

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: LARRY GRANT LONCHAR, Petitioner v.
ALBERT G. THOMAS, WARDEN
CASE NO: No. 95-5015
PLACE: Washington, D.C.
DATE: Monday, December 4, 1995
PAGES: 1-55

96 MAR -6 A9:02

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

CORRECTED COPY

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 LARRY GRANT LONCHAR, :
4 Petitioner :
5 v. : No. 95-5015
6 ALBERT G. THOMAS, WARDEN :
7 - - - - -X

8 Washington, D.C.

9 Monday, December 4, 1995

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.

13 APPEARANCES:

14 DONALD B. VERRILLI, JR., ESQ., Washington, D.C.; on behalf
15 of the Petitioner.

16 MARY BETH WESTMORELAND, ESQ., Senior Assistant Attorney
17 General of Georgia, Atlanta, Georgia; on behalf of
18 the Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

ORAL ARGUMENT OF	PAGE
DONALD B. VERRILLI, JR., ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
MARY BETH WESTMORELAND, ESQ.	
On behalf of the Respondent	26

1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 95-5015, Larry Lonchar v.
5 Albert Thomas.

6 Mr. Verrilli.

7 ORAL ARGUMENT OF DONALD B. VERRILLI, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. VERRILLI: Mr. Chief Justice, and may it
10 please the Court:

11 This case is about the standards that govern a
12 Federal court's decision whether to entertain a first
13 Federal habeas corpus petition.

14 The issue arises in an anomalous factual
15 context. The record is clear that petitioner Larry
16 Lonchar, though found competent, is a deeply disturbed
17 person with suicidal impulses. That mental illness led
18 him to resist efforts by his siblings to challenge his
19 conviction and death sentence in next friend habeas corpus
20 proceedings. He has not been entirely consistent,
21 however.

22 QUESTION: Well, are you suggesting that one
23 would have to be mentally ill in order to resist efforts
24 to challenge the appeal, to appeal your case?

25 MR. VERRILLI: Not in every instance, Mr. Chief

1 Justice, but in this instance, yes. His mental illness is
2 one that produces and has been documented as producing
3 serious suicidal impulses and that, we think, is the
4 principal reason, and the record shows it's the principal
5 reason that it's led to his resistance of those efforts.

6 QUESTION: Mr. Verrilli, do we take this case on
7 the assumption, as the -- I guess it's the Eleventh
8 Circuit found, that the petitioner is seeking Federal
9 habeas for purposes of delaying his execution and not to
10 vindicate any constitutional right he might have?

11 MR. VERRILLI: There is a factual finding to
12 that effect --

13 QUESTION: To that effect.

14 MR. VERRILLI: -- Justice O'Connor, yes.

15 QUESTION: And so do we take the case on that
16 assumption?

17 MR. VERRILLI: No, Justice O'Connor. In our --

18
19 QUESTION: And why not?

20 MR. VERRILLI: In our view, Justice O'Connor,
21 the record shows that the district court found both that
22 Lonchar seeks, genuinely seeks to pursue these claims, and
23 that his motive for doing so is solely to achieve delay.
24 In our view, those are irreconcilable.

25 However, it should not matter as a matter of

1 law, even if the Court does take the case with that
2 finding unchanged, because our position is that Lonchar's
3 motivation, subjective motivation for filing a first
4 Federal habeas petition should be irrelevant as a matter
5 of law. It should not be the subject of inquiry in this
6 case, as it is not in civil litigation generally.

7 QUESTION: Well, I suppose, though, that you do
8 acknowledge that habeas is an equitable remedy.

9 MR. VERRILLI: We do, Justice O'Connor, yes.

10 QUESTION: And are we limited to what Rule 9
11 provides in that regard as to delay in filing, or could
12 conceivably equitable considerations allow a Federal court
13 to deny even a first Federal habeas?

14 MR. VERRILLI: Justice O'Connor, I think there
15 are two separate issues woven together there, and if
16 you'll permit me --

17 QUESTION: Sure.

18 MR. VERRILLI: -- let me to try to separate
19 them.

20 QUESTION: Fine.

21 MR. VERRILLI: The first is the passage of time
22 up to the point in June of 1995 when Lonchar's Federal
23 habeas petition, the petition at issue here, was filed.
24 Our view about that is that Rule 9(a) governs the analysis
25 of that issue.

1 There's a second issue here about Lonchar's
2 subjective motive for filing as of June 1995. Our
3 position there is that subjective motive should not be a
4 subject of inquiry. If it's a substantial petition, an
5 objectively substantial petition, then it ought to be
6 treated just like a petition for relief in any other kind
7 of case.

8 QUESTION: Well, Mr. Verrilli, what if the
9 motive is, you know, to really make a laughing stock out
10 of the Federal courts.

11 MR. VERRILLI: Your Honor, that's a serious
12 question here. I understand that.

13 QUESTION: Well, take it just as a hypothetical,
14 not necessarily this case, but you're saying motive is
15 immaterial. What if a first habeas petitioner says, I
16 think I've got some good claims here, but I really don't
17 care what the court does, I really just want to make fools
18 of these judges.

19 MR. VERRILLI: I think, Your Honor, if there are
20 substantial claims on the merits, and it's a first
21 petition, that they must be adjudicated. The only reason
22 that motive was injected into the inquiry here was because
23 the district judge put Mr. Lonchar on the stand and asked
24 him what his motives were. Our view is, that's not a
25 proper subject of inquiry.

1 If there's a verification on record, as there
2 was on this case, signed under penalty of perjury pursuant
3 to Habeas Rule 2, that the petitioner genuinely wishes to
4 pursue the claim for relief, that should be the end of the
5 matter.

6 QUESTION: But if the petition on its face shows
7 that it's frivolous and/or malicious, it could be
8 dismissed.

9 MR. VERRILLI: Very definitely, Justice
10 Ginsburg. That's right in the habeas rules. If there's
11 no substantial claim for relief, the petition may be
12 dismissed on its face, but here there are very substantial
13 claims for relief, and there's no doubt about that, and
14 when substantial claim for relief is alleged, as it was
15 here, this case, a first Federal habeas petition, should
16 be treated just like an antitrust case, a labor case, a
17 civil case generally under Rule 11, and pursued on the
18 merits.

19 QUESTION: Well, do you think --

20 QUESTION: Mr. Verrilli --

21 QUESTION: Do you think that there's any ground,
22 other than what's stated in 9(a) and (b) -- let's assume
23 there's no prejudice to the State in that it can answer
24 the petition, and that it's a first Federal habeas, do you
25 see any room at all for a Federal court to dismiss the

1 petition outside of the specifications of 9(a) and (b)?

2 MR. VERRILLI: There may be a very, very limited
3 and narrowly circumscribed discretion to do so, Your
4 Honor. It is not our position that Rule 9(a) and Rule
5 9(b) codify and thereby exhausts completely the limits of
6 a court's discretion. However, that discretion in our
7 view must be very narrowly circumscribed.

8 QUESTION: Can you give me a concrete example --

9 MR. VERRILLI: Well --

10 QUESTION: -- of what such a case would be?

11 MR. VERRILLI: -- there -- the traditional
12 equitable doctrine of unclean hands is the only additional
13 equitable principle that I think is not already
14 encompassed within 9(a) that might be brought to bear
15 here.

16 QUESTION: Well, is 9(a) an exclusive statement
17 of the doctrine of laches?

18 MR. VERRILLI: Our view, Justice Kennedy, is
19 that it is definitely an exclusive statement of the
20 doctrine of laches. It codified the common law doctrine
21 of laches as it applied to habeas. This Court has said
22 repeatedly and most recently in the Brecht v. Abrahamson
23 case that in habeas the only laches recognized are those
24 which prejudice the State's ability to defend the
25 petition.

