

IN THE SUPREME COURT OF ALABAMA
Execution Date: July 31, 2008

EX PARTE THOMAS D. ARTHUR)	
)	
In re: State of Alabama,)	
)	
Petitioner,)	
)	
v.)	No. 1951985
)	
Thomas D. Arthur,)	
)	
Respondent.)	

**STATE'S OPPOSITION TO THOMAS ARTHUR'S MOTION FOR ACCESS
TO EVIDENCE**

On July 19, 2008, Thomas Arthur (hereinafter "Arthur") filed a motion in this Court seeking access to evidence for DNA testing purposes to allow him to support a future post-conviction claim of innocence.¹ This Court should deny Arthur's motion because, as this opposition demonstrates, it is based on misrepresentations of fact and because it constitutes

¹ The Clerk's office informed undersigned counsel that Arthur's motion was filed on July 18, 2008. The motion Arthur served on the State, however, purports to have been filed on July 19, 2008. Further, the postmark on envelope used to serve the State establishes that the State's copy of Arthur's motion was mailed on Saturday the 19th. See (State's Exhibit 1) The State, however, did not receive Arthur's motion until July 23, 2008.

nothing more than an additional attempt (of which there have been many) to delay Arthur's execution.²

In his motion, Arthur urges this Court to grant him access to the following pieces of physical evidence collected at his crime scene: 1) Judy Wicker's rape kit; 2) hairs and a wig from Judy Wicker's car; 3) Judy Wicker's clothing; and 4) debris and hairs vacuumed from the Wicker's residence. Arthur asserts that DNA testing of these items of evidence "could support his claim of innocence." (Arthur Motion at 3) Arthur further contends that he stands to be executed "without ever having received any state or federal substantive collateral review of his trial and death sentence." (Arthur's Motion at 3) Stated plainly, both of Arthur's assertions are false.

As discussed in detail below, three federal judges and the Eleventh Circuit have reviewed and rejected his claim of innocence and his requests for discovery of the above listed items to support his claim is innocence. Every court that reviewed Arthur's request

² On July 23, 2008, the Eleventh Circuit denied Arthur's request for a stay of execution relating to Arthur's third federal civil rights action. (State's Exhibit 2)

to examine the above listed items have come to the same conclusion - favorable test results will not establish Arthur's innocence.

For instance, Arthur filed an untimely petition seeking federal habeas review.³ In an attempt to

³ Arthur argues that he was diligent "in attempting to present his collateral claims." (Arthur Motion at 2-3) This statement is false. Arthur waited to file his state post-conviction petition until after the two year statute of limitations had expired. Arthur v. State, 820 So. 2d 886, 887 (Ala. Crim. App. 2001). Arthur also failed to file his federal habeas petition within the applicable statute of limitations. Arthur v. Allen, 452 F.3d 1234 (11th Cir. 2006). Arthur's refusal to file his post-conviction petitions in a timely manner establishes that he has not been diligent. In fact, Arthur has not been diligent in seeking any review in any court beyond his direct appeal.

For instance, on August 12, 2004, during oral argument before the Eleventh Circuit regarding Arthur's federal habeas action and request for discovery of physical evidence, Judge Barkett informed Arthur's attorney Suhana Han (who represents Arthur here) that Arthur could seek access to physical evidence (the same evidence he seeks here) in a § 1983 action. Arthur v. King, 500 F.3d 1335, 1342, n.5 (11th Cir. 2007). Despite being informed in 2004 that he could file a federal civil rights action seeking DNA testing, Arthur, through counsel, waited until April 12, 2007 (when he knew the State would seek to execute him) to file his DNA civil rights action. Id. at 1337. Because Arthur waited to file his DNA civil rights action until it would serve him best by requiring a stay of execution to litigate, the district court dismissed it on equitable grounds and the Eleventh Circuit affirmed that dismissal. Id. at 1337-44; see also Arthur v. Allen, 248 Fed. Appx. 128, 130-31, 2007 WL 2709942, at* 2-4 (11th Cir. Sept. 17, 2007); Arthur v. Allen, CV-07-0722-WS-M, 2007 WL 4105113, *1-3 (S.D. Ala. Nov. 15, 2007) (dismissing Arthur's third federal civil rights action due to his unreasonable delay in filing it.).

