

IN THE SUPREME COURT OF FLORIDA  
**WARRANT SIGNED  
EXECUTION SET**

**ARTHUR D. RUTHERFORD,**

Appellant,

v.

CASE NO. SC06-18

STATE OF FLORIDA,

Appellee.

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RESPONSE TO EMERGENCY MOTION

Rutherford filed an emergency motion for serological samples and for independent testing requesting a blood sample from Clarence Hill, who is scheduled to be executed on January 24, 2006, to determine the post-mortem level of sodium thiopental in Hill's blood by independent testing to support his cruel and unusual punishment challenge to lethal injection. The State responded to the same motion filed in the trial court in its answer brief stating:

Rutherford made a motion for serological samples and independent testing of the thiopental levels in the blood of Clarence Hill following his execution. IB at 68. *Sims* controls this claim as well. The trial court properly denied the motion.

AB at 57.

This motion is not proper. Rutherford already filed the same motion in the trial court which is now pending on appeal before this Court. Parties file such motions in the trial courts, not the appellate courts. Rutherford's motion

bypasses the trial court and the normal appellate structure including the normal abuse of discretion standard of review and results in a premature, piecemeal appeal. The motion should be stricken as authorized.

The motion is contrary to existing precedent. This Court recently held that a trial court properly summarily denied an Eighth Amendment challenge to Florida's lethal injection protocols based on the Lancet article. *Hill v. State*, - So.2d. -, 2006 WL 91302, \*1 (Fla. January 17, 2006)(rejecting Hill's claim that a research letter published in April 2005 in The Lancet presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain based on Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 Lancet 1412 (2005) and an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study.). The motion is designed to support a claim that this Court conclusively rejected just days ago.

Neither the motion nor the study provide a basis for an Eighth Amendment challenge. The focus of the Lancet study was consciousness. There is no constitutional right to be unconscious during execution. The Eighth Amendment simply does not care about consciousness. The study mentions the level of sodium thiopental necessary to perform surgery, not the level required to control burning sensations of drugs or muscle cramps. The State will not be

performing surgery on Rutherford; rather, it will be injecting a drug, potassium chloride, into him. The level of pain associated with the injection of the third drug has not been alleged to be equivalent to surgical levels of pain. Even with the lower levels of sodium thiopental claimed in the study, Rutherford could be totally insensate to the third drug or merely feel a tingling sensation. Rutherford's affidavit was silent on this critical question. (Vol. III 420 paragraph 20 & 21). The motion, like the study, does not provide the basis for a cruel and unusual challenge to Florida's lethal injection protocols.

Nor is the motion necessary. The toxicological report of Mr. Hill's autopsy will contain this information. The Medical Examiner of the Eighth District will conduct an autopsy, including toxicological results, whether or not this Court grants the motion. The motion should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.  
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE TO EMERGENCY MOTION has been furnished by electronic mail Linda McDermott, Esq. at lindammcdermott@msn.com with a follow up hard copy by U.S. mail to Linda McDermott, 141 N.E. 30<sup>th</sup> Street, Wilton Manors, FL 32334 20<sup>th</sup> day of January, 2006.

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