No. 21-439

IN THE
Supreme Court of the United States

MICHAEL NANCE,
Petitioner,
v.
TIMOTHY C. WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, AND WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,
Respondents.

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

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Catherine E. Stetson
Dana A. Raphael
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

Allison M. Wuertz
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017

David D. Cole
Counsel of Record
David C. Fathi
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 Fifteenth Street, N.W.
Washington, D.C. 20005
(212) 549-2611
dcole@aclu.org

(Additional counsel listed on inside cover)

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
legal@rutherford.org

Brian W. Stull
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
201 W. Main Street,
Suite 402
Durham, NC 27701

Jennesa Calvo-Friedman
Brandon J. Buskey
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Sean J. Young
AMERICAN CIVIL LIBERTIES
UNION OF GEORGIA
P.O. Box 570738
Atlanta, GA 30357

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has authored *amicus*

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

briefs in many different matters that address issues related to the death penalty, including in *United States* v. *Tsarnaev*, No. 20-443 (U.S.), *McKinney* v. *Arizona*, 140 S. Ct. 702 (2020), *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019), *Ayestas* v. *Davis*, 138 S. Ct. 1080 (2018), and *Baze* v. *Rees*, 553 U.S. 35 (2008). The ACLU of Georgia is its state affiliate in Georgia.

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by the Constitution and laws of the United States.

SUMMARY OF ARGUMENT

During a pre-execution physical examination, Michael Nance learned that he may not be fully sedated during his execution due to a drug interaction between the lethal injection and his prescription medication. Nance also learned that his veins were compromised and could rupture, which would cause severe pain as the drugs intended to kill him also burned surrounding tissue.

Accepting the fact of his execution but not the State's planned method, Nance brought a challenge under 42 U.S.C. § 1983 to Georgia's lethal injection protocol as applied to his execution. Following this Court's recent command that death-condemned prisoners allege "a

feasible and readily implemented alternative" when challenging the method of execution, *Bucklew*, 139 S. Ct. at 1125, Nance proposed that Georgia execute him by firing squad—a method authorized in four other States.

But because Nance's proposed alterative is not *currently* authorized in Georgia, the Eleventh Circuit transformed his § 1983 suit into a habeas petition—despite the fact that "the alternative method of execution need not be authorized under current state law." *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring).

The Eleventh Circuit eschewed this Court's precedents to string together an atextual, ahistoric, and complicated jurisdictional regime that would deprive many death-condemned prisoners of their right to federal court review. Amici write to support Nance's argument that his method-of-execution claim is properly brought under § 1983.

Nance seeks a remedy to redress the circumstances of his execution, not one that prevents it, making his claim akin to any other unconstitutional-conditions challenge typically brought under § 1983. The Eleventh Circuit's labored reasoning to the contrary ignores this Court's precedents, which allow prisoners to point to alternative execution methods authorized in other States. States also routinely change their execution methods without resentencing death-condemned prisoners, understanding that the method of execution is independent from the death sentence itself. Accordingly, such challenges are properly heard under § 1983.

Section 1983 is a familiar, efficient tool that is well-suited to resolve method-of-execution claims. It

provides courts with flexibility to consider claims when ripe while also establishing safeguards to deter meritless litigation. But instead of considering Nance's § 1983 petition on its merits, the Eleventh Circuit grafted habeas rules onto a proceeding that impugns neither the conviction nor the sentence. That procedural mismatch opens the door to an array of problems future litigants will ask this Court to resolve.

This Court should reverse.

ARGUMENT

I. TEXT, HISTORY, AND PRECEDENT ESTABLISH THAT METHOD-OF-EXECUTION CLAIMS ARE PROPERLY BROUGHT UNDER 42 U.S.C. § 1983.

A. Challenges to Methods of Execution Do Not Implicate the Fact of Conviction or Sentence and Are Therefore Appropriate for § 1983 Rather Than Habeas.

Section 1983 affords a remedy for challenges to the conditions by which one's sentence is executed, while habeas is the appropriate remedy for challenges to the conviction itself and to seek release or resentencing. Nance does not seek to overturn his conviction or sentence in this action, nor does he dispute that Georgia can execute him. He contests only the State's planned method of carrying out the sentence—a lethal injection protocol that, he alleges, will be cruel and unusual as applied to him because of his medical condition. As Nance does not seek release or a reprieve from capital punishment, he properly brought his method-of-execution challenge under § 1983, not habeas.

"Section 1983 authorizes a 'suit in equity, or other proper proceeding for redress,' against any person who, under color of state law, 'subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution.'" *Nelson* v. *Campbell*, 541 U.S. 637, 643 (2004) (quoting 42 U.S.C. § 1983). "Habeas is the exclusive remedy * * * for the prisoner who seeks 'immediate or speedier release' from confinement." *Skinner* v. *Switzer*, 562 U.S. 521, 525 (2011) (quoting *Wilkinson* v. *Dotson*, 544 U.S. 74, 82 (2005)). Challenges to the fact of a conviction or sentence are "within the 'core' of habeas corpus" and "not cognizable when brought pursuant to § 1983." *Nelson*, 541 U.S. at 643.

But "claims that merely challenge the conditions of a prisoner's confinement," not the underlying fact of conviction or sentence, fall outside the habeas corpus "core" and "may be brought pursuant to § 1983 in the first instance." *Id*. Such claims, "even if successful, will not demonstrate the invalidity" of the conviction or sentence, *Heck* v. *Humphrey*, 512 U.S. 477, 487 (1994), and do not "necessarily spell speedier release." *Skinner*, 562 U.S. at 525 (quoting *Wilkinson*, 544 U.S. at 82).

