

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   RAFAEL ARRIAZA GONZALEZ,                   :

4                   Petitioner                   :

5                   v.   :   No. 10-895

6   RICK THALER, DIRECTOR, TEXAS             :

7   DEPARTMENT OF CRIMINAL JUSTICE,         :

8   CORRECTIONAL INSTITUTIONS DIVISION:

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10   Washington, D.C.

11   Wednesday, November 2, 2011

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13                   The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 11:00 a.m.

16 APPEARANCES:

17 PATRICIA A. MILLETT, ESQ., Washington, D.C.; on behalf  
18 of Petitioner.

19 JONATHAN F. MITCHELL, ESQ., Solicitor General, Austin,  
20 Texas; on behalf of Respondent.

21 ANN O'CONNELL, ESQ., Assistant to the Solicitor  
22 General, Department of Justice, Washington, D.C.; for  
23 United States, as amicus curiae, supporting  
24 Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case No. 10-895, Gonzalez v. Thaler.

Ms. Millett.

ORAL ARGUMENT OF PATRICIA A. MILLETT

ON BEHALF OF THE PETITIONER

MS. MILLETT: Mr. Chief Justice, and may it please the Court:

The court of appeals in this case had jurisdiction to adjudicate the appeal, but in doing so, it decided the case wrongly.

Mr. Gonzalez's petition for habeas corpus was timely because it was filed within a year of the conclusion of direct appellate proceedings in the State court and at the -- within a year of that court's ending of his appeal process.

With respect to jurisdiction, jurisdiction existed because a certificate of appealability was issued. It rested upon a substantial showing of the denial of a constitutional right.

To be sure, the judge in issuing that certificate did not identify the substantial constitutional question required by 2253(c)(3). That is a requirement. It is mandatory, but it is not

1 jurisdictional.

2 CHIEF JUSTICE ROBERTS: What if he had  
3 identified a constitutional issue, speedy trial issue?  
4 Does that give the court the authority to consider a  
5 different constitutional issue, a Fourth Amendment  
6 issue?

7 MS. MILLETT: Yes, it does. Once -- this is  
8 a gatekeeping function to identify which case, which  
9 appeals should go forward and claim the attention of the  
10 court. But the text of the statute and 22 -- that's on  
11 page -- excuse me -- page 3a of the appendix to the blue  
12 brief. It provides that an appeal may not go forward,  
13 and if a certificate is issued, appeals may go forward.  
14 The operative language here in (c)(1) is that this is  
15 about an appeal going forward.

16 So, once the certificate identifies issues,  
17 the appeal goes forward. It's much like 1292(b), where  
18 certification of questions comes to an appellate court,  
19 and they decide whether to take interlocutory review.  
20 Once they do, they're not bound to just those questions.  
21 The entire order comes up for review.

22 CHIEF JUSTICE ROBERTS: So, what if it  
23 identifies something that is not remotely a Federal  
24 constitutional issue? By the terms of the COA, it's  
25 quite clear, you know, whether it is a State law issue or

1 something else. There's no constitutional plausibility  
2 on the face of it.

3 Does that still work for you?

4 MS. MILLETT: It -- it works in the sense  
5 that it's not a jurisdictional bar to going forward. It  
6 is a violation of (c)(3). If timely raised by the  
7 State, then it can either be dismissed or revisited by  
8 the original judge. An appeal from the authorizing  
9 judge --

10 JUSTICE SCALIA: How do you decide whether  
11 it's a jurisdictional bar? You acknowledge that the  
12 issuance by a judge of a certificate of appealability is  
13 a jurisdictional step; right?

14 MS. MILLETT: This Court so held --

15 JUSTICE SCALIA: That is jurisdictional. If  
16 he doesn't do that, there's no jurisdiction.

17 MS. MILLETT: Because this Court held in  
18 Miller-El --

19 JUSTICE SCALIA: Okay. So -- so, the issue  
20 is whether (c)(3), which says the certificate of  
21 appealability "shall indicate which specific issue or  
22 issues satisfy the showing required," whether that  
23 provision is a requirement for the validity of the  
24 certificate of appealability. If it is, then there's no  
25 jurisdiction, because the certificate of appealability

1 is invalid.

2 MS. MILLETT: Well, I don't --

3 JUSTICE SCALIA: Isn't that right?

4 MS. MILLETT: I don't agree that the  
5 so-called content validity of a document that is post  
6 hoc certifying a gatekeeping requirement is itself  
7 jurisdictional, because there is a --

8 JUSTICE SCALIA: Well, let's take the Fourth  
9 Amendment, I mean, which says, "no warrants shall issue,  
10 but upon probable cause." Okay? So -- but then it goes  
11 on, "supported by oath or affirmation, and particularly  
12 describing the place to be searched and the persons or  
13 things to be seized." Is the warrant valid if indeed it  
14 does not meet those requirements of being supported by  
15 oath or affirmation, and particularly describing the --

16 MS. MILLETT: No, a warrant may well not be  
17 valid if it doesn't --

18 JUSTICE SCALIA: It won't be valid. It will  
19 just be invalid.

20 MS. MILLETT: But the certificate of  
21 appealability is invalid as matter of law here. It's an  
22 incorrect -- it's an incorrect action by the court.  
23 That doesn't make it jurisdictional. It's just --  
24 warrants aren't jurisdictional, either, in that sense.

25 JUSTICE KAGAN: Just to take a kind of nutty

1 example, Ms. Millett, suppose that a judge took a blank  
2 piece of paper and typed the words "certificate of  
3 appealability" on top and issued it. Still jurisdiction  
4 to take the appeal?

5 MS. MILLETT: Still jurisdiction to take the  
6 appeal. Of course, one would expect -- one would expect  
7 either the court of appeals judges or the State,  
8 which -- both of which have every incentive to check on  
9 these things, to raise the issue. But the question  
10 is when something happens --

11 JUSTICE KAGAN: So, what counts as a  
12 certificate of appealability is I guess the question.  
13 All you need is those three words, and then you have a  
14 certificate of appealability --

15 MS. MILLETT: Well, I think it --

16 JUSTICE KAGAN: -- such that jurisdiction  
17 attaches?

18 MS. MILLETT: No, there's more to it. I  
19 mean, it's not issued by the clerk's office, right? The  
20 statute requires a judge to do this, a Federal judge,  
21 circuit judge or justice -- circuit justice -- to issue  
22 this. And these are -- these are officials who are  
23 sworn to uphold the law and the Constitution. And when  
24 they do this, when they make these determinations, they  
25 aren't handing these out like candy; they're deciding

1 that their court, their colleagues, maybe themselves,  
2 should invest resources in this process.

3 So, the fact that a certificate is issued is  
4 not simply a piece of paper coming out. I think it is  
5 fair to presume that it is a deliberate determination by  
6 a judicial officer.

7 JUSTICE ALITO: Well, under Justice --

8 JUSTICE GINSBURG: Ms. Millett, suppose,  
9 instead of having the statute broken down into (c)(1),  
10 (2), and (3), Congress had written (c) as just one  
11 paragraph that says: You must have a certificate of  
12 appealability, and this is what the certificate must  
13 contain. No division into (2) and (3). Would you still  
14 maintain that only the first sentence of the paragraph  
15 is jurisdictional and the rest is not?

16 MS. MILLETT: Well, my position would be  
17 harder for precisely the reason you phrased. And as  
18 Justice Scalia was asking, how do we tell? These are --  
19 these are jobs of statutory construction, and the fact  
20 that Congress broke these two steps out and broke (c)(3)  
21 out by itself, and there's a noticeable turn in the  
22 language by the time you get to (c)(3) -- (c)(1) says  
23 "no appeal shall be taken." That sounds jurisdictional.  
24 (c)(3) says a document "shall indicate" issues after the  
25 fact.



1           The important thing to understand here is  
2   that you not only have the language shifting materially,  
3   but your starting presumption, the starting presumption  
4   here, is that we need a clear direction from Congress  
5   before we decide that something is jurisdictional. And  
6   this Court has faced language far more emphatic than  
7   (c)(3). For example, in Reed --

8           JUSTICE ALITO: Suppose the Petitioner asks  
9   for a certificate of appealability on 10 issues, and the  
10  circuit judge says, I'm granting it on issue 1, I'm  
11  denying it on issue 2 through 9 -- 2 through 10.

