OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: KENNETH EUGENE BOUSLEY, Petitioner v. UNITED STATES

CASE NO: 96-8516 C.2

PLACE: Washington, D.C.

DATE: Tuesday, March 3, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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KENNETH EUGENE BOUSLEY, :

Petitioner :

v. : No. 96-8516

UNITED STATES :

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Washington, D.C.

Tuesday, March 3, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:18 a.m.

APPEARANCES:

L. MARSHALL SMITH, ESQ., St. Paul, Minnesota; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

THOMAS C. WALSH, ESQ., St. Louis, Missouri; amicus curiae by invitation of the Court in support of the judgment below.

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P R O C E E D I N G S

(10:18 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 96-8516, Kenneth Eugene Bousley v. United States.

Mr. Smith.

ORAL ARGUMENT OF L. MARSHALL SMITH

ON BEHALF OF THE PETITIONER

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

This is an unusual case in that it may fairly be said that this defendant is in prison for acts that do not amount to a crime. This Court's unanimous opinion in the Bailey case made it clear that mere possession of weapons near drugs does not amount to use under the Federal statute under which Mr. Bousley was convicted.

It is at the core of habeas corpus jurisprudence to release prisoners who are held without legal authority. Mr. Bousley is in this position because at the time he entered his guilty plea to the charge under 924(c) the charges had been explained to him in language of possession. However, the Bailey case makes it clear that one cannot be convicted of this -- violating this statute lest there's been proof of active employment.

QUESTION: In other words, this is just really a

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somewhat standard argument that the Rule 11 colloquy was inadequate?

MR. SMITH: Your Honor, it's not -- no, I wouldn't say that, Your Honor. There's much more to it than that.

QUESTION: Well, I take it that even pre-Bailey you would have this same objection. You talk about possession, not use.

MR. SMITH: That's correct, the argument would be the same. The difficulty here is that it's not just the colloquy but it's the entire presentation of the nature of the charges to Mr. Bousley led him to believe and, indeed, caused the reflection that this was a mere possession crime, rather than an active employment crime.

As a result, his guilty plea cannot be construed as --

QUESTION: Well, but then that goes to the next argument that the law has changed in your view, et cetera, but if this were pre-Bailey, and Bailey had never been on the books, would you -- you would still say, I take it, that the plea was inadequately counseled and that the colloquy under Rule 11 was inadequate.

MR. SMITH: Yes, Your Honor, certainly the colloquy was --

QUESTION: Because they talked about possession,

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not use.

MR. SMITH: That's correct, but again, in order for a guilty plea to be valid, it must be knowledgeable and it must be intelligent and when the crime is explained as something other than what the statute actually describes, the plea cannot be intelligent or knowing, because the defendant is not aware and because the presentation does not comply with the statute, so it's more than just a Rule 11 violation. It's --

QUESTION: Well, I think that's a conventional argument and that the plea bargain and the fact that he had the indictment, the plea -- he signed the plea agreement, did he not?

MR. SMITH: He did sign the plea agreement.

QUESTION: And that adequate -- and that sets forth use.

MR. SMITH: No. No, Your Honor.

QUESTION: It did not?

MR. SMITH: The plea agreement uses the word use. The plea agreement, however, describes the nature of the conduct that amounts to use as ownership and possession, and this is consistent throughout the proceedings that --

QUESTION: Well, it says count 2 charges that defendant was using a firearm.

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MR. SMITH: That's correct, Your Honor, but it's -- use is merely the label for the crime. That's not the critical element. The critical element of the crime is active employment and, as the Bailey case --

QUESTION: Well, the statute doesn't talk about active employment.

MR. SMITH: No, but it --

QUESTION: So that the plea agreement, at least, was in terms of the statute, as was the indictment, of course.

MR. SMITH: Yes, Your Honor. Now, the difficulty is, if a defendant is told the label for the crime but not the elements, as in the Henderson and Morgan case, it's not possible to appreciate what actually is involved for a conviction and therefore the plea cannot be knowing and intelligent.

QUESTION: Well, may I ask you this. When the factual basis for the plea was stated, was that factual basis couched in terms of use, active employment in the sense that Bailey described, or was it couched in terms of mere possession?

MR. SMITH: It was couched in terms of possession, Your Honor and the notion of active employment was not referred to at all during this proceedings. The only reference was to possession as being the critical

element in this charge.

QUESTION: And isn't it the case here that all participants, the judge, the prosecutor and the defendant, all of them in fact understood that the crime was possession, availability of guns and not active use, and that's what the judge explained to the defendant?

MR. SMITH: Yes, Your Honor, that's correct. That's what all participants thought. It turns out that that was incorrect, because, as the Court well knows, section 924 requires proof of active employment rather than mere possession.

QUESTION: Now, if he hadn't been told this, but was -- by the court but was advised to that effect by his lawyer and had his own misimpression as to what the law meant, would you have a solid case?

MR. SMITH: I think that would be a much harder case, Your Honor, than the one we have here. However, the test, as reflected in the Henderson and Morgan case, is whether under all of the circumstances there's been an adequate explanation of the crucial elements of the charge and, under your hypothetical, it's quite likely that the defendant would not have had an adequate explanation even in that situation.

Here, of course, it's quite clear that the explanation did not match the critical element of use as

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it's defined under section 92 --

QUESTION: But you can't demand that the trial judge do more than nature allows. He gave a description of the crime that was the generally understood description. I mean, it's one thing to say it was misdescribed according to what the law was at the time and then you could invoke Rule 11 and say the court wasn't doing its job.

MR. SMITH: Well --

QUESTION: But here, the court did its best on the basis of the current law.

MR. SMITH: Well, Your Honor, I have to disagree with the notion that this was the current law. It was what the Eighth Circuit had described the law as. However, when section 924(c) was enacted, the Bailey case makes it clear that possession, mere possession was never a crime and, in fact, to the extent that there is any such thing, or ever was any such thing as possession of a weapon near drugs, that's a --

QUESTION: But a decision by this Court, you know, it is -- it speaks finally to what the law means, but it doesn't simply change the legal world that existed 3 years before, where several courts of appeals may have said exactly the opposite.

