IN THE SUPREME COURT OF THE UNITED STATES

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MELVIN TYLER, :

Petitioner :

v. : No. 00-5961

BURL CAIN, WARDEN. :

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Washington, D.C.

Monday, April 16, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:57 a.m.

APPEARANCES:

HERBERT V. LARSON, JR., ESQ., New Orleans, Louisiana; on behalf of the Petitioner.

CHARLES E. F. HEUER, ESQ., Assistant District Attorney, New Orleans, Louisiana; on behalf of the Respondent.

JAMES A. FELDMAN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 00-5961, Melvin Tyler v. Burl Cain.

Mr. Larson.

ORAL ARGUMENT OF HERBERT V. LARSON, JR.

ON BEHALF OF THE PETITIONER

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

In June 1993 when this Court handed down its decision in Sullivan v. Louisiana, it did something it had done in only five other instances which spanned the preceding seventy-six years -- it characterized an error as structural.

The holding of the Sullivan decision, which reaffirmed and explained this Court's decision in Cage, is what makes Melvin Tyler's conviction unconstitutional, but it is the Court's rationale underlying the Sullivan decision that makes Sullivan retroactively available to Melvin Tyler, and that is because the rationale underlying Sullivan also satisfies the second exception to Teague's policy of nonretroactivity to cases on collateral review.

QUESTION: How about EDPA?

MR. LARSON: EDPA. The statutory argument is, Your Honor, that EDPA in this case would be purely

theoretical if this Court finds that Mr. Tyler's case satisfies the second Teague exception. Having found that it did so, it could then make Cage retroactive. And had it made Cage retroactive, he would then satisfy the statutory language to EDPA.

I want to make clear at the outset that we are not contending that all structural errors fall within Teague's second exception; we are simply saying that this one does, and it does so because the new rule first announced in Cage requires the observance of a procedure that is implicit --

QUESTION: Just getting back to EDPA for a moment, Mr. Larson. That says that an applicant has to show the claim relies on a new rule of constitutionality made retroactive to cases on collateral review by the Supreme Court. Now, do we interpret that as meaning that some other court can say it has been made retroactive by our Court, or that we ourselves must have said it is retroactive?

MR. LARSON: You yourselves must have said that it is retroactive in a successive petition. This Court -- when I say must have said, this Court must have done something to communicate that the new rule is retroactive.

QUESTION: Well, when -- first you said said, and then must have done something to communicate. Is that

a broader standard than just said?

MR. LARSON: Well, made is the word I'm looking for, Your Honor. This Court must have done something that made the new rule retroactive.

QUESTION: But, you know, one obvious choice in this language is to say, yes, the Supreme Court has held that this rule is retroactive. Now, does your use of the term made mean go beyond the concept of a holding?

MR. LARSON: Yes, it does, Your Honor.

QUESTION: How would you define made?

MR. LARSON: That it would be clear that the unmistakable import of an action taken by this Court would be that the new rule that had been announced was to be applied retroactively.

QUESTION: But this Court need not have said so in haec verba, so to speak, in so many words.

MR. LARSON: Precisely, Your Honor. That it need not have said so expressly. And -- to return to the point, we are not contending that this applies -- that all structural errors fall within Teague's second exception. It is simply that this Court made very, very clear in Sullivan that that particular structural error was based on the two matters that were central in Fulminante v. Arizona.

QUESTION: So you think that it is the

unmistakable import, to use your words, of the Court's opinion, earlier opinion in Cage, that it was meant to be retroactive.

MR. LARSON: No, I would say that it was the unmistakable import, Your Honor, in the Court's opinion in Sullivan --

Q QUESTION: In Sullivan.

MR. LARSON: -- that Cage was meant to be applied retroactively, and that unmistakable import was received by seven circuit courts of appeal that have applied Cage retroactively since Sullivan. Every lower court that has considered the new rule in Cage since this Court's holding in Sullivan has said that Sullivan compels the application of Cage on a retroactive basis.

The respondent in this case and amici have advanced two principal arguments for denying Melvin Tyler relief in this case. The first would be the language of EDPA which requires that a matter relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, and then finally this Court's holding in Teague v. Lane that new rules of constitutional law cannot be applied retroactively to cases on collateral review unless they fall within one of two, as the Court has described, narrow exceptions.

As I said in response to Chief Justice's question, from our perspective now that we are before the Court, the first obstacle is purely theoretical. If this Court should decide that Teague requires that the new rule announced in Cage as explained by Sullivan should be applied retroactively, and it simply says in this case, which it has the power to do, and as all -- as amici has conceded, that it's made retroactive and applies it to Mr. Tyler's case, and that resolves the issue.

Obviously, not every case that turns on the meaning of 2244(b)(2)(A) is going to be heard by this Court, so if the Court decides that it should address the statutory question now, we would submit that the better interpretation is the one that has been offered by the Third and the Ninth Circuits in the two cases of West v. Vaughn and Flowers v. Walter -- that the phrase made retroactive to cases on collateral review by the Supreme Court does not require the express ruling of this Court.

We are not saying, as the Ninth Circuit has said in Flowers v. Walter, that all cases that should be retroactive under Teague are, in fact, retroactive. We are simply saying that the word made in this case should be given its simple plain meaning of caused to be the case.

QUESTION: But I think an equally simple plain

meeting is to say, made retroactive would be that this Court has said they were retroactive.

MR. LARSON: That would be, Your Honor, but if that were to be the case, it creates an entire host of problems. First, I think that the Court -- that Congress had before it the possibility of a wide variety of language such as held by, determined to be retroactive by the Supreme Court. The first is that this -- the use of the word made as not requiring an express decision by this Court avoids the unequal treatment of similarly situated petitioners. You would have a first petitioner who received the -- who a lower court could say, well, yes, the Court had made that new rule retroactive, whereas a second petitioner identically situated for Teague purposes would not receive the benefit of the rule.

