No. 03-6821

In the

Supreme Court of the United States

DAVID L. NELSON,
Petitioner,

v.

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections, *et al.*,
Respondents.

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

BRIEF FOR RESPONDENTS

Richard F. Allen
Acting Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record *

Michael B. Billingsley
Deputy Solicitor General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130-0152
(334) 242-7401

Counsel for Respondents

March 3, 2004

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Triple murderer David Larry Nelson has been on Alabama's death row for more than 20 years. On March 24, 2003, after his case had made three full trips through the state-court system and another two through the federal system, this Court denied Nelson's petition for a writ of certiorari from the denial of his federal habeas corpus petition. *Nelson v. Alabama*, 538 U.S. 926 (2003). Given that Congress has, subject to two narrow exceptions that Nelson has conceded do not apply here (App. 69-70), expressly prohibited inmates from filing "second or successive" federal habeas petitions, 28 U.S.C. § 2244(b)(2), this Court's order denying certiorari seemingly brought to an end Nelson's repeated attacks on his conviction and sentence.

Then, on October 6, 2003, just three days before his scheduled execution, Nelson, ostensibly proceeding under 42 U.S.C. § 1983, filed a pleading styled a "Complaint for Injunctive and Declaratory Relief." In that "Complaint," Nelson, a long-time IV drug abuser with "compromised veins," alleged that the use of a "cut-down" procedure to administer his execution by lethal injection would violate the Eighth Amendment and, on that basis, sought "an order granting injunctive relief and staying [his] execution." App. 22. The lower courts saw Nelson's nominal § 1983 complaint for what it is — a transparent, last-minute effort to derail his execution and to circumvent Congress' considered judgment effectively barring successive habeas corpus petitions — and dismissed it as "the 'functional equivalent' of a second habeas petition." App. 121.

Nelson's argument in this Court essentially proceeds as if neither the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[1] nor this Court's decisions in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and *Gomez v. United States District Court*, 503 U.S. 653 (1992), ever happened. The lower

---

[1] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

courts rightly rejected Nelson's manipulative end-run. The Eleventh Circuit's judgment should be affirmed, and the stay of execution lifted.

STATEMENT OF THE CASE

A. Nelson's Crimes

On New Year's Eve 1977, Nelson and his girlfriend, Linda Vice, met James Dewey Cash, a cab driver, at the Red Dog Saloon in Birmingham. *Nelson v. State*, 511 So. 2d 225, 232 (Ala. Crim. App. 1986). "Cash was going to a party, and he asked [Nelson] and Vice if they wanted to go with him. They agreed, and the three of them left in Cash's taxicab, with Cash driving." *Id*. "After driving a few blocks, … [Nelson] pulled out [a] pistol and told Cash to hand over his money." *Id*. When Nelson tried to rob Cash of his watch, "Cash grabbed the barrel of the pistol and [Nelson] started firing." *Id*. at 233. "[O]ne bullet hit Cash in the chest, one hit him in the head, and one hit the window." *Id*. Vice and Nelson fled, leaving Cash's body at the scene. *Id*.

Having killed Cash, Nelson went with Vice to another bar where they met Wilson W. Thompson. *Id*. at 229. Nelson introduced Vice to Thompson as his sister and told Thompson that he and Vice had no way home. *Id*. "Thompson and Nelson discussed going to Thompson's mobile home in Kimberly, [Alabama,] which was twenty to thirty miles from Birmingham, and having an 'orgy.'" *Id*. The three left the bar in Thompson's car and headed for Thompson's home. *Id*.

When they arrived, "Thompson fixed everyone a drink." *Id*. Then, "[a]fter some further discussion of orgies, Nelson ordered Vice to remove her clothes." *Id*. When Vice expressed reluctance, Nelson took her into the bedroom, where he again demanded that she "take something off." *Id*. As she removed her blouse, Thompson, who was now nude, entered the room and told Vice to take off the rest of her clothing. *Id*. She did so and then, at Nelson's direction, lay down on the bed. *Id*. "Nelson then told Thompson he could

have oral sex with Vice. Just as Thompson commenced performing oral sex on Vice, Nelson shot him in the back of the neck at close range with [a] .38 caliber pistol." *Id*.

"The bullet apparently passed through Thompson's neck and wounded Vice in the upper part of her leg." *Id*. When Vice started screaming, Nelson shot her twice more; "one bullet wound[ed] her in the wrist and the other graz[ed] the back of her head." *Id*. Nelson then pistol-whipped Thompson in the back of the head and proceeded to "ransack[]" the mobile home. *Id*. "Nelson returned to the bedroom and, upon finding Vice alive, displayed his penis and tried to get Vice to perform oral sex upon him." *Id*. When she refused, "telling him that she was dying and he was not going to make her do anything else," Nelson "threw a blanket over her and walked out." *Id*.

Fortunately, Vice survived Nelson's attack. Thompson, whose nude body police discovered lying face down on the bed, was not so lucky. "When the bullet passed through [Thompson's] neck, it caused major damage to the spinal cord, terminating the function of all vital organs below the neck and causing death to quickly follow." *Id*. at 230.

B. Procedural History

The procedural history culminating in Nelson's last-minute stay request is tortured and, for the most part, irrelevant to the resolution of this case. Several aspects of that history are pertinent, however. First, it was Thompson's murder – the third of Nelson's three murders – for which Nelson received the death sentence at issue here. (Nelson was convicted and sentenced to life imprisonment for Cash's murder; before that, Nelson had pled guilty to the unrelated murder of Oliver King. *Id.* at 228 & n.1.) Second, as a result of two court-ordered resentencing proceedings, Nelson was for the Thompson murder alone sentenced to death three separate times by three different Alabama juries. *Id*. at 228; *Nelson v. Alabama*, 292 F.3d 1291, 1294 (11th Cir. 2002). Finally, and most importantly for present purposes, Nelson has filed and litigated to conclusion a federal habeas

corpus petition challenging his current death sentence. The district court denied Nelson's petition, the Eleventh Circuit affirmed, *see id*., and on March 24, 2003, this Court denied certiorari, *Nelson v. Alabama*, 538 U.S. 926 (2003) – which brings us to the current proceeding.

As a preface, it should be noted that on July 1, 2002 – shortly after the Eleventh Circuit had affirmed the denial of habeas relief – the Alabama Legislature changed the State's method of execution from electrocution to lethal injection. Ala. Code § 15-18-82.1. In doing so, the Legislature provided every death-row inmate "one opportunity" to choose electrocution over lethal injection. *Id*. § 15-18-82.1(a), (b). Nelson waived the electrocution option by failing to exercise it timely. *Id*.

Following this Court's March 24, 2003, denial of certiorari on Nelson's habeas petition, the State on April 4, 2003, moved the Alabama Supreme Court to set Nelson's execution date. Shortly thereafter, counsel for the State received a letter from Nelson stating that his attorneys would not respond to the motion or "seek a stay of execution [on his] behalf." App. 89. Nelson requested that all possible steps be taken to ensure that an execution date was set expeditiously. *Id*. On September 3, the Alabama Supreme Court set Nelson's execution for October 9, 2003.

In the meantime, on August 19, 2003 – more than two weeks before the Alabama Supreme Court issued its order setting Nelson's execution and nearly *two months* before the scheduled execution date itself – counsel for Nelson wrote to Warden Culliver to explain that "Mr. Nelson has great concerns about the lethal injection procedure due to the fact that he has severely compromised veins" as a result of years of illegal drug abuse. App. 25. Specifically, counsel referred to the possibility that a "'cutdown' procedure" might be used to carry out Nelson's lethal injection. App. 26.

In response to the August 19 letter, state medical personnel examined Nelson's veins. App. 93. On discovering that locating a vein in Nelson's lower arms might be problematic, Warden Culliver found a doctor who

could attach a direct IV line to a vein in another part of Nelson's body. App. 93-94. Specifically, the State's doctor proposed first "to attempt to connect a direct intravenous line to the femoral vein located in [Nelson's] thigh" and, failing that, to a vein in his neck. App. 93. A cut-down was "the last procedure" the doctor proposed to attempt, and only then if it "bec[a]me necessary." *Id*.

Although the August 19 letter shows that Nelson was aware of the bases for his Eighth Amendment claim at least seven weeks before his scheduled execution, Nelson waited until the afternoon of October 6, 2003 – three days before the execution date – to file his § 1983 complaint. App. 39. The next day, after conducting a conference call with counsel and receiving the parties' briefs, the district court dismissed Nelson's suit. App. 105. The district court determined that because Nelson's complaint "challenge[d] procedures closely related to his execution and s[ought] a stay of execution," it was the "functional equivalent" of a habeas corpus petition and, therefore, was subject "to the limits imposed on successive petitions in 28 U.S.C.A. § 2244." App. 110. The court held that "[b]ecause Nelson did not first apply to [the Eleventh Circuit] for approval to file a second habeas petition, [it] did not have jurisdiction to hear his claim." App. 112.

The Eleventh Circuit affirmed in a 2-1 decision. In likewise holding Nelson's complaint to be the "functional equivalent" of a successive habeas petition, the court of appeals emphasized that the complaint sought "an immediate stay to the imposition of [his] death sentence." App. 121. "Nelson's prayer to stay his execution," the court observed, "directly impedes the implementation of the state sentence, and is indicative of an effort to accomplish via § 1983 that which cannot be accomplished by a successive petition for habeas corpus." App. 122-23 n. 4.

Nelson petitioned this Court for certiorari on two questions: first, as a procedural matter, whether the Eleventh Circuit erred in dismissing his § 1983 complaint as the "functional equivalent" of a successive habeas corpus

petition; and second, as a substantive matter, whether the use of a cut-down procedure as a means of administering an execution by lethal injection would violate the Eighth Amendment. Pet. i. This Court stayed Nelson's execution and subsequently granted Nelson's petition for certiorari, limited to the first question presented, which the Court reformulated as follows: "Whether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. Sec. 2254?" App. 132-33.

C. The Cut-Down Procedure

Before turning to the Question Presented, it is necessary to clear away some underbrush. As noted, this Court did *not* grant certiorari on the substantive question whether the use of a cut-down as a means of administering a lethal injection would violate the Eighth Amendment. Rather, the Court agreed to review only the procedural question whether § 1983 is an appropriate vehicle for Nelson's challenge. Accordingly, Nelson's dramatic descriptions of the cut-down procedure – as well as the lone *amicus* brief filed on his behalf, which addresses itself exclusively to the medical pros and cons of cut-downs – are irrelevant to this case. Nonetheless, because Nelson has misrepresented both (i) the specifics of the cut-down procedure itself and (ii) the likelihood that a cut-down will actually come to pass in his execution, a brief clarification of the record is in order.

