Case No. 05-8794

IN THE SUPREME COURT OF THE UNITED STATES

CLARENCE HILL, *Petitioner*,

v.

JAMES McDONOUGH, Interim Secretary,
Florida Department of Corrections, *Respondent*,

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

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

I. 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.

II. Whether, under this Court's decision in *Nelson v. Campbell*, 541 U.S. 637 (2004), 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.

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OPINIONS BELOW

The district court decision in *Hill* was captioned as *Hill v. Crosby*, Case No. 4:06-cv-032-SPM (N.D. Fla. Jan. 21, 2006). It is reproduced at J.A. 11. The panel decision from the Eleventh Circuit Court of Appeals was reported as *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006). It is reproduced at J.A. 9.

JURISDICTIONAL STATEMENT

The Eleventh Circuit entered the final judgment below on January 24, 2006. Petitioners filed the petition seeking certiorari on January 24, 2006, and the Court granted certiorari on January 25, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED: CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves two sets of federal statutes. The first is 42 U.S.C. §1983, which states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 . . ..

The other relevant statutes are the federal habeas corpus laws, 28 U.S.C. §§ 2241 through 2254.

STATEMENT OF THE CASE

A. Introduction

The questions presented concern the unanswered query in *Nelson v. Campbell*, 541 U.S. 637 (2004), whether §1983 can be used to challenge the method of execution regularly used by the state or whether such challenges must be brought in habeas. At issue is what federal forum is appropriate and available for a state prisoner who challenges the general method for carrying out a lethal injection execution.

The Eleventh Circuit properly found that Hill's suit for declaratory and "permanent injunctive relief barring execution" under 42 U.S.C. §1983, arguing "that death by lethal injection causes pain and unnecessary suffering and thus constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments, is the 'functional equivalent' of a successive habeas petition."[1] Such suits brought as §1983 complaints are governed by federal habeas corpus jurisprudence because, no matter how it is styled, the end result is that whenever a state prisoner attacks the usual means or method of execution, he is directly or indirectly challenging the enforcement of an otherwise valid death sentence. Nothing in any of the Court's governing jurisprudence holds to the contrary.

Clarence 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." Pet. Br. 17. Following denial in state judicial proceedings of his constitutional challenge to be free of cruel and unusual punishment under the Eighth Amendment, Hill proceeded to

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[1] *Hill v Crosby*, 437 F. 3d 1084 (11th Cir. 2006).

federal court via a last-minute §1983 complaint "modeled on the one this Court approved in *Nelson v. Campbell*, 541 U.S. 637 (2004)." Pet. Br. 2. In adjudicating Hill's eleventh hour filing, the Eleventh Circuit Court, in *Hill v. Crosby*, 437 F.3d 1084 (11th Cir. 2006), held that because his case was a habeas-equivalent, the district court's finding, that it was without jurisdiction pursuant to 28 U.S.C. §2244(b), was proper and affirmed. Relying on *Nelson*, Hill presently submits that his §1983 challenge "falls squarely within the ambit of *Nelson*." Pet. Br. 3. *Nelson* itself strongly suggests otherwise.

Alternatively, for the first time, Hill now characterizes his suit either as an "original habeas petition" or an exception to habeas procedures and argues that the Eleventh Circuit erred in deeming his claim the "functional equivalent" or a "second or successive" petition. Arguing a lack of redress, Hill's contention is that his "claim was not ripe for presentation or judicial consideration" because the current execution method was not adopted until 2000 "after the denial of Hill's federal habeas was final," and therefore based on favorable language found in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), and *Slack v. McDaniel*, 529 U.S. 473 (2000), he is also entitled to federal habeas corpus consideration. Pet. Br. 34. He is in error.

B. Factual Background

Hill was convicted of the first degree murder of Officer Stephen Taylor and sentenced to death in 1983. On October 19, 1982, Clarence Hill and his accomplice, Cliff Jackson, stole a pistol and an automobile in Mobile, Alabama, which they later used to rob a savings and loan association in Pensacola. During the robbery, the police arrived, and Hill and Jackson fled the savings and loan building from different exits. The police immediately apprehended Jackson, who had exited through the front door. Hill, who had fled out the back door, approached two officers from behind as they attempted to handcuff Jackson. Hill

shot the officers, killing one and wounding the other. Hill was convicted of first-degree murder, attempted first-degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony.

In 1985, the Florida Supreme Court affirmed the murder conviction but vacated the death sentence. *Hill v. State*, 477 So.2d 553 (Fla. 1985). Hill again received a death sentence at his 1986 resentencing. The Florida Supreme Court affirmed that sentence. *Hill v. State*, 515 So.2d 176 (Fla. 1987), *cert. denied*, 485 U.S. 993 (1988). An initial death warrant was signed in November 1989, and Hill commenced collateral litigation in the state courts and then moved to federal court. The state courts denied all relief, but in January 1990, the federal district court entertaining Hill's federal petition granted a stay of execution, based on a plethora of issues, none of which challenged the method of execution. Finally, in 1992, the district court granted in part federal habeas relief, finding the state trial court and the Florida Supreme Court failed to conduct a proper harmless error inquiry when reweighing the aggravating factors supporting the death sentence after one of the factors was invalidated. The district court remanded the case to the state appellate court where the Florida Supreme Court reopened the appeal, reweighed the aggravating and mitigating factors, and affirmed Hill's death sentence. *Hill v. State*, 643 So.2d 1071 (Fla. 1995). Hill again sought federal habeas corpus relief in the district court from the reimposed death sentence. The district court denied relief and the Eleventh Circuit subsequently affirmed. *Hill v. Moore*, 175 F.3d 915 (11th Cir. 1999), *cert. denied*, 528 U.S. 1087 (2000).

During this time period, the Florida Legislature changed Florida's method of execution, making lethal injection the presumptive method of execution.[2]

Immediately following enactment of the statute, a number of Florida capital inmates contested the validity of this change to lethal injection on a variety of grounds including specific complaints about "the drugs to be used" and "the potential problems resulting from their use." The Florida Supreme Court, in *Sims v. State,* 754 So.2d 657 (Fla. 2000), rejected a full-scale assault on Florida's lethal injection method, based on detailed findings that the protocols and procedures authorizing lethal injections were proper. *Sims v. State*, *Id*., 665 n.17 (Fla. 2000).[3]

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[2] §922.105(1) Fla. Stat. reads in material part:

(1) A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution.

§922.105(2), Fla. Stat. further provides that persons similarly situated to Hill, shall have 30 days from the effect of the act "to make an election" as to method–if no election is made then the method shall be by lethal injection.

[3] The state record discussed in *Sims,* 754 So.2d at 666, notes that Sims obtained a copy of the "Execution Day Procedures" created by the Florida Department of Corrections (DOC) on January 28, 2000, including the drugs used and how they would be delivered. The *Sims* record showed DOC disclosed to Sims on February 7, 2000, what chemicals were to be used during an execution. The testimony at Sims' evidentiary hearing revealed that after being placed on a heart monitor, "[T]he inmate will then be injected with two IV's containing saline solution. He will then be escorted into the execution chamber where the witnesses will be able to view the execution." "...A pharmacist will prepare the lethal substances. In all, a total of eight syringes will be used, each of which will be injected in a consecutive order into the IV tube attached to the inmate. The first two syringes will contain "no less than" two grams of sodium pentothal, an ultra-short-acting barbiturate which renders the inmate unconscious. The third syringe will contain a saline solution to act as a flushing agent. The fourth and fifth syringes will contain no less than fifty

No subsequent decision has declared otherwise. And Hill has not provided any.

