DOCKET NO. _______

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2006

CLARENCE EDWARD HILL

Petitioner,

vs.

WILLIAM McDONOUGH,
SECRETARY FLORIDA
DEPARTMENT OF CORRECTIONS;
AND
CHARLIE CRIST,
Florida Attorney General,

Respondent(s).

CAPITAL CASE
EXECUTION SCHEDULED FOR
SEPTEMBER 20, 2006, 6:00 P.M.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

1. When considering whether to "invoke their equitable powers" to grant injunctive relief or to dismiss a suit as "filed too late in the day," were the federal district court and the Eleventh Circuit Court of Appeals required to consider the fact that the Eleventh Circuit's own controlling precedent indicated that the district court lacked jurisdiction to hear Petitioner's § 1983 action challenging Florida's use of lethal injection as the method of carrying out a death sentence at all relevant times prior to this Court's decision in *Hill v. McDonough*, 126 S.Ct. 2096, 2104 (2006)?

2. When undertaking to weigh the equities in deciding whether to grant injunctive relief, were the federal district court and the Eleventh Circuit of Appeals required to consider the Eleventh Circuit's inaction when it failed to issue the mandate and only returned jurisdiction to the district court for further proceedings after the Governor of Florida rescheduled Petitioner's execution for August 17, 2006, citing the lack of judicial activity (*i.e.* though this Court issued its opinion on June 12, 2006, the Eleventh Circuit did not remand to the district court until August 29, 2006), thereby depriving Petitioner of the opportunity to proceed on his § 1983 action during that two month time period when no execution date was set?

3. When undertaking to weigh the equities in deciding whether to grant injunctive relief or to dismiss a § 1983 challenging a method of execution, is a federal court required to consider any aspect of the merits of the § 1983 and/or the actions of the State in scheduling the execution and its prerogative to alter the method or the protocol up until the execution, or is the equitable analysis to be solely concerned with the timing of Petitioner's initiation of the action?

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PETITION FOR A WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner, **CLARENCE EDWARD HILL**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review Order of the Eleventh Circuit Court of Appeals.

CITATION TO OPINIONS BELOW

The decision of the Eleventh Circuit Court of Appeals in this cause appears as *Hill v. McDonough*, Case No. 06-14927, (11th Cir. 2006), and is attached to this petition as Appendix A. The decision of the United States District Court, Northern District of Florida, Tallahassee Division appears as *Hill v. McDonough*, Case No. 4:06-cv-032-SPM, (N.D. Fla. 2006) and is attached to this petition as Appendix B.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1257. The Eleventh Circuit Court of Appeals issued an opinion denying relief on September 15, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> [N]or be deprived of life, liberty, or property, without due process of law U.S. Const. amend. V.
>
> [N]or [shall] cruel and unusual punishments [be] inflicted. U.S. CONST. amend. VIII.
>
> No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983

PROCEDURAL HISTORY

Appellant, Clarence Hill, was convicted of first degree murder in 1983. On appeal, his conviction was affirmed, but his sentence was vacated. Following a second sentencing proceeding, Mr. Hill was again sentenced to death, and the Florida Supreme Court affirmed. *Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, *Hill v. State,* 108 S.Ct. 1302 (1988).

On November 9, 1989, the Governor of Florida signed a death warrant scheduling Mr. Hill's execution for January 25, 1990. Mr. Hill filed an expedited postconviction motion, which was denied on January 18, 1990. On appeal, the Florida Supreme Court denied relief. *Hill v. State*, 556 So. 2d 1385 (Fla. 1990).

Mr. Hill subsequently filed a Motion to Stay Execution and a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida on January 27, 1990. After granting a stay of execution, on August 31, 1992, the district court granted relief to Mr. Hill on a sentencing issue.

On remand, the Florida Supreme Court again denied relief. *Hill v. State*, 643 So. 2d 1071 (Fla. 1995). Mr. Hill's subsequent state and federal applications, including his federal Petition for Writ of Habeas Corpus, were unsuccessful. *See Hill*

v. Moore, 175 F.3d 915 (11th Cir. 1999), *Hill v. State*, 528 U.S. 1087 (2000), *Hill v. State*, 2006 Fla. LEXIS 8 (January 17, 2006).

On Friday, January 20, 2006, Mr. Hill brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court, Northern District of Florida, Tallahassee Division. Mr. Hill alleged violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. On Saturday, January 21, 2006, the district court dismissed Mr. Hill's complaint for declaratory and injunctive relief for lack of jurisdiction. Thereafter, on Monday, January 23, 2006, Mr. Hill filed a Notice of Appeal and by separate pleading an application for stay of execution. On January 24, 2006, the Eleventh Circuit Court of Appeals denied his application for stay. The Eleventh Circuit went on to hold that Mr. Hill's action was a successive petition for a writ of habeas corpus and that any application for leave to file a successive petition would be denied under § 2244(b)(2). *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006).

Mr. Hill then filed a petition for certiorari review and an application for stay by separate pleading in the Supreme Court of the United States. At 7:00 p.m., January 24, 2006, Justice Kennedy issued a stay until the full court could consider Mr. Hill's pleadings. The following day, January 25, 2006, the full court granted Mr. Hill a stay and granted certiorari. The stay

was to remain in effect until the Supreme Court of the United States rendered a decision in the case. *Hill v. Crosby*, 126 S.Ct. 1189 (2006). Subsequently, on June 12, 2006, the Court rendered a 9-0 decision that reversed and remanded the cause back to the Eleventh Circuit for proceedings consistent with the opinion. *Hill v. McDonough*, 126 S.Ct 2096 (2006). The Supreme Court held that Mr. Hill's claim under 42 U.S.C. § 1983 was essentially comparable to that brought in *Nelson v. Campbell*, 124 S.Ct. 2117 (2004), and that Mr. Hill should be allowed to proceed under § 1983. *See Hill v. McDonough*, 126 S.Ct 2096 (2006). The Supreme Court's decision became final on July 14, 2006.

