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Note

To Be or Not To Be? The Actual Innocence Exception in Noncapital Sentencing Cases

James J. Sticha*

Missouri inmate Jack Higgins petitioned for federal habeas corpus review alleging that the sentencing court failed to apply an amendment to Missouri’s drug laws that reduced the maximum possible sentence for his crime. While acknowledging that the sentencing court made a mistake, the United States Court of Appeals for the Eighth Circuit denied review of Higgins' claim because he failed to raise the issue in the state trial court, on state appeal, or in an application for state post-conviction relief. Higgins' failure to follow the applicable state procedural rules in raising the claim constituted a procedural default, which federal habeas courts normally will not review.

Previously, in Jones v. Arkansas, the Eighth Circuit excused a federal habeas petitioner’s procedural default by

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1. The writ of habeas corpus is a form of collateral attack in which a court determines whether a prisoner is unlawfully deprived of his or her liberty. BLACK'S LAW DICTIONARY 709 (6th ed. 1991) [hereinafter BLACK'S]. Title 28 U.S.C. § 2241 empowers federal courts to grant the writ of habeas corpus and provides that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States. . . ." 28 U.S.C. § 2241 (1994).
3. Id. at 441. District Judge Floyd Gibson noted in dissent that "nobody has seriously contended that the correct statute was used to sentence Higgins." Id. at 442 (Gibson, J., dissenting).
4. Id. at 441. Generally, a reviewing court will refuse to consider issues not raised in a lower court. Hormel v. Helvering, 312 U.S. 552, 556 (1941).
7. 929 F.2d 375 (8th Cir. 1991).
invoking the actual innocence exception. This exception allows a federal habeas court to excuse a procedural default to correct a fundamentally unjust incarceration. In Jones the state trial court sentenced the defendant under the wrong statute. The Eighth Circuit reversed and remanded the case, noting that it is difficult to think of a person more innocent of a sentence than a defendant sentenced under an inapplicable statute. The same appellate court, however, refused to apply the actual innocence exception in Higgins' case despite recognizing that he received a sentence exceeding the maximum permitted by state law. The apparent inconsistency of these two cases exemplifies the problems that courts experience in applying the actual innocence exception to noncapital sentencing cases.

The actual innocence exception emerged in cases where federal habeas petitioners asserted that the wrong person was convicted of the crime. Subsequently, the Supreme Court extended the actual innocence exception to capital sentencing cases, but recognized that the exception did not translate easily

8. Id. at 381.
9. Id. (citing Smith v. Murray, 477 U.S. 527, 537 (1986)). The trial court in Jones found that the defendant had two valid previous convictions and sentenced the defendant under an amended version of the state's habitual offender statute. 929 F.2d at 377. The habitual offender statute applicable at the time of defendant's offense, however, required more than two previous felony convictions. Id. at 378. On federal habeas corpus appeal, the Eighth Circuit invoked the actual innocence exception to hear the defendant's claim that his sentence violated the Ex Post Facto Clause of the Constitution. Id. at 380. See U.S. CONST., art. I, § 10, cl. 2.
10. Id. at 378 (noting that the state conceded it had used the wrong statute).
11. Id. at 381.
12. Higgins argued that his case required application of the Jones principle that a person sentenced under an inapplicable statute is actually innocent of the sentence. Higgins v. Smith, 991 F.2d 440, 441 (8th Cir. 1993).
13. Several facts in Higgins differed from the facts of Jones. First, the decision in Sawyer v. Whitley, 505 U.S. 333 (1992), may have overruled Jones. See Higgins, 991 F.2d at 441 (noting that Jones may no longer be "good law" in the context of a noncapital case). Second, Higgins did not allege a constitutional violation. See Herrera v. Collins, 506 U.S. 390, 400 (1993) (noting that the claim of actual innocence requires a showing of a constitutional violation). Finally, the Jones court relied on the bifurcated nature of the trial in extending the actual innocence exception. See Jones, 929 F.2d at 381 n.16 (stating that the trial-like proceedings in the habitual offender sentencing case resembled capital sentencing proceedings). But see United States v. Maybeck, 23 F.3d 888 (4th Cir. 1994) (applying the actual innocence exception in a post-Sawyer case without relying on a constitutional violation or a bifurcated trial).
into the context of sentencing because it requires characterizing a defendant as innocent of a death sentence rather than innocent of the underlying crime. The Supreme Court has not ruled on whether a defendant can be "innocent" of a noncapital sentence.

This Note argues that the actual innocence exception should extend to certain noncapital sentencing cases, but that the exception's narrow scope requires an extremely limited extension. Part I reviews the history of habeas corpus law and examines the actual innocence exception and its extension to capital sentencing proceedings. Part II discusses the actual innocence exception in the context of noncapital sentencing proceedings. Part III analyzes the debate over the extension of the actual innocence exception to noncapital sentences, delineates the proper scope of review in noncapital sentencing cases, and discusses the ramifications of extending the actual innocence exception to these cases. This Note concludes that the benefits associated with narrowly extending the exception to certain noncapital sentencing cases outweigh the added administrative burdens.

I. THE HISTORY AND DEVELOPMENT OF THE ACTUAL INNOCENCE EXCEPTION

A. THE WRIT OF HABEAS CORPUS

The writ of habeas corpus provides a post-conviction procedure which enables prisoners to challenge the legal authority under which they are detained. Known as the "Great Writ," the writ of habeas corpus holds an honored position in American jurisprudence because it redresses denials of due process and acts as a "bulwark against convictions that

16. Sones v. Hargett, 61 F.3d 410, 419 n.16 (5th Cir. 1995).
17. See BLACK'S, supra note 1, at 709 (stating that "t]he primary function of the writ is to release from unlawful imprisonment"); see also supra note 1 and accompanying text (discussing the statutory requirements of habeas corpus).
18. See, e.g., Ex Parte Bollman, 8 U.S. (4 Cranch) 75, 95 (1807) (describing the writ of habeas corpus as the "great writ").
19. See Fay v. Noia, 372 U.S. 391, 402 (1963) (discussing the writ's role in vindicating due process violations); see also Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (granting relief because excessive publicity overcame the defendant's trial, violating due process); Moore v. Dempsey, 261 U.S. 86, 90-91 (1923) (finding that a judgment of death or imprisonment based upon a verdict from
violate fundamental fairness. The framers of the Constitution included the writ in Article I, Section 9 of the Constitution, assuring that the "Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The Judiciary Act of 1789 empowered federal courts to grant the writ as a remedy for prisoners held in the federal government's custody. In 1867, Congress extended the scope of federal habeas corpus to include prisoners held in a state's custody by authorizing federal courts to grant the writ in all cases in which a person is incarcerated in violation of the Constitution. With the exception of the Fourth Amendment, the writ today extends to virtually all constitutional claims that follow the proper procedural rules.

Federal habeas corpus review, however, is a controversial and volatile issue. The large number of frivolous habeas proceedings dominated by a mob violated constitutional rights of those convicted).

24. State prisoners alleging a Fourth Amendment violation are not entitled to federal habeas review if the state provided a full and fair hearing of their Fourth Amendment claims. Stone v. Powell, 428 U.S. 465, 494 (1976). Courts have not extended the Stone rule to other constitutional violations. See Withrow v. Williams, 113 S. Ct. 1745, 1748 (1993) (refusing to apply Stone to violations of Miranda safeguards); Rose v. Mitchell, 443 U.S. 545, 560-61 (1979) (refusing to extend the Stone rationale to claims of racial discrimination in the selection of a grand jury); Ira P. Robbins, Whither (or Wither) Habeas Corpus? Observations on the Supreme Court's 1985 Term, 111 F.R.D. 265, 292 (1986) ("Justice Brennan's fear that the reasoning of [Stone] would extend beyond exclusionary-rule claims has not been realized."). Justice Black explained the reasoning for differential treatment Fourth Amendment claims receive on federal habeas review:

A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty. Kaufman v. United States, 394 U.S. 217, 237 (1969) (Black, J., dissenting).

25. See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 364 (5th ed. 1994) [hereinafter WRIGHT, FEDERAL COURTS] (acknowledging that constitutional violations entitle prisoners to relief unless violations are harmless).
26. Id. at 366 ("Federal habeas corpus for state prisoners is, and always has been, a controversial and emotional-ridden subject.").
corpus petitions places a heavy burden on federal courts. In addition, state courts resent a single federal judge reviewing decisions considered by every level of the state's judicial process. The principles of comity and finality require federal courts to carefully examine the proper scope of federal habeas corpus law because extending federal habeas review increases costs to society, the accused, the judicial system, and our federal system.

27. See Brown v. Allen, 344 U.S. 443, 536 (1953) (stating that "floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own"); 17A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4261, at 269 (2d ed. 1988) (noting that federal judges resent the large number of frivolous federal habeas petitions filed). In 1992, the number of federal habeas petitions filed exceeded 12,000, and the writ was granted in at most, four percent of the cases. See WRIGHT, FEDERAL COURTS, supra note 25, at 366-67 (discussing the great number of applications for habeas corpus).