Further establishing Arthur's lack of diligence is the timing of his current motion. The Eleventh Circuit affirmed the dismissal of Arthur's DNA § 1983 lawsuit on September 21, 2007, and the Supreme Court denied certiorari on November 26, 2007. Arthur v. King, 500 F.3d 1335, 1342, n.5 (11th Cir. 2007); Arthur v. King, 128 S. Ct. 660 (2007). Thus, in November of last year, Arthur was aware that the federal courts were not going to grant him access to the evidence he seeks; however, he waited until July 19, 2008 (less than two weeks before his scheduled execution) to file his motion in this Court. Arthur's decision to wait until the last minute to turn to this Court for relief establishes that his true intent is to delay his execution. See Jones v. Allen, 485 F.3d 635, 640 (11th Cir. 2007) (recognizing that the timing of Jones's civil rights action "leaves little doubt that the real purpose behind his claim is to seek a delay of his execution. . . .").

overcome the fact that his habeas petition was time barred, Arthur alleged a gateway actual innocence claim and sought DNA testing of the above listed items to attempt to prove this claim. Rejecting Arthur's claim of innocence and request for discovery, United States District Judge Edwin Nelson held that DNA testing would not establish Arthur's innocence:⁴

Although Arthur generally claims that a new examination of the evidence might obtain results contrary to Wicker's version of events, his specific allegations do not support his claim. He has a notion that blood typing or DNA testing of Judy Wicker's bloody clothing might show someone else assaulted her, but there is no basis in the record for his belief that the blood on her clothing belonged to her assailant. Rather, the evidence was that Wicker was assaulted from behind, did not struggle, and was bleeding due to extensive head and face injuries. Arthur contends examination of the rape kit and vacuum sweepings could support Wicker's prior testimony about being assaulted and raped by

In sum, Arthur's litigation record establishes that he has not (as he represents to this Court) been diligent in seeking review of his claims. Instead, he has filed three § 1983 actions and this motion when such filings would serve him best - when he could use these actions to attempt to delay his execution further. See Jones v. Allen, 485 F.3d 635, 640 (11th Cir. 2007) (recognizing that the timing of Jones's civil rights action "leaves little doubt that the real purpose behind his claim is to seek a delay of his execution. . . ."). Consequently, Arthur's statement that he has been diligent is false.

⁴ This Court should note that a gateway claim of actual innocence, which was recognized in Schlup v. Delo 513 U.S. 298 (1995), as an exception to federal procedural default, cannot, by definition, be barred by the statute of limitations. Thus, the federal district court's determination that Arthur could not establish actual innocence was a ruling on the merits of his gateway claim.

someone else, but merely showing another person was with Judy Wicker or in her home at some unspecified time does little to support her prior testimony or further impeach her testimony about Arthur's involvement. At best, it would provide some additional inference about Judy Wicker's veracity, a subject which was amply covered during the trial. Arthur also speculates that DNA tests of the wig and hair samples from the car could show Wicker fabricated her testimony that Arthur wore a wig and dark face makeup to disguise himself as a 'black man.' However, expert testimony at the trial indicated the hair samples were of African American origin. Arthur provides no support for his speculation that different tests could impeach Wicker's testimony. Experts testified the cartridge casings and bullets were consistent with the type of ammunition Patricia Green obtained for Arthur on the day prior to the murder. Arthur hopes that his tests might now show an inconsistency, but does not explain the reasons for his expectation. Finally, Arthur seeks to resolve a discrepancy he perceives in the evidence. He points to expert testimony indicating gunpowder residue on the pillowcase found beneath Troy Wicker's head show the murder weapon was not discharged at close range. This, he argues, conflicts with Wicker's testimony that her husband was shot while sleeping and the autopsy report that Troy Wicker died of a gunshot wound to the right eyelid 'fired at a close range.' He seeks to examine the pillowcase and crime scene photographs to resolve this discrepancy. Judy Wicker did not testify about the distance between the killer and her husband so the discrepancy is not relevant to her testimony. Any discrepancy between the expert witnesses was heard and resolved by the jury and no further investigation is warranted.

Arthur v. Haley, No. CV-01-N-0983-S, (Judge Nelson's opinion at 7 n.6.)

