Antiterrorism and Effective Death Penalty Act of 1996 — Actual Innocence Gateway — McQuiggin v. Perkins

For decades, a lively debate has persisted about the proper role of innocence in the doctrine surrounding the writ of habeas corpus.[1] Hornbook criminal procedure holds that "habeas courts sit to ensure" procedural justice — that is, "that individuals are not imprisoned in violation of the Constitution — not to correct errors of fact."[2] Yet substantive concern for innocence is not irrelevant[3]: the Supreme Court has long recognized an "actual innocence gateway" that allows petitioners who can credibly show their actual innocence to bypass procedural bars and have their habeas claims adjudicated.[4] Since Congress imposed new statutory restrictions on the availability of habeas in 1996, the academy has debated whether the writ should be expanded to allow petitioners to elude those statutory barriers as well.[5] Last Term, in *McQuiggin v. Perkins*,[6] the Supreme Court created an exception to a statutory barrier — a statute of limitations — for the actually innocent. Though the purpose of habeas relief is to correct constitutionally significant procedural defects, the Court properly allowed concerns for substantive justice to guide its decision.

On March 4, 1993, Floyd Perkins, Rodney Henderson, and Damarr Jones attended a house party in Flint, Michigan.[7] Shortly after they left together, Henderson was fatally stabbed.[8] Perkins claimed that he separated from Henderson and Jones at a liquor store, and that he saw Jones later wearing bloody clothing.[9] Jones testified that Perkins murdered Henderson while the three were still together.[10] A jury convicted Perkins of first-degree murder, largely on the strength of Jones's

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[1] *See, e.g.*, *In re* Davis, 130 S. Ct. 1, 3 (2009) (Scalia, J., dissenting) ("This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent. Quite to the contrary, we have repeatedly left that question unresolved . . . .").

[2] Herrera v. Collins, 506 U.S. 390, 400 (1993).

[3] *See generally* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (arguing that innocence is not irrelevant to habeas).

[4] *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 494–95 (1991) (exception to bar on "abuse of the writ"); Murray v. Carrier, 477 U.S. 478, 496 (1986) (exception to bar on procedurally defaulted claims); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (exception to bar on successive petitions).

[5] *See, e.g.*, Angela Ellis, Note, *"Is Innocence Irrelevant" to AEDPA's Statute of Limitations? Avoiding a Miscarriage of Justice in Federal Habeas Corpus*, 56 VILL. L. REV. 129, 132–34 (2011); Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 347–49 (2001).

[6] 133 S. Ct. 1924 (2013).

[7] *Id.* at 1928–29.

[8] *Id.* at 1929.

[9] Perkins v. McQuiggin, 670 F.3d 665, 667 (6th Cir. 2012).

[10] *Id.*; *McQuiggin*, 133 S. Ct. at 1929.

testimony and that of Henderson's two friends, who claimed that Perkins confessed to them.[11] The court sentenced Perkins to life in prison without possibility of parole.[12] After Perkins exhausted his direct appeals, his conviction became final on May 5, 1997.[13]

Under the Antiterrorism and Effective Death Penalty Act of 1996[14] (AEDPA), prisoners convicted by a state court must file a petition for a writ of habeas corpus within one year of "the date on which the judgment became final" unless one of three exceptions applies.[15] In the case of certain impediments to filing — including unconstitutional state action, recognition of a new right by the Supreme Court, or recent discovery of facts crucial to the petition — the limitation obtains one year after removal of the impediment.[16] AEDPA's statute of limitations, like those in many federal statutes,[17] is also subject to equitable tolling for petitioners who pursued their rights diligently but encountered "extraordinary circumstances" that prevented timely filing.[18]

Perkins filed his habeas petition on June 13, 2008, more than eleven years after his conviction became final.[19] Appearing pro se,[20] Perkins claimed several constitutional defects in his original trial, including prosecutorial misconduct and ineffective assistance of counsel.[21] After offering affidavits from three new witnesses implicating Jones as the murderer,[22] Perkins argued that he had a credible claim of actual innocence that entitled him to an equitable exception to the statute of

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[11] *See McQuiggin*, 133 S. Ct. at 1929.

[12] *Id.*

[13] *Id.*

[14] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[15] 28 U.S.C. § 2244(d)(1) (2006); *see also id.* § 2255 (2006 & Supp. V 2011) (imposing the same limitation on federal prisoners).

[16] The statute provides, in relevant part:

> The limitation period shall run from the latest of —
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Id. § 2244(d)(1).

