NO. 21-439

In the Supreme Court of the United States

MICHAEL NANCE,

Petitioner,

v.

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, AND WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondents.

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

BRIEF IN OPPOSITION

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*** * * CAPITAL CASE * * ***

QUESTIONS PRESENTED

1. Petitioner Michael Nance sought relief from the district court—an injunction prohibiting the State of Georgia from executing him by any means of lethal injection—that, if successful, would have precluded the State from executing him under current state law, because lethal injection is the sole method of execution in Georgia. Based on the nature of Nance's requested relief, did the court of appeals correctly determine that Nance's as-applied method-of-execution claims were not cognizable in a complaint filed under 42 USCS § 1983, but instead were only cognizable in a habeas corpus petition filed under 28 USCS § 2254?

2. Did the court of appeals correctly determine that, because Nance had already challenged his death sentence in a prior federal habeas petition, his claims must be dismissed for lack of jurisdiction as successive, where he failed to satisfy either exception to the bar against successive petitions under 28 USCS § 2244 (b)(2)?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

STATE STATUTES

JUDICIAL RULES

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. VIII

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FEDERAL STATUTES

28 USCS § 2254 (a) provides in relevant part:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 USCS § 2244(b)(2) provides in relevant part:

> (b)(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that 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; or

(B)

(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, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

42 USCS § 1983 provides in relevant part:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

GEORGIA STATUTE

O.C.G.A. § 17-10-38(a) states:

> All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by lethal injection. Lethal injection is the continuous intravenous injection of a substance or substances sufficient to cause death into the body of the person sentenced to death until such person is dead.

INTRODUCTION

On December 18, 1993, Nance robbed a bank at gunpoint, murdered Gabor Balogh in an attempted carjacking, and was apprehended that same day following a standoff with law enforcement. *Nance v. State*, 272 Ga. 217 (2000). He was then tried, convicted, and sentenced to death. *Id.* Decades later, in January of 2020, Nance filed a § 1983 complaint, raising an as-applied, method-of-execution challenge under the Eighth Amendment, seeking to permanently enjoin the State of Georgia from carrying out his death sentence by any method of lethal injection. Pet.App.E. Nance claimed that, based on his allegedly compromised veins and his past use of the drug gabapentin, any attempt to execute him by any method of lethal injection would violate the Eighth Amendment. Pet. App.E. Nance alleged that execution by firing squad was a feasible and readily available alternative to lethal injection. Pet.App.E. But because Georgia's sole method of execution is by lethal injection, O.C.G.A. § 17-10-38(a), Nance's chosen alternative of execution by firing squad would prevent Georgia from carrying out his death sentence under state law.

Accordingly, Nance's challenge to his method of execution is effectively a challenge to his capital sentence, and it must therefore be filed as a habeas petition, not a § 1983 complaint. The Eleventh Circuit correctly held as much below, following this Court's repeated suggestions that, "if the relief sought in a 42 U.S.C. § 1983 action would 'foreclose the State from implementing the [inmate's] sentence under present law,' then 'recharacterizing a complaint as an action for

habeas corpus might be proper.'" *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019). That is because a court *cannot* grant relief under § 1983 where it would logically imply the invalidity of a prisoner's sentence. *Heck v. Humphrey*, 512 U.S. 477 (1994).

The Eleventh Circuit's decision does not require review by this Court. *First*, there is no reason to grant review as to the question whether habeas or § 1983 is the appropriate procedural vehicle for method-of-execution claims that effectively invalidate a death sentence. Nance has identified only a *single other court* that has even *addressed* this question, and that court (the Sixth Circuit) did so before *Bucklew* and has not reexamined the question in a published opinion since. In any event, this would be a poor vehicle for review, as Nance's filing would be time-barred and meritless regardless of how it is characterized.

Second, the Court should not grant review on the ancillary question whether Nance's filing was a *successive* petition. Nance barely even purports to identify any broader significance to this question beyond his desire to correct a purported error (which was also not an error). Nance's petition should be denied.

