No. 05-8794

In the Supreme Court of the United States

CLARENCE E. HILL, PETITIONER

v.

JAMES R. MCDONOUGH, INTERIM SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

(CAPITAL CASE)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a state prisoner's claim that the method to be used in carrying out his execution violates the Eighth Amendment may be brought in an action under 42 U.S.C. 1983 where the prisoner does not identify any alternative, permissible method of execution.

2. Whether, even assuming that such a claim is otherwise cognizable under Section 1983, petitioner's claim should be rejected because it was filed just days before his scheduled execution date and because petitioner failed to exhaust his administrative remedies.

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INTEREST OF THE UNITED STATES

This case concerns the manner by which a prisoner sentenced to death may challenge the method to be used in carrying out his execution. Federal law authorizes capital punishment for a variety of criminal offenses, and provides that federal death sentences shall be "implement[ed] * * * in the manner prescribed by the law of the State in which the sentence is imposed," or, if the sentencing State does not authorize capital punishment, in the manner prescribed by a State designated by the sentencing court. 18 U.S.C. 3596(a). Lethal injection has been adopted as the sole or primary method of execution in 37 of the 38 States that currently authorize

capital punishment. See *Beardslee* v. *Woodford*, 395 F.3d 1064, 1072 & n.8 (9th Cir.), cert. denied, 543 U.S. 1096 (2005).

The Court's decision in this case will likely resolve the closely related question whether a federal prisoner sentenced to death must bring a method-of-execution claim in a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 (the analogue to a petition for habeas corpus by a state prisoner under 28 U.S.C. 2254). Several federal prisoners who have been sentenced to death by lethal injection are currently pursuing a method-of-execution claim in an action against federal prison officials for injunctive and declaratory relief. See *Roane* v. *Gonzales*, Civ. No. 05-2337 (D.D.C.). As a result of the Court's grant of certiorari in this case, their executions have been stayed. In addition, to the extent that state prisoners bring claims seeking to invalidate the method of execution used in a particular State without identifying a permissible alternative, the federal government has an interest in the ultimate resolution of those claims, insofar as it may delay or effectively block federal executions to be implemented in accordance with that State's procedure. The United States therefore has a substantial interest in this case.

STATEMENT

1. On October 19, 1982, petitioner and an accomplice, Cliff Jackson, stole a car and pistol in Mobile, Alabama, and drove to Pensacola, Florida, where they robbed a savings and loan at gunpoint. Officers arrived at the scene while the robbery was still in progress. Petitioner fled the building through a back door; Jackson fled through the front and was apprehended. While two of the officers were handcuffing Jackson, petitioner snuck up behind the officers and shot them in cold blood, killing one and wounding the other. *Hill* v. *State*, 477 So. 2d 553, 554 (Fla. 1985).

2. In 1983, petitioner was convicted in Florida state court of first-degree murder and various other offenses, and sentenced to death. At the time petitioner was sentenced, Florida law provided that electrocution was the method of execution. See Fla. Stat. Ann. § 922.105 (West 1999). On direct appeal, the Florida Supreme Court affirmed petitioner's convictions, but reversed his sentence on the ground that the trial court had erred during the jury-selection process. *Hill* v. *State*, 477 So. 2d 553 (1985). On remand, petitioner was again sentenced to death. The Florida Supreme Court affirmed petitioner's sentence, *Hill* v. *State*, 515 So. 2d 176 (1987), and this Court denied review, 485 U.S. 993 (1988).

Petitioner then filed both a motion for post-conviction relief in state court and a petition for habeas corpus, pursuant to 28 U.S.C. 2254, in federal court. The trial court denied petitioner's motion for post-conviction relief, and the Florida Supreme Court affirmed. *Hill* v. *Dugger*, 556 So. 2d 1385 (1990). The federal district court partially granted petitioner's habeas petition on the ground that the state courts had failed to conduct a proper harmless-error inquiry after one of the submitted aggravating factors had been invalidated. The Florida Supreme Court subsequently reopened petitioner's appeal and held that any error was harmless. *Hill* v. *State*, 643 So. 2d 1071 (1994). This Court denied review. 516 U.S. 872 (1995). Petitioner then filed an amended habeas petition, which the district court denied. The court of appeals affirmed, *Hill* v. *Moore*, 175 F.3d 915 (11th Cir. 1999), and this Court again denied review, 528 U.S. 1087 (2000).

In 2000, the state legislature changed the presumptive method of execution in Florida from electrocution to lethal injection. See Fla. Stat. Ann. § 922.105(1) (West 2005) (providing that "a death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution" within a specified pe-

riod). Petitioner did not elect to be executed by electrocution. In 2003, petitioner filed a second motion for post-conviction relief in state court, in which he did not challenge the constitutionality of Florida's new method of execution. The trial court denied the motion, and the Florida Supreme Court affirmed, *Hill* v. *State*, 904 So. 2d 430 (2005) (Table).

3. On November 29, 2005, the Governor of Florida signed a death warrant, and petitioner's execution was scheduled for January 24, 2006. On December 15, 2005, petitioner filed a third motion for post-conviction relief in state court, contending for the first time, *inter alia*, that execution by lethal injection, as administered by the State of Florida, constitutes cruel and unusual punishment under the Eighth Amendment. The trial court denied the motion on grounds of procedural default. The Florida Supreme Court affirmed. *Hill* v. *State*, No. 06-2, 2006 WL 91302 (Jan. 17, 2006). The Florida Supreme Court noted that it had rejected a similar claim in *Sims* v. *State*, 754 So. 2d 657, cert. denied, 528 U.S. 1183 (2000), and it rejected petitioner's argument that he was entitled to an evidentiary hearing based on an article recently published in a British medical journal, *The Lancet*, on the ground that the article "is inconclusive" and "does not sufficiently call into question our holding in *Sims*." *Hill*, 2006 WL 91302, at *2.[1] This Court denied review. 126 S. Ct. 1441 (2006).

