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IN THE SUPREME COURT OF THE UNITED STATES

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DAVID L. NELSON, :

Petitioner :

v. : No. 03-6821

DONAL CAMPBELL, COMMISSIONER, :

ALABAMA DEPARTMENT OF :

CORRECTIONS, ET AL. :

- - - - -X

Washington, D.C.

Monday, March 29, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

BRYAN STEVENSON, ESQ., Montgomery, Alabama; on behalf of the Petitioner.

KEVIN C. NEWSOM, ESQ., Solicitor General, Montgomery, Alabama; on behalf of the Respondents.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 03-6821, David Nelson v. Donal Campbell.

Mr. Stevenson.

ORAL ARGUMENT OF BRYAN STEVENSON
ON BEHALF OF THE PETITIONER

MR. STEVENSON: Mr. Chief Justice, and may it please the Court:

6 days before petitioner's scheduled execution in this case, an execution that he had sought and informally requested be -- be carried out as soon as possible, prison officials went to him and for the first time told him that to deal with a medical problem that both parties acknowledged exists, he would be subjected to a procedure that would be conducted by State officials, not necessarily medically trained, not necessarily licensed, where they were going to make a 2-inch incision in his arm, cut through fat and tissue and muscle, until they had a vein that they could access for the purposes of inserting a catheter.

QUESTION: Well, presumably at a much earlier date, the prisoner did know that he -- he was -- he would be scheduled to be executed by lethal injection.

MR. STEVENSON: Absolutely, Your -- Your Honor.

1 QUESTION: And he did know his veins were
2 compromised.

3 MR. STEVENSON: Absolutely, and as soon as he --

4 QUESTION: So -- so presumably in -- well in
5 advance he could anticipate a problem.

6 MR. STEVENSON: Yes, Your Honor, and he did. He
7 immediately began contacting the warden at Holman Prison.
8 He was housed in another facility some 200 miles away. He
9 immediately began contacting the warden at Holman Prison,
10 who had just been installed, who did not know him, and
11 informed him he had this condition, that they would need
12 to create protocols necessary to deal with it.

13 The State admitted that they had never dealt
14 with someone in this condition before and began offering
15 all kinds of things that would accomplish this execution.
16 Let him bring in a physician that can insert a catheter.
17 Let's get some protocols established so that we don't have
18 any problems. And for 6 weeks essentially this effort was
19 being made.

20 He had been previously told that they were going
21 to do this 24 hours in advance, that they weren't going to
22 make this kind of 2-inch incision, and even though he
23 hadn't been assured there would be medical people, he was
24 relatively comfortable with that. He did not file suit.
25 It's only 6 days before for the first time that the State

1 announced they would have this kind of invasive procedure
2 carried out by someone who was not necessarily medically
3 trained.

4 He filed a 1983 action. I think it's important
5 for this Court's judgment here today. The district court
6 found that that 1983 action, if it went in Mr. Nelson's
7 favor, would not invalidate his judgment or conviction.
8 Notwithstanding that conclusion, the district court felt
9 compelled to apply a rule in force in the Eleventh Circuit
10 that effectively shields death row prisoners facing an
11 execution from doing anything that can challenge
12 unconstitutional conditions of -- of confinement.

13 The Eleventh Circuit rule is essentially once
14 you are scheduled for an execution, it doesn't matter that
15 the prison begins to do something and amount to something
16 that -- that is unconstitutional.

17 QUESTION: Well, they're -- they're not saying
18 that. They can bring actions that -- that challenge
19 unconstitutional conditions of confinement. He's being
20 kept in a dank and dark cell that's -- that's cruel and
21 painful. The only thing they're saying he can't bring is
22 -- is an action that, in effect, says I can't be executed
23 the way the State intends to execute me, that that has to
24 have been brought up earlier.

25 MR. STEVENSON: Yes, and -- and I -- I guess

1 that's our --

2 QUESTION: It has -- has to be under habeas
3 rather than under 1983.

4 MR. STEVENSON: Yes. And Your Honor, I -- I
5 guess our position is -- is that this action is like the
6 action that you describe. He is challenging medical
7 treatment, medical procedures. He doesn't say he doesn't
8 want to be executed. He's not trying to block his
9 execution.

10 QUESTION: Well, but it's unlike these other
11 actions in this one crucial respect: its effect is to
12 prevent the execution.

13 MR. STEVENSON: No. I think the effect here was
14 to facilitate the execution. Mr. Nelson went into court
15 saying, let's just get an order so that my doctor can come
16 in and carry this out. Let's just get a temporary
17 restraining order on this 2-inch incision which makes no
18 sense. The -- the court -- the district court judge says,
19 can't you lawyers work this out? Mr. Nelson's counsel was
20 ready then and there to effectuate a procedure that would
21 carry out this execution.

22 And the Eleventh Circuit judgment, Justice
23 Scalia, is actually one that says once the petitioner is
24 scheduled for an execution, it doesn't matter whether it's
25 a conditions of confinement suit as you described, that

1 the Federal courts somehow have no authority to grant
2 relief or conduct review because the execution -- the
3 scheduling of the execution somehow divests those courts
4 of jurisdiction. That's the Eleventh Circuit rule.

5 They didn't argue here that because his
6 litigation, because his lawsuit is, in effect, an attempt
7 to bar the execution, he loses. That's the distinction.

8 What they said here is that because he is
9 already scheduled for execution, it doesn't matter what
10 the conditions of the confinement are, whether it
11 invalidates the conviction and sentence. Federal courts
12 have no authority to grant relief. And that's the rule we
13 urge this Court to overturn.

14 QUESTION: May -- may I get clear on one thing?

15 MR. STEVENSON: Yes, sir.

16 QUESTION: Did he -- did his counsel say to the
17 court, the district court, we want under 1983 an order
18 that says admit this man's doctor to the place of
19 execution at the time the State chooses so he can find a
20 way then and there to allow the State to carry out the
21 execution when it wants to do it? Did he ask for that?

22 MR. STEVENSON: Well, what he asked for -- what
23 -- what he -- what he put in his complaint was that he had
24 made that offer to the State, and that was in his
25 complaint, that -- that the defendant's counsel had

1 authorized or requested the opportunity to bring in a
2 physician to facilitate a review --

3 QUESTION: Is that what he was asking for when
4 he went into court?

5 MR. STEVENSON: Well, what he was asking for is
6 an injunction barring them from doing this kind of 2-inch
7 incision, but yes, he made it very clear in the
8 complaint --

9 QUESTION: Was it made clear to the district
10 court that he would be satisfied with the order I have
11 just described?

12 MR. STEVENSON: Only to the extent -- yes, I
13 believe so, Your Honor, because when the district court
14 said, can't you work this out, Mr. Nelson's counsel said,
15 yes, I think we can.

16 QUESTION: Did -- did he ask for a postponement
17 of the execution?

18 MR. STEVENSON: He did, Your Honor. He did, and
19 that was in part because the State was, at least at the
20 point at which this lawsuit was filed in, saying that this
21 is what they were going to do in -- in the absence of some
22 kind of Federal intervention.

23 QUESTION: What would have been the terms of the
24 postponement that you were asking for?

25 MR. STEVENSON: I -- I think the district court

1 could have basically issued a cease and desist order. You
2 are enjoined from doing this kind of conduct because it
3 violates contemporary standards of medical decency.

4 QUESTION: Would it have been sufficient to say,
5 don't -- postpone it until you admit the doctor to be
6 present and get the catheter in?

7 MR. STEVENSON: I -- I think it could have been
8 sufficient to say I'm going to order that his physician be
9 admitted into the facility. I'm going to order that you
10 accomplish this through the method proposed by
11 petitioner's counsel. I think all of those things could
12 have been done, but the district court here felt like he
13 did not have the authority to actually deal with this in
14 the 1983 context.

15 QUESTION: Was it that -- before, Mr. Stevenson,
16 you said that nothing that the prisoner requests, once the
17 date of execution is set, is actionable in 1983. But I
18 thought that the Eleventh Circuit made a distinction
19 between a proceeding that would require a stay of the
20 execution. If he says that prior to the execution I'm in
21 -- in a dark, dank cell, that would be actionable so long
22 as he's not seeking to postpone the date of the execution,
23 as I understand it.