29. Comity, in this context, refers to federal courts giving effect to the judicial decisions of state courts out of respect and deference to the state courts. BLACK'S, supra note 1, at 267.


31. See Engle v. Isaac, 456 U.S. 107, 127-28 (1982) ("[T]he Great Writ imposes special costs on our federal system. . . . Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."); Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring) (stating that conceding the possibility of error in all trials undermines the stability and effectiveness of the judicial system); Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting) (noting that both criminal defendants and society have an interest in seeing litigation come to an end because then attention can be focused on rehabilitation).

The costs of federal habeas review continually prompt proposals for legislation restricting its scope. See Lay, supra note 27, at 1021-22 ("Over the past few years, proponents of new limitations to habeas corpus have continued to pursue their agenda with proposals to the Congress."). These proposals garner growing support among those believing the costs of federal habeas review outweigh the benefits. See WRIGHT, FEDERAL COURTS, supra note 25, at 367 (discussing the growing call for a modification of the writ's scope).
B. THE EMERGENCE OF THE CAUSE AND PREJUDICE STANDARD FOR SUCCESSIVE, ABUSIVE, AND PROCEDURALLY DEFAULTED CLAIMS

Federal habeas petitioners bringing successive, abusive, or procedurally defaulted claims have forced federal courts to examine closely the costs and benefits of extending the scope of habeas review to these claims. A successive petition raises claims identical to those raised and rejected on the merits in a prior federal habeas petition. An abusive petition raises claims available but not relied on in a prior habeas petition. Procedurally defaulted claims occur when state prisoners fail to comply with state procedural rules in raising their claims. Extending review to procedurally defaulted claims is particularly troubling because it allows federal courts to hear a state claim without the opportunity for state court review. In Fay v. Noia, the Supreme Court liberally construed federal courts' power to hear procedurally defaulted claims by holding that federal habeas relief was available as long as petitioners did not deliberately bypass state procedures. The Court limited the sweeping breadth of the Noia decision, however, in Wainwright v. Sykes. In Wainwright, the Court rejected the deliberate bypass standard of Noia and adopted a rule requiring federal habeas petitioners to show cause for failing to comply with state rules that required contemporaneous objections at trial, and to show prejudice from an alleged constitutional error. The Court viewed this "cause and

32. Successive, abusive, and procedurally defaulted claims are distinct concepts, but are treated alike under the cause and prejudice standard and actual innocence standard. See, e.g., Sawyer v. Whitley, 505 U.S. 333, 338 (1992).
34. Id.
35. See, e.g., Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977) (stating that petitioner's failure to timely object at his state trial constituted a procedural default).
38. See id. at 439 (stating that federal courts may deny habeas writs if petitioners deliberately bypass state procedures).
40. Id. at 85, 87-88.
prejudice” standard as protecting against a petitioner being a “victim of a miscarriage of justice.” Subsequently, the Supreme Court extended the cause and prejudice standard to all state procedurally defaulted claims, as well as to successive and abusive habeas petitions.

The cause and prejudice standard evolved in the context of procedural defaults resulting from defense attorneys’ failure to assert claims at the state level. Typically, to show cause for a default, a petitioner must rely on an “ineffectiveness of trial counsel” argument. Proving ineffective counsel, however, is extremely difficult because only the most egregious and obvious errors by counsel support a finding of ineffective counsel. Attorney errors insufficient to render counsel

41. Id. at 90-91.
44. See Wainwright, 433 U.S. at 104 (Brennan, J., dissenting) (stating that “the ordinary procedural default is born of the inadvertence, negligence, inexperience, or incompetence of trial counsel”).
45. See John C. Jeffries, Jr. & William J. Stuntz, Ineffective Assistance and Procedural Default in Federal Habeas Corpus, 57 U. CHI. L. REV. 679, 681-90 (1990) (discussing the standards used to determine whether the cause and prejudice standard has been met, and recognizing ineffective counsel as “cause” for procedural defaults).
46. See id. at 682 (noting that “only a small percentage of defaulted claims” involve attorney error that is construed as ineffective counsel); Jordan Steiker, Ineffective and Federal Habeas, 41 UCLA L. REV. 303, 335 (1993) (stating that empirical studies confirm that few habeas petitioners have been able to show ineffective counsel).
47. Strickland v. Washington, 466 U.S. 668, 689-91 (1984). A strong presumption exists that counsel’s conduct is reasonable. Id. at 689. This standard is extraordinarily deferential to the attorney’s strategic decision-making. Steiker, supra note 46, at 334.

In Romero v. Lynaugh, defense counsel’s entire presentation at the sentencing stage of a capital trial consisted of the following:

Defense Counsel: . . . Jesse?
The Defendant: Sir?
Defense Counsel: Stand up.

You are an extremely intelligent jury. You’ve got that man’s life in your hands. You can take it or not. That’s all I have to say. 884 F.2d 871, 875 (5th Cir. 1989). The Fifth Circuit held that the presentation did not amount to ineffective counsel, stating that “[h]ad the jury returned a life sentence the strategy might well have been seen as a brilliant move.” Id. at 877.
ineffective fail to satisfy the cause prong. The stringent requirements for establishing ineffective counsel virtually guarantee that petitioners will fail to satisfy the cause prong.

The prejudice prong of the cause and prejudice test is equally difficult to satisfy. To show prejudice, a petitioner normally must demonstrate that the alleged trial errors substantially disadvantaged the petitioner and infected the entire trial with constitutional error. For example, in the typical claim of ineffective counsel, a petitioner must show that but for counsel's error, the outcome of the proceedings would have been different. Without defining "cause' and 'prejudice," the Supreme Court delineated stringent requirements for its satisfaction.

C. ACTUAL INNOCENCE: AN EXCEPTION TO THE CAUSE AND PREJUDICE STANDARD

The realization that some victims of a wrongful conviction would fail to meet the cause and prejudice standard led the Court to create a separate "miscarriage of justice," or "actual

48. See Jeffries & Stuntz, supra note 45, at 682 (noting that attorney errors not constituting ineffective counsel are not "cause"); see also Coleman v. Thompson, 501 U.S. 722, 752-54 (1991) (holding that attorney's errors in post-conviction proceedings cannot constitute cause because petitioners possess no constitutional right to an attorney in post-conviction proceedings); Engle v. Isaac, 456 U.S. 107, 130-34 (1982) (rejecting an argument that the cause test was satisfied when defense counsel failed to object, believing an objection was futile). But see Reed v. Ross, 468 U.S. 1, 1-15 (1984) (holding that the cause test is satisfied if a claim was so novel that it was not reasonably available to defense counsel).

49. See supra notes 46-48 and accompanying text (discussing the inability of petitioners to demonstrate ineffective counsel).

50. See, e.g., United States v. Frady, 456 U.S. 152, 169-72 (1982) (rejecting the argument that first degree murder instructions that allegedly relaxed the government of the burden of proving malice were not prejudicial error because petitioner presented no evidence that he acted without malice); Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (stating that an erroneous jury instruction satisfies the prejudice prong only if it "so infect[s] the entire trial that the resulting conviction violates due process" (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)).

51. Strickland, 466 U.S. at 694.

52. See Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (refraining from defining "cause" and "prejudice").

innocence,” exception. This exception allows a petitioner to gain federal habeas review of a successive, abusive, or defaulted claim without satisfying the cause and prejudice standard. The actual innocence exception applies to the narrow class of cases in which a petitioner shows that a constitutional violation probably resulted in the conviction of an innocent person. Invoking the concept of actual innocence helped alleviate concerns that innocent people might be punished because of errors in their trials.

Typically, a state prisoner raises an actual innocence claim by asserting that the state wrongly convicted the prisoner of a crime. A free-standing claim of actual innocence, however,

54. The terms “miscarriage of justice” and “actual innocence” are synonymous. See, e.g., Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (stating that “we elaborated on the miscarriage of justice, or ‘actual innocence,’ exception”).

55. See id. at 339 (“We have previously held that even if a state prisoner cannot meet the cause and prejudice standard, a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a ‘miscarriage of justice.’”); see also Steiker, supra note 46, at 342-43 (noting cases holding that the miscarriage of justice exception applies to successive, abusive, and procedurally defaulted petitions).

56. Murray v. Carrier, 477 U.S. 478, 496 (1986). Requiring a showing of actual innocence conformed to the views of judges and commentators believing that allowing habeas review in the absence of a showing of innocence was illogical. See, e.g., Kaufman v. United States, 394 U.S. 217, 242 (1969) (Black, J., dissenting) (“I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt.”); Friendly, supra note 30, at 142 (“[W]ith a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.”).

57. See Schlup v. Delo, 115 S. Ct. 851, 866 (1995) (“Concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.”); Bruce Ledewitz, Habeas Corpus as a Safety Valve for Innocence, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 421 (1991) (noting that the thought of punishing innocent prisoners simply because they failed to comply with state procedural rules troubled some Supreme Court Justices, and the actual innocence exception helped alleviate the concern). Some commentators contend that it is better to let ninety-nine guilty people go free than to have one innocent person condemned. Cf. Jon O. Newman, Beyond “Reasonable Doubt,” 68 N.Y.U. L. REV. 979, 980-81 (1993) (noting the differing ratios of guilty people acquitted to innocent people convicted that courts find acceptable).

does not allow a federal court to review a habeas petition. A federal habeas petitioner must also raise a constitutional claim because "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." A claim of actual innocence is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." The Supreme Court recently determined that a petitioner claiming to be innocent of a crime and raising a procedurally barred constitutional violation must show that the constitutional violation "probably resulted" in the conviction of an innocent person.

