

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 28 2022

FOR THE NINTH CIRCUIT

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

EDWARD SLADE,

Petitioner-Appellant,

v.

PERRY RUSSELL; ATTORNEY  
GENERAL FOR THE STATE OF  
NEVADA,

Respondents-Appellees.

No. 21-16801

D.C. No.

3:19-cv-00641-MMD-CLB

MEMORANDUM\*

Appeal from the United States District Court  
for the District of Nevada  
Miranda M. Du, Chief District Judge, Presiding

Argued and Submitted November 17, 2022  
San Francisco, California

Before: LINN,\*\* RAWLINSON, and HURWITZ, Circuit Judges.

Edward Slade appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition as untimely. We have jurisdiction under §§ 1291 and 2253. Reviewing de novo, *see Waldrip v. Hall*, 548 F.3d 729, 733 (9th Cir. 2008), we

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

\*\* The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

affirm.

A state prisoner must file a § 2254 habeas petition no more than one year after a judgment of conviction becomes final. 28 U.S.C. § 2244(d)(1). A tardy filing, however, can be excused if a petitioner demonstrates “actual innocence.” *Bousley v. United States*, 523 U.S. 614, 623–24 (1998). “One way a petitioner can demonstrate actual innocence is to show in light of subsequent case law that he cannot, as a legal matter, have committed the alleged crime.” *Vosgien v. Persson*, 742 F.3d 1131, 1134 (9th Cir. 2014).

Even assuming, as Slade contends, that our opinion in *Riley v. McDaniel*, 786 F.3d 719 (9th Cir. 2015), is a change in the law, Slade must demonstrate that even if properly instructed on deliberation, it is more likely than not that “no reasonable juror would have convicted him” in light of all the evidence. *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995). The Supreme Court has described this standard as “demanding.” *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013).

Slade has not demonstrated actual innocence. Deliberation can be established through circumstantial evidence that a defendant engaged in a “dispassionate weighing process and consideration of consequences before acting” that “may be arrived at in a short period of time.” *Byford v. State*, 994 P.2d 700, 714 (Nev. 2000). On the night before the killing, Slade had a loud argument with the victim at her residence, and police were summoned. The next night, Slade returned, entered the

victim's bedroom, and fatally shot her. Although Slade claimed that there was a struggle over a gun before the shooting, first responders found no sign of one. And a witness described Slade as "calm" after the shooting, while others observed him purchasing food and playing video games at a nearby convenience store, where he called a cab rather than 911. Although not overwhelming on the issue of deliberation, the evidence was more than sufficient for a reasonable juror to conclude that Slade acted not in a heat of passion but after a "dispassionate weighing process and consideration of consequences." *Id.* Because Slade has not shown actual innocence, the district court did not err by finding his petition untimely.<sup>1</sup>

**AFFIRMED.**

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<sup>1</sup> Because Slade has not demonstrated actual innocence, we decline to expand the certificate of appealability to address whether decisions of this Court and the Nevada Supreme Court after his conviction became final were changes in the law.