

19-8313 ORIGINAL

No. _____

Supreme Court, U.S.
FILED

APR 10 2020

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS TULLY — PETITIONER

(Your Name)

vs.

HAROLD CLARKE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

FOURTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Thomas Tully 1130289

(Your Name)

Haynesville Correctional Center

P.O. Box 129

(Address)

Haynesville, Va. 22472

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

In *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013), the United States Supreme Court ruled: "a prisoner otherwise subject to defenses of abuse or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.* Did the lower courts err in determining Petitioner's reliance on *McQuiggin v. Perkins*, 569 U.S. (2013) actual innocence (under the miscarriage of justice exception) is misplaced in Petitioner's ability to file a successive writ of habeas corpus petition?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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STATUTES AND RULES

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was January 28, 2020.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Actual innocence, if proved, is the gateway through which a state prisoner petitioning for federal habeas corpus relief with a successive habeas petition might pass, under the miscarriage of justice exception, regardless of whether the impediment is a procedural bar or second or successive habeas petition.

The United States Supreme Court has applied the miscarriage of justice exception to overcome various procedural defaults. These include "successive" petitions asserting previously rejected claims, abusive petitions asserting in a second petition claims that could have been raised in a first petition, failure to develop facts in state court, and failure to observe state procedural rules, including filing deadlines. This rule, or fundamental miscarriage of justice exception, is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

See Facebook:

Equal Justice For Tom Tully / #

Segments 1-15 For complete Case History

STATEMENT OF THE CASE

Petitioner, Thomas Tully (hereafter Tully), is a factually innocent man unconstitutionally incarcerated in the Virginia Department of Corrections because Frederick County, Virginia Commonwealth Attorneys Ross & Nicole Spicer abused their powers of the court (for their own political gain) and frauded a jury into convicting Tully of crimes he did not commit.

On November 1, 2018, Tully received an affidavit in the mail from the alleged victim/witness L.H. in which this alleged victim/witness has now come forward with newly discovered facts that establish Tully is factually innocent of the crimes charged. This alleged victim/witness has stated under oath that Assistant Commonwealth Attorney Nicole M. Spicer coerced [them] into falsely testifying against Tully in open court.

On December 3, 2018, Tully filed a successive petition for writ of habeas corpus in the United States District Court, Western District of Virginia, Roanoke Division, averring that he is factually innocent of the crimes charged and that it's a miscarriage of justice to continuously keep him incarcerated for crimes he did not commit. Tully presented facts, supported by extensive evidentiary submissions, that establish the "rare showing" of Tully's factual innocence.

The court issued an order of response to the Office of the Attorney General for the State of Virginia.

Respondent, by counsel, filed a motion to dismiss arguing that: "[T]his Court has no discretion to address the merits of [his] claims and must dismiss the petition on this basis alone, without prejudice to [Tully's] subsequent attempts to receive authorization" from the Fourth Circuit Court of Appeals to file a successive habeas petition. Respondent's counsel did not dispute that Tully established his factual innocence, nor did Respondent's counsel dispute that Tully is entitled to have his claims reviewed under the miscarriage of justice exception's actual innocence.

Tully filed a Traverse in response, arguing that Respondent's argument is contrary to precedence announced by the United States Supreme Court in

McQuiggin v. Perkins, 569 U.S. 383, 393 (2013):

"We have applied the miscarriage of justice exception to overcome various procedural defaults. These include successive petitions asserting previously rejected claims ... abusive petitions asserting in a second petition claims that could have been raised in a first petition ... failure to develop facts in state court ... and failure to observe state procedural rules, including filing deadlines."

also see Sawyer v. Whitley, 505 U.S. 333, 340 (1992) (a federal court may hear the merits of successive claims if the failure to hear the claims would constitute a "miscarriage of justice"); Keeney v. Tamayo-Reyes, 504 U.S. 1, 12 (1992). Tully averred that these Court rulings give the district court "discretion to address the merits" of his constitutional claims, in a successive petition, under the miscarriage of justice exception; without Tully's need to first obtain "authorization" from the Fourth Circuit Court of Appeals -- to file a successive habeas corpus petition under the miscarriage of justice exception.