24 MR. STEVENSON: And I guess here, Your Honor,
25 what we think is that when the prison waits until 6 days

1 before the scheduled execution -- a complaint can only be
2 filed 3 days before the scheduled execution -- a
3 determination of whether what the prison is proposing is
4 unconstitutional or not cannot ordinarily --

5 QUESTION: He -- he didn't -- he didn't know
6 before that that -- that this was --

7 MR. STEVENSON: No, Your Honor.

8 QUESTION: -- the procedure they were going to
9 use?

10 MR. STEVENSON: No, Your -- he had been told
11 before that they were going to do something 24 hours in
12 advance. It was only on the Friday before the Thursday --

13 QUESTION: When they're going to do it is not
14 the issue. It's what they're going to do.

15 MR. STEVENSON: Well, yes, that's -- he was told
16 for the first time on that Friday, 2-inch incision in the
17 arm, not necessarily done by someone medically trained.
18 That presented a very different kind of --

19 QUESTION: But he -- he knew that -- that
20 something special had to be done with respect to him
21 because he had these compromised veins. Didn't he?

22 MR. STEVENSON: Absolutely. And -- and the
23 record reflects that there were repeated efforts on the
24 part of Mr. Nelson's counsel to get the State to -- to
25 deal with it.

1 QUESTION: How -- how long ago was the
2 conviction for which he was condemned to -- to death?

3 MR. STEVENSON: The conviction was 1978. The
4 death sentence is 1994. He spent a lot of years on death
5 row under an illegal death sentence that the Eleventh
6 Circuit overturned in 1993.

7 QUESTION: The crime was committed when?

8 MR. STEVENSON: In 1978. The death sentenced
9 imposed here was committed in 1994, and it's worth noting
10 that even then Mr. Nelson was very, very sort of unsure
11 about fighting a death sentence. He told the judge he
12 wanted a death sentence. No appeal briefs were filed into
13 the Alabama appellate courts. The --

14 QUESTION: Did -- did you at any point shape
15 your claim for relief in the alternative, saying we want
16 either habeas corpus or 1983? Or do we take this case on
17 the assumption that almost everybody agrees it has to be
18 1983?

19 MR. STEVENSON: Well, no, it was not styled as a
20 habeas action, in part because the Eleventh Circuit rules
21 would have prevented us from ever getting review in this
22 Court or any other court if it had been framed in that
23 way.

24 QUESTION: Is that -- is that correct? If -- if
25 we had to do this in a circuit with no precedents, could

1 you argue that this would be -- could be habeas? It's not
2 successive because it's -- the issue hasn't come up
3 before?

4 MR. STEVENSON: Well, yes. There -- there
5 certainly -- it's certainly true that other circuits,
6 Justice Kennedy, apply this Court's doctrine in *Stewart v.*
7 *Martinez* where a claim, an execution claim, not previously
8 ripe, can be subject to habeas review. The Eleventh
9 Circuit doesn't. Their position expressed in *In re Medina*
10 is that if it wasn't in your first habeas, it can't be
11 presented.

12 QUESTION: Well, what does the statute say? It
13 says it has to be not only not previously ripe -- you
14 didn't have the information -- but also the statute says
15 it has to show that he was innocent.

16 MR. STEVENSON: Yes. And that's why we -- we --

17 QUESTION: So why isn't that conclusive here? I
18 mean, it -- it doesn't meet the second condition.

19 MR. STEVENSON: Well, absolutely. It's -- it's
20 certainly conclusive, Justice Scalia. It could not be --

21 QUESTION: Well, of course, that's assuming it's
22 successive.

23 MR. STEVENSON: That's right. That's right. It
24 certainly would not be a successive petition. What we
25 would be arguing is what this Court has already held, that

1 an unripe execution claim of this sort, of a competency to
2 be executed claim, which this Court held in Stewart was
3 cognizable would be proper. In the Eleventh Circuit
4 that's not possible.

5 QUESTION: But you don't have to go that far, do
6 you?

7 MR. STEVENSON: We do not. We do not.

8 QUESTION: Because ripeness could be a merely
9 evidentiary matter, whereas in this case, you did not have
10 a claim that you could bring --

11 MR. STEVENSON: Absolutely.

12 QUESTION: -- at the time. So this is more than
13 just ripeness.

14 MR. STEVENSON: Absolutely. And -- and, Justice
15 Souter, I think you're absolutely right. Here, where
16 you're not trying to do something that invalidates a
17 conviction and sentence, it's not arguably appropriate to
18 be thinking about this in the habeas context.

19 2241(c) says that to grant habeas relief, the
20 petitioner has to allege that the conviction and sentence
21 is illegal, is in violation of the Constitution. That's
22 not Mr. Nelson's contention here.

23 QUESTION: Would you say -- would you be making
24 the same argument if his complaint was not this inch cut
25 but the combination of chemicals?

1 MR. STEVENSON: No, Your Honor. I think that's
2 a much -- a much harder question because that does, it
3 seems to me, get closer to the execution. What's
4 analogous to our claim is a claim where the prison says a
5 week before the execution that we're going to and
6 effectively shackle you to a hitching post and not give
7 you any food for 72 hours. We contend that that kind of
8 treatment would be in violation of the Constitution. What
9 we'd be trying to block is that treatment, not the
10 execution. The reality is in this case --

11 QUESTION: Well, I mean, you know, as you know,
12 we've -- we've turned down certiorari in -- in these cases
13 challenging the type of drug used. What -- what is the
14 difference between, you know, your using a drug that's --
15 that's going to hurt me and your using a catheter
16 procedure that's going to hurt me? I don't --

17 MR. STEVENSON: I think the primary difference,
18 Justice Scalia, is that those are a method of execution
19 cases. They are challenging the method of execution.
20 Here we have a procedure that is not even unique to
21 executions.

22 QUESTION: Well, but --

23 MR. STEVENSON: Venous access can --

24 QUESTION: -- they're -- they're not challenging
25 the method of execution. If you want to execute me by

1 drugs, they're saying, that's perfectly fine, just don't
2 use a drug that hurts me.

3 MR. STEVENSON: Well, it's -- it's --

4 QUESTION: And just as here, you're saying if
5 you want to execute me by lethal injection, that's fine,
6 just don't use a manner of lethal injection that hurts me.
7 I find it very difficult to separate the two --

8 MR. STEVENSON: Well, I guess --

9 QUESTION: -- categories of case.

10 MR. STEVENSON: It's not clear, Your Honor, that
11 in all of those cases that they are saying if you want to
12 use a different drug, that's okay. I think that that's
13 one distinction.

14 I think the second distinction is that an order
15 -- particularly in States that have statutes dictating
16 which chemicals can be used, in those cases it may be
17 easier for a court to find that an order in that case does
18 invalidate the sentence.

19 Here we have a completely severable procedure.
20 We have something that is not in any way required by the
21 execution. And -- and the State is saying we want to do
22 it this way, and there are 100 other ways that it can be
23 done. And in fact, it's just the discretionary conduct of
24 the State prison officials that puts us in this situation.

25 QUESTION: Well, was it -- was it any more than

1 the presence of his own doctor to make the cut that he --
2 he was asking for?

3 MR. STEVENSON: No, Your Honor, and it wasn't
4 even -- he wasn't even insisting on that. He was prepared
5 to have their doctor come in. He was promised a doctor
6 when he got to the prison. He never saw one. There was
7 never a physical -- never a doctor to examine him.

8 QUESTION: Well, but this isn't a contract
9 action.

10 MR. STEVENSON: No, no, Your Honor. I'm just
11 suggesting that there was -- he wasn't insisting on this
12 being carried out in one way. There were dozens of -- of
13 offers of -- of carrying this out, including being
14 executed by electrocution, something else that the State
15 rejected as -- as an option for him.

16 QUESTION: But he did -- he did want more than a
17 doctor. He didn't want this procedure to be used when
18 there was an alternate procedure that would be safer, less
19 painful?

20 MR. STEVENSON: Yes. It's our position that
21 this procedure is unconstitutional. It does not comport
22 with contemporary standards of medical decency. It's a
23 procedure that is rarely done. When it's done in the
24 hospital, it's under deep sedation. That there are all of
25 these alternative procedures that could be done very

1 easily. A percutaneous insertion would be very easy to
2 accomplish. There are a lot --

3 QUESTION: Doesn't that require a cut as well?

4 MR. STEVENSON: No, ma'am. It -- it would just
5 require a -- a needle, a hollow needle, with a wire
6 inside. And -- and they would then access the vein that
7 way. It wouldn't require the kind of incision and all of
8 the kind of auxiliary support systems.

9 QUESTION: But that sounds to me more like the
10 mode of execution with the -- with the drugs that you said
11 was distinguishable.

