

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

September 10, 2019

Elisabeth A. Shumaker
Clerk of Court

AARON DAVID TRENT NEEDHAM,

Petitioner - Appellant,

v.

STATE OF UTAH,

Respondent - Appellee.

No. 18-4032 & 18-4152
(D.C. No. 2:17-CV-00115-JNP)
(D. Utah)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ, PHILLIPS**, and **EID**, Circuit Judges.

Pro se state prisoner Aaron Needham requests a Certificate of Appealability (COA) under 28 U.S.C. § 2253(c)(1)(A) to challenge the district court's orders dismissing his habeas corpus petition and denying several post-judgment motions. We **DENY** Needham's request for a certificate of appealability. We also **DENY** his requests to proceed *in forma pauperis*.

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I.

Needham is currently incarcerated at the Utah State Prison in Draper, Utah. In 2013, Needham was convicted of eight counts of communications fraud and one count of pattern of unlawful activity. Needham sought review of his convictions and sentence directly and through collateral challenges in the Utah state courts but was unsuccessful. Of particular note, however, he did not seek review before the Utah Supreme Court. While his state post-conviction proceedings were pending, he filed the underlying federal habeas petition.

On July 13, 2017 the State of Utah filed a motion to dismiss. That motion was based on the State's arguments that (1) Needham did not exhaust state remedies, and (2) the claims were procedurally defaulted due to the lapse in time. On January 11, 2018, the district court issued an order ruling the claims were defaulted on procedural grounds. The district court granted the State's motion.

On January 26, 2018, Needham filed a timely motion for post-judgment relief. Needham, however, filed a notice of appeal on February 28, 2018, before the district court ruled on the post-judgment motion. That notice became case number 18-4032. Needham then filed multiple motions and supplements to motions. Case number 18-4032 was abated while the district court considered these requests. On September 27, 2018, the district court issued an order denying the motion for new trial and all the other post-

judgment motions. That order also included language declining to grant a COA.¹ The resulting appeal became case number 18-4152.

Through an order issued on October 18, 2018, these § 2254 proceedings were consolidated by this court for all procedural purposes including briefing and submission. Case number 18-4032 seeks review of the district court's January 11, 2018 memorandum decision and order granting the State's motion to dismiss. Case number 18-4152 is an appeal from the district court's September 27, 2018 memorandum decision and order denying various post-judgment motions filed in the same case.

II.

To proceed in this court, Needham must obtain a COA. *See United States v. Gantt*, 762 F. App'x 566, 568 (10th Cir. 2019) (unpublished) (“[The] COA requirement applies to appeals from orders resolving motions under Rules 59(e) and 60(b).”); *United States v. Parada*, 555 F. App'x 763, 765 (10th Cir. 2014) (unpublished) (AEDPA “requires a petitioner to obtain a COA before he can appeal the denial of any final order in a habeas corpus proceeding, including a motion for reconsideration under Rule 59(e)”). Thus, our analysis will center on whether a COA should be granted. When a district court denies a habeas petition on procedural grounds, a COA may issue only “when the prisoner shows, at least, 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

¹ Because a COA was denied, and in accord with 10th Cir. R. 22.1(B), the State has not filed a response brief.

find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A.

Needham’s first argument appears to find issue with the district court’s holding that he cannot establish a cause and prejudice argument to obtain federal review of the defaulted claim. *See Trevino v. Thaler*, 569 U.S. 413, 421 (2013). The procedural-default rule generally prevents a federal court from reviewing a habeas claim when the state court would decline to consider the merits of that claim based “on independent and adequate state procedural grounds.” *Smith v. Allbaugh*, 921 F.3d 1261, 1267 (10th Cir. 2019) (quotations omitted). But a court may excuse a procedural default “if a petitioner can ‘demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.’” *Id.* “[T]o satisfy the ‘cause’ standard, Petitioner must show that ‘some objective factor external to the defense’ impeded his compliance with Utah’s procedural rules.” *Dulin v. Cook*, 957 F.2d 758, 760 (10th Cir. 1992) (citation omitted). And to demonstrate prejudice, “[t]he habeas petitioner must show not merely that . . . errors . . . created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage.” *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (quotations omitted). Alternatively, a federal court may excuse procedural default if the petitioner can demonstrate actual innocence. *House v. Bell*, 547 U.S. 518, 521 (2006). Needham argues that state interference established cause and prejudice sufficient to obtain federal review of his defaulted claim. He also argues that his default should be excused because

of new evidence or because he is actually innocent. We address each in turn and hold that no reasonable jurist would find the district court's conclusions debatable or wrong.

1.

Needham argues that the State of Utah interfered with his ability to file his petition for writ of certiorari to the Utah Supreme Court. Needham argues that he requested an extension of time to file his petition for certiorari but did not receive a response from the Utah Supreme Court until May 16, 2017, after the expiration of time to file his petition. Needham therefore argues that he had no chance to file his habeas petition. We agree with the district court that this is not "cause" to excuse Needham's procedural default because Needham could have met the deadline for filing his petition for writ of certiorari. The Utah Supreme Court's failure to respond to his petition for an extension until after the filing deadline did not prevent him from filing his petition. We find no merit in Needham's state interference argument and conclude that no reasonable jurist would find the district court's denial of Needham's habeas petition on procedural-default grounds debatable or wrong.

2.

