No. 16-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2016

WILLIAM CARY SALLIE

PETITIONER,

v.

ERIC SELLERS, WARDEN

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

IMMINENT EXECUTION SCHEDULED TODAY 7:00 P.M. ET, December 6, 2016

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CAPITAL CASE: IMMINENT EXECUTION

QUESTIONS PRESENTED

1. Is a death-sentenced inmate entitled to a hearing in accord with fundamental fairness upon a substantial threshold showing that a capital punishment scheme is cruel and unusual as actually inflicted?

2. Does a claim that infliction of a death sentence is cruel and unusual ripen only after an execution is imminent or must a death sentenced inmate anticipate the denial of all relief and bring such a claim during the pendency of claims challenging the inmate's conviction and sentence?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William C. Sallie respectfully petitions for a writ of certiorari to review the judgment of the Georgia Supreme Court.

OPINIONS BELOW

The opinion of the Georgia Supreme Court is unreported and is attached as Appendix A. App. A at 2a. The Opinion of the Bacon County Superior Court is unreported and is attached as Appendix C. App. C at 6a.

JURISDICTION

The Georgia Supreme Court entered its judgment on December 6, 2016. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in relevant part: No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law.

The Eighth Amendment provides in relevant part: Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

STATEMENT OF THE CASE

A. Georgia's Capital Punishment Scheme, As Inflicted, Is Arbitrary

Georgia's arbitrary imposition of the death penalty has been at the heart of this Court's Eighth Amendment jurisprudence throughout the modern era of the death penalty. In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the Court struck down the punishment as unconstitutional as administered. The Court was concerned that death sentences, as imposed by Georgia, were "cruel and unusual in the same way that being

struck by lightning is cruel and unusual." *Id.* at 309-310 (Potter, J. concurring). Reviewing another Georgia case, the Court reinstated the penalty in 1976 with the caveat that the "death penalty is (and would be) unconstitutional if 'inflicted in an arbitrary and capricious manner.'" *Glossip v. Gross*, 135 S. Ct. 2726, 2759 (2015) (Breyer, J. dissenting) quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, and Stevens JJ.). A few years later, again reviewing a Georgia case, the Court insisted that the death penalty be directed and limited to limit the risk of arbitrary administration. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion). A few years after that, this Court reviewed, and infamously rejected, a claim that racial bias in Georgia's administration of the penalty rendered it arbitrary. *McClesky v. Kemp*, 481 U.S. 279, 291 (1987); *id.* at 339 (Brennan, J., dissenting) (majority opinion reflects "fear of too much justice"); *see also Death Penalty: Racial Discrimination*, 101 Harv. L. Rev. 149, 159 (1989) ("*McClesky* is logically unsound, morally reprehensible, and legally unsupportable."). Georgia has been at the heart of this Court's jurisprudence on the constitutionality of the administration of the death penalty.

Throughout this Court's death penalty jurisprudence, the animating concern has been the risk of wrongful execution. That is, the death penalty must be actually inflicted only on those who have committed the "most atrocious crimes" *Furman*, 408 U.S. at 310, and the penalty must not be imposed in an unpredictable or wanton manner. *Gregg*, 428 U.S. at 188. The Court has imposed procedural protections throughout the trial process. But the goal of these protections is to avoid arbitrary *infliction* of the death penalty. *Id.* ("Because of the uniqueness of the death penalty, . . . it [cannot] be *imposed* under sentencing under sentencing procedures that created a substantial risk that it would be

inflicted in an arbitrary and capricious manner." (emphasis added)); *see also Furman*, 408 U.S. at 309-10 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the *infliction* of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." (emphasis added)). That goal is reflected in this Court's assessment of whether a class of offenders should be excluded from punishment when it looks to the "number of executions" of persons in a particular class of offenders. *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (noting "no individual has been executed for the rape of an adult or child since 1964"); *see e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (noting number of persons executed despite having intellectual disability); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (noting number of persons executed for juvenile offenses). The infliction of the death penalty must not be arbitrary.

