No. 02-1824

In The
Supreme Court of the United States

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Petitioner,

v.

MICHAEL WAYNE HALEY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether the "actual innocence" exception to the procedural default rule concerning federal habeas corpus claims should apply to noncapital sentencing error.

LIST OF PARTIES

The caption includes all parties to the Fifth Circuit appeal. *See* SUP. CT. R. 24.1(b).

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JURISDICTION

The Fifth Circuit issued its judgment and opinion on September 27, 2002, and denied the Director's petition for rehearing en banc on March 19, 2003. The Director timely filed a petition for writ of certiorari on June 13, 2003, *see* SUP. CT. R. 13.1, invoking the Court's jurisdiction under 28 U.S.C. §1254(1). The Court granted certiorari on October 14, 2003. *Dretke v. Haley*, 124 S. Ct. 385 (2003).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §2254 ("AEDPA"), provides, in relevant part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Texas Penal Code §12.42 provides, in relevant part:

(a)(2) If it is shown on the trial of a state jail felony punishable under Section 12.35(a) that the defendant 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, on conviction the defendant shall be punished for a second-degree felony.

Texas Penal Code §31.03 provides, in relevant part:

> (a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.
>
> . . .
>
> (e) Except as provided by Subsection (f), an offense under this section is:
>
> . . .
>
> (4) a state jail felony if:
>
> . . .
>
> (D) the value of the property stolen is less than $1,500 and the defendant has been previously convicted two or more times of any grade of theft.

STATEMENT OF THE CASE

Michael Wayne Haley is a career offender. From 1989 to 1997, he was convicted of six crimes. On March 28, 1989, Haley was convicted of theft by check; on December 3, 1991, he was again convicted of theft by check. State's Exhs. 1, 2.[1] He was sentenced to county jail for both offenses, for 180 days and ninety days respectively. *Id.* On October 18, 1991, Haley was convicted of delivery of amphetamines, for which he was sentenced to twelve

[1] These trial exhibits are contained in the envelope of State Court Records in the record on appeal.

years confinement in the Texas Department of Criminal Justice. J.A. 47-51. On September 9, 1992, he was convicted of attempted robbery and sentenced to another ten years in prison. J.A. 42-46. While out of prison on parole, Haley was convicted on November 2, 1995, of misdemeanor possession of marijuana and sentenced to 150 days in county jail. J.A. 36-39.

On October 29, 1997, Haley was again convicted of theft. J.A. 61-67. Haley's crime, the theft of a calculator, ordinarily would have been punishable as a Class A misdemeanor, but was instead elevated to a "state jail felony" based on his two prior theft convictions. J.A. 8-10; State's Exhs. 1, 2; TEX. PEN. CODE §31.03(e)(4)(D). Additionally, because he had two additional prior felony convictions (for delivery of amphetamines and attempted robbery),[2] Haley was classified as a habitual felony offender, which resulted in the enhancement of his sentence to that of a second-degree felony. J.A. 8-10; 40-51;

[2] Each of the courts below have at some point incorrectly identified Haley's prior attempted robbery conviction as being for "aggravated robbery." This incorrect characterization of Haley's conviction derives from Texas Department of Criminal Justice records that inaccurately reflected that conviction. Although the indictment charged Haley with aggravated robbery (for threatening a woman with a claw hammer in the course of an attempted robbery), J.A. 46, the district court's nunc pro tunc judgment correctly reflects that Haley was in fact convicted of attempted, not aggravated, robbery. J.A. 171-74. Because both attempted robbery and aggravated robbery are felonies that can trigger enhancement under Texas Penal Code §12.42(a)(2), the erroneous characterization of his prior conviction had no effect on the enhancement of Haley's sentence at trial, and is not at issue in this appeal. *See Haley v. Cockrell*, 325 F.3d 569, 570 n.2 (CA5 2003) (Smith, J., dissenting) ("Haley concedes that any such error is irrelevant, because his enhancement rested solely on the chronological order of his convictions."); Pet. App. 28a.

TEX. PEN. CODE §12.42(a)(2). Haley was sentenced to sixteen years and six months imprisonment. J.A. 61-67.

Under the Texas habitual felony offender statute, however, a defendant is not eligible for punishment enhancement merely because he has been convicted of two prior felonies. In addition, the statute requires that the convictions be "sequential"—*i.e.*, it requires the second previous felony conviction to be for an offense that was committed after the first previous felony conviction became final. TEX. PEN. CODE §12.42(a)(2). Accordingly, the indictment in this case alleged that Haley's first felony conviction for delivery of amphetamines had become final before the commission of his second felony of attempted robbery. J.A. 8-10. As the State has since conceded, however, this allegation was incorrect. Pet. App. 5a. In actuality, Haley committed attempted robbery on October 15, 1991,[3] three days before he was convicted of delivery of amphetamines on October 18, 1991.[4] J.A. 40-51.

The evidence submitted to the jury correctly reflected the fact of Haley's prior felony convictions, and the dates thereon indicated that the second crime was not subsequent

[3] The court of appeals incorrectly identified the date that Haley committed attempted robbery as October 12, 1991, Pet. App. 5a, based on Haley's statement to that effect in his habeas petitions. J.A. 87, 124. The indictment and judgment for that conviction state that the offense was committed on October 15, 1991. J.A. 42, 46. In either event, he committed attempted robbery before October 18, 1991.

[4] The record indicates that the sentence for delivery of amphetamines was entered on October 18, 1991. There is no indication in the record that Haley appealed that sentence, and, as a matter of Texas law, "[a]fter the State establishes that a defendant has been previously convicted, [the] Court will presume that a conviction is final when faced with a silent record regarding such." *Johnson v. State*, 784 S.W.2d 413, 414 (Tex. Crim. App. 1990) (en banc).

to the first final conviction. Nevertheless, Haley never objected to the non-sequential nature of the convictions,[5] and the jury convicted him as a habitual offender. J.A. 14-35; 61-67.

On direct appeal, Haley again failed to challenge the non-sequential nature of his prior convictions. Although he claimed the evidence was insufficient to support his conviction, he did not raise any challenge to the sufficiency of the evidence to support his enhanced sentence.[6]

The state court of appeals affirmed, finding that adequate evidence supported Haley's conviction. J.A. 80-81. The Texas Court of Criminal Appeals refused Haley's petition for discretionary review. Pet. App. 4a.

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[5] Although Texas law requires the enhancement paragraphs to be read to the jury during the punishment phase of the trial, *see* TEX. CODE CRIM. PROC. art. 36.01, the prosecution inadvertently failed to read them before the jury was excused to deliberate. Once the trial court realized the error, it reopened the evidence to allow the prosecution to read the enhancement paragraphs to the jury and to afford Haley the opportunity to plea. J.A. 17-22; *see also Haley v. State*, No. 06-98-00040-CR, J.A. 76-77. Haley, however, refused to plea to the enhancement paragraphs and requested that the jury not be informed that he had been given the opportunity to plea. J.A. 18-19. The court granted his request, and the jury found the enhancements to be true. J.A. 19; 61-67.

