FILED
United States Court of Appeals
Tenth Circuit

September 17, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ALBERTO MATIAS-MARTINEZ,

Petitioner - Appellant,

v.

DEAN WILLIAMS; ATTORNEY GENERAL STATE OF COLORADO,

Respondents - Appellees.

No. 20-1249
(D.C. No. 1:19-CV-02993-LTB-GPG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **KELLY**, and **EID**, Circuit Judges.

Petitioner-Appellant Alberto Matias-Martinez, an inmate appearing pro se, seeks a Certificate of Appealability (COA) to appeal from the district court's order dismissing with prejudice his application for a writ of habeas corpus, 28 U.S.C. § 2254, as untimely.[1] To obtain a COA Mr. Matias-Martinez must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where, as here, the district court denies a habeas application on procedural grounds, the movant must show that reasonable jurists

---

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Mr. Matias-Martinez also moves the court to take judicial notice of a document filed in the district court. This document is included in the record on appeal, so judicial notice is not necessary. See R. 273.

would find the procedural ruling debatable, as well as the underlying constitutional claims. Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Mr. Matias-Martinez was convicted of two counts of first-degree felony murder and sentenced to life in prison without the possibility of parole. The Colorado Court of Appeals affirmed on direct appeal. People v. Matias-Martinez, Colo. App. No. 93CA1938 (Nov. 9, 1995) (unpublished). In 1997, Mr. Matias-Martinez sought state postconviction relief, which the state district court denied. On appeal, the Colorado Court of Appeals affirmed but remanded to the state district court with directions to issue letters rogatory to Mexico so that defense counsel could obtain statements from individuals then incarcerated in that country. People v. Martinez, Colo. App. No. 02CA2256 (Feb. 10, 2005) (unpublished). The Colorado Supreme Court denied certiorari. Matias-Martinez v. People, Colo. No. 05SC226 (June 20, 2005) (unpublished). The state district court issued the letters as directed and Mr. Matias-Martinez eventually filed another motion for state postconviction relief in 2012.

The district court adopted a recommendation of a magistrate judge that Mr. Matias-Martinez's application be dismissed as untimely. The magistrate reasoned that the one-year limitation period, 28 U.S.C. § 2244(d), had run between the denial of certiorari on the postconviction claim by the Colorado Supreme Court in 2005 and the filing of Mr. Matias-Martinez's motion for state postconviction relief in 2012, seven years later. The magistrate judge also rejected Mr. Matias-Martinez's claim that state action prevented him from timely filing, that equitable tolling should apply, and that he qualified for an exception because he could make a credible showing of actual innocence.

Initially, Mr. Matias-Martinez faces a different timeliness issue under this court's rules. The district court entered final judgment on May 13, 2020, which means that his notice of appeal was due on or before June 12, 2020. Fed. R. App. P. 4(a)(1)(A). The district court did not receive his notice until July 6, 2020. In response to this court's order to show cause, Mr. Matias-Martinez moved for and obtained an order from the district court extending the time to file a notice of appeal or reopening the time to file an appeal. The district court did not abuse its discretion in so ruling. Fed. R. App. P. 4(a)(5)(A) & 4(a)(6).

The habeas corpus limitation period is tolled for "[t]he time which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). Mr. Matias-Martinez maintains that "the postconviction action was one continuous event" that only concluded when his second motion for state postconviction relief was fully resolved. Aplt. Br. at 9. But § 2244(d)(2) tolls the limitation period only while state courts review an application, i.e. while it is "pending" under the statute. Lawrence v. Florida, 549 U.S. 327, 332 (2007). Mr. Matias-Martinez had no application for state postconviction relief under review by Colorado courts between 2005 — when his first motion was resolved — and 2012 — when he filed his second motion. Accordingly, the one-year limitation period ran during that time.

Mr. Matias-Martinez's arguments for equitable tolling or actual innocence do not make the district court's rejection of them reasonably debatable. To qualify for equitable tolling, Mr. Matias-Martinez must show "(1) that he has been pursuing his rights

diligently, and (2) that some extraordinary circumstance stood in his way." Yang v. Archuleta, 525 F.3d 925, 928 (10th Cir. 2008) (quoting Lawrence, 549 U.S. at 327). Setting aside the diligence question, Mr. Matias-Martinez has shown no extraordinary circumstance that would excuse his untimely filing. His reasonable, though mistaken, understanding of the legal posture and effects of his motions and the proceedings in state court do not meet the bar. See Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000).

