[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-13639

ANTHONY F WAINWRIGHT,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 3:05-cv-00276-TJC

Before JORDAN, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

Anthony Wainwright, who is under sentence of death in Florida for the 1994 rape, kidnapping, and robbery of Carmen Gayheart, *see Wainwright v. State*, 704 So. 2d 511, 512 (Fla. 1997) (opinion on direct appeal), appeals from the district court's denial of his Rule 60(b) motion in his habeas corpus case. Following oral argument and a review of the record, we affirm.[1]

I

In 2007, we affirmed the district court's dismissal of Mr. Wainwright's habeas corpus petition as time-barred by six days. In so doing we held that Mr. Wainwright was not entitled to equitable tolling of the limitations period. *See Wainwright v. Sec'y, Dep't of Corr.*, 537 F.3d 1282, 1285–86 (11th Cir. 2007) (*Wainwright I*).

On June 5, 2018, the Capital Habeas Unit of the Federal Defender's Office for the Northern District of Florida filed a motion to be appointed as habeas counsel for Mr. Wainwright. The district court granted the motion on June 22, 2018. Almost a year later, on June 21, 2019, the CHU filed a Rule 60(b) motion on Mr. Wainwright's behalf. The motion asserted a number of grounds, which we summarize.

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[1] We assume the parties' familiarity with the vast record in this case, and set out only what is necessary to explain our decision.

First, Mr. Wainwright argued that the matter of equitable tolling should be revisited. His former habeas counsel, Joseph Hobson, had a conflict of interest in arguing equitable tolling because he was the attorney who had missed the filing deadline. Moreover, Mr. Hobson had misrepresented his experience and qualifications, had lied to him (about working on the petition and about the limitations period), and had perpetrated a fraud on the court (concerning the equitable tolling argument he had made). Mr. Wainwright asserted that he had acted diligently to protect his rights.

Second, Mr. Wainwright argued that there were independent grounds for granting him relief from his conviction and death sentence through Rule 60(b). He claimed for the first time that he was actually innocent of Ms. Gayheart's murder and asserted 12 new substantive grounds for relief.

The district court denied the Rule 60(b) motion.

With respect to Mr. Wainwright's first argument, the district court concluded that Mr. Hobson had a conflict of interest with respect to equitable tolling because he was the attorney who had missed the filing deadline. But the district court found that the late filing was due to his misunderstanding of how the limitations period set out in 28 U.S.C. § 2244(b) worked. The district court ruled that Mr. Hobson's negligent miscalculation of the filing deadline—though troubling—was not extraordinary and did not give rise to equitable tolling. The district court also found that Mr. Hobson had not lied to Mr. Wainwright when he assured him that he would work on filing a habeas corpus petition. Given its rationale, the

district court did not address whether Mr. Wainwright had pursued his rights diligently.

Turning to Mr. Wainwright's actual innocence claim, the district court concluded that it constituted an unauthorized second or successive habeas petition because the newly presented assertion of actual innocence was not a contention that the previous ruling (the dismissal of the original habeas corpus petition as untimely) was erroneous. As a result, the district court explained, it lacked jurisdiction to consider the claim of actual innocence and the new substantive claims Mr. Wainwright presented for relief from the conviction and sentence.

Mr. Wainwright filed a motion to alter and amend, which the district court denied. Assuming that Rule 59(e) could be used to challenge the denial of a Rule 60(b) motion in a habeas case, the district court explained that it had not acted prematurely in denying the equitable tolling claim. The record showed that Mr. Hobson's behavior did not constitute egregious attorney misconduct, and Mr. Wainwright did not show the existence of an equitable tolling claim with some merit. Moreover, some of the new arguments Mr. Wainwright presented were not proper bases for Rule 59(e) relief and failed in any event. Finally, the newly raised actual innocence claim did not indicate any defect in the integrity of the original habeas proceeding.

II

Rule 60(b), in subsections (1) through (5), provides a number of specific reasons that allow a court to relieve a party from a

judgment (e.g., mistake, excusable neglect, fraud, satisfaction). Rule 60(b)(6), a catch-all provision, allows a court to reopen a judgment for "any other reason that justifies relief." To obtain relief under Rule 60(b)(6), a movant must demonstrate "extraordinary circumstances." *Buck v. Davis*, 580 U.S. 100, 123 (2017). Even when the movant has demonstrated extraordinary circumstances, whether to grant relief is a matter for the court's discretion. *See Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006).