1. For starters, to read Nelson's pleadings in this case, the challenged cut-down procedure is "barbaric" (App. 13; Pet. 16, 20, 33; Pet. Br. 31), "invasive" (App. 13; Pet. 16, 22, 23; Pet. Br. 30), "inhumane" (Pet. 22), "risky" (Pet. 22), and, with his emphasis, "**exceptionally** suspect" (Pet. 11). A cut-down, Nelson says, will entail the "mutilation" of his body (App. 13; Pet. 5; Pet. Reply 2, 3, 4, 5, 7, 8), involve "unnecessary pain and suffering" (App. 13; Pet. 16, 23), and risk "life-threatening" complications including "severe

hemorrhage," "cardiovascular collapse," "shock," and "terror" (Pet. 17). Indicative of Nelson's own hyperbole, Nelson's expert goes so far as to suggest that during any cut-down procedure, "smoke will rise from the area of incision" and "the room will smell of burning tissue, flesh, and blood." App. 32.[2]

Nelson's gory description of the cut-down procedure finds scant support in objective evidence. The scientific fact, as recognized by the sources on which Nelson's own *amici* principally rely, is that a venous cut-down is "a time-honored, simple surgical technique" and "an excellent method of obtaining venous access in several emergent clinical situations," S. Dronen & P. Lanter, *Venous Cutdown*, *in* Clinical Procedures in Emergency Medicine 341-42, 350 (J. Roberts & J. Hedges eds., 3d ed. 1998), and, further, "an effective option for venous access … when peripheral cannulation becomes difficult or impossible," *Venous Cut Down: A Quicker and Safer Technique*, The Royal College of Surgeons, www.edu.rcsed.ac.uk/operations/op4.htm. As the State's affiants have testified (App. 91, 93), a cut-down procedure entails only "a small skin incision, after which a venectomy is made and a wide-bore plastic catheter is inserted into the vein and secured with sutures." *The Merck Manual of Diagnosis and Therapy* 1621 (17th ed. 1999). A cut-down typically takes "5 to 6 minutes to complete," requires only local anesthetic, and involves "minimal" bleeding. *See* Dronen & Lanter, *supra*, at 342, 345. As with any surgical procedure, "common complications" may arise, but they "can be reduced by catheter removal as soon as possible or frequent catheter replacement." *Merck Manual*, *supra*, at 1621. In any event, the sources cited by Nelson's own *amici* indicate that the complications that may attend a cut-down are no more serious than those associated with Nelson's

---

[2] Our research indicates that in the last year alone, Nelson's expert, Dr. Heath, has testified in support of at least nine inmates challenging various aspects of seven different States' lethal-injection procedures.

preferred method of central venous access. *See* Royal College of Surgeons, *supra*.

Nelson's blood-and-guts portrayal also ignores that cut-downs are not reserved for use in executions; rather, as Nelson's *amici*'s source confirms, "[v]enous cut down is an emergency procedure that is potentially *life saving*." *Id*. (emphasis added); *see also* Br. for Sen. Orrin G. Hatch, *et al*., as Amici Curiae at 6-7 (hereinafter "Hatch Br.") (cut-down used on "newborn infants" and "trauma patients"). A cut-down is no more "barbaric" in the present context than it would be in the event that Nelson – or for that matter, any patient in a public hospital – required a life-saving medical procedure and venous access could not otherwise be obtained. The cut-down procedure itself – which Nelson repeatedly insists is all he is challenging (*see infra* at 25) – is precisely the same in both circumstances.

2. Even more significant for present purposes than Nelson's misleading description of the cut-down procedure is his mischaracterization of the probability that a cut-down will even occur as part of his execution. From Nelson's pleadings, one would surmise that the State "in fact does intend to perform" a cut-down as a predicate to his execution. App. 13; *accord* App. 11; Pet. 15, 20, 35; Pet. Reply 6. Indeed, Nelson went so far in the lower courts to as to feature on the covers of his briefs a banner reading: "**Cut-down procedure expected to begin at approximately 4:00 p.m. central time.**" In this Court, Nelson continues to assert that the State is "adamant that [it] intends to implement an inhumane method for gaining venous access" (Pet. 22), that the State "insist[s] … upon [its] chosen 'cut-down' technique for acquiring venous access" (Pet. Br. 35), and, further, that the State "will perform [a] cut-down procedure on [him] prior to his execution" (Pet. 24). In opposition to what he describes as the State's certain "barbari[sm]," Nelson proposes – seemingly reasonably – an "alternative procedure," called percutaneous central line placement, which he claims is "superior to the cut-down procedure in virtually all regards." App. 17; Pet. 20.

Contrary to Nelson's mischaracterizations, the record makes clear that it is highly "unlikely that [a cut-down] procedure will even become necessary" in Nelson's case. Br. in Opp. 2. Rather, as the Eleventh Circuit summarized:

> Alabama first proposes to gain venous access through a femoral vein in Nelson's thigh and if unsuccessful through the external carotid artery in Nelson's neck, neither of which procedure Nelson challenges. It is only if venous access cannot be readily gained in those two areas that Alabama proposes to use the third alternative of the "cut-down" procedure.

App. 120 n.3.

The State has consistently maintained that a cut-down "will only be considered as a last resort" – *i.e.*, only if the doctor responsible for connecting the intravenous line to Nelson is unable to obtain venous access through more conventional techniques. Br. in Opp. 2; *see also id*. at 22-23 ("[T]he sole basis for Nelson's eleventh hour claim, the 'cut-down' procedure, will most likely not even be utilized."); Supp. Br. in Opp. 7-8 n.3 ("last resort"). The record is clear on this point. In their affidavits, both Warden Culliver and Dr. Sonnier described the cut-down procedure as being the third of three options – one that will be utilized only if options one (a central line in the thigh) and two (a central line in the neck) fail and a cut-down becomes truly "necessary." App. 91, 93.

Thus, what the record in this case reveals is not that a cut-down is inevitable (or even likely) but, to the contrary, that the parties agree that conventional IV methods are preferable to the cut-down procedure and should be attempted before resorting to a cut-down. *Compare* App. 37-38 (Heath) *with* App. 90-91 (Sonnier) and App. 93-94 (Culliver). On the understanding that Nelson's years of illegal IV drug abuse have foreclosed the possibility of a simple, superficial needle stick in the lower arm, the State has proposed first to seek venous access by "attach[ing] the

IV to the femoral vein located in the upper thigh." App. 90. Nelson's expert apparently concurs in that approach. After reviewing the Sonnier and Culliver affidavits describing the State's plans, Dr. Heath testified that given Nelson's history of illegal IV drug abuse and the apparent absence of peripheral veins in Nelson's arms, it is "highly likely" that the State will be required to "place a central line" into a deep vein such as "the femoral vein (in the groin) ...." App. 98.[3]

Thus, to be clear, all agree that conventional IV methods – initially, a central line placement in the femoral vein – are preferable to and should be attempted before the cut-down procedure. And there is no particular reason to believe that conventional venous access through the femoral vein in the thigh (or failing that, the neck) will not succeed; the record indicates only that Nelson does "not have any veins *in his lower arms and hands* sufficient to support a direct intravenous line." Pet. Br. 6 n.4 (quoting App. 93) (emphasis added). A cut-down will be implemented only "as a last resort" in the unlikely event that conventional IV techniques do not provide venous access.

---

[3] Nelson makes much (Pet. Br. 9-10) of a mistaken reference in Dr. Sonnier's affidavit to the "external carotid vein located in the neck." Notably, however, Nelson's own expert, Dr. Heath, readily recognized that Dr. Sonnier meant to refer to the "external jugular vein," which Heath acknowledged to be a "commonly-used structure for obtaining intravenous access if peripheral access cannot be secured." App. 99.

Contrary to Nelson's suggestion, all Dr. Sonnier's mistake proves is that his affidavit was hastily prepared – a circumstance that is wholly the result of Nelson's own eleventh-hour filing. Indeed, even Dr. Heath – who regularly testifies on behalf of condemned inmates (*see supra* at 7 n.2) – arguably misstepped in executing his affidavit. Heath testified that a cut-down – which (at least as envisioned here) is used to administer IV drugs where standard IV techniques will not work – should typically be "performed under deep sedation that includes the administration *of potent intravenous analgesics* ...." App. 32 (emphasis added). It is not immediately apparent how one would administer "intravenous analgesics" as a means of sedating a cut-down patient given that the sole reason for employing a cut-down is that conventional intravenous access is impossible. Conspicuously, Nelson's brief to this Court ellipsizes the "intravenous analgesics" portion of Dr. Heath's statement. *See* Pet. Br. 10.

SUMMARY OF ARGUMENT

By his own admission, Nelson filed his eleventh-hour stay request in the guise of a § 1983 complaint for only one reason: not because § 1983 is the appropriate vehicle for his challenge but, rather, because he "ascertained" that binding law "foreclosed any access to habeas corpus relief." Nelson's suit is an end-run, plain and simple.

1. Several explicit restrictions on habeas corpus practice would have precluded Nelson from attacking the imposition of his death sentence in a habeas petition. Most obviously, having already fully litigated one habeas challenge to his death sentence, any effort by Nelson to obtain habeas relief would have run squarely into AEDPA's virtual bar on successive petitions. As relevant here, the only exception to that bar permits a successive petition raising a new claim that *both* (i) depends on a "factual predicate" that could not have been discovered earlier *and* (ii) implicates the inmate's actual, factual innocence. 28 U.S.C. § 2244(b)(2). As Nelson's lawyers have acknowledged that Nelson's claim "does not have anything to do with factual innocence," AEDPA's bar expressly applies and prohibits Nelson from pursuing habeas relief. In any event, even aside from AEDPA's successive-petitions bar, any habeas petition filed by Nelson would have been dismissed for failure to exhaust, 28 U.S.C. § 2254(b), and as barred by *Teague v. Lane*, 489 U.S. 288 (1989).

2a-b. Nelson cannot skirt Congress' specific limitations on habeas relief by what this Court has called "the simple expedient of putting a different label on [his] pleadings." *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973). Section 1983 simply is not an appropriate vehicle for Nelson's Eighth Amendment claim. *Preiser*, which deals expressly with actions, like Nelson's, seeking injunctive relief from state convictions or sentences, makes clear that an inmate may not "challeng[e]" or "attack" his sentence in a § 1983 action. Given that (i) obtaining venous access is, in Nelson's own words, a "condition precedent" to his execution, and (ii) the cut-down procedure that Nelson challenges will be utilized

only if other means of venous access fail and a cut-down becomes truly "necessary," it is clear that Nelson's challenge to the use of a cut-down constitutes a forbidden "challeng[e]" to the imposition of his sentence within the meaning of *Preiser*. For the same reasons, even if the governing precedent here were not *Preiser* but, instead, *Heck v. Humphrey*, 512 U.S. 477 (1994) – which dealt specifically with § 1983 *damages* actions – Nelson's suit would be barred because in every real and meaningful sense Nelson's challenge to the use of a cut-down "necessarily impl[ies] the invalidity of his … sentence." *Id*. at 487.

2c. In seeking habeas-like relief from the imposition of his death-sentence in what is nominally a § 1983 complaint, Nelson is effectively asking this Court to engraft a new exception onto AEDPA's successive-petitions bar. Nelson's suit is completely unmoored from – and, indeed, would gut – AEDPA's plain language and manifest purpose.

3. Even assuming that Nelson's claim itself does not take his suit outside § 1983's ambit, the specific relief he seeks – a stay of his impending execution – does so. Because a request for a stay of execution entails a federal interference with state penal interests at least as grave – if not more so – than the request for speedier release at issue in *Preiser*, federal courts may not stay impending executions under § 1983. Nelson had ample time in which to litigate his challenge to the possible use of a cut-down without seeking a stay. Instead of promptly pursuing his claim, he waited until the last minute to spring his challenge on the State and the courts. Nelson's sandbagging should not be rewarded.