[17] *See* Young v. United States, 535 U.S. 43, 49 (2002).

[18] *See* Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (internal quotation marks omitted).

[19] *McQuiggin*, 133 S. Ct. at 1929.

[20] Perkins v. McQuiggin, No. 2:08-CV-139, 2009 WL 1788377, at *1 (W.D. Mich. June 18, 2009).

[21] Perkins v. McQuiggin, 670 F.3d 665, 668 (6th Cir. 2012).

[22] *Id.*

limitations[23] and, alternatively, that the limitations period should run from the removal of his impediment to filing — the date on which "the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence."[24]

The United States District Court for the Western District of Michigan denied his petition. The court held that the actual innocence gateway was not available to Perkins since he had failed to diligently pursue his rights and his last-dated affidavit had been signed on July 16, 2002 — almost six years before Perkins filed his petition.[25] Further, Perkins failed to make a valid claim of actual innocence: his new evidence had been "substantially available" at trial and merely supported a theory that Perkins already had tested there.[26]

The Sixth Circuit reversed.[27] Writing for the panel, Judge Cole[28] found that habeas petitioners need not diligently pursue their rights in order to pass through the actual innocence gateway.[29] Under binding circuit precedent, petitioners demonstrating actual innocence could evade AEDPA's statute of limitations.[30] Including a diligence requirement would close the actual innocence gateway. Only claims filed later than the statute of limitations — more than a year after the discovery of new evidence was possible through reasonable diligence — required use of the gateway to receive a merits hearing.[31] The court remanded for a full consideration of whether Perkins had established actual innocence.[32] Judge Beckwith concurred, agreeing with the holding but cautioning that it would lead to a flood of stale petitions claiming actual innocence.[33]

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[23] While some courts, including the Western District of Michigan and the Sixth Circuit in these proceedings, consider actual innocence as an issue of equitable tolling, it does not fit neatly into equitable tolling doctrine since actual innocence does not delay filing. Other courts, including the Supreme Court, therefore understand actual innocence as an equitable exception to the limitations period distinct from equitable tolling of the limitations period. *See McQuiggin*, 133 S. Ct. at 1931; Rivas v. Fischer, 687 F.3d 514, 547 n.42 (2d Cir. 2012) (explaining this distinction). For clarity, this comment will use the Supreme Court's terminology.

[24] *Perkins*, 2009 WL 1788377, at *2 (quoting 28 U.S.C. § 2244(d)(1)(D) (2006)).

[25] *Id.* at *2–3.

[26] *Id.* at *3.

[27] Under AEDPA, appeal from denial of a habeas petition is permitted only with a certificate of appealability, which issues only if the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2006). Here, the district court denied the certificate, finding that the procedural bar to relief was plainly evident. *Perkins*, 2009 WL 1788377, at *4. The Sixth Circuit granted the certificate to decide whether diligence is a precondition to its actual innocence exception. *Perkins*, 670 F.3d at 669.

[28] Judge Cole was joined by Judge Moore and District Judge Beckwith of the Southern District of Ohio, sitting by designation.

[29] *Perkins*, 670 F.3d at 676.

[30] *Id.* at 670–72 (citing Souter v. Jones, 395 F.3d 577, 601 n.16 (6th Cir. 2005)).

[31] *Id.* at 673–74 (citing *Souter*, 395 F.3d at 601 n.16).

[32] *Id.* at 676.

[33] *Id.* (Beckwith, J., concurring).

The Supreme Court vacated and remanded. Writing for the Court, Justice Ginsburg[34] agreed with the Sixth Circuit that the actual innocence gateway applies to AEDPA's statute of limitations and that it does not require diligence by the petitioner.[35] She vacated, however, because the Sixth Circuit did not adequately recognize that a petitioner's unjustifiable delay counts "as a factor in determining whether actual innocence has been reliably shown."[36] The Court noted the deep circuit split over whether the actual innocence gateway opens the courts to untimely habeas claims.[37] Justice Ginsburg began by framing the question as whether actual innocence serves as an equitable exception to the statute of limitations; equitable tolling could not apply since Perkins did not satisfy its diligence requirement.[38] Before and after AEDPA's passage, the Court allowed showings of actual innocence to overcome procedural defects, such as failure to satisfy state court filing deadlines, in order to avoid a "miscarriage of justice."[39] "It would be passing strange," Justice Ginsburg noted, to exclude only the federal statute of limitations from the procedural bars vitiable by the actual innocence gateway.[40]