We review the denial of a Rule 60(b)(6) motion for abuse of discretion. *See Buck*, 580 U.S. at 122–23; *Arthur v. Thomas*, 739 F.3d 611, 628 (11th Cir. 2014). The same deferential standard applies to the denial of an evidentiary hearing on equitable tolling. *See Cano*, 435 F.3d at 1342–43 (reviewing denial of evidentiary hearing under Rule 60(b)(6) for abuse of discretion); *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1206–07 (11th Cir. 2014) (reviewing denial of evidentiary hearing on equitable tolling for abuse of discretion).

A different standard applies to the district court's underlying findings of fact, including those relating to equitable tolling. We review those findings for clear error. *See Wilson v. Thompson*, 638 F.2d 801, 803–04 (5th Cir. Unit B March 2, 1981); *Dodd v. United States*, 365 F.3d 1273, 1277 (11th Cir. 2004).

III

Mr. Wainwright asserted in his Rule 60(b)(6) motion that he was entitled to equitable tolling of the habeas limitations period. He acknowledged that an attorney's negligence in calculating a filing deadline does not warrant equitable tolling. *See* D.E. 52 at 69.

See also Holland v. Florida, 560 U.S. 631, 651–52 (2010) ("We have previously held that 'a garden variety claim of excusable neglect,' such as a simple 'miscalculation' that leads a lawyer to miss a filing deadline does not warrant equitable tolling.") (internal citations omitted). He argued, however, that this was not a typical case of negligence because his former habeas counsel, Mr. Hobson, (1) operated under a conflict of interest in arguing for tolling because he was the attorney who had missed the filing deadline; (2) engaged in bad faith by (a) lying to him about working on the habeas petition and making it seem as if the petition would be filed on time, and (b) misrepresenting to him that the petition was timely; and (3) perpetrated a fraud on the court by basing his equitable tolling argument on the false claim that he was not provided notice of the rulings of the Florida Supreme Court. *See* D.E. 52 at 69–78.

A

The district court concluded, based on *Christenson v. Roper*, 574 U.S. 373, 377–78 (2015), that Mr. Hobson was indeed acting under a conflict of interest when he requested equitable tolling because he was the attorney who missed the filing deadline and was placed in the position of arguing his own ineffectiveness. *See* D.E. 60 at 13–15. It then turned to whether the arguments that Mr. Hobson failed to raise for equitable tolling (the ones set forth in the Rule 60(b) motion and summarized in the preceding paragraph) had some merit.

Noting that Mr. Wainwright based his equitable tolling claim on Mr. Hobson's alleged dishonesty, the district court rejected that

contention. The district court found that Mr. Hobson missed the filing deadline "because he misunderstood the federal statute of limitations." D.E. 60 at 17. And it based that finding on the following evidence in the record.

First, Mr. Hobson's misunderstanding was reflected in both his court filings and in his letters to Mr. Wainwright, and "[u]nfortunately such misconceptions are not extraordinary. Mr. Hobson is not the only attorney to have thought that [the] limitations period did not start running until the Florida Supreme Court docketed a denial of certiorari review." *Id.* at 17–18 (citations omitted).

Second, the fact that Mr. Hobson communicated his mistaken belief about the operation of the limitations period did not amount to a lie because "nearly anytime a lawyer miscalculates or misinterprets AEDPA's limitations period, he has an opinion about the deadline that, by definition has no basis in law or fact." *Id.* at 19. The district court explained that if it accepted Mr. Wainwright's "recasting of the facts, many instances of attorney negligence like this one would morph into cases of attorney dishonesty. That cannot be so, because it is well established that a 'garden variety claim of excusable neglect,' such as a 'simple miscalculation that leads a lawyer to miss a filing deadline,' does not warrant equitable tolling." *Id.* (quoting *Holland*, 560 U.S. at 651–52, with some internal quotation marks omitted).

Third, Mr. Wainwright's case was like *Cadet v. Fla. Dep't of Corrections*, 853 F.3d 1216, 1219, 1237 (11th Cir. 2017), which held that gross negligence or misunderstanding of the law on the part

of an attorney is not enough, by itself, to warrant equitable tolling. *See* D.E. 60 at 19–20. In that case, equitable tolling was denied even though habeas counsel misunderstood how the limitations period functioned, relayed that misunderstanding to his client, and stuck to his position when the client suggested that the limitations period should be calculated differently. *See Cadet*, 853 F.3d at 1234–36.