A panel of the Eleventh Circuit received the case on remand on July 18, 2006. On August 17, 2006, the State of Florida arbitrarily scheduled Mr. Hill's execution date for September 20, 2006. Thereafter, Mr. Hill filed in the Eleventh Circuit his Motion for Immediate Remand of This Cause to the District Court, via overnight mail on August 23, 2006. The Eleventh Circuit then remanded this cause on August 29, 2006 to the district court, with the mandate being received on August 31, 2006.

Undersigned counsel's office was contacted by telephone by the district court on August 31, 2006. At the time of the call, undersigned counsel was out of town conducting attorney visits with clients on Florida's Death Row, including Mr. Hill. Undersigned counsel then arrived back at his office at

approximately 5:00 p.m. At this time, undersigned learned through his assistant of the district court's directive that all pleadings in this matter were to be filed by the parties prior to 12:00 p.m., September 1, 2006. Undersigned counsel, a sole practitioner, then had less than twenty-four hours to comply with the district court's order. Subsequently, Mr. Hill filed a motion to file an amended complaint, an amended complaint, a motion for expedited discovery, propounded interrogatories, requested admissions, requested production, and moved for a temporary injunction staying Mr. Hill's execution. On that very same date, September 1, 2006, the district court entered its Order Dismissing Complaint. The following business day, September 5, 2006, Mr. Hill filed his motion for reconsideration and his motion for temporary injunction. The motion for temporary injunction was intended upon being filed electronically on September 1, 2006; however, either due to an error in transmission or counsel's error due to fatigue from working all night to comply with the district's court order the motion was not docketed until September 5, 2006. On September 11, 2006, the district court issued an Order Denying Motion for Reconsideration and Motion for Stay.

Petitioner then filed his Application for Stay of Execution and for Expedited Appeal on September 13, 2006 before the

Eleventh Circuit Court of Appeals.[1] The State of Florida filed a response in opposition on September 14, 2006. On September 15, 2006, the Eleventh Circuit denied the stay, denied the request for expedited briefing and refused to hear Mr. Hill's appeal based upon its determination that Mr. Hill was dilatory in seeking relief. This petition for certiorari follows the Eleventh Circuit's erroneous ruling.

FACTS RELEVANT TO QUESTIONS PRESENTED

After this Court's decision in *Hill v. McDonough*, 126 S.Ct 2096 (2006), the Eleventh Circuit Court of Appeals received the remand on July 18, 2006. Subsequently, in an apparent response to the fact that thirty days passed without any action by the Eleventh Circuit, on August 17, 2006 Florida's Governor reset Mr. Hill's execution date for Wednesday, September 20, 2006. See Appendix C, Letter from Attorney General Charlie Crist to Governor Bush dated August 17, 2006.

Despite the action by the Governor, the Eleventh Circuit refrained from remanding Mr. Hill's case back to the district court for consideration of his § 1983 action. Only after Mr. Hill filed a motion for immediate remand did the circuit court remand this cause on August 29, 2006. See *Hill v. McDonough*, No. 06-

[1] The Application for Stay and Expedited Appeal was not filed on September 12, 2006 because counsel for Mr. Hill was arguing before the Eleventh Circuit Court of Appeals in the case of *Sweet v. McDonough*, Case No. 05-15199.

10621 (11th Cir. Aug. 29, 2006).[2]

On remand to the district court, in his amended complaint filed under 42 U.S.C. § 1983, Mr. Hill challenged the three drug protocol used by the State of Florida in its lethal injection procedure. The challenge was premised on the study published in the medical journal THE LANCET. The study was published in April, 2005, and detailed the results of research on the effects of chemicals in lethal injections. See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution, Vol 365, THE LANCET 1412-14 (April 16, 2005). This study confirmed, through the analysis of empirical after-the-fact data, that the scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed. The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from

[2] The mandate issued on Thursday, August 31, 2006.

pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.[3]

Mr. Hill also amended his complaint to reflect new developments that had occurred subsequent to the granting of certiorari by this Court. Further, Mr. Hill argued that these developments clearly supported his request for discovery. For example, in California, shortly before his execution date was scheduled, Michael Morales filed a challenge to the lethal injection protocol used by the State of California in its executions. *See Morales v. Hickman*, 415 F.Supp 2d 1037, 1042 (N.D. Cal. 2006). Specifically, like Mr. Hill, Morales challenged the amount of sodium pentothal used and the use of pancuronium bromide in its execution protocol. *Id.* at 1044. In California, a condemned inmate is administered five (5) grams of sodium pentothal, whereas in Florida a condemned inmate is administered "'no less than' two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious". *Sims v. State*, 754 So. 2d 657, 666 (Fla. 2000).

After the United States Supreme Court stayed Mr. Hill's execution, a district court judge in California granted Morales discovery. Thus, Morales received the detailed execution logs from several of the recent executions in the State of California.

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[3]As noted in Mr. Hill's § 1983 action, the chemical process utilized in executions in Florida to the best of Mr. Hill's knowledge is identical to that identified in the study.

