FILED
United States Court of Appeals
Tenth Circuit

February 28, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIE J. TRIMBLE, JR.,

Petitioner - Appellant,

v.

WARDEN: MATHEW HANSEN, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 18-1490
(D.C. No. 1:18-CV-01336-LTB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **BACHARACH**, **McKAY**, and **O'BRIEN**, Circuit Judges.

On December 9, 2009, Willie J. Trimble was sentenced to life imprisonment without parole after a Colorado state jury convicted him of sexual assault and felony murder. The Colorado Court of Appeals (CCA) affirmed his conviction on direct appeal on September 12, 2013, and the Colorado Supreme Court denied his certiorari petition on July 28, 2014. Trimble delivered a state petition for post-conviction review to the prison mailroom on October 25, 2015; it was filed three days later. The state trial judge denied relief. The CCA affirmed and the Colorado Supreme Court again denied certiorari review

on May 21, 2018. Four days later, Trimble filed a pro se 28 U.S.C. § 2254 petition.[1]

The district judge dismissed the petition as time-barred. Trimble wishes to appeal and seeks a certificate of appealability (COA), a jurisdictional prerequisite. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The judge denied a COA, so he renews his request here.

A COA is warranted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Here, Trimble must show "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." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The judge's written opinion was abundantly clear and the result indisputably correct. A COA applicant who merely regurgitates arguments made in the district court is doomed to failure. He must tangibly show how and why the judge's ruling is reasonably debatable. That is hard work; Trimble hasn't even broken a sweat.

Because Trimble did not seek certiorari review with the United States Supreme Court during his direct appeal proceedings, the judge recognized his conviction as final on October 27, 2014—the next business day after the 90-day window closed for filing a petition for a Writ of Certiorari with the United States Supreme Court. *See* Sup. Ct. R. 13.1; *Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001). Absent tolling, he had one

[1] We read Trimble's pro se materials with a solicitous attitude but don't act as his advocate. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

year from that date, or until October 27, 2015, in which to apply for federal habeas relief. 28 U.S.C. § 2244(d)(1)(A). He did not file his § 2254 petition until May 25, 2018.[2]

State petitions for post-conviction relief generally toll the time limitations for seeking federal habeas relief. 28 U.S.C. § 2244(d)(2). Be that as it may, the federal district judge concluded Trimble was not entitled to statutory tolling because the state court received his state petition for post-conviction relief on October 28, 2015, one day after the federal habeas limitations period had expired. Trimble contends the federal judge erred because he is entitled to the "mailbox rule." Aplt.'s Opening Br. & COA Mot. at 7. In this context, state—not federal—procedural law governs. *Garcia v. Shanks*, 351 F.3d 468, 471-72 (10th Cir. 2003). To Trimble's benefit, Colorado has a mailbox rule. Colo. R. Civ. P. 5(f) (2018).[3] Assuming he complied with that rule's requirements, his state habeas petition was "filed" on October 25, 2015, within the one-year allotted by § 2244(d). Accordingly, his federal habeas limitations period was statutorily tolled on that date pending resolution of his state habeas claims. *See Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006). That helps him, but not enough.

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[2] The district court did not receive Trimble's § 2254 petition until May 31, but the Colorado Department of Corrections received the petition for mailing on May 25. *Compare* R. at 4 *with* R. at 15. The judge did not explicitly discuss it, but he seems to have given Trimble the benefit of a prison mailbox rule. *See* Rule 3(d), Rules Governing § 2254 Cases.

[3] In Colorado, "a pleading or paper filed or served by an inmate confined to an institution is timely filed or served if deposited in the institution's internal mailing system on or before the last day for filing or serving." Colo. R. Civ. P. 5(f). If the prison has a legal-mail system, "the inmate must use that system to receive the benefit of this rule." *Id.*

As the judge also realized, state habeas proceedings toll the federal habeas statute of limitations while those proceedings are "pending." 28 U.S.C. § 2244(d)(2). Trimble's state habeas proceedings were pending only until May 21, 2018, when the Colorado Supreme Court denied certiorari review. The next day statutory tolling ceased and the available time for filing a federal habeas petition resumed its relentless decline. *Lawrence v. Florida*, 549 U.S. 327, 332 (2007) (tolling ceases under § 2244(d)(2) "[a]fter the State's highest court has issued its mandate or denied review"). The bar imposed by federal law fell two days after the Colorado Supreme Court denied certiorari review—May 23, 2018. Trimble's May 25, 2018 filing came too late.

