

125 BROAD STREET
NEW YORK, N.Y. 10004-2498

September 25, 2009

Via Federal Express

Robert G. Esdale, Sr., Clerk
Supreme Court of Alabama
300 Dexter Avenue
Montgomery, Alabama 36104

Re: Ex Parte Thomas D. Arthur , No. 1951985

Dear Mr. Esdale:

Enclosed please find Mr. Arthur's Memorandum in Opposition to the State of Alabama's Motion to Set an Execution Date for the above-captioned case, together with nine additional copies of the same.

If you detect any deficiencies with this filing or if you have any questions, please do not hesitate to call me at 212-558-4154.

Sincerely,



Andrew S.C. Brinkman

(Enclosures)

cc: J. Clayton Crenshaw, Esq.

IN THE SUPREME COURT OF ALABAMA

EX PARTE THOMAS D. ARTHUR)
)
IN RE: STATE OF ALABAMA,)
)
 Petitioner,) No. 1951985
 v.)
)
THOMAS D. ARTHUR,)
)
 Respondent.)

**THOMAS D. ARTHUR'S MEMORANDUM IN OPPOSITION TO
THE STATE OF ALABAMA'S MOTION TO SET AN EXECUTION DATE**

This Court should deny the State of Alabama's motion to set a date for the execution of Thomas D. Arthur. Although the Jefferson County Circuit Court denied Mr. Arthur's Rule 32 petition, no appellate court has reviewed that decision. The State's attempt to curtail appellate review is particularly troubling because the limited DNA testing that was conducted failed to implicate Mr. Arthur. Indeed, Mr. Arthur's DNA was not found on any of the tested evidence. In concluding that Bobby Ray Gilbert's confession was false, the Rule 32 court misconstrued the probative value of the DNA test results on Judy Wicker's clothing. The Rule 32 court also made its finding based on

incomplete information. A critical piece of evidence – a wig worn by the perpetrator – was not subjected to DNA testing because the Alabama Department of Forensics lacks the technology to develop a DNA profile for this evidence. The Rule 32 court erroneously denied Mr. Arthur's request for more advanced DNA testing that could help demonstrate his innocence.

Background

On February 1, 1982, Troy Wicker was murdered inside his home in Muscle Shoals, Alabama. In 1991, Mr. Arthur was convicted and sentenced to death for Troy Wicker's murder, even though no physical evidence linked Mr. Arthur to the crime. The prosecution's star witness, Judy Wicker, was convicted of committing the same crime and sentenced to life imprisonment. According to the prosecution's theory of the case, Judy Wicker hired Mr. Arthur to murder her husband. But she initially claimed that a burglar had raped her and murdered her husband. At her own trial, Judy Wicker denied that Mr. Arthur was involved in her husband's murder. But she changed her story and testified against Mr. Arthur during his trial in 1991. As a result of her testimony, Judy Wicker was

released from prison after serving only a few years of a life sentence.

Throughout various proceedings in the state and federal courts, Mr. Arthur has maintained his innocence and sought access to several pieces of physical evidence for purposes of DNA testing, including Judy Wicker's rape kit prepared on the morning of the murder. The State opposed Mr. Arthur's requests for DNA testing, and Mr. Arthur litigated his right to the physical evidence for six years without success.

This Court set an execution date of July 31, 2008 for Mr. Arthur. On July 28, 2008, an inmate at St. Clair Correctional Facility, Bobby Ray Gilbert, confessed in a sworn affidavit that he had murdered Troy Wicker. Gilbert stated that he had an affair with Judy Wicker who paid him to kill her husband. Gilbert also stated that he disguised himself as an African-American by wearing a wig before, during and after the murder, and that he had unprotected sex with Judy Wicker after committing the crime. Based on Gilbert's confession, on July 29, 2008, Mr. Arthur filed an emergency Rule 32 petition for postconviction relief, asserting a claim of actual innocence and requesting DNA

testing to help prove that claim. The State opposed the petition on July 30, 2008, and disclosed for the very *first time* that the rape kit – which had been the subject of several years of litigation and numerous judicial decisions – could not be located. On July 30, 2008, this Court issued an order staying Mr. Arthur's execution and remanded the case to the Jefferson County Circuit Court to adjudicate Mr. Arthur's Rule 32 petition.