[6] On direct appeal, Haley also challenged the failure to read the enhancement paragraphs to the jury at the beginning of the punishment phase, the failure to obtain his plea to them, and the decision to allow the State to reopen the evidence to read the enhancement paragraphs. J.A. 76. The court rejected Haley's arguments concerning the reading of the enhancement paragraphs and the reopening of the evidence on the grounds that he had waived any error by failing to object at trial, J.A. 77, and his challenge to the failure to obtain his plea on the grounds that he had waived any error under the doctrine of invited error, J.A. 78.

In his state habeas petition, Haley alleged for the first time that his sentence had been improperly enhanced because of the non-sequential nature of his prior convictions. J.A. 85; 87-89. The state habeas court recommended that Haley's application be denied because this complaint, properly couched under state law as a challenge to the sufficiency of the evidence for the enhancement, is not cognizable in a state post-conviction proceeding, but can be brought only on direct appeal. J.A. 107-08; *see also Ex parte McWilliams*, 634 S.W.2d 815, 818 (Tex. Crim. App. 1980); *Renz v. Scott*, 28 F.3d 431, 432 (CA5 1994); *Clark v. Texas*, 788 F.2d 309, 310 (CA5 1986). Haley also claimed that he had received ineffective assistance of counsel at trial because, among other things, his counsel "never investigated [the] State's contention on enhancements." J.A. 85; 92-95. The state habeas court considered that claim and concluded that Haley's counsel was not ineffective. J.A. 108. The Texas Court of Criminal Appeals subsequently denied Haley's state habeas application based on the findings of the trial court. J.A. 109.

Haley timely filed his federal habeas application asserting that there was no evidence to support the sequential nature of the enhancements as stated in the indictment. J.A. 110-31. The Director[7] responded that Haley's claim was procedurally barred because Haley failed to raise the complaint on direct appeal. J.A. 142-44.

The magistrate judge recommended that, despite the procedural bar, Haley's application be granted with respect to sentencing because Haley had shown he was "actually

[7] Respondent Doug Dretke will be referred to herein as "the Director."

innocent" because he lacked the timely predicate violation for sentencing as a habitual offender under Texas law.[8] Pet. App. 48a-50a, 55a.

Haley also reasserted an ineffective assistance of counsel claim, alleging nine specific instances of ineffectiveness at trial, and also advanced that the prosecutor had made improper jury argument. J.A. 118-19; 125-31. The magistrate judge addressed and recommended denial of all these claims with the exception of the ineffectiveness claim as to the improper enhancement, which she declined to discuss separately because she had granted Haley habeas relief on the merits. Pet. App. 50a-55a. The district court adopted the magistrate judge's report and recommendations, granted Haley habeas relief on the ground that he was "actually innocent" of his sentence, and denied all other relief. Pet. App. 37a.

The Fifth Circuit affirmed, holding that the "actual innocence" exception to the procedural bar doctrine applies to noncapital cases involving the application of habitual felony offender sentencing provisions.[9] *Haley v. Cockrell*,

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[8] The magistrate judge also discussed, at some length, the discrepancy in the records concerning Haley's prior conviction for attempted robbery. Pet. App. 49a. As explained previously, however, *see supra* note 2, Haley's sentence was not enhanced based on the nature of the robbery offense, but solely because of the believed sequential nature of that conviction in relation to Haley's conviction for delivery of amphetamines.

[9] The Fifth Circuit also held that Haley had demonstrated he was "actually innocent" of having used a deadly weapon in the commission of his previous attempted robbery. Pet. App. 19a. This discussion is not relevant to the issue before this Court, however, because, as previously explained, *see supra* note 2, the State did not enhance Haley's sentence based on the inaccurate deadly weapon finding. Additionally, the court of appeals incorrectly stated that "Haley was not convicted of two

306 F.3d 257 (CA5 2002); Pet. App. 13a. In so doing, the Fifth Circuit acknowledged a growing division among the circuit courts on the issue. Pet. App. 14a-16a. Three circuits—the Seventh, Eighth, and Tenth—have held that the "actual innocence" exception does not apply to sentencing in noncapital cases. *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc) (holding that the "actual innocence" exception applies only to sentencing in capital cases); *Hope v. United States*, 108 F.3d 119 (CA7 1997) (holding that the "actual innocence" sentencing exception did not survive the enactment of the AEDPA); *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996) (holding that the "actual innocence" exception does not apply in cases involving challenges to noncapital sentences). The Second Circuit, on the other hand, has extended the exception to all sentencing proceedings. *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162 (CA2 2000). And reaching a middle ground, the Fourth Circuit—along with the Fifth as a result of this case—have applied the exception to noncapital cases in the context of the application of habitual offender provisions. *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999).

The Director timely filed a petition for rehearing en banc, which was denied. Pet. App. 21a. Judge Smith, joined by Judges Jolly, Jones, Barksdale, Garza, and Clement dissented from the denial, pointing out the national importance of this issue and the well-developed circuit split. Pet. App. 21a-29a. On June 13, 2003, the Director timely filed the petition for writ of certiorari asking the Court to review the question whether the

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felonies." Pet. App. 19a. Haley was in fact convicted of two prior felonies—delivery of amphetamines and attempted robbery. J.A. 40-51.

"actual innocence" exception should allow federal habeas review of a procedurally barred claim concerning noncapital sentencing-phase error. On October 14, 2003, the Court granted certiorari.

SUMMARY OF THE ARGUMENT

Federal courts cannot set aside a state criminal conviction that rests on adequate and independent state grounds. That rule, and the procedural-default bar in particular, derive from a fundamental respect for federalism, comity, and finality. Hence, a claim that has been procedurally defaulted can be reviewed on federal habeas only upon a showing of cause and prejudice, absent extraordinary circumstances. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977).

The lone exception to this bedrock rule—drawn from prior language in 28 U.S.C. §2244 that looked to the "ends of justice"—is that procedurally defaulted claims may be reviewed to avoid a "miscarriage of justice." That exception, in turn, has been articulated in two specific circumstances.

First, if a defendant can show he is "actually innocent" of the crime, that will allow a federal habeas court to overcome the procedural bar. Second, if he can show, by clear and convincing evidence, that he is "actually innocent" of his capital sentence—"actually innocent of the death penalty," in the parlance—again, a federal habeas court can overcome a procedural bar.

This Court has never expanded the exception beyond those two instances. Specifically, it has never extended the "actual innocence" exception to noncapital sentencing. Nor should it do so now.

Repeatedly, the Court has stated that the "miscarriage of justice" exception should be "extremely rare," *Schlup v. Delo*, 513 U.S. 298, 321 (1995), and "extraordinary," *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989). If the Court were to expand it to include noncapital sentencing errors, it would no longer be so.

