FILED
United States Court of Appeals
Tenth Circuit

August 25, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JASON MARTINEZ,

Petitioner - Appellant,

v.

DAVE BERGMAN; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 26-1047
(D.C. No. 1:25-CV-02848-LTB-RTG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY[*]

Before **TYMKOVICH**, **PHILLIPS**, and **FEDERICO**, Circuit Judges.

Jason Martinez proceeds pro se to request a certificate of appealability (COA) to appeal the district court's order dismissing his 28 U.S.C. § 2254 petition.[1] He also seeks to proceed in forma pauperis (IFP) and to supplement

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[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially help determine this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

[1] Because Martinez proceeds pro se, we liberally construe his arguments but do not act as his advocate. *See Greer v. Moon*, 83 F.4th 1283, 1292 (10th Cir. 2023).

the record on appeal. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we deny a COA, grant Martinez's IFP motion, deny his motion to supplement the record, and dismiss this matter.

BACKGROUND

After a four-day trial in July 2013 in Colorado state court, a jury convicted Jason Martinez of four felony counts involving sexual assault of a child and two misdemeanor counts of child abuse. He was sentenced to sixteen years to life in prison. He also had to register as a sex offender. His appeal was unsuccessful.

In 2017, Martinez sought post-conviction relief in state court under Colorado's criminal-procedure rules, but the state district court didn't acknowledge his petition until he filed a supplemental notice in 2022. The court then denied his petition. The Colorado Court of Appeals affirmed and the Colorado Supreme Court denied certiorari. In 2024, Martinez filed a state habeas petition, which the state district court converted into a second motion for post-conviction relief under the state rules before transferring it to a different court. Martinez did not appeal.

In September 2025, Martinez filed his 28 U.S.C. § 2254 petition in federal court in Colorado. In it, he alleged, first, that the state district court denied him the Fourteenth Amendment's due-process protections when it failed to act for more than four years on his first post-conviction motion. Second, he alleged that his defense attorney was ineffective under the Sixth Amendment because the attorney didn't interview alibi witnesses, investigate the crime scenes, or present any evidence at trial.

A magistrate judge ordered Colorado to file a pre-answer response. Colorado argued that Martinez failed to exhaust his state-court remedies before filing his federal claims, and that his second claim was untimely.

The magistrate judge then recommended that the court deny Martinez's § 2254 petition. As for Martinez's first claim about the state court's delay in deciding his post-conviction motion, the magistrate judge recommended that the claim be dismissed for two reasons. First, the magistrate judge concluded that Martinez had failed to exhaust his state-court remedies because he did not appeal the denial of his second post-conviction motion. Second, the magistrate judge concluded that Martinez's first claim was "not cognizable in a federal habeas action" because there is "no federal constitutional right to postconviction review in the state courts." R. at 201.

As for Martinez's second claim—for ineffective assistance of counsel—the magistrate judge recommended that it be dismissed as untimely and for failure to exhaust. According to the magistrate judge, Martinez's one-year deadline to file his § 2254 petition began on November 21, 2016, and ended on June 18, 2025, after tolling the deadline for his earlier appeal and prior post-conviction petitions. The magistrate judge also concluded that equitable tolling didn't apply, and that Martinez had not made a credible showing of actual innocence. It then determined that Martinez had not exhausted his remedies in state court because he had either never raised his asserted grounds or had raised them only in a reply brief. It also said that Martinez had not provided a sufficient reason to excuse his procedural default.

The magistrate judge filed his recommendations on December 8, 2025. The district court clerk mailed Martinez a copy the same day.

Martinez filed objections to the magistrate judge's recommendations on January 2, 2025. He argued that the magistrate judge erred by treating his second post-conviction motion as a habeas petition because the state court had construed it as a post-conviction motion under Rule 35(c) of the Colorado Rules of Criminal Procedure. He also argued that he had made a sufficient case for ineffective assistance of counsel because his trial counsel didn't present any evidence or file any motions at trial that could have changed the trial's outcome. From this, he argued for a "strong presumption" that his attorney "f[ell] way below 'Reasonable Professional Assistance.'" R. at 222 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

The district court overruled Martinez's objections for two reasons. First, it held that his objections were untimely. It ruled that, even giving Martinez the benefit of the prison-mailbox rule, the deadline to file objections was December 26, 2025. But Martinez didn't deliver his objections to prison officials until December 29, 2025, and they weren't entered on the docket until January 2, 2026, so the firm waiver rule barred considering them. Second, the district court ruled that Martinez's objections "do not identify a specific factual or legal error in" the magistrate judge's recommendation. Suppl. R. at 17. The district court thus adopted the recommendation as its own and dismissed Martinez's § 2254 petition. It also denied Martinez leave to proceed IFP and denied a COA.