Id. The logs suggest that, contrary to the theoretical principle that a high dose of sodium pentothal causes a condemned's loss of consciousness and respiration to cease within a minute, in many executions respiration and consciousness do not cease several minutes after the administration of sodium pentothal. *Id.* at 1044-1045. In *Morales*, the district court noted the following pertinent details about the execution logs:

> Jaturun Siripongs, executed February 9, 1999: The administration of sodium thiopental began at 12:04 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations did not cease until 12:09 a.m., four minutes after the administration of sodium thiopental began and one minute after the administration of pancuronium bromide began.
>
> Manuel Babbitt, executed May 4, 1999: The administration of sodium thiopental began at 12:28 a.m. and the administration of pancuronium bromide began at 12:31 a.m., yet respirations did not cease until 12:33 a.m., five minutes after the administration of sodium thiopental began and two minutes after the administration of pancuronium bromide began. In addition, brief spasmodic movements were observed in the upper chest at 12:32 a.m.
>
> Darrell Keith Rich, executed March 15, 2000: The administration of sodium thiopental began at 12:06 a.m. and the administration of pancuronium bromide began at 12:08 a.m., yet respirations did not cease until 12:08 a.m., when pancuronium bromide was injected, two minutes after the administration of sodium thiopental began. Chest movements were observed from 12:09 a.m. to 12:10 a.m.
>
> Stephen Wayne Anderson, executed January 29, 2002: The administration of sodium thiopental began at 12:17 a.m. and the administration of pancuronium bromide began at 12:19 a.m., yet respirations did not cease until 12:22 a.m., five minutes after the administration of sodium thiopental began and three minutes after the administration of pancuronium bromide began.

> Stanley Tookie Williams, executed December 13, 2005: The administration of sodium thiopental began at 12:22 a.m., the administration of pancuronium bromide began at 12:28 a.m., and the administration of potassium chloride began at 12:32 a.m. or 12:34 a.m., yet respirations did not cease until either 12:28 a.m. or 12:34 a.m. -- that is, either six or twelve minutes after the administration of sodium thiopental began, either when or six minutes after the administration of pancuronium bromide began, and either four minutes before or when the administration of potassium chloride began.
>
> Clarence Ray Allen, executed January 17, 2006: The administration of sodium thiopental began at 12:18 a.m., yet respirations did not cease until 12:27 a.m., when pancuronium bromide was injected, nine minutes after the administration of sodium thiopental began.

Morales v. Hickman, 415 F.Supp. 2d at 1044-1045 (footnotes omitted).[4]

The recent evidence that has surfaced in California, only after discovery was received, and after Mr. Hill's case was stayed by this Court, supports and corroborates the newly discovered evidence contained in the Lancet article, upon which Mr. Hill relied in his § 1983 action.

Indeed, following the evidence that surfaced after discovery was disclosed about the recent executions in California, a district court in Ohio granted a condemned inmate's request for

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[4]Further, in the case of Clarence Ray Allen, two doses of potassium chloride were required to stop the beating of the inmate's heart. *Id*. at 1046. In addition to the execution logs, the district court noted the evidence from the eyewitnesses "tending to show that many inmates continue to breathe long after they should have ceased to do so." *Id*. at 1045.

preliminary injunction based on a challenge to the chemicals and the amount of chemicals used in the execution procedures in Ohio.[5] The district court stated:

> this Court would be remiss if it did not take note of the evidence that the district courts in *Morales* and *Brown* considered. And that evidence raises grave concerns about whether a condemned inmate would be sufficiently anesthetized under Ohio's lethal-injection protocol prior to and while being executed, especially considering that the dose of sodium thiopental prescribed under Ohio's lethal-injection protocol (2 grams) is less than that prescribed under California's protocol (5 grams) and that prescribed under North Carolina's protocol (3000 mg)."

Cooey v. Taft, et. al, 430 F.Supp 2d 702 (2006); 2006 U.S. Dist. LEXIS 24496, 13. The district court referenced the execution logs disclosed in *Morales*, as well as other affidavits and information.

In regards to the evidence submitted in *Brown v. Beck*, the *Cooey* Court also noted the autopsy results that showed the post-mortem levels of sodium pentothal being less than what would be expected. *Id.* at 11-12. And, again, in *Brown*, evidence was submitted from witnesses present at recent executions who had seen condemned inmates writhing and convulsing after the administration of the sodium pentothal, which was inconsistent with the notion that the inmates had lost consciousness.

Thus, the information submitted in *Brown v. Beck* is entirely

[5] Ohio, like Florida, requires two (2) grams of sodium pentothal be administered. *Cooey v. Taft, et. al*, 430 F.Supp 2d 702 (2006); 2006 U.S. Dist. LEXIS 24496, 13.

consistent and supports the recent scientific research published in the Lancet article.

In issuing the preliminary injunction in *Cooey*, the district court found: "Given the evidence that has begun to emerge calling this and other conclusions by Dr. Dershwitz into question, the Court is persuaded that there is an unacceptable and unnecessary risk that Plaintiff Hill will be irreparably harmed absent the injunction, i.e., that Plaintiff Hill could suffer unnecessary and excruciating pain while being executed in violation of his *Eighth Amendment* right not to be subjected to cruel and unusual punishment." *Id.* at 15. Further, the district court in *Cooey* found that "[i]n view of the lack of development of the record in this case, this Court does not feel that it is in a position to avoid the issuance of a preliminary injunction by fashioning a remedy by which Ohio could carry out the execution of Plaintiff Hill within the confines of the *Eighth Amendment*." *Id.* at 19.

