No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), "all nine Justices" agreed that a person challenging a State's method of execution could allege an alternative "not . . . authorized under current state law" and that there was therefore "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1136 (Kavanaugh, J., concurring).

In the proceedings below, Petitioner filed a § 1983 suit bringing an as-applied challenge to Georgia's sole statutorily authorized method of execution, lethal injection. Petitioner alleged the use of a firing squad as an alternative method. A divided panel held that Petitioner's challenge could not be heard. The panel ruled that Petitioner must bring his challenge in habeas rather than via § 1983 because he had alleged an alternative method not currently authorized under Georgia law. It further held that Petitioner's claim would be an impermissible successive petition notwithstanding that the claim would not have been ripe at the time of Petitioner's first petition.

The questions presented are:

1. Whether an inmate's as-applied method-of-execution challenge must be raised in a habeas petition instead of through a § 1983 action if the inmate pleads an alternative method of execution not currently authorized by state law.

2. Whether, if such a challenge must be raised in habeas, it constitutes a successive petition where the challenge would not have been ripe at the time of the inmate's first habeas petition.

RELATED PROCEEDINGS

The related proceedings below are:

United States District Court (N.D. Ga.):

Nance v. Ward, Civ. A. No. 20-cv-0107 (N.D. Ga. Mar. 13, 2020) (order and judgment granting respondents' motion to dismiss)

United States Court of Appeals (11th Cir.):

Nance v. Commissioner, Georgia Department of Corrections, No. 20-11393, 981 F.3d 1201 (11th Cir. Dec. 2, 2020) (opinion)

Nance v. Commissioner, Georgia Department of Corrections, No. 20-11393, 994 F.3d 1335 (11th Cir. 2021) (en banc) (denial of petition for rehearing)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RELATED PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 3

STATEMENT OF THE CASE 6

A. Precedential Background 6

B. Procedural Background 9

REASONS FOR GRANTING THE PETITION 15

I. THE ELEVENTH CIRCUIT CREATED A CIRCUIT SPLIT BY INCORRECTLY RULING THAT METHOD-OF-EXECUTION CLAIMS LIKE NANCE'S MUST PROCEED IN HABEAS. 15

A. The Circuits Are Split on the Proper Procedural Vehicle for Claims Like Nance's. 15

B. The Eleventh Circuit's Holding Contradicts This Court's Jurisprudence on the Relationship Between Habeas and § 1983. 17

C. The Eleventh Circuit's Rule Will Create Jurisprudential and Practical Confusion 20

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHERS BY HOLDING CLAIMS LIKE NANCE'S TO BE SECOND OR SUCCESSIVE HABEAS PETITIONS. 22

III. REVIEW IS NEEDED BECAUSE THE DECISION BELOW ELIMINATES THE RIGHT THE COURT CONFIRMED IN *BUCKLEW*. 27

CONCLUSION 30

Appendix A
Nance v. Commissioner, Georgia Department of Corrections, 981 F.3d 1201 (11th Cir. 2020)..... 1a

Appendix B
Order, *Nance v. Ward*, Civ. A. No. 20-cv-0107 (N.D. Ga. Mar. 13, 2020)..... 47a

Appendix C
Judgment, *Nance v. Ward*, Civ. A. No. 20-cv-0107 (N.D. Ga. Mar. 13, 2020)..... 68a

Appendix D
Denial of Petition for Rehearing, *Nance v. Commissioner, Georgia Department of Corrections*, 994 F.3d 1335 (11th Cir. 2021) (en banc)..... 70a

Appendix E
Complaint, *Nance v. Ward*, Civ. A. No. 20-cv-0107 (N.D. Ga. Jan. 8, 2020)..... 85a

TABLE OF AUTHORITIES

CASES

Banister v. Davis, 140 S. Ct. 1698 (2020).....24, 25, 28

Baze v. Rees, 553 U.S. 35 (2008).....7

Borden v. United States, 141 S. Ct. 1817 (2021) 20

In re Bowling, No. 06-5937, 2007 WL 4943732 (6th Cir. Sept. 12, 2007).....26

Brown v. Muniz, 889 F.3d 661 (9th Cir. 2018).....26

Bucklew v. Precythe, 139 S. Ct. 1112 (2019) 4, 8, 20, 27, 28, 29

In re Campbell, 874 F.3d 454 (6th Cir. 2017).....16

Department of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959 (2020).....18

Garcia v. Quarterman, 573 F.3d 214 (5th Cir. 2009).....26

Glossip v. Gross, 576 U.S. 863 (2015) 7, 8, 10, 11, 19

Harbison v. Bell, 556 U.S. 180 (2009).....18

Heck v. Humphery, 512 U.S. 477 (1994).....18, 20

Hill v. McDonough, 547 U.S. 573 (2006).....7, 8, 19

Hope v. Pelzer, 536 U.S. 730 (2002).....19

Magwood v. Patterson, 561 U.S. 320 (2010).....18, 25

Nelson v. Campbell, 541 U.S. 637 (2004) 6, 7, 10, 18, 20

Panetti v. Quarterman, 551 U.S. 930 (2007) 23, 24

Singleton v. Norris, 319 F.3d 1018 (8th Cir. 2003) 26

Skinner v. Switzer, 562 U.S. 521 (2011) 18

In re Smith, 806 F. App'x 462 (6th Cir. 2020) 16

Stewart v. Martinez-Villareal, 523 U.S. 637 (1998) 24

United States v. Buenrostro, 638 F.3d 720 (9th Cir. 2011) 26

Wilkinson v. Dotson, 544 U.S. 74 (2005) 19

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VIII 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2244(b)(2) 23, 28

28 U.S.C. § 2254(a) 2

42 U.S.C. § 1983 ..... *passim*

OTHER AUTHORITIES

Authorized Methods by State, Death Penalty Information Center, https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state (last visited Sept. 16, 2021) 29

Death Row, Death Penalty Information Center, https://deathpenaltyinfo.org/death-row/overview (last visited Sept. 16, 2021) 29

PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Northern District of Georgia is not published but is reproduced in the Appendix hereto at Pet. App. 47a-67a. The judgment of the Northern District of Georgia is not published but is reproduced in the Appendix hereto at Pet. App. 68a-69a. The Eleventh Circuit's opinion is reported at 981 F.3d 1201 and reproduced in the Appendix hereto at Pet. App. 1a–46a. The Eleventh Circuit's divided order denying rehearing is reported at 994 F.3d 1335 and reproduced in the Appendix hereto at Pet. App. 70a-84a.

JURISDICTION

The judgment of the court of appeals was entered December 2, 2020, and a timely petition for en banc review was denied on April 20, 2021. Under this Court's order of March 19, 2020, the time for filing a petition for certiorari was extended to 150 days from the date of denial of en banc review, *i.e.*, September 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Title 28, Section 2254(a) of the United States Code provides:

> 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.

Title 42, Section 1983 of the United States Code 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 . . . .

INTRODUCTION

This petition presents an issue that has both recurred in this Court's cases and divided the courts of appeals. It is settled law that in challenging a method of execution as unconstitutional, a person must allege an alternative method that is feasible and available. In this case, Petitioner Michael Nance alleged that execution by lethal injection would be tortuous for him due to his severely compromised veins and other underlying conditions. Nance further alleged an alternative method—firing squad—that could be used to carry out his execution constitutionally. Because lethal injection is the only method of execution currently authorized by Georgia statute, the alternative Nance alleged was necessarily a non-statutory one.

Nance brought his method-of-execution challenge in a § 1983 complaint, which is the vehicle this Court has consistently held is proper for such challenges. But in the decision below, a divided panel—later backed up by a similarly divided en banc court—held that Nance was required to bring his claim via a habeas petition because Nance's alternative proposed method was not currently authorized under state law. In so holding, the Eleventh Circuit squarely departed from the Sixth Circuit, which has held that even where a prisoner asserts that all methods of execution authorized under state law are unconstitutional, that claim must be brought via § 1983, not habeas.

It is vitally important that the Court address whether § 1983 or habeas is the proper procedural vehicle for bringing a method-of-execution challenge where the prisoner identifies an alternative method not

currently authorized under state law. A split of authority is intolerable in this area: a prisoner facing execution in Ohio should not have different federal remedies available to him than one facing execution in Georgia. The panel's decision is also plainly incompatible with the line this Court has consistently drawn between habeas and § 1983, including in other method-of-execution cases. Nance does not assert that it would be unconstitutional to execute him under any circumstances; he asserts that the *method* the State proposes to use to execute him is unconstitutional. That kind of claim falls squarely on the conditions-of-confinement side of the §1983/habeas line. And that conclusion is unchanged by the fact that Nance has alleged an alternative method not currently authorized by state law. No one would say that a prisoner who challenges the adequacy of prison medical care must bring his claim in habeas if state law does not currently authorize a constitutionally adequate level of care. It is the same here.

But more than that, the Eleventh Circuit's decision warrants review because it closes the courthouse doors to the very claim that this Court carefully preserved in *Bucklew*. When *Bucklew* confirmed that a prisoner need not plead an alternative method of execution currently authorized under state law, it reflected that "all nine Justices" saw "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1136 (2019) (Kavanaugh, J., concurring) (internal quotation marks omitted). But by classifying claims such as Nance's as the province of habeas petitions, and further

barring them as second or successive, the decision below prevents Nance and similarly situated inmates from obtaining federal relief when facing the prospect of an unconstitutional execution.

According to the panel, if a prisoner has already filed a habeas petition, his method-of-execution claim is subject to the stringent rules for second or successive petitions, even if the claim would not have been ripe at the time of that earlier petition. Given that most death row prisoners, like Nance, will have filed a first habeas petition long before an as-applied method-of-execution claim is likely to become ripe, the panel decision all but ensures that no court will ever hear these claims. And in states like Georgia that authorize a single method of execution, prisoners will necessarily have to allege a non-statutory alternative method, and thus necessarily will be barred from bringing an Eighth Amendment challenge under the panel's decision, no matter how deficient the State's method is. In so holding, the panel decision departs from decisions of this Court and other appellate courts that have rejected that kind of Catch-22 interpretation of the second or successive petition rules. And it nullifies *Bucklew*'s decision to allow such claims as long as they allege *some* reasonable alternative.

Accordingly, this Court should review whether these claims sound in § 1983 or habeas. To ensure that it has the ability to review the entirety of the decision below, it should also take up the ancillary question of whether, if the claim does sound in habeas, it amounts to a second or successive petition.

Petitioner respectfully asks this Court to grant this petition for certiorari.

STATEMENT OF THE CASE

A. Precedential Background

In a series of cases stretching back almost two decades, this Court has considered, but never conclusively resolved, when a prisoner challenging the constitutionality of the method of execution employed by the State must bring that challenge via a § 1983 action, and when the challenge must be brought in a habeas petition.

The Court first opined on this issue in *Nelson v. Campbell*, 541 U.S. 637 (2004). Three days before he was set to be executed, Alabama prisoner David Nelson filed a civil rights action under § 1983, "alleging that the use of a 'cut-down' procedure to access his veins would violate the Eighth Amendment." *Id.* at 639. The Court agreed that § 1983 was an appropriate vehicle for Nelson to bring his claim. *Id.* at 639-40. The Court determined that it need not resolve the broader debate over "whether civil rights suits seeking to enjoin the use of a particular method of execution—*e.g.*, lethal injection or electrocution—fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence." *Id.* 643–44. Even if a total challenge to the use of lethal injection as a method of execution had to be brought in habeas—an argument the Court did not adopt—a challenge to a particular *means* of accessing the prisoner's veins to execute the injection need not be. *Id.* at 645-46. As Nelson's "entire claim is that use of the cut-down would be *gratuitous*," enjoining "the cut-down procedure would [not] *necessarily* prevent Alabama

from carrying out its execution" and thus would not trigger habeas jurisdiction. *Id.* at 645, 647.

The Court took a similar approach in *Hill v. McDonough*, 547 U.S. 573 (2006). Hill "challenge[d] the constitutionality of a three-drug sequence the State of Florida likely would use to execute him by lethal injection." *Id.* at 576. The Court held that Hill's suit could go forward under § 1983 rather than as a habeas petition. *Id.* In dicta, the Court observed that, if the relief sought in a § 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.* at 582–83. But it had no need to decide the question, for, as in *Nelson*, "it could not be said that the suit seeks to establish 'unlawfulness [that] would render a conviction or sentence invalid.'" *Id.* at 583 (alteration in original) (citation omitted).

The Court later revisited the substantive Eighth Amendment standards for method-of-execution challenges in *Glossip v. Gross*, 576 U.S. 863 (2015). Following the plurality opinion in *Baze v. Rees*, 553 U.S. 35, 61 (2008), the Court held in *Glossip* that "the Eighth Amendment requires a prisoner to plead and prove a known and available alternative" method of execution that "presents less risk" of pain than the State's planned method, 576 U.S. at 879-80. The Court did not directly address the procedural questions at issue in *Nelson* and *Hill*. However, it noted that, in *Hill*, "[w]e held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Id.* at 879.

The Court's most recent guidance on both the substantive standards and the procedural vehicle for establishing a method-of-execution claim came in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019). Regarding the substantive standard, the Court held that as-applied Eighth Amendment challenges to a State's chosen method of execution, as well as facial challenges, must plead an alternative method of execution. *Id.* at 1125. This Court made clear, however, that prisoners seeking to identify an alternative method of execution are "not limited to choosing among those presently authorized by a particular State's law." *Id.* at 1128. Because "the Eighth Amendment is the supreme law of the land," reasoned the Court, "the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes." *Id.*

On the procedural side, however, the Court merely repeated its earlier discussions without breaking new ground. Mindful of the potential conflict between state law and the alternative method alleged, this Court noted that "existing state law might be relevant to determining the proper procedural vehicle for the inmate's claim," so that habeas might be appropriate if the claim foreclosed the State from carrying out the execution. *Id.* (citing *Hill*, 547 U.S. at 582-83). However, the Court did not decide the question. Nor did it change the dividing line prior cases had drawn: method-of-execution cases "must be brought under § 1983," *Glossip*, 576 U.S. at 879, unless they would "necessarily impl[y] the invalidity of the prisoner's sentence," *Hill*, 547 U.S. at 580.

B. Procedural Background

Prior proceedings. In 1997, a jury convicted Michael Nance of malice murder and related offenses and sentenced him to death. Pet. App. 88a. On direct appeal, the Georgia Supreme Court reversed his death sentence. *Id.* After a 2002 resentencing hearing, Nance was re-sentenced to death, which was affirmed on direct appeal. *Id.* Nance then sought habeas corpus relief in state court; he was granted sentencing relief by the trial court, which the Georgia Supreme Court reversed. *Id.* He then sought and was denied habeas corpus relief in federal court. Pet. App. 88a-89a.

Lethal injection challenge. In or around May 2019, a prison medical technician told Nance that the execution team would have to "cut his neck" to carry out a lethal injection because they could not otherwise obtain sustained intravenous access. Pet. App. 93a. An anesthesiologist who subsequently examined Nance confirmed that Nance is at substantial risk of facing a torturous and excessively painful execution due to his severely compromised veins, and his prolonged and increased use of the prescription medication gabapentin. Pet. App. 93a-94a, 96a-97a.

If Respondents attempt an execution by lethal injection, Nance will likely endure a prolonged and painful attempt to gain intravenous access. Pet. App. 94a. Even if the execution team locates a vein, Nance's veins will not support an IV, and there is a substantial risk that his veins will lose their structural integrity and "blow," causing the injected chemical (pentobarbital) to extravasate (leak) into the surrounding tissue. Pet. App. 94a-95a. This would cause intensely painful burning and

a prolonged and only partially anesthetized execution that would feel like death by suffocation. Pet. App. 94a; *see also Glossip*, 576 U.S. at 872 (describing execution attempt where, after numerous unsuccessful attempts to obtain IV access, IV leaked fluid into Glossip's tissue, resulting in a botched execution). At the same time, Nance's use of gabapentin will interfere with the sedative effect of pentobarbital, further increasing the risk that he will be partially sensate to the agony associated with respiratory and organ failure. Pet. App. 96a-97a. Aspects of Georgia's protocol—like untested compounded drugs from an unknown source and the administration of the drugs from an ancillary room into extended IV tubing—further increase the risks posed by Nance's medical conditions. Pet. App. 90a-93a.

The alternatives to conventional intravenous access—central venous cannulation and a cutdown—also present an unacceptable risk of a torturous and botched execution because they are complicated medical procedures that require specific training, tools, and equipment not possessed by the execution team, and the risks generated by Nance's medical conditions and Georgia's protocol would still exist. Pet. App. 95a-96a; *see also Nelson*, 541 U.S. at 641-42 (describing cutdown procedure).

Because Georgia's plan to execute Nance by lethal injection presents a substantial risk of unnecessary pain, Nance filed a complaint under 42 U.S.C. § 1983 on January 8, 2020, against the Commissioner of the Georgia Department of Corrections and the Warden of the Georgia Diagnostic and Classification Prison ("Respondents"). The complaint alleged that

Respondents' lethal injection protocol, as applied to Nance, violates his right to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the U.S. Constitution. Pet. App. 97a-103a.

As required under *Glossip* and *Bucklew*, Nance pled the use of a "feasible, readily implemented" alternative to lethal injection—the firing squad—that would "significantly reduce[] [the] substantial risk of severe pain" present in lethal injection. *Glossip*, 576 U.S. at 877 (quotation marks omitted); *see* Pet. App. 101a-102a. Nance asked the district court to grant declaratory and injunctive relief prohibiting Respondents from executing him by lethal injection. Pet. App. 103a-104a.

Respondents filed a motion to dismiss Nance's complaint, arguing, *inter alia*, that it was filed outside the statute of limitations and failed to state a plausible claim for relief. Pet. App. 4a. The district court granted the motion, finding that Nance's complaint was untimely and failed to state a claim. *Id.*

Panel decision. Nance timely appealed to the U.S. Court of Appeals for the Eleventh Circuit, and the parties briefed the grounds on which the district court relied to dismiss Nance's complaint. Two weeks before argument, the panel issued an order requesting the parties to address two issues at argument that had never been raised or briefed by either party: 1) Whether Nance's § 1983 claim amounts to an attack on his death sentence that may only be brought in habeas because "[h]e seeks an injunction that would foreclose the State from implementing his death sentence under present law"; and 2) If Nance's claim must be reconstrued as a

habeas petition, whether it is second or successive. Order, *Nance v. Comm'r, Ga. Dep't of Corrections*, No. 20-11393 (11th Cir. Sept. 30, 2020); *see* Pet. App. 4a, 81a.

On December 2, 2020, a divided panel vacated the district court's order and remanded with instructions to dismiss the complaint for lack of jurisdiction. Pet. App. 2a. The panel majority's opinion did not address the grounds on which the district court dismissed the complaint and on which the parties based their briefs. It instead disposed of Nance's case on the grounds raised by the panel *sua sponte*. *Id.* Writing for himself and Judge Lagoa, Chief Judge William Pryor said that "the Supreme Court made it clear in *Nelson*, *Hill*, and *Bucklew* that it is an open question whether section 1983 can support a claim that would 'foreclose the State from implementing [a] lethal injection sentence under present law.'" Pet. App. 11a (quoting *Hill*, 547 U.S. at 583). The panel majority then answered "the question" this Court "left open," Pet. App. 12a: it held that *any* "complaint seeking an injunction against the only method of execution authorized in a state must be brought in a habeas petition, because such an injunction necessarily implies the invalidity of the prisoner's death sentence." Pet. App. 14a.

Having held that Nance's complaint sounded in habeas, the panel majority then further held that Nance was barred from relief by the restrictions governing second or successive petitions. Pet. App. 25a. The panel majority noted that Nance had already brought a habeas petition contesting the validity of his death sentence. Pet. App. 20a. Given that prior habeas challenge, the panel majority concluded that the district court lacked

subject matter jurisdiction over this second petition. Pet. App. 25a. The panel majority further concluded that even if Nance had asked the appellate court for permission to bring a successive petition, that request would be denied because Nance was not relying on a new rule of constitutional law or newly discovered evidence of innocence. Pet. App. 19a-20a.

Judge Martin dissented and concluded that "the majority's ruling offers chaos instead—not only for Mr. Nance, but for everyone on death row in Georgia, Alabama, and Florida." Pet. App. 26a. Judge Martin explained that the majority decision upset settled law that a prisoner who did not challenge the validity of the death penalty itself, but only the particular means of carrying it out, "best fits into the category of one relating to the circumstances of his confinement. He simply is not seeking to 'invalid[ate] a particular death sentence.'" Pet. App. 33a. Judge Martin expressed concern that the majority's rule would lead to uncertainty about whether a given method-of-execution challenge sounds in § 1983 or in habeas. Pet. App. 35a-36a. Judge Martin further found that on the merits, Nance had stated a § 1983 claim based on his allegations that he would unconstitutionally suffer under the State's lethal injection protocol and that a firing squad is a feasible and readily available alternative. Pet. App. 43a-45a.

En banc proceedings. Nance filed a petition for rehearing *en banc* on December 23, 2020. *See* Pet. for Reh'g En Banc, *Nance*, No. 20-11393 (11th Cir. Dec. 23, 2020). On April 20, 2021, a majority of judges

participating voted to deny the *en banc* petition. Pet. App. 70a-71a.

