"Habeas Hints"

by Kent Russell

This column provides "habeas hints" to prisoners who are considering or handling habeas corpus petitions as their own attorneys ("in pro per"). The focus of the column is on "AEDPA", the federal habeas corpus law which now governs habeas corpus practice in courts throughout the United States.

ACTUAL INNOCENCE

In *McQuiggin v. Perkins*, 133 S.Ct. 1924 (2013), the U.S. Supreme Court held that "actual innocence", if proved, is a gateway through which a habeas petitioner can make it into federal court even though the AEDPA statute of limitations has run. *McQuiggin* is an important case because it potentially opens the door to the federal courthouse for prisoners who claim that they are innocent, but whose convictions are so old that they would otherwise have been barred by AEDPA's one-year statute of limitations. On the other hand, the standard of proof for actual innocence claims is so demanding that only a handful of prisoners will be able to satisfy it.

McQuiggin involved a habeas corpus petitioner (Perkins) who had been convicted of first degree murder and sentenced to death back in 1977. The prosecution's star witness at trial was one Jones, who was present at the murder scene, but who testified that Perkins alone committed the murder while Jones looked on. Other prosecution witnesses testified that Perkins had told them that he planned to kill the victim beforehand and had admitted afterward to being the killer. Perkins, however, denied killing the victim, and testified at trial that he was not present when the victim was killed, and that he had seen Jones later on that night with blood on his hands.

Between the time his conviction became final in 1997 and July of 2002, Perkins obtained affidavits which pointed to Jones as the murderer. However, Perkins did nothing with them until June of 2008, when he filed a federal habeas corpus petition alleging that the affidavits constituted "newly discovered evidence of actual innocence", and that his trial attorney had been ineffective in failing to present this exonerating evidence at the trial.

The U.S. District Court denied Perkins any habeas relief on two separate grounds:

First, as to the affidavits Perkins presented in support of his actual-innocence claim, the court reasoned that, even assuming they qualified as newly discovered

evidence of innocence, Perkins could only get past the AEDPA statute of limitations if he could establish *equitable tolling*. Equitable tolling, however, requires not only a showing of extraordinary circumstances justifying the delay in obtaining the new evidence, but also "diligence" in bringing the case to court promptly after its discovery. Because Perkins had waited 11 years from conviction and 5 years after the date of the latest affidavit before filing his habeas corpus petition, he "had failed utterly to demonstrate the necessary diligence in exercising his rights". Therefore, the District Court denied any relief from the statute of limitations because Perkins could not possibly satisfy the diligence requirement for equitable tolling.

Secondly, the District Court found that Perkins had failed to meet the strict standard by which pleas of actual innocence are measured, because he had not shown that, taking into account all the evidence, it is "more likely than not that no reasonable juror would have convicted him".

Perkins appealed to the Sixth Circuit, which granted a COA on the single issue embraced by the first reason for the District Court's denial: Is reasonable diligence a pre-condition to relying on actual innocence as a gateway to adjudication of a federal habeas corpus petition on the merits? The 6th Circuit answered "No" to this question, and on that basis reversed the District Court's dismissal of Perkins' petition. The Supreme Court ("SCOTUS") then granted review.

The *McQuiggin* court began by reminding everyone that, although SCOTUS had never decided whether a prisoner can obtain habeas relief based on a "free-standing" actual-innocence claim (that is, a petition arguing solely that the petitioner is innocent, without any allegation that he was denied a specific right under the Constitution), the Court had permitted petitioners to overcome procedural barriers to relief under the "fundamental miscarriage of justice" exception, which applies where a constitutional violation "has probably resulted in the conviction of one who is actually innocent." Applying this fundamental miscarriage of justice exception, which the Court equated with a claim of actual innocence, SCOTUS had permitted petitioners to be heard on the merits who would otherwise have been barred from relief by procedural defaults, such as a violation of the successive petition rule, or being barred from an evidentiary hearing in federal court after failing to develop the claim fully in state court. The *McQuiggin* court explained that, in these and other situations where the miscarriage of justice applied, Congress had specified additional requirements that had to be met in order to obtain relief: For example, to overcome the successive-petition rule or obtain an evidentiary hearing on an undeveloped claim, a petitioner also had to establish diligence and meet a higher standard of proof ("clear and convincing evidence" rather than just a probability).

Yet, Congress had not placed any additional requirements on overcoming the AEDPA statute of limitations. Thus, a petitioner could do *that* solely by alleging and establishing actual innocence. Conversely, lack of diligence was not a make-or-break requirement for relief from the statute of limitations, but rather a single factor to be considered in evaluating the overall sufficiency of the actual-innocence claim.

In sum, *McQuiggin* held that a federal habeas court, faced with a first federal habeas petition that alleged actual innocence but which, on its face, showed that the AEDPA statute of limitations had run, should not treat lack of diligence as an absolute barrier to relief, but rather as one factor to be taken into account in determining whether the petitioner had alleged and proved that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence".

Applying this principle, the *McQuiggin* court found that the District Court had erred by barring Perkins from entering the gateway to the federal court on the basis that he had not shown diligence in bringing the newly discovered evidence to the federal court's attention. Nevertheless, the District Court had also based its dismissal on Perkins' failure to meet the demanding actual innocence standard – which requires "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error" – and the Supreme Court found no reason to question the District Judge's decision in this regard. So, SCOTUS vacated the Sixth Circuit's reversal of the dismissal order and remanded the case, thereby reviving the dismissal of Perkins' case in the District Court. In short, Perkins won on the law, but he lost his case on the facts.

