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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 19-5807, Edwards
5 versus Vannoy.

6 Mr. Belanger.

7 ORAL ARGUMENT OF ANDRE BELANGER

8 ON BEHALF OF THE PETITIONER

9 MR. BELANGER: Mr. Chief Justice, and
10 may it please the Court.

11 "A verdict by 11 is no verdict at all"
12 is a line from the Court earlier this year that
13 ended Louisiana's nonunanimous jury scheme. On
14 paper, it restored the full breadth of the Sixth
15 Amendment's jury trial right to Louisianans.

16 But we need to place the effect of
17 this ruling into perspective. This laudable
18 ruling would only apply to cases then pending or
19 recently adjudicated. It meant nothing to
20 Mr. Edwards, who is serving a life sentence at
21 Angola for a verdict that would be illegal
22 everywhere else, as Louisiana is the only place
23 that would jail you for natural life on a
24 nonunanimous verdict.

25 Ultimately, the question before the

1 Court is, why should the Sixth Amendment mean
2 something less to Mr. Edwards? Members of the
3 Ramos Court were divided on how to reconcile the
4 fractured decision in Apodaca with then existing
5 precedents. This division cleared two paths to
6 holding that Ramos applies retroactively under
7 Teague, two paths for providing a remedy to
8 those jailed by a jury scheme we know was
9 morally wrong at its inception and is
10 unconstitutional.

11 For some justices, Apodaca was dead on
12 arrival since its deciding votes rationale was
13 foreclosed by precedent. For these justices,
14 Apodaca provided no precedential value and Ramos
15 is an old rule dictated by precedent --
16 precedents that simply restored the Sixth
17 Amendment's full measure either through the Due
18 Process Clause or the Privileges or Immunities
19 Clause of the Fourteenth Amendment.

20 For other justices, Apodaca was such a
21 wrongly decided decision that it needed to be
22 explicitly overruled. For these members of the
23 Court, Ramos should be a watershed rule
24 requiring retroactivity as this restores
25 fairness and accuracy to jury trials in

1 Louisiana.

2 Both paths remedy something we all
3 know to be wrong. Both paths will provide the
4 promise of a fair trial to all Louisianans.

5 Mr. Chief Justice, I'm ready to
6 entertain questions from the Court.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. I -- I think your biggest hurdle is
9 the Court's decision in DeStefano, where we held
10 that the jury trial right itself should not be
11 applied retroactively. What -- what we're
12 talking about here is a subordinate right to a
13 unanimous verdict, a lesser included right. How
14 do -- how do you get around DeStefano?

15 MR. BELANGER: There's two
16 considerations I would like to bring to the
17 Court's attention. DeStefano itself was just
18 dealing with the judge's ability to make a
19 decision, and as this Court noted in Duncan, you
20 cannot say whether or not necessarily that a
21 judge-rendered decision is more or less accurate
22 than a jury-rendered decision.

23 Our case here deals with the in --
24 intricacies of what goes on in the jury room. I
25 will also note that I think the more analogous

1 case, Mr. Chief Justice, is the Brown decision.
2 It too provided the same retroactivity standard
3 that was incorporated in DeStefano which relied
4 heavily on state interest, and that decided to
5 apply the Burch decision retroactively, which
6 prevented Louisiana from having nonunanimous
7 petit juries.

8 CHIEF JUSTICE ROBERTS: You know, in
9 Ramos, five of us thought that Apodaca was a
10 precedent that was being overruled and therefore
11 was the most compelling evidence that it was a
12 new rule. Were those five justices
13 unreasonable?

14 MR. BELANGER: Well, when we get to
15 the reasonableness standard of -- of -- of the
16 jurists, it's on objective criterion. I think
17 that we can all agree that the Sixth Amendment
18 requires a unanimous jury and that we can all
19 agree that the Bill of Rights are fully
20 incorporated to the states at this point.

21 Normally, the reasonable jurist
22 standard goes hand in hand with being dictated
23 by precedent, but Apodaca was such a bizarre
24 decision that it broke those two hands apart,
25 and that's why it is in a unique universe of

1 one, Mr. Chief Justice.

2 CHIEF JUSTICE ROBERTS: I think,
3 particularly given your answer on DeStefano,
4 that -- that you have something of a burden of
5 establishing that the unanimous jury is -- is
6 necessary to avoid an impermissibly large risk
7 of an inaccurate conviction.

8 What -- what is your best empirical
9 evidence for that?

10 MR. BELANGER: Well, I have two.
11 First is we have amici have provided some
12 statistics on the actual exonerations coming out
13 of Louisiana. Of the 65 or so cases that
14 they've identified, half of those cases were
15 eligible for a nonunanimous verdict, and from
16 that population of half, half of those, or one
17 quarter of the 65, were actual exonerations of
18 nonunanimous jury verdicts.

19 I would also turn the Court's
20 attention to a law review article published in
21 Notre Dame after Gideon versus Wainwright was
22 decided written by Abe Krash. It's the Right to
23 a Lawyer: The Implications of Gideon versus
24 Wainwright.

25 Krash was one of the brief authors in

1 Gideon, and he reported data in that that
2 Florida at that time had about 8,000 people in
3 jail and 4500 of those were jailed without a
4 lawyer. And -- and -- and so the system
5 accounted for that. If Gideon's going to be our
6 watershed rule, we -- we can look to see just
7 the numbers there, and they're radically
8 different from what we have here.

9 And -- and so you -- you have a system
10 where we look to see whether or not the system
11 itself was fair, and a nonunanimous jury is not
12 fair because it flies in the historical
13 tradition of this country.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas.

17 JUSTICE THOMAS: Thank you, Mr. Chief
18 Justice.

19 Counsel, we agree this is a -- unlike
20 Montgomery, this is a procedural rule. So can
21 you -- other than Gideon, can you think of
22 another case where we have said that a
23 procedural rule was retroactive?

24 MR. BELANGER: Well, not since Teague.
25 But, when we go back to the Brown decision, that

1 was applied -- that was applying Burch
2 retroactively and it dealt with the same issue
3 of unanimity in a Louisiana jury trial.

4 JUSTICE THOMAS: The -- on your
5 statistics that you -- or the data that you just
6 suggested about unanimous versus nonunanimous
7 juries, how do you respond to the arguments on
8 the other side that the statistics and the
9 studies are a mixed bag and really doesn't move
10 the dial very much one way or the other?

11 MR. BELANGER: Well, we have to look
12 at whether or not the process seems fair. Our
13 tradition puts together the reasonable doubt and
14 the unanimous jury together. We want people to
15 come together as a community to be convinced
16 beyond a reasonable doubt that this person needs
17 to be deprived of their liberty.

18 And -- and -- and so there -- there
19 are studies that suggest that the effectiveness
20 of deliberation is simply cut short when you
21 don't have to have a unanimous jury, and that
22 systemically leads to the possibility of an
23 inaccurate conviction.

24 When we go back to those Gideon
25 numbers out of Florida I just mentioned, I mean,

1 certainly, not all of the 4500 people would have
2 been convicted, but we're talking about more
3 than half the population in the jail at that
4 time. It leaves room for the premise that the
5 system can be inaccurate and unfair even though
6 it may in -- in -- in many instances lead --
7 lead to conceivably the right decision.

8 JUSTICE THOMAS: But I don't know how
9 you can -- how it translates right to counsel
10 versus unanimous jury. What has the Court
11 said -- what have we said in our cases about
12 nonunanimous juries?

13 MR. BELANGER: Well, going back to the
14 Brown decision, it was required, that, you know,
15 Burch and Brown both required unanimous juries.
16 And --

17 JUSTICE THOMAS: We've had Apodaca on
18 the book for -- books for quite some time. I
19 think the cases we have actually, if not
20 endorsed it, certainly saw it sitting
21 comfortably if not awkwardly with our case law.

22 MR. BELANGER: I would respectfully
23 disagree with that. While this Court has
24 acknowledged Apodaca for quite some time, I do
25 not believe that Apodaca was used for what it's

1 being argued to stand for and thus we're going
2 to have a watered-down Bill of Rights. You
3 know, it --

4 JUSTICE THOMAS: Let me ask you -- let
5 me change a bit and go a little bit different
6 direction. Let's assume that the Court finds
7 that this is retroactive. How do you get around
8 the relitigation bar in 2254(d)(1) of AEDPA?

9 MR. BELANGER: Sure. I -- I have two
10 points to make on that.

11 First, if the Court were just simply
12 to decide retroactivity and save for another day
13 any procedural objections, this case will go
14 back down to the Louisiana courts, where we will
15 have a -- a viable claim to make on state
16 post-conviction.

17 Secondly, when we go down to a --
18 well, first of all, I don't necessarily agree
19 that there was a decision on the merits for
20 starters for purposes of (d)(1), but even if the
21 Court were inclined to think there was, when we
22 go to (e)(2)(A), subsection 1, new rules made
23 retroactively by the United States Supreme Court
24 would allow petitions like Mr. Edwards' to get
25 in under a different portion of AEDPA.

1 So, you know, I don't think we can
2 read those two statutes together that they
3 should -- it -- it really necessarily poses a
4 problem.

5 JUSTICE THOMAS: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer.

8 JUSTICE BREYER: Thank you.

9 How -- how many approximate -- what's
10 your rough estimate of -- if you win, how many
11 new trials in Louisiana will be called for?

12 MR. BELANGER: At -- at this point, we
13 believe the maximum population is 1600 people.
14 I do not believe that all of those 1600 people
15 will be able to establish that they had a
16 nonunanimous jury. I think amici did a good job
17 breaking down the statistics. And it's probably
18 closer to a thousand. And from that, there's
19 different subsets. Some of these people will
20 either be eligible for parole soon or they will
21 benefit from a change on the habitual offender
22 law or they are also in jail for a very
23 significant unanimous jury conviction.