Chief Judge Pryor, joined by Judge Newsom and Judge Lagoa, issued a statement respecting the denial. Pet. App. 72a. Chief Judge Pryor reiterated that the panel majority's decision is "not . . . inconsistent with Supreme Court precedent," and in particular *Bucklew*. Pet. App. 74a. And he disputed that the decision made relief unavailable to claimants like Nance who allege alternative methods of execution not authorized by state law. "Prisoners may allege in habeas petitions [such] methods . . . . All the panel opinion does is recognize that Congress denies us the power—regardless of whether a petitioner alleges a violation of his substantive constitutional rights—to provide a forum or a remedy for a claim in an unauthorized second or successive habeas petition." Pet. App. 76a.

Judge Wilson dissented, joined by Judges Jordan and Martin. Pet. App. 77a. The dissent noted that, in *Bucklew*, this Court had held that prisoners challenging methods of execution "may point to a well-established protocol in another State as a potentially viable option" for comparison, even if not currently authorized by the prisoner's State. Pet. App. 80a (quotation marks omitted). Indeed, "Justice Kavanaugh wrote separately in *Bucklew* to emphasize this point." *Id.* Doing so does not convert a method-of-execution challenge into an attack on the death sentence itself. Pet. App. 82a. Prisoners challenging a State's only authorized method, who necessarily must identify an alternative not presently authorized under state law, still are not challenging the validity of their death sentences, but

only the means by which the State has chosen to carry it out. Pet. App. 83a-84a.

The dissenters thus found that "Nance did everything he was supposed to: he made a colorable claim, alleged sufficient facts, and proposed a viable remedy in accordance with *Bucklew*." Pet. App. 83a. Yet "this decision would leave prisoners like Nance without a remedy in federal court—no matter how cruel and unusual the State's authorized method of execution might be. . . . [Those inmates] may be executed without their constitutional claims ever making it past the courthouse door." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT CREATED A CIRCUIT SPLIT BY INCORRECTLY RULING THAT METHOD-OF-EXECUTION CLAIMS LIKE NANCE'S MUST PROCEED IN HABEAS.

A. The Circuits Are Split on the Proper Procedural Vehicle for Claims Like Nance's.

For over fifteen years, this Court has declined to decide whether method-of-execution claims like Nance's must proceed in habeas, though it has strongly suggested they should not. Last year, the Eleventh Circuit felt compelled to decide the question itself, and held that habeas is the sole vehicle for these claims. The federal courts of appeals are now divided on this important issue. Had Nance's case arisen in the Sixth Circuit, he could have brought his as-applied method-of-execution challenge under § 1983, and his case would not have been dismissed for lack of jurisdiction. In that circuit, all method-of-execution claims must be brought

as § 1983 actions. By contrast, the Eleventh Circuit now requires method-of-execution claims like Nance's to be raised in a habeas petition.

The Sixth Circuit holds that, even where a petitioner asserts that all methods of execution authorized under a State's law are unconstitutional, that claim must be brought via § 1983, not habeas. *In re Campbell*, 874 F.3d 454, 465-66 (6th Cir. 2017). In *Campbell*, the Sixth Circuit considered a habeas petition contending that lethal injection—the State's only method of execution—was unconstitutional. The Sixth Circuit held that that claim had to be brought in a § 1983 action because, even if the prisoner prevailed on the merits, "Ohio would still be permitted to execute him"—"it would simply need to find a method that comports with the Eighth Amendment." *Id.* at 465. Thus, the "proper method" for Campbell to challenge "a particular method of execution as applied to him" was a § 1983 action. *Id.* at 465-67. The Sixth Circuit subsequently reaffirmed *Campbell* after this Court's decision in *Bucklew*. *In re Smith*, 806 F. App'x 462, 464-65 (6th Cir. 2020) ("Whether an as-applied method-of-execution claim may be brought in habeas is not implicated by the question presented in *Bucklew*, its holding, or its primary legal reasoning.").

Conversely, the Eleventh Circuit held below that precisely the same claim at issue in *Campbell*—that "*any* method of lethal injection, regardless of the protocol," would violate a prisoner's constitutional rights—must be reconstrued as a habeas petition. Pet. App. 2a. "Lethal injection is necessary to carry out any death sentence in Georgia," the court explained, "because lethal injection is the *only* method of execution

authorized under Georgia law." Pet. App. 18a (citation omitted). By preventing his execution from being carried out under current law, the court determined that the relief Nance sought necessarily implied the invalidity of his sentence. *Id.* Consequently, according to the court, his method-of-execution challenge was cognizable only in habeas. *Id.*

Thus, the Sixth and Eleventh Circuits have taken diametrically opposed positions. In the Sixth Circuit, a *Bucklew* claim proposing a currently unauthorized alternative execution method *must* be brought under § 1983. In the Eleventh Circuit, the same claim *must* be brought under the habeas statutes, with their attendant procedural limitations. And the split is entrenched: the Sixth Circuit has recently reinforced its decision post-*Bucklew*, while the Eleventh Circuit has refused to reconsider its decision *en banc*. Only this Court can clarify whether method-of-execution claims alleging currently unauthorized alternative methods are properly brought under § 1983, or if instead the challenge to a State's authorized method(s)—and the attendant identification of an unauthorized (though feasible and available) alternative—converts the claim to one cognizable exclusively in habeas.

B. The Eleventh Circuit's Holding Contradicts This Court's Jurisprudence on the Relationship Between Habeas and § 1983.

In reconstruing Nance's § 1983 action as a habeas petition, the Eleventh Circuit eroded the long-settled distinction between these two avenues for relief.

This Court has set a clear dividing line between habeas and § 1983. Since the Founding, the writ of habeas corpus has been understood "simply [to] provide[] a means of contesting the lawfulness of restraint and securing release." *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020). Habeas therefore is reserved for a state prisoner who actually or constructively "challenges the fact or duration of his confinement and seeks immediate or speedier release." *Heck v. Humphrey*, 512 U.S. 477, 481 (1994).[1] Section 1983, by contrast, covers challenges to the conditions of a prisoner's confinement and of his sentencing. *Nelson*, 541 U.S. at 643-45. In other words, habeas is about *whether* or *how long* prisoners should remain in custody; § 1983 is about *how* they are treated while they are. Hence, a prisoner's claim sounds exclusively in habeas only if it "would *necessarily* imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487 (emphasis added). "Where the prisoner's claim would not 'necessarily spell speedier release,' however, suit may be brought under § 1983." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (citation omitted).

A method-of-execution claim that does not dispute the prisoner's death sentence, but merely challenges how it is carried out, falls plainly on the § 1983 side of

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[1] This Court has reiterated habeas's limited scope time and time again. *See, e.g.*, *Magwood v. Patterson*, 561 U.S. 320, 332 (2010) ("A § 2254 petitioner is applying for something: His petition 'seeks *invalidation* (in whole or in part) *of the judgment* authorizing the prisoner's confinement.'" (citation omitted)); *Harbison v. Bell*, 556 U.S. 180, 183 (2009) (describing habeas as "a proceeding challenging the lawfulness of the petitioner's detention").

this line. As Justice Scalia once put it: "[T]o say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody . . . . would utterly sever the writ from its common-law roots." *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring). No court would rule that a § 1983 claim alleging dangerous prison conditions, for instance, must be brought in habeas. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 734-35 (2002). So, too, "a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Glossip*, 576 U.S. at 879.

The Eleventh Circuit's decision to the contrary "require[s] [courts] to broaden the scope of habeas relief beyond recognition." *Wilkinson*, 544 U.S. at 85 (Scalia, J., concurring). The decision invoked *Bucklew*'s cross-reference to *Hill* about the possibility of habeas being the appropriate vehicle for such claims. Pet. App. 11a. But *Hill* reiterated that habeas could be appropriate only if the claim "necessarily implies the invalidity of the prisoner's sentence," *Hill*, 547 U.S. at 580. Nance does not allege that his death sentence is invalid or that he should be released. Nor does he seek to preclude imposition of the death penalty by implying that all possible methods to execute him are cruel and unusual. To the contrary, he has explicitly identified the firing squad as a constitutional means of execution. Pet. App. 101a-102a. In holding that Nance must nevertheless bring his case through habeas, the panel "simply shrugs off the language" from this Court's prior opinions and distorts the "ordinary meaning" of the habeas statutes.

Borden v. United States, 141 S. Ct. 1817, 1847 (2021) (Kavanaugh, J., dissenting).

C. The Eleventh Circuit's Rule Will Create Jurisprudential and Practical Confusion.

Because habeas was not designed to reach cases that only challenge a particular method of execution, it is an awkward tool for the job. Courts will have immense difficulty applying the Eleventh Circuit's new rule, which replaces an easily administrable line between habeas and § 1983 with a hopelessly confused one.

As described above, the line that *Heck* drew, and that *Nelson* and *Hill* followed, is clear: A method-of-execution claim—like any claim raised by someone in custody—should be brought in habeas only if it "would 'necessarily imply' the invalidity of the fact of an inmate's conviction, or 'necessarily imply' the invalidity of the length of an inmate's sentence." *Nelson*, 541 U.S. at 646; *accord Heck*, 512 U.S. at 487. *Bucklew*, in turn, resolved that the Eighth Amendment allows prisoners to bring method-of-execution claims even where the prisoner's State does not authorize the proffered less-painful alternative. After all, "the Eighth Amendment is the supreme law of the land," and its standards "can't be controlled by the State's choice of which methods to authorize in its statutes." *Bucklew*, 139 S. Ct. at 1128.

Together, these cases indicate that method-of-execution claims, including those challenging a State's only authorized method, are properly brought under § 1983. Identifying an alternative execution method not currently authorized by state statute does not necessarily imply the prisoner's sentence is invalid. Such

claims by their terms do *not* challenge the prisoner's sentence. Indeed, to have a hope of succeeding, challengers must proffer a readily available means for their own sentences to be carried out. This is the standard the Sixth Circuit has adopted, and this is the standard the Eleventh Circuit has spurned. *Supra* Part I.A.

Once courts abandon this clear standard, it becomes difficult to determine exactly when a method-of-execution claim does or does not challenge the prisoner's underlying confinement or conviction. The Eleventh Circuit's effort only proves the point. The panel majority held that "[a] complaint seeking an injunction against the only method of execution authorized in a state must be brought in a habeas petition." Pet. App. 14a. Yet under the Eleventh Circuit's new rule, it will be difficult for courts to determine when a claim involves alternatives that are not "authorized in a state" and therefore must be brought in habeas. *Id.*

For example, to reach its holding, the panel majority had to distinguish prior circuit precedent holding that "a [§] 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection *procedures*." Pet. App. 12a (quotation marks omitted). Yet what if a State's law requires not just a particular method, such as lethal injection, but also a particular procedure? For instance, what would happen if a State's lethal injection protocol required particular dosages of each drug, and a prisoner claims that he needs higher dosages of the initial anesthetic to prevent unbearable pain? Would that count as an unavailable alternative "method" not "authorized in [the] state," and thus subject to habeas? Pet. App. 14a.

Or would it be considered an alternative "lethal injection *procedure[]*," subject to § 1983? Pet. App. 12a. Under the Eleventh Circuit's test, the answer is far from clear.

Moreover, the Eleventh Circuit's test also fails to specify clearly which sources of state law must be considered. Say that a state statute were worded broadly enough to allow a plaintiff's proposed alternative method of execution, but a state regulation defined the general statutory standards in a manner that precludes the alternative method. Would the prisoner's proposed alternative "prevent a state from implementing a death sentence under its current law," and thus implicate habeas? Pet. App. 14a. Or could the case proceed under § 1983 because it does not seek "an injunction directing the State to either enact new *legislation* or vacate his death sentence"? Pet. App. 19a (emphasis added). As Judge Martin put it below, "[a] prisoner can no longer be certain about the proper procedure for bringing a method-of-execution claim." Pet. App. 35a.

II. The Eleventh Circuit's Decision Conflicts With Decisions Of This Court And Others By Holding Claims Like Nance's To Be Second Or Successive Habeas Petitions.

The panel decision presents a companion question that also warrants this Court's review, to ensure that the Court has the opportunity to address the full scope of the decision below should the Court decide that habeas is the appropriate procedural vehicle for these claims.

As explained above, *see* supra at 12, after holding that Nance's complaint must be reconstrued as a habeas petition, the Eleventh Circuit held that it was barred as "second or successive" under 28 U.S.C. § 2244(b)(2). Pet. App. 25a. The Eleventh Circuit also held that Nance's claim did not qualify for the exception to second-or-successive status for unripe claims that this Court recognized in *Panetti v. Quarterman*, 551 U.S. 930 (2007). Pet. App. 20a-24a. In the Eleventh Circuit's view, that exception applies only to competency-to-be-executed ("*Ford*") claims. Pet. App. 23a-24a. That holding is inconsistent with this Court's precedent and the precedent of other circuits, and it effectively closes the courthouse doors to claims like Nance's that were not ripe at the time an initial habeas petition was filed.[2]

In *Panetti*, the Supreme Court held that "[t]he phrase 'second or successive' is not self-defining," and "declined to interpret [it] as referring to all § 2254 applications filed second or successively in time, even when the later filing addresses a state-court judgment already challenged in a prior § 2254 application." 551 U.S. at 943-44. Of particular relevance here, the *Panetti* Court explained that it treated the phrase "second or successive" as a term of art inapplicable to a *Ford* claim

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[2] Nance's as-applied method-of-execution claim was unripe at the time of his initial habeas petition in 2013. He alleged that it was not until May 2019 that a prison medical technician alerted him to the complications his veins would pose to an execution by lethal injection, and that it was not until October 2019 that an anesthesiologist examined him and confirmed the compromised state of his veins and the consequent risks of a botched execution. Pet. App. 93a-94a.

because of ripeness considerations. It held "that Congress did not intend [for] the provisions of AEDPA addressing 'second or successive' petitions to govern a filing in the unusual posture presented here: a § 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe." 551 U.S. at 945 (emphasis added); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (holding that a prisoner could bring a *Ford* challenge without triggering the second-or-successive petition bar after the same "claim was dismissed as premature" in the first habeas petition "because his execution was not imminent and therefore his competency to be executed could not be determined at that time").

The Court also considered the "practical effects" of barring the *Ford* claim as second or successive, "particularly . . . when petitioners 'run the risk' under the proposed interpretation [of 2244(b)] of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Panetti*, 551 U.S. at 945-46 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)). The Court noted that this exception was fully consistent with AEDPA's goals of "comity, finality, and federalism." *Id.* at 945; *see also Stewart*, 523 U.S. at 644 ("We believe that respondent's *Ford* claim here—previously dismissed as premature—should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies.").

As recently as last term, this Court affirmed the two-pronged approach *Panetti* outlined. *See Banister v. Davis*, 140 S. Ct. 1698, 1705-06 (2020). Far from limiting the analysis to one genre of claim, like *Ford* competency-

to-be-executed suits, this Court reiterated that courts must look both to "historical habeas doctrine and practice" and to "AEDPA's own purposes" to determine "what qualifies as second or successive." *Id.* First, recognizing that the phrase "second or successive" is a term of art "given substance in [the Court's] prior habeas corpus cases," courts must "ask[] whether a type of later-in-time filing would have 'constituted an abuse of the writ, as that concept is explained in [this Court's] pre-AEDPA cases.'" *Id.* (citation omitted). "If so, it is successive; if not, likely not." *Id.* at 1706. Second, courts must "consider[] 'the implications for habeas practice' of allowing a type of filing, to assess whether Congress would have viewed it as successive." *Id.* (citation omitted). The Eleventh Circuit engaged in none of this analysis. Instead, it flatly—and wrongly—held that *Panetti*'s analytical framework applies only to *Ford* claims. Pet. App. 23a-24a. That logic defies this Court's rulings.[3]

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[3] The Eleventh Circuit justified its decision by asserting that this Court's decision in *Magwood v. Patterson*, 561 U.S. 320 (2010), cabined the holding of *Panetti* to the facts of that case. Pet. App. 22a-23a. Yet the *Magwood* majority said nothing about limiting *Panetti*'s holding to *Ford* claims. And Justice Kennedy's dissent, which the Eleventh Circuit quotes for its assertion, *id.*, also does not support its holding. Rather, the question presented to the Court in *Magwood* was whether an application is "second or successive" when it challenges a new death sentence on grounds that could have been raised against the initial death sentence. 561 U.S. at 329-30. The Court held that, because Magwood was challenging an entirely new judgment, the application was not second or successive, and Section 2244(b) did not apply. *Id.* at 331-34. In any event, the

The Eleventh Circuit's ruling also conflicts with those of other courts of appeals. While the decision below limited *Panetti*'s ripeness rationale to *Ford* claims, other circuits have held that *Panetti*'s reasoning applies broadly to claims whose factual basis did not exist when the prisoner filed their initial habeas petition. *See, e.g.*, *Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009) ("If . . . the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive."); *In re Bowling*, No. 06-5937, 2007 WL 4943732, at *3 (6th Cir. Sept. 12, 2007) (petition raising *Atkins* claim was not second or successive because "the factual basis for this claim did not exist" at the time of the first petition); *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (stating that "a habeas petition raising a claim that had not arisen at the time of a previous petition is not barred by § 2244(b) or as an abuse of the writ," and holding petition not second or successive when it raised a claim that did not arise until petitioner was subject to an involuntary medication order and his execution date had been scheduled); *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) ("*Martinez* and *Panetti* do not apply only to *Ford* claims. Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded."); *see also Brown v. Muniz*, 889 F.3d 661, 670 n.7 (9th Cir. 2018) (citing pre-*Panetti* federal appeals court cases from "outside the *Ford* context" that "have recognized that unripe claims . . . are not subject to the

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Eleventh Circuit completely ignored the broader inquiry this Court again embraced in *Banister* only last year.

second or successive bar when properly raised in a subsequent federal habeas petition"). The Eleventh Circuit has thus declared itself an outlier in interpreting *Panetti*'s scope.

III. Review Is Needed Because The Decision Below Eliminates The Right The Court Confirmed In *Bucklew*.

By eliminating § 1983 as a vehicle, and then restricting *Panetti*'s ripeness exception to AEDPA's second-or-successive habeas petition bar, the Eleventh Circuit has eviscerated *Bucklew*'s promise that the courthouse doors would not be closed to a method-of-execution claim simply because a petitioner proposed an alternative not currently permitted by state law. The result is that, in the Eleventh Circuit, prisoners who have valid Eighth Amendment claims—and who meet *Bucklew*'s requirements for proposing an alternative method of execution—will be executed without any federal review via methods that pose an unconstitutionally serious risk of severe pain.

Bucklew held that prisoners seeking to identify an alternative method of execution under the *Baze-Glossip* test are "not limited to choosing among those presently authorized by a particular State's law." 139 S. Ct. at 1128. As a result, the Court concluded there was "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1128-29. "Importantly, all nine Justices . . . agree[d] on that point." *Id.* at 1136 (Kavanaugh, J., concurring). Justice Kavanaugh wrote separately to "underscore" and "emphasize [this] statement." *Id.* As Justice Kavanaugh noted, after the Court's ruling, "an inmate

who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Id.*

The effect of *Bucklew*'s holding, as the Eleventh Circuit recognized, was to make it easier for prisoners to satisfy the *Baze-Glossip* test. *See* Pet. App. 10a. Yet the Eleventh Circuit contravened both the intent and reasoning of that decision when it held that having to allege a currently unauthorized alternative method of execution would deprive the court of jurisdiction.

Nearly every death row prisoner will, like Nance, have already used their first habeas petition to challenge alleged substantive or procedural errors in their trials. Under the Eleventh Circuit's holding, any subsequent challenge will be subject to—and almost certainly fail—the "stringent limits on second or successive habeas applications." *Banister*, 140 S. Ct. at 1703. Petitioners must show either that a new rule of constitutional law has been made retroactive, or that new evidence has emerged proving that they are actually innocent. *See* 28 U.S.C. § 2244(b)(2).

Thus, under the panel majority's rule, prisoners like Nance will be left without a remedy in federal court—no matter how cruel and unusual a State's authorized method of execution might be. What's more, this outcome occurs through no fault of the prisoners' own: they have no say in what methods the state legislature does or does not authorize, and they cannot control when their execution-related claims will ripen. A State could easily foreclose such challenges by authorizing only a single method of execution. Such a rule does not comport

with this Court's assurances that "the burden of the alternative-method requirement" is relatively low and can "ordinarily" be overcome. *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring).

The Eleventh Circuit's decision to close the courthouse doors will have severe effects. As of April 2021, the Eleventh Circuit housed over 22% of all people on death row in the United States. *See Death Row*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/death-row/overview (last visited Sept. 16, 2021). Moreover, seventeen states, as well as the federal government and the U.S. military, presently authorize only one method of execution: lethal injection. *See Authorized Methods by State*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state (last visited Sept. 16, 2021). Thus, if other circuits are allowed to follow the Eleventh Circuit's lead, a significant portion of death-row inmates could see their challenges to lethal injection dismissed on jurisdictional grounds. This even if they can plead "an available alternative" from another State, like (perhaps) "the firing squad." *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring). Review is merited to protect the fundamental interests of prisoners seeking to vindicate their Eighth Amendment rights.