Actual innocence "serves as a gateway through which a petitioner may pass" to overcome the expiration of the limitations period. McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). But "tenable actual-innocence gateway pleas are rare" because the petitioner must show that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). As the magistrate judge explained, the Innocence Project letter and legal memorandum relied on by Mr. Matias-Martinez are not new, reliable exculpatory evidence under Schlup. Even if the information related in the affidavit from a fellow inmate is reliable and true, it fails to meaningfully call Mr. Matias-Martinez's conviction for felony murder into question, much less demonstrate that no juror could reasonably vote to find him guilty beyond a reasonable doubt.

We DENY a COA, DENY IFP, and DENY as moot the motion to take judicial notice.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

16

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Gordon P. Gallagher, United States Magistrate Judge

Civil Action No. 19-cv-02993-LTB-GPG

ALBERTO MATIAS-MARTINEZ,

Petitioner,

v.

DEAN WILLIAMS, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter comes before the Court on the *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254* filed *pro se* by Petitioner Alberto Matias-Martinez on October 18, 2019. (ECF No. 1). The matter has been referred to this Magistrate Judge for recommendation (ECF No. 17).[1]

The Court must construe the application liberally because Petitioner is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v.*

---

[1] Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

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.

The Court has reviewed the filings to date. The Court has considered the entire case file, the applicable law, and is advised of the premises. This Magistrate Judge respectfully recommends dismissing the § 2254 application as untimely.

I. BACKGROUND

The Colorado Court of Appeals summarized the underlying criminal prosecution giving rise to this habeas action as follows:

> In 1992, Juan and Aurelia Lara (the victims) were shot multiple times while they were transporting $26,000 in cash to pay the onion field workers whom they supervised. During the police investigation, Matias-Martinez's wife (Tanya Mackey) described how the murders occurred, including Matias-Martinez's and codefendants' participation in the crimes. Mackey recanted those statements at the trial and testified that she made them because the police had threatened her. But the statements were admitted as evidence. In addition to Mackey's statements, an eyewitness placed Matias-Martinez at the crime scene. A jury found Matias-Martinez guilty of two counts of first degree felony murder, and the court sentenced him to life in prison without the possibility of parole. On appeal, a division of this court affirmed Matias-Martinez's convictions and sentences. *People v. Matias-Martinez*, (Colo. App. No. 93CA1938, Nov. 9, 1995) (not published pursuant to C.A.R. 35(f)).

(ECF No. 12-1 at 2).

As the appellate court put it: "The postconviction proceedings that followed have a long and tortuous history." (*Id.* at 3). However, the timeliness of this action hinges on two postconviction filings. First, "[i]n 1997, [Petitioner] filed a pro se Crim. P. 35(c) motion, alleging that trial counsel was constitutionally ineffective (1997 motion)."[2] (*Id.*). On February 10, 2005, the Colorado Court of Appeals ruled on the district court's denial

[2] The Court also refers to the 1997 motion as "the first 35(c) motion" or "the initial 35(c) motion."

of the 1997 motion. The Court of Appeals affirmed the district court's denial of postconviction relief, but reversed the district court's denial of counsel's request to issue Letters Rogatory[3] "with directions that the court issue the Letters Rogatory and order that the costs associated with the issuance of the letters be paid." (ECF No. 12-5 at 7). A second 35(c) motion was filed in 2012. (*Id.*). The relevant details of the two postconviction motions will be discussed below as they relate to accrual and tolling of the statute of limitations.

Petitioner initiated this action on October 18, 2019 by filing an *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254.* (ECF No. 1). On November 19, 2019, the Court ordered Respondents Dean Williams and The Attorney General of the State of Colorado (collectively, the "State of Colorado" or the "State") 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 remedies pursuant to 28 U.S.C. § 2254(b)(1)(A). (ECF No. 6). On January 20, 2020, the State of Colorado filed a *Pre-Answer Response*, arguing that this action is barred by § 2244(d)'s one-year limitation period.[4] (*See* ECF No. 12). On February 24, 2020, Mr. Martinez filed *Applicant's Reply to Respondents' Pre-Answer Response* contending, among other things, that his application should be considered timely because: (1) State action prevented him from filing the application sooner; (2) his 1997 postconviction motion remained "pending" until

[3] Letters Rogatory, referred to as a "letter of request" under Fed. R. Civ. P. 28, is defined as follows: "[A] request issued to a foreign court requesting a judge to take evidence from a specific person within that court's jurisdiction." Letters Rogatory, Garner's Dictionary of Legal Usage, 540 (3d ed. 2011).