Because a challenge to a State's planned method of execution "does not attack the validity of the prisoner's conviction or death sentence," it "must be brought under § 1983." *Glossip* v. *Gross*, 576 U.S. 863, 879 (2015). Habeas is required only when "a grant of relief to the inmate would *necessarily* bar the execution," not just when relief "would frustrate the execution as a practical matter." *Hill* v. *McDonough*, 547 U.S. 573, 583 (2006) (emphasis added) (citing *Edwards* v. *Balisok*, 520 U.S. 641, 645 (1997)).

Nance's claim fits squarely within the literal terms of § 1983 and this Court's explication of its interrelationship with habeas in *Heck*. Nance accepts that if he "gets all the relief he seeks, he will still be executed." Pet'r's Br. 4. Nance challenges only the specific way he will be executed—not whether he will die. Nance alleged that the combination of his compromised veins and his tolerance to the lethal-injection sedative would render lethal injection so painful that it would violate the Eighth Amendment. *Id*. at 14. He specified that he could be executed by firing squad.[2] Thus, his request for an alternative method does not "imply the invalidity" of his sentence; it implies the invalidity of only one means of carrying it out.

As this Court has made clear, § 1983 is the appropriate vehicle for challenging the method of execution. *See Nelson*, 541 U.S. at 647 (challenge to cut-down procedure to enable lethal injection properly brought under § 1983); *Glossip*, 6 U.S. at 879-880 (addressing Eighth Amendment challenge to Oklahoma's switch from pentobarbital to midazolam under § 1983); *Hill*, 547 U.S. at 583 (same, for challenge to drug cocktail). "The severability of the sentence of death from the method of execution of that sentence in Georgia law is apparent in the death penalty statutes * * * ." *Dawson* v. *State*, 554 S.E.2d 137, 144 (Ga. 2001). Nance seeks a remedy relating to the circumstances of his execution, not one that prevents it.

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[2] Not only does Nance concede the fact of his execution, he has affirmatively proposed a method for carrying it out—as this Court requires.

B. Method-of-Execution Challenges Do Not Require That Prisoners Allege Alternatives Currently Authorized By State Law.

This Court requires prisoners challenging a method of execution to allege an alternative method, confirming that such challenges are not to death sentences themselves, but merely to some particular means of carrying them out. Nance pointed to the firing squad as "a known and available alternative." *Glossip*, 576 U.S. at 880. The fact that Georgia does not currently authorize death by firing squad does not alter the result.

This Court has explicitly provided that a death row prisoner may point to an alternative method authorized by a sister State; a prisoner is "not limited to choosing among those [methods] presently authorized by a particular State's law," and "may point to a well-established protocol in another State as a potentially viable option." *Bucklew*, 139 S. Ct. at 1128; *see also id*. at 1136 (Kavanaugh, J., concurring) ("I write to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law * * * ."). "[T]he Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes." *Id*. at 1128.[3]

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[3] The Eleventh Circuit said it must "take the State's law as fixed" because the alternative "effectively * * * direct[s] the State to either enact new legislation or vacate his death sentence," which the Eleventh Circuit intimated would violate the anticommandeering principle. Pet.App.19a (citing *New York* v. *United States*,

The fact that a death row prisoner may point to an alternative that is *not* currently authorized under state law so long as it is "known" and "available" in sister States confirms that it makes no difference to the analysis whether the State in question has authorized only one or more than one method of execution. This Court's test contemplates that a successful claim can be made if: (1) the State's only authorized method is cruel and unusual; and (2) there is a known and available alternative, whether or not the State currently authorizes that alternative. The requirement to plead an alternative makes clear that *by definition* a method-of-execution challenge is not a challenge to the death penalty itself, but only to one particular way of carrying it out. If Nance prevails, he has maintained that Georgia is free to authorize a firing squad (or some other constitutional method it identifies) and execute him; just as in a challenge to

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505 U.S. 144, 188 (1992)). Under that principle, "*Congress* cannot compel the States to enact or enforce a federal regulatory program," nor "circumvent that prohibition by conscripting the State's officers directly." *Printz* v. *United States*, 521 U.S. 898, 935 (1997) (emphasis added).

But *courts* may order state officials to comply with the Constitution and do so every day. Indeed, the anticommandeering cases *themselves* recognize "the power of federal *courts* to order state officials to comply with federal law" because "the text of the Constitution plainly confers this authority on the federal courts." *New York*, 505 U.S. at 179. To suggest otherwise is incompatible with our constitutional order. *See* U.S. Const. art. III, § 2; art. VI, § 2; *Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958) ("If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery * * * ." (quoting *United States* v. *Peters*, 9 U.S. (5 Cranch) 115, 136 (1809))).

conditions of confinement, the State is free to continue confinement if it eliminates the offending conditions. Both actions properly sound in § 1983, not habeas.

Nance met those pleading requirements by identifying an alternative method—death by firing squad—that is one of several "traditionally accepted methods of execution." *Bucklew*, 139 S. Ct. at 1125; *see also Wilkerson* v. *Utah*, 99 U.S. 130, 134-135 (1878) ("Cruel and unusual punishments are forbidden by the Constitution, but * * * the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category * * * ."). Four States currently permit execution by firing squad if other methods are found unconstitutional or are otherwise unavailable.[4] Since 1976, Utah has executed three people by firing squad, most recently in 2010. *See* Pet.App.44a (Martin, J., dissenting).[5] Indeed, Missouri conceded in *Bucklew* "that the firing squad would be such an available alternative, if adequately pleaded"—even though the firing squad was not currently authorized under Missouri law. *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring).