Although the Florida Supreme Court's decision in *Sims* provided Hill the wherewithal to attack the method and means in which Florida's execution process is carried out, Hill took no advantage of either the state or federal courts to address his

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milligrams of pancuronium bromide, which paralyzes the muscles. The sixth syringe will contain saline, again as a flushing agent. Finally, the seventh and eighth syringes will contain no less than one-hundred-fifty milliequivalents of potassium chloride, which stops the heart from beating. Each syringe will be numbered to ensure that they are injected into the IV tube in the proper order. A physician will stand behind the executioner while the chemicals are being injected. The physician's assistance (sic) will also observe the execution and will certify the inmate's death upon completion of the execution." Evidence was also presented that "these procedures were created with the purpose of 'accomplishing our mission with humane dignity [while] carrying out the court's sentence.'"

The Florida Supreme Court further found that:

> On the issue of dosage, a defense expert admitted that only one milligram per kilogram of body weight is necessary to induce unconsciousness, and that a barbiturate coma is induced at five milligrams per kilogram of body weight. Thus, two grams of sodium pentothal (i.e., 2000 milligrams) is a lethal dose and certain to cause rapid loss of consciousness (i.e., within 30 seconds of injection). The expert further stated that muscle paralysis occurs at .1 milligram of pancuronium bromide per kilogram of body weight. Thus, fifty milligrams of pancuronium bromide far exceeds the amount necessary to achieve complete muscle paralysis. Finally, the expert admitted that 150 to 250 milliequivalents of potassium chloride would cause the heart to stop if injected quickly into the inmate and that an IV push would qualify as "quickly."

concerns[4] prior to his December 2005. Clearly his claim became ripe during the 2000-2005 period prior to the November 29, 2005 death warrant.[5]

Hill now assumes that "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.

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[4] Under Florida Rule 3.851(e)(2)(C), Fla.R.Crim.P., a capital defendant may file a successive postconviction motion "if based upon newly discovered evidence...." Newly discovered evidence is evidence that was not known at the time of trial by the court, the party, or counsel, and "it must appear that the defendant or his counsel could not have known [of it] by the use of diligence." *Jones v. State*, 591 So.2d 911, 916 (Fla. 1991) (quoting *Hallman v. State*, 371 So. 2d 482, 485 (Fla. 1979)), and the nature of the evidence must be such that on retrial it would probably produce an acquittal (either guilt or sentence). *Id*. at 915. *Robinson v. State*, 865 So.2d 1259, 1263 (Fla. 2004). In *Sims*, Sims filed a third 3.850 motion arguing that newly discovered evidence establishes his innocence. He also challenged the retroactive application of the recent legislative change to execution by lethal injection and the constitutionality of lethal injection.

Additionally, in *Hill v. State*, 904 So.2d 430 (Fla. 2005), the Florida Supreme Court summarily denied Hill's 2003 "second" postconviction motion which raised a *Ring v. Arizona* 536 U.S. 584 (2002), claim. Hill certainly had the opportunity in that litigation to raise his challenge to Florida's method of execution. He did not.

And nothing barred Hill from raising a state civil rights action as to the change in method of execution, *Black v. Rouse,* 587 So.2d 1359 (Fla. 1991) (State civil rights action where defendant claimed that prison officials violated his Eighth Amendment rights by providing him with inadequate medical treatment), or prevented Hill from filing a federal §1983 suit in 2000, or including that issue in his application to file a successive habeas as to his *Atkins* and *Roper* claims filed in the Eleventh Circuit in *In re Hill*, 437 F.3d 1080 (11th Cir. 2006).

[5] Florida has had sixteen (16) executions by lethal injection in the interim, from January 2000 to December 2005.

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*, 438 F.3d 926 (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)." Pet. Br. 8. Based on the aforenoted, he argues in his brief on the merits, that these cases are compelling. These cases were not decided at the time Hill sought §1983 review in federal court,[6]

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[6] In 2000, in *Sims*, 754 So. 2d at 666, n. 18, a multifaceted Eighth Amendment attack as to lethal injection was made:

"This claim includes several subissues: (1) lethal injection can be cruel and unusual punishment based on the number of reported problems in correctly administering such executions around the country; (2) the lack of written guidelines for carrying out lethal injection constitutes cruel and unusual punishment because the participants may not know what to do if a problem occurs; (3) the participants to the execution do not know what their function is; (4) under the protocols, the DOC intends to give the inmate his last meal an hour before the execution which contradicts standard anesthesia protocols on the consumption of food and fluids prior to administering sodium pentothal; (5) the testimony at the hearing conflicts with the written protocol on the procedure to be followed if the inmate does not die after the initial series of injections; (6) the written protocols conflict with state law concerning the witnesses to the execution; (7) the lack of specific protocols subjects Sims to a risk of pain, torture and degradation in violation of Eighth Amendment; (8) the act violates the separation of powers clause because (a) it unlawfully delegates to the DOC the power to determine and administer the lethal substances without explanation, standards or guidelines and (b) it gives the DOC the power to determine whether the method of execution has been elected or defaulted. Subissues (1) through (7) relate to the lack of specific written details about the execution procedures, the chemicals to be administered and the roles of the persons who will be carrying out the

and they are not based on the same evidence as the case Hill presented in state and federal district court, which raised only the April 2005 LANCET research letter as "newly discovered evidence."

C. Proceedings Below

On November 29, 2005, the Governor of Florida signed a new death warrant setting Hill's execution for January 24, 2006. Hill sought public records pursuant to Rule 3.852(h)(3), Fla.R.Crim.P.[7] from a plethora of state agencies including the Department of Corrections, (hereinafter referred to as "Department") seeking "all information that in any way" is related to the method the Department uses to carry out the execution, and information on the drugs administered, the dosages, and the order the drugs are administered. The Department provided information mandated by Florida's criminal rule of procedure governing the release of records during an active warrant and declined to provide records not in its possession.

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execution."

[7] Rule 3.852(h)(3), Fla.R.Crim.P. provides in material part:

> (3) Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency from which collateral counsel has previously requested public records. A person or agency shall copy, index, and deliver to the repository any public record:
>
> (A) that was not previously the subject of an objection;
> (B) that was received or produced since the previous request; or
> (C) that was, for any reason, not produced previously.

Pursuant to the trial court's scheduling order, Hill filed his third, successive state postconviction motion on December 15, 2005, which included an Eighth Amendment challenge to the particular drugs used in Florida's execution procedures. The trial court denied Hill's Eighth Amendment claim as procedurally barred, as well as Hill's public records request. The Florida Supreme Court affirmed in *Hill v. State*, 2006 Fla. LEXIS 8, * 7-8 (Fla.), *cert. denied*, 2006 U.S. LEXIS 1909 (2006), holding that as to Hill's Eighth Amendment claim:[10]

> The trial court in this case correctly determined that this study does not entitle Hill to relief. As it clearly admits, the study is inconclusive. It does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render the inmate unconscious. *Sims*, 754 So.2d at 665 n.17.

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[10] The Florida Supreme Court found that Hill was satisfied with the responses to his demands for additional public records under Fla.R.Crim.P. 3.852(h)(3), however, the Court concluded the trial court was correct in denying Hill's non-specific demands made to three state agencies, including the Department of Corrections to produce "all information that in any way related to public execution," because they were untimely and fell outside the public records rule or because these claims were overly broad and unrelated to a colorable claim. *Moore v. State*, 820 So.2d 199, 204 (Fla. 2002) (recognizing that a trial court has discretion to review public records requests that are "overly broad, of questionable relevance, and unlikely to lead to discoverable evidence"). "The record supported the trial court's finding. Hill's requests were much broader than necessary to obtain information necessary to correlate the lethal injection study to Florida." *Hill,* 2006 Fla. LEXIS 8, *12 (Fla. 2006)

What Hill sought was not only every document in any way related to public executions, but also any and all documents relating to the sixteen (16) prior executions by lethal injection since 2000, including autopsy reports and other medical information. Many, if not all, are not kept by the Department, and the Department was not the custodian of the records.

> Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect. n4 And, in *Sims*, we rejected the claim that the mere possibility of technical difficulties during executions justified a finding that lethal injection was cruel and unusual punishment. *Id*. at 668. Therefore, we affirm the trial court's denial of this claim without an evidentiary hearing.

On January 20, 2006, Hill filed a 42 U.S.C. §1983 complaint challenging "the particular execution procedures the State intended to use," urging that these procedures "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." J.A. 21. Hill sought a preliminary injunction prohibiting execution until his Eighth Amendment claim could be adjudicated, and a "permanent injunction[] barring defendants from executing Plaintiff in the manner they currently intend." J.A. 22. Hill expressly stated that he "is not challenging the statutory provision which allows for lethal injection as a method of execution" and was careful to "neither allege nor imply" that the State lacked the authority to execute him under a "different and lawful" method. Moreover, Hill made no offer as to what he perceived would be an acceptable alternate or different and lawful method.

On January 21, 2006, the district court found that under *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004), and *In re Provenzano*, 215 F.3d 1233 (11th Cir. 2000), 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 district court dismissed the claim for

lack of subject matter jurisdiction because Hill had not complied with filing requirements regarding a successive petition per 28 U.S.C. §2244(b).

The Eleventh Circuit affirmed the district court on January 24, 2006, finding Hill's complaint sought "a permanent injunction barring his execution," J.A. 9, and agreed that Hill's §1983 was properly recharacterized as a successive habeas petition and therefore dismissible for lack of subject matter jurisdiction. Hill sought certiorari review and the Court granted review and a permanent stay on January 25, 2006.

SUMMARY OF ARGUMENT

The instant suit brought as a §1983 complaint is governed by federal habeas corpus jurisprudence because the end result is that whenever a state prisoner, like Hill, attacks the usual means or method of execution, he is directly or indirectly challenging the enforcement of an otherwise valid death sentence. Nothing in any of the Court's governing jurisprudence holds to the contrary.

The Court is being asked to clarify the line separating those claims that state prisoners may advance under §1983 from those they may not. Congressional intent and precedent dictate that a prisoner cannot use §1983 as a vehicle to collaterally attack claims that "necessarily imply the invalidity of" state court sentences, here, the method a state normally uses to perform lawful lethal injection executions. Hill's challenge to Florida's general method of execution sounds in habeas, rather than §1983, and that is where Hill is required to pursue his claims.

ARGUMENT

I. 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.

The answer is yes. Where a prisoner's claim falls squarely within the traditional scope of habeas corpus, habeas corpus is the exclusive federal vehicle for advancing that claim. Any §1983 challenge to an impending execution qualifies as falling within the traditional scope of habeas corpus and must be dismissed and brought as a habeas corpus action.

While Hill's claim is likely without merit to warrant relief, he is by no means without a federal forum within which to seek review.[11] State prisoners have two principal avenues for relief in federal courts: habeas corpus and §1983, each providing distinct remedies but with a common thread that each must raise

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[11] Hill asserts he did not have the wherewithal to adjudicate *"any* challenge to lethal injection" in any prior pleading or occasion – "much less the specific narrow challenge he raises to the particular procedures" the State proposes to use, because he "cannot raise the claim in a federal habeas corpus pursuant to 28 U.S.C. §2254 – because under the circuit's law, it is automatically deemed a second or successive petition and subject to immediate dismissal on that basis." Pet. Br. 15. Likewise, he argues 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)." Pet. Br. 15.

violations of a constitutional right. By focusing on the substantive grounds upon which claims arise and the relief sought, the Court has differentiated habeas petitions from §1983 complaints. While acknowledging there are many claims and forms of relief exclusively the province of habeas corpus and others more appropriately brought by way of §1983 actions, Hill has selectively chosen a course of litigation that seeks to ensnarl both.

Hill's tactics in filing a last-minute stay request in order to "perfect his §1983 complaint" instead of seeking authorization to file a habeas corpus petition, exposes his effort to sidestep habeas review predicated on having no available habeas remedy. He urges the Court to sanction an exception to federal habeas, suggesting that §1983 should fill any defects in the habeas statute's remedial scheme, but nowhere explains why his claims and the relief sought are inappropriate to habeas. Rather, he postulates that because habeas corpus does not provide him relief, §1983 must. The Court has never held that §1983 is an alternative to habeas, if the latter is unavailable.

Hill's §1983 complaint is woefully inadequate in its development of a valid claim as to the "means not method," and in fact, Hill would not prevail in any civil rights complaint. Hill has no excuse for his dilatory filing and cannot assume he has successfully pled his deficiencies away. However, and more to the point, the fact that he would not prevail should not cloud the more important issue: under Hill's theory, §1983 provides an open-ended format in lieu of proceedings in capital cases governed by particular rules in §2254 context, thereby undercutting Congressional intent and goals as to deference to state court findings and finality in judgments and ignoring the Court's jurisprudence regarding the exclusivity of habeas relief as to issues of the fact or length of sentence.

Under §1983, unlike habeas, prisoners only have minimum requirements for exhaustion; indeed, "exhaustion of state remedies is [generally] not a prerequisite to an action under §1983, even an action by a state prisoner." *Heck*, 512 U.S. at 480, and Hill never sought to challenge the lethal injection drugs at issue in any state administrative proceedings available. *But see Boyd v. Beck*, 404 F.Supp. 879 (E.D. N.C. 2005) (the court held in this §1983 case, that the state carries the burden of demonstrating that the prisoner has not exhausted.). Moreover, because §1983 has no deference requirement, it means little that Hill went to state court and raised his Eighth Amendment claim on the very facts which he relies on in federal court. *See* 28 U.S.C. §2254(d)(2) (state-court factual determination must stand unless "unreasonable"). Hill asserts presently that he is not challenging the method of execution *per se*, (although his state litigation speaks otherwise), yet there is no basis for the federal courts under §1983 to quiz him as to his most recent change of "theory".[12] And of course the reason he sought §1983 is obvious–he is precluded from filing a second or successive federal habeas. Under §1983, while statutes of limitations may bar litigation, any concept of finality in capital cases is wanting. Nothing prevents Hill from continually modifying his complaint after suffering an adverse ruling on a particular allegation. Even

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[12] The fact that Hill has changed legal theories from his state Eighth Amendment suit to his §1983 complaint is not significant, because it is well established that he is under no obligation to plead legal theories under §1983. *See, e.g.*, *Slaney v. Int'l Amateur Athletic Found.*, 244 F.3d 580, 600 (7th Cir. 2001). The only question is whether Hill's §1983 complaint satisfied the notice pleading standards of Rule 8, Fed.R.Civ.P. and, if the facts he has presented would entitle him to relief under any applicable legal theory. In ordinary civil proceedings, the governing rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," *See* Fed.R.Civ.P. 8(a)(2); and Jack M. Beermann, *Article: The Unhappy History of Civil Rights Litigation, Fifty Years Later,* 34 Conn. L. Rev. 981 (Spring 2002).

if the State were to change its lethal injection protocol to accommodate Hill's preferences, prior to a next execution, he could easily change his three drug cocktail complaint regarding the kind of barbiturate to be used or that the state has failed to properly engage in rule making.[13]

28 U.S.C. §2254 versus 42 U.S.C. §1983–In Principle

The core purpose espoused by Congress in granting federal courts the power to issue a writ of habeas corpus is to authorize any challenge, by a person in custody, regarding the legality of his custody, and to permit him an opportunity to secure release from any illegal custody. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); 28 U.S.C. §2254.[14] Habeas litigation requires

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[13] Most illustrative is the case of *Morales v. Hickman*, 438 F. 3d 926 (9th Cir. February 19, 2006), where the Ninth Circuit approved the district court's handling of Morales's attack as to the drugs used by California in their lethal injection protocols. The district court conditioned the denial on the state's compliance, formulated by the court, regarding two alternative conditions. The state agreed to the second condition which called for the presence of an anesthesiologist to ensure Morales was unconscious during the second and third stages of the lethal injection execution.