STATEMENT

A. Factual Background

On December 18, 1993, Nance stole a 1980 Oldsmobile Omega and drove to a bank in Gwinnett County. *Nance v. State*, 272 Ga. 217 (2000). After entering the bank at approximately 11:00 a.m., Nance pulled a ski mask over his face, waved a .22 caliber revolver, and demanded that the tellers place cash in two pillowcases that he was carrying. *Id.* Nance made several threats to the tellers, including threatening to kill them if they used dye packs. *Id.* The tellers nevertheless slipped two dye packs into the pillowcases with the money. *Id.* Nance exited the bank and got into the Omega where the dye packs detonated, emitting red dye and tear gas. *Id.*

Grabbing a black trash bag containing the gun, Nance abandoned the Omega and went across the street to a liquor store parking lot where Gabor Balogh was backing his car out of a parking space. *Id.* Dan McNeal, who had just left the liquor store behind Balogh, was standing nearby. *Id.* He saw Nance run around the front of Balogh's car, yank open the driver's door, and thrust his right arm with the plastic bag into Balogh's car. *Id.* Then McNeal heard an argument and Balogh saying, "no, no, no," as he leaned away from Nance and raised his left arm defensively. *Id.* Nance shot Balogh in the left elbow, and the bullet entered his chest and caused his death a short time later. *Id.*

Nance then pointed the gun at McNeal and demanded his keys. *Id.* Instead of complying, McNeal

ran around the side of the liquor store. *Id.* Nance fired another shot, though McNeal was not hit. *Id.* Nance then ran around the opposite side of the liquor store, confronted McNeal behind the store, and pointed the gun at him. *Id.* As McNeal ran back to the front of the store, Nance turned and ran to a nearby Chevron station, where he entered into a standoff with police, telling them, "If anyone rushes me, there's going to be war." *Id.* Over an hour passed before police persuaded Nance to surrender. *Id.* The State also presented evidence that Nance had robbed another Gwinnett County bank three months earlier where he had made a similar threat to kill the teller and that he had pleaded guilty in federal court to committing both Gwinnett County bank robberies. *Id.*

B. Proceedings Below

1. Trial Proceedings

On September 26, 1997, following a jury trial, Nance was found guilty of his crimes and sentenced to death for the murder of Gabor Balogh. The Georgia Supreme Court affirmed Nance's convictions but reversed his death sentence and remanded the case for resentencing because a prospective juror was improperly qualified to serve on the jury. *Nance v. State.*

The State retried the sentencing portion of his case from August 29 to September 20, 2002. *Nance v. State*, 280 Ga. 125 n.1 (2005); *Humphrey v. Nance*, 293 Ga. 189, 203 (2013). Following the resentencing trial, Nance was again sentenced to death. *Nance*, 280 Ga. at 125 n.1. On December 1, 2005, the Georgia Supreme Court affirmed Nance's sentence. *Id.* at 125. In affirming, the Georgia Supreme Court found no error in

the trial court's determinations that, after conducting hearings on the procedures employed by the State of Georgia while carrying out an execution by lethal injection, the procedures were not unconstitutional. *Id*. at 127. This Court denied Nance's petition for a writ of certiorari on October 2, 2006. *Nance v. Georgia*, 549 U.S. 868 (2006).

2. State Habeas Proceedings

Nance subsequently pursued state habeas corpus relief. Following an evidentiary hearing on August 19-21, 2008, the state habeas court denied relief with respect to Nance's convictions but vacated his death sentence and found that counsel was ineffective at the resentencing trial. Respondents appealed the state habeas court's order, and the Georgia Supreme Court reversed the state habeas court's grant of relief. *Nance*, 293 Ga. at 203. This Court denied Nance's petition for writ of certiorari on January 27, 2014. *Nance v. Chatman*, 571 U.S. 1177 (2014).

3. Federal Habeas Proceedings

Nance then pursued relief under 28 U.S.C. § 2254, in which he raised numerous claims, including ineffective assistance of counsel for not challenging the State's lethal injection protocol and for not specifically challenging the protocol based on his allegedly compromised veins from past intravenous drug use. The district court denied relief on August 7, 2017, but granted Nance a COA on two issues: (1) whether counsel was ineffective in their presentation of mitigating evidence at the resentencing trial; and (2) whether the trial court erred in requiring him to wear a stun belt during his resentencing trial. Nance filed a

notice of appeal on December 1, 2017. The district court's decision was affirmed by the Eleventh Circuit on April 30, 2019. *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298 (11th Cir. 2019). This Court denied Nance's petition for writ of certiorari on March 23, 2020, in *Nance v. Ford*, 140 S. Ct. 2520 (2020), paving the way for a date to be set for Nance's execution. However, the ongoing pandemic delayed the scheduling of his execution.

