



IN THE COURT OF CRIMINAL APPEALS  
OF TEXAS

NO. WR-59,908-02

EX PARTE CARLTON AKEE TURNER, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS  
IN CAUSE NO. F99-00220-MS FROM THE  
282<sup>ND</sup> DISTRICT COURT OF DALLAS COUNTY

*Price, J., filed a dissenting statement in which Womack, Johnson & Holcomb, JJ., join.*

DISSENTING STATEMENT

Particularly in view of the United States Supreme Court's grant of certiorari this week in *Baze v. Rees, Comm'r, Ky. DOC*,<sup>1</sup> and for reasons expressed in my dissenting statement in *Ex parte O'Brien*,<sup>2</sup> I dissent to the failure of the Court to grant the applicant's motion for stay of execution in order to decide whether the applicant has an available post-conviction forum in state court in which to pursue his claim that execution by lethal injection as

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<sup>1</sup>  
No. 07-5439 (2007 U.S. LEXIS 9066)

<sup>2</sup>  
190 S.W.3d 677, 683-85 (Tex. Crim. App. 2006) (Price, J., joined by Holcomb, J., dissenting).

## Turner Dissenting Statement — 2

presently carried out in Texas violates the Eighth Amendment to the United States Constitution. We have filed and set another successive post-conviction writ specifically in order to decide whether “a claim that the lethal-injection protocol violates the Eighth Amendment [is] cognizable under Article 11.071 of the Texas Code of Criminal Procedure[.]”<sup>3</sup> I do not understand why we would allow this applicant, who has expressly raised the same claim in this successor application, to proceed to execution without our having resolved that question. Moreover, the reason given in the concurring statement in *Ex parte O'Brien*,<sup>4</sup> namely, that the applicant had not made a *prima facie* showing of an Eighth Amendment violation, has surely been undermined by the Supreme Court’s grant of certiorari review in *Baze*. Under the circumstances, this Applicant has stated facts which, if true, could establish a violation of the Eighth Amendment if the State proceeds with his execution according to its usual protocol. I would stay the applicant’s execution. Because the Court does not, I dissent.

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Do Not Publish

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<sup>3</sup>

*Ex parte John Avalos Alba*, No. AP-75,510 (Tex. Crim. App., Sept. 20, 2006) (Slip op. at 2).

<sup>4</sup>

*O'Brien*, *supra*, at 683 (Cochran, J., concurring) (“I therefore join in the Court’s decision to lift the temporary stay of execution and to the dismissal of applicant’s subsequent petition for failing to make a *prima facie* showing of possible merit.”).