IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CASE NO. _____

CLARENCE EDWARD HILL,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
JAMES MCDONOUGH, SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity;	)	**EMERGENCY APPLICATION: CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION IMMINENT.**
	)	
and	)	
	)	
CHARLES J. CRIST, JR., ATTORNEY GENERAL, in his official capacity	)	
	)	
Appellees.	)	
_____	)	

APPLICATION FOR A STAY OF EXECUTION AND FOR EXPEDITED APPEAL

COMES now the Appellant, CLARENCE HILL, through undersigned counsel and respectfully moves for a stay of execution and an expedited appeal. Mr. Hill's execution is presently scheduled for September 20, 2006 at 6:00 p.m.

I. 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, this Court denied his application for stay. This Court 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.3rd 1084, 2006 U.S. App. LEXIS 1674 (11th Cir. Fla., 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, 163 L.Ed.2d 1144, 2006 U.S. LEXIS 1074 (January 25, 2006). Subsequently, the Court rendered a 9-0 decision that reversed and remanded the cause back to this Court for proceedings consistent with the opinion. *Hill v. McDonough*, 126 S.Ct 2096, 165 L.Ed.2d 44, 2006 U.S. LEXIS 4674 (June 12, 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*, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004),

and that Mr. Hill should be allowed to proceed under § 1983. *See Hill v. McDonough*, 126 S.Ct 2096, 165 L.Ed.2d 44, 2006 U.S. LEXIS 4674 (June 12, 2006). The Supreme Court's decision became final on July 14, 2006.

A panel of this Court 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 this Court his Motion for Immediate Remand of This Cause to the District Court, via overnight mail on August 23, 2006. This Court then remanded this cause on August 29, 2006 to the District Court, with the mandate being received on August 30, 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, 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. On September 11, 2006, the district court issued an Order Denying Motion for Reconsideration and Motion for Stay.

II. BASIS FOR STAY OF EXECUTION

In *Hill*, the U.S. Supreme Court stated that the requirements for a stay of execution stated in *Nelson* and *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, 503 U.S. 653, 654, 122 S.Ct. 1652, 118 L.Ed.2d 293 (1992) (*per curiam*) should be followed. *Hill v. McDonough*, 126 S.Ct 2096, *2104, 165 L.Ed.2d 44, **54, 2006 U.S. LEXIS 4674, ***21 (2006). In the past, this Court has determined whether a stay of execution should be granted by utilizing a four-part test that generally comports with *Gomez*:

> whether the movant has made a showing of likelihood of success on the merits and of irreparable injury if the stay is not granted, whether the stay would substantially harm other parties, and whether granting the stay would serve the public interest.

Bundy v. Wainwright, 808 F. 2d 1410, 1421 (11th Cir. 1987).

Mr. Hill has met the standards attendant to the granting of a stay of his execution. The Supreme Court of the United States considered these same factors when granting Mr. Hill a stay to

consider the case which eventually led to its reversing this Court's decision and remanding it back for consideration consistent with its opinion. Each of the *Gomez* criteria are satisfied in this case.

A. IRREPARABLE INJURY

If the requested stay is not issued, Mr. Hill will be executed at 6:00 p.m. on Wednesday, September 20, 2006. This execution will carry an unacceptably high risk of being conducted in a torturous manner in violation of Mr. Hill's Eighth Amendment right to be free from cruel and unusual punishment. This constitutes irreparable injury. *See, e.g., Evans v. Bennett*, 440 U.S. 1301, 1306 (1979) (Rehnquist, Circuit Justice, granting a stay of execution and noting the "obviously irreversible nature of the death penalty"); *O'Bryan v. Estelle*, 691 F.2d 706, 708 (5th Cir. 1982) (the "irreversible nature of the death penalty" constitutes irreparable injury and weighs heavily in favor of granting a stay); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (holding that continued pain and suffering resulting from deliberate medical indifference is irreparable harm).

Additionally, the State's violation of Mr. Hill's Eighth Amendment rights alone validates a presumption of irreparable harm. *See Associated General Contractor's of California, Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1412 (9th Cir. 1991) (an alleged constitutional infringement will often alone

constitute irreparable harm).

B. HARM TO OTHER PARTIES

There will be no harm to other parties if a stay of execution is granted. Mr. Hill will remain in custody at Florida State Prison, where he has been held since his conviction and, most recently, since the stay of execution was entered by the Supreme Court of the United States on January 25, 2006. A relatively brief continuation of the *status quo* will cause absolutely no harm to other parties. *See Gomez v. U.S. Dist. Ct. For Northern Dist. Of Cal.,* 966 F.2d 460, 462 (9th Cir. 1992) (Noonan, J., dissenting from grant of writ of mandate) ("The state will get its man in the end. In contrast, if persons are put to death in a manner that is determined to be cruel, they suffer injury that can never be undone, and the Constitution suffers an injury that can never be repaired.")

