No. __________

In the Supreme Court of the United States

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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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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This case presents the Court with a well-developed, three-way circuit split on the issue whether the "actual innocence" exception to the procedural bar rule applies in the noncapital sentencing context. The Seventh, Eighth, and Tenth Circuits have held that it does not; the Second has held that it does; and the Fourth and Fifth have held that it does in cases involving the application of habitual offender statutes. This question of national importance invokes concerns of comity, finality of state court convictions, and federalism. The Court should grant the petition for writ of certiorari to address this important question of federal law and resolve the circuit split. *See* SUP. CT. R. 10(a), (c).

CITATION OF OPINIONS

The Fifth Circuit's opinion is reported at 306 F.3d 257 (CA5 2002) (*Haley I*). App., at 1a-20a. The opinion denying the Director's petition for rehearing en banc is reported at 325 F.3d 569 (CA5 2003) (*Haley II*). App., at 21a-29a. The district court's final judgment is unreported. App., at 30a-38a.

BASIS FOR JURISDICTION

The Fifth Circuit delivered its judgment and opinion on September 27, 2002, and denied the Director's petition for rehearing en banc on March 19, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C.A. §1254(1).

STATUTORY PROVISIONS INVOLVED

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.

The Antiterrorism and Effective Death Penalty Act, 28 U.S.C.A. §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.

STATEMENT OF THE CASE

On October 29, 1997, Haley was convicted of theft. *Haley I*, App., at 1a-2a. Haley's criminal act, theft of a calculator, would ordinarily have been punishable as a Class A misdemeanor, but it was enhanced to a "state jail felony" based on two prior theft convictions. *Id.*; TEX. PEN. CODE

§31.03(e)(4)(D). Additionally, based upon two other prior felony convictions for delivery of amphetamines and attempted robbery,[1] Haley was classified as a habitual felony offender, which resulted in the enhancement of his sentence to that of a second-degree felony. *Haley I*, App., at 2a; TEX. PEN. CODE §12.42(a)(2). Haley was sentenced to sixteen years imprisonment. *Haley I*, App., at 3a.

Under the Texas habitual felony offender statute, however, a defendant is not eligible for punishment enhancement merely because he has been convicted of any two prior felonies. As relevant to this case, the statute also requires that the convictions be "sequential"—that is, 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 amphetamine had become final before the commission of his second felony of attempted robbery. *Haley I*, App., at 5a-6a, n.5. As the State has since conceded, however, this allegation was incorrect. *Id.*, at 5a. In actuality, Haley committed attempted robbery on October 12, 1991, six days before his felony conviction for delivery of

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1. The panel opinion, the dissent from the petition for rehearing en banc, the district court, and the magistrate judge have identified this second felony 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 charge. However, as demonstrated by the district court's nunc pro tunc judgment, Haley was convicted of attempted, not aggravated, robbery. This minor discrepancy is irrelevant to the question presented.

amphetamine became final on October 18, 1991. *Id.* Thus, there is no dispute that Haley's punishment was improperly enhanced under the statute.

Haley did not, however, object to the enhancement, at trial or on appeal. *Id.*, at 3a. On direct appeal, the state court of appeals affirmed Haley's conviction, and the Texas Court of Criminal Appeals refused Haley's petition for discretionary review. *Id.* In his state habeas petition, Haley alleged for the first time the specific complaint that his sentence had been improperly enhanced. *Id.*, at 4a. The state habeas court recommended that Haley's application be denied because this complaint, properly couched as a challenge to the sufficiency of the evidence, is not cognizable in a state post-conviction writ of habeas corpus, but can be brought only on direct appeal. *Id.*; *see also id.*, at App. 11a-12a (citing *Clark v. Texas*, 788 F.2d 309, 310 (CA5 1986)). Because Haley did not challenge the sufficiency of the evidence on direct appeal, his claim was procedurally barred. *Id.*, at App. 4a. The Texas Court of Criminal Appeals denied Haley's state habeas application based on the findings of the trial court. *Id.*

Haley timely filed his federal habeas application asserting, among other things, that there was no evidence to support the sequential nature of the enhancements as stated in the indictment. *Id.* The federal district court granted Haley's application on this ground, despite the state court's finding that it was procedurally barred. *Id.*, at App. 8a. The federal district court found that the procedural bar was excused because Haley had shown he was "actually innocent" with respect to sentencing because he lacked the timely predicate

violation for sentencing as a habitual offender under the Texas statute. *Id.*

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. *Id.*, at App. 17a. The Director timely filed a petition for rehearing en banc. The petition was denied. However, 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. *See Haley II*, App., at 21a-29a.

