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DRETKE V. HALEY AND THE STILL UNKNOWN LIMITS OF THE ACTUAL INNOCENCE EXCEPTION

Dretke v. Haley, 124 S. Ct. 1847 (2004)

I. INTRODUCTION

Can a petitioner assert actual innocence in a federal habeas petition where he has been sentenced under an entirely inapplicable habitual offender statute, has served considerably more prison time than the correct sentencing statute would have prescribed, and where even the State has conceded as much?[1] The United States Supreme Court confronted this question in *Dretke v. Haley* and, based on a procedural technicality, avoided resolution of this issue that has split and confounded the courts of appeals.[2] The Court decided that it would not even consider the merits of a petitioner's actual innocence claim (even with a state's concession that the sentence was statutorily unauthorized) until the district court had first heard all of the petitioner's nondefaulted claims for similar relief as well as other grounds to show cause for any procedurally defaulted claims.[3] The Court held that lower court consideration of the petitioner's ineffective assistance of counsel claim should have preceded review of the petitioner's actual innocence claim, even where, in a case such as the instant one, the sentence was indisputably impermissible.[4] Whereas the Supreme Court had previously endorsed application of the actual innocence exception to capital sentencing cases,[5] the Court here declined to resolve the circuit court split over whether the actual innocence exception should be extended to the noncapital sentencing context.[6] The Supreme Court thus vacated the Fifth Circuit's decision upholding the decision of the district court, which had

[1] Dretke v. Haley, 124 S. Ct. 1847, 1849-50 (2004).

[2] *Id.* at 1852.

[3] *Id.*

[4] *Id.*

[5] Sawyer v. Whitley, 505 U.S. 333, 339-46 (1992); Smith v. Murray, 477 U.S. 527, 537-39 (1986).

[6] *Dretke*, 124 S. Ct. at 1851-52.

held that the actual innocence exception did apply to noncapital sentencing cases.[7]

Notwithstanding the Court's detailed legal analysis, the practical result for the petitioner, Haley, is that though he has already served a sentence of four years longer than that authorized by the appropriate state sentencing statute,[8] he must *continue* to serve that sentence until he has first exhausted his ineffective assistance of counsel claim.[9] If the lower court finds Haley's ineffective assistance of counsel claim to be meritorious, then Haley will be resentenced.[10] If not, then due to his exhaustion of the ineffective assistance of counsel claim, Haley could finally assert actual innocence.[11] Only then would the Supreme Court presumably address whether the actual innocence exception applies to the noncapital sentencing context, and only then would Haley potentially receive the *same* relief that he was entitled to all along. This undesirable result epitomizes the perils of strict form-over-substance thinking when adopted without regard to efficiency, liberty, or even common sense.

This Note will criticize the Court's decision and its troublesome result on several grounds. First, not only should the Court have recognized that the actual innocence exception applies to some noncapital sentencing cases, but it also should have applied this exception to the instant case. The Court's reluctance to expand habeas doctrine based on a principle of avoidance found in *Carrier*[12] misconstrues this precedent and the purpose of habeas corpus itself. No habeas precedent forecloses a narrow application of the actual innocence exception to noncapital sentencing cases, and some past cases even endorse this result.[13] The Court should have endorsed the Fifth Circuit's holding, which narrowly applied the actual innocence exception to Haley's case.[14] In addition, Texas's objection to Haley's actual innocence claim as merely freestanding in violation of *Herrera*[15] ironically undermines Justice Rehnquist's very reliance in *Herrera* that clemency should provide a "fail safe" for nonjusticiable actual innocence claims.[16] Second, because the actual innocence exception

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[7] *Id.* at 1854.

[8] *See* Respondent's Brief at 15, *Dretke* (No. 02-1824).

[9] *Dretke*, 124 S. Ct. at 1852-53.

[10] *Id.* at 1853.

[11] *Id.* at 1852.

[12] *Id.* at 1852-53 (quoting Murray v. Carrier, 477 U.S. 478, 495-96 (1986)).

[13] *See infra* Part V.A.2.

[14] Haley v. Cockrell, 306 F.3d 257, 263-64 (5th Cir. 2002).

[15] Herrera v. Collins, 506 U.S. 390, 405-05 (1993).

[16] *Id.* at 415 (quoting KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 315 (1989)).

represents judge-made law and is subject to equitable considerations,[17] the Court and the dissent both missed opportunities to consider the policy implications of the majority's holding. The Court's rigid adherence to its own judge-made temporal requirements may cause the procedural default rule to swallow the actual innocence exception, rendering it a practical nullity in the context of noncapital sentencings. The Court's decision is also fundamentally unfair, because it punishes Haley for a triad of mistakes by others: his counsel during trial, the district court, and the Fifth Circuit.

II. BACKGROUND

A. HABEAS CORPUS DOCTRINE

"A bulwark against convictions that violate 'fundamental fairness,'"[18] the writ of habeas corpus affords prisoners the post-conviction opportunity to challenge their confinement as unlawful.[19] Labeled "the most celebrated writ in English law,"[20] it is also one of the most contentious.[21] Hardly any other right in American jurisprudence has so repeatedly drawn the federal and state courts more squarely into conflict.[22] The ability for federal judges with lifetime tenure to review and potentially overturn state court convictions without giving any preclusive or res judicata effect is a complete anomaly in American jurisprudence.[23] Furthermore, it is the precarious balance between a prisoner's right to freedom from unlawful confinement and a state's interest in comity and finality that continues to avoid simple resolution today.[24]

The framers of the Constitution provided that "the privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of

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[17] *Dretke*, 124 S. Ct. at 1853; *Herrera*, 506 U.S. at 404 (citing McCleskey v. Zant, 499 U.S. 467, 502 (1991)).

[18] Engle v. Isaac, 456 U.S. 107, 126 (1982) (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)).

[19] MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS 585 (4th ed. 1998).

[20] ERWIN CHEMERINSKY, FEDERAL JURISDICTION 838 (3d ed. 1999) (quoting BLACKSTONE, COMMENTARIES 129 (1791)).

[21] *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 368 (6th ed. 2002) ("Federal habeas corpus for state prisoners is, and always has been, a controversial and emotion-ridden subject.").

[22] *See* REDISH & SHERRY, *supra* note 19, at 586 (noting that habeas corpus doctrine is the sole circumstance where lower federal courts can review and potentially overturn state court decisions without giving preclusive or res judicata effect to them).

[23] *See id.* ("The existence of habeas is therefore something of an anomaly.").

[24] *See* WRIGHT & KANE, *supra* note 21, at 368.

Rebellion or Invasion the public Safety may require it."[25] In 1789, the Judiciary Act empowered federal courts to issue writs of habeas corpus for prisoners held in federal custody and who alleged that their confinement violated the Constitution, Treaties, or laws of the United States.[26] In 1867, Congress extended the availability of habeas corpus to prisoners held in state custody as well.[27] With the exception of Fourth Amendment claims, which a habeas petitioner may not raise where the state has "provided a full and fair opportunity to litigate" the claims,[28] the writ of habeas corpus today allows virtually all dispositive constitutional claims that correctly follow the procedural rules.[29]

B. FROM *FAY V. NOIA* TO *WAINWRIGHT V. SYKES*: THE TIGHTENING OF THE NOOSE AROUND PROCEDURALLY DEFAULTED CLAIMS

One of the more difficult questions for the Supreme Court has been how to treat federal habeas petitioners who raise successive, abusive, or procedurally defaulted claims.[30] Specifically, the prevalence of procedurally defaulted claims, many of which are frivolous, has forced the Court to manage the difficult balance between a prisoner's interest in liberty and a state's interest in comity and finality.[31] A procedurally defaulted claim refers to a claim that the state prisoner could have, but did not, raise in state court in accordance with state procedural rules.[32] Federal review of such procedurally defaulted claims presents the federal court with a dilemma. On the one hand, it wishes to avoid disturbance of state court

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[25] U.S. CONST. art. I, § 9, cl. 2.

[26] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82 (current version at 28 U.S.C. §§ 2241, 2254(a) (2005)).

[27] Act of Feb. 5, 1867, ch. 27, § 1, 14 Stat. 385 (current version at 28 U.S.C. §§ 2241, 2254(a) (2005)); *see also* McCleskey v. Zant, 499 U.S. 467, 477-80 (1991); Wainwright v. Sykes, 433 U.S. 72, 77-82 (1977) (discussing the history of habeas corpus doctrine).

[28] Stone v. Powell, 428 U.S. 465, 494 (1976).

[29] *See* WRIGHT & KANE, *supra* note 21, at 366-67 (stating that except for alleged Fourth Amendment violations, harmless constitutional error, and some new rules of constitutional law, all other alleged constitutional violations may serve as bases for habeas corpus relief).

[30] While successive, abusive, or procedurally defaulted claims have different meanings, the cause-and-prejudice standard and actual innocence exception apply similarly to all of them. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 318-19 (1995); Sawyer v. Whitley, 505 U.S. 333, 338 (1992); *see also* WRIGHT & KANE, *supra* note 21, at 368 (noting that the large number of "utterly unjustified" habeas applications puts a burden on federal courts). *But see* REDISH & SHERRY, *supra* note 19, at 587 (stating that "habeas jurisdiction is not a significant burden on the federal courts; only about five percent of the federal district court caseload consists of habeas petitioners brought by state prisoners").

[31] *See* WRIGHT & KANE, *supra* note 21, at 369 (illustrating the difficult balance between the large number of applications for habeas corpus and the human rights of the petitioners).

[32] *Id.*

decisions based on adequate and independent state law procedural grounds.[33] On the other, a federal court should strive to preserve fairness as the predominant purpose behind habeas corpus.[34] In particular, review of a procedurally defaulted claim in federal court presents such a difficult problem, because it permits the federal court to address state claims that the state court itself did not and could not have even heard.[35]

Fay v. Noia[36] represented the Supreme Court's first detailed attempt to outline the ability of federal courts to review procedurally defaulted claims.[37] The Court's liberal approach in this case mandated federal review of procedurally defaulted claims except where the petitioner had "deliberately by-passed" the state court's procedural rules.[38] In *Wainwright v. Sykes*,[39] however, the Court significantly curtailed the breadth of *Fay* and instead permitted federal review of procedurally defaulted claims only where the petitioner could show "cause" for his failure to comply with state rules requiring contemporaneous objections at trial as well as "prejudice" arising from the alleged constitutional error.[40] The Court found this cause-and-prejudice standard sufficient to provide a safeguard against "a miscarriage of justice."[41] The Court also reasoned that the cause-and-prejudice standard would promote several vital interests: state court review when witnesses' recollections were freshest, the possibility of a ruling in the defendant's favor, enhanced ability for the state judge to make factual determinations on federal constitutional questions, the potential exclusion of the disputed evidence, and a higher demand on state prosecutors to consider the admissibility of questioned evidence.[42] In addition, the Court expressed displeasure at the potential for the *Fay* rule to encourage "sandbagging" where a defendant would withhold raising the constitutional issue until federal court review.[43] Subsequently, the Court extended the

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[33] Wainwright v. Sykes, 433 U.S. 72, 81 (1977).

