

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EDDIE S. YLST, WARDEN, Petitioner
v. OWEN DUANE NUNNEMAKER

CASE NO: 90-68

PLACE: Washington, D.C.

DATE: March 19, 1991

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SUPREME COURT, U.S.
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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EDDIE S. YLST, WARDEN, :

4 Petitioner :

5 v. : No. 90-68

6 OWEN DUANE NUNNEMAKER :

7 - - - - - X

8 Washington, D.C.

9 Tuesday, March 19, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:43 a.m.

13 APPEARANCES:

14 CLIFFORD K. THOMPSON, JR., ESQ., Deputy Attorney General
15 of California, San Francisco, California; on behalf
16 of the Petitioner.

17 JULIANA DROUS, ESQ., San Francisco, California; appointed
18 by this Court on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (10:43 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 90-68, Eddie S. Ylst v. Owen Duane Nunnemaker.

5 Mr. Thompson, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF CLIFFORD K. THOMPSON, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. THOMPSON: Mr. Chief Justice, and may it
10 please the Court:

11 The United States court of appeals for the Ninth
12 Circuit held in this case that footnote dictum --

13 QUESTION: Would you speak up a little, Mr.
14 Thompson?

15 MR. THOMPSON: I'm sorry. That footnote dictum
16 in Harris against Reed compels a Federal court to presume
17 that by summarily denying a successive State habeas corpus
18 petition the California Supreme Court intentionally waived
19 a procedural default that the State court of appeal had
20 expressly claimed 10 years earlier. In 1976 respondent
21 Nunnemaker was convicted of first degree murder. On
22 appeal he challenged prosecution evidence on Miranda
23 grounds. The California court of appeal refused to
24 consider that claim on its merits because, contrary to the
25 State's statutory contemporaneous objection rule, no

1 objection was made to that evidence at trial on any
2 constitutional ground.

3 Seven years later the respondent began
4 collaterally attacking his conviction. The State trial
5 court, the State court of appeals, and the California
6 Supreme Court successively denied his petitions, all
7 without discussing the merits of his Federal claim.

8 QUESTION: These were petitions for habeas
9 corpus?

10 MR. THOMPSON: Yes, Your Honor.

11 At that point, Mr. Nunnemaker then turned to the
12 Federal district court, which ultimately denied his
13 Federal habeas corpus petition on the grounds that he had
14 in fact waived -- procedurally defaulted his Miranda
15 claim. He then appealed to the Ninth Circuit.

16 While that appeal was pending this Court
17 announced its decision in Harris v. Reed, which became the
18 basis for the decision below, reached without the benefit
19 of argument or -- either briefing or oral argument on this
20 Court's intervening decision.

21 It was in the context of divining the unspoken
22 intent underlying a 7-page State court opinion that in
23 Harris against Reed the Court held that a procedural
24 default would not bar consideration of a Federal claim
25 either on direct or Federal habeas review unless the last

1 State court rendering judgment clearly and expressly
2 stated that its decision rested on a State procedural bar.

3 So the holding of Harris appeared to apply only
4 when it was unclear whether in fact the last State court
5 to write an opinion had invoked a State procedural rule.
6 And in Harris the last State court wrote an opinion, an
7 opinion expressly deciding the Federal question, but no
8 State court in Harris clearly claimed a procedural
9 default.

10 By contrast, in Nunnemaker a State court did
11 claim clearly, in fact exclusively as a basis for its
12 decision, a State procedural bar. No State court
13 addressed the Federal question, and the last State court
14 did not write an opinion. Nevertheless --

15 QUESTION: Mr. Thompson, as I understand the
16 ruling of the court of appeal, it was based on the
17 proposition that the Supreme Court of California, which
18 denied a writ of habeas corpus without opinion in this
19 case, does on occasion grant review of otherwise defaulted
20 claims where there's an original petition for habeas
21 corpus. And so you can't say flatly that a denial of the
22 writ is based on procedural grounds.

23 MR. THOMPSON: Well, Your Honor, the Ninth
24 Circuit's opinion quotes your opinion and says that the
25 Supreme Court in Harris discussed the issue now before us.

1 And it then holds that the judgment, that the California
2 Supreme Court summary denial is a judgment under Harris,
3 without reference to State law. It declined to look
4 beyond the four corners of the California Supreme Court's
5 order denying the petition. And it, like Harris, did not
6 distinguish between the exercise of a State's court's
7 mandatory and discretionary jurisdiction.

8 Now, on its face the Ninth Circuit seems to say
9 that Harris disposes of this case. And I think that that
10 view is reinforced by the fact that the Ninth Circuit
11 unnecessarily raised the question as to whether or not a
12 petition for review, not -- that is addressed to the State
13 supreme court's discretionary appellate jurisdiction in a
14 habeas corpus case, if it were summarily denied might not
15 be a judgment within the Harris rule also. So it would
16 seem the Ninth Circuit takes a fairly literal reading of
17 Harris. I may be, however --

18 QUESTION: You take the position that the Ninth
19 Circuit probably relied on that footnote in Harris --

20 MR. THOMPSON: I do, Your Honor. I recognize --

21 QUESTION: -- and that footnote, I suppose, in
22 Harris may be dicta, in any event.

23 MR. THOMPSON: Oh, it's unquestionably dicta,
24 Your Honor. I mean, those were not the facts as
25 described, I think, in footnote 1 of the dissent and in

1 the text of the opinion. The facts before Harris were
2 that it involved an opinion. What Harris involved, the
3 application of the plain statement in -- rule in Harris
4 was really an application of the plain English rule. The
5 State interest at stake was in writing ambiguous opinions.
6 Here California is asking that its State supreme court
7 have the right to decide when to write its opinions, not
8 how to write them. And the complementary Federal interest
9 in Harris was in relieving Federal courts of the somewhat
10 impossible task of deciphering all those ambiguous
11 opinions.

12 In this case, however, California simply asked
13 that the Federal court correctly interpret California law,
14 and that once that is done that that interpretation will
15 inform all Federal subsequent litigation.

16 Now, it may be that the Ninth Circuit's reading
17 of Harris was reinforced by its longstanding
18 misapprehension of California law, namely that the
19 California Supreme Court's habeas jurisdiction, because it
20 is original, must be mandatory. Well, that is not true.

21 QUESTION: Must be what?

22 MR. THOMPSON: Mandatory, Your Honor.

23 QUESTION: I didn't read the Ninth Circuit
24 opinion that way. I thought they said that the California
25 Supreme Court on the original habeas petition can and does

1 on occasion take a case regardless of previous procedural
2 defaults and decide the merits, but that most of the time
3 it doesn't. And that's why it applied Harris against
4 Reed.

5 MR. THOMPSON: I don't understand the opinion
6 that way, Your Honor. I believe it's an extension of what
7 we in California call the Ninth Circuit's postcard rule.
8 Back in 1974 they were faced with the problem of what to
9 do with summary denials from the California Supreme Court
10 when the issue was exhaustion. And this is 3 years before
11 Wainwright was even decided.

