UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

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February 19, 2013

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 13-10702-P
Case Style: In re: Warren Hill, Jr.
District Court Docket No:

The following action has been taken in the referenced case:

The enclosed order has been ENTERED.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Jenifer L. Tubbs
Phone #: 404-335-6166

MOT-2 Notice of Court Action

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-10702-P

IN RE: WARREN LEE HILL, JR.,

Petitioner.

On Appeal from the United States District Court for the
Middle District of Georgia

Before BARKETT, HULL and MARCUS, Circuit Judges.

BARKETT and MARCUS, Circuit Judges:

Petitioner Warren Lee Hill, Jr. is scheduled for execution today: Tuesday, February 19, 2013, at 7:00 p.m. Today, Hill filed an application with this court for permission to file a second petition for writ of habeas corpus pursuant to 28 U.S.C. § 2244(b)(3). Hill contends that every mental health expert who has evaluated him for mental retardation (including both the State's and the petitioner's experts) now

unambiguously conclude that he is mentally retarded. Hill contends that his execution would therefore violate the Eighth and Fourteenth Amendments to the United States Constitution. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (concluding that the Eighth Amendment "places a substantive restriction on the State's power to take the life of a mentally retarded offender" (internal quotation marks omitted)). Hill also moved for a stay of execution.

The statutory provisions in 28 U.S.C. § 2244 govern our consideration of Hill's request to file a second habeas petition. The statute provides that:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless --
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(A), (B). We may authorize the filing of a second or successive application only if we determine "that the application makes a prima

facie showing that [it] satisfies the requirements" enunciated above. 28 U.S.C. § 2244(b)(3)(C).

A motion for stay of execution is an equitable remedy not available as a matter of right. *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only when there are 'substantial grounds upon which relief might be granted.'" *Delo v. Stokes*, 495 U.S. 320, 321 (1990) (per curiam) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 895, 103 S. Ct. 3383, 3396 (1983)). In considering whether to grant a motion to stay execution, we consider "the relative harms to the parties," "the likelihood of success on the merits," "the extent to which the inmate has delayed unnecessarily in bringing the claim," *Nelson*, 541 U.S. at 649-50, and "whether granting the stay would serve the public interest," *In re Holladay*, 331 F.3d 1169, 1176 (11th Cir. 2003) (internal quotation marks omitted). We recognize that "[e]ntry of a stay on a second . . . habeas petition is a drastic measure." *Bowersox v. Williams*, 517 U.S. 345, 346 (1996) (*per curiam*).

At issue is whether the newly filed affidavits by the State's psychiatric experts that the petitioner is mentally retarded entitle the petitioner to a brief stay. Upon our review of the record, we conclude that Hill has met the burden for a provisional stay of execution. *See Delo*, 495 U.S. at 321. In the state court proceedings in 2000, Hill presented four experts who testified that Hill was

mentally retarded, and the State presented three experts -- Dr. Thomas Sachy, Dr. Donald Harris, and Dr. Gary Carter -- who testified that Hill was not. In the face of the whole record, the state courts concluded at the time that Hill was mentally retarded by a preponderance of the evidence, but that Hill had failed to demonstrate that he was mentally retarded beyond a reasonable doubt as required by O.C.G.A. § 17-7-131(c)(3), (j). In his current application, however, Hill has filed affidavits from *all* three of the State's experts -- Dr. Sachy, Dr. Harris, and Dr. Carter -- each of whom has revised his opinion and now testifies that Hill meets the criteria for mental retardation:

- "Having reviewed my earlier evaluation results and the far more extensive materials from the record of this case, I believe that my judgment that Mr. Hill did not meet the criteria for mild mental retardation was in error. In my opinion today, within a reasonable degree of scientific certainty, Mr. Hill has significantly subaverage intellectual functioning with an IQ of approximately 70, associated with significant deficits in adaptive skills, with onset prior to age 18. I thus concur with the conclusions (rendered previously in Mr. Hill's case) of Dr. Daniel Grant, Dr. Jethro Toomer, Dr. Donald Stonefeld, and Dr. William Dickinson that Mr. Hill meets the criteria for mild mental retardation and the bases for those conclusions which they articulated." Affidavit of Dr. Thomas H. Sachy, at ¶ 6 (Feb. 8, 2013).

