and in this Court' subsequent practice with respect to stays of executions, as more fully discussed below.)

18. Moreover, the appropriateness of a stay is all the more obvious because the statute of limitations argument was not even properly before the Eleventh Circuit, a point that Mr. Callahan raised below, but which the Eleventh Circuit did not even address.

19. The time constraints in this case that were clearly created by the State, as set forth above, do not permit a full explication of the statute of limitations issue at this point because Mr. Callahan will be executed tomorrow unless these papers are filed on Mr. Callahan's behalf and this Court acts. Therefore, we will here simply summarize the essential aspects of the errors in the Eleventh Circuit's holding and otherwise make the references set forth above.

20. To summarize, the Eleventh Circuit's reasoning and its conclusion with respect to the statute of limitations are deeply flawed, clearly erroneous, and contrary to law. Except for the Sixth Circuit decision in *Cooey* which has a muddled history (not cited by the Eleventh Circuit majority), an unclear effect even in the Sixth Circuit, *and is still pending before this Court on a Petition for Writ of Certiorari that raises the identical statute of limitations point involved here*, *Cooey v. Strickland*, 479 F.3d 412 (6th Cir. March 2, 2007) (finding that statute of limitations barred plaintiff's claim) (Gilman, J., dissenting); order refusing to vacate stay of execution, Strickland v. Biros, 127 S. Ct. 1873 (March 20, 2007); rehearing en banc denied, Cooey v. Strickland, 489 F.3d 775 (6th Cir. June 1, 2007) (Gilman, J., dissenting, Martin, Daughtrey, Moore, Cole and Clay, J.J., joining in dissent); petition for cert. filed (U.S. Aug. 29, 2007), the courts that have considered the statute of limitation arguments advanced by the State, and adopted by the majority Eleventh Circuit Opinion have rejected those arguments. See, e.g., Jones v. Allen, 483 F. Supp. 2d 1142 (M.D. Ala. 2007); Alderman v. Donald, No. 1:07-cv-1474-BBM (N.D. Ga. July 30, 2007) (Martin, J.) (denying Pre-Answer Motion to Dismiss on the basis

of statute of limitations). See also *Grayson v. Allen*, 2007 WL 1491009 at *5 n. 9 (M.D. Ala. May 21, 2007). They have done so for good reason.

21. Judge Wilson in his dissent below (pages 21–24) makes this clear and succinctly states that Mr. Callahan's position is correct.

> For this and the other reasons set forth in the decisions and Briefs previously referred to, it is clear that the majority in the Eleventh Circuit erred in its conclusion that the statute of limitations began to run at the time that Mr. Callahan selected lethal injection as a method by which he would be put to death (and expired two years later). At the very least, Callahan's execution should be stayed until he has an opportunity to file a petition for writ of certiorari on this question and the Court has time to consider it. This is particularly true given the fact that in this case there is a presumption that Mr. Callahan has otherwise met all of the requirements for a stay including a showing of a substantial likelihood of success on the merits.

22. In fact, as other courts have recognized, basic tort principles make clear that the majority's reasoning was in error. Mr. Callahan's claim for an injunction to prevent future harm is not subject to the statute of limitations because a claim, even if actionable, cannot accrue until the harm occurs. A claim is considered ripe, meaning suitable for judicial review, at the point at which it can give rise to a lawsuit, whether that suit is in law seeking damages for a harm that has occurred already, or in equity seeking an injunction to prevent a harm that will occur in the future. See Jones v. Allen, 483 F. Supp. 2d 1142, 1148 n.3 (M.D. Ala. 2007). However, a claim that is actionable is not necessarily a claim that has accrued for statute of limitations purposes. Id. at 1149. For instance, a plaintiff can be the subject of a tortious act at one point in time and yet not able to reasonably discover the harm caused by that act, and the source of that harm (the tortious act), until some later time. In theory, the harm is actionable at the point of actual injury, but it does not accrue, and the statute of limitations clock does not begin to tick, until the harm can reasonably be discovered. United States v. Kubrick, 444 U.S. 111, 122 (1979). Similarly, when a plaintiff is seeking an injunction, he is seeking to enforce a right in court. Although his

claim may be ripe for judicial review, the claim may not have accrued for statute of limitations purposes if no harm has yet occurred. Jones, 483 F. Supp. 2d at 1149.

