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

REPLY BRIEF FOR PETITIONER

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Nothing in the briefs filed by respondents and their *amici* justifies the holding of the Eleventh Circuit that the federal courts lack jurisdiction to hear Mr. Hill's challenge to the particular lethal injection procedures Florida intends to use to execute him. Respondents have not advanced a comprehensible argument for denying Mr. Hill a forum to adjudicate his Eighth Amendment claim. Nor does the *amicus* brief of the States offer a principled legal justification for that result.[1] The United States at least attempts to

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[1] The States offer "a cautionary tale" to argue for abandonment of the rule this Court unanimously announced in *Nelson v. Campbell*, 541 U.S. 637 (2004). The tale they tell is one about supposed "abuse" by Nelson in proceedings on remand from this Court. Of course, if any such "abuse" occurs, the district court has equitable discretion to hold that Nelson (or any other § 1983 plaintiff) is disentitled to relief under *Gomez v. United States District Court for the Northern District of California,* 503 U.S. 653 (1992) (per curiam) – a point this Court made explicitly in *Nelson*, 541 U.S. at 649. In fact, however, *amici*'s description of the remand proceedings in *Nelson* is a gross distortion. Nelson has not altered his position on remand. As this Court recognized, Nelson's position from the outset included challenges to the "cut-down" procedure "as well as the warden's refusal to provide reliable information regarding the . . . protocol." *Id.* at 645-46. On remand Nelson has continued to assert that central line placement is a constitutional way to execute him; he has sought only the information needed to assure it is done by qualified personnel under proper conditions. *See* Hearing Tr. 8, *Nelson v. Campbell*, No. 2:03-CV-1008-T (M.D. Ala. Oct. 6, 2004). The sole reason the *Nelson* litigation remains unresolved is because Alabama officials have refused to prepare a protocol that specifies the procedure so that it can be evaluated medically. Moreover, *amici*'s "cautionary tale," which is crafted to convince this Court that *Nelson* has created a device for obstructing executions in Alabama, notably fails to disclose that Alabama's Attorney General has moved to set six execution dates since the decision in *Nelson*; all

advance legal arguments for denying Mr. Hill the right to invoke § 1983 (or in the alternative to proceed in habeas), but its position rests on mischaracterizations of this Court's decisions in *Nelson v. Campbell*, 541 U.S. 637 (2004), *Slack v. McDaniel*, 529 U.S. 473 (2000), and *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

The long and short of it is that *Nelson v. Campbell* controls here and entitles Mr. Hill to pursue his claims in a § 1983 action. As *Nelson* recognized, "[a] suit seeking to enjoin a particular means of effectuating a sentence of death" is a proper § 1983 action because it "does not directly call into question the 'fact' or 'validity' of the sentence itself – by simply altering its method of execution, the State can go forward with the sentence." *Nelson*, 541 U.S. at 644. Mr. Hill advances precisely such a claim. Nor is there any reason to deny Mr. Hill a § 1983 cause of action on the theory that his § 1983 proceeding constitutes an evasion of the limitations imposed on habeas petitions. Even if brought as a habeas action, his Eighth Amendment claim could not be characterized as a second or successive petition under *Slack* and *Martinez-Villareal* because it did not ripen until after Mr. Hill's first federal habeas proceedings ended. Respondents and the United States can dispute that conclusion only by treating the dissents in *Slack* and *Martinez-Villareal* as though they were the opinions of the Court.

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of those executions were carried out; in none of them did the inmate scheduled for execution file a § 1983 challenge to the method of execution. *See* Alabama Dep't of Corrections, Inmates Executed in Alabama, *available at* <http://www.doc.state.al.us/execution.htm> (last visited Apr. 16, 2006) (listing prisoners executed in Alabama and their dates of execution).

ARGUMENT

I. MR. HILL'S CLAIM IS PROPERLY BROUGHT UNDER § 1983.

1. Neither respondents nor their *amici* offer any persuasive reason for refusing to allow Mr. Hill to pursue his Eighth Amendment claim in a § 1983 action. Although respondents suggest that all challenges to procedures used to carry out lethal injections are at the "core" of habeas (Fla. Br. 22-23) and therefore prohibited in § 1983 actions, that contention ignores virtually everything the Court said in *Nelson v. Campbell*, as well as decades of this Court's jurisprudence. *See Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Presier v. Rodriquez*, 411 U.S. 475 (1973).

