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P R O C E E D I N G S

(11:08 a.m.)

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

Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

ON BEHALF OF THE PETITIONER

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

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

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

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

1 this case back. They'd conclude it again.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, but don't stop

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

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

10 So, on the one hand, they disavowed deciding  
11 it, and then quite clearly there are some -- there are a  
12 couple paragraphs there. You've -- you've stated one.  
13 The next paragraph does the same thing, talking about  
14 the merits of the Brady claim.

15 So here's the dilemma that I faced in  
16 writing the cert petition. They say they're not  
17 deciding the Brady claim, but then they talk quite  
18 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 Romanette i, where is -- where the questions  
3 presented are. There's nothing in there about the  
4 merits of the Brady claim. It's all about the  
5 procedural objections that you have.

6 MR. GOLDSTEIN: Mr. Chief Justice, and I --  
7 the doctrine, 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: And I -- I guess  
14 what I would say is you've got Federal habeas review of  
15 that claim because the district court decided it on the  
16 merits and the court of appeals decided it on the  
17 merits.

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

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

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

10          MR. GOLDSTEIN: Yes.

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

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

25                 The particular place that I want to point

1 the Court to -- so starting on 26, we lay out our  
2 argument about the merits, and then footnote 6 explains  
3 quite clearly to the Court -- the Court sometimes has a  
4 concern that parties are smuggling questions into the  
5 case in front of it, and that's clearly what did not  
6 happen here. We explain our dilemma about the Sixth  
7 Circuit saying it wasn't deciding the merits, and then  
8 footnote 6: "Because the panel" -- this is on page 30  
9 --

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

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

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

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

23 MR. GOLDSTEIN: Sir, the -- but it was  
24 disavowing it, I think, as an alternate holding. The  
25 court of appeals opinion is not clear. It disclaims the

1 power even to decide the Brady claim.

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

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

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

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

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

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

5 JUSTICE SCALIA: The crime was committed in  
6 1980, 28 years ago.

7 MR. GOLDSTEIN: Yes.

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

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

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

16 MR. GOLDSTEIN: I'm sorry?

17 JUSTICE SCALIA: How old is this -- is this  
18 defendant now?

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

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

24 MR. GOLDSTEIN: Yes. In the Woodall case,  
25 12 years after the crime, Justice Scalia -- so all the

1 evidence was suppressed. In --

2 JUSTICE KENNEDY: Was that -- oh, I thought  
3 that was 2000 -- when was that?

4 MR. GOLDSTEIN: In 1992.

5 JUSTICE KENNEDY: 1992.

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

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

13 MR. GOLDSTEIN: Yes, sir. So it's --  
14 there's no question about timeliness. Justice Scalia,  
15 your frustration about how long death cases is perfectly  
16 understandable, how long they take. But let me just be  
17 clear that this --

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

24 MR. GOLDSTEIN: Well, I took Justice  
25 Kennedy's question to be that this has been in the case

1 all along and hasn't been finally resolved. There isn't  
2 a final judgment. You're quite right that, as the Chief  
3 Justice pointed out, there is language in the court of  
4 appeals' very first opinion in the case. There is  
5 unfortunately only one sentence, but to be fair there is  
6 a sentence in the first opinion saying that it's not --  
7 that the Brady evidence is not material.

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

17 CHIEF JUSTICE ROBERTS: I guess it's -- my  
18 questionings and -- questions and the point --

19 MR. GOLDSTEIN: Yes.

20 CHIEF JUSTICE ROBERTS: -- that was raised  
21 about the time aren't related, because one reason these  
22 things drag on interminably is that you are -- exactly  
23 why you're raising this issue here: It's a procedural  
24 nicety or a procedural difficulty that arose some time  
25 ago in the State courts. But since then the Federal

1 courts, both the district court and the court of appeals  
2 have addressed it, and -- and that that's a good  
3 jurisprudential approach to say, particularly in a  
4 complicated case like this that is 26 years old, here's  
5 our answer on this, but so that we don't have to go  
6 through this again, if we're reversed on that, here's  
7 our -- our alternative holding. And they said right  
8 after the sentence I quoted, we said this before, and we  
9 now say it again: This is not Brady material.

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, that would --  
2 that would then depend upon us agreeing to review a very  
3 fact-bound -- necessarily fact-bound, Brady question  
4 when the questions presented focused on a procedural  
5 issue.

