UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-2367

MARTIN B. BROWN,
Appellant

v.

DISTRICT ATTORNEY PHILADELPHIA;
SUPERINTENDENT FRACKVILLE SCI;
ATTORNEY GENERAL PENNSYLVANIA

(E.D. Pa. No. 2:23-cv-02890)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, and CHUNG, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz
Circuit Judge

Date: March 6, 2025
PDB/KR/cc: Martin B. Brown
All Counsel of Record

***AMENDED BLD-035**

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **24-2367**

MARTIN B. BROWN, Appellant

v.

DISTRICT ATTORNEY PHILADELPHIA, et al.

(E.D. Pa. Civ. No. 2-23-cv-02890)

Present: SHWARTZ, MATEY, and CHUNG, Circuit Judges

Submitted are:

(1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's motion for appointment of counsel

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant Martin Brown's motion for a certificate of appealability is denied because he has not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For substantially the same reasons given by the District Court, reasonable jurists would not debate that Appellant's habeas petition filed pursuant to 28 U.S.C. § 2254 was untimely filed. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). Additionally, reasonable jurists would not debate the District Court's findings that Brown did not meet his burden of showing that equitable tolling was warranted; and that Brown's proffered evidence of actual innocence would not instill reasonable doubt in any reasonable juror's mind that his actions caused the victim's death, according to relevant Pennsylvania state law. Holland v. Florida, 560 U.S. 631, 649 (2010); McQuiggin v. Perkins, 569 U.S. 383, 392 (2013); See Commonwealth v. Rementer, 598 A.2d 1300, 1306 (Pa. Super. Ct. 1991) (collecting cases). Brown's motion to appoint counsel is also

denied.

By the Court,

s/Patty Shwartz
Circuit Judge

Dated: December 5, 2024

kr/cc: Martin B. Brown
Andrew Metzger, Esq.
Susan E. Affronti, Esq.
Ronald Eisenberg, Esq,

A True Copy:

Patricia S. Dodszuweit, Clerk
Certified Order Issued in Lieu of Mandate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN B. BROWN,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	**NO. 23-cv-2890**
	:	
MS. K. BRITTAIN, et al.,	:	
Respondents.	:	

ORDER

AND NOW, this day of , 2024, upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Lynne A. Sitarski, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The petition for habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED as untimely.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

_____
NITZA I. QUINONES ALEJANDRO, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN B. BROWN,	:	**CIVIL ACTION**
Petitioner,	:	
	:	
v.	:	**NO. 23-cv-2890**
	:	
MS. K. BRITTAIN, et al.,	:	
Respondents.	:	

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI
UNITED STATES MAGISTRATE JUDGE **April 10, 2024**

Presently before the Court is a *pro se* petition for writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, by Martin Brown ("Petitioner"), an individual currently incarcerated at the State Correctional Institution – Frackville in Frackville, Pennsylvania. For the following reasons, this Court respectfully recommends that the petition be DISMISSED as untimely.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

On May 27, 2014, Martin Brown was found guilty of one count of third-degree murder (Crim. Docket No. CP-51-CR-0004214-2013) and one count each of possession of a firearm by a

[1] This Court has consulted the Superior Court's most recent decision (*see Commonwealth v. Brown*, Nos. 1427 EDA 2022, 1428 EDA 2022, 293 A.3d 638, 2023 WL 2196613 (Pa. Super. Ct. Feb. 24, 2023)) and the Philadelphia County Court of Common Pleas criminal docket sheets in *Commonwealth v. Brown*, Nos. CP-51-CR-0003080-2011 and CP-51-CR-0004214-2013, *available at* https://ujsportal.pacourts.us/Report/CpDocketSheet?docketNumber=CP-51-CR-0003080-2011&dnh=%2BhyEnAH42mt56h63IeD5Kg%3D%3D (last visited Apr. 10, 2024) [hereinafter "3080 Crim. Docket"], and https://ujsportal.pacourts.us/Report/CpDocketSheet?docketNumber=CP-51-CR-0004214-2013&dnh=kb0mDBcxzR8EkD%2Fso7c3FQ%3D%3D (last visited Apr. 10, 2024) [hereinafter "4214 Crim. Docket"].

