

IN THE SUPREME COURT OF ALABAMA

<u>EX PARTE THOMAS D. ARTHUR</u>)	
)	
In re: State of Alabama,)	
)	
Petitioner,)	
)	No. 1951985
v.)	
)	
Thomas D. Arthur,)	
)	
Respondent.)	

MOTION TO SET AN EXECUTION DATE

Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State of Alabama respectfully requests this Honorable Court set an execution date of November 15, 2007 for carrying out Thomas Arthur's duly-adjudicated sentence of death. In support of its motion, the State asserts the following:

Governor's Reprieve

This Court previously set Thomas Arthur's ("Arthur") execution for September 27, 2007. On the day of Arthur's scheduled execution, Governor Bob Riley exercised his authority under Amendment 38 of the Alabama Constitution to grant Arthur a 45-day reprieve. In his order of reprieve, Governor Riley stated,

The sole purpose of this reprieve is to allow the Department of Corrections sufficient time to make

modifications to its lethal injection protocol. It is my desire that the Alabama Attorney General will make a motion for, and that the Supreme Court of Alabama will promptly set, a new date of execution at the expiration of this 45-day period.

(Exh. A) In his official press release, Governor Riley stated that "the decision to grant a brief stay is being made only because the state is changing its lethal injection protocol, and this will allow sufficient time for the Department of Corrections to make that change. . . It is my desire that, **as soon as the [45-day] stay has expired**, justice will be administered to Thomas Arthur."

(Exh. B)

The Department of Corrections is currently revising its execution protocol as discussed in Governor Riley's order of reprieve. This office has been informed by the Governor that these revisions will be complete and ready for implementation before the end of the 45-day period of reprieve.

Arthur's 45-day reprieve expires on Sunday, November 11, 2007. Because the reprieve ends on a Sunday, and the next day is a State holiday (Veteran's Day), Arthur is eligible for execution beginning November 13, 2007. In accordance with Governor Riley's request that Arthur be

executed "as soon as the stay period has expired," the State requests this Court set Arthur's execution date for November 15, 2007; that is, the first Thursday after the conclusion of Arthur's 45-day reprieve.

This Court should set Arthur's execution for the earliest possible Thursday after the 45-day reprieve expires because it is past time for justice to be administered to Tommy Arthur. Arthur has now, on two separate occasions, escaped his sentence shortly before its execution. He is due no further reprieves from justice. As the Governor stated,

The evidence is overwhelming that Thomas Arthur is guilty and he will be executed for his crime. The decision to grant a brief stay is being made only because the state is changing its lethal injection protocol, and this will allow sufficient time for the Department of Corrections to make that change.

(Exh. B) Thus, as soon as the Department of Corrections modifies its execution protocol, it will be time for Arthur's duly-adjudicated judgment to be carried out.

Facts of Arthur's Crimes and Judicial Proceedings

Arthur has been thrice convicted in Alabama courts of capital murder and thrice sentenced to death for his crime. Arthur was convicted in 1977 of murder in the second degree in the Circuit Court of Marion County, in violation of Ala.

Code § 13A-5-40(a)(13)(1975). He was sentenced to life imprisonment. While serving that sentence and assigned to the Decatur, Alabama work release center, Arthur murdered Troy Wicker, the husband of one of his paramours, by shooting him with a .22 caliber pistol through the right eye, while he was asleep. He was indicted for that murder by a Colbert County grand jury on August 29, 1982. At trial, Arthur was convicted and sentenced to death by electrocution. The Alabama Court of Criminal Appeals affirmed both the conviction and the sentence. Arthur v. State, 472 So. 2d 650 (Ala. Crim. App. 1984). This Court reversed because the trial court had improperly permitted the State to offer evidence at trial of the details of the 1977 murder conviction, which provided one of the factors that made Arthur eligible for the death penalty. Ex parte Arthur, 472 So. 2d 665 (Ala. 1985) (details of prior murder were improperly admitted at trial under identity exception to general exclusionary rule).

In May of 1987, after a change of venue to the Circuit Court of Jefferson County, Arthur was again convicted of the murder of Troy Wicker and was sentenced to death. The second conviction was reversed by the Alabama Court of

Criminal Appeals. Arthur v. State, 575 So. 2d 1165 (Ala. Crim. App. 1990) (The trial court improperly admitted in evidence a statement made by the defendant to a police officer in the absence of counsel two weeks after he had asserted his right to remain silent. This was plain error.), cert. denied, Ex parte State of Alabama [Re Arthur v. State] 575 So. 2d 1191 (Ala. 1991).

