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IN THE SUPREME COURT OF THE UNITED STATES

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ERICK DANIEL DAVILA, :

Petitioner : No. 16-6219

v. :

LORIE DAVIS, DIRECTOR, :

TEXAS DEPARTMENT OF CRIMINAL :

JUSTICE, CORRECTIONAL :

INSTITUTIONS DIVISION, :

Respondent. :

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Washington, D.C.  
Monday, April 24, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:  
SETH KRETZER, ESQ., Houston, Tex.; on behalf of the  
Petitioner. Appointed by this Court.  
SCOTT A. KELLER, ESQ., Solicitor General,  
Austin, Tex.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 16-6219, Davila v. Davis.

Mr. Kretzer.

ORAL ARGUMENT OF SETH KRETZER

ON BEHALF OF THE PETITIONER

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

The nature and logic of Martinez naturally applies to claims of ineffective assistance of appellate counsel, just as it does to claims of ineffective assistance of trial counsel.

Erick Davila faces execution despite having been convicted pursuant to erroneous jury instructions that vitiating his only viable defense. On direct appeal, Davila's counsel recognized the centrality of the intent issue, but challenged only sufficiency of the evidence --

JUSTICE SOTOMAYOR: But I have --

MR. KRETZER: -- not the jury instructions.

JUSTICE SOTOMAYOR: May I ask you, when do you believe that counsel below objected? And your brief seems to assume he did, but as I read the transcript, I can't find where he objected clearly.

1                   Assuming he didn't object clearly, can you  
2 say under any circumstance that appellate counsel was  
3 ineffective for choosing the route he did?

4                   MR. KRETZER: Yes, Your --

5                   JUSTICE SOTOMAYOR: Given plain error  
6 review, if there was no objection, wasn't the  
7 sufficiency of the evidence the best way to approach a  
8 forfeited error?

9                   MR. KRETZER: Well, as an initial matter, it  
10 must be remembered that plain error is not the standard  
11 in Texas. Even if a jury instructional objection is not  
12 made, all that happens under Almanza is the standard of  
13 review turns to -- from harm to egregious harm, which is  
14 less incisive for Petitioners than plain error standard,  
15 which prevails in Federal court.

16                   But, more importantly, the trial counsel did  
17 object, particularly at page 52 of the Joint Appendix --

18                   JUSTICE SOTOMAYOR: He objected to the  
19 sequence of what the judge was saying. He didn't argue  
20 any transferred intent in the way that the Court later  
21 found in Roberts. I think it's Roberts, if I'm --

22                   MR. KRETZER: Yes.

23                   JUSTICE SOTOMAYOR: -- if my memory is  
24 correct.

25                   MR. KRETZER: Yes.

1 JUSTICE SOTOMAYOR: He didn't -- I don't see  
2 any discussion of the Roberts transferred intent. All  
3 he argued was, give the original instruction over again,  
4 and then give this new one.

5 MR. KRETZER: Oh, no, he did not say, then  
6 please do give the new one. There's no doubt the  
7 objection could have been better calibrated. And yet  
8 the closing, a discrete, complete sentence said, we  
9 object to giving of the supplemental instruction. And  
10 immediately thereafter, the State trial judge said,  
11 overruled.

12 JUSTICE GORSUCH: But, counsel --

13 MR. KRETZER: And it must be remembered --  
14 oh --

15 JUSTICE GORSUCH: Sorry, counsel.

16 Just to follow up on Justice Sotomayor's  
17 point, I think you argued at page 228 of the Joint  
18 Appendix that trial counsel's objection was not  
19 sufficient to cover the charging error, and I think that  
20 the Federal district court on habeas found the same  
21 thing on page 366.

22 And so that raises, to my mind, a question  
23 whether Martinez applies here. Couldn't -- couldn't  
24 your client have brought a Martinez claim? And isn't  
25 the Martinez rule premised on the idea you get one clear

1 shot at bringing the issue? And -- and maybe the  
2 absence of one clear shot here would bring you within  
3 the rule of Martinez, and that would take care of this  
4 case.

5 What am I missing there?

6 MR. KRETZER: Yes, absolutely.

7 The reason this could not have been couched  
8 as a Martinez ineffective assistance of trial claim in  
9 Federal habeas is, even if the objection had not been  
10 proper to preserve the issue in the Texas State court,  
11 and then in the court of criminal appeals, there's still  
12 no way that the direct appellate attorney argued the  
13 issue either way.

14 In other words, what should have happened,  
15 the conforming, constitutionally sufficient direct  
16 appellate brief should have argued jury instructional  
17 error. And then first in the situation that the  
18 objection had been preserved by the objection has harm  
19 under Almanza, or alternatively, that the objection of  
20 the trial court was not sufficient to preserve the  
21 objection, and then would move to egregious harm under  
22 Almanza. But in no case, in no situation was there no  
23 underlying error for the State direct appellate attorney  
24 to argue against.

25 CHIEF JUSTICE ROBERTS: One -- one thing a

1 good appellate lawyer will do is pare down the issues  
2 that are presented on appeal, even if they think that  
3 some of those issues have merit. I mean, if you have  
4 six issues that you think you can argue credibly before  
5 the -- before the appellate court, you may decide it  
6 would be much better to focus that court on the two or  
7 three strongest issues, that adding the others will, in  
8 fact, dilute from the value of that.

9           So when you have these -- I'm not talking  
10 about this particular case. But in general, when you  
11 have the claim of ineffective assistance of appellate  
12 counsel, it's sometimes easy in retrospect to say, well,  
13 here's an issue that, you know, maybe -- the appellate  
14 counsel, in the exercise of discretion, thought it was  
15 like number 6 in the order of -- of strength. And you  
16 look back and in hindsight you say, well, he should have  
17 made more of that, and it's not even mentioned at all in  
18 the appellate brief.

19           I mean, I know there's also issues of trial  
20 strategy, but it seems it's more typical in an appellate  
21 case that you have -- you know, you leave things off the  
22 table. Is -- is that going to present a problem, in  
23 your view, in evaluating the effectiveness of appellate  
24 counsel?

25           MR. KRETZER: No, it will not. There's no

1 doubt that appellate attorneys retain substantial  
2 discretion to not raise certain claims that are regarded  
3 to be necessarily weaker. In fact, in a trial,  
4 presumably almost all appellate lawyers have to  
5 necessarily not raise some claims. That's why the  
6 backstop of our argument is substantiality.

7 In other words, it's not one thing to raise  
8 an appellate claim that might have, you know,  
9 theoretically gotten you somewhere, and yet not likely  
10 to have gotten a reversal in the reviewing State court  
11 of appeals. It is very difficult to raise a substantial  
12 claim, by which we mean, in this context, one that --  
13 and this is sort of a distinction that Federal district  
14 judges make all the time in habeas -- but the question  
15 here would be whether or not it was likely that that  
16 claim would have resulted in a different outcome in the  
17 reviewing court of appeals. And the case --

18 JUSTICE GINSBURG: But in this actual case,  
19 didn't the district court hold that the ineffective  
20 assistance of appellate counsel argument, on the merits,  
21 it was insubstantial? And if -- if it was  
22 insubstantial, then we didn't -- we don't even have to  
23 get to the question you would like to present to us.

