No. 05-8794

IN THE
Supreme Court of the United States

CLARENCE EDWARD HILL,
Petitioner,
v.
JAMES R. MCDONOUGH, INTERIM SECRETARY OF THE FLORIDA DEPARTMENT OF CORRECTIONS, in his official capacity, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

DONALD B. VERRILLI, JR.
IAN HEATH GERSHENGORN
ERIC BERGER
JENNER & BLOCK LLP
601 Thirteenth Street N.W.
Washington, DC 20005
(202) 639-6000

D. TODD DOSS*
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025
(386) 755-9119

JOHN ABATECOLA
JOHN ABATECOLA, P.A.
P.O. Box 450128
Sunrise, FL 33345
(954) 560-6742

March 6, 2006

* Counsel of Record

QUESTIONS PRESENTED

1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254.

2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Eleventh Circuit.

The petitioner here and plaintiff-appellant below is Clarence Edward Hill.

Defendants-appellees below were James V. Crosby, Jr., in his official capacity as Secretary of the Florida Department of Corrections, and Charlie Crist, in his official capacity as Attorney General of Florida. James V. Crosby, Jr. has since been replaced on an interim basis by James R. McDonough. McDonough has been substituted as a party pursuant to Supreme Court Rule 35.3.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

MISCELLANEOUS

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Eleventh Circuit is available at 2006 WL 163607 and is reprinted in the Joint Appendix ("J.A.") at 9-10. The district court opinion is available at 2006 WL 167585 and is reprinted at J.A. 11-15.

JURISDICTION

The court of appeals entered its judgment on January 24, 2006. The petition for a writ of certiorari was timely filed on January 24, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part:

> [N]or [shall] cruel and unusual punishments [be] inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . .

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. Introduction

This case presents the question whether there is any federal forum for a condemned inmate who contends that a state corrections department's discretionary choice of an excruciatingly and unnecessarily torturous method for carrying out a lethal injection violates the Eighth and Fourteenth Amendments. The Eleventh Circuit below (and in cases preceding and following this one) has wholly foreclosed access to the federal courts for inmates who, while not challenging the State's right to execute them – or even the State's right to execute them by a humane lethal injection procedure – seek a hearing on the claim that the procedure actually chosen by state officials is wantonly and needlessly cruel.

The case of Petitioner Clarence Hill provides a vivid illustration. Mr. Hill contends that the particular lethal injection procedures Florida intends to use to execute him violate the Eighth Amendment because those procedures create a foreseeable probability that he will be subjected to excruciating pain before death. He sought to raise that claim – following the conclusion of all judicial proceedings challenging his conviction and sentence – by filing a federal civil rights action under 42 U.S.C. § 1983 modeled on the one this Court approved in *Nelson v. Campbell*, 541 U.S. 637 (2004). But the Eleventh Circuit recharacterized this action as a habeas corpus petition and then proceeded to hold that, because of Mr. Hill's earlier federal habeas petition challenging his conviction and sentence, his present action was an improper "second or successive [habeas] petition" – even though his only present claim challenges the discretionary choice of a particular lethal injection procedure by the Florida Department of Corrections. J.A. 9-10. As a result, Mr. Hill has been denied any federal forum for his Eighth Amendment claim.

As Mr. Hill will show, that result is impossible to square with this Court's decisions. In *Nelson*, a unanimous Court held that a condemned prisoner may use § 1983 to challenge a particular lethal injection procedure as long as the relief sought would not "*necessarily* prevent [the State] from carrying out its execution." 541 U.S. at 647 (emphasis in original). Mr. Hill's § 1983 challenge here falls squarely within the ambit of *Nelson*. Should he prevail, the State would remain free to carry out his execution by a lethal injection using other more humane (and constitutional) lethal injection procedures.

In all events, even if Mr. Hill's suit were recharacterized as a habeas petition, the Eleventh Circuit erred in deeming it the functional equivalent of a "second or successive" petition. In this case, Mr. Hill's claim was not ripe for presentation or judicial consideration until after his earlier federal habeas case was final and the Department of Corrections' execution process began – indeed, Florida did not even adopt lethal injection as the presumptive method of execution until after the denial of Mr. Hill's first federal habeas was final. Under this Court's decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), a state prisoner does not present a successive petition when the petition raises a claim that would not have been ripe at the time of the first petition.

It follows *a fortiori* from these decisions that Mr. Hill's claim is not subject to dismissal. Because *Nelson* directly authorizes the bringing of Mr. Hill's claim in a § 1983 case, and because the claim would not have been subject to dismissal under § 2244(b) even if brought in a habeas case (and therefore is not fairly characterized as an end-run around the limitations on habeas jurisdiction), there is no conceivable basis for concluding that the district court lacked subject matter jurisdiction to adjudicate the claim.

B. Factual Background

Mr. Hill was convicted of murder and sentenced to death in 1983. His death sentence was twice vacated in state and federal postconviction proceedings.[1] The Florida Supreme Court reimposed the death sentence in 1995. *Hill v. State*, 643 So. 2d 1071 (Fla. 1995). Mr. Hill then sought federal habeas corpus relief from the reimposed sentence. The district court denied relief, and the Eleventh Circuit affirmed. *Hill v. Moore*, 175 F.3d 915 (11th Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000).

In January 2000, after Mr. Hill's first federal habeas corpus proceeding was final, Florida amended its laws to make lethal injection the presumptive method of execution in the State. Fla. Stat. § 922.105 provides that "[a] death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution."[2]

---

[1] In 1985, the Florida Supreme Court invalidated the death sentence, *Hill v. State*, 477 So. 2d 553 (Fla. 1985), and Mr. Hill again received the death sentence in a resentencing proceeding in 1986. The Florida Supreme Court affirmed that sentence. *Hill v. State*, 515 So. 2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993 (1988). After an initial warrant for execution was signed in November 1989, Mr. Hill sought postconviction relief in state court and then in federal court. In January 1990, the federal district court granted a stay of execution. In 1992, the court granted Mr. Hill's petition on the ground that the state trial court and the Florida Supreme Court failed to conduct a proper harmless error inquiry when re-weighing the aggravating factors supporting a death sentence after one of the factors found by the trier of fact had been invalidated. After that ruling, the Florida Supreme Court reweighed the aggravating and mitigating factors, and again sentenced Mr. Hill to death. *Hill v. State*, 643 So. 2d 1071 (Fla. 1995).

[2] Prior to January 2000, Florida law provided that "[a] death sentence shall be executed by electrocution." Fla. Stat. § 922.105 (1999). The earlier statute provided that, in the event electrocution was held

The Florida legislature did not prescribe by statute the precise method to be used in carrying out lethal injections. That authority was left to the discretion of the Florida Department of Corrections. *See Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (noting that the Florida legislature did not specify the procedures for lethal injection but left this determination up to the Department of Corrections "because it has personnel better qualified to make such determinations"). The Department of Corrections has not promulgated any regulation or published any guidance prescribing the lethal injection procedures it uses to execute condemned prisoners. It therefore retains complete discretion to design procedures for lethal injections and to modify those procedures at any time for any reason. The Department could do so based on advances in scientific understanding, knowledge gained through the experience of prior lethal injections in Florida or elsewhere, or even through negotiations with the condemned prisoner to avoid unnecessary risks of pain or suffering. *Cf. Nelson*, 541 U.S. at 640-41 (describing the negotiations between the condemned inmate and prison officials about the protocols for his lethal injection).

Because the Department of Corrections does not publish any information about its lethal injection methods and is free to change methods at any time, it is impossible to know in advance what procedures the Department will use to execute Mr. Hill. Mr. Hill sought to obtain that information from the Department, but his request was refused. Compl. ¶ 15 n.3, J.A. 21.