prohibited person, carrying a firearm without a license, carrying a firearm on a public street in Philadelphia, and possessing an instrument of crime (Crim. Docket No. CP-51-CR-0003080-2011) (3080 Crim. Docket at 5-6; 4214 Crim. Docket at 5). In its opinion dated February 24, 2023, the Pennsylvania Superior Court set forth the factual and procedural history through that point:

> Briefly, in January 2011, Brown attended a cabaret with several friends, including the victim, Clyde Raynor (Raynor). Brown and Raynor began arguing while Brown was driving the group home after the show. Brown pulled the car over to the side of the road and he and Raynor continued their argument outside. The interaction became physical and Brown retrieved a firearm from the trunk of the car and shot Raynor once in the chest before fleeing the scene. Raynor was paralyzed from the waist down and spent the remainder of his life in the hospital and various care facilities before he ultimately died as a result of the gunshot wound in May 2012.
>
> Brown proceeded to a consolidated jury trial []. In Case 4214-2013, he was convicted of one count of third-degree murder. In Case 3080-2011, he was convicted of possession of a firearm by a prohibited person, carrying a firearm without a license, carrying a firearm on a public street in Philadelphia, and possessing an instrument of crime. The trial court sentenced him to an aggregate term of 30 years to 60 years in prison. He timely appealed and this Court affirmed the judgement of sentence [on February 19, 2016].[2] *Id.* at *21. Brown filed a timely first PCRA petition, which the PCRA court denied without a hearing, and this Court affirmed on the basis of waiver. *Commonwealth v. Brown*, 2794 EDA 2019 & 2795 EDA 2019, at *6 (Pa. Super. Sept. 11, 2020) (unpublished memorandum).

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[2] Petitioner filed a timely post-sentence motion challenging his third-degree murder conviction, which the trial court denied on December 1, 2014. (4214 Crim. Docket at 12). Although he filed a timely direct appeal in that matter, he failed to do so in his case involving the firearms convictions and ultimately filed a PCRA petition on February 9, 2015, seeking reinstatement of his appeal rights *nunc pro tunc*. (3080 Crim. Docket at 13). The trial court granted Petitioner's PCRA petition on February 27, 2015, and he filed an appeal that same day. (*Id.*). Thereafter, the two appeals were consolidated, and the Superior Court affirmed the judgment of sentence on February 19, 2016. (3080 Crim. Docket at 15; 4214 Crim. Docket at 14).

> Brown filed the instant petition on August 10, 2021 arguing, *inter alia*, that the financial settlement the victim's family reached with his care providers after his death was after discovered evidence that would have proven that the gunshot wound was not the victim's true cause of death. The PCRA court concluded that the petition was untimely and that he had not pled a valid exception pursuant to 42 Pa.C.S. § 9545(b). Accordingly, it dismissed the petition without an evidentiary hearing. Brown timely appealed and he and the PCRA court have complied with Pa. R.A.P. 1925.

Brown, 2023 WL 2196613, at *1 (internal citations and footnotes omitted). The Superior Court affirmed the PCRA court's dismissal of Petitioner's second PCRA petition as untimely. *Id.* Petitioner did not appeal to the Pennsylvania Supreme Court.

Petitioner filed a *pro se* petition for a writ of habeas corpus on July 8, 2023[3] (Hab. Pet., ECF No. 1) and an amended Petition on August 21, 2023 (Am. Hab. Pet., ECF No. 8). The matter was assigned to the Honorable Nitza I. Quiñones Alejandro, who referred it to me for a Report and Recommendation. (Order, ECF No. 9). The Commonwealth responded on December 18, 2023. (Answer, ECF No. 16). Petitioner filed a reply and amended reply. (Reply, ECF No. 20; Am. Reply, ECF No. 19; *see also* Order, ECF No. 21). This matter is now fully briefed and ripe for disposition.

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[3] Pennsylvania and federal courts employ the prisoner mailbox rule. *See Perry v. Diguglielmo*, 169 F. App'x 134, 136 n.3 (3d Cir. 2006) (citing *Commonwealth v. Little*, 716 A.2d 1287 (Pa. Super. Ct.1998)); *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Under this doctrine, a prisoner's *pro se* petition is deemed filed when delivered to prison officials for mailing. *See Burns*, 134 F.3d at 113; *Commonwealth v. Castro*, 766 A.2d 1283, 1287 (Pa. Super. Ct. 2001). Nevertheless, it is a prisoner's burden to provide evidence for when the petition was placed within a prison mailbox or delivered to prison officials. *See Commonwealth v. Jones*, 549 Pa. 58, 700 A.2d 423, 426 (Pa. 1997); *Thomas v. Elash*, 781 A.2d 170, 176 (Pa. Super. Ct. 2001). Here, Petitioner certified that he placed his *pro se* petition in the prison mailing system on July 8, 2023, and it will be deemed filed on that date. (Hab. Pet., ECF No. 1, at 5).

