ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WARREN LEE HARRIS, Petitioner V. MARVIN REED, WARDEN, ET AL.

CASE NO: 87-5677

PLACE: WASHINGTON, D.C.

DATE: October 12, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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WARREN LEE HARRIS, :

Petitioner :

V. : No. 87-5677

MARVIN REED, WARDEN, ET AL. :

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Washington, D.C.

Wednesday, October 12, 1988

The above entitled matter came on for oral argument before the Supreme Court of the United States at 1:58 o'clock p.m.

APPEARANCES:

KIMBALL R. ANDERSON, ESQ., Chicago, Ill.; on behalf of the Petitioner.

ROBERT V. SHUFF, JR., ESQ, Special Asst. Atty. Gen. of Illinois, Springfield, Ill.; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

(1:58 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-5677, Warren Lee Harris v. Marvin Reed.

Mr. Anderson, you may proceed whenever you're ready.

ORAL ARGUMENT OF KIMBALL R. ANDERSON

ON BEHALF OF THE PETITIONER

MR. ANDERSON: Mr. Chief Justice, and may it please the Court. I am here today to urge that the Court apply the plain statement rule of Michigan v. Long to Federal habeas review of state court convictions under 28 USC Sec. 2254.

I suggest that if a state court plainly relies on a procedural default, then Federal habeas review should ordinarily be foreclosed, absent cause and prejudice.

On the other hand, if, as in this case, the state court is ambiguous or obscure concerning whether it relied on the procedural default, then I suggest that that ambiguity should be resolved in favor of preserving the Federal issue for habeas review.

QUESTION: Mr. Anderson --

QUESTION: Do you think that -- excuse me.

QUESTION: Mr. Anderson, if the state court

opinion says there has been a procedural default here and we need not reach this question, nonetheless, you know, for guidance, or whatever, then they go ahead and express an opinion on it -- how does that come out under your rule?

MR. ANDERSON: Well, this Court has said on several occasions that merely noting a procedural default is not the same as actually relying on the procedural default. Oftentimes state courts -- and indeed, in Illinois, the state court will note a procedural default but then go on to excuse it, and consider and dispose of the case on the merit.

QUESTION: And that is your view, as to how this ought to be handled too?

MR. ANDERSON: Yes. My view is that absent a plain statement clearly invoking the procedural default, as opposed to merely noting it, that absent a plain statement invoking the default and finding the issue waived, then the Federal issue that's been discussed by the appellate court ought to be preserved for review by the --

QUESTION: So in order to rely on procedural default, the state court opinion must say nothing about the merits of the question?

MR. ANDERSON: Oh, no. In order to -- the

rule would be the same as this Court has articulated in Michigan v. Long, and also in the context of a procedural default that Caldwell v. Mississippi.

If the state court plainly relies on a procedural default, then that would foreclose --

QUESTION: Alone. Alone.

QUESTION: But -- okay. So --

MR. ANDERSON: No, not necessarily alone. If they -- yes. If they do that, then Federal habeas review is foreclosed absent cause and prejudice, even if they go on to discuss the Federal issue in dicta.

QUESTION: Okay.

QUESTION: So if the Court says, we have two reasons here for decision: one, a procedural default, two, you haven't got anything on the merits anyway.

MR. ANDERSON: That's correct, Your Honor. And that is --

QUESTION: Then what? Then what?

MR. ANDERSON: Well, that's the circumstances that arises occasionally where you have alternative reliance.

QUESTION: Well, there's no question if they say they are relying on the procedural default.

MR. ANDERSON: And in that instance, habeas --the Sykes test would apply, habeas review would be

foreclosed absent cause and prejudice.

QUESTION: That isn't quite Michigan v. Long, is it?

MR. ANDERSON: Well, Michigan v. Long, of course, is a direct review case, Your Honor. And the rule has --

QUESTION: I know. But you say you're -- you want the Michigan v. Long rule.

MR. ANDERSON: That is the rule in Michigan v. Long, Your Honor, as I understand it. It's also applied in Caldwell v. Mississippi, that if the State Court, if the highest Court of the State plainly relies on a procedural default, then that will preclude direct review by the Supreme Court, regardless of whether the State Court also discusses the merits of a Federal issue.

QUESTION: You mean Caldwell would obtain reversal for you here, because the Illinois Appellate Court did not say anything about procedural default in its opinion?

MR. ANDERSON: It noted the procedural default, but instead of invoking the default and finding the issue waived, Your Honor, the Court went on to address the merits of Mr. Harris' ineffective assistance of counsel claim.

