

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
GEORGE H. BALDWIN, :
Petitioner :
v. : No. 02-964
MICHAEL REESE :

- - - - -X

Washington, D.C.
Monday, December 8, 2003

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:02 a.m.

APPEARANCES:
GEN. HARDY MYERS, ESQ., Attorney General, Salem, Oregon;
on behalf of the Petitioner.
DENNIS BALSKE, ESQ., Portland, Oregon; on behalf of the
Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
GEN. HARDY MYERS, ESQ.	
On behalf of the Petitioner	3
DENNIS BALSKE, ESQ.	
On behalf of the Respondent	24
REBUTTAL ARGUMENT OF	
GEN. HARDY MYERS, ESQ.	
On behalf of the Petitioner	54

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now
in No. 02-964, George Baldwin v. Michael Reese.

General Myers.

ORAL ARGUMENT OF GEN. HARDY MYERS

ON BEHALF OF THE PETITIONER

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

When a state prisoner decides to attack his
conviction on the basis of a claimed violation of Federal
constitutional right, your cases have held that he must
first alert the state courts he is raising a Federal
claim, if that claim is to be exhausted for Federal habeas
purposes. But what the prisoner must say to the state
courts to tell them he is raising a Federal claim
continues to be a - a troubled area of Federal habeas law.
It is one that has divided the circuits and is producing
very different analyses and results.

Some cases are holding that the prisoner must
make some explicit citation or reference to the Federal
source of his claim. Some cases are holding that a
Federal claim has been fairly presented even when - even
though what the prisoner is saying to the state courts
could as - as - as reasonably be interpreted as stating a

1 state law claim. And some courts have held that a Federal
2 claim is fairly presented even when the statement of the
3 claim is clearly a claim under state law only.

4 This continuing - and in this - in this case -

5 QUESTION: Well, we're reviewing a Ninth Circuit
6 holding, which seems fairly open-ended. How would you
7 characterize the Ninth Circuit rule?

8 MR. MYERS: Your Honor, I was about to describe
9 it is a transformation of the responsibility of the state
10 prisoner to present his claim, a transformation of that
11 into a responsibility of the - of the state court - state
12 courts to, in effect, step into the shoes of the state
13 prisoner and complete or try to complete an incompletely
14 presented claim.

15 This - this overall division among the circuits
16 and this case from the Ninth Circuit, we think, Your
17 Honors, illustrates or confirms very strongly the need for
18 further clarification by this Court as to exactly what
19 must be said by -

20 QUESTION: Well, do you agree with your opponents
21 here on at least some of the ground rules that would
22 suffice? I mean, is it enough to cite a Federal
23 constitutional provision or a Federal statute or other
24 provision describing the right as Federal? You're both in
25 agreement that would do?

1 MR. MYERS: Yes. We believe that is so, so long
2 as -

3 QUESTION: How about if you cite at least a - a
4 reported case that has decided the claim on a Federal
5 basis? You make your claim and cite a case that -

6 MR. MYERS: Yes -

7 QUESTION: - clearly has decided the claim on a
8 Federal basis. Is that - you're both in agreement that
9 would do?

10 MR. MYERS: Yes, Your Honors, so -

11 QUESTION: And what if a - a claim is spelled out
12 that necessarily must be based on a Federal right to exist
13 at all?

14 MR. MYERS: Yes, Your Honor, that is part of the
15 test that we propose -

16 QUESTION: Why yes? I don't understand that. I
17 mean, why is it necessarily a Federal claim? It's
18 necessarily a Federal claim only if it's a valid claim.
19 It might be an erroneous state claim.

20 MR. MYERS: Well, we are referring to
21 necessarily, Your Honor, in the sense that the - the
22 source of the claim, that is its Federal source, is -

23 QUESTION: Who -

24 QUESTION: But the - the -

25 MR. MYERS: - is unmistake -

1 QUESTION: He hasn't read the state constitution.
2 He - he makes a due process claim. Now, you're - you're
3 going to say, since there is no Due Process Clause in the
4 state constitution, but there is in the Federal
5 Constitution, we must assume it's a Federal claim. Why?
6 It may be an erroneous state claim.

7 MR. MYERS: Your Honor, we think that the state
8 court -

9 QUESTION: And I don't want to have to go through
10 the trouble of figuring out whether there's a valid state
11 claim. I - I mean, this is going to require a Federal
12 court every time there's such a claim to go through state
13 law and determine whether there is anything to this under
14 state law. Why should - why should we do that? Why, I
15 mean, why aren't your first two requirements enough? Look
16 at - cite a Federal case, cite a Federal provision. Is -
17 is this an enormous burden?

18 MR. MYERS: No, Your Honor, and we would be quite
19 content -

20 QUESTION: So why do you want to add anything to
21 it? I - I don't - I don't really understand going beyond
22 that.

23 QUESTION: Let me ask you the other - the
24 contrary question. Suppose the - the prisoner alleges, I
25 had a lawyer who didn't even graduate from law school, and

1 because I had such a law - lousy lawyer, I lost the case
2 and I'm in jail, and I would be innocent if I were not in
3 jail, but he doesn't cite any cases or any constitutional
4 provision. Would that have - present a Federal claim?

5 MR. MYERS: No, Your Honor. Inasmuch as -

6 QUESTION: You don't think so?

7 MR. MYERS: Not - not necessarily -

8 QUESTION: Yeah, but if he added, and therefore,
9 it violated the Federal Constitution, then it would be a
10 Federal claim?

11 MR. MYERS: Your Honor, it would - the - a
12 Federal source of the claim would have been identified,
13 but, of course, whatever further clarification the Court
14 might consider adopting or adopt, the balance of the
15 statement of the claim also has to meet the requirements
16 of fair presentation.

17 QUESTION: But why - why doesn't the state judge
18 know he's raising a claim of inadequate assistance of
19 counsel that violates the Federal Constitution? Doesn't
20 that give the state judge a fair opportunity to decide the
21 Federal question?

22 MR. MYERS: No, Your Honor, because the
23 description of the claim that you just gave, apart from
24 whether it's factually adequate or whatever could as -
25 could equally address, or state a claim under state law.

1 QUESTION: Well, certainly -

2 QUESTION: But that anybody knows -

3 QUESTION: - but the question is whether it
4 states a Federal claim that has been exhausted. Doesn't
5 it also state a Federal claim?

6 MR. MYERS: Not necessarily, Your Honor.

7 QUESTION: I - I thought the Federal standards -
8 and I was going to get into this, but let's do it in
9 relation to Justice Stevens' hypothetical - I thought the
10 Federal standards and the state standards for adequate
11 assistance of counsel were - were in substance the same,
12 and in, you know, in Oregon. And - and if they are the
13 same, why is it unfair to the state or to the state courts
14 to construe a - a - a statement like the one Justice
15 Stevens just read, as stating a Federal as well as a state
16 claim? The court is going to do the same thing no matter
17 how it construes it.

18 MR. MYERS: Your Honor, when state judicial
19 authority is invoked to address a claim before it, it's of
20 paramount importance for that court to know whether it is
21 addressing a state claim -

22 QUESTION: No, my -

23 QUESTION: Well, we - we need to lay down a rule,
24 I think, that is - can be applied generally and not just
25 to Oregon, so that, of course, a peculiarity of Oregon law

1 ought not to control what we're trying to do in making a
2 more general statement.

3 MR. MYERS: No, Your Honor, and I would like to -

4 QUESTION: May - maybe I didn't make my - my
5 point. My - my point was, if a claim is stated as a
6 matter of fact, which under the law of the state and the
7 law of the United States is governed by identical
8 standards, what is unfair about construing that as a
9 Federal as well as a state claim, regardless of what label
10 is put on it?