23. Not all tortious acts are suitable for equitable relief. In fact, in most tort actions, the harm has already accrued, and the relief sought is not equity, but damages. See Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir. 1989) (explaining that "a cause of action for a tort accrues when there has been an invasion of the plaintiff's legally protected interest...ordinarily, this invasion occurs at the time the tortuous act is committed" (emphasis added) (internal citations omitted)). However, the very remedy and language of 42 U.S.C. § 1983 presupposes that there are claims where the harm has not yet accrued, and that the purpose of the § 1983 suit is not to remedy the harm, but to prevent the harm from occurring in the first instance. Mitchum v. Foster, 407 U.S. 225, 242 (1972). As the Court stated in Mitchum: "Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressing authorizing a "suit in equity" as one of the means of redress." Id. The court further noted that "federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." Id.

24. Both the availability of equity suits under § 1983 and the Supreme Court's recognition of the importance of federal injunctive relief suggest that a § 1983 claim need not have accrued to be actionable. Because statutes of limitations attach only to accrued claims, and § 1983 claims seeking injunctions have not yet accrued, such claims are not subject to a statute of limitations. See Jones, 483 F. Supp. 2d at 1149. As Judge Thompson stated in the Jones opinion, "There is simply no reason why, in order for a plaintiff to seek injunctive relief to prevent a future unconstitutional harm from occurring, the statute-of-limitations clock must

already be ticking." Id. After all, statutes of limitations are designed to protect against "stale claims." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 125 (2002). But an action seeking an injunction to protect against an imminent future harm is by definition not "stale", it cannot be in the "too-distant past." Jones, 483 F. Supp. 2d at 1150-51 n.4.

25. In establishing when the claim accrues, Judge Thompson in Jones recognized that a claimant's knowledge of possible harm is not the constitutional violation at stake. The knowledge of the potential for harm from Alabama's execution procedure is not a constitutional violation. Rather, it is the implementation of that procedure that raises the risk of a constitutional violation he will suffer if he is subjected to Alabama's execution protocol. As such, the claim could not possibly accrue for statute-of-limitations argument in this situation "anomalous to say the least." Id. at 1145. Judge Watkins correctly followed the reasoning of Jones in his decision denying summary judgment below, *McNair v. Allen*, 2007 WL 4106483, at *4 (M.D. Ala. Nov. 16, 2007), and his decision in Grayson, 499 F. Supp. 2d 1228, 1235 (M.D. Ala. 2007), for further discussions on this point we refer to those opinions.

26. Additionally, the Eleventh Circuit erred because the courts already have more than enough flexibility in considering the timelines of a § 1983 challenge to a method of execution in the body of equitable principle and concepts of dilatoriness already established as applying to such claim.

27. Moreover, a rigid statute of limitations rule would contradict the underlying logic of evolving standards of decency. The Supreme Court has long made clear that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.). It is through this framework that numerous punishments once deemed

constitutional were later found to violate the Eighth Amendment. See, e.g., Atkins v. Virginia, 536 U.S. 304 (2002) (banning the execution of mentally retarded offenders thirteen years after ruling that the practice did not violate the Eighth Amendment); Roper v. Simmons, 543 U.S. 551 (2005) (banning the execution of juvenile offenders sixteen years after ruling that the practice did not violate the Eighth Amendment).

28. Any statute of limitations for § 1983 lethal injection claims would be susceptible to a situation in which the nation's standards of decency evolved between the end of the statute of limitations period and the actual implementation of the execution protocol. However, capital cases take years to proceed from the conclusion of the direct appeal to execution; in that time, Eighth Amendment standards of decency, which by definition evolve over time, could well change.

29. Even a later triggering date – for example, the conclusion of the claimant's federal habeas action – would risk this problem. A claimant might file a successive habeas action, or the state in which he is under a death sentence might delay in setting an execution date, or even temporarily halt executions. See, e.g., Fla. Exec. Order No. 260 (Dec. 15, 2006), available at http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/December/06-260-lethalinjection.pdf (suspending executions by lethal injection pending completion of Governor's Commission investigation and implementation of necessary revisions). Any statute of limitations on an Eighth Amendment-based lethal injection claim could prevent a claimant from having his claim measured by contemporary standards of decency, undermining the principle of evolving standards of decency.