24 Wasn't it an alternative holding that, in  
25 any case, this objection to the instruction was



1 insubstantial?

2 MR. KRETZER: Yes. The Federal district  
3 court did make an alternative holding on the merits.  
4 However, that was not addressed in the Fifth Circuit's  
5 opinion, and was, hence, not a part of the judgment that  
6 was appealed to this Court.

7 So at the minimum, we would ask for relief  
8 as the same which this Court afforded in Martinez, which  
9 is a remand to the reviewing court of appeals -- in that  
10 case, the Ninth Circuit -- for a determination as to  
11 that prejudice -- prejudice prong. And, in fact,  
12 Mr. Martinez was ultimately unsuccessful in Federal  
13 district court in Arizona on the prejudice prong.

14 JUSTICE GINSBURG: You're not in Missouri --

15 JUSTICE KENNEDY: Well, on the -- on the  
16 issue of whether or not Martinez should be extended to  
17 alleged inadequate assistance of counsel on appeal, what  
18 is the test that I'm supposed to apply? The -- the  
19 practicality of this? The consequences? The private  
20 interests of the prisoners and the public interest  
21 in finality -- is that what I'm supposed -- is there  
22 some test you want me to apply?

23 MR. KRETZER: Oh --

24 JUSTICE KENNEDY: And when this test is  
25 applied, I -- I have -- have to say, it was somewhat

1    stunning to me to read at page 15 of your brief that one  
2    study indicates that although 81 percent of habeas  
3    petitions in capital cases raise a claim of ineffective  
4    assistance of counsel, only 31 percent alleged  
5    ineffective assistance of appellate counsel, that's a  
6    third of the cases. This is a tremendous burden.

7                   MR. KRETZER: Well, to answer your question,  
8    no, the test that we -- the standard we would ask you to  
9    apply is the same that was in Martinez. Basically,  
10   first, was there a substantial claim? Did -- was that  
11   claim defaulted in the initial review collateral  
12   proceeding?

13                   And when we say "substantial," we mean one  
14   that was likely to result in a different outcome.  
15   That's why the claims will be very rare of --  
16   substantial claims of ineffective appellate counsel.  
17   And yet when they do exist, they will likely be  
18   incredibly meritorious claims --

19                   JUSTICE KENNEDY: No, but my question was,  
20   was the systemic one, is -- is what are the systemic  
21   standards I look to, to see whether or not we should  
22   extend Martinez to this kind of case?

23                   MR. KRETZER: Oh, yes.

24                   JUSTICE KENNEDY: And then what guidance do  
25   I have? It looked like Mathews v. Eldridge. I'm the

1 one that -- or this Court's the one that balances?

2 MR. KRETZER: Well, yes, in Martinez, this  
3 Court particularly created an equitable rule in the  
4 exercise of this Court's discretion saying that there  
5 would be an exception as it were to cause and the cause  
6 and prejudice inquiry, because otherwise you would have  
7 petitioners who would never have any forum in which this  
8 ineffective assistance claim could be litigated.

9 The door has been opened in Martinez now for  
10 over 5 years. There has not been an inundation of new  
11 petitions in Federal court. And --

12 CHIEF JUSTICE ROBERTS: One -- one  
13 significant distinction, of course, is that these claims  
14 of appellate assistance -- ineffective appellate  
15 assistance of counsel, under the logic can be raised in  
16 every State. Martinez, Trevino, it's only where the  
17 State has funneled the decisions to collateral review.

18 Appellate claims like this, you know,  
19 obviously can't be brought on appeal in every State, and  
20 so this would arise, in terms of evaluating the  
21 statistics, it would be many, many times the numbers of  
22 Martinez claims that you see, and we see -- and -- and  
23 there are now an awful lot of Martinez claims anyway.

24 MR. KRETZER: In Martinez, what Arizona had  
25 done was said as a statutory matter, you cannot raise an

1 ineffective assistance contention in the direct appeal.  
2 Instead it was deliberately channeled over to habeas.

3 There's a reason that in a claim like  
4 Mr. Davila's that the initial review collateral  
5 opportunity to challenge the claim of ineffective  
6 contention is State habeas, and that is because it is  
7 impossible, physically impossible --

8 CHIEF JUSTICE ROBERTS: I -- I've got --  
9 I've got to -- do -- for them to raise the appellate --

10 MR. KRETZER: Yes, themselves --

11 CHIEF JUSTICE ROBERTS: I'm sorry to cut you  
12 off, but I -- I understand that, but that's going to be  
13 true in every State, right? It's going to be -- you're  
14 going to have the same difficulty of raising  
15 ineffectiveness of appellate counsel on direct review in  
16 every -- every State.

17 MR. KRETZER: Yes, that would be a uniform  
18 impossible --

19 CHIEF JUSTICE ROBERTS: Yeah. Martinez, one  
20 of the important considerations at least for some in  
21 Martinez is that it is narrow. It's only where the  
22 State has funneled the ineffective assistance at trial  
23 claims to collateral review.

24 MR. KRETZER: I would ask the Court to look  
25 at the vantage point. In Martinez, there was not a

1 mechanism by which the States were punished for removing  
2 the claim from what -- direct appeal to habeas. It was  
3 an equitable exception in favor of the petitioner,  
4 because if the equitable exception were not there, then  
5 petitioners would suffer the reality, there would be  
6 no court ever --

7 JUSTICE SOTOMAYOR: Counsel, you're not  
8 dealing with the question asked.

9 MR. KRETZER: Okay.

10 JUSTICE SOTOMAYOR: All right? The question  
11 asked has to do with the burden on the courts. Both  
12 Justice Kennedy and Justice Roberts are saying, if we  
13 recognize this right, the courts are going to be  
14 inundated with these kinds of claims because in every  
15 State, ineffective assistance of appellate counsel  
16 isn't -- can't be, by definition, raised in direct  
17 review. It all has to be channelled to collateral  
18 review. So in every State, every defendant will be able  
19 to raise this claim and it will inundate the -- the  
20 system.

21 MR. KRETZER: We don't think so. The --

22 JUSTICE SOTOMAYOR: And you haven't  
23 articulated the reasons you don't think so.

24 MR. KRETZER: Yes. I would --

25 JUSTICE SOTOMAYOR: I could start with how

1 many post-conviction ineffective assistance of appellate  
2 counsel cases, the 31 percent that Justice Kennedy was  
3 pointing to, in how many of those is relief granted?