4. Nance's § 1983 Complaint

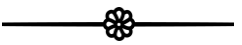
On January 8, 2020, Nance filed a complaint under § 1983 claiming that his veins are compromised and that he has been taking gabapentin, a drug for back pain, since 2016. Pet.App.E. Based on these conditions, Nance claimed that Georgia's lethal injection protocol, as applied to him, violates the Eighth Amendment prohibition against cruel and unusual punishment. *Id*. Nance asked the court to enjoin the State from executing him by any means of lethal injection and asserted that execution by firing squad was a feasible alternative the State could employ. *Id.* On March 13, 2020, the district court dismissed the complaint under Fed. R. Civ. P 12(b)(6), because Nance's claims were barred by the statute of limitations and they failed to state a claim for relief. Pet.App.B.

Nance appealed the district court's dismissal to the Eleventh Circuit, which asked both parties to be prepared to address at oral argument: (1) whether Nance's § 1983 complaint amounted to a challenge to the death sentence itself that must be construed as a habeas petition; and (2) if Nance's complaint was a habeas petition, was it a prohibited successive petition.

In an opinion by Chief Judge Pryor, the Eleventh Circuit held that Nance's claims were not cognizable in a § 1983 complaint. Pet.App.A. The court explained that his challenge must be included in a habeas petition because the relief requested would preclude the State from executing him, which logically implied the invalidity of his death sentence. Pet.App.2a. The Eleventh Circuit also determined that Nance's filing constituted a *successive* habeas petition under 28 USCS § 2244(b). Pet.App.19a-25a. The Eleventh Circuit remanded to the district court with instructions to dismiss for lack of jurisdiction. *Id*.

Nance filed a petition for rehearing *en banc*, which the Eleventh Circuit denied on April 20, 2021. Pet.App.D.

The district court subsequently dismissed the complaint for lack of jurisdiction, in compliance with the Eleventh Circuit's decision, on May 4, 2021.



REASONS FOR DENYING THE PETITION

Nothing in the Eleventh Circuit's decision warrants this Court's review. *First*, the Court need not review the Eleventh Circuit's conclusion that Nance's complaint was, in fact, a habeas petition. There is no meaningful conflict among the circuits on this issue. The Eleventh Circuit's decision was correct. And this is a poor vehicle to address the argument, as Nance's claims would be barred, regardless. *Second*, this Court should also decline to review whether Nance's filing constituted a successive petition. Nance seeks only error correction, and futile error correction at that.

I. THE ELEVENTH CIRCUIT'S HOLDING THAT NANCE'S CLAIMS ARE COGNIZABLE ONLY IN HABEAS CORPUS DOES NOT WARRANT REVIEW.

As it has stated numerous times, this Court is a court of "final review and not first view." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 56 (2015). Yet Nance would have this Court answer a legal question that, to date, only the Eleventh Circuit has truly resolved. There is no reason to jump into this issue before it has percolated among the lower courts, and there is especially no reason to do so here, where the Eleventh Circuit was correct *and* where the question is not even dispositive—Nance will not obtain relief *regardless* of whether his filing can be treated as a § 1983 complaint.

A. There Is No Meaningful Split Among the Circuits on the Issue of Whether Nance's Claims Are Cognizable in Habeas.

Even on his own account, Nance can identify only a *single* other circuit court that has purportedly addressed the question whether a supposed "method of execution" claim that challenges *all* legal methods of execution is cognizable under § 1983. That would not be enough to counsel in favor of this Court's review anyway, but it is worse than that: the Sixth Circuit decision that Nance relies on, *In re Campbell*, 874 F.3d 454 (6th Cir. 2017), was decided before this Court's decision in *Bucklew*.