1 QUESTION: Well, would you take that so far as
2 to cover a case in which the prisoner in effect requested
3 various next friends to file next friend petitions in bad
4 faith, knowing perfectly well that he was competent, and
5 to do so solely for the repeatedly delaying the execution
6 date?

7 Would you say that Rule 9(a) -- and in each
8 case, the State's capacity to defend on the merits, if any
9 of these requests for relief reached the merit stage,
10 would not in any way be compromised.

11 Would you say, in a case like that, that Rule
12 9(a) precluded an equitable consideration of that bad
13 faith that he had participated in?

14 MR. VERRILLI: No, Justice Souter, and that's
15 why, in response to Justice Ginsburg, I indicated that I
16 thought there was some narrow room for the traditional
17 equitable principle of unclean hands to operate even
18 beyond 9(a).

19 QUESTION: How is that consistent with your --
20 maybe I didn't understand what you said. How is that
21 consistent with your answer that 9(a) exhausts the concept
22 of laches?

23 MR. VERRILLI: Because, Justice Souter, laches
24 is about delay and the consequences of delay. Bad faith
25 seems to me to be a separate inquiry. Bad faith --

1 QUESTION: But suppose the State were to show
2 that the evidence were stale, and it would be more
3 difficult for the State to prevail on retrial. That's
4 beyond the wording of 9(a) as I understand 9(a), because
5 9(a) talks about the ability to respond to the petition.

6 Let's assume the State can completely respond to
7 the petition on, say, ineffectiveness of counsel, but that
8 the evidence will be very, very stale, and the State will
9 have a much more difficult time prevailing. That's not
10 part of laches?

11 MR. VERRILLI: That's correct, Justice Kennedy.
12 Indeed, that is precisely the holding of this Court in
13 1986 in Vasquez v. Hillery. That was exactly the issue,
14 whether that kind of prejudice could be recognized and
15 held against a petitioner in habeas. The holding of the
16 Court in Vasquez was that it could not, that Congress
17 recognized only laches in the sense of difficulty in
18 defending the petition, that different kind of prejudice
19 was not cognizable in laches as applied in habeas. That
20 was the specific holding of that case.

21 QUESTION: Mr. Verrilli, may I go back to the
22 earlier point about the finding that he had taken the
23 action he had solely for purposes of delay. I don't want
24 to argue your case for you, but it seems to me there's
25 another point to be made. You tell me if I'm wrong.

1 Usually when we talk about or when we condemn an
2 application as being made solely for delay, the
3 implication is that it really is not made with a belief in
4 the merits asserted, that it is either in bad faith or
5 it's on the verge of bad faith, and that it's explicable
6 only as a device to postpone an execution.

7 In this case, as I understand it, the finding of
8 delay was made on the understanding that he wanted to
9 preserve his life long enough to see a change in the
10 method of execution so that he could donate his vital
11 organs to -- I don't know, to science, or an organ bank,
12 or something or other. That isn't delay in sort of the
13 classic sense that has been condemned, is it?

14 In other words, a person -- if I want to
15 preserve my life, I can then give it away, or throw it
16 away, or do anything I want to with it if I succeed, and
17 that's what your client wants to do, isn't it?

18 MR. VERRILLI: Justice Souter, you've put it
19 beautifully. That is exactly our argument, that the delay
20 that is at issue with respect to the period from June '95
21 forward has to be analyzed as a question of whether it's
22 unwarranted delay, whether it's delay that would not
23 normally have occurred in the normal course of
24 adjudicating a substantial petition, raising substantial
25 claims with a petitioner who has a good faith belief in

1 the substantiality of his claim, and that's what we
2 have --

3 QUESTION: So you can that in terms of our usual
4 terminology there really isn't any contradiction between
5 the two findings that you've pointed out of the lower
6 court in this case.

7 MR. VERRILLI: That's precisely right, Justice
8 Souter.

9 QUESTION: Mr. Verrilli, I thought a moment ago
10 you said they were inherently contradictory.

11 MR. VERRILLI: If one reads them as I understood
12 Justice O'Connor to have been reading them I think they
13 are contradictory, but what I tried to suggest is that the
14 two can coexist in the sense that, as the facts here show,
15 a person can have a substantial claim, can have a good
16 faith belief in the substantiality of the claim, and can
17 nonetheless be pursuing it for purposes that are other
18 than the purpose of achieving substantive relief, and
19 that's why we think there just shouldn't be an inquiry on
20 a substantial first Federal habeas petition into that
21 issue.

22 QUESTION: It's strange that that shouldn't be
23 considered by an equity court when even in civil law, if
24 you pursue a right that is a genuine right, but you pursue
25 it solely for the purpose of harassment, that's

1 actionable.

2 MR. VERRILLI: Well, I take it Your Honor is
3 referring to the tort of abuse of process.

4 QUESTION: Yes.

5 MR. VERRILLI: Well, I think that there are
6 significant differences here. As Your Honor described
7 that abuse of process tort in the Hecht case two terms
8 ago, it applies in a very narrow circumstance, not just
9 when a civil case is filed for purposes of harassment, but
10 only when there is the equivalent of what would I think in
11 the equity context be considered bad faith, or unclean
12 hands. It's got to be a very serious effort to achieve
13 coercion or extortion through use of the civil process.

14 And I would also note, Your Honor, that with
15 respect to abuse of process, although there is a separate
16 tort for damages, it's -- the finding of abuse of process
17 does not forfeit the valid substantive claim. That claim
18 continues to go forward on the merits.

19 QUESTION: Why is it clear that Rule 9 itself
20 doesn't cover this case? Don't you think the State's
21 ability to respond is affected if this habeas petition is
22 dumped upon the State at the eleventh hour when it is
23 clear that the State cannot respond in time to go ahead
24 with the scheduled execution?

25 MR. VERRILLI: I do not, Your Honor. First, the

1 burden is on the State to plead rule 9(a) and to advance
2 it as a reason for dismissal. They did not do so. The
3 State did preserve Rule 9(a) for future litigation in this
4 case, but they very clearly and distinctly did not advance
5 it as a reason for dismissal.

6 QUESTION: I see, and you think that a court of
7 equity cannot even take into account the fact that this
8 would have come under 9(a) anyway in deciding whether the
9 court of equity could decide that habeas corpus won't lie?

10 MR. VERRILLI: Well, I don't think it would have
11 come under Rule 9(a) anyway.

12 QUESTION: Well, that's a different argument
13 from the one --

14 MR. VERRILLI: Yes.

15 QUESTION: -- you were just making.

16 MR. VERRILLI: It is, but there is a threshold
17 point here of some importance.

18 QUESTION: I'm asking whether a court can
19 consider whether, had 9(a) been alleged, that wouldn't
20 have sufficed anyway.

21 MR. VERRILLI: what this Court has said is that
22 the timing of the filing of a petition can be considered.
23 However, the only circumstance in which this Court has
24 indicated that it has decisive weight, or very substantial
25 weight, is in the context of a subsequent petition. The

1 case that comes to mind is this Court's Gomez case, which
2 was Mr. Harris' case, and it was a section 1983 action
3 after four petitions had been filed.

4 QUESTION: So you'd say, even with a later
5 petition if the petition comes in, you know, 2 minutes
6 before the execution and the State is supposed to respond
7 and a court consider the State's response and rule on the
8 matter within those 2 minutes, that wouldn't be a
9 violation of Rule 9?