II. LEGAL STANDARD

This petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §§ 2241 *et seq.* A strict one-year time limitation on the filing of new petitions is set forth in the AEDPA. Under § 2244(d)(1), the AEDPA provides that a one-year statute of limitations applies to all petitions brought pursuant to § 2254, which begins to 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.

28 U.S.C. § 2244(d)(1)(A)-(D).

AEDPA creates a tolling exception, which states that "[t]he time during which a properly filed application for state post-conviction or other collateral review with respect to pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2). "[A]n application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." *Artuz v. Bennet*, 531 U.S. 4, 8 (2000). An untimely post-conviction petition is not considered "properly filed." *Pace v. Diguglielmo*, 544 U.S. 408, 413 (2005) (citing *Artuz*, 531 U.S. at 8, 11). When applying the AEDPA, "we must look to state law governing when a petition for collateral relief is

properly filed" and "defer to a state's highest court when it rules on an issue." *Merritt v. Blaine*, 326 F.3d 157, 165 (3d Cir. 2003) (quoting *Fahy v. Horn*, 240 F.3d 239, 243-44 (3d Cir. 2001)).

The timeliness provision in the federal habeas corpus statute is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 634 (2010). Equitable tolling of the limitations period is to be used sparingly and only in "extraordinary" and "rare" circumstances. *Satterfield v. Johnson*, 434 F.3d 185, 195 (3d Cir. 2006). It is only in situations "when the principle of equity would make the rigid application of a limitation period unfair" that the doctrine of equitable tolling is to be applied. *Merritt*, 326 F.3d at 168. Further, an untimely petition is not barred when a petitioner makes a "credible showing of actual innocence." *Reeves v. Fayette SCI*, 897 F.3d 154, 160 (3d Cir. 2018), *as amended* (July 25, 2018) (citing *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013)).

III. DISCUSSION

Petitioner asserts three claims in his habeas petition: (1) violation of due process based on the PCRA court's acceptance of a late-filed motion by the government without permitting him to reply; (2) actual innocence based on newly discovered evidence that the victim died of nursing home neglect rather than from being shot by Petitioner; and (3) a *Brady* violation for withholding evidence and eliciting false testimony. (*See generally* Am. Hab. Pet., ECF No. 8). However, the

petition is untimely,[4] and Petitioner fails to demonstrate actual innocence.[5] Accordingly, I respectfully recommend that the petition for habeas corpus be dismissed.

In this case, the applicable starting point for the one-year habeas statute of limitations is the "conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The Pennsylvania Superior Court affirmed Petitioner's judgment of sentence on February 19, 2016. (3080 Crim. Docket at 15; 4214 Crim. Docket at 14). Petitioner did not file a petition for allowance of appeal with the Pennsylvania Supreme Court. The statute of limitations on Petitioner's habeas petition therefore began to run on March 21, 2016, thirty days following the Superior Court's decision. *See* Pa. R.A.P. 903. Petitioner had one year from the date his conviction became final, or until March 21, 2017, to timely file a federal habeas petition. The instant habeas petition was filed on July 8, 2023. Consequently, unless it is subject to statutory or

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[4] Petitioner's first claim is also non-cognizable in habeas. Petitioner argues that the PCRA court "violated [his] constitutional due process and equal protection rights when [an] extension was made specifically for the Commonwealth/Appellee's benefit" without affording him the opportunity to file a reply brief. (Am. Hab. Pet., ECF No. 8, at 8-9). He also asserts, without further explanation, that the PCRA court's actions violate his Eight Amendment right against cruel and unusual punishment. (*Id.* at 35). However, "alleged errors in collateral proceedings . . . are not a proper basis for habeas relief from the original conviction. It is the original trial that is the 'main event' for habeas purposes." *Lambert v. Blackwell*, 387 F.3d 210, 247 (3d Cir. 2004) (citing *Hassine v. Zimmerman*, 160 F. 3d 941, 954 (3d Cir. 1998)). A federal habeas court's role is "limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceedings does not enter into the habeas calculation." *Hassine*, 160 F. 3d at 954. Accordingly, the PCRA court's decision to grant extensions to the Commonwealth and deny Petitioner the opportunity to file a reply is not reviewable by this court.

