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IN THE SUPREME COURT OF THE UNITED STATES

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GARY BRADFORD CONE, :
Petitioner :
v. : No. 07-1114
RICKY BELL, WARDEN. :
- - - - - x

Washington, D.C.
Tuesday, December 9, 2008

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:08 a.m.

APPEARANCES:

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf
of the Petitioner.
JENNIFER L. SMITH, ESQ., Assistant Deputy Attorney
General, Nashville, Tenn.; on behalf of the
Respondent.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-1114, Cone v. Bell.

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

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

As this case comes to the Court, two things I think are uncontested. The first is that, at this trial, the prosecution suppressed all the evidence in its files that went to the single most important contested issue of the case, and that's whether the defendant was a drug addict and committed the crimes in an amphetamine psychosis.

And the second is that, as soon as the Petitioner found out about the suppression, he presented his Brady claim to the State courts. In this --

CHIEF JUSTICE ROBERTS: There's also a third thing that's uncontested, which is there's no Brady claim on the merits. That's not at all included in your question presented. The district court and the court of appeals concluded that there was no Brady violation on the merits. I don't know what would happen if we sent

1 this case back. They'd conclude it again.

2 MR. GOLDSTEIN: Well, Mr. Chief Justice,
3 there are a couple issues that you've raised. Can I
4 first address the question of whether it's encompassed
5 within the question presented on the merits? Because
6 the question is, well, is this all just an academic
7 exercise because the procedural default holding wouldn't
8 change the ultimate outcome in the case?

9 The answer is that it is, we think, fairly
10 encompassed within the question presented, and I can
11 explain why, including with respect to the text of the
12 question presented.

13 The court of appeals in this case disavowed
14 deciding the merits of the Brady claim. And let me take
15 you to the petition appendix, and that is at page 22a
16 and again at 24a. So I'm just trying to walk you
17 through what the court of appeals did. At the very top
18 of 22a: "We therefore will not disturb our decision
19 that Cone's Brady claims are procedurally defaulted and
20 not before this court."

21 And then on 24a, at the bottom of the first
22 full paragraph, the last sentence: "We again find that
23 Cone's claims are procedurally defaulted and we reject
24 Cone's request to reconsider his Brady claims." And --

25 CHIEF JUSTICE ROBERTS: Well, but don't stop

1 there. On page 25a, they've been talking about those
2 federalism issues. They say: "We need not be delayed
3 by these interesting questions of federalism, however,
4 because, in all events, the documents discussed in the
5 dissenting opinion that were allegedly withheld are not
6 Brady material."

7 MR. GOLDSTEIN: Yes, Mr. Chief Justice. I
8 was not going to stop, and I was going to just point out
9 the dilemma that I faced when I wrote the cert petition.

10 So, on the one hand, they disavowed deciding
11 it, and then quite clearly there are some -- there are a
12 couple paragraphs there. You've -- you've stated one.
13 The next paragraph does the same thing, talking about
14 the merits of the Brady claim.

15 So here's the dilemma that I faced in
16 writing the cert petition. They say they're not
17 deciding the Brady claim, but then they talk quite
18 clearly about it. So I expressed --

19 CHIEF JUSTICE ROBERTS: Well, but don't --
20 you've resolved your dilemma by not raising anything at
21 all about the merits in the question presented.

22 MR. GOLDSTEIN: Mr. Chief Justice, I
23 disagree, and let me explain why. If you go to the cert
24 petition, of course, which you have in front of you,
25 starting on page 26 --

1 CHIEF JUSTICE ROBERTS: Well, let's start on
2 page Romanette i, where is -- where the questions
3 presented are. There's nothing in there about the
4 merits of the Brady claim. It's all about the
5 procedural objections that you have.

6 MR. GOLDSTEIN: Mr. Chief Justice, and I --
7 the document, of course -- let's -- let's talk about the
8 text of the question presented, and then I'll give my
9 explanation. So, the question presented, it says, is
10 "Whether Petitioner is entitled to Federal habeas review
11 of his claim that the State suppressed material evidence
12 in violation of Brady v. Maryland?" We thought --

13 CHIEF JUSTICE ROBERTS: And I -- I guess
14 what I would say is you've got Federal habeas review of
15 that claim because the district court decided it on the
16 merits and the court of appeals decided it on the
17 merits.

18 MR. GOLDSTEIN: Well, Mr. Chief Justice, I
19 have explained why it is, and if I can then take you to
20 the rest of the body of the cert petition. The doctrine
21 that I'm going to rely on is the question -- the issue
22 is, is it fairly encompassed within the question
23 presented? So -- the dilemma I have described to you is
24 the one I faced. The court of appeals said it wasn't
25 deciding the Brady claim, then it talked about it.

1 Then -- so, in the body of the cert
2 petition, which you all look to in my experience in
3 determining what's fairly encompassed, there are two
4 headings for the reasons for granting the writ. The one
5 is the procedural one. Then starting on page 26, we
6 present the merits question of the merits of the Brady
7 claim. And --

8 CHIEF JUSTICE ROBERTS: Okay. It seems to
9 me you either did not raise the question or you did.

10 MR. GOLDSTEIN: Yes.

11 CHIEF JUSTICE ROBERTS: If you did not, then
12 we don't address the procedural issues that you raised.
13 If you did, then also we have to resolve the question on
14 the merits, a very fact-specific Brady claim that we
15 would not normally take without reaching those
16 procedural issues. So, I -- I don't see why the
17 procedural issues are before us.

18 MR. GOLDSTEIN: Well, Mr. Chief Justice, can
19 I -- can I answer the -- finish answering my question
20 about the body of the cert petition and then come to
21 this? I'm glad to do it in whichever order. I do have
22 a couple of important points to make on your very
23 understandable question about what's fairly encompassed
24 within the question presented.

25 The particular place that I want to point

1 the Court to -- so starting on 26, we lay out our
2 argument about the merits, and then footnote 6 explains
3 quite clearly to the Court -- the Court sometimes has a
4 concern that parties are smuggling questions into the
5 case in front of it, and that's clearly what did not
6 happen here. We explain our dilemma about the Sixth
7 Circuit saying it wasn't deciding the merits, and then
8 footnote 6: "Because the panel" -- this is on page --

9 JUSTICE KENNEDY: Where am I going to find
10 footnote 6?

11 MR. GOLDSTEIN: Footnote 6 at page 30 of the
12 cert petition, sir.

13 "Because the panel disavowed deciding the
14 merits of Petitioner's Brady claim" -- in the language
15 that I quoted you to -- "and discussed the question only
16 in dictum, Petitioner's counsel have concluded that it
17 would not be permissible to state that issue as a
18 distinct question presented."

19 CHIEF JUSTICE ROBERTS: Our -- our cases
20 clearly hold that when you have alternate holdings,
21 neither one is -- is dicta.

22 MR. GOLDSTEIN: Sir, the -- but it was
23 disavowing it, I think, as an alternate holding. The
24 court of appeals opinion is not clear. It disclaims the
25 power even to decide the Brady claim.

1 And if I can just finish the footnote, it
2 really is only two sentences long: "This Court could,
3 of course, reach the issue either by directing the
4 parties to brief it or by recognizing that it is fairly
5 encompassed within the question as described in the
6 petition."

7 Then the brief in opposition to cert is only
8 about the merits of the claim, and our reply brief on
9 cert -- if you go to page 4 of the cert reply brief --
10 then clearly identifies this question for the Court
11 again.

12 CHIEF JUSTICE ROBERTS: Well, that's fair
13 for the Respondents to say, look, there's no reason to
14 take this procedural -- complicated procedural issue,
15 because we win on the merits. And the court, as their
16 view articulates, the court decided that question.

17 MR. GOLDSTEIN: Well, I agree it was
18 perfectly fair for them. But the question that I'm
19 trying to address -- and I apologize if I've
20 misunderstood the question -- is did we sufficiently
21 identify for you all in the question that we presented
22 to the Court what the issues were, and so that you were
23 agreeing to decide the procedural question and the
24 merits question, and --

25 JUSTICE SCALIA: How -- how long has this

1 case been going on? When -- when was -- when was the
2 crime?