Justice Ginsburg then rebutted Michigan's textual arguments. Michigan argued that opening the gateway would render superfluous AEDPA's extended limitations period for claims based on new evidence, allowing those claims to be brought at any time.[41] Justice Ginsburg observed, however, that there are two distinct rules for overcoming the statute of limitations depending on the nature of the petitioner's claim.[42] Petitioners who develop new evidence supporting their constitutional claim have one year from when that evidence could reasonably have been discovered to bring that claim, while petitioners who develop new evidence supporting their actual innocence — a higher standard — may bring claims featuring that evidence at any time.[43] Michigan also argued that the explicit incorporation of the actual innocence gateway in certain other provisions of AEDPA meant that the limitations provision's silence should be understood as prohib-

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[34] Justice Ginsburg was joined by Justices Kennedy, Breyer, Sotomayor, and Kagan.

[35] *McQuiggin*, 133 S. Ct. at 1928, 1935–36.

[36] *Id.* at 1928.

[37] *Id.* at 1930–31 (citing Rivas v. Fischer, 687 F.3d 514, 548 (2d Cir. 2012) (identifying cases from the Sixth, Ninth, Tenth, and Eleventh Circuits that open the gateway through the statute of limitations and cases from the First, Fifth, and Seventh Circuits that do not)).

[38] *Id.* at 1931.

[39] *Id.* at 1931–32 (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991) (state deadlines); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (repetitive petitions)).

[40] *Id.* at 1932.

[41] *Id.* at 1932–33.

[42] *Id.* at 1933.

[43] *Id.*

iting the gateway's use.[44] Those other provisions, however, incorporated a more stringent version of the gateway, so Justice Ginsburg interpreted congressional silence as permitting use of the traditional gateway for an untimely first petition alleging actual innocence.[45]

As applied to this case, Perkins was free to claim actual innocence notwithstanding his failure to pursue his rights diligently.[46] The Sixth Circuit, however, understood the inquiry too narrowly: Perkins's neglect of his rights was relevant to the credibility of his new evidence.[47] Since the district court found Perkins's evidence inadequate to make out an actual innocence claim, that determination "should be dispositive, absent cause, which [the Court] d[id] not currently see, for the Sixth Circuit to upset that evaluation."[48]

Justice Scalia dissented.[49] He emphasized the absence of an AEDPA provision in which Congress waived the statute of limitations for petitioners credibly claiming actual innocence.[50] Though it is true, as the majority observed, that some procedural barriers to habeas relief have traditionally been subject to actual innocence exceptions, those barriers were all judicially created.[51] For example, since state deadlines only bind federal courts through the nonstatutory, judicially created doctrine of procedural default, courts can open the actual innocence gateway through state deadlines without trampling congressional prerogatives.[52] As Justice Scalia explained, "Never before ha[s the Court] applied the exception to circumvent a categorical *statutory* bar to relief."[53]

In Justice Scalia's view, AEDPA provided the "comprehensive path" for petitioners seeking to base their constitutional claims on the discovery of new evidence.[54] When a petitioner seeks to introduce newly discovered evidence, AEDPA extends the statute of limitations from one year after the conviction becomes final until one year after

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[44] *Id.*

[45] *Id.* at 1933–34. Having held that the actual innocence gateway is open to untimely petitions, Justice Ginsburg agreed with the Sixth Circuit that it would be "bizarre" to impose a diligence barrier on petitioners. *Id.* at 1935. Instead, she held that unreasonable delay bears on the credibility of newly offered evidence, in part so as to prevent manipulations of the system. *Id.* at 1936.

[46] *Id.* at 1936.

[47] *Id.*

[48] *Id.*

[49] The Chief Justice and Justices Thomas and Alito joined Justice Scalia's dissent.

[50] *McQuiggin*, 133 S. Ct. at 1936 (Scalia, J., dissenting).

[51] *Id.* at 1937.

[52] *See id.* at 1940.

[53] *Id.* at 1937; *see also id.* at 1939 ("There are many statutory bars to relief other than statutes of limitations, and we had never (and before today, have never) created an actual-innocence exception to *any* of them.").