4. Wholly apart from the question whether Nelson's claim and requested relief are cognizable under § 1983, equitable considerations require dismissal. Under *Gomez v. United States District Court*, 503 U.S. 653 (1992), "[w]hether [Nelson's] claim was framed as a habeas petition or a § 1983 action," his suit should be dismissed because (i) a quarter century after Nelson's crime, the State has a "strong interest in proceeding with its judgment"; (ii) there is "no good reason for [Nelson's] abusive delay" in filing; and (iii) by

waiting until the eleventh hour Nelson has plainly engaged in "last-minute attempts to manipulate the judicial process." *Id*. at 654.

5. Nelson's assertion that if not allowed to proceed under § 1983 he will be without "any remedy" is misleading and factually inaccurate. Nelson had – and still has – multiple viable remedies open to him, including at least one in this Court directly (an original writ), and several more in state court with subsequent § 1257 review in this Court. To the extent that Nelson's contention is that he has an absolute right to litigate his claim in a lower federal court, this Court has squarely – and repeatedly – rejected it.

ARGUMENT

There is a simple – and transparent – explanation for Nelson's decision to file his last-minute stay request in a § 1983 complaint rather than a habeas corpus petition. That explanation is *not* that § 1983 is the more appropriate vehicle for Nelson's Eighth Amendment challenge. Rather, as Nelson concedes in his brief, he filed a § 1983 action because he "ascertained" that binding law "foreclosed any access to habeas corpus relief." Pet. Br. 29. Nelson's suit, therefore, is nothing more and nothing less than "an effort to accomplish via § 1983 what cannot be accomplished by a successive petition for habeas corpus." App. 123 n.4. Nelson's suit, by his own admission, is an end-run.

This Court has never suggested that § 1983 exists to fill perceived "gaps" in the habeas statute's remedial scheme. Rather, habeas corpus and § 1983 are distinct remedies that address distinct situations. This Court's decisions uniformly differentiate habeas petitions from § 1983 complaints on the substantive bases of (i) the claims raised and (ii) the relief sought. Some claims and forms of relief are exclusively the province of habeas; others are appropriately the subject of § 1983. Nelson nowhere contends that the claim he raises and the relief he seeks are inappropriate to habeas, and he only glancingly suggests that his claim and requested relief are truly appropriate to § 1983. Nelson's principal position,

instead, is that because habeas corpus does not provide him relief, § 1983 must. That is not the law. A nonactionable habeas claim does not, simply by virtue of its nonactionability, become a § 1983 claim.

I. Nelson Could Not Have Obtained Relief on His Eighth Amendment Claim in a Federal Habeas Corpus Petition.

Nelson, by his own admission, filed under § 1983 not because it is an appropriate vehicle for the claim he raises or the relief he seeks – it is not – but rather because Congress and this Court have on multiple bases clearly foreclosed habeas corpus relief to inmates in Nelson's position.

A. A Federal Habeas Petition Presenting Nelson's Claim Would Have Been Barred as Successive.

Having already litigated one habeas corpus petition challenging his death sentence, the first and most obvious impediment to habeas relief that Nelson faced was AEDPA's virtual ban on "second or successive habeas corpus application[s]," 28 U.S.C. § 2244(b). As this Court observed just last Term, "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, *particularly in capital cases*." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (citing *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J.), 404 (O'Connor, J., for the Court), and *Williams v. Taylor*, 529 U.S. 420, 436 (2000)) (emphasis added). Specifically, Congress sought "to curb the abuse of the statutory writ of habeas corpus" and, thereby, to "address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944; *accord* 142 Cong. Rec. S3465 (Apr. 17, 1996) (Sen. Warner) (purpose to stop "the charade of habeas corpus appeals" and to preclude "death row inmates [from] drag[ging] out their appeals for several decades"). In signing AEDPA, President Clinton lamented that "[f]or too long, and in too many cases, endless death row appeals have stood in the way of justice being served." Statement on Signing the Antiterrorism and Effective Death

Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 719, 720 (Apr. 24, 1996). The point of AEDPA, the President emphasized, was to "streamline Federal appeals for convicted criminals sentenced to the death penalty." *Id*.

One of the principal means by which Congress sought to "streamline" the appeals process was by severely restricting inmates' ability to file "second or successive" habeas petitions. 28 U.S.C. § 2244(b). Section 2244(b)(1) requires dismissal, without exception, of any claim raised in a second or successive petition that "was presented in a prior application." With respect to so-called "new claim" petitions – second or successive petitions raising claims, like Nelson's Eighth Amendment claim here, that were "*not* presented in a previous application" – § 2244(b)(2) requires dismissal save in two narrow circumstances. Specifically, Congress determined that an inmate may file a new-claim successive petition only:

- 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
- where *both* (i) the "factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* (ii) the facts underlying the claim establish by clear and convincing evidence that the prisoner is actually, factually innocent "of the underlying offense" (§ 2244(b)(2)(B)).

One of Nelson's own lawyers, Mr. Stevenson, has in his academic writings accurately described the changes wrought by AEDPA's stringent successive-petitions bar. "As a general matter" in the pre-AEDPA days, "any type of claim that was unavailable at the time of the earlier filing – because the legal or factual basis for that claim did not exist or was not reasonably knowable by the prisoner – was an appropriate candidate for inclusion in a successive petition." B. Stevenson, *The Politics of Fear and Death: Successive*

Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 736 (2002). "AEDPA's successive petition standard," Stevenson explains, "appears to incorporate this general approach, but with one major difference." *Id*. at 737. Specifically, and as particularly relevant here, "Subsection 2244(b)(2)(B)(ii) sharply diverges from the prior law … by modifying the 'new facts' category to include an additional requirement that the prisoner make a showing of 'innocence.'" *Id*. at 737-38.[4] Stevenson goes on to explain (again correctly) that § 2244(b)(2)(B)(ii)'s standard "is not elastic enough to include certain capital punishment claims" – like Nelson's here – "that concern the constitutionality of an execution as opposed to the constitutionality of the capital sentencing determination." *Id*. at 740.[5]

Consistent with this understanding, Nelson's lawyers have conceded that Nelson's Eighth Amendment claim does not fit within AEDPA's narrow exceptions. In view of the fact that Alabama did not adopt lethal injection as its method of execution until July 2002, after Nelson's first habeas petition had been adjudicated, the district court pointedly asked Nelson's lawyer whether Nelson's claim "couldn't arguably … fall under a factual predicate that wasn't discovered earlier" within the meaning of § 2244(b)(2)(B). App. 69. Presumably alluding to the change in execution method, counsel responded that "[o]bviously, the factual predicate for this case was not available to Mr. Nelson until very recently." App. at 69-70. But, referring to § 2244(b)(2)(B)'s actual-innocence prong, counsel correctly added that "[t]he problem is, I don't think that's the only part of the standard" and admitted that "*obviously … our*

---

[4] *See also* 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); H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 250 (R. Fallon, *et al.*, eds., 2002 Supp.) (AEDPA changes prior law such that claim must "satisfy both conditions").

[5] *Accord* Hertz & Liebman, *supra*, § 28.3e, at 1321.

claim does not have anything to do with factual innocence." *Id*. (emphasis added). Accordingly, it is common ground in this case that because "an execution-related claim" – like Nelson's – "does not qualify for the innocence requirement of § 2244(b)(2)(B)," *see* Stevenson, *supra*, at 756, AEDPA's successive-petitions bar would have precluded Nelson from pursuing his Eighth Amendment challenge to Alabama's lethal-injection procedures in a habeas corpus petition.

B. Nelson's Belated Contention That His Claim Should Not Be Considered Successive Is Meritless.

In his brief to this Court, Nelson attempts an about-face. Despite his concession, noted by the lower courts, "that he had exhausted all available habeas corpus relief and that he would have to get permission from the Eleventh Circuit in order to file a second or successive habeas petition" (App. 119-20 n.2), Nelson now contends that his claim should *not* be considered successive, for two reasons.

1. As an initial matter, Nelson repeatedly asserts that this Court in *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), "held specifically that a lawsuit limited to claims arising for the first time out of the circumstances of a death-sentenced inmate's imminent execution – claims that were premature and unfit for adjudication until just before the execution is carried out – does not constitute a 'second or successive' habeas corpus application for purposes of § 2244(b) when it is filed after the denial of habeas corpus relief on an earlier petition challenging the underlying conviction and sentence." Pet. Br. 15; *see also id*. at 23, 25, 28, 36-37.

Nelson is wrong; his argument is based on either a misunderstanding or a mischaracterization of the decision in *Martinez-Villareal*. At issue there was a habeas petition presenting a "competency-to-be-executed" claim under *Ford v. Wainwright*, 477 U.S. 399 (1986). The condemned inmate had raised his *Ford* claim in a prior habeas petition, but the district court had "dismissed [the claim] 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. After the State had obtained an execution warrant, the inmate moved the district court to reopen his earlier-filed *Ford* claim. Based on AEDPA's successive-petitions bar, the district court refused. The Ninth Circuit reversed, seemingly on the broad ground that because, almost by definition, a *Ford* claim will not arise until after the first round of habeas litigation, AEDPA's successive-petitions bar "does not apply to a petition that raises only a competency to be executed claim." *Martinez-Villareal v. Stewart*, 118 F.3d 628, 629 (9th Cir. 1997).

This Court affirmed but, as Nelson's counsel has correctly observed elsewhere, "on a much narrower ground than the appellate court had employed." Stevenson, *supra*, at 744. Whereas "the Ninth Circuit [had] essentially read into the statute an exemption for *Ford* claims," this Court "avoided deciding the broad issues in the case." *Id*. at 742, 747. This Court held only that the inmate there 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 ("There was only one application for habeas relief …."). The Court concluded that in that unique situation, where a habeas petitioner moves to reopen an earlier-filed petition to obtain an initial merits determination of a previously-unripe claim, AEDPA posed no bar. The Court expressly did *not* adopt a broad-ranging exception to § 2244(b)'s successive-petitions bar for all claims that, for whatever reason, could not have been raised in a first petition. *See id*. at 645 n.*. Nelson's repeated suggestion to the contrary is mistaken – and given his own counsel's evident understanding of *Martinez-Villareal*'s "narrow" holding (*see* Stevenson, *supra*, at 742-48), disingenuous.

Neither *Martinez-Villareal* nor its successor, *Slack v. McDaniel*, 529 U.S. 473 (2000), can be stretched to encompass Nelson's case. As noted, the numerically second petition in *Martinez-Villareal* was deemed a first petition because the petitioner there had moved to reopen a previously-filed claim. In *Slack*, a numerically second petition was deemed a first only because the actual first petition had been dismissed

on exhaustion grounds and, thus, could be treated "as though it had not been filed." 529 U.S. at 488. Neither special circumstance would have obtained here. Nelson would not have been moving to reopen an earlier-filed claim; and because his first petition was denied on the merits, not for failure to exhaust or for some other technical deficiency, it could hardly have been deemed a non-event. There simply is no amount of massaging that could have made Nelson's petition (had he filed one) anything other than "second or successive."

2. Nelson's brief next suggests (albeit obliquely) that Congress could not possibly have intended to preclude successive habeas petitions like his – petitions raising new claims that, though not implicating actual innocence, are based on facts not available at the time the first habeas petition was adjudicated. Pet. Br. 22-23. But as AEDPA's plain language demonstrates, that is *precisely* what Congress intended. Again, before 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. *See* Hertz & Liebman, *supra* note 4, § 28.3e, at 1318 (citing *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991)). Section 2244(b)(2)(B), as amended by AEDPA, clearly represents Congress' conscious design to tighten the successive-petition standard by requiring a showing of *both* (i) a newly-discovered factual predicate *and* (ii) probable actual innocence. *See id.* ("cause and innocence"); Hart & Wechsler, *supra* note 4, at 250 ("both conditions"). *See generally* Hatch Br. 2, 17-21.