While hindsight reveals that the choice selected by the state proved problematic, no time was wasted in mounting Morales's second wave of attacks–in the Plaintiff's Response to Modification of the Lethal Injection Procedure in *Morales*, filed February 16, 2006, Case Nos. C 06 0219 (JF) and C 06 926 (JF). Not only did Morales complain about the anesthesiologists' qualifications and medical training but, in footnote 1 he chastised the "process" arguing that "[I]ndeed, this new procedure is a gross violation of the State's Administrative Procedures Act...as well as the agencies own regulations.... Time has prevented a review of the Department Operations Manual and other Government Code sections that this may violate."

[14] *See* 28 U.S.C. §2254(d)(1) and (2), as amended 1996, which provides that habeas writs "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings," with two exceptions, consideration of decisions which are "contrary to" or "an

pursuit and exhaustion of all available state remedies. §2254(b)(1)(A). And, more relevant here, AEDPA allows the filing of any successive federal petition under specific, but restricted circumstances, after obtaining leave of court to do so.[15]

The civil action – established by §1983 – was Congress' attempt to redress grievances asserting deprivation of one's constitutional rights. In particular, the Court in *Monroe v. Pape*, 365 U.S. 167, 173-174 (1961), identified §1983 as the avenue with which to "override certain kinds" of discriminatory state statutes and to provide remedies where the state statutes were wanting--either due to "materially inadequate remedies" or "technically adequate, but inadequate remedies in practice". Section 1983 was enacted to provide federal court remedies to circumstances where the "claims of citizens" to enjoy the "rights, privileges, and immunities guaranteed by the Fourteenth Amendment" were abridged by state actors. As recognized in *Heck v. Humphrey*, 512 U.S. 477, 483 (1994), a "species of tort liability" was crafted by Congress, subject to rules governing common law torts, limited only by conventional notions of res judicata and collateral estoppel.

"*Preiser*" versus "*Heck*" –Reality

In *Preiser,* the Court observed that the essence of habeas corpus was to effectuate release. Congress intended habeas to be the appropriate remedy to attack the validity of the fact or length of confinement, and required state prisoners to litigate in habeas instead of §1983 actions because the "specific" habeas statute

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unreasonable application of clearly established Federal Law," or decisions which are "based on an unreasonable determination of the facts in light of the evidence."

[15] *See* 28 U.S.C. §2244(b).

controlled the "broader" wording of §1983. *Preiser*, 411 U.S. at 489.

Preiser established the structural blueprint to evaluate which set of jurisprudence applies. Later decisions, such as *Wolff v. McDonnell*, 410 U.S. 539 (1974), offered more guidance as to where suits should lie. *Wolff* was part of the evolution from *Preiser* to *Heck*, and its analysis was refined by *Heck*. In *Wolff* the Court, in applying the two-fold analysis of *Preiser*,[16] found that Wolff's claims for "both damages and injunctive relief" should be handled thusly: as to any damages complained of, Wolff could proceed under §1983 because relief on damages of an illegal or faulty procedure would not result in habeas-like results; on the other matter, more pertinent here, requesting injunctive relief, the Court held Wolff was barred under *Preiser*, because it would result in immediate habeas-like relief. *Id.* at 555.

Enter *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck* a prisoner is unable to use §1983 where a judgment in his favor would "necessarily imply the invalidity" of a state sentencing decision. Essentially, the Court held §1983 is not available to a prisoner who collaterally attacks a state conviction or sentence, either directly or indirectly. Prisoners cannot secure a federal judgment that directly overturns a state death sentence by seeking an injunction vacating the ability of the state to enforce the sentence. Nor can they secure a federal judgment indirectly premised on a federal declaration finding a state's method of carrying out an execution, for example, sufficiently problematic so as to enjoin the state's ability, even "when a

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[16] *Preiser's* analysis questioned whether an action was an attempt to sidestep habeas requirements by challenging an unsullied conviction and whether, based on a specific factual pattern, the requested basis for redress would mean release from incarceration, and if so, promote "habeas-like" relief.

prisoner does not ask." Under *Heck*, if the federal judgment would "necessarily imply the invalidity" of the state "conviction or sentence," it is irrelevant that the prisoner does not ask the federal court to deliver the ultimate blow. *Heck*, 512 U.S. at 487 .

Heck incorporated and extended *Preiser's* rule,[17] under which prisoners, like Hill, asserting claims that fall within the

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[17] *Preiser* observed that "Congress has made the specific determination . . . that requiring the exhaustion of adequate state remedies," a necessary precondition of habeas relief when claims implicate state sentences, "will best serve the policies of federalism." *Preiser,* 411 U.S. at 492, n.10. Moreover, "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the . . . length of their confinement, and that specific determination must override the general terms of §1983." *Id. Preiser* determined whether a prisoner's claim falls within that universe by examining the relief sought – if he seeks to expedite his release, his claim is within the exclusive control of habeas.

A majority of the Court recognized that *Heck* is similarly rooted in the need to protect the scope of habeas and its attendant exhaustion requirement. The *Heck* majority did explain the "rule purely in §1983 terms without regard to the availability of habeas". See *Heck*,. 512 U.S. at 491 (Thomas, J., concurring) ("Because the Court today limits the scope of §1983 in a manner consistent both with the federalism concerns undergirding the explicit exhaustion requirement of the habeas statute . . . I join the Court's opinion."); *id*. at 499 n.4, 500, 503 (Souter, J., concurring, joined by Blackmun, Stevens and O'Connor, J.J.) ("The proper resolution of this case . . . is to construe §1983 in light of the habeas statute and its explicit policy of exhaustion."). *See also Spencer v. Kemna*, 523 U.S. 1, 20 (1997) (Souter, J., concurring, joined by O'Connor, Ginsburg, and Breyer, J.J.) ("The statutory scheme must be read as precluding such attacks . . . because [*Heck*] was a simple way to avoid collisions at the intersection of habeas and §1983.") (citations and internal punctuation omitted), id. at 21 (Ginsburg, J., concurring), *id*. at 25, n.8 (Stevens, J., dissenting). *But see* Bruce Ellis Fein, *Heck v. Humphrey After Spencer v. Kemna*, 28 New Eng. J.on Crim & Civ. Confinement 1 (2002) (questioning whether a state prisoner ineligible for habeas review should be permitted to bring a civil rights suit that would impugn his conviction, – expounding on Justice Souter's concerns in *Spencer*.).

core of habeas must use habeas rather than §1983, to advance such claims

In *Edwards v. Balisok*, 520 U.S. 641 (1997), the Court held that the precise relief sought by a prisoner is not relevant because *Heck* looks past any federal relief on the merits as it might impact the state decision, even if the prisoner does not expressly ask the federal court to nullify that decision. The Court concluded that the nature of the relief sought in a given case would not remove a claim from any *Heck* bar. Rather, the question was whether the nature of a prisoner's claim was such that any "affirmation of the claim" would imply that a state conviction or sentence was invalid. *Id*. at 645. It mattered not whether a prisoner sought damages or even just a declaratory judgment; if a successful claim would amount to a federal determination the state decision was so error-ridden that it was the type that should not be allowed to stand, the claim was barred in §1983. Claims advanced in *Balisok* – the denial of an opportunity to present a defense, and issues with suspect decision makers – if successful, would mean that the state decision was per se invalid. *Id*. at 647-48. *Clearly*, the claims were barred as "implying invalidity" and the prisoner could not get around this bar merely by choosing a form of relief that would leave the targeted decision formally untouched.

