

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

MARION WILSON,)
)
) Petitioner,)
)
) v.) No. 16-6855
)
ERIC SELLERS, WARDEN,)
)
) Respondent.)
)

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9

10 Washington, D.C.

11 Monday, October 30, 2017

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:04 a.m.

16

17 APPEARANCES:

18 MARK E. OLIVE, Tallahassee, Florida; on behalf
19 of the Petitioner.

20 SARAH HAWKINS WARREN, Solicitor General of Georgia,
21 Atlanta, Georgia; on behalf of the Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 16-6855, Wilson against Sellers.

Mr. Olive.

ORAL ARGUMENT OF MARK E. OLIVE

ON BEHALF OF THE PETITIONER

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

When a court in 2254 proceedings reviews a state court's summary denial of appeal from a lower court's reasoned postconviction opinion, the federal court should look through the appellate cited order to that last reasoned decision, as this Court does, as all the circuits have done, other than the Eleventh. A look-through like this best fits the history of AEDPA, it best fits the plain reading of 2254(d), and it best fits this Court's precedents.

The ruling in Richter was a necessary ruling and a narrow ruling. The question posed in Richter was what to do "where a state court's decision is unaccompanied by an

1 explanation.

2 This Court's choice was either to
3 require de novo review of that, utterly
4 inconsistent with the purpose and the history
5 of AEDPA, or to accommodate AEDPA and 2254(d).

6 JUSTICE ALITO: Suppose that the --
7 the Georgia Supreme Court in this case had
8 issued an order saying we affirm the decision
9 below; our decision should not be taken as
10 necessarily agreeing or disagreeing the
11 reasoning in the lower court's opinion.

12 Would look-through be appropriate in
13 that situation?

14 MR. OLIVE: Your Honor, it depends.
15 The Nielson presumption is rebuttable, as
16 Justice Scalia explained in the 1991 opinion,
17 and he also explained that there's also no gold
18 standard for how it is rebutted. He gave some
19 examples of how it could be rebutted.

20 JUSTICE ALITO: Well, what if -- if
21 that --

22 MR. OLIVE: And I think that would be
23 something to consider, but whether it would --

24 JUSTICE ALITO: So you --

25 MR. OLIVE: -- ultimately rebut, I

1 couldn't say.

2 JUSTICE ALITO: You can't say?

3 MR. OLIVE: Right. I know that it --
4 it --

5 JUSTICE ALITO: So we -- we should --
6 we would presume that the state supreme court
7 had adopted the reasoning of the lower court
8 even though the supreme court said specifically
9 that it didn't?

10 MR. OLIVE: I think that it goes a
11 long way toward rebutting, but whether it
12 ultimately would rebut could depend on other
13 facts and circumstances in the case.

14 For example, there could be a reason
15 for that decision because the state briefs
16 things that weren't presented as bases for the
17 decision below. It could be that the court, as
18 Justice Scalia said in *Ylst* in '91, asked for
19 further briefing on some items and got that
20 further briefing on some items. And I agree
21 that a court saying that, it is a significant
22 circumstance to consider. And the Georgia
23 Supreme Court is quite capable of saying that.
24 And --

25 JUSTICE GINSBURG: Suppose it said it

1 in every case. Suppose you win here and then
2 the Georgia Supreme Court says now we're going
3 to add, as boilerplate to every decision, we
4 are not relying on the reasoning of the lower
5 court.

6 MR. OLIVE: That -- that would seem
7 like a ruse, Your Honor, to do it, and how
8 could they know in every single case that
9 that's what they're going to do and why would
10 they intend in every single case --

11 JUSTICE KENNEDY: Well, you could play
12 with the words. They could say we do -- we
13 affirm not necessarily for the reasons below.
14 You know, they could have a formulation.

15 MR. OLIVE: Yes, I -- you know, the --
16 Justice -- even the dissent below said that
17 that was a possibility. And it gets around the
18 critique that this is judging opinions by lower
19 courts --

20 JUSTICE ALITO: Well, why would it
21 be --

22 MR. OLIVE: -- or for having an
23 opinion --

24 JUSTICE ALITO: -- why would it be a
25 ruse? I -- it seems to me that there is a

1 general -- that that is the general practice of
2 appellate courts in the United States. When a
3 court summarily affirms the decision of the
4 lower court, the summary affirmance is not
5 taken as necessarily adopting the reasoning of
6 the lower court.

7 That's the meaning of our summary
8 affirmances. That is the meaning, the
9 established meaning of thousands and thousands
10 of summary affirmances by federal district
11 courts -- by federal courts of appeals.

12 MR. OLIVE: Well, we know that --

13 JUSTICE SOTOMAYOR: That might be the
14 reasoning, correct, on merits decisions. Is it
15 necessarily what courts do in granting or not
16 granting a COA?

17 MR. OLIVE: Granting or not granting?

18 JUSTICE SOTOMAYOR: A COA, which is
19 what's at issue here, correct?

20 MR. OLIVE: Right. That's correct.
21 We -- we actually know that it --

22 CHIEF JUSTICE ROBERTS: I'm sorry,
23 what -- what's correct?

24 MR. OLIVE: Would you repeat it?

25 JUSTICE SOTOMAYOR: What I said was

1 it's true that on summary affirmances, where
2 there's been full argument by both sides --

3 MR. OLIVE: Right.

4 JUSTICE SOTOMAYOR: -- that you don't
5 know the basis for a lower court's decision.

6 MR. OLIVE: Right.

7 JUSTICE SOTOMAYOR: But is that the
8 uniform -- the same thing, a uniform practice
9 in granting or denying a COA?

10 MR. OLIVE: I don't know the answer to
11 that question.

12 JUSTICE SOTOMAYOR: Well, we do know
13 in this case because we have a former chief
14 judge of Georgia and a bunch of other --

15 MR. OLIVE: That's correct.

16 JUSTICE SOTOMAYOR: -- judges from
17 Georgia telling us that that's not the standard
18 in Georgia, correct?

19 MR. OLIVE: Correct. That is correct.
20 The summary affirmance --

21 JUSTICE ALITO: But that's a question
22 of -- that's a question of Georgia law. That's
23 not a question of Ylst.

24 MR. OLIVE: Well, we know that this
25 Court doesn't consider the denial of a

1 certificate of probable cause to appeal not to
2 adopt the decision of the habeas court. In
3 both Sears and in Foster, this Court looked at
4 a CPC denial and concluded not that it was
5 precedent or that it said anything, but instead
6 looked through it to the -- to the habeas
7 corpus court and the -- and the state.

8 JUSTICE ALITO: Well, that's a very
9 debatable -- that's a very debatable and --
10 and, I think, a dubious reading of both of
11 those decisions. There's nothing in any of
12 those decisions that says in determining, like
13 in Foster, was the -- was -- was there a Batson
14 violation. We didn't say we're going to
15 consider only the things that were said by the
16 lower state court; we're not going to consider
17 anything else.