Fourth, the district court found that Mr. Hobson did not lie to Mr. Wainwright when he assured the latter that he was working on filing a habeas petition. Mr. Hobson filed a 73-page habeas petition raising 11 grounds for relief, stating factual and legal bases for each claim. Though Mr. Hobson filed the petition late, he did so because of his misunderstanding of the limitations period, and his letters to Mr. Wainwright about working on the petition were not false: "Mr. Hobson's intentions were sincere," and he did not "lie[ ] to [Mr. Wainwright] about investigating and filing the habeas petition." D.E. 60 at 22. And although the petition contained typographical and factual errors, and only included four case citations, those shortcomings demonstrated negligence rather than "willfully misle[ading] Mr. Wainwright about working on the petition." *Id.* at 23. Similarly, the fact that Mr. Hobson pivoted to other arguments on equitable tolling on appeal in *Wainwright I* also did not "indicate that [he] was willfully deceitful." *Id.* at 21 n.13.

Assuming that Mr. Hobson had been grossly negligent, the district court found no basis for equitable tolling based on the new arguments that Mr. Wainwright presented. *See id.* at 20. The

district court concluded that there was no basis for an evidentiary hearing or for Rule 60(b)(6) relief. *See id.* at 17 n.11, 24.[2]

B

Mr. Wainwright argues that he plausibly alleged misconduct on the part of Mr. Hobson, and that he was entitled to Rule 60(b)(6) relief on equitable tolling grounds. Alternatively, he argues that the district court should have held an evidentiary hearing. *See* Br. for Appellant at 8–22.

Applying clear error review, we cannot say that any of the district court's factual findings concerning Mr. Wainwright's claim of attorney dishonesty and misconduct are clearly erroneous. *See generally Cooper v. Harris*, 581 U.S. 285, 293 (2017) ("A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern."). That means that Mr. Hobson missed the habeas filing deadline because he misunderstood how AEDPA's statute of limitations functioned; that Mr. Hobson's communications with Mr. Wainwright about preparing the habeas petition reflected and conveyed that misunderstanding; and that Mr. Hobson did not lie to Mr. Wainwright when he said he was working on the habeas petition.

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[2] Because the district court addressed the equitable tolling claim on the merits after finding that Mr. Hobson operated under a conflict of interest, it reasoned that it did not have to address Mr. Wainwright's contention that Mr. Hobson perpetrated a fraud on the court by making spurious equitable tolling arguments. *See* D.E. 60 at 13–14 n.9.

As for Mr. Wainwright's reliance on Mr. Hobson's "apparent deceit" about his experience and qualifications in federal habeas corpus litigation—which allegedly led to him being hired and paid $25,000 by a charitable organization—the problem is that there is no "causal link" between that "apparent deceit" and the subsequent untimely filing of the habeas corpus petition. *See Cadet*, 853 F.3d at 1236. And without that link, any "apparent deceit" on Mr. Hobson's part does not provide a basis for Rule 60(b)(6) relief based on equitable tolling.

We also see no abuse of discretion on the part of the district court in denying Mr. Wainwright an evidentiary hearing. The abuse of discretion standard gives a district court a "range of choice" as long as its decision is not a "clear error of judgment." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc). This deferential review means that we will sometimes affirm the district court even though we might have ruled differently had it been our call. *See In re Rasbury*, 24 F.3d 159, 168 (11th Cir. 1994). Here the "record refute[d]" most of Mr. Wainwright's "factual allegations" about Mr. Hobson, and in such a situation "a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

IV

Mr. Wainwright also argues that the district court erred in holding that his petition was an unauthorized second or successive petition because actual innocence is a cognizable basis for finding extraordinary circumstances for Rule 60(b)(6) relief. We affirm the

district court's decision because Mr. Wainwright has failed to show that he is actually innocent.

A

A petitioner sentenced to death may "raise[ ] a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims." *Schlup v. Delo*, 513 U.S. 298, 326–27 (1995). Such a showing of actual innocence allows a petitioner to overcome AEDPA's statute of limitations, even without successfully asserting equitable tolling. *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). The so-called *Schlup* gateway standard used to invoke this exception is high—a petitioner asserting actual innocence must "persuade[ ] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 386 (citing *Schlup*, 513 U.S. at 329).