Any doubt was removed in *Muhammad v. Close*, 540 U.S. 749 (2004), when the Court observed that "conditioning the right to bring a §1983 action on a favorable result in state litigation or federal habeas" serves "the practical objective of preserving limitations on the availability of habeas remedies." *Heck* reflects that policy by looking beyond the relief sought, the focus of *Preiser*, and examining the indirect impact a claim may bear on a sentence; in Hill's case, the ability of the State to carry out an otherwise valid death sentence. A claim is barred if it would "necessarily remove" the legal foundation for such a decision, even if it stops short of requesting immediate cession of

enforcement of a sentence. *Heck* itself, which barred a claim "clearly not covered by the holding of *Preiser*," so held. *Heck*, 512 U.S. at 481.

In *Nelson v. Campbell*, 541 U.S. 637 (2004), the Court declined to resolve the issue presently here for review, acknowledging that it had never decided whether a challenge to a particular means of execution could be brought pursuant to §1983 or instead fell within the "core of federal habeas corpus."[18] The Court admonished the district court that if again that court was "confronted with a request for stay of execution, at that time the court would have to determine whether a request to enjoin Nelson's execution, 'rather than merely to enjoin an allegedly unnecessary precursor medical procedure, properly sounds in habeas.'" *Id.* at 648.[19]

Faced with the issue squarely here–Hill simply relies on *Nelson.* However, his reliance is erroneous and *Nelson* does not control. Historically, when a claim meets both the habeas requirements and seeks relief that would yield habeas-equivalent results, that case is a pure "core habeas case," and Hill loses as to

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[18] The Court in remanding suggested that if "the District Court concludes that use of the cut-down procedure as described in the complaint is necessary for administering the lethal injection, the District Court will [then] need to address the broader question, left open here, of how to treat method-of-execution claims generally." *Id.* at 646 (emphasis added).

[19] See Justin B. Shane, *Case Note: United States Supreme Court: Nelson v. Campbell, 124 S. Ct. 2117 (2004),* 17 Cap.Def. J. 107 (Fall, 2004), while agreeing that "[T]he Court limited its holding (in *Nelson*), to §1983 claims that do not necessarily challenge the method of execution." citing *Reid v. Johnson*, 105 F. Appx 500, 503 (4th Cir. 2004), and *Harris v. Johnson*, 376 F.3d 414, 416 (5th Cir. 2004), urged that "attorneys challenging execution procedures after the denial of their clients' federal habeas corpus petitions must propose acceptable alternative execution procedures when framing their §1983 claims in order to avoid the possibility of the court construing the claim as a general method of execution challenge."

his §1983 complaint.[20] Where a claim falls within the "hybrid or grey zone," that is, cases that meet the habeas jurisdictional requirements but do not seek results that have a habeas equivalent yield, Hill also loses because in the final analysis the end result "necessarily implies invalidity of a sentence." *Accord, Muhammad v. Close*, 540 U.S. at 750-751. Hill's claims fall into all of the above-- if he asserts that the drugs used would be cruel and unusual, he has presented a core habeas challenge and any §1983 complaint would be thrown out, and if he argues that the state actors will use drugs that might potentially be cruel and unusual but, if they find an alternative, then that's okay–he has still presented a core habeas challenge to the sentence and any §1983 complaint should be thrown out. *Preiser*, 411 U.S. 500; *Balisok*, 520 U.S. 644.

Hill, like all capital defendants, is in custody and satisfies habeas jurisdictional requirements. His prayer seeks not only a preliminary injunction order to delay his execution, but also calls for a permanent injunction to prevent entirely his execution by lethal injection, like the defendant in *Robinson v. Crosby*, 358 F.3d 1281 (11th Cir. 2004).[21]

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[20] To be sure, there are cases that are purely §1983 cases; those cases, of course, do not meet any of the habeas requirements and seek no relief that yield habeas-equivalent results.

[21] In *Felker v. Turpin*, 101 F.3d 95 (11th Cir. 1996), and *Hill v. Hopper*, 112 F.3d 1088 (11th Cir. 1997), the Eleventh Circuit held that § 1983 challenges to the constitutionality of electrocution as a means of execution were the "functional equivalent" to a petition for habeas corpus and were therefore subject to the procedural requirements governing second or successive petitions. The court's reasoning being that *Heck* states that the relevant inquiry is "whether a judgement in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . ." 512 U.S. at 487. Obviously, if the plaintiff loses, the validity of the conviction or sentence has not been called into question. But *Heck* would be meaningless if the possibility that the plaintiff might lose his §1983 suit were sufficient to establish that the suit does not necessarily imply the invalidity of the

Hill is trying to "get around" state remedies and a habeas outcome.[22] While his claim is described as the "means not the method" challenge, in reality the "means becomes the method." *Heck*, 512 U.S. at 490 (dismissal of a damages claim where claim ultimately challenged the legality of the conviction.). Moreover, the Court has not yet endorsed the proposition that a civil rights action is the appropriate vehicle for litigating and eliminating any potential risk of human error associated with a general method of execution on the eve of that execution. *Nelson*, 541 U.S. at 642-643; *Lonchar v. Thomas*, 517 U.S. 314, 329 (1996); *Gomez v.*

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conviction or sentence. That is why the *Heck* inquiry considers the effect on the conviction and sentence if the plaintiff is successful. If the *Felker* and *Hill* prisoners were successful--in other words, if the court determined that electrocution was an unconstitutional means of execution--it would "necessarily imply" the invalidity of their sentences of death by electrocution. Accordingly, under *Heck*, a §1983 suit does not lie in those cases.

[22] Hill did challenge the constitutionality of Florida's lethal injection method in the state postconviction litigation asserting that newly discovered evidence had come to light in a recently published (April 2005) research letter in The LANCET, which questioned the utilization of the drug protocols in carrying out a lawful execution. Although this research letter did not involve any Florida executions, Hill reasoned that the examples used therein were close enough to the protocol used in Florida and therefore compelling. The Florida Supreme Court held, in *Hill v. State*, 2006 Fla. LEXIS 8, 31 Fla.L.Weekly S31, S32 (Fla.) *cert. denied*, 2006 U.S. LEXIS 1909 (2006), that Hill's cruel and unusual punishment argument was wanting. "...Hill's claim is that a research letter published in April 2005 in The Lancet presents new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. *See* Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 Lancet 1412 (2005). He supports this claim with an affidavit from one of the study's authors, Dr. David A. Lubarsky, asserting that Florida's procedure is substantially similar to the procedures used in the other states evaluated in the study. Hill ultimately asserts that the information in this study is new information not previously available to this Court when it decided *Sims v. State*, 754 So.2d 657 (Fla. 2000). The trial court denied this claim. We agree."

United States Dist. Court, 503 U.S. 653, 653-54, (1992). Seeking to enjoin a scheduled execution based on such risks is in substance "a challenge seeking to interfere with the sentence itself, and thus is properly construed as a petition for habeas corpus." *In Re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997); *Nelson*, 541 U.S. 647.