18 Did we say that?

19 MR. OLIVE: That's what the Court
20 focused its attention on.

21 JUSTICE ALITO: Did it say that,
22 though?

23 MR. OLIVE: It didn't -- you didn't --
24 no, sir, you didn't say that expressly, but
25 that's exactly what you looked to. You didn't

1 say, oh, well, the state supreme court had a
2 better reason or a different reason; we ought
3 to defer to it. You --

4 CHIEF JUSTICE ROBERTS: Well, but if
5 you have it -- I think in Foster it was
6 pertinent in the analysis of the -- the lower
7 state court determination was certainly
8 evidence of what the issues were and were not
9 decided. But I've read the footnote carefully,
10 and I don't see anything in there that
11 suggested that that was a -- an absolute rule
12 of law.

13 MR. OLIVE: Looking at what the
14 practice that the court undertook and the
15 procedure the court undertook, you looked at
16 the reasons given by the state habeas court.

17 I agree that the state would never
18 cite a CPC denial as precedent for anything in
19 Georgia, and they haven't and we wouldn't
20 either. But it -- it is clear that, in this
21 case and in most cases, except when the court
22 says otherwise, the court is adopting the facts
23 as set forth in the lower court's opinion.

24 The state -- the state, in its brief
25 to the Georgia Supreme Court in support of the

1 denial of CPC, argued strictly the bases that
2 were in the order that was entered in the lower
3 court, which they wrote, by the way, with some
4 alterations, minor alterations by the court.

5 And in the brief -- in that brief,
6 they cited 52 times this court should deny the
7 CPC on the basis of what the lower court did.
8 There was no --

9 JUSTICE ALITO: Suppose -- suppose
10 that there is a decision by a state
11 intermediate court of appeals, and the majority
12 rejects a claim for certain reasons, and
13 there's a concurrence in the judgment that says
14 we would also reject the claim -- or I would
15 also reject the claim for a different reason,
16 and then that decision is summarily affirmed by
17 the state supreme court. What happens there?

18 MR. OLIVE: I think it would be
19 look-through.

20 JUSTICE ALITO: To what?

21 MR. OLIVE: To the majority.

22 JUSTICE ALITO: Just to the majority?

23 MR. OLIVE: Pardon me?

24 JUSTICE ALITO: You would assume that
25 the state supreme court relied on the reasoning

1 of the majority and not the reasoning of the
2 concurrence.

3 MR. OLIVE: Correct.

4 JUSTICE ALITO: And that -- and based
5 on what? What would be the basis of that?

6 MR. OLIVE: Based on the commonsense
7 workable, well-known, well-used rule of Ylst,
8 is --

9 JUSTICE ALITO: What about the
10 commonsense, well-known, well-used --
11 well-understood rule that a summary affirmance
12 by an appellate court is not interpreted in
13 this country as an adoption of the reasoning of
14 the lower court?

15 MR. OLIVE: According to Ylst, where
16 there's been one reasoned state judgment --
17 judgment rejecting a federal claim, federal
18 habeas courts should presume later unexplained
19 orders rest upon the same ground. That's the
20 rule of Ylst, and it's been applied by all the
21 circuits.

22 JUSTICE GINSBURG: Except that that
23 was a procedural default question.

24 MR. OLIVE: It -- it -- it was. But
25 the logic is the same. The logic is most --

1 most narrowly reflects the role such orders are
2 ordinarily intended to play.

3 CHIEF JUSTICE ROBERTS: Well, I
4 thought the logic -- the logic would be,
5 though, that it is unusual for a court
6 reviewing a procedural determination, if you
7 can't tell, because it's silent, you would
8 normally not assume the Court went on to the
9 merits when the lower court said there was a
10 procedural bar.

11 But when it's simply merits decisions
12 in both cases, the -- the argument anyway is
13 that's a different situation.

14 MR. OLIVE: Well, the circuits haven't
15 ruled that way, and I know you are wanting to
16 resolve the issue for all of us now. This
17 Court has looked through on merits rulings as
18 well without citing Ylst. Just last term the
19 Court in LeBlanc looked through and denied
20 relief in -- in McWilliams.

21 JUSTICE GINSBURG: But when -- when --
22 when -- when is -- this question will arise
23 only if that lower court decision was
24 unreasonable.

25 MR. OLIVE: That's correct.

1 JUSTICE GINSBURG: So why shouldn't a
2 court of appeals -- why don't we assume that a
3 court of appeals would not adopt a badly
4 reasoned decision?

5 MR. OLIVE: Well, I think that
6 probably that is a good assumption and that in
7 most instances state courts get it right, but
8 in the situation where a order is palpably
9 unreasonable, what Congress directs us to do is
10 apply de novo review.

11 And so the individuals who will be
12 injured by this rule, Respondent's rule and the
13 lower court's rule, are the people whose very
14 judgments ought to be viewed -- ought to be
15 getting greater review.

16 JUSTICE GORSUCH: Mr. Olive, if we're
17 talking about consequences of the ruling here,
18 it seems to me it's possible that by adopting a
19 look-through rule, we would encourage state
20 supreme courts to say more, perhaps very little
21 more, maybe as little as we're agreeing with
22 the result but not necessarily the reasoning.

23 But equally possible would be to
24 encourage state intermediate courts to say less
25 and perhaps take advantage of Harrington, so

1 that no state court says anything and achieves
2 maximum deference from federal courts, like
3 California has, for example.

4 Should we be concerned that a ruling
5 in favor of look-through might actually yield
6 if states are rational and look for the least
7 cost and the most deference adverse
8 consequences to your -- your -- your clients?

9 MR. OLIVE: You know, there was an
10 assertion of that in Richter. And the response
11 was there are no -- there is no merit to the
12 assertion that our decision would encourage
13 state courts to withhold explanations. Opinion
14 writing practices are influenced by
15 considerations other than avoiding scrutiny by
16 federal courts. And that's at 560 West at 99.

17 JUSTICE GORSUCH: I'm asking do you
18 agree with that? I mean, do you think that's
19 right?

20 MR. OLIVE: Well, yeah I don't agree
21 with that. I think that federal -- I mean
22 state court judges are not nearly as concerned
23 with federal review as some say.

24 JUSTICE GORSUCH: I understand they
25 are, but perhaps state legislatures are. And

1 they may for altruistic reasons, as in Georgia,
2 and very, very altruistic reasons, insist on a
3 practice of some reasoned decision-making, but
4 couldn't you see other state legislators making
5 other decisions, say like California has,
6 because of cost of analyzing these cases?

7 MR. OLIVE: We note just as an aside,
8 that's changed now in California under
9 Proposition 66, all capital cases start in the
10 lower court and will go through the appeals
11 process, when that's eventually implemented.

12 But, no, I don't think the
13 legislatures or the courts after AEDPA are
14 losing ground when it comes to federal habeas.
15 And they have reasons for structuring their --
16 their processes in whatever way they please.

17 And in Georgia, it's a serious opinion
18 writing endeavor by a trial court that then is
19 looked through, or has been for years, until
20 two, about two years ago, by the appellate
21 court.

22 JUSTICE BREYER: So how seriously
23 should we take a word that you read from Ylst
24 which was "presume," it says the -- the habeas
25 court should presume that this simple, one-word

1 statement of the state supreme court means that
2 the decision that is keeping the person in
3 prison is, in fact, the decision of the
4 intermediate appellate court?

