

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 16 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KAVIN MAURICE RHODES,

Petitioner-Appellant,

v.

CHRISTIAN PFEIFFER, Warden, Warden,
in individual capacity,

Respondent-Appellee.

No. 21-55870

D.C. No.

2:14-cv-07687-JGB-KK

Central District of California,
Los Angeles

ORDER

Before: LEE and H.A. THOMAS, Circuit Judges, and BENNETT,* District Judge.

Judges Lee, Thomas, and Bennett have voted to deny the Petition for Rehearing. Judges Lee and Thomas voted to deny, and Judge Bennett recommended denying, the Petition for Rehearing En Banc. The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote. Petitioner-Appellant's Petition for Rehearing and Rehearing En Banc (Dkt. No. 42), filed November 16, 2022, is DENIED. The memorandum disposition filed October 31, 2022 (Dkt. No. 39) is amended to note that the panel declines to address Petitioner-Appellant's uncertified claims. The parties may not file another petition for rehearing or petition for rehearing en banc.

* The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

NOT FOR PUBLICATION

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2:14-cv-07687-JGB-KK

CHRISTIAN PFEIFFER, Warden, in
individual capacity,

AMENDED

MEMORANDUM*

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of California
Jesus G. Bernal, District Judge, Presiding

Submitted October 6, 2022**
Pasadena, California

Before: LEE and H.A. THOMAS, Circuit Judges, and BENNETT,*** Senior
District Judge.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Richard D. Bennett, Senior United States District Judge for the District of Maryland, sitting by designation.

Kavin Rhodes, who was convicted of first-degree murder and attempted second-degree robbery, appeals the dismissal of his 28 U.S.C. § 2254 habeas petition. In his petition, Rhodes argued that newly discovered evidence undermines the credibility of trial witnesses and thus supports his innocence. The district court held that he did not timely present these claims and that he could not meet the “actual innocence” standard under *Schlup v. Delo* for time-barred claims. 513 U.S. 298 (1995). We affirm the district court’s dismissal.

1. Timeliness of claims: Rhodes first challenges the district court’s finding that Claims One through Five in his habeas petition were not timely. Even though this issue was not expressly certified for appeal, we review it because the timeliness of these claims determines whether the district court properly analyzed them under *Schlup*. See *Tillema v. Long*, 253 F.3d 494, 502–03 n.11 (9th Cir. 2001) (considering a question that “clearly [was] comprehended” within the claim certified for appeal even though that question was not expressly certified), *overruled on other grounds by Pliler v. Ford*, 542 U.S. 225 (2004); *Jones v. Smith*, 231 F.3d 1227, 1231 (9th Cir. 2000) (“Absent an explicit statement by the district court . . . we will assume that the [certificate of appealability] also encompasses any procedural claims that must be addressed on appeal.”).

The district court correctly concluded that Claims One through Five of Rhodes’s habeas petition are untimely. Under the Antiterrorism and Effective Death

Penalty Act (AEDPA), habeas claims based on newly discovered evidence must be brought within one year of discovery of the evidence, not counting periods “during which a properly filed application for State post-conviction or other collateral review . . . is pending.” 28 U.S.C. § 2244(d). Rhodes claims that he timely raised his claims because they were referenced in post-conviction discovery motions. But a post-conviction discovery motion does not qualify as a collateral review motion because it does not allow a court to grant relief from a judgment or to grant a reduction in sentence. Rhodes’s post-conviction discovery motions and discovery appeals thus did not toll AEDPA’s statute of limitations. Nor did Rhodes’s inclusion of a request to remand for resentencing in his discovery appeal convert the appeal into a motion for collateral review, because the resentencing request was procedurally improper. California’s post-conviction discovery statute does not allow a court to grant a petitioner relief from a sentence. *See* Cal. Penal Code § 1054.9.

Rhodes argues in the alternative that he is entitled to equitable tolling of AEDPA’s statute of limitations. This argument fails under *Holland v. Florida*, 560 U.S. 631 (2010), because Rhodes does not contend that an extraordinary circumstance prevented his timely filing. *See id.* at 649.