10 MR. VERRILLI: That's not the kind of prejudice
11 that we think Rule 9 addresses, Your Honor.

12 QUESTION: Well, Rule 9 is -- it must be a very
13 poorly drawn rule, then.

14 QUESTION: You say that if the petitioner comes
15 in, say even with a second Federal habeas, 5 minutes
16 before the execution is scheduled, he's entitled to have a
17 complete consideration on the merits even though the
18 district judge cannot immediately digest any part of it?

19 MR. VERRILLI: With respect to a second Federal
20 habeas, no, Mr. Chief Justice. We think the rules are
21 quite different there. The presumption in that context is
22 strongly against review, because of the various doctrines
23 that this Court has announced as a matter of the equitable
24 nature of this remedy over the years, and as a general
25 matter.

1 QUESTION: But the State has to plead abuse in a
2 second Federal habeas, doesn't it? I mean, it just
3 doesn't automatically get pleaded.

4 MR. VERRILLI: That rule is clear, Mr. Chief
5 Justice, and has been clear for years, that the burden is
6 on the State to plead abuse.

7 QUESTION: Well, if this were -- so the
8 question, it seems to me, is whether we should consider as
9 effectively a second habeas what is technically a first
10 habeas that's been filed after the proceeding has been
11 delayed numerous times, not by this petitioner but by
12 people related to this petitioner, seeking to proceed as
13 next friends. Why shouldn't I consider that the same
14 thing as a second habeas for purposes of whether Rule 9
15 applies --

16 MR. VERRILLI: Justice Scalia --

17 QUESTION: -- in the way I've just suggested?

18 MR. VERRILLI: I think that is the crux of the
19 case, Justice Scalia, but I think this Court cannot do so,
20 and there are three reasons for that.

21 The first is that, as a matter of the statute
22 and Rule 9(b), there is a requirement of a prior
23 determination on the merits of the claims. Thus, as a
24 statutory matter, the condition for treating this as a
25 subsequent petition simply isn't satisfied. Second, there

1 is no --

2 QUESTION: Excuse me, why do you say -- what
3 about delayed petitions, 9(a)? I'm talking about 9(a),
4 not 9(b). There's no requirement that it be a second or
5 successive petition. 9(a) relates to a delayed petition.
6 It says it may be dismissed if it appears that the State
7 has been prejudiced in its ability to respond.

8 MR. VERRILLI: Yes, but I took it that Your
9 Honor was asking me why shouldn't the Court treat this as
10 though it were a successive petition, and I'm trying to
11 suggest --

12 QUESTION: For purposes of whether 9(a) is
13 applicable, not 9(b). For purposes of whether the State
14 has been prejudiced in its ability to respond.

15 MR. VERRILLI: Well --

16 QUESTION: You say that we shouldn't apply 9(a)
17 strictly to the first petition, and granting that,
18 although 9(a) doesn't say anything like that, but even if
19 that is true, why should I consider this to be the first
20 petition for that purpose when in fact there have been
21 several others filed on this prisoner's behalf?

22 MR. VERRILLI: Well, I think the Court has to
23 consider it a first petition because it is. 9(a) imposes
24 a requirement of unjustified delay as a trigger to this
25 laches analysis, and that -- if the Court is to analyze

1 the case --

2 QUESTION: Mr. Verrilli, 9(a) could be
3 applicable to a first petition, could it not?

4 MR. VERRILLI: Certainly.

5 QUESTION: If there had been delay, and as a
6 result the prosecutor was unable to answer a point that he
7 might have answered earlier.

8 MR. VERRILLI: Certainly, Justice Ginsburg.

9 QUESTION: So 9(a), it doesn't matter whether
10 it's the first or the tenth, 9(a) could apply.

11 MR. VERRILLI: That's certainly correct, Justice
12 Ginsburg, and I didn't mean to suggest anything to the
13 contrary. 9(a) would apply, but the question would be
14 whether there were unjustified -- there was unjustified
15 delay here, given the prior next friend proceedings. The
16 question would require, it seems to me, an inquiry into
17 those next friend proceedings then, because if delay is
18 unjustified under Rule 9(a) it's got to be in some sense
19 attributable to the petitioner. That --

20 QUESTION: Yes, but that could happen in either
21 of two ways. I take it there's no indication here that he
22 had requested or encouraged the next friend petitions. I
23 guess that's -- in your favor.

24 MR. VERRILLI: Correct, Justice Souter.

25 QUESTION: On the other hand, the fact that

1 those next friend petitions were pending, or there were
2 proceedings on them, didn't bar him from coming in with
3 his own petition. All he had to do was walk in and say,
4 here's my petition. I'm competent. Nothing stopped me.

5 MR. VERRILLI: That's right, Justice Souter, but
6 in terms of whether those prior proceedings created an
7 unjustified delay, I think we have to look into whether --
8 we have to look into the way those --

9 QUESTION: Well, I'm prepared -- I think what I
10 meant to suggest by my two questions is, I'm prepared to
11 say that to the extent those prior next friend proceedings
12 dragged things out, I guess there's no evidence that would
13 support the argument that we should attribute them to him
14 as opposed to the next friends, but I'm also suggesting
15 that those next friend petitions really don't necessarily
16 explain the delay, because there could have been 10 next
17 friend petitions going on, and he could still have walked
18 in with his own petition at any time.

19 MR. VERRILLI: That's correct if there were some
20 obligation on his part to do so, and --

21 QUESTION: Well, the question is why --
22 that's -- I guess that's the question. Was there an
23 obligation, since we have a rule against delay, and my
24 suggestion is that nothing precluded him from coming in
25 earlier, including the next friend petitions.

1 MR. VERRILLI: Yes, Justice Souter, nothing
2 precluded him from doing that. He resisted those
3 petitions because he wanted to die. He changed his mind
4 at a later time, but --

5 QUESTION: Well, if there's no obligation to
6 come forward at any time, then the provision of delay in
7 9(a) really doesn't mean much. I mean, if in order to
8 trigger any inquiry into delay you have to find that there
9 was some sort of a statutory obligation on the petitioner
10 to come in and bring his petition, then 9(a) really
11 doesn't mean much.

12 MR. VERRILLI: Well, Mr. Chief Justice, there is
13 no statute of limitations on habeas. I take it that's an
14 intentional decision by Congress that petitions can be
15 brought at several years after the conviction becomes
16 final.

17 The constraint on delay is the constraint of
18 laches imposed by Rule 9(a), which is laches, that delay
19 that prejudices the other party's ability --

20 QUESTION: Are you saying, then, that our more
21 recent decision in Gomez -- there's Hillery and Vasquez,
22 which you rely on. Then in Gomez we said that a court may
23 consider the last minute nature of an application to stay
24 execution in deciding whether to grant equitable relief.

25 MR. VERRILLI: Yes, but the context of Gomez is

1 quite different here. That was the Harris case, where
2 there had been four adjudications, habeas petitions
3 adjudicated on the merits, and what I take to be the gist
4 of that statement --

5 QUESTION: Well, it's preceded by a sentence
6 that says the claim could have been brought more than 10
7 years ago.

8 MR. VERRILLI: Yes --

9 QUESTION: It was not geared to successive --
10 you're quite correct there were successive petitions in
11 that case.

12 MR. VERRILLI: Your Honor, as I read that
13 opinion, what it seemed to be saying is that precisely
14 because there had been four prior opportunities to raise
15 that claim in Federal habeas in the normal course of
16 events and it was not raised, that this section 1983
17 action in Gomez ought to be considered and truly was an
18 end round, a run -- an end run around the abuse of the
19 writ principles that would normally have foreclosed
20 consideration of that, and that section 1983 ought not to
21 be used in that manner.

