

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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.

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

EMERGENCY PETITION FOR WRIT OF CERTIORARI

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

Dated: May 21, 2008

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QUESTION PRESENTED

Capital Case

1. Whether the Court of Appeals erred when it denied Petitioner's Emergency Motion to Stay Execution citing expiration of the statute of limitations and purported undue delay where the constitutional cause of action Petitioner asserted under 28 U.S.C. § 1983 was created by this Court on June 12, 2006, and Petitioner filed his constitutional claim less than two years after that date, at a time when he was not under death warrant, and before he had filed his petition for certiorari with the United States Supreme Court seeking review of the denial of his first federal habeas corpus petition?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CITATION TO OPINION BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Emergency Motion for Stay of Execution – *Crowe v. Donald*, Case No. 07-15680 (May 20, 2008) – is appended as Appendix A. The Order of the United States District Court for the Northern District of Georgia dismissing *sua sponte* Petitioner's complaint asserting that the lethal injection execution protocol as practiced in Georgia constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution is appended as Appendix B.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit issued its decision denying Petitioner's Motion for Stay of Execution, which also carried the effect of resolving the underlying appeal against Petitioner, on May 20, 2008. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution Provides in Relevant Part:

No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. STATEMENT OF MATERIAL FACTS

On March 3, 1988, Samuel David Crowe was arrested in his Douglasville, Georgia, home for the murder of Joseph Pala at the Wickes Lumber Co. store, also located in Douglasville. This

was Mr. Crowe's first arrest for any crime. Following his arrest, Mr. Crowe told Earl Lee, Sheriff of Douglas County, that he killed Joseph Pala during the course of an armed robbery. The statement was given in Mr. Crowe's home, after a search of his home and car yielded evidence linked to the crime, and after Mr. Crowe asked to speak with a lawyer. Appendix H to January 25, 2008, petition for certiorari (Case No. 07-9096), *Crowe v. Georgia*, 265 Ga. 582, 584, 586, 458 S.E.2d 799, 805, 806 (1995) (direct appeal).

Mr. Crowe's adoptive mother, Hazel Crowe, hired trial counsel Michael Bergin to defend her son. Trial counsel pursued a defense, based on suppression of the evidence seized at Mr. Crowe's home, and on suppression of Mr. Crowe's statements. An evidentiary hearing on Mr. Crowe's motion to suppress took place over three days in July and September of 1988. (R1-9-RXs 4-6.) The court then took six months to rule on the motion. Although it denied the motion, the trial court did grant an interlocutory appeal of the issue to the Georgia Supreme Court, an appeal that was later withdrawn when Mr. Crowe decided to plead guilty *pro se*. (R1-9-RX 10.)

Mr. Crowe pleaded guilty, waiving his right for an attorney for the plea (as noted by D.A. Frank Winn), and asked the judge to sentence him. (R1-9-RX 10.) The trial judge refused and required him to stand trial for his sentence. Mr. Crowe re-hired his counsel for the sentencing trial. *Id.*

On November 18, 1989, a jury in the Superior Court of Douglas County recommended that Mr. Crowe be sentenced to death by electrocution. On November 20, 1989, the trial court sentenced Mr. Crowe to death by electrocution for the murder, and to imprisonment for the remainder of his natural life for the armed robbery. Appendix H to 07-9096, 265 Ga. at 583 n.1, 458 S.E.2d at 804 n.1.

II. PROCEDURAL HISTORY

Samuel David Crowe is an inmate being held under sentence of death in the State of Georgia. Mr. Crowe is in the custody of the Georgia Department of Corrections at the Georgia Diagnostic and Classification State Prison in Jackson, Butts County, Georgia, under the control of Respondent, Warden Hilton Hall.

A. Trial and Direct Appeal

On May 5, 1989, Mr. Crowe pleaded guilty *pro se* to malice murder in the Superior Court of Douglas County in connection with the death of Joseph Pala. At the same time he also pleaded guilty to armed robbery pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). The trial judge refused to enter his sentence pursuant to those pleas, and Mr. Crowe faced trial for his sentence. The sentencing trial ended on November 18, 1989, with a jury verdict recommending a sentence of death by electrocution. (R1-9-RX 17.) On November 20, 1989, the trial court sentenced Mr. Crowe to death by electrocution for the murder, and to imprisonment for the remainder of his natural life for the armed robbery. (R1-9-RX 18.)