The second is that this interpretation of made retroactive is the only one that works with the statute of limitations that EDPA has created. If -- if we are to interpret the rule as requiring an express ruling from this Court that something has been made retroactive, when the statute of limitations begins to run when the new rule has been recognized, as we pointed out in our briefs, you could have a statute of limitations expiring before this Court ever ruled on whether something had been made retroactive. On the other hand, if you were to take the

position of the Solicitor General that maybe the statute of limitations doesn't begin running until this Court recognizes the retroactivity for successive petitions, the statute of limitations would never begin to run. So you would have successive --

QUESTION: On the other hand there is a thirty-day requirement in the court of appeals to determine whether or not to decide the issue, and that indicates, it seems to me, that the only thing they can do is look to see whether this Court has decided it. Because otherwise they have to decide a difficult substantive issue within thirty days. It does not seem to me that that is consistent with the statutory scheme.

MR. LARSON: Well, but that's precisely the type of decision that lower courts make every day in terms of first petitions, as was done in this case. The Fifth Circuit had determined that Sullivan had been made retroactive -- Cage had been made retroactive by Sullivan, and it applied it to all first petitioners. So I don't think, Your Honor, that we're placing an additional burden on the lower court because, quite candidly, we are only talking about a very, very, very small category of new rules that would have been made retroactive.

In fact, in the eleven decisions that this -- in which this Court has considered new rules of law since

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Teague was handed down, none have been found to qualify for the second Teague exception. In fact, this would be the first new rule under the second Teague exception. So to respond more fully to your question, Your Honor, I do not think we are placing an undue burden on the lower courts, because Your Honors' interpretation of requiring an express ruling from this Court would mean that a successive habeas petitioner under a new rule was either too early or too late, but never on time.

QUESTION: How many jury instructions do you suppose have been given out there in the past on reasonable doubt that would fall within Cage? I would think there might be a great many and going back a great many years, wouldn't you?

MR. LARSON: The -- my understanding is, Justice O'Connor, is that this instruction was the standard bench book instruction for Orleans Parish for a period of time. As to the number of --

QUESTION: Yeah, but how about other states and other jurisdictions? There has to have been a wide variety of reasonable doubt instructions that have been given over time.

MR. LARSON: There were unquestionably a wide variety of reasonable doubt instructions, but I don't think that there would be many states, and I have not seen

many cases indicated, that would meet the requirements of Cage that have all three of the elements that Cage had that would be condemned. And the best example would be this Court's decision in Victor, which followed after Sullivan, in which it said, no, these type of instructions that Cage is where we draw the line, Victor is simply not, does not form part of that --

QUESTION: Yes, but presumably the Orleans Parish bench book instructions came from somewhere. You know, I think reasonable doubt instructions probably were quite frequent all around -- they had to be in any criminal case, and I think it is probably not terribly accurate to assume that in no other place than Orleans Parish was this sort of an instruction given.

MR. LARSON: Your Honor, in all the reading I have done everywhere, I have never seen an instruction as bad as the Cage instruction from any other jurisdiction. This -- and in fact the instruction that was given in Melvin Tyler's case is worse than the one that was given in Cage.

QUESTION: The -- is this -- we tried to look this up, and I'll tell you what I found and see if it corresponds -- either of you -- that there were six or seven states right after Cage that had similar instructions, then the Court decided Victor v. Nebraska,

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and that seemed to suggest that all but in one or two, maybe the Louisiana and New York, that the instructions were okay. We found twenty-one reversals in New York on this ground, and some in Louisiana, and no others. I mean, that's just a quick check, so it would be in New York and possibly Louisiana, if that's right. I mean, you know more about it than I do and have looked into this.

MR. LARSON: My understanding is that very, very few states gave this type of instructions. The ones that were giving it certainly corrected it after Cage, and the number of people that would ultimately be affected by a finding that Sullivan compels the retroactivity of Cage would be fifty to sixty people would be --

QUESTION: What you're saying --

QUESTION: If that's all, why is it a watershed?

MR. LARSON: Beg your pardon?

QUESTION: I mean, if they're only going to affect fifty or sixty people, why is it a watershed rule?

MR. LARSON: It is a watershed rule, Your Honor, because what happened in Sullivan changed the way that we understood reasonable doubt. It changed --

QUESTION: Sullivan is a watershed rule, or Cage is?

MR. LARSON: Cage is the new rule, Your Honor. It is the ruling in Sullivan explaining Cage that makes it

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a watershed rule.

QUESTION: What makes Cage a watershed rule -- but your position is that Cage is a watershed rule.

MR. LARSON: Cage is the new rule, Your Honor.

QUESTION: Do you know of any other watershed rule that we have announced in a per curiam, unargued opinion?

MR. LARSON: No, Your Honor.

QUESTION: Wasn't Cage just an application of Winship?

MR. LARSON: Cage --

QUESTION: I mean, I don't know that you can say that Cage was more than that. I would have thought Winship was the case that may have led to Cage.

MR. LARSON: Winship was the principal. Cage was the application. Winship did not address jury instructions, Cage did. For the first time in Cage, this Court said that there is a reasonable doubt instruction that we can give that is error, and when we got to Sullivan --

QUESTION: But Cage was just a per curiam that I guess the Court thought was compelled by Winship.

MR. LARSON: That's correct, Your Honor, but it was Sullivan which was a unanimous opinion by this Court after full briefing on the merit, saying that a Cage error

is structural that represented truly the paradigm shift. That's why it becomes the watershed rule.

Sullivan tells you for the first time and makes it clear that a reasonable doubt jury instruction, unlike any other jury instruction that you can give at a trial, if it is flawed, flaws the entire process.

QUESTION: Is it Sullivan that's the watershed?