5 Now, then if it's a presumption, the
6 state could refute it. And I guess is this
7 right? The state would be free to say, well,
8 look, here, Your Honor, to federal judges,
9 look, this decision of the intermediate court
10 is so obviously wrong, in any event, it's so
11 obviously a procedural ground, an adequate
12 state ground, and look at what they argued to
13 the state supreme court and bring out the
14 briefs, and say under these circumstances you
15 shouldn't presume that that lower court
16 decision is what the Supreme Court decided on.

17 Indeed, nobody even claimed in the
18 supreme court that they ought to just decide on
19 that ground. I mean, would you be free to do
20 such -- would they be free to do that kind of
21 thing?

22 MR. OLIVE: I think they would, but
23 the state has never in Georgia disagreed that
24 it's most improbable that the Georgia Supreme
25 Court's decisions did not rely on --

1 JUSTICE BREYER: Well, in Georgia, I
2 take it, the adequate state ground is not
3 really one -- it's not in play in this kind of
4 situation, but there are states where it are --
5 it is.

6 I don't know how well, but what I've
7 just said and what you said it would be free,
8 is that basically the situation that most of
9 the states use, as that's what's going on right
10 now in the country.

11 MR. OLIVE: The circumstances under
12 which the presumption can be rebutted are
13 probably innumerable. And how the briefing
14 went in the lower court and other indicia are
15 important.

16 Again, the court in Georgia is
17 perfectly free to and knows how to and does
18 issue orders denying CPC for bases other than
19 the briefs of the parties or other than what
20 was in the lower court.

21 JUSTICE GINSBURG: Did the -- did the
22 lower court in this case that we looked-through
23 to, did it say anything at all about why it
24 found no prejudice?

25 MR. OLIVE: It did, Your Honor. It

1 said that much of the evidence that had been
2 proffered in post-conviction was cumulative,
3 which it really -- there's an argument that it
4 wasn't that I can make.

5 And also that the neuropsychological
6 testing omissions could not be considered
7 prejudicial, but didn't really give reasons,
8 other than the evidence of guilt and the
9 evidence in aggravation.

10 JUSTICE ALITO: Well, it said --
11 didn't it -- I mean, it said a lot. I think it
12 devoted about 30 pages to this.

13 And I -- I suspect you think that some
14 of the things that it said were wrong, but is
15 it fair to say that in general it said, in
16 fact, said over and over one of the reasons why
17 we find no -- why -- why the judge found no
18 prejudice is that taking into account all the
19 evidence that it suggested is mitigating and
20 all of the aggravating evidence -- and there
21 was a lot of it here -- the addition of this
22 mitigating evidence wouldn't change the
23 outcome? Didn't the court say that?

24 MR. OLIVE: The court did say that.
25 But it wasn't -- it didn't consider all of the

1 mitigating evidence. There was a swath of
2 mitigating evidence that had to do with this
3 19-year-old who had not, in -- to the defense
4 of the case, killed anyone with respect to this
5 crime and whose lawyer said he's just been bad
6 and led a bad life.

7 There was, in fact, presentation at
8 post-conviction proceedings of evidence of
9 redeemability for this person and his good
10 acts.

11 JUSTICE ALITO: No, it wasn't, all
12 right, it wasn't presented at trial, but it was
13 presented to the habeas court.

14 MR. OLIVE: And it was not mentioned
15 by the habeas court.

16 JUSTICE ALITO: It wasn't mentioned.

17 MR. OLIVE: Right.

18 JUSTICE ALITO: But does that mean it
19 wasn't considered? I mean, it does seem
20 like --

21 MR. OLIVE: Well --

22 JUSTICE ALITO: What is your answer to
23 the argument that what you're asking the
24 federal habeas court to do really is to grade
25 the quality of the opinion that was written?

1 MR. OLIVE: Well, the evidence that
2 was offered was of institutional failure and
3 also things like he was creative and
4 intelligent and was struggling to break away
5 from his past.

6 And the redeemability, this Court
7 knows, with an 18-year-old, a 17-year-old, a
8 19-year-old is serious mitigation. But, Your
9 Honor, they -- they -- it's not a grading of
10 what the judge did or the opinion that was
11 written. 2254 works this way.

12 The Court says federal habeas judges
13 must train their attention on what was actually
14 involved -- this is a quote -- "in the
15 application of this Court's law to facts."
16 That's kind of a grading, but you can get a D
17 and pass under 2254.

18 It's just egregious actions outside
19 the realm that no one would consider
20 reasonable.

21 JUSTICE ALITO: I mean, so what if
22 the -- what the habeas court did was this?
23 They said this is all the evidence that is --
24 is proffered in mitigation, and this is all the
25 evidence that was provided by the state in

1 aggravation, and taking into account all the --
2 all the mitigation and all the aggravation, we
3 conclude that there's no reasonable probability
4 that a jury would have returned anything other
5 than a sentence of death?

6 Now, would that be -- would that be
7 unreasonable because there isn't a detailed
8 explanation?

9 MR. OLIVE: In -- in this case, we
10 think it would be unreasonable. Again, the
11 state wrote this order. The -- there's nothing
12 wrong with that. There's orders for both
13 sides, and the judge takes it and amends it in
14 whatever way they think necessary. And it was
15 a very minimal way in this case.

16 And the order that was written and the
17 order that was signed reduced to irrelevancy,
18 it went through item by item various things,
19 but when it got to the institutional failure
20 and to the positive characteristics and traits
21 of this 19-year-old, you can't find it. So you
22 can't reduce to irrelevancy under Porter
23 important mitigating evidence, and that's what
24 the --

25 JUSTICE ALITO: That does sound

1 like grading.

2 MR. OLIVE: That's what this order
3 did.

4 JUSTICE ALITO: So let me modify what
5 I -- my hypothetical where there is no
6 explanation, there's just a citation, there's
7 just a listing of mitigation and aggravation.
8 There's a little bit of explanation. There are
9 three sentences of explanation or there's a
10 half a page of explanation.

11 At what point does it become, would
12 you say, okay, well, that's enough, it's
13 reasonable?

14 MR. OLIVE: Well, that's -- the level
15 of abstraction there is difficult for me to
16 give an answer to, but this Court has given an
17 answer in Williams and Wiggins and Rompilla and
18 Porter where the Court painstakingly went
19 through the evidence on aggravation and
20 mitigation, especially on the prejudice prong.

21 So grading is a bad label for it, but
22 the AEDPA says take a look at what they said
23 and analyze it and see if it's reasonable.

24 And the second prong of 2254(d), which
25 I didn't mention before, the court has to grade

1 in that you look at what the state fact
2 findings were based upon. So you do have to
3 look at the opinion, and you do have to analyze
4 the opinion. If that's called grading, it
5 doesn't take much to get a high enough grade to
6 pass 2254 muster for the courts.

7 And going back to the limited holding
8 in Richter, this Court's language shows its
9 fealty really to 2254. The Court says, "Under
10 2254(d), a habeas court must determine what
11 arguments or theories supported" -- and so if
12 there's a written opinion, you can see what
13 arguments or theories supported -- "or, as
14 here, could have supported the state court's
15 decision."

16 And so, if you know the reasons, and
17 with look-through, our argument is you do know
18 the reasons, if you know the reasons for the
19 decision under Brumfeld, quoting Richter, you
20 follow Richter where there is no opinion
21 explaining the reasons relief has been denied.

22 And under Wetzel, this Court says
23 taking out the second clause, a habeas -- a
24 habeas court must determine what arguments or
25 theories supported the state court's decision.