12 QUESTION: These are summary denials of habeas?

13 MR. THOMPSON: Summary denial. By that, Your
14 Honor, I mean a denial that says the petition for habeas
15 corpus is denied. There is no explanation and no citation
16 of authority.

17 In order to prevent a situation in which the
18 prisoner became a ping pong ball going back and forth
19 between Federal and State courts, the Ninth Circuit
20 created a presumption, and that was that a summary denial
21 exhausted State remedies. We don't object to that
22 presumption. We don't think that the State has any
23 legitimate interest in exhausting the petitioner as
24 opposed to his remedies.

25 What happened was subsequently, in 1989 in Lewis

1 against Borg, the Ninth Circuit extended that rule in the
2 context of procedural default. We don't accept that rule.
3 I mean, the State interests are altogether different in
4 the two situations. The Ninth Circuit's reference in
5 Nunnemaker to the California Supreme Court's original
6 jurisdiction refers to its holding in Harris against
7 Superior Court. They do not cite that, but they do cite
8 McQuown v. McCartney distinguishing Harris. I think that
9 that's fairly clear.

10 The problem lies in the Ninth Circuit's
11 insistence that the California Supreme Court's habeas
12 jurisdiction is mandatory. I mean, if it were
13 discretionary --

14 QUESTION: What do you mean by saying that
15 jurisdiction in mandatory?

16 MR. THOMPSON: What I mean, Your Honor, is that
17 the California Supreme Court's denial represents its view
18 of the merits of a habeas petition. And it is our
19 position that they do not treat in a petition for habeas
20 corpus invoking their original jurisdiction any
21 differently from a petition for a review either from
22 direct appeal or from a court of appeals decision in a
23 habeas case. The Ninth Circuit disputes that. However,
24 and I understand that it's awkward for the State to come
25 here and say that the local Federal court has

1 misinterpreted Ninth Circuit law or is in exception to
2 that.

3 QUESTION: Misinterpreted California law.

4 MR. THOMPSON: I'm sorry, yes. California law.
5 There is an exception to that rule, however, and that's
6 sort of a plain error doctrine. When it's clear that
7 there has been an error, this Court will correct it.

8 QUESTION: I take it you don't -- you certainly
9 agree that the -- that the -- on an original habeas
10 petition the California Supreme Court can decide the
11 merits if it wants to?

12 MR. THOMPSON: If it wants to, Your Honor, but
13 --

14 QUESTION: But you say if they, if they just
15 automatically just say petition denied --

16 MR. THOMPSON: That's a decision not to decide
17 the case.

18 QUESTION: They won't -- if they decide the
19 merits you think there will be an opinion?

20 MR. THOMPSON: Under California procedure if
21 they are going to decide the merits they will first issue
22 an order to show cause. Under our law the case doesn't
23 become a cause for decision without an order to show
24 cause, and they will issue one and hear argument and
25 decide the case.

1 QUESTION: So you say --

2 QUESTION: Where do we look when a petition
3 denied order from the California Supreme Court in an
4 original habeas case cannot possibly mean that they
5 considered the merits, found them wanting, and therefore
6 denied it for that reason?

7 MR. THOMPSON: No more, Your Honor, than an
8 order from this Court saying that certiorari is denied.

9 QUESTION: Your answer is yes to the question?

10 MR. THOMPSON: Yeah, I mean, they look at
11 everything, but the criteria go far beyond the merits.

12 QUESTION: But what's the answer to my question?

13 MR. THOMPSON: I think that the answer is, Your
14 Honor, it is not a decision on the merits. It is a
15 decision that for whatever reason they do not wish to
16 entertain the case. For example --

17 QUESTION: Including possible lack of merit? In
18 this case possible lack of merit to the Miranda claim?

19 MR. THOMPSON: I think, Your Honor, no, because
20 in that case they would, what they would say is they would
21 deny the writ and then cite to In re Swain saying -- which
22 is a State case, saying that you don't state a prima facie
23 case. But --

24 QUESTION: Where do we look first for a concise
25 statement of California law on this? It's true there are

1 some cases in which they do exactly what you have
2 described, and then there's a whole string of cases in
3 which they simply give a one-sentence order. Has the
4 Supreme Court of California ever come down with a
5 definitive statement itself about the significance of the
6 one-sentence orders, or do we have to just infer it from
7 practice?

8 MR. THOMPSON: Well, I think, Your Honor, as the
9 Ninth Circuit has recognized, it turns on the nature of
10 the State jurisdiction. If it's discretionary, if a
11 petition invokes discretionary jurisdiction, then the
12 Ninth Circuit would not look behind it. They have done
13 that in Idaho. Just --

14 QUESTION: As I understand it, the jurisdiction
15 is not discretionary in the sense that they must in effect
16 entertain the case at length and come down with a
17 discursive opinion. But it seems to be an open question
18 so far as what we have had presented to us as to whether
19 it is discretionary in the sense that a denial does not
20 imply a view of the merits. You -- the parties here
21 disagree, and I want to know where we can look for a
22 definitive statement of California law on that.

23 MR. THOMPSON: Well, I think, Your Honor, where
24 I find it is in the California Supreme Court's manual of
25 practices and procedures, where at page 13 the court

1 describes its own --

2 QUESTION: Where do we find that in the papers
3 here?

4 MR. THOMPSON: Your Honor, it's not in the
5 record in this case. Copies have been provided to the
6 clerk of the Court. It's cited in our brief and the
7 respondent's brief and in one amicus brief, and is the --
8 according to the chief justice of California, some 10,000
9 copies have been printed and distributed.

10 What the California court said there is that, as
11 follows. Appeals in all death penalty cases are
12 automatically taken to the California Supreme Court.
13 Other cases normally come before the court either in the
14 form of petitions for review of decisions by the court of
15 appeal or as petitions for extraordinary writs of mandate,
16 prohibition, certiorari, or habeas corpus. In these cases
17 the court must decide whether to accept the matter for
18 decision.

19 Like the United States Supreme Court, the
20 California Supreme Court has discretionary jurisdiction
21 over many of the matters presented to it. Thus, with the
22 exception of a relatively small number of appeals that
23 come to the court directly, it has discretion to decide
24 whether or not it will accept any particular case for
25 review and decision on the merits. In other words, that

1 the order saying that petition for writ of habeas corpus
2 is denied means we do not entertain the petition, we will
3 not hear the case. It is not a decision on the merits.
4 It is not intended to be a waiver of any procedural
5 default.

6 QUESTION: It's substantially like a denial of
7 hearing on a petition for hearing from the court of
8 appeals?

9 MR. THOMPSON: It is exactly --

10 QUESTION: Exactly?

11 MR. THOMPSON: -- like that in our view, Your
12 Honor, yes. And in fact --

13 QUESTION: May I ask this question on it?
14 Supposing you had a case, and I am sure there must be many
15 of these, in which there was never an argument of
16 procedural default, but there's just an argument about the
17 merits of the constitutional claim. And the court of
18 appeal wrote a long opinion denying the claim on the
19 merits. And the petitioner thereafter went to the
20 California Supreme Court and filed an original petition
21 for habeas corpus. Would the entry of that order be a
22 judgment that would be reviewable in this Court, or would
23 it then have to review the judgment of the court of
24 appeals?