- "I now believe, to a reasonable degree of scientific certainty, that Mr. Hill does meet the criteria for mild mental retardation . . . ." Affidavit of Dr. Donald W. Harris, at ¶ 22 (Feb. 11, 2013).

- "[I]t is now my opinion, to a reasonable degree of scientific certainty, that Mr. Hill's correct diagnosis is mental retardation." Affidavit of Dr. James Gary Carter, at ¶ 16 (Feb. 12, 2013).

In other words, all of the experts -- both the State's and the petitioner's -- now appear to be in agreement that Hill is in fact mentally retarded. *See*, *e.g.*, Affidavit of Dr. Thomas H. Sachy, at ¶ 6 ("I . . . concur with the conclusions (rendered previously in Mr. Hill's case) of Dr. Daniel Grant, Dr. Jethro Toomer, Dr. Donald Stonefeld, and Dr. William Dickinson that Mr. Hill meets the criteria for mild mental retardation and the bases for those conclusions which they articulated."); Affidavit of Dr. Donald W. Harris, at ¶ 22 ("I . . . concur in the findings of Drs. Grant, Toomer, Stonefeld, Dickinson and Sachy in this case.").

In light of these affidavits, we grant Hill a conditional STAY of execution and direct the parties to specifically address whether Hill can satisfy the stringent requirements found in 28 U.S.C. § 2244(b)(2) for leave to file a second or successive petition. Specifically, the parties shall address the questions (1) whether Hill could have previously discovered the factual predicate for the claim through the exercise of "due diligence," 28 U.S.C. § 2244(b)(2)(B)(i); (2) whether he can show that the facts underlying his claim, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Hill] guilty of the underlying offense," 28 U.S.C. § 2244(b)(2)(B)(ii); *see also In re Boshears*, 110 F.3d 1538, 1541 (11th Cir. 1997); and (3) whether Hill's claim in this application for a successive petition "was presented in a prior

application," 28 U.S.C. § 2244(b)(1). The second question includes the question of whether Hill's claim of mental retardation is cognizable as a claim of actual innocence under 28 U.S.C. § 2244(b)(2)(B)(ii).

Accordingly, we order and direct the petitioner to file a brief not exceeding 30 pages within 15 days of the date of this Order. After receiving the petitioner's brief, the State has 10 days to file a response brief not exceeding 30 pages. After receiving the State's response, the petitioner has 5 days to file a reply brief not exceeding 15 pages.

IT IS SO ORDERED.

HULL, Circuit Judge, dissenting:

Hill's execution is set for 7:00 pm on Tuesday, February 19, 2013. On this day, and less than three hours before the execution, Hill filed a Motion for a Stay of Execution and an Application for Leave to File a Successive Habeas Petition pursuant to § 2244(b)(2)(B). After review, I would deny the Motion and the Application for the reasons that follow. Therefore, I respectfully dissent from a grant of a stay of execution, even the conditional, limited stay being granted above, because Hill has not met the stringent requirements of § 2244(b)(2)(B). Hill's Motion and Application also fail because of the wholly independent ground that he has raised mental retardation claims in his prior federal § 2254 petition, and thus § 2244(b)(1) bars his current Motion and Application.

In addition, a granting of a stay defies our prior panel precedent which holds that federal law does not authorize the filing of a successive habeas application under § 2244(b)(2)(B) based on a sentencing claim even in death cases. In re Schwab, 531 F.3d 1365, 1366-67 (11th Cir. 2008); In re Jones, 137 F.3d 1271, 1273-74 (11th Cir. 1998); In re Medina, 109 F.3d 1556, 1565 (11th Cir. 1997). I recount the procedural history.

I. Malice Murder Conviction and Unanimous Death Sentence

In 1990, while Hill was serving a life sentence for the murder of his girlfriend, he murdered another person in prison. Using a nail-studded board, Hill

bludgeoned a fellow inmate to death in his bed. As his victim slept, Hill removed a two-by-six board that served as a sinkleg in the prison bathroom and forcefully beat the victim numerous times with the board about the head and chest as onlooking prisoners pleaded with him to stop. Although in jail for life for one murder, Hill continued to kill.

