

Thomas Arthur is on Alabama's death row, and since before his 1991 trial the State of Alabama has successfully opposed the forensic/DNA testing of blood, hair, sperm, clothing and other crime related evidence. Arthur claims the testing can not only prove he was not at the scene of the 1982 murder he was convicted of committing, but it can provide a scientific way to identify the actual perpetrator. (*Justice:Denied* previously reported on Arthur's case, see, "Thomas Arthur — In His Own Words," Issue 7, Fall 1999).

Alabama is one of only eight states that have no law establishing a protocol for DNA testing of crime scene evidence at the request of a prisoner. Consequently, after Arthur's *pro bono* law firm spent years fruitlessly sending formal letters to Alabama authorities requesting access to the evidence

## Alabama Has Opposed Testing Evidence In Thomas Arthur's Case For 16 Years

for DNA testing at the law firm's expense, in April 2007 Arthur filed a federal civil rights lawsuit seeking a court order to compel Alabama to "search for and release ... the Requested Evidence and transfer ... the Requested Evidence to Mr. Arthur's counsel for purposes of DNA and other testing;"

Alabama is the only state that does not provide legal counsel for death row prisoners and there is no law library for death row prisoners. So by the time Arthur found a law firm to take his case *pro bono*, the time limit had expired for filing for state post-conviction review, and the federal courts wouldn't toll the AEDPA's one-year filing deadline. Thus, Arthur has had no state or federal post-conviction review of his case, even though

there are numerous prejudicial irregularities in Arthur's case that could be expected to result in a new trial, and his subsequent acquittal or dismissal of the charges. Just one of those significant issues is that Arthur's court-appointed trial lawyer, who was paid \$1,000, did not conduct *any* investigation of Arthur's alibi that at the time of the murder in Muscle Shoals, he was more than an hours drive away in Decatur. Yet there are witnesses who would have testified if contacted, and who swore in post-conviction affidavits, that they saw and talked with him in Decatur. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the U.S. Supreme Court established the precedent that defense counsel's failure to "reasonably" investigate their client's case can establish constitutionally ineffective assistance of counsel.

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*Justice:Denied* posted the following editorial on its website six days before Alabama was scheduled to end Thomas Arthur's life on September 27, 2007. Just hours before Arthur was to be administered a lethal dose of drugs, Gov. Bob Riley ordered a 45-day stay so that the AL Dept. of Corrections could alter its lethal injection protocol. As of early October, the AL Sup. Ct. has not set a new date.

Murder is defined as, "The action of killing or causing destruction of life, regarded as wicked and morally reprehensible irrespective of its legality." (*Oxford English Dictionary*, def. 1.c.) Although murder is commonly thought of only in terms of how it is defined in a statute, as a concept it predates any written laws.

Murder is what Judy Wicker was convicted of committing in 1982 in Muscle Shoals, Alabama against her husband Troy Wicker. After almost ten years of imprisonment she made a deal with the State of Alabama. She would be paroled from her life sentence in exchange for recanting her trial testimony and numerous extra-judicial statements that she had been raped by a black intruder who then killed her husband, and that Thomas Arthur had nothing to do with the crime.

Murder is what Thomas Arthur was convicted in 1991 of committing against Troy Wicker. Yet none of the plethora of crime scene evidence that included hair, blood, sperm, fingerprints, and a bullet and bullet cartridges, was forensically linked to him. The only direct evidence placing Thomas Arthur at the murder scene was the revised testimony of Judy Wicker.

Murder is a gravely serious charge, and if a State is going to make that accusation against a person, that person deserves the aid of a competent and diligent team of attorneys, who prior to trial independently investigate the case, interview witnesses, review the state's evidence, and file all necessary pre-trial motions. To accomplish those crucial tasks, Thomas Arthur's counsel was paid the princely sum of \$1,000 — the amount designated by law in Alabama.