Mr. Crowe pursued a direct appeal, and while that appeal was pending he also filed an Extraordinary Motion for New Trial seeking to set aside the guilty pleas, on the ground that they were procured in violation of his right to counsel by improper communication by the county Sheriff with Mr. Crowe. That Motion was denied without a hearing. Mr. Crowe appealed that denial, and the Georgia Supreme Court vacated that denial and remanded the Extraordinary Motion for New Trial to the Superior Court of Douglas County for an evidentiary hearing, with the Supreme Court retaining jurisdiction. Appendix H to previous Petition for Certiorari, No. 07-9096, 265 Ga. at 583 n.1, 458 S.E.2d at 804 n.1.

The hearing was held in front of Judge Emerson of the Superior Court of Douglas County, and the Motion was denied. The Georgia Supreme Court then consolidated the original

appeal and the appeal of the denial of the Extraordinary Motion for New Trial. On June 26, 1995, the Georgia Supreme Court affirmed both the denial of Mr. Crowe's Extraordinary Motion for New Trial and the death sentence. Appendix H to 07-9096, *Crowe v. Georgia*, 265 Ga. 582, 458 S.E.2d 799 (1995). Mr. Crowe sought certiorari, which the United States Supreme Court denied. *Id.*, *cert. denied*, 516 U.S. 1148, 116 S. Ct. 1021, *and pet. for reh'g denied*, 517 U.S. 1151, 116 S. Ct. 1455 (1996).

B. State Habeas

Mr. Crowe filed his petition for writ of habeas corpus in the Superior Court of Butts County, Georgia, on December 6, 1996. (An earlier *pro se* petition that was filed while his petition for writ of certiorari was still pending had been dismissed as premature.) The State habeas judge denied all relief on July 14, 2000. (Appendix G to 07-9096.)

C. Federal Habeas

Following the Georgia Supreme Court's denial of his Application for Certificate of Probable Cause to Appeal and the United States Supreme Court's denial of his petition for writ of certiorari seeking review of that denial, Mr. Crowe filed his first petition for federal habeas corpus relief on August 15, 2002, in the United States District Court for the Northern District of Georgia. (R1-1.) On the same day that he filed his federal habeas petition, Mr. Crowe filed another State Petition for Writ of Habeas Corpus to raise constitutional claims based on new law, claims that were not available to him during the first state habeas proceeding. Those claims included a constitutional challenge to Georgia's lethal injection as cruel and unusual punishment under the U.S. and Georgia Constitutions. The Superior Court of Butts County dismissed that Petition on September 20, 2002, without permitting Mr. Crowe to oppose the Respondent's Motion to Dismiss. (Appendix J to 07-9096, R3-15-RX 115.) A timely application for Certificate of Probable Cause to Appeal that dismissal was filed with the Georgia Supreme

Court, and denied on January 14, 2003. Mr. Crowe sought certiorari, which the United States Supreme Court denied. These claims were added to the federal habeas petition by amendment. (R2-13.)

On September 30, 2005, the District Court entered an order denying all relief. (*Crowe v. Head*, 356 F. Supp. 2d 1339 (N.D. Ga. 2005), Appendix C, R11-56.) The District Court granted in part and denied in part Petitioner's Motion to Alter or Amend Judgment on November 15, 2005, but refused to reverse its denial of the writ. (R11-62.) One of the claims covered by these decisions was Mr. Crowe's Eighth Amendment challenge to Georgia's lethal injection. Mr. Crowe then timely filed an Application for Certificate of Appealability ("COA") in the District Court asking for the opportunity to appeal the District Court's rulings. (R11-66.) On July 26, 2006, the District Court granted the application in part and denied the application in part. (Appendix D to 07-9096.)