4 MR. KRETZER: If any, a very minute number,  
5 because it is so --

6 JUSTICE SOTOMAYOR: Infinitesimally small.

7 MR. KRETZER: Yes.

8 CHIEF JUSTICE ROBERTS: Are there hearings  
9 in those cases --

10 MR. KRETZER: For --

11 CHIEF JUSTICE ROBERTS: -- cranting the  
12 necessity for the court to evaluate the claims before  
13 they decide not to grant the -- the allegation --

14 MR. KRETZER: No, very rarely are there  
15 actually Strickland hearings on 2254 in Federal district  
16 court, for the reason that it's very hard to, one, show  
17 a substantial claim, and then, two, to reach through  
18 the --

19 CHIEF JUSTICE ROBERTS: The court presumably  
20 has to read the -- the filings in the case to decide  
21 that the claim is not substantial, correct?

22 MR. KRETZER: Yes, it would be necessary for  
23 the court --

24 CHIEF JUSTICE ROBERTS: So -- so the number  
25 that are granted really isn't the consideration we're

1 looking to, is it? It's the number that are going to  
2 force the courts to review them.

3 MR. KRETZER: Well, I think if one accepts  
4 that for now, 4 or 5 years Martinez has been the law  
5 and -- and a number of these claims have been made, at  
6 most there might be, in a small subset of those, a very  
7 small number of additional ineffective assistance of  
8 appellate counsel claims made because it is so hard for  
9 a petitioner to formulate such a claim.

10 For a Petitioner such as Mr. Davila, to have  
11 raised a claim like this on his own, of course, Martinez  
12 talked a lot about the importance of having an effective  
13 assistance of counsel to vindicate an underlying  
14 ineffectiveness contention, Mr. Davila would have had to  
15 have been familiar with the jury charge, he would have  
16 had have been -- with the Texas law --

17 CHIEF JUSTICE ROBERTS: Well, I mean, are  
18 you saying it would have been hard to formulate? Are  
19 you suggesting that someone facing this sentence that  
20 Mr. Davila is facing would say, well, let's not do that,  
21 let's not raise an ineffective assistance of appellate  
22 counsel or somewhere and said, because it's just too  
23 hard to formulate that claim?

24 These are situations where the defendant is  
25 facing capital punishment where they are going to raise

1 every possible claim they can, and I don't know why it  
2 would be terribly different for defendants facing life  
3 in prison or further sentences.

4 MR. KRETZER: Well, the -- as I said,  
5 there's a very difference between raising every possible  
6 claim that they could versus a lawyer's obligation to  
7 raise meritorious, not raise frivolous claims. And  
8 there may be at the margin some additional claim that  
9 perhaps when it's sifted through is found not to  
10 ultimately be successful. We would argue a substantial  
11 claim is one that necessarily, when it does exist, is  
12 going to be one that which -- about which there does  
13 need to be a hearing about the underlying  
14 ineffectiveness.

15 JUSTICE ALITO: What concerns me about your  
16 position is that it seems to blast an enormous hole in  
17 the doctrine of procedural default. Unlike Martinez and  
18 unlike Trevino, which were cabined, it -- it seems to  
19 me, and you'll correct me if I'm wrong, that if we agree  
20 with your position, then anything that -- that an  
21 attorney in Federal habeas can examine the trial record,  
22 and if that attorney finds anything that seems to be an  
23 error, it can be raised in Federal habeas, even if there  
24 was no objection at the time of trial, it wasn't raised  
25 on direct appeal, it wasn't raised in a State collateral



1 proceeding. That's where this is going.

2 And if it's an -- if the underlying error is  
3 ineffective assistance of counsel, well, whatever it is,  
4 all of that will be evaluated by the Federal habeas  
5 court outside of AEDPA. That's where this is going.  
6 So this is an enormous hole.

7 Am I not -- isn't that where this -- isn't  
8 that what this means? Because the -- the argument in  
9 Federal habeas would be there was cause because counsel  
10 was ineffective at the collateral -- State collateral  
11 proceeding, and this counsel was ineffective at the  
12 State collateral proceeding because there was  
13 ineffective assistance on direct appeal. And then  
14 counsel on direct appeal was ineffective because there  
15 was an error at trial.

16 So the Federal habeas court has to make all  
17 of those determinations, and if the court -- the --  
18 which means the court is going to have to look at  
19 whether or not there was an error at trial and, in doing  
20 that, it is not going to be asking whether a -- whether  
21 a State court reasonably rejected the claim because it  
22 was never presented to the State court. So it's going  
23 to be de novo review.

24 MR. KRETZER: It would be very difficult --  
25 the situation is not simply -- the task for the Federal

1 habeas petitioner is not to simply aggregate every  
2 objected to or unobjected to evidentiary error or any  
3 downline error and simply present all of those in the  
4 Federal habeas petition.

5           What they would then have to do is also find  
6 some authority from the State court of appeals saying  
7 that this type of error or constellation of errors would  
8 constitute a reversible error.

9           JUSTICE ALITO: Well, they'd have to find  
10 something that they can argue in the Federal habeas was  
11 an error, but procedural default would be out the  
12 window.

13           MR. KRETZER: Well, yes, but, again, it's  
14 not enough to simply say these were the trial errors.  
15 One would have to say that these were trial errors and  
16 here's some reason why the reviewing court of appeals  
17 would have held differently. That's very different  
18 from --

19           JUSTICE ALITO: Right. And the Federal  
20 habeas court is going to have to analyze that, which  
21 means the Federal habeas court is going to have to  
22 analyze all of these alleged trial errors that were  
23 never previously raised in the State court.

24           MR. KRETZER: Our argument would simply be  
25 it's one thing to make a -- state this error or that

1 error happened at the trial. Of course, every trial has  
2 some error that occurred in it. But one would have to  
3 do to create a substantial claim, in other words, not  
4 one that would be very easily discarded by the Federal  
5 district court would be then to say, here's a reason why  
6 this would create a different outcome. That would not  
7 be easy to do for downline claims, but when one gets to  
8 claims as important or as vital as jury instructional  
9 errors, those are a type of substantial claim that --

10 JUSTICE BREYER: Say, so what -- you started  
11 to say this, but I guess Martinez itself, one of the  
12 concerns was that any mistake that the trial -- that the  
13 trial attorney makes -- and normally, by the way, you --  
14 you don't make ineffective assistance counsel claims on  
15 direct appeal, I don't think. It's usually the same  
16 lawyer. You have to make it in State habeas.

17 Okay. What would happen would be that the  
18 defendant with a new lawyer in Federal habeas would go  
19 through every mistake that the trial court made, that  
20 the -- that the trial lawyer made, and say it was  
21 ineffective assistance of counsel. And so the judge  
22 would have to do just what Justice Alito said, though  
23 perhaps a few fewer States.

24 So, you started to say this. What's the  
25 answer? It's five years. To what extent has the

1 Martinez claim proved a burden on Federal court? Is  
2 there any empirical information?

3 MR. KRETZER: We don't think there had  
4 been -- there may have been additional -- Martinez and  
5 now Martinez-Trevino claims that had been made in  
6 Federal petitions, but not an increase in the number or  
7 appreciable increase in the number of Federal  
8 petition --

9 JUSTICE BREYER: What I -- I asked you  
10 really, is there any empirical information? Because, of  
11 course, I think you probably think no. But the other  
12 side may think yes. And so that's what I would like to  
13 know, is there any -- anyplace I could look to find out  
14 whether it has proved to be a burden or not, where there  
15 have been a lot of claims or not?