[5] To the extent that Petitioner purports to assert a free-standing claim of actual innocence, rather than to merely excuse his untimeliness, such a claim is not cognizable. *See Fielder v. Varner*, 379 F.3d 113, 121 (3d Cir. 2004) (stating "[i]t has long been established that 'claims for actual innocence based on newly discovered evidence' are never grounds for 'federal habeas relief absent an independent constitutional violation' " (internal citations omitted)); *see also Rainey v. Superintendent Coal Twp. SCI*, No. 16–3184, 2016 WL 9410906, at *1 (3d Cir. Oct. 27, 2016) (stating "assertion of actual innocence is not cognizable as a freestanding claim that would entitle him to habeas relief").

equitable tolling, or Petitioner demonstrates actual innocence, the petition is jurisdictionally time-barred.

A. Statutory Tolling

Statutory tolling of the habeas limitations period does not excuse Petitioner's untimely filing. The AEDPA creates a tolling exception, which states that "[t]he time during which a properly filed application for State postconviction 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)(2). Petitioner timely filed a PCRA petition on April 14, 2016, 24 days into the federal statute of limitations period. (3080 Crim. Docket at 15; 4214 Crim. Docket at 14). Because this petition was filed in accordance with Pennsylvania's procedural requirements, it is considered a properly filed application for state post-conviction relief, thereby tolling AEDPA's one year limitation period. *See* 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction [review] . . . is pending shall not be counted toward any period of limitation under this subsection."); *see also Artuz*, 531 U.S. at 8 ("an application is 'properly filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings"). Further, such a petition is considered "pending" within the meaning of § 2244(d)(2) during the time a state prisoner is pursuing his state post-conviction remedies, including the time for seeking discretionary review of any court decisions whether or not such review was actually sought. *See Swartz v. Meyers*, 204 F.3d 417, 424 (3d. Cir. 2000); *Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 85 n.4 (3d Cir. 2013) (citation and quotation omitted).

In Petitioner's case, the PCRA Court denied Petitioner's PCRA petition on August 23, 2019, and Petitioner timely appealed. (3080 Crim. Docket at 18; 4214 Crim. Docket at 17). The

Superior Court affirmed, and the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal on May 26, 2021. (3080 Crim. Docket at 19; 4214 Crim. Docket at 18). Although Petitioner filed a second PCRA petition on August 10, 2021, the PCRA court concluded that the petition was untimely, and the Superior Court affirmed on February 24, 2023. *Brown*, 2023 WL 2196613, at *4. An "untimely application" for state postconviction relief is "not 'properly filed' under 28 U.S.C. § 2244(d)(2)," *Merritt*, 326 F.3d at 159, 162, and therefore does not toll the habeas statute of limitations. Thus, the AEDPA's statute of limitations began to run again on May 26, 2021, after the Pennsylvania Supreme Court denied Petitioner's petition for allowance of appeal of his first PCRA petition. *See Lawrence v. Florida*, 529 U.S. 327, 332 (2007). At this point, Petitioner had 341 days remaining, or until May 2, 2022, to file a timely § 2254 petition. However, Petitioner did not file until July 8, 2023, more than 14 months later. Consequently, he is barred from presenting his claims unless the instant petition is subject to equitable tolling or Petitioner establishes a credible showing of actual innocence.

B. Equitable Tolling

The Supreme Court of the United States has held that "the timeliness provision in the federal habeas corpus statute is subject to equitable tolling." *Holland,* 560 U.S. at 634. However, equitable tolling should be used "only when the principle of equity would make the rigid application of a limitation period unfair." *Fahy*, 240 F.3d at 244; *see also Brinson v. Vaughn*, 398 F.3d 225, 230 (3d Cir. 2005) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). A litigant invoking the doctrine of equitable tolling bears the burden of establishing two elements: "'(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 (quoting *Pace*, 544 U.S. at 418); *see also Williams v. Beard*, 300 F. App'x 125, 129 n.6 (3d Cir. 2008).