[34] Strickland v. Washington, 466 U.S. 668, 697 (1984) (citing Engle v. Issac, 456 U.S. 107, 126 (1982)) ("[F]undamental fairness is the central concern of the writ of habeas corpus . . . .").

[35] *Engle*, 456 U.S. at 128-29 (citing *Wainwright*, 433 U.S. at 89-90) (interpreting *Wainwright* to recognize that the costs to state comity and finality are "particularly high" in situations of a procedural default).

[36] 372 U.S. 391 (1963).

[37] *Id.* at 438.

[38] *Id.*

[39] 433 U.S. 72.

[40] *Id.* at 85, 87-88.

[41] *Id.* at 90-91.

[42] *Id.* at 88-89.

[43] *Id.* at 89.

cause-and-prejudice standard to cover all claims procedurally defaulted at the state level, not just those requiring contemporaneous objections.[44]

Since a defense attorney's failure to assert a claim at the state level is one of the easiest ways for a prisoner to default, it is no surprise that petitioners must typically demonstrate ineffective assistance of trial counsel in order to show cause.[45] Such an argument, to demonstrate cause, must meet the exacting Sixth Amendment standard of ineffective assistance of counsel.[46] That is, the defendant's counsel must have "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[47] Mere failure by defense counsel to recognize and raise every conceivable constitutional claim does not meet this threshold.[48] To satisfy the prejudice requirement, a petitioner must show that had his counsel been effective, there is a reasonable probability that the state court's result would have been different.[49]

C. AN EXCEPTION TO THE EXCEPTION: THE ACTUAL INNOCENCE "SAFETY VALVE"[50]

Despite *Wainwright*'s limitation on a habeas petitioner's ability to raise procedurally defaulted claims, the Supreme Court, in three 1986 decisions, later recognized that "'[in] appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'"[51] To prevent such unjust incarcerations, the Court went on to recognize an actual innocence exception to the cause-and-prejudice

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[44] Coleman v. Thompson, 501 U.S. 722, 748 (1991).

[45] *Wainwright*, 433 U.S. at 104 (Brennan, J., dissenting) ("[T]he ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel.").

[46] *Coleman*, 501 U.S. at 753-54.

[47] Strickland v. Washington, 466 U.S. 668, 686 (1984).

[48] Murray v. Carrier, 477 U.S. 478, 486 (1986) (quoting Engle v. Isaac, 456 U.S. 107, 133-34 (1982)) ("[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

[49] *See* WRIGHT & KANE, supra note 21, at 365-66 (stating that, to show prejudice, the petitioner must demonstrate that the errors at trial "worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimension").

[50] Harris v. Reed, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring).

[51] *Carrier*, 477 U.S at 495 (quoting *Engle*, 456 U.S. at 135) (alteration in original); Smith v. Murray, 477 U.S. 527, 537 (1986) (quoting *Engle*, 456 U.S. at 135) (alteration in original); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (quoting *Engle*, 456 U.S. at 135) (alteration in original).

standard.[52] That is, a federal court could grant habeas relief without satisfaction of the cause-and-prejudice standard if a petitioner could show that a constitutional violation "probably resulted" in the conviction of an actually innocent person.[53] The Court also noted that most actually innocent habeas petitioners would be able to fulfill the cause-and-prejudice standard.[54]

In these cases, the Court confined the actual innocence exception to assertions of innocence both of a substantive offense and of a capital sentence.[55] A claim of innocence of a substantive offense refers to an assertion that the wrong person has been convicted of the crime.[56] As for claims of innocence of a capital sentence, the Court acknowledged that the actual innocence exception could apply to such contentions in *Smith*[57] and further expounded on a federal court's proper standard of review in *Sawyer*.[58] Despite noting the linguistic difficulty separating innocence of a crime from innocence of a death sentence, the Court nevertheless found extension of the actual innocence exception to be well-deserved.[59]

In *Sawyer*, the Court elaborated on a petitioner's burden when asserting actual innocence of a capital sentence.[60] After the conviction of a capital defendant, there typically exists a separate sentencing phase where the prosecutor attempts to show aggravating circumstances justifying imposition of the death penalty, while the defense attempts to counter with mitigating factors.[61] If a jury sentences the capital defendant to death, the *Sawyer* standard provides that federal habeas review should look solely at the aggravating circumstances to determine if there was either no aggravating circumstance warranting the death penalty or some other detail rendering the petitioner ineligible for the death sentence.[62] Conversely, a petitioner, asserting actual innocence of a capital sentence, must show "by

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[52] *Smith*, 477 U.S. at 537-38; *Carrier*, 477 U.S. at 495-96; *Kuhlmann*, 477 U.S. at 454.

[53] *Smith*, 477 U.S. at 537 (quoting *Carrier*, 477 U.S. at 496).

[54] *Carrier*, 477 U.S. at 495-96 (quoting *Engle*, 456 U.S. at 135).

[55] *Carrier*, 477 U.S. at 496 (substantive offense); *Smith*, 477 U.S. at 537 (capital sentence).

[56] Sawyer v. Whitley, 505 U.S. 333, 340 (1992).

[57] 477 U.S. at 537.

[58] 505 U.S. at 339-45.

[59] *Id.* at 341 ("The phrase 'innocent of death' is not a natural usage of those words."); *Smith*, 477 U.S. at 537 ("We acknowledge that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense.").

[60] 505 U.S. at 339-45.

[61] *Id.* at 342-45.

[62] *Id.* at 345.

clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[63] Thus, while the petitioner must demonstrate his ineligibility for the death penalty, the prosecutor need only show the presence of one aggravating factor.[64] The *Sawyer* Court thus rejected the petitioner's argument that federal courts should review improperly excluded mitigating factors, reasoning that a federal judge could not reasonably deduce a jury's reaction to such considerations.[65] By limiting the focus to the presence or absence of aggravating factors, the Court confined federal habeas review to an "obvious class of relevant evidence."[66]

In practice, the *Sawyer* standard has confined success on actual innocence grounds to an extremely narrow body of cases.[67] Importantly, the *Sawyer* standard for actual innocence of a capital sentence requires "clear and convincing evidence,"[68] while the "probably resulted" standard enunciated in *Carrier* is the relevant burden only for the petitioner alleging actual innocence of a substantive offense.[69] This heightened burden coupled with the prosecution's need to show just one aggravating factor have made asserting actual innocence of a capital sentence almost impossible.[70] More recently in *Herrera*, the Court has maintained its extremely narrow focus by holding that the actual innocence doctrine does not permit freestanding claims of actual innocence, but rather requires the petitioner to assert a constitutional claim that underlies the actual innocence

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[63] *Id.* at 336.

[64] *Id.* at 345.

[65] *Id.* at 345-46.

[66] *Id.* at 345.

[67] *See, e.g.*, Lisa R. Duffett, *Habeas Corpus and Actual Innocence of the Death Sentence After* Sawyer v. Whitley*: Another Nail into the Coffin of State Capital Defendants*, 44 CASE. W. RES. L. REV. 121, 135-37 (1993) (discussing how *Sawyer* narrowed of the scope of the actual innocence exception in the capital sentencing context from *Smith*); William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 382 (1995) (referring to several cases where courts rejected actual innocence claims even though the alleged constitutional error impeached a prosecution witness, resulted in improperly admitted evidence, and might have affected the accuracy of a sentence); James J. Sticha, Note, *To Be or Not to Be? The Actual Innocence Exception in Noncapital Sentencing Cases*, 80 MINN. L. REV. 1615, 1629-30 (1996) (noting the "extremely narrow" scope of the actual innocence exception in capital sentencing cases).

[68] *Sawyer*, 505 U.S. at 336.

[69] Murray v. Carrier, 477 U.S. 478, 496 (1986).

[70] *See* Sticha, *supra* note 67, at 1629-30.

assertion.[71] That is, an actual innocence declaration standing alone is not a constitutional claim, but rather acts as a "gateway" through which an independent procedurally defaulted constitutional claim may pass.[72]

D. APPLICATION OF THE ACTUAL INNOCENCE EXCEPTION TO NONCAPITAL SENTENCING CASES: THE CIRCUIT SPLIT

1. The Second Circuit's Broad Extension of the Actual Innocence Exception to Noncapital Sentencings

Recently, the Second Circuit extended the actual innocence exception to a noncapital sentencing case in *Spence v. Superintendent, Great Meadow Correctional Facility*.[73] After conviction on a robbery charge, the trial judge suspended the defendant's sentence, but only if he adhered to the conditions of his probation.[74] After an arrest for robbery, the trial judge determined that the defendant had violated his plea agreement and imposed the maximum sentence on the defendant.[75] The Second Circuit, however, noted that a jury had acquitted Spence of the robbery charge and therefore reversed his sentence.[76] The court held that, though Spence had procedurally defaulted his due process constitutional claim, he was nevertheless entitled to assert actual innocence of the sentence.[77] In its reasoning, the Second Circuit cited *Smith* for the proposition that availability of the actual innocence exception depended not on "the nature of the penalty," but rather on whether the constitutional error "undermined the accuracy of the guilt or sentencing determination."[78] Like the Fifth Circuit, the Second Circuit utilized the language of *Sawyer* and directed the court's inquiry to whether the petitioner had shown by clear and convincing evidence that he was actually innocent of the prior act which enhanced his sentence.[79] However, unlike *Dretke*, the defendant was not sentenced under a habitual offender statute.[80] Thus, the Second Circuit's application of the

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[71] Herrera v. Collins, 506 U.S. 390, 404-05 (1993); *see also id.* at 400 ("[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact.").

[72] *Id.* at 403.

[73] 219 F.3d 162 (2d Cir. 2000).

[74] *Id.* at 166.

[75] *Id.*

[76] *Id.* at 168.

[77] *Id.* at 169-71.

[78] *Id.* at 170 (quoting Smith v. Murray, 477 U.S. 527, 538-39 (1986)).

[79] *Id.* at 172 (citing Sawyer v. Whitley, 505 U.S. 333, 348 (1992)).

[80] *Id.* at 166.

actual innocence exception has been read to apply not just to unauthorized habitual or career offender sentences, but to all sentencing proceedings of any kind.[81] Arguably, *Spence* therefore deviates from the Supreme Court's stated desire to maintain the actual innocence exception's narrow focus.[82]

2. The Fourth and Fifth Circuit's Narrow Extension of the Actual Innocence Exception to Noncapital Sentencings

United States v. Maybeck,[83] the Fourth Circuit's first attempted application of the actual innocence exception to noncapital sentencing cases, represented a decision of ambiguity and arguable folly.[84] After agreeing to a plea agreement, Maybeck erroneously told the probation officer that he had been convicted of armed robbery, though this in fact mischaracterized the crime as one including violence.[85] Utilizing this incorrect information, the State increased Maybeck's criminal history category and erroneously sentenced him as a career offender, a mistake which neither the judge nor Maybeck's counsel noticed.[86] After the district court dismissed Maybeck's motion to vacate on the ground that Maybeck had procedurally defaulted and failed to show cause, the Fourth Circuit reversed.[87] The court held that, regardless of whether Maybeck could show cause for his procedural default, the actual innocence exception still applied and entitled the defendant to resentencing.[88] In reaching its holding, the Fourth Circuit reasoned that the rationale behind finding a defendant innocent of a death sentence (endorsed in *Smith* and *Sawyer*) could be easily extended to the noncapital sentencing context.[89] However, the Fourth Circuit's holding has been criticized, not because of the extension itself, but because the court failed to identify any constitutional violation

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[81] *See* Petitioner's Brief at 8, *Dretke* (No. 02-1824).

