

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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CARLOS MANUEL AYESTAS,)
)
Petitioner,)
)
v.) No. 16-6795
)
LORIE DAVIS, DIRECTOR, TEXAS)
)
DEPARTMENT OF CRIMINAL JUSTICE)
)
(CORRECTIONAL INSTITUTIONS)
)
DIVISION),)
)
Respondent.)
- - - - -

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4 Petitioner,)
5 v.) No. 16-6795
6 LORIE DAVIS, DIRECTOR, TEXAS)
7 DEPARTMENT OF CRIMINAL JUSTICE)
8 (CORRECTIONAL INSTITUTIONS)
9 DIVISION),)
10 Respondent.)
11 - - - - -

12 Washington, D.C.
13 Monday, October 30, 2017
14

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

18
19 APPEARANCES:
20 LEE B. KOVARSKY, Baltimore, Maryland; on
21 behalf of the Petitioner.
22 SCOTT A. KELLER, Solicitor General of Texas, Austin,
23 Texas; on behalf of the Respondent.

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25

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 16-6795, Ayestas versus Davis.

Mr. Kovarsky.

ORAL ARGUMENT OF LEE B. KOVARSKY

ON BEHALF OF THE PETITIONER

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

18 U.S.C. Section 3599 entitles indigent inmates facing the death penalty to reasonably necessary services. And services are reasonably necessary when they would be used to identify or develop possible claims by a reasonable attorney representing a paying client of ordinary means.

But in the Fifth Circuit, the standard is higher. Inmates must show necessity that is not just reasonable but that is substantial. As a result, courts in the Fifth Circuit, and the Fifth Circuit alone, are permitted to probe deeply into the merits and procedural viability of as yet undeveloped claims that the requested services might support.

1 CHIEF JUSTICE ROBERTS: Why would a
2 reasonable attorney with finite means to spend
3 spend them on -- on the research into the facts
4 as -- as you propose, when he won't be able to
5 submit those facts to the court under
6 2254(e)(2)?

7 MR. KOVARSKY: Mr. Chief Justice, I
8 actually think that they may well be able to
9 submit those facts under 2254(e)(2), and I also
10 think that there are reasons why a reasonable
11 attorney might pursue evidence notwithstanding
12 the inability to introduce that evidence at an
13 (e)(2) hearing to prove the under -- underlying
14 constitutional violation.

15 CHIEF JUSTICE ROBERTS: Well, if he is
16 ever able to submit under (e)(2), it would be
17 because it's a new rule of constitutional law
18 -- I'm just looking at the statute here -- or a
19 factual predicate that could not have been
20 previously discovered. And if it could not
21 have been previously discovered, it seems to me
22 you won't be able to make a case of ineffective
23 assistance of counsel. It's not ineffective if
24 he couldn't have discovered it.

25 MR. KOVARSKY: Mr. Chief Justice,

1 you're looking at the two subsections under
2 (e) (2).

3 CHIEF JUSTICE ROBERTS: Uh-huh.

4 MR. KOVARSKY: We actually drop out of
5 the (e) (2) analysis because the inmate didn't
6 "fail to develop the claim" within the opening
7 clause. So you -- the Court would never even
8 reach the analysis in the two subsections that
9 you're --

10 CHIEF JUSTICE ROBERTS: Well, I would
11 have thought he did fail to develop it. You
12 just have an excuse, I guess, a reason why he
13 shouldn't be faulted in your view, and that's
14 because of the ineffective assistance of
15 counsel. And you plan to make that case by
16 submitting the new evidence that you want the
17 funds to uncover. And this says that you can't
18 do that.

19 MR. KOVARSKY: I -- we -- he did not
20 fail to develop the evidence in state court.
21 In Williams v. Taylor, the Court said that's
22 not a no fault phrasing, that failed --

23 JUSTICE GINSBURG: This -- this issue
24 was not aired at all below, was it?

25 MR. KOVARSKY: No.

1 JUSTICE GINSBURG: So --

2 CHIEF JUSTICE ROBERTS: So you think
3 it will be available on remand?

4 MR. KOVARSKY: The issue should be
5 available to the Fifth Circuit on remand,
6 although the Fifth Circuit has, you know,
7 encountered this on a number of occasions and
8 has refused to adopt the director's
9 interpretation. In fact, a number of states
10 have pressed the director's interpretation in a
11 number of different courts of appeals, and not
12 a single jurisdiction anywhere adopts it. So
13 the idea of --

14 CHIEF JUSTICE ROBERTS: Is there a
15 Fifth Circuit decision -- you say you've
16 encountered this in the Fifth Circuit. Is
17 there a Fifth Circuit decision that rules on
18 this?

19 MR. KOVARSKY: The Fifth Circuit
20 decision that's most on point is Canales v.
21 Quarterman or Canales v. Thaler. Canales is
22 the first name of the case. And in that case,
23 it says in a footnote the director acts as --
24 asks us to take the step, and we're not going
25 to do that.

1 CHIEF JUSTICE ROBERTS: It sounds to
2 me like that's -- we're not -- as you suggest
3 we should do here, is you're not going to reach
4 it and make a ruling on it.

5 MR. KOVARSKY: Yes, exactly.

6 CHIEF JUSTICE ROBERTS: You think --

7 MR. KOVARSKY: I don't mean to suggest
8 they've heard the issue and decided that it's
9 nonmeritorious. It's just that the director
10 has made that case to the Fifth Circuit, and
11 that is not the law in the Fifth Circuit. It's
12 not, you know, the basis of a judgment below.
13 It's not a bar that we'll encounter unless the
14 Fifth Circuit decides to make new law.

15 JUSTICE ALITO: Could I ask you a
16 question about the jurisdictional issue that
17 your adversary has raised? Do you think that
18 appellate courts have jurisdiction over
19 disputes about the amount of funding?

20 MR. KOVARSKY: In certain
21 circumstances, yes.

22 JUSTICE ALITO: And what would those
23 circumstances be?

24 MR. KOVARSKY: If the amount of
25 funding interferes with the representation. So

1 to --

2 JUSTICE ALITO: So any -- any time
3 there's a -- that the attorney is dissatisfied
4 with the amount of funding, I assume, that
5 would mean that there could be an appeal?

6 MR. KOVARSKY: No, Justice Alito. If
7 -- for example, if an attorney comes in after
8 the case is concluded and asks for attorneys'
9 fees or something like -- something like that,
10 then maybe there's a discussion to be had about
11 whether that's appealable. But when you're
12 asking for resources in the midst of litigating
13 a case or controversy, that's bound up with the
14 case or controversy. It's an exercise --

15 JUSTICE ALITO: Yeah. Well, that's --
16 that was the situation I had in mind. So the
17 attorney asks for \$20,000 to investigate and
18 the court grants \$5,000 to investigate. There
19 could be an appeal about that?

20 MR. KOVARSKY: Yes. If -- I mean, if
21 the determination is based on an evaluation of
22 reasonable necessity.

23 JUSTICE GINSBURG: I thought the
24 statute said that for any requests exceeding
25 \$7500, there has to be approval of a circuit

1 court judge?

2 MR. KOVARSKY: Justice Ginsburg, for
3 any granted amount over \$7500, then there has
4 to be a finding that those services are not
5 only reasonably necessary but that they are for
6 an unusual character or duration, and then the
7 chief justice -- excuse me -- the chief judge
8 of the Fifth Circuit or his delegee will review
9 the question of whether it's for an unusual
10 character or a duration.

11 The -- what is not -- the reasonable
12 necessity determination is not reviewed by a
13 judge. It's reviewed by a court.

14 JUSTICE ALITO: I mean, what about --

15 JUSTICE GINSBURG: Here, we're --

16 JUSTICE ALITO: I'm sorry.

17 JUSTICE GINSBURG: We're not talking
18 about how much. We're just talking about
19 whether there is access at all to funds to
20 investigate.

21 MR. KOVARSKY: Yes, I suppose in a
22 situation where an inmate asks for an amount
23 that exceeds \$7500, the question might get
24 presented because the chief judge writes it
25 down to \$7500. But that's not this case.