1 In this case, it's -- it is clear and
2 has been clear for years that the arguments
3 that support the Georgia Supreme Court's denial
4 of CPC are those arguments that are in the
5 state post-conviction reasoned order.

6 And if the Court wishes to -- to go
7 beyond that, it's quite capable of doing it.
8 It can issue three or four pages in denying
9 CPC, and it does.

10 It can issue a paragraph in denying
11 CPC, explaining reasons beyond the lower court,
12 and it does. The Court -- if the Court wants
13 to do it, it can do it. It knows how to do it.
14 Otherwise, the presumption in *Ylst* should be
15 respected.

16 JUSTICE KENNEDY: Have there been any
17 commentary or can the bar offer us any
18 experience as to whether or not the Richter
19 rule, in the cases where it has applied has
20 proven to be workable and administratable or
21 unworkable and unadministratable, is there any
22 commentary on how Richter has worked out?

23 MR. OLIVE: I'm not aware of any
24 commentary on how it has worked out. It no
25 longer really is applicable in California with

1 respect to death penalty cases. And the truth
2 is in non-capital cases, they're almost all
3 indigent, and they almost all start in the
4 trial court and work up and they have the 1st
5 presumption.

6 The workability of Richter in its
7 application in other jurisdictions, I'm not
8 seeing commentary on, but it is, again, cabined
9 to the unique situation which otherwise the
10 Court might have had to order de novo review
11 with respect to the unique situation that there
12 be no reasons given by a court.

13 JUSTICE SOTOMAYOR: Now, Richter does
14 require a habeas court, a federal habeas court
15 to imagine all of the conceivable arguments
16 that could have supported a state court
17 decision, correct?

18 MR. OLIVE: Yes, ma'am.

19 JUSTICE SOTOMAYOR: So it by
20 definition requires more work.

21 MR. OLIVE: I mean, it's an incredible
22 situation to -- it would be difficult for
23 federal district court judges, if I were one,
24 to imagine a set of considerations that might
25 lead to a constitutional violation, determine

1 whether there was a constitutional violation,
2 then determine whether it would be unreasonable
3 to find there wasn't a constitutional
4 violation.

5 So it's an interesting process to go
6 through. Right now the administrability is
7 courts around the country that are looking at
8 decisions from all states, including the death
9 penalty states, know the drill.

10 They understand Ylst. It hasn't
11 caused any problems. It's imminently workable.
12 It makes common sense. Everyone knows how to
13 do it.

14 JUSTICE SOTOMAYOR: It's much simpler.

15 MR. OLIVE: Pardon?

16 JUSTICE SOTOMAYOR: It's much simpler?

17 MR. OLIVE: Much simpler and
18 well-known.

19 JUSTICE SOTOMAYOR: Because you're not
20 really granting habeas relief that will result
21 in -- necessarily in the release of a defendant
22 because, once it goes back down, the state
23 court can then decide which among the many
24 possibilities there are to still affirm the
25 conviction, couldn't it?

1 MR. OLIVE: That's correct. And all
2 that happens when you do an analysis of a
3 reasoned decision, if you find it to be
4 unreasonable, you get de novo review. You
5 don't get relief, you get de novo review, and
6 you may lose under de novo review.

7 I mean, what the AEDPA has
8 accomplished is removing from federal judges
9 the power to unilaterally, by exercising de
10 novo review and not paying any attention
11 necessarily to what the state court ruling was,
12 violate comity and federalism.

13 What the AEDPA did was say: No, you
14 have to look at what the state court did and
15 give it credit where credit's due. And to
16 apply Richter in states where there is a state
17 seeking credit for its reasonable decision, to
18 just ignore it creates sort of two polar
19 opposites.

20 Before the AEDPA, federal courts could
21 pay no attention to what a state court did and
22 grant relief. And the state's rule now is
23 federal courts should pay no attention to what
24 state courts did and deny relief.

25 And I think the AEDPA strikes the

1 right balance. It's between those two. I
2 respect what the state court has done. If it's
3 reasonable, then there is no de novo review.
4 If it's unreasonable, there's de novo review.
5 And whether you win under that review one way
6 or the other is a separate question.

7 There's no circuit having any trouble
8 with this other than the lower court. This
9 Court doesn't have any trouble with it when it
10 looks through decisions and looks at the facts
11 in the lower court.

12 And I think the rule of all the
13 circuits, other than the Eleventh, ought to be
14 the rule for everyone. If I can reserve my
15 time.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Ms. Warren?

19 ORAL ARGUMENT OF SARAH HAWKINS WARREN

20 ON BEHALF OF THE RESPONDENT

21 MS. WARREN: Mr. Chief Justice and may
22 it please the Court:

23 A federal habeas court must apply 28
24 U.S.C. 2254(d) standard to the last state court
25 merits decision whether that decision is

1 summary and whether or not that decision is
2 preceded by a lower state court's opinion.

3 Put another way, federal habeas courts
4 conducting a 2254(d) inquiry are not required
5 to look through a later summary state court
6 merits decision to review only the specific
7 reasoning of a lower state court opinion.

8 JUSTICE KAGAN: Ms. Warren, can I just
9 ask a question about the breadth of your
10 position? It's a little bit confusing to me
11 from the briefs.

12 You spent a lot of time talking about
13 the word "decision" and how habeas review is
14 only available for decisions, not for opinions.

15 So does your argument go that even
16 when a state court, the higher state court has
17 issued a reasoned decision, that even there the
18 habeas court is not limited to that decision
19 but can and should decide whether there are
20 other grounds?

21 MS. WARREN: Justice Kagan, our
22 position is that 2254(d) always applies to the
23 decision, but when that last state court
24 adjudication on the merits is reasoned, there
25 is a textual basis in 2254(d) for the federal

1 habeas court to look at those reasons to help
2 assess whether the decision itself is contrary
3 to or involved in unreasonable application of
4 this Court's precedents.

5 JUSTICE KAGAN: I'm not sure I
6 understand the question. But suppose you said
7 that the reasoned decision is -- is not -- is
8 just completely wrong.

9 Could you substitute, you know, so I
10 think the way I've understood that that goes is
11 that's completely wrong, so now we don't -- we
12 don't give deference to it, right? It's taken
13 itself out of AEDPA because it's completely
14 wrong.

15 Are you saying, no, there is a second
16 step where you have to say, well, if I were the
17 judge, I could have written a better decision
18 that would receive AEDPA deference?

19 MS. WARREN: No, Justice Kagan, I
20 don't think that's what our position is here.
21 So we would say that looking to the reasoning
22 as part of the analysis of the decision is part
23 and parcel of ascertaining whether that last
24 state court decision on the merits was contrary
25 to or involved in a reasonable application.

1 That, of course, is a very different
2 situation than we have here where the last
3 state court decision is summary and there is no
4 evidence of what that last state court actually
5 reasoned. There is only the decision.

6 JUSTICE SOTOMAYOR: So aren't we
7 attributing to them --

8 JUSTICE GINSBURG: And what about the
9 -- we were told that it was a matter of
10 practice in Georgia, I think Petitioner said,
11 the Georgia Supreme Court's practice is to
12 issue a reasoned denial of a CPC whenever it
13 disagrees with the lower court reasoning.