QUESTION: Well, how does a court invoke the

procedural default in its opinion?

MR. ANDERSON: Well, any number of ways, but I suggest that the same rules that would govern in Michigan v. Long would govern here, and there the Court has, has said that a simple statement that the Court finds a matter waived or barred because of procedural default would suffice.

The Court said that that claims statement rule would serve interests of comity and uniformity and in the systemic interests, and I suggest that all of those policy considerations are equally well-served here in the context of habeas review. The plain statement rule would afford due respect to a decision by a state court to plainly invoke its procedural rules.

QUESTION: And you say that it ought to be the plain statement by the appellate court, the federal court shouldn't try to imagine whether they relied on it or not? They should say, they should, just an objective test --

MR. ANDERSON: I'm sorry?

QUESTION: -- (inaudible) the opinion of the appellate court?

MR. ANDERSON: Precisely Your Honor, and for all of the good reasons that were articulated in Michigan v. Long.

This ad hoc method of guessing at, at what the appellate court meant lends itself to error. It disserves the comity interest, and I think the --

QUESTION: It makes a lot of sense where you have a written appellate court decision, but what do you do, I mean, a lot of state appellate courts that, that have mandatory appeals don't write full opinions. In most of them, they just say "appeal denied."

MR. ANDERSON: Yes. Sometimes it --

QUESTION: Right.

MR. ANDERSON: Sometimes this issue does arise in the context of summary --

QUESTION: Suppose you have --

MR. ANDERSON: -- affirmants.

QUESTION: Right. And suppose you have a lower court opinion that rested its decision on procedural default.

MR. ANDERSON: Well --

QUESTION: And all that the appellate court says is appeal denied.

MR. ANDERSON: Yeah.

QUESTION: What, what obtains there?

MR. ANDERSON: Well, the plain statement rule should be applied in the context of summary affirmances, because here's the danger that's going to arise if you

don't. You have a case where the procedural default is, is, let's say, questionable, both as a matter of state law and as the facts. You also have an arguable Constitutional issue.

The prosecutor argues on appeal that the, makes a very weak clàim that the procedural default should be invoked. The defendant argues on appeal that his strong Constitutional error ought to be reviewed, and then the appellate court just summarily affirms without a decision.

The danger of not applying the plain statement rule in that context is that the state court, you may be in one of those States like Illinois where procedural defaults are excused, and here we've got a busy Court that has not taken the time to articulate its real intent. It -- its real intent may be to excuse the, the procedural default, because that's a weaker questionable argument, and rely on the merits. If that happened, and the Federal -- and then the plain statement rule is not applied, the federal court runs the risk of guessing incorrectly about the meaning or the intent of the state court.

QUESTION: How about --

MR. ANDERSON: And that kind of --

QUESTION: How about the second part of

Justice Scalia's (inaudible), maybe you're coming to that, the Illinois appellate court rests its decisions solely on procedural fault, appeal to, leave to appeal to the Supreme Court denied without opinion.

MR. ANDERSON: Well, if leave to appeal is denied, then there, then there's really -- it's like denial of certiorari. There's really been no opinion. So I think then you would look at the appellate court decision --

QUESTION: Illinois?

MR. ANDERSON: Yes, and you'd look to see whether the appellate court had plainly relied on the procedural default.

QUESTION: Mr. Anderson, in this case, the Illinois Court said that, except for the alibi witnesses, all the matters raised in the Petitioner's ineffectiveness claim could have been raised on direct appeal. And then it went on, and dealt with, on the merits, the alibi witness question.

Now, in all fairness, shouldn't that be read as, as procedurally barring everything but the alibi witnesses?

MR. ANDERSON: Well, in fairness, that is a reasonable interpretation of the decision, but I would point out that reasonable minds have disagreed all the

way up through here. We've had four Federal judges below who have disagreed concerning the meaning of the decision. As you know, the District Court concluded that the Appellate Court had intended to excuse the waiver issue, because the Appellate Court discusses not only the alibi witness issue, but also some of the other ineffective assistance of counsel claim issues that Mr. Harris had raised.

Two judges in the Seventh Circuit Court of Appeals also said that the order was ambiguous, but they -- and then they tried to ascertain the intent of the Court, and they disagreed with the District Court.

And then we have Judge Cudahy, who wrote a concurring opinion, and he said: Gee, the order is ambiguous, and I don't think we ought to be trying to divine the unspoken intent.