[4] Because the Court finds the application untimely, it does not address exhaustion.

2019, which resulted in statutory tolling; (3) equitable tolling applies to his claims; and (4) he is "actually innocent" of the crimes which he was convicted. (ECF No. 15 at 1-8; 12-25). The Court now addresses whether the application is timely.

II. DISCUSSION

A. Accrual

The State of Colorado argues that the application is barred by the one-year limitation period in 28 U.S.C. § 2244(d). That statute 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). Petitioner is not asserting a constitutional right newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review,

and he knew or could have discovered the factual predicate for each of his claims before the proceedings relevant to the claims were final. *See* 28 U.S.C. § 2244(d)(1)(C) - (D).

But Petitioner does contend he was prevented by State action from filing this application sooner. (ECF No. 15 at 4-7); *see* 28 U.S.C. § 2244(d)(1)(B). His argument proceeds as follows: The Colorado Court of Appeals remanded the appeal of his initial postconviction motion "with directions that the court issue the Letters Rogatory and order that the costs associated with the issuance of the letters be paid." (ECF No. 12-15 at 7). Counsel remained appointed. (ECF No. 15 at 3). Colorado law explicitly prohibits the appointment of an attorney solely for the purpose of investigating the merit of a defendant's claims. (*Id.*). Therefore, because counsel continued to represent him, Petitioner "reasonably and detrimentally relied upon state law for his belief that his motion was [a] collateral attack motion [] properly pending." (*Id.* at 4).

Petitioner's reliance on § 2244(d)(1)(B) is misplaced. To start, generally applicable legal precedent decided by Colorado courts regarding the appointment of postconviction counsel cannot be characterized as "State action in violation of the Constitution or laws of the United States." And the contention that Petitioner was "prevented" by State action from filing this action sooner is even more strained. Merriam-Webster defines "prevent" as "to keep from happening or existing[;] to hold or keep back[;] to deprive of power or hope of acting or succeeding." Merriam-Webster's Online Dictionary, https://www.merriamwebster.com/dictionary/prevent (last visited Mar. 12, 2020). In no sense of the word did State action "prevent" the Petitioner from filing this habeas action sooner. Rather, Petitioner's own incorrect interpretation of the

interplay between state and federal law—even if reasonable—caused him to not file this habeas action sooner. But "it is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000). As a result, the one-year limitation period began to run from the date Petitioner's conviction of judgment became final. *See* 28 U.S.C. § 2244(d)(1)(A).

Finality occurs on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review[.]" 28 U.S.C. § 2244(d)(1)(A). Here, the Colorado Supreme Court denied certiorari review of Petitioner's direct appeal on July 22, 1996. Because Petitioner did not file a petition for certiorari review in the United States Supreme Court, his direct appeal proceeding concluded when the time for filing a certiorari petition in the United States Supreme Court expired. *See Gonzalez v. Thaler*, 565 U.S. 134, 150 (2012) (if a defendant directly appeals to the state's highest court, the conviction is final on the expiration of the 90-day period for seeking certiorari in the United States Supreme Court); *see also* S. Ct. R. 13.1. Therefore, Petitioner's conviction became final on October 21, 1996[5]—90 days after the Colorado Supreme Court's July 22, 1996 denial of certiorari review—and the AEDPA statute would have begun to run the following day. *See Holland v. Florida*, 560 U.S. 631, 635 (2010); *Al-Yousif v. Trani*, 779 F.3d 1173, 1178 (10th Cir. 2015).

[5] The 90th day was actually Sunday, October 20, 1996. However, the deadline was extended to the next business day Monday, October 21, 1996. *See* S. Ct. Rule 30.1 (time periods ending on a weekend or holiday run through the next court business day).

