

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CLARENCE E. HILL, :

4 Petitioner :

5 v. : No. 05-8794

6 JAMES R. MCDONOUGH, INTERIM :

7 SECRETARY, FLORIDA DEPARTMENT :

8 OF CORRECTIONS, ET AL. :

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10 Washington, D.C.

11 Wednesday, April 26, 2006

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

15 APPEARANCES:

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17 the Petitioner.

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23 on behalf of the United States, as amicus curiae,
24 supporting the Respondents.

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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 the 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

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

5 JUSTICE SCALIA: Which you decline to
6 specify. Right?

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

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

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

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

21 MR. DOSS: Well, this --

22 JUSTICE SCALIA: You -- we -- we say this --
23 this procedure is no good. The State comes up with
24 another procedure, and you challenge that one. Right?

25 And -- and another few years go by.

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

4 JUSTICE SCALIA: Why?

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

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

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

21 JUSTICE SCALIA: That's not bad.

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

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

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

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

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

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

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

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

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

13 MR. DOSS: That's correct.

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

17 MR. DOSS: That's correct.

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

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

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

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

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

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

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

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

8 JUSTICE SOUTER: Yes.

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

11 JUSTICE SOUTER: Right.

12 MR. DOSS: Yes.

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

15 MR. DOSS: Yes.

16 JUSTICE KENNEDY: Well, do you have
17 confidence --

18 JUSTICE GINSBURG: You said --

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

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

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

8 JUSTICE ALITO: Do you --

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

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

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

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

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

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

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

25 JUSTICE ALITO: Do you agree that that was

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

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

5 JUSTICE ALITO: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. DOSS: I --

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

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

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

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

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

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

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

1 execution in the sentence, then you would not have a
2 1983 action. Is that correct? Because you would then
3 be challenging the sentence, and it would have to be
4 brought under habeas.

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

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

18 MR. DOSS: The only --

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

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

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

7 The added problem is --

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

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

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

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

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

4 JUSTICE GINSBURG: Well, what did they have?

5 There was the Sims case. No -- no -- certainly not in
6 the legislation. There's no rule that emerges. But
7 you did know that there was a lethal injection
8 procedure that had been prescribed for another
9 prisoner, and yet you didn't challenge the lethal
10 injection at that time. Why did you wait until so
11 late?

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

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

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

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

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

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

14 MR. DOSS: Once --

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

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

1 respond and have various pleadings in. We --

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

5 MR. DOSS: Yes.

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

9 MR. DOSS: Yes. It's under Florida Rule of
10 Criminal Procedure. It's geared specifically to death-
11 sentenced individuals as opposed to being -- we don't
12 have available what's under Florida statute. Chapter
13 119 is not available to a death-sentenced inmate. So
14 we must proceed through the 3.852 procedures, and that
15 was not activated until the point in time that the
16 warrant was actually signed.

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

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

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

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

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

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

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

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

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

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

6 MR. DOSS: We --

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

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

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

17 MR. DOSS: By our public records request,
18 yes. If -- if Your Honor is asking if I spoke to the
19 --

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

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

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

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

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

7 JUSTICE SOUTER: Okay.

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

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

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

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

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

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

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

15 MR. DOSS: That's correct.

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

19 MR. DOSS: That is correct.

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

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

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

3 ORAL ARGUMENT OF CAROLYN M. SNURKOWSKI

4 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

25 MS. SNURKOWSKI: And I understand that, but

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

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

18 MS. SNURKOWSKI: Correct.

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

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

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

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

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

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

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

25 But apart from that, there has not been a

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

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

7 MS. SNURKOWSKI: I'm sorry?

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

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

14 JUSTICE BREYER: No.

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

25 JUSTICE GINSBURG: Would he have to come up

1 --

2 MS. SNURKOWSKI: Excuse me.

3 JUSTICE GINSBURG: -- with, as you suggest,
4 an alternative that would be acceptable? Suppose there
5 had been a hearing and it was proved more probable than
6 not that in some cases -- not in all, but in some cases
7 -- use of this injection would cause excruciating pain.

8 Would the petitioner who is objecting being exposed to
9 that have to come up with an alternative in order to
10 avoid the risk of excruciating pain?

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

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

1 as long as the petitioner himself doesn't come up with
2 an alternative.

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

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

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

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

1 MS. SNURKOWSKI: Correct.

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

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

10 JUSTICE GINSBURG: So the answer is yes.

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

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

16 MS. SNURKOWSKI: Yes.

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

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

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

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

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

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

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

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

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

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

16 MS. SNURKOWSKI: The principle I'm --

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

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

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

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

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

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

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

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

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

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

1 We don't have a record.

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

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

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

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

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

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

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

8 JUSTICE BREYER: But in respect to that core
9 position, I can understand the State's concern with the
10 possibility of abuse. But in Nelson, what the Court
11 says is it points to Gomez, and Gomez was a 1983 case.