Whether a convincing showing of actual innocence can also reopen a final judgment pursuant to Rule 60(b)(6) is an open question for us. The Third Circuit has held that "a proper demonstration of actual innocence by [the petitioner] should permit Rule 60(b)(6) relief unless the totality of equitable circumstances ultimately weigh heavily in the other direction." *Satterfield v. Dist. Att'y Philadelphia*, 872 F.3d 152, 163 (3d Cir. 2017). *Accord Howell v. Superintendent Albion SCI*, 978 F.3d 54, 58 (3d Cir. 2020) (same). On the other hand, the Eighth Circuit has ruled that a Rule 60(b) motion raising a new claim of actual innocence is an unauthorized second or successive petition. *See Rouse v. United States*, 14 F.4th 795, 800–

03 (8th Cir. 2021). *Cf. Brooks v. Yates*, 818 F.3d 532, 534 (9th Cir. 2016) (holding that the district court did not abuse its discretion in holding that the petitioner failed to demonstrate entitlement to Rule 60(b) relief via a showing of actual innocence, but alternatively holding that even if "the *Schlup* gateway is available to support a Rule 60(b) motion, [the petitioner] has fallen well short of raising sufficient doubt about his guilt to undermine confidence in the result of the trial") (internal brackets, citation, and quotation marks omitted).

In one of our prior habeas decisions presenting a Rule 60(b) motion premised on actual innocence, we looked at the petitioner's evidence of actual innocence and found it to be insufficient. We did this without first taking a position on whether actual innocence can be used to reopen a final habeas judgment pursuant to Rule 60(b)(6) because the "actual innocence question" is the "decisive factor." *Kuenzel v. Comm'r, Ala. Dep't of Corr.*, 690 F.3d 1311, 1314 (11th Cir. 2012). Here we follow the approach of *Kuenzel*. We need not reach the question of whether actual innocence can reopen a final judgment under Rule 60(b) because Mr. Wainwright has not sufficiently shown that he is actually innocent.

B

Mr. Wainwright offers a new report from a DNA expert criticizing the work and testimony that the state's DNA experts presented at his trial. He argues that this report, considered with all the other evidence in the record, establishes his actual innocence

of sexual battery, premediated and felony murder, and innocence of the death penalty. We do not agree.

Again, to meet the applicable standard, the petitioner must show "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Kuenzel*, 690 F.3d at 1314–1315 (citing *Schlup*, 513 U.S. at 867). Or, to remove the double negative, he must demonstrate "that more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538 (2006). The standard does not require a district court to form an "independent judgment as to whether reasonable doubt exists," but rather "requires the district court to make a probabilistic determination about what reasonable jurors would do." *Schlup*, 513 U.S. at 868.

The petitioner must present new, credible evidence of innocence: "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." *Kuenzel*, 690 F.3d at 1315 (citing *Schlup*, 513 U.S. at 865). Cases in which constitutional error has caused the conviction of an innocent person are "extremely rare[,]" and therefore claims of actual innocence are "rarely successful." *Schlup*, 513 U.S. at 865–66. *See House*, 547 U.S. at 538 ("the *Schlup* standard is demanding and permits review only

in the extraordinary case") (internal citation and quotation marks omitted).[3]

As new evidence, Mr. Wainwright offers a report from a DNA analyst, Candy Zuleger, which criticizes the findings of the two state DNA experts who testified at trial. Those two experts were James Pollock, a Florida Department of Law Enforcement serologist, and Michael DeGuglielmo, a DNA analyst from a private company. Both experts testified that DNA evidence found on the backseat of Ms. Gayheart's car was consistent with Mr. Wainwright's semen.

According to Ms. Zuleger, Mr. Pollock obtained DNA evidence from unreliable testing methods, and therefore the evidence does not show that Mr. Wainwright raped Ms. Gayheart. Specifically, Ms. Zuleger's report states that "it is unclear how [Mr. Pollock] . . . extracted sperm cells" because his report does not explain

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[3] The circuits are split as whether the new evidence required under *Schlup* includes only newly discovered evidence that was not available at the time of trial or whether it encompasses evidence that was available but not presented at trial. The Seventh, Ninth, and Tenth Circuits have interpreted "new" to mean evidence that was not presented at trial. *See Gomez v. Jaimet*, 350 F.3d 673, 679–80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 962–63 (9th Cir. 2003); *Fontenot v. Crow*, 4 F.4th 982, 1032 (10th Cir. 2021). The Third and Eighth Circuits have held that "new" means evidence not available at trial through the exercise of due diligence. *See Kidd v. Norman*, 651 F.3d 947, 952 (8th Cir. 2011); *Hubbard v. Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004). Because we conclude that Mr. Wainwright has not sufficiently established his actual innocence with the evidence he has presented, we need not address this issue today.