In *Bucklew*, this Court made clear that "existing state law might be relevant to determining the proper procedural vehicle" for method of execution claims. *Bucklew*, 139 S. Ct. at 1128. The Court reiterated that: "if the relief sought in a 42 U.S.C. § 1983 action would

'foreclose the State from implementing the [inmate's] sentence under present law,' then 'recharacterizing a complaint as an action for habeas corpus might be proper.'" *Id.* (quoting *Hill*, 547 U.S. at 582-83). The Sixth Circuit did not have the benefit of *Bucklew* when it decided *In re Campbell*; indeed, the Eleventh Circuit is the only Court, as far as Respondents are aware, that has analyzed this question in a published opinion in the wake of *Bucklew*.[1] These are not the ingredients of a sustained or deep circuit split requiring this Court's intervention.

B. The Eleventh Circuit's Decision Was Correct.

Review is also unwarranted because the Eleventh Circuit's decision was correct. Indeed, on at least three prior occasions, this Court has cautioned that if a prisoner's Eighth Amendment claims would effectively preclude the State from carrying out the prisoner's death sentence under current state law, then such claims may be cognizable in habeas. *See* Pet.App.8a. The Eleventh Circuit simply took the next step and correctly *held* as much.

Nance claimed that he cannot be executed by lethal injection in Georgia without violating the Eighth Amendment, due to his particular medical problems. *Id.* He explicitly asked the federal court to permanently

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[1] In an unpublished decision, *In re Smith*, 806 F. App'x 462, 464 (6th Cir. 2020), a panel of the Sixth Circuit adhered to *In re Campbell* without reexamination in the wake of *Bucklew*, but this only reinforces the point: few, if any courts have examined this question at all, much less post-*Bucklew*.

enjoin the State of Georgia from executing him by any means of lethal injection, which is the State's sole statutorily-authorized method of execution. *Id.* at 103a-104a. *See also* O.C.G.A. § 17-10-38(a). Thus, his claim would necessarily imply the *invalidity* of his capital sentence. But § 1983 is not a vehicle for challenging a criminal conviction or sentence. *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997). Where "a grant of relief to the inmate would necessarily bar the execution," it is not an appropriate claim under § 1983. *Hill v. McDonough*, 547 U.S. 573, 583 (2006).

Contrary to Nance's arguments, this Court has never said otherwise, and in fact has strongly implied that method-of-execution claims are habeas claims if they *necessarily* invalidate the state's execution procedures. For instance, in *Nelson v. Campbell*, 541 U.S. 637 (2004), a prisoner raised a § 1983 challenge to his state's potential use of a "cut-down" procedure to gain access to the petitioner's allegedly compromised veins for lethal injection. *Id.* at 639. This Court held that the claim was properly raised in a § 1983 complaint, because the cut-down procedure was not "indispensable" to the State's execution procedures. *Id.* at 645. But the Court also noted that some method-of-execution challenges may be cognizable only in habeas: "If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself." *Id.* Likewise, in *Hill,* 547 U.S.

at 583, the Court again recognized that "whether a grant of relief to the inmate would necessarily bar the execution" is a critical question in determining whether relief can be obtained through § 1983 or habeas. And most recently in *Bucklew*, this Court again made clear that "existing state law might be relevant to determining the proper procedural vehicle for the inmate's claim." 139 S. Ct. at 1128. To be sure, this Court has never *held* as much, but the only indications from this Court are that it would follow the clear logic of *Heck* and *Balisok*.

Nance contends that the Eleventh Circuit's rule would create confusion, but it is unclear how. Although Nance lists a parade of horribles regarding line-drawing problems, Pet. at 20-21, none of them are present here, and in any event, there will always be line drawing problems when trying to determine whether a civil judgment necessarily implies the invalidity of a criminal conviction or sentence. That does not undermine the *principle* that § 1983 suits cannot undermine criminal convictions and sentences.

