

June 25, 2013

Dear Mr. Henry,

My name is Michael Barnes and I am a friend of Mark Crawford. I am a paralegal and have approximately twenty-five years of prison "legal beagle" experience, primarily in post conviction relief. Prior to this incarceration, I worked for a time in a criminal law office. My position involved research and writing but primarily my job was to assist in trial preparation and investigation.

Over the course of my friendship with Mark, I have developed an interest in him and his case. He is a genuinely good person (something you do not find in a place like this very often) and he has a very interesting and compelling story. With that said, I'll get to the point of my letter.

A few weeks ago the Supreme Court announced a decision in *McQuiggins v. Perkins*, U.S. No. 12-126 (5-28-13). My initial opinion was that *McQuiggins* could open the door to get several of Mark's Habeas claims (§2255) back into court. Based on that, I did what I should have done from the very beginning; I reviewed every shred of paperwork available to me in Mark's case. I have now thoroughly reviewed the following: (1) The reply brief to Mark's §2255 prepared by Mr. Zimmerman, Mr. Kahn, William Christian, and of course Race Horse Haynes, (2) the two volumes of exhibits in support of that brief, (3) the government's motion to strike and the reply to that motion, (4) the babbling ninety-five page district court order denying the petition, and (5) the request for C.O.A., the petition for rehearing, and the petition for certiorari. In addition, I have spent dozens and dozens of hours during the last year going over details and questioning Mark about the case.

Let me say that I know Mark is forever grateful to you, most people do not have a real concept of the time and money that went into this case and this reply. It was fantastic and it is an example of what needs to be done to win this type of case. It speaks highly of you and your desire to help. I think you and I agree that had the court considered all of Mark's claims, he would have won.

I know of your reputation as a civil attorney. Unfortunately, I do know what you know about Habeas Corpus Law. Not a lot of attorneys deal with it in non-capital situations. 95% of briefs filed are prepared by *pro se* litigants (one of the reasons for the horrible body of case law). Of those, 90% are done by prisoner legal beagles (like me) and many of those people have no idea what they are doing and no true understanding of the law. I apologize ahead of time if I come across as a "know-it-all", that is not my intent. I know how most attorneys feel about *pro se* litigants and I just wanted to qualify myself a bit for credibility purposes.

After having his first petition denied on the merits, Mark is now in a situation that would require him to file a "second or successive" petition. The rules governing these types of petitions are a result of the Antiterrorism Effective Death Penalty Act (AEDPA) and are virtually impossible to meet. In Mark's case however, I feel strongly that we can gain permission from the Court of Appeals to file a second successive petition based on *newly discovered* evidence. (I

have included case references at the end of this letter that will direct you to discussions that will bring you up to speed quickly on this type of litigation, if you are not already versed in it.)

Mark's Second Successive petition would be governed in part by 28 U.S.C. §2255(h)(1); basically that requires (1) Newly discovered evidence, (2) when taken together with all the other evidence as a whole, (3) would establish by clear and convincing evidence that no reasonable fact finder could find [Mark] guilty [beyond a reasonable doubt] of the offense. (ie. The murder of Nick Brueggen). (Note: While this does not address several of the other charges, the idea is to get a complete view of Mark's ineffective claims reviewed.)

A few months ago an inmate litigator (like me) arrived here at this facility. He is very intelligent and has a propensity to tell the truth, his word is beyond question (as inmates go). Because we both pass our days working in the institutional law library, we discuss various cases and ideas. One day we were sitting in the law library and I was going through a stack of cases to clean out my file. In the process, my friend noticed the case of Ronald Jeffery Prible. Prible is a State inmate in Texas that Mike Beckcom testified against. I had been researching Prible's case because, as it happens, Beckcom is also the cooperator in Mark's case. Anyway, when my friend saw the Prible case he said, "Hey! I know that case."

Come to find out, my friend served time at the Federal Correctional Institution in Beaumont. When he arrived, the Prible case had just recently happened, so everyone there was still talking about it and the fact that Beckcom had ratted on Prible from that prison (FCI Beaumont). My friend, the one who is now here, in keeping with his nature to stay up on the law, went to work at that Law Library where he met two other jailhouse lawyer's, who like me, talked legal issues back and forth with him. These two individuals relayed a story to my friend that they thought Beckcom might have set Prible up. **They explained that they had both heard Beckcom "brag" directly to them that he had previously murdered one of his (Beckcom's) business partners and framed another business partner for it, and that these events allegedly (according to Beckcom) happened in Texas.** (ie. The murder of Brueggen and the framing of Crawford)