In connection with his petition, Mr. Arthur filed a motion for access to DNA evidence and discovery, which sought access to the physical evidence for DNA testing purposes and discovery relating to the whereabouts of the rape kit. On January 28, 2009, Mr. Arthur filed an amended Rule 32 petition, adding a claim that the State's failure to preserve the rape kit combined with its failure to inform Mr. Arthur, his counsel or any court of its alleged destruction, amounted to a violation of Mr. Arthur's constitutional right to due process.

On April 14 and 15, 2009, the Jefferson County Circuit Court held an evidentiary hearing. Mr. Arthur presented four witnesses: Gilbert, inmates Steve Murphy and Charles Hastings, and Dr. Norah Rudin, a forensic DNA

expert. Although Gilbert invoked the Fifth Amendment during his testimony, he affirmed that the information in his confession was true. Messrs. Hastings and Murphy confirmed that Gilbert had confessed to them in 2006 or 2007 that he had murdered Troy Wicker, contradicting the State's claim that Gilbert had fabricated his confession just before Mr. Arthur's 2008 execution date. Dr. Rudin testified as to the types of DNA testing that could be conducted on the available evidence and what such testing could show.

The State presented thirteen witnesses, including several corrections officers and three jailhouse snitches. Though two of the snitches, Brian Barnes and Jeffrey Holmes, claimed that Gilbert told them that his planned confession was a fabrication, neither produced evidence beyond their testimony and both admitted that they sought to benefit from testifying on behalf of the State. In each of his three prior letters written to the Attorney General's office regarding his testimony, Mr. Barnes sought assistance to gain admission into a parole program known as "Life Tech". (Rule 32 Transcript at 146.) Likewise, Mr. Holmes testified that in meeting with the State prior to

his testimony, he had discussed his upcoming parole hearing and sought a favorable recommendation from the Attorney General's office. (Rule 32 Transcript at 287-88.)

The State also called Judy Wicker. Although she testified that she had never met Gilbert and that Mr. Arthur killed her husband,¹ she also admitted that she wanted to move on with her life and did not want Mr. Arthur to get a new trial. (Rule 32 Transcript at 322-23.)

Angelo Della Manna, the chief of forensic biology and DNA at the Alabama Department of Forensic Sciences (ADFS), testified about the search for Judy Wicker's rape kit and its likely whereabouts. He concluded that the rape kit had been destroyed sometime during the 1980s. Mr. Della Manna, however, was not employed by ADFS at any time relevant to the creation and purported destruction of the rape kit.

At the conclusion of the two-day hearing, the Rule 32 court denied Mr. Arthur's claim relating to the rape kit and ordered limited DNA testing on the available evidence, including the wig worn by the perpetrator during the crime,

¹ Judy Wicker's claims were never fully tested through cross-examination because the repeated attempts by Mr. Arthur's counsel to examine her credibility were blocked when constant objections from the State, which were made to several questions posed to Judy Wicker, were sustained.

Judy Wicker's bloody clothing and a hair found at the scene of the crime. Because the State claimed to have lost or destroyed Judy Wicker's rape kit, it was not tested.

On July 9, 2009, ADFS issued its report on the DNA test results. Neither Mr. Arthur's nor Gilbert's DNA was detected on any of the evidence. Moreover, a critical piece of evidence – the wig worn by the perpetrator – was not subjected to DNA testing because ADFS lacks the technology to develop a DNA profile on this evidence.² And although DNA testing of semen stains on Judy Wicker's panties and jeans matched biological material presumably from Troy Wicker, such test results do not shed light on whether Gilbert's confession is truthful.