Trimble urges us to consider his § 2254 petition as timely because he did not receive a copy of the Colorado Supreme Court order denying his certiorari petition until May 24, 2018, and he filed his petition the next day. Circuit courts have consistently held the federal habeas limitations period not to be subject to any sort of "notice rule." *Garcia*, 351 F.3d at 472 (collecting cases). The statutory tolling period ends the day the state supreme court denies review; not when the prisoner receives notice of that ruling or his paper copy. *Id.* ("Section 2244(d)(2) clearly and unambiguously states that the federal limitations period is tolled only during the time a properly filed state application for collateral review is *pending* in state court.").

The only remaining question is whether Trimble can show he is entitled to equitable tolling. To do so, he must demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (citation and quotations

omitted). This doctrine applies only in "rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (quotations omitted). Rightly so; "[a]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Rouse v. Lee*, 339 F.3d 238, 246 (4th Cir. 2003) (en banc) (quotations omitted). Thus, Trimble's burden is a heavy one. Equitable tolling applies only if he "show[s] specific facts to support his claim of extraordinary circumstances and due diligence." *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (quotations omitted).

In considering the application of equitable tolling to federal habeas petitions, we have recognized "a prisoner's lack of knowledge that state courts have reached a final resolution of his case can provide grounds for equitable tolling if the prisoner has acted diligently in the matter." *Woodward v. Williams*, 263 F.3d 1135, 1143 (10th Cir. 2001) (citing *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir.) (per curiam), *amended in part by* 223 F.3d 797 (5th Cir. 2000)); *see also Diaz v. Kelly*, 515 F.3d 149, 155 (2d Cir. 2008) (noting that the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits "have concluded that prolonged delay by a state court in sending notice of a ruling that completes exhaustion of state court remedies can toll the [§ 2244(d)] limitations period" and collecting cases). But "not in every case will a prisoner be entitled to equitable tolling until he receives notice"—it depends on the facts of each case. *Knight v. Schofield*, 292 F.3d 709, 711 (11th Cir. 2002).

Equitable tolling requires an extraordinary circumstance preventing timely filing.

Holland, 560 U.S. at 649. A prolonged delay in the state court's mailing of an order or in the prisoner's receipt thereof can be one such extraordinary circumstance. *See, e.g.*, *Woodward*, 263 F.3d at 1142-43 (petitioner had not received notice twenty-five days after state court issued its order)[4]; *Knight*, 292 F.3d at 711 (eighteen-month delayed notice); *Miller v. Collins*, 305 F.3d 491, 496 (6th Cir. 2002) (six-month delayed notice). "In contrast, an ordinary de minimis delay incident to transmission of mail from court to prisoner would not be an extraordinary circumstance warranting equitable tolling." *Earl v. Fabian*, 556 F.3d 717, 723 n.3 (8th Cir. 2009); *see also Saunders v. Senkowski*, 587 F.3d 543, 550 (2d Cir. 2009) (seven-day delay in notice "occasioned by the normal course of the mail" is not "an 'extraordinary' circumstance for purposes of equitable