14 So, if it disagrees, it's its practice
15 to tell us.

16 MS. WARREN: Your Honor, I would
17 disagree that it always issues a reasoned
18 decision when it disagrees. It is certainly
19 true that there are instances, a handful of
20 instances that Petitioner points to where a
21 reasoned denial has issued.

22 But I don't think it is fair to
23 characterize it or to presume that those are
24 the only instances in which the Georgia Supreme
25 Court would disagree with reasoning for that.

1 JUSTICE SOTOMAYOR: I'm sorry, you are
2 disavowing the statements of a former Supreme
3 Court Justice of a Georgia court and all the
4 judges that signed onto that amicus brief?

5 MS. WARREN: Well, respectfully, Your
6 Honor, we -- we -- we disagree with the
7 characterization.

8 JUSTICE SOTOMAYOR: Well, then, but
9 you don't know, do you?

10 MS. WARREN: We -- we don't --

11 JUSTICE SOTOMAYOR: You don't know
12 know -- you don't, but they do because they
13 actually did the work.

14 MS. WARREN: Your Honor, we don't
15 know. And, similarly, the rest of us don't
16 know.

17 JUSTICE BREYER: Why do we not know?
18 I mean, what he quotes in his brief, is this
19 wrong? He says that Supreme Court Rule 36 says
20 when somebody files an application for a cause,
21 for a certificate of probable cause, the
22 application, quote -- he's quoting from the
23 rule -- "will be issued where there is arguable
24 merit."

25 And here we have denied. And,

1 therefore, there is no arguable merit. Now,
2 that seems like Euclid, or whoever, I don't
3 know, was it Aristotle or something, but, you
4 see, that's their point.

5 So how can you get up and say we don't
6 know what they do? We do know they thought
7 there was no arguable merit.

8 So I guess what you're asking us to do
9 is to think of ways that nobody, has yet
10 occurred to anybody, but there was no arguable
11 merit, not necessarily because it's a good
12 opinion below, but because we've thought of one
13 of your assistants, a bright young graduate,
14 has walked into your office with a case from
15 Georgia law of 1812.

16 And judging from the dust, nobody's
17 ever seen it before, but it was written by
18 Oglethorpe's second cousin twice removed. And
19 there we are. And it's brilliant. Nobody's
20 thought of it. You say how do we know that
21 wasn't their reason?

22 Now, that's extreme but you see my
23 point. Okay? What's the answer to my point?

24 MS. WARREN: Justice Breyer, I'm not
25 sure exactly what the -- what the question was.

1 JUSTICE BREYER: Well, the point of
2 the question --

3 (Laughter.)

4 JUSTICE BREYER: Sorry. Well, from
5 your pleasant expression, it sounded to me as
6 if you were understanding my obscure question.

7 My -- I had two separate questions.
8 One, I quoted the rule, which seemed to me what
9 Justice Sotomayor said, must be correct.

10 Then I asked a separate question, that
11 the problem looking at it practically is that
12 you're asking us to take on a burden. The only
13 person who will have a greater burden is you
14 because you, in your job, when faced with a
15 decision of an intermediate appellate court and
16 a denial of CPC, will have to sit there making
17 up reasons that are not present in anybody's
18 opinion.

19 And I use Oglethorpe as a comic
20 example of that. But it's that kind of thing
21 that you'll have to do.

22 So my question is obviously why should
23 we take a system that works fairly well and
24 throw this practical monkey wrench, which means
25 a lot more work for you, into the gears?

1 MS. WARREN: A few answers to your
2 question, Your Honor.

3 The first is we agree with the way
4 that you stated the arguable merits standard
5 and I do think that is the correct way to view
6 Rule 36 from the Georgia Supreme Court.

7 As to the second point, a few
8 different answers.

9 As to the process, that process
10 exactly -- is exactly what the California
11 courts do with Richter already, so it is not a
12 novel process.

13 But on the practical side of things,
14 and as the Eleventh Circuit explained below, I
15 think in practice the federal habeas court when
16 assessing the Georgia Supreme Court summary
17 denial on the merits will first look to the
18 lower court to see if the lower court's
19 reasoned opinion offers any reasonable basis.

20 And so, in many cases, the process
21 would be very similar. The problem here, and I
22 think the problem that -- the thread that runs
23 through the Petitioner's argument that is
24 problematic is presuming that the lower state
25 courts' reasons are the reasons of the Georgia

1 Supreme Court.

2 JUSTICE KAGAN: So, Ms. Warren, I take
3 that, but it seems to me that that's the
4 question, right? What should we presume about
5 what the Georgia Supreme Court is doing here in
6 -- in exactly the way you said?

7 So let me give you a hypothetical.
8 Let's say we have a Batson case and there was a
9 denial of relief in the Batson case. And it
10 was based on a very clear error of law. So
11 somebody said -- it's a Hispanic defendant, and
12 somebody said Hispanic defendants are not
13 entitled to raise Batson claims. All right?

14 And then the supreme court, the state
15 supreme court just says affirmed. All right?
16 So what should we understand about that?

17 Why is the state court doing that?
18 What -- what -- what's the reasonable
19 assumption about what the state court is doing?

20 MS. WARREN: I think there are two
21 reasonable assumptions. The first is that they
22 have, presuming that that claim was properly
23 preserved for merits review at the certificate
24 for probable cause stage, we can presume that
25 they have denied that claim on the merits.

1 But then I think that the -- the other
2 presumption we must make, according to this
3 Court's precedents and admonitions, we should
4 presume that the Georgia Supreme Court knew and
5 followed the law.

6 JUSTICE KAGAN: You see, this is -- it
7 seems a very odd thing to say the Georgia
8 Supreme Court looked at an opinion and said
9 that is such a bad opinion, it has such a clear
10 error of federal constitutional law, but we are
11 not going to explain that to anybody. Instead
12 we're just going to affirm. Now, that's one
13 option.

14 The other option is that the Georgia
15 Supreme Court had a bad day, and it too made an
16 error. And the question is, and I suppose, you
17 know, Ylst answered this question, but it
18 seemed to me to answer it in a pretty
19 reasonable way. It's like we just don't expect
20 state supreme courts to say that's a clear
21 error of federal constitutional law and we are
22 not going to tell anybody about it.

23 MS. WARREN: Well, the example you
24 give, Justice Kagan, there are a few things
25 about it. The first is if there is a clear

1 error of law below and there is no other
2 reasonable basis on which the Georgia Supreme
3 Court could have denied relief, then habeas
4 relief will ensue.

5 Because even when the federal --
6 JUSTICE KAGAN: No, no, no. Here
7 there is, there's another basis, but you have
8 to believe that what the state court is saying,
9 even though this -- this lower state court made
10 an error of federal constitutional law, because
11 we can dream up something better, we'll just
12 affirm it. We won't tell anybody what we're --
13 what we think is an alternative basis. We
14 won't do anything. We will just let it be out
15 there. That judge will think that he's done a
16 fine job. Everybody else will think that he's
17 done a fine job. We'll just leave it out there
18 because, what, because we can't be bothered to
19 write two sentences saying, you know, we're
20 affirming on a ground where, you know, yes, of
21 course, he's entitled to make a Batson claim,
22 but he had a bad Batson claim?