1 The basis of the lower court's
2 decision in this case is just that the funds
3 are not reasonably necessary. The services are
4 not reasonably necessary.

5 JUSTICE ALITO: I mean, one other
6 jurisdictional question. Is it true that the
7 director of the Administrative Office of the
8 Courts can under some circumstances review a
9 funding grant, and, if that is so, how can the
10 funding grant be the exercise of judicial
11 power?

12 MR. KOVARSKY: That's not accurate,
13 Justice Alito. The cases that are recited in
14 the Respondent's brief are cases about the AO's
15 authority under the CJA, not under Section
16 3599. Those are distinct statutes. Of course,
17 the CJA governs in all non-capital cases and
18 3599 governs in capital cases, and there's no
19 authority in 3599 for the AO to do that. And
20 you'll notice that all of the cases that are
21 recited in the Respondent's brief are from the
22 1970s, and that's, of course, because none of
23 those scenarios recited there have anything to
24 do with 3599.

25 JUSTICE BREYER: Looking at the cases,

1 my impression was that if, say, the defendant
2 asked for \$15,000 and the court gave \$10,000 or
3 maybe \$20,000, whatever it is, or one side or
4 the other disagrees with that, they can't
5 appeal. I mean, they can appeal. It's like an
6 administrative law. Of course, they can
7 appeal. You can always appeal. But you're
8 going to lose because the statute is read by
9 various courts, I think correctly, as giving
10 very broad discretion to the trial court to
11 decide how much.

12 It's just like they want to call a
13 witness or something. I mean, you say this
14 witness is irrelevant. Well, the judge says
15 I'm calling him. You can appeal. Ask for
16 mandamus or something. You're going to lose
17 because it's up to the -- it's up to the court.
18 And isn't that the same here and shouldn't it
19 be the same?

20 MR. KOVARSKY: So, first, I don't -- I
21 think it's true that there is -- that the
22 district courts have enormous discretion to
23 determine the award. I don't necessarily mean
24 -- know that that means that there wouldn't be
25 jurisdiction.

1 JUSTICE BREYER: It doesn't. I'm
2 saying it doesn't mean that.

3 MR. KOVARSKY: Right.

4 JUSTICE BREYER: It's just like any
5 other situation where a trial court has to run
6 his trial. He has broad discretion over many
7 areas, and that should be the same here.

8 MR. KOVARSKY: Yes. I mean, and, in
9 fact, that's -- these -- these decisions are
10 reviewable for an abuse of discretion. And so
11 there's extraordinary latitude in the district
12 court to make these decisions. So there's no
13 need to, you know, worry about whether there's
14 a jurisdictional basis because oftentimes what
15 the district court does is going to carry the
16 day.

17 JUSTICE SOTOMAYOR: Do you --

18 MR. KOVARSKY: Now, if there are --
19 I'm sorry.

20 JUSTICE SOTOMAYOR: Do you believe
21 that the statute can be read to mean that a
22 district court, even if it finds reasonable
23 necessity, that it has the authority not to
24 award fees?

25 MR. KOVARSKY: I think there are

1 certainly extenuating circumstances where the
2 statute suggests that could happen.

3 JUSTICE SOTOMAYOR: And what would
4 those be and what if a judge exercises that
5 discretion improperly?

6 MR. KOVARSKY: Okay. So, before I
7 answer that, I just want to be clear that's not
8 the case that we have here. The case that's
9 decided here is reasonable necessity.

10 Now -- so, for example, if there's
11 some indication of gamesmanship on the part of
12 federal habeas counsel, the resources are
13 reasonably necessary at this point in the
14 litigation because federal habeas counsel has
15 decided not to pursue them at some earlier
16 point when he or she should have.

17 Or, as in -- as is the case in Texas,
18 sometimes if there's a new claim discovered on
19 federal habeas review and the federal habeas
20 lawyer has to take it back to state court, the
21 state court will pay for that litigation, and
22 so the federal habeas -- sometimes the federal
23 courts will say we're not going to write this
24 check until we know whether the state courts
25 are going to write the check. So --

1 JUSTICE KAGAN: The things, the
2 examples that you just gave to Sotomayor, is
3 that why you think the word "may" is in the
4 statute? What is the effect of that word?
5 What is it covering and what discretion does it
6 allow?

7 MR. KOVARSKY: Those are examples --
8 "may" is basically an escape hatch that allows
9 a court to decline to award services under
10 extenuating circumstances like the
11 circumstances I just described.

12 The other work that "may" does in the
13 statute is affirm that review is for abuse of
14 discretion, because when "may" is added to the
15 statute, it's denominated as a technical
16 amendment, which means that it is an amendment
17 designed to conform the statute to what
18 existing practice is.

19 And so the idea is just that what the
20 "may" is doing is clarifying what was already
21 happening in the courts of appeal, which is to
22 say that they review for abuse of discretion.

23 JUSTICE SOTOMAYOR: So you believe
24 it's appealable but under an abuse of
25 discretion standard?

1 MR. KOVARSKY: It's appealable on an
2 abuse of discretion standard, but as long as
3 it's bound up with the case or controversy, as
4 long as it's affecting the quality of the
5 representation, then it's appealable.

6 It's not like an order refusing
7 licensure. It's not like, as mentioned in
8 Respondent's brief, a decision by a judge or
9 justice to hire a clerk.

10 Now maybe the closer question is when
11 an attorney comes in after the case is over on
12 a separate docket number and asks for
13 compensation and a court doesn't want to award
14 that because that decision, the attorney's fee
15 decision after the case is finished, doesn't
16 actually interfere with the representation.

17 So you can make an argument that it's
18 not part of the case or controversy, but as
19 long as the decision under 3599 about resources
20 affects the representation, then it's
21 appealable. Just --

22 JUSTICE GINSBURG: Can we get back to
23 what is the question here? I think you agree
24 that the district court, as you said in your
25 brief, may satisfy itself that a defendant may

1 have a plausible claim or defense before
2 granting the funds.

3 So the -- the plausible claim is -- is
4 a standard that a district court can require
5 counsel to meet?

6 MR. KOVARSKY: This Court has used
7 different formulations for referring to the
8 obligations of federal habeas counsel. In
9 *McFarland v. Scott*, it says that the
10 representation is designed to allow counsel to
11 identify and develop possible claims.

12 In *McCleskey v. Zant*, the way it's
13 characterized is all relevant claims. The
14 dissent in *McCleskey* calls it all conceivable
15 claims.

16 I don't necessarily want to get caught
17 up in, you know, is it plausible, is it
18 conceivable, is it relevant. The most on point
19 authority uses the phrase "possible claims" and
20 that's from *McFarland v. Scott*. The
21 representation has to be capable of allowing
22 trial counsel to perform that function.

23 JUSTICE KAGAN: But what --

24 JUSTICE ALITO: Well, I would think
25 the most relevant language is the language of

1 the statute, "reasonably necessary."

2 And I really struggled with that, and
3 also with the phrase "substantial need." But
4 taking "reasonably necessary," if it just said
5 necessary, that would be a pretty tough
6 standard.

7 Would you accept the interpretation of
8 reasonably necessary to mean that this is
9 something that a reasonable attorney would
10 think is necessary?

11 MR. KOVARSKY: That -- the reasonable
12 attorney standard and a reasonable attorney
13 representing a client of finite means is the
14 standard that we think is appropriate.

15 And it's actually the way they
16 interpreted the word "necessary." Necessary is
17 the word that appears in the CJA. And they
18 interpret necessary to mean reasonably
19 necessary under the CJA, and every single court
20 of appeals, with the exception of the D.C.
21 Circuit, which does basically the same thing,
22 interprets "reasonably necessary" to mean a
23 reasonable attorney representing a client of
24 finite means.

25 JUSTICE KAGAN: And the finite means

1 business is just to make sure that, like a
2 reasonable attorney for Bill Gates, would scour
3 the earth and not care about it.