The only readily available source of information about Florida's practices for administering lethal injections is the record of the *Sims* case, in which the Secretary of Corrections and other witnesses described the procedure by which Florida

---

unconstitutional, "all persons sentenced to death for a capital crime shall be executed by lethal injection." *Id.*

planned to carry out lethal injections in 2000, when lethal injection had only just been adopted. 754 So. 2d at 665 n.17. That procedure involved the use of a three-chemical sequence.

The procedure described in *Sims* began with the administration of two grams of sodium pentothal, the only anesthetic used in the process. Sodium pentothal is a short-acting substance that produces a shallow level of anesthesia. Health care professionals use it only as an initial anesthetic in preparation for surgery while they set up a patient's breathing tube and administer different drugs to bring the patient to a surgical plane of anesthesia that will last through the operation and block the stimuli of surgery that would otherwise cause pain. Sodium pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the deep anesthesia, so that the patient can wake up and signal to the staff that something is wrong. Compl. ¶ 9, J.A. 18-19.

The second step of the procedure described in *Sims* was the administration of fifty milligrams of pancuronium bromide, a paralytic agent that stops one's breathing. That chemical has three effects relevant here. First, it causes the condemned prisoner to whom it is administered to suffer suffocation when the lungs are paralyzed. Second, it blocks the condemned prisoner from manifesting any suffering he or she might be experiencing because it prevents any movement, speech, or facial expressions. Compl. ¶ 10, J.A. 19. Third, if pancuronium bromide is administered improperly and comes into contact with sodium pentothal, the sodium pentothal will precipitate and become ineffective. *See, e.g., Brown v. Crawford*, 408 F.3d 1027, 1028 (8th Cir. 2005) (Bye, J., dissenting), *cert. denied*, 125 S. Ct. 2927 (2005).

The procedure described in *Sims* concluded with the administration of 150 milliequivalents of potassium chloride,

which inflicts death by causing cardiac arrest. Potassium chloride burns intensely as it courses through the veins to the heart. It also causes massive muscle cramping before cardiac arrest. Compl. ¶ 12, J.A. 19.

The practices outlined in *Sims* included no requirement that persons knowledgeable about, or trained in the administration of, these chemicals carry out the lethal injection. *See Sims*, 754 So. 2d at 665 n.17. Although a physician apparently stands behind the executioner and a physician's assistant observes the execution and certifies death, *id*. at 666 n.17, there is no indication that either attendee has the ability to monitor the inmate's anesthetic depth from the inmate's side (or even from the same room); that the observers are appropriately trained to detect inadequate anesthetic depth; that the executioner has been given appropriate training, including careful instructions on how to number and operate the syringes to avoid misadministration of the chemicals; or that the IV tubes running from the syringe to the inmate's body are properly designed and attached so that the chemicals do not leak. It also does not indicate the duration between injections or how and where the inmate's veins will be accessed.[3] In short, there is no indication that the procedures used by the Department of Corrections (as described in *Sims*) contain adequate safeguards to ensure that the chemicals and methods of administration do not cause unnecessary or wanton pain.

This is especially troubling given that the chemicals the Department of Corrections has selected are themselves volatile and likely to give rise to wanton pain in many

[3] A "cut-down" procedure would, for instance, raise serious constitutional concerns. *See, e.g., Nelson*, 541 U.S. at 642. Additionally, at least one court has already ruled unconstitutional lethal injection into the jugular vein of the neck of the condemned prisoner. *See Baze v. Rees*, No. 04-CI-01094, slip op. at 13 (Ky. Cir. Ct. July 8, 2005).

circumstances. If sodium pentothal fails to perform its anesthetic function (because it has been administered improperly or in an incorrect dosage[4]), the condemned prisoner will endure intense suffering (from conscious suffocation) and excruciating pain (from the effects of potassium chloride in the veins and on the muscles). Moreover, because of the paralyzing effects of pancuronium bromide, the person being executed will lack the ability to convey suffering to those supervising the execution.

Florida's procedure is similar to procedures that two district courts have recently found to raise serious questions under the Eighth Amendment. *See Morales v. Hickman*, __ F. Supp. 2d __, 2006 WL 335427, at *7 (N.D. Cal. Feb. 14, 2006) (finding that administration of same three-chemical sequence raises "substantial questions" that the condemned would be subjected to "an undue risk of extreme pain"), *aff'd*, __ F.3d __, 2006 WL 391604 (9th Cir. Feb. 19, 2006), *cert. denied*, No. 05-9291, __ S. Ct. __, 2006 WL 386765 (Feb. 20, 2006); *Anderson v. Evans*, No. Civ-05-0825-F, 2006 WL 83093, at *4 (W.D. Okla. Jan. 11, 2006) (accepting in its entirety a Magistrate Judge's report holding that death-sentenced inmates stated a valid claim that Oklahoma's administration of same three-chemical sequence for lethal injection "creates an excessive risk of substantial injury" and pain under the Eighth Amendment).

C. Proceedings Below

On November 29, 2005, the Governor of Florida signed an execution warrant that set Mr. Hill's execution for January 24, 2006. Hill promptly sought from the Department of

---

[4] It is noteworthy that Florida uses only two grams of sodium pentothal, less than half of the five grams used by States such as California. *See Morales v. Hickman*, No. C06-219, __ F.Supp.2d __, 2006 WL 335427, at *1 (N.D. Cal. Feb. 14, 2006), *aff'd*, No. 06-99022, __ F.3d __, 2006 WL 391604 (9th Cir. Feb. 16, 2006), *cert. denied*, No. 05-9291, __ S. Ct. __, 2006 WL 386765 (Feb. 20, 2006).

Corrections information relevant to the method the Department proposed to use to execute him, including principally "a complete copy of the execution procedures, protocols, policies and guidelines utilized during executions by lethal injection in Florida," and information on "the drugs administered during lethal injection in Florida, the dose of the drugs, and the order as to which the drugs are administered." Defendant's Demand for Additional Public Records at 2 (Dec. 8, 2005). The Department refused to provide any information in response. Compl. ¶ 15 n.3, J.A. 21.

Following the Department's refusal to comply with his December 8, 2005 demands, Mr. Hill filed a state postconviction petition on December 15, 2005, raising an Eighth Amendment challenge to the particular procedures the Department intended to use to execute him and seeking an evidentiary hearing to marshal evidence regarding the risks of wanton pain and suffering inherent in the procedures the Department has chosen. The Circuit Court for Escambia County denied Mr. Hill's request for an evidentiary hearing and dismissed his Eighth Amendment claim as procedurally barred on December 23, 2005. On January 3, 2006, Mr. Hill appealed to the Florida Supreme Court, which affirmed the state trial court's decision on January 17, 2006. *Hill v. State*, No. SC06-2, __ So. 2d __, 2006 WL 91302 (Fla. Jan. 17, 2006), *cert. denied*, No. 05-8731, 2006 WL 160276 (Feb. 27, 2006).

On January 20, 2006, Hill filed a complaint in the United States District Court for the Middle District of Florida pursuant to 42 U.S.C. § 1983. The complaint asserted that the particular procedures the Department of Corrections intended to use to execute him "will cause unnecessary pain in the execution of a sentence of death, thereby depriving Plaintiff of his rights under the Eighth and Fourteenth Amendments to be free from cruel and unusual punishment."

