

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY BRADFORD CONE, :

4 Petitioner :

5 v. : No. 07-1114

6 RICKY BELL, WARDEN. :

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8 Washington, D.C.

9 Tuesday, December 9, 2008

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

14 APPEARANCES:

15 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf
16 of the Petitioner.

17 JENNIFER L. SMITH, ESQ., Associate Deputy Attorney
18 General, Nashville, Tenn.; on behalf of the
19 Respondent.

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4	On behalf of the Petitioner
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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 of 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 is also a third thing that's uncontested, which is there is 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

1 if we sent this case back. They would conclude it
2 again.

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

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

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

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

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

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

11 So, on the one hand, they disavowed deciding
12 it, and then quite clearly there are some -- there are a
13 couple paragraphs there, you've start -- you've stated
14 one, the next paragraph says the same thing -- talking
15 about the merits of the Brady claim. So here's the
16 dilemma that I faced in writing the cert petition. They
17 say they're not deciding the Brady claim, but then they
18 talk quite 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 Roman xi, where the questions presented are.
3 There's nothing in there about the merits of the Brady
4 claim. It's all about the procedural objections that
5 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: I -- I guess what I
14 would say is you've got - habeas review of that claim
15 because the district court decided it on the merits and
16 the court of appeals decided it on the merits.

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

25 Then -- so, in the body of the cert

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

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

9 MR. GOLDSTEIN: Yes.

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

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

24 The particular place that I want to point
25 the Court to, so starting on 26, we lay out our argument

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

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

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

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

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

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

25 And if I can just finish the footnote, it

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

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

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

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

22 JUSTICE SCALIA: How -- how long has this
23 case been going on? When -- when was -- when was the
24 crime?

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

1 JUSTICE SCALIA: The crime was committed in
2 1980, 28 years ago.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE SCALIA: And when was the -- when
5 was the conviction and the sentence of death pronounced?

6 MR. GOLDSTEIN: Very soon thereafter, within
7 a couple of years. This -- let me answer that and make
8 sure that I've resolved --

9 JUSTICE SCALIA: And you want to go back
10 down again, for another --

11 MR. GOLDSTEIN: I'm sorry?

12 JUSTICE SCALIA: How old is this -- is this
13 defendant?

14 MR. GOLDSTEIN: He's around 50 years old
15 now.

16 JUSTICE KENNEDY: And when -- when did the
17 court indicate in -- in Tennessee that you had access to
18 the file?

19 MR. GOLDSTEIN: Yes. In the Woodall case,
20 12 years after the crime, Justice Scalia, so all the
21 evidence was suppressed.

22 JUSTICE KENNEDY: Oh, I thought that was
23 2000 -- when was that?

24 MR. GOLDSTEIN: In 1992.

25 JUSTICE KENNEDY: 1992.

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

5 JUSTICE KENNEDY: And the Brady claim has
6 been pending in the Federal courts but just not decided
7 since about 2001?

8 MR. GOLDSTEIN: Yes, sir. So there's no
9 question about timeliness. Justice Scalia, your
10 frustration about how long in this case is perfectly
11 understandable, how long they take. But let me just be
12 clear that this --

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

19 MR. GOLDSTEIN: Well, I took Justice
20 Kennedy's question to be that this has been in the case
21 all along and hasn't been finally resolved, there isn't
22 a final judgment. You're quite right that, as the Chief
23 Justice pointed out, there is language in the court of
24 appeals' very first opinion in the case. There is
25 unfortunately only one sentence, but to be fair there is

1 a sentence in the first opinion saying that it's not --
2 that Brady evidence is not material.

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

12 CHIEF JUSTICE ROBERTS: I guess it's -- my
13 questions and the questions and the points --

14 MR. GOLDSTEIN: Yes.

15 CHIEF JUSTICE ROBERTS: -- that was raised
16 about the time are related, because one reason these
17 things drag on interminably is that you are -- exactly
18 why you're raising this issue here, it's a procedural
19 nicety or a procedural difficulty that arose some time
20 ago in the State courts. But since then the Federal
21 courts, both the district court and the court of appeals
22 have addressed it, and -- and that that's a good
23 jurisprudential approach to say, particularly in a
24 complicated case like this that is 26 years old, here's
25 our answer on this, but so that we don't have to go

1 through this again, if we're reversed on that, here's
2 our -- our alternative holding; and they said right
3 after the sentence I quoted, we said this before, and we
4 now say it again: This is not Brady material.

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

12 JUSTICE ALITO: I thought what you asked us
13 to do was to reverse on the procedural default issue and
14 remand the case.

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

21 CHIEF JUSTICE ROBERTS: That would -- that
22 would then depend on us agreeing to review a very
23 fact-bound, necessarily fact-bound, Brady question when
24 the questions presented focused on a procedural issue.

25 MR. GOLDSTEIN: Well, first of all, Mr.

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

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

23 But we do think that the Court -- it is
24 actually quite sensible for this Court to not justify
25 the procedural question, given that it's a very weak --

1 call it holding, call it dictum -- the Sixth Circuit has
2 sent strong signals about what it views regarding the
3 merits of the Brady claim.