Georgia has not lived up to the promise of *Gregg*, the promise that its infliction of the penalty would "minimize the risk of wholly arbitrary and capricious action." 428 U.S. at 189. Mr. Sallie is currently the only living prisoner in Georgia under a sentence of death who has completed federal habeas corpus proceedings and had the U.S. Supreme Court deny his corresponding petition for a writ of certiorari, thereby concluding those proceedings. The others to have so concluded such proceedings have been executed.

Since reinstatement of the death penalty in 1976, California has executed 13 prisoners. In contrast, Georgia has executed 68. Death Penalty Information Center, *Execution Database* available at http://www.deathpenaltyinfo.org/views-executions. Review of court dockets has yielded the Appendix attached to this petition reflecting that at least 18 California state prisoners under sentence of death have concluded U.S.

Supreme Court review from denial of a federal habeas corpus writ and simply remain confined on death row. Many have been in this posture for years on end. In contrast, Mr. Sallie's sentence is pointedly and certainly a sentence of *actual* death. The fact that Georgia will carry it out, barring the relief called for herein or other legal intervention, is arbitrary.

It is arbitrary for two interrelated reasons. First, it is "seems capricious, random, indeed, arbitrary" to receive a death sentence in Georgia or any of the other jurisdictions that have been meaningfully studied on an empirical basis for any period. *Glossip*, 135 S. Ct. at 2764. The intertwined history of the modern death penalty and this Court includes a rich history of empirical analysis of how Georgia's scheme works in practice. Empirical studies of Georgia's death penalty pre-date the *Furman* decision. *See, e.g.*, Wolfgang & Riedel, *Rape, Racial Discrimination and the Death Penalty*, in Capital Punishment in the United States 99, 105-07 (H. Bedau & C. Pierce eds. 1976) (examining, *inter alia*, 361 of capital rape cases in Georgia over the years 1945-1965).

Immediately following Georgia's amendment of its capital-sentencing statute after *Furman*, David Baldus, Charles Pulaski, and George Woodworth conducted two studies, the Procedural Reform Study and the Charging and Sentencing Study. These studies directed by Baldus, a professor at the University of Iowa College of Law, are chronicled in *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*, Baldus et al. (UPNE, 1990). The Charging and Sentencing Study consisted of a multivariate logistic regression model that contained 39 explanatory variables. The Study concluded that the odds of a death sentence were 4.3 times higher for those convicted of killing a white compared with homicides where an African-American was killed. The

magnitude of this racial disparity was strongest in the mid-range of case culpability (*i.e.*, the mid-range level of aggravation of the crime).

The Charging and Sentencing Study also revealed profound capital sentencing disparity by geographic region within the state of Georgia. The probability that a death eligible offense would be both charged as a capital crime and result in a death sentence was higher in some areas of the state. For example, the death-sentencing rate in rural areas was 1.4 times higher than in urban areas, and the North-Central portion of the state had a death-sentencing rate that was 2.5 times higher than in Fulton County (Atlanta) and 3.7 times higher than in the Northern part of the state.

The data and findings from the Baldus studies were at the center of *McCleskey v. Kemp*, 481 U.S. 279 (1987). *McCleskey* recognized the empirical proof of disparity but held that it did not establish an Equal Protection Clause violation or pose an unacceptable risk of arbitrariness in violation of the Eighth Amendment. 481 U.S. at 293-95, 309-13. Additional studies are reflected in academic literature too numerous to completely list. Representative studies include: Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 Crime & Delinq., 563 (1980); Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. Crim. L. & Criminology 1067 (1983); Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 Wash. U.L.Q. 573 (1985); Hubbard, *"Reasonable Levels of Arbitrariness" in Death Sentencing Patters: A Tragic Perspective on Capital Punishment*, 18 U.C. Davis L. Rev. 1113 (1985).

Less than a decade after *McCleskey*, investigative reporters for the Atlanta Journal-Constitution conducted a data collection of 2,328 murder convictions in Georgia

from January 1, 1995 to December 31, 2004, gathering information on each case from a number of different sources: Georgia Supreme Court decisions; transcripts of trials and guilty pleas; police reports and investigative summaries; medical examiners' reports; search and arrest warrants; indictment and sentencing sheets; trial judges' reports; news media accounts; and documents provided by the Georgia Department of Corrections and the Department of Human Resources.