59. A free-standing claim of actual innocence occurs when a petitioner contends to be innocent, but does not accompany this contention with a constitutional claim. Herrera, 506 U.S. at 404-05.

60. Id. at 400. But see id. at 417 (assuming arguendo that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution . . . unconstitutional, and would warrant federal habeas relief if there were no state avenue open to process such a claim"); id. at 426 (O'Connor, J., concurring) (reserving "the question whether federal courts may entertain convincing claims of actual innocence" absent a separate constitutional violation); id. at 429 (White, J., concurring) (stating that a truly persuasive showing of actual innocence would render an execution unconstitutional); id. at 431-36 (Blackmun, J., dissenting) (stating that the Eighth Amendment and the Fourteenth Amendment's Due Process Clause allow death-row petitioners to challenge punishment on the grounds of actual innocence); see also Barry Friedman, Failed Enterprise: The Supreme Court's Habeas Reform, 83 CAL. L. REV. 485, 509 (1995) (arguing that all nine Justices in Herrera held that an innocent person could not be executed).

61. Herrera, 506 U.S. at 400. Alleging a constitutional violation normally poses few problems because "it is the rare criminal appeal that does not involve a 'constitutional' claim." Friendly, supra note 30, at 156 (emphasis in original).


63. Schlup v. Delo, 115 S. Ct. 851, 867 (1995) (citing the "Carrier standard"). In Murray v. Carrier, the Court held that the miscarriage of justice
II. APPLYING THE ACTUAL INNOCENCE EXCEPTION AT SENTENCING

A. THE EXTENSION OF THE ACTUAL INNOCENCE EXCEPTION TO CAPITAL SENTENCING CASES

On the same day the Supreme Court formulated the actual innocence exception in *Kuhlmann v. Wilson* and *Murray v. Carrier*, it acknowledged in *Smith v. Murray* that the exception applies to capital sentencing proceedings. The Court noted that although the concept of actual innocence did not translate easily into the context of capital sentences, a petitioner could be innocent of a capital sentence.

At first glance, the extension of the actual innocence exception to capital cases appears rooted in the belief that the exception applies "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." 477 U.S. 478, 496 (1986). Subsequently, the Supreme Court held that to show actual innocence of a capital sentence, "one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). In *Schlup*, the Court limited the *Sawyer* standard to capital sentencing cases and endorsed the *Carrier* standard for claims of actual innocence of a crime. *Schlup*, 115 S. Ct. at 866-67.

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64. 477 U.S. 436 (1986).
67. *Id.* at 537. At the sentencing stage of petitioner's capital trial, psychiatric testimony describing his past sexual deviance was admitted over defense counsel's objection. *Id.* at 530. On appeal from his death sentence, the defendant's attorney did not challenge the issue of the admittance of the psychiatric testimony. *Id.* at 531. Subsequent cases established that psychiatric testimony, such as that admitted in *Smith*, violates a defendant's Fifth and Sixth Amendment rights. *See Estelle v. Smith*, 451 U.S. 454, 463, 471 (1981) (psychiatric testimony admitted at the sentencing phase). In his federal habeas appeal, the petitioner in *Smith v. Murray* argued that the admission of the psychiatric evidence violated his Fifth Amendment right. *Smith*, 477 U.S. at 531-32. The Supreme Court, however, held that petitioner could not show "cause" for failing to raise the issue on direct appeal. *Id.* at 533-37. The Court noted a willingness to apply the actual innocence exception if it would avoid a fundamentally unjust incarceration, but did not find this to be such a case. *Id.* at 537-38.

68. *Smith*, 477 U.S. at 537 ("We acknowledge 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."); *see also Sawyer v. Whitley*, 505 U.S. 333, 341 (1992) (stating that "[t]he phrase 'innocent of death' is not a natural usage of those words").
finality of the death penalty mandates increased reliability in capital sentencing. The Eighth and Fourteenth Amendments require the sentencing authority to possess sufficient information on the character and individual circumstances of a defendant before imposing a death sentence. Typically, the prosecution presents aggravating circumstances associated with the crime in arguing for the death penalty, and the defense presents mitigating factors in arguing for a life sentence. This process seeks to insure that, in light of all the individual circumstances of a case, the sentencing authority reaches an informed decision regarding whether the defendant should receive a sentence of life imprisonment or death.

The Supreme Court, however, consistently has held that a death sentence does not require a heightened standard of review on federal habeas corpus review. Following this rationale,

70. See, e.g., Beck v. Alabama, 447 U.S. 625, 637 (1980) (arguing that risks of unwarranted sentences cannot be tolerated when defendants' lives are at stake); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (stating that the qualitative difference between the death penalty and other penalties is the greater degree of reliability required when the death penalty is imposed); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."). Noncapital sentencing cases are different because various post-conviction remedies, such as probation, parole, and work furloughs, are available to modify an unjust sentence. Lockett, 438 U.S. at 605.

71. See Lockett, 438 U.S. at 606 (noting that statutes precluding the admission of evidence concerning certain mitigating circumstances in capital cases violate the Eighth and Fourteenth Amendments); Woodson, 428 U.S. at 304-05 (invalidating statute that did not permit consideration of relevant factors pertaining to defendant's character and record or the circumstances of his offense). But see id. at 604 n.11 (stating that a mandatory death penalty may be permitted in certain rare types of homicide cases).

72. See, e.g., ALA. CODE § 13A-5-45(e)(g) (1995) (stating that, at a capital sentencing hearing, the state has the burden of proving aggravating factors and the defense may offer mitigating circumstances).

73. See Lisa R. Duffett, Note, Habeas Corpus and Actual Innocence of the Death Sentence after Sawyer v. Whitley: Another Nail into the Coffin of State Capital Defendants, 44 CASE W. RES. L. REV. 121, 147-51 (1993) (discussing states that weigh aggravating and mitigating factors and states that simply require the sentencing authority to consider mitigating factors). These sentencing structures are established to insure that "discretion in the area of sentencing be exercised in an informed manner." Gregg v. Georgia, 428 U.S. 153, 189 (1976). This process guards against imposing the death penalty arbitrarily or capriciously. Id.

74. Herrera v. Collins, 506 U.S. 390, 405 (1993); Murray v. Giarratano, 492 U.S. 1, 9 (1989). In Smith v. Murray, the Court rejected the idea that "the principles of Wainwright v. Sykes apply differently depending on the nature of the penalty a State imposes for the violation of its criminal law." 477 U.S. 527,
application of the actual innocence exception in capital sentencing proceedings focuses solely on aggravating circumstances.\textsuperscript{75} In Sawyer v. Whitley, the Court held that a petitioner claiming innocence of a capital sentence must show by clear and convincing evidence that "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."\textsuperscript{76} To satisfy this test, a petitioner must show that no aggravating circumstances existed that would qualify the petitioner for the death penalty.\textsuperscript{77} Focusing solely on the proof or disproof of aggravating circumstances confines review to an "obvious class of relevant evidence."\textsuperscript{78}

538 (1986). Although the Eighth Amendment requires increased reliability of the capital punishment process, reviewing a federal habeas claim brought well after trial brings less reliability to the process. See Herrera, 506 U.S. at 405 (stating that "it is far from clear that a second trial 10 years after the first trial would produce a more reliable result"). But see Smith, 477 U.S. at 545-46 (Stevens, J., dissenting) (arguing that the Court has a special obligation to hear substantial and colorable Eighth Amendment claims to determine if a capital sentence is fundamentally unfair).

75. See Sawyer v. Whitley, 505 U.S. 333, 345 (1992) (stating that to be innocent of a death penalty a petitioner must show that there was "no aggravating circumstance or that some other condition of eligibility has not been met"); Kris T. Daniel, Note, Sawyer v. Whitley: The Deadly Game of Procedures in Death Penalty Cases, 61 UMKC L. REV. 599, 600 (1993) (noting that the Sawyer majority focused solely on aggravating circumstances).

76. Sawyer, 505 U.S. at 336. Requiring a constitutional violation is consistent with the standard used in the context of actual innocence of a crime. See supra notes 58-62 and accompanying text (discussing the Herrera case and the requirement that to gain review a constitutional violation must exist). Sometimes the petitioner is unable to overcome this burden. See, e.g., Jacobs v. Scott, 31 F.3d 1319, 1325 (5th Cir. 1994) (refusing to rule on petitioner's eligibility for death penalty because no independent constitutional error existed).

77. See supra note 75 and accompanying text (noting that the actual innocence exception focuses solely on aggravating circumstances in capital sentencing cases).