[82] *Sawyer*, 505 U.S. at 341 ("[W]e bear in mind that the exception for 'actual innocence' is a very narrow exception . . . .").

[83] 23 F.3d 888 (4th Cir. 1994).

[84] *See generally id.*

[85] *Id.* at 890.

[86] *Id.* at 890-91. While some states use the term "career offender" and others use "habitual offender," the terms are generally interchangeable. *See* United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999) ("[W]e conclude that under the reasoning of Maybeck actual innocence applies in noncapital sentencing only in the context of eligibility for application of a career offender or other habitual offender guideline provision.").

[87] *Maybeck*, 23 F.3d at 890.

[88] *Id.*

[89] *Id.* at 893. The Fourth Circuit noted that, because the Supreme Court had applied the actual innocence exception to the sentencing phase of a capital trial even though it "d[id] not translate easily," there was similarly no linguistic barrier preventing similar application to a noncapital sentencing case. *Id.*

accompanying Maybeck's actual innocence claim as well as any clear standard that guided its review.[90]

In its most recent case, *United States v. Mikalajunas*,[91] the Fourth Circuit has now apparently joined the Fifth Circuit in holding that the actual innocence exception's application to the noncapital sentencing context exists narrowly for erroneous career offender or habitual offender sentencings.[92] Convicted for second-degree murder, the petitioner challenged his sentence on the grounds that the State had improperly enhanced his sentence on basis of the petitioner's restraint of the victim.[93] In rejecting the petitioner's actual innocence argument, the court stated that *Maybeck*'s endorsement of the actual innocence exception could only apply in the context of eligibility for a career or habitual offender enhancement.[94] Application of the actual innocence exception to any sentencing proceeding, as endorsed by the Second Circuit, would broaden the rule to an absurd extent and counter the Supreme Court's stated desire for narrowness.[95]

In two decisions prior to *Dretke*, the Fifth Circuit assumed in dicta that the strict *Sawyer* standard applied to noncapital sentencing cases.[96] In both cases, the Fifth Circuit assumed *arguendo* that the actual innocence exception could apply and then stated that the petitioners' claims were nevertheless meritless.[97] The court reasoned that a petitioner asserting actual innocence of a noncapital sentence must demonstrate that "but for the constitutional error he would not have been legally eligible for the sentence he received."[98] Much like a death penalty case where the petitioner must show his ineligibility for that punishment, the court held that a petitioner in a noncapital case must demonstrate his ineligibility for the length of his incarceration.[99] That is, the length of the petitioner's habitual offender

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[90] *See* Sean L. Dalton, *Carved in Sand: Actual Innocence in* United States v. Maybeck, 73 N.C. L. REV. 2388, 2404-05 ("Despite Chief Justice Rehnquist's admonition [in *Herrera*] that a claim of actual innocence must be accompanied by some independent constitutional violation, no such violation was explicitly identified in Maybeck."); Sticha, *supra* note 67, at 1631 ("Surprisingly, the court [in *Maybeck*] did not rely on any constitutional violation in applying the actual innocence exception.").

[91] 186 F.3d at 490.

[92] *Id.* at 495.

[93] *Id.* at 492.

[94] *Id.* at 495.

[95] *Id.*

[96] Sones v. Hargett, 61 F.3d 410, 419 n.16 (5th Cir. 1995); Smith v. Collins, 977 F.2d 951, 959 (5th Cir. 1992) ("[A]ctual innocence in a non-capital sentencing case can be no less stringent than the Supreme Court's formulation of actual innocence in capital sentencing.").

[97] *Sones*, 61 F.3d at 419; *Collins*, 977 F.2d at 959.

[98] *Sones*, 61 F.3d at 418 (quoting *Collins*, 977 F.2d at 959).

[99] *Collins*, 977 F.2d at 959.

sentence must have been greater than the maximum permitted under the proper statutory sentencing guideline.[100] Specifically in *Collins*, the court rejected the petitioner's actual innocence claim, because even if the defendant had not been considered a habitual offender, the jury still could have imposed the same sentence of life in prison.[101]

3. The Seventh Circuit's Unclear Position on the Actual Innocence Exception's Application to Noncapital Sentencings

The Seventh Circuit initially applied the actual innocence exception to a noncapital sentencing in *Mills v. Jordan*,[102] noting the similarities between the habitual offender sentencing context and the capital sentencing context in *Sawyer*.[103] In this case, the State enhanced the defendant's sentence from two to thirty years under Indiana's habitual offender statute, which required two prior unrelated felony convictions.[104] Claiming ineffective assistance of counsel in one of these predicate felonies, Mills invoked the actual innocence exception in an effort to obtain resentencing.[105] Though finding that Mills had procedurally defaulted his ineffective assistance of counsel claim and could not show cause for the default, the Seventh Circuit concluded that the actual innocence exception applied to the petitioner's case.[106] The court reasoned that there were significant similarities between Mills's case and that in *Sawyer*, such as the bifurcated trial and the question of the sentence's eligibility.[107] Nevertheless, the court denied Mills's actual innocence claim, because he had actually been convicted of three prior felonies, which rendered his possible innocence of one of those felonies irrelevant for the purpose of the habitual offender sentence.[108] By analogizing to *Sawyer* in its reasoning, the Seventh Circuit, like the Fourth and Fifth Circuits, appeared to adopt a narrow application of the actual innocence exception.[109]

In light of the Seventh Circuit's recent decision, *Hope v. United States*,[110] there now exists disagreement over whether this circuit allows any

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[100] *Id.*
[101] *Id.*
[102] 979 F.2d 1273 (7th Cir. 1992).
[103] *Id.* at 1278-79 (citing Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).
[104] *Id.* at 1275 (citing IND. CODE § 35-50-2-8 (1992)).
[105] *Id.* at 1275, 1278-79.
[106] *Id.* at 1278-79.
[107] *Id.* (citing *Sawyer*, 505 U.S. at 339).
[108] *Id.* at 1279.
[109] *Id.* at 1278-79 (citing *Sawyer*, 505 U.S. at 339).
[110] 108 F.3d 119 (7th Cir. 1997).

extension of the actual innocence exception at all. While not overruling *Mills*, the court rejected a petitioner's successive habeas assertion of an improperly enhanced sentence, because the Anti-Terrorism and Effective Death Penalty Act (AEDPA) precluded such review.[111] To proponents of expanding the actual innocence exception, *Hope* is confined only to consideration of successive, not procedurally defaulted, habeas petitions, which are barred under AEDPA unless the petitioner asserts substantive innocence of the underlying offense.[112] To opponents, however, *Hope* stands for the broader proposition that AEDPA precludes all assertions of actual innocence from improper sentences, not just successive habeas petitions.[113]

4. The Eighth and Tenth Circuit's Erratic Application of the Actual Innocence Exception to Noncapital Sentencings

The Tenth Circuit's habeas jurisprudence epitomizes the confusion surrounding the extent of the actual innocence exception. In *United States v. Richards*,[114] the Tenth Circuit expressly refused to extend the actual innocence exception to a noncapital sentencing case.[115] Like the Second, Fourth, and Fifth Circuits, the Tenth Circuit cited *Sawyer*.[116] Unlike them, however, the court inferred that *Sawyer* in fact foreclosed application of the actual innocence exception to noncapital sentencing cases.[117] Because the *Sawyer* Court stated that "in the context of a noncapital case, the concept of actual innocence is easy to grasp," the Tenth Circuit reasoned that this necessarily meant that actual innocence in these cases must only refer to actual innocence of the substantive offense.[118] A couple years later,

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[111] *Id.* at 120. As amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (1996), the current version of 28 U.S.C. § 2255 (2005) provides:

> A second or successive habeas corpus motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—
>
> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

[112] *See* Respondent's Brief at 17, *Dretke* (No. 02-1824).

[113] *See* Petitioner's Brief at 8, *Dretke* (No. 02-1824).

[114] 5 F.3d 1369 (10th Cir. 1993).

[115] *Id.* at 1371.

[116] *Id.* (citing *Sawyer*, 505 U.S. at 341).

[117] *Id.* (citing *Sawyer*, 505 U.S. at 341).

[118] *Id.* (quoting *Sawyer*, 505 U.S. at 341).

however, in *Selsor v. Kaiser*,[119] the Tenth Circuit changed course and endorsed application of the actual innocence exception to habitual offender sentences.[120] The court cited the Seventh Circuit, and strangely not the Tenth Circuit's prior decision in *Richards*, to hold that a petitioner can be actually innocent of a noncapital sentence if he can show innocence of the prior conviction that necessitated the harsher sentence.[121] Two years later, however, the Tenth Circuit went back to the *Richards* approach and rejected extension of the actual innocence exception to noncapital cases.[122] In a 1999 unpublished opinion, the Tenth Circuit changed its mind again and endorsed extension of the actual innocence exception to cover the noncapital sentencing context.[123] With both *Richards* and *Selsor* continuing as good law and standing for diametrically opposed conclusions, it is difficult to know where the Tenth Circuit stands.

Like the Tenth Circuit, the Eighth Circuit's habeas jurisprudence is quite muddled as well. In two cases prior to *Sawyer*, the Eighth Circuit held that a petitioner could be actually innocent of a habitual offender statute.[124] In *Jones v. Arkansas*, the court ordered a resentencing despite the petitioner's eligibility for the same sentence under the proper sentencing guideline.[125] Like other circuits, the court cited favorable language in *Smith* that the exception should not depend on the "nature of the penalty."[126] In a decision after *Sawyer*, however, the Eighth Circuit expressed doubt as to whether *Jones* was still good law.[127] Finding that the petitioner had not advanced an alleged constitutional violation and thus violated *Herrera*, the court was able to dismiss the petitioner's claim without resolving the issue.[128] The court confirmed its confusion in *Waring v. Delo*,[129] where it noted that application of *Sawyer*'s standard to the noncapital sentencing

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[119] 22 F.3d 1029 (10th Cir. 1994).

[120] *Id.* at 1035-36.

[121] *Id.* at 1036 (citing Mills v. Jordan, 979 F.2d 1273, 1279 (7th Cir. 1992)).

[122] Reid v. Oklahoma, 101 F.3d 628, 630 (10th Cir. 1996) (quoting *Richards*, 5 F.3d at 1371) ("[B]ecause '[a] person cannot be actually innocent of a noncapital sentence,' petitioner's challenge to his recidivist enhancement does not fall within the potential scope of the miscarriage of justice exception.") (second alteration in original).

[123] Hampton v. Scott, 1999 U.S. App. LEXIS 14833, at *14 (10th Cir. June 29, 1999) (unpublished opinion).

[124] Pilchak v. Camper, 935 F.2d 145, 148-49 (8th Cir. 1991); Jones v. Arkansas, 929 F.2d 375, 381 (8th Cir. 1991).

[125] 929 F.2d at 379-80.

[126] *Id.* at 381 n.16 (quoting Smith v. Murray, 477 U.S. 527, 538 (1986)).