A jury unanimously convicted Hill of malice murder and unanimously imposed a death sentence. See Hill v. State, 263 Ga. 37, 427 S.E.2d 770, 774 (1993) ("Hill I").

II. No Mental Retardation Claim at Trial or on Direct Appeal

In 1988, the State of Georgia abolished the death penalty for mentally retarded defendants. See O.C.G.A. § 17-7-131 (1988 statute prohibiting the death penalty where defendant proves mental retardation). At the time of Hill's 1991 trial, Georgia already prohibited executing mentally retarded defendants. Yet at his trial and on direct appeal, Hill never claimed he was mentally retarded. Rather, it was five years after his 1991 trial before Hill ever claimed he was mentally retarded and thus could not be executed.

Importantly, at all times herein Hill has never asserted mental retardation as a defense to his malice murder conviction. Rather, Hill's mental retardation claim now and always has related to only his sentence.

III. First State Habeas as to Death Sentence–1996 Amendment–First Claim of Mental Retardation

In 1996, Hill amended his state habeas petition to allege mental retardation for the first time. On May 13, 2002, and in a supplemental order of September 16, 2002, after extensive evidentiary hearings and briefing on mental retardation, the state habeas court denied Hill relief on his mental retardation claims. The Georgia Supreme Court affirmed. Head v. Hill, 277 Ga. 255, 587 S.E.2d 613 (2003).

IV. First Federal Petition Under 28 U.S.C. § 2254

On October 5, 2004, Hill filed a 28 U.S.C. § 2254 petition for a writ of habeas corpus in the United States District Court for the Middle District of Georgia, Albany Division. Among the issues raised were Hill's multiple and diverse mental retardation claims as to his death sentence, including that he had proved his mental retardation. After extensive briefing on this and other issues, the district court denied relief on November 7, 2007. On August 22, 2008, the district court denied Hill's timely filed Motion to Alter and Amend Judgment.

On November 22, 2011, this Court granted a certificate of appealability on limited issues and en banc affirmed the district court's denial of Hill's § 2254 petition. Hill v. Humphrey, 662 F.3d 1335 (11th Cir. 2011) (en banc).

The United States Supreme Court denied certiorari. Hill v. Humphrey, 132 S. Ct. 2727 (June 4, 2012). On July 3, 2012, a warrant issued in the Superior Court of Lee County setting Hill's execution for a window from July 18 to July 25, 2012.

On July 16, 2012, the Georgia Board of Pardons and Paroles denied Hill's petition for clemency.

V. Second State Habeas–Filed July 18, 2012

On July 18, 2012, one day before his scheduled execution, Hill filed a successive state habeas petition reasserting these same mental retardation claims ("Hill II"). On July 19, 2012, the state habeas court denied Hill's claims. Hill appealed. On July 23, 2012, the Georgia Supreme Court found Hill's claims were barred from review as they were res judicata, holding:

> To the extent that Hill's petition for a writ of habeas [corpus] raised claims previously addressed by this Court in Hill's first state habeas proceedings, such claims are barred as res judicata. See Head v. Hill, 277 Ga. 255 (587 S.E.613) (2003) . . . .

Hill v. Humphrey, Case No. S12W1799 (Ga. July 23, 2012) (unpublished order).[1]

VI. Third State Habeas–Filed February 15, 2013

On Friday, February 15, 2013, Hill filed his third state habeas petition, this time asserting that certain prior mental health experts, including Dr. Thomas Sachy, had now modified their opinions about Hill's mental capabilities. Hill's own pleadings, however, admit that Dr. Sachy contacted Hill's counsel on July 27, 2012, but Hill filed nothing in federal court until the eve of his execution.

[1]During this same summer of 2012, Hill filed a separate civil action challenging the method of his lethal injection on various grounds. A stay was entered while the state courts considered his claims. Subsequently, the state court and the Georgia Supreme Court rejected his lethal injection claims. Hill v. Owens, No. S12A1819, (Ga. Feb. 4, 2013).