22 QUESTION: But Mr. Verrilli, it is your
23 position, if I understand it correctly, that a condemned
24 prisoner can routinely wait until the last minute,
25 1 minute before his execution, to file his first Federal

1 habeas, and that's no problem, that you get one free
2 postponement of the execution by just filing a Federal
3 habeas, so long as you make a claim that is, as you say, a
4 substantial claim, not necessarily true, but a substantial
5 claim.

6 MR. VERRILLI: I think that's where the law is,
7 Justice Scalia --

8 QUESTION: Is that right?

9 MR. VERRILLI: -- and where it's been since
10 Barefoot v. Estelle, that a --

11 QUESTION: But is that true even if, because of
12 the lateness of the filing, the State is unable to present
13 what could well be a claim showing how the State has been
14 prejudiced by the delay?

15 MR. VERRILLI: Yes, I think so, Justice
16 O'Connor, and particularly -- and the circumstances of
17 this case are somewhat anomalous in that respect because
18 actually because of the next friend proceedings the State
19 has known since 1991 in this case what the claims are, and
20 therefore that sort of surprise issue, though it might be
21 present in another record, actually isn't present on this
22 record.

23 There's also something about the way in which
24 Georgia's procedure works with death penalties that makes
25 that a more difficult issue as well, and that there's this

1 week-long period in which the execution can occur, which I
2 gather is established precisely to avoid this problem, so
3 that even if the petition is filed shortly before --

4 QUESTION: Well, certainly Barefoot says that
5 Federal habeas is not essential to the validity of a death
6 penalty, and so supposing I am a Federal district judge
7 sitting in Atlanta, and I'm brought a petition 5 minutes
8 before an execution is scheduled for, and I simply say, I
9 can't possibly digest the contents of this petition at
10 this time, it's so late. What do I do?

11 MR. VERRILLI: I think a limited stay is in
12 order --

13 QUESTION: Why?

14 MR. VERRILLI: -- in those circumstances --

15 QUESTION: The petitioner has to persuade the
16 judge that there's some Federal flaw in the punishment
17 procedure, or the guilty phase, don't they?

18 MR. VERRILLI: Yes, Mr. Chief Justice, but a
19 limited stay in situations where that inquiry can't be
20 done simply on the face of the papers in short order,
21 which I imagine --

22 QUESTION: But it's the fault of the petitioner
23 that it can't be done.

24 MR. VERRILLI: I think, Mr. Chief Justice, that
25 it's the result of a system in which there is no statute

1 of limitations.

2 QUESTION: Okay, there's no statute of
3 limitations, and nobody is saying that you're barred
4 because of the statute of limitations. There is no
5 statute of limitations in habeas. But you're coming in
6 5 minutes before an absolute deadline with a complicated
7 thing that can't be digested in the remaining 5 minutes.
8 Why can't the judge say, sorry, the burden is on you, and
9 you've just come in too late to establish it?

10 MR. VERRILLI: Well, I don't think the facts
11 would support that result here, but --

12 QUESTION: No, no. I'm -- this is a
13 hypothetical.

14 MR. VERRILLI: I understand, Mr. Chief Justice,
15 but even in another case, it seems to me a very short stay
16 would be in order in those circumstances simply to permit
17 the evaluation of whether there are substantial Federal
18 claims in the petition, and that's --

19 QUESTION: Mr. Verrilli, take the Chief's
20 example with one further fact added.

21 The judge asks the same question that he asked
22 as the Chief Justice put the hypo to you, and there is
23 also before him this further fact, that the prison warden
24 had gone to this prisoner five times in the last 6 months
25 saying, legal services are available to you, do you want

1 to file a habeas petition because we're setting the
2 execution date and we don't want to be doing this at the
3 last minute, and his answer in each case was, I'm going to
4 file one, but I'm going to wait till the last minute
5 because I have a right to file it 5 minutes beforehand.

6 In that case, would you say that under this rule
7 the court was required to stay it and consider it on the
8 merits?

9 MR. VERRILLI: There may be circumstances,
10 extreme circumstances --

11 QUESTION: How about my circumstances?

12 MR. VERRILLI: Extreme circumstances like those
13 circumstances in which there is proof of bad faith. In
14 that case, the equitable doctrine, the traditional
15 equitable doctrine of unclean hands narrowly confined
16 within its traditional bounds may apply and give --

17 QUESTION: All right. Does your argument, then,
18 boil down to this, that if we don't know -- if we don't
19 have affirmative knowledge of the reason for the delay,
20 5 minutes is not enough, and that's as far as you're
21 going?

22 MR. VERRILLI: Absent a finding of bad faith and
23 unclean hands, it seems to me there's no basis for denying
24 a stay in those circumstances.

25 QUESTION: All right. Can I ask you a question

1 before you run out of time? Are you -- you're still
2 representing this person, and he wants you to represent
3 him here?

4 MR. VERRILLI: Very definitely, Justice Breyer.

5 QUESTION: He's made it clear that he wants this
6 case to be brought here in the Court?

7 MR. VERRILLI: My communications with this
8 client have left me with no doubt about that, Your Honor.

9 QUESTION: Okay, thank you.

10 MR. VERRILLI: I'll reserve the balance of my
11 time, if I may.

12 QUESTION: Very well, Mr. Verrilli.

13 Ms. Westmoreland, we'll hear from you.

14 ORAL ARGUMENT OF MARY BETH WESTMORELAND

15 ON BEHALF OF THE RESPONDENT

16 MS. WESTMORELAND: Mr. Chief Justice, and may it
17 please the Court:

18 The Court is faced today with what is truly not
19 a classic first Federal habeas corpus petition filed by a
20 death row inmate in a timely fashion. There are many
21 things this case is, but that is exactly what it is not.

22 All we have asked the Court in this case to do
23 is to apply traditional equitable principles in existence
24 for decades to what is clearly an inequitable conduct on
25 the part of the petitioner in this action.

1 QUESTION: Ms. Westmoreland, could the State
2 court have done, in effect, the same thing? The State
3 court, as I -- if I've got my facts straight, dismissed
4 the first State habeas petition without prejudice, is that
5 correct?

6 MS. WESTMORELAND: The first one that
7 Mr. Lonchar actually filed himself, yes, sir.

8 QUESTION: That's right -- not the next friend
9 petitions --

10 MS. WESTMORELAND: That's correct.

11 QUESTION: -- but the first one of his.

12 MS. WESTMORELAND: That's correct.

13 QUESTION: Is there any reason why the State
14 court judge could not have said at that point, this is
15 your chance to bring a State habeas petition, and this is
16 the only one you're going to get, and I'm going to -- you
17 either go forward with this, raising whatever you can
18 raise, or I'm going to dismiss it with prejudice, not
19 without prejudice, but with prejudice. Could the State
20 court judge have done that?

21 MS. WESTMORELAND: Your Honor, in fact we
22 discussed that issue at the hearing before the judge in
23 1994. That was a question that came up, because our
24 position was we did not want Mr. Lonchar to be able to do
25 exactly what he had done --

1 QUESTION: Right.

2 MS. WESTMORELAND: -- to change his mind again.

3 We asked for the dismissal with prejudice. After we
4 researched Georgia law on the point, it appeared that
5 Georgia law was at best unclear, but it certainly -- the
6 Civil Practice Act seemed to allow a dismissal without
7 prejudice. The court at the hearing made it clear to
8 Mr. Lonchar that she felt that this was the end of the
9 proceedings, that finality as far as State court was
10 concerned --

11 QUESTION: Yes, but the order was without
12 prejudice.

13 MS. WESTMORELAND: The order definitely was
14 without prejudice.

15 QUESTION: But that's a question of Georgia law.

16 MS. WESTMORELAND: Yes.

17 QUESTION: So isn't it fair to say that Georgia
18 made the decision at some level that in fact this would be
19 without prejudice, whereas Georgia could have made the
20 converse decision and said, it's going to be with
21 prejudice, in which case there would have been a -- I --
22 there would have been a, I suppose, a state bar to raising
23 anything that once an appeal from that was exhausted
24 openly to this Court --

25 MS. WESTMORELAND: That's correct.

1 QUESTION: -- that would have barred anything
2 that could have been raised and we really wouldn't be in
3 this position, would we?