25 MR. THOMPSON: Well, Your Honor, you would have

1 jurisdiction to take it, but under --

2 QUESTION: Under the theory that it is the final
3 judgment?

4 MR. THOMPSON: Yes. But under the practice of
5 looking through a discretionary denial order, and that
6 would be one.

7 QUESTION: What -- just a minute. Let me just
8 be sure I understand you. First, if it had been a
9 petition for review as distinguished from a habeas corpus,
10 then our review would be of the court of appeals'
11 judgment, would it not?

12 MR. THOMPSON: Yes, it would, Your Honor. In
13 which case the State court would, having reached the first
14 --

15 QUESTION: Right, I understand.

16 MR. THOMPSON: -- could not claim a procedural
17 default.

18 QUESTION: But now my other hypothetical, the
19 case like this one, where it's an original petition for
20 habeas, then would not our review be of the California
21 Supreme Court's action?

22 MR. THOMPSON: I think not, Your Honor. You
23 would re -- you would have jurisdiction to review their
24 order, but the only decision they would make is the
25 exercise of discretion.

1 QUESTION: Well, we only have jurisdiction if
2 it's a final judgment.

3 MR. THOMPSON: I understand, Your Honor.

4 QUESTION: That's why we couldn't review the
5 discretionary one.

6 MR. THOMPSON: I understand.

7 QUESTION: But you think we would have
8 jurisdiction over the original habeas?

9 MR. THOMPSON: No, I think what you would have
10 jurisdiction to review is their exercise of discretion,
11 which could be challenged --

12 QUESTION: Well, we review judgments, not
13 opinions and so forth, and it's a particular order that
14 would give us jurisdiction. And in one case it's the
15 earlier order and the other case it's the later order.

16 MR. THOMPSON: Well, I think what would happen
17 is you would have to conclude that you should deny cert.
18 because there was no judgment on the merits.

19 Now, the Court could choose, I suppose, by
20 analogy to its practice on direct review, to look through
21 the State supreme court's habeas denial until you got a
22 decision. Now you should get one even on habeas, because
23 the rule 260(e) of the California Rules of Court requires
24 a trial court when it denies a habeas petition to state
25 brief reasons for its denial.

1 In this case you could look through to the court
2 of appeals opinion and reach the merits. I am not sure
3 that the Court would wish to do that, because what it
4 would do in practice is to result in allowing the
5 petitioner to renew his petition for cert. annually or
6 even more frequently because he could always file a
7 petition for habeas in California criticizing or
8 challenging on Federal grounds a decision rendered by a
9 court of appeal or even the supreme court years earlier,
10 and then if the subsequent habeas were reviewable then you
11 would get to review that cert. petition at least once or
12 twice a year.

13 Now you might wish not to do that and say
14 instead to the petitioner, you have quite an adequate
15 remedy on Federal habeas corpus. That decision, however,
16 would be the court's and is not determined by the outcome
17 in this case.

18 All we're asking is that Harris v. Reed plain
19 statement rule be applied only to judgments, that judgment
20 be defined by State law consistent with Sykes' goal of --

21 QUESTION: You're just saying that in this case
22 we should just treat this case as never having been in the
23 California Supreme Court, as it never really was.

24 MR. THOMPSON: I am saying, Your Honor, I --

25 QUESTION: And that therefore the last court to

1 have addressed the question is the intermediate appellate
2 court --

3 MR. THOMPSON: The last State court.

4 QUESTION: -- and it relies on procedural
5 default.

6 MR. THOMPSON: That's correct, Your Honor.

7 QUESTION: Expressly.

8 MR. THOMPSON: Yes. Exclusively, in fact. Did
9 not discuss the Federal claim.

10 Yes, we're saying --

11 QUESTION: You're really saying the petition for
12 habeas corpus in the California Supreme Court was really
13 -- the case was never entertained there. It was just
14 dismissed.

15 MR. THOMPSON: That's correct, Your Honor. And
16 therefore a summary denial of a habeas petition by the
17 California Supreme Court, whether it invokes their
18 original or appellate jurisdiction, is, for procedural
19 default purposes, a neutral procedural event. It means
20 nothing.

21 QUESTION: Well, now, to make -- to make that
22 decision the Federal court has to look to California law
23 to determine that in California that's the effect of the
24 order, right?

25 MR. THOMPSON: Yes, Your Honor.

1 QUESTION: And that, of course, is not what the
2 footnote in Harris against Reed suggests. So you would
3 have us back off from that footnote.

4 MR. THOMPSON: Your Honor, I would have the
5 Court honor the principle that the State court is the
6 ultimate arbiter of its own law. And I believe that the
7 California Supreme Court has spoken very clearly in the
8 passage I read, a passage which certainly would satisfy
9 any plain statement rule, even if only because it is
10 written for lay people, as the respondent will say. But
11 there's more.

12 There are examples, and we furnish them. In In
13 re Joiner, In re Jackson, those are two California habeas
14 cases in which the State court quite clearly said that our
15 criteria for accepting an original habeas petition include
16 the public importance of the question presented and the
17 possibility of conflict below. Those are precisely the
18 criteria that the California Supreme Court uses under rule
19 29 in exercising its discretionary appellate jurisdiction.

20
21 In addition --

22 QUESTION: Do you think that -- do you think
23 that we have to -- if we agree with you we have to say
24 that the court of appeals misunderstood California law? I
25 thought they just relied on Harris against Reed, without

1 any -- without any -- did you argue, make this kind of an
2 argument before the court of appeals?

3 MR. THOMPSON: We didn't -- Your Honor --

4 QUESTION: This very argument that you're
5 making, that you should treat this habeas corpus petition
6 when it's dismissed with just a blind order as never
7 having really been in the court -- in the supreme court?
8 Did you make that argument?

9 MR. THOMPSON: No, Your Honor. There was no
10 oral argument in this case. It was -- the Ninth Circuit
11 submitted it without oral argument.

12 QUESTION: All right. Was it briefed?

13 MR. THOMPSON: Briefing was completed in this
14 case, Your Honor, before you decided Harris v. Reed.

15 QUESTION: Well --

16 MR. THOMPSON: We were at a bit of a
17 disadvantage. We think --

18 QUESTION: Well, it looks to me like the court
19 of appeals just relied on Harris against Reed without any
20 real close analysis of the State law such as you are now
21 presented to us.