On August 10, 2009, the Rule 32 court held a hearing on the DNA results. Mr. Della Manna testified about the tests conducted by ADFS, while Dr. Keith Inman, a forensic DNA expert, testified that additional, more advanced testing could and should be done on the wig to develop a profile that might match either Gilbert or Mr. Arthur. At the conclusion of the hearing, the court denied

² ADFS' sampling and extraction techniques were unable to isolate a quantity of DNA material from the wig sufficient to be recognized by the DNA typing protocols employed by ADFS.

Mr. Arthur's request for more advanced DNA testing and ruled from the bench that it was denying Mr. Arthur's Rule 32 petition because the DNA results and other evidence demonstrated that Gilbert was lying, and that he and Mr. Arthur "defrauded" the court. (Order at 23.) On September 1, 2009, the court entered its written order, denying Mr. Arthur's claims.

Argument

On July 30, 2008, this Court stayed Mr. Arthur's execution to allow the Jefferson County Circuit Court to review Mr. Arthur's claim of actual innocence. The Rule 32 court issued a ruling replete with factual and legal errors that have yet to be reviewed by *any* court. To curtail appellate review in a death penalty case is unconscionable, especially where, as here, the petitioner has consistently maintained his innocence, no biological evidence tested to date has ever linked him to the crime, none of his DNA was detected on the available evidence and additional DNA testing could help confirm or refute his claim of innocence. Full appellate review of the trial court record is critical to ensure that an innocent man is not executed.

I. The DNA Test Results Do Not Prove That Gilbert's Confession Is False.³

The "most important[]" factor in the Rule 32 court's decision to deny Mr. Arthur relief was its determination that the DNA test results proved Gilbert's confession was false. (Order at 18.) Specifically, the court reasoned that Gilbert's claim that he had sex with Judy Wicker immediately after the murder was false, because the semen found on Judy Wicker's underwear and jeans matched that of her husband, Troy Wicker, and because ADFS could find no DNA evidence linking Gilbert to the crime. (Order at 18-23.) The court's conclusion is not supported by the DNA tests or the record.

The DNA tests merely establish that Judy Wicker had sexual intercourse with her husband at some time prior to having him murdered. It may have been days before, however, as even Mr. Della Manna testified that it was not possible to deduce from the DNA tests how long prior to the murder Judy and Troy Wicker had sex. (Rule 32 Transcript at 430.) The fact that Judy Wicker had sex with her

³ Although Mr. Arthur is appealing the trial court's order on numerous grounds, for the purpose of this opposition, he highlights only those errors in the court's order with respect to analysis of the DNA results, which the court stated was the most significant factor in its conclusion that Mr. Arthur was not entitled to relief. (Order at 18.)

husband in the days leading up to his murder is not at all probative of whether she also had sex with Gilbert after her husband's murder.

The court's misplaced reliance on these tests was due to its mistaken belief that if Gilbert had engaged in sexual intercourse with Judy Wicker, his semen necessarily would have been on her clothing. (Order at 21.) But nothing from Gilbert's affidavit suggests, much less requires, that for his confession to be true his semen must have been on Judy's underwear or jeans. To be sure, Gilbert claims he had sex with Judy Wicker (Gilbert Aff. ¶ 11), but for the jeans and panties to have contained his semen as a result of that sexual activity, Judy Wicker would have needed to put her panties back on after intercourse, allowing the mixture of male and female DNA following Gilbert's ejaculation to be released onto the fabric of the underwear. Neither Gilbert's affidavit nor any of his testimony suggests that, after having sex, Judy Wicker put her underwear back on. Therefore, contrary to the court's conclusion, the DNA results do not disprove Gilbert's affidavit.

Moreover, the record indicates that Judy Wicker did not put her clothes back on after any sexual intercourse in which she engaged on the morning of her husband's murder. It is beyond dispute that Judy Wicker was not wearing her panties or jeans when the police arrived at her home on the morning of the murder, and that she did not put either item of clothing back on after the police arrived at the scene. Indeed, the Rule 32 court made a finding to this effect. (Order at 26-27; see also Order at 20-21 (citing testimony of an officer from the crime scene that the panties and jeans were collected from the den floor of the Wicker residence); Rule 32 Transcript at 430-42.) Thus, the weight of the evidence, including Gilbert's affidavit, the testimony of law enforcement personnel and the DNA results, is not inconsistent with Gilbert's claim that he and Judy Wicker had intercourse after Troy Wicker's murder.