SUMMARY OF THE ARGUMENT

The circuit courts are, and have been for some time, deeply divided on the question whether the "actual innocence" exception to the procedural bar rule applies in noncapital sentencing cases. The Fifth Circuit's application of the "actual innocence" exception in this noncapital sentencing case widens the already well-developed three-way circuit split.

In holding that the "actual innocence" exception applies in this case, the Fifth Circuit joined the Fourth Circuit (and to some extent the Second) on the side of the debate that extends the exception beyond the realm authorized by this Court—that is, beyond those cases concerning "actual innocence" of the underlying crime or "actual innocence" of the death penalty. On the opposite side of the debate are the Seventh, Eighth, and Tenth Circuits, which have correctly rejected the application of the "actual innocence" exception to noncapital sentencing cases.

The Second, Fourth, and Fifth Circuits's erroneous extension of the "actual innocence" exception beyond the narrow circumstances identified by this Court creates the potential for numerous collateral attacks to state court convictions. By painting with too wide a brush the category of cases that may be creatively described as involving "actual innocence," these circuits' holdings have the dangerous potential of opening the floodgates of habeas claims that allege improper sentencing under the guise of "actual innocence."

Moreover, these circuits' expansion of the "actual innocence" exception into the noncapital sentencing context undermines the procedural bar doctrine—a critical underpinning of federal habeas corpus law. The expansion disregards this Court's traditional adherence to and recognition of the principles of comity, finality, and federalism that likewise form a key basis of federal habeas corpus law.

As six judges noted in dissent from denial of rehearing en banc, "this case squarely presents a legal question of exceptional importance in an unusually pristine form." *Haley II*, App., at 23a. The Court should grant the petition to resolve the circuit split, halt the further degradation of the procedural bar rule, and clarify that the "actual innocence" exception to the procedural bar rule does not apply in the noncapital sentencing context.

ARGUMENT

I. THERE IS A SIGNIFICANT SPLIT IN THE COURTS OF APPEALS AS TO WHETHER THE "ACTUAL INNOCENCE" EXCEPTION TO THE PROCEDURAL BAR RULE APPLIES TO NONCAPITAL SENTENCING-PHASE ERROR.

There is a well-defined and growing split among the courts of appeals regarding the application of the "actual innocence" exception to the procedural bar rule in noncapital habeas corpus cases involving sentencing-phase error. Generally, a federal habeas petitioner may not raise a procedurally defaulted claim unless he demonstrates either (1) clear cause and prejudice for the default or (2) that a miscarriage of justice would result in not considering the claim. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). The miscarriage of justice exception is also called the "actual innocence" exception. *Sawyer*, 505 U.S., at 339. In ordinary usage, "actual innocence" is generally understood to mean that the petitioner did not actually commit the underlying crime. *Sawyer*, 505 U.S., at 340.

However, this Court has expanded the "actual innocence" exception to the capital sentencing context to include claims that the petitioner is "actually innocent" of the death penalty. *Id.*, at 339-40. At issue in this appeal is whether the Court's *Sawyer* opinion should be further extended to allow a noncapital habeas petitioner to present a procedurally defaulted claim that he is "actually innocent" of the sentence he received—as opposed to a claim that he is not guilty of the underlying crime.

As recognized by both the panel opinion below and the dissent from the denial of the petition for rehearing en banc, the courts of appeals have generated a three-way split on this issue that is clear, wide, and deep.[2] On one side of the split, the Seventh, Eighth, and Tenth Circuits have held that the "actual innocence" exception does not apply at all in noncapital sentencing cases. *See Hope v. United States*, 108 F.3d 119 (CA7 1997) (holding that the "actual innocence" sentencing exception did not survive the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA)); *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc) (holding that the "actual innocence" exception applies only to sentencing in capital cases); *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); *United States v. Richards*, 5 F.3d 1369 (CA10 1993) (same). On the second side, the Second Circuit has held that the "actual innocence" exception extends to all noncapital sentences. *Spence v. Superintendent, Great Meadow Corr. Facility*, 219 F.3d 162 (CA2 2000). And on the third side of the split, reaching somewhat of a middle ground, the Fourth Circuit—and Fifth as a result of this case—have held that the "actual innocence" exception extends to noncapital sentences imposed under habitual offender statutes. *Haley I*, App., at 1a-

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2. The extent of the circuit split is demonstrated both by the fact that the circuits have split three, as opposed to merely two, ways on this issue and by the fact that there are three courts of appeals decisions on one side of the split (the Seventh, Eighth, and Tenth), one on the second side (the Second), and two on the third (the Fourth and Fifth).