[54] *Id.* at 1939.

the petitioner could have discovered the evidence through reasonable diligence.[55] AEDPA also lifts the bar on successive habeas petitions if the petitioner has clear and convincing evidence of her actual innocence.[56] Therefore, to reach the merits of any petition credibly showing actual innocence through use of a judge-made pathway, no matter how infrequently those petitions arise, would "frustrate Congress's design."[57]

Finally, Justice Scalia surmised that the Court's impulse to hear all claims of actual innocence, no matter how untimely, would allow a deluge of frivolous litigation.[58] Not only are colorable actual innocence pleas rare, but courts will now also face the heavy burden of looking at the merits of each claim to see whether it is tenable.[59]

Habeas traditionally serves to ensure procedural justice in criminal proceedings. It is not directly concerned with substantive justice; indeed, as the Supreme Court has made clear, collateral review is not meant as a second opportunity for defendants to receive direct review of their convictions.[60] Nonetheless, a close reading of *McQuiggin* reveals that the Court was motivated by its concerns for substantive justice — in particular, concern that petitioners who can show their actual innocence have an opportunity for courts to consider their claims' merits. And that special solicitude for the actually innocent is well founded, for petitioners who pass through the actual innocence gateway are likely to receive habeas relief.

The *McQuiggin* Court's concern with substantive fairness is evident from two major steps of the opinion. First, the Court decided to retain equitable authority over the availability of habeas notwithstanding AEDPA's text.[61] As Justice Scalia noted, *McQuiggin* is the first case in which the Court allowed a petitioner to avoid statutory barriers to consideration of the merits of the petitioner's habeas claim by passing through the actual innocence gateway.[62] Yet the Court chose to do so in part for substantive reasons: it pointed to "the individual interest in justice that arises in the extraordinary case," which needs to be bal-

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[55] *Id.* (discussing 28 U.S.C. § 2244(b)(2)(B), (d)(1)(D) (2006)).

[56] *Id.* (discussing 28 U.S.C. § 2244(b)(2)(B), (d)(1)(D)).

[57] *Id.* In Justice Scalia's view, the majority misunderstood AEDPA's inclusion elsewhere of the actual innocence standard. Given a background presumption that the actual innocence exception did not apply to statutes of limitations, Congress more likely intended to reject rather than accept such an application — or, at least, intended only a narrow application. *Id.* at 1940–41.

[58] *Id.* at 1942–43.

[59] *Id.*

[60] *See* Herrera v. Collins, 506 U.S. 390, 400–01 (1993).

[61] *See* Jordan Steiker, *Opinion Analysis: Innocence Exception Survives, Innocence Claim Does Not*, SCOTUSBLOG (May 29, 2013, 11:06 AM), http://www.scotusblog.com/?p=164160. *Compare McQuiggin*, 133 S. Ct. at 1931–34, *with id.* at 1937–43 (Scalia, J., dissenting).

[62] *McQuiggin*, 133 S. Ct. at 1937 (Scalia, J., dissenting).

anced against societal interests.[63] "Sensitivity to the injustice of incarcerating an innocent individual" persisted in the face of AEDPA.[64] These concerns are uniquely substantive: the Court opened the courthouse doors to petitioners who can show that their convictions were substantively unjustified because they are actually innocent, rather than petitioners who can, for example, make especially persuasive cases that their trial involved a procedural defect.

Second, the Court decided to exercise its equitable authority by making a habeas merits hearing available to petitioners who could satisfy the actual innocence standard but filed outside the statute of limitations. On this point, the Court offered virtually no reasoning. While the Court repeatedly underscored that the gateway is open only "to a severely confined category" of cases,[65] that assertion is only a response to concerns about judicial resources and frivolous litigation;[66] it does not explain why the Court should exercise its authority on behalf of actually innocent petitioners in a context concerned primarily with procedural justice. Instead, the Court seemed to assume that equity required intervention on behalf of actually innocent petitioners — on behalf of substantive justice. That assumption is rooted in the Court's prior precedent on the actual innocence gateway, which references substantive reasons guiding the exercise of that authority: namely, ensuring "that federal constitutional errors do not result in the incarceration of innocent persons"[67] and, more generally, protecting constitutional rights.[68]

The crucial role of substantive justice in *McQuiggin* is unsurprising. The internal logic of the actual innocence gateway — often called the "miscarriage of justice exception"[69] — is that a credible claim of actual innocence casts doubt on the fairness of the procedures that convicted the petitioner.[70] That logic is invariant across procedural barriers that would otherwise bar a habeas claim. And the gateway was designed to balance social and individual interests, one of which is an interest in substantive justice.[71] Substantive justice, therefore, is baked into the inquiry over the gateway's domain.

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[63] *Id.* at 1932 (majority opinion) (quoting Schlup v. Delo, 513 U.S. 298, 324 (1995)) (internal quotation mark omitted).