MR. SMITH: That's correct, Your Honor, but what

it does do is create a class of defendants who are in prison for acts that Congress has never made into a crime, and --

QUESTION: Well, it seems to me that's an important substantive argument. I don't think it means the plea is involuntary. Voluntariness of the plea should be tested by the adequacy and competency of counsel based on the laws that exists at the time. Then if you want to say that the law has changed and he should be released anyway because it's substantively retroactive, that's another argument, but I don't think it invalidates the plea.

MR. SMITH: Well, I understand your point, Your Honor, and I would say that in order to test the validity of the plea, the appropriate standard ought to be what the statute actually says. Once one departs --

QUESTION: May I interrupt? Isn't the test what the law was at the time, and in your view, what was the law?

MR. SMITH: The law at the time, Your Honor, was what section 924(c) says.

QUESTION: Yes. The fact that the court of appeals has misconstrued the law didn't make it the law, does it?

MR. SMITH: No, Your Honor. The law has --

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QUESTION: Didn't we squarely hold that in Rivers?

MR. SMITH: That's exactly right, Your Honor. The law has always been, under section 924(c), that mere possession does not violate that code section.

QUESTION: So you wanted this district judge to instruct in the Rule 11 colloquy contrary to the holding of the court of appeals of the circuit in which he sits?

MR. SMITH: Well --

QUESTION: That's what you want these -- I guess each district judge would have to just sit back and figure out what he thinks the law is, never mind what his court of appeals says.

MR. SMITH: Actually, Your Honor, what we're pointing out here is that in these unusual situations, when a Bailey case happens -- and they don't happen very often. Ordinarily the circuit courts are quite effective in doing a -- in explaining what the congressional intent is and what the statute actually says.

QUESTION: Well, they won't happen very often in the future, because we will be very, very reluctant to set aside a longstanding misinterpretation by the court of appeals if the consequence is going to be that every guilty plea rendered during that period is invalidated.

I mean, don't you see that as a risk for the

legal system? I certainly would give great second thought to setting aside any longstanding misinterpretation by the courts of appeals.

MR. SMITH: Certainly, Your Honor, if there had been many of those, but the fact is there have not been many. This just doesn't happen very often.

QUESTION: But we -- one of the reasons we grant certiorari on a statutory question is there's a difference of opinion among the courts of appeals, so many of the criminal statutes we decide are here solely because one court of appeals takes one position and another court of appeals takes another, so it's not as if this is going to be limited to the Bailey type situation.

MR. SMITH: Well, except for this, Your Honor, and this is an important distinction. The thing that makes Bailey different from other statutory construction cases is, this is not just any construction of the statute. This is the critical -- the critical element in the statute, which is possession versus active employment.

QUESTION: Well now, most statutes have several elements, you know. You have a certain intent, a general intent, mens rea -- now, the next lawyer who comes before us for the city is going to say, well, it's the intent that's the critical element. You really can't say that one element is more critical than the other, can you?

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MR. SMITH: Well, I -- no, Your Honor, I'm not saying that one element is more critical than the other. What I am saying, however, is that when the critical element has been misapplied, as it was in this case --

QUESTION: Well, why do you say this -- this particular element, possession, that sort of thing, is critical, whereas there are other elements of the crime, too, the intent with which you have to do it.

MR. SMITH: Yes. That's correct, Your Honor.

QUESTION: So they're all critical?

MR. SMITH: Well, I can't say whether they're all critical until I would see them, Your Honor.

QUESTION: Well, isn't it true that that would be -- of every essential element -- imagine the case going to trial. The judge charges the jury, in order to convict you must find A, B, and C.

MR. SMITH: Yes, Your Honor.

QUESTION: So one is no more or less important than the other, but it's what the law calls an essential element, something the jury must find.

MR. SMITH: What makes up the crime when you put them together, and I would distinguish this from the situation where a court determines, for example, that an affirmative defense might or might not be recognized.

Additionally, Your Honor -- and Justice Scalia,

to respond to your concern -- when cases such as this are sought to be reopened at the district court level it's not, certainly, an automatic situation where there would be, the guilty plea would be set aside. The district judge would have to take into account all of the facts, as he's, or she is entitled to do under 2255, and determine --

QUESTION: Well, if your rule is that the plea is involuntary if he doesn't know all of the correct elements, all of the correct definition of the elements of the crime, then it seems to me the district judge doesn't have much to do.

MR. SMITH: Well, except, Your Honor, what --

QUESTION: So I hope we can get beyond this. It seems to me that the plea is clearly voluntary based on the law at the time. Now, if you want to say that it should be set aside in any event because the law has changed, that's quite a different argument.

And I might just point out, you did not raise the involuntariness point as -- in your petition for certiorari, did you?

MR. SMITH: The invalidity of the plea on the basis of the inaccurate description would, I believe, fit within the second question, although it's not specifically described there, so Your Honor is correct in that regard.

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This --

QUESTION: Mr. Smith, there -- this petitioner took an appeal, did he not, after the guilty plea?

MR. SMITH: He did, Your Honor.

QUESTION: And he was convicted not only of this 924 charge, use of a firearm, but also of a substantive drug offense.

MR. SMITH: Yes, that's correct.

QUESTION: The appeal was from the conviction of the substantive drug offense, I take it.

MR. SMITH: Yes, it was.

QUESTION: And the petitioner did not appeal from the 924(c) --

MR. SMITH: Correct.

QUESTION: -- conviction and sentence.

MR. SMITH: That's correct.

QUESTION: So presumably that was waived, and at the time he chose not to appeal, assertions were being made all over the country by defendants that 924(c) did not -- was not a mere possession statute. I mean, those claims were being made across the United States, but this defendant did not raise that issue.

MR. SMITH: Correct, Your Honor.

QUESTION: So it was waived.

MR. SMITH: Well, I --

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QUESTION: Now, is he stuck with that waiver?