78. Sawyer, 505 U.S. at 345. The Sawyer court stated that the actual innocence exception must be subject to objective factors. Id. at 341. The Court noted the "regrettable fact" that a judge will only have a limited time to review the habeas claim because a death-row inmate typically presents a federal habeas petition challenging a death sentence within a few days of the scheduled execution. Id. at 341 n.7; see, e.g., Gomez v. United States District Court, 503 U.S. 653, 653-54 (1992) (per curiam) (noting petitioner's attempt to manipulate system by filing last minute habeas claim); Delo v. Stokes, 495 U.S. 320, 321 (1990) (per curiam) (characterizing petitioner's fourth habeas corpus petition, which was filed a few days before the scheduled execution, as an "abuse of the writ"). But see Gomez, 503 U.S. at 654 ("A court may consider the last-minute nature of an application to stay execution in deciding whether to grant
The Court rejected the argument that federal habeas courts consider improperly excluded mitigating factors, stating that a judge cannot reasonably determine a jury's subjective reaction to those factors.\textsuperscript{79} The Court also noted that allowing judges to subjectively assess a jury's reaction would expand the actual innocence exception beyond its narrow limits.\textsuperscript{80} Moreover,

\begin{quote}
79. Sawyer, 505 U.S. at 345-46. The Sawyer majority noted the wide variety of mitigating factors that juries are allowed to consider in capital cases. \textit{Id.} at 346; see, e.g., IND. CODE ANN. § 35-50-2-9(c) (Burns 1995) (providing a similar list of mitigating circumstances to be considered); KY. REV. STAT. ANN. § 532.025(2)(b) (Michie/Bobbs-Merrill 1995) (same); LA. CODE CRIM. PROC. ANN. art. 905.5 (West 1995) (listing mitigating factors, which include prior criminal history, extreme mental or emotional disturbance, domination of another, belief that offense was morally justified, capacity to appreciate criminality of conduct, youth of offender, level of participation in crime, and any other relevant mitigating factors).

80. Sawyer, 505 U.S. at 341 (stating that “we bear in mind that the exception for 'actual innocence' is a very narrow exception”); see Murray v. Carrier, 477 U.S. 478, 495-96 (1986) (noting that the actual innocence exception applies only in extraordinary cases).

Prohibiting petitioners from showing the improper exclusion of certain mitigating factors at the sentencing stage has drawn criticism. See, e.g., Sawyer, 505 U.S. at 366 (Stevens, J., concurring) (stating that neglecting mitigating circumstances in capital proceedings is “wholly without foundation”); Duffett, supra note 73, at 151 (arguing that the Sawyer standard fails to protect defendants who are actually innocent of sentences because accurate sentences cannot be determined if juries lack the complete profiles of defendants' circumstances); Eric D. Scher, Comment, Sawyer v. Whitley: Stretching the Boundaries of a Constitutional Death Penalty, 59 BROOK. L. REV. 237, 259 (1993) (arguing that Sawyer contradicts past capital punishment adjudication and diminishes the heightened reliability requirements in capital proceedings).

Often, the sentencing body in a capital case never hears critical mitigating evidence because capital defendants do not receive the specialized representation needed in capital cases. See Scher, supra, at 268 (“Virtually all prisoners on death row get 'slapdash representation' from court-appointed counsel at trial and at the direct appeal stage.”). The following colloquy illustrates the type of representation death-row defendants normally receive at the sentencing stage. After Smith was convicted in his Alabama capital murder trial, the judge asked his defense counsel if the counsel was ready to proceed with the sentencing phase. The following exchange took place:

\begin{itemize}
  \item Thomas E. Jones (Defense Counsel): No, sir, we are not.
  \item Court: I hate to send the jury back to a motel another night. What do you lack being ready?
  \item J. Michael Williams (Defense Counsel): Judge, I haven't even read the statute about it. All I've been doing is working on this case. As you recall, we filed numerous motions to continue it, and this is all we've been working on for the last two weeks.
\end{itemize}

The judge then recessed until 8:30 the next morning. \textit{Fatal Defense, Fatal Flaws: Learning the Law in Half a Day}, NAT'L J., June 11, 1990, at 36. The
allowing review of mitigating factors would equate actual innocence to a simple showing of prejudice, thereby undermining the cause and prejudice exception because many constitutional violations already require a showing of prejudice.\textsuperscript{81}

In sum, the extension of the actual innocence exception to capital sentencing proceedings has been extremely narrow.\textsuperscript{82} Sawyer makes it nearly impossible for a petitioner to succeed on federal habeas review because the state can show at least one aggravating circumstance existed in most capital cases.\textsuperscript{83} In


The fact that the overwhelming majority of capital defendants are indigent helps explain the woefully inadequate representation some capital defendants receive. See Scher, supra, at 268. Court-appointed counsel is normally undercompensated, making it difficult for counsel to build a strong defense, especially in capital litigation which is extremely complex. See, e.g., Fred Strasser, Fatal Defense: $1,000 Fee Cap Makes Death Row's "Justice" a Bargain for the State, Nat'L L.J., June 11, 1990, at 33 (finding that Mississippi gives court-appointed counsel a maximum of $1,000 to investigate, prepare, and try capital cases).


82. William S. Laufer, The Rhetoric of Innocence, 70 Wash. L. Rev. 329, 382 (1995) (stating that the exception has been construed narrowly by holdings that alleged constitutional violations were insufficient to meet the exception's requirements despite bearing on the reliability of the evidence, the credibility of a witness, and the accuracy of the sentence).

83. See, e.g., Clabourne v. Lewis, 64 F.3d 1373, 1376-77 (1995) (finding that the offense was committed in a heinous, cruel, and depraved manner, an aggravating circumstance under Arizona law). Most state death penalty statutes list a number of factors constituting aggravating circumstances. See, e.g., Fla. Stat. Ann. § 921.141(5) (West Supp. 1996) (listing the following aggravating circumstances: (1) capital felony committed while under prison sentence; (2) defendant previously convicted of another capital felony or felony involving violence; (3) creating great risk of death to many people; (4) capital felony committed while committing or attempting to commit another serious or violent felony; (5) capital felony committed to avoid arrest or to escape from custody; (6) capital felony committed for pecuniary gain; (7) capital felony committed to disrupt enforcement of laws; (8) an especially cruel capital felony; (9) capital felony committed in premeditated manner; (10) victim of capital felony was a law enforcement officer engaged in performance of his official duties; (11) victim was person less than 12 years old).
addition, a petitioner challenging a capital sentence must satisfy the "clear and convincing" standard rather than the less onerous "probably resulted" standard used for claims of innocence of a crime.\textsuperscript{84} The differing standards reflect the reduced procedural protections at sentencing\textsuperscript{85} and the greater injustice that results from an erroneous conviction as compared to an erroneous sentence.\textsuperscript{86}

B. THE DEBATE OVER EXTENDING THE ACTUAL INNOCENCE EXCEPTION TO NONCAPITAL CASES

The Supreme Court has not addressed whether the actual innocence exception applies to the sentencing phase of noncapital trials.\textsuperscript{87} Circuit courts confronting this issue disagree over the application of the exception to noncapital cases.\textsuperscript{88} These courts have either entirely rejected an extension of the actual innocence exception to noncapital sentencing cases, liberally extended the exception to noncapital sentencing cases, or narrowly extended the exception to habitual offender cases.

1. The Fourth Circuit: Expanding the Boundaries of the Actual Innocence Exception

The Fourth Circuit liberalized the application of the actual innocence exception to noncapital sentencing cases in \textit{United States v. Maybeck}.\textsuperscript{89} Maybeck argued that the district court improperly sentenced him as a career offender because it included an erroneous charge in calculating his criminal history score under the Federal Sentencing Guidelines.\textsuperscript{90} Maybeck failed to object

\textsuperscript{84} See supra note 63 and accompanying text (discussing the Court's use of the "clear and convincing" standard in capital sentencing proceedings and the "probably resulted" standard in cases involving a claim of innocence of a crime).

\textsuperscript{85} See, e.g., Williams v. New York, 337 U.S. 241, 247 (1949) (stating that it is "necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial").


\textsuperscript{87} Sones v. Hargett, 61 F.3d 410, 419 n.16 (5th Cir. 1995).

\textsuperscript{88} Id. (noting that "[t]he other circuits appear to be split on this issue").

\textsuperscript{89} 23 F.3d 888 (4th Cir. 1994).

\textsuperscript{90} Id. at 891. The government and Maybeck negotiated a plea agreement in which Maybeck pleaded guilty to certain charges in exchange for the government dismissing the other charges. Id. at 890. The agreement incorrectly stated that Maybeck was a career offender and he had a criminal history category of VI under the U.S. Sentencing Guidelines (U.S.S.G.). Id. at 890-91 (citing U.S.S.G. § 4B1.1). Based on this information, the district court sentenced Maybeck to 198 months. Id. at 891.
to his sentence or appeal the sentence, thus constituting a procedural default of his claim. On federal habeas review, the Fourth Circuit reversed the sentence, finding Maybeck actually innocent of being a career offender under the Guidelines. Surprisingly, the court did not rely on any constitutional violation in applying the actual innocence exception.