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The decision below creates a split of authority, transgresses this Court's jurisprudence on the difference between § 1983 and habeas, and undermines the very right that this Court agreed should be protected in *Bucklew*: the right to bring a method-of-

execution challenge that relies on an alternative method of execution not currently authorized by state law. The Eleventh Circuit's decision warrants review.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11393

D.C. Docket No. 1:20-cv-00107-JPB

MICHAEL NANCE,

Plaintiff-Appellant,

versus

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

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(December 2, 2020)

Before WILLIAM PRYOR, Chief Judge, MARTIN and LAGOA, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

This appeal requires us to decide whether a method-of-execution claim that would have the necessary effect

of preventing the prisoner's execution should be brought as a civil-rights action, 42 U.S.C. § 1983, or as a petition for a writ of habeas corpus, 28 U.S.C. § 2254. Michael Wade Nance argues that Georgia's lethal-injection protocol, as applied to his unique medical situation, violates the Eighth Amendment and that the firing squad is a readily available alternative. He sued under section 1983 for an injunction to bar the State from executing him by lethal injection—the only method of execution under Georgia law. *See* Ga. Code § 17-10-38(a). To be sure, the Supreme Court has permitted prisoners to seek relief under section 1983 when a prisoner's proposed alternative method of execution "would have allowed the State to proceed with the execution as scheduled" under current state law. *Nelson v. Campbell*, 541 U.S. 637, 646 (2004). But Nance complains that the Constitution bars Georgia from executing him by *any* method of lethal injection, regardless of the protocol. The Supreme Court has mentioned the possibility of a complaint like Nance's on three occasions and warned that it might not be cognizable under section 1983. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019); *Hill v. McDonough*, 547 U.S. 573, 582 (2006); *Nelson*, 541 U.S. at 644. We now decide it is not. Because the injunction Nance seeks would necessarily imply the invalidity of his death sentence, his complaint must be reconstrued as a habeas petition. And because that petition is second or successive, we vacate and remand with instructions to dismiss for lack of jurisdiction.

I. BACKGROUND

In 1993, Nance went to a bank in Gwinnett County, Georgia, pulled a ski mask over his face, threatened the tellers with a gun, and left with two pillowcases full of cash. After Nance got into his car, dye packs hidden in the stolen cash exploded. He then decided to abandon the vehicle. He crossed the street to a nearby liquor store, where he found Gabor Balogh backing his car out of a parking space. Nance ran around the front of Balogh's car, yanked open the door, and pointed his gun at Balogh. As Balogh pleaded for his life, Nance pulled the trigger and shot him dead.

A jury convicted Nance of murder in 1997, and he was sentenced to death. He was resentenced to death after a new sentencing trial in 2002, and the Georgia Supreme Court affirmed that sentence on direct appeal. The Georgia Supreme Court rejected his petition for collateral relief in 2013. Nance then filed a federal habeas petition, *see* 28 U.S.C. § 2254, and we affirmed the order denying that petition.

Nance filed this civil-rights action, *see* 42 U.S.C. § 1983, on January 8, 2020, and alleged that the State's lethal-injection protocol was unconstitutional as applied to him because of two medical issues. First, he alleged that, due to his compromised veins, he would be subjected to excruciating pain during attempts to establish venous access for his execution, that he would be subjected to painful leakage of the injection drug even if venous access was established, and that the State's alternative methods to establish venous access would not be performed humanely. Second, he alleged that his use of gabapentin, a drug that he has been prescribed for

his back pain since 2016, had altered his brain chemistry in a way that would diminish the efficacy of the lethal injection drug and leave him sensate and in extreme pain during his execution. Nance alleged that death by firing squad was a feasible and readily implemented alternative method of execution that would significantly reduce his substantial risk of severe pain. He sought a declaratory judgment as well as "injunctive relief to enjoin the [State] from proceeding with [his] execution . . . by a lethal injection."

The State moved to dismiss Nance's complaint on January 30, 2020. It argued that Nance's claim was untimely, that he failed in his complaint to allege sufficient facts to support a plausible claim for relief, and that he failed to exhaust his administrative remedies. The district court granted the State's motion to dismiss. It concluded that Nance's suit was untimely and that he failed to state a claim for relief with respect to his venous-access theory because he did not allege plausible facts establishing that his compromised veins created the requisite risk of suffering for a valid claim under the Eighth Amendment. After Nance appealed, we directed the parties to address at oral argument whether Nance's complaint should be reconstrued as a habeas petition and, if so, whether it was second or successive.

II. STANDARD OF REVIEW

We are obligated to address subject-matter jurisdiction *sua sponte*. *Mallory & Evans Contractors & Eng'rs, LLC v. Tuskegee Univ.*, 663 F.3d 1304, 1304 (11th Cir. 2011). A district court lacks subject-matter jurisdiction over a state prisoner's second or successive petition for a writ of habeas corpus absent an order from

the court of appeals authorizing it to consider the petition. *Williams v. Chatman*, 510 F.3d 1290, 1295 (11th Cir. 2007).

III. DISCUSSION

To succeed in a method-of-execution challenge under the Eighth Amendment, a prisoner "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Bucklew*, 139 S. Ct. at 1125 (citing *Glossip v. Gross*, 576 U.S. 863, 869–78 (2015), and *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality opinion)). In most method-of-execution challenges, prisoners satisfy the alternative-method requirement of the *Baze-Glossip* test by alleging that the State could make changes to its lethal-injection protocol that would significantly reduce the prisoner's risk of pain. *See, e.g.*, *Jordan v. Comm'r, Miss. Dep't of Corr.*, 947 F.3d 1322, 1325 (11th Cir. 2020) (prisoners alleged that single-injection protocol might reduce risk of pain and was a known and available alternative to State's three-drug protocol). Nance takes a different approach.

Nance alleges that death by firing squad is a feasible and readily implemented alternative method of execution, and he seeks an injunction barring the use of lethal injection. But Georgia law authorizes execution *only* by lethal injection. *See* Ga. Code § 17-10-38(a). It is not necessarily fatal to the merits of Nance's claim that the State does not authorize his alleged alternative method of execution. *See Bucklew*, 139 S. Ct. at 1128 ("[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."). But a court considering the merits of a complaint like Nance's must "inquire into the possibility that one State possessed a legitimate reason for declining to adopt" the alleged alternative method. *Id.* And alleging an alternative method of execution that is not authorized by the State's law not only complicates the merits of a method-of-execution challenge; it has procedural implications as well.

We divide our discussion of those procedural implications in two parts. First, we explain that Nance's complaint must be reconstrued as a habeas petition because an injunction preventing the State from executing a prisoner under its present law necessarily implies the invalidity of that prisoner's sentence. Second, we explain that Nance's habeas petition is second or successive and that the district court lacked jurisdiction to consider it.

A. A Section 1983 Claim for Relief That Would Prevent a State from Executing a Prisoner Under Present Law Must be Reconstrued as a Habeas Petition.

Two statutes establish the procedural landscape for method-of-execution claims. Section 1983 authorizes "an action at law, suit in equity, or other proper proceeding for redress" against any person who, under color of state law, "subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983. This general language covers Nance's suit: the Eighth Amendment secures the right not to be subjected to a

"method of execution [that] cruelly superadds pain to the death sentence." Bucklew, 139 S. Ct. at 1125. But a specific statute controls over a general one, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 28, at 183 (2012), and the more-specific federal habeas statute, 28 U.S.C. § 2254, provides an *exclusive* remedy when it applies, *Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973).

Prisoners challenging their convictions or the duration of their sentences proceed exclusively through habeas, and prisoners challenging the conditions of their confinement proceed exclusively through section 1983. "Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of [section] 1983." *Id.* Because a prisoner's challenge to the fact of his conviction or duration of his sentence falls at the "core of habeas corpus," such a challenge may not be brought in a complaint under section 1983. *Id.* at 489. By contrast, a suit that does not "seek[] a judgment at odds with [a prisoner's] conviction or . . . sentence" may be brought only under section 1983. *Muhammad v. Close*, 540 U.S. 749, 754–55 (2004). "[A section] 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." *Preiser*, 411 U.S. at 499. In sum, "[i]ssues sounding in habeas are mutually exclusive from those sounding in a [section] 1983 action." *McNabb v. Comm'r, Ala. Dep't of Corr.*, 727 F.3d 1334, 1344 (11th Cir. 2013).

Situating method-of-execution claims in this landscape presents a "difficult question." *Nelson*, 541 U.S. at 644. Method-of-execution claims often fall in an uncertain area near the line between section 1983 and habeas, where "[n]either the 'conditions' nor the 'fact or duration' label is particularly apt." *Id.* The Supreme Court has never held that a challenge to a method of execution was not cognizable as a complaint under section 1983. But the Court has repeatedly cautioned that there could be a type of method-of-execution challenge that would be cognizable only in habeas. And this appeal concerns exactly that type of challenge. We first review the guidance provided by the Supreme Court before turning to the unanswered question presented in this appeal.

The Supreme Court first considered the possibility that a method-of-execution claim might be cognizable only in habeas in *Nelson v. Campbell*, 541 U.S. 637. *Nelson* involved a challenge, under section 1983, to the contemplated use of a "cut-down" procedure to gain access to a prisoner's compromised veins for lethal injection. *Id.* at 641–42. The State argued that the prisoner's complaint should be construed as a habeas petition because, if successful, it would prevent the State from carrying out his execution. *Id.* at 645. The Court rejected that argument because the cut-down procedure was not indispensable to the execution; in fact, the prisoner had "alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled." *Id.* at 646. But the Court stated in dicta that some method-of-execution challenges might still be cognizable only in habeas: "In a

State . . . where 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." *Id.* at 644 (citation omitted).

The Supreme Court revisited the boundary between section 1983 and habeas in *Hill v. McDonough*, 547 U.S. 573. In *Hill*, a prisoner filed a complaint under section 1983 seeking an injunction to prevent the State from proceeding with its planned lethal-injection protocol; he alleged that the drug to be used for the first injection was not a suitable anesthetic for the administration of the second and third drugs. *Id.* at 578. The Supreme Court reiterated its dicta in *Nelson* that "a constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself." *Id.* at 579 (quoting *Nelson*, 541 U.S. at 644). But the prisoner in *Hill* "concede[d] that other methods of lethal injection the [State] could choose to use would be constitutional," *id.* at 580 (internal quotation marks omitted), and the State did not argue that "granting [the prisoner's] injunction would leave the State without any other practicable, legal method of executing [him] by lethal injection," *id.* Because "injunctive relief would not prevent the State from implementing the sentence," the Court said that "the suit as presented would not be deemed a challenge to the fact of the sentence itself" and that it was cognizable under section 1983. *Id.* at 579–80. But the Court left open the possibility that "recharacterizing a complaint as an action for habeas corpus might be

proper" in a method-of-execution challenge where "the relief sought would foreclose execution." *Id.* at 582.

The most recent guidance from the Court on the question whether a method-of-execution claim may be brought under section 1983 came last year in *Bucklew v. Precythe*, 139 S. Ct. 1112. And the Court once again repeated its warnings in *Nelson* and *Hill*. The main holding of *Bucklew* was that as-applied challenges to a method of execution, like facial challenges, under the Eighth Amendment, must plead an alternative method of execution. *Id.* at 1126 (citing *Glossip*, 576 U.S. at 878, and *Baze*, 553 U.S. at 61). But, the Court noted, "[a]n inmate seeking to identify an alternative method of execution is not limited" by the *Baze-Glossip* test under the Eighth Amendment "to choosing among those presently authorized by a particular State's law." *Id.* at 1128. That concern was not implicated in *Bucklew* itself, because the prisoner's alleged alternative to lethal injection was authorized under state law. *Id.* at 1121; Mo. Rev. Stat. § 546.720. But it was nonetheless important to clarify the point, because inferior courts—including this one—had understood *Baze* and *Glossip* to mean that the Eighth Amendment requires a prisoner to "identify an alternative that is 'known and available' *to the state in question*," meaning that unauthorized alternatives did not satisfy the test. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1317 (11th Cir. 2016) (emphasis added), *abrogated in part by Bucklew*, 139 S. Ct. 1112. Still, the Supreme Court made clear that the *Baze-Glossip* test is not friendly to an "inmate [who] is more interested in . . . delaying his execution" than in "avoiding unnecessary pain." *Bucklew*, 139 S. Ct. at

1129. And to avoid opening the floodgates to abusive litigation based on its clarification of the alternative-method requirement, the Court cautioned that "existing state law might be relevant to determining the proper procedural vehicle for the inmate's claim," 139 S. Ct. at 1128, even if it had no bearing on the prisoner's substantive right under the Eighth Amendment.

And so, the Supreme Court made it clear in *Nelson*, *Hill*, and *Bucklew* that it is an open question whether section 1983 can support a claim that would "foreclose the State from implementing [a] lethal injection sentence under present law." *Hill*, 547 U.S. at 583; *see also Bucklew*, 139 S. Ct. at 1128 (relying on *Hill*). The dissent says that we "assume the role of the Supreme Court" by "anticipat[ing] that the Supreme Court has overruled its own precedent." Dissenting Op. at 29, 38. But the Supreme Court was clear in *Nelson*, *Hill*, and *Bucklew* that it has no precedent on this question to overrule. The Supreme Court has left it for us to decide in the first instance whether a claim for relief that would prevent a state from implementing a death sentence under its current law must be brought as a civil complaint under section 1983 or as a habeas petition. This appeal squarely presents that question.

Nance argues that circuit precedent establishes that his claim is cognizable under section 1983 and that the Supreme Court's parenthetical in *Bucklew* is only "a curiosity" that does not undermine that precedent. But the decisions he cites are inapposite. Nance argues that in *McNabb*, 727 F.3d 1334, we held that method-of-execution challenges are never cognizable in habeas. We disagree. *McNabb* involved a challenge to the State's

lethal-injection protocol based on the argument that "an ineffective first drug or improper administration of a first drug in a three-drug protocol would violate the constitution." *Id.* at 1344. That claim is indistinguishable from the claim in *Hill* that the Supreme Court allowed to proceed under section 1983. 547 U.S. at 578.

We explained in *McNabb* that "*[u]sually*, . . . challenges [to] a state's method of execution . . . [are] not an attack on the validity of [a prisoner's] conviction and/or sentence," 727 F.3d at 1344 (emphasis added), and accordingly held that "a [section] 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection *procedures*," *id.* (alteration adopted) (emphasis added) (internal quotation marks omitted). *McNabb* did not announce a categorical rule for all method-of-execution challenges; it addressed only challenges to specific lethal injection *procedures*, and its holding clearly left open the question this appeal presents.

Nance also argues that we considered a complaint under section 1983 that would have prevented the State from carrying out a death sentence under present law in *Ledford v. Commissioner, Georgia Department of Corrections*, 856 F.3d 1312 (11th Cir. 2017), but we never considered whether the complaint should have been construed as a habeas petition. Nance is correct that his complaint is similar to the prisoner's complaint in *Ledford*; both Nance and Ledford argued that gabapentin would have a bad interaction with the State's execution drug, *id.* at 1317, and both alleged the firing squad as an alternative method of execution rather than offer changes to the State's injection protocol, *id.* at

1317–18. But we did not hold in *Ledford* that a complaint that would leave a State unable to carry out a death sentence could be brought under section 1983.

We denied relief in *Ledford* for a multitude of independently sufficient reasons: we concluded that the prisoner's complaint was untimely, *id.* at 1316; that he did not establish a substantial risk of severe pain for his substantive right under the Eighth Amendment, *id.* at 1317; that his firing-squad argument did not satisfy the substantive requirement under the Eighth Amendment that he plead an alternative method of execution that was feasible and readily implemented under state law, *id.* at 1317–18 (citing *Arthur*, 840 F.3d at 1315–18, *abrogated in part by Bucklew*, 139 S. Ct. 1112); and that he had not established entitlement to the equitable relief requested in his last-minute challenge, *id.* at 1319. A decision that does not catalog every independently sufficient reason for denying relief does not create a binding precedent with respect to the alternative reasons it does not discuss. This rule is particularly important in the context of an unaddressed jurisdictional defect like lack of permission to file a second-or-successive habeas petition. 28 U.S.C. § 2244(b)(3)(A); *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."). *Ledford*'s silence on the prisoner's use of section 1983 instead of habeas has no precedential effect.

We failed in *Ledford* to recognize the jurisdictional error in allowing a prisoner to bring a section 1983 claim that would have left the State unable to carry out his death sentence because we believed—erroneously, as

Bucklew later revealed—that no such claim even existed under the Eighth Amendment as a matter of substantive law. When we decided *Ledford* our precedents held that the Eighth Amendment required prisoners to allege an alternative method of execution authorized under state law. *See Arthur*, 840 F.3d at 1316, *abrogated in part by Bucklew*, 139 S. Ct. 1112. Based on our misunderstanding of the alternative-method requirement under *Baze* and *Glossip*, we ruled in *Ledford* that the prisoner failed to state a claim because his complaint did not allege an alternative method *of lethal injection*, and that his firing-squad argument was not a permissible alternative to doing so. *Ledford*, 856 F.3d at 1317–18 (citing *Arthur*, 840 F.3d at 1316). We do not have a binding precedent establishing the proper vehicle for a claim for relief that would prevent a state from implementing a death sentence under its current law.

A complaint seeking an injunction against the only method of execution authorized in a state must be brought in a habeas petition, because such an injunction necessarily implies the invalidity of the prisoner's death sentence. "The line of demarcation between a [section] 1983 civil rights action and a [section] 2254 habeas claim is based on the effect of the claim on the inmate's . . . sentence." *McNabb*, 727 F.3d at 1344 (internal quotation marks omitted). "[I]f the relief sought by the inmate would either invalidate his conviction or sentence or change the nature or duration of his sentence, the inmate's claim must be raised in a [section] 2254 habeas petition, not a [section] 1983 civil rights action." *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006).

Because Nance's requested relief would prevent the State from executing him, implying the invalidity of his death sentence, it is not cognizable under section 1983 and must be brought in a habeas petition. This conclusion follows from the decisions in *Heck v. Humphrey*, 512 U.S. 477 (1994), and *Edwards v. Balisok*, 520 U.S. 641 (1997), in which the Supreme Court distinguished between complaints under section 1983 and habeas petitions. Although the *Heck* line of cases involved civil-rights actions for damages, the Supreme Court has suggested that the logic of *Heck* also applies in the context of method-of-execution challenges. In both *Nelson* and *Hill*, the Supreme Court made clear that its decision was "consistent with *Heck*'s and *Balisok*'s approach to damages actions that implicate habeas relief," *Hill*, 547 U.S. at 583 (citing *Nelson*, 541 U.S. at 646–47), and suggested that the parallel analysis between the two fields followed from the fact that "civil rights damages actions . . . , like method-of-execution challenges, fall at the margins of habeas," *Nelson*, 541 U.S. at 646.

In *Heck*, the Supreme Court proceeded from the fact "that [section] 1983 creates a species of tort liability," 512 U.S. at 483 (internal quotation marks omitted), and explained that the relationship of section 1983 to the common law of torts comes with limitations on the kinds of claims cognizable under it. Citing "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," *id.* at 486, the Court held that "when a state prisoner seeks damages in a [section] 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" and, if so, dismiss the complaint unless the plaintiff showed a favorable termination of the underlying criminal proceeding, *id.* at 487. The Court clarified this principle in *Balisok*, where it held that a "claim for declaratory relief and money damages, based on allegations . . . that necessarily imply the invalidity of the punishment imposed, is not cognizable under [section] 1983." 520 U.S. at 648.

In the light of the principle distilled in *Heck* and *Balisok*, the Supreme Court in *Hill* described the inquiry for determining whether a method-of-execution claim is cognizable under section 1983 as being "whether a grant of relief to the inmate would *necessarily* bar the execution." 547 U.S. at 583 (emphasis added). The word "necessarily" is key to the *Heck* inquiry, and it explains why Nance's complaint is different from the prisoners' complaints in *Nelson* and *Hill*. We have noted that the concept of "logical necessity . . . is at the heart of the *Heck* opinion," *Dyer v. Lee*, 488 F.3d 876, 879 (11th Cir. 2007), and explained that this "emphasis on logical necessity is a result of the Court's underlying concern in *Heck*: that [section] 1983 and the federal habeas corpus statute . . . were on a collision course," *id.* at 880 (internal quotation marks omitted). The *Heck* inquiry prevents prisoners from making "an 'end-run' around habeas," but when there is no necessary logical connection between relief under section 1983 and the negation of a conviction or sentence, there is no concern about an end-run and no need to apply *Heck*. *Id.* Both *Nelson* and *Hill* are examples of decisions that did not implicate the concern

expressed in *Heck* about end-runs around the habeas statutes.

