

NO. \_\_\_\_\_

**IN THE SUPREME COURT OF THE UNITED STATES**

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SAMUEL DAVID CROWE,  
Petitioner,

-v.-

JAMES E. DONALD, in his official capacity as Commissioner of the Georgia  
Department of Corrections,  
and  
HILTON HALL, in his official capacity as Warden, Georgia Diagnostic and  
Classification Prison,  
Respondents.

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**EMERGENCY MOTION TO STAY EXECUTION**

***CAPITAL CASE – EXECUTION SCHEDULED FOR MAY 22, 2008 AT 7:00 P.M.***

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Dated: May 21, 2008

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## I. INTRODUCTION

This matter has come before this Court following the decision of the U. S. Court of Appeals for the Eleventh Circuit on May 20, 2008, denying an Emergency Motion for Stay of Execution. Georgia inmate Samuel David Crowe is currently scheduled to be executed at 7:00 pm on Thursday, May 22, 2008. A stay is necessary to permit this Court to resolve the statute of limitation questions concerning challenges to Georgia's lethal injection protocol under 42 U.S.C. § 1983, and to review the Eleventh Circuit's decision to deny a stay of execution, and the District Court's *sua sponte* dismissal pursuant to 28 U.S.C. § 1915A of Plaintiff-Appellant Crowe's 42 U.S.C. § 1983 challenge to Georgia's lethal injection procedure. An Emergency Petition for Writ of Certiorari has been filed simultaneously with this Motion to seek said review.

Oral argument on the fully-briefed appeal was scheduled for June 16, 2008. Despite the pendency of this appeal, on May 8, 2008 the Superior Court of Douglas County, Georgia, entered an Order setting Crowe's execution for the period May 22, 2008 to May 29, 2008. (The Order is attached hereto as Exhibit "A"). The defendants have set the execution for 7:00 p.m. on Thursday, May 22, 2008. (The press release setting the date is attached hereto as Exhibit "B"). Pursuant to Supreme Court Rule 24, Crowe moves the Court for a stay of execution pending resolution of his Emergency Petition for Writ of Certiorari, so that he may be permitted to pursue this appeal.

On October 12, 2007 Crowe filed a detailed 18 page Complaint pursuant to 42 U.S.C. § 1983 challenging Georgia's lethal injection procedures. (R.1, Complaint.) Crowe alleges that Georgia's procedures violate the Eighth Amendment's proscription against cruel and unusual punishment because the procedures create the unreasonable and unacceptable risk of unnecessary physical and psychological pain. (R.1, Complaint ¶¶ 56-57.) The District Court dismissed the Complaint *sua sponte* on November 14, 2007 pursuant to 28 U.S.C. § 1915A prior to the filing

of an answer and without notice to the parties. (R.4.) As a formal matter, Crowe's appeal from that dismissal remains pending before the Court of Appeals and has been fully briefed, with oral argument is set for Monday, June 16, 2008, because the order of the Eleventh Circuit denying the motion to stay execution did not explicitly address the status of the appeal. *See* Exhibit C. As a practical matter, however, the refusal to grant the stay of execution has the effect of terminating the appeal.

As outlined in more detail in the accompanying Emergency Petition for Certiorari, the Eleventh Circuit improperly relied upon the statute of limitations accrual rule for section 1983 challenges to state lethal injection procedures when denying Mr. Crowe's motion to stay his execution. Indeed, the rule articulated by the Court of Appeals would have required Mr. Crowe to seek section 1983 relief at a point in time when the law of the Circuit would not have permitted review under section 1983, instead treating the action as a successor habeas petition, subject to stringent limits that Mr. Crowe could not have satisfied. Mr. Crowe seeks a stay of execution so that this Court can fully consider his Emergency Petition for Certiorari, and require the Eleventh Circuit to hear and rule upon his Section 1983 challenge to Georgia's lethal injection procedures. Expedited consideration of this emergency motion is necessary because of Crowe's impending execution date.

