IN THE SUPREME COURT OF THE UNITED STATES

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CLARENCE E. HILL, :

Petitioner :

v. : No. 05-8794

JAMES R. MCDONOUGH, INTERIM :

SECRETARY, FLORIDA DEPARTMENT :

OF CORRECTIONS, ET AL. :

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Washington, D.C.

Wednesday, April 26, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

D. TODD DOSS, ESQ., Lake City, Florida; on behalf of the Petitioner.

CAROLYN M. SNURKOWSKI, ESQ., Assistant Deputy Attorney General, Tallahassee, Florida; on behalf of the Respondents.

KANNON K. SHANMUGAM, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Hill v. McDonough.

Mr. Doss.

ORAL ARGUMENT OF D. TODD DOSS

ON BEHALF OF THE PETITIONER

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

In Nelson v. Campbell, this Court held that a challenge to procedures to execute an inmate may be brought in a section 1983 action unless the challenge would necessarily prevent the State from carrying out its execution. Mr. Hill does not challenge the State's right to execute him by lethal injection, but instead, only challenges the particular protocol Florida Department of Corrections in their discretion has adopted. Mr. Hill's claim, thus, does not necessarily prevent his execution, and his claim falls squarely within the scope of Nelson, as announced by this Court.

The current claim -- the only focus of that claim is the discretionary choice of the particular injection procedure that has been chosen by the Florida Department of Corrections. Therefore, it does not violate Nelson because the relief sought would not

necessarily prevent the State of Florida from carrying out its execution. The State could still carry out the execution through a more humane means by altering the particular protocol that -- that they have adopted.

JUSTICE SCALIA: Which you decline to specify. Right?

MR. DOSS: I'm sorry, Justice. I didn't hear the first part of your question.

JUSTICE SCALIA: By a means which you decline to specify, so that if they come up with some other means, you could -- you could object to that as well I assume.

MR. DOSS: Well, there -- in -- in answer to your question, there's never been a -- a requirement that a section 1983 plaintiff must plead a constitutionally acceptable alternative.

JUSTICE SCALIA: No, I understand that. But I'm just -- I'm just pointing out what -- what becomes available to you if we -- if we give you the relief you request.

MR. DOSS: Well, this --

JUSTICE SCALIA: You -- we -- we say this -- this procedure is no good. The State comes up with another procedure, and you challenge that one. Right? And -- and another few years go by.

MR. DOSS: I -- I respectfully disagree with the fact that it would just leave open a total series of challenges.

JUSTICE SCALIA: Why?

MR. DOSS: The State -- the State would have the opportunity to come in and propose a acceptable alternative. Just like any other finding of unconstitutionality, once they propose that alternative, we can challenge that if something is -- is not acceptable, or accept the -- the proposed alternative and the court enters a -- a consent decree.

JUSTICE SCALIA: You -- you think that the -- the way you would proceed in trial court is the trial court finds that this is no good, and -- and then the trial court proposes an alternative, or -- or invites the State to propose to the trial court an alternative, and then asks whether you agree to that alternative. And if you don't, the trial court makes the decision whether the alternative is -- is constitutional or not.

MR. DOSS: This -- that's --

JUSTICE SCALIA: That's not bad.

MR. DOSS: -- that's entirely correct, and I think we've seen that in -- in a couple of the cases that are out there. Mr. Brown's case out of North Carolina followed that track. Mr. Morales' case

somewhat followed that track, although through no fault of Mr. Morales, California wasn't able to carry through on the alternative that they chose because the anesthesiologists decided to not participate. But it -- but it just proceeded to basically an up or down ruling upon the proposed alternatives. So I -- I would disagree that there's a seriatim effect of -- of just perpetual litigation over whether the alternatives --

JUSTICE GINSBURG: You're envisioning that one case will take care of it. That is, if the Court rules against you, that's the end of it. You can't come back with another inadequacy because you'd be barred by claim preclusion.

On the other hand, if the State comes up with an acceptable alternative, you agree to it. That's one thing. The Court holds -- but there wouldn't be a second episode I think. One way or another this proceeding would end it.

MR. DOSS: The only -- the only way I would foresee a second episode is if they -- if they proposed a second unconstitutional procedure.

CHIEF JUSTICE ROBERTS: Well, that probably will be what will be alleged. Of course, you don't know when -- at this proceeding, we have no idea, if we rule in your favor, what alternative the State is going

to provide, and I am willing to bet whatever that alternative is that it will be subject to a challenge under a new 1983 suit. There would be no claim preclusion if you didn't know what the alternative was at this point. Right?

MR. DOSS: That's correct, although it would proceed to basically an up or down ruling, just as it did in -- in the Brown case and the -- the Morales case.

JUSTICE SCALIA: In this very case, you're saying the court would -- would rule on the State's proposed alternative. Right?

MR. DOSS: That's correct.

JUSTICE SCALIA: But if you disagreed with that, you could appeal it up again. Right? You can go to the court of appeals --

MR. DOSS: That's correct.

JUSTICE SCALIA: -- and then seek cert up here. Right?

MR. DOSS: That -- that would be correct.

JUSTICE SOUTER: May -- just as a -- maybe this is technical, but what did you ask for for relief? Did you ask for relief that the State be enjoined from using this method, or that the State be enjoined from executing him until an acceptable method had been

found? Because in the first case, the door theoretically is open to seriatim 1983 actions, and in the second case, presumably the issue would be resolved in this one case, as you suggest. So which did you ask for? Injunction against this or injunction until an acceptable alternative came up?

MR. DOSS: We asked for -- for two -- two injunctions: one a preliminary injunction allowing the -- the Court to be able to consider the case, and then the way the prayer for relief was worded is, is that we asked for a permanent injunction barring the State of Florida from executing Mr. Hill as they currently intend.

JUSTICE SOUTER: Well, if that's -- if that's the relief you get, then the door would be open to successive different 1983 actions every time the State comes up with -- with a new protocol. Whereas, if what the -- if -- if the trial court -- if you succeed at this stage, if we say, yes, you're -- you're properly in court and you go ahead and litigate it, if the trial court, in fact, awards not the injunction that you asked for but the injunction saying do not execute this person until a constitutional protocol has been proposed and accepted by the court, then everything will get resolved in this one action, as you suggest.

So would -- would you consent to -- as it were, to an amendment of your prayer for relief so that the injunction will be in such a form that everything can get resolved in this one case?