2. The Fifth, Seventh, and Eighth Circuits: Attempting to Remain Within the Narrow Confines of the Actual Innocence Exception

The Fifth Circuit has assumed, without deciding, that the actual innocence exception extends to noncapital sentencing cases. This circuit applies the strict Sawyer standard to challenges of a noncapital sentence. A petitioner must show "but for the constitutional error, [petitioner] would not have been legally eligible for the sentence [petitioner] received." Therefore, even if a petitioner is improperly sentenced under a habitual offender statute, redress is unavailable if the same sentence could have been imposed under the normal statutory sentencing range. Unlike the Fourth Circuit, a petitioner must also allege and prove a constitutional violation.

91. Id. The procedural default in Maybeck occurred at the federal level rather than the state level, thus implicating costs less than those normally associated with reviewing procedurally defaulted claims. See supra note 36 and accompanying text (discussing the costs of reviewing procedurally defaulted state claims).

92. Id. at 892 (stating that "[t]here is no question . . . Maybeck is actually innocent of being a career offender"). The court stated that the actual innocence exception logically applies to noncapital enhancement cases. Id. at 893.

93. See Sean L. Dalton, Carved in Sand: Actual Innocence in United States v. Maybeck, 73 N.C. L. REV. 2388, 2404-05 (1995) (noting that no constitutional violation was explicitly identified in Maybeck). Maybeck did allege that his guilty plea was not entered knowingly and voluntarily, but the court never addressed this issue. Maybeck, 23 F.3d at 891.

94. Sones v. Hargett, 61 F.3d 410, 419 n.16 (5th Cir. 1995); Smith v. Collins, 977 F.2d 951, 959 (5th Cir. 1992).

95. See Smith, 977 F.2d at 959 ("[W]e are convinced that actual innocence in a non-capital sentencing case can be no less stringent than the Supreme Court's formulation of actual innocence in capital sentencing.").

96. Id.

97. See id. (finding that the defendant, sentenced as an habitual offender, could not demonstrate actual innocence because he was eligible for the same sentence even if he had not been sentenced as an habitual offender).

98. See supra note 93 and accompanying text (noting that the Fourth Circuit's actual innocence approach in Maybeck did not require a constitutional violation).
The Seventh Circuit considered extending the actual innocence exception to noncapital sentences in *Mills v. Jordan*. In *Mills*, the petitioner claimed he was innocent of being a habitual offender because a prior conviction was constitutionally defective. The Seventh Circuit found that the similarities between habitual offender and capital sentencing proceedings warranted an extension of the actual innocence exception to habitual offender cases. In evaluating the petitioner's claim, the *Mills* court concluded that the petitioner could not show he was actually innocent of being a habitual offender. Without explicitly adopting the strict *Sawyer* standard, the Seventh Circuit implied that it evaluates noncapital sentencing cases under the *Sawyer* standard.

In *Jones v. Arkansas*, the Eighth Circuit found the petitioner actually innocent of a sentence received pursuant to a habitual offender statute, despite his eligibility for the same sentence under normal sentencing guidelines. After

99. 979 F.2d 1273 (7th Cir. 1992).
100. *Id.* at 1275. Mills received a two-year sentence that was increased by 30 years under Indiana's habitual offender statute requiring two prior unrelated felonies. *Ind. Code Ann.* § 35-50-2-8 (Burns 1995). In his federal habeas appeal, Mills argued that one of his prior felony convictions was constitutionally defective due to ineffective counsel and a lack of a knowing and intelligent plea. *Mills*, 979 F.2d at 1275. This conviction was used in finding Mills a habitual offender. *Id.*
101. *Id.* at 1279. The court noted that habitual offender and capital sentencing proceedings are similar because they are determined by a decision of factual guilt or innocence, and both look to whether a petitioner is innocent of the factors justifying the sentence rather than innocent of the actual crime. *Id.* at 1278-79.
102. *Id.* at 1279. The court noted that the record demonstrated that Mills had a number of other previous felonies and he admitted he was guilty of these offenses at the sentencing stage. *Id.* In addition, Mills' argument that the prior conviction was unconstitutional was a claim of legal innocence rather than actual innocence. *Id.*; cf. *Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992) (stating that the actual innocence exception deals with actual rather than legal innocence claims); *Boyer v. United States*, 55 F.3d 296, 300 (7th Cir. 1995) ("[C]laims of legal innocence rather than claims of actual innocence have no relevance in the miscarriage of justice context.").
103. See *Mills*, 979 F.2d at 1278-79 (noting the similarities between *Mills* and *Sawyer*); see also *Dalton*, supra note 93, at 2401 (explaining that the petitioner in *Mills* was unable to show actual innocence because the court relied on the stringent standard of *Sawyer*).
104. 929 F.2d 375 (8th Cir. 1991).
105. *Id.* at 381.
106. See *id.* at 379 (recognizing that the habitual offender statute and the general statutory guidelines both allowed sentences of life imprisonment).
Sawyer, the Eighth Circuit has questioned the continuing validity of Jones.\textsuperscript{107} Most recently, the Eighth Circuit noted that applying the Sawyer standard to noncapital cases "raises perplexing questions."\textsuperscript{108} The court stated that the language in Sawyer supported the view that Jones was still good law\textsuperscript{109} despite other language in Sawyer indicating that the actual innocence exception did not apply to noncapital sentencing cases\textsuperscript{110} or, at a minimum, a petitioner could only be innocent of a noncapital sentence if the sentence exceeded the statutory maximum.\textsuperscript{111} The Eighth Circuit, however, refrained from overruling Jones.\textsuperscript{112}

3. The Sixth and Tenth Circuits: Rejecting an Extension of the Actual Innocence Exception

The Tenth Circuit refused to extend the actual innocence exception to noncapital cases in United States v. Richards.\textsuperscript{113} Richards claimed that the district court miscalculated his sentence under the Federal Sentencing Guidelines, an issue he raised in a previous federal habeas petition.\textsuperscript{114} The Tenth Circuit refused to consider the claim, stating that "[a] person cannot be actually innocent of a noncapital sentence." In Selsor v. Kaiser,\textsuperscript{115} however, the Tenth Circuit appeared to endorse the actual innocence exception in habitual offender

\begin{itemize}
  \item \textsuperscript{107} See Higgins v. Smith, 991 F.2d 440, 441 (8th Cir. 1993) (noting that after Sawyer, it is unclear whether Jones is still good law in noncapital cases).
  \item \textsuperscript{108} Waring v. Delo, 7 F.3d 753, 757 (8th Cir. 1993).
  \item \textsuperscript{109} Id. (noting that Sawyer cited Engle v. Isaac, 456 U.S. 107, 135 (1981), for the proposition that the actual innocence exception seeks to correct fundamentally unjust incarcerations). Sawyer also cited Smith v. Murray, 477 U.S. 527, 539 (1986), for the proposition that a fundamentally unjust incarceration included a claim that an alleged error undermined the accuracy of the guilt or sentencing determination. Waring, 7 F.3d at 757.
  \item \textsuperscript{110} See Waring, 7 F.3d at 757 (noting the Court's recognition that the concept of actual innocence is easy to grasp in noncapital cases, implying that the exception does not apply to noncapital sentencing proceedings).
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} Id. at 758.
  \item \textsuperscript{113} 5 F.3d 1369 (10th Cir. 1993).
  \item \textsuperscript{114} Id. at 1370. Richards claimed the district court improperly included the "weight of unmarketable and unusable waste water along with the weight of extractable methamphetamine in determining the base offense level." Id.
  \item \textsuperscript{115} Id. at 757.
  \item \textsuperscript{116} 22 F.3d 1029 (10th Cir. 1994).
\end{itemize}
cases. The court stated: "In a habitual offender case, the petitioner is actually innocent of the sentence if he can show he is innocent of the fact—i.e., the prior conviction—necessary to sentence him as an habitual offender." Surprisingly, neither the majority nor the dissent in Selsor cited Richards in discussing the actual innocence exception in noncapital sentencing cases.

In two unpublished opinions, the Sixth Circuit cited Richards in rejecting an extension of the actual innocence standard to noncapital sentences. Both of these cases also cited United States v. Flores, a Fifth Circuit case, for the proposition that the actual innocence exception is inapplicable to noncapital sentencing cases. The Fifth Circuit's most recent discussion on the actual innocence exception in noncapital cases, however, assumed that the exception applied in this context.

