

DOCKET NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

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CLARENCE EDWARD HILL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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CAPITAL CASE  
EXECUTION SCHEDULED FOR  
JANUARY 24, 2006, 6:00 P.M.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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## QUESTIONS PRESENTED

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

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

**TABLE OF CONTENTS**

**PAGE**

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

CITATION TO OPINIONS BELOW.....2

STATEMENT OF JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

PROCEDURAL HISTORY.....3

FACTS RELEVANT TO QUESTIONS PRESENTED.....7

THE FEDERAL COURTS’ RULINGS.....10

REASONS FOR GRANTING THE WRIT.....11

THIS COURT SHOULD REVIEW THE ISSUES SURROUNDING  
THE ELEVENTH CIRCUIT’S DETERMINATION THAT  
MR. HILL’S CHALLENGE TO A PARTICULAR PROTOCOL  
WHICH THE STATE PLANS TO USE DURING THE EXECUTION  
PROCESS CONSTITUTES A SUCCESSIVE HABEAS  
CORPUS PETITION.....11

A. Uncertainty amongst the circuits.....11

1. Methods of execution can be  
challenged.....12

2. A particular protocol can be  
challenged.....13

3. Leaving the issue open.....14

4. Any challenge amounts to a  
successive habeas petition.....14

B. This Court should resolve the split  
in the circuits.....14

C. Mr. Hill's complaint does not challenge  
a method of execution generally.....14

CONCLUSION.....17

**TABLE OF AUTHORITIES**

**PAGE**

**CASES**

Aldrich v. Johnson  
388 F.3d 159, 161 (5<sup>th</sup> Cir. 2004).....14

Beardslee v. Woodford  
395 F.3d 1064 (9<sup>th</sup> Cir. 2005).....13

Gregg v. Georgia  
428 U.S. 153 (1976).....15

Harris v. Johnson  
376 F.3d 414 (5<sup>th</sup> Cir. 2004).....14

Hill v. Crosby  
Case No. 06-10621 (11<sup>th</sup> Cir. January 24, 2006)....11, 12, 15

Hill v. Moore  
175 F.3d 915 (11<sup>th</sup> Cir. 1999).....5

Hill v. State  
Case No. 4:06-cv-032-SPM.....2, 10

Hill v. State  
477 So. 2d 533 (Fla. 1985).....3

Hill v. State  
515 So. 2d 176 (Fla. 1987).....3

Hill v. State  
108 S.Ct. 1302 (1988).....3

Hill v. State  
556 So. 2d 1385 (Fla. 1990).....4

Hill v. State  
643 So. 2d 1071 (Fla. 1995).....5

Hill v. State  
528 U.S. 1087 (2000).....5

Hill v. State  
2006 Fla. LEXIS 8 (January 17, 2006).....6

<u>Johnson v. Reid</u>	
2004 U.S. LEXIS 4856 (2004).....	13
<u>Louisiana ex. rel. Francis v. Resweber</u>	
329 U.S. 459 (1947).....	15
<u>Nelson v. Campbell</u>	
541 U.S. 637 (2004).....	11, 12, 14
<u>Parker v. Dugger</u>	
498 U.S. 308 (1991).....	5
<u>Reid v. Johnson,</u>	
2004 U.S. App. LEXIS 15855 (2004).....	3
<u>Rhodes v. Chapman</u>	
452 U.S. 337 (1981).....	15
<u>Ross v. Rell</u>	
392 F. Supp 2d 224 (D.Ct. Conn. 2005).....	13
<u>Weems v. United States</u>	
217 U.S. 349 (1909).....	15

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Petitioner, **CLARENCE EDWARD HILL**, is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review Order of the Eleventh Circuit Court of Appeals.

**CITATION TO OPINIONS BELOW**

The decision of the Eleventh Circuit Court of Appeals in this cause appears as Hill v. Crosby, Case No. 06-10621 (11<sup>th</sup> Cir. January 24, 2006), and is attached to this petition as Appendix A. The decision of the United States District Court, Northern District of Florida, Tallahassee Division appears as Hill v. State, Case No. 4:06-cv-032-SPM, and is attached to this petition as Appendix B.