Compl. ¶ 18, J.A. 21. The complaint sought a preliminary injunction prohibiting Mr. Hill's execution until his Eighth Amendment claim could be adjudicated, and a "permanent injunction[] barring defendants from executing Plaintiff *in the manner they currently intend.*" Compl. ¶ 20, J.A. 22 (emphasis added). The complaint neither alleged nor implied that the State lacked the authority to execute Mr. Hill by a different and lawful method, including by a different lawful method of lethal injection. Indeed, in a motion seeking a stay of execution, Mr. Hill expressly stated that he "is not challenging the statutory provision which allows for lethal injection as a method of execution. Rather, he is 'seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the "fact" or "validity" of the sentence itself – by simply altering its method, the State can go forward with the sentence.'" Application for a Stay of Execution and for Expedited Appeal at 12 (quoting *Nelson*, 541 U.S. at 644) (footnote omitted), J.A. 46.

The district court denied relief on January 21, 2006. The court believed that Eleventh Circuit precedent dictated dismissal for lack of subject matter jurisdiction. J.A. 12-15 (citing *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004), and *In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000)). Specifically, the court held that under *Robinson* and *Provenzano*, Hill's § 1983 claim was "the functional equivalent of a successive petition for writ of habeas corpus." J.A. 15. Having recharacterized the § 1983 claim in that manner, the court dismissed the claim for lack of subject matter jurisdiction because Hill had not first sought permission from the Eleventh Circuit to file a successive habeas petition pursuant to 28 U.S.C. § 2244(b), and because he could not, in the district court's view, have obtained permission if he sought it. The district court's decision rested on its description of Mr. Hill's complaint as one that sought "a permanent injunction barring the execution of his

death sentence" (J.A. 12) – notwithstanding that the complaint expressly sought only the narrower relief of an injunction "barring defendants from executing Plaintiff *in the manner they currently intend.*" Compl. ¶ 20 (emphasis added), J.A. 22.

The district court did not mention this Court's decision in *Nelson v. Campbell* or apply the analysis set forth in that decision for determining when a challenge to the procedures used for execution by lethal injection can properly be brought pursuant to § 1983. Nor did the court mention the fact that Mr. Hill could not have brought his Eighth Amendment challenge during his prior federal habeas proceedings because the claim would have been manifestly unripe at that point.

Hill filed an emergency appeal in the Eleventh Circuit, which affirmed the district court on January 24, 2006. Like the district court, the Eleventh Circuit described Mr. Hill's complaint as seeking "a permanent injunction barring his execution." J.A. 9. The Eleventh Circuit also failed to mention this Court's decision in *Nelson* or to apply the principles set forth in that decision for determining whether a claim such as the one Mr. Hill actually raised was proper under § 1983. Instead, the Eleventh Circuit agreed with the district court that Mr. Hill's § 1983 claim was properly recharacterized as a successive habeas petition and was properly dismissed for lack of subject matter jurisdiction.

Mr. Hill filed a petition for certiorari and sought a stay from this Court on January 24, 2006. Justice Kennedy granted a temporary stay on January 24, 2006, and the Court granted the petition and a full stay on January 25, 2006.

SUMMARY OF ARGUMENT

The Eighth Amendment prohibits punishments that inflict unnecessary and wanton pain. It permits sentences of death to be carried out, but not in a manner that is more torturous

than necessary to extinguish life. Invoking 42 U.S.C. § 1983, Petitioner Hill contends that the procedures the Florida Department of Corrections intends to use to execute him violate the Eighth Amendment because those procedures subject him to needless excruciating pain before death. Characterizing Mr. Hill's claim as a challenge to Florida's authority to execute him, the Eleventh Circuit held that Mr. Hill could not pursue the claim in a § 1983 action, and further held that he could not pursue it in a habeas corpus action because such an action would be an improper "second or successive" petition within the meaning of 28 U.S.C. § 2244(b). Thus, the Eleventh Circuit denied Mr. Hill any federal forum to adjudicate his Eighth Amendment claim.

Nelson v. Campbell requires reversal of the Eleventh Circuit's decision. *Nelson* squarely holds that a condemned inmate may bring a § 1983 action to challenge a State's proposed lethal injection procedures so long as judicial relief prohibiting the procedure would not "*necessarily* prevent [the State] from carrying out its execution." 541 U.S. at 647 (emphasis in original). Under that standard, Mr. Hill plainly has the right to proceed with his § 1983 action. He challenges only the particular procedures the Department of Corrections will employ in executing him, and the permanent relief he seeks is limited to an injunction barring the Department from executing him "in the manner they currently intend" to use. Compl. ¶¶ 19-20, J.A. 22. Moreover, he has acknowledged that he could be executed by a different means of lethal injection chosen by the Department. J.A. 46 ("by simply altering its method, the State can go forward with the sentence" (quoting *Nelson*, 541 U.S. at 644)). In no sense can his claim be characterized as a challenge to the fact or duration of his confinement (or to the State's authority to execute him) that is cognizable only in federal habeas proceedings. *Cf. Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). Thus, as in *Nelson*, the Eleventh Circuit erred in holding that Mr. Hill's § 1983 action should

be recharacterized as a "second or successive" habeas petition and dismissed for lack of subject matter jurisdiction.

Even if Mr. Hill's § 1983 complaint were recharacterized as a habeas petition, the Eleventh Circuit erred in concluding that it was a "second or successive" petition subject to the gatekeeping restrictions of 28 U.S.C. § 2244(b). This Court's decisions in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), establish that the statutory phrase "second or successive petition" is a term of art that draws its meaning from the Court's "abuse of the writ" doctrine. Under this settled understanding of the meaning of the statutory term, Mr. Hill's recharacterized § 1983 action was not a "second or successive" petition because his Eighth Amendment claim was not ripe (indeed it lacked any factual or legal predicate) until after his federal habeas proceedings were final. *Martinez-Villareal*, 523 U.S. at 644; *Slack*, 529 U.S. at 486. Even on its own terms, therefore, the Eleventh Circuit erred in holding that the district court lacked subject matter jurisdiction to consider Mr. Hill's Eighth Amendment claim.

In sum, the Eleventh Circuit has advanced no valid reason for dismissing Mr. Hill's § 1983 action. That action, which is on all fours with *Nelson*, raises an Eighth Amendment claim within the "literal applicability" of § 1983, does not "challenge the fact or duration" of Mr. Hill's confinement (or the State's authority to execute him using more humane lethal injection procedures), and in no sense constitutes an effort to evade the procedural limitations that apply to habeas actions. *See Nelson*, 541 U.S. at 643, 647. Thus, the Eleventh Circuit should be reversed.

ARGUMENT

The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 392

(1972)). This Court has long held that the Eighth Amendment protects prisoners from the "gratuitous infliction of suffering." *Gregg*, 428 U.S. at 183 (citing *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878) and *In re Kemmler*, 136 U.S. 436, 447 (1890)). In the capital punishment context, where the suffering inflicted in executing a condemned prisoner is caused by procedures involving "something more than the mere extinguishment of life," the Eighth Amendment's prohibition against cruel and unusual punishment is implicated. *See Furman v. Georgia*, 408 U.S. 238, 265 (1972) (quoting *Kemmler*, 136 U.S. at 447).