On August 16, 2006, Mr. Crowe filed a Motion to Expand Certificate of Appealability with the United States Court of Appeals for the Eleventh Circuit, which was granted in part and denied in part on August 31, 2006. That motion covered Mr. Crowe's Eighth Amendment challenge to Georgia's lethal injection. (Appendix E to 07-9096.) On September 14, 2006, Mr. Crowe filed a Petition for Panel Rehearing or Reconsideration of Partial Denial of Motion to Expand Certificate of Appealability. This petition was denied on October 4, 2006. (Appendix F to 07-9096.) On November 13, 2006, Petitioner filed his appeal brief, and oral argument on Mr. Crowe's appeal took place on May 31, 2007. On June 27, 2007, the Court of Appeals affirmed the District Court's denial of Mr. Crowe's Petition. (*See* Appendix A to 07-9096, *Crowe v. Hall*, 490 F.3d 840 (11th Cir. 2007).) Petitioner moved for rehearing, which was denied on August 28, 2007. (*See* Appendix B to 07-9096, Order denying Petition for Rehearing.)

Following the denial of the Petition for Rehearing, Petitioner sought certiorari in this Court to the United States Court of Appeals for the Eleventh Circuit. *Crowe v. Hall*, Case No. 07-9096. The denial of Certificate of Appealability to permit an appeal of the federal habeas court's denial of his habeas claim asserting an Eighth Amendment challenge to Georgia's lethal injection was included in this petition. This petition was denied on April 21, 2008, following this Court's decision in *Baze v. Rees*, 128 S. Ct. 1520 (2008).

D. Section 1983 Challenge to Lethal Injection.

On October 12, 2007, Petitioner filed a challenge to Georgia's lethal injection execution method under 28 U.S.C. § 1983. The district court dismissed the case *sua sponte* under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(b)(1), citing the denial of Petitioner's federal habeas claim as a res judicata ruling on the merits of his claim. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. The parties briefed the issues, and oral argument was set for June 16, 2008. On May 8, 2008, the Douglas Superior Court entered its order placing Petitioner under execution warrant from noon on May 22, 2008, to noon on May 29, 2008. On May 15, 2008, Petitioner filed his Emergency Motion to Stay Execution in the Eleventh Circuit. (A similar motion also was filed in the federal district court on May 16, 2008, which was denied on May 19, 2008.) The Eleventh Circuit denied the motion to stay the execution pending the existing appeal on May 20, 2008.

III. HOW THE JURISDICTIONAL QUESTION WAS RAISED

Petitioner first raised the claim that lethal injection as it is practiced in Georgia violates the Eighth Amendment in his 2002 State Petition for Writ of Habeas Corpus to assert constitutional claims based on new law. These claims were not available to Mr. Crowe during the first state habeas proceeding which concluded on July 14, 2000 (Appendix G to Case No. 07-9096), because Georgia ceased executions by electrocution and adopted lethal injections in 2001.

See Dawson v. Georgia, 274 Ga. 327, 335-36, 554 S.E.2d 137, 144 (2001); O.C.G.A § 17-10-38.

The Superior Court of Butts County dismissed this State habeas petition asserting the lethal injection claim on September 20, 2002. (Appendix J to Case No. 07-9096.) The claims were subsequently added to the federal habeas petition, and addressed by the District Court. Early in the federal habeas case, the District Court denied Petitioner's request for discovery related to this claim. On September 30, 2005, the District Court denied Petitioner's request for an evidentiary hearing, and then denied the Eighth Amendment challenge to Georgia's lethal injection for purported lack of evidence. Appendix C to Case No. 07-9096, *Crowe v. Terry*, 426 F. Supp. 2d at 1352-54. Petitioner then filed a Motion to Alter or Amend Judgment. On November 15, 2005, the District Court granted the motion to alter or amend concerning the lethal injection issue because the original order was based on an incorrect standard. Under the correct standard, the District Court still denied Petitioner's request for an evidentiary hearing, and denied the challenge to Georgia's lethal injection.