"The diligence required for equitable tolling purposes is 'reasonable diligence.'" *Holland*, 569 U.S. at 653 (citing *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996)). Reasonable diligence is a fact-specific inquiry that asks whether the petitioner acted "as diligently as reasonably could have been expected under the circumstances[.]" *Ragan v. Horn*, 598 F. Supp.2d 677, 681-82 (E.D. Pa. 2009) (quoting *Baldayaque v. United States*, 338 F.3d 145, 153 (2d Cir. 2003)). "[T]he fact that a petitioner is proceeding *pro se* does not insulate him from the 'reasonable diligence' inquiry and his lack of legal knowledge or legal training does not alone justify equitable tolling." *Ross v. Varano*, 712 F.3d 784, 799-800, 802 (3d Cir. 2013). Where the delay was substantial and the petitioner does not contend that he took any steps to ensure that his federal habeas petition was timely or "offer[] any explanation whatsoever for [the] delay," a petitioner is not entitled to a finding that he was reasonably diligent. *Betancourt v. Folino*, No. 10-3450, 2011 U.S. Dist. LEXIS 18270, at *23-24 (E.D. Pa. Jan. 26, 2011) (citing *Holland*, 560 U.S. at 653) (petitioner was not reasonably diligent when he waited eight months past the one-year AEDPA deadline to file his habeas petition); *Gutierrez-Almazan v. Pennsylvania*, 80 F. Supp. 3d 602, 607 (E.D. Pa. 2015) (petitioner was not reasonably diligent when he waited seven months to file a habeas petition after becoming aware that his state appeal was not properly filed); *see also White v. Martel*, 601 F. 3d 882 (9th Cir. 2010) (eleven-month delay shows a lack of diligence on the part of the petitioner). Extraordinary circumstances have been found where: (1) the respondent has actively misled the petitioner; (2) the petitioner has in some extraordinary way been prevented from asserting his rights; (3) the petitioner has timely asserted his rights mistakenly in the wrong forum, *see Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999); or (4) the court has misled a party regarding the steps that the party needs to take to preserve a claim, *see Brinson*, 398 F.3d at 230.

Here, Petitioner cannot establish that he has been diligently pursuing his rights or that some extraordinary circumstance caused his untimely filing. Petitioner filed his habeas claim more than 14 months after the statute of limitations had expired. He makes no argument as to equitable grounds for relief and does not provide an explanation for the late filing. In the space on Petitioner's standardized habeas form where he is asked to explain why the one-year statute of limitations does not bar his petition, Petitioner wrote "none." (Am. Hab. Pet., ECF No. 8, at 24). Insofar as Petitioner may have believed that the second, untimely PCRA petition filed during the pendency of his habeas statute of limitations tolled that deadline, "[i]t is well-settled that a prisoner's ignorance of the law and lack of legal expertise does not excuse his failure to make a prompt and timely filing." *Hendricks v. Johnson*, 62 F. Supp. 3d 406, 411 (D. Del. 2014). Further, Petitioner waited over four months to file his habeas petition after learning that the Superior Court had affirmed the PCRA court's finding that his second PCRA petition was not properly filed and does not explain this delay. *See Gutierrez-Almazan*, 80 F. Supp. 3d at 607. Accordingly, Petitioner does not qualify for equitable tolling of his untimely-filed habeas petition.

C. Actual Innocence

"To prevent a 'fundamental miscarriage of justice,' an untimely petition is not barred when a petitioner makes a "credible showing of actual innocence," which provides a gateway to federal review of the petitioner's otherwise procedurally barred claim of a constitutional violation." *Reeves*, 897 F.3d at 160 (citing *McQuiggin*, 569 U.S. at 386). *McQuiggin* "establishes an *exception* to the statute of limitations, even where a petitioner may not qualify for an *extension* to the statute of limitations via equitable tolling." *Wallace v. Mahanoy*, 2 F.4th 133, 151 (3d Cir. 2021) (emphasis in original). To satisfy this standard, a petitioner must first present new, reliable evidence, and second, must show that it is "more likely than not any reasonable juror would have

reasonable doubt." *Reeves*, 897 F.3d at 160 (citing *House v. Bell*, 547 U.S. 518, 538 (2006)). This requires that a petitioner furnish "'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.'" *Reeves*, 897 F.3d at 161 (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)). "New" evidence includes both newly discovered evidence as well as exculpatory evidence that counsel failed to discover or present at trial. *Wallace*, 2 F.4th at 152 (citing *Reeves*, 897 F.3d at 163-64.). As to the second prong, the court "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Id.* (citing *House*, 547 U.S. at 538). In weighing the evidence, "[t]he court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors"; the actual innocence standard "does not require absolute certainty about the petitioner's guilt or innocence." *Id.* (citing *House*, 547 U.S. at 538). The gateway actual innocence standard is "demanding" and satisfied only in the "rare" and "extraordinary" case where "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." McQuiggin, 569 U.S. at 386, 392 (internal quotation marks and citations omitted).

