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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 2006

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**RALPH BAZE, ET AL.**

**PETITIONER**

v.

**JOHN D. REES, ET AL.**

**RESPONDENTS**

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**RESPONDENTS' BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF UNITED STATES**

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**CAPITAL CASE**

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## **COUNTERSTATEMENT OF QUESTIONS PRESENTED**

- I. Does the Eighth Amendment to the United States Constitution require the elimination of remote, insubstantial risks of pain and suffering?
- II. In the unlikely event that a stay of execution is ordered after the administration of one or more of the lethal injection drugs, do the Eighth and Fourteenth Amendments require the Commonwealth of Kentucky to implement extraordinary measures beyond providing reasonable emergency medical care in order to attempt to maintain the life of the inmate?

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**CITATIONS TO OPINION BELOW**

The opinion below, Baze and Bowling v. Rees, et al., is published at 217 S.W.3d 207 (Ky. 2006). The petition for rehearing was denied on April 19, 2007. The unpublished trial court order denying the Petitioners' declaratory judgment was issued on July 8, 2005. A true copy of the order in Baze and Bowling v. Rees, et al., Civil Action No. 04-CV-1094 (Franklin Cir. 2005), is included in the Appendix to the Petitioner's Petition for Writ of Certiorari.

**JURISDICTION**

Respondents accept the statement of jurisdiction appearing in the petition, except that review is barred because the Petitioners now concede that their application for relief was a post-conviction challenge to their sentences of death, and thus, is procedurally barred as an unauthorized successive application for post-conviction relief.

**CONSTITUTIONAL PROVISIONS INVOLVED**

The Constitutional provisions involved are the Eighth and Fourteenth Amendments to the United States Constitution. These Constitutional provisions are quoted from in the petition.

**STATUTORY PROVISIONS INVOLVED**

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## COUNTERSTATEMENT OF THE CASE

On January 30, 1992, Petitioner Ralph Baze ambushed and murdered Powell County, Kentucky Sheriff Steve Bennett and Deputy Sheriff Arthur Briscoe, who were attempting to serve several Ohio felony warrants on the Petitioner. The Petitioner shot Sheriff Bennett three times in the back with an SKS semi-automatic assault rifle, killing the Sheriff. Deputy Briscoe returned fire with a pistol until he ran out of ammunition. The Deputy was attempting to run for cover when the Petitioner shot him twice in the back with the assault rifle. As the officer lay face down, the Petitioner punched Deputy Briscoe with the muzzle of the rifle, then executed the Deputy with a shot to the back of the head from point blank range.<sup>1</sup>

On April 9, 1990, Thomas C. Bowling shot and killed Eddie and Tina Earley, and wounded the Earley's two-year-old son, as the victims sat inside their automobile in a parking lot of a dry cleaning business in Lexington, Kentucky. Petitioner Bowling's automobile had crashed into the driver's side of the Earley's vehicle, Bowling got out of his automobile, shot the victims, then returned to his vehicle and fled from the scene.<sup>2</sup>

The Petitioners filed the action below in the Franklin Circuit Court on August 8, 2004,<sup>3</sup> ostensibly for the purpose of challenging the constitutionality of specific aspects of the lethal injection protocol used to carry out executions in Kentucky. The Petitioners specifically stated that the action was not intended as a challenge to their death sentences or to the carrying out of their death sentences.

Testimony at the trial established that the risk of any condemned inmate being conscious during an execution was extremely remote. The testimony also established that the Petitioners' allegations that the risk of pain and suffering could be reduced by eliminating one or more of the

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<sup>1</sup> See Baze v. Com., 965 S.W.2d 817,819-20 (Ky.1997).

<sup>2</sup> See Bowling v. Com., 873 S.W.2d 175, 176-77 (Ky.1994).

drugs used in Kentucky's lethal injection protocol<sup>4</sup>, or by the use of alternate drugs or combinations of drugs during lethal injections was speculative, at best. The trial court found, and the Kentucky Supreme Court unanimously affirmed, that Kentucky's lethal injection protocol did not expose condemned inmates to a substantial risk of wanton or unnecessary pain or suffering. Baze and Bowling v. Rees, et al., 217 S.W.3d 207, 210-12 (Ky. 2006).