For its part, the United States at least acknowledges the well-established law set forth in *Preiser* and its progeny, which dictates that § 1983 is unavailable only for challenges to the fact or duration of an inmate's sentence – *i.e.*, challenges that, if successful, would invalidate (or necessarily imply the invalidity of) a sentence. *See* U.S. Br. 9-11, 12-13. As the United States recognizes in theory, a challenge to the particulars of a State's lethal injection procedure falls within the category of claims that may properly be brought in a § 1983 action. If successful, such a challenge does not "*necessarily* prevent [the State] from carrying out its execution," *Nelson*, 541 U.S. at 647, because "by simply altering its method of execution, the State can go forward with the sentence," *id.* at 644. *See* U.S. Br. 12-13, 18-19. In contrast, the category of challenges that must be brought in habeas proceedings comprises those cases "where a prisoner contends that execution per se constitutes cruel and unusual punishment – *i.e.*, that the particular method of execution being contemplated by the State *and any other method of execution* would be unconstitutional." U.S. Br. 13.

Mr. Hill's challenge is indisputably in the former category. He does not contend that "execution per se constitutes cruel and unusual punishment." *Id.* He does not seek relief "permanently enjoin[ing] the use of lethal injection" or relief that would require "statutory amendment or variance" before the State could carry out a lethal injection. *Nelson*, 541 U.S. at 644. Nor would the relief Mr. Hill seeks necessarily imply the invalidity of his sentence. Under the well-established law reflected in *Nelson*, therefore, Mr. Hill has a right to invoke § 1983.[2]

2. The United States nevertheless contends that Mr. Hill's claim should be treated as though it were in the latter category and relegated exclusively to habeas. That counterintuitive result is dictated, the United States contends, by the fact that Mr. Hill's complaint "nowhere specifically identified an alternative method by which he could permissibly be executed." U.S. Br. 14. But it has never been

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[2] The United States seeks to distinguish *Nelson* from Mr. Hill's case on grounds that cannot withstand the slightest scrutiny. The United States describes as an "essential" feature of *Nelson* that the cut-down procedure Nelson challenged could have been challenged by a prisoner had Alabama sought to use it "for the purposes of medical treatment." U.S. Br. 12. That factor does not distinguish Mr. Hill's case because an inmate could use § 1983 to challenge the reckless administration of torturous, medically unsound anesthetic or other drugs as a medical treatment. Nor is the United States correct that an inquiry into whether an inmate's claim for relief would "necessarily prevent [the State] from carrying out its" sentence is applicable only to so-called "hybrid" cases, and not to direct challenges to lethal injection procedures. *See* U.S. Br. 16-18. In *Nelson*, the Court stated unambiguously that "[i]n the present context [*i.e.* a challenge to a lethal injection procedure], focusing attention on whether [the] petitioner's challenge . . . would necessarily prevent Alabama from carrying out its execution" was the appropriate test for deciding whether the inmate could pursue his claim in a § 1983 action. 541 U.S. at 647.

the law that plaintiffs invoking § 1983 to challenge the constitutionality of the manner in which their sentences are carried out must propose a specific constitutional alternative, or must instead proceed in habeas if they do not. Nor should the Court adopt any such rule now.

First, because the courts below dismissed this case on the pleadings, the dismissal can be upheld on the ground proposed by the United States only if this Court requires § 1983 plaintiffs challenging execution procedures to specify a constitutional alternative in their complaints. Even if such a change in pleading rules were desirable, it could not properly or fairly be ordered judicially to apply retrospectively, but is instead "a result which must be obtained by the process of amending the Federal Rules." *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

Second, requiring a plaintiff to set forth a constitutionally acceptable alternative would be antithetical to this Court's insistence that courts adjudicating § 1983 cases must preserve the discretion of state officials regarding how to change procedures in response to a finding of unconstitutionality. As this Court has explained, "strong considerations of comity . . . require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." *See Lewis v. Casey*, 518 U.S. 343, 362-64 (1996). Rather than forcing a State to accept a § 1983 plaintiff's preferred procedure, the proper course is to "refrain[ ] from 'dictat[ing] precisely what course the State should follow'" and "'charg[ing] the Department of Correction with the task of devising a Constitutionally sound [alternative].'" *Id.* at 362 (quoting *Bounds v. Smith*, 430 U.S. 817, 818-19 (1977)). There is no reason why that principle of deference to state administrative discretion – which the

United States ignores – should apply any differently in the present context.

