SUPREME COURT OF THE UNITED STATES

No. 96–8516

KENNETH EUGENE BOUSLEY, PETITIONER *v.* UNITED STATES

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

[May 18, 1998]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I agree with the Court that petitioner has not demonstrated "cause" for failing to challenge the validity of his guilty plea on direct review. I disagree, however, that a defendant who has pleaded guilty can be given the opportunity to avoid the consequences of his inexcusable procedural default by having the courts inquire into whether "'it is more likely than not that no reasonable juror would have convicted him'" of the offense to which he pleaded guilty. *Ante*, at 8–9, quoting *Schlup* v. *Delo*, 513 U. S. 298, 327–328 (1995).

No criminal-law system can function without rules of procedure conjoined with a rule of finality. Evidence not introduced, or objections not made, at the appropriate time cannot be brought forward to reopen the conviction after judgment has been rendered. In the United States, we have developed generous exceptions to the rule of finality, one of which permits reopening, via habeas corpus, when the petitioner shows "cause" excusing the procedural default, and "actual prejudice" resulting from the alleged error. *United States* v. *Frady*, 456 U. S. 152, 167–168 (1982). We have gone even beyond that generous exception in a certain class of cases: cases that have actually

gone to trial. There we have held that, "even in the absence of a showing of cause for the procedural default," habeas corpus will be granted "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup* v. *Delo, supra,* at 321 (internal quotation marks omitted). In every one of our cases that has considered the possibility of applying this so-called actual-innocence exception, a defendant had asked a habeas court to adjudicate a successive or procedurally defaulted constitutional claim *after his conviction by a jury*. See *Kuhlmann* v. *Wilson,* 477 U. S. 436, 441, 452 (1986) (opinion of Powell, J.); *Murray* v. *Carrier,* 477 U. S. 478, 482, 495–496 (1986); *Smith* v. *Murray,* 477 U. S. 527, 529, 537–538 (1986); *McCleskey* v. *Zant,* 499 U. S. 467, 471, 502 (1991); *Sawyer* v. *Whitley,* 505 U. S. 333, 336–337, 339–340 (1992); *Schlup, supra,* at 305, 317–332.

There are good reasons for this limitation: First and foremost, it is feasible to make an accurate assessment of "actual innocence" when a trial has been had. In *Schlup*, for example, we said that to sustain an "actual innocence" claim the petitioner must "show that it is more likely than not that no reasonable juror would have convicted him *in the light of the new evidence*." 513 U. S., at 327 (emphasis added). That "new evidence" was to be evaluated, of course, along with the "old evidence," consisting of the transcript of the trial. The habeas court was to "make its determination concerning the petitioner's innocence in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." *Schlup, supra,* at 328 (internal quotation marks omitted). As the Court's opinion today makes clear, *ante,* at 9, the Government is permitted to supplement the trial record with any additional evidence of guilt, but the court begins with (and ordinarily ends with) a complete trial

transcript to rely upon. But how is the court to determine "actual innocence" upon our remand in the present case, where conviction was based upon an admission of guilt? Presumably the defendant will introduce evidence (perhaps nothing more than his own testimony) showing that he did not "use" a firearm in committing the crime to which he pleaded guilty, and the Government, eight years after the fact, will have to find and produce witnesses saying that he did. This seems to me not to remedy a miscarriage of justice, but to produce one.*

Secondly, the Court has given as one of its justifications for the super-generous miscarriage-of-justice exception to

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* The Court believes these concerns are overstated because, in the federal system, the court must be satisfied that there is a factual basis for the plea. See *ante*, at 9, n. 3. This displays a sad lack of solicitude for state courts, which handle the overwhelming majority of criminal cases. But even in the federal system, the "factual basis" requirement will typically be of no use. Consider the factual basis for the guilty plea in the present case, as set forth in the plea agreement:

"The parties . . . agree that, on or about March 19, 1990, . . . the defendant knowingly used firearms during and in relation to a drug-trafficking offense . . . . The following firearms were found in the defendant's bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The defendant admits ownership and possession of these two guns. This conduct constituted a violation of Title 18, United States Code, Section 924(c). Three other firearms were found in the two briefcases containing the bulk of the methamphetamine: a loaded .22 caliber North American Arms handgun, serial number C7854; a loaded .45 caliber Colt Model 1911 semiautomatic handgun, serial number 244682; an unloaded Ruger .357 caliber revolver, serial number 151-36099. The defendant denies knowledge of these guns." App. 8.

Of course "knowingly used" in this statement presumably means "knowingly used" in the erroneous sense that prompts this litigation. And that will almost always be the situation where the "involuntariness" of the plea is a consequence of subsequently clarified uncertainty in the law: the factual basis will not include a fact which, by hypothesis, the court and the parties think irrelevant.

inexcusable default, "the fact that habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." *Schlup, supra,* at 321. That may be true enough of petitions challenging jury convictions; it assuredly will not be true of petitions challenging the "voluntariness" of guilty pleas. I put "voluntariness" in quotation marks, because we are not dealing here with only *coerced* confessions, which may indeed be rare enough. The present case is here because, in *Henderson* v. *Morgan,* 426 U. S. 637, 644–646 (1976), this Court held that where neither the indictment, defense counsel, nor the trial court explained to the defendant that intent to kill was an element of second-degree murder, his plea to that offense was "involuntary." A plea, the Court explained, can "not be voluntary *in the sense that* it constitute[s] an intelligent admission that he committed the offense unless the defendant receive[s] 'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *Id.,* at 645, quoting *Smith* v. *O'Grady,* 312 U. S. 329, 334 (1941). Of course the word "voluntary" had never been used (by precise speakers, at least) *in that sense*– in the sense of "intelligent"– and what the *Henderson* line of cases did was, by sleight-of-tongue, to obliterate the distinction between *involuntary* confessions and *misinformed* or even *uninformed* confessions. Once all those categories have been lumped together, the cases within them are not at all rare, but indeed exceedingly numerous.

