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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
MELVIN TYLER, :  
Petitioner :  
v. : No. 00-5961  
BURL CAIN, WARDEN. :  
- - - - -X

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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C O N T E N T S

PAGE

ORAL ARGUMENT OF

HERBERT V. LARSON, JR., ESQ.

On behalf of the Petitioner

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CHARLES E. F. HEUER, ESQ.

On behalf of the Respondent

24

JAMES A. FELDMAN, ESQ.

As amicus curiae in support of

Respondent

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REBUTTAL ARGUMENT OF

HERBERT V. LARSON, JR., ESQ.

On behalf of the Petitioner

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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

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

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

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

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

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

1 a broader standard than just said?

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

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

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

10 QUESTION: How would you define made?

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

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

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

25 QUESTION: So you think that it is the

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

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

7 Q QUESTION: In Sullivan.

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

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

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

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

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

25           QUESTION: But I think an equally simple plain

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 QUESTION: What you're saying --

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

16 MR. LARSON: Beg your pardon?

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

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

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

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

1 a watershed rule.

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

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

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

8 MR. LARSON: No, Your Honor.

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

11 MR. LARSON: Cage --

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

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

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

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

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

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

7 QUESTION: Is it Sullivan that's the watershed?

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

10 QUESTION: But is --

11 MR. LARSON: -- is the watershed.

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

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

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

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

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

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

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

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

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

15 What you really have is a watershed --

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

19 MR. LARSON: Yes.

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

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

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

2 --

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

7 MR. LARSON: We knew --

8 QUESTION: So what's watershed about Cage?

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

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

21 MR. LARSON: Yes, Your Honor.

22 QUESTION: So Sullivan's the watershed case.

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

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

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

7 MR. LARSON: Yes, Your Honor.

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

11 MR. LARSON: Statements in Sullivan, Your Honor.

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

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

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

17

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1 MR. LARSON: No, Your Honor.

2 QUESTION: No.

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

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

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

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

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

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

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

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

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

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

13                   MR. LARSON:  We can, and --

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

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

1 Teague retro --

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

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

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

20 MR. LARSON: Precisely, Your Honor.

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

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

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

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

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

13 QUESTION: That's not quite right.

14 QUESTION: That's incorrect, Mr. Larson.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 for rebuttal.

2 QUESTION: Very well, Mr. Larson.

3 Mr. Heuer.

4 ORAL ARGUMENT OF CHARLES E. F. HEUER

5 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

1 rule, but what is, other than Gideon?

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

6 QUESTION: But isn't the --

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

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

11 QUESTION: What makes it a watershed rule?

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

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

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

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

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

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

1 to be applied retroactively. Isn't that right?

2 MR. HEUER: Correct, Your Honor.

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

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

12 QUESTION: Can I just interrupt with one --

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

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

17 MR. HEUER: Excuse me, Your Honor.

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

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

1                   QUESTION:  Doesn't that ask the question what  
2   was the law at the time of the trial, and you're saying  
3   --

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

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

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

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

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

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

1 many are there?

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

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

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

14 QUESTION: What? All of those thousand --

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

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

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

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

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

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

3 MR. HEUER: Oh, yes.

4 QUESTION: Yes?

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

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

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

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

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

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

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

15 MR. HEUER: Well, I believe --

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

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

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

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

5 MR. HEUER: Correct.

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

9 MR. HEUER: Yes, Your Honor.

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

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

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

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

22 QUESTION: Because?

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

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

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

7 MR. HEUER: Yes, Your Honor.

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

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

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

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

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

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

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

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

6 MR. HEUER: Yes.

7 QUESTION: But they didn't say it said.

8 QUESTION: One of the problems with --

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

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

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

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

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

11 MR. HEUER: Right.

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

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

19 Thank you, Your Honor. I have nothing further.

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

22 ORAL ARGUMENT OF JAMES A. FELDMAN  
23 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE  
24 SUPPORTING THE RESPONDENT

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

1 please the Court:

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

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

12           MR. FELDMAN: I don't think there is. I think  
13 the fairest reading of the statute is that it has to be  
14 made  
15 -- the specific rule relied upon by the second petitioner  
16 has to be made retroactive by the Supreme Court, not by  
17 some other court --

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

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

1 QUESTION: Which case?

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

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

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

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

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

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

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

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

1 first habeas.

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

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

6 MR. FELDMAN: On an original petition --

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

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

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

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

22 QUESTION: What's the distinction?

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

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

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

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

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

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

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

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

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

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

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

21 QUESTION: But you agree we could.

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

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

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

6 MR. FELDMAN: Yes, I do.

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

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

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

45

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1 MR. FELDMAN: That's correct.

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

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

13 QUESTION: But in your view, you are saying that  
14 --

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

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

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

25 MR. FELDMAN: That is sometimes what happens,

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

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

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

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

18 QUESTION: Thank you, Mr. Feldman.

19 MR. FELDMAN: Thank you.

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

22 REBUTTAL ARGUMENT OF HERBERT V. LARSON, JR.

23 ON BEHALF OF THE PETITIONER

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

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

14 The reason that Mr. Tyler did not raise this in  
15 his first petition to Federal court is because it wasn't  
16 available to him. His first petition was in 1988, Cage  
17 was handed down in 1990. Sullivan didn't come along until  
18 1993, and as soon as Sullivan came along, Mr. Tyler timely  
19 filed his habeas petition.

20 QUESTION: How long a term was your client  
21 serving?

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

24 QUESTION: A life sentence?

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

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

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

25           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.)