In denying Arthur's motion to alter or amend Judge Nelson's judgment, United States District Judge Scott Coogler reviewed his claim of innocence and also held that DNA testing would not establish Arthur's innocence:

Arthur seeks DNA testing of the blood on Judy Wicker's clothing, stating that he wants to show her assailant was someone other than him, but offers no 'reason to believe' that the blood on Judy Wicker's clothing came from anyone other than Judy Wicker. Arthur seeks to examine the 'afro' wig and Negroid hair samples taken from Judy Wicker's car, contending testimony that the hair was forcibly removed and the inside of the wig was free of hair was inconsistent with Wicker's testimony that Arthur wore a black wig to disguise himself. While there has been no explanation for the hair found in the car and the lack of hair in the wig, the findings are not inconsistent with Wicker's testimony. Further, Arthur offers no 'reason to believe' his examination would reveal anything other than what is already established, and therefore, there is no 'reason to believe' his examination could show he is 'more than likely' innocent.

Arthur seeks access to the bullet recovered from Troy Wicker's body and four spent cartridge casings found at the scene, claiming Patricia Green's testimony that she sent a third party to purchase .22 mini magnum long rifle bullets for Arthur on the day before the murder was insufficiently

corroborated by the ballistic expert's testimony that the recovered bullet was a .22 long rifle caliber consistent with a CCI brand mini mag and the four shell casings were CCI brand .22 long or long rifle casings. But, Green's testimony was consistent with the testimony of the ballistic expert and does not require corroboration. Moreover, Arthur does not offer 'reason to believe' that his examination of the bullet and casings will reveal any different information from that already discovered by the experts.

Arthur seeks access to a gunpowder-tainted pillowcase and crime scene photographs arguing he must resolve an inconsistency between the ballistic expert's testimony and the autopsy report regarding the 'critical issue' of whether the gun was fired at close or far range. However, he offers no explanation for his conclusory claim that this discrepancy is 'critical' to his claim of actual innocence. He implies that he might be able to impeach Judy Wicker's testimony that her husband was sleeping when he was shot, but Wicker did not testify about the distance from which Troy Wicker was shot.

Arthur seeks to test Judy Wicker's rape kit. He alleged in his initial motion and in his present motion that Judy Wicker previously testified a 'black man' forced his way into her home, beat her, raped her, and killed her husband, but he did not point to any evidence of record that supports his assertion. This Court's review of the published opinions and the transcript of Arthur's last trial did not uncover any testimony that Judy Wicker was raped or that she had sexual intercourse on the morning of her husband's murder. Arthur has not offered any reason to believe that testing the rape kit would help show he was 'more likely than not' actually innocent of Troy Wicker's murder. Similarly, Arthur has

not explained how examination of vacuum sweepings of the Wicker home could show he is 'more likely than not' actually innocent.

Finally, none of the physical evidence can help Arthur establish his gateway claim of actual innocence because such a claim must rest on 'new reliable evidence' which was 'not presented at trial.' Schlup v. Delo, 513 U.S. 298, 324 (1995). Although Arthur claims some of the items were not tested, he does not claim or show that the items or proposed tests were unavailable at the time of his trial. Many of the items were admitted at trial. Thus, this evidence is not 'new' as required by Schlup.

Arthur v. Haley, No. CV-01-N-0983-S. (Judge Coogler's opinion at 5-7).

Likewise, the district court reviewing Arthur's § 1983 action seeking access to evidence for DNA testing analyzed whether the evidence Arthur seeks could establish his innocence and found that "Arthur cannot establish that DNA testing, even if the testing results in a favorable outcome, will exonerate him of murder." Arthur v. King, No. 2:07-cv-319-WKW, 2007 WL 2381992, at *7 (M.D. Ala. Aug. 17, 2007). On appeal from the district court's dismissal of his § 1983, the Eleventh Circuit also found that "[t]he evidence which [Arthur] seeks . . . will not clearly exonerate him." Arthur v.

King, 500 F.3d 1335, 1342 (11th Cir. 2007) (emphasis added).