C. PUBLIC INTEREST

Although there are competing public interests, ultimately one factor favors the issuance of the temporary relief sought. Certainly, the public has an interest in the execution of Mr. Hill pursuant to the judgment of the Florida Courts. More importantly, however, it has an interest in determining that Mr. Hill's execution will be carried out consistent the with requirements of the Eighth Amendment. Additionally, the State has an interest in not subjecting Mr. Hill to the excruciating

and torturous pain likely involved in the lethal injection process Florida intends upon utilizing. *See Sims v. State*, 754 So.2d 657 (Fla. 2000). It is therefore paramount that Mr. Hill's weighty constitutional claims be resolved on the merits.

By arbitrarily setting an execution date while this case was awaiting remand, the State has attempted to manipulate the process and kill Mr. Hill before its unconstitutional method of execution is reviewed on the merits. The temporary delay in carrying out the execution, which will be necessitated by review and consideration of the merits of Mr. Hill's case, is a small price to pay to assure fairness in this critical aspect of carrying out Mr. Hill's sentence.

The State of Florida created the current supposed time bind by setting an execution date rather than simply moving to remand this cause to the district court for a full and fair hearing. *See* Appendix A & B. In letters exchanged between the Office of the Governor and the Attorney General, the letter written by Attorney General Crist states in reference to this cause, "The case has been remanded to the Eleventh Circuit Court of Appeals on the complaint filed pursuant to 42 U.S.C. § 1983, however no further action has occurred." Appendix B at 2. This letter was penned a mere thirty-four days after this Court received the remand from the Supreme Court of the United States. Mr. Hill was anticipating that this Court would remand his cause to the

district court and was simply waiting for notification of such remand. Mr. Hill was shocked that the Governor of Florida would set an execution date without this cause being fully litigated, especially in light of the problems being exposed in the lethal injection process in cases around the country, and the likelihood he will experience a torturous death under Florida's current lethal injection procedure. *See infra.*

The State of Florida has rescheduled Mr. Hill's execution in order to obtain a strategic advantage in his § 1983 suit. Its actions will deprive Mr. Hill of his right to pursue his claims, thereby achieving its ultimate goal – to prevent Florida's lethal injection procedure from being subjected to any meaningful scrutiny. The equities have now certainly been reversed from when this cause was entertained by the district court in January. Instead of Mr. Hill filing his lawsuit when his execution was imminent, the State of Florida now has scheduled his execution after his lawsuit was allowed to go forward in an apparent attempt to preclude judicial resolution.

The analysis under *Gomez* changed when the original execution date was stayed on January 25, 2006. In contrast to when the Supreme Court of the United States voted unanimously to stay this cause and grant *certiorari*, after the remand in January of 2006 Mr. Hill was not initially operating under an imminent execution date. Thirty-four days after the remand, the Governor of Florida

set an execution date to "get things going in the courts," rather than filing a motion for remand. This action presents a different set of equities than what this Court considered when originally denying Mr. Hill's request to stay his execution. The State of Florida's action, not Mr. Hill's, abrogated Mr. Hill's ability to adequately develop a factual record as requested in this cause. The State's actions should not unduly prejudice Mr. Hill by preventing him from pursuing his constitutional claim to the fullest extent of the law.

Per Governor Bush's orders, the State of Florida did not proceed with any further death warrants while Mr. Hill's case was pending. The State's "strong interest in enforcing its criminal judgments . . ." (See *Hill v. McDonough* at 2104) was voluntarily and volitionally decided to be of less importance than the issues surrounding lethal injection. However, by now resetting Mr. Hill's execution date, while continuing to hold all other warrants in abeyance, the intent of the State of Florida is obvious – kill Mr. Hill, and prevent a reasoned review of the torturous lethal injection process currently in place.

The State of Florida's conduct has only served to delay and obstruct the proper resolution of Mr. Hill's claims. By setting an execution date for Mr. Hill, Florida has short-circuited the normal course of litigation – a course of litigation which was anticipated by the United States Supreme Court when it stayed Mr.

Hill's execution and remanded this case. The State's action belies its publicly stated intent of awaiting a judicial resolution of this matter, and evinces its true intent of not allowing a judicial review of its lethal injection procedure.

It should be noted that two Supreme Court justices recognized that the State has a responsibility to ensure that its execution method comports with the Constitution. As Justice Kennedy stated in oral argument in *Hill v. McDonough*, "This -- this is a death case. . . . Doesn't the State have some minimal obligation under the Eighth Amendment to do the necessary research to assure that this is the most humane method possible? Doesn't the State have a minimal obligation on its own to do that?" *Hill v. McDonough*, 547 U.S. ___, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), Oral Argument transcript at 29.

Similarly, Justice Souter queried the assistant solicitor general on what he believed to be the State's duty to investigate:

> [T]he Lancet article has been out there for a while, and it certainly is enough to suggest. . .that there is something problematic about the manner in which Florida proposes to do this. And yet, we have not heard a word that Florida has made any effort whatsoever to find an alternative or, for that matter, to – to disprove what the Lancet article suggests. *Id.* at 48.

