Case Western Reserve Law Review

Volume 72 | Issue 3 Article 9

2022

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CODIFYING INNOCENCE: A MODEST STEP TOWARD REFORM

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The twenty-fifth anniversary of the enactment of the Antiterrorism and Effective Death Penalty Act of 1996[1] provides an opportunity for a few observations. These reflections come not from systematic study, but from the perspective of a judge who, as one small part of his practice, formerly represented a number of clients in federal district and appellate courts petitioning for writs of habeas corpus. Under the statute, relief is rare. From the perspective of attorneys general and those who defend against claims, few have merit. Therefore, the statute appropriately limits relief, even if cases take too long to reach their inevitable result, often on procedural grounds that foreclose collateral review of the merits.

On the other side, those who represent petitioners and study practice and procedure under the statute in the legal academy largely view the AEDPA as a lost cause. In their view, the statute fetishizes procedure at the expense of fundamental constitutional rights and too narrowly circumscribes relief. Additionally, the intricacies the statute layers on the writ—in a federal system in which Article III presumes, as a matter of constitutional law, that State courts can and will vindicate federal rights[2]—impose significant access-to-justice burdens on overwhelmingly pro se petitioners. Those in this camp see the AEDPA as sitting on the precipice of collapsing under its own weight as a result of the cumulative effect of these developments over the last two and a half decades. But however much they favor repeal of the AEDPA, such a legislative step appears highly unlikely.

In the AEDPA, Congress asserted its prerogative to shape the writ, then abandoned the field. Since then, the federal courts, and the Supreme Court in particular, drive common-law making under the statute. This ad hoc interpretation of the statute has contributed greatly to the complexities attending habeas practice, particularly involving issues of procedural default or claims of ineffective assistance of counsel, as most petitions invariably seem to do. At a high level, these judicial developments promote the overall congressional goals embodied in the AEDPA. Though Congress could make federal litigation over the writ more "effective," and better promote the goals of comity and finality, with legislation cutting through at least some of

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1. Pub. L. No. 104-132, 110 Stat. 1214.

2. *See generally* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 275 (1997); Printz v. U.S., 521 U.S. 898, 907 (1997).

the procedural thicket that has grown up around its statutory creation, it shows no interest in doing so.

As the federal courts have lived with the AEDPA, another phenomenon has grown up alongside it over the last quarter century or so, primarily but not exclusively in state courts. A growing number of exonerations has laid bare the need for effective post-conviction and collateral proceedings, at least in a limited number of cases. These exonerations initially resulted from advances in DNA technology[3] and later from other flaws and deficiencies in the criminal justice system, such as junk science involving bite marks and arson investigation, witness identification, and false or coerced confessions.[4] At some level, the writ seeks to vindicate claims of innocence—at least so long as a State-court conviction results from a substantive constitutional violation. Less clear is whether the Constitution provides a remedy under the AEDPA's standard in § 2254(d) for an actually innocent defendant whose conviction is not obtained in violation of his constitutional rights.[5]

Against that background, this essay proposes a modest amendment to the AEDPA as a reform that might have value beyond its fairly limited formal reach. Explaining the proposal requires a little additional context. In *Schlup v. Delo*,[6] a white prisoner was convicted of stabbing a black inmate to death based on the testimony of two corrections officers.[7] "[N]o physical evidence connect[ed]" the defendant to the crime, for which he received a death sentence.[8] Schlup developed new evidence that he contended established his actual innocence—namely, transcripts of inmate interviews conducted five days after the murder that bolstered his defense that he was in the cafeteria when the murder occurred and could not have committed it.[9] He also produced affidavits from two black inmates who witnessed the murder and swore Schlup did not commit it.[10]

3. *See generally* Paul C. Gianelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791 (1991).

4. *See generally* Paul C. Gianelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J.L. & Liberty 221, 223 n.11 (2013).

5. For example, see *Herrera v. Collins*, where five justices agreed that a meritorious claim of actual innocence does not require an independent constitutional violation. 506 U.S. 390, 419–20 (1993) (O'Connor, J., concurring, Kennedy, J., joining); *id.* at 430–31 (Blackmun, dissenting, J., Stevens, J., and Souter, J., joining).

6. 513 U.S. 298 (1995).

7. *Id.* at 302, 305.

8. *Id.* at 302.

9. *Id.* at 308–09.

10. *Id.* at 308.

With this evidence, Schlup filed a second petition for a writ of habeas corpus (Congress had not yet enacted the AEDPA, which limits second or successive petitions[11]), alleging violations of *Brady v. Maryland*,[12] and ineffective assistance of counsel.[13] Because the petitioner did not present those claims in his first petition, he was unable to make a showing of cause or prejudice to excuse the procedural bar to review.[14] Under Supreme Court jurisprudence at the time, a narrow exception allowed a petitioner to avoid a procedural bar where he falls within a limited "class of cases . . . implicating a fundamental miscarriage of justice."[15] In this regard, a claim of actual innocence is procedural and does not entitle a petitioner to relief—just to review under other standards, in this case the standards for alleged *Brady* violations and ineffective assistance of counsel.[16]

The Court held that "a petitioner who has been sentenced to death [and] raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims" must establish "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[17] This standard requires a stronger showing than prejudice but less than proof by clear and convincing evidence of acquittal.[18] In *Schlup*, then, the Supreme Court created an exception to a procedural bar that otherwise precludes collateral review on the merits where a petitioner establishes a colorable claim of actual innocence.[19] Put another way, where a petitioner can show that no reasonable juror would have convicted in light of new evidence, *Schlup* provides a gateway to review the merits of constitutional claims.

On remand, the proceedings in the district court demonstrate the operation of the *Schlup* gateway in practice. After analyzing the new evidence Schlup presented, the district court found it credible.[20] Then, applying the standard the Supreme Court articulated, the district court

11. *See* 28 U.S.C. § 2244(b)(2) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . .").