12 MR. STEVENSON: No. They wouldn't effectuate
13 the injection that way. They would just actually get
14 access to the vein that way. And -- and this could be
15 done, Your Honor, 24 hours in advance. It could be done
16 some time in advance. There was no objection expressed by
17 Mr. Nelson in any of the lower courts to that procedure.

18 But again, all of these issues we never got to
19 in the district court. There was never any opportunity to
20 develop facts, to have discussion, to have argument to
21 resolve a basic problem.

22 QUESTION: If a challenge is brought to the use
23 of lethal injection as a method of execution, how must
24 that be brought? In habeas?

25 MR. STEVENSON: Yes. My position, Justice

1 O'Connor, would be if I'm representing someone, I would
2 put that in a habeas mostly because that's -- there is
3 some historical precedent for those kinds of challenges
4 coming in habeas. I think you are, in effect, saying that
5 the sentence is invalid. It -- it should not be carried
6 out.

7 QUESTION: This comes close because you say it's
8 unconstitutional to proceed with lethal injection under
9 these circumstances.

10 MR. STEVENSON: No. We tried really hard to not
11 say that. What we say, it is unconstitutional to proceed
12 with venous access in this manner, to conduct medical care
13 in this manner. It violates recognized standards of
14 medical care. And that's what we're saying you cannot do.
15 We have no objection. Mr. Nelson doesn't object to lethal
16 injection. He doesn't even object to venous access. What
17 he objects to is some kind of inhumane cutting by people
18 who are not qualified or competent to do that.

19 And like any other condition of confinement, the
20 fact that he is near an execution, the fact that he has
21 been scheduled for an execution shouldn't exempt him from
22 protection if the State at the last minute announces that
23 this is what they intend to do. This has not historically
24 been a big problem. There have been over 700 executions
25 in this country involving lethal injections.

1 QUESTION: What is -- as a lawyer who works in
2 this area, what do you think is the correct procedure that
3 should be followed in respect to Ford mental incompetence
4 claims or general challenges to a whole big method of
5 execution not just this individual one which arise for the
6 first time after termination of a first habeas?

7 MR. STEVENSON: Well, Justice Breyer, I -- I
8 think you're right. There is a problem. We do have a gap
9 in the law in that the Congress did not contemplate the
10 possibility of execution claims that arise just as you
11 describe.

12 In the competency context, this Court created a
13 rule, which I think is a very functional rule. I think it
14 is a very appropriate rule. If the facts supporting that
15 claim were not ripe previously, I think that -- and it's a
16 legitimate execution-related claim, I think the petitioner
17 should be able to get access in front of the district
18 court judge that reviewed his initial habeas petition. I
19 think that's the way we should deal --

20 QUESTION: Yes, that may be. So what's the
21 procedural route? That's why I'm curious.

22 MR. STEVENSON: Yes.

23 QUESTION: This fits into a bigger picture.

24 MR. STEVENSON: Yes, yes.

25 QUESTION: And I'd like to be clear about the

1 bigger picture --

2 MR. STEVENSON: Yes. The big --

3 QUESTION: -- in your opinion.

4 MR. STEVENSON: Yes. The bigger picture in my
5 judgment, Your Honor, would be it would be filed as a
6 habeas petition in front of that district court judge
7 relying on this Court's --

8 QUESTION: And -- and you say that it would be
9 -- count as a first habeas.

10 MR. STEVENSON: Well, it would be part of the
11 first habeas. It would --

12 QUESTION: Well, what the -- what the response
13 to that is it's very hard to reconcile that with the
14 language of the statute.

15 MR. STEVENSON: Well, what the --

16 QUESTION: And -- and also they add that the
17 right route is to file an initial habeas here or,
18 alternatively, to go to the State court, at least if
19 that's still open.

20 MR. STEVENSON: Yes. And --

21 QUESTION: In which case it raises no
22 constitutional question about blocking habeas because we
23 could review the State court. I'd just like briefly your
24 views on that kind of an argument.

25 MR. STEVENSON: Yes, sir. Well, in Stewart,

1 what this Court did was resolve it by saying, no, Congress
2 did not intend to preclude petitioners with legitimate
3 execution claims from getting that. This Court has
4 created those protections. I think --

5 QUESTION: Was there -- was there anything open
6 to this petitioner in the State for an application for
7 relief here?

8 MR. STEVENSON: No, Justice O'Connor,
9 unfortunately not. In Alabama you cannot present a second
10 post-conviction petition even on claims that -- that turn
11 on new evidence. On execution claims, on new evidence
12 claims, you have no remedy. And consequently, we would
13 need access to the Federal courts to protect Mr. Nelson
14 from the kind of claim that we're presenting here or even
15 in the kind of claims that Justice Breyer is suggesting.

16 And that's why we do think there is a problem.
17 It's not presented precisely in this case. There is a
18 problem with the way in which there are these execution
19 claims. If some State says tomorrow, we're going to
20 change our method and from here on out, we're going to
21 stone people to death or beat them to death with baseball
22 bats, and this Court believes that that is
23 unconstitutional, in a place like Alabama, to the extent
24 that -- that the Court construes that as an execution
25 claim -- and that's the only way they could carry out the

1 execution, so it might be said that that would invalidate
2 the conviction and sentence -- we would need a rule. We
3 would need to find some way to get access to courts, and
4 we currently don't have it.

5 Here --

6 QUESTION: Your -- your claim here is an Eighth
7 Amendment claim, cruel and unusual punishment.

8 MR. STEVENSON: Yes, sir.

9 QUESTION: Right?

10 But -- but you say it just doesn't comport with
11 what? The -- the most advanced medical procedures?

12 MR. STEVENSON: No, Your Honor.

13 QUESTION: Anything that does not comport with
14 the most advanced medical procedures is cruel and unusual
15 punishment?

16 MR. STEVENSON: That --

17 QUESTION: I mean, you know --

18 MR. STEVENSON: No, I hear you. I hear you.

19 QUESTION: -- this man is -- is looking death in
20 the face.

21 MR. STEVENSON: Sure.

22 QUESTION: And -- and the crime was committed
23 over a quarter of a century ago for which he was -- he was
24 condemned. And -- and what he's really concerned about is
25 -- is an incision? I find it difficult to contemplate

1 that this constitutes cruel and unusual punishment.

2 MR. STEVENSON: Well, Your Honor, it's not our
3 position that he is seeking and -- and demanding the most
4 advanced procedures. What I think he is objecting to is
5 something that we regard as fairly barbaric, to have a
6 correctional staff member come back with a scalpel, make a
7 2-inch cut in his arm, cut through fat and tissue to get
8 to a vein with no assurances that that person knows what
9 they're doing, violates the basic standards of medical
10 decency.

11 And it's not just a cruel and unusual
12 punishment. This Court has created a line of cases under
13 *Estelle v. Gamble* that talk about deliberate indifference
14 to serious medical needs. This is a medical care case.
15 Yes, he's in prison. Yes, he's on death row. Yes, he's
16 forfeited some of his basic expectations, but he hasn't
17 given them all away. He's still entitled to be treated
18 with some regard.

19 QUESTION: You're saying it's -- it's not the
20 Eighth Amendment. You're saying it's a medical care case.

21 MR. STEVENSON: No. It's -- it's both. We --
22 the complaint raises both the cruel and unusual theory and
23 a deliberate indifference theory. Both are alleged in the
24 complaint.

25 QUESTION: It just doesn't fit under deliberate

1 indifference somehow. It's a little bit like the case
2 that the court of appeals decided that you couldn't use a
3 lethal injection because it hadn't been approved by the
4 FDA.

5 MR. STEVENSON: I -- I agree, Mr. Chief Justice.
6 I think it -- it fits more in the cruel and unusual
7 category because it seems so pointless to be doing it in
8 this way. However, for all of this time, there -- there
9 was no protocol. There was no response. There was no, in
10 effect, effort by the State to deal with this problem and
11 that's why we -- we made that allegation of deliberate
12 indifference as well. And the district court could make a
13 determination that says, no, following this case -- this
14 line of cases, we -- we can't make that determination.

15 But here, we never got to any of this. We
16 didn't basically have an opportunity --

17 QUESTION: But your deliberate indifference
18 claim is also an Eighth Amendment claim, isn't it?

19 MR. STEVENSON: Yes, sir. Yes, yes, yes.
20 That's correct. And so we're still dealing with this --
21 the Eighth Amendment universe.

