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

RESPONDENT'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.

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STATEMENT OF THE CASE

As the State of Texas has repeatedly conceded,[1] Michael Haley was sentenced to sixteen years and six months in the penitentiary for stealing a calculator, even though he was eligible to receive, at most, a sentence of two years in a state jail. Nevertheless, Petitioner Doug Dretke insists that a federal habeas court should not be allowed to review the merits of Mr. Haley's procedurally defaulted, and manifestly meritorious, due process claim.[2]

Mr. Haley was charged by indictment with the state jail felony offense of theft. J.A. 8-10; Tex. Penal Code Ann. § 31.03(e)(4)(D) (Vernon 2003). The range of punishment for a state jail felony is 180 days to two years in a state jail. Tex. Penal Code Ann. § 12.35(a) (Vernon 2003). However, the indictment also alleged that Mr. Haley was previously convicted of delivery of amphetamines and robbery, and that the delivery conviction "became final prior to the commission of [the robbery]."[3] J.A. 9. If proved

[1] *See*, *e.g.*, J.A. 140 (conceding in the District Court that "Haley is correct in his assertion that the enhancement paragraphs as alleged in the indictment do not satisfy section 12.42(a)(2) of the Texas Penal Code"); Petition for Rehearing *En Banc* 6 (conceding that "Haley's conviction was improperly enhanced under state law because his prior convictions were not sequential"); Petition for *Certiorari* 4-5 (advising this Court that "the State has since conceded, [the enhancement] allegation was incorrect. . . . Thus, there is no dispute that Haley's punishment was improperly enhanced under the statute"); Pet. Br. 4 (admitting that "the State has since conceded . . . [the enhancement] allegation was incorrect").

[2] Petitioner Doug Dretke (hereinafter "Dretke") is the Director of the Texas Department of Criminal Justice, Institutional Division.

[3] The judgment admitted during the punishment phase of the trial reflects a conviction for attempted robbery rather than robbery as alleged. J.A. 43.

beyond a reasonable doubt, as required by Texas law, these prior sequential felony convictions would increase the statutory minimum sentence to two years and the statutory maximum sentence to twenty years in the penitentiary.[4] Tex. Penal Code Ann. §§ 12.42(a)(2), 12.33 (Vernon 2003).

During the punishment phase of the trial, the prosecutor offered without objection, and the trial court admitted, a "penitentiary pack" containing evidence of the two prior felony convictions. J.A. 16-17. This evidence conclusively established that, contrary to the indictment's allegation, Mr. Haley's prior convictions were not sequential, and thus did not support an enhanced sentence. J.A. 40-51. However, neither the trial court nor Mr. Haley's court-appointed attorney recognized the prosecutor's error. As a result, the issue was submitted to the jury. J.A. 22-23, 52. During closing argument, the prosecutor argued that the evidence supported the enhancement allegations and called upon the jury to find the allegations true and to sentence Mr. Haley near the top of the enhanced range of punishment. J.A. 23-27, 29-32.

Despite the absence of any evidence that the prior convictions were sequential, the jury found the enhancement allegations true and assessed punishment at sixteen years and six months in the penitentiary. J.A. 33-34, 61-62, 63-67. The trial court imposed that sentence, which

[4] Prior convictions are "sequential" only where "the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final." Tex. Penal Code Ann. § 12.42(a)(2) (Vernon 2003).

Dretke admits is more than eight times the statutory maximum for which Mr. Haley was actually eligible.

After trial, Mr. Haley's court-appointed lawyer moved to withdraw from continued representation based on a "conflict of interest." J.A. 11, 68-69. Although the trial court granted this motion, J.A. 70, the same lawyer represented Mr. Haley on appeal.[5] J.A. 71. Counsel did not challenge the sufficiency of the evidence to support the enhancements, and the Texas Court of Appeals affirmed. J.A. 72-83.

Mr. Haley filed a *pro se* application for a writ of habeas corpus in state court alleging, *inter alia*, that he was denied due process because the evidence was insufficient to support a finding that his prior convictions were sequential, J.A. 85, 87-89, and asserting a related ineffective assistance of counsel claim. J.A. 93-94. Instead of conceding error and agreeing to re-sentence him, however, the prosecutor argued that Mr. Haley had procedurally defaulted his sufficiency claim and asserted that Mr. Haley's lawyer had provided effective assistance. J.A. 104-106. The Texas Court of Criminal Appeals denied the application for the reasons given by the prosecutor. J.A. 107-109.

Mr. Haley, still *pro se*, timely filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on August 24, 2000.[6] J.A. 110. In his petition, Mr. Haley presented

[5] The record does not explain why the lawyer continued to represent Mr. Haley even though the trial court granted his motion to withdraw.

[6] Based on the filing date of this petition, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132,

(Continued on following page)

the same claims he raised in his state writ, including, among others, that he was denied due process because the evidence was insufficient to support a finding that his prior convictions were sequential, J.A. 118, 124, and that his lawyer rendered constitutionally ineffective assistance related to the improper enhancement of his sentence. J.A. 119, 126.

In response, the Director of the Texas Department of Criminal Justice, Institutional Division conceded that Mr. Haley's prior convictions were not sequential, but argued that the due process claim was procedurally defaulted, J.A. 179-184, and that the ineffective assistance of counsel claim should be denied on the merits. J.A. 146-149. The District Court granted relief on the due process claim, Pet. App. 37a, and therefore did not reach the related ineffective assistance of counsel claim. Pet. App. 37a (adopting Pet. App. 51a).[7] The final judgment provided that the State of Texas had ninety days to re-sentence Mr. Haley without the improper enhancement, and that if it failed to do so, his conviction would be reversed. Pet. App. 30a.

The Director then appealed. J.A. 5. The Fifth Circuit held that the due process claim was procedurally defaulted and that Mr. Haley did not allege cause and prejudice.[8]

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110 Stat. 1214 (1996) (AEDPA). *Lindh v. Murphy*, 521 U.S. 320, 326 (1997).

[7] "Because relief is to be granted regarding the erroneous enhancement, the Court will not address Haley's claims concerning the performance of counsel on this points [sic]." Pet. App. 51a.

[8] Mr. Haley asserted both cause and prejudice in his brief to the Fifth Circuit. Petitioner's Rebuttal to Respondent's Brief 2-4. This directly contradicts Dretke's statement that "Haley did not even

(Continued on following page)

However, the Court of Appeals also held that the fundamental miscarriage of justice exception permitted review of this claim because Mr. Haley was actually innocent of the sentence. Pet. App. 12a. On the merits, the Fifth Circuit held that Mr. Haley was denied due process because the evidence was insufficient as a matter of law. Pet. App. 18a-20a.

The Director then sought rehearing *en banc*. J.A. 6. Mr. Haley, proceeding for the first time with the assistance of counsel, argued that the panel decision was correct, and advised the Court of Appeals that alternative grounds existed for affirming because he had alleged cause and prejudice. Petitioner-Appellee's Response to Petition for Rehearing *En Banc* 15, n.14. The Court of Appeals denied the petition to rehear this case *en banc*. J.A. 6; Pet. App. 21a-29a.

The mandate issued on April 25, 2003, J.A. 6, and the State of Texas did not re-sentence Mr. Haley. Instead, his conviction was reversed, and the Director released him from custody. Respondent's Advisory to the Court.[9] Although Mr. Haley has already served more than six years – three times the statutory maximum sentence – the Director advised the District Court that he intends to re-incarcerate Mr. Haley for the remaining ten years of his admittedly erroneous sentence if this Court reverses the

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attempt to demonstrate cause and prejudice in the court of appeals, but simply argued 'actual innocence' to attack his sentence." Pet. Br. 33-34.

[9] The Texas Attorney General filed this Advisory in the District Court on July 28, 2003.

Fifth Circuit's decision. *Id.* This Court then granted *certiorari*. J.A. 7.

SUMMARY OF THE ARGUMENT

Although federal courts typically are precluded from reaching the merits of procedurally defaulted claims absent a showing of cause and prejudice, this Court has consistently held that such claims may be reached if the failure to do so would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice is present when a habeas petitioner is able to show that he or she is "actually innocent" of the crime or the sentence. The principles that underlie this well-established exception apply irrespective of whether the petitioner is subject to a capital or noncapital sentence.

Contrary to the indictment's allegation, Mr. Haley's prior convictions were not sequential. In fact, the evidence conclusively establishes, and Dretke concedes, that he was eligible for, at most, a sentence of up to two years in a state jail. As such, he is actually innocent of the facts required by Texas substantive law to subject him to the sixteen year and six month prison sentence he received.