22 MR. THOMPSON: That's unclear, Your Honor. I
23 think -- what is clear to me is what, if we go back, what
24 will happen --

25 QUESTION: I would hesitate to say that

1 California -- that the court of appeals miss -- made a
2 mistake about State law --

3 MR. THOMPSON: Well, they have.

4 QUESTION: -- unless it's clear that they did.

5 MR. THOMPSON: Well, I think it is clear, Your
6 Honor.

7 QUESTION: Well they didn't say, they didn't
8 talk about State law like you're talking about it.

9 MR. THOMPSON: Well, that depends on the meaning
10 one attributes to their reference in the opinion below to
11 the fact that this is a petition invoking the California
12 Supreme Court's original jurisdiction. Because that's the
13 phrase that they seized upon in Harris against Superior
14 Court in 1974, I believe, in characterizing, or
15 mischaracterizing our State supreme court's habeas
16 practice.

17 QUESTION: Well, Mr. Thompson, now, the order of
18 the California Supreme Court, the last order denying the
19 original State habeas, was decided -- handed down before
20 our decision in Harris against Reed? Is that right?

21 MR. THOMPSON: That's true, Your Honor.

22 QUESTION: And the Ninth Circuit opinion came
23 down after we had decided Harris against Reed?

24 MR. THOMPSON: Yes. Yes, Your Honor. In all
25 candor, however, I find it difficult to assign a great

1 deal of importance to that. And the reason is that the
2 California Supreme Court has not perceptibly altered its
3 practice since Harris against Reed. In noncapital cases
4 -- capital cases are different because the State supreme
5 court has mandatory appellate jurisdiction, and under its
6 rules consolidates habeas corpus proceedings. And so in
7 those cases they will claim procedural default. They will
8 use the words "procedural default." They have not done so
9 in any noncapital case, and in 1989 denied 550 -- gave 550
10 summary denials and about 648 in 1990. They are not going
11 to change their practice.

12 And I think the reason for it is that it would
13 put an enormous burden on them. I mean, it's one thing to
14 cite State cases, as they do -- Swain, Linley, Dexter --
15 because those cases show defects apparent from the face of
16 the petition. Defects not in the procedure below but in
17 the petition itself, such as not stating a prima facie
18 case or raising a question of Fourth Amendment law, for
19 example. Our State courts anticipated Stone v. Powell in
20 that regard. Those are principles that are fairly non-
21 controversial. They don't require a lot of time to apply,
22 not much judge time involved. Those orders do not even
23 relate to individual claims, and many of the petitions
24 present up to 16 or more claims. So there is not much
25 time involved -- de minimus drafting time. Those are easy

1 orders to write.

2 On the other hand, for the State supreme court
3 to claim a procedural default is pretty onerous. The
4 Ninth Circuit itself in Bachelor against Cup pointed out
5 that most times it's more difficult to decide the
6 procedural default question than the underlying merits.

7 Now, what the Ninth Circuit is asking is that
8 the California Supreme Court look at this petition and
9 then determine whether there has been exhaustion, whether
10 there has been a claim of a procedural default, whether
11 the State rules vindicates legitimate interest, whether it
12 has been even-handedly applied, whether it is truly
13 independent of Federal law, and whether there has been a
14 waiver of that default, or whether it is cause and
15 prejudice. I mean, this is an enormous burden on a court
16 whose docket approaches this Court's. They simply can't
17 do it, which is why they haven't done what the Ninth
18 Circuit wants.

19 As a matter of fact, the Ninth Circuit has given
20 the Supreme Court of California an ultimatum. It says you
21 have three choices. Either continue your summary denial
22 process and we'll view it as a ruling on the merits, and
23 then you will undermine the integrity of your State
24 procedural rules and the finality of your judgments, or do
25 all this work that I have just been describing, adding at

1 least 650 cases a year to your caseload. And that doesn't
2 include the never-ending stream of petitions as predicted
3 by the Harris dissent that will result by guys who will --
4 prisoners who will keep petitioning until they get a
5 suitably ambiguous --

6 QUESTION: May I just interrupt a minute? I'm
7 trying to think out through the workload problem for the
8 judge. And you're telling me that there are cases where
9 it's not clear on the face of the court -- I assume they
10 read the court of appeals' opinion that they're asked to
11 review before they act on these petitions.

12 And you're telling me there are a lot of cases
13 where they can't tell whether the court of appeals has
14 acted on a procedural default ground or some other ground.
15 And how do we know, then, that it's going to be any easier
16 for the Federal district court, who has the same problem,
17 when the petitioner files that complaint? It seems to me
18 if it is clear they could very simply say this is -- as
19 you say it is in this case, just entered a one-line order.

20 MR. THOMPSON: Because, Your Honor, when the
21 Federal district court looks through these summary denials
22 and hits that State court opinion, it'll apply the Harris
23 v. Reed plain statement rule. And if the State court of
24 appeal, for example, in this case --

25 QUESTION: Well, but if it's plain. I mean, if

1 it is plain on the face of the court of appeals' opinion,
2 what is the burden on the justice of the California
3 Supreme Court?

4 MR. THOMPSON: Well, the question then is that
5 they're going to have to decide whether there was cause or
6 prejudice. Because if there -- if there was, then the
7 procedural default is forgiven. Or they could decide on a
8 given case, gee, maybe we should forgive it.

9 QUESTION: Well --

10 MR. THOMPSON: It's enormous. And they have to
11 do this not just once, but as to each separate Federal
12 claim that's presented.

13 QUESTION: Well, why is there -- if their basis
14 is there was a procedural default and they're going to
15 rely on that ground in the same kind of order they use
16 now, why can't they just add the words for grounds of
17 procedural default?

18 MR. THOMPSON: Because then, Your Honor, to do
19 that they would have to review both the record to
20 determine whether in fact it was, the trial record, and
21 they don't do that in a habeas case. They look at the
22 habeas petition and they look at the opinion. That's the
23 -- those are the documents on which these are generally
24 disposed of. I mean, after all, we had, in 1989, 898
25 denials. There were only 20 cases that weren't denied.

1 Now it cannot be --

2 QUESTION: They would look at the same documents
3 that the district judge will look at later on, don't they?

4 MR. THOMPSON: Well, I guess they have them
5 available, Your Honor. I don't think they -- that they --
6 they obviously are not making the same inquiry. I mean,
7 after all, there's another factor here, too, and that is
8 that normally --

9 QUESTION: Let me just ask you to be sure I --
10 are you telling us that they do or do not read the court
11 of appeals' opinion before them?

12 MR. THOMPSON: I believe that they do, Your
13 Honor.

14 QUESTION: Okay.

15 MR. THOMPSON: But it's not easy to tell
16 everything that they do, because these are basically ex
17 parte proceedings. Outside of a capital case, we are
18 rarely asked to respond to a habeas corpus petition. And
19 so there is nobody there on behalf of the State to urge
20 procedural default. They may have to find it on their
21 own.

22 Not only that, but the prototypical cause for
23 excusing default is competency of counsel. So now they're
24 going to have to decide -- the State court will have to
25 decide the merits of the competency claim in order to

1 decide whether to waive the procedural default. And
2 there's an enormous burden being asked here.