The Supreme Court allowed the complaints under section 1983 in *Nelson* and *Hill* to proceed because the relief sought in each case did not *necessarily* imply the invalidity of the prisoner's death sentence, even if, as the State argued in *Hill*, the claim would "frustrate the execution as a practical matter." 547 U.S. at 583. The requested injunction against the use of a cut-down procedure for venous access in *Nelson*, 541 U.S. at 641–42, did not necessarily imply the invalidity of the prisoner's death sentence because the fact "[t]hat venous access is a necessary prerequisite [to carrying out a death sentence] does not imply that a particular means of gaining such access is likewise necessary," *id.* at 645. The State could potentially carry out the death sentence with a different method of venous access.

And the requested injunction against the use of an allegedly inadequate anesthetic as part of the injection protocol in *Hill*, 547 U.S. at 578, did not necessarily imply the invalidity of the prisoner's death sentence because the "obvious necessity" of "the injection of lethal chemicals" does not by itself mean that a particular combination of drugs chosen by the State is a necessary prerequisite to carrying out a death sentence, *id.* at 581. That is, the injunction would not ban the state from carrying out the death sentence using a different injection protocol.

In this appeal, unlike in *Nelson* and *Hill*, a judgment in Nance's favor *would* imply the invalidity of his death sentence—not only as a practical matter, but as a matter of logical necessity. In his complaint, Nance asked the

district court to "[g]rant injunctive relief to enjoin the [State] from proceeding with [his] execution . . . by a lethal injection." Lethal injection is necessary to carry out any death sentence in Georgia, because lethal injection is the *only* method of execution authorized under Georgia law. *See* Ga. Code § 17-10-38(a). Unlike the injunctions in *Nelson* and *Hill*, the injunction Nance seeks would prevent his execution from being carried out, necessarily implying the invalidity of his death sentence.

There is no way to read Nance's complaint to avoid the collision between section 1983 and habeas that the Supreme Court contemplated in *Heck*, and given that conflict, the specific terms of the habeas statute must override the general terms of section 1983. *See Preiser*, 411 U.S. at 490. Habeas and section 1983 are mutually exclusive. *McNabb*, 727 F.3d at 1344. And based on the lines drawn by the Supreme Court in *Heck*, *Nelson*, and *Hill*, Nance's claim falls beyond the outer border of section 1983 and is cognizable only in habeas.

To be sure, 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. Even if Nance prevails in this suit, the State could respond by enacting a law authorizing execution by firing squad. And Nance does not contest—at least for now—that the State could constitutionally carry out his death sentence if it did so.

But section 1983 complaints are "civil tort actions," which means that they are not "appropriate vehicles for challenging the validity of outstanding criminal judgments." *Heck*, 512 U.S. at 486. So it is not our place to entertain complaints under section 1983 that ask us to

force a State to fundamentally overhaul its system of capital punishment. "[T]he Constitution affords a 'measure of deference to a State's choice of execution procedures.'" *Bucklew*, 139 S. Ct. at 1125 (quoting *Baze*, 553 U.S. at 52 n.2).

For purposes of determining whether a method-of-execution challenge sounds in section 1983 or habeas, a federal court must accept as fixed a state law providing a facially constitutional method of execution. That is particularly so when a would-be section 1983 complainant insists that the State resort to a method of execution that it has already determined is less humane than the alternatives. *See id.* at 1128 ("[A] court [must] inquire into the possibility that one State possessed a legitimate reason for declining to adopt the protocol of another."). If we sanction Nance's decision to proceed under section 1983 by refusing to take the State's law as fixed, we must effectively interpret Nance's complaint as a request for an injunction directing the State to either enact new legislation or vacate his death sentence. By doing so, we invite a collision with more than the habeas statute. *Cf. New York v. United States*, 505 U.S. 144, 188 (1992).

No matter how you read it, Nance's complaint attacks the validity of his death sentence. It is cognizable only as a habeas petition, and we must evaluate it as such.

B. Nance's Petition is Second or Successive.

Because Nance's complaint is a habeas petition, we must determine whether it is second or successive. When a prisoner effectively, even if not formally, raises

a new habeas claim without first obtaining this Court's permission to file a second or successive petition, the district court lacks subject-matter jurisdiction to consider the petition. *Franqui v. Florida*, 638 F.3d 1368, 1375 (11th Cir. 2011). Nance did not move this Court for permission to file his petition, so the district court lacked jurisdiction if the petition was second or successive. *See* 28 U.S.C. § 2244(b)(3)(A).

Under the normal rule, Nance's petition is second or successive. *See Patterson v. Sec'y, Fla. Dep't of Corr.*, 849 F.3d 1321, 1325 (11th Cir. 2017). Nance already brought a habeas petition contesting his death sentence. *Nance v. Warden, Ga. Diagnostic Prison*, 922 F.3d 1298 (11th Cir. 2019). As we have explained above, he effectively contested the validity of that sentence a second time when he brought this section 1983 action. Because Nance did not move this Court for permission to file a second or successive petition, section 2244(b) required the district court to dismiss the suit for lack of jurisdiction. Even if Nance had asked us to allow his second or successive petition, we could not have done so because the petition does not satisfy either of the requirements of section 2244(b)(2). Nance's petition does not rely on a new rule of constitutional law made retroactive to his case by the Supreme Court, 28 U.S.C. § 2244(b)(2)(A), nor is it predicated on newly discovered facts establishing that no reasonable factfinder could have found him guilty, *id.* § 2244(b)(2)(B).

Nance argues that a different second-or-successive rule controls as-applied method-of-execution claims, and that his petition is not second or successive because he filed it as soon as his claim was ripe. He relies primarily

on the Supreme Court's decision in *Panetti v. Quarterman*, 551 U.S. 930 (2007). In *Panetti*, a prisoner filed a habeas petition raising issues about his competency to stand trial and waive his right to counsel, but not his competency to be executed. *Id.* at 937. Those claims were denied. *Id.* He later filed another habeas petition in which he argued that he was insane and, therefore, not competent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986). *Panetti*, 551 U.S. at 934–35, 938. The State argued that because the prisoner's first habeas petition failed to raise a *Ford* claim, his second-in-time petition—which did raise a *Ford* claim—was second or successive. *Id.* at 942. The Supreme Court rejected the State's interpretation of section 2244 because it would put prisoners in the position of either "forgo[ing] the opportunity to raise a *Ford* claim in federal court[,] or rais[ing] the claim in a first federal habeas application . . . even though it [would be] premature." *Id.* at 943. The Court reasoned that "Congress did not intend the provisions of [the Antiterrorism and Effective Death Penalty Act] addressing 'second or successive' petitions to govern a filing in the unusual posture presented [by] a [section] 2254 application raising a *Ford*-based incompetency claim filed as soon as that claim is ripe," *id.* at 945, and it held that "[t]he statutory bar on 'second or successive' applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe," *id.* at 947.

As we have observed, "the [Supreme] Court was careful to limit its holding [in *Panetti*] to *Ford* claims." *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1259 (11th Cir. 2009). But Nance says that this appeal is

indistinguishable from *Panetti* because his petition also involves a challenge based on facts existing at the time of a contemplated execution and brought as soon as that claim was ripe. Nance's reliance on *Panetti* assumes that the decision established a rule that a prisoner is entitled to one full and fair opportunity to challenge his sentence through habeas, and that the accrual of a new challenge entitles him to a new opportunity to file a petition.

The Supreme Court rejected Nance's reading of *Panetti* in *Magwood v. Patterson*, 561 U.S. 320 (2010). In *Magwood*, a prisoner was sentenced to death at a second sentencing trial after successfully challenging his original death sentence through habeas. *Id.* at 326. He filed another habeas petition, which was dismissed as second or successive because it challenged an alleged error repeated in the first and second sentencing trials that could have been challenged in the first habeas petition. *Id.* at 328–29. The Supreme Court reversed, *id.* at 343, reasoning that the "first [habeas petition] challenging [a] new judgment cannot be 'second or successive' such that [section] 2244(b) would apply," *id.* at 331. Four dissenters objected that the Court's opinion did not apply the rule in *Panetti* as they understood it: that "to determine whether an application is 'second or successive,' 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." *Id.* at 345 (Kennedy, J., dissenting). But the Court did more than just apply a different rule. In fact, the Court's opinion explicitly

rejected the "full and fair opportunity" interpretation of section 2244(b) that Nance would extract from *Panetti*.

Nance and the *Magwood* dissenters' "full and fair opportunity" interpretation of *Panetti*, the Court explained, leads to "fundamental error." *Id.* at 335. "Under the . . . 'one opportunity' rule, . . . the phrase 'second or successive' would not apply to a claim that the petitioner did not have a full and fair opportunity to raise previously." *Id.* (emphasis omitted). That result is erroneous, the Court recognized, because the language of section 2244 describes petitions with claims based on intervening caselaw or newly discovered facts as second or successive. *See* 28 U.S.C. § 2244(b)(2). And it does so despite the fact that "[i]n either circumstance, a petitioner cannot be said to have had a prior opportunity to raise the claim," *Magwood*, 561 U.S. at 335, which would make them not second or successive under a "one opportunity" rule. The "full and fair opportunity" reading of *Panetti* is foreclosed by the text of the statute. *Magwood* did not directly undermine *Panetti* by deciding that a "[habeas petition] challenging the same state-court judgment must always be second or successive." *Id.* at 335 n.11. But the Court did reject a broad reading of *Panetti*'s exception to the second-or-successive bar in section 2244, and the *Magwood* dissenters lamented that, in doing so, the Court "confin[ed] the holding of *Panetti* to the facts of that case." *Id.* at 350 (Kennedy, J., dissenting).

Panetti's holding is tailored to the context of *Ford* claims. And because the considerations informing the Supreme Court's adoption of the rule in that context do not obtain in the context of as-applied method-of-

execution challenges, we do not extend *Panetti* in this appeal. *Panetti* was motivated by a desire to avoid putting prisoners in the position of either "forgo[ing] the opportunity to raise a *Ford* claim in federal court[,] or rais[ing] the claim in a first federal habeas application . . . even though it [would be] premature." *Panetti*, 551 U.S. at 943. That concern is far more serious in the *Ford* context than it is in the context of an as-applied method-of-execution claim. A *Ford* claim always challenges the fact of a death sentence itself, *see Ford*, 477 U.S. at 410 ("The Eighth Amendment prohibits the State from inflicting the penalty of death upon a prisoner who is insane."), and must therefore be brought in a habeas petition and never under section 1983, *see Nelson*, 541 U.S. at 643 ("[Section] 1983 must yield to the more specific federal habeas statute . . . where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence."). Without the ability to file an additional habeas petition, a prisoner whose mental health deteriorates after his first habeas petition has no way to bring a *Ford* claim in federal court. In 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.

Nance could have filed a complaint under section 1983 to demand changes to the State's lethal-injection protocol that would accommodate his weak veins and past gabapentin usage and thus mitigate the risk of a

needlessly painful execution. Instead, he demanded death by firing squad and dared the legislature to call his bluff. Applying the normal test for a second or successive habeas petition instead of the special *Panetti* rule does not prevent any prisoner from bringing a method-of-execution challenge in federal court—"assuming, of course, that [he] is more interested in avoiding unnecessary pain than in delaying his execution." *Bucklew*, 139 S. Ct. at 1129. The fact that the Antiterrorism and Effective Death Penalty Act prevents prisoners from bringing second or successive petitions designed to undermine the effectiveness of the death penalty is part of the statutory design, not a justification for extending *Panetti*.

The ordinary meaning of a second or successive petition applies in this appeal. Nance already challenged his death sentence in habeas once. This petition is second or successive, and the district court should have dismissed it for lack of jurisdiction under section 2244(b).

IV. CONCLUSION

We **VACATE** the order dismissing Nance's complaint as untimely and **REMAND** with instructions to dismiss for lack of jurisdiction.

MARTIN, Circuit Judge, dissenting:

Michael Wade Nance is a Georgia prisoner who has been sentenced to die for his crime. Georgia law establishes a protocol for taking Mr. Nance's life by lethal injection. For death penalty cases, one would expect federal courts to respect precedent and deliver predictability. Yet the majority's ruling offers chaos instead—not only for Mr. Nance, but for everyone on death row in Georgia, Alabama, and Florida. This opinion creates chaos because it plainly violates at least two principles firmly established by Supreme Court and Eleventh Circuit precedent. Specifically the majority opinion violates the well-established principles from our precedent that: (1) require method of execution claims to be brought as claims pursuant to 42 U.S.C. § 1983; and (2) instruct federal courts of appeals not to anticipate that the Supreme Court has overruled its own precedent, but instead to wait for the Court to expressly tell us it has done so. Surely it is the role of the courts to provide predictable and reliable processes for those facing their death at the hands of the State. We have failed to perform that role here.

Mr. Nance brought suit under 42 U.S.C. § 1983 seeking to have the District Court order the Defendants, the Commissioner of the Georgia Department of Corrections and the Warden of Georgia Diagnostic and Classification Prison, not to execute him using Georgia's current execution policies, because doing so would violate his Eighth and Fourteenth Amendment rights. Mr. Nance alleges there is a substantial risk that executing him according to Georgia's lethal injection protocol will "lead[] to a prolonged execution that will

produce excruciating pain" because his veins are "extremely difficult to locate through visual examination, and those veins that are visible are severely compromised and unsuitable for sustained intravenous access."

Notably, the mistakes with Mr. Nance's case did not begin in our court. The District Court dismissed Mr. Nance's complaint under Federal Rule of Civil Procedure 12(b)(6), which requires a court to accept all factual allegations in the complaint as true and "draw all reasonable inferences in the plaintiff's favor." *West v. Warden, Comm'r, Ala. DOC*, 869 F.3d 1289, 1296 (11th Cir. 2017) (applying Rule 12(b)(6) standard to § 1983 suit challenging the constitutionality of Alabama's lethal injection protocol). The District Court did quite the opposite here, conducting its own evaluation of Mr. Nance's claims and finding, for example, that his claims were "false." When this type of mistake happens in a district court, Eleventh Circuit precedent requires this Court to conduct a *de novo* review to determine whether the plaintiff has alleged facts that, if true, would state a method of execution claim (and, if so, reverse the District Court's dismissal). *See id.* at 1300–01. Yet Mr. Nance has not received the benefit of this well-established process.

It is from this obvious error made by the District Court that Mr. Nance appealed. But rather than litigate this issue as expected, the lawyers handling this case were seemingly blindsided by a direction from this Court to be prepared to answer whether Mr. Nance properly brought his claim under § 1983, or whether his claim "amount[s] to a challenge to the fact of his sentence

itself that must be reconstrued as a habeas petition." Counsels' surprise was evidenced, for example, by a statement from counsel for Georgia who told us, "candidly," at oral argument, that "this was a situation that until we got this order from the Court, we had – we had grown accustomed to dealing with these in [§] 1983." *See* Oral Argument Recording at 26:58–27:32 (Oct. 14, 2020). Mr. Nance and his attorneys rose to this unexpected challenge and offered several examples of why construing Nance's claim as a habeas petition is error under Eleventh Circuit precedent. *See id.* at 12:45–15:06. Nevertheless the majority opinion departs from our precedent. The majority justifies its disregard for precedent by saying the Supreme Court has "mentioned the possibility" that a complaint like Mr. Nance's "might not be cognizable" under § 1983. *See* Maj. Op. at 2.

I regret that I must dissent in what should have been a case we easily remanded to the District Court so it could correct its errors.

I.

Georgia law provides that the single method for executing death row prisoners is lethal injection. *See* O.C.G.A. § 17-10-38(a). On its own, the majority raised the issue of whether Mr. Nance's § 1983 claim challenging Georgia's lethal injection protocol is actually a challenge to the fact of his sentence such that it must be construed as a habeas petition. The correct answer is a resounding no. Mr. Nance is not saying he should not be executed. He has apparently accepted his fate. Rather, he is merely asking our court to direct the State

to execute him by a different method because the State's lethal injection method violates his constitutional rights.

The majority opinion makes several related errors in ruling on Mr. Nance's action that result in the creation of a new category of cases—subject to new procedural rules—not recognized by the Supreme Court. The majority does away with the established line of demarcation between a § 1983 civil rights action and a habeas petition. *See* Maj. Op. at 15–20. In doing so, it calls this Court's decision in *Ledford v. Commissioner, Georgia Department of Corrections*, 856 F.3d 1312 (11th Cir. 2017), "erroneous[]," and proceeds to dismiss *Ledford*'s substantive analysis in an effort to support its procedural conclusion. Maj. Op. at 15; *see id.* at 13–15. But for all the majority's talk of distinguishing the substantive requirements of Eighth Amendment claims from the rights and remedies in § 1983 actions, the majority can point to no concrete holding—in any decision by the Supreme Court or this Circuit—that supports today's decision requiring Mr. Nance to bring his Eighth Amendment method-of-execution claim by way of a habeas petition.

A. MR. NANCE HAS ALLEGED A FEASIBLE, READILY IMPLEMENTED ALTERNATIVE METHOD FOR HIS EXECUTION UNDER *BUCKLEW*.

To begin, the Supreme Court's ruling in *Bucklew* does not support the majority's holding that Mr. Nance's claim must be brought in a habeas petition. Neither does any other Supreme Court case. To the contrary, ample binding precedent compels us to conclude that method of execution claims must be brought in a § 1983 action. *See*,

e.g., *Nelson v. Campbell*, 541 U.S. 637, 642, 124 S. Ct. 2117, 2122 (2004) (reversing this Court's holding "that § 1983 claims challenging the method of execution necessarily sound in habeas"); *Hill v. McDonough*, 547 U.S. 573, 576, 578, 126 S. Ct. 2096, 2100–01 (2006) (reversing this Court's holding that the § 1983 action was a successive habeas petition because the suit was "comparable in its essentials" to *Nelson*); *Baze v. Rees*, 553 U.S. 35, 52, 128 S. Ct. 1520, 1532 (2008) (plurality opinion) (holding that in a § 1983 action, plaintiffs are required to plead and prove a known and available alternative in order to state an Eighth Amendment claim); *Glossip v. Gross*, 576 U.S. 863, 879, 135 S. Ct. 2726, 2738 (2015) (characterizing *Hill* as holding "that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence"); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009) (per curiam) ("A § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures."); *Valle v. Singer*, 655 F.3d 1223, 1229 n.6 (11th Cir. 2011) (per curiam) (affirming District Court's finding that "Valle challenges the constitutionality of the execution procedure he is scheduled to undergo. Such challenges are appropriately brought under § 1983."); *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 865 (11th Cir. 2017) ("Following *Nelson* and *Hill*, we have entertained method-of-execution challenges to specific aspects of a state's lethal injection protocol pursuant to § 1983."). Even in the face of all of this precedent, the majority opinion relies on dicta in *Bucklew* to reach the opposite conclusion.

Bucklew did two things. It affirmed that a person bringing a method of execution claim—whether a facial challenge or an as-applied challenge—must meet the requirements set out by the Supreme Court in *Baze-Glossip*. *Bucklew*, 139 S. Ct. at 1122, 1129. To that end, *Bucklew* said that a prisoner "seeking to identify an alternative method of execution [under the *Baze-Glossip* test] is *not limited* to choosing among those [methods of execution] *presently authorized by a particular State's law*." *Id.* at 1128 (emphases added). Instead, "a prisoner may point to a well-established protocol in another State as a potentially viable option." *Id.* In this way, the Supreme Court gave substantive guidance in *Bucklew* for what is required to state a method of execution claim. It said "the 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.* "In light of this," and recognizing that the burden to show this prong is often "overstated," the Supreme Court saw "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1128–29.

Of course, *Bucklew* also said that "existing state law *might* be relevant to determining the proper procedural vehicle for the inmate's claim." *Id.* at 1128 (emphasis added). On this topic, it cited *Hill* and referenced, in a parenthetical, the idea 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.* (alteration in

original) (quoting *Hill*, 547 U.S. at 582–83, 126 S. Ct. at 2103). The majority opinion, and the resulting loss of this appeal by Mr. Nance, is based on this obscure reference in *Bucklew*.

Yet nothing in *Bucklew*, nor in any other Supreme Court case I am aware of, says that when a plaintiff points to an alternative method of execution not expressly codified under state law, that plaintiff's case *must* sound in habeas.[1] The Supreme Court has simply never ruled that method-of-execution claims must—or even should—be brought by way of a habeas petition. Nevertheless the majority appears to have carved out a new procedural requirement based on this parenthetical citation in *Bucklew*. In so doing, the majority ignores at least two key principles. First, courts may not anticipate that the Supreme Court will overrule its own precedent. Second, *Bucklew* (parenthetical included) does not require method-of-execution claims to be brought in habeas.