III. ANALYZING THE EXTENSION OF THE ACTUAL INNOCENCE EXCEPTION TO NONCAPITAL SENTENCING CASES

A. THE THRESHOLD QUESTION: IS AN EXTENSION WARRANTED?

As the Eighth Circuit noted, Sawyer v. Whitley provides persuasive support for the Tenth Circuit's rejection of the actual innocence exception in noncapital sentencing cases. In discussing the meaning of actual innocence, the Sawyer Court described the epitome of actual innocence as convicting the wrong person of a crime. The Court went on to state, "[i]n the context of a noncapital case, the concept of 'actual innocence' 

117. Id. at 1036 (citing Mills v. Jordan, 979 F.2d 1273, 1279 (7th Cir. 1992)).
119. 981 F.2d 231 (5th Cir. 1993).
120. Flahardy, 1995 WL 570925 at *2; Black, 1995 WL 445718 at *2.
121. See Sones v. Hargett, 61 F.3d 410, 419 n.16 (5th Cir. 1995) (assuming without deciding that the actual innocence exception applies to noncapital sentencing cases).
122. See supra note 110 and accompanying text (noting that the actual innocence exception may not apply to noncapital sentencing cases).
123. See United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993) (stating that Sawyer explained that in a noncapital case actual innocence simply means the defendant did not commit the crime).
is easy to grasp.\textsuperscript{125} The Court noted the difficulty in applying
the actual innocence exception to a capital sentence, but stated
that "we must strive to construct an analog to the simpler
situation represented by the case of a noncapital defendant."\textsuperscript{126}
This discussion implies that a noncapital case provides a
"simpler situation" because the actual innocence exception
applies only to the guilt-or-innocence phase of noncapital
proceedings,\textsuperscript{127} while a capital case is more problematic be-
cause the actual innocence exception applies at the guilt-or-
innocence stage and at the sentencing stage.\textsuperscript{128}

Conversely, the Court's statements in \textit{Smith v. Murray}\textsuperscript{129}
imply that the actual innocence exception applies to noncapital
sentencing proceedings.\textsuperscript{130} In extending the actual innocence
exception to capital sentencing proceedings, the Court stated
that procedural default principles do not depend on the nature
of the penalty imposed.\textsuperscript{131} In addition, the Court stated that
it is fair to enforce procedural default rules in a case lacking a
"substantial claim that the alleged error undermined the
accuracy of the guilt or sentencing determination."\textsuperscript{132} The
Supreme Court also consistently has held that the death penalty
does not mandate a higher standard of review on federal habeas
corpus appeal.\textsuperscript{133} Thus it follows that the Court overcame the
barrier to extending review to noncapital sentencing cases when
it extended the exception to capital sentencing cases because
capital and noncapital cases are treated alike on federal habeas
review.\textsuperscript{134}

Because the Supreme Court's cases fail to resolve the issue,
it is important to weigh the costs and benefits of extending the

\begin{footnotes}
\item 125. \textit{Id.} at 341.
\item 126. \textit{Id.}
\item 127. \textit{Waring}, 7 F.3d at 757 (stating that \textit{Sawyer} "suggests that there may be
no exception for procedurally barred noncapital sentencing claims, unless one
is innocent of the crime").
\item 128. \textit{See Sawyer}, 505 U.S. at 340-47 (applying the actual innocence exception
to capital sentencing case).
\item 130. \textit{See} \textit{Jones v. Arkansas}, 929 F.2d 375, 381 n.16 (8th Cir. 1991) (citing
\textit{Smith} and stating that "there are indications that the actual innocence
exception also may apply to non-capital sentencing").
\item 131. \textit{Smith}, 477 U.S. at 538.
\item 132. \textit{Id.} at 539 (emphasis added).
\item 133. \textit{See supra} note 74 and accompanying text (stating that the death
penalty does not require heightened scrutiny on federal habeas review).
\item 134. \textit{See supra} notes 75-78, 82-86 and accompanying text (discussing the
extension of the actual innocence exception to capital sentencing proceedings).
\end{footnotes}
actual innocence exception to noncapital cases. In general, federal habeas corpus review places high costs on society, the accused, the judicial system, and our federal system.\textsuperscript{135} Allowing federal habeas review of successive, abusive, and procedurally defaulted claims further increases these costs.\textsuperscript{136}

Furthermore, extending the actual innocence exception to all noncapital sentencing cases threatens to expand the exception beyond its narrow limits.\textsuperscript{137} Courts reviewing most noncapital sentencing proceedings cannot focus on "a relatively obvious class of relevant evidence"\textsuperscript{138} because noncapital cases normally do not involve a separate sentencing stage resembling the guilt-or-innocence stage, and a number of factors determine the sentencing range.\textsuperscript{139} In a capital sentencing case, the sentencing stage develops specific findings of facts, which a reviewing court examines to determine whether a petitioner is eligible for the death penalty.\textsuperscript{140} The existence of any aggravating circumstance establishes eligibility for a death sentence.\textsuperscript{141} Unlike capital cases, eligibility for a noncapital sentence is determined by a number of factors.\textsuperscript{142} Examining each factor and assessing its weight on the sentencing decision is incompatible with the premise that review must focus on an obvious class of relevant evidence.\textsuperscript{143}

Extending the actual innocence exception, however, benefits society, the judicial system, and the accused by correcting

\textsuperscript{135} See supra note 31 and accompanying text (discussing the costs of federal habeas review).

\textsuperscript{136} See supra note 36 and accompanying text (discussing costs associated with reviewing procedurally defaulted claims).

\textsuperscript{137} See supra notes 56, 78, 80, 82-86 and accompanying text (noting the narrow scope of the actual innocence exception).

\textsuperscript{138} Sawyer v. Whitley, 505 U.S. 333, 341 (1992); see also supra notes 79-81 and accompanying text (stating that extending review to mitigating factors in capital cases is inappropriate).

\textsuperscript{139} See infra notes 201-06 and accompanying text (discussing the Federal Sentencing Guidelines).

\textsuperscript{140} See, e.g., Sawyer, 505 U.S. at 348 (finding that the jury found two aggravating factors at the sentencing stage).

\textsuperscript{141} See, e.g., LA. CODE CRIM. PROC. ANN. art. 905 (West 1996) (stating that a death sentence shall not be imposed unless the jury finds the existence of at least one aggravating circumstance at the sentencing hearing).

\textsuperscript{142} See infra notes 205-06 and accompanying text (noting factors used in determining a sentence under the Federal Sentencing Guidelines).

\textsuperscript{143} See supra notes 56, 78, 80, 82-86 and accompanying text (noting the narrow limits of the actual innocence exception).
fundamentally unjust incarcerations.\footnote{See supra note 53 and accompanying text (noting that principles of comity and finality must yield to correct incarcerations that are fundamentally unjust).} Although not all incorrect sentences constitute fundamentally unjust sentences,\footnote{See Knight v. United States, 37 F.3d 769, 773 (1st Cir. 1994) (finding that a misapplication of the Federal Sentencing Guidelines did not constitute a miscarriage of justice).} habitual offender statutes that punish more severely based on previous convictions create the potential for a fundamentally unjust incarceration.\footnote{See, e.g., IND. CODE ANN. § 35-50-2-8 (West 1996) (providing for a sentence up to three times as long as the sentence for an underlying offense if the defendant is an habitual offender).} In habitual offender cases, an extension is appropriate because the benefits of correcting such unjust sentences outweigh the relatively small costs associated with reviewing habitual offender sentences.\footnote{Jones v. Arkansas, 929 F.2d 375, 381 n.16 (8th Cir. 1991) (stating that enforcing the procedural default rule in petitioner's challenge to the habitual offender sentence would create "manifest injustice").} Habitual offender statutes typically provide a separate sentencing stage, resembling the guilt-or-innocence stage, in which the state must prove that the defendant committed a certain number of prior offenses.\footnote{See, e.g., ARK. CODE. ANN. § 5-4-502 (1995) (establishing a separate sentencing proceeding for determining the number of prior felonies).} This procedure develops objective facts, including the number of prior offenses proved, which a court can review easily when evaluating a petitioner's claim of innocence.\footnote{See, e.g., Jones, 929 F.2d at 377 (noting that the state proved two prior felonies at the sentencing stage of the habitual offender proceeding).}

B. ADOPTING THE STRICT SAWYER STANDARD IN NONCAPITAL SENTENCING CASES

Remaining mindful of the costs and benefits, as well as the narrow scope of the actual innocence exception, this Note argues that an extension of the exception is warranted in the small group of cases in which a petitioner: (1) is sentenced under a procedure resembling the guilt-or-innocence stage; (2) alleges and proves that a constitutional violation resulted in the sentence; (3) demonstrates innocence of the sentence by clear and convincing evidence; and (4) proves that the sentence received exceeded the maximum permitted under the applicable statute. This test mirrors the Fifth Circuit's approach requiring
that a petitioner prove "that but for the constitutional error [petitioner] would not have been legally eligible for the sentence [petitioner] received."  

This test is consistent with Supreme Court precedent concerning the actual innocence exception and it recognizes the proper role of federal habeas courts. Requiring that a petitioner receive a sentence pursuant to a separate sentencing proceeding resembling the guilt-or-innocence stage complies with the actual innocence exception's narrow scope and ensures that a petitioner's claim is subject to determination by objective factors.  

Reviewing courts simply decide whether the state proved the requisite facts at the sentencing stage. Requiring that a petitioner's sentence exceed the statutory maximum adopts Sawyer's "no reasonable juror" standard and forces reviewing courts to remain focused on objective factors in assessing a sentencing authority's reaction in the absence of the alleged constitutional violation. Forcing a petitioner to allege and prove a constitutional violation reaffirms the purpose of federal habeas corpus review—to ensure that people are not incarcerated in violation of the Constitution. Finally, employing Sawyer's "clear and convincing" standard to noncapital sentences complies with Schlup v. Delo, in which the Court noted that this standard applies to claims of innocence of a sentence.  

