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IN THE SUPREME COURT OF THE UNITED STATES

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KELLY HARRINGTON, WARDEN, :

Petitioner :

v. : No. 09-587

JOSHUA RICHTER :

- - - - - x

Washington, D.C.

Tuesday, October 12, 2010

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:04 a.m.

APPEARANCES:

HARRY J. COLOMBO, ESQ., Deputy Attorney General,
Sacramento, California; on behalf of Petitioner.

CLIFFORD GARDNER, ESQ., Berkeley, California; on behalf
of Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case No. 09-587, Harrington v. Richter.

Mr. Colombo.

ORAL ARGUMENT OF HARRY J. COLOMBO

ON BEHALF OF THE PETITIONER

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

The California Supreme Court's denial of Respondent's ineffective counsel claim was entitled to the deferential review for reasonableness prescribed by 28 U.S.C. section 2254(d). By its plain terms, nothing in 2254(d) requires a State court to render a reasoned or explained decision, nor is there anything in section 2254(d) that would treat Strickland claims differently from any other Federal constitutional claim.

Here, the Ninth Circuit failed to give the State court decision the proper deference -- indeed, double deference -- it was owed. Rather than applying this Court's proper -- excuse me -- clearly established Strickland standard, the court of appeals employed its own eccentric rule that essentially requires counsel to always consult with and present expert testimony in

1 every case in which the prosecution --

2 JUSTICE GINSBURG: How do -- how do we know
3 that the -- the California court even reached that
4 question? Because there was -- wasn't there a motion to
5 deny review as -- as -- wasn't there a time bar question
6 raised?

7 MR. COLOMBO: There was a procedural bar
8 that was argued in the informal opposition to the
9 petition for writ of habeas corpus that had been
10 requested by the California Supreme Court. It did not
11 invoke that bar as a basis for denying relief. Under
12 well-established --

13 JUSTICE KENNEDY: Of course, it said -- it
14 just said denied on -- on the merits. And it's still
15 not clear to me how to -- pardon me. It just said
16 "denied"?

17 MR. COLOMBO: Yes.

18 JUSTICE KENNEDY: It's still not clear to me
19 how to distinguish that, between denied, deny -- do we
20 say, when there's a one-line order, as in this case,
21 where it says simply "deny," it is presumptively on the
22 merits? I mean, how -- how do we interpret that?

23 MR. COLOMBO: Yes. In fact, that is a
24 well-settled and long-established practice, local
25 practice. It's well-understood by not only the

1 litigants, but the State and Federal courts of the Ninth
2 Circuit, dating back to the Ninth Circuit's 1974
3 decision in Harris v. Superior Court.

4 JUSTICE KENNEDY: Then it is presumptively
5 on the merits?

6 MR. COLOMBO: Yes.

7 JUSTICE KENNEDY: They don't -- I mean, is
8 that the way it's stated? Don't let me use my
9 formulation. What's -- what's the State's formulation?

10 MR. COLOMBO: The State's formulation is
11 that the silent or so-called summary denial is on the
12 merits, unless the State court indicates otherwise in --

13 JUSTICE SCALIA: Now, that can't be a Ninth
14 Circuit rule. I mean, that has to depend upon each --
15 each of the States in the Ninth Circuit, no?

16 I mean, some State could -- could have a
17 different rule, I assume. You're -- you're telling us,
18 however, that California has that rule?

19 MR. COLOMBO: Yes. And that rule, again,
20 has been well-established --

21 JUSTICE GINSBURG: But did --

22 JUSTICE KENNEDY: But if I'm on the
23 California court and I have two choices -- one is to say
24 denied, no explanation, as this case; the other is to
25 say denied on the merits -- if I have those two options,

1 then why are they both on the merits?

2 MR. COLOMBO: Again, because it has
3 certainly been well-understood for at least three and a
4 half decades that when the California Supreme Court
5 renders a so-called silent denial, that it is on the
6 merits unless the court ordered --

7 JUSTICE KENNEDY: And what is the leading
8 California authority on that proposition?

9 MR. COLOMBO: That would be In re Robbins,
10 in which --

11 JUSTICE KENNEDY: That's the Robbins case.
12 Okay.

13 MR. COLOMBO: -- which is discussed in our
14 brief, as well as in the reply brief.

15 JUSTICE KENNEDY: All right. Thank you.

16 JUSTICE SOTOMAYOR: Counsel, I don't know
17 that you answered Justice Kennedy's question.

18 MR. COLOMBO: I'm sorry.

19 JUSTICE SOTOMAYOR: I don't know you
20 answered his question.

21 His question was: If you can deny or deny
22 on the merits, what's the difference between the two?

23 MR. COLOMBO: There really is no
24 substantive --

25 JUSTICE SOTOMAYOR: There's two choices, so

1 they have to have different meanings in some way.

2 MR. COLOMBO: I would submit that there is
3 no substantive distinction between an order that simply
4 reflects denied versus one that reflects denied on the
5 merits.

6 JUSTICE SOTOMAYOR: They showed us the
7 docket for that day --

8 MR. COLOMBO: Yes.

9 JUSTICE SOTOMAYOR: -- of the denial here,
10 and there were different ones. If it's the same court
11 taking action, why would they choose one over the other
12 for particular cases?

13 MR. COLOMBO: Well, I submit that there
14 could be any number of reasons, and not the least of
15 which this Court addressed itself in *Carey v. Saffold*,
16 just a couple of terms ago.

17 As the Court recognized, that sometimes the
18 State court may choose to include the phrase "on the
19 merits" to give a reviewing court an alternative basis
20 for understanding why relief was denied, or to let, for
21 example, a pro se petitioner, who are typically the ones
22 that present petitions for writs of habeas corpus in the
23 California Supreme Court, know that their case wasn't
24 denied because of some mere procedural technicality, but
25 because the claim itself was substantively meritless.

1 JUSTICE SOTOMAYOR: Well, that's what --
2 that's feeding into your adversary's argument, that when
3 the court does a summary denial, you don't know whether
4 it's procedural or merits.

5 That's his argument. You're adopting his
6 argument?

7 MR. COLOMBO: No. No. Our argument is that
8 it's a long-settled, established question of local
9 practice that when the California Supreme Court renders
10 a -- a silent denial, simply says "petition for writ of
11 habeas corpus denied," it is understood by the court's
12 litigants, has been well-established for over three and
13 a half decades: That is a merits decision.

14 JUSTICE GINSBURG: Well, what would the
15 California Supreme Court do if they all agree that this
16 application should be denied, but two of them think it's
17 for a procedural bar -- timeliness -- and then others
18 think it has no merit, and they say just "denied," but
19 there's no majority for either one?

20 MR. COLOMBO: In -- in that instance, then
21 the claim would be presumed -- assuming that the court's
22 order simply reflected "petition denied," again, it's
23 well understood that that would be a denial on the
24 merits.

25 JUSTICE GINSBURG: Even though, in fact, it

1 wasn't?

2 MR. COLOMBO: Well, we can't know that. In
3 fact, it would be purely speculative to suggest that
4 that's what the courts have done.

5 JUSTICE GINSBURG: So we -- so there is that
6 possibility -- even though there is that possibility, we
7 should assume it was on the merits.

8 What about -- I mean, you said this is three
9 decades, but we are told that the California Supreme
10 Court has this pattern of saying merits when it's on the
11 merits; giving a citation, if it's a procedural bar to
12 the -- a procedural fault; and when it says simply
13 "denied," that's most likely that they couldn't all
14 agree on a reason.

15 MR. COLOMBO: Well, I would respectfully
16 disagree with that suggestion, that because it simply
17 says "denied" without including the phrase "on the
18 merits," it's not a merits determination.

19 JUSTICE GINSBURG: But that's what they
20 would say if, in fact, they were divided, right?

21 MR. COLOMBO: I'm sorry. What?

22 JUSTICE GINSBURG: If, in fact, the court
23 was divided, all agree that the petition should be
24 denied, but there's no majority for any particular
25 reason, merits or procedure, they -- they would say

1 "petition denied," right?

