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Actually Less Guilty: The Extension of the Actual Innocence Exception to the Sentencing Phase of Non-Capital Cases

Matthew Mattingley
University of Kentucky

Actually Less Guilty: The Extension of the Actual Innocence Exception to the Sentencing Phase of Non–Capital Cases

BY MATTHEW MATTINGLY*

I. INTRODUCTION

Currently a three–way circuit split exists as to whether or not the actual innocence exception[1] to procedurally defaulted, successive or abusive habeas corpus claims applies to the sentencing phase of non–capital cases. The Seventh, Eighth, and Tenth Circuits have held that this exception does not apply to this phase.[2] The Fourth and Fifth Circuits have held that the actual innocence exception does apply, but only in the context of defendants sentenced under habitual offender statutes. [3] The Second Circuit alone has held that the actual innocence exception applies to the sentencing phase of *all* non–capital cases.[4]

On October 14, 2003, the Supreme Court of the United States granted certiorari in *Dretke v. Haley*.[5] This gave the Court an opportunity to finally resolve the current split among the federal circuit courts regarding the extension of the actual innocence exception to the sentencing phase of non–capital cases. Instead, in its May 3, 2004 decision, the Supreme Court held that other grounds should have been addressed by the federal habeas court prior to the actual innocence exception issue. Accordingly, the Court remanded the case to the Fifth

* J.D. 2005, University of Kentucky College of Law.

[1] The actual innocence exception is an exception through which procedurally defaulted, successive, or abusive habeas corpus claims, which otherwise would be barred, are allowed provided the petitioner is shown to be actually innocent of the crime charged or, in some circumstances, undeserving of the sentence imposed.

[2] *See* Hope v. United States, 108 F.3d 119 (7th Cir. 1997); Embrey v. Hershberger, 131 F.3d 739 (8th Cir. 1997); United States v. Richards, 5 F.3d 1369 (10th Cir. 1993).

[3] *See* Haley v. Cockrell, 306 F.3d 257 (5th Cir. 2002), *vacated sub nom.* Dretke v. Haley, 124 S. Ct. 1847 (2004); United States v. Mikalajunas, 186 F.3d 490 (4th Cir. 1999).

[4] *See* Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162 (2d Cir. 2000).

[5] Dretke v. Haley, 540 U.S. 945 (2003).

Circuit Court of Appeals for decision on these alternative grounds.[6] In so doing, the Court sidestepped a perfect opportunity to finally shed some light on an issue that has divided the federal circuit courts for over a decade.

In *Haley*, Michael Wayne Haley was arrested after stealing a calculator from a Texas Wal–Mart in 1997.[7] Due to his two prior theft convictions, Haley was charged with a "state jail felony" punishable by up to two years in prison.[8] Additionally, Haley was charged under the Texas habitual offender statute.[9] His habitual offender status was predicated on two prior felony convictions for delivery of amphetamines and attempted robbery, respectively.[10] It was later determined that the first conviction did not become final prior to the commission of the second, rendering Haley ineligible for the enhanced sentence he had received.[11]

At the trial level, when the state offered evidence of his prior convictions, Haley did not cross–examine the State's witness, offer evidence, or enter a plea regarding the sentence enhancements.[12] Haley's ineligibility for his enhanced sentence was brought up for the first time in a state habeas corpus claim.[13] The state habeas court refused to consider this claim, as it had not previously been preserved either at trial or on direct appeal, as required by state law,[14] and on this ground contended that Haley was ineligible for federal habeas corpus relief.[15] The United States Court of Appeals for the Fifth Circuit held that, in spite of this default, Haley fell within the actual innocence exception to defaulted habeas corpus claims.[16] As a result, the court officially extended the

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[6] Dretke v. Haley, 124 S. Ct. 1847, 1852 (2004) (holding that the petitioner had a viable claim of ineffective assistance of counsel and that this claim should have been addressed prior to making an extension of the actual innocence exception to the sentencing phase of a non–capital case).

[7] *Id.* at 1849.

[8] *Id.* at 1850. Haley had been charged with theft, a Class A misdemeanor, but two prior theft convictions elevated this to a "state jail felony." *Haley*, 306 F.3d at 259.

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

[10] *Id.*

[11] *Id.* "Under Texas' habitual offender statute, only a defendant convicted of a felony who 'has previously been finally convicted of two felonies, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, . . . shall be punished for a second degree felony.'" *Id.* The record, however, indicated that Haley's second previous felony was committed on October 15, 1991, three days before his first conviction became final. *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 1851.

[16] Haley v. Cockrell, 306 F.3d 257, 264 (5th Cir. 2002), *vacated sub nom.* Dretke v. Haley, 124 S. Ct. 1847 (2004).

actual innocence exception to the sentencing phase of non–capital cases in the Fifth Circuit.[17]

This note offers an evaluation of the extension of the actual innocence exception to the sentencing phase of non–capital cases in the wake of the Supreme Court's avoidance of the issue in *Dretke*. Part II begins by explaining the writ of habeas corpus, the emergence of the actual innocence exception, and its role in habeas corpus jurisprudence. Then, in Part III, the three sides of the federal circuit split will be examined. Part IV proposes that the actual innocence exception should be extended to the sentencing phase of *all* non–capital cases, provided that the petitioner's actual innocence renders him ineligible for the sentence received.

