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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

A defendant generally may not raise a procedurally defaulted claim on habeas corpus unless he shows cause for the default and prejudice from the asserted underlying error. There is a narrow exception to that rule when the defendant shows that he is actually innocent. The question presented is whether the exception applies where the defendant asserts "actual innocence" of a noncapital sentence.

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INTEREST OF THE UNITED STATES

This case presents the question whether the actual innocence exception allowing habeas corpus review of a procedurally defaulted claim applies to noncapital sentencing. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the actual innocence exception applies in the same manner to collateral attacks by both federal and state prisoners. The United States has a substantial interest in the outcome of this case because extending the actual innocence exception to noncapital sentencing would permit belated collateral attacks on prison sentences where those attacks are not justified by the need to prevent a fundamental miscarriage of justice.

STATEMENT

1. On April 9, 1997, respondent entered a Wal-Mart store in Smith County, Texas, picked up a calculator, and placed it in the front of his pants. Respondent then left the store,

reentered through another entrance, and exchanged the calculator for other merchandise. J.A. 8, 73-74.

Respondent was charged with theft of property valued at less than $1500, an offense that would ordinarily have been punishable as a Class A misdemeanor under Texas law. J.A. 8; see Tex. Penal Code Ann. § 31.03(e)(3) (West 2003). In this case, however, the indictment alleged that respondent had two prior convictions for theft, which resulted in the enhancement of his offense to a "state jail felony" punishable by up to two years of imprisonment. J.A. 8-9; see Tex. Penal Code Ann. §§ 12.35(a), 31.03(e)(4)(D) (West 2003). The indictment further alleged that respondent had been convicted in 1991 of delivery of amphetamine and in 1992 of robbery, and that the amphetamine conviction "became final prior to the commission" of the robbery. J.A. 9.[1] Under the Texas habitual felony offender statute, a defendant convicted of a state jail 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." Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). A second-degree felony conviction is punishable by imprisonment for "any term of not more than 20 years or less than 2 years." *Id.* § 12.33(a).

A jury found respondent guilty of the theft charge. Pet. App. 2a; J.A. 63-64. During the punishment phase of the trial, the State introduced records of respondent's prior convictions, which showed that, on October 18, 1991, respondent had been convicted of delivery of a controlled substance, and that, on September 9, 1992, respondent had been convicted of an attempted robbery, which he had committed on

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[1] The indictment originally alleged that respondent had been convicted of "aggravated robbery," but the word "aggravated" was crossed out before respondent's trial. J.A. 9.

October 15, 1991. J.A. 42, 47. The State also presented one witness, who testified that respondent was the person identified in the records. Pet. App. 2a; J.A. 15-17. Respondent did not cross-examine the State's witness or put on any evidence.

After the parties rested, the trial court realized that the allegations in the indictment concerning respondent's prior convictions had not been read to the jury. Outside the presence of the jury, the court asked respondent whether he wanted to enter a plea to the prior-conviction allegations, but respondent declined to do so. The court reopened the proceedings to allow the State to read the allegations to the jury. Pet. App. 2a-3a; J.A. 16-17.[2]

The jury found the allegations concerning respondent's prior convictions to be true and "assess[ed] his punishment" at imprisonment "for a term of 16 years 6 months." Pet. App. 3a; J.A. 33-34. The court imposed the sentence determined by the jury. Pet. App. 3a; J.A. 63-66.

Respondent appealed his conviction. Although he raised several arguments, respondent did not argue that there was insufficient evidence to support the habitual felony offender enhancement. The state appeals court affirmed respondent's conviction. J.A. 72-83.

2. In February 2000, respondent filed an application for state post-conviction relief, in which he argued for the first time that his sentence was erroneously enhanced because his conviction for delivery of a controlled substance did not become final until after he committed the attempted robbery. J.A. 87-88; Pet. App. 4a. The state trial court characterized that claim as a challenge to the "sufficiency of the evidence to support the enhancements" and concluded that

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[2] When the allegations were read to the jury, the word "aggravated" was not included since it had been deleted from the indictment. J.A. 18, 22.

"[t]he sufficiency of the evidence was [not] raised on direct appeal and can not be attacked by a Writ of Habeas Corpus." J.A. 108. Respondent also argued that his trial counsel rendered constitutionally ineffective assistance regarding the enhancements, J.A. 93, and the state trial court rejected that claim as well, J.A. 108. The Texas Court of Criminal Appeals denied respondent's habeas application based upon the findings of the trial court. Pet. App. 4a; J.A. 109.

3. Respondent then filed a federal petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 in the United States District Court for the Eastern District of Texas. He renewed the claim raised in his state post-conviction filing that his sentence was erroneously enhanced. Respondent argued that, because his conviction for delivery of amphetamine had not become final before he committed the robbery offense, his robbery conviction was not "for an offense that occurred subsequent to the first previous conviction having become final," as required by the habitual felony offender statute. Pet. App. 4a-5a; J.A. 118, 124; see Tex. Penal Code Ann. § 12.42(a)(2) (West 2003). In its response, the State conceded that respondent committed the attempted robbery offense before his conviction for delivery of a controlled substance became final and that respondent was therefore "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." J.A. 140. The State argued, however, that respondent had procedurally defaulted the claim by failing to raise it in the trial court or on direct appeal. Pet. App. 7a; J.A. 142-144.

Respondent's habeas petition was referred to a magistrate judge, who recommended that it be granted. Pet. App. 38a-56a. The magistrate judge concluded that respondent's procedural default was excused because he was "'actually innocent' of a sentence for a second-degree felony." *Id.* at 49a. The district court adopted the magistrate judge's

report, granted the petition, and ordered that respondent be resentenced without the enhancement. *Id.* at 32a-37a.