Murder can be punished by a sentence of death in Alabama, and that was Thomas Arthur's sentence. However, Alabama does not provide a post-conviction lawyer for a death row prisoner, so by the time he was able to find a *pro bono* lawyer to handle his case the time limit had expired for him to file his state, and then a first federal habeas corpus petition. So neither Thomas Arthur's claim of innocence nor any of the irregularities related to the investigation of Troy Wicker's murder, Judy Wicker's suspect testimony, and the deficient performance of Thomas Arthur's counsel, has ever been considered by a state or federal post-conviction review

### Thomas Arthur's Impending Murder

*Justice:Denied* Editorial

for how they affected his constitutional right to due process, a fair trial, effective assistance of counsel and to be shielded from cruel and unusual punishment. (Arthur's trial counsel has admitted that he received inadequate representation.)

Murder can be disproved, and a convicted person's claim of innocence can be vindicated, by DNA testing of crime scene evidence that can directly or indirectly exculpate that person. The State of Alabama has for many years unwaveringly opposed making the crime scene evidence in Thomas Arthur's case available to him for forensic testing at his expense. Alabama's refusal to allow post-conviction testing of the evidence has continued with its opposition to a federal civil rights lawsuit Thomas Arthur filed seeking access to the biological evidence for DNA testing that could contribute to proving his innocence. That evidence sought for DNA testing includes Judy Wicker's bloody clothing, Judy Wicker's rape kit that includes sperm recovered from her the morning of the murder, a wig and hair samples collected from Judy Wicker's car, vacuum sweepings from the Wickers' home, hair samples taken from a shoe, bullet cartridges, a bullet, and a pillow case taken from the Wickers' home.

Murder can be characterized as what a State intends when it uses its prosecutorial power to obtain a conviction and death sentence that is tainted by numerous pre-trial, trial and post-trial irregularities, and possibly illegal tactics that have a direct bearing on concealing both the truth of the crime and the possible innocence of the defendant. There are many suspect aspects of Thomas Arthur's case. Those include that the office of Alabama's Attorney General strong-armed two credible alibi witnesses to recant their post-trial sworn affidavits that on the morning of Troy Wicker's murder they saw and talked with Thomas Arthur in Decatur, which was then about an hours drive from Muscle Shoals.

Murder describes what will happen the State of Alabama and its agents commit the "wicked and morally reprehensible" act of administering a lethal mix of substances into Thomas Arthur's body until he is legally, clinically and permanently dead — when there is the all too real possibility that he is factually innocent of Troy Wicker's murder and the evidence that could prove it remains untested.

# John Tension Denied California Compensation

By Hans Sherrer

In August 1989 Roderick Shannon was beaten by a group of young men and then shot to death in the parking lot of a Super Fair Market in San Francisco.

Four months later, 17-year-old John Tension was arrested and charged as an adult with the first-degree murder of Shannon. The prosecution's theory was that after a number of young men chased Shannon and caught him in the supermarket's parking lot, Tension held Shannon while Anton Goff shot him.

Tension and Goff were tried as co-defendants in October 1990. The prosecution's main evidence connecting Tension to the murder was the testimony of two young girls, Masina Fauolo, 11, and Pauline Maluina, 14. The girls testified Masina had been driving around in a stolen car with Pauline as her passenger when they saw Shannon being chased. They said they followed him to the parking lot, where they saw the shooting.

The jury found Tension guilty of first-degree murder. Prior to his sentencing, Tension filed a motion for a new trial primarily based on newly discovered evidence that Lovinsky Ricard confessed to police in No-


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Consequently, Alabama's opposition to DNA testing of the crime evidence is for the same reason that Arthur wants it — the testing could result in the new exculpatory evidence necessary for Arthur to meet the requirements to file a motion for state, and if necessary federal, post-conviction review of his conviction.

Arthur's lawyers currently have two writs of certiorari filed in the U.S. Supreme Court. One seeks review of the Eleventh Circuit's dismissal of Arthur's lawsuit for DNA testing of the crime evidence. The other challenges the constitutionality of Alabama's lethal injection procedure.

Alabama Gov. Bob Riley ordered a 45-day stay hours before Arthur's scheduled execution on September 27, so that the Alabama Department of Corrections could alter its lethal injection protocol. As of early October, the Alabama Sup. Ct. has not set a new date.

