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A Little-Noticed Supreme Court Case Represents A Huge Injustice:

## **The Court Refuses to Free A Man Serving Six Years on a Two-Year Sentence**

By EDWARD LAZARUS ---- Thursday, Jun. 10, 2004

At the Supreme Court, the least significant and least noticed cases sometimes say the most about the institution and our system of justice. *Dretke v. Haley*, decided last month with no fanfare, is just such a case. Unfortunately, the story it tells is of an institution and a system remarkably unconcerned with the common call simply to do the right thing. Everyone involved in Michael Wayne Haley's case - the State of Texas, which prosecuted him; the lower federal court judges who heard his case; and all the U.S. Supreme Court's Justices - recognize that he's been in jail more than six years for a crime carrying a maximum sentence of two years. The lower federal courts ordered Haley released. But Texas, despite agreeing that Haley is serving time under an unlawful sentence, still appealed to the Supreme Court to keep Haley in jail. And the Supreme Court, rather than exonerating Haley and making permanent the temporary freedom granted him by the court of appeals, doomed him to another long round of litigation in the lower courts and the possibility of a return to jail for a crime he undoubtedly did not commit. How does this happen? The story of Haley's case illustrates how hard it can be to correct, through our system, what is really a simple and straightforward injustice.

**The Facts of Haley's Case: Why He Got Sixteen Years When Only Eligible for Two** In 1997, Haley was arrested for stealing a calculator from a Wal-Mart. At trial, he was convicted of theft. Because Hale had two prior theft convictions, his relatively minor crime was punishable by up to two years in prison. Not satisfied, Haley's prosecutors also charged him with the separate offense of being a habitual felony offender, under Texas's "three strikes" law. The jury found Haley guilty of being a habitual offender and recommended a sentence of 16½ years - a recommendation that the sentencing judge followed. The judge deemed Haley a "habitual offender" on the ground that he had two prior felony convictions - one for attempted robbery, the other for delivery of amphetamines. Now for the fly in the ointment. Under the law, Haley was not eligible to be charged as a habitual offender, because the timing of his prior felonies did not fit the statutory requirements. Unfortunately for Haley, however, his defense lawyer at trial did not notice the problem. And apparently, neither did the prosecutors. So Haley went to prison, and started serving a sentence at least 14½ years too long.

**The Attempt to Correct the Mistakes in Haley's Sentence** Eventually, Haley caught on to the mistake. And in August 2000, he filed a petition for habeas corpus in federal court. In his petition, he claimed that he was "innocent" of being a habitual

offender and, accordingly, that his sentence was unlawful. The State of Texas conceded that Haley's criminal record made him ineligible for habitual offender treatment. But the State still wanted Haley to serve the extra 14-plus years on the ground that he had waived the argument he now was making - having failed to raise the objection at trial or on direct appeal from his conviction and sentence. Using one of those lovely obscurities of the law, the State argued that Haley's claim was "procedurally defaulted" - which is another way of sticking your tongue out and screaming "Hah-hah, too late!" The federal district court rejected the State's claim. It ruled that Haley's claim fell within what is known as the "actual innocence" exception to the bar against raising defaulted claims. Accordingly, the court ordered Texas to re-sentence Haley. In so doing, the district court broke a bit of new ground. The "actual innocence" exception allows defendants to raise new claims in a petition for a writ of habeas corpus. In the past, it had only been recognized in death penalty cases - not term-of-years cases like Haley's. The district court, however, saw no logical reason for limiting this safety valve where such a limitation would be so obviously unjust. After all, the safety valve itself is designed to achieve a just result, and to ensure that legal technicalities do not force an innocent person to serve longer time than he or she should. The U.S. Court of Appeals for the Fifth Circuit -- arguably the most conservative in the country --- agreed. It was willing to extend the "actual innocence" exception to non-capital cases involving habitual offender statutes like Texas'. And that was enough to free Haley, who by then had already served far more than the maximum two years jail time for which he rightfully was eligible.

### **The Way Haley Could Be Freed: Broadening the "Actual Innocence" Exception**

As the Fifth Circuit recognized, broadening the "actual innocence" exception, even modestly, created some problems of doctrinal purity. To see why, it's necessary to understand how the doctrine evolved. In a long line of cases, the Supreme Court had decreed that ordinarily the only way to raise a procedurally defaulted claim was to show "cause and prejudice." That is, a defendant had to show that there was a good cause for having failed to bring up the defaulted claim at the right time, and that the failure to raise the claim was going to cause real harm. But in effect, the "actual innocence" exception does away with the first, "cause" part of this calculus. It recognizes that when the harm is sufficient great - for instance, when the harm is the wrongful imposition of the death penalty - a defendant need not have an excuse for failing to raise the winning argument at the proper time. (The exception is especially sensible in light of the fact that it's virtually never the defendant's own mistake that the argument isn't timely raised; it's virtually always his attorney's. And ironically, even a grievous mistake that causes the defendant great harm cannot always support a winning "ineffective assistance of counsel" claim.) Readers may wonder why the actual innocence exception wasn't very broad in the first place. After all, if someone is really innocent, it violates due process to keep that person in jail. So why not focus on proof of innocence, and forget about bickering about why a certain

