IN THE SUPREME COURT OF THE UNITED STATES

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GARY BRADFORD CONE, :

Petitioner :

v. : No. 07-1114

RICKY BELL, WARDEN. :

- x

Washington, D.C.

Tuesday, December 9, 2008

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

APPEARANCES:

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

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

C O N T E N T S

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

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

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

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

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

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

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

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

So, on the one hand, they disavowed deciding it, and then quite clearly there are some -- there are a couple paragraphs there, you've start -- you've stated one, the next paragraph says the same thing -- talking about the merits of the Brady claim. So here's the dilemma that I faced in writing the cert petition. They say they're not deciding the Brady claim, but then they talk quite clearly about it. So I expressed --

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

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

CHIEF JUSTICE ROBERTS: Well, let's start on page Roman xi, where the questions presented are. There's nothing in there about the merits of the Brady claim. It's all about the procedural objections that you have.

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

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

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

Then -- so, in the body of the cert

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

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

MR. GOLDSTEIN: Yes.

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

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

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

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

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

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

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

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

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

And if I can just finish the footnote, it

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

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

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

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

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

MR. GOLDSTEIN: In 1980, August of 1980.

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

MR. GOLDSTEIN: Yes.

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

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

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

MR. GOLDSTEIN: I'm sorry?

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

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

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

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

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

MR. GOLDSTEIN: In 1992.

JUSTICE KENNEDY: 1992.

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

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

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

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

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

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

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

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

MR. GOLDSTEIN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GOLDSTEIN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: 52.

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

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

case.

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

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

JUSTICE GINSBURG: If it is --

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

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

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

MR. GOLDSTEIN: Uh --

JUSTICE KENNEDY: Or have we talked about that?

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

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

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

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

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

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

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

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

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

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

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

MR. GOLDSTEIN: It wasn't a friendly

question --

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

MR. GOLDSTEIN: Right.

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. GOLDSTEIN: Two points, Justice Alito.

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

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

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

If I could --

JUSTICE GINSBURG: You recognize that a -- a

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

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

If I could reserve the remainder of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Smith.

ORAL ARGUMENT OF JENNIFER L. SMITH

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

the district court --

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

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

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

JUSTICE BREYER: Blankman, that isn't the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Same with Agent Flynn --

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

material?

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SOUTER: Right. And --

MS. SMITH: -- have some relevance.

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

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

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

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

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

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

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

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

MS. SMITH: No, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: But what about the

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

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

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

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

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

And so I just don't see, like Justice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. SMITH: The trial court --

JUSTICE BREYER: Yes.

MS. SMITH: -- held that.

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

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

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

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

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

MS. SMITH: Well, I --

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

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

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

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

parties and the courts had been reading it all along. The Court of Criminal Appeals --

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

MS. SMITH: The State --

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

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

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

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

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

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

It was on the basis of that argument that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: That's the 2001

opinion. Do they do that in the 2007 opinion?

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

JUSTICE SCALIA: What was the photographic evidence?

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

MR. GOLDSTEIN: Thank you very much.

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

MR. GOLDSTEIN: Yes.

CHIEF JUSTICE ROBERTS: Did you raise --

cite Kyles in your petition for cert?

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

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

MR. GOLDSTEIN: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

T