To date, no case exemplifies the characteristics needed to
satisfy the test advocated in this Note. Combining the facts of Jones and Mills, however, presents a scenario that satisfies this test. The petitioner in Jones received a bifurcated trial, demonstrated that a constitutional violation resulted in the determination that he was a habitual offender, and proved by clear and convincing evidence that he was ineligible for sentencing as a habitual offender because he lacked the requisite number of prior offenses. The petitioner in Jones, however, could not satisfy the fourth prong of the test because his sentence was within the sentencing range of the applicable statute. If the petitioner in Mills had proven he lacked the requisite number of prior convictions, he would have satisfied the fourth prong of the test. The applicable auto theft statute in Mills allowed a maximum sentence of three years. The petitioner in Mills, however, received a sentence of thirty-two years based on a thirty-year sentence enhancement for being a habitual offender.

C. REJECTING THE MORE EXPANSIVE MODEL

1. The Fourth Circuit: An Impermissible Extension of the Actual Innocence Exception

The Fourth Circuit's application of the actual innocence exception in noncapital sentencing cases represents the most expansive application of the exception. In United States v. Maybeck, the Fourth Circuit extended the actual innocence exception beyond the boundaries delineated in Sawyer. First, the court did not rely on a constitutional violation, 

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157. The Eighth Circuit held that the petitioner in Jones satisfied the actual innocence standard, but applying the Sawyer standard to Jones would result in the petitioner failing to show actual innocence. See supra note 107 and accompanying text (noting the Fifth Circuit's discussion in Jones).
158. See supra notes 9, 13 and accompanying text (discussing the facts of Jones).
160. See supra note 100 and accompanying text (discussing the facts of Mills).
161. The applicable Indiana auto theft statute involved a Class D felony. IND. CODE § 35-43-4-2 (1995). A Class D felony carries a fixed term of one and one-half years, with the possibility of an additional one and one-half years for aggravating circumstances. Id. § 35-50-2-7.
163. 23 F.3d 888 (4th Cir. 1994).
164. See supra notes 75-78 and accompanying text (explaining the strict test Sawyer established for claims of actual innocence in capital sentencing cases).
ignoring the fact that the purpose of federal habeas review is to prevent incarceration in violation of the Constitution. The second, the court applied the exception to a challenge of the Federal Sentencing Guidelines, a procedure that prevents a reviewing court from focusing on objective factors when applying the actual innocence exception. The federal nature of Maybeck best explains the expansive use of the actual innocence exception, but its breadth contradicts the exception's narrow scope.

a. Requiring Petitioners to Prove a Constitutional Violation

Formulating a valid constitutional claim is often a difficult task for federal habeas petitioners challenging a noncapital sentence. Petitioners cannot rely on constitutional defects in prior convictions because that amounts to a claim of legal innocence, and the Sawyer standard requires petitioners to prove factual innocence. In habitual offender cases, this means a petitioner must prove factual innocence of the number of prior convictions needed for eligibility as a habitual offender. Petitioners demonstrating factual innocence of prior felonies used to sentence them as habitual offenders usually point to obvious defects. For example, in Jones, the state proved that the petitioner had two prior felony convictions, but the applicable habitual offender statute required three prior felonies. In Jones, a constitutional violation was readily available, in contrast to the majority of federal habeas cases where peti-

165. See supra notes 23, 25, 61 and accompanying text (explaining the role of federal habeas courts).
166. See Maybeck, 23 F.3d at 890-91 (noting that petitioner received his sentence based on the level of the offense and the criminal history score stipulated to by the parties and prepared by the petitioner's probation officer).
167. See Dalton, supra note 93, at 2401 ("The ease with which the court in Maybeck chose to employ the actual innocence exception . . . may best be explained by the purely federal nature of the case."). Federal cases do not present the same types of costs that are implicated when a federal habeas court reviews a state decision or a procedurally defaulted state claim. See supra notes 31, 36 and accompanying text (noting the high costs of reviewing state decisions and procedurally defaulted state claims).
169. See supra note 102 and accompanying text (noting that the petitioner in Mills could not prove factual innocence of his previous convictions).
170. See supra note 9 (discussing Jones).
171. See supra note 9 and accompanying text (explaining that petitioner's sentence violated the Ex Post Facto Clause of the Constitution).
tioners struggle to find an error that rises to the level of a constitutional violation.\textsuperscript{172}

Generally, petitioners must argue ineffectiveness of counsel as the constitutional violation.\textsuperscript{173} The problem with the ineffective counsel argument is that it has been implicitly rejected by the time the court analyzes the actual innocence exception. In cases of successive, abusive, or defaulted claims, courts only apply the actual innocence exception if petitioners fail to satisfy the cause and prejudice standard.\textsuperscript{174} A successful ineffective counsel claim satisfies the "cause" prong of this test.\textsuperscript{175} It also implicitly satisfies the "prejudice" prong because a successful ineffective counsel claim requires a showing of prejudice.\textsuperscript{176} If the petitioner's ineffective counsel claim satisfies the cause and prejudice standard, the court will never reach the actual innocence exception.\textsuperscript{177} Courts reaching the actual innocence exception, therefore, have already rejected a petitioner's ineffective counsel claim by finding that the petitioner did not satisfy the cause and prejudice exception.\textsuperscript{178}

Petitioners also cannot rely on a sentencing error as a constitutional violation because noncapital sentencing errors normally do not rise to the level of constitutional violations.\textsuperscript{179} The Court in \textit{Herrera} left open the question whether a truly persuasive showing of actual innocence in a capital case allows a petitioner to gain relief despite the lack of a valid constitutional claim.\textsuperscript{180} The possibility that a truly persuasive showing of actual innocence of a capital crime would render an execution

\textsuperscript{172} See infra text accompanying notes 173-184 (noting the problems petitioners experience in formulating valid constitutional claims).
\textsuperscript{173} See supra notes 44-45 and accompanying text (explaining that procedural defaults generally result from attorney error).
\textsuperscript{174} See supra note 55 and accompanying text (noting that the actual innocence exception is an exception to the cause and prejudice standard).
\textsuperscript{175} See supra note 45 and accompanying text (noting that ineffective counsel satisfies the "cause" prong).
\textsuperscript{176} See supra notes 47, 51 and accompanying text (discussing the \textit{Strickland} standard for ineffective counsel claims and the prejudice requirement).
\textsuperscript{177} See supra notes 53-55 (noting that courts only reach the actual innocence exception if petitioners fail to satisfy the cause and prejudice exception).
\textsuperscript{178} See supra note 45 and accompanying text (explaining that valid ineffective counsel claims satisfy the cause and prejudice standard).
\textsuperscript{179} See infra text accompanying note 184 (quoting \textit{Higgins}).
\textsuperscript{180} See supra note 60 and accompanying text (discussing the \textit{Herrera} opinion).
unconstitutional is grounded in the Eighth Amendment's right against cruel and unusual punishment, and the Fourteenth Amendment's Due Process guarantees. In this context, the execution of a petitioner showing innocence of a crime constitutes a constitutional violation in itself. This exception logically extends to capital sentencing proceedings in which the petitioner proves ineligibility for the death penalty. Extending this analysis to noncapital sentencing cases, however, is inappropriate because, as the Eighth Circuit stated:

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

Applying the actual innocence exception in the absence of a constitutional violation is appealing in noncapital sentencing cases because requiring a constitutional violation creates increased problems. In a case where a petitioner claims to be innocent of a crime and supplements the claim with an alleged constitutional error, an anomalous result could occur if the petitioner presents evidence of probable innocence, but remains incarcerated because the court finds the constitutional claim meritless.

The Supreme Court believes that executive clemency will remedy these situations; however, relying on executive clemency in noncapital sentencing cases is misguided because executive clemency focuses mainly on preventing executions of innocent people. Petitioners demonstrating actual innocence

182. See id. at 426 (O'Connor, J., concurring) (implying that the constitution does not permit the execution of an innocent person).
183. See supra notes 70-73 and accompanying text (discussing the heightened reliability that death penalty cases require because of the nature of the penalty).
185. See supra note 60 (noting that the possibility of an innocent prisoner remaining incarcerated because no constitutional violation existed drew large public criticism).
186. See supra note 60 (discussing the availability of executive clemency in cases involving strong showings of innocence).
of noncapital sentences by clear and convincing evidence are unlikely to receive a pardon because no threat of executing an innocent person exists.\textsuperscript{188} Therefore, a petitioner proving innocence of a noncapital sentence but failing to prove a constitutional violation is less likely to receive redress than a petitioner proving innocence of a capital crime or capital sentence.\textsuperscript{189}

Although forcing a petitioner to prove a constitutional violation despite making a persuasive showing of innocence is questionable,\textsuperscript{190} it conforms to the federal habeas court's role of correcting constitutional errors rather than errors of fact.\textsuperscript{191} The Fourth Circuit's failure to rely on a constitutional violation ignores this role and impermissibly expands the actual innocence exception beyond its narrow limits.\textsuperscript{192}

\textbf{b. Limiting Review to Objective Factors: Rejecting an Extension to Guideline Sentences}

Applying the actual innocence exception to noncapital sentences promulgated under sentencing guidelines is problematic because reviewing courts evaluating the propriety of a guideline sentence cannot focus on objective factors.\textsuperscript{193} Courts cannot focus on objective factors because sentencing under guidelines does not involve a separate sentencing stage resembling the guilt-or-innocence stage,\textsuperscript{194} a number of factors

\textsuperscript{188} See supra note 187 and accompanying text (stating that executive clemency focuses on preventing the execution of innocent persons).

