

FILED

**United States Court of Appeals
Tenth Circuit**

UNITED STATES COURT OF APPEALS

September 5, 2023

FOR THE TENTH CIRCUIT

**Christopher M. Wolpert
Clerk of Court**

ROBERT EDWARD HILL,

Petitioner - Appellant,

v.

JEFF LONG, Warden, SCF; DEAN
WILLIAMS, Executive Director CDOC;
PHILIP J. WEISER, Attorney General of
the State of Colorado,

Respondents - Appellees.

No. 22-1207
(D.C. No. 1:21-CV-03203-LTB-GPG)
(D. Colo.)

ORDER AND JUDGMENT*

Before **BACHARACH, MORITZ, and CARSON**, Circuit Judges.

Robert Edward Hill, a Colorado state prisoner appearing pro se, is serving a life sentence for first degree murder of a child under the age of twelve. He appeals the district court’s dismissal of his federal habeas application pursuant to 28 U.S.C.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

§ 2254. The court dismissed the petition as untimely under 28 U.S.C. § 2244(d)(1) and denied his request for a certificate of appealability (COA).¹

Mr. Hill then requested a COA from this court to appeal the district court’s procedural ruling. *See* 28 U.S.C. § 2253(c)(1)(A) (a state prisoner’s right to appeal a denial of habeas relief is conditioned on the grant of a COA). He conceded that his application was untimely under the one-year statute of limitations, *see id.*

§ 2244(d)(1), but argued that he was entitled to either (1) equitable tolling based on state post-conviction counsel’s failure to file a timely notice of appeal from the denial of his motion for post-conviction relief or (2) an equitable exception to the statute of limitations based on his actual innocence.

A judge of this court granted a COA on one of the two issues raised by Mr. Hill, namely, “whether the district court erred in rejecting [Mr.] Hill’s actual-innocence argument on the grounds that he failed to present new evidence of innocence.” Order Granting Certificate of Appealability at 2, *Hill v. Long*, No. 22-1207 (10th Cir. Nov. 21, 2022). Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.²

¹ The magistrate judge issued a report and recommendation to deny Mr. Hill’s application, which was affirmed and adopted by the district court.

² We deny a COA on Mr. Hill’s argument that the statute of limitations should have been equitably tolled based on post-conviction counsel’s failure to file a timely notice of appeal. Equitable tolling requires an applicant to show both reasonable diligence and “some extraordinary circumstance” that “prevented timely filing.” *Holland v. Florida*, 560 U.S. 631, 649 (2010) (internal quotation marks omitted). “Attorney miscalculation[, however,] is . . . not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right

In his habeas application, Mr. Hill listed five claims: (1) trial counsel’s failure to properly investigate and present the theory that the victim had a bleeding disorder, which might have undermined the prosecution’s theory about the cause of death; (2) trial counsel’s cursory consultation with only one emergency room physician and no other experts; (3) trial counsel’s failure to fully investigate a theory that the victim died of natural causes; (4) the denial of a meaningful appeal from the trial court’s denial of post-conviction relief because the Colorado Court of Appeals relied on untrue facts; and (5) cumulative prejudice from trial counsel’s errors. The district court dismissed the fourth claim for relief because it failed to state a federal constitutional claim and the remaining claims as time-barred.³ According to Mr. Hill, the court erred in its actual-innocence analysis because it was under the mistaken belief that he failed to present any new evidence to demonstrate his actual innocence. We agree that this was clear error and remand for further proceedings.

to counsel.” *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007). *See also Fleming v. Evans*, 481 F.3d 1249, 1255-56 (10th Cir. 2007) (recognizing that “attorney negligence is not extraordinary and clients, even if incarcerated, must vigilantly oversee, and ultimately bear responsibility for, their attorneys’ actions or failures” (internal quotation marks omitted)). Because reasonable jurists could not debate the propriety of the district court’s procedural ruling, we deny a COA. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (holding that a petitioner is not entitled to a COA unless he can show both that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling”).

³ Mr. Hill does not dispute the district court’s resolution of the fourth claim for relief.

A convincing showing of actual innocence provides a gateway to allowing consideration of otherwise untimely claims of constitutional error as an equitable exception to the one-year limitation period in § 2254(d). *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). The Supreme Court has “caution[ed], however, that tenable actual innocence gateway pleas are rare[.]” *Id.*

“To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup v. Delo*, 513 U.S. 298, 324 (1995). The Tenth Circuit interprets “new reliable evidence” broadly, to include any evidence that was not presented at trial, regardless of whether such evidence is newly discovered. *See Fontenot v. Crow*, 4 F.4th 982, 1032-33 (10th Cir. 2021).

If there is “new reliable evidence,” then petitioner must demonstrate that when considering the new evidence “it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.” *Schlup*, 513 U.S. at 327. And “[w]hile a gateway innocence claim requires new reliable evidence to be credible, the habeas court’s analysis is not limited to such evidence.” *Fontenot*, 4 F.4th at 1052 (internal quotation marks omitted). “Rather, the habeas court must consider all the evidence, old and new, incriminating and exculpatory, and thereby base its probabilistic determination about what reasonable, properly instructed jurors would do on the total record.” *Id.* (internal quotation marks omitted).

Finally, although the actual innocence test does not require a showing of diligence, the federal habeas court “should count unjustifiable delay on a habeas petitioner’s part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.” *Perkins*, 569 U.S. at 387.

“The district court’s legal conclusions regarding [the] threshold issue[]” of whether Mr. Hill was entitled to an exception to the statute of limitations, is a question of law that is “reviewed de novo, while its factual findings are reviewed for clear error.” *Fontenot*, 4 F.4th at 1018.

During his *state post-conviction proceedings*, Mr. Hill presented expert testimony that the victim had a bleeding disorder that could have exacerbated otherwise routine injuries. According to Mr. Hill, if this testimony had been presented at trial, it would have allowed the defense to argue that the victim died from a simple fall, rather than abuse. However, on habeas review, the district court mistakenly determined that the evidence *was* presented at trial and therefore, it was not “new.”

Mr. Hill asserts he is actually innocent, but he has not presented any new and reliable evidence to support a claim of actual innocence. Mr. Hill insists the actual innocence argument is developed in the Application, but his arguments in the Application regarding counsel’s alleged failures are supported by references to trial transcripts and the state court record and not any *new* evidence sufficient to support a credible claim of actual innocence under *Schlup*. Therefore, the Court finds no basis for an equitable exception to the one-year limitation period based on actual innocence.

R. at 241-42.

We agree with Mr. Hill that this was clear error. No doubt this was nothing more than an oversight; however, the district court's erroneous finding means that it never considered whether—based on the new evidence and its review of the record as a whole—it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. Nor did the court consider whether unjustifiable delay should affect the evaluation of the evidence on which his petition relies.

Therefore, the case is remanded to the district court for consideration of Mr. Hill's claim of actual innocence based on the new evidence presented during his post-conviction proceedings. We grant Mr. Hill's motion to proceed on appeal without pre-payment of costs and fees.

Entered for the Court

Joel M. Carson III
Circuit Judge