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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Washington, D.C.
Monday, October 30, 2017

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

APPEARANCES:
LEE B. KOVARSKY, Baltimore, Maryland; on behalf of the Petitioner.
SCOTT A. KELLER, Solicitor General of Texas, Austin, Texas; on behalf of the Respondent.

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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.

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

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

CHIEF JUSTICE ROBERTS: Well, if he is ever able to submit under (e)(2), it would be because it's a new rule of constitutional law -- I'm just looking at the statute here -- or a factual

record?

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

JUSTICE BREYER: All right. Look, the statute says upon a finding that investigative, expert, dah-dah-dah, are reasonably necessary for the representation of the defendant, dah-dah-dah-dah-dah, the Court may authorize the defendant's attorneys to obtain such services. It says the court, the judge, the judge may authorize. All right.

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

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

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

MR. KELLER: I'm not sure you can separate the amount of funding, though, from whether an investigator is assigned. Here we're not arguing that counsel or the investigator categorically lacks power under the CJA. Their investigator has started to perform the investigation that they seek to do.

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

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

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

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

JUSTICE BREYER: I'm not sure that's true, what you say is true. The question is, is the judge performing a judicial duty? And the statute says he

is. It's in with other statutes that talk about his judicial duties.

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

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

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

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

(Laughter.)

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

key here.

What happens is the district judge sends a memo to the circuit judge. There's no party involvement in any of that review.

In no sense is that an adversary proceeding, and yet that's the proceeding that Congress has created. And, indeed, there would be constitutional issues with that proceeding that would --

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

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

MR. KELLER: The system that Congress created, they were worried about spending too much money. They

did not create a mechanism for review when funds were denied. The Tenth Circuit has said that -- and multiple federal judges have advocated placing these benefits granting duties with officers besides judges. That could not be an exercise of judicial power.

If I can turn, though, to the --

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

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

whatever.

(Laughter.)

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

The Seventh and Eighth Circuits have said you can't take an appeal from that single circuit judge determination. And that's correct. But that would mean that if the district judge denies funding at the outset, you do get to take an appeal of that. But if a circuit judge is revising that certification award, then there would not be an appeal. Also --

JUSTICE GINSBURG: Not that award. One case is you don't get funding. That doesn't go to a circuit judge. There is no competing -- there is no two-track anything.

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

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

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

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

MR. KELLER: We did not forfeit it. First of all, it answers the question presented. The Fifth Circuit

did not err because this goes to whether it's reasonably necessary, and that is an issue that both sides have been joined on throughout.

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: So --

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

Now, that isn't what we took this case to decide, is what everybody has told you. So proceed if you want on this thing, but at some point, I'd

love to hear your point in answer to what he said on -- on the issue we did say we would take.

MR. KELLER: Definitely.

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

MR. KELLER: No, no, that's right. The Court, of course, can in answering the question presented, though, take account of the fact that there are habeas limitations inherent here. Essentially, Petitioner has now conceded that it is permitted to do a preliminary merits analysis in considering 3599(f) funding.

Whether you call it a plausible analysis or would a reasonable attorney with finite means spend money on it, a reasonable attorney with finite means is going to look at is this claim barred? Is it speculative? Is the evidence that I would attempt to get into the record, is it duplicative? Those are the three elements of the "substantial need" formulation that the

Fifth Circuit is using --

CHIEF JUSTICE ROBERTS: I think that --

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

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

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

And even if we come out and say one or the other, I don't know that it's going to get to the heart of the question, which is what is exact -- exactly is the district court judge

supposed to do or -- so why -- what's wrong with asking when a reasonable attorney working with finite resources would devote resources to that service?

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

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

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

MR. KELLER: Provided that there would be an analysis, a preliminary analysis, of the merits that accounts

for limitations that AEDPA and other doctrines such as Martinez, if it would apply, actually imposes on the representation.

JUSTICE KAGAN: Well, take this case as an example, right? So it seems to me if a judge looks at this case, a judge would say: I -- look, I don't know what you're going to find in your investigation, and it's unreasonable for me to make a judgment about what you're going to find in your investigation because that's the whole point of an investigation. But I do know that here no social history was done at all and you've got like a schizophrenic defendant, somebody who has had a mental health diagnosis of a very serious order.

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

MR. KELLER: Well, and here,

counsel wanted to contact the Petitioner's Honduran family members, but Petitioner himself said: Don't do that. Petitioner relented just days before trial.

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

MR. KELLER: Well, in this case, the trial investigator and trial counsel obtained records from the state, all of the mental illness records postdate trial. The schizophrenia diagnosis was not -- years after trial.

JUSTICE KAGAN: Yes, but I know, you know, if you have a -- a person who has since the incident in question been diagnosed as schizophrenic, you know, some bell goes off that says I think maybe we should do some investigation

and try to figure out whether he was suffering from mental health issues at the time of the incident.

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

JUSTICE SOTOMAYOR: Counsel, he did --

MR. KELLER: -- mental health issues.

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

MR. KELLER: Well, and here, funds were approved for the trial investigator to do an investigation, to contact different witnesses. That happened.

When Petitioner's counsel and

the investigator wanted to contact the family members, who would have been in a position to try to give some indication about social --

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

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

JUSTICE GINSBURG: What -- what about the -- the specialist at the state habeas -- at the state habeas

level? Wasn't there a specialist who said this is what should be done in this case, all of these things should be investigated? And none of them were.

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

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

withdraw that.

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

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

JUSTICE GORSUCH: How?

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

JUSTICE GORSUCH: But that's contacting the family members. And I'll spot you that. But I'm talking

about the mental health issue.