20a; *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999); *United States v. Maybeck*, 23 F.3d 888 (CA4 1994).

As noted by the Third Circuit in *Cristin v. Brennan*, a noncapital case in which the court assumed, without deciding, that the "actual innocence" exception may apply to overcome a procedural bar, "the issue is not as simple as whether to apply *Sawyer* in a non-capital context; the courts of appeals have debated the types of sentences of which a petitioner can be innocent and whether a claim of innocence of the sentence is actually a disguised attack on the conviction's validity." 281 F.3d 404, 421-22 (CA3 2002). Reflecting the difficult nature of this issue, the courts of appeals have not only been at odds with each other, they have been internally inconsistent, and at various times, have placed themselves on opposite sides of the debate.

For example, the Seventh Circuit had previously held in *Mills v. Jordan*, 979 F.2d 1273 (CA7 1992), that the "actual innocence" exception applies in noncapital cases involving habitual offender sentencing statutes. In *Hope*, however, the court changed course and effectively overruled itself when it held that the "actual innocence" exception did not survive the 1996 amendments to the AEDPA. 108 F.3d, at 120.

Similarly, the Eighth Circuit had previously applied the "actual innocence" exception in a noncapital sentencing case where the defendant was sentenced under a statute that did not apply to him. *Jones v. Arkansas*, 929 F.2d 375, 380-81 (CA8 1991) (stating that "[i]t would be difficult to think of one who is more 'innocent' of a sentence than a defendant sentenced under a statute that *by its very terms* does not even apply to the defendant") (emphasis in original). The court also noted in a

footnote that "there are indications that the actual innocence exception also may apply to non-capital sentencing." *Id*., at 381 n.16 (citing *Smith v. Murray*, 477 U.S. 527, 538 (1986)). *See also Pilchak v. Camper*, 935 F.2d 145, 148 (CA8 1991) (noting that the Eighth Circuit had "transported the exception into the sentencing phase of a trial"). Subsequent to this Court's opinion in *Sawyer*, however, the Eighth Circuit expressed doubt, in *Higgins v. Smith*, 991 F.2d 440, 441 (CA8 1993), that *Jones* was still good law, before eventually overruling itself, *en banc*, in *Embrey*.

And finally, the Tenth Circuit has changed its position twice since 1993. In *Richards*, a case involving an alleged misapplication of federal sentencing guidelines, the court stated that "a person cannot be actually innocent of a noncapital sentence." 5 F.3d, at 1371. One year later, in *Selsor v. Kaiser*, 22 F.3d 1029, 1036 (CA10 1994), the court suggested that the "actual innocence" exception might apply where a petitioner shows factual innocence of a sentencing element that was not required for proof of an underlying conviction. Coming full circle in *Reid*, another case involving a defendant claiming to be innocent of an enhancement charge, the Tenth Circuit, without mentioning its contrary statement in *Selsor*, held once again that "a person cannot be actually innocent of a noncapital sentence." 101 F.3d, at 630 (citing *Richards*, 5 F.3d, at 1371).

The Fifth Circuit's opinion is the latest in a long line of cases from the courts of appeals grappling with the question of whether the "actual innocence" exception to the procedural bar rule applies to noncapital sentencing. The courts of appeals have generated a stark three-way split that shows no signs of

resolving itself. In recent years, the Court has denied certiorari three times on this issue.[3] The issue has percolated long enough. Because of its importance to the finality of state convictions, the Court should grant the petition and address the issue in this case that is ripe for review.[4]

II. THE APPLICATION OF THE "ACTUAL INNOCENCE" EXCEPTION IN NONCAPITAL SENTENCING CASES RAISES A QUESTION OF NATIONAL IMPORTANCE.

A. The "Actual Innocence" Exception Should Remain a Narrow Exception to the Procedural Bar Rule.

One of the founding principles of federal habeas review is the abiding concern for the "finality of state judgments of conviction and the significant costs of federal habeas review." *Sawyer*, 505 U.S., at 338 (citations omitted). With this principle in mind, the Court has long held that, ordinarily, a federal habeas court may not review procedurally barred claims. *Id.*

The "actual innocence" exception is a narrow exception to the procedural bar rule that has been described by the Court as

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3. *United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999), *cert. denied*, 529 U.S. 1010 (2000); *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc), *cert. denied*, 525 U.S. 828 (1998); *Reid v. Oklahoma*, 101 F.3d 628 (CA10 1996), *cert. denied*, 520 U.S. 1217 (1997).