[127] Higgins v. Smith, 991 F.2d 440, 441 (8th Cir. 1993) ("It is not clear to us that *Jones* is still good law in the context of a capital case.").

[128] *Id.*

[129] 7 F.3d 753 (8th Cir. 1993).

context "raise[d] perplexing questions."[130] The court recognized that, while language in *Smith* and *Engle* indicated that expansion of the actual innocence exception might be warranted, other language in *Sawyer* seemed to point in the other direction.[131] The court concluded that *Sawyer*, at the very least, mandated use of a narrow and objective standard where a petitioner alleged actual innocence of a noncapital sentencing.[132] Most recently, however, the Eighth Circuit has strangely reversed course (while not overruling any of its past decisions) and held that *Sawyer*'s concept of actual innocence applied only to capital sentencings.[133]

5. The Sixth Circuit's Rejection of the Actual Innocence Exception's Application to Noncapital Sentencings

In two unpublished opinions, the Sixth Circuit has cited the Tenth Circuit's decision in *Richards* and rejected any extension of the actual innocence exception to noncapital cases.[134] For noncapital cases, the Sixth Circuit held that claims of actual innocence were reserved only for cases where the petitioner asserted substantive innocence of the actual offense.[135] With little in the way of reasoning, the court simply cited *Richards* and *Carrier* as necessitating this result.[136]

The post-*Sawyer* history reveals a divide not only among the various circuits, but also within some circuits themselves. The Second Circuit has adopted a broad reading and seemingly endorsed application of the actual innocence exception to all sentencing proceedings. The Fourth and Fifth

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[130] *Id.* at 757.

[131] *Id. Compare* Engle v. Isaac, 456 U.S. 107, 135 (1981) (asserting that the actual innocence exception is directed at "the imperative of [correcting] a fundamentally unjust incarceration"), *and Smith*, 477 U.S. at 539 (stating that the exception includes "any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination"), *with* Sawyer v. Whitley, 505 U.S. 333, 341 (1992) ("In the context of a noncapital case, the concept of 'actual innocence' is easy to grasp.").

[132] *Waring*, 7 F.3d at 757. In this case, the court favorably noted the State's argument that a defendant could not be actually innocent of a sentence within the statutory maximum. *Id.*

[133] Embrey v. Hershberger, 131 F.3d 739, 740 (8th Cir. 1997). Interestingly, the court cited *Richards* in reaching its holding, a bizarre decision given that *Richards* was not the Tenth Circuit's most current case on the issue. *Id.* at 740-41.

[134] Flahardy v. United States, 1995 WL 570925 (6th Cir. Sept. 27, 1995); Black v. United States, 1995 WL 445718 (6th Cir. July 26, 1995).

[135] *Flahardy*, 1995 WL 570925, at *2; *Black*, 1995 WL 445718, at *2.

[136] *Flahardy*, 1995 WL 570925, at *2; *Black*, 1995 WL 445718, at *2. The Sixth Circuit also cited *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993), even though *Flores* did not represent the Fifth Circuit's most recent interpretation given the holdings of *Sones v. Hargett*, 61 F.3d 410 (5th Cir. 1995) and *Smith v. Collins*, 977 F.2d 951 (5th Cir. 1992).

Circuits have taken a narrow approach and modeled their application of the actual innocence exception after *Sawyer*. The Seventh Circuit initially endorsed extension of the actual innocence exception to noncapital sentencing cases, but its most recent decision in *Hope* leaves ambiguity as to the circuit's position. The Sixth Circuit has refused to endorse such an extension, and the capricious jurisprudence of the Eighth and Tenth Circuits conveys perfectly the confusion and difficulty that courts have had in attempting to define the outward limits of the actual innocence exception.

III. FACTS AND PROCEDURAL HISTORY

A. FACTS OF THE CASE

In 1997, Michael Wayne Haley, the defendant and petitioner, was arrested for stealing a calculator from a Wal-Mart store and then trying to exchange it for other Wal-Mart goods.[137] At trial, the State charged Haley with theft of property valued at less than $1,500, which as a result of his two prior theft convictions, represented a "state jail felony" punishable by up to two years in prison.[138] The State also charged Haley as a habitual offender due to his two prior felony convictions.[139] The State maintained that the defendant's first conviction in 1991 for delivery of amphetamine became final prior to his commission of the second felony, a robbery in 1992.[140] This timing was of paramount importance, because under Texas's habitual offender statute, only a defendant who "has previously been finally convicted of two felonies, *and* the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final . . . shall be punished for a second-degree felony."[141] Such second-degree felonies carry sentences between two and twenty years in prison.[142] Further, Texas provides bifurcated trials for habitual offender cases.[143] Therefore, if a defendant is guilty of the substantive offense, the case proceeds to a second penalty phase where the State carries the burden of proving, beyond a reasonable doubt, the defendant's habitual offender status.[144]

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[137] Dretke v. Haley, 124 S. Ct. 1847, 1849 (2004).

[138] *Id.* at 1849-50 (citing TEX. PENAL CODE ANN. § 31.03(e)(4)(D) (Vernon 2004)).

[139] *Id.* at 1850.

[140] *Id.*

[141] *Id.* (citing § 12.42(a)(2)).

[142] *Id.* (citing § 12.33(a)).

[143] *Id.* (citing TEX. CODE CRIM. PROC. ANN., Art. 37.07, § 3 (Vernon 2004)).

[144] *Id.* (citing TEX. CODE CRIM. PROC. ANN., Art. 37.07, § 3 (Vernon 2004)).

After a jury convicted Haley for the substantive felony of theft, the State, during the penalty phase, introduced evidence to prove that the defendant was a habitual offender.[145] For Haley's first felony, the State pointed to a delivery of amphetamine felony conviction which was finalized on October 18, 1991. For the second felony, the State described an attempted robbery felony conviction which was finalized on September 9, 1992.[146] For classification as a habitual offender under the terms of Texas's statute, Haley's commission of this second felony had to have occurred *after* finalization of his first felony conviction on October 18, 1991.[147] However, the record showed that Haley had actually committed the second felony on October 15, 1991, three days *before* his first conviction became final.[148] The prosecutor, defense attorney, State's witness, jury, and trial judge all failed to notice the three-day discrepancy, and the defense attorney neither cross-examined the State's witness nor put on any evidence of his own.[149]

Following the penalty phase, a jury found Haley guilty of the habitual offender charge and recommended incarceration of sixteen-and-a-half years.[150] The trial court followed this recommendation.[151] On direct appeal, Haley's appellate counsel again failed to mention the three-day discrepancy with respect to the habitual offender enhancement and did not challenge the sufficiency of the evidence during the penalty phase.[152] The State Court of Appeals affirmed the defendant's conviction and sentence, and the Texas Court of Criminal Appeals declined Haley's petition for discretionary review.[153]

Seeking state habeas post-conviction relief, Haley asserted for the first time that he was ineligible for the habitual offender enhancement, because the commission of his second felony occurred three days prior to the finalization of his first conviction.[154] The state habeas court refused Haley's petition, because he had not raised this issue at trial or on direct appeal as required by state procedural law.[155] The court also rejected the

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[145] *Id.*

[146] *Id.*

[147] *Id.* (citing TEX. PENAL CODE ANN. § 12.42(a)(2) (Vernon 2004)).

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*; *see* Haley v. Texas, 1999 Tex. App. LEXIS 104 (Tex. App. Texarkana Jan. 12, 1999).

[154] *Id.*

[155] *Id.*

defendant's ineffective assistance of counsel claim, stating only that "counsel was not ineffective" for its failure to object to or appeal the habitual offender enhancement.[156] The Texas Court of Criminal Appeals then denied the defendant's state habeas application.[157]

B. PROCEDURAL HISTORY

1. District Court Decision

In August 2000, Haley filed a timely *pro se* petition for a federal writ of habeas corpus under 28 U.S.C. § 2254, renewing both his insufficiency of the evidence to support the habitual offender enhancement and ineffective assistance of counsel claims.[158] The State, though conceding that Haley's insufficiency of the evidence claim was correct, nevertheless argued that Haley had procedurally defaulted this claim by neglecting to raise it during his state trial or on direct appeal.[159] The magistrate judge recommended excusal of the procedural default and success on the insufficiency of the evidence claim due to Haley's actual innocence of the habitual offender sentence.[160] In what would turn out to be a pivotal oversight, the magistrate judge did not even address the merits of the petitioner's ineffective assistance of counsel challenge.[161] The District Court for the Eastern District of Texas then adopted the magistrate judge's recommendation, granted Haley's petition, and ordered the State to resentence Haley without the erroneous habitual offender enhancement.[162]

2. Fifth Circuit Decision

The State subsequently appealed to the Court of Appeals for the Fifth Circuit from the district court's grant of habeas corpus in favor of the defendant.[163] The State argued that Haley was procedurally barred from asserting his insufficiency of the evidence claim, because he had not objected to the habitual offender sentence at trial.[164] The State further contended that, even if the procedural default could be excused, the actual

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[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 1850-51.
[160] *Id.* at 1851.
[161] *Id.*
[162] *Id.*
[163] Haley v. Cockrell, 306 F.3d 257, 259 (5th Cir. 2002).
[164] *Id.* at 264.

innocence exception still could not apply, because the instant case involved a noncapital offense.[165]

Noting its past two decisions in *Sones*[166] and *Collins*,[167] the Fifth Circuit held that the actual innocence exception did apply to habitual or career offender sentencings and therefore affirmed the decision of the district court.[168] The court deemed Haley to be actually innocent of having two prior sequential felony convictions, the prerequisite for a habitual felony offender sentence enhancement in Texas.[169] The Fifth Circuit thus agreed with the district court that Haley's sentence was "unquestionabl[y] improper" and that "but for the constitutional error, he would not have been legally eligible for the sentence he received."[170]

The State contended that the Supreme Court had not addressed this issue, and that such an extension was therefore unjustified.[171] In rejecting this argument, the Fifth Circuit stated that, while *Sawyer* expressly applied only to the capital sentencing context, the decision itself did not foreclose similar application to noncapital sentencing cases.[172] The court also noted that the purpose of the habeas doctrine "is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."[173] While recognizing the disagreement in the courts of appeals, the Fifth Circuit sided with the reasoning of the Fourth and Second Circuits and found Haley to be actually innocent of the habitual offender sentence.[174] Like the district court, the Fifth Circuit declined to address Haley's ineffective assistance of counsel claim either as a freestanding claim for relief or as an argument to excuse the procedurally defaulted insufficiency of the evidence claim.[175] Like other circuits in agreement, the court cited favorable language in *Smith*, which stated that application of the exception should depend not on the type of penalty imposed but rather on the legitimacy of the guilt or sentence imposed.[176]

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[165] *Id.*

[166] Sones v. Hargett, 61 F.2d 410 (5th Cir. 1995).

[167] Smith v. Collins, 977 F.2d 951 (5th Cir. 1992).

[168] *Haley*, 306 F.3d at 264.

[169] *Id.*

[170] *Id.* at 264-65.

[171] *Id.* at 265.

[172] *Id.* (citing Sawyer v. Whitley, 505 U.S. 333, 345 (1992)).

