SUPREME COURT OF THE UNITED STATES

No. 00–5961

MELVIN TYLER, PETITIONER *v.* BURL CAIN, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 28, 2001]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

In *Cage* v. *Louisiana,* 498 U. S. 39 (1990) *(per curiam),* this Court held that a certain jury instruction violated the Constitution because it inaccurately defined "reasonable doubt," thereby permitting a jury to convict "based on a degree of proof below that required by the Due Process Clause." *Id.,* at 41. Here we must decide whether this Court has "made" *Cage* "retroactive to cases on collateral review." 28 U. S. C. §2244(b)(2)(A) (1994 ed., Supp. V). I believe that it has.

The Court made *Cage* retroactive in two cases taken together. Case One is *Teague* v. *Lane,* 489 U. S. 288 (1989). That case, as the majority says, held (among other things) that a new rule is applicable retroactively to cases on collateral review if (1) infringement of the new rule will "seriously diminish the likelihood of obtaining an accurate conviction," *id.,* at 315 (plurality opinion), and (2) the new rule " 'alter[s] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction,' " *id.,* at 311 (plurality opinion) (quoting *Mackey* v. *United States,* 401 U. S. 667, 693 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)) (emphasis deleted).

Case Two is *Sullivan* v. *Louisiana,* 508 U. S. 275 (1993).

This Court decided *Sullivan* after several lower courts had held that *Cage*'s rule did not fall within the *Teague* "watershed" exception I have just mentioned. See, *e.g.*, *Adams* v. *Aiken,* 965 F. 2d 1306, 1312 (CA4 1992), vacated, 511 U. S. 1001 (1994); *Skelton* v. *Whitley,* 950 F. 2d 1037, 1045 (CA5), cert. denied, 506 U. S. 833 (1992). The question in *Sullivan* was whether a violation of the *Cage* rule could ever count as harmless error. The Court answered that question in the negative. In so concluding, the Court reasoned that an instruction that violated *Cage* by misdescribing the concept of reasonable doubt "vitiates *all* the jury's findings," and deprives a criminal defendant of a "basic protection . . . without which a criminal trial cannot reliably serve its function." *Sullivan, supra,* at 281 (emphasis in original; internal quotation marks omitted). It renders the situation as if "there has been no jury verdict within the meaning of the Sixth Amendment." 508 U. S., at 280.

To reason as the Court reasoned in *Sullivan is* to hold (in *Teague*'s language) (1) that infringement of the *Cage* rule "seriously diminish[es] the likelihood of obtaining an accurate conviction," *Teague, supra,* at 315 (plurality opinion), and (2) that *Cage* "alter[s] our understanding of the bedrock procedural elements" that are essential to the fairness of a criminal trial, 489 U. S., at 311 (plurality opinion) (internal quotation marks omitted; emphasis deleted). That is because an instruction that makes "*all* the jury's findings" untrustworthy, *Sullivan, supra,* at 281, must "diminish the likelihood of obtaining an accurate conviction," *Teague, supra,* at 315 (plurality opinion). It is because a deprivation of a "basic protection" needed for a trial to "serve its function," *Sullivan, supra,* at 281 (internal quotation marks omitted), is a deprivation of a "bedrock procedural elemen[t]," *Teague*, *supra*, at 311 (plurality opinion) (internal quotation marks omitted). And it is because *Cage* significantly "alter[ed]" pre-existing

law. 489 U. S., at 311. That is what every Court of Appeals to have considered the matter has concluded. See *Tillman* v. *Cook,* 215 F. 3d 1116, 1122 (CA10), cert. denied, 531 U. S. 1055 (2000); *West* v. *Vaughn,* 204 F. 3d 53, 61, and n. 9 (CA3 2000); *Gaines* v. *Kelly,* 202 F. 3d 598, 604–605 (CA2 2000); *Humphrey* v. *Cain,* 138 F. 3d 552, 553 (CA5) (en banc), cert. denied, 525 U. S. 935 (1998); *Adams* v. *Aiken,* 41 F. 3d 175, 178–179 (CA4 1994), cert. denied, 515 U. S. 1124 (1995); *Nutter* v. *White,* 39 F. 3d 1154, 1158 (CA11 1994). But cf. *In re Smith,* 142 F. 3d 832, 835–836 (CA5 1998) (concluding that explicit Supreme Court statement is necessary to make *Cage* retroactive for second or successive habeas purposes); *Rodriguez* v. *Superintendent, Bay State Correctional Ctr.,* 139 F. 3d 270, 275–276 (CA1 1998) (same); *In re Hill,* 113 F. 3d 181, 184 (CA11 1997) (same). And I do not see how the majority can deny that this is so.