2 MR. COLOMBO: Yes, if it's -- if it's a
3 straight silent denial, and the -- the court doesn't
4 invoke either a procedural bar to deny relief or forgo
5 the procedural bar and find that the claims are
6 substantively meritless in any event.

7 What I submit that the silent denial simply
8 means is the court didn't agree that there was a basis
9 for invoking a procedural bar; the claims were
10 meritless, and it simply orders the petition denied,
11 which is, again, well-understood. It's a
12 well-established practice in the -- in the State and
13 Federal courts in California that those silent denials
14 are merits determinations, which are entitled, then, to
15 AEDPA deference under the statute.

16 Even the Ninth Circuit, in the en banc
17 decision in this case, recognized that the California
18 Supreme Court's silent denial was a merits determination
19 which it then had to review.

20 JUSTICE SCALIA: Do -- does the court
21 sometimes deny explicitly on procedural grounds?

22 MR. COLOMBO: Yes. And when the court does
23 that, it will reflect such in its orders. That's
24 discussed in footnote 34 in the Robbins case, which we
25 discuss in our brief in this Court.

1 The court says when it's going to invoke as
2 a basis for denying relief on a Federal claim, it will
3 indicate that in its order. If it's relying on a
4 separate State procedural default, for example, if it's
5 a successive petition of the claimant's previously
6 raised on direct appeal or --

7 JUSTICE SCALIA: So you're saying that if
8 it's on both grounds, if they agree with both the
9 procedural and the merits ground, they may well just --
10 just deny without any explanation? But if they deny
11 only on the procedural ground, they will -- they will
12 say it?

13 MR. COLOMBO: Yes.

14 JUSTICE SCALIA: All right.

15 JUSTICE ALITO: If you looked back at a
16 sample of the cases in which they have simply said
17 "denied," would we find cases in which no procedural bar
18 was raised by the State?

19 MR. COLOMBO: I don't know the answer to
20 that question, because I haven't researched to find out
21 whether or not in any of those cases, like in this case,
22 the California Supreme Court directed the Attorney
23 General to file an informal opposition or some other
24 pleading that would have addressed that question.
25 Without knowing whether or not there was briefing on

1 this -- those particular cases, and there's no
2 suggestion in Respondent's brief that that was done, I
3 couldn't -- I couldn't guess on that.

4 JUSTICE BREYER: Was there a procedural
5 issue in this case before the California Supreme Court?

6 MR. COLOMBO: Yes.

7 JUSTICE BREYER: What was that?

8 MR. COLOMBO: A timeliness bar, among
9 others.

10 JUSTICE SOTOMAYOR: What was the basis of
11 that?

12 MR. COLOMBO: That the claim of ineffective
13 assistance could and should have been discovered at an
14 earlier time than when it was presented to the
15 California Supreme Court under California's timeliness
16 rule, which would require that counsel present the claim
17 of, in this case, ineffective assistance upon learning
18 of the factual basis to support such a claim.

19 JUSTICE SOTOMAYOR: So it took 14 months for
20 this petition to be filed to the State court. Do you
21 have cases that show whether those 14 months are
22 presumptively unreasonable under California law?

23 MR. COLOMBO: Yes. And that's basically the
24 Clark case that's also discussed in our brief.

25 JUSTICE SOTOMAYOR: So there is great

1 validity, you think, to your timeliness -- so this
2 timeliness claim. And despite that, you believe the
3 silent denial was an adjudication on the merits.

4 MR. COLOMBO: Yes, because I would submit
5 that when the State argued that the claim was
6 procedurally barred by reason of untimeliness and the
7 State court did not invoke that as a bar to relief, it
8 necessarily concluded that the claims were
9 unmeritorious, because they otherwise could have been
10 barred by a procedural bar, but they --

11 JUSTICE SCALIA: I thought you just told me
12 that if they -- if they agreed both with the procedural
13 ground and the merits ground, they could issue just --
14 just a denial without explanation.

15 MR. COLOMBO: That's --

16 JUSTICE SCALIA: Now you're telling me
17 that -- the opposite.

18 MR. COLOMBO: If I said that, then I
19 misspoke or perhaps I misunderstood the Court's
20 question.

21 What I'm suggesting is if the court invokes
22 as a basis for denying a Federal claim a State
23 procedural bar, it will reflect that in its order.

24 JUSTICE SCALIA: That will always be in the
25 order.

1 MR. COLOMBO: Yes.

2 JUSTICE BREYER: But if, in this case, they
3 did reject it on a procedural ground, and it was a
4 reasonable ground that they applied consistently, then
5 the Ninth Circuit or the Federal courts couldn't
6 consider the claim at all; is that right?

7 MR. COLOMBO: That's correct, assuming that
8 the Federal courts agreed that the State bar wasn't --

9 JUSTICE BREYER: If, in fact, the -- they
10 are right, if in fact that the State was correct that
11 this is procedurally barred -- they should have raised
12 it earlier; they didn't -- and if that was correct and
13 reasonable and proper under both Federal and State law,
14 then you shouldn't be in this subject at all; is that
15 right or not?

16 MR. COLOMBO: Yes. That's correct. Yes.

17 JUSTICE BREYER: So, normally, to decide a
18 matter on a substantive -- to have a presumption that
19 they were deciding it substantively rather than
20 procedurally will help a defendant, though not in this
21 case.

22 MR. COLOMBO: That's correct.

23 JUSTICE ALITO: But you didn't raise -- you
24 haven't argued that it's procedurally barred.

25 MR. COLOMBO: Not in the Federal court, no.

1 JUSTICE ALITO: So you may have waived that.
2 On the other hand, your opponent has, as I gather, until
3 they got here, never argued that it was based on
4 anything other than the merits. So they might have
5 waived that.

6 MR. COLOMBO: Yes. I would submit that --

7 JUSTICE ALITO: So everything might be
8 waived here.

9 (Laughter.)

10 MR. COLOMBO: Well, I'm not sure that -- we
11 never invoked a procedural bar in the Federal court
12 insofar as the presentation of these particular claims.

13 CHIEF JUSTICE ROBERTS: One thing that's not
14 waived is the second question, or the first, which is
15 the merits of the Strickland claim.

16 MR. COLOMBO: Yes.

17 CHIEF JUSTICE ROBERTS: And maybe this would
18 be a good point for you to switch to that.

19 MR. COLOMBO: I would -- I would be pleased
20 to discuss that with the Court.

21 We have argued in our brief, and I think
22 it's crystal clear: First of all, the Ninth Circuit's
23 grossly overbroad explication of a so-called Strickland
24 standard that would require counsel in every case in
25 which the prosecution presents forensic --

1 JUSTICE SOTOMAYOR: Did they say that?

2 MR. COLOMBO: I'm sorry.

3 JUSTICE SOTOMAYOR: Did they explicitly say
4 in every single case you have to consult an expert?

5 MR. COLOMBO: No. They didn't say that.

6 JUSTICE SOTOMAYOR: Or did they say, in the
7 circumstances of this case, given the nature of the
8 issues, that consultation would have been effective?

9 MR. COLOMBO: That is -- that certainly is
10 one reading of the Ninth Circuit's opinion. I submit
11 that the more correct reading, so to speak, would be if
12 the Court looks at the language that the Ninth Circuit
13 uses in -- in discussing this standard, they essentially
14 say, since counsel should have reasonably expected the
15 prosecution was going to present this forensic evidence,
16 he should have not only investigated it, he should have
17 consulted with experts. He should have presented them.
18 And I think --

19 JUSTICE SOTOMAYOR: We could take issue with
20 -- with the timing of that consultation, but let's
21 assume that it turns out afterwards that if he had
22 consulted an expert, that that expert would have told
23 him that one of those blood spots absolutely had to be
24 Klein's near the bedroom. You would have no quarrel
25 with saying it would have been ineffective for that

1 counsel to have failed to confer with an expert,
2 wouldn't you?

3 MR. COLOMBO: No, I would disagree with that
4 for the reasons --

5 JUSTICE SOTOMAYOR: You would say, even if
6 the expert were to give that kind -- an expert would
7 have given that kind of exculpatory information, that
8 that would not have been ineffective?