The Fifth Circuit properly held that this sentence – more than eight times the maximum authorized by law – was fundamentally unjust, and it accordingly reached the merits of Mr. Haley's procedurally defaulted *Jackson v. Virginia*, 443 U.S. 307 (1979), claim. In doing so, the Fifth Circuit joined the Second and Fourth Circuits in holding that the fundamental miscarriage of justice exception permits review of procedurally defaulted claims when the petitioner shows "actual innocence" of facts necessary to

render one minimally eligible for a noncapital sentence. The Court of Appeals applied the test announced in *Sawyer v. Whitley*, 505 U.S. 333 (1992), because it correctly recognized that the nature of the petitioner's penalty does not affect the principles underlying this exception.

Applying *Sawyer*'s eligibility test to noncapital sentences furthers, rather than compromises, the interests guiding the Court's procedural default doctrine. By reaching the merits of valid but procedurally defaulted constitutional claims by the rare petitioner who can show by clear and convincing evidence that he or she is actually innocent of the conduct required to make him or her minimally eligible for an increase in the statutory maximum of a noncapital sentence, federal courts vindicate state legislatures' policy decisions about the appropriate punishment for a given offense. Further, permitting review in these narrow circumstances does not undermine the integrity of state court proceedings protected by the procedural default rules, because it creates no incentive for defendants to "sandbag" by withholding claims for federal habeas. A defendant has no reason to hide his or her true innocence at trial in the hopes of obtaining a later, more favorable, re-trial. Further, permitting review in cases where this exception applies will not unduly burden the states because the only relief will be re-sentencing. These conclusions are consistent with this Court's decisions and with Congress' post-*Sawyer* amendments to the federal habeas statute which left intact the principle that actual innocence of one's sentence excuses a procedural default.

This Court's fundamental miscarriage of justice exception was not narrowed by the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi* addressed a

substantive constitutional rule, which has equal application in capital and noncapital cases, not the inequitable nature of confining a petitioner beyond the statutory maximum sentence permitted by state law. If relevant at all, *Apprendi* supports the Fifth Circuit's decision because factual innocence of the required sequence of the prior convictions, which increases the statutory maximum sentence, and Texas' requirement that sequence be proved to the jury beyond a reasonable doubt, means that Mr. Haley is actually innocent of not only his sentence, but also the enhanced offense of habitual offender theft.

Sawyer's eligibility test, which requires a federal habeas court to determine whether the petitioner received a sentence for which he or she was statutorily ineligible, is both narrow in application and easy to administer. The experience of several circuit courts over the course of a decade demonstrates that this exception will be invoked only rarely and may be determined with relative ease. As such, the exception imposes little burden upon the states' legitimate interests in finality, comity and federalism.

The Court of Appeals appropriately concluded that the District Court could reach the merits of Mr. Haley's procedurally defaulted *Jackson v. Virginia*, 443 U.S. 307 (1979), claim. Neither this Court nor the relevant federal habeas statutes require that a claim of actual innocence of a sentence must rely exclusively on "new" evidence in order to reach a procedurally defaulted claim. In fact, there is no justification in this Court's decisions or Congressional policy for limiting a federal habeas court's ability to consider evidence which conclusively demonstrates a petitioner's innocence of a crime or sentence in a first federal habeas petition.

The Fifth Circuit was also correct in concluding that Mr. Haley was entitled to relief under *Jackson*. Here, the prosecution was required by Texas law to prove to the jury beyond a reasonable doubt that Mr. Haley's prior convictions were sequential, but, as the Court found, it failed to provide any evidence to support that fact. The fact that the same evidence establishes the fundamental miscarriage of justice and the underlying constitutional claim is of no import and does not convert *Sawyer*'s gateway claim into a free standing constitutional claim.

ARGUMENT

I. Federal Habeas Courts May Review Procedurally Defaulted Constitutional Claims Where The Petitioner Can Demonstrate By Clear And Convincing Evidence That He Or She Is Innocent Of Conduct Making Him Or Her Minimally Eligible For An Increase In The Statutory Maximum Sentence

A. A Core Purpose Of Habeas Is Ensuring That Persons Are Not Subject To Sentences For Which They Are Statutorily Ineligible

The writ of habeas corpus has functioned for centuries as the "bulwark against convictions that violate fundamental fairness." *Engle v. Isaac*, 456 U.S. 107, 126 (1982). Recognizing the costs associated with federal habeas corpus review, *McCleskey v. Zant*, 499 U.S. 467, 490-91 (1991), this Court has held that a federal habeas court may not ordinarily reach the merits of a procedurally defaulted claim absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977). At the same time, the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy that

must operate to correct a fundamental miscarriage of justice. *Schlup v. Delo*, 513 U.S. 298, 319-21 (1995). For this reason, the Court has consistently held that "'[i]n 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.'" *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle*, 456 U.S. at 135); *Schlup*, 513 U.S. at 321; *see also Sunal v. Large*, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting).[10]

The Court has linked this "fundamental miscarriage of justice exception," *Schlup*, 513 U.S. at 321, to "actual innocence" in order to accommodate "the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the extraordinary case." *Id.* at 322 (internal quotation marks and citations omitted). The Court has used innocence as a touchstone, *Harris v. Reed*, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring), because "a sufficient showing of actual innocence" is the "ultimate equity on the prisoner's side." *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O'Connor, J., concurring in part and

[10] As Justice Rutledge stated over fifty years ago:

> The writ should be available whenever there clearly has been a fundamental miscarriage of justice for which no other adequate remedy is presently available. Beside executing its great object, which is the preservation of personal liberty and assurance against its wrongful deprivation, considerations of economy and judicial time and procedures, important as they undoubtedly are, become comparatively insignificant.

Sunal, 332 U.S. at 189 (Rutledge, J., dissenting).

dissenting in part); *see also id.* at 718 (Scalia, J., concurring in part and dissenting in part) (same); *Brecht v. Abrahamson*, 507 U.S. 619, 652 (1993) (O'Connor, J., dissenting) (describing actual innocence as "the ultimate equity on the prisoner's side").

The fundamental miscarriage of justice exception applies to instances of factual innocence of an offense and factual innocence of the pre-requisites for a sentence. In *Carrier*, the Court held that the fundamental miscarriage of justice exception permits a federal habeas court to reach a procedurally defaulted claim, absent a showing of cause and prejudice, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent" of the crime. *Carrier*, 477 U.S. at 496. In a companion case, the Court simultaneously recognized that this exception could apply in the context of one who is guilty of an offense, but actually innocent of a fact that would render him or her eligible for a capital sentence. *See*, *e.g.*, *Smith v. Murray*, 477 U.S. 527, 537 (1986). The Court later set forth the standard for evaluating whether a petitioner is "actually innocent" of a capital sentence in *Sawyer v. Whitley*, 505 U.S. 333, 348-49 (1992). The *Sawyer* test requires a petitioner to show by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found him or her eligible for the death penalty under the applicable state law. *Id.* Once that test is met, a federal habeas court may reach the merits of a defaulted constitutional claim without a showing of cause and prejudice. *Id.* at 338-39.

Smith and *Sawyer* are not unprecedented extensions of the fundamental miscarriage of justice exception. Rather, their focus – detention without legal authority – reflects one of the core concerns that the writ was

historically intended to address.[11] As noted by Judge Henry J. Friendly in his influential article advocating that habeas review be limited to innocent petitioners, "[b]roadly speaking, the original sphere for collateral attack on a conviction was where the tribunal lacked jurisdiction either in the usual sense . . . *or because the sentence was one the court could not lawfully impose*." Henry J. Friendly, "Is Innocence Irrelevant? Collateral Attack on Criminal Judgments," 38 U. CHI. L. REV. 142, 151 (1970) (footnotes omitted) (emphasis added); *accord* Paul M. Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 HARV. L. REV. 441, 466-67 (1963); s*ee*, *e.g.*, *Ex parte Lange*, 18 Wall. (85 U.S.) 163 (1873) (granting relief from an unlawful sentence); *Ex parte Snow*, 120 U.S. 274 (1887) (same); *Ex parte Nielsen,* 131 U.S. 176 (1889) (same).