Also, recently in Missouri, an evidentiary hearing was held and discovery regarding Missouri's recent executions was disclosed to Michael Taylor, a condemned inmate challenging the lethal injection protocol used in executions. Information was revealed that showed that "unacceptable" risks existed in Missouri's execution procedures that may cause a condemned inmate unconstitutional pain and suffering. *Taylor v. Crawford*, 2006 U.S. Dist. LEXIS 42949, 22 (June 26, 2006). That information

included: 1) no written protocol existed; 2) that the State had misrepresented the amount of sodium thiopental that had been administered in recent executions; five (5) grams was to have been administered, but only two and a half (2.5) grams were actually administered; 3) the doctor overseeing the executions was not an anesthesiologist, but rather a surgeon, who was not well versed in mixing and dissolving the chemicals used in the execution protocol and who believed he could modify the amount of chemicals and/or protocol at his discretion; and 4) there is no means to monitor the anesthetic depth of the condemned during the execution procedure. *Id.* at 19-21.

Of particular note to Mr. Hill's case is that the district court in *Taylor* was concerned that the amount of sodium pentothal had been decreased from five (5) grams to two and a half (2.5) grams, which is still more than the State of Florida intends to administer in Mr. Hill's execution. Further, *Taylor* shows the importance of being provided discovery about execution procedures as well as information about recent executions – information to which Mr. Hill has been completely denied.

Thus, as Mr. Hill explained in his amended § 1983 action, since this Court granted Mr. Hill a stay of execution, new, critical information has surfaced that undermines the theories that originally supported the current lethal injection protocols used in states, including Florida. This new information

demonstrates the flaws in Florida's current lethal injection protocols and at a minimum supports Mr. Hill's claim that under the current Florida lethal injection protocol he will suffer unnecessary and excruciating pain while being executed in violation of his Eighth Amendment right not to be subjected to cruel and unusual punishment.

THE FEDERAL COURTS' RULINGS

The district court granted the State of Florida's amended motion to dismiss, declined to issue a stay of execution, and dismissed Mr. Hill's Amended Verified Complaint for Declaratory and Injunctive Relief. See *Hill v. McDonough*, Case No. 4:06-cv-032-SPM, (N.D. Fla. 2006) . The district court then denied Mr. Hill's motion for reconsideration and motion for stay. See *Hill v. McDonough*, Case No. 4:06-cv-032-SPM, Doc. 47.

In denying Mr. Hill's motion for a stay of execution and for expedited appeal, the Eleventh Circuit determined that the equities did not support Hill's request:

> Simply put, Hill was the architect of the very trap from which he now seeks relief. At the outset, Hill filed his § 1983 complaint four days before his previously scheduled execution date of January 24, 2006, and just after the Florida Supreme Court rejected his application for post-conviction relief on, among other grounds, his challenge to the Florida lethal injection protocol. See Hill v. State, 921 So. 2d 579, 582–83 (Fla. 2006). Hill's assertion of essentially the same lethal injection challenge in the Florida courts reveals that he was aware of the grounds for the claim much earlier than the date on which he actually filed his § 1983 action in federal district court. But we need not rely on that inference alone to determine

that Hill unreasonably delayed in filing his federal complaint. The Florida Supreme Court considered a challenge to the Florida lethal injection protocols on similar grounds as early as 2000. Sims v. State, 754 So. 2d 657, 666–68 (Fla. 2000).[6] Although it is unclear from the procedural history whether Hill addressed the Sims precedent in his post-conviction proceedings after 2000, the fact remains that, during the pendency of his various collateral challenges, Florida had considered the same type of claim upon which Hill now seeks relief. In light of this context, Hill cannot claim that it was impossible for him to initiate his federal suit any earlier.

Further, with regard to more recent procedural history, Hill has again demonstrated his intent to delay proceedings in order to necessitate a stay. After the district court denied his request for injunctive relief and dismissed his complaint, Hill moved for reconsideration and, again, for a stay of execution. The district court denied his motions on September 11, 2006, noting that "Hill's emotionally-laden arguments raise no new evidence. . . . [I]t appears that Hill is engaging in dilatory tactics to delay a death sentence." Order Denying Motion for Reconsideration and Motion for Stay at 2–3, Hill v. McDonough, No. 4:06-CV-032-SPM (N.D. Fla. Sept. 11, 2006). By moving for reconsideration, Hill only further delayed this court's receipt of his case on appeal, bringing us within days of his scheduled execution before he filed the instant motion for a stay and expedited appeal.

In light of Hill's actions in this case, which can only be described as dilatory, we join our sister circuits in declining to allow further litigation of a § 1983 case filed essentially on the eve of execution. See White v. Johnson, 429 F.3d 572, 573–74 (5th Cir. 2005) (holding that even if the condemned inmate's § 1983 action was cognizable, "'he is not entitled to the equitable relief he seeks' due to his dilatory filing" (citations omitted)); Harris v. Johnson, 376 F.3d 414, 417–18 (5th Cir. 2004) (condemned inmate who filed § 1983 action ten weeks before his scheduled execution "leaves little doubt that the real purpose behind his

[6] The Florida Supreme Court relied on Sims in rejecting Hill's lethal injection challenge during post-conviction proceedings. *Hill v. State*, 921 So. 2d at 582–83.

> claim is to seek a delay of his execution, not merely to effect an alteration of the manner in which it is carried out"); see generally Hicks v. Taft, 431 F.3d 916 (6th Cir. 2005); Cooper v. Rimmer, 379 F.3d 1029 (9th Cir. 2004). This holding is consistent with the Supreme Court's instruction in its remand of Hill's case that "[a] court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such time as to allow consideration of the merits without requiring entry of a stay.'" Hill v. McDonough, 547 U.S. at ---, 126 S. Ct. at 2104 (citation omitted).