On occasion, the circumstances giving rise to a constitutional claim of cruelty in the means proposed for conducting an execution do not emerge until after the condemned prisoner has completed federal habeas proceedings. Such circumstances can arise where a State adopts a new and untested method of execution, or where evidence emerges raising the question whether an existing execution method in fact inflicts gratuitous pain or suffering.[5]

This is precisely such a case. Florida did not adopt lethal injection as the presumptive means of execution until January 14, 2000, after Mr. Hill had completed federal habeas corpus proceedings challenging his conviction and sentence. Thus

---

[5] For example, in Florida, after electrocuted prisoners caught on fire, were burned and charred, and bled excessively during executions, this Court granted certiorari to review the constitutionality of the procedures involved in using Florida's electric chair. *See Bryan v. Moore*, 528 U.S. 960 (1999), *cert. dismissed*, 528 U.S. 1133 (2000) (dismissing the writ after Florida amended its procedures to provide for lethal injection as the presumptive method of execution); *Provenzano v. Moore*, 744 So. 2d 413, 431-36 (Fla. 1999) (Shaw, J., dissenting) (describing executions), *cert. denied*, 528 U.S. 1182 (2000). By the time of *Bryan*, it had become apparent that Florida's condemned prisoners – both those who had completed federal habeas corpus proceedings and those who had not – faced the possibility of a torturous and needlessly painful execution raising serious constitutional claims that merited federal court review.

he could not have adjudicated *any* challenge to lethal injection during those proceedings – much less the specific narrow challenge he raises to the particular procedures the Department (in its discretion) proposes to use to execute him. Yet under the law of the Eleventh Circuit, no federal court has subject matter jurisdiction to adjudicate his claim. He cannot raise the claim in a federal habeas corpus petition because under the circuit's law it is automatically deemed a second or successive petition and subject to immediate dismissal on that basis. Likewise, he cannot raise the claim in an action brought pursuant to 42 U.S.C. § 1983 because Eleventh Circuit law holds that such claims are the "functional equivalent" of a second or successive habeas petition, and must therefore be "recharacterized" as such and dismissed for lack of subject matter jurisdiction for failure to meet the requirements of 28 U.S.C. § 2244(b).

The Eleventh Circuit's position demonstrates the prescience of Chief Justice Rehnquist's observation in *Martinez-Villareal* that such purblind and far-reaching extensions of § 2244(b) are fraught with "implications . . . [that] would be . . . seemingly perverse." 523 U.S. at 644. It categorically denies Mr. Hill recourse to a forum necessary for the vindication of his rights and does so arbitrarily, on the basis of an accident of timing over which he had no control. This is radically at odds with the fundamental tenet of Anglo-American legal tradition expressed in the maxim *ubi jus, ubi remedium* – where there is a right there is a remedy – a maxim classically viewed as central to the rule of law. Chief Justice Marshall in *Marbury v. Madison* quoted Blackstone for the proposition that "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" 5 U.S. (1 Cranch) 137, 163 (1803). And the Chief Justice added that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*

This Court's recent unanimous decision in *Nelson v. Campbell* – which reviewed an Eleventh Circuit ruling that, like the one here, denied the petitioner any federal forum for adjudicating an Eighth Amendment challenge to lethal injection procedures – prescribed a rule of decision that avoided this perversity by marking out a clear path through which condemned prisoners such as Mr. Hill can bring challenges pursuant to § 1983, so long as the challenge, if successful, would not preclude a state from carrying out an otherwise valid sentence of death. And, even apart from *Nelson*, this Court had made clear in *Martinez-Villareal* and *Slack* that a habeas petitioner's claim is not to be considered a "second or successive" petition subject to the gatekeeping restrictions of 28 U.S.C. § 2244(b) if the claim could not have been brought (because it did not exist or was not ripe) at the time of the petitioner's first federal habeas proceedings.

In this case, those two lines of clear authority converge. Mr. Hill has an unassailable right to proceed via § 1983 based on this Court's ruling in *Nelson*. And his claim was not properly dismissed as a "second or successive" claim under the logic of *Martinez-Villareal* and *Slack* because they did not become ripe until long after his first federal habeas proceedings concluded. Therefore, even if the Eleventh Circuit were correct (and it is not) that Mr. Hill's entitlement to raise his claim in a § 1983 proceeding would be defeated if the claim were tested on the rules applicable to second or successive habeas petitions, the plain fact is that the latter rules would *permit* a habeas adjudication of Mr. Hill's cruel-and-unusual-method-of-execution claim. Mr. Hill's resort to the civil remedy specifically designed by Congress for the relief of persons imminently threatened by irremediable state action that would violate their federal civil rights is in no sense an end-run around the jurisdictional limits of 28 U.S.C. § 2244(b).

Thus, the Eleventh Circuit's disposition of Mr. Hill's Eighth Amendment claim was erroneous and should be reversed.

I. MR. HILL'S CLAIM IS PROPERLY BROUGHT UNDER 42 U.S.C. § 1983 BECAUSE HE CHALLENGES ONLY THE PARTICULAR PROCEDURES THE DEPARTMENT OF CORRECTIONS HAS CHOSEN TO USE TO EXECUTE HIM AND NOT THE STATE'S AUTHORITY TO EXECUTE HIM BY LAWFUL MEANS.

Nelson v. Campbell holds that a condemned inmate's challenge to a specific process for implementing the State's chosen method of execution presents a cognizable claim under 42 U.S.C. § 1983, so long as the inmate's challenge would not "*necessarily* prevent [the State] from carrying out its execution." 541 U.S. at 647 (emphasis in original). Mr. Hill's complaint falls squarely within the holding of *Nelson*. He contends only that the particular procedures that the Department (in its discretion) has chosen to use to execute him violate the Eighth Amendment by causing unnecessary and torturous pain. He concedes that other methods of lethal injection the Department could choose to use would be constitutional, and he seeks to enjoin the Department only from carrying out the execution "in the manner they currently intend." Here, as in *Nelson*, "by simply altering its method of execution, the State can go forward with the sentence." 541 U.S. at 644.

The courts below held that habeas corpus provided the exclusive means for raising Mr. Hill's challenge, and then dismissed that challenge as "the functional equivalent of a successive habeas petition." J.A. 9-10, 15. But the case law on which they rely pre-dates and cannot survive *Nelson*. Because Mr. Hill's claim is materially indistinguishable from that in *Nelson*, the decision below should be reversed.

A. *Nelson v. Campbell* Permits An Action Under 42 U.S.C. § 1983 To Challenge The Process For Carrying Out A Lethal Injection.

Mr. Hill has appropriately invoked § 1983 to pursue his Eighth Amendment claim. Section 1983 authorizes a "suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Mr. Hill's lawsuit seeks to bar Florida from executing him using particular lethal injection procedures that impose unnecessary and torturous pain and suffering. Mr. Hill thus plainly seeks to vindicate rights and immunities secured to him by the Eighth Amendment.

As this Court has explained, federal law provides two avenues for prisoners' complaints related to their confinement: section 1983 and the federal habeas corpus statute, 28 U.S.C. § 2254. *See Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam); *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). Habeas is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement. *Heck*, 512 U.S. at 481; *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). By contrast, constitutional claims that challenge how a lawfully imposed sentence is carried out fall outside the core of habeas and are cognizable under § 1983. *See Nelson*, 541 U.S. at 643; *Muhammad*, 540 U.S. at 750.

To be sure, where the recognition of a claim will necessitate a finding that a state prisoner's underlying conviction or sentence is invalid, the prisoner bringing such a claim must file a habeas corpus petition. *See Preiser*, 411 U.S. at 500 ("when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate

release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus"). Where, however, an inmate's claim challenges the constitutionality of procedures that are ancillary to the prisoner's conviction and sentence and can be corrected without undermining the integrity of the underlying conviction or sentence, then § 1983 relief is available. *See Heck*, 512 U.S. at 487 (finding that state prisoners may bring § 1983 actions if a judgment in the prisoner's favor would not "necessarily imply" the invalidity of his or her conviction or sentence); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that § 1983 was a permissible avenue of relief when adjudication of a prisoner's claim would not undermine the outcome of disciplinary proceedings).

