



arguing that the limitations period should be equitably tolled because petitioner's trial and post-conviction counsel were all inadequate - thus presenting "cause" for missing the limitations deadline - and that petitioner is actually innocent of the crime of which he stands convicted.

The magistrate judge concluded that the state courts had made factual findings in the PCRA proceedings which negated the "actual innocence" defense, and that the slight additional "new" evidence now proffered by the petitioner did not suffice, when coupled with the earlier evidence, to meet petitioner's burden of proof on the issue of actual innocence. Moreover, as the magistrate judge noted, it appears to be an open question in this circuit as to whether a showing of actual innocence is a valid basis for equitably tolling the AEDPA limitations period. See Harper v. Vaughn, 272 F. Supp.2d 527, 534 (E.D. Pa. 2003). I agree with the magistrate judge that, assuming there is such an exception, the evidence presented by petitioner does not suffice to meet the high standards imposed by Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed.2d 397 (1986). At most, petitioner's evidence suggests that a trial verdict of not guilty would not have been unreasonable. But that is not enough to permit a federal court to set aside the trial verdict.

I therefore will approve the magistrate judge's report, and his recommendation that the petition be denied. But because petitioner's arguments in favor of a finding of actual innocence

are substantial, and because of the need for clarification of the law on this subject, I believe it appropriate to enable the Third Circuit Court of Appeals to review this decision, if it wishes to do so. Accordingly, a certificate of appealability will be issued.

An Order follows.