24 JUSTICE BREYER: And can the Louisiana
25 system handle that?

1 MR. BELANGER: Oh, yes, sir. I mean,
2 we're --

3 JUSTICE BREYER: How --

4 MR. BELANGER: -- only talking
5 about --

6 JUSTICE BREYER: -- about how many
7 trials are there in a year in -- in Louisiana?

8 MR. BELANGER: I don't know the --

9 JUSTICE BREYER: Or how --

10 MR. BELANGER: -- I do not know the
11 exact number. It varies by jurisdiction, but I
12 believe there's 145,000 cases filed per year,
13 and we're really looking at our estimates of
14 maybe two to three cases per prosecutor. So
15 the -- the system is more than capable of
16 accommodating this type of caseload.

17 JUSTICE BREYER: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: This whole quest for
20 watershed rules is rather strange. We keep
21 saying there were some in the past that were
22 discovered, but it's not clear that there are
23 any new -- any new ones that haven't yet been
24 discovered, but, you know, maybe, just maybe
25 there might be a watershed rule out there that

1 hasn't been discovered.

2 It -- I mean, it sort of reminds me of
3 something you see on some TV shows about the --
4 the quest for an animal that was thought to have
5 become extinct, like the Tasmanian tiger, which
6 was thought to have died out in a zoo in 1936,
7 but every once in a while, deep in the forests
8 of Tasmania, somebody sees a footprint in the
9 mud or a howl in the night or some fleeting
10 thing running by, and they say, a-ha, there
11 still is one that exists.

12 So, I mean, all of that is a wind-up
13 to getting back to the question that Justice
14 Thomas asked. Why should we decide whether this
15 Teague exception applies to a habeas petition
16 brought by a state prisoner without first
17 deciding whether it's barred by AEDPA?

18 MR. BELANGER: Well, the retroactivity
19 issue, as -- as I said earlier, new rules made
20 retroactive by the United States Supreme Court
21 can be litigated by another portion of AEDPA.

22 Secondly, I do believe that there is a
23 legit -- legitimate disagreement as to whether
24 or not this case was actually decided on the
25 merits in state post-conviction. My

1 recollection of what we had happen on the record
2 below is that we were summarily dismissed for no
3 legal or -- or -- or factual basis. So I don't
4 believe the -- the merits were fully addressed.

5 JUSTICE ALITO: Another oddity about
6 applying the -- the watershed rule inquiry in
7 this particular case is that the test for a
8 watershed rule depends pretty heavily on Justice
9 Harlan's decision, his opinion in the Mackey
10 case, which -- where he relied on exactly the
11 rationale, the concept of ordered liberty, Palko
12 versus Connecticut rationale, that the lead
13 opinion in Ramos excoriated. So is -- would it
14 be consistent to apply it here?

15 MR. BELANGER: Well, I -- I -- I do
16 think this is a -- a watershed rule. There are
17 so many parallels between this case and Gideon.
18 Both recognized fundamental bedrock principles,
19 and both had to deal with cases that were
20 inconsistent with those principles and restore
21 the -- the fundamental rights at issue. For
22 Gideon, it was the right to appointed counsel,
23 and, here, it's the unanimous jury requirement.

24 JUSTICE ALITO: Well, isn't part of a
25 watershed rule inquiry whether it's consistent

1 with ordered liberty?

2 MR. BELANGER: Well, it -- it is, and
3 I don't know how we say that a nonunanimous --

4 JUSTICE ALITO: Yeah, but didn't --

5 MR. BELANGER: -- jury is --

6 JUSTICE ALITO: -- didn't -- didn't

7 Justice Gorsuch's opinion repudiate that,
8 ridicule that approach?

9 MR. BELANGER: Well, I read Justice
10 Gorsuch's opinion as not finding precedential
11 force with Apodaca.

12 JUSTICE ALITO: Yeah, and Justice
13 Powell's opinion in Apodaca was based on what?

14 MR. BELANGER: Well, Justice Powell
15 thought that the Sixth Amendment wasn't fully
16 incorporated to the states, and we know that to
17 be wrong.

18 JUSTICE BREYER: He thought it wasn't
19 incorporated for what reason?

20 MR. BELANGER: He didn't believe that
21 the Sixth Amendment was -- was fully
22 incorporated through the due process clause of
23 the Fourteenth Amendment.

24 JUSTICE ALITO: All right. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor.

2 JUSTICE SOTOMAYOR: Counsel, can you
3 explain that 1600 number? Is that all prisoners
4 that are in jail currently, whether it's a year
5 old or not or post- -- past their AEDPA time?
6 Is that the total prison population?

7 MR. BELANGER: That -- those -- when
8 you mean by prison population -- if you mean
9 that -- are those the people that are in jail,
10 yes, Justice Sotomayor.

11 JUSTICE SOTOMAYOR: All right. And so
12 your statistic is based -- you're saying some of
13 them may not be able to prove that they were
14 convicted by a -- a nonunanimous verdict, is
15 that correct?

16 MR. BELANGER: That's correct. Some
17 of that 16 -- some of those 1600 may not be able
18 to do that, Your Honor.

19 JUSTICE SOTOMAYOR: Why are you
20 guessing a thousand?

21 MR. BELANGER: Based on amici's
22 efforts to pull the court records on those 1600
23 people. They haven't been able to establish
24 that yet. But, even for purposes of just
25 assuming that all 1600 could prove it, it is

1 still the burden on the petitioner to show that
2 they had a nonunanimous jury. And -- and -- and
3 there are many instances we may find that
4 lawyers didn't simply ask for the polling. We
5 -- that would just be on a case-by-case basis.

6 JUSTICE SOTOMAYOR: All right. Thank
7 you, counsel.

8 MR. BELANGER: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan.

10 JUSTICE KAGAN: Mr. Belanger, as you
11 know, I thought that Apodaca was a precedent, so
12 you would have a very steep climb to get me to
13 think that Ramos was anything other than a new
14 rule. So I want to focus on the watershed
15 inquiry, and in that inquiry, we've talked a lot
16 about accuracy. And I think somebody previously
17 asked you about your empirical evidence, and
18 I'll just give you sort of my sense that the
19 empirics here are sparse, maybe surprisingly
20 sparse, as to how this unanimity requirement
21 works with respect to what I take to be the
22 ordinary meaning of accuracy, which is simply a
23 reduction in the error rate in trials.

24 And -- and so too it seems like one's
25 intuition is not necessarily in your corner,

1 that it might be that the unanimity rule allows
2 more guilty people to go free than it -- than it
3 stops innocent people from being convicted, or
4 at least it's just not certain.

5 So I -- I guess what I -- I'd like to
6 ask you is whether your -- well, I mean, number
7 one, do you just contest all of everything that
8 I just said? But, number two, are -- are you
9 talking about accuracy in some different sense?
10 Your first sentence to us was, "A verdict by a
11 nonunanimous jury is no verdict at all." And
12 then you talked about a verdict can be
13 inaccurate and unfair even though it leads to
14 the right decision.

15 And I guess what I'm asking is, are
16 you talking about and do you think in our cases
17 we've been talking about accuracy in some
18 different sense than simply the reduction of
19 errors in whatever direction?

20 MR. BELANGER: I -- I do not think
21 that accuracy needs to necessarily be
22 statistics-driven. I've just provided the
23 statistics that were available for illustrative
24 purposes. A verdict by 11 is no verdict at all
25 is an accurate statement, the way -- the -- the

1 way the framers intended the Sixth Amendment
2 jury trial right to be.

3 I go back again to Gideon, which this
4 Court has recognized as the exemplar for the
5 watershed rule. If the figures in the Notre
6 Dame article were accurate, we're talking about
7 three times as many more people as we have
8 affected in Louisiana, and we're also talking
9 about half of that prison population where,
10 here, we may be talking about 5 percent.

11 I -- I do believe it is a -- a
12 systemic approach to say whether or not a trial
13 that's deprived someone of his liberty without a
14 unanimous verdict is fair.

15 JUSTICE KAGAN: Could I ask you about
16 your argument which hasn't come up so far today
17 but featured prominently in your briefs about
18 the racial aspect of -- of -- of this rule,
19 picking up on Justice Gorsuch's opinion and
20 Justice Kavanaugh's opinion about how this rule
21 started as a -- the nonunanimity rule started as
22 a racially discriminatory one.

23 How does that play into the Teague
24 analysis and how can it play given that we've
25 held Batson non- -- nonretroactive?

1 MR. BELANGER: Well, I -- I think this
2 is a case that is different than Batson. A -- a
3 Batson case is something where you're looking at
4 the particular actions of an individual
5 prosecutor in an individual case, and Batson
6 requires speculation. We don't know if there
7 would have been a unanimous verdict or not with
8 a Batson-compliant jury.

9 Here, we know. We can -- we can show
10 that this was not a unanimous verdict. We had
11 at least one juror and sometimes two jurors vote
12 not guilty. And the types of cases that we'll
13 be talking about moving forward, the burden will
14 be on the petitioner to show I actually had a
15 nonunanimous jury. And -- and so it is
16 measurable, whereas Batson was not.

17 I do think that the racial origins of
18 the -- the -- the nonunanimous jury is something
19 to consider. It shows that this type of system
20 was set up for the purpose of not being
21 accurate, for the purpose of not being fair.
22 And even though the state has tried to cleanse
23 itself, it still has a negative racially
24 disproportionate impact today.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch.

2 JUSTICE KAGAN: Thank you.

3 JUSTICE GORSUCH: Good morning,
4 counsel. I'd like to start with your first
5 argument, that Ramos did not announce a new
6 rule. I -- I'm certainly sympathetic to that
7 point of view. I believe the Court had, for
8 well over 100 years, spoken about the unanimity
9 requirement, as you know, but only a plurality
10 agreed with me on that, and -- and there were a
11 couple of joiners who thought that Apodaca was a
12 precedent of the Court. A single justice
13 speaking for himself defined existing precedent
14 was nonetheless itself a precedent that we had
15 to abide. And, of course, the dissenters took
16 that point of view.