B. Statutory Tolling

That is, the AEDPA statute would have begun to run unless statutory tolling applies. Pursuant to § 2244(d)(2), a properly filed state court postconviction motion tolls the one-year limitation period while the motion is pending. The issue of whether a state court postconviction motion is pending for the purposes of § 2244(d)(2) is a matter of federal law, but "does require some inquiry into relevant state procedural laws." *See Gibson v. Klinger*, 232 F.3d 799, 806 (10th Cir. 2000). The term "pending" includes "all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application." *Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999).

Furthermore, "regardless of whether a petitioner actually appeals a denial of a post-conviction application, the limitations period is tolled during the period in which the petitioner *could have* sought an appeal under state law." *Gibson*, 232 F.3d at 804. In Colorado in 1996, a party had 45 days from a court's written order to file an appeal. Colo. App. R. 4(b)(1). But unlike a direct appeal, "the statute of limitations is tolled only while state courts review the [postconviction] application." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007). "The application for state postconviction review is therefore not 'pending' after the state court's postconviction review is complete, and § 2244(d)(2) does not toll the 1–year limitations period during the pendency of a petition for certiorari [in the United States Supreme Court]." *Id.*

Here, Petitioner filed a postconviction motion in state court under Colo. R. Crim. P. 35(b) for reconsideration of his sentence on October 16, 1996. That filing tolled the statute of limitations from October 21, 1996 (the date his conviction became final) until

December 16, 1996, which is when the time for appealing the state court's October 30, 1996 ruling on the motion expired. From there, the statute ran for twenty-eight days until January 13, 1997, which is when Petitioner's first Colo. R. Crim. P. 35(c) motion was filed. As Respondents explain, counsel was appointed and, for years, heavily litigated the postconviction claims raised in that first motion. (*See* ECF No. 12 at 9-10). However, on September 20, 2002, the state district court denied postconviction relief. (*Id.* at 10).

On February 10, 2005, the Colorado Court of Appeals affirmed the denial of postconviction relief: "Those portions of the order upholding the validity of the Curtis advisement, and denying defendant's motion to amend his Crim. p. 35(c) motion to add a discovery violation are affirmed." (ECF No. 12-5 at 7). Yet the Court of Appeals reversed the district court's denial of counsel's request to issues Letters Rogatory "with directions that the court issue the Letters Rogatory and order that the costs associated with the issuance of the letters be paid." (*Id.* at 7). Petitioner sought the Letters Rogatory to obtain information from "four potential alibi witnesses, who were incarcerated in Mexico[.]" (*Id.* at 6). The information sought from these potential alibi witnesses "related to a potential claim for the ineffective assistance of trial counsel." (*Id.*). Petitioner filed a Petition for Writ of Certiorari in the Colorado Supreme Court, which was denied on June 20, 2005. (ECF No. 12-34). On July 7, 2005, the district court issued the Letters Rogatory as directed by the Colorado Court of Appeals. (ECF No. 12-5 at 18). It was not until February 16, 2012 that Petitioner filed his second Colo. R. Crim. P. 35(c) motion. Because nearly seven years elapsed between the filing of these two postconviction motions, the present § 2254 action is clearly time-barred unless. . .

As Petitioner argues, his "initial postconviction motion remained pending before

the trial court until his appeal was exhausted on August 19, 2019[.]" (ECF No. 15). The Court finds Petitioner's argument flawed for several reasons. First, as Respondents explain, the Colorado Court of Appeals only has jurisdiction to review a final appealable order. (ECF No. 12 at 11 n.5 (citing "Colo. App. R. 1 (an appeal may be prosecuted only from a final appealable order); *People v. Davis*, 182 P.3d 703, 704 (Colo. App. 2008) ('A final appealable order is one that effectively terminates the proceedings in the court below')."")). Thus, the appellate court concluded that the proceedings in district court—i.e., the relief being sought in the first 35(c) motion—had been terminated.

