

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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: THOMAS D. ARTHUR, :
: :
: Plaintiff, :
: v. :
: TROY KING, ATTORNEY GENERAL :
: FOR THE STATE OF ALABAMA, :
: in his official capacity, :
: BRYCE U. GRAHAM, JR., DISTRICT :
: ATTORNEY FOR COLBERT COUNTY, : No. 2:07-cv-319-WKW
: in his official capacity, :
: RONNIE MAY, SHERIFF FOR :
: COLBERT COUNTY, :
: in his official capacity, :
: M. DAVID BARBER, DISTRICT :
: ATTORNEY FOR JEFFERSON COUNTY, :
: in his official capacity, :
: Defendants. :
: -----X

THOMAS D. ARTHUR’S MOTION TO ALTER OR AMEND JUDGMENT

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Plaintiff Thomas D. Arthur, through his undersigned counsel, respectfully moves this Court to amend or alter its August 17, 2007 Memorandum Opinion and Order (“Order”) dismissing his Complaint brought pursuant to 42 U.S.C. § 1983.

I. A New Affidavit from an Alibi Witness Provides Powerful Evidence of Mr. Arthur’s Innocence.

In dismissing the Complaint, this Court held that Mr. Arthur “cannot demonstrate a substantial likelihood of success on the merits in his DNA and other testing

claim.” (Order at 10.) Relying primarily on the decisions of other courts in connection with Mr. Arthur’s habeas corpus proceedings, this Court concluded that “discrediting” the testimony of Judy Wicker—a convicted murderer who obtained early parole in exchange for her testimony against Mr. Arthur—with the “speculative results of DNA evidence” would not “undermine confidence in the conviction of Arthur in view of the evidence otherwise linking him to the murder.” (*Id.* at 14, 16.) In light of the new testimony of an alibi witness that Mr. Arthur was nowhere near the Wicker residence on the morning of the murder, Mr. Arthur should be granted access to physical evidence for DNA testing.

In connection with his habeas proceedings, Mr. Arthur submitted the affidavit of Ray Melson who recalled specific details of Mr. Arthur’s visit on the morning of Troy Wicker’s murder. (Attached hereto as Exhibit A). The State of Alabama subsequently submitted a second affidavit by Mr. Melson claiming that he was on “some strong medication, pain and otherwise” when he signed his original affidavit and did not know when he saw Mr. Arthur. (Attached hereto as Exhibit B.) Although Mr. Arthur’s investigator submitted a detailed affidavit highlighting critical questions that could only be resolved through live testimony (attached hereto as Exhibit C), Mr. Arthur’s request for a hearing was denied. *After* this Court issued its Order, counsel for Mr. Arthur was able to obtain an affidavit from Mr. Melson that finally explains the discrepancies between his first and second affidavits, and confirms that he saw Mr. Arthur in Decatur on the morning of Troy Wicker’s murder in Muscle Shoals. (Attached hereto as Exhibit D.)

As set forth in his third affidavit, when representatives of the State of Alabama visited him, Mr. Melson had recently taken pain medication and told them what he thought they wanted to hear so that they would just leave him alone allowing him to feel the effects of the medication undisturbed. (Exhibit D at ¶ 8.) Mr. Melson felt intimidated and was afraid to mention to the State representatives that he was on drugs. (*Id.* at ¶ 9.) Mr. Melson stopped taking pain medication in 2003 (*id.* at ¶ 10), and today he recalls clearly Mr. Arthur’s visit to Copper Mobile Homes in Decatur on the morning of the murder. That day was memorable because Mr. Melson helped deliver a double-wide trailer to the Birmingham area, which he had done only two or three times in his life, and the trailer got stuck in mud while it was being transported. (*Id.* at ¶¶ 12, 13.)

Mr. Melson remembers that Mr. Arthur stopped by between 8 a.m. and 9 a.m. offering to help with this delivery but his help was not needed, and that there was nothing unusual about Mr. Arthur’s behavior. (*Id.* at ¶ 15.) Mr. Melson also remembers that when he learned that Mr. Arthur had been arrested for the murder of a man in Muscle Shoals, he put “two and two together” at the time and realized that the day of the murder was the same day that Mr. Arthur had visited Copper Mobile Homes offering to help deliver the double-wide trailer. (*Id.* at ¶ 17.) Mr. Melson—who has not seen or spoken to Mr. Arthur in the past 25 years—has no reason to lie. (*Id.* at ¶ 19.)

Consistent with Judy Wicker’s testimony at her own trial, Mr. Melson’s third affidavit demonstrates that Mr. Arthur was nowhere near the Wicker residence on the morning of Troy Wicker’s murder. In light of this powerful evidence of Mr. Arthur’s innocence, DNA testing would not be “speculative.” Such testing would do much more than merely show that Mr. Arthur did not “rape[] or assault[] Judy.” (Order at 14.) If the

test results of Judy Wicker’s rape kit that was prepared on the same day as the murder matched the DNA sample of a convicted felon from the national DNA database, this would substantially undermine confidence in Mr. Arthur’s conviction. Mr. Arthur respectfully submits that the other “overwhelming evidence linking Arthur to Troy’s murder”—consisting entirely of circumstantial evidence— is *not* “more than enough to withstand” (Order at 13, 16) DNA test results demonstrating that Judy Wicker was raped by someone who was previously convicted of a violent crime, and that this person fit the description of her husband’s murderer that she provided during her own trial. Because favorable DNA test results—together with Mr. Melson’s third affidavit—would provide powerful evidence of Mr. Arthur’s innocence completely outweighing any contrary circumstantial evidence, this Court should grant Mr. Arthur’s request to test the physical evidence.