12           Is there jurisdiction to consider 2 through  
13  10?

14           MS. MILLETT: There is jurisdiction to  
15  consider. It's obviously within the discretion of the  
16  court. They could also determine not to. And I say  
17  that, again, because the language talks --

18           JUSTICE ALITO: No, in that situation then,  
19  if the State moves to dismiss the arguments that are  
20  made by Petitioner on issues 2 through 10, would the --  
21  would the panel be obligated to do that?

22           MS. MILLETT: No, it wouldn't. It would not  
23  be obligated to, because what (c)(1) says is this  
24  determines when an appeal comes forward, the whole  
25  appeal comes forward.

1 JUSTICE ALITO: It could do that without  
2 issuing a new -- without issuing a certificate of  
3 appealability, without saying we think that the judge  
4 who issued the certificate of appealability was  
5 incorrect, that jurists of reason could disagree on  
6 issues 2 through 10?

7 MS. MILLETT: Well, I think -- I think  
8 whether you have -- the panel would then have to do  
9 the paperwork of doing a new certificate of  
10 appealability or adjusting its own decision in the  
11 course of its ruling, explain that we've decided to  
12 reach these is not, I don't think, of jurisdictional  
13 significance, which way they --

14 JUSTICE SCALIA: Ms. Millett --

15 MS. MILLETT: I'm sorry.

16 JUSTICE SCALIA: -- it seems to me you beg  
17 the question when you say that the issue is whether the  
18 appeal will go forward. That's precisely what -- what  
19 the issue is here, whether it is that the appeal will go  
20 forward or whether an appeal on an identified issue will  
21 go forward. That's exactly what we're talking about.

22 MS. MILLETT: Well, it's a statutory  
23 construction question, whether Congress --

24 JUSTICE SCALIA: And it seems that the  
25 structure of the statute wants an appeal to go forward

1 on a particular issue, and not in -- not in general on  
2 -- on who knows how many issues.

3 MS. MILLETT: Well, Justice Scalia, with  
4 respect, that's not what the statute says. Congress  
5 could have written the statute that way, but I think it  
6 would be extraordinary to tell courts that an appeal  
7 comes forward but we're only going to allow you to look  
8 at this precise issue decided by one judge.

9 JUSTICE SCALIA: It says it doesn't come  
10 forward -- doesn't come forward unless there is a  
11 certificate of appealability.

12 MS. MILLETT: Yes.

13 JUSTICE SCALIA: And then it says the  
14 certificate of appealability shall indicate which  
15 specific issue or issues satisfy the showing required.

16 MS. MILLETT: But in nowhere --

17 JUSTICE SCALIA: I mean, I read that as  
18 saying you -- we're going to have an appeal but just an  
19 appeal on the issue that's identified.

20 MS. MILLETT: First of all, I mean, courts  
21 can certainly do that as a matter of discretion, but  
22 whether they are compelled --

23 JUSTICE GINSBURG: Then that would exclude  
24 this case, wouldn't it, because there is a  
25 constitutional issue? It's a speedy trial issue. But

1 that issue was not reached below, because the case was  
2 dismissed as untimely. So, the only constitutional  
3 issue that's in the case is one that couldn't be  
4 adjudicated by the court of appeals. Isn't that right?  
5 Is there another constitutional issue other than the  
6 speedy trial issue?

7 MS. MILLETT: There -- there are other  
8 issues that were raised. I think for our purposes that  
9 the strongest one that was most clearly substantial is  
10 a speedy trial one. And that's the one that we  
11 identified --

12 JUSTICE GINSBURG: It's a little odd that  
13 you would identify that issue for the court of appeals  
14 when the court of appeals couldn't take it up because it  
15 wasn't reached below, because the case was -- was  
16 dismissed at an earlier stage.

17 MS. MILLETT: Well, I think, Justice  
18 Ginsburg, your question actually captures why these  
19 mistakes happen by court of appeals judges. The court  
20 of appeals judge presumably -- and again, I'm just  
21 presuming here. This Court's seen this mistake happen  
22 before. And I think what -- the judge that looked at  
23 this didn't make a determination there wasn't a  
24 substantial constitutional question, had to know that  
25 that was there.

1           But for the court of appeals' purposes,  
2 they're just going to sort out the procedural question,  
3 and if it's timely they're not going to address speedy  
4 trial in the first instance. That would go back to the  
5 district court. So, that's one of the reasons I think  
6 just as a practical matter why this mistake happens  
7 sometimes in this certificate of appealability process.

8           But the fundamental question here is one of  
9 statutory construction: Did Congress make clear, clear  
10 at the level we require for jurisdiction, clear that we  
11 -- at the level we would require for holding -- and I've  
12 never seen this anywhere in this Court's precedent --  
13 holding that an individual pro se prisoner who does  
14 everything reasonably possible, fully and timely  
15 complies with all obligations, will still have his right  
16 to first habeas on a substantial constitutional claim  
17 irretrievably jurisdictionally foreclosed because the  
18 court of appeals judge miswrote a certificate  
19 documenting a judgment that the officer made.

20           JUSTICE KENNEDY: Can you -- can you make  
21 the argument -- does it help you, in distinguishing the  
22 notice of appeals section, to -- to say that the notice  
23 of appeal has to say the judgment or order that's being  
24 appealed?

25           That's almost clerical. It doesn't require

1 any -- any discretion on the part of the judge or  
2 extensive review of the record, whereas in the COA,  
3 there has to be an element of judgment in deciding what  
4 the constitutional issue is. Does that help you  
5 distinguish the two?

6           You rely on the fact that the notice of  
7 appeals cases were decided before our -- our case  
8 indicating that it has to be clear language.

9           MS. MILLETT: I think certainly that there's  
10 that point. I think what's important to recognize is  
11 that there's actually a similarity between this Court's  
12 notice of appeal cases in something like Houston v.  
13 Lack, the mail -- prison mailbox rule. You have a  
14 specific textual jurisdictional requirement in the -- in  
15 the rules, that require filing a notice of appeal  
16 with the clerk of the district court. And this Court  
17 said, look, when it comes to prisoners who have done  
18 everything humanly possible within their control to meet  
19 the jurisdictional requirements, we are not going to  
20 interpret these rules -- as part of the presumption, we  
21 don't interpret rules to strip away jurisdiction from  
22 individuals who have done everything humanly possible,  
23 particularly when the facts on the ground are that the  
24 statute was satisfied.

25           The facts here are that it was met, and

1 there's every reason to think that Judge Garza made that  
2 determination --

3 JUSTICE SCALIA: Well, but --

4 MS. MILLETT: -- but didn't want to go into  
5 the speedy trial --

6 JUSTICE SCALIA: You've done everything  
7 humanly possible, and just because of the mistake of a  
8 -- of a district judge, it can't go forward. But that  
9 happens.

10 What if the district judge does -- makes a  
11 mistake and -- and he thinks that there has not been a  
12 substantial showing of the denial of a constitutional  
13 right? He makes a mistake about that. What happens?

14 MS. MILLETT: That can be appealed.

15 JUSTICE SCALIA: The same -- the same  
16 terrible result --

17 MS. MILLETT: That can -- that can be  
18 appealed. There are -- you can -- you can -- there are  
19 processes for attempting to appeal single-judge orders.  
20 Within every court of appeals, they have rules for that.

21 The difficulty here is that you have a pro  
22 se prisoner who thought he won. He got something that's  
23 hard to get from a court of appeals judge, and that's a  
24 certificate of appealability. And he did it by  
25 providing documentation of a substantial speedy trial

1 claim, a speedy trial claim unlike this Court has ever  
2 seen, a 10-year gap between indictment and trial and  
3 then conviction on nothing but eyewitness testimony.

4 He documented that for the court, did  
5 everything he could. And it isn't until this Court that  
6 the State says, hang on; there was never any  
7 jurisdiction over this whole case. They didn't tell the  
8 court of appeals judges that. They didn't say anything  
9 until the case came to this Court. And that type of  
10 trap --

11 JUSTICE ALITO: But is it necessary for you  
12 to go -- is it necessary for you to go as far as you  
13 seem to be going? Would it be possible to read (c)(3)  
14 as mandatory but not jurisdictional?

15 MS. MILLETT: That's --

16 JUSTICE ALITO: So that if -- well, I  
17 understood what you just -- your argument to be that it  
18 doesn't even have any effect, that so long as there's  
19 any document that's called a certificate of  
20 appealability, then anything can be considered by the  
21 court of appeals panel without the issuance of a -- of a  
22 certificate of appealability covering the issue.