11 MR. MYERS: And, Your Honor, as I was saying a
12 few moments ago, it - the answer to that goes to the fact
13 - or rests on the fact that the state court's authority to
14 address a state law-based claim is very different, of
15 course, from its authority to address a Federal law-based
16 claim. It has the ability to judge and decide the state
17 law claim any way it - it thinks is correct under state
18 law. It must, of course, in the relation to a Federal
19 claim, follow the precedents faithfully of this Court -

20 QUESTION: No, but I'm - my - the - the - my - my
21 question assumed that the - that the substantive law
22 governing the claim was the same under - under the state
23 system and under the Federal system. So my assumption is
24 that you're going to get the same result, and the result
25 is going to be equally right or equally wrong, regardless

1 of - of - of whether you construe it as a state claim and
2 a Federal claim.

3 MR. MYERS: But, Your Honor, the - the - the
4 authority issue is crucial, because if the state court
5 does not know whether it, in fact, has a state law claim
6 before it, it does not know whether it has the prerogative
7 in that case to change the rule.

8 QUESTION: Suppose -

9 QUESTION: Well, it -

10 QUESTION: - Oregon had said in prior decisions,
11 as states sometimes do in dealing with constitutional
12 provisions, we interpret inadequate assistance of counsel
13 in our state to be strictly in tune with the way the
14 Supreme Court interprets inadequate or ineffective
15 assistance of counsel. That is, our state standard is the
16 same, identical, to the Federal, so there isn't any doubt
17 about there being a difference between the state law and
18 the Federal law. The - the state supreme court has said,
19 we take our lead from the Federal definition.

20 MR. MYERS: Your Honor, I - I would still assert
21 respectfully that the - the - the clarity with which the
22 claim is presented in terms of making clear whether there
23 is a state claim or a Federal claim present is still of
24 great importance, because the state court can still change
25 its decision with respect to the state claim if it is a

1 state claim.

2 QUESTION: Sure it can, but the question is, what
3 does it know when it sets out to adjudicate the case? Is
4 it fairly on notice at day one on a premise like Justice
5 Ginsburg's that the claim is equally state or Federal?
6 And it seems to me that on a premise like hers, of course
7 the state can fairly say the law is the same, doesn't
8 matter at this point whether - whether I call it state or
9 whether I call it Federal, so it's fair to assume it's
10 both.

11 If the state court, let's say the state supreme
12 court, later on says, we think we'll change our rule, then
13 all the state court has to do is to say, the claim is
14 either good or bad under Federal law and this - the result
15 is now going to be different under state law. But the
16 state courts at each stage on a premise like Justice
17 Ginsburg is fairly on notice of what it has to decide.
18 There's no unfairness to it. That's the point that we're
19 getting at, and I - and I don't understand your answer
20 when you say it's important for them to know the source if
21 there's no unfairness.

22 MR. MYERS: Well, Your Honor, with respect, we do
23 think that there is unfairness if it is not absolutely and
24 explicitly clear to the court that a Federal claim is
25 being presented by a state court.

1 QUESTION: You mean because it's just nice to
2 know?

3 MR. MYERS: No, because it -

4 QUESTION: It doesn't make any difference in the
5 law. It doesn't make any difference in - in the standards
6 by which they would go about adjudicating it.

7 MR. MYERS: But it could, in the sense that they
8 might want to change their position or interpretation with
9 respect to state law.

10 QUESTION: Yes, but that - the change in position
11 to allow the claim. But we're only concerned with cases
12 in which the state has denied relief. If you could - if
13 the state grants relief, there's no exhaustion problem.
14 He got the relief.

15 MR. MYERS: That's true, Your Honor.

16 QUESTION: And so if he's denied relief without
17 knowing whether it's Federal or state, is there any
18 possibility that if it were refiled, and clearly named
19 Federal Constitution as the background, he would then
20 grant relief?

21 MR. MYERS: I'm not sure, Your Honor. I don't
22 think so.

23 QUESTION: I don't see how it could possibly
24 happen. If the rules are the same, he made a
25 conscientious examination, they claim, and said, you lose.

1 If he came back and added the words, cited some Federal
2 case, he'd still lose. So why hasn't the state had a fair
3 opportunity to consider that claim and the interests of
4 Federal is in par not, why are they not accommodated by
5 that - by just saying, if you - if you made a claim that's
6 clearly Federal on its facts and you've had a chance to
7 decide it, why - why shouldn't that - that not count - be
8 sufficient exhaustion?

9 MR. MYERS: Well, because we think at - again,
10 Your Honor, we think - not only do I still feel the
11 authority issue, very respectfully, is important, but also
12 our whole approach toward fair presentation of Federal
13 claims places a choice on the petitioner to make as to
14 whether or not to assert a Federal claim.

15 QUESTION: General Myers, doesn't the burden on
16 the habeas court have anything to do with this? If - if
17 this hypothesis is adopted, the habeas court will have to,
18 I suppose, consider the facts and determine whether that
19 statement of facts makes out a Federal claim or not, thing
20 one. Thing two, the Federal habeas court will then have
21 to examine state court, a state law, to assure itself that
22 state law and Federal law, with regard to this matter, are
23 exactly the same.

24 And all of this is in order to save the habeas
25 petitioner what burden? The burden of saying Federal

1 claim when he files his - his complaint. What - does it
2 seem to you a close question who should bear that burden?

3 MR. MYERS: No, Your Honor.

4 QUESTION: How often are these habeas -

5 MR. MYERS: There is -

6 QUESTION: - petitioners represented by counsel
7 in Oregon? Is this - are - is counsel regularly appointed
8 for Federal habeas petitioners?

9 MR. MYERS: For Federal habeas?

10 QUESTION: Right.

11 MR. MYERS: Yes, I - well, like indigent Federal
12 habeas, yes, I believe so, Your Honor.

13 QUESTION: You don't know that?

14 QUESTION: In - in the state courts?

15 MR. MYERS: Oh, I'm sorry. I - I -

16 QUESTION: In - in the Federal court you think
17 they're routinely appointed by the state?

18 MR. MYERS: No, not -

19 QUESTION: A Federal habeas petitioner?

20 MR. MYERS: In Federal court, no, Your Honor.

21 They - they are -

22 QUESTION: No.

23 MR. MYERS: They would -

24 QUESTION: It would be up to the Federal rules.

25 MR. MYERS: - they would probably be Federal,

1 yes. But they are -

2 QUESTION: And must - must the petitioner seeking
3 habeas relief also fairly present the factual basis for
4 the claim?

5 MR. MYERS: Yes, Your Honor.

6 QUESTION: Was that done here?

7 MR. MYERS: No, Your Honor.

8 QUESTION: And did the state point that out
9 alone?

10 MR. MYERS: No, Your Honor. In the - in the
11 habeas proceedings in the district court, we focused
12 solely on the issue of the adequacy of that - of the
13 identification of the claim as Federal in nature.

14 QUESTION: Well, but if the petition contains no
15 facts, you wouldn't point that out? I - I don't
16 understand.

17 MR. MYERS: Your Honor -

18 QUESTION: Why wouldn't you say, but there are no
19 facts?

20 MR. MYERS: Your Honor, in this case, we made a
21 choice to concentrate or focus on the issue of the - of
22 the sufficiency of the - of the identification of the
23 claim as Federal, and we maintained that as the focus and
24 that was the - the focus of the petition, of course, for -

25 QUESTION: And you want us to decide this case on

1 the assumption that facts were presented when indeed none
2 were?