Third, the approach suggested by the United States would undermine the clarity and predictability of the established rule for deciding when cases must be brought in habeas. The application of that rule to Mr. Hill's complaint is straightforward. Because he does not challenge the fact or duration of his sentence or advance any claim that asserts its invalidity – indeed, his complaint expressly disclaims any contention that Florida is constitutionally forbidden to execute him by lethal injection – he is entitled to proceed under § 1983. What the United States proposes is that his claim be treated *as though* it were a "fact or duration" challenge because the practical effect of adjudicating it may be to delay his execution. The Court unanimously rejected exactly the same argument in *Nelson*. As *Nelson* explained, "focusing attention on whether petitioner's challenge . . . would *necessarily* prevent Alabama from carrying out its execution 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 the prisoner's imminent execution will require differential treatment of his otherwise cognizable § 1983 claims." 541 U.S. at 647.[3]

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[3] In the face of this clear holding, there is no basis for the contention of the United States that "the fact of the prisoner's imminent execution" *should* be viewed as barring "his otherwise cognizable § 1983 claims." *Nelson* explained that the district courts' equitable authority under *Gomez* would suffice to police abuse (*see* note 1 *supra*) and that plaintiffs challenging execution procedures under § 1983 would be constrained by the requirements of the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626. *See Nelson*, 541 U.S. at 649-50. As *Nelson* indicates, there is no reason *also* to substitute *ad hoc* analysis of the kind the United States proposes for the clear rule of *Preiser* and its progeny.

Fourth, the United States is simply incorrect in its assertion that requiring inmates such as Mr. Hill to specify a constitutionally acceptable alternative is necessary to ensure that they do not thwart execution "by challenging individual methods of execution *seriatim*." U.S. Br. 16. As with any other § 1983 challenge, the State has two options when confronted with a claim that a particular execution procedure violates the Eighth Amendment: it can dispute the claim or it can propose an alternative that eliminates the basis for the objection. If the State chooses to defend the challenged procedure and the trial court upholds it, the court's judgment disposes of the litigation and the execution goes forward. If the State chooses to put forward an alternative procedure, either the inmate will agree (and the case will be disposed of by consent decree) or the case will be contested (and disposed of by court order). Either way, the challenge will be resolved in a manner that is no different from a case in which a plaintiff affirmatively pleads a specific alternative. Only if the State continues to put forward alternatives that the trial court finds to be unconstitutional will the litigation continue in *seriatim* fashion.[4]

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[4] Given the constitutional options available to the State for carrying out execution by lethal injection, *see, e.g., Morales v. Hickman*, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), *aff'd*, 438 F.3d 926 (9th Cir.), *cert. denied*, 126 S. Ct. 1314 (2006), there is no reason to believe that *seriatim* challenges will prevent lawful executions. In *Morales*, for example, the district court determined that California's protocol did not comport with the Eighth Amendment unless modified in one of two critical respects. *See Morales*, 415 F. Supp. 2d at 1047-48. When the State modified the protocol in a manner consistent with the court's order, Morales challenged the revised protocol. The District Court rejected Morales's challenge, finding the protocol, as revised, constitutional. *See Morales v. Hickman*, No. 06-219JF (N.D. Cal. Feb. 16, 2006); *see also Baze v. Rees*, No. 04-CI-01094 (Ky. Cir. Ct. July 8, 2005) (finding

To be sure, in *Nelson*, the Court mentioned the alternative procedure alleged by the inmate in that case. But Nelson's allegations merely confirmed that he did not seek to challenge the validity of his death sentence, given that his complaint requested injunctive relief that could have been construed as barring his execution entirely. *See* 541 U.S. at 648; *see also id.* at 647 (questioning whether the prayer for relief "transformed his conditions of confinement claim into a challenge to the validity of his death sentence"). Where, as here, an inmate makes clear that the challenge is neither to the death sentence *per se* nor to the State's chosen method of lethal injection, but only to specific procedures, the inmate need not plead an alternative procedure to bring the claim within *Nelson*.[5]