3 MR. GOLDSTEIN: In 1980, August of 1980.

4 JUSTICE SCALIA: The crime was committed in
5 1980, 28 years ago.

6 MR. GOLDSTEIN: Yes.

7 JUSTICE SCALIA: And when was the -- when
8 was the -- the conviction and the sentence of death
9 pronounced?

10 MR. GOLDSTEIN: Very soon thereafter, within
11 a couple of years. This -- let me answer that and then
12 make sure that I've resolved the question.

13 JUSTICE SCALIA: And you want to go back
14 down again, for another --

15 MR. GOLDSTEIN: I'm sorry?

16 JUSTICE SCALIA: How old is this -- is this
17 defendant now?

18 MR. GOLDSTEIN: He's around 50 years old
19 now.

20 JUSTICE KENNEDY: And when -- when did the
21 court indicate in -- in Tennessee that you had access to
22 the file?

23 MR. GOLDSTEIN: Yes. In the Woodall case,
24 12 years after the crime, Justice Scalia -- so all the
25 evidence was suppressed. In --

1 JUSTICE KENNEDY: Was that -- oh, I thought
2 that was 2000 -- when was that?

3 MR. GOLDSTEIN: In 1992.

4 JUSTICE KENNEDY: 1992.

5 MR. GOLDSTEIN: In 1992 he was granted
6 access to the files. He immediately stated, right away
7 -- it's uncontested -- his Brady claim. And then,
8 Justice Scalia, the case went on --

9 JUSTICE KENNEDY: And the Brady claim has
10 been pending in the Federal courts but just not decided
11 since about 2001?

12 MR. GOLDSTEIN: Yes, sir. So it's --
13 there's no question about timeliness. Justice Scalia,
14 your frustration about how long death cases is perfectly
15 understandable, how long they take. But let me just be
16 clear that this --

17 JUSTICE GINSBURG: But it was -- it was
18 decided. It was decided -- wasn't it decided the first
19 time around? I mean, what the -- the Chief Justice
20 calls your attention to page 25a. The reason the court
21 said they're not Brady material is we said it before; we
22 said it the last time the case was before the court.

23 MR. GOLDSTEIN: Well, I took Justice
24 Kennedy's question to be that this has been in the case
25 all along and hasn't been finally resolved. There isn't

1 a final judgment. You're quite right that, as the Chief
2 Justice pointed out, there is language in the court of
3 appeals' very first opinion in the case. There is
4 unfortunately only one sentence, but to be fair there is
5 a sentence in the first opinion saying that it's not --
6 that the Brady evidence is not material.

7 But I -- I did want to come back to why this
8 has been in the courts for so long. When he presented
9 it immediately, Justice Kennedy, to the State courts,
10 the State told the State courts that it had been
11 previously determined. It -- it no longer defends that.
12 It just wasn't true. And that caused the whole thing to
13 go off the rails, because we have been trying ever since
14 the day that we got access to the materials to get one
15 full adjudication of the claim.

16 CHIEF JUSTICE ROBERTS: I guess it's -- my
17 questionings and -- questions and the point --

18 MR. GOLDSTEIN: Yes.

19 CHIEF JUSTICE ROBERTS: -- that was raised
20 about the time aren't related, because one reason these
21 things drag on interminably is that you are -- exactly
22 why you're raising this issue here: It's a procedural
23 nicety or a procedural difficulty that arose some time
24 ago in the State courts. But since then the Federal
25 courts, both the district court and the court of appeals

1 have addressed it, and -- and that that's a good
2 jurisprudential approach to say, particularly in a
3 complicated case like this that is 26 years old, here's
4 our answer on this, but so that we don't have to go
5 through this again, if we're reversed on that, here's
6 our -- our alternative holding. And they said right
7 after the sentence I quoted, we said this before, and we
8 now say it again: This is not Brady material.

9 MR. GOLDSTEIN: Right. So, Mr. Chief
10 Justice, it seems to me, though you and I might disagree
11 on what's fairly encompassed, we might have one piece of
12 common ground, and that is it's time to bring this all
13 to a close, that there really isn't a big benefit to
14 having Cone 4 and 5, and that's actually what we have
15 asked the Court to do. Now, we are not --

16 JUSTICE ALITO: I thought what you asked us
17 to do was to reverse on the procedural default issue and
18 remand the case.

19 MR. GOLDSTEIN: We -- we do do that. We
20 also say, however, that if the Court believes that the
21 Sixth Circuit has reached the merits, then this Court
22 should address what are the undefended -- the -- what
23 the Sixth -- the State does not contest are legal errors
24 in its assessment of the merits. The Kyles --

25 CHIEF JUSTICE ROBERTS: Well, that would --

1 that would then depend upon us agreeing to review a very
2 fact-bound, necessarily fact-bound, Brady question when
3 the questions presented focused on a procedural issue.

4 MR. GOLDSTEIN: Well, first of all, Mr.
5 Chief Justice, there -- we have two different sets of
6 errors that we think exist with respect to the Brady
7 claim. I'm not avoiding the question of whether it's
8 encompassed, and I'll come back to it. But to your
9 first point, we do identify what we think are clear
10 legal mistakes by the lower courts in -- whether it's a
11 holding or dictum, not to get into -- enter into that
12 debate. We explain that the Sixth Circuit avowedly
13 split the evidence into sort of four different silos or
14 categories, and we think inconsistently with *Kyles v.*
15 *Whitley*, and we think the lower courts were wrong not to
16 hold an evidentiary hearing.

17 Now, those aren't fact-bound points; those
18 are questions of law, so we believe that it would be
19 perfectly appropriate for this Court to decide the
20 procedural question. The procedural holding of the
21 Sixth Circuit is not defended here, the idea that
22 previous determination amounts to a procedural default.
23 And then on the question of the merits, the Court could
24 decide those two limited legal questions and leave it to
25 the lower courts to decide the more fact-bound

1 questions.

2 But we do think that the Court -- it is
3 actually quite sensible for this Court to not just
4 decide the procedural question, given that at the very
5 least -- call it a holding, call it dictum -- the Sixth
6 Circuit has sent strong signals about what it views
7 regarding the merits of the Brady claim.

8 JUSTICE ALITO: That -- that seems to me to
9 be directly contrary to what you say in your brief. The
10 last sentence of your brief: "This case can accordingly
11 be properly resolved more narrowly by remanding the case
12 to the district court for consideration of the merits of
13 the Brady claim in the first instance."

14 MR. GOLDSTEIN: Yes, sir, that -- that is
15 something that the Court can do. We explained in the
16 preceding pages what would happen in the district court,
17 and that is we think that there needs to be an
18 evidentiary hearing and that the -- the Court should
19 point out the Kyles error. But in all events, that
20 would still be a sufficient ground for reversal. But I
21 think we could all agree --

22 JUSTICE ALITO: Can I ask you a question
23 about -- on the procedural default issue?

24 MR. GOLDSTEIN: Yes.

25 JUSTICE ALITO: Could you put yourself in

1 the position of the Tennessee Court of Criminal Appeals?
2 In light of the briefing that they received, if you had
3 been on that court, would you have understood that
4 Petitioner was asserting that he had a valid reason for
5 not raising the Brady claim earlier, because he had
6 not -- at the time when he could have, at the time of
7 the prior proceedings, he had not had access to the
8 State records? Would you have understood that from the
9 briefing that they got?

10 MR. GOLDSTEIN: I would have, although I
11 would have -- I understand your concern about whether it
12 was fully elaborated and sufficiently so. This of
13 course was not the procedural default theory that has
14 been argued in this case before now.

15 JUSTICE ALITO: Was that mentioned in -- in
16 either the principal brief or the -- or the reply brief,
17 the reason why it wasn't raised earlier?