4 MR. KOVARSKY: Exactly. Or, you know,
5 the standard doesn't involve a Richie Rich
6 client or something like that.

7 JUSTICE KAGAN: Uh-huh.

8 JUSTICE ALITO: But the -- but the
9 attorney, the reasonable attorney still has to
10 think that it is necessary, which is pretty
11 tough.

12 MR. KOVARSKY: Well, the standard that
13 Congress --

14 JUSTICE ALITO: Unless necessary
15 doesn't mean necessary.

16 MR. KOVARSKY: We assume --

17 JUSTICE ALITO: It's like the
18 necessary and proper clause. It doesn't mean
19 that it's really necessary.

20 (Laughter.)

21 MR. KOVARSKY: Right. We know what
22 Congress was thinking when it used the phrase
23 "reasonably necessary."

24 JUSTICE ALITO: You really know what
25 they were thinking?

1 (Laughter.)

2 MR. KOVARSKY: Well, Congress plucked
3 that phrase directly from the case law that was
4 interpreting the word "necessary" in the CJA.
5 And it's not a particularly close question in
6 the courts of appeal about what the word
7 necessary meant.

8 At the time that Congress wrote the
9 statute, necessary meant reasonably necessary,
10 and reasonably necessary meant the reasonable
11 attorney rule that I described at the top of my
12 opening.

13 JUSTICE ALITO: Okay. What is the
14 difference between "reasonably necessary" and
15 "substantial need"? I have been racking my
16 brain trying to think of something that it is
17 reasonably necessary for me to obtain but as to
18 which I do not have a substantial need.

19 And I can't think of an example.
20 Maybe you can give me an example.

21 MR. KOVARSKY: So, Justice Alito, I'm
22 going to scrap the formal labels for a minute.
23 I'm not going to use substantial need or
24 reasonably necessary. I'm going to talk about
25 --

1 JUSTICE ALITO: No don't -- - no,
2 don't do that, because one is the statutory
3 language and the other is the language that's
4 used by the Fifth Circuit. And that's what we
5 have to deal with, no matter what the various
6 courts of appeals have said about this.

7 MR. KOVARSKY: I'm just trying to
8 answer the question functionally.

9 JUSTICE ALITO: Yeah, okay. All
10 right.

11 MR. KOVARSKY: So, of course, a court
12 can decide a 3599 motion by reference to a
13 merits or procedural issue. It's just that the
14 referenced issue can't be intertwined with the
15 evidence that the inmate is seeking in the
16 motion.

17 So take the following example. A
18 claim has two elements, element A and element
19 B. And the record is fully developed with
20 respect to element A, and the record is not
21 going to get any better with respect to element
22 A. And the inmate comes to court under 3599
23 and asks for resources to develop element B.

24 A court can decide the 3599 motion by
25 reference to the merits if what it's doing is

1 saying that your evidence on element A is never
2 going to be good enough and we know that
3 because the record there is fully developed.

4 What the court cannot do and what the
5 Fifth Circuit regularly does under its
6 substantial need rule is say, oh, we're going
7 to guess about what the record on B looks like.
8 We're going to speculate about what you're
9 going to find when you go out and you look for
10 this mitigation evidence or this evidence of
11 materiality, and we're going to -- we're going
12 to guess, based on that estimation, that you're
13 not going to meet that showing on element B.

14 So that's the difference between
15 reasonable necessity, which looks at what a
16 reasonable lawyer would do, and the substantial
17 need rule as operationalized by courts in the
18 Fifth Circuit.

19 JUSTICE KAGAN: If I could --

20 CHIEF JUSTICE ROBERTS: But when
21 you're -- but when you're talking about
22 facts -- and this is the point you make in your
23 brief -- how do you know that the record is
24 fully developed under issue A?

25 The lawyer can come in and say, well,

1 if we have another investigator and could look
2 further at this, we're going to develop some
3 more facts. I mean, it -- I'm not sure that
4 that's a valid distinction in your case where
5 it focuses solely on what facts are available.

6 MR. KOVARSKY: There are certainly
7 some cases where an inmate will be requesting
8 funds to develop both prejudice and deficiency,
9 both prong 2 and prong 1.

10 That is not our case. In our case,
11 the record for deficiency is fully developed.
12 And it will often be the case that the record
13 on deficiency is fully developed in the motion
14 because the deficiency is the thing that should
15 be evident from trial counsel's files and all
16 the information that federal habeas counsel has
17 available to her.

18 JUSTICE SOTOMAYOR: Now, do you think
19 that that includes an attorney -- that's not
20 the facts of your case. I -- I know that in
21 your case the defendant himself, to the first
22 investigator who interviewed him, said he had
23 had head traumas and -- and some dependency.
24 And by the time the request for investigative
25 services came about, he had already had a

1 schizophrenic episode.

2 But how about a case where there's no
3 evidence whatsoever of dependency and/or of any
4 mental illness, mental challenges, whatever you
5 want to call it? Can an attorney come in and
6 say it is common practice to do this, so I want
7 to do it anyway? Even though there is no
8 suggestion in the record that this is a
9 fruitful inquiry?

10 MR. KOVARSKY: The answer,
11 unfortunately, is it depends. So, in a case
12 like ours where there's also no social history,
13 something that this Court has said has to be
14 performed in absolutely every single case,
15 then, yes, the attorney can come into federal
16 court and say -- without any evidence of red
17 flags, and they can say look, they just didn't
18 do a social history, that's deficiency, and
19 should be able to get funds to look for what
20 the prejudice from that is.

21 Now, there are other cases, however,
22 where counsel -- where trial counsel might have
23 performed a social history, might have done
24 some mitigation. And if trial counsel can't
25 show up and explain what the deficiency is and

1 identify what flags -- red flags that trial
2 counsel didn't follow up on, and can't provide
3 a coherent explanation for why they need
4 resources to go look for those flags, then a
5 trial court would be within its discretion to
6 deny the resources.

7 JUSTICE GORSUCH: I have a separate
8 jurisdictional problem that I'm hoping you can
9 help me with and it concerns the COA
10 requirement. And neither side discusses it,
11 but it's jurisdictional, so I'm -- I feel like
12 I should give you a shot at it and you can help
13 me out with it.

14 The Fifth Circuit didn't require a COA
15 because it read Harbison as saying one wasn't
16 required. But some circuits, including my old
17 one, have distinguished Harbison in similar
18 circumstances, pointing out that Harbison just
19 dealt with the appointment, I believe, of
20 clemency counsel, and the issue wasn't part of
21 the final order in the merits of the habeas
22 petition.

23 Here, the denial of funding was part
24 of the final order in the denial of a habeas
25 petition. And as I read 2253, a final order in

1 a habeas proceeding, you need a COA.

2 Now, maybe you can say it's just
3 independent and totally separate from that.
4 But then that might suggest you'd have to --
5 you'd be able to appeal as a matter of right
6 anytime a funding denial takes place, even
7 before a final judgment.

8 And that seems odd too, though,
9 because funding requests, attorney fee denials,
10 sanctions, usually are wrapped up in and merged
11 with the final judgment. So, long-winded
12 question, but it's jurisdictional, so -- and I
13 thought you could help me out with that.

14 MR. KOVARSKY: Sure.

15 So we're appealing the judgment, and
16 the determination on 3599 is part of the
17 judgment.

18 We're not appealing the underlying
19 disposition of the claims because those claims
20 haven't been developed.

21 JUSTICE GORSUCH: Sure. But you're
22 appealing the final order in a habeas
23 proceeding, and that's the language in 2253.
24 So help me out with the language in 2253.

25 MR. KOVARSKY: Well, I take the

1 language -- I'm appealing some -- I'm appealing
2 a determination that was made part of the final
3 order --

4 JUSTICE GORSUCH: Final order?

5 MR. KOVARSKY: -- as well, but I'm not
6 appealing the disposition --

7 JUSTICE GORSUCH: In -- in -- in a
8 habeas proceeding, right?

9 MR. KOVARSKY: It's in a habeas --
10 it's in habeas proceeding, but it's also a
11 proceeding under 3599. So -- and there's no
12 COA requirement for that.

13 You know, there are lots of
14 collateral, you know, orders that are issued in
15 habeas proceedings that I -- I don't think are
16 subject to COA requirements.