As a result, the Court found "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id*. at 1128-29. "In other words, an inmate who contends that a particular method of execution is very likely to cause him

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[4] They are Mississippi, Miss. Code. Ann. § 99-19-51(4); Oklahoma, Okla. Stat. tit. 22, § 1014(D); South Carolina, S.C. Code Ann. § 24-3-530; and Utah, Utah Code Ann. § 77-18-113.

[5] Documents referenced by "App." have been attached as an appendix to this brief for the Court's convenience and are included within the certified word count.

severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Id*. at 1136 (Kavanaugh, J., concurring).

What *Bucklew* did *not* say was that failing to satisfy those pleading requirements transforms a § 1983 method-of-execution claim into a habeas petition, over which district courts would lack jurisdiction in the first instance if the petition were second or successive. Under this Court's precedents, failing to identify an alternative execution method—whether that of the defendant State or another in the Union—simply means that the prisoner failed to state a claim for relief, not that the district court lacked jurisdiction to entertain the claim at all.[6]

The Eleventh Circuit's position that the district court ultimately lacked jurisdiction to hear Nance's claim thus comes as a surprise, given that no Justice identified any jurisdictional problem in *Bucklew*. The prisoner there, as here, filed a § 1983 action alleging that Missouri's lethal injection protocol would constitute cruel and unusual punishment because of his medical condition. *See Bucklew* v. *Precythe*, 883 F.3d 1087, 1089 (8th Cir. 2018), *aff'd*, 139 S. Ct. 1112 (2019). After *Glossip*, the Eighth Circuit instructed the plaintiff to amend his complaint by "identify[ing] a feasible, readily implemented alternative procedure." *Bucklew* v. *Lombardi*, 783 F.3d 1120, 1128 (8th Cir. 2015) (en banc). In addition to identifying nitrogen hypoxia as an alternative method of execution,

[6] What's more, because the *Baze* plaintiffs also challenged the State's sole authorized method of execution (lethal injection), the plurality could have explained that such challenges must proceed by habeas—but did not.

the amended complaint alleged that "no modification of Missouri's lethal injection method of execution could be constitutionally applied." *Bucklew*, 883 F.3d at 1093.

Like Nance, Bucklew had unsuccessfully challenged his conviction and death sentence through habeas before bringing a method-of-execution claim under § 1983. *Id*. at 1089. Just as Georgia law does not permit execution by firing squad, Missouri protocols did not provide for execution by nitrogen hypoxia. Thus, just as Nance's complaint did here, Bucklew's "complaint s[ought] an injunction against the only method of execution authorized." Pet.App.14a.[7]

But neither party contested the Court's ultimate jurisdiction to hear the challenge, and this Court did not identify any jurisdictional problem despite its "independent obligation to determine whether subject-matter jurisdiction exists." *Foster* v. *Chatman*, 578 U.S. 488, 496 (2016) (citation omitted). The Eleventh Circuit's logic implies that this Court in *Bucklew* departed, silently and radically, from its long-held view that the Court will never "decid[e] the merits before a disputed question of Article III jurisdiction." *Steel Co.*

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[7] Although Missouri statutory law permitted executions by lethal gas generically, it had not used that method since 1965, had no protocol in place for such executions, and had never used nitrogen hypoxia. *Bucklew*, 883 F.3d at 1094. Therefore, because the prisoner "sought the adoption of an entirely new method" rather than "point[ing] to a proven alternative method," this Court concluded that he failed to plead a "feasible," "readily implemented" alternative. *Bucklew*, 139 S. Ct. at 1129-30. Oklahoma, Mississippi, and Alabama have since authorized execution by nitrogen hypoxia. *See* Okla. Stat. tit. 22, § 1014; Miss. Code. Ann. § 99-19-51; Ala. Code § 15-18-82.1.

v. *Citizens for a Better Env't*, 523 U.S. 83, 100 n.3 (1998).

The requirement of pleading and proving an alternative method—whether or not it is currently authorized by state law—makes clear that a method-of-execution challenge does not seek to invalidate the death sentence itself, but only the designated method, making it akin to any other challenge to unconstitutional conditions of confinement. A prisoner challenging his placement in solitary confinement as unconstitutional does not seek to be let out of jail, only to remove himself from solitary confinement. *See e.g.*, *Hutto* v. *Finney*, 437 U.S. 678, 685 (1978) (judgment for prisoners who brought § 1983 challenge to solitary confinement under Eighth Amendment). Nor does a prisoner seeking to practice his religion while incarcerated look to have his sentence reduced, only to have unconstitutional limits on his religious freedom removed. *See e.g.*, *Murphy* v. *Collier*, 139 S. Ct. 1475 (2019) (staying execution of prisoner who brought § 1983 challenge to Texas's refusal to permit Buddhist spiritual advisor in execution chamber); *Murphy* v. *Collier*, 942 F.3d 704, 706-708 (5th Cir. 2019) (district court did not abuse discretion by staying execution pending resolution of prisoner's § 1983 suit alleging revised execution policy violated First Amendment and Religious Land Use and Institutionalized Persons Act).

The Eleventh Circuit recites dicta from prior cases that it says require jettisoning precedent.[8] However,

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[8] *See* Pet.App.11a ("[E]xisting state law might be relevant to determining the proper procedural vehicle for the inmate's claim." (quoting *Bucklew*, 139 S. Ct. at 1128)); *id.* at 9a-10a ("[If]

as Judge Martin explained in dissent,"[t]aken to its logical end, the [Eleventh Circuit's] holding would also bless a State's efforts to legislate away available alternatives that a litigant could point to in order to satisfy his burden under *Baze*-*Glossip* in a § 1983 action," thus foreclosing claims that "the Supreme Court ha[s] historically and repeatedly treated as cognizable under § 1983." Pet.App.38a-39a n.3 (Martin, J., dissenting).