17 How -- how -- how can we get to where
18 you want us to go in that light? Do we account
19 for the dissenters' position? Should we
20 discount the dissenters' position? Even if we
21 do discount that, what about the fact that the
22 majority itself had different views?

23 MR. BELANGER: I would have two
24 responses.

25 First, I believe you all's opinion in

1 -- in Ramos did set up two paths for the Court
2 to decide retroactivity.

3 Secondly, I don't -- while I respect
4 the dissenters' viewpoint and realize that may
5 be how they feel today, I do not necessarily
6 count the votes in dissent to say explicitly
7 we've overruled Ramos -- Apodaca, rather. I
8 apologize.

9 JUSTICE GORSUCH: So I'm -- I'm
10 just -- just flesh that out for me a little bit
11 more as to how you see this as not a rule, not a
12 new rule. You know, certainly, Justice Ginsburg
13 and -- and -- and Justice Breyer and I thought
14 that's correct, but some of the other joiners
15 even on the majority did not. What about them,
16 if you -- if you have us discount the dissents?

17 MR. BELANGER: Yeah. So, you know,
18 the Sixth Amendment has always required
19 unanimity, and then going back to the Malloy
20 versus Hogan decision, we have said that we do
21 not have a watered down Bill of Rights so that
22 the two lines of precedent there, Sixth
23 Amendment requires unanimity and that the Sixth
24 Amendment is fully incorporated to the states,
25 leads to one logical conclusion and that is that

1 Louisiana had to apply a unanimous jury scheme.

2 And -- and -- and, you know, Justice
3 Powell's decision is just a -- a unique opinion.
4 It is one that requires us, if we -- if we are
5 to follow it, to go -- to take a -- what's
6 considered a -- a fundamental Bill of Right and
7 marry it up to something that was foreclosed as
8 at the time the opinion was given, and I just
9 don't think that is something you'll ever see
10 ever again.

11 I -- I think we will sit down people
12 to explain that these are the two lines of
13 precedent. Louisiana has a 10-2 system. Do you
14 think that would hold water? I think people
15 would say no if they did not know about the
16 Apodaca decision.

17 JUSTICE GORSUCH: I surely hope you're
18 right.

19 With respect to the watershed route,
20 your alternative route, you -- you -- you've
21 gotten different variations of the question,
22 but I -- I guess the way I'd -- I'd put it is
23 Teague holds out this promise that there's going
24 to be some watershed rule in the hands of Gideon
25 as an example, which predates Teague, of course.

1 But then, ever since, we haven't -- we
2 haven't found a single one. Is -- is this a
3 false promise? If it is, should we just admit
4 it's a false promise? If it isn't a false
5 promise, then what counts, what principle counts
6 if DeStoff -- DeStefano doesn't count, Ring
7 doesn't count, Batson doesn't count, Crawford
8 doesn't count? Are we -- are we just -- who are
9 we kidding and -- and what should we do about
10 it?

11 MR. BELANGER: Your -- Your Honor,
12 I -- I -- I -- I couldn't frame it better.
13 It's -- for Teague to mean anything, there has
14 to be something that counts, and that's why I
15 think that Ramos is more analogous to Gideon
16 than any of these other cases that we have
17 decided in the past.

18 Both decisions restored our
19 understanding of fundamental bedrock principles.
20 Both of these decisions took away a -- a -- a
21 case that deviated from those prior precedents,
22 and because you'll never see an opinion like
23 Apodaca again, we can all rest assured that this
24 is not going to open any type of floodgate.
25 This has to be a watershed rule if you find that

1 Apodaca was explicitly overruled by Ramos.

2 JUSTICE GORSUCH: Thank you, Counsel.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: Thank you, Chief
6 Justice.

7 And good morning, counsel. I had been
8 concerned that your approach would require us to
9 chart a new half on retroactivity. As Justice
10 Thomas and Justice Alito pointed out, we have a
11 long line of cases, and you were just discussing
12 with Justice Gorsuch post-Teague cases, such as
13 Wharton about the Crawford rule and -- and many
14 others where we have declined to apply a new
15 rule retroactively on collateral.

16 I'm also, though, concerned about
17 the -- some of the pre-Teague cases which I
18 think are on point here. The Chief Justice
19 brought up DeStefano. You've -- you've equated
20 Ramos to Gideon. The dissenters in DeStefano
21 equated the jury trial right itself to Gideon,
22 Justice Douglas and Justice Black, in their
23 dissents, and I just want to give you an
24 opportunity. The -- the -- the jury trial right
25 not applying retroactively but the unanimous

1 jury right applying retroactively on collateral
2 review seems like an asymmetry.

3 MR. BELANGER: Sure. Two -- two
4 responses to that.

5 First of all, I think we have to
6 remember that DeStefano was decided by a
7 different standard of retroactivity than Teague.
8 And the three factors in existence at that time,
9 two of them were heavily relate -- weighted
10 towards the state's reliance interest that
11 was reliance about law enforcement and the
12 overall effect on the administrative --
13 administration of justice with the retroactive
14 application. Those two enumerated factors are
15 removed from Teague analysis. We just have to
16 focus on fairness and accuracy.

17 And -- and -- and the second point is
18 that that issue would -- would -- would have
19 required the Court to say that a judge-made
20 decision is somehow so inconsistent in accuracy
21 and fairness than with a -- a jury decision.
22 And -- and that has not been the position of
23 this Court, so that is a bit different.

24 JUSTICE KAVANAUGH: Okay. On the
25 Batson angle, as you know, in Ramos, I thought

1 the Batson precedent was an important --
2 important one in thinking about how the
3 nonunanimous jury actually operated in practice,
4 and I think Batson is a -- a landmark opinion
5 and one of the more important opinions in this
6 Court's history in terms of ensuring that trials
7 occur without racial discrimination.

8 Yet, in *Allen v. Hardy*, we did not
9 apply Batson retroactively. I know Justice
10 Kagan referenced this with you. And that's I
11 guess another asymmetry I'm concerned about here
12 in -- in this case. And your distinction of --
13 of *Allen v. Hardy* would be?

14 MR. BELANGER: Well, it -- I'm sorry,
15 my distinction, Your Honor, would be that *Allen*
16 versus *Hardy* was also using the pre-*Teague*
17 standards that heavily relied upon the reliance
18 factors of the state.

19 And, secondly, with -- again, with
20 *Batson* challenges, they're hard to measure.
21 You -- you just do not know if a
22 *Batson*-compliant jury would or would not have
23 found guilty beyond a reasonable doubt --

24 JUSTICE KAVANAUGH: Well, I think
25 that's --

1 MR. BELANGER: -- whereas, here, I can
2 measure it.

3 JUSTICE KAVANAUGH: Yeah, that's -- I
4 -- I think that's a fair point.

5 Lastly, I wanted to mention, you've
6 several times cited Brown versus Louisiana. And
7 I agree with you the plurality there is
8 supportive of you, but the opinion that -- that
9 was decisive was the concurring opinion of
10 Justice Powell and Justice Stevens, and they
11 would have applied Burch retroactively only on
12 direct cases, pending on direct, not on
13 collateral. Any response to that?

14 MR. BELANGER: Yes. You know, with
15 the -- the Teague analysis now, we do really
16 make that distinction between direct and
17 collateral review, but Brown was illustrative of
18 the fact that the standard at that time applied
19 the same standards on direct and on collateral
20 review. I -- I think the -- the premise that
21 unanimity was required and under a standard of
22 review applicable at the time, it was.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Justice Barrett?

1 JUSTICE BARRETT: Mr. Belanger, I want
2 to press you a little bit more on Justice
3 Kagan's questions to you about what accuracy
4 means, because when I heard your answers to
5 Justice Kagan, it was hard for me to distinguish
6 between your view of the accuracy prong and your
7 view of the bedrock procedural element prong,
8 the fairness of the proceeding, because you kept
9 saying, well, it's possible for a nonunanimous
10 jury verdict to have reached the right result,
11 i.e., maybe convicting someone who actually, in
12 fact, had committed the crime, while still being
13 unfair.

14 Can you -- can you help me understand
15 a -- a little bit more how your two prongs are
16 distinct of what "accuracy" means?

17 MR. BELANGER: Yeah. Well, the -- the
18 accuracy component is we're looking to see
19 whether or not the -- the -- the system of how
20 the trial took place was fair.

21 And in -- in Gideon versus Wainwright,
22 we have said that all of these cases where
23 people were not represented by counsel was not
24 fair. But I can't tell you today how many of
25 those people would have been exonerated.

1 JUSTICE BARRETT: Well -- well, right.

2 MR. BELANGER: But this is --

3 JUSTICE BARRETT: You may not be able
4 to identify a specific number, but, I mean, I
5 think what Gideon was saying is that there is a
6 significant chance that someone may have been
7 convicted when he otherwise would not have been
8 or when it was -- it reached the wrong result.

9 I -- I guess I don't understand -- you
10 know, you've got statistics saying that in
11 Louisiana, as many unanimous verdict defendants
12 have been exonerated or even more than those who
13 had been convicted by nonunanimous juries, or
14 that Oregon has a lower rate per capita of
15 exonerations than those states that do have
16 unanimous rights.

17 So -- so what does it mean? Are we
18 trying to ask whether juries wrongfully
19 convicted someone because the majority saw the
20 case in the wrong way and the -- and the one
21 dissenter in the jury or the two dissenters in
22 the jury were right? Can you just -- I'm just
23 having trouble understanding what we're
24 measuring.

25 MR. BELANGER: Well, this type of

1 verdict would not be a verdict anywhere else but
2 Oregon. So, fundamentally, at its premise, it
3 is not a conviction.

4 The -- trying to look at -- at
5 fairness in -- in dealing with how this can --
6 how this jury verdict can -- can stand, I have
7 to go back to why it was created in the first
8 place. This jury scheme was created so it would
9 not be accurate, so it could disproportionately
10 impact a segment of the population. And it is
11 true that it still has those negative effects
12 even today.

