# SUPREME COURT
# OF THE UNITED STATES

---

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - -

THEDRICK EDWARDS, )

Petitioner, )

v. ) No. 19-5807

DARREL VANNOY, WARDEN, )

Respondent. )

- - - - - - - - - - - - - - - - - - -

Pages: 1 through 82

Place: Washington, D.C.

Date: December 2, 2020

---

**HERITAGE REPORTING CORPORATION**

*Official Reporters*

1220 L Street, N.W., Suite 206

Washington, D.C. 20005

(202) 628-4888

www.hrccourtreporters.com

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - -

THEDRICK EDWARDS, )

Petitioner, )

v. ) No. 19-5807

DARREL VANNOY, WARDEN, )

Respondent. )

- - - - - - - - - - - - - - - - - - - -

Washington, D.C.

Wednesday, December 2, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

APPEARANCES:

ANDRE BELANGER, ESQUIRE, Baton Rouge, Louisiana; on behalf of the Petitioner.

ELIZABETH MURRILL, Solicitor General, Baton Rouge, Louisiana; on behalf of the Respondent.

CHRISTOPHER G. MICHEL, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:00 a.m.)

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

Mr. Belanger.

ORAL ARGUMENT OF ANDRE BELANGER

ON BEHALF OF THE PETITIONER

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

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

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

Ultimately, the question before the

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

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

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

Louisiana.

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

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

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

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

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

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

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

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

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

one, Mr. Chief Justice.

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

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

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

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

Krash was one of the brief authors in

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

JUSTICE BREYER: Thank you.

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

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

JUSTICE BREYER: And can the Louisiana system handle that?

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

JUSTICE BREYER: How --

MR. BELANGER: -- only talking about --

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

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

JUSTICE BREYER: Or how --

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

JUSTICE BREYER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito.

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

hasn't been discovered.

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

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

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

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

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

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

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

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

with ordered liberty?

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

JUSTICE ALITO: Yeah, but didn't --

MR. BELANGER: -- jury is --

JUSTICE ALITO: -- didn't -- didn't Justice Gorsuch's opinion repudiate that, ridicule that approach?

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

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

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

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

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

JUSTICE ALITO: All right. Thank you.

CHIEF JUSTICE ROBERTS: Justice

Sotomayor.

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

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

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

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

JUSTICE SOTOMAYOR: Why are you guessing a thousand?

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

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

JUSTICE SOTOMAYOR: All right. Thank you, counsel.

MR. BELANGER: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice

Gorsuch.

JUSTICE KAGAN: Thank you.

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

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

MR. BELANGER: I would have two responses.

First, I believe you all's opinion in

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

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

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

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

Louisiana had to apply a unanimous jury scheme.

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

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

JUSTICE GORSUCH: I surely hope you're right.

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

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

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

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

Apodaca was explicitly overruled by Ramos.

JUSTICE GORSUCH: Thank you, Counsel.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: Thank you, Chief Justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Barrett?

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

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

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

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

JUSTICE BARRETT: Well -- well, right.

MR. BELANGER: But this is --

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

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

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

MR. BELANGER: Well, this type of

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

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

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

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

jury.

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

JUSTICE BARRETT: Okay. Thank you, counsel.

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

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

Jury unanimity predates the founding

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

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

Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

General Murrill.

ORAL ARGUMENT OF ELIZABETH MURRILL

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

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

CHIEF JUSTICE ROBERTS: Justice Thomas.

JUSTICE THOMAS: Thank you, Mr. Chief Justice.

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

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

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

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

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

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

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

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

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

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

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

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

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

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

MS. MURRILL: Just --

JUSTICE BREYER: -- I could find out?

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. MURRILL: -- and also finding --

CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

JUSTICE ALITO: Well, maybe that's

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you,

counsel.

Justice Sotomayor.

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

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

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

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

JUSTICE SOTOMAYOR: Counsel, this is Justice Sotomayor.

MS. MURRILL: Oh, I'm sorry.

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

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

JUSTICE SOTOMAYOR: You're saying

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you.

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

CHIEF JUSTICE ROBERTS: Thank you.

MS. MURRILL: -- about --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Kagan.

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

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

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

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

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

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

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

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

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

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

JUSTICE KAGAN: Thank you, counsel.

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

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

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

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

JUSTICE GORSUCH: I understand that --

MS. MURRILL: That's what we dispute.

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

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

JUSTICE GORSUCH: All right. And what --

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

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

Teague tell us that that matters?

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

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

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

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

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

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

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

MS. MURRILL: Yes.

JUSTICE GORSUCH: Thank you.

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you, Chief Justice.

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. MURRILL: So --

CHIEF JUSTICE ROBERTS: Justice Barrett.

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

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

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

Do you have a position on that?

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

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

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

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

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

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

MS. MURRILL: No, I think --

JUSTICE BARRETT: -- an independent Teague inquiry?

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

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

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

But, I mean, our position is that --

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

JUSTICE BARRETT: Thank you.

MS. MURRILL: -- that it was overridden.

JUSTICE BARRETT: Thank you.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Michel.

ORAL ARGUMENT OF CHRISTOPHER G. MICHEL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Thomas.

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

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

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

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

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

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

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

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

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

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

retroactively comes from?

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

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Breyer.

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

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

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

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

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

JUSTICE BREYER: Okay. I see. Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito.

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor.

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

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

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

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

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

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

I --

CHIEF JUSTICE ROBERTS: Justice Kagan.

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

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

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

JUSTICE KAGAN: I'm not just talking

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

MR. MICHEL: Well, I --

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

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

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

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

JUSTICE KAGAN: Thank you, Mr. Michel.

CHIEF JUSTICE ROBERTS: Justice Gorsuch.

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

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

unlikely that one will emerge at this point.

JUSTICE GORSUCH: Does the government have any -- any one in mind that mighty emerge? I mean, any -- any possible hypothetical that you can imagine?

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh.

JUSTICE KAVANAUGH: Thank you. And

good morning, Mr. Michel.

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett.

JUSTICE BARRETT: Good morning, Mr. Michel.

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

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

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

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

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

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

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

problem.

JUSTICE BARRETT: Thank you.

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

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

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

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

final conviction should remain final. Thank you.

CHIEF JUSTICE ROBERTS: Mr. Belanger. Rebuttal.

REBUTTAL ARGUMENT OF ANDRE BELANGER
ON BEHALF OF PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chief Justice.

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

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