The reality is that most States authorize just one method of execution; "[t]wenty-seven of the thirty-six States that [as of 2008] provide for capital punishment require execution by lethal injection as the sole method." *Baze*, 553 U.S. at 42 n.1 (plurality op.). Under the Eleventh Circuit's ruling, the State's "selection of procedures, no matter how narrow or specific," not only deserve deference "but also work to prevent a challenge under § 1983." Pet.App.38a-39a n.3 (Martin, J., dissenting). Federal law does not require that result.

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the relief sought would foreclose execution," "recharacterizing a complaint as an action for habeas corpus might be proper." (quoting *Hill*, 547 U.S. at 582)); *id*. at 8a-9a ("[W]here the legislature has established lethal injection as the preferred method of execution, a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." (quoting *Nelson*, 541 U.S. at 644)); *see also* Pet.App.72a-73a (Pryor, C.J., and Newsom and Lagoa, JJ., respecting the denial of rehearing en banc). As Nance points out (at Pet'r's Br. 31), the dicta in *Hill* and *Nelson* "addressed a scenario that is no longer permitted today"—challenging a State's method of execution without proposing an alternative—and the dictum in *Bucklew* "merely identified" an issue the Court had previously noted in earlier dicta. *Id*. at 30.

C. States Frequently Change Their Execution Methods Without Requiring Resentencing.

Successfully challenging a State's execution method does not render the State incapable of executing the prisoner, and the Eleventh Circuit's speculation to the contrary is belied by the historical record. Over the past several decades, most States that previously authorized electrocution as their primary method of execution switched to lethal injection. Prisoners sentenced to die under the former method were routinely executed under the latter—without resentencing.

The ability of States to change their methods of execution without the need for resentencing dates back at least a century. In 1912, South Carolina decided that "all persons convicted of capital crime and have imposed upon them the sentence of death shall suffer such penalty by electrocution * * * instead of by hanging." *Malloy* v. *South Carolina*, 237 U.S. 180, 181-182 & n.1 (1915). This Court rejected an *ex post facto* challenge to the law because it "did not change the penalty—death—for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings. The punishment was not increased, and some of the odious features incident to the old method were abated." *Id*. at 185.

Of the States permitting capital punishment in 1970, nineteen specified "that electrocution was the exclusive form of capital punishment." *Provenzano* v. *Moore*, 744 So. 2d 413, 418 (Fla. 1999) (Harding, C.J., specially concurring). When courts invalidated electrocution protocols, States switched to alternative methods of execution, like lethal injection, and

proceeded with the executions. No condemned prisoner required resentencing because of the shift.[9]

Georgia, for example, adopted electrocution as its sole method of execution in 1924. *Dawson*, 554 S.E.2d at 147 (Thompson, J., dissenting). The legislature in 2000 prospectively authorized lethal injection as the exclusive method. Shortly thereafter, the Georgia Supreme Court held that electrocution violated the state constitution's ban on cruel and unusual punishment. *Dawson*, 554 S.E.2d at 139, 144. As a result, numerous prisoners who had been sentenced to death by electrocution were put to death instead by lethal injection. *See* App.2a-7a (death sentences for J.W. Ledford, Jr., Marcus Ray Johnson, and Marion Wilson); *J.W. Ledford*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database/1453/jw-ledford (last visited Mar. 4, 2022) (executed by lethal injection); *Marcus Ray Johnson*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database/1421/marcus-johnson (last visited Mar. 4, 2022) (same); *Marion Wilson*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database/1500/marion-wilson (last visited Mar. 4, 2022) (same). None of those prisoners was resentenced, even though their sentencing orders specified they were subject to "death by electrocution." App.3a-8a. That is because *Dawson*'s invalidation of

[9] The Eleventh Circuit concedes this point, recognizing that "a judgment in Nance's favor implies the invalidity of his sentence as a matter of logical necessity only if we take Georgia law as fixed," because "the State could respond by enacting a law authorizing execution by firing squad." Pet.App.18a. The Eleventh Circuit concluded, however, that it was *required* to take Georgia law as "fixed" because of purported commandeering concerns. *Id.* Those concerns are unfounded. *See supra* pp. 7-8 n.3.

electrocution "ha[d] no impact whatsoever on the viability of the death penalty in Georgia." *Dawson*, 554 S.E.2d at 145 (Sears, J., concurring); *see also id*. at 144 (rejecting as "misguided and inaccurate" the State's argument that the method-of-execution challenge was "to the death penalty statute as a whole").[10]

Nebraska similarly specified that the "mode of inflicting the punishment of death, in all cases, shall be by causing to pass through the body of the convicted person a current of electricity," and went a step further: "[a] crime punishable by death *must* be punished according to the provisions herein made and not otherwise." L.B. 268, § 17, 83d Leg., 1st Sess. (Neb. 1973), 1973 Neb. Laws 782 (emphasis added). When Nebraska's Supreme Court invalidated electrocution under the state constitution, the decision bore "solely on the legality of the execution of the sentence and not on the validity of the sentence itself." *State* v. *Mata*, 745 N.W.2d 229, 278-279 (Neb. 2008) (citations omitted). Thus, death sentences "remain[ed] valid" even though they "cannot be implemented under current law." *Id.* at 278. Nebraska soon after adopted lethal injection as its sole method of execution, Neb. Rev. Stat. § 83-964, and used it in 2018 to execute a prisoner who had been sentenced to death by electrocution in 1980. *State* v. *Moore*, 316 N.W.2d 33, 35-36 (Neb.