[64] *Id.*

[65] *Id.* at 1933; *see also id.* at 1928, 1936.

[66] *See id.* at 1942–43 (Scalia, J., dissenting).

[67] *Id.* at 1936 (majority opinion) (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)) (internal quotation marks omitted).

[68] *See id.* at 1934 (citing Holland v. Florida, 130 S. Ct. 2549, 2562 (2010)).

[69] *Id.* at 1931.

[70] *See* Schlup v. Delo, 513 U.S. 298, 316 (1995).

[71] *See id.* at 324–25 ("Of greater importance, the individual interest in avoiding injustice is most compelling in the context of actual innocence." *Id.* at 324.).

The Court's special solicitude for the actually innocent is well founded, for courts seem more likely to find constitutionally significant procedural defects in the convictions of petitioners who pass through the actual innocence gateway. In general, habeas merits claims are adjudicated according to AEDPA's extremely deferential standard of review.[72] Under AEDPA, the writ is only available for state petitioners who can show that a decision in their case "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "was based on an unreasonable determination of the facts."[73] As a result, less than one percent of habeas petitions in noncapital cases and less than thirteen percent of habeas petitions in capital cases are successful.[74]

The data for petitioners who pass through the actual innocence gateway, however, seem remarkably different.[75] Though the total number of successful gateway claims is unknown, it is likely quite small.[76] But a recent survey found twenty-three cases in which a federal court allowed a petitioner to pass through the actual innocence gateway.[77] In each of these cases for which an opinion is available, the petitioner subsequently received habeas relief, including in capital cases.[78] In at least one of the remaining cases, the state agreed to release the peti-

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[72] *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 386 (2000) (plurality opinion).

[73] 28 U.S.C. § 2254(d) (2006).

[74] *See* NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 9–10 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf.

[75] The following discussion includes only challenges to convictions under *Schlup*'s actual innocence standard, not challenges exclusively to sentences under the higher standard of *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

[76] *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 321 (1995) ("[H]abeas corpus petitions that advance a substantial claim of actual innocence are extremely rare.").

[77] Jordan M. Barry, *Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause*, 64 STAN. L. REV. 535, 587 (2012).

[78] Paradis v. Arave, 240 F.3d 1169, 1181 (9th Cir. 2001) (affirming grant of habeas relief); Silva v. Wood, 14 F. App'x 803, 805 (9th Cir. 2001) (granting habeas relief); Fairman v. Anderson, 188 F.3d 635, 647 (5th Cir. 1999) (affirming grant of habeas relief); Carriger v. Stewart, 132 F.3d 463, 482 (9th Cir. 1997) (en banc) (granting habeas relief in capital case); Lisker v. Knowles, 651 F. Supp. 2d 1097, 1141 (C.D. Cal. 2009) (recommending grant of habeas relief); Garcia v. Portuondo, 459 F. Supp. 2d 267, 295 (S.D.N.Y. 2006) (granting habeas relief); Perez v. United States, 502 F. Supp. 2d 301, 311 (N.D.N.Y. 2006) (same); Eastridge v. United States, 372 F. Supp. 2d 26, 61 (D.D.C. 2005) (same); Stocker v. Warden, No. Civ.02-2077, 2004 WL 603400, at *17 (E.D. Pa. Mar. 25, 2004) (same); Nickerson v. Roe, 260 F. Supp. 2d 875, 918 (N.D. Cal. 2003) (same); Brown v. Crosby, 249 F. Supp. 2d 1285, 1325 (S.D. Fla. 2003) (same); Watkins v. Miller, 92 F. Supp. 2d 824, 857 (S.D. Ind. 2000) (same); Bragg v. Norris, 128 F. Supp. 2d 587, 609 (E.D. Ark. 2000) (same); Reasonover v. Washington, 60 F. Supp. 2d 937, 981 (E.D. Mo. 1999) (same); Jose v. Johnson, No. Civ. 97-500-KI, 1999 WL 1120374, at *7 (D. Or. Dec. 7, 1999) (same); Mercado Negron v. Torres-Suarez, Civil No. 95-1967, 1999 U.S. Dist. LEXIS 7194, at *21 (D.P.R. May 11, 1999) (same).

tioner before the court decided the merits of the procedural claims.[79] No court denied a prisoner's petition in full. Similarly, in Supreme Court cases leaving the final disposition open, the court on remand either found that the petitioner failed to show actual innocence or issued the writ.[80] While petitioners passing through the gateway must still demonstrate a procedural defect in their direct decision,[81] they seem to do so with some frequency.