4 MS. WESTMORELAND: It would have barred the
5 claims. The problem with that is --

6 QUESTION: It would have barred all the claims
7 that he could have brought at that point.

8 MS. WESTMORELAND: Right. There were numerous
9 claims that had already been decided on direct appeal that
10 were present in that petition, so I'm not - I don't know
11 that those would have been barred as a matter of State
12 law, because they have been decided on the merits, but it
13 would have barred --

14 QUESTION: Yes.

15 MS. WESTMORELAND: -- the remainder of the
16 claims.

17 QUESTION: Ms. Westmoreland, in this present
18 Federal habeas proceeding, did the State try to make any
19 showing that it had been prejudiced by this late filing?

20 MS. WESTMORELAND: No, Your Honor, we did not,
21 and we --

22 QUESTION: And why not?

23 MS. WESTMORELAND: Because of the late filing
24 itself. It was the timing of the petition and the time at
25 which we received it, and simply did not have the time to

1 get a response filed, to get the petition dismissed, and
2 to make further inquiry into the entire prejudice, and I
3 would point out a second aspect --

4 QUESTION: Could we just review a little bit the
5 factual circumstances here? A period of time had been set
6 within which the execution could be carried out. It was
7 June 20 to 30th --

8 MS. WESTMORELAND: Yes.

9 QUESTION: -- a 10-day period?

10 MS. WESTMORELAND: Seven-day period, actually.

11 QUESTION: A 7-day period.

12 MS. WESTMORELAND: Yes, that's correct.

13 QUESTION: And the petition filed by petitioner
14 was filed 2 days before the expiration of that period?

15 MS. WESTMORELAND: His petition was filed on
16 the -- initially in State court on the day we had an
17 execution scheduled.

18 It was temporarily stayed over the weekend, and
19 then the Federal petition was then filed, I believe, 2
20 days before the end of that period that had occurred, yes,
21 Your Honor, that's correct, and during that time we were
22 engaged in looking at the first question of whether the
23 State court was going to even consider the merits of the
24 claim, because the State court was concerned with
25 timeliness as well.

1 QUESTION: And did the State tell the Federal
2 district court that it was unable to file a response
3 because of the lateness of the filing?

4 MS. WESTMORELAND: We -- what I pled in the
5 answer, in the motion in the district court was that we
6 were not waiving 9(a), but we did not have information on
7 the merits of the claims at that point in time -- things
8 such as the competency to stand trial claim, and the
9 ineffective assistance of claims due to the timeliness of
10 the proceedings involved, yes.

11 QUESTION: But did the State explain to the
12 court -- do you think it was clear to the court that it
13 was the State's position that it did not have time to make
14 a response?

15 MS. WESTMORELAND: Your Honor, I think that was
16 clearly pled in our pleadings with the district court that
17 we were saying we don't have time -- because of the
18 circumstances there's no way we can make a representation
19 about prejudice one way or the other.

20 And now we'll get back to a secondary point on
21 that, is that obviously on certain claims there was no
22 prejudice because they had already been litigated on the
23 merits, and that was the secondary problem we had with
24 pleading delay as a general principle and pleading 9(a) as
25 a general principle, and I didn't want to misrepresent to

1 the Court that we couldn't respond to all of the claims
2 because I think we probably could have, although how
3 quickly and how thoroughly I could have done so would have
4 been a different matter.

5 QUESTION: If you didn't invoke Rule 9 -- I take
6 it you didn't invoke it. You didn't say we're going to
7 come in and show that we're prejudiced.

8 So then what you're asking this Court to do is
9 to say there's a new ground for denying a habeas petition
10 that no one's ever invoked before, and if there is a good
11 ground, and there may be, I'm not saying there isn't, why
12 isn't that a matter that we would leave to Congress and
13 the rules committees rather than say there's an ill-
14 defined power to make up new grounds, which I guess would
15 work both ways.

16 Sometimes there would be new grounds, never made
17 up before, to deny petitions, and sometimes they would be
18 new grounds, never heard of before, for granting
19 petitions.

20 But rather than say there is an ill-defined
21 power in the Federal court simply to grant or deny
22 petitions on grounds that have not appeared yet in our
23 cases and have not appeared in the rules or in the
24 statutes, rather we'll stick to Barefoot v. Estelle and
25 keep to what we've seen in the past and let Congress and

1 the rules committees decide when there are new grounds.

2 MS. WESTMORELAND: Your Honor, first of all, I
3 think we did plead delay, and we did plead 9(a). What we
4 acknowledged at the time of filing the proceedings in the
5 district court was that based upon the time factor we
6 could not make the particularized showing --

7 QUESTION: I'm not saying that you didn't -- I'm
8 not turning to blame or praise for a particular instance.
9 I'm saying, I take it -- and tell me if I'm wrong -- that
10 you and the Eleventh Circuit have a new ground for denying
11 a first petition never invoked before. Certainly my law
12 clerks in the library could not find a comparable instance
13 forever.

14 Maybe this kind of thing is good, maybe it
15 isn't, but the issue before us, I would take it, is
16 whether there is a general power in the Federal courts to
17 create new grounds not found in Barefoot v. Estelle or
18 later cases for either granting or denying petitions.

19 If that's the issue, I guess my first thought
20 would be, why isn't it up to Congress, or later
21 experience, or the rules committees to embody those new
22 kinds of grounds, rather than simply giving a mandate to
23 the lower courts to do whatever they think is nice in the
24 circumstance?

25 MS. WESTMORELAND: Your Honor, I submit to you

1 that this is not a new ground. We're not asking the
2 Court --

3 QUESTION: We could find no instance, so you can
4 tell me what the instance is. We could find no instance
5 in a first petition where a court had denied the first
6 petition without following Rule 9 or some other well-
7 established ground. Now, what is the instance where this
8 was --

9 MS. WESTMORELAND: I'll agree with you on that,
10 Your Honor. I can find no factual scenario out there like
11 this anywhere.

12 QUESTION: Right. So then am I right in
13 thinking what this Court would be doing if you're upheld
14 is to say the lower Federal courts are free to create new
15 grounds. Sometimes they'll be for denying petitions,
16 sometimes they'll be for granting petitions. We'll have
17 to supervise it, I guess, and that seems a rather far-
18 reaching proposition, and contrary to Barefoot v. Estelle,
19 and that's what I'm putting to you to hear your response.

20 MS. WESTMORELAND: Your Honor, what we would
21 submit is what the district courts have the discretion to
22 do is to examine new issues as they arise, new factual and
23 procedural scenarios as they come up under long-
24 established equitable principles. We're asking that this
25 Court allow the district court to utilize what this Court

1 has consistently recognized the district court can do, and
2 that is, look at equity.

3 QUESTION: And of course the other way will
4 work, too.

5 MS. WESTMORELAND: Certainly.

6 QUESTION: We'll got a lot of cases where they
7 have new grounds in equity for granting them, and why -- I
8 mean, normally, I take it Barefoot v. Estelle was a
9 statement that by and large we will follow traditional
10 practices rather specifically or leave it up to the rules
11 committee rather than just have a general mandate. Am I
12 right about that, to make up --

13 MS. WESTMORELAND: I think that's a general
14 statement, but I don't think Barefoot went so far as to
15 say we're never going to look at equitable principles on
16 habeas corpus. The history of this Court's habeas
17 jurisprudence has been to examine equitable factors
18 consistently.