23 MS. WARREN: But, Justice Kagan, the
24 situation you describe is exactly the situation
25 where the approach we're describing is most

1 important for reasons of federalism and comity,
2 because we must start with the proposition that
3 this Court has reiterated time and time again,
4 that the Georgia Supreme Court did know and
5 follow the law, and to resist the readiness to
6 attribute error that this Court described in
7 *Winthrop versus Visciotti*.

8 But in those situations --

9 JUSTICE KAGAN: I mean, it seems to me
10 that that just makes a bizarre assumption about
11 state courts, that they're so uninterested in
12 errors of federal constitutional law that
13 they're just going to say, well, as long as we
14 have something in our heads that suggests that
15 the ultimate judgment was right, we're not
16 going to tell anybody about them. We're going
17 to leave them out there as -- as something that
18 the judge and the parties and -- and future
19 judges and future parties will think was right
20 when we know it's wrong.

21 MS. WARREN: That -- that may be so,
22 Justice Kagan, but, of course, 2254(d) does not
23 require by its text reasoning. It does not
24 require statement of opinions. And this Court
25 has already found based on that very textual

1 interpretation the reasons are not required.

2 And that is exactly what this Court has --

3 JUSTICE SOTOMAYOR: I'm sorry, that's
4 the problem, which is it does require it,
5 because when you read 2254(d), it talks about
6 resulted in a decision that was based on an
7 unreasonable determination of the facts in
8 light of the evidence presented in the state
9 court proceedings.

10 So it requires us to look at the
11 reasoning. So does (a) when it talks to us
12 about involved an unreasonable application of
13 clearly established federal law.

14 So you're right. There's nothing that
15 says you have to write an opinion in a
16 particular way, but we do have to look at what
17 they say. You even admit that.

18 MS. WARREN: Justice Sotomayor, I
19 think we have to look at what they say when
20 they say something. And in a (d)(1) inquiry,
21 looking at the "involved an unreasonable
22 application," I think that language points to
23 the situation I described with -- with Justice
24 Kagan earlier, where there is a reasoned
25 opinion.

1 JUSTICE SOTOMAYOR: All right. Let's
2 take -- and let me just deviate to that
3 question.

4 Let's assume that there's an argument
5 below. The state court denies the habeas
6 petition summarily. Can the state now come in
7 to a habeas court and present an argument that
8 wasn't made below and argue that that is an
9 alternative ground to deny the habeas, even
10 though it wasn't presented below?

11 MS. WARREN: Let me make sure I
12 understand your hypothetical. Are you
13 suggesting that the lower state court did not
14 issue a reasoned opinion?

15 JUSTICE SOTOMAYOR: No -- exactly.

16 MS. WARREN: Okay.

17 JUSTICE SOTOMAYOR: No reasoned
18 opinion. But we know for a fact that this
19 particular argument was not raised below.

20 MS. WARREN: Well, in Georgia, by law,
21 the lower state court, the state habeas court,
22 is required to issue a reasoned opinion. So
23 that is not a situation --

24 JUSTICE SOTOMAYOR: I'm asking you
25 what happens on hab -- on federal habeas

1 review. Can the state come in, in this
2 imagining that we have the state doing in every
3 court, not only do we have to imagine; the
4 lawyers have to come in and set forth every
5 potential constitutional violation and set
6 forth every interpretation of the facts that
7 are potentially available, decide which ones
8 would be an unreasonable application of federal
9 law or unreasonable finding to grant a habeas
10 -- you have to do the same thing to deny one.
11 All right? Could the state come in with a
12 totally new argument that wasn't made to the
13 state court at all and say you should deny
14 habeas on this totally new argument?

15 MS. WARREN: I'm not sure that it
16 would be precluded from doing so. And,
17 certainly, that's the inquiry that the federal
18 habeas court would be --

19 JUSTICE SOTOMAYOR: So why do we
20 bother having state habeas anymore? Why don't
21 we just say don't -- have federal habeas only
22 and --

23 MS. WARREN: Well, I think --

24 JUSTICE SOTOMAYOR: -- and assume that
25 the state will deny every habeas?

1 MS. WARREN: I think an -- an
2 important point to -- to show where there is
3 not much daylight between the Petitioner's
4 argument and ours is that we are not suggesting
5 that that state habeas court lower opinion is
6 outlawed from consideration or that it has no
7 role in the process whatsoever.

8 In many cases, the very first place
9 and in many cases perhaps the very last place
10 the federal habeas court will look is to that
11 reasoned decision below, but not because it
12 presumes those lower court reasons are the
13 reasons of the last court that's adjudicated
14 the claim on the merits, but simply to see
15 whether a reasonable basis exists to sustain
16 the denial of relief.

17 JUSTICE SOTOMAYOR: You don't think
18 that there's more respect for a state court, to
19 let them make their own decisions? Because
20 what we're doing is imagining what they would
21 have said, instead of just asking them.

22 MS. WARREN: Your Honor, to the extent
23 there's any discomfort with the imagining or
24 the hypotheticals, that line has already been
25 drawn by this Court in Richter. But Georgia,

1 to the respect point, has --

2 JUSTICE SOTOMAYOR: There was no
3 absolutely reasoned decision anywhere there.
4 We had to do something.

5 MS. WARREN: That is correct. But the
6 textual analysis that this Court engaged as to
7 2254 applies equally here. It's the same text,
8 it's the same statute, and there's no
9 principled basis for deviating from that
10 textual analysis when it is applied to the
11 summary denial on the merits by the Georgia
12 Supreme Court.

13 As to your point about respect for
14 state courts, Georgia has a two-tiered habeas
15 system. There are two courts that will always
16 pass on a habeas claim that is properly
17 exhausted, first in the lower state court,
18 where a reasoned opinion will ensue, and then
19 the Georgia Supreme Court, which will analyze
20 the application for CPC.

21 And so, to suggest that the Georgia
22 Supreme Court should be written out altogether,
23 I think, is also an affront to federalism and
24 to comity. And to -- to require a presumption
25 that the Georgia Supreme Court has adopted

1 those lower state court reasonings similarly is
2 an affront to federalism.

3 JUSTICE ALITO: Where is the question
4 of -- of Georgia law that is implicated here?
5 It would be one thing if it were generally
6 understood in Georgia that a summary affirmance
7 by the state supreme court does not necessarily
8 adopt reasoning of the lower court. It would
9 be another thing if it was the rule in Georgia
10 or generally understood in Georgia that the
11 opposite is true.

12 So what do we do with that?

13 MS. WARREN: Because there is no
14 explicit rule in Georgia?

15 JUSTICE ALITO: Yeah.

16 MS. WARREN: I think what --

17 JUSTICE ALITO: Because there is no --
18 is there a specific rule in Georgia? Is there
19 a well-known practice in Georgia?

20 MS. WARREN: Well, Justice Alito,
21 there -- there is none that we are aware of.
22 There is no, for example, court rule that
23 explains it or -- or --

24 JUSTICE GINSBURG: But where did --
25 where did Petitioner get it from? Petitioner

1 said that is the Georgia Supreme Court's
2 practice when it disagrees with the court
3 below. It so states. It doesn't adopt its
4 reasoning. If it disagrees with the lower
5 court, it will issue a decision saying so.