17 JUSTICE GORSUCH: So -- so it's like a
18 Cohen issue, you'd say, and we have collateral
19 -- you know, it's a collateral issue and so we
20 can take it up before a final judgment in -- in
21 the habeas proceeding?

22 MR. KOVARSKY: I'm saying it's a
23 collateral order. I'm not saying it's an
24 exception to the collateral order doctrine in
25 the sense that there's an interlocutory appeal

1 from it.

2 JUSTICE GORSUCH: I've never heard of
3 this animal before. It's collateral, but it
4 still merges to the final order?

5 MR. KOVARSKY: Well, it's -- in the
6 same way that if you denied a hearing without
7 deciding the merits of the claim, I don't
8 necessarily know that that would be subject to
9 the COA requirement.

10 JUSTICE GORSUCH: Well --

11 MR. KOVARSKY: I mean, it's a
12 different --

13 JUSTICE GORSUCH: Deny a hear --
14 evidentiary hearing or a discovery ruling, it
15 all merges into the final order, traditionally.
16 That's my understanding.

17 MR. KOVARSKY: I -- I -- I want to
18 walk back the -- the -- the evidentiary hearing
19 example.

20 JUSTICE GORSUCH: Sure.

21 MR. KOVARSKY: If I deny --

22 JUSTICE GORSUCH: I would too.

23 MR. KOVARSKY: If I deny discovery in
24 a case or I deny something that just prevents
25 the claim from even being presented, the -- the

1 premise behind 2253 is that you can take a
2 rough cut, a first look, at the claim and see
3 if it is -- it has got some merit. And that's
4 why, you know, we have the substantiality
5 requirement and that's why it refers expressly
6 to the merit of the claim.

7 In situations where you're dealing
8 with a procedure that prevents you from even
9 generating that information, the COA
10 requirement doesn't apply. And it's not --

11 JUSTICE BREYER: We don't have to --
12 do we have to -- I mean, look, suppose it is
13 the case that we're, technically speaking,
14 correctly, listening to what you've done and it
15 is an appeal from a final habeas order. All
16 right.

17 We granted the petition for cert in
18 order to decide whether the circuit is correct
19 in using the words "substantially necessary"
20 instead of "reasonably necessary." Right?
21 Well, there are cases in which we have done
22 just that. We've decided the issue we granted
23 on, and then we've said: And if they needed a
24 COA, this opinion suggests, indeed requires,
25 that they should have granted one. Okay?

1 And then we don't have to deal with
2 that. And if we did that, would that violate
3 something?

4 MR. KOVARSKY: Not to my knowledge.

5 JUSTICE BREYER: And we'll find out if
6 the other side is.

7 JUSTICE GORSUCH: You're okay with
8 that?

9 (Laughter.)

10 JUSTICE GORSUCH: You're okay with
11 that? You like that proposal -- Justice
12 Breyer's proposal?

13 MR. KOVARSKY: Justice Gorsuch, I do,
14 yes.

15 JUSTICE GORSUCH: Okay. All right.

16 JUSTICE ALITO: Well, picking up on
17 what Justice Breyer just said and trying this
18 one last time, I thought the issue that we had
19 agreed to decide was whether the Fifth
20 Circuit's formulation of "substantial need" is
21 different from "reasonably necessary," which is
22 the statutory standard.

23 And I still don't understand what the
24 difference is between those two formulations.
25 It seems possibly like just a matter of words.

1 So explain to me what is the
2 difference between those -- those two
3 formulations?

4 MR. KOVARSKY: The reasonable
5 necessity determination starts -- is a
6 construct that starts with thinking about what
7 a reasonable lawyer would do.

8 JUSTICE ALITO: Right. Would a
9 reasonable lawyer think it's necessary?

10 MR. KOVARSKY: Would a reasonable --
11 and the -- every evaluation of merit or whether
12 the evidence is helpful for the case starts
13 from the perspective of a reasonable lawyer.

14 JUSTICE ALITO: Right.

15 MR. KOVARSKY: The substantial need
16 test has -- wants nothing to do with that
17 concept.

18 JUSTICE ALITO: Why? I mean, if you
19 have -- if it's a reasonable attorney -- you
20 know, reasonably necessary, would a reasonable
21 attorney think there was a substantial need for
22 it?

23 MR. KOVARSKY: A reasonable attorney
24 would -- when a reasonable attorney thinks
25 there's a substantial need for -- as the Fifth

1 Circuit defines it, then they would, of course,
2 seek the evidence. The problem is that a
3 reasonable attorney will also seek evidence in
4 situations that the Fifth Circuit does not
5 define as a substantial need, such as a
6 situation where it's before -- where it's
7 before the petition has even been filed.

8 JUSTICE ALITO: It -- it just -- it
9 seems to me like you're not really arguing the
10 question that we granted. You're -- what
11 you're saying is that if we take a look at
12 everything that the Fifth Circuit's been doing
13 in this area in lots of cases that are not
14 before us, it's not doing the right thing.
15 That seems to be your argument. Not that there
16 really is a difference between these two verbal
17 formulations.

18 MR. KOVARSKY: Justice Alito, I'm
19 going to answer your question then I'd like to
20 reserve the rest of my time for rebuttal.

21 What the Fifth Circuit did in our case
22 that it is not supposed to be able to do is
23 speculate about the record on prejudice, which
24 is the claim with two elements that I, you
25 know, that I discussed. The -- the evidence is

1 developed on element A and they're speculating
2 as to what the record is going to look like on
3 B. And that's what they can't do, because
4 reasonable attorneys don't take a fatalistic
5 view towards evidence they don't understand yet
6 if relief is still available in light of
7 everything else in the case. Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Keller.

11 ORAL ARGUMENT OF SCOTT A. KELLER

12 ON BEHALF OF THE RESPONDENT

13 MR. KELLER: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 There is no meaningful difference
16 between reasonably necessary and substantial
17 need. But before that, a predicate issue.
18 There is no jurisdiction here because CJA
19 funding is an administrative claim for federal
20 money.

21 It is not a claim against the state.
22 It is not a claim against the state for money.
23 There is not concrete adverseness here, and --

24 JUSTICE SOTOMAYOR: So where do you go
25 if a circuit is arbitrarily and capriciously

1 saying, we're not going to give any funds,
2 period. You're going to tell me that won't
3 happen, but during the financial crisis not so
4 long ago, they had a reason, but whether that
5 takes care of your right to counsel and counsel
6 that has the resources to do the work necessary
7 to represent you is a different question, a
8 constitutional question.

9 So what happens in that situation?
10 Where does the defendant go?

11 MR. KELLER: The statutory system that
12 Congress put in place says there's only review
13 when funding has been granted at a level of
14 more than \$7500. And if you're asking is there
15 a private right of action here to go get
16 federal money under the statute, there is
17 nothing in the statute that evinces that. But
18 -- but, regardless, this is a claim for federal
19 money for U.S. Treasury funds.

20 JUSTICE SOTOMAYOR: By the way, in
21 which ways is this outside of the judicial
22 branch? I mean, I understand our prior cases
23 where we were asked to review a claim and it
24 then went to the Secretary of the Treasury, who
25 had absolute discretion to grant the claim or

1 not. That went outside the judiciary.

2 But how does this go outside the
3 judiciary?

4 MR. KELLER: Not everything that a
5 federal district judge is assigned to do is an
6 act of judicial power. We know that from
7 Ferreira, for instance.

8 JUSTICE SOTOMAYOR: Well, we also know
9 that those things don't get records made. But
10 here this is required by statute to be put --
11 to be made a part of the record.

12 MR. KELLER: For potential
13 concessions. But I think looking at the single
14 circuit judge --

15 JUSTICE SOTOMAYOR: Potential what --
16 you put things to be on the record --

17 MR. KELLER: If there are potential
18 concessions made during the ex parte hearing or
19 proceeding that then could be used on the
20 merits, then that would be the reason why --

21 JUSTICE BREYER: All right. Look, the
22 statute says upon a finding that investigative,
23 expert, dah-dah-dah, are reasonably necessary
24 for the representation of the defendant,
25 dah-dah-dah-dah-dah, the court may authorize

1 the defendant's attorneys to obtain such
2 services. It says the court, the judge, the
3 judge may authorize. All right.