23 But if it's mandatory but not  
24 jurisdictional, then if the State moves or maybe if the  
25 court, if the panel, sue sponte identifies the fact that



1 there may be an error, there's an opportunity for a new  
2 certificate of appealability. If nothing is done,  
3 then -- then there isn't a problem. It's not a  
4 jurisdictional issue that lingers forever.

5 MS. MILLETT: No, I'm sorry if I misspoke.  
6 I absolutely agree that it's mandatory and, if timely  
7 raised, must be dealt with. I think it's an open  
8 question whether if it's not raised until you're  
9 actually before the panel, whether the panel then has to  
10 identify one of its judges to issue a certificate or it  
11 can simply in the course of its opinion say we've  
12 determined that this should go forward, even though the  
13 initial -- would you have to go through a formal  
14 amendment process or you just do that as part of your  
15 decision? I think either one will accomplish the same  
16 result and will comply with the statute, the functional  
17 gatekeeping requirement.

18 But the separate question which your  
19 question -- your comment leads to is that in looking at  
20 this, would Congress have wanted this gatekeeping  
21 function to be subject to perpetual review and revision,  
22 obligatory perpetual review by the panel? You couldn't  
23 accept that your colleague found that there was a  
24 substantial question; all three judges would again have  
25 to revisit that and determine that it's substantial.

1           This was set up as a gatekeeping  
2 requirement, and it was meant to be a -- a promotion of  
3 efficiency, not to cause more work, not to cause more  
4 paperwork, to sift out cases, identify the appeals that  
5 merit the time and resources of the court. And once  
6 that's identified, the more efficient process is not to  
7 make the certificate of appealability a whole side show,  
8 a whole other layer of processing, ping-ponging cases  
9 back and forth between this Court, courts of appeals;  
10 courts of appeals, single judges.

11           We simply -- we try -- we look at this and  
12 we determine that a judgment was made by a judicial  
13 officer sworn to uphold the law; a substantial showing  
14 was made. And the fact that it wasn't written down as  
15 the statute likes is a problem; it should have been  
16 raised, but it wasn't raised, and we don't start all  
17 over.

18           JUSTICE SCALIA: Ms. Millett, as I  
19 understand the State, the State is not contending that  
20 (c)(2) is jurisdictional. So, you're -- you're arguing  
21 against a position they haven't taken. They -- they  
22 don't say that there's no jurisdiction if in fact there  
23 has been no substantial showing, so that the court of  
24 appeals has to review that. They're just saying that  
25 (c)(3), which describes the content of the -- of the

1 certificate of appealability, is in effect  
2 jurisdictional.

3 MS. MILLETT: Right.

4 JUSTICE SCALIA: So, I think you're --  
5 you're exaggerating the consequence of what the State is  
6 urging us to hold here.

7 MS. MILLETT: Well, I think this -- my point  
8 is that a substantial showing was made. So, this Court  
9 doesn't even have to determine the status of (c)(2).

10 JUSTICE SCALIA: Right. The State wouldn't  
11 go into that. They're --

12 JUSTICE SOTOMAYOR: Counsel, before your  
13 time expires, I'd like to ask one question on the  
14 merits.

15 In Jimenez, we held that the most natural  
16 reading of 2244(d)(1)(A) is to read it like we read  
17 2255. And we read 2255 to say that finality is reached  
18 when direct review -- and direct review concludes when  
19 the court affirms a conviction or denies a petition, or,  
20 if the defendant forgoes direct review, when the time  
21 for seeking such review expires.

22 Isn't that what the Fifth Circuit did --

23 MS. MILLETT: No, what the --

24 JUSTICE SOTOMAYOR: -- with -- with 2244? It  
25 read it exactly the way we read it in Jimenez?

1 MS. MILLETT: No, but I think, in Jimenez is  
2 -- we're -- we're happy to take the language of Jimenez  
3 which --

4 JUSTICE SOTOMAYOR: I know, but you're not  
5 taking its holding.

6 MS. MILLETT: I'm sorry?

7 JUSTICE SOTOMAYOR: You -- you take language  
8 from it --

9 MS. MILLETT: No --

10 JUSTICE SOTOMAYOR: -- but I read -- I read  
11 Jimenez to say that the court should be reading this  
12 alternative "or" language in exactly the way the Fifth  
13 Circuit did.

14 MS. MILLETT: This Court said in Jimenez  
15 that the -- quote, I'm quoting here, "the language  
16 points to the conclusion of direct appellate proceedings  
17 in State court," as -- end quote, as a -- as a moment  
18 of finality. And that is the test that we're asking  
19 for. The conclusion of direct appellate proceedings in  
20 State court in Texas is the issuance of the mandate.  
21 Clay and Jimenez together prove our point.

22 JUSTICE SOTOMAYOR: Jimenez held that it's  
23 an either/or. If you do direct review, you do it from  
24 the time that it's final, that it concludes or, if  
25 you've forgone direct review, when the time for seeking

1 review expires.

2 MS. MILLETT: And two responses to that.  
3 First, that simply begs the question that we're presenting  
4 in this case of when the direct review ended. That's our  
5 argument in the case, is that prong. When did that  
6 direct review prong end?

7 And the second -- the second aspect of this  
8 is to understand what happened in Jimenez. The whole  
9 argument there was that you've got to -- by the State,  
10 was you're only -- you stopped -- remember, Jimenez had  
11 stopped at the intermediate court of appeals as well.  
12 And the State's argument was you stopped at the  
13 intermediate court of appeals originally; so, you're  
14 only in the expiration of review prong.

15 And this -- but then he went back 4 years  
16 later, I think it was, and got the court to reopen,  
17 started -- had a whole new direct review process going  
18 on. And this Court said -- rejected the argument that  
19 because he didn't go to the intermediate court, we don't  
20 look at the direct review prong; we only look at  
21 expiration of review prong. We don't look at that. We  
22 stop and we look to see is the State done. And  
23 whichever of those two prongs you're in -- and it may  
24 depend on what time the question is asked. Whichever  
25 prong you're in, the last -- the last of those will

1 determine when your judgment becomes final.

2 JUSTICE KAGAN: Well, Ms. Millett, let's  
3 take a look at the text of 2244(d)(1). It says the  
4 limitation shall run from the latest of. And then it  
5 gives four dates essentially, four sections, each of  
6 which produces a date, (A), (B), (C), and (D). And (A)  
7 is the one that's concerned here. And (A) says the date  
8 on which the judgment becomes final, and then it gives  
9 two ways by which a judgment can become final. And the  
10 two ways are basically you lose or you quit, right? You  
11 lose or you abandon your process.

12 So, I just don't understand your argument,  
13 quite honestly, because it seems to me that (A) says the  
14 date, a single date, on which the judgment becomes  
15 final. When is that going to happen? Well, for some  
16 people it's going to happen when they lose, and for  
17 other people it's going to happen when they quit.

18 MS. MILLETT: First of all, the language  
19 forks out again, and so it says the date on which the  
20 judgment becomes final, and then there's the two options  
21 for finality.

22 JUSTICE KAGAN: Right. Two ways for it to  
23 become final: They lose or they quit.

24 MS. MILLETT: Well -- and the question in  
25 this case is, how do we know when that -- that direct

1 review process, what you're calling the lose prong,  
2 ends? And it's when the State says it's done. Because the  
3 point of this is not an exhaustion prong. The point of  
4 2244(d)(1) in particular, but 2244(d) generally, is to  
5 say, as this Court talked about, is the State done? This  
6 supports federalism.

7 Ex parte Johnson, the case that we cite,  
8 footnote 2, says, until the mandate issues, the appeal  
9 continues. And so, the notion of --

10 JUSTICE KAGAN: There's no suggestion in  
11 section (A) that there's ever going to be a conflict  
12 between these two ways of a judgment becoming final.  
13 There is no suggestion that one is going to have to pick  
14 between them. Subsection (A) is most naturally read --  
15 again, it says "the date" -- as there's just going to be  
16 one date. And some people, the date of finality is  
17 going -- you know, it becomes final because they lose.  
18 Other people, it becomes final because they quit. But  
19 subsection (A) suggests a single date, not two dates  
20 which you then have to choose between.

21 MS. MILLETT: One, I don't think the text  
22 compels that one way or the other. It says when does it  
23 become final. And so, let's ask the questions: When  
24 did direct review conclude --

25 JUSTICE GINSBURG: But it does -- it does

1 suggest, Ms. Millett, that final, two ways -- conclusion  
2 of direct review is you've gone up the ladder, and  
3 that's it. And the second part is, well, if you don't  
4 go up the ladder, you just stop. Then when your time  
5 to go up the ladder has ended, that's it. It -- it  
6 seems that there are those two possibilities, as Justice  
7 Kagan put it so well: You lose or you quit.