Hill v. McDonough, Case No. 06-14927 at 6-9.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD REVIEW THE ISSUES SURROUNDING THE FEDERAL COURTS' CONSIDERATION OF EQUITIES IN DENYING MR. HILL A STAY OF EXECUTION AND A TEMPORARY INJUNCTION.

A. Equities consideration after remand

In *Hill v. McDonough*, 126 S.Ct. 2096 (2006), this Court held that Mr. Hill's claim under 42 U.S.C. § 1983 was essentially comparable to that brought in *Nelson v. Campbell*, 124 S.Ct. 2117 (2004), and that Mr. Hill should be allowed to proceed under § 1983.

This Court also noted that a stay of execution is an equitable remedy and "[t]hus, like other stay applicants, inmates seeking time to challenge the manner in which the State plans to execute them must satisfy all of the requirements for a stay, including a showing of a significant possibility of success on the merits." *Hill*, 126 S.Ct. at 2104. "A court considering a stay must also apply 'a strong equitable presumption against the grant of a stay where a claim could have been brought at such a

time as to allow consideration of the merits without requiring entry of a stay.'" *Id.* (citations omitted).

In denying Mr. Hill's requested relief, the Eleventh Circuit determined that Hill was dilatory by filing his original § 1983 complaint four days before his execution and by filing a motion for reconsideration after the denial of his amended complaint. *Hill v. McDonough*, Case No. 06-14927 at 6, 8. The Eleventh Circuit concluded that "In light of Hill's actions in this case, which can only be described as dilatory, we join our sister circuits in declining to allow further litigation of a § 1983 case filed essentially on the eve of execution." *Id.* at 8 (citations omitted).

In making this determination, the Eleventh Circuit ignores the fact that it "was the architect of the very trap from which [Hill][] now seeks relief." When Mr. Hill's case was remanded by this Court after its decision in *Hill v. McDonough*, Mr. Hill's execution was no longer imminent. This change in circumstances, not only changed the equities, it rendered an analysis of the equities moot because the equities are to be considered in determining whether to grant equitable relief, *i.e.* a stay of execution, not in deciding the merits of a § 1983 action. *See Nelson v. Campbell*, 541 U.S. 637, 649 (2004)("the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right"); *Gomez v. United States*

Dist. Court of the Norther Dist. of Cal., 503 U.S. 653, 654 (1992)("A court may consider the last minute nature of an application to stay an execution whether to grant equitable relief.").

As this Court made clear in *Nelson v. Campbell*, 541 U.S. 637, 649 (2004), *Gomez* governed the standard for determining whether a §1983 plaintiff was entitled to a stay of execution during the pendency of the lawsuit. This Court explained, "the mere fact that an inmate states a cognizable §1983 claim does not warrant the entry of a stay as a matter of right." As to the entitlement to a stay, the Supreme Court in *Nelson* quoted its earlier opinion in *Gomez*, 503 U.S. at 654:

> This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

However, since there was no scheduled execution at the time of remand in Mr. Hill's case, *Gomez* was inapplicable. Ultimately, Mr. Hill was not permitted to proceed on his § 1983 action without a looming execution date solely because of the actions by the State and the court. Despite this Court's remand on July 14, 2006, the Eleventh Circuit failed to take any action on Mr. Hill's case. Thirty days passed without any instruction from the Eleventh Circuit and, significantly, without any

execution date having been scheduled by the State of Florida. Then, in an apparent response to the inaction by the Eleventh Circuit, on August 17, 2006 Florida's Governor reset Mr. Hill's execution date for Wednesday, September 20, 2006. See Appendix C, Letter from Attorney General Charlie Crist to Governor Bush dated August 17, 2006.

Despite the action by the Governor, the Eleventh Circuit still refrained from remanding Mr. Hill's case back to the district court for consideration of his § 1983 action. Only after Mr. Hill filed a motion for immediate remand did the circuit court remand this cause on August 29, 2006. See *Hill v. McDonough*, No. 06-10621 (11th Cir. Aug. 29, 2006).[7]

Clearly, the scheduling of Mr. Hill's execution was enacted in order to obtain a strategic advantage in the § 1983 proceedings, to change the balance of equities. This was done to preclude judicial resolution and violated Mr. Hill's right to due process. The guarantee that no person shall be deprived of life, liberty or property without due process of law is a fundamental constitutional right that applies to both federal and state governmental actors through the Fifth and Fourteenth Amendments to the U.S. Constitution.[8] Here, Mr. Hill should not

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[7] The mandate issued on Thursday, August 31, 2006.

[8] The Due Process Clause applies to federal courts, *Dusenberry v. United States*, 534 U.S. 161, 165 (2002), and it applies in civil as well as criminal proceedings, *e.g. Honda Motor Co. V.*

be penalized because the lower court and the State forced him to proceed on his § 1983 "on the eve" of execution.

B. Equities have been changed by circumstances

In faulting Mr. Hill for not raising his original § 1983 action at an earlier time, the Eleventh Circuit fails to acknowledge that prior to *Hill v. McDonough*, Eleventh Circuit precedent refused to recognize and thereby notice condemned prisoners that a §1983 action could be used to challenge "[m]ethod of execution" under the Eighth Amendment. In fact, the Eleventh Circuit had consistently ruled that Mr. Hill, and others on Florida's death row, "could [not] have brought" the claim contained in the pending §1983 action. As well, the court's clear holding in *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004), precluded such a lawsuit. Indeed, the district court originally dismissed Mr. Hill's claim based upon that precedent. It was only on January 24, 2006 – when this Court granted certiorari review in *Hill v. Crosby* to determine whether the Eleventh Circuit's determination that district courts lack

Oberg, 512 U.S. 415, 430-435 (1994). It has been long established that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and to afford them an opportunity" to present their case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

jurisdiction to consider claims like Mr. Hill's was correct – that the validity of this precedent was called into question.