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

19 Now, those aren't fact-bound points; those  
20 are questions of law, so we believe that it would be  
21 perfectly appropriate for this Court to decide the  
22 procedural question. The procedural holding of the  
23 Sixth Circuit is not defended here, the idea that  
24 previous determination amounts to a procedural default.  
25 And then on the question of the merits, the Court could

1 decide those two limited legal questions and leave it to  
2 the lower courts to decide the more fact-bound  
3 questions.

4 But we do think that the Court -- it is  
5 actually quite sensible for this Court to not just  
6 decide the procedural question, given that at the very  
7 least -- call it a holding, call it dictum -- the Sixth  
8 Circuit has sent strong signals about what it views  
9 regarding the merits of the Brady claim.

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

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

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

1 MR. GOLDSTEIN: Yes.

2 JUSTICE ALITO: Could you put yourself in  
3 the position of the Tennessee Court of Criminal Appeals?  
4 In light of the briefing that they received, if you had  
5 been on that court, would you have understood that  
6 Petitioner was asserting that he had a valid reason for  
7 not raising the Brady claim earlier, because he had  
8 not -- at the time when he could have, at the time of  
9 the prior proceedings, he had not had access to the  
10 State records? Would you have understood that from the  
11 briefing that they got?

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

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

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

25 Now, I will point you to one particular

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

5           The first is that in the entire long course  
6 of this litigation, the State has never before made this  
7 argument, and the second is in the Tennessee Supreme  
8 Court -- right, the Tennessee Court of Criminal Appeals  
9 decides the case. We take the Brady claim up to the  
10 Tennessee Supreme Court. And even there the State  
11 doesn't say that it was insufficiently preserved. They  
12 file a response to our application and they address it  
13 as to its substance.

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

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

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

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

25           JUSTICE GINSBURG: 52.

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

3 MR. GOLDSTEIN: The -- but when we got to my  
4 point in the Tennessee Supreme Court, there was much  
5 less action in the case. The Brady claim was point 3.  
6 There was a lot less that was presented in the case.

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

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

22 JUSTICE GINSBURG: If it is -- if it is --

23 JUSTICE KENNEDY: Can you tell me what --  
24 can you tell me what is this -- let's suppose that you  
25 had an initial Brady claim that there was one part of

1 the file that you were entitled to see that said that  
2 there is some evidence that he's a drug user. And you  
3 -- and you take that Brady claim up.

4 Later you find out -- you have access to a  
5 new file and you find cumulative information plus the  
6 information that he was dazed or something, which may  
7 not be very strong. What's our test to determine  
8 whether the Brady claim has been exhausted? Or have we  
9 talked about that?

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

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

1 State court right away, at the urging of the State,  
2 said, oh, that's been previously determined, and I won't  
3 consider the merits.

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

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

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

23 MR. GOLDSTEIN: I don't know that he made a  
24 concrete proposal. I think he would prefer -- I think  
25 the court system would prefer it, and I think everyone

1 would prefer it. The dilemma is that it can't happen.  
2 The -- as we explain in footnote 3 at page 26 of our  
3 reply brief, there is no window of opportunity to send  
4 the State -- the case back to the State. It's been  
5 dismissed there. The statute of limitations has run.  
6 And in a case called Harris v. State, the Tennessee  
7 Supreme Court said that you couldn't reopen it.

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

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

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

24           CHIEF JUSTICE ROBERTS: That was -- that was  
25 not a friendly question. My point is that you argued

1 the merits of the Brady claim not only in the district  
2 court but specifically on appeal as well.

3 MR. GOLDSTEIN: It wasn't a friendly  
4 question --

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

7 MR. GOLDSTEIN: Right.

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

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

12 (Laughter.)

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

1 Brady claim, notwithstanding the Sixth Circuit's own  
2 repeated disavowals of doing so, then the merits of that  
3 Brady claim ruling would be properly before this Court,  
4 not immunized from review. Indeed, the Brady issue, as  
5 encompassed within the questions presented, would be  
6 properly briefed by the parties if certiorari were  
7 granted."