[173] *Id.* (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

[174] *Id.*

[175] *See generally id.*

[176] *Id.* at 265-66 (quoting Smith v. Murray, 477 U.S. 527, 537-38 (1986)).

3. Supreme Court Granted Certiorari

The Supreme Court then granted certiorari to determine whether the Fifth Circuit had erred in holding that the actual innocence exception applied to Haley's case.[177]

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

The Supreme Court declined to resolve the question of whether the actual innocence exception extended to noncapital sentencing cases, because the district court and Fifth Circuit had both failed to consider Haley's alternative grounds for relief first.[178] Writing for the majority, Justice O'Connor[179] noted that Haley's alternative ground for relief, the ineffective assistance of counsel claim, might have foreclosed any need to reach his actual innocence claim.[180] In vacating the Fifth Circuit's judgment and remanding the case, the Court held that where a petitioner alleges actual innocence, a federal court must first review all nondefaulted claims for similar relief and other arguments for cause to excuse procedural defaulted claims.[181]

The Court's fundamental rationale for refusing to delineate the outward limits of the actual innocence exception was the "avoidance principle . . . implicit in *Carrier* itself, where we expressed confidence that, 'for the most part, victims of fundamental miscarriage of justice will meet the cause-and-prejudice standard.'"[182] The Court indicated assurance that the availability of ineffective assistance of counsel claims either to show cause for a procedural default or as a freestanding ground for relief would provide a satisfactory safeguard for petitioners such as Haley.[183] The Court also noted the State's concession that Haley had a "viable" and "significant" ineffective assistance of counsel argument that, if successful on the merits, would provide him with both a freestanding claim for relief

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[177] Dretke v. Haley, 124 S. Ct. 1847, 1852 (2004).

[178] *Id.* at 1849.

[179] Justice O'Connor's majority was joined by Chief Justice Rehnquist and Justices Scalia, Thomas, Ginsburg, and Breyer.

[180] *Dretke*, 124 S. Ct. at 1852.

[181] *Id.*

[182] *Id.* (quoting Murray v. Carrier, 477 U.S. at 495-96 (1982) (internal quotations omitted).

[183] *Id.*

and cause for his procedurally defaulted insufficiency of the evidence claim.[184]

Furthermore, and in stark contrast to the dissent's argument, the Court noted that because the cause-and-prejudice standard and the actual innocence exception were judge-made rules, it should exercise restraint and expand these rules "only when necessary."[185] For the Court, to expand these rules needlessly would be to "license district courts to riddle the cause and prejudice standard with ad hoc exceptions whenever they perceive an error to be 'clear' or departure from the rules expedient."[186] In addition, such unwarranted expansion would prolong federal habeas cases, as each new proposed exception would mandate review in federal courts of appeals.[187] Because the State expressed willingness to permit litigation of Haley's ineffective assistance of counsel claim prior to any new incarceration proceeding, the Court stated that the adverse consequences for Haley would be minimal.[188]

In addition, the Court remarked that, because actual innocence claims must present a constitutional question and because such questions frequently involve threshold legal issues, this provided an additional reason for restraint.[189] In the instant case, Haley predicated his actual innocence claim on an insufficiency of the evidence due process argument that the State's evidence in the penalty phase was insufficient to support the habitual offender enhancement.[190] Yet while the Supreme Court's holding in *In re Winship*[191] had previously ruled that due process required proof beyond a reasonable doubt of each element of a criminal offense, the Court in *Dretke* stated that such due process protections had not been extended to proof of prior convictions used to support habitual offender sentence enhancements.[192] Thus, an aversion to assessing such tough constitutional questions provided the Court with an additional rationale for restraint.[193]

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[184] *Id.* at 1853.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] 397 U.S. 358 (1970).
[192] *Dretke*, 124 S. Ct. at 1853.
[193] *Id.*

B. STEVENS'S DISSENTING OPINION

"The unending search for symmetry in the law can cause judges to forget about justice," began Justice Stevens in his brief, but stern, dissent.[194] Contrary to the majority, Justice Stevens had no trouble finding Haley's insufficiency of the evidence claim to be well within the Court's due process jurisprudence.[195] Because all parties agreed that Haley's habitual offender conviction contained no factual basis, to Justice Stevens it followed necessarily that he had been denied due process.[196] Unlike the majority which was concerned with the scope of *In re Winship*'s holding, Stevens remained decidedly unperturbed.[197] Thus, because of the presence of a constitutional error and the fact that Haley's sentence was unauthorized, Stevens deemed Haley a "victim of a miscarriage of justice" and deserving of immediate release.[198]

In addition, Justice Stevens entirely rejected the majority's reliance on *Carrier* which led the majority to exercise restraint when dealing with judge-made laws, such as the cause-and-prejudice standard and the actual innocence exception.[199] For Justice Stevens, it was precisely because these rules were judge-made that the Court has the authority to recognize a narrow exception for a clear case like *Dretke*.[200] Were the actual innocence exception grounded in a federal statute or Federal Rule of Procedure, as opposed to judge-made law, that might have provided Justice Stevens with a basis for judicial restraint.[201] In addition, because Haley's sentence was clearly unlawful, there was no possibility of federal court encroachment on the principles of comity and finality, which had concerned the Court in *Carrier*.[202]

Also, like some courts of appeals that had sided with an expansion of the actual innocence exception, Justice Stevens cited favorable language from *Engle* that the cause-and-prejudice standard "must yield to the imperative of correcting a fundamentally unjust incarceration."[203] If there had been any uncertainty as to the permissibility of Haley's incarceration,

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[194] *Id.* at 1854. Justice Stevens's dissent was joined by Justices Kennedy and Souter.

[195] *Id.* (Stevens, J., dissenting).

[196] *Id.* (Stevens, J., dissenting).

[197] *Id.* (Stevens, J., dissenting).

[198] *Id.* (Stevens, J., dissenting) (quoting Wainwright v. Sykes, 433 U.S. 72, 91 (1977)).

[199] *Id.* (Stevens, J., dissenting).

[200] *Id.* (Stevens, J., dissenting).

[201] *Id.* (Stevens, J., dissenting).

[202] *Id.* (Stevens, J., dissenting).

[203] *Id.* at 1855 (Stevens, J., dissenting) (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)).

Justice Stevens conceded that requiring him to seek other avenues for comparable relief might make sense.[204] But because Haley would be entitled to a writ regardless of the outcome of a cause-and-prejudice inquiry, the majority "perversely prolong[ed] the very injustice that the cause and prejudice standard was designed to prevent."[205]

As a final note, Justice Stevens criticized the State for admitting to the sentencing error and then opposing the grant of habeas relief in this case.[206] Justice Stevens questioned whether the State had forgotten its duty to provide justice for its citizens.[207]

C. KENNEDY'S DISSENTING OPINION

In addition to joining Justice Stevens' dissent, Justice Kennedy added his own brief dissent to comment on and sternly criticize the conduct of the State and the prosecutor.[208] Justice Kennedy expressed displeasure that the State would even oppose Haley's habeas petition and desire to imprison him for a sentence they agree was unlawful.[209] The State should have allowed Haley's writ of habeas corpus to proceed unopposed all the while taking affirmative steps to set him free.[210] The State's unwillingness to use its clemency power caused Justice Kennedy to remark that "[e]xecutive discretion and clemency can inspire little confidence if officials sworn to fight injustice choose to ignore it."[211] Though there might have been an important legal interest in the comity and finality of state sentences, Justice Kennedy stated that there was a far greater interest in Haley's liberty, which the State should have served in the first place.[212]

V. ANALYSIS

The *Dretke* majority, instead of deciding whether the actual innocence exception applies to the noncapital sentencing context, remanded the case on a procedural technicality.[213] In refusing to answer this issue that has

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[204] *Id.* (Stevens, J., dissenting).

[205] *Id.* (Stevens, J., dissenting).

[206] *Id.* (Stevens, J., dissenting).

[207] *Id.* (Stevens, J., dissenting) (quoting United States v. Agurs, 427 U.S. 97, 111 (1976) (noting that the actions of Texas "might cause some to question whether the State has forgotten its overriding 'obligation to serve the cause of justice'").

[208] *Id.* at 1856 (Kennedy, J., dissenting).

[209] *Id.* (Kennedy, J., dissenting).

[210] *Id.* (Kennedy, J., dissenting).

[211] *Id.* (Kennedy, J., dissenting).

[212] *Id.* (Kennedy, J., dissenting).

[213] *Id.* at 1849.

split and perplexed the courts of appeals, the Supreme Court has prolonged not only a disturbing lack of clarity within its habeas jurisprudence,[214] but also the injustice of Haley's habitual offender sentence itself. This Note criticizes the Court's decision on several fronts. First, the Court's reliance on the avoidance principle in *Carrier* and its extreme reluctance to carve out a narrow exception for Haley's case[215] misinterprets *Carrier* and the purpose of the actual innocence exception itself. Second, the Court should have found the actual innocence exception applicable to certain noncapital cases that satisfy a standard analogous to *Sawyer*'s strict test for capital sentencing cases. Such an application finds support in *Engle*, *Carrier*, *Smith*, and *Herrera* while *Sawyer*, contrary to the reasoning by some circuits,[216] does not preclude such a result. Third, the Court should have determined that Haley's case fits within a narrow and strict application of the actual innocence exception, because the factual and procedural posture of *Dretke* is analogous to that in capital cases, where *Sawyer* has previously endorsed application of the actual innocence exception.[217] Fourth, Texas's refusal to grant clemency and its opposition to Haley's insufficiency of the evidence claim as a freestanding claim of innocence in violation of *Herrera* ironically undermines *Herrera*'s very reliance on clemency to prevent miscarriages of justice.[218]

In addition, forcing Haley and other petitioners in his situation to exhaust ineffective assistance of counsel claims and other arguments for cause runs counter to policy and equitable considerations at the heart of habeas doctrine.[219] The court's strong reliance on Haley's "viable" and "significant" ineffective assistance of counsel claim to provide comparable relief may lead the cause-and-prejudice inquiry to swallow the actual innocence exception for all practical purposes.[220] Furthermore, the majority's holding punishes Haley for the mistakes of his attorney, the district court, and the Fifth Circuit, not himself.

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[214] *See supra* Part II.D.

[215] *Dretke*, 124 S. Ct. at 1852-53 (quoting Murray v. Carrier, 477 U.S. 478, 495-96 (1986)) (internal citations omitted).

[216] *See supra* Parts I.D.4-5.

[217] Sawyer v. Whitley, 505 U.S. 333, 340-41 (1992).

[218] Herrera v. Collins, 506 U.S. 390, 404-17 (1993).

[219] *Dretke*, 124 S. Ct. at 1853; *Herrera*, 506 U.S. at 404 (citing McCleskey v. Zant, 499 U.S. 467, 502 (1991)).

[220] *Dretke*, 124 S. Ct. at 1853.