MR. DOSS: In -- in the sense of -- of the State of Florida proposing a -- a -- hopefully a constitutional way of executing --

JUSTICE SOUTER: Yes.

MR. DOSS: -- Mr. Hill, where it wouldn't give rise to another 1983 action?

JUSTICE SOUTER: Right.

MR. DOSS: Yes.

JUSTICE SOUTER: You -- you would agree to that?

MR. DOSS: Yes.

JUSTICE KENNEDY: Well, do you have confidence --

JUSTICE GINSBURG: You said --

JUSTICE KENNEDY: -- do you have confidence that Florida can do that?

MR. DOSS: Based upon the litigation that we've seen around the country, yes, I think there are acceptable ways to -- to do it out there. Whether they would choose that way or not, I don't know because the way Florida's system is designed is -- is that it's not

statutorily mandated as to -- as to particular protocol that's utilized. It's left totally with the Secretary of the Florida Department of Corrections. It's not subject to any rulemaking or any administrative procedures as far as promulgating those rules. It's -- it's just within the Secretary's discretion.

JUSTICE ALITO: Do you --

JUSTICE KENNEDY: Well, one -- one of the circumstances that -- that was raised by the questioning is this. States generally have the defense of laches. They -- they require the petition to be filed within a reasonable time. With changes in pharmacology, the laches defense will not usually be available. And under the proposal that the -- the State resolves it once and for all, I suppose the State couldn't adopt a new protocol that it thought was better, more humane, without risking more litigation. So it -- it really is a disincentive for the States to try to make the procedure less painful for the -- for the accused.

MR. DOSS: Well, within -- within the Eighth Amendment jurisprudence of -- of the evolution of -- of Eighth Amendment jurisprudence, we've seen hanging go by the wayside. We've effectively seen electrocution

go by the wayside. As we advance as a society and as we advance within our knowledge of what's going on --

JUSTICE KENNEDY: Precisely. And that's going to be true with every new protocol.

MR. DOSS: That's an -- that's an evolution over time. It's --

JUSTICE GINSBURG: You said there were other States. You mentioned California. There was a proposal by the State. It couldn't be executed. What was the experience -- you mentioned a couple of other cases where the particular combination of drugs was successfully challenged, but then the State did what?

MR. DOSS: In Mr. Brown's case in North Carolina, my understanding was -- is that the State had went and purchased a device to make sure that he was actually unconscious during the procedure and wasn't subject to the excruciating pain that's been detailed within -- within the briefs. That actually was challenged because Mr. Brown's attorneys didn't think that the -- the people that were monitoring the machine were properly trained. The court ruled against them, and as we know, Mr. Brown was -- was executed. It didn't result in the series of challenges as -- as many are obviously concerned about.

JUSTICE ALITO: Do you agree that that was

not a -- that method of execution is not a violation of the Eighth Amendment?

MR. DOSS: As far as using the machinery that was used in Brown?

JUSTICE ALITO: Yes.

MR. DOSS: I -- I don't know enough about -- about that machine to -- to accurately comment on -- on that. I know that the challenges that were brought in Brown wasn't necessarily regarding the machine itself, but it was the qualifications of -- of the people monitoring the machine and whether they had the authority and ability to intervene in the execution itself. And I believe that that was the challenge that was ruled upon by the court in Mr. Brown's case before he was executed.

JUSTICE ALITO: Do you know of any method that has been used -- used throughout the country that is not a violation of the Eighth Amendment?

MR. DOSS: As far as -- as far as this particular protocol, this particular protocol that's -- that's utilized and that we're -- we're challenging is unconstitutional because of the excruciating pain. If the -- if the sedative works, and there's no -- and -- and the person is not in -- not in wanton and gratuitous type of -- of pain, as -- as this Court's

precedents hold, that would be constitutional. It's the -- it's the evidence that's coming forward that this is not what's happening that gives rise to our claim that -- that we would like to be able to litigate in a 1983 action so that we can get those facts before the court.

JUSTICE SCALIA: Is it only excruciating pain that the Eighth Amendment prohibits or is it any pain? Does the Eighth Amendment require painless execution?

MR. DOSS: No, absolutely not. It's -- it's that it's -- it's that it's wanton and -- and gratuitous pain.

JUSTICE SCALIA: Well, when you say wanton and gratuitous, you're -- you're saying any pain that can be eliminated must be eliminated. Otherwise, it's gratuitous I assume.

MR. DOSS: It's -- it's gratuitous when it's beyond what's -- what's necessary, and whenever the --

JUSTICE SCALIA: Yes. So if there's any way of -- of execution that is totally painless, that -- that must be pursued.

MR. DOSS: If there were a way to do that, I -- I would agree with that.

JUSTICE SCALIA: Where -- where do you derive that from? I mean, gee, you know, that -- that was

certainly never the principle evident in -- in executions in the past. Hanging was -- was not a -- you know, a quick and easy way to go. You would have thought they would have required a firing squad instead or something like that. I -- I just don't know where you're deriving this principle that there cannot be any pain associated with the execution.

MR. DOSS: I --

JUSTICE SCALIA: I can understand excruciating pain, but -- but you -- you want to press it to the point where there can't be any pain associated. Any pain that can be eliminated must be eliminated. That seems to me a very extreme proposition.

MR. DOSS: The -- the -- what -- what we've detailed here in our complaint is an extreme and tortuous method of -- of death. At this point --

JUSTICE SCALIA: No. I understand what you're challenging here. But what -- what alternative would be acceptable to you? Only one -- only one that -- that, to the maximum extent possible, eliminates all pain. Isn't that right?

MR. DOSS: Well, when you look at the -- when you look at -- at Morales and Brown, both of those that -- that were proposed were eliminating -- for instance,

one of the options within Mr. Morales' case was that only the sodium thiopental be used eliminating the pancuronium bromide and the potassium chloride. The State of California, for -- for whatever reason, did not -- did not choose that and went, instead, and tried to use the same protocol and bringing in anesthesiologists that were properly trained and qualified to determine whether or not Mr. Morales was, in fact, anesthetized to -- to a degree where he would not feel that pain. That -- that is -- that is an example of a proper procedure being -- being come up with -- or being dealt with.