Thus, after three United States District Judges and the Eleventh Circuit have reviewed and soundly rejected Arthur's claim of innocence and his requests for access to evidence to support that claim, Arthur's assertion that DNA testing "could support his claim of innocence" is false.⁵

Now, less than two weeks before his scheduled execution and having failed to convince three federal district judges and the Eleventh Circuit that DNA testing could establish his factual innocence, Arthur turns to this Court and seeks an order allowing him access to the above listed items. Arthur alleges that DNA testing of these items "could provide powerful evidence of [his] innocence" and "could support his

⁵ In a further attempt to support his motion for access to evidence, Arthur argues that the Innocence Project, the former Attorney General of Ohio, and other organizations and individuals from around the world support his request for DNA testing. (Arthur's Motion at 5) It is safe to assume, however, that these organizations and individuals incorrectly believe, as Arthur inaccurately represents to this Court, that DNA testing could support a claim of innocence. See (Arthur Motion at Exhibit 5) (showing that the former Ohio Attorney General believes that DNA testing could answer factual questions relating to "what, if any, role Arthur played in the crime."). As the State explained earlier, however, this inaccurate belief in the relevance of testing evidence from Arthur's crime has been debunked by three federal judges and the Eleventh Circuit. Consequently, the misinformed

claim of innocence," necessarily a future post-conviction claim. (Arthur Motion at 3, 9) Contrary to Arthur's assertions, as three federal district judges and the Eleventh Circuit have held, favorable results of DNA testing on the evidence Arthur seeks will not, and cannot, establish or support a claim of innocence. Because the evidence Arthur seeks could not support a claim of innocence, his only purpose for seeking access to such evidence is to find some basis to delay his execution further - a future (and frivolous) post-conviction claim.

For instance, if DNA testing of debris vacuumed from the Wickers' den and hair collected in the Wickers' home does not establish that Arthur left biological evidence in the Wickers' den, Arthur will file another state or federal post-conviction petition alleging that these results establish his innocence. However, as the federal courts have already found, the fact that Arthur did not leave biological evidence in the Wickers' den cannot prove that he did not murder Troy Wicker. Arthur's inability to prove his innocence

requests of individuals and organizations should not be considered by

will not prevent him from filing a frivolous post-conviction claim for the purpose of delaying his execution further.

This Court, like the three federal courts before it, should see through Arthur's latest delay tactic and deny his motion for access to physical evidence.

Conclusion

For the forgoing reasons, the State of Alabama respectfully requests that this Court deny Arthur's motion for access to evidence.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL




Jasper B. Roberts, Jr. (Rob157)
ASSISTANT ATTORNEY GENERAL

this Court.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2008, I did serve a copy of the foregoing on the attorneys for Arthur by email and by placing the same in the United States Mail, first class, postage prepaid and addressed as follows:

Suhana S. Han
(hans@sullcrom.com)
Sara L. Manaugh
(manaughs@sullcrom.com)
Jordan T. Razza
(razzaj@sullcrom.com)
Jennifer L. Parkinson
(parkinsonj@sullcrom.com)
125 Broad Street
New York, NY 10004


Jasper B. Roberts, Jr.
Assistant Attorney General

ADDRESS OF COUNSEL:

Office of the Attorney General
Capital Litigation Division
Alabama State House
11 South Union Street
Montgomery, AL 36130
(334) 353-4848
(334) 353-3637 Fax
jroberts@ago.state.al.us

EXHIBIT 1



UNITED STATES POSTAL SERVICE

Flat Rate Mailing Envelope

For Domestic and International Use

Visit us at usps.com



EB942435348US



UNITED STATES POSTAL SERVICE®

Post Office To Addressee

Addressee Copy

Label 11-B, March 2004



02 1M \$23.00 0004240709 JUL 19 2008 MAILED FROM ZIP CODE 10004



When used internationally affix customs declarations (PS Form 2976, or 2976A).

800-735-8789

ORIGIN (POSTAL SERVICE USE ONLY)

PO ZIP Code: 10007

Date Accepted: 7/19/08

Time Accepted: 11:50 AM

Flat Rate or Weight lbs. 16 ozs.