B. The Principles Supporting This Court's Holding In *Sawyer* Apply With Equal Force In The Context Of Those Actually Innocent Of The Conduct Making Them Minimally Eligible For A Particular Noncapital Sentence

1. Imposition Of The Death Penalty Does Not Require Different Application Of This Court's Habeas Doctrine

In the decision on review, the Fifth Circuit joined the Second and Fourth Circuits in holding that "actual

[11] This focus is consistent with the recognition that the habeas inquiry does not involve review of the state court's judgment, but rather the lawfulness of the petitioner's custody *simpliciter*. *Coleman v. Thompson*, 501 U.S. 722, 730 (1991).

innocence" of a noncapital sentence provides a gateway to reach the merits of an otherwise procedurally defaulted constitutional claim. Pet. App. 12a; *see*, *e.g.*, *Spence v. Superintendent, Great Meadow Correctional Facility*, 219 F.3d 162, 170-71 (CA2 2000); *United States v. Mikalajunas*, 186 F.3d 490, 494-95 (CA4 1999). The Fifth Circuit correctly concluded that the fundamental miscarriage of justice exception does not depend on the nature of the penalty the state imposes. Pet. App. 15a-16a.

There is, in fact, no principled reason to limit *Sawyer* to capital sentences. "[T]he availability of [the] actual innocence exception depends not on the 'nature of the penalty' the state imposes, but on whether the constitutional error 'undermined the accuracy of the guilt or sentencing determination.'" *Spence*, 219 F.3d at 170-71 (quoting *Smith*, 477 U.S. at 538-39). Except for the obvious difference in the severity of the sentence, there is no principled difference between a defendant who is innocent of the acts required to make him or her eligible for a death sentence, and a defendant who is innocent of the acts required to confine him or her beyond the legislatively established statutory maximum. *See United States v. Maybeck*, 23 F.3d 888, 893 (CA4 1994). In either case, the defendant faces the same result if the claim is not heard; he or she will be subjected to a punishment for which he or she is not eligible. *Id.* "Because the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures." *Spence*, 219 F.3d at 171.

This Court has consistently recognized that the same rules for reviewing constitutional claims apply without

regard to the nature of the petitioner's sentence. In the specific context at issue here, the Court has expressly "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus."[12] *Murray v. Giarratano*, 492 U.S. 1, 9 (1989).

> In *Smith v. Murray*, a case involving federal habeas corpus, this Court unequivocally rejected "the suggestion that the principles [governing procedural default] of *Wainwright v. Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws."

Id. (quoting *Smith*, 477 U.S. at 538) (internal citations omitted).

The Court has made clear in several contexts that, while it requires additional procedural safeguards in the trial of capital offenses, *Giarratano*, 492 U.S. at 8-9, no difference is warranted in reviewing constitutional errors following trial. The Court uses the same harmless-error standard in capital and noncapital cases, *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988), applies the same *Teague* non-retroactivity rule in capital and noncapital cases, *Graham v. Collins*, 506 U.S. 461, 467 (1993); *Butler v.*

[12] The Court's procedural default doctrine has developed in both capital and noncapital cases. Three of the Court's seminal cases dealing with procedural defaults, the cause and prejudice standard and the fundamental miscarriage of justice exception are noncapital cases, and the rules announced in them have been applied without reservation in capital cases. *See*, *e.g.*, *Wainwright*, 433 U.S. at 74; *Engle*, 456 U.S. at 113; *Carrier*, 477 U.S. at 482; *Coleman*, 501 U.S. at 749-55 (applying *Wainwright*, *Engle* and *Carrier* in a capital case).

McKellar, 494 U.S. 407, 412 (1990), and applies the same ineffective assistance of counsel test in capital and noncapital cases. *See*, *e.g.*, *Hill v. Lockhart*, 474 U.S. 52, 57-58 (1985) (applying *Strickland* standard, announced in a capital case, in a noncapital case); *see also Giarratano*, 492 U.S. at 10, n.5 (holding that capital petitioners, like noncapital petitioners, are not constitutionally entitled to counsel in post-conviction proceedings).

Finally, there is no basis for distinguishing *Sawyer* on the ground that death is somehow more permanent or final than incarceration. Just as a capital sentence permanently and finally deprives a person of his or her life, so too does a noncapital sentence permanently and finally take away a period of one's liberty. It is self-evident that just as a person's life cannot be returned, the liberty taken from one who is unjustly confined can never be restored either. *See Embrey v. Hershberger*, 131 F.3d 739, 745 (CA8 1997) (en banc) ("Surely no one can claim that requiring an individual to serve a twenty-year illegal sentence is not a miscarriage of justice.") (Lay, J., dissenting); *see also* Note, "The Rhetoric of Difference and the Legitimacy of Capital Punishment," 114 HARV. L. REV. 1599, 1621 (2001) (The "distinctive aspect of death, its finality, is also questionable – not because death is not final, but because most other punishments are also").

The present case demonstrates the permanence and finality of the injustice inflicted on a habeas petitioner who is factually ineligible for his or her sentence. Michael Haley spent six years in prison – three times the maximum authorized by Texas law – based on a factually false indictment. Mr. Haley can never get back those years. According to Dretke, however, Mr. Haley should lose ten more years of his liberty if this Court were to accept his

view – ten years he concedes are not authorized under Texas law. *See* Note, *supra*, at 1621 ("A wrongfully convicted man [or woman] who spends twenty years in prison before the discovery of the error has lost twenty years. There is no way to revoke any portion of a sentence, be it a death sentence or a term of years, once it has already been served").

2. The Reasons Advanced By The Seventh, Eighth And Tenth Circuits To Limit *Sawyer* To Capital Cases Do Not Justify That Rule And Rest On A Misreading Of This Court's Holding

Dretke bases his claim that *Sawyer* does not apply to noncapital cases in part on two circuit court decisions. Pet. Br. 25-26 (*citing Embrey*, 131 F.3d at 741, and *United States v. Richards*, 5 F.3d 1369, 1371 (CA10 1993)). In *Embrey* and *Richards*, the Eighth and Tenth Circuits respectively read one passage in this Court's *Sawyer* decision as implying that this Court meant to exclude noncapital sentences from the fundamental miscarriage of justice exception. Specifically, they refer to the Court's statement that "actual innocence" usually refers to innocence of an offense and "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." Pet. Br. 25 (quoting *Sawyer*, 505 U.S. at 341). Based on this language, these lower courts inferred that S*awyer* meant to preclude review of defaulted claims presented by petitioners who are "actually innocent" of their noncapital sentences.

Contrary to Dretke's suggestion, this Court's statements in *Sawyer* do not support, let alone dictate, the conclusion that the fundamental miscarriage of justice

exception is limited to capital sentences. Rather, read in context, the Court did not draw a conclusion about all noncapital cases; it was merely contrasting the claim of actual innocence of a sentence in that case with the more typical claim in a noncapital case that the petitioner is innocent of all criminal conduct. This reading is consistent with the principles announced in the decision itself (which are not based on the uniqueness of capital punishment) and with this Court's consistent determination that "death is not different" for purposes of enforcing habeas rules. *See*, *supra*, I.B.1.

Notably, the other decision relied upon by Dretke as supporting his position actually rejected this strained reading of *Sawyer*. In *Hope v. United States*, 108 F.3d 119 (CA7 1997), the Seventh Circuit did not rely on this passage from *Sawyer* or reject on that basis its prior holding in *Mills v. Jordan*, 979 F.2d 1273, 1278 (CA7 1992), that the fundamental miscarriage of justice exception reaches noncapital sentences. *Hope,* 108 F.3d at 119-20. Instead, *Hope* held that a petitioner in a subsequent writ cannot rely on *Sawyer*'s fundamental miscarriage of justice exception because AEDPA's subsequent writ provision refers only to innocence of the "offense." *Id.* Given its reliance on an AEDPA provision dealing exclusively with subsequent petitions and the lack of a similar provision applicable to procedurally defaulted claims, *Hope* plainly does not apply in this case. *See*, *infra*, I.C.3.

C. Applying *Sawyer*'s Eligibility Test To Noncapital Sentences Exceeding The Statutory Maximum Is Consistent Both With This Court's Holding In *Sawyer*, And Advancing The Interests In Comity And Federalism Recognized By This Court And Congress

1. Comity And Federalism Are Advanced By Respecting State Sentencing Schemes And Enforcing Their Requirements

Applying *Sawyer*'s eligibility test to noncapital sentences furthers, rather than compromises, the interests guiding the Court's procedural default doctrine. Texas' substantive law specifying the maximum sentences for which defendants are eligible deserves respect and vindication in federal court. *See Ewing v. California*, 538 U.S. 11, ___, 123 S.Ct. 1179, 1187 (2003) (plurality) (noting that sentencing schemes are a matter of policy to be made by state legislatures). Adopting the position urged by Dretke grants respect to Texas' procedural rules at the expense of the Texas Legislature's substantive policy judgments concerning the maximum punishment that should be meted out in particular circumstances.