There are several possible explanations for the high merits success rate for petitioners satisfying the actual innocence standard. It may be a matter of sampling. Perhaps prisoners who are actually innocent but were convicted are much more likely than the typical petitioner to have suffered a constitutionally significant procedural defect. After all, in many cases the trial seemed to have rendered an inaccurate result.[82] It may alternatively be a matter of motivated reasoning. Unconsciously, human perceptions and determinations of "policy-consequential facts" are "covertly recruited," at least sometimes, to align with the perceiver's cultural worldview.[83] And since the legal worldview holds that it is deeply unjust to let someone who is likely actually innocent remain imprisoned,[84] judges may understand the facts surrounding an innocent's constitutional claims as evidence of a constitutional violation.[85] A judge who has already held that it is "more likely than not that no reasonable juror would have convicted"[86] a defendant in light

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[79] *See* Stephanie Denzel, *Larry Pat Souter*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3656 (last visited Sept. 29, 2013).

[80] *See* Whitmore v. Avery, 63 F.3d 688, 690 (8th Cir. 1995) (finding that the petitioner failed to show actual innocence); House v. Bell, No. 3:96-CV-883, 2007 WL 4568444, at *1 (E.D. Tenn. Dec. 20, 2007) (issuing the writ, unless the state began a new trial), *aff'd*, 276 F. App'x 437 (6th Cir. 2008); Schlup v. Bowersox, No. 4:92CV443, 1996 WL 1570463, at *46 (E.D. Mo. May 2, 1996) (issuing the writ).

[81] *McQuiggin*, 133 S. Ct. at 1931.

[82] That is, of course, not the case for some petitioners whose actual innocence claims are based on newly discovered information.

[83] Dan M. Kahan, *The Supreme Court 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19, 23 (2011). *See also id.* at 7 (describing motivated reasoning). *See generally* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990) (explaining that motivated reasoning encourages perceivers to reach their desired conclusions, so long as those conclusions are reasonably justifiable).

[84] *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *352 ("[I]t is better that ten guilty persons escape, than that one innocent suffer.").

[85] Of course, the analysis is more subtle. For example, courts confront numerous other cases of substantive unfairness yet are bound to affirm them as the results of fair procedures. *See, e.g.*, Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190 (2004) (calling this discrepancy the "hard question" of procedural fairness). Claims by actually innocent prisoners, however, may be especially likely to cause motivated reasoning, especially when evaluating whether procedures were properly followed, rather than whether more procedures were due.

[86] Schlup v. Delo, 513 U.S. 298, 327 (1995).

of the evidence is likely later to find that the defendant's counsel offered constitutionally deficient assistance.

By opening the actual innocence gateway for reasons of substantive justice, the *McQuiggin* Court facilitated the possibility of relief for a set of procedural injustice claims that are particularly likely to be meritorious and would otherwise have been procedurally barred.[87] Since cases in which the petitioner shows actual innocence appear to correlate closely with cases that are found to include a constitutionally problematic procedural defect, the Court's concern for substantive fairness expands the availability of habeas relief for petitioners who also suffered procedural injustice.[88] Expanding the actual innocence gateway therefore aligns the interests of procedural and substantive justice: habeas jurisprudence's goal of procedural justice can be vindicated when petitioners who can show grave substantive injustice are allowed to bring their procedural claims.

Although habeas is ostensibly concerned only with procedural injustice, the *McQuiggin* Court removed a procedural barrier to habeas relief for those petitioners who can demonstrate their actual innocence. This outcome both illustrates that concerns about substantive injustice partially underlie the Court's habeas jurisprudence and reaffirms the Court's focus on habeas as a remedy for procedural injustice. While the Court relied in part on its concerns about substantive injustice, that reliance was proper — even in habeas's procedural context — given the correlation between petitioners who pass through the actual innocence gateway and those who are granted relief on the merits of their procedural habeas claim.

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[87] *Cf. id.* at 315–16 (explaining that convictions of petitioners claiming both actual innocence and a procedural error "may not be entitled to the same degree of respect" as convictions of petitioners claiming only actual innocence, *id.* at 316).

[88] If motivated reasoning explains the procedural-substantive correlation, some cases that receive habeas relief through the gateway would not be successful were they reviewed after a properly filed petition. But it is not obvious which outcome is more just for those petitions, especially since motivated reasoning can lead judges to grant the writ only where doing so is reasonably justified. *See* Kunda, *supra* note 83, at 482–83.