8 MS. MILLETT: And the issue is -- and I hate  
9 to call it the "lose prong" -- but when did he lose?  
10 When did the State say, we're done and we've decided  
11 this case is over, this appeal is over? And that was  
12 when the mandate issued. This is only about when that  
13 prong happens. And because you can have --

14 JUSTICE GINSBURG: So, you would have a  
15 difference between 2255 and 2254. And on the State  
16 level, you would have a variety of times because some  
17 States -- they don't all make it the mandate. They  
18 don't set finality at the mandate. There may be  
19 different -- there may be different periods of time  
20 before the mandate issues. So, you would have various  
21 time periods for State prisoners. But if you were a  
22 Federal prisoner, then you would have -- there would  
23 only be the one --

24 MS. MILLETT: No. You have the exact  
25 same test. The answer is easier in the Federal system



1 because when direct review is concluded -- this Court  
2 said in Clay, look, if all we had to look at was  
3 conclusion of direct review -- it didn't say we didn't  
4 know it -- we don't -- there would be no conclusion for  
5 the mandate --

6 JUSTICE GINSBURG: I'm not talking about a  
7 test. I'm talking about time periods. There -- there's  
8 a uniform time period for 2255 petitions. There would  
9 not be a uniform time period for 2254 petitions.

10 MS. MILLETT: That's a result -- but that's  
11 already a result of Jimenez, which had this whole  
12 reopening process that I -- unless the Federal system  
13 were to do that, there -- as this Court noted in Wall v.  
14 Kholi, you can have discretionary applications that can  
15 be called direct review as well. Direct review is not  
16 the linear process that has tried to be portrayed here.  
17 And the time ultimately is the same.

18 What happened in Clay -- these things are  
19 equivalent. You have the same test. Sometimes the  
20 outcome is different based on what the individual does  
21 and what the State law allows, but you have -- this is  
22 supposed to protect federalism. And the only way to  
23 protect federalism and comity interests is to respect  
24 when the State says it's done. To have the Federal law  
25 tell them you're done and to start the statute of

1 limitations ruling when State law is saying we're not  
2 done, the appeal continues, and do not start your State  
3 postconviction relief is to put Federal law at  
4 loggerheads with the State law it's supposed to be  
5 respecting.

6 I would like to reserve the balance of my time.

7 JUSTICE SCALIA: Where -- where is  
8 2244(d)(1)? I looked in your brief.

9 MS. MILLETT: 2244(d)(1) is attached to the  
10 appendix.

11 JUSTICE SCALIA: To the petition for cert?

12 MS. MILLETT: Petition for cert --

13 JUSTICE SCALIA: Why isn't it in your brief?  
14 I mean, it's what your brief's about. Why isn't it in  
15 the appendix to your brief? It's also not in the  
16 appendix to the Government's brief. It's also not in an  
17 appendix to the State's brief. I have to go back to the  
18 -- to the petition to get it. I mean, it's what we're  
19 talking about here. I don't understand why the text is  
20 not -- is not in your brief, but that's --

21 MS. MILLETT: I apologize for the  
22 inconvenience.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Mitchell.

25 ORAL ARGUMENT OF JONATHAN F. MITCHELL

1 ON BEHALF OF THE RESPONDENT

2 MR. MITCHELL: Mr. Chief Justice, and may it  
3 please the Court:

4 The Fifth Circuit lacked jurisdiction to  
5 review the district court's dismissal of Mr. Gonzalez's  
6 habeas petition because the document issued by the  
7 circuit judge in this case fails to qualify as the  
8 required certificate of appealability under 2253(c)(1).

9 Justice Kagan asked my opponent how one  
10 should determine whether a document counts as a  
11 certificate of appealability. The answer is found in  
12 Section 2253(c)(3). "A certificate of appealability  
13 under paragraph (1) shall indicate which specific issue  
14 or issues satisfy the substantial showing requirement"  
15 in paragraph (c)(2).

16 CHIEF JUSTICE ROBERTS: You agree with your  
17 friend that the only fault here was on the part of the  
18 judge and not the Petitioner?

19 MR. MITCHELL: We agree that the judge is at  
20 fault. The Petitioner did mention in his application  
21 for a COA his speedy trial claim. So, I don't believe  
22 we can fault Mr. Gonzalez for the way he applied for a  
23 COA. But at the same time, Mr. Chief Justice,  
24 Mr. Gonzalez, if he had the opportunity to qualify for a  
25 COA under 2253, should have the opportunity to seek a

1 new COA, if this Court were to conclude that (c)(3) is  
2 not --

3 JUSTICE BREYER: But what are -- I mean,  
4 what are we arguing about? It's a -- he should have  
5 filled in the blank and said there's a Speedy Trial Act  
6 issue, and he didn't. The judge didn't. He should have  
7 done it; he didn't.

8 MR. MITCHELL: Right.

9 JUSTICE BREYER: So, now I am the court of  
10 appeals judge, I get this, and I say, oh, my God, he  
11 forgot to fill in the right number; I'll tell you what,  
12 I'll fill it in, and I'll sign my name. Is that legal?

13 MR. MITCHELL: If the court of appeals judge  
14 does it?

15 JUSTICE BREYER: I'm a judge in the court of  
16 appeals. I have the case here. I say -- I say: Oh, my  
17 God, I've read the appendix. I don't always read  
18 appendices, but sometimes I do. And I notice that  
19 there's blank here, and it's supposed to say Speedy  
20 Trial Act. So, I get out my pen, and I say Speedy Trial  
21 Act, SB. I sign it. Okay? Now, is everything okay?

22 MR. MITCHELL: If he does that before the  
23 court of appeals issues its judgment, we believe that's  
24 permissible under the statute.

25 JUSTICE BREYER: All right. So, what are we

1 arguing about? Why not just say, look, this is like the  
2 Copyright Act registration requirement?

3 MR. MITCHELL: Right.

4 JUSTICE BREYER: I mean, it's not  
5 jurisdictional in the sense that the court has to look  
6 through all these appendices itself to see that  
7 everything is perfect. It's just something you should  
8 do. And if you didn't do it, then in an appropriate  
9 case, the judge could do it himself or waive it or  
10 whatever makes sense in the circumstance. What's wrong  
11 with that?

12 MR. MITCHELL: The problem in this case, the  
13 court of appeals did not do that. They entered judgment  
14 without a valid certificate --

15 JUSTICE BREYER: Well, suppose we say -- if  
16 they entered judgment without it, we will assume, nunc  
17 pro tunc, they did it.

18 MR. MITCHELL: Okay, because Mr. Gonzalez --

19 JUSTICE BREYER: What is the horrible thing  
20 about that?

21 MR. MITCHELL: Mr. Gonzalez can't qualify  
22 for a COA under the standards this Court has set forth  
23 in Slack and Miller-El, because his speedy trial claim  
24 encounters an insurmountable procedural obstacle. This  
25 is precisely the type of case that 2253 and Slack and

1 Miller-El are designed to keep out of the Federal  
2 appellate courts.

3 JUSTICE SCALIA: Mr. Mitchell, do you think  
4 the court of appeals could do it nunc pro tunc without  
5 -- without first making the determination that the trial  
6 judge was supposed to have made?

7 MR. MITCHELL: A circuit judge can issue a  
8 COA under the statute. So --

9 JUSTICE SCALIA: But he would have to make  
10 the determination required by (c)(1), no?

11 MR. MITCHELL: He would have to make the  
12 determination, yes.

13 JUSTICE SCALIA: Yes. And --

14 MR. MITCHELL: As I understood the question --

15 JUSTICE SCALIA: And that wouldn't  
16 necessarily point him just to the Speedy Trial Act.  
17 He'd have to see what other constitutional claims are in  
18 the case, right?

19 MR. MITCHELL: That's correct. And often  
20 the courts of appeal will have their own circuit rules  
21 that govern how litigants should seek certificates of  
22 appealability, and there may be a process that the  
23 litigant would have to invoke in order to get one.