In addition, testimony at trial established that Kentucky's execution protocol calls for a doctor to be present on site and available to provide medical care to the condemned inmate in the unlikely event that a stay is granted after one or more of the lethal injection chemicals were administered to the inmate. The testimony established that an automated defibrillator and a "crash cart" containing certain medical equipment, medications and supplies was present in case a stay was issued and the condemned inmate had to be revived. The testimony also established that the odds of reviving an inmate after administration of the second lethal injection drug (pancuronium bromide) or the third lethal injection drug (potassium chloride) are minimal, even in a hospital setting.

The Petitioners argued that any inmate executed in error because of a late stay would be deprived of due process and fundamental fairness if the state did not take every possible step to correct the error and revive the inmate. The trial court found, and the Kentucky Supreme Court affirmed, that the Kentucky's lethal injection protocol was sufficient to satisfy the due process and fundamental fairness rights of condemned inmates in the event of a late stay, the trial court finding that "[t]he standards the [Petitioners] would have this Court apply would require that all executions take place in a trauma center with a team of cardiac surgeons standing by."<sup>5</sup>

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<sup>3</sup> Baze and Bowling v. Rees, et al., Civil Action 2004-CV-1094 (Franklin Cir.2005).

<sup>4</sup> Kentucky and most other lethal injection states utilize sodium thiopental, pancuronium bromide, and potassium chloride in their lethal injections protocol. See Baze and Bowling v. Rees, et al., 217 S.W.2d 207, 212 (Ky. 2006).

<sup>5</sup> Findings of Fact and Conclusions of Law at 11, Baze and Bowling v. Rees, et al., Civil Action 2004-CV-1094

## REASONS WHY CERTIORARI SHOULD BE DENIED

### I. THE PETITION FOR RELIEF WAS PROCEDURALLY DEFAULTED.

In the case below, the Respondents asserted as an affirmative defense that the Petitioners' action was procedurally barred as the functional equivalent of a successive application for post-conviction relief, which is prohibited under Ky.R.Crim.Proc. 11.42.<sup>6</sup> Throughout this case, however, the Petitioners have evaded the procedural bar of Ky.R.Crim.Proc. 11.42 by contending that their action did not involve a challenge to their death sentences, but rather, challenged only the constitutionality of certain specific procedures used by the State of Kentucky to carry out executions by lethal injection.

After the Kentucky Supreme Court denied the Petitioners' motion for reconsideration on April 19, 2007 in the action below, the Petitioners filed a motion pursuant to Ky.R.Civ.P. 76.44<sup>7</sup> for a stay of enforcement of the Kentucky Supreme Court's Opinion pending the Petitioner's application for a Writ of Certiorari. In relevant part, Ky.R.Civ.Proc. 76.44(a) provides that a stay "shall be granted in appeals involving a sentence of death." The Petitioners, wanting to take advantage of this automatic stay provision of Ky.R.Civ.Proc. 76.44, then made the admission in their CR 76.44 motion to stay enforcement of the Kentucky Supreme Court's Opinion pending application for a Writ of Certiorari<sup>8</sup> that "the 'sentence of death' was clearly at issue in this case," and that "[b]ecause the case involves the carrying out of Baze's and Bowling's death

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(Franklin Cir.2005). A copy of the unpublished Findings of Fact and Conclusions of Law entered by the trial court on July 8, 2005 in Civil Action 2004-CV-1094 was included in the Appendix to the Petitioner's Petition for Writ of Certiorari.

<sup>6</sup> The full text of Ky.R.Crim.Proc. 11.42 is included in the Appendix. *See also Crick v. Commonwealth*, 550 S.W.2d 534 (Ky.1977).

<sup>7</sup> The full text of Ky.R.Civ.Proc. 76.44 is included in the Appendix.

<sup>8</sup> A true copy of the Petitioners' CR 76.44 Motion to Stay Enforcement of Opinion Pending Application for Writ of Certiorari filed on April 19, 2007 in Baze and Bowling v. Rees, et al., Appeal No. 2005-SC-000543, is included in the Appendix.



sentences, the mandatory provisions of [Rule] 76.44 applies.”<sup>9</sup>

The Petitioners have thus admitted that their action does involve a challenge to the death sentences themselves and the carrying out of their death sentences, making their action the functional equivalent of a prohibited successive application for post-conviction relief. See Hill v. McDonough, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2096, 2101-02, 165 L.Ed.2d 44 (2006). The result is that the Petitioners’ action is procedurally barred under Ky.R.Crim.Proc. 11.42. See Gross v. Commonwealth, 648 S.W.2d 853 (Ky.1983). The Petition for Writ of Certiorari should therefore be denied.