It is well established that "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers* v. *Roadway Express, Inc.,* 511 U. S. 298, 313, n. 12 (1994). Thus, every time this Court resolves a Circuit split regarding the elements of a crime defined in a federal statute, most if not all defendants who pleaded guilty in those Circuits on the losing end of the

split will have confessed "involuntarily," having been advised by the Court, or by their counsel, that the law was what (as it turns out) it was not– or even (since this would suffice for application of *Henderson*) merely *not* having been advised that the law was what (as it turns out) it was. Indeed the latter basis for "involuntariness" (mere lack of "real notice of the charge against him," *Henderson*, *supra*, at 165) might be available even to those defendants pleading guilty in the Circuits on the *winning* side of the split. Thus, our decision in *Bailey* v. *United States*, 516 U. S. 137 (1995), has generated a flood of 28 U. S. C. §2255 habeas petitions, each asserting actual innocence of "using" a firearm in violation of 18 U. S. C. §924(c). This Term, we will resolve a Circuit split over the meaning of another element ("carry" a firearm) in the same statute. See *Muscarello* v. *United States*, No. 96–1654; *Cleveland and Santana* v. *United States*, No. 96–8837. And we will also resolve Circuit splits over the requisite elements of five other federal criminal statutes. See *Salinas* v. *United States*, 522 U. S. ___ (1997) (18 U. S. C. §666(a)(1)(B)); *Brogan* v. *United States*, 522 U. S. ___ (1998) (18 U. S. C. §1001); *Bates* v. *United States*, 522 U. S. ___ (1997) (20 U. S. C. §1097(a)); *Bryan* v. *United States*, No. 96–8422 (18 U. S. C. §922(a)(1)(A)); *Caron* v. *United States*, No. 97–6270 (18 U. S. C. §921(a)(20)).

To the undeniable fact that the claim of "actual innocence" is much more likely to be available in guilty-plea cases than in jury-trial cases, there must be added the further undeniable fact that guilty-plea cases are very much more numerous than jury-trial cases. Last year, 51,647 of the 55,648 defendants convicted and sentenced in federal court (or nearly 93 percent) pleaded guilty. Administrative Office of the United States Courts, L. Mecham, Judicial Business of the United States Courts: 1997 Report of the Director 214.

When all these factors are taken into account, it could

not be clearer that the premise for our adoption in *Schlup* of the super-generous "miscarriage of justice" exception to normal finality rules— viz., that the cases in which defendants seek to invoke the exception would be "extremely rare"— is simply not true when the exception is extended to guilty pleas. To the contrary, the cases will be extremely frequent, placing upon the criminal-justice system a burden it will be unable to bear— especially in light of the fact, discussed earlier, that on remand the habeas trial court will not have any trial record on the basis of which to make the "actual innocence" determination.

Not only does the disposition agreed upon today overload the criminal-justice system; it makes relief available where equity demands that relief be denied. When a defendant pleads guilty, he waives his right to have a jury make the requisite findings of guilt— typically in exchange for a lighter sentence or reduced charges. Thus, defendants plead guilty to charges that have not been proven— that perhaps *could not* be proven— in order to avoid conviction on charges of which they are "actually guilty," which carry a harsher penalty. Under today's holding, a defendant who is the "wheel-man" in a bank robbery in which a person is shot and killed, and who pleads guilty in state court to the offense of voluntary manslaughter in order to avoid trial on felony-murder charges, is entitled to federal habeas review of his contention that his guilty plea was "involuntary" because he was not advised that intent-to-kill was an element of the manslaughter offense, and that he was "actually innocent" of manslaughter because he had no intent to kill. In such a case, it is excusing the petitioner from his procedural default, not holding him to it, that would be the miscarriage of justice.

The Court evidently seeks to avoid this absurd consequence by prescribing that the defendant's "showing of actual innocence must also extend" to any charge the Government has "forgone," *ante*, at 9. This is not even a fully

satisfactory solution in theory, since it assumes that the "forgone" charge is identifiable. If, as is often the case, the bargaining occurred before the charge was filed ("charge-bargaining" instead of "plea-bargaining"), it will almost surely not be identifiable. And of course in practical terms, the solution is no solution at all. To avoid the patent inequity, the Government will be called upon to refute, without any factual record to rely upon, not only the defendant's testimony of his innocence on the charge of conviction, but his testimony of innocence on the "forgone" charge as well– and as to the second, even the finding of "factual basis" required in federal courts, see n. 1, *supra*, will not exist. But even if rebuttal evidence existed, it is a bizarre waste of judicial resources to require mini-trials on charges made in dusty indictments (or indeed, if they could be identified, on charges *never made*), just to determine whether the defendant can litigate a procedurally defaulted challenge to a guilty plea on a *different* offense. Rube Goldberg would envy the scheme the Court has created.

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It would be marvellously inspiring to be able to boast that we have a criminal-justice system in which a claim of "actual innocence" will always be heard, no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault. But of course we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could. The "actual innocence" exception this Court has invoked to overcome inexcusable procedural default in cases decided by a jury "seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U. S., at 324. Since the balance struck there simply does not obtain in the guilty-

plea context, today's decision is *not* a logical extension of *Schlup*, and it is a grave mistake. For these reasons, I respectfully dissent.