## **II. LEGAL STANDARD**

An inmate seeking a stay of execution pending review of his petition for certiorari must demonstrate a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383 (1983), standards incorporated by reference in *Hill v.*

*McDonough*, 547 U.S. 573, 584, 126 S.Ct. 2096, 2104 (2006). In addition, the Court will consider the states' interests in enforcing their criminal judgments, and whether the inmate unnecessarily delayed in bringing his claim. *Id.*; *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). Here, these factors weigh in favor of granting Crowe's motion for a stay of execution while this Court considers his Emergency Petition for Certiorari, to allow him to pursue his appeal in the Eleventh Circuit.

Moreover, a stay is warranted in this case so the Court of Appeals will consider the legal issues presently pending on appeal, which are of significance not only to Mr. Crowe but to all other inmates facing execution under the Georgia lethal injection protocol. *See Zeigler v. Wainwright*, 791 F.2d 828, 830 (11th Cir. 1986) (granting stay of execution where pending appeals presented issues "that ha[d] not previously been considered by this Court" and that "must be decided before this Court can . . . reach any decision on the merits of the issues presented in the [habeas petitions]"). These issues have been fully briefed and scheduled for oral argument and the Court should enter a stay to allow determination of those issues.

### **III. ARGUMENT**

#### **A. There Is a Strong Likelihood that Crowe Will Prevail on the Merits.**

Crowe is likely to succeed on his appeal. Crowe's initial and reply briefs previously filed with the Court of Appeals detail why the District Court's sua sponte dismissal of his Section 1983 complaint was error. The dismissal pursuant to 28 U.S.C. § 1915A was improper because no court has ruled on the merits of Crowe's Section 1983 challenge to Georgia's lethal injection procedures. In order for a claim to be precluded by res judicata the prior determination must have been a final judgment on the merits. *In re Omine*, 485 F.3d at 1311-12. The federal habeas decision on which the District Court based its dismissal was grounded solely on a preliminary ruling denying an evidentiary hearing and not on the merits of the claims. There was no merits

determination in Crowe's habeas proceeding. *See Crowe v. Terry*, No. 1:02-cv-2265-ODE, 426 F. Supp. 2d 1310, 1351-1354 (N.D. Ga. 2005) (the "Habeas Court"), *aff'd* 490 F.3d 840 (11th Cir. 2007) (Exhibit D)<sup>1</sup> When his motion for discovery on this issue was denied (Exhibit E), Crowe proffered the record that was before the Gwinnett County, Georgia Superior Court in *State v. Nance*, an action in which Nance challenged the constitutionality of his death sentence. (426 F. Supp. 2d at 1353, 1353 n.40.) Crowe was not a party to that case. The denial of Crowe's request for an evidentiary hearing was a preliminary procedural determination regarding the sufficiency of Crowe's proffer of evidence from an unrelated state court case under a clear and convincing evidence standard. In essence, the Habeas Court found that it could not consider the merits of the claim because Crowe had not made the threshold showing. While it may have been appropriate for the District Court to look to the proceedings in the Habeas Court in making a frivolousness determination under Section 1915A, the District Court improperly gave preclusive effect to the Habeas Court's procedural ruling denying an evidentiary hearing. Crowe has never had a full and fair opportunity to litigate this claim.

Like the Habeas Court ruling, none of the other court rulings on this claim have reached the merits. The Eleventh Circuit has not previously considered Crowe's lethal injection challenge because the habeas court denied the portion of Crowe's petition for a certificate of appealability seeking to appeal the Habeas Court's refusal to hold an evidentiary hearing on his lethal injection challenge. The appeal decision says nothing about the lethal injection claim. *Crowe v. Hall*, 490 F.3d 840 (11th Cir. 2007). Further, the denial of Crowe's petition for writ of certiorari to the United States Supreme Court is not a decision on the merits. *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J., *op. on denial of cert.*); *Covad*

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<sup>1</sup> *Crowe v. Terry* was initially filed *sub nom. Crowe v. Head*, No. 1:02-cv-2265 (N.D. Ga.)

*Commc'ns Co. v. Bellsouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004) ("[T]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.") (quoting *United States v. Carver*, 260 U.S. 482 (1923)). Nor did the habeas court substantively consider the evidence Crowe submitted in support of his lethal injection challenge – in fact, the court expressly refused to consider such evidence for the purpose of determining the merits of Crowe's lethal injection claim. 426 F. Supp. 2d at 1353-1354. Crowe's motion for a stay should be granted so that he can present his lethal injection challenge on the merits.