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

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

21 I was turning to the question of whether we  
22 have a serious Brady claim, and so the Court should have  
23 some concern here. And I really do think that we do and  
24 that the passing observations about the lower courts  
25 don't fulfill the duty to assess the merits of the Brady

1 claim fairly. There was one -- the action in this case  
2 -- the whole reason that there was effectively a trial  
3 was the question of whether the defendant committed  
4 these acts in an amphetamine psychosis. He had two  
5 experts that explained, because of his post-traumatic  
6 stress disorder and his very heavy drug issue, that he  
7 did not understand the consequences of his action. He  
8 was completely paranoid.

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

21           JUSTICE GINSBURG: Where was that colloquy?  
22 I remember witnesses saying he looked weird, he looked  
23 wild-eyed. Where was the answer that he looked -- that  
24 --

25           MR. GOLDSTEIN: Justice Ginsburg, this is in

1 the yellow brief, our merits reply brief. It starts at  
2 the very bottom of 21, but you can just start at the top  
3 of 22.

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

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

21           JUSTICE SCALIA: Well, I -- you know, I'll  
22 give you the first, that he appeared drunk or high.  
23 That's pretty clear, but I -- I think -- I think you  
24 tend to look wild-eyed after you're running out after a  
25 jewelry store robbery, and I think you're -- you're

1 certainly inclined to look "agitated" and "looking about  
2 in a frenzied manner" when you've just committed two  
3 brutal murders. I don't think that's evidence of -- of  
4 drug addiction at all --

5 MR. GOLDSTEIN: Well --

6 JUSTICE SCALIA: -- of being under the  
7 influence of drugs.

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

22 JUSTICE ALITO: This is a very complicated  
23 factual question. It's not -- we're dealing with  
24 numerous documents, isn't that right, that were -- that  
25 you claim were --

1 MR. GOLDSTEIN: There are three witness  
2 statements, and there are a series of police reports and  
3 FBI --

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

8 MR. GOLDSTEIN: Two points, Justice Alito.  
9 The first is that we say at the very least the Court  
10 should make the Kyles point and the evidentiary hearing  
11 point. And the second is, I think to be fair to us --  
12 given your point about this is so complicated; there's a  
13 lot of evidence here -- one ought to compare that in  
14 fairness to what the Sixth Circuit did, and the one  
15 footnote that the Chief Justice has put -- talked about  
16 with the district court and whether they really did take  
17 a hard look at the claim.

18 I think it would -- it would be fair to us  
19 to say, look, there are some legal errors here that this  
20 Court can correct, and then the district court would be  
21 the proper place, if it decides to have an evidentiary  
22 hearing, to resolve the remainder of the claim.

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

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

8           If I could --

9           JUSTICE GINSBURG: You recognize that a -- a  
10 defense like this, that the defendant was high on drugs,  
11 that's -- isn't it ambivalent? I mean, a jury, just  
12 like it might react adversely to the defendant if he  
13 says I was drunk on alcohol, that they might say: This  
14 is a person who put himself in the condition where his  
15 will could be overpowered. This was a voluntary act.  
16 Why should we consider it? Why should we consider it  
17 mitigating? We -- we could just as well consider it  
18 aggravating.

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

24           If I could reserve the remainder of my time.

25           CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Smith.

2 ORAL ARGUMENT OF JENNIFER L. SMITH

3 ON BEHALF OF THE RESPONDENT

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

6 As the Court has alluded in a number of  
7 questions, both the district court and the Sixth Circuit  
8 now twice have resolved -- have rejected Cone's Brady  
9 claim on the merits, and we believe correctly so in  
10 light of Cone's actions in the day surrounding the  
11 murder, his statements about what he did and why he did  
12 it, and more importantly the lower court's recognition  
13 that additional evidence --

14 JUSTICE STEVENS: May I ask this to get my  
15 thought on the table? Do you agree that the evidence  
16 shows that the -- this evidence was deliberately  
17 suppressed?

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

20 JUSTICE STEVENS: But is there any  
21 explanation for it?

22 MS. SMITH: -- prosecution stated line on  
23 that --

24 JUSTICE STEVENS: Was there any explanation  
25 for it other than a tactical explanation?

1 MS. SMITH: There's no explanation in the  
2 record. There has been no finding about whether the  
3 evidence has been suppressed at all in this case because  
4 both the district court and the Sixth Circuit decided as  
5 a matter of law that the materials on their face --

6 JUSTICE STEVENS: But it seems to me it's  
7 relevant because if it was suppressed for a tactical  
8 reason, it seems to me hard to say that the prosecution  
9 thought it didn't make any difference.

