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IN THE SUPREME COURT OF THE UNITED STATES

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

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

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

APPEARANCES:

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

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P R O C E E D I N G S

(10:02 a.m.)

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

General Myers.

ORAL ARGUMENT OF GEN. HARDY MYERS

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

6 MR. MYERS: Yes -

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

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

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

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

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

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

23 QUESTION: Who -

24 QUESTION: But the - the -

25 MR. MYERS: - is un mistake -

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

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

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

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

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

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

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

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

6 QUESTION: You don't think so?

7 MR. MYERS: Not - not necessarily -

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

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

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

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

1 QUESTION: Well, certainly -

2 QUESTION: But that anybody knows -

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

6 MR. MYERS: Not necessarily, Your Honor.

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

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

22 QUESTION: No, my -

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



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

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

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

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

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

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

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

8 QUESTION: Suppose -

9 QUESTION: Well, it -

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

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

1 state claim.

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

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

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

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

3 MR. MYERS: No, because it -

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. MYERS: No, Your Honor.

4 QUESTION: How often are these habeas -

5 MR. MYERS: There is -

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

9 MR. MYERS: For Federal habeas?

10 QUESTION: Right.

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

13 QUESTION: You don't know that?

14 QUESTION: In - in the state courts?

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

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

18 MR. MYERS: No, not -

19 QUESTION: A Federal habeas petitioner?

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

21 They - they are -

22 QUESTION: No.

23 MR. MYERS: They would -

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

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

1 yes. But they are -

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

5 MR. MYERS: Yes, Your Honor.

6 QUESTION: Was that done here?

7 MR. MYERS: No, Your Honor.

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

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

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

17 MR. MYERS: Your Honor -

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

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

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

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

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

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

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

20 MR. MYERS: Yes, Your Honor.

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



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

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

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

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

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

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

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

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

18           QUESTION: This was not in the habeas context.

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

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

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

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

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

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

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

25 QUESTION: Do you - do you think the hypothetical

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

3 MR. MYERS: Yes, Your Honor.

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

6 MR. MYERS: Yes, Your Honor.

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

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

11 QUESTION: - for state habeas -

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

14 QUESTION: Okay.

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

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

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

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

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

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

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

20                   MR. MYERS: Yes.

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

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

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

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

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

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

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

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

12 MR. MYERS: Yes, that's -

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

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

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

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

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

5 MR. MYERS: I do. Thank you.

6 QUESTION: Very well.

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

8 ORAL ARGUMENT OF DENNIS BALSKE

9 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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



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

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

7 MR. BALSKE: Correct.

8 QUESTION: Correct me if I'm wrong.

9 MR. BALSKE: You're right.

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

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

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

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

7           MR. BALSKE: Yes.

8           QUESTION: - or a rule of Federal law?

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

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

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

15          QUESTION: Okay.

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

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

1 appeals.

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

5 MR. BALSKE: No.

6 QUESTION: - was based?

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

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

15 MR. BALSKE: Right.

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

20 MR. BALSKE: Right.

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

1 you do.

2 MR. BALSKE: Right.

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

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

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

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

24 MR. BALSKE: And - well -

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

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

2 MR. BALSKE: A judge -

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

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

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

13 MR. BALSKE: Yes, and in -

14 QUESTION: Where is that?

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

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

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

3 QUESTION: I see.

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

7 MR. BALSKE: And that -

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

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

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

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

19 QUESTION: But it - but the point is -

20 MR. BALSKE: I'm sorry.

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

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

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

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

5 MR. BALSKE: Well -

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

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

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

14 MR. BALSKE: Sure.

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

19 MR. BALSKE: Well -

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

21 MR. BALSKE: Well -

22 QUESTION: Could - can you answer that?

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

1 the sharpest lawyers in the world.

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

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

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

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

19 QUESTION: Go ahead.

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



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

3 QUESTION: Touche.

4 (Laughter.)