3 MR. MYERS: In this case, yes, Your Honor,
4 inasmuch as we have not appealed from - we have not made
5 that an issue below and appealed from it. We have asked
6 for review solely confined to the issue of the adequate -
7 the adequacy of the - of the sufficiency of the - of the
8 identification of the claim as Federal in nature. If I
9 could -

10 QUESTION: May I - may I go back to the question
11 -

12 QUESTION: Just to make it clear where - where
13 your - what your rule is, the very asset Justice O'Connor
14 said, does it suffice if you cite a constitutional
15 provision, a case, a - a formulation. And then we had
16 another discussion, but that was only part of your test,
17 because you also, I take it, assert that you - that the
18 petitioner must set forth the factual basis for its claim
19 - for his claim?

20 MR. MYERS: Yes, Your Honor.

21 QUESTION: So that that's a two-part test. It -
22 and it seems to me that in some cases it's going to be
23 fairly obvious what the facts are and in some cases it's
24 fairly obvious what the legal standard is, and depending.
25 In the case that Justice Stevens puts, where he alleges

1 just the facts that his - that his lawyer was not even a
2 lawyer and - and indicates why it was ineffective, but -
3 but doesn't cite a Federal provision, it seems to me any
4 judge knows you have to have adequate assistance of
5 counsel under the Sixth Amendment, and that in the case
6 put by Justice Stevens, it is simply a formalistic
7 requirement.

8 Now, it may be that you're going to say,
9 although it's formalistic in some cases, it's necessary to
10 run the habeas system that we have this rule. Is - is -
11 is the latter your position?

12 MR. MYERS: It - well, Your Honor, we don't -
13 yes. We don't believe that it's formalistic inasmuch as a
14 claim so described could equally describe a violation of,
15 conceivably, I suppose, state statute, but certainly a
16 state constitution. And I think it's at the very heart of
17 the whole notion of - of - of Federalism or comity, as
18 applied in habeas, that this Court enforce the reality
19 that we have state constitutions that are offering
20 protections -

21 QUESTION: We certainly enforce it with respect
22 to people raising claims in our Court. We require very
23 specifically that they refer to a specific source of
24 Federal law before we will even decide it.

25 MR. MYERS: Yes, Your Honor. I would -

1 QUESTION: How does the case decided, the
2 Fitzgerald case, which is cited in page 34 of the red
3 brief, it was just last term, when - when this Court said
4 that the Court would consider a state court decision as
5 relying on Federal grounds sufficient to support this
6 Court's jurisdiction, if under the state's decisional law,
7 the state and the Federal constitutional claim are treated
8 identically, the content of the right is treated
9 identically.

10 That - that decision from just last term says,
11 you've got a claim out there and it's a constitutional
12 claim and the Federal law and state law are identical, the
13 content of the law is identical, we will treat it as
14 Federal. That was a decision just from last term.

15 MR. MYERS: I - I may have misunderstood the -
16 that interpretation, Your Honor, because I thought this
17 was still a very much open question as to whether -

18 QUESTION: This was not in the habeas context.

19 MR. MYERS: Yes, I understand. And in the habeas
20 context -

21 QUESTION: And it - what I read to you is - is
22 from the decision itself. The Court will consider a state
23 court decision as relying upon Federal grounds sufficient
24 to support the Court's jurisdiction. That is, when the
25 state courts have in other cases declared that they will

1 apply the same analysis in considering the state
2 constitutional claim as the Federal courts would, I think
3 in that case it was equal protection. But the - the Court
4 - that was critical to the Court's deciding that case last
5 term.

6 MR. MYERS: Well, if I am understanding it
7 correctly, Your Honor, I would very much advocate for the
8 Court not extending - I'm understanding it correctly - not
9 extending that - that doctrine or view, if you will, into
10 the habeas context.

11 QUESTION: It had to do with jurisdiction, not
12 with pleading. There was pled in the case a violation of
13 Federal law. There was no doubt that the person before
14 the Court was claiming a violation of Federal law. What
15 the case held was that there is jurisdiction because the -
16 we will assume that the state court made a ruling on a
17 question of Federal law where it relies on state law that
18 looks to Federal cases. That's quite different from the
19 pleading question that you have before you.

20 QUESTION: May I ask you what you understand to
21 be the purpose of the exhaustion requirement?

22 MR. MYERS: It is, Your Honor, to assure that the
23 states have a meaningful first response - opportunity to
24 consider Federal attacks on their convictions, and to -

25 QUESTION: Do you - do you think the hypothetical

1 that I gave you would give a state court a meaningful
2 opportunity to decide the Federal question?

3 MR. MYERS: Yes, Your Honor.

4 QUESTION: Then it would seem we would follow the
5 exhaustion requirement is satisfied.

6 MR. MYERS: Yes, Your Honor.

7 QUESTION: May I go back to the question of
8 appointment of counsel? Is counsel routinely appointed
9 for state petitioners in the state courts of Oregon -

10 MR. MYERS: Yes, Your Honor, by statute -

11 QUESTION: - for state habeas -

12 MR. MYERS: In the post-conviction relief
13 process, yes.

14 QUESTION: Okay.

15 MR. MYERS: Always, by statute. There is one
16 further reason also I'd like to mention to the Court for
17 not adopting a view that generally says, if a state
18 court's interpretation of a particular assertion of - of a
19 - of a right, and the Federal interpretation are the same,
20 therefore the Federal claim has been presented
21 automatically. And that is that I think that represents a
22 very transitory rule for the Court to adopt inasmuch as
23 the state interpretation of its own law could change at a
24 given point in time, and thus, in a given jurisdiction,
25 what was congruent ceases to be congruent.

1 This Court's interpretation of Federal law could
2 change so that, again, where there might have been
3 congruencies before, they - they have now become
4 incongruent, and -

5 QUESTION: Don't you think it's likely that
6 Federal judges sitting in the state would be aware of
7 those changes?

8 MR. MYERS: Yes, I think they would be aware of
9 them, Your Honor. But also to come back to a point that
10 Justice Scalia made, it - there could be also renewed and
11 further issues as to whether there has been a change,
12 whether they are congruent or not congruent -

13 QUESTION: But are you thinking of changes that
14 are favorable to the claimant or favorable to the state?

15 MR. MYERS: Well, I think it could go either way,
16 Your Honor.

17 QUESTION: But certainly if it's favorable to the
18 claimant, it couldn't cause any harm. It's only if you
19 make it narrower that it would make a difference.

20 MR. MYERS: Yes.

21 QUESTION: I guess in every case where the
22 Federal habeas court has some doubt whether a Federal
23 claim was raised, the Federal habeas court, that is, where
24 it is not explicitly stated, the Federal habeas court will
25 have to inquire into state law to see whether it is indeed

1 congruent with Federal law. Isn't that right?

2 MR. MYERS: Yes, that's correct. Any event, with
3 the present state of the law within the circuits, and in
4 light of the Ninth Circuit's decision, Your Honors, we
5 very much hope that this Court will take the opportunity
6 in this case to both reaffirm that it is the petitioner's
7 responsibility to set forth, to choose and to set forth
8 his Federal claim as Federal, and that you will provide
9 further guidance as to how that must occur. That furthers
10 clarification can certainly work to serve all the
11 interests that are at stake here, a true meaningful
12 opportunity for the states to be able to - to have the
13 first opportunity to decide the Federal questions.

14 It can reduce the amount of litigation that is
15 occurring around the exhaustion issue, and, I think - and
16 - and save precious resources, and I think, Your Honors,
17 that a clear, further - a further clarification of the
18 rule will actually serve the interests of petitioners by
19 make - bringing meritorious Federal claims to - to
20 decision more - sooner and more consistently.

21 QUESTION: What was wrong with the Ninth
22 Circuit's position, at least with respect to the
23 intermediate appellate court? That is, it's reviewing a
24 decision of a court below. That court below has Federal
25 written all over it. Why isn't that a - a reasonable

1 assumption that the - that the intermediate appellate
2 court where there is jurisdiction as a matter of right,
3 it's reviewing a decision, it's bound to read that
4 decision?

