

circumstances, the State of Alabama should not be permitted to execute Mr. Arthur now.

Furthermore, although the State argues that the United States Supreme Court's decision in *Baze v. Rees*, No. 07-5439, 2008 U.S. LEXIS 3476 (U.S. Sup. Ct. Apr. 16, 2008) "removed any question as to the constitutionality of Alabama's lethal injection protocol," the State is wrong. The decision in *Baze* adjudicated the constitutionality of the lethal injection protocol in Kentucky. Mr. Arthur is currently appealing the dismissal of his § 1983 action challenging Alabama's new lethal injection protocol, and this Court should not set any execution date until Mr. Arthur's claims are fully and finally adjudicated.

This Court thus should deny the State of Alabama's premature motion to set a date for the execution of Thomas D. Arthur for the following reasons:

1. Despite the fact that no physical evidence linked Mr. Arthur to the murder of Troy Wicker, Mr. Arthur was sentenced to death based almost exclusively on the testimony of a convicted murderer

and admitted perjurer: the victim's wife, Judy Wicker, who, at the time of her testimony was serving a life sentence for the very same crime. Although Judy Wicker previously had testified under oath at her own trial that Mr. Arthur was not involved in her husband's murder, but rather that a burglar assaulted her and killed her husband, she changed her testimony at Mr. Arthur's trial in return for the proverbial "get out of jail free" card.

2. Mr. Arthur's actual innocence claims have never been reviewed on the merits by a federal court. Notwithstanding Mr. Arthur's diligence in attempting to present his collateral claims on a timely basis and the circumstances that prevented him from doing so, the United States District Court refused to toll the limitations period and dismissed his *first* and only federal habeas petition as untimely. The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of Mr. Arthur's federal habeas petition, and the United States Supreme Court denied Mr. Arthur's petition for a writ of certiorari on April 16, 2007. Consequently, Mr. Arthur stands to be executed without

ever having received any state or federal collateral review of his trial and death sentence.

3. Mr. Arthur has diligently sought access to the DNA evidence in the State's custody. In 1991, Mr. Arthur, through counsel, filed a Motion to Inspect, Examine and Test Physical Evidence. The trial court, however, never ruled on this motion. In connection with Mr. Arthur's habeas proceedings, he filed a motion to conduct discovery, which was denied by the United States District Court for the Northern District of Alabama.

4. In April 2007, Mr. Arthur filed an action pursuant to 42 U.S.C. § 1983, requesting access to physical evidence for DNA testing. The State of Alabama moved to dismiss the complaint, which the United States District Court for the Middle District of Alabama granted, and the dismissal was affirmed by the Eleventh Circuit Court of Appeals. The United States Supreme Court denied Mr. Arthur's Petition for a Writ of Certiorari.

5. Although courts have refused to grant any relief to Mr. Arthur, Governor Riley is authorized

under his executive powers to direct the Attorney General's Office to provide Mr. Arthur's counsel with access to the DNA evidence. Despite the fact that the Innocence Project, an internationally renowned organization that specializes in DNA exonerations, supports Mr. Arthur's request, Governor Riley has refused to grant such request.

6. DNA testing, the cost of which would be borne entirely by Mr. Arthur's pro bono counsel, could be accomplished in a matter of weeks and could help to demonstrate Mr. Arthur's innocence. Neither the State of Alabama nor the family of Troy Wicker has any interest in the execution of an innocent man. The State should not be permitted to execute Mr. Arthur before DNA testing is conducted.

7. Mr. Arthur also has pending in the Eleventh Circuit Court of Appeals an appeal of the dismissal of his lawsuit challenging the constitutionality of Alabama's revised lethal injection protocol on timeliness grounds. Contrary to the State's assertions, *Baze* did not adjudicate the constitutionality of Alabama's lethal injection

protocol. In any event, Mr. Arthur's § 1983 action was dismissed on timeliness grounds. Unlike the petitioner in *Baze*, Mr. Arthur was never able to conduct any discovery with respect to Alabama's protocol.

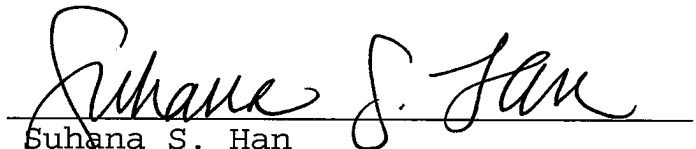
Mr. Arthur respectfully requests that this Court refrain from setting any execution date until all of his lethal injection claims have been fully and finally adjudicated.

CONCLUSION

For the foregoing reasons, the Court should deny the State of Alabama's renewed motion to set an execution date, and order that no execution date be set until such time as: (1) the State of Alabama provides Mr. Arthur with access to the DNA evidence and the testing of such DNA evidence is completed; and (2) Mr. Arthur's lethal injection challenge has been fully and finally adjudicated.

Dated: New York, New York
April 25, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2008, I caused to be served by United States Express Mail a copy of the attached Memorandum in Opposition to the State of Alabama's Motion to Set an Execution Date on:

J. Clayton Crenshaw, Esq.
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