Mr. Crowe then timely filed an Application for Certificate of Appealability in the District Court asking for the opportunity to appeal all the court's rulings, including the lethal injection ruling. On July 26, 2006, the District Court granted the application in part, but denied permission to appeal the lethal injection claim. (Appendix D to Case No. 07-9096.) On August 16, 2006, Mr. Crowe filed a Motion to Expand COA with the Court of Appeals. Among other relief, Petitioner sought expansion of the COA to include the lethal injection claim, and remand of the case to the District Court to conduct an evidentiary hearing, or in the alternative, a stay of the appeal while the lethal injection challenge in *Hill v. McDonough*, Case No. 4:06-cv-0032-SPM (N.D. Fla.), was under remand to the Court of Appeals. *See Hill v. McDonough*, 126 S. Ct. 2096 (2006). The Court of Appeals denied in part Mr. Crowe's motion to expand the COA on

August 31, 2006. The challenge to Georgia's lethal injection was one of the claims for which COA was denied. (Appendix E to Case No. 07-9096.) On September 14, 2006, Mr. Crowe filed a Petition for Panel Rehearing or Reconsideration of Partial Denial of Motion to Expand COA. This petition was denied on October 4, 2006. (Appendix F to Case No. 07-9096.)

On October 12, 2007, Petitioner filed a challenge to Georgia's lethal injection execution method under 28 U.S.C. § 1983. The district court dismissed the case *sua sponte* under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(b)(1), citing the denial of Petitioner's federal habeas claim as a res judicata ruling on the merits of his claim. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. The parties briefed the issues, and oral argument was set for June 16, 2008. On May 8, 2008, the Douglas Superior Court entered its order placing Petitioner under execution warrant from noon on May 22, 2008, to noon on May 29, 2008. On May 15, 2008, Petitioner filed his Emergency Motion to Stay Execution in the Eleventh Circuit. (A similar motion also was filed in the federal district court on May 16, 2008, which was denied on May 19, 2008.) The Eleventh Circuit denied the motion to stay the execution pending the existing appeal on May 20, 2008. Because Petitioner's execution is scheduled to take place at 7:00 pm on May 22, 2008, refusing to stay the execution has the effect of denying his appeal.

REASONS FOR GRANTING THE WRIT

I. IT IS INEQUITABLE TO RETROACTIVELY APPLY THE STATUTE OF LIMITATIONS ACCRUAL RULE ESTABLISHED IN *MCNAIR V. ALLEN* TO PETITIONER'S CLAIM, BECAUSE UNDER ELEVENTH CIRCUIT PRECEDENT, PETITIONER DID NOT HAVE A CLAIM AVAILABLE UNDER SECTION 1983 TO CHALLENGE GEORGIA'S LETHAL INJECTION UNTIL THIS COURT'S RULING IN *HILL V. MCDONOUGH* ON JUNE 12, 2006.

Petitioner raised his first challenge to the lethal injection as practiced in Georgia in 2002, within months after the State's adoption of lethal injection, and then asserted the claim throughout federal habeas. Despite these efforts, made in conformance with the state of the law in the Eleventh Circuit at every stage of his proceeding, no court has ever permitted Mr. Crowe to argue this issue on the merits. In 2002, the Georgia habeas court dismissed his petition on the State's motion, without receiving an opposition brief from Petitioner, long before the expiration of the time for opposing a motion to dismiss, and without any evidence before it. When the claim was added to the federal habeas case, the district court refused to permit discovery on the issue. *See* Appendix C hereto. After denying Petitioner the discovery he needed to be able to make his case, perversely, that same court dismissed the claim because Petitioner produced insufficient evidence to support it. Neither the district court nor the circuit court would grant a certificate of appealability on this issue, and this Court refused to grant certiorari after *Baze v. Rees* was decided.

When Petitioner filed his section 1983 challenge to the lethal injection, the district court then erroneously concluded that the federal habeas court's decision had been one on the merits, rather than a procedural decision, and dismissed the case as res judicata. After the case was appealed to the Eleventh Circuit, fully briefed, and with oral argument set, the State then set the Petitioner's execution date for three weeks before the scheduled oral argument. It was during the

briefing on Petitioner's motion to stay the execution pending the oral argument that the State first raised the statute of limitations defense to the section 1983 claim.