5 MR. MYERS: Actually, Your Honor, in the petition
6 for review in Oregon, the decision of the court below is
7 included, but that in this case was a summary affirmance
8 of the - of the trial court's decision.

9 QUESTION: Well, you're talking about the court -
10 the Supreme Court of Oregon. I think Justice Ginsburg was
11 asking about the Oregon Court of Appeals.

12 MR. MYERS: Yes, that's -

13 QUESTION: The - the appeal from the trial court
14 to the court of appeals.

15 MR. MYERS: I beg your pardon, Your Honor. Well,
16 insofar as that stage is concerned, the - the - the papers
17 that were submitted to the court of appeals did not advise
18 or tell that court that a Federal question was being
19 raised, a Federal claim was being raised. There was
20 simply a claim of inadequate assistance of appellate
21 counsel, but there was no indication that - whether that
22 was a state claim, state law-based claim or a Federal law-
23 based claim.

24 And both state and Federal law-based claims of
25 inadequate assistance of appellate counsel had been - had

1 been raised in the - in the - in the petition at the trial
2 stage.

3 QUESTION: Do you wish to reserve the rest of
4 your time, General Myers?

5 MR. MYERS: I do. Thank you.

6 QUESTION: Very well.

7 Mr. Balske, we'll hear from you.

8 ORAL ARGUMENT OF DENNIS BALSKE

9 ON BEHALF OF THE RESPONDENT

10 MR. BALSKE: Mr. Chief Justice, and may it please
11 the Court:

12 We have a narrow question of fair presentation
13 here, and it isn't a great effort for the courts, I don't
14 believe, in Mr. Reese's case, to go searching to find that
15 he did fairly present. We start out by going to the PCR
16 petition itself, which alleges the violation both under
17 the state and Federal Constitution. It mentions the Sixth
18 and Fourteenth Amendments. And then, when the -

19 QUESTION: You're talking about the trial court,
20 correct?

21 MR. BALSKE: Yes, I am. And when -

22 QUESTION: You have to - you agree you have to
23 present the claim all the way up through the state?

24 MR. BALSKE: I do, I do. And when the trial
25 court decides it, we go right into the Oregon clear

1 statement rule. Oregon post-conviction is designed to let
2 the appellate courts know the basis of those trial court
3 rulings, so we have the clear statement rule under
4 138.640.

5 QUESTION: Well, there were - there were two -
6 there was a petition and an amended position, as I recall.

7 MR. BALSKE: Correct.

8 QUESTION: Correct me if I'm wrong.

9 MR. BALSKE: You're right.

10 QUESTION: And the - the original petition did
11 not recite the - the factual basis to support the claim.
12 That was only in the amended petition, and the amended
13 petition was not - the amended petition, I - I take it,
14 please correct me if I'm wrong, was - was the one in which
15 the allegation of conflict of interest and the precise
16 reasons for it was cited. That seems to drop out of the
17 case because then it's not - that amended petition, which
18 contained the factual basis, is - is not incorporated or
19 cited to the court of - the state court of appeals.

20 MR. BALSKE: Well, well the - the way it works in
21 PCR is the court, under the pleadings, decides the case
22 based on the first amended petition. That's the one that
23 states the legal basis of the claim under the Federal and
24 state Constitution. That's the one that the judgment of
25 the state trial court made and - and relied on.

1 So under the clear statement rule, then, when it
2 made its decision and cited a Federal ground, under
3 Oregon's clear statement rule, we have a decision on
4 Federal grounds at that -

5 QUESTION: No, you're - you're - you refer to a
6 clear statement rule. Is that a rule of Oregon law -

7 MR. BALSKE: Yes.

8 QUESTION: - or a rule of Federal law?

9 MR. BALSKE: That is a rule of Oregon law, and
10 that -

11 QUESTION: And what does - what does it - what
12 does that - what's the case for it, and what does it say?

13 MR. BALSKE: It's not a case, it's a
14 statute.

15 QUESTION: Okay.

16 MR. BALSKE: It's 138.640. It's at the state's
17 brief in the appendix at page 4, and it reads as follows,
18 quote, the order making final disposition of the petition
19 shall state clearly the grounds upon which the cause was
20 determined, and whether a state or Federal question, or
21 both, was presented and decided.

22 And in Mr. Reese's case, the trial court
23 followed that rule and filed a memorandum of opinion that
24 cited that its decision of the ineffectiveness claim was
25 on Federal grounds only. And then Mr. - then Mr. Reese

1 appeals.

2 QUESTION: Did - did - did the order of the
3 Oregon trial court specify the facts upon which the
4 Federal claim was -

5 MR. BALSKE: No.

6 QUESTION: - was based?

7 MR. BALSKE: No. But again, that's not before
8 the Court in the issue presented, and that issue was
9 waived by the state in the Ninth Circuit. They abandoned
10 any position that Mr. Reese's claim wasn't sufficiently
11 factually based, and we're presented with the question of
12 fair presentation, whether or not he indicated -

13 QUESTION: Well, all right, but it wasn't, okay?
14 I mean, I'm in an appeals court, I've a lot to do -

15 MR. BALSKE: Right.

16 QUESTION: - thousands of cases. There are
17 judgments of all sorts below. I don't read the judgments
18 when I have thousands of cases. I look and see, what is
19 this individual complaining about?

20 MR. BALSKE: Right.

21 QUESTION: So I look to see what the arguments
22 are that he's making that the lower court made a mistake.
23 Now, if I was in the Supreme Court of Oregon, and I
24 thought, but I lost this, that you shouldn't have to
25 present it in the Supreme Court of Oregon, but the rule is

1 you do.

2 MR. BALSKE: Right.

3 QUESTION: All right? Well, I'm there as a busy
4 judge, I look at it, he makes no mention of the Federal
5 claim, goodbye, that's the end of it. I don't look up at
6 the Federal claim. So - what - what - why - how could we
7 hold to the contrary?

8 MR. BALSKE: There - let - let me help you there.
9 If you will turn to the - page 44 of the joint appendix,
10 what you're going to find there is the petition for review
11 to the Oregon Supreme Court. And when you get to page 44,
12 and 44 and 45 across, what you see is it follows the
13 standard form, it's in proper form, nothing more.

14 But when you turn the page, as a busy judge
15 you're scanning, as you're talking about, and you look and
16 you say, what's it about, is this a state case or a
17 Federal case, look on the first page, 46, index of
18 authorities, constitutions. Only one, the Federal
19 Constitution, four constitutional amendments cited, Fifth,
20 Sixth, Eight, Fourteenth -

21 QUESTION: But all that tells me is that
22 somewhere in this brief they're cited, that's the table of
23 authorities they cite. That isn't what the argument is.

24 MR. BALSKE: And - well -

25 QUESTION: So if I'm going to look to see what

1 the argument is, I'll try to turn the page and -

2 MR. BALSKE: A judge -

3 QUESTION: - where does it say he's making the
4 argument -

5 MR. BALSKE: You're not going to look for an
6 argument because you're an Oregon Supreme Court judge, and
7 under the Oregon Supreme Court rule, I'm - yeah,
8 9.05(4)(A)(v), the petitioner only presents a brief
9 argument if he wants to, it's optional. You don't put
10 argument into a petition for a review, so -

11 QUESTION: Do you have to have your reasons why
12 they're wrong and so on?

13 MR. BALSKE: Yes, and in -

14 QUESTION: Where is that?

15 MR. BALSKE: - that's where we turn to the next
16 page, 47, statement of legal questions presented on
17 review. We - we see on the page across from the Federal
18 Constitution, ineffectiveness - ineffective assistance of
19 both trial court and appellate court counsel. The next
20 paragraph, statement of reasons for reversal of court of
21 appeals. Again we see ineffective assistance of both
22 trial court and appellate court counsel.