II. BACKGROUND

A. The Writ of Habeas Corpus

The writ of habeas corpus is a procedure through which a previously convicted petitioner is brought before a court, typically to ensure the legality of his imprisonment.[18] Habeas review is a fundamental part of the American legal system and is protected by the Constitution.[19] Initially provided for by common law, the writ of habeas corpus was first codified in the Judiciary Act of 1789, which made the writ available to federal prisoners.[20] In 1867, Congress extended the writ to state prisoners.[21] Given its protection of the very notions of justice which underlie the American judicial system, the importance of the writ of habeas corpus cannot be overstated.

Nonetheless, the writ is subject to abuse and can be problematic for a number of reasons. After–the–fact review of cases may undermine the finality of judgments, thus hindering one of the primary purposes of the American legal system.[22] Habeas review also makes use of "scarce federal judicial resources and threatens the capacity of the system to resolve primary disputes."[23] Additionally, the possibility of federal habeas corpus review might motivate parties to withhold certain evidence at the initial trial so it would be available to serve as the basis

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[17] *Id.*

[18] BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

[19] *See* U.S. CONST. art I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[20] McCleskey v. Zant, 499 U.S. 467, 477 (1991).

[21] *Id.* at 478.

[22] *Id.* at 491.

[23] *Id.*

for a later habeas claim.[24] Additional problems arise when federal habeas review involves a state prisoner. Such review can be problematic both to state sovereignty and to the willingness of states to cooperate with federal courts in the protection of constitutional rights.[25] In light of these potential problems, the availability of the writ of habeas corpus must be limited.

The need for limits on the scope of the writ of habeas corpus is complicated by the fact that, at common law, res judicata was not applicable to a denial of habeas review.[26] Rather, a petitioner's habeas claim could be given to different judges and courts, none of whom were expected to be uninfluenced by earlier denials.[27] Needless to say, such treatment would not be practical today given the size of the modern American legal system. As a result, both Congress and the courts began to impose limitations on the scope of habeas review.[28]

Given the equitable nature of habeas courts, these limitations should strike a balance between protecting the integrity of the system and ensuring that justice is served.[29] In pursuit of this goal, in *Wainwright v. Sykes*[30] the Supreme Court adopted the cause and prejudice test for defaulted habeas corpus claims.[31] Under this standard, such claims may be entertained by a federal court only where it is shown that: 1) there is cause for the default and 2) not entertaining the claim would result in prejudice to the petitioner.[32] In adopting this standard, the court rejected a more lenient view which had previously been set forth.[33] The Court reasoned that, while strict enough to protect against abuse, the cause and prejudice standard would not "prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."[34] Thus, the Court created a rule which sought both to protect the integrity of the system and to ensure justice.

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[24] *Id.*

[25] *Id.*

[26] Schlup v. Delo, 513 U.S. 298, 317 (1995).

[27] *Id.*

[28] *Id.* at 318–19.

[29] *Id.* at 319.

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

[31] *Id.* Later the cause and prejudice test was extended to abusive and successive habeas corpus claims. *See* Sawyer v. Whitley, 505 U.S. 333, 338 (1992) ("Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of: (a) successive claims that raise grounds identical to the grounds heard and decided on the merits in a previous petition; (b) new claims, not previously raised, which constitute an abuse of discretion . . . .").

[32] *See Wainwright*, 433 U.S. at 72.

[33] *See* Fay v. Noia, 372 U.S. 391, 399 (1963) (requiring a knowing waiver in order for claims to be barred).

[34] *Wainwright*, 433 U.S. at 91.

B. *The Actual Innocence Exception*

In *Murray v. Carrier*,[35] the Supreme Court set forth the actual innocence exception[36] to the cause and prejudice test as an additional safeguard[37] with respect to procedurally defaulted habeas claims. The *Murray* Court found that in very limited instances, even where a petitioner does not show cause for their default, a federal habeas court may hear the claim.[38] The Court explained: "we think that in an extraordinary case, where a constitutional violation has 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."[39] In this way, the actual innocence exception was created as a safeguard against injustice. The Court reasoned, "[W]e remain confident that, for the most part 'victims of a fundamental miscarriage of justice will meet the cause and prejudice standard.' But we do not pretend that this will always be true."[40] The actual innocence exception serves to provide relief in those limited circumstances where the cause and prejudice test would result in an injustice.

In *Kuhlmann v. Wilson*,[41] decided the same day as *Murray*, the Court sought to define when, given this new exception, courts may entertain successive habeas corpus claims in order to protect the "ends of justice."[42] The Court made clear the importance of the actual innocence exception but found that its use should be rare,[43] ruling that such claims should be entertained only where "the prisoner supplements his constitutional claim with a colorable showing of factual innocence,"[44] a standard which would later be modified.[45] Thus, the actual innocence exception was given very limited applicability.

In *Herrera v. Collins*[46] the Supreme Court held that the actual innocence exception is only applicable where there is some constitutional violation.[47] The Court explained that "actual innocence is not itself a

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[35] Murray v. Carrier, 477 U.S. 488 (1986).

[36] It should be noted that the actual innocence exception is sometimes referred to as the prevention of a miscarriage of justice.

[37] *Murray*, 433 U.S. at 495.

[38] *Id.* at 488.

[39] *Id.* at 496.

[40] *Id.* at 495.

[41] Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[42] *Id.* at 454.