By ordering Mr. Hill to be executed on September 20, 2006, the State of Florida is willfully disregarding the very real possibility that Mr. Hill will be executed cruelly, painfully,

and unconstitutionally. The State's blatant attempt to avoid addressing this serious constitutional and civil rights issue significantly lessens the equitable weight that would generally be afforded a State when an execution date is imminent. This Court should re-weigh the equities accordingly, and find that equitable process mandates reversing and remanding this cause for an evidentiary hearing.[1]

D. THE LIKELIHOOD THAT MR. HILL WILL PREVAIL ON THE MERITS

The likelihood that Mr. Hill will prevail on the merits of his claims is demonstrated by recent developments in litigation surrounding lethal injection. *See, e.g., Taylor v. Crawford*, 2006 U.S. Dist. LEXIS 42949, 22 (June 26, 2006). Additionally, there is now empirical, scientific evidence establishing that the chemical process for lethal injection (utilized in accordance with the Florida Department of Correction's protocol) creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed. *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).

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[1]Judicial resolution is necessary. One of two outcomes will result: Either the State of Florida's execution procedure will withstand constitutional scrutiny and remain in place; or, more likely, it will crumble under constitutional scrutiny and be modified to prevent the State of Florida from torturously executing the condemned.

1. Empirical, scientific evidence now shows that the lethal injection procedure used by the Florida Department of Corrections creates an unnecessary, unconstitutional, and foreseeable risk of pain during an execution.

The likelihood that Mr. Hill will prevail on the merits of his claims is demonstrated by empirical, scientific evidence establishing that the chemical process for lethal injection utilized in accordance with the Florida Department of Correction's (hereinafter "DOC") protocol, creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

A recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration was attached to Mr. Hill's Complaint) and three co-authors detailed the results of their 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.[2] The authors

[2] Dr. Lubarski has noted that each of the opinions set forth in the LANCET study reflects his opinion to a reasonable degree of

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. (Complaint, Att. B). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by a heart attack caused by the potassium chloride. As noted in Mr. Hill's Complaint, the chemical process utilized in executions in Florida is identical to that identified in the study.

As explained in the declaration of Dr. Lubarsky, sodium pentothal is an ultra-short acting substance which produces shallow anesthesia. (Complaint, Att. A). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the

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scientific certainty. (Complaint, Att. A).

long-run, deep anesthesia; the patient is supposed to be able to wake up and signal the staff that something is wrong.

The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. Its purpose is merely cosmetic, as it masks the effects of the application of the lethal chemical, potassium chloride, to the condemned. It is,quite simply, unnecessary to bring about the death of a person being executed by lethal injection. (Complaint, Att. A). Pancuronium has two contradictory effects: First, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; and second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Complaint, Att. A).

The third chemical, potassium chloride, is the substance that causes the death of the prisoner by cardiac arrest. It burns intensely as it courses through the veins toward the heart, causing massive muscle cramping and excruciating pain along the way. (Complaint, Att. A). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels all of this pain, as well as the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium

will have paralyzed his entire body so that he cannot express himself, verbally or otherwise. (Complaint, Att. A).

Doctors and physicians who entered Mr. Hill's case as *Amici Curiae* before the Supreme Court of the United States concluded as follows:

> The combination of chemicals administered by the state of Florida to executing condemned inmates -- *i.e.*, the sequential intravenous administration of sodium thiopental, pancuronium bromide and potassium chloride -- is widely used by the United States jurisdictions that execute condemned inmates by lethal injection. See *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 307 (Tenn. 2005) ("the undisputed evidence before the Chancellor was that only two states do not use some combination" of these chemicals in lethal injection). If improperly administered, this combination of chemicals will cause inhuman suffering on the part of the inmate prior to his death. And the procedures by which lethal injection is administered in jurisdictions across the country create a significant likelihood that the three-drug procedure will be administered in a manner that causes such suffering on the part of at least some inmates prior to their death.
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> Both sodium thiopental and pancuronium bromide can cause respiratory arrest and be lethal, but the injection of potassium chloride shortly after the injection of sodium thiopental and pancuronium bromide normally ensures that death occurs by cardiac arrest before respiratory arrest occurs. Thus, in all lethal injection jurisdictions, potassium chloride is the agent intended to bring about the inmate's death. Sodium thiopental is administered as an anesthetic, and pancuronium bromide is administered for "cosmetic" or "aesthetic" reasons; *i.e.*, to make the prisoner appear serene.
>
> In the doses and concentrations in which it is administered in the lethal injection process, potassium chloride is - absent adequate anesthesia – indescribably

painful. It "scours the nerve fibers lining [the inmate's] veins," *Evans v. Saar*, 2006 WL 274476 (D. Md. February 1, 2006), and interrupts the heart's signaling function, interfering with its rhythmic contractions and causing a massive coronary arrest. Administering this quantity of potassium chloride to a conscious individual would, in addition to precipitating a painful coronary arrest, result in an excruciating burning pain, extending from the site of the injection (normally an arm, hand, leg or foot) to the heart, and would constitute the most severe form of torture.