II. THERE IS NO OTHER GROUND FOR DENYING MR. HILL ACCESS TO A § 1983 FORUM FOR HIS EIGHTH AMENDMENT CLAIM.

There is no merit to any of the remaining reasons advanced by respondents and the United States for denying

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jugular vein access unconstitutional but upholding lethal injection through peripheral vein access).

[5] Although the question of how to bring "general" method-of-execution claims is not presented here, the logic of this Court's cases suggests that such claims are congnizable under § 1983. In *Dotson* the Court made clear that the "implied exception" to § 1983's coverage is limited to claims that lie "within the core of habeas corpus," *Dotson*, 125 S. Ct at 1247 (internal quotation omitted), and in *Nelson*, this Court noted that method of execution challenges "fall at the margins of habeas," 541 U.S. at 646. Moreover, requiring "general" method of execution claims to be brought in habeas would force district courts to confront threshold issues as to whether a particular challenge is "general" or "specific," eschewing the clarity and efficiency that would result from adopting *Nelson*'s bright line for all method of execution claims.

Mr. Hill the right to pursue his Eighth Amendment claim in a § 1983 action.

1. The Eleventh Circuit cannot be affirmed on the ground that Mr. Hill failed to satisfy the requirement of the Prison Litigation Reform Act ("PLRA") that he exhaust administrative remedies before bringing his § 1983 action. Respondents do not raise exhaustion as an alternative ground for affirmance in this Court, and they have never suggested that administrative remedies are available to Mr. Hill. Because the requirement is not jurisdictional, it has been waived.[6] It certainly should not be considered at the behest of an *amicus* when the party defending the judgment has not raised it – especially where the *amicus* does not even try to identify the specific administrative procedure that Mr. Hill should have exhausted prior to filing his complaint.

Notably, Mr. Hill's complaint alleged that no administrative remedies were available to him. *See* J.A. 17-18. In response, the State alleged only that "Hill has not identified what administrative remedies he claims he has exhausted." J.A. 25 (citing 42 U.S.C. § 1997e(a)). The State did not identify any unexhausted procedures available to Mr. Hill. The PLRA's exhaustion requirement is not a rule of pleading the plaintiff must satisfy. It is an affirmative

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[6] *See Anderson v. XYZ Corr. Health Servs., Inc*., 407 F.3d 674, 677 (4th Cir. 2005); *Richardson v. Goord*, 347 F.3d 431, 433-34 (2d Cir. 2003) (*per curiam*); *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1206 (10th Cir. 2003); *Ali v. Dist. of Columbia*, 278 F.3d 1, 5-6 (D.C.Cir.2002); *Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir. 2002); *Wright v. Hollingsworth*, 260 F.3d 357, 358 n.2 (5th Cir. 2001); *Curry v. Scott*, 249 F.3d 493, 501 n.2 (6th Cir. 2001); *Chelette v. Harris*, 229 F.3d 684, 687 (8th Cir. 2000); *Nyhuis v. Reno*, 204 F.3d 65, 69 n.4 (3d Cir. 2000); *Rumbles v. Hill*, 182 F.3d *1064*, 1067-68 (9th Cir. 1999); *Massey v. Helman*, 196 F.3d 727, 732 (7th Cir. 1999).

defense *the defendant* must plead and prove.[7] Thus, the State forfeited the defense.[8]

2. Nor can the Eleventh Circuit be affirmed on the ground that Mr. Hill is disentitled to relief under *Gomez v. United States District Court for the Northern District of California,* 503 U.S. 653 (1992) (per curiam). To begin with, that is not a matter for this Court at the present juncture. It is a matter for the district court to consider on remand after this Court corrects the erroneous holding of both courts below that the district court lacked jurisdiction in the case. *See Nelson*, 541 U.S. at 648. As *Nelson* made clear, any equitable considerations are to be assessed by the district court in the first instance. *See* 541 U.S. at 649-50; *cf. Padilla v. Hanft*, __ S. Ct. __, No. 05-533, 2006 WL 845383, at *2 (Apr. 3, 2006) (Kennedy, J., concurring) (it is the province of