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

16 JUSTICE STEVENS: What they have seen, but  
17 one of the first questions that always troubles me in a  
18 Brady case is the conduct of the prosecutor and the  
19 ethics of the profession and the whole -- whole  
20 importance of the rule is to be sure prosecutors perform  
21 their public function. And I'm just wondering if there  
22 is any -- if this was a case of just an honest mistake,  
23 it would be one thing, but if it appears to have been a  
24 tactical decision and a tactical program, it seems to me  
25 very difficult to assume that the prosecutor thought it

1 was really not important evidence.

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

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

14 JUSTICE BREYER: But Blankman -- that isn't  
15 the concern. The concern is simply this, if they're  
16 correct: That this whole trial revolves around whether  
17 this individual is suffering post-traumatic stress  
18 disorder with -- with these amphetamines.

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

22 On cross, the prosecutor gets both of them  
23 to admit that they're basing their testimony on what the  
24 defendant told them about his drug use. At which point  
25 the prosecutor says, let's talk to Mr. Roby, who is the

1 arresting officer, did you see he was on -- when you  
2 arrested him, was he on -- did he look like he was on  
3 drugs? No. Let's talk to Mr. Flynn. When you  
4 processed him, did he look like he was on drugs? No.  
5 And then let's talk to Ms. Blankman, okay?

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

10 Now, in fact in the files is evidence that  
11 Mr. Roby, that very day of the crime and the next day,  
12 sent out all-points bulletins saying he was a dangerous  
13 drug user. There is evidence in the files that Mr. --  
14 that the FBI man sent out similar all-point bulletins.  
15 There are three witnesses who have described the  
16 behavior on the day as frenzied, and we have heard the  
17 descriptions.

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

22 MS. SMITH: Well, Your Honor, I can't speak  
23 for the prosecutor's state of mind at the time, but I  
24 will -- will state that the central question in the case  
25 was not whether the Petitioner used drugs. There was

1 evidence in the record from his mother. There was  
2 evidence in the record from his own mouth that --

3 JUSTICE SCALIA: Well, it was conceded that  
4 he was a drug user.

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

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

9 MS. SMITH: It came -- some of that came  
10 through the State's own witnesses. And -- and the --  
11 the argument that the State made about him being a drug  
12 user versus a drug seller was not the only argument the  
13 State made. The State specifically said look at -- to  
14 the jury: Look at what he did on the day of the  
15 murders; look at what he did on Saturday and Sunday to  
16 go to his state of mind. And the State focused on  
17 the -- the goal-oriented, the purposeful behavior and  
18 the very direct behavior that --

19 JUSTICE KENNEDY: Do -- do you think that  
20 the material described by Justice Breyer would have been  
21 excluded by the trial court as irrelevant if it had been  
22 introduced? Or cumulative? That's --

23 MS. SMITH: I don't think it would have been  
24 excluded. I think it could have been used to attempt to  
25 cross-examine certainly Agent Roby. But Agent Roby's

1 testimony didn't -- didn't state that Mr. Cone was not a  
2 drug user. Mr. -- Agent Roby's testimony was that at  
3 the time that he observed him, four days after the  
4 murders, he didn't appear to be on -- under the  
5 influence of drugs, and when he saw him eight days after  
6 the murder, he examined his body and there were no  
7 needle marks.

8           The testimony was very specific as to his  
9 observations on the 4-day point and the 8-day point  
10 after to the murders.

11           Same with Agent Flynn --

12           JUSTICE STEVENS: So do you think the  
13 prosecutor had an ethical duty to turn over this  
14 material?

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

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

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

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

25           MS. SMITH: I'm unaware of any ethical

1 requirement that he turn it over, and I don't think  
2 that -- and certainly under Brady if it's not material  
3 -- and we don't think it was material -- then it's  
4 certainly not required as a constitutional matter. And  
5 the reason it's not --

6 JUSTICE SOUTER: Do you believe that the  
7 materiality judgment is yours to make -- the State's to  
8 make as sort of a gate-keeping measure? Isn't the  
9 materiality an issue for the factfinder?