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[4] *Woodward* did not involve an untimely § 2254 petition. Rather, the issue of equitable tolling arose when the petitioner attempted to add new claims to his § 2254 petition after the limitations period had expired. Woodward filed his § 2254 petition with twenty days to spare. 263 F.3d at 1139. Five days later, he filed a state petition for post-conviction relief raising sixteen new claims. *Id.* The petition was denied, and the New Mexico Supreme Court denied certiorari review. *Id.* Thirty-eight days later, he sought to amend his § 2254 petition to add the sixteen new claims. *Id.* The district judge decided the new claims were time-barred because the statutory tolling period expired fifteen days after the New Mexico Supreme Court denied certiorari. *Id.* Woodward, like Trimble, claimed the statute of limitations should be equitably tolled until he received notice of the denial. *Id.* at 1142. But the delay in *Woodward* was more substantial—at least a several week delay. *Id.* at 1139, 1142 n.5. Woodward claimed he had not received notice of the state court order as of February 20, 1998—if the statute of limitations were tolled until that time, his amended federal petition would have been timely. *Id.* at 1142 n.5. Ultimately, there was a more fundamental problem—we could not meaningfully review the judge's decision because he had simply overruled the argument without comment. *Id.* at 1143. We therefore remanded the case to the district court to consider the petitioner's equitable tolling argument, directing the district court to "balance the equities of this case on the record and, if necessary, determine when Woodward actually learned of the state court's disposition." *Id.*

tolling"). As the Fourth Circuit has explained, "[e]very person knows, or should know, that it can take at least several days to receive mail even from within the same postal jurisdiction, and he can, and may reasonably be required to, adjust his conduct accordingly." *Spencer v. Sutton*, 239 F.3d 626, 630 (4th Cir. 2001). If this were not so, applying equitable tolling because of an ordinary mailing period "effectively would be nothing short of [an improper judicial extension of] the legislatively-prescribed one-year statute of limitations." *Id.* That we will not do.

Here, there is no allegation or evidence of a prolonged delay on the part of the Colorado Supreme Court in sending Trimble notice of its denial of review that would constitute an extraordinary circumstance warranting equitable tolling. We are dealing only with the brief interval between a prompt state court mailing and Trimble's receipt of that court's order—he received his copy just three days after it was issued. That's not extraordinary by any measure. *See id.* ("Ordinary delivery time is not a 'rarity,' nor is the charge of knowledge of such to the habeas petitioner 'unconscionable.'").

Further, whether equitable tolling is appropriate in a given case depends not only on the allegation of delayed notice, but also on whether the prisoner pursued his rights with due diligence. *Holland*, 560 U.S. at 649. In this vein, Trimble contends requiring him to file for federal habeas relief the same day the Colorado Supreme Court denied his certiorari petition is "unfair" because he is a pro se prisoner. Aplt.'s Opening Br. & COA Mot. at 8. To begin, this is factually inaccurate—the bar imposed by the statute of limitations descended two days after the Colorado Supreme Court denied review. To continue, liberal construction of pro se petitions has limits; petitioners are bound by

federal procedural rules and, without more, a party's ignorance of the law and pro se status do not give rise to equitable tolling. *See, e.g.*, *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000). In summary, pleas for equitable tolling require not only sensitivity to the applicant's immediate circumstances, but also a candid look at the totality of the circumstances. Due diligence is a marathon, not merely a sprint to the finish line.

Trimble had a full year to either file a federal habeas petition or to toll the limitations period by seeking post-conviction relief in state court. Had he acted sooner on the front end, he would have had more time on the back end. He has offered no explanation for delaying his petition for state post-conviction relief until two days before the window of opportunity closed. Without a compelling explanation for that delay (and he offers none) we cannot credit him with acting diligently in pursuing his rights.[5] "Were it not for [his] own delay, the time needed for ordinary mail delivery almost certainly would not have affected the timeliness of his habeas petition." *Spencer*, 239 F.3d at 630. Thus, absent evidence of a prolonged delay in notice of the state supreme court's order and without any explanation for his waiting 363 days to seek post-conviction relief in state court, Trimble has failed to show equitable tolling applies—this is not, as our sibling circuit put it, "a petitioner with a special call on equity." *Id.* at 631.

Nothing about the ultimate result of the district court's order is incorrect or even

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[5] An applicant, late for a job interview, might seek to explain his tardiness by blaming traffic. A sophisticated interviewer would want to know why the applicant had not anticipated the problem and prepared accordingly. A natural disaster might satisfy as a sufficient reason, a mere lack of proper prior planning would not.

debatably incorrect. We **DENY** a COA and **DISMISS** this matter.