Congress' determination to limit § 2244(b)(2)(B)'s reach to claims that (unlike Nelson's) implicate an inmate's actual innocence is not only crystal clear, but also eminently reasonable. It appropriately tempers the traditional habeas concerns of federalism, comity, and finality with a heightened solicitude for one uniquely compelling circumstance: an inmate's showing that he is actually, factually innocent – *i.e.*, that he didn't do it. *See Schlup v.*

Delo, 513 U.S. 298, 324-25 (1995) ("[T]he individual interest in avoiding injustice is most compelling in the context of actual innocence."); *see also Calderon v. Thompson*, 523 U.S. 538, 558 (1998) ("AEDPA's central concern" is "that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.").

* * *

This Court has recognized "that judgments about the proper scope of the writ are 'normally for Congress to make.'" *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)). This Court has also held that § 2244(b)(2)'s "added restrictions" on new-claim successive petitions are "well within the compass" of the "complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions" and, accordingly, do not implicate the Suspension Clause. *Id*. Given the evident care with which Congress crafted § 2244(b)(2)(B)'s exception – specifically (and reasonably) defining it to apply only to claims concerning a prisoner's actual innocence – this Court should refuse Nelson's end-run, which, as one of his own lawyers has acknowledged, is wholly "unmoored in the language" of § 2244(b) (Stevenson, *supra*, at 781) and, indeed, reads the actual-innocence limitation right out of the statute.

C. Even If It Were Not Barred as Successive, Nelson's Claim Could Not Have Been Presented in a Federal Habeas Petition.

Even aside from AEDPA's successive-petitions bar, Nelson would have faced at least two additional obstacles to filing a federal habeas petition challenging the imposition of his death sentence. First, as the State has emphasized throughout these proceedings, Nelson has made no effort whatsoever to exhaust his state remedies. *See* 28 U.S.C. § 2254(c) (inmate must exhaust "any available procedure" for raising his claim in state court). Nelson's failure is not excused by the fact that his claim arose after direct appeal. Where, as here, "state post-conviction processes are open to

a claim not previously raised in state court … exhaustion of those processes is required." Hart & Wechsler, *supra* note 4, at 1446.

Second, the claims Nelson raises here – not only his challenge to the cut-down procedure itself but also his demand to know the particulars of the State's lethal-injection "protocol," the identities and credentials of the persons performing execution procedures, and the setting in which those procedures will be performed – are in all likelihood barred by *Teague v. Lane*, 489 U.S. 288 (1989). As support for his various claims, Nelson cites only stock language from this Court's decisions in *Louisiana v. Resweber*, 329 U.S. 459 (1947), *Trop v. Dulles*, 356 U.S. 86 (1958), *Estelle v. Gamble*, 429 U.S. 97 (1976), and *Farmer v. Brennan*, 511 U.S. 825 (1994). There is no sense in which a favorable resolution of Nelson's claims is "*dictated* by" any of those decisions or by any other "precedent existing at the time [his] conviction became final." *Teague*, 489 U.S. at 301.

* * *

Correctly "ascertain[ing]" that existing law "foreclosed any access to habeas corpus relief" (Pet. Br. 29), Nelson filed what was nominally a § 1983 complaint. But Nelson's "Complaint" bears all of the hallmarks of a habeas corpus petition and, accordingly, constitutes "an obvious attempt to avoid application" of the various restrictions on federal habeas practice. *Gomez v. United States District Court*, 503 U.S. 653, 653 (1992). Nelson's pleading seeks purely equitable relief, is directed to state officers in their official capacities, and, indeed, expressly names Warden Culliver as a defendant. Most importantly, as detailed below, Nelson's pleading expressly and directly challenges the imposition of his criminal sentence – by seeking "an order granting injunctive relief and staying [his] execution" (App. 22) – and thus falls squarely within the rule of *Preiser v. Rodriguez* that an inmate challenging his sentence in federal court "is limited to habeas corpus" and may not sue under § 1983. 411 U.S. 475, 489 (1973).

II. The Claim Nelson Presents Is Not Cognizable Under Section 1983.

Nelson describes the State's position here (as well as the Eleventh Circuit's holding) as categorically barring a "death-sentenced inmate[] who ha[s] filed a federal habeas corpus petition … from bringing *any* § 1983 action that could be brought by other inmates." Pet. 25 (emphasis added); *see also id*. at 26 ("any actions"); *id*. at 27 ("all § 1983 claims"); Pet. Br. 20 ("any federal action"). Thus, Nelson warns, unless he prevails, condemned inmates who have filed federal habeas petitions will be forever precluded from bringing § 1983 actions challenging, for instance, "the malicious and sadistic infliction of harm by prison guards," "denial[s] of medical care," and "denial[s] of the minimal civilized nature of life's necessities." Pet. 25.

Nelson is wrong; he attacks the proverbial straw man. The State has never contended, and the Eleventh Circuit never held, that a condemned inmate who has filed a federal habeas petition is thereafter categorically barred from filing suit under § 1983. Nelson quotes the Eleventh Circuit as having held "that '*a § 1983 claim* is subject to the procedural requirements for bringing a second or successive habeas claim.'" Pet. 26 (quoting *Spivey v. Board of Pardons & Paroles*, 279 F.3d 1301, 1302 (11th Cir. 2002)) (emphasis added). Nelson's quotation, however, conspicuously omits an important limitation on the scope of the Eleventh Circuit's rule. What the *Spivey* court actually held – and all the State contends here – is "that a '§ 1983 claim *[challenging the legality of an execution]* is subject to the procedural requirements for bringing a second or successive habeas claim.'" 279 F.3d at 1302 (emphasis added).

State prisoners in Nelson's shoes – *i.e.*, those who have previously filed federal habeas petitions – may of course file § 1983 complaints challenging the conditions of their confinement. Indeed, this Court observed in *Preiser v. Rodriguez* that "a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life." 411 U.S. at 499. What a state

prisoner may *not* do is dress up in § 1983 garb what is in substance a habeas petition – a pleading expressly seeking equitable relief from a conviction or sentence – in an attempt to skirt the various restrictions on habeas practice. On that score, this Court made two important observations in *Preiser*: first, that "a state prisoner challenging his underlying conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus"; and second, that an inmate may not circumvent applicable habeas restrictions "by the simple expedient of putting a different label on [his] pleadings." *Id*. at 489-90. As explained below, that is exactly what Nelson tried to do here.

A. Nelson's Claim Is Not Cognizable Under Section 1983 Because It Directly Challenges the Imposition of His Death Sentence.

1. Under *Preiser v. Rodriguez*, a Claim That Challenges a Criminal Sentence Is Not Cognizable Under Section 1983.

Nelson's position is, as it must be, that "Section 1983 is an appropriate vehicle for [his] claims." Pet. Br. 30. The principal basis for that position seems to be § 1983's broad language, which authorizes "suit[s] in equity" against state actors who deprive citizens "of any rights, privileges, or immunities secured by the Constitution." *Preiser v. Rodriguez*, however, makes clear that the fact that "[t]he broad language of § 1983" covers a prisoner-plaintiff's request for equitable relief is "not conclusive." 411 U.S. at 489. Rather, "despite the literal applicability of [§ 1983's] terms," the "specific federal habeas corpus statute" is the exclusive remedy where it "clearly applies." *Id*.; *see also 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 ….").

To the end of giving the "specific" habeas statute its intended scope and effect, the *Preiser* Court embraced the uncontroversial proposition that a state prisoner who "challeng[es]" or "attack[s]" his criminal sentence on

constitutional grounds in a federal court and seeks equitable relief from that sentence, *see* 411 U.S. at 484, 489, 494, 498, 499, "is limited to habeas corpus" and may not pursue his challenge via § 1983, *id*. at 489. Indeed, even the *Preiser* dissenters seemed to agree that the habeas statute would – at the very least – govern a case involving an "attack … directed at a state court conviction or sentence." *Id*. at 520 (Brennan, J., dissenting). More recently, in addressing a claim similar to Nelson's, this Court in *Lonchar v. Thomas* reiterated that the various restrictions on habeas practice "apply to a suit challenging the method of execution, regardless of the technical form of action." 517 U.S. at 329 (citing *Gomez v. United States District Court*, 503 U.S. 653).

In the light of (and typically citing) *Preiser* and its progeny, every court of appeals squarely to consider the issue has held that a condemned inmate challenging the imposition of his death sentence must proceed via habeas, not § 1983. *See, e.g.*, *Buchanan v. Gilmore*, 139 F.3d 982, 984 (4th Cir. 1998); *Martinez v. Texas Court of Criminal Appeals*, 292 F.3d 417, 420-21 (5th Cir. 2002); *In re Sapp*, 118 F.3d 460, 462 (6th Cir. 1997); *Williams v. Hopkins*, 130 F.3d 333, 335 (8th Cir. 1997); *Fugate v. Department of Corr.*, 301 F.3d 1287, 1288 (11th Cir. 2002).[6]

Accordingly, inasmuch as Nelson's claim for injunctive relief in this case constitutes a "challeng[e]" to or "attack[]" on his death sentence, *Preiser* controls and prohibits the claim from proceeding under § 1983.

---

[6] None of the decisions cited in Nelson's petition actually addresses the question whether *Preiser*-like concerns prevent an inmate's challenge to the imposition of his death sentence from proceeding under § 1983. *See* Supp. Br. in Opp. 2-6 (explaining *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000), *Duvall v. Keating*, 162 F.3d 1058 (10th Cir. 1998), and *Wilson v. United States District Court*, 161 F.3d 1185 (9th Cir. 1998)).

2. By Challenging a Procedure That Is a "Condition Precedent" to the Imposition of His Death Sentence, Nelson Challenges the Sentence Itself.

Nelson seeks to avoid *Preiser* on two bases. First, he contends that, by definition, "§ 1983 cases do not challenge the conviction or sentence." Pet. 26. That argument is baseless. Indeed, it is precisely the argument that this Court rejected in *Preiser*, namely, 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. Both *Preiser* and *Lonchar* make clear that it is a suit's substance, not its form, that determines its characterization as a § 1983 complaint or a habeas petition. *See Lonchar*, 517 U.S. at 329; *Preiser*, 411 U.S. at 489-90. To be sure, there are § 1983 claims – complaints about unsanitary living conditions, for instance – that do not entail challenges to criminal sentences. But just as surely there are those – like Nelson's – that *do* challenge criminal sentences and, accordingly, are subject to the restrictions on habeas corpus practice.