**STATEMENT OF JURISDICTION**

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals on the basis of 28 U.S.C. Section 1257. The Eleventh Circuit Court of Appeals issued an opinion denying relief on January 24, 2006.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

[N]or [shall] cruel and unusual punishments [be] inflicted.  
U.S. CONST. amend. VIII.

No State shall . . . deprive any person of life [or] liberty . . . without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

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.  
42 U.S.C. § 1983



### PROCEDURAL HISTORY

On November 2, 1982, Mr. Hill was indicted and charged with one count of first degree murder, one count of attempted first degree murder, three counts of armed robbery, and possession of a firearm during the commission of a felony. (R. 1440-41). Following a trial which commenced on April 27, 1983, the jury found Mr. Hill guilty of all the crimes charged. (R. 1662). Subsequently, the jury rendered an advisory sentence recommending death by a vote of ten to two, which the trial court imposed. (R. 1665, 1668-9).

Mr. Hill appealed his conviction to the Florida Supreme Court, which found that the trial court erred in denying Mr. Hill's challenge of a juror who was not impartial in his state of mind. The Court remanded the case for a new penalty phase with a new jury. Hill v. State, 477 So. 2d 553 (Fla. 1985).

Mr. Hill's new penalty phase was held on March 24, 1986. By a vote of eleven to one, the jury issued an advisory opinion for Mr. Hill's death on March 27, 1986. The circuit court sentenced Mr. Hill to death on April 2, 1986. (RS. 835).

Mr. Hill filed an appeal with the Florida Supreme Court, which affirmed his sentences. Hill v. State, 515 So.2d 176 (Fla. 1987). Mr. Hill then filed a Petition for a Writ of Certiorari before this Court, which was denied. Hill v. State, 108 S.Ct. 1302 (1988).

On November 9, 1989, the Governor of Florida signed a death warrant scheduling Mr. Hill's execution for January 25, 1990. Mr. Hill's counsel filed an expedited Motion to Vacate Judgments of Convictions and Sentences with Special Emergency Request for Leave to Amend on December 11, 1989. (PCR. 1-128). On January 18, 1990, the circuit court refused to grant Mr. Hill an evidentiary hearing and summarily denied Mr. Hill's motion.

On January 22, 1990, Mr. Hill appealed the order from the circuit court. (PCR. 387). Mr. Hill also filed a habeas corpus petition with the Florida Supreme Court. On January 26, 1990, the Florida Supreme Court denied all relief. Hill v. State, 556 So. 2d 1385 (Fla. 1990).<sup>1</sup>

Mr. Hill subsequently filed a Motion to Stay Execution and a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Florida on January 27, 1990. The district court granted a stay on January 28, 1990. On August 31, 1992, the district court granted relief to Mr. Hill on the grounds that the circuit court and the Florida Supreme Court failed to conduct a proper harmless error test when re-weighting the aggravating factors after eliminating the cold, calculating, and premeditating aggravator. Furthermore, the trial judge failed to find certain nonstatutory mitigating facts even though

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<sup>1</sup>Mr. Hill's execution was rescheduled for Monday, January 29, 1990 at 7:01 a.m.

mitigation was established by the record. The district court made no recommendation as to whether a new sentencing hearing had to be conducted.

Upon remand, Mr. Hill filed a motion to reopen his direct appeal to address the issues cited by the United States District Court. The Florida Supreme Court granted the motion, but upon re-weighing the four remaining aggravating factors against the one statutory mitigating circumstance of Mr. Hill's age and several non-statutory mitigating factors that were not previously considered, the court resentenced Mr. Hill to death. Hill v. State, 643 So. 2d 1071 (Fla. 1995).

Mr. Hill then filed an amended habeas corpus petition before the United States District Court challenging the decision of the Florida Supreme Court. The district court denied relief on the grounds that the Florida Supreme Court satisfied the dictates of Parker v. Dugger, 498 U.S. 308 (1991). Mr. Hill appealed this decision to the Eleventh Circuit Court of Appeals, which found that the district court had correctly decided Mr. Hill's claims. Hill v. Moore, 175 F.3d 915 (11<sup>th</sup> Cir. 1999). Mr. Hill subsequently filed a Petition for Writ of Certiorari before this Court, which was denied. See Hill v. State, 528 U.S. 1087 (2000).