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

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

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

20 MR. GOLDSTEIN: Yes.

21 JUSTICE ALITO: Could you -- could you put
22 yourself in the position of the Tennessee Court of
23 Criminal Appeals? In light of the briefing that they
24 received, if you had been on that court, would you have
25 understood that Petitioner was asserting that he had a

1 valid reason for not raising the Brady claim earlier,
2 because he had not -- at the time when he could have, at
3 the time of the prior proceedings, he had not had access
4 to the State records? Would you have understood that
5 from the briefing that they got?

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

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

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

19 Now, I will point you to one particular
20 point, Justice Alito, on the question of whether we
21 fairly preserved this in the State Court of Criminal
22 Appeals -- I guess two points that hopefully will give
23 you some comfort there.

24 The first is that in the entire long course
25 of this litigation, the State has never before made this

1 argument; and the second is in the Tennessee Supreme
2 Court -- the Tennessee Court of Criminal Appeals decides
3 the case. We take the Brady claim up to the Tennessee
4 Supreme Court. And even there the State doesn't say
5 that it was insufficiently preserved. They file a
6 response to our application and they address it as to
7 its substance.

8 They never made this argument even in the
9 State courts. So I think it -- it could have been
10 better briefed. The reason -- by the way, let me just
11 explain to you why --

12 JUSTICE SCALIA: How many claims were -- was
13 this a case where there, what, 81 separate claim counts?

14 MR. GOLDSTEIN: The -- it -- I don't think
15 there were --

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

19 JUSTICE GINSBURG: 52.

20 JUSTICE SCALIA: 52. Close enough. I'll
21 say the same for 52.

22 MR. GOLDSTEIN: The -- but when we got to my
23 point in the Tennessee Supreme Court, there was much
24 less action in the case. The Brady claim was point
25 three, there was a lot less that was presented in the

1 case.

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

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

17 JUSTICE GINSBURG: If it is --

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

24 Later you find out -- you have access to a
25 new file and you find cumulative information plus the

1 information that he was dazed or something, which may
2 not be very -- what's our test to determine whether the
3 Brady claim has been exhausted?

4 MR. GOLDSTEIN: Uh --

5 JUSTICE KENNEDY: Or have we talked about
6 that?

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

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

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

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

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

20 MR. GOLDSTEIN: I don't know that he made a
21 concrete proposal. I think he would prefer -- I think
22 the court system would prefer it, and I think everyone
23 would prefer it. The dilemma is that it can't happen.
24 As we explain in footnote 3 at page 26 of our reply
25 brief, there is no window of opportunity to send the

1 State -- the case back to the State. It's been
2 dismissed there. The statute of limitations has run.
3 And in a case called Harris v. State, the Tennessee
4 Supreme Court said that you couldn't reopen it.

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

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

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

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

25 MR. GOLDSTEIN: It wasn't a friendly

1 question --

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

4 MR. GOLDSTEIN: Right.

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

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

9 (Laughter.)

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

1 immunized from review. Indeed, the Brady issue, as
2 encompassed within the questions presented, would be
3 properly briefed by the parties if certiorari were
4 granted."

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

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

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

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

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

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

21 MR. GOLDSTEIN: Justice Ginsburg, this is in
22 the yellow brief, our merits reply brief. It starts at
23 the very bottom of 21, but you can just start at the top
24 of 22.

25 And as to this question -- so we're talking

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

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

17 JUSTICE SCALIA: Well, you know, I'll give
18 you the first, that he appeared drunk or high. That's
19 pretty clear, but I think you tend to look wild-eyed
20 after you're running out after a jewelry store robbery,
21 and I think you're -- you're certainly inclined to look
22 "agitated" and "looking about in a frenzied manner" when
23 you've just committed two brutal murders. I don't think
24 that's evidence of drug addiction at all, of being under
25 the influence of drugs.

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

15 JUSTICE ALITO: This is a very complicated
16 factual question, isn't it? We're dealing with numerous
17 documents, isn't that right, that you claim are --

18 MR. GOLDSTEIN: There are key witness
19 statements, and there are a series of police reports and
20 FBI --

21 JUSTICE ALITO: And so you would have to
22 evaluate all of those and evaluate the prejudice against
23 what was in the record, and you're suggesting now that
24 this is something we should decide?

25 MR. GOLDSTEIN: Two points, Justice Alito.

1 The first is that we say at the very least the Court
2 should make the Kyles point and the evidentiary hearing
3 point. And the second is, I think to be fair to us,
4 given your point about this is so complicated, there is
5 a lot of evidence here, one ought to compare that in
6 fairness to what the Sixth Circuit did, and the one
7 footnote that the Chief Justice has talked about with
8 the district court and whether they really did take a
9 hard look at the claim. I think it would be fair to us
10 to say, look, there are some legal errors here that this
11 Court can correct, and then the district court would be
12 the proper place, if it decides to have an evidentiary
13 hearing, to resolve the remainder of the claim.

14 JUSTICE STEVENS: Let me ask just one quick
15 question: Is it your view that the evidence was
16 deliberately suppressed or negligently suppressed?

17 MR. GOLDSTEIN: Deliberately suppressed,
18 although it doesn't matter under Brady. There was --
19 they turned over almost nothing, and this was the heart
20 of our case. They knew that we were conceding that the
21 acts had been committed, and our defense was one of
22 insanity, and it was our only argument in mitigation of
23 the death penalty.

