

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

THOMAS D. ARTHUR,

Plaintiff-Appellant,

– v. –

TROY KING,

Attorney General for the State of Alabama, in his official capacity, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

**MOTION OF APPELLANT THOMAS D. ARTHUR FOR A
STAY OF EXECUTION PENDING APPEAL**

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**Attorneys for Appellant
Thomas D. Arthur**

September 12, 2007

CAPITAL CASE: Execution Scheduled for SEPTEMBER 27, 2007

**CERTIFICATE OF INTERESTED PERSONS
ARTHUR v. KING ET AL.
CASE NO. 07-13933-P**

Under Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, Appellant certifies that the following is a complete list of all trial judges, attorneys, persons, associations of persons, partnerships, or corporations that have an interest in the outcome of this appeal.

Albritton, Benjamin H.

Alverson, Gary

Arthur, Thomas D.

Barber, M. David

Bennett, Sultana L.

Bruce, Steven

Crenshaw, J. Clayton

Del Grosso, William

Fogel, Ruben

Gao, Qian A.

Graham, Bryce U.

Gustat, Stephen J.

Han, Suhana S.

**CERTIFICATE OF INTERESTED PERSONS
ARTHUR v. KING ET AL.
CASE NO. 07-13933-P**

Jones, Peggy Wicker

King, Troy

Levine, Arnold J.

Manaugh, Sara L.

May, Ronnie

McKinney, Theron

Parkinson, Jennifer L.

Razza, Jordan T.

Rowland, Teresa (a/k/a Teresa Vickers)

Stone, Sherrie

Trzaskoma, Theresa

Vercelli, Jr., Charles E.

Watkins, Hon. W. Keith

Walden, Harold

Wicker, Judy (a/k/a Mary Turner)

Wicker, Jr., Troy

**MOTION OF APPELLANT THOMAS D. ARTHUR FOR A
STAY OF EXECUTION PENDING APPEAL**

Appellant Thomas D. Arthur, now incarcerated on death row at Holman State Prison in Atmore, Alabama, by and through his attorney, respectfully moves this Court to stay his execution by the State of Alabama. **Mr. Arthur's execution is scheduled for September 27, 2007.** Mr. Arthur's appeal of the judgment of the United States District Court for the Middle District of Alabama dismissing his Complaint brought pursuant to 42 U.S.C. § 1983 is now before this Court, which has ordered expedited briefing.

INTRODUCTION

Mr. Arthur was convicted of the 1982 murder of Troy Wicker and sentenced to death. His conviction was based largely on the testimony of a convicted murderer and known perjurer, and no physical evidence linked him to the crime. Mr. Arthur's Complaint brought under 42 U.S.C. § 1983 was the most recent—and possibly his last—attempt to obtain access to physical evidence, including a rape kit and blood-stained clothing, that is in the State's possession, in order to subject it to DNA testing. Along with newly discovered evidence showing that Mr. Arthur was many miles away when the murder for which he was convicted took place, such DNA testing

could provide powerful, exculpatory evidence demonstrating that Mr. Arthur was wrongfully convicted and sentenced to death. Although the results of such testing could identify the real perpetrator, the District Court nonetheless dismissed his Complaint, evaluating Mr. Arthur's claims using an improperly stringent standard, erroneously finding that Mr. Arthur had unreasonably delayed in bringing his Complaint, and erroneously concluding that Mr. Arthur has no constitutional right of access to the physical evidence. The District Court refused to amend its judgment of dismissal even in the face of compelling new evidence of Mr. Arthur's alibi witness whose testimony confirms that Mr. Arthur was nowhere near the Wicker residence on the morning of the murder.

After Mr. Arthur filed his Complaint, but before the District Court granted Defendants' motion to dismiss, the Supreme Court of Alabama set Mr. Arthur's execution date for September 27, 2007.

A STAY OF EXECUTION IS REQUIRED

Mr. Arthur now stands to be executed in two weeks without having had any substantive collateral review of his trial and sentence, and without any court giving due consideration to evidence that could demonstrate his innocence. Mr. Arthur respectfully moves this Court to

stay his execution by the State of Alabama pending his appeal, so that the Court is able to give full and fair consideration to the complex legal and factual issues bearing upon whether Mr. Arthur is entitled to such review and consideration.

**THIS COURT IS LEGALLY EMPOWERED TO STAY
MR. ARTHUR'S EXECUTION**

The All Writs Act, 28 U.S.C. § 1651, authorizes courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” In this case, this Court should issue a writ staying the State of Alabama’s execution of Mr. Arthur in order that it may exercise its jurisdiction to consider fully and adjudicate the meritorious arguments presented in Mr. Arthur’s appeal.

**MR. ARTHUR HAS MET THE LEGAL REQUIREMENTS FOR
ISSUANCE OF A STAY OF EXECUTION**

In determining whether a stay of execution should be issued, a court “must consider not only the likelihood of success on the merits and the relative harms to the parties, but also the extent to which the inmate has delayed unnecessarily in bringing the claim.” *Nelson v. Campbell*, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126 (U.S. 2004). As set forth in detail in his

Appellant's Brief, Mr. Arthur's case satisfies all of the requirements for issuance of a stay.

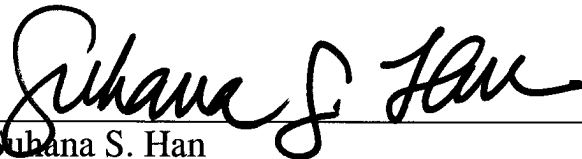
First, Mr. Arthur's entitlement to access to evidence for DNA purposes under the Due Process Clause of the Fourteenth Amendment to the United States Constitution has been recognized by many federal courts and has not been foreclosed by this Court. *Second*, Mr. Arthur stands to be executed without having had any state or federal post-conviction review on the merits of his trial and sentence, and without having had the opportunity to present all evidence bearing upon his innocence. The harm Mr. Arthur faces is demonstrably substantial and irreparable. The State, meanwhile, has not demonstrated that it would suffer any harm beyond inconvenience if Mr. Arthur's execution were delayed at least until his meritorious legal claims have been adjudicated. *Third*, Mr. Arthur has not delayed unreasonably in seeking access to evidence for DNA testing purposes via a § 1983 action, as he has sought such evidence for years via other legal avenues that, through no dilatoriness on his part, he has only recently exhausted.

Accordingly, Mr. Arthur has made the requisite showing that a stay of execution is warranted.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Arthur's
Motion for a Stay of Execution Pending Appeal.

Respectfully submitted,



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September 12, 2007

**CERTIFICATE OF COMPLIANCE WITH
LENGTH, TYPEFACE AND TYPE-STYLE LIMITATIONS**

The undersigned hereby certifies (1) that this Motion of Appellant Thomas D. Arthur for a Stay of Execution Pending Appeal complies with the page-length limitation of Fed. R. App. P. 27(d)(2), because it does not exceed 20 pages, exclusive of the Certificate of Interested Persons; and (2) that this Motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using 14-point Times New Roman font, a proportionally spaced, serif typeface.

Dated: New York, New York
September 12, 2007



Suhana S. Han

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of September, 2007, I filed the original and three copies of this Motion of Appellant Thomas D. Arthur for a Stay of Execution Pending Appeal by sending them by a third-party commercial carrier for timely delivery to the Court and by delivering a copy of the Motion to the Court by facsimile according to the Court's instructions.

The undersigned further certifies that on this 12th day of September, 2007, I caused a true and complete copy of this Motion of Appellant Thomas D. Arthur for a Stay of Execution Pending Appeal to be served via third-party commercial carrier for timely delivery upon the following:

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