4. The United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment. Pet. App. 1a-20a. The court of appeals held that respondent had defaulted his claim that the evidence was insufficient to support his sentence enhancement by failing to raise that claim on direct review. Therefore, the court noted, federal review of the claim was barred unless respondent could show "cause and actual prejudice from the procedural default, or that failure to review the claim would result in a complete miscarriage of justice due to his 'actual innocence.'" *Id.* at 12a. The court concluded that respondent's default should be excused because, "based on the unquestionable improper enhancement of [respondent]'s sentence, he has shown that, but for the constitutional error, he would not have been legally eligible for the sentence he received." *Id.* at 13a.

The court rejected the State's claim that the actual innocence exception to the requirement that a habeas petitioner show cause and prejudice to excuse his procedural default does not apply to noncapital sentencing. Instead, the court held that the exception also "applies to noncapital sentencing procedures involving a career or habitual felony offender." Pet. App. 13a. The court noted that other courts of appeals have divided on the application of the actual innocence exception to noncapital sentences. *Id.* at 14a. The Seventh, Eighth, and Tenth Circuits, the court explained, have held that the exception applies to sentencing only in capital cases. *Id.* at 14a-15a (citing *Embrey* v. *Hershberger*, 131 F.3d 739, 740 (8th Cir. 1997) (en banc), cert. denied, 525 U.S. 828 (1998); *Hope* v. *United States*, 108 F.3d 119, 120 (7th Cir. 1997); *Reid* v. *Oklahoma*, 101 F.3d 628, 630 (10th Cir. 1996), cert. denied, 520 U.S. 1217 (1997)). The Second Circuit, in contrast, has applied the exception broadly to noncapital sentences. See Pet. App. 15a-16a (citing *Spence* v. *Super-*

intendent, *Great Meadow Corr. Facility*, 219 F.3d 162, 171 (2d Cir. 2000) (applying exception to factual finding that led sentencing judge to exercise his discretion to impose a more severe sentence)). The Fourth Circuit applies the exception to noncapital sentencing "only in the context of eligibility for application of a career offender or other habitual offender guideline provision." *Id.* at 16a (quoting *United States* v. *Mikalajunas*, 186 F.3d 490, 495 (4th Cir. 1999), cert. denied, 529 U.S. 1010 (2000)). Rejecting the broader rule adopted by the Second Circuit in *Spence*, the court of appeals "agree[d] with the Fourth Circuit which has held that the actual innocence exception applies to non capital cases only in the context of a habitual offender finding." Pet. App. 14a.

The court of appeals subsequently denied the State's petition for rehearing en banc. Pet. App. 21a-29a.

SUMMARY OF ARGUMENT

A. A prisoner generally may not raise a procedurally defaulted claim on habeas corpus unless he establishes both "cause" for the default and "actual prejudice" from the asserted error. There is, however, a narrow exception to that rule in the rare situation where the prisoner can show that he is "actually innocent." Because a prisoner's innocence of the crime of which he was convicted is both a compelling injustice and an extremely rare occurrence, allowing collateral review in that circumstance appropriately balances society's interest in finality, comity, and conservation of judicial resources and the individual's interest in avoiding a fundamentally unjust incarceration. This case presents the question whether the actual innocence exception should be extended to the situation where a prisoner claims innocence of a noncapital sentence. It should not.

B. "Innocence" ordinarily means that a defendant is not guilty of a substantive crime. The Court has applied the actual innocence exception to capital sentencing, while ac-

knowledging that the concept of innocence is not easily applied to sentencing. The capital sentencing context, however, is unique. Concepts of "innocence" and "error" make little sense in traditional noncapital sentencing because the sentencer makes a highly discretionary choice among a range of possible sentences. Where there is no standard limiting the sentencer's discretion, there is no "correct" sentence for the defendant, and a defendant cannot be innocent of the sentence imposed unless he is innocent of the underlying crime.

C. Contemporary noncapital sentencing sometimes involves significant limits on a sentencer's discretion. The concept of an erroneous sentence can be given more meaning in such sentencing schemes, because specific factual findings, which can be identified as either true or false, may have a demonstrable impact on a defendant's sentence. Nonetheless, extension of the actual innocence exception to the myriad facts that have an impact on noncapital sentences is unwarranted. If the actual innocence exception applied to any factual finding that has a demonstrable impact on a noncapital sentence, the exception would no longer be limited to situations involving a compelling injustice. As the lower degree of constitutional protection applicable at sentencing reflects, the injustice of an erroneous sentence within statutory maximum and minimum bounds presents significantly less concern than the paradigmatic injustice of conviction of an innocent person. Applying the actual innocence exception to all factual findings that have an impact on noncapital sentences would also mean that the exception would no longer be limited to the rare case, because challenges to the factual findings made at sentencing are quite common.

D. More limited applications of the actual innocence exception to noncapital sentencing would either be unworkable or still impose unacceptable costs. The court of appeals here and the Fourth Circuit have proposed that the exception

apply only to sentencing findings concerning a defendant's habitual or career offender status. But there is no logical reason why a defendant can be "actually innocent" of such findings but not of other findings that are equally capable of being erroneous and may have just as great an impact on the defendant's sentence.

There would be a logical basis to limit the actual innocence exception to recidivist findings that raise the statutory maximum sentence, but applying the exception to such findings would still impose unacceptable costs on the criminal justice system. Findings that increase the statutory maximum, unlike findings that increase the mandatory minimum or the presumptive sentencing range under a guidelines system, expose the defendant to a greater sentence than he is otherwise eligible to receive. The actual innocence exception probably already applies to facts other than recidivism that increase the statutory maximum because those facts are elements of an aggravated substantive offense—either because the legislature has designated them as offense elements or because the Constitution requires that they be treated that way. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

But facts concerning recidivism remain sentencing factors and need not be made elements even if they raise the statutory maximum. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). The balance between the societal interest in obtaining closure to the criminal process and the individual interest in avoiding fundamental injustice would be upset by extending the actual innocence exception to recidivism-based sentencing factors. Because they are not offense elements, those sentencing findings do not involve the unique stigma and collateral consequences entailed by conviction of a separate offense. Moreover, recidivist enhancements are common, and therefore extension of the

actual innocence exception to cover them would have significant costs.