Neither does the majority's opinion appropriately account for this Circuit's test for determining whether a claim is properly brought in a civil action or in a habeas

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[1] A plurality of the Supreme Court could have done so in *Baze*, when the plaintiff challenged Kentucky's method of execution, which statutorily required death sentences "be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death." Ky. Rev. Stat. Ann. § 431.220(1)(a); *see* 553 U.S. at 44, 128 S. Ct. at 1527–28. Yet *Baze* said nothing at all about habeas. *See id.* at 56, 128 S. Ct. at 1534 (holding that Kentucky's failure to adopt the proposed alternatives does not, by itself, demonstrate that the execution procedure is cruel and unusual).

petition. Our Circuit precedent has set the "line of demarcation between a § 1983 civil rights action and a § 2254 habeas claim." *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006). That precedent called upon this panel to look at the effect Mr. Nance's claim will have on his sentence. We are required to ask, on the one hand, does Mr. Nance seek to invalidate his conviction or sentence, or to change the nature or duration of his sentence? *Id.*; *see also Magwood v. Patterson*, 561 U.S. 320, 332, 130 S. Ct. 2788, 2797 (2010) ("A § 2254 petitioner is applying for something: His petition seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement." (quotation marks and emphases omitted)); *Edward v. Balisok*, 520 U.S. 641, 648, 117 S. Ct. 1584, 1589 (1997) (explaining that only those claims that "*necessarily* imply the invalidity of the punishment imposed" are not cognizable under § 1983 (emphasis added)). Or on the other hand, does Mr. Nance seek to change the "'circumstances of his confinement'"? *Hutcherson*, 468 F.3d at 754 (quoting *Hill*, 547 U.S. at 579, 126 S. Ct. at 2101). For me, the remedy Mr. Nance seeks best fits into the category of one relating to the circumstances of his confinement. He simply is not seeking to "invalid[ate] a particular death sentence." *See Johnson v. Bredesen*, 558 U.S. 1067, 130 S. Ct. 541, 543 (2009) (mem.) (Stevens, J., respecting the denial of certiorari). Mr. Nance does not challenge or dispute that the State can go forward with his execution. He is asking that it do so "'by simply altering its method of execution.'" *Id.* (quoting *Nelson*, 541 U.S. at 644, 124 S. Ct. at 2123).

When properly applied to Mr. Nance's case, the "line of demarcation" test is fatal to the analysis in the majority opinion. But the majority makes almost no effort to analyze Mr. Nance's case in this way. Rather, it summarily concludes that because Mr. Nance pointed to an alternative method of execution authorized by other states, we must interpret his complaint "as a request for an injunction directing the State [of Georgia] to either enact new legislation or vacate his death sentence," which "would prevent the State from executing him." *See* Maj. Op. at 16, 21. Mr. Nance's case is not the one portrayed by the majority.

B. THE MAJORITY OPINION CREATES A NEW PROCEDURE FOR BRINGING A METHOD-OF-EXECUTION CLAIM.

The majority seems to assume the role of the Supreme Court here, because it creates new requirements for method-of-execution claims. Again, it does this despite the precedent I've cited that requires these claims to be brought in a § 1983 action. *See Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 2017 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (quotation marks omitted)); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1264 (11th Cir. 2012) ("[W]e have always been careful to obey the supreme prerogative rule and not usurp the Supreme Court's authority to decide whether its decisions should be considered overruled."). The State of Georgia was

not the one to suggest Mr. Nance's case requires this new procedure. *See* Oral Argument Recording at 26:58–27:32. Indeed, Georgia acknowledged that the issue (of whether a method-of-execution claim should be brought in a habeas petition) was not before the Supreme Court in *Bucklew*. *See id.* As if more support were needed, this underscores how the majority has acted with an *absence* of precedent to support its ruling. The job of our panel was to read the plain language of *Bucklew* and apply it as binding precedent, like this Court has done in so many cases before. Instead, the panel itself raised a new issue for Mr. Nance's case—theorizing a novel outcome before the parties had even argued their case. As a result, method-of-execution claims must now be handled differently in this Circuit. And as for Mr. Nance, this panel has deprived him of a claim he had every right to pursue. With this loss, Mr. Nance's execution will arrive more swiftly, and without his method-of-execution claims ever having been examined beyond a mere read of his pleadings.

Neither does Mr. Nance's case offer up such a unique set of facts that we must depart from the analysis both this Court and the Supreme Court have applied in every previous method-of-execution case. And today's ruling disturbs a well-settled rule of law in a way that does not clarify, but instead harms existing Supreme Court precedent. The majority opinion will sow confusion. A prisoner can no longer be certain about the proper procedure for bringing a method-of-execution claim. The majority's holding will also invite new litigation—if a plaintiff's attorney previously brought a method of execution claim in a § 1983 suit, will the attorney now be

found to have been ineffective? I know of no basis for this panel to take the drastic action of holding that Mr. Nance's claim should have been brought in a habeas petition when no Supreme Court precedent directs him to.

The majority arrives at its novel ruling in part by describing why this Court's decision in *Ledford*, 856 F.3d 1312, has no bearing on Mr. Nance's case. *See* Maj. Op. at 13–15. To begin, there is very little difference between Mr. Nance's case and Mr. Ledford's case. *Ledford* was based on similar facts and had the same procedural posture now before us in Mr. Nance's case. *See id.* at 13–14 (acknowledging that Mr. Nance's allegations are similar to those in *Ledford*). Mr. Ledford filed suit under § 1983, alleging "that, because he has taken gabapentin for a decade," the dose of pentobarbital required by Georgia's lethal injection protocol would "not render him insensate quickly enough and that he will suffer serious pain during the execution." *Ledford*, 856 F.3d at 1316. Mr. Nance alleged the same facts in addition to his allegations that his veins are too compromised to be executed by lethal injection. The *Ledford* court recognized that the lethal injection protocol challenged by Mr. Ledford was required by Georgia law. *Id.* at 1315 ("In October 2001, Georgia adopted lethal injection as its method of execution." (citing O.C.G.A. § 17-10-38(a)). And it is worth noting that the *Ledford* court also recognized that Mr. Ledford had not alleged that an alternative method *of lethal injection* would substantially reduce his risk of severe pain. *Id.* at 1317–18. Rather, Mr. Ledford, like Mr. Nance, alleged that a firing squad is a feasible and

readily implemented method of execution in Georgia that would reduce his risk of severe pain. *Id.* at 1318.

Like Mr. Nance, Mr. Ledford brought his claim under § 1983. In contrast to Mr. Nance, Mr. Ledford suffered no ill effects for failing to bring his claim in a habeas petition. Mr. Ledford's panel simply applied well-established precedent to hold that he was tardy in bringing his claims about the interaction of gabapentin and pentobarbital as applied to him because he "alleges that he has been taking gabapentin for approximately a decade." *Id.* at 1316. Despite the similarity of the two cases, the *Ledford* court did not sua sponte raise the issue the majority opinion raises and says is "squarely present[ed]" here. Maj. Op. at 12. Of course the *Ledford* panel could have, based on the same statement in *Hill* that was later restated in the now-touted *Bucklew* parenthetical. But it did not, again because no precedent requires or even directs us to hold that method of execution claims are cognizable in habeas. We should not deviate from the line of demarcation *Ledford*—and many other courts—have essentially taken for granted, and apply the Supreme Court's procedural directive to Mr. Nance's case as well.

The majority opinion itself recognizes that the facts of Mr. Nance's case are similar to those in *Ledford*. *See* Maj. Op. at 13–14. But it avoids explaining the different procedural approach it takes for Mr. Nance's case by turning to the *Ledford* panel's substantive analysis of the Eighth Amendment's alternative-method requirement. *See id.* at 14–15. But this collapses the very distinction between the "substantive right under the Eighth Amendment" and the procedural vehicle of

§ 1983 the majority says it is making. *See id.* at 14; *see also id.* at 12 (citing *Bucklew*, 139 S. Ct. at 1128). Thus it would seem that the majority cannot disagree with my point that no precedent supports the majority's new rule that Mr. Nance must bring his method-of-execution claim in a habeas petition.

It is true that the *Ledford* panel, as the majority says, did not decide what is the proper vehicle for bringing a method-of-execution claim.[2] *See* Maj. Op. at 15. It had no reason to. The proper vehicle for bringing these claims is well-established and *Bucklew*'s clarification of the substantive requirements does not change the procedural ones. This reflects a missing link in the majority's logic. *See id.* at 14–15 (describing *Ledford* as an erroneous Eighth Amendment ruling "[b]ased on our misunderstanding of the alternative-method requirement under *Baze* and *Glossip*"). And the majority cannot properly ignore precedent by merely explaining that the judges who decided *Ledford* misunderstood the alternative-method requirement under the *Baze-Glossip* test. *See* Maj. Op. at 15.[3]

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[2] The majority also distinguishes *Ledford* by saying it did not expressly address any jurisdictional defect. *See* Maj. Op. at 14. Perhaps that is because, like here, there was no jurisdictional defect to be found. Neither is Mr. Nance's a case that finally brings any purported jurisdictional issue before us. It resembles *Ledford* in all key respects but for one: the majority's sua sponte invitation to counsel to address the existence of this court-created jurisdictional issue in Mr. Nance's case.

[3] Taken to its logical end, the majority'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

But for the majority's strained effort to justify a new category of method-of-execution claims based on an obscure parenthetical in the Supreme Court's opinion in *Bucklew*, Mr. Nance would win this appeal.

II.

At last, I will address the merits of the appeal Mr. Nance actually filed. The parties argue about whether Mr. Nance's method of execution claim is timely and whether he stated a claim for relief. Assuming that at least Mr. Nance's compromised vein claim is timely,[4] we

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§ 1983 action. By limiting the ways an execution can be carried out under statute, any state can foreclose claims under § 1983 that this Court and the Supreme Court have historically and repeatedly treated as cognizable under § 1983.

Today the Georgia statute says only that execution must be effected by "lethal injection"; tomorrow it could mandate lethal injection by a specified three-drug cocktail, or require a particular procedure to gain intravenous access. But of course, people sentenced to death have repeatedly brought challenges under § 1983 alleging that certain portions of a lethal injection protocol or cutdown procedure violates their Eighth Amendment rights. *See, e.g.*, *Glossip*, 576 U.S. at 867, 135 S. Ct. at 2731 (addressing challenge to Oklahoma's switch from pentobarbital to midazolam under § 1983); *Nelson*, 541 U.S. at 645–46, 124 S. Ct. at 2123–24 (holding that the challenge to the cut-down procedure to enable the lethal injection was properly brought under § 1983). The logical implication of the majority's ruling is that now a legislature's selection of procedures, no matter how narrow or specific, would not only deserve "deference," Maj. Op. at 20 (quotation marks omitted), but also work to prevent a challenge under § 1983.

[4] The parties agree that, for as-applied challenges, "the statute of limitations does not begin to run until 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.*

must determine whether Nance's complaint includes "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Co. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007).

Under the *Baze-Glossip* test, a prisoner challenging the method of his execution must show two things: "(1)

Allen, 515 F.3d 1168, 1173 (11th Cir. 2008). Mr. Nance says his veins are severely compromised, and that "medical technicians have difficulty locating a suitable vein" when they seek to draw his blood. He also alleged that in May 2019, a medical technician told him that the GDOC execution team would have to use an alternative procedure to gain intravenous access, because they "would not otherwise be able to obtain sustained intravenous access." Then, in October 2019, after a physical examination, Mr. Nance learned there are no discernible veins in his upper or lower extremities.

From the face of Mr. Nance's complaint, he affirmatively alleged that he learned about the condition of his veins—and the impact they would have on his execution—in May 2019 at the earliest. *See Siebert v. Allen*, 506 F.3d 1047, 1048–49 (11th Cir. 2007) (recognizing that knowledge of underlying medical conditions, and thus "factual predicate" for claim, was "in place" upon diagnosis). Defendants acknowledge that Mr. Nance did plead he became aware of his "severely compromised and tortured veins in May 2019," but urge us to read Mr. Nance's complaint as "conveniently silent" about the cause of his compromised veins or any change in his veins. However, a statute of limitations bar is an affirmative defense, and a plaintiff is not required to negate an affirmative defense in his complaint. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004); *see also Boyd*, 856 F.3d at 872 (noting that dismissal of a § 1983 method-of-execution claim is appropriate "only if it is apparent from the face of the complaint that the claim is time-barred"). Mr. Nance alleged sufficient facts to survive Defendants' timeliness challenge. *See La Grasta*, 358 F.3d at 848 ("[D]epending on what discovery reveals, the result at the summary judgment stage may or may not be the same.").

the lethal injection protocol in question creates a substantial risk of serious harm, and (2) there are known and available alternatives that are feasible, readily implemented, and that will in fact significantly reduce the substantial risk of severe pain." *Ledford*, 856 F.3d at 1316 (quotation marks omitted) (alteration adopted); *see also Bucklew*, 139 S. Ct. at 1125 (citing *Glossip*, 576 U.S. at 868–78, 135 S. Ct. at 2732–38; *Baze*, 553 U.S. at 52, 128 S. Ct. at 1532). This legal framework applies to both facial and as-applied challenges to a State's method of execution. *See Bucklew*, 139 S. Ct. at 1128–29 ("(re)confirm[ing] that anyone bringing a method of execution claim . . . must meet the *Baze-Glossip* test"). With these principles in mind, I turn to the elements of Mr. Nance's claim.

A. THE DISTRICT COURT ERRED BY MAKING FACTUAL FINDINGS ABOUT MR. NANCE'S ALLEGATIONS BASED ON HIS PLEADINGS ALONE.

The District Court made findings of fact and weighed Mr. Nance's claims when it ruled on the Defendants' motion to dismiss under Rule 12(b)(6). Here are a few examples.

- "In response to Plaintiff's claim that, because the IV Team is not in the execution chamber it is 'very unlikely that they could recognize [an] extravasation and take timely, appropriate action,' *this Court finds that the claim is false*." *See* R. Doc. 26 at 15–16 (emphasis added) (relying on protocol language that "clearly refutes Plaintiff's claim").

- "While it is possible that Plaintiff may experience pain if the IV Team unsuccessfully attempts to establish intravenous access, *such pain would be de minimis* as it would be no worse than that encountered when visiting a physician or donating blood." *Id.* at 14 (emphasis added).
- "[T]his court first notes that Plaintiff's claim [that if cannulation is not successful the physician will resort to a cutdown procedure] is entirely speculative because it is based on Plaintiff's 'information and belief.' In fact, it is not at all clear that Georgia would use a cut-down procedure" based on the GDOC's Protocol. *Id.* at 16–17 (citation omitted).
- "As far as this Court can determine, utilization of a cut-down procedure in an execution is quite rare. This Court is aware of only one, or possibly two, cut-down procedures during an execution in the United States." *Id.* at 17 & n.7 (citing *Bucklew*, 139 S. Ct. at 1131, and *Nooner v. Norris*, 594 F.3d 592, 604 (8th Cir. 2010)).
- "[T]his Court must further presume that,"—contrary to Mr. Nance's allegations—"to the degree that a physician must resort to a cutdown procedure, he will do so in a humane manner[.]" *Id.* at 18 (emphasis added).

It is black letter law that "[a] motion to dismiss does not test the merits of a case." *See Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1037 (11th Cir. 2008). In deciding a motion to dismiss, courts must accept the allegations in the complaint as true and

construe them in the light most favorable to the plaintiff. *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016). This rule does not permit evaluating facts or taking judicial notice of findings of fact in other cases. *Cf. Grayson v. Warden, Comm'r, Ala. Dep't of Corr.*, 869 F.3d 1204, 1225–26 (11th Cir. 2017) (holding the issue of "[w]hether compounded pentobarbital was feasible and 'readily available' . . . was a factual issue" specific to this plaintiff's case). The District Court violated these well-established principles here, so it clearly erred in reaching its holding that Mr. Nance failed to state a claim.

An evaluation of Mr. Nance's complaint reveals that he has properly alleged the first element of a method of execution claim based on his compromised veins. To show that Georgia's lethal injection protocol "creates 'a substantial risk of serious harm,'" *Ledford*, 856 F.3d at 1316, Mr. Nance alleges, among other things, that (1) inserting an intravenous catheter into his veins will be "extremely difficult and presents a substantial risk that the vein will 'blow' and lose its structural integrity, causing the injected pentobarbital to leak into the surrounding tissue"; and (2) the likely alternative to intravenous access is a "cutdown procedure." These allegations track the allegations of other plaintiffs who have survived a motion to dismiss.[5] Mr. Nance has

[5] For example, in *Bucklew*, the Supreme Court noted that the plaintiff asserted, among other things, that the state's injection protocol "could cause the vein to rupture" and the IV Team might use a painful cut-down procedure. 139 S. Ct. at 1130. The Supreme Court did not say these risks could not qualify as substantial risk of severe pain as a matter of law; rather, the Court rejected these

therefore alleged sufficient facts to show a substantial risk of harm based on his compromised veins.

B. MR. NANCE PROPERLY ALLEGED THAT A FIRING SQUAD IS A FEASIBLE AND READILY IMPLEMENTED ALTERNATIVE.

Mr. Nance's allegations also support the second element of the *Baze-Glossip* test: that "there are known and available alternatives that are feasible, readily implemented, and that will in fact significantly reduce the substantial risk of severe pain." *Ledford*, 856 F.3d at 1316 (quotation marks omitted). He alleges that the State of Utah has carried out three executions by firing squad since 1976, most recently in 2010, and Utah's procedures for doing so are publicly accessible. He alleges execution by firing squad is "a known and available alternative method" recognized as permissible by the Supreme Court. Mr. Nance says Georgia has a "sufficient stockpile or can readily obtain both the weapons and ammunition necessary" to carry out such an execution. And he alleges a firing squad will result in a "swift and virtually painless" execution. These allegations are sufficient to allege that Georgia is "able

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asserted risks because they "rest[ed] on speculation unsupported" at the summary judgment stage. *Id.* The Supreme Court made a similar determination in *Baze*. The *Baze* plaintiffs claimed that "it is possible that the IV catheters will infiltrate into surrounding tissue, causing an inadequate dose to be delivered to the vein." 553 U.S. at 54, 128 S. Ct. at 1533. The Supreme Court rejected that risk because the evidence—following "extensive hearings and . . . detailed findings of fact" by the trial court—showed that Kentucky trained its personnel to calculate and mix an adequate dose. *Id.* at 41, 128 S. Ct. at 1526.

to implement and carry out" execution by firing squad "relatively easily and reasonably quickly." *See Boyd*, 856 F.3d at 868. Defendants argue Mr. Nance has done nothing more than "recite[] the formulaic elements" of this prong, but they place too heavy a burden on Nance at the pleadings stage. *See Bucklew*, 139 S. Ct. at 1128–29 (recognizing there is "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative"). Mr. Nance has indeed pointed to "well-established protocol in another State" and alleged that Georgia has the means to carry out this method of execution. *See id.* at 1128.

This Court has recognized the viability of execution by firing squad. *See Ledford*, 856 F.3d at 1318 (explaining that the firing squad method has "given way to more humane methods of execution" (quotation marks omitted and alteration adopted)); *Boyd*, 856 F.3d at 881 (Wilson, J., concurring in judgment) ("[W]e know that the firing squad is a straightforward, well-known procedure that has been performed for centuries."). So has the Supreme Court. *See Bucklew*, 139 S. Ct. at 1123 (citing *Wilkerson v. Utah*, 99 U.S. 130 (1879)). There appear to be two Supreme Court Justices who have recognized that a firing squad may be "significantly more reliable than other methods, including lethal injection," and "there is some reason to think that [death by firing squad] is relatively quick and painless." *Glossip*, 576 U.S. at 976–77, 135 S. Ct. at 2796 (Sotomayor, J., dissenting); *see also Arthur v. Dunn*, 137 S. Ct. 725, 733–34 (2017) (mem.) (Sotomayor, J., dissenting from the denial of certiorari); *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) (citing Justice

Sotomayor's dissent in *Arthur* and explaining the State conceded a firing squad is an available alternative, if adequately pled).

In sum, Mr. Nance has stated a sufficient claim and the District Court erred in holding he did not.

* * *

I can think of no more consequential act of a government than to take the life of one of its citizens. Mr. Nance is facing that fate in Georgia. The role of federal courts in the process of the taking of Mr. Nance's life is limited. Our job in Mr. Nance's case was merely to apply straightforward and well-established rules to determine whether, as Mr. Nance claims, the District Court erred by making findings of fact and weighing allegations in ruling on the State's motion to dismiss. The majority opinion fails to undertake this job. More worrisome, the majority's decision to change the rules governing the procedure by which death row prisoners must bring a method of execution claim introduces chaos into this area of the law. People facing their death at the hands of the State deserve more reliable treatment from their federal courts. I dissent.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL WADE NANCE, Plaintiff, v. TIMOTHY C. WARD and BENJAMIN FORD, Defendants.	CIVIL ACTION NO. 1:20-cv-0107-JPB

ORDER

Before the Court is Defendants' Motion to Dismiss the Complaint ("Motion"). ECF No. 19. Having reviewed and considered Defendants' arguments, the Court finds as follows:

I. Background

Plaintiff, a prisoner currently under a sentence of death by the State of Georgia, filed this action under 42 U.S.C. § 1983 claiming that, because of his unique medical issues, the State of Georgia's lethal injection method of execution will cause him excessive pain in violation of his Eighth Amendment rights. As a solution, Plaintiff suggests that the State could avoid the unreasonable risk of pain by executing him by firing squad.

In their Motion, Defendants contend that the complaint should be dismissed because (1) Plaintiff's claims are time-barred under the applicable two-year statute of limitations, (2) Plaintiff's complaint fails to state a plausible claim for relief, and (3) Plaintiff has failed to properly exhaust his administrative remedies as required by the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e.

II. Discussion

A. Plaintiff's Claims

In his complaint, Plaintiff claims that he has been taking prescription gabapentin since April 2016. ECF No. 1 at 14. Gabapentin is an anti-epileptic drug, which is also prescribed for nerve pain. Plaintiff takes it for back pain.