On August 27, 2019, Michael F. Urbanski, Chief United States District Judge, issued a MEMORANDUM OPINION dismissing Tully's habeas petition. Judge Urbanski ruled that: "The court notes that Tully may seek certification from the United States Court of Appeals for the Fourth Circuit to have this court review a successive § 2254 motion." *Id.* at Appendix B, page 3. Judge Urbanski went on to state in a footnote that:

"Tully's argument that the court should entertain his petition based on McQuiggin v. Perkins, 569 U.S. 383 (2013), is misplaced. The Supreme Court in McQuiggin determined that a viable claim of actual innocence could, in some circumstances, excuse procedural default and allow otherwise barred claims to be heard in a federal habeas petition. 569 U.S. at 392. However, the court expressly confined its holding to first habeas petitions. *Id.* at 396-97; In re Bolin, 811 F.3d 403, 411 (11th Cir. 2016). This is not Tully's first habeas petition and, therefore. McQuiggin has no effect." See Appendix B, page 3, footnote 2.

Tully filed a timely notice of appeal and submitted a Certificate of Appeal

to the Fourth Circuit Court of Appeals arguing that Judge Urbanski's decision on McQuiggin, in footnote 2, is contrary to the language announced by the United States Supreme Court in McQuiggin.

In denying Tully a certificate of appeal, the Fourth Circuit Court of Appeals issued a Per Curiam order with boiler-plate language dismissing Tully's appeal. The court refused/failed to address the actual innocence Tully raised, or its application to a successive habeas corpus petition. See Appendix A.

REASONS FOR GRANTING THE PETITION

There is a misinterpretation of the exact point involved in this case. The United States Supreme Court ruled in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), that a petitioner can file a successive habeas petition in the district court under the miscarriage of justice exception, without first obtaining authorization from the Court of Appeals, if the petitioner can meet the rare showing of factual innocence. All of the district courts and Circuit Courts of Appeal hold that the McQuiggin Court's ruling only applies to a first time habeas petition being filed.

The interpretation of the word successive is the point of law that must be defined for all parties involved. As successive is understood to mean one after another. The McQuiggin court understood that meaning when it ruled "a prisoner otherwise subject to defenses of abuse or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.* For the Circuit Court of Appeals and district courts to interpret the meaning of successive to only apply to a first time habeas petition is contrary to the whole concept of the use of the word successive in law.

The gatekeeper of entry for a successive habeas petition is actual innocence. Tully has far exceeded meeting this requirement and shown that he is factually innocent of the crimes charged. The district court erred in not applying Tully's showing of factual innocence, under the miscarriage of justice exception, to the successive habeas petition Tully filed. And the Fourth Circuit Court of Appeals erred in not finding that Tully met the burden before him and overcame that hurdle with extensive evidentiary submissions and newly discovered facts provided to him in a affidavit by the alleged victim/witness.

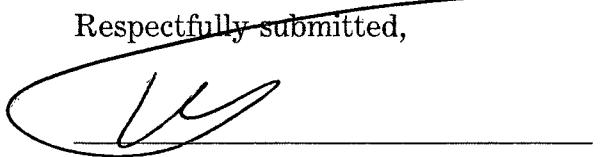
The United States Supreme Court must decide if the McQuiggin Court ruling is applicable to a successive habeas corpus petition -- in the form of a second or subsequent petition for writ of habeas corpus -- when petitioner is using actual innocence under the miscarriage of justice exception as the gateway. A remand for hearing in this case on the point of successive would promote such

courtroom-wide vigilance, not to mention the insistence of fairness which undergirds McQuiggin. At such a hearing, Respondent should have the burden to prove that Tully failed to meet the actual innocence requirements to have his habeas petition denied. Burdens should not shift because Respondent refused, and or, failed to dispute Tully rare showing of factual innocence. As shown by the district court ruling, Judge Urbanski did not state that Tully failed to meet the actual innocence requirement. Judge Urbanski just ruled that Tully's habeas corpus petition can not be viewed on the merits because it is not a first habeas petition. That defeats the entire purpose of using actual innocence as the gateway. For those reasons, this Court must grant this writ of certiorari and remand this case back to the lower courts for a hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Thomas Tully
Date: 4/7/20

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