[43] *Id.*

[44] *Id.*

[45] *See* Sawyer v. Whitley, 505 U.S. 333 (1992). *But see* Schlup v. Delo, 513 U.S. 298 (1995).

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

[47] *Id.* at 404.

constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."[48] In this case the Supreme Court has made it clear that actual innocence is not a cure–all for unjust sentences and convictions, but rather a means of making the writ of habeas corpus a more effective safeguard. In so doing, the Court further narrowed the applicability of an already limited source of relief.

C. *The Extension of Actual Innocence to the Sentencing Phase of Capital Cases*

On the same day *Kuhmann* and *Murray* were decided, the Supreme Court acknowledged in *Smith v. Murray*[49] "that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense."[50] This was based on the troubling concept of being innocent of death; that is, that the petitioner was not actually innocent of the crime, but rather was not culpable enough to warrant the death sentence received. In such a context, "actually innocent" would really mean "actually less guilty." It is understandable how this notion could be problematic given the limited scope of the actual innocence exception.

Nonetheless, six years later the Supreme Court made just such an extension in *Sawyer v. Whitley*.[51] There the Court described the application of the actual innocence exception in non–capital cases as "easy to grasp."[52] With regard to the sentencing phase of capital cases, however, the Court said, "'innocent of death' is not a natural usage of those words, but we must strive to construct an analog to the simpler situation of a non–capital defendant."[53] In so doing, the Court chose between three possible ways of defining actual innocence in the context of capital sentences.[54]

The three proposed options involved looking at either: 1) the elements of the crime; 2) the elements of the crime and aggravating factors; or 3) the elements of the crime and both aggravating and mitigating factors.[55] The Court found that merely allowing evidence

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[48] *Id.*

[49] Smith v. Murray, 477 U.S. 527 (1986).

[50] *Id.* at 537.

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

[52] *Id.* at 340. As will be discussed later, the application in non–capital case is anything but "easy to grasp," and this ambiguous language has been used to support both sides of the argument.

[53] *Id.* at 341.

[54] *Id.* at 343.

[55] *Id.*

regarding actual innocence of the elements of the crime was too restrictive.[56] Such an approach would not serve to extend the exception to the sentencing phase, an extension the Court felt was warranted.[57] In the end, the Court found that the best means of defining actual innocence with regard to the sentencing phase of capital cases was to allow proof of actual innocence of aggravating factors—those making the petitioner eligible for the death penalty—but not mitigating factors.[58]

The Court refused to allow actual innocence of mitigating factors for two reasons. First, such an allowance would mean that the required showing for application of the actual innocence exception would essentially be the same as what was already required to show prejudice under the cause and prejudice test.[59] Therefore, allowing such a broad extension would lead to the erosion of the cause prong of the cause and prejudice test.[60] Such an extension would replace cause and prejudice with actual innocence as the general standard for allowing defaulted, successive, and abusive habeas corpus claims. More importantly, according to the Court, actual innocence is meant to be a narrow exception to the requirement that the petitioner must show both cause and prejudice in order to have their habeas corpus claims heard.[61] Allowing the consideration of mitigating factors in that context would "so broaden the inquiry as to make it anything but a 'narrow' exception."[62] Allowing consideration of the elements of the crime and aggravating factors, however, would focus attention on the elements that make the petitioner eligible for the death penalty.[63] The Supreme Court thus extended the actual innocence exception to the sentencing phase of capital cases, allowing consideration of the actual innocence of a petitioner regarding the elements of the crime and aggravating factors.[64]

While clarifying the role of actual innocence in the sentencing phase of capital cases, *Sawyer* at the same time further blurred the already puzzling question of whether such an extension also applies to non–capital sentences. The ambiguous and confusing manner in which the Court discussed actual innocence in non–capital cases in *Sawyer*—while also suggesting that actual innocence in such cases is "easy to grasp"[65]—set the stage for over a decade of uncertainty as to whether or not the

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[56] *Id.*
[57] *Id.*
[58] *Id.* at 347.
[59] *Id.* at 345.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* at 347.
[64] *Id.*
[65] *Id.* at 341.

exception also applied to the sentencing phase of non–capital cases. This debate came to a head on October 14, 2003, when certiorari was granted in *Dretke v. Haley*.[66] The Supreme Court's decision in that case could have resolved the current three–way circuit split regarding the applicability of the actual innocence exception in the sentencing phase of non–capital cases. Instead, the Court chose to sidestep the issue, allowing uncertainty to prevail regarding the applicability of the exception in this context.

III. THE CIRCUIT SPLIT

Currently, the federal circuit courts are split three ways regarding the applicability of the actual innocence exception to the sentencing phase of non–capital cases. The Seventh, Eighth, and Tenth Circuits have held that the exception does not apply to non–capital sentences.[67] The Fourth and Fifth Circuits have held that the actual innocence exception *does* apply in such cases, but only regarding those sentenced under habitual offender statutes.[68] The Second Circuit alone has held that the exception applies to the sentencing phase of *all* non–capital cases.[69]

A. The Seventh, Eighth, and Tenth Circuits

In *United States v. Richards*,[70] the Tenth Circuit held that "one cannot be actually innocent of a non–capital sentence."[71] Defendant Larry Richards, in a second habeas corpus petition, raised the issue (not raised in the first petition) that his sentence, calculated according to the amount of methamphetamine in his possession, included in that amount the weight of wastewater.[72] The government successfully pled that this was abuse of the writ, and that the only ways Richards' claim could be heard were either upon a showing of cause and prejudice or upon a showing of actual innocence.[73] The court, citing *Sawyer*, said that to be actually innocent in the non–capital context meant that you did not

[66] Dretke v. Haley, 540 U.S. 945 (2003).