According to Plaintiff, prolonged gabapentin use alters a person's brain chemistry and makes the person's brain less responsive, or even unresponsive, to certain other drugs, including pentobarbital. As a result, Plaintiff contends that there is a risk that the pentobarbital that the State intends to use to execute him will not render him unconscious while at the same time, the pentobarbital's effect on his respiratory system will be undiminished. If that were to happen, Plaintiff asserts that he would suffer from the painful effects of respiratory and organ failure while fully conscious.

Plaintiff also claims that his veins are compromised and not suitable for intravenous (IV) insertion of pentobarbital. He contends that finding a suitable vein "will likely require multiple painful needle insertions and

blind attempts by the IV team." ECF No. 1 at 11. Plaintiff further contends that his veins are "heavily scarred, tortuous, and have thin walls," *id.*, and if pentobarbital is injected into one of his veins, there is a risk that the vein will "blow," causing pentobarbital to leak into surrounding tissue, which would result in burning pain and "incomplete and inconsistent drug delivery [and] a prolonged and only partially anesthetized execution." *Id.* at 12.

Plaintiff also contends that the Georgia Department of Corrections' (GDOC) lethal execution protocol provides for the alternative of a central venous cannulation[1] if IV access cannot be established, and he claims that such a procedure would cause him intolerable pain. According to Plaintiff, if central venous cannulation is not viable, "upon information and belief, the Execution Team will attempt to perform a cutdown procedure," whereby an incision is made to find a suitable vein, which would also be intolerably painful as well as bloody. *Id.* at 13.

Plaintiff also raises numerous issues related to the IV delivery of pentobarbital under Georgia's execution protocol. According to Plaintiff, the execution team

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[1] "Central venous cannulation is a technique for gaining access to one of the major veins in an individual's body, such as the jugular or femoral veins." *Gissendaner v. Commr., Georgia Dept. of Corrections*, 779 F.3d 1275, 1278 (11th Cir. 2015) (citation omitted). The procedure entails inserting a catheter into a central vein located either in the groin or above or below the clavicle. The National Institutes of Health describes central venous cannulation as "a commonly performed procedure." *See* information available at www.ncbi.nlm.nih.gov/pmc/articles/PMC3270925/.

administering the pentobarbital into his IV tube will not be in the same room as Plaintiff, and they thus will be unaware if complications arise in the application of the lethal injection drug. Because the IV team is in another room, the IV tubing for delivery of the pentobarbital is too long, creating a risk of "incomplete delivery of the drug" and a "prolonged and/or partially anesthetized execution." *Id.* at 17.

Plaintiff further alleges that the pentobarbital that the State receives from a compounding pharmacy is poor in "quality, potency, purity or stability," *id.*, and that the "[m]embers of the execution team lack the professional skills, training, and/or necessary equipment to safely and humanely perform these procedures" of central venous cannulation or a cutdown, *id.* at 17-18. As an alternative, Plaintiff proposes that he be executed by firing squad, "which would significantly reduce the substantial risk of severe pain." *Id.* at 20-21.

B. Statute of Limitations

An action brought pursuant to § 1983 is subject to the statute of limitations governing personal injury actions in the state where the challenge is brought. *Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 872-76 (11th Cir. 2017); *Gissendaner v. Ga. Dep't of Corr.*, 779 F.3d 1275, 1280 (11th Cir. 2015). In Georgia, the statute of limitations for personal injury actions is two years. *Gissendaner*, 779 F.3d at 1280. Because the statute of limitations is an affirmative defense, dismissal under Fed. R. Civ. P. 12(b)(6) on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time-barred. *Id.*

While the limitations period for a § 1983 claim is governed by the applicable state law, federal law determines when a claim accrues. *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987). Under federal law, actions brought pursuant to § 1983 accrue "from the date the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003). The right of action for a method-of-execution challenge "'accrues on the later of the date on which' direct review is completed by denial of certiorari, 'or the date on which the capital litigant becomes subject to a new or substantially changed execution protocol.'" *Gissendaner*, 779 F.3d at 1280 (quoting *McNair v. Allen*, 515 F.3d 1168, 1174 (11th Cir. 2008)).

The United States Supreme Court denied Petitioner's petition for certiorari on direct review on October 2, 2006. *Nance v. Georgia*, 549 U.S. 868 (2006). In 2001, Georgia adopted lethal injection as its method of execution. O.C.G.A. § 17-10-38(a) (stating "[a]ll 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"); *Gissendaner*, 779 F.3d at 1281. In March 2013, Georgia changed from using a single dose of FDA-approved pentobarbital to using a single dose of compounded pentobarbital. *Gissendaner*, 779 F.3d at 1281.[2] The

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[2] This Court notes that the GDOC's current Lethal Injection Procedures, attached as Exhibit A to Plaintiff's complaint, ECF No. 1-1, which was adopted on July 17, 2012, states that condemned prisoners will be executed with a five-gram does of pentobarbital.

Eleventh Circuit has held that the State's change to the use of compounded pentobarbital is not a substantial change to Georgia's execution protocol. *Id.* at 1281-82. Thus, as a general matter, Petitioner's method-of-execution claim accrued in October 2006 and must have been filed by October 2008 to be timely. *See Gissendaner*, 779 F.3d at 1280; *Ledford v. Commr., Georgia Dept. of Corrections*, 856 F.3d 1327, 1330 (11th Cir. 2017). The absolute latest that his claims would have accrued is 2012 or 2013 when the state switched to pentobarbital and adopted its current protocol.

Plaintiff concedes that any facial challenge that he makes to Georgia's execution protocol is untimely,[3] but he argues that his "as-applied" claims—specifically his claims that his long-term use of gabapentin and his compromised veins render it more likely that he will suffer constitutionally intolerable pain or discomfort during his execution—did not accrue until the time that a reasonable layperson would understand that he faced risks during his execution due to his medical history. According to Plaintiff, the limitations period did not begin to run with respect to his compromised-vein claim until May 2019, when a medical technician at the prison

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Accordingly, it appears that the State adopted the single dose of pentobarbital before 2013.

[3] Indeed, despite appearances otherwise, Plaintiff states that he raises only as-applied challenges to Georgia's lethal injection protocol based on his compromised veins and his prolonged use of gabapentin. [Doc. 22 at 2]. His assertions regarding the other aspects of the State's execution protocol are merely offered in support of those as-applied challenges. As a result, this Court's discussion is limited to his as-applied claims.

informed Plaintiff that, because of his veins, the execution team would have to cut his neck to carry out the execution. Plaintiff further claims that the limitations period did not run on his gabapentin claim until he "became aware, or should have become aware, that his prolonged use and increasing dosages, would affect the efficacy of pentobarbital and impact his execution." ECF No. 22 at 5. He does not, however, specify when that was.

As Defendants point out, Plaintiff does not cite to any case law in support of his argument that a layperson's lack of technical knowledge or technical expertise might delay the accrual of a cause of action under § 1983. In *Ledford*, cited above, J.W. Ledford claimed that his prolonged use of the drug gabapentin left him susceptible to a painful execution by pentobarbital. The Eleventh Circuit determined that Ledford's claim was time-barred after noting that "Ledford also alleges that he has been taking gabapentin for approximately a decade," and his claims "about the interaction of those two drugs—compounded pentobarbital and gabapentin—are filed too late." *Ledford*, 856 F.3d at 1330. As is noted above, according to the complaint, Plaintiff has been taking prescription gabapentin since April, 2016, over three years before he filed his complaint. Because Plaintiff knew that he was taking gabapentin and knew that the State planned to execute him using pentobarbital, and because Plaintiff makes no claim about when he learned of the potential adverse interaction between the two drugs, Plaintiff's gabapentin claim is clearly time-barred. Moreover, in response to Plaintiff's implied claim that he learned of

the potential problems resulting from his gabapentin use recently, this Court concludes that his knowledge that he took gabapentin and would be executed with pentobarbital was sufficient to put him on notice that he should inquire whether there might be some adverse interaction between the two drugs.

As to his claim regarding his compromised veins, in *Gissendaner*, also cited above, Gissendaner raised a method-of-execution challenge, claiming that her obesity and possible sleep apnea left her susceptible to an increased risk of pain during her execution by lethal injection. The Eleventh Circuit concluded that Gissendaner's claims were time-barred after noting that her "complaint contains no factual allegations suggesting that her obesity or her potential sleep apnea (the chance of which is increased by her obesity) are recent developments." *Gissendaner*, 779 F.3d at 1281. Likewise, Plaintiff has made no claim that his veins became compromised within the past two years.

Neither *Ledford* nor *Gissendaner* addressed arguments like Plaintiff's that his claim did not accrue until he learned of the potential for his medical conditions to cause problems if pentobarbital is administered during his execution. But the limited analogous, persuasive case law determining when claims accrue in § 1983 actions indicate that Plaintiff's argument is unavailing. For example, in *Hawkins v. Spitters*, 79 Fed. Appx. 168 (6th Cir. 2003), Stacy Hawkins, a prisoner, raised a deliberate indifference to serious medical needs claims under § 1983 against a physician who had repeatedly refused to refer him for testing to determine whether he suffered from sleep

apnea. The Sixth Circuit determined that the claim was time-barred because Hawkins failed to raise the claim within the applicable three-year statute of limitations. Hawkins argued that his claim did not accrue until he was actually diagnosed with sleep apnea, "otherwise his claim would be mere speculation about his condition," but the court rejected that argument, holding that the claim accrued when the physician rejected his request. *Id.* at 169.

Some case law, however, indicates that a claim will not accrue until certain knowledge is gained by the plaintiff. For example, in *Diaz v. United States*, 165 F.3d 1337, 1338 (11th Cir. 1999), Alejandro Diaz committed suicide while in prison. Prison officials informed Diaz's wife that they had no indication or warning that he might kill himself. Only later did the wife learn that Diaz had been treated by psychologists and had reported "a fifty pound weight loss during the preceding weeks, recurring depression, anxiety, headaches, insomnia, racing thoughts and other symptoms" as well as suicidal thoughts. *Id.* The Eleventh Circuit concluded that the wife's medical malpractice, wrongful death, and negligence claims under the Federal Tort Claims Act (FTCA) accrued when the wife learned that Diaz had received psychological treatment rather than at the time of Diaz's death. *Id.* at 1341. Central to the Eleventh Circuit's holding, however, was that the facts indicating a causal link between Diaz's death and the actions of prison officials were in the control of those prison officials. *Id.* at 1339. In this case, there is no indication that state officials had superior knowledge of the status of Plaintiff's veins.

This Court also credits Defendants' argument that under Plaintiff's theory, "he could simply sit back and wait, ostensibly for as long as he wanted, to ascertain the alleged impact of a perceived injury under § 1983," ECF No. 25 at 5, which would defeat the purpose of the statute of limitations. In *United States v. Kubrick*, 444 U.S. 111 (1979), the plaintiff sued a Veterans Affairs physician under the FTCA alleging negligence/medical malpractice for causing a hearing loss by improperly prescribing a neomycin treatment. In reversing the court of appeals and holding that the claim accrued when the neomycin treatment occurred rather than when another physician informed him that the neomycin treatment had been improper, the Supreme Court noted,

> it is apparent, particularly in light of the facts in this record, that the Court of Appeals' rule would reach any case where an untutored plaintiff, without benefit of medical or legal advice and because of the "technical complexity" of the case, would not himself suspect that his doctors had negligently treated him. As we understand the Court of Appeals, the plaintiff in such cases need not initiate a prompt inquiry and would be free to sue at any time within two years from the time he receives or perhaps forms for himself a reasonable opinion that he has been wronged. In this case, for example, Kubrick would have been free to sue if Dr. Soma had not told him until 1975, or even 1980, instead of 1971, that the neomycin treatment had been a negligent act.

Id. at 118 (citation to the record omitted). This Court similarly rejects Plaintiff's argument for an open ended

date for the accrual of his claim that is based on when he happens to discover information purportedly sufficient to inform him that he has a viable claim.

This Court also points out that central venous cannulation and the cut-down procedure[4] have been a part of Georgia's execution protocol at least since 2012, and, to the degree that he now claims that those procedures would cause intolerable pain, Plaintiff has been on notice that he might be subject to them for several years.

Having reviewed the record, this Court concludes that Plaintiff's as-applied claims are barred by the statute of limitations.

C. Failure to State a Claim

Even if Plaintiff is correct that his compromised-vein claims did not accrue until the prison medical technician put him on notice of the potential problem, this Court agrees with Defendants that the claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because Plaintiff has failed to state a viable claim for relief.

Pursuant to Fed. R. Civ. P. 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although detailed factual allegations are not necessarily required, the pleading must contain more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[A] complaint must contain sufficient factual

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[4] As discussed below, it is not clear that a cut-down procedure is a part of the GDOC's lethal injection protocol.

matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* A "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In order to state a claim of an Eighth Amendment risk of future harm, the alleged "conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers." *Gissendaner*, 779 F.3d at 1283.

Defendants first argue that Plaintiff's claim regarding his compromised veins fails because "Georgia's lethal injection protocol accounts for the possibility of an inmate's veins being compromised." ECF No. 19 at 17. As noted above, *see supra* n.2, Plaintiff has attached the Georgia lethal injection protocol to his complaint. In that protocol, it states:

> The IV Team will provide two (2) intravenous accesses into the condemned. If the veins are such that intravenous access cannot be provided, a Physician will provide access by central venous cannulation or other medically approved alternative.

ECF No. 1-1 at 7; *see Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) ("A district court can generally consider exhibits attached to a complaint in ruling on a motion to dismiss, and if the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls."). Accordingly, this Court agrees with Defendants that, to the degree that Plaintiff contends that his veins might "blow" when injected with pentobarbital, Plaintiff fails

to state a viable claim because Georgia's protocol mandates that a physician perform a medically-approved alternative method if the condemned prisoner has veins that are not amenable to establishing an intravenous line.

While it is possible that Plaintiff may experience pain if the IV Team unsuccessfully attempts to establish intravenous access, such pain would be *de minimis* as it would be no worse than that encountered when visiting a physician or donating blood. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) ("[T]he Eighth Amendment does not guarantee a prisoner a painless death.").

Further, this Court must presume that "state officials carr[y] out their duties under the death warrant in a careful and humane manner." *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947).[5] Plaintiff has made no allegation that would serve to overcome the presumption.[6] In contrast, GDOC officials certainly

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[5] In addition to *Resweber*, the Supreme Court has more recently held that state government officials are presumed to carry out their duties in a good-faith manner and in compliance with the federal laws. *Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 507, (2004); *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004) (discussing the presumption of regularity under which courts can presume that government officials have faithfully carried out their duties); *Alden v. Maine*, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the States will refuse to honor . . . or obey the binding laws of the United States.").

[6] In his complaint, Plaintiff does claim that "[m]embers of the execution team lack the professional skills, training, and/or necessary equipment to safely and humanely perform" a central venous cannulation or a cutdown procedure. ECF No. 1 at 17. However, this claim is clearly refuted by the GDOC lethal injection

have a strong interest in executing its condemned prisoners in a manner that does not violate their rights. Botched executions lead to embarrassment, investigations, bad press and, for those involved, the knowledge that they caused an individual needless pain and suffering.

As Plaintiff has failed to rebut the presumption, this Court must apply it. Given that presumption, Plaintiff has no basis to allege that state officials will, effectively, torture him by repeatedly sticking him with a needle in a fruitless effort to locate a suitable vein.

In response to Plaintiff's claim that, because the IV Team is not in the execution chamber it is "very unlikely that they could recognize [an] extravasation and take timely, appropriate action," this Court finds that the claim is false. As the state's protocol makes clear:

> Throughout the lethal injection process, an IV Nurse will monitor the progress of the injection *in the Execution Chamber* to ensure proper delivery of chemicals and to monitor for any signs of consciousness. If the IV Nurse in the execution chamber observes a problem with intravenous flow, the Nurse will inform the attending Physician, who will inform the Warden as to whether or not using an alternative intravenous access is appropriate. The Warden will give the appropriate instructions to the Injection Team.

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protocol, attached to the complaint, which states that a physician will perform those procedures. ECF No. 1-1 at 4; *see Hoefling*, *supra*.

ECF No. 1-1 at 5 (emphasis supplied). As this passage from the State's protocol clearly refutes Plaintiff's claim, *see Hoefling*, *supra*, this Court concludes that the claim is unavailing.

As to Plaintiff's claim that officials may have to resort to central venous cannulation, which would cause him pain, this Court again refers to the presumption that state officials will carry out their duties humanely and carefully, *Resweber*, 329 U.S. at 462, and repeats that central venous cannulation is a routine procedure, *see supra* n.1. As such, this Court must presume that, to the degree that cannulation would cause constitutionally intolerable pain, the physician performing the procedure would provide the appropriate anesthetic.

Finally, regarding Plaintiff's claim that, if cannulation is not successful the physician will resort to a cut-down procedure—where a physician would cut an incision into Plaintiff's arm or leg in order to locate a suitable vein—this Court first notes that Plaintiff's claim is entirely speculative because it is based on Plaintiff's "information and belief." ECF No. 1 at 13. In fact, it is not at all clear that Georgia would use a cut-down procedure. The GDOC's protocol states that "[i]f the veins are such that intravenous access cannot be provided, a Physician will provide access by central venous cannulation or *other medically approved alternative*." ECF No. 1-1 at 4 (emphasis supplied). Plaintiff contends that the other alternative would be a cut-down procedure, but has not expanded on the basis of that belief. According to the Supreme Court, this Court "can and should . . . invok[e its] equitable powers to dismiss or curtail [method of execution challenges]

that are . . . based on speculative theories." *Bucklew*, 139 S. Ct. at 1134 (quotations and citations omitted).

As far as this Court can determine, utilization of a cut-down procedure in an execution is quite rare. This Court is aware of only one, or possibly two,[7] cut-down procedures during an execution in the United States. The one well-known instance was the 1992 execution of Rickey Ray Rector by Arkansas. *See Nooner v. Norris*, 594 F.3d 592, 604 (8th Cir. 2010). In *Nooner*, the Eighth Circuit discussed the Rector execution and concluded that the plaintiffs raising a claim that Arkansas' protocol permitted the use of a cut-down procedure had failed to establish an Eighth Amendment violation because (1) the procedure would be performed by "a licensed physician who is properly qualified to carry out the procedure," and (2) the physician would use local anesthetic as necessary to avoid pain. *Id.* In other cases where a cut-down procedure has been challenged by condemned prisoners, the claims were generally denied as moot when state officials stated that they would not use a cut-down procedure. *E.g.*, *Cooey v. Strickland*, 589 F.3d 210, 228 (6th Cir. 2009); *Boyd v. Beck*, 404 F. Supp. 2d 879, 885 (E.D.N.C. 2005).

Again this Court must apply the unrebutted presumption that state officials will act carefully and humanely in carrying out a death warrant. *Resweber*, 329 U.S. at 462. As such, this Court must further presume that, to the degree that a physician must resort

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[7] In *Bucklew*, 139 S. Ct. at 1131, the Supreme Court noted that the warden of a Missouri prison testified that he "once saw medical staff perform a cut-down as part of an execution."

to a cutdown procedure, he will do so in a humane manner as accepted by the Eighth Circuit in *Nooner*. Because Plaintiff's allegation that his veins are compromised fails to allege a condition that will very likely cause "serious illness and needless suffering and give rise to sufficiently imminent danger," *Gissendaner*, 779 F.3d at 1283, this Court concludes that Plaintiff has failed to state a viable Eighth Amendment claim, and his compromised-vein claim is thus dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

D. Exhaustion of Remedies

Defendants also contend that Plaintiff has failed to properly exhaust his administrative remedies. Plaintiff did file a prison grievance, but it is undisputed that Plaintiff did not complete the administrative remedy process available to him.

Under the Prison Litigation Reform Act, a prisoner may not file a § 1983 action "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Eleventh Circuit has interpreted this requirement to mean that prisoners "'must file a grievance and exhaust the remedies available under that procedure before pursuing a § 1983 lawsuit.'" *Bryant v. Rich*, 530 F.3d 1368, 1372–73 (11th Cir. 2008) (quoting *Johnson v. Meadows*, 418 F.3d 1152, 1156 (11th Cir. 2005)). However, "[a] remedy has to be available before it must be exhausted, and to be 'available' a remedy must be 'capable of use for the accomplishment of [its] purpose.'" *Turner v. Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008) (quoting *Goebert v. Lee County*, 510 F.3d 1312, 1322–23 (11th Cir. 2007)). "Remedies that rational inmates cannot be expected to use are not capable of

accomplishing their purposes and so are not available." *Id.*

In a recent order entered in *Martin v. Ward*, No. 1:18-cv-4617 (N.D. Ga. Nov. 21, 2019) (hereinafter Martin Order) (ECF No. 21), a § 1983 method-of-execution action, Judge Brown noted that in *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016), the Supreme Court expanded the concept of what it means when a remedy is not available under § 1997e(a).