Even if Hill's case, as pled, meets the habeas jurisdictional requirements but does not seek habeas-equivalent yield, it seems this is where Justice Thomas' concurrence in *Heck* identified the elephant in the room-- "...it is we who have put §1983 and the habeas statute on what Justice Souter appropriately terms a 'collision course... .' . . .Given that the Court created the tension between the two statutes, it is proper for the Court to devise limitations aimed at ameliorating the conflict, provided that it does so in a principled fashion." *Heck*, 512 U.S. at 91. Believing *Heck* had done so, Justice Thomas commented because, "the Court today limits the scope of §1983 in a manner consistent both with the federalism concerns undergirding the explicit exhaustion requirement of the habeas statute, *ante*, at 483, and with the state of the common law at the time §1983 was enacted, *ante*, at 484-486, and n. 4, I join the Court's opinion." *Id.* at 491.

In *Wilkinson v. Dotson*, 544 U.S. 74 (2005), the Court again wrestled with the question–holding that "civil tort actions are not appropriate vehicles for challenging the validity of an "outstanding criminal judgment," and in sum found, based on the torturous history that preceded it, "...*Balisok,* like *Wolff,* demonstrates that habeas remedies do not displace *§1983* actions where success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement. These cases, taken together, indicate that a state prisoner's *§1983* action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal

prison proceedings) – *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration."[23]

The Court found in *Wilkinson* that defendants Dotson (challenging parole eligibility proceedings) and Johnson (challenging parole-suitability proceedings) both presented claims which "would not inevitably lead to release." Embracing this outcome, Justice Scalia, in concurring, observed:

> Finally, I note that the Court's opinion focuses correctly on whether the claims respondents pleaded were claims that may be pursued in habeas--not on whether respondents can be successful in obtaining habeas relief on those claims. *See, e.g.*, *ante*, at ____, 161 L. Ed. 2d, at 262. Thus, for example, a prisoner who wishes to challenge the length of his confinement, but who cannot obtain federal habeas relief because of the statute of limitations or the restrictions on successive petitions, *§§2244(a), (b), (d)*, cannot use the unavailability of federal habeas relief in his individual case as grounds for proceeding under *§1983*. *Cf. Preiser, supra*, at 489-490, 36 L.Ed.2d 439, 93 S. Ct. 1827 ("It would wholly frustrate explicit congressional intent to hold that [state prisoners] could evade [the exhaustion]

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[23] See Benjamin Vetter, *Comment: Habeas, Section 1983, and Post-conviction Access to DNA Evidence*, 71 U. Chi. L. rev. 587 Spring, 2004. *See Harvey v. Horan*, 278 F.3d 370, 374-80 (4th Cir. 2002) (treating §1983 action requesting access to DNA evidence as a successive application for habeas relief) But see, *Bradley v. Pryor*, 305 F. 3d 1287 (11th Cir. 2002) (approving the use of §1983 to request access to DNA testing of evidence). Apparently, the Eleventh Circuit is able to identify those claims that were not habeas-equivalent yielding.

> requirement by the simple expedient of putting a different label on their pleadings").

Wilkinson, 125 S.Ct. at 1251 (Scalia, J., concurring).

What is apparent from the Court's discussion in *Wilkinson*[24] and to a lesser degree in *Nelson*, is that in viewing the problem more pragmatically, a clearer line is closer to being drawn whether viewing a case from a complainant, like *Wilkinson*, who argued his case was not controlled by habeas jurisprudence but rather §1983 or *here*, where the state argues that the means and method are one and the same and therefore habeas, not §1983, applies.[25]

Unsurprisingly, these issues--the method and means of carrying out an execution--are populating the federal district courts as a result of the Court's most recent decisions. Indeed, the Court's prediction in *Nelson*, that its decision would have narrow application has proven overly optimistic and the reality of Respondents' fears, as expressed in *Nelson*, realized:"...that a decision to reverse the judgment of the Eleventh Circuit would open the floodgates to all manner of method-of-execution challenges, as well as last minute stay requests." *Nelson*, 512 at

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[24] See Timothy P. O'Toole and Gionanna Shay, *Feature: Wilkinson v. Dotson: How A 'Boring' Parole Case Can Reduce Government Forum - Shopping*, 29 Champion 38, December, 2005 (finding that "[D]espite the *Preiser-Wolff-Heck-Balisok* quartet, before *Wilkinson*, many lower courts continued to relegate to *habeas* even prisoner claims that did not necessarily invalidate a conviction or sentence.").

[25] In *Nelson,* Justice O'Connor expressed grave concerns about the inconsistencies in what result *Nelson* truly intended – "By asking for broader relief than necessary, petitioner undermines his assertions that: (1) his §1983 suit is not a tactic for delay, and (2) he is not challenging the fact of his execution, but merely a dispensable preliminary procedure." *Nelson*, 541 U.S. at 648.

649. For all intents and purposes, every State actively seeking to carry out capital sentences has been impacted. The general argument that, the "drug cocktails" used by every capital state but one and the federal government, is the core allegation in virtually all capital defendants' §1983 suits. Allowing §1983 complaints relating to the method of executions has created a "litigation hold" in those jurisdictions awaiting resolution of the §1983-habeas dilemma.

Nelson answered the simpler question, whether a capital prisoner could bring his challenge to the non-protocol cut-down procedure Alabama authorities announced would be used to carrying out Nelson's execution as a §1983 action. The Court determined that inquiries into whether a procedure is necessary may include whether the procedure is statutory, whether it is physically necessary in order to perform the lethal injection and whether acceptable alternates exist. The Court majority forewarned, that "[W]e have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution--e.g., lethal injection or electrocution--fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence. Neither the 'conditions' nor the 'fact or duration' label is particularly apt." Given the fact that a state could to elect to allow a defendant dictate the drugs to be used, for example, the Court majority also noted that, "...imposition of the death penalty presupposes a means of carrying it out. In a State such as Alabama, where the legislature has established lethal injection as the preferred method of execution, *see* Ala. Code §15-18-82 (Lexis Supp. 2003) (lethal injection as default method), a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little

sense to talk of the "duration" of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion. *See Calderon v. Thompson*, 523 U.S. 538, 556-557 (1998); *In re Blodgett*, 502 U.S. 236, 238, 116 L.Ed.2d 669, 112 S.Ct. 674 (1992) (*per curiam*); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("[T]he power of a State to pass laws means little if the State cannot enforce them")." *Nelson* 512 U.S. 644.

Hill insists that §1983 is an appropriate vehicle for his claims, Pet. Br. 18, the principal basis being §1983's broad language authorizing "suit[s] in equity" against state actors who deprive citizens "of any rights, privileges, or immunities secured by the Constitution." *Preiser* and the cases that followed, however, clearly reject the notion that "the broad language of §1983" covers a prisoner's request for equitable relief is "not conclusive." 411 U.S. at 489. "[D]espite the literal applicability of [§1983's] terms," the "specific federal habeas corpus statute" is the exclusive remedy where it "clearly applies." *Spencer v. Kemna*, 523 U.S. 1, 20 (1998) (Souter, J., concurring) ("In the manner of [*Preiser*], I read the 'general' §1983 statute in light of the 'specific' federal habeas statute ....").

In *Preiser,* the Court held that a state prisoner who challenges his criminal sentence on constitutional grounds and seeks equitable relief from that sentence, "is limited to habeas corpus" and may not pursue his challenge via §1983. *Id*. at 489; *Lonchar v. Thomas,* 517 U.S. 314, 329 (1996) (reiterated that the various restrictions on habeas practice "apply to a suit challenging the method of execution, regardless of the technical form of action." (citing *Gomez v. United States District Court*, 503 U.S. 653 (1992)). Understandably, Hill seeks to avoid *Preiser.* He suggests §1983 cases do not challenge a conviction or sentence. *Preiser* however, recognized that state prisoners may "evade [habeas] requirement[s] by the simple expedient of putting a different label on their pleadings." 411 U.S. at 489-90. Substance, not form, determines whether a claim is characterized

a §1983 complaint or a habeas petition. *See Lonchar*, 517 U.S. at 329; *Preiser*, 411 U.S. at 489-90. Hill also contends his claim "does not attack lethal injection per se" but instead merely challenges the constitutionality of the means to accomplish his execution. Pet. Br. 20. He is incorrect.[26]

It would seem logical that a workable solution–a "line-drawing" outcome distinguishing bona fide §1983 claims from habeas claims--is ripe for implementation. Such a solution would not be disruptive to either habeas or §1983 case law and would bring clarity and force to Congress' intent as to both. Rightfully, under this line-drawing outcome, a prisoner who cannot file a viable habeas challenge to his death sentence *per se* -- because his petition is successive, or because he has not exhausted state remedies, or otherwise -- would not be permitted to simply recast his claim from one challenging lethal injection to some lesser degree of stopping his execution, and rename it a §1983 complaint.