This AJC study gathered additional information from the Georgia Bureau of Investigation, local prosecutor files, and interviews conducted with prosecutors, defense attorneys, judges and law enforcement officials. From these sources a detailed database was created and the data was analyzed under the leadership of Raymond Paternoster, a statistician and criminology professor at the University of Maryland. Based on this information available for each case every homicide was examined to determine if it was death eligible under Georgia law by containing at least one of the statutory aggravating circumstances enumerated in the Georgia statute. A total of 1,302 cases ultimately were evaluated. These death eligible Georgia killings represent the universe of potentially capital crimes for which the death penalty could have been imposed from 1995 to 2004.

Out of the 1,302 death eligible homicides prosecuted in Georgia from 1995 to 2004, prosecutors charged the offense as a capital crime, in only 341 of these, for a death charging probability of .262. The probability of the prosecutor seeking death over this more recent time period is slightly lower than that reported by Baldus and colleagues with their data from the first years of the Georgia statute, when the probability of a capital charge given a death eligible crime was .326. With less than one-third of all capital crimes resulting in a death request by the prosecutor, it is clear that Georgia

prosecutors exercise considerable discretion in their respective decisions to seek a death sentence.

Without adjusting for any case characteristics it can be seen that both the race of the offender and the victim have an effect on the prosecutors' charging decision. The race of the offender is related to the decision to seek a death sentence by the prosecutor with *white defendants* significantly more likely than black defendants. There is, however, an even more pronounced effect for the race of the victim. The probability that the prosecutor will seek death in a case with a white victim is .410 while in black victim cases it is only .156 (over two and one-half times higher for white victim cases). This AJC study reflects at least as much racial and geographic disparity in the Georgia prosecutors' charging decisions between 1995 and 2004 as occurred in the late 1970s when the post-*Furman* statute was in its infancy. As was the case with those prisoners under a sentence of death at the time of *Furman*, those currently under such a sentence in Georgia and the other capital jurisdictions throughout the nation "are among a capriciously selected random handful upon which the sentence of death has in fact been imposed." *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring), *quoted in Glossip*, 135 S.Ct. at 2759.

If given a hearing subject to adversarial testing, these studies, each of which was before the courts below, will demonstrate that the selection of those subject to a sentence of death in Georgia is arbitrary.

Georgia's arbitrary sentencing scheme is arbitrary for a second reason. Exacerbating the wanton Georgia capital sentence practices actually being subject to such a sentence is in and of itself evidence of arbitrary imposition of the death penalty.

Georgia, like much of the rest of the country, had seen declining executions in recent years. 2016, however, will mark a sharp shift in this trend. Since 2008, Georgia has sentenced only nine people to death. Death Penalty Information Center, *Death Sentences in the United States from 1977 By State and By Year* available at http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present. In 2016 alone, Georgia has already *executed* eight people. Death Penalty Information Center, *Execution List 2016* available at http://www.deathpenaltyinfo.org/execution-list-2016. This run of executions is out of step with the number of executions across the country as well. Georgia alone will account for nearly half of all executions nationwide in 2016. *Id.* There will only be executions in five states in 2016: Alabama, Florida, Georgia, Missouri, and Texas. *Id.* Nationwide, we may execute fewer than 20 people this year. *Id.* For context, 2015 represented a 20-year low with 49 executions, and 1992, 1996, 1997, and 1999, California alone sentenced over 40 people to die. Death Penalty Information Center, *Death Sentences in the United States from 1977 By State and By Year*. Whether Georgia's unique interest in executing its citizens is attributable to a change in the composition of the Office of the Attorney General or the pace at which courts are denying review, no factor related to assessing who the "worst of the worst" explains the disparity. *See Roper*, 543 U.S. at 568 ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" (internal quotation marks omitted)). As such, the constitution will not countenance this arbitrary imposition of sentences.

Georgia's warrant process further exacerbates this problem. Section 17-10-40 of the Georgia's Annotated Code provides that an execution can be set by the "superior court of the county where the case was tried" and must be set "not less than ten days nor more than 20 days from the date of the order." This provision leaves very little time to develop and present claims that may only become ripe after the end of the normal course of challenges to convictions and sentences. *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007).