"The ends of justice" do not support expanding the exception. The defendant in this case, Michael Wayne Haley, is not "actually innocent" in the usual sense of the words. He committed the underlying crime of theft. And he committed both predicate felonies, distribution of amphetamines and attempted robbery. The only "innocence" is the product of an undisputed technical legal error: under the terms of the statute, one of his felonies was committed three days too early.

Had Haley objected at trial, the error would have been corrected. Indeed, had he challenged his sentencing enhancement on direct appeal, the state courts may well have corrected the error. But he did not. Now, declining to excuse this procedural default in order to address a three-day discrepancy in dates—and not disturbing the state criminal conviction that was entered following a full and fair jury trial—would by no means be a "miscarriage of justice."

Extending the "actual innocence" exception to noncapital sentencing would dramatically expand the number of cases exempt from the strictures of procedural default. As the en banc Eighth Circuit observed in *Embrey v. Hershberger*, 131 F.3d 739, 741 (1997), "[a] legal claim that a substantive criminal statute has been wrongly applied to facts can, by resort to a rather unsophisticated play on words, always be converted into a complaint that the

relevant facts did not support a conviction and that therefore the defendant was 'actually innocent.' "

Extending the exception would also, for that subset of cases, effectively eliminate the "cause" requirement from "cause and prejudice" and would allow criminal defendants to retry their cases, based on the trial record alone and without any new evidence, after they procedurally defaulted their claims.

Moreover, even if the "actual innocence" exception were to extend to noncapital sentencing, Haley should still not prevail because "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). In this case, Haley presses "actual innocence" as a freestanding constitutional claim, rather than as a gateway to consideration of an alleged independent constitutional error.

In light of the strictures of federalism and the carefully circumscribed "actual innocence" exception to the procedural default rule that this Court has fashioned, the Court should not expand that exception to encompass claimed legal errors at noncapital sentencing. Rather, federal habeas courts should respect the final judgments of state criminal courts and the adequate and independent state ground of procedural default.

ARGUMENT

I. THE "ACTUAL INNOCENCE" EXCEPTION IS A JUDICIALLY CRAFTED "NARROW" GATEWAY AROUND THE PROCEDURAL DEFAULT RULE.

"This is a case about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). "It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus." *Id.*

In this case, there was indisputably error at sentencing. Equally indisputably, Haley procedurally defaulted on that error twice—at trial, and on direct appeal. As the Court explained in *Coleman*:

> "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.*, at 750.

Haley, however, does not advance any claim of cause and prejudice. Instead, he relies exclusively on the judicially created "miscarriage of justice" exception. But, because of the States' strong interests in finality, comity, and federalism, the Court has consistently limited the "actual innocence" exception to the rare and extraordinary circumstances where the State has convicted the wrong person of the crime or to the equally extraordinary cases involving imposition of the death penalty. The court of appeals's erroneous decision should be reversed.

A. Expanding the Scope of the Federal Writ of Habeas Corpus Would Exact a Heavy Price on the States' Interests in Finality, Comity, and Federalism.

Although "[t]he writ of habeas corpus indisputably holds an honored position in [the Court's] jurisprudence," *Engle v. Isaac*, 456 U.S. 107, 126 (1982), the Court has consistently recognized that the "Great Writ entails significant costs," *id.*, and the States' interests in both the finality of judgments and their rightful place in the federal system can be frustrated and undermined by the writ. *See McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986).

Liberal use of the writ breeds disrespect for the finality of convictions and "disparages the entire criminal justice system." *McCleskey*, 499 U.S., at 492. A prisoner's impression that he can always seek to overturn his conviction on habeas review "tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Wainwright*, 433 U.S., at 89. And, the ready availability of the writ encourages litigants to withhold claims for manipulative purposes, *i.e.*, "sandbagging," and interferes with the States' ability to address and resolve claims while the facts are fresh. *See id.*; *McCleskey*, 499 U.S., at 491-92.

In the context of a federal attack on a state conviction, habeas review carries the added affront to the States' position in the federal system. "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McCleskey*, 499 U.S., at 491. The power of a State to pass laws means little, however, if the State cannot enforce them. *Id.* Further, as the primary authority for enforcing the criminal law, the

States "also hold the initial responsibility for vindicating constitutional rights." *Engle*, 456 U.S., at 128. Federal oversight and reexamination of state convictions "frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* Accordingly, the States' vital interest in preserving their proper place in the federal system can be directly impugned by overly expansive federal use of the writ.

B. Use of the Writ Is Generally Limited To Considering Only Claimed Constitutional Violations That Were Properly Presented in the State System.

The Court has long recognized careful limits on the availability of federal habeas review. Of primary importance to the issue in this case is the basic habeas principle that habeas courts do not sit to review questions of fact, but only errors of constitutional dimension. *See*, *e.g.*, *Herrera*, 506 U.S., at 400-01 (citing *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923); *Hyde v. Shine*, 199 U.S. 62, 84 (1905); *Ex parte Terry*, 128 U.S. 289, 305 (1888)). Accordingly, a habeas court may not reweigh the evidence or otherwise allow the habeas petitioner to relitigate his criminal trial, but must limit the scope of its review to "the question whether [the petitioner's] constitutional rights have been preserved." *Moore*, 261 U.S., at 87-88.

Furthermore, as a prerequisite to obtaining federal habeas relief, a habeas petitioner must first properly present all constitutional claims to the state court in the manner prescribed by the state's procedural rules. *Coleman*, 501 U.S., at 729-32. Failure to do so will result in

procedural default of the claims.[10] *Id.*, at 729-39. And, generally, the federal habeas courts will refuse to hear procedurally defaulted claims. *Id.*, at 729.

The procedural default doctrine directly facilitates the States' interests in finality of convictions and preservation of the proper balance between state and federal authority. By requiring habeas petitioners to comply with procedural rules, the doctrine vindicates the States' interest in finality and lessens "the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to address at a prior, appropriate time." *McCleskey*, 499 U.S., at 493.

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[10] The procedural default doctrine is a specific application of the Court's rule that it will not review a question of federal law decided by a state court "if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*, 501 U.S., at 729 (citations omitted). The doctrine applies whether the state-law ground is substantive or procedural. *Id.* Thus, when a state court refuses to consider a claim because the habeas petitioner failed to meet a state procedural requirement, an independent and adequate state-law reason supports the judgment, and the claim is procedurally barred. *Id.*, at 729-30; *see also Wainwright*, 433 U.S., at 88-91.

In the context of a direct appeal, the independent and adequate state-ground doctrine is jurisdictional because the Court has no power to review a state-law determination that is sufficient to support the judgment. *Coleman*, 501 U.S., at 729. The Court recognized in *Coleman* that the independent and adequate state-law rule applies in the habeas context because, if it did not, a federal district court could do on habeas what this Court could not do on direct review. *Id.*, at 730. That result would be unacceptable, the Court noted, because it would offer state prisoners whose custody was supported by an independent and adequate state ground an end run around the limits of the Court's jurisdiction and a means to undermine the State's interest in enforcing its laws. *Id.*, at 731.