Day of Delivery: Next 2nd 3rd/4th Day

Scheduled Date of Delivery: 21

Month: 7

Scheduled Time of Delivery: 3 PM

COOD Fee: \$

Insurance Fee: \$

Postage: \$ 16.50

Return Receipt Fee: \$

Military Neon 3 PM

2nd Day 3rd Day

Int'l Alpha Country Code: A1E

Acceptance Emp. Initials: A1E

FROM: (PLEASE PRINT) PHONE ()

FOR PICKUP OR TRACKING
Visit www.usps.com
Call 1-800-222-1811



Visit us at usps.com

We Deliver

DELIVERY (POSTAL SERVICE USE ONLY)

Delivery Attempt: AM PM Employee Signature

Day: AM PM Employee Signature

Delivery Date: AM PM Employee Signature

Time: AM PM Employee Signature

CUSTOMER USE ONLY

NO DELIVERY Weekend Holiday Master Signature

WAVAYER OF SIGNATURE (Domestic Mail Only)
Additional merchandise insurance is void if customer requests waiver of signature. (Must deliver to the residence without obtaining signature. This waiver is not valid for international destinations. Signature required for delivery of insured mail. Signature required for delivery of insured mail. Signature required for delivery of insured mail. Signature required for delivery of insured mail.)

TO: (PLEASE PRINT) PHONE ()

ZIP + 4 (U.S. ADDRESSES ONLY, DO NOT USE FOR FOREIGN POSTAL CODES.)

FOR INTERNATIONAL DESTINATIONS, WRITE COUNTRY NAME BELOW.

1 2 3 4 5 6 7 8 9 0 + 1 2 3 4 5 6 7 8 9 0



Cradle to Cradle Certification is awarded to products that pursue an innovative vision of ecologically-intelligent design that eliminates the concept of waste. This USPS® packaging has been certified for its material content, recyclability, and manufacturing characteristics.

Please recycle.



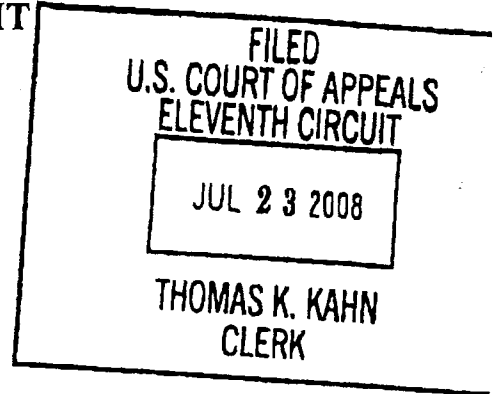
EP13F

EXHIBIT 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-15877-P



THOMAS D. ARTHUR,

Plaintiff-Appellant,

versus

ALABAMA DEPARTMENT OF CORRECTIONS,
RICHARD ALLEN,
HOLMAN CORRECTIONAL FACILITY,
GRANTT CULLIVER,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Alabama

Before BIRCH, BLACK and BARKETT, Circuit Judges.

BY THE COURT:

Plaintiff-appellant Thomas D. Arthur seeks a stay of his execution which is currently scheduled for Thursday, 31 July 2008, pending his appeal of the district

484 155 0002 Circuit Clerk's Office 10:27:11 a.m. 07-24-2008 3/7

court's dismissal of his complaint, filed pursuant to 42 U.S.C. § 1983, which challenged Alabama's lethal injection protocol. The district court dismissed Arthur's complaint in November 2007 because he unreasonably delayed challenging the constitutionality of the protocol. At that time, Arthur's execution was set for 6 December 2007.

On 5 December 2007, Arthur was granted a stay of execution by the Supreme Court pending his petition for writ of certiorari in a prior appeal, Arthur v. Allen, 248 Fed. Appx. 128 (11th Cir. 2007). In that case, we affirmed the district court's dismissal of Arthur's § 1983 challenge of Alabama's lethal injection protocol. Id. We held that the district court did not abuse its discretion in dismissing the action due to laches because "[t]here was no justification for Arthur's failure to bring his lethal injection challenge earlier to allow sufficient time for full adjudication on the merits of this claim." Id. at 132-33. Following the issuance of Baze v. Rees, __ U.S. __, 128 S. Ct. 1520 (2008) (upholding the constitutionality of Kentucky's similar lethal injection protocol), the Supreme Court denied Arthur's petition for writ of certiorari on 21 April 2008, Arthur v. Allen, __ U.S. __, 128 S. Ct. 2048 (2008), and the Alabama Supreme Court set the new execution date.