9 MR. COLOMBO: Let me start by saying this:
10 First of all, we can't know and no one can ever know
11 that Klein's, or Johnson's blood, for that matter, was
12 in this blood pool that the Ninth Circuit --

13 JUSTICE SOTOMAYOR: I'm not talking --

14 MR. COLOMBO: -- focused its attention on.

15 JUSTICE SOTOMAYOR: I gave you a
16 hypothetical different from the facts of this case. I
17 take the Ninth Circuit to be saying, if you're in an
18 area, and you are a lawyer, where you have no expertise
19 and your case depends on a technical issue, it behooves
20 you to at least talk to an expert to find out if you are
21 on the right track. And if you fail to and you get
22 something that's completely exculpatory, you're
23 ineffective.

24 So I posed the hypothetical: If an expert
25 would have looked at all of these test results and said,

1 that has to be Klein's blood there, it can't be
2 Johnson's for this reason, you are positing that even
3 under that circumstance there would not have been
4 ineffectiveness for the failure to consult with an
5 expert? Is that what you are telling us?

6 MR. COLOMBO: Yes. And the reason why I say
7 that is because it's important to remember that the
8 critical forensic evidence in this case, that the jury
9 was --

10 JUSTICE SOTOMAYOR: You keep wanting to
11 return to this case, and I respect why you want to, but
12 I am positing a hypothetical that underlies, I think,
13 the Ninth Circuit's point.

14 MR. COLOMBO: In response --

15 JUSTICE SOTOMAYOR: It may well be in this
16 case that the consultation would have resulted in no
17 prejudice. That's different from whether it was
18 effective to ignore a consultation. Those are two
19 different questions.

20 MR. COLOMBO: I suppose, accepting the
21 Court's hypothetical as stated, that counsel was aware
22 of and failed to consult with an expert knowing that
23 that testimony would be presented, could be deemed
24 deficient performance under --

25 JUSTICE SCALIA: Why -- do you think it

1 makes a difference whether the expert would have --
2 would have helped or not? I mean, counsel has to make
3 that decision of whether to call an expert ex ante, not
4 ex post. I mean, you -- we shouldn't evaluate his
5 decision on the basis of whether, even if it's a
6 1,000-to-1 long shot, it turns out that that testimony
7 would have been very successful.

8 Don't we have to examine it ex ante before
9 he knows what the result will be?

10 MR. COLOMBO: Yes, and I think it's
11 important to look at -- as this Court has described in
12 the Strickland case itself, we have to view from
13 counsel's perspective at that time. What did he know?
14 What could he have reasonably expected the prosecution's
15 evidence to be? How is he going to meet that evidence?
16 What tactical or strategic choices --

17 JUSTICE SCALIA: Well, Justice Sotomayor's
18 hypothetical would include the situation where he
19 doesn't know that the prosecution is going to introduce
20 any expert testimony. He knows that there is blood
21 there. He should -- he should get his own expert,
22 whether or not the prosecution uses one. Right?

23 I mean, can it never be ineffective
24 assistance not to call an expert where -- so long as the
25 prosecution doesn't have one on the other side?

1 MR. COLOMBO: No, I would submit that it
2 certainly could be deficient performance if counsel
3 fails to investigate readily available evidence that
4 could lead to exculpatory evidence in support of his
5 client's defense. That's the hypothetical, I believe,
6 that Her Honor asked a moment ago.

7 JUSTICE SCALIA: Well, could? Really? Is
8 that your test? It could -- there's some remote
9 possibility?

10 MR. COLOMBO: Again, I think it would be --
11 it's going to be fact-specific depending upon the kind
12 of case. It may well be in a given case that forensic
13 testimony would not be controverted, would not be
14 disputed. It wouldn't be relevant, necessarily, to the
15 defense.

16 Let's say, for example, that there was no
17 dispute that the person who committed the offense left
18 DNA evidence at the crime scene, and it's clear that the
19 DNA evidence suggests that the perpetrator was the
20 defendant. Then the court -- then the defense attorney
21 isn't going to profit by consulting an expert to dispute
22 an indisputable issue.

23 JUSTICE KENNEDY: But isn't it the reality
24 that sometimes the defense doesn't want to have an
25 expert, because the expert may turn up findings that are

1 adverse for him, and it's better for the defense counsel
2 to just leave things murky and argue to the jury that
3 the State didn't produce the evidence, either? That's a
4 perfectly legitimate strategy, isn't it?

5 MR. COLOMBO: It is. And I think that in
6 many instances that would -- that would inform a defense
7 attorney's strategic choices as to how to present the
8 defense in a given case.

9 JUSTICE GINSBURG: Mr. Colombo --

10 JUSTICE ALITO: Unless the -- sorry.

11 JUSTICE GINSBURG: Mr. Colombo, you -- you
12 say in any event, leaving aside the question of whether
13 there was ineffective assistance of counsel, even
14 assuming there was, there would -- there would be no
15 prejudice in this case.

16 MR. COLOMBO: That's correct. Yes.

17 JUSTICE GINSBURG: And could you just
18 summarize why you say there would be no prejudice?

19 MR. COLOMBO: Well, first of all, I think
20 it's important to recognize that the expert declarations
21 that were proffered by Respondent in support of his
22 habeas petition really don't challenge the testimony
23 that was presented in the State trial by the State's
24 experts, specifically the question of whether or not the
25 murder victim could have been moved from, supposedly,

1 the area outside the bedroom door onto the couch.

2 The testimony at trial suggested that that

3 distance was somewhere between about 20 and 25 feet.

4 There was no evidence at the crime scene that suggested

5 the victim had moved from the point where he was shot

6 with a fatal gunshot wound.

7 JUSTICE GINSBURG: What about the -- the

8 pool of blood? There was one expert affidavit that said

9 something about -- that Johnson, standing up, could not

10 have produced that amount of blood.

11 MR. COLOMBO: I think the actual expert

12 declaration suggested that the prosecution's theory, as

13 the expert described it, could be eliminated, because

14 Johnson could not have bled into the blood pool

15 sufficient to have formed it by merely standing and

16 waiting for the police to arrive.

17 I think it's important to realize the

18 distinction between the prosecutor's theory which he

19 propounded in his closing argument versus the evidence

20 that the jury actually heard at trial from the State's

21 own blood-spatter expert that suggested in order for --

22 for Klein to have been moved from the point where the

23 blood pool had formed onto the couch where his body was

24 discovered by the police, there would have been some

25 trail or some indicia, some evidence that would have

1 suggested that he had to have been moved from that
2 point.

3 And the more important question, I suppose,
4 would be, as the dissenting opinion pointed out in this
5 case: Why would the victim have been moved if he had
6 been shot at that location? Why would he have been
7 moved onto the couch?

8 It certainly makes no sense for another
9 victim, who's already shot, who's intoxicated, who's
10 wounded and moving around in the house -- why would he
11 have wanted to have moved the victim of the gunshot
12 wound to the head from point A to point B? It just
13 doesn't make any sense. And there has never been
14 anything in any of Respondent's experts' declarations
15 that suggests a rational explanation for how or why that
16 could have happened. Without --

17 JUSTICE GINSBURG: On the -- on the no
18 prejudice issue, are you relying just on what
19 happened -- what was found at the scene of the crime? I
20 mean, you said it's implausible that Klein would have
21 been moved with no trail of blood at all. So, you say,
22 therefore no prejudice.

23 Any -- anything else that goes into your no
24 prejudice argument?

25 MR. COLOMBO: Yes. I think for all of the

1 reasons that are discussed in the dissenting opinion at
2 pages 193a to 194a of the petition for writ of
3 certiorari -- excuse me -- of the appendix.

4 As the dissenting opinion points out, it
5 certainly was -- there's no evidence in the various
6 experts' declarations that suggests, first of all, why
7 the jury would have believed Respondent's trial
8 testimony that after having essentially partied with the
9 two victims for several hours the night before, they
10 suddenly leave, go back to their place of employment,
11 come back two hours later to return property and a
12 firearm to another occupant of the house that they had
13 no reason to believe was actually there; then they are
14 suddenly surprised by these two victims; that there is a
15 spontaneous gunfight that ensues involving a firearm
16 that's never found, that's never attributed to either of
17 the two victims in the house, that could have only been
18 attributable to the Respondent himself.