As well, Mr. Brown -- and -- and thing is, is that for -- there's -- there's never been a requirement for -- for us to plead this. The reason being is -- is this Court's case law within -- for example, Lewis v. Casey shows the -- the strong deference that this Court gives to States in -- in coming up with the prison procedures. That's not an execution case, but here the Florida courts -- not Florida courts, but the Florida officials within the Department of Correction -- they know their facilities. They know what's capable of -- of being done there or not.

CHIEF JUSTICE ROBERTS: Would it be -- if -- if in the future, if States specify the method of

execution in the sentence, then you would not have a 1983 action. Is that correct? Because you would then be challenging the sentence, and it would have to be brought under habeas.

MR. DOSS: If the particular protocol that was alleged in the sentence, yes, it would be ripe at that point in time as opposed to Florida's system where it's within -- it's within the discretion of the Department of Correction to change it at any time. We've seen that happen whenever the electric chair litigation was going on, that they changed these procedures over time, adding and detracting different things.

JUSTICE SCALIA: Well, but -- but you -- you -- their procedure was set forth in a -- in a notice, a regulation or something. You -- you had notice of what procedure they intended to use several years ago, didn't you?

MR. DOSS: The only --

JUSTICE SCALIA: Now, you're saying they could change it in the future, but sure, of course. Any -- any agency can change its -- its regulations. But didn't you know that this is the procedure they intended to use several years ago?

MR. DOSS: No, Your Honor. It was -- what they relied upon was what was -- what was detailed in

Sims, which was 6 years ago. But with the -- with the discretion that Florida Department of Corrections has and that they've exhibited in the past, that they've utilized that discretion whenever we were having the electric chair litigation going on, we can't presume that.

The added problem is --

JUSTICE SCALIA: So you have to wait to -- you have to wait to the eve of execution before -- before you think you have a -- a ripe claim under -- under habeas.

MR. DOSS: Under -- under Florida's scheme, yes, we have to wait because they have the complete discretion. We have no access to be able to get the public records. In fact, we've been denied throughout.

JUSTICE SCALIA: Congress has the complete discretion to change the statutes it's enacted, but that doesn't mean that you can't change -- you can't challenge a statute now because it might be changed before -- before the action you want to take occurs. You can challenge it now. And it seems to me it's the same thing with the method of execution prescribed by -- by an administrative agency in -- in a State.

MR. DOSS: If Congress has the situation set up that Florida does not engage in -- in rulemaking.

They don't go through an orderly administrative process, taking public input and having people come and participate in that. It's totally --

JUSTICE GINSBURG: Well, what did they have? There was the Sims case. No -- no -- certainly not in the legislation. There's no rule that emerges. But you did know that there was a lethal injection procedure that had been prescribed for another prisoner, and yet you didn't challenge the lethal injection at that time. Why did you wait until so late?

MR. DOSS: Because -- because that claim was not ripe at that time, because we didn't know what would be utilized whenever it came to Mr. Hill being executed. Our knowledge as to how Florida Department of Corrections utilizes that discretion has been that they actually used that discretion in the past. We have not been able to get any records post-Sims regarding their procedures, regarding the protocol --

JUSTICE GINSBURG: Have they, in fact, changed the procedure for the lethal injection?

MR. DOSS: I don't have any public records to -- to be able to say one way or another. We were denied all public records whenever we were proceeding in State court.

JUSTICE SOUTER: When did you ask for the public -- when did you ask for the -- a -- a statement of the protocol that would be used in your case?

MR. DOSS: It was December the 8th is whenever it began, and then pursuant to the court's -- the trial court's order that was entered in that case, the State's response came on December 19th. The court ruled on December 23rd. The rehearing was denied on the 30th, and we filed our briefs in the Florida Supreme Court on January 3rd.

JUSTICE SCALIA: I don't understand. How did you get into the court if you didn't know what protocol they were going to use?

MR. DOSS: Once --

JUSTICE SCALIA: You say you didn't know it until the 19th when your case was already in the court. What -- what were you challenging?

MR. DOSS: What we -- what had happened is -- is whenever the -- whenever the death warrant was signed on November 29th, that put into play Florida Rule of Criminal Procedure 3.852(h)(3) which then entitles us to more records that we are not entitled to before a warrant is signed. At -- at that point, we filed our records request, and the trial court, indeed, put forth their order as to when everybody was to

respond and have various pleadings in. We --

JUSTICE SCALIA: Excuse me. How did the trial court get into it? Does the records request go through -- through a trial court?

MR. DOSS: Yes.

JUSTICE SCALIA: What -- what is the -- the action that you're bringing? An action for records request?

MR. DOSS: Yes. It's under Florida Rule of Criminal Procedure. It's geared specifically to death-sentenced individuals as opposed to being -- we don't have available what's under Florida statute. Chapter 119 is not available to a death-sentenced inmate. So we must proceed through the 3.852 procedures, and that was not activated until the point in time that the warrant was actually signed.

We filed other pleadings in the court that were denied regarding mental retardation, regarding a Roper claim, and various other -- other claims.

Ultimately, we also filed in regards to the public records claim and us being denied the public records and the ability to assess the protocol. Florida --

JUSTICE SOUTER: May -- may I ask you to clarify one thing? I take it, at this point, there

isn't any question about the -- the amounts and ingredients that will be used in -- if -- if the execution goes forward. But my recollection is that you said that your -- your request for a specification of this formula or protocol was denied by Florida. Did you ever, as a result of your records request or otherwise, get a statement directly from Florida to you that the following proportions of chemicals will be used?

MR. DOSS: Within the -- within the public records proceeding, it was referenced that it would be the same as -- as Sims. Florida Department of Corrections --

JUSTICE SOUTER: But until you went into that proceeding, I take it, you had asked Florida to specify and Florida said, no, it would not do so?

MR. DOSS: We had asked for the records and had requested the records that would specify and any written procedures and protocol, as well as the records from -- from prior executions. They fought that and prevailed in the trial court.

And in the Florida Supreme Court, we had also sought records from the medical examiner that does the autopsies on executed individuals, as well as various other officials we thought might have information. We

were -- we were given nothing and they objected to us receiving any records whatsoever.

JUSTICE SOUTER: Did -- did you ever say to -- to any Florida official, please tell me what the chemicals are and the amounts that will be used --

MR. DOSS: We --

JUSTICE SOUTER: -- not asking for records, just asking for a statement about what they were going to do?

MR. DOSS: It -- it came forward at the -- at the hearing regarding the public records that it was going to be the Sims -- that it was going to be the Sims procedure.