So I think that the, the best evidence, really, that this, that this order is a good candidate for the plain statement rule is the fact that we've now had four lower judges below who have been unable to agree at the meaning of it. And of course the parties --

QUESTION: Well, maybe --

MR. ANDERSON: -- have spent a lot of time briefing it as well.

QUESTION: Maybe on Federal habeas, our

Federalism concerns are somewhat greater than on direct review, so that we could give the benefit of the doubt to the state's position of, of procedural bar.

MR. ANDERSON: Well, the plain statement rule certainly is not going to preclude the state courts from invoking or applying a procedural rule. So, all the plain statement rule really does is provide the lower Federal courts with guidance concerning whether or not to afford habeas review when the state courts have been obscure.

QUESTION: Yes, but are the considerations on Federal habeas any different at all than on direct review, do you think? I mean, should we be less eager for the Federal courts to reach out and decide these cases?

MR. ANDERSON: I think that, Your Honor, in the context of habeas review, the Court has noted that its jurisdiction is really broader than on direct review, and I think you also have to keep in mind the historic office of the great writ here, in that it is the ultimate protection against un-Constitutional detention, and this Court has noted that a procedural default does not bar a habeas court from, from exercising jurisdiction and, and affording review.

So I think that all of the reasons that Your

Honor articulated in Michigan v. Long apply with equal, if not greater, force here in the habeas context, in terms of promoting uniformity, in terms of promoting comity, and protecting the systemic interests that were articulated in Wainwright.

QUESTION: What -- what is, on what basis does a Federal court refuse habeas corpus when there's been a procedural default that the state court relies on?

MR. ANDERSON: Well, as Justice Rehnquist wrote in Wainwright v. Sykes, comity interest would ordinarily preclude a court from affording habeas review if there has been an adequate and independent state grounds for the state court's decision.

And that rule was explained in terms of affording proper due respect for the decision of the state courts to enforce their procedural rules.

QUESTION: But this is a, this is a court made consideration, I take it?

MR. ANDERSON: It is a court made consideration. I'm sure Your Honor is familiar with the history of it. In Fay v. Noia, the Court said that absent a deliberate bypass, Federal habeas review would be allowed. And then we have the Daniels v. United States and Fay v. Henderson, which began developing this cause and prejudice test, and then the Court finally

adopted the cause and prejudice test in Wainwright v. Sykes, emphasizing the, the systemic interest of finality and efficiency and the comity interests of --

QUESTION: So Federal habeas is really, as has been suggested, is a different kettle of fish than a directed review, I suppose? Why shouldn't there be a presumption in favor of the, in an ambiguous situation, a presumption in favor of the state grounds?

MR. ANDERSON: Well, for all of the reasons that we discussed. In part because if you have, if you have a presumption in favor of default, for example, you are not going to give the appropriate, the respect that is due when, for example, a state court without being clear decides not to apply its procedural rules. When a state court decides not to invoke its procedural rules, and instead to reach the merits of a Federal issue, it has necessarily made a determination that the policies underpinning its procedural rules aren't worthy of indication in that particular case.

And a Federal court, I think, ought to give proper respect for that determination as well as the determination to invoke the rules where appropriate.

QUESTION: Well, in the ambiguous case, the State Court hasn't said that. The State Court is, how do you know whether they relied on it or not?

MR. ANDERSON: That's the problem. You don't know, and the danger --

QUESTION: Well, the --

MR. ANDERSON: The danger with the --

QUESTION: Well, at least, at least the State Court notes the procedural default.

MR. ANDERSON: Notes it and goes on to address merit. So you don't know --

QUESTION: Well, they --

MR. ANDERSON: -- in our instance what they intended.

QUESTION: They just want lawyers to know what the Federal rule is.

MR. ANDERSON: Maybe, but maybe they thought that their procedures -- the policies underpinning their procedural rules didn't merit the vindication given the important issues in this case, and the importance of this particular issue to this particular defendant.

You don't know, and the danger of presuming in favor of default is that you're going to guess wrong, and the danger --

QUESTION: This argument, your argument now sounds like even if the state court relies solely on procedural default in a particular case, the habeas, the habeas corpus court should sit and entertain the claim

if it finds that there has been an uneven application of procedural default.

MR. ANDERSON: No, I haven't said that at all, Your Honor.

QUESTION: Well, you did.

MR. ANDERSON: Not here today or on the briefs. I said that if the state court plainly relies on the procedural default as the basis for its decision --

QUESTION: Regardless of whether it does it every day or not?

MR. ANDERSON: Correct.

