

IN THE SUPREME COURT OF ALABAMA

 EXECUTION DATE SCHEDULED FOR JULY 31, 2008

EX PARTE THOMAS D. ARTHUR	}	
	}	
In re: STATE OF ALABAMA,	}	
	}	
Petitioner,	}	Case No. 195-1985
v.	}	
	}	
THOMAS D. ARTHUR,	}	
	}	
Respondent.	}	

**EMERGENCY MOTION FOR A STAY OF EXECUTION TO PERMIT
 RULE 32 LITIGATION BASED ON NEWLY DISCOVERED FACTS THAT
 EXONERATE THOMAS D. ARTHUR**

Petitioner, Thomas D. Arthur, now incarcerated on death row at Holman Prison in Atmore, Alabama, for the murder of Troy Wicker, by and through his attorney, petitions this Court under Ala. Code §§ 12-2-2 for a stay of execution based on newly discovered evidence - **a sworn affidavit from Bobby Ray Gilbert confessing to the murder of Troy Wicker.** This evidence vindicates Mr. Arthur's longstanding claim of innocence. A stay of execution is necessary to allow Mr. Arthur to litigate the merits of his Rule 32 petition, which is

being filed today in the Tenth Judicial Circuit Court, Jefferson County, Alabama, and which seeks, among other things, access to physical evidence for DNA testing and an evidentiary hearing.

FACTS

On Friday, July 25, 2008, counsel for Mr. Arthur was informed that an inmate in St. Clair Correctional Facility, Bobby Ray Gilbert, had relevant information about Mr. Arthur's case. On Monday, July 28, 2008, counsel interviewed Gilbert, who confessed that he murdered Troy Wicker. (See Affidavit of Bobby Ray Gilbert, sworn to July 28, 2008 ("Gilbert Affidavit"), attached hereto as Exhibit A.)

In 1982, Gilbert was living in Grove Oak and working at Beason & Son Construction in Huntsville, Alabama. (Gilbert Affidavit ¶ 3.) He met Judy Wicker ("Wicker") around early January 1982 at a bar or nightclub when he was 17 years old, and they had a sexual relationship. (*Id.* ¶ 2.)

Wicker told Gilbert that her husband was physically abusive. (*Id.* ¶ 5.) Around a month after their affair began, Wicker asked Gilbert whether his

cousin, Gerald Gilbert, who had served time in prison, would be willing to kill her husband. (Id.) Bobby Gilbert told Wicker that he himself would be willing to kill Troy Wicker. (Id.) Wicker offered to give Gilbert something in return, but did not say what that would be. (Id.) Wicker and Gilbert planned the murder of Troy Wicker. Wicker asked Gilbert to wear an "Afro wig" and dark make-up as a disguise, and to meet at her house. (Id. ¶ 6.) Gilbert's cousin, Gerald, opposed the idea of meeting at the Wicker residence, so Wicker and Gilbert agreed to meet instead at the parking lot of a trade school, which was not far from the Wicker residence. (Id.)

One early morning in late January or early February 1982, Gilbert's cousin, Gerald, drove him to the designated parking lot and Wicker picked Gilbert up in her maroon-colored car. (Id. ¶ 8.) Wicker gave Gilbert an "Afro wig" and make-up, which he applied while in her car. (Id.) Wicker also told Gilbert that her husband would be in the bedroom. (Id. ¶ 9.)

When Gilbert and Wicker arrived at the Wicker residence, Gilbert went to the bedroom and found Troy

Wicker sleeping. (Id. ¶ 9.) Gilbert stood less than 20 inches from Troy Wicker and shot him in the face with a .22 sawed-off rifle. (Id.) Gilbert's father gave him this rifle when he was 7-years old, and Gilbert's cousin, Gerald, gave him ".22 caliber longs." (Id. ¶ 10.) Gilbert's cousin told him that a dancer or stripper obtained these bullets. (Id.)

After Gilbert shot her husband, Wicker held a mirror to Troy Wicker's face to see if he was still breathing. (Id. ¶ 11.) A hand mirror was recovered from the Wicker residence. (Memo to File by J.G. Wallace, April 28, 1982, attached hereto as Exhibit B.) Gilbert and Wicker ransacked the house, pulled out drawers and turned over furniture, and then had unprotected sex in the hallway. (Gilbert Affidavit ¶ 11.) Wicker asked Gilbert to "beat her up," so he punched her in the face. (Id.) Wicker also called her sister and asked her to come over. (Id. ¶ 13.)