3 Now, they have to -- they either have to do
4 that, accept the Ninth Circuit's rule, or renounce their
5 original habeas corpus jurisdiction. If they do that,
6 they can escape the Ninth Circuit's rule, because
7 essentially that's what happened in Idaho. And we don't
8 think that comity should force the court to amend -- the
9 State to amend its own constitution.

10 However, the court may get a little assistance
11 from the electorate in that respect because on the 28th of
12 January of this year assembly constitutional amendment 10
13 was introduced in the State assembly. It proposes to
14 curtail the California Supreme Court's habeas -- original
15 habeas corpus jurisdiction. And we hope that that doesn't
16 -- that doesn't happen. I don't think that would, that
17 would serve anyone's interest.

18 If I may, Your Honor, I'd like to reserve my
19 time for rebuttal.

20 QUESTION: Very well, Mr. Thompson.

21 Ms. Drous, we'll hear now from you.

22 ORAL ARGUMENT OF JULIANA DROUS

23 APPOINTED BY THIS COURT

24 ON BEHALF OF THE RESPONDENT

25 MS. DROUS: Thank you, Mr. Chief Justice, and

1 may it please the Court:

2 This Court developed a bright-line rule in
3 Harris v. Reed instructing Federal courts as to how to
4 quickly determine if in fact a procedural default was
5 relied upon in the denial of a habeas or in the State
6 court.

7 QUESTION: The part about habeas was dicta, was
8 it not? Or the part where -- in the part where it said if
9 the last opinion on the merits, and that -- because what
10 we were dealing with there was an opinion from the
11 Illinois appellate court which treated both the merits and
12 procedural default.

13 MS. DROUS: I have two responses to that.
14 First, the question presented in Harris v. Reed was when
15 you have an ambiguous order, what do you do. And I would
16 submit that a silent order is an ambiguous order.

17 Second --

18 QUESTION: Are you answering the question
19 whether that was dicta or not?

20 MS. DROUS: Yes. Second, I would answer that if
21 it is dicta, it's very well reasoned. In reviewing the
22 Harris v. Reed oral argument transcript, I noted that
23 justices specifically asked questions regarding a silent
24 denial. And I am assuming that that footnote came from
25 the responses to those questions.

1 QUESTION: So you say it may be dicta, but if it
2 was dicta it was -- it was good dicta and it ought to be
3 adhered to?

4 MS. DROUS: Absolutely. Absolutely, Your Honor.

5 It puzzles me as to where the burden, the
6 additional burden will come to the State courts to provide
7 two words on a denial, to tell the Federal courts when a
8 procedural default was relied on.

9 QUESTION: Ms. Drous, I think it's easy to
10 underestimate that burden. I wonder how we would do in
11 our processing of 4,500 petitions for certiorari every
12 year if we had to give an explanation as to why we -- when
13 we were denying for an issue that wasn't properly
14 preserved below. Lots of times you just don't get into
15 quite that amount of specificity when you're exercising
16 discretionary jurisdiction.

17 MS. DROUS: Well, first of all -- the question
18 here should be what kind of discretion is exercised by the
19 California Supreme Court. I would note, first of all,
20 that this Court is in a very different position than the
21 California Supreme Court. You are, after all, the Court
22 of last resort, and after you rule, that's it. The
23 California Supreme Court knows that when it denies a
24 Federal -- excuse me, a State habeas petition, that more
25 than likely that petitioner will move on to Federal court,

1 and what the supreme court does is relevant as to what is
2 going to happen next.

3 Second of all, as to the burden, the State seems
4 to argue here that its position would not apply on death
5 penalty cases, so we are not talking about the cases that
6 are the most troublesome to the California Supreme Court.
7 And so no burden would be lessened there.

8 In fact, when you look at the statutes in
9 California, I would first state that this pamphlet relied
10 upon is simply a pamphlet that is given to the public in
11 the most basic terms to explain what the California
12 Supreme Court does, and it is not signed -- the
13 introduction in fact is signed by Justice Lucas, but it is
14 not signed by any other justice and we do not know if in
15 fact the other justices agree with this.

16 I would also point out to this Court that there
17 is no way that either the State --

18 QUESTION: Do you think it's likely that the
19 chief justice would put out a book about procedures that
20 the other members of the court didn't agree with?

21 MS. DROUS: Well, let me -- the passage relied
22 on here as to the different cases that the California
23 Supreme Court deals with, it's true that in death penalty
24 cases and in a few other situations the court must render
25 a written opinion, and it's true that there is discretion

1 to be exercised regarding a petition for writ of habeas
2 corpus and a petition for review. But it's also true that
3 the two procedures are treated totally differently in
4 California.

5 First of all, the California Supreme Court has a
6 separate section of lawyers, researchers, to deal only
7 with petitions for habeas corpus. Griggs v. Superior
8 Court very clearly states that when a petition for habeas
9 corpus is filed in the California Supreme Court the merits
10 have to be looked at. The language -- there are different
11 sections of the constitution dealing with habeas and with
12 petitions for review.

13 QUESTION: Does Griggs -- does Griggs hold that
14 a decision following that review is necessarily a decision
15 on the merits?

16 MS. DROUS: It does not, but there's a reason
17 for that. There is no case out of the California Supreme
18 Court which says whether or not a decision denying habeas
19 relief is a decision on the merits.

20 QUESTION: It sounds then as though this
21 pamphlet, whatever its status may be, probably is the
22 closest thing we're going to get to a definitive statement
23 of California law.

24 MS. DROUS: Well, let me get back to that. The
25 discretion that they're talking about in habeas is

1 different than the discretion that is exercised in a
2 petition for review. First of all, when a petition for
3 review comes before the California Supreme Court it comes
4 up with two numbers. It comes up with the California
5 Supreme Court number, and the number from the case below,
6 indicating that it is one case. And what the court is
7 doing there is simply reviewing the opinion from the court
8 of appeal to determine if a hearing, if review is proper.

9 The -- article VI, section 12 of the California
10 constitution very specifically states that the supreme
11 court may -- clearly granting discretion -- review the
12 decision of a court of appeal in any case. When you look
13 to the language regarding --

14 QUESTION: Well, isn't that dealing with the
15 petition for hearing in the normal course of direct
16 review?

17 MS. DROUS: No, Your Honor. They are different
18 proceedings. When the habeas -- when the original habeas
19 corpus petition is filed, what the supreme court does --
20 that is not a review of the opinion below. First of all,
21 you must note that one of the main reasons --

22 QUESTION: That was really my point. That when
23 you're talking about the Supreme Court of California
24 reviewing an -- a decision below, that's the process of a
25 petition for hearing, isn't it, after the --

1 MS. DROUS: Correct. Except now it's called the
2 petition for review.

3 QUESTION: Petition for review?

4 MS. DROUS: But that's correct. Correct, Your
5 Honor.

6 And when you look at the language dealing with
7 the California Supreme Court's original jurisdiction in
8 habeas, there is no word "may." The words are "required,"
9 as in Gonzales, as in People-Gonzales, which was recently
10 decided and which was a death penalty case. I believe
11 it's 51 Cal. 3d. "Should" in People v. Lawler. "Must" --
12 I'm sorry, it's In re Lawler. "Must," as in In re
13 Hochberg. There is no "may."