16 MR. KRETZER: Yes. We do have some studies  
17 cited, and certainly I will get them to have ready to  
18 present in the -- in the rebuttal.

19 But our point would be that, again, if the  
20 rule of Martinez is still the rule, and if it is not  
21 also applied to  
22 ineffective-assistance-of-appellate-counsel claims, then  
23 Petitioners, like Mr. Davila, are actually worse off if  
24 their trial lawyer did object than if they did not. If  
25 they did object, they -- they had not objected down at

1 trial court, they would already be covered by the  
2 Martinez -- this is a very modest application of  
3 Martinez that we don't think will create appreciable --

4 JUSTICE ALITO: But Martinez concerned  
5 ineffective assistance of counsel in a limited number of  
6 States, and Trevino arguably extended it to a few  
7 additional States. But if we accept your argument, it  
8 applies everywhere, and it's not limited to ineffective  
9 assistance of counsel. It is -- it applies to every  
10 single -- every single type of error that could occur at  
11 trial.

12 MR. KRETZER: No. We would disagree.  
13 Certainly, the only issue -- Martinez and Trevino, of  
14 course, were limited. It talked about ineffective  
15 assistance of trial claims. Those were the claims that  
16 were presented in those cases. That was different. We  
17 don't think that this Court necessarily, if you rule in  
18 our favor in this case, that has application anywhere  
19 beyond ineffective-assistance-of-appellate-counsel  
20 claims.

21 JUSTICE ALITO: Yeah. But the ineffective  
22 assistance of appellate counsel would be based on any  
23 type of error that occurred at trial.

24 So here you have a jury instruction error.  
25 But if we agree with you, it would apply to the

1 erroneous introduction of evidence, to the -- to  
2 improper statements made in closing, to any type of  
3 trial error, any type of constitutional trial error you  
4 can dream of. So whatever the statistics are on  
5 Martinez, this goes way, way, way beyond Martinez. And  
6 Trevino.

7 MR. KRETZER: I would say that, again, the  
8 only -- if Martinez is the rule and those -- Martinez  
9 claims were about ineffective assistance of trial  
10 counsel now, have been made for at least five years.  
11 There is not, as Justice Breyer said, a large number of  
12 claims made contending ineffective assistance of  
13 appellate counsel. And that's why it's so important  
14 that the Martinez doctrine do apply.

15 JUSTICE BREYER: I don't think that's -- I  
16 think, as I'm gathering Justice Alito's point -- and I  
17 think it's an -- you know, it's an interesting point and  
18 important, what is ineffective assistance of appellate  
19 counsel? I mean, I understand somewhat ineffective  
20 assistance of trial counsel, but it can't just be an  
21 ordinary mistake. It has to be something rather  
22 special.

23 MR. KRETZER: Yes.

24 JUSTICE BREYER: Now, is ineffective  
25 assistance of appellate counsel the same, or is an

1 appellate counsel ineffective whenever the appellate  
2 counsel fails to present a claim that the trial judge  
3 made a mistake in the trial?

4 MR. KRETZER: The Strickland standard for  
5 ineffective assistance is the same for contentions of  
6 ineffective assistance of trial counsel and ineffective  
7 assistance of appellate counsel.

8 JUSTICE BREYER: So it's very hard to see  
9 when it would be ineffective assistance when there  
10 wasn't also ineffective assistance of trial counsel.  
11 What is such a case? I mean, I'm just probably missing  
12 it, but what -- what is a case where -- where there's  
13 ineffective assistance of appellate counsel, but not  
14 ineffective assistance of trial counsel? What is that  
15 case?

16 MR. KRETZER: Yes. Certainly evidence is  
17 seen in Mr. Davila's case, because there is, in Texas,  
18 jury instructional error is not forfeitable. In other  
19 words, there is not some -- unless the trial  
20 lawyer objects, there's necessarily --

21 JUSTICE BREYER: So then why didn't the  
22 trial counsel -- this -- I can see that this was a very  
23 important matter for this particular defendant, but then  
24 why wasn't the trial counsel ineffective?

25 MR. KRETZER: Well, again, the trial counsel

1 did formulate -- maybe not the best calibrated -- but  
2 did formulate an objection. The -- I think the way in  
3 which this arose in this case is very unusual in that  
4 neither the -- the State never requested a  
5 transferred-intent instruction.

6 After the jury, which had been out for over  
7 four hours at this point with those confessions, sent  
8 out that jury note No. 2 asking directly about the  
9 theory of Mr. --

10 JUSTICE BREYER: Well, what about saying  
11 this: Suppose we said, yes, there is -- it's the same  
12 situation, you know, you have ineffective assistance --  
13 you have ineffective appellate counsel. Well,  
14 obviously, you can't raise it because he was  
15 ineffective. So you never had a shot at it. It's  
16 catch-22. Same with the trial counsel.

17 But those things, it's very unlikely that  
18 you're going to have ineffective assistant of appellate  
19 counsel where there wasn't also the ineffective  
20 assistance of trial counsel. It's very hard to think of  
21 such an instance. And just the bringing of an ordinary  
22 mistake is failure to bring an ordinary mistake will  
23 unlikely to be qualified.

24 Suppose we wrote that into the opinion or  
25 the equivalent. What would you think of that?



1                   MR. KRETZER: I think the problem is that  
2 the question here is not a Strickland determination as  
3 to the direct appellate attorney in this case. There  
4 may have been a strategic reason not to raise the claim.

5                   I would rather be skeptical, considering the  
6 direct appellate brief specifically did not request oral  
7 argument. There were no page limitations they were up  
8 against or anything like that, but that would be  
9 something that would be sorted out at a Strickland  
10 hearing where this -- the first prong, the tactical  
11 reason for doing or not doing something, would be  
12 pressed out in detail.

13                   JUSTICE GORSUCH: Counsel, we spent a lot of  
14 time talking about Martinez, but one case we haven't  
15 discussed is Coleman.

16                   MR. KRETZER: Yes.

17                   JUSTICE GORSUCH: And Coleman sets out the  
18 general rule that ineffective assistance by counsel in  
19 collateral review does not suffice to establish cause  
20 for purposes of Federal habeas. That's the general  
21 rule. And Martinez carves out a small exception for  
22 when there wouldn't be any chance to raise an issue in  
23 State court at all. And that doesn't apply here because  
24 trial court counsel could have raised this issue. We  
25 all admit that.

1           So when we -- when we overrule a precedent,  
2 or part of a precedent, as I think you're effectively  
3 asking us to do with Coleman, we normally don't just ask  
4 about the merits. We also ask about the reliance  
5 interest, the workability, whether the question is  
6 statutory rather than constitutional. And I didn't see  
7 you address any of those factors in your brief. And I'm  
8 wondering what I'm supposed to make of that. Help me  
9 out.