Nelson's second contention is that, even if a § 1983 action could be used to attack a state-imposed sentence, *his* § 1983 action does not. Specifically, Nelson says that his suit does not attack lethal injection *per se*, but instead merely challenges the constitutionality of a separate medical procedure. *See* Pet. Br. 9, 13, 15, 22, 29, 32, 33-35. Nelson's argument does not withstand scrutiny. As a baseline for evaluating Nelson's position, he has acknowledged that a "chemical composition challenge" – that is, a "challenge to the chemicals used for lethal injection" – "constitutes a challenge to a sentence of death by lethal injection" that must proceed via habeas, not § 1983. Supp. Cert. Reply 6. Nelson's concession is well-founded; this Court has recently refused stays of execution in a slew of cases in which death-sentenced inmates had presented chemical-composition claims in what were nominally § 1983 complaints. *See Robinson v. Crosby*, 124 S. Ct. 1196 (2004); *Roe v. Taft,* 124 S. Ct. 1196 (2004); *Zimmerman v. Johnson*, 124 S. Ct. 1168 (2004);

Bruce v. Dretke, 124 S. Ct. 1142 (2004); *Williams v. Taft*, 124 S. Ct. 1142 (2004); *Ward v. Darks*, 124 S. Ct. 1142 (2004); *Beck v. Rowsey*, 124 S. Ct. 980 (2004); *Zimmerman v. Johnson*, 124 S. Ct. 979 (2003). *See also Lonchar*, 517 U.S. at 329 ("method of execution" claim must proceed on habeas, not via § 1983).

Nelson seeks to distinguish his claim from the chemical-composition cases on the ground that his "challenge is to [the cut-down] medical procedure and not to the sentence of death." Supp. Cert. Reply 6. But as Justice Stevens has correctly pointed out, the "procedural issue" whether a prisoner's claim is cognizable under § 1983, or must instead proceed via habeas, is "precise[ly]" the same in the chemical-composition and cut-down contexts. *See Zimmerman*, No. 03A497, 540 U.S. __ (Dec. 15, 2003) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting). In any event, as explained below, the razor-fine distinction that Nelson posits cannot be squared with either (i) the premise underlying the Question Presented, as reformulated by this Court, (ii) Nelson's own pleadings in this litigation, or (iii) most importantly, the real-world facts.

1. In his petition, Nelson framed the first of his two questions presented as follows: "Whether an action brought by a death-sentenced prisoner pursuant to 42 U.S.C. § 1983, *which does not attack a conviction or sentence*, is – simply because the person is under a sentence of death – to be treated as a habeas corpus case subject to the restriction on successive petitions ….?" Pet. i (emphasis added). Plainly, the premise underlying Nelson's question presented was that his was *not* a challenge to the imposition of his death-sentence. In granting certiorari, this Court indicated a different view. Specifically, this Court reformulated the Question Presented, seemingly on the assumption that Nelson's claim *does* challenge the imposition of his sentence. As framed by this Court, the Question Presented asks "[w]hether a complaint brought under 42 U.S.C. Sec. 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a *challenge to the procedures for carrying out the execution*, is properly recharacterized as a

habeas corpus petition under 28 U.S.C. Sec. 2254?" App. 132-33 (emphasis added). Thus, the reformulated Question Presented does not, as Nelson continues to suggest even in his merits brief, ask generically "whether a death row inmate's § 1983 action should be treated as a habeas corpus petition subject to the procedures required for filing successive petitions …." Pet. Br. 13. Rather, it asks only whether habeas treatment is appropriate for a § 1983 complaint that seeks to "pursue a challenge to the procedures for carrying out the execution."

2. Nelson's suggestion that his § 1983 suit challenges something other than the imposition of his death sentence is also belied by his own pleadings, which demonstrate that it is *precisely* the imposition of his death sentence he is challenging. Nelson's complaint, for instance, refers to cut-downs (as well as other, preferable preparatory techniques) as "procedures employed *in the execution process*" (App. 16) (emphasis added), and asserts that the use of a cut-down will entail "unnecessary pain and suffering *in administering the punishment of lethal injection* to [him]" App. 20 (emphasis added). More to the point, Nelson has consistently (and correctly) represented that a medical procedure – whether cut-down or other – "**necessarily must be performed on [him] as a predicate to the legal procedure of execution ….**" Pet. 14 (boldface in original).[7] Indeed, in response to the district court's pointed question how one could "separate [the cut-down] procedure from the execution" itself, Nelson's attorney responded that, while the procedure and the execution are not exactly "one and the same," the procedure is "certainly … a *condition precedent* of the lethal injection." App. 68 (emphasis added). Nelson's own pleadings thus demonstrate that his challenge is indeed to the imposition of his death sentence.

---

[7] *Accord*, *e.g.*, App. 11 ("predicate"), 11 ("predicate"), 12 ("necessary"), 16 ("predicate"), 30 ("require[d]"); Pet. at 12 ("necessary"), 21 ("predicate"), 32 ("predicate"), 33 ("predicate").

3. Nelson's own characterizations of the preparatory procedure (whether cut-down or other) as "necessar[y]" to, a "predicate" to, and a "condition precedent" to his execution by lethal injection are not just consistent, they are accurate as a factual matter. It goes without saying that the State "will have to" perform some preparatory procedure "in order to be in a position to carry out the sentence of death by lethal injection." Supp. Cert. Reply 6. The State cannot carry out an execution by lethal injection – the only means of capital punishment available to Nelson[8] – without first preparing the condemned prisoner in some fashion, whether by a superficial IV stick, by the insertion of a central line, or, if all else fails, through the use of a cut-down. *See, e.g.*, App. 30 (Heath), 90-91 (Sonnier), 93-94 (Culliver), 99-100 (Heath). A preparatory medical procedure, therefore, is an integral component of – a necessary step in – the State's execution process. The procedure and the lethal injection itself are inseparable. A challenge to the former is necessarily a challenge to the latter.

Given that the State cannot proceed with Nelson's execution in the absence of some preparatory medical procedure – and, should it become necessary, a cut-down – it is plain that Nelson's challenge to the possible use of a cut-down constitutes an attack on the imposition of his sentence. Nelson's contrary argument rests on pure formalism, and has no footing in reality. Nelson's challenge to the cut-down procedure bears no meaningful similarity to a garden-variety conditions-of-confinement claim – concerning, say, unsanitary living quarters or a guard's mistreatment. Such a claim has no necessary effect on the imposition of a criminal sentence. By contrast, Nelson's claim challenges a procedure that is, by his own admission, a "condition precedent of the lethal injection" itself. Nelson's claim thus necessarily interferes with the imposition of his sentence.

---

[8] *See* Ala. Code 15-18-82.1 (changing method of execution to lethal injection and giving inmates "one opportunity," which Nelson failed to exercise, to choose death by electrocution).

In the teeth of this common-sense logic, Nelson asks this Court to draw a line between challenges to an execution *per se*, which he concedes must be raised on habeas, and all other claims, which he says may proceed under § 1983. Thus, for instance, Nelson concedes that a chemical-composition claim "constitutes a challenge to a sentence of death by lethal injection" that must be pursued on habeas. Supp. Cert. Reply 6. It follows, presumably, that a claim that lethal injection itself is unconstitutional must also in Nelson's view proceed on habeas. *Accord, e.g.*, *In re Sapp*, 118 F.3d at 461; *Hill v. Hopper*, 112 F.3d 1088, 1089 (11th Cir. 1997). But, Nelson says, because his challenge is not technically to the execution itself, but instead to a necessary preparatory procedure, it is exempt from the restrictions on habeas practice and may proceed unencumbered under § 1983. Nelson is wrong.

In distinguishing bona fide § 1983 claims from habeas claims, line-drawing is required, to be sure. But the line Nelson would have this Court draw is formalistic and, worse, illogical. It leaves a gaping hole in – to the point of rendering virtually meaningless – the restrictions that Congress and this Court have specifically imposed on habeas corpus practice. An inmate who cannot file a viable habeas challenge to his death sentence *per se* – because his petition is successive, because he has not exhausted state remedies, etc. – will simply recast his claim as one challenging a preparatory procedure and slap a § 1983 label on it. Rather, for instance, than arguing forthrightly on habeas that his death sentence should be set aside or frontally attacking electrocution as a means of execution, he will challenge via § 1983 the use of arm and leg restraints as a means of securing him to the chair. Rather than filing a habeas petition attacking the constitutionality of lethal injection or challenging the particular cocktail of chemicals used in the injection, he will sue under § 1983 disputing the use of a gurney, a cut-down, or, perhaps, even a needle.

These are not idle concerns; Nelson's slope is a slippery one. Indeed, this Court recently confronted a § 1983-based

stay request in which a condemned inmate facing lethal injection relied on Nelson's case to challenge as "invasive" and "mutilat[ing]" the use of a "central line" – *the very procedure Nelson offers as an acceptable alternative to a cut-down*. *See* Pet. for Cert. 16, *Robinson v. Crosby*, No. 03-8673, *cert. denied*, 124 S. Ct. 1196 (2004). The point is that a challenge to a procedure – whether a cut-down, a central line, or an IV stick – that is by all accounts a "condition precedent" to an execution will, if successful, yield precisely the same relief as would a frontal attack on the execution itself – inevitably the delay, and quite possibly the prevention, of that execution.

There is a better, more defensible line distinguishing habeas corpus petitions from bona fide § 1983 complaints in the unique context of capital sentencing. It is common ground here that challenges to death sentences *per se* (*e.g.*, method-of-execution, chemical-composition) are on the habeas side of the line. Also on the habeas side are challenges, like Nelson's, to acts or procedures that are necessary predicates or, in his words, "condition[s] precedent," to the imposition of a death sentence. Other constitutional claims – like garden-variety prison-conditions claims, which have no necessary effect on the imposition of a death sentence – may be pursued via § 1983.[9] This line is easily administrable in that it turns on the clear answer to a single question: Does the claim at issue challenge either the death sentence itself or some act or procedure necessary for administering that sentence, such that success on the claim will necessarily interfere with the sentence's imposition? If so, it must be pursued on habeas; if not, it may proceed via § 1983. Unlike Nelson's formalistic rule, which opens a gaping loophole in settled habeas corpus restrictions, this line is also sensible in that it requires claims that in a

---

[9] That is not to say that a § 1983 plaintiff pursuing a claim that does not by its nature affect the imposition of a criminal sentence (say, a living conditions claim) is entitled to obtain a stay of execution while he litigates that claim. He is not. *See infra* Part III.

functional, real-world sense will necessarily interfere with the imposition of a criminal sentence to proceed via habeas.

B. Nothing in *Heck v. Humphrey* Suggests a Different Analysis or Result.

Nelson asserts that the "decisive question" under *Preiser* for determining whether a claim is cognizable under § 1983, or must instead proceed on habeas, is "whether recognition of the claim will necessitate a finding that a state prisoner's underlying conviction or sentence is invalid." Pet. Br. 31 That is incorrect. As shown above – and, indeed, by the very language from *Preiser* on which Nelson relies (*see* Pet. Br. 32) – the determinant in a suit for injunctive relief like Nelson's is whether the claim "challeng[es]" or "attack[s]" a criminal conviction or sentence. *See supra* at 23-24. Because Nelson's does so, it is barred by *Preiser*.

To the extent that Nelson contends that the controlling precedent here is not *Preiser*, but *Heck v. Humphrey*, 512 U.S. 477 (1994), he is mistaken. Nelson cites *Heck* in passing for the proposition that "state prisoners may seek redress under § 1983 if a judgment in the prisoner's favor would not 'necessarily imply' the invalidity of his or her conviction or sentence." Pet. Br. 32. Nelson's point in citing *Heck* is presumably that because his challenge to the use of a cut-down in his execution would not "necessarily imply" the invalidity of his underlying death sentence, his claim is cognizable under § 1983.