QUESTION: Isn't part of the problem with adopting an ambiguity rule? It's not a clear line rule.

I'm helping you -- don't -- I mean, if you could tell me how that could be a clear line rule, I'll be happy to rule against you. But you don't know whether it's ambiguous until you inquire into state law.

MR. ANDERSON: That's right.

QUESTION: You have to inquire into what the State law procedure is.

MR. ANDERSON: That's right --

QUESTION: You really don't know that there's an ambiguity until you've made the Federal habeas court conduct an inquiry into state procedural law.

MR. ANDERSON: Which, as this Court said in Michigan v. Long, was not a good procedure.

QUESTION: But we usually rely on the court of appeals judges to tell us what state law is.

MR. ANDERSON: Yes, but there are going to be instances where the state court hasn't told you, they've been obscure as to the whether or not there is a procedural default, either legally or factually in the context, and the danger of presuming in favor of default in those instances, as I said, is that important individual rights may be lost simply because the state court judge was obscure about his intent. And I think when you're dealing with individual liberty, that kind of ambiguity or obscurity just should not be tolerated, should not block Federal review of the habeas issue.

And I think that this Court -- if you look at the Court's decisions in this area over the years, you've seen the rule developed in the direct review cases, of about the plain statement rule, but you've also seen the rule develop in the habeas cases that if the state court has disposed of the Federal issue, then the Federal courts have an unflagging duty to resolve or to review the correctness of the state court's decision on the Federal issue.

Going back, way back to Brown v. Allen --

Brown v. Allen said that if there's an adequate and independent State grounds, then habeas review is going to be foreclosed. But they went on to give some exceptions to that, and one of those exceptions is right on point here. In Brown v. Allen, they said, well, if the state court indicates that state collateral review is permissible despite a procedural default, then the Federal court can afford habeas review of the Federal issue that has been disposed of by the state court in the state collateral proceeding.

That's really what we have here. We have, we have a situation where the state court indicated that state collateral review may be permissible. The Circuit Court disposed of Mr. Harris' ineffective assistance claim on the merits, and then we get up in the appellate court and we're really not sure what they did with it, but they at least talked about it, discussed it, and concluded in their -- at the end of their order, that his petition is denied, based on their review of the entire record.

QUESTION: Mr. Anderson, may I ask you a question about your reliance on Michigan v. Long? Generally speaking, not exclusively, the Michigan v. Long line of cases deal with situations in which the state is contending that the state courts have given

more protection to a Federal Constitutional claim than the Constitution actually warrants.

In the habeas situation, it's the exact reverse. Typically the defendant is claiming that he was deprived of protection the Constitution would provide him. Do you think that distinction has any significance and which way does it cut?

MR. ANDERSON: I don't think it has a significance, because I would call Your Honors' attention to the fact that that Michigan -- although that was the context of Michigan v. Long, that plain statement rule has been applied subsequently in a procedural default case, in Caldwell v. Mississippi, where the defendant failed to, failed to raise his Constitutional issue on appeal, and his conviction was affirmed. And then it went to the Mississippi Supreme Court, which raised the issue sua sponte, split four to four over it, and then it went to this Court on certiorari, and I, I think Justice Marshall was writing for the majority.

He made it very clear there that the mere existence of a procedural bar is not going to foreclose this Court's direct review jurisdiction. On the contrary, the state court actually had to have relied upon the procedural bar before this Court will decline

jurisdiction.

So I think, Your Honor is right. That was the context of Michigan v. Long. But I think it is, it's gone the other way in subsequent cases. So I don't think the distinction is important.

I do think that all of the reasons for the application of the plain statement rule in the context of direct review apply equally well in the habeas context, in the context of habeas review.

QUESTION: Well, in the Caldwell case, we found that the State Court's ruling was not ambiguous, and that they had not invoked the procedural bar.

MR. ANDERSON: That's true.

The defendant had --

QUESTION: So the --

MR. ANDERSON: -- defaulted --

QUESTION: So the inference, that, or the language in the opinion that procedural bars are treated the same way as state substantive grounds was really unnecessary to that decision?

MR. ANDERSON: I'm not following you there, Your Honor.

QUESTION: In Caldwell, we found that the State Supreme Court's order was clear, and that it had not relied on the state procedural ground.

MR. ANDERSON: As I recall, the Court in Caldwell said that the reference to the waiver issue in the prevailing opinion is somewhat cryptic, but then went on to note that the Michigan Supreme Court had requested briefs on the Constitutional issue, had requested oral argument, and had in fact attempted to decide it, four to four.