E. This Court's decisions applying the actual innocence exception to the death penalty do not require extension of the exception to noncapital sentencing. To the contrary, the death penalty decisions are consistent with the principle that a defendant can be actually innocent only of a substantive offense. In light of the Court's recent decisions applying *Apprendi* in the capital sentencing context, the cases recognizing actual innocence of the death penalty are best understood as involving actual innocence of the aggravated offense of death-eligible murder. See *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003) (plurality opinion); *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002). Moreover, because of the unique severity and finality of the death penalty, an erroneous capital sentence represents a significantly greater injustice than an erroneous noncapital sentence. And because capital sentences are relatively rare, substantial claims of error in capital sentencing are likely to be less frequent than claims of noncapital sentencing error. But extending the actual innocence exception to routine noncapital sentencing would disrupt the balance reflected in the exception between the interest in obtaining finality in the criminal process and the interest in ensuring justice in the individual case.

ARGUMENT

THE ACTUAL INNOCENCE EXCEPTION DOES NOT APPLY TO NONCAPITAL SENTENCING

When a prisoner fails to raise a claim on direct review, the claim is deemed procedurally defaulted. A prisoner generally may not raise a defaulted claim on collateral review unless he establishes both "cause" for the default and "actual prejudice" from the asserted error. See *United States* v. *Frady*, 456 U.S. 152, 167 (1982); *Wainwright* v. *Sykes*, 433

U.S. 72, 87 (1977). There is, however, an exception to the cause-and-prejudice requirement in the "extraordinary case" where the prisoner makes a persuasive showing that he is "actually innocent." *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986).

This case concerns the scope of the actual innocence exception. The Court has explained that the "prototypical" example of actual innocence is when the prisoner is innocent of the criminal offense of which he has been convicted. *Sawyer* v. *Whitley*, 505 U.S. 333, 340 (1992). The Court has also applied the exception to capital sentencing and has held that review of a defaulted claim is permissible if a capital prisoner is actually innocent of the elements that render him statutorily eligible for the death penalty. *Id.* at 347. The question presented here is whether the actual innocence exception should be extended to noncapital sentencing. It should not.

A. "Actual Innocence" Is A Narrow Exception To The Rule That Defaulted Claims May Not Be Raised On Collateral Review

1. Habeas corpus has significant societal costs

The right to petition a federal court for a writ of habeas corpus is "one of the centerpieces of our liberty." *McCleskey* v. *Zant*, 499 U.S. 467 (1991). The writ, which has its roots in the English common law and is mentioned in the Constitution, Art. I, § 9, Cl. 2, serves as "a bulwark against convictions that violate fundamental fairness." *Engle* v. *Isaac*, 456 U.S. 107, 126 (1982) (citation and internal quotation marks omitted). Nonetheless, collateral review of criminal convictions entails "profound societal costs." *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (quoting *Smith* v. *Murray*, 477 U.S. 527, 539 (1986)).

Most significant, collateral review undermines the finality of criminal judgments. As a result, it "extends the ordeal of

trial for both society and the accused." *Isaac*, 456 U.S. at 126-127. The absence of finality interferes with the government's ability to exact retribution for crimes because it prevents the government from executing the moral judgments reflected in criminal convictions. *Thompson*, 523 U.S. at 556. The absence of finality also frustrates deterrence and rehabilitation. Effective deterrence depends on the expectation that punishment will be swift and sure, and successful rehabilitation requires the defendant to accept that he is justly subject to sanction and that he needs to be rehabilitated. See *Isaac*, 456 U.S. at 127-128 n.32.

Ready availability of habeas corpus also may diminish the sanctity of the constitutional safeguards against wrongful conviction and punishment by suggesting to participants in criminal prosecutions that there is less need to adhere to those safeguards during the prosecutions themselves because any errors will be corrected later. See *Isaac*, 456 U.S. at 127; *Thompson*, 523 U.S. at 555. Moreover, "writs of habeas corpus frequently cost society the right to punish admitted offenders" because the passage of time, with the consequent erosion of memory and dispersion of witnesses, may render retrial difficult or impossible. *Isaac*, 456 U.S. at 127-128; see *McCleskey*, 499 U.S. at 491. And collateral review consumes scarce federal judicial resources that might otherwise be devoted to resolving primary disputes. *Ibid.*

Collateral review of state convictions also threatens principles of comity and federalism. *Schlup* v. *Delo*, 513 U.S. 298, 318 (1995). Review of state court judgments by lower federal courts "frustrate[s] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Isaac*, 456 U.S. at 128. Comity and federalism costs are particularly high when a state prisoner seeks federal habeas review of a claim that the prisoner neglected to raise on direct review in the state courts. The state courts are deprived of the opportunity to correct their

own errors and to avoid federal intrusion. Moreover, the intrusion on state sovereignty is magnified because federal review not only revisits state court judgments but also denies the State the ability to enforce its procedural rules. See *id.* at 128-129; *Sykes*, 433 U.S. at 87-90.

2. Actual innocence is a rare exception to temper the usual rule that a defaulted claim cannot be raised on habeas

Because of the substantial costs of habeas review of defaulted claims, this Court has imposed stringent limits on a federal court's discretion to entertain such claims. Consideration of defaulted claims is permitted only where necessary to correct "a fundamentally unjust incarceration." *Isaac*, 456 U.S. at 135. A prisoner generally may obtain habeas review of a defaulted claim only if he can show "cause" for his default and "actual prejudice" from the asserted error. *Sykes*, 433 U.S. at 88-91; see *Frady*, 456 U.S. at 167 (applying same rule to federal prisoners seeking collateral relief).

The Court has expressed confidence that, in most cases, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." *Carrier*, 477 U.S. at 496 (quoting *Isaac*, 456 U.S. at 135). At the same time, the Court has recognized that there may be "an extraordinary case" in which it would be fundamentally unfair not to afford relief to a prisoner even though he cannot satisfy the cause-and-prejudice test. *Ibid.* Accordingly, the Court has held that a prisoner can obtain habeas review, even absent a showing of cause and prejudice, if he can establish that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Ibid.*; accord *Bousley* v. *United States*, 523 U.S. 614, 623 (1998).