Tellingly, Nance reaches for fantastical hypotheticals unmoored from real-world state laws. For instance, Nance offers the hypothetical of a State that codifies a specific execution protocol such as the dosage of the drugs for lethal injection. Pet. at 21-22. But Nance can point to no specific examples of any states that codify such specific protocols by statute, likely because there are none. States codify their respective methods of execution by statute, not protocols. *See, e.g.,* O.C.G.A. § 17-10-38(a) (authorizes lethal injection as the sole method of execution in Georgia); Ala. Code § 15-18-82.1 (authorizes lethal injection as the primary method of execution in Alabama with execution

by electrocution or nitrogen hypoxia as alternative methods); Fla. Stat. § 922.105 (authorizes lethal injection as the primary method of execution in Florida with execution by electrocution as an alternative method). Similarly, Nance asks: what if a state statute were worded broadly enough to allow a prisoner's proposed alternative method of execution, but a state regulation defined the general statutory standards in a manner that precluded the suggested alternative method? Pet. at 22. Again, he can point to no specific example of such a scenario. And resolving such an issue would likely be an issue of state law—that is, what *is* the state law on the relevant question?

The Eleventh Circuit's decision was crystal clear that a habeas petition will be the appropriate vehicle only if the claim, as a logical necessity, would prohibit the state from executing him under state law. For example, if Nance had suggested an alternative that left the door open for Georgia to execute him by some *other* method of lethal injection, such a claim would have to be filed via § 1983. *See, e.g., Hill*, 547 U.S. 573 (a challenge to the first drug used in a three-drug protocol for execution by lethal injection does not necessarily prevent that State from carrying out the execution by other means of lethal injection). Deciding when a challenge *logically excludes* the death penalty versus merely making it difficult, "as a practical matter," *Hill*, 547 U.S. at 583, is something courts are well equipped to do.

In sum, because Georgia can only execute by lethal injection, to argue that any lethal injection, under any circumstances, is unconstitutional is to argue that Nance's *sentence* was unconstitutional. Any other holding would create a good-for-one-subject-matter-

only exception to the ordinary rule that § 1983 complaints cannot imply the logical invalidity of their sentences.

C. This Petition Presents a Poor Vehicle to Address the Question Whether § 1983 or Habeas Is the Appropriate Procedure.

Regardless of whether Nance's claims are cognizable in a § 1983 complaint or in a § 2254 habeas petition, they are barred by the statute of limitations and would have been doomed to fail on the merits. This Court's intervention would thus be premature *and* pointless.

1. As an initial matter, Nance's complaint is time-barred. A challenge to a state's method of execution brought under § 1983 is subject to the statute of limitations governing personal injury actions in the state where the challenge was filed. *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 872-76 (III)(B) (11th Cir. 2017). Nance's § 1983 complaint was filed in Georgia, so Georgia's two-year statute of limitations period for personal injury actions applies. *Id.* For as-applied § 1983 challenges, the statute of limitations begins to run when the facts which would support the cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights. *See McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008).

Nance admits in his complaint that he started using the drug gabapentin in April 2016, which was over three years before he filed his complaint in January 2020. Pet.App.53a. Therefore, the statute of limitations would have accrued in April 2016, and the two-year § 1983 statute of limitations would have expired by the time the complaint was filed. *See, e.g.,*

Ledford v. Comm'r, Ga. Dep't of Corr., 856 F.3d 1312, 1316 (11th Cir. 2017) (Ledford had been taking gabapentin for approximately a decade, thus his § 1983 claim about the interaction between gabapentin and pentobarbital was filed outside the two-year statute of limitations).

As for the claims concerning Nance's compromised veins, Nance's first habeas petition, filed in May 2014, demonstrates that Nance knew of his allegedly compromised veins. Res.App.16a, 19a. In that petition, Nance claimed that trial and appellate counsel failed to adequately litigate the unconstitutionality of lethal injection, particularly in the wake of Nance's long history of intravenous drug use. *Id.* Thus, Nance knew about his supposedly compromised veins more than five years before he filed his complaint in January 2020 and outside both the one-year habeas period of limitations and the two-year statute of limitations for § 1983 claims. At the very least, Nance's complaint includes *nothing* to suggest his compromised veins are a recent development. Pet.App.54a.