19 So the jury had all of that evidence to
20 consider, and we balance that against these -- as I,
21 again, described them -- inconclusive and speculative
22 expert opinions that are proffered in support of
23 Respondent's habeas petition. The jury could not have
24 been persuaded to find the defendant not guilty, even
25 had that evidence been introduced.

1 So, necessarily, Petitioner could --
2 Respondent could not have been prejudiced by the failure
3 to introduce that evidence, assuming that that evidence
4 was, in fact, available and could have been presented in
5 this case at the time of Respondent's trial.

6 JUSTICE ALITO: Was there additional
7 physical evidence found not at the scene?

8 MR. COLOMBO: Yes. In fact, the -- the
9 other thing that really tied the Respondent into this
10 crime was that there was an expended casing at the crime
11 scene that matched perfectly with a loaded firearm
12 magazine with the exact same kind of bullets and a box
13 full of the same exact bullets in the Respondent's house
14 when the officer served a search warrant, along with the
15 stolen gun safe and some evidence that there was
16 marijuana there, which the victim -- the surviving
17 victim was -- admitted to be a marijuana dealer.

18 JUSTICE ALITO: Could I ask you a question
19 about California procedure?

20 Is what happened here unusual? Is there --
21 doesn't -- does the prosecution have an obligation to
22 provide notice before trial of its intention to call
23 expert witnesses?

24 MR. COLOMBO: Yes. Under California
25 discovery rules, the prosecution would have to disclose

1 to the defense any evidence it intends to introduce,
2 either by way of lay testimony or expert testimony,
3 before the trial commences.

4 JUSTICE ALITO: And if the defendant
5 requests that, does -- what's the defendant's reciprocal
6 obligation, if any?

7 MR. COLOMBO: The defendant would have to
8 disclose any witnesses that he or she intends to
9 introduce at trial, including expert testimony and any
10 reports supporting such experts.

11 Unless the Court has any further questions,
12 I'd like to reserve my remaining time.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 Mr. Colombo.

15 MR. COLOMBO: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Gardner.

17 ORAL ARGUMENT OF CLIFFORD GARDNER

18 ON BEHALF OF THE RESPONDENT

19 MR. GARDNER: Mr. Chief Justice, and may it
20 please the Court:

21 The Court has invited briefing in the
22 additional question presented on the application of
23 AEDPA in this case, and in light of the Court's many
24 questions this morning, I want to address that. But I
25 did want to clear up one piece of information that seems

1 to be confusing in the record, and if I can start with
2 that.

3 This was in response, I think, to a question
4 you asked, Justice Ginsburg, regarding the -- the
5 prejudice prong of the Strickland claim. And the
6 question was: Why is it -- why is it not -- why is it
7 harmless? And counsel suggested that there was an
8 absence of blood between the blood pool and the couch.
9 Detective Bell testified to that.

10 And I just want to clear up, because I know
11 this -- this bit was confusing in the briefs, too: That
12 is not what Detective Bell testified to. If you look at
13 pages 181 and 195 in the reporter's transcript in
14 Exhibit R5, you will see that Detective Bell says, yes,
15 there were drops leading away from the couch; yes, there
16 were drops leading away from the blood pool.

17 And in fact, Exhibit R5 is a picture of the
18 couch, and you can indeed see --

19 JUSTICE GINSBURG: I thought that the point
20 was that there was no trail from the bed. I mean, the
21 theory was that Klein was removed from the bed to the
22 couch.

23 And I thought that the point that the --
24 that counsel for the State emphasized was, did the -- if
25 someone were moved from the bed, taken to the living

1 room couch, you would have expected to see a trail of
2 blood from the bed. And there wasn't that.

3 MR. GARDNER: Indeed. But the State's
4 theory -- the defense theory was that the body had been
5 moved from the blood pool -- not the bed -- the blood
6 pool to the couch. And the State's response, in its
7 briefing and today at oral argument, was that there was
8 no blood trail between the blood pool and the couch.
9 And, indeed, that's not what Detective Bell testified
10 to. He said there were drops outside the blood pool,
11 drops outside the couch, and when asked if there was
12 blood in the carpeting in between, he said he did not
13 remember how much blood there was in between.

14 CHIEF JUSTICE ROBERTS: So -- so the idea is
15 that Johnson drags Klein. This is your theory, right?
16 Because you are not suggesting he could have lifted
17 Klein and walked him over, are you?

18 MR. GARDNER: Yes, I think he could have
19 lifted him, Your Honor.

20 CHIEF JUSTICE ROBERTS: Really? Did you
21 have an expert testify to that?

22 MR. GARDNER: No.

23 CHIEF JUSTICE ROBERTS: Did you get expert
24 testimony about that or an expert report about that?

25 MR. GARDNER: No. There was no -- there was

1 no expert testimony about the ability of someone to --
2 to lift a weight.

3 CHIEF JUSTICE ROBERTS: But you think you
4 can assume that he could lift the weight. How much did
5 Klein weigh?

6 MR. GARDNER: I think he weighed between 150
7 and 160 pounds.

8 CHIEF JUSTICE ROBERTS: And Johnson?

9 MR. GARDNER: I think about the same, Your
10 Honor.

11 CHIEF JUSTICE ROBERTS: Okay. And you say
12 that he could have dragged him from the pool to the
13 couch because there were drops along the way.

14 MR. GARDNER: I'm saying that -- that the
15 testimony and -- and the suggestion that there was no
16 trail of blood between the blood pool and the couch is
17 not consistent with what Detective Bell testified to.

18 JUSTICE SOTOMAYOR: Mr. --

19 JUSTICE ALITO: And what is your theory
20 about why he -- why Johnson would have a motive to go
21 through this exertion? He's -- he's wounded. And let's
22 say there really was a gun -- a gun fight, and Klein
23 fell someplace else. Johnson wants to make it seem like
24 Klein was -- that there wasn't any gun fight.

25 Why -- why is it so valuable to him to move

1 Klein's body from the location where you think he fell
2 to the couch?

3 MR. GARDNER: Well, if he's -- if he falls
4 in the bedroom doorway, Your Honor, and he falls in a
5 crossfire, then Johnson is in some ways culpable. Now,
6 we don't know what the extent of his culpability is, but
7 if he's involved in firing the first shot, he is
8 culpable.

9 Putting Klein on the couch and having as
10 State's theory that Klein is shot in cold blood on the
11 couch eliminates his culpability, or at least eliminates
12 the risk of it.

13 JUSTICE ALITO: But he could have -- if he's
14 going to make up a story, he could have made up the
15 story that Klein jumped up and he was shot without
16 having engaged in any firing himself, and he fell
17 wherever he fell. Putting him on the couch doesn't seem
18 to -- unless I'm missing something and I wish you'd
19 explain it -- doesn't seem to aid this purportedly false
20 story very much.

21 And if you weigh whatever benefit there is
22 from that against the exertion of moving this guy, it
23 doesn't seem to make a whole lot of sense. But
24 maybe there's something there that's not apparent.

25 MR. GARDNER: Well, I can only say that if

1 Klein is caught in a crossfire, then Johnson is
2 culpable. And let's remember, he has drugs in the
3 house. He has scales. He has all sorts of drug --

4 JUSTICE SCALIA: Why wouldn't he wipe up the
5 blood? I mean, what -- what good is it to simply put
6 him on the couch when you leave a pool of blood showing
7 that that's where he was shot?

8 MR. GARDNER: Yes, I don't doubt that in
9 retrospect he could have come up with a better plan,
10 Your Honor.

11 (Laughter.)

12 MR. GARDNER: But I do think it's important
13 to realize that this plan, at least on its face and
14 initially, in terms of his adrenaline response, is going
15 to get him out of a crossfire scenario.

16 CHIEF JUSTICE ROBERTS: What other --

17 JUSTICE SOTOMAYOR: Counsel, there's a lot
18 of talk about the importance of this pool of blood, but
19 as I read Detective Bell's testimony, he never posited
20 -- or talks about how that pool was formed. Only your
21 expert does that.