14 QUESTION: The court of appeals said it was
15 limiting its decision to original petitions for -- for
16 habeas.

17 MS. DROUS: That's correct.

18 QUESTION: And I suppose if there's -- if
19 there's an original petition for habeas corpus in the
20 California Supreme Court and that court just enters that
21 blind order, dismissed or denied -- what was it?
22 Dismissed or denied?

23 MS. DROUS: In California it's never dismissed.
24 It's always denied.

25 QUESTION: All right, denied. I would think

1 the, that the fellow who has filed the original petition
2 there and loses on such an order can come right here on a
3 petition for certiorari, and we would not dismiss it on
4 the grounds that we didn't have any jurisdiction.

5 MS. DROUS: That's correct, Your Honor. And in
6 fact, petitioner --

7 QUESTION: And although we usually say that we
8 don't -- we only take cases from a State court that has
9 decided an issue that has been presented to us.

10 MS. DROUS: That's correct, Your Honor. And in
11 fact --

12 QUESTION: So we could, we could theoretically
13 and actually we could reverse --

14 MS. DROUS: Absolutely.

15 QUESTION: -- the California Supreme Court.

16 MS. DROUS: Absolutely. In fact there have been
17 petitions for certiorari from such a denial, as I noted in
18 my brief, and this Court did deny certiorari. However,
19 two justices felt that certiorari should be granted, and
20 if certiorari was granted it would run to the supreme
21 court.

22 Well, if it's a petition for review and this
23 Court grants certiorari, the certiorari runs not to the
24 Supreme Court of California. It runs to the court of
25 appeal.

1 QUESTION: When they have just denied review?

2 MS. DROUS: That's correct, Your Honor. That's
3 correct.

4 QUESTION: Certainly you acknowledge, don't you,
5 a matter of California law?

6 MS. DROUS: Yes. And the --

7 QUESTION: And so what we have to do is take our
8 best shot at figuring out whether California, the
9 California Supreme Court itself regards its habeas
10 petitions as mandatory or discretionary. Is that right?
11 Is that a fair refrain of the question?

12 MS. DROUS: That's correct, but you have --
13 there's another -- what discretion is exercised. There is
14 discretion to be exercised in a petition for habeas. For
15 example if a procedural default is found, there is
16 discretion to forgive that procedural default.
17 Interestingly enough, in the past the California Supreme
18 Court, and I can cite to you -- these are in the brief --
19 at least five cases right now where the California Supreme
20 Court and one of the California court of appeals found a
21 procedural default, forgave the default, and then denied
22 on the merits or granted on the merits.

23 QUESTION: No, the discretion we're talking
24 about here, to make it clearer, is discretion not to
25 consider the case.

1 MS. DROUS: The California --

2 QUESTION: To look at the case and say it
3 doesn't seem to us important enough, or the probability of
4 error below does not seem to us enough, without really
5 looking into it. It just, you know, it's not a useful
6 expenditure of our time. That's the kind of discretion
7 we're talking about.

8 MS. DROUS: The California Supreme Court does
9 not have that absolute discretion to ignore a petition for
10 habeas corpus filed in its office.

11 QUESTION: Um-hum.

12 MS. DROUS: The --

13 QUESTION: And your authority for saying that
14 are the cases, as I understand it, from which you were
15 quoting the verbs a few moments ago?

16 MS. DROUS: Correct. Lawler, Hochberg.

17 Also, it's -- what the supreme -- the supreme
18 court has noted this in its actions. Behavior speaks
19 louder than words. In approximately 40 percent of the
20 cases where an original petition for habeas review is
21 filed, the California Supreme Court in fact, when it
22 denies, denies with citations either for exhaustion or
23 failure -- or procedural default. That does not happen --
24 I know of no case where the California Supreme Court did
25 that in a denial of review of a court of appeal opinion.

1 Which also --

2 QUESTION: And it doesn't have two different
3 formulations, denied or declined? Whether it's on the
4 merits or not, the judgment of the California Supreme
5 Court is always the same? It's denied.

6 MS. DROUS: It uses the same word. That's
7 correct, Your Honor.

8 QUESTION: I suppose this would differ from
9 State to State?

10 MS. DROUS: That's correct. And I would like to
11 point out that the Ninth Circuit itself has noted that. I
12 have under -- I heard that the -- California wants
13 California law to be treated the way Idaho law is, and I
14 believe it's Oregon law in the other case. However, in
15 Ninth Circuit opinions the Ninth Circuit has noted that in
16 those States original jurisdiction in habeas corpus is
17 rarely used, which is very different than in California.

18 QUESTION: So Harris v. Reed requires us to look
19 in a very searching way at the procedural law of all of
20 these different States in order to understand the
21 consequences of these orders?

22 MS. DROUS: I don't think in a very searching
23 way. I think that that determination would --

24 QUESTION: You don't think we've given a
25 searching examination into California law here this

1 morning?

2 MS. DROUS: I believe that you have, and I know
3 the Ninth Circuit has.

4 QUESTION: I thought the whole point of Harris
5 v. Reed was to avoid having to do that.

6 MS. DROUS: And it will, and it does.

7 QUESTION: After we do 50 States?

8 MS. DROUS: Well, the -- the courts --

9 QUESTION: 50 times isn't so many, I suppose,
10 compared to the alternative.

11 MS. DROUS: Well, I don't think that the -- that
12 it --

13 QUESTION: Do you think this is easier than our
14 having to just look to see whether or not there was a
15 procedural default on the merits, something we're familiar
16 with?

17 MS. DROUS: No, because that's only the first
18 step. That would only be the first step. In --

19 QUESTION: I thought you agreed that Harris --
20 that there just ought to be the simple rule, either the
21 last court that deals with the case says procedural
22 default or that's the end of it.

23 MS. DROUS: I believe that.

24 QUESTION: And you don't -- and you say -- so
25 that saves you from examining all sorts of --

1 MS. DROUS: That's correct. I believe what you
2 have here is someone, someone has to decide whether a
3 procedural -- a State procedural default will bar Federal
4 review. That is State law, State procedure. The entity
5 that is best suited to decide that is the State court, and
6 the State court does decide that. And all that Harris v.
7 Reed requires is the State court to state so.

8 QUESTION: I suppose there would be no problem
9 if the California constitution were amended not to
10 eliminate the original habeas jurisdiction of the
11 California Supreme Court, but simply to make it clear that
12 that jurisdiction is discretionary. I suppose it could be
13 amended that way.

14 MS. DROUS: That's correct, Your Honor.

15 QUESTION: And then we'd have no problem here.
16 We'd simply look to the court of appeals.

17 MS. DROUS: That's correct. I would have
18 another question, and that is if there is no difference in
19 the procedure of petition for review and original -- and a
20 petition for habeas corpus in the State court, why do we
21 have it.

