

IN THE SUPREME COURT OF ALABAMA

EX PARTE THOMAS D. ARTHUR)
)
In re: STATE OF ALABAMA,)
)
 Petitioner,) Case 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 new date for the execution of Thomas D. Arthur, which was filed concurrently with the State's application for rehearing of this Court's order granting a stay of Mr. Arthur's execution. As set forth in Mr. Arthur's opposition to the State's application for rehearing, in granting the stay, this Court carefully considered the relevant law and facts - including the sworn confession of Bobby Ray Gilbert. The State's motion to set an execution date amounts to nothing more than an end-run around this Court's sound

decision staying Mr. Arthur's execution. Moreover, because Mr. Arthur's Rule 32 petition is pending before the Jefferson County Circuit Court, the State's motion to set an execution date is premature.

Background

Mr. Arthur's execution date was previously scheduled for Thursday, July 31, 2008. On Monday, July 28, 2008, Bobby Ray Gilbert, an inmate serving a sentence of life without parole for capital murder and other crimes, confessed to the murder for which Mr. Arthur was about to be executed. On Tuesday, July 29, Mr. Arthur filed in the Jefferson County Circuit Court an emergency Rule 32 petition based on Gilbert's sworn confession. That same day, Mr. Arthur filed in this Court a motion for a stay of execution to permit litigation of his Rule 32 petition based on newly discovered evidence.

On Wednesday, July 30, 2008, in its opposition to Mr. Arthur's motion for a stay of execution, the State of Alabama, for the very first time, admitted that it cannot find Judy Wicker's rape kit - a critical

piece of evidence that can confirm whether Gilbert is telling the truth. This is the very same rape kit that Mr. Arthur has been requesting for purposes of DNA testing since 2002. The State offered no explanation for its failure to maintain a proper chain of custody for evidence in a capital murder case, nor did it explain why it was only searching for this evidence within the past six months.

Upon review of the papers filed by both parties, this Court issued an order staying Mr. Arthur's execution.

Argument

Notwithstanding Gilbert's sworn statement that he murdered Troy Wicker, the State of Alabama seeks to set a new execution date for Mr. Arthur. Through his pending Rule 32 petition, Mr. Arthur seeks to conduct DNA testing that can confirm whether Gilbert is telling the truth. Mr. Arthur also seeks to explore the circumstances surrounding the alleged disappearance of Judy Wicker's rape kit, including the scope of the

State's search and the State's failure to preserve evidence in a capital case.

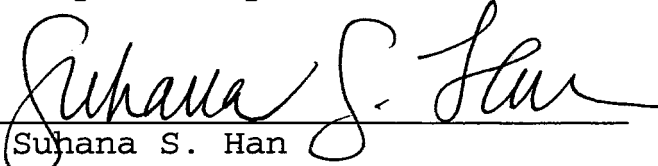
Absent resolution of these critical factual issues that relate directly to Mr. Arthur's long-standing claim of innocence, setting an execution date for Mr. Arthur would be premature. The State of Alabama should not be permitted to execute Mr. Arthur before the Jefferson County Circuit Court has had the opportunity to adjudicate Mr. Arthur's Rule 32 petition based on Gilbert's confession.

CONCLUSION

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

Dated: August 19, 2008

Respectfully submitted,



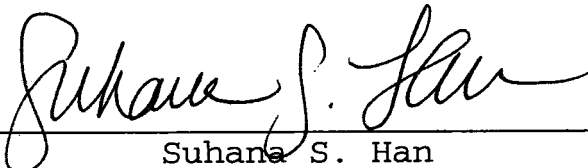
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Counsel for Thomas D. Arthur

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of August, 2008, 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
Alabama State House
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Suhana S. Han