MR. SMITH: I would argue that he did not waive it, but if it were determined that he did based on Your Honor's position, I would argue that he should not be stuck with that for three important reasons.

First, the notion of procedural default, which is what it's been labeled, in a sense this is bringing it full circle and perhaps makes a somewhat perverse use of the doctrine, because here's a defendant who's attempting to establish his actual innocence, and what's placed in front of him is a procedural bar that prevents him from establishing that.

When a defendant is in this situation where the statute as interpreted now makes it clear that his conduct simply did not violate the statute, the notion of default should not be applied, and the notion of cause, as that's been found in this Court's prior jurisprudence, certainly should be found because of the string of Eighth Circuit opinions which would have prevented Mr. Bousley from knowing that he had the opportunity to bring this, as well as what the trial court told him.

QUESTION: Mr. Smith, I think we often apply the doctrine of procedural default when its consequence is to exclude a claim of actual innocence. I mean, that's not at all unusual.

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MR. SMITH: With this case, however, it's different, Your Honor, in that what we're speaking here about is the critical element of the crime. That's what's different. Those -- the cases that have been --

QUESTION: It's no different. I mean, in some cases -- let's assume a witness was improperly excluded by the trial court and that witness would have shown the nonexistence of one of the elements of the crime --

MR. SMITH: That's -- that's --

QUESTION: -- and you know, if it hasn't been raised on appeal, and he says I'm innocent, and this witness would have shown I'm innocent because one of the crucial elements of the crime didn't exist, we would say, well, you should have -- you know, we have a trial system and you have to play by the rules.

MR. SMITH: It's quite different, Your Honor, however, when the actual element of the crime is one that's never been enacted by Congress, and which forms the basis for the petitioner's imprisonment, is something that's never actually been a crime at all, and that's the situation that we have here.

QUESTION: But in the hypothetical I gave you he is going -- gone to jail for doing something that Congress did not say is a crime.

MR. SMITH: I --

QUESTION: Because one of the elements that Congress prescribed was not -- you know, he was not given a chance to deny it.

MR. SMITH: The difference, however, Your Honor, is that as a matter of process and procedure here it's clear that the district court was applying the improper element from the very beginning and the explanation was improper from the very beginning.

QUESTION: Yes, but the defendant could have taken the position, as many defendants all across the country were doing at that time, that the statute meant something else, and he could have preserved his right to challenge that throughout.

I mean, that was happening all over the country, but this defendant didn't do that and I think that leads us to the question whether he should be held to the waiver or the procedural default.

MR. SMITH: I'd say two things. There's an important principle which is that, because this defendant is actually innocent here of the charge, he ought not be held to the waiver.

There's also a very practical problem with taking the position that he should have raised this on appeal when there was uniform Eighth Circuit precedent to the contrary.

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If the Court wishes to encourage guilty pleas and to encourage people to accept settled precedent, the appropriate thing to do is to accept the law as it is and in these unusual circumstance, when it turns out that there have been a series of mistakes made, to allow the remedy which Mr. Bousley seeks here, the remedy of habeas corpus, rather than saying to defendants, bring up these appeals every single time you have the opportunity, don't take guilty pleas, don't accept the law as it is, constantly challenge it.

QUESTION: What about the other side of the bargain? I mean, the prosecutor didn't appeal from the amount of drugs that the judge determined in part because there had been this bargain on the 924(c).

If you are right, doesn't that have to be reopened, too, so that the prosecutor has a chance to contest the amount of drugs?

MR. SMITH: I would not agree with the notion that it should be reopened because there has been a full-blown hearing at which there was an opportunity to present all the relevant facts.

In an appropriate case, however, the district court may determine that some remedy along the lines that you describe would be appropriate.

QUESTION: But didn't the Government say, in

this very case, that the reason we didn't appeal on the drug part of the -- at least in part was that we had this defendant on the 924(c) charge?

MR. SMITH: So the Government says now, Your Honor. However, the Government has not pointed out any basis upon which an appeal from that factual finding could have been made and, indeed, there was already an appeal made by the defendant on that very issue, that is, the drug quantity and the propriety of a sentence. --

QUESTION: Thank you, Mr. Smith.

Mr Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE UNITED STATES

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

The decision of this Court in Bailey, interpreting the use element of the section 924(c) offense, gives rise to a variety of fairly complicated legal issues involving whether Bailey is a new rule under the Teague decision, would affect the guilty plea the petitioner entered -- has in this case, and whether petitioner is a -- is subject to procedural default that he must overcome in order to get collateral relief.

QUESTION: Mr. Dreeben, it seems to me that you exaggerate the extent to which Bailey makes this a unique

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case.

As the Chief Justice's question suggests, if the Government takes the position it has taken on the validity of the plea agreement, it seems to me that position will have to be applied not just in a case like this where the circuits were at one time virtually uniform, but in the case of any circuit split you would have to invalidate all of the plea agreements in that half of the circuit split that ultimately loses, because the district judges in that half of the circuits will have been instructing the -- in the Rule 11 colloquy according to the law of their circuit, and would not all of those plea agreements be invalid whenever it turns out that the element of the crime in question is as the other circuits have said?

MR. DREEBEN: Justice Scalia, that has, in fact, been the practice that the lower courts have followed when this Court has rendered a decision that cuts back on the reach of a Federal criminal statute as compared to the view that had prevailed in the lower courts.

QUESTION: Let me put it this way. Has it been the practice of the district courts uniformly to say that the guilty pleas were involuntary, which is the position you surprisingly take in your brief?

MR. DREEBEN: That issue has not been litigated in that fashion, Justice Kennedy, so I can't say that

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there are a huge number of cases that address it in one way or the other.

QUESTION: To take the example that again the Chief Justice gave, I think it was in Ratzlaf that we held the defendant had to have knowledge of the banking regulation. Under your view, a) all of those pleas that were previous to that are -- were involuntary and, second, even if they're not the convictions are void, so I assume that all the fines have to be given back. Is the Government going to give back all the fines?