19 QUESTION: Well, let's see how it might work.
20 Suppose we had in this case everything you're saying
21 except for one thing, and the one thing is if there had
22 been no next friend petitions, so that we take out of it
23 the question whether this was effectively a successive
24 Federal petition, no next friend petitions at all. Would
25 that have fit your category of something outside 9(a) and

1 (b) but nonetheless can be an abuse of the writ?

2 MS. WESTMORELAND: Your Honor, I think if we had
3 had the 6 years where nothing had happened, and I presume
4 that is the hypothetical you're proposing, I think our
5 argument certainly becomes much harder because then you're
6 a lot closer to what 9(a) is designed to deal with, a true
7 laches situation where nothing has happened except delay.

8 We would submit to the Court that there should
9 be a way for the district court to take that into
10 consideration. However --

11 QUESTION: Well, Ms. Westmoreland, do you take
12 the position that a last minute filing of a first Federal
13 habeas, without all these intervening next friend things,
14 is inherently prejudicial under Rule 9(a)? Do you take
15 the position that it fits under 9(a) simply because the
16 filing is so close to the deadline?

17 MS. WESTMORELAND: No, Your Honor, we have not
18 taken that position in our brief primarily because we
19 don't need to take that position. We don't need for the
20 Court to take that step in this case because that's simply
21 not what we have.

22 QUESTION: Well, that's not as big a step as
23 saying the Court can go outside Rule 9 and develop new
24 grounds, but you aren't trying to shoehorn this into rule
25 9(a).

1 MS. WESTMORELAND: No. We're not trying to
2 shoehorn it deliberately into Rule 9(a). I think there's
3 certainly some suggestion that it could be, but what we're
4 simply going back to asking the Court to do is to examine
5 everything that took place in this case -- that is, it's
6 not a true first Federal habeas petition filed by Mr. --

7 QUESTION: Is that your strongest position, that
8 it is effectively a succeeding Federal habeas petition?

9 MS. WESTMORELAND: Your Honor, I think our two
10 strongest positions are that particular fact, and
11 encompassed in that involves the fact that this is not a
12 situation where Larry Lonchar was unaware of anything that
13 was going on. We have an individual determined to be
14 competent by four courts, was brought into court
15 consistently given consistent opportunities to
16 participate.

17 QUESTION: Well, is there any -- is there any
18 authority that you could find where courts have said that
19 a next friend petition which is dismissed without
20 prejudice is to be regarded as in fact a first Federal
21 habeas petition?

22 MS. WESTMORELAND: No, Your Honor. No.

23 QUESTION: May I ask in that regard, please,
24 just one question?

25 Supposing instead of the next friends being his

1 brother and his sister, the State itself had a
2 psychiatrist who was concerned about the mental condition
3 of the person about to be executed, and the defendant kept
4 saying I'm perfectly healthy, I want to be executed and
5 all the rest, but the State's genuine doubt led to
6 precisely the same delay that you had here.

7 Then they finally made up their mind, yes, he's
8 competent, and they set the execution date, and he
9 immediately changed his mind and filed a first Federal
10 habeas. What result?

11 MS. WESTMORELAND: Your Honor, I think in that
12 case you'd have to say that the delay at least is in large
13 part attributable to the State, as opposed --

14 QUESTION: Well, supposing the State did
15 nothing. Very often you have long delays because it's
16 hard to get these things arranged, and what if nothing
17 happened? Would it be the same case then?

18 MS. WESTMORELAND: Your Honor, again, I don't
19 think -- it's certainly not the same case that we have
20 here.

21 QUESTION: Well, why not? Is it because he's
22 responsible for the next friend petitions?

23 MS. WESTMORELAND: He's not responsible per se
24 for the next friend petitions. What he's responsible for
25 is not participating in and not filing petitions when he

1 had ample opportunity to do so.

2 QUESTION: Well, he could have in my
3 hypothetical about the State having its own psychiatrist
4 have these doubts. He could have said -- gone ahead any
5 time he wanted. Why is that case different?

6 MS. WESTMORELAND: Your Honor, I think the
7 difference in that case is because again you get back to,
8 that becomes our fault. That becomes our fault that it's
9 a last minute proceeding because we haven't taken the
10 action that the State should have taken, and either gone
11 ahead and gotten some litigation to proceed and determine
12 that he was competent, or taken some action to get an
13 execution date set to move the case along.

14 QUESTION: So you're saying that if everything
15 just remained in status quo from 1990 to 1995, for reasons
16 that the State just didn't decide to execute him promptly
17 enough, you would not deny he could then come in 5 minutes
18 before the execution and get an automatic stay.

19 MS. WESTMORELAND: I would have some problems
20 with it. The problem with -- first of all, under State
21 law, he can do that. Under Georgia law he can do that.
22 We would not have any way to bar him from doing that at
23 this point, so I would be precluded from making much of an
24 argument in State court, and we would have a State
25 petition filed.

1 QUESTION: So the last minute application for
2 stay is not, per se, an abuse of the writ.

3 MS. WESTMORELAND: No, Your Honor, I don't think
4 it is.

5 QUESTION: Then I --

6 MS. WESTMORELAND: I don't think it is, and
7 again, what we're saying in this case is there is much
8 more involved than just --

9 QUESTION: Yes, but all that's involved is that
10 (a) he had the opportunity, which he had in my
11 hypothetical, and (b), you somehow are attributing his
12 brother's and sister's activities as though he was really
13 behind them.

14 MS. WESTMORELAND: Your Honor, I think we're
15 doing a little bit more than that, and actually I'm not
16 blaming or crediting Larry Lonchar for the actions of his
17 brother and sister. What I am giving him responsibility
18 for is for being in open court on numerous occasions and
19 having the opportunity to raise the exact claims he's
20 raised here.

21 QUESTION: Yes, but that could have happened in
22 my hypothetical. When the State is, on its own motion,
23 conducting hearings all along the line trying to satisfy
24 itself he's an appropriate candidate for execution he'd be
25 in court repeatedly, and you're saying that would be a

1 different case.

2 MS. WESTMORELAND: Well, Your Honor, if he's in
3 court repeatedly denying the opportunity to do so, that
4 might present a somewhat different situation, but I think
5 what we're focusing on is his opportunity to participate
6 in litigation, his opportunity to raise the identical
7 claims -- the only claim raised in this petition that's
8 new is the method of execution claim. Everything else has
9 been presented in one of these prior petitions, if not
10 more than one.

11 QUESTION: But in each of the cases, in the case
12 of each prior petition, he in effect was saying, I am not
13 incompetent, and I do not want these people to file these
14 things for me.

15 MS. WESTMORELAND: That's correct, Your Honor.
16 That --

17 QUESTION: And so all he has done, it seems to
18 me, is to change his mind at the last minute that he wants
19 his case reviewed, and yet you have said that under
20 Georgia law he could perfectly well do that if he had sat
21 silent for 6 years.

22 So in -- it seems to me -- I guess I'm
23 getting -- trying to make the same point that Justice
24 Stevens' question did. Unless you are going to attribute
25 the brother and sister petitions to him, I don't see why

1 his position is any different, essentially, from what it
2 would have been if for 6 years he had said, I don't want
3 relief, I want to die, and at the end of 6 years, with 5
4 minutes to go, he said, I've changed my mind. I don't see
5 what the difference is, unless you attribute the brother
6 and sister to him.