Other states that actively pursue executions have much more robust protections for their inmates, providing substantially more time to develop and present execution related claims. Texas statute provides a minimum of 90 days between the court's order setting the execution date and the execution. Vernon's Ann. C.C.P. Art. 43.141(c).[1] In practice, this timeframe may be substantially *longer*, providing even greater opportunity to obtain process before imposition of the ultimate penalty. Tom Meager, *The Next to Die: Texas*, The Marshall Project *available at* https://www.themarshallproject.org/next-to-die/tx (noting James Bigby's execution date was set on November 28, 2016 for March 14, 2016). Florida's execution process includes a "letter of certification" process, whereby "[w]ithin 30 days after receiving the letter of certification from the Clerk of the Florida Supreme Court, the Governor shall issue a warrant for execution if the executive clemency process has concluded, directing the warden to execute the sentence within 180 days, at a time designated in the warrant." Fla. Stat. § 922.052(2)(b).[2]

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[1] In 2015, Texas lengthened its timeframe from entry of the warrant to execution from 30 to 90 days. *Id.*

[2] In the 1940s, Florida provided only five days after the warrant for the execution to occur. *See, e.g.*, *In re Advisory Opinion to the Governor*, 19 So.2d 370, 371 (1944).

In light of the greater process available, it should be no surprise that inmates in these jurisdictions receive stays of execution with greater frequency. *See, e.g.*, *Ex parte Ruiz*, __ S.W.3d __, 2016 WL 6609721 (Tex.Crim.App. Nov. 9, 2016) (entering stay of execution on Aug. 26, 2016 to entertain successor state writ, subsequently denying writ after due consideration); Order, *Battaglia v. Texas*, No. AP-77,069 (Crim. App. Dec. 2, 2016) (granting stay of execution and setting briefing schedule on competency to be executed); *Battaglia v. Stephens*, 824 F.3d 470 (5th Cir. 2016) (appointing substitute counsel to litigate competency to be executed). In Georgia, with much less process, none of the previous eight people executed in Georgia had a stay granted by any court.

"[C]ertainly to find it implemented is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?" *Glossip*, 135 S. Ct. at 2764. Georgia's ordered execution of Mr. Sallie violates the constitution because the execution would be "inflicted in an arbitrary and capricious manner." *Gregg*, 428 U.S. at 188 (joint opinion of Stewart, Powell, and Stevens, JJ).

As was the case with those prisoners under a sentence of death at the time of *Furman*, those currently under such a sentence in Georgia and the other capital jurisdictions throughout the nation "are among a capriciously selected random handful upon which the sentence of death has in fact been imposed." *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring), *quoted in Glossip*, 135 S.Ct. at 2759.

Since *Gregg*, the Supreme Court has sought to diminish the arbitrariness of capital punishment "by restricting its use to those whom Justice Souter called 'the worst of the worst.'" *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting), quoting *Kansas v.*

Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting). But the foregoing studies (and there are very many more to draw upon) consistently have shown that "the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*." *Glossip*, 135 S. Ct. at 2760.

Thus, by ordering the infliction of Petitioner's execution on December 6, 2016, Georgia has selected Mr. Sallie to be executed from a pool of individuals assembled by a highly flawed and irremediable scheme.

B. Mr. Sallie's Lack Of Access to Process In State Court Has Given Rise To This Litigation

Mr. Sallie brought this case on December 1, 2016, two weeks after this Court denied review of his petition for writ of certiorari related to an application for a writ of habeas corpus. *Sallie v. Sellers*, No. 16-5876 (Nov. 14, 2016). On December 5, 2016, the Superior Court signed the state's proposed order dismissing his petition. App. C at 6a. On the same day, Mr. Sallie gave notice of appeal and sought a writ of probable cause from the Georgia Supreme Court.

At no point has Mr. Sallie been afforded an opportunity to present his evidence. From the outset of this litigation, Mr. Sallie has sought a hearing where he could put forward his proof. In *Glossip v. Gross*, members of this Court argued vociferously over the credibility and weight of the evidence that the death penalty was administered arbitrarily. 135 S. Ct. 2726, 2746-50 (Scalia, J. concurring); *id.* at 2750-55 (Thomas, J. concurring); *id.* at 2755-80 (Breyer, J. dissenting). The issues here relate to Mr. Sallie's

basic request for a hearing where he can make his case and a factfinder can resolve any disputes about the power of his proof. To date, the Georgia courts have declined.