When ruling on the Petitioner's Emergency Motion to Stay Execution, the Eleventh Circuit relied on its decision in *McNair v. Allen*, 515 F.3d 1168, 1172 (11th Cir. 2008), and determined that Petitioner's claim is now time barred, because he failed to bring it within two years of the 2001 decision by the State of Georgia to adopt lethal injection as its method of execution. App. A at 5. The position is in direct conflict with the Eleventh Circuit's own law which had been crystal clear: Until this Court's 2006 decision *Hill v. McDonough*, any attempt to challenge the method of execution, under whatever statutory or procedural device, would be considered a habeas corpus claim, and if the inmate had already been through federal habeas, the claim would be considered only under the successor petition rules, which have the effect of barring any successor petitions unless they are supported by strong evidence of actual innocence. See *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004) (holding that a "§ 1983 claim seeking relief -including a TRO, preliminary injunction, or a stay of execution- from a sentence of death as cruel and unusual punishment is the 'functional equivalent' of a successive habeas petition"); *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006) (finding that plaintiff's § 1983 claim is the functional equivalent of a successive petition for writ of habeas corpus).

Moreover, *McNair* ought not be invoked to permit Petitioner's execution to proceed a mere three weeks before oral argument was to take place on his section 1983 appeal, because its legal status is questionable. It is a split decision, with a vigorous dissent. See *McNair*, 515 F.3d at 1168 (Wilson, J., dissenting). Further, the United States Supreme Court granted a stay of execution to allow for a petition for writ of certiorari to be filed on this issue, which has yet to be ruled on, further suggesting that this Court believes there is some merit to *McNair* and

Callahan's challenge to the statute of limitations and accrual rules the Eleventh Circuit announced in *McNair*, 515 F.3d 1168. See *Callahan v. Allen*, 128 S. Ct. 1138 (2008) (granting a stay of execution).

Petitioner's § 1983 claim was timely when filed. In applying *McNair* retroactively, the District Court ignored the laws of equity. See *Jones v. Allen*, 483 F. Supp. 2d 1142, 1147 (M.D. Ala. 2007) (stating that the interests in considering a statute of limitations defense are "equitable interests"). Given that the purpose behind a statute of limitations is to protect defendants from litigating stale claims, see, e.g., *Jones*, 483 F. Supp. 2d at 1149, it is inequitable to retroactively apply *McNair* to this case after the parties have briefed the appeal on the merits, and the Eleventh Circuit had scheduled oral argument only three weeks after the execution date arbitrarily set by State. The equitable purpose behind the statute of limitations is not served under these facts.

II. EVEN IF *MCNAIR* IS APPLIED RETROACTIVELY, THE STATUTE OF LIMITATIONS SHOULD HAVE BEEN EQUITABLY TOLLED FOR MR. CROWE'S CLAIM.

The standard of review for equitable tolling is one of an abuse of discretion. *Drew v. Department of Corr.*, 297 F. 3d 1278, 1283 (11th Cir. 2002). Mr. Crowe has met the burden of establishing that equitable tolling is appropriate in this matter because Mr. Crowe diligently pursued his Section 1983 claim once the Eleventh Circuit made the claim available to him in 2006. Accordingly, even if the *McNair* rationale is applied retroactively, the District Court abused its discretion by not tolling the statute of limitations to the date on which the Section 1983 first became available to Mr. Crowe.

A party seeking equitable tolling bears the burden of establishing "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (internal citation omitted); see *Penoyer v.*

Briggs, 206 Fed. Appx. 962, 965 (11th Cir. 2006) (finding that equitable tolling requires a showing of “extraordinary circumstances that are both beyond [the party’s] control and unavoidable even with diligence”) (internal quotations omitted); *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993) (stating that “courts, acting in their equitable capacity, will toll statutes of limitations, but only upon finding of an inequitable event that prevented plaintiff’s timely action”) (internal citations omitted). Mr. Crowe diligently pursued his rights even though an extraordinary circumstance stood in his way.