22 What Bell does talk about, however, is that
23 there's a high-velocity blood splatter in front of the
24 couch and that the pooling of blood on Klein's face
25 shows that he was shot there.

1 Your experts do nothing to refute that
2 testimony, which was really the basis of -- of Bell's
3 testimony. He had nothing to say about the pool of
4 blood. He talked about why Klein was shot where he was
5 shot. And there's no expert testimony to refute that.

6 So how do you get past there being a
7 reasonable probability of a different verdict when there
8 is nothing to refute the critical testimony at issue,
9 that Klein was shot where he was shot because there's
10 high-velocity blood splatter in front of him and because
11 the pooling on his face shows that?

12 MR. GARDNER: Let's take both the
13 high-velocity blood spatter and the pooling, Your Honor,
14 but let me start with the predicate. And you are right,
15 Detective Bell did not testify at all about the
16 formation of the blood pool, and that's why this case
17 isn't about anticipating a State's expert about the
18 blood pool, but about getting your own for your own
19 case.

20 But turning to the specifics of your
21 question, the high-velocity blood spatter. It actually
22 wasn't in front of the couch, Your Honor. It was to the
23 side and below the arm. And let's remember Detective
24 Bell's testimony about how the homicide occurred,
25 because the State's theory was not that Pat Klein was

1 shot while he was lying on the couch, but that he was
2 sitting on the couch.

3 And so what's -- what's most interesting
4 about the high-velocity blood spatter, since he's shot
5 in the head, is that there is none on the wall
6 immediately behind the couch. This was a matter of some
7 confusion in the briefs as well, but I think it's been
8 cleared up. There's no high-velocity blood spatter
9 behind, on the pristine white wall.

10 So the question is: If he's shot while
11 sitting up, the high-velocity blood spatter that Bell
12 testifies to travels, oh, about 4 feet over the couch,
13 and then two drops sink down. Now, in terms of the jury
14 evaluating that testimony, it's important to note that
15 Detective Bell gave a description of what high-velocity
16 blood spatter is, and he said it's a fan-like pattern of
17 atomized blood. And when you look at these two drops,
18 these two drops alone that travel 4 feet and then drop
19 straight down to fall on a plastic bag, you see, as
20 defense counsel pointed out in his closing argument,
21 that they are the same size as blood drops found in the
22 kitchen on Exhibits R18 to R22.

23 And Detective Bell's entire theory for why
24 these were high-velocity was their size. There was
25 never any dispute that there was no shooting in the

1 kitchen.

2 CHIEF JUSTICE ROBERTS: Counsel, what other
3 expert evidence should Richter's counsel have pursued
4 before deciding upon his course of action in this case?

5 Put aside the blood-spatter expert. What
6 other experts did he need to consult?

7 MR. GARDNER: Putting aside the
8 blood-spatter issue -- and these were raised in the
9 lower court but not addressed -- there were -- he
10 promised the jury ballistics testimony as well, which he
11 didn't produce.

12 CHIEF JUSTICE ROBERTS: Okay. We have got a
13 blood-spatter expert, a ballistics expert. Go on.

14 I thought, in their habeas proceeding, you
15 said he should have consulted a serologist and a
16 pathologist. Okay, that's four. Why wouldn't he have
17 wanted to talk to an expert on the effects of alcohol
18 and drugs on people's different perceptions of the
19 events?

20 MR. GARDNER: Well, I think the chief reason
21 is, is that that wasn't part of his theory. If you
22 look -- and really, the guide to this, Your Honor, is
23 defense counsel's own theory, because defense counsel
24 stands up in opening statement and he promises the jury
25 a theory. And the theory isn't you're going to hear two

1 stories, and you have to assess credibility.

2 His theory, as he explained to the jury, was
3 the physical evidence will show you Pat Klein was not
4 shot on the couch.

5 JUSTICE ALITO: Well, he had not received
6 notice from the State that they were going to call any
7 experts, so why wasn't it reasonable for him to assume
8 they're not going to call any experts, they're not going
9 to be able to pull experts out of their pocket in the
10 midst of the trial, and the judge isn't going to allow
11 them to do that without providing a -- without granting
12 a recess? What seems to have happened here seems pretty
13 unusual.

14 MR. GARDNER: Well, if this case were about
15 anticipating the State's decision to call an expert, I
16 would agree, but it's not. And the reason it's not is
17 because we have an insight into what defense counsel's
18 theory of the case was before the State ever started its
19 case, Your Honor. I mean --

20 CHIEF JUSTICE ROBERTS: I thought the Ninth
21 Circuit said that part of the ineffective assistance was
22 failing to consult an expert in planning his defense and
23 in preparing his defense, not simply responding to the
24 State's expert in the middle of trial.

25 MR. GARDNER: I agree, Your Honor, and if I

1 said something that sounded like I didn't, then I
2 misspoke. My point is that that's exactly the theory.
3 Once defense counsel decides on his defense -- in this
4 case, I think he picked the right defense. He told the
5 jury the physical evidence would prove Pat Klein wasn't
6 on the couch, and he could have done that.

7 But despite promising the jury that the
8 physical evidence would prove this, he never consulted
9 with someone. And once --

10 JUSTICE SOTOMAYOR: Could you explain the
11 blood pooling in the face for me? You talked about the
12 high-velocity, but --

13 MR. GARDNER: Yes, I did. I didn't get back
14 to that. Thank you, Your Honor.

15 The testimony was, of course, about the
16 blood pattern flow on the face. And when you read
17 Detective Bell's testimony carefully, that testimony has
18 nothing to do with where Pat Klein is shot. It has to
19 do with the angle of his face after he's shot. So if
20 he's shot on the bedroom -- in the bedroom doorway and
21 falls and that's the angle, the blood flow would be the
22 same. So it really -- the blood flow pattern really has
23 little to do with where he was shot, but just the angle
24 of his face.

25 And getting back to the blood spatter

1 itself, the blood pool itself, what's interesting in
2 this case now is that, even after all these years, the
3 State has never disputed the fact that the absence of
4 satellite drops means the State's theory is false.

5 Gunner Johnson could not have deposited that
6 blood, because there's no satellite drops, which means
7 it had to come from another source. The only other
8 source is Pat Klein.

9 CHIEF JUSTICE ROBERTS: Did I understand you
10 -- I just want to step back to the prior answer.

11 You think what counsel did here would have
12 been effective assistance but for exactly what he said
13 in the opening statement?

14 MR. GARDNER: If -- I'm sorry. If the
15 question is, but for the opening statement, would we
16 still have this argument, yes, although it would be much
17 more difficult to establish what his theory was. The
18 opening statement doesn't change the Strickland
19 analysis. It simply gives us an insight, an easier path
20 into knowing what counsel's theory was, much like --
21 much like the case of Wiggins v. Smith, where the Court
22 looked at defense counsel's opening statement in the
23 penalty phase repeatedly to see what was his theory and
24 what didn't he do. And when there was a suggestion made
25 in Wiggins v. Smith that, in fact, counsel's theory was

1 something else, the Court said no, look at his opening
2 statement. We know what his theory was.

3 So it doesn't change the standard, but it
4 gives us a very keen insight into exactly what he was
5 thinking and when he was thinking it.

6 JUSTICE GINSBURG: Mr. Gardner, what about
7 the argument that all this is beside the point because
8 the argument for prejudice is so weak, given all the
9 other evidence that Mr. Colombo referred to?

10 MR. GARDNER: Well, it will come as no
11 surprise to know that I disagree with that argument,
12 Your Honor, and -- and for a couple of reasons.

13 The -- the cases really came down to Gunner
14 Johnson v. Petitioner Richter. Who was the jury going
15 to believe? Even on the record that counsel has
16 described, the jury deliberated 14 hours. And remember,
17 that record included a surviving eyewitness, and if you
18 believe the surviving eyewitness, the case is over.

19 The jury deliberated over 14 hours, asking
20 for reinstruction twice and a rereading of testimony
21 three times. And I think there's good reason for that
22 pause.

23 JUSTICE KENNEDY: Well, of course, Johnson
24 had given so many inconsistent statements at the outset
25 that he was a weak prosecution witness.