Consequently, *Sullivan,* in holding that a *Cage* violation can never be harmless because it leaves the defendant with no jury verdict known to the Sixth Amendment, also holds that *Cage* falls within *Teague*'s "watershed" exception. The matter is one of logic. If Case One holds that all men are mortal and Case Two holds that Socrates is a man, we do not need Case Three to hold that Socrates is mortal. It is also a matter of law. If Case One holds that a party's expectation measures damages for breach of contract and Case Two holds that Circumstances X, Y, and Z create a binding contract, we do not need Case Three to hold that in those same circumstances expectation damages are awarded for breach. Ordinarily, in law, to hold that a set of circumstances falls within a particular legal category is simultaneously to hold that, other things being equal, the normal legal characteristics of members of that category apply to those circumstances.

The majority says that *Sullivan*'s only "holding" is that *Cage* error is structural, and that this "holding" does not dictate the "watershed" nature of the *Cage* rule. See *ante,*

at 8–9. But the majority fails to identify a meaningful difference between the definition of a watershed rule under *Teague* and the standard that we have articulated in the handful of instances in which we have held errors structural, namely, that structural errors deprive a defendant of a "'basic protectio[n]'" without which a "'trial cannot reliably serve its function as a vehicle for determination of guilt or innocence'" to the point where "'no criminal punishment may be regarded as fundamentally fair.'" *Arizona* v. *Fulminante,* 499 U. S. 279, 310 (1991) (quoting *Rose* v. *Clark,* 478 U. S. 570, 577–578 (1986)); see also *Neder* v. *United States,* 527 U. S. 1, 8 (1999) (identifying the six kinds of error, including *Cage* error, that have been held structural). In principle *Teague* also adds an element that "structural error" alone need not encompass, namely, the requirement that a violation of the rule must undermine *accuracy*. But that additional accuracy requirement poses no problem here, for our language in *Sullivan* could not have made clearer that *Cage* error seriously undermines the accuracy and reliability of a guilty verdict.

Of course, as the majority points out, identifying an error as structural need not "alter our understanding of th[e] fundamental procedural elements" that are essential to a fair trial. See *ante,* at 10, n. 7. But this "altering" requirement is not a problem here. No one denies that *Cage*'s rule was a new one. "Whether a trial court's unconstitutional misdescription of the burden of proof in a criminal case violates the Due Process Clause was certainly an open question before *Cage*." *Adams,* 41 F. 3d, at 178; see also *Gaines*, *supra*, at 606–607 (noting that *Cage* led to reversals of numerous convictions that had been based on similar reasonable doubt instruction); *State* v. *Humphrey*, 544 So. 2d 1188, 1192 (La. App.) (citing multiple decisions by Louisiana Supreme Court which had upheld reasonable doubt instructions like that invalidated in *Cage*), cert. denied, 550 So. 2d 627 (1989). And our

holding that such a misdescription of the burden of proof means that "there has been no jury verdict within the meaning of the Sixth Amendment," *Sullivan*, 508 U. S., at 280, certainly altered the understanding of the significance of such an error.

Insofar as the majority means to suggest that a rule may be sufficiently "new" that it does not apply retroactively but not "new enough" to qualify for the watershed exception, I note only that the cases establishing this exception suggest no such requirement. Rather than focus on the "degree of newness" of a new rule, these decisions emphasize that watershed rules are those that form part of the fundamental requirements of due process. See *Teague*, 489 U. S., at 311–312 (plurality opinion); *Mackey*, 401 U. S., at 693–694 (Harlan, J., concurring in judgments in part and dissenting in part); cf. *O'Dell* v. *Netherland,* 521 U. S. 151, 167 (1997) (holding that "narrow right of rebuttal" established by *Simmons* v. *South Carolina,* 512 U. S. 154 (1994), "has hardly alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding" (internal quotation marks omitted; emphasis in original)); *Caspari* v. *Bohlen,* 510 U. S. 383, 396 (1994) (holding that application of double jeopardy bar to successive noncapital sentencing would not be unfair and would enhance rather than hinder accuracy); *Sawyer* v. *Smith,* 497 U. S. 227, 242–244 (1990) (holding that rule which "provid[ed] an additional measure of protection" to existing prohibition on prosecutorial remarks that render a proceeding "fundamentally unfair" was not "an 'absolute prerequisite to fundamental fairness'" that would fall within the second *Teague* exception) (quoting *Teague*, *supra*, at 314 (plurality opinion)).

Nor does the majority explain why the reasoning that was necessary to our holding in *Sullivan* (and is therefore binding upon all courts) lacks enough legal force to "make" the *Cage* rule retroactive. Cf. *Seminole Tribe of Fla.* v.