The Court has recognized that federal habeas review of a procedurally defaulted claim exacts "particularly high" costs in terms of finality, comity, and federalism. *Engle*, 456 U.S., at 128 (citing *Wainwright*, 433 U.S., at 88-91). A habeas petitioner's failure to comply with a state procedural rule of trial deprives the state trial court of the opportunity to correct the defect and avoid the error in the first place. *Id.* Failure to comply with a State's appellate procedures likewise deprives the state appellate court of an opportunity to review and correct trial error prior to federal intervention. *See Murray v. Carrier*, 477 U.S. 478, 491 (1986). In both cases, issuance of the writ on a procedurally defaulted claim undercuts the State's ability to enforce its procedural rules and authorizes federal interference with a core state function. *See id.*; *Engle*, 456 U.S., at 129. Therefore, the Court has long held that, ordinarily, a federal habeas court may not reach the merits of a procedurally defaulted claim. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992) (citing *McCleskey*, 499 U.S., at 490-91); *Wainwright*, 433 U.S., at 88-91.

C. Habeas Review of Procedurally Defaulted Claims Is Limited to Those Circumstances Where a Habeas Petitioner Can Demonstrate Cause and Prejudice or "Actual Innocence."

The Court has allowed procedurally defaulted claims to be considered in federal court only where the habeas petitioner can show cause and prejudice, or in the extraordinary case of "actual innocence." *Sawyer*, 505 U.S., at 339.

1. A showing of cause and prejudice will excuse a procedural default.

The Court adopted the "cause and prejudice" standard for review of procedurally defaulted claims in *Wainwright*, 433 U.S., at 87. When a habeas petitioner can demonstrate cause for his default and prejudice as a result of the claimed constitutional error, the habeas court may bypass the procedural bar and address the merits of the constitutional claim. *Id.*; *see also Sawyer*, 505 U.S., at 338; *Carrier*, 477 U.S., at 496.

The cause and prejudice standard is a rigorous one. To demonstrate cause for a procedural default a petitioner must show that an objective factor external to the defense impeded compliance with the State's procedural rule. *Carrier*, 477 U.S., at 488. Examples cited by the Court include circumstances where a claim was not readily available to counsel, or when interference by state officials made compliance with the procedural rule impracticable. *Id.* Mere ignorance or inadvertence of counsel, however, is insufficient to show cause, unless it rises to the level of ineffective assistance of counsel under the Sixth Amendment. *Id.*, at 487; *see also Strickland v. Washington*, 466 U.S. 668, 690 (1984).

The prejudice prong of the cause and prejudice standard is also difficult to satisfy. A petitioner must show "'not merely that the errors at . . . trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Carrier*, 477 U.S., at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)).

A habeas petitioner, therefore, has a difficult burden to obtain review of his procedurally defaulted constitutional

claim under the cause and prejudice standard. The Court expressly acknowledged this difficulty in *Carrier* and found it to be justified in light of the substantial state interests in enforcing procedural rules and being afforded the opportunity to hear and resolve claims prior to federal intervention. *See* 477 U.S., at 487.

2. In the absence of cause, a federal habeas court may review a procedurally defaulted constitutional claim only if the habeas petitioner can demonstrate "actual innocence."

The Court has recognized a limited class of procedurally defaulted claims that may receive federal habeas review even if the habeas petitioner cannot demonstrate cause for his procedural default. In the rare and extraordinary event that "the failure to hear the claim[ ] would constitute a 'miscarriage of justice,' " the federal habeas court may bypass the procedural bar and review the constitutional claim. *Sawyer*, 505 U.S., at 339. Justice O'Connor has described this process as "a kind of 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring).

The Court elaborated on the miscarriage of justice or "actual innocence" exception in "a trio of 1986 decisions." *Sawyer*, 505 U.S., at 339 (referring to *Smith v. Murray*, 477 U.S. 527 (1986); *Carrier*, 477 U.S., at 478; *Kuhlmann*, 477 U.S., at 436). In *Kuhlmann*, a plurality of the Court explained that the "actual innocence" exception was derived from language in 28 U.S.C. §2244 that, prior to 1966, allowed denial of successive habeas claims without a hearing if the habeas court was "satisfied that the *ends of justice will not be served by such inquiry*." *Kuhlmann*, 477

U.S., at 448 (citing 28 U.S.C. §2244) (emphasis in original). Although Congress deleted that language from the statute in 1966, the *Kuhlmann* plurality chose to maintain the exception to allow consideration of successive claims in the limited circumstances where the habeas petitioner supplements his constitutional claim with a "colorable showing of factual innocence." *Id.*, at 454.

In *Carrier*, the second case in the trio, the Court held that the "actual innocence" exception applies to procedurally defaulted claims. 477 U.S., at 496. Continuing with its narrow application of the exception, the Court stated that the merits of a defaulted claim could be reached in an extraordinary case where "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id.*

In *Smith*, the last of the three decisions, the Court acknowledged that the "actual innocence" exception may apply to allow consideration of a procedurally defaulted claim in the capital sentencing context. 477 U.S., at 537. In reaching this conclusion, the Court noted 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." *Id.* Nonetheless, the Court signaled in *Smith* that a procedurally defaulted constitutional claim may be considered upon the habeas petitioner's demonstration that he is "actually innocent" of the death penalty. *See id.* Although the Court did not enunciate the specific test to apply in such circumstances, the Court noted that the habeas petitioner in *Smith* had failed to show himself entitled to the exception because "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Id.*, at 538.

Subsequently, in *Sawyer*, the Court developed the applicable standard for cases in which a habeas petitioner claims to be "actually innocent" of the death penalty. 505 U.S., at 348. The Court held that a habeas petitioner must demonstrate by "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty" in order to justify federal habeas review of a procedurally defaulted constitutional claim.[11] *Id.*

Finally, in *Schlup v. Delo*, 513 U.S., at 326-27, the Court held that the more lenient *Carrier* standard[12]—rather than the more stringent *Sawyer* standard[13]—applies to a claim by a capital petitioner that he is "actually innocent" of the underlying crime.

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[11] The evidence considered by the habeas court is limited to the aggravating factors that made the defendant eligible for the death penalty, and not the additional mitigating evidence that may have been excluded as a result of a claimed constitutional error. *Sawyer*, 505 U.S., at 347. The Court specifically rejected the argument that consideration of mitigating evidence should be a factor in the standard because that "extension would mean that 'actual innocence' amounts to little more than what is already required to show 'prejudice,' a necessary showing for habeas relief for many constitutional errors." *Id.*, at 345. The Court went on to note that "[i]f a showing of actual innocence were reduced to actual prejudice, it would allow the evasion of the cause and prejudice standard. . . . In practical terms a petitioner would no longer have to show cause, contrary to our prior cases." *Id.*, at 345 n.13 (citing *McCleskey*, 499 U.S., at 494-95; *Carrier*, 477 U.S., at 493).