1 MR. GARDNER: I -- I --

2 JUSTICE KENNEDY: It seems to me the defense
3 could have pinned a great deal of hope on that.

4 MR. GARDNER: Well, I think -- actually, I
5 agree with the predicate of the question, Your Honor,
6 and that is Johnson had given a number of stories. He'd
7 given four or five different stories. And after all, he
8 knew both Branscombe and Richter. When he first spoke
9 to the 9-1-1 people, they said: What happened? He
10 said: Five people came in and shot me. Then he said
11 four, then he said three. And when they said, Who, he
12 said: I don't know. So clearly Gunner Johnson was a
13 compromised witness, Your Honor.

14 But the fact that the State has a
15 compromised witness is not the reason not to research
16 the physical evidence and enhance your client's
17 credibility. It's more of a reason to do it.

18 JUSTICE GINSBURG: What do you do with the
19 ammunition back at Richter's home, that the -- the gun
20 safe is found there and the unlikely story about them
21 going -- having the zeal to clean up their workplace and
22 then coming back?

23 MR. GARDNER: Well, let me take them one at
24 a time, Your Honor. And in a sense, the ammo and the
25 gun safe, the answer is -- is very similar. All parties

1 agreed in this case that several weeks before the
2 incident, Gunner Johnson had stored all his belongings
3 at my client's house. And, so, the only dispute was had
4 the -- the gun safe included. And this is one of the
5 unusual features, is that the State's theory requires us
6 to believe that this happened so he could rob a gun safe
7 that had been at his house for weeks.

8 The question was had -- had the material,
9 the gun safe and the ammo -- who's was it and had it
10 been taken back to Gunner's house? The ammo is found in
11 a place with two other things. It's found with a scale
12 used for measuring drugs, and it's found with shotgun
13 ammunition.

14 Now, the record shows that Gunner Johnson
15 had a shotgun, and Gunner Johnson was a drug dealer. So
16 the defense theory, of course, is that this ammo wasn't
17 my client's. It was Gunner Johnson's and hadn't been
18 moved back. Similarly, as to the safe, there was
19 conflicting testimony as to whether the safe had ever
20 been moved back.

21 So, that really is the explanation. And
22 that, I think, is why the jury had such pause about this
23 case when it heard the case.

24 CHIEF JUSTICE ROBERTS: You mean the case
25 against Gunner you've just described, would it have been

1 enough, and wouldn't that have justified counsel's
2 decision to focus on credibility rather than expert
3 physical evidence?

4 MR. GARDNER: I think not. And -- and --
5 and we know this again for two reasons. And let me
6 start by saying the fact is that when counsel was asked,
7 that wasn't the reason he gave. It's not as if he -- he
8 came to the depo and he said this was my tactical
9 reason, and so we can say, okay, that's a reasonable
10 tactical decision. That wasn't the decision -- reason
11 he gave.

12 When asked did you decide not to present or
13 why didn't you present this blood-spatter testimony, he
14 said I simply didn't know it was out there. And after
15 all, let's keep in mind this was only his second
16 trial -- his second murder trial. He didn't know what
17 was out there. So, he didn't make that tactical
18 decision. And that's the first reason.

19 The second reason, I think, is that -- and
20 almost every case that has ever addressed this -- and I
21 have cited most of them -- has come to the same
22 conclusion. When there is a credibility determination,
23 when a defense -- any defense lawyer worth his salt
24 knows that there's a credibility determination to be
25 made, the jury is going to believe either this story or

1 my client's story, it at least behooves you to
2 investigate to see if the physical evidence can support
3 your position. You can always make --

4 CHIEF JUSTICE ROBERTS: Did -- did counsel
5 have to investigate the other aspects? I mean, we're
6 talking -- we're focusing on the scene where the
7 shooting took place. Did he have to consider experts
8 with respect to the bypass, where they threw the guns,
9 Richter's apartment, the vehicle that was used? One
10 thing counsel said is he thought about hiring a tire
11 expert because of the vehicle. He has to look at the
12 possibility of expert testimony affecting every aspect
13 of the various scenes that were pertinent in this claim?

14 MR. GARDNER: I don't believe so. And -- and
15 the reason, again, comes back to the same focus this
16 Court had in Wiggins, another failure-to-investigate
17 case. What we know is that counsel suggested to the --
18 told the jury in opening statement, this is about the
19 physical evidence. The physical evidence will show
20 this.

21 When counsel -- when it's clear that that's
22 counsel's position in a case, it's simply application of
23 the Strickland test. It's unreasonable for counsel not
24 to at least have investigated the physical evidence that
25 he told the jury would show that Klein wasn't on the

1 couch.

2 CHIEF JUSTICE ROBERTS: What does -- what
3 happens -- I know you have an answer that that's not
4 this case, but what -- what happens if the defendant
5 tells his lawyer, look, I did it, I'm guilty? And the
6 lawyer decides that the best thing to do is try to pin
7 it on a guy whose nickname is Gunner?

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Does -- does -- what
10 else is the lawyer supposed to do? He thinks no matter
11 what -- what physical evidence is found, it's got to cut
12 against his client because his client did it.

13 MR. GARDNER: Well, in a situation where --
14 where counsel's investigation will not be exposed to the
15 prosecutor, and -- and there was questions before about
16 how California procedure works. And, indeed, once you
17 decide to name -- to call a witness, you name him and he
18 becomes, you know, exposed through cross-examination and
19 for investigation. But at least in terms of your
20 private investigation of a case, the ABA standards are
21 fairly clear that even an admission of guilt doesn't
22 affect your ability or your obligation to investigate.

23 JUSTICE KENNEDY: But if -- if the expert
24 says that the pool of blood all belonged to -- I guess
25 it's Johnson, I certainly think ethically that you could

1 not argue otherwise to the jury?

2 MR. GARDNER: I think ethically you couldn't
3 argue otherwise to the jury.

4 JUSTICE KENNEDY: All right. So, that's a
5 reason why defense counsel in this case and, the Chief
6 Justice puts, in many cases prefers not to have experts,
7 just so they can punch holes in the State's case.
8 That's a -- that's a legitimate strategy. And this
9 counsel was very -- an adept cross-examiner. There's no
10 doubt about that.

11 MR. GARDNER: I -- I don't disagree, except
12 that again we come back to the -- the notion from
13 Wiggins, which is you can't defend a tactical judgment
14 that wasn't made. And, in fact, when counsel was asked,
15 is this the reason you did this, he said no. I didn't
16 call a blood-spatter expert because I didn't know it was
17 out there. I --

18 JUSTICE SCALIA: Can I come back to your
19 response to the Chief Justice's question about counsel
20 who knows that his client is guilty, and you say the ABA
21 standards say that even when that's the case, you have
22 an obligation to get an expert witness to confirm that
23 the client is --

24 MR. GARDNER: I'm sorry. I thought -- I
25 thought the hypothetical was counsel's client has said

1 he was guilty, not that counsel knew he was guilty.

2 JUSTICE SCALIA: Right.

3 MR. GARDNER: The ABA standards say that the
4 duty to investigate, the broad duty to investigate on
5 defense counsel exists irrespective of the client's
6 statements to his lawyer.

7 JUSTICE SCALIA: We've never adopted the ABA
8 standards, have we?

9 MR. GARDNER: In that regard, no, you
10 haven't.

11 JUSTICE SCALIA: That standard seems to me
12 quite silly.

13 (Laughter.)

14 MR. GARDNER: I -- I -- you know, I can
15 understand that, Your Honor, but from practical
16 experience, I will tell you the fact that a client
17 admits to something doesn't mean he did it or she did
18 it. That's the real world consequence we face as
19 defense lawyers. Often our clients tell us things, and
20 you can't always believe them, whether they say they're
21 innocent or whether they say they're guilty.

22 JUSTICE SCALIA: Well, I'm sure they often
23 say they're innocent when they're guilty, but I'm --
24 I'm -- I'm astounded that they often say they're guilty
25 when they're innocent.

1 MR. GARDNER: Well, you know, I would
2 suggest the false confession literature that has come
3 out, and there's plenty of it to show that, in fact,
4 that's not an infrequent occurrence.