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[10] The *method* of execution is no more part of the sentence than the *date* of execution. Georgia law requires that courts "specify the time period for the execution in the sentence" because executions must occur within 67 days of sentencing. Ga. Code Ann. § 17-10-34. As a result, Nance's sentencing order, dated September 20, 2002, states that he "shall be executed" sometime between October 24 and 31, 2002. App.1a. Although the specified period of execution has passed, the lapse obviously does not vitiate Nance's death sentence.

1982); *Carey Moore*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database/1481/carey-moore (last visited Mar. 4, 2022).[11]

Likewise, Florida authorized electrocution as its sole method of execution until 2000. *See Provenzano*, 744 So. 2d at 415; Fla. Stat. § 922.10 (1997) ("A death sentence shall be executed by electrocution."). After

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[11] Nebraska courts have thus repeatedly rejected challenges to death sentences because the method of execution authorized at the time of sentencing was no longer permissible. *See*, *e.g.*, *State* v. *Ryan*, 845 N.W.2d 287, 297 (Neb. 2014) ("[I]f [the method is] statutorily required (as it effectively is here), it would take some time to adopt a new procedure; but in our view, that does not affect the validity of the sentence, only the time it takes to carry it out."), *disapproved on other grounds by State* v. *Allen*, 919 N.W.2d 500 (Neb. 2018); *State* v. *Torres*, 812 N.W.2d 213, 241 (Neb. 2012) ("Put simply, the sentencing court always had the authority to sentence Torres to death; the State's enactment of a new method of execution and its accompanying protocol simply made it possible for the State to enforce that sentence."); *State* v. *Ellis*, 799 N.W.2d 267, 287-288 (Neb. 2011) (rejecting prisoner's argument that "he is not subject to the death penalty" and "must be sentenced to life imprisonment because at the time of his sentencing, there was no valid method of punishment," because the "sentence was lawfully imposed" and "itself remains valid," "although the sentence could not have been executed at that very time"); *State* v. *Vela*, 777 N.W.2d 266, 317 (Neb. 2010) ("[F]or the reasons discussed in *Mata II*, the constitutional infirmity in this method of execution does not require that we disturb the death sentences imposed in this case." (footnote omitted)); *State* v. *Galindo*, 774 N.W.2d 190, 214 (Neb. 2009) ("[Although] there was no constitutional procedure to determine death eligibility in a trial for first degree murder, it does not follow that Nebraska law no longer provided for the death penalty as the maximum punishment at the time of [the prisoner's] crimes."); *accord State* v. *Dunster*, 769 N.W.2d 401, 409 (Neb. 2009) (no assignment of error in postconviction challenge to electrocution because "electrocution is no longer the method of execution under Nebraska law," so prisoner "is no longer subject to electrocution").

Florida switched to lethal injection, prisoners condemned under the old regime were not resentenced. As in Georgia and Nebraska, they were executed by lethal injection. *See, e.g.*, *In re Provenzano*, 215 F.3d 1233, 1235-36 (11th Cir. 2000) (per curiam); *Execution Database*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database (choose "Florida" from dropdown; then select "start date" as 01/01/2000; then click "apply") (showing all 55 prisoners executed by lethal injection after method adopted).[12]

This history shows that both this Court and the States consistently view the method of execution as independent from the death sentence itself. Alterations to the execution method do not disturb the sentence of a prisoner condemned to die under the previous regime, and thus do not implicate the underlying sentence itself. Accordingly, they are properly heard under § 1983, not as petitions for habeas corpus—whether or not state law currently authorizes one or more methods of execution.

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[12] Tennessee, too, opted for lethal injection in 1998, and prisoners sentenced to die by electrocution were subsequently executed by lethal injection without resentencing. *See, e.g.*, *Johnson* v. *Bell*, 457 F. Supp. 2d 839, 841-842 (M.D. Tenn. 2006). Alabama added lethal injection in 2002 and did the same. *See, e.g.*, *Grayson* v. *Dunn*, 156 F. Supp. 3d 1340, 1350 (M.D. Ala. 2015), *aff'd sub nom. Brooks* v. *Warden*, 810 F.3d 812 (11th Cir. 2016); *Jones* v. *Allen*, 483 F. Supp. 2d 1142, 1143 (M.D. Ala.), *as clarified* (Apr. 20, 2007), *aff'd*, 485 F.3d 635 (11th Cir. 2007).

II. SECTION 1983 IS WELL-SUITED TO RESOLVE METHOD-OF-EXECUTION CHALLENGES.

A. Section 1983's Flexibility Facilitates the Efficient Resolution of Method-of-Execution Challenges.

Section 1983 provides a superior avenue for adjudicating method-of-execution claims. Such claims accrue "when the plaintiff has 'a complete and present cause of action.'" *Wallace* v. *Kato*, 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). For a prisoner challenging an execution method, that "complete and present" requirement ensures that the prisoner brings such a claim only when the execution method is settled and the prisoner knows or should know that the method presents a problem. *See Siebert* v. *Allen*, 506 F.3d 1047, 1048-49 (11th Cir. 2007) (per curiam) (recognizing that knowledge of underlying medical conditions, and thus "factual predicate" for claim, was "in place" upon diagnosis). Where, as here, the claim turns on the interaction of the method with the prisoner's health status at the time of execution, the claim may not ripen until the execution is imminent. Section 1983 allows such claims to be brought when they are ripe—whenever that may be.

Because habeas petitions, by contrast, challenge the legality of the conviction and sentence itself, prisoners must usually file them within a year of the criminal judgment becoming final—years, sometimes decades, before a warrant issues for their execution. A method-of-execution claim brought at that time runs the risk of being dismissed as unripe, especially where

it turns on an individual's health status, which by definition can change over time. *See, e.g.*, *Poland* v. *Stewart*, 117 F.3d 1094, 1104 (9th Cir. 1997) (habeas petitioner's Eighth Amendment challenge to execution by lethal gas "not ripe for review" where petitioner had "not yet chosen lethal gas as the method of execution to be used"); *Tompkins* v. *Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009) (per curiam) (recognizing that habeas petitioner's Eighth Amendment challenge to execution method "was not ripe at the time he filed his first habeas petition in 1989 because the state did not use that method of execution at that time").