how he did it. *See* D.E. 52–4 at 30. Ms. Zuleger contends that her "review cannot determine that [Mr.] Pollock used a verifiable method for the extraction of sperm cells" and therefore she "cannot conclude that the cells [Mr.] Pollock analyzed were sperm cells." *Id*. She concludes that Mr. Pollock's testing does not show to a degree of reasonable scientific certainty that the DNA that came from Mr. Wainwright is from semen. In other words, she asserts that Mr. Wainwright's DNA could have come from his skin or elsewhere. *See id*.

Mr. DeGuglielmo testified that he was able to extract from the sample an epithelial cell—one of the four main types of body tissue—that came from Ms. Gayheart. But according to Ms. Zuleger his report does not explain how he knows the epithelial cell was from Ms. Gayheart. *See* D.E. 52–4 at 30–31. It does not, for example, say that this extracted cell matched a known sample from Ms. Gayheart (perhaps one provided by the medical examiner's office). *Id*. She also states that Mr. DeGuglielmo's testing, which showed that Mr. Wainwright's sperm was mixed in the same sample with Ms. Gayheart's epithelial cells, does not show that Mr. Wainwright raped Ms. Gayheart because "[t]he epithelial cells could have come from the skin on any part of her body." *Id*. at 31.

Ms. Zuleger hypothesizes that the sample could have been a result of Mr. Wainwright's "ejaculation on a place where Ms. Gayheart's epithelial cells were[.]" *Id*. She also criticizes other aspects of both experts' work—they shared their results with each

other, and Mr. DeGuglielmo failed to list the database that he used. *See id*. at 31–33.

Mr. Wainwright's new impeachment evidence—even considered on its own—does not meet the rigorous *Schlup* innocence standard. Ms. Zuleger's report does not include results from new DNA testing showing that Mr. Wainwright is innocent of the rape or the murder. Indeed, Ms. Zuleger's affidavit does not even establish that the state's experts mistakenly identified Mr. Wainwright's DNA as semen. It merely points to some ways that the experts may have deviated from proper protocol or procedure in conducting the DNA testing and highlights some conclusions that she contends could not have been reliably drawn from the results. This impeachment evidence falls short of establishing Mr. Wainwright's innocence. *See House*, 547 U.S. at 540–553 (petitioner satisfied gateway standard from *Schlup* by presenting new DNA testing showing that sperm did not come from petitioner but from victim's husband, along with new witnesses testifying that the husband confessed to the murder); *McQuiggin*, 569 U.S. at 389–90 (petitioner presented sufficient new evidence of actual innocence based on new affidavits from three witnesses, two of whom heard another person confess to the murder, and two of whom saw that other person's blood-stained clothing).

Moreover, Mr. Wainwright's new evidence is insufficient when considered together with the other evidence presented at trial. *See House*, 547 U.S. at 538 ("In assessing the adequacy of a petitioner's showing, the habeas court must consider all the

evidence, old and new, incriminating and exculpatory.") (internal citation and quotation marks omitted). At trial, the state presented evidence that Mr. Wainwright confessed to Sheriff James Harrell Reid that he had kidnapped, robbed, and raped Ms. Gayheart (although he claimed his co-defendant, Richard Hamilton killed her). *See Wainwright v. State*, 2 So. 3d 948, 950 (Fla. 2008). Additionally, two jailhouse informants, Robert Murphy and Gary Gunter, testified that Mr. Wainwright told them that he shot Ms. Gayheart. Mr. Murphy testified that Mr. Wainwright admitted to strangling Ms. Gayheart and shooting her in the head. *See* R. 2708, 3414. Mr. Gunter testified that Mr. Wainwright said both he and his co-defendant raped a woman they abducted, and "they" took a gun and shot her. *See* R. 2742.

Reasonable jurors, considering the new evidence along with the evidence available at trial, would still find Mr. Wainwright guilty beyond a reasonable doubt. He therefore has not met the *Schlup* innocence standard and cannot set aside the previous judgment under Rule 60(b).

V

We affirm the district court's denial of Mr. Wainwright's Rule 60(b) motion.

AFFIRMED.