The administration of pancuronium bromide during the lethal injection process greatly increases the likelihood that the inmate will suffer agonizing pain. Although it makes the inmate incapable of any voluntary movement, and even of breathing, pancuronium bromide has no effect whatsoever on awareness, cognition or sensation. As a result, an individual to whom pancuronium bromide has been administered, but who is not properly anesthetized, will endure the terror of conscious paralysis, with no ability to struggle or communicate to anyone else that he is conscious and feels pain. An inmate undergoing lethal injection to whom pancuronium bromide has been administered, and who is not properly anesthetized, would suffocate while experiencing (consciously) the blinding pain of an injection of potassium chloride and a massive heart attack, while onlookers believed him to be unconscious and insensitive to any pain.

Although an inmate who is properly anesthetized will not consciously experience the pain and terror associated with injections of pancuronium bromide and potassium chloride, their injection into the veins of an individual who is not sufficiently anesthetized would cause horrible suffering. Therefore, unless the inmate is brought to an appropriate anesthetic depth by the injection of sodium thiopental, and unless that depth is maintained throughout the lethal injection process, the inmate will endure savage torment.

However, achieving and maintaining an appropriate anesthetic depth is an extraordinarily complex endeavor,

> which requires specialized training and procedures, and equipment. If adequately trained personnel, appropriate procedures and proper equipment are not employed throughout the lethal injection process, there is a great likelihood that tremendous agony will be inflicted upon some inmates in the course of any significant number of executions.

See Brief of *Amici Curiae* Physicians for Human Rights, Global Lawyers and Physicians, Lawrence D. Egbert, M.D., and Andrew Gumbs, M.D., pp. 5-7, *Hill v. McDonough*, 126 S.Ct 2096, 165 L.Ed.2d 44, 2006 U.S. LEXIS 4674 (June 12, 2006).

As explained by Dr. Lubarsky, because Florida's practices are substantially similar to those of the lethal injection jurisdictions which conducted autopsies and toxicology reports, kept records of them, and disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will not be anesthetized at the time of his death. (Complaint, Att. A).

Here, the appellees are acting under color of Florida law by using a succession of three chemicals that will cause unnecessary pain in the execution of a sentence of death, which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

The Eighth Amendment "proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. 97, 102

(1976). It prohibits the risk of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Louisiana ex. rel. Francis v. Resweber*, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." *Weems v. United States*, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," *Id.* at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. *Id.* at 370 (emphasis added).

Under the present circumstances, given the fact that Mr. Hill possesses scientific evidence proving his claim, he will likely succeed on the merits of the issue; that is, he will be unnecessarily subjected to a substantial risk of wanton infliction of pain, in violation of the Eighth Amendment.

2. Recent developments in litigation surrounding lethal injection since the Supreme Court of the United States stayed Mr. Hill's execution on January 25, 2006 demonstrate a likelihood that Mr. Hill will prevail on the merits.[3]

[3] As will be discussed herein, these recent developments also demonstrate the necessity of a stay of execution and the granting of discovery.

Since the stay in *Hill v. McDonough*, 126 S.Ct. 1189, 163 L.Ed.2d 1144, 2006 U.S. LEXIS 1074 (January 25, 2006), an evidentiary hearing was held in Missouri, and discovery conducted regarding Missouri's recent executions. The case involved Michael Taylor, a condemned inmate challenging the lethal injection protocol used in Missouri executions. Information was revealed which showed that "unacceptable" risks existed in Missouri's execution procedures that may cause a condemned inmate unconstitutional pain and suffering. *See Taylor v. Crawford*, 2006 U.S. Dist. LEXIS 42949, 22 (June 26, 2006). The Court succinctly summarized the value of the discovery materials in *Taylor* as follows:

> After learning more about how executions are carried out in Missouri, through the interrogatories submitted to the John Doe defendants, reviewing the chemical dispensary logs, reviewing the videotape of the execution chamber and listening to the testimony of John Doe I, and to the testimony of the other expert witnesses at the June 12-13, 2006 hearing, it is apparent that there are numerous problems. *Id.* at *19.

These problems included:

1) no written protocol existed describing which drugs were administered, the dosage to be used, and the method of administration;

2) 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;

4) there is no means to monitor the anesthetic depth of the condemned during the execution procedure.

5) there are no checks and balances or oversight at any point in the process. *Id.* at 19-21.

The Court observed, "It is obvious that the protocol as it currently exists is not carried out consistently and is subject to change at a moments notice." *Id.* at *19.

The *Taylor* case is illustrative of the problems with the Missouri protocol, which is virtually identical to the procedures used in Florida. Of particular note is the *Taylor* court's concern that the amount of sodium pentothal had been decreased from five (5) grams to two and a half (2.5) grams. Yet, appallingly, this is still more than the State of Florida intends to administer in Mr. Hill's execution. Florida officials will not use less than two grams of sodium pentothal. See *Sims v. State,* 754 So.2d 657 (Fla. 2000). 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 so far completely been denied access.