2. On top of everything else, Nance's complaint would also fail, regardless of whether this Court granted review, because it simply repeats substantive arguments rejected by this Court in *Glossip* and *Bucklew*. To prevail on an Eighth Amendment as-applied execution challenge, a petitioner must show that a feasible, readily implemented alternative method of execution will significantly reduce a substantial risk of severe pain, which the State has refused to adopt without a legitimate penological reason. *See Bucklew*, 139 S. Ct. at 1125, 1129; *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015). Here, regardless of whether Nance's claim was raised in a § 1983 complaint or a § 2254

habeas petition, Nance's firing squad alternative fails. The State of Georgia has legitimate penological reasons for rejecting death by firing squad in lieu of lethal injection. For example, Georgia has never executed a prisoner by firing squad, *see Bucklew*, 139 S. Ct. at 1129-30, and lethal injection has been universally accepted as the most humane method of execution, *Baze v. Rees*, 553 U.S. 35, 62 (2008). Indeed, Nance's claim is virtually indistinguishable from the claim *rejected* by this Court in *Bucklew*.

II. THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' FACTBOUND DETERMINATION THAT NANCE'S HABEAS CLAIMS WERE SUCCESSIVE UNDER 28 USCS § 2244(B)(2).

As to Nance's second question presented, he has identified little reason to grant review, and many reasons counsel against it. This is a factbound issue that would, at best, result in error correction, and a *futile* one at that, since Nance's complaint was also untimely under the applicable habeas statute of limitations. And the Eleventh Circuit was correct on the merits, to boot.

Because Nance never requested permission to file a second or successive habeas petition, the Eleventh Circuit ordered the district court to dismiss the case for lack of jurisdiction. As the court explained, "[e]ven if Nance had asked [the Eleventh Circuit] to allow his second or successive petition, [the court] could not have done so because the petition does not satisfy either of the requirements of section 2244(b)(2)." Pet.App.20a. His claim plainly did not rely on either "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," nor was there a newly discovered

"factual predicate" sufficient to establish that "no reasonable factfinder" could have found him guilty of the offense. 28 U.S.C. § 2244(b)(2).

Nance argues that his complaint, if construed as a habeas petition, is *not* second or successive, because his claim was not previously "ripe." Pet.App.22a. The Eleventh Circuit appropriately rejected that argument, and more importantly, whether the court was correct or not, it has no bearing on the outcome of the case and does not implicate any circuit split.

A.

The Eleventh Circuit rested its holding on two basic points:

(1) Nance's petition was successive unless there was some exception, and (2) Nance's reliance on *Panetti v. Quarterman*, 551 U.S. 930 (2007), to provide such an exception, was unavailing. Pet.App.20a-25a. In *Panetti*, this Court held that prisoners who are insane at the time of execution can raise claims under *Ford v. Wainwright*, 477 U.S. 399 (1986)—which prohibited the execution of insane prisoners—in a new habeas petition, without being subject to the second or successive bar. To do otherwise would demand that a prisoner either "forgo the opportunity to raise a *Ford* claim in federal court[,] or raise the claim in a first federal habeas application . . . even though it [would be] premature." *Panetti*, 551 U.S. at 943.

Nance argued that his claim should, analogously, be considered a first habeas petition because it was not previously ripe, but the Eleventh Circuit correctly held otherwise. This Court has specifically rejected, post-*Panetti*, the notion that "all that matters is that the facts could not have been discovered previously

through the exercise of due diligence." *Magwood v. Patterson*, 561 U.S. 320, 336 (2010). Such a rule would be contrary to statute—it would, for instance, render § 2244(b)(2)'s exception for certain second or successive petitions completely superfluous. *Id.* The dissent in *Magwood* likewise understood that the majority rejected the view that "a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application." *Magwood*, 561 U.S. at 345 (Kennedy, J., dissenting).

The Eleventh Circuit correctly recognized that the *Panetti* "holding is tailored to the context of *Ford* claims," and so the court looked to the "considerations informing the Supreme Court's adoption of the rule *in that context*." Pet.App.23a-24a. But those concerns "do not obtain in the context of as-applied method-of-execution challenges." Pet.App.24a. The *Panetti* Court was concerned that a prisoner with a valid *Ford* claim could be stuck between a rock and a hard place—either the claim is unripe (since it is *necessarily* ripe only close to the time of execution) or barred; "[i]n contrast, a prisoner whose physical health deteriorates following his first habeas petition may rely on section 1983 to minimize the risk of pain during his execution —with the caveat that he seek relief designed to accommodate his state's authorized methods of execution to his unique health factors instead of an injunction that would effectively serve as a permanent stay of his execution." Pet.App.24a.