18 MR. GOLDSTEIN: Insofar as the defendant,
19 Mr. Cone, told the court of appeals as to paragraph 35
20 and paragraph 41, the court of appeals should look at
21 the affidavit. It did not say what the contents of the
22 affidavit was as to the Brady claim.

23 Now, I will point you to one particular
24 point, Justice Alito, on the question of whether we
25 fairly preserved this in the State Court of Criminal

1 Appeals -- I guess two points that hopefully will give
2 you some comfort there.

3 The first is that in the entire long course
4 of this litigation, the State has never before made this
5 argument, and the second is in the Tennessee Supreme
6 Court -- the Tennessee Court of Criminal Appeals decides
7 the case. We take the Brady claim up to the Tennessee
8 Supreme Court. And even there the State doesn't say
9 that it was insufficiently preserved. They file a
10 response to our application and they address it as to
11 its substance.

12 They never made this argument even in the
13 State courts. And so I think it -- it could have been
14 better briefed. The reason -- by the way, let me just
15 explain to you why --

16 JUSTICE SCALIA: How many claims were -- was
17 this a case where there, what, 81 separate claims?

18 MR. GOLDSTEIN: The -- it -- I don't think
19 there were --

20 JUSTICE SCALIA: I mean, I can understand
21 giving a lick and a promise to -- to each one if you
22 come up with 81.

23 JUSTICE GINSBURG: 52.

24 JUSTICE SCALIA: 52. Close enough. I'll
25 say the same for 52.

1 MR. GOLDSTEIN: The -- but when we got to my
2 point in the Tennessee Supreme Court, there was much
3 less action in the case. The Brady claim was point 3.
4 There was a lot less that was presented in the case.

5 Look, I don't think -- my point is not to
6 say that the State, you know, inexplicably behaved
7 horribly here. There could have been better briefing on
8 both sides of this thing. What I'm saying here, though,
9 is that the Petitioner right away presented what is a
10 very serious Brady claim to the State courts. He didn't
11 abandon it; he fully presented it; and what he wants is
12 one shot.

13 There is a footnote in the district court's
14 opinion. There are two -- three sentences in the second
15 opinion and one sentence in the first opinion of the
16 Sixth Circuit. But nobody has sat down and done this
17 and disposed of the merits of this claim as anything
18 other than a -- an aside, and it is a very serious
19 claim.

20 JUSTICE GINSBURG: If it is --

21 JUSTICE KENNEDY: Can you tell me what --
22 can you tell me what is this -- let's suppose that you
23 had an initial Brady claim that there was one part of
24 the file that you were entitled to see that said that
25 there is some evidence that he's a drug user. And you

1 -- and you take that Brady claim up.

2 Later you find out -- you have access to a
3 new file and you find cumulative information plus the
4 information that he was dazed or something, which may
5 not be very strong. What's our test to determine
6 whether the Brady claim has been exhausted? Or have we
7 talked about that?

8 MR. GOLDSTEIN: Well, this is, I think,
9 similar to the Bell v. Kelly question, the case that the
10 Court DIG'ed on when you present a Brady claim and the
11 State courts evaluate the merits of that Brady claim,
12 and then you find out other material later, and the
13 question becomes, how much deference you owe to the
14 State courts the -- the first go-around.

15 This is a very different case. The -- all
16 of this evidence in the file appeared at one time.
17 There weren't -- it wasn't split, and the only time a
18 Brady claim was disposed of was at the time this Brady
19 claim was disposed of. After the Woodall files that you
20 mentioned became available to the Petitioner, right then
21 and there, he added -- there was paragraph 35 and
22 paragraph 41 of his post-conviction application that
23 were added within a couple months of each other. The
24 State court right away, at the urging of the State,
25 said, oh, that's been previously determined, and I won't

1 consider the merits.

2 So this is not a case in which the State
3 court has assessed a Brady claim and said we don't think
4 there's any Brady issue here.

5 JUSTICE GINSBURG: But your -- but your
6 proposal would be that they would never do it because
7 you want to send it back to the Federal district court,
8 and -- and if the State was laboring under
9 misapprehension, it thought that, because he brought up
10 the issue twice, he had somehow been defaulted, everyone
11 can agree that that didn't make sense.

12 But now you're proposing that the State
13 court will not be the one to look at these materials;
14 instead it will be the Federal court. I think there was
15 something that Judge Merritt said in his dissent that
16 indicated he thought that the State court ought to be
17 the one to do this close examination. Didn't -- didn't
18 he propose a stay of the Brady claim in the Federal
19 court pending exhaustion of that claim in the State
20 court?

21 MR. GOLDSTEIN: I don't know that he made a
22 concrete proposal. I think he would prefer -- I think
23 the court system would prefer it, and I think everyone
24 would prefer it. The dilemma is that it can't happen.
25 The -- as we explain in footnote 3 at page 26 of our

1 reply brief, there is no window of opportunity to send
2 the State -- the case back to the State. It's been
3 dismissed there. The statute of limitations has run.
4 And in a case called Harris v. State, the Tennessee
5 Supreme Court said that you couldn't reopen it.

6 And so we -- we're not saying we want a
7 Federal judge rather than a State judge. We're just
8 saying we want a judge, and our problem is that,
9 understanding that there has been some discussion of the
10 merits, it has been very thin --

11 CHIEF JUSTICE ROBERTS: I didn't look,
12 counsel, at your -- I don't know if it's yours or your
13 predecessor counsel's brief in the -- appealing from the
14 district court here to the court of appeals. Did that
15 raise a discussion of the Brady claim on the merits,
16 saying that the district court was wrong?

17 MR. GOLDSTEIN: Yes, it did. And so we have
18 -- we did try to present it to the Sixth Circuit. The
19 Sixth Circuit accepted a finding of procedural default
20 that is undefended in this court, and I did want to -- I
21 had just started to get to this --

22 CHIEF JUSTICE ROBERTS: That was -- that was
23 not a friendly question. My point is that you argued
24 the merits of the Brady claim not only in the district
25 court but specifically on appeal as well.

1 MR. GOLDSTEIN: It wasn't a friendly
2 question --

3 CHIEF JUSTICE ROBERTS: So this wasn't sort
4 of sua sponte addressing --

5 MR. GOLDSTEIN: Right.

6 CHIEF JUSTICE ROBERTS: -- the Brady claim
7 as kind of a safety net on the procedural --

8 MR. GOLDSTEIN: It wasn't a friendly
9 question, but it was an honest answer.

10 (Laughter.)

11 MR. GOLDSTEIN: And we did present the
12 question to the court of appeals. We think when it said
13 we don't have the power, it was disavowing it. But even
14 -- Mr. Chief Justice, even assuming that the court of
15 appeals had a whole section in its opinion saying, we're
16 deciding the merits of the Brady claim, my constraint
17 was, in -- in framing the question presented, as I
18 explained in that footnote in the cert petition -- and I
19 would also encourage you to read -- I didn't -- I didn't
20 get to the language in it. In our reply brief, we have
21 a whole paragraph that explains -- this is at page 4 --
22 "First, even if this Court were to conclude that the
23 court of appeals had reached the merits of Petitioner's
24 Brady claim, notwithstanding the Sixth Circuit's own
25 repeated disavowals of doing so, then the merits of that

1 Brady claim ruling would be properly before this Court,
2 not immunized from review. Indeed, the Brady issue, as
3 encompassed within the questions presented, would be
4 properly briefed by the parties if certiorari were
5 granted."

6 CHIEF JUSTICE ROBERTS: Yes. No, my -- my
7 concern is not that you didn't brief the Brady claim; it
8 is that -- whatever the non-pejorative synonym for
9 "smuggled" it in -- is you smuggled it in on a case that
10 purportedly presented a procedural objection and a
11 conflict on a procedural issue.