4. On January 20, 2006, four days before his execution date, petitioner filed an action in federal district court against various state officials pursuant to 42 U.S.C. 1983. J.A. 16-23. In his complaint, petitioner again contended that execution by lethal injection, as administered by the State of Florida, con-

[1] To the extent that the Florida Supreme Court rejected petitioner's claim on the merits, rather than on the ground that it was procedurally defaulted, the Florida Supreme Court's decision could have preclusive effect in any subsequent action under 42 U.S.C. 1983. See *Migra* v. *Warren City Sch. Dist.*, 465 U.S. 75, 80-85 (1984); *Allen* v. *McCurry*, 449 U.S. 90, 96-105 (1980).

stitutes cruel and unusual punishment. J.A. 21. Specifically, petitioner contended that Florida's use of a succession of three chemicals—sodium pentothal, pancuronium bromide, and potassium chloride—"creat[ed] a foreseeable risk of the gratuitous and unnecessary infliction of pain on a person being executed." J.A. 18.[2] Again citing the *Lancet* article, petitioner alleged that, in a number of executions using the same sequence of chemicals, prisoners received an insufficient dose of sodium pentothal and thus suffered pain from the subsequent chemicals. J.A. 20. Petitioner sought a preliminary injunction to allow consideration of his claim, and a permanent injunction "barring defendants from executing [him] in the manner they currently intend." J.A. 22.

5. On January 21, 2006, the district court dismissed petitioner's complaint. J.A. 11-15. The court reasoned that petitioner's Section 1983 action was "the functional equivalent of a successive habeas corpus petition," and petitioner thus could not proceed without first obtaining leave to file from the court of appeals under 28 U.S.C. 2244. J.A. 12. The court rejected petitioner's contention that the *Lancet* article constituted "newly discovered evidence" on the ground that, "[w]hile the *Lancet* article may be new, * * * the factual basis of [petitioner's] claim has certainly been raised and disposed of in numerous cases, both in Florida and in other states." J.A. 14-15. The court thus determined that "[petitioner] has made no showing that he could not have discovered these underlying predicates through the exercise of due diligence." J.A. 14.

6. On January 24, 2006, the court of appeals affirmed. J.A. 9-10. The court reasoned that "[i]t is clear to us that the district court lacked jurisdiction to consider [petitioner's]

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[2] Lethal injection by means of a succession of three chemicals—sodium pentothal, pancuronium bromide, and potassium chloride—is the predominant method of execution in the United States today and is used by at least 27 States. See *Beardslee*, 395 F.3d at 1072.

claim because it is the functional equivalent of a successive habeas petition and he failed to obtain leave of this court to file it." J.A. 10. The court added that any application for leave to file a second or successive habeas petition would be denied in any event, on the ground that it would not meet the requirements of 28 U.S.C. 2244(b)(2). J.A. 10.[3]

7. Later that day, Justice Kennedy granted a temporary stay. The Court granted certiorari on the following day and entered a stay pending decision on the merits.

SUMMARY OF ARGUMENT

A. Petitioner's challenge to execution by lethal injection, as administered by the State of Florida, is cognizable only in a petition for habeas corpus under 28 U.S.C. 2254, and not in an action under 42 U.S.C. 1983. This Court has repeatedly affirmed the principle that certain types of claims by prisoners fall within the exclusive scope of the habeas statute. Specifically, this Court has distinguished between challenges to the *conditions* of a prisoner's confinement, which can proceed in an action under Section 1983, and challenges to the *fact* of a prisoner's confinement or duration of his sentence, which can proceed only in a habeas petition. Where a prisoner challenges a particular method of execution but identifies an alternative, permissible method of execution, that claim is akin to a conditions-of-confinement claim, and therefore is cognizable in a Section 1983 action. But where a prisoner contends that execution per se constitutes cruel and unusual punishment—*i.e.*, that the particular method of execution being contemplated by the State *and any other method of execution* would be unconstitutional—that claim amounts to a challenge to the prisoner's sentence because it effectively seeks a reduc-

[3] Petitioner also filed an application for leave to file a second or successive habeas petition, in which he raised other claims. The court of appeals denied that application in a separate order. 437 F.3d 1080 (11th Cir. 2006).

tion in the sentence from death to life imprisonment, and therefore is cognizable only in a habeas petition.

The claim at issue in this case more closely resembles the latter type of claim, and therefore is cognizable only in habeas. Petitioner has challenged the method of execution used by Florida to deliver lethal injection, but has pointedly declined to identify any permissible alternative method. Where a prisoner challenges his method of execution but fails to identify any permissible alternative, it is reasonable to construe that claim as a challenge to his execution per se. Moreover, such a claim (if successful) is likely to delay, and potentially delay substantially, the prisoner's execution. If such a claim could proceed in a Section 1983 action, then prisoners could use Section 1983 as a means to delay executions simply by waiting until the eve of execution to file suit, as petitioner did here. Moreover, if such claims were cognizable under Section 1983, a prisoner could circumvent any restrictions on his ability to contend in a habeas petition that execution per se constitutes cruel and unusual punishment through the simple expedient of challenging particular methods of execution *seriatim*. The better view, therefore, is that petitioner's claim—which seeks relief different only in degree from an outright injunction against his execution—is cognizable only in a petition for habeas corpus.

B. If petitioner can pursue his claim only in a habeas petition, his action is plainly barred as both successive and untimely. Petitioner's contention that his action should be treated as a "first" habeas petition, rather than a "second or successive" one, is not fairly included in the questions presented and was not passed on below, and therefore is not properly before this Court. In any event, it lacks merit. If petitioner's Section 1983 action were treated as a habeas petition, it would unambiguously be barred as a second or successive habeas petition that does not come within the stringent

statutory exceptions for such petitions established by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Moreover, even if petitioner's claim were not barred outright as a second or successive habeas petition, it would be out of time in any event. AEDPA establishes a one-year statute of limitations for habeas claims. Petitioner did not file this action until more than *six years* after Florida adopted lethal injection as its preferred method of execution.