\textsuperscript{189} See, e.g., Higgins v. Smith, 991 F.2d 440, 441 (8th Cir. 1993) (noting that the petitioner was mistakenly sentenced, but no redress was available because the petitioner did not point to any constitutional violation).

\textsuperscript{190} See Steiker, supra note 46, at 377 ("It is difficult to imagine that a federal habeas court could sensibly conclude that a petitioner is probably innocent and that relief is nonetheless inappropriate.").

\textsuperscript{191} See supra notes 23, 25, 61 and accompanying text (explaining the role of federal habeas courts).

\textsuperscript{192} See supra notes 56, 78, 80, 82-86 and accompanying text (noting the narrow limits of the actual innocence exception).

\textsuperscript{193} See supra note 78 and accompanying text (noting that the actual innocence exception must focus on objective factors for it to operate properly).

\textsuperscript{194} See, e.g., UNITED STATES SENTENCING COMMISSION, SENTENCING GUIDELINES § 6A1.1 (1995) [hereinafter U.S.S.G.] (stating that a presentence investigation and report are to be submitted to the court before imposition of a sentence).
determine the sentencing range,\(^{195}\) and the sentencing authority possesses discretion at sentencing.\(^{196}\) Allowing courts to review guideline sentences under these conditions unduly broadens the actual innocence exception beyond its narrow limits.\(^{197}\)

In capital sentencing cases, a separate sentencing stage requires the state to prove the existence of aggravating circumstances beyond a reasonable doubt.\(^{198}\) Similarly, in habitual offender sentencing, the state must prove the requisite number of prior offenses beyond a reasonable doubt.\(^{199}\) These sentencing procedures develop facts and provide a reliable record for a court to review.\(^{200}\) Unlike these proceedings, sentencing guidelines normally do not involve a separate stage in which the prosecution must prove certain facts beyond a reasonable doubt. For example, the Federal Sentencing Guidelines provide for a separate sentencing hearing in which the prosecution must prove disputed facts by a preponderance of the evidence.\(^{201}\) This procedure is less formal than capital sentencing procedures because a probation officer prepares the sentencing report\(^{202}\) and the defendant challenges any disputed information in the report at the sentencing hearing.\(^{203}\) As a result, reviewing courts encounter a less reliable record when determining a petitioner's eligibility for the sentence received.\(^{204}\)

Guideline sentences create further problems because a

\(^{195}\) See, e.g., United States v. Maybeck, 23 F.3d 888, 891 (4th Cir. 1994) (noting that the sentencing court relied on the defendant's offense level and criminal history category to determine a guideline range of 168-210 months before imposing a sentence of 198 months).

\(^{196}\) See U.S.S.G. § 5K2.0 (stating that sentencing courts can depart from the guideline range if aggravating circumstances exist).

\(^{197}\) See supra notes 55-56 and accompanying text (noting that the actual innocence exception is a narrow exception to the cause and prejudice standard).

\(^{198}\) See, e.g., LA. CODE CRIM. PROC. ANN. art. 905 (West 1996) (stating that a death sentence shall not be imposed unless the jury finds beyond a reasonable doubt the existence of at least one aggravating circumstance at the sentencing hearing).

\(^{199}\) See supra note 146 (citing Indiana's habitual offender statute).

\(^{200}\) See supra notes 9, 140 (discussing the sentencing phases in Jones and Sawyer).

\(^{201}\) U.S.S.G. § 6A1.3(a)(b).

\(^{202}\) Id. § 6A1.1.

\(^{203}\) Id. § 6A1.3(a).

\(^{204}\) See, e.g., United States v. Maybeck, 23 F.3d 888, 890 (4th Cir. 1994) (noting that defendant's criminal history worksheet incorrectly indicated that he was a career offender).
number of factors determine the appropriate sentence. Typically, a guideline sentence is determined by a defendant's criminal history score and the offense level of the crime charged. Both of these factors are calculated based on a combination of other factors. Allowing a reviewing court to evaluate each factor to determine the propriety of the sentence is inappropriate because review must focus on a "relatively obvious class of relevant evidence."

Furthermore, the sentencing judge's discretion to depart from the recommended guideline sentence creates difficulties when applying Sawyer's "no reasonable juror" standard. For example, the petitioner in Maybeck received a 198-month sentence based on the improper finding that he was a career offender under the Federal Sentencing Guidelines. The correct guideline range permitted a maximum sentence of 165 months. In holding that the petitioner was actually innocent of the sentence, the Fourth Circuit failed to recognize the possibility that the sentencing authority could depart upward from the Guidelines. Furthermore, because judges may depart, or decide not to depart, from the Guidelines for different reasons, it is impossible for a reviewing court to determine how an individual judge would sentence based on a certain set of facts. Applying the actual innocence exception in these situations is improper because it forces reviewing courts to subjectively assess the reactions of sentencing authorities.

205. See U.S.S.G. § 5A (providing sentencing table).
206. See id. §§ 4A1.1, 4B1.1, 4B1.4(c) (describing the factors used to calculate criminal history scores). See generally id. chs. 2-3 (discussing the factors used to calculate offense level).
208. See supra notes 95-97 and accompanying text (discussing the Fifth Circuit's requirement that petitioners show they were legally ineligible for the sentence received).
210. Id. at 894.
211. Id.
212. See supra note 196 and accompanying text (noting that judges possess the discretionary power to depart from the Guidelines).
213. See U.S.S.G. §§ 5K2.1-5K2.16 (providing numerous factors on which a judge may rely in departing from the Guidelines).
214. See supra note 78 and accompanying text (stating that the actual innocence exception must focus on objective factors).
2. The Eighth Circuit's Approach: Violating the "No Reasonable Juror" Standard

The Eighth Circuit's approach in Jones, applying the actual innocence exception to habitual offender cases even if the sentence received was available under the general felony statute, is arguably more appropriate than applying Sawyer's "no reasonable juror" standard because of the differences between capital sentencing and habitual offender sentencing. Capital cases subject a defendant to death, a penalty not available under normal statutory sentencing guidelines. In habitual offender cases, however, a defendant may be eligible for the same maximum sentence under either the habitual offender statute or the general sentencing statute. Although the maximum penalties may be the same, the habitual offender statute's harsher options may influence a juror to sentence a defendant more severely.

Requiring a habitual offender sentence to exceed the statutory maximum, however, ensures that the actual innocence exception remains narrowly tailored. The Court's belief that the death penalty does not require a different standard of review on federal habeas review implies that the "no reasonable juror"
standard applies to both capital and noncapital sentences. 220 Allowing petitioners to challenge habitual offender sentences falling within the sentencing range of a general felony statute contradicts the reasoning behind the "no reasonable juror" standard because a reasonable juror could sentence the defendant to the same penalty without relying on the habitual offender options. 221 Allowing federal judges to assess how jurors would react to the sentencing range of a general felony statute impermissibly broadens the actual innocence exception because it shifts the focus of a reviewing court from objective to subjective factors. 222

CONCLUSION

The actual innocence exception provides a safety valve for federal habeas petitioners bringing successive, abusive, or procedurally defaulted claims. The Supreme Court's decisions in Sawyer and Herrera that strictly limit the ability of petitioners to demonstrate "actual innocence" of a crime or death sentence, however, create the impression that the exception is a roadblock rather than a safety valve. The high costs of federal habeas corpus review combined with the additional costs of reviewing successive, abusive, and procedurally defaulted claims require courts to place these limits on the use of the actual innocence exception.

This Note recognizes the strict limits associated with the actual innocence exception and proceeds to weigh the costs of habeas review against the benefits of extending the exception to noncapital sentencing cases. The Note concludes that the exception should extend to the narrow class of cases in which a petitioner receives a sentence in a separate sentencing procedure resembling the guilt-or-innocence stage, demonstrates that a constitutional violation resulted in the sentence, proves innocence of the sentence by clear and convincing evidence, and shows that the sentence received exceeded the statutory maximum. This test benefits petitioners serving sentences that are fundamentally unjust, such as incorrect habitual offender

220. See supra note 74 and accompanying text.
221. See Smith, 977 F.2d at 959-60 n.5 ("Applying the actual innocence test of Sawyer to the facts of Jones supports the conclusion that Jones had not demonstrated actual innocence because even absent the constitutional error, a reasonable juror could still have found Jones eligible for life imprisonment.").
222. See supra notes 79-80 and accompanying text.
sentences, because it provides an avenue for these petitioners to challenge their sentences. Conversely, the costs of this narrow extension are low in that review is limited to objective factors. This test complies with the Supreme Court's admonition that the actual innocence exception is a narrow exception.