23 So, it - we're scanning it, we're busy, we're
24 just trying to decide whether we're going to review the
25 case. We're not deciding it on the merits. We've got a

1 Federal case. We've got a Federal issue. It's presented
2 by Mr. Reese.

3 QUESTION: I see.

4 QUESTION: I - I couldn't possibly tell from this
5 what - what the case was about, other than some free-
6 floating ineffective assistance of counsel case.

7 MR. BALSKE: And that -

8 QUESTION: And - and are you saying that Oregon
9 rules make it optional as to whether he's going to tell me
10 what the case is about?

11 MR. BALSKE: Yeah, what - well, whether you're
12 going to brief it, whether you're going to present legal
13 argument. It's optional under -

14 QUESTION: But there are no facts. I mean, if
15 you're in the Federal habeas court, why aren't you just
16 out right there for having no facts?

17 MR. BALSKE: Because the state waived that
18 defense in this case. I'm - I - that's just the way -

19 QUESTION: But it - but the point is -

20 MR. BALSKE: I'm sorry.

21 QUESTION: - as I understand my colleague's
22 question, if the judge sees that there are no facts set
23 out, why doesn't the judge just say, you're out of here?

24 MR. BALSKE: The judge might say that, but the
25 judge would say that in the context of a Federal question,

1 a Federal issue presented of ineffective assistance of
2 counsel under the Federal Constitution.

3 QUESTION: But think he would say that on the
4 basis of Oregon procedural law that -

5 MR. BALSKE: Well -

6 QUESTION: - you - you just haven't said
7 anything.

8 MR. BALSKE: Well, I don't - well, it's
9 conjecture what they would have decided or thought.
10 What's critical here is what was presented, the question
11 today is what was presented versus -

12 QUESTION: Okay. What - what - what is the
13 hardship for a - for a petitioner in PCR Oregon -

14 MR. BALSKE: Sure.

15 QUESTION: - to either say, I'm relying on
16 section, you know, article XIV of the United States
17 Constitution, or I'm relying on some Federal case. I
18 mean, that - that just seems a very minimal requirement.

19 MR. BALSKE: Well -

20 QUESTION: What's - what's hard about that?

21 MR. BALSKE: Well -

22 QUESTION: Could - can you answer that?

23 MR. BALSKE: I - I can answer it by saying that
24 the prisoners are pretty ignorant. Their lawyers in the
25 state post-conviction system, bless their souls, are not

1 the sharpest lawyers in the world.

2 QUESTION: Well, you - how sharp do you have to
3 be to figure that out?

4 MR. BALSKE: Well, tell you what, let me give you
5 the perfect example in this case. Turn to page 42 of the
6 state's brief for its application of the rule. Here's how
7 sharp you have to be. Now, I think if you read the cover
8 of the brief, we see that five lawyers, including the
9 attorney general of Oregon have -

10 QUESTION: No, where - are - are you reading from
11 some - in the brief?

12 MR. BALSKE: Yes. I'm sorry. Please look at the
13 top and then look at number IIA and read their language,
14 alert the state court to the Federal legal source of the
15 claim by, A, citing to the Sixth Amendment, quote, my
16 appellate attorney violated my right to effective
17 assistance of counsel under the Sixth Amendment. I'm
18 sorry, you didn't pick that up. It's page 42 -

19 QUESTION: Go ahead.

20 MR. BALSKE: If Mr. Reese followed the formula
21 written by the attorney general, he would fail their test,
22 because the right to ineffective assistance of appellate
23 counsel comes under the Fourteenth Amendment, not the
24 Sixth Amendment. But the state's attorney generals, who
25 are writing the test for you, can't even get it right.

1 How is a poor indigent prisoner going to know how to say
2 the right number? I mean -

3 QUESTION: Touche.

4 (Laughter.)

5 MR. BALSKE: I - I think, Justice O'Connor -

6 QUESTION: I - I think it's - it's - it's common
7 to, you know, you've heard of the incorporation doctrine,
8 which is that the Fourteenth Amendment incorporates and
9 applies to the states the first ten amendments, or at
10 least portions of the first ten amendments.

11 MR. BALSKE: But -

12 QUESTION: So it is not inaccurate to say that -
13 that it's a Sixth Amendment right, which has been applied
14 to the states via the Fourteenth.

15 MR. BALSKE: I thought when we're talking about
16 appellate counsel, though, the Sixth Amendment doesn't
17 cover it, because the Sixth Amendment doesn't give you the
18 right to effective counsel on your appeal, only at trial.
19 And the Fourteenth Amendment equal protection and due
20 process are what actually cover them. So, if - if you're
21 claiming ineffective assistance of appellate, not trial,
22 appellate counsel, it is Fourteenth Amendment, it's not
23 Sixth Amendment.

24 QUESTION: What would happen if the Oregon
25 constitution happened to contain the right in the same

1 number amendment, like the Sixth was - they were both
2 Sixth Amendment. Then you have to say Sixth Amendment of
3 the Federal Constitution?

4 MR. BALSKE: Well, the - it - the trouble here,
5 the heart -

6 QUESTION: Or is this - is this one of the ones
7 that it doesn't contain it in the Oregon constitution
8 Sixth Amendment so this is one of the ones that, by
9 necessity, must refer to.

10 MR. BALSKE: No. This isn't one of those,
11 because that's at article I, section 11, it doesn't. So
12 this isn't the easy case, this is a -

13 QUESTION: But the - the court of appeals -

14 MR. BALSKE: - tougher case.

15 QUESTION: - thought that the only way in which
16 this claim was properly presented was if they adopted, the
17 court of appeals adopted the rule, that the state court is
18 deemed to have read and understood the proceedings in the
19 trial court. Am I - am I right about -

20 MR. BALSKE: I think they said that and -

21 QUESTION: - that formulation of the rule?

22 MR. BALSKE: I think they said that, and I don't
23 think you have to go that far to find that Mr. Reese
24 fairly presented his claim.

25 QUESTION: Well, do you defend that as the test?

1 MR. BALSKE: I'm -

2 QUESTION: It - it's a - do you defend -

3 MR. BALSKE: No.

4 QUESTION: - the Ninth Circuit's -

5 MR. BALSKE: I don't.

6 QUESTION: - articulated test?

7 MR. BALSKE: I do not defend the Ninth Circuit's
8 test. I only defend the judgment.

9 QUESTION: In your -

10 MR. BALSKE: I only say to you he fairly
11 presented the claim in this case.

12 QUESTION: Right. In - in your opinion, as a
13 lawyer who, I take it, is involved in these things -

14 MR. BALSKE: Yes.

15 QUESTION: - is there really a big problem of
16 differences among the lower circuits - among the lower
17 courts? To what extent do we have to find a rule? I take
18 it the rule now is called fair presentation?

19 MR. BALSKE: Correct.

20 QUESTION: And there are dozens of ways it could
21 be done. And so the court is just like - supposed to look
22 at the individual circumstance, say was it done, was it
23 not done? Here you think it was done because the whole
24 thing's two pages, they refer to the Federal Constitution
25 in the - in the citation of authorities, and they have no

1 particular, et cetera. All right. Now, is there a
2 problem or isn't there a problem among the circuits in
3 applying this fair presentation test?