The likelihood of the success of Crowe's appeal is unaltered by the recent Supreme Court decision in *Baze v. Rees*, 128 S. Ct. 1520 (2008). *Baze* does not prevent an inmate from raising an as applied challenge to a state's lethal injection procedures. *Id.* at 1532, 1537.<sup>2</sup> Nor does *Baze* touch on the error made by the District Court in dismissing the Complaint *sua sponte*. Crowe should be permitted to present his lethal injection challenge on the merits.

**B. Crowe Will Face Irreparable Injury if He Is Executed Before He Can Fully Litigate His Section 1983 Claim.**

The injury that Crowe faces is clear. Even though the appeal from the dismissal of the Section 1983 action has been fully briefed and the case set for argument, the state intends to proceed with Crowe's execution. While oral argument was scheduled to take place in a little over a month when Crowe sought his stay of execution, the execution was scheduled to take place in just over a week – on May 22, 2008. It is now scheduled to take place tomorrow. If Crowe's execution is carried out as scheduled he will be deprived of his ability to establish that his execution under Georgia's lethal injection procedures is in violation of his constitutional

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<sup>2</sup> The constitutionality of Georgia's lethal injection procedures is still in question even after *Baze*. A notice of appeal was filed with this Court on May 5, 2008 in *Alderman v. Donald*, 08-12550-DD, a Section 1983 proceeding challenging Georgia's lethal injection procedures.

rights, even though the Court of Appeals has not had the opportunity to consider his arguments. There is no remedy for such an injury. The injury to Crowe far outweighs any potential prejudice to Defendants or to the public interest.

**C. Neither the Defendants nor the Public Interest Will Be Harmed if Crowe Is Granted a Stay of Execution.**

While the state has a strong interest in enforcing its criminal judgments, *Hill v. McDonough*, 126 S. Ct. 2096, 2104 (2006), there is no legitimate interest in executing someone using procedures that are challenged as unconstitutional. Further, “[a] defendant’s interest in being free from cruel and unusual punishment is primary.” *McNair v. Allen*, 515 F.3d 1168, 1172 (11th Cir. 2008).

**D. Crowe Did Not Unnecessarily Delay in Bringing His Section 1983 Claim.**

Prior to June 2006, Crowe could not have brought his Section 1983 action in the Eleventh Circuit. Such a claim would have been dismissed as the equivalent of a second and successive petition for a writ of habeas corpus. *Hill v. McDonough*, 126 S. Ct. 2096, 2100-01 (2006). However in *Hill v. McDonough*, the Supreme Court found that an inmate’s challenge to the conditions of his confinement – including the *method* of execution – may be brought as a Section 1983 action. Crowe filed this litigation within two years after the cause of action first became available to him. The appeal in Crowe’s Section 1983 action was fully briefed in the Court of Appeals before the United States Supreme Court denied Crowe’s petition for certiorari on the writ of habeas corpus and well before his execution date was set. There was no undue delay in bringing this action.

**IV. CONCLUSION**

All factors weigh in favor of issuing a stay of Crowe’s execution. The briefing on Crowe’s appeal demonstrates that the District Court’s dismissal of the Section 1983 action was

in error. Crowe has a strong likelihood of success on the merits of his appeal. He faces clear, irreparable harm – imminent execution before the Court has had an opportunity fully to consider his claims. Without a stay, these claims will become moot and no Court will have considered Crowe’s claims. Neither Respondents nor the public will suffer harm from a stay of execution. This matter was fully briefed well before Crowe’s execution date was set. A stay will permit the Court to consider fully the case that is now pending before it. Finally, Crowe did not unduly delay in bringing this Section 1983 action. Crowe’s emergency motion to stay his execution should be granted.

Respectfully submitted, this 21st day of May, 2008.

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**CERTIFICATE OF SERVICE  
FOR EMERGENCY MOTION TO STAY EXECUTION**

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I hereby certify that I have this date served a copy of the foregoing Emergency Motion to Stay Execution upon counsel for Respondent by email, and by depositing a copy in the United States Mail, with proper first class postage affixed thereto, addressed as follows:

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This 21st day of May, 2008.

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