

CASE NO. 07-10275
CAPITAL CASE

IN THE SUPREME COURT OF THE UNITED STATES

MARK DEAN SCHWAB

Petitioner,

v.

FLORIDA,

Respondent.

MOTION TO VACATE STAY OF EXECUTION

_____ COMES NOW the State of Florida, and moves this Court to vacate the stay of execution entered in this case on November 15, 2007. As grounds for vacating that stay, the State submits the following:

1. On November 9, 2007, Schwab filed a motion for a stay of his November 15, 2007, execution "pending the filing and disposition of a petition for a writ of certiorari, or in the alternative, pending the outcome of *Baze v. Rees*, 2008 WL 1733259 (U.S. Apr. 16, 2008)."

2. On November 15, 2007, this Court entered a stay "pending the timely filing and disposition of a petition for a writ of certiorari," thus permitting Schwab the normal 90 day period within which to file his petition, which was due on February 5, 2008.

3. On January 24, 2008, Schwab filed a motion for an extension

of time for filing his petition for writ of certiorari so he could address issues raised during the *Baze* oral argument, argued January 7, 2008. Implicit in that motion was the notion that *Baze* would control the disposition of Schwab's case.

4. This Court granted an extension of time for filing his petition for writ of certiorari until April 5, 2008. The petition was filed within the time allowed by the extension.

5. Schwab has at all times taken the position that this Court's decision in *Baze* will dictate the result in his case. That decision has been issued. Under *Baze*, Schwab has no likelihood of success on his constitutional claim, which is foreclosed by *Baze*, which, of course, is binding precedent.

6. As this Court held in *Baze*:

A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Baze v. Rees, ms. op., at 22. Schwab, just as *Baze*, cannot make that showing. Further, as this Court held:

Kentucky has adopted a method of execution believed to be the most humane available, one it shares with 35 other States. Petitioners agree that, if administered as intended, that procedure will result in a painless death. **The risks of maladministration they have suggested – such as improper mixing of chemicals and improper setting of IVs by trained and experienced personnel – cannot**

remotely be characterized as "objectively intolerable."

Id., at 23. (emphasis added). Thus, any ancillary matters arguably at issue in Schwab's case are disposed of by *Baze*, as well.

7. Each delay in execution of a sentence of death is, for its duration, a commutation of that sentence to one of life in prison. See, *Thompson v. Wainwright*, 714 F.2d 1495, 1506 (11th Cir. 1983). Schwab has delayed his execution since November 2007, based upon the premise that the *Baze* decision would help his case. That result did not come to pass, and, as Justice Rehnquist wrote, as Circuit Justice:

There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, when the legal issues in the case have been sufficiently litigated and relitigated that the law must be allowed to run its course.

Evans v. Bennett, 440 U.S. 1301, 1303 (1979). That time has come in this case.

WHEREFORE, based on the foregoing, the State submits that the stay of execution entered on November 15, 2007, should be vacated because, in light of *Baze*, there is nothing to justify its continuation as evidenced by the accompanying State's response to Schwab's petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by **e-mail and U.S. Mail** to: **Mark S. Gruber, gruber@ccmr.state.fl.us**, Assistant CCRC - Middle, 3801 Corporex Park Dr., Suite 210, Tampa, Florida 33619-1136, on this _____ day of April, 2008.

Of Counsel