10 MS. SMITH: Well, I think that -- as --

11 JUSTICE SOUTER: You -- you exclude -- do  
12 you believe that you can, in effect, suppress any piece  
13 of evidence on -- on the State's judgment that it will  
14 not prove to be material in the context of the whole  
15 case?

16 MS. SMITH: I think prosecutors make those  
17 kinds of judgment calls all the time.

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

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

23 JUSTICE SOUTER: Right. And wouldn't --

24 MS. SMITH: -- that have some relevance.

25 JUSTICE SOUTER: Wouldn't he err on the side

1 of turning over the matters because Brady leaves the  
2 materiality judgment, like all materiality judgments,  
3 ultimately, to the factfinder?

4 MS. SMITH: Certainly ultimately it's left  
5 to the factfinder, but the prosecutor is --

6 JUSTICE KENNEDY: Well, initially Brady  
7 leaves the judgment -- the judgment, further on Justice  
8 Souter's point, to the attorney for the defense. You're  
9 saying that the prosecutor can pre-empt the role of the  
10 attorney for the defense in deciding what to offer to  
11 the court as material? And if -- and if it -- even if  
12 the evidence is in a gray area, that's for -- that's for  
13 the defense attorney to decide under -- under our Brady  
14 jurisprudence, as I understand it. Correct me if that's  
15 wrong.

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

23 JUSTICE SOUTER: Isn't the prosecutor's  
24 obligation to make an -- an initial assessment as to  
25 whether the evidence tends to be mitigating evidence or

1 favorable to the defendant? Isn't that the prosecutor's  
2 judgment?

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

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

8 MS. SMITH: No, Your Honor.

9 JUSTICE SOUTER: You don't think --

10 MS. SMITH: I don't --

11 JUSTICE SOUTER: You don't think it would be  
12 favorable to the defendant to get any evidence that  
13 Justice Breyer summarized a moment ago?

14 MS. SMITH: No, sir, I do not. There was  
15 already evidence before the jury that the defendant was  
16 a drug addict, that he was a drug user, that he was  
17 changed after Vietnam. This Court's own opinion in 2002  
18 noted that he was a drug addict.

19 JUSTICE SOUTER: Maybe I'm beating a dead  
20 horse, but Justice Breyer made the point, and he made it  
21 I think very clearly, that although that evidence was  
22 in, the argument here -- the argument that was made  
23 before the jury in this case is that the witnesses upon  
24 whom the defense was specifically relying were witnesses  
25 whose account of the defendant's drug use came solely

1 from the defendant himself.

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

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

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

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

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

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

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

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

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

14           JUSTICE GINSBURG: But what about the  
15 prosecutor who said "baloney"? He said -- the  
16 prosecutor -- the prosecutor says: The defendant tells  
17 you he was a drug user. Baloney, he was a drug dealer.

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

23           And that line to the jury -- "baloney" he  
24 says he was a drug user -- that, it seems to me, is  
25 exactly what the prosecutor wanted to do, is to tell

1 this jury this guy's a dealer; he's not a drug abuser.

2 MS. SMITH: I think that the prosecutor  
3 overstated in that portion of his argument, I would  
4 agree with Your Honor --

5 JUSTICE BREYER: He also had cross-examined  
6 the two expert witnesses in order to show that they  
7 didn't really know that this man was a drug user,  
8 because their only basis for that was he told them.

9 So as I've read these briefs, I've come away  
10 -- including yours -- with a strong impression that this  
11 was a relevant issue, that the prosecution did not  
12 concede that he was on drugs at the time of the murder.  
13 Indeed, that that was all that was at issue.

14 And so I just don't see, like Justice  
15 Souter, how you can say that this wouldn't at least be  
16 useful information if -- even for cross-examination, and  
17 I think more than that since you have three direct  
18 witnesses.

19 But leaving that aside, there's another part  
20 of this case that equally bothers me. It seems to me  
21 there was a lawyer for the State here that twice told  
22 the courts that this matter had never been raised. Is  
23 that so? Or maybe he said that the courts had decided  
24 it, because the State has taken absolutely inconsistent  
25 positions, first saying that the trial courts decided

1 it, and they did decide it, but by accident. They  
2 thought that paragraph 41 referred to this claim when it  
3 referred to an earlier claim.