13 JUSTICE BARRETT: Well, in cases like
14 Crawford or -- or even Batson, you pointed out
15 that, you know, it -- you called it speculative
16 in Batson as to whether a juror that had been
17 struck would have voted differently, but, here,
18 we know that someone would have voted
19 differently. I mean, Batson is an egregious
20 example of racial contamination and
21 discrimination in a jury that may well have
22 affected the verdict.

23 It seems to me that it would be
24 speculation here too to think that the case
25 would have come out differently with a unanimous

1 jury.

2 MR. BELANGER: Well, I don't think we
3 have to speculate here. In our particular case,
4 I have one juror on -- on every count that voted
5 not guilty, and I have another juror on some
6 counts that voted not guilty. People that want
7 to raise Ramos retroactively will have to come
8 into court and show that they had a nonunanimous
9 jury. And so there is no speculation as to
10 whether or not we have a proper unanimous
11 verdict in these types of cases.

12 JUSTICE BARRETT: Okay. Thank you,
13 counsel.

14 CHIEF JUSTICE ROBERTS: Counsel, a
15 minute to wrap up.

16 MR. BELANGER: Ramos is retroactive in
17 either of two ways. For members of this Court
18 who viewed Apodaca as an anomaly that did not
19 alter prevailing constitutional standards, Ramos
20 was logically dictated by precedent and set out
21 an old rule. For members of this Court who
22 viewed Ramos as announcing a new rule, it is a
23 watershed rule of criminal procedure akin to
24 Gideon.

25 Jury unanimity predates the founding

1 and ranks amongst our most indispensable rights.
2 It significantly improves the accuracy and
3 fairness because a verdict taken from 11 is no
4 verdict at all.

5 The state has no legitimate interests
6 in avoiding retroactivity. Louisiana's
7 nonunanimous jury scheme was thoroughly racist
8 and discriminatory in its origin. As members of
9 this Court said in Ramos, we should not
10 perpetuate something we all know to be wrong
11 only because we fear the consequences of being
12 right.

13 Thank you, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 General Murrill.

17 ORAL ARGUMENT OF ELIZABETH MURRILL

18 ON BEHALF OF THE RESPONDENT

19 MS. MURRILL: Thank you, Mr. Chief
20 Justice, and may it please the Court:

21 Louisiana adopted its 10-2 jury
22 verdict rule in 1974 after a new constitutional
23 convention where delegates expressly relied on
24 Apodaca v. Oregon and Johnson v. Louisiana when
25 revising its criminal procedures.

1 Petitioner minimizes Louisiana and
2 Oregon's reliance interests and dismisses Puerto
3 Rico's entirely. But there can be no doubt that
4 declaring the Ramos rule retroactive unsettles
5 thousands of cases that involve terrible crimes
6 in all three jurisdictions. Requiring new
7 trials and long final criminal cases would be
8 impossible in sum and particularly unfair to the
9 victims of these crimes.

10 Ramos is unquestionably a new rule.
11 This Court has held on numerous occasions that a
12 discarded precedent is the clearest sign of a
13 new rule. Six justices in Ramos agreed that
14 Apodaca was a binding precedent. And virtually
15 every jurist, state and federal, addressing the
16 issue before Ramos viewed it that way as well
17 for almost 50 years.

18 Petitioner concedes that Ramos
19 announced a procedural rule so Ramos only
20 applies retroactively if it's a watershed rule.

21 While undoubtedly important, Ramos
22 isn't a watershed rule. A supermajority verdict
23 does not render a trial fundamentally unfair,
24 nor does it seriously undermine factual accuracy
25 of the verdict. In some cases, unanimity might

1 improve accuracy, but in others, it might
2 diminish it. Here, Edwards confessed to rape
3 and armed robbery and was identified by one of
4 his victims. Because Ramos was decided long
5 after Edwards' conviction became final, the
6 Teague retroactivity bar should prevent him and
7 others like him from benefiting from Ramos's
8 holding.

9 This Court should affirm the Fifth
10 Circuit's denial of a certificate of
11 appealability.

12 CHIEF JUSTICE ROBERTS: General, you
13 talk about Ramos's overruling Apodaca, but it's
14 questionable exactly what it overruled. It -- I
15 think it's more accurate to say it overruled the
16 decision rather than the opinion because it's
17 not really clear what the -- what the opinion
18 was. So that -- doesn't that discount the
19 conclusion that it's a new decision if it's --
20 it's not the same as overruling a typical
21 precedent?

22 MS. MURRILL: No, Mr. Chief Justice.
23 I think that -- so for -- so, for one thing, I
24 think that the question is what -- how lower
25 courts would have perceived it when they were

1 applying the rule at the time. And this Court
2 even in Ramos recognized that the Court itself
3 has been studiously ambiguous and even
4 inconsistent about what Apodaca might mean.

5 But there's no question that its
6 result was binding. I think its result was
7 always binding on lower courts. And this Court
8 has also very carefully guarded its right to
9 overrule its own precedent. Even where it was
10 the result that was binding, it's not the
11 reasoning.

12 CHIEF JUSTICE ROBERTS: Your friend
13 tells us that over -- making Ramos retroactive
14 is not going to have a very significant impact
15 on the criminal justice system in Louisiana. It
16 -- do you agree with his math, I guess, that
17 it's going to be simply two or three additional
18 cases per prosecutor in the state?

19 MS. MURRILL: So we absolutely
20 disagree with that math, and I think that it
21 is -- it's certainly not fair to suggest that we
22 can just distribute all serious felony, 2,000 --
23 nearly, by their end number, 1600 or more new
24 appeals and new trials for people that might be
25 retroactively impacted by this. You can't just

1 hand out cases to anybody who happens to be an
2 assistant district attorney. I mean, some of
3 those people actually enforce laws in city court
4 and -- or do -- you know, they collect money
5 from -- they do civil cases. I mean --

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MS. MURRILL: -- it's just not fair to
9 spread them out that way.

10 CHIEF JUSTICE ROBERTS: Justice
11 Thomas.

12 JUSTICE THOMAS: Thank you, Mr. Chief
13 Justice.

14 Counsel, there's been some discussion
15 about what we thought on this Court about
16 Apodaca and the decision, et cetera, and there
17 has been some confusion, but in the lower
18 courts, do you know of any court that did not
19 think that Apodaca permitted or perhaps allowed
20 the use of nonunanimous juries or did not -- or
21 actually did not think that Apodaca held that
22 unanimous juries were permissible, nonunanimous
23 juries were permissible?

24 MS. MURRILL: No, Justice Thomas, not
25 a single one. State and federal judges to --

1 100 percent of them believed that it was settled
2 precedent. And, in fact, the petitioner even in
3 his habeas petition acknowledged that it would
4 settle the petition, as -- as he did at the time
5 that he brought this issue up in front of the
6 commissioner at the state trial level.

7 JUSTICE THOMAS: So what role should
8 that play in our analysis of whether or not this
9 is a new rule?

10 MS. MURRILL: Well, I mean, I think it
11 plays a -- a significant role because, both
12 under Teague and under AEDPA, the -- the Court
13 asks what was clearly established law at the
14 time that the state adjudicated the claim.

15 And I would also disagree with my
16 friend's position that the state -- that he
17 claims that this wasn't adjudicated on the
18 merits. It clearly was raised on and
19 adjudicated on the merits by the commissioner
20 and the state district court in post-conviction
21 relief.

22 JUSTICE THOMAS: One quick question.
23 What's your view of what the term "accuracy"
24 means? Does it mean scientifically accurate
25 both in acquittal and convictions, or is it

1 loading -- or a thumb on the scale one way or
2 the other to prevent inaccurate convictions?

3 MS. MURRILL: Well, I think this Court
4 has -- has treated the accuracy question as a
5 question of factual accuracy. And -- and under
6 Teague, the -- the analysis asks an even -- even
7 harder question, I think. It's not enough to
8 say that it's aimed at improving the accuracy or
9 that it's directed toward enhancing reliability
10 or accuracy in some way.

11 The question is whether the new rule
12 remedied an impermissibly large risk of an
13 inaccurate conviction, and I don't think you can
14 say that about a -- a supermajority verdict
15 rule.

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer.

19 JUSTICE BREYER: I have two questions.
20 The first is, do you know any numbers about new
21 trials required in Puerto Rico or Oregon, as
22 well as yours? And the reason I think that's
23 important is I -- I have always seen Teague as a
24 kind of compromise here that, because of the
25 Fourteenth Amendment applying to the states, our

1 Court, this Court, the Supreme Court, was
2 insisting upon somewhat fairer constitutional
3 procedures, but they didn't want to let everyone
4 out of prison, so they compromised.

5 Now, if that's so, I'd like to know
6 the total impact. Do you know anything about
7 California -- about Puerto Rico and Oregon, or
8 do you know where --

9 MS. MURRILL: Just --

10 JUSTICE BREYER: -- I could find out?

11 MS. MURRILL: Justice Breyer, I don't
12 have exact numbers. Puerto Rico and Oregon both
13 filed amicus briefs emphasizing the -- their --
14 their belief that this would have a -- a very
15 significant impact in their states. And Oregon
16 cites to two cases that are currently
17 challenging plea agreements, and -- and we
18 have -- we -- we also have concerns about that.

19 We know that -- that the issue in --
20 in our state has been raised to challenge a plea
21 agreement as well. So it doesn't just affect
22 those that were nonunanimous jury verdicts. It
23 also has been raised as a -- a claim for -- to
24 undermine and attack plea agreements, and those
25 are even larger in number.

1 But just in our state, we -- we would
2 take the Promise of Justice Initiative's numbers
3 at face value and think 1600 is an awfully lot
4 of new trials.

5 JUSTICE BREYER: Well, and most of
6 what my totally separate question is, what do
7 you do about Brown versus Louisiana? It says
8 that it's retroactive because you have -- a
9 six-man -- six-person jury has to be unanimous.
10 It can't be 5 to 1. So, if a six-person --
11 person jury can't be 5 to 1 -- a 12-person can't
12 be 10 to 2, and if the first was fundamental,
13 why isn't the second?