22 But again, the district court was precluded from
23 getting to any of this. If the State wants to come in and
24 say, we think this is silly, we think it is not
25 appropriate for the Constitution to create these kinds of

1 protections for these kinds of prisoners, the district
2 court can make a finding that says, I agree. What
3 happened here, however, was the district court was
4 precluded from ever even engaging in discussion about this
5 issue because of this rule that, in effect, blocks people
6 on death row facing execution and enforcing basic
7 constitutional protections. And that's what we think is
8 objectionable.

9 There are several hundred executions that have
10 taken place, 733, lethal injections that have taken place,
11 where this has not been a problem. This is an -- an
12 unusual medical problem. It's not a medical problem that
13 usually presents itself, but it presented itself for the
14 first time in Alabama. It's only come up a few times.
15 But we do think there ought to be some constitutional
16 protection.

17 QUESTION: When -- when did Alabama switch from
18 electrocution to lethal injections?

19 MR. STEVENSON: That happened in July of 2002,
20 after Mr. Nelson had already completed his Federal habeas
21 procedure.

22 QUESTION: And before that, electrocution was
23 the only option?

24 MR. STEVENSON: Yes, sir.

25 Unless there are further questions from the

1 Court, I'd like to reserve the rest of my time.

2 QUESTION: Very well, Mr. Stevenson.

3 Mr. Newsom, we'll hear from you.

4 ORAL ARGUMENT OF KEVIN C. NEWSOM

5 ON BEHALF OF THE RESPONDENTS

6 MR. NEWSOM: Mr. Chief Justice, and may it
7 please the Court:

8 I'd like to make three points this morning.

9 I'd like to first discuss and to convince the
10 Court that a challenge to a State's means of gaining
11 venous access for purposes of accomplishing a lethal
12 injection, a challenge that runs to the very core of the
13 execution process, is indeed tantamount to a challenge of
14 the imposition of the sentence itself and subject to
15 habeas corpus restrictions.

16 I hope also to -- to be able to address the
17 remedies issue, which we were discussing with Mr.
18 Stevenson at the end of -- of his argument.

19 And third, I'd like to discuss the practical
20 consequences of a decision in Nelson's favor in this case,
21 which I think will be not only to unleash in Federal
22 courts a torrent of -- of new challenges to all manner of
23 State execution procedures, but also in the process,
24 fundamentally to undermine Congress' intent to stem the
25 tide of what President Clinton in his signing statement

1 called endless death row appeals.

2 QUESTION: On the -- on your first point, are
3 you going to address directly whether this is second or
4 successive?

5 MR. NEWSOM: I can certainly address that, Your
6 Honor, and I can address it now, if you'd like.

7 QUESTION: Yes.

8 MR. NEWSOM: We simply cannot agree with -- with
9 -- with Mr. Stevenson's contention here that this is
10 second or successive, and I would like to point out to the
11 Court that I -- that I think --

12 QUESTION: He says it's not.

13 MR. NEWSOM: I'm sorry. That -- that is not
14 second or successive. I'd like to point out to the Court
15 that I think in fact there is a concession on the record
16 in this case that it, in fact, is second or successive.
17 Mr. Stevenson, of course, has -- has given the Court
18 essentially a two-page footnote in his brief trying to
19 walk away from --

20 QUESTION: You mean if it's treated as habeas.

21 MR. NEWSOM: Correct. Our -- correct. Our
22 position, of course, is that this -- that this sort of
23 challenge is fundamentally a habeas challenge, and in
24 answer to Justice Souter's question, I think that there is
25 a concession on the record. Of course, this -- this

1 issue, the second or successive issue, was not raised in
2 the lower courts. It was raised for the first time in --

3 QUESTION: Well, it wasn't raised because he
4 brought 1983. But, I mean, as I understand the -- the
5 application of the Alabama rule, 1983 was ruled out
6 because this either should have been brought in habeas or
7 if it had been brought in habeas, it would have been
8 barred under AEDPA, and it would have been barred under
9 AEDPA, because it was second or successive. So I think
10 regardless of -- of how we analyze it, we've got to get to
11 that point.

12 MR. NEWSOM: And our position certainly is, Your
13 Honor, that this would have been barred as second or
14 successive. I think Justice Scalia really hit the nail on
15 the head. It is -- Mr. Stevenson, in his argument, just
16 has not done business, I think, with the textual and
17 structural gymnastics required to -- to make this petition
18 anything other than second or successive. His position,
19 in essence, is that any claim that is new, in the sense
20 that it could not have been brought before, is by
21 definition not second or successive.

22 QUESTION: Well, isn't that a possibility? In
23 other words, one of the things we've got to do is -- is
24 give effect to the -- to the AEDPA text. We can give
25 effect to the -- I'm not saying that we should read it

1 this way, but we could give effect to the AEDPA text if we
2 say that regardless of whether a claim was ripe or not as
3 a factual matter, so long as there is new evidence,
4 whatever new means, the evidence is -- is not going to
5 entitle him to relief unless it satisfies the -- the
6 innocence prong at the end of the test. We could say that
7 and at the same time say, all right, that's how we give
8 effect to AEDPA.

9 But if there is something more than ripeness,
10 which makes the difference between bringing the claim and
11 not bringing the claim, then that goes to whether we
12 should regard it as second or successive. There is
13 something more here because this is a claim which simply
14 did not arise. He could not have pleaded this claim at
15 any point prior to the conclusion of -- of his habeas, and
16 for that reason, we should interpret second or successive
17 as not barring this because otherwise we would have a
18 universe of claims, assuming they are proper habeas
19 claims, that could never be brought even though they state
20 a constitutional claim.

21 MR. NEWSOM: My own sense, Justice Souter, is
22 that that might just be slicing the bologna a little thin.
23 Congress -- the -- the point of section 2244 in my view is
24 certainly to get at claims that, for whatever reason,
25 could not have been brought earlier, and I think the --

1 QUESTION: But that's -- that's fine, but I
2 mean, that's a conclusory statement: for whatever reason.
3 What I'm suggesting to you is that this is a good reason
4 to say that the term, second or successive, does have some
5 limiting effect.

6 MR. NEWSOM: Perhaps, but I think that we are
7 coming awfully close simply to -- to reading the
8 limitations that Congress imposed on these sorts of
9 petitions out of the statute.

10 QUESTION: If Congress felt that way, they
11 simply wouldn't have added the second condition.

12 MR. NEWSOM: That's certainly the position
13 that --

14 QUESTION: They would have just said the facts
15 -- the factual predicate for the claim could not have been
16 discovered previously through the exercise of due
17 diligence. That describes a situation in which there's no
18 way that the person could have brought the constitutional
19 claim.

20 MR. NEWSOM: That's precisely --

21 QUESTION: But Congress didn't leave it there.
22 It went on to add (ii), the facts underlying the claim
23 would -- would show that the applicant is not guilty of
24 the underlying offense.

25 MR. NEWSOM: Which is exactly the point that I'm

1 trying to make about stripping out the limitations. In
2 section 2244 --

3 QUESTION: Except that to -- in order to make
4 that point, you have to assume that Congress was adverting
5 to this problem, and you have to assume that the words,
6 second and successive, could -- could simply have been --
7 or the word subsequent could have been inserted in place
8 of second or successive, which in fact is -- is a set of
9 phrases that -- that are terms of art.

10 MR. NEWSOM: Well --

11 QUESTION: So I think -- I think the argument is
12 a stretch.

13 MR. NEWSOM: It -- it -- I -- I think it is not
14 the case, Your Honor, that -- that second or successive is
15 a term of art in the sense that -- that AEDPA in section
16 2244 merely incorporates the old abuse of the writ
17 doctrine as -- as this Court made --

18 QUESTION: It doesn't necessarily incorporate
19 the old abuse of the writ doctrine, but it seems to me
20 that it does allude to a body of law by which we made --
21 because there was no other law involved, we had to draw
22 conclusions as to whether it was appropriate or not
23 appropriate to bar this claim. That's the kind of art
24 that those words plug into. If they did want to plug into
25 that, all they had to use was a neutral word like

1 subsequent.

2 MR. NEWSOM: Again, Your -- Your Honor, I -- I
3 feel like clearly I'm not convincing you, but I think that
4 -- that we are -- that the Court would be coming
5 awfully --

6 QUESTION: Convince the others.

7 (Laughter.)