6 MS. WARREN: Justice --

7 JUSTICE GINSBURG: Where does that
8 come from?

9 MS. WARREN: Justice Ginsburg, I
10 believe that's based on Petitioner's practice.
11 I would characterize that as anecdotal. The
12 fact that five or six of these reasoned denials
13 have issued over the hundreds or thousands of
14 CPC applications the Georgia Supreme Court has
15 reviewed I do not think stands for the
16 proposition that every time the Georgia Supreme
17 Court disagrees with the lower court's
18 reasoning, it takes the time to issue a
19 reasoned dissent.

20 JUSTICE KAGAN: Well, didn't Ylst tell
21 us what we should generally draw from silence?
22 It just says the maxim is that silence implies
23 consent, not the opposite. Courts generally
24 behave accordingly, not always, but generally
25 affirming when -- without further discussion

1 when they agree, not when they disagree, with
2 the reasons given below.

3 And that was -- you know, there was a
4 different context. As you say, it was
5 procedural versus merits. But that basic
6 reasoning was not limited to -- to the context.
7 It was -- it was a more general understanding
8 of what silence means, or generally should be
9 taken to mean, with respect to state supreme
10 courts. Why wasn't it right?

11 MS. WARREN: Well, Justice Kagan, a
12 few reasons. First, this was a pre-AEDPA
13 determination. It's a judge-made prudential
14 doctrine that is restricted to help federal
15 courts ascertain whether it can hear federal
16 claims, not how to conduct substantive habeas
17 review.

18 And so it very well may be the case
19 that in that context -- in that context that
20 it's helping federal habeas courts ascertain
21 whether later state summary adjudications have
22 vitiated a state court bar, that silence does
23 imply consent. That is not the case here.

24 CHIEF JUSTICE ROBERTS: What do you do
25 when you're presenting an argument in these

1 cases? Do you just -- you, the -- the state,
2 respond primarily or only to the state court
3 decision, or do you say we've got four more
4 good arguments, and so we're going to put all
5 those in our brief?

6 MS. WARREN: Mr. Chief Justice, I am
7 not exactly sure of the practice. I don't
8 think that it is limited to exactly what the
9 state court has said below, but I cannot say
10 for sure.

11 JUSTICE KAGAN: What if the -- the
12 state supreme court says, you know, we think
13 that this opinion is clearly wrong, but we're
14 going to -- we're good lawyers and we're going
15 to think of another opinion that could have
16 been written. It wasn't, but it could have
17 been. And -- and we're going to affirm on that
18 ground. Of course, we're not going to say
19 this; we're just going to say affirmed. But --
20 but the thing that I'm thinking is this habeas
21 petitioner has never been presented with this
22 alternative argument.

23 So it might be that this habeas
24 petitioner would have a really good response to
25 this alternative argument, but he doesn't even

1 know that it's in the case. That seems quite
2 unfair to the habeas petitioner, to say your
3 petition is denied, not to tell him why, even
4 though he's never been given the chance to
5 respond to this new reasoning.

6 MS. WARREN: Well, I think Harrington
7 versus Richter already says that the -- the
8 petitioner's burden still remains the same,
9 which is to say there is no reasonable basis on
10 which that court could have based its denial of
11 relief.

12 JUSTICE ALITO: Did counsel go that
13 far in this case? I mean, this is not a case
14 where anybody's arguing that the decision of
15 the Georgia Supreme Court is a reasonable one
16 based on some ground that was never raised by
17 anybody below. The -- the contours of the
18 dispute here are very well known. Deficient
19 performance, which has largely dropped out, and
20 the question of prejudice. So it's all about
21 whether there was prejudice under Strickland.

22 MS. WARREN: And so -- and so do we
23 have to go so far as to make a ruling?

24 JUSTICE ALITO: Do we have to have a
25 -- do we have to decide in this case what would

1 be the situation where the issue, the ground
2 for affirmance was never raised at all below or
3 where the ground for affirmance that -- that is
4 attributed to the state supreme court is
5 different from the basic ground for affirmance
6 that was addressed by the district court -- by
7 the -- by the lower state court?

8 MS. WARREN: Well, I think that all
9 this Court has to do is apply what it has
10 already found in Harrington versus Richter, and
11 then that has laid out the process for how the
12 federal habeas court would treat the Georgia
13 Supreme Court's summary adjudication on the
14 merits there.

15 JUSTICE GORSUCH: Counsel, you know,
16 of course, in this Court, we say our summary
17 affirmances are not necessarily an endorsement
18 of the -- of the lower court's reasoning.
19 That's well established in this Court's
20 jurisprudence.

21 And as I understood Mr. Olive, he said
22 it might be a different case if that were
23 clearer in Georgia. So let's say we are going
24 to now confront 50 states or X number of states
25 with rules or something in their precedents or

1 a footnote saying we do not necessarily endorse
2 all the lower court reasoning, just exactly as
3 this Court has done for itself.

4 Then what?

5 MS. WARREN: I think if a state has a
6 clear rule, either by case law or rule by its
7 court, that -- that gives further direction as
8 to how to treat summary affirmances, that those
9 would be honored. But where --

10 JUSTICE BREYER: Where --

11 MS. WARREN: Whereas here the Georgia
12 Supreme Court has no rule, has -- has no clear
13 binding practice that is consistently
14 indicative of what it intends by summary
15 affirmances, that the summary affirmation of the
16 Georgia Supreme Court should not be treated the
17 exact opposite as the way this Court and other
18 federal courts treat their own summary
19 affirmances.

20 JUSTICE BREYER: Well, there is a big
21 difference. First, Harrison is different
22 because in Harrison there was no decision of
23 the state court that you could look to.

24 Obviously, the federal habeas court
25 has to try to figure out some theory as to what

1 they were holding. That isn't the question
2 here where there is a decision of the court.

3 And where a habeas court later takes
4 that decision as being the decision from the
5 state that led to this person's being deprived
6 of liberty, what does that say about whether
7 the summary affirmance should be treated as
8 precedent for state law? It says nothing, I
9 think.

10 When you have us saying ours should
11 not be treated that way, of course we don't
12 want it as a precedent binding every court in
13 the nation. When a federal appeals court says
14 our summary affirmance does not mean that we
15 agree, of course they don't want it to be
16 binding throughout the circuit.

17 But this decision before us has
18 nothing to do with that. We can say this
19 district could set -- the appeals court in
20 Georgia has made the decision that is leading
21 to his deprivation of liberty and ignore the
22 summary affirmance without saying anything
23 about whether the summary affirmance is
24 precedent or not, a matter not before us.
25 Isn't that so?

1 MS. WARREN: Justice Breyer, you are
2 correct that I don't think this Court has to
3 make a judgment as to what the summary
4 affirmances mean in Georgia, but at that point
5 I would -- I would ask the Court to go back to
6 the text because the text requires application
7 of 2254(d) to the adjudication of the claim
8 that resulted in a decision.

9 The decision under review is the
10 decision by the Georgia Supreme Court. And the
11 text of AEDPA does not authorize habeas relief,
12 de novo, or ultimate relief, based on on the
13 lower court's reasoning that are not attributed
14 to --

15 JUSTICE SOTOMAYOR: I -- I just have
16 so much trouble. It starts with what Justice
17 Kagan said.

18 You admit that if the -- if it's a
19 reasoned decision in the supreme court, we have
20 to look at the reasoned decision, correct?