## II. THE CASE PRESENTS NO UNIQUE ISSUES OF LAW OR FACT THAT MERIT THE GRANTING OF CERTIORARI

The case below presents no unique issues of law or fact that merit the granting of certiorari. Stripped of the Petitioners’ impassionate pleas for further review, the Petitioners’ action below is indistinguishable from any number of actions working their way through the state and federal court systems since this Court’s decision in Hill v. McDonough. The action below involves all of the same legal challenges to the three-drug protocol used in Kentucky and in the majority of other states in which lethal injection has been adopted as the primary statutory method of execution.<sup>10</sup> The Petitioners’ claims in the case below were substantially the same as those raised in numerous federal court actions across the nation, a number of which have already been the subject of Federal Circuit Court rulings.<sup>11</sup>

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<sup>9</sup> Petitioners’ 76.44 Motion to Stay Enforcement of Opinion Pending Application for Writ of Certiorari at 2.

<sup>10</sup> In fact, the Petitioners currently have motions to intervene pending in a federal district court case in which other death row inmates have raised substantially the same issues as the Petitioners raised in the action below. See Moore et al. v. Rees et al., 3:06:CV 00022 (E.D.Ky., filed April 19, 2006).

<sup>11</sup> See, e.g., Workman v. Bredesen, 486 F.3d 896, 908-910 (6th Cir. May 7, 2007) (“no state or federal court has entered a final decision invalidating the three-drug protocol”); Taylor v. Crawford, 487 F.3d 1072, 2007 WL 1583874 (8th Cir. June 4, 2007); Hamilton v. Jones, 472 F.3d 814, 416-417 (10th Cir. Jan. 4, 2007).

In addition, the Petitioners are mistaken in their assertions that courts are reaching disparate results in determining the constitutionality of lethal injection protocols across the nation, or that clarification is needed to assist courts in ascertaining the applicable legal standards. A number of Federal Circuit Courts have had the opportunity to review the constitutionality of the three-drug execution protocol used in Kentucky and most other states that have adopted lethal injection as the primary statutory method of execution, and each has determined lethal injection to be constitutional under the test set forth in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct.2902, 49 L.Ed.2d 859 (1976). Each Federal Circuit Court considering the issue to date has found that the three-drug lethal injection protocol does not create a substantial risk of wanton or unnecessary infliction of pain, torture or lingering death. Id. The reason given is because the evidence has shown that the administration of the overdose of the first lethal injection drug, sodium thiopental, is sufficient to ensure that the condemned inmate will be unconscious for hours, thus eliminating any substantial risk that the inmate might experience pain. <sup>12</sup> See, e.g., Workman v. Bredesen, 486 F.3d 896, 908-910 (6th Cir. May 7, 2007); Taylor v. Crawford, 487 F.3d 1072, 2007 WL 1583874 (8th Cir. June 4, 2007); Hamilton v. Jones, 472 F.3d 814, 416-417 (10th Cir. Jan. 4, 2007).

Other state and federal courts issuing final judgments in lethal injection cases across the nation have unanimously reached the same conclusion, including a number of recent final judgments. <sup>13</sup> The case decisions cited by the Petitioners as reaching different conclusions are all interlocutory trial court rulings on preliminary injunction motions, none of which have

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<sup>12</sup> See, e.g., Workman v. Bredesen, 486 F.3d 896, 908-910 (6th Cir. May 7, 2007) ("no state or federal court has entered a final decision invalidating the three-drug protocol"); Taylor v. Crawford, 487 F.3d 1072, 2007 WL 1583874 (8th Cir. June 4, 2007); Hamilton v. Jones, 472 F.3d 814, 416-417 (10th Cir. Jan. 4, 2007).

<sup>13</sup> See Workman v. Bredesen, 486 F.3d 896, 908-910 (6th Cir. May 7, 2007) ("no state or federal court has entered a final decision invalidating the three-drug protocol").

progressed to trial or resulted in final judgments. In at least one recent case, a federal district court's failure to follow the standard announced in Gregg v. Georgia resulted in a swift reversal upon appeal. Taylor v. Crawford, 487 F.3d 1072, 2007 WL 1583874 (8th Cir. June 4, 2007) (rejecting the district court's application of Constitutional standard requiring elimination of all known risks).