Nelson's reliance on *Heck* is misplaced, for two reasons. First, because Nelson's complaint seeks purely injunctive relief from a criminal sentence, rather than damages, his suit is governed by *Preiser*, not *Heck*. Second, even assuming that *Heck* controlled here, Nelson's § 1983-based attack on a medical procedure that is by all accounts a "condition precedent" to his execution would be barred as "necessarily imply[ing] the invalidity" of his sentence.

1. *Preiser*, Not *Heck*, Defines the Scope of Section 1983 for Suits Seeking Equitable Relief From Criminal Sentences.

By its own terms, *Heck* is inapplicable to Nelson's suit, which seeks purely injunctive relief rather than money damages. What the passage in *Heck* from which Nelson excerpts the "necessarily imply" language actually says is that "*when 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." 512 U.S. at 487 (emphasis added). Indeed, the *Heck* Court emphasized that Roy Heck's case was "clearly not covered by the holding of *Preiser*" for the very reason that he had *not* sought injunctive relief from his sentence but had instead sought only "monetary damages, as to which he could not 'have sought and obtained fully effective relief through federal habeas corpus proceedings.'" *Id*. at 481 (quoting *Preiser*, 411 U.S. at 488). In short, *Preiser* is an injunctive-relief case, *Heck* was a damages case. *See Heck*, 512 U.S. at 478, 481, 482, 483, 486, 487, 488, 489, 490 ("damages"); *see also Muhammad v. Close*, No. 02-9065, 2004 WL 344163, at * 1 (Feb. 25, 2004) (*Heck* rule applies to "§1983 damages action[s]").

Unlike Roy Heck's, Nelson's suit does not request damages and, in fact, is expressly styled a "Complaint for Injunctive and Declaratory Relief." App. 5. In its prayer, Nelson's complaint seeks purely equitable relief – principally "an order granting injunctive relief and staying [Nelson's] execution." App. 22. Nelson's suit, therefore, is subject not to *Heck*'s rule allowing § 1983 "damages" claims that do not "necessarily imply the invalidity of [a] conviction or sentence," 512 U.S. at 487, but rather to *Preiser*'s rule foreclosing § 1983 claims that "challeng[e]" and seek equitable relief from a state-court sentence, 411 U.S. at 489. This, put simply, is a *Preiser* case, not a *Heck* case.

To the extent that *Preiser*'s rule for injunctive-relief claims sweeps more broadly, and precludes more § 1983 actions, than does *Heck*'s rule for damages claims, there is

good reason. There is a very real difference in the extent to which each type of suit – for damages on the one hand, for injunctive relief on the other – should be viewed as circumventing the habeas statute and its attendant restrictions. In the case of a plaintiff who seeks only damages for an allegedly unconstitutional conviction or sentence, the circumvention of the habeas statute occurs, if at all, only indirectly. The damages plaintiff could not have obtained the monetary relief he seeks in a habeas proceeding. *Preiser*, 411 U.S. at 488. Nor will his suit, even if successful, *ipso facto* give him the equitable relief that habeas corpus is designed to provide; rather, to complete the cycle of circumvention, he will have to file a second suit for injunctive relief and convince a second judge to give the § 1983 damages judgment preclusive, precedential, or persuasive effect. In stark contrast, the plaintiff who files a § 1983 action seeking injunctive relief from his conviction or sentence – *the very relief he could have sought in a habeas petition* – thumbs his nose at the habeas statute's requirements.

The two situations are different, and call for different rules. It makes sense to give more leeway – in the form of a rule that forecloses only those claims that "necessarily imply" a judgment's invalidity – to a § 1983 plaintiff who seeks only damages, and whose suit therefore may be used only indirectly to circumvent traditional habeas restrictions. By the same token, a stricter rule – one that broadly prohibits all "challeng[es]" and "attack[s]" – is warranted in the case of suits seeking injunctive relief from state convictions or sentences, in which the circumvention of the habeas statute is patent, immediate, and certain.

In any event, the important point here is that no matter what standard *Heck* establishes for § 1983 suits seeking only damages – and no matter why *Heck*'s standard may be more permissive than *Preiser*'s – Nelson's suit, which seeks purely injunctive relief from his state-imposed death sentence, is governed by *Preiser*, not *Heck*. Accordingly, Nelson's claims in this case, which "challeng[e]" and "attack[]" his sentence, are not cognizable under § 1983.

2. Nelson's Suit Would Be Barred Even Under *Heck* Because It Necessarily Implies the Invalidity of His Death Sentence.

Under *Heck*, the determinant of a § 1983 damages claim's cognizability is whether that claim, if successful, would "necessarily imply the invalidity of [the prisoner-plaintiff's] conviction or sentence." If so, the § 1983 plaintiff must as a precondition to suit show – as Nelson cannot – that the conviction or sentence has been invalidated in another forum. Because in every real and meaningful sense Nelson's claim does "necessarily imply" the invalidity of his sentence, it is not cognizable under § 1983 even on *Heck*'s seemingly more permissive test.

Nelson's challenge to the use of a cut-down "necessarily impl[ies]" the invalidity of the sentence of death by lethal injection *as it pertains to him* – in *Heck*'s words, "his … sentence." 512 U.S. at 487. Again, as Nelson himself has correctly recognized, the State "will have to" perform a procedure to gain venous access "in order to carry out the sentence of death by lethal injection." Supp. Cert. Reply 6. And again, the record in this case makes clear that a cut-down will be used only as a "last resort" – only, that is, if it becomes truly "necessary" to administer the lethal injection. *See supra* at 8-10, 28-29. Granting the assumption underlying Nelson's own claim – that a cut-down will become necessary and will in fact be used to carry out his execution – it is clear that Nelson's challenge to that "necessary" procedure would, if successful, leave the State without any available means of administering a lethal injection. And, indeed, given Nelson's failure to choose electrocution when that option was open, which in turn leaves lethal injection as the only means of execution available to him (*see supra* at 4, 28 n.8), Nelson's claim would seemingly prevent the State from carrying out his death sentence *at all*. Accordingly, in every practical, real-world sense, Nelson's § 1983 action would, if successful, "necessarily imply" the invalidity of "his … sentence" within the meaning of *Heck*.

Nelson, of course, contends that he is not challenging his sentence *per se*, but is instead challenging only a "procedure" for carrying his sentence into effect. *See supra* at 25. But as we have shown, Nelson's effort to separate "procedure" from sentence rests on a formalistic – and ultimately untenable – distinction, because the "procedure" Nelson challenges is by his own admission a necessary predicate – a "condition precedent" – to the imposition of his sentence. *See supra* at 27. In the circumstances of this case, a decision invalidating the "procedure" would also effectively invalidate the sentence.

This Court has made clear that the *Heck* standard should be applied functionally, not formalistically. In *Heck* itself, the Court characterized its holding as reaching beyond claims of "unconstitutional conviction or imprisonment" to encompass, as well, allegations of "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid." 512 U.S. at 486-87. The Court thus clarified that *Heck*'s limitations on § 1983 actions extend beyond unvarnished, frontal assaults on convictions and sentences *per se*. Rather, those limitations apply as well – as they must in the real world – to claims that, though perhaps not "directly attributable" to a conviction or sentence, *see id.* at 487 n.6, nonetheless necessarily affect the conviction's or sentence's validity.

In *Edwards v. Balisok*, 520 U.S. 641 (1997) – a decision that Nelson altogether ignores – this Court's emphasis on functional reasoning was even more apparent. There, the Court pointed to *Heck*'s "other harm" language in expressly embracing a practical, functional approach to the question whether a given § 1983 claim "necessarily impl[ies]" the invalidity of a conviction or sentence. Balisok had filed a § 1983 action alleging that the procedures utilized in a prison disciplinary hearing at which he was deprived of good-time credits violated due process. Like Nelson here, Balisok insisted that his challenge was concerned solely with "procedures," and *not* with his ultimate sentence or punishment. *See, e.g.*, Br. for Resp. 6, 7, 8, 16, No. 95-1352

(Aug. 2, 1996). As this Court summarized Balisok's claim, it "posited that the procedures were wrong, but not necessarily that the result was." 520 U.S. at 645. The Ninth Circuit had adopted a formalistic rule that a claim challenging only procedures will *never* "necessarily imply" a punishment's invalidity within the meaning of *Heck* and thus is "always cognizable under § 1983." *Id.* at 644.

In reversing, this Court unanimously rejected the Ninth Circuit's bright-line rule sanctioning all § 1983-based challenges to disciplinary-hearing "procedures." Instead, the *Balisok* Court concluded that while some challenges to procedures will not run afoul of *Heck*, others certainly will. That determination, this Court emphasized, will depend on "the nature of the challenge to the procedures" and whether, in a particular case, the procedural challenge is "such as necessarily to imply the invalidity of the judgment." *Id.* at 645. And, indeed, this Court held that several of Balisok's challenges, although ostensibly aimed solely at the procedures employed, not at the punishment imposed, *did* "necessarily imply" the invalidity of his punishment within the meaning of *Heck*, and were therefore not cognizable under § 1983.

Balisok's functional reasoning applies precisely to this case. Like Balisok, Nelson insists that he is not attacking his sentence *per se*, but is instead challenging a "procedure" used to administer that sentence. That procedural challenge, he says, may proceed under § 1983, without regard to the rules governing habeas corpus practice. What Nelson seeks in this case is a Ninth-Circuit-like rule that a challenge to an execution "procedure" can *never* amount to a challenge to the execution itself. But that is just the sort of wooden formalism that this Court rejected in *Balisok*. It is the "nature of [Nelson's specific] challenge," *id.* at 645, that determines whether his § 1983 claim is foreclosed by *Heck*. Viewed functionally, as *Balisok* shows it should be, it is clear that Nelson's claim is indeed barred. Just as *Balisok* demonstrates that the *legal* relationship between a particular "procedure" and a sentence can be such that a challenge to the former is

tantamount to a challenge to the latter, so, too, the *factual* relationship between the cut-down "procedure" that Nelson attacks and his death sentence – the former being a "condition precedent" to the latter – exposes Nelson's challenge as one directed to his sentence.

C. A Decision Permitting Nelson's Section 1983 Suit Would Gut AEDPA's Successive-Petitions Bar.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court was unanimous as to one point: A death-row inmate's motion to recall an appellate court's mandate (or, for that matter, a court's *sua sponte* recall of its own mandate) may not "be condoned as a mechanism to frustrate [AEDPA's] limitations on second and successive petitions." *Id*. at 569 (Souter, J., dissenting); *accord id*. at 553-54 (majority opinion). The question in this case is whether another device – a civil rights suit brought under § 1983 – should be "condoned" as a means of achieving the very same "frustrat[ion]" of congressional intent. The answer is no.

When it enacted AEDPA's successive-petitions bar as part of its effort "to reduce delays in the execution of state and federal sentences, particularly in capital cases," *Garceau*, 538 U.S. at 206, Congress seemingly had a case like this one in mind. As is evident from the text of 28 U.S.C. § 2244(b) – quoted and discussed in detail above – Congress carefully considered the question when, if ever, a prisoner who has already litigated one habeas corpus petition should be able to collaterally attack his conviction or sentence a second time. As to successive petitions raising claims presented in earlier petitions, Congress answered categorically: never. *Id*. § 2244(b)(1). With respect to claims – like Nelson's here – that were *not* raised in previous petitions, Congress was only slightly more circumspect. As relevant here, Congress determined that an inmate may file a successive petition raising a new claim only where *both* "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* the claim, if successful, would prove by clear and convincing evidence

that the inmate was actually, factually innocent of the underlying offense. *Id*. § 2244(b)(2). *See generally* Hatch Br. 2, 17-21. Here, Nelson's lawyers have conceded – correctly – that Nelson's Eighth Amendment claim does not fit within AEDPA's narrow exceptions. *See supra* at 16-17.