[67] *See infra* Section III.A.

[68] *See infra* Section III.B.

[69] *See infra* Section III.C.

[70] United States v. Richards, 5 F.3d 1369 (10th Cir. 1993).

[71] *Id.* at 1371.

[72] *Id.* at 1370. Petitioner contended that the inclusion of the wastewater (a byproduct of methamphetamine production) is a misapplication of the federal sentencing guidelines. The district court agreed and thus reduced Richards' sentence from 188 months to 60 months. *Id.*

[73] *Id.*

commit the crime.[74] Thus the abusive habeas claim did not fall within the actual innocence exception and could not be entertained, as Richards did not claim to be innocent of the crime itself, but rather that he was improperly sentenced. In subsequent cases, the Tenth Circuit has continued to hold steadfastly to its ruling in *Richards* that one cannot be actually innocent of a non–capital sentence.[75]

Similarly, the Eighth Circuit has barred the extension of the actual innocence exception to the sentencing phase of non–capital cases.[76] In *Embrey v. Hershberger*,[77] the Eighth Circuit had before it the case of a man who had been sentenced to consecutive twenty–year sentences under the Federal Bank Robbery Act and the Federal Kidnapping Act, respectively.[78] Embrey argued that, according to the intent of Congress in the Federal Bank Robbery Act, his conviction under the Federal Kidnapping Act was illegal, as the Federal Bank Robbery Act was supposed to operate to the exclusion of all other applicable federal statutes.[79] However, having brought up the same issue on "at least three or four other occasions," Embrey's petition for habeas review was successive.[80] This presented the question of whether the actual innocence exception was available in the context of a non–capital sentence.

The *Embrey* court held that it was not. The court supported this holding by pointing to the language in *Sawyer* stating that actual innocence in non–capital cases is "easy to grasp."[81] The court also felt that allowing such a claim would threaten the limited nature of the actual innocence exception.[82] The court said, referring to the language in *Sawyer*, "[w]e believe with the Tenth Circuit, that the most natural inference to draw from these observations on the Court's part is that in non–capital cases the concept of actual innocence is 'easy to grasp' because 'it simply means the person didn't commit the crime.'"[83] Thus, both the Tenth and Eighth Circuits have interpreted the *Sawyer* Court as

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[74] *Id.* at 1371. The court interpreted the statement in *Sawyer* that a "noncapital case is easy to grasp" as meaning it was easy to grasp because it means the person did not commit the crime. *See id.*

[75] *See* Reid v. Oklahoma, 101 F.3d 628 (10th Cir. 1996).

[76] *See* Embrey v. Hershberger, 131 F.3d 739 (8th Cir. 1997).

[77] *Id.* Here the petitioner raised the previously unraised claim that he was not eligible for the sentence he received. In fact the U.S. Attorney, at oral argument, said that Embrey should not be barred from raising his claim. The court did not agree. *Id.* at 746.

[78] *Id.* at 739.

[79] *Id.* at 739–40.

[80] *Id.* at 740. A successive habeas corpus claim like this could only be heard through: a) cause and prejudice or b) the actual innocence exception.

[81] *Id.*

[82] *Id.* at 741.

[83] *Id.* at 740–41.

having foreclosed the availability of actual innocence in non–capital sentences—an interpretation that is, at the very least, unclear.

Initially, the Seventh Circuit extended actual innocence to the sentencing phase of non–capital cases.[84] However, in *Hope v. United States*,[85] the Seventh Circuit held that this extension of the actual innocence exception did not survive the Antiterrorism and Effective Death Penalty Act of 1996.[86] Thus, the Seventh Circuit joined the Tenth and Eighth Circuits in holding that one can not be actually innocent of a non–capital sentence.

B. The Fourth and Fifth Circuits

Prior to *Haley v. Cockrell*,[87] the Fifth Circuit had twice assumed, without actually deciding, that the actual innocence exception applied to the sentencing phase of non–capital cases involving habitual offenders.[88] In *Cockrell*, the Fifth Circuit definitively held that the exception applied in non–capital cases.[89] In so doing, the court interpreted *Sawyer* as not foreclosing the extension of actual innocence to the sentencing phase of non–capital cases.[90] Additionally, the court quoted the Supreme Court's later explanation that the purpose of the rule "is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."[91] Essentially, the *Cockrell* court looked through the procedural problems and arrived at the real issue, protecting petitioners from both wrongful conviction and wrongful punishment. With its ruling in *Cockrell*, the Fifth Circuit joined the Fourth Circuit in the contention that actual innocence should apply to the sentencing phase of non–capital cases, but

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[84] *See* Mills v. Jordan, 979 F.2d 1273 (7th Cir. 1992). The court said: "[a]lthough the issue is not well–settled, we conclude that the actual innocence exception applies to habitual offender proceedings such as Indiana's whether or not they involve the possibility of capital punishment." *Id.* at 1279.

[85] Hope v. United States, 108 F.3d 119 (7th Cir. 1997).