The judge also denied Trimble's motion to proceed on appeal without prepayment of fees (*in forma pauperis* or *ifp*) because an appeal could not be taken in good faith. 28 U.S.C. § 1915(a)(3). Trimble has renewed his *ifp* request with this Court. We agree with the district judge—this appeal is frivolous. But because we have fully addressed his COA application, his renewed request to proceed *ifp* on appeal is **DENIED AS MOOT**.[6]

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge

[6] A matter is moot if "granting a *present* determination of the issues offered will have [no] effect in the real world." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) (quotations omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-01336-GPG

WILLIE J. TRIMBLE JR.,

Applicant,

v.

WARDEN: MR. MATHEW HANSEN, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER OF DISMISSAL

Applicant, Willie J. Trimble Jr., is a prisoner in the custody of the Colorado Department of Corrections ("CDOC") and is currently incarcerated at the Sterling Correctional Facility in Sterling, Colorado. On August 17, 2018, Applicant, acting *pro se*, filed an Amended Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Amended Application") challenging the validity of his Colorado conviction and sentence in Denver County District Court Case No. 07CR7263. (ECF No. 10).

On August 20, 2018, Magistrate Judge Gordon P. Gallagher ordered Respondents to file a Pre-Answer Response limited to addressing the affirmative defenses of timeliness under 28 U.S.C. § 2244(d) and exhaustion of state court remedies pursuant to 28 U.S.C. § 2254(b)(1)(A) if Respondents intend to raise either or both of those defenses in this action. (ECF No. 12). Respondents filed their Pre-Answer Response on August 31, 2018 and raised both the defenses of timeliness and failure to exhaust state court remedies. (ECF No. 16). Applicant filed his Reply on September 26, 2018. (ECF No. 17).

The Court must construe the filings by Applicant liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110. Further, the Court cannot "supply additional factual allegations to round out [the *pro se* litigant's pleading] or construct a legal theory on [his] behalf." *Whitney v. State of New Mexico,* 113 F.3d 1170, 1173-74 (10th Cir. 1997). For the reasons stated below, the Amended Application will be dismissed as time-barred under 28 U.S.C. § 2244(d).

I. BACKGROUND

Applicant is serving a sentence of life without parole as a result of his conviction for sexual assault and first degree murder. (ECF No 10 at 3). The Applicant's judgment of conviction and the sentence were affirmed on direct appeal. *See People v. Trimble*, No. 10CA0239 (Colo. App. Sept. 12, 2013) (unpublished) (ECF 16-3). Applicant filed a petition for writ of certiorari with the Colorado Supreme Court, but it was denied on July 28, 2014 (ECF No. 16-4).

On October 28, 2015, Applicant filed a petition for postconviction relief pursuant to Rule 35(c) of the Colorado Rules of Criminal Procedure. (ECF Nos. 10 at 4 and 16-1 at 7). On November 17, 2015, the trial court denied Applicant's postconviction motion. (ECF No. 16-5 at 6). The Colorado Court of Appeals affirmed the trial court's order denying postconviction relief. *See People v. Trimble*, No. 16CA0083 (Colo. App. Oct. 12, 2017) (unpublished) (ECF No. 16-6). The Colorado Supreme Court denied the Applicant's petition for writ of certiorari on May 21, 2018. (ECF No. 16-7).

The instant action was date stamped as received by this Court on May 31, 2018, with the Amended Application being filed on August 17, 2018 (ECF No. 10) pursuant to

Magistrate Judge Gallagher's Order Directing Applicant to File Amended Application issued on July 3, 2018 (ECF No. 6) and Minute Order granting an extension of time (ECF No. 8). Applicant asserts the following two claims for relief in his Amended Application:

1. Applicant was denied his Sixth Amendment rights to effective counsel.

2. Applicant is being deprived of liberty as a result of due process and equal protection violations that negatively affected jury impartiality and denied a fair trial.

(ECF No. 10).

II. ONE-YEAR LIMITATION PERIOD

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") found at 28 U.S.C. § 2244(d) provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> >
> > (D) the date on which the factual predicate of the claim or claims

> presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

A judgment becomes final for purposes of the one-year limitation, after the United States Supreme Court has denied review of a decision by the state court of last resort, or if no petition for certiorari is filed, after the time for filing a petition for certiorari with the Supreme Court has passed. *Locke v. Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001).