4. The fact that the mandate has issued in this case does not cause a mootness problem. *See Mancusi v. Stubbs*, 408 U.S. 204, 205-07 & n.1 (1972); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 306-08 (1946).

the "extraordinary case" when a habeas petitioner shows cause and prejudice or "actual innocence." *Sawyer*, 505 U.S., at 339 n.6 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (holding that a habeas petitioner may obtain review of a procedurally defaulted claim only on a showing of cause and prejudice). As originally conceived, the exception contemplated strictly factual innocence—that is, the case where the State has convicted the wrong person of the crime, and not "legal innocence"—meaning mere legal insufficiency. *Sawyer*, 505 U.S., at 339-40. Thus, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S., at 496.

In *Sawyer*, the Court took the next step, extending the "actual innocence" exception beyond its original construction and into the arena of capital sentencing, so that a habeas petitioner who has committed the crime may nonetheless be able to show that he is "actually innocent" of the death penalty if he can show by "clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty." *Id.*, at 340-41, 348. But, the Court did not, in *Sawyer* or since, extend the "actual innocence" exception beyond the death penalty sentencing context.

Nonetheless, the Second, Fourth, and Fifth Circuits have themselves extended the exception to include claims of sentencing error in the noncapital context. But, if the "actual innocence" exception extends to noncapital cases—whether

only those involving the incorrect application of habitual offender statutes or to all noncapital sentences—these kinds of claims will cease to be "extremely rare." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). A legal claim that a substantive criminal statute has been wrongly applied to specific facts can, by resort to a rather unsophisticated play on words, always be converted into a complaint that the relevant facts did not support the sentence and that therefore the defendant was "actually innocent" of his particular sentence. *See Embrey*, 131 F.3d, at 741.

For example, under the logic of the Second, Fourth, and Fifth Circuits, a habeas petitioner could always raise a procedurally defaulted claim that there was insufficient evidence to support a finding that the underlying crime was aggravated, thus resulting in an improper and, according to the petitioner, illegal sentence. In such a case, the petitioner would simply argue that he was "actually innocent" of the imposed sentence because he was "actually innocent" of having committed an aggravated crime.

But if the "actual innocence" exception is to be applied in that manner, then any claim challenging the legal sufficiency of the evidence can be said to be one of "actual innocence," effectively unraveling the barrier to post-conviction relief that the limited exception of "actual innocence" was meant to maintain. *Id.* The "actual innocence" exception would cease to be a narrow "gateway" through which a habeas petitioner must pass, and would become instead a readily available means to upset state convictions, on grounds never adjudicated in state court. That interpretation of the "actual innocence" exception is untenable, for it could result in a deluge of habeas

claims alleging "actual innocence" of sentencing in countless criminal cases.

B. The Fifth Circuit's Expansion of the "Actual Innocence" Exception to the Noncapital Sentencing Context Conflates the Exception with the Alleged Underlying Constitutional Violation.

The Court's habeas jurisprudence "makes clear that 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 other words, a free-standing claim of "actual innocence" will not alone support a claim for habeas relief. *Id.*, at 404-05. Instead, the habeas petitioner must "supplement[] his constitutional claim with a colorable showing of factual innocence." *Id.*, at 404.

By extending the "actual innocence" exception to noncapital cases involving habitual offender statutes, the panel opinion, in effect, allows a free-standing "actual innocence" claim to serve—by itself—as the basis for habeas relief, in direct contradiction to *Herrera*. This is because 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 sentencing under the habitual offender statute. Haley claims to be "actually innocent" because he is "actually innocent."[5]

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5. Of course, Haley is not "actually innocent" of being an habitual offender. Factually speaking, he has been convicted of several crimes, five of which are implicated in this case. Instead, he is only "legally

Indeed, the panel opinion demonstrates the error of its own logic. The panel did not—because it could not—first determine that Haley had demonstrated "actual innocence" of his sentence before proceeding to review the underlying procedurally barred claim. Instead, the panel's analysis of Haley's claim of "actual innocence" and his underlying constitutional claim of insufficient evidence collapse into one inquiry of whether the habitual offender statute was correctly applied to Haley. The "actual innocence" exception was never intended to be applied in this circular manner.

The Second, Fourth, and Fifth Circuit's expansion of the "actual innocence" exception to noncapital sentencing ignores the Court's admonitions that the exception should be a "narrow" one. And, it misreads the Court's "actual innocence" jurisprudence by allowing a free-standing claim of "actual innocence" to serve as the constitutional claim supporting habeas relief. If this line of cases is not reversed, the gateway will be open to numerous—and heretofore unsupportable—claims of "actual innocence" being used to excuse procedurally defaulted claims.