Applying this settled law, *Nelson* addressed whether § 1983 is a proper vehicle for challenging the specific procedure a State uses to carry out a death sentence. In *Nelson*, a condemned prisoner filed a § 1983 challenge to the "cut-down" procedure to be used to access his veins for lethal injection, contending that the procedure would inflict unnecessary pain and suffering prior to his death. *Nelson,* 541 U.S. at 642, 645. Nothing in the Alabama statutes prescribing lethal injection as the method of execution for that State's condemned prisoners required such a procedure. The Eleventh Circuit nonetheless held that the § 1983 claim had to be dismissed for want of subject matter jurisdiction because it was the functional equivalent of a second or successive habeas petition subject to the gatekeeping provisions of 28 U.S.C. § 2244(b). *Id.*

This Court reversed, holding that a condemned person may bring a § 1983 challenge to a specific lethal injection procedure, so long as judicial relief prohibiting the procedure would not "*necessarily* prevent [the State] from carrying out its execution." *Id.* at 647 (emphasis in original). That is so because "[a] suit seeking to enjoin a particular means of

effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself." *Id.* at 644. Rather, it challenges how the State carries out a lawfully imposed sentence. Such an approach is entirely consistent with *Preiser* and its progeny, and "both protects against the use of § 1983 to circumvent any limits imposed by the habeas statute and minimizes the extent to which the fact of a prisoner's imminent execution will require differential treatment of his otherwise cognizable § 1983 claims." *Id*. at 674.

Applying that standard, the Court held that Nelson's action fell squarely within the ambit of § 1983. The "venous access" procedure there at issue was not mandated by state law, and Nelson conceded that other procedures for gaining access were constitutional. Nelson's challenge thus did not *necessarily* imply the invalidity of the inmate's conviction or the State's ability ultimately to carry out the death sentence. Nelson could therefore proceed under §1983.

B. Mr. Hill's Case Is Indistinguishable From *Nelson* And Thus The Eleventh Circuit Erred In Dismissing Mr. Hill's § 1983 Claim.

Mr. Hill's claim is indistinguishable from the claim at issue in *Nelson*. He alleges that the particular procedures the Department has chosen to use for his execution "create[] a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed" in violation of the Eighth Amendment. Compl. ¶ 8, J.A. 18; *see also id.* ¶¶ 9-16, J.A. 18-21. Like Mr. Nelson, therefore, Mr. Hill challenges only a specific method of administering lethal injection. He does not assert that that lethal injection *per se* violates the Eighth Amendment, and he does not contest the State's authority to carry out his execution. To the contrary, Mr. Hill seeks relief limited to an injunction "barring defendants from executing Plaintiff *in the manner they currently intend*." Compl. ¶¶ 19-20 (emphasis added), J.A. 22. Were his action successful,

Mr. Hill could still be executed by a different procedure, including a different means of lethal injection chosen by the Department. Indeed, in his district court submissions, Mr. Hill expressly stated that "'by simply altering its method, the State can go forward with the sentence.'" Application for a Stay of Execution and for Expedited Appeal at 12, J.A. 46 (quoting *Nelson*, 541 U.S. at 644). Mr. Hill's challenge is thus plainly proper under § 1983, because it does not "necessarily imply" the invalidity of the fact or length of the inmate's sentence. *See Nelson*, 541 U.S. at 646.[6]

Ruling for Mr. Hill does not require this Court to address any of the questions this Court reserved in *Nelson*. The case does not present, for example, the broader question of how to address general method-of-execution claims, such as a challenge to electrocution or hanging. Nor is Mr. Hill's Eighth Amendment challenge one that seeks *sub silentio* to

---

[6] If anything, this case is easier than *Nelson*. Nelson's complaint requested "an order granting injunctive relief and staying [petitioner's] execution." *Nelson*, 541 U.S. at 648 (alteration in original). The Court indicated that this phrasing complicated the issue, because the request for a permanent injunction "did not specify what permanent injunctive relief [petitioner] was seeking," *id*., and therefore might have "transformed his conditions of confinement claim into a challenge to the validity of his death sentence," *id.* at 647. Despite this inartful phrasing, this Court concluded that "a fair reading of the complaint leaves no doubt that petitioner was asking only to enjoin the State's use of the cut-down, not his execution by lethal injection." *Id*. at 648.

Hill's filings below make unmistakably clear that he seeks only to bar the State's corrections officials from executing him before his claim has been heard and from executing him "in the manner they currently intend." Compl. ¶¶ 19-20, J.A. 22; *see also* Application for a Stay of Execution and for Expedited Appeal at 12, J.A. 46 ("Mr. Hill is not challenging the statutory provision which allows for lethal injection as a method of execution. Rather, he is 'seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the "fact" or "validity" of the sentence itself – by simply altering its method, the State can go forward with the sentence.'") (quoting *Nelson*, 541 U.S. at 644).

preclude imposition of the death penalty by implying that all methods of execution are cruel and unusual. To the contrary, Hill alleges only that the particular procedures the Department intends to use to execute him create a foreseeable risk of wanton pain. His is not a challenge objecting merely to the pain inherent in death.

Mr. Hill's claim similarly does not require the Court to determine the proper outcome in the situation left unresolved in *Nelson* – where the challenged execution practices are dictated by statute. 541 U.S. at 645. The relevant Florida statute authorizes lethal injection, but dictates no particular procedure for carrying it out. *See* Fla. Stat. § 922.10 ("A death sentence shall be executed by electrocution or lethal injection."). Nor does any Florida regulation require the specific procedures at issue here. The Department of Corrections therefore has complete discretion to change the method of lethal injection to comply with the Eighth Amendment – at any time and for any reason. *See Sims*, 754 So. 2d at 670.

Indeed, the Department could readily adopt any one of a number of different approaches to lethal injection that would end Mr. Hill's life without a foreseeable likelihood of excruciating pain. *See, e.g., Morales*, 2006 WL 335427, at *8. It could therefore afford Mr. Hill all of the relief he seeks in this lawsuit without requiring "statutory amendment or variance" that might "impos[e] significant costs on the State and the administration of its penal system." *Nelson*, 541 U.S. at 644.[7]

---

[7] For these reasons, it is impossible to construe Mr. Hill's claim as the equivalent of a direct challenge to Florida's statutorily prescribed method of execution. But even if it were such a challenge, his claim would still be properly brought under § 1983 because no statutory changes would be required if the challenge succeeded. Florida statutes *already* provide for the enforcement of a death sentence even if the statutorily prescribed method of execution is held unconstitutional. *See* Fla. Stat. § 922.105(3)

Because *Nelson* is plainly controlling in this circumstance, it is not surprising that, with the exception of the Eleventh Circuit, every court of appeals to have addressed the question has recognized that claims challenging particular lethal injection procedures (but not the state's authority to carry out execution by lethal injection) may proceed under § 1983. *See, e.g.*, *White v. Johnson*, 429 F.3d 572, 573 (5th Cir. 2005) (per curiam); *Beardslee v. Woodford*, 395 F.3d 1064, 1068 (9th Cir.), *cert. denied*, 543 U.S. 1096 (2005); *Reid v. Johnson*, 105 Fed. Appx. 500, 503 (4th Cir. 2004); *Bryan v. Mullin*, 100 Fed. Appx. 801, 802-03 (10th Cir. 2004), *cert. denied*, 541 U.S. 1096 (2005); *see also Johnston v. Crawford*, No. 04CV1075, 2005 WL 1474022, at *2 (E.D. Mo. June 13, 2005); *Ross ex rel. Ross v. Rell*, 392 F. Supp. 2d 224, 226 (D. Conn. 2005).

