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GARY BRADFORD CONE, :

Petitioner :

v. : No. 07-1114

RICKY BELL, WARDEN. :

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.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

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

5 Mr. Goldstein.

6 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 MR. GOLDSTEIN: Yes.

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

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

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

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

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

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

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

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

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

25 And if I can just finish the footnote, it



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

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

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

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

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

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

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

3 MR. GOLDSTEIN: Yes.

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

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

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

11 MR. GOLDSTEIN: I'm sorry?

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

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

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

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

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

24 MR. GOLDSTEIN: In 1992.

25 JUSTICE KENNEDY: 1992.

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

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

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

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

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

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

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

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

14 MR. GOLDSTEIN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. GOLDSTEIN: Yes.

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

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

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

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

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

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

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



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

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

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

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

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

19           JUSTICE GINSBURG: 52.

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

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

1 case.

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

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

17              JUSTICE GINSBURG: If it is --

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

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

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

4 MR. GOLDSTEIN: Uh --

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. GOLDSTEIN: It wasn't a friendly

1 question --

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

4 MR. GOLDSTEIN: Right.

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

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

9 (Laughter.)

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

25                   MR. GOLDSTEIN: Two points, Justice Alito.

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

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

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

24 If I could --

25 JUSTICE GINSBURG: You recognize that a -- a

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

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

14 If I could reserve the remainder of my time.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Ms. Smith.

17 ORAL ARGUMENT OF JENNIFER L. SMITH

18 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

1 the district court --

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

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

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

25 JUSTICE BREYER: Blankman, that isn't the

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

23 Same with Agent Flynn --

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

1 material?

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

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

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

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

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

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

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

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

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

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

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

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

10 JUSTICE SOUTER: Right. And --

11 MS. SMITH: -- have some relevance.

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

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

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

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

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

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

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

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

20 MS. SMITH: No, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: But what about the

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

5                   MS. SMITH: The trial court --

6                   JUSTICE BREYER: Yes.

7                   MS. SMITH: -- held that.

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

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

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

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

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

3 MS. SMITH: Well, I --

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

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

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

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

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

2 The Court of Criminal Appeals --

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

8 MS. SMITH: The State --

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

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

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

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

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

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

25 It was on the basis of that argument that

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: That's the 2001



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

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

13 JUSTICE SCALIA: What was the photographic  
14 evidence?

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

21 MR. GOLDSTEIN: Thank you very much.

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

24 MR. GOLDSTEIN: Yes.

25 CHIEF JUSTICE ROBERTS: Did you raise --

1 cite Kyles in your petition for cert?

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

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

6 MR. GOLDSTEIN: Thank you.

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

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

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