2. Schlup “actual innocence”: Because Claims One through Five of Rhodes’s habeas petition are untimely, the district court appropriately analyzed them under *Schlup*’s “actual innocence” standard. *Schlup* allows a habeas petitioner

whose claims would otherwise be procedurally barred to proceed only if the petitioner can “show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence.” 513 U.S. at 327.

The district court certified for appeal the question whether Rhodes can meet the “actual innocence” standard on Claims One through Five in his habeas petition “solely by undermining or impeaching the credibility of witnesses.” When new evidence undermines the credibility of witnesses who testified against a petitioner, *Schlup* requires that the evidence do more than merely “provide[] a basis for some degree of impeachment” of those witnesses. *Sistrunk v. Armenakis*, 292 F.3d 669, 677 (9th Cir. 2002). Instead, the evidence must “fundamentally call into question the reliability of [the petitioner’s] conviction.” *Id.* While it is possible that a witness’s credibility can be so undermined as to fundamentally call a petitioner’s conviction into question, Rhodes is unable to meet that standard here.

The evidence supporting Claims One through Five of Rhodes’s habeas petition raises potentially troubling questions about the prosecution’s conduct. It does not, however, meet the high bar for “actual innocence” under *Schlup*. Claims One and Two center on evidence of payments by law enforcement to Hyron Tucker, a main witness who testified against Rhodes. This evidence does not satisfy *Schlup* because Tucker disclosed at trial that he benefited in his own criminal case by acting as a cooperative witness against Rhodes. Evidence that Tucker also benefited

financially from testifying against Rhodes is cumulative. In addition, the evidence does not conclusively establish that Tucker lied under oath about receiving payments from police, as the payments may have been included with the witness protection program that Tucker admitted that he was placed in. And Tucker's trial testimony was generally corroborated by two other witnesses, reducing the impact of any impeachment of his credibility. Finally, though this evidence may demonstrate that a detective testified falsely about payments to Tucker, it does not satisfy *Schlup* because the detective's testimony was of limited value in securing Rhodes's conviction.

Claim Three of Rhodes's habeas petition focuses on evidence of criminal charges against Yvette Comeaux, another witness who testified against Rhodes. This evidence also does not satisfy *Schlup*. First, it is cumulative to Comeaux's trial testimony disclosing that she engaged in criminal activity. Second, a reasonable juror would not credit Rhodes's purely speculative argument that Comeaux testified falsely because of pressure from law enforcement arising out of these criminal charges. In any event, Comeaux testified at trial that police promised not to revoke her probation if she testified against Rhodes, so any additional evidence of law enforcement leverage over her is cumulative.

Claim Four of Rhodes's habeas petition centers on evidence that the same prosecutor appeared both in Rhodes's case and in a criminal case against Tucker, as

well as evidence of Tucker's criminal history. This evidence does not satisfy *Schlup* because Tucker disclosed at trial that Rhodes's prosecutor advocated for him in a criminal case because he was acting as a cooperative witness against Rhodes, so Rhodes's speculative argument that Tucker received still other benefits from law enforcement would be cumulative even if it were true. And evidence of Tucker's criminal past is cumulative to Tucker's trial testimony that he engaged in criminal behavior. Finally, even if the evidence proves that Tucker lied under oath that he had no prior felony convictions, the fact that his testimony was generally corroborated by other witnesses would maintain his credibility before a reasonable juror.

Claim Five of Rhodes's habeas petition relies on an eyewitness statement that contradicts the trial testimony of Shashawn Green, another witness against Rhodes. This evidence does not satisfy *Schlup* because Green's testimony was of limited value in securing Rhodes's conviction.

3. Other claims: Rhodes makes several additional arguments based on newly discovered evidence that fall outside of the claims certified for appeal. The evidence supporting these arguments does not demonstrate Rhodes's innocence. We decline to address them. 9th Cir. R. 22-1(e).

AFFIRMED.