12. 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused . . . violates due process").

13. *Schlup*, 513 U.S. at 307, 314.

14. *Id.* at 314.

15. *Id.* at 314–15 (quoting McCleskey v. Zant, 499 U.S. 467, 494 (1991)).

16. *See id.* at 314 (first citing Strickland v. Washington, 466 U.S. 668 (1984); and then citing *Brady*, 373 U.S. 83).

17. *Id.* at 326–27.

18. *Id.* at 327.

19. *Id.*

20. Schlup v. Delo, 912 F. Supp. 448, 450–55 (E.D. Mo 1995).

determined that no reasonable juror would have voted to convict in light of the new evidence.[21] Following an evidentiary hearing, the district court granted a writ on the basis of ineffective assistance of counsel.[22] A constitutional violation, not likely innocence, provided the ground for relief.

At a certain level, one might fairly view that result as inevitable. After all, the Supreme Court reviewed the case and signaled that Schlup had made a colorable showing of actual innocence.[23] In such circumstances, it would be anomalous for an inferior court to analyze the evidence and reach a contrary conclusion. Even so, the issuance of a writ does not end the case. Following the issuance of the writ, in the midst of his 1999 retrial, Schlup pled guilty to second-degree murder to avoid the death penalty.[24]

But nothing mandates that a district court set aside a procedural bar based on a showing of actual innocence and then determine that the record supports a conclusion that a petitioner's conviction resulted from a violation of his constitutional rights. In such a circumstance, there is *no* right to appeal under the AEDPA.[25] That is, although a court determines that a petitioner made a sufficient showing of actual innocence, denial of his claims on the merits under § 2254(d) is not reviewable unless a court first grants a certificate of appealability.[26] Under the standard for issuance of a certificate of appealability in § 2253(c)(2), the prior showing of actual innocence does not factor into the analysis. Only "a substantial showing of the denial of a constitutional right" matters.[27]

As a practical matter, following a showing of actual innocence, a court might not deny a certificate of appealability. But it happens. In *Cleveland v. Bradshaw*,[28] the petitioner made a showing that he was innocent of the murder for which he was serving a sentence of life in prison.[29] Based on that showing, the Sixth Circuit set aside the AEDPA's one-year statute of limitations, codified at 28 U.S.C.

21. *Id.* at 455.

22. Schlup v. Bowersox, No. 4:92CV443, 1996 WL 1570463, at *46 (E.D. Mo. May 2, 1996).

23. *See Schlup*, 513 U.S. at 325.

24. *Partial Innocence—Sentence Reduced*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/policy-issues/innocence/partial-innocence [https://perma.cc/YV2L-NSJW] (last visited Feb. 5, 2022).

25. *See* 28 U.S.C. § 2253(c).

26. *Id.*

27. *Id.* § 2253(c)(2).

28. 693 F.3d 626 (6th Cir. 2012).

29. *Id.* at 642.

§ 2244(d)(1).[30] Following an evidentiary hearing on remand (at which, in the interest of full disclosure, I served as co-counsel for the petitioner), the district court determined that the evidence did not support the claim of actual innocence.[31] Fair enough.

But whether one agrees or disagrees with that determination, surely a colorable claim of actual innocence merits review. Yet the district court summarily denied a certificate of appealability. In its entirety, the district court stated: "because this Court finds Cleveland has not made 'a substantial showing of the denial of a constitutional right,' it declines to issue a certificate of appealability."[32] Even though the Sixth Circuit previously held that the petitioner had made a showing of actual innocence, it too denied a certificate of appealability. First, the court did so in an unsigned order.[33] On petition for panel rehearing and rehearing en banc, the panel adhered to its decision,[34] then the court denied rehearing en banc.[35] On application to the Circuit Justice, Justice Kagan also denied a certificate of appealability.[36]

This experience confirms that the federal courts will not necessarily use the writ to vindicate the innocent and may even seek to avoid review, even where a petitioner makes a sufficient showing of actual innocence. Therefore, to ensure review, an amendment to the statute is necessary, adding language to § 2253(c) to the effect of what is italicized below:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—
>
> > (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> >
> > (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. *A person in custody need not obtain a*

30. *Id.*; 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.").

31. Cleveland v. Bradshaw, 65 F. Supp. 3d 499, 541–42 (N.D. Ohio 2014).

32. *Id.* at 542 (quoting 28 U.S.C. § 2253(c)(2)).

33. Cleveland v. Bradshaw, No. 15-3029, 2016 U.S. App. LEXIS 23573, at *12 (6th Cir. Feb. 24, 2016).

34. Cleveland v. Bradshaw, No. 15-3029 (6th Cir. May 23, 2016).

35. Cleveland v. Bradshaw, No. 15-3029 (6th Cir. June 7, 2016).

36. Cleveland v. Bradshaw, No. 16A226 (U.S. Sept. 13, 2016) (Kagan, J.).

> *certificate of appealability under paragraph (1) if that person made a previous showing of actual innocence recognized by a court of competent jurisdiction.*
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Put simply, if a petitioner makes a showing of actual innocence under *Schlup*, he is (and should be) entitled to an appeal as of right from any adverse determination.

If anything, this proposed amendment is too modest. Few cases pass through the *Schlup* gateway. For that reason, this proposed amendment will hardly overburden the circuit courts. But appellate review can serve as an important check in those few cases to ensure that an innocent petitioner is not denied relief. Formally bringing innocence into the Judicial Code and incorporating it into the statute will also carry considerable symbolic weight. Moreover, restoring Congress to its proper legislative role, through even a modest or limited amendment such as this, might encourage other legislative interventions governing the Great Writ that are overdue.