The actual innocence exception is a "'safety valve' for the 'extraordinary case'" where it is necessary to prevent a fundamental miscarriage of justice. *Schlup*, 513 U.S. at 333

(O'Connor, J., concurring) (citation omitted). The Court has employed the same "actual innocence" safety valve in other circumstances where concerns about finality, comity, and scarce judicial resources require stringent limits on the power of the federal courts to grant collateral relief. In *Kuhlmann* v. *Wilson*, 477 U.S. 436, 454 (1986), a plurality of the Court reasoned that, under the then-existing version of 28 U.S.C. 2244(b), federal courts should not consider a successive habeas petition unless the prisoner supplements the claim raised in the petition with "a colorable showing of factual innocence." In *McCleskey*, the Court held that a prisoner filing a second habeas petition cannot obtain relief if he has "abused the writ" by including a claim that he could have brought in a prior petition unless he can show either cause and prejudice or that he is "innocent of the crime" of which he was convicted. 499 U.S. at 494. And, in *Thompson*, the Court held that a federal court may not recall its mandate to revisit the merits of an earlier decision denying habeas relief unless the prisoner has made "a strong showing of 'actua[l] innocen[ce]." 523 U.S. at 557 (quoting *Carrier*, 477 U.S. at 496).

The Court has "often emphasized 'the narrow scope' of the exception." *Thompson*, 523 U.S. at 559.[3] Indeed, the Court has explained that it tied the exception to the petitioner's innocence for the very purpose of ensuring that the exception would allow relief rarely and only for the "truly deserving." *Schlup*, 513 U.S. at 321. A prisoner has an "overriding 'interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.'" *Ibid.*

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[3] See *Schlup*, 513 U.S. at 321 ("rare" and applicable "only" to the "extraordinary case"); *Sawyer*, 505 U.S. at 341 ("very narrow"); *McCleskey*, 499 U.S. at 494 (applies to a "narrow class of cases"); *Dugger* v. *Adams*, 489 U.S. 401, 412 n.6 (1989) (applies only to the "extraordinary case"); *Carrier*, 477 U.S. at 496 (same); *Kuhlmann*, 477 U.S. at 454 (permits review "only in rare cases").

(quoting *Kuhlmann*, 477 U.S. at 452 (plurality opinion)). At the same time, petitions for collateral relief in which a prisoner can make that contention are extremely unusual. *Id.* at 321-322 & n.36.[4] The narrowness of the actual innocence exception thus reflects a careful balance between the societal interests in finality, comity, and conservation of judicial resources and the individual interest in doing justice in the extraordinary case. *Ibid.*; *id.* at 324.

B. A Prisoner Cannot Logically Be Described As Actually Innocent Of A Discretionary Noncapital Sentence

As this Court has noted, the "prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer*, 505 U.S. at 340. In traditional legal terminology as well, "innocence" generally refers to a defendant's lack of guilt of a substantive crime rather than his failure to deserve or his ineligibility for a particular sentence. See *Black's Law Dictionary* 708 (5th ed. 1979) (defining "innocent" as "[f]ree from guilt"); *id.* at 637 (defining "guilty" as "[h]aving committed a crime or tort" and "[r]esponsible for a delinquency, crime, or other offense").

Consistent with an offense-based understanding of actual innocence, the plurality in *Kuhlmann* described the exception as involving someone who is "innocent of the charge for which he was incarcerated." 477 U.S. at 452. The Court in *McCleskey* described the exception as covering someone who is "innocent of the crime" of which he was convicted.

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[4] "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. A prisoner who asserts his actual innocence of the crime of which he was convicted must show that, in light of all the evidence, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. The government may seek to rebut that showing with "any admissible evidence of * * * guilt," *Bousley*, 523 U.S. at 624, even if the evidence was not introduced at trial.

499 U.S. at 494. And the description in *Carrier* of the exception as involving the "*conviction* of one who is actually innocent" also appears to focus on innocence of a crime. 477 U.S. at 496 (emphasis added).

The "notion that one can be actually innocent of a sentence, although guilty of the underlying crime" is an "awkward" one. *Cristin* v. *Brennan*, 281 F.3d 404, 421 (3d Cir.), cert. denied, 537 U.S. 897 (2002). Unlike the determination whether someone has committed a crime, the imposition of sentence does not involve a decision whether the defendant is "guilty" or "innocent." Rather, the imposition of sentence entails the calculation of the punishment that befits the crime of which the defendant has already been found guilty.

This Court has applied the concept of actual innocence to capital sentencing. See *Smith*, 477 U.S. at 537-539; *Sawyer*, 505 U.S. at 339-347. In so doing, however, the Court has acknowledged that "[t]he phrase 'innocent of death' is not a natural usage of those words." *Id.* at 341. The Court has also explained that the concept of actual innocence "does not translate easily" into the sentencing context. *Smith*, 477 U.S. at 537. The Court therefore "struggled to define 'actual innocence'" of a capital sentence. *Schlup*, 513 U.S. at 323. The Court did so by "striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant" who is not guilty of the crime of which he has been convicted. *Sawyer*, 505 U.S. at 341. The Court concluded that "the 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty." *Id.* at 347. Therefore, the Court held that, to establish "actual innocence" of a death sentence, a prisoner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found [him] eligible for the death penalty under the applicable state law." *Id.* at 336.

The Court has, however, never applied the concept of "actual innocence" to a noncapital sentence. Indeed, the Court's discussion in *Sawyer* suggests that the Court did not understand the concept to apply in the noncapital sentencing context. That inference follows from the Court's assertions that "the case of a noncapital defendant" represents a "simpler situation" and that, "[i]n the context of a noncapital case, the concept of 'actual innocence' is easy to grasp." 505 U.S. at 341. Presumably, the Court was referring to what it had earlier described as the "prototypical example" of "where the State has convicted the wrong person of the crime." *Id.* at 340.