C. Even if prisoners could pursue method-of-execution claims in Section 1983 actions, petitioner's action is improper. This Court has made clear that, in considering whether a prisoner is entitled to injunctive relief in a Section 1983 action, a court can consider whether the prisoner has engaged in manipulation or undue delay. Such factors would point to denying relief here, where petitioner waited until just days before his scheduled execution before filing this Section 1983 action. Moreover, petitioner failed to exhaust his administrative remedies before doing so, which provides an independent basis for sustaining the lower courts' dismissal of this action. Where a prisoner challenges the method of execution, it is particularly important that the State be provided an opportunity to address that claim, and to consider potential alternatives, before an action may be brought in federal court.

Indeed, the litigation incentives surrounding last-minute capital filings led Congress to enact a variety of carefully focused requirements for the filing of habeas petitions in that setting. As the challenge here amounts to an effort to forestall the sentence, it should be construed as a habeas petition. But even if this Court construes it to be a valid Section 1983 action, the Court should look to Congress's treatment of habeas petitions and import analogous limitations on last-minute filings, like this one, raising claims that could have been filed earlier. Likewise, this Court should vigorously enforce the limits imposed on civil-rights actions under the PLRA.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S ELEVENTH-HOUR CHALLENGE TO THE METHOD OF HIS EXECUTION WAS FORECLOSED

Petitioner contends that execution by lethal injection, as administered by the State of Florida, constitutes cruel and unusual punishment. That claim, like a more categorical claim that execution per se constitutes cruel and unusual punishment, is cognizable only in a petition for habeas corpus under 28 U.S.C. 2254, and not in an action under 42 U.S.C. 1983. Regardless of how petitioner's claim is characterized, moreover, it is clear that this last-ditch action cannot proceed. The court of appeals' decision should therefore be affirmed.

A. Petitioner's Claim Must Be Brought In A Petition For Habeas Corpus

Petitioner contends (Br. 17-29) that his method-of-execution claim was cognizable in an action under 42 U.S.C. 1983. That contention lacks merit.

1. "Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under * * * 42 U.S.C. § 1983." *Muhammad* v. *Close*, 540 U.S. 749, 750 (2004) (per curiam). Although Section 1983 by its terms provides a broad remedy for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," this Court has held that certain types of claims are cognizable only under the habeas statute. Specifically, "[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." *Id.* at 750.

In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), three state prisoners brought an action for injunctive relief under Section 1983, seeking restoration of good-time credits that they

claimed had been unconstitutionally revoked. The Court held that the prisoners could proceed with their claims only in a petition for habeas corpus, not in a Section 1983 action. *Id.* at 500. The Court reasoned that the habeas statute was "explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement" and that, where a prisoner's claim "goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration," "[s]uch a challenge is just as close to the core of habeas corpus as an attack on the prisoner's conviction." *Id.* at 489.

By contrast, this Court has "repeatedly permitted prisoners to bring § 1983 actions challenging the *conditions* of their confinement." *Wilkinson* v. *Dotson*, 544 U.S. 74, 84 (2005) (emphasis added); see, *e.g.*, *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971) (per curiam) (conditions in maximum security); *Cooper* v. *Pate*, 378 U.S. 546, 546 (1964) (per curiam) (access to religious publications). Such a claim falls outside "the heart of habeas corpus" because it does not "challeng[e] the fact or duration of [a prisoner's] physical confinement itself," nor does it "seek[] immediate release or a speedier release from that confinement." *Preiser*, 411 U.S. at 498.

In addition, this Court has recognized that a prisoner's claim may be cognizable in a Section 1983 action if it seeks "relief unavailable in habeas, notably damages," except where it "impl[ies] the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement." *Muhammad*, 540 U.S. at 751. With respect to such "hybrid" claims (*id.* at 750), the Court has held that a prisoner must first challenge his conviction or sentence by other means, such as a petition for habeas corpus. See *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994). The exception for so-called "hybrid" actions, however, is a narrow one. "[W]hen a state prisoner seeks damages in a § 1983 suit,

the district court must consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 487 (emphasis added). The Court has reasoned that a broader exception would "cut off potentially valid damages actions" that "could otherwise have gone forward had the plaintiff not been convicted." *Nelson* v. *Campbell*, 541 U.S. 637, 647 (2004). Although these cases typically involve claims for damages, see *id.* at 646 (characterizing exception as applicable to "civil rights damages actions"), this Court has indicated that the same rule would apply where a prisoner seeks declaratory relief as an adjunct to his claim for damages, see *Edwards* v. *Balisok*, 520 U.S. 641, 648 (1997); *Wolff* v. *McDonnell*, 418 U.S. 539, 554-555 (1974); prospective injunctive relief, see *Edwards*, 520 U.S. at 648; *Wolff*, 418 U.S. at 555; or injunctive relief that differs in kind from an injunction ordering the prisoner's release or shortening his confinement, see *Wilkinson*, 544 U.S. at 82.

2. In *Nelson* v. *Campbell*, *supra*, this Court considered how to categorize a claim seeking injunctive relief enjoining Alabama's use of a so-called "cut-down" procedure in connection with an execution by lethal injection. Because the prisoner's veins had been severely compromised by years of drug abuse, the State informed the prisoner shortly before his execution that it would make an incision in his arm or leg in order to gain venous access. 541 U.S. at 640-642. The prisoner brought a Section 1983 action, alleging that the use of the cut-down procedure constituted cruel and unusual punishment.

The Court held that the prisoner could pursue his claim in a Section 1983 action. *Nelson*, 541 U.S. at 644-647. In so holding, the Court emphasized two essential features of the prisoner's claim. First, the Court noted that the State had

conceded that a prisoner who had not been sentenced to death could bring a similar claim if the State had sought to use the cut-down procedure to gain venous access *for purposes of providing medical treatment*—and that such a claim would be analogous to a conventional conditions-of-confinement claim and therefore cognizable in a Section 1983 action. See *id.* at 644. The Court concluded that there was "no reason on the face of the complaint to treat [the instant prisoner's] claim differently solely because he has been condemned to die." *Id.* at 645. For that reason, the Court explained that it was unnecessary to resolve the question of how to categorize method-of-execution claims generally. See *id.* at 644.