[86] *Id.* at 120.

[87] Haley v. Cockrell, 306 F.3d 257 (5th Cir. 2002), *vacated sub nom.* Dretke v. Haley, 124 S. Ct. 1847 (2004).

[88] *See id.* at 264 (citing Sones v. Hargett, 61 F.3d 410, 413 (5th Cir. 1995); Smith v. Collins, 977 F.2d 951, 959 (5th Cir. 1992)). In both of these cases the court's dicta assumes that the actual innocence exception applies to the sentencing phase of non–capital cases; however, neither court explicitly made this holding.

[89] *Id.* at 264. Although this holding was vacated and remanded by the Supreme Court, it seems likely that if the Fifth Circuit were presented with this issue again they would make the extension.

[90] *Id.* at 265.

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

only with regard to habitual offender statutes.[92] Although the *Cockrell* holding was later vacated by the Supreme Court on alternative grounds,[93] it seems likely that, given a similar situation, the Fifth Circuit would stand by its original decision to extend the actual innocence exception to the sentencing phase of non–capital cases.

In *United States v. Mikalajunas*[94] the Fourth Circuit narrowed an earlier extension of actual innocence to all non–capital sentences.[95] The court reasoned that an extension of actual innocence beyond those sentenced under habitual offender statutes would "conflict squarely with Supreme Court authority indicating that generally more than prejudice must exist to excuse a procedural default."[96] This logic echoes other courts' fears that a more broad extension of actual innocence might erode the cause prong of the cause and prejudice test, and therefore take the "rare"[97] actual innocence exception and make it the new rule of law. In *Cockrell*, the Fifth Circuit followed this same line of reasoning in reaching its conclusion that actual innocence in non–capital sentences should be limited to those sentenced under habitual offender statutes.[98]

C. The Second Circuit

In *Spence v. Superintendent, Great Meadow Correctional Facility*,[99] the Second Circuit extended the actual innocence exception to the sentencing phase of all non–capital cases.[100] Donovan Spence, who was arrested on a robbery charge, was offered a deal by the judge:[101] if he was not arrested again the judge would punish him only as a youthful offender, but if he was arrested he would be given a sentence of eight–and–one–third years to twenty–five years.[102] Soon after his release

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[92] *See* United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999).

[93] Dretke v. Haley, 541 U.S. 1852 (2004) ("A federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all non–defaulted claims for comparable relief and other grounds for cause to excuse the procedural default.").

[94] *Mikalajunas*, 186 F.3d at 490.

[95] *See* United States v. Maybeck, 23 F.3d 888, 893 (4th Cir. 1994). The Fourth Circuit dealt with a habitual offender statute, but the language of the case did not limit the extension of actual innocence to such a situation. *See id.*

[96] *Mikalajunas*, 186 F.3d at 495.

[97] *See supra* notes 41–43 and accompanying text.

[98] Haley v. Cockrell, 306 F.3d 257, 266 (5th Cir. 2002), *vacated sub nom.* Dretke v. Haley, 124 S. Ct. 1847 (2004). The court, after quoting the rationale of *Mikalajunas* said: "We find the approach of the Fourth Circuit persuasive." *Id.*

[99] Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162 (2d Cir. 2000).

[100] *Id.* at 171.

[101] *Id.* at 165.

[102] *Id.*

Spence was rearrested, again on robbery charges.[103] Following through on his promise, the judge imposed a stiff sentence relating to the first robbery.[104] Later, however, it was determined that Spence did not commit the second robbery and therefore did not deserve the judge's harsher sentence.[105] The Second Circuit allowed the sentence to be reduced, thereby extending the actual innocence exception to the sentencing phase of non–capital cases. The court explained that "[b]y challenging the determination of his responsibility for the act predicating his enhanced sentence, Spence raises precisely the question that the actual innocence exception contemplates."[106]

The court reasoned that the Supreme Court has "made clear that the availability of 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."[107] Clearly, this court did not interpret the prior Supreme Court habeas corpus jurisprudence, particularly *Sawyer*, as foreclosing the applicability of actual innocence to non–capital sentences. Thus, the court saw little reason to differentiate between capital and non–capital sentencing.[108]

D. Understanding the Circuit Split

It seems that the vague language in *Sawyer*, stating that actual innocence in non–capital cases is "easy to grasp,"[109] is largely responsible for the current dissension among the federal circuit courts regarding whether or not the exception is applicable to the sentencing phase of non–capital cases. The circuit split is particularly difficult to reconcile due to the fact that this language has been interpreted differently: it is used as support both by those courts in favor of applicability and those opposed to it.[110] As a result, *Sawyer* has done

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[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 171.

[107] *Id.* at 170–71 (quoting Smith v. Murray, 477 U.S. 527, 538–39 (1986)).

[108] *Id.* at 171. The court said: "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 sentences." *Id.*

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

[110] *See* Haley v. Cockrell, 306 F.3d 257, 265 (5th Cir. 2002) (holding one can be actually innocent of a non–capital sentence involving a habitual offender statute), *vacated sub nom.* Dretke v. Haley 124 S. Ct. 1847 (2004); Embrey v. Hershberger, 131 F.3d 739, 740–41 (8th Cir. 1997) (holding one cannot be actually innocent of a non–capital

nothing to bolster the understanding of actual innocence in the sentencing phase of non–capital cases. With the granting of certiorari in *Dretke,*[111] these problems of interpretation could have at last been put to rest. The issue should finally have moved from what the Supreme Court meant by "easy to grasp" in *Sawyer* to the real policy concerns surrounding the extension of the actual innocence exception to the sentencing phase of non–capital cases. Instead, the Supreme Court avoided the issue,[112] refusing to put an end to the confusion and disagreement which has characterized this issue for more than a decade.