A. THE COURT SHOULD HAVE ENDORSED APPLICATION OF THE ACTUAL INNOCENCE EXCEPTION TO HALEY'S CASE

Due to the Supreme Court's unwillingness to define the outward extent of the actual innocence exception, a lower federal court will now have to address Haley's ineffective assistance of counsel claim.[221] A court will have to review the actions of Haley's counsel at trial both as a freestanding claim of relief and as an argument to provide cause for the procedurally defaulted insufficiency of the evidence claim.[222] Regardless of whether a court considers the ineffective assistance of counsel assertion as a freestanding claim of relief or as an argument for cause, the inquiry is essentially the same.[223] That is, a petitioner must show that his representation amounted to a Sixth Amendment violation in either case.[224] Because a freestanding Sixth Amendment violation would entitle Haley to resentencing,[225] a federal court would avoid answering the actual innocence question if it were to find merit in Haley's ineffective assistance of counsel claim.[226] Only if Haley's ineffective assistance of counsel claim cannot meet the Sixth Amendment standard would a federal court have to consider Haley's actual innocence assertion,[227] and only then would Haley potentially receive the resentencing that he was entitled to from the beginning.

Though the Supreme Court found comfort for this strict form-over-substance thinking in *Carrier*,[228] such comfort was misplaced. The Court should have allowed federal courts to consider a petitioner's actual innocence claim contemporaneously with his other claims, where the sentencing error is incontrovertible or conceded by the State. The Supreme Court then should have held that the actual innocence exception applies to certain improper habitual or career offender sentences like Haley's, which fulfill a strict standard analogous to that found in *Sawyer*. In fact, the State's objection to Haley's insufficiency of the evidence claim as a mere freestanding claim of innocence precluded by *Herrera* not only raises troubling questions about Texas's view towards clemency, but also

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[221] *Id.* at 1852.

[222] *Id.*

[223] *Id.* at 1853; Coleman v. Thompson, 501 U.S. 722, 752 (1991); Murray v. Carrier, 477 U.S. 478, 492 (1986) ("Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default . . . .").

[224] *Coleman*, 501 U.S. at 752; *Carrier*, 477 U.S. at 488.

[225] *Dretke*, 124 S. Ct. at 1853.

[226] *Id.*

[227] *Id.* at 1852.

[228] *Id.* at 1852-53 (quoting *Carrier*, 477 U.S. at 495-96) (internal citations omitted).

undermines the *Herrera* Court's assurance that clemency should prevent miscarriages of justice outside the scope of constitutional mandate.[229]

1. The Court's Reliance on the Carrier *Avoidance Principle was Misguided*

Despite the difference of interpretation among the courts of appeals, the Supreme Court in *Dretke* avoided resolution of the split by relying on the "avoidance principle . . . implicit in *Carrier* itself, where we expressed confidence that, 'for the most part, victims of fundamental miscarriage of justice will meet the cause-and-prejudice standard.'"[230] The majority then cited *Carrier*'s reasoning that the availability of ineffective assistance of counsel claims either to show cause for a procedurally defaulted claim or as a freestanding claim for relief provided an adequate safeguard against miscarriages of justice.[231] The majority also acknowledged Haley's "significant" and "viable" ineffective assistance of counsel claim, as conceded by the State.[232] Noting that the State would not attempt to bar Haley from asserting this claim, the Court appeared confident that success on this merit would provide Haley with all the relief he sought.[233]

Yet the issue presented in *Dretke* differed noticeably from that in *Carrier* and is, in fact, quite unique. The Court in *Dretke* correctly noted that federal habeas review of freestanding constitutional claims and arguments for cause does, as a general rule, precede review of actual innocence.[234] The Court's reliance on this general rule and on *Carrier* for guidance,[235] however, represented an oversimplification of the issue presented by *Dretke*. In *Carrier*, the petitioner was convicted of rape and abduction in state court.[236] The petitioner's habeas application then raised only a procedurally defaulted claim that the prosecution had denied him due process of law by withholding statements made by the victims.[237] To show cause for this default, the petitioner asserted that his counsel neglected to include the proper discovery claim at the state appeals level.[238] A divided Fourth Circuit agreed with the petitioner and remanded the case on the

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[229] Herrera v. Collins, 506 U.S. 390, 404-17 (1993).

[230] *Dretke*, 124 S. Ct. at 1852 (quoting *Carrier*, 477 U.S. at 495-96) (internal quotations omitted).

[231] *Id.* (quoting *Carrier*, 477 U.S. at 495-96) (internal quotations omitted).

[232] *Id.* at 1853.

[233] *Id.*

[234] *Id.* at 1852.

[235] *Id.*

[236] *Carrier*, 477 U.S. at 482.

[237] *Id.*

[238] *Id.* at 483.

grounds that even if this single omission by counsel did not rise to the level of a Sixth Amendment violation, it could still show cause.[239] The Supreme Court reversed the Fourth Circuit's decision and held that to demonstrate cause for a procedurally defaulted claim, a habeas petitioner must demonstrate that his counsel's ineffectiveness rose to the level of a Sixth Amendment violation.[240] The Court then went on to state:

> [F]or the most part, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.[241]

The important fact is that in the factual posture of *Carrier*, the petitioner never even raised an actual innocence claim.[242] Furthermore, unlike *Dretke*, the petitioner never raised an actual innocence claim that, if allowed, was incontrovertible. *Dretke* presented the unique situation where a habeas petitioner raised a freestanding claim, a procedurally defaulted claim, and an actual innocence assertion that, if allowed, was indisputable.[243] To require Haley to jump through the procedural hoop of first asserting ineffective assistance of counsel both as a freestanding claim and as an argument to show cause was to oversimplify the issue and rely on precedent that did not even consider this precise issue.[244] The issue, had it been properly framed by the Supreme Court, would have asked whether a habeas petitioner asserting freestanding claims, procedurally defaulted claims, and irrefutable sentencing error must adhere to the traditional requirement of first exhausting nondefaulted and defaulted claims before asserting actual innocence. In the Court's own past words, the purpose of habeas corpus is to "correct a fundamentally unjust incarceration."[245] It would seem especially odd that the same Court, which stated that the purpose of habeas corpus was to correct fundamentally unjust incarcerations, would not similarly extend this purpose to prevent the unnecessary continuation of fundamentally unjust incarcerations as well.

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[239] *Id.* at 484.

[240] *Id.* at 488.

[241] *Id.* at 495-96 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)).

[242] *Id.* at 482-83.

[243] Dretke v. Haley, 124 S. Ct. 1847, 1850-51 (2004).

[244] *Id.* at 1852.

[245] *Engle*, 456 U.S. at 135.

2. *The Court's Precedents in* Smith, Carrier, Sawyer, *and* Herrera *Do Not Foreclose Application of the Actual Innocence Exception to a Narrow Body of Noncapital Sentencing Cases*

Had the Court held that a petitioner can assert actual innocence contemporaneously with nondefaulted and defaulted claims in the unique situation where a sentencing error is manifest, the next question would have been whether the actual innocence exception itself can apply to noncapital sentencing cases. As demonstrated by the circuit court split, those courts endorsing such application rely on language in *Engle*, *Smith*, *Sawyer*, and *Herrera* while those circuits rejecting this application state that *Sawyer*, in fact, precludes this result.[246] *Engle*, *Smith*, and *Herrera* all provide evidence that such application is warranted, and the language in *Sawyer* is inconclusive. The net result is that, because no language in Supreme Court precedent explicitly precludes application of actual innocence in *Dretke*, the Fifth Circuit correctly considered such a possibility open for resolution.[247]

In *Engle*, a case prior to the express application of actual innocence to capital sentencing cases, the Court stated that in appropriate cases, the cause-and-prejudice standard "must yield to the imperative of correcting a fundamentally unjust *incarceration*."[248] Such language did not differentiate between incarceration due to a capital sentence and that due to a noncapital sentence, and provided evidence that, at least to the *Engle* Court, actual innocence could exist in noncapital sentencing cases. A few years later, in *Smith*, the Court cited the *Engle* language favorably and provided its own language indicative of the intent behind the actual innocence exception.[249] The Court noted that it was appropriate to enforce the cause-and-prejudice standard "in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or *sentencing determination*."[250] In *Herrera*, which the Fifth Circuit quoted,[251] the Court found the actual innocence exception to be "grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the *incarceration* of innocent persons."[252] In all of these cases, the Supreme

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[246] *See supra* Part II.D.

[247] Haley v. Cockrell, 306 F.3d 257, 265 (5th Cir. 2002). See Sticha, *supra* note 67, at 1634-37 for an in-depth argument that habeas precedent does not preclude extension of the actual innocence exception to noncapital sentencing cases.

[248] *Engle*, 456 U.S. at 135 (emphasis added).

[249] Smith v. Murray, 477 U.S. 527, 538-39 (1986).

[250] *Id.* (emphasis added).

[251] *Haley*, 306 F.3d at 265 (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

[252] *Herrera*, 506 U.S. at 404 (quoting McCleskey v. Zant, 499 U.S. 467, 502 (1991)) (emphasis added).

Court did not once qualify that only certain types of sentences, incarcerations, or punishments warranted habeas relief while others did not.

Sawyer does present more confusing language than *Engle*, *Smith*, and *Herrera*, and circuit courts both sides of the divide haved cited it as support.[253] *Sawyer* contains two critical passages, one of which might support extension of the actual innocence exception and the other which might not. On the one hand, the *Sawyer* Court noted that "the phrase 'innocent of death' is not a natural usage of those words," but nevertheless applied the actual innocence exception to capital sentencing cases.[254] Thus, to circuits supporting an extension of the actual innocence exception, the Supreme Court's extension of the actual innocence exception to capital sentencing cases despite the linguistic barrier similarly overcame any possible hurdle preventing application to noncapital cases.[255] On the other hand, the *Sawyer* Court also stated that "in the context of a noncapital case, the concept of 'actual innocence' is easy to grasp."[256] Thus, to circuits opposing any extension of the actual innocence exception, this meant that actual innocence in a noncapital sentencing case could only refer to the defendant's substantive guilt or innocence, not the validity of the sentencing itself.[257]

In upholding the district court's decision to vacate Haley's sentence, the Fifth Circuit relied on favorable language in *Smith* and *Herrera*.[258] The Fifth Circuit also noted that *Sawyer* did not expressly preclude extension of actual innocence claims to the noncapital sentencing context.[259] Objective consideration of all the language in *Engle*, *Smith*, *Sawyer*, and *Hererra* does reflect, at best, an endorsement of the result reached by the Fifth Circuit. At worst, the totality of language is inconclusive due to one passage in *Sawyer*.[260] Therefore, the Fifth Circuit correctly noted that nothing precluded an extension of the actual innocence exception to Haley's case and proceeded to analyze the facts of Haley's argument.

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[253] *See supra* Part II.D.

[254] Sawyer v. Whitley, 505 U.S. 333, 341 (1992).

[255] *See supra* Parts II.D.1-2.

[256] 505 U.S. at 341.

[257] *See, e.g.*, Waring v. Delo, 7 F.3d 753, 757 (8th Cir. 1993) (interpreting *Sawyer* to mean that "there may be no exception for procedurally barred noncapital sentencing claims, unless one is innocent of the crime").

[258] Haley v. Cockrell, 306 F.3d 257, 265 (5th Cir. 2002) (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)); *id.* at 266 (quoting Smith v. Murray, 477 U.S. 527, 537-38 (1986)).

[259] *Id.* at 265 (citing *Sawyer*, 505 U.S. at 345).

[260] 505 U.S. at 341.