The Eleventh Circuit's divergent approach appears to result from its consistent practice of treating every challenge to particular procedures for administering a lethal injection as equivalent to a challenge to the state's authority to carry out *any* execution. For example, in *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004) (per curiam), the Eleventh Circuit construed Mr. Robinson's challenge to Florida's method of administering lethal injection as a broad contention that "seeks to avoid entirely execution by lethal injection" – notwithstanding that Robinson's complaint appeared to challenge only the particular procedures that were to be used in executing him. 358 F.3d at 1285. Similarly, in the present case, the Eleventh Circuit erroneously characterized Mr. Hill's claim as one that "seeks a permanent injunction barring his execution," and on that basis dismissed it on the ground that it raised "the very issue" that was decided in *Robinson*. J.A. 10; *see also Rutherford v. Crosby*, No. 06-

---

("If electrocution or lethal injection is held to be unconstitutional . . . all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution."); *id.* § 922.105(8).

10783, __ F.3d __, 2006 WL 224123, at *1 (11th Cir. Jan. 30, 2006) (per curiam) (invoking *Robinson* to dismiss a claim expressly challenging only "the procedures or protocols" used to carry out lethal injections). By characterizing the claims brought in these cases as seeking relief broader than they in fact seek, the Eleventh Circuit has apparently felt no need to come to grips with the rule set forth in *Nelson*. Because Mr. Hill's claim is not the broad one the Eleventh Circuit ascribed to him, however, *Nelson* plainly applies here. The district court thus had subject matter jurisdiction to adjudicate his claim.

C. Allowing Mr. Hill's Claim To Proceed Is Consistent With The Language And Purpose Of 42 U.S.C. § 1983, As Well As This Court's Longstanding Case Law.

Allowing Mr. Hill to proceed with his § 1983 claim is consistent with the language, purpose, and history of that statute. Hill's invocation of the Eighth Amendment to challenge the particular procedures the Department has chosen to use to end his life satisfies all the statutory elements of § 1983. It is a suit in equity against a state official who, under color of state law, is causing Hill to be deprived of the Eighth Amendment's protections against cruel and unusual punishment. *See Nelson*, 541 U.S. at 643 (noting that Nelson's claim falls within the "literal applicability" of § 1983).

Permitting Hill's claim to proceed is also consistent with the purpose of § 1983. The Civil Rights Act was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyments of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by these state agencies." *Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*,

436 U.S. 658 (1978). The State's callous indifference to Hill's constitutional concerns – whether motivated by prejudice, neglect, intolerance, or something else – falls within the intended scope of the Civil Rights Act. Because § 1983 authorizes injunctive actions challenging barbaric conditions of confinement, *see, e.g., Hutto v. Finney*, 437 U.S. 678, 681-83 (1978), it can hardly be supposed that the statute does not also provide a cause of action to challenge a barbaric method of execution. Similarly, because an inmate could bring a § 1983 action challenging the constitutionality of a callously painful chemical prescription used to provide medical treatment, the result cannot plausibly be different when the chemicals chosen to effectuate an execution produce unnecessary pain. *See Nelson*, 541 U.S. at 645 ("Merely labeling something as part of an execution procedure is insufficient to insulate it from a § 1983 attack.").

Section 1983 has been traditionally interpreted, furthermore, to extend to inmate suits where, as here, the challenged procedures can be restrained or corrected without impugning the integrity of the underlying conviction and sentence, *i.e.*, without seeking "core" habeas corpus relief. *Wilkinson v. Dotson*, 125 S. Ct. 1242, 1247 (2005). This relationship between § 1983 and federal habeas corpus has deep roots. Indeed, "[a]t the time of § 1983's adoption, the federal habeas statute mirrored the common-law writ of habeas corpus, in that it authorized a single form of relief: the prisoner's immediate release from custody." *Dotson*, 125 S. Ct. at 1250 (Scalia, J., concurring). Section 1983, therefore, would have presented the vehicle for relief outside of immediate release. Although the federal habeas statute has since been amended to provide "relief short of release," *id.*, a distinction between claims that lie within the "core of habeas" and those that are cognizable under § 1983 remains intact. *Dotson*, 125 S. Ct. at 1246 (quoting *Preiser*, 411 U.S. at 487).

Just last term, the Court held that two state prisoners' challenge to Ohio's state parole procedures was properly brought under § 1983, because the action did not lie "within the core of habeas corpus." *Dotson*, 125 S. Ct. at 1246 (quoting *Preiser*, 411 U.S. at 487). The Court explained that actions lie within the core of habeas where they challenge the "'fact or duration of . . . confinement' and seek[] either 'immediate release from prison,' or the 'shortening' of [the] term of confinement." *Id.* (quoting *Preiser*, 411 U.S. at 482, 489) (internal citations omitted). In other words, a state prisoner's § 1983 action is only barred "*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 125 S. Ct. at 1248 (emphasis in original). Because the two state prisoners sought declaratory and injunctive relief regarding the *procedures* used to deny parole eligibility and suitability, rather than an injunction ordering immediate or speedier release, the actions were cognizable under § 1983. *Id.*; *see also id.* at 1250 (Scalia, J., concurring) ("[W]hat is sought here [is] the mandating of a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedures to be followed. A holding that this sort of judicial immersion in the administration of discretionary parole lies at the 'core of habeas' would utterly sever the writ from its common-law roots.").

The Court's opinion in *Dotson* traverses the "legal journey from *Preiser* to [*Edwards v.*] *Balisok*," and clarifies that, in every case,

> the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement – either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily

> implies the unlawfulness of the State's custody. Thus, *Preiser* found an implied exception to § 1983's coverage where the claim seeks – not where it simply 'relates to' – 'core' habeas corpus relief, *i.e.*, where a state prisoner requests present or future release.

125 S. Ct. at 1247 (emphasis in original).

In *Wolff v. McDonnell*, for instance, the inmate's § 1983 complaint sought restoration of good-time credits and damages for the deprivation of civil rights resulting from the use of an allegedly unconstitutional procedure to determine those credits. *See Wolff*, 418 U.S. at 553; *see also Heck*, 512 U.S. at 482 (construing *Wolff*). This Court found the § 1983 claim for restoration of good time credits foreclosed under *Preiser*, but permitted the use of § 1983 to obtain a declaration that the disciplinary procedures were invalid, as well as "ancillary relief," *Wolff*, 418 U.S. at 554-55 (emphasis added), because "[i]n neither case would victory for the prisoners necessarily have meant immediate release or a shorter period of incarceration; the prisoners attacked only the 'wrong procedures, not . . . the wrong result . . . .'" *Dotson*, 125 S. Ct. at 1246-47 (quoting *Heck*, 512 U.S. at 483 (discussing *Wolff*)); *see also Wolff*, 418 U.S. at 555 ("[A] declaratory judgment as a predicate to a damages award would not be barred by *Preiser*; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.").

Following the same reasoning, this Court concluded in *Heck* that an inmate's claim for damages was not cognizable under § 1983, when establishing the basis for damages would necessarily demonstrate the invalidity of the conviction or sentence. 512 U.S. at 481-82. Like *Preiser*, *Heck* recognized that the dividing line was whether the plaintiff

was challenging the fact or duration of his sentence, or something else. Thus, a state prisoner who has not received favorable termination of a state or federal habeas petition cannot state a cognizable § 1983 claim to recover damages for a "harm caused by actions whose unlawfulness would render [his] conviction or sentence invalid." *Id.* at 486; *see also Nelson*, 541 U.S. at 646. But if "plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the [§ 1983] action should be allowed to proceed." *Heck*, 512 U.S. at 487 (emphasis in original); *see also Edwards v. Balisok*, 520 U.S. 641, 646-48 (1997) (holding, in a challenge to prison procedures depriving inmate of good-time credits, that the claims for declaratory and monetary relief that "necessarily imply the invalidity of the punishment imposed" could not be brought under § 1983, but that a claim for injunctive relief barring future procedures was permitted, because "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits").