Additionally, 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 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. *See 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. *See id.* at 1098. Taylor was unable to conduct any further discovery and unable to procure the attendance of his witnesses due to the untenable time constraints. *See 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. . ." *Id.* Mr. Taylor also asserted error regarding his inability to call necessary witnesses and the denial of his claims on the merits. *See id.* He also moved for a stay, which the panel denied. *See id.* The same day an *en banc* panel granted Taylor's request for a stay, 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 hereby offer our *mea culpa* . . . We simply asked the district court and the parties to do too much in too little time. *Id.* at 1099.

The similarities between Mr. Hill's case and the *Taylor* case are striking. Mr. Hill's case was initially dismissed before the district court the day after it was filed. On remand, after pending seven months before the Supreme Court of the United States, Mr. Hill was given less than twenty-four hours to file

his pleadings, and he was denied discovery or any meaningful opportunity to pursue his claim. As in *Taylor*, too much was demanded in too little time. The opportunities afforded Mr. Hill here were even less than those afforded in *Taylor*.

Similarly, the case of Michael Morales is a case study in why a factual record must be fully developed to allow a court to properly review an Eighth Amendment challenge to a state's lethal injection procedures. *See Morales v. Hickman*, 2006 WL 335427 (N.D. Cal., Feb. 14, 2006) *reviewed at Morales v. Hickman*, 2006 WL 391604 (9th Cir., 2006). The facts of *Morales* furnish a powerful example of why this Court should stay Mr. Hill's execution and afford him the opportunity to discover and present evidence challenging Florida's lethal injection procedure. Florida and California's execution protocols are similar in that they both use the same three chemicals and similar methods to dispense the chemicals. Both employ machines to inject the drugs, rather than utilize a traditional syringe, and the same three drugs (sodium thiopental, pancuronium bromide, and potassium chloride) are utilized. Morales' challenge is essentially that some element or interaction of the elements of the lethal injection procedure will result in him not being properly anesthetized by the sodium thiopental and the injection of the other chemicals will subject him to torturous pain.[4]

[4] As the Ninth Circuit observed: "There is no dispute that in the absence of a properly administered anesthetic, Morales would

The record developed in Mr. Morales' case demonstrates that California's lethal injection procedure created an unjustifiable likelihood that he would endure excruciating pain if executed by lethal injection. Morales also argued that there were recurrent, critical problems with equipment and personnel used in the lethal injection procedure. The permitted factual development was critical to Morales demonstrating that prison personnel were not properly trained to insert intravenous lines and that the execution team deviated from their protocol by administering multiple doses of chemicals and the these irregularities were not reported in execution records.

In at least three of the executions reviewed in the *Morales* litigation, intravenous line placement was a problem. News reports detailed problems with the line placement during the execution of Stanley "Tookie" Williams. *See* Kevin Fagan, *The Execution of Stanley "Tookie" Williams; Eyewitness: Prisoner Did Not Die Meekly, Quietly,* S.F. CHRON., Dec. 14, 2005, at A12. The first line was placed quickly, although it spurted blood, and then the staff struggled to insert the second line. The line placement took long enough that "[b]y 12:10 a.m., the medical tech's lips were tight and white and sweat was pooling on her forehead as she probed William's arm." *Id.* More importantly,

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experience the sensation of suffocation as a result of the pancuronium bromide and excruciating pain from the potassium chloride activating nerve endings in Morales' veins." *Morales v. Hickman*, 2006 WL 391604 at *2.

the execution log showed that one of the intravenous lines failed. This illustrative experience demonstrates that properly trained and experienced personnel are critical for this difficult process.

As to the administration of multiple doses of potassium chloride, the district court in *Morales* cogently observed:

> [E]vidence in the present record raises additional concerns as to the manner in which the drugs used in the lethal-injection protocol are administered. For example it is unclear why some inmates - including Clarence Ray Allen, who had a long history of coronary artery disease and suffered a heart attack less than five months before he was executed, ... – have required second doses of potassium chloride to stop promptly the beating of their hearts. *Morales v. Hickman*, 2006 WL 335427 at *6(N.D. Cal., Feb. 14, 2006).

Morales also received the detailed execution logs from several of the recent executions in the State of California. *See 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 until several minutes after the administration of sodium pentothal. *See 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).

The discovery and factual development in *Morales* was ample enough to render the district court capable of determining that California's execution protocol was rife with grievous problems that threatened to produce gratuitous, wanton, torturous pain unless the protocol was substantially modified. The evidence demonstrated a highly significant difference between the painless way the protocol was to work in theory and the torturous way it actually operated. Mr. Hill should have been permitted to engage in discovery and have his case proceed so that he could demonstrate Florida's lethal injection procedure is just as fraught with danger and constitutional infirmity as California's.

