APPENDIX A

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40630

DARRELL WAYNE BELL,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

O R D E R:

Darrell Wayne Bell, Texas prisoner # 1983875, moves for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2254 application in which he attacked his conviction for continuous sexual abuse of a child under 14 years of age. The district court dismissed the application as barred by the applicable one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1).

Bell asserts that his § 2254 application was timely filed because he filed it within one year of when he obtained his counsel's file and found that counsel possessed—but did not present at trial—potentially exculpatory evidence. He also argues that the evidence that he discovered in counsel's files establishes that he is actually innocent and, thus, the untimeliness of his application should be excused. We need not consider Bell's argument that the limitations

period should be equitably tolled based on the ineffectiveness of his counsel because he did not assert that claim in the district court. *See Butler v. Cain*, 533 F.3d 314, 320 (5th Cir. 2008).

To obtain a COA, Bell must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). When a district court denies federal habeas relief based on procedural grounds, a COA should issue when the prisoner establishes, 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 find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Houser v. Dretke*, 395 F.3d 560, 562 (5th Cir. 2004).

The Antiterrorism and Effective Death Penalty Act provides that a one-year limitations period applies to state prisoners filing § 2254 applications. 28 U.S.C. § 2244(d)(1). The limitation period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," *see* § 2244(d)(1)(A), or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," *see* § 2244(d)(1)(D), whichever is later. 28 U.S.C. § 2244(d)(1).

Bell first contends that § 2244(d)(1)(D), not § 2244(d)(1)(A), should determine the start date for the one-year limitations period. He argues that, under § 2244(d)(1)(D), the limitations period did not begin until June 2016 when he viewed the possibly exculpatory evidence that his counsel failed to offer at trial. His argument is unavailing. Bell is deemed to have known of the evidence when his counsel obtained it, which the record reflects was prior to trial. *See Starns v. Andrews*, 524 F.3d 612, 620–21 (5th Cir. 2008) (holding

that a criminal defendant was considered to have learned of the factual predicate for his habeas claims when his attorney did); *see also Hunter v. Cain*, 478 F. App'x 852, 853 (5th Cir. 2012) (indicating that applicant had not shown why he could not have found evidence through due diligence after it was disclosed to his criminal counsel). Thus, § 2244(d)(1)(A) applies, and the one-year limitations period expired in October 2016. Because Bell did not file the instant petition until June 2017 at the earliest, reasonable jurists would not debate whether Bell's § 2254 application was time-barred. *See Slack*, 529 U.S. at 484.

Bell next contends that he is actually innocent, pointing to evidence that he discovered in counsel's files that he claims shows that, on the date of one of the alleged sexual assaults, he could not have been alone with the victim and lacked the opportunity to commit the assault. While this court does not recognize freestanding actual-innocence claims on federal habeas review, *see Foster v. Quarterman*, 466 F.3d 359, 367–68 (5th Cir. 2006), actual innocence, if demonstrated, can be a gateway through which a prisoner may pass to overcome the limitations period, *see McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). As a threshold matter, to assert a credible claim of actual innocence, a prisoner must present "new reliable evidence" that was not introduced at trial. *Schlup v. Delo*, 513 U.S. 298, 324 (1995). This court has determined that evidence is not "new" under the *Schlup* actual-innocence standard if it "was always within the reach of [petitioner's] personal knowledge or reasonable investigation." *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008). As discussed, the evidence on which Bell relies—the records that he located in his counsel's files—had been acquired by counsel by the time of trial. Therefore, Bell has not satisfied the *Schlup* actual-innocence standard.

For these reasons, Bell has not made the required showing to obtain a COA. His motion for a COA is DENIED. His motion for leave to proceed in forma pauperis also is DENIED.

/s/ James L. Dennis

JAMES L. DENNIS
UNITED STATES CIRCUIT JUDGE

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Before DENNIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

A member of this panel previously denied appellant's motion for a certificate of appealability and to proceed in forma pauperis. The panel has considered appellant's motion for reconsideration of the motion for a certificate of appealability. IT IS ORDERED that the motion is DENIED.