DISCUSSION

I. Certificate of Appealability

"A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal." *Buck v. Davis*, 580 U.S. 100, 115 (2017). Rather, the prisoner must first obtain a COA. *See* 28 U.S.C. § 2253(c)(1)(A). A COA is a jurisdictional prerequisite to appellate review. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

We will not grant a COA unless Martinez makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the district court denied Martinez's habeas petition on procedural grounds without reaching the merits of his constitutional claims, he must show both (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, 484 (2000). We can address either requirement and, if one is not met, we need not address the other. *Id.* at 485.

Martinez has not shown how jurists of reason might debate whether the district court's procedural ruling was correct. Martinez lists four issues with the district court's opinion. First, he says he exhausted his state-court remedies because they "are exhausted in [his] filing process." Open. Br. at 7. Second, he argues that he was denied his right to a competent attorney, and that he is actually innocent. Third, he argues that his multiple convictions for child sexual abuse violate the Constitution's double-jeopardy prohibitions. Fourth, he says the district court abused its discretion by denying him due process in violation of the Fifth, Thirteenth, and Fourteenth Amendments. But he never challenges the district court's application of the firm waiver rule, so he doesn't show that the district court's procedural ruling was debatably wrong.

We address Martinez's actual-innocence argument before turning to the firm waiver rule.

A. Actual Innocence

Martinez's actual-innocence argument is unavailing.[2] "A proper showing of actual innocence by a habeas petitioner enables the petitioner to pursue a

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[2] As far as we can tell, we have not held in a published opinion that the firm waiver rule bars considering actual-innocence arguments. Though "[a] proper showing of actual innocence by a habeas petitioner enables the petitioner to pursue a claim that would otherwise be barred on grounds other than the merits, *Pacheco v. Habti*, 62 F.4th 1233, 1241 (10th Cir. 2023), we've also held that the firm waiver rule or similar party-presentation-related rules can bar review of actual-innocence claims. *See, e.g.*, *Macklin v. Dowling*, 822 F. App'x 720, 723–24 (10th Cir. July 24, 2020); *Heath v. Soares*, 49 F. App'x 818, 821–22 (10th Cir. Oct. 21, 2002). Without deciding the effect of the firm waiver rule on an actual-innocence argument, "[i]n consideration of a pro se litigant, . . . we exercise our discretion to briefly address" his actual-innocence argument. *Miller v. Legacy Bank*, No. 24-6105, 2024 WL 5154002, at *2 (10th Cir. Dec. 18, 2024).

claim that would otherwise be barred on grounds other than the merits." *Pacheco v. Habti*, 62 F.4th 1233, 1241 (10th Cir. 2023). When used to "overcome procedural issues," an actual-innocence claim "is not itself a constitutional claim." *Fontenot v. Crow*, 4 F.4th 982, 1029–30 (10th Cir. 2021) (citation omitted). Rather, it's "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 1030 (citation omitted). The actual-innocence exception applies "when a petitioner can demonstrate that he is actually innocent of the crime of conviction." *Pacheco*, 62 F.4th at 1241 (citation omitted). In this context, "actual innocence" means "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). To qualify for the exception, Martinez must show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Martinez points to two pieces of evidence: (1) a Denver Human Services Child Study about the victim and the victim's sibling, and (2) W-2 statements that show Martinez's address at the time of the offenses. It appears that this evidence is "new" because it wasn't presented to the factfinder at his trial. *See Fontenot*, 4 F.4th at 1032 (holding that new evidence is "all evidence that was *not presented* to the fact-finder during the trial, i.e., newly presented evidence").

The Denver Human Services Child Study doesn't show that it's "more likely than not that no reasonable juror would have convicted him" with this evidence. *Schlup*, 513 U.S. at 327. Martinez appears to rely on the study to show that he could not have sexually assaulted the victim, because it says that the victim moved into Martinez's mother's house on July 17, 2008—after the charging document's date range for those offenses ended. But, by itself, the study doesn't show that Martinez had no opportunity for the crime. The "date range for those offenses was amended during trial to a range of April 27, 2007, to August 31, 2009." *People v. Martinez*, No. 22CA1899, 2024 WL 3797466, at *3 (Colo. App. Feb. 29, 2024). So a reasonable juror would conclude that Martinez had more than a year of opportunity after the victim moved into Martinez's mother's house.

The same is true of the W-2s that Martinez uses to challenge his other counts. As he acknowledges, his living address is "not conclusive proof of [his] lack of opportunity for these crimes." Open. Br. at 84. Thus, Martinez cannot use the actual-innocence exception to overcome procedural default.