So I can't agree with Your Honor that the decision was crystal clear, because Justice Marshall did note that the Mississippi Supreme Court had referred to the waiver issue, and that the Court's reference, as he put it, was "somewhat cryptic."

QUESTION: Well, assuming that we made a clear holding, that procedural grounds are subject to the Michigan Long, v. Long rule in direct review cases, if we apply it in the context of a habeas proceeding, I assume that in most of the cases such as Justice Scalia puts, where there is simply a one-line order affirmed, we won't need cause and prejudice anymore because we simply rely on a presumption that procedural bar was not invoked?

MR. ANDERSON: Well, I have urged in my briefs, and here today, that you don't adopt that presumption because that presumption is contrary to the rationale set forth in Michigan v. Long, and it also

runs the risk that the Federal District Court is simply going to guess wrong at the meaning of the State Court, and fundamental rights will be lost simply because the State Court's opinion was obscured.

QUESTION: Well, you mention the Illinois practice, really as an empirical matter. I should think that most state courts respect their procedural bar rules. They're designed to tell the state courts that these are not litigatible issues --

MR. ANDERSON: I have no --

QUESTION: -- and you're asking us to presume the opposite.

MR. ANDERSON: Oh, no. Oh, no. I have no quarrel with that as a general proposition, Your Honor. Illinois State, Illinois State Courts as a general rule do invoke their procedural default rules. But there are instances where they also excuse them, and you see the most frequent, that arises most frequently in the context that we're here today in, namely, cases under our Illinois Post-Conviction Hearing Act.

If, if you look at our reply brief, we list a number of cases where cases arising under the Illinois Post-Conviction Act have excused a procedural default, particularly when, when ineffective assistance of counsel is at issue.

And all I'm saying is, if the, if the state court wants to foreclose Federal review, all they have to do is plainly rely on and invoke the procedural default.

On the other hand, if they're going to be ambiguous about it, then in order to preserve the vitality of the great writ, and to protect the comity and systemic interests, you've got to preserve the Federal issue for review by the Federal court.

QUESTION: And that is not -- or is it based on an inference that the state court probably did ignore the procedural bar?

MR. ANDERSON: It's --

QUESTION: Or is that just irrelevant, as far as you're concerned?

MR. ANDERSON: Well, you just can't tell, and when you can't tell, all of the policy reasons we've discussed, I think, in the context of habeas, even more so than direct review compel preservation of the Federal issue for Federal review. I'm not saying you have to make an inference one way or the other. In some cases, you'll be able to make an inference. Some cases you won't.

In this case, there are several reasonable inferences that you can make from the order, but it

still boils down to the fact that you're guessing at what the appellate court really intended to do. And I'm saying when you're guessing in the context of individual liberty, it's -- it's a dangerous game to play, and it's the wrong game to play.

QUESTION: Well, Mr. Anderson, speaking of the Illinois practice, it wouldn't be a matter of presuming that they've ignored the bar, but rather because of the broad exception in the Illinois Post Conviction Act for a case of fundamental unfairness, that they think there's enough substance to the claim alleged in the petition that they are concerned that it might meet that test, and in the case of doubt, they go ahead and decide it on the merit.

But I don't think it's -- you're really arguing they were simply unaware of the procedural bar?

MR. ANDERSON: Oh, no --

QUESTION: They just don't think it might apply, given the allegations of Federal Constitutional violations.

MR. ANDERSON: Absolutely. They were clearly aware of the procedural default. They noted it. I agree with Your Honor entirely.

I -- with Your Honor's permission, I think I'll reserve my remaining time for rebuttal.

QUESTION: Thank you, Mr. Anderson.

We'll hear now from you, Mr. Shuff.

ORAL ARGUMENT OF ROBERT V. SHUFF, JR.

ON BEHALF OF THE RESPONDENT

MR. SHUFF: Mr. Chief Justice, and may it please the Court. The Respondents here respectfully submit that when a state court opinion is unclear whether it rests on adequate and independent state grounds or the merits of a Federal Constitutional claim, that that ambiguity should be resolved in favor of the state grounds, so that habeas review is unavailable, absent the showing of cause and prejudice.

In effect, we're asking that this Court form a presumption that the state courts have followed their own procedural rules, and therefore an adequate and independent state grounds exists in such cases.