[12] To demonstrate "actual innocence" of a crime, a petitioner must show "a constitutional violation has probably resulted in the conviction of one who is actually innocent." 477 U.S., at 496.

[13] To demonstrate "actual innocence of the death penalty," a petitioner must show by "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." 505 U.S., at 348.

II. THE COURT SHOULD NOT EXPAND THE "ACTUAL INNOCENCE" EXCEPTION TO ENCOMPASS CLAIMS OF NONCAPITAL SENTENCING ERROR.

Repeatedly, the Court has emphasized how "narrow" and "extraordinary" the "actual innocence" exception is intended to be. *Schlup*, 513 U.S., at 321 (substantial claims of "actual innocence" are "extremely rare" and should remain the extraordinary case); *McCleskey*, 499 U.S., at 502 (same); *Dugger*, 489 U.S., at 410 n.6 (excuse of a procedural default under the "actual innocence" exception would happen only in an "extraordinary" case); *Kuhlmann*, 477 U.S., at 454 (habeas review should be granted "only in rare cases" when "the ends of justice so require"). It is a doctrine of last resort, which the Court created to justify the nullification of a state conviction or sentence in the exceedingly rare circumstances where an innocent person is convicted. *See Harris*, 489 U.S., at 271 (O'Connor, J., concurring) (noting that the "operative test" to review a procedurally defaulted claim is cause and prejudice, and that failure to demonstrate cause will result in the unavailability of federal habeas review *unless* the habeas petitioner can make a "substantial claim of factual innocence").

A. Haley Is Not "Actually Innocent," as That Term is Normally Used.

Mindful that exceptions to the procedural default rule exact a very high toll on the States' interests in enforcing judgments, the Court has made clear that "actual innocence" refers only to factual—not legal—innocence. *See*, *e.g.*, *McCleskey*, 499 U.S., at 502; *Dugger*, 489 U.S., at 410 n.6; *Kuhlmann*, 477 U.S., at 454. A habeas petitioner can demonstrate "legal innocence" simply by showing a constitutional violation that itself may require reversal. *See*, *e.g.*,

Caldwell v. Mississippi, 472 U.S. 320 (1985) (remarks by prosecutor in capital case that misinformed the jury as to the role of appellate review violated the Eighth Amendment). However, to demonstrate "actual innocence" sufficient to overcome a procedural default the petitioner must show more than a constitutional error, even when the verdict would have been different absent the error. *Dugger*, 489 U.S., at 410 n.6. The petitioner must demonstrate that he is innocent of the crime for which he was convicted. *See*, *e.g.*, *Schlup*, 513 U.S., at 316; *Kuhlmann*, 477 U.S., at 454.

Under that standard, Haley is not "actually innocent." Haley concedes that he is guilty of the underlying crime in this case. He committed the theft that led to his present sentence, and he committed the felonies of delivery of amphetamines and attempted robbery that led to his sentence enhancement. He is, as a factual matter, a career offender with those convictions and numerous others.

To be sure, his second felony was committed three days too early. Thus, there was error: the enhancement does not fall within the literal terms of the statute. There is little doubt that, had Haley objected, he would not have been sentenced as a habitual offender. Likewise, had he raised the claim on direct appeal, his habitual offender conviction may well have been reversed. *See, e.g., Hernandez v. State*, 929 S.W.2d 11 (Tex. Crim. App. 1996).[14] But

[14] In *Hernandez*, a prisoner was convicted of possession of less than one gram of cocaine, a state jail felony. The indictment also alleged two prior felony convictions, delivery of a controlled substance and robbery, which became final before Hernandez's commission of the charged offense. Following his conviction, Hernandez pleaded "true" to the enhancement paragraphs and was assessed life in prison. On direct appeal, he claimed that his sentence was improperly enhanced. The

Haley did not give either the state trial court or the state appellate courts the opportunity to correct the error.[15]

Haley committed the crime, and he committed the predicate felonies. His claim of "actual innocence," accordingly, is not based on the ordinary usage—"I didn't do it"—but rather on the legal technicality that the dates are three days off. Although there was legal error, refusing to excuse his two procedural defaults simply would not be a "miscarriage of justice."

B. Expanding the "Actual Innocence" Exception to Noncapital Sentencing Error Is Not Mandated by the "Ends of Justice."

Because the "actual innocence" exception is a judicially created rule drawn from the prior "ends of justice" language in 28 U.S.C. §2244, the scope of the "actual innocence" exception will ultimately turn on what the Court determines the "ends of justice" require. No sound equitable principle supports extending the exception to noncapital sentencing.

First, the equities are far less compelling than the circumstances in which the Court has already extended the exception. Actual innocence of the crime is, by definition, the most compelling instance of a miscarriage of

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Texas Court of Criminal Appeals reversed and remanded for new sentencing because—even though he had pleaded "true" to the enhancement paragraphs—the same robbery conviction had been used twice, to enhance the state jail felony up to a third-degree felony and then again to enhance it under the habitual offender statute.

[15] The Texas Court of Criminal Appeals has repeatedly held that sufficiency of the evidence claims must be raised on direct appeal, not by collateral attack. *See*, *e.g.*, *Ex Parte McWilliams*, 634 S.W.2d at 818 (collecting cases).

justice. And, "actual innocence of the death penalty," where the petitioner committed the underlying crime but did not in fact satisfy the aggravators necessary for the imposition of the death penalty, presents the equities of someone improperly sentenced to die.[16]

Second, an exception for noncapital sentencing errors would be subject to abuse, *see infra* 28-31, and therefore would exact even greater costs from the States in terms of federalism, comity, and finality. As the Court noted in *Schlup*, "[t]he threat to judicial resources, finality, and comity posed by claims of actual innocence [of the crime] is thus significantly less than that posed by claims relating only to sentencing." 513 U.S., at 324.

Third, the Court's prior "actual innocence" cases have carefully cabined the exception to actual innocence of the

[16] *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny are not inconsistent with this taxonomy. The Court, in the "actual innocence" context, has consistently drawn distinctions between "actual innocence" of the crime and "actual innocence" of the sentence (with different standards—*Carrier* and *Sawyer*—applicable to each) and between "actual innocence of the death penalty" (an exception to procedural default) and "actual innocence" of noncapital sentences (we submit, not an exception). Whether, and which, sentencing factors are properly framed as elements of the crime for *Apprendi* purposes is not relevant to the Court's discretionary judgment—pursuant to the "ends of justice"—of when to authorize a federal habeas court to set aside a state conviction notwithstanding the adequate and independent state ground of procedural default. And strong equitable reasons exist not to expand that exception to all procedurally defaulted claims of sentencing error.