24 JUSTICE BREYER: You tell me. This is a  
25 statute the purpose of which was to speed things up,

1 which was to help courts of appeals by eliminating  
2 dross --

3 MR. MITCHELL: Yes.

4 JUSTICE BREYER: -- while focusing on issues  
5 that really do have constitutional issues. Now,  
6 suddenly what's worrying me -- and I don't have the  
7 definite answer -- is if I adopt your interpretation,  
8 this is jurisdictional, I am somehow increasing the  
9 workload of the courts of appeals because they will have  
10 to have staff people going through to see whether every  
11 i is dotted and every t crossed and they did have all  
12 the right things there, and the pain of doing that is if  
13 you don't do it, then you have to do these things over  
14 again. It will be too late. People will get another  
15 argument.

16 MR. MITCHELL: But, at the same time, many  
17 other appeals that should not have been taken will be  
18 cut off at the district court as they should be.

19 JUSTICE SOTOMAYOR: Counsel, are -- are you  
20 accepting Justice Scalia's point that the certificate of  
21 appealability doesn't have to jurisdictionally describe  
22 the substantial constitutional issue?

23 MR. MITCHELL: No, it must describe the  
24 constitutional issue.

25 JUSTICE SOTOMAYOR: So, you're disagreeing

1 with the question he posed to your adversary, that --

2 MR. MITCHELL: No, as I understand

3 Justice --

4 JUSTICE SOTOMAYOR: You're saying that this  
5 was deficient because, both, it didn't indicate the  
6 issue and because it didn't describe the substantial  
7 constitutional question.

8 MR. Delaney: Our contention is that a  
9 certificate of appealability must indicate a specific  
10 constitutional claim under (c)(3) to qualify as a  
11 certificate of appealability under (c)(1).

12 JUSTICE KAGAN: General Mitchell, but you say  
13 that (c)(2) is not jurisdictional; is that correct? You  
14 say (c)(1) and (c)(3) are, but (c)(2) is not?

15 MR. MITCHELL: That's correct.

16 JUSTICE KAGAN: And if that's right, why?

17 MR. MITCHELL: (C)(2) is phrased differently  
18 from (c)(3). (C)(3) describes the essential content of what a  
19 certificate of appealability must contain. (C)(2), by  
20 contrast, simply says that a certificate of  
21 appealability may issue under paragraph (1) only if the  
22 applicant has made a substantial showing of the denial  
23 of a constitutional right. It's defining the conditions  
24 under which a COA may issue. A wrongly issued COA is  
25 not necessarily one that is patently defective so that



1 it no longer deserves the title of certificate of  
2 appealability.

3 JUSTICE KAGAN: But (c)(3) says "shall  
4 indicate" which specific issues satisfy the showing  
5 required by (c)(2). It just seems as if all of these  
6 are a little bit of a piece, and, you know, you can stop  
7 it at (1) or you can go on to (2) and (3). But it seems  
8 to me sort of hard to make the jump here and leave (2)  
9 out of it.

10 MR. MITCHELL: Well, perhaps analogy from  
11 other areas of appellate jurisdiction -- sometimes a  
12 district court may issue a final judgment for the wrong  
13 party. Perhaps he entered summary judgment, and he  
14 shouldn't. That final judgment may be erroneous, it may  
15 be wrongly issued, but it doesn't mean it deprives the  
16 appellate court of jurisdiction to review what the  
17 district court did.

18 JUSTICE GINSBURG: Can we back up and tell  
19 me why which statute we're dealing with, 2253 -- why  
20 that's jurisdictional if "jurisdiction" means, as we  
21 have said, that class of cases that the court is  
22 competent to hear. So, I look at 2254. That's State  
23 habeas.

24 MR. MITCHELL: Right.

25 JUSTICE GINSBURG: Federal petition by a

1 State prisoner. And 2255 is a petition by a Federal  
2 prisoner. So, those are the class of cases. The  
3 class of cases are habeas cases, '54 State prisoners,  
4 '55 Federal prisoners.

5 MR. MITCHELL: Yes.

6 JUSTICE GINSBURG: 2253, it seems to me, is  
7 a processing rule that applies to both categories. It  
8 applies to '54, and it applies to '55, but the classes  
9 of cases are identified in '54 and '55. So, I would  
10 write 2253 as a mandatory processing rule but not -- not  
11 a rule that tells us what class of cases the court is  
12 competent to here.

13 MR. MITCHELL: Well, 2253(a) reads as though  
14 it's a grant of appellate jurisdiction. It says that in  
15 either the habeas corpus proceeding or in a 2255, the  
16 final order shall be subject to review on appeal by the  
17 court of appeals. It doesn't mention the word  
18 "jurisdiction," but it's phrased in the way that is --  
19 seems as though it's conferring appellate jurisdiction  
20 in cases where a habeas petition or a 2255 motion  
21 precedes the finality in the district court.

22 JUSTICE GINSBURG: So that it doubles as --  
23 2254 is jurisdictional; 2255, and then 2253, which tells  
24 how you are to proceed under either one of those, is not  
25 simply a mandatory how you do it but jurisdictional.

1           MR. MITCHELL: Right, 2253(a) is the  
2 provision that establishes appellate jurisdiction in  
3 habeas cases. And then subsections (b) and (c) narrow  
4 that jurisdictional ground and define the conditions  
5 under which a litigant cannot take an appeal and in  
6 which cases the courts of appeals cannot exercise  
7 appellate jurisdiction.

8           This Court also has held in Miller-El that  
9 the issuance of certificate of appealability is a  
10 jurisdictional prerequisite to an appeal. And in  
11 holding that, it relied on a long history of treating  
12 both the COA and the earlier certificate of probable  
13 cause.

14           JUSTICE GINSBURG: The feature of this case  
15 that I think is very unsettling is there is an issue for  
16 the court of appeals to decide. It's the timeliness  
17 issue. The court of appeals could not decide the speedy  
18 trial. If -- if this case were to fail because the  
19 trial judge didn't identify the speedy trial issue when  
20 the court of appeals in no way could reach that issue in  
21 this case, isn't that something only a -- a distinction  
22 only a lawyer could love?

23           (Laughter.)

24           MR. MITCHELL: Well, we view the purpose of  
25 2253(c) as keeping cases out of the courts of appeals

1 when habeas petitioners have no chance of obtaining  
2 ultimate habeas relief. It's designed to keep out  
3 petitions that may present interesting statute of  
4 limitations --

5 JUSTICE GINSBURG: If you say -- if you say  
6 that -- here's Judge Gaza, and he says: Yes, there's a  
7 statute of limitations question here; it has to be  
8 decided before we get to the speedy trial. But if the  
9 judge felt that the speedy trial issue was not  
10 meritorious, then why would he grant a certificate of  
11 appealability on the threshold question that you have to  
12 decide before? Because, it seems to me, it would be a  
13 waste of everyone's time if the judge thought that the  
14 speedy trial issue had no merit.

15 MR. MITCHELL: He can't grant the COA under  
16 Slack. If the constitutional claim has no merit,  
17 then --

18 JUSTICE KAGAN: Right, but presume, General  
19 Mitchell, that he thinks that it does, but he just  
20 forgot to write down "speedy trial." And the question  
21 is: Why that forgetting to write down "speedy trial"  
22 should make a difference here given that, as Justice  
23 Ginsburg said, in any event the court of appeals  
24 couldn't reach it because of the procedural issue that  
25 it had to reach first?

1           MR. MITCHELL: Well, the first problem is  
2 the speedy trial thing in this case encounters a  
3 procedural bar. If we put that to one side --

4           JUSTICE KAGAN: Put that to one side.

5           MR. MITCHELL: -- and assume that this were  
6 a case where he had a substantial Constitutional claim  
7 and the circuit judge simply forgot to write it down,  
8 the statute requires that the constitutional claim has  
9 to be indicated in writing in the certificate. That  
10 serves --

11           JUSTICE SOTOMAYOR: Counsel, I'm a little  
12 confused, okay? And I think it's what Justice Ginsburg  
13 was trying to get at, and Justice Breyer, which is:  
14 What you are requiring and you're saying the statute  
15 requires if, is that for the district court to always reach  
16 the merits of any argument presented in a habeas petition,  
17 to figure out whether it's a substantial argument before  
18 it dismisses on a procedural ground.

19           MR. MITCHELL: He doesn't have to --

20           JUSTICE SOTOMAYOR: And that seems to be  
21 what you're -- you're wanting to happen because a judge  
22 would have to say: I'm dismissing on a procedural  
23 ground, and I believe that the claim is more than  
24 nonfrivolous, that it has a substantial basis.