argument wasn't raised at a certain time? Surely there is much to be said for this approach as long as some protections are built in to prevent lawyers and their clients from strategically holding some arguments in reserve. But some judges felt differently. They believed that, to protect the integrity of the "cause and prejudice" standard, the actual innocence exception really ought to be limited to the drastic circumstance of death penalty cases. Only there, the theory has it, is the "prejudice" great enough to allow the court to forget about the fact that there was no good "cause" for the argument's not being made when it should have been.

**Texas's Supreme Court Appeal, and the Court's Decision** Back to Haley's case. The State of Texas was not satisfied that Haley had already served years longer than he should have. Rather than agreeing to his permanent release, it appealed to the U.S. Supreme Court. In its petition to the Court, it argued that the actual innocence exception should not extend to Haley's case, and that he should serve the full 16½ years even though the facts of his case could not justify that sentence. So what did the Supreme Court do when faced with a choice between doctrinal purity and gross injustice? By a 6-3 vote, the justices punted. Specifically, in an opinion written by Justice Sandra Day O'Connor, they decided not to decide whether the actual innocence exception should be interpreted as extending to habitual offender cases. Instead, they ruled that Haley should go back to the district court and try to exonerate himself based on one of his other claims of error - claims that the district court had not ruled on in light of the obvious and admitted problem with Haley's sentence.

**Forgetting Justice - and Making an Ass Out of the Law** For that reason, Justice John Paul Stevens, joined by Justices Anthony Kennedy and David Souter, bemoaned that the majority, in order to avoid dealing with the cause and prejudice standard, had managed to "forget about justice." If Justice Stevens had been blunter, he might simply have written that the Court had made an ass out of the law. After all, it is not as though the cause and prejudice standard is a constitutional requirement, or even a statutory command. That standard for excusing procedural default was created by the Supreme Court, and thus subject to tinkering by the justices. What the Court itself wrought, the Court can certainly amend. Moreover, past Supreme Court decisions dealing with procedural default have recognized that lower courts should be able to ignore defaults to avoid miscarriages of justice. How much worse a miscarriage could there be than keeping a person in jail unlawfully? Why, then, couldn't the Court have deferred to the Eighth Circuit's view and left the ultimate issue for another day, while at the same time allowing Haley to rightfully claim his freedom?

**Rewarding the State for Its Attempts to Keep a Person Unlawfully In Jail** As Justice Kennedy pointed out separately, the majority decision also sends a perverse message to officials of the State of Texas. There is no legal or moral justification for

state officers trying to keep someone in jail for a crime that the state admits the person did not commit. Yet Texas officials implacably pursued appeals in Haley's case - and the Court's decision puts a judicial imprimatur on that patently unjust practice. It rewards the State's intransigent refusal to admit that a mistake had been made, and to correct it. Sadly, it is, perhaps, not quite accurate to say that the Supreme Court's decision is shocking. The current Court is frequently at pains to distance itself from the purportedly "soft" jurisprudence of the Warren era, where issues of fairness are said to have over-influenced the Court's constitutional interpretation. The opposite of this soft, fairness-based approach to judging is the reflexive formalism that seemed to be driving the majority in Haley's case. So perhaps this outcome was not shocking at all - but simply to be expected.

**Another Proof of Justice Kennedy's Strong Moral Compass** Still, it says a lot about the current Court that both Clinton appointees, Ruth Bader Ginsburg and Stephen Breyer, voted with the majority - and, indeed, could have swung the case the other way had they so chosen - while Justice Kennedy joined the dissent. The Haley case renders laughable the common accusation that Ginsburg and Breyer are "liberal." To the contrary, they are moderate, profoundly cautious, and unmoved by claims of individualized injustice. The case also serves as another reminder that, on this Court, Kennedy owns the strongest moral compass. In the field of criminal law alone, in the last few years, Kennedy has now written passionately to decry abusive interrogation tactics, the misuse of race by prosecutors, and now the failure of Texas officials to observe their absolute duty to seek justice. Unfortunately for Haley, for this Court, being clearly and uncontroversially right - as Haley has been all along -- is not enough. For those who bemoan criminal defendants' "getting off on a technicality," isn't keeping Haley in jeopardy on a technicality even worse? Conservatives and liberals alike ought to scorn this shameful ruling.

**Proverbs 9:9** Give instruction to a wise man, and he will be yet wiser: teach a just man, and he will increase in learning.

-or-

Wise men are instructed by reason;  
Men of less understanding, by experience;  
The most ignorant, by necessity;  
The beasts by nature.

*Letters to Atticus*[?], Marcus Tullius Cicero