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

MR. KELLER: Because, Justice Gorsuch, that was not the only basis for that holding. The Fifth Circuit and the district court also noted that the evidence of mental health issues all postdated trial. And when you're asking was there a deficient performance under Rompilla, you're asking about the quantum of evidence known by trial counsel at the time of trial.

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

There were two and a half pages of mitigation evidence. The prosecution gets up and says this is a perfect guy, there's no history of

mental health, there's no mitigation on substance abuse. The prosecutor at trial points to the deficits of mitigation investigation that trial counsel has done.

We hear from the investigator that he's hired. He's told to investigate. And less than a month before trial, he starts trying to do things and fails completely, as Justice Ginsburg points out, to do even the basics of investigation, trying to get school records, that had nothing to do with not reaching the parents or not; not talking to a witness in California, where this man lived and worked for a long period of time; nowhere in Texas, because he had been there for a period of time.

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

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

Rather, the key feature here and what this case had been about up until just recently was the failure to contact the Honduran family members. And that was the gateway through which Petitioner was trying to say that trial counsel could have obtained information that then would have led trial counsel to believe that a mental health or

substance abuse investigation should have --

JUSTICE BREYER: To go back to what the --

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

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

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

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

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

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

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

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

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

(Laughter).

JUSTICE GINSBURG: On any grounds?

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

On the other hand, it seems to me there are also things that you could

say to the district judge. They do these discretionary rulings all the time. They're much more familiar than we are with how these sorts of mitigation investigations are conducted. So that if the "may" goes into what's reasonably necessary, it seems to me that makes sense.

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

MR. KELLER: Well, let me clarify my answer in this way. The "may" language, switching from shall to may doesn't imbue the district court with more discretion, again, assuming that there is jurisdiction.

This would be a case sort of like Olano that we cite at page 45 of our brief where there what this court said is a court can analyze, is this a serious issue? And that's very close

to what the Fifth Circuit did here in asking is this a substantial -- is there a substantial need, or the Fourth and Sixth Circuits say is this a substantial question?

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

And if I could also address Justice Gorsuch's question about certificate of appealability, because I think this dovetails with our jurisdiction argument, our position is that this is an administrative act, it is not a judicial act.

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

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

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

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

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

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

mind, which is sometimes wrong.

(Laughter.)

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

JUSTICE GORSUCH: That's usually pretty reliable.

JUSTICE BREYER: But the question -- this is reminding me of something, if I'm perhaps overly simple-minded on this, but what it reminds me of is the great argument that used to take place in ad law. You see if, in fact, you reverse a fact finding of a district judge, you're supposed to do it if it's clearly erroneous. You reverse a fact finding of an administrative ALJ, you are supposed to do it if there isn't substantial evidence in the record. All right. That's what the statute does.

That's -- so Jerome P. Frank, who was a great judge, one day said, my God, I've found it, eureka, I've found a case that a judge wouldn't reverse

under the first standard but would -- or would reverse under the first standard but wouldn't under the second.

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

See, he thought there was no difference.

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

End of case. This circuit, you are to follow the statute. And that's it. Good-bye. And all these other arguments are for the lower court. And if you want, you say that the lower court should take into account all the arguments that it deems relevant and significant. All right?

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

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

MR. KELLER: But in doing a preliminary merits analysis, the second part of that would also be what are the inherent limitations on federal habeas?

For instance, if a claim is categorically barred or if the evidence

cannot be introduced because 2254(e)(2) bars it, those are all things that an attorney would look at in doing a reasonable, necessary, necessity analysis.

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

Is that your suggestion?

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

JUSTICE SOTOMAYOR: When?

MR. KELLER: A failure to challenge evidence, that was Martinez,

correcting a jury instruction.

JUSTICE SOTOMAYOR: Trevino wasn't an effective assistance of counsel claim.

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

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

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

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

MR. KELLER: Well --

JUSTICE SOTOMAYOR: To have one

fair chance at having a claim reviewed.

MR. KELLER: Martinez said it was creating a narrow exception. It was only over -- it was -- it was clarifying Coleman in that very narrow instance and not --

JUSTICE KAGAN: But, Mr. Keller, this is the language that Martinez used. Martinez said that these sorts of claims often require investigative work.

It said, I'm quoting again, "they depend on evidence outside the trial record."

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

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

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

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

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

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

So I don't understand how that can be the test here, where the statutory language is reasonably necessary.

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

I don't see how you can get around it. And to say the test is

whether -- what would a reasonable attorney with finite means do, I -- it seems to me quite meaningless.

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

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

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

And what a counsel does at the beginning of the case when there is no record, there has been no trial, that analysis may look very different. But when we're talking about what is reasonably necessary on federal habeas review, that will necessarily account for habeas limitations that have been placed on AEDPA --

JUSTICE GINSBURG: May -- may I ask you before your time runs out, I

wasn't clear about your position on prejudice. It seems at one point you were making the point that this murder was so brutal, no amount of mitigating evidence would have helped.

MR. KELLER: Mr. --

JUSTICE GINSBURG: Are you still making that?

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

CHIEF JUSTICE ROBERTS: Yes.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. KELLER: Thank you.

CHIEF JUSTICE ROBERTS: Four minutes, Mr. Kovarsky.

REBUTTAL ARGUMENT OF
LEE B. KOVARSKY ON BEHALF
OF THE PETITIONER

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

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

They saw in the state habeas

file that state habeas counsel was told by his investigator nine days after he hired her that the first thing he had to do was a mitigation investigation and a social history, and he didn't do that.

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

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

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

And it's also the desirable rule because it gives effect to the dominant

purpose of the statute, which is to promote parity and representation as between those capable of paying for it and those who aren't.

And, finally, it's a really good standard because it's workable. It is flexible enough to apply across phases of the capital representation, courts have 50 years of experience in dealing with it, and it's got meaningful limits.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel, the case is submitted.

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

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