Prior Eleventh Circuit precedent was succinctly explained in *Hill v. Crosby*:

> It is clear to us that the district court lacked jurisdiction to consider appellant's claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it. *See* 28 U.S.C. § 2244(b)(3)(A). And as the panel observed in *Robinson*, "such an application to file a successive petition would be due to be denied in any event. *See In re Provanzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied*, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B))."

437 F.3d 1084, 1085 (11th Cir. 2006).

Thus, unlike the situation in the bevy of cases cited by the district court[9], the Eleventh Circuit[10], or even in *Gomez v. U.S. Dist. Ct. For N. Dist. Cal.* 503 U.S. 653, (1992)(per curiam), there is "good reason" in this case for the failure to present this claim previously. According to the binding precedent of the Eleventh Circuit when the *Lancet* study came out

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[9] *Harris v. Johnson*, 376 F.3d 414, 418 (5th Cir. 2004); *White v. Johnson*, 429 F.3d 572, 574 (5th Cir. 2005); *White v. Livingston*, 126 S.Ct. 601 (2005); *Patton v. Jones*, 2006 WL 2468312 (10th Cir. Aug. 25, 2006); *Reese v. Livingston*, 453 F.3d 289, 291 (5th Cir. June 20, 2006).

[10] *White v. Johnson*, 429 F.3d 572, 573-74 (5th Cir. 2005); *Harris v. Johnson*, 376 F.3d 414, 417-18 (5th Cir. 2004); *Hicks v. Taft*, 431 F.3d 916 (6th Cir. 2005); *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004).

in April of 2005, Mr. Hill could file neither a successive habeas petition challenging the protocol employed by the State of Florida for carrying out a lethal injection execution, nor a §1983 complaint.

The Eleventh Circuit is incorrect in asserting that Mr. Hill could have brought his claim in the years preceding the date his execution was scheduled. Not only did the court's binding case law preclude it, Mr. Hill's challenge could not have become ripe before his death warrant issued, because it was only at that time that the Florida Department of Corrections ("DOC") was obliged to begin planning to conduct his execution, and only at that point that Mr. Hill could attempt to ascertain the specific means by which the State meant to carry out his lethal injection. *See Worthington v. Missouri*, 166 S.W. 3d 566, 583 n.3 (Mo. 2005).[11] That is the case in Florida because the DOC retains complete discretion over how lethal injections will

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[11]As Justice Breyer stated in his questioning of the State of Florida during oral argument in this cause:

> And so [Mr. Hill] thinks, up until the last minute, that maybe Florida will just do it, and lo and behold, when the death warrant is actually executed, it now begins to appear that they won't. And therefore, at that time, he brings the case. Now, I've spun out a story which seems probable, that if it's true, it would be very understandable why this wasn't ripe before the execution warrant is issued and thereafter it is.

Hill v. McDonough, 126 S.Ct. 2096 (2006), Oral Argument transcript at 29.

be carried out, and it shrouds its intentions in secrecy.

No Florida statute provides the chemical sequence to be used, the procedures for administering it, any qualifications or training required for persons engaged in administering the chemicals and monitoring the execution, or the means of venous access. Nor does any Florida statute even require that such procedures be devised through rule-making process, or in consultation with medical experts. *Compare* Fla. Stat. § 828.055 (requiring Board of Pharmacy to adopt rules for the issuance of permits authorizing the use of chemicals in animal euthanasia, which "shall set forth guidelines for the proper storage and handling" of the chemicals); 828.058 (requiring training for animal euthanasia technicians involving a curriculum approved by the Board of Veterinary Medicine). And the Department has not itself decided to publish any definitive set of procedures through rule-making or otherwise. DOC, therefore, retains total discretion to change the chemical sequence, the manner of administration, the qualifications and training of the execution team, and any safeguards to ensure proper administration and adequate anesthetic depth at any time and with respect to any particular execution. The State has never disputed that DOC has total discretion in this regard. The "central concern" of the ripeness doctrine "is whether the case involves uncertain or contingent future events that may not

occur as anticipated." Charles Alan Wright et al., 13A *Federal Practice and Procedure* § 3532, at 112.

Here, rather than promulgate a definitive policy, DOC has retained total discretion over its process of lethal injection. For this reason, it was only when Mr. Hill's execution was imminent that he could ascertain what execution procedures would be applied to him. The State cannot fight tooth and nail to resist publication of any definitive protocol[12], and then accuse the condemned person of inequitable conduct because he must wait until his death warrant is issued to ascertain the particular procedures that will be used in his execution.[13]

Given the lack of *any* constraints on DOC's discretion and of any definitive practices that would have provided the courts with a sufficiently concrete policy to review, Mr. Hill's claim did not ripen until the execution warrant issued. From the moment that Mr. Hill's challenge ripened, he has diligently pursued his claim. Mr. Hill initially filed suit in state

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[12] The State of Florida has denied Mr. Hill any access whatsoever to records, policies, procedures, or any other information concerning its lethal injection protocols and procedures.

[13] Instead, the State can secure an earlier disposition of such suits simply by prescribing definitive practices or the orderly adoption of rules, as it already has done to regulate animal euthanasia. The Department, moreover, need only implement the familiar process of agency rule-making to ensure that the question whether its chosen procedures for administering lethal injection violates the Eighth Amendment ripens before the inmate's date of execution is set.

court, in order to defend against an argument that he had failed to exhaust state remedies.[14] As soon as his action was dismissed on procedural grounds in state court, he filed his § 1983 action. The aforementioned facts establish that Mr. Hill was diligent in filing his §1983 claim. Unfortunately, the district court's order nor the Eleventh Circuit's order acknowledge or specifically consider the facts presented.