First, the unavailability of this cause of action in the Eleventh Circuit was an extraordinary circumstance that stood in the way of Mr. Crowe. Mr. Crowe was precluded from bringing a Section 1983 lethal injection challenge prior to 2006 because it was not an available vehicle for lethal injection challenges prior to *Hill v. McDonough*. See *Robinson v. Crosby*, 358 F.3d 1281, 1284 (11th Cir. 2004) (holding that a “§ 1983 claim seeking relief -including a TRO, preliminary injunction, or a stay of execution- from a sentence of death as cruel and unusual punishment is the ‘functional equivalent’ of a successive habeas petition”); *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006) (finding that plaintiff’s Section 1983 claim is the functional equivalent of a successive petition for writ of habeas corpus). Given the Eleventh Circuit’s precedent at the time of refusing to entertain Section 1983 method of execution challenges, Mr. Crowe could not have been expected to bring this claim knowing that it would be procedurally denied and would have been a waste of judicial resources. Mr. Crowe relied upon the state of the law and should not be penalized for doing so.

Second, it is clear that prior to and throughout this litigation, Mr. Crowe has diligently pursued his rights. Mr. Crowe filed his original complaint on October 12, 2007, less than two years of the date upon which the § 1983 claim became available to him via *Hill v. McDonough*,

547 U.S. 573 (2006) (holding that a death row inmate could bring a § 1983 challenge to a state's method of execution). Up until August 28, 2007, his federal habeas case was still under consideration by the Eleventh Circuit. Mr. Crowe relied upon the existing state of the law in making his legal decisions. While Mr. Crowe conceivably could have filed his Complaint earlier, *see William v. Allen*, 496 F.3d 1210 (11th Cir. 2007), had Mr. Crowe filed his Complaint prior to June, 2006 his Complaint would have been summarily dismissed. It would be inequitable to require an individual to file a complaint that has no basis under the state of the law at the time in order to satisfy a mechanistic accrual rule.

Mr. Crowe relied on Eleventh Circuit precedent in determining when to file his claim. His claim was timely when it was filed. Equity demands that, should *McNair* be applied retroactively, the statute of limitations for Mr. Crowe's claim be tolled and the limitations period should run from the date of the *Hill v. McDonough* decision, when Mr. Crowe was first able to bring this claim according to Eleventh Circuit precedent at the time. *See e.g., Harris v. Carter*, 515 F.3d 1051, 1052, 1054-55 (9th Cir. 2008) (where petitioner relied on Circuit precedent that was subsequently overruled by a Supreme Court decision which made petitioner's habeas corpus petition untimely, circuit court equitably tolled the statute of limitations and refrained from applying the new law retroactively. The *Harris* court reasoned the petitioner had no control over the operative facts that subsequently made petition untimely and he relied on the state of the law in making tactical decisions); *see York v. Galetka*, 314 F. 3d 522, 528 (10th Cir. 2003) (finding that equitable tolling is justified when the petitioner relied on settled law and was subsequently time barred by a later case); *see generally Justice*, 6 F.3d at 1475; *Robinson v. U.S.*, No. 07-10506, 2007 WL 2988759 (11th Cir. Oct. 15, 2007).

Finally, Petitioner's underlying claim remains viable in light of the pending appeal of the district court's application of *Baze* to Georgia's lethal injection protocol. *See Alderman v. Donald*, Case No. 08-12550-DD (11th Cir., filed May 5, 2008).

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition on one or more of his claims. At the very least, Petitioner respectfully requests that this Court take whatever procedural steps are required to ensure that he does not face execution before the lower courts with jurisdiction are able to apply this Court's holding in *Baze* to the lethal injection protocol as it is practiced in the State of Georgia.

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

/s/ Ann Grunewald Fort

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Samuel David Crowe

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**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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**CERTIFICATE OF SERVICE
FOR EMERGENCY PETITION FOR WRIT OF CERTIORARI**

I hereby certify that I have this date served a copy of the foregoing Emergency Petition for Writ of Certiorari 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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Atlanta, Georgia 30334-1300

This 21st day of May, 2008.

/s/ Ann Grunewald Fort
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