> [A]s *Booth*[8] made clear, an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. *See* 532 U.S. at 736, 738. Suppose, for example, that a prison handbook directs inmates to submit their grievances to a particular administrative office—but in practice that office disclaims the capacity to consider those petitions. The procedure is not then "capable of use" for the pertinent purpose. In *Booth*'s words: "[S]ome redress for a wrong is presupposed by the statute's requirement" of an "available" remedy; "where the relevant administrative procedure lacks authority to provide any relief," the inmate has "nothing to exhaust." *Id.* at 736 and n.4. So too if administrative officials have apparent authority, but decline ever to exercise it. Once again: "[T]he modifier 'available' requires the possibility of

[8] *Booth v. Churner*, 532 U.S. 731 (2001).

> some relief." *Id.* at 738. When the facts on the ground demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy.

Ross v. Blake, 136 S. Ct. 1850, 1859 (2016).

Judge Brown further noted that under the GDOC's "published grievance policy, '[m]atters over which the Department has no control, including parole decisions, sentences, probation revocations, court decisions, and any matters established by the laws of the state' are 'non-grievable issues.'" Martin Order at 8 (citing the state grievance policy). Judge Brown also noted that GDOC officials routinely disclaim the authority to consider grievances that raise method-of-execution claims. *Id.* Accordingly, Judge Brown concluded that

> [i]f, in response to every single grievance raising a method-of-execution challenge, [GDOC] officials have always responded that they lack authority to grant relief, the Court finds that this grievance procedure is the "simple dead end" discussed in *Ross* where officials "disclaim[] the capacity to consider those petitions." 136 S. Ct. at 1859. The Court thus agrees with Plaintiff that relief is unavailable under [GDOC]'s grievance procedure and that lack of exhaustion must be excused.

Id. at 9.

Relying on Judge Brown's analysis, this Court concludes that exhaustion must likewise be excused in this case.

III. Defendant's Motion to Exceed Page Limits

Pursuant to Local Rule 7.1(D) (N.D. Ga.), motions filed in this Court are limited to twenty-five pages. Along with their motion to dismiss, Defendants filed a motion to exceed that limit by seven pages. ECF No. 17. In opposing the motion, ECF No. 21, Plaintiff points out that under the undersigned's Standing Order Regarding Civil Litigation, ECF No. 4,

> Parties seeking an extension of the page limit must do so at least five days in advance of their filing deadline and should explain with specificity the reasons necessitating the extension. If a party files a motion to extend the page limit at the same time his or her brief is due, the extension request will be denied absent a compelling and unanticipated reason for violating the rule. The Court will also not consider any arguments made in pages which exceed the Local Rules' requirements.

Id. at 12.

Under Local Rule 7.1(F), this Court has the discretion to waive application of the page limit, and the undersigned has the authority to waive the requirements of the standing order. While Plaintiff's arguments are well-taken, and counsel for Defendants should not have ignored the standing order, in the interests of justice and efficiency, this Court will exercise its discretion and waive the page limits in the Local Rules and the requirements of the standing order.

IV. Conclusion

For the foregoing reasons, **IT IS ORDERED** that Defendants' motion to dismiss, ECF No. 19, is **GRANTED** and the instant action is hereby **DISMISSED** as untimely under the applicable statute of limitations and for failure to state a claim under Fed. R. Civ. P. 12(b)(6) as discussed above. Defendants' motion to exceed the page limit, ECF No. 17, is, for good cause shown, **GRANTED** nunc pro tunc. Defendants' motion to stay discovery, ECF No. 20, is **DENIED** as moot.

The Clerk is **DIRECTED** to **CLOSE** this action.

SO ORDERED, this 13th day of March, 2020.

/s/
J. P. BOULEE
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MICHAEL WADE NANCE, Plaintiff, v. TIMOTHY C. WARD and BENJAMIN FORD, Defendants.	CIVIL ACTION FILE NO. 1:20-CV-107-JPB

JUDGMENT

This action having come before the Court, Honorable J. P. Boulee, United States District Judge, for consideration of Defendants' Motion to Dismiss, and the Court having granted said Motion, it is

Ordered and Adjudged that this action is **DISMISSED** as untimely under the applicable statute of limitations and for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Dated at Atlanta, Georgia, this 13th day of March, 2020.

JAMES N. HATTEN
CLERK OF COURT

By: *s/R. Spratt*
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
March 13, 2020
James N. Hatten
Clerk of Court

By: *s/R. Spratt*
Deputy Clerk

Appendix D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-11393

MICHAEL NANCE,

Plaintiff-Appellant,

versus

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

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before WILLIAM PRYOR, Chief Judge, WILSON, MARTIN, JORDAN, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, and BRASHER, Circuit Judges.[*]

BY THE COURT:

A petition for rehearing having been filed and a member of this Court in active service having requested

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[*] Judges Robin Rosenbaum and Jill Pryor recused themselves and did not participate in the en banc poll.

a poll on whether this appeal should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting rehearing en banc, it is ORDERED that this appeal will not be reheard en banc.

WILLIAM PRYOR, Chief Judge, joined by NEWSOM and LAGOA, Circuit Judges, statement respecting the denial of rehearing en banc:

A majority of judges voted not to rehear this appeal en banc. As author of the panel-majority opinion, I write to respond to my dissenting colleagues' arguments that the panel opinion is irreconcilable with Supreme Court and circuit precedent and that it leaves some prisoners without a remedy in federal court. Neither charge is true.

Before I discuss the dissent's arguments, I want to set the record straight on a procedural matter: the panel's resolution of this appeal on jurisdictional grounds was not a surprise to the parties. Two weeks before oral argument, the panel directed the parties to be prepared to address our jurisdiction. The panel explained that "[l]ethal injection is the only method of execution authorized by Georgia law," and pointed out that Nance was "seek[ing] an injunction that would foreclose the State from implementing his death sentence under its present law." Given that premise, the panel asked the parties whether "[Nance's] section 1983 claim amount[ed] to a challenge to the fact of his sentence itself that must be reconstrued as a habeas petition," and whether, "[i]f Nance's claim [was] a habeas petition, . . . it [was] second or successive[.]"

In its order to the parties, the panel framed the issue by quoting passages from *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019) ("An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law. . . . [But] existing state law might

be relevant to determining the proper procedural vehicle for the inmate's claim."), *Hill v. McDonough*, 547 U.S. 573, 582 (2006) ("If the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper."), and *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) ("In a State. . . where 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." (citation omitted)). In doing so, the panel gave Nance and his counsel a preview of what would eventually become the majority opinion.

Nance's counsel came to oral argument prepared, and most of the argument was devoted to the jurisdictional issue. And Nance provided supplemental authority on the issue one week after oral argument. The dissent suggests that that panel did not "giv[e] the parties an adequate opportunity to prepare to address the issue," Dissent at 13, but neither party asked the panel to submit supplemental briefing. Our obligation to consider subject-matter jurisdiction *sua sponte* may sometimes catch parties by surprise, but it did not in this appeal.

The dissent's justifications for rehearing Nance's appeal en banc are unpersuasive. The most the dissenters can say about any direct conflict between the panel opinion and Supreme Court precedent is that "[n]one of [the Supreme Court's] vaguely worded dicta [relied on by the panel opinion] is irreconcilable" with the dissent's preferred resolution of Nance's appeal. *Id.* at 12. But even if some other approach would not have

been "irreconcilable" with the decisions of the Supreme Court, it does not follow that the panel opinion is itself inconsistent with Supreme Court precedent.

The dissent also suggests the panel opinion is somehow inconsistent with what it claims the Supreme Court *did not* say in *Bucklew*. The dissent says it is "inconceivable" that the Supreme Court would have "emphasized that a prisoner can point to an alternative method of execution authorized in another State," *see Bucklew*, 139 S. Ct. at 1128 ("An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law."), without pairing that substantive holding with a warning that pleading an unauthorized method might have serious procedural implications. Dissent at 14–15. The Supreme Court apparently found that possibility "inconceivable" as well. Only four sentences after its substantive holding, the Supreme Court issued the exact warning the dissent claims it did not:

> [E]xisting state law might be relevant to determining the proper procedural vehicle for the inmate's claim. . . . [I]f the relief sought in a [section] 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, 139 S. Ct. at 1128 (alteration adopted) (internal quotation marks omitted). The panel opinion is consistent with Supreme Court precedent.

The panel opinion is also consistent with circuit precedent. The dissent suggests that it is "well-established in our circuit that, not only can a prisoner plead a method of execution not authorized under state law, but [section] 1983 is the proper avenue of relief, and, as a corollary, such claims cannot be brought in habeas." Dissent at 13. But the opinions the dissent cites in support of its claim do not establish any such blanket rule for method-of-execution challenges. One of the opinions did not involve a method-of-execution challenge at all. *See Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006) ("On appeal, Hutcherson frames his issue for review as . . . a denial of [his] rights to counsel as envisioned in the Sixth Amendment to the United States Constitution and Due Process of Law as envisioned in the Fifth and Fourteenth Amendments to the United States Constitution[.]"). And the other opinions involved garden-variety challenges to specific lethal-injection procedures that clearly did not imply the invalidity of the entire sentence. *McNabb v. Comm'r Ala. Dep't of Corr.*, 727 F.3d 1334, 1344 (11th Cir. 2013) (prisoner's claim that "an ineffective first drug or improper administration of a first drug in a three-drug protocol would violate the [C]onstitution" was improperly brought in a habeas petition); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1259, 1261 (11th Cir. 2009) (prisoner's claim "involving lethal injection *procedures*" was improperly brought in a habeas petition (emphasis added)). None of the opinions decided the proper procedural vehicle for the type of method-of-execution challenge Nance presents, which the Court previously and incorrectly believed was foreclosed as a matter of substantive constitutional law. *See Arthur v.*

Comm'r, Ala. Dep't of Corr., 840 F.3d 1268, 1317 (11th Cir. 2016) ("[A] prisoner must identify an alternative that is 'known and available' *to the state in question* . . . ." (emphasis added)), *abrogated in part by Bucklew*, 139 S. Ct. 1112. Nance's appeal presented an issue of first impression, and the panel opinion does not conflict with any binding precedent.

Finally, the dissent argues that the Court should have reconsidered Nance's appeal en banc because the panel opinion may leave some prisoners without access to a federal forum in which to litigate their method-of-execution challenges, which the dissent says renders the appeal a question of exceptional importance for the full court. Dissent at 15. But the panel opinion does not close the federal courts to prisoners. Prisoners may allege in habeas petitions alternative methods of execution that are unauthorized by state law. And they may bring more traditional challenges to an execution protocol under section 1983. For example, Nance was free to insist that Georgia modify its venous-access protocol or choice of injection drug in his complaint under section 1983. All the panel opinion does is recognize that Congress denies us the power—regardless of whether a petitioner alleges a violation of his substantive constitutional rights—to provide a forum or a remedy for a claim in an unauthorized second or successive habeas petition. *See* 28 U.S.C. § 2244(b). Federal courts do not have jurisdiction to provide the remedy for every right denied, and not every decision reflecting that fact is worthy of en banc review.

WILSON, Circuit Judge, joined by MARTIN and JORDAN, Circuit Judges, dissenting from the denial of rehearing en banc:

Michael Nance, a Georgia death-row prisoner, sought an injunction under 42 U.S.C. § 1983 to bar the state from executing him via lethal injection, and requested an alternate method of execution: firing squad. Nance argued that, because of a unique medical condition, Georgia's lethal-injection protocol will violate his Eighth Amendment right to be free from cruel and unusual punishment. U.S. Const. amend. VIII. Nance's veins lack sufficient structural integrity, meaning that medical technicians often have difficulty locating a vein from which to draw blood. A prison medical technician told Nance that the execution team will have to "cut his neck" to carry out lethal injection because they will not otherwise be able to obtain sustained intravenous access. During his execution, Nance will likely endure a prolonged and painful attempt to gain intravenous access. Even if the execution team locates a vein, Nance's veins will not support an IV and there is substantial risk that his veins will lose their structural integrity and "blow," causing the injected chemical to leak into the surrounding tissue. This will cause intensely painful burning and a prolonged execution that will feel like death by suffocation.

A panel of this court held that because lethal injection is the only authorized method of execution under Georgia law, granting Nance relief would "necessarily imply the invalidity of his death sentence." *Nance v. Comm'r, Ga. Dep't of Corr.*, 981 F.3d 1201, 1203 (11th Cir. 2020). Consequently, the panel concluded that

Nance's method-of-execution claim had to be brought as a petition for a writ of habeas corpus under 28 U.S.C. § 2254. Next, the panel determined that Nance's claim was barred as a second or successive habeas petition. *Id.*

The resolution of this case turns on whether Nance's claim is a method-of-execution claim cognizable under § 1983, or whether it is a habeas claim disguised as a § 1983 claim to prevent the State from carrying out the execution at all. A majority of the court concluded that the panel decision does not merit en banc review. I disagree. En banc rehearing is appropriate when it is "necessary to secure or maintain uniformity of the court's decisions" or the case "involves a question of exceptional importance." Fed. R. App. P. 35(a). This case meets both criteria. The panel's decision disrupts intra-circuit uniformity and is irreconcilable with Supreme Court precedent. It also leaves prisoners like Nance who are to be executed cruelly and unusually without a remedy in federal court.

The Supreme Court held in *Nelson v. Campbell* that method-of-execution claims, like this one, are to be brought under § 1983. 541 U.S. 637 (2004). That case originated here in the Eleventh Circuit. *Nelson v. Campbell*, 347 F.3d 910 (11th Cir. 2003). In *Nelson*, we considered whether a prisoner could bring a § 1983 claim to challenge the method by which the State would administer his lethal injection. *Id.* at 912. The majority held 2-1 that because the claim was really an attempt to prevent the State from carrying out the execution, it was cognizable only as a habeas petition. *Id.* And, because it would be Nelson's second or successive habeas petition, it was barred. *Id. But see id.* at 913–15

(Wilson, J., dissenting) (explaining "that the outcome of Nelson's petition has no effect on either his sentence or his conviction, and therefore cannot properly be construed under any circumstances as the equivalent to a subsequent habeas petition"). The Supreme Court granted certiorari and reversed in a 9-0 decision, holding that method-of-execution claims are cognizable under § 1983. *Nelson*, 541 U.S. 637.

To be sure, there is a difference between this case and *Nelson*. While the prisoner in *Nelson* did not object to being executed by lethal injection—provided it was administered more humanely—Nance claims that any type of lethal injection would be cruel and unusual because of his particular medical condition. He asks to be executed by firing squad instead—a method not currently permitted under Georgia law. But we faced a nearly identical § 1983 claim only years ago when a death-row prisoner challenged execution via lethal injection, and instead suggested a firing squad as an alternative method. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016). There, we (mistakenly) held in a divided panel that the prisoner failed to state a claim, in part because "firing squad is not a currently valid or lawful method of execution in Alabama." *Id.* at 1316. *But see id.* at 1321–33 (Wilson, J., dissenting) (noting that Utah had recently used the firing squad to execute a prisoner and therefore it was "a potentially viable alternative," so "Arthur may be entitled to relief . . . based on that method of execution").

The majority's holding in *Arthur* turned out to be wrong. *Bucklew v. Precythe*, 587 U.S. ___, 139 S. Ct. 1112 (2019). In *Bucklew*, the Supreme Court made clear

that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Id.* at 1128. A method-of-execution claim can allege that there is "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.* at 1125 (citing *Baze v. Rees*, 553 U.S. 35, 52 (2008); *Glossip v. Gross*, 576 U.S. 863, 868–79 (2015)). And even if applicable state law does not authorize any such option, the prisoner "may point to a well-established protocol in another State as a potentially viable option." *Id.* at 1128. Justice Kavanaugh wrote separately in *Bucklew* to emphasize this point. *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—a legal issue that had been uncertain before today's decision. Importantly, all nine Justices today agree on that point." (citations omitted) (citing *Arthur v. Dunn*, 580 U.S. ___, 137 S. Ct. 725, 729–31 (2017) (mem.) (Sotomayor, J., dissenting))). Shortly thereafter, we acknowledged the obvious: "*Bucklew* demonstrates our conclusion in *Arthur* was incorrect." *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1326 (11th Cir. 2019) (per curiam).

It has since been well-established in our circuit that, not only can a prisoner plead a method of execution not authorized under state law, but § 1983 is the proper avenue of relief, and, as a corollary, such claims cannot be brought in habeas. *See McNabb v. Comm'r Ala. Dep't*

of Corr., 727 F.3d 1334, 1344 (11th Cir. 2013) (explaining that a challenge to the method of execution is properly brought under § 1983 and that issues to be raised in § 1983 are "mutually exclusive" of those to be raised in habeas); *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009) (per curiam) (same); *see also Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006) (similarly explaining that a petition for habeas corpus and a complaint under § 1983 are mutually exclusive).

Consequently, it is not surprising that the State in this case did not even contest that Nance's complaint was cognizable under § 1983. The panel raised the issue sua sponte, just two weeks before oral argument, in an appeal involving death by execution, without giving the parties an adequate opportunity to prepare to address the issue.

The panel majority then dismissed Nance's claim, following the same line of reasoning that the Supreme Court rejected in *Bucklew*—but this time framing the defect as jurisdictional rather than as a failure to state a claim. *Nance*, 981 F.3d at 1203. The majority rationalized its approach using dicta from three Supreme Court decisions. *Nelson*, 541 U.S. at 644 ("In a State . . . where 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." (citation omitted) (emphasis added)); *Hill v. McDonough*, 547 U.S. 573, 579 (2006) (same); *Bucklew*, 139 S. Ct. at 1128 ("[E]xisting state law *might* be relevant to determining the proper

procedural vehicle for the inmate's claim." (emphasis added)).

None of this vaguely worded dicta is irreconcilable with construing a claim like Nance's as a civil rights claim rather than a habeas petition. Even assuming it is possible for a purported method-of-execution claim to cross the line between § 1983 and habeas (perhaps if the record made clear that the prisoner's intent was, in reality, to challenge his sentence itself), there is no support for the majority's view that pleading an alternative not authorized by state law necessarily precludes a claim from proceeding under § 1983, thereby jurisdictionally barring cases like these. If that were so, I find it inconceivable that the Supreme Court would not have said as much when it emphasized that a prisoner can point to an alternative method of execution authorized in another State.

The Supreme Court has had to correct our prior decisions in this arena. I am concerned for this court's credibility if we refuse to listen to the Supreme Court and again must be corrected. At a minimum, the panel's decision will generate confusion in our circuit about how to bring method-of-execution claims. *Nance*, 981 F.3d at 1214, 1223 (Martin, J., dissenting). For these reasons, I would rehear the case en banc to provide much-needed clarity on this issue.

Nance's case also presents a question of exceptional importance necessitating en banc review. We bear great responsibility in overseeing the methods by which a State can kill its citizens. It is a great failure of this court today to ignore the impact of this decision on other death-row prisoners in our circuit. Especially here,

where the stakes are particularly high because this decision would leave prisoners like Nance without a remedy in federal court—no matter how cruel and unusual the state's authorized method of execution might be.[2] The panel majority's holding not only "deprive[s] [Nance] of a claim he ha[s] every right to pursue," *id.* at 1218—it takes that right from death-row prisoners to come. Along with Nance, they too may be executed without their constitutional claims ever making it past the courthouse door.

Nance did everything he was supposed to: he made a colorable claim, alleged sufficient facts, and proposed a viable remedy in accordance with *Bucklew*. But this court told him no anyway, claiming that "[n]o matter how you read it, Nance's complaint attacks the validity of his death sentence." *Nance*, 981 F.3d at 1211. Except, no matter how you read it, it doesn't. There is no constitutional impediment to the State executing Nance by firing squad. This much is clear in light of *Malloy v. South Carolina*, where the Supreme Court held that a legislative change in the mode of execution after a crime has been committed does not constitute an ex post facto violation. 237 U.S. 180, 185 (1915) ("The statute under consideration did not change the penalty—death—for murder, but only the mode producing this . . . ."). Numerous state courts have concluded the same. *E.g.*,

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[2] At oral argument in *Nelson v. Campbell*, Justice Ginsburg expressed her concern with this conundrum through the following hypothetical: "[T]he State tells the inmate that they're going to hang him up by his thumbs and beat him with a whip until he dies." Transcript of Oral Argument at 35, *l*, 541 U.S. 637 (2004). What then would be his remedy?

Ex parte Granviel, 561 S.W.2d 503, 510 (Tex. Crim. App. 1998) (en banc); *State ex rel. Pierce v. Jones*, 9 So. 2d 42, 46 (Fla. 1942); *State v. Brown*, 32 P.2d 18, 25 (Ariz. 1934); *Woo Dak San v. State*, 7 P.2d 940, 941 (N.M. 1932). Therefore, by asking to be executed by firing squad, Nance is not seeking to avoid his execution. He accepts his fate. He does not ask to be spared. Nance asks only that the method by which the State will take his life falls in line with his Eighth Amendment right to be free of cruel and unusual punishment.

The constitutionality of the method of Nance's execution should have weighed heavily on this court. It should have been deemed worthy of en banc review. Sadly, by declining to rehear Nance's case, a majority of the court follows a pattern of employing faulty reasoning to bar relief from inhumane executions. I dissent from the denial of rehearing en banc.