Second, the Court observed that the prisoner "ha[d] alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled": specifically, that the State could instead have gained venous access by means of a percutaneous central line. *Nelson*, 541 U.S. at 646. The Court accordingly concluded that "the gravamen of [the prisoner's] entire claim is that the use of the cut-down would be *gratuitous*." *Id.* at 645. The Court suggested that the outcome might be different "[i]f as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter [the prisoner] were unable or unwilling to concede acceptable alternatives for gaining venous access." *Ibid.*

3. a. The foregoing decisions—and, in particular, this Court's decision in *Nelson*—provide the appropriate framework for categorizing method-of-execution claims.

On the one hand, where a prisoner challenges a particular method of execution but identifies an alternative, authorized method of execution, that claim closely resembles the claim at issue in *Nelson*, and therefore could be brought in a Section 1983 action. Although such a claim by definition could be brought only in connection with an impending execution, that

claim necessarily does not "call into question the 'fact' or 'validity' of the sentence itself," because it is clear that, "by simply altering its method of execution, the State can go forward with the sentence." *Nelson*, 541 U.S. at 644. Such a claim is "properly viewed as [a] challenge[] to the conditions of a condemned inmate's death sentence," *ibid.*, and, like a conditions-of-confinement claim brought by any other prisoner, is cognizable in a Section 1983 action.[4]

On the other hand, where a prisoner contends that execution per se constitutes cruel and unusual punishment—*i.e.*, that the particular method of execution being contemplated by the State *and any other method of execution* would be unconstitutional—that claim can only be brought in a habeas petition. Such a claim would be tantamount to a challenge to the prisoner's death sentence itself, because "imposition of the death penalty presupposes a means of carrying it out." *Nelson*, 541 U.S. at 644. Although this Court has never explicitly addressed the issue, lower courts have held that challenges to a prisoner's death sentence, like challenges to the duration of a non-death sentence, are cognizable only in habeas. See, *e.g.*, *Gilreath* v. *State Bd. of Pardons & Paroles*, 273 F.3d 932, 933 (11th Cir. 2001); *Moody* v. *Rodriguez*, 164 F.3d 893, 893-894 (5th Cir. 1999) (per curiam); *Buchanan* v. *Gilmore*, 139 F.3d 982, 983-984 (4th Cir. 1998) (per curiam).

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[4] In *Nelson*, this Court suggested that the analysis might be different where a prisoner was challenging the State's method of execution *as established by statute*—for example, if petitioner was here challenging the constitutionality of execution by lethal injection *simpliciter*, rather than execution by lethal injection *as administered by the State of Florida*. 541 U.S. at 644. The Court reasoned that, where "[a] finding of unconstitutionality would require statutory amendment or variance," such a result would "impos[e] significant costs on the State and the administration of its penal system." *Ibid.* The same result would follow from a challenge to the lone authorized method of execution, even if it pointed to a specific unauthorized alternative. Here, the statute at issue does not specify the precise means by which a lethal injection will be administered.

b. The claim at issue in this case more closely resembles the latter type of claim, and therefore can be brought only in a habeas petition. Although petitioner in his complaint sought to enjoin respondents only from "executing [him] in the manner they currently intend," J.A. 22, petitioner nowhere specifically identified an alternative method by which he could permissibly be executed.[5] Nor has petitioner done so before this Court, instead stating only (with consistent ambiguity) that he "could still be executed by a different procedure, including a different means of lethal injection chosen by the [State]." Pet. Br. 21; see *id.* at 12 (suggesting that "[petitioner] could be executed by a different means of lethal injection chosen by the [State]"); *id.* at 17 (stating that "[petitioner] concedes that other methods of lethal injection the [State] could choose to use would be constitutional"); *id.* at 22 (contending that "the [State] could readily adopt any one of a number of different approaches to lethal injection that would end [petitioner's] life without a foreseeable likelihood of excruciating pain"). Except in the abstract, therefore, petitioner remains "unable or

[5] In his complaint, petitioner alleged that, in a number of executions in various States using the same sequence of chemicals that Florida uses, prisoners received an insufficient dose of sodium pentothal, with the result that they were not properly sedated and thus suffered pain from the administration of the subsequent chemicals. J.A. 20. Petitioner's complaint therefore might be read to imply that, if the dose of sodium pentothal used by Florida were to be increased, his execution could constitutionally proceed. Petitioner, however, has pointedly stopped short of explicitly embracing that alternative method (or saying by how much, in his view, the dosage of sodium pentothal should be increased), and he still does not embrace it before this Court—even though he cites a decision from another court that effectively adopted it (together with other modifications). See Pet. Br. 22 (citing *Morales* v. *Hickman*, No. 06-219, 2006 WL 335427, at *8 (N.D. Cal. Feb. 14, 2006), aff'd, 438 F.3d 926 (9th Cir.), cert. denied, 126 S. Ct. 1314 (2006)). As discussed in the text above, specification of a lawful alternative means of executing the death sentence not only makes the claim cognizable under Section 1983, but also prevents manipulation of the judicial process.

unwilling to concede acceptable alternatives" that "would have allowed the State to proceed with the execution as scheduled." *Nelson*, 541 U.S. at 645, 646. Indeed, the statements made in petitioner's brief about other methods of execution are sufficiently vague that petitioner presumably could attempt to challenge the validity of any alternative method of execution that the State subsequently adopted.

Where a prisoner challenges his method of execution but fails to identify a permissible alternative, a finding of unconstitutionality will "impos[e] significant costs on the State and the administration of its penal system." *Nelson*, 541 U.S. at 644. At a minimum, the State will be required to devise an alternative method of execution, which will then potentially be subject to further challenge. See *In re Sapp*, 118 F.3d 460, 463 (6th Cir.) (noting that a method-of-execution claim that does not identify a permissible alternative "is not equivalent to a simple 'conditions of confinement' action, such as a claim that a prisoner's cell is too cold, though the prisoner doesn't object to being imprisoned in a warmer cell"), cert. denied, 521 U.S. 1130 (1997). While it is possible that the State will eventually be able to carry out the prisoner's death sentence, this Court has repeatedly recognized that "a State retains a significant interest in meting out a sentence of death in a timely fashion." *Ibid.*; see *Calderon* v. *Thompson*, 523 U.S. 538, 556 (1998) (noting that a State has a "powerful and legitimate interest" in carrying out an execution once first federal habeas proceedings have been completed) (citation omitted). Although a State's ability to carry out an execution may be temporarily delayed even where a prisoner identifies a suitable alternative method of execution (while the prisoner's claim is adjudicated and any alternative method is implemented), it is far more likely to be delayed, and delayed substantially, where there is no guarantee that the State will be able to execute the prisoner even after an alternative method

has been devised. Requiring the prisoner to identify a specific alternative also allows the State and the reviewing court to assess the legality and validity of that alternative. When the alternative is unlawful or impractical, the challenge will produce precisely the kind of costs identified in *Nelson*.