The defensible line distinguishing habeas corpus petitions from valid §1983 complaints in capital sentencing would allocate challenges to death sentences *per se* (*e.g.*, method-of-execution, chemical-composition, established protocols), on the habeas side

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[26] Indeed, in *Nelson*, the defendant there all but acknowledged that a "chemical composition challenge" - that is, a "challenge to the chemicals used for lethal injection" - "constituted a challenge to a sentence of death by lethal injection" that would require proceeding via habeas, not §1983. The Court has refused stays of execution in a slew of cases in which capital prisoners have presented "drug-composition claims" in §1983 complaints. *See, e.g., Robinson v. Crosby*, 124 S.Ct. 1196 (2004) (cert. denied); *Roe v. Taft*, 124 S.Ct. 1196 (2004) (cert. denied); *Zimmerman v. Johnson*, 124 S.Ct. 979 (2004) (cert. denied); *Bruce v. Dretke*, 124 S.Ct. 1143 (2004) (cert. denied); *Williams v. Taft*, 124 S.Ct. 1142 (2004) (cert. denied); *Ward v. Darks*, 124 S.Ct. 1142 (2004) (cert. denied); *Beck v. Rowsey*, 124 S.Ct. 980 (2004) (cert. denied). *See also Lonchar*, 517 U.S. at 329 ("method of execution" claim must proceed on habeas, not via §1983).

of the line. Challenges as found in *Nelson* that have a necessary affect on the execution of a death sentence, such as acts or procedures that are necessary predicates or, conditions precedent, to the enforcement of a death sentence would likewise fall in the habeas column where the claim is a "general attack" compared to a case that is a fact-specific assertion, as articulated by the Court in *Nelson*, "...that venous access is a necessary prerequisite, does not imply that a particular means of gaining such access is likewise necessary." If, however, the cut-down method was mandatory by law, or the petitioner was unable or unwilling to "concede acceptable alternatives," the State's argument "would have ample weight," and therefore would fall nearer the line but still on the habeas side. Other constitutional claims, like prison-conditions claims, which have no "necessary affect" on the imposition of a death sentence, would fall on the §1983 side, in keeping with cases that have traditionally been considered conditions of confinement cases.

No doubt, a line drawing outcome would be understood and, as importantly, would result in more effective litigation without grave disruption or strain to traditional habeas or civil rights concepts. No longer would there be a need for linguistic gymnastics in pleading a case, satisfying or imposing Congressionally mandated requisites or strained decisions. Differences in cases will no longer reflect divergent decisions bottomed on the number of outcomes possible multiplied by the number of federal district courts entertaining lethal injection allegations.[27] No longer would federal courts be required to

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[27] Recent litigation nationwide has resulted in a plethora of inconsistent outcomes predicated on the same basic facts: *Morales v. Hickman*, (Nos. C 06 219 JF & C 06 926 JF RS) (N.D. Cal. 2006) (effectively, stopping all enforcement of California's capital statute); or *Anderson v. Evans*, 2005 U.S.Dist. LEXIS 39407 (December 20, 2005) (holding that the "drug cocktail" used in Oklahoma- (the first state to embrace lethal injection in 1977),-- justifies a finding of substantial risk of serious

avoid pegging a case for what it is-- the "functional equivalent" or a "second or successive" habeas.

II. Whether, under this Court's decision in *Nelson v. Campbell*, 541 U.S. 637 (2004), 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.

The answer is no. Hill filed his complaint cloaked in §1983 trappings, realizing his access to federal habeas would be foreclosed because he could not comply with various restrictions on federal habeas practice. *Gomez v. United States District Court*, 503 U.S. 653, 653 (1992). Left to speculate as to what differences a properly filed habeas would look like, it is evident that Hill's §1983 complaint resembles in form and substance any habeas Hill would have filed as to this issue.[28]

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injury during execution and deliberate indifference on the part of the state actors), and *Murphy v. Oklahoma*, 124 P.3d 1198, 1209 n. 23 (Okla. Crim. App. 2005); or *Moody v. Beck*, Case No. 5:06-CT-3020-D (E.D. N.C March 14, 2006) (finding neither a basis to overcome the dilatory filing nor any reason to grant a stay challenging a chemical composition attack); or *Evans v. Saar*, 2006 U.S. Dist. LEXIS 4418 (February 1, 2006) (Holding no unnecessary risk of unconstitutional pain or suffering which would disallow or restrain use of three drug protocol based on similar facts as found in Oklahoma), *Abdur' Rahman v. Bredesen*, 2005 Tenn. LEXIS 828 (Tenn. Oct. 17, 2005)(the federal courts becoming the micro managers of state execution procedures.), to name a few.

[28] Contemporaneous to his §1983 complaint in federal district court, on January 20, 2006, Hill filed an application to file a successive habeas in the Eleventh Circuit in *In re Hill*, 437 F.3d 1080 (11th Cir. 2006), raising both an *Atkins v. Virginia*, 536 U.S. 304 (2002) (mental retardation), claim and a *Roper v. Simmons*, 543 U.S. 551 (2005) (mental age) claim. The Eleventh Circuit denied his application on January 24, 2006, finding that Hill waited and was therefore 29 months too late in bringing the mental retardation claim.

In disposing of the cut-down procedure as a §1983 complaint, the *Nelson* Court reasoned that this holding "... is consistent with our approach to civil rights damages actions, which, like method-of-execution challenges, fall at the margins of habeas." *Nelson*, 541 U.S. 646. Recognizing that "damages are not an available habeas remedy," the Court observed that "we have previously concluded that a §1983 suit for damages that would "necessarily imply" the invalidity of the fact of an inmate's conviction, or "necessarily imply" the invalidity of the length of an inmate's sentence, is not cognizable under §1983 unless and until the inmate obtains favorable termination of a state, or federal habeas challenge to his conviction or sentence," citing *Heck* and *Balisok*. "This 'favorable termination' requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief – challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute. *Muhammad*, 540 U.S. at 754.

Here, Hill talks about the "two lines of clear authority converg[ing]," premised on a notion that he has "an unassailable right to proceed via §1983 based on this Court's ruling in *Nelson,*, or via habeas because his "pleading" was "improperly dismissed as a "second or successive" claim under the logic of *Stewart v. Martinez-Villareal,* 523 U.S. 637 (1998), and *Slack v. McDaniel,* 529 U.S. 473 (2000). Specifically, Hill contends that his claims did not become ripe until long after his first "federal habeas proceedings concluded." Not so.

His argument for relief no matter the style of the case, is, "even if the Eleventh Circuit were correct," ..."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." P. Brief 16. Therefore he argues "the plain fact is that the latter rules would *permit* a habeas adjudication of Mr. Hill's cruel and unusual-method-of-execution claim." P.

Brief 16. Hill protests that his "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)." *Id.* at 16.