In adopting the Penal Code, the Texas Legislature established "a system of prohibitions, penalties, and correction measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm." Tex. Penal Code Ann. § 1.02 (Vernon 2003). It determined that a defendant, such as Mr. Haley, should be subject to an enhanced sentence only if he or she had been previously convicted of two felony offenses *and* the first became final prior to the commission of the second. *See* Tex. Penal Code Ann. § 1.02(6) (Vernon 2003) (stating that one of the

objectives of the Penal Code is "to define the scope of state interest in law enforcement against specific offenses").

The requirements that there be two prior convictions and that those convictions also be sequential is not uniform throughout Texas' habitual offender statutes. For instance, one prior felony conviction (other than a state jail felony conviction) results in an enhanced maximum sentence for all felony offenses except state jail felonies which do not involve deadly weapons. *See*, *e.g.*, Tex. Penal Code Ann. § 12.42(a)(3), (b), (c) (Vernon 2003) (requiring only one prior conviction). Texas law also provides for an increased statutory maximum sentence upon conviction of a state jail felony with two prior *non-sequential* state jail felony convictions. *See*, *e.g.*, Tex. Penal Code Ann. § 12.42(a)(1) (Vernon 2003) (requiring only two prior convictions, regardless of sequence).

In carefully calibrating its habitual offender scheme, the Texas Legislature plainly concluded that although the statutory maximum sentence in some circumstances should be increased on proof of only one prior felony conviction, it should not be increased by a single prior felony conviction when the instant offense is of the relatively minor type committed by Mr. Haley. Further, the Legislature concluded that the type of prior offenses committed by Mr. Haley should only result in the increase of the statutory maximum sentence if they were sequential, in contrast to its judgment that in other instances the prior convictions need not be sequential.[13]

[13] The requirement of sequence is not unique to Texas law. *See*, *e.g.*, 720 Ill. Comp. Stat. Ann. 5/33B-1 (West 2003); Md. Code Ann., Crim.

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In adopting its sentencing scheme, the Texas Legislature made a careful policy judgment which is entitled to respect – that persons who do not use weapons, who are accused of only a state jail felony, and who committed their second prior non-state jail felony offense before they had been convicted of a prior offense, should not be subjected to confinement up to twenty years. Texas' policy judgment is entitled to respect not only because it is the state legislature's judgment, but also because it draws a manifestly sensible set of distinctions. Offenders who have not used a weapon and who have been convicted of the lowest level of felony offense recognized by the state should not be subjected to a sentence of up to twenty years unless they have previously demonstrated a resistance to rehabilitation. Defendants who commit a second offense before they are ever convicted have not been judged, sentenced or punished at the time of that offense, and thus have not demonstrated any predisposition against rehabilitation as of the time of that offense.

At Mr. Haley's trial, the prosecutor undermined the policy judgment of the Texas Legislature by seeking a sentence which was not authorized for defendants such as Mr. Haley. The indictment falsely alleged that Mr. Haley was eligible for an enhanced sentence based on his prior convictions, J.A. 8-9, when in fact the Texas Legislature had determined that defendants such as Mr. Haley should be subject to enhanced punishment only if their prior convictions were sequential. The prosecutor capitalized on this error during closing argument by incorrectly stating

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Law § 14-101 (2002); Va. Code Ann. § 19.2-297.1 (Michie 2000); Wis. Stat. Ann. § 939.62 (West 1996 & Supp. 2002).

that the evidence was sufficient to support an enhanced sentence, J.A. 24-26, and by calling upon the jury to sentence Mr. Haley to a term of imprisonment for which he was not eligible. J.A. 32.

Despite being advised – and forthrightly conceding – that the sentence the prosecutor sought was not proper in this case, the Texas Attorney General, on behalf of Dretke, similarly refuses to vindicate substantive Texas law. Dretke has notified the District Court that he intends to re-incarcerate Mr. Haley if this Court reverses the judgment of the Court of Appeals. Respondent's Advisory to the Court (advising "[i]n the event that the Supreme Court grants the Director's petition, and reverses this Court's judgment, the Director intends to reincarcerate Haley for the remainder of his original sentence"). To now bar the federal court from considering Mr. Haley's concededly meritorious claims out of "respect" for state law would stand the notion of comity on its head, and would have the perverse effect of perpetuating a violation of Texas law in the name of respecting it.

Dretke has not argued – because he cannot – that there is a legitimate interest in continuing to confine a petitioner that he admits is serving a sentence which he or she was ineligible to receive under state law. He merely argues that he should be able to continue the admittedly unlawful sentence in the name of federalism. But, federalism is not advanced by confining an individual who is innocent of his or her sentence under state law. On the contrary, it is advanced by ensuring that state prosecutors do not disregard state law and the federal constitution.

2. The Interests That Underlie This Court's Decisions Limiting Federal Habeas Review Of Procedurally Defaulted Claims Are Not Jeopardized By Applying The Fundamental Miscarriage Of Justice Exception To A Person Who Is Innocent Of Any Conduct Making Him Or Her Eligible For An Increase In The Statutory Maximum Sentence

In *Wainwright*, this Court adopted the cause and prejudice standard for reaching the merits of procedurally defaulted claims in part to discourage petitioners from withholding valid claims at trial for a tactical purpose. *See* 433 U.S. at 89. This risk of "sandbagging" – that defendants "may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off" – is not present in cases involving actual innocence of a sentence. A defendant has no rational incentive to withhold information at the punishment phase regarding his or her statutory ineligibility for a particular sentence. Mr. Haley's situation illustrates this point. Mr. Haley had no tactical reason to expose himself to a maximum twenty-year sentence when he was actually eligible for only a two-year maximum. Indeed, despite the fact that he promptly filed his state writ application and timely filed his federal petition within the one year statute of limitations, he had already served four years more than the statutory two-year maximum sentence by the time this case was decided.

The other concerns supporting limited review of procedurally defaulted claims, including the costs associated with a re-trial of a defendant, are likewise not

present where the petitioner received a sentence for which he or she was statutorily ineligible. In such a circumstance, the petitioner's sole remedy is re-sentencing. Thus, there is no danger that a guilty person would be freed because of faded memories, lost evidence or unavailable witnesses.

3. Applying *Sawyer*'s Miscarriage Of Justice Standard In The Rare Circumstances Where A Petitioner Is Able To Establish Actual Innocence Of His Or Her Sentence Is Also Consistent With Congressional Policy As Reflected In AEDPA

Congress' actions following the decision in *Sawyer* further confirm that its eligibility test applies regardless of whether the petitioner's sentence is capital or noncapital. Four years after this Court's decision in *Sawyer*, Congress extensively amended the federal habeas statute as part of AEDPA. At the time it enacted AEDPA, Congress was legislating not only against the background of *Sawyer*'s eligibility test, but also *Smith*'s clear statement that the Court's procedural default doctrine should not vary according to the nature of the petitioner's punishment. Nevertheless, Congress chose not to alter this Court's rules concerning the fundamental miscarriage of justice standard for procedurally defaulted claims or the application of procedural default rules in noncapital cases. This omission is particularly significant in light of the fact that Congress addressed procedurally defaulted claims in capital cases from opt-in states and made it more difficult to obtain merits review of a successive and abusive petition.

Despite ample opportunity to do so, Congress did not address procedural defaults in noncapital cases in AEDPA. *See* R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001) § 26.1; *see also Ortiz v. Stewart*, 149 F.3d 923, 931 (CA9 1998). It was, however, aware of these standards and did address the circumstances in which a federal habeas court may reach the merits of a procedurally defaulted claim in a capital case from a qualified opt-in state.[14] 28 U.S.C. § 2264. As a matter of statutory interpretation, this demonstrates that Congress intended to leave intact this Court's fundamental miscarriage of justice exception as it pertains to procedural defaults. *See Custis v. United States*, 511 U.S. 485, 491-92 (1994) (inferring Congressional intent based on statutory authority in one statute which is not present in another statute); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Russello v. United States*, 464 U.S. 16, 23 (1983) (same).