14 MS. MURRILL: Well, I think Brown
15 is -- is -- is distinguishable in a couple of
16 ways, but I -- I think to the -- the -- the kind
17 of question of accuracy, I think that Brown
18 specifically related to the number of jurors and
19 it held that it was retroactively -- retroactive
20 in part because I think it found that five was
21 simply not enough, and it was looking at Ballew
22 and Burch collectively and -- and finding that
23 even where you had a six-man jury, you
24 ultimately only had a five-person verdict, and
25 in Ballou, the Court had said five wasn't enough

1 to have a -- have a significant -- for the jury
2 to actually do its job --

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MS. MURRILL: -- and also finding --

6 CHIEF JUSTICE ROBERTS: Justice Alito.

7 JUSTICE ALITO: Gideon versus
8 Wainwright, which recognized the Sixth Amendment
9 right to appointed counsel if the defendant is
10 indigent, was a watershed rule, wasn't it?

11 MS. MURRILL: Well, this Court has
12 always pointed to Gideon as the -- the -- the
13 one example that would be considered a watershed
14 rule, so yes.

15 JUSTICE ALITO: But that was not based
16 on the original meaning or understanding of the
17 Sixth Amendment right to counsel, isn't that
18 right?

19 MS. MURRILL: That's right. I think
20 it -- it -- it -- the -- the discussions in all
21 of the Court's cases about Gideon and why it was
22 watershed points to the primacy and centrality
23 of the rule throughout the process of a criminal
24 prosecution from start to -- to finish.

25 JUSTICE ALITO: Well, maybe that's

1 your answer to the next question I was going to
2 ask, but if -- if the Gideon rule, which was not
3 the original meaning of the Sixth Amendment, is
4 a watershed rule, how could we find that a --
5 the -- the unanimity rule, which the Court held
6 in Ramos was dictated by the original meaning of
7 the Sixth Amendment, does not rise to the level
8 of a waterhead -- A watershed rule?

9 MS. MURRILL: Well, Justice Alito, I
10 don't think that the historical roots of the
11 rule is what determines whether or not it is a
12 watershed rule. I mean, that's -- that's
13 certainly not how the court examined it in
14 Schriro v. Suther -- Summerlin.

15 I -- I -- I think the Court has
16 actually just looked at two questions, and --
17 and that is whether it alters the Court's
18 understanding of a bedrock procedural element
19 that is essential to fairness of a proceeding.

20 And it -- it can't be met -- the
21 standard can't be met simply by showing the rule
22 is based on a red -- bedrock right, and I would
23 submit that Ramos is a rule that may be built on
24 other bedrock rules, but it didn't establish a
25 bedrock rule.

1 JUSTICE ALITO: Well, those who
2 insisted on including the Bill of Rights as a
3 condition for ratifying the Constitution
4 certainly thought that the rules protected by
5 the Bill of Rights were bedrock rules or, if
6 they thought of this rather strange term,
7 watershed rules, so isn't there something rather
8 odd about our saying, well, that's what they
9 thought, but we know better now, and some of the
10 rules that they thought were bedrock rules
11 really are not so bedrock or watershed, but
12 there are some others, like the Gideon rule,
13 which we now think are more important. So those
14 would be retroactive on collateral review.

15 MS. MURRILL: Well, I -- I think,
16 Justice Alito, that that's changing the nature
17 of the Teague analysis. Teague -- Teague
18 doesn't focus and none of this Court's
19 precedents have -- in -- in conducting the
20 Teague retroactivity analysis have focused
21 necessarily on the historical roots of the rule
22 in deciding whether it was or should be held
23 retroactive under Teague. And -- and AEDPA asks
24 an even more limited question.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Sotomayor.

3 JUSTICE SOTOMAYOR: Counsel, could you
4 tell me -- and I'm going to ask the Solicitor
5 General the same question -- if this is not
6 watershed, give me what you think might be. And
7 it harkens back to the questions of some of my
8 colleagues earlier of the other side, which is,
9 since Teague, we haven't found anything
10 watershed. Are we claiming an exception that
11 is -- we're never going to utilize?

12 MS. MURRILL: No, Justice Kagan, I
13 don't think so. I mean, I think it's fair --

14 JUSTICE SOTOMAYOR: This is Justice --
15 this is --

16 MS. MURRILL: -- to leave open the
17 possibility.

18 JUSTICE SOTOMAYOR: Counsel, this is
19 Justice Sotomayor.

20 MS. MURRILL: Oh, I'm sorry.

21 JUSTICE SOTOMAYOR: But why don't you
22 start again.

23 MS. MURRILL: I'm sorry. I'm sorry,
24 Justice --

25 JUSTICE SOTOMAYOR: You're saying

1 that -- give me hypotheticals -- give me
2 hypotheticals of what you think might qualify.

3 MS. MURRILL: Okay. I mean, I think,
4 Justice Sotomayor, that -- that I would look
5 potentially back at the -- the purpose of the
6 scope of the writ. I mean, for -- for one
7 thing, I think you're applying -- you -- you are
8 in the context of habeas corpus, so I think
9 that's important.

10 And -- and I don't -- you know, this
11 Court has never applied anything as watershed
12 other than Gideon, but I think when you talk
13 about the -- the original context of habeas
14 corpus, the Court has pointed to things like a
15 trial that was tainted by mob violence or -- or,
16 you know, something of that nature. I mean,
17 that -- that is one potential answer, I think,
18 to that question.

19 JUSTICE SOTOMAYOR: How about a trial
20 that was held by a special master without
21 consent?

22 MS. MURRILL: Well, I think a trial
23 held by a special master without consent
24 potentially goes to jurisdiction. I mean, that
25 the Court has also addressed the scope of the

1 writ in the con -- the historical scope of the
2 writ in the context of whether a court had
3 actual jurisdiction to entertain the case.

4 And if it wasn't a court of competent
5 jurisdiction where -- a special master without
6 consent would arguably not be a court of
7 competent jurisdiction.

8 JUSTICE SOTOMAYOR: All right. I am a
9 little troubled by the empirical studies but for
10 a different reason than you are. You haven't
11 put anything to the contrary. You really
12 haven't put any evidence that the -- that there
13 aren't a significant number of people who have
14 been wrongfully convicted because of the lack of
15 unanimity. You say there some people benefitted
16 and some people didn't.

17 But what does it matter? Meaning, if
18 some people didn't benefit from the rule and may
19 have been not guilty, doesn't that answer the
20 watershed question on its own?

21 MS. MURRILL: No, I don't -- I don't
22 think that it does because I think the focus of
23 the question -- the question focuses on whether
24 it is a procedural element that is essential to
25 the proceeding and so seriously undermines

1 the -- the -- the process that we can't have any
2 confidence in -- in -- in the verdict at all. I
3 think that's what the question is. And --

4 CHIEF JUSTICE ROBERTS: Thank you.

5 MS. MURRILL: -- that simply cannot be
6 said --

7 CHIEF JUSTICE ROBERTS: Thank you.

8 MS. MURRILL: -- about --

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Kagan.

12 JUSTICE KAGAN: General, in In re
13 Winship, this Court held that a reasonable doubt
14 standard was -- had to be used by any criminal
15 jury. That was before Teague, but if you -- but
16 if Teague had applied, do you think that that
17 would have been held to be a retroactive rule?

18 MS. MURRILL: I mean, it's -- it's --
19 I think it's possible. I mean, I -- you know,
20 the Court has not declared Cage to be
21 retroactive. I -- I don't -- I think that --

22 JUSTICE KAGAN: Just answer, you know,
23 just what I asked. I mean, it's possible, yes
24 or no?

25 MS. MURRILL: It -- it's -- it's hard

1 to say. I mean, I think the -- the beyond a
2 reasonable doubt standard goes to the -- the --
3 the proof that's put on throughout the course of
4 the trial, so it's possible, yeah.

5 JUSTICE KAGAN: Let me tell you,
6 General, that I think you're having trouble with
7 the question, it's hard to say, because two
8 things are true. We cannot imagine that rule
9 being viewed as anything less than fundamental
10 to our entire system. That's number one.

11 But, number two, if you're only
12 talking about accuracy as like a reduction of
13 error rate across the board, we wouldn't have
14 that rule. We would have a preponderance
15 standard. So, I mean, that's what makes it
16 hard. And -- and -- and I guess I think it's
17 inconceivable that it wouldn't be held to be
18 retroactive.

19 MS. MURRILL: Well, Justice Kagan, I
20 think the Court did examine that -- the -- the
21 context of the beyond a reasonable doubt
22 standard in the context of a nonunanimity rule
23 in Johnson, and -- and it -- it really did look
24 at the question of each individual juror
25 carrying -- and I don't think we can assume that

1 11 -- 10 or 11 jurors are not doing their duty
2 and following their jury instructions.

3 And that was, I think, part of the
4 premise of Johnson. When you look at a
5 nonunanimity rule, you're looking at each
6 individual juror's -- whether each individual
7 juror would carry their -- carry their burden
8 and -- and take their instructions seriously --

9 JUSTICE KAGAN: Thank you, counsel.

10 MS. MURRILL: -- and the Court found
11 there's no reason to assume they won't.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch.

15 JUSTICE GORSUCH: Good morning,
16 counsel. As I heard you in response to the
17 Chief Justice, you said you absolutely did
18 dispute the estimates of about 1600 cases. But
19 I haven't actually seen or heard anything where
20 you do dispute that that is the appropriate
21 number. Am I missing something?

22 MS. MURRILL: Justice Gorsuch, we
23 don't dispute the 1600 number in -- I mean, we
24 have no basis to dispute it. We -- but I
25 would -- what we disputed was the premise that

1 you could simply grant new trials and distribute
2 all of those cases across the board to any
3 prosecutor who happens to be an assistant
4 district attorney.