Nelson is entirely consistent with this line of cases. It holds that § 1983 is available for the inmate who challenges the specific procedure by which he will be executed, as opposed to the validity of the death sentence itself. 541 U.S. at 644-45. *Nelson* thus preserves this Court's repeated teaching that claims that do not attack the fact or duration of confinement and thus lie outside the core of habeas corpus are cognizable under § 1983.

Indeed, *Nelson* was an even clearer case than *Dotson*. Whereas the prisoners' claim in *Dotson* "would not *necessarily* spell speedier release," 125 S. Ct. at 1247 (emphasis added), method-of-execution challenges, like the challenge at issue in *Nelson* and the claim presented here by Mr. Hill, necessarily contemplate that the inmate's death sentence will be carried out; they challenge only specific

aspects of the procedure that entail gratuitous pain. *See Nelson*, 541 U.S. at 645. Allowing Mr. Hill's claim to proceed is thus entirely consistent with § 1983's place in our constitutional and legal system.

For all the foregoing reasons, Mr. Hill's narrow challenge to the specific procedures chosen by the Florida Department of Corrections is properly brought pursuant to § 1983. Mr. Hill does not challenge his sentence of death by lethal injection, but only specific aspects of the State's means for carrying out that sentence. The Eleventh Circuit plainly erred, therefore, in dismissing the suit for lack of jurisdiction.

II. MR. HILL'S CHALLENGE IS NOT A SECOND OR SUCCESSIVE PETITION UNDER AEDPA.

Because *Nelson* establishes Mr. Hill's right to proceed under § 1983, it suffices to require a reversal of the Eleventh Circuit's determination that the district court lacked jurisdiction to adjudicate his Eighth Amendment challenge to the manner of his execution. Nevertheless, there is an additional reason why the Eleventh Circuit's decision fails on its own terms. Even if Mr. Hill's § 1983 complaint were recharacterized as a habeas challenge, it would not be a "second or successive" petition subject to the gate-keeping provisions in § 2244(b). Thus, there was no basis whatsoever for concluding that the district court lacked subject matter jurisdiction over Mr. Hill's claim that the Department of Corrections means to put him to death in a torturous manner that violates the Eighth Amendment. His invocation of § 1983 cannot plausibly be construed as an evasion of the jurisdictional restrictions on habeas corpus.

Section 2244(b) requires petitioners who seek to file a "second or successive" habeas corpus petition to obtain leave from the appropriate court of appeals, 28 U.S.C. § 2244(b)(3), and it permits the court of appeals to grant such leave only in narrow circumstances, *see id.* § 2244(b)(1),

(2).[8] This Court, however, has consistently rejected the view that § 2244(b) applies to all claims brought in a *numerically* "second" (or subsequent) petition. It has recognized, rather, that the phrase "second or successive" in § 2244(b) is a "term of art" that draws its meaning from this Court's "abuse of the writ" doctrine. *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). That settled understanding of the statute puts a constitutional claim such as Mr. Hill's here – a claim that was not ripe at the time when the initial federal habeas petition was filed and decided and which ripened only shortly before the filing of a second petition – outside the scope of § 2244(b)'s gate-keeping provisions.

In *Martinez-Villareal*, for example, the prisoner had earlier filed a habeas petition contending, among other things, that he was incompetent to be executed under *Ford v. Wainright*, 477 U.S. 399 (1986). The district court denied the petition, dismissing the *Ford* claim as unripe because no execution date was imminent. Once a new execution date was set, thus rendering the *Ford* claim ripe for adjudication, Martinez-Villareal sought to raise the *Ford* claim again, and the State challenged the filing as a successive petition. Affirming the Ninth Circuit – which had disagreed with the approach of the Eleventh Circuit in *In re Medina*, 109 F.3d

---

[8] Section 2244(b)(2) provides:

> A claim presented in a second or successive habeas corpus application under [28 U.S.C. § 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.

1556 (11th Cir. 1997) – this Court held that the presentation of the previously unripe *Ford* claim did not constitute a second or successive petition. Invoking this Court's pre-AEDPA jurisprudence, *see Martinez-Villareal*, 523 U.S. at 644-45, the Court noted that the State's reading of § 2244(b)(2) to bar claims that were previously unripe would effect a substantial departure from prior practice and that the "implications [of the State's argument] for habeas practice would be far reaching and seemingly perverse." 523 U.S. at 644.

Under *Martinez-Villareal*, Hill's challenge to the particular procedures that the Florida Department of Corrections intends to use to execute him is not a "second or successive" petition. As noted above, Florida law gives the Department of Corrections total discretion to develop and implement the process for executing prisoners for lethal injection. Neither the combination of chemicals nor the procedures for mixing and injecting them (and monitoring their effects) are prescribed in statute or regulation. The Department retains complete flexibility to devise and implement injection protocols for any particular execution; and, as Mr. Hill's case demonstrates, the Department aggressively resists inmates' efforts to obtain advance information about its intended procedures. Thus, it is only when an execution warrant has been signed and the Department of Corrections begins to make its arrangements for a particular execution that any constitutional challenge to the execution procedures which the Department is preparing to use becomes ripe. *See Worthington v. Missouri*, 166 S.W. 3d 566, 583 n.3 (Mo. 2005) (holding that an Eighth Amendment claim challenging a particular lethal injection procedure is "premature" because "it is unknown what method, if any, of lethal injection may be utilized by the State of Missouri at such future time, if any, as Mr. Worthington's right to seek relief in state and federal court is concluded and his execution method and date are set"). And

once such a constitutional challenge ripens, *Martinez-Villareal* permits it to be raised on federal habeas without a gatekeeping application under § 2244(b), notwithstanding that the condemned inmate has had his underlying conviction and sentence reviewed in a previous federal habeas proceeding.

To be sure, the Court in *Martinez-Villareal* reserved the question of how its decision would apply to a previously unripe claim that had not been presented on first federal habeas. 523 U.S. at 645 n.*. The Court's decision, however, leaves no doubt of the outcome. *See generally Clark v. Martinez*, 543 U.S. 371, 378 (2005) (finding that the logic of a prior opinion compelled the answer to question expressly reserved in that opinion). The Court ruled as it did even though the district court in *Martinez-Villareal* had rendered a final judgment denying the initial habeas petition and had not held the initial *Ford* claim in abeyance. The subsequent filing raising the ripened claims was thus in no sense a "continuation" of the first petition, as the dissent emphasized. *See Martinez-Villareal*, 523 U.S. at 650 (Thomas, J. dissenting). The plain import of *Martinez-Villareal*, therefore, is that timely presentation of a previously unripe claim is not a second or successive petition under AEDPA, and that a prisoner should have at least one opportunity to present his federal claims to the federal court. To hold otherwise would deny a habeas petitioner the opportunity to obtain the "adjudication of his claim" to which he is entitled. *Martinez-Villareal*, 523 U.S. at 645.[9]

---

[9] The rule of *Martinez-Villareal* cannot conceivably be that, in order to bring their possible future claims within it, inmates are required to anticipate the various possible constitutionally challengeable actions which correctional officers might (or might not) later take in the course of execution of the inmate's sentence and to insert those challenges into ever initial federal habeas petition. Such a rule would impose a staggering burden on the district courts to receive and read through premature claims for no purpose other than to cull them out. Furthermore, such a game of

Slack confirms this reading of *Martinez-Villareal*. *See Slack*, 529 U.S. at 486. In *Slack*, the district court dismissed the state prisoner's initial federal habeas petition because it contained claims that had not yet been litigated in state court. Once the prisoner had gone to state court and exhausted his claims, he returned to federal court and eventually filed a new petition, adding claims that had not been raised in the initial petition. This Court squarely rejected the State's contention that the subsequent petition was a "second or successive petition" as that term was used in AEDPA. *Id.*

Justice Kennedy's opinion for seven members of the Court recognized that the term "second or successive petition" in AEDPA was a "term of art given substance in our prior habeas corpus cases." 529 U.S. at 486; *see also Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'"). Thus, as in *Martinez-Villareal*, the Court looked to its pre-AEDPA "second or successive" cases – in particular *McCleskey v. Zant*, 455 U.S. 509 (1991), and *Rose v. Lundy*, 455 U.S. 509 (1982) – to give meaning to the term. Because Slack's claims would not have been considered an abusive "second or successive petition" as the Court had defined that term of art, § 2244(b)(2) did not bar Slack's claims.