Indeed, if a prisoner were able to bring a challenge to a particular method of execution in a Section 1983 action without identifying a permissible alternative, a prisoner could "seek[] *sub silentio* to preclude imposition of the death penalty" (Pet. Br. 22) simply by challenging individual methods of execution *seriatim*. A prisoner who wished to argue that execution per se constitutes cruel and unusual punishment could circumvent any restrictions on his ability to bring that claim in a habeas petition through the "simple expedient of putting a different label on [his] pleadings" (*Preiser*, 411 U.S. at 490): namely, by presenting his claim in a Section 1983 action as a narrower challenge to the *particular* method of execution being used by the State, with the knowledge that he could subsequently challenge any *other* method adopted by the State if his initial claim were successful. As previously discussed, the complaint in this case appears to be artfully drafted to leave open the option of pursuing that strategy. A rule that prisoners could pursue method-of-execution claims like petitioner's in Section 1983 actions would thus effectively permit claims challenging the constitutionality of capital punishment per se in Section 1983 actions as well.[6]

4. Relying on the test employed by this Court to categorize so-called "hybrid" cases—*i.e.*, cases in which the prisoner seeks "relief unavailable in habeas," *Muhammad*, 540 U.S. at

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[6] Although petitioner abstractly contends (Br. 22) that "[h]is is not a challenge objecting merely to the pain inherent in death," he does not disavow any intention to challenge any alternative method of execution adopted by Florida. That is unsurprising, given that petitioner fails to identify any alternative method of execution that he believes would be permissible.

751—petitioner contends (Br. 20) that his claim should be cognizable in a Section 1983 action because the claim would "not *necessarily* imply the invalidity of [his] conviction or the State's ability ultimately to carry out the death sentence." That contention is unsound for two principal reasons.

a. First, this case is not properly classified as a "hybrid" case at all. Petitioner does not seek damages, and the relief that he does seek—a permanent injunction "barring defendants from executing [him] in the manner they currently intend," J.A. 22—differs only in degree, not in kind, from the relief usually awarded by habeas courts (an order directing a prisoner's immediate release from custody or invalidating or modifying a prisoner's sentence). Cf. 28 U.S.C. 2243 (providing that a court considering a habeas petition may "dispose of the matter as law and justice require"); see generally *Wilkinson*, 544 U.S. at 85-86 (Scalia, J., concurring) (discussing forms of relief authorized by habeas statute). This case is therefore distinguishable in a critical respect from *Wilkinson*, in which the prisoners sought injunctions that would at most entitle them to a new hearing (or further administrative review)—not injunctions that would directly (or indirectly) operate on their convictions or sentences. See *id*. at 81, 82.

Petitioner contends (Br. 17, 19) that, in *Nelson*, this Court held that the claim at issue was cognizable in a Section 1983 action because relief on that claim would not *necessarily* prevent the State from carrying out its execution. That is incorrect. In *Nelson*, the Court did not classify the prisoner's claim as a "hybrid" claim—nor could it have, since the prisoner was seeking an injunction preventing the State from using the cut-down procedure. 541 U.S. at 648. Instead, the Court held only that, because the prisoner had "alleged alternatives that * * * would have allowed the State to proceed with the execution as scheduled" (and because the prisoner could have brought a similar claim if the State had sought to

use the cut-down procedure for non-execution-related purposes), the prisoner's claim was properly brought as a Section 1983 action under *Preiser* and its progeny. *Id.* at 643-646. Only *after* the Court reached that conclusion did the Court state that "our holding here is consistent with our approach to *civil rights damages actions*," on the ground that "[the prisoner's] challenge to the cut-down procedure would [not] *necessarily* prevent Alabama from carrying out its execution." *Id.* at 646-647 (first emphasis added). Far from characterizing the claim at issue as a "hybrid" claim, therefore, the Court in *Nelson* merely looked by analogy to its earlier cases involving such claims, and concluded that the outcome would be the same even under the test applicable to those claims.

Moreover, *Nelson* itself confirms that the test applicable to "hybrid" claims is not relevant here. In *Nelson*, the Court reasoned that the "necessarily implies" test was deliberately narrow because "[t]o hold otherwise would have cut off potentially valid damages actions" that "could otherwise have gone forward had the plaintiff not been convicted." 541 U.S. at 647. That rationale, however, is wholly inapposite where, as here, the claim at issue would not have existed but for the fact that the prisoner had been sentenced to death. In such a situation, the "hybrid" cases are not directly on point, and the appropriate inquiry is instead simply whether the claim at issue more closely resembles a challenge to a prisoner's *conditions* of confinement or a challenge to the *fact* of confinement (or the duration of sentence).

b. Second, even assuming that this case were properly classified as a "hybrid" case, the "necessarily implies" test is satisfied here. Petitioner suggests (Br. 20) that the relevant question is whether his claim would necessarily affect "the State's ability *ultimately* to carry out the death sentence" (emphasis added). In *Nelson*, however, the Court stated only that, in the capital context, the appropriate question was

whether a prisoner's claim "would *necessarily* prevent [the State] from carrying out its execution." 541 U.S. at 647. A claim such as petitioner's—which identifies no permissible alternative methods of execution—*does* necessarily prevent the State from carrying out its execution in the relevant sense: it necessarily prevents the State from carrying out its execution in a timely manner and in the manner of the State's own choosing. At a minimum, such a claim creates a sufficient likelihood that an execution will be substantially delayed that, particularly given the State's interest in "meting out a sentence of death in a timely fashion" (*id.* at 644), it should be cognizable only in habeas.