Concepts of "innocence" and "error" make little sense in traditional noncapital sentencing, in which the sentencer makes a highly discretionary choice among a range of possible sentences. See *Bullington* v. *Missouri*, 451 U.S. 430, 443-444 (1981); *United States* v. *DiFrancesco*, 449 U.S. 117, 136-137 (1980). Where there is no standard limiting the discretion of the sentencer, there is no "correct" sentence for the defendant. Thus, when a sentencing scheme is wholly discretionary, a defendant's "innocence" of his sentence can have no meaning independent of his innocence of the underlying crime.

C. Applying The Actual Innocence Exception To All Factual Findings With A Demonstrable Impact On Noncapital Sentences Would Encroach Unacceptably On Finality, Comity, And Scarce Judicial Resources

Contemporary noncapital sentencing sometimes involves significant limits on the sentencer's discretion. In the federal system, the discretion of sentencing judges is constrained by the United States Sentencing Guidelines. See *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). Factual findings at sentencing may raise the defendant's offense level or criminal history category and trigger a higher sentencing range within the statutory maximum. See Sentenc-

ing Guidelines Chs. 3, 4; Sentencing Table. In both the federal and the state systems, other factual findings may also constrain the sentencer's discretion. Certain facts, such the defendant's use of a firearm, may increase the mandatory minimum sentence specified by statute. See, *e.g.*, *Harris* v. *United States*, 536 U.S. 545 (2002). Other facts, such as those concerning prior convictions, may, as in this case, shift the applicable sentencing range or increase in the statutory maximum. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998).

It is easier to understand how the concept of an erroneous sentence could be applied to those more determinate sentencing schemes than to traditional discretionary sentencing. Specific factual findings can be identified as either true or false, and those findings may have a demonstrable impact on the defendant's sentence. Extension of the actual innocence exception to the myriad facts that have an impact on noncapital sentences would, however, unmoor the exception from its roots as a safety valve that applies only in extraordinary cases where necessary to prevent a fundamental miscarriage of justice.

If the actual innocence exception were to apply to any factual finding that has a demonstrable impact on a noncapital sentence, the exception would no longer be limited to situations involving a compelling injustice. As this Court has recognized, there is a "significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." *Schlup*, 513 U.S. at 326 n.44. A determination of guilt does more than authorize the government to impose punishment; it brands the person found guilty with a virtually indelible stigma in the eyes of his community and carries enormous collateral consequences. See, *e.g.*, *Ball* v. *United States*, 470 U.S. 856, 865 (1985); *Missouri* v. *Hunter*, 459 U.S. 359, 373 (1983) (Marshall, J., dissenting); *Price* v. *Georgia*, 398 U.S.

323, 331 n.10 (1970). For that reason, "the individual interest in avoiding injustice is most compelling in the context of actual innocence" of a substantive crime. *Schlup*, 513 U.S. at 324.

The lesser injustice involved in an erroneous sentence is reflected in the lower degree of constitutional protection applicable at sentencing. See *Schlup*, 513 U.S. at 326 n.44. The government must prove guilt of a substantive offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-364 (1970). Proof at trial is subject to the Confrontation Clause of the Sixth Amendment; and, for serious offenses, the defendant is entitled to a trial by jury. The sentencing process, in contrast, is "less exacting than the process of establishing guilt." *Nichols* v. *United States*, 511 U.S. 738, 747 (1994). Generally, a noncapital sentence may be based on facts found by the sentencing court by a preponderance of the evidence. See *Harris*, 536 U.S. at 558; cf. *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). And the Confrontation Clause does not limit the evidence that the sentencer may consider. Rather, the sentence may be based on "the fullest information possible concerning the defendant's life and characteristics." *Williams* v. *New York*, 337 U.S. 241, 247 (1949).

If the actual innocence exception were to apply to noncapital sentences, the exception would also no longer be limited to the extraordinary case. As this Court has noted, "experience has taught us that a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare." *Schlup*, 513 U.S. at 324. In contrast, challenges to the factual findings made at sentencing are not uncommon. Statistics maintained by the United States Sentencing Commission show, for example, that, in federal sentencing appeals in fiscal year 2001, defendants raised 532 challenges to the district court's determination of the quantity of drugs attributable to the defendant, and 361

challenges to the district court's determination of the defendant's role in the offense, as well as hundreds of other factual challenges. United States Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics* (2001) (Table 59) (available at <*http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm*>). If a defendant could claim actual innocence of any factual finding that led to an increase in his sentence, "the actual innocence exception would swallow the rule that issues not raised on appeal cannot be considered [on collateral attack] absent a showing of cause and prejudice to excuse the default." *United States* v. *Mikalajunas*, 186 F.3d 490, 494 (4th Cir. 1999), cert. denied, 529 U.S. 1010 (2000). Innocence claims "relating only to sentencing" thus pose a significantly greater "threat to judicial resources, finality, and comity" than claims of innocence of a substantive offense. *Schlup*, 513 U.S. at 324.

D. More Limited Applications Of The Actual Innocence Exception To Noncapital Sentencing Either Are Unworkable Or Would Still Impose Unacceptable Costs On The Criminal Justice System

1. There is no basis for limiting "actual innocence" to habitual or career offender findings or based on the length of the alleged sentencing error

Because an unlimited extension of the actual innocence exception to noncapital sentencing would impose unacceptable burdens on finality, comity, and scarce federal judicial resources, the Fourth and Fifth Circuits have proposed that the exception should apply only to sentencing findings concerning a defendant's habitual or career offender status. See *Mikalajunas*, 186 F.3d at 495; Pet. App. 16a. There is, however, no logical reason why a defendant should be able to establish "actual innocence" of a sentence that was enhanced based on habitual or career offender status but unable to establish "actual innocence" of a sentence that was enhanced based on some other factual finding. Other factual findings

are equally capable of being erroneous. And the effect of a habitual offender finding on the length of a defendant's sentence will not necessarily be greater than the effect of any other finding. Compare, *e.g.*, *Mikalajunas*, 186 F.3d at 492 (erroneous enhancement for restraint of victim resulted in 52 month increase) with *United States* v. *Maybeck*, 23 F.3d 888, 894 (4th Cir. 1994) (erroneous habitual offender enhancement resulted in increase of between three and 55 months), cert. denied, 517 U.S. 1161 (1996).