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

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

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

24           We dispute that it's material. We don't  
25 think it's material in every court, but the district

1 court and the sixth circuit have found it immaterial.  
2 But on the -- on the -- the -- what has happened, in  
3 terms of the procedural defense, we have confessed that  
4 there was an error by the State in the -- in the post-  
5 conviction court.

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

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

20 Now, in the appeal, the petitioner doesn't  
21 again raise the Brady claim. In his principal brief, he  
22 never mentions the Brady claim. He never even mentions  
23 --

24 JUSTICE ALITO: If we read the -- can I ask  
25 you this? If we read the decision of the Court of

1 Criminal Appeals as having ratified the -- the district  
2 court's -- the -- the lower court's treatment of the  
3 procedural default issues, as having rejected it on the  
4 ground that it was previously decided, that would be an  
5 instance in which a State court applied a procedural  
6 default rule based on an undisputed error of fact.

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

13 MS. SMITH: In answer to your first  
14 question, yes, we don't disagree with the proposition  
15 that if a trial -- that if a State court refuses to  
16 consider a claim on the basis that that claim has been  
17 determined previously, that that would not be an  
18 adequate basis for a procedural default in Federal  
19 court.

20 But we don't -- I don't think that this case  
21 presents that scenario, and every court that has looked  
22 at the Court of Criminal Appeals' decision has read that  
23 decision as applying a waiver. The District Court read  
24 that decision as applying a waiver. And if you look at  
25 -- at page 112a of the petition appendix, not only does

1 the District Court read it as a waiver, but the  
2 Petitioner read it as a applying a waiver, because, if  
3 you note in that first sentence, as to the Brady claim  
4 to the district court, Cone also attempts to argue that  
5 those claims were improperly held waived by the court.

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

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

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

19 MS. SMITH: The trial court --

20 JUSTICE BREYER: Yes.

21 MS. SMITH: -- held that.

22 JUSTICE BREYER: Okay. So there are cases  
23 in this Court which say if a State appeals court writes  
24 a matter -- something -- a sentence that is ambiguous so  
25 you don't know whether it was decided -- for example,

1 they mean it was waived or mean that it was decided --  
2 then the next best thing to do, which makes sense, is  
3 look to the lower court to see what they actually did.

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

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

11 JUSTICE BREYER: Don't you think at this  
12 point the Petitioner is saying in his briefs: I've been  
13 getting the runaround. First, they tell me it's one  
14 thing; then they tell me another. All I can tell you is  
15 this: No one has ever passed on the merits of this  
16 Brady claim, which is a substantial claim.

17 MS. SMITH: Well, I --

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

20 MS. SMITH: Well, first of all, Your Honor,  
21 I don't think the Petitioner has been getting the  
22 runaround. The Petitioner has always throughout this  
23 litigation proceeded on the premise that the CCA's  
24 opinion -- the Court of Criminal Appeals' decision in  
25 Tennessee was based on a waiver. All of his briefs in

1 the lower court and in the -- the Sixth Circuit reflect  
2 that.

3 The district court proceeded as if that  
4 ruling was a waiver. The Sixth Circuit, in its 2001  
5 decision, if you look at page 62a and 62 -- 63a at the  
6 bottom, the -- the Sixth Circuit specifically said the  
7 Tennessee waiver rule is plainly applicable to the Brady  
8 claim. And the Tennessee courts explicitly relied on  
9 the waiver rule.

10 It wasn't until the 2007 opinion that the --  
11 the Sixth Circuit even discussed this notion of previous  
12 determination, and only then in response to what I think  
13 was a red herring injected by the dissenting opinion  
14 that somehow the -- the Court of Criminal Appeals'  
15 decision stood for something different than what the  
16 parties and the courts had been reading it all along.  
17 The Court of Criminal Appeals --

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

23 MS. SMITH: The State --

24 JUSTICE BREYER: Is that why they're writing  
25 about waiver?

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

8 JUSTICE GINSBURG: Spell out the waiver in  
9 light of what he said. The first time he learns that  
10 these -- the cases, other cases cited and he has access  
11 to the district attorney's file, he then files a habeas  
12 -- State habeas petition in which he says that the facts  
13 on which his Brady claim rests have been revealed  
14 through disclosure of the State's file which occurred  
15 after the first conviction proceeding. Those words are  
16 in the affidavit, right, that came with the second  
17 petition? So how could he possibly have waived it when  
18 he has explained it wasn't available to him?