JUSTICE SOUTER: But I guess before you went into court with a public records action, did you ever say to somebody, tell us what you're going to do?

MR. DOSS: By our public records request, yes. If -- if Your Honor is asking if I spoke to the --

JUSTICE SOUTER: What -- what I'm getting at is --

MR. DOSS: -- Department of Corrections, no.

JUSTICE SOUTER: -- there -- there are ways to find out. One would be to ask. One would be to chop the door down with an ax to find out if there's a

statement hidden inside. Did you ever try the easy way and simply say to them, will you specify for us what you're going to do and how you're going to do this?

MR. DOSS: That was essentially done at the public records hearing on December 19th whenever they came in and said it was -- that it was Sims.

JUSTICE SOUTER: Okay.

MR. DOSS: The -- the thing is, is --

CHIEF JUSTICE ROBERTS: Well, you -- you alleged in your complaint -- I'm looking at footnote 3 -- that you assumed they were going to follow the same protocol as in Sims.

MR. DOSS: Because of their -- because of -- of the representations that were made during the public records litigation. That was based upon -- that was what we based our assumption on, knowing that they still had the ability to change it all the way up until the date that Mr. Hill was scheduled to be executed.

JUSTICE SCALIA: Well, they still do, but you're here. I mean, they -- they still have the opportunity to change it, but you're here challenging it even though it is still changeable. Right?

MR. DOSS: They -- yes. Because of the way Florida operates with the total discretion and -- and the refusal to give any public records regarding this,

yes, we are in the dark regarding it. They could -- they could alleviate that situation by doing an administrative rulemaking process, that that rule is then in place, and with that rule in place, it would be ripe at that point because at that point they're constrained to follow the rule as opposed to having the liberty to -- to change the procedures as they -- as they deem fit at the last minute.

JUSTICE STEVENS: Can I just clarify one thing for myself? Do I correctly understand that the Federal district court -- I'm not talking about the State court -- did not rule on the merits of your claim, but merely held that 1983 is not the proper method of pursuing the claim?

MR. DOSS: That's correct.

JUSTICE STEVENS: So that there hasn't been a decision by a Federal judge on whether or not there's merit to your case.

MR. DOSS: That is correct.

JUSTICE STEVENS: It's just a question of which -- whether you do it by way of habeas corpus or by 1983.

MR. DOSS: That is -- that is correct, and it was recharacterized as -- as a successive habeas petition rather than a 1983 action.

JUSTICE STEVENS: And I suppose it's entirely possible that if the judge then decided it is really -- if we said it should have been a 1983 action, the judge could say, well, okay, even under 1983 the State has the defense of laches and you still lose. I mean, you -- we don't know what's going to happen if we find out -- if we agree with what your argument in this Court is. Is that right?

MR. DOSS: It would go back for -- for an analysis as to the equities of the situation, and -- and that being an intensely fact-bound procedure, the district court is actually in -- in a better position to go ahead and -- and be able to make that analysis there at the district court level, a Gomez analysis as to the equities that are involved within the situation.

So as -- as we sit here today, there has not been any ruling on the merits of -- of this, and there hasn't been any evidence produced in -- in any court through testimony whatsoever regarding the issues of the protocol and -- and things of -- of that nature that we've been discussing here this morning.

And I think that -- that whenever -- whenever you -- you look at -- actually if the Court doesn't have any more questions, I'm going to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Snurkowski, we'll hear now from you.

ORAL ARGUMENT OF CAROLYN M. SNURKOWSKI

ON BEHALF OF THE RESPONDENTS

MS. SNURKOWSKI: Mr. Chief Justice, and may it please the Court:

The State is here today to suggest that the method that -- to challenge these claims is by habeas corpus, and that the Federal district court, as well as the Eleventh Circuit, was correct in finding that the district court had correctly found it had no jurisdiction because, in fact, it was a functional equivalent of the habeas corpus.

But to -- to address some of the issues that were currently brought before the Court today with regard to the ability of the defendant to come forward and discern what exactly was the method by which Florida was intending to execute him, the record bears out that, in fact, the Sims case was in the public domain and, in fact, is the method by which Florida does execute individuals. There was --

JUSTICE GINSBURG: But there's no statute and there's no regulation that requires Florida to do that.

MS. SNURKOWSKI: These -- there is no specific statute. The statute itself merely says that

lethal injection is the method by which Florida is to execute individuals.

The Department of Corrections, through rulemaking process internally, provides protocols for the execution day and other protocols with regard to the execution team performing its function on that given day and -- and hours leading up to that. And that has not been changed nor modified, nor has it been challenged --

JUSTICE GINSBURG: But there is no statute, no regulation. That means the executive can do what it will. There's nothing that binds them to the way it was done in Sims' case.

MS. SNURKOWSKI: That is correct, to the extent that there's no statutory provision or regulatory rule because, in fact, under Florida -- the Florida legislature has exempted rulemaking of the Department of Corrections with regard to executions.

JUSTICE GINSBURG: And I suppose that's -- that's the complaint. If there was a procedure in place, we could address it. If Florida reserves to itself the ability to change at any time, well, that's -- we want to be told what it will be in our particular case so we have a target that we can aim at.

MS. SNURKOWSKI: And I understand that, but

the State would contend that based on the fact that there have 16 executions since the time that Sims has occurred and all those executions have been performed exactly as the manner in which Sims has occurred, and that there has not been any challenge to a deviance from that, and in fact, the Florida Supreme Court has ratified again in this case, when Mr. Hill brought his Eighth Amendment claim, that Sims was the method of execution in Florida, I think we have a very reasoned determination that, in fact, the method of execution, as it has been proposed in Sims, is currently the method of execution that we utilize.

JUSTICE BREYER: But what he -- I -- I take it the ripeness issue is -- he delayed in bringing it because he wasn't certain what you'd do. And -- and one of the reasons, I think, would be that it's only recently there was an article in the Lancet --

MS. SNURKOWSKI: Correct.

JUSTICE BREYER: -- that says the -- in the opinion of the doctors who wrote it, a significant number of executed people are conscious when they die, and that's painful.

And then it's been suggested there are ways around that. Just give them more sodium pentothal or have a doctor or somebody there to make certain the

individual is unconscious at the time that the death-causing drugs take effect.

All right. Now, that doesn't seem too difficult. Maybe it's difficult, but it doesn't seem too difficult. So why can't they think, you know, Florida -- they can read there too. They have people who read these articles, and indeed, maybe they'll just do it. They don't have any real interest in -- in causing suffering. Why don't they just do it?

