

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS DOUGLAS ARTHUR, Petitioner,

v.

RICHARD F. ALLEN, *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.¹

As more fully set forth in the Petition, this case raises profound issues about the limitations on a death row inmate's right to bring a method-of-execution claim under 42 U.S.C. § 1983, as permitted by this Court in *Hill v. McDonough*, 126 S. Ct. 2096 (2006), outside of the so-called "eve-of-execution" or "eleventh-hour" context, including an issue on which there is a conflict among various circuit courts of appeals.

Mr. Arthur brought suit to challenge the constitutionality of Alabama's lethal injection protocols on May 14, 2007. He alleges that the execution procedures used by the Respondents, in violation of the Eighth and Fourteenth Amendments, lack the medically necessary safeguards to ensure that he will remain fully anaesthetized throughout the execution. As such, Mr. Arthur alleges that there is a grave and substantial risk that he will be conscious of suffocation during the execution and will suffer excruciating pain as the injection of potassium chloride travels through his bloodstream. On Respondent's motion to dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure, the district court dismissed Mr. Arthur's § 1983 action as untimely. The Eleventh Circuit affirmed, with one judge dissenting.

¹ On August 28, 2007, the Eleventh Circuit granted Mr. Arthur's motion for expedited briefing. On August 31, 2007, the Eleventh Circuit granted Mr. Arthur's motion for further expedited briefing. Pursuant to the court's briefing schedule, the parties simultaneously filed their briefs on September 7, 2007. Accordingly, Mr. Arthur did not move for a stay in his Eleventh Circuit proceedings because he believed that the court would be able to decide the appeal without a stay.

The Eleventh Circuit has adopted an “unreasonable delay” standard that mandates dismissal of all method-of-execution § 1983 claims if they cannot, in the trial court’s view, be fully litigated without entry of a stay. The Eleventh Circuit’s standard, which the Fifth and Eighth Circuits have similarly adopted, would 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 four months before the execution date scheduled by the Alabama Supreme Court. The Ninth Circuit has rejected the approach of the Eleventh, Fifth and Eighth Circuits, and instead has adopted a fact-specific inquiry. To assess the timeliness of a method-of-execution claim, the Sixth Circuit has adopted a statute of limitations rule. Unless this Court resolves this conflict regarding the appropriate measure for timeliness, whether a death-row inmate can proceed with his § 1983 method-of-execution claim will depend entirely on which Circuit he files his complaint.

Even assuming *arguendo* that this Court determines that the Eleventh Circuit’s “unreasonable delay” rule should govern § 1983 method-of execution claims, this case raises the question of whether that test, as applied here, violates the case or controversy requirement of Article III, § 2 of the Constitution by requiring death-row inmates to file premature and unripe § 1983 claims that, depending upon the eventual outcome of their habeas appeals, may turn out to be moot. As the dissenting Circuit Judge recognized, Mr. Arthur’s method-of-execution claim did not become ripe until at least the conclusion of his federal habeas review or until an execution date has been set.

Finally, the balance of equities warrants substantive review of Mr. Arthur’s § 1983 complaint. Mr. Arthur’s complaint was summarily dismissed without

either the district court or the Eleventh Circuit undertaking a meaningful and individualized assessment of the equities unique to Mr. Arthur's circumstances.

Indeed, new developments further support the need for a stay. On September 7, 2007, after Mr. Arthur had filed his brief in the Eleventh Circuit, a legislative panel approved a contract between the State of Alabama and Dr. Mark Dershwitz, a University of Massachusetts professor of anesthesiology. Under the terms of the contract, Dr. Dershwitz will review the chemical composition of drugs administered to state capital murder defendants during the execution process. The contract is effective from October 1, 2007 to September 30, 2009. Mr. Arthur should benefit from any additional safeguards Dr. Dershwitz's involvement in Alabama's execution process may offer.

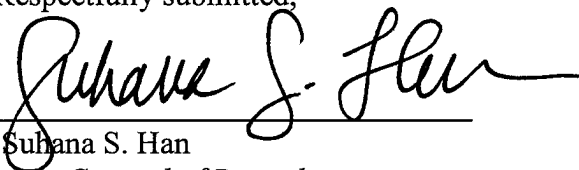
Furthermore, on October 3, 2007, plaintiffs Willie McNair and James Callahan will proceed to a nonjury trial in the United States District Court for the Middle District of Alabama on the merits of their claim that lethal injection, as practiced by the State of Alabama, is unconstitutional.² This claim is substantially similar to that raised by Mr. Arthur, and the trial will resolve for the first time in Alabama the constitutionality of the lethal injection process. Mr. Arthur stands to be executed on September 27, 2007 in a manner he contends constitutes cruel and unusual punishment, even though the constitutionality of Alabama's lethal injection procedure will be litigated on the merits in front of a federal judge the very week after Mr. Arthur is sentenced to die.

² The final pre-trial order in this matter was filed on September 7, 2007, also after Mr. Arthur had filed his brief in the Eleventh Circuit.

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 here.

In accordance with § 2101(f), this Court should stay Mr. Arthur's execution so as to afford itself a reasonable time to review, consider, and take action on his Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Suhana S. Han", written over a horizontal line.

Suhana S. Han

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September 21, 2007