MR. LARSON: Well, Cage is the new rule, Your Honor, and it is Sullivan's explanation of Cage --

QUESTION: But is --

MR. LARSON: -- is the watershed.

QUESTION: If per curium Cage is just following Winship, isn't it a little hard to say that it's the new rule.

MR. LARSON: Cage has been recognized as the new rule because for the first time -- Winship did not address jury instructions, Your Honor, Cage did. For the first time, the new rule becomes that when a court gives a reasonable doubt jury instruction that misdefines reasonable doubt, and in effect lowers the state's burden of proof, you have violated the due process rule.

QUESTION: I am quite surprised that you say that Cage is not the watershed rule. I think that really has to be your -- this would have been very odd for us to issue Cage and then only say in Sullivan that it's a

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watershed rule. That's a very strange holding. It seems to me that Cage has to be the watershed.

MR. LARSON: Well, Cage would be the new rule, Your Honor, and it is Sullivan's --

QUESTION: Everyone, I think, would agree that it's the new rule. The question is whether it's a watershed rule.

MR. LARSON: Well, as explained by Sullivan --

QUESTION: A watershed rule is like Gideon v. Wainwright, I take it? Is that a paradigm?

MR. LARSON: It is a shift in the paradigm, is the best way to explain it. To use an analogy, I would say that Gideon would be the continental divide, and Cage would be the watershed.

What you really have is a watershed --

QUESTION: No, no -- well, now we've got three different terms. Gideon is a watershed rule, could we stipulate that?

MR. LARSON: Yes.

QUESTION: I'm tempted to say I know Gideon, and Cage is no Gideon.

MR. LARSON: Cage is no Gideon -- I will admit that Cage is no Gideon, but it is still watershed because it has changed our thinking about the centrality of the reasonable doubt instruction. What Sullivan teaches us

because it tells us that a Cage-type error is structural --

QUESTION: I didn't think Cage made it apparent to us for the first time that beyond a reasonable doubt is a fundamental aspect of our system. We knew that, before Cage, during Cage and after Cage.

MR. LARSON: We knew --

QUESTION: So what's watershed about Cage?

MR. LARSON: What is watershed about Cage as explained by Sullivan -- I don't think that you can view the two in isolation. As explained by Sullivan, which identified Cage as structural error, that what is watershed about it is that when you have had a reasonable doubt jury instruction of the type given in Cage and Sullivan, you have not had a trial by jury within the meaning of the Sixth Amendment. That's not my language, that's the language of the Court. That there has been no jury verdict of guilt beyond a reasonable doubt.

QUESTION: But it is the language of the Court in Sullivan.

MR. LARSON: Yes, Your Honor.

QUESTION: So Sullivan's the watershed case.

MR. LARSON: But Sullivan builds on Cage, and you can't have, I guess, one without the other. I wish the two had come together, but what I have is Cage first

announcing the new rule and then Sullivan explaining the import of the Court's decision in Cage.

QUESTION: Let me ask you -- the Chief Justice asked earlier, we're focusing on the word made retroactive by this Court, and your position is Sullivan made Cage retroactive.

MR. LARSON: Yes, Your Honor.

QUESTION: And my question is, did Sullivan -- is it the Sullivan holding that made Cage retroactive, or statements in Sullivan that made it?

MR. LARSON: Statements in Sullivan, Your Honor.

QUESTION: So it's dicta rather than the holding.

MR. LARSON: No, Your Honor, it's not dicta. It's the rationale, and the rationale was precisely following Arizona v. Fulminante. That as Arizona v. Fulminante defined structural error, it had two components. The first component was that a structural error deprives a defendant of a basic protection or right. And the second component is that that protection or right is one without which the criminal trial cannot reliably serve its purpose as a vehicle for determining guilt or innocence.

QUESTION: Well, do you say that every structural error is a watershed rule under Teague?

MR. LARSON: No, Your Honor.

QUESTION: No.

QUESTION: How do you draw the line? I was going to ask the same question. You say, well, this is a structural error that is watershed, some structural errors would not be. How do we tell?

MR. LARSON: You draw the line by looking to the two Teague factors, Your Honor, and those two Teague factors are that we have to be dealing with a rule that requires the observance of a procedure that is implicit in the concept of ordered liberty, which Sullivan tells us we unquestionably are. We are dealing with the Sixth Amendment right to a trial by jury.

And then there is the second problem of the Teague analysis, which is the reliability factor. And because of Cage and Sullivan, we know that when you have an erroneous reasonable doubt instruction such as the one in Cage, Sullivan and Tyler, that you have -- that the likelihood of an accurate conviction has been serious diminished.

QUESTION: Well, except that that's not the way we explained it in Sullivan -- what was at stake. We didn't say anything about accuracy or reliability, as I understand it, and as you quoted from it a moment ago. What we said was that as a matter of definition, what we

mean by a jury verdict has not been observed when the jury is operating under this kind of reasonable doubt instruction. It had nothing to do, as I understand it, with what we normally mean by the reliability of a verdict, i.e., was the person really guilty or not guilty? Did he do it, did he not do it?

So it seems to me that the two don't synchronize the way you're arguing.

MR. LARSON: They do, Your Honor, if you go more into the structure. The reason you have been deprived of a jury verdict within the meaning of the Sixth Amendment. For that you have to go all the way back to In re: Winship. And what we understand from In re: Winship is that there is only one measure of reliability within a criminal trial, and that is the proof beyond a reasonable doubt standard. Presumably as you push the burden of proof to higher levels, the likelihood of an improper or erroneous conviction is lessened, and that if you require proof beyond all doubt, you would have -- certainly you would not have any innocent people hopefully convicted. And so what Winship tells you is that it is that proof beyond a reasonable doubt standard that, quote, from Winship, plays a vital role in the American scheme of criminal procedure, because it is the prime instrument for reducing the risk of convictions resting on factual error.