MR. DREEBEN: Well, by and large, Justice Kennedy, the lower courts, when confronted with guilty pleas that were entered under a serious misunderstanding of the law, have left the defendant out of the plea subject to the inquiry that we think is critical in this case, which is whether the defendant can establish that, under the correct interpretation of the law, he is actually innocent.

QUESTION: So they'll all have to go back and reconstruct a factual situation that may have occurred years ago. I can imagine the petitioner taking this position, but I'm surprised to see the Government taking it.

MR. DREEBEN: Chief Justice Rehnquist, we have taken a position that we think balances the fundamental

interest in obtaining convictions under a correct understanding of the law with the interests in finality that we share with the courts.

Under section 924(c), we advocated for many years a position that in essence permitted us to obtain convictions based on a showing of possession of a firearm near guns. This Court unanimously that position.

QUESTION: Near drugs.

MR. DREEBEN: Near drugs. Near drugs. Thank you.

This Court unanimously rejected that position. We were left with quite a few convictions that we had obtained without ever proving the essential element of active use and which guilty pleas have been entered with the defendant never having conceded that element and the question is, what happens to those convictions in which the Government has not established and the courts have never determined whether an essential element of the offense was satisfied?

In our view, the progression of analysis here leads to the following conclusion. The decision of this Court in Bailey says what the statute always meant. It doesn't say what the statute meant from the date that this Court decided it, and we're prepared to accept that consequence, which means that, as to the convictions that

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we obtained before, there is the possibility, although not a certainty, that defendants may have either been pleaded guilty or been convicted based on conduct that is not a crime and that, to us, raises a question that ought to be available to be considered on habeas corpus if there's a statutory basis for asserting it.

QUESTION: Well, that's one way to go, and another way to go is to adopt the rule that when you plead guilty to the text of a statute, you take your chances as to whether the interpretation of that statute that you have assumed is correct or not. The mistake of law is washed out by your agreement. That's what a voluntary agreement is all about.

MR. DREEBEN: That is certainly true, Justice Scalia.

QUESTION: It would be different if the -- you know, if the court or your lawyer told you something that was contrary to what seemed to be the law in the circuit at the time.

MR. DREEBEN: But the circuit law at the time doesn't define what the crime is, and the premise of using a guilty plea as a basis for incarcerating an individual is that the individual has conceded that he is guilty of the elements of the crime.

If the defendant never gets an adequate

explanation of what the elements are either from his lawyer or from the court, it's very difficult --

QUESTION: Well --

MR. DREEBEN: -- to say that that plea knowingly concedes guilt of the offense.

QUESTION: Well, Justice Holmes said that law is what the courts say it is, and he wasn't speaking only of this Court. I mean, the idea that there's some sort of an abstract law up there in the sky that is finally delineated by this Court is -- really doesn't correspond with reality in many senses.

Certainly, this Court is the final expositor of the law, but there are all sorts of other courts in the meantime that are handing down decisions saying what a particular statute means, and the idea that when we say it means this, that everything that happened in the past is simply washed out is, I think, extraordinary.

MR. DREEBEN: Well, we don't think that everything that happened in the past is washed out by any means. There is a judgment of conviction on the books, and the petitioner has the burden of explaining why it should be set aside, even though he did not challenge the issue that he now raises at the proper time, and for that reason we think two things are true.

First, Congress is the one who determined what

the elements of 924(c) are, and this Court said so in 1995 in Bailey, so that decision explained what the law was from the time that Congress enacted the statute.

But petitioner had the burden of bringing that issue to the attention to the courts at the timely way that the procedure of the law provides for him upon pain of procedural default and he did not do that here, so our position is that unless he can overcome his procedural default by showing either cause in prejudice or actual innocence, his conviction stands and the past --

QUESTION: Well, he says actual innocence. He says, I didn't -- here were these drugs -- here were the firearms in the closet. That's what the factual basis showed.

MR. DREEBEN: That's right, Justice --

QUESTION: Actual innocence, he says.

MR. DREEBEN: That's his claim.

QUESTION: Right.

MR. DREEBEN: And it is a narrow claim --

QUESTION: Can that be defaulted or waived, that problem?

MR. DREEBEN: The actual innocence -- I think it's very important to focus on this. Actual innocence in our view is not an independent, freestanding legal claim that he has the right to bring into court.

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It represents, as this Court said in the Schlup decision, a gateway that permits him to present a court -- to a court a defaulted claim that would otherwise be permanently barred from judicial cognizance on 2255 or habeas corpus.

It is the last safety valve in the system for a defendant who was a --

QUESTION: Well, does it -- can he get through that gateway in a situation where people all over the country were challenging 924(c) on what it meant -- hadn't been successful, but they were challenging it, and he chose not to. He didn't appeal on this ground.

MR. DREEBEN: That's right.

QUESTION: He appealed on something else. Now, should we open this up now --

MR. DREEBEN: Well, I think --

QUESTION: -- when he made that choice?

MR. DREEBEN: That, Justice O'Connor, constitutes his default. He should have done that. He did not do that.

But once a defendant does procedurally default on a claim, they can get it into Federal court on 2255 under this Court's decision in United States v. Frady only by making one of two showings. First, they can show cause for their default, prejudice flowing from the error that

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they claim, and we say in this case he has no cause for not raising it.

As Your Honor has pointed out, defendant's were raising this issue all over the country. He could have done that. He elected not to. It's a default, and we think that the court of appeals was correct in saying that he did default his claim.

But there is a safety valve above and beyond cause and prejudice that this Court articulated in Smith v. Murray and in Murray v. Carrier and other cases that says that even when a defendant has defaulted his claim, if he can make a colorable threshold showing that he is actually innocent of the offense and it is only as a result of the error, the constitutional error that he claims, that he remains in prison, a habeas court can reach the merits.

QUESTION: Does it have to be a constitutional error? Suppose we don't -- I don't think this is a constitutional error. What's the constitutional error here? Is this a violation of due process here to hold an innocent man?