Moreover, in this case, all of the facts necessary to apply the habitual offender enhancement were charged in the indictment, submitted to the jury, and found beyond a reasonable doubt. And, since the Texas habitual offender statute is aimed at recidivism as measured by prior convictions, those findings are properly deemed sentencing enhancements under *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

crime or of the death penalty. In *Sawyer*, for example, the Court drew a clear distinction between "actual innocence" in a noncapital case as compared to the capital sentencing context. 505 U.S., at 339-41. Noting that the "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime," the Court stated that "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." *Id.*, at 341. Thus, the Court described its task as "striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant." *Id.*

As the six judges dissenting from denial of rehearing en banc in this case explained,

> "[t]he Tenth and Eighth Circuits inferred from this reasoning that the Supreme Court never intended the lower courts to extend the actual innocence exception to non-capital sentencing cases. Otherwise, why is the concept of actual innocence so 'easy to grasp' in the non-capital context? And why is a non-capital case a 'simpler situation'? In the Tenth Circuit's view, it is 'because it simply means the person didn't commit the crime.' The Eighth Circuit concluded that 'the most natural inference to draw from these observations on the Court's part is that' the actual innocence exception should not extend to non-capital sentencing." Pet. App. 26a-27a (quoting *Richards*, 5 F.3d, at 1371; *Embrey*, 131 F.3d, at 741).[17]

[17] The Fifth Circuit panel, in contrast, based its extension of the "actual innocence" exception to noncapital sentencing error on the general principle that the rules of procedural default do not apply differently depending on the nature of the penalty. Pet. App. 15a-16a (citing *Smith*, 477 U.S., at 538-39). *See also Murray v. Giarratano*, 492

The Court in *Sawyer* went on to note "[t]he present case requires us to further amplify the meaning of 'actual innocence' *in the setting of capital punishment*." 505 U.S., at 340 (emphasis added). The most logical implication of these precise statements is that the Court intended to expand—or amplify—the "actual innocence" exception from actual innocence of a crime to "actual innocence" of a sentence only in the unusual circumstances of capital cases.

C. Expanding the "Actual Innocence" Exception to Noncapital Sentencing Error Would Render the Exception Neither "Extremely Rare" Nor Extraordinary.

As the en banc Eighth Circuit noted in *Embrey*, "[a] legal claim that a substantive criminal statute has been wrongly applied to facts can, by resort to a rather unsophisticated play on words, always be converted into a

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U.S. 1, 9 (1989) (stating that habeas review of a death sentence does not require a heightened standard of review). The court of appeals reasoned that since, under *Smith* and *Sawyer*, the "actual innocence" exception applies to capital sentencing, and since the rules of procedural default do not depend on the "nature of the penalty," *Smith*, 477 U.S., at 537-38, the "actual innocence" exception should apply to noncapital sentencing as well. Pet. App. 14a-17a.

The Court's refusal to apply a different standard of review on federal habeas to death penalty cases is rooted in its conviction that "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are . . . sufficient to assure the reliability of the process by which the death penalty is imposed." *Giarratano*, 492 U.S., at 10. Accordingly, the Court has refused to afford capital defendants extra leniency in complying with State procedural rules. *Id*., at 9 (citing *Smith*, 477 U.S., at 538-39). The principle is yet a further example of the Court's reluctance to disturb State convictions on habeas review; it acts as a shield to the validity of State convictions, and should not be used as a sword to undermine the procedural default rule across the board.

complaint that the relevant facts did not support a conviction and that therefore the defendant was 'actually innocent.'" 131 F.3d, at 741. Thus, expansion of the exception to noncapital sentencing runs the risk of starting down a slippery slope toward the widespread undermining of the procedural default rule altogether.

Haley may respond that the facts of this case are unique—in that the error is objective and in that the State concedes error—and so the Court could fashion an exception that would not be subject to abuse. But, it is a near unalterable practical reality that, whenever the Court creates an exception to the rules protecting the finality of state convictions, that exception will grow in the hands of lower courts and creative defense lawyers.

And, the fact that the error is conceded here is not really a workable limitation. The fundamental premise behind the procedural default rule is that valid claims of legal error—not just state law error, as here, but violations of the U.S. Constitution—can be forever defaulted if the defendant fails to bring them to the attention of the state court. Indeed, the procedural default rule only really matters *when there is in fact error*; otherwise, the state conviction will not be disturbed in any event. Every procedural default case begins with the supposition that the defendant has a meritorious constitutional claim and examines, nevertheless, whether there is cause and prejudice for the failure to raise the claim in state court.[18]

[18] *Cf. Schlup*, 513 U.S., at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred habeas claim.").

Therefore, the admitted error here is not qualitatively different from the premise of any claim of procedurally defaulted error.

Moreover, the peril of the floodgates being opened to widespread attacks on state sentences through "rather unsophisticated play[s] on words" is not merely hypothetical. An examination of some of the claims that have been brought in reported cases alleging "actual innocence" of noncapital sentences reveals the versatility of such an exception.

In *Embrey*, the petitioner was convicted of armed robbery in violation of the Federal Bank Robbery Act (FBRA), 18 U.S.C. §2113(a), (d), and kidnapping, in violation of the Federal Kidnapping Act, 18 U.S.C. §1201(a)(1). He was sentenced to two consecutive twenty-year terms, one for each conviction. 131 F.3d, at 739. The petitioner filed a successive petition under 28 U.S.C. §2255 in federal district court asserting that he was not eligible for sentencing under the Federal Kidnapping Act because Congress intended the FBRA to be a comprehensive statute that provided punishment for what he did to the exclusion of other federal statutes. *Id.*, at 740. The petitioner argued that because he was ineligible for sentencing under the Federal Kidnapping Act, he was "actually innocent" of the sentence he received under that statute, and therefore the court of appeals could reach the merits of his claim. *Id.*

The en banc Eighth Circuit court rejected his claim, stating that it was not "disposed to hold that in *Sawyer* the Supreme Court intended to allow petitioners successive collateral attacks on convictions and sentences by resorting to the simple expedient of reasserting an alleged legal error that resulted in a conviction that would not

have otherwise occurred, or in a sentence that would not have otherwise been imposed." If that were the case, noted the court, "then every sentence would be subject to an endless number of successive reviews." *Id.*, at 741.

In *United States v. Richards*, 5 F.3d 1369, 1371 (CA10 1993), Petitioner asserted, in a second §2255 motion, that his sentence was improperly calculated under the federal sentencing guidelines because the court included wastewater weight in computing the total weight of the amphetamines he was manufacturing. Thus, he argued, he was "actually innocent" of the sentence he had received. The court rejected that claim, holding that "[a] person cannot be actually innocent of a noncapital sentence." *Id.*, at 1371.

In *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996), Petitioner pleaded guilty in state court to numerous felony counts, and he was sentenced under the state's habitual offender statute. *Id.*, at 629. In his third habeas petition, Petitioner alleged his punishment was improperly enhanced because, among other things, his prior guilty pleas were unknowing and involuntary due to the contemporaneous use of the psychotropic drug Elavil and to ineffective assistance of counsel. The court of appeals rejected Petitioner's writ as abusive, refusing to review the petition under the "actual innocence" exception because Petitioner did not allege he was innocent of the felonies to which he pled guilty. *Id.*, at 630. Instead, Petitioner alleged only that he was innocent of the enhancement charge. *Id.* The court held that "because '[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." *Id.* (citing *Richards*, 5 F.3d, at 1371).