And a prisoner's health is not the only variable subject to change; state law can change, too. Thus, even assuming a method-of-execution challenge could be instituted before a warrant issues, States can, and do, change their execution methods. If the challenge must proceed by habeas, such changes in law or health may create the need for a second, successive habeas petition—with no guarantee that that petition will be heard.[13] *See infra* pp. 22-23 (discussing *In re Provenzano*, 215 F.3d at 1235).

While § 1983 suits are not as rigidly bounded as habeas petitions, thus providing flexibility to file claims when they actually arise, other limits on § 1983 curb meritless litigation. *See Nelson*, 541 U.S. at 650 ("[T]he ability to bring a § 1983 claim, rather than a

[13] The circuit split as to whether method-of-execution claims qualify as exceptions to the rule barring successive petitions is the subject of the second question presented in this case. *Amici* limit their brief to the first question presented, which, if resolved in Petitioner's favor, would moot the second question. But if the Court were to disagree and channel method-of-execution claims through habeas, it should ensure that such claims are not foreclosed.

habeas application, does not entirely free inmates from substantive or procedural limitations"). The Prison Litigation Reform Act (PLRA), for one, limits prisoners' ability to bring § 1983 claims by imposing "constraints designed to prevent sportive filings in federal court," like administrative exhaustion requirements. *Skinner*, 562 U.S. at 535; *see id*. at 535-536 (explaining how various provisions of the PLRA "discourage prisoners from filing claims that are unlikely to succeed" (quoting *Crawford–El* v. *Britton*, 523 U.S. 574, 596-597 (1998)).

Section 1983 claims are also subject to the statute of limitations for personal-injury torts of the State in which the cause of action arose—often two years. *Wallace*, 549 U.S. at 387.[14] Additionally, "[t]he doctrine of res judicata or claim preclusion bars relitigation of a § 1983 claim if the prior judgment was a final judgment on the merits rendered by a court of competent jurisdiction, and if the same cause of action and the same parties or their privies were involved." *Bucklew*, 883 F.3d at 1090 n.2 (citation omitted).

Section 1983's statutory scheme thus allows prisoners to raise method-of-execution challenges, if any, when they ripen—which may occur long after the criminal judgment and based on changing

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[14] For example, when J.W. Ledford brought a § 1983 challenge to lethal injection, rather than converting the complaint into an application to file a successive habeas petition, the Eleventh Circuit affirmed the district court's dismissal on the merits as time-barred and for failure to state a claim. *See Ledford* v. *Comm'r, Georgia Dep't of Corr.*, 856 F.3d 1312, 1318-19 (11th Cir. 2017); *see also Alderman* v. *Donald*, 293 F. App'x 693, 694 (11th Cir. 2008) (per curiam) (same).

circumstances—but not without appropriate limits to curtail unnecessary litigation.

B. Section 1983 Ensures Timely Federal Review of Method-of-Execution Challenges.

Proceeding under § 1983 also ensures that prisoners can present the substance of their claims in federal court. Any challenge, including to an execution method, that does not implicate the underlying validity of the death sentence itself may proceed by § 1983. That rule is easy for litigants to understand and for courts to apply. By looking at a complaint, the district court can quickly determine whether the prisoner contests the State's method of execution, cognizable under § 1983, or whether the complaint challenges the death sentence itself, cognizable only in habeas.

The Eleventh Circuit, by contrast, would require courts to parse complicated questions unrelated to the merits of prisoners' claims, potentially threatening the right to federal court review that § 1983 was enacted to guarantee. Its position would in most cases shut the courthouse doors to the very claims this Court greenlighted in *Bucklew*.

Take, for example, Thomas Provenzano, who was sentenced in 1984 to death by electrocution—the sole method authorized under Florida law at the time. *Provenzano*, 744 So. 2d at 415. The district court denied Provenzano's petition for a writ of habeas corpus seeking relief from conviction and sentence, and the Eleventh Circuit affirmed. *Provenzano* v. *Singletary*, 148 F.3d 1327 (11th Cir. 1998). Provenzano then sought the Eleventh Circuit's permission to file a second habeas petition challenging Florida's electrocution protocol, which the court denied for failing to

raise a new factual predicate.[15] *In re Provenzano*, 179 F.3d 1326, 1326-27 (11th Cir. 1999) (per curiam) (citing 28 U.S.C. § 2244(b)(2)(B)).

Shortly thereafter, following a highly publicized botched electrocution, Florida approved lethal injection as an alternative execution method. *See Provenzano*, 744 So. 2d at 440-444 (Shaw, J., dissenting). Provenzano sought permission to file a habeas petition challenging Florida's new lethal injection protocol. *In re Provenzano*, 215 F.3d at 1235. But even though the "factual basis" of the claim "was not available to Provenzano at the time he filed his first federal habeas petition, because at that time Florida did not use lethal injection as the means of execution," the Eleventh Circuit concluded that the petition was successive and thus barred for failing to meet an exception. *Id.* at 1235-36. Provenzano was executed by lethal injection the same day—without ever having a federal court consider his method-of-execution claim on the merits. *Thomas Provenzano*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/execution-database/647/thomas-provenzano (last visited Mar. 4, 2022).

The Eleventh Circuit's position would also require courts to resolve complicated jurisdictional questions, even in cases easily dismissed on the merits. *See Steel Co.*, 523 U.S. at 101 (rejecting "hypothetical jurisdiction" doctrine). Because district courts may not hear successive habeas petitions in the first instance, district courts would have to resolve several difficult non-merits issues just to establish their jurisdiction.