And so he thinks, up until the last minute, that maybe Florida will just do it, and lo and behold, when the death warrant is actually executed, it now begins to appear that they won't. And therefore, at that time, he brings the case.

Now, I've spun out a story which seems probable, but if it's true, it would be very understandable why this wasn't ripe before the execution warrant is issued and thereafter it is. Now, what is your reply on the ripeness question?

MS. SNURKOWSKI: Well, my reply on the ripeness question is, first of all, that I don't believe that your scenario -- while I'll accept your scenario as your scenario, it is not accurate with regard to what occurred in Florida.

But apart from that, there has not been a

change and nor has there been any allegations by the defendant. He certainly, as you have indicated, could have read and, in fact, did read the Lancet article and made no statements with regard to his allegations --

JUSTICE BREYER: -- my -- my little story was inaccurate as to Florida or accurate as to Florida.

MS. SNURKOWSKI: I'm sorry?

JUSTICE BREYER: Is the kind of thing I was explaining why it would be ripe I think -- is that accurate enough for the purposes of ripeness as to what happened in Florida?

MS. SNURKOWSKI: No. And my answer, I would suggest to you, is no --

JUSTICE BREYER: No.

MS. SNURKOWSKI: -- because I think it's part of the pleadings. I mean, he certainly had the wherewithal. If he felt that there was another manner by which it could have been changed or that the Department of Corrections, in this particular instance, was suddenly going to -- now aware of the Lancet article, would change its method, he has not made any allegations of that, nor has he asked. And that was one of the questions that was postulated to him, the fact that in -- that he never asked.

JUSTICE GINSBURG: Would he have to come up

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MS. SNURKOWSKI: Excuse me.

JUSTICE GINSBURG: -- with, as you suggest, an alternative that would be acceptable? Suppose there had been a hearing and it was proved more probable than not that in some cases -- not in all, but in some cases -- use of this injection would cause excruciating pain. Would the Petitioner who is objecting being exposed to that have to come up with an alternative in order to avoid the risk of excruciating pain?

MS. SNURKOWSKI: Well, it seems to me, based on this Court's decision in Nelson, that that was the focal point of why relief was granted in the fashion it was, that it was a proper issue to rely in 1983 because, in fact, there might be a -- he had proposed a mechanism that might be alternative mechanism that was accepted by the government. In this instance, it's -- the record is silent and -- which goes --

JUSTICE GINSBURG: Well, my question to you is -- I take it you're answering yes, that if they prove that some people will be subject to excruciating pain, that's not good enough unless the Petitioner proposes an alternative, that it's all right for the State to expose someone to the risk of what has -- what has been determined to be the risk of excruciating pain

as long as the Petitioner himself doesn't come up with an alternative.

MS. SNURKOWSKI: Well, I think the answer is twofold. First of all, the fact that the articles out there reflect that there's a potential that that could happen, there's not been evidence that it has occurred or has happened, which has been necessarily what is the precursor to when there has been changes in the method of execution because there has been a history where, in fact, a botched execution has occurred no matter what the method may have been.

The second part is that there has not be a -- a specific showing in this particular case, nor an allegation for that matter, that any kind of event in this particular case would, in fact, cause excruciating or any kind of pain --

JUSTICE GINSBURG: Well, because there's been no hearing. We've never gotten past is this -- can you open the door through 1983, and I -- I still don't understand what your answer is to my question.

Now, I'm supposing that we do have the 1983 hearing, and the judge says, yes, I agree with the Petitioner's experts. In some cases there will be excruciating pain. Then you say, but, Judge, they haven't come up with an alternative.

MS. SNURKOWSKI: Correct.

JUSTICE GINSBURG: And the judge says, you're both right. Some people have excruciating pain, but there's been no alternative suggested. Bottom line of that particular case would be?

MS. SNURKOWSKI: That, in fact, I think that he has to make some colorable showing of an alternative that would be acceptable to him based on the procedures because, again, the second prong of that seems to me --

JUSTICE GINSBURG: So the answer is yes.

MS. SNURKOWSKI: Yes, Your Honor. I'm sorry.

JUSTICE GINSBURG: The court, having found that some people will be subject to excruciating pain, still no Eighth Amendment violation because the Petitioner hasn't come up with an alternative.

MS. SNURKOWSKI: Yes.

JUSTICE SOUTER: What is the source of his obligation to do this? I mean, why does he have an obligation under the Eighth Amendment or under any other ground to tell the State how to execute people?

MS. SNURKOWSKI: Well, I think the Court in its Nelson opinion suggested that that was a means --

JUSTICE SOUTER: That -- that was a fact in Nelson, but my question to you is if -- if we were to agree with you and say that that, in fact, is a -- is

an element of a 1983 action here, what would be the source of -- of the -- the conclusion that -- that he has to propose a less painful alternative?

MS. SNURKOWSKI: I guess part of the source would be the fact that in overcoming the qualifications -- while maybe his pleading may be simple, the notion is that he has to overcome those things that may have happened in the past. For example, in this particular instance, whether in fact there's been any violation as to a -- a res judicata, collateral estoppel --

JUSTICE SOUTER: No. But I mean, that's not -- that's not the issue. I'm not asking you about res judicata. I'm saying that if he comes into court and, as Justice Ginsburg suggested in her hypo, his experts demonstrate to the satisfaction of the fact finder that there will, in a certain number of cases, be excruciating pain, and he is at least within the risk of that, your response is we're still -- that is no grounds for enjoining the execution under 1983. We can still execute unless he comes up with a proposal for a less painful way of doing it.

And what I want to know is, why does he have such an obligation? Why isn't it enough for him to show that there is a probability that he will suffer excruciating pain?

MS. SNURKOWSKI: Well, I think for one point, it would be that, in fact, if the State had chosen or selected a method or a change in the modification of the method that was not acceptable to him, then we'd be still back at square zero --

JUSTICE KENNEDY: No. Justice Souter and Justice Ginsburg can protect their own questions.

Part of that allegation in here is that the State wasn't forthcoming with the -- with -- with the information requested, and you're not very forthcoming with the answers. What is the source, what is the legal source, what is the precedent for the proposition that the -- that the condemned man has to come up with an alternative? What case do you cite? What principle do you cite?