In *Sones v. Hargett*, 61 F.3d 410, 418-19 & n.16 (CA5 1995), the Fifth Circuit assumed, without deciding, that a Petitioner could be "actually innocent" of a noncapital sentence. Petitioner claimed he was "actually innocent" of habitual offender status because the prior convictions used to enhance his sentence were obtained without counsel. *Id.*, at 419. The court rejected Petitioner's claim of "actual innocence" because there was no evidence on the face of the commitment papers that would have led his lawyer to challenge the constitutionality of the prior convictions. *Id.*, at 420-21.

Finally, in *Pilchak v. Camper*, 935 F.2d 145 (CA8 1991),[19] Petitioner was convicted as a participant in a drug conspiracy and sentenced to life in prison. On habeas, she argued that she had been represented by a lawyer who was suffering from Alzheimer's disease and was convicted by a jury that was unconstitutionally selected. *Id.*, at 146. Because Petitioner failed to raise these complaints in the appropriate state forum, the State argued she was procedurally barred from raising them on federal habeas. *Id.*, at 147. The court of appeals held that the "actual innocence" exception has been "transported . . . into the sentencing phase of a trial." *Id.*, at 148. Although it did not explain how Petitioner was "actually innocent" of her sentence, the court upheld the granting of the writ, noting in a footnote that "elements of equal protection, substantive due process, and unusual punishment involved in the lifetime sentence" supported its decision. *Id.*, at 148 n.5.

[19] This case was effectively overruled by *Embrey*, 131 F.3d, at 740-41.

Examining just a few of these cases shows the potential breadth of the claims that can be characterized as being "actually innocent" of a noncapital sentence. And any exception to the procedural default rule that threatens to make "every sentence . . . subject to an endless number of successive reviews," *Embrey*, 131 F.3d, at 741, would, at a minimum, render the exception neither "extraordinary," *Dugger*, 489 U.S., at 410 n.6, nor "extremely rare," *Schlup*, 513 U.S., at 321.

D. Haley Produced No Newly Discovered Evidence of His "Innocence."

The "actual innocence" exception should not be available to Haley for the additional reason that he has produced no new evidence of his alleged "innocence." In *Schlup*, the Court stated, "*[w]ithout any new evidence of innocence*, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." 513 U.S., at 316; (emphasis added); *see also id.*, at 324 (noting that "credible" claims of actual innocence require "new reliable evidence . . . not presented at trial").

Haley does not claim to have new information that was unavailable at the time of trial. Nor does he argue, because he cannot, that the jury was allowed to consider erroneous evidence at his sentencing hearing.[20] Haley instead argues simply that the jury misapplied Texas's habitual offender statute—that it made a mistake. This

[20] The documentation admitted into evidence to support Haley's sentence under the habitual offender statute accurately reflected that his convictions were not sequential. *See* 40-51.

information, however, was entirely available to Haley at trial. He could have raised it at trial or on direct appeal to correct the error. He did neither.

Haley's obligation to object and bring the error to the state court's attention serves two important purposes. First, it eliminates the potential for "sandbagging," for counsel intentionally or through neglect allowing erroneous charges to go forward (on the hope of acquittal) and then raising those errors afterwards to undo the sentence. Second, it prevents later courts—state courts or, especially, federal habeas courts—from second-guessing the decisions made at trial and considering claims never made to the trial court. Once the trial is complete, absent new probative evidence that was unavailable at trial, the trial record should not be reopened and reweighed in federal court.

Haley's claim that the jury misapplied Texas's habitual offender statute is not cognizable under the "actual innocence" exception. Haley's evidence is not new; he simply failed to raise it at trial or on direct appeal.

III. APPLICATION OF THE "ACTUAL INNOCENCE" EXCEPTION TO NONCAPITAL SENTENCING ERROR WOULD SUBVERT THE COURT'S CAUSE AND PREJUDICE STANDARD.

As a general matter, the "operative test" for determining whether a federal habeas court may review a procedurally defaulted claim is cause and prejudice. *Harris*, 489 U.S., at 271 (O'Connor, J., concurring). The "actual innocence" exception provides the "safety valve" for circumstances where a factually innocent prisoner cannot show cause. *Id.* Although each doctrine provides an independent avenue for a habeas petitioner to obtain review of a procedurally defaulted claim, the two doctrines do not operate

wholly independently from one another. Instead, the Court interprets the "actual innocence" exception with reference to the cause and prejudice test, and has refused to interpret "actual innocence" in a manner that would result in the degradation of the cause and prejudice test. *See Sawyer*, 505 U.S., at 345 n.13.

In particular, the Court refused in *Sawyer* to reduce the definition of "actual innocence" to mere actual prejudice, because "[i]n practical terms a petitioner would no longer have to show cause, contrary to [the Court's] prior cases." *Id.* Accordingly, a proper application of the "actual innocence" exception in any context must require more than a showing of actual prejudice in order to maintain the integrity of the cause and prejudice test. *See id.*

The court of appeals held, however, that Haley was "actually innocent" of habitual offender status based merely on a showing that the statute was improperly applied—*i.e.*, prejudice. Pet. App. 19a. The court of appeals's decision to apply the "actual innocence" exception in this case thus creates a ready means for petitioners to contest their state criminal sentences in federal court, without ever having brought the complaints in the proper state forum, simply by showing error that results in prejudice. That showing is a far cry from the rigorous cause and prejudice standard that the Court has erected to prevent such misuse of the writ and to protect the States' interests in preserving convictions and in enforcing procedural rules.

Tellingly, Haley did not even attempt to demonstrate cause and prejudice in the court of appeals, but simply

argued "actual innocence" to attack his sentence.[21] Of course, demonstrating that trial counsel was ineffective under *Strickland*, 466 U.S., at 668,[22] for failing to object to the enhancements is inherently more difficult than merely showing that the sentence was applied in error. It is not surprising that Haley chose the easier path and simply argued that he was "actually innocent" of his noncapital sentence.

But, by allowing Haley to abandon his ineffective assistance claim—which, given the clear error in the enhancement, conceivably could have prevailed—free of consequence, the court of appeals effectively eliminated the cause requirement in this case. Hence, Haley could surmount his procedural default merely by demonstrating prejudice, which he did.

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[21] Although Haley asserted potential grounds for cause—ineffective assistance of trial counsel—in his federal habeas petition, those claims were denied, and Haley did not appeal them to the court of appeals. Pet. App. 12a (noting that Haley has not alleged "cause or actual prejudice"). Thus, Haley has waived any argument he might have made that his counsel at trial and on direct appeal was ineffective. *See Morley Constr. Co. v. Md. Cas. Co.*, 300 U.S. 185, 191 (1937) (holding that, in the absence of a cross-appeal, an appellee cannot "attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary").