19 MS. SMITH: Well, I think to understand how  
20 this -- how this can happen, the bottom line is that he  
21 failed to demonstrate to the State courts why he should  
22 -- he was properly before the court to begin with. And  
23 when you -- when you raise a claim -- he buried his  
24 claim among a hundred other parts and subparts. If --  
25 if he had a legitimate claim, he certainly didn't

1 highlight it as such, and then he -- he buried even  
2 further his explanation for a waiver in a 41-page  
3 affidavit filed six days before the State court's ruling  
4 in this case.

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

15           It was on the basis of that argument that  
16 the Court of Criminal Appeals held that the Petitioner  
17 had failed to rebut the presumption of waiver as a  
18 matter of law as to all claims that had not been  
19 previously determined.

20           So that holding is an overarching holding.  
21 It applies to every claim that was raised for the first  
22 time in the successive habeas position, and we think  
23 justified the district court -- it certainly was the  
24 basis of the district court's default and, as well, in  
25 2001 was the basis of the Sixth Circuit's decision.

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

11           In 2001, the Sixth Circuit clearly relied on  
12 the waiver bar, and that's very evident on pages 62 and  
13 63a in the petition appendix, and that's the basis of  
14 the waiver. So we don't even think that the -- that the  
15 situation in question 1 is even presented, although  
16 if -- to answer the question, in response to Justice  
17 Alito's question, I think it would be -- would be an  
18 absurd result to say that something that has been  
19 previously determined is defaulted, but that's not the  
20 situation here. The record shows it's not previously  
21 determined. The Petitioner has never argued that it's  
22 previously determined, and no court until this point has  
23 ever even read the Court of Criminal Appeals' decision  
24 as making a previous determination finding. Everyone  
25 has accepted the fact that that holding was a waiver

1 holding.

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

16           But all of this aside, it really is -- is  
17 beside the point because at the end of the day, the  
18 district court very clearly addressed -- and  
19 specifically, not just in passing, but specifically at  
20 -- at various points in its -- in its opinion, the  
21 materiality of each and every item of evidence.

22           He went through in detail a discussion of  
23 the police teletypes, stating that -- that the jury  
24 already was aware that he was a drug user. It really  
25 wasn't any question whether he was a drug user; the

1 evidence clearly showed that he was. The question was  
2 what was his state of mind at the time of the murders.

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

10 MS. SMITH: Well, I think if you look at the  
11 -- at the district court's opinion, I think that  
12 argument could be made based upon the way the district  
13 court treated the items. The district court certainly  
14 did look at them in categories and separated them, but I  
15 think if you look at the Sixth Circuit's opinion,  
16 certainly in 2007 where the court -- the court looked at  
17 it in more detail, I think that it is clear that the  
18 court cumulated the items and said that as a whole that  
19 the Brady materials don't undermine -- do not undermine  
20 confidence in the verdict. So I disagree that -- that  
21 the Sixth Circuit treated them incorrectly, and -- and I  
22 would note --

23 JUSTICE SCALIA: Do -- do you agree that the  
24 prosecutor was arguing, when he said that -- that he's a  
25 drug dealer, that he was not a drug user? Was it -- was

1 it conceded that he was a drug user? I suspect it was  
2 not.

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

8 MS. SMITH: Your Honor, I -- I think I've  
9 noted earlier, I think that the prosecutor overstated  
10 his case on that point. No question about it. But I  
11 think there was ample evidence in the record indicating  
12 that he was a drug user. This Court even noted that,  
13 even noted there was proof of the fact that he was a  
14 drug addict, that he was a drug user, that the evidence  
15 was strong that he was -- that he was under the  
16 influence of an amphetamine psychosis. There were two  
17 experts that testified to that. On the other hand,  
18 there were two experts for the State that said that that  
19 -- that defense couldn't be supported.

