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]

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner pleaded guilty to "using" a firearm in violation of 18 U. S. C. §924(c)(1) in 1990. Five years later we held in *Bailey* v. *United States*, 516 U. S. 137, 144 (1995), that §924(c)(1)'s "use" prong requires the Government to show "active employment of the firearm." Petitioner meanwhile had sought collateral relief under 28 U. S. C. §2255, claiming that his guilty plea was not knowing and intelligent because he was misinformed by the District Court as to the nature of the charged crime. We hold that, although this claim was procedurally defaulted, petitioner may be entitled to a hearing on the merits of it if he makes the necessary showing to relieve the default.

Following his arrest in March 1990, petitioner was charged with possession of methamphetamine with intent to distribute, in violation of 21 U. S. C. §841(a)(1). A superseding indictment added the charge that he "knowingly and intentionally used . . . firearms during and in relation to a drug trafficking crime," in violation of 18 U. S. C.

§924(c). App. 5–6. Petitioner agreed to plead guilty to both charges while reserving the right to challenge the quantity of drugs used in calculating his sentence. *Id.*, at 10–12.

The District Court accepted petitioner's pleas, finding that he was "competent to enter [the] pleas, that [they were] voluntarily entered, and that there [was] a factual basis for them." *Id.*, at 29–30. Following a sentencing hearing, the District Court sentenced petitioner to 78 months' imprisonment on the drug count, a consecutive term of 60 months' imprisonment on the §924(c) count, and four years of supervised release. *Id.*, at 83–84. Petitioner appealed his sentence, but did not challenge the validity of his plea. The Court of Appeals affirmed. 950 F. 2d 727 (CA8 1991).

In June 1994, petitioner sought a writ of habeas corpus under 28 U. S. C. §2241, challenging the factual basis for his guilty plea on the ground that neither the "evidence" nor the "plea allocution" showed a "connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." App. 109. A magistrate judge recommended that the petition be treated as a motion under 28 U. S. C. §2255 and recommended dismissal, concluding that there was a factual basis for petitioner's guilty plea because the guns in petitioner's bedroom were in close proximity to drugs and were readily accessible. App. 148–153. The District Court adopted the magistrate judge's Report and Recommendation and ordered that the petition be dismissed. *Id.*, at 154–155.

Petitioner appealed. While his appeal was pending, we held in *Bailey* that a conviction for use of a firearm under §924(c)(1) requires the Government to show "active employment of the firearm." 516 U. S., at 144. As we explained, active employment includes uses such as "brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire" the weapon, *id.*, at

148, but does not include mere possession of a firearm, *id.*, at 143. Thus, a "defendant cannot be charged under §924(c)(1) merely for storing a weapon near drugs or drug proceeds," or for "placement of a firearm to provide a sense of security or to embolden." *Id.*, at 149.

Following our decision in *Bailey*, the Court of Appeals appointed counsel to represent petitioner. Counsel argued that *Bailey* should be applied "retroactively," that petitioner's guilty plea was involuntary because he was misinformed about the elements of a §924(c)(1) offense, that this claim was not waived by his guilty plea, and that his conviction should therefore be vacated. Nevertheless, the Court of Appeals affirmed the District Court's order of dismissal. *Bousley* v. *Brooks*, 97 F. 3d 284 (CA8 1996).

We then granted certiorari, 521 U. S. ___ (1997), to resolve a split among the Circuits over the permissibility of post-*Bailey* collateral attacks on §924(c)(1) convictions obtained pursuant to guilty pleas.[1] Because the Government disagreed with the Court of Appeals' analysis, we appointed *amicus curiae* to brief and argue the case in support of the judgment below. 522 U. S. ___ (1997).

A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." *Brady* v. *United States*, 397 U. S. 742, 748 (1970). We have long held that a plea does not qualify as intelligent unless a criminal defendant first receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941). *Amicus* contends that petitioner's plea was intelligently made because, prior to pleading guilty, he was provided with a copy of his indictment, which charged him with "using" a firearm. Such circumstances,

---

[1] See *United States* v. *Carter*, 117 F. 3d 262 (CA5 1997); *Lee* v. *United States*, 113 F. 3d 73 (CA7 1997); *United States* v. *Barnhardt*, 93 F. 3d 706 (CA10 1996); *In re Hanserd*, 123 F. 3d 922 (CA6 1997).

standing alone, give rise to a presumption that the defendant was informed of the nature of the charge against him. *Henderson* v. *Morgan*, 426 U. S. 637, 647 (1976); *id.*, at 650 (White, J., concurring). Petitioner nonetheless maintains that his guilty plea was unintelligent because the District Court subsequently misinformed him as to the elements of a §924(c)(1) offense. In other words, petitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. Were this contention proven, petitioner's plea would be, contrary to the view expressed by the Court of Appeals, constitutionally invalid.