4 They say the judge should authorize,
5 and this is the standard, and you say no,
6 that's not the standard. The standard -- or
7 it's the same, do some other way. But in
8 either case it is a judge who is performing a
9 duty that is imposed upon him by a statute.
10 Well, why isn't that the end of it?

11 We -- we -- we review matters of
12 appointing attorneys' fees and paying for them.
13 There can be all kinds of things that judges
14 are authorized by statute to do as part of
15 their judicial duties.

16 I really don't see -- and the cases
17 that you cite are all cases saying basically
18 that there's a lot of discretion in the judge
19 to decide how much, which I agree with. But
20 this is an unusual jurisdictional argument.

21 MR. KELLER: I'm not sure you can
22 separate the amount of funding, though, from
23 whether an investigator is assigned. Here
24 we're not arguing that counsel or the
25 investigator categorically lacks power under

1 the CJA. Their investigator has started to
2 perform the investigation that they seek to do.

3 This is about a claim for federal
4 funding. And I think the procedure for single
5 circuit judge review --

6 JUSTICE GINSBURG: Is there any
7 administrative review of a no funding decision?
8 No, there isn't. The review is -- concerns the
9 amount of the funds. And here it strikes me
10 that what we're dealing with is a simple
11 question of statutory interpretation, what does
12 13 -- 3599(f) require counsel to show to get
13 funds for investigating the existence of a
14 mitigation case?

15 That sounds to me like a legal
16 question, the kind of question that is fit for
17 a court, not an administrative review.

18 MR. KELLER: But Murray's Lessee says
19 that an inquiry into the existence of facts and
20 the application of them to rules of law is not
21 enough to have an exercise of -- of judicial
22 power. Here this can be revised outside the
23 traditional hierarchy.

24 JUSTICE BREYER: That's -- that's
25 true, you're -- what you say is true. The

1 question is, is the judge performing a judicial
2 duty? And the statute says he is. It's in
3 with other statutes that talk about his
4 judicial duties.

5 And it would seem that making certain
6 that a defendant has an expert, where
7 necessary, is part of an ordinary judicial
8 duty.

9 I mean, can you think of -- if you're
10 -- if Murray's Lessee is the best you can do,
11 at least in my own mind, that's quite a
12 different matter. It was asking judges to
13 award pensions or something like that, I think.
14 But -- but that's -- is there anything else you
15 have going for you at the moment?

16 MR. KELLER: Well, this -- this --

17 JUSTICE BREYER: Obviously, I'm
18 skeptical of your argument, but go ahead.

19 (Laughter.)

20 MR. KELLER: And -- and I'll try to --
21 to fix that, Justice Breyer. This can be
22 revised outside the traditional judicial
23 hierarchy. The single circuit judge review
24 point is key here.

25 What happens is the district judge

1 sends a memo to the circuit judge. There's no
2 party involvement in any of that review.

3 In no sense is that an adversary
4 proceeding, and yet that's the proceeding that
5 Congress has created. Indeed, there would be
6 constitutional issues with that proceeding that
7 would --

8 JUSTICE GINSBURG: Is there any
9 instance of such a review, district judge sends
10 a note where the district judge says, circuit
11 judge, I'm giving nothing, not one penny.

12 Is there any such procedure existing?
13 Aren't all the cases cases where the district
14 judge says, circuit judge, I'm giving this
15 much. Do you think it's too much? Do you
16 think it's too little?

17 MR. KELLER: The system that Congress
18 created, they were worried about spending too
19 much money. They did not create a mechanism
20 for review when funds were denied. The Tenth
21 Circuit has said that -- and multiple federal
22 judges have advocated placing these benefits
23 granting duties with officers besides judges.
24 That could not be an exercise of judicial
25 power.

1 If I can turn, now, to the --

2 JUSTICE KAGAN: Well, Mr. Keller, if I
3 can just -- I mean, suppose, this is the kind
4 of language which routinely gives rise to
5 circuit splits, you know, one circuit
6 interprets it one way and a second another way
7 and a third another way, and it can go on and
8 on.

9 And you're essentially saying that we
10 have no way to decide which standard is the
11 standard that Congress meant when it said this.
12 So another circuit tomorrow could say, you
13 know, we're just not giving any funds for any
14 mitigation investigations at all under this
15 standard, and we would be, like, whatever.

16 (Laughter.)

17 MR. KELLER: Whether administrative
18 agencies, though, are using or applying a
19 certain rule of law, though, is not the test
20 for whether there is judicial power. There
21 would be extremely anomalous results here to
22 allow a potential two-track appeal.

23 The Seventh and Eighth Circuits have
24 said you can't take an appeal from that single
25 circuit judge determination. And that's

1 correct. But that would mean that if the
2 district judge denies funding at the outset,
3 you do get to take an appeal of that. But if a
4 circuit judge is revising that certification
5 award, then there would not be an appeal. Also
6 --

7 JUSTICE GINSBURG: It's not that
8 award. It's -- one case is you don't get
9 funding. That doesn't go to a circuit judge.
10 There's no competing -- there's no two-track
11 anything.

12 If the judge says, nothing, I'm not
13 giving you the funds to investigate, the only
14 place that that can go is to a court of
15 appeals.

16 MR. KELLER: That's correct. But
17 whether a district judge is granting or denying
18 funds, Article III judicial power can't turn on
19 that, that all of a sudden it becomes judicial
20 power when the funds are being denied.

21 If I can turn to the question
22 presented in the issue of Section 2254(e)(2),
23 it is not going to be reasonably necessary to
24 pursue any evidence outside the state court
25 record of trial counsel's performance because

1 AEDPA in Section 2254(e)(2) is going to bar
2 that evidence.

3 JUSTICE GINSBURG: What about the
4 argument that you forfeited -- you forfeited
5 the AEDPA argument by not urging it in the
6 Fifth Circuit?

7 MR. KELLER: We did not forfeit it.
8 First of all, it answers the question
9 presented. The Fifth Circuit did not err
10 because this goes to whether it's reasonably
11 necessary, and that is an issue that both sides
12 have been joined on throughout.

13 And we can't waive arguments. We can
14 only waive issues.

15 JUSTICE SOTOMAYOR: But, I'm sorry,
16 the Fifth Circuit didn't rely on that ground.
17 Neither have you below.

18 So we reach out to a totally new
19 question in which there's no circuit split and
20 answer that question?

21 MR. KELLER: Well, this Court, of
22 course, could narrow its analysis and not
23 decide that issue. Petitioner has conceded,
24 though, that this point remains open. And it
25 is absolutely necessary to also --

1 JUSTICE SOTOMAYOR: Well, I'm not sure
2 it's open after Martinez and Trevino given the
3 nature of our language in those decisions. But
4 that's a merits issue on the question. But
5 having said that, why do we reach it?

6 MR. KELLER: The reason that you
7 should reach it here is because, in asking can
8 a circuit do a preliminary merits analysis, it
9 has to account for the limits of habeas review.

10 And if it is the case that (e)(2) is
11 going to bar this evidence, and it does, then
12 there's no reason to continue to fund an
13 investigation to raise evidence that cannot
14 possibly be presented to a federal court.

15 JUSTICE SOTOMAYOR: So --

16 JUSTICE BREYER: Maybe, but they may
17 have to go to -- maybe they have to exhaust --
18 maybe they haven't exhausted on this point. I
19 mean, I don't know. In -- in the first
20 sentence of where the language you're quoting
21 does -- it's kind of -- it's an exhaustion
22 requirement. And -- and so they'll go and
23 exhaust.

24 Now, that isn't what we took this case
25 to decide, is what everybody has told you. So

1 proceed if you want on this thing, but at some
2 point, I'd love to hear your point in answer to
3 what he said on -- on the issue we did say we
4 would take.