Second, the Colorado Court of Appeals' remand for the district court to issue Letters Rogatory did not toll the limitations period because there was no longer any substantive claim for postconviction relief before the district court to review. *Wall v. Kholi*, 131 S.Ct. 1278, 1285 (2011) (finding that "'collateral review' of a judgment or claim means a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process."); *see also Woodward v. Cline*, 693 F.3d 1289, 1293 (10th Cir. 2012) (motion requesting results of DNA testing did not toll AEDPA limitations period because motion was a request for information or discovery and did not request judicial review of a judgment); *May v. Workman,* 339 F.3d 1236, 1237 (10th Cir. 2003) (postconviction motions for transcripts and petitions for writs of mandamus relating to those motions do not toll the one-year time bar); *Pursley v. Estep*, 216 F. App'x 733, 734 (10th Cir. 2007) (unpublished) (finding that motions for appointment of counsel in postconviction proceedings pursuant to Colorado Rule 35(c) that did not state adequate factual or legal grounds for relief did not toll the one-year limitation period); *Hodge v. Greiner*, 269 F.3d 104 (2d Cir. 2001) (concluding that a discovery motion does not toll

the statute because it "d[oes] not challenge [the] conviction," but merely seeks "material that might be of help in developing such a challenge"). Although issuance of the Letters Rogatory may have been helpful in obtaining information from potential alibi witnesses to use in a future challenge to the conviction, such a request for information did not subject Petitioner's criminal judgment to further review in the district court. Moreover, the district Court issued the Letters Rogatory on July 7, 2005—thus, at the very latest the initial 35(c) proceedings ceased on that date as there was no other claim for relief for the district court to review and no further action for the court to take in relation to the 1997 motion.

Finally, Petitioner filed a second 35(c) motion on February 16, 2012. Had the initial motion remained pending, there would have been no need to file anew a second 35(c) motion. This further supports the conclusion that the initial motion did not remain pending for nearly seven years. So, the present § 2254 action initiated on October 18, 2019 is clearly time-barred, unless Petitioner can establish a basis for equitable tolling.

C. Equitable Tolling

Petitioner maintains his application is timely. (*See* ECF No. 15). His argument—discussed above in relation to accrual—overlaps with the invocation of equitable tolling. (*Id.* at 4-8). Again, Petitioner argues that he "reasonably and detrimentally relied upon state law for his belief that his [first 35(c)] motion was [a] collateral attack motion [] properly pending." (*Id.* at 4). Because of this reasonable belief, Petitioner concludes that he "should be entitled to equitable tolling of § 2244(d)(1)'s limitations." (*Id.* at 5). Equitable tolling is available to Petitioner "only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and

prevented timely filing." *Holland*, 560 U.S. at 649 (quotations and citation omitted). "An inmate bears a strong burden to show specific facts to support his claim of extraordinary circumstances and due diligence." *Yang v. Archuleta*, 525 F.3d 925, 928 (10th Cir. 2008) (brackets and quotations omitted). That burden has not been shouldered here.

To reiterate, Petitioner's own incorrect interpretation of the interplay between state and federal law—even if reasonable—caused him to not file this habeas action sooner. But "it is well established that ignorance of the law, even for an incarcerated pro se petitioner, generally does not excuse prompt filing." *Marsh*, 223 F.3d at 1220. Nor does Petitioner identify the steps he took to diligently pursue his claims during the years that intervened between the conclusion of his first 35(c) motion and the filing of the present habeas application. Therefore, Petitioner fails to "show specific facts to support his claim of extraordinary circumstances and due diligence" required to invoke equitable tolling. *Yang*, 525 F.3d at 928; *see also Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000).

D. Actual Innocence

What remains is Petitioner's attempt to demonstrate that he is "actually innocent" of felony murder. (ECF No. 15 at 6-8). He does not. 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. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (considering claim of actual innocence in context of one-year limitation period in 28 U.S.C. § 2244(d)). However, "tenable actual-innocence gateway pleas are rare." *Id.* To be credible, a claim of actual innocence requires a 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—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). "[T]he *Schlup* standard is demanding. The gateway should open only when a petition presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *Perkins*, 569 U.S. at 401 (citation omitted).

Petitioner submits the following in support of his claim: (1) an affidavit from Daniel Santillan, a fellow inmate at the Arkansas Valley Correctional Facility; (2) a letter from the Korey Wise Innocence Project; and (3) a legal memorandum from former counsel concluding that Petitioner "may very well be innocent of these charges." (ECF No. 15 at 12-25). The Court addresses each in turn.