Congress' intent is further reflected in its determination not to modify the standards for reviewing procedural

[14] These petitioners' procedurally defaulted claims may be considered only where the failure to raise the claims is the result of state action in violation of the Constitution or laws of the United States, the result of this Court's recognition of a new federal right that is made retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim in state or federal post-conviction review. 28 U.S.C. § 2264(a).

defaults in noncapital cases at the same time that it amended the requirements for obtaining review of a second or successive petition. 28 U.S.C. § 2244(b). For instance, Section 2244(b)(2) provides that abusive petitions, *see Schlup*, 513 U.S. at 319, n.34 (defining "abusive" petitions), shall be dismissed unless the claim relies on a new rule of constitutional law made retroactive or the factual predicate for the claim could not have been discovered previously, and the facts underlying the claim if proven would "establish by clear and convincing evidence that, but for a constitutional violation, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2). Section 2244(b)(2) confirms that Congress was aware of *Sawyer*'s actual innocence eligibility formulation as well as its standard of proof, and that where it chose to do so, Congress knew how to alter the miscarriage of justice exception. *See Williams v. Taylor*, 529 U.S. 420, 433 (2000) (holding that "in requiring that prisoners who have not been diligent satisfy § 2254(e)(2)'s provisions rather than show cause and prejudice, and in eliminating a freestanding 'miscarriage of justice' exception, Congress raised the bar *Keeney* [*v. Tamayo-Reyes*, 504 U.S. 1 (1992),] imposed on prisoners who were not diligent in state-court proceedings"); *see also Custis*, 511 U.S. at 491-92.[15]

[15] Moreover, other aspects of AEDPA further assure that states' finality interests are protected notwithstanding the existence of *Sawyer*'s fundamental miscarriage of justice test. Mr. Haley filed his petition within the one-year statute of limitations, *see* 28 U.S.C. § 2244(d), which, until passage of AEDPA in 1996, did not exist. *See*, *e.g.*, *Brecht*, 507 U.S. at 637; *Vasquez v. Hillery*, 474 U.S. 254, 264 (1986). This strict statute of limitations addresses any lingering finality

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D. This Court's Decision In *Apprendi v. New Jersey* Did Not Alter The Holding In *Sawyer*, Or Modify Its Principles But, If Anything, Supports The Fifth Circuit's Decision

The State of Illinois, *et al.*,[16] as well as the Solicitor General,[17] argue that this Court misspoke in *Sawyer* when it concluded that punishing one who is "innocent of a sentence" constitutes a miscarriage of justice. In their view, this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), "clarifies" that – because death eligibility criteria are elements of an enhanced offense – *Sawyer* does not concern innocence of a *sentence*, but only innocence of an enhanced offense. Ill., *et al.* Br. 8-10; S.G. Br. 26-28. Thus, they urge this Court to re-interpret *Sawyer* to abandon the concept that one can be innocent of a sentence and to eliminate a decade of jurisprudence applying the fundamental miscarriage of justice exception to persons who are factually ineligible for their sentence.

As an initial matter, *Apprendi* did not concern the standard for establishing a fundamental miscarriage of justice in habeas corpus, and did not purport to address the issue. In *Apprendi*, the Court granted *certiorari* on a direct appeal to resolve "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum

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concerns about applying *Sawyer* to procedurally defaulted claims in noncapital cases.

[16] The States of Illinois, Alabama, Arizona, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, Oregon, South Dakota, Utah and Wyoming filed an *amicus* brief, which will be cited hereinafter as "Ill., *et al.* Br."

[17] The Solicitor General filed an *amicus* brief on behalf of the United States, which will be cited hereinafter as "S.G. Br."

prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." 530 U.S. at 469. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Thus, the Court invalidated the New Jersey statute permitting "a jury to convict a defendant of a second-degree offense [with a maximum sentence of 10 years imprisonment] based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon" and allowing "a judge to impose punishment identical to that New Jersey provides for crimes of the first degree [with a maximum sentence of 20 years imprisonment], based upon the judge's finding, by a preponderance of the evidence, that the defendant's 'purpose' for unlawfully possessing the weapon was 'to intimidate' his victim on the basis of a particular characteristic the victim possessed." *Id.* at 491 (internal citation omitted).

Apprendi establishes only that facts which increase the statutory maximum sentence, like facts required to determine guilt, must be proved to a jury beyond a reasonable doubt as a matter of substantive constitutional law. It does not address whether, and in what context, a sentence constitutes a miscarriage of justice such that a federal habeas court should be permitted to reach a procedurally defaulted claim absent a showing of cause and prejudice.[18]

[18] Further, *Apprendi* does not justify any differentiation in the application of a constitutional rule, or an equitable rule, based on the severity of the punishment. *Apprendi*'s holding has equal force in

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Nothing in *Apprendi* suggests that *amici*'s re-interpretation of *Sawyer* is warranted. *Sawyer* made clear that the fundamental miscarriage of justice exception was intended to permit review where the petitioner is ineligible for a sentence. The Court expressly contrasted innocence of a sentence with the "prototypical example of 'actual innocence' . . . where the State has convicted the wrong person of the crime," 505 U.S. at 340, and rejected the position that a petitioner should be entitled to the benefit of the exception only if he or she could negate an element of the offense itself. *Id.* at 343.

The Court's subsequent treatment of *Sawyer* demonstrates that the fundamental miscarriage of justice exception is applicable not only to those who did not commit the crime, but also to those who are not eligible for the sentence. *See Schlup*, 513 U.S. at 326 (distinguishing *Sawyer* on the ground that "[t]hough formulated as an element of the offense . . . , the arson *functioned essentially as a sentence enhancer*") (emphasis added). In *Schlup*, for instance, the Court addressed whether the *Sawyer* standard or the less demanding *Carrier* standard for the fundamental miscarriage of justice exception should apply when the petitioner alleges actual innocence of the crime. *Schlup,* 513 U.S. at 326-27. In analyzing the comparative balance of the equities between the two situations, the Court stated that "the *Sawyer* standard was fashioned to

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capital and noncapital cases. *See*, *e.g.*, *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

reflect the relative importance of a claim of an *erroneous sentence*. . . ."[19] *Id.* at 325 (emphasis added).

Finally, *Calderon v. Thompson*, 523 U.S. 538, 560 (1998), makes plain that this Court intended *Sawyer* to permit review of the claims of a petitioner who is actually innocent of his or her sentence.

> The *Sawyer* standard has a *broader* application than is at first apparent. As the Court explained in *Schlup*, when a capital petitioner challenges his underlying capital murder conviction on the basis of an element that "function[s] essentially as a sentence enhancer," the *Sawyer* "clear and convincing" standard applies to the claim. Thus, to the extent a capital petitioner claims he did not kill the victim, the *Schlup* "more likely than not" standard applies. To the extent a capital petitioner contests the special circumstances rendering him eligible for the death penalty, the *Sawyer* "clear and convincing" standard applies, irrespective of whether the special circumstances are elements of the offense . . . or, as here, mere sentencing enhancers.

Id. (emphasis added; internal citations omitted).

Although consideration of this issue is unnecessary for this Court to affirm, *Apprendi* supports, rather than

[19] Similarly, the Court noted "[n]or do we believe that confining *Sawyer*'s more rigorous standard to claims involving eligibility for the sentence of death is anomalous. Our recognition of the significant difference between the injustice that results from an erroneous conviction and the injustice that results from an *erroneous sentence* is reflected in our decisions that permit reduced procedural protections at sentencing." *Schlup*, 513 U.S. at 326, n.44 (emphasis added).

undermines, the Fifth Circuit's holding. Under *Apprendi*, Mr. Haley is actually innocent of not only his sentence, but also the enhanced offense of theft by a habitual offender, *see Sattazahn v. Pennsylvania*, 537 U.S. 101, 112 (2003) (plurality), because the proof of the element of sequence, which increased the statutory maximum ten-fold, is wholly lacking. *Tomlin v. State*, 722 S.W.2d 702, 705 (Tex. Crim. App. 1987) ("The sequence of events must be proved [beyond a reasonable doubt] as follows: (1) the first conviction becomes final; (2) the offense leading to a later conviction is committed; (3) the later conviction becomes final; (4) the offense for which defendant presently stands accused is committed").

To avoid this conclusion, *amici* rely on this Court's statement in *Apprendi*, 530 U.S. at 490, that prior convictions are not elements for Sixth Amendment purposes, and on this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Ill., *et al.* Br. 9-10; S.G. Br. 21. Neither offers refuge. The Court in *Apprendi* did not hold that prior convictions which raise the statutory maximum sentence are not elements; rather it expressly noted that it was not called upon to decide that question. *See Apprendi*, 530 U.S. at 490 (noting that the Court need not revisit *Almendarez-Torres* because Apprendi did not contest its validity).