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 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

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

> 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*, 2006 U.S. Dist LEXIS 60084 (E.D.N.C. Apr. 7, 2006), *affirmed*, 445 F.3d 752, 2006 U.S. App. LEXIS 9894 (4th Cir. 2006), *cert. denied, stay denied*, 126 S.Ct. 1836, 164 L.Ed.2d 566 (2006), 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. 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. *Brown* at *16-18. Thus, the information submitted in *Brown v. Beck* is entirely 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.

As demonstrated above, since the United States Supreme Court granted Mr. Hill a stay of execution and rendered its decision, new, critical information has surfaced which undermines the theories that originally supported the current lethal injection protocols used in numerous states, including Florida.[6] This new information demonstrates the flaws in Florida's current lethal

[6] In addition to the recent developments mentioned above, on August 21, 2006, the Associated Press reported that in light of testimony during a recent hearing on lethal injection in Oklahoma, that state "has changed the way it administers fatal drugs during executions." According to the article, Oklahoma changed the way it had administered the fatal drugs in 2005, but will now administer a double dose of the sedative, thiopental, before administering the sodium chloride to stop the heart. Additionally, Oklahoma will also insert two intravenous lines so that there is a back-up in case one of the lines fails.

It is important to note that when Florida adopted lethal injection as a method of execution, the protocol was modeled after the protocol that was used in Oklahoma in 2000 – a protocol which has now been changed in order to reduce the chance that a condemned inmate would not be sufficiently sedated.

injection protocols and 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.

III. TRUNCATED CONSIDERATION BY THE DISTRICT COURT DID NOT PROVIDE MR. HILL DUE PROCESS IN LITIGATING HIS §1983 CLAIM.

The district court originally heard Mr. Hill's § 1983 in January 2006. Mr. Hill filed his claim on Friday, January 20, 2006, and the State of Florida filed their response the same day. The next day, Saturday, January 21, 2006, the district court dismissed Mr. Hill's claim, re-characterizing the claim as a successive habeas petition and then dismissing under AEDPA.

Subsequently, this cause was remanded to the district court pursuant to *Hill v. McDonough*, 126 S.Ct. 2096 (June 12, 2006) and *Hill v. McDonough*, No. 06-10621 (11th Cir. Aug. 29, 2006), on Thursday, August 31, 2006. The CM/ECF notification of the remand occurred at 12:12 p.m. on that date. The district court's staff contacted the office of undersigned counsel at approximately 1:45 p.m. to order that all pleadings in this matter be submitted by the following day at noon. Undersigned counsel was at the prison visiting death row clients, including Mr. Hill, and returned around 5:00 p.m. to receive the district court's order. This allowed undersigned counsel a mere 19 hours, if he chose not to sleep, to comply with the district court's request. The parties

complied with the district court's order and filed their pleadings by noon on September 1, 2006. In less than seven hours, the district court denied Mr. Hill's request for a preliminary temporary injunction staying the execution – even though the execution was still nineteen days away. The district court's consideration and rejection of Mr. Hill's claims in such a short time span is not the process which Mr. Hill is due.

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. 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. 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).

The Supreme Court of the United States contemplated more when it held that district courts should decide the equities of a

stay in the first instance. *See Gomez*, 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992)(per curiam); *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 158 L.Ed.2d 924 (2004); *Hill v. McDonough,* 126 S.Ct. 2096 (June 12, 2006). In this case, the efficacy of a stay would have been more appropriately determined after assessing the discovery requests submitted by Mr. Hill subject to the expediting of the discovery process. Instead, the district court gave the parties less than twenty-four hours to present their claims, and then rendered judgment on the pleadings without the benefit of discovery. This truncated process was utilized even though nineteen days were left before Mr. Hill's scheduled execution.

The nature of Mr. Hill's case demands that he be granted a full and fair evidentiary hearing both as to the efficacy of the stay and the merits of his claims. An evidentiary hearing is necessary to make certain that Mr. Hill will not be subjected to an unconstitutionally cruel punishment, as well as to ensure public legitimacy as the State of Florida carries out his sentence. The highly specific factual claims advanced by Mr. Hill plainly cannot be properly litigated without a meaningful opportunity for discovery. The district court's order dismissing Mr. Hill's claims effectively prejudges Mr. Hill's claims as factually meritless. That type of prejudging is highly improper

in any case, but is even more inappropriate in an Eighth Amendment challenge to a specific means of execution.

IV. NO UNNECESSARY DELAY IN BRINGING MR. HILL'S CLAIM

In denying Mr. Hill relief, the district court found that "Moreover, Florida's lethal injection methods were subjected to a full evidentiary hearing in 2000 in *Sims v. State,* 754 So.2d 657 (Fla. 2000), and Hill could have challenged the procedure after the *Sims* decision was rendered." Order Dismissing Complaint, at 7. The district court continued, "Hill has offered no reason for his delay in bringing a §1983 action until just days before his execution. Therefore, under the authority of *Gomez, Nelson, and Hill*, this Court finds that Hill has delayed unnecessarily in bringing his §1983 challenge of Florida's lethal injection procedure, and his complaint must be dismissed." Order Dismissing Complaint at 7-8 (citations omitted).