There are strong cases, strong interests of both the states and public which make this presumption desirable. These interests are grounded in Constitutional considerations, under our Federal system, the interests of comity, which allows us the fair opportunity to review, allows us a degree of finality, reduces our states' ability to -- I'm sorry, increases our states' ability to decide our own future, and to bring order to our criminal justice --

QUESTION: It also would save the Federal courts from some work, I suppose?

MR. SHUFF: Yes. That is an attendant side benefit.

QUESTION: From going through a useless procedure, which because it may be it goes back to the State Court and they decide it on the State grounds.

MR. SHUFF: Your Honor, they could decide it on the State grounds. That is an attendant -- an attendant --

QUESTION: I don't understand that. They can --after the Federal habeas Court decides that there's merit to the case, and orders a retrial, how would it go back to the State system to reargue the State procedural bar? I don't understand that.

MR. SHUFF: Well, it would not.

QUESTION: It would not? Okay.

MR. SHUFF: But if the --

QUESTION: But if there's ambiguity, you say you should assume that it's a State ground.

MR. SHUFF: That's correct. You should assume that it was a State ground, and therefore the relief on a habeas proceeding --

QUESTION: So you never -- you never decide the Federal claim?

MR. SHUFF: That's correct.

The Federal claim should be decided that it is barred. The Respondent's proposal is a presumption in favor of the State Courts' following their rules. Finality is one of the main reasons that we propose this. Habeas is after all a collateral attack, not like the direct appeal. When it's a collateral attack, it is already further removed from the direct appeal, from the trial, from what should be, as this Court has stated, the main event.

It allows the state to have order, and that order allows us to punish criminals, and that that ability to punish criminals allows us to have the rule of law and order, and the rule of law and order allows us to guarantee the individual liberties by the use of the great writ of habeas corpus.

The role of the trial cannot be overemphasized. If we lose or obscure evidence by a review after review after review, the state's ability to protect the integrity of that trial is in fact, in many cases, lost.

QUESTION: Mr. Shuff, I'm -- I happen to think that the silliest thing to spend a lot of time litigating about, and for judges to have to spend a lot of time inquiring into, is, is whether they have

jurisdiction, that the jurisdictional issues ought to be clear.

Now, Mr. Anderson has given us a clear line. You can tell right away -- you look at the opinion of the State Court. If it says, either as an alternative holding or as, as a sole holding, "we rely on the procedural default," that's the end of the matter. If it doesn't say that, there's Federal jurisdiction; if it does say it there isn't.

What clear line do you give us? You say where it's ambiguous. How do I know when it's ambiguous?

MR. SHUFF: Well, I would submit that it would be ambiguous if it didn't say "we rely solely on the State ground."

QUESTION: I don't have anything except a court of appeals, a state court of appeals order that says: affirmed. That's all I have.

MR. SHUFF: In that instance, Your Honor, we would suggest that the Court assume that the State followed its rules and if the state followed its rules and procedural default was argued, that it would be a matter of procedural default, and habeas would not lie.

QUESTION: Well, I'd have to look to see whether procedural default was argued? Right?

MR. SHUFF: Under that circumstances, you

might have to make that second inquiry.

QUESTION: And I'd also have to make a ruling on whether the argument was a right one, I suppose. I'd have to figure out what the state law is about procedural default, wouldn't I, as a Federal court?

MR. SHUFF: In some instances, yes.

QUESTION: I don't --

MR. SHUFF: In that instance, when it's just "appeal denied," --

QUESTION: That's going to be a very common instance. That's going to be a very common instance.

MR. SHUFF: Well --

QUESTION: I just don't consider that a very clear line. I don't like to -- to, you know, I'd much rather have Federal judges figuring out what Federal law is, than figuring out what the State procedural law is. That seems to me an utterly useless exercise for Federal judges to engage in.

MR. SHUFF: Well, it is not a, a useless exercise when you look to some of the ideas such as comity and what the burden is in the habeas on the States.

If you look at the, the habeas practice in Illinois, for example, 300 cases a year, you then think about how you, how you would apply this rule to 300

cases. That is not a great number of cases, but is a significant number of cases, and the burden to the States -- you should look at it possibly back that way, rather than the burden on the Federal court looking at that question.

QUESTION: What, as a practical matter, is the burden to the states of the rule that the Petitioner proposes?

MR. SHUFF: Well, the burden to the State is one that is systemic. The cases, for example, that are cited by the Petitioner -- in each one of those cases, the Illinois Court said, "We have found" -- this is, I'm sorry, this is in their reply brief -- they have -- "We have found that there is in fact a default, but we are choosing to waive that default and go to the merits."