Furthermore, the Petitioners are mistaken in their belief that the Kentucky Supreme Court somehow failed to apply the correct legal standard in affirming the trial court's judgment in the action below. In their Petition, the Petitioners seem to suggest that the Kentucky Supreme Court rejected any notion that a risk of unnecessary pain and suffering could ever rise to the level of a constitutional violation. To the contrary, the Kentucky Supreme Court's opinion specifically recognized that "A method of execution is considered to be cruel and unusual punishment under the Federal Constitution when the procedure for execution creates a *substantial risk* of wanton and unnecessary infliction of pain, torture or death." Baze and Bowling v. Rees, et al., 217 S.W.3d 207 (Ky. 2006), *rehearing denied*, (April 19, 2007), *citing* Gregg v. Georgia, *supra*. Thus, the Kentucky Supreme Court simply applied the same legal standard that has been unanimously applied by all state and federal courts issuing final decisions to date on the constitutionality of the three-drug lethal injection used in most states that have reinstated the death penalty since Gregg v. Georgia.

The standard espoused by Petitioners would place Kentucky and all other jurisdictions using lethal injection as the statutory means of execution down an endless road of litigation over whether their lethal injection protocols could somehow be changed to further reduce the already remote chance that a condemned inmate could be conscious during an execution. Condemned inmates will never run out of ideas for changes to the procedures, drugs or equipment used to

during lethal injection.

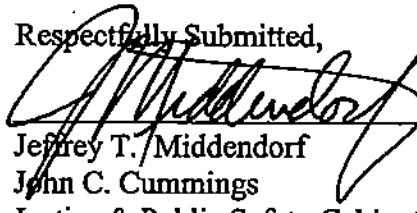
The Kentucky Supreme Court reviewed the matter and confirmed the trial court's determination that Kentucky's lethal injection protocol eliminated any substantial risk of unnecessary pain and suffering to the Petitioners. The Kentucky Supreme Court also affirmed the trial court's determination that Kentucky's lethal injection protocol was sufficient to satisfy the due process and fundamental fairness rights of Petitioners in the event of a late stay following the introduction of one or more of the lethal injection drugs. The Petitioners may disagree with the factual findings in the case below, but their dissatisfaction with the factual findings is a poor reason for the Petitioners to ask this Court to grant certiorari.

### CONCLUSION

The case below does not present any unique issues of law or fact that merit certiorari. Final judgments issued by federal and state courts across the nation have unanimously upheld in upholding the constitutionality of the three-drug lethal injection protocol utilized in Kentucky and in the vast majority of states having adopted lethal injection as the statutory method of execution. The Courts have not been inconsistent in their application of the appropriate legal standard in these cases. Furthermore, the Petitioners have procedurally defaulted by admitting that their actions involve a legal challenge to their sentences of death.

For all these reasons, the Respondents submit that certiorari is not warranted. The Respondents respectfully urge this Court to deny Petitioners' petition.

Respectfully Submitted,



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NO. 07-5439

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 2006

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RALPH BAZE, et al.

PETITIONER

versus

COMMONWEALTH OF KENTUCKY

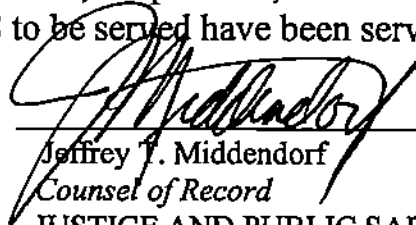
RESPONDENT

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Proof of Service

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I, Jeffrey T. Middendorf, a member of the Bar of this Court, hereby certify that on the 20<sup>th</sup> day of August, 2007, one copy of the Brief for Respondent in Opposition to Petition for Writ of Certiorari thereto in the above-entitled case were mailed, first class postage prepaid, to Hon. David M. Barron and Hon. John Anthony Palombi, Assistant Public Advocates, Department of Public Advocacy, 100 Fair Oaks Lane, Suite 301, Frankfort, Kentucky 40601, Counsel for Petitioner, Ralph Baze, et al. I further certify that all parties required by Rule 28 to be served have been served.