II. *Grayson* Is Factually Distinguishable.

In rejecting Mr. Arthur’s procedural due process right to DNA testing, this Court found that the “same procedural safeguards afforded Grayson were exactly those afforded to Arthur.” (Order at 16.) Mr. Arthur respectfully disagrees. Both state and federal courts, including the Eleventh Circuit, substantively reviewed and rejected Grayson’s claims raised in post-conviction proceedings. *Grayson v. Thompson*, 257 F.3d 1194 (11th Cir. 2001). Grayson even received a hearing in state habeas court. Unlike Grayson, Mr. Arthur *never* received any state or federal post-conviction review on the merits of his trial and death sentence because his petitions were dismissed as untimely. Although this Court concluded that the “procedural safeguards in place and afforded to

Arthur for twenty-five years of litigation are sufficient for the protection of his liberty interest” (Order at 16), such “safeguards” are not sufficient under these circumstances.

As the Supreme Court has stressed, procedural safeguards are particularly necessary where the punishment is death. *See, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (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”). To ensure that the death penalty is imposed reliably, collateral review of convictions and sentences is an essential part of the death penalty appellate process. *See Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., concurring in the judgment). Indeed, in Mr. Arthur’s case, post-conviction proceedings should have provided the first real opportunity to present ineffective assistance of trial and appellate counsel claims, but Mr. Arthur was unable to file timely petitions because the State of Alabama failed to provide him with counsel to prepare a petition or access to an adequate law library. It is only through a rigorous review of collateral claims that finality in capital litigation can be justly achieved. Because Mr. Arthur stands to be executed without ever having received any substantive collateral review of his trial or death sentence, the risk of erroneous deprivation of Mr. Arthur’s liberty interest in his life is unacceptably high.

III. Mr. Arthur Did Not Unreasonably Delay in Seeking DNA Testing.

In finding that Mr. Arthur’s delay was unreasonable, this Court concluded that Mr. Arthur could have sought DNA testing at his second or third trial but failed to do so, and relied on the diligence analysis of the courts dismissing Mr. Arthur’s habeas

petition as untimely. Mr. Arthur respectfully submits that neither basis is sufficient to warrant such a finding of delay.

First, relying on *Grayson*, this Court stated that “DNA testing has been available since 1986, more than twenty years before Arthur sought testing in this action, a period which includes his last two capital trials.” (Order at 24.) *Grayson*, however, merely noted that exhibits attached to the complaint “indicate[d]” that DNA testing was available as early as 1986 but did not even take judicial notice of this. *Grayson v. King*, 460 F.3d 1328, 1335 (11th Cir. 2006). Such an observation cannot serve as the basis for finding that DNA testing was available to Mr. Arthur during his trials in Alabama. Moreover, although the Court faulted Mr. Arthur for failing to “diligently pursue the procedure either at his second or third trial” (Order at 24), such assertion ignores the fact that Mr. Arthur has been deprived of any opportunity to litigate the merits of his claims that his trial and appellate counsel were constitutionally ineffective. *See Murray v. Carrier*, 477 U.S. 478, 488 (1986) (defendant represented by constitutionally effective counsel does not bear the risk of attorney error); *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990) (“Although defendant generally bears the risk of attorney error that results in procedural default, such error cannot be attributed to the defendant when counsel’s performance is constitutionally ineffective.”).

Second, relying on the decisions of the “two district judges and the Eleventh Circuit” that Mr. Arthur was “not diligent in pursuing access to the evidence before 2002” (Order at 25), this Court found that these “other reasons” support a finding

of unreasonable delay.¹ The diligence analysis in these habeas decisions, however, is not good law. As this Court is aware (Order at 7), on Mr. Arthur’s petition for rehearing and rehearing en banc, the Eleventh Circuit modified its decision by holding that the diligence requirement of 28 U.S.C. § 2254(e)(2) does *not* apply to a first federal habeas petition seeking review of defaulted claims based on a showing of actual innocence. *Arthur v. Allen*, 459 F.3d 1310, 1311 n.1 (11th Cir. 2006). Accordingly, because these habeas courts erroneously relied on a diligence analysis in denying Mr. Arthur’s requests for discovery and a hearing, such diligence analysis cannot serve as “other reasons” for this Court’s finding of “unreasonable delay.” In short, “unreasonable delay” should not be a basis for denying Mr. Arthur’s request for DNA testing under these circumstances, especially because DNA testing has become more precise and reliable with the passage of time.

¹ This Court also noted that Mr. Arthur requested the physical evidence in a series of letters in 2003 but offered “no explanation why he delayed nearly five years after the ruling in *Bradley*, and over three years after his demand letters, to bring” his § 1983 action. (Order at 25.) In the interest of judicial economy, Mr. Arthur did not file the Complaint while his request for physical evidence was being litigated in habeas proceedings.

CONCLUSION

For the foregoing reasons, the Court should amend its Memorandum Opinion and Order and grant Mr. Arthur's request for access to physical evidence.

Dated: August 27, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to the following:

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