5 JUSTICE GORSUCH: I understand that --

6 MS. MURRILL: That's what we dispute.

7 JUSTICE GORSUCH: -- but the number --
8 the universe is agreed, it seems, then?

9 MS. MURRILL: We have no -- we have no
10 reason to dispute that number. The -- the amici
11 who filed that has been in the system trying to
12 generate data about how many convictions there
13 might be --

14 JUSTICE GORSUCH: All right. And
15 what --

16 MS. MURRILL: -- but it is always the
17 records that are --

18 JUSTICE GORSUCH: -- what relevance
19 does this have anyway? As I understand your
20 argument is that, okay, it's 1600, but it's
21 really difficult. Wouldn't we expect it to be
22 difficult if, in fact, it were a watershed rule?
23 If this really were a significant change and an
24 important one, wouldn't we expect there to be
25 some burden for the state, and -- and where does

1 Teague tell us that that matters?

2 MS. MURRILL: Well, I think every
3 retroactivity question assumes or -- or takes
4 into account that there will be some burden, and
5 I think that it's built into the Teague analysis
6 in -- in terms of our reliance interests. And
7 that was -- the pre-Teague Linkletter balancing
8 test --

9 JUSTICE GORSUCH: But you'd -- you'd
10 -- you'd agree with me, though --

11 MS. MURRILL: -- expressly took that
12 into account that --

13 JUSTICE GORSUCH: I think you'd agree
14 that if it is watershed, it's retroactive
15 regardless of the burdens on the state. And, in
16 fact, we'd expect some burdens on the state in
17 such a case, right?

18 MS. MURRILL: I think that Teague --
19 that Teague -- if it's watershed, Teague -- that
20 is the question in the Teague analysis, is
21 whether it's retroactive. I'm not sure it
22 answers the question of whether it's still
23 precluded under AEDPA.

24 JUSTICE GORSUCH: I understand that,
25 counsel. I'm not asking about AEDPA. You told

1 me not to even think about AEDPA in your brief.
2 Fine. So I'm talking about under Teague. Once
3 we answer the Teague question that it's
4 watershed, it doesn't matter how many cases
5 there are. And, in fact, if it really were
6 watershed, we'd expect there to be a
7 considerable number, right?

8 MS. MURRILL: Yes.

9 JUSTICE GORSUCH: Thank you.

10 MS. MURRILL: I mean, I think Teague
11 is calibrated to account for reliance interests.
12 That's the presumption against retroactivity.

13 CHIEF JUSTICE ROBERTS: Justice
14 Kavanaugh.

15 JUSTICE KAVANAUGH: Thank you, Chief
16 Justice.

17 And good morning, General Murrill. In
18 Ramos, Justice Gorsuch's opinion and mine as
19 well talked about the history of nonunanimous
20 juries, the linkage to racist origins. I know
21 your point about the 1974 adoption. But I also
22 looked at the -- how it was linked to the
23 history of race-based peremptory strikes in
24 Batson and how those two things had come from a
25 -- from a similar place, a similar unfortunate

1 place in our history, in the court -- in the
2 country's history.

3 And in this case, you know, there's a
4 black defendant. The state uses its peremptory
5 strikes to strike all but one black juror --
6 this is four of its six peremptories against
7 black venire persons -- strikes five blacks for
8 cause because several of them -- in part, for
9 several of them -- had a family history of
10 incarceration. And you're left with one black
11 juror with a black defendant. Then you get a
12 11-to-1 verdict on the armed robbery count, the
13 two kidnapping counts -- one of the armed
14 robbery counts, two kidnapping counts, and the
15 rape count. And the one juror is the black --
16 black woman, the black juror.

17 This case seems like a classic example
18 of what we were concerned about with the
19 combination of peremptory challenges being used
20 on the basis of race, maybe not to strike every
21 juror but to strike all but one, and then the
22 nonunanimous jury system complementing the --
23 the peremptory challenges.

24 I know there wasn't a Batson --
25 successful Batson challenge in this case, but

1 the facts of this case certainly seem troubling
2 on how it all played out. I'll Just give you an
3 opportunity to react to that if you want.

4 MS. MURRILL: Justice Kavanaugh, I
5 mean, the -- the Batson claim was rejected
6 because there was absolutely no basis for Batson
7 challenges in this case. And -- and, I mean,
8 you can -- you can read the voir dire in the
9 record and see that there were non-race-based --
10 there were neutral reasons for striking the
11 jurors that were struck. And in some of these
12 cases, Sydney -- Sydney Eatman is one example,
13 there was a white male juror and a black male
14 juror struck at the exact same time for the
15 exact same reason.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 MS. MURRILL: So --

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett.

21 JUSTICE BARRETT: General Murrill, I'd
22 like to ask you about 2254(d). So Justices
23 Thomas and Gorsuch asked Mr. Belanger whether
24 2254(d) erected an independent bar, you know,
25 regardless of what we say about Teague. We have

1 an amicus brief saying that 24 -- 2254(d)(1)
2 supersedes Teague, so there are no exceptions,
3 there is no watershed exception, and that's
4 because 2254(d)(1) precludes a federal court
5 from granting relief if the claim resulted -- if
6 the state court adjudication resulted in a
7 decision that was contrary to or involved an
8 unreasonable application of -- sorry, permits
9 granting relief only in that circumstance.

10 And 2254(d)(1) makes no mention of
11 watershed rules, perhaps reflecting Justice
12 Alito's view that, you know, these are Tasmanian
13 tigers and there are none left. And so, under
14 2254(d)(1), federal courts ought not be engaging
15 in the Teague exception analysis.

16 Do you have a position on that?

17 MS. MURRILL: Yes. Yes, Justice
18 Barrett. Our position is that Edwards can't
19 surmount AEDPA's relitigation bar and that it
20 asks a very narrow question and it's a
21 backward-looking question about what was clearly
22 established law at the time the state
23 adjudicated the claim. And that was Apodaca.

24 So I think, you know, we do have a --
25 that is our position on it. We -- we answered

1 the question the Court posed with regard to
2 Teague, and the Court has treated Teague as a
3 separate threshold inquiry.

4 JUSTICE BARRETT: So you think we're
5 wrong to do that --

6 MS. MURRILL: But our position is that
7 it's barred either way.

8 JUSTICE BARRETT: So you think we're
9 wrong to do that; however, you think that
10 2254(d)(1) does supersede Teague so that there
11 should not be --

12 MS. MURRILL: No, I think --

13 JUSTICE BARRETT: -- an independent
14 Teague inquiry?

15 MS. MURRILL: That -- that -- I don't
16 think that's been entirely briefed. We simply
17 argued in our -- our brief that he is precluded
18 under both.

19 JUSTICE BARRETT: So you don't have a
20 position on the amicus brief?

21 MS. MURRILL: I -- I -- I think we
22 would join the United States in saying that --
23 that that might need to be litigated further if
24 you got to that point.

25 But, I mean, our position is that --

1 that he is precluded under both, that even if it
2 was a watershed ruling, he's still precluded
3 under that statute. So, I mean, I -- I guess we
4 do believe --

5 JUSTICE BARRETT: Thank you.

6 MS. MURRILL: -- that it was
7 overridden.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: A minute to
10 wrap up, General.

11 MS. MURRILL: Thank you, Mr. Chief
12 Justice.

13 While the Ramos decision is no doubt
14 an important one, Ramos's rule incorporating the
15 unanimity rule against the states isn't a
16 watershed rule. Permitting a supermajority rule
17 was not a fundamentally unfair procedure, nor
18 does the absence of unanimity seriously
19 undermine the accuracy of the verdict. This
20 Court should affirm the Fifth Circuit denial of
21 COA.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Michel.

25 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL

1 FOR THE UNITED STATES, AS AMICUS CURIAE,
2 SUPPORTING THE RESPONDENT

3 MR. MICHEL: Thank you, Mr. Chief
4 Justice, and may it please the Court:

5 The rule announced by this Court in
6 Ramos applies prospectively and to convictions
7 on direct appeal, but it does not apply to final
8 convictions on federal collateral review. That
9 result follows from a straightforward
10 application of Teague.

11 The Ramos rule is new because whatever
12 disputes might exist about the precedential
13 weight of Apodaca in this Court, it was at least
14 reasonable for lower courts to rely on it when
15 petitioner's conviction became final in 2011.

16 And the rule is not watershed because
17 it is not essential to accuracy or a fair trial.
18 After all, as the Chief Justice suggested at the
19 outset of the argument, the right to a jury
20 trial itself is not watershed, so subsidiary
21 rights like that of a unanimous jury cannot be
22 either.

23 That result also reflects the purposes
24 of federal collateral review. As Teague
25 emphasized, habeas is not a substitute for

1 direct appeal. When a criminal judgment
2 obtained under the law at the time becomes
3 final, it should stay final outside the very
4 narrow -- narrow exceptions that are not
5 satisfied here.

6 CHIEF JUSTICE ROBERTS: Counsel, I'm
7 not sure that your reliance on DeStefano is
8 really right. Isn't the right to a unanimous
9 jury more important as a matter of factual
10 accuracy than the right to a jury itself?

11 I mean, you would expect a judge to be
12 at least as accurate and presumably even more
13 than a -- a jury. So I'm not sure that the fact
14 that DeStefano is not retroactive really makes
15 the case that this right shouldn't be.

16 MR. MICHEL: Mr. Chief Justice, a
17 couple of responses.

18 I think the Court in Summerlin, for
19 example, said that it's -- it's just hard to
20 tell whether a judge or a jury is going to be
21 more accurate. And I think that that alone is
22 enough to -- to show that petitioner can't meet
23 the high standard here.

24 But I take your point, even if you
25 don't think DeStefano gets you all the way, the

1 Court has repeatedly declined to find watershed
2 other subsidiary jury rights, including in
3 Teague itself, which both -- which both
4 reaffirmed the Court's decision in Allen versus
5 Hardy that Batson is not retroactive on
6 collateral review and also rejected the fair
7 cross-section requirement.

8 So I think all of those subsidiary
9 jury rights, including the unanimity right at
10 issue here, simply don't meet the watershed
11 test.