B. Petitioner's Claim Cannot Proceed In Habeas Corpus

In the alternative, petitioner contends (Br. 29-37) that, even assuming that his method-of-execution claim is cognizable only in a petition for habeas corpus under 28 U.S.C. 2254, this action should be allowed to proceed because his Section 1983 complaint may be recharacterized as a "first" petition. That contention is unavailing.

1. As a preliminary matter, petitioner's contention that his complaint should be treated as a "first" habeas petition, rather than a "second or successive" one, is not fairly included in the questions presented. See Sup. Ct. R. 14.1(a). Both of those questions focus on whether petitioner's claim is cognizable in a Section 1983 action—not on whether, if it is not and the complaint as recharacterized as a habeas petition, it should be treated as a "first" or "second" one. See Pet. i. The body of the certiorari petition supports that interpretation: far from suggesting that his complaint would constitute a "first" habeas petition if it were recharacterized, petitioner conceded that a recharacterized complaint would "amount[] to a successive habeas petition," and seemingly also conceded that such a petition would be barred. Pet. 14.

Moreover, although the district court concluded that petitioner's Section 1983 action was "the functional equivalent of a successive habeas corpus petition," J.A. 12, petitioner does not appear to have challenged that conclusion on appeal, and instead argued only that his claim was cognizable in a Section 1983 action in the first place. See J.A. 36-47. It is therefore unsurprising that the court of appeals not only agreed with the district court that petitioner's claim was not cognizable in a Section 1983 action, but also agreed that petitioner's action, if recharacterized, would constitute an impermissible "second" habeas petition. J.A. 10. Because petitioner failed to argue below that his recharacterized action should be treated as a "first" habeas petition, and failed to present that issue in the petition, the issue is not properly before this Court. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) (per curiam); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

2. In any event, there is no merit to petitioner's contention that this action should be treated as a "first" habeas.

a. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), "Congress established a gatekeeping mechanism for the consideration of second or successive habeas corpus applications in the federal courts." *Stewart* v. *Martinez-Villareal*, 523 U.S. 637, 641 (1998) (internal quotation marks and citation omitted). AEDPA specifically provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed" unless (1) the claim relies on a new rule of constitutional law meeting certain requirements or (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* the facts underlying the claim would sufficiently establish that the applicant was not guilty of the underlying offense. 28 U.S.C. 2244(b)(2); see 28 U.S.C.

2255 para. 8 (imposing similar limitations on second or successive motions under 28 U.S.C. 2255).[7]

Under the plain language of that provision, petitioner's recharacterized action is unambiguously barred. That action would constitute a "second" habeas petition, because petitioner filed a previous habeas petition in 1990, soon after his conviction and sentence became final. See *Hill*, 175 F.3d at 919 n.4 (listing claims advanced in first habeas petition). And any "second" habeas petition would not qualify for either exception to the bar on such petitions. Although it is true that the "factual predicate" of petitioner's claim (*i.e.*, that Florida was employing the challenged method of execution) could not have been discovered "until after his federal habeas proceedings were final" (Pet. Br. 13), petitioner does not contend that he could satisfy the conjunctive actual-innocence requirement of Section 2244(b)(2)—and, indeed, appears to have conceded in his petition that he could not. See Pet. 14. Accordingly, the lower courts correctly held that petitioner's recharacterized action could not proceed as a habeas petition.

b. Petitioner contends (Br. 33-35) that, before AEDPA, his recharacterized action could be maintained under the abuse-of-the-writ doctrine, and that the abuse-of-the-writ doctrine "provides the relevant context here." That is incorrect. Before AEDPA, a new claim could validly be presented in a successive habeas petition *either* if the petitioner could show cause and prejudice for his failure to raise the claim in his earlier petition (*e.g.*, by showing that "the factual or legal basis for a claim was not reasonably available to counsel") *or*

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[7] Before proceeding with a second or successive petition, a petitioner must apply for leave to file in the court of appeals, making "a prima facie showing" that he satisfies the requirements of either exception. 28 U.S.C. 2244(b)(3); see 28 U.S.C. 2255 para. 8. Although petitioner sought leave in the court of appeals to file a second petition containing *other* claims, see J.A. 9, he did not seek leave to present his method-of-execution claim.

if the petitioner could show that a fundamental miscarriage of justice would result from a failure to consider the claim (*e.g.*, by showing that the alleged violation "probably has caused the conviction of one innocent of the crime"). *McCleskey* v. *Zant*, 499 U.S. 467, 493-494 (1991).

In AEDPA, however, Congress overrode that common-law standard and unambiguously required that "a successive claim satisfy *both* of [the] conditions" discussed in *McCleskey*. Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System* 1386 (5th ed. 2003) (emphasis added). In Section 2244(b)(2), Congress used the word "and," rather than "or," to specify the requirements for bringing a successive action. Congress's tightening of the conditions under which prisoners, including prisoners sentenced to death, could file second or successive habeas petitions is entirely consistent with its overarching objective, in enacting AEDPA, of "reduc[ing] delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003). A rule that "a petition is not second or successive simply because it does not violate the old abuse of the writ doctrine," therefore, "would run counter to congressional intent." *Sustache-Rivera* v. *United States*, 221 F.3d 8, 13 (1st Cir. 2000), cert. denied, 532 U.S. 924 (2001); see *Felker* v. *Turpin*, 518 U.S. 651, 664 (1996) (noting that "judgments about the proper scope of the writ are normally for Congress to make") (internal quotation marks and citation omitted).

c. Petitioner further contends (Br. 30) that, in *Stewart* v. *Martinez-Villareal*, *supra*, and *Slack* v. *McDaniel*, 529 U.S. 473 (2000), this Court "rejected the view that § 2244(b) applies to all claims brought in a *numerically* 'second' (or subsequent) petition." But neither of those cases supports the considerably broader proposition advanced by petitioner: *viz.*, that a numerically second petition may be treated as a "first"

petition simply because the factual predicate for the underlying claim did not exist at the time of the earlier petition.