Of further note is that the study relied upon by Mr. Hill was not published until April 2005, five years after the *Sims* decision. This study is new. It is post-*Sims*.[15] In addition, *Taylor* and *Morales* are recent decisions which demonstrate examples of how reality vastly differs from theory when grappling with lethal injection issues. The discovery in these cases exposed the Missouri and California procedures to be much more inadequate than ever imagined. As none of this information was available at the time *Sims* was decided, certainly Mr. Hill

[14] Although Mr. Hill was not required to exhaust state-court remedies prior to bringing his federal-court action under § 1983, *see Wilkinson v. Dotson*, 125 S. Ct. 1242, 1249 (2005), he did so out of an abundance of caution, recognizing that if the district court were to construe his complaint as a habeas filing in accord with Eleventh Circuit precedent, he *would* have had to exhaust those judicial remedies, *see* 48 U.S.C. § 2254(b)(1)(A).

[15] Mr. Hill's claim is no different than in cases where new scientific DNA techniques were developed after those cases had concluded. Just as in those cases where courts are reconsidering prior rulings in light of subsequent scientific research, so should Mr. Hill's claim be considered in light of new scientific evidence.

cannot be faulted for failing to raise the issue.

C. Merits review in equities consideration

Since the stay in *Hill v. McDonough*, 126 S.Ct. 1189, 163 L.Ed.2d 1144, 2006 U.S. LEXIS 1074 (January 25, 2006),the outcome of §1983 lethal injection around the country has been random and arbitrary. Condemned inmates in similar positions to Mr. Hill have been permitted stays of execution, and some have been allowed to pursue litigation in order to have the merits of their claim reviewed. In other circuits, however, inmates with the exact same constitutional challenge have been executed without consideration of their claims, despite the fact that such an analysis is required in order to assess the equities involved in granting a stay and/or a temporary injunction.

The disparity in the circuits' approach to lethal injection challenges is widespread and striking. Executions have been put on hold pending extensive hearings on the lethal injection issue in California. *See Morales v. Hickman*, Case No. C06-219-JF & C06-926-JF-RS (N.D. Cal. 2006). Similarly, in Missouri, a federal district judge has ordered a new lethal injection protocol and halted executions in that state until at least October 27, 2006. *Taylor v. Crawford*, Case No. 2:05-cv-04173-FJG (W.D. Mo.), Docs. 195, 213. Federal judges in Arkansas and Delaware also halted executions in those states. *Nooner et al. V. Norris, et al.*, Case No. 5:06-cv-110 (E.D. Ark.); *see also*

Terrick Nooner v. Larry Davis, et al., Case No. 06-2748, (8th Cir.). In South Dakota, the governor halted an execution at the last minute amid concerns regarding the state's lethal injection procedure and asked the state legislature to amend the statute on lethal injections.

Likewise, in Oklahoma, the state voluntarily changed its execution protocol in response to the litigation in *Patton v. Jones*, Case No. CIV-06-591-F (W.D. Okla.), which exposed serious problems inherent in that state's procedures.[16] Similarly, North Carolina revised their lethal injection procedures in response to a §1983 challenge. *See Brown v. Beck*, 2006 U.S. Dist. LEXIS 60084 (E.D. N.C. 2006).

Yet despite the recognition by numerous states and circuits that lethal injection procedures merit review, executions have proceeded in other states - - states which have lethal injection protocols substantially similar, if not exactly the same, as states which have halted their executions. Texas, for example, has executed 21 people this year by lethal injection, fully half of all the executions in the country for 2006. www.deathpenaltyinfo.org (site last visited September 17, 2006). As one judge in a Tennessee capital case cogently observed regarding the wide disparity and arbitrary nature of court

[16] Significantly, Florida's lethal injection procedure was modeled upon Oklahoma's, which was altered in response to the lethal injection challenge in *Patton. Id.*

responses to lethal injection challenges and their arbitrariness:

> [T]he dysfunctional patchwork of stays and executions going on in this country further undermines the various states' effectiveness and ability to properly carry out death sentences. **We are currently operating under a system wherein condemned inmates are bringing near identical challenges to the lethal injection procedure. In some instances stays are granted, while in others they are not and the defendants are executed, with no principled distinction to justify such a result.**
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> *Alley v. Little*, No. 06-5650 (6th Cir. May 16, 2006)(Martin, J., dissenting from denial of a rehearing en banc)(emphasis added).

A review of lethal injection litigation around the country demonstrates that courts have developed essentially two methods to handle lethal injection claims. One approach, utilized by the Fourth, Fifth, and (now) Eleventh Circuits, is to deny both the claim and the stay based upon dilatoriness, without any examination of the merits in assessing the equities involved. (See, e.g., *White v. Johnson*, 429 F.3d 572, 573-74 (5th Cir. 2005); *Harris v. Johnson*, 376 F.3d 414, 417-18 (5th Cir. 2004), and *Hill v. McDonough*, Case No. 06-14927 (2006)). The second method, which has been used in the Eighth, Ninth, and Tenth Circuits, is that a stay is denied, but the case is not dismissed. Rather, the case is permitted to proceed on a fast-track basis, and if the plaintiff develops enough evidence, a stay is then granted. *Patton v. Jones*, 2006 U.S. Dist. LEXIS 54429 (Okla. W.D. Aug. 4, 2006) *affirmed, stay denied, Patton v.*