12 MR. GOLDSTEIN: It's -- I don't think,
13 pejorative or not, that it's fair to accuse us of -- of
14 smuggling it. There's a big section in the cert
15 petition about it. It's not -- it was not hidden from
16 -- I don't -- I don't purport to tell the Court what it
17 was thinking when it granted cert in this case, but I
18 tried to be as clear as -- as absolutely possible.

19 I was turning to the question of whether we
20 have a serious Brady claim, and so the Court should have
21 some concern here. And I really do think that we do and
22 that the passing observations about the lower courts
23 don't fulfill the duty to assess the merits of the Brady
24 claim fairly. There was one -- the action in this case
25 -- the whole reason that there was effectively a trial

1 was the question of whether the defendant committed
2 these acts in an amphetamine psychosis. He had two
3 experts that explained, because of his post-traumatic
4 stress disorder and his very heavy drug issue, that he
5 did not understand the consequences of his action. He
6 was completely paranoid.

7 And the State went after those experts by
8 saying he's not a drug user at all; he's a drug dealer;
9 when all the while in their files, there were -- Justice
10 Kennedy, to distinguish the hypothetical you gave -- FBI
11 teletypes, police reports, witness statements from
12 before the day of the robbery, soon thereafter in
13 Florida, explaining that he was not just a heavy drug
14 user, but was acting -- the witness was asked, did he
15 act like he was on drugs? And the witness says, yes, he
16 did. That that really would have made a difference in
17 at the very least the sentencing phase in this case to
18 at least --

19 JUSTICE GINSBURG: Where was that colloquy?
20 I remember witnesses saying he looked weird, he looked
21 wild-eyed. Where was the answer that he looked -- that
22 --

23 MR. GOLDSTEIN: Justice Ginsburg, this is in
24 the yellow brief, our merits reply brief. It starts at
25 the very bottom of 21, but you can just start at the top

1 of 22.

2 And as to this question -- so we're talking
3 here about the evidence, not just that he was a drug
4 user, which, I think, would have been relevant to the
5 jury, but that he actually was on drugs in August of
6 1980 at the time all this was happening. There's a
7 robbery -- there are two robberies here that precede
8 these killings, and there's a -- the first one, there's
9 a statement about the robbery right before the murders
10 confirming that the Petitioner -- he was asked, did he
11 appear to be drunk or high? And the witness says, yes,
12 he did because "he acted real weird."

13 The next one is that the day of the -- at
14 the jewelry store robbery that immediately preceded the
15 killings, that the Petitioner looked wild-eyed, and then
16 soon thereafter a police officer reports in Florida that
17 he's -- looks "agitated" and "looking about in a
18 frenzied manner."

19 JUSTICE SCALIA: Well, I -- you know, I'll
20 give you the first, that he appeared drunk or high.
21 That's pretty clear, but I -- I think -- I think you
22 tend to look wild-eyed after you're running out after a
23 jewelry store robbery, and I think you're -- you're
24 certainly inclined to look "agitated" and "looking about
25 in a frenzied manner" when you've just committed two

1 brutal murders. I don't think that's evidence of -- of
2 drug addiction at all --

3 MR. GOLDSTEIN: Well --

4 JUSTICE SCALIA: -- of being under the
5 influence of drugs.

6 MR. GOLDSTEIN: I don't doubt for a second
7 that that's exactly the argument that the prosecution
8 would have made. The question is whether a juror, in
9 the context of the expert testimony and the evidence
10 about drug addiction, could have also found that it was
11 consistent with the idea that he was high on drugs,
12 whether you can have confidence in saying now --
13 particularly if you'll give me the first statement. And
14 all the FBI teletypes and the police reports that said
15 -- remember this is not just a case about suppression of
16 evidence. This is a case where the prosecution, with
17 all this stuff in its files, goes after the experts and
18 argues to the jury that he's a drug dealer, not a drug
19 user --

20 JUSTICE ALITO: This is a very complicated
21 factual question. It's not -- we're dealing with
22 numerous documents, isn't that right, that were -- that
23 you claim were --

24 MR. GOLDSTEIN: There are three witness
25 statements, and there are a series of police reports and

1 FBI --

2 JUSTICE ALITO: And so you'd have to
3 evaluate all of those and evaluate the prejudice against
4 what was in the record. And you're suggesting now that
5 this is something we should decide?

6 MR. GOLDSTEIN: Two points, Justice Alito.
7 The first is that we say at the very least the Court
8 should make the Kyles point and the evidentiary hearing
9 point. And the second is, I think to be fair to us --
10 given your point about this is so complicated; there's a
11 lot of evidence here -- one ought to compare that in
12 fairness to what the Sixth Circuit did, and the one
13 footnote that the Chief Justice has talked about with
14 the district court and whether they really did take a
15 hard look at the claim.

16 I think it would -- it would be fair to us
17 to say, look, there are some legal errors here that this
18 Court can correct, and then the district court would be
19 the proper place, if it decides to have an evidentiary
20 hearing, to resolve the remainder of the claim.

21 JUSTICE STEVENS: Let me ask this one quick
22 question: Is it your view that the evidence was
23 deliberately suppressed or negligently suppressed?

24 MR. GOLDSTEIN: Deliberately suppressed,
25 although it doesn't matter under Brady. There was --

1 they turned over almost nothing, and this was the heart
2 of our case. They knew that we were conceding that the
3 acts had been committed, and our defense was one of
4 insanity, and it was our only argument in -- in
5 mitigation of the death penalty.

6 If I could --

7 JUSTICE GINSBURG: You recognize that a -- a
8 defense like this, that the defendant was high on drugs,
9 that's -- isn't it ambivalent? I mean, a jury, just
10 like it might react adversely to the defendant if he
11 says I was drunk on alcohol, that they might say: This
12 is a person who put himself in the condition where his
13 will could be overpowered. This was a voluntary act.
14 Why should we consider it? Why should we consider it
15 mitigating? We -- we could just as well consider it
16 aggravating.

17 MR. GOLDSTEIN: It -- it could, and that's
18 why I think it's very important that our defense was
19 amphetamine psychosis brought on by post-traumatic
20 stress disorder from honorable service in Vietnam, not
21 just that he was a drug addict.

22 If I could reserve the remainder of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Ms. Smith.

25 ORAL ARGUMENT OF JENNIFER L. SMITH

1 ON BEHALF OF THE RESPONDENT

2 MS. SMITH: Mr. Chief Justice, and may it
3 please the Court:

4 As the Court has alluded in a number of
5 questions, both the district court and the Sixth Circuit
6 now twice have resolved -- have rejected Cone's Brady
7 claim on the merits, and we believe correctly so in
8 light of Cone's actions in the day surrounding the
9 murder, his statements about what he did and why he did
10 it, and more importantly the lower court's recognition
11 that additional evidence --

12 JUSTICE STEVENS: May I ask this get it out
13 on the table? Do you agree that the evidence shows that
14 the -- this evidence was deliberately suppressed?

15 MS. SMITH: Your Honor, I don't think
16 there's been any -- any finding about the --

17 JUSTICE STEVENS: But is there any
18 explanation for it?

19 MS. SMITH: The State denied that.

20 JUSTICE STEVENS: Was there any explanation
21 for it other than a tactical explanation?

22 MS. SMITH: There's no explanation in the
23 record. There has been no finding about whether the
24 evidence has been suppressed at all in this case because
25 both the district court and the Sixth Circuit decided as

1 a matter of law that the materials on their face --

2 JUSTICE STEVENS: But it seems to me it's
3 relevant because if it was suppressed for a tactical
4 reason, it seems to me hard to say that the prosecution
5 thought it didn't make any difference.

6 MS. SMITH: Well, again, there has --
7 there's been no finding on that, because each court --
8 and I think more than just in a passing statement, each
9 court that has looked at it, both the district court and
10 the Sixth Circuit, have looked point by point,
11 especially in the district court --

12 JUSTICE STEVENS: What they have seen, but
13 one of the first questions that always troubles me in a
14 Brady case is the conduct of the prosecutor and the
15 ethics of the profession and the whole -- whole
16 importance of the rule is to be sure prosecutors perform
17 their public function. And I'm just wondering if there
18 is any -- if this was a case of just an honest mistake,
19 it would be one thing, but if it appears to have been a
20 tactical decision and a tactical program, it seems to me
21 very difficult to assume that the prosecutor thought it
22 was really not important evidence.