Arthur's website has extensive case information, links to an online petition to Gov. Riley, and contact information, [www.thomasarthurfightforlife.com](http://www.thomasarthurfightforlife.com) 

ember 1990 that he was the person who shot Shannon. Ricard also stated that Tension was not present. In June 1991 Tension's motion was denied and he was sentenced to 25 years to life in prison.

## Federal habeas granted

Tension's state court direct appeal and habeas corpus petition were denied. He then filed a habeas petition in federal district court that was granted in August 2003. The court's decision was based on five violations by the prosecution of its constitutional obligation to disclose potentially exculpatory evidence to Tension, as required by *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny. The federal court concluded, "Given the weakness of the prosecution's case against Tension, ... there is a reasonable probability that any one of [the five pieces of non-disclosed evidence] ... could have caused the result of Tension's ... trial to have been different." Tension's conviction was vacated and the state was ordered to release or retry him.

Two days after the decision, Tension's lawyer filed a Joint Stipulation for his immediate release from custody. The federal court ordered Tension's release on his own recognizance, and the San Francisco District Attorney's office announced it would not retry Tension for Shannon's murder.

## Tension declared factually innocent

After Tension's release from almost 14 years of wrongful imprisonment, he filed a motion under California Penal Code section 851.8 for an order declaring him factually innocent of Shannon's murder. The San Francisco D.A.'s response was: "The People concur that Petitioner is factually innocent pursuant to Penal Code section 851.8." The San Francisco Superior Court then entered an order that stated in part: "... all evidence in this case ... shows that Tension is innocent of all charges relating to the murder of Roderick Shannon and that he should not have been tried for Shannon's murder."

## State compensation claim

Tension filed a claim, in December 2003, under Penal Code section 4903 for \$445,300 with the state Victim Compensation and Government Claims Board ("Board"). Tension stated his innocence was "undisputed" based on the court order declaring him factually innocent. Goff, who had been released several days after Tension, submitted a separate claim for \$489,800. The California Attorney General disputed Tension's and Goff's claims of innocence. In November 2004, the Admin-

istrative Law Judge ("ALJ") issued a proposed joint decision denying the claims of Tension and Goff, concluding that each "failed to establish by a preponderance of the evidence that he is entitled to compensation pursuant to Penal Code section 4903."

In June 2005 the Board adopted the ALJ's proposed decision that the superior court's findings of "factual innocence" pursuant to section 851.8 are "not binding and inapplicable" to a section 4900 compensation proceeding. After the Board's ruling, Tension filed a petition for writ of mandate in the trial court. The court agreed with the Board in denying Tension's petition. Tension appealed.

## Court of Appeals decision

The Court of Appeals decision in June 2007 rejected the trial court's ruling that, "a finding of factual innocence under section 851.8 is somehow different from a finding under section 4900 that the defendant did not commit the crime charged." The court ruled, "Both proceedings concern the identical issue: whether the evidence proves the defendant did not, in fact, commit a particular crime." (*Tension v. California Victim Compensation and Government Claims Board*, No. A112313 (Cal.App. Dist.1 06/28/2007))

However, the appeals court noted that because the San Francisco D.A. conceded Tension was factually innocent, the superior court entered its order under section 851.8 without having heard any evidence concerning Shannon's murder. The court's order "was thus the equivalent of "a stipulated judgment, or consent decree, [whereby] litigants voluntarily terminate a lawsuit by assenting to specified terms, which the court agrees to enforce as a judgment." The appeals court thus decided, "it would disserve the integrity of the court system to give preclusive effect to what was essentially a stipulated order on the section 851.8 motion."

The court concluded that the vacating of Tension's conviction and his release had nothing to do with his innocence, stating, "The federal habeas court granted relief based on a legal impropriety, not insufficiency of the evidence. ... Thus, despite the district attorney's ... stipulation, and the court's acquiescence to it, Tension was not entitled to petition for or receive a finding of factual innocence under section 851.8."

The appeals court then proceeded to discount the exculpatory value of the evidence the federal court relied on in finding that if Tension were retried, it is more likely than not that a reasonable juror would not vote to

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