

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**

**August 25, 2021**

**FOR THE TENTH CIRCUIT**

**Christopher M. Wolpert**  
**Clerk of Court**

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SCOTTY L. BROOKS-GAGE,

Petitioner - Appellant,

v.

JIMMY MARTIN,

Respondent - Appellee.

No. 21-7008  
(D.C. No. 6:19-CV-00347-JFH-KEW)  
(E.D. Okla.)

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**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

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Before **MATHESON, BRISCOE, and PHILLIPS**, Circuit Judges.

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Scotty L. Brooks-Gage, a state prisoner, seeks a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(1)(A) to challenge the denial of his 28 U.S.C. § 2254 habeas petition.<sup>1</sup> We deny the application for a COA.

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\* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

<sup>1</sup> We liberally construe Brooks-Gage’s pro se filings but will not act as his advocate. *See United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (citation omitted).

## BACKGROUND

The federal district court ruled that Brooks-Gage's § 2254 habeas petition was time-barred under 28 U.S.C. § 2244(d). In the following paragraphs, we describe the timeline of events in Brooks-Gage's state proceedings, as shown by the record.

On October 19, 2007, the state district court accepted Brooks-Gage's entry of an *Alford* plea to one count of first-degree murder.<sup>2</sup> As part of the plea agreement, the state dismissed eight additional charges and recommended life imprisonment without the possibility of parole (initially, the state had sought the death penalty).

On October 25, 2007, the court entered a "Judgment and Sentence," imposing the state's recommended sentence. Sometime afterward, Brooks-Gage sought to withdraw his plea. After holding a hearing, the state court denied his motion. On February 25, 2009, the Oklahoma Court of Criminal Appeals declined to issue a Writ of Certiorari that would have allowed him to withdraw his plea.

On April 16, 2009, Brooks-Gage filed his first application for state postconviction relief, which the state district court denied on August 10, 2010. Brooks-Gage did not appeal that decision.

On March 18, 2016, Brooks-Gage filed a second application for state postconviction relief, which the state district court also denied, on June 7, 2016. Brooks-Gage appealed that denial. On August 12, 2016, the Oklahoma Court of Criminal

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<sup>2</sup> An *Alford* plea is "a guilty plea accompanied by protestations of innocence." *United States v. Buonocore*, 416 F.3d 1124, 1129–30 (10th Cir. 2005).

Appeals dismissed the appeal, stating that it was granting Brooks-Gage's motion to dismiss the appeal. Later, Brooks-Gage alleged that he never filed such a motion.

On June 14, 2017, Brooks-Gage filed another application for state postconviction relief, requesting a recommendation from the district court for an appeal out of time. On July 26, 2017, the state district court denied that request. On March 21, 2018, Brooks-Gage renewed the application. On December 27, 2018, the state district court denied it again. On August 30, 2019, the Oklahoma Court of Criminal Appeals denied this "subsequent application for post-conviction relief." R. at 211.

On September 11, 2019, Brooks-Gage commenced the current § 2254 habeas proceeding in the Western District of Oklahoma. That court transferred the case to the Eastern District of Oklahoma, because that was "where the [state] conviction was obtained." R. at 14. On November 4, 2019, Brooks-Gage filed his amended habeas petition there. After ruling that Brooks-Gage's habeas petition was untimely, the federal district court denied a COA. Brooks-Gage now applies to us for a COA under § 2253(c)(1)(A).

### **DISCUSSION**

Brooks-Gage must obtain a COA before he may appeal. 28 U.S.C. § 2253(c)(1)(A). To obtain a COA, he must make "a substantial showing of the denial of a constitutional right." § 2253(c)(2). To make this showing after the district court dismissed the habeas petition on procedural grounds, he must demonstrate (1) "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) "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, 478 (2000). That is, he must show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Id.* at 483–84 (internal quotation marks and citation omitted).

We need not discuss the first showing, because Brooks-Gage has failed to make the second showing. Reasonable jurists would agree that the federal district court’s procedural ruling was correct, i.e., that § 2244(d) barred Brooks-Gage’s § 2254 habeas petition.