24 If I could --

25 JUSTICE GINSBURG: You recognize that a -- a

1 defense like this, that the defendant was high on drugs,
2 that isn't ambivalent? I mean, a jury, just like it
3 might react adversely to the defendant if he says I was
4 drunk on alcohol, that they might say this is a person
5 who put himself in this condition where his will could
6 be overpowered, this is a voluntary act, why should we
7 consider it, why should we consider it mitigating, we --
8 we could just as well consider it aggravating?

9 MR. GOLDSTEIN: It -- it could, and that's
10 why I think it's very important that our defense was
11 amphetamine psychosis brought on by post traumatic
12 stress disorder from honorable service in Vietnam, not
13 just that he was a target.

14 If I could reserve the remainder of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Ms. Smith.

17 ORAL ARGUMENT OF JENNIFER L. SMITH

18 ON BEHALF OF THE RESPONDENT

19 MS. SMITH: Mr. Chief Justice, and may it
20 please the Court:

21 As the Court has alluded in a number of
22 questions, both the district court and the Sixth Circuit
23 now twice have resolved -- have rejected Cone's Brady
24 claim on the merits, and we believe correctly so in
25 light of Cone's actions in the day surrounding the

1 murder, his statements about what he did and why he did
2 it, and more importantly the lower court's recognition
3 that additional evidence --

4 JUSTICE STEVENS: May I ask -- let me get
5 something on the table. Do you agree that the evidence
6 shows that this evidence was deliberately suppressed?

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

9 JUSTICE STEVENS: But is there any
10 explanation for -- was there any explanation for it
11 other than the tactical explanation?

12 MS. SMITH: There's no explanation in the
13 record, there has been no finding about whether the
14 evidence has been suppressed at all in this case because
15 both the district court and the Sixth Circuit decided as
16 a matter of law that the materials --

17 JUSTICE STEVENS: It seems to be relevant
18 because if it was suppressed for tactical reasons, it
19 seems to me hard to say that the prosecution thought it
20 didn't make any difference.

21 MS. SMITH: Well, again, there has --
22 there's been no finding on that, because each court, and
23 I think more than just in a passing statement, each
24 court that looked at it, both the district court and the
25 Sixth Circuit, have looked point by point, especially in

1 the district court --

2 JUSTICE STEVENS: What they -- one of the
3 first questions always troubles me in a Brady case is
4 the conduct of the prosecutor and the ethics of the
5 profession, the whole -- whole importance of the rule is
6 to be sure prosecutors perform their public function.
7 And I'm just wondering if there is any -- if this was a
8 case of just an honest mistake, it would be one thing,
9 but if it appears to have been a tactical decision and a
10 tactical program, it seems to me very difficult to
11 assume that the prosecutor thought it was really not
12 important evidence.

13 MS. SMITH: Your Honor, I certainly
14 understand the Court's concern, and I'll just -- and
15 again reiterate, there has not been any finding on that,
16 but there is at least a suggestion in the record that
17 some of the evidence on which the Petitioner is relying
18 at this point actually wasn't suppressed. And we noted
19 this in our brief, specifically as to the witness Ilene
20 Blankman.

21 All of the individual items on which the
22 Petitioner is traveling now were the subject of
23 cross-examination, so that at least raises the question
24 about whether --

25 JUSTICE BREYER: Blankman, that isn't the

1 concern. The concern is simply this: If they're
2 correct, that this whole trial revolves around whether
3 this individual is suffering post traumatic stress
4 disorder with these amphetamines.

5 They have two expert witnesses who say that
6 he's in very bad shape, everything the defense wanted
7 them to say; that's it. That's their evidence.

8 On cross, the prosecutor gets both of them
9 to admit that they're basing their testimony on what the
10 defendant told them about his drug use. At which point
11 the prosecutor says, let's talk to Mr. Roby, who is the
12 arresting officer, did you see he was on -- when you
13 arrested him, was he on -- did he look like he was on
14 drugs? No.

15 Let's talk to Mr. Flynn. When you processed
16 him, did he look like he was on drugs? No. And then
17 let's talk to Ms. Blankman, okay?

18 So, now the case is submitted, and at that
19 point the prosecutor says, there is no evidence that he
20 was on drugs. He said that. Two, those two expert
21 witnesses, and it's baloney. There's your case.

22 Now, in fact in the files is evidence that
23 Mr. Roby, that very day of the crime and the next day,
24 sent out all-points bulletins saying he was a dangerous
25 drug user. There is evidence in the files that Mr. --

1 that the FBI man sent out similar all-point bulletins.
2 There are three witnesses who have described the
3 behavior of the day as frenzied, and we have heard the
4 descriptions.

5 And you're saying that the lawyer, the
6 trained lawyer for the government, who knew this
7 information and knew the defense just what? Just
8 overlooked it by accident? Just what?