MR. DREEBEN: No, Justice Kennedy. I think that we may disagree on whether there is a constitutional error with respect to the voluntariness of the plea. That is the constitutional error that we have identified that he

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can raise on 2255. The statutory claim --

QUESTION: Well, that's not linked to the actual innocence gateway exception that you just applied.

MR. DREEBEN: The first thing that any defendant needs to show if they want to get in the door on 2255 is either a constitutional claim or a statutory claim that is cognizable in 2255 proceedings. We don't think he has any statutory claim that's cognizable on 2255 because he did plead guilty.

QUESTION: So what's the constitutional violation?

MR. DREEBEN: The constitutional claim is that in order for a defendant to enter a valid guilty plea which waives his privilege against compulsory self-incrimination and his right to a jury trial, he must have an adequate understanding of what elements of the offense he's admitting to.

QUESTION: So we go back to the very beginning.

MR. DREEBEN: We go back to the premise that when Congress enacts a statute that tells us what the elements of the crime are, and if that defendant didn't get any notice of that, his plea of guilty is not a reliable basis for concluding that he is guilty.

If the judge says, this statute has elements A, B, and C, do you admit that you did these elements, and he

says yes, I do, judge, there's no question my conduct satisfies that, but the statute actually contains element D, which is an element of his conduct that has never been explained to him and that he does not admit doing, the guilty plea does not represent a reliable determination that he is, indeed, guilty of the offense.

QUESTION: Well, another thing he says in the guilty plea is that he wants to end the criminal process. He wants to begin that necessary reconciliation to return him to civilized society, and it seems to me that you are very much undercutting the whole purpose of a guilty plea by your argument and that your argument also requires such an arcane and abstract course of reasoning that it seems to cast doubt on the whole question of whether or not our decision is retroactive at all to a final judgment.

MR. DREEBEN: Well, I agree, Justice Kennedy, that there are a number of fairly arcane questions that are built into the analysis in a case like this because this Court has enunciated a number of doctrines that sharply limit and, we think, appropriately so the availability of relief on habeas corpus.

And I am prepared to march through the various doctrines and explain them, but I wanted to state at the outset and at this point that our basic position is that if the defendant's guilty plea doesn't admit to all the

elements of the crime because they have never been explained to him, and yet he did not challenge that at the appropriate time, he has a remedy in habeas corpus at present under the present statutory regime if, and only if, he can show he is actually innocent, and --

QUESTION: Does that meant also if he was convicted?

MR. DREEBEN: Yes.

QUESTION: I mean, how does it apply, how does it apply to a person convicted?

MR. DREEBEN: It applies similarly, Justice Breyer. There is --

QUESTION: All right. If it applies similarly, then is it -- has it been the practice -- you started off with something very important to me. You said that -- I'm thinking of many statutes -- drug statutes have words in it like customs orders of the United States. We had a bribery statute that was all State law bribery is connected with a Federal program. There are thousands of statutes that have difficult statutory interpretations in them.

All right. Is it -- you're saying that it's common practice until this case, I guess, that where there was an interpretation that was in doubt and a court resolved it, all the courts that had followed previous

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interpretations to the contrary released the people from prison, I take it, who were convicted at trial under the wrong interpretation and also let them withdraw guilty pleas if they wanted to. Is that right?

MR. DREEBEN: Very few people actually get relief under the analysis that we propose, and very few people have --

QUESTION: What has been the practice? Has -- you started out by saying, it has been the practice that those lower courts which followed the erroneous interpretation would automatically let a person, no matter how long he'd been in prison, I guess -- he comes in, he says, I want to withdraw my plea now.

MR. DREEBEN: No, I didn't say that that --

QUESTION: No, but that's -- I'd like you to expound on that a little bit. What has been the practice?

MR. DREEBEN: For example, when this Court decided the McNalley case and said that the intangible rights theory of good Government did not fall within the mal fraud statute, there were a lot of defendants who had been convicted, some under guilty pleas, some under trial, as to whom the Government had never shown the kind of fraud that this Court held was in the mail fraud statute.

Those defendants were freely allowed to come back into court and attempt to make the case that they

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were innocent under the interpretation of the statute that this Court said was correct. Most of them failed, because in the process of proving an intangible rights violation, we most often did prove some injury to money or property that this Court said was the proper definition of the mail fraud statute.

QUESTION: I have no problem with the people who were convicted protecting their innocence all along, had the same rule been applied to all those who pleaded guilty to the statute and in my view took their chances as to what the proper meaning of the statute was.

MR. DREEBEN: There are relatively few cases, Justice Scalia, but I have not seen a single case in which a court said because of your guilty plea you are barred from even coming into court and saying that the statutory meaning changed and what you did is not a crime at the court of appeals level.

There are comparatively few cases before Bailey in which this issue was presented to courts and ruled upon. I think --

QUESTION: There were cases in the wake of Ratzlaf, were there not?

MR. DREEBEN: Yes, Justice Ginsburg, there were cases in the wake of Ratzlaf, and I'd have to say that in most of those cases where the Government had obtained

either a guilty plea or a conviction after a trial and it had never established the defendant's knowledge of the law, as this Court said was required under Ratzlaf, we didn't object to giving the defendant an opportunity to get some form of relief if, indeed, he could establish that he had a colorable claim of innocence.

QUESTION: Mr. Dreeben, you've made out a perfectly good case for saying that we ought to look at the voluntariness of the plea in the light of the final resolution of what the elements of the crime are, but there is a case for looking at it the other way and saying there is no constitutional violation if, at least under the prevailing or the unobjected-to law at the time of the plea, it was properly done.

What's the Government's -- what is your best reason for saying we ought to look at it your way rather than look at it the way that if it was okay at the time, no constitutional violation?

MR. DREEBEN: Justice Souter, in most contexts it is the law at the time of the plea that should govern the analysis of the question, and that is because if you look at a case like Brady, in which this Court basically said then-existing law governs the validity of the plea, the question that is being asked is, the defendant has admitted his guilt of the substantive offense and now,

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should we let him after the fact say, in hindsight I miscalculated about what the law might have been, if I had known what the law would be, I never would have admitted my guilt.

