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New Supreme Court Gatekeeper for 11th Circuit

By [Carl Jones](#)
02-08-2006

The U.S. Supreme Court has assigned Justice Clarence Thomas, a strong supporter of capital punishment, to handle emergency stay requests coming out of the 11th U.S. Circuit Court of Appeals.

The move could affect Florida death penalty appeals.

Justice Anthony Kennedy, a relative moderate on death penalty issues, previously handled the 11th Circuit, which includes Florida, Georgia and Alabama.

Kennedy will handle the 9th Circuit, which covers California.

On Feb. 1, Chief Justice John G. Roberts Jr. assigned Thomas to oversee the 11th Circuit. The move was part of a shuffle following the confirmation of Justice Samuel Alito Jr.

The power to grant emergency stays is most critical in death penalty cases. But it's also a key method of freezing judgments and judicial orders in time-sensitive legal disputes like those that arose in the end-of-life case involving Terri Schiavo and in the 2000 presidential election recount battle.

If a justice denies a petition, a litigant can still ask the other eight justices, or the full court, to review the case. But experts say the chances of being granted review decrease if the justice in charge of a circuit already has denied review.

Thomas' appointment to cover the 11th Circuit makes some

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Florida criminal defense lawyers nervous.

"I don't perceive Justice Thomas as being particularly friendly toward death penalty defendants," said Neal DuPree, the Fort Lauderdale-based capital collateral regional counsel for South Florida. His state agency represents death row inmates in post-conviction habeas corpus petitions.

Last month, Kennedy granted a temporary halt to the pending execution in Florida of convicted murderer Clarence Edward Hill, who was minutes from receiving a lethal injection. Hill received a reprieve while the high court debates a procedural issue involving how many times death row convicts can appeal their sentence.

Hill's underlying claim, which has not yet been addressed by the Supreme Court, is that the Florida's lethal injection procedure violates the U.S. Constitution's prohibition against cruel and unusual punishment.

Kennedy's decision delayed Hill's execution by at least several months. The first brief is not due to the high court until early March. Hill's last reply brief, if necessary, is due by mid-April.

Kennedy recently denied an emergency stay for Arthur Rutherford, another Florida inmate facing death.

DuPree said Kennedy, who wrote the Supreme Court decision barring execution of juvenile criminals and supported the decision preventing the execution of the retarded, has been "more receptive" to death penalty defendants than Thomas during their time on the Supreme Court.

Thomas has come out against repetitive petitions and generally is unsympathetic to prisoners' rights to sue. In the two landmark rulings outlawing the execution of the retarded and juveniles, Thomas joined in dissenting opinions arguing that such executions are not "cruel and unusual."

He also refused to go along with an eight-judge majority that found the systematic exclusion of black jurors in a Texas capital case should have warranted an appeal.

"I think Thomas would not, on his own, have granted [Hill's] stay request," said Los Angeles-based attorney and author Edward Lazarus, who wrote of his experiences clerking for Justice Harry Blackmun in the book "Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court." "I think he, like Justice Scalia, really does not want to go back down the road of strict judicial oversight of the death penalty."

Florida, Alabama and Georgia are some of the most active death penalty states in the country. As of Feb. 3, there were 366 men and women on death row in Florida. Alabama has 192 people facing execution, while Georgia has 102 prisoners on death row.

In Florida, there are a number of death penalty issues that could be brought to the Supreme Court for review. Legal experts say, for example, that the state's unusual system for how jurors and judges hand down death sentences is ripe for challenge.

If a stay is granted by the justice in charge of a judicial circuit, whatever judgment or sentence that has been handed down cannot go forward. But a case can move forward while a request for review is pending before the full court.

Lazarus said requests for stays in politically charged cases, such as the Terri Schiavo case and the *Bush v. Gore* election case, are typically referred to the full court by the justice in charge of the circuit. But he said the swap of Kennedy for Thomas could be important in "fringe" cases in the 11th Circuit, such as Hill's petition.

Lazarus said having Kennedy in charge of the 11th Circuit gave death penalty defendants a better shot, even though Kennedy is a moderate conservative who was appointed by President Reagan. "When you had Justice Kennedy [in the 11th Circuit], you had a swing vote on the death penalty taking a first crack on these cases," Lazarus said. "Now you don't."

Indeed, it may be harder now for Florida death row inmates to receive Kennedy's support for a stay if they get shot down by Thomas and seek support from the other justices. "He's going to be receiving the information [from Thomas], so I think it makes the hill a little bit steeper to climb," Lazarus said.

THOMAS RETURNED HOME

The reassignment of positions, called allotments, follows the retirement of Justice Sandra Day O'Connor after 25 years on the Court and the elevation of Justice Alito. The chief justice decides the allotments based on seniority and the desires of the individual justices.

O'Connor, the second most senior justice on the high court, was in charge of the 9th Circuit. Thomas previously was in charge of the 8th Circuit, based in St. Louis, to which he has been assigned since his 1991 confirmation. Alito will oversee the 8th Circuit.

Florida International University law professor Thomas Baker said the assignment of circuits tends to be rooted in the justices' "natural proclivities." Kennedy is from California, but could not take over the 9th Circuit until O'Connor retired. Meanwhile, Thomas, a Georgia native, had to wait until Kennedy relinquished control of the 11th Circuit.

"I would not be surprised if Justice Thomas lobbied the chief [justice] to say, 'If we're reshuffling these circuits, I'd like to go back to the southeast,'" Baker said.

There are checks and balances to make sure one justice does not prevent a meritorious case from reaching the court. Not only can justices ask the full court for a stay in a case from their circuit, a litigant also can approach the other eight justices for an emergency stay if the justice in charge of that circuit declines to grant a stay.

Baker said those checks and balances means a single justice cannot "misbehave and impose his will" on the court. "The justice is acting in good faith," he said. "It's not about, 'How I would vote,' but 'How would I predict the nine [justices] would vote.'"

STAYS CAN BE HUGE

In both the Schiavo case last year and the *Bush v. Gore* presidential election recount battle in 2000, several emergency stay requests were sent to Kennedy for his approval. But Kennedy asked the full Court to make a decision on the merits of a stay in each instance.

A stay was of huge importance in the 2000 election case because there was a looming deadline for vote certification. The Florida Supreme Court extended the deadline for counties to submit returns to the Florida secretary of state from Nov. 14 to Nov. 26. The U.S. Supreme Court reversed that decision. But on Dec. 8, the Florida Supreme Court reinstated its order for the recount to continue.

The George W. Bush campaign asked Kennedy to stay that decision on the same day. Kennedy referred the matter to the full court, which granted the stay Dec. 9. That froze the recount process until the nation's high court could be briefed and hear oral arguments. The election dispute was decided on Dec. 12, when the U.S. Supreme Court halted the recount for good, essentially handing the election to Bush.

In the Schiavo case, emergency stays also were a critical issue. Last year, the U.S. Supreme Court denied three petitions for emergency stays, referred to the full court by Kennedy, that would have allowed Schiavo's feeding and hydration to continue. Schiavo died last March.