B. Firm Waiver Rule

To avoid our "firm waiver rule," "a party's objections to a magistrate judge's report and recommendation must be both timely and specific." *Coomer v. Make Your Life Epic, LLC*, 140 F.4th 1269, 1277 (10th Cir. 2025) (citation modified). "This means the objection must be sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." *Id.* (citation modified). So a party who fails to either timely object or object with sufficient specificity "waiv[es] appellate review of factual and legal questions." *Id.*

The firm waiver rule has two exceptions: (1) when a pro se litigant "has not been informed of the time period for objecting and the consequences of failing to object," and (2) when "the interests of justice require review." *Morales-Fernandez v. INS*, 418 F.3d 1116, 1119 (10th Cir. 2005) (citation modified). For the interests-of-justice exception, we consider "a pro se litigant's effort to comply, the force and plausibility of the explanation for his failure to comply, and the importance of the issues raised." *Id.* at 1220.

None of Martinez's arguments challenges the district court's application of the firm waiver rule. But, when construed liberally, Martinez's briefing suggests that his objections were timely because he didn't receive the magistrate judge's recommendation until December 15, 2025, which, he says, put his objection deadline at December 30, 2025. So according to Martinez, his objections were timely because he gave his completed objections to prison officials on December 29, 2025.

Under the prison-mailbox rule, Martinez's objections would be timely "if [they were] given to prison officials for mailing prior to the filing deadline, regardless of when the court itself receives the documents." *Price v. Philpot*, 420 F.3d 1158, 1164 (10th Cir. 2005); *see also Dunn v. White*, 880 F.2d 1188, 1190 (10th Cir. 1989) (applying prison-mailbox rule to an inmate's objections to a magistrate's recommendation).

But Martinez is wrong that his deadline was December 30. Yes, Martinez had fourteen days to object to the magistrate judge's recommendation. *See* 28 U.S.C § 636(b)(1)(C). But that period did not begin when he received the recommendations on December 15. The period begins when the magistrate judge "serve[s]" a copy of the recommendations. *Id.* And, under Federal Rule of Civil Procedure 5(b)(2)(C), service is complete "when documents are placed in the hands of the United States Post Office or in a Post Office Box." *Theede v. U.S. Dep't of Lab.*, 172 F.3d 1262, 1266 (10th Cir. 1999); *see also United States v. Clingman*, 288 F.3d 1183, 1185 (10th Cir. 2002) (applying Rule 5's service rules to 28 U.S.C § 636(b)(1)'s timeline). So the fourteen-day timeline began on December 8, when the district court clerk mailed the magistrate judge's recommendation.

With three days added under Rule 6(d) because the recommendation was served by mail, Martinez's deadline was December 25, 2025. But because December 25 was a holiday, Martinez's deadline was extended to December 26, 2025. *See* Fed. R. Civ. P 6(a)(1)(C). But Martinez didn't give his written objections to prison officials until three days after that. Thus, his objections were not timely, and the firm waiver rule bars considering them. *See Coomer*, 140 F.4th at 1277.

What's more, Martinez does not argue that either exception to the firm waiver rule applies. Nor do they. Martinez concedes that he was aware of the fourteen-day deadline. And, though he tried to comply with the deadline, the issues he raises—broadly construed—challenge *only* the district court's dismissal for failure to exhaust. They do not challenge the district court's second reasons for dismissing each of Martinez's two claims—in addition to being unexhausted, the first was "not cognizable in a federal habeas action" and the second was untimely. R. at 200. So even if we were persuaded by his arguments, we'd still deny a COA. *See Slack*, 529 U.S. at 484 (holding that, to obtain a COA, a habeas prisoner must show "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner"). Thus, the "interests of justice" do not require review. *Morales-Fernandez v. INS*, 418 F.3d at 1119.

None of Martinez's other arguments attacks the district court's application of the firm waiver rule, so they would not give reasonable jurists reason to debate whether the district court's procedural ruling was correct. *See Slack*, 529 U.S. at 484. We reject his other arguments and deny a COA.

II. IFP Motion

Martinez also seeks to proceed IFP. To proceed IFP on appeal, he "must comply with the filing requirements" and show "a financial inability to pay the required filing fees and the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (citation modified).

Martinez meets his burden. He shows no assets and only $30 of income each month. And though his procedural argument is not persuasive, it is not frivolous. So we grant his request to proceed IFP.

III. Motion to Supplement the Record

Martinez also seeks to supplement the record on appeal with transcripts from hearings in his state-court proceedings. But because we deny a COA, we deny his motion as moot.

CONCLUSION

We deny Martinez's request for a COA, grant his IFP Motion, deny his request to supplement the record, and dismiss this matter.

Entered for the Court

Gregory A. Phillips
Circuit Judge