4 MR. BALSKE: Well, if the - the - there are
5 differences in the circuits, so I can't disagree -

6 QUESTION: Is it - are they real differences in
7 terms of what counts or -

8 MR. BALSKE: Well, I -

9 QUESTION: - are they just differences in -

10 MR. BALSKE: - I don't think they are in the
11 sense of, although I know this Court likely views the
12 Ninth Circuit as quote, unquote, a liberal circuit of
13 sorts, when you read their opinion here, they were being
14 very conservative. They're saying Duncan v. Henry
15 applies. Under Duncan you must state it at every level of
16 the proceedings. I mean, they -

17 QUESTION: But that - that's a Ninth Circuit
18 case, isn't it, the - Duncan against Henry?

19 MR. BALSKE: Yes, it is. It is.

20 QUESTION: It's not a case from this Court?

21 MR. BALSKE: No, I was talking about -

22 QUESTION: But - but the only -

23 MR. BALSKE: - they were applying your Duncan
24 decision.

25 QUESTION: But the only way in which they could

1 sustain their judgment was to adopt this rule of - that
2 the appellate court has the duty, or is presumed to have
3 understood what happened in the trial court. You seem to
4 agree that your case doesn't have to turn on that. The
5 Ninth Circuit, I thought, said that the case turned on
6 that proposition. Otherwise, it was not going to make it.

7 And - and I just have to - I can't speak for my
8 colleagues -

9 MR. BALSKE: Right.

10 QUESTION: - but the - the petition that you read
11 me at the appendix, where that just cites the Federal
12 constitutional provision and then says ineffective of
13 counsel - ineffective assistance of counsel - does not
14 give the court any clue as to what it's supposed to do -

15 MR. BALSKE: Well -

16 QUESTION: - other than to review a record.

17 MR. BALSKE: Well - sorry.

18 QUESTION: And - and - and I had thought the
19 exhaustion requirement was designed to give the court some
20 assistance in determining whether or not it showed -
21 should spend more time with the case in order to review
22 the record, in other words, said that counsel had a
23 conflict of interest because of marriage or something. It
24 would have been - it would have - it would have been
25 triggered - a - a - a more specific review by the district

1 court. And it just - by the - by the state appellate
2 court - and it just didn't have that information.

3 MR. BALSKE: Well, what the purpose of the
4 exhaustion rule is to give him a fair opportunity to
5 decide it. And when you're talking about petitions for
6 review, it's a little different because it's not your
7 brief on the merits where they're actually deciding -

8 QUESTION: But we get thousands of cases around
9 here that just says Fifth Amendment, ineffective
10 assistance of counsel. That gives us very, very little
11 help.

12 MR. BALSKE: Well -

13 QUESTION: Sixth Amendment.

14 MR. BALSKE: - here - here we're talking about
15 ineffective assistance of counsel. We're talking about it
16 with an Oregon statute that required the Oregon court to
17 even tell the appellate courts whether it had been decided
18 under the state or the Federal Constitution. And here
19 they said this was decided under Federal. And then when
20 he uses ineffective, I know that that's less than
21 satisfying, but in Oregon too, if you look in the state's
22 brief, I think, at page 4, footnote 5, what you're going
23 to find there is Oregon's - the State of Oregon's position
24 on what a inmate means when he says ineffectiveness.

25 There it says that in applying article I,

1 section 11 of the Oregon constitution, quote, Oregon
2 courts often refer to inadequate assistance of counsel
3 instead of ineffective assistance of counsel, the term
4 usually employed by the state and Federal courts in
5 applying the analogous provision of the Federal
6 Constitution.

7 So as the Oregon courts are reading the
8 pleadings, the definition we're looking at, ineffective
9 assistance of counsel, the term usually employed by the
10 state and Federal courts. We're giving, factual parts
11 aside, which aren't with this case at this point, legal
12 only, the Oregon courts were fairly presented with the
13 Federal question because -

14 QUESTION: Well, it seems to me that argument
15 that you're making now that inadequate is the buzzword for
16 a state claim, ineffective for a Federal claim, is at
17 least in tension with your argument that - that in - with
18 respect to ineffective assistance of counsel, the state -
19 the content of the state standard and - is identical to
20 the Federal. So these labels don't mean anything if the
21 content is identical, so how -

22 MR. BALSKE: Right. Well, I - all I'm, I guess I
23 inartfully stated it. I - the position I wanted to
24 convey, and I didn't, is that we started out with a clear
25 Federal claim, and when he used ineffective twice more in

1 his appeals, he did nothing at all to dispel anybody of
2 the fact that it was a Federal case. It started out
3 Federal and he had allegations under state and Federal
4 Constitution. It got decided Federal and then he said
5 ineffectiveness. He gave no indication that he was
6 narrowing the case at all.

7 And a good contrast is another Ninth Circuit en
8 banc case, Peterson, because Peterson raised it just like
9 Mr. Reese initially, under both constitutions. He raised
10 it again that way in the appellate court. But when he got
11 to his petition for review, he indicated that, to the
12 Oregon Supreme Court, that he was going on the state
13 constitution, because he only said in his petition for
14 review that this violated article I, section 11 of the
15 Oregon constitution.

16 That's a contrast, and much - and he, as the
17 Ninth Circuit held, did not exhaust his state remedies,
18 because he didn't give the Oregon Supreme Court the fair
19 opportunity, because what he did was he took their eyes
20 and led them over to the state constitution. And Mr.
21 Reese didn't do that.

22 QUESTION: Well, if you - you say that the Ninth
23 Circuit approach to this was wrong, which - which seems to
24 be anchored in, if it's clear that the court of first
25 instance relied on the Federal ground, that stays with the

1 case all the way up. You - you reject that, or you say,
2 you - you are asking us to affirm the judgment, not that
3 reasoning. What is your reasoning? What is enough?

4 MR. BALSKE: Sure. My reasoning is that it's
5 fairly presented when a state inmate clearly articulates
6 it under the Federal Constitution, and then continues to
7 appeal that judgment without indicating in any way
8 whatsoever that he's relying on anything but the Federal
9 Constitution.

10 QUESTION: But may I -

11 QUESTION: Then I don't see how that differs from
12 the Ninth Circuit -

13 QUESTION: That's the Ninth Circuit.

14 QUESTION: - because you have to start with the
15 court of first instance, and you seem to be saying that
16 the court of first instance relies on a Federal ground
17 that stays with the case.

18 MR. BALSKE: That - I - that's true. I agree
19 with that portion of it. I guess maybe I -

20 QUESTION: I thought you said before that you
21 were not defending the - the Ninth Circuit's approach.

22 MR. BALSKE: I -

23 QUESTION: Now you tell me you are. I thought
24 you were relying upon the statement in the - in the brief
25 to the supreme court that he was relying upon - upon the

1 Federal Constitution.

2 MR. BALSKE: That's correct.

3 QUESTION: And I was going to ask you if you're
4 relying on that now, why didn't you rely on it in your
5 brief in opposition? The question presented by the state
6 was, does a state prisoner alert the state's highest court
7 that he is raising a Federal claim when, in that court, he
8 neither cites a specific provision of the Federal
9 Constitution nor cites at least one authority that has
10 decided the claim on a Federal basis? Why - why didn't -

11 MR. BALSKE: I did -

12 QUESTION: - you respond to that -

13 MR. BALSKE: I did, but I -

14 QUESTION: - by simply saying the question is not
15 presented because, in fact, he did cite a specific
16 provision of the Constitution?

17 MR. BALSKE: I did, but I didn't -

18 QUESTION: I mean, we're wasting our time here if
19 - if you want us to decide whether this brief -

20 MR. BALSKE: It's -

21 QUESTION: - you know, contains the - the Sixth
22 Amendment or not. The question we granted cert on is,
23 does he alert it when he neither - neither cites a
24 specific provision of the Federal Constitution nor cites
25 at least one authority? I - I mean -

1 MR. BALSKE: I understand.

2 QUESTION: What - we're just spinning our wheels

3 here.

4 QUESTION: You - you said you did raise that in

5 the EIO?

6 MR. BALSKE: But, yeah -

7 QUESTION: Where?

8 MR. BALSKE: - it's argued in -

9 QUESTION: I need to go back to it.

10 MR. BALSKE: It's in section III of my brief.

11 QUESTION: I've just looked at it. I - I didn't

12 see it.