22 QUESTION: Your -- I would think your answer
23 would be, in the case of the amendment that Justice Scalia
24 talked to you about, that even though it were completely
25 discretionary, so long as the California Supreme Court

1 could possibly consider a default and claim on the merits,
2 Harris against Reed wouldn't be satisfied.

3 MS. DROUS: That's correct, Your Honor. Harris
4 v. Reed is an easy rule to follow.

5 QUESTION: What -- do you think Harris against
6 Reed applies to the direct review procedure?

7 MS. DROUS: It does reply -- apply to the direct
8 review procedure. However, in the direct review procedure
9 the denial has to be taken in conjunction with the opinion
10 from the court of appeal.

11 QUESTION: Well, then you're saying it really
12 doesn't apply in the same way it applies in the -- in the
13 original habeas. In other words, if this had been a
14 direct review petition to the California Supreme Court
15 with just a denial without any explanation, would we look
16 to the court of appeals or would we say there is no
17 compliance with Harris and therefore we have -- the
18 Federal court has jurisdiction?

19 MS. DROUS: I would answer that by saying well,
20 it would make no sense in looking at California law to go
21 to any prior proceeding in determining what the State
22 court meant in its denial of an original petition. It
23 does make more sense --

24 QUESTION: Well, I understand. I'm asking about
25 the other.

1 MS. DROUS: No, it makes more sense to do that
2 --

3 QUESTION: I know it makes more sense, but
4 what's your position on that? Would you -- I know the
5 Ninth Circuit didn't decide it, but I think your opponent
6 is probably as much concerned about that as this issue.

7 MS. DROUS: I think the Ninth Circuit did
8 clearly state -- made a distinction between the petition
9 for review procedure and the original petition procedure.
10 And in the petition for review, because it has two case
11 numbers, and the petition for review clearly relates back
12 to the opinion, that looking to the opinion as the last
13 judgment would be proper.

14 QUESTION: Okay.

15 MS. DROUS: But when you have a denial of
16 original habeas corpus --

17 QUESTION: So you do draw a distinction between
18 the two?

19 MS. DROUS: Yes, I would. I would. Because in
20 -- when you have a denial of original habeas corpus you do
21 not know that in fact whatever happened in the court of
22 appeal was relied on in that denial. What this ignores is
23 the fact -- the use of the habeas is primarily to bring
24 new facts before the court.

25 QUESTION: What about when the Supreme Court of

1 California denies review but directs depublication, or
2 whatever the phrase is in California?

3 MS. DROUS: That -- denying -- that doesn't make
4 any difference in the petition for review procedure to
5 that instant case. The only thing of -- depublishing the
6 opinion, that just means that other people can't rely on
7 that opinion in arguing law. So as to the effect on that
8 specific case, that really makes no difference.

9 QUESTION: Can other people rely on it for
10 determining what the basis of the decision was? I mean,
11 if it's depublished and it states a procedural default
12 basis, does the depublishing eliminate that as the basis
13 or not?

14 MS. DROUS: Not in that individual case.

15 QUESTION: Okay.

16 MS. DROUS: But in an unrelated case you cannot
17 cite back to it because it is no longer law.

18 California's procedure is unique. It makes no
19 sense to argue -- Harris v. Superior Court, cited by the
20 Ninth Circuit some time ago, found that a denial without
21 comment is in fact a decision on the merits. The -- it
22 has been treated like that in California since that
23 decision and perhaps even somewhat before.

24 The California Supreme Court knows that when
25 people have a petition for habeas relief denied they are

1 going to go to Federal court. They have been told -- they
2 have been told by the Ninth Circuit as to how the Ninth
3 Circuit will view their opinion. There is no reason to go
4 back on that at this point. It just doesn't make any
5 sense.

6 You must assume that the judges know the law. I
7 would say that the California justices are very aware of
8 Harris v. Superior Court, and if it wanted a procedural
9 default honored in the Federal system all it needed to do
10 was say so. The -- the State here is asking in effect for
11 a reverse presumption, as what this, as declared in Harris
12 v. Reed where there is a silent denial. There's a danger
13 in that, because in California if you presume that a
14 procedural default was in fact applied, you might very
15 well be wrong, and then the individual would be denied all
16 habeas review.

17 QUESTION: Well, do you think, looking at the
18 record of multiple proceedings in this case, that
19 reasonable people would differ over the meaning of the
20 denial here, absent Harris against Reed's presumption?

21 MS. DROUS: This is an interesting case. We do
22 have successive petitions, but all -- and we have two
23 petitions in the California Supreme Court, only because
24 Mr. Nunnemaker, who was in pro per at the time, was sent
25 back to the California Supreme Court by the judge of the

1 district court saying I have no idea what the California
2 Supreme Court meant in this denial. He went back to the
3 California Supreme Court, and the second time around they
4 cited no cases in the denial.

5 QUESTION: But the reason for that was the fact
6 he had another claim, an ineffective assistance claim as
7 well as the Miranda claim, isn't it? There was a concern
8 as to whether that had been exhausted.

9 MS. DROUS: That might have had an effect. And
10 it's also possible that the court decided to forgive the
11 procedural default. That's the problem that we have here.
12 No one -- the only -- the only entity that knows in fact
13 the intent of the California Supreme Court is the
14 California Supreme Court. It makes no sense whatsoever to
15 have other people guessing at what that intent was, either
16 the Federal courts or the petitioner.

17 Now, if the burden is going to be on the
18 petitioner, I would suggest that then that the files of
19 the supreme court, of the California Supreme Court, would
20 have to be made open, because there's no other way to in
21 fact find out what that intent was. The intent should be
22 stated by the court who makes the decision, and not
23 others.

24 QUESTION: Of course there may not be any single
25 intent. I mean, you may have had four justices vote for

1 -- against -- against your client each for a quite
2 different reason. That is quite possible, too, so that
3 the court couldn't even give a reason. If you asked the
4 court to give a reason, it couldn't give any.

5 MS. DROUS: And if that's the case, Your Honor,
6 there has been no reliance. The procedural default was
7 not in fact used, did not -- you cannot then say that the
8 procedural default barred review.

9 QUESTION: I guess that's an interesting
10 question. What if, I mean, you needed four votes. What
11 if only one of them relied on the procedural -- it's a
12 least a but for cause, isn't it?

13 MS. DROUS: That's correct.

14 QUESTION: What would be the hardship to your
15 client of having a rule that would say in a case like this
16 there the last court in the -- California to pass on the
17 merits of this claim said it was procedurally defaulted.
18 Every other thing has been simply a blind denial without
19 any opinion. In that case the last opinion on the merits
20 controls.

21 MS. DROUS: Excuse me, Your Honor?

22 QUESTION: Did you get any of it?

23 MS. DROUS: I got lost somewhere along the way.
24 I'm sorry.

25 QUESTION: Okay. What would be the hardship to

1 people in your client's position of having a rule as to
2 exhaustion that said in a case like this, where the last
3 opinion in the California court system was the opinion of
4 the court of appeal saying there had been a procedural
5 default and every subsequent proceeding has been simply a
6 blind denial without opinion of relief, that it's that
7 last opinion dealing with the merits that controls, and
8 therefore there has been a procedural default?