MS. SNURKOWSKI: The principle I'm --

JUSTICE KENNEDY: That's what we're asking.

MS. SNURKOWSKI: Yes, Your Honor. And I'm sorry that I was in any way disingenuous.

But the bottom line is I think that Nelson is the bottom line source of -- of concern that we would bring forth to this Court that if, in fact --

JUSTICE SOUTER: But it was mentioned -- it was mentioned in Nelson. But what would be the reason for -- for elevating that -- that fact in Nelson to a

requirement? What is the legal principle that would support your argument?

MS. SNURKOWSKI: I think the legal principle being that the individual who is coming forth and seeking to have the execution or requesting some relief -- he has to come forward with some evidence, some -- some body of law --

JUSTICE STEVENS: But isn't there evidence in -- I noticed the brief filed by some veterinarians call our attention to the statute that prohibits the euthanasia of dogs and cats unless they follow a certain procedure. So there must have been a legislative feeling that unless that procedure were followed, there's a risk of undue pain to the dogs and cats. Why isn't there a similar basis for believing that if you don't follow a similar procedure that such a risk might be present for human beings?

MS. SNURKOWSKI: And that -- that has been an allegation and that has been raised before the courts over the years with regard to that.

JUSTICE STEVENS: And what's your response to it?

MS. SNURKOWSKI: That, in fact, recent -- recent development -- and I mean, we're talking about an area that has not -- we have not gotten that far.

We don't have a record.

JUSTICE STEVENS: But your procedure, if I understand it, would be prohibited to be applied to dogs or cats.

MS. SNURKOWSKI: But the procedure -- that procedure -- there is -- there is legal information or -- or scientific information out there that -- or -- refutes that, and that, in fact, there's a different mechanism and that's --

JUSTICE STEVENS: Well, at least it was sufficiently convincing to get the Florida legislature to pass a statute.

MS. SNURKOWSKI: That's -- that's correct, with regard to that particular aspect because it was one needle being used and all the drugs were being used in that needle. But that is, again --

CHIEF JUSTICE ROBERTS: Counsel, I would have thought your -- your answer to the line of questioning earlier was that the reason that the Petitioner has to come up with this -- an alternative is that otherwise it's plausible, at least, to suspect the reason he's bringing the action is as a challenge to the execution itself rather than the particular method. And that if it's a challenge to the execution itself, it has to be brought under habeas. If it's just a challenge to the

method, it can be brought under 1983. If he's unwilling to say there is a valid method, then it starts to look like a challenge to the execution that has to be brought under habeas.

MS. SNURKOWSKI: And -- and that is the core position the State has taken, and I'm sorry if I did not articulate that in a fashion that --

JUSTICE BREYER: But in respect to that core position, I can understand the State's concern with the possibility of abuse. But in Nelson, what the Court says is it points to Gomez, and Gomez was a 1983 case. And there, the Court denied a stay of the execution because it looked into the history of the litigation, and they said that this particular individual had done just what worries you, though in a somewhat different context. He kept bringing the cases, and every time, you know, he'd lose. Then he'd think of another way of making the same point, and in your context, it would be first he challenges this method and he says there are others that are fine. So we go to another. Then he challenges that. Then he challenges that. Then he challenges that, always at the very last minute. So there's a case that provides a weapon if the abuse that you worry about occurs.

So why do we need something else like an

absolute rule of some sort that the Petitioner has to think of a method of execution, a matter on which he is not necessarily expert, that would turn out in the future to be not painful? I mean, you don't need to put on your overcoat and also turn up the heat.

MS. SNURKOWSKI: But --

JUSTICE BREYER: You've got the case that helps you if that occurs. Why do you need to argue for something else?

MS. SNURKOWSKI: Well, and the only reason we're arguing for something else, it seems to me that the basis upon which we are here today is to determine whether 1983 or habeas will lie. And apart from that, I'm trying to make an argument, to the extent I have or not, that -- that this is more in keeping with habeas as opposed to 1983 litigation.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Shanmugam, we'll hear now from you.

ORAL ARGUMENT OF KANNON K. SHANMUGAM

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

Where a prisoner challenges a particular

method of execution but fails to identify a permissible alternative, that claim is functionally equivalent to a claim challenging the prisoner's death sentence per se and therefore must be brought --

JUSTICE SCALIA: Why is that? Why is that? That -- that -- in which case it would be like -- like Heck. Right? It would come within the Heck principles.

MR. SHANMUGAM: Well, our view is that the Heck principle is not applicable here where a prisoner is seeking relief that is indisputably available in habeas. Our view is that the governing precedent and really the touchstone here is this Court's decision in Preiser v. Rodriguez, which drew the distinction that the Court has long recognized between claims challenging the conditions of a prisoner's confinement and claims challenging the fact or duration of that confinement.

Now, to be sure, that analogy is not exactly apt in the capital context. But we believe that where a prisoner identifies a permissible alternative, it is that which renders the claim --

JUSTICE BREYER: Well -- well, why? But I mean, suppose he doesn't. Okay? But it's absolutely clear he's not saying all methods are unconstitutional.

He's saying this method is unconstitutional. If he says this method of constitutional and he wins, then his challenge will not necessarily prevent the State from carrying out its execution. And, of course, I'm reading to you directly from Nelson v. Campbell. That would seem right in point. And why isn't that the end of this case?

MR. SHANMUGAM: Well, we do believe that where a prisoner brings an open-ended claim of the type at issue here, it would necessarily prevent the State from carrying out the execution in one relevant sense. Namely, it would prevent the State from carrying out the execution --

JUSTICE BREYER: Yes, and if I bring a claim that my prison cell is so cold, I actually get pneumonia and die, or near it, and then I challenge the coldness of the cell, I'm preventing my confinement in one particular way.

MR. SHANMUGAM: Well, that's exactly --

JUSTICE BREYER: It's a cold cell. And so that would similarly, on your theory, be habeas, but we know it isn't.

MR. SHANMUGAM: Well, no, I don't think that that's true, and I do think that the --

JUSTICE BREYER: My cold cell is habeas?

MR. SHANMUGAM: No. I think that the cold cell case clearly is a conditions of confinement claim.