30. Of course the specific manner in which lethal injection is carried out in any given state can and does change. It did, in fact change in Alabama just months ago: consider very

simply the fact that the method to be applied to Mr. Callahan himself changed in the midst of the proceedings on his claim in the District Court below, and in fact delayed his trial.

31. For all these reasons the Eleventh Circuit decision is simply wrong on the statute of limitation holding. A stay must be issued to give Mr. Callahan an opportunity to fully address this complex issue and have this Court fully consider it in a petition for writ of certiorari.

II. The Execution Also Should Be Stayed in Light of Baze

32. A stay of execution also should issue given the pendency in this Court of the Baze case and this Court's practice in granting or upholding stays of execution in lethal injection cases since it granted certiorari in Baze. This Court has granted, or refused to vacate, stays of execution in every case post-Baze that has raised a lethal injection challenge (except for the case where the condemned was scheduled to be executed the same day as Baze was issued). See, e.g., Arthur v. Allen, No. 07-0342-WS-C, 2007 WL 2320069 (S.D. Ala. Aug. 10, 2007), aff'd No. 07-13929, 2007 WL 2709942 (11th Cir. Sept. 17, 2007), stay granted pending disposition of petition for writ of certiorari 128 S. Ct. 740, No. 07395, 2007 WL 4248619 (Dec. 5, 2007); Schwab v. Florida, ____ S. Ct. ___, No. 07A383, 2007 WL 3380059 (Nov. 15, 2007) (stay of execution granted pending disposition of petition for writ of certiorari); Berry v. Epps, ___ S. Ct. ___, No. 07-7348 (07A367), 2007 WL 3156229 (Oct. 30, 2007) (same); Turner v. Texas, ___ S. Ct. ___, No. 07A272, 2007 WL 2803693 (Sept. 27, 2007) (same); Emmett v. Johnson, ___ S. Ct. ___, No. 07A304, 2007 WL 3018923 (Oct. 17, 2007) (stay of execution granted pending final disposition of appeal by the Fourth Circuit or further order of the Court); Norris v. Jones, ___ S. Ct. ___, No. 07A311, 2007 WL 2999165 (Oct. 16, 2007) (denying application to vacate a stay granted by the Eighth Circuit). See also In re Richard, 128 S. Ct. 37 (Sept. 25, 2007) (denying stay of execution and petitions for writs of habeas corpus and mandamus and/or prohibition). Further, courts in Arizona, Georgia, Nevada, Texas, Delaware and Arkansas all have stayed

executions in light of Baze, while state officials in Texas and Oklahoma are voluntarily holding off in seeking execution dates. In virtually all of these cases there are questions of dilatoriness and/or statute of limitations. In fact, all or at least most, involve timeliness arguments by much, stronger than such claims against Callahan here.

33. Consider, then, the implications for the appearance of justice and fairness if Mr. Callahan were to be hastily executed after the State caused a delay of the trial on his claim and dragged out its appeal from the order granting the stay that was necessary only because of that delay, and it were later to be found in Baze that the same three-drug cocktail employed by Alabama violates the Eighth Amendment, or if this Court determined that a different standard for adjudicating Eighth Amendment claims should be used than the standard employed by the District Court for Mr. Callahan's claim. Mr. Callahan has as a strong interest in having his claims adjudicated with the benefit of this Court's ruling in Baze as other condemned inmates challenging the constitutionality of their states' lethal injection protocols whose executions already have been delayed pending Baze.

34. Clearly, were this Court to render a decision in Baze that had the effect of finding a method of execution unconstitutional, states would not be free to execute inmates with that method on the grounds that the statute of limitations had run as to these claims. Without a stay here, the State will have made an "end run" around that fact by its timing tactics. Indeed, it seems highly likely that Mr. Callahan would be the only person executed in the United States during the pendency of Baze as a result of the State's race to execute. Not only would that be a gross injustice, it would undermine the jurisdiction of this Court and its interest in giving effect to its decisions. That should not be allowed to happen.

CONCLUSION