Being familiar with Mark's case I immediately went about identifying the individuals who allegedly heard Beckcom make this claim. I have now accomplished that; but there is a problem. There are certain "codes" and ways of doing things in prison, and making a statement against another inmate (like Beckcom did) is frowned upon and can be political suicide for an inmate. Once a person is designated as a "snitch", his life can become miserable. With that in mind, inmates who are "solid" (not a snitch, child molester, or rapist) are usually hesitant to provide testimony to anyone (even when they are testifying against a rat like Beckcom). Nevertheless, I have made contact with one of these individuals through underground prison channels and I believe he is willing to help. I am awaiting an affidavit from him now. I hope to be able to put the affidavit and his name in your hand within the next month.

The important thing to note is that the "*Newly discovered evidence*", in this case, the inmate affidavit, simply opens the door to file a request to the court of appeals seeking permission to file the second successive petition. (see 28 U.S.C. §2244(b)(3)(A)) Once that request is made, the petitioner must make a "*prima facie*" showing that he meets the requirement of §2255(h)(1). (See 28 U.S.C. §2244(b)(3)(C)). The Court of Appeals only has thirty days to make a decision.

Obviously, this standard could not be met based only on the inmate affidavit, however, once the door is open the court must consider MORE than that... they must consider *all of the evidence* taken together as a "whole". This means not only the newly discovered evidence (the affidavit) but also the evidence previously presented at trial, evidence that could have been presented but wasn't, and even any other evidence available to [Mark] regardless of whether or not it would have been admissible at the trial. (See research references attached). (Note: During the investigation in this case, Beckcom failed a lie detector test; this type of information would now become part of our evidence of actual innocence, as would the FACT that a Prosecution's witness misrepresented the fingerprint evidence to the jury). With this type of an attack I feel this is a standard that can be met in Mark's case. I might add that the fact that Mark was acquitted in State Court, based on the evidence we are saying was not properly admitted in federal court, helps us also.

Once a petitioner makes this "*prima facie*" showing, and the Court of Appeals authorizes the filing, the entire petition is filed with the District Court. This includes the new claim AND *any other claims* (such as the ineffective claims that were presented in Mark's reply brief but were never decided on the merits, because they were time or procedurally barred.) The District Court must then make a claim by claim analysis and "dismiss" any claims that are barred by the AEDPA.

This is where the District Court runs into a problem. In response to Mark's original reply brief, the government argued that Mark's claims were *new claims* and did not "*relate back to the original petition*". As a result, many of Mark's claims (claims that support his "*actual innocence*" argument) were stricken as time and procedurally barred by the AEDPA. Of course those procedural bars still exist with respect to those claims... However, *McQuiggins* now holds that claims involving *actual innocence* must survive the AEDPA barrier. In other words, it is going to be very difficult, in my opinion, for the district Court not to be forced to address those previously dismissed claims.

The government will likely now argue that these claims were raised in the original petition. Really that is the only thing they can argue. That argument is defeated by the fact that they previously argued that these were "new claims" and not related to the original petition. In light of the fact that *McQuiggins* makes it clear that claims related to actual innocence can not be procedurally barred, they now have a problem.

Another interesting thing to note is that claims of "*actual innocence*" do not necessarily require "newly discovered" evidence but can be made with "newly presented" evidence (evidence available but not presented at trial). The reading references I've attached will discuss all of these issues.

There is one other option that could conceivably get Mark back into court and that is the "savings clause" (28 U.S.C. §2255(e)). In that situation, Mark would file a petition pursuant to 28 U.S.C. §2241 and argue that he is actually innocent but cannot meet the gate keeping provisions of the AEDPA and therefore §2255 is *inadequate of ineffective* to test the illegality of his detention (an unconstitutional suspension of the writ).

As I have said, I believe, due to *McQuiggins*, the §2255 second successive is the way to go... but there are a couple differences that should be considered and you are in a better position to make that determination than I. For instance; the §2241 would not be filed in the Ninth Circuit and would not go back to the District Judge that heard the first petition. Instead, the §2241 is filed in the district court "nearest the place of confinement". In this case, that would be the District Court here in Alexandria, Louisiana. If I had local influence or an attorney who did have local influence, that may sway me to attempt to go the §2241 route. Another consideration is that if the §2241 is denied on the merits the petitioner is entitled to appeal that decision (no C.O.A. required)... that appeal would take place in the 5th Circuit. The downside is that usually, what happens is the District Court construes the §2241 as a second successive petition, even though it is filed as a §2241, and the petitioner is then left trying to seek a C.O.A. anyway. My current view is that the case law in the Ninth Circuit is more favorable than the Fifth.

