

1 collateral review has to also have been inadequate. And
2 so we have to have a couple of situations where they are
3 both inadequate or you don't even get into the Federal
4 court. So the standard for winning, which you concede
5 is quite -- is very tough and -- but suppose it's met,
6 that's -- that's, of course, what's annoying on the
7 other side. Here is a person in jail forever or worse,
8 and the trial filled with errors and didn't have decent
9 counsel anywhere and what a mess. I mean, shouldn't
10 there be some remedy? And there is none. And that's
11 why Justice Scalia wrote that there's no way to stop
12 this extension.

13 GENERAL KELLER: Well, first of all --

14 JUSTICE BREYER: He wasn't for it.

15 (Laughter.)

16 GENERAL KELLER: First of all, the
17 miscarriage of justice -- actually in this instance,
18 exception to overcome procedural default -- already
19 exists. And so that would capture any cases of actual
20 innocence that Your Honor would be discussing.

21 JUSTICE BREYER: Where -- where does it
22 exist?

23 GENERAL KELLER: McQuiggin v. Perkins.
24 The -- you can overcome a procedural default for a
25 miscarriage of justice. Wholly separate from Martinez.

1 And in that situation you could overcome a procedural
2 default using that -- that actual-innocence gateway.

3 Now, as Justice Kennedy noted, though, State
4 habeas would be the place to raise that claim. And if
5 the claim was adjudicated in trial court, a record was
6 made for appellate counsel and the habeas counsel, and
7 then neither appellate --

8 JUSTICE BREYER: Actual innocence means he
9 was actually innocent.

10 GENERAL KELLER: Well -- or actually
11 innocent of the death penalty.

12 JUSTICE BREYER: Yeah.

13 GENERAL KELLER: And that would be another
14 way that that type of claim --

15 JUSTICE SOTOMAYOR: Well, that's an
16 interesting open question.

17 GENERAL KELLER: For a different day.

18 (Laughter.)

19 GENERAL KELLER: But the question before the
20 Court today is whether to extend the narrow exception
21 for trial IAC claims when the court has recognized that
22 the trial is the main event; appeals are not central due
23 to determination of innocence or guilt. There's a
24 significant difference between appeals and trials, as
25 the Court has noted in Ross. And the costs of opening

1 up the entire Federal trial do not warrant that
2 extension.

3 JUSTICE KAGAN: General, could I just -- I
4 guess I got a little bit confused in your exchange with
5 Justice Alito, because you had been pressing this is
6 just going to be an infinitesimally small --
7 infinitesimally small, I think that that was your
8 phrase. And Justice Alito said he thought it would
9 happen all the time, and then you said yes, and then you
10 went back to infinitesimally small.

11 So, which is it?

12 GENERAL KELLER: The answer is, there's
13 going to be an infinitesimally small number of claims
14 that are actually successful, meritorious at the end of
15 the day. However, the courts and the States are going
16 to be faced with a wide number of --

17 JUSTICE KAGAN: Right. Okay. I thought
18 that his point was different, that it was actually not
19 going to be infinitesimally small. But let's say that
20 it is going to be pretty rare, as you say. You know,
21 then I think it really is Justice Breyer's question.
22 It's like, okay, it will be rare. But the alternative
23 is that those rare, good claims, where there really has
24 been a defective appellate process and a violation of
25 the constitutional right to a fair appellate process has

1 been violated, and there's no way to correct for that in
2 the same way that there was no way to correct for the --
3 the trial -- the ineffective trial counsel that we
4 talked about in Martinez and Trevino.

5 GENERAL KELLER: You'd still have the
6 actual-innocence exception, and also Martinez reaffirmed
7 the general rule of Coleman. And what State procedural
8 bars necessarily will do is bar certain claims that
9 otherwise could have been raised. But when a trial
10 court has adjudicated the case and neither appellate nor
11 a habeas counsel have raised it, the universe of cases
12 that we're talking about here combined with the cost on
13 the other side of opening an entire Federal trial up do
14 not warrant that extension. And --

15 JUSTICE KAGAN: It did reaffirm the general
16 rule of Coleman except to the extent that this was your
17 only shot. And this is your only shot to raise a claim
18 of ineffective assistance of appellate counsel, which is
19 a violation of a constitutional right.

20 GENERAL KELLER: To raise that particular
21 claim, but that particular claim --

22 JUSTICE KAGAN: That's all we're dealing
23 with here.

24 GENERAL KELLER: But it will be predicated
25 on an underlying trial issue.

1 And that's the difference. The trial IAC
2 claim in Martinez, that was the trial error. That was
3 the particular trial error the court was concerned
4 about, and that unique bedrock right.