In *Stewart*, a prisoner filed a habeas petition contending that he was incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986). The district court dismissed the *Ford* claim, reasoning that it was premature because the prisoner's execution was not imminent. Several years later, after the State obtained an execution warrant, the prisoner moved to reopen his *Ford* claim. The district court refused, on the ground that the motion constituted the equivalent of a second or successive habeas petition. The court of appeals reversed, holding that the restrictions on second or successive habeas petitions in Section 2244(b) were inapplicable to *Ford* claims. This Court affirmed, but on a far narrower ground. The Court reasoned that the prisoner's filing did not constitute a second or successive habeas petition, but instead constituted merely a motion to *reopen* his first petition. 523 U.S. at 643. The Court concluded that AEDPA did not bar the prisoner from filing such a motion, explaining that the prisoner "was entitled to an adjudication of all of the claims presented in his earlier, undoubtedly reviewable, application for federal habeas relief." *Ibid*. The Court therefore expressly left open the supplemental question (belatedly) presented by petitioner to this Court: namely, whether a numerically second petition could be treated as a "first" petition where a prisoner's claim was not "ripe" at the time of the prisoner's numerically first petition (and the prisoner failed to include the claim in the earlier petition). *Id*. at 645 n.*.

In *Slack*, a prisoner filed a habeas petition containing both exhausted and non-exhausted claims. The district court dismissed the petition for failure to exhaust. After the prisoner exhausted his remedies in state court, he filed a new petition in federal court. The district court dismissed the petition on the ground that it was second or successive, and the court of

appeals denied a certificate of probable cause. This Court reversed, but again on a narrow ground. The Court reasoned that, where an initial mixed petition had been dismissed for failure to exhaust, "[i]t is * * * more appropriate to treat the initial mixed petition as though it had not been filed." 529 U.S. at 487-488. The Court therefore concluded that "[a] petition filed after a mixed petition has been dismissed * * * is to be treated as any other first petition and is not a second or successive petition." *Id.* at 487 (internal quotation marks and citation omitted). The Court again did not address the question whether a numerically second petition could be treated as a "first" petition where a prisoner's claim was not "ripe" at the time of the prisoner's first petition.

3. In any event, if petitioner's action could be treated as a "first" petition, it is plainly untimely.

a. Method-of-execution claims are different from incompetency claims and are not categorically "unripe" at the moment a defendant is sentenced to death. A claim that a prisoner is incompetent to be executed under *Ford* v. *Wainwright*, *supra*, arguably becomes "ripe" only when the prisoner's execution is imminent, insofar as the claim depends on the prisoner's competency at (or shortly before) the moment of execution. But see *Richardson* v. *Johnson*, 256 F.3d 257, 258 (5th Cir.), cert. denied, 533 U.S. 942 (2001); *Scott* v. *Mitchell*, 250 F.3d 1011, 1013 (6th Cir.), cert. denied, 533 U.S. 912 (2001). A claim that the State's method of execution is unconstitutional, however, ordinarily can be brought on direct appeal and, if it is rejected, in a prisoner's first federal habeas petition. For example, if, at the time a prisoner was sentenced, state law provided that lethal injection was the primary method of execution and it was known that the State used a particular method of lethal injection, then the prisoner could readily challenge that method in his direct appeal and in his first federal habeas petition. Even if this Court were to

recognize an exception to the restrictions on second or successive habeas petitions for petitions containing "unripe" claims, therefore, method-of-execution claims should fall outside the exception where the method of execution being challenged was already in place at the time the prisoner was sentenced.

In this case, petitioner could not have brought his particular method-of-execution claim on direct appeal or in his 1990 federal habeas petition because Florida law at the time provided that electrocution, not lethal injection, was the State's method of execution. Petitioner's particular claim arose, or "ripened," on January 14, 2000, when Florida adopted lethal injection as its preferred method of execution. See *Rutherford* v. *Crosby*, 438 F.3d 1087, 1092 (11th Cir. 2006) (noting that "[t]here has been no suggestion that the lethal injection chemicals or procedures used by Florida have changed in the last six years"). AEDPA, however, provides that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. 2244(d)(1); see 28 U.S.C. 2255 para. 6. Assuming that the limitations period could run from the date on which a previously "unripe" claim became "ripe," the limitations period on petitioner's claim would have expired on January 14, 2001, one year after Florida's adoption of lethal injection as its preferred method of execution—and more than five years before petitioner filed the instant action.[8]

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[8] AEDPA also provides that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2). Petitioner, however, did not raise his method-of-execution claim in a motion for post-conviction relief in state court until December 15, 2005—several *years* after the one-year limitations period had run.

To be sure, AEDPA provides that the limitations period runs from the *latest* of several dates, including "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. 2244(d)(1)(D); see 28 U.S.C. 2255 para. 6. Petitioner notes (Br. 5-6) that, although Florida adopted lethal injection as its method of execution by statute in 2000, it did not specify in that statute exactly how lethal injection should be implemented. By no later than February 14, 2000, however, it became known that Florida intended to use the succession of three chemicals that petitioner now challenges, when the Florida Supreme Court rejected a similar challenge to the constitutionality of Florida's method of execution (and, in so doing, discussed at some length testimony from Florida Department of Corrections officials providing "specific details about the chemicals to be administered"). *Sims*, 754 So. 2d at 665 & n.17. At least by that date, therefore, the "factual predicate" of petitioner's claims not only "could have been discovered," but had been publicly disclosed. Petitioner, however, instead waited almost five years and brought this challenge just days before his scheduled execution.[9]

Even assuming, therefore, both that petitioner's recharacterized action could be treated as a "first" habeas petition and that the limitations period on that petition began

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[9] Petitioner notes (Br. 31) that the Florida Department of Corrections had discretion to determine exactly how his execution would be carried out. For purposes of determining when petitioner's claim would become "ripe," however, there is no basis for presuming that the Florida Department of Corrections would deviate from the method disclosed in *Sims*. See J.A. 21 n.3 (noting, in complaint, that "[petitioner] can only assume that the Florida Department of Corrections has not changed [its] chemical process since the *Sims* opinion"). Similarly, a prisoner's claim more generally challenging execution by lethal injection would not be "unripe" simply because Florida *might* amend its statute at some point before the prisoner's execution occurred. There was no reason for petitioner to delay his challenge to the method in place.

to run from the date that the basic protocol of Florida's method of execution became known in 2000, petitioner's action is patently untimely and thus barred under AEDPA.[10]

C. Even If Petitioner's Claim Is Cognizable In A Section 1983 Action, Petitioner Is Not Entitled To Relief

Finally, even if petitioner's method-of-execution claim is properly cognizable under Section 1983, petitioner cannot proceed with this action for two independent reasons.