Unhappy with the district court's initial ruling, Needham filed various post-judgment motions attempting to overcome the procedural-default barrier. The district court denied Needham's motion for relief from the judgment, his motions to compel discovery, his motions for time extensions and leave to file electronically, and further denied his COA as to the dismissal of the petition for habeas corpus and as to the denial of this motion. The district court also dismissed Needham's claims brought under the

supplemental pleadings for lack of subject matter jurisdiction as second or successive habeas claims.

The theories Needham presented in his post-judgment motions—that his failure to exhaust should be excused due to ineffective assistance of counsel and the prosecution’s failure to provide exculpatory evidence—are based on allegedly new evidence.² As the district court noted, however, the “new” evidence is a partial copy of an audit from the Utah Department of Public Licensing attached to a letter hand-delivered to Wayne Holman, an investigator with the Utah Division of Occupational and Professional Licensing, by Faux & Associates on September 1, 2006. September 27, 2018 Order at 8. The letter and audit were allegedly received by Needham’s mother in January 2018. *Id.* Needham alleges that his counsel’s inadequate investigation resulted in the failure to discover the document, and that this ineffective assistance excuses his failure to exhaust. Needham also argues that the State’s alleged failure to provide this evidence is in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), providing, according to Needham, an alternative ground to excuse Needham’s failure to exhaust.

Needham fails to explain how the letter and audit—which were provided in 2006 to Holman, Needham’s lawyer, and potentially Needham himself—could be considered

² Needham appears to argue, for the first time, that records from Wells Fargo related to his case were stolen by the State, that they were given without consent, or they did not exist. Relatedly, he alleges that defense counsel was operating under a conflict of interest, which had an adverse effect on his performance. This appears to be a second ineffective assistance of counsel claim. It is a general rule that a federal appellate court should not consider issues not “passed upon” below. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Regardless, we find these arguments devoid of grounding in the record and thus find them meritless.

“new evidence” that was previously unavailable for purposes of Rule 59(e). Moreover, even if we were to consider the evidence, Needham has failed to establish cause and prejudice to excuse his failure to exhaust his state remedies. As the district court noted, Needham fails to explain how not possessing this letter and audit caused him to fail to meet the procedural deadline to file his petition for certiorari. Further, Needham fails to establish how this lack of evidence prejudiced him. For all of these reasons, no reasonable jurist would find the district court’s denial of Needham’s post-judgment motions debatable or wrong.

3.

Needham also argued in his post-judgment motions that the letter and audit are newly discovered evidence that establish his actual innocence and should be addressed despite his unexcused procedural default. “[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To even assert “innocence as a gateway to defaulted claims,” however, Needham must “establish that in light of new evidence, it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt.” *House*, 547 U.S. at 537 (quotations omitted). To establish actual innocence, Needham offers only the letter to Holman and a partial copy of an audit. The letter and the audit relate to two civil cases, one in which the Utah Division of Occupational and Professional Licensing sanctioned Needham and another in which a breach of contract claim was brought against him. The letter and audit

do nothing to suggest his innocence of the crimes of conviction. Because Needham has not made a showing of actual innocence, the district court's refusal to excuse his procedural default on that basis was not debatable or wrong.

B.

Needham also challenges the district court's conclusion regarding his *Brady* violation claim and his prosecutorial misconduct claims. The district court rejected these claims, which were raised in the supplemental post-judgment pleadings, on jurisdictional grounds. The district court concluded that the claims related to the state court judgment and further determined that any claims challenging that judgment could not be properly brought as post-judgment motions because they were second or successive habeas challenges governed by 28 U.S.C. § 2244. In a case such as this, where a successive petition has been filed without "the required authorization," the district court has two options. *In re Cline*, 531 F.3d 1249, 1252 (10th Cir. 2008) (citing *Boone*, 464 F.3d at 1227). "The district court may transfer the matter to [the court of appeals] if it determines it is in the interest of justice to do so under § 1631, or it may dismiss the motion or petition for lack of jurisdiction." *Id.*

The district court declined to transfer Needham's motions to this court because it found them lacking merit. The district court further noted that despite numerous and voluminous filings with the court, Needham failed to specifically identify claims for relief and evidence on which to base those claims. In his most recent filing before us, Needham appears to ask this court for an authorization to file his second or successive petition. To this end, Needham advances several arguments that new records discovered

would assist his case, and that discovery is necessary with respect to loan documents and specified deeds of trust. Once again, Needham's request is without merit and we agree with the district court's denial of transfer and decline to authorize a second or successive petition.

C.

Finally, Needham advances, for the first time, an incompetency argument. Needham appears to argue that a medical condition precluded his ability to understand the proceedings during trial, and therefore, his medical record establishes specific evidence of reasonable doubt that he did not or was unable to understand the proceedings. This new argument was not passed upon below because it was not raised in the habeas petition. It is a long-held principle that "[a] federal appellate court will not consider an issue not passed upon below." *F.D.I.C. v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999) (quoting *Singleton*, 428 U.S. at 120). "Consequently, when a litigant fails to raise an issue below in a timely fashion and the court below does not address the merits of the issue, the litigant has not preserved the issue for appellate review." *Id.* We find it waived for this reason.

III.

Based on the foregoing, we decline to grant a Certificate of Appealability. We **DENY** Needham's requests to proceed *in forma pauperis*. The request for remand contained in Needham's June 5, 2019 motion is also denied.

Entered for the Court

Allison H. Eid
Circuit Judge