More specifically, psychiatrist Dr. Thomas Sachy, who evaluated Warren Lee Hill for mental retardation in December 2000, contacted Hill's counsel on July 27, 2012 to opine that his earlier conclusion that Hill was not mentally retarded may have been in error:

> In late July 2012, I noticed media reports about a man whom courts had found to be mildly mentally retarded and who was nevertheless facing execution. I then realized that this man was Warren Lee Hill, and I remembered that I had evaluated him for the government many years ago. Not realizing that a stay of execution had already been entered in the case, I contacted Mr. Hill's counsel on July 27, 2012, and offered to discuss the case. I told counsel I felt that my previous conclusions about Mr. Hill's mental health status were unreliable because of my lack of experience at the time, and I wanted to revisit the case.

Pet. for Writ of Habeas Corpus 12 (quoting Dr. Thomas Sachy Aff.).

In response to Hill's third habeas petition, the State pointed out that Hill again raises the same, multiple claims of mental retardation that were adjudicated by the state habeas courts and upheld by the Georgia Supreme Court. The State also stressed, among other things, that Hill's claims in his third habeas petition remain barred under state law by Stevens v. Kemp, 254 Ga. 228, 327 S.E.2d 185 (1985).

On February 18, 2013, the state habeas court denied Hill's third habeas petition stating:

> This Court DISMISSES the instant action as procedurally barred as this is Petitioner's third state habeas petition in this Court asserting the same claims. Stevens v. Kemp, 254 Ga. 228, 230 (1984). This Court

> does not find Petitioner has cited any new law to overcome the bar. Further, Petitioner's "new evidence" does not establish a miscarriage of justice. Thus, the claims in this petition are barred by law from review. The instant petition is DISMISSED and this Court therefore DENIES Petitioner's motion for stay of his execution.

Hill v. Humphrey, Habeas Corpus Action (Butts Cnty., Ga. Super. Ct. Feb. 18, 2013) (unpublished order).

As to the denial of his third state habeas petition, Hill then sought a stay and application for a certificate of probable cause to appeal from the Georgia Supreme Court and a stay of execution on February 19, 2013. The Georgia Supreme Court denied Hill's application and request for a stay of execution.

On February 19, 2013, and less than three hours before his execution, Hill filed in this Court a motion for a Stay of Execution and an Application for Leave to File a Successive Habeas Petition.

VII. Stringent Federal Restrictions on Successive Habeas Corpus Petitions

A state prisoner who wishes to file a second or successive habeas corpus petition must move this Court for an order authorizing the district court to consider such a petition. 28 U.S.C. § 2244(b)(3)(A).

"A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1); In re Mills, 101 F.3d 1369, 1371 (11th Cir. 1996). Hill has raised multiple mental retardation claims in a prior § 2254 habeas petition,

which has been denied first by the district court on numerous and various grounds, and then by this Court. See Hill v. Humphrey, 662 F.3d 1335, 1340-43 (11th Cir. 2011) (en banc). Indeed, in his prior § 2254 petition, Hill claimed he had sufficiently proven that he was mentally retarded and could not be executed. Accordingly, we must deny his current application for a successive petition on this § 2244(b)(1) ground alone.

Moreover, where a claim has not been raised in a prior habeas petition, this Court may grant authorization to file a successive habeas petition only if:

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. § 2244(b)(2). This Court "may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection." Id. § 2244(b)(3)(C).

Hill's application does not meet either of the two exceptions enunciated in § 2244(b)(2). As to the first exception, Hill does not rely on a new rule of

constitutional law that was previously unavailable. Indeed, under Georgia law, Hill had a right to raise his mental retardation claim long before the Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002). And, as outlined above, Hill has already raised the mental retardation issue multiple times in state and federal courts, and both state and federal courts have rejected his claims. See Hill v. Humphrey, 662 F.3d 1335, 1340-43 (11th Cir. 2011) (en banc) (outlining procedural history of case).