5 MR. KELLER: Definitely.

6 JUSTICE BREYER: When you want. You
7 don't have to now.

8 MR. KELLER: No, no, that's right.

9 (Laughter.)

10 MR. KELLER: The Court, of course, can
11 in answering the question presented, though,
12 take account of the fact that there are habeas
13 limitations inherent here. Essentially,
14 Petitioner has now conceded that it is
15 permitted to do a preliminary merits analysis
16 in considering 3599(f) funding.

17 Whether you call it a plausible
18 analysis or would a reasonable attorney with
19 finite means spend money on it, a reasonable
20 attorney with finite means is going to look at
21 is this claim barred? Is it speculative? Is
22 the evidence that I would attempt to get into
23 the record, is it duplicative? Those are the
24 three elements of the "substantial need"
25 formulation that the Fifth Circuit is using --

1 CHIEF JUSTICE ROBERTS: I think that
2 --

3 MR. KELLER: -- and that is completely
4 correct.

5 CHIEF JUSTICE ROBERTS: I understand
6 that point, which is -- the end result of which
7 is that it seems to me that you can make all of
8 your arguments under the guise of the test that
9 the Petitioner proposes, which is, the course,
10 the reasonable attorney working with finite
11 resources.

12 I have something of the same problem
13 that Justice Alito has. I -- I don't see that
14 it would be terribly valuable for us to spend
15 the time trying to figure out is reasonable
16 necessary; is that the same as substantial need
17 or not?

18 And even if we come out and say one or
19 the other, I don't know that it's going to get
20 to the heart of the question, which is what is
21 exact -- exactly is the district court judge
22 supposed to do or -- so why -- what's wrong
23 with asking when a reasonable attorney working
24 with finite resources would devote resources to
25 that service?

1 MR. KELLER: Mr. Chief Justice,
2 there's nothing wrong with that, provided that
3 the Court does clarify that you could do a
4 preliminary merits analysis, that you can
5 account for the underlying nature of the
6 representation, the limits on habeas.

7 Even the Fourth and Sixth Circuits,
8 which purported to create a circuit split with
9 the Fifth Circuit, analyze is this a
10 substantial question? So the circuits are --

11 JUSTICE GINSBURG: If we said taking
12 account of all the circumstances, would a
13 reasonable attorney ask for funds to
14 investigate? That, you think, would be --
15 that's the test?

16 MR. KELLER: Provided that there would
17 be an analysis, a preliminary analysis, of the
18 merits that accounts for limitations that AEDPA
19 and other doctrines such as Martinez, if it
20 would apply, actually imposes on the
21 representation.

22 JUSTICE KAGAN: Well, take this case
23 as an example, right? So it seems to me if a
24 judge looks at this case, a judge would say: I
25 -- look, I don't know what you're going to find

1 in your investigation, and it's unreasonable
2 for me to make a judgment about what you're
3 going to find in your investigation because
4 that's the whole point of an investigation.
5 But I do know that here no social history was
6 done at all and you've got like a schizophrenic
7 defendant, somebody who has had a mental health
8 diagnosis of a very serious order.

9 Well, of course, that's the kind of
10 thing that a reasonable attorney would
11 investigate in determining how to spend their
12 limited resources, isn't it?

13 MR. KELLER: Well, and here, counsel
14 wanted to contact the Petitioner's Honduran
15 family members, but Petitioner himself said:
16 Don't do that. Petitioner relented just days
17 before trial.

18 JUSTICE KAGAN: Putting aside whether
19 those particular witnesses and what -- what --
20 what cross -- whether the -- and maybe just
21 even putting those people aside, I mean, go and
22 figure out whether there's a history of mental
23 health issues.

24 MR. KELLER: Well, in this case, the
25 trial investigator and trial counsel obtained

1 records from the state, all of the mental
2 illness records postdate trial. The
3 schizophrenia diagnosis was not for -- years
4 after trial.

5 JUSTICE KAGAN: Yes, but I know, you
6 know, if you have a -- a person who has since
7 the incident in question been diagnosed as
8 schizophrenic, you know, some bell goes off
9 that says I think maybe we should do some
10 investigation and try to figure out whether he
11 was suffering from mental health issues at the
12 time of the incident.

13 MR. KELLER: Well, and counsel wanted
14 to contact the family members, and in 1995
15 Petitioner himself denied having any health
16 problems, such as drugs, alcohol or --

17 JUSTICE SOTOMAYOR: Counsel, he did --

18 MR. KELLER: -- mental health issues.

19 JUSTICE KAGAN: I mean, what better
20 purposes would you spend this money on? It
21 seems to me in this case, it's like the only
22 thing you want to spend your money on is a
23 mitigation investigation. There's nothing
24 else, really, to spend your money on.

25 MR. KELLER: Well, and here, funds

1 were approved for the trial investigator to do
2 an investigation, contact different witnesses.
3 That happened.

4 When -- when Petitioner's counsel and
5 the investigator wanted to contact the family
6 members, who would have been in a position to
7 try to give some indication about social --

8 JUSTICE GINSBURG: But there are many,
9 many sources other than asking family members
10 if you're looking into mental health. There's
11 school records. There's criminal justice
12 records. You don't stop when the family -- the
13 family doesn't want to or he doesn't want his
14 family to be called.

15 MR. KELLER: And counsel did obtain
16 records. This is not a case like Rompilla or
17 Porter, where there is just a file of
18 information sitting there, a treasure trove of
19 information that counsel just had to pick up,
20 or Porter, where there was no attempt
21 whatsoever to go contact potential witnesses.
22 There was no deficient performance here.

23 JUSTICE GINSBURG: What -- what about
24 the -- the specialist at the state habeas -- at
25 the state habeas level? Wasn't there a

1 specialist who said this is what should be done
2 in this case, all of these things should be
3 investigated? And none of them were.

4 MR. KELLER: There was a state habeas
5 investigator report. This is not in the state
6 court record, but this was presented on federal
7 habeas. But even then, there was not
8 particular evidence looking back to say, oh,
9 trial counsel knew this piece of evidence and,
10 therefore, this investigation of it should have
11 done. Rather -- this is JA 266 -- one of the
12 stated purposes of that report was to provide
13 "ammunition" to get funding. And so the
14 purpose of this report --

15 JUSTICE GORSUCH: Counsel, you say
16 there was no deficient performance, but the
17 circuit court had to amend its -- its ruling
18 because it had mistakenly said that there had
19 been an investigation of mental health in 1997
20 by trial counsel, and it had to withdraw that.

21 Is there -- is it fair to say there
22 was no deficient performance or a holding on
23 that score by the Fifth Circuit after -- after
24 it reissued its opinion? Or did it rely solely
25 on prejudice at least with respect to trial

1 counsel?

2 MR. KELLER: It -- it first analyzed
3 the fact -- the answer to the question is the
4 Fifth Circuit opinion can still be read as
5 holding that there was not deficient
6 performance and, in the alternative, that there
7 was no prejudice.

8 JUSTICE GORSUCH: How?

9 MR. KELLER: Because what the Fifth
10 Circuit said was it was proper -- or there was
11 no error from not contacting the Honduran
12 family members, one; and, two, the evidence of
13 mental illness postdated --

14 JUSTICE GORSUCH: But -- but -- that's
15 contacting the family members. And I'll spot
16 you that. But I'm talking about the mental
17 health issue.

18 How can -- how can there have been no
19 deficient performance holding if it withdrew
20 the basis of that holding in its -- in its
21 revised opinion?

22 MR. KELLER: Because, Justice Gorsuch,
23 that was not the only basis for that holding.
24 The Fifth Circuit and the district court also
25 noted that the evidence of mental health issues

1 all postdated trial. And when you're asking
2 was there a deficient performance under
3 Rompilla, you're asking about the quantum of
4 evidence known by trial counsel at the time of
5 trial.

6 JUSTICE SOTOMAYOR: Counsel, how can
7 you justify saying there wasn't deficient trial
8 performance? I mean, I understand all your
9 legal arguments.