IV. ANALYZING THE EXTENSION OF THE EXCEPTION

A. The Argument Against Extension

Clearly, the current circuit split regarding the extension of the actual innocence exception to the sentencing phase of non–capital cases would not exist were there not valid arguments on both sides. The arguments against making this extension of the exception can be grouped into two categories: 1) those relating to the generally problematic nature of the writ of habeas corpus, and 2) those dealing specifically with the actual innocence exception. Valid arguments can be found in each category.

As discussed earlier, the writ of habeas corpus can be problematic for a number of reasons. Any expansion on the availability of the writ must be balanced against these potential problems, and the actual innocence exception is no different. It is imperative that we not allow our federal courts to become bogged down by frivolous claims from inmates who have nothing better to do than make unwarranted claims that their imprisonment is unjust. Thus, the preservation of scarce judicial resources is one factor limiting the availability of habeas review.[113] Additionally, by allowing collateral review the writ of habeas corpus compromises the finality of judgments.[114] Another concern with habeas review is the fact that it can put a strain on the relationship between state and federal courts.[115] These valid concerns attach generally to the writ of habeas corpus and must be weighed whenever considering its application.

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sentence); United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993) (holding one cannot be actually innocent of a non–capital sentence).

[111] Dretke v. Haley, 540 U.S. 945 (2003).

[112] *See supra* note 93.

[113] *See supra* note 23.

[114] *See supra* note 22.

[115] *See supra* note 25.

There are also arguments specifically addressed to the extension of the actual innocence exception to the sentencing phase of non–capital cases. The most common of these, to date, is that such an extension was foreclosed by the Supreme Court in *Sawyer*.[116] However, with the granting of certiorari in *Dretke* the Supreme Court had the opportunity to decide this issue without concern for the subtle, entirely unclear, implications of the *Sawyer* Court. Additionally, those circuit courts which have already made this extension, either under limited circumstances or fully as in the case of the Second Circuit, obviously did not believe such action to be foreclosed by *Sawyer*.

Another concern with allowing actual innocence of non–capital sentences is that this would erode the cause prong of the cause and prejudice test.[117] Critics of extending the actual innocence exception also point out the narrow scope of the exception and argue that any extension would serve to undermine this limited scope.[118]

B. The Importance of Extending the Actual Innocence Exception

There is no denying the validity of the arguments against extending the actual innocence exception to the sentencing phase of non–capital cases. In light of these legitimate concerns, it is easy to lose sight of what is really at stake here—at the least someone's liberty, at the most someone's life. Justice Black once said, "it is never too late for courts in habeas corpus proceedings to look straight through procedural screens in order to prevent forfeiture of life or liberty in flagrant defiance of the Constitution."[119] The actual innocence exception does just that. It is a rare exception which serves to cut through all the red tape in order to prevent a grave injustice. Viewed in this light, the arguments against the extension are less than convincing.

It is true that the problematic nature of the writ of habeas corpus carries over to the actual innocence exception. This, however, is not a valid deterrent to extension. Any use of the writ must face these concerns

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[116] *See* Embrey v. Hershberger, 131 F.3d 739, 740 (8th Cir. 1997) ("[W]e think that Sawyer, in terms, applies only to the sentencing phase of death cases."); United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993) (holding that a person cannot be actually innocent of a non–capital sentence).

[117] *See* Haley v. Cockrell, 306 F.3d 257, 265 (5th Cir. 2002), *vacated sub nom.* Dretke v. Haley, 124 S. Ct. 1847 (2004); United States v. Mikalajunas, 186 F.3d 490, 494–95 (4th Cir. 1999). This contention is made also in defense of limiting applicability to those non–capital offenders whose sentences were received under habitual offender statutes.

[118] *See Embrey*, 131 F.3d at 739; *Richards*, 5 F.3d at 1369.

[119] Brown v. Allan, 344 U.S. 443, 554 (1954) (Black, J., dissenting). Note that Justice Black says the forfeiture "of life or *liberty*." (emphasis added).

and be balanced against the cost of undiscovered injustice. Perhaps it could be argued that the finality of judgments and preservation of resources are legitimate reasons not to create a new exception in habeas corpus jurisprudence. A new exception, however, is not what is being offered here; rather, it is the logical extension of an existing exception. If these factors did not bar the creation of the actual innocence exception in the first place, there is no reason to believe they will or should be sufficient to block its extension to the sentencing phase of non–capital cases. Justice Stevens put this in perspective in his *Sawyer* dissent:

> Although we have frequently recognized the State's interest in finality we have never suggested that that interest is sufficient to outweigh the individual's claim to innocence. To the contrary, the 'actual innocence' exception itself manifests our recognition that the criminal justice system occasionally errs and that, when it does, finality must yield to justice.[120]

It is important to remember that the actual innocence exception is a tool to be used in rare cases.[121] Additionally, its extension to the sentencing phase of non–capital cases is a very small extension. This extension would by no means serve to open up the floodgates to habeas courts. This being the case, it is hard to imagine that such an extension will result in a significant impact on the problems and concerns generally associated with the writ of habeas corpus.