That was a very small number of cases. They have cited a Law Review article in that reply brief that states it conservatively. It's Paul Wangren, and it's an article in the De Paul Law Review that says conservatively for every 10 cases that the courts don't find a waiver and don't waive, they find one where they find a waiver and, and I'm sorry, the procedural default, and do waive.

And so what you're doing is, you're putting the burden back on the states to, in over 90 percent of

their cases, to say, well, we're not waiving.

QUESTION: Big deal. All they have to do is say by the way, we're relying on procedural default when they are. That's all they have to say. We are relying on procedural default. You could even summarize it.

You could say procedural default. You say, is that such a terrible burden on the States? Whenever they say that, the Federal Court is out of it. If they don't say it, the Federal Court isn't.

MR. SHUFF: Well, I believe that is the --

QUESTION: It's quick and easy, no trouble for everybody.

MR. SHUFF: I believe that is a simple rule, but I don't believe that it serves the interest of comity or Federalism or the finality rules or the main event of trial or any other interests that you have been trying to address.

QUESTION: Instead of that, you want to have the Federal judges enter into this, this inquiry, for no useful Federal purpose at all, into what the State law of procedural default is.

MR. SHUFF: Well, to begin with, to start with the presumption that we followed our rules, and to give our Courts the respect of a co-existing jurisdiction to say that we believe that you followed your rules.

That's a rebuttable presumption --

QUESTION: Why can't they give us some respect, and just, some respect, and just say procedural default when that, when that's what they're relying on?

MR. SHUFF: That would be ideal if they would all do that, Your Honor.

QUESTION: You see? Makes sense to me.

QUESTION: Well, what are the circumstances when they don't do it, in these 300 cases? We're not just talking about the whole world, 300 cases going through the Illinois Court of Appeals. Are a lot of them affirmances of trial courts without opinion?

MR. SHUFF: No, not in Illinois. Primarily they'll be what we call a Rule 23 opinion, which is an unpublished opinion, very short, no issues that are merit publishing but that here's what we decided.

QUESTION: Is there anything that concerns you from the point of your representing the State by your opponent's rule, other than the fact that the Court would have to say, "We find a procedural default here" when perhaps they would prefer not to? Are there any class of cases that haven't been explored in the argument or on the briefs?

MR. SHUFF: Yes, there is a classic case that I think would mitigate against that, and that's the

classic case --

QUESTION: Nullicate against it.

MR. SHUFF: I'm sorry.

QUESTION: Yes.

MR. SHUFF: That's a class where you have a procedural default and you're talking of possibly of something like incompetency of counsel or misconduct of the judiciary, because when you take those through the Illinois system, you're going to go up two different lines: either on direct appeal, where you talk about a plain error, or a, a post conviction proceeding where you're talking about a fundamental fairness. And when you then come to the habeas review, if the Court were to throw those cases back, it would change the standard by which those questions would be decided.

QUESTION: If what court were to throw the --

MR. SHUFF: The Federal court. The habeas Court, Mr. Chief Justice.

QUESTION: I don't -- perhaps I don't understand enough about Illinois law. I don't -- I really don't understand exactly what you're saying.

There are two different post-conviction routes in Illinois?

MR. SHUFF: Yes.

QUESTION: And --

MR. SHUFF: Well, there's a post conviction direct appeal route, okay, and there we have a rule of plain error, okay, which is simply almost a one, a one-step rule. And then we have a fundamental fairness on a post conviction proceeding, which is the normal place where matters off the record in the direct appeal would be brought if they raise a Constitutional claim.

And those rules are different than the rule that you would obtain in a habeas case, if in fact you granted the habeas under the proposed rule.

QUESTION: But what difference does that -- I think the Chief Justice's question is, is not going to the, to that point, the effect of a habeas decision. It's going to the question of whether there's some category of case where it would be difficult or impossible for the state court to say "procedural default." Is there any?

MR. SHUFF: There is no impossibility that I could think of, if that was the question. I'm sorry I misunderstood the question.

QUESTION: I thought that was the question.

QUESTION: You've answered either one question or two.

[Laughter]

MR. SHUFF: Well, the cause and prejudice

standard that this Court has set forth provides an adequate safety net for the habeas seeker, so to speak, the Petitioner, in those cases where there would have been a procedural default, and yet a serious Constitutional question could exist. You also have the further review of a, an extreme miscarriage of, a fundamental miscarriage of justice.

So you have, actually, two safety nets or safety valves for which people who are kept from the habeas system via presumption of the state, following these rules, for them to escape into the habeas system, or enter the habeas system, more correctly.