10 There were two and a half pages of
11 mitigation evidence. The prosecution gets up
12 and says this is a perfect guy, there's no
13 history of mental health, there's no mitigation
14 on substance abuse. The prosecutor at trial
15 points to the deficits of mitigation
16 investigation that trial counsel has done.

17 We hear from the investigator that
18 he's hired. He's told to investigate. And
19 less than a month before trial, he starts
20 trying to do things and fails completely, as
21 Justice Ginsburg points out, to do even the
22 basics of investigation, trying to get school
23 records, that had nothing to do with not
24 reaching the parents or not; not talking to a
25 witness in California, where this man lived and

1 worked for a long period of time; nowhere in
2 Texas, because he had been there for a period
3 of time.

4 All of those things suggest to me
5 deficient performance. You have a lot of legal
6 defenses, but how can you stand here and say
7 that this kind of investigation meets any
8 constitutional standard?

9 MR. KELLER: Because both counsel and
10 the trial investigator were doing -- this is
11 page 1 and 2 of our brief. The investigator
12 began interviewing Petitioner several times in
13 February 1996, subpoenaed psychological and
14 disciplinary records, made multiple attempts to
15 contact the Honduran family members, contacted
16 several potential witnesses, searched criminal
17 histories and attempted to obtain deportation
18 records and California records. In other
19 words, this is not a situation where Rompilla
20 and Porter, where there was simply no attempt
21 at trying to provide a defense.

22 Rather, the key feature here and what
23 this case had been about up until just recently
24 was the failure to contact the Honduran family
25 members. And that was the gateway through

1 which Petitioner was trying to say that trial
2 counsel could have obtained information that
3 then would have led trial counsel to believe
4 that a mental health or substance abuse
5 investigation should have --

6 JUSTICE BREYER: To go back to what
7 the --

8 CHIEF JUSTICE ROBERTS: Counsel, I can
9 see -- I have a question about how the two
10 parts of the statute worked.

11 The first says reasonably necessary.
12 And then there's the "may" question.

13 Now, it would seem to me, I mean, it
14 can work one of two ways. In other words, the
15 discretion that is granted to the district
16 court could go to the question about whether
17 something is reasonably necessary, the sort of
18 things we've been talking about.

19 I mean, maybe it's necessary if you
20 haven't done anything, but maybe if you're
21 saying, well, I think if I ask the parents a
22 third time, maybe they'd give me a different
23 answer.

24 Or is it necessarily a two-step
25 process where the judge has to make a

1 determination: Is this reasonably necessary,
2 and, if it is, then the district court judge
3 can still deny it because it says "may"?

4 Which of those do you think is how the
5 statute should be read?

6 MR. KELLER: It's the second, Mr.
7 Chief Justice. And we know that --

8 CHIEF JUSTICE ROBERTS: I was hoping
9 you were going to say the first.

10 JUSTICE GINSBURG: On any grounds?

11 (Laughter.)

12 CHIEF JUSTICE ROBERTS: Because under
13 the first it does seem to me that all the stuff
14 we've been talking about, you know, did they
15 get the school records or not, did they talk to
16 this person or not, how much did -- it strikes
17 me that those are the sorts of things that
18 would be very hard for a court in the normal --
19 an appellate court in the normal course to get
20 into.

21 On the other hand, it seems to me
22 there are also things that you could say to the
23 district judge. They do these discretionary
24 rulings all the time. They're much more
25 familiar than we are with how these sorts of

1 mitigation investigations are conducted. So
2 that if the "may" goes into what's reasonably
3 necessary, it seems to me that makes sense.

4 If, however, you say the statute
5 requires an inquiry, is this reasonably
6 necessary, and then the district court has this
7 unusual power to say, even though it meets the
8 statutory standard, I'm not going to do it.

9 MR. KELLER: Well, let me clarify my
10 answer in -- in this way. The "may" language,
11 switching from "shall" to "may" does imbue the
12 district court with more discretion, again,
13 assuming that there is jurisdiction.

14 This would be a case sort of like
15 Olano that we cite at page 45 of our brief
16 where there what this Court said is a court can
17 analyze, is this a serious issue? And that's
18 very close to what the Fifth Circuit did here
19 in asking is this a substantial -- is there a
20 substantial need, or the Fourth and Sixth
21 Circuits say is this a substantial question?

22 And so those would be proper analyses
23 that a district court could do.

24 And if I could also address Justice
25 Gorsuch's question about certificate of

1 appealability, because I think this dovetails

2 --

3 JUSTICE GORSUCH: Yeah.

4 MR. KELLER: -- with our jurisdiction
5 argument, our position is that this is an
6 administrative act, it is not a judicial act.

7 But if we're wrong about that, and
8 this is actually an appeal from an exercise of
9 judicial power, then a certificate of
10 appealability should be required because then
11 it is an appeal from the federal habeas
12 judgment --

13 JUSTICE GINSBURG: Again, you --

14 JUSTICE GORSUCH: What do --

15 JUSTICE GINSBURG: -- are asking us to
16 take up a question in the first instance, which
17 we don't do. There was no discussion of this
18 at all.

19 JUSTICE GORSUCH: Yeah. What do we do
20 about that? On the one hand, it's
21 jurisdictional. On the other hand, it's not in
22 the question presented.

23 So, as Justice Breyer said, maybe we
24 should let the court of appeals deal with that
25 in the first instance.

1 MR. KELLER: Given that it's
2 jurisdictional, the argument would have to be
3 reached. And this is not a situation like
4 Harbison because here it is not simply about a
5 --

6 JUSTICE BREYER: It's jurisdictional,
7 we have to reach it, I think I can find pretty
8 good authority where it came up before and they
9 didn't issue a -- COA, but we decided the issue
10 and said now you should have issued a COA too.
11 I may be wrong, but you don't have it in your
12 briefs. They don't have it in their briefs. I
13 don't have it in anything I've looked at yet.
14 But I have it somewhere in the back of my mind,
15 which is sometimes wrong.

16 (Laughter.)

17 JUSTICE BREYER: So I'll look it up.
18 Okay. I believe --

19 JUSTICE GORSUCH: That's usually
20 pretty reliable, too.

21 JUSTICE BREYER: No, it's not that
22 reliable. But the question -- this is
23 reminding me of something, if I'm perhaps
24 overly simple-minded on this, but what it
25 reminds me of is the great argument that used

1 to take place in ad law. You see if, in fact,
2 you reverse a fact finding of a district judge,
3 you're supposed to do it if it's clearly
4 erroneous. You reverse a fact finding of an
5 administrative ALJ, you're supposed to do it if
6 there isn't substantial evidence in the record.
7 All right. That's what the statute does.

8 That's -- so Jerome P. Frank, who was
9 a great judge, one day said, my God, I've found
10 it, eureka, I've found a case that a judge
11 wouldn't reverse under the first standard but
12 would -- or would -- would reverse under the
13 first standard but wouldn't under the second.

14 But then, when I looked at it more
15 closely, I discovered I didn't have that
16 unusual case anyway.

17 See, he thought there was no
18 difference.

19 That spanned a bunch of law reviews
20 that said, yeah, there is a difference. Some
21 said yes; some said no. So why don't we just
22 say, look, that's what the statute says. Pick
23 up his standard. All these arguments you've
24 been making, maybe good, maybe bad, make them
25 to the district court. Okay?

1 End of case. Fifth Circuit, you are
2 to follow the statute. And that's it.
3 Good-bye. And all these other arguments are
4 for the lower court. And if you want, you say
5 that the lower court should take into account
6 all the arguments that it deems relevant and
7 significant. All right?

8 MR. KELLER: And -- and in that narrow
9 ruling, though, it would be very important for
10 the Court to clarify a few things and, that is,
11 first of all, a preliminary merits analysis is
12 acceptable, as Petitioner has conceded, and
13 second of all --

14 JUSTICE GINSBURG: Why not just what
15 would a reasonable lawyer do? And if the
16 reasonable lawyer would make a preliminary
17 analysis, fine. But the standard, I thought
18 you agreed, was we look at this case, this is a
19 horrendous murder, the only chance in the world
20 that this defendant has is if he can put on a
21 mitigation -- mitigation case and convince one
22 juror that he shouldn't get the death penalty.
23 There is nothing else, as Justice Kagan pointed
24 out.