Florida, 517 U. S. 44, 67 (1996) ("We adhere . . . not to mere *obiter dicta,* but rather to the well-established rationale upon which the Court based the results of its earlier decisions. When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound"); *Burnham* v. *Superior Court of Cal., County of Marin,* 495 U. S. 604, 613, n. 2 (1990) (plurality opinion) (exclusive basis for judgment is not dicta). In any event, technical issues about what constitutes a "holding" are beside the point. The statutory provision before us does not use the words "holding" or "held." But cf. *ante,* at 7 (majority opinion) (stating without explanation that "made" means "held"). It uses the word "made." It refers to instances in which the Supreme Court has *"made"* a rule of law "retroactive to cases on collateral review." 28 U. S. C. §2244(b)(2)(A) (1994 ed., Supp. V) (emphasis added). And that is just what the Supreme Court, through *Teague* and *Sullivan,* has done with respect to the rule of *Cage.*

I agree with JUSTICE O'CONNOR— as does a majority of the Court— when (in describing a *different Teague* exception) she says that "[w]hen the Court holds as a new rule in a subsequent case that a particular species of primary, private individual conduct is beyond the power of the criminal lawmaking authority to proscribe, it necessarily follows that this Court has 'made' that new rule retroactive to cases on collateral review." *Ante,* at 2 (concurring opinion). But I do not understand why a decision by this Court which makes it apparent that a rule is retroactive under *Teague*'s second exception will necessarily be "more subjective and self-conscious." *Ante,* at 3 (concurring opinion). Of course, it will sometimes be difficult to decide whether an earlier Supreme Court case has satisfied the watershed rule's requirements. But that is not so here. In *Sullivan,* this Court used language that unmistakably stated that a defective reasonable-doubt instruction undermines the accuracy of a trial and deprives the defen-

dant of a bedrock element that is essential to the fairness of a criminal proceeding. That is sufficient to make *Teague*'s watershed exception applicable.

I would add two further points. First, nothing in the statute's purpose favors, let alone requires, the majority's conclusion. That purpose, as far as I can surmise, is to bar successive petitions when lower courts, but not the Supreme Court, have held a rule not to be "new" under *Teague* because dictated by their own precedent, cf. *Dyer* v. *Calderon,* 151 F. 3d 970, 993–995 (CA9) (en banc) (O'Scannlain, J., dissenting) (rejecting proposition that lower court decisions can establish rule for *Teague* purposes), cert. denied, 525 U. S. 1033 (1998); *Clemmons* v. *Delo,* 124 F. 3d 944, 955, n. 11 (CA8 1997) (assuming, without deciding, that only Supreme Court precedent may dictate rule so that it is not new for *Teague* purposes), cert. denied, 523 U. S 1088 (1998), or when lower courts have themselves adopted new rules and then determined that the *Teague* retroactivity factors apply, see *Smith* v. *Groose*, 205 F. 3d 1045, 1054 (CA8) (holding that Circuit rule that prosecution's use of contradictory theories violates due process would fall within *Teague*'s "watershed" exception), cert. denied *sub nom. Gammon* v. *Smith,* 531 U. S. 985 (2000); *Sanders* v. *Sullivan,* 900 F. 2d 601, 606–607 (CA2 1990) (same, with respect to Circuit rule that prosecution's unknowing use of material, perjured testimony violates Constitution). Here, consistent with such a purpose, the Supreme Court has previously spoken.

Second, the most likely consequence of the majority's holding is further procedural complexity. After today's opinion, the only way in which this Court can make a rule such as *Cage*'s retroactive is to repeat its *Sullivan* reasoning in a case triggered by a prisoner's filing a first habeas petition (a "second or successive" petition itself being barred by the provision here at issue) or in some other case that presents the issue in a posture that allows

such language to have the status of a "holding." Then, after the Court takes the case and says that it meant what it previously said, prisoners could file "second or successive" petitions to take advantage of the now-clearly-made-applicable new rule. We will be required to restate the obvious, case by case, even when we have explicitly said, but not "held," that a new rule is retroactive. See, *e.g.*, *Penry* v. *Lynaugh,* 492 U. S. 302, 330 (1989) (stating that, if Court were to hold that Eighth Amendment prohibits execution of persons with mental retardation, this rule would be retroactively applicable on collateral review).

Even this complex route will remain open only if the relevant statute of limitations is interpreted to permit its 1-year filing period to run from the time that this Court has "made" a new rule retroactive, not from the time it initially recognized that new right. See 28 U. S. C. §2244(d)(1)(C) (1994 ed., Supp. V) (limitations period runs from "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"). Otherwise, the Court's approach will generate not only complexity, along with its attendant risk of confusion, but also serious additional unfairness.

I do not understand the basis for the Court's approach. I fear its consequences. For these reasons, with respect, I dissent.