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Counsel for Respondent

**APPENDIX**

Ky.R.Crim.Proc 11.42 ..... 1

Ky. R. Civ.P. 76.44 .....2

Petitioners' CR 77.44 Motion to Stay Enforcement of  
Opinion Pending Application for a Writ of Certiorari  
filed in Baze and Bowling v. Rees, et al., Appeal

No. 2005-SC-000543 on April 19, 2007 ..... 3

**RCr 11.42 Motion to vacate, set aside or correct sentence**

(1) A prisoner in custody under sentence or a defendant on probation, parole or conditional discharge who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court that imposed the sentence to vacate, set aside or correct it:

(2) The motion shall be signed and verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the attorney general and the Commonwealth's attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the Commonwealth's attorney shall have 20 days after the date of mailing of notice by the clerk to the Commonwealth's attorney in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that cannot be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and if financially unable to employ counsel, shall upon specific written request by the movant appoint counsel to represent the movant in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings, the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him or her a new trial, or correct the sentence as may be appropriate. A final order shall not be reversed or remanded because of the failure of the court to make a finding of fact on an issue essential to the order unless such failure is brought to the attention of the court by a written request for a finding on that issue or by a motion pursuant to Civil Rule 52.02.

(7) Either the movant or the Commonwealth may appeal from the final order or judgment of the trial court in a proceeding brought under this rule.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.04 and shall remain suspended until final disposition of an appeal duly taken and perfected.

(9) Original applications for relief of the nature described in this Rule 11.42 that are addressed directly to a court other than the one in which the sentence was imposed shall be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth.

(10) Any motion under this rule shall be filed within three years after the judgment becomes final, unless the motion alleges and the movant proves either:

(a) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence; or

(b) that the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

If the judgment becomes final before the effective date of this rule, the time for filing the motion shall commence upon the effective date of this rule. If the motion qualifies under one of the foregoing exceptions to the three year time limit, the motion shall be filed within three years after the event establishing the exception occurred. Nothing in this section shall preclude the Commonwealth from relying upon the defense of laches to bar a motion upon the ground of unreasonable delay in filing when the delay has prejudiced the Commonwealth's opportunity to present relevant evidence to contradict or impeach the movant's evidence.

**HISTORY:** Amended by Order 98-3, eff. 3-1-99; prior amendments eff. 10-1-94 (Order 94-1); 1-1-86, 1-1-85, 9-1-81 (Order 81-5), 11-1-78, 1-1-78, 7-1-76, 9-1-70, 1-1-70, 1-1-65; adopted eff. 1-1-63

**Supreme Court Commentary**

**1962:**

RCr 11.42 supplements CR 60.02 and provides a post-conviction review procedure consistent with the trend of U.S. Supreme Court pronouncements. See Uniform Code Sec. 44. This rule and RCr 10.06 replace coram nobis.

**Caveat:** The provision for counsel's travel expenses cannot be given effect until such time as statutory authority for payment is enacted.



**CR 76.44 Stay pending review by United States Supreme Court**

The taking of an appeal to the Supreme Court of the United States or the filing in that court of a petition for review on a writ of certiorari does not affect the finality of an opinion or final order. An order staying execution or enforcement of an opinion or final order may be entered upon motion under the following conditions and circumstances and for the periods designated:

(a) When an appeal is taken to the Supreme Court of the United States by the filing of a notice of appeal with the clerk of an appellate court as required by Rule 10 of the Rules of the Supreme Court of the United States and otherwise in accordance with Part IV of the Rules of that court, a stay during the pendency of the appeal may be granted on motion by any judge of the appellate court from which the appeal is taken, and shall be granted in appeals involving a sentence of death. The stay may be conditioned upon the giving of security to be fixed and approved by the judge that the appeal will be duly perfected and prosecuted as required by the Rules of the Supreme Court of the United States, and if the stay is to act as a supersedeas, a supersedeas bond shall be required in accordance with Rule 18 of the Rules of the Supreme Court of the United States. (Supreme Court Rules may be found in 28 U.S.C.A. Rules, Supreme Court); and

(b) When a party desires to make application for a writ of certiorari, a stay may be granted by any judge of the appellate court for such specified number of days not exceeding 90, as may reasonably be required to enable the writ to be obtained, and may be conditioned upon the giving of adequate security as specified in Title 28, Section 2101(f), U.S. Code.