20 So the question of whether he was a drug  
21 user or not a drug user was really beside the point. I  
22 think the prosecutor eventually got around to that in  
23 his argument. If you look at the argument as a whole,  
24 the bottom line of the argument was -- and we quoted it  
25 in our brief -- look at what he did, look at his actions

1 around this murder, and let that go to his state of mind  
2 because that was the best evidence. Not only is that --  
3 what he said -- he specifically said he went into this  
4 individual's home with the purpose of getting fed,  
5 getting cleaned up, and getting out of town, and when  
6 the Todds ceased to cooperate with him, he had to  
7 control them physically. That's code I suppose for  
8 beating them to death because that's exactly what he  
9 did.

10 He explained what he did and why he did it.  
11 His actions are very calculated from -- from beginning  
12 to end. So whether he used drugs or not used drugs, the  
13 question is what was going on at the time of this  
14 murder? And by his own admission the reason that the  
15 Todds are -- are not with us today is because they  
16 ceased to cooperate; they became frightened; and he had  
17 to control them physically. I think that's the best  
18 evidence of his state of mind at the time. Those are  
19 words out of his own mouth, and I think that that  
20 certainly supports the finding of both the district  
21 court and the Sixth Circuit on materiality.

22 I agree with the -- with Chief Justice's  
23 assessment: We do not think that the Brady claim is  
24 fairly included within the question. The merits issue  
25 is not a predicate to the default question. I certainly

1 understand Petitioner's dilemma in this case, but I  
2 think faced with that dilemma, he should have squarely  
3 presented that question among the questions presented  
4 and not dropped it in a footnote in argument 2. We  
5 don't think it's fairly presented, but -- but in any  
6 event, it certainly justifies affirmance of the judgment  
7 or at a minimum dismissal of the appeal.

8           And for all of these reasons, if there are  
9 no further questions, we ask that Court to affirm the  
10 judgment of the district court -- of the Sixth Circuit,  
11 excuse me.

12           JUSTICE KENNEDY: It's outside the record  
13 and not really relevant to the case. Has he been on  
14 death row since 1984 or so? And if so, is that solitary  
15 confinement? Do you know how large the cell is, if you  
16 know?

17           MS. SMITH: I don't know. I'm not aware  
18 that he's in any sort of heightened level of security.  
19 I would assume he's just at a standard level. I don't  
20 know his -- his security level, but he has been on death  
21 row for the entire period, Your Honor.

22           CHIEF JUSTICE ROBERTS: Thank you, counsel.

23           Mr. Goldstein, you have three minutes.

24           REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

25           ON BEHALF OF THE PETITIONER

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

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

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

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

25 On the Brady claim, it seems to me that the

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

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

15 And so I think an opinion of this Court that  
16 simply dealt with the undefended procedural default  
17 ruling and then went to the merits and only made those  
18 three points and then left it to the lower courts to  
19 resolve the Brady claim ultimately would balance the  
20 concerns about the Court's institutional interests in  
21 not sending a signal of affirming this judgment in light  
22 of what the State has done here and not getting into the  
23 weeds of the claim.

24 CHIEF JUSTICE ROBERTS: Is there anything in  
25 the court of appeals' treatment of the Brady claim on

1 the merits that suggests it also treated them separately  
2 in the different silos, as you put it?

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

13 CHIEF JUSTICE ROBERTS: Where -- where do  
14 they say that they're only considering the categories  
15 separately?

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

19 CHIEF JUSTICE ROBERTS: That's the -- that's  
20 the 2001 opinion. Do they do that in the 2007 opinion?

21 MR. GOLDSTEIN: No. The -- in the 2007  
22 opinion, that discussion happens at 25a, and here is  
23 their explanation. It goes to my first point. And they  
24 do sort of then turn around and treat them more  
25 generally. "It would not have been news to the jurors

1 that Cone was a drug user. They had already heard  
2 substantial direct evidence that he was a drug user,  
3 including the opinion of the two expert witnesses,  
4 Cone's mother, the drugs found in Cone's car, and  
5 photographic evidence." And that's our point, that that  
6 was discredited because it came out of his mouth.

7 JUSTICE SCALIA: What was the photographic  
8 evidence, if you know?

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

15 MR. GOLDSTEIN: Thank you very much.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 I'm sorry, Mr. Goldstein, I have one more.

18 MR. GOLDSTEIN: Yes.

19 CHIEF JUSTICE ROBERTS: Did you raise --  
20 cite Kyles in your petition for cert?

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

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

25 MR. GOLDSTEIN: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
2 The case is submitted.

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

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