21 MS. WARREN: Yes -- yes, Your Honor, I
22 think that is --

23 JUSTICE SOTOMAYOR: All right. And
24 there is nothing in the language of 2254(d)
25 that says that. It just says you have to look

1 at the reasoning and determine whether they are
2 -- it's contrary to federal law.

3 So I'm not sure how that gets you to
4 where you are going. We're looking at a
5 decision. We're looking at the one court that
6 the state system has designated as the court
7 that is required to take the evidence and give
8 a full, reasoned decision. So we are looking
9 at the full, reasoned decision and deciding
10 whether that reasoned decision stands or not.

11 MS. WARREN: Your Honor is correct
12 that the lower state court will always have
13 reasons, but the Georgia legislature has not
14 said by law that those reasons are the reasons
15 attributable to the Georgia Supreme Court.

16 And looking to the text, as Your Honor
17 was, there is --

18 JUSTICE SOTOMAYOR: Well, we're not
19 saying it either.

20 MS. WARREN: But that --

21 JUSTICE SOTOMAYOR: All -- all we're
22 saying is that these reasons don't stand up to
23 habeas scrutiny. And we would send it back for
24 the court to properly -- and it -- because it
25 is its decision, it shouldn't be ours --

1 MS. WARREN: Well, and --

2 JUSTICE SOTOMAYOR: -- to see if there
3 is another ground for it to affirm.

4 MS. WARREN: In those set of
5 circumstances, however, Your Honor, where the
6 lower state court's reasoning contains an
7 infirmity because the lower state court's
8 reasoning shows that the decision below was
9 contrary to or an unreasonable application of
10 this Court's precedence.

11 It is not the most probable, it is not
12 the most pragmatic, and it is not the correct
13 presumption to presume that those lower state
14 court's reasons are imputed on the Georgia
15 Supreme Court; the last state court to
16 adjudicate the claim on the merits.

17 That is what --

18 JUSTICE SOTOMAYOR: It's okay for you
19 when we say you do that to find the procedural
20 bar, because you like that.

21 MS. WARREN: Well --

22 JUSTICE SOTOMAYOR: But if we're going
23 to do it, why don't we do it in every
24 situation; other than that you like one part of
25 it and not the other?

1 MS. WARREN: Well, I would certainly
2 resist that characterization, but I would say
3 that Ylst's purpose, as it was originally
4 conceived, is consistent with and complementary
5 to the inquiry that this Court later set out in
6 Harrington versus Richter.

7 And so using Ylst for the purpose that
8 Ylst was originally intended, which was to
9 identify the state court bars and to preserve
10 them, which is a probable assumption, where
11 silence may very well equal consent, that --
12 that respects comity in its own way by ensuring
13 that state court procedural bars are not
14 vitiated by later state court summary opinions.

15 Here asking this Court to make sure
16 that the Georgia Supreme Court or any higher
17 state court of the land does not have infirmed
18 reasoning imputed on it when they are faced
19 with both reasonable and unreasonable bases on
20 which to sustain the denial of relief also
21 serves comity. And is the best -- and is in
22 service of federalism and comity in that set of
23 cases where it matters the most, when that
24 lower state court may contain an infirmity.

25 And for that reason the presumption

1 that is the thread running throughout
2 Petitioner's argument, the presumption that the
3 lower state court's reasons are the same as the
4 last state court's decision cannot stand.

5 If the Court has no further questions.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Three minutes, Mr. Olive.

9 REBUTTAL ARGUMENT BY MARK E. OLIVE

10 ON BEHALF OF THE PETITIONER

11 MR. OLIVE: Thank you, Mr. Chief
12 Justice.

13 Until about a year ago, the state was
14 well aware of what the state process was in
15 Georgia. The state process in Georgia is the
16 parties submit a proposed order and the state's
17 order in this case is at Docket Number 18-1 in
18 the record.

19 And then a final order is entered.

20 And in this case it's Docket 18-4 in the
21 record. Fairly changed.

22 And Mr. Chief Justice, if they had
23 four more good arguments to make, they would
24 have been in their proposed order that they
25 submitted to the Court to begin with.

1 Does the court say when it disagrees
2 with the lower court judgment? Dissenting
3 Judge Jill Pryor below at Joint Appendix 380 --

4 JUSTICE GORSUCH: Mr. Olive, we've
5 spent -- we're spending a lot of time arguing
6 about Georgia specific law, and I guess I'm
7 wondering if -- if it all turns on what the
8 state court practice is, and we're going to
9 create a huge incentive for a state court to
10 simply adopt different orders that say we adopt
11 more or less the reasoning of the appellate
12 court but not necessarily all of it, and there
13 may be other reasons, what have we accomplished
14 in -- in this?

15 Presumably we're going to defer to
16 those final decisions of the state courts and
17 not look behind those. I mean, I haven't heard
18 an argument that we'd look behind that kind of
19 ruling.

20 So what exactly have we accomplished
21 here?

22 MR. OLIVE: I think what the state's
23 rule creates is a maze trying to figure out
24 what a summary affirmance means in a state,
25 what a discretionary denial of an appeal means,

1 what a -- you know, what do any of them mean
2 when the -- when the Ylst rule applies across
3 the board?

4 The Ylst rule says a silence means
5 agreement.

6 JUSTICE GORSUCH: So even if a state
7 Supreme Court says we affirm the judgment, and
8 uses language exactly like this Court uses, but
9 not necessarily all the reasonings, and there
10 may be additional reasons beyond those that the
11 lower court provided, we would look behind
12 that? Is that -- is that the suggestion? And
13 how does that fit with federalism and comity?

14 MR. OLIVE: What Ylst holds is that
15 we're trying to figure out what's most
16 probable, not necessarily what is absolutely
17 right. What is most probable?

18 And we think that the court said
19 what's most probable is agreement with the
20 lower court. It can --

21 JUSTICE GORSUCH: Even when the court
22 -- the supreme court disclaims --

23 MR. OLIVE: -- be rebutted in your
24 example --

25 JUSTICE GORSUCH: -- that?

1 MR. OLIVE: Pardon? In your example,
2 that is the circumstance which could lead to
3 rebuttal.

4 JUSTICE GORSUCH: Okay.

5 MR. OLIVE: And in the Georgia Supreme
6 --

7 JUSTICE GORSUCH: And -- and in that
8 case then, what have we accomplished is my
9 question, if you could answer that.

10 MR. OLIVE: You mean by just having a
11 rubber stamp that says "not for the same
12 reasons"?

13 JUSTICE GORSUCH: It's just going to
14 be a slightly different rubber stamp.

15 MR. OLIVE: Well, I think --

16 JUSTICE SOTOMAYOR: We have created a
17 simple rule and states could decide what they
18 want to do. Correct?

19 MR. OLIVE: I see my time is up. I'd
20 love to say "correct" to that.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: Well --

23 JUSTICE GORSUCH: I'd say correct and
24 stop, if I were you.

25 CHIEF JUSTICE ROBERTS: At least -- at

1 least would like to give you the final word.

2 You can take a sentence.

3 MR. OLIVE: Yes, Your Honor.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel. The case is submitted.

7 (Whereupon, at 12:02 p.m., the case
8 was submitted.)

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