Almendarez-Torres does not support *amici*'s position because it is distinguishable and inapplicable. The statute at issue in *Almendarez-Torres* only required proof of the "fact" of a prior conviction. 523 U.S. at 229-31. The Texas statute, on the other hand, requires proof beyond a reasonable doubt that the first prior conviction became final before the offense underlying the second prior conviction was committed. *Tomlin v. State*, 722 S.W.2d at 705. Thus,

sequence is an element of the enhanced offense and innocence of it constitutes actual innocence of the offense. Additionally, *Almendarez-Torres* is inapplicable because, even if *Apprendi* does not require the recidivist allegations to be accorded Sixth Amendment protection, they function as elements under Texas law because the prosecutor is required to prove them beyond a reasonable doubt to the jury. *Tomlin v. State*, 722 S.W.2d at 705. If anything, the lack of evidence supporting the sequence element means that Mr. Haley is actually innocent of the enhanced offense and that, as a result, review is available under the fundamental miscarriage of justice exception.

E. The Nature Of The *Sawyer* Test And The More Than A Decade Of Experience In The Circuit Courts Demonstrates That The Test Is Easy To Administer In Noncapital Cases And That It Will Not Open A "Floodgate" Of Unmeritorious Or Cumbersome Claims

1. The *Sawyer* Eligibility Test Functions Equally Well In The Noncapital Context And Need Not Be Modified

The Fifth Circuit, like the Fourth Circuit, held that the fundamental miscarriage of justice exception "applies to noncapital sentencing procedures involving a career or habitual felony offender." Pet. App. 13a; *accord Mikalajunas*, 186 F.3d at 495. The operative fact is not the habitual offender enhancement, although often relevant, but rather that the sentence is outside the statutory maximum. *See Sawyer*, 505 U.S. at 348 (focusing on statutory eligibility). Thus, a petitioner demonstrates a fundamental miscarriage of justice where he or she: (1) proves by clear and convincing evidence that he or she is

actually innocent of a fact that was essential to the sentence, such that no reasonable juror would have found against the petitioner; and (2) shows that the court's reliance on that false fact did not merely enhance the sentence, but increased it beyond the statutory maximum for which the defendant was actually eligible.

The Fifth Circuit properly applied the *Sawyer* eligibility test. Mr. Haley conclusively established that he received a sentence eight times above the statutory maximum because he did not commit the attempted robbery before his delivery convictions became final. Dretke concedes that contrary to the allegations in the indictment, Mr. Haley was not eligible for a sentence exceeding two years in a state jail. Pet. Br. 4; Pet. App. 23a.

This constitutes actual – not legal – innocence. "Actual innocence" refers to being factually innocent of the basis for one's sentence whether that is an element of the crime or an element of the sentence. *See Sawyer*, 505 U.S. at 345. It is beyond dispute that the allegation that the convictions were sequential was factually untrue. Thus, it is irrelevant that one of the additional eligibility criteria, namely two convictions, was factually accurate. "Actual innocence" does not require innocence in the broad sense of having led a blameless life. *Schlup*, 513 U.S. at 328 & n.47.

2. Applying The *Sawyer* Standard To Sentences That Exceed The Statutory Maximum Is Consistent With This Court's Prior Precedents And Can Be Accomplished With Little Administrative Effort

The *Sawyer* eligibility test requires more than simply an error in the calculation of a sentence; instead, it requires imposition of a sentence that could not be imposed lawfully because it exceeds the statutory maximum. Limiting this exception to such sentences is consistent with this Court's substantive constitutional and habeas doctrines, and may be implemented with relative ease to assure that the fundamental miscarriage of justice exception will remain narrow.

The Court has recognized that whether a fact increases the statutory maximum sentence determines whether the constitutional rights to a jury trial and proof beyond a reasonable doubt are implicated. *See*, *e.g.*, *Apprendi*, 530 U.S. at 490. Further, the Court has not required additional constitutional safeguards when a factor is used merely to adjust sentences within a statutory range. *See*, *e.g.*, *Harris v. United States*, 536 U.S. 545, 565 (2002). The distinction between factors that increase a sentence beyond the statutory maximum and factors that affect sentencing discretion is thus already established in existing law.

Similarly, this Court has recognized the limited availability of habeas relief for a sentence that is not above the statutory maximum. For instance, in *Townsend v. Burke*, 334 U.S. 736, 741 (1948), the Court noted that if a sentence is within the limits set by statute, its severity alone would not be grounds for habeas relief. *See also United States v. Pridgeon*, 153 U.S. 48, 63 (1894) (holding

that only the portion of the sentence that is excessive is subject to habeas attack). The courts of appeals too have precluded habeas relief where a sentence is not outside the statutory maximum. *See*, *e.g.*, *Williams v. Duckworth*, 738 F.2d 828, 831 (CA7 1984), *cert. denied*, 469 U.S. 1229 (1985) (affirming the denial of a habeas petition because "[a]s a general rule, a federal court will not review state sentencing determinations that fall within statutory limits"); *Mira v. Marshall*, 806 F.2d 636, 639 (CA6 1986) (same).

In *Sawyer*, this Court adopted an eligibility test because it is narrow and can be determined with "relative ease" by federal habeas courts. 505 U.S. at 345-46. This eligibility test is similarly narrow when applied to non-capital sentences and can be applied with relative ease. "An individual is either eligible or not eligible to receive a particular sentence." *Embrey v. Hershberger*, 131 F.3d 739, 744 (CA8 1997) (Lay, J., dissenting). As the Court noted in *Caspari v. Bohlen*, 510 U.S. 383, 397 (1994), for example, "[p]ersistent-offender status is a fact objectively ascertainable on the basis of readily available evidence. Either a defendant has the requisite number of prior convictions or he does not."

Sawyer's eligibility test is, if anything, less difficult to apply to noncapital sentences than capital sentences. For instance, determining whether a petitioner's prior convictions are sequential – the eligibility criteria at issue – is more objective and less difficult to ascertain than whether the petitioner constitutes a future danger, which the prosecution must prove in order to subject a Texas defendant to a death sentence. *Compare* Tex. Penal Code Ann. § 12.42(a)(2) (Vernon 2003) *with* Tex. Crim. Proc. Code Ann. art. 37.071 § 2(b)(1) (Vernon 2003).

Similarly, one of the eligibility criteria under Louisiana law for imposition of the death penalty – that "[t]he offense was committed in an especially heinous, atrocious or cruel manner,"[20] La. C.Cr.P. Art. 905.3, 905.4 (West 2003) – is less objective and more difficult to perceive than the criteria under Louisiana law for habitual offender sentence – the number, nature and length of the prior convictions, and, in some instances, the age of the victim. La. R.S. 15:529.1 (West 2003).[21]

[20] The Court has upheld the use of "especially heinous, cruel, or depraved" behavior as an aggravating circumstance, *Walton v. Arizona*, 497 U.S. 639, 652-56 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), as well as the slightly different "especially heinous, atrocious, or cruel." *See*, *e.g., Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976).

[21] The federal sentencing regime highlights the same point. Under federal law, a defendant's drug sentence can be enhanced by prior convictions. *See*, *e.g.*, 21 U.S.C. § 841(b)(1)(A) (providing, in part, that a person convicted of possessing with intent to distribute 50 grams or more of cocaine base shall be sentenced to life if he has two or more prior convictions for felony drug offenses). Additionally, a federal defendant can be sentenced to death for a drug related murder. *See*, *e.g.,* 21 U.S.C. § 848(e) (providing that "any person engaging in or working in furtherance of . . . an offense punishable under section 841(b)(1)(A) . . . who intentionally kills . . . may be sentenced to death"). Determining the eligibility criteria for the former is much more objective, and less difficult, that determining the eligibility criteria for imposition of the death penalty. *Cf.* 21 U.S.C. § 848(n)(12) (providing that one of the statutory aggravating factors is that "[t]he defendant committed the offense in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victim"); 18 U.S.C. § 3592(c)(6) (same).

3. The Experience Of Numerous Lower Federal Courts Demonstrates That Application Of *Sawyer* To Noncapital Cases Has Not Opened The "Floodgates" To Unmeritorious Or Burdensome Claims

Applying *Sawyer* in noncapital cases will not result in a flood of actual innocence claims. Given the "clear and convincing" standard of proof required to establish ineligibility, the relatively limited number of cases in which sentences are actually enhanced beyond the statutory maximum and the limited category of facts which may increase the statutory maximum sentence without constituting an element of an enhanced offense per *Apprendi*, the likelihood of many cases being brought that raise this claim is negligible. Indeed, the experience of the circuits that have applied the miscarriage of justice standard to noncapital sentences confirms that these claims are rare and extraordinary.