As to the second exception in § 2244(b)(2)(B) concerning newly discovered evidence, Hill has failed to satisfy either the first or second prongs of that exception. First, Hill has not shown that the amended expert reports regarding his mental retardation "could not have been discovered previously through the exercise of due diligence." See 28 U.S.C. § 2244(b)(2)(B)(i). For example, I note that Hill's own pleadings indicate that his attorney knew about the expert's alleged change of opinion on July 27, 2012, but Hill did not file his instant application for a successive habeas petition until hours before his execution on February 19, 2013. This is well over six months after Dr. Sachy alerted counsel to his change of opinion. Petitioner has not alleged any reason why Dr. Sachy's so-called re-review of the records in this case could not have occurred years before, or during his earlier § 2254 proceedings, or at least in August 2012. Rather, Hill has waited

until the eve of his execution to make the claims here, and for that reason alone has not shown due diligence or a right to equitable relief in the form of a stay.

Second, even if Hill has shown due diligence, the amended expert reports do not establish that, "but for constitutional error, no reasonable factfinder would have found [Hill] guilty of the underlying offense." See id. § 2244(b)(2)(B)(ii) (emphasis added). Hill has not pointed to any newly discovered facts that establish, or even could possibly establish, his innocence. To the contrary, Hill has never denied that he was guilty of intentionally murdering his fellow inmate, and he does not now challenge his malice murder conviction. Rather, Hill challenges only his death sentence, arguing that he should not be executed because he suffers from mental retardation. Federal law does not authorize the filing of a successive application under § 2244(b)(2)(B) based on a sentencing claim even in death cases. In re Schwab, 531 F.3d 1365, 1366-67 (11th Cir. 2008) (denying a death row inmate's application for a successive habeas petition premised on a change of expert opinion purporting to establish the inmate's "innocen[ce] of the death penalty," because (1) the inmate's application did not assert "a constitutional error, just a change in the opinion of an expert witness," and (2) "the asserted change in opinion [went] to the existence of mitigating circumstances, not to whether [the inmate was] guilty of the underlying offense"); In re Jones, 137 F.3d 1271, 1273-74 (11th Cir. 1998) (denying an application to file a second or successive habeas

petition on a claim that execution by electric chair violates the Eighth Amendment, because the newly discovered evidence exception in § 2244(b)(2)(B) does not apply to sentence-related claims); see also In re Schwab, 506 F.3d 1369, 1370 (11th Cir. 2007) (denying a death row inmate's application to file a second or successive habeas petition because it neither relied on a new rule of constitutional law, "nor involve[d] facts relating to guilt or innocence").

And if there were any remaining doubt about the matter, I point out that in his just-filed pleadings today, Hill concedes that § 2244(b)(2)(B), as well as our Court's precedent, does not permit the filing of a successive habeas petition to challenge his death sentence, stating:

> Mr. Hill concedes that this Court has held that the language of 2244(b)(2)(B) does not permit the filing of a successive habeas petition to challenge a death sentence because such a claim "has nothing to do with . . . guilt or innocence of the underlying offense." In re Medina, 109 F.3d 1556, 1565 (11th Cir. 1997).

For all these reasons, § 2244(b)(1), § 2244(b)(2)(B), and this Court's established precedent require us to deny Hill's application to file a second or successive § 2254 habeas petition.

VIII. Stay of Execution as Equitable Relief

There's more too. Other alternative and independent reasons exist that mandate we deny a stay of execution today.

"A stay of execution is equitable relief." Powell v. Thomas, 641 F.3d 1255, 1257 (11th Cir.), cert. denied, 131 S. Ct. 2487 (2011) (citing Williams v. Allen, 496 F.3d 1210, 1212–13 (11th Cir. 2007)). "This Court may grant a stay of execution *only if* the moving party shows that: (1) he has a substantial likelihood of success on the merits; (2) he will suffer irreparable injury unless the injunction issues; (3) the stay would not substantially harm the other litigant; and (4) if issued, the injunction would not be adverse to the public interest." Powell, 641 F.3d at 1257 (emphasis added); see also Nelson v. Campbell, 541 U.S. 637, 649–50, 124 S. Ct. 2117, 2126 (2004).