So, we feel that the individual liberties should be carefully balanced against the state's liberties with the very fundamental thought in mind that in this country, the states have the majority of the burden of protecting society from the criminal. We are the sentry, and we feel that the interests of comity and Federalism should be protected, and therefore that the presumption should go to the states.

For those reasons, we ask you that you please affirm the Seventh Circuit.

QUESTION: Mr. Shuff, before you sit down, could I ask you a question?

MR. SHUFF: Sure.

QUESTION: You said there are about 300 habeas cases in Illinois every year, is that the --

MR. SHUFF: That's approximately numbered.

QUESTION: How many of those go to hearing, are there evidentiary hearings in them, would you say? Do you -- maybe, I mean, if you do know?

MR. SHUFF: I do not know how many go to evidentiary hearing. But it's a significant amount --there are quite a few that do go to evidentiary hearing.

QUESTION: Yes.

QUESTION: Thank you, Mr. Shuff.

Mr. Anderson, you have four minutes remaining.

REBUTTAL ARGUMENT OF KIMBALL R. ANDERSON

MR. ANDERSON: Thank you, Mr. Chief Justice.

My opponent argues that there should be a presumption that the State Courts have followed their procedural rules. I certainly don't have any quarrel with that, but the presumption should recognize that the State Courts, in following their procedural rules, sometimes invoke procedural default and sometimes excuse it. I think the plain statement rule would recognize that fact.

My opponents also argue that there should be a presumption in procedural default whenever there's

ambiguity. And I would remind my opponent that that very presumption in favor of dismissal has been rejected by this Court in the context of direct review in the Michigan v. Long case. There, the Court said that it would not dismiss the case outright if the State Court had been ambiguous or obscure concerning whether it relied on an adequate and independent state ground. On the contrary, the Court there said that it would presume in those instances that the court had disposed of the issue on the Federal issue.

And now my opponents are arguing basically for the reverse presumption in the context of habeas review, but have identified no good reasons that I've heard here today --

QUESTION: Well, I take it, I take it then that your position, the state would never be able to, should never be allowed to raise procedural default in the first instance in the Federal habeas court?

MR. ANDERSON: I'm not, I'm not sure I'm following the gist of your question, Your Honor. If --

QUESTION: Well, there, no claim of procedural default was ever made in the state courts --

MR. ANDERSON: If --

QUESTION: -- and the state court simply decided the Federal issue, and the state comes into the

Federal habeas Court saying procedural default.

MR. ANDERSON: Well, I think that -- I think that's settled, Your Honor, and that was -- that was, that was settled in the County Court of Ulster case, and also --

QUESTION: So the answer is the state may not raise it in the first instance?

MR. ANDERSON: That's right. It's not -- it cannot be raised in the first instance in the Federal court, because the state court didn't give any indication that, that its review of the Federal issue was barred because of the procedural default, and I think Justice Stevens said in County Court of Ulster that if a state court doesn't indicate that, that review of the Federal issue is precluded by the state's procedural bar, then the Federal Court certainly implies no disrespect for the state courts by entertaining the issue.

My opponents also say that the cause and prejudice rule provides some kind of safety net here, but the cause and prejudice test was never intended as a safety net for obscure state court opinions. There is certainly no authority for that proposition. In Wainwright v. Sykes, the Court didn't charge ahead to determine whether or not there was cause and prejudice.

Instead, they first, the Court first addressed in detail whether or not there was in fact an adequate and independent State grounds for the state court decision.

You don't just jump over that and rely on the, rely on the, rely on the cause of prejudice test as some kind of safety net here.

Finally, I think that maybe I should conclude with an analogy to a baseball rule, since I know noted the Court's reliance on baseball precedent this morning, and since we are approaching the seventh game of the National League series tonight. It's settled in baseball that a tie between the runner and the ball goes to the runner. I think it's equally settled in the context of direct review that a tie between the procedural default and the Federal issue goes to the Federal issue.

And now, I think, what we have here is the state is trying to change the rules of the ball game just because we're here on habeas review instead of direct review. And as I've said today and in our briefs, there really isn't any different -- there isn't any good reason to treat ambiguity in the context of direct review any differently than in habeas review.

And I thank Your Honors very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

Anderson.

The case is submitted.

(Whereupon, at 2:42 o'clock p.m., the case in the above-titled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-5677 - WARREN LEE HARRIS, Petitioner V. MARVIN REED, WARDEN, ET AL.

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BY alan friedman

(REPORTER)