HISTORY: Amended by Order 84-2, eff. 1-1-85; prior amendment eff. 7-1-81; adopted eff. 1-1-78

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OFFICE OF LEGAL SERVICES

IN THE SUPREME COURT  
COMMONWEALTH OF KENTUCKY  
No. 2005-SC-000543

RALPH BAZE, )  
)  
and )  
)  
THOMAS C. BOWLING, )  
)  
Appellant, )  
)  
v. )  
)  
JOHN D. REES, )  
Commissioner, )  
Kentucky Department of Corrections, )  
)  
GLENN HAEBERLIN, )  
Warden, Kentucky State )  
Penitentiary, Eddyville Kentucky, )  
)  
and )  
)  
ERNE FLETCHER, )  
Governor of Kentucky, )  
)  
Appellees )  
\_\_\_\_\_ )

**CR 76.44 MOTION TO STAY ENFORCEMENT OF OPINION  
PENDING APPLICATION FOR A WRIT OF CERTIORARI.**

Ralph Baze and Thomas C. Bowling request that this Court stay enforcement of this Court's opinion affirming the judgment of the Franklin Circuit Court so they will have adequate time to file a petition for a writ of certiorari in the United States Supreme Court.

This Court's authority to stay enforcement of its opinion is found in CR 76.44, which allows any justice of this Court to stay enforcement of an opinion of this Court for

up to (and including) 90 days to enable a party to seek certiorari. CR 76.44(b).<sup>1</sup> Although a stay is discretionary in non-capital cases, this discretion does not exist when the case involves a death sentence. Rather, a stay “shall be granted in appeals involving a sentence of death.” CR 76.44(a). Because this case involves the carrying out of Baze’s and Bowling’s death sentences, this mandatory provision of 76.44 applies.

This case was filed as a civil action seeking declaratory and injunctive relief. That, however, does not impact the application of CR 76.44. The only issues before this Court involved the constitutionality of the means for carrying out Baze’s and Bowling’s execution by lethal injection. Thus, the “sentence of death” was clearly at issue in this case.

Further, cases involving a sentence of death must be appealed directly to this Court. Ky. Const. §110(2)(b). By considering this case without requiring Baze and Bowling to first appeal to the Court of Appeals, this Court resolved any potential doubt about whether this case involves a “sentence of death.” Thus, as was the case with case No. 2004-SC-000880, in which this Court stayed enforcement of the opinion even though the petition was in the context of a successive post conviction action,<sup>2</sup> under the plain language of CR 76.44(a), this Court is obligated to stay enforcement of this Court’s opinion to allow time to seek certiorari.

Even if this Court was not obligated to stay enforcement of its opinion, this case is one of those cases where this Court should exercise its discretion to do so. The lethal injection trial that took place in this case was the first of its kind in the country. The issues presented were so important that the Franklin Circuit Court enjoined Bowling’s

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<sup>1</sup> The Petition for Rehearing was denied on April 19, 2007.

<sup>2</sup> The orders in 2004-SC-000880 and the online docket sheet are attached.

execution until a trial on the merits and a decision based on that trial could be rendered. Then, the Franklin Circuit Court continued that injunction for sixty days after the record on appeal was certified to this Court. When the briefing was filed, Appellees joined in the motion for oral argument. As each of these events exemplify, the issues presented in this case are important and caution has been taken to ensure that the rights of the parties are being upheld. This caution should continue for a short period of time to allow Baze and Bowling to seek certiorari, which will be the first case presented to the United States Supreme Court challenging the chemicals and procedures used in lethal injections that is based upon a fully developed record. In light of this, if this Court does not rule that it is required to stay enforcement of its opinion, this Court should exercise its discretion to do so.

90 days is necessary to allow Baze and Bowling adequate time to review this Court's detailed opinion and the pleadings filed in this Court and the court below. For example, there are more than 200 docket entries in this Court alone and seven days worth of trial to fully analyze. All of this must be done in a quick fashion to adequately present the issues to the United States Supreme Court in the time allotted by the United States Supreme Court for doing so.

For the reasons expressed above, Baze and Bowling request that this Court: 1) issue an order staying enforcement of its November 22, 2006 Order; and, 2) that the order remain in effect until the petition is filed or 90 days (whichever is shorter).

RESPECTFULLY SUBMITTED,

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April 19, 2007.

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused a true and correct copy of the foregoing

**CR 76.44 MOTION TO STAY ENFORCEMENT OF OPINION  
PENDING APPLICATION FOR A WRIT OF CERTIORARI.**

to be served VIA FIRST CLASS MAIL-POSTAGE PREPAID AND FACSIMILE on the  
following individuals:

Hon. David Smith  
Assistant Attorneys General  
1024 Capital Center Drive  
Frankfort, Kentucky 40601

Hon. Jeff Middendorf, General Counsel  
Holly Harris-Ray, Attorney  
Department of Corrections  
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April 19, 2007.