Respectfully, this cannot be so, as there is nothing "ancillary" about Hill's constitutional challenge to the death sentence that does not specifically undermine it.

Hill filed under §1983 not because it was the appropriate federal forum but rather because he knew he was foreclosed from any habeas corpus relief. Having litigated one habeas corpus petition challenging his conviction and death sentence, he was facing, under AEDPA's restrictions a bar on "second or successive habeas corpus." 28 U.S.C. §2244(b). Congress' "streamlining" of the habeas process severely restricted prisoners' ability to file "second or successive" habeas pleadings. In fact, 28 U.S.C. §2244(b), provides for dismissal, without exception, of any claim raised in a "second or successive" petition that "was presented in a prior application." And with"new claims" raised in a second or successive petition, like Hill's, "not presented in a previous application," 28 U.S.C. §2244(b)(2), requires dismissal except for two narrow circumstances: (i) where 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" (§2244(b)(2)(A)); or (ii) where both the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and the facts underlying the claim established by clear and convincing evidence that the prisoner is

actually, factually innocent "of the underlying offense" (§2244(b)(2)(B)).[29]

Hill does not fall within either of AEDPA's narrow exceptions. Hill's first habeas petition was final prior to Florida's adoption of a lethal injection method in 2000. Hill's claim, therefore, would still be defective because he cannot satisfy the factual predicate required pursuant to §2244(b)(2)(B), that the claim could not have been discovered earlier due to the change in execution method.[30] Thus, AEDPA's successive-petitions bar

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[29] See R. Hertz & J. Liebman, 2 Federal Habeas Corpus Practice and Procedure §28.3e, at 1318 (4th ed. 2001) (explaining AEDPA's shift from disjunctive cause-or-innocence standard to conjunctive "cause and innocence" standard).

[30] On June 20, 2003, Hill, represented by current counsel, filed his second, successive trial court postconviction motion arguing a "four-prong" attack premised on *Ring v. Arizona*, 536 U.S. 584 (2003). The trial court denied relief and the Florida Supreme Court affirmed that denial in *Hill v. State*, 904 So.2d 430 (Fla. 2005). Hill elected not to pursue a challenge to Florida's change in method of execution albeit other state prisoners similarly circumstanced did. *Provenzano v. State,* 761 So.2d 1097, 1099 (Fla. 2000) (concluding that "execution by lethal injection does not amount to cruel and/or unusual punishment"); *Provenzano v. Moore*, 744 So.2d 413, 415 (Fla. 1999) (stating that "Florida's electric chair is not cruel or unusual punishment"), *cert. denied*, 528 U.S. 1182 (2000); *Power v. State*, 886 So.2d 952 (Fla. 2004) (rejecting constitutional challenge to execution by lethal injection and electrocution); *Johnson v. State*, 804 So.2d 1218, 1225 (Fla. 2001) (rejecting constitutional challenge to execution by lethal injection and electrocution); *Sochor v. State*, 883 So.2d 766, 789 (Fla. 2004) (rejecting claims that both electrocution and lethal injection are cruel and unusual punishment); *Sims v. State*, 754 So.2d 657, 668 (Fla. 2000) (holding that execution by lethal injection is not cruel and unusual punishment).)

Hill did raise his Eighth Amendment claim as to the constitutionality of Florida's method based on the drug cocktail as one of his claims in his "third successive postconviction motion" filed December 15, 2005, as a direct result of a new warrant signed on November 29, 2005. For the first time in any pleading Hill contended that the method was unconstitutional. The trial

would preclude Hill from "pursuing his Eighth Amendment challenge to Florida's lethal-injection procedures in a habeas corpus petition."[31]

To overcome any deficiencies outstanding, Hill now argues that his claim should not be considered successive, based upon the Court's holdings in *Martinez-Villareal* and *Slack*. His reliance is misplaced. In sum, *Martinez-Villareal* addressed whether a federal habeas petition filed after the initial filing was dismissed as premature should not be deemed a "second or successive" petition barred by §2244; whether "dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review." *Martinez-Villareal* 523 U.S. at 645. *Slack* dealt with whether a federal habeas petition filed after dismissal of an initial filing for non-exhaustion should be considered a "second or successive petition," because "the complete exhaustion rule" has become a "trap" for "'the unwary pro se prisoner.'" *Slack*, 529 U.S. at 487. Hill's case does not fall within either circumstance.

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court rejected his argument and the Florida Supreme Court affirmed *Hill v. State*, 2006 Fla. LEXIS 8 (Fla.), *cert. denied* 2006 US LEXIS 1909 (February 27, 2006). This Court's denial of certiorari review issued as to the Eighth Amendment claim issued approximately one month after certiorari was granted here.

[31] AEDPA is forthright. While prior to AEDPA a new claim could be presented in a successive petition on a showing either (i) that the factual basis for the claim was not available at the time the first petition was filed, or (ii) that the petitioner was likely to be innocent. *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991). §2244(b)(2)(B), as amended by AEDPA, clearly represents Congress' tightening of the successive-petition standard by requiring a showing of both (i) a newly-discovered factual predicate, and (ii) probable actual innocence, ("cause and innocence"). *Calderon v. Thompson*, 523 U.S. 538, 558 (1998). Hill's attempted end-run, if permitted would eliminate the actual-innocence limitation from the statute.

Martinez-Villareal's habeas petition alleged a "competency-to-be-executed" claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). His *Ford* claim was raised in a prior habeas petition but "dismissed as premature ... because his execution was not imminent and therefore his competence to be executed could not be determined at that time." *Martinez-Villareal*, 523 U.S. at 644-45. Martinez-Villareal moved the district court to reopen his earlier-filed *Ford* claim following the issuance of a warrant, but based upon AEDPA's successive-petitions bar, the lower court refused. The Ninth Circuit reversed, and this, while affirming, Court held only that Martinez-Villareal had not filed a "second or successive" habeas petition at all but, instead, had simply moved to reopen his first petition. *See Martinez-Villareal*, 523 U.S. at 643. This unique situation, where a habeas petitioner moves to reopen an earlier filed petition to obtain an initial merits determination of a previously unripe claim, had no AEDPA bar. The Court expressly rejected a broad exception to §2244(b) for all claims that could not have been raised in a first petition. The later petition in *Martinez-Villareal* was "deemed a first petition because the petitioner there had moved to reopen a previously-filed claim." In *Slack*, a second petition was "deemed a first" only because the actual first petition was dismissed on exhaustion grounds and, logically should be treated "as though it had not been filed." *Slack*, 529 U.S. at 488.

Hill also argues that because the State has protocols that are drafted by the Department rather than detailed in the lethal injection statute, he somehow could not have identified the issue raised that the chemicals to be used, could potentially be injurious. This argument is unworthy. First, a plethora of Florida capital defendants have made the identical challenge in state and federal courts. The fact that their claims are without merit, of course, does not mean there is a lack of an identifiable issue. Second, it strains credulity to suggest that Hill is the only defendant who could not figure out how to develop this claim.

While a decision on the appropriate legal standard is a must in clarifying which federal forum for relief applies, in actuality Hill is without recourse under either §1983 or §2254. *Gomez v. United States District Court*, 503 U.S. 653, 654 (1992). As the Court held in *Gomez*, it matters not how Hill "frames" his claim, because both ultimately involve "an equitable remedy," to enjoin the state from carrying out Hill's execution. "Equity must take into consideration the State's strong interest in proceeding with its judgment" and Hill's "obvious attempt at manipulation." Hill had the wherewithal to bring his "method challenge" as early as 2000, with the change in the Florida execution procedures and when capital inmates such as Sims make similar claims. *Sims*. Prior to his December 15, 2005, successive post conviction motion, Hill never even hinted at discontent with the Florida lethal injection procedures during that interim.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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