Arthur was indicted for the third time on August 29, 1991, on two counts of capital murder - murder done for pecuniary or other valuable consideration (Ala. Code § 13A-5-40(a)(7)) and murder by one previously convicted during the past twenty years (Ala. Code § 13A-5-40(a)(13)). Before the case was submitted to the jury, however, the prosecutor elected to dismiss one count - that which charged Arthur with capital murder because he had allegedly killed Wicker for pecuniary or other gain. The case went to the jury on a single count - intentionally causing the death of Troy Wicker by shooting him with a pistol after having been convicted of murder in the second degree in 1977 in the Circuit Court of Marion County, in violation of Ala. Code § 13A-5-40(a)(13)(1975).

On December 5, 1991, for the third time, a jury found Arthur guilty of capital murder. After the penalty phase of the trial, this jury recommended by a vote of 11 to 1 that Arthur be sentenced to death. On January 24, 1992, after conducting a separate hearing and reviewing the aggravating/mitigating circumstances, the state trial judge sentenced Arthur to death. The Alabama Court of Criminal Appeals and the Alabama Supreme Court each affirmed both the conviction and the sentence. Arthur v. State, 711 So. 2d 1031 (Ala. Crim. App. 1996); Ex parte Arthur, 711 So. 2d 1097 (Ala. 1997). An application for rehearing was denied by the Alabama Supreme Court on March 20, 1998. Arthur did not, within the time allowed, file a petition for review with the United States Supreme Court.

Rule 32.2(c) of the Alabama Rules of Criminal Procedure provides that a petition for post-conviction relief be filed within two years after the issuance of the certificate of judgment by the Court of Criminal Appeals.¹ A certificate of judgment was issued by the Court of Criminal Appeals on April 7, 1998, establishing April 7,

¹The Alabama Supreme Court, effective August 1, 2002, changed the Rule 32 statute of limitations to one year. Ala. R. Crim. P. 32.2(c) (comment following that rule states the effective date of the amendment).

2000, as the last date on which Arthur could file his Rule 32 petition for relief from the sentence of death imposed on January 24, 1992.

On September 8, 2000, following some two and one-half years of inactivity by Arthur or by anyone on his behalf, the Alabama Attorney General filed, in the Alabama Supreme Court, a motion for that court to set a date to carry out the death sentence and to issue a death warrant instructing the State to proceed. On March 23, 2001, the Alabama Supreme Court granted the Attorney General's motion to set an execution date and ordered that Arthur be executed on Friday April 27, 2001.

On January 25, 2001, Arthur, proceeding through counsel, filed a Rule 32 petition in the Circuit Court of Jefferson County. The Rule 32 petition was dismissed as untimely on March 5, 2001. The Alabama Court of Criminal Appeals affirmed the denial and dismissal of Arthur's Rule 32 petition. Arthur v. State, 820 So. 2d 886, 889 (Ala. Crim. App. 2001). The Court of Criminal Appeals agreed with the trial court that "the two-year limitations period in Rule 32.2(c), Ala. R. Crim. P., is mandatory and jurisdictional." Id. The Alabama Court of Criminal

Appeals denied Arthur's application for rehearing on July 27, 2001, and the Alabama Supreme Court denied certiorari review on November 2, 2001. Id. The United States Supreme Court, on May 13, 2002, denied Arthur's petition for writ of certiorari. Arthur v. Alabama, 535 U.S. 1053 (2002).

On April 20, 2001, seven days before his scheduled execution, Arthur filed a petition for writ of habeas corpus, along with a motion to stay the execution, in the United States District Court for the Northern District of Alabama. That court issued a stay of execution on April 25, 2001. That same day, the federal district court entered an order staying the habeas proceeding pending a resolution of the above-listed state post-conviction proceeding.

Arthur attempted to overcome his failure to comply with the statute of limitation in federal court by asserting a "gateway claim" of actual innocence. His claim was based principally on the affidavits of Alphonso High and Ray Melson, who claimed to have seen Arthur on February 1, 1982, the morning of the murder. High and Melson gave affidavits to the State that contradicted their earlier

affidavits, stating that they could not be certain of the day or month that they saw Arthur.

The federal district court rejected Arthur's "actual innocence" claim and dismissed Arthur's habeas petition as untimely. Arthur's motion for reconsideration was denied. Arthur's motion for a certificate of appealability was granted by the district court. The Eleventh Circuit Court of Appeals affirmed the dismissal. Arthur v. Allen, 452 F.3d 1234 (11th Cir. 2006). The decision was modified slightly on petition for rehearing, with the court elucidating its denial of a hearing and discovery. Arthur v. Allen, 459 F.3d 1310 (11th Cir. 2006). Arthur's petition for certiorari was recently denied by the United States Supreme Court. Arthur v. Allen, ---S.Ct.----, 2007 WL 121124 (Apr. 16, 2007).

As shown above, Arthur has exhausted all three avenues of appellate relief. Thus, once Arthur's 45-day reprieve ends November 11, 2007, it will be the appropriate time under Rule 8(d)(1) for this Court to enter an order to execute Arthur's duly-adjudicated sentence.