23 MS. SMITH: Your Honor, I certainly
24 understand the Court's concern, and I'll just -- and
25 again reiterate, there has not been any finding on that,

1 but there is at least a suggestion in the record that
2 some of the evidence on which the Petitioner is relying
3 at this point actually wasn't suppressed. And we -- we
4 noted this in our -- our brief, specifically as to the
5 witness Ilene Blankman.

6 All of the individual items on which the
7 Petitioner is traveling now were the subject of
8 cross-examination, so that at least raises a question
9 about whether --

10 JUSTICE BREYER: But Blankman -- that isn't
11 the concern. The concern is simply this, if they're
12 correct: That this whole trial revolves around whether
13 this individual is suffering post-traumatic stress
14 disorder with -- with these amphetamines.

15 They have two expert witnesses who say that
16 he's in very bad shape, everything the defense wanted
17 them to say. That's it. That's their evidence.

18 On cross, the prosecutor gets both of them
19 to admit that they're basing their testimony on what the
20 defendant told them about his drug use. At which point
21 the prosecutor says, let's talk to Mr. Roby, who is the
22 arresting officer, did you see he was on -- when you
23 arrested him, was he on -- did he look like he was on
24 drugs? No. Let's talk to Mr. Flynn. When you
25 processed him, did he look like he was on drugs? No.

1 And then let's talk to Ms. Blankman, okay?

2 So, now the case is submitted, and at that
3 point the prosecutor says, there is no evidence that he
4 was on drugs; he said that to those two expert
5 witnesses, and it's baloney. There's your case.

6 Now, in fact in the files is evidence that
7 Mr. Roby, that very day of the crime and the next day,
8 sent out all-points bulletins saying he was a dangerous
9 drug user. There is evidence in the files that Mr. --
10 that the FBI man sent out similar all-point bulletins.
11 There are three witnesses who have described the
12 behavior on the day as frenzied, and we have heard the
13 descriptions.

14 And you're saying that the lawyer, the
15 trained lawyer for the government, who knew this
16 information and knew the defense just what? Just
17 overlooked it by accident? Just what?

18 MS. SMITH: Well, Your Honor, I can't speak
19 for the prosecutor's state of mind at the time, but I
20 will -- will state that the central question in the case
21 was not whether the Petitioner used drugs. There was
22 evidence in the record from his mother. There was
23 evidence in the record from his own mouth that --

24 JUSTICE SCALIA: Well, it was conceded that
25 he was a drug user.

1 MS. SMITH: That's exactly right. It came
2 through the State's own --

3 JUSTICE SCALIA: And that he was dangerous
4 because he admitted the murders.

5 MS. SMITH: It came -- some of that came
6 through the State's own witnesses. And -- and the --
7 the argument that the State made about him being a drug
8 user versus a drug seller was not the only argument the
9 State made. The State specifically said look at -- to
10 the jury: Look at what he did on the day of the
11 murders; look at what he did on Saturday and Sunday to
12 go to his state of mind. And the State focused on
13 the -- the goal-oriented, the purposeful behavior and
14 the very direct behavior that --

15 JUSTICE KENNEDY: Do -- do you think that
16 the material described by Justice Breyer would have been
17 excluded by the trial court as irrelevant if it had been
18 introduced? Or cumulative? That's --

19 MS. SMITH: I don't think it would have been
20 excluded. I think it could have been used to attempt to
21 cross-examine certainly Agent Roby. But Agent Roby's
22 testimony didn't -- didn't state that Mr. Cone was not a
23 drug user. Mr. -- Agent Roby's testimony was that at
24 the time that he observed him, four days after the
25 murders, he didn't appear to be on -- under the

1 influence of drugs, and when he saw him eight days after
2 the murder, he examined his body and there were no
3 needle marks.

4 The testimony was very specific as to his
5 observations on the 4-day point and the 8-day point
6 after to the murders.

7 Same with Agent Flynn --

8 JUSTICE STEVENS: So do you think the
9 prosecutor had an ethical duty to turn over this
10 material?

11 MS. SMITH: I think that the material -- if
12 the material -- if the subject was immaterial --

13 JUSTICE STEVENS: It's a simple question,
14 yes or no?

15 MS. SMITH: I think that as a legal matter,
16 he -- there was no -- no need to turn it over because it
17 was immaterial.

18 JUSTICE STEVENS: That's not my question.
19 Can you answer my question? Did he have an ethical duty
20 to turn this material over?

21 MS. SMITH: I'm unaware of any ethical
22 requirement that he turn it over, and I don't think
23 that -- and certainly under Brady if it's not material
24 -- we don't think it was material -- then it's certainly
25 not required as a constitutional matter. And the reason

1 it's not --

2 JUSTICE SOUTER: Do you believe that the
3 materiality judgment is yours to make -- the State's to
4 make as sort of a gate-keeping measure? Isn't the
5 materiality an issue for the factfinder?

6 MS. SMITH: Well, I think that -- as --

7 JUSTICE SOUTER: You -- you exclude -- do
8 you believe that you can, in effect, suppress any piece
9 of evidence on -- on the State's judgment that it will
10 not prove to be material in the context of the whole
11 case?

12 MS. SMITH: I think prosecutors make those
13 kinds of judgment calls all the time.

14 JUSTICE SOUTER: Do you think that's a
15 proper judgment for the prosecution to make?

16 MS. SMITH: Well, I think that probably a
17 prudent prosecutor would err on the side of turning over
18 matters that --

19 JUSTICE SOUTER: Right. And wouldn't --

20 MS. SMITH: -- that have some relevance.

21 JUSTICE SOUTER: Wouldn't he err on the side
22 of turning over the matters because Brady leaves the
23 materiality judgment, like all materiality judgments,
24 ultimately, to the factfinder?

25 MS. SMITH: Certainly ultimately it's left

1 to the factfinder, but the prosecutor is --

2 JUSTICE KENNEDY: Well, initially Brady
3 leaves the judgment -- the judgment, further on Justice
4 Souter's point, to the attorney for the defense. You're
5 saying that the prosecutor can pre-empt the role of the
6 attorney for the defense in deciding what to offer to
7 the court as material? And if -- and if it -- even if
8 the evidence is in a gray area, that's for -- that's for
9 the defense attorney to decide under -- under our Brady
10 jurisprudence, as I understand it. Correct me if that's
11 wrong.

12 MS. SMITH: Well, I think -- yes, I think
13 the defense ultimately would make the decision how to
14 use the evidence that comes into his possession. But,
15 obviously, the prosecutor has to make an initial
16 judgment call about whether or not the evidence is going
17 to be material, given what he knows about -- about the
18 defense.

19 JUSTICE SOUTER: Isn't the prosecutor's
20 obligation to make an -- an initial assessment as to
21 whether the evidence tends to be mitigating evidence or
22 favorable to the defendant? Isn't that the prosecutor's
23 judgment?

24 MS. SMITH: I think that -- that falls
25 within that -- the prosecutor's judgment. But I think

1 if we look -- look at the evidence in --

2 JUSTICE SOUTER: Isn't this evidence clearly
3 of a mitigating character?

4 MS. SMITH: No, Your Honor.

5 JUSTICE SOUTER: You don't think --

6 MS. SMITH: I don't --

7 JUSTICE SOUTER: You don't think it would be
8 favorable to the defendant to get any evidence that
9 Justice Breyer summarized a moment ago?

10 MS. SMITH: No, sir, I do not. There was
11 already evidence before the jury that the defendant was
12 a drug addict, that he was a drug user, that he was
13 changed after Vietnam. This Court's own opinion in 2002
14 noted that he was a drug addict.