Other attempts at limiting the scope of an actual innocence exception for noncapital sentencing are also unlikely to prove workable. For example, it would not be practicable to limit the scope of the exception based on the extent of the increase in the defendant's sentence. As this Court noted in rejecting a length-of-sentence limitation on "prejudice" for ineffective-assistance-of-counsel claims, "there is no obvious dividing line by which to measure how much longer a sentence must be for the increase to constitute substantial prejudice. Indeed, it is not even clear if the relevant increase is to be measured in absolute terms or by some fraction of the total authorized sentence." *Glover* v. *United States*, 531 U.S. 198, 204 (2001).

2. The actual innocence exception should not be extended to recidivist findings that increase the statutory maximum sentence

A slightly more feasible way to limit the scope of the actual innocence exception, if it were applied to noncapital sentencing, would be to apply the exception only to recidivist sentencing factors that increase the statutory maximum sentence. But that limitation, although it would be administrable, would still impose unacceptable costs on the criminal justice system.

a. There is a logical basis on which to distinguish between findings that raise the statutory maximum sentence and other findings that result in a longer sentence, such as

findings that increase the mandatory minimum or the applicable sentencing range under the federal Sentencing Guidelines. Unlike a finding that increases the statutory maximum, a finding that increases the mandatory minimum sentence does not make the defendant eligible for any sentence for which he was not already eligible. Similarly, because of the robust departure authority under the Guidelines, a defendant may be eligible to receive a sentence above his sentencing range, see 18 U.S.C. 3553(b); *Koon* v. *United States*, 518 U.S. 81, 92-96, 98 (1996), but he is never eligible to receive a sentence greater than the statutory maximum.

Moreover, the actual innocence exception would appear already to apply to facts other than recidivism that increase the statutory maximum sentence. Such facts are elements of an aggravated substantive offense—either because the legislature has designated them as offense elements or because the Constitution requires that they be treated that way. In *Apprendi*, the Court held that, as a matter of constitutional law, "[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." 530 U.S. at 490. The Court explained that such a fact is "the functional equivalent of an element of a greater offense." *Id.* at 494 n.19.

The actual innocence exception likely applies to the situation where a defendant who has been convicted of an aggravated offense later establishes that a factual finding necessary to support the greater offense was erroneous. In that circumstance, the defendant is reasonably understood as "actually innocent" of the greater offense even though he remains guilty of a lesser included offense. See, *e.g.*, *In re Minarik*, 166 F.3d 591, 607 (3d Cir. 1999) (assuming that "actual innocence" applies to the situation where new evidence would show the petitioner not guilty of first degree murder though guilty of some lesser offense). Cf. *Frady*, 456

U.S. at 171 (discussing the possibility that the defendant could be "innocent" of murder although guilty of manslaughter).

Application of the actual innocence exception to defendants who are innocent of an aggravated offense but guilty of a lesser offense is somewhat more difficult to justify than application of the exception to defendants who are entirely innocent. It imposes a greater burden on the finality of criminal convictions, state court autonomy, and judicial resources. In addition, the injustice of an erroneous conviction for an aggravated offense is less severe than the injustice of the erroneous conviction of someone who is "entirely innocent." *Schlup*, 513 U.S. at 325. Nonetheless, as described above, our criminal justice system accords special weight to the determination of guilt or innocence of a substantive offense, and criminal law "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." *Mullaney* v. *Wilbur*, 421 U.S. 684, 697-698 (1975). The constitutional protections associated with the determination of guilt or innocence apply with full force whether the question is the defendant's guilt of any offense or his guilt of an aggravated offense. See *Apprendi*, *supra*. Likewise, application of the actual innocence exception to aggravated offenses does not upset the balance between the societal interests in finality, comity, and conservation of judicial resources and the individual interest in protection from fundamental unfairness embodied by the exception.

b. Not all facts that increase the statutory maximum sentence, however, are offense elements. The Court expressly limited its holding in *Apprendi* to facts that do not concern recidivism. See *Apprendi*, 530 U.S. at 487-490. That limitation reflects the fact that there is a long tradition of treating recidivism as a sentencing factor rather than an offense element, as the Court recognized in *Almendarez-Torres*. The balance between the societal interest in obtaining

closure to the criminal process and the individual interest in avoiding fundamental injustice would be upset by extension of the actual innocence exception to facts that, even though they expose the defendant to a longer term of imprisonment, are sentencing factors rather than offense elements.[5]

Extension of the actual innocence exception to such recidivist sentencing enhancements is not justified by the considerations that support applying the exception to aggravated offenses. Imposition of a sentencing enhancement does not involve a finding of guilt of a greater offense, which, as explained above, carries a unique stigma and collateral consequences. Moreover, because recidivist sentencing enhancements are quite common, extension of the actual innocence exception to those enhancements would have significant costs. At least 49 States and the District of Columbia have recidivism laws that provide for increases in statutory maximum sentences.[6] The federal government also has

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[5] A holding that the actual innocence exception applies only to sentencing factors that raise the statutory maximum would be different from the Fourth and Fifth Circuit's rule applying the exception to *all* habitual and career offender findings. An exception limited to maximum-increasing factors would not apply to habitual or career offender findings that do not increase the statutory maximum, such as findings under Sentencing Guideline § 4B1.1. See *Maybeck*, *supra* (Fourth Circuit decision applying exception to habitual offender finding under Guidelines).