10           MR. KRETZER: Yes. The Coleman rule bars  
11 all other attorney mistakes that would be imputed to a  
12 client. Martinez is very clear that there was not a  
13 stare decisis problem because, in Coleman, the  
14 ineffectiveness was missing the deadline for the appeal  
15 from the hearing on the habeas petition in Federal -- in  
16 State court in Virginia, not an ineffectiveness in the  
17 initial collateral proceeding itself, called first-tier  
18 review opportunities at that point in time.

19           Nothing about the relief Mr. Davila is  
20 seeking will have any effect on deficient performance by  
21 Federal habeas counsel. There will be no effect that  
22 the State petitioner missed their limitations period to  
23 file in Federal district court. There would be no  
24 effect if that State habeas petitioner had gotten leave  
25 to file a successor writ, or then re-file for State

1 habeas, or if they declined the State-appointed  
2 attorney, the attorney the State offered to appoint.  
3 All of those situations would still be barred by the  
4 rule in Coleman, so Coleman is very much good law.

5           Martinez simply looked at -- at peace that  
6 was arguing dicta in Coleman, whether or not the  
7 ineffectiveness was in that initial review collateral  
8 proceeding itself, and that's the situation we have  
9 here.

10           JUSTICE GINSBURG: If I may ask one question  
11 about your -- your bottom line. I think you said that  
12 if counsel had taken up -- challenged the instruction on  
13 direct appeal, it would have led to a new trial.

14           MR. KRETZER: Yes.

15           JUSTICE GINSBURG: Why a new trial? Why  
16 isn't the consequence of ineffective assistance of  
17 appellate counsel not a new trial of the case, but just  
18 a new State court appeal?

19           MR. KRETZER: Oh, yes. Well, the remedy --  
20 the Federal remedy that we're seeking would be leave to  
21 file a additional supplemental direct appeal in State  
22 court, at which the argument would first be made that  
23 the jury instructional challenge was the harm standard  
24 of Almanza, or alternatively, under the egregious harm  
25 standard of Almanza. But with the -- ultimate new trial

1 would, of course, have to be upon prevailing on a new  
2 direct appeal in the Texas Court of Criminal Appeals.

3 So I will save the balance of my time for  
4 rebuttal.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Mr. Keller.

7 ORAL ARGUMENT OF SCOTT A. KELLER

8 ON BEHALF OF THE RESPONDENT

9 GENERAL KELLER: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 Extending Martinez to appellate-IAC claims  
12 will have a huge systemic cost by opening up the entire  
13 trial and everything that happened at trial to Federal  
14 habeas review. And the countervailing concern, as  
15 Justice Sotomayor noted, is there's an infinitesimally  
16 small number of meritorious appellate IAC claims. So  
17 you're going to have huge costs --

18 JUSTICE SOTOMAYOR: Ah, but does that --  
19 does that mean that we don't remedy that? Assuming --  
20 because, I agree -- Justice Breyer pointed out, and  
21 others have, the number of cases are going to be tiny.  
22 And as with all cases, there's an initial uptick of  
23 claims until people settle down and realize that it's a  
24 small number that are viable, and that happens pretty  
25 quickly. Do we ignore that simply because there might

1 be that small uptick at the beginning?

2 GENERAL KELLER: Well, this is why Coleman  
3 is still the rule. Martinez expressly reaffirmed  
4 Coleman. Outside of that narrow context at trial --

5 JUSTICE SOTOMAYOR: You mean the substantial  
6 claim of IAC? This is -- no one is going to be looking  
7 at an ineffective-assistance-of-appellate-counsel claim,  
8 assuming one is viable, unless there's a substantial  
9 claim, and no one will otherwise look at it.

10 GENERAL KELLER: Well, and here, the  
11 question is -- the relevant appellate IAC claims to look  
12 at here are those where the claim was raised in trial  
13 court, and the trial court did, in fact, adjudicate,  
14 decide the issue. It made a record, and then both  
15 appellate and habeas counsel have chosen not to raise  
16 it.

17 JUSTICE KENNEDY: Yes. And just -- just to  
18 fortify your point, I take it there are any number of  
19 defense counsel objections that are overruled. So  
20 defense counsel has been adequate, but then if -- but  
21 then the appellate counsel may very well overlook some  
22 of those. And that -- and so -- so the idea that  
23 there's not going to be IAC at the appellate level if  
24 there was not IAC at the trial level, it seems to me,  
25 not -- not sound.

1                   GENERAL KELLER: Justice Kennedy, and  
2 when -- here, there -- there's no dispute that trial  
3 counsel was effective. They have not raised a trial IAC  
4 claim about the supplemental jury instruction.

5                   And so while appellate IAC claims are  
6 difficult to prevail, there -- it's going to be even  
7 more difficult in this situation, because the trial IAC  
8 gateway that Martinez already provides would give a  
9 petitioner everything they needed if trial counsel was  
10 ineffective. So if trial counsel does raise the claim,  
11 if trial counsel does preserve it, and the trial court  
12 does decide the issue, then both appellate and habeas  
13 counsel choose not to raise it, it's going to be an  
14 exponentially lower chance that those claims are going  
15 to be meritorious.

16                   JUSTICE KENNEDY: Could you address my  
17 question to the Petitioner's counsel? What is the  
18 standard of -- we're supposed to follow in deciding this  
19 case? Our view of the systemic consequences? And --  
20 and what is -- what -- what is the case authority that  
21 gives us instruction in that regard?

22                   GENERAL KELLER: Martinez itself recognized  
23 that what it was doing creating the narrow exception  
24 from Coleman was that was an equitable judgment. And in  
25 fashioning the rule, the Court looked at -- it was

1 trying to maintain a baseline where no court had ever  
2 adjudicated the underlying claim of trial error, and the  
3 Court recognized the bedrock foundation unique right to  
4 trial counsel. And putting together those two factors,  
5 plus the channelling concern, those were the three  
6 pillars of Martinez, and none of those three pillars are  
7 present here.

8 JUSTICE SOTOMAYOR: So let's go through the  
9 three pillars here. No one is reviewing whether  
10 appellate counsel has been adequate. Do you -- although  
11 you're not entitled constitutionally to appellate  
12 counsel on direct appeal, I don't know that we haven't,  
13 repeatedly, and so has every other court recognized the  
14 importance of counsel at the appellate level. I think  
15 virtually every State, if not every State, gives you a  
16 lawyer. So that prong is, in my mind, equal.

17 The second prong is the --

18 JUSTICE KAGAN: Could you respond to that  
19 first? Is that okay, Justice Sotomayor?

20 JUSTICE SOTOMAYOR: Yes.

21 JUSTICE KAGAN: Because -- because there  
22 is -- there's no right -- there's no need to have an  
23 appellate process, but once the State has given an  
24 appellate process, there is a right to have effective  
25 assistance of counsel on appeal. So that seems an

1 important right.