8 MR. NEWSOM: -- that the Court -- the Court is
9 certainly coming awfully close to simply stripping out the
10 limitations on the statute --

11 QUESTION: What -- what should happen?

12 QUESTION: Isn't -- isn't (B)(i) a description
13 of what our prior successive habeas --

14 MR. NEWSOM: The -- the --

15 QUESTION: -- law was?

16 MR. NEWSOM: The Court --

17 QUESTION: The first condition alone: the
18 factual predicate for the claim could not have been
19 discovered previously through the exercise of due
20 diligence.

21 MR. NEWSOM: That's absolutely right, and
22 that --

23 QUESTION: Isn't that a fair description --

24 MR. NEWSOM: -- that's the --

25 QUESTION: -- of what our prior second or

1 successive law was?

2 MR. NEWSOM: I -- I --

3 QUESTION: And Congress rejects that by adding
4 to it a new -- a new number (ii).

5 MR. NEWSOM: Precisely.

6 QUESTION: So it's impossible to say that it was
7 -- it was simply embracing our prior law.

8 MR. NEWSOM: Which is precisely the point we
9 tried to make in our brief, that under --

10 QUESTION: Well, so can it be brought as a 1983
11 action?

12 MR. NEWSOM: I don't think it can, Your Honor,
13 and -- and I --

14 QUESTION: And why not?

15 MR. NEWSOM: -- I hope I can convince why it
16 can't. I'd like to start by addressing that position with
17 Mr. Stevenson's concession here this morning that he has
18 reiterated, that the chemical composition claim indeed is
19 subject to habeas corpus restrictions. Of course, he
20 seeks to distinguish his own claim from the chemical
21 composition claim on the basis, he says, that his claim
22 does not challenge the sentence itself, but merely a
23 separate and unnecessary procedure. But the procedure he
24 challenges is a procedure for gaining venous access. It
25 goes without --

1 QUESTION: Well, there are other ways to do
2 it --

3 MR. NEWSOM: Well --

4 QUESTION: -- is his point. And it is a little
5 curious that the State isn't willing to talk to the
6 prisoner's counsel about considering one of the other ways
7 of doing it. Why is that?

8 MR. NEWSOM: Well, let me just -- if I could
9 answer in two parts.

10 First, I think frankly that -- that on the
11 record in this case, he's just not right about that. The
12 record at pages 91 and 93 of the joint appendix makes
13 clear that the specific procedure that he has challenged
14 here, this cut-down procedure, will be used only as a last
15 resort in the event that other means of gaining venous
16 access --

17 QUESTION: Well, does that mean that -- what is
18 the description of the other? The --

19 MR. NEWSOM: The percutaneous central line
20 placement.

21 QUESTION: Percutaneous. Is that something the
22 State is prepared to use first?

23 MR. NEWSOM: By all means. And that's part of
24 the irony of this case.

25 QUESTION: And you make that assurance to us

1 today.

2 MR. NEWSOM: Oh, absolutely. And -- and in
3 fact, the -- the affidavits that we filed make that
4 assurance.

5 QUESTION: That will be attempted.

6 MR. NEWSOM: Yes. And -- and let me just be
7 clear that -- that the State, of course, has outlined a
8 three-step process in this case. Steps one and two are a
9 central line placement in the femoral vein and a central
10 line placement in the jugular vein in the neck. Both of
11 those, in essence, are percutaneous central line
12 placements. So the parties are in agreement here that the
13 first two procedures attempted should, in fact, be
14 percutaneous central line placement.

15 This cut-down procedure comes into play only in
16 the event that those two procedures fail and as a last
17 resort must be used to accomplish the sentence.

18 QUESTION: Are you sure, Mr. Newsom --

19 QUESTION: Mr. Newsom, can I ask you a -- a
20 hypothetical question? Because -- assume there's merit on
21 the -- to the -- assume -- assume you have a case in which
22 a week before the election -- the execution the State
23 tells the inmate that they're going to hang him up by his
24 thumbs and beat him with whips until he dies. And he
25 never expected that. What is his remedy in the -- in your

1 circuit and in Alabama for trying to stop that?

2 MR. NEWSOM: Well, the important point here --
3 and I --

4 QUESTION: If -- if any. Is there a remedy?

5 MR. NEWSOM: Sure, absolutely. And I can't
6 agree, of course, with Mr. Stevenson's description of
7 Alabama law. I think that there very clearly are remedies
8 in the State courts, and his argument essentially asks the
9 -- this Court to ignore those -- the entire State system.

10 With respect to two of the remedies --

11 QUESTION: What would the remedy be in Alabama?
12 It would be a habeas corpus proceeding?

13 MR. NEWSOM: Well, he is, of course -- I -- I
14 should just be careful about how I answer this question.
15 There is an Alabama procedure called a rule 32 petition
16 which is -- is, in effect, a -- a State habeas petition to
17 challenge things like this. And his -- his position in
18 his reply brief is that -- that a rule 32 petition would
19 have been time barred. That may be true now, but it was
20 not true as of the time that he filed this petition.

21 QUESTION: Well, let's assume he -- assume he's
22 denied relief in the Alabama courts. What can he do? Can
23 he get into Federal court?

24 MR. NEWSOM: May I just --

25 QUESTION: And if so, how?

1 MR. NEWSOM: May -- may I continue with the
2 Alabama courts just on a minute because that's not --
3 that's not -- I'm not done with the Alabama courts, in
4 essence. I mean, there -- there are other remedies that
5 we've outlined in --

6 QUESTION: But you -- you said if this happened
7 today, that rule 32 procedure would not be available.

8 MR. NEWSOM: I think very arguably. It comes
9 down frankly to how you -- at -- at what point that the
10 statute of limitations begins to run. Our position, of
11 course --

12 QUESTION: The law wasn't changed. You just say
13 more time has gone by, that -- that he could have brought
14 a rule 32 at the time, but he can't now because more time
15 has gone by. Is that your point?

16 MR. NEWSOM: Rule 32 statute of limitations is a
17 -- is a 6-month statute of limitations that begins running
18 at the time new -- a new factual predicate is discovered.

19 QUESTION: I see.

20 MR. NEWSOM: That -- that -- if -- if the
21 statute began to ran -- began -- began to run, as -- as we
22 would say, on August 19th of 2003, when the record at
23 pages 25 and 26 of the joint appendix makes plain that he
24 knew that a cut-down was a possibility as a means of
25 gaining access to his veins, then yes, that statute has

1 expired.

2 If, as Mr. Stevenson has pointed out to the
3 Court today, that statute began to ran not -- began to run
4 -- why do I keep saying that -- began to run on October
5 3rd of 2003, then the truth is he has 4 or 5 more days to
6 file that rule 32 petition.

7 But I want to get to the other remedies, if I
8 can.

9 QUESTION: Can he -- can he get a stay?

10 QUESTION: Well, I'm not really so much
11 interested in the State remedy. I assume that an Alabama
12 judge says it was a terrible crime, he deserves that
13 punishment. And now what does he -- can he get into
14 Federal court?

15 MR. NEWSOM: He can get into --

16 QUESTION: And if so, how?

17 MR. NEWSOM: He can -- of course, by all means.
18 This Court retains the discretion, as it always does, to
19 grant in an extraordinary circumstance an original writ of
20 habeas corpus. And I--

21 QUESTION: You mean he should apply for an
22 original writ in this Court? That's his remedy?

23 MR. NEWSOM: Well, not --

24 QUESTION: If -- if that's not the remedy, is
25 there a remedy in the district court in Alabama?

1 MR. NEWSOM: There is not I think a remedy in
2 lower Federal courts. But I should just emphasize that
3 this Court has -- has discussed a case very similar to
4 this and dealt with a case very similar to this in Allen
5 v. McCurry where the Court refused to indulge --

6 QUESTION: Well now, if there is no remedy in
7 the Federal district court, why should there not be a 1983
8 remedy?

9 MR. NEWSOM: Well, because our -- our position,
10 Your Honor, is that 1983 is not intended to be used to
11 fill the gaps in the remedial scheme that Congress has
12 specifically set up in the habeas statutes, that instead
13 section 1983 deals with different kinds of claims.

14 QUESTION: Do you think AEDPA amended 1983?

15 MR. NEWSOM: No. But the point is, of course,
16 AEDPA does not have, in effect, an integration clause in
17 it that -- that precludes review of all -- under all other
18 statutory sources of review. But this Court's decision --

19 QUESTION: If AEDPA had never been passed, would
20 there be a remedy under 1983?

21 MR. NEWSOM: No. I think then it -- then it
22 clearly -- it's a -- it's a habeas petition however you --
23 however you view it, and -- and our --

24 QUESTION: If the only thing -- say it's a
25 person who's not on death row who's going to be subjected

1 to this kind of treatment for 6 days. Would he have a
2 remedy under 1983?