25           MR. MITCHELL: He doesn't have --

1 JUSTICE SOTOMAYOR: How does that speed the  
2 habeas process in the normal cases? I mean, in my  
3 experience, what district court judges do is find the  
4 easiest way to dismiss something. If the speedy trial  
5 ground is the easiest, they go that way. I'm sorry. If  
6 it's not --

7 MR. MITCHELL: Right.

8 JUSTICE SOTOMAYOR: -- and it's a procedural  
9 bar, they use the procedural bar. They don't create  
10 extra work for themselves.

11 MR. MITCHELL: Right. He doesn't have to  
12 decide the merits of the speedy trial claim. He just  
13 needs to take a peek at the constitutional claim and see  
14 if it has some chance of being substantial. And if it  
15 encounters a procedural bar, as it does in this case,  
16 because Mr. Gonzalez never sought direct review in the  
17 Texas Court of Criminal Appeals --

18 JUSTICE SOTOMAYOR: So, what do we do then?

19 CHIEF JUSTICE ROBERTS: Maybe -- maybe it's  
20 a good time -- you're a good bit more than halfway through  
21 your argument. Maybe it's a good time to switch to the  
22 merits.

23 MR. MITCHELL: Yes. Thanks.

24 On the statute of limitations question, this  
25 case turns on the meaning of section 2244(d)(1)(A),

1 which first establishes the date on which the  
2 conviction, the judgment became final as a potential  
3 starting point for the 1-year limitations period and  
4 then establishes two prongs for determining when that  
5 date of finality occurs. Finality, under the statute,  
6 can occur either at the conclusion of direct review, or  
7 it can occur at the expiration of time for seeking such  
8 review. And the Fifth Circuit correctly held that the  
9 conclusion of direct review prong applies only when the  
10 habeas applicant pursues direct review to its natural  
11 conclusion, by obtaining either a judgment or a denial  
12 of certiorari from the Supreme Court of the United  
13 States.

14           The expiration of time prong should govern  
15 all other cases, those in which the habeas applicant  
16 allows the time for seeking direct review to expire  
17 before reaching this Court.

18           JUSTICE KAGAN: General, it seems to me that  
19 Ms. Millett's best argument is an argument just about  
20 the oddity of what would happen if we adopt your  
21 construction of the statute, which is that the time  
22 begins to run before a habeas petitioner actually can  
23 file a State habeas petition, and whether that's so odd  
24 as to make this a -- a wrong way to construe the  
25 statute.

1           MR. MITCHELL: In some cases, that will  
2 happen. There will be habeas petitioners who have  
3 concluded their direct review process, or they've -- in  
4 this case, they've allowed the time to expire. But the  
5 statute of limitations will start running for Federal  
6 habeas; yet, they won't be able to quite yet go to State  
7 court. But the --

8           JUSTICE GINSBURG: In this -- in this very  
9 case, that was so, right? Because the -- the period for  
10 discretionary review expired in August.

11          MR. MITCHELL: Yes.

12          JUSTICE GINSBURG: And the mandate issued on  
13 September -- some date in September.

14          MR. MITCHELL: Right.

15          JUSTICE GINSBURG: So, there could be no  
16 State habeas until the mandate issued. So, the days in  
17 between would count against the defendant on the speedy  
18 trial clock, even though he would -- he could not have  
19 filed a State habeas; he could not have stopped the  
20 clock by filing a State habeas.

21          MR. MITCHELL: That's correct. And it's  
22 only a 45-day window or so in this particular case. And  
23 in most cases, it should only be a few weeks or months.  
24 No one is going to lose their entire 1-year clock  
25 waiting for their ability to seek State postconviction



1 review to begin.

2 JUSTICE SOTOMAYOR: What happens if it  
3 happens?

4 MR. MITCHELL: Well, if that were to happen,  
5 then the prisoner should file a protective habeas  
6 petition under Rhines v. Weber. He should file it in  
7 Federal district court and then ask the district judge  
8 to use the stay-and-abeyance procedure that this Court  
9 approved in Rhines, and then wait for his opportunity to  
10 seek State postconviction review and return to Federal  
11 court --

12 JUSTICE SOTOMAYOR: Does that make any  
13 sense? Isn't it easier to read it, the statute, the way  
14 your adversary suggests, which would protect both the  
15 right to direct review and the right to collateral  
16 review?

17 MR. MITCHELL: Well, the Fifth Circuit has  
18 had this regime now for almost 8 years, since Roberts  
19 was decided. And as far as we know, no habeas  
20 petitioner has had to file a protective habeas petition.  
21 And even if it occasionally will happen, it's not much  
22 different than what we currently deal with on mixed  
23 petitions, when a habeas petitioner needs to use the  
24 stay-and-abeyance mechanism in Rhines.

25 One other point back on jurisdiction. It's

1 important that we emphasize we asked for this Court to  
2 vacate and remand with instructions to dismiss the  
3 appeal, but the only reason we requested a dismissal of  
4 the appeal is because Mr. Gonzalez should not get a  
5 certificate of appealability under the standards of  
6 Slack and Miller-El.

7           If there are other habeas applicants who are  
8 victims of (c)(3) errors committed by circuit judges,  
9 and that error is discovered later in the appellate  
10 process, the proper remedy should be normally to allow  
11 that habeas applicant to seek a new certificate of  
12 appealability --

13           JUSTICE BREYER: Well, why then? I mean,  
14 you can read the statute differently. You can say: I'm  
15 now the court of appeals judge. I look at it. Lo and  
16 behold, there are two blanks. But on the basis of what  
17 I've read in the briefs and the record, I can say that  
18 the appellant has made a substantial showing of a denial  
19 of a constitutional right. I know the record, and he  
20 has these things there. And also, I know what they are.  
21 Okay?

22           So, I fill in the blanks, or the chief judge  
23 of the circuit fills in the blanks with the panel's  
24 approval. Now, the only reason for doing that is that  
25 it saves everybody a lot of time and that it costs

1 nobody anything. So -- so, why not, since the language  
2 permits it, do that?

3 MR. MITCHELL: Because it would also -- Your  
4 Honor's proposal would allow habeas applicants such as  
5 Mr. Gonzalez to take appeals when the statute precludes  
6 them from taking them. And --

7 JUSTICE BREYER: Well, yes, you're giving the  
8 conclusion.

9 MR. MITCHELL: Right.

10 JUSTICE BREYER: I've just said the statute  
11 doesn't. They can take the appeal, and they're not  
12 going to get anywhere because of this error of the lower  
13 court judge --

14 MR. MITCHELL: Right.

15 JUSTICE BREYER: -- unless the court of  
16 appeals, having looked at the record a little bit,  
17 discovers that there is a substantial constitutional  
18 question, and they know what it is, and then they fill  
19 in the blanks.

20 MR. MITCHELL: That doesn't necessarily --

21 JUSTICE BREYER: And in the language -- it  
22 allows that, I believe, and the purpose would allow it,  
23 for, after all, the purpose is to be more efficient, not  
24 less efficient. And I can't think of any harm that's  
25 done reading it that way.

1           So, you tell me what is the harm that's  
2 done.

3           MR. MITCHELL: Several harms. One of the  
4 functions of 2253(c) is to protect the habeas applicants  
5 who have substantial constitutional claims, and avoid  
6 their habeas petitions from being crowded out in a sea  
7 of meritless petitions, all of which can go up on  
8 appeal if circuit judges --

9           JUSTICE BREYER: No, no. They can't, you  
10 see, because I'd have to be able to fill in those  
11 blanks, or goodbye. So, it doesn't get any meritless  
12 ones up there. The only ones that come up are merit --  
13 merited.

14           MR. MITCHELL: Well, it would have to be  
15 both merited and also not encounter an insurmountable  
16 procedural obstacle, which is the problem that plagues  
17 Mr. Gonzalez position here.

18           JUSTICE BREYER: Oh no, if there's an  
19 insurmountable obstacle -- although, as in this case  
20 perhaps we don't reach the constitutional issue -- there  
21 is one there, so it is appealable, but we say we do not  
22 reach it because there is this impossible procedural  
23 obstacle that here blocks it.

24           There we have a system that seems more  
25 efficient and seems what is being argued, and all we

1 have to do is say this is not a jurisdictional  
2 requirement in (2) or (3), and there we have it.

3 Now, what's wrong with it?

4 MR. MITCHELL: Well, if States are allowed  
5 to waive (c)(3), it will open opportunities for  
6 gamesmanship. For example, a State's lawyers could  
7 decide whether to invoke (c)(3) based on the strength of  
8 opposing counsel.

9 I see my time has expired.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Do you want to  
12 finish your sentence?