12 And there, the Court denied a stay of the execution
13 because it looked into the history of the litigation,
14 and they said that this particular individual had done
15 just what worries you, though in a somewhat different
16 context. He kept bringing the cases, and every time,
17 you know, he'd lose. Then he'd think of another way of
18 making the same point, and in your context, it would be
19 first he challenges this method and he says there are
20 others that are fine. So we go to another. Then he
21 challenges that. Then he challenges that. Then he
22 challenges that, always at the very last minute. So
23 there's a case that provides a weapon if the abuse that
24 you worry about occurs.

25 So why do we need something else like an

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

6 MS. SNURKOWSKI: But --

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

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

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

20 ORAL ARGUMENT OF KANNON K. SHANMUGAM

21 ON BEHALF OF THE UNITED STATES,

22 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

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

25 Where a prisoner challenges a particular

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE BREYER: My cold cell is habeas?

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

3 And let me explain to you, Justice Breyer, if
4 I may, the reason that the identification of an
5 alternative is so critical. It is the identification
6 of an alternative that renders the claim the functional
7 equivalent of a conditions of confinement claim because
8 a conditions of confinement claim is really necessarily
9 predicated on the assumption that the prisoner will
10 continue to serve exactly the same sentence, even if
11 the claim is successful. In your hypothetical, if a
12 prisoner claims that his cell is too cold, the
13 necessary implication is that the prisoner will be able
14 to continue to be imprisoned at some higher
15 temperature, even if the prisoner does not specify in
16 his complaint that he wants to be held at 70 degrees or
17 72 degrees. And that is the reason why identification
18 of the alternative is so important.

19 JUSTICE BREYER: Why more than in Nelson?

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

1 execution.

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

4 MR. SHANMUGAM: Yes.

5 (Laughter.)

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

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

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

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

21 JUSTICE GINSBURG: But would --

22 MR. SHANMUGAM: -- is that he cannot proceed
23 in a section 1983 action. Presumably what would happen
24 --

25 JUSTICE GINSBURG: Why not? Because he's

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

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

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

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

20 JUSTICE STEVENS: Of saying no.

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

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

1 unlikely the State will accept it, that would make it a
2 1983 action?

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

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

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

13 And in Nelson --

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

19 MR. SHANMUGAM: Well, I --

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

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

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

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

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

16 (Laughter.)

17 MR. SHANMUGAM: At a minimum, the alternative
18 has to be one that is permissible under currently
19 government --

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

22 (Laughter.)

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

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

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

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

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

20 MR. SHANMUGAM: Well, I think more broadly,
21 Justice Kennedy, that one reason that States do have
22 discretion in this area -- and I think that Florida is
23 not unusual in that regard -- is that prison officials
24 are expected to adopt to evolving methods of execution
25 and to take into account changes that might suggest

1 that a particular method is problematic. And so
2 whether or not there is a constitutional obligation, I
3 think that there is every reason to think that States
4 will, in fact, do that.

5 I think that it is noteworthy --

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

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

23 MR. SHANMUGAM: Well, whether or not the
24 State has that obligation -- it may very well have that
25 obligation as a constitutional matter, but putting that

1 to one side, it does seem as if the critical question
2 is whether or not the State, in fact, has adopted a
3 method that inflicts cruel and unusual punishment, and
4 where a prisoner has a claim of that variety, a
5 prisoner has other options if the prisoner is unwilling
6 to identify a permissible alternative to bring that
7 claim besides --

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Mr. Shanmugam,

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

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

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Doss, you have 5 minutes remaining.

14 REBUTTAL ARGUMENT OF D. TODD DOSS

15 ON BEHALF OF THE PETITIONER

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

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

1 The interesting thing is, is that -- is that
2 Florida created this problem. They can -- they can lay
3 it out as to how to euthanize dogs and cats, but they
4 can't do it for humans. That's perfectly in the open.

5 Yet, they shroud this in secrecy. We can't get public
6 records. We can't -- 3.852(h)(3) of the Florida Code of
7 Criminal Procedure prevents us from going and getting
8 these records before --

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

14 MR. DOSS: No.

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

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

22 CHIEF JUSTICE ROBERTS: The Sims protocol was
23 there as a matter of public domain. You said in your
24 complaint yourself, when you didn't get any
25 information, you said, well, I assume you're going to

1 follow Sims. Why wasn't that assumption valid 3 months
2 before, 6 months before, or a year before?

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

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

14 MR. DOSS: That --

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

18 MR. DOSS: As far as -- as far as the -- the
19 ripeness issue, it's not -- because of the way Florida
20 chose to do their procedure, it was not ripe, and it
21 doesn't comport with this Court's basic ripeness
22 doctrine that we are going to presume it's going to be
23 done a certain way when the State can come in and say,
24 it's not ripe for review, we -- we still have the
25 ability to change this rather than us coming --

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

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

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

23 MR. DOSS: At that --

24 JUSTICE SCALIA: -- because they could change
25 it?

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

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

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

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

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

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

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

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

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

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

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

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

16 CHIEF JUSTICE ROBERTS: Finish.

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

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 The case is submitted.

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

25