13 MR. BALSKE: Okay.

14 QUESTION: I didn't see it presented very

15 clearly. It seems to me -

16 QUESTION: All right. Anyway, what you're asking

17 is - that's why I started at the beginning. I thought the

18 question was - I thought what the Ninth Circuit did was

19 cite a case called Lyons, and in Lyons they say you do

20 have to either cite a particular provision of the Federal

21 Constitution or a case that's clearly a Federal case. And

22 then they held that the brief you pointed out to me did

23 not do that. Then they said, but anyway, that brief is

24 good enough because in the lower courts or other courts

25 they had cited the Federal Constitution explicitly.

1 Now on that question, I would think they're
2 wrong, aren't they? Because, as I started out, you can't
3 expect judges to start going back and filing - looking
4 through all the briefs they filed in the lower courts, or
5 the opinions below.

6 MR. BALSKE: Well, I -

7 QUESTION: That was, I thought, the question.

8 MR. BALSKE: Well -

9 QUESTION: And on that question, do you - what do
10 you want to say? I mean, if you're -

11 MR. BALSKE: Well, I guess what I want to say is
12 this. I think - if the rule that I'm - I'm not
13 necessarily espousing a rule, I'm trying to say that my
14 client, Mr. Reese, fairly presented. But in saying that
15 Mr. Reese fairly presented, I don't think that our
16 approach is going to place a great burden on the courts by
17 any stretch, because all you have to look at is his
18 pleading in the state court that started it, where he says
19 Sixth and Fourteenth Amendment. Then you just look at his
20 brief in the court of appeals and his petition for review,
21 and the answer is there. And -

22 QUESTION: So - so - so now you're - you're -
23 what you - in order to win your case, you're going to have
24 to give us a standard, and your standard is, it seems to
25 me, that state appellate courts are bound to look at the

1 pleadings in the lower courts.

2 MR. BALSKE: I guess you're seeing my focus being
3 back in the state courts, and I'm looking at Federal
4 court. I'm looking at when the petitioner files his
5 petition and the state steps forward and says failure to
6 exhaust. Petitioner's counsel then has the burden of
7 coming forward and saying, take a look at what was in the
8 briefs and what was presented, not what was in the minds
9 of the state courts when they looked at them -

10 QUESTION: No, but the exhaustion rule -

11 MR. BALSKE: - but what did he present?

12 QUESTION: - depends upon whether or not the
13 state appellate courts had fair notice of the claim.

14 MR. BALSKE: Yes.

15 QUESTION: And that's - that's what we're trying
16 to discuss here and -

17 QUESTION: That sounds -

18 QUESTION: - and it - and - and the - and the
19 only way you can save your case, in the posture that comes
20 to us, as I see it, is that that state appellate court is
21 bound to look at the pleadings in the - in the court of
22 first instance.

23 MR. BALSKE: Well, what we have here -

24 QUESTION: And - and that is a rule. I mean -

25 MR. BALSKE: Well - well, here's -

1 QUESTION: - you - you - if you're going to save
2 your judgment, we're going to have to do it with a rule.

3 MR. BALSKE: Well, and I think with the rule,
4 here's - here's the caveat to the rule, so to speak, and
5 it's that comity goes both ways. In other words, we're
6 respecting the state courts have given him the
7 opportunity, but we're also going to respect the state's
8 courts own rules and statutes that they use when they're
9 looking at petitions and appeals. And here we're looking
10 at Oregon. When you look at Oregon, we turn the page to
11 Oregon, we have the statute that I read early - earlier,
12 the plain statement, clear statement rule. So -

13 QUESTION: But that just goes to the trial
14 court's judgment, doesn't it?

15 MR. BALSKE: Well, that goes to the - the -
16 specifying the basis of the judgment in the trial court -

17 QUESTION: Yeah.

18 MR. BALSKE: - whether it's a state or a Federal
19 issue.

20 QUESTION: Yeah.

21 MR. BALSKE: And in this case, in his written
22 opinion, he does that.

23 QUESTION: But how does - how does that bear on
24 the appeal process?

25 MR. BALSKE: And then in the appeal process, I'm

1 - the - the - the reason you have the clear statement rule
2 is so the appellate courts will know what the trial court
3 did, not -

4 QUESTION: Well, then, you're really - you really
5 are supporting the Ninth Circuit's judgment, aren't you -
6 opinion? The - the Supreme Court of Oregon should have
7 looked at the trial court's decision, even though it's a
8 court where the review is discretionary from the court of
9 appeals.

10 MR. BALSKE: The - the court of appeals most
11 certainly would have seen it and the - the Oregon Supreme
12 Court was on notice by his petition, I mean, the petition
13 for review itself -

14 QUESTION: You - you want -

15 MR. BALSKE: - is ineffective assistance of
16 counsel.

17 QUESTION: You want to withdraw your - your
18 assurance earlier that you are not defending the - the
19 Ninth Circuit's basis for reaching its result, but just
20 the result?

21 MR. BALSKE: Well, I guess, you know, I didn't
22 think that I needed the Ninth Circuit's and I - I must be
23 confused now, because I think I just -

24 QUESTION: I - I'm certainly confused. I don't
25 know whether you are.

1 MR. BALSKE: Well, I think I can -

2 QUESTION: Is - is -

3 MR. BALSKE: I'm sorry.

4 QUESTION: I don't think you need the Ninth
5 Circuit if you're saying the following. Let me tell you
6 what I think you're saying and you tell me -

7 MR. BALSKE: Yeah.

8 QUESTION: - whether I'm right.

9 (Laughter.)

10 QUESTION: At the court of appeals level, we
11 don't need the Ninth Circuit rule because the court of
12 appeals was reviewing a trial court judgment including
13 findings and statement of law and there it was right in
14 the statement of law referred to, Federal. Number two, we
15 don't need the Ninth Circuit rule when we get to the
16 Oregon Supreme Court because we've got a petition and the
17 petition says Federal, refers specifically to four Federal
18 amendments, doesn't refer to any state court, any state
19 law or any state constitution. So you don't need the
20 Ninth Circuit rule for that purpose. Is that what you're
21 saying?

22 MR. BALSKE: That's what I'm saying.

23 QUESTION: Okay.

24 QUESTION: Well, then you have the problem -

25 QUESTION: May I ask you -

1 QUESTION: - of the Ninth Circuit. Yes?

2 QUESTION: Excuse me, may I ask you another
3 question? Is - is it your view that there's a difference
4 between the state rule on inadequate assistance of counsel
5 and the Federal rule on the ineffective assistance of
6 counsel?

7 MR. BALSKE: Well, yes, in this sense of - did
8 you want -

9 QUESTION: Well, if there's a difference, would
10 your client not have had the obligation to - to exhaust
11 the state rule as well as the Federal rule? Because that
12 was a remedy for the basic wrong you're complaining of.

13 MR. BALSKE: I guess I didn't follow your
14 question. Could I ask you to repeat it?

15 QUESTION: Are inadequate assistance as a matter
16 of state law the same as -

17 MR. BALSKE: Right.

18 QUESTION: - ineffective assistance as a matter
19 of Federal law?

20 MR. BALSKE: Well, at the trial level, trial
21 ineffectiveness, they are different clearly. They have a
22 test that's called inadequate for state counsel. They
23 call it ineffective under Strickland -

24 QUESTION: It is just a difference in names or a
25 difference in substance?

1 MR. BALSKE: It's a difference in substance when
2 you're talking about trial court ineffectiveness. In - in
3 our case when we move over -

4 QUESTION: I see. You're talking about
5 appellate.

6 MR. BALSKE: - now we're talking about appellate
7 ineffectiveness.

8 QUESTION: Yeah.

9 MR. BALSKE: They've got one test that was
10 discussed during earlier questions, and what they do is
11 they interchangeably use the words ineffective and
12 inadequate. They don't use any one term all the time, but
13 there's just one test. That's Oregon law.