13 MR. MITCHELL: We ask the Court to vacate  
14 and remand or, in the alternative, affirm.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: That's a different  
17 sentence.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: Ms. O'Connell.

20 ORAL ARGUMENT OF ANN O'CONNELL

21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE RESPONDENT

23 MS. O'CONNELL: Mr. Chief --

24 JUSTICE SOTOMAYOR: Do you have any idea of  
25 how much the jurisdictional question plagues the courts

1 below? Meaning, is it -- is it so complicated that  
2 people below don't really know what district courts are  
3 granting COAs on?

4 MS. O'CONNELL: Well --

5 JUSTICE SOTOMAYOR: -- and do -- circuit  
6 courts don't understand what the issues are somehow by  
7 the opinion below?

8 MS. O'CONNELL: No. I think that the -- the  
9 court of appeals in this case understood exactly what  
10 the issue was. In footnote 1 of its opinion, it said  
11 the Petitioner has briefed these four other -- these  
12 four constitutional claims in addition to the procedural  
13 claim that was in the certificate of appealability. A  
14 COA was not granted on any of those issues; so, we don't  
15 have jurisdiction to consider them.

16 Nobody has made a determination in this case  
17 that there is a single constitutional issue that could  
18 potentially warrant habeas relief for Petitioner. I  
19 don't think it's a matter of the courts being confused.  
20 It's a matter of what the -- what the statute is trying  
21 to do is getting everybody to focus up front on why this  
22 case should go forward in the court of appeals.

23 JUSTICE GINSBURG: So, if someone on the  
24 court of appeals noticed that, yes, the certificate  
25 pinpoints the only case -- only question that the panel

1 can decide at this juncture, but there is a lurking  
2 constitutional question, then isn't 28 U.S.C. 1653  
3 exactly what the panel would do? That is, 1653 says  
4 that defective jurisdictional allegations can be amended  
5 in the trial or the appellate court. And so, all that  
6 would have had to have happened is very much in line  
7 with Justice Breyer's questions, is the judge on  
8 the panel said, oh, the certificate of appealability  
9 didn't mention the speedy trial issue. So, counsel,  
10 would you like to amend, or we on our own will amend to  
11 put that question in?

12 MS. O'CONNELL: That could certainly happen.  
13 There should be a presumption -- if the court of appeals  
14 amended the certificate of appealability, an appeal  
15 could go forward on that issue. That didn't happen in  
16 this case.

17 JUSTICE GINSBURG: Well, the appeal couldn't  
18 go forward on that issue because that issue hasn't been  
19 decided below. The one thing we know is the speedy  
20 trial issue -- the case cannot go forward on the speedy  
21 trial issue. Isn't that right?

22 MS. O'CONNELL: Justice Ginsburg, I don't --  
23 first of all, I don't think that's right.

24 JUSTICE GINSBURG: Why?

25 MS. O'CONNELL: I think that just because

1 the district court kicked this case out on a procedural  
2 issue doesn't mean that the court of appeals couldn't  
3 reach the substantive issue if it reversed the  
4 procedural issue.

5 JUSTICE GINSBURG: How common is it for  
6 courts of appeals to reach substantive issues in the  
7 first instance --

8 Ms. O'CONNELL: Well, it --

9 JUSTICE GINSBURG: -- when there's no  
10 decision of the district court?

11 MS. O'CONNELL: It certainly could send it  
12 back, but if that issue was briefed and if it was  
13 briefed again in the court of appeals, the court of  
14 appeals certainly could decide it. There's no bar to  
15 the court of appeals deciding --

16 JUSTICE GINSBURG: Wouldn't -- wouldn't the  
17 most sensible procedure be -- let's forget the  
18 intricacies of 2244 and '53. But you -- you have a case  
19 where there's a statute of limitations question, and  
20 that has come up for review. Wouldn't the court of  
21 appeals 99 out of 100 times say now the substantive --  
22 since we've decided that the case is timely, then it is  
23 district court's function to resolve the substantive  
24 issue?

25 MS. O'CONNELL: Even if the court of appeals



1 would normally do that, this Court said in Slack that if  
2 the court of appeal -- or if the district court kicks  
3 the case out on a procedural ground, the certificate of  
4 appealability has to indicate at least that the  
5 procedural issue is debatable and also that a  
6 constitutional issue in the case is debatable.

7 Nobody has ever made that determination in  
8 this case. If -- if a court of appeals judge would have  
9 noticed it and reissued a new certificate that certified  
10 that constitutional question, that would be fine, and  
11 the case could go forward, but if this --

12 CHIEF JUSTICE ROBERTS: If the court of  
13 appeals -- if a court of appeals judge can do that, can  
14 we do that?

15 MS. O'CONNELL: This Court could do that.  
16 Section 2253(c)(1) gives circuit justices the authority  
17 to issue amended certificates of appealability.

18 CHIEF JUSTICE ROBERTS: You read -- you read  
19 that to be any circuit justice or only the circuit  
20 justice from the circuit in which the case comes from?

21 MS. O'CONNELL: Well, the court has  
22 procedures in place where, like, an application for a  
23 certificate of appealability would normally go to the  
24 circuit justice and then, I suppose, could be referred  
25 to the Court.

1 JUSTICE BREYER: -- if I say that.

2 MS. O'CONNELL: Well, but this Court's  
3 procedures indicate that. I think that under the  
4 statute, sure, any circuit justice could issue a  
5 certificate of appealability. That might --

6 JUSTICE SOTOMAYOR: Circuit judge -- or a  
7 circuit judge or judge?

8 MS. O'CONNELL: A circuit justice or judge.

9 JUSTICE SOTOMAYOR: Yes.

10 MS. O'CONNELL: Right.

11 JUSTICE BREYER: So, I could just sign this  
12 tomorrow and that would moot this case and get rid of  
13 it.

14 (Laughter.)

15 MS. O'CONNELL: I don't think so.

16 CHIEF JUSTICE ROBERTS: No. Because Justice  
17 Breyer is not the circuit justice for the Fifth Circuit.

18 MS. O'CONNELL: Under this Court's  
19 procedures the application, I think, would have to go to  
20 Justice Scalia --

21 JUSTICE SCALIA: Right.

22 (Laughter.)

23 MS. O'CONNELL: -- and then come back.

24 JUSTICE SCALIA: So there!

25 MS. O'CONNELL: However, even if this Court

1 were to issue a certificate of appealability, if the --  
2 if the Court determined that there was actually a  
3 debatable constitutional issue in this case, which no  
4 Federal judge has done to this point, I don't think that  
5 it could still reach the procedural issue that's  
6 presented in the second question.

7           The court of appeals didn't have  
8 jurisdiction to issue a decision on that -- on that  
9 question. So, the only remedy would be for this Court  
10 to vacate that opinion and either send it back with an  
11 order to dismiss if it didn't think there was a  
12 debatable constitutional issue, or let the court of  
13 appeals reissue its opinion or redecide the case how it  
14 wants to.

15           I don't think the Court should issue a  
16 certificate of appealability in this case. Because it  
17 has to go back anyway, it makes more sense to let the  
18 court of appeals tell us if -- if what they thought is  
19 that there was a debatable constitutional issue here on  
20 the speedy trial claim. It's not clear at all that they  
21 did think that. Footnote 1 of their opinion says they  
22 -- the Petitioner briefed the speedy trial claim, but we  
23 don't have jurisdiction to consider it. It indicates  
24 that --

25           JUSTICE KAGAN: Ms. --

1 MS. O'CONNELL: -- that they didn't think  
2 that the speedy trial claim was implicitly included in  
3 the certificate of appealability.

4 JUSTICE KAGAN: Ms. O'Connell, could I just  
5 clarify your argument? You disagree with the State of  
6 Texas, isn't that right, because you think (c)(1),  
7 (c)(2), and (c)(3) are all jurisdictional; is that  
8 correct?

9 MS. O'CONNELL: That's right.

10 JUSTICE KAGAN: So, I mean, (c)(2) is -- it  
11 appears to make a substantive inquiry jurisdictional,  
12 that in any case a court is going to have to make  
13 this -- is going to have to ask itself whether a  
14 substantial showing of the denial of a constitutional  
15 right has been made, and that would seem to be a very  
16 odd thing to do for jurisdictional purposes.