Mr. Hill filed a successive Rule 3.850 motion in state court on June 20, 2003 pursuant to Ring v. Arizona, 536 U.S. 584

(2002). The circuit court denied said motion on May 26, 2004, and denied the motion for rehearing on June 21, 2004. Mr. Hill timely filed his appeal to the Florida Supreme Court, which was denied on May 13, 2005.

On November 29, 2005, Governor Jeb Bush signed a death warrant setting an execution date of January 24, 2006 at 6:00 p.m. Mr. Hill filed a successive 3.850 motion on December 15, 2005. Following a case management conference on December 19, 2005, the lower court orally denied Mr. Hill an evidentiary hearing on his claims for relief. A written order was issued on December 23, 2005.

On December 31, 2005, Mr. Hill filed a notice of appeal of the order from the circuit court. (PCR. 387). On January 17, 2006, the Florida Supreme Court denied all relief. Hill v. State, 2006 Fla. LEXIS 8 (January 17, 2006). On January 20, 2005, Mr. Hill filed a Petition for a Writ of Certiorari before this Court.

On Friday, January 20, 2006, Mr. Hill brought an action pursuant to 42 U.S.C. § 1983 in the United States District Court, Northern District of Florida, Tallahassee Division. Mr. Hill alleged violations of his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. On Saturday, January 21, 2006, the district court dismissed Mr. Hill's complaint for declaratory and injunctive relief for lack of jurisdiction.

On Monday, January 23, 2006, Mr. Hill filed a Notice of Appeal. On that same date, Mr. Hill filed in the Eleventh Circuit an Application for a Stay of Execution and for Expedited Appeal. The Eleventh Circuit denied Mr. Hill's Application on January 24, 2006.

**FACTS RELEVANT TO QUESTIONS PRESENTED**

In his complaint brought pursuant to 42 U.S.C. § 1983 in the United States District Court, Mr. Hill asserted that the defendants, acting under color of Florida law, are using a succession of three chemicals that will cause unnecessary pain in the execution of a sentence of death, which they have admitted to be their practice, which is unnecessary as a means of employing lethal injection, and which creates a foreseeable risk of inflicting unnecessary and wanton infliction of pain contrary to contemporary standards of decency.

Mr. Hill's claim was premised upon a recent study published in the world-renowned medical journal THE LANCET by Dr. David A. Lubarsky (whose declaration was attached to Mr. Hill's Complaint) and three co-authors who detailed the results of their research on the effects of chemicals in lethal injections. See Koniaris L.G., Zimmers T.A., Lubarski D.A., Sheldon J.P., Inadequate anaesthesia in lethal injection for execution, Vol 365, THE LANCET 1412-14 (April 16, 2005). This study confirmed, through the analysis of empirical after-the-fact data, that the

scientific critique of the use of sodium pentothal, pancuronium bromide, and potassium chloride creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.<sup>2</sup> The authors found that in toxicology reports in the cases they studied, post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%). Moreover, 21 of the 49 executed inmates (43%) had concentrations consistent with awareness, as the inmates had an inadequate amount of sodium pentothal in their bloodstream to provide anesthesia. (Complaint, Att. B). In other words, in close to half of the cases, the prisoner felt the suffering of suffocation from pancuronium bromide, and the burning through the veins followed by the heart attack caused by the potassium chloride.

As explained in the declaration of Dr. Lubarsky, sodium pentothal is an ultra-short acting substance which produces shallow anesthesia. (Complaint, Att. A). Health-care professionals use it as an initial anesthetic in preparation for surgery while they set up a breathing tube in the patient and use different drugs to bring the patient to a "surgical plane" of anesthesia that will last through the operation and will block the stimuli of surgery which would otherwise cause pain. Sodium

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<sup>2</sup>Dr. Lubarski has noted that each of the opinions set forth in the Lancet study reflects his opinion to a reasonable degree of scientific certainty. (Complaint, Att. A).

pentothal is intended to be defeasible by stimuli associated with errors in setting up the breathing tube and initiating the long-run, deep anesthesia; the patient is supposed to be able to wake up and signal the staff that something is wrong.

The second chemical used in lethal injections in Florida is pancuronium bromide, sometimes referred to simply as pancuronium. It is not an anesthetic. It is a paralytic agent, which stops the breathing. It has two contradictory effects: first, it causes the person to whom it is applied to suffer suffocation when the lungs stop moving; second, it prevents the person from manifesting this suffering, or any other sensation, by facial expression, hand movement, or speech. (Complaint, Att. A). Pancuronium bromide is unnecessary to bring about the death of a person being executed by lethal injection. (Complaint, Att. A).