Habeas Hints

$ *McQuiggin* carved out an actual-innocence exception to the AEDPA statute of limitations that stands on its own, separate and apart from the exception that already exists based on equitable tolling. The difference between the two is that the *McQuiggin* exception does not require a diligence showing but does require actual innocence; whereas equitable tolling does require diligence but not a showing of actual innocence. But, keep in mind that it will be easier in many cases to demonstrate equitable tolling rather than actual innocence. Therefore, when you set out the facts and law which would justify the federal court to hear the petition on the merits despite the lapse of AEDPA's statute of limitations – which you will have to do in the petition itself and/or in response to the Attorney General's motion to dismiss for untimeliness – consider the following recommendations: (1) If you missed the statute of limitations because of prison restrictions or other

outside impediments which made it impossible for you to file on time, and you were diligent in filing relatively soon after the restrictions ended, then seek to be heard based solely on equitable tolling and do not rely on *McQuiggin*. (2) If you were late because you hired an attorney for habeas corpus who took your money and never did anything for you, then allege that the default is excusable because of attorney "abandonment" [see *Maples v. Thomas*, 565 U.S. __ (No. 10-63, 2012)], a legitimate basis for equitable tolling, and don't bother with *McQuiggin*. (3) If you don't have any legally acceptable reason for waiting as long as you did to file for federal habeas (e.g., not having money is not a valid legal excuse for delay), but you do have a strong claim of actual innocence, then rely on *McQuiggin* and don't argue equitable tolling.

$ The majority's reasoning in *McQuiggin* makes clear that actual innocence can be used, not only to excuse a violation of the AEDPA statute of limitations, but also to overcome any other kind of procedural default as well. Hence, for example, if you filed a state habeas petition to exhaust but it was denied for violating some state procedural rule, this would ordinarily prevent you from getting heard on the merits in federal court. However, under *McQuiggin* you could attempt to avoid the state procedural default problem by alleging actual innocence in your federal petition, even if you could not show diligence. Nevertheless, because the actual innocence standard is so hard to satisfy, you should only use *McQuiggin* as a last resort, i.e., in those situations where you cannot overcome the procedural default in any other way.

$ *McQuiggin* did not invalidate current law, which provides that actual innocence cannot, standing alone, be the basis for a federal court to grant habeas corpus relief. See, e.g., *Herrera v. Collins*, 506 U.S. 390 (1993). Therefore, although *McQuiggin* does allow a petitioner to get to the door to the federal courthouse if he has a strong claim of actual innocence, it doesn't get him successfully through the door unless he also can also allege a separate claim of prejudicial error arising from a violation of the U.S. Constitution. However, this challenge can almost always be met by alleging ineffective assistance of counsel (IAC), which is a recognized Constitutional violation under the Sixth Amendment, along with actual innocence to excuse the default in question. The reasoning proceeds as follows: "By definition, newly discovered evidence is evidence that was *not* obtained and presented at trial by trial counsel. Newly discovered evidence sufficiently compelling to meet the very difficult actual-innocence standard was necessarily so vital to the defense that it certainly *should* have been located and introduced at trial by competent defense counsel. Hence, counsel's failure to do so

is IAC." In other words, in any case where you can credibly argue actual innocence based on newly discovered evidence pursuant to *McQuiggin*, you should also be able to allege, as a substantive habeas corpus claim, that your trial counsel was ineffective in failing to obtain and present that evidence in the trial court.

$ While *McQuiggin* potentially opens the door to consideration of old claims that would otherwise have clearly violated the statute of limitations, establishing actual innocence amounts to proving beyond a reasonable doubt that the petitioner is innocent. Put another way, to prove actual innocence, a defendant who has been found *guilty* despite the most demanding standard under American law – proof beyond a reasonable doubt – has to now establish his *innocence* according to that same, tough standard, applied in reverse! Thus, in evaluating whether a *McQuiggin*-type claim has any real chance of success on habeas, remember that, although actual innocence breathes life into claims that before *McQuiggin* would have been DOA in federal court, as a practical matter only a very, very few petitioners will ultimately be able to make the extremely difficult showing that *McQuiggin* requires.

$ Although I've repeatedly emphasized the immense difficulty of successfully making the showing of actual innocence required by *McQuiggin*, as a practical matter it may now not be too much harder to do so than to succeed on a more conventional IAC claim. SCOTUS has recently made federal habeas corpus relief for IAC so extremely difficult [see, e.g., *Harrington v. Richter*, 131 S.Ct. 770 (2011), requiring "double deference" to state-court denials of IAC claims and refusing to set them aside so long as *any* reasonable judge could have denied the claim for *any* reason], that one has to wonder whether, practically speaking, getting habeas corpus granted on an IAC claim in federal court can ever be done without ultimately showing, beyond a reasonable doubt, that the petitioner is "actually innocent".

Kent A. Russell specializes in habeas corpus and is the author of the California Habeas Handbook, which thoroughly explains state and federal habeas corpus under AEDPA. The 6th Edition, completely revised in September of 2015, can be purchased for ***$49.99****, which includes priority mail postage. An optional order form can be obtained from Kent's website (russellhabeas.com), or simply send a check or money order to: Kent Russell, "Cal. Habeas Handbook", 3169 Washington St., San Francisco, CA 94115.*