REASONS FOR GRANTING THE WRIT

A. The Georgia Courts Have Deprived Mr. Sallie Of A Hearing In Accordance With Fundamental Fairness Despite His Substantial Threshold Showing That Infliction Of His Sentence Would Be Arbitrary

Due Process requires an opportunity to present evidence and be heard upon a substantial threshold showing of a violation of constitutional right. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) quoting *Ford v. Wainwright*, 477 U.S. 399, 317 (1986) (Powell, J., concurring). "Notice and opportunity to be heard are fundamental to due process of law." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 178 (1951); *see also In re Oliver*, 333 U.S. 257, 273 (1948) ("[A]n opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence."). In the context of the death penalty, this Court has repeatedly held that upon ripening of a constitutional violation, along with a substantial showing of a deprivation of the related right, a defendant is entitled to an opportunity to present evidence. Because of the unique gravity of death penalty cases, greater process is required to protect the constitutional rights at stake. *See Matthews v. Eldridge*, 424 U.S. 319, 335-36 (1973) (to assess degree of process provided by the due process clause, courts weigh the private party's interest and the risk associated with a wrongful determination against the government's interests); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) ("death is a punishment different from all other sanction sin kind rather than degree" requiring heightened procedural protections); *see also Green v. Georgia*, 442 U.S. 95, 95-97 (1979) (per curiam) (due process requires admission of otherwise inadmissible hearsay in death penalty sentencing hearing).

However, Georgia's rushed warrant process, together with the summary fashion in which the courts below have treated this claim, have precluded any meaningful opportunity to establish it. Mr. Sallie has not been permitted to present evidence, have counsel make argument, or undertake motion practice and discovery. In short, he has been denied a "'fair hearing' in accord with fundamental fairness." *Panetti*, 551 U.S. at 949 quoting *Ford*, 477 U.S. at 426, 424.

Because, as outlined *supra*, Mr. Sallie has made a substantial threshold showing that Georgia's death sentencing scheme is arbitrary as inflicted, the Georgia courts' deprivation of a fair hearing contravenes this Court's precedents ensuring that such petitioners receive their "day in court." *In re Oliver*, 333 U.S. at 273. This outcome is at odds with the assumptions that are "basic in our system of jurisprudence," contravene this Court's precedent, and should be reversed. *Id.* Review of this decision denying state habeas relief is warranted. *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737 (2016); *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (per curiam).

B. The Circuit Courts Are Divided On When A Claim Challenging The Infliction Of A Death Sentence Ripens

Granting review would resolve a circuit split that implicates a range of issues surrounding the infliction of a death sentence. That is, the Ninth Circuit has held that waiting to bring a lethal injection claim until execution is imminent is sensible in light of when the challenge would become ripe. *See Beardslee v. Woodford*, 395 F.3d 1064, 1069-70 (9th Cir. 2005) (lethal injection challenge properly brought once execution is "imminent"). In contrast, the Eleventh Circuit has held that waiting until such a time would be unduly delayed. *See Williams v. Allen*, 496 F.3d 1210, 1215 (11th Cir. 2007)

(Barkett, J dissenting) ("[The inmate's] claim did not become ripe until it was clear that he had exhausted the claims pertaining to his conviction and sentence.").

The split, of course, relates to Article III courts, which present constraints many state courts do not face. *See Whitmore v. Arkansas*, 495 U.S. 149, 154-56 (1990) (discussing third-party standing to seek review of a death sentence). However, as discussed more fully below, the state court treatment of this issue, and its refusal to even consider the claim, is based in substantial part on its view that the claim has not been timely brought. App. C at 6a-7a.

For that reason, granting review here would provide the Court with an opportunity to address and perhaps resolve this Circuit split and provide the courts of appeal with guidance on related issues. That is, the circuit courts frequently face the question of imminence and ripeness in the context of lethal injection challenges. *See, e.g.*, *Beardslee* 395 F.3d at 1069; *Cooey v. Strickland*, 479 F.3d 412, 423 (6th Cir. 2007) citing *Alley v. Little*, 186 Fed. App'x 604, 607 (6th Cir. 2006) (unpublished) (rejecting argument that imminent execution triggered justiciability of lethal injection challenge where protocol had been published years before); *Brown v. Livingston*, 457 F.3d 390, 391 (5th Cir. 2006) ("it is clear from our precedent that [the inmate] could have proceeded with a section 1983 civil complaint in federal court at any time after his direct appeal became final.").

