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 STEVENS, concurring in part and dissenting in part.

While I agree with the Court's central holding and with its conclusion that none of its judge-made rules foreclose petitioner's collateral attack on his conviction under 18 U. S. C. §924(c), I believe there is a flaw in its analysis that will affect the proceedings on remand. Given the fact that the record now establishes that the plea of guilty to the §924(c) charge was constitutionally invalid, petitioner remains presumptively innocent of that offense. Accordingly, unless he again pleads guilty, the burden is on the Government to prove his unlawful use of a firearm.

I

This case does not raise any question concerning the possible retroactive application of a new rule of law, cf. *Teague* v. *Lane*, 489 U. S. 288 (1989), because our decision in *Bailey* v. *United States*, 516 U. S. 137 (1995), did not change the law. It merely explained what §924(c) had meant ever since the statute was enacted. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U. S. C. §1981 had been consistently misconstrued prior to our decision in *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989). Our comment on the significance of

the pre-*Patterson* jurisprudence applies equally to the pre-*Bailey* cases construing §924(c):

> "*Patterson* did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read §1981 to cover discriminatory contract termination were *incorrect*. They were not wrong according to some abstract standard of interpretive validity, but by the rules that necessarily govern our hierarchical federal court system. Cf. *Brown* v. *Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result). It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U. S. 298, 312–313 (1994).

Thus in 1990 when petitioner was advised by the trial judge, by his own lawyer, and by the prosecutor that mere possession of a firearm would support a conviction under §924(c), he received critically incorrect legal advice. The fact that all of his advisers acted in good-faith reliance on existing precedent does not mitigate the impact of that erroneous advice. Its consequences for petitioner were just as severe, and just as unfair, as if the court and counsel had knowingly conspired to deceive him in order to induce him to plead guilty to a crime that he did not commit. Our cases make it perfectly clear that a guilty plea based on such misinformation is constitutionally invalid. *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941); *Henderson* v. *Morgan*, 426 U. S. 637, 644–645 (1976). Petitioner's conviction and punishment on the §924(c) charge "are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance 'inherently re-

sults in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under [28 U. S. C.] §2255." *Davis* v. *United States*, 417 U. S. 333, 346–347 (1974).

II

The Government charges petitioner with "procedural default" because he did not challenge his guilty plea on direct appeal. The Court accepts this argument and therefore places the burden on petitioner to demonstrate either "cause and prejudice" or "actual innocence." See *ante*, at 7. Yet the Court cites no authority for its conclusion that "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review." *Ante*, at 6.[1] Moreover, the primary case upon which the Government relies, *United States* v. *Timmreck*, 441 U. S. 780 (1979), actually supports the contrary proposition: that a constitutionally invalid guilty plea may be set aside on collateral attack whether or not it was challenged on appeal.

Several years before we decided *Timmreck*, the Court had held that it is reversible error for a trial judge to accept a guilty plea without following the procedures dictated by Rule 11 of the Federal Rules of Criminal Procedure. *McCarthy* v. *United States*, 394 U. S. 459 (1969). The question in *Timmreck* was whether such an error was sufficiently serious to support a collateral attack under 28 U. S. C. §2255. Because the error was neither jurisdictional

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[1] The Court does cite *Reed* v. *Farley*, 512 U. S. 339, 354 (1994), for the general proposition that habeas review "'will not be allowed to do service for an appeal.'" *Reed* is inapposite, however, as it involved neither a constitutional violation nor a guilty plea. In *Reed*, the Court rejected a state prisoner's statutory claim brought under 28 U. S. C. §2254 on the grounds that the prisoner had neither made a timely objection nor suffered prejudice. See 512 U. S., at 349 ("An unwitting judicial slip of the kind involved here ranks with the nonconstitutional lapses we have held not cognizable in a postconviction proceeding").

nor constitutional, we held that collateral relief was unavailable. If we had thought that the failure to challenge the constitutionality of a guilty plea on direct appeal amounted to procedural default, there would have been no need in *Timmreck* to rely on the critical difference between reversible error and the more fundamental kind of error that can be corrected on collateral review. The opinion makes it clear that an ordinary Rule 11 violation must be challenged on appeal; the only criterion for collateral review that it mentions is that the error must be jurisdictional or constitutional.[2]

Decisions of this Court that do not involve guilty pleas are not controlling. For example, in *United States* v. *Frady*, 456 U. S. 152 (1982), two of the Court's reasons for dismissing the §2255 claim alleging that the jury instructions were erroneous are not present in this case. First, the defendant failed to object to the jury instructions— as

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[2] As we explained: "In *Hill* v. *United States*, 368 U. S. 424, the Court was presented with the question whether a collateral attack under §2255 could be predicated on a violation of Fed. Rule Crim. Proc. 32(a), which gives the defendant the right to make a statement on his own behalf before he is sentenced. The Court rejected the claim, stating: 'The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. . . .' 368 U.S., at 428." *United States* v. *Timmreck*, 441 U. S. 780, 783 (1979). The *Timmreck* Court went on to hold that "[t]he reasoning in *Hill* is equally applicable to a formal violation of Rule 11" because "[s]uch a violation is neither constitutional nor jurisdictional," and the error did not "resul[t] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.' Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the Rule." *Id.*, at 783–784.

required by Federal Rule of Civil Procedure 30– before the jury retired to consider its verdict; no comparable Rule applies to petitioner's claim. Second, as the Court emphasized by quoting from both *United States* v. *Addonizio*, 442 U. S. 178, 184–185 (1979), and *Henderson* v. *Kibbe*, 431 U. S. 145, 154 (1977), the prejudice to the defendant was not sufficient to warrant relief under §2255; that is plainly not the case with respect to this petitioner. Similarly, in *Davis* v. *United States*, 411 U. S. 233, 242 (1973), there was a failure to comply with Federal Rule of Civil Procedure 12(b)(2), which required challenges to the composition of the grand jury to be made by pretrial motion– a Rule that has no counterpart in the guilty plea context– coupled with the absence of the kind of prejudice that is present here.

The Court has never held that the constitutionality of a guilty plea cannot be attacked collaterally unless it is first challenged on direct review. Moreover, as the facts of this case demonstrate, such a holding would be unwise and would defeat the very purpose of collateral review. A layman who justifiably relied on incorrect advice from the court and counsel in deciding to plead guilty to a crime that he did not commit will ordinarily continue to assume that such advice was accurate during the time for taking an appeal. The injustice of his conviction is not mitigated by the passage of time. His plea should be treated as a nullity and the conviction based on such a plea should be voided.

Because the record in this case already unambiguously demonstrates that petitioner's plea to the §924(c) charge is invalid as a matter of constitutional law, I would remand with directions to vacate his §924(c) conviction and allow him to plead anew.