The same analysis demonstrates that Hill's presentation of his newly ripened claim is not "second or successive." A federal habeas petition presenting a claim that was unripe at the time of a previous petition would not have been an abusive successive petition prior to AEDPA. The abuse-of-the-writ doctrine received its fullest treatment in Justice Kennedy's opinion in *McCleskey*. There the Court noted that

---

"what if" contravenes the basic tenet of our system of adjudication, that claims are brought when they are sufficiently concrete to permit non-speculative, fact-informed resolution.

"the abuse-of-the-writ doctrine . . . concentrate[s] on a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." 499 U.S. at 490. It has never been thought an abuse of the writ to fail to raise an unripe claim in one's first federal habeas petition and then, after the claim ripens, to base a later habeas petition upon it. *See id.* at 493-94; *see also* 2 Randy Hertz & James S. Leibman, *Federal Habeas Corpus Practice and Procedure* § 28.3b at 1410 (5th ed. 2005) (noting that, pre-AEDPA, a petition was not subject to the rules governing "successive" petitions when the "earlier petition did not produce, or for some reason could not possibly have produced, a judgment on the merits of the claim in question"); *see also id.* (noting that AEDPA "preserves the preexisting law's recognition" that such claims are "not subject to statutory and common law restrictions upon successive petitions").

In short, the abuse-of-the-writ principles expressly made relevant by *Slack* and *Martinez-Villareal* do not require the futile act of raising in a first federal habeas petition a claim known to be unripe. Thus AEDPA's gatekeeping provisions do not apply to Mr. Hill's challenge, which was brought as soon as the signing of his execution warrant caused his constitutional claim to ripen.

The Eleventh Circuit's holding to the contrary is even more troubling because the court characterized as second or successive a constitutional claim that not only was previously unripe but also had no factual or legal predicate at all at the time of Mr. Hill's initial federal habeas proceeding. Florida did not enact its lethal injection statute until January 14, 2000, years after Mr. Hill's federal habeas petition challenging his current sentence was filed and, indeed, after that denial became final. *See Hill v. Moore*, 528 U.S. 1087 (Jan. 10, 2000) (denying certiorari). Reading the habeas statutes (as did the Eleventh Circuit) to foreclose even a

claim that did not exist and could not possibly have been brought until after the completion of an inmate's earlier federal habeas proceeding has no colorable basis in this Court's "abuse of the writ" jurisprudence, which provides the relevant context here. *Felker*, 518 U.S. at 652 (citing *McCleskey*); *Slack*, 529 U.S. at 486 (relying on "our prior decisions regarding successive petitions and abuse of the writ" and citing *McCleskey*); *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (noting that "this Court has created careful rules for dismissal of petitions for abuse of the writ" (citing *McCleskey*)).[10]

It is no surprise, therefore, that the Eleventh Circuit stands virtually alone in adopting a complete bar on substantial constitutional claims that could not have been raised during a first federal habeas proceeding. *See Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (en banc) ("a habeas petition raising a claim that had not arisen at the time of a previous petition is not barred by § 2244(b) or as an abuse of the writ"); *see also In re Cain*, 137 F.3d 234, 236-37 (5th Cir. 1998); *Coe v. Bell*, 209 F.3d 815, 823 (6th Cir. 2000); *James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002); *see also Allen v. Ornoski*, No. Civ.50664FCDDAD, 2006 WL 83384 (E.D. Cal. Jan. 12, 2006), *aff'd*, 435 F.3d 946 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 1140 (2006); *Nguyen v. Gibson*, 162 F.3d 600, 601 (10th Cir. 1998) (dismissing *Ford*

---

[10] As the lower courts have recognized, reading AEDPA to bar review of claims that could not have been brought on first federal habeas would implicate serious constitutional concerns under the Suspension Clause, and principles of constitutional avoidance, *see Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), thus provide yet another reason for rejecting the Eleventh Circuit's approach. *See, e.g.*, *James v. Walsh*, 308 F.3d 162, 168 (2d Cir. 2002) (Winter, J.) ("Denial of habeas relief in the present case may implicate the Suspension Clause, because it would constitute a complete denial of any collateral review of a claim that arose only after James filed his 1997 petition.").

claim that could have been raised in first habeas petition, but specifically noting that it would be a different situation if the grounds for the claim came to light only after the first federal habeas petition was filed).

The Eleventh Circuit viewed this case as lying at the crossroads of habeas and § 1983, and held that the obstacles it perceived as blocking Hill's route to habeas relief would similarly foreclose Hill from proceeding via § 1983. That view led the court to the conclusion that the federal courts lack jurisdiction over Hill's claim because it is the "functional equivalent of a successive habeas petition."

But the Eleventh Circuit's reasoning was doubly misguided. The prospect that a claim might be barred in habeas is of no moment if the claim does not challenge the "fact or duration" or "validity" of the conviction or sentence (or the State's authority to execute him using more humane lethal injection procedures). *See Dotson*, 125 S. Ct. at 1247 (recognizing "an implied exception to § 1983's coverage where the claim seeks – not where it simply 'relates to' – 'core' habeas relief, *i.e.*, where a state prisoner requests present or future release"). District courts plainly have subject matter jurisdiction to consider such a claim in a § 1983 action.

Equally to the point, the fear that Hill is somehow "evading" an otherwise applicable habeas bar provides no justification for straining to recharacterize Hill's § 1983 action. The presentation of a recently ripened claim is not a "successive" petition, and thus nothing in § 2244(b) or elsewhere in the habeas statutes or this Court's habeas jurisprudence would bar Hill's Eighth Amendment claim even if it were presented in a habeas petition. The rule developed by this Court that "§ 1983 must yield to the more specific federal habeas statute with its attendant procedural and exhaustion requirements," *Nelson*, 541 U.S. at 643, is "necessary to prevent inmates from doing indirectly . . . what

they could not do directly . . . – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute," *id.* at 647. And where, as in Mr. Hill's case, (1) a habeas petition containing a claim *would* comply with all of those procedural limitations, *and* (2) the claim does *not* "challenge the fact or duration of . . . [the petitioner's] confinement, *and* (3) the inmate presents the claim in a § 1983 complaint that manifestly states a cause of action within the "literal applicability" of § 1983, *Nelson*, 541 U.S. at 643, there is simply no reason to decline jurisdiction to hear the claim.

In short, the Eleventh Circuit's conclusion that the district court lacked subject matter jurisdiction to adjudicate Mr. Hill's claim is meritless on every score.

CONCLUSION

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

DONALD B. VERRILLI, JR.
IAN HEATH GERSHENGORN
ERIC BERGER
JENNER & BLOCK LLP
601 Thirteenth Street N.W.
Washington, DC 20005
(202) 639-6000

D. TODD DOSS*
725 Southeast Baya Drive
Suite 102
Lake City, FL 32025
(386) 755-9119

JOHN ABATECOLA
JOHN ABATECOLA, P.A.
P.O. Box 450128
Sunrise, FL 33345
(954) 560-6742

March 6, 2006

* Counsel of Record