QUESTION: If that's the argument, then why isn't the structural nature of this error essentially irrelevant to your analysis?

MR. LARSON: It is -- what I am saying is that the Court has -- it is not irrelevant, because the Court has already made those findings as to what a Cage or Sullivan-type jury instruction means.

QUESTION: Well, the Court -- the Court has said it's structural, but in your answer to my question, you're saying the reason this structural error is, in fact, a structural error which must be made retroactive is a product of Teague. Why don't we simply go to Teague?

MR. LARSON: We can, and --

QUESTION: Okay. If we go to Teague then, what's left of the significance of Sullivan? Sullivan is significant, as I understand it, only because Sullivan indicated that the first case was structural, and yet you say you concede that the structural nature of it is not dispositive. If the structural nature is not dispositive, then how can we tell from Sullivan that, in fact, Cage must be retroactive? We can't.

MR. LARSON: What you can tell from Sullivan is that the Court has, in essence, found that these two components of the original structural error test in Fulminante are congruent with the two components of the

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Teague retro --

QUESTION: If that were the case, then we wouldn't bother with a Teague analysis. We would say it satisfies Teague as a matter of law, and I don't think that is your argument, nor do I think it could be your argument.

MR. LARSON: No, that is not my argument, Your Honor. I'm simply saying that the Court, having made that type of findings and having set forth that rationale for a finding of structural error in that case -- because there could have been a finding of -- there can be findings of structural error that don't satisfy the Teague analysis, and obviously we wouldn't rely on them, then. We're simply relying on Sullivan because it's made the findings for us.

QUESTION: Okay, but you are relying on Sullivan not because Sullivan said it's structural, but because Sullivan has made some findings which happen to satisfy Teague criteria. That's your real argument.

MR. LARSON: Precisely, Your Honor.

QUESTION: And the structural nature of it is essentially beside the point.

MR. LARSON: Precisely, Your Honor. But the reason we --

QUESTION: Mr. Larson, if that's the position

you're taking, to say, if we read Cage and Sullivan and we see this is a watershed rule, practically doesn't it become less watershed? This goes back to a question Justice Breyer asked. When you then add Victor and Sandoval, and you get to the proposition that the jury doesn't have to be given any charge at all, it can be left to its own devices to define reasonable doubt.

MR. LARSON: The centrality of Cage is -- what it told us for the first time is that somehow the message of what proof beyond a reasonable doubt has to be conveyed to a jury. Otherwise you have no Sixth -- trial within the meaning of the Sixth Amendment.

QUESTION: That's not quite right.

QUESTION: That's incorrect, Mr. Larson.

QUESTION: It has to be conveyed accurately, it doesn't have to be conveyed at all. We've held you don't have to have a reasonable doubt -- a definition of reasonable doubt.

MR. LARSON: You don't have to define reasonable doubt, but if you do define reasonable doubt, it has to be defined accurately.

QUESTION: Then practically isn't there a great risk of distortion or misunderstanding if there is no charge at all?

MR. LARSON: Oh, absolutely, Your Honor. If

reasonable doubt is never defined for a jury, if the jury is not told something about reasonable doubt --

QUESTION: They're just given the words, and I thought from our latest decision that that is enough, that they do not have to be told anything more than beyond a reasonable doubt is the standard.

MR. LARSON: Proof beyond a reasonable doubt -- they do not have to be told what reasonable doubt is. It's simply that if they are told what it is, that is must be defined accurately.

QUESTION: But I thought a moment ago you said that you have to say something more than just reasonable doubt, and I agree with you. Our cases have not said that. They have not said that you must define reasonable doubt in any way.

MR. LARSON: You have to make clear what the burden of proof is in a criminal trial, and --

QUESTION: By saying, quote, beyond a reasonable doubt, closed quote.

MR. LARSON: That the burden is on the state to prove --

QUESTION: Yes, well, I wasn't suggesting it was on the defendant.

MR. LARSON: Unless there are further questions from the Court, I would like to reserve any remaining time

for rebuttal.

QUESTION: Very well, Mr. Larson.

Mr. Heuer.

ORAL ARGUMENT OF CHARLES E. F. HEUER

ON BEHALF OF THE RESPONDENT

MR. HEUER: Thank you Mr. Chief Justice, and may it please the Court:

There are two questions presented here. The first concerns the meaning of Section 2244, and the second concerns whether Cage fits the second Teague exception. If I may, I would like to begin with the second question presented.

The -- I submit that the principal issue here has less to do with Cage and Sullivan than it does with Teague's implication for a watershed rule. I think clearly Cage conveys an element of accuracy and fairness.

QUESTION: Before you get started, may I just ask, do you agree that Cage was a new rule?

MR. HEUER: Yes, Your Honor. Teague gives us an example of a watershed rule in Gideon and provides a definition that a watershed rule is a rule which alters our understanding of the bedrock procedural elements necessary for a fair trial. Our principal point is that -- the question is, does this definition encompass the notion that a watershed rule can redefine an existing

procedural element, or does the watershed rule need to announce a new previously unarticulated procedural element?

I would submit that to adopt the first definition would require the rule so redefine an existing procedural element that we have, in a sense, created a new bedrock procedural element, and it is insufficient to simply alter our understanding and illuminate an existing procedural element in some way. That the new rule must tell us a fundamentally new principle that is applicable in each and every trial that should be conducted in the future.

QUESTION: Can you give an example other than Gideon? I mean, you say this is not a watershed rule. Gideon is a watershed rule. And then there's a vast space. Is there any -- is Gideon it, or are there other watershed rules?

MR. HEUER: Well, I think you need to go back in history to an extent, and a lot of our principles have not evolved in such a dramatic fashion. If you take Winship, although it made it constitutional, the notion of reasonable doubt had been you know around for, you know, as long as anyone could remember at that time.