9 MS. DROUS: If the -- if the Federal courts
10 decided that that was the rule to be imposed here, or if,
11 if the State court decided?

12 QUESTION: Well, no --

13 MS. DROUS: There would be a difference.

14 QUESTION: Presumably -- what would be the
15 hardship to your client in this Court adopting a rule such
16 as that?

17 MS. DROUS: The hardship on my client would be
18 that in fact perhaps the procedural default was excused
19 and he should have been allowed to go into Federal court
20 to litigate his Federal constitutional claim. He would be
21 denied his day in court, in Federal court on the Federal
22 constitutional claim.

23 QUESTION: Because one of the blind denials from
24 the California appellate courts might have been on the
25 merits?

1 MS. DROUS: The problem is is that, exactly
2 that, that it might have been and you do not know that.
3 In fact in California --

4 QUESTION: Do you say that there's a probability
5 that that would have been the case?

6 MS. DROUS: There's a --

7 QUESTION: Do you base your answer to the Chief
8 Justice on the mathematical possibilities of this
9 happening?

10 MS. DROUS: I couldn't state what the
11 mathematical possibilities are, but --

12 QUESTION: Not even a mathematical possibility?

13 MS. DROUS: Well, there is a possibility.

14 QUESTION: How about a probability?

15 MS. DROUS: It's possible. It's possible, but
16 the problem is --

17 QUESTION: It's possible, but not probable, is
18 it?

19 MS. DROUS: The problem is, is that you do not
20 know. And you -- if you presume that in fact that was
21 what was done, you might be wrong.

22 QUESTION: Does -- the California Supreme Court
23 gets what, 700 petitions for habeas corpus a year?

24 MS. DROUS: I would -- that would sound --

25 QUESTION: Some -- oh -- that order of -- in how

1 many of those does it grant relief typically in a year?

2 MS. DROUS: Very few. But --

3 QUESTION: Can you give me some order of
4 magnitude? 5? 10?

5 MS. DROUS: Probably. Maybe a -- probably. But
6 in death penalty cases the rate is probably somewhat
7 higher than in other cases. However, what is ignored here
8 that is -- that in 40 percent of the cases in California
9 is documented by both the State statistics and our looking
10 at the same minute orders, that in fact California does
11 give reasons for denial in 40 percent of the cases. Which
12 clearly indicates that California knows -- the California
13 Supreme Court knows that Federal review is going to be
14 asked for, and that an explanation of what their intent
15 was is needed.

16 QUESTION: Oh, I don't know. We give reasons.
17 We don't expect anybody to be reviewing us. You give
18 reasons. It's always a good idea to give reasons where
19 you can, I suppose.

20 MS. DROUS: That's exactly my point, Your Honor.
21 It's always a good idea to give reasons. It makes
22 everyone's job easier. It makes --

23 QUESTION: But sometimes you can't. Sometimes
24 you can't, where you have four justices voting not to take
25 a case for a different reason.

1 MS. DROUS: In that case I would say, as I said
2 earlier, the procedural default was not relied upon.

3 QUESTION: May I ask you -- maybe this is off
4 the wall, but supposing the district judge was persuaded
5 there was -- that they may well have acted on the merits
6 in this case, adopted your position, but looked at the
7 record in the trial court and thought well, by golly, this
8 defendant certainly should have objected to this evidence
9 and didn't do so. Could he as a matter -- could the
10 district judge as a matter of Federal law decide there was
11 a waiver of the claim?

12 MS. DROUS: Yeah, the -- this rule is not
13 jurisdictional. It does not -- if a procedural default is
14 there, the court, the Federal court is not --

15 QUESTION: It's really not jurisdictional either
16 way. If there is cause and prejudice he can go ahead with
17 it, but supposing there's neither the traditional cause
18 nor prejudice argument, but he thinks the last State court
19 waived the procedural default and addressed the merits.
20 Could he say I don't think I even have to reach the merits
21 because it's so clear to me that this argument was waived
22 by the failure to make an objection in the trial court?

23 MS. DROUS: In that case, no, Your Honor.

24 QUESTION: You don't think he could?

25 MS. DROUS: Because the issue of State

1 procedural default is one for the State to decide and not
2 the Federal court. Whether a State --

3 QUESTION: I know that's what most of these
4 opinions say, but I have never been sure that made all
5 that much sense.

6 MS. DROUS: I would end by just asking this
7 Court to not go back on Harris v. Reed. It has only been
8 the law a short time, and in fact in California the courts
9 are now giving more detailed explanations for denial of
10 habeas review. And it's working and it's going to make
11 everybody's burden lighter.

12 Thank you.

13 QUESTION: Thank you, Ms. Drous.

14 Mr. Thompson, do you have rebuttal? You have 1
15 minute remaining.

16 REBUTTAL ARGUMENT OF CLIFFORD K. THOMPSON, JR.

17 ON BEHALF OF THE PETITIONER

18 MR. THOMPSON: Thank you, Your Honor.

19 Your Honor, the district court did not send Mr.
20 Nunnemaker back to the State courts because it could not
21 figure out what they were up to. It couldn't understand
22 what Mr. Nunnemaker was up to, because, as indicated at
23 page 83 of the joint appendix, he came to the district
24 court and said I have raised none of my claims on direct
25 appeal in the State courts. That's why it was sent back

1 for exhaustion.

2 The respondent says what burden does footnote 12
3 impose on the State courts. I'd like to give an example.
4 The Ninth Circuit's rule doesn't simply require an
5 unequivocal claim of default by the last State court
6 rendering judgment. It has to do it in the last order it
7 enters. So the California Supreme Court granted a
8 hearing, claimed a default, and then came upon the case
9 again on collateral attack, on habeas review, and issued a
10 summary denial. The Ninth Circuit would hold, under its
11 interpretation of footnote 12, that they had waived the
12 default they claimed in the first place.

13 Why any court would do that is inexplicable to
14 me, but I would like to point out that it -- that that's
15 quite contrary to the assurance given in Harris that a
16 State court need do no more to preclude Federal review on
17 habeas than it need do on direct review.

18 Thank you, Your Honor.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Thompson.

21 The case is submitted.

22 (Whereupon, at 11:42 a.m., the case in the
23 above-entitled matter was submitted.)
24
25

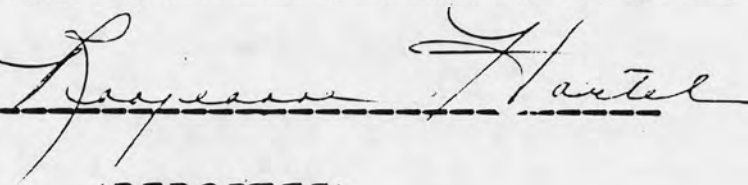
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Eddie S. Ylst, Warden, Petitioner -v- Owen Duane Nunnemaker

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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