5 Here, in contrast, when the Court has
6 recognized repeatedly that appeals are quite different
7 from trials, and that an appellate IAC claim is
8 necessarily predicated upon an alleged trial error, the
9 Court has adjudicated that alleged trial error. And
10 separating it out and just saying that the appellate IAC
11 claim itself has not been raised, that has to be seen,
12 though, in the context that the underlying claim has.

13 If there are no further questions, we ask
14 the Court to affirm the judgment of the Fifth Circuit.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Kretzer, three minutes.

17 REBUTTAL ARGUMENT OF SETH KRETZER

18 ON BEHALF OF THE PETITIONER

19 MR. KRETZER: The point at which my friend
20 elicited a little bit of laughter in the courtroom is
21 when he talked about whether or not actual innocence
22 would apply to actual innocence of the death penalty,
23 and he said that would be an issue for a future day.

24 I think it bears to note that the error in
25 this case, in Mr. Davila's case, was a guilt/innocence

1 phase error. In other words, error that arose at the
2 guilt/innocence phase. In other words, had the jury
3 been allowed, properly instructed, Mr. Moblin -- with
4 Mr. Davila's theory of defense, he would not have been
5 able to get the death penalty.

6 JUSTICE GORSUCH: Counsel --

7 MR. KRETZER: This was the critical issue in
8 the case.

9 JUSTICE GORSUCH: -- I don't know whether
10 we'd create a couple of strange incentives if -- if we
11 went down your road.

12 If procedural default by State habeas
13 counsel, ineffective assistance of appellate counsel is
14 cause, I can see a world in which State habeas counsel
15 might have an incentive not to raise it, you know, might
16 actually be ineffective assistance of State habeas
17 counsel to raise the issue, because Federal habeas may
18 be more forgiving. So what do we about that problem,
19 number one?

20 And, number two, do we also create an
21 incentive for States to stop using collateral review to
22 test IAC claims? They don't have to do that. It's
23 generally thought to be favorable to defense that they
24 do do that, because it gives defense a chance to present
25 evidence and prepare and do things like that. Some

1 States don't permit it. Oklahoma, my old jurisdiction,
2 it was very hard for defense counsel. And don't we
3 create an incentive to go back to that, the bad old
4 days? And -- and so by adding more procedure and
5 perfecting this, do we actually wind up hurting the
6 defense interests in this case?

7 MR. KRETZER: Any State habeas attorney who
8 would deliberately fault a claim from State habeas
9 because they think they could get an ultimately more
10 favorable meritorious review in Federal court would
11 necessarily be violating any number of rules of
12 professional conduct. As an initial matter, they would
13 be --

14 JUSTICE GORSUCH: Why? Why? If it's -- if
15 it's -- if it's the effective best strategy for your
16 client, I would think that's exactly what you'd do.

17 MR. KRETZER: Well, as an initial matter,
18 one would necessarily be perpetrating ineffective
19 assistance on their own by deliberately defaulting a
20 claim from State habeas. There's very few attorneys out
21 there who would deliberately open themselves up to a
22 susceptibility of ineffectiveness contention if, for no
23 other reason, you're kicked off the court appointments
24 list. There's any number of reasons why lawyers would
25 have a duty of candor to court not to deliberately

1 strategically try not to raise a claim here, so that, in
2 fact, they can get some more favorable forum later on.

3 Outside the death penalty context, has to
4 remember that, of course, the process goes very slowly.
5 And so one might, in a non-death case, in a general
6 felony case, might -- one might already be free from
7 custody by the point they would have this aired in
8 Federal court.

9 The number of Federal courts actually having
10 merits hearings on Strickland claims is incredibly
11 small. And considering that habeas is designed --
12 Federal habeas is designed to prevent and correct severe
13 malfunctions of the State trial system, that's probably
14 a very good thing. And yet, in cases where the
15 underlying ineffective-assistance-of-appellate-counsel
16 claim is so integrally intertwined with the underlying
17 strength of the appellate claim that was not raised, I
18 think there's serious pause, because all that Mr. Davila
19 is asking is for the same standard as that which exists
20 in Martinez. Bedrock principles, where the situation --
21 the contention has to be raised in a writ. The -- the
22 two situations are exactly analogous.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

25 (Whereupon, at 12:01 p.m., the case in the

1 above-entitled matter was submitted.)
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