QUESTION: Well, I think we would like to know if you have a positive example, not what isn't a watershed

rule, but what is, other than Gideon?

MR. HEUER: You know, I think you look to the Bill of Rights and the defendant's opportunity to confront the witness against him, to have a public trial, a fair and impartial jury, and --

QUESTION: But isn't the --

QUESTION: I would think all of those are not watershed rules. I mean, surely all of that has been around. I don't -- I really don't understand --

MR. HEUER: Well, in the sense that --

QUESTION: What makes it a watershed rule?

MR. HEUER: Well, in the sense that to be a watershed rule -- a watershed rule requires two components. One is that it be the fundamental foundation that -- and that it -- to become a watershed rule it has to announce a new principle, yet encompassed in that definition is the fact that it forms an essential bedrock procedural element. So the examples I gave you, correct, would not be watershed rules. They would --

QUESTION: Well, why wouldn't this one be, then? Why wouldn't this one be? That is, what their argument is -- I mean you might find it easier to address the specific. The specific, I take it, is that before Cage and Sullivan, people always understood that judges can make mistakes on jury instructions. They do every day of

the week, and some are very important. But after Cage and Sullivan, we suddenly see that a misdescription of the reasonable doubt standard is like no other. It is so important that automatically you get a new trial no matter what. The only other thing that compares is not having a lawyer at all.

So before the two cases we thought, yes, you could make a mistake in the instructions, maybe even a bad one. After the instructions, we recognized that that kind of mistake is unique among all others and like not having a lawyer. Now, that's their argument, I think, as to the significance in you're reshaping our legal thinking about a jury standard misdescription. All right? So now, on your principle, why isn't that watershed, or why isn't it watershed irrespective of your principle?

MR. HEUER: I think the question of structural error is distinct from retroactivity. I believe Teague requires an additional component. Moreover, the structural error of a misdescription of reasonable doubt has more to do with whether or not we can get our hands on what's going on there, whether or not the effect of the error is quantitative. We simply cannot look at the verdict and conduct an analysis because we don't --

QUESTION: Well, now every court of appeals to have considered the question has said it has -- Cage has

to be applied retroactively. Isn't that right?

MR. HEUER: Correct, Your Honor.

QUESTION: And they're all wrong, I guess, in your view.

MR. HEUER: That's our position, Your Honor. And I think it comes from the fundamental misunderstanding that a watershed rule must announce a new bedrock principle. It cannot simply cast new light on an existing bedrock principle. And although, you know, we have cited the same language as the various courts of appeals, that the rule alter our understanding --

QUESTION: Can I just interrupt with one --

MR. HEUER: -- of the bedrock procedural elements for a fair trial, then it's clear --

QUESTION: Mr. Heuer, can I just interrupt with one --

MR. HEUER: Excuse me, Your Honor.

QUESTION: -- one thought. When you ask a question whether a rule is retroactive, I think you are really asking whether the rule applied at the time of the trial. And are you arguing that at the time this man was tried he did not need a better reasonable doubt instruction?

MR. HEUER: I think the retroactivity -- whatever the --

QUESTION: Doesn't that ask the question what was the law at the time of the trial, and you're saying --

MR. HEUER: That he was entitled to a reasonable doubt --

QUESTION: -- he did not need a better instruction than he got.

MR. HEUER: Well, Your Honor, correct. But I think that at the time of anyone's trial you can say that he was entitled to confront the witnesses against him, yet we could create a new rule which shows that a videotape conference was not the equivalent of confronting the witnesses against you.

QUESTION: But if it's a new rule -- if it's a new rule, he was not entitled to that instruction at the time of his trial, it seems to me.

MR. HEUER: Well, you know, this language fell within the logical compass of the reasoning in Winship, but, you know, I don't think that anything we knew before dictated or compelled the conclusion that this instruction failed to accurately delineate the standard of reasonable doubt, so this --

QUESTION: Can you shed any light for us on how many verdicts would be affected by our clarification, if we made it, that this must be applied retroactive? How

many are there?

MR. HEUER: I checked with the Department of Corrections, and there are 1.057 inmates in Angola currently whose trials came from Orleans Parish, and whose trials commenced approximately a year before Cage.

QUESTION: It's been eight years since the Court decided Sullivan. You would have thought that if there are a thousand people there under the -- in respect to whom the trial courts, in fact, used this wrong standard, some of them would have thought of this idea of bringing a habeas petition. I mean, are there any other habeas petitions filed?

MR. HEUER: That's all I do, Your Honor.

QUESTION: What? All of those thousand --

MR. HEUER: There's hardly a habeas petition filed in the Eastern District of Louisiana that does not include a --

QUESTION: Okay. So is that -- that number of a thousand is the number of habeas petitions that have been filed that include this question?

MR. HEUER: No. That is simply the number of inmates --

QUESTION: How many habeas petitions have been filed, to your knowledge, that include this question?

MR. HEUER: I can't answer that, Your Honor.

QUESTION: Do you come across in your personal experience more than one?

MR. HEUER: Oh, yes.

QUESTION: Yes?

MR. HEUER: Clearly over a hundred -- you know, in the hundreds, since Cage was announced. I could say that any given year I answer thirty to forty myself as a member of an office of seven or eight attorneys, including the case here.

QUESTION: Counsel, based on your argument was the Fifth Circuit wrong in allowing the district court to consider this successive petition?

MR. HEUER: Yes, Your Honor. I don't believe that Sullivan constitutes a prima facie showing that Cage was made retroactive by this Court. Sullivan concerns a different issue other than retroactivity, and that, you know -- I just don't see -- you can make a prima facie showing that this Court has ever made Cage retroactive, even though the standard is simply prima facie. I think that goes more to the prima facie and this also goes to whether or not the particular individual actually had an instruction that resembled Cage --

QUESTION: Well, I am asking the question because of the short time frame that the court of appeals has to determine whether it's going to allow a successive

petition. The district court got the question, as it did here, would have more space. But you're saying that the court of appeals within the short time that it has, should have cut this off at the pass?