Although there are no pending challenges to the validity of Arthur's lawful conviction and death sentence

(thus, execution of his sentence is appropriate under Rule 8(d)(1)), Arthur currently has pending two petitions for a writ of certiorari in the United States Supreme Court on two separate federal issues under 28 U.S.C. § 1983: Arthur v. King, 07-397 (requesting DNA-testing) and Arthur v. King, 07-395 (challenging Alabama's lethal injection protocol). These cases will presumably be set on the Supreme Court's conference schedule in the near future.

This pending federal litigation, however, is not a valid ground for preventing this Court from properly entering Arthur's execution order under Rule 8(d)(1). Arthur's pending federal lawsuits in no way challenge the validity of the Arthur's duly-adjudicated criminal judgment and sentence under Alabama law. Indeed, the Supreme Court has held that death row inmates can only file federal § 1983 lawsuits if the lawsuits **do not** challenge the validity of the inmate's state conviction or sentence of death. See Hill v. McDonough, 126 S.Ct. 2096, 2104 (2006).

Furthermore, the United States Supreme Court has decreed that, when dealing with such federal § 1983 actions, it is the federal courts that must balance the equities to determine whether or not a stay of execution


must be ordered during the § 1983 litigation. In other words, it is the federal courts duty to respect any decision of this Court in setting an execution date and to protect any such order of this Court against dilatory suits under the standard set forth by the Supreme Court. See Arthur v. King, 2007 WL 2381992 (M.D. Ala. Aug. 17, 2007) *aff'd* Arthur v. King, ___ F.3d ___, 2007 WL 2744884 (11th Cir. Sept. 21, 2007); Arthur v. Allen, 2007 WL 2320069 (S.D. Ala. Aug. 10, 2007) *aff'd* Arthur v. Allen, 2007 WL 2709942 (11th Cir. Sept. 17, 2007).

CONCLUSION

Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State respectfully requests this Court -- by October 18, 2007² -- "enter an order fixing a date of execution" of November 15, 2007 for Thomas Arthur.

Respectfully submitted,

TROY KING
Attorney General



J. CLAYTON CRENSHAW sbp/AM
Assistant Attorney General

²The State respectfully requests this Court's order be entered by October 18, 2007 because Rule 8(d)(1) requires Arthur's execution date be set "not less than 30 days from the date of the order."


CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2007, I did serve a copy of the foregoing on the attorneys for the Appellant, by placing the same in the United States Mail, first class, postage prepaid and addressed as follows:

Arnold J. Levine
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11 Park Place, Suite 606
New York, NY 10007

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Exh. A

OFFICE OF THE GOVERNOR



STATE CAPITOL
MONTGOMERY, ALABAMA 36130

BOB RILEY
GOVERNOR

(334) 242-7100
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STATE OF ALABAMA

September 27, 2007

Mr. Richard F. Allen, Commissioner
Alabama Department of Corrections
AL Criminal Justice Complex
301 South Ripley Street
Montgomery, Alabama 36130

Dear Commissioner Allen:

By my authority under Amendment 38 to the Alabama Constitution, I hereby grant a reprieve of 45 days to Thomas D. Arthur, who is scheduled for execution on this date. The sole purpose of this reprieve is to allow the Alabama Department of Corrections sufficient time to make modifications to its lethal injection protocol. It is my desire that the Alabama Attorney General will make a motion for, and that the Alabama Supreme Court will promptly set, a new date of execution at the expiration of this 45-day period.

Sincerely,

A handwritten signature in black ink that reads "Bob Riley".

Bob Riley
Governor

BR/rdg

cc: United States Supreme Court
Alabama Supreme Court
Alabama Attorney General Troy King
Suhana S. Han, Esquire

Exh. B

OFFICE OF GOVERNOR BOB RILEY
FOR IMMEDIATE RELEASE: SEPTEMBER 27, 2007

Governor Riley Issues 45-Day Stay of Execution

MONTGOMERY – Governor Bob Riley granted a brief stay of execution to Thomas Arthur, a death row inmate who was scheduled to die by lethal injection at 6 p.m. Thursday.

The Governor made the decision to grant a stay of 45 days and met with Commissioner Richard Allen of the Alabama Department of Corrections on Thursday morning.

“The evidence is overwhelming that Thomas Arthur is guilty and he will be executed for his crime. The decision to grant a brief stay is being made only because the state is changing its lethal injection protocol, and this will allow sufficient time for the Department of Corrections to make that change,” Governor Riley said. “It is my desire that, as soon as the stay has expired, justice will be administered to Thomas Arthur. I have encouraged the Attorney General to make a motion with the Alabama Supreme Court for a new date of execution as soon as possible.”

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For more information, contact the Governor's Press Office at 334-242-7150.

9/28/2007