5 JUSTICE SCALIA: To -- to the police,
6 perhaps, yes, but to his own counsel? I -- I'm -- I'm
7 not aware of any literature to that effect.

8 MR. GARDNER: In which case I'll come back
9 to the answer the Chief Justice suggested moments ago,
10 that that's not my case. It seems like a safe haven at
11 this point.

12 (Laughter.)

13 CHIEF JUSTICE ROBERTS: Counsel, your
14 case -- your case does involve the AEDPA issue. Perhaps
15 you want to turn --

16 MR. GARDNER: It does, and so --

17 CHIEF JUSTICE ROBERTS: -- to that now.

18 MR. GARDNER: I was trying to use that as a
19 segue into that, Your Honor. Thank you.

20 CHIEF JUSTICE ROBERTS: It worked.

21 MR. GARDNER: It worked. That rarely
22 happens, Your Honor.

23 And let me turn then to the AEDPA issues in
24 this case, because on March 28, 2001, this California
25 Supreme Court denied the petition for writ of habeas

1 corpus in my client's case with an order that said the
2 petition for writ of habeas corpus is denied. That same
3 day in five other cases, noncapital cases, the
4 California Supreme Court denied the writ saying the
5 petition for writ of habeas corpus is denied on the
6 merits. And the State's position here today and in the
7 briefing is that the Federal court should simply ignore
8 that difference. And I don't believe that's the case
9 for several reasons.

10 JUSTICE GINSBURG: What is your answer to
11 the -- to -- to the representation that In re Robbins
12 settled that when the California Supreme Court says just
13 denied, it's on the merits?

14 MR. GARDNER: Well, actually I agree and I
15 disagree. In re Robbins does settle the matter from a
16 State law perspective, but not as the Attorney General
17 has suggested. In re Robbins says a few things.

18 First, it says that when we deny a case on
19 the merits, we add the phrase "on the merits."

20 Then it says that when we find a procedural
21 default, we cite to that default so that everyone knows.

22 And then it says -- and this was in response
23 to a question I think you asked, Justice Scalia -- they
24 say a third thing. They say sometimes we'll find both,
25 that it's meritless and it's defaulted, and we will say

1 both. We will cite a default, and we will say it's
2 denied on the merits as well, trusting that the Federal
3 courts will give deference to --

4 JUSTICE BREYER: But what they cite it for,
5 actually, is they make a slightly different argument in
6 their brief. They say going back to 1974, there are at
7 least three cases in the Ninth Circuit that have said
8 when the California Supreme Court says nothing, just
9 denied, we take that as a decision to reach the Federal
10 issue and deny it on the merits.

11 Now, not in your case, but in most cases
12 that will benefit a defendant, because it will avoid the
13 question of whether there's an adequate and independent
14 State ground of a procedural nature. So, what they're
15 saying is that that's the Ninth Circuit's statement in
16 three cases, and the California Supreme Court over a
17 course of 30 years has never said to the contrary, which
18 it had plenty of opportunity to do, and in other
19 instances where the Ninth Circuit was wrong, it did do
20 it.

21 So, that, I think, is a fairly strong
22 argument. Now, you're going to -- the only reason that
23 you're not out of court on your own interpretation is
24 because you'll say that the State waived the procedural
25 issue. And then they'll come back and say so did you.

1 So, what -- what is your response to all
2 that?

3 MR. GARDNER: Well, I -- there's a whole
4 bunch there, so let me see if I can -- if I can tease it
5 out. It is true that the Ninth Circuit has had this
6 process, this procedure for a long time, and, of course,
7 it developed in a pre-AEDPA world, when the fact whether
8 something was on the merits or not didn't really matter.
9 The only question was, Was it defaulted? And if it was
10 defaulted, it might bar Federal review. Whether it was
11 on the merits was really irrelevant because, before
12 2254(d), that really didn't matter.

13 So that's where -- and I agree with the
14 State -- that's where those cases come from. I don't
15 believe, however, that the waiver argument is really
16 implicated here, Your Honor.

17 JUSTICE BREYER: Well, look, for example, in
18 Hunter v. Aispuro -- they quote it as saying the
19 following: The California Supreme Court's denial of a
20 State habeas petition, quote, "without comment or
21 citation constitutes, a decision on the merits of the
22 Federal claims." End quote. And then they have three
23 other cases roughly to the same effect.

24 Now, what you're saying is that this Court
25 should hold to the contrary, and by the way, in doing

1 that, we will bar many Federal habeas petitioners from
2 the Federal courts, because what it will mean is that
3 there is an adequate and independent State ground in
4 case after case, which perhaps is an irrelevant feature.
5 But, nonetheless, the silence of the California Supreme
6 Court is significant, I think, when faced with those
7 pretty clear interpretations of what their silence means
8 by the Ninth Circuit.

9 MR. GARDNER: Yes. And actually if the
10 Ninth Circuit were the only voice in the fray, Your
11 Honor, I think the argument would be stronger, but the
12 Ninth Circuit's voice isn't the only voice in the fray,
13 and that brings me to Ylst. In Ylst, of course, the
14 Ninth -- and Ylst v. Nunnemaker is a case which is part
15 and parcel of this history from the Ninth Circuit of
16 saying silent denial is on the merits.

17 In Ylst v. Nunnemaker that's exactly what
18 the Ninth Circuit said. And it came to this Court, and
19 the State actually argued that it wasn't on the merits.
20 And, indeed, this Court held that you cannot tell from a
21 silent denial whether it's on the merits or not. That's
22 the first response, Your Honor, is that there are
23 additional voices other than the Ninth Circuit. The
24 second is that well after Hunter v. Aispuro comes the
25 Robbins footnote and in the Robbins footnote --

1 JUSTICE SOTOMAYOR: I'm having a very hard
2 time with your reliance on that footnote because the
3 very last paragraph of that footnote says when
4 Respondent's asserts -- and I'm shortening the
5 introductory line -- a State procedural bar and when
6 nevertheless our order disposing of a habeas corpus
7 position does not impose the proposed bar or bars as to
8 that claim, that signifies that we have considered
9 Respondent's assertion and have determined that the
10 claim or subclaim is not barred on the procedural
11 ground.

12 MR. GARDNER: Yes.

13 JUSTICE SOTOMAYOR: So the footnote itself
14 says unless we invoke the procedural bar, we're not
15 applying it.

16 MR. GARDNER: I think that's right, Your
17 Honor, but that's not the only thing the footnote says.
18 The footnote says when we deny on the merits, we say on
19 the merits; when we cite a procedural bar, we mean a
20 bar; and if the State has raised a bar, as they did
21 here, and we don't rely on it, that means we haven't
22 relied on the procedural bar.

23 JUSTICE SOTOMAYOR: Right.

24 MR. GARDNER: When you put those together,
25 what it means is there was no majority for a decision on

1 the merits, otherwise they would have said on the
2 merits. There was no majority for a decision on
3 procedural default, otherwise they would have said
4 default. And that's what a silent denial means, and
5 that's exactly what this Court said in Ylst. You cannot
6 tell because there are seven judges, there are different
7 claims, there are different possibilities. That's why a
8 silent denial is there in State court. It's
9 precisely --

10 JUSTICE SCALIA: Excuse me. There --
11 there's no majority for either ground, and yet you find
12 in favor of the State? How can that be?

13 MR. GARDNER: Well, I -- you say either
14 ground. There are -- there are multiple grounds for
15 procedural default, Your Honor, under State law. There
16 are many possible procedural defaults.

17 JUSTICE SCALIA: Yes, but you're -- you're
18 positing that the only time they do not say either
19 procedurally barred or on the merits is when they don't
20 have a majority for either one?

21 MR. GARDNER: That's correct.

22 JUSTICE SCALIA: How can they render a
23 decision in favor of the State, then, if there's no
24 majority for either disposition?

25 MR. GARDNER: The question is, Why

1 deliberate to a majority when they sit around the
2 conference, the seven judges -- let's say two judges
3 believe there's a procedural default of untimeliness.
4 Two judges think it's timely but think it should have
5 been raised below. Two judges think it's both timely
6 and it didn't need to be raised below, but it hasn't
7 been pled with sufficient specificity, and one judge
8 thinks it's improper on the merits. There's seven
9 judges; they all believe it should be denied, but
10 there's no majority for any position.