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[15] Provenzano filed his petition before case law clarified that method-of-execution claims are cognizable under § 1983.

First, the district court would have to deduce the authorized methods of execution under state law—requiring a determination of what even constitutes state law. *Accord In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 112 (D.C. Cir. 2020) (per curiam) (three-judge panel disagreeing as to whether state law encompassed "only the top-line choice among execution methods, such as the choice to use lethal injection instead of hanging or electrocution" (Katsas, J.), or "execution procedures set forth in state statutes and regulations, but not execution procedures set forth in less formal state execution protocols" (Rao, J.)), *cert. denied sub nom*. *Bourgeois* v. *Barr*, 141 S. Ct. 180 (2020).

Second, the district court would have to carefully analyze the complaint to determine whether it implicated the State's ability to execute the prisoner under any of the methods the court gleaned from its state-law analysis. How the district court should balance that review with "the liberal pleading standards set forth by Rule 8(a)(2)" is unclear. *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) (per curiam). And if the district court determines that the suit *does* "effectively contest the validity of [the] sentence," Pet.App.20a, and thus transforms into a habeas petition, the court must then decide whether it qualifies as a second or successive habeas petition, which would necessitate dismissal or transfer to the court of appeals to seek permission to file. *See* 28 U.S.C. § 2244(b)(3). Only after clearing these hurdles could the district court proceed to consider the prisoner's method-of-execution challenge on the merits.

For cases relegated to habeas under the Eleventh Circuit's approach, state procedural rules create further complications. For example, some States do not

allow prisoners to raise method-of-execution challenges in state postconviction or habeas proceedings because such claims "even if meritorious, would not render the judgment void or voidable, as [state law] requires." *Ryan*, 845 N.W.2d at 295; *see also id*. at 296 ("[R]egardless [of] what the U.S. Supreme Court has intimated in *Nelson* and *Hill*, we continue to adhere to the view that a method-of-execution claim cannot be considered an attack on the sentence itself."); *State* v. *Moore*, 718 N.W.2d 537, 544 (Neb. 2006) (prisoner had "not alleged grounds for relief under the Nebraska Postconviction Act" because his "electrocution procedure challenge would not constitute grounds for setting aside his sentence of death"); *Owens* v. *Hill*, 758 S.E.2d 794, 799 (Ga. 2014) (method-of-execution challenges not cognizable in state habeas).

These state rules increase the risk that prisoners will be left without recourse to pursue method-of-execution claims in federal court. *See Martinez* v. *Ryan*, 566 U.S. 1, 9 (2012) ("[A] federal [habeas] court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule."). For example, when Carey Moore (the individual Nebraska most recently executed) challenged Nebraska's planned execution method in state postconviction proceedings, the Nebraska Supreme Court held that his failure to raise the claim on direct appeal was a "procedural default" that precluded consideration of Moore's constitutional claims. *Moore*, 718 N.W.2d at 542. Moore's subsequent federal habeas petition also challenged the execution method, but the district court held that the claim was "subject to procedural default" given the state court's decision. *Moore* v. *Kinney*, 119 F. Supp. 2d 1022, 1039-40 (D.

Neb. 2000), *aff'd*, 320 F.3d 767 (8th Cir. 2003) (en banc). And because Moore "d[id] not even attempt to demonstrate either cause or prejudice sufficient to excuse this default, or evidence of actual innocence," the claim was "barred and may not be considered by this court." *Moore*, 119 F. Supp. at 1040 (citations omitted).

These difficulties have no easy solution, as the doctrines of exhaustion and procedural default are "grounded in concerns of comity and federalism." *Coleman* v. *Thompson*, 501 U.S. 722, 730 (1991); *see Castille* v. *Peoples*, 489 U.S. 346, 349 (1989). And they invite subsequent litigation asking this Court to preserve prisoners' opportunities for federal court review.

This Court need not and should not invite such procedural headaches. Section 1983, the traditional vehicle for method-of-execution challenges, amply suffices and preserves federal review.

CONCLUSION

For these reasons, and those in Petitioner's brief, the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

Catherine E. Stetson
Dana A. Raphael
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
cate.stetson@hoganlovells.com

David D. Cole
Counsel of Record
David C. Fathi
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 Fifteenth Street, N.W.
Washington, D.C. 20005
(212) 549-2611
dcole@aclu.org

Allison M. Wuertz
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017

John W. Whitehead
William E. Winters
THE RUTHERFORD INSTITUTE
109 Deerwood Road
Charlottesville, VA 22911
(434) 978-3888
legal@rutherford.org

Brian W. Stull
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
201 W. Main Street, Suite 402
Durham, NC 27701

Jennesa Calvo-Friedman
Brandon J. Buskey
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Sean J. Young
AMERICAN CIVIL LIBERTIES UNION OF GEORGIA
P.O. Box 570738
Atlanta, GA 30357

Counsel for Amici Curiae

MARCH 2022

APPENDIX

APPENDIX A

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

vs.

MICHAEL WAYNE NANCE a/k/a
MICHAEL WADE NANCE,
Defendant.

CRIMINAL ACTION

FILE NO. 95-B-02461-4

SENTENCE

In accordance with the Verdict received September 20, 2002, the Court hereby sentences the defendant, MICHAEL WAYNE NANCE a/k/a MICHAEL WADE NANCE, to death. MICHAEL WAYNE NANCE a/k/a MICHAEL WADE NANCE, having been sentenced to the punishment of death, the Court hereby specifies the time period for the execution in the sentence pursuant to O.C.G.A. §17-10-34. MICHAEL WAYNE NANCE a/k/a MICHAEL WADE NANCE shall be executed during the period of time that commences on noon of October 24, 2002 and ends on noon of October 31, 2002.