Our decisions in *Brady* v. *United States*, *supra*, *McMann* v. *Richardson*, 397 U. S. 759 (1970), and *Parker* v. *North Carolina*, 397 U. S. 790 (1970), relied upon by *amicus*, are not to the contrary. Each of those cases involved a criminal defendant who pleaded guilty after being correctly informed as to the essential nature of the charge against him. See *Brady*, 397 U. S., at 756; *McMann*, 397 U. S., at 767; *Parker*, 397 U. S., at 792. Those defendants later attempted to challenge their guilty pleas when it became evident that they had misjudged the strength of the Government's case or the penalties to which they were subject. For example, Brady, who pleaded guilty to kidnapping, maintained that his plea was neither voluntary nor intelligent because it was induced by a death penalty provision later held unconstitutional. 397 U. S., at 744. We rejected Brady's voluntariness argument, explaining that a "plea of guilty entered by one fully aware of the direct consequences" of the plea is voluntary in a constitutional sense "unless induced by threats . . . , misrepresentation . . . , or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business." *Id.*, at 755 (internal quotation marks omitted). We further held that Brady's plea was intelligent because, although later judicial decisions indicated that at the time

of his plea he "did not correctly assess every relevant factor entering into his decision," *id.*, at 757, he was advised by competent counsel, was in control of his mental faculties, and "was made aware of the nature of the charge against him," *id.*, at 756. In this case, by contrast, petitioner asserts that he was misinformed as to the true nature of the charge against him.

Amicus urges us to apply the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989), to petitioner's claim that his plea was not knowing and intelligent. In *Teague*, we held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," *id.*, at 310, unless the new rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *id.*, at 311 (quoting *Mackey* v. *United States*, 401 U. S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)), or could be considered a "watershed rul[e] of criminal procedure," 489 U. S., at 311. But we do not believe that *Teague* governs this case. The only constitutional claim made here is that petitioner's guilty plea was not knowing and intelligent. There is surely nothing new about this principle, enumerated as long ago as *Smith* v. *O'Grady*, *supra*. And because *Teague* by its terms applies only to procedural rules, we think it is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress.

This distinction between substance and procedure is an important one in the habeas context. The *Teague* doctrine is founded on the notion that one of the "principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" *Teague*, 489 U. S., at 312 (quoting *Desist* v. *United States*, 394 U. S. 244, 262 (1969)). Consequently, unless a new

rule of criminal procedure is of such a nature that "without [it] the likelihood of an accurate conviction is seriously diminished," 489 U. S., at 313, there is no reason to apply the rule retroactively on habeas review. By contrast, decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, like decisions placing conduct "'beyond the power of the criminal law-making authority to proscribe,'" *id.*, at 311 (quoting *Mackey*, 401 U. S., at 692), necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal." *Davis* v. *United States*, 417 U. S. 333, 346 (1974). For under our federal system it is only Congress, and not the courts, which can make conduct criminal. *United States* v. *Lanier*, 520 U. S. ___, ___, n. 6 (1997) (slip op., at 8, n. 6); *United States* v. *Hudson*, 7 Cranch 32 (1812). Accordingly, it would be inconsistent with the doctrinal underpinnings of habeas review to preclude petitioner from relying on our decision in *Bailey* in support of his claim that his guilty plea was constitutionally invalid.

Though petitioner's claim is not *Teague*-barred, there are nonetheless significant procedural hurdles to its consideration on the merits. We have strictly limited the circumstances under which a guilty plea may be attacked on collateral review. "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked." *Mabry* v. *Johnson*, 467 U. S. 504, 508 (1984) (footnote omitted). And even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. Habeas review is an extraordinary remedy and "'will not be allowed to do service for an appeal.'" *Reed* v. *Farley*, 512 U. S. 339, 354 (1994) (quoting *Sunal* v. *Large*, 332 U. S. 174, 178 (1947)). Indeed, "the concern with finality served by the limitation on collateral attack has special force with

respect to convictions based on guilty pleas." *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979). In this case, petitioner contested his sentence on appeal, but did not challenge the validity of his plea. In failing to do so, petitioner procedurally defaulted the claim he now presses on us.