Similarly, the lower courts face the issue when addressing claims of whether a person is competent to be executed. The uniform rule there, however, appears to that competency to be executed claims do not ripen until an execution is imminent. *See, e.g.*, *Scott v. Mitchell*, 250 F.3d 1011, 1013 (6th Cir. 2001) (holding competency to be executed ripens once execution is imminent); *Holmes v. Neal*, 816 F.3d 949, 955 (7th Cir.

2016) ("No [competence to be executed] hearing has been held because the state has yet to set an execution date, which must precede the hearing.").

The claim at issue here, whether the infliction of executions in Georgia, particularly in light of the recent spate of executions, was only available after Mr. Sallie's execution date was set, similar to a claim of competency to be executed. Cases are not justiciable "absent a genuine need to resolve a real dispute." 1 Wright & Moore, *Federal Practice and Procedure* § 3532.1. Only after Mr. Sallie's initial federal litigation attacking his conviction and sentence was denied and his execution order entered was any claim about the infliction of his sentence ripe for review. *See Calderon v. Ashmus*, 523 U.S. 740 (1998) (federal statute of limitations not justiciable until defendant exhausts available state challenges to conviction and sentence).

The relevant information is only recently available and there is no reason, prior to November 14, when this Court denied review of his conviction and sentence, that Mr. Sallie should have "*anticipated* the denial of all relief and filed prior" to his recent denial. *Williams*, 496 F.3d at 1215. Thus, Mr. Sallie has diligently pursued this claim, which has only recently become ripe for review.

Regardless, Mr. Sallie's case presents an opportunity to resolve the circuit split and give guidance to the lower courts on the justiciability of claims stemming from the imposition of executions.

C. This Case Squarely Presents Theses Issues

Mr. Sallie presented the due process claim both at the Superior Court and the Georgia Supreme Court. Both courts rejected it, effectively holding that no forum existed for the claim because "they are noncognizable and not properly before this court." App. C at 6a. The court so held because "[n]either of these claims challenge the

proceedings which resulted in his convictions or sentences." *Id*. The lone alternative holding at the Superior Court was that Mr. Sallie should have raised the claim sooner, holding that he should have raised the claim on direct appeal or in prior collateral proceedings. App. C 6a-7a. Ignoring the basis for the claim, the Superior Court explained that they are not based on any new facts or law. *Id*.[3] Although both holdings relate to state law matters, they both turn on federal questions. *Michigan v. Long*, 463 U.S. 1032, 1043-44 (1983).

That is, the lack of any forum available to raise the claim gives rise to the due process question: where Mr. Sallie has made an initial substantial threshold showing of a deprivation of a constitutional right, does due process demand an opportunity to present evidence in support of that claim, *i.e.* his "day in court." As discussed *supra*, this Court has repeatedly held that due process demands as much. *In re Oliver*, 333 U.S. at 273.

That claim is related to the second question and the second ground upon which the state court relied: when did Mr. Sallie's claim become ripe? Other challenges to executions, such as lethal injection, may become ripe before the execution is imminent. However, where the pattern of infliction the penalty that gives rise the claim – the merits claim here – that claim does not become ripe until that risk is substantial. The courts below, by holding that Mr. Sallie should have raised the claim earlier, present the second question.

Mr. Sallie has diligently pursued this claim from the moment it ripened. Although the strained timeline imposed by Georgia law has compressed the time available for the

[3] Although the Georgia Supreme Court at least in part disavowed the Superior Court's reasoning, it did not explain its reasoning for its conclusion that the Superior Court reached the right result. App. A 2a.

courts to consider it, that compressed timeline is necessitated by the very forces that make his execution arbitrary, a claim that deserves a day in court.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests this that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing was forwarded via electronic mail and U.S. First Class Mail, postage prepaid, to the following addresses on this the 6th day of December, 2016:

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