The *Sawyer* eligibility test permits review of otherwise barred claims on the merits only when the habeas petitioner shows by clear and convincing evidence that he or she is statutorily ineligible for the sentence. This exception will be rare because most, if not all, factors which raise the statutory maximum sentence are elements under *Apprendi* – thus, implicating "actual innocence" of the crime – and very few petitioners receive a sentence above the statutory maximum for which they are actually eligible. Thus, the Solicitor General's discussion of United States Sentencing Guidelines statistics misses the mark; a Guideline error could never constitute a fundamental miscarriage of justice.

Dretke identifies a number of cases where the petitioner sought to rely on the fundamental miscarriage of

justice exception based on "actual innocence" of a noncapital sentence in support of his proposition that expressly recognizing *Sawyer*'s application to noncapital sentences will result in a flood of claims. Pet. Br. 28-30. These cases do not support Dretke's contention; instead, they highlight the narrowness of the exception. For instance, the petitioner in *United States v. Richards*, 5 F.3d 1369, 1371 (CA10 1993) (arguing that drug quantity had been incorrectly measured and thus petitioner was "actually innocent" of sentence for certain amount of amphetamines), would not be able to establish "actual innocence" because he received a sentence for which he was statutorily eligible.

Additionally, the petitioners in *Reid v. Oklahoma*, 101 F.3d 628, 629 (CA10 1996) (arguing "actual innocence" because the guilty pleas for the prior convictions were involuntary due to psychotropic drug use), and *Sones v. Hargett*, 61 F.3d 410, 418-19 (CA5 1995) (arguing actual innocence of habitual offender status on the ground that petitioner did not have counsel on the prior convictions), could not show "actual innocence" of their noncapital sentences. The only fact in these cases that triggered eligibility for the enhanced sentences were the existence of prior convictions. The actual innocence inquiry, thus, does not extend to the validity of the prior convictions.[22]

[22] This approach is consistent with eligibility determinations in other contexts. For instance, in *Custis v. United States*, 511 U.S. 485, 490-92 (1994), this Court held that absent statutory authority a defendant cannot collaterally attack prior convictions used for sentencing purposes under the Armed Career Criminal Act.

Contrary to the concerns expressed by the Eighth Circuit in *Embrey*, 131 F.3d at 741, and relied upon by Dretke, Pet. Br. 26-27, experience with the fundamental miscarriage of justice exception in noncapital cases establishes that applying *Sawyer* will not result in a flood of actual innocence claims. Prior to the decision below, the Fifth Circuit had assumed since 1992 that actual innocence applied to noncapital sentences. *See*, *e.g.*, *Smith v. Collins*, 977 F.2d 951, 959 (CA5 1992). However, in the ten years between *Smith* and this case, there are only two published Fifth Circuit opinions concerning actual innocence of a noncapital sentence and none where the petitioner prevailed.[23] Similarly, there have been exceptionally few decisions from the Fourth Circuit, where the exception has been applied since 1994,[24] *see United States v. Maybeck*, 23 F.3d 888, 893 (CA4 1994), and the Second Circuit where the exception has included actual innocence of noncapital sentences since 2000.[25] Finally, the exception

[23] *See*, *e.g.*, *Sones*, 61 F.3d at 413; *Jackson v. Anderson*, 112 F.3d 823, 830 (CA5 1997) (Garza, E., J., dissenting) (arguing in dissent that the petitioner established actual innocence of a habitual offender sentence). Respondent was unable to locate any unpublished appellate opinions or District Court opinions discussing this exception which predate this case.

[24] Respondent has been able to identify only five decisions through Westlaw research. *See, e.g.*, *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999); *Alston v. United States,* 235 F. Supp. 2d 477 (D.S.C. 2002); *United States v. Payne*, 990 F. Supp. 412 (D. Md. 1998); *Mobley v. United States*, 974 F. Supp. 553 (E.D. Vir. 1997); *Berger v. United States*, 867 F. Supp. 424 (S.D. W. Va. 1994); *Patterson v. United States*, 2002 WL 32079233 (D.S.C. 2002). In these cases, the petitioner obtained relief in only *Payne* and *Mobley*.

[25] Respondent has been able to identify only five decisions through Westlaw research. *See*, *e.g.*, *Spence*, 219 F.3d at 171; *Poindexter v. Nash*,

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was rarely invoked in the Seventh and Eighth Circuits while available.[26]

II. The Fifth Circuit Correctly Reached The Merits And Granted Relief On Mr. Haley's Procedurally Defaulted *Jackson v. Virginia* Claim Because New Evidence Is Not Required To Establish A Fundamental Miscarriage Of Justice[27]

A. Neither This Court Nor Congress Has Required That New Evidence Of Innocence Is Necessary To Establish Actual Innocence Of A Sentence In This Context

State's Exhibit 6 conclusively establishes that Mr. Haley is actually innocent of the punishment he received. J.A. 40-51. Dretke, however, points to this virtue and argues that it is a vice. The fact that his claim of actual

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333 F.3d 372 (CA2 2003) (denying petitioner's claim of actual innocence of the sentence); *Talj v. United States*, 1997 WL 705807 (S.D.N.Y.1997); *Walden v. United States*, 63 Fed. Appx. 568 (CA2 2003). In each of these cases, the petitioner did not obtain relief. Respondent has identified only one case prior to *Spence* applying the exception. *Borrego v. United States*, 975 F. Supp. 520 (S.D.N.Y. 1997).

[26] Courts in at least two other circuits applied the *Sawyer* standard for several years in noncapital cases, and also did not experience any massive influx in unmeritorious claims. *See*, *e.g.*, *Mills v. Jordan*, 979 F.2d 1273, 1278-79 (CA7 1992) *superseded by statute as stated in Hope v. United States*, 108 F.3d 119 (CA7 1997); *Jones v. Arkansas*, 929 F.2d 375, 380-81 (CA8 1991); *Pilchak v. Camper*, 935 F.2d 145, 148 (CA8 1991).

[27] The propriety of the Fifth Circuit's decision on the merits is beyond the scope of the question presented. Thus, this Court need not reach the arguments related to the merits of Mr. Haley's defaulted claim. *See*, *e.g.*, Sup. Ct. R. 14.1; *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

innocence can be evaluated solely by reference to the trial court's record in fact reduces the impact on the interests served by this Court's procedural default rules. The consideration of record evidence only is less likely to detract from the original trial's status as the "main event." *Wainwright*, 433 U.S. at 90. Similarly, this narrower inquiry is less taxing on the resources of the state, and is consistent with the purposes of the fundamental miscarriage of justice exception. *See id.*

This Court has not held that new evidence of innocence of a sentence is required under *Sawyer* to permit a federal habeas court to reach the merits of a procedurally defaulted claim. *See Sawyer*, 505 U.S. at 336. *Cf. Schlup*, 513 U.S. at 324. The Court in *Schlup* suggested that new evidence is required in cases where the petitioner alleges "actual innocence" of the crime in a second or successive petition. *Schlup*, 513 U.S. at 324 (stating that to be credible, a claim of "actual innocence" of the crime "requires petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial"); *see id.* at 332 (O'Connor, J., concurring) ("The Court holds that, in order to have an abusive or successive habeas claim heard on the merits, a petitioner who cannot demonstrate cause and prejudice 'must show that it is more likely than not that no reasonable juror would have convicted him' in light of newly discovered evidence of innocence").

However, the reasons for requiring new evidence where the petitioner alleges "actual innocence" of the crime in a subsequent writ are not present where the petitioner alleges "actual innocence" of the sentence as a gateway to reach the merits of a procedurally defaulted

claim raised in an initial petition. Moreover, the heightened standard of proof required to establish "actual innocence" of a noncapital sentence is sufficient to ensure that the exception remains rare. *See id.* More specifically, the fundamental difference between a procedurally defaulted claim (raised in an initial petition) and a subsequent petition justifies requiring new evidence in the latter context, but not in the former.