15 JUSTICE SOUTER: Maybe I'm beating a dead
16 horse, but Justice Breyer made the point, and he made it
17 I think very clearly, that although that evidence was
18 in, the argument here -- the argument that was made
19 before the jury in this case is that the witnesses upon
20 whom the defense was specifically relying were witnesses
21 whose account of the defendant's drug use came solely
22 from the defendant himself.

23 Given that fact, wouldn't it have been
24 mitigating evidence to learn that other people, at times
25 relatively close to the events in question, without

1 being coached by the defendant, had concluded that he
2 was a drug user? Wouldn't that have been mitigating
3 evidence?

4 MS. SMITH: I don't think that it would have
5 been material to --

6 JUSTICE SOUTER: We are not asking about
7 materiality at this point. We are asking about the
8 mitigating character of the evidence. Would it have
9 been favorable to the defendant? Would that have been
10 its tendency?

11 MS. SMITH: I think it added no more than --
12 than what was already before the jury.

13 JUSTICE SOUTER: That was not my question.
14 Was it favorable evidence? Did it have a tendency to
15 favor the defendant?

16 MS. SMITH: No, not under his theory, and
17 the reason is --

18 JUSTICE SOUTER: Then I will be candid with
19 you that I simply cannot follow your argument because I
20 believe you have just made a statement to me that is
21 utterly irrational.

22 MS. SMITH: Well, let me explain, if I -- if
23 I may, and the reason I say that it is not mitigating is
24 because the -- the entire question in the defense and
25 for mitigation purposes is the defendant's state of mind

1 at the time of the murder.

2 There was already evidence that there was --
3 that he was a drug user. The fact that he was a drug
4 user doesn't say anything more -- or additional evidence
5 of drug use says nothing more about his state of mind at
6 the time of the crime than what was already presented.
7 The question is not whether he was a drug user. The
8 record showed it. It came out of the mouths of the
9 State's own witness.

10 JUSTICE GINSBURG: But what about the
11 prosecutor who said "baloney"? He said -- the
12 prosecutor -- the prosecutor says: The defendant tells
13 you he was a drug user. Baloney, he was a drug dealer.

14 The prosecutor deliberately tried to paint
15 this man as somebody who had a huge quantity of drugs,
16 which he did, and he was dealing in them. I mean the --
17 the prosecutor tried to portray a man who was a cold-
18 blooded killer, who didn't have any blurred vision.

19 And that line to the jury -- "baloney" he
20 says he was a drug user -- that, it seems to me, is
21 exactly what the prosecutor wanted to do, is to tell
22 this jury this guy's a dealer; he's not a drug abuser.

23 MS. SMITH: I think that the prosecutor
24 overstated in that portion of his argument, Your Honor.

25 JUSTICE BREYER: He also had cross-examined

1 the two expert witnesses in order to show that they
2 didn't really know that this man was a drug user,
3 because their only basis for that was he told them.

4 So as I've read these briefs, I've come away
5 -- including yours -- with a strong impression that this
6 was a relevant issue, that the prosecution did not
7 concede that he was on drugs at the time of the murder.
8 Indeed, that that was all that was at issue.

9 And so I just don't see, like Justice
10 Souter, how you can say that this wouldn't at least be
11 useful information if -- even for cross-examination, and
12 I think more than that since you have three direct
13 witnesses.

14 But leaving that aside, there's another part
15 of this case that equally bothers me. It seems to me
16 there was a lawyer for the State here that twice told
17 the courts that this matter had never been raised. Is
18 that so? Or maybe he said that the courts had decided
19 it, because the State has taken absolutely inconsistent
20 positions, first saying that the trial courts decided
21 it, and they did decide it, but by accident. They
22 thought that paragraph 41 referred to this claim when it
23 referred to an earlier claim.

24 So first they tell the courts -- and you
25 wouldn't know that unless you are pretty familiar

1 because there were a lot of words written. They tell
2 the courts: It's been decided, judge. Don't worry.
3 They decided it -- adequate State ground. Then next
4 they wake up to the fact that it wasn't decided, and
5 then they announce: Oh, he waived it, despite the fact
6 that there's a case called Swanson in Tennessee that
7 says that you can raise a later claim if you have
8 grounds for not knowing of it in the first place. And
9 he didn't know of it until 1993.

10 So I see the State taking opposite positions
11 and -- and what seems from the briefs inconsistent with
12 the State law, and I'm confused. What is it that
13 happened in this case?

14 MS. SMITH: Well, I -- I want to answer your
15 question -- I will answer your question, Your Honor, if
16 I could just say one thing about the Brady. We don't
17 dispute that the material in question is relevant to the
18 defense and is relevant to the sentence.

19 We dispute that it's material. We don't
20 think it's material in every court, but the district
21 court and the sixth circuit have found it immaterial.
22 But on the -- on the -- the -- what has happened, in
23 terms of the procedural defense, we have confessed that
24 there was an error by the State in the -- in the post-
25 conviction court.

1 We agree that Tennessee law does allow -- it
2 certainly at -- at this time did allow a petitioner to
3 raise -- to file successive petitions if that petitioner
4 could establish cause. Now, the prosecutor in the
5 course of responding to some 80 claims, both parts and
6 subparts, made a mistake and read paragraph 35 as being
7 similar to -- to a claim that had been raised on direct
8 appeal and argued that it appeared to be the same. That
9 was an error.

10 Likewise, the trial court erroneously ruled
11 that both paragraph 35 and paragraph 41, both Brady
12 claims, had been previously determined on direct appeal
13 or post-conviction. That was an error. We have
14 confessed that in our brief and -- and do at this point.

15 Now, in the appeal, the petitioner doesn't
16 again raise the Brady claim. In his principal brief, he
17 never mentions the Brady claim. He never even mentions
18 --

19 JUSTICE ALITO: If we read the -- can I ask
20 you this? If we read the decision of the Court of
21 Criminal Appeals as having ratified the -- the district
22 court's -- the -- the lower court's treatment of the
23 procedural default issues, as having rejected it on the
24 ground that it was previously decided, that would be an
25 instance in which a State court applied a procedural

1 default rule based on an undisputed error of fact.

2 In that situation, would it not -- wouldn't
3 it be clear that there was not an adequate, independent
4 State ground for the decision and, therefore, no
5 procedural default? And if we were to find that,
6 wouldn't the appropriate step be on this very factual
7 Brady issue to send it back to the lower Federal courts?

8 MS. SMITH: In answer to your first
9 question, yes, we don't disagree with the proposition
10 that if a trial -- that if a State court refuses to
11 consider a claim on the basis that that claim has been
12 determined previously, that that would not be an
13 adequate basis for a procedural default in Federal
14 court.

15 But we don't -- I don't think that this case
16 presents that scenario, and every court that has looked
17 at the Court of Criminal Appeals' decision has read that
18 decision as applying a waiver. The District Court read
19 that decision as applying a waiver. And if you look at
20 -- at page 112a of the petition appendix, not only does
21 the District Court read it as a waiver, but the
22 Petitioner read it as applying a waiver, because, if
23 you note in that first sentence, as to the Brady claim
24 to the district court, Cone also attempts to argue that
25 those claims were improperly held waived by the court.

1 JUSTICE BREYER: Well, "waiver" -- my
2 goodness. First, I don't think it's impossible to say
3 "waiver" since he wrote the words in paragraph 41 that
4 make absolutely clear that they aren't waiving it. He
5 is raising it.

6 Then, aside from that, the paragraph of the
7 district -- of the court of appeals' opinion says they
8 were already decided or waived. So it's ambiguous, at
9 best, for you.

10 So let's go back and see what the State
11 district court held, and I think that the State district
12 court held that it had been decided, not that it had
13 been waived. Am I right?