The district court's analysis of Mr. Hill's *perceived* delay in bringing his claim is erroneous and incomplete. Mr. Hill did not unduly delay in bringing his claim. Rather, as is explained in his motion for temporary injunction before the district court, Mr. Hill could not have brought his claim prior to the time his execution date was set. In support of this position, Mr. Hill stated as follows:

> **E. NO UNNECESSARY DELAY IN BRINGING MR. HILL'S CLAIM**

> Mr. Hill diligently pursued his claim as soon as it ripened. His claim became ripe when his death warrant issued, because it was only at that point that he could ascertain the specific means by which the State would carry out his lethal injection. *See Worthington v. Missouri*, 166 S.W. 3d 566, 583 n.3 (Mo. 2005). That is so because the Department of Corrections retains complete discretion over how lethal injections will be carried out, and 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.[7] 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

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[7] In contrast, Florida prescribes, with careful detail, the chemicals to be used in animal euthanasia and the chemicals that are prohibited for such use (including any neuromuscular blocking agent); a strict "order of preference" for the manner in which the lethal solution is to be administered; the qualifications that a person administering the lethal solution must possess; and a 16-hour "euthanasia technician course" that anyone administering the lethal solution must have taken. *See* Fla. Stat. 828.058. The statute goes on to detail the minimum topics that the certification course must cover (including pharmacology, proper administration and storage of euthanasia solutions) and the manner in which the curriculum for the course is to be approved (by the Board of Veterinary Medicine). *See id.* at 828.058(4)(a).

through rule-making or otherwise. The Department, 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 the Department 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. Accordingly, the ripeness inquiry looks to whether a sufficiently concrete and definitive agency policy or practice exists. Otherwise, judicial intervention would "den[y] the agency an opportunity to correct is own mistakes and to apply its expertise." *Federal Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 242 (1980). As the Supreme Court of the United States has explained in the analogous context of federal administrative review,

> [T]he ripeness requirement is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1983).

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[8], 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.
>
> 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.
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> Given the lack of *any* constraints on the Department'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 court, in order to defend against an argument that he had failed to exhaust state remedies.[9] As soon

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[8] 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.

[9] 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, he *would* have had to exhaust those judicial remedies, *see* 48 U.S.C. § 2254(b)(1)(A). The State of Florida raises the issue of the PLRA exhaustion requirements in its motion to dismiss. Doc. 34, at 8-16. Notably, Mr. Hill's complaint alleged that no administrative remedies were available to him. *See* Complaint at 17-18 and in his Amended Complaint. The PLRA's exhaustion requirement is not a rule of pleading the plaintiff must satisfy. It is an affirmative defense *the defendant* must plead and prove, not appropriate for consideration under a Fed.R.Civ.P. 12(b)(6) motion where all facts must be construed in the light most favorable to the Plaintiff. *See Anderson*, 407

> as his action was dismissed on procedural grounds in state court, he filed his § 1983 action.
>
> Plaintiff's Motion for Temporary Injunction to Stay His Execution Scheduled for September 20, 2006 at 6:00 p.m. at 28-31.

The above facts establish that Mr. Hill was diligent in filing his §1983 claim. Unfortunately, the district court's order failed to 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*.[10] In addition, *Taylor* and *Morales* are recent decisions which demonstrate

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F.3d at 681; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003); *Casanova v. Dubois,* 304 F.3d 75, 77 (1st Cir. 2002); *Ray v. Kertes,* 285 F.3d 287, 295 (3d Cir. 2002); *Foulk v. Charrier,* 262 F.3d 687, 697 (8th Cir. 2001); *Massey v. Helman,* 196 F.3d 727, 735 (7th Cir. 1999); *Jenkins v. Haubert,* 179 F.3d 19, 28-29 (2d Cir. 1999); *see also Johnson v. California*, 543 U.S. 499 (2005) (assuming that the PLRA's exhaustion requirement is waivable); *id.* at 528 n.1 (Thomas, J., dissenting) (pointing out assumption); *Jackson v. District of Columbia,* 254 F.3d 262, 267 (D.C. Cir. 2001) (suggesting that exhaustion is an affirmative defense). Even if this Court construes the PLRA exhaustion requirement as a special matter that must be pled, Fed.R.Civ.P. 9(c) allows Mr. Hill to plead generally that the condition was satisfied and a denial of performance or occurrence must be specifically pled with particularity.

[10] 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.

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 cannot be faulted for failing to raise the issue.

Prior to *Hill v. McDonough*, this Court's 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, this 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, this Court's clear holding in *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004), precluded such a lawsuit. Indeed, the district court initially dismissed Mr. Hill's claim based upon that precedent, stating that there was no subject matter jurisdiction for that court to consider the claim. It was only on January 24, 2006 – when the United States Supreme Court granted certiorari review in *Hill v. Crosby* to determine whether this Court's determination that district courts lack jurisdiction to consider claims like Mr. Hill's was correct – that the validity of this precedent was called into question.