Referring specifically to § 2244(b)'s foreclosure of successive habeas petitions like Nelson's – those presenting claims that do *not* implicate actual innocence but that, for whatever reason, were not available when the first petition was adjudicated – Nelson's counsel, Mr. Stevenson, has in his academic writings lamented what he calls "the problems with AEDPA's successive petition restrictions." Stevenson, *supra*, at 774. Stevenson acknowledges that the most forthright way to "cure" AEDPA's "problems" would be "to seek a congressional amendment to the statute." *Id*. He also realizes, however, that a statutory amendment would require the support of a majority of elected representatives and that "securing such a Congressional majority is … the big hitch." *Id*. Faced with what he calls that "hitch," Stevenson has said that the courts offer the "best hope" for AEDPA "reform." *Id*. at 776.

The first judicial fix Stevenson has proposed is for this Court to "proceed down the path traveled by the Ninth Circuit" and to "construe the successive petitions provision as exempting claims that were not reviewable at the time of the earlier petition" – *wholly without regard for § 2244(b)(2)'s explicit limitation to new claims that implicate actual innocence*. *Id*. at 778. Ultimately, Stevenson rightly concedes that such a solution is "unmoored in the language of the statute." *Id*. at 781. Nelson's position here is no different. He would have this Court arrive at the same destination as the Ninth Circuit, only by the seemingly more benign route of § 1983.

In seeking habeas-like equitable relief from his sentence in what is nominally a § 1983 action, Nelson is effectively asking this Court to engraft a new exception onto AEDPA's rule prohibiting successive petitions. Nelson would have this Court permit his suit to go forward on the basis that, in view of Alabama's change in execution method, the "factual

predicate" underlying his current claim was not available to him when he filed his first habeas petition – even though he acknowledges that his "claim does not have anything to do with factual innocence" (App. 70) as expressly required by § 2244(b)(2)(B). Nelson's position is every bit as "unmoored" in AEDPA's text and structure as the Ninth Circuit's freewheeling interpretation in that it, too, reads the carefully considered actual-innocence limitation right out of the statute. *See generally* Hatch Br. 2, 17-21.

As this Court held in *Preiser*, the "specific federal habeas corpus statute" must control over the general § 1983 wherever the former "clearly applies." 411 U.S. at 489; *see also Spencer*, 523 U.S. at 21 (Souter, J., concurring). In § 2244(b)(2), Congress made a very "specific determination," *Preiser*, 411 U.S. at 490, not to permit claims like Nelson's to proceed in successive habeas petitions. Nelson may not circumvent that specific determination by the "simple expedient of putting a [§ 1983] label" on what is in substance a successive petition. *See id*. at 489-90.

* * *

Citing *Preiser*, this Court has observed that "[i]t is difficult to believe that the drafters of [§ 1983] considered it a substitute for a federal writ of habeas corpus," and has emphasized "the continuing illogic of treating federal habeas and § 1983 suits as fungible remedies for constitutional violations." *Allen v. McCurry*, 449 U.S. 90, 104 & n.24 (1980). Offering § 1983 as a convenient "substitute" for what is in substance a habeas corpus petition – and treating the two very different remedies as "fungible" – is precisely what Nelson's challenge in this case does. This Court should reject Nelson's effort to conflate the two.

III. The Relief Nelson Seeks – A Stay of His Impending Execution – Is Not Available Under Section 1983.

Even assuming that the *claim* Nelson presents is not itself categorically outside the scope of § 1983 on the ground that it "challeng[es]" (or "necessarily impl[ies] the invalidity" of) his sentence, Nelson's suit is nonetheless impermissible

because the *relief* he requests – namely, a federal stay of his impending execution – is not available under § 1983.

This Court's reformulated Question Presented focuses, in a way that Nelson's did not, on Nelson's request for a stay of execution. Nelson's proposed question did not mention the stay request and, indeed, as shown above, presupposed that Nelson's suit did not in any way "attack a conviction or sentence." Pet. i. As reformulated by this Court, however, the Question Presented asks whether a § 1983 complaint brought "by a death-sentenced state prisoner, *who seeks to stay his execution* in order to pursue a challenge to the procedures for carrying out the execution," should be subject to the restrictions on habeas practice. App. 132-33 (emphasis added). This Court's focus on Nelson's stay request is appropriate, because "federal courts lack jurisdiction under § 1983 to stay executions." *Beets v. Texas Bd. of Pardons & Paroles*, 205 F.3d 192, 193 (5th Cir. 2000); *Gilreath v. State Bd. of Pardons & Paroles*, 273 F.3d 932, 933 (11th Cir. 2001) (same); *see also In re Sapp*, 118 F.3d at 462-63.

It is scarcely debatable that "a request for a stay of execution entails a potential federal interference with state penal interests that is equivalent to, if not greater than, the request for immediate release (or speedier release) from prison that was at issue in *Preiser*." *Martinez*, 292 F.3d at 423. Just as in *Preiser* this Court acknowledged the State's compelling interest in making certain that prison sentences are not cut short, so too the State has an overriding interest in ensuring that its death sentences are carried out promptly and not stalled as the result of procedural gamesmanship. For victims' families, and for society at large, endless maneuvering like Nelson's very much implicates the old maxim – quoted by Senator Hatch during the debates on AEDPA's habeas-reform provisions[10] – that "[w]hen the case is proved, and the hour is come, justice delayed is justice denied." *Geo. Walter Brewing Co. v. Henseleit*, 132 N.W. 631,

---

[10] *See* 142 Cong. Rec. S3362 (Apr. 16, 1996).

632 (Wis. 1911).[11] Accordingly, just as this Court held in *Preiser* that a request for speedier release must proceed, if at all, on habeas corpus, so must a prisoner's "last-minute effort to defeat and delay [his] execution" by way of a stay. *Beets*, 205 F.3d at 193.

The rule that federal courts may not stay impending executions under § 1983 precludes Nelson's suit, but that result was hardly inevitable. That Nelson's stay request is now barred is no one's fault but his own. The record shows that Nelson has known about his "severely compromised veins" and, indeed, "has encountered repeated problems … with prison medical personnel gaining venous access," for at least "two decades." Pet. Br. 5; App. 7. The implication of this known venous condition for his execution should have been apparent to Nelson, at the latest, by July 1, 2002, when the Alabama Legislature adopted lethal-injection as the State's method of execution. *See* Ala. Code § 15-18-82.1.

Even setting aside what Nelson knew or should have known in July 2002, it is indisputable that Nelson had actual, subjective knowledge of the particulars of his Eighth Amendment claim by August 19, 2003. On that date, Nelson's lawyer reported in a letter to Warden Culliver that "Mr. Nelson has great concerns about the lethal injection procedure due to the fact that he has severely compromised veins," and acknowledged the possibility that the State might have to use a "'cutdown' procedure" to administer Nelson's execution. App. 25-26.

Nelson, however, did not file his § 1983 complaint in July 2002, or even in August 2003. Nor, for that matter, did Nelson file on September 3, 2003, when the Alabama Supreme Court set his execution for October 9, 2003. Had Nelson filed at any of those times, he may well have been able to litigate his Eighth Amendment challenge without

---

[11] *See also Thompson*, 523 U.S. at 556 ("Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out.").

requiring a stay of execution. *See, e.g.*, 11th Cir. R. 27, I.O.P. 3 ("Motion to Expedite Appeals"). As it is, Nelson sat on his rights for (at least) a full seven weeks and then sprang his challenge on the State a mere 72 hours before his scheduled execution – at which point he sought a stay of execution and asserted, as a basis for the stay, that in the light of his (now) impending execution "[f]ailure to provide injunctive relief w[ould] result in irreparable harm." App. 20, 22.

In these circumstances, it is hardly unjust to apply to Nelson the rule disallowing federal courts to stay impending executions under § 1983. Thus, even if the nature of Nelson's claim does not take Nelson's suit outside § 1983 (*see* Part II), the relief he seeks does so.

IV. No Matter How Nelson's Suit Is Characterized, Equitable Considerations Require Its Dismissal.

Ultimately, this Court can decide this case without resolving whether either the claim Nelson presents (*see* Part II) or the relief he seeks (*see* Part III) carries his suit outside § 1983's ambit. Instead, this Court can dispose of Nelson's suit, and affirm the court of appeals' decision, on a straightforward application of *Gomez v. United States District Court*, 503 U.S. 653 (1992).

In *Gomez* – which Nelson inexplicably ignores – condemned inmate Robert Alton Harris filed an eleventh-hour § 1983 complaint alleging that California's method of execution violated the Eighth Amendment. After the Ninth Circuit stayed Harris' execution, the State filed a motion to vacate the stay, which this Court granted by a 7-2 vote. The *Gomez* Court gave two distinct reasons for rejecting Harris' complaint and lifting the stay. First, noting that Harris had previously filed four federal habeas petitions, the Court found Harris' § 1983 complaint to be "an obvious attempt to avoid the application" of pre-AEDPA limitations on successive petitions. *Id*. at 653 (citing *McCleskey v. Zant*, 499 U.S. 467).

Separately, and more importantly for present purposes, this Court held that it did not ultimately matter "[w]hether

[Harris'] claim was framed as a habeas petition or as a § 1983 action." *Id*. at 653-54. In either case, "Harris s[ought] an equitable remedy" – namely, a stay of execution. And "[e]quity," this Court emphasized, must take into account both (i) "the State's strong interest in proceeding with its judgment" and (ii) "Harris' obvious attempt at manipulation." *Id*. at 654. Further, observing that "there [was] no good reason for [Harris'] abusive delay" in bringing suit and that Harris had engaged in "last-minute attempts to manipulate the judicial process," this Court held that it would "consider the last-minute nature of [Harris'] application to stay execution in deciding whether to grant relief." *Id*.; *accord Sawyer v. Whitley*, 505 U.S. 333, 341 n.7 (1992); *Herrera v. Collins*, 506 U.S. 390, 425-26 (1993) (O'Connor, J., concurring).