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

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

11 MR. BALSKE: But -

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

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

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

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

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

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

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

13 QUESTION: But the - the court of appeals -

14 MR. BALSKE: - tougher case.

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

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

21 QUESTION: - that formulation of the rule?

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

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

1 MR. BALSKE: I'm -

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

3 MR. BALSKE: No.

4 QUESTION: - the Ninth Circuit's -

5 MR. BALSKE: I don't.

6 QUESTION: - articulated test?

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

9 QUESTION: In your -

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

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

14 MR. BALSKE: Yes.

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

19 MR. BALSKE: Correct.

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

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

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

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

8 MR. BALSKE: Well, I -

9 QUESTION: - are they just differences in -

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

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

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

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

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

22 QUESTION: But - but the only -

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

25 QUESTION: But the only way in which they could

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

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

9 MR. BALSKE: Right.

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

15 MR. BALSKE: Well -

16 QUESTION: - other than to review a record.

17 MR. BALSKE: Well - sorry.

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

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

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

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

12 MR. BALSKE: Well -

13 QUESTION: Sixth Amendment.

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

25 There it says that in applying article I,

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

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

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

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

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

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

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

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



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

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

10 QUESTION: But may I -

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

13 QUESTION: That's the Ninth Circuit.

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

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

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

22 MR. BALSKE: I -

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

1 Federal Constitution.

2 MR. BALSKE: That's correct.

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

11 MR. BALSKE: I did -

12 QUESTION: - you respond to that -

13 MR. BALSKE: I did, but I -

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

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

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

20 MR. BALSKE: It's -

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

1 MR. BALSKE: I understand.

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

4 QUESTION: You - you said you did raise that in  
5 the EIO?

6 MR. BALSKE: But, yeah -

7 QUESTION: Where?

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

9 QUESTION: I need to go back to it.

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

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

13 MR. BALSKE: Okay.

14 QUESTION: I didn't see it presented very  
15 clearly. It seems to me -

16 QUESTION: All right. Anyway, what you're asking  
17 is - that's why I started at the beginning. I thought the  
18 question was - I thought what the Ninth Circuit did was  
19 cite a case called Lyons, and in Lyons they say you do  
20 have to either cite a particular provision of the Federal  
21 Constitution or a case that's clearly a Federal case. And  
22 then they held that the brief you pointed out to me did  
23 not do that. Then they said, but anyway, that brief is  
24 good enough because in the lower courts or other courts  
25 they had cited the Federal Constitution explicitly.

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

6                   MR. BALSKE: Well, I -

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

8                   MR. BALSKE: Well -

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

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

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

1 pleadings in the lower courts.

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

10 QUESTION: No, but the exhaustion rule -

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

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

14 MR. BALSKE: Yes.

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

17 QUESTION: That sounds -

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

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

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

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

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

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

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

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

17           QUESTION: Yeah.

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

20           QUESTION: Yeah.

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

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

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

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

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

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

14 QUESTION: You - you want -

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

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

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

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

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

2 QUESTION: Is - is -

3 MR. BALSKE: I'm sorry.

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

7 MR. BALSKE: Yeah.

8 QUESTION: - whether I'm right.

9 (Laughter.)

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

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

23 QUESTION: Okay.

24 QUESTION: Well, then you have the problem -

25 QUESTION: May I ask you -



1 QUESTION: - of the Ninth Circuit. Yes?

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

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

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

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

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

17 MR. BALSKE: Right.

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

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

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

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

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

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

8 QUESTION: Yeah.

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

14 QUESTION: Okay.

15 QUESTION: If you -

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

19 MR. BALSKE: Yes.

20 QUESTION: - the - the issue that -

21 MR. BALSKE: Sure.

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

25 MR. BALSKE: Right.

1 QUESTION: Where -

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

5 QUESTION: This is the brief in opposition -

6 QUESTION: The brief in opposition -

7 QUESTION: - to certiorari.

8 QUESTION: - to the petition for cert.

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

11 QUESTION: Once I've granted -

12 QUESTION: It's orange.

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

15 MR. BALSKE: I'm sorry.

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

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

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

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

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

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

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

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

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

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

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

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

4 QUESTION: Do we have to ignore that too?

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

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

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

15 QUESTION: So, what your case is about -

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

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

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

24 General Myers, you have three minutes remaining.

25

1 REBUTTAL ARGUMENT OF GEN. HARDY MYERS

2 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

6 QUESTION: Yes.

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

11 QUESTION: Yes.

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

17 QUESTION: I see, I see.

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

23 QUESTION: Okay.

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

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

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

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

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

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