3 MR. NEWSOM: To be sure. And that I think is a
4 -- is a categorical distinction. I don't disagree with
5 Mr. Stevenson that -- that a -- that a cut-down occurring
6 for purposes of venous access, wholly divorced from an
7 execution, is indeed a valid conditions of confinement
8 claim.

9 But this simply is not a conditions of
10 confinement case. This is, to be sure, a procedure of --
11 the means of gaining venous access for the purposes of --
12 of carrying out a lethal injection. Venous access, of
13 course, is a necessary predicate, as Nelson has
14 acknowledged in his briefing in this case, to -- to the --

15 QUESTION: You were going to -- you were going
16 to tell us that, you know, the sky is going to fall if we
17 find that this is 1983.

18 MR. NEWSOM: I think it will fall pretty hard,
19 Justice Kennedy. I think that if -- if this Court
20 concludes that -- that Nelson in this case can -- can
21 challenge this -- this cut-down as a means of gaining
22 venous access, then the -- the lower courts will be
23 inundated with -- with challenges to all manner of State
24 execution procedures just as this Court was inundated with
25 challenges following --

1 QUESTION: Well, there are a lot of ways to deal
2 with that. One, you could say on the merits, if they're
3 not valid, they're not valid.

4 MR. NEWSOM: That's --

5 QUESTION: If they are valid, why shouldn't they
6 be able to make it?

7 MR. NEWSOM: Well, that certainly is one way of
8 -- of dealing with the problem, Your Honor, but --

9 QUESTION: Or there's the equitable problem --

10 QUESTION: How long do the appeals take?

11 MR. NEWSOM: I'm sorry.

12 QUESTION: The district court says it's not
13 valid. Get out of here. Then there's appeal to the court
14 of appeals and then certiorari here. How long does it
15 take?

16 QUESTION: And suppose in a case where there is
17 whips and so forth, he happens, by the way, actually to
18 have a valid claim because they're going to be tortured.
19 All right. Now, you're saying there's no remedy for such
20 a person.

21 MR. NEWSOM: In answer --

22 QUESTION: And indeed, the reason there's no
23 remedy is because the courts are unable to use their
24 normal rules to prevent abuse of process.

25 MR. NEWSOM: Let me try to answer these various

1 questions in order, if I can keep up.

2 With respect to your first question, I think
3 that to be sure, there is -- the -- the district court can
4 always reject the claim, but the problem is that when
5 these claims come in at the last minute and the complaint
6 is chock full of -- of inflammatory language, then the
7 district courts I think in -- in many cases will feel
8 virtually coerced into granting the stay. And the stay
9 itself is -- is an imposition or an impediment to the
10 State's imposition of the sentence.

11 QUESTION: But there's nothing in the language.
12 I mean, as I read the language of 1983, it says there will
13 be an action, if I'm subject to the deprivation of a right
14 secured by the Constitution, which is what his claim is.
15 So it fits within the language.

16 MR. NEWSOM: To be sure.

17 QUESTION: And there's nothing in the habeas
18 statute that suggests it fits because habeas is when
19 you're challenging a custody in violation of the
20 Constitution. So the habeas language doesn't apply and
21 1983 does apply.

22 And there's nothing in Preiser that suggests it
23 fits because that's where in fact we're talking about a
24 challenge to fact or duration, and he's not challenging
25 the fact and he's not challenging the duration.

1 And there's nothing in Heck v. Humphrey because
2 it talks about necessarily implying the invalidity of the
3 conviction or sentence, and he's not talking about the
4 conviction and he's not talking about the sentence that
5 was given in the judgment anyway.

6 All right. So how is it we get this claim which
7 risks people who might have a valid claim not getting into
8 court --

9 MR. NEWSOM: Okay. Now --

10 QUESTION: -- into the language of any prior
11 case or the statute itself?

12 MR. NEWSOM: Bear with me. Section 1983, to be
13 sure, does not exclude this claim as a matter of its text,
14 but this Court in Preiser did make clear that -- that
15 where a -- where an action falls within the traditional
16 scope of habeas corpus, that section 1983 must give way.
17 When there is that intersection, section 1983 must give
18 way.

19 Now, in answer to part two of the question, to
20 be sure, the habeas corpus -- the -- the specific language
21 of the habeas corpus statute talks in terms of custody,
22 but for more than 100 years, this Court has dealt with
23 challenges to death sentences in habeas corpus petitions.
24 And indeed, in Your Honor's opinion for the Court in
25 Lonchar, this Court said that -- that --

1 QUESTION: You're right about that.

2 MR. NEWSOM: Bear with me. Citing Gomez and --
3 and reiterated that habeas restrictions apply to suits
4 challenging the method of execution regardless of the
5 technical form of action.

6 QUESTION: Gomez was 10 years and a claim that
7 could have been brought much earlier. As was just
8 explained to us, this claim could not have been brought
9 until 6 days before the scheduled date of execution
10 because it was only at that point that he -- that he knew
11 about this. So I don't think that Gomez --

12 But I did want to ask you something you said
13 that seemed to me inconsistent with what -- what Mr.
14 Stevenson told us. You said that it was only the -- they
15 -- they agreed on what would be the first steps and that
16 incorporated the percutaneous. I thought we were told by
17 Mr. Stevenson that, no, everybody agreed on what the first
18 procedure would be, but you then went immediately to the
19 cut-down and they didn't. There was an intermediate step
20 that you don't have in your protocol that they said would
21 have been more respectful of this man's right to have a
22 painless death.

23 MR. NEWSOM: I think that's just not quite
24 right. Percutaneous central line placement simply means
25 central line placement through the skin.

1 QUESTION: But was there -- whatever labels you
2 use, was there something else that they asked for that you
3 were not willing to give?

4 MR. NEWSOM: They -- I'm sorry. Go ahead. I
5 didn't mean to --

6 QUESTION: Yes. I thought I understood from the
7 briefs that there was the first step. Everybody agreed if
8 could do it that way, it would be okay. And then there
9 was something else that the defendant said should have
10 been done before you would ever get to the cut-down, and
11 if you got to the cut-down, certainly you'd want to have
12 proper medical personnel there to administer it.

13 MR. NEWSOM: The point that I'm trying to make
14 is that -- that in fact those first two -- what the --
15 what the plaintiffs asked for in this case was indeed
16 percutaneous central line placement. That's the label not
17 that I'm giving it but that they gave it. That's the
18 procedure that they wanted, and now I'm trying to tell the
19 Court that -- that percutaneous central line placement is
20 a central line placement through the skin which options
21 one and two, central line placement in the thigh, central
22 line placement in the neck, are indeed both percutaneous
23 central line placement. So, no, there is -- I think there
24 is no disagreement here that percutaneous central line
25 placement is the preferred method and will, in fact, be

1 used, a cut-down to be used only if actually necessary.

2 QUESTION: I'll ask Mr. Stevenson to clarify
3 that.

4 MR. NEWSOM: Fair enough.

5 And if I can, just in answer to the -- to the
6 first question that you were asking me, my -- the point
7 that I was making about Gomez at this point in the
8 argument is not necessarily, although I'd like to make
9 this point as well, if I have time, an abuse point so
10 much. We certainly recognize that the abuse at issue in
11 Gomez is in some sense more -- more egregious than the
12 abuse here. The point I was simply trying to make in
13 answer -- in answer to Justice Breyer's question was that
14 this Court in Lonchar pointed to Gomez for the proposition
15 that habeas rules apply to method of execution claims
16 without respect to what label is placed at the top of the
17 pleading.

18 QUESTION: It wasn't an issue in that case, was
19 it? I was simply describing what happened. I mean, it
20 was true --

21 MR. NEWSOM: Accurately describes.

22 QUESTION: -- in that case it was -- yes,
23 accurately described it. Nobody challenged it. So I
24 wouldn't think that's terrifically strong precedent for
25 the proposition that that is what should have happened.

1 MR. NEWSOM: Well, I think -- I think it is
2 fairly clear, Your Honor, from Gomez and Lonchar, read
3 together, that method of execution --

4 QUESTION: But is there anything other than --
5 other than -- Lonchar, which is describing the posture of
6 the case as it appeared here on a different issue?