Gomez controls this case and requires dismissal of Nelson's suit, whatever its label. Each of the factors this Court emphasized in *Gomez* is present in this case, as well. *First*, like Harris, Nelson expressly seeks an equitable remedy, namely, "an order granting injunctive relief and staying [his] execution." App. 22. *Second*, given that more than a quarter century has passed since Nelson committed the murders at issue, the State's equitable interest in "proceeding with its judgment" is every bit as "strong" as – and indeed is stronger than – it was in *Gomez*, where only 14 years had elapsed. 503 U.S. at 654; *see also Thompson*, 523 U.S. at 552; *In re Blodgett*, 502 U.S. 236, 239 (1992); *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

Third, just as in *Gomez* there was "no good reason" for Harris' delay in bringing suit, *see* 503 U.S. at 654, there is no excuse for Nelson having sat on his rights. As explained above, Nelson possessed all of the facts necessary to raise his claim as of July 1, 2002, and, at the very latest, subjectively knew of the particulars of his claim on August 19, 2003 – seven full weeks before his scheduled execution. *See supra* at 5, 41-42. *Finally*, and relatedly, by springing his claim on the State and the courts a mere 72 hours before his scheduled execution and then brazenly asserting – based on the

shortness of time – that he would suffer "irreparable harm" (App. 20) in the absence of a stay, Nelson, like Harris before him, plainly engaged in "last-minute attempts to manipulate the judicial process." *Gomez*, 503 U.S. at 654. Nelson's suit is gamesmanship, pure and simple.[12]

The only respect in which this case is even arguably distinct from *Gomez* is the length of each prisoner's delay in bringing suit. In *Gomez*, this Court noted that Harris' challenge to California's use of lethal gas "could have been brought more than a decade ago." *Id*. We acknowledge that Nelson would have had no particular reason to challenge the use of a cut-down procedure ten years ago, as Alabama had not yet adopted lethal injection as its method of execution. Nelson, however, most certainly could have raised his claim – and had every reason to do so – when Alabama switched from electrocution to lethal injection in July 2002, fifteen months before his scheduled execution. He did not. Indeed, even if Nelson's delay is measured not from July 2002 but instead from August 19, 2003, his situation is not so different from Harris' as to call for a different result. It is the *fact* of Nelson's manipulative delay, not its length, that should control.

Had Nelson really wanted to litigate his Eighth Amendment claim – rather than merely to derail the State's capital sentencing process – he could have done so without waiting until the eleventh hour and seeking a stay. Nelson opted instead to lie in wait. He sandbagged both the State and the courts. This Court should not reward Nelson's obvious manipulation of the system.

---

[12] *Lonchar v. Thomas*, 517 U.S. 314 (1996), which held that a lower court may not dismiss a *first* federal habeas petition solely on "equitable" *Gomez* grounds, is of no aid to Nelson. Throughout its opinion, the *Lonchar* Court emphasized that the case before it involved a "first habeas petition," *id*. at 319, 321, 322, 324, 325, 329, and distinguished *Gomez* on the ground that it "was not a *first* habeas petition," *id*. at 329 (emphasis in original). Because Nelson's pleading is not, on any reading, a "first habeas petition," this case is controlled by *Gomez*, not *Lonchar*.

V. Nelson Is Not Without a Remedy Here.

We conclude our brief where Nelson began his. Nelson contends that unless he prevails in this case – *i.e.*, unless his Eighth Amendment claim here is cognizable under § 1983 – he will be without "any remedy" at all. Pet. Br. 14, 19, 20. Again, Nelson is wrong.

A. Nelson Had – And Still Has – Viable Remedial Options Open to Him.

Even on the assumption – which underlies the lower courts' decisions and was until Nelson's merits brief accepted as fact by all parties here – "that [Nelson] ha[s] exhausted all available habeas corpus relief" (App. 119 n.2), it simply is *not* the case that § 1983 is the only means by which Nelson could have raised his claim. In fact, Nelson had multiple avenues – some in federal court, and many more in state court – available to him for pressing his Eighth Amendment challenge. For whatever reason, Nelson opted not to avail himself of any (but one) of the remedies open to him, but it simply is not true that he was without a non-§ 1983 remedy to begin with.

One avenue open to Nelson – and the only non-§ 1983 remedy that Nelson bothered to pursue as a means of raising his Eighth Amendment challenge – was a petition for an original writ of habeas corpus in this Court. *See Felker v. Turpin*, 518 U.S. 651 (1996). Nelson filed an application for an original writ alongside his petition for certiorari in this case; this Court denied Nelson's application. *In re Nelson*, 124 S. Ct. 583 (2003).

Nelson had at least three additional avenues open to him in state court. First, subject to generally applicable procedural rules, he could have sought state post-conviction relief on any of several grounds pursuant to what in Alabama is called a "Rule 32" petition. *See* Ala. R. Crim. P. 32.1(a) (State or Federal Constitution requires new sentence), (c) (sentence not authorized by law), (e) (newly discovered facts). Any decision of the Alabama Supreme Court affirming the denial of an Eighth Amendment-based Rule 32

petition on the merits would have been subject to certiorari review in this Court under 28 U.S.C. § 1257. Nelson never filed a Rule 32 petition challenging the use of a cut-down in the administration of his death sentence.

Second, and wholly apart from Rule 32, Nelson could have filed under Ala. R. App. P. 27(a) a response to the State's motion in the Alabama Supreme Court to set his execution date. In that response, Nelson could have argued (as he does here) that his execution should be set aside at least until such time as a cut-down is definitively eliminated as a means of administering his lethal injection. A response to the State's motion to set the execution date would hardly have been futile. The Alabama Supreme Court may not set an execution date without at least allowing time for an inmate's response, *see* Ala. R. App. P. 27(a), (b), and, in fact, that court can (and sometimes will) sua sponte "order[]" an inmate to "file a written response" to the State's motion, *see* Order, *Ex parte Bradley*, No. 85-424 (Oct. 5, 2001). More than once, the Alabama Supreme Court has on the basis of a condemned inmate's response denied the State's motion to set an execution date. *See, e.g.*, Order, *Ex parte Grayson*, No. 1830756 (May 22, 2003). And, indeed, in recently-issued ruling, the court granted a condemned inmate (who, like Nelson, has been on death row for more than 20 years) a *three month* extension of time in which to respond to the State's motion so that he could pursue an open-ended "review of his medical records." Order, *Ex parte Hubbard*, No. 1780688 (Jan. 22, 2004).

In this case, Nelson's lawyers sought the State's consent to an additional seven-day enlargement, beyond the time to which state law already entitled them, in which to file a response to the State's motion to set an execution date. The State consented to, and the Alabama Supreme Court granted, Nelson's requested enlargement. *See* Order, *Ex parte Nelson*, No. 1860528 (Apr. 17, 2003). Nelson never filed a response.

Finally, once his execution was set, Nelson could have filed in state court a motion to stay the execution on federal

constitutional grounds, the denial of which would have been subject to this Court's review under § 1257. *See* Order, *Ex parte Bradley*, No. 85-424 (July 13, 2001) (granting motion to stay execution); *see also In re Tarver*, 528 U.S. 1146 (2000) (granting stay of execution pending disposition of certiorari petition from state court's denial of motion to stay), *cert. denied*, 528 U.S. 1183 (2000). Nelson had every reason and opportunity to file a motion to stay in state court. Again, the record makes absolutely clear that Nelson was actually, subjectively aware of his Eighth Amendment claim on or before August 19, 2003, two weeks before the Alabama Supreme Court set Nelson's execution date, and nearly *two months* before the scheduled execution date itself. (On the afternoon of his scheduled execution, Nelson in fact did file a stay motion in the Alabama Supreme Court, which that court denied as moot after this Court granted Nelson's stay request. For whatever reason, Nelson declined to raise any Eighth Amendment issue in his state-court stay motion; he relied exclusively on state law. *See* Br. in Opp. 4 n.1.)

Nelson, therefore, was not without options.[13] To the extent that Nelson now finds his remedies limited, that is a problem of his own making. By and large, Nelson has refused to avail himself of the non-§ 1983 remedies open to him. He still has offered no explanation for that failure. In any event, Nelson is not without avenues for relief even now. Despite Nelson's failure to pursue viable state-court remedies before, those very outlets remain available to him today – *even if the State prevails in this case*. In the wake of this Court's October 9, 2003, order staying Nelson's execution, *see* 124 S. Ct. 383 (2003), the State, even if it wins here, must go back to the Alabama Supreme Court and ask it to set a new execution date. During the pendency of that request, Nelson may again pursue a Rule 32 petition in the trial court and on appeal. Further, Nelson may respond

---

[13] Alabama, of course, is by no means alone in granting condemned inmates access to these and other similar state post-conviction remedies. *See* Br. of Ohio, *et al*., as Amici Curiae at 22 & n.1.

directly in the Alabama Supreme Court to the State's motion to reset the execution date. And further still, once that court fixes a new date, Nelson may then move to stay.

The State would of course vigorously oppose Nelson's Eighth Amendment challenge to the imposition of his death sentence, but it is not clear how that dispute would be resolved. Neither this Court, nor the Alabama Supreme Court, nor the Eleventh Circuit will have reviewed – let alone decided – the merits of Nelson's claim. The question whether the Eighth Amendment prohibits the use of a cut-down as a predicate to an execution by lethal injection will remain open. And, again, any decision of the Alabama Supreme Court on that question will be subject to this Court's certiorari review under § 1257. (Nelson's implicit suggestion that this Court's § 1257 jurisdiction somehow provides an insufficient check on state courts' decisions concerning execution-related issues is belied by this Court's routine issuance of writs of certiorari to state courts to consider such questions. *See, e.g.*, *Roper v. Simmons*, 124 S. Ct. 1171 (2004) (certiorari to state court); *Atkins v. Virginia*, 533 U.S. 976 (2001) (same); *Bryan v. Moore*, 528 U.S. 960 (1999) (same).)

B. Nelson Has No Absolute Right To Litigate His Eighth Amendment Claim in a Section 1983 Action.

Given the viable state-court options open to him (and the existence of certiorari review in this Court), the fact that Nelson does not have at his disposal the full panoply of federal-court remedies – including § 1983 – is of no particular moment. There are all manner of procedural rules, defenses, and doctrines that, in certain circumstances, will operate to foreclose a federal court's consideration of a federal constitutional claim under § 1983 – even where that claim has never before been decided on the merits. *See, e.g.*, *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 83-84 (1984) (res judicata); *Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (statute of limitations); *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998) (absolute immunity).

The unstated premise of Nelson's argument here – that because habeas corpus is not available to him, § 1983 must be – has been squarely rejected by this Court. In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court reviewed a lower-court decision holding, in essence, that because under *Stone v. Powell*, 428 U.S. 465 (1976), a state convict could not raise his Fourth Amendment claim in a federal habeas corpus petition, he was entitled to a "federal judicial hearing of that claim in a § 1983 suit." *Allen*, 449 U.S. at 103. This Court expressly rejected that holding, as well as the supposition underlying it "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises." *Id*. That assumption, this Court observed, has no support either "in the Constitution" or "in § 1983 itself." *Id*.

The *Allen* Court added, in words uniquely applicable here, that "[t]he only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues." *Id*. at 105. This Court then "emphatic[ally] reaffirm[ed] … the constitutional obligation of the state courts to uphold federal law" and expressed its "confidence in their ability to do so." *Id*.; *accord, e.g.*, *Stone*, 428 U.S. at 493-94 n.35; *Huffman v. Pursue*, 420 U.S. 592, 611 (1975); *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974); *Ex parte Royall*, 117 U.S. 241, 251 (1886).

Thus, even accepting Nelson's view that "[t]he failure to provide any remedy for an Eighth Amendment violation would offend longstanding traditions of justice" (Pet. Br. 14, 19), Nelson simply is not in that boat. Nelson had – and still has – meaningful avenues of relief open to him. As it has done before in *Preiser*, *Heck*, *Balisok*, and *Allen*, this Court should reject Nelson's invitation to anoint § 1983 as a one-size-fits-all remedy.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals and lift the stay of execution.

Respectfully submitted,

Richard F. Allen
Acting Attorney General

Kevin C. Newsom
Solicitor General
Counsel of Record *

Michael B. Billingsley
Deputy Solicitor General

STATE OF ALABAMA
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401

March 3, 2004