

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

---

THOMAS DOUGLAS ARTHUR, Petitioner,

v.

TROY KING, *et al.*, Respondents.

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

**CAPITAL CASE:**  
**Execution Scheduled for September 27, 2007, at 6:00 p.m. CDT**

---

**MOTION FOR STAY OF EXECUTION**

The Petitioner, Thomas Douglas Arthur, applies to this Court pursuant to 28 U.S.C. § 2101(f) for a stay of his execution, which is currently scheduled for **Thursday, September 27, 2007 at 6:00 p.m. CDT**. Section 2101(f) provides in relevant part:

In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court.

28 U.S.C. § 2101(f). Mr. Arthur asks this Court to stay his execution to allow the Court adequate time to consider the Petition for Writ of Certiorari that he has filed herewith.<sup>1</sup>

As more fully set forth in the Petition, this case raises profound issues regarding a death-sentenced inmate's right of access to evidence for post-conviction DNA testing and the strictures on the inmate's ability to litigate such a claim.

Mr. Arthur brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Middle District of Alabama, seeking access to certain items of physical evidence in order to perform DNA testing on them at his own expense. He alleges that the results of such DNA testing could show that—consistent with the previous sworn testimony of the prosecution's star witness—a burglar committed the murder of Troy Wicker, for which Mr. Arthur was convicted and for which he was sentenced to death. The district court granted Respondents' motion to dismiss Mr. Arthur's § 1983 action pursuant to Rule 12 of the Federal Rules of Civil Procedure—not because Mr. Arthur had failed to state a claim, for it never reached this question, but because Mr. Arthur had purportedly failed to rebut a “strong equitable presumption against a stay of execution.” The Eleventh Circuit affirmed, also without reaching the legal question of whether Mr. Arthur's complaint asserted a right cognizable under 42 U.S.C. § 1983.

---

<sup>1</sup> On September 6, 2007, the Eleventh Circuit granted Mr. Arthur's motion for expedited briefing. Pursuant to the court's briefing schedule, the parties simultaneously filed their briefs on September 12, 2007. Mr. Arthur also filed a motion for a stay in the Eleventh Circuit; the Eleventh Circuit denied that motion as moot when it affirmed the dismissal of Mr. Arthur's complaint.

The Eleventh Circuit has adopted a standard, akin to the standard applicable on a motion for a preliminary injunction, that mandates dismissal of § 1983 claims brought by death-sentenced inmates if such claims cannot, in the trial court's view, be fully litigated without entry of a stay of execution (irrespective of whether the inmate has actually sought a stay). Under the Eleventh Circuit's standard, the "strong equitable presumption against a stay" could bar claims that are brought even before an execution date is set or before certiorari review of a federal habeas petition has been completed. Here, Mr. Arthur filed his § 1983 action over five months before the execution date eventually ordered by the Alabama Supreme Court and before the State had even moved for an execution date to be set.

The Eleventh Circuit is the only appellate court that has applied this standard—previously applied only in the context of method-of-execution challenges—to § 1983 actions brought by death-sentenced inmates seeking access to evidence for DNA testing. Such an extension is improper, because DNA access cases implicate concerns that are not present in method-of-execution cases, paramount among which is the real possibility that the relief sought could prevent the state from executing an innocent person. Moreover, the Eleventh Circuit's ruling would make the negative presumption essentially irrebuttable where a court has decided—based on no clearly defined criteria—that a stay would have been necessary in order to litigate the case. Such a result is not compelled by any precedent of this Court.

In the context of method-of-execution challenges, the Eleventh Circuit has applied the "strong equitable presumption against a stay," as have the Fifth and Eighth Circuits. By contrast, the Ninth Circuit has rejected the general application of a "strong

equitable presumption” and instead has adopted a fact-specific inquiry. Rejecting any equitable standard, the Sixth Circuit has applied a statute of limitations rule to similar cases. What is more, even among the Circuits that apply the “strong equitable presumption,” there is no clear consensus on the circumstances in which it should be applied.

Unless this Court resolves this conflict as to how—or whether—the timing of a death-sentenced § 1983 action seeking DNA testing affects the chances of its surviving a motion to dismiss, an inmate’s odds of success will continue to hinge not only on when but also on where he files his complaint. Where life-or-death questions are at stake, this result is intolerable.

Even assuming *arguendo* that this Court determines that the Eleventh Circuit’s “strong equitable presumption” should govern § 1983 actions brought by death-sentenced inmates seeking DNA access, the balance of equities warrants substantive review of Mr. Arthur’s § 1983 complaint. The lower courts applied the “strong equitable presumption” without conducting a careful inquiry into the equitable factors as required by this Court. As a result, Mr. Arthur’s complaint was summarily dismissed based upon an incomplete inquiry and several critical errors of fact, particularly with respect to Mr. Arthur’s likelihood of success on the merits.

Mr. Arthur respectfully moves this Court to stay his execution by the State of Alabama so that the Court is able to give full and fair consideration to the complex legal and factual issues presented in his Petition before he is put to death.

Respectfully submitted,

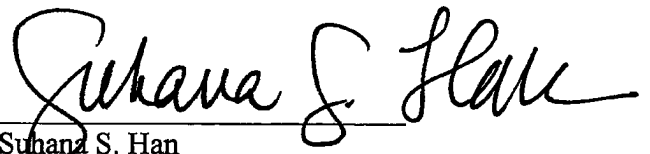
---

Suhana S. Han  
*Counsel of Record*  
Sara L. Manaugh  
Sultana L. Bennett  
Qian A. Gao  
125 Broad Street  
New York, New York 10004  
(212) 558-4000  
*Counsel for Petitioner*

September 25, 2007

Mr. Arthur respectfully moves this Court to stay his execution by the State of Alabama so that the Court is able to give full and fair consideration to the complex legal and factual issues presented in his Petition before he is put to death.

Respectfully submitted,

A handwritten signature in black ink that reads "Suhana S. Han". The signature is written in a cursive style with a horizontal line underneath it.

Suhana S. Han

*Counsel of Record*

Sara L. Manaugh

Sultana L. Bennett

Qian A. Gao

125 Broad Street

New York, New York 10004

(212) 558-4000

*Counsel for Petitioner*

September 25, 2007