14 MS. SMITH: The trial court --

15 JUSTICE BREYER: Yes.

16 MS. SMITH: -- held that.

17 JUSTICE BREYER: Okay. So there are cases
18 in this Court which say if a State appeals court writes
19 a matter -- something -- a sentence that is ambiguous so
20 you don't know whether it was decided -- for example,
21 they mean it was waived or mean that it was decided --
22 then the next best thing to do, which makes sense, is
23 look to the lower court to see what they actually did.

24 So we follow that rule, and we get to
25 exactly what Justice Alito said: That what they did was

1 they were holding that this has already been decided.

2 MS. SMITH: I think that rule holds if the
3 petitioner has made the argument to the appellate court.
4 Here the Petitioner didn't make the argument to the
5 appellate court. Petitioner --

6 JUSTICE BREYER: Don't you think at this
7 point the Petitioner is saying in his briefs: I've been
8 getting the runaround. First, they tell me it's one
9 thing; then they tell me another. All I can tell you is
10 this: No one has ever passed on the merits of this
11 Brady claim, which is a substantial claim.

12 MS. SMITH: Well, I --

13 JUSTICE BREYER: So you choose the
14 procedures, but be sure that that's the outcome.

15 MS. SMITH: Well, first of all, Your Honor,
16 I don't think the Petitioner has been getting the
17 runaround. The Petitioner has always throughout this
18 litigation proceeded on the premise that the CCA -- the
19 Court of Criminal Appeals' decision in Tennessee was
20 based on a waiver. All of his briefs in the lower court
21 and in the -- the Sixth Circuit reflect that.

22 The district court proceeded as if that
23 ruling was a waiver. The Sixth Circuit, in its 2001
24 decision, if you look at page 62a and 62 -- 63a at the
25 bottom, the -- the Sixth Circuit specifically said the

1 Tennessee waiver rule is plainly applicable to the Brady
2 claim. And the Tennessee courts explicitly relied on
3 the waiver rule.

4 It wasn't until the 2007 opinion that the --
5 the Sixth Circuit even discussed this notion of previous
6 determination, and only then in response to what I think
7 was a red herring injected by the dissenting opinion
8 that somehow the -- the Court of Criminal Appeals'
9 decision stood for something different than what the
10 parties and the courts had been reading it all along.
11 The Court of Criminal Appeals --

12 JUSTICE BREYER: Could the explanation of
13 this language in the opinion be due to the fact that the
14 State first argued that it had already been decided;
15 then in later courts the State changed its theory and
16 announced that it had been waived?

17 MS. SMITH: The State --

18 JUSTICE BREYER: Is that why they're writing
19 about waiver?

20 MS. SMITH: No, Your Honor. The State has
21 consistently maintained throughout the habeas that the
22 -- that the Brady claim was either defaulted or waived.
23 In the answer to the petition, the State presented the
24 very argument that we're presenting today, that the
25 Court of Criminal Appeals relied on a waiver. In the --

1 in the brief to the Sixth Circuit --

2 JUSTICE GINSBURG: Spell out the waiver in
3 light of what he said. The first time he learns that
4 these -- the cases, other cases cited and he has access
5 to the district attorney's file, he then files a habeas,
6 State habeas petition in which he says that the facts on
7 which his Brady claim rests have been revealed through
8 disclosure of the State's file which occurred after the
9 first conviction proceeding. Those words are in the
10 affidavit, right, that came with the second petition?
11 So how could he possibly have waived it when he has
12 explained it wasn't available to him?

13 MS. SMITH: Well, I think to understand how
14 this -- how this can happen, the bottom line is that he
15 failed to demonstrate to the State courts why he should
16 -- he was properly before the court to begin with. And
17 when you -- when you raise a claim -- he buried his
18 claim among a hundred other parts and subparts. If --
19 if he had a legitimate claim, he certainly didn't
20 highlight it as such, and then he -- he buried even
21 further his explanation for a waiver in a 41-page
22 affidavit filed six days before the State court's ruling
23 in this case.

24 It was the first time in the entire case
25 that he mentioned anything at all about access to the

1 prosecutor's files. Then when he got an adverse
2 judgment in the trial court, he never even made the
3 argument in the Court of Criminal Appeals. He took a
4 completely different theory about waiver, said that
5 waiver was personal and should be -- should be judged on
6 a subjective standard rather than objective. Never
7 mentioned to the Court of Criminal Appeals any argument
8 whatsoever about access to the prosecutor's files.

9 It was on the basis of that argument that
10 the Court of Criminal Appeals held that the Petitioner
11 had failed to rebut the presumption of waiver as a
12 matter of law as to all claims that had not been
13 previously determined.

14 So that holding is an overarching holding.
15 It applies to every claim that was raised for the first
16 time in the successive habeas position, and we think
17 justified the district court -- it certainly was the
18 basis of the district court's default and, as well, in
19 2001 was the basis of the Sixth Circuit's decision.

20 Now, regarding the 2007 decision, we concede
21 that that decision could be read as presenting the
22 question 1, where this Court relies on a finding of
23 previous determination, but we don't think that's what
24 the court did in 2007. In 2007, the court specifically
25 ruled that it was not revisiting the Brady claim. That

1 was a decision based on law of the case principles, and
2 to the extent that it discussed previous determination,
3 we don't think it in any way intended to modify its
4 earlier holding.

5 In 2001, the Sixth Circuit clearly relied on
6 the waiver bar, and that's very evident on pages 62 and
7 63a in the petition appendix, and that's the basis of
8 the waiver. So we don't even think that the -- that the
9 situation in question 1 is even presented, although
10 if -- to answer the question, in response to Justice
11 Alito's question, I think it would be -- would be an
12 absurd result to say that something that has been
13 previously determined is defaulted, but that's not the
14 situation here. The record shows it's not previously
15 determined. The Petitioner has never argued that it's
16 previously determined, and no court until this point has
17 ever even read the Court of Criminal Appeals' decision
18 as making a previous determination finding. Everyone
19 has accepted the fact that that holding was a waiver
20 holding.

21 So on that -- that's the basis of the
22 default, and the reason that he was defaulted is that he
23 failed to make that argument when he had -- when he the
24 opportunity to make it. He could have made it, and he
25 didn't make it. He buried all his good arguments. Even

1 on his waiver argument, he was making inconsistent
2 arguments. On the one hand, he was saying the claim was
3 novel, the claim of my post-conviction counsel didn't
4 discuss it with me. On the other hand, he says that I'm
5 just now finding out about it. Those are completely
6 inconsistent theories, and the theory that he actually
7 presented in the Court of Criminal Appeals bears no
8 resemblance to the argument that he's making now or that
9 he made in the district court.

10 But all of this aside, it really is -- is
11 beside the point because at the end of the day, the
12 district court very clearly addressed -- and
13 specifically, not just in passing, but specifically at
14 -- at various points in its -- in its opinion, the
15 materiality of each and every item of evidence.

16 He went through in detail a discussion of
17 the police teletypes, stating that -- that the jury
18 already was aware that he was a drug user. It really
19 wasn't any question whether he was a drug user; the
20 evidence clearly showed that he was. The question was
21 what was his state of mind at the time of the murders.

22 JUSTICE SOUTER: What -- what do you say to
23 the argument on the other side, that these various items
24 of -- of Brady material were adverted to and were
25 discussed on a purely isolated basis; they were not

1 discussed in terms of their cumulative effect, which
2 Kyles v. Whitley says is the standard. What's your
3 response to that?

4 MS. SMITH: Well, I think if you look at the
5 -- at the district court's opinion, I think that
6 argument could be made based upon the way the district
7 court treated the items. The district court certainly
8 did look at them in categories and separated them, but I
9 think if you look at the Sixth Circuit's opinion,
10 certainly in 2007 where the court -- the court looked at
11 it in more detail, I think that it is clear that the
12 court cumulated the items and said that as a whole that
13 the Brady materials don't undermine -- do not undermine
14 confidence in the verdict. So I disagree that -- that
15 the Sixth Circuit treated them incorrectly, and -- and I
16 would note --

17 JUSTICE SCALIA: Do -- do you agree that the
18 prosecutor was arguing, when he said that -- that he's a
19 drug dealer, that he was not a drug user? Was it -- was
20 it conceded that he was a drug user? I suspect it was
21 not.