3. *The Court Should Have Applied a Strict Standard Analogous to that in* Sawyer *in Haley's Case*

In illustrating its standard of review for Haley's actual innocence argument, the Fifth Circuit ruled that a petitioner asserting actual innocence of a noncapital sentence must show that "but for the constitutional error, he would not have been legally eligible for the sentence he received."[261] Unlike the absence of a clearly defined rule in the Fourth Circuit's *Maybeck* decision,[262] for example, the Fifth Circuit adopted *Sawyer*'s language in analogous form.[263] In keeping with the Supreme Court's desire to keep the actual innocence exception narrow,[264] this Note argues that the Fifth Circuit got it right.

In his 1996 article, James Sticha also endorsed application of the *Sawyer* rule to noncapital sentencing cases and indicated that such application implicitly contained four elements.[265] First, application would be confined to noncapital cases where the offender is sentenced in a stage separate from the guilt-or-innocence phase.[266] This element would thus adhere to the *Sawyer* Court's desire to confine federal review to an "obvious class of relevant evidence."[267] Much like death penalty cases where the State must simply show the presence of one aggravating factor, here federal courts would simply look at whether the State demonstrated the requisite number or sequence of prior felonies justifying the sentencing enhancement. In addition, because most noncapital cases do not involve separate sentencing phases, such a narrow extension would not have a deleterious effect on the federal docket.[268] The exception thus would be confined mainly to habitual or career offender cases like *Dretke* with bifurcated trials. Second, the petitioner would have to maintain a constitutional violation.[269] This requirement would comport with the *Herrera* rule that habeas petitioners may not simply assert freestanding

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[261] *Haley*, 306 F.3d at 264-65.

[262] United States v. Maybeck, 23 F.3d 888 (4th Cir. 1994); *see supra* note 90 and accompanying text (highlighting criticism of the *Maybeck* decision).

[263] *Haley*, 306 F.3d at 264-65.

[264] *Sawyer*, 505 U.S. at 341; *see supra* note 82.

[265] Sticha, *supra* note 67, at 1637-39 (recommending adoption of the *Sawyer* standard for noncapital sentencing cases).

[266] *See id.* at 1638.

[267] *Sawyer*, 505 U.S. at 345.

[268] *See* Sticha, *supra* note 67, at 1636. Noncapital cases normally do not involve a separate sentencing stage resembling the guilt-or-innocence stage, and a number of factors determine the sentencing range. Therefore, under this inquiry, the actual innocence exception would not apply to most noncapital cases. *Id.*

[269] *See id.* at 1637.

claims of innocence, but must demonstrate an independent constitutional violation underlying the actual innocence.[270] Third, the petitioner would have to meet the higher burden of "clear and convincing evidence" required in *Sawyer*,[271] not the lesser "probably resulted" burden required for actual innocence of a substantive offense.[272] Fourth, the petitioner would have to show that his incarceration period exceeded the maximum permissible under the appropriate sentencing guideline, and therefore that no reasonable juror could have imposed that sentence.[273] Incursions into a state court's comity and finality could hardly be present where a federal judge simply compares the number of days in a petitioner's habitual or career offender sentence with the maximum number of days permitted under the appropriate sentencing statute.

Dretke can potentially fulfill all of these elements. First, Haley's trial was bifurcated, and the State cannot show the requisite sequence of prior finalized felonies warranting a habitual offender sentence.[274] Second, Haley maintained that the unjust result occurred due to insufficiency of the evidence, a possible constitutional claim.[275] This, in fact, is the only element that Haley cannot unquestionably pass. The *Dretke* majority declined to address whether an insufficiency of the evidence claim in the habitual offender sentencing context fell within the Supreme Court's due process jurisprudence laid out in *In re Winship* and *Jackson v. Virginia*,[276] while the dissent contended that it clearly did.[277] Third, because October 15 comes before October 18, Haley demonstrated by clear and convincing evidence that but for the insufficiency of the evidence, he was not legally eligible for a sentence of sixteen years and six months.[278] Fourth, because Haley's sixteen-and-a-half-year sentence exceeded the maximum two-year sentence permitted under the correct sentencing statute, no reasonable juror could have imposed such a sentence.[279] Thus, even under a strict and objective application of the actual innocence exception to noncapital

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[270] Herrera v. Collins, 506 U.S. 390, 416 (1993).

[271] 505 U.S. at 336.

[272] Murray v. Carrier, 477 U.S. 478, 496 (1986).

[273] *See* Sticha, *supra* note 67, at 1637.

[274] Haley v. Cockrell, 306 F.3d 257, 260 (5th Cir. 2002).

[275] *Id.* at 266-67.

[276] Dretke v. Haley, 124 S. Ct. 1847, 1853 (2004) (citing Jackson v. Virginia, 443 U.S. 307 (1979); *In re* Winship, 397 U.S. 358 (1970)). The State argued that Haley merely asserted a freestanding constitutional claim, which was impermissible under *Herrera*. Petitioner's Brief at 35-39, *Dretke* (No. 02-1824).

[277] *Dretke*, 124 S. Ct. at 1854 (Stevens, J., dissenting).

[278] *Haley*, 306 F.3d at 264-65.

[279] *Dretke*, 124 S. Ct. at 1850.

sentencing cases, Haley has a powerful case for relief, subject only to resolution of his insufficiency of the evidence argument as a due process constitutional claim.

4. Texas's Failure to Grant Clemency Undermines Herrera*'s Reliance on Executive Clemency as Providing a "Fail Safe"*[280]

In its brief before the Supreme Court, Texas carefully analyzed the Court's past due process jurisprudence in an effort to discount Haley's insufficiency of the evidence assertion as a mere freestanding claim of innocence.[281] As held in *Herrera*, a habeas petitioner may only use the actual innocence exception as a "gateway" through which his otherwise procedurally defaulted constitutional claim may pass.[282] A petitioner may not utilize the actual innocence exception without an independent constitutional claim.[283] To Texas, Haley's actual innocence and insufficiency of the evidence claims were, in reality, one and the same, posing no cognizable due process constitutional argument.[284] The Supreme Court neither agreed nor disagreed, managing instead to postpone resolution of this "difficult" constitutional question because of the Fifth Circuit's alleged procedural error.[285] There is, however, a distinct irony that underlies and pervades through the State's entire argument. Justice Rehnquist's hook in *Herrera* placed reliance on the fact that, even if a petitioner's claim were freestanding, a state would use its executive clemency power as a "fail safe" in appropriate instances.[286] Thus, while Texas can find support in *Herrera*'s general rule of law precluding non-constitutional actual innocence assertions,[287] it can find no similar support for its failure to exercise executive clemency.

In *Herrera*, the petitioner attempted, but ultimately failed, to utilize the actual innocence exception by citing newly discovered evidence in the form of several affidavits.[288] The *Herrera* Court declined to allow the petitioner's actual innocence assertion, because the presentation of this

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[280] Herrera v. Collins, 506 U.S. 390, 415 (1993) (quoting MOORE, *supra* note 16, at 315).

[281] Petitioners Brief at 36, *Dretke* (No. 02-1824) (citing Jackson v. Virginia, 443 U.S. 307 (1979)).

[282] 506 U.S. at 403.

[283] *Id.* at 404 ("[A] claim of 'actual innocence' is not itself a constitutional claim . . . .").

[284] Petitioners Brief at 37, *Dretke* (No. 02-1824).

[285] *Dretke*, 124 S. Ct. at 1854.

[286] 506 U.S. at 415 (quoting MOORE, *supra* note 16, at 315).

[287] *Id.* at 404-05.

[288] *Id.* at 396-97.

newly discovered evidence posed no independent constitutional claim. [289] The Court reasoned that such consideration necessarily fell outside the scope of federal courts.[290] Yet this did not mean that when pertinent newly discovered evidence emerges, a petitioner should be without any recourse. Justice Rehnquist cautioned that the justice system can still be fallible even when a defendant's constitutional rights are upheld.[291] In these uncommon circumstances, he reasoned that the provider of such relief should not be federal habeas judges tasked with the correction of constitutional violations,[292] but rather the states through use of their clemency power.[293] Justice Rehnquist's reliance on the clemency power was not a mere pipedream that states would administer mercy only when they so desired. Rather, clemency "[wa]s the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[294] Justice Rehnquist then surveyed the rich history of clemency and expressed strong confidence that this state power would provide a "fail safe" against miscarriages of justice.[295]

Though not a constitutional mandate, the majority of states today and all of the states with the death penalty, including Texas, have provisions for clemency.[296] While the exercise of clemency in Texas has been the subject of much criticism, most of the criticism has focused on death penalty cases, where there exists newly uncovered exculpatory evidence.[297] Whatever the merit of the exculpatory evidence in these cases, such situations have usually involved great complexity, including intricate eyewitness testimony, expert testimony, and often jury inferences. In Texas's defense, there exists an inherent difficulty in using hindsight to weigh a jury's potential reaction to newly discovered exculpatory evidence. Therefore, these complex

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[289] *Id.* at 400.

[290] *Id.*; *see supra* note 71.

[291] *Herrera*, 506 U.S. at 415.

[292] *Id.* at 400.

[293] *Id.* at 411.

[294] *Id.* at 412.

[295] *Id.* at 415 (quoting MOORE, *supra* note 16, at 315).

[296] *Id.* at 414; TEX. CRIM. PROC. CODE. ANN. § 48.01 (Vernon 2004).

[297] *See, e.g.*, Stephen E. Silverman, *There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375 (1995); James C. Harrington, *Texas Needs an Effective Clemency Process*, TEX. LAW., June 14, 1993, at 17; Gabrielle K. McDonald et al., *Texas Clemency "Sorely Inadequate,"* TEX. LAW., May 17, 1993, at 10; Mike Ward, *Clemency Policy Seen as 'Empty Gesture,'* AUSTIN AM.–STATESMAN, June 2, 1999, at A1; Jim Henderson, *Controversy Dogs Actions of the State's Parole Board*, HOUSTON CHRON., Jan. 10, 1999, at 1E; Bruce Tomasco, *States Grant Clemency Sparingly; Texas Tough but Not Alone in Secrecy*, DALLAS MORNING NEWS, Jan. 10, 1999, at 35A.

circumstances make objective analysis of whether a jury would have found guilt or innocence extremely difficult. In stark contrast, *Dretke* presents no such complexity. It, in fact, represents the highly unusual situation where there are no disagreeing expert witnesses, no contradictory eyewitnesses, and nothing else that would impede an objective analysis of whether a miscarriage of justice exists. The matter in *Dretke* concerns only the validity of a sentence: whether October 15 comes before October 18 and whether sixteen-and-a-half years exceeds four.

While Texas objected to Haley's actual innocence assertion mainly on the federalist principles of comity and finality, these principles cannot similarly explain a refusal to grant clemency. Clemency is nonjusticiable,[298] and state statutes usually provide little in the way of substantive guidance.[299] The only plausible explanation for withholding clemency is that Texas does not believe a miscarriage of justice has occurred in this case.[300] Indeed, the language of the State's petition confirms this result. To Texas, the fact that Haley committed his second felony "three days too early" is a matter of technicality, not innocence.[301] Yet as countered by Justice Kennedy in dissent, "the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail."[302] Texas's keen reliance on *Herrera* as a bar to Haley's insufficiency of the evidence claim is indeed double-edged. For if the State views *Herrera* as a golden rule that, on the one hand, bars freestanding actual innocence claims, then it also must undoubtedly consider Justice Rehnquist's strong reliance on clemency.[303] Either Texas should have granted clemency, or Justice Rehnquist's words of caution in *Herrera* ring empty.