The only evidence to the contrary was the testimony of Judy Wicker, a convicted murderer and admitted perjurer. As she made clear during the Rule 32 hearing, Judy Wicker did not want to revisit the past and she did not want Mr. Arthur to be granted a new trial. (Rule 32

Transcript at 322-23.) In fact, Judy Wicker expressed to the media that she is "sick" of delays and eagerly anticipating Mr. Arthur's execution: "Me and the kids can't put this behind us until he is finally executed." (Dennis Sherer, *Alabama Death Row Has Strong Shoals Presence*, Florence Times Daily, Sept. 14, 2009.) When the Rule 32 court asked Judy Wicker about the results of the rape kit, she replied that the DNA was Troy's. (Rule 32 Transcript at 324.) The credibility of this testimony is obviously suspect for multiple reasons, not the least of which is Judy Wicker's history of perjuring herself on the witness stand. (See Rule 32 Transcript at 315.) Furthermore, even if Gilbert and Judy Wicker did have sex, Judy Wicker had no reason to be truthful because the State had recently and conveniently revealed that the only evidence that could prove her a liar – the rape kit – was destroyed over two decades ago. And, in any event, relying on the testimony of a known perjurer is a long way from science proving Gilbert's affidavit to be false, as the court mistakenly ruled.

II. More Advanced DNA Testing On The Wig Could Confirm Gilbert's Confession.

Contrary to the Rule 32 court's findings, the results of the limited DNA testing conducted by ADFS do not "prove Bobby Gilbert's affidavit is false and incredible" (Motion at 7), nor do they "confirm[] that Gilbert and Arthur attempted to perpetrate a fraud on this Court." (Motion at 8.) The DNA test results showed no match to either Gilbert or Mr. Arthur on any of the physical evidence. The court mistakenly interpreted this as proof that DNA testing could not confirm the veracity of Gilbert's affidavit. (Order at 18.)

The testimony at the Rule 32 hearing showed that more advanced DNA testing on the wig – which all parties agree was worn by the murderer – could confirm Gilbert's truthfulness. Although Mr. Della Manna testified that the tests and equipment available to ADFS were likely insufficient to obtain results from the wig (Rule 32 Transcript at 551-52), Dr. Inman testified that more advanced DNA testing is available and could confirm or refute Gilbert's confession. (Rule 32 Transcript at 521-22, 539-40.) Such advanced DNA testing on the wig could be conducted quickly and at no cost to the State. The Rule 32

court's failure to allow additional testing was clear error. Executing Mr. Arthur without testing evidence that unquestionably could identify Troy Wicker's true murderer would be a miscarriage of justice.

Conclusion

Until the outstanding factual and legal questions relating to Mr. Arthur's long-standing claim of innocence are fully resolved, it is premature and unjust to set an execution date. The State of Alabama should not be permitted to execute Mr. Arthur before he receives the appellate review to which he is entitled.

For the foregoing reasons, the Court should DENY the State of Alabama's Motion to Set an Execution Date for Mr. Arthur.

Dated: September 25, 2009

Respectfully submitted,

Suhana S Han *HAB*

Suhana S. Han
Jordan T. Razza
125 Broad Street, Rm. 2522
New York, New York 10004
(212) 558-4000
(212) 558-3588 (facsimile)
hans@sullcrom.com
Counsel for Thomas D. Arthur

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of
September, 2009, I caused to be served by U.S. mail a copy
of the foregoing on:

J. Clayton Crenshaw, Esq.
Office of the Attorney General
Capital Litigation Division
500 Dexter Avenue
Montgomery, Alabama 36130

Suhana S Han 11AB
Suhana S. Han