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[7] *See Anderson*, 407 F.3d at 681; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003); *Casanova v. Dubois,* 304 F.3d 75, 77 (1st Cir. 2002); *Ray v. Kertes,* 285 F.3d 287, 295 (3d Cir. 2002); *Foulk v. Charrier,* 262 F.3d 687, 697 (8th Cir. 2001); *Massey v. Helman,* 196 F.3d 727, 735 (7th Cir. 1999); *Jenkins v. Haubert,* 179 F.3d 19, 28-29 (2d Cir. 1999); *see also Johnson v. California*, 543 U.S. 499 (2005) (assuming that the PLRA's exhaustion requirement is waivable); *id.* at 528 n.1 (Thomas, J., dissenting) (pointing out assumption); *Jackson v. District of Columbia,* 254 F.3d 262, 267 (D.C. Cir. 2001) (suggesting that exhaustion is an affirmative defense).

[8] Had respondents pleaded the defense in the district court, that court would have had to determine whether the State had in fact shown that Mr. Hill had administrative remedies available to him. *See Booth v. Churner*, 532 U.S. 731, 736 n.4 (2001) ("Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust."). Given that no one so far has even attempted to point this Court to any available administrative procedure, it is highly unlikely that the State could have made the requisite showing.

the district court, in the course of its supervision of a case, to guard against any abuses of the judicial system by the parties).

In any event, Mr. Hill diligently pursued his claim as soon as it ripened. His claim was not ripe before his death warrant issued, because it was only at that time that the Florida Department of Corrections ("DOC") was obliged to begin planning to conduct his execution, and only at that point that Mr. Hill could attempt to ascertain the specific means by which the State meant to carry out his lethal injection. *See Worthington v. Missouri*, 166 S.W. 3d 566, 583 n.3 (Mo. 2005). That is the case in Florida because the DOC retains complete discretion over how lethal injections will be carried out, and it shrouds its intentions in secrecy.

No statute specifies the chemicals or the injection sequence to be used, the procedures for performing the injection, any qualifications or training required for persons engaged in administering the chemicals and monitoring the execution, or the means of venous access.[9] Nor does the Florida lethal injection statute – or any other provision of Florida law – require that such procedures be devised through a rule-making process, or even in consultation with

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[9] In contrast, Florida prescribes, with careful detail, the chemicals to be used in animal euthanasia and the chemicals that are prohibited for such use (including any neuromuscular blocking agent); a strict "order of preference" for the manner in which the lethal solution is to be administered; the qualifications that a person administering the lethal solution must possess; and a 16-hour "euthanasia technician course" that anyone administering the lethal solution must have taken. *See* Fla. Stat. § 828.058. The statute goes on to detail the minimum topics that the certification course must cover (including pharmacology, proper administration and storage of euthanasia solutions) and the manner in which the curriculum for the course is to be approved (by the Board of Veterinary Medicine). *See id.* § 828.058(4)(a).

medical experts.[10] And the DOC itself has not published any stable set of procedures through rule-making or otherwise. The DOC retains total discretion to change at any time and with respect to any particular execution the chemical sequence, the manner of its administration, the qualifications and training of the execution team, and any provisions it might (or might not) adopt to ensure proper administration and adequate anesthetic depth.

The United States does not dispute that the DOC has total discretion in these regards. Instead, the United States suggests that Mr. Hill could not "presume" that the DOC would exercise that discretion prior to his execution and that he should instead be required to assume that the State would use the procedures revealed in litigation six years earlier in *Sims v. State*, 754 So.2d 657 (Fla. 2000). *See* U.S. Br. 26 n.9. That contention cannot be squared with this Court's ripeness doctrine.