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[298] *Herrera*, 506 U.S. at 412.

[299] *See* Silverman, *supra* note 297, at 386 ("[W]hen state supreme courts have considered the [clemency] issue, they tend to allow executive clemency authorities to exercise the power in any manner that they see fit."); Steve Woods, *A System Under Siege: Clemency and the Texas Death Penalty After the Execution of Gary Graham*, 32 TEX. TECH L. REV. 1145, 1188 (2001) ("Neither the Texas Constitution nor Texas statutes define precisely what the purpose [of clemency] is; they simply give the governor the power to exercise it within the bounds of the Board.").

[300] *See* Jeff Bleich, *Supreme Court Watch: Actual Innocence*, 30 SAN FRANCISCO ATT'Y 43, 44 (2004).

[301] *See* Petitioner's Brief at 10, 22, Dretke v. Haley, 124 S. Ct. 1847 (2004) (No. 02-1824).

[302] Dretke v. Haley, 124 S. Ct. 1847, 1856 (Kennedy, J., dissenting).

[303] *Herrera*, 506 U.S. at 404-17.

B. THE RESULT IN *DRETKE* MAY LEAD TO UNDESIRABLE CONSEQUENCES

Rather than entertain Haley's actual innocence claim and his unauthorized sentence of sixteen-and-a-half years, the Court in *Dretke* took undue comfort in the fact that "for the most part victims of fundamental miscarriage of justice will meet the cause-and-prejudice standard."[304] That is, because Haley's ineffective assistance of counsel claim was "viable" and "significant,"[305] the Court had no trouble forcing him to exhaust this argument both as a freestanding claim and as a way to show cause for his procedurally defaulted insufficiency of the evidence claim. Yet habeas doctrine is an equitable one,[306] and the majority and dissent both missed opportunities to consider the practical and ill-advised consequences of the majority's rule.

1. The Court's Holding May Lead the Cause-and-Prejudice Standard to Swallow the Actual Innocence Exception in Noncapital Sentencing Cases

One plausible implication of the Court's decision in *Dretke* is that the Court's recognition of Haley's "significant" and "viable" ineffective assistance of counsel claim[307] may cause the cause-and-prejudice standard to sap the actual innocence exception of any practical meaning in the noncapital sentencing context. Under the Supreme Court's holding, a lower federal court must first review Haley's ineffective assistance of counsel claim as a freestanding claim for relief and as an argument for cause to excuse the procedurally defaulted insufficiency of the evidence claim.[308] Not only does the Court express a strongly supportive view of Haley's ineffective assistance of counsel claim, but it also highlights the evidently relevant fact that the State has promised not to raise any procedural impediment to this claim.[309] Such support and reliance by the Court seemingly implies that any counsel, who fails to object to an unauthorized habitual offender statute, is automatically ineffective. Thus, it may be unnecessary for erroneously sentenced petitioners to bother asserting actual

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[304] *Dretke*, 124 S. Ct. at 1852 (quoting Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (quotations omitted)).

[305] *Id.* at 1853.

[306] *Herrera*, 506 U.S. at 404 (citing McCleskey v. Zant, 499 U.S. 467, 502 (1991)).

[307] *Dretke*, 124 S. Ct. at 1853.

[308] *Id.* at 1852.

[309] *Id.* at 1853.

innocence, because their "viable" and "significant" ineffective assistance of counsel claims will axiomatically show cause for any procedural default.[310]

In addition, the Supreme Court's Sixth Amendment jurisprudence supports this possibility. The Court has upheld the right of a defendant to effective counsel during both the guilt or innocence phase and sentencing phase of a trial.[311] The *Strickland* two-pronged test provides the Supreme Court's analysis for determining the existence or non-existence of ineffective assistance of counsel.[312] First, the defendant bears the burden of demonstrating that his counsel's performance was "deficient."[313] To avoid a Sixth Amendment violation, a defendant's counsel must prove reasonably effective and comport with prevailing professional norms.[314] In addition, the *Strickland* Court cautioned that federal court scrutiny must be "highly deferential," and the defendant must overcome a strong presumption that his counsel acted reasonably.[315] Second, the defendant must also carry the burden of showing that this deficient performance prejudiced his defense.[316] To meet this second prong, the defendant must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[317]

Haley can likely satisfy both elements. Haley has a strong case that his counsel was deficient, especially in light of the Supreme Court's recent holding in *Wiggins v. Smith*.[318] There, the Court added to *Strickland* by holding that effective counsel includes all reasonable investigations into potential mitigating evidence and other possible avenues of defense during the sentencing phase of a trial.[319] In *Wiggins*, the Court reversed a lower court's finding of effective assistance of counsel, reasoning that any reasonable counsel would have comprehensively investigated the defendant's background, which included a history of prevalent dysfunction,

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[310] *Id.*; *see also* Larry J. Ritchie, *Justice in Rhode Island: Edson Toro and Procedural Default*, 9 ROGER WILLIAMS U. L. REV. 455, 489 n.103 (2004) (referring to the Court's temporal requirement that "ironically makes the 'actual innocence' exception to the procedural default doctrine even less important").

[311] *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003) (finding ineffective assistance of counsel during the sentencing phase).

[312] Strickland v. Washington, 466 U.S. 668 (1984).

[313] *Id.* at 687.

[314] *Id.* at 687-88.

[315] *Id.* at 689.

[316] *Id.* at 692.

[317] *Id.* at 695.

[318] 539 U.S. 510 (2003).

[319] *Id.* at 521-22 (quoting *Strickland*, 466 U.S. at 690-91).

during the sentencing phase of a murder trial.[320] While defense counsel is permitted to make strategic decisions with regard to the evidence it chooses to present, such decisions may be made only after reasonable investigation.[321] In *Dretke*, Haley's counsel during the sentencing phase arguably performed even worse than that in *Wiggins*. At a bare minimum, a reasonable attorney would have almost certainly analyzed the applicability of a sentencing statute to his client during a habitual offender sentencing phase. In addition, Haley can likely meet the burden of showing prejudice. But for the fact that his counsel failed to notice the inapplicability of Texas's habitual offender statute, a jury would not have sentenced Haley to sixteen-and-a-half years in prison.[322]

In *Dretke*, the Supreme Court's requirement that Haley exhaust his concededly strong ineffective assistance of counsel claim before asserting actual innocence leaves the role of the actual innocence exception in a state of flux. If defense counsel is almost always ineffective when it fails to object to an unauthorized habitual offender sentence, then it is unclear whether the actual innocence exception exists in the noncapital sentencing context, at least in any meaningful capacity. A petitioner need not bother asserting actual innocence in addition to an ineffective assistance of counsel claim, if the latter claim will always prove meritorious. Yet while the *Dretke* Court, at least for now, can avoid deciding whether the actual innocence exception exists in noncapital sentencings, this postponement will undoubtedly end. In the future, the Court will be faced with the situation where a petitioner, wrongfully sentenced under a habitual offender statute, raises only an actual innocence argument. Or a situation will arise where a habeas petitioner, unlike Haley, failed to raise his ineffective assistance of counsel claim on direct appeal and thus procedurally defaulted this argument. In either of these situations, the Supreme Court will be

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[320] *Id.* at 524.

[321] *Id.* at 521-22.

[322] Haley's ineffective assistance of counsel claim might even have the presumption of prejudice under the rule laid out in *United States v. Cronic*. 466 U.S. 648, 658 (1984) ("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."). Where defense counsel acts as a "mere spectator" during his client's sentencing, the Fifth Circuit has applied the *Cronic* presumption of prejudice. Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (prejudice presumed where, even though the defendant did not receive an illegal sentence, his counsel did nothing during a resentencing phase). The court will also presume prejudice when counsel is somehow absent from trial, or a judge or the State interfered with counsel's ability to provide vigorous advocacy. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 318 (1974) (prejudice presumed when judge denies counsel's right to cross-examine); Green v. Arn, 809 F.2d 1257, 1263 (6th Cir. 1987) (prejudice presumed when counsel absent during critical stage of trial).

forced to address the actual innocence controversy and what its existence means, if anything, in the noncapital sentencing context.

2. *The Court Has Prolonged Haley's Incarceration Because of the Mistakes of Haley's Counsel and the Lower Courts, Not the Petitioner Himself*

It should be pointed out that Haley, in raising both ineffective assistance of counsel and actual innocence claims, did nothing wrong. It was, in fact, both the district court and the Fifth Circuit that chose to consider only his actual innocence claim.[323] As if Haley had not served enough time in prison before commencing his federal habeas petition, Haley's already unjust incarceration will be prolonged even more, because the district court and the court of appeals failed to address his ineffective assistance of counsel claim initially. Throughout the Supreme Court's various attempts to balance a petitioner's interest in his own liberty with the comity and finality of state court decisions, the Court has tried to refrain from punishing habeas petitioners from mistakes attributable solely to poor counsel.[324] The *Carrier* avoidance principle itself maintained that most victims of a miscarriage of justice will fulfill the cause-and-prejudice standard.[325] With a Court so concerned with punishing habeas petitioners for the mistakes of counsel, the Court should have been similarly concerned with punishing Haley for the mistakes of the lower federal courts, which were even further removed from his control than his counsel. The Supreme Court could have ended this incarceration, but rather chose to continue Haley's punishment, a punishment due only to the errors of his attorney and the lower federal courts.

VI. CONCLUSION

In *Dretke*, the Supreme Court held that a federal habeas petitioner could not assert the actual innocence exception to the cause-and-prejudice standard until after federal review of the petitioner's other nondefaulted claims and arguments for cause on procedurally defaulted claims.[326] The Court adhered to this strict procedural requirement despite the

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[323] Haley v. Cockrell, 306 F.3d 257, 264-68 (5th Cir. 2002).

[324] In *Wainwright v. Sykes*, 433 U.S. 72, 100 (1977), Justice Brennan, in his dissent, framed that the question for the treatment of procedurally defaulted claims as: "How should the federal habeas court treat a procedural default in a state court that is attributable purely and simply to the error or negligence of a defendant's trial counsel?"

[325] Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)).

[326] Dretke v. Haley, 124 S. Ct. 1847, 1852 (2004).

incontrovertible error of Haley's sentence[327] and despite the fact that this rigid adherence would prolong Haley's incarceration. In reaching this holding, the Court avoided answering the larger question that has split the circuit courts: whether the actual innocence exception applies to noncapital sentencing cases.[328] While the Court has found comfort in the principle that it should avoid both expanding habeas doctrine and reaching tough constitutional issues unless absolutely necessary,[329] this reluctance is sure to provide Haley with little solace as he continues to serve a sentence now more than four years longer than it should have been.[330]

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[327] *Id.* at 1850.

[328] *Id.* at 1852.

[329] *Id.* at 1853.

[330] *See* Respondent's Brief at 15, *Dretke* (No. 02-1824).