11 There's no reason for the California Supreme
12 Court -- and this is addressed more in the amicus brief
13 by the California Academy of Appellate Lawyers. There's
14 no reason for the California Supreme Court at that point
15 to spend a day, two days debating it when all seven
16 judges agree there's a reason to deny the petition.

17 JUSTICE ALITO: But under your example,
18 isn't there a majority for the proposition that there's
19 a procedural default, but disagreement as to the
20 particular procedural default?

21 MR. GARDNER: That could be. And -- and
22 what the California -- I'm sorry.

23 JUSTICE ALITO: If it's just a binary choice
24 between procedural default and merits, isn't there --
25 and everybody agrees it should be denied, then there's

1 going to be a majority for one or the other, right?

2 MR. GARDNER: That is true, and I have been
3 unclear and I apologize for that. It is not a binary
4 choice between default and merits; it's a choice between
5 which default and merits. And there are many defaults
6 under State law. When the court denies on timeliness
7 grounds, it will cite Clark. When the Court finds that
8 it has been pled with insufficient specificity, it will
9 cite Swain --

10 JUSTICE ALITO: Is there more than one
11 possible procedural problem here?

12 MR. GARDNER: Yes.

13 JUSTICE ALITO: I thought it was just
14 timeliness.

15 MR. GARDNER: Well, timeliness was the only
16 one raised by the State, but -- but to be sure, like
17 this Court, the California Supreme Court has never been
18 bound in terms of its procedural default findings by
19 what has been raised and --

20 JUSTICE SOTOMAYOR: What others could apply
21 in this case?

22 MR. GARDNER: Well, at the risk of not
23 wanting to argue against my client, I could give you
24 some -- some that could apply that haven't been
25 suggested and, therefore, most certainly are waived.

1 But the California law often requires that you file your
2 habeas petition in a lower court first. Reviewing
3 courts often deny petitions for failure to file in a
4 lower court first.

5 There is a requirement that says you must
6 plead with sufficient specificity. That's often relied
7 on by reviewing courts. There is a requirement that
8 says you must attach all readily available documents.
9 That's another --

10 JUSTICE GINSBURG: With this confusion, your
11 version, your colleague's version, when the district
12 court -- the district court denied relief, did you ask
13 the district court, please certify this question of what
14 a silent denial means, certify it to the California
15 Supreme Court so we will have once and for all an answer
16 of what a silent denial means?

17 MR. GARDNER: The answer is no, I didn't
18 request certification. When we were in district court
19 and when we were in the Ninth Circuit, both sides
20 accepted the existing framework the Ninth Circuit had
21 established applies to a silent denial, but only under
22 -- only through the lens of independent review. The
23 Court's added question has put both of those at issue.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MR. GARDNER: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Mr. Colombo, you
2 have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF HARRY J. COLOMBO

4 ON BEHALF OF THE PETITIONER

5 MR. COLOMBO: Thank you.

6 I think it's important to remember this is
7 an AEDPA case. It has always been an AEDPA case. We've
8 never asserted this case was not an AEDPA case. The
9 Court has had a very spirited discussion this morning
10 essentially conducting a de novo Strickland review of
11 the claims that are presented in the district court in
12 this case.

13 It's important to remember that we have to
14 view, as this Court described in *Woodford v. Visciotti*,
15 a Strickland claim through the lens of the applicant's
16 burden to demonstrate that the State court's resolution
17 of the Strickland claim on the facts of his case was
18 objectively unreasonable.

19 Whether this Court were to choose to find
20 that the California Supreme Court's determination, if it
21 were reviewed de novo, was improper is different from
22 determining whether or not the State court could have
23 reasonably concluded, on the factual record presented to
24 it, that the applicant's claim failed to -- to show a
25 basis for relief. That --

1 JUSTICE BREYER: Is it fair to say that this
2 -- in this case, that every party in the lower courts
3 assumed this was going to be a merits-related issue and
4 that some deference was due, and that nobody ever said
5 anything about it being a procedural issue where there
6 would be a procedural bar of some kind that was either
7 waived or not waived?

8 MR. COLOMBO: That's correct. The --

9 JUSTICE BREYER: The first time anybody
10 mentioned this procedural issue was when?

11 MR. COLOMBO: When Respondent's counsel
12 filed his brief in opposition in this Court.

13 JUSTICE BREYER: That was on the merits
14 brief in opposition?

15 MR. COLOMBO: That's correct.

16 JUSTICE BREYER: There was nothing before
17 that?

18 MR. COLOMBO: Yes.

19 JUSTICE SOTOMAYOR: It wasn't part of the
20 cert -- the question -- we added the question.

21 MR. COLOMBO: Well, I would submit that if
22 there was a dispute about the applicability of AEDPA
23 deference to the California Supreme Court's summary
24 denial in this case, it should have been raised much
25 earlier than when we got to this Court.

1 JUSTICE SOTOMAYOR: No, no. I'm saying they
2 didn't raise it to start with; we added the question.

3 MR. COLOMBO: Yes, that's true.

4 JUSTICE SOTOMAYOR: So it wasn't as if they
5 were trying to get around their own waiver?

6 MR. COLOMBO: No, I wouldn't suggest that
7 Respondent's counsel was avoiding that. I'm suggesting
8 that if this was a legitimately disputed question, it
9 could have been addressed much earlier.

10 JUSTICE SCALIA: Excuse me. You've lost me.
11 I thought you said -- I thought you said that they
12 raised it in the brief in opposition to the petition for
13 cert?

14 MR. COLOMBO: No, it was not raised in the
15 opposition to cert. It was not raised -- it was not
16 presented until the merits brief --

17 JUSTICE SCALIA: Until the merits brief in
18 opposition?

19 MR. COLOMBO: Yes. I wanted, if I may, just
20 touch a couple of points real quickly. On page 23 in
21 footnote -- I believe it's 6 of our reply brief, there's
22 a discussion about what the detective's testimony was in
23 regard to this blood spatter near the couch where the --
24 where the murder victim's body was found. I think it's
25 important to remember Respondent's counsel talked about

1 whether or not this spatter would have been consistent
2 with having been shot on the couch if there were blood
3 spatter behind the armrest.

4 What the detective testified to and what's
5 described in our brief is the detective said because
6 this was not a through-and-through exit wound -- that
7 is, the bullet lodged in the victim's head -- that the
8 spatter would have been what he described as back
9 spatter, meaning the blood would have flown out from the
10 victim's head outward, and that was consistent with what
11 the evidence was at the crime scene that the detective
12 observed when he was there after the murder was
13 committed.

14 CHIEF JUSTICE ROBERTS: What about the drops
15 between the blood pool and the couch?

16 MR. COLOMBO: The detective described those
17 as essentially insignificant, that they didn't reflect
18 anything other than that someone was moving around in
19 the house, which was consistent with what the crime
20 scene investigators had discovered when they first
21 responded to the 9-1-1 call from the -- Mr. Johnson to
22 the police.

23 JUSTICE BREYER: Is there any reason not to
24 do this? I'm just thinking from our point of view -- I
25 mean, I think it's probably correct what you say:

1 Nobody mentioned a word about this procedural issue
2 until the brief in opposition on the merits, not the
3 cert brief. And the reason they did was perfectly
4 legitimate: We'd asked the question.

5 Well, if we were wrong to do that, could --
6 and if we took the opinion as being a question of
7 reasonable deference, et cetera, and went into it, is
8 there anything -- any reason not to put in that opinion
9 somewhere, given Ylst and given the Ninth Circuit, it
10 would be helpful if the California Supreme Court, for
11 future reference, explained what their practice does in
12 fact mean, whether it's procedural or whether it's on
13 the merits?

14 MR. COLOMBO: I would submit that that would
15 be helpful but unnecessary.

16 JUSTICE BREYER: All right.

17 CHIEF JUSTICE ROBERTS: Thank you, counsel,
18 counsel.

19 The case is submitted.

20 (Whereupon at 11:05 a.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

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