2 GENERAL KELLER: Every appellate IAC claim  
3 is necessarily going to, though, be based on an  
4 underlying issue of an alleged trial error. In other  
5 words, this is going to be a -- to use the words of  
6 prisoner's counsel in *Martinez v. Ryan*, appellate IAC  
7 claims are a second order claim. They are going to be  
8 based on what happened at trial. And the trial court  
9 will have already adjudicated that claim of underlying  
10 trial error in the relevant set of cases that any  
11 extension of *Martinez* could apply to. Because, again,  
12 if the court --

13 JUSTICE SOTOMAYOR: I'm sorry. I -- I --  
14 they're only -- they're not asking the question on the  
15 trial court whether appellate counsel has erred. They  
16 are asking a different question.

17 GENERAL KELLER: That's correct. But an  
18 appellate IAC claim necessarily says, my appellate  
19 counsel didn't raise an issue and that issue is  
20 something that happened at trial that I thought was  
21 error. That issue is --

22 JUSTICE SOTOMAYOR: Not just error, but  
23 error likely to result in a different outcome.

24 GENERAL KELLER: Yes. However, that alleged  
25 trial error that would have resulted in a different



1 outcome would have been, in fact, adjudicated in the  
2 trial court already. In --

3 JUSTICE SOTOMAYOR: But we already know that  
4 even under plain-error review, because we've done it  
5 in -- in a number of different cases, that trial courts  
6 err.

7 GENERAL KELLER: But if -- if the Court were  
8 reviewing this under plain error, though --

9 JUSTICE SOTOMAYOR: The question is, did  
10 appellate counsel err in failing to raise something that  
11 might ultimately go to the Supreme Court, as has  
12 happened.

13 GENERAL KELLER: The Martinez trial IAC  
14 gateway, though, that already exists, would cover any  
15 claim that was not, in fact, preserved in the trial  
16 court. So what the Court is confronting now is whether  
17 to extend Martinez to situations where the trial court  
18 has, in fact, already ruled on the case. So really what  
19 this case concerns would be a doubly defaulted claim of  
20 trial --

21 JUSTICE SOTOMAYOR: They have ruled on --  
22 they've ruled on a question of error below, but not a  
23 question of appellate counsel error.

24 GENERAL KELLER: That -- that's right. The  
25 precise ruling on the appellate counsel issue, that

1 claim in particular, would not have been passed upon.  
2 However, that claim is necessarily predicated on an  
3 issue of a -- an alleged trial error that would have  
4 been adjudicated, and that neither appellate nor habeas  
5 counsel raised it.

6           And in that situation, when you'd have to  
7 have three levels of error, there's going to be an  
8 infinitesimally small number of cases that are  
9 meritorious, combined with opening up the entire trial,  
10 every single issue, even State law objections to Federal  
11 habeas review. That would be taking the Court back to  
12 something akin to *Fay v. Noia*, which was overruled --

13           JUSTICE BREYER: The same question that I  
14 had before. I -- I mean, every -- every instance in  
15 which a trial counsel might have objected but didn't, in  
16 principle, could be the subject of *Martinez*. I suppose  
17 that's quite a few. I don't know there are any more or  
18 any less. So what's actually happened? Is there any  
19 information anywhere about whether -- any empirical  
20 information about whether habeas courts, Federal habeas  
21 courts, have been deluged, or have -- do we know?

22           GENERAL KELLER: The answer is yes. In our  
23 brief, we've pointed out --

24           JUSTICE BREYER: Where?

25           GENERAL KELLER: -- *Martinez* has been cited

1 3,800 times in Federal cases since it was decided, and I  
2 would also point the Court to the amicus brief for the  
3 Criminal Justice Legal Foundation at page 20. What it  
4 did was it looked at the last ten cases in the Ninth  
5 Circuit out of Arizona in capital cases. Arizona was  
6 picked because that would have been the longest standing  
7 State that has that rule, because that was where  
8 Martinez came from, and seven out of the ten cases there  
9 raised Martinez claims.

10 JUSTICE BREYER: Yeah --

11 JUSTICE SOTOMAYOR: How many were granted?

12 GENERAL KELLER: None. We are -- we are  
13 facing all sorts of collateral litigation in the  
14 Martinez trial IAC paradigm. And the Court justified  
15 that on the basis that that right was unique. Martinez  
16 was just the latest in a long line of cases where this  
17 Court has treated the right to trial counsel and only  
18 that right as unique, that would be an exception to  
19 procedural bars that would apply otherwise.

20 JUSTICE BREYER: Is it fair to say several  
21 hundred a year have come up under Martinez out of -- out  
22 of, roughly, how many habeas petitions? Out of fifty  
23 thousand? I don't know. Hundred thousand? Forty  
24 thousand?

25 GENERAL KELLER: I do not have those

1 statistics.

2 JUSTICE BREYER: All right. But several  
3 hundred a year. Now, is there a reason to think there  
4 would be more? I mean, after all, you know, I grant you  
5 it's slightly different, you're complaining here about a  
6 trial error that was raised and the judge wrongly  
7 decided it. And the counsel on appeal should have  
8 pointed that out, but he didn't. Just like you point  
9 out with the trial judge -- the trial lawyer should have  
10 raised, but he didn't. Very, very few are granted, very  
11 few. And here, I guess, very, very few would be  
12 granted. But the burden would be to read all those.

13 Now, is it -- is it more, do you think? Why  
14 would it be more? I don't see why it would be more. It  
15 might be. I'm -- that's why I'm asking, though.

16 GENERAL KELLER: Well, I'm not sure more  
17 actual petitions would be filed, but the courts will  
18 certainly see a massive uptick in Federal habeas review  
19 of appellate IAC claims. As the reply brief at page 15  
20 noted, a third of the cases were raising appellate IAC  
21 claims. And it's not just will these claims be  
22 successful. It's are courts going to have to go through  
23 them? And -- and consider in briefing this case, what  
24 the courts and the States will be presented with. You  
25 would be arguing about what did appellate counsel raise,

1 what didn't appellate counsel raise, which claims were  
2 stronger, and then what was the underlying trial error.

3 CHIEF JUSTICE ROBERTS: Would this apply in  
4 -- wouldn't -- I mean, this would apply in every State,  
5 right?

6 GENERAL KELLER: Yes.

7 CHIEF JUSTICE ROBERTS: Not just States  
8 where Martinez and Trevino apply, right?

9 GENERAL KELLER: That's right.

10 CHIEF JUSTICE ROBERTS: And wouldn't that be  
11 pertinent in assessing the significance of the number of  
12 times this issue is going to be raised?

13 GENERAL KELLER: It absolutely would.

14 CHIEF JUSTICE ROBERTS: If it's going to be  
15 raised in 50 States rather than two?

16 GENERAL KELLER: It would. And this goes to  
17 the point that Martinez recognized, that there --  
18 there's an external factor. There's a deliberate choice  
19 by the State to channel a claim. That's not present  
20 here. And it will apply in all 50 States.