MR. HEUER: Yes, Your Honor. And it goes to, you know, there's a fundamental difference between what -- how you consider made retroactive, and whether or not a decision such as Sullivan can stand as a determination that this Court has explicitly held or ruled that a particular new rule should be applied retroactively.

QUESTION: Let's assume that we have never said whether or not Cage is retroactive -- let's assume that. On a successive habeas petition, how could we ever make that determination substantively?

MR. HEUER: Well, I believe --

QUESTION: The only thing that the court of appeals can answer, according to you I take it, is whether or not we have said that, and if the court of appeals is right that we've never said that, isn't that the end of the matter? Can we ever reach the question on a successive petition? We're talking on the merits.

MR. HEUER: Well, I believe -- I believe that Congress believed that the finality concerns were so critical in terms of second and successive habeas petitioners that it would leave that judgment to this

Court, and presumably that would occur at the time of a first habeas petitioner.

QUESTION: So we have to wait for a first habeas petition or a direct review to say this?

MR. HEUER: Correct.

QUESTION: What do you think of unmistakable imports? Sorry, were you finished? Were you finished in your answer to Justice Kennedy?

MR. HEUER: Yes, Your Honor.

QUESTION: Unmistakable import is their idea, that sometimes this Court might not say, and it is retroactive on collateral review. Rather it is the unmistakable import of the opinion that it isn't. Is that good enough for you?

MR. HEUER: Your Honor, I believe the fair reading of the statute makes the inclusion of this Court superfluous under that rationale.

QUESTION: But can you answer just yes or no, I'm not sure whether you -- I said, is that good enough for you?

MR. HEUER: No, it's not, Your Honor.

QUESTION: Because?

MR. HEUER: Because I believe the only fair natural reading of the statute is that Congress put such a -- had such great concern over second and successive

habeas petitions that they have given this Court the additional responsibility of announcing the retroactivity of a rule before a second or successive habeas petitioner can come back to court and challenge his conviction.

QUESTION: And you put up with the anomaly that that creates?

MR. HEUER: Yes, Your Honor.

QUESTION: Even if, for example, there were such cases just obvious -- like flag-burning, the Court says flag-burning is -- you can't punish that, or you can't punish writing an editorial in a newspaper criticizing the government. Or, you know -- and so there is a certain conduct that now they cannot punish. It's absolutely clear that it's in that category. This Court has now made certain conduct unpunishable under the criminal law, and that's the kind of thing that Teague says is retroactive, and even where it's absolutely plain that it is the reason, it still, in your opinion, is not retroactive unless the Court adds the words and it is retroactive.

MR. HEUER: Your Honor, in cases -- the first exception cases clearly present a more difficult argument than the second exception. Nevertheless, I believe that the Congress believed that cases that fall under the second exception are never so clear as to not require a statement from this Court.

QUESTION: But you would accept dicta. In other words, you say we can make it within the meaning of EDPA, even though we say it in dictum? Because that's what we would be doing. We would have to do it to decide the case in which we make the statement so that our further statement, and by the way, this is going to be retroactive would be dictum so far as that case is concerned, and that would satisfy the concept of made in EDPA?

MR. HEUER: Yes, Your Honor. I believe that that would satisfy the congressional concerns regarding the retroactive application.

QUESTION: Well, if we -- if EDPA does not require a holding, in other words, for example, an appeal from a first habeas in which there's no question that the issue can get up and in which case our declaration would be a holding. If no holding is required, if dictum is satisfactory, why shouldn't a straightforward application, if there is such a thing of Teague, be equally satisfactory? I could understand the line if you were saying it's got to be a holding of the Court, but if it hasn't got to be a holding of the Court, why is Teague less worthy than dictum?

MR. HEUER: Well, my principal argument would be this case itself -- that the courts have seized on the conclusion that Sullivan, without deciding any

retroactivity concerns, because it the error structural, made it retroactive.

QUESTION: Aren't you saying in response to Justice Souter that we should read the word made to mean said?

MR. HEUER: Yes.

QUESTION: But they didn't say it said.

QUESTION: One of the problems with --

QUESTION: Unless you believe that what we say has effect. I don't know, some people believe that.

QUESTION: But is it appropriate for this Court to say, now we've got this case before us, and we decide this case. There's going to be another case down the road which would present the question of retroactivity. So we are going to say in this case, which doesn't present the question because it's here on direct review, that in that other case is not before us. Courts don't operate that way. They decide the cases before them.

MR. HEUER: And in the case of second successive habeas petitioners, you know, they may have to wait until this Court has had an opportunity to address a first habeas that raises that issue. They may have a legitimate claim to file but because they are second or successive habeas petitioners as opposed to a first habeas petitioner who, upon announcement of the rule, can go into Federal

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court and say, look, I think this ought to apply to me even though I was tried before the decision was held, and the second successive petitioner, he might have to sit and wait until that speculative argument has been --

QUESTION: Well, it's more than sitting and waiting. He won't be able to get the benefit of the retroactivity is what you're saying, and what you're saying is, serve him right, he should have raised it in his first habeas. You're saying that that's one of the results of EDPA.

MR. HEUER: Right.

QUESTION: And the Congress was not particularly sympathetic to second habeas petitioners in EDPA.

MR. HEUER: Exactly, Your Honor. The finality concerns for second and successive petitioners is so strong that they created a separate gateway for them to enter in order to present claims of this nature on a second petition.

Thank you, Your Honor. I have nothing further.

QUESTION: Thank you, Mr. Heuer. Mr. Feldman, we will hear from you.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

SUPPORTING THE RESPONDENT

MR. FELDMAN: Mr. Chief Justice, and may it

please the Court:

Petitioner may not base his petition in this case on Cage, because the rule of that case has not been and should not be made retroactive by this Court.