While it can be argued that the extension of this exception lacks significance when balanced against the concerns of extending habeas review, the same cannot be said for the significance of the extension from the perspective of the petitioner using the exception to make a defaulted, successive, or abusive habeas claim. Take for example the situation in *Embrey v. Hershberger*,[122] where a procedural default robbed a man of twenty years of his life.[123] This is particularly egregious in light of the fact that the U.S. Attorney in the case said at oral argument that Embrey should not have been barred from making the claim.[124] In this sort of situation, an extension of the actual innocence exception to the

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[120] Sawyer v. Whitley, 505 U.S. 333, 364 (1992) (Stevens, J., concurring).

[121] Kuhlman v. Wilson, 477 U.S. 436, 454 (1986).

[122] Embrey v. Hershberger, 131 F.3d 739 (8th Cir. 1997).

[123] The dissent said: "Surely no one can claim that requiring an individual to serve a twenty year illegal sentence is not a miscarriage of justice." *Id.* at 745 (Lay, J., dissenting).

[124] *Id.* at 746 (Lay, J., dissenting). The dissent noted that while a court is not required to accept such a concession, "where a claim of an illegal sentence is at issue, the court should examine with great scrutiny the reasons it has rejected the government's good faith concession." *Id.*

sentencing phase of non–capital cases would serve to remedy a great injustice.

It is difficult to understand why a showing of actual innocence should be allowed for those petitioners convicted of capital crimes, but not for those serving non–capital sentences. Other than the inherent finality of capital punishment, little reason exists to differentiate between capital and non–capital sentencing in terms of actual innocence. In fact, the difference in finality is fairly insignificant, as by the time a petitioner is trying to have their federal habeas corpus claim heard it is highly unlikely that any further options exist for them. Is it any less outrageous to force a petitioner to serve a significantly longer sentence than they deserve than it is to execute them for a crime for which they should have received only life in prison? While the public perception might be different, in actuality the injustice seems to be the same. Essentially, there is no difference between requiring a petitioner to serve a sentence for which they were not eligible and putting an innocent man behind bars. Framed in this light the choice is clear: the actual innocence exception should be extended to the sentencing phase of non–capital cases.

C. Eligibility

If it is accepted that an extension of the actual innocence exception to non–capital sentences is warranted, the issue becomes when to allow such an extension. Currently, courts seem to employ one of two options: either a blanket extension[125] or extension only in those situations involving a habitual offender statute.[126] It is asserted here that a hybrid of these two options should be employed. Actual innocence should be extended to those non–capital sentences where the petitioner's actual innocence renders him ineligible for the sentence he received. It is likely that in many, if not most, cases where this standard is met, habitual offender statutes will be involved. Nonetheless, a strict requirement of a habitual offender statute is illogical.

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[125] *See* Spence v. Superintendent, Great Meadows Corr. Facility, 219 F.3d 162, 171 (2d Cir. 2000) ("[T]here is no reason why the actual innocence exception should not apply to noncapital sentencing procedures."). Note that the facts of this case make it subject to possible limitation in the future.

[126] *See* Haley v. Cockrell, 306 F.3d 257, 265 (2002) (holding that the actual innocence exception applies only to non–capital cases in the context of a habitual offender finding during the punishment phase of the trial), *vacated sub nom.* Dretke v. Haley, 124 S. Ct. 1847 (2004); United States v. Mikalajunas, 186 F.3d 490, 495 (1999) (holding that actual innocence applies in non–capital sentencing only in the context of eligibility for application of career offender or other habitual offender guideline provisions).

The extension of this exception only to those cases involving habitual offender statutes is counterintuitive, as the actual innocence exception is meant to be a remedy only for those situations where strict rules of procedure fail to protect the ends of justice.[127] It has been contended that an extension of actual innocence to non–capital sentences not requiring the involvement of a habitual offender statute would eliminate the cause prong of the cause and prejudice test.[128] Clearly, preventing the cause and prejudice test from being swallowed is a legitimate purpose, as doing so helps ensure the procedural efficiency of habeas courts.[129] However, applying actual innocence only to those non–capital cases involving habitual offender statutes seems to further this purpose at the expense of reason. Why should those sentenced under habitual offender statutes warrant more federal habeas corpus protection than those in similar situations who were not sentenced under such a statute?

As discussed earlier, the facts of *Spence v. Superintendent*,[130] the case wherein the Second Circuit extended actual innocence to non–capital sentences even in the non–habitual offender statute context, illustrate this well. Spence had made a plea agreement with a judge, agreeing not to get in any more trouble.[131] He was later arrested for another robbery, one that he did not commit, and received a harsh sentence per the terms of his plea agreement.[132] The court found that he was actually innocent of the very factor which qualified him for the harsher sentence, and thus held that his habeas corpus claim was not defaulted.[133]

However, if the Second Circuit had found that the actual innocence exception either: 1) did not apply to non–capital sentences, or 2) only applied in the context of habitual offender statutes, Spence's habeas claim would not have been allowed to proceed. Barring finding another avenue of appeal, he would have had to serve out this excessive sentence. The first consequence, while seeming harsh and unfair, is at least consistent. However, not allowing Spence's claim to proceed because he

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[127] *But see Cockrell*, 306 F.3d at 266; *Mikalajunas*, 186 F.3d at 495.