7 QUESTION: I thought we had a lot of cases that
8 -- that say you can bring habeas to challenge not only --

9 QUESTION: That's what I want to know. I want
10 to know which are the ones --

11 QUESTION: Let's go one at a time. Go ahead.

12 QUESTION: I thought that it -- it was our law
13 that -- that you can bring a habeas action to show that
14 you are not guilty of the sentence, which always seemed to
15 me a very strange formulation, but it's -- it's been done
16 in a lot of cases.

17 MR. NEWSOM: I think it is unquestionably
18 correct, Justice Scalia, that this Court has held that
19 habeas is an appropriate vehicle for a method of execution
20 claim or otherwise. And my point in answer to Justice
21 Breyer is I think that this Court's decisions in Gomez and
22 Lonchar, read together, make -- come pretty close to
23 saying that it is the appropriate -- the appropriate
24 vehicle for challenging a method --

25 QUESTION: So those are the two cases which you

1 feel are the strongest support for you.

2 MR. NEWSOM: The strongest support I think, yes,
3 for the -- for the fact that a -- that a habeas -- that
4 habeas is -- is the appropriate vehicle for a method of
5 execution claim.

6 And I should just be clear -- and we're getting
7 back here to Justice Kennedy's question -- that if -- if
8 we're rolling back habeas all the way to simply the fact
9 of the sentence and you can challenge nothing other than
10 to say I should not have been sentenced to the death
11 penalty, then we have a -- an even bigger floodgates issue
12 than I had -- had at first imagined. District courts
13 tomorrow will be dealing with everything short of I should
14 not have been sentenced to the death penalty under section
15 1983 without the protections that Congress built in --
16 built into AEDPA to protect against that very floodgates
17 problem.

18 QUESTION: But this is -- you made the point
19 earlier that if this man were just in his cell and under a
20 term of years, that this would be an entirely proper 1983
21 case. That's not the same for somebody who's says I'm
22 innocent of the death penalty. That -- that one -- you
23 can say, oh, yes, that's habeas and nothing else. Here,
24 you've already said exactly what they're doing to him, if
25 they had done it in order to get access to his vein for

1 some other procedure while he's incarcerated, it would be
2 a good, plain 1983 claim. But somehow when it gets to be
3 connected with how he's going to die, it's no longer a
4 1983.

5 MR. NEWSOM: To be sure. There -- there is
6 clearly some common sense line between a pure conditions
7 of confinement claim, the fellow in his cell that has to
8 have the cut-down for some other purpose, and the -- the
9 fellow on death row who has to have the cut-down as a
10 means of gaining access to his veins for purposes of
11 accomplishing a lethal injection. Without the venous
12 access, there is no lethal injection.

13 I think there is a very real difference between
14 those two situations, and I can't, as I'm standing here,
15 promise you that I know precisely where that line is
16 between the outer bounds of an execution procedures claim
17 and the outer bounds of a conditions of confinement claim,
18 but what I can tell you is that this claim runs to the
19 very core of the State's execution process.

20 QUESTION: Well, but -- but is it? I mean, you
21 -- you said without venous access, there -- there is no --
22 there's no execution by lethal injection. But there is
23 execution by lethal injection without cut-down. And --
24 and the question in each case is is the cut-down
25 gratuitous. Calling the cut-down gratuitous for purposes

1 of injection does not challenge the legality of injection.

2 MR. NEWSOM: It just strikes me, Justice Souter,
3 that that with respect -- well, let me answer in two ways.

4 First, as I said earlier, I think the record in
5 this case is clear that the cut-down becomes a live issue
6 only in -- in the event that it is necessary.

7 Point two, and I think the more important point,
8 is that it just strikes me as a bad way to administer the
9 rule on a going-forward basis for a district court to have
10 to sift through on a procedure-by-procedure basis to
11 determine is this procedure in fact medically,
12 scientifically necessary to accomplish the sentence, in
13 which case Mr. Stevenson I think concedes that it's a
14 habeas petition, but it's not.

15 QUESTION: What you're doing is asking all the
16 courts, including this one, to ignore the very issue and
17 simply say, in effect, under AEDPA we don't care. I mean,
18 we're somewhere between the devil and the deep blue sea
19 here, and -- and I would suppose there -- there ought to
20 be a middle ground.

21 MR. NEWSOM: I certainly am not suggesting in
22 any -- to any extent that -- and I don't think it's true
23 -- that -- that to extent that, say, a -- a technically
24 unnecessary but nonetheless chosen procedure for gaining
25 venous access is unreviewable. That's the point -- that's

1 the discussion that I was having with Justice --

2 QUESTION: That's I thought is what he wanted
3 reviewed. He wants to be able to litigate the necessity
4 of this. He claims that it is gratuitous. That's his
5 point.

6 MR. NEWSOM: Right. And -- and our point is --
7 is that that is fine if he wants to litigate and we will
8 litigate and fight him tooth and nail in the appropriate
9 forum. The appropriate forum in this case --

10 QUESTION: There is no appropriate forum because
11 the appropriate forum was closed to him before you
12 announced, A, that you were going to execute him by
13 injection and, B, that you were going to use this
14 procedure as a last resort.

15 MR. NEWSOM: With respect, Justice Souter, the
16 appropriate forum in this case exists. It exists in the
17 State court system. It is -- it simply is not the case
18 that Mr. -- that Mr. Nelson is out of luck entirely
19 without a 1983 --

20 QUESTION: Well, let's try this again. What
21 procedure is open to him in the State of Alabama? We were
22 told that no procedure was.

23 MR. NEWSOM: Your Honor, I think that there
24 certainly are procedures. We outlined procedures in our
25 brief, namely, the two that we have not discussed to this

1 point were that Mr. Nelson could have filed a response to
2 the State's motion to set the execution date, and two, he
3 could have filed a motion to stay the execution in State
4 court. Now --

5 QUESTION: Well, we're talking about now. What
6 is open to the prisoner today --

7 MR. NEWSOM: Those --

8 QUESTION: -- in Alabama?

9 MR. NEWSOM: Those procedures, Your Honor, are
10 in fact open to -- to the prisoner today because when this
11 Court stayed the execution, the death warrant expired. We
12 will now need to go back to the Alabama Supreme Court,
13 even -- even in the event that we prevail here and ask for
14 a new death warrant, at which point Mr. Nelson can -- can
15 participate in the State process --

16 QUESTION: And do you represent he can get a
17 hearing on the merits of his arguments in one of those
18 procedures?

19 MR. NEWSOM: What I -- what I can represent to
20 the Court is that I am certainly not aware of any
21 procedural bars that exist to him participating in either
22 one of those processes, and that certainly with respect to
23 Mr. Nelson, we would -- we would be glad to waive any
24 procedural bar that did exist. We would certainly expect
25 the --

1 QUESTION: So that there could be a factual
2 hearing on -- on the necessity of the -- and the -- and
3 the medical propriety of these procedures?

4 MR. NEWSOM: Sure. If he -- if he chooses, as
5 -- as we hope he will -- as we hope he would have and now
6 hope he will, to participate in the State process, he will
7 get a hearing on the merits of his Eighth Amendment claim.
8 And again, I'm not suggesting --

9 QUESTION: But -- but if he does and loses, his
10 only access to the Federal courts is by a petition for an
11 original writ here.

12 MR. NEWSOM: That's right and that's -- that's
13 very close, Your Honor, to the -- to the very situation
14 that this Court dealt with in *Allen v. McCurry*.

15 QUESTION: He would also have the opportunity to
16 seek a stay, would he not, from this Court from the
17 decision of the Alabama court saying that his Eighth
18 Amendment claim was --

19 MR. NEWSOM: To -- to be sure. This Court
20 always retains cert jurisdiction over merits
21 determinations of State courts.

22 QUESTION: Would we have to go into the question
23 of whether that's a suspension of the writ of habeas
24 corpus in a case, say, much worse than this one? It's
25 horrendous. He couldn't raise it before. No access to a

1 Federal district court.

2 MR. NEWSOM: I don't think, Justice Breyer, that
3 this case even presents a suspension --

4 QUESTION: No, no, no. But just imagine this
5 case with much horrible circumstance because your rule of
6 law is the same, irrespective of the horror of the
7 circumstance. So there would be no claim but a State
8 court for a person who could never had brought a Federal
9 habeas because the issue didn't arise. Is that a
10 suspension of the writ of habeas corpus not in time of
11 war?