III. PRINCIPLES OF COMITY, FINALITY, AND FEDERALISM DICTATE THAT A FEDERAL COURT SHOULD RESPECT A STATE COURT'S FINDING OF A PROCEDURAL BAR.

The touchstone of federal habeas law is the "historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts." *Williams*

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innocent" of habitual offender status in Texas because two of his convictions were not sequential: the second conviction occurred six days before his first became final. *See* TEX. PEN. CODE §12.42(a)(2).

v. Taylor, 529 U.S. 420, 436 (2000). In keeping this delicate balance, the Court has "been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Id.*; *see also Coleman*, 501 U.S. 722, 726 (noting that federal courts owe the States and the States' procedural rules deference when reviewing the claims of state prisoners in federal habeas corpus).

The procedural default doctrine is a critical underpinning of federal habeas law. It is "designed to lessen 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 v. Zant*, 499 U.S. 467, 493 (1991). Moreover, the doctrine seeks "to vindicate the State's interest in the finality of its criminal judgments." *Id.* Thus, proper respect of a State court's finding of a procedural bar is crucial to the federal habeas framework and is mandated by our federalism.

Because application of the"actual innocence" exception to the procedural bar rule undermines principles of federalism, it should be narrowly construed. Indeed, this Court has repeatedly emphasized the narrow scope of the exception. *See, e.g., Sawyer*, 505 U.S., at 340-41; *McCleskey*, 499 U.S., at 502; *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989); *Murray*, 477 U.S., at 496. And, until *Sawyer*, the Court found no reason, even in capital cases, to extend the exception beyond the conventional definition that strictly involves "actual innocence" of the crime.

However, as noted by the dissent from the denial of rehearing en banc, language from this Court's "actual

innocence" cases "can be read to point in opposite directions." *Haley II*, App., at 25a. Specifically, the Second, Fourth, and Fifth Circuits find support for their position that the "actual innocence" exception may apply to noncapital sentencing in the Court's suggestion in *Smith* that the 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." 477 U.S., at 537-38. These circuits construe that language—taken out of context—to mean that the Court did not intend to prohibit the application of the "actual innocence" exception in noncapital cases. *Haley I*, App., at 13a-14a; *Spence*, 219 F.3d, at 170-71; *Maybeck*, 23 F.3d, at 893 & n.9.

But, when viewed in conjunction with the Court's complete jurisprudence in this area, the better argument is the reverse. While extending the "actual innocence" exception to the capital sentencing context in *Sawyer*, the Court was careful to draw a clear distinction between the concept of "actual innocence" in the context of noncapital versus capital sentencing cases. The Court stated that "[t]he present case requires us to further amplify the meaning of 'actual innocence' in the setting of capital punishment." *Id.*, at 340. 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. The most logical implication of this statement is that Court intended to expand—or amplify—the "actual innocence" exception to sentencing only

in the unusual circumstance of capital cases. *See Embrey*, 131 F.3d, at 740-41; *Richards*, 5 F.3d, at 1371.

The Court should expand the "actual innocence" exception no further. Empowering federal habeas courts to look past a procedural bar under the "actual innocence" exception sanctions the non-compliance with state procedural rules. It encourages "'sandbagging' on the part of defense lawyers, who 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." *Wainwright*, 433 U.S., at 89. Ultimately, the federal court's ability to disregard state procedural rules undermines the state trial process and "detract[s] from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.*, at 90. Thus, principles of comity, finality, and federalism demand that the federal court's power to review procedurally defaulted claims under the guise of "actual innocence" be limited in scope and narrowly conceived.

The Fifth Circuit—following the lead of the Fourth, and to a lesser extent, the Second—erroneously extended the "actual innocence" exception to cases involving noncapital sentencing phase error in the application of habitual offender statutes. The Court should grant the petition to clarify that the "actual innocence" exception does not apply outside the narrow confines already identified by the Court, and in particular, does not apply to overcome a procedural bar in a noncapital sentencing case.

IV. THIS CASE IS AN IDEAL VEHICLE FOR THE COURT TO CONSIDER THE APPLICATION OF THE "ACTUAL INNOCENCE" EXCEPTION TO NONCAPITAL SENTENCING.

Because there is no disagreement as to the underlying facts in this case, it presents an excellent vehicle for the Court to resolve an important and widening circuit split. Indeed, as the dissent from the denial of the Director's petition for rehearing en banc noted, "[t]his purely legal question is unsullied by factual disputes . . . Thus, this case squarely presents a legal question of exceptional importance in an unusually pristine form." *Haley II*, App., at 23a. The Court should take this opportunity to resolve the circuit split on this important issue of law.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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