9 MS. SMITH: Well, Your Honor, I can't speak
10 for the prosecutor's state of mind at the time, but I
11 will -- will state that the central question in the case
12 was not whether the Petitioner used drugs. There was
13 evidence in the record from his mother, there was
14 evidence in the record from his own mouth --

15 JUSTICE SCALIA: He was conceded that he was
16 a drug user.

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

19 JUSTICE SCALIA: And that he was dangerous
20 because he admitted the murders.

21 MS. SMITH: It came -- some of that came
22 through the State's own witnesses. And -- and the
23 argument the State made about him being a drug user
24 versus a drug seller was not the only argument the State
25 made. The State specifically said look at -- to the

1 jury, look at what he did on the day of the murders,
2 look at what he did on Saturday and Sunday to go to his
3 state of mind. And the State focused on the -- the goal
4 oriented, the purposeful behavior and the very direct
5 behavior --

6 JUSTICE KENNEDY: Do you think that the
7 material described by Justice Breyer would have been
8 excluded by the trial court as irrelevant if it had been
9 introduced, or cumulative as --

10 MS. SMITH: I don't think it would have been
11 excluded. I think it could have been used to attempt to
12 cross-examine certainly Agent Roby. But Agent Roby's
13 testimony didn't -- didn't state that Mr. Cone was not a
14 drug user. Mr. Roby -- Agent Roby's testimony was that
15 at the time that he observed him, four days after the
16 murders, he didn't appear to be on -- under the
17 influence of drugs, and when he saw him eight days after
18 the murder, he examined his body and there were no
19 needle marks.

20 The testimony was very specific as to his
21 observations on the four-day point and the eight-day
22 point as to the murders.

23 Same with Agent Flynn --

24 JUSTICE KENNEDY: Do you think the
25 prosecutor had an ethical duty to turn over this

1 material?

2 MS. SMITH: I think that the material -- if
3 the material -- if the subject was immaterial --

4 JUSTICE STEVENS: It's a simple question,
5 yes or no?

6 MS. SMITH: I think that as a legal matter
7 there was no -- no need to turn it over because it was
8 immaterial.

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

12 MS. SMITH: I'm unaware of any ethical
13 requirement that he turn it over, and I don't think
14 that -- and certainly under Brady if it's not material,
15 we don't think it was material, then it's certainly not
16 required as a constitutional matter. And the reason is
17 not --

18 JUSTICE SOUTER: You believe that the
19 materiality judgment is yours to make, the State's to
20 make as sort of a gate keeping measure? Isn't the
21 materiality an issue for the fact finder?

22 MS. SMITH: Well, I think it's -- it's --

23 JUSTICE SOUTER: You exclude -- do you
24 believe that you can, in effect, suppress any piece of
25 evidence on -- on -- on the State's judgment that it

1 will not prove to be material in the context of the
2 whole case?

3 MS. SMITH: I think prosecutors make those
4 kind of judgment calls all the time.

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

7 MS. SMITH: Well, I think that probably a
8 prudent prosecutor would err on the side of turning over
9 matters that --

10 JUSTICE SOUTER: Right. And --

11 MS. SMITH: -- have some relevance.

12 JUSTICE SOUTER: Wouldn't -- wouldn't he err
13 on the side of turning over the matters because Brady
14 leaves the materiality judgment, like all materiality
15 judgments, ultimately, to the fact finder?

16 MS. SMITH: Certainly ultimately it's left
17 to the fact finder, but the prosecutor is --

18 JUSTICE KENNEDY: Well, initially Brady
19 leaves the judgment for, furthering Justice Souter's
20 point, to the attorney for the defense. You're saying
21 that the prosecutor can preempt the role of the attorney
22 for the defense in deciding what to offer to the court
23 as material? And if -- and if -- and if -- even if the
24 evidence is in a gray area, that's for the defense
25 attorney to decide under -- under our Brady

1 jurisprudence, as I understand it. Correct me if that's
2 wrong.

3 MS. SMITH: Well, I think -- yes, I think
4 the defense ultimately would make the decision how to
5 use the evidence that comes into his possession. But
6 obviously, the prosecutor has to make an initial
7 judgment call about whether or not the evidence is going
8 to be material, given what he knows about -- about the
9 defense.

10 JUSTICE SOUTER: Isn't the prosecutor's
11 obligation to make an initial assessment as to whether
12 the evidence tends to be mitigating evidence or
13 favorable to the defendant? Isn't that the prosecutor's
14 judgment?

15 MS. SMITH: I think that -- that falls
16 within that -- the prosecutor's judgment. But I think
17 if we look -- look at the evidence in --

18 JUSTICE SOUTER: Isn't this evidence clearly
19 of a mitigating character?

20 MS. SMITH: No, Your Honor.

21 JUSTICE SOUTER: You don't think -- you
22 don't think it would be favorable to the defendant
23 getting the evidence that Justice Breyer summarized a
24 moment ago?

25 MS. SMITH: No, sir, I do not. There was

1 already evidence before the jury that the defendant was
2 a drug addict, that he was a drug user, that he was
3 changed after Vietnam. This Court's own opinion in 2002
4 noted that he was a drug addict.

5 JUSTICE SOUTER: Maybe I'm being -- but
6 Justice Breyer made the point, and made it, I think very
7 clearly, that although that evidence was in, the
8 argument here -- the argument that was made before the
9 jury in this case is that the witnesses upon whom the
10 defense was specifically relying, were witnesses whose
11 account of the defendant's drug use came solely from the
12 defendant himself.

13 Given that fact, wouldn't it have been
14 mitigating evidence to learn that other people, at times
15 relatively close to the events in question, without
16 being coached by the defendant, had concluded that he
17 was a drug user? Wouldn't that have been mitigating
18 evidence?

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

21 JUSTICE SOUTER: We are not asking about
22 materiality at this point. We are asking about the
23 mitigating character of the evidence. Would it have
24 been favorable to the defendant? Would that have been
25 its tendency?

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

3 JUSTICE SOUTER: That was not my question.
4 Was it favorable evidence? Did it have a tendency to
5 favor the defendant?