12 MR. NEWSOM: I think it's not in this Court --

13 QUESTION: And you'd refer me, because there's
14 only a minute, to read on that so I'd become convinced
15 what?

16 MR. NEWSOM: Please read Felker. This Court's
17 decision in Felker is quite clear that pointing
18 specifically to section 2244, this Court said Congress, by
19 and large, gets to make judgments about the scope of the
20 writ. Section 2244 is not a suspension. We're not even
21 in the ball park of an across-the-board bar on -- on
22 jurisdiction.

23 QUESTION: But if we -- we're doing 1983, then
24 there's no -- there's no exhaustion requirement.
25 There's --

1 MR. NEWSOM: That's -- that's certainly true,
2 but I guess it assumes that -- that I'm wrong about --
3 about the nature of this claim. Our position, of course,
4 as I've tried to convince the Court --

5 QUESTION: But you've said it is a good 1983
6 claim except if it -- if it is in relation to the
7 administration of the death sentence.

8 MR. NEWSOM: Your -- that's right, Your Honor,
9 and this will give me I think a -- as good an opportunity
10 as I can to try to sum up our position in this case.

11 We have certainly made the argument that a
12 challenge to a State's means of gaining venous access, a
13 challenge to -- to a procedure for carrying out an
14 execution is in and of itself -- should be understood to
15 be a challenge to the sentence itself and subject to
16 habeas corpus restrictions.

17 The State amici, the 30 States who have
18 participated in this case on our behalf, have made very
19 strongly the argument that a -- that a stay of execution
20 in and of itself should be understood as a challenge to
21 the sentence.

22 The Court need not go so far in either respect
23 with us today. All we ask the Court to hold today is that
24 where -- where an inmate both challenges a procedure for
25 carrying out his execution and, in essence, tries to tell

1 the State, dictate to the State how to go about conducting
2 that execution, and seeks a stay of that execution to give
3 himself time to engage in that reordering of the process,
4 that that should be understood as a challenge to the
5 sentence.

6 QUESTION: May I --

7 QUESTION: Thank you, Mr. Newsom.

8 Mr. Stevenson, you have 8 minutes remaining.

9 REBUTTAL ARGUMENT OF BRYAN STEVENSON

10 ON BEHALF OF THE PETITIONER

11 MR. STEVENSON: Thank you, Mr. Chief Justice.

12 I -- I'd like to start first by -- by trying
13 desperately to -- to inform this Court that there is no
14 remedy available to Mr. Nelson in State court. I
15 appreciate Mr. Newsom's argument on this point, but rule
16 32 is not an available option. I --

17 QUESTION: Before you go into that, would you
18 clarify one thing for me I want? Did they object in the
19 district court to -- on the ground there was a failure to
20 exhaust State remedies?

21 MR. STEVENSON: No, they did not. No, Justice
22 Stevens. There's never been any --

23 QUESTION: And the district court did not rule
24 on the claim that there was --

25 MR. STEVENSON: Absolutely, and the problem here

1 is, again, none of these issues were -- were permitted to
2 -- to develop.

3 Let me just start with the State court question.
4 Rule 32 has the same kind of factual innocence
5 requirement. For the 6-month time line that Mr. Newsom
6 was talking about, yes, you can file a new successive
7 State court petition under rule 32, but just as you have
8 to in the Federal context, the State court petition has to
9 allege factual innocence.

10 In footnote 19 of our reply brief, I cite a
11 case, Tarver v. State. It's a case where immediately
12 before an execution, the prosecutor admitted that he had
13 excluded African Americans from jury service in a
14 discriminatory manner. He said here's our new evidence.
15 The execution be -- should be stopped. The Court of
16 Criminal Appeals and the Alabama Supreme Court held no.
17 New evidence claims must go to factual innocence. That's
18 32.1(e). There is no remedy available.

19 Mr. Newsom talks about filing something in the
20 State supreme court. The State supreme court of Alabama
21 has no jurisdiction --

22 QUESTION: But that's a little different from a
23 case that alleges a current impending constitutional
24 violation.

25 MR. STEVENSON: Yes, Your Honor. And I could

1 speak to that because in the other case we cite in
2 footnote 19, we did that too. In the first Tarver case,
3 this Court had granted cert on the constitutionality of
4 execution by electrocution. The case was pending at this
5 Court. We went to the State courts of Alabama saying,
6 look, the State supreme -- the United States Supreme Court
7 is about to review this. We've got new evidence that
8 electrocutions in Alabama are being conducted in an
9 unconstitutional manner. Let us in. No. Your method of
10 execution claim is not cognizable because the 2-year
11 statute of limitations at that time is an absolute bar.
12 The courts have no jurisdiction to adjudicate any
13 constitutional claim unless it is a new evidence innocence
14 claim. The Alabama Supreme Court has no jurisdiction to
15 give us a merits review on this issue.

16 QUESTION: We were told there were a couple of
17 other methods besides rule 32.

18 MR. STEVENSON: There are none, Justice
19 O'Connor. The only thing we could do is file a motion for
20 a stay. At the point at which the stay motion was
21 requested here, April of 2000, Mr. Nelson didn't want a
22 stay. He doesn't want a stay of execution. He actually
23 wants his execution to be carried out.

24 QUESTION: Well, he did ask for a stay you said,
25 in order that this could be resolved.

1 MR. STEVENSON: Absolutely.

2 QUESTION: So, as I understand it, he does want
3 a stay in order that this can be heard.

4 MR. STEVENSON: Well, he wants a stay to -- he
5 wants to enjoin the kind of conduct that we're talking
6 about here, but filing a stay motion in the Alabama
7 Supreme Court would not get him merits review where we
8 could present the kind of facts that we're now presenting.

9 And I have to say that access to the Federal
10 courts in this case has really changed the State's
11 position. Nothing that we've been talking about here this
12 afternoon about what they intend to do was ever presented
13 to Mr. Nelson until he got in front of the Federal judge.
14 In front of the Federal judge, they said for the first
15 time, we will try to do a peripheral stick, not
16 percutaneous invasion. It's a different procedure. And
17 at page 109 of our joint appendix, the district court
18 finds -- and I'm reading here -- the defendants have
19 offered no explanation as to why they intend to use a cut-
20 down procedure instead of a percutaneous central line
21 placement.

22 They have never made that offer. They're making
23 it here today. It's because we're in court, and of
24 course, we can't get to court unless this Court recognizes
25 our authority to bring a legitimate challenge that does

1 not attempt to invalidate his conviction or sentence.

2 There is a gap.

3 QUESTION: Well, what we heard today, does that
4 satisfy the prisoner's request that these -- all of these
5 other things be used first?

6 MR. STEVENSON: Well, if -- if the State had
7 then and would now concede that percutaneous line
8 placement would be an acceptable method, then yes. That's
9 all we were seeking. But of course, without a remedy --

10 QUESTION: Is that not what was said today?

11 MR. STEVENSON: Well, it's not said in a way
12 that we can enforce, Your Honor. Until we can go to the
13 district court, go to a court, and enforce any of these
14 representations, we are at risk. And that's all we're
15 asking. That's all Mr. Nelson asked in the first
16 instance.

17 And the irony, of course, is if it had been
18 permitted to proceed, I think we would have resolved this.
19 He'd already be executed. And I think their conduct today
20 strengthens that position. And that's why we would
21 urgently ask this Court to reverse the rule that the
22 Eleventh Circuit is now applying which bars prisoners like
23 Mr. Nelson from getting Federal review. It's not asking a
24 lot.

25 And I understand the fears, but I don't agree

1 with Mr. Newsom that this is opening up anything. People
2 can file complaints now. They could have done it for the
3 last 20 years. But district courts are not obligated to
4 review those complaints. The PLRA puts restrictions on
5 1983 actions. The habeas corpus right permits -- creates
6 restrictions.

7 What this Court shouldn't do out of fear is to
8 block prisoners like Mr. Nelson who have legitimate
9 constitutional complaints from getting remedies that are
10 precisely the kinds of claims that could and should be
11 resolved in the manner that they've been discussed about
12 -- discussed today easily. We tried to exhaust the
13 administrative remedies, but until we got in front a
14 Federal judge, no one would allow us to be heard. And
15 that's simply the problem that we face in this case and
16 why relief is required. And I think that's why there
17 ought to be the kind of Federal -- Federal remedy that
18 Justice Breyer has indicated because without it, our
19 prisoners are at risk.

20 Unless there are further questions, I'll -- I'll
21 rest --

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
23 Stevenson.

24 The case is submitted.

25 (Whereupon, at 12:02 p.m., the case in the

1 above-entitled matter was submitted.)

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