12 CHIEF JUSTICE ROBERTS: Counsel, very
13 briefly, does the federal government have any
14 light to shed on the statistics that we've been
15 talking about?

16 MR. MICHEL: Mr. Chief Justice, the --
17 the one we know the best is the federal interest
18 here. As we mentioned in our brief, there is a
19 sort of ripple effect for the vacator of these
20 convictions.

21 On federal recidivist sentences, you
22 know, we think the number is somewhere around a
23 couple hundred. It's hard to pin down the --
24 the exact number, but there would be an impact
25 on the federal system.

1 CHIEF JUSTICE ROBERTS: Justice
2 Thomas.

3 JUSTICE THOMAS: Yes. Thank you,
4 Mr. Chief Justice.

5 Counsel, would you just briefly
6 discuss the term "accuracy" and what you think
7 it means in this context.

8 MR. MICHEL: Yes, Justice Thomas.
9 I -- I think the Court has not always spoken
10 with one voice on that, but there are certainly
11 a number of opinions in which "accuracy" I think
12 is understood just to mean factual accuracy.

13 The Court in Wharton, for example,
14 when discussing Crawford, made the point that
15 confrontation could sometimes actually make --
16 make a -- a trial less accurate. And the Court
17 in Butler versus McKellar, when discussing the
18 Fourth Amendment right at issue there, made the
19 same point.

20 So I think the Court has focused on
21 factual accuracy. But even if you were to adopt
22 a more generous understanding of it and look to
23 sort of the risk of wrongful convictions, I
24 still think the right here doesn't -- doesn't
25 come close, especially under this Court's

1 decision in Johnson versus Louisiana, which
2 expressly held that a nonunanimous jury verdict
3 does not impugn the fairness or accuracy of the
4 conviction.

5 JUSTICE THOMAS: And what role do you
6 think that the sordid roots of the nonunanimous
7 jury rule in Louisiana should play in our
8 analysis?

9 MR. MICHEL: Well, I think the Court
10 -- at least some members of the Court took that
11 into account in the decision last time, the
12 decision in Ramos. But I think, as -- as both
13 Justice Gorsuch and Justice Kavanaugh's opinions
14 recognize, that there's simply a separate
15 question here.

16 I think Justice Gorsuch said you
17 shouldn't double-count the reliance interest
18 between stare decisis and retroactivity, and
19 Justice Kavanaugh, of course, while recognizing
20 those racial issues, seemed to suggest that this
21 right shouldn't apply retroactively. So I -- I
22 think it -- it can't be dispositive here.

23 JUSTICE THOMAS: So, in your -- just
24 briefly, where do you think this -- the
25 authority of this Court to apply rules

1 retroactively comes from?

2 MR. MICHEL: So I think this -- this
3 Court has said in Danforth, for example, that --
4 that Teague ultimately reflects an
5 interpretation of the habeas statute. I think
6 the -- the Court, you know, has -- has over
7 centuries exercised the right to control the
8 finality of its judgments through rules of res
9 judicata and preclusion, and I think there's a
10 similar source of authority here.

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer.

14 JUSTICE BREYER: Well, maybe this will
15 just be repetitive, but the -- we're talking
16 about the Anglo American system and that's in
17 the Seventh Amendment, jury trial, so forth.

18 Now, within the confines of that
19 system, why isn't unanimity basic, and if it's
20 basic, aren't these just words, the accuracy and
21 so forth, and you're really trying to think of
22 how basic is this and then compare it to
23 everybody who's going to be released from jail.
24 That was the old system. Maybe Teague changed
25 that a lot. I don't know.

1 What do you think? Why isn't it
2 basic?

3 MR. MICHEL: Well, Justice Breyer, I
4 suppose I could start with the Anglo -- part of
5 the Anglo American system. I do think it's
6 notable that England, for example, you know,
7 continues to use nonunanimous jury verdicts.
8 And as the Court pointed out in Johnson versus
9 Louisiana, you know, respected institutions in
10 the Anglo American system like the ABA and the
11 ALI and respected professors have all endorsed
12 nonunanimous jury verdicts on legitimate
13 grounds, such as avoiding hung juries.

14 So I -- I do think, although the --
15 the Court of course concluded in Ramos that the
16 text and history of the Sixth Amendment require
17 unanimity, I don't think that's the same thing
18 as saying that it is essential to accuracy and
19 fairness under the inquiry the Court has
20 outlined in Teague.

21 JUSTICE BREYER: Okay. I see. Thank
22 you.

23 CHIEF JUSTICE ROBERTS: Justice Alito.

24 JUSTICE ALITO: Where does the
25 authority to impose the Teague rule on the

1 states come from? If it's an interpretation of
2 the -- of the habeas statute, then don't we have
3 to deal with 2254(d)?

4 If it's not an interpretation of the
5 statute, it would have to come from a provision
6 of the Constitution, such as the suspension
7 clause. Is that where you think it comes from?

8 MR. MICHEL: Well, Justice Alito, I --
9 I want to distinguish between the -- the general
10 retroactivity bar of Teague, which is what I --
11 I meant to refer to earlier by saying that's an
12 interpretation of the habeas statute informed by
13 equity and the historical scope of the writ.

14 Separately, I -- I think your question
15 is getting to what's the authority for the
16 exceptions to Teague. The Court -- majority of
17 the Court in Montgomery versus Louisiana
18 suggested that the substantive rule exception is
19 rooted in the Constitution.

20 The Court has not reached a similar
21 determination with respect to the watershed rule
22 exception I think, in part, because it's never
23 been applied, but if forced to confront that, I
24 think we would say that's -- that's not
25 constitutionally required and -- and it's

1 supported by, at best, you know, an equitable
2 determination similar to that that informs the
3 retroactivity bar.

4 JUSTICE ALITO: Well, why should we
5 decide this case under the Teague exception if
6 there's a possibility that the Teague exception
7 doesn't matter as a result of AEDPA? What kind
8 of a decision would that be?

9 MR. MICHEL: Well, to be candid,
10 Justice Alito, we were trying to follow the
11 Court's lead with the question presented here,
12 which refers to retroactivity. Of course, the
13 opinions in Ramos referred repeatedly to -- to
14 Teague, and I do think that with respect, this
15 is a straightforward case under Teague. I
16 think that that's plenty to resolve it. And
17 it's a separate and independent basis from --
18 from AEDPA and would be enough to resolve the
19 case this time around.

20 JUSTICE ALITO: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, do you
24 think the Teague exception is an -- an ill fit?
25 If not, can you think of any example of a

1 potential watershed rule that is not Gideon?
2 And, second, you dispute -- I'd like you to
3 answer both, so I'm going to give you your
4 remaining time for that. You dispute that
5 unanimity is necessary to increase accuracy in
6 jury verdicts. But I can't think of any
7 justification other than that, the unanimity
8 requirement that the Constitution seeks --
9 that's set. Our founders must have thought that
10 that process enabled accuracy. So I don't know
11 why I should second-guess them or on what basis
12 we would second-guess them.

13 MR. MICHEL: If it's okay, Justice
14 Sotomayor, I might start with the second
15 question first. I think the -- the -- the
16 plurality opinion in Ramos importantly didn't
17 rely on functional considerations like fairness
18 and accuracy in -- in reaching its
19 interpretation of the Sixth Amendment. It said,
20 you know, the unanimity requirement may serve
21 purposes that evade our current notice. And I
22 think, you know, the most extensive discussion
23 of that issue is found in footnote 2 of Justice
24 White's opinion in Apodaca. And, of course,
25 that opinion is no longer governing.

1 But it -- but -- but the history is
2 still valid, and it suggests a number of
3 different historical bases for the unanimity
4 requirement, including the medieval notion that,
5 you know, one juror who disagreed would be
6 committing perjury, which would have the
7 consequence of damnation, and the medieval
8 notion of consent, which, among other things,
9 was manifested in the requirement that
10 Parliament itself pass laws by unanimity. So,
11 you know, I -- I -- I do think there are some
12 medieval origins of this that don't necessarily
13 go to -- to accuracy or -- or fairness as we
14 would think of it today.

15 On -- On your first question, I do
16 want to make the point, of course, that, you
17 know, the substantive rule exception to -- to
18 Teague is alive and well, and the Court has
19 found substantive rules recently.

20 As -- as to the watershed rule
21 exception, it's true that the Court has said
22 Gideon is the only one in -- in recent memory.
23 But, you know, I -- I think that reflects more
24 that the things we would think of as watershed,
25 you know, simply have been recognized earlier.

1 I --

2 CHIEF JUSTICE ROBERTS: Justice Kagan.

3 JUSTICE KAGAN: Mr. Michel, you told
4 Justice Breyer that the unanimity requirement
5 wasn't basic. But when I read the opinions on
6 the majority side in Ramos, I think they say it
7 absolutely is, you know, that it's basic in the
8 exact same way that the beyond a reasonable
9 doubt standard is basic, that it goes to the
10 inherent characteristics of what in our system a
11 jury has to do to find a defendant guilty.

12 I mean, Ramos says that if you haven't
13 been convicted by a unanimous jury, you really
14 haven't been convicted at all. And so how could
15 it be that a rule like that does not have
16 retroactive effect?

17 MR. MICHEL: Well, Justice Kagan, I --
18 I take all your points about, you know, the
19 merits decision in -- in Ramos, but -- but I
20 think as Whorton, for example, explains, the
21 fact that a constitutional rule is compelled by
22 the text and history of -- of the Constitution
23 itself doesn't mean that it's retroactive on
24 collateral review. There's --

25 JUSTICE KAGAN: I'm not just talking

1 about the origins of the rule and whether it
2 goes back to founding times. There's more in
3 Ramos. There's -- there's -- there's an idea
4 that in those founding times, it was thought --
5 this rule was thought of as inherent in what it
6 meant to have a fair trial by jury, and a -- and
7 an accurate trial by jury, so that whatever came
8 out of that process, if unanimity wasn't a part
9 of it, there wasn't a true conviction.