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MICHAEL WADE NANCE, Plaintiff, v. TIMOTHY C. WARD, Commissioner, Georgia Department of Corrections, BENJAMIN FORD, Warden, Georgia Diagnostic and Classification Prison, Defendants.	)	CIVIL ACTION NO.:

COMPLAINT OF MICHAEL WADE NANCE

1. This is an action by Michael Wade Nance seeking to have the court order Defendants not to execute Mr. Nance under their current execution policies and procedures and to enforce Mr. Nance's rights under 42 U.S.C. § 1983 and the Eighth and Fourteenth Amendments of the United States Constitution.

2. Mr. Nance is a death-sentenced prisoner whom Defendants intend to execute by lethal injection.

Mr. Nance's veins are extremely difficult to locate through visual examination, and those veins that are visible are severely compromised and unsuitable for sustained intravenous access. If Defendants attempt to execute Mr. Nance by lethal injection, there is a substantial risk that Mr. Nance's veins will lose their structural integrity and "blow," leading to the leakage of the lethal injection drug into the surrounding tissue. The leakage of the lethal injection drug causes intense pain and burning in the surrounding tissue, and also results in inadequate or inconsistent drug delivery, leading to a prolonged execution that will produce excruciating pain.

3. In addition, Mr. Nance has been taking increasing dosages of prescription gabapentin for several years to treat chronic back pain. Mr. Nance's continuous exposure to gabapentin has altered his brain chemistry in such a way that pentobarbital will no longer reliably render him unconscious and insensate, further creating and exacerbating the substantial risk that Mr. Nance will consciously suffer a prolonged and painful execution.

4. Accordingly, Defendants' current execution protocol presents a substantial risk of serious harm to Mr. Nance that is objectively intolerable, in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Defendants could avoid subjecting Mr. Nance to a gratuitously painful execution by implementing a readily available alternative, namely death by firing squad, which would significantly reduce the substantial risk of severe pain.

THE PARTIES

5. Plaintiff Michael Nance is a United States citizen and resident of the State of Georgia. He is a death-sentenced prisoner currently being held in the custody of Defendants at the Georgia Diagnostic and Classification Prison (the "Prison") in Jackson, Georgia.

6. Defendant Timothy C. Ward is the commissioner of the Georgia Department of Corrections ("DOC"), which is headquartered in Atlanta, Georgia. He is being sued here in his official capacity.

7. As commissioner, Defendant Ward is responsible for the supervision, direction, and execution of operations at the DOC.

8. Ward has a duty to ensure that executions are carried out in compliance with DOC procedure.

9. Ward also has a duty to ensure that executions are carried out in a manner consistent with and not in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

10. Defendant Benjamin Ford is the warden of the Prison. He is being sued here in his official capacity.

11. As warden, Defendant Ford is responsible for the day-to-day operations of the prison.

12. Ford has a duty to ensure that executions are carried out in compliance with DOC procedure.

13. Ford also has a duty to ensure that executions are carried out in a manner consistent with and not in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

JURISDICTION

14. Jurisdiction over this matter arises under 42 U.S.C. § 1983, 28 U.S.C. § 1331, 23 U.S.C. § 1343, 28 U.S.C. § 2201, and 28 U.S.C. § 2202.

VENUE

15. Venue is proper in the Northern District of Georgia under 28 U.S.C. § 1391(b).

PROCEDURAL HISTORY

16. In the Superior Court of Gwinnett County in 1997, a jury convicted Mr. Nance for malice murder and five other crimes and sentenced him to death.

17. On direct appeal, the Georgia Supreme Court affirmed Mr. Nance's convictions but reversed his death sentence.

18. A new sentencing trial in 2002 resulted in a new death sentence, which the Georgia Supreme Court affirmed on direct appeal.

19. Mr. Nance then filed a petition for collateral relief in the Superior Court of Butts County. That court granted him relief from the death sentence after concluding that Mr. Nance had received ineffective assistance of counsel at the resentencing trial. The State appealed.

20. In 2013, the Georgia Supreme Court reversed.

21. At the end of 2013, Mr. Nance filed a 28 U.S.C. § 2254 petition in this Court. In 2017, this Court denied relief but granted a certificate of appealability on two of Mr. Nance's claims: (1) his trial counsel were ineffective in presenting his case in mitigation, and (2) the trial

court erred in requiring him to wear a stun belt during the resentencing trial.

22. On April 30, 2019, the United States Court of Appeals for the Eleventh Circuit rejected Mr. Nance's claims and affirmed the decision by the Georgia Supreme Court.

23. Mr. Nance filed a petition for certiorari review in the Supreme Court of the United States on December 9, 2019. Mr. Nance's petition for certiorari is currently pending before the Supreme Court.

FACTUAL BACKGROUND

A. Georgia's Lethal Injection Procedure.

24. The Georgia Code states that "[a]ll 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." O.C.G.A. § 17-10-38(a).

25. The Georgia Code defines "[l]ethal injection" as "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." *Id.*

26. In conducting an execution, the DOC and the Prison maintain and follow the Lethal Injection Procedures (attached as **Exhibit 1**, hereinafter "Protocol" or "Protocols").

27. The Protocol specifies that a single drug—compounded pentobarbital—is to be used for all lethal injections.

28. Defendants obtain the compounded pentobarbital used in lethal injections from a compounding pharmacy.

29. The identity of the compounding pharmacy that manufactures the pentobarbital for executions is a confidential state secret. O.C.G.A. § 42-5-36(d).

30. The origin and identity of the ingredients used by the compounding pharmacy to manufacture the pentobarbital is also a confidential state secret. *Id.*

31. The compounded pentobarbital used by Defendants to carry out executions is not subject to the Food and Drug Administration's (FDA) drug-approval process or manufacturing standards. Consequently, Defendants' compounded pentobarbital has not met the FDA's standards for quality, potency, purity and stability.

32. Upon information and belief, the compounding pharmacy that manufactures Defendant's compounded pentobarbital does not test the compounded pentobarbital for quality, potency, purity or stability prior to delivering it to Defendants.

33. Since 2015, there have been problems with the quality of the pentobarbital possessed by the State of Georgia for use in executions, including pentobarbital that has appeared cloudy. Because of the secrecy surrounding Georgia's sourcing of the drug, there is no assurance that the quality, potency, purity or stability of the drug is consistent with accepted medical practice or industry standards.

34. The Protocol states that two physicians must be present at the execution to "determine when death supervenes" and "provide medical assistance during the execution." *Id.*

35. The Protocol also requires an "IV Team" to be present for executions. The IV Team must "consist of two (2) or more trained personnel, including at least one (1) Nurse, to provide intravenous access." *Id.*

36. The Protocol also requires an "Injection Team" to be present for executions. The Injection Team consists of "three (3) trained staff members to inject solutions into the intravenous port(s) during the execution process." *Id.*

37. The IV Team is responsible for providing "two (2) intravenous accesses into the condemned. If the veins are such that intravenous access cannot be provided, a Physician will provide access by central venous cannulation or other medically approved alternative." *Id. at 4.*

38. Under the Protocol, members of the Injection Team inject five grams of compounded pentobarbital into the IV from which the drug is delivered to the prisoner. *Id.* at 5. The Injection Team must inject three different syringes—the first two syringes each containing 2.5 mg of pentobarbital, the third syringe containing 60 cubic centimeters of saline. *Id.*

39. The Injection Team is not in the same room as the condemned and administers the pentobarbital remotely through many feet of IV tubing. Upon information and belief, this necessitates the use of several 72-inch extension sets of tubing.

40. This unnecessarily increases the risk of leakage and/or pinching of the tubing, thereby creating a greater risk that the prisoner will not receive the full dose of pentobarbital.

41. Further, the longer the IV tubing, the longer the injected drugs will be in contact with the walls of the tubing. This allows resistance to play a larger role in the overall flow of the drugs and introduces significantly more variation and risk into the process.

42. Also, the only effective means of detecting problems with the IV is to gauge the amount of resistance in the tubing, an assessment that is made more difficult with longer IV tubing. Additionally, the execution team, on information and belief, does not possess the training necessary to gauge this resistance.

43. Thus, the fact that the drug is injected into the IV in another room and must travel through many feet of IV tubing with 60 cubic centimeters of saline before reaching the prisoner's vein creates a substantial risk that the intended fatal dose of pentobarbital is not delivered consistently or completely to the prisoner.

44. Under the Protocol, the Warden is authorized to instruct the Injection Team to administer an additional dose of 5 mg of pentobarbital, and an additional 60 cubic centimeters of saline, if the prisoner still exhibits visible signs of life. *Id.*

45. The Warden is also authorized to repeat the entire process over again, should the prisoner continue to exhibit signs of life after the completion of the injections. *Id.*

46. Georgia has executed twenty-one (21) persons with compounded pentobarbital under the Protocol. The range in duration of the executions spans from at least eight (8) to twenty-seven (27) minutes.

47. The autopsies of at least fifteen (15) of those individuals reveal that each suffered a significant degree of fluid congestion in their lungs, while at least seven (7) experienced fulminant pulmonary edema.

B. Mr. Nance's Severely Compromised Veins.

48. Mr. Nance's veins are severely compromised.

49. When receiving medical attention that requires blood to be drawn, medical technicians have difficulty locating a suitable vein in Mr. Nance.

50. Obtaining and maintaining intravenous access as required in a lethal injection is more invasive and requires far more venous structural integrity than drawing blood.

51. On or around May 2019, a medical technician at the Prison told Mr. Nance that if he were to be executed by lethal injection, the execution team would have to cut his neck to carry out the execution because they would not otherwise be able to obtain sustained intravenous access.

52. Upon information and belief, the medical technician was referring either to a procedure whereby the execution team would obtain sustained venous access through central venous cannulation or a surgical procedure known as a cutdown.

53. Mr. Nance had a physical examination by an anesthesiologist on October 28, 2019.

54. The examination revealed that there are no discernible veins on visual examination in Mr. Nance's forearms or left or right antecubital fossa and that Mr. Nance's lower extremities also lack visible and palpable veins.

55. The insertion of an intravenous catheter into Mr. Nance for a lethal injection will likely require multiple painful needle insertions and blind attempts by the IV team to locate a suitable vein.

56. The veins that are discernible in Mr. Nance, either through sight or touch, are heavily scarred, tortuous, and have thin walls.

57. Insertion of an intravenous catheter into a scarred and tortuous vein is extremely difficult and presents a substantial risk that the vein will "blow" and lose its structural integrity, causing the injected pentobarbital to leak into the surrounding tissue.

58. The medical term for this leakage is extravasation.

59. The extravasation of pentobarbital due to a blown vein would cause Mr. Nance to experience intense and painful burning in the surrounding tissue.

60. The extravasation of pentobarbital due to a blown vein would also lead to incomplete and inconsistent drug delivery to Mr. Nance, which would result in a prolonged and only partially anesthetized execution wherein Mr. Nance would experience the excruciating feeling of suffocating to death.

61. In addition, the fact that, under the Protocol, the Injection Team is not in the same room as the

condemned and administers the pentobarbital remotely through many feet of IV tubing significantly lessens the probability that the Injection Team would even be aware of a blown vein when it occurs, making it very unlikely that the Injection Team could recognize the extravasation and take appropriate action in a timely manner.

C. Alternatives to Intravenous Access.

62. The Protocol specifies central venous cannulation as an alternative method of injection if intravenous access cannot otherwise be established. Exhibit 1, at 4.

63. Central venous cannulation entails inserting a catheter into a central vein located either in the groin, or above or below the clavicle.

64. Central venous cannulation requires adequately trained and experienced medical personnel to locate and catheterize a central vein.

65. Central venous cannulation is a complicated medical procedure which should only be performed by properly trained and experienced medical personnel with access to the necessary tools and equipment. If done incorrectly or imprecisely, the technique risks puncturing arteries, creating a substantial risk that it will result in a torturous and botched execution.

66. If central venous cannulation is not a viable alternative in a particular execution, upon information and belief, the Execution Team will attempt to perform a cutdown procedure.

67. A cutdown procedure entails making a deep incision into the subject's skin to find a blood vessel, which is then cut open to allow for the insertion of a catheter.

68. A cutdown procedure is an extremely painful, bloody, and complicated medical procedure that is rarely used by modern medical professionals.

69. Because cutdowns are so painful and invasive, they are typically performed on a subject who is under deep sedation, not local anesthetic.

70. Even on a sedated subject, a cutdown procedure requires greater skill than either intravenous access or central venous cannulation. Because it is so rarely used by modern medical professionals, most medical professionals have never been trained and do not possess the requisite skill to adequately perform a cutdown.

D. Mr. Nance's Prescription Usage of Gabapentin.

71. Mr. Nance also suffers from chronic back pain.

72. Since April 2016, Mr. Nance has been administered the drug gabapentin to treat his back pain.

73. In April 2019, his dosage increased from 800 mg, three times per day, to 900 mg, three times per day. The dosage recently increased to 1100 mg, three times per day.

74. Prolonged gabapentin use alters a person's brain chemistry and makes the person's brain less responsive, or even unresponsive, to other drugs, including pentobarbital.

75. As a result of his prolonged gabapentin use, pentobarbital's capacity to render Mr. Nance unconscious and insensate during his execution will be diminished.

76. At the same time, pentobarbital's effects on Mr. Nance's respiratory system will remain undiminished, meaning that Mr. Nance will feel the painful effects of the severe respiratory distress and organ failure that occur when pentobarbital is administered for a lethal injection.

77. In addition, if the lethal injection induces pulmonary edema in Mr. Nance, as it has in at least seven (7) recent executions, Mr. Nance will feel his lungs filling with fluid, also resulting in the excruciating sensation of suffocating to death.

CLAIM FOR RELIEF

Defendants' Lethal Injection Protocol as Applied to Mr. Nance Violates His Eighth and Fourteenth Amendment Rights Under the United States Constitution.

78. The Eighth Amendment's prohibition against cruel and unusual punishment forbids methods of execution that involve unnecessary or wanton infliction of pain and present a substantial risk of significant harm.

79. Defendants' current Protocol calls for lethal injection, which requires the insertion of intravenous catheters to administer the lethal drug.

80. Mr. Nance's difficult-to-locate and heavily scarred, tortuous, irregular, and thin veins create a substantial risk of unnecessary and excruciating pain

during efforts to obtain IV access and the administration of the lethal drug.

81. Because Mr. Nance has severely compromised veins, it will be exceedingly difficult, if not impossible, for the IV Team to establish reliable, sustained intravenous access during the lethal injection procedure.

82. If the IV Team attempts to insert an intravenous catheter into Mr. Nance's veins, they will very likely be unsuccessful and will, in the process, cause excruciating pain to Mr. Nance by repeatedly attempting to insert needles into unidentifiable and/or inaccessible veins.

83. Even if the IV Team eventually does obtain intravenous access on Mr. Nance to administer the lethal drug, Mr. Nance's vein will likely lose structural integrity during the execution, leading to extravasation—the leakage of pentobarbital into the soft tissue surrounding the vein.

84. Extravasation can have two severely painful results: (1) an inadequate and/or inconsistent drug delivery, which can cause a prolonged and only partially anesthetized execution; and (2) an intense burning of the tissues surrounding the vein.

85. Assuming the IV Team is even able to find and enter a vein, the risk of extravasation means that Mr. Nance will then be at substantial risk to experience even more intense pain as a result of a prolonged and only partially anesthetized execution as his soft tissue burns within his body.

86. Given the fact that the Injection Team will not be in the same room as Mr. Nance, it is unlikely to even be aware of the fact that extravasation has occurred.

87. In addition, the risk of inconsistent and incomplete delivery of the drug to Mr. Nance because it is being administered through many feet of IV tubing increases the risk of a prolonged and/or only partially anesthetized execution.

88. Poor or reduced quality, potency, purity or stability of the compounded pentobarbital also increases the risk that Mr. Nance will suffer a prolonged and/or only partially anesthetized execution.

89. Any factor that results in a prolonged and/or only partially anesthetized execution will cause Mr. Nance to experience excruciating pain as the pentobarbital suppresses his respiratory functioning and causes his organs to fail.

90. Furthermore, should the attempts to provide intravenous access fail, the alternatives are central venous cannulation or a cutdown. Members of the execution team lack the professional skills, training, and/or necessary equipment to safely and humanely perform these procedures.

91. Regardless of the cause, if the drug is inconsistently or inadequately delivered, or if there is a problem with its quality, potency, purity or stability, Mr. Nance may survive the admissions of the intended lethal dose. If Mr. Nance shows visible signs of life, according to the Protocol, the whole excruciating process will be repeated.

92. Alternatively, a problem with the quality, potency, purity or stability of the drug, or failed or inadequate drug delivery could result in brain damage to Mr. Nance, rather than death.

93. Even if the Defendants' lethal injection drug, pentobarbital, could be humanely and effectively administered to Mr. Nance, his altered brain chemistry resulting from his prescribed use of gabapentin will diminish the efficacy of the drug, which will result in it taking a longer period of time to take effect. The risk of inadequate or inconsistent drug delivery resulting from the many feet of IV tubing and problems with the quality, potency, purity or stability of the drug significantly exacerbate this problem.

94. As a result, Mr. Nance is at a substantial risk of remaining conscious while the pentobarbital suppresses his respiratory system and causes his organs to fail.

95. Central venous cannulation or a cutdown procedure while Mr. Nance is conscious would further subject Mr. Nance to excruciating pain.

96. The pentobarbital injection may also induce pulmonary edema, as is common in Georgia executions. If this occurs, and Mr. Nance is not fully insensate, he will feel his lungs filling with fluid, also resulting in the excruciating sensation of suffocating to death.

97. Individually or in combination, Mr. Nance's medical conditions (including his gabapentin treatment for chronic back pain); the unknown and untested quality, potency, purity and stability of the compounded pentobarbital; the execution team's inadequate skill,

experience, and training; and other problematic elements of the Protocol as applied to Mr. Nance (i.e., long tubing, remote injection, alternatives to intravenous access) are sure or very likely to cause Mr. Nance needless pain and suffering, and put him in imminent danger.

98. There is a substantial and objectively intolerable risk that Mr. Nance will experience severe pain and suffering if DOC and the Prison proceed to execute him by lethal injection under the Protocols, in violation of his Eighth Amendment rights.

99. These risks to Mr. Nance are so substantial and imminent that, if he is executed by lethal injection under the Protocols, the Defendants cannot claim they are subjectively blameless for the purposes of the Eighth Amendment.

100. There is an alternative method of execution that is feasible and readily implemented which will significantly reduce or eliminate the substantial risk of severe pain to Mr. Nance. That alternative method is execution by a firing squad.

101. Execution by use of a firing squad is a known and available alternative method. The Supreme Court has held that the firing squad is a constitutionally permissible form of execution.

102. Since 1976, Utah has carried out three executions by firing squad—most recently on July 18, 2010.[1]

103. Protocols for execution by firing squad are known and available. Utah's technical manual, specifying the state's execution protocol in great detail, is publicly accessible. *See* Technical Manual of Utah Department of Corrections; *see also Utah Brings Back the Firing Squad, So How Does It Work?*, ASSOCIATED PRESS, Mar. 24, 2015.

104. Georgia could easily identify qualified personnel to carry out an execution by firing squad. Furthermore, Georgia already has a sufficient stockpile or can readily obtain both the weapons and ammunition necessary to carry out an execution.

105. Moreover, execution by firing squad is both swift and virtually painless. If performed properly, the use of a firing squad will eliminate the substantial risk of severe pain that Defendants' current execution Protocol presents to Mr. Nance. Evidence and recent experience strongly suggest that the firing squad is significantly more reliable than lethal injection.

106. Accordingly, an execution by firing squad is a known and available alternative method of execution that presents a substantially lower risk of pain and suffering to Mr. Nance than Defendants' Protocols for lethal injection.

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[1] Kirk Johnson, *Double Murderer Executed by Firing Squad in Utah*, N.Y. TIMES, June 19, 2010, at A12.

107. Faced with this viable alternative, if the Defendants refuse to adopt Mr. Nance's proposed alternative, without a legitimate penological justification for adhering to its current method of execution, then it should be viewed as a choice by the Defendants to intensify the sentence of death with a cruel "superaddition" of terror and pain, in violation of the Eighth Amendment of the United States Constitution.

EXHAUSTION OF ADMINISTRATION REMEDIES

108. On November 26, 2019, Mr. Nance filed a grievance with DOC concerning his planned execution by lethal injection under DOC's Statewide Grievance Procedure, Policy No. 227.02.

109. Mr. Nance's grievance is pending, but Mr. Nance's complaints are "non-grievable" under DOC's published grievance policy.

PRAYER FOR RELIEF

For the foregoing reasons, Plaintiff Michael Nance respectfully requests that this Court:

1. Enter a declaratory judgment under 42 U.S.C. § 1983 that Defendants' plans to execute Mr. Nance by lethal injection violate Mr. Nance's rights under the Eighth and Fourteenth Amendments of the United States Constitution;
2. Grant injunctive relief to enjoin the Defendants from proceeding with the execution of Mr. Nance by a lethal injection under 42 U.S.C. § 1983 and

the Eighth and Fourteenth Amendments of the United States Constitution; and,

3. Issue any further relief as it seems just and proper.

Dated: January 8, 2020 Respectfully submitted,

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