And let me explain to you, Justice Breyer, if I may, the reason that the identification of an alternative is so critical. It is the identification of an alternative that renders the claim the functional equivalent of a conditions of confinement claim because a conditions of confinement claim is really necessarily predicated on the assumption that the prisoner will continue to serve exactly the same sentence, even if the claim is successful. In your hypothetical, if a prisoner claims that his cell is too cold, the necessary implication is that the prisoner will be able to continue to be imprisoned at some higher temperature, even if the prisoner does not specify in his complaint that he wants to be held at 70 degrees or 72 degrees. And that is the reason why the identification of the alternative is so important.

JUSTICE BREYER: Why more than in Nelson?

MR. SHANMUGAM: Well, in Nelson, it was important, and we would submit that it was really the dispositive factor in the Court's analysis. The Court noted the fact that the State had conceded -- the prisoner had identified and the State had conceded that an alternative method could be used to administer the

execution.

JUSTICE SCALIA: I didn't -- I didn't get your explanation. Had you finished it?

MR. SHANMUGAM: Yes.

(Laughter.)

MR. SHANMUGAM: Let me try -- let me -- let me try again through a different route, though.

Where a prisoner fails to identify an alternative, the risk here is that such a claim could delay and may, in fact, prevent the ultimate execution of the death sentence.

JUSTICE GINSBURG: What about the risks that the prisoner will die an excruciating death? I'm asking you the same question that I asked co-counsel. What happens then? He hasn't been able to come up with an alternative, but the judge finds it credible that he may be exposed to an excruciating death. What then?

MR. SHANMUGAM: Well, in that case, he may very well have a valid Eighth Amendment claim. But our principal submission --

JUSTICE GINSBURG: But would --

MR. SHANMUGAM: -- is that he cannot proceed in a section 1983 action. Presumably what would happen --

JUSTICE GINSBURG: Why not? Because he's

saying I am not asking for this to be one day further along. I'm just asking the State to give me a death that will not require me to suffer excruciating pain.

MR. SHANMUGAM: Well, again, the concern with the claim that fails to identify a permissible alternative is the risk of seriatim litigation. And I think that the history not only of the Nelson case, but also of some of the ongoing litigation, most notably the Morales case in California, demonstrates that that risk is a very real one. Where a prisoner fails to identify an alternative method, it is not --

JUSTICE STEVENS: Except -- let me just interrupt. Supposing he did identify, say you can only use pentobarbital on me, the same way they do it for a veterinarian. And the -- and the judge says, well, I don't think that's required. But he would then be satisfied the 1983 requirement?

MR. SHANMUGAM: Well, the State would at least have the option in that case --

JUSTICE STEVENS: Of saying no.

MR. SHANMUGAM: -- of acquiescing in the alternative. The State would, of course, have the option of saying no and litigating it.

JUSTICE STEVENS: But do you agree if he had said I propose alternative X, even though it's highly

unlikely the State will accept it, that would make it a 1983 action?

MR. SHANMUGAM: That would make it a 1983 action. And the critical point, as this Court recognized --

JUSTICE STEVENS: Even though there's no functional difference in terms of future litigation between that case and this.

MR. SHANMUGAM: Well, the only reason that there would be no functional difference is if the State chose to, in fact, litigate the issue, notwithstanding his identification of the permissible alternative.

And in Nelson --

JUSTICE BREYER: So you're saying -- saying then that the defense bar, the capital punishment bar, and the prisoners are the group of people that have to go and do the research on humane methods of putting people to death rather than the government.

MR. SHANMUGAM: Well, I --

JUSTICE BREYER: That strikes me as a little odd, doesn't it?

MR. SHANMUGAM: -- I would -- I would respectfully submit, Justice Breyer, that that is exactly the kind of research that they would have to do in order to bring the claim in the first place.

JUSTICE BREYER: Why?

JUSTICE SCALIA: I don't think -- I don't think that's the research they would do. I think the research they would do would be to come up with another method that the State certainly would not find acceptable, thereupon, rendering it a 1983 action and -- and leaving everything in the same status that it's -- that it is here. I mean, I don't see that you've accomplished anything by simply demanding that they -- that they come up with an alternative. They're going to come up with a -- with an unacceptable alternative.

MR. SHANMUGAM: Well, the alternative at a minimum has to be --

JUSTICE SCALIA: It -- it might be malpractice not to come up with -- with an unacceptable alternative.

(Laughter.)

MR. SHANMUGAM: At a minimum, the alternative has to be one that is permissible under currently governing law.

JUSTICE BREYER: Old age. They'll come with that alternative, old age. Right?

(Laughter.)

MR. SHANMUGAM: Well, that would not -- presumably that would not be a method of execution at

all.

JUSTICE KENNEDY: This -- this is a death case. It was not that amusing.

Let me ask you this. Doesn't the State have some minimal obligation under the Eighth Amendment to do the necessary research to assure that this is the most humane method possible? Doesn't the State have a minimal obligation on its own to do that?

MR. SHANMUGAM: I'm not sure whether it -- it would have an obligation to use the most humane method under the Eighth Amendment because this Court's cases have only suggested that the gratuitous infliction of pain is barred by the Eighth Amendment. I'm not aware of any cases --

JUSTICE KENNEDY: Well, I can define gratuitous -- I don't have the dictionary here. But gratuitous means essentially unnecessary. If there were other -- other means, other alternatives, that might be used, it seems to me that the State might have some minimal obligation to investigate those.

MR. SHANMUGAM: Well, I think more broadly, Justice Kennedy, that one reason that States do have discretion in this area -- and I think that Florida is not unusual in that regard -- is that prison officials are expected to adopt to evolving methods of execution

and to take into account changes that might suggest that a particular method is problematic. And so whether or not there is a constitutional obligation, I think that there is every reason to think that States will, in fact, do that.

I think that it is noteworthy --

JUSTICE SOUTER: But is there -- is there in this case? I mean, the Lancet article has been out there for a while, and it certainly is enough to suggest, in your words, that there is something problematic about the manner in which Florida proposes to do this. And yet, we have not heard a word that Florida has made any effort whatsoever to find an alternative or, for that matter, to -- to disprove what the Lancet article suggests.

And so it's one thing for you to say the States have discretion. I don't think that answers Justice Kennedy's question as to why the State does not have an obligation to fulfill its constitutional duty to execute without gratuitous pain. And I don't see why you have given any answer to -- to the proposal that that obligation requires the State to do some investigation of it's own.