The "central concern" of the ripeness doctrine "is whether the case involves uncertain or contingent future events that may not occur as anticipated." 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3532, at 112 (2d ed. 1984). Accordingly, the ripeness inquiry looks to whether a sufficiently concrete and definitive agency policy or practice exists. Otherwise, judicial intervention would "den[y] the agency an opportunity to correct its own mistakes and to apply its expertise." *FTC v. Standard Oil Co.*, 449 U.S. 232, 242 (1980). As this Court has explained in the analogous context of federal administrative review,

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[10] *Compare* Fla. Stat. § 828.055 (requiring the Board of Pharmacy to adopt rules for permits authorizing the use of chemicals in animal euthanasia, which "shall set forth guidelines for the proper storage and handling" of the chemicals); *id.* § 828.058 (requiring training for animal euthanasia technicians involving a curriculum approved by the Board of Veterinary Medicine).

> [T]he ripeness requirement is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726, 732-33 (1998) (citation omitted).

Here, rather than promulgate a definitive policy, the DOC has retained total discretion. For this reason, it was only when Mr. Hill's execution was imminent that he could attempt to ascertain what procedures would be used to execute him. Significantly, the DOC even then refused to disclose its execution protocol, and Florida's lawyers successfully opposed Mr. Hill's efforts to obtain the protocol through public-records requests and other state-court discovery procedures, which requests the Florida Supreme Court did not finally deny until January 17, 2006. *See* Pet'r Br. 8-9. The State cannot fight tooth and nail to resist publication of any definitive protocol and then accuse a condemned person of inequitable conduct because he must wait until his death warrant is issued to ascertain the particular procedures that will be used in his execution.

The State could, however, secure an earlier resolution of any challenges to its execution procedures simply by the orderly adoption of rules and their public disclosure. The DOC could then properly insist that the question whether its chosen procedures for administering lethal injection violate the Eighth Amendment be adjudicated before any individual inmate's date of execution is set.

Given the lack of *any* constraints on the DOC's discretion and the absence of any authoritative procedures that would

have provided the courts with a sufficiently concrete lethal injection process to review before Mr. Hill's execution warrant issued and the DOC began its preparations to execute him, Mr. Hill's claim did not ripen until that time. And from that moment forward, Mr. Hill diligently pursued his claim. Mr. Hill initially filed suit in state court, in order to defend against an argument that he had failed to exhaust state remedies.[11] As soon as his action was dismissed on procedural grounds in state court, he immediately filed his § 1983 action.

III. MR. HILL CANNOT BE DENIED A FORUM ON THE THEORY THAT HIS SUIT SHOULD BE RECHARACTERIZED AS A SUCCESSIVE HABEAS PETITION.

There is also no merit to the contention by respondents and some of their *amici* that Mr. Hill's § 1983 complaint would be subject to dismissal as a "second or successive" habeas petition if it were recharacterized as a habeas pleading. Thus, even apart from *Nelson v. Campbell*, there is no conceivable justification for concluding that his § 1983 claim is an impermissible end-run around the limitations on habeas jurisdiction.

1. To begin with, the suggestion of the United States that this question ought not be considered by the Court is indefensible. Respondents did not raise any objection to its consideration and fully briefed the question (as did the State *amici*). That should be dispositive. *Cf. City of Springfield v. Kibbe*, 480 U.S. 257, 260 (1987) (refusing to reach claim

[11] Although Mr. Hill was not required to exhaust state-court remedies prior to bringing his federal-court action under § 1983, *see Dotson*, 125 S. Ct. at 1249, he did so out of an abundance of caution, recognizing that if the district court were to construe his complaint as a habeas filing, he *would* have had to exhaust those judicial remedies, *see* 28 U.S.C. § 2254(b)(1)(A).

only because respondent objected "at the first point that she was on notice that it was at issue"). In any event, both the district court and the Eleventh Circuit squarely addressed the question below. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). The district court held that the petition was "the functional equivalent of a successive petition for writ of habeas corpus" and that petitioner "should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition." J.A. 15. The court of appeals affirmed, holding that "the district court lacked jurisdiction to consider [Mr. Hill's] claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it." J.A. 10.

Moreover, the issue was fairly presented in the petition for certiorari. The petition characterized the Eleventh Circuit as holding that "[a]ny challenge amounts to a successive habeas petition," Pet. at 14-15, and it quoted the court of appeals' holding that Mr. Hill's claim was successive, *see id.* at 14-15.