Under a liberal construction of his habeas petition, Petitioner argues that he should be excepted from the habeas statute of limitations due to his discovery in 2021 that the victim's family received a settlement in a wrongful death action against the nursing home where he received medical care after Petitioner shot him, information that Petitioner believes to be "clear[] evidence that the chain was broken concerning the causation of [the victim's] death." (Am. Hab.

Pet., ECF No. 8, at 14). Specifically, Petitioner contends that he is actually innocent because, "but for the nursing home negligence[,] the decedent [] would have never died in their custody, and therefore no murder charges would have ever been lodged against Petitioner[.]" (*Id.*).

The evidence and argument advanced by Petitioner are inadequate to establish a claim of actual innocence that would excuse his untimely habeas filing. Petitioner's evidence of the victim's family's 2015 settlement with the nursing home is "new" in the sense that it could not have been presented to the jury during his 2014 trial. However, the evidence does not establish that it is "more likely than not any reasonable juror would have reasonable doubt" about his guilt upon learning this information because Petitioner's actions remain the cause of the victim's death regardless of negligent care by the nursing home. As the Superior Court explained in its review of Petitioner's second PCRA petition, Pennsylvania law provides a two-part test to determine causation:

> First, the defendant's conduct must be an antecedent, but for which the result in question would not have occurred. A victim's death cannot be entirely attributable to other factors; rather, there must exist a "causal connection between the conduct and the result of conduct; and causal connection requires something more than mere coincidence as to time and place."
>
> Second, the results of the defendant's actions cannot be so extraordinarily remote or attenuated that it would be unfair to hold the defendant criminally responsible. As to the first part of the test, the defendant's conduct need not be the only cause of the victim's death in order to establish a causal connection. "Criminal responsibility may be properly assessed against an individual whose conduct was a direct and substantial factor in producing the death even though other factors combined with that conduct to achieve the result." The second part of the test is satisfied when the victim's death is the natural or foreseeable consequence of the defendant's actions.

Brown, 2023 WL 2196613, at *3 (quoting *Commonwealth v. Nunn*, 947 A.2d 756, 760 (Pa. Super. Ct. 2008) (citations omitted); 18 Pa. C.S. § 303(a)(1)).

At trial, testimony by the Chief Medical Examiner was subject to cross-examination by Petitioner's counsel regarding negligent medical treatment that the victim received at the nursing home following the shooting but nonetheless established that his cause of death was homicide based on the gunshot wound. *Brown*, 2023 WL 2196613, at *3. Petitioner does not assert that he did not shoot the victim. Accordingly, Petitioner cannot show that the wrongful death settlement would more likely than not cause a reasonable juror to have reasonable doubt about his conviction, and his petition is not excepted from the habeas statute of limitations based on a claim of actual innocence. *See Hill v. Harry*, No. 20-CV-1841, 2024 WL 944023, at *12 (W.D. Pa. Mar. 5, 2024) (where Petitioner asserted actual innocence to overcome untimely habeas filing, medical records showing that a rape victim died from pneumonia acquired in the hospital where she was admitted as a consequence of Petitioner's assault "did not establish that Petitioner was actually innocent of Third Degree Murder under Pennsylvania law . . . instead, so long as the defendant's conduct started the chain of causation which led to the victim's death, criminal responsibility for the crime of homicide may properly be found."). Thus, the Court respectfully recommends that Petitioner's petition be dismissed as time-barred.

IV. CONCLUSION

For the foregoing reasons, I respectfully RECOMMEND that the petition for writ of habeas corpus be denied as untimely without the issuance of a certificate of appealability.

Therefore, I respectfully make the following:

RECOMMENDATION

AND NOW this 10TH day of April, 2024, I respectfully RECOMMEND that the petition for writ of habeas corpus be DENIED as untimely without the issuance of a certificate of appealability.

Petitioner may file objections to this Report and Recommendation. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

/s/ Lynne A. Sitarski
LYNNE A. SITARSKI
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.