1. As this Court noted in *Nelson*, "the mere fact that an inmate states a cognizable § 1983 claim does not warrant the entry of a stay as a matter of right." 541 U.S. at 649. In *Gomez* v. *United States District Court for the Northern District of California*, 503 U.S. 653 (1992) (per curiam), this Court considered a prisoner's claim, brought in an eleventh-hour Section 1983 action, that execution by gas chamber constituted cruel and unusual punishment. The Court noted that the prisoner had filed four prior habeas petitions and that he had "made no convincing showing of cause for his failure to

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[10] Petitioner alleges (Br. 8-9, 31) that Florida refused to disclose whether it would use the same succession of chemicals in his own execution. See J.A. 21 n.3 (alleging, in complaint, that, "[w]hile [petitioner] requested updated information from the defendants, such request was refused"). Even taking petitioner's allegation as true, however, it appears that petitioner waited until December 8, 2005, to seek confirmation from Florida concerning the procedures to be used in his execution—long after it became publicly known that Florida was using the succession of chemicals that petitioner now challenges.

In the lower courts, but not in his brief before this Court, petitioner relied on an article published in *The Lancet* in support of his contention that his action was timely. That article, however, at most constitutes *evidence* supporting petitioner's claim; it does not provide the "factual predicate" for that claim. See, *e.g.*, *Jurado* v. *Burt*, 337 F.3d 638, 644 (6th Cir. 2003); *Flanagan* v. *Johnson*, 154 F.3d 196, 199 (5th Cir. 1998). Indeed, other prisoners had brought similar claims well before publication of the *Lancet* article. See, *e.g.*, *LaGrand* v. *Lewis*, 883 F. Supp. 469, 470 (D. Ariz. 1995), aff'd, 133 F.3d 1253 (9th Cir.), cert. denied, 525 U.S. 971 (1998).

raise [the method-of-execution] claim in his prior petitions." *Id.* at 653. The Court, however, ultimately did not decide whether the prisoner should have brought his claim in a Section 1983 action or a habeas petition. Instead, the Court noted that the prisoner was "seek[ing] an equitable remedy" and that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and [the prisoner's] obvious attempt at manipulation." *Id.* at 654. The Court observed that "[t]his claim could have been brought more than a decade ago" and that "[t]here is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process." *Ibid.* On that basis, the Court vacated the court of appeals' stay of the prisoner's execution. *Ibid.* *Gomez* thus stands for the proposition that "there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Nelson*, 541 U.S. at 650.

Consistent with *Gomez*, courts of appeals have frequently denied equitable relief on eleventh-hour method-of-execution claims. See, *e.g.*, *Rutherford*, 438 F.3d at 1089-1093; *White* v. *Johnson*, 429 F.3d 572, 573-574 (5th Cir. 2005); *Sapp*, 118 F.3d at 462-464. There is no justification for a different result here. For essentially the same reasons that petitioner's action would be untimely even if it were recharacterized as a "first" habeas petition, petitioner would not be entitled to equitable relief even if his action were properly brought under Section 1983. Because petitioner could have brought his method-of-execution claim at any point after Florida adopted lethal injection as its preferred method of execution and it became known that Florida intended to use the succession of three chemicals that petitioner now challenges, this case is directly analogous to *Gomez*. Moreover, petitioner was convicted of his capital offense more than 22 years ago, and long

ago completed his direct appeal and first rounds of state and federal collateral review. Because petitioner's action constitutes nothing more than a "last-minute attempt[] to manipulate the judicial process" (*Gomez*, 503 U.S. at 654), the lower courts correctly denied petitioner equitable relief.[11]

2. In addition, as this Court also noted in *Nelson* (541 U.S. at 650), the Prison Litigation Reform Act of 1995 (PLRA) prohibits an inmate from bringing a Section 1983 action concerning prison conditions until "such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a). Petitioner concededly has not sought to exhaust any administrative remedies available within the Florida prison system. Instead, petitioner contended in his complaint only that it was not *necessary* for him to exhaust his administrative remedies because "the lethal injection procedure at issue is a prospective violation of his constitutional rights, not ripe for administrative remedy." J.A. 17. As discussed above, however, it is clear that petitioner's claim was "ripe" by no later than 2000, when petitioner knew, or should have known, that Florida was using the succession of three chemicals that he now challenges. Petitioner's failure to exhaust his administrative remedies therefore constitutes yet another basis to uphold the lower courts' dismissal of this action.

The PLRA's exhaustion requirement is particularly important in this context. Where a prisoner challenges a particular method of execution *and* identifies an alternative, permissible method of execution (and so brings the claim within Section 1983), the exhaustion requirement affords the State

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[11] The Prison Litigation Reform Act of 1995, enacted after this Court's decision in *Gomez*, similarly specifies that, in deciding whether to issue preliminary or permanent injunctive relief in a Section 1983 action concerning prison conditions, "[t]he court shall give substantial weight to any adverse impact on * * * the operation of a criminal justice system caused by [any injunction]." 18 U.S.C. 3626(a)(1), 3626(a)(2).

an opportunity to consider whether the proposed alternative method would in fact be permissible. Moreover, if the identified alternative is feasible, federal-court involvement may be unnecessary. For example, if petitioner identified a higher dose of sodium pentothal that in his view would be sufficient, the State may have been able to accommodate that request. Here, of course, petitioner did not identify any alternative method of execution. The exhaustion requirement still would have permitted the State an opportunity to consider petitioner's claim. But more fundamentally, as discussed above, a prisoner's challenge to the method of execution employed by the State which does not identify any permissible, alternative method of execution is properly characterized as a challenge to his execution per se. That kind of challenge may be brought only in habeas.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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