One last consideration is that a prisoner can "venue shop" and try to get transferred to a prison in the jurisdiction or Circuit most favorable to the petitioner... this only applies to the §2241. There are "consultants" that can assist in making these type of transfers happen. They usually are attorneys or ex bureau employees with contacts inside the prison system, they are expensive (3-10 k).

At this moment my opinion is that we can meet the §2255(h)(1) initial gateway. It is obvious from the district court opinion denying the first §2255 that Judge Wanger is not on our side. Some of his prior decision are very questionable (I've read a couple of dozen decisions by him... it's my experience that it pays to know the judge). In this situation I don't know if Wanger hurts us... as I said, *McQuiggins* and the *actual innocent* claims could give him some problems and being that we would have already survived the first gate by getting authorization from the Court of Appeals... the appeal from any claims that Wanger dismisses is going to go back to that same three Judge panel—making a Certificate of Appealability much more likely. (In my opinion.)

What I mean to say about Wanger is that he doesn't seem to... well, for lack of better words, the guy is a frigging idiot and often misconstrues the law. (Proof of which is easily found in Mark's denial). The point I want to make is that even if he again dismisses these claims he will likely get the law wrong and we might then be able to get action from the Court of Appeals.

I've written a rough draft of a brief (very rough). I don't have many of the transcripts that I need (primarily the state transcripts and prior testimony of Beckcom and Johnson), all of that needs to be reviewed. There is also some investigation that needs to be done, out there, that could be a significant help. For example:

I don't believe that Brueggen was killed in the tool box. During the second State trial an expert testified that there was no "trace elements" of carbon monoxide found in the box... I believe that if exhaust fumes had been piped into that box as Beckcom claimed, there would have been evidence of carbon found in the box... For that reason I think it would be wise to have the crime scene *recreated* by an expert. I would like to see what happens if you hook a hose up to a similar vehicle, pump the exhaust into a similar box, and then (30 days later) test the box for "trace elements" of carbon. My guess is there would be carbon monoxide traces.!

The purpose of this is that if we can present an expert to prove that elements of carbon would have remained in the box, combined with the prior testimony of the expert that said there was no evidence of carbon in the box in question, we could prove that Brueggen was not killed as Beckcom claims. I feel that this new affidavit would be well worth the expense.

After reviewing the evidence available to me, I have several question for witnesses and leads that I think would be wise to have the right type of investigator (one hopefully has a law enforcement background), track down... I've made a separate list of these items for your review and that list is attached.

In addition to this, there are a number of research items that I don't have access to because I am in prison. If I could get those items I could be much more thorough, and I believe we may uncover helpful facts. I've attached a list of these items as well.

There is one small problem. I recently won my own criminal appeal in the Ninth Circuit Court of Appeals causing my conviction and thirty year sentence to be vacated. The government claims they intend to retry me based on remaining evidence and I will be going back to the County Jail in Alaska to continue to fight my own case. I will likely represent myself in the new trial (and yes I know that is stupid but I have my case *beat* and I can't trust any of the attorneys that they are likely to give me—besides I'm kind of a knuckle head like that). Because of my pending transfer I am in a rush to get this out to you. I am embarrassed with the rough brief I have prepared and I wish I had more time for it now. Once I arrive back at the County Jail in Alaska I will again have time to work on Mark's case.

I hope to continue to work on Mark's case and be the one to research the other trial transcripts, etc. The transcripts could be sent to me at the county jail once I am there. I have plenty of time, Mark is my friend, and I feel that I am the best person for the job because I know the case better than anyone (with the possible exception of you). If you want to do it yourself or hire someone else (a lawyer or other professional), I understand, but I am, even in that instance, willing to do my share of the research.

Lastly, in the rough draft I have attached, I included a part of the story about the banker, Les Tatum. I couldn't resist it. I believe it adds a compelling angle to the entire story... All of the exhibits referenced are the same exhibits in support of Mark's §2255 reply (I assume you have a copy). Through the years, I have come to believe that the story is the key to success. It may be that the brief would be better if it did not include the Tatum angle, but, I will leave those types of matters to those better qualified than me to make that decision.

The only thing that I ask of you is that you keep me informed of what you intend to do and the progress in the case. If you don't need me to work on it, as I indicated, I understand, in that instance I would appreciate a heads up so that I can shop for another case to work on, as this is how I make my time go by. I will always drop what I am doing to help Mark.

Sincerely,

Michael Barnes