6 MS. SMITH: No, not under his theory, and
7 the reason is --

8 JUSTICE SOUTER: Then I will be candid with
9 you that I simply cannot follow your argument because I
10 believe you have just made a statement to me that is
11 utterly irrational.

12 MS. SMITH: Well, let me explain if I -- if
13 I may, and the reason I say that it is not mitigating is
14 because the -- the entire question in the defense and
15 for mitigation purposes is the defendant's state of mind
16 at the time of the murder.

17 There was already evidence that there was --
18 that he was a drug user. The fact that he was a drug
19 user doesn't say anything more -- or additional evidence
20 of drug use says nothing more about his state of mind at
21 the time of the crime than what was already presented.
22 The question is not whether he was a drug user. The
23 record showed it. It came out of the mouths of the
24 State's own witness.

25 JUSTICE GINSBURG: But what about the

1 prosecutor who said "baloney." He said the prosecutor
2 -- the prosecutor says: The defendant tells you he was
3 a drug user. Baloney, he was a drug dealer.

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

9 And that line to the jury, "baloney" -- he
10 says he was a drug user -- that, it seems to me, is
11 exactly what the prosecutor wanted to do, which is to
12 tell this jury this guy's a dealer; he's not a drug
13 abuser.

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

16 JUSTICE BREYER: You also had cross-examined
17 the two expert witnesses in order to show that they
18 didn't really know that this man was a drug user,
19 because their only basis for that was he told them. So
20 as I've read these briefs, I've come away concluding
21 yours with a strong impression that this was a relevant
22 issue. That the prosecution did not concede that he was
23 on drugs at the time of the murder. Indeed, that that
24 was all that was at issue.

25 And so I just don't see, like Justice

1 Souter, how you can say that this wouldn't at least be
2 useful information if -- even for cross-examination, and
3 I think more than that since you have three direct
4 witnesses.

5 But leaving that aside, there's another part
6 of this case that equally bothers me. It seems to me
7 there was a lawyer for the State here that twice told
8 the courts that this matter had never been raised. Is
9 that so? Or maybe he said that the courts had decided
10 it because the State has taken absolutely inconsistent
11 positions, first saying that the trial courts decided
12 it, and they did decide it, but by accident. They
13 thought that paragraph 41 referred to this claim when it
14 referred to an earlier claim.

15 So first they tell the courts -- and you
16 wouldn't know that unless you are pretty familiar
17 because there were a lot of words written. They tell
18 the courts: It's been decided, judge. Don't worry.
19 They decided it: Adequate State ground. And next they
20 wake up to the fact that it wasn't decided, and then
21 they announce: Oh, he waived it, despite the fact that
22 there's a case called Swanson in Tennessee that says
23 that you can raise a later claim if you have grounds for
24 not knowing of it in the first place. And he didn't
25 know of it until 1993.

1 So I see the State taking opposite
2 positions, and -- and what seems from the briefs
3 inconsistent with the State law, and I'm confused. What
4 is it that happened in this case?

5 MS. SMITH: Well, I -- I want to answer your
6 question, and I will answer your question, Your Honor,
7 if I could just say one thing about the Brady. We don't
8 dispute that the material in question is relevant to the
9 defense and is relevant to the sentence.

10 We dispute that it's material. We don't
11 think it's material in every court where the district
12 court and the sixth circuit have found it immaterial.
13 But on the -- on the -- the -- what has happened in
14 terms of the procedural defense, we have confessed that
15 there was an error by the State in the -- in the post-
16 conviction court.

17 We agree that Tennessee law does allow -- it
18 certainly at -- at this time did allow a petitioner to
19 raise -- to -- to file successive petitions if that
20 petitioner could establish cause. Now, the prosecutor
21 in the course of responding to some 80 claims, both
22 parts and subparts, made a mistake and read paragraph 35
23 as being similar to -- to a claim that had been raised
24 on direct appeal and argued that it appeared to be the
25 same. That was an error.

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

6 Now, in the appeal the petitioner doesn't
7 again raise the Brady claim. In his principal brief he
8 never mentions the Brady claim. He never even reaches
9 --

10 JUSTICE ALITO: If we read the -- can I ask
11 you this: If we read the decision of the Court of
12 Criminal Appeals as having ratified the -- the district
13 court's -- the -- the lower court's treatment of the
14 procedural default issues, having rejected it on the
15 ground that it was previously decided, that would be an
16 instance in which a State court applied a procedural
17 default rule based on an undisputed error of fact.

18 In that situation, would it not -- wouldn't
19 it be clear that there was not an adequate, independent
20 State ground for the decision; and, therefore, no
21 procedural default? And if we were to find that,
22 wouldn't the appropriate step be on this very factual
23 Brady issue to send it back to the lower federal courts?

24 MS. SMITH: In answer to your first
25 question, yes, we don't disagree with the proposition

1 that if a trial -- that if a State court refuses to
2 consider a claim on the basis that that claim has been
3 determined previously, that that would not be an
4 adequate basis for a procedural default in Federal
5 Court.

6 But we don't -- I don't think that this case
7 presents that scenario, and every court that has looked
8 at the Court of Criminal Appeals's decision has read
9 that decision as applying a waiver. The District Court
10 read that decision as applying a waiver. If you look at
11 -- at page 112-A of the petition appendix, not only does
12 the District Court read it as a waiver, but the
13 Petitioner read it as a applying a waiver. Because as
14 you note in that first sentence, as to the Brady claim
15 to the district court, Cone also attempts to argue that
16 those claims were improperly held waived by the court.