Jones, 2006 U.S. App. LEXIS 22312 (10th Cir. Aug. 25, 2006), *Patton v. Jones*, *petition denied, stay denied,* 2006 U.S. LEXIS 5379 (Aug.29, 2006); *Morales v. Hickman*, 2006 WL 335427 (N.D. Cal., Feb. 14, 2006) *reviewed at Morales v. Hickman*, 2006 WL 391604 (9th Cir., 2006); *Taylor v. Crawford*, 445 F.3d 1095, 1097-98 (8th Cir. 2006) *on remand, Taylor v. Crawford*, 2006 U.S. Dist. LEXIS 42949, 22 (June 26, 2006).[17] Thus, in *Patton, Morales,* and *Taylor*, a determination on the merits was made in a very limited amount of time, and enough discovery and testimony were adduced to allow meaningful consideration to be given to the plaintiffs' claims. Clearly, these cases demonstrate that it is possible to litigate and resolve lethal injection issues quickly.[18]

Yet there is no doubt that with an issue as grave and weighty as lethal injection, the courts should permit thorough and meaningful litigation. The procedural history in Mr. Taylor's case is instructive as to the perils of attempting to litigate lethal injection claims at a moment's notice when a state

[17] For example, the docket sheet in *Patton* reveals that the plaintiff filed a motion for preliminary injunction on July 28, 2006, and a hearing on that motion was held on August 8, 2006. At the hearing, the State of Oklahoma introduced a new protocol in response to plaintiff's claims, and the Court ruled that the protocol extant at the time the lawsuit was filed was unconstitutional; however, the new protocol was ruled to have sufficiently addressed plaintiff's concerns regarding the constitutionality of the method of execution. See *Patton v. Jones*, Case No. 5:06-cv-00591-F, Docket Report & Doc. 25.

[18] It was incorrect for the district court and the Eleventh Circuit to assume that the parties could not address Mr. Hill's claims prior to his September 20, 2006 execution date.

arbitrarily sets an execution date to gain an advantage in a §1983 lethal injection case. During the pendency of Mr. Taylor's lethal injection challenge the State of Missouri arbitrarily set an execution date on January 3, 2006 for February 1, 2006. *See Taylor v. Crawford*, 445 F.3d 1095, 1097 (8th Cir. 2006). The district court then stayed the execution and set an evidentiary hearing on Mr. Taylor's claims for February 21, 2006. The district court's stated reason for the stay was that it could not accommodate a hearing in Mr. Taylor's case prior to February 21, 2006 due to its full calendar. *Id.*

The State of Missouri appealed the issuance of a stay and the Eighth Circuit vacated the stay and remanded to the district court on January 29, 2006 with instructions to assign a district court judge that could immediately hold a hearing and issue a ruling prior to the scheduled February 1, 2006 execution. See Order, No. 06-1278. Eighth Cir. Jan. 29, 2006; see also *Taylor v. Crawford*, 445 F.3d 1095, 1097-98 (8th Cir. 2006).

On remand the district court judge immediately conducted a hearing on January 30 and 31, 2006, while making it clear the hearing would be conducted in accord with the Eighth Circuit's timeline. *Id.* at 1098. Taylor was unable to conduct any further discovery and unable to procure the attendance of indispensable witnesses due to the untenable time constraints. *Id.* "Taylor immediately appealed the district court's adverse order,

asserting that "the expedited and truncated hearing before the district court denied him due process" and that it was erroneous for the court to preclude him from calling necessary witnesses and to deny his claim on the merits. *Id.* He also moved for a stay, which the panel denied. *See id.*

The same day he filed his appeal, an *en banc* panel granted Taylor's request for a stay and his motion for rehearing, and returned the case to the panel for briefing and oral argument. *See id.* The panel's observation after briefing and oral argument is enlightening:

> Having reviewed the record made before the district court, we now realize the burdensome strain that our order imposed upon the district court as well as upon the parties as they made extraordinary efforts to comply. We herby offer our *mea culpa* . . . We simply asked the district court and the parties to do too much in too little time.

Id. at 1099.

After remand, Mr. Taylor was able to engage in meaningful discovery that exposed serious flaws in Missouri's execution procedures resulting in the district court judge ruling their system unconstitutional.[19]

Unfortunately for Mr. Hill, despite this Court's ruling in *Hill v. McDonough*, despite Eleventh Circuit precedent which

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[19] The cruel irony is that due to Mr. Hill's geographical location, depending upon the outcome of these proceedings, he may be executed pursuant to a lethal injection procedure strikingly similar to Missouri's.

precluded him from litigating his claim before *Hill*, and despite his timely and good faith efforts to pursue his §1983 claim, he was never given the opportunity for any kind of discovery or evidentiary hearing whatsoever. The merits of his claim were never examined in any meaningful capacity.

The procedural history of Mr. Hill's § 1983 challenge has placed the Eleventh Circuit squarely in conflict with the Sixth, Eighth, Ninth, and Tenth Circuits. This conflict, and the arbitrary disparity around the country which seemingly depends upon nothing but geography, now unconstitutionally imperils Mr. Hill's life. Mr. Hill should have been allowed to pursue discovery and present evidence in support of his claim and receive a judicial resolution on the merits. Instead, at this point this litigation is no further along than when this Court granted certiorari on January 25, 2006. It is difficult to believe that is the outcome this Court contemplated when it decided *Hill v. McDonough* this past June.

CONCLUSION

Petitioner, Clarence Edward Hill, requests that certiorari review be granted.

Respectfully submitted,

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