In this case, Applicant did not file a writ of certiorari with the United States Supreme Court. Therefore, his judgment became final for purposes of the habeas one-year limitation period "after the time of filing a petition for certiorari with the Supreme Court has passed." *Id.* Applicant's deadline for submitting a petition for certiorari with the United States Supreme Court was October 27, 2014, which was the next business day following the 90 days after the Colorado Supreme Court denied his petition for writ of certiorari on July 28, 2014 (ECF No. 16-4). *See Locke*, 237 F.3d at 1273. Accordingly, Applicant's one-year limitation period for filing a federal habeas petition began to run on October 27, 2014. *See Holland v. Florida*, 130 S. Ct. 2549, 2555 (2010) (first date of limitation period is date on which direct review concludes); *Al-Yousif v. Trani*, 779 F.3d 1173, 1178 (10th Cir. 2015) (same).

The limitation period ran for 365 days until October 27, 2015, when it expired. Therefore, this federal habeas corpus action which Applicant indicates was served upon this Court on May 25, 2018 (ECF No. 1 at 11) and which reflects the CDOC mail facility received for mailing to the Court on May 25, 2018 (*id.* at 12) appears to be time-barred.

III. STATUTORY TOLLING

Pursuant to 28 U.S.C. § 2244(d)(2), a properly filed state court postconviction motion tolls the one-year limitation period while the motion is pending. Tolling pursuant to § 2244(d)(2) is considered "statutory" tolling.

In his Amended Application, Applicant acknowledges that his state postconviction motion was filed on October 28, 2015. (ECF No. 1 at 4); (*see also* ECF No. 16-1 at 7 (state court docket in Denver County District Court Case No. 07CR7263)) and *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (an application for postconviction review is properly filed within the meaning of § 2244(d)(2) "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings"). Accordingly, when Applicant's postconviction relief motion was filed on October 28, 2015, the one-year time limitation for habeas relief had already expired. Therefore, the limitations period could not be tolled for the postconviction motion because by the time it was filed, the limitation period had already expired. *See Clark v. Oklahoma*, 468 F.3d 711, 714 (10th Cir. 2006) (stating that properly filed state court postconviction motions toll the one-year limitation period only if they are filed within the one-year limitation period).

As the Respondents have pointed out, even if the Court were to assume that the state postconviction motion filed by the Applicant on October 28, 2015 somehow tolled the AEDPA one-year limitations period, it would have only have been tolled until May 21, 2018 and these federal habeas proceedings were not initiated until May 25, 2018. Applicant does not allege any facts demonstrating he was prevented by unconstitutional state action from filing this action sooner. Therefore, subsection (B) of § 2244(d)(1) is not applicable. Applicant also is not asserting any constitutional rights newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review

and there is no indication that he did not know and could not have discovered the factual predicate for his claims through the exercise of due diligence. *See* 28 U.S.C. § 2244(d)(1)(C) & (D). Consequently, the Court finds that the Amended Application is time-barred unless equitable tolling applies.

IV. EQUITABLE TOLLING

Applicant does raise arguments in his Reply that the one-year limitation period should be equitably tolled. The one-year limitation period in 28 U.S.C. § 2244(d) is not jurisdictional and may be tolled for equitable reasons "in rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (internal quotation marks omitted; *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998)). Equitable tolling may be appropriate if (1) the petitioner is actually innocent; (2) an adversary's conduct or other extraordinary circumstance prevents the petitioner from timely filing; or (3) the petitioner actively pursues judicial remedies but files a defective pleading within the statutory period. *See Holland,* 560 U.S. at 649; *Gibson*, 232 F.3d at 808. Simple excusable neglect is not sufficient to support equitable tolling. *Gibson*, 232 F.3d at 808. Furthermore, equitable tolling is appropriate only if the petitioner pursues his claims diligently. *Miller*, 141 F.3d at 978. The petitioner must "allege with specificity 'the steps he took to diligently pursue his federal claims.'" *Yang v. Archuleta*, 525 F.3d 925, 930 (10th Cir. 2008)(quoting *Miller*, 141 F.3d at 978). Applicant bears the burden of demonstrating that equitable tolling is appropriate in this action. *See id.*