Finally, this issue is "inextricably linked" to the questions that all concede are presented. Invoking *Preiser*, respondents and the United States contend that Mr. Hill's § 1983 claim should be foreclosed because it is an attempt to avoid the restrictions on habeas jurisdiction. That contention invites inquiry into whether in fact the claim would be precluded in habeas. Thus, there is no justification for refusing to conduct the inquiry. *See Missouri v. Jenkins*, 515 U.S. 70, 84-86 (1995); *cf. City of Sherrill v. Oneida Indian Nation of N.Y.*, 125 S. Ct. 1478, 1490, n.8 (2005); *Ballard v. Commissioner*, 125 S. Ct. 1270, 1275, n.2 (2005).

2. On the merits, lacking any case law to support their position, respondents and the United States contend first that Mr. Hill's claims are barred by the plain language of AEDPA. Specifically, they assert that because Mr. Hill's claim is "successive," it must satisfy both conditions set forth

in § 2244(b)(2)(B), *i.e.*, that the factual predicate for the claim could not have been discovered previously and that the claim must demonstrate Mr. Hill's innocence. *See* U.S. Br. 21-22; Fla. Br. 34-36. But that argument assumes its conclusion. AEDPA's textual conditions apply only to "second or successive" petitions. They do not define (or even purport to define) what constitutes a second or successive petition.

Slack and *Martinez-Villareal* make that distinction clear. In neither case could the habeas petitioners satisfy *either* condition of § 2244(b)(2)(B). Yet the Court allowed the claims to proceed, holding that the petitions at issue, although numerically second or successive, were not "second or successive" within the meaning of AEDPA. In *Slack*, the Court held that "[a] petition filed after a mixed petition has been dismissed under *Rose v. Lundy* before the district court adjudicated any claims is to be treated as 'any other petition' and *is not a second or successive petition*." 529 U.S. at 487 (emphasis added). Similarly, the Court held in *Martinez-Villareal* that "respondent's *Ford* claim *was not a 'second or successive' petition* under § 2244(b)." 523 U.S. at 645.

These decisions are dispositive of the question whether Mr. Hill's claim is "second or successive" within the meaning of AEDPA. Although the United States is correct that those cases did not technically decide the precise issue presented here, they leave no doubt about how the issue here should be resolved. *Martinez-Villareal* permits the adjudication of a claim that ripened only after the first federal petition was denied. The United States suggests that the Court simply held that petitioner was entitled to an adjudication of all the claims presented in his first petition. That is not accurate. The petitioner in *Martinez-Villareal* received an adjudication of all claims in his first petition – the *Ford* claim was properly dismissed as unripe. What the Court actually held was that petitioner was entitled to a re-

adjudication of his claim on the merits once it had ripened, which is all that Mr. Hill seeks here.

Slack likewise did more than merely hold that a petition re-filed after dismissal of a so-called "mixed" petition is not a "second" petition – it also adopted pre-AEDPA case law as the base-line for defining "second or successive." Justice Kennedy's opinion stated unambiguously that "[t]he phrase 'second or successive petition' is a term of art given substance in our prior habeas corpus cases," 529 U.S. at 486, and neither the United States nor Florida contends that, under this Court's "prior habeas corpus cases," Mr. Hill's petition would be successive. It is thus unsurprising that the courts of appeals have consistently relied on *Martinez-Villareal* and *Slack* to reject the precise position the United States advances here. *See* Pet'r Br. 35-36. *Cf. Johnson v. United States*, 125 S. Ct. 1571, 1579 (2005) (rejecting an interpretation of AEDPA under which "the statute of limitations may begin to run (and even expire) before the § 2255 claim and its necessary predicate even exist").