17 JUSTICE BREYER: Well, "waiver," my
18 goodness. First, I don't think it's impossible to say
19 "waiver" since he wrote the words in paragraph 41 that
20 make absolutely clear that they aren't waiving it. He
21 is raising it.

22 Then, aside from that, the paragraph of the
23 district -- of the court of appeals's opinion says they
24 were already decided or waived. So it's ambiguous, at
25 best, for you.

1 So let's go back and see what the State
2 district court held, and I think that the State district
3 court held that it had been decided, not that it had
4 been waived. Am I right?

5 MS. SMITH: The trial court --

6 JUSTICE BREYER: Yes.

7 MS. SMITH: -- held that.

8 JUSTICE BREYER: Okay. So there the cases
9 in this Court would say if a State appeals court writes
10 a matter -- something -- a sentence that is ambiguous so
11 you don't know whether it was decided: For example,
12 they mean it was waived or mean that it was decided,
13 then the next best thing to do, which makes sense, is
14 look to the lower court to see what they actually did.

15 So we follow that rule, and we get to
16 exactly what justice Alito said: That what they did was
17 they were holding that this has already been decided.

18 MS. SMITH: I think that rule holds if the
19 petitioner has made the argument to the appellate court.
20 Here the Petitioner didn't make the argument to the
21 appellate court.

22 JUSTICE BREYER: Don't you think at this
23 point the Petitioner is saying in -- in his briefs:
24 I've been getting the runaround. First, they tell me
25 it's one thing; then they tell me another. All I can

1 tell you is this: No one has ever passed on the merits
2 of this Brady claim, which is a substantial claim.

3 MS. SMITH: Well, I --

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

6 MS. SMITH: Well, first of all, Your Honor,
7 I don't think the Petitioner has been getting the
8 runaround. The Petitioner has always throughout this
9 litigation proceeded on the premise that the CCA -- the
10 Court of Criminal Appeals's decision in Tennessee was
11 based on a waiver. All of his briefs in the lower court
12 and in the -- the sixth circuit reflect that.

13 The District Court proceeded as if that
14 ruling was a waiver. The sixth circuit in its 2001
15 decision, if you look at page 62-A and 62 -- 63-A at the
16 bottom, the -- the sixth circuit specifically said the
17 Tennessee waiver rule is plainly applicable to the Brady
18 claim. And the Tennessee courts explicitly relied on
19 the waiver rule.

20 It wasn't until the 2007 opinion that the --
21 the sixth circuit even discussed this notion of previous
22 determination, and only then in response to what I think
23 was a red herring injected by the dissenting opinion
24 that somehow the -- the Court of Criminal Appeals's
25 decision stood for something different than what the

1 parties and the courts had been reading it all along.

2 The Court of Criminal Appeals --

3 JUSTICE BREYER: Could the explanation of
4 this language in the opinion be due to the fact that the
5 State first argued that it had already been decided;
6 then in later courts the State changed its theory and
7 announced that it had been waived?

8 MS. SMITH: The State --

9 JUSTICE BREYER: Isn't that why they're
10 writing about waiver?

11 MS. SMITH: No, Your Honor. The State has
12 consistently maintained throughout the habeas that the
13 -- that the Brady claim was either defaulted or waived.
14 In the answer to the petition, the State presented the
15 very argument that they're presenting today, that the
16 Court of Criminal Appeals relied on a waiver. In the --
17 in the brief to the Sixth Circuit --

18 JUSTICE GINSBURG: Spell out the waiver in
19 light of what he said. The first time he learns that
20 these -- cases, other cases cited and he has access to
21 the district attorney's file, he then files a habeas,
22 State habeas petition in which he said that the facts on
23 which his Brady claim rests have been revealed through
24 disclosure of the State's files which occurred after the
25 first conviction proceeding. Those words are in the

1 affidavit -- right -- that came with the second
2 petition. So how could he possibly have waived this
3 when he has explained it wasn't available to him?

4 MS. SMITH: Well, I think to understand how
5 this -- how this could happen, the bottom line is that
6 he failed to demonstrate to the State courts why he
7 should -- he was properly before the court to begin
8 with; and when you -- when you raise a claim -- he
9 buried his claim among a hundred other parts and
10 subparts. If --if he had a legitimate claim, he
11 certainly didn't highlight it as such, and then he -- he
12 buried even further his explanation for a waiver in a
13 41-page affidavit filed six days before the State
14 court's ruling in this case.

15 It was the first time in the entire case
16 that he mentioned anything at all about access to the
17 prosecutor's files. Then when he got an adverse
18 judgment in the trial court he never even made the
19 argument in the Court of Criminal Appeals. He took a
20 completely different theory about waiver, said that
21 waiver was personal, and should be -- should be judged
22 on a subjective standard rather than objective -- never
23 mentioned to the Court of Criminal Appeals any argument
24 whatsoever about access to the prosecutor's files.

25 It was on the basis of that argument that

1 the Court of Criminal Appeals held that the Petitioner
2 had failed to rebut the presumption of waiver as a
3 matter of law as to all claims that had not been
4 previously determined.

5 So that holding is an overarching holding,
6 it applies to every claim that was raised in the first
7 term and in the successive habeas position, and we think
8 justified the district -- it certainly was the basis of
9 the district court's default and as well, in 2001 was
10 the basis of the Sixth Circuit's decision.