22 I said earlier it was, and it seemed that it
23 was not, because he introduced one witness to -- to say
24 that there were no -- no needle marks on his body, which
25 would suggest that he's trying to make the point to the

1 jury that this person doesn't even use drugs.

2 MS. SMITH: Your Honor, I -- I think I've
3 noted earlier, I think that the prosecutor overstated
4 his case on that point. No question about it. But I
5 think there was ample evidence in the record indicating
6 that he was a drug user. This Court even noted that,
7 even noted there was proof of the fact that he was a
8 drug addict, that he was a drug user, that the evidence
9 was strong that he was -- that he was under the
10 influence of an amphetamine psychosis. There were two
11 experts that testified to that. On the other hand,
12 there were two experts for the State that said that that
13 -- that defense couldn't be supported.

14 So the question of whether he was a drug
15 user or not a drug user was really beside the point. I
16 think the prosecutor eventually got around to that in
17 his argument. If you look at the argument as a whole,
18 the bottom line of the argument was -- and we quoted it
19 in our brief -- look at what he did, look at his actions
20 around this murder, and let that go to his state of mind
21 because that was the best evidence. Not only is that --
22 what he said -- he specifically said he went into this
23 individual's home with the purpose of getting fed,
24 getting cleaned up, and getting out of town, and when
25 the Todds ceased to cooperate with him, he had to

1 control them physically. That's code I suppose for
2 beating them to death because that's exactly what he
3 did.

4 He explained what he did and why he did it.
5 His actions are very calculated from -- from beginning
6 to end. So whether he used drugs or not use drugs, the
7 question is what was going on at the time of this
8 murder? And by his own admission the reason that the
9 Todds are -- are not with us today is because they
10 ceased to cooperate; they became frightened; and he had
11 to control them physically. I think that's the best
12 evidence of his state of mind at the time. Those are
13 words out of his own mouth, and I think that that
14 certainly supports the finding of both the district
15 court and the Sixth Circuit on materiality.

16 I agree with the -- with Chief Justice's
17 assessment: We do not think that the Brady claim is
18 fairly included within the question. The merits issue
19 is not a predicate to the default question. I certainly
20 understand Petitioner's dilemma in this case, but I
21 think faced with that dilemma, he should have squarely
22 presented that question among the questions presented
23 and not dropped it in a footnote in argument 2. We
24 don't think it's fairly presented, but -- but in any
25 event, it certainly justifies affirmance of the judgment

1 or at a minimum dismissal of the appeal.

2 And for all of these reasons, if there are
3 no further questions, we ask that Court to affirm the
4 judgment of the district court -- of the Sixth Circuit.

5 JUSTICE KENNEDY: It's outside the record
6 and not really relevant to the case. Has he been on
7 death row since 1984 or so? And if so, is that solitary
8 confinement? Do you know how large the cell is, if you
9 know?

10 MS. SMITH: I don't know. I'm not aware
11 that he's in any sort of heightened level of security.
12 I would assume he's just at a standard level. I don't
13 know his -- his security level, but he has been on death
14 row for the entire period, Your Honor.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Goldstein, you have three minutes.

17 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

18 ON BEHALF OF THE PETITIONER

19 MR. GOLDSTEIN: Thank you, Mr. Chief
20 Justice.

21 Justice Kennedy, he has been on death row;
22 he is not in solitary confinement.

23 Here's the dilemma I think about how the
24 Court needs to dispose of the case. On the one hand, we
25 have the State, which is unapologetic about having

1 suppressed a whole bunch of evidence and about having
2 misstated the procedural history to the State court and
3 then to the Sixth Circuit. On the other hand, the
4 Court's business is usually not to get into the weeds of
5 things like fact-bound Brady claims. And I think that
6 the Court can accommodate both the concern of the signal
7 that it would send in affirming the judgment in this
8 case and also the -- the bad precedent it might set by
9 getting into the jots and tittles of this witness
10 statement and that witness statement, by resolving the
11 case as follows:

12 On page 22 and 24a of the petition appendix,
13 the court of appeals says the claim was procedurally
14 defaulted because it was previously determined. That's
15 wrong. That is the argument that was passed upon by the
16 court of appeals, and that should be reversed on
17 procedural grounds.

18 On the Brady claim, it seems to me that the
19 court of appeals, when it did discuss the claim, made a
20 couple of big mistakes the Court could identify and send
21 the case back. The first is, when it talked about the
22 merits, it said we don't think this evidence would have
23 mattered because there was a lot of evidence at trial
24 that he was a drug user. But as has been discussed, I
25 think in detail, the court of appeals, because its

1 assessment was kind of passing here, misunderstood that
2 when the experts said that, then the prosecutor turned
3 around and completely discredited that. And so I think
4 that colored the Sixth Circuit's assessment incorrectly.

5 The second is the Kyles point, and the third
6 is the possibility that we're entitled to an evidentiary
7 hearing.

8 And so I think an opinion of this Court that
9 simply dealt with the undefended procedural default
10 ruling and then went to the merits and only made those
11 three points and then left it to the lower courts to
12 resolve the Brady claim ultimately would balance the
13 concerns about the Court's institutional interests in
14 not sending a signal of affirming this judgment in light
15 of what the State has done here and not getting into the
16 weeds of the claim.

17 CHIEF JUSTICE ROBERTS: Is there anything in
18 the court of appeals' treatment of the Brady claim on
19 the merits that suggests it also treated them separately
20 in the different silos, as you put it?

21 MR. GOLDSTEIN: Yes, Mr. Chief Justice. We
22 point out that the court of appeals twice said: We
23 consider the -- the four different categories of Brady
24 evidence separately. And then when it did discuss them
25 -- it's very hard to tell, its discussion is so passing

1 here -- but it does go through this kind of evidence,
2 say, the FBI files or the -- the police teletypes from
3 Agent Roby, and it says that wouldn't have been
4 persuasive, and then it turns to the witness statements.
5 But I would also say that its overarching point --

6 CHIEF JUSTICE ROBERTS: Where -- where do
7 they say that they're only considering the categories
8 separately?

9 MR. GOLDSTEIN: On page 57a. "We take" --
10 "We will take up each category of documents separately
11 and discuss whether they are" --

12 CHIEF JUSTICE ROBERTS: That's the -- that's
13 the 2001 opinion. Do they do that in the 2007 opinion?

14 MR. GOLDSTEIN: No. The -- in the 2007
15 opinion, that discussion happens at 25a, and here is
16 their explanation. It goes to my first point. And they
17 do sort of then turn around and treat them more
18 generally. "It would not have been news to the jurors
19 that Cone was a drug user. They had already heard
20 substantial direct evidence that he was a drug user,
21 including the opinion of the two expert witnesses,
22 Cone's mother, the drugs found in Cone's car, and
23 photographic evidence." And that's our point, that that
24 was discredited because it came out of his mouth.

25 JUSTICE SCALIA: What was the photographic

1 evidence, if you know?

2 MR. GOLDSTEIN: There was one photo. It
3 actually points in the opposite direction. The State
4 cites it in its merits brief. They have a picture of
5 Cone as not having any needle marks, to your point,
6 Justice Scalia, that they tried to prove he wasn't a
7 drug user at all.

8 MR. GOLDSTEIN: Thank you very much.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 I'm sorry, Mr. Goldstein, one moment.

11 MR. GOLDSTEIN: Yes.

12 CHIEF JUSTICE ROBERTS: Did you raise --
13 cite Kyles in your petition for cert?

14 MR. GOLDSTEIN: I can tell that you quickly,
15 Mr. Chief Justice.

16 CHIEF JUSTICE ROBERTS: Oh, I see it. Yes.
17 Pages 30 and 32. Okay.

18 MR. GOLDSTEIN: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 12:07 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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