21 JUSTICE BREYER: Well, yes, that's true, but  
22 how many are in the other? How many -- what's the  
23 number in the other? What is the -- what is the number?  
24 I mean, the norm, I thought, was that you raise an  
25 ineffective-assistance-counsel claim in the collateral

1 proceeding.

2 So how many States, actually, does Martinez  
3 not apply to? Do you know that? I -- I doubt that  
4 it's, you know, a small number, but I'm pretty certain  
5 it isn't every State.

6 Do we have any idea here?

7 GENERAL KELLER: At page 33 of our brief, I  
8 don't have the precise number, but we do cite various  
9 cases that show that Massachusetts, Wisconsin, Ohio,  
10 Oklahoma, the Martinez Rule does not apply, because,  
11 effectively, what happens there is the proceedings are  
12 stayed so that the trial-IAC claim can be raised at that  
13 time and not --

14 JUSTICE KAGAN: But in -- in most States it  
15 does apply; isn't that right?

16 GENERAL KELLER: Correct.

17 JUSTICE KAGAN: Yeah. Yeah. And then,  
18 General, I think that your brief did the right thing in  
19 terms of thinking about Martinez to say why did Martinez  
20 make the exception that it did and ask whether those  
21 same factors suggest an analogous exception here. I  
22 think that that's the right way to go about thinking  
23 about this question.

24 So, I mean, it seems to me that your main  
25 theme here is this idea that you did get one shot; is --

1 is that -- is that correct?

2 GENERAL KELLER: Combined with the unique  
3 right to trial counsel --

4 JUSTICE KAGAN: Yeah --

5 GENERAL KELLER: -- and the -- and the --  
6 and the significant --

7 JUSTICE KAGAN: Okay.

8 GENERAL KELLER: -- systemic costs.

9 JUSTICE KAGAN: Okay. So the unique right,  
10 I mean, I think we've talked about. It's -- trial  
11 counsel, for sure, is the most, most, most important,  
12 but appellate counsel is pretty important too.

13 But just let's think about this you -- you  
14 got one shot already. I guess I'm just not sure I  
15 understand it, because it seems to me what Martinez said  
16 is, you wouldn't -- you wouldn't get a shot to make your  
17 trial -- ineffective assistance of trial counsel claim,  
18 your IATC claim, and only if we made the exception that  
19 we did would you get a shot to make that trial counsel  
20 claim.

21 And here, similarly, only if we do the same  
22 thing will you ever get a shot to make a claim that your  
23 appellate counsel was deficient. And people do have an  
24 independent, freestanding constitutional right to  
25 effective appellate counsel.

1                   GENERAL KELLER: But Martinez focused on the  
2 fact that there was a particular trial error and a  
3 particular type of trial error that was not being able  
4 to be raised. And appellate-IAC claims are going to be  
5 based --

6                   JUSTICE KAGAN: I think if you read --

7                   GENERAL KELLER: -- on that trial error.

8                   JUSTICE KAGAN: -- Martinez, Martinez  
9 basically does not talk at all about the underlying  
10 error. It talks about the ineffective assistance claim.  
11 Now, of course, ineffective assistance is important  
12 because, you know, it's not just the lawyers there for  
13 show, it's -- it's to remedy or prevent some underlying  
14 claim.

15                   But the same is true here. If Martinez was  
16 trying to figure out how to ensure the fairness of the  
17 trial process, this would be trying to figure out how to  
18 ensure, through effective counsel, the fairness of the  
19 appellate process. And it seems to me quite analogous,  
20 indeed identical --

21                   GENERAL KELLER: But in --

22                   JUSTICE KAGAN: -- just on a different  
23 level.

24                   GENERAL KELLER: But in Martinez, the  
25 ineffective assistance claim was a trial error. The



1 litigation necessarily applies --

2 JUSTICE KAGAN: But here -- but here it's an  
3 appellate error.

4 JUSTICE GINSBURG: But one thing that's the  
5 same is that the State habeas would be the first  
6 opportunity to raise this. You can't raise ineffective  
7 assistance of appellate counsel on the appeal. That's  
8 obvious. So your -- the -- the State habeas is the  
9 first time you could raise it.

10 And in considering this question, I'm sure  
11 you anticipated this, Justice Scalia, in *Martinez*, said  
12 there's not a dime's worth of difference between an  
13 ineffective assistance of trial counsel -- the issue in  
14 *Martinez* -- and those where Petitioner claims his direct  
15 appeal counsel was ineffective.

16 Was he wrong in thinking there's not a  
17 dime's worth of difference?

18 GENERAL KELLER: He was wrong in this  
19 instance. And the reason is because *Martinez* was trying  
20 to maintain a baseline where at least some court had  
21 adjudicated the underlying trial error, and even as  
22 *Martinez* itself reaffirmed the general rule of *Coleman*.  
23 And if this Court were to start extending that now to  
24 appellate-IAC claims, it would be returning the Court to  
25 something akin to *Fay v.* --

1 JUSTICE KAGAN: But, again --

2 GENERAL KELLER: -- litigation --

3 JUSTICE KAGAN: -- General, you're sort  
4 of --

5 GENERAL KELLER: -- at some point.

6 JUSTICE KAGAN: -- redefining it so that it  
7 fits your position. But Martinez was about having some  
8 court evaluate the ineffective assistance of trial  
9 claim, and this is about having some court evaluate the  
10 ineffective assistance of appellate counsel claim.

11 And is there an underlying thing that we're  
12 trying to get at? Sure. In Martinez, it was  
13 ineffective assistance of trial counsel to ensure that  
14 the trial process was fair. Here, it's -- it's -- it's  
15 having some court litigate the ineffective assistance of  
16 appellate counsel claim in order to ensure that the  
17 appellate counsel is fair. So the two are quite  
18 analogous.

19 GENERAL KELLER: But under that reasoning,  
20 it would be -- the right to counsel necessarily has to  
21 end at some point. It could always be that you could  
22 then show ineffective assistance of State habeas counsel  
23 or Federal habeas counsel.

24 JUSTICE KAGAN: It -- it ends, I think --  
25 you're exactly right. And I think it ends where the

1 Constitution gives out. Because we've said that  
2 although the State does not have to set up an appeals  
3 process, once it sets up an appeals process, you are  
4 entitled to effective counsel in it. And so that's  
5 where it ends.

6 GENERAL KELLER: That's right as a  
7 constitutional matter. However, State procedural bars  
8 under Coleman and Martinez still apply. And the cost of  
9 federalism and comity, particularly in a situation like  
10 this where the State trial court will have necessarily  
11 already decided the issue, and upsetting that is going  
12 to be precisely what the Court was trying to avoid in  
13 Coleman. And that's why when -- the first sentence of  
14 Coleman is, "This is a case about federalism." And  
15 indeed this case is too.