The procedural default doctrine operates to bar federal review of a claim for failure to comply with a state procedural rule. *See* R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* (4th ed. 2001) § 26.1. By contrast, the law dealing with successive federal petitions may bar review of claims raised in a second or successive petition, where the petitioner has already benefited from at least one round of federal habeas review. *Id.* at § 28.1. Although historically the Court has treated these doctrines similarly, it has also recognized that the disruptions caused by second or successive petitions are "much more severe." *See McCleskey v. Zant*, 499 U.S. 467, 492 (1991) ("if reexamination of convictions in the first round of habeas offends federalism and comity, the offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition"). As noted above, Congress has recognized these differing costs in AEDPA by codifying strict requirements for filing second or successive petitions but leaving procedural default rules unchanged in noncapital cases, as well as capital cases in non-opt-in states. 28 U.S.C. § 2244. Thus, the fundamental miscarriage of justice exception, as applied in the context of procedural defaults, serves a qualitatively different function than in the context of subsequent writs. In the

former, it permits a federal habeas court at least one opportunity to release a person who is factually innocent of the basis for the specific sentence. By contrast, in the second or successive petition context, the doctrine has not prohibited the presentation of evidence of innocence to a federal court – it has merely placed a restriction on how many times a petitioner can attempt to demonstrate his or her innocence. To the extent that a petitioner fails to establish his or her innocence in the first proceeding (or does not deny his or her guilt in that petition), he or she has had a chance to do so and it is reasonable to demand that before the prisoner submit another petition he make a showing that the evidence of innocence now being presented was not available at the time of the earlier petition.

AEDPA, as discussed above, did not alter this Court's procedural default doctrine in this context. The basic canon of statutory interpretation, *expressio unius exclusio alterius*, requires the Court to presume that an amendment to one section – but not to another – is intentional and entitled to respect. *See United States v. Vonn*, 535 U.S. 55, 65 (2002); *see also Custis v. United States*, 511 U.S. 485, 491 (1994). Congress' decision to adopt 28 U.S.C. § 2244(b), requiring new evidence (if the claim does not rely on new constitutional rule made retroactive by this Court) for the consideration of an "abusive petition" and its passage of 28 U.S.C. § 2264, similarly requiring new evidence in some circumstances to raise procedurally defaulted claims in capital cases arising from opt-in

states,[28] confirms that Congress did not intend to alter this Court's procedural default doctrine in noncapital cases.

B. Mr. Haley Is Entitled To Consideration Of His Underlying *Jackson v. Virginia* Claim Based On The Same Evidence That Was Used To Establish The Fundamental Miscarriage Of Justice

Dretke argues that Mr. Haley has alleged a "freestanding" claim of actual innocence. Pet. Br. 35-36. This is demonstrably untrue. Mr. Haley in his initial petition alleged that he was denied due process of law because the evidence submitted during the punishment phase of his trial was insufficient to prove the enhancement allegations and expressly relied on a Fifth Circuit decision which held that such a claim is properly analyzed under *Jackson v. Virginia*. J.A. 124 (citing *McGee v. Estelle*, 732 F.2d 447, 451 (CA5 1984)). Furthermore, the Fifth Circuit addressed "actual innocence" only as a gateway to reach the defaulted *Jackson* claim.[29] Pet. App. 17a.

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[28] The likely reason for treating procedural default in capital cases arising from opt-in states differently than procedural defaults in noncapital cases is the added safeguard of competent state habeas counsel in the former. *See* 28 U.S.C. § 2261 (requiring the appointment of "competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have . . . become final").

[29] *See Schlup*, 513 U.S. at 313-15 (discussing a gateway claim of "actual innocence"). Mr. Haley does not suggest, in any way, that a petitioner's ability to pass through the "actual innocence" gateway should end the inquiry. A petitioner must be able to establish an underlying constitutional claim in order to obtain relief on the merits.

(Continued on following page)

The fact that evidence used to establish passage through the fundamental miscarriage of justice gateway may also be relevant to the substantive due process claim does not transmute the separate inquiries into a "free-standing claim of actual innocence." Pet. Br. 39. Similarly, the commonality of the evidence does not subvert the cause and prejudice standard. Pet. Br. 32-33. Often, the evidence relied upon to overcome a procedural default will be the same evidence that supports the substantive claim for relief, for the simple reason that the factual error that caused the confinement of an actually innocent person is closely related to the underlying constitutional claim. Dretke and *amici* point to no case by this Court holding that consideration of evidence for both purposes is in any way improper.

Instead, the Court has considered the same evidence both in analyzing the question of procedural default and in evaluating the merits of a claim. For example, in *Strickler v. Greene*, 527 U.S. 263, 266 (1999), this Court addressed a procedurally defaulted *Brady* claim.[30] The Court noted that "cause and prejudice parallel two of the three components of the alleged *Brady* violation itself." *Id.* at 282. This Court found that the suppression of the favorable evidence – one of the elements of the substantive *Brady* claim – constituted cause. *Id.* at 289. Although the Court held that the petitioner failed to establish prejudice, it relied on the same evidence to determine materiality of the suppressed

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See Sawyer, 505 U.S. at 348 (requiring an underlying constitutional claim).

[30] *Brady v. Maryland*, 373 U.S. 83 (1963).

evidence – another element of the substantive claim – and prejudice. *Id.* at 296.

Dretke in effect argues that a *Jackson* claim should be categorically excluded from the otherwise unlimited class of claims which may be reviewed by a federal habeas court when a petitioner is able to establish "actual innocence." This is unjustified and would produce anomalous results. The function of the fundamental miscarriage of justice exception is to permit merits review of constitutional claims of persons who have received convictions or sentences for which they were not eligible. There is no reason why a claim arising under *Jackson v. Virginia* should be subject to any different treatment than other constitutional claims. Indeed, if anything, *Jackson* claims are more appropriately heard under this gateway because, unlike many other types of constitutional claims, the requirement that the state present sufficient evidence to support a conviction is directly linked to the fundamental question of whether the person is actually innocent of the offense or sentence he or she received.[31] Ironically, under Dretke's suggestion a petitioner who is able to satisfy the stringent requirements of the fundamental miscarriage of justice exception by showing clear and convincing evidence of his or her actual innocence would be prevented from obtaining relief on a meritorious constitutional claim because of the close link between the constitutional claim and the fact of actual innocence.

[31] *Cf. Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) ("Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received").

The District Court properly reached Mr. Haley's procedurally defaulted *Jackson v. Virginia* claim because, as discussed above, he showed, by clear and convincing evidence, that but for the constitutional violation, no reasonable juror would have found him eligible for the sixteen year and six month sentence he received. *See Sawyer*, 505 U.S. at 348. Moreover, relief was appropriate because, viewing the record evidence in the light most favorable to the prosecution, no reasonable juror *could* have found that the prior convictions were sequential beyond a reasonable doubt.[32] *See*, *e.g.*, *Moore v. Parke*, 148 F.3d 705, 708 (CA7 1998) ("Because the Indiana courts require that the state prove habitual offender status beyond a reasonable doubt, we apply the standard of review articulated in *Jackson v. Virginia*"); *Shaw v. Johnson*, 786 F.2d 993, 1000 (CA10 1986), *cert. denied*, 479 U.S. 843 (1986); *Williams v. Duckworth*, 738 F.2d 828, 831-32 (CA7 1984), *cert. denied*, 469 U.S. 1229 (1985); *McGee v. Estelle*, 732 F.2d 447, 451 (CA5 1984); *see also Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (holding that if state law affords defendants the right to jury sentencing it violates due process for the state to withhold that right).[33]

[32] Under Texas law, these enhancement allegations must be proven beyond a reasonable doubt. *Tomlin*, 722 S.W.2d at 705; *Ex parte Augusta,* 639 S.W.2d 481, 484 (Tex. Crim. App. 1982), *overruled on other grounds by*, *Bell v. State*, 994 S.W.2d 173 (Tex. Crim. App. 1999); *Williams v. State*, 899 S.W.2d 13, 14 (Tex. App.-San Antonio 1995, no pet.); *see also* Tex. Crim. Proc. Code Ann. art. 37.07 (Vernon 2003).

[33] In fact, Mr. Haley could have satisfied the pre-*Jackson* "no evidence" standard or, for that matter, any standard. *See Thompson v. Louisville*, 326 U.S. 199, 206 (1960).

CONCLUSION

The Court should affirm the judgment of the Court of Appeals, or, alternatively vacate and remand to the Court of Appeals with instructions to remand to the District Court to consider Mr. Haley's ineffective assistance of counsel claim.[34]

Respectfully submitted,

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[34] In his federal petition, Mr. Haley raised an ineffective assistance of counsel claim related to the improper enhancement of his sentence. J.A. 119, 126. This claim is not procedurally defaulted and is fully exhausted. J.A. 146, 136. However, the District Court did not rule on it. Pet. App. 51a, 37a, 8a, n.9; S.G. Br. 25-26 & n.8.