Under § 2244(d), a one-year statute of limitations applies to § 2254 habeas petitions. This limitations period runs from “the date on which the judgment became final.”<sup>3</sup> § 2244(d)(1)(A). This period is tolled, however, while a “properly filed application for [s]tate post-conviction or other collateral review with respect to the . . . judgment . . . is pending.” § 2244(d)(2).

No reasonable jurists could debate whether Brooks-Gage filed his § 2254 habeas petition after the § 2244(d) limitations period had expired. As noted, Brooks-Gage filed his first application for state postconviction relief on April 16, 2009. His judgment became final after that, on May 26, 2009—ninety days after his direct appeal was denied—when the time for filing a certiorari petition with the Supreme Court expired.

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<sup>3</sup> Section 2244(d) provides that the limitations period will run “from the latest of” “the date on which the judgment became final” or the date of one of three other listed events. § 2244(d)(1)(A)–(D). None of the other three events have occurred here, so we do not discuss them.

U.S. Sup. Ct. R. 13(1); *Harris v. Dinwiddie*, 642 F.3d 902, 906 n.6 (10th Cir. 2011) (citation omitted) (judgment becomes final at the end of the ninety days for filing a certiorari petition with the Supreme Court). Because the application for state postconviction relief was pending before the judgment became final, the one-year limitations period did not begin running when the judgment became final. *See* § 2244(d)(2). The limitations period did not run while the application for state postconviction relief was pending. *See id.* The state district court denied the application for postconviction relief on August 10, 2010. On September 9, 2010, the thirty days during which Brooks-Gage could have appealed to the Oklahoma Court of Criminal Appeals expired. *See* 22 Okla. Stat. Ann. § 1087. The limitations period began the next day, on September 10, 2010. *See Gibson v. Klinger*, 232 F.3d 799, 803, 807 (10th Cir. 2000) (limitations period does not run during the thirty days for appealing to the Oklahoma Court of Criminal Appeals); *cf. United States v. Hurst*, 322 F.3d 1256, 1260–61 (10th Cir. 2003) (limitations period begins the day after the time for appealing expires). The limitations period expired one year later, on September 10, 2011.<sup>4</sup> Brooks-Gage filed his § 2254 habeas petition eight years too late, on September 11, 2019.

As a separate, though related, matter, the federal district court noted that Brooks-Gage referenced actual innocence in his amended habeas petition and in documents filed in his state postconviction proceedings. Recognizing that “[a]ctual innocence can serve as

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<sup>4</sup> We note that Brooks-Gage filed the second and additional applications for state postconviction relief after September 10, 2011. So § 2244(d)(2) statutory tolling could not follow from those.

a gateway past the § 2244(d) limitations period,” the court ruled that Brooks-Gage had failed to meet his burden for “asserting a claim of actual innocence” entitling him to bypass the limitations period. R. at 217.

No reasonable jurists could debate whether Brooks-Gage has met that “demanding” burden. *House v. Bell*, 547 U.S. 518, 538 (2006) (citations omitted). “[A]ctual innocence’ means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623–24 (1998) (citation omitted). Claiming actual innocence implicates “an equitable exception”—specifically, the fundamental-miscarriage-of-justice exception—to the § 2244(d) limitations period, distinguishable from equitable tolling. *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (emphasis and citation omitted). The exception applies only when “new evidence shows ‘it is more likely than not that no reasonable juror would have convicted the petitioner.’” *Id.* at 394–95 (alteration omitted) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). To benefit from the exception, a petitioner must support his claim of actual innocence with “new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 324). On appeal, Brooks-Gage merely points to witness testimony given at a preliminary hearing in his criminal case, not to new evidence.

## CONCLUSION

In conclusion, no reasonable jurists could debate whether the district court correctly ruled that Brooks-Gage untimely filed his habeas petition under § 2244(d). We deny his application for a COA.<sup>5</sup>

Entered for the Court

Gregory A. Phillips  
Circuit Judge

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<sup>5</sup> Brooks-Gage also moved to proceed on appeal without prepaying costs or fees. We grant this motion.