After the murder, Gilbert drove Wicker's car back to the trade school to meet his cousin, Gerald. (Id. ¶ 12.) Gilbert was still wearing the "Afro wig" and the make-up. (Id.) Gilbert left Wicker's car in

the parking lot. (Id.) Gilbert and his cousin then drove to Morgan's Cove off of Monosanto Highway, where Gilbert threw the .22 sawed-off rifle into the lagoon. (Id. ¶ 14.)

Around two or three weeks after the murder, Gilbert met Wicker at a club called the Hourglass in Huntsville, where Wicker paid Gilbert \$2000. (Id. ¶ 15.) Wicker thanked Gilbert and suggested that they not see each other for awhile. Gilbert has not seen Wicker since that meeting. (Id.) Gilbert spent the money he received on a car, alcohol and gambling. (Id. ¶ 16.)

Last year, prior to Mr. Arthur's then-scheduled execution in September 2007, Gilbert confessed to killing Troy Wicker to various individuals and asked them to try to contact Mr. Arthur's counsel. (Id. ¶ 18.) Nobody, however, had contacted Mr. Arthur's counsel at that time. Gilbert had never spoken to Mr. Arthur's counsel until Monday, July 28, 2008. (Id. ¶ 10.) Gilbert did not come forward earlier because he was afraid to be executed and only confessed to killing Troy Wicker after the United

States Supreme Court had ruled that a minor could not receive the death penalty.¹ (*Id.* ¶¶ 19, 22.) Gilbert would be willing to provide a DNA sample. (*Id.* ¶ 20.) Testing such sample to determine if it matches the physical evidence collected in this case - including the rape kit, "Afro wig," blood-stained clothing, and hairs - could confirm that Gilbert is telling the truth when he confessed to murdering Troy Wicker.

ARGUMENT

The facts in Gilbert's sworn affidavit, if true, would completely exonerate Mr. Arthur of the crime for which he has spent 25 years on death row. For years, Mr. Arthur has sought access to the DNA evidence that he claimed could prove his innocence. For years, the State of Alabama has maintained that even if the DNA evidence did not match Mr. Arthur's, such result would fail to demonstrate Mr. Arthur's innocence. Mr. Arthur has now presented new evidence -

¹ In March 2005, the Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005), held that it is unconstitutional to sentence anyone to death for a crime he or she committed while under the age of 18.

Gilbert's sworn confession obtained just yesterday - that casts unquestionable doubt on Mr. Arthur's conviction and sentence.

If Gilbert is telling the truth, the DNA in the rape kit will match Gilbert's DNA profile. If the DNA in the rape kit matches any DNA found on the inside of the wig or other evidence found in the Wicker residence, and that profile matches Gilbert, such result will confirm both that Mr. Gilbert is guilty and that Mr. Arthur is innocent.

Mr. Arthur has for years sought DNA testing in order to identify the real killer. Now, the real killer has come forward and offered to submit to a DNA test. Proceeding with Mr. Arthur's execution in light of this powerful new evidence would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. The costs of the DNA testing will be borne entirely by Mr. Arthur's pro bono counsel and the testing can be conducted expediently. See *McKithen v. Brown*, 02-cv-1670, 2008 U.S. Dist. LEXIS 55094, at *2 (E.D.N.Y. July 21, 2008) (*Due Process Clause of the Fourteenth Amendment grants

a convicted offender access to physical evidence for the purpose of DNA testing if it can be performed with negligible cost to the state and exculpatory results would undermine confidence in the outcome of trial.")

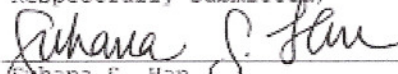
In short, in light of Gilbert's sworn confession, the State of Alabama should not proceed with Mr. Arthur's execution on July 31, 2008. Because the "penalty of death is qualitatively different" from even a life sentence, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Because someone else has confessed to committing the crime for which Mr. Arthur is about to be executed, the State of Alabama has no basis to claim that it is imposing the death penalty reliably in Mr. Arthur's case.

CONCLUSION

For the foregoing reasons, the Court should
GRANT Mr. Arthur's Emergency Motion for a Stay of
Execution to Permit Rule 32 Litigation.

Dated: July 29, 2008

Respectfully submitted,

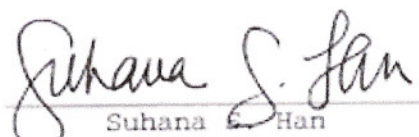


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 2008, I caused to be served by fax and by United States Postal Service Express Mail a copy of the attached Emergency Motion of Thomas D. Arthur for a Stay of execution on:

J. Clayton Crenshaw, Esq.
Office of the Attorney General
Capital Litigation Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130-1052


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