The Eleventh Circuit's view makes far more sense than Nance's. Under Nance's rule, Congress's statutory scheme is all but ignored—the exceptions for certain second or successive claims are unnecessary, at the

very least. More generally, it would turn on its head a statutory scheme directed at finality, requiring that courts re-review cases constantly, as long as a prisoner asserts that some new fact has come to light. By contrast, under the Eleventh Circuit's (far more limited) holding, prisoners can continue to file true method-of-execution challenges, "assuming, of course, that [they] [are] more interested in avoiding unnecessary pain than in delaying [their] execution." *Bucklew*, 139 S. Ct. at 1129.

B.

Regardless of whether the Eleventh Circuit is correct, any intervention now would amount to error correction. No other court has ruled opposite the Eleventh Circuit. Nance briefly asserts some sort of split, but it is illusory. None of Nance's cited cases even addressed this issue, and most were pre-*Magwood*. For instance, in *Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009), the Fifth Circuit merely explained (in dicta) that a "later petition based on [a previously unripe] defect may be non-successive." That is, of course, true—for instance, in *Panetti*. But the Fifth Circuit did not purport to hold it was *always* true or that a petition would be non-successive in circumstances similar to these.

Likewise, in *In re Bowling*, No. 06-5937, 2007 WL 4943732, at *2 (6th Cir. Sept. 12, 2007), the Sixth Circuit held that a newly ripe claim under *Atkins v. Virginia*, 536 U.S. 304 (2002) was not successive, but an *Atkins* claim is *far* more analogous to the situation in *Panetti*. Plus, the Sixth Circuit did not purport to impose a broad rule (in an unpublished opinion) that *all* newly ripe claims are free from the second or successive bar. Indeed, the Eleventh

Circuit's opinion here suggests that it might extend *Panetti* to cover *Atkins* claims as well. Such claimants may be like *Ford* claimants in that, "[w]ithout the ability to file an additional habeas petition, a prisoner whose mental health deteriorates after his first habeas petition" would have no way of challenging an unconstitutional execution. But of course, that is far afield from this case, where Nance purports to object only to a certain method of execution.

Moving down the line, in *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003), the Eighth Circuit was faced with a different factual context, plus it relied on the notion that "a habeas petition raising a claim that had not arisen at the time of a previous petition is not barred by § 2244(b)," a position this Court specifically rejected seven years later. Finally, the Ninth Circuit cases cited by Nance include only irrelevant dicta—neither case would impose a rule conflicting with the Eleventh Circuit's resolution of this case, as neither case even granted relief. *United States v. Buenrostro*, 638 F.3d 720 (9th Cir. 2011); *Brown v. Muniz*, 889 F.3d 661 (9th Cir. 2018).[2]

C.

Finally, Nance not only asks for error correction regarding a splitless question, he asks for *futile* error correction. For the same reasons noted above with respect to his § 1983 complaint, *see supra* Section I.C, Nance's filing, construed as a habeas petition, would

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[2] Nance cites a footnote in *Brown* listing several cases where courts construed petitions to be non-successive, but all were pre-*Magwood* and none conflicts with the decision below.

be time-barred. 28 U.S.C. § 2244(d)(1)(D) (habeas petition must be filed within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"). So again, this Court's review of the substantive question would be simply pointless, since there is no serious doubt that Nance's filing was untimely.

* * * * *

The decision below does not make it any harder to make out a method-of-execution claim under § 1983, Pet.App.26a-29a. It simply recognizes that a prisoner cannot, under the guise of such a claim, object to *all lawful* methods of execution outside of a habeas petition; such a claim is really a challenge to a sentence, and it has more do with "delaying . . . execution" than "avoiding unnecessary pain." *Bucklew*, 139 S. Ct. at 1129.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted,

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