In an effort to avoid this conclusion, petitioner contends that his claim falls within an exception to the procedural default rule for claims that could not be presented without further factual development. Brief for Petitioner 28–34. In *Waley* v. *Johnston*, 316 U. S. 101 (1942) (*per curiam*), we held that there was such an exception for a claim that a plea of guilty had been coerced by threats made by a Government agent, when the facts were "dehors the record and their effect on the judgment was not open to consideration and review on appeal." *Id.*, at 104. Petitioner's claim, however, differs significantly from that advanced in *Waley*. He is not arguing that his guilty plea was involuntary because it was coerced, but rather that it was not intelligent because the information provided him by the District Court at his plea colloquy was erroneous. This type of claim can be fully and completely addressed on direct review based on the record created at the plea colloquy.

Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either "cause" and actual "prejudice," *Murray* v. *Carrier*, 477 U. S. 478, 485 (1986); *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), or that he is "actually innocent," *Murray*, 477 U. S., at 496; *Smith* v. *Murray*, 477 U. S. 527, 537 (1986).

Petitioner offers two explanations for his default in an attempt to demonstrate cause. First, he argues that "the legal basis for his claim was not reasonably available to counsel" at the time his plea was entered. Brief for Petitioner 35. This argument is without merit. While we have

held that a claim that "is so novel that its legal basis is not reasonably available to counsel" may constitute cause for a procedural default, *Reed* v. *Ross*, 468 U. S. 1, 16 (1984), petitioner's claim does not qualify as such. The argument that it was error for the District Court to misinform petitioner as to the statutory elements of §924(c)(1) was most surely not a novel one. See *Henderson*, 426 U. S., at 645–646. Indeed, at the time of petitioner's plea, the Federal Reporters were replete with cases involving challenges to the notion that "use" is synonymous with mere "possession." See, *e.g.*, *United States* v. *Cooper*, 942 F. 2d 1200, 1206 (CA7 1991) (appeal from plea of guilty to "use" of a firearm in violation of §924(c)(1)), cert. denied, 503 U. S. 923 (1992).[2] Petitioner also contends that his default should be excused because, "before *Bailey*, any attempt to attack [his] guilty plea would have been futile." Brief for Petitioner 35. This argument too is unavailing. As we clearly stated in *Engle* v. *Isaac*, 456 U. S. 107 (1982), "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" *Id.*, at 130, n. 35. Therefore, petitioner is unable to establish cause for his default.

Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his plea colloquy "has probably resulted in the conviction of one who is actually innocent." *Murray* v. *Carrier*, 477 U. S., at 496. To establish actual innocence, petitioner must demonstrate that, "'in light of all the evidence,'" "it is more likely than not that no reasonable juror would

---

[2] Even were we to conclude that petitioner's counsel was unaware at the time that petitioner's plea colloquy was constitutionally deficient, "[w]here the basis of a . . . claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." *Engle* v. *Isaac*, 456 U. S. 107, 134 (1982).

have convicted him." *Schlup* v. *Delo,* 513 U. S. 298, 327–328 (1995) (quoting Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev 142, 160 (1970)). The District Court failed to address petitioner's actual innocence, perhaps because petitioner failed to raise it initially in his §2255 motion. However, the Government does not contend that petitioner waived this claim by failing to raise it below. Accordingly, we believe it appropriate to remand this case to permit petitioner to attempt to make a showing of actual innocence.

It is important to note in this regard that "actual innocence" means factual innocence, not mere legal insufficiency. See *Sawyer* v. *Whitley,* 505 U. S. 333, 339 (1992). In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner's guilt even if that evidence was not presented during petitioner's plea colloquy and would not normally have been offered before our decision in *Bailey*.[3] In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges.

In this case, the Government maintains that petitioner must demonstrate that he is actually innocent of both "using" and "carrying" a firearm in violation of §924(c)(1). But petitioner's indictment charged him only with "using" firearms in violation of §924(c)(1). App. 5–6. And there is

---

[3] JUSTICE SCALIA contends that this factual innocence inquiry will be unduly complicated by the absence of a trial transcript in the guilty plea context. *Infra,* at 2–3. We think his concerns are overstated. In the federal system, where this case arose, guilty pleas must be accompanied by proffers, recorded verbatim on the record, demonstrating a factual basis for the plea. See Fed. Rules Crim. Proc. 11(f), (g).

no record evidence that the Government elected not to charge petitioner with "carrying" a firearm in exchange for his plea of guilty. Accordingly, petitioner need demonstrate no more than that he did not "use" a firearm as that term is defined in *Bailey*.

If, on remand, petitioner can make that showing, he will then be entitled to have his defaulted claim of an unintelligent plea considered on its merits. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.