7 MS. WESTMORELAND: Your Honor, I think under the
8 circumstances that we have here, I think you have to
9 attribute those proceedings to him at least to the extent
10 of, he's had his chance. He's had his opportunity for
11 access. He's had the opportunity --

12 QUESTION: He would have had the opportunity in
13 Justice Stevens' hypo --

14 MS. WESTMORELAND: Certainly.

15 QUESTION: -- and he would simply have sat on
16 it. The only difference is, in one case he would have
17 been sitting on it in a jail cell, and in another case he
18 was sitting on it during certain periods of time when he
19 was pulled into court against his will.

20 MS. WESTMORELAND: Pulled into court and given
21 ample opportunity to adopt the same claims that he is now
22 seeking to raise.

23 QUESTION: Absolutely, and in each case he said,
24 I'm competent. I don't want these people filing claims on
25 my behalf.

1 MS. WESTMORELAND: And I think, Your Honor --

2 QUESTION: I mean, wasn't he free to take that
3 position?

4 MS. WESTMORELAND: Certainly. Certainly. He
5 was free to take the position and free to pursue what he
6 still says he wants to do, and I think that becomes our
7 second -- in response to Justice O'Connor's question
8 earlier, our second most important factor in this case is
9 what Mr. Lonchar is trying to do, and what he says he is
10 trying to do, and what both the State court and the
11 district court found as fact he is trying to do.

12 He adopted, and I use the word very loosely, the
13 allegations of these petitions because he's decided that
14 was the only way he could try to have the method of
15 execution changed in the State of Georgia. Mr. Lonchar
16 has never said he wants his death sentence reversed. He
17 has never said he wants a new trial. He has never said
18 anything but, I want to be executed.

19 QUESTION: But he is saying that he does have a
20 claim that entitles him to relief. He's saying that.

21 MS. WESTMORELAND: What he --

22 QUESTION: Isn't he?

23 MS. WESTMORELAND: What he is saying, and I
24 think this gets back to what -- if you look at what he
25 says in these proceedings, he wants the opportunity to

1 donate his organs.

2 QUESTION: Right.

3 MS. WESTMORELAND: To make some meaningful
4 contribution to society.

5 QUESTION: That's what may motivate him to
6 change his position going forward here, but so -- don't we
7 have to take his claim at this point as a claim that he is
8 entitled to some relief, I presume a vacation of his
9 conviction, and he is making that claim, isn't he?

10 MS. WESTMORELAND: Your Honor, I don't think
11 that's the claim he's making. I think the reading --

12 QUESTION: Then if he's not, then the thing
13 should be thrown out on a motion to dismiss.

14 MS. WESTMORELAND: That's exactly what the State
15 court did in the first fashion and said he's not seeking
16 relief.

17 QUESTION: All right, but then you'll get your
18 relief. If that's the case, then you'll get your relief
19 on a motion to dismiss, not on the invocation of some new
20 equity room.

21 MS. WESTMORELAND: And we moved to dismiss.

22 QUESTION: All right, but you're --

23 MS. WESTMORELAND: That's exactly what we did.

24 QUESTION: That's a separate issue, and so far
25 at least in the Federal court you haven't had any success

1 on that, in part because the Federal court went off on
2 another ground, but leaving that aside, until it is
3 dismissed, I guess we have to assume that he's making a
4 claim which says I'm entitled to some relief here, and the
5 relief, in fact, if I get it, will prolong my life, right?

6 MS. WESTMORELAND: Your Honor, if you looked at
7 the face of the pleadings alone, yes, I think you would
8 have to assume that. If you looked at what Mr. Lonchar --

9 QUESTION: All right. Well, we -- haven't we
10 got to assume that for the sake of this case?

11 MS. WESTMORELAND: I think if you look at what
12 he said in open court, both before the State court and
13 before the district court in June of this year, that's not
14 what he's trying to do.

15 QUESTION: Well, what he said in open court was,
16 I want this relief because I want to buy time, and in that
17 time I hope the State is going to change its method of
18 execution so that when and if I am executed, or when I am
19 executed, I may drop my proceedings, if that happened. I
20 will drop my proceeding if that happened. I can donate my
21 organs to an organ bank, or to science, or whatever.
22 That's what he said, isn't it?

23 MS. WESTMORELAND: What he actually said was,
24 I've been told that the only way I can get this
25 accomplished, to change the method of execution, is to

1 file this petition.

2 QUESTION: Well, didn't the court of appeals say
3 in its opinion that he had filed for improper purposes?

4 MS. WESTMORELAND: Yes, they did, Your Honor.

5 QUESTION: So that is in effect before us.

6 MS. WESTMORELAND: Yes, Your Honor, that's
7 correct. That's exactly -- and the district court --

8 QUESTION: And the improper purpose was this
9 desire to wait so that he could make the organ donation,
10 right?

11 MS. WESTMORELAND: The desire simply to wait.

12 QUESTION: Yes.

13 MS. WESTMORELAND: And that's not --

14 QUESTION: But I mean, isn't he -- if he is
15 entitled to relief on his claim, taken by itself, isn't he
16 entitled to do with his life what he wants to do with it?

17 MS. WESTMORELAND: If he's raising a substantive
18 claim for habeas corpus relief, which we submit he's not
19 doing. What he's seeking --

20 QUESTION: Okay, but that's the separate issue.
21 If that's the case, you will succeed on a motion to
22 dismiss.

23 If he hasn't stated a claim, you're going to get
24 it thrown out because he hasn't stated a claim, and that's
25 not before us, as I understand it.

1 MS. WESTMORELAND: Well, Your Honor, I think
2 that's wrapped up in what the Eleventh Circuit's opinion
3 was. I believe --

4 QUESTION: No, but the Eleventh Circuit did not
5 say, he has not stated a claim. The Eleventh -- as I
6 understand it, the Eleventh Circuit said he has engaged in
7 delaying tactics which, on equitable grounds, we are
8 entitled to consider in denying the petition. Isn't that
9 what it said?

10 MS. WESTMORELAND: That was the fundamental
11 premise, but I believe they also focused, as did the
12 district court, on what he was trying to do. The district
13 court's opinion itself, and it's discussed --

14 QUESTION: Sure, but -- no, but all I'm saying
15 is, we are not here to consider whether or not he stated a
16 claim upon which habeas relief could be granted, isn't
17 that fair to say?

18 MS. WESTMORELAND: I think that's fair to say.

19 QUESTION: Okay.

20 MS. WESTMORELAND: In that technical sense, when
21 we look at the entire petition --

22 QUESTION: Right. Okay.

23 MS. WESTMORELAND: Certainly.

24 QUESTION: Okay, so if we put that issue aside,
25 we've got to assume that he has, at least for purposes of

1 this proceeding, stated a claim, and the answer which
2 comes, I guess, out of the circuit, and what you're saying
3 is, that shouldn't matter, because he wants to use his
4 relief for an improper purpose, and the improper purpose
5 is to live long enough to donate his organs to science,
6 and my question to you is, if he is entitled to relief,
7 which we have to assume at this point he is, why is he not
8 entitled to use the life or the period of life that he
9 gains by it for whatever purpose he chooses?

10 MS. WESTMORELAND: If Mr. Lonchar were saying
11 that I want my conviction and sentence reversed, and in
12 that time period we're going to do what we can about the
13 method of execution, then that does undercut that aspect
14 of our argument, but that's not what he's doing in this
15 case.

16 In spite of the fact that the petition has
17 claims in it which are not subject to dismissal, Mr.
18 Lonchar's stated intent, and the relief he seeks, he does
19 not seek to have his conviction and sentence reversed.
20 That's not the relief he's seeking. We're back to the
21 point --

22 QUESTION: Okay, then it ought to be thrown out
23 because he is not seeking relief upon which habeas corpus
24 can grant relief, but that's a separate issue, isn't it?