11 Now, regarding the 2007 decision, we concede
12 that that decision could be read as presenting the
13 question 1, where this Court relies on a finding of
14 previous determination, but we don't think that's what
15 the court did in 2007. In 2007 the court specifically
16 ruled that it was not revisiting the Brady claim. That
17 was a decision based on law of the case principles, and
18 to the extent that it discussed previous determination,
19 we don't think it in any way intended to modify its
20 earlier holding.

21 In 2001 the Sixth Circuit clearly relied on
22 the waiver bar, and that's very evident on pages 62 and
23 63a in the petition appendix, and that's the basis of
24 the waiver. So we don't even think that the -- that the
25 situation in question 1 is even presented, although

1 if -- to answer a question, in response to Justice
2 Alito's question, I think it would be -- would be an
3 absurd result that something that has been previously
4 determined is defaulted, but that's not the situation
5 here. The record shows it's not previously determined.
6 The Petitioner has never argued that it's previously
7 determined, and no court until this point has ever even
8 read the Court of Criminal Appeals decision as making a
9 previous determination finding. Everyone has accepted
10 the fact that that holding was a waiver holding.

11 So on that -- that's the basis of the
12 default, and the reason that he has defaulted is that he
13 failed to make that argument when he had -- when he the
14 opportunity to make it. He could have made it, and he
15 didn't make it. He buried all his good arguments, even
16 on his waiver argument, he was making inconsistent
17 arguments. On the one hand, he was saying the claim was
18 novel, the claim that my post-conviction counsel didn't
19 discuss it with me. On the other hand, he says that I'm
20 just now finding out about it. Those are completely
21 inconsistent theories, and the theory that he actually
22 presented in the Court of Criminal Appeals bears no
23 resemblance to the argument that he is making now or
24 that he made in the district court.

25 But all of this aside, it really is -- is

1 beside the point because at the end of the day, the
2 district court very clearly addressed -- and
3 specifically, not just in passing, but specifically at
4 various points in its -- in its opinion, the materiality
5 of each and every item of evidence.

6 He went through in detail a discussion of
7 the police teletypes, stating that -- that the jury
8 already was aware that he was a drug user. It really
9 wasn't any question whether he was a drug user; the
10 evidence clearly showed that he was. The question was
11 what was his State of mind at the time evidence was what
12 was his state of mind at the time of the murders.

13 JUSTICE SOUTER: What -- what do you say to
14 the argument on the other side, that these various items
15 of -- of Brady material were averted to and were
16 discussed on a purely isolated basis; they were not
17 discussed in terms of their cumulative effect, which
18 *Kyles v Whitley* says is the standard. What's your
19 response to that?

20 MS. SMITH: Well, I think if you look at the
21 -- at the district court's opinion, I could that
22 argument could be made based upon the way the district
23 court treated the items. The district court certainly
24 did look at them in categories and separated them; but I
25 think if you look at the Sixth Circuit's opinion,

1 certainly in 2007 where the court -- the court looked at
2 it in more detail, I think that it is clear that the
3 court cumulated the items and said as a whole that the
4 Brady materials don't undermine -- do not undermine
5 confidence in the verdict. So I disagree that -- that
6 the Sixth Circuit treated them incorrectly, and -- and I
7 would note --

8 JUSTICE SCALIA: Do -- do you agree the
9 prosecutor was arguing, when he said that he's a drug
10 dealer, that he was not a drug user? Was it -- was it
11 conceded that he was a drug user? I suspect it was not.

12 I said earlier it was, and it seems that it
13 was not, because he introduced one witness to say that
14 there were no -- no needle marks on his body, which
15 would suggest that he's trying to make the point to the
16 jury that this person doesn't even use drugs.

17 MS. SMITH: Your Honor, I -- I think I've
18 noted earlier, I think that the prosecutor overstated
19 his case on that point, no question about it; but I
20 think there was ample evidence in the record indicating
21 that he was a drug user. This Court even noted that,
22 even noted there was proof of the fact that he was a
23 drug addict, that he was a drug user, that the evidence
24 was strong that he was -- that he was under the
25 influence of an amphetamine psychosis. There were two

1 experts that testified to that. On the other hand,
2 there were two experts for the State that said that that
3 -- that defense couldn't be supported.

4 So the question of whether he was a drug
5 user or not a drug user was really beside the point. I
6 think the prosecutor eventually got around to that in
7 his argument. When you look at the argument of the
8 whole, the bottom line of the argument was, and we
9 quoted it in our brief, "look at what he did, look at
10 his actions around this murder, and let that go to his
11 state of mind," because that was the best evidence. Not
12 only is that -- he said, he specifically said he went
13 into this individual's home with the purpose of getting
14 fed, getting cleaned up and getting out of town, and
15 when the Todds ceased to cooperate with him, he had to
16 control them physically. That's code I suppose for
17 beating them to death because that's exactly what he
18 did.

19 He explained what he did and why he did it.
20 His actions are very calculated from -- from beginning
21 to end. So whether he used drugs or didn't use drugs,
22 the question is what was going on at the time of this
23 murder, and by his own admission the reason that the
24 Todds are -- are not with us today is because they
25 ceased to cooperate; they became frightened; and he had

1 to control them physically. I think that's the best
2 evidence of his state of mind at the time. Those are
3 words out of his own mouth, and I think that that
4 certainly supports the finding of both the district
5 court and the Sixth Circuit on materiality.