"[T]he equitable principles at issue when inmates facing imminent execution delay in raising their . . . challenges are equally applicable to requests for both stays and injunctive relief and are not available as a matter of right." Arthur v. King, 500 F.3d 1335, 1340 (11th Cir. 2007) (internal quotation marks omitted) (brackets and ellipses in original). Those equitable principles include:

> (1) "sensitiv[ity] to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts," (2) the [petitioner's] satisfaction of "all of the requirements for a stay, including a showing of a significant possibility of success on the merits," (3) the application of "a strong equitable presumption against the grant of a stay where the claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay," and (4) protection of the "States from dilatory or speculative suits."

Id. (first brackets in original). Furthermore, "[w]e will 'consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.' " In re Hutcherson, 468 F.3d 747, 749 (11th Cir. 2006) (quoting Gomez v. U.S. Dist. Court for N. Dist. of Cal., 503 U.S. 653, 654, 112 S. Ct. 1652, 1653 (1992) (per curiam)).

The Supreme Court has noted that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." Gomez, 503 U.S. at 654, 112 S. Ct. at 1653. "A defendant's interest in being free from cruel and unusual punishment is primary; however, the State's interest in effectuating its judgment remains significant." McNair v. Allen, 515 F.3d 1168, 1172 (11th Cir. 2008). Victims of crime also "have an important interest in the timely enforcement of a sentence." Hill v. McDonough, 547 U.S. 573, 584, 126 S. Ct. 2096, 2104 (2006) (citing Calderon v. Thompson, 523 U.S. 538, 556, 118 S. Ct. 1489, 1501 (1998)). "[L]ike 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." Id.

Here, I would deny Hill's motion for a stay for several reasons. First, Hill has waited until the eve of execution to request a stay. The last-minute nature of the allegation, after 20 years of litigation over his mental retardation claims,

counsels against an equitable stay. Both the State and the victim's family have a strong interest in the timely enforcement of Hill's death sentence. The State and the surviving victims have waited long enough for some closure to Hill's heinous crime. Our established precedent does not allow us to interfere with the State's strong interest in enforcing its judgment in this case. "Speaking of the effect of federal court litigation on state death sentences, twenty-three years ago Judge Godbold of this Court sagely observed that '[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment.'" Thompson v. Wainwright, 714 F.2d 1495, 1506 (11th Cir. 1983). By holding his claim back until there was not enough time to have it adjudicated without a stay of execution, Hill has used what then-Justice Rehnquist called the "hydraulic pressure" of a last-minute filing, Evans v. Bennett, 440 U.S. 1301, 1307, 99 S. Ct. 1481, 1485 (1979) (Rehnquist, Circuit Justice), to obtain a federal court imposed stay of a state court's final judgment and further delay in his death sentence. Hill is not entitled to another delay beyond the already 22-year delay in this case.

Second, Hill's counsel heard from Dr. Sachy on July 27, 2012 but then did not file his application for a successive habeas petition with this Court until the eve of his execution on February 19, 2013. Hill's pleadings have alleged no explanation for this delay. Third, "[w]e repeatedly have noted that 'recantations are viewed with extreme suspicion by the courts.'" In re Davis, 565 F.3d 810, 825

(11th Cir. 2009) (quoting United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir.1988)); see United States v. Smith, 433 F.2d 149, 150-51 (5th Cir.1970); Newman v. United States, 238 F.2d 861, 862 n.1 (5th Cir.1956)). "This makes sense, because as Justice Brennan once explained, recantation testimony 'upsets society's interest in the finality of convictions, is very often unreliable and given for suspect motives, and most often serves merely to impeach cumulative evidence rather than to undermine confidence in the accuracy of the conviction.'" In re Davis, 565 F.3d at 825 (quoting Dobbert v. Wainwright, 468 U.S. 1231, 1233-34, 105 S. Ct. 34, 36 (1984) (Brennan, J., dissenting)). This same reasoning applies even more to Hill, since the alleged change in expert opinion comes 13 years after the expert's original testimony and is not based on any new underlying facts. Indeed, Dr. Sachy contends his change of opinion is primarily that he had less medical experience in 2000, but this ignores that Dr. Harris had over 20 years of experience in 2000 and Dr. Carter had 21 years of experience in 2000.