QUESTION: In answer to the question Justice Breyer asked your colleague, where primary conduct is held to be not punishable as a matter of law, is that also subject to the same retroactivity principles we're talking about, or is there a different rule? If the first rule of Teague is involved, i.e., conduct which cannot be punishable?

MR. FELDMAN: I don't think there is. I think the fairest reading of the statute is that it has to be made

-- the specific rule relied upon by the second petitioner has to be made retroactive by the Supreme Court, not by some other court --

QUESTION: Even if it's beyond the power of the law to punish? I mean, isn't that somehow automatically retroactive?

MR. FELDMAN: Well, I think the fairest reading is what I said. I do think you could distinguish some if the Court -- I think the fairest reading is what I said, but you could distinguish some cases in which -- like the Eichmann case, for example, perhaps.

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QUESTION: Which case?

MR. FELDMAN: The Eichmann case, the flag-burning case, in which -- you could distinguish some cases under the first Teague exception in which the application of that exception is just absolutely crystal clear, but I don't think all first exception cases are even close to that, and I don't think that any second exception cases would be like that. So although you could say an absolutely clear first Teague exception case could satisfy the made retroactive standard, I actually think the better rule is want Congress provide, which is that it be this Court and not some other court that's vested with the responsibility of finally and conclusively deciding that the certain new rule is valid, and it should be made retroactive.

QUESTION: But that's fair because then if it's this Court -- I mean, it's this Court and not some other court that writes an opinion, the unmistakable import of which is that it is retroactive on collateral review. That would satisfy you, though you think -- if I'm right, that satisfies you, but I'm guessing.

MR. FELDMAN: No, that wouldn't. I think the fairest reading of the statute is Congress made a considered decision that there have been difficulties in the lower courts with understanding what is retroactive

and what is not retroactive, and that you could never be sure, finally and conclusively, that a particular rule was retroactive until this Court had said that it was. And that someone who is on second and successive habeas, who has had direct review and first habeas already, that person is in jail validly and pursuant to his conviction, and if this Court gets around to saying that, then the person may be --

QUESTION: You mean -- no, I'm sorry --

QUESTION: I just want to be -- in other words, unmistakable import isn't good enough, you have to say it in those words.

MR. FELDMAN: I think so. Yes, I think that that's what Congress provided, and I think they provided it for a good reason. As I said in response to Justice Kennedy, if the Court wanted to distinguish unmistakable import cases, I would think those would only arise under the first Teague exception, and I also think that not all cases under the first Teague exception would qualify or be even close. I mean, petitioner in this case -- I think in their brief they have about five examples. I would agree with one or maybe two of them, but not with the other three, and I think there would be a lot to argue about.

QUESTION: I take it that the only conclusive determination by this Court could be a determination on a

first habeas.

MR. FELDMAN: I think on a first habeas in a case like this whereas a kind of, whereas a kind of --

QUESTION: When the defendant takes an appeal on the second.

MR. FELDMAN: On an original petition --

QUESTION: But in terms of what? The gatekeeper should allow through -- the gatekeeper on your theory, I take it, shouldn't allow anything through until there had been a conclusive determination. And I take it on your view that requires a holding so that the only holding that you could look to would be a holding, if the system works right, would be a holding on first habeas.

MR. FELDMAN: Yeah, I would go maybe just an inch beyond holding, which is either a holding or a statement that's not dicta. That is, a statement that's necessary to the conclusion in the case.

QUESTION: Right. But if you do that, there stands a distinction.

MR. FELDMAN: I'm not sure that could not be the holding.

QUESTION: What's the distinction?

MR. FELDMAN: Well, it can be part of the reasoning in the case but if it was the necessary reasoning. It is very hard for me to --

QUESTION: But in any case you wouldn't be satisfied with dicta from a case on direct review, or a statement from a case on direct review?

MR. FELDMAN: No, I -- I just don't think that we can fairly say that it's this Court that's made the specific new rule that the habeas petitioner is relying on, that it's this Court that's made it retroactive when it's just a statement in an opinion which the lower courts have to pay attention to, but those statements don't themselves have legal force and effect like the holding of a case or perhaps a statement that was necessary to the reasoning and therefore not dicta.

QUESTION: Then you'll run into a statute of limitations problem, because the statute of limitations seems to say that it has to -- you have a year after the right of cert was initially recognized by the Supreme Court, and so you're going to have to do within the year -- it's going to have to come up on habeas to the Supreme Court in an instance, let's say, where it's absolutely clear from the reasoning that it is meant to apply retroactively, so you'll never -- I mean, it'll put this Court in an impossible situation, wouldn't it?

MR. FELDMAN: I don't think it would. First of all, I think the statute of limitations provision hasn't been construed, as far as I know, that particular

provision of it, by any lower court, and the meaning of whether it would run from the date of the original decision or the date that this Court had made the decision retroactive I think is not entirely clear, so I don't think it would necessarily be a problem. But I also do think that Congress intended that the gateway for second and successive habeas petitioners should be extremely narrow, and they assigned, Congress assigned, the courts of appeals the responsibility within a thirty-day period of deciding -- usually they're based just on the petition, not on any response from the other party, from the warden -- based just on the petition a determination of whether it satisfies the Teague exception or not. If they can look at the decisions of this Court, that part of it won't be hard to do. They might have difficulty figuring out just what the claim is, but they won't have difficulty figuring out whether it's retroactive.

QUESTION: What about the Gideon example? Well, that's a clear case where it would be -- the Court would have made it retroactive, but the Court didn't say that expressly in Gideon.