[22] The Court established a difficult standard to demonstrate ineffective assistance in *Strickland.* A criminal defendant can establish ineffective assistance only by "showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable," 466 U.S., at 690, and that but for the errors, there is a reasonable probability that the results in the case would be different. *Id.*, at 694.

IV. THE COURT OF APPEALS'S DECISION ERRONEOUSLY ALLOWS HABEAS REVIEW OF A FREESTANDING CLAIM OF "ACTUAL INNOCENCE."

Absent extraordinary circumstances, a claim of actual innocence cannot state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding. *Herrera*, 506 U.S. 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." *Id.* The Court has long held that the focus on habeas review is not on the habeas petitioner's guilt or innocence, and it is not to relitigate state trials. *See*, *e.g.*, *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Moore*, 261 U.S., at 87-88. Rather, a habeas court must be concerned solely with whether the petitioner's constitutional rights have been preserved. *See id*; *Ex parte Terry*, 128 U.S., at 305.

This guiding habeas principle is, in turn, rooted in the underlying concern for federalism and the States' interests in preserving the integrity of their criminal justice systems and the finality of their convictions. *See Herrera*, 506 U.S., at 401. A state criminal trial is a "decisive and portentous event" designed "within the limits of human fallibility" to determine "the question of guilt or innocence of one of its citizens." *Wainwright*, 433 U.S., at 90. Respect for that event demands that a conviction or sentence will not be disturbed on habeas review based on a mere claim of innocence, but only on the basis of a constitutional violation. *See Herrera*, 506 U.S., at 401. "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* (quoting *Kuhlmann*, 477 U.S., at 454).

Consequently, the Court has made clear that a bare claim of "actual innocence" will not support review of a procedurally defaulted claim. *Id.*, at 404. As the Court explained in *Herrera*,

> "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.*

In other words, a freestanding claim of "actual innocence" will not alone support a claim for habeas relief. *See id.*, at 404-05. Instead, the habeas petitioner must "supplement[ ] his constitutional claim with a colorable showing of factual innocence." *Id.*, at 404.

Haley cannot meet this standard. He does not seek to demonstrate that he is "actually innocent" to support the habeas court's review of an independent constitutional violation.[23] Rather, Haley's claim that he is "actually innocent" of habitual offender status is identical to his underlying and procedurally barred claim that the evidence was insufficient to support his sentence under the habitual offender statute.

Nor can Haley claim that his *Jackson v. Virginia*, 443 U.S. 307 (1979), sufficiency-of-the-evidence claim is the independent constitutional claim that might allow him to

[23] Of course, as discussed previously, Haley is not "actually innocent." Factually speaking, he has been convicted of numerous crimes, five of which are implicated in this case. Instead, he is only "legally innocent" of habitual offender status in Texas because the two sentencing convictions were not sequential: the second crime was committed three days before his first became final. *See* J.A. 40-51; Tex. Pen. Code §12.42(a)(2).

go through the "actual innocence gateway." Haley never challenged the sufficiency of the evidence supporting the enhancements, at trial or on appeal. Hence, that claim is procedurally defaulted, twice over.

The Court in *Jackson* expressly contemplated that sufficiency claims could be procedurally defaulted:

> "[A]ssuming that state remedies have been exhausted and that no independent and adequate state ground stands as a bar, it follows that [a constitutional sufficiency of the evidence] claim is cognizable in a federal habeas corpus proceeding." *Id.*, at 321 (internal citations omitted) (citing, *inter alia*, *Wainwright*, 433 U.S., at 72.).

Yet, if Haley is right that the identical grounds can serve both as the basis for his "actual innocence" exception and as his underlying sufficiency of the evidence claim, then procedural defaults on sufficiency claims will have been rendered impossible. Any time there is insufficient evidence of a sentence, on Haley's circular reasoning, that error will suffice both to show "actual innocence" (eliminating the Court's longstanding requirement of cause and prejudice) and to provide the underlying constitutional relief. Thus, any incentive for defendants to bring sufficiency claims to the attention of state courts will have been dramatically reduced.

Under *Herrera*, the court of appeals should have rejected Haley's "actual innocence" claim as an inappropriate attempt to obtain habeas review of a claim of pure innocence. In holding to the contrary, the court of appeals has sanctioned the disruption of any state sentence entered pursuant to a habitual offender statute, irrespective of an applicable procedural bar, based on a freestanding

claim of "innocence."[24] Under this decision, a habeas petitioner need not demonstrate that a constitutional violation tainted his trial proceedings. Rather, all the petitioner needs to demonstrate is that he is "innocent" of the sentence because it was entered in legal error.

For example, in *Higgins v. Smith*, 991 F.2d 440 (CA8 1993), Petitioner asserted in his habeas petition that he was given a sentence in excess of that permitted by state law. Prior to his sentencing, the Missouri Legislature had reduced the applicable maximum sentence, but the sentencing court mistakenly did not apply the amendment. *Id.*, at 441. The federal district court granted Petitioner habeas relief.

On appeal, the State asserted a procedural bar; Petitioner countered that the habeas court could reach his claim under the "actual innocence" exception. The Eighth Circuit rejected that argument because Petitioner could point to no constitutional violation that resulted in his conviction or sentence. Rather, Petitioner's complaint was merely that the sentencing court misapplied state law. *Id.* Thus, the court noted,

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[24] For this reason, the Second and Fourth Circuits' holdings extending the "actual innocence" exception to noncapital sentencing error are equally erroneous. *See Spence* 219 F.3d, at 171-72 (holding that the "actual innocence" exception applies to allow review of procedurally defaulted claim of insufficient evidence to support sentence with no claim of independent constitutional error); *United States v. Mikalajunas*, 186 F.3d, at 495 n.4 (rejecting United States's argument that "actual innocence" exception applies only in conjunction with independent constitutional violation, stating that court had, in *United States v. Maybeck*, 23 F.3d 888 (CA4 1994), excused a procedural default based on "actual innocence" exception involving misapplication of habitual offender statute, not a constitutional error).

> "if we were to hold that the mistake complained of here was a constitutional one, say, because it violates due process to incarcerate a person beyond his term, or offends the prohibition against cruel and unusual punishment to do so, then there would be no effective boundaries to habeas inquiries." *Id.*, at 442.

Additionally, observing that "it is not unconstitutional for a state court (or any other) to make a mistake, particularly if the relevant matter was never properly argued to it," the court of appeals reversed the district court's decision to grant habeas relief. *Id.*

Accordingly, the Fifth Circuit's decision erroneously allows a freestanding "actual innocence" claim to serve as the basis for habeas relief, in direct contradiction not only to *Herrera*, but also to the underlying, basic principle that habeas relief is not available to address a claim of "innocence" absent a constitutional defect at trial. *See Herrera*, 506 U.S., at 400-01 (citing *Moore*, 261 U.S., at 87-88; *Hyde*, 199 U.S. at 84; *Ex parte Terry*, 128 U.S., at 80). The court of appeals's erroneous judgment should be reversed.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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December 12, 2003