[6] See, *e.g.*, Ala. Code § 13A-5-9 (Supp. 2001); Alaska Stat. § 12.55.125(*l*) (Michie 2002); Ariz. Rev. Stat. Ann. § 13-604 (West 2001); Ark. Code Ann. § 5-4-501 (Michie Supp. 1995); Cal. Penal Code § 667 (West 1999); Colo. Rev. Stat. Ann. § 16-13-101 (2001); Conn. Gen. Stat. Ann. § 53a-40 (West 2001); Del. Code Ann. tit. 11, § 4214 (2003); D.C. Code Ann. § 22-1804 (2001); Fla. Stat. Ann. § 775.084 (West Supp. 2003); Ga. Code Ann. § 17-10-7 (1997); Haw. Rev. Stat. § 706-661 (Supp. 2000); Idaho Code Ann. § 19-2514 (West 1997); 720 Ill. Comp. Stat. Ann. 5/33B-1 (West 2003); Ind. Code Ann. § 35-50-2-8 (West 2003); Iowa Code Ann. § 902.9 (West Supp. 2003); Kan. Stat. Ann. § 21-4504 (1995); Ky. Rev. Stat. Ann. § 532.080 (Michie 1999); La. Rev. Stat. Ann. § 15:529.1 (West Supp. 2003); Me. Rev. Stat. Ann. tit. 17-A, § 1252(4-A) (West Supp. 2002); Md. Code Ann., Crim. Law §

many recividist provisions that provide for increases in the statutory maxima.[7]

Qualification for enhancements under recidivist provisions often involves a number of subsidiary findings, which are sometimes quite technical. For example, in this case, the erroneous factual finding on which petitioner bases his actual innocence claim is not the existence of his two prior felony convictions but rather the sequential nature of those convictions, *i.e.*, that one of the convictions became final before he committed the second. Application of the actual innocence exception to recidivist enhancements that raise statutory maximum sentences would thus permit belated reexamination in any number of cases of numerous and sometimes technical findings that relate only to the length of the habeas petitioner's sentence. The exception would no longer

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14-101 (2002); Mass. Gen. Laws ch. 266, § 40 (2002); Mich. Comp. Laws Ann. § 769.12 (West 2000); Miss. Code Ann. § 99-19-83 (1999); Mo. Ann. Stat. § 558.016 (West 1999); Mont. Code Ann. § 46-18-219 (2001); Neb. Rev. Stat. Ann. § 29-2221 (Michie 2003); Nev. Rev. Stat. Ann. §§ 207.010, 207.012, 207.014 (Michie 2001); N.H. Rev. Stat. Ann. § 651:6 (Supp. 2003); N.J. Stat. Ann. § 2C:43-7.1 (West 1995); N.M. Stat. Ann. § 31-18-23 (Michie Supp. 2002); N.Y. Penal Law § 70.08 (McKinney 1998); N.C. Gen. Stat. §§ 14-7.7, 14-7.8, 14-7.12 (2002); N.D. Cent. Code § 12.1-32-09 (Supp. 2003); Ohio Rev. Code Ann. §§ 2929.11, 2929.14(D)(2)(b) (Anderson 2002); Okla. Stat. Ann. tit. 21, § 51.1 (West 2002); Or. Rev. Stat. § 161.725 (2001); 42 Pa. Cons. Stat. Ann. § 9714 (West Supp. 2003); R.I. Gen. Laws § 12-19-21 (2002); S.C. Code Ann. § 17-25-45 (Law Co-op Supp. 2002); S.D. Codified Laws § 22-7-8 (Michie 1998); Tenn. Code Ann. §§ 40-35-107, 40-35-120 (2003); Tex. Penal Code Ann. §§ 12.35(c), 12.42 (West 2003); Utah Code Ann. § 76-3-203.5 (Supp. 2003); Vt. Stat. Ann. tit. 13, § 11 (1998); Va. Code Ann. § 19.2-297.1 (Michie 2000); Wash. Rev. Code Ann. § 9.94A.570 (West 2003); W. Va. Code § 61-11-18 (2000); Wis. Stat. Ann. § 939.62 (West 1996 & Supp. 2002); Wyo. Stat. Ann. § 6-10-201 (Michie 1998).

[7] See, *e.g.*, 18 U.S.C. 924(e), 1028(b)(3)(C), 1365(f)(2), 1864(c), 2247(a), 2251(d), 2252(b), 2252A(b), 2260(c)(2), 2701(b)(1)(B) and (b)(2)(B); 21 U.S.C. 841(b)(2), 842(c)(2)(B), 843(d)(1) and (2), 844(a), 849(c), 859(b), 860(b), 861(c), 960(b), 962.

be limited to the "extraordinary case"; nor would it be limited to instances involving a fundamental miscarriage of justice.

3. Existing means of overcoming procedural defaults are adequate without creating a new category of "actual innocence" challenges

Because there is no administrable way to apply the actual innocence exception to noncapital sentencing that will not result in unjustified societal costs, the Court should hold that the exception does not apply to noncapital sentencing. Such a holding, however, will not mean that habeas petitioners will never be able to raise procedurally defaulted claims. To the contrary, prisoners will still be able to raise defaulted claims if they satisfy the cause-and-prejudice standard.

The cause-and-prejudice standard will permit review of defaulted sentencing errors where review is warranted. A prisoner will satisfy the cause-and-prejudice standard whenever he would have had a viable actual innocence claim, and his default resulted from ineffective assistance of counsel. For example, respondent may have a valid claim that his trial counsel was ineffective in failing to object to the lack of evidence to support the habitual offender enhancement in this case. Indeed, respondent raised that claim in the district court. The magistrate judge declined to rule on the claim because she recommended relief from the erroneous enhancement based on actual innocence. See Pet. App. 8a n.9, 51a. If respondent preserved the ineffective assistance argument, he may well be able to obtain review of his defaulted claim on remand.