In his motion, Arthur argues that his claim regarding the constitutionality of

Alabama's protocol was not foreclosed by the Supreme Court's decision in Baze and is currently being litigated in McNair v. Allen, No. 2:2006 cv 00696 (M.D. Ala. 2008). He maintains that he did not unreasonably delay seeking relief on this claim because he raised it before his execution date was set. Arthur also contends that he has sought and been denied access to evidence for DNA testing.

Defendants-appellees Alabama Department of Corrections, Richard Allen, Holman Correctional Facility, and Grantt Culliver respond that Arthur has unreasonably delayed seeking relief, failed to meet his burden for a preliminary injunction, and that his arguments regarding DNA are merely another attempt to relitigate this issue and are not properly before us in his appeal from the method of execution challenge.

We rejected Arthur's argument regarding unreasonable delay in Arthur v. Allen, 248 Fed. Appx. at 131-33, and in Arthur v. King, 500 F.3d 1335 (11th Cir.) (per curiam), cert. denied, __ U.S. __, 128 S. Ct. 660 (2007), when we considered his appeal from the district court's dismissal of his § 1983 action seeking access to crime scene evidence for DNA testing. In Arthur v. King, Arthur also sought a stay of execution, which, at that time, was set for September 2007. We affirmed the district court's dismissal and denied his motion for stay of execution, finding that he had unreasonable and unjustifiably delayed his request to permit a full

404 333 0002 11th Circuit Clerk's Office 10.27.07 a.m. 07-24-2008 377

adjudication on the merits absent a stay. Id., 500 F.3d at 1341-42, 1344. As we noted in Arthur v. Allen, we have previously held that "waiting until after [Alabama has filed] a motion to set the execution date is too late to avoid the inevitable need for a stay of execution and is too late to allow for a full adjudication of the merits of his action." 248 Fed. Appx. at 132 (citations, modification, and quotations omitted). We observed that "Arthur was on notice that a challenge to Alabama's method-of-execution was available under § 1983 as early as June 2006 . . . or August 2006." Id.

Arthur's claim that the merits of the lethal injection protocol are being litigated in Alabama is moot. McNair was dismissed following our vacation of the district court's grant of McNair's co-defendant's motion to stay his execution. McNair v. Allen, No. 2:06-cv-695 (M.D. Ala. Jul 11, 2008). On appeal, we held that McNair's co-defendant's 2006 challenge was barred by the statute of limitations which expired in 2004. McNair v. Allen, 515 F.3d 1168, 1170 (11th Cir.), cert. denied, __ U.S. __, 128 S. Ct. 2914 (2008).

Arthur's complaint was filed on 9 October 2007, 14 days after Alabama's 25 September 2007 announcement that it would review its execution protocol. See Document No. 1 at 1, 9; McNair, 515 F.3d at 1171. When the complaint was filed, Arthur argued that Alabama's method of execution was cruel and unusual

based on the drugs used during the procedure, the personnel performing the procedure, and the facilities used during the procedure. Document No. 1 at 11-17. Arthur believed that the protocol, which Alabama does not disclose, consisted of sodium thiopental, pancuronium bromide, potassium chloride, and saline, and was significantly the same as the "three-drug 'cocktail'" used in Kentucky. Id. at 4, 9; Document No. 22 at 1; McNair, 515 F.3d at 1179 (Wilson, J. dissenting). On 26 October 2007, Alabama "minimally" changed its execution protocol to add a "consciousness assessment" and a "second dosage of sodium pentothal" if necessary. Document No. 22 at 3; McNair, 515 F.3d at 1172 and n. 1. It does not appear that any material changes were made to the drugs used during the procedure, the personnel performing the procedure or the facilities used during the procedure, which were adopted in 2002. McNair, 515 F.3d at 1171, 1177 and n. 6.

For the same reasons that we rejected Arthur's motion for stay of execution in Arthur v. Allen, Arthur's motion for stay of execution is DENIED.

BARRETT, Circuit Judge, specially concurring in result:

I concur in the decision to deny Arthur's request for a stay of execution only because I believe we are bound by the precedent in Baze v. Rees, __ U.S. __, 128 S. Ct. 1520 (2008) and McNair v. Allen, 515 F.3d 1168 (11th Cir. 2008).