And I think the law quite properly says, that's not the kind of claim you can raise. You must take your chances with what the consequences of pleading guilty might be, or whether you had a good suppression motion that you forewent, but this case is different, because the requirement for the valid admission of guilt that justifies holding somebody in prison in the first place is that he had an idea of what the crime was that he was pleading guilty to, in other words, as this Court said in Henderson v. Morgan, that he had true knowledge of the charges that he was admitting.

This defendant knew that he was admitting possession of a firearm near drugs and he was told that that made him guilty of a criminal offense and he said, I did that. Those facts are correct. I'm willing to take a guilty plea.

But in fact, that's not what the law meant, as we now know from Bailey, was required to obtain a valid admission of guilty, so Justice Souter, my distinction is that the core basis for allowing a guilty plea rather than a trial to establish guilt is that the defendant

acknowledges that this conduct either was or can be shown to be satisfying of the elements of the offense under a proper understanding.

If he lacks that proper understanding, his admission of the crime is not a valid basis for holding him in prison, and that is distinct from all of the other considerations that he might have viewed in hindsight as impugning whether he would have made that admission. Here, he never really made it in the first place.

Thank you.

QUESTION: Thank you, Mr. Dreeben.

Mr. Walsh, we'll hear from you.

ORAL ARGUMENT OF THOMAS C. WALSH

AMICUS CURIAE BY INVITATION OF THE COURT

IN SUPPORT OF THE JUDGMENT BELOW

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

As has been alluded to on a number of occasions already this morning the single most important fact in this case is that this petitioner, pursuant to a plea agreement, pleaded guilty to the gun charge in open court under oath in accordance with the language of count 2 of the indictment, which accused him of the use of a firearm during and in relation to a drug-trafficking crime.

Now, guilty pleas are at the core of the

administration of our criminal justice system. Some 75 to 90 percent of cases being resolved --

QUESTION: May I ask you to comment on Henderson v. Morgan?

MR. WALSH: Henderson v. Morgan involved a case where the petitioner originally was charged with first degree murder and then, without ever having been recharged, pleaded guilty to second degree murder. The indictment was never changed. He was never charged with the offense.

Now, by contrast, here, this defendant pleaded guilty to --

QUESTION: What was the reason this Court gave for saying that the plea was involuntary in that case?

MR. WALSH: Because he wasn't apprised of the charge that he was pleading guilty to.

QUESTION: He wasn't apprised of one of the elements of the offense.

MR. WALSH: Well, it was the offense itself, Your Honor. I mean, he was charged with first degree murder and he pleaded guilty to second, and the wilfulness aspect of second also was not explained to him, and that was part of the Court's reasoning.

QUESTION: And that's the reason the Court said that there was a violation of due process of law in that

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he did not plead voluntarily because no one told him of one of the elements of the offense.

MR. WALSH: No one told --

QUESTION: And we set aside a State conviction on a guilty plea.

MR. WALSH: But that's a completely different case here, and let me explain what this defendant knew, because the Government seems to think it's very important what this particular petitioner's understanding was, and that's what Henderson said. If he has such an incomplete understanding of the elements of the offense, then we have to take a hard look at his guilty plea.

QUESTION: Right. If there's one element of the offense he doesn't understand, you've got to set aside his guilty plea.

MR. WALSH: Well, I wouldn't go that far, but --

QUESTION: That's what the opinion says.

MR. WALSH: But here, this defendant was charged both with possession of originally 7 pounds of meth -- methamphetamine, and with the possession, or with the use of five guns during and in relation to his trafficking in those drugs.

Now, in that scenario, on the drug count alone he was subjected potentially to a level 34 crime which could have brought him 188 months -- when you take into

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account the two-level enhancement for the use of the gun, 188 months to 235 months in prison on the drug charge alone.

Now, he was told by his lawyer -- and it's in the record. Pages 133 to 143 of the appendix in this Court show that there was a dialogue between this defendant and his lawyer about the elements of this particular gun charge and the lawyer said, I have told you repeatedly that section 924(c) requires more than possession, and the petitioner wrote back to his lawyer and said, I feel so strongly I am not guilty of the use of a firearm that there is a good chance I would not be convicted of count 2. That's at page 138 and 139 of the joint appendix.

The lawyer said, well, under present Eighth Circuit law I think you would be convicted, but it is your option, if you so desire, to move to set aside the plea and go to trial on that count, and for good reason, as part of a plea bargain, the defendant -- the petitioner decided not to do that.

And what did he get in return? In addition to the fact that the Government did not appeal on the amount of drugs that were found he got the right to contest the amount of drugs with which he was going to be charged, and that ended up reducing the quantity from 3,100 grams to

less than 1,000 grams, so instead of looking at a level 34 sentence, he started out with a base offense level of 30.

QUESTION: Mr. Walsh, you're explaining things that went on behind the scenes, but the scene itself in the courtroom was a judge asking the defendant, do you know what you were charged with? Defendant answers, possession of a firearm.

Judge Murphy then says, okay, if -- the indictment charges you with possessing the firearms during a drug trafficking offense.

So in open court he is told by the judge -- he pleads to something called possession of a firearm. The judge affirms that the charge is possessing a firearm.

MR. WALSH: And at page 28 of the colloquy, Your Honor, the defendant starts to quarrel with the court about what access he actually had to these guns, and the court explains, if you want a resolution of the gun issue and its relation to the drug issue and whether you used the gun, you have a right to ask for a jury determination of that.

QUESTION: Where did she say use the gun?

MR. WALSH: Well, she talked about the relationship of the gun to the drugs.

QUESTION: She had in her mind that the crime was possession and proximity. I was not aware that she

had at any point used the word used.

MR. WALSH: She said, I want you to understand that if you want to contest whether the guns are related to your drug-trafficking you can go to trial to do that, do you understand.