6 I agree with the Chief Justice's assessment;
7 we do not think that the Brady claim is fairly included
8 within the question. The merits issue is not a
9 predicate to the default question. I certainly
10 understand Petitioner's dilemma in this case, but I
11 think faced with that dilemma, he should have squarely
12 presented that question among the questions presented
13 and not dropped it in a footnote in argument 2. We
14 don't think it's fairly presented; but -- but in any
15 event, it certainly justifies affirmance of the judgment
16 or at a minimum the dismissal of the appeal.

17 And for all these reasons, if there are no
18 further questions, we ask this Court to affirm the
19 judgment of the district court -- of the Sixth Circuit.

20 JUSTICE KENNEDY: It's outside the record
21 and not really relevant to the case. Has he been on
22 death row since 1984 or so? And if so, is that solitary
23 confinement? Is he not allowed -- if you know?

24 MS. SMITH: I don't know. I'm not aware
25 that he's in any sort of heightened level of security.

1 I would assume he's just at a standard level. I don't
2 know his security level, but he has been on death row
3 for the entire period, Your Honor.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Goldstein, you have three minutes.

6 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN
7 ON BEHALF OF THE PETITIONER

8 MR. GOLDSTEIN: Thank you, Mr. Chief
9 Justice.

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

12 Here's the dilemma I think about how the
13 Court needs to dispose of the case. On the one hand, we
14 have the State, which is unapologetic about having
15 suppressed a whole bunch of evidence and about having
16 misstated the procedural history to the State court and
17 then to the Sixth Circuit. On the other hand, the
18 Court's business is usually not to get into the weeds,
19 things like fact-bound Brady claims, and I think that
20 the Court can accommodate both the concern of the signal
21 that it would send in affirming the judgment in this
22 case and also the -- the bad precedent it might set by
23 getting into the Johnson pitfalls of this witness
24 statement and that witness statement, by resolving the
25 case as follows:

1 On page 22 and 24a of the petition appendix,
2 the court of appeals says the claim was procedurally
3 defaulted because it was previously determined. That's
4 wrong. That is the argument that was passed upon by the
5 court of appeals, and that should be reversed on
6 procedural grounds.

7 On the Brady claim, it seems to me that the
8 court of appeals, when it did discuss the claim, made a
9 couple of big mistakes the Court could identify and send
10 the case back. The first is, when it talked about the
11 merits, it said we don't think this evidence would have
12 mattered because there was a lot of evidence at trial
13 that he was a drug user. But as has been discussed, I
14 think in detail, the court of appeals, because its
15 assessment was kind of passing here, misunderstood that
16 when the experts said that, when the prosecutor turned
17 around and completely discredited that. And so I think
18 that colors the Sixth Circuit's assessment incorrectly.

19 The second is the Kyles point, and the third
20 is the possibility that we're entitled to an evidentiary
21 hearing.

22 And so I think an opinion of this Court that
23 simply dealt with the undefended procedural default
24 ruling and then went to the merits and only made those
25 three points and then left it to the lower courts to

1 resolve the Brady claim ultimately would balance the
2 concern about the Court's institutional interests in not
3 sending a signal of affirming this judgment in light of
4 what the State has done here and not getting into the
5 weeds of the claim.

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

10 MR. GOLDSTEIN: Yes, Mr. Chief Justice. We
11 point out that the court of appeals twice said, "We
12 consider the four different categories of Brady evidence
13 separately." And then when it did discuss them -- it's
14 very hard to tell, its discussion is so passing here --
15 but it does go through this kind of evidence, say, the
16 FBI files or the police teletypes from Agent Roby, and
17 it says that wouldn't have been persuasive, and then it
18 turns to the witness statements. But I would also say
19 that its overarching point --

20 CHIEF JUSTICE ROBERTS: Where do they say
21 that they're only considering the categories separately?

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

25 CHIEF JUSTICE ROBERTS: That's the 2001

1 opinion. Do they do that in the 2007 opinion?

2 MR. GOLDSTEIN: No. The -- in the 2007
3 opinion, that discussion happens at 25a, and here is
4 their explanation. It goes to my first point. And they
5 do sort of then turn around and treat them more
6 generally. "It would not have been news to the jurors
7 that Cone was a drug user. They had already heard
8 substantial direct evidence that he was a drug user,
9 including the opinion of the two expert witnesses,
10 Cone's mother, the drugs found in Cone's car, and
11 photographic evidence." And that's our point, that that
12 was discredited because it came out of his mouth.

13 JUSTICE SCALIA: What was the photographic
14 evidence?

15 MR. GOLDSTEIN: There was one photo. It
16 actually points in the opposite direction. The State
17 cites it in its merit brief. They have a picture of
18 Cone as not having any needle marks, to your point,
19 Justice Scalia, that they tried to prove he wasn't a
20 drug user at all.

21 MR. GOLDSTEIN: Thank you very much.

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

24 MR. GOLDSTEIN: Yes.

25 CHIEF JUSTICE ROBERTS: Did you raise --

1 cite Kyles in your petition for cert?

2 MR. GOLDSTEIN: I can tell that you quickly,
3 Mr. Chief Justice.

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

6 MR. GOLDSTEIN: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 The case is submitted.

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

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