This Court's 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 circuit court cases cited by the District Court[11], or even in *Gomez v. U.S. Dist. Ct. For N. Dist. Cal.* 503 U.S. 653, 112 S.Ct. 1652, 118 L.Ed.2d 293 (1992)(per curiam), there is "good reason" in this case for the failure to present this claim previously. According to the binding precedent of this Circuit when the *Lancet* study came out 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.

Further, in its consideration of the timeliness of Mr. Hill's action, the district court improperly conflated two key issues and the appropriate analysis for each: (1) the question of

[11] *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).

dismissal pursuant to Rule 12(b)(6); and (2) the question of whether to temporarily enjoin (stay) Mr. Hill's execution. The State of Florida based their motion to dismiss upon Rule 12(b)(6). As this Court is well aware, Rule 12(b)(6) is an appropriate vehicle for dismissal only when the Plaintiff fails to state a claim upon which relief can be granted. Yet the entire procedural history of this case has been about whether Mr. Hill has stated a viable claim under §1983. See *Hill v. McDonough*, 547 U.S. ___, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006); *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006).

Clearly, the United States Supreme Court found that Mr. Hill stated a viable claim, **or it would not have remanded this cause**. All that is required from Mr. Hill at this juncture is a short, concise statement of facts. *See* Rule 8. The Supreme Court specifically held that there are no heightened pleading requirements in Mr. Hill's §1983 action. *See Hill* at **53. And the Supreme Court clearly contemplated that ripeness was not a hindrance to Mr. Hill's cause. 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, 547 U.S. ___, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006), Oral Argument transcript at 29.

Mr. Hill's complaint is timely as long as he files it within the statute of limitations, so there is no dilatoriness or untimeliness in the filing of the lawsuit. As the district court stated in *Cooey v. Taft*, it is illogical to require a death-sentenced plaintiff to file a §1983 action any earlier than when his execution is "imminent":

> [Because] it appears that the [lethal injection] protocol is subject to alteration until the time of execution . . . requiring a death-sentenced plaintiff to file his method-of-execution challenge any sooner [than when his death is imminent] strikes this Court as potentially wasteful and possibly absurd, given the possibility that, prior to his execution becoming imminent, a plaintiff could see his conviction or death sentence reversed, or the alteration of the precise execution protocol that plaintiff might seek to challenge as unconstitutional. *Cooey v. Taft*, No. 2:04-cv-1156(Doc.14, at 11).

The timeliness issue is only relevant to the propriety of a stay under *Gomez, Nelson,* and *Hill*. In terms of the viability of Mr. Hill's §1983 action, there is no question that Mr. Hill was diligent, timely, and acting in accordance with established precedent as he pursued this claim through the courts. Therefore, the District Court was clearly in error in dismissing Mr. Hill's claim on the basis of timeliness.

Mr. Hill diligently pursued his claim as soon as it ripened. His claim became ripe when his death warrant issued, because it was only at that point that he could ascertain the specific means

by which the State would carry out his lethal injection. *See Worthington v. Missouri*, 166 S.W. 3d 566, 583 n.3 (Mo. 2005). That is so because the Department of Corrections retains complete discretion over how lethal injections will be carried out, and 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.[12] 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

[12] In contrast, Florida prescribes, with careful detail, the chemicals to be used in animal euthanasia and the chemicals that are prohibited for such use (including any neuromuscular blocking agent); a strict "order of preference" for the manner in which the lethal solution is to be administered; the qualifications that a person administering the lethal solution must possess; and a 16-hour "euthanasia technician course" that anyone administering the lethal solution must have taken. *See* Fla. Stat. 828.058. The statute goes on to detail the minimum topics that the certification course must cover (including pharmacology, proper administration and storage of euthanasia solutions) and the manner in which the curriculum for the course is to be approved (by the Board of Veterinary Medicine). *See id.* at 828.058(4)(a).

the Board of Veterinary Medicine). And the Department has not itself decided to publish any definitive set of procedures through rule-making or otherwise. The Department, 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 the Department 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. Accordingly, the ripeness inquiry looks to whether a sufficiently concrete and definitive agency policy or practice exists. Otherwise, judicial intervention would "den[y] the agency an opportunity to correct is own mistakes and to apply its expertise." *Federal Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232, 242 (1980). As the Supreme Court of the United States has explained in the analogous context of federal administrative review,

> [T]he ripeness requirement is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Ohio Forestry Association, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1983).

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[13], 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.

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.

Given the lack of *any* constraints on the Department's discretion and of any definitive practices that would have provided the courts with a sufficiently concrete policy to

[13] 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.

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 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.

V. CONCLUSION

For the foregoing reasons, Mr. Hill respectfully requests that this Court grant his Application For a Stay of Execution and for Expedited Appeal.

Respectfully submitted,

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[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, he *would* have had to exhaust those judicial remedies, *see* 48 U.S.C. § 2254(b)(1)(A).

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served on the following counsel on this 13th day of September 2006.

D. TODD DOSS

Copies furnished to:

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