17 MS. O'CONNELL: I -- I don't think it is,  
18 Justice Kagan. It's no different than under section  
19 1331. A court would have to take a peek at the merits  
20 to see if there is a -- a Federal question in the case  
21 before letting it move forward. It's just looking at  
22 what the class of cases is that section 2253(c) --

23 JUSTICE KAGAN: But, in most cases, the  
24 Federal question inquiry is just: Look, I'm looking at  
25 your complaint. Do you cite a Federal statute? Do you

1 cite a Federal constitutional provision? If so, there's  
2 a Federal question in the case.

3 What (c)(2) says is, have you made a  
4 substantial showing of the denial of a constitutional  
5 right? That's a very different inquiry.

6 MS. O'CONNELL: It is, and once a judge  
7 issues a certificate of appealability on that question,  
8 it should be presumed that it's been satisfied.

9 What we're saying in -- when we say that  
10 (c)(2) is jurisdictional is that if it becomes --

11 JUSTICE KAGAN: Well, is it a jurisdictional  
12 rule that we're -- rule that we're going to presume that  
13 it's been satisfied? That's a sort of odd thing to do  
14 for jurisdictional rules, right? Jurisdictional rules,  
15 we sua sponte have to look at them, and we have to be  
16 serious about them.

17 MS. O'CONNELL: Yes. But if a -- if a  
18 district judge or a court of appeals judge has made a  
19 determination that there's a constitutional issue that's  
20 debatable, going forward that seems to be something that  
21 would be extremely hard to overturn.

22 JUSTICE ALITO: So, if the panel looks at  
23 the merits of the constitutional issue as to which there  
24 is a reference in the certificate of appealability, when  
25 it -- when it writes its opinion it first has to ask

1     itself, was there a substantial showing? And if there  
2     wasn't, then it will say we'll dismiss this claim.

3                     And then -- but if it says, well, there was  
4     a substantial showing, but it's wrong, then we'll  
5     affirm. Is that -- is that right?

6                     MS. O'CONNELL: I mean, I think that could  
7     happen. In most cases, it's not going to be an issue.  
8     If somebody certified that it's debatable, then somebody  
9     has made that showing. If it turns out -- like, for  
10    example, if there was, if the petitioner had said my  
11    right to testify at trial was violated, they wouldn't  
12    let me testify; and then that issue is certified and  
13    then it turns out when it gets to the merits panel that  
14    he did in fact testify and it was a totally frivolous  
15    claim, yes, I think that the court of appeals should  
16    dismiss the case at that point for lack of jurisdiction.

17                    JUSTICE KAGAN: Then let's go on to (c)(3),  
18    because (c)(3) seems to be just a documentation  
19    requirement. In other words, let's presume that (c)(2)  
20    has been satisfied; there was a substantial showing  
21    made; and there is a documentation error and (c) --  
22    under (c)(3). Why should that be jurisdictional? A  
23    sort of -- you know, there has been a substantial  
24    showing made. There's a documentation error. It's an  
25    error that the habeas petitioner has absolutely no

1 control over. Why should we view that as a  
2 jurisdictional bar?

3 MS. O'CONNELL: Justice Kagan, I think it's  
4 because we don't actually know that a substantial  
5 showing has been made until a Federal judge tells us  
6 that. We could -- you know, you could assume that a  
7 substantial showing was made. It's not clear that --  
8 that Judge Garza thought that or that any judge on the court of  
9 appeals thought that.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MS. O'CONNELL: Thank you.

12 CHIEF JUSTICE ROBERTS: Ms. Millett, you  
13 have 3 minutes remaining.

14 REBUTTAL ARGUMENT OF PATRICIA A. MILLETT

15 ON BEHALF OF THE PETITIONER

16 MS. MILLETT: Thank you, Mr. Chief Justice.

17 Justice Kagan, the question is whether State  
18 prisoners now should be worse off than Federal  
19 prisoners. It's not some prisoners that will fall in  
20 this gap; it is 99-plus percent of prisoners because in  
21 Texas -- in Texas -- only about 1 percent file  
22 discretionary petitions for review. Far less than  
23 that -- 99.7, 99.8 percent -- do not seek cert on direct  
24 review from this Court. So, we're now in some backwards  
25 world where we -- Clay is going to drive the rule for

1 Federal prisoners, is going to drive the statute --

2 JUSTICE KAGAN: I don't understand that, Ms.  
3 Millett. I mean, the situation in this case is  
4 presented because the Petitioner here didn't seek review  
5 in the highest State court. The situation is not  
6 presented because the Petitioner did not file a cert  
7 petition.

8 MS. MILLETT: Well, the question is what one  
9 means by the so-called natural conclusion of direct  
10 review. Now, statistically -- this is a statutory  
11 provision written for State prisoners by Congress, to  
12 address State prisoners; and if the natural thing that  
13 happens in the world is 99 percent do not even seek  
14 review in the State's highest court -- and I'm  
15 extrapolating from Texas; I don't know all 50 States,  
16 but I have no reason to think that's anomalous.  
17 Ninety-nine percent don't file petitions for  
18 discretionary review. What kind -- why would Congress  
19 have written this statute in a way that's going to  
20 create a gap, that is going to cause prisoners who  
21 wouldn't otherwise file to now file? Instead of 2,000,  
22 they're now going to have 102,000 petitions for  
23 discretionary review, and the Texas courts --

24 JUSTICE KAGAN: I'm sorry. Let me make sure I  
25 understand you. You're saying 99 percent don't file



1 petitions in Texas's highest court?

2 MS. MILLETT: Correct. Correct. And I'm --  
3 this is -- the Texas judicial reports are -- are  
4 available online that record this. I'm -- I'm looking  
5 at the number of petitions each year. Roughly the last  
6 3 years, in the 2,000-ish range. Convictions in the  
7 State, more than 100,000 range. And so --

8 JUSTICE ALITO: You're saying 99 percent of  
9 the -- of the defendants who take an appeal through the  
10 Texas system don't file a petition with the Texas Court  
11 of Criminal Appeals? Or is it 99 percent of those who  
12 don't do that and then file a Federal habeas petition?  
13 I would imagine it's the former, right?

14 MS. MILLETT: I'm talking about the former.  
15 Right. But the point --

16 JUSTICE ALITO: Yes.

17 MS. MILLETT: The point is that -- the argument  
18 here is -- we are --

19 JUSTICE KAGAN: Because under Federal habeas  
20 review, these petitioners are not going to be in good  
21 shape, right? They're going to have their claims  
22 unexhausted or defaulted.

23 MS. MILLETT: They -- they may or may not.  
24 As we pointed out, in the Kinsey case the Texas court  
25 of -- the Texas courts have actually entertained a

1 speedy trial claim in -- at both levels. It was raised  
2 on direct review, and then it wasn't, but -- right. It  
3 was also -- they raised in both forums. So, it casts  
4 some doubt on the procedural default argument advanced  
5 here, but you're right. Of course, there -- there are  
6 issues here, but the question is whether Congress wanted  
7 a gap.

8           In *Johnson v. United States*, this Court  
9 construed 2255, I think it was subsection (4) there, the  
10 one on -- if a conviction is overturned that was used to  
11 enhance. And then when do you -- what is the timing to  
12 come back and file a habeas claim to change your  
13 sentence that relied on a now-vacated prior conviction.

14           And this Court said we're not going to  
15 construe this language to create a gap between when  
16 the -- when the finality attaches and when the time that  
17 you can actually file for postconviction review  
18 commences.

19           The whole point of this, of 2244, was to  
20 respect State processes. It's not another exhaustion  
21 requirement; it's respect the State. And Texas couldn't  
22 be clearer: In *Ex parte Johnson* footnote 2, it says the  
23 appeal continues -- sorry, may I finish the sentence?

24           The appeal continues until the mandate  
25 issues. Federal law shouldn't change that.

1 CHIEF JUSTICE ROBERTS: I just have a -- I  
2 don't understand the 99 percent figure. That includes  
3 people who entered a plea bargain and presumably gave up  
4 the right to appeal?

5 MS. MILLETT: It's 99 percent of -- the  
6 way --

7 CHIEF JUSTICE ROBERTS: So, 99 percent of  
8 the convictions that are entered. So, that would  
9 include all the plea bargains. Those people obviously  
10 didn't appeal, is what --

11 MS. MILLETT: Some of them did. Mr. Jimenez  
12 was a plea bargain. Some of them do.

13 CHIEF JUSTICE ROBERTS: Okay. Thank you,  
14 counsel; counsel.

15 The case is submitted.

16 (Whereupon, at 12:01 p.m., the case in the  
17 above-entitled matter was submitted.)

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