MR. SHANMUGAM: Well, whether or not the State has that obligation -- it may very well have that

obligation as a constitutional matter, but putting that to one side, it does seem as if the critical question is whether or not the State, in fact, has adopted a method that inflicts cruel and unusual punishment, and where a prisoner has a claim of that variety, a prisoner has other options if the prisoner is unwilling to identify a permissible alternative to bring that claim besides --

JUSTICE SCALIA: We've -- we've never held that anyway, have we?

MR. SHANMUGAM: And the Court has never held that.

JUSTICE SCALIA: That the State must, in -- in imposing the death penalty, use a method that inflicts the least amount of pain.

MR. SHANMUGAM: The Court has not held that. Instead, it has --

CHIEF JUSTICE ROBERTS: And presumably there's some range between most humane and what's cruel and unusual. Right?

MR. SHANMUGAM: Well, I think that that is presumably true, based on the formulations that this Court has used which have repeatedly focused on the gratuitous or wanton infliction of pain as opposed to the least painful method.

CHIEF JUSTICE ROBERTS: Mr. Shanmugam, several of the emergency death proceedings we've had involving this question, the district court judges have assumed that it could proceed under 1983 but then denied relief because it was brought on the eve of execution, as this one was. Is that option available to the district court in this case if it's sent back?

MR. SHANMUGAM: It is available to the district court, and indeed, it would potentially be available even to this Court as a matter of first instance as it was in the Gomez case.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Doss, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF D. TODD DOSS

ON BEHALF OF THE PETITIONER

JUSTICE KENNEDY: You know it -- it is true that the 1983 is a civil action, and the plaintiff has the burden of proof, burden of producing evidence.

MR. DOSS: That is true. That is true, and we would be prepared to do that if we were allowed to go back and -- and proceed. We have produced evidence at the -- at the pleadings stage, and as we sit here today, since there hasn't been an answered filed, our -- our pleadings are -- are accepted as -- as true for

-- as a matter of procedure.

The interesting thing is, is that -- is that Florida created this problem. They can -- they can lay it out as to how to euthanize dogs and cats, but they can't do it for humans. That's perfectly in the open. Yet, they shroud this in secrecy. We can't get public records. We can't -- 3.852(h)(3) of the Florida Code of Criminal Procedure prevents us from going and getting these records before --

CHIEF JUSTICE ROBERTS: Do you think there was adequate time for the district court to fully consider the evidence you intended to present and consider your claim and still proceed with the execution that was scheduled?

MR. DOSS: No.

CHIEF JUSTICE ROBERTS: You filed your case 4 days before the execution.

MR. DOSS: No, but we were put in that posture by -- by the way the State of Florida has chosen to -- to vest this total discretion, shroud everything in secrecy, and then complain that we didn't bring it earlier when we --

CHIEF JUSTICE ROBERTS: The Sims protocol was there as a matter of public domain. You said in your complaint yourself, when you didn't get any

information, you said, well, I assume they're going to follow Sims. Why wasn't that assumption valid 3 months before, 6 months before, or a year before?

MR. DOSS: Because at that point, I knew that they had total discretion. I knew that before they had changed their protocols when the electric chair litigation was going on. Indeed, the Florida legislature changed the entire statute when this Court accepted Mr. Bryant's case --

JUSTICE KENNEDY: Well, it seems to me that you might -- you might have alleged that -- that you've read articles, Lancet articles, and so forth, and that there is a substantial risk that they're going to do this. I think that might suffice.

MR. DOSS: That --

JUSTICE KENNEDY: And -- and it would -- it would mean that the -- as the Chief Justice indicates, the court has more time to look at this.

MR. DOSS: As far as -- as far as the -- the ripeness issue, it's not -- because of the way Florida chose to do their procedure, it was not ripe, and it doesn't comport with this Court's basic ripeness doctrine that we are going to presume it's going to be done a certain way when the State can come in and say, it's not ripe for review, we -- we still have the

ability to change this rather than us coming --

JUSTICE ALITO: Suppose you -- suppose you never were told by Florida what the -- how exactly it was going to be done. Does that mean you never could have brought a 1983 claim even on the day -- the scheduled day of execution?

MR. DOSS: If they -- if they never told us, I guess we would be in -- in a position of -- of assuming Sims is in place. But the thing is, is that it's an equitable -- it's an equitable argument. And Florida is not coming forward with clean hands. They created this and then they just want to say, well, you should have known. We're not going to do anything to help you. We're going to shroud this in secrecy and not tell anybody.

JUSTICE SCALIA: Suppose -- suppose they did set it forth but reserved the right to change it. They promulgated a regulation without public notice, without hearings or anything. This is our regulation. This is how we intend to conduct executions in the future. Period. We reserve the right to change this. Would you claim that -- that this was not ripe? You couldn't challenge it at that point --

MR. DOSS: At that --

JUSTICE SCALIA: -- because they could change

it?

MR. DOSS: If Your Honor -- if Your Honor's fact situation includes a presumption that that's going to be the presumed method, I think at that point, yes --

JUSTICE SCALIA: No. This is the current method that we intend to use in all future executions. Period. We may change our mind.

MR. DOSS: At that point, yes, because they -- they are stating that they intend upon using that rather --

JUSTICE SCALIA: Don't -- don't you think you -- you --

MR. DOSS: -- rather than playing hide the ball.

JUSTICE SCALIA: -- don't you think effectively had that knowledge when you knew -- knew about Sims and you knew about all of the cases after Sims? Is that very much short of -- of their saying this is the -- the procedure we intend to use?

MR. DOSS: Absolutely not. We only knew about Sims. We asked for records regarding all the executions since Sims. We have not received it.

JUSTICE SOUTER: I -- I understand your -- your argument to be -- and I don't think you're making it here, but I understood your argument elsewhere to be

we knew about Sims, but when they stonewalled us and said we won't tell you what we're going to use, we had reason to question whether they were going to follow Sims. Isn't -- isn't that your point?

MR. DOSS: Yes, and that only came into play at the point --

CHIEF JUSTICE ROBERTS: No. You alleged the exact opposite in footnote 3. You said when they stonewalled you, we assumed they were going to follow Sims.

MR. DOSS: They stonewalled us only after the warrant was signed because we couldn't do anything at -- at the point before the warrant was signed to be able to try to -- to gather evidence as to what it was going to be. And we were never --

CHIEF JUSTICE ROBERTS: Finish.

MR. DOSS: -- we were never told that. And because the way Florida has created their system, we were prevented from doing that.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:09 a.m., the case in the above-entitled matter was submitted.)