First, the affidavit. In it, Mr. Santillan attests that during the summer of 2003 he "was approached by and had a conversation with Ramon Valasquez. Ramon Valasquez informed [Santillan] that he had been present during the [] time of the murders of the Laras[.]" (ECF No. 15 at 12, ¶ 1). Additionally, "Mr. Valasquez informed [Santillan] that the wrong person, i.e,. Mr. Matias-Martinez had been convicted of the murders of the Laras and that Mr. Valasquez had aided one of the persons who had actually committed the murders of the Laras in escaping to Mexico, by driving him to the border." (*Id.*). Assuming everything Mr. Santillan says is true, Petitioner was convicted of felony murder. The felony murder statute provides, in pertinent part:

> A person commits the crime of murder in the first degree if: [a]cting either alone or with one or more persons, he or she commits or attempts to commit . . . robbery . . . and, in the course of or in furtherance of the crime that he

> or she is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone[.]

Colo. Rev. Stat. § 18-3-102(1)(b). Thus, even if the affidavit provides "new evidence" that Valasquez knew "one of the persons" who "had actually committed the murders," it does not mean that Petitioner is innocent of committing or attempting to commit robbery and, in the course of or in furtherance of that crime, the Laras' death was caused. In other words, such allegations do not bear on whether he is factually innocent of felony murder. *See U.S. v. Maravilla*, 566 Fed. App'x 704, 708 (10th Cir. 2014) (unpublished) (requiring a petitioner to show actual, factual innocence, not merely legal innocence). Thus, the affidavit is not reliable exculpatory evidence establishing factual innocence of the crime charged.

Next, the letter. It is dated January 13, 2020, addressed to Petitioner, and appears to be from Danielle Buckley of the Korey Wise Innocence Project. (ECF No. 15 at 14). Ms. Buckley states: "We are in the process of assigning your case for preliminary review and are in need of signed releases from your current and prior attorneys authorizing us to contact and discuss your case." (*Id.*). Such a confirming letter does not constitute reliable exculpatory evidence.

Finally, the legal memorandum. The memorandum is dated September 15, 2016 and appears to have been drafted in connection with the appeal of Petitioner's second 35(c) motion. Quite simply, the legal analysis and conclusions of counsel is not new reliable evidence. *Schlup*, 513 U.S. at 324. Nor does anything in the memorandum present evidence of innocence so strong that the Court cannot have confidence in the outcome of the trial. *See Perkins*, 569 U.S. at 401. Accordingly, Petitioner fails to make

a credible showing of actual innocence—this action is therefore barred by the one-year limitation period in § 2244(d).

III. RECOMMENDATION

For these reasons, this Magistrate Judge respectfully recommends that the *Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254* (ECF No. 1) be **denied** and the action be **dismissed with prejudice** as untimely.

DATED March 12, 2020.

BY THE COURT:

Gordon P. Gallagher
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-02993-LTB-GPG

ALBERTO MATIAS-MARTINEZ,

Petitioner,

v.

DEAN WILLIAMS, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed on March 12, 2020. (ECF No. 18). After being granted an extension of time, Petitioner Alberto Matias-Martinez filed timely written objections to the Recommendation. (ECF No. 21). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct for the reasons stated therein.

Accordingly, it is

ORDERED that Petitioner's written objections (ECF No. 21) are overruled. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 18) is accepted and adopted. It is

FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is DISMISSED WITH PREJUDICE as untimely. It is

FURTHER ORDERED that no certificate of appealability will issue because

Petitioner 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 without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith.

DATED at Denver, Colorado, this 13th day of May, 2020.

BY THE COURT:

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

EXHIBIT A

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 19, 2019 CASE NUMBER: 2019SC271
Certiorari to the Court of Appeals, 2014CA2142 District Court, Weld County, 1992CR873	
Petitioner: Alberto Matias Martinez, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2019SC271
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 19, 2019.

EXHIBIT B

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 19, 2019 CASE NUMBER: 2014CA2142
Weld County 1992CR873	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Alberto Matias Martinez.	Court of Appeals Case Number: 2014CA2142
MANDATE	

This proceeding was presented to this Court on the record on appeal. In accordance with its announced opinion, the Court of Appeals hereby ORDERS:

ORDERS AFFIRMED

POLLY BROCK
CLERK OF THE COURT OF APPEALS

DATE: AUGUST 19, 2019