16 JUSTICE KAGAN: Yes. And then there was  
17 Martinez. And as you said, in Martinez and in Trevino,  
18 we really went through the three factors that you talk  
19 about in your brief: How important is this? Is this  
20 the only shot? And, you know, does the State have  
21 something to do with this, or something. Is that the  
22 third one?

23 And, you know, I'm -- I'm suggesting it's  
24 pretty important, and this is your only shot.

25 GENERAL KELLER: But the difference is it's

1 not your only shot because the claim is going to be  
2 about an underlying alleged trial error. Here, opening  
3 up the claims for appellate-IAC --

4 JUSTICE KAGAN: But this claim --

5 GENERAL KELLER: -- you're going to have --

6 JUSTICE KAGAN: -- is not about the  
7 underlying trial error. This claim is about effective  
8 assistance of appellate counsel. And -- and -- and  
9 that's about ensuring that the appellate process has  
10 integrity and fairness attached to it.

11 GENERAL KELLER: But, Justice Kagan, at root  
12 here, the issue is a supplemental jury instruction which  
13 was not preserved, which was correct, and there would  
14 have been no prejudice from in any event. And this is  
15 the type of case the Court should be worried about.  
16 There are going to be these State law objections of  
17 something that came up at trial, although this is an odd  
18 posture because it was not preserved in fact, but that  
19 would be the case the Court would have to be worrying  
20 about.

21 And then we're going to be here twice over  
22 that claim being defaulted, arguing about not  
23 necessarily whether there was -- did appellate counsel  
24 make this decision or that decision. It's going to  
25 collapse into an underlying review of what happened at

1 trial. And that's going to apply for all errors at  
2 trial on federal habeas, which is something this Court  
3 has long avoided, to undo the judgments issued by State  
4 courts, particularly when they are doubly defaulted  
5 claims that were, in fact, considered by at least one  
6 court before.

7 JUSTICE KAGAN: But, General, that assumes  
8 that a -- that some court is going to say, if there was  
9 a trial error that we can see out there, then there was  
10 ineffective assistance of appellate counsel. But that's  
11 not correct for many of the reasons that people on -- I  
12 mean, that everybody acknowledges. To have ineffective  
13 assistance of appellate counsel, it's not because you  
14 failed to make an argument about any old trial error;  
15 it's going to be a special and rare thing.

16 GENERAL KELLER: And, Justice Kagan,  
17 precisely because it's going to be rare, that it's going  
18 to be an infinitesimally small number of cases are going  
19 to be meritorious, that has to be weighed under  
20 Martinez's equitable calculus against the huge systemic  
21 cost of opening up the entire trial on Federal habeas  
22 review to every little State law objection and  
23 evidentiary objection. Here, it's jury instructions.

24 JUSTICE ALITO: Why will it be a small  
25 thing? If you can identify looking back that there was

1 an objection that should have been granted, and it might  
2 have -- might have led to a different result at trial  
3 but it wasn't raised on direct appeal, then there's  
4 going to be ineffective assistance of -- of appellate  
5 counsel.

6 GENERAL KELLER: Exactly, Justice Alito, and  
7 that's why it will collapse.

8 Also, too --

9 JUSTICE SOTOMAYOR: I'm sorry. That's not  
10 the test -- that's not the test. The test is, would it  
11 have resulted in a -- a difference on appellate review,  
12 not at trial.

13 GENERAL KELLER: Well --

14 JUSTICE SOTOMAYOR: There's -- the appellate  
15 review is on the basis of the record as it exists, not  
16 on one that should have existed.

17 GENERAL KELLER: Yes, but it's going to  
18 collapse into an analysis of what was the alleged trial  
19 error, because that would be what appellate counsel  
20 should have been trying to raise in that situation.

21 Also, if I can back out, what we're talking  
22 about here is not just success on the merits of the  
23 claim. Raising a substantial claim of appellate-IAC,  
24 that standard is the would reasonable jurists debate  
25 standards that the Court is familiar with from the

1 certificate of appealability standard. That is not a  
2 high threshold to survive. And so the number of claims  
3 that would flood into courts on Federal habeas review  
4 would be many. It's --

5 JUSTICE BREYER: Well, you'd have to show,  
6 wouldn't you, that -- that the -- any reasonable lawyer  
7 would have raised this -- would have won this claim and  
8 made a difference -- raised it, won it, and it would  
9 have made a difference.

10 GENERAL KELLER: You'd have to show that,  
11 but this case --

12 JUSTICE BREYER: Yeah, but that's not that  
13 easy to show, just as it's not that easy to show in a --  
14 in the -- in the same situation in the trial.

15 GENERAL KELLER: But that's analyzing  
16 whether the claim would succeed. As far as --

17 JUSTICE BREYER: No --

18 GENERAL KELLER: -- on court --

19 JUSTICE BREYER: I -- I accept that, and  
20 people raise all kinds of things in habeas. You know,  
21 they're -- they're -- this is a -- district judges are  
22 kept busy with these habeas petitions, I accept that.  
23 That's why I'm -- I'll read the empirical -- I -- I'm  
24 curious to know just what the situation is empirically.

25 GENERAL KELLER: And -- and they're going to

1 be even busier and it's going to divert their attention  
2 from claims that would otherwise be meritorious.

3 Extending an exception like this to an acknowledged set  
4 of claims that have an infinitesimally small chance of  
5 merit, that is not a good use of judicial resources.

6 That's not why the writ of habeas corpus exists. And  
7 the equitable judgment inherent in -- in Martinez and  
8 various other cases on habeas review have noted that  
9 that equity must weigh in, and we would be inundated  
10 with all sorts of claims about even State law and --

11 JUSTICE BREYER: The other side has been  
12 brought out. I mean, there is the occasional claim  
13 where let's suppose the appellate lawyer just really  
14 didn't even bring an appeal. He had a two-page brief  
15 and the trial was rife with errors and a serious  
16 penalty. It was attached and -- and no relief  
17 whatsoever. He can't bring that to any court. Do you  
18 see that? That's the other side of it. Even if there  
19 are only a few.

20 JUSTICE KENNEDY: Or you could bring it on  
21 State collateral.

22 GENERAL KELLER: You absolutely -- you could  
23 bring it as is --

24 JUSTICE BREYER: He has to have -- he has to  
25 have failed to do that, and -- or at least the State



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

13 GENERAL KELLER: Well, first of all --

14 JUSTICE BREYER: He wasn't for it.

15 (Laughter.)

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

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

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

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

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

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

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

12 JUSTICE BREYER: Yeah.

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

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

17 GENERAL KELLER: For a different day.

18 (Laughter.)

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

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

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

11 So, which is it?

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

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

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

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

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

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

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

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

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

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

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

15           CHIEF JUSTICE ROBERTS: Thank you, counsel.

16           Mr. Kretzer, three minutes.

17           REBUTTAL ARGUMENT OF SETH KRETZER

18           ON BEHALF OF THE PETITIONER

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

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

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

6 JUSTICE GORSUCH: Counsel --

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

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

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

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

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

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 The case is submitted.

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



1 above-entitled matter was submitted.)  
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