MR. FELDMAN: In our -- that's correct, and this statute, of course, didn't apply then, but a second or successive habeas petitioner would have had to wait until there was a decision of this Court that finally and --

what Congress had in mind was that it be finally and conclusively decided, both the validity of the rule the petitioner is relying on and its retroactivity, before they're going to get into Court. Congress did not intend that people should be able to bring second or successive habeases so that they can establish whether it's retroactive or not. And as shown in this case -- the petitioner in this case claims that it was totally clear after Sullivan that the rule in Cage should be made retroactive, but I think we've at least made substantial arguments it's not, and it's going to be -- there are going to be issues raised in these cases, and I think the Congress wanted this Court --

QUESTION: Mr. Feldman, the petitioner argues in the alternative that Sullivan made it retroactive, or that we could now in this case make it retroactive. What do you say about the second argument?

MR. FELDMAN: I think that the Court could, but I don't think that the Court should, make it retroactive. I think the key distinction --

QUESTION: But you agree we could.

MR. FELDMAN: Yes. I think the key distinction that the Court should keep in mind is between the refinement and the application of rules that are bedrock which I think is what Cage did, and I think a comparison

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the Cage decision with the decision in Victor v. Nebraska shows that that was a refinement of just precisely what the reasonable doubt instruction means --

QUESTION: But you do agree that Cage is a new rule?

MR. FELDMAN: Yes, I do.

QUESTION: But how can we reach the substantive retroactivity question here if we assume that we've never said it before -- that's the end, the court of appeals was right to dismiss. So how can we reverse the court of appeals?

MR. FELDMAN: I think the Court could do it because the question would really come down to whether the word made retroactive had a temporal component, that is, it had to have been done at the time he filed the petition, or whether it could be done some time later in the litigation. And it's our view that it doesn't necessarily have that temporal component. If you thought that it did have that temporal component, then you would stop after the first question.

QUESTION: No, but -- maybe I don't understand your answer. I mean, the only determination that the gatekeepers were supposed to make was the determination as to whether the case should go forward and that determined -- that turns on the retroactivity of the decision.

MR. FELDMAN: That's correct.

QUESTION: So if the decision was not retroactive before it gets here, the gatekeeper should have said, no, we should reverse them on that, and we should reach no other issue. And if we reach another issue, we're in dictum.

MR. FELDMAN: I don't think that that's correct, because it's true that that's what they should have done, but the consequences of them not doing that are that there are two questions that are presented to this Court in this case, and the Court in other cases -- again, the Court could just reach a --

QUESTION: But in your view, you are saying that --

QUESTION: No, but if the court of appeals was correct.

MR. FELDMAN: No, I think the court of appeals was clearly incorrect because this Court had not made Cage retroactive and, in our view, should not make Cage retroactive.

QUESTION: So you're saying they were wrong, but we're going to forget that because we are now going to say something which we had not said, which had we said it earlier, would have made them right. That's the reason.

MR. FELDMAN: That is sometimes what happens,

for example, when this Court overrules its own decision in a past case, where the lower court did not have the authority to do that but might have nonetheless --

QUESTION: But isn't this discussion a perfectly good reason to say, we should analyze it the way it was before the court of appeals and not do anything to alter that situation in the present case?

MR. FELDMAN: Well, that would be also -- the Court could -- the Court could do that. I think the Court has discretion as to -- I was only saying that I thought the Court could reach the other question if it chose to.

With respect to the retroactivity of Cage, the point of the rule in Teague was that good faith reasonable explications of rules of constitutional law -- even bedrock rules and very important rules of constitutional law should be validated and should not form the basis for later habeas review.

QUESTION: Thank you, Mr. Feldman.

MR. FELDMAN: Thank you.

QUESTION: Mr. Larson, you have three minutes remaining.

REBUTTAL ARGUMENT OF HERBERT V. LARSON, JR.

ON BEHALF OF THE PETITIONER

MR. LARSON: To respond to Justice O'Connor's question regarding the number of people who might be

affected, the number one thousand I would submit is very inaccurate. This instruction was not given in all criminal cases in Orleans Parish. It would also be subject to the statute of limitations under EDPA. Following Sullivan, people had to file Cage claims saying I had a Cage instruction. And so the number of people -- and this is based purely on an estimate from inmate counsel at the Louisiana State Prison -- there might be fifty or sixty people still in prison who had gotten a Cage instruction and, even then, since we are only dealing with the retroactivity issue, they would still have to surmount all of the very formidable procedural obstacles that otherwise apply in habeas cases.

The reason that Mr. Tyler did not raise this in his first petition to Federal court is because it wasn't available to him. His first petition was in 1988, Cage was handed down in 1990. Sullivan didn't come along until 1993, and as soon as Sullivan came along, Mr. Tyler timely filed his habeas petition.

QUESTION: How long a term was your client serving?

MR. LARSON: He's serving a life sentence, Your Honor.

QUESTION: A life sentence?

MR. LARSON: Life sentence. And in terms of the

unmistakable import of this Court's decision in Sullivan, seven circuit courts of appeal had considered this question, one of them en banc. Not one judge in any of those courts has ever suggested that Sullivan did not compel a finding that Cage was to be applied retroactively.

In terms of whether there is some ground between Gideon and Cage in terms of watershed rules, I would suggest that in Justice Harlen's concurring opinion in Mackey, he made it clear that that category, that second category, does have cases, and that cases will arise in that second category. It's not an empty box as one of the amici suggested in their brief, it is a box into which we put rules, new rules of law, that are fundamental. And what is fundamental about Sullivan is that it tells us that if a jury is given a yardstick that is two feet long, that's not sufficient. It has to be accurate because that is the central point of any jury trial, criminal jury trial. There are some decisions that are -- some errors that are so fundamental that a conviction obtained with that type of process should never be final. That's what Justice Harlen recognized in his entire retroactivity doctrine. If we obtained a jury verdict by flipping a coin --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Larson.

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The case is submitted.

(Whereupon, at 11:56 a.m., the case in the above-entitled matter was submitted.)

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