A. Ignorance of the Law

Applicant contends that equitable tolling is warranted because he was ignorant of the law regarding the AEDPA one-year limitations period, but his argument does not provide a basis for equitable tolling. An applicant's *pro se* status and ignorance of the

law are not extraordinary circumstances that warrant equitable tolling. *See Marsh v. Soares,* 223 F.3d 1217, 1220 (10th Cir. 2000) ("Ignorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing") (internal quotation marks and citation omitted); *see also Miller*, 141 F.3d at 978 (equitable tolling not justified by fact that petitioner simply did not know about AEDPA time limitation).

B. Actual Innocence

Applicant argues in his Reply he is entitled to equitable tolling because he is innocent and, therefore, if the Court fails to consider his claims, there will be a "miscarriage of justice." (ECF No. 17). In support of this position, he appears to contend that had an expert been employed in his case, the expert could have investigated the State's evidence to determine whether Crim. P. Rule 41.1 evidence obtained from the Applicant was not included as original evidence to prove the prosecution's case. (ECF No. 17 at 1-2). Further, he speculates that the expert could have determined whether new DNA needed to be taken and re-tested. (*Id.*).

A fundamental miscarriage of justice occurs when "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). A credible showing of actual innocence provides a gateway to consideration of an otherwise untimely claim of constitutional error as an equitable exception to the one-year limitation period in § 2244(d). *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). However, "tenable actual-innocence gateway pleas are rare." *Id.* To be credible, a claim of actual innocence requires an applicant "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); *see McQuiggin*, 569 U.S.

at 400-01 (applying actual innocence test in *Schlup* to one-year limitation period in § 2244(d)). The applicant then must demonstrate "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327; *see also McQuiggin*, 569 U.S. at 386.

In this case, Applicant provides no specific details as to why or how any of the evidence (or lack of evidence) he cites qualifies as "new" reliable evidence under the *Schlup* standard; and nothing in *Schlup* suggests that Applicant is entitled to perform evidence gathering as part of this federal habeas corpus action in order to obtain new reliable evidence so that he may proceed based on actual innocence. Applicant's arguments fall far short of the showing that is necessary to support a credible claim of actual innocence under *Schlup*.

Applicant cites to the case of *Wilson v. Sellers,* 138 S.Ct. 1188 (2018), in support of his argument that the fact he has claimed his innocence throughout his proceedings provides a basis for this Court to hear his claims. (ECF No. 17 at 2). However, the opinion in *Wilson* concerns how a federal district court should proceed in a habeas case when a relevant state court decision is not accompanied by a reasoned opinion explaining why relief was denied. *Wilson,* 138 S.Ct. at 1191-92 (explaining that, in the § 2254 context, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale . . . [and] presume that the unexplained decision adopted the same reasoning"). The opinion in *Wilson* does not address the issue of timeliness or equitable tolling under the actual innocence test in *Schlup,* and does not assist the Applicant in overcoming the time bar applicable to his claims. Therefore, Applicant's request for equitable tolling based on an actual innocence claim is rejected.

IV. CONCLUSION AND ORDERS

For the reasons discussed above, the Amended Application and this action will be dismissed as time-barred. Because the Amended Application is untimely, the Court need not reach Respondents' alternative argument that not all of Applicant's claims were exhausted in the state courts prior to his filing of this action and are procedurally barred from federal habeas review. Accordingly, it is

ORDERED that the Amended Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 **(ECF No. 10)** is **DENIED** as time-barred under 28 U.S.C. § 2244(d). It is

FURTHER ORDERED that this action is **DISMISSED WITH PREJUDICE**. It is

FURTHER ORDERED that no certificate of appealability will issue because jurists of reason would not debate the correctness of the procedural ruling and Applicant has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied for the purpose of appeal. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

DATED at Denver, Colorado, this 23rd day of October, 2018.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court