IT IS SO ORDERED, this 20th day of September, 2002.

/s/ Michael C. Clark
Michael C. Clark

Judge Superior Court
Gwinnett Judicial Circuit

APPENDIX B

IN THE SUPERIOR COURT FOR THE
COUNTY OF MURRAY, STATE OF GEORGIA

STATE OF GEORGIA

vs.

J.W. LEDFORD, JR.

INDICTMENT NO.
92-CR-4295

DEATH SENTENCE

Whereupon, the jury in the above stated case having returned the following verdict, "We, the jury, find the defendant, J.W. Ledford, Jr., guilty and fix his punishment as death by electrocution. Thomas Grover Lunsford, Foreman. This 14th day of November, 1992.

It is CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant, J.W. Ledford, Jr., be taken from the bar of this court to the common jail of Murray County or to some other safe and secure place under such guard and protection as may be deemed necessary where he shall be safely and securely kept until his removal therefrom to the custody of the Department of Corrections for the purpose of execution of this sentence in the manner prescribed by law.

It is further ORDERED AND ADJUDGED by the Court that during the time period of 12:00 noon, December 5, 1992 and 12:00 noon, December 15, 1992, the defendant, J.W. Ledford, Jr., shall be executed by the director of the Department of Corrections at such

penal institution as may be designated by said director, and witnessed only by those persons provided by law.

It is further ORDERED that the Sherriff of Murray County, together with such deputies as he may deem necessary, the number of guards to be approved by the presiding judge or Probate Judge of said county, shall convey and deliver the said J.W. Ledford, Jr. to the Department of Corrections at such penal institution as may be designated by said director not more than 20 days and not less than 2 days prior to the time fixed herein for the execution of said condemned person.

And there delivered into the custody of said director.

And it is further ORDERED that the said defendant, J.W. Ledford, Jr., on the day fixed herein between the hours of 10:00 o'clock a.m. and 2:00 o'clock p.m. be by the director of the Department of Corrections electrocuted at the time and place and in the manner herein provided by law. And may God have mercy upon your soul.

Signed this 14th day of November, 1992.

/s/ William T. Boyett

JUDGE, MURRAY SUPERIOR COURT
PRESIDING

JACK PARTAIN
DISTRICT ATTORNEY

FILED IN OPEN COURT
This 14th day of November 1992
/s/ Loraine Matthews
C.S.C.

APPENDIX C

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

vs.

MARCUS RAY JOHNSON,

Defendant.

Indictment No. 97-R-1723

Judgement and Sentence of Death

Count I: Murder

The jury impaneled and sworn to try the above-stated case having, on the 5th day of April, 1998, found the defendant, Marcus Ray Johnson, guilty of malice murder beyond a reasonable doubt, and on April 7, 1998, having returned a verdict fixing the sentence at Death by electrocution, as provided by law.

The Sheriff of Dougherty County, Georgia, together with one deputy, or more, if in his judgment it is necessary, shall deliver the defendant to the Department of Corrections at a State Correctional Institution designated by the time fixed in this judgment for the execution of the defendant by electrocution; and

It is further ordered that Marcus Ray Johnson be put to death by electrocution in the manner prescribed and as provided by law. The time period for the execution shall be seven days in duration, commencing at

noon on May 11, 1998 and ending at noon on May 18, 1998.

So ordered this 7th day of April, 1998.

/s/ Herbert E. Phipps

Honorable Herbert E. Phipps
Judge, Dougherty Superior Court

APPENDIX D

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

vs.

MARION WILSON, JR.

CASE NUMBER 39249B
COUNT I : MURDER (MALICE)

SENTENCE

The defendant, Marion Wilson, Jr., on the trial of the above-stated case, at the October 1997 Term of this Court, having been convicted of the charge and crime of Murder, and the jury having recommended the death penalty after finding one statutory aggravating circumstance as shown by the verdict on the punishment phase as to Count I, and the defendant now being before the bar of this Court, and showing no cause why the sentence of the Court, should not be pronounced:

IT IS CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that you, Marion Wilson, Jr., be taken from the bar of this Court, where you now stand, to the common jail of Baldwin County, Georgia, where you shall be safely kept and confined until you shall be removed therefrom by the Official and in the manner provided by law, and under the terms and conditions specified by law, when you shall be delivered to the Director of Corrections of the State of Georgia for electrocution at such penal institution

as may be designated by said Director. In such institution you shall be submitted to the penalty of death by electrocution, as provided by law, between the hours of 12:00 noon on the 1st day of December, 1997 and 12:00 noon on the 7th day of December, 1997, AND MAY THE LORD HAVE MERCY ON YOUR SOUL.

IT IS FURTHER ORDERED, that said execution be done by the Warden of said penal institution or a deputy Warden thereof, who shall serve as executioner, together with at least two assistants, in the presence of two physicians to determine when death supervenes, and an electrician, a suitable guard, and if you so desire, your counsel, relatives, and such clergyman and friends as you may desire to have present.

SO PRONOUNCED AND ORDERED by the Court, in open Court, this 7th day of November, 1997.

/s/ William A. Prior, Jr.

William A. Prior, Jr.
Judge, Superior Courts Ocmulgee
Judicial Circuit

/s/ Frederic D. Bright

Frederic D. Bright
District Attorney
Ocmulgee Judicial Circuit

FILED IN OFFICE THIS
7th DAY of November 1997
/s/ Wanda J. Chambers

CHIEF DEPUTY CLERK
SUPERIOR COURT
BALDWIN CO. GEORGIA