10 MR. MICHEL: Well, I --

11 JUSTICE KAGAN: That's what Ramos
12 says. I'm just trying to take what Ramos says
13 seriously here, which I think you ought to do,
14 too.

15 MR. MICHEL: Absolutely, although I --
16 I do think, with respect, you could say the same
17 thing about Duncan and Apprendi and other cases
18 in which, you know, the Court has found that a
19 determination by -- by a jury beyond a
20 reasonable doubt is -- is required on the merits
21 and yet is not retroactive on collateral review
22 because there's simply a different -- a
23 different inquiry there.

24 And, again, I guess I would return to
25 the Court's holding in Johnson versus Louisiana,

1 that a nonunanimous jury verdict does not impugn
2 the fairness or accuracy of the majority verdict
3 of guilty. I -- I --

4 JUSTICE KAGAN: Thank you, Mr. Michel.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Good morning
8 counsel. Just to pick up there and -- and with
9 Justice Sotomayor's line of questioning. And I
10 understand your argument to us today, the
11 watershed rule exception in Teague might have
12 served a purpose at some point, but it doesn't
13 any longer because we captured all watershed
14 rules of criminal procedure. None are likely to
15 come forward and it -- it is hard to see if --
16 if this doesn't qualify, which the founders
17 thought was an essential component of the jury
18 trial right, then it's pretty hard to see what
19 might emerge that would qualify. Is that a
20 fair statement of the government's position?

21 MR. MICHEL: I -- I think yes -- I
22 mean, we're not -- except I would qualify it to
23 say we're not saying that it's impossible that
24 such a right could emerge, but I agree with the
25 Court's repeated statement that it's very

1 unlikely that one will emerge at this point.

2 JUSTICE GORSUCH: Does the government
3 have any -- any one in mind that might emerge?
4 I mean, any -- any possible hypothetical that
5 you can imagine?

6 MR. MICHEL: It -- there -- there's
7 nothing that -- that we're thinking of. You
8 know, I -- I guess I would also note that, of
9 course, when Teague made that statement which
10 has been repeated for many it decades, you know,
11 the Court was well aware of the nonunanimous
12 jury issue. And so if -- if the Court thought
13 that that was something that could arise in the
14 future, it seems unlikely it would have said
15 that, you know, no -- no -- no watershed rules
16 are likely to arise in the future.

17 JUSTICE GORSUCH: You're giving a lot
18 of credit to the Teague Court for thinking about
19 all these eventualities, and I appreciate that.
20 But is -- does all this point out or maybe
21 suggest that -- that post-conviction review here
22 has been overextended and that while Teague was
23 once an attempt to rein in considerable efforts,
24 and I think of Brown versus Allen, to -- to
25 apply the Constitution post-conviction, that

1 maybe this -- this whole area -- that Teague
2 itself is a little outmoded and that it may be
3 better just to give up the ghost. Is that the
4 government's essential point of view?

5 MR. MICHEL: You know, I'm not sure I
6 would go all the way there, but I -- I do think
7 there's a lot of merit to what you're saying. I
8 do think actually if you look back at Justice
9 Harlan's opinions that gave rise to Teague and
10 Judge Friendly's article that was relied on, it
11 was saying something pretty similar to that,
12 that, you know, the exceptions really have to be
13 narrow, the substantive exception when something
14 is not a crime, and the watershed rule exception
15 has to be similarly high, something so serious
16 that you're really not sure a crime was
17 committed.

18 And so I think if you keep the
19 exceptions that narrow, Teague is -- is serving
20 a good purpose. But I agree that they could be
21 over-read and they would -- it would do real
22 damage.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh.

25 JUSTICE KAVANAUGH: Thank you. And

1 good morning, Mr. Michel.

2 I wanted to follow up on something
3 Justice Gorsuch was asking the Solicitor General
4 of -- of Louisiana about, which is do you think
5 the number of cases that would be affected has
6 any bearing on whether something is watershed?

7 MR. MICHEL: I -- I think it does. I
8 think it goes to the reasons for having a high
9 bar, you know, for -- for both the new rule and
10 the watershed rule inquiries. You know, I think
11 the -- as I was just discussing with Justice
12 Gorsuch, you know, the court in Teague very
13 consciously broke from its past retroactivity
14 jurisprudence, which it found had been too lax,
15 and emphasized finality and federalism in
16 adopting the new Teague rule. And I think the
17 reason it did that is it was worried about
18 large-scale disruptions of the state criminal
19 justice system like that would be, you know,
20 worked here.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE BARRETT: Good morning,
25 Mr. Michel.

1 I want to talk to you about accuracy,
2 and the first thing I'd like to ask is a
3 follow-up to your dialogue with Justice Thomas.
4 And -- and this is, I think, a point of
5 clarification for me.

6 You were distinguishing between
7 factual accuracy and what I understood you to
8 say would have been the more generous standard
9 of considering the likelihood of wrongful
10 conviction. What is the difference between the
11 two of those, and how is the latter more
12 generous than the former, if I understood you
13 correctly?

14 MR. MICHEL: Well, I -- I think that's
15 a -- it's a tricky question. I had understood
16 some of the questions earlier in the argument to
17 -- to reflect a view that, you know, there
18 should be a sort of thumb on the scale in favor
19 of the defendant. And so, you know, if -- you
20 know, if there's twice as likely a risk of
21 convicting wrong -- wrongfully convicting, that
22 should, you know, have outsized risk as compared
23 to not convicting. And, you know, I -- I do
24 think it's a sort of a difficult abstract
25 question, but -- but as I said to Justice

1 Thomas, I -- I don't think that, however you
2 resolve that abstract question it's -- it's
3 going to matter here.

4 JUSTICE BARRETT: Well, what then is
5 factual accuracy? Because, as you were pointing
6 out, our decisions haven't spoken necessarily
7 with one voice about what the accuracy prong
8 means. So what is factual accuracy as
9 distinguished from the risk of wrongful
10 conviction?

11 MR. MICHEL: Sure. I -- what I --
12 Butler versus McKellar, I think, is a good
13 example, and that was a -- a case about
14 excluding a -- a confession or a defendant's
15 statements he had requested a lawyer. And the
16 Court said, you know, it actually might
17 contribute to factual accuracy to have the
18 statements in because we would know more about
19 what actually happened.

20 Of course, if you were worried about
21 wrongful convictions, then I think you might
22 have a different view of that. But no matter
23 how you -- you cash out that somewhat
24 theoretical distinction, I -- I don't think this
25 rises to the level of -- of a serious accuracy

1 problem.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: A minute to
4 wrap -- wrap up, counsel.

5 MR. MICHEL: Thank you, Mr. Chief
6 Justice. I guess I would just close by saying,
7 you know, this Court's decision in Ramos will
8 have great significance going forward. But the
9 question before the Court today is a different
10 one.

11 As -- as the Ramos plurality noted,
12 it's the Teague doctrine that frees the Court to
13 reconsider its constitutional decision without
14 having the risk of seriously disrupting wrong
15 final judgments. And we think that's the right
16 result here. This petitioner was convicted of
17 serious crimes after a full and fair trial.
18 His conviction became final almost a decade ago.
19 To retry him now would require at minimum making
20 his victims relive their trauma, and in many
21 other cases a retrial might not be possible,
22 causing disruptive effects in both the federal
23 and the state systems.

24 We think this is a heartland case for
25 the application of the Teague bar. Petitioner's

1 final conviction should remain final. Thank
2 you.

3 CHIEF JUSTICE ROBERTS: Mr. Belanger.
4 Rebuttal.

5 REBUTTAL ARGUMENT OF ANDRE BELANGER

6 ON BEHALF OF PETITIONER

7 MR. BELANGER: Unanimity and
8 reasonable doubt are two doctrines that work
9 hand-in-hand to assure that we have a fair and
10 accurate judicial system. Gideon, Winship and
11 Ramos all point us to the realization that is
12 the legitimate risk of inaccuracy within the
13 system that matters.

14 As this Court said in Ballew the risk
15 of sending 10 innocent people to jail is greater
16 than the risk of sending one guilty person free.

17 Apodaca was an opinion that was dead
18 on arrival because it predicated its decisive
19 vote on analysis that was foreclosed by
20 precedent at the time it was decided.

21 Ramos removed this uncomfortable thorn
22 from the side of our legal system and, as such,
23 it became a unique case which falls on the line
24 that checks the boxes as being both an old rule
25 and a new rule.

1 First, Ramos is an old rule. It
2 ignores -- it -- it has followed preexisting
3 precedent that was logically dictated by the
4 case law that preceded it. Ultimately the state
5 fails to dispute that jury unanimity and
6 incorporation of the jury trial right are deeply
7 rooted in American jurisprudence.

8 Let's be clear, Ramos did not break
9 any new ground under Teague.

10 Second, for members of this Court who
11 viewed Apodaca as precedent, Ramos announced a
12 watershed rule of criminal procedure. The state
13 does not meaningfully address the parallels
14 between Ramos and Gideon.

15 Both decisions restored bedrock Sixth
16 Amendment principles and both decisions
17 compelled outlier states to apply rights they
18 previously refused to recognize. A conviction
19 can only be legally accurate if the states
20 proves its case beyond a reasonable doubt of all
21 jurors.

22 The expressly racist origin of
23 nonunanimous juries also contravene any state
24 interest in finality and repose. Since Ramos,
25 members of this Court have recognized that the

1 original motivation for the laws mattered,
2 notwithstanding any subsequent re-ratification.

3 The same is true here. In the end the
4 state has no legitimate interest in avoiding
5 retroactivity but for its desire to let
6 Mr. Edwards languish in Angola for the rest of
7 his life.

8 On what grounds can we let this happen
9 when we know his conviction is unconstitutional?
10 The answer to that question is none.

11 Thank you, Mr. Chief Justice.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel. The case is submitted.

14 (Whereupon, at 11:26 a.m., the case
15 was submitted.)

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