Even if *Slack* and *Martinez-Villareal* left any doubt on the matter, there is little to recommend the approach advanced by the United States (and, as noted, no case law to support it). On this view, to avoid forfeiting federal review of an Eighth Amendment claim every habeas petitioner must include in his first federal petition a challenge to every conceivable method of execution. Thus, Mr. Hill would have to have challenged not only the gas chamber, hanging, and lethal injection (even though electrocution was Florida's chosen method of execution), but also (for example) every possible combination of chemicals that could be used to implement lethal injection, or risk having all of those challenges lost forever. Similarly, every prisoner, whether mentally competent or not, would have to raise a plainly unripe *Ford* claim to guard against the possibility that he or she will become incompetent by the time of his execution

(when the claim first ripens). And prisoners would have to anticipate a host of other claims that might arise after first federal habeas was over, such as claims under *Brady v. Maryland*, 373 U.S. 83 (1963), which often arise after initial federal habeas proceedings are completed (*see, e.g.*, *Banks v. Dretke*, 540 U.S. 668 (2004)). Why Congress would have wanted to clutter first federal habeas petitions with such an array of hypothetical and unripe claims as a precondition for their later adjudication once they had ripened is never explained.

Moreover, as noted in Mr. Hill's opening brief, such an argument is at odds with this Court's prior understanding of second or successive petitions, which does not require the futile act of filing an unripe claim merely to preserve it for later. Pet'r Br. at 33-34. The United States chides Mr. Hill for relying on those pre-AEDPA decisions, but (as noted above) this Court squarely held that AEDPA used "second or successive petition" as a "term of art" that drew substance from "our prior habeas corpus cases." 529 U.S. at 486. Given that AEDPA itself contains no definition of "second or successive," it is hardly surprising that the Court looked to its prior decisions.

In truth, respondents and the United States do not seek to apply *Slack* and *Martinez-Villareal* faithfully, but instead seek to repackage the dissents in those cases as the holdings of the Court. But the Court squarely rejected the contention that all claims that are numerically second or successive are governed by AEDPA's rules for "second or successive" petitions and adopted a more flexible understanding informed by pre-AEDPA case law. Congress could have overturned that interpretation if it had wanted to do so, but it has not. There is no basis for departing from those decisions now.

3. Bereft of a convincing argument to support the Eleventh Circuit's dismissal of Mr. Hill's habeas petition on jurisdictional grounds, the United States – but not

respondents – urges this Court to dismiss the claim as barred by AEDPA's statute of limitations. *See* U.S. Br. 24-27 (invoking 28 U.S.C. § 2244(d)(1)). That position, which has not been raised by any court or party throughout this litigation, provides no basis for resolving the petition here.

The limitations defense is not jurisdictional. It is an affirmative defense that ordinarily must be pled and is subject to waiver. The State has not raised the defense at any stage of this case. It would be altogether inappropriate for this Court to take up the defense at the request of an *amicus* when the State has chosen not to raise it.[12]

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[12] In *Day v. McDonough*, 04-1324 (argued Feb. 27, 2006), this Court is considering a district court's authority to dismiss a habeas petition on limitations grounds even when the State has waived the issue. Should the petitioner in *Day* prevail, the argument of the United States here would necessarily fail as well.

But even if a court *may* in some cases dismiss on limitations grounds in the face of a State's waiver, it would be inappropriate for this Court to exercise that sort of discretion in the first instance on the present record. Among other things, limitations defenses such as those raised by the *amicus* often turn on an intensely factual analysis. *Compare* Pet'r Br. at 45-50, *Day v. Crosby*, No. 04-1324 (U.S. filed Nov. 30, 2005) (no disputed facts with respect to tolling of limitations provision). Mr. Hill's case, for example, presents a strong case for equitable tolling, which the courts of appeals have agreed applies to AEDPA's limitations provisions. When there are facts to be determined and equities to be weighed, resolution by this Court on a motion to dismiss is inappropriate, particularly when neither party has fully briefed the issue. *See Lance v. Dennis*, 126 S. Ct. 1198, 1203 (2006) (per curiam) (reversing jurisdictional holding but remanding for district court to address preclusion arguments in the first instance); *id.* (Ginsburg, J., concurring) (noting that preclusion is "best left for full airing and decision on remand").

In any event, the statute of limitations does not justify dismissal, for reasons discussed earlier in this Reply. In Mr. Hill's situation, "the date on which the factual predicate of the claim . . . presented could have been discovered through the exercise of due diligence," § 2244(d)(1)(D), is the same as the date on which the claim ripened: the date when Mr. Hill's execution warrant issued. Mr. Hill's claim was thus timely when filed, and § 2244(d)(1)(D) affords no basis for dismissing the petition.

CONCLUSION

The decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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