

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 14 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

DANIEL WHITAKER BLUESTEIN,

No. 18-35137

Petitioner-Appellant,

D.C. No. 2:16-cv-01808-JE

v.

MEMORANDUM*

JERI TAYLOR, Superintendent, EOCI,

Respondent-Appellee.

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Submitted December 12, 2018**

Before: FARRIS, TROTT, and TALLMAN, Circuit Judges.

Former Oregon state prisoner Daniel Bluestein appeals pro se from the district court's judgment denying his 28 U.S.C. § 2254 habeas petition challenging his 2007 jury conviction for rape, sodomy, and sexual abuse. We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

We review de novo a district court's denial of a 28 U.S.C. 2254 habeas petition as untimely. *Porter v. Ollison*, 620 F.3d 952, 958 (9th Cir. 2010). Our court has not yet decided whether we review actual innocence gateway claims de novo or for abuse of discretion. *Stewart v. Cate*, 757 F.3d 929, 938-39 (9th Cir. 2014). We need not answer that question here because Bluestein has not made out his claim under either standard.

We have considered all of the evidence proffered by Bluestein and agree with the district court's well-reasoned conclusion that he does not qualify for the actual innocence gateway exception to excuse the untimely filing of his habeas petition. On this record, Bluestein has not demonstrated that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." See *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

AFFIRMED.