25 MS. WESTMORELAND: It -- there's two different

1 issues, and that's a different one, yes, but it's
2 certainly an issue.

3 QUESTION: Okay. But we've got to assume that
4 that issue is not before us right now. Now, why -- if we
5 make that assumption, what's the answer to my question
6 that he ought to be entitled to use whatever life he gets
7 for whatever purpose he wants to use it? What's the
8 answer to that?

9 MS. WESTMORELAND: Your Honor, if you get past
10 that -- if you take that assumption, and you go past that
11 point, then what he wants to do with his life is not
12 necessarily the factor any more. Then we're back to
13 looking at equitable principles. We're looking at what
14 has gone on over the past 6 years in this case to
15 determine -- we're back to looking at equity, and why
16 equity allows the district court --

17 QUESTION: And that then gets us solely to the
18 matter of delay, and you have said that even under Georgia
19 law he could have delayed up until 5 minutes and that
20 would not disentitle him on equitable principles under
21 Georgia law to relief.

22 MS. WESTMORELAND: Alone.

23 QUESTION: Ms. Westmoreland, I thought you were
24 not willing to accept that assumption. I thought what --

25 MS. WESTMORELAND: I'm not, Your Honor.

1 QUESTION: Yes, I thought not. I thought that
2 your position is, yes, we're not entitled to a dismissal.
3 That's been ruled on, and it states a claim on its face,
4 but nonetheless, for equitable purposes you can consider
5 the purpose for which he is seeking relief as a factor in
6 the equitable judgment.

7 MS. WESTMORELAND: Yes, Your Honor.

8 QUESTION: It's the same factor that could be
9 used for a dismissal of the complaint, but merely because
10 you can't dismiss the complaint doesn't mean you that you
11 cannot consider it as an equitable factor.

12 MS. WESTMORELAND: I think that's absolutely our
13 point.

14 QUESTION: Is that normally an equity, that -- I
15 mean, if I think that somebody is sitting on my piece of
16 property, and I get an injunction to get rid of them, and
17 I'm legally entitled to the injunction, does it matter if
18 I want to get rid of him because I hate him, rather than I
19 couldn't care less whether he's actually on the property?

20 I mean, I've just never seen that in equity, but
21 maybe it is, I don't -- that the motive matters as opposed
22 to whether you're legally entitled to get rid of this
23 person or not get rid of him. What matters, whether you
24 like him, you don't like him, is there some equitable
25 principle?

1 MS. WESTMORELAND: Your Honor, I think that
2 equitable principles -- and again, we get back to
3 separating one at a time. If you look strictly at
4 motivation in your hypothetical, then no, that alone does
5 not figure into it.

6 But can you factor all of these aspects
7 together? Can you factor into the equation in this case
8 his stated purpose, the stated relief he seeks, his
9 failure to participate in the next friend actions, factor
10 all of these things together --

11 QUESTION: Yes, but I take it his purpose, he
12 says, look, I'm legally entitled not to be executed
13 because there were legal mistakes made in my trial in
14 earlier proceedings. Does it matter if the reason he
15 doesn't want to be executed is because he wants to live
16 forever, or because he feels that he'd like to use the
17 last few years left to him to make certain his organs are
18 donated to help humanity? What's the difference?

19 MS. WESTMORELAND: I think it certainly matters,
20 Your Honor, when what he says is, I'm not interested in
21 getting my death sentence or my conviction reversed. I
22 want to be executed. And what he specifically said was,
23 I'd be happy to be executed this afternoon.

24 QUESTION: Ms. Westmoreland, you listed a series
25 of factors in response to Justice Breyer's question about

1 the equities. It's true habeas is an equitable remedy,
2 but isn't there also a large concern that there shouldn't
3 be unevenness? Equity discretion for the individual
4 chancellor may fit one way when we're talking about
5 distribution of property, it may fit another way when
6 we're talking about life or death.

7 MS. WESTMORELAND: Your Honor, I think there's
8 certainly a concern about the evenhanded distribution of
9 justice, if you will.

10 QUESTION: Isn't that why rules are important,
11 so that everybody will do it the same way?

12 MS. WESTMORELAND: Rules are certainly
13 fundamentally important, Your Honor. The problem that we
14 have in this case is we have a scenario never envisioned
15 by Congress, on which Congress simply has never had the
16 occasion to need to enact a rule. This Court in its
17 history has never felt constrained to refuse to look at an
18 equitable principle simply because Congress has not acted.

19 QUESTION: Well, there's a lot of stretch left
20 in Rule 9 anyway, isn't there, 9(b), for example, if the
21 judge finds that the failure of the petition constituted
22 an abuse of the writ? There's a lot of leeway allowed as
23 to what the judge may consider to be abuse of the writ,
24 isn't that right?

25 MS. WESTMORELAND: That's correct, Your Honor,

1 and I think this Court has made it quite clear in its
2 abuse-of-the-writ cases that -- we're not saying it's
3 limited to any specific little litany of factors.

4 QUESTION: To get into that box, though, it has
5 to be a successive petition.

6 MS. WESTMORELAND: For 9(b), it does. 9(b)
7 specifies successive petitions, that's correct, but there
8 are other --

9 QUESTION: May I go back to Justice Ginsburg's
10 earlier question, and that is, if this case, given the
11 importance that we all agree a -- some kind of a regime of
12 general rules has, isn't the very fact that this case is
13 so unusual, perhaps it is truly unique, a good reason not
14 to use this case as the occasion to fashion a new rule
15 which in fact is broader than the case?

16 MS. WESTMORELAND: Your Honor, one of the
17 reasons that we're not asking for a new rule is because I
18 think the old rules of equity apply to this case. That's
19 the problem with --

20 QUESTION: Well, a rule which addresses this
21 situation under circumstances which equity courts have
22 never done before. You agree -- Justice Breyer said, I
23 can't find any examples of this --

24 MS. WESTMORELAND: I can't --

25 QUESTION: -- and you said, I can't, either.

1 MS. WESTMORELAND: No.

2 QUESTION: And isn't that a good reason not to
3 use this as the springboard for a new line of equity
4 jurisprudence?

5 MS. WESTMORELAND: Your Honor, if we were asking
6 the Court to do just that and to engage in an entire new
7 line of lawmaking or decisionmaking, then I think this
8 case presents certain factual problems that make it more
9 difficult to engage in general rulemaking, because it's
10 not the general case, but we're not asking the Court to go
11 off making new broad-ranging rules because we don't --
12 under the circumstances of the case, we simply don't need
13 them.

14 Yes, this case presents a classic example of we
15 got two different last minute petitions being filed, two
16 different stays of executions at the very last minute,
17 which could have come up certainly much earlier in the
18 proceedings. It does lend itself to that analysis.

19 QUESTION: Thank you, Ms. Westmoreland.

20 MS. WESTMORELAND: Thank you, Your Honor.

21 QUESTION: Mr. Verrilli, you have 3 minutes
22 remaining.

23 MR. VERRILLI: If the Court has no further
24 questions, we're prepared to submit.

25 QUESTION: I have just one question I would -- I

1 should know this from the papers, but what method of
2 execution does Georgia now use?

3 MR. VERRILLI: Electrocution.

4 QUESTION: It still uses electrocution.

5 CHIEF JUSTICE REHNQUIST: Very well. The case
6 is submitted.

7 (Whereupon, at 11:00 a.m., the case in the
8 above-entitled matter was submitted.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

LARRY GRANT LONCHAR, Petitioner v. ALBERT G. THOMAS, WARDEN

CASE NO: 95-5015

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mani Federico

(REPORTER)