The third chemical is potassium chloride, which is the substance that causes the death of the prisoner. It burns intensely as it courses through the veins toward the heart. It also causes massive muscle cramping before causing cardiac arrest. (Complaint, Att. A). When the potassium chloride reaches the heart, it causes a heart attack. If the anesthesia has worn off by that time, the condemned feels the pain of a heart attack. However, in this case, Mr. Hill will be unable to communicate his pain because the pancuronium bromide has paralyzed his face, his

arms, and his entire body so that he cannot express himself either verbally or otherwise. (Complaint, Att. A).

As explained by Dr. Lubarsky, because Florida's practices are substantially similar to those of the lethal-injection jurisdictions which conducted autopsies and toxicology reports, which kept records of them, and which disclosed them to the LANCET scholars, there is at least the same risk (43%) as in those jurisdictions that Mr. Hill will not be anesthetized at the time of his death. (Complaint, Att. A).

#### **THE FEDERAL COURTS' RULINGS**

In dismissing Mr. Hill's complaint for lack of jurisdiction, the district court stated:

Because Plaintiff's motion raises no true issues of newly-discovered evidence, it is the functional equivalent of a successive petition for writ of habeas corpus. Robinson, 358 F.3d at 1284. As such, he should have first sought the permission of the Eleventh Circuit under 28 U.S.C. § 2244 to file such a successive petition. There is no indication in the record whatsoever that Plaintiff has followed this procedure. Absent authorization from the Eleventh Circuit, this Court lacks jurisdiction to entertain the instant successive petition.

Hill v. State, Case No. 4:06-cv-032-SPM, at 5.

In upholding the district court's order, the Eleventh Circuit Court of Appeals stated:

It is clear to us that the district court lacked jurisdiction to consider appellant'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. See 28 U.S.C. § 2244(b)(3)(A). And as the panel observed in Robinson, "such an application to



file a successive petition would be due to be denied in any event. See *In re Provanzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000), cert. denied, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B)).”

Hill v. Crosby, Case No. 06-10621 at 3.

### **REASONS FOR GRANTING THE WRIT**

**THIS COURT SHOULD REVIEW THE ISSUES SURROUNDING THE ELEVENTH CIRCUIT’S DETERMINATION THAT MR. HILL’S CHALLENGE TO A PARTICULAR PROTOCOL WHICH THE STATE PLANS TO USE DURING THE EXECUTION PROCESS CONSTITUTES A SUCCESSIVE HABEAS CORPUS PETITION.**

#### **A. Uncertainty amongst the circuits**

In Nelson v. Campbell, 541 U.S. 637 (2004), this Court addressed the parameters of an action under 42 U.S.C. § 1983, as a vehicle for challenging a procedure relating to an inmate’s execution:

We 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. A suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the “fact” or “validity” of the sentence itself — by simply altering its method of execution, the State can go forward with the sentence. Cf. *Weaver v. Graham*, 450 U.S. 24, 32-33, n. 17 (1981) (no *ex post facto* violation to change method of execution to more humane method). On the other hand, 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 (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, 541 U.S. at 643-4.

This Court concluded that it "need not reach here the difficult question of how to categorize method-of-execution claims generally." Id. at 644. Rather, in the specific case of a cut-down procedure, the Court stated:

Respondents at oral argument conceded that § 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a "deliberate indifference" challenge to the constitutionality of the cut-down procedure if used to gain venous access for purposes of providing medical treatment. Tr. of Oral Arg. 40 ("I don't disagree . . . that a cut-down occurring for purposes of venous access, wholly divorced from an execution, is indeed a valid conditions of confinement claim"); see also *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" (citation omitted)). We see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die.

Id. at 644-5.

Subsequent to Nelson, there has been dissension amongst the various federal circuits in determining to what extent, if any, a challenge to an execution procedure constitutes a colorable claim under 42 U.S.C. § 1983.

1. *Methods of execution can be challenged*

The Ninth Circuit Court of Appeals has determined that a § 1983 action is in fact a proper vehicle by which to challenge a method of execution. Beardslee v. Woodford, 395 F.3d 1064, 1068 (9<sup>th</sup> Cir. 2005).