QUESTION: Yes, related to the drug trafficking, and that's what she explained to him.

MR. WALSH: Well, that's --

QUESTION: Possession and proximity.

MR. WALSH: Which --

QUESTION: Not active use.

MR. WALSH: Well, I think that's semantical difference, Your Honor. I think they were talking about the same --

QUESTION: Semantical difference? It's what meant the difference between committing a crime and not committing a crime in Bailey, and in slews of cases that were backed up behind it, so it's hardly a semantical difference whether the crime is possession of guns in proximity to drugs and, as explained in the Bailey opinion, actively using the gun.

MR. WALSH: If the ultimate issue is whether this defendant knew what he was charged with, clearly the indictment in this case charged him with use, and that's how it's different from Henderson.

If the issue is whether the Rule 11 colloquy was somehow defective, then maybe that's a different issue, but that doesn't raise a constitutional question, and that has been the fault --

QUESTION: Well, it surely does raise the constitutional -- Henderson squarely holds, if you do not advise the guilty -- the man before he pleads guilty of all the elements of the offense, the plea is involuntary, and that's what happened there, and that's what happened here.

MR. WALSH: Well, in addition, Henderson failed to explain the state of the law at the time that the fellow pleaded guilty. In this case --

QUESTION: Yes, but the state of the law at the time here is what we say it is. It's not what the district judge erroneously thought it was.

MR. WALSH: Well, I -- the district judge can't explain the law in terms different than the law of the circuit in which he sits.

QUESTION: He certainly can. He certainly has a duty to do it if the law in fact is what Congress enacted as we interpret it.

MR. WALSH: Well --

QUESTION: We squarely held that in the Rivers case.

MR. WALSH: Well, that -- well, I don't know that that was a holding --

QUESTION: We said there the statute always has the same meaning. It had that meaning since the date of enactment. The fact that a lot of courts of appeals, and there were just as many there, had read it the other way didn't cut any ice at all.

MR. WALSH: But whether that trumps the rule that the defendant takes the law as he finds it when he decides to plead guilty is a different question, and also --

QUESTION: It's not the law as he finds it. It's the law as is.

MR. WALSH: Well, then that opens up Pandora's box for --

QUESTION: You see, in Henderson the defendant was incorrectly advised by his counsel as to what the law was, and he acted on his advice of counsel and pleaded to a crime that had not been charged.

MR. WALSH: But in Broce, in Brady, and the --

QUESTION: Those are not elements of the offense.

MR. WALSH: Well, those are misinterpretations of the legal consequences of the plea, and when the defendant decides to take his chances with a guilty plea

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and save as much as 10 or 12 years off a drug sentence by pleading guilty to a crime that he may not be guilty of by his own acknowledgement in the record -- people plead guilty for a lot of different reasons.

He might have wanted to save his family and friends the embarrassment or the humiliation of testifying. He might have wanted to avoid dealing with his source for these drugs. He might have had a lot of reasons for wanting to put finality to this criminal episode, and he also was very interested in trying to save as much time in prison as he could, so the fact that at the time he may have miscalculated the consequences of his actions should not allow him 8 years later to come in and --

QUESTION: It's not a question of miscalculating the consequences of his actions. It's a question of entering a plea without being advised of what the elements of the crime to which he's asked to plea were --

MR. WALSH: Well, he --

QUESTION: -- by either the court or his counsel.

MR. WALSH: Well, he was advised by the terms of the indictment. He was advised by the terms of the plea agreement that he signed, which is written in terms of use of drugs.

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QUESTION: Well, but that -- isn't that really an equivocation? Sure, the word use was employed, but the explanation that was given to him, and the explanation that was presupposed by the statement of factual basis, was not use as we defined it in Bailey. It was in effect proximity of possession, so that he was not told about use as Bailey described and defined use, was he?

MR. WALSH: That's correct.

QUESTION: All right.

Now, let me try a different hypothetical. Let me go part-way with your argument, and let me assume that there certainly are some cases in which, if -- I'll take a Holmesian view that the law changed when Bailey came down, and I will assume for the sake of argument that there are a class of cases in which we shouldn't disturb the plea simply because the elements were explained improperly, as understood by hindsight.

The distinction I want to test out is this. I suppose there are -- you know, there are infinite varieties of mistakes in the plea colloquys, but one broad distinction would be this. In some cases, the law is explained to a defendant who wishes to plead in a way that simply does not make it clear what the distinction is between the offense that he's charged with and some related offense, first degree murder, second degree

murder, that sort of thing.

In another class of cases, of which this is supposedly one, there is no other offense, so that if he pleads guilty to this kind of -- under these circumstances, he's pleading guilty to something which under no possible set of legal facts would be punishable.

Shouldn't a distinction be drawn between those two kinds of plea cases, the argument being that in the first class of cases the public has a -- at least an interest in having murderers generally locked up, but there is no discernible public interest, or no serious public interest in locking up people for something which is not a crime by anyone's definition, and for conduct which does not fit within a crime by anybody's definition. Would you admit that distinction?

MR. WALSH: Well, no, Justice Souter. I mean, I would think that the public does have an interest in locking up people who are trafficking in drugs, and even more so people who have --

QUESTION: For trafficking -- for trafficking in drugs, that's right, and that --

MR. WALSH: -- and who use guns --

QUESTION: But that's -- but he's not being locked up here for trafficking in drugs.

MR. WALSH: Well, he is in part.

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QUESTION: To the extent that we are concerned with his lock-up, we're concerned with his lock-up for the firearms offense.

MR. WALSH: And certainly Congress could have made mere possession in connection with a drug-trafficking offense --

QUESTION: But it didn't. It didn't.

MR. WALSH: It didn't yet, right, but it did provide for an enhancement in the guidelines, so that conduct is recognized as reprehensible, because it gets him two extra levels on his sentence if he's found with guns, even if he's not charged under 924(c).

QUESTION: So you're saying the Government -- I don't -- I think you're saying that the Government's interest is sufficiently weighty because we can more or less equate a guidelines enhancement with conviction for a separate crime. That -- you don't mean that.