Fourth, and in any event, Hill has not shown a substantial likelihood of success on the merits of his alleged claims. I recognize that Hill argues that he has "new evidence" to support his claims of mental retardation. Hill's "new evidence" consists of affidavits of three experts who evaluated Hill 13 years ago and found that he was not mentally retarded. These experts have not seen Hill in 13 years and they now allege that they question some of their prior findings. In 2000, these

experts reviewed extensive materials prior to the 2000 state habeas hearing, including school records, and affidavits from family, friends, and teachers. Naval records and much more were provided to these experts. These experts underwent thorough cross-examination by Hill's habeas counsel, produced a 35-page report of their findings, and swore under oath that Hill did not meet the criteria for mental retardation.

In that report, the experts noted, inter alia, Hill provided for his family from an early age, budgeted his money from an early age, was "more mature than the other children his age," was "level headed," was a recruiter in the military, was on the Human Relations Council in the military, and was a father figure to his siblings. The experts have not retreated from these underlying findings.

The record evidence also shows, for example, that Hill entered the military at the rank E-1 and attained the rank of E-5 in five years, advancing each year. Hill was eligible for E-6; however, he was demoted not because of any mental inability, but because he murdered his girlfriend. Hill was decorated as a .38 caliber sharpshooter. Hill received military education in nuclear weapons loading, aviation fund school, and corrosion control. Hill completed an 80-hour instructor training course. Hill also attended and completed a 2-week military course in leadership management education and training. Hill was qualified as an assistant supervisor and ordnance systems maintenance man and troubleshooter, with

collateral duties in shop training, as a publications petty officer, as a nuclear conventional weapons load team member, and as a corrosion control/reclamation and salvage team member. Hill was also qualified as a weapons technician and was a Human Relations council member. Hill completed a 2-week tour with a hometown recruiting program, played on the football team, and was Petty Officer of the Watch. Hill also functioned as an assistant work center supervisor, an ordnance troubleshooter, was CPR qualified, and played on an intramural basketball team.

Evaluations of Hill during his military duty comment:

> Dedicated and reliable petty officer. Completes all tasks expeditiously, at times under very adverse conditions. Quiet, friendly manner, and positive attitude greatly enhances squadron morale. Uniforms and appearance always outstanding. Actively supports the Navy's equal opportunity goals. Good use of the English language orally and written. Strongly recommended for advancement and retention.

Similarly, Hill was reported to be:

> [a] reliable individual and devoted second class petty officer. Works exceptionally well with others and assists in the training of weapons-loading team members. Implemented a new W/C tool control program and aided in the redesigning of the W/C technical Pubs library, both areas receiving an outstanding during the latest COMHEL WINGGRES visit. His quiet personality enhances squadron morale. Uniforms and appearance continually outstanding. Actively supports the Navy's equal opportunity goals. Demonstrates excellent command of the English language orally and written. Strongly recommended for advancement and retention in the Naval service.

It is also noteworthy that the state habeas court found that Hill failed to show, among other things, that he had significant impairments in adaptive behavior. Hill, 662 F.3d at 1341. The state habeas court noted Hill's (1) extensive work history and ability to function well in such employment, (2) disciplined savings plans to purchase cars and motorcycles, (3) extensive and exemplary military service, (4) social life, (5) sufficient writing skills, and (6) ability to care for himself in home living. Id.

While Hill stresses the three new affidavits, the fact remains that after 20 years of litigation, this case has a voluminous record and a wealth of other evidence showing Hill's extensive mental capabilities and his lack of significant impairment in adaptive functioning. Hill's Naval records are but one example of the overwhelming reliable and unbiased evidence of Hill's extensive mental capabilities and of his lack of any significant impairment in adaptive functioning. Given the record here, I cannot say Hill has shown a substantial likelihood of success required for a stay of execution.

Lastly, but importantly too, the grant of a stay defies two express federal statutes—§ 2244(b)(1) and § 2244(b)(2)(B)—and our Circuit's prior precedent described above, which holds that § 2244(b)(2)(B) does not authorize the filing of a successive habeas application based on a sentencing claim in death cases.

Accordingly, based on the two federal statutes and our Circuit precedent, I am required to deny a stay and dissent.