Like actual innocence, cause and prejudice is a "gateway" through which a prisoner must pass to obtain review of an independent underlying claim. See *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993). Even if respondent passes through the gateway, he must prove an underlying claim of a "violation of the Constitution or laws or treaties of the United States" to

obtain habeas relief. 28 U.S.C. 2241(c)(3). If respondent preserved his ineffective assistance claim, that claim could, in addition to supplying cause for his default, serve as the underlying claim entitling him to habeas relief.[8]

E. This Court's Cases Applying The Actual Innocence Exception To The Death Penalty Do Not Require That The Exception Also Apply To Noncapital Sentencing

1. This Court's decisions applying the actual innocence exception in the death penalty context do not require extension of the exception to noncapital sentencing. To the contrary, the death penalty decisions are consistent with the principle that a defendant can be actually innocent only of a substantive offense. In light of the Court's recent decisions applying *Apprendi* in the capital sentencing context, the cases recognizing actual innocence of the death penalty are best understood as involving actual innocence of an aggravated offense.

In *Sawyer*, the Court held that a defendant can show actual innocence of the death penalty only if he shows that no

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[8] The court below did not grant relief on that claim but on a claim of insufficient evidence to support the sentencing enhancement. See Pet. App. 17a-19a. This Court has recognized a constitutional claim of insufficient evidence to support conviction of an offense. See *Jackson* v. *Virginia*, 443 U.S. 307 (1979). As far as the government is aware, however, the Court has not yet recognized a comparable claim based on insufficient evidence to support a sentencing enhancement. The Court has held that it violates due process for a defendant who is not represented by counsel to be sentenced based on "assumptions concerning his criminal record which were materially untrue." *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948). The Court has also ordered resentencing where the sentence was "founded at least in part upon misinformation of constitutional magnitude" because it was based on prior convictions that were imposed in cases in which the defendant was not represented by counsel. See *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); cf. *Custis* v. *United States*, 511 U.S. 485 (1994). But petitioner was represented by counsel at his sentencing and in the cases that resulted in his prior felony convictions.

reasonable jury would have found the aggravating circumstances necessary for him to be eligible for the death penalty under state law. 505 U.S. at 336. At the time that the Court decided *Sawyer*, the Court viewed those aggravating circumstances as "elements of the capital sentence" rather than elements of an aggravated offense. See *id.* at 345. Nonetheless, the Court decided that the actual innocence inquiry must focus on the "elements that render a defendant eligible for the death penalty" (*id.* at 347) because the Court was "striv[ing] to construct an analog to the simpler situation represented by the case of a noncapital defendant" innocent of a crime (*id.* at 341).

Recent cases have confirmed the Court's intuition in *Sawyer* that the aggravating circumstances that render a defendant statutorily eligible for a death sentence are analogous to the elements of a substantive offense. In *Ring* v. *Arizona*, 536 U.S. 584 (2002), the Court held that aggravating circumstances that cause a defendant convicted of first-degree murder to be eligible for the death penalty must be found by a jury because they "operate as 'the functional equivalent of an element of a greater offense.'" *Id.* at 609 (quoting *Apprendi*, 530 U.S. at 494 n.19). As a plurality of the Court explained in *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 111-112 (2003), "in the post-*Ring* world," first-degree murder "is properly understood to be a lesser included offense of 'first-degree murder plus aggravating circumstance(s).'" Thus, the Court's cases applying the actual innocence exception to capital sentencing are properly understood as applying the exception to the situation in which a defendant is innocent of the greater offense of "first degree murder plus aggravating circumstance(s)." *Ibid.*[9]

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[9] In *Sawyer*, the Court held that a defendant must show actual innocence of a capital sentence by "clear and convincing evidence." 505 U.S. at 348. In *Schlup*, however, the Court held that a prisoner may prove actual

A defendant cannot, however, claim actual innocence of a substantive offense based on the fact that his noncapital sentence was enhanced by an erroneous factual finding that is not an element of any offense. For that reason, *Sawyer* and the Court's other cases applying the actual innocence exception to the death penalty do not support application of the exception to noncapital sentencing.

2. The death penalty cases also do not support application of the actual innocence exception to noncapital sentencing for a further reason. This Court has frequently recognized that there is a "qualitative difference between death and other penalties" because "the death penalty is unique in both its severity and its finality." *Monge* v. *California*, 524 U.S. 721, 732 (1998) (citations and internal quotation marks omitted). The erroneous imposition of a death sentence is therefore a far greater injustice than a noncapital sentencing error. See *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (noting that a death sentence "differs more from life imprisonment than a 100-year prison term differs from one of only a year or two"). In addition, death sentences are imposed far less frequently than ordinary noncapital sentences. As a result, application of the actual innocence exception in the death penalty context pre-

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innocence of the underlying murder by only a preponderance of the evidence. See 513 U.S. at 327. The higher standard of proof required in *Sawyer* may reflect the Court's view at the time that death eligibility factors were sentencing considerations rather than elements of a distinct substantive offense. Alternatively, the higher standard of proof may reflect the view that habeas courts should require a greater degree of certainty that an injustice has been done when a defendant claims innocence of only an aggravated offense and does not challenge his guilt of a lesser included offense. The latter explanation is consistent with the fact that the Court in *Sawyer* applied the "clear and convincing evidence" standard to the claim that the defendant was innocent of arson, which was not only an eligibility factor but also an element of first-degree murder. See *Schlup*, 513 U.S. at 326 & n.43 (citing *Sawyer*, 505 U.S. at 342 n.8).

sents a lesser burden on finality, comity, and judicial resources than would application of the exception to noncapital sentencing.

Given the severe injustice entailed by an erroneous death sentence and the infrequency with which capital punishment is imposed, applying the actual innocence exception to capital sentencing preserves the balance reflected in the exception between the interest in obtaining closure to the criminal process and the interest in ensuring justice in the individual case. An erroneous noncapital sentence, however, is a qualitatively less significant injustice. Claims of noncapital sentencing error are also likely to occur with greater frequency because of the vastly greater number of noncapital sentences. The balance of interests thus weighs against extension of the actual innocence exception to noncapital sentencing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General

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