MR. WALSH: No, but we can take that into account in seeing whether that's conduct that the Government has the right to punish.

QUESTION: It's about 3 years difference, isn't it --

QUESTION: Right, yes.

QUESTION: -- between the enhancement and being convicted of a substantive offense.

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MR. WALSH: 2-1/2 or 3, yes, Your Honor.

I'd like to move, if I could, to the procedural default question, because --

QUESTION: May I ask you just one question also on a procedural line, because I understood your brief to make no distinction, as I thought our cases had, in the so-called Teague bar between a procedural issue -- I think Teague itself uses the word procedural.

MR. WALSH: Constitutional rules of procedure.

QUESTION: Procedure -- of procedure, and something that is substantive. Here we're not talking about any slip or change in the law about procedure. We're talking about a definition of what the crime is, and I had not seen Teague applied to the substance, as distinguished from the procedure.

MR. WALSH: Well, to the extent that the Teague progeny have been developed to date, I would agree that there has not been a case like this. I would suggest that the distinction to date has been between the constitutional rules Teague has addressed and this statutory rule, which this Court has never applied Teague to yet because it's never been asked to.

QUESTION: But we never -- don't talk about what the crime is as being a new rule. Maybe there was merely a misconstruction, but it's not -- the notion that -- not

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the common law that you pull down from the sky, but words that Congress used to define an offense, we haven't, to my knowledge, spoken about this Court's interpretation as a, quote, new rule.

MR. WALSH: Well, under Teague a new rule is one that's not dictated by precedent, and Bailey clearly was not dictated by precedent. That was a departure from --

QUESTION: So are you urging that we extend -- I mean, you've been candid in saying we haven't -- we -- that Teague itself uses the word procedural.

MR. WALSH: Absolutely. We think this case should be subject to Teague and should be Teague-barred, and it's a small step in our view from the cases that have applied Teague so far to prisoners on death row, for instance, denying them retroactive application of constitutional provisions, to this case, which simply says that a new statutory rule won't be applied retroactively.

But if I could talk for a minute about procedural default, because not only did this petitioner commit what we would call the ultimate act of procedural default by pleading guilty, but then it was compounded by his failure to appeal on the gun charge after he was convicted, and the record again shows that he knew what his rights were, but he waived them.

And as Justice O'Connor has indicated, there was

plenty of litigation going on around the country, and we agree with the Government that there is no cause for his failure to assert his gun rights on the original appeal. It was not futile, and even perceived futility under Engle v. Isaac and Smith v. Murray is not cause, so he procedurally defaulted --

QUESTION: Would you distinguish a case like -- post Lopez, suppose somebody -- direct appeal time is over, applies under 2255 to be released because he was convicted of the crime of carrying a gun within X distance of a school?

MR. WALSH: Well, I think as far as procedural default is concerned I would have the same analysis there. There might be other reasons why someone under that kind of a situation might be --

QUESTION: Well, do you distinguish these two cases, or do you say they're saying too bad, you entered a plea, even though the Supreme Court said that that's not -- that can't -- not only it's not a crime, but can't be a crime?

MR. WALSH: Well, as far as if a statute is held unconstitutional the Blackledge-Menna exception might -- might -- give that particular petitioner the right to set aside the guilty plea, but that's -- Blackledge and Menna don't apply to this situation.

QUESTION: How do you deal with the argument made by the Solicitor General's Office that if there -- there is, despite the waiver, a gateway for somebody who comes in with a colorable claim of actual innocence?

MR. WALSH: Well, that would be a novel application of the doctrine of actual innocence, Justice O'Connor. Never has this Court, first of all, ever applied actual innocence, the gateway or freestanding actual innocence, to a situation in which a man pleaded guilty.

But -- and the actual innocence paradigm that's been created by this Court most recently in Schlup just simply doesn't fit the situation where you have a plea of guilty, because in that case, for instance, the defendant --

QUESTION: If this defendant had gone to trial and been convicted, would you be here making this same argument, or would you say under these circumstances that person could come in with his claim of actual innocence?

MR. WALSH: Well, he'd --

QUESTION: No guilty plea. He went to trial.

MR. WALSH: He'd have a better claim, but still, this isn't actual innocence at the bottom. Actual innocence means, I didn't do this. There's a dead body on the floor, but I didn't do it. Prototypical actual

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innocence, as mentioned by this Court in one of its cases is, they got the wrong man.

But what we're talking about here, at best, is what the Court has described as legal innocence, or technical innocence. What it really is is a claim that the evidence was insufficient to support the conviction, whether obtained by a guilty plea or by jury verdict. This --

QUESTION: Well, I think at bottom it's a little more than that. It was that this statute was misinterpreted by the lower courts. Justice Harlan in Mackey and in Desist confined the retroactivity to conduct that could not be made a crime, flag-burning and so forth.

MR. WALSH: Right.

QUESTION: Was the reason that he did that because there was an extant body of jurisprudence or understanding that statutory interpretations are not retroactive to final judgments, or was this -- do you think this was just the assumption of the law?

MR. WALSH: I think he just felt that there were certain primary personal rights that were so fundamental that they're beyond the ability of Congress to proscribe.

QUESTION: Neither side has a great case for us on that, on the substantive point of retroactivity of statutory reinterpretations.

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MR. WALSH: That's correct. It has not been decided by this Court. We've cited a couple of cases from --

QUESTION: You mean, all those books in my office, this thing has never come up?

MR. WALSH: Well, some of the lower courts have refused to apply decisions like Bailey retroactively, relying on the Davis case, but the Davis case is a total -- that's a total misapplication of Davis, which was not a retroactivity case at all but a cognizability case, and to that extent, to that analysis we think he's just wrong.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Walsh. You were appointed as amicus by the Court, and the Court wishes to express its appreciation to you for your service.

MR. WALSH: Thank you, Mr. Chief Justice.

(Whereupon, at 11:18 a.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)