[128] *Cockrell*, 306 F.3d at 266; *Mikalajunas*, 186 F.3d at 494–95.

[129] *See Mikalajunas*, 186 F.3d at 494–95 (stating that if the actual innocence exception was available, any time a guideline is misapplied it would mean that whenever a movant was prejudiced by the misapplication of a sentencing guideline and failed to raise the error on direct appeal, a federal court could correct the error during a § 2255 proceeding).

[130] Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162 (2d Cir. 2000).

[131] *Id.* at 165.

[132] *Id.*

[133] *Id.* at 171.

was not sentenced under a habitual offender statute seems completely arbitrary.

Per the terms of his plea agreement, Spence was only eligible for the harsh sentence if he was rearrested.[134] He was actually innocent of the second robbery and therefore was not eligible for the sentence he received at all.[135] By making eligibility for the sentence, regardless of the facts relating to the statute under which the sentence is imposed, the standard for applying the actual innocence exception in the sentencing phase of non–capital cases, Spence and those like him will not be forced to serve out sentences they do not deserve in the name of procedural efficiency.

Additionally, by making eligibility for the specific sentence the yardstick for application of the actual innocence exception, the Supreme Court will harmonize the standards for capital and non–capital sentencing. In *Sawyer*, the Court allowed actual innocence of aggravating, but not mitigating, factors.[136] The Court explained, "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of constitutional error."[137] In all likelihood, many, if not most, of the cases which require actual innocence in non–capital sentences will deal with habitual offender statutes. However, there is no valid reason to foreclose the claim of a petitioner like Spence who, for whatever reason, received a sentence for which he was not eligible. Doing so seems to do little to remedy the problematic aspects of habeas claims and could possibly work a grave injustice.

The argument has been made that by not limiting actual innocence in non–capital sentences to those sentenced under habitual offender statutes the cause prong of the cause and prejudice test would be swallowed.[138] While this is a valid concern, it seems unlikely to happen if eligibility were adopted as the standard. Given the high standard of proof for an actual innocence claim,[139] and the very slight difference between those serving sentences they are not eligible for and those doing so because of habitual offender statutes, it is hard to see how limiting the use of actual innocence to those sentenced under habitual offender statutes really

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[134] *Id.*

[135] *Id.* at 172.

[136] Sawyer v. Whitley, 505 U.S. 333, 345 (1992) (rejecting petitioner's argument that showing of actual innocence could extend beyond a showing that there were no aggravating circumstances, or that some other conditions of eligibility had not been met; holding instead that it could extend to the existence of additional mitigating evidence).

[137] *Id.* at 347.

[138] *See supra* note 136.

[139] *Sawyer*, 505 U.S. 346–48. *But see* Schlup v. Delo, 513 U.S. 298, 324–25 (1995).

protects the cause and prejudice test at all. True, this may slightly reduce the number of actual innocence claims, but it will do so in an arbitrary manner, as there is no substantive difference between those who are serving under habitual offender statutes and those who are not.

By granting certiorari in *Dretke*, the Supreme Court finally had the opportunity to decide the applicability of the actual innocence exception in the context of the sentencing phase of non–capital cases. Given the preceding evaluation of the situation, this note contends that the Court should have made the extension, provided the petitioner's actual innocence renders him ineligible for the sentence he received. Since the Court chose to avoid this issue, this note further contends that the language of *Sawyer* does not foreclose the federal circuit courts from making this same extension, and even urges them to do just that when given the opportunity.

V. CONCLUSION

Despite its potentially problematic nature, the writ of habeas corpus occupies a very important place in American jurisprudence. The right to challenge constitutionally impermissible imprisonment is absolutely fundamental to our criminal justice system. The protection of this right should be an issue of concern for all Americans, particularly the Supreme Court.

In light of this, the *Dretke* Court should have extended the actual innocence exception for procedurally defaulted, successive, or abusive habeas corpus claims to the sentencing phase of all non–capital cases, provided the petitioner's actual innocence renders them ineligible for the sentence he received. However, since the Court did not make the extension, it is contended that those courts who encounter this issue in the future should find the exception applicable in this context. In so doing, these courts will merely be making a logical extension to an existing exception. Given the importance of this extension to the guarantee of justice in the American legal system, no adequately convincing argument exists not to make such an extension.

The actual innocence exception is a very limited tool to be used only in rare instances. There is no reason to believe that this will change given an extension to non–capital sentences, particularly in light of the fact that several federal circuits have already made this extension, at least to some degree. What will change, however, is the fate of those wrongfully sentenced, who otherwise would have no recourse. The impact of the actual innocence exception on the American legal system is, in the grand scheme of things, quite small. Most Americans have likely never heard of it. The same can probably be said for many, if not most, of those

engaged in the practice and study of law. To the individual petitioner whose liberty is spared by it, however, actual innocence is of incredible importance. There is no doubt that the Supreme Court will again be called upon to decide this issue. In light of the foregoing discussion, it is clear that the Court should extend the actual innocence exception to the sentencing phase of non–capital cases, provided the petitioner's actual innocence renders him ineligible for the sentence he received. For the sake of those petitioners serving wrongfully enhanced sentences in circuits refusing to make the extension, it is hoped that this issue will again reach the Supreme Court sooner rather than later.