14 QUESTION: Okay.

15 QUESTION: If you -

16 QUESTION: Mr. Balske, could you cite me the -
17 the portion of your brief in opposition that you think
18 most clearly presented -

19 MR. BALSKE: Yes.

20 QUESTION: - the - the issue that -

21 MR. BALSKE: Sure.

22 QUESTION: - that you are now relying on at the
23 Supreme Court level to wit that the Federal Constitution
24 was cited in the brief to the Supreme Court?

25 MR. BALSKE: Right.

1 QUESTION: Where -

2 MR. BALSKE: Well, I think it will be in - I did
3 it in three parts, and the third part would have been that
4 -

5 QUESTION: This is the brief in opposition -

6 QUESTION: The brief in opposition -

7 QUESTION: - to certiorari.

8 QUESTION: - to the petition for cert.

9 MR. BALSKE: Oh, oh, oh, I'm sorry. I'm not even
10 thinking.

11 QUESTION: Once I've granted -

12 QUESTION: It's orange.

13 QUESTION: - on - on this question, it's too late
14 to tell me the question is irrelevant. `

15 MR. BALSKE: I'm sorry.

16 QUESTION: I - I like to know it's irrelevant
17 before I vote to grant cert.

18 MR. BALSKE: Right. I - I, you know, I honestly
19 don't remember what I argued at all in that brief. I
20 haven't looked at that in preparing for this and I
21 apologize, but I -

22 QUESTION: If - can you tell - tell me, if I were
23 to accept your position about the Ninth Circuit rule, how
24 does it differ from what I wrote in dissent when I thought
25 that we - you - you shouldn't have to go to the supreme

1 court of the state, if you - if you remember? If you don't
2 remember, that's all right.

3 MR. BALSKE: I mean, I know that -

4 QUESTION: I mean, what's bothering me about it
5 is it sounds like a reasonable position, but it also
6 sounds like a position I agreed with in dissent, which
7 means it isn't the law, the opposite is the law.

8 MR. BALSKE: Well, at - I don't disagree that
9 O'Sullivan says that it's got to be presented to the
10 highest court of the state. And my position is simply
11 that he did so in this case.

12 QUESTION: If there had been an - an objection
13 preserved in the Ninth Circuit that whatever else, this
14 doesn't tell us what the facts were, would not that have
15 been a - a ground for saying you didn't exhaust?

16 MR. BALSKE: That would have been a bigger
17 problem for me than this problem, yes, because although he
18 said, and part of his saying was under the Oregon Balfour
19 procedure when he didn't have a lawyer, he said, my lawyer
20 and I disagreed on what issues to raise. One thing that
21 Mr. Reese didn't say factually was what those issues were,
22 and that would be my problem if their position were that
23 factually it wasn't clear enough.

24 QUESTION: So - so they - they have abandoned an
25 objection one - one would think would be the logical first

1 one, he doesn't have any facts, out the door.

2 MR. BALSKE: Yes, I - that's true. They did
3 abandon it.

4 QUESTION: Do we have to ignore that too?

5 MR. BALSKE: I think you should, and I've argued
6 in my brief that you should because they dropped it from
7 the case and abandoned it, and because the only issue
8 presented is the issue of whether or not he fairly
9 presented it. So I would espouse that, whether you have
10 to or not, obviously your decision.

11 QUESTION: But if this - if this Court is going
12 to give any guidance, certainly that should be the - the
13 first one, shouldn't it?

14 MR. BALSKE: Well sure. The first piece -

15 QUESTION: So, what your case is about -

16 MR. BALSKE: - and - and I think that is fair
17 presentation law. You have to supply sufficient facts and
18 the law upon which you rely. Here they didn't object to
19 the insufficiency of facts, but the rule wouldn't be any
20 different than it was before under Picard.

21 If there are no more questions, thank you very
22 much.

23 MR. CHIEF JUSTICE: Thank you, Mr. Balske.

24 General Myers, you have three minutes remaining.

25

1 REBUTTAL ARGUMENT OF GEN. HARDY MYERS

2 ON BEHALF OF THE PETITIONER

3 MR. MYERS: Your Honor, so two quick comments or
4 points. First, this case illustrates the fallacy of any
5 kind of doctrine which says that a appellate court can
6 tell what issues have been chosen to be asserted to it,
7 put before it, by going back and looking at the decision
8 of a - of a lower court. Here, the trial court in Oregon
9 disposed of one of the Federal inappellate assistance of
10 counsel claims, citing Jones against Barnes, but it had
11 before it state law claims of inappellate - ineffective
12 assistance of counsel, as well as Federal. The trial
13 court didn't mention the state claims, but they were all
14 dismissed as well by the judgment that was ultimately
15 entered at the trial court level.

16 So both state and Federal claims were dismissed.
17 You couldn't tell by looking at the trial court judgment
18 what the - what the prisoner was choosing to actually
19 assert among those dismissed claims at the court of
20 appeals level. He could as well have been asserting his
21 dismissed state ineffective assistance of counsel claim.

22 QUESTION: General Myers, do you have any
23 response to the - to the new point raised - it was new to
24 me anyway - that - that this in fact, the Federal claim
25 was raised in the petition?

1 MR. MYERS: No. Yes, I do, Your Honor.

2 QUESTION: What - what is that? I'd really like
3 to know that.

4 MR. MYERS: It - at page 47-48 of the joint
5 appendix, which you may have already been referring to -

6 QUESTION: Yes.

7 MR. MYERS: - the petition for review is set
8 forth. And if you go to the argument portion, Your Honor,
9 which is at the very - second paragraph of the argument
10 portion, I think that's going to be on page 48.

11 QUESTION: Yes.

12 MR. MYERS: You'll see the last - second sentence
13 of the second paragraph: Moreover, since petitioner
14 asserts he was coerced and threatened by counsel to waive
15 his right to trial by jury, petitioner believes his Fifth,
16 Sixth, and Fourteenth Amendment rights have been -

17 QUESTION: I see, I see.

18 MR. MYERS: - have been violated. So - so the
19 ineffective assistance of trial counsel claim was
20 specifically Federalized, if you will, and that's the -
21 that's the only place where those Federal citations
22 appear.

23 QUESTION: Okay.

24 MR. MYERS: Your Honors, again, the - the state
25 of the law in this area, we think, can fairly be described

1 as still disturbed, a term I used earlier, and we very
2 sincerely hope that this Court will use this case both in
3 relation to the Ninth Circuit decision to reaffirm that it
4 is the state petitioner, not the state courts, who have
5 the responsibility to assert - fairly present the claim,
6 and secondly, to go for further - and further clarify
7 specifically what state prisoners must do in order to
8 clearly indicate the Federal source of their claim -

9 QUESTION: If you prevail, I hope you're not
10 unhappy with what you get, because you're going to have
11 petitions in which there's a huge laundry list of cases.
12 We have to then qualify that by saying there has to be a
13 fair and concise statement of the legal and the factual
14 basis for the claim.

15 MR. MYERS: Your Honor, indeed, the fact that
16 Federal - or that the Federal source of the claim is used
17 is not the end of the fair presentation issue, because
18 there's still going to be the ongoing requirement of
19 adequately identifying your substance of your claim, to
20 use the terminology of this Court, the - the legal theory
21 as well as the adequacy of the fact.

22 CHIEF JUSTICE REHNQUIST: Thank you, General
23 Myers. The case is submitted.

24 (Whereupon, at 11:02 a.m., the case in the
25 above-entitled matter was submitted.)