2. *A particular protocol can be challenged*

The Fourth Circuit Court of Appeals, on the other hand, has permitted a § 1983 action where the Petitioner does not assert that lethal injection generally is an unconstitutional method of execution, but rather that the particular protocol the State plans to use is impermissible. Reid v. Johnson, 2004 U.S. App. LEXIS 15855, \*6 (2004), stay vacated by Johnson v. Reid, 2004 U.S. LEXIS 4856 (2004) ("In light of *Nelson*, we conclude that Reid has stated a cognizable claim under § 1983. Like *Nelson*, Reid does not assert that lethal injection generally is an unconstitutional method of execution. Rather, he asserts only that the particular protocol the State plans to use is

impermissible; he acknowledges that other protocols would pass constitutional muster.”).<sup>3</sup>

3. *Leaving the issue open*

However, the Fifth Circuit Court of Appeals has declined to directly address the issue, instead disposing of such claims on other grounds. *See, e.g., Harris v. Johnson*, 376 F.3d 414, 417 (5<sup>th</sup> Cir. 2004) (“We do not decide whether Harris properly states a claim under § 1983, because even if he does, he is not entitled to the equitable relief he seeks.”). *See also Aldrich v. Johnson*, 388 F.3d 159, 161 (5<sup>th</sup> Cir. 2004) (“Because Aldrich did not allege or show that there is any alternative to the protocol that the State proposes to use in his execution, the district court properly dismissed his § 1983 action.”).

4. *Any challenge amounts to a successive habeas petition*

Finally, the Eleventh Circuit Court of Appeals has determined that:

And as the panel observed in *Robinson*, “such an application to file a successive petition would be due to be denied in any event. *See In re Provanzano*, 215

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<sup>3</sup>A United States District Court for the Second Circuit Court of Appeals has applied a similar logic. *See Ross v. Rell*, 392 F. Supp 2d 224, 226 (D.Ct. Conn. 2005) (note omitted) (“The plaintiff here has not challenged the constitutionality of lethal injection in all cases, but only the specific protocol of drugs and attendant procedures used by the State of Connecticut as will be applied to Michael Ross. Therefore, the action properly may be construed as a *section 1983* claim and not a petition for habeas corpus relief.”).

F.3d 1233, 1235-36 (11th Cir. 2000), *cert. denied*, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) (concluding that a claim that lethal injection constitutes cruel and unusual punishment does not meet the requirements of 28 U.S.C. § 2244(b)(2)(A) or (B)).”

Hill v. Crosby, Case No. 06-10621 at 3.

**B. This Court should resolve the split in the circuits**

Mr. Hill respectfully submits that this Court should grant certiorari in order to resolve the dissension amongst the circuits as to this issue.

**C. Mr. Hill’s complaint does not challenge a method of execution generally**

In any event, Mr. Hill maintains that his complaint brought pursuant to 42 U.S.C. § 1983 does not fall into the category of “method-of-execution claims generally.” Nelson, 541 U.S. at 644. As in Nelson, Mr. Hill is not challenging the statutory provision which allows for lethal injection as a method of execution.<sup>4</sup>

("[A] constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." Id. at 693-4). Rather, Mr. Hill is “seeking to enjoin a particular means of effectuating a sentence of death [which] does not directly call into question the ‘fact’ or ‘validity’ of the sentence itself —by simply altering its method of execution, the State can go forward with the sentence.” Id. at 693-4. Here, it is the succession of chemicals to be

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<sup>4</sup>In fact, the protocol utilized by the Department of Corrections is not part of any state statutory provision.

utilized, in accordance with the Department of Correction's protocol, which creates a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed.

The Eighth Amendment prohibits the substantial risk of punishments that "involve the unnecessary and wanton infliction of pain," Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459 (1947). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981). The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). It forbids laws subjecting a person to "circumstance[s] of degradation," Id. at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. Id. at 370 (emphasis added).

Mr. Hill submits that his complaint is a cognizable one under 42 U.S.C. § 1983, as explained by this Court in Nelson, and that the federal courts erroneously recharacterized it as a successive habeas corpus petition.

CONCLUSION

Petitioner, Clarence Edward Hill, requests that certiorari review be granted.

Respectfully submitted,

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