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. :

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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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C O N T E N T S

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.

QUESTION: And he did know his veins were compromised.

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

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

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

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

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

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

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

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

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

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

that's our --

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

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

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

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

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

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

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

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

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

MR. STEVENSON: Yes, sir.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. STEVENSON: No, Your Honor.

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

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

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

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

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

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

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

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

QUESTION: The crime was committed when?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. STEVENSON: Absolutely.

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

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

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

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

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

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

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

QUESTION: Well, but --

MR. STEVENSON: Venous access can --

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

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

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

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

MR. STEVENSON: Well, I guess --

QUESTION: -- categories of case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. STEVENSON: Yes. My position, Justice

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

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

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

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

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

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

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

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

MR. STEVENSON: Yes.

QUESTION: This fits into a bigger picture.

MR. STEVENSON: Yes, yes.

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

bigger picture --

MR. STEVENSON: Yes. The big --

QUESTION: -- in your opinion.

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

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

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

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

MR. STEVENSON: Well, what the --

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

MR. STEVENSON: Yes. And --

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

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

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

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

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

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

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

Here --

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

MR. STEVENSON: Yes, sir.

QUESTION: Right?

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

MR. STEVENSON: No, Your Honor.

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

MR. STEVENSON: That --

QUESTION: I mean, you know --

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

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

MR. STEVENSON: Sure.

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

that this constitutes cruel and unusual punishment.

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

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

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

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

QUESTION: It just doesn't fit under deliberate

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

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

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

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

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

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

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

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

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

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

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

MR. STEVENSON: Yes, sir.

Unless there are further questions from the

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

QUESTION: Very well, Mr. Stevenson.

Mr. Newsom, we'll hear from you.

ORAL ARGUMENT OF KEVIN C. NEWSOM

ON BEHALF OF THE RESPONDENTS

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

I'd like to make three points this morning.

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

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

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

called endless death row appeals.

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

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

QUESTION: Yes.

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

QUESTION: He says it's not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. NEWSOM: That's precisely --

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

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

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

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

MR. NEWSOM: Well --

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

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

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

subsequent.

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

QUESTION: Convince the others.

(Laughter.)

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

QUESTION: What -- what should happen?

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

MR. NEWSOM: The -- the --

QUESTION: -- law was?

MR. NEWSOM: The Court --

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

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

QUESTION: Isn't that a fair description --

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

QUESTION: -- of what our prior second or

successive law was?

MR. NEWSOM: I -- I --

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

MR. NEWSOM: Precisely.

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

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

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

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

QUESTION: And why not?

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

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

MR. NEWSOM: Well --

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

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

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

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

MR. NEWSOM: The percutaneous central line placement.

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

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

QUESTION: And you make that assurance to us

today.

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

QUESTION: That will be attempted.

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

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

QUESTION: Are you sure, Mr. Newsom --

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

circuit and in Alabama for trying to stop that?

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

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

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

With respect to two of the remedies --

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

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

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

MR. NEWSOM: May I just --

QUESTION: And if so, how?

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

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

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

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

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

QUESTION: I see.

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

expired.

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

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

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

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

MR. NEWSOM: He can get into --

QUESTION: And if so, how?

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

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

MR. NEWSOM: Well, not --

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

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

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

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

QUESTION: Do you think AEDPA amended 1983?

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

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

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

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

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

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

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

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

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

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

MR. NEWSOM: That's --

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

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

QUESTION: Or there's the equitable problem --

QUESTION: How long do the appeals take?

MR. NEWSOM: I'm sorry.

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

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

MR. NEWSOM: In answer --

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

MR. NEWSOM: Let me try to answer these various

questions in order, if I can keep up.

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

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

MR. NEWSOM: To be sure.

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

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

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

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

MR. NEWSOM: Okay. Now --

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

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

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

QUESTION: You're right about that.

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

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

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

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

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

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

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

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

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

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

MR. NEWSOM: Fair enough.

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

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

MR. NEWSOM: Accurately describes.

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

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

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

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

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

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

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

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

QUESTION: So those are the two cases which you

feel are the strongest support for you.

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

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

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

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

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

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

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

of injection does not challenge the legality of injection.

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

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

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

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

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

the discussion that I was having with Justice --

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

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

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

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

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

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

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

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

MR. NEWSOM: Those --

QUESTION: -- in Alabama?

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

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

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

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

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

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

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

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

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

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

Federal district court.

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: May I --

QUESTION: Thank you, Mr. Newsom.

Mr. Stevenson, you have 8 minutes remaining.

REBUTTAL ARGUMENT OF BRYAN STEVENSON

ON BEHALF OF THE PETITIONER

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

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

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

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

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

MR. STEVENSON: Absolutely, and the problem here

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

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

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

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

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

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

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

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

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

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

MR. STEVENSON: Absolutely.

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

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

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

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

not attempt to invalidate his conviction or sentence.

There is a gap.

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

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

QUESTION: Is that not what was said today?

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stevenson.

The case is submitted.

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

above-entitled matter was submitted.)