25 MR. KELLER: But in doing a

1 preliminary merits analysis, the second part of
2 that would also be: what are the inherent
3 limitations on federal habeas?

4 For instance, if a claim is
5 categorically barred or if the evidence cannot
6 be introduced because 2254(e)(2) bars it, those
7 are all things that an attorney would look at
8 in doing a reasonable, necessary, necessity
9 analysis.

10 JUSTICE SOTOMAYOR: Did we create a
11 meaningless right in Martinez/Trevino? Because
12 that's what you're arguing, which is it's nice
13 to have a hearing and get past the procedural
14 bar, but all of the things that an effective
15 counsel should have done, and we've now found
16 they weren't, no record has been created.
17 Martinez/Trevino, we said that that was the
18 failing that we were remedying, the fact that a
19 defendant has not been given one clear chance
20 to fully develop a record and make his claim.

21 Is that your suggestion?

22 MR. KELLER: No, Martinez will still
23 have force under our argument.

24 JUSTICE SOTOMAYOR: When?

25 MR. KELLER: A failure to challenge

1 evidence, that was Martinez, correcting a jury
2 instruction.

3 JUSTICE SOTOMAYOR: Trevino was an
4 ineffective assistance of counsel claim.

5 MR. KELLER: Well, and a terrible
6 strategic decision, like Buck versus Davis from
7 last term. All of those are on the state court
8 record.

9 And this Court has already held in
10 Holland versus Jackson and in Williams that
11 attorney negligence is chargeable to the client
12 for purposes of 2254(e)(2). That was an
13 interpretation of the statute.

14 JUSTICE SOTOMAYOR: But isn't
15 Martinez/Trevino suggesting the very essence of
16 the exception to that rule, which is if you've
17 not been given a chance, a fair chance to have
18 some court decide your claim, then you haven't
19 been represented.

20 I don't know what is more attorney
21 abandonment than that.

22 MR. KELLER: Well --

23 JUSTICE SOTOMAYOR: To have one fair
24 chance at having a claim reviewed.

25 MR. KELLER: Martinez said it was

1 creating a narrow exception. It was only over
2 -- it was -- it was clarifying Coleman in that
3 very narrow instance and it was not --

4 JUSTICE KAGAN: But, Mr. Keller, this
5 is the language that Martinez used. Martinez
6 said that these sorts of claims often require
7 investigative work. It said, I'm quoting
8 again, "they depend on evidence outside the
9 trial record."

10 So the whole exception that Martinez
11 set out, you know, seems to be premised on the
12 idea that there's an opportunity to develop the
13 factual basis for the IAT -- IATC claim.

14 MR. KELLER: Well, nothing in Martinez
15 or Trevino cited to 2254(e)(2). And the Court
16 was only considering the narrow procedural
17 default rules created by the Court, but when
18 Congress has spoken --

19 JUSTICE KAGAN: Well, we said all
20 this. It often requires investigative work and
21 it depends on evidence outside the trial
22 record, and now you're saying we'll just take a
23 look at this statute and say that of course it
24 doesn't allow investigative work or evidence
25 outside the trial record. I mean, this is

1 precisely what we said.

2 MR. KELLER: But when Congress has a
3 statute that directs what the rule is for new
4 evidence, and Congress is raising the bar after
5 the Keeney decision, which was the cause and
6 prejudice standard, that what Martinez said was
7 this ought not put a significant strain on
8 state resources, but this would, in fact,
9 provide huge systemic costs on the system if
10 you're going to open up a trial again and take
11 in any new evidence in a claim of trial IAC
12 which could bring in anything into the record.
13 But that's the 2254(e)(2) issue.

14 The point, though, on the question
15 presented is that those type of considerations
16 are absolutely proper for not only the circuit
17 or the district courts to be analyzing but what
18 a reasonable attorney would take account --

19 JUSTICE ALITO: A reasonable attorney
20 with finite means might devote those finite
21 means to an avenue of investigation that has
22 very, very little chance of success because
23 there is so much at stake.

24 So I don't understand how that can be
25 the test here, where the statutory language is

1 reasonably necessary.

2 That seems clearly -- whatever
3 necessary means, it -- it means some degree of
4 importance. It has -- the evidence has to
5 be -- has to meet some level of importance in
6 order for the standard to be met.

7 I don't see how you can get around it.
8 And to say the test is whether -- what would a
9 reasonable attorney with finite means do, I --
10 it seems to me quite meaningless.

11 MR. KELLER: Well, and that's right,
12 Justice Alito, because we're in a habeas
13 context.

14 JUSTICE ALITO: And I thought you
15 agreed with that standard.

16 MR. KELLER: Well, because we're in a
17 habeas context, the reasonable necessity
18 analysis has to account for the limits on
19 habeas review. Petitioner has relied on many
20 non-habeas cases.

21 And what a counsel does at the
22 beginning of a case when there's no record,
23 there has been no trial, that analysis may look
24 very different. But when we're talking about
25 what is reasonably necessary on federal habeas

1 review, that will necessarily account for
2 habeas limitations that have been placed on
3 AEDPA --

4 JUSTICE GINSBURG: May -- may I ask
5 you before your time runs out, I wasn't clear
6 about your position on prejudice. It seems at
7 one point that you were making the point that
8 this murder was so brutal, no amount of
9 mitigating evidence would have helped.

10 MR. KELLER: Mr. --

11 JUSTICE GINSBURG: Are you still
12 making that?

13 MR. KELLER: Mr. Chief Justice, I see
14 my time has expired. If I may answer?

15 CHIEF JUSTICE ROBERTS: Yes.

16 MR. KELLER: Justice Ginsburg, we are
17 still arguing that there was no prejudice. And
18 it's not only the brutality of the crime.

19 There was a robbery at gunpoint three
20 days later with a threat to kill the victim's
21 family. There was an admission to wanting to
22 kill accomplices. There was a threat to kill
23 another witness through his confession, and the
24 criminal history that resulted in jail time
25 after violating probation.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 MR. KELLER: Thank you.

4 CHIEF JUSTICE ROBERTS: Four minutes,
5 Mr. Kovarsky.

6 REBUTTAL ARGUMENT OF
7 LEE B. KOVARSKY ON BEHALF
8 OF THE PETITIONER

9 MR. KOVARSKY: When federal habeas
10 counsel got this case, they looked at the
11 record and they saw that when invested with the
12 momentous responsibility of explaining to a
13 court why the defendant's moral feedback loop
14 was not such that it should impose the death
15 penalty, the sentencing phase, mitigation
16 presentation, lasted two minutes.

17 They also saw that there had been no
18 social history performed. They saw that there
19 had been no mental health expert that had
20 examined the defendant, and that the trial
21 counsel had failed to follow up on red flags.

22 They saw in the state habeas file that
23 state habeas counsel was told by his
24 investigator nine days after he hired her that
25 the first thing he had to do was a mitigation

1 investigation and a social history, and he
2 didn't do that.

3 And we know that there's a there there
4 because there is a diagnosis of schizophrenia
5 in the record. It is inconceivable that a
6 reasonable attorney, having received this file,
7 getting this case, would do anything other than
8 precisely what federal habeas counsel did in
9 this case.

10 And the reasonable attorney standard
11 is the right standard because it is the
12 standard that Congress picked.

13 At the time Congress enacted Section
14 3599, it knew that courts had spent 20 years
15 defining reasonable necessity, using a
16 reasonable attorney rule.

17 And it's also the desirable rule
18 because it gives effect to the dominant purpose
19 of the statute, which is to promote parity in
20 representation as between those capable of
21 paying for it and those who aren't.

22 And, finally, it's a really good
23 standard because it's workable. It's flexible
24 enough to apply across phases of the capital
25 representation, courts have 50 years of

1 experience in dealing with it, and it's got
2 meaningful limits.

3 Mr. Chief Justice, I yield the rest of
4 my time.

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

7 (Whereupon, at 11:03 a.m., the case
8 was submitted.)

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