IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13622-F

BOBBY GLENN,

Petitioner-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before: WILSON and JILL PRYOR, Circuit Judges.

BY THE COURT:

Bobby Glenn has filed a motion for reconsideration of this Court's order dated November 20, 2018, denying his motions for a certificate of appealability and leave to proceed *in forma pauperis*, in the appeal from the dismissal of his 28 U.S.C. § 2254 petition. Because Glenn has not alleged any points of law or fact that this Court overlooked or misapprehended in denying his motions, this motion for reconsideration is DENIED.

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1.

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SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ORDER:

Bobby Glenn, a Florida prisoner serving a life sentence after a jury convicted him, in 1987, of sexual battery, seeks a certificate of appealability ("COA") and leave to proceed *in forma pauperis* ("IFP"), in order to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition as time-barred, and its subsequent denial of his Fed. R. Civ. P. 60(b) motion for relief from judgment. In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the district court denied a habeas petition on procedural grounds, the petitioner must show that jurists of reason would find debatable (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

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1.

Here, reasonable jurists would not debate the district court's determination that Mr. Glenn's § 2254 petition was time-barred. Mr. Glenn's conviction became final on February 15, 1990, 90 days after Florida's First District Court of Appeal ("DCA") issued its opinion affirming his convictions and sentences, and the time for him to seek review in the U.S. Supreme Court expired. *See* 28 U.S.C. § 2244(d)(1)(A). Because his conviction became final prior to the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), he had until April 24, 1997, to file a timely § 2254 petition, absent tolling. *See Wilcox v. Fla. Dep't of Corr.*, 158 F.3d 1209, 1211 (11th Cir. 1998). While Mr. Glenn filed several post-conviction motions that would have tolled the limitations period, he filed none of them during the pendency of the limitations period, and, therefore, they were not effective to toll that period. *See Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003). Thus, Mr. Glenn's petition clearly was untimely.

Mr. Glenn has repeatedly asserted that he can overcome the limitations period by making a showing of actual innocence. *See McQuiggin v. Perkins*, 589 U.S. 383, 394-95 (2013). Liberally construed, his filings suggest two actual innocence claims based on: (1) his sufficiency claim arising out of the medical expert's testimony at trial; and (2) testimony from the victim at trial in which she stated that Mr. Glenn did not have any sexual contact with her. First, neither of these claims is based on "new" evidence, as they both are based on information that was available or presented at trial. *See See Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1011 (11th Cir. 2012).

Second, neither claim is sufficient to show the sort of factual innocence necessary to overcome the AEDPA's limitations period. *See Bousley v. United States*, 523 U.S. 614, 623 (1998). Even assuming that his sufficiency argument is meritorious, he would be able to show only legal insufficiency, not factual innocence. As to his claim regarding the victim's testimony,

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the portion of the record that Mr. Glenn points to contradicts his claim. The trial transcript clearly shows that the victim testified in significant detail regarding Mr. Glenn's actions, which involved sexual contact. She answered "no" when asked repeatedly whether the sexual contact involved penetration, but Florida's sexual battery statute does not require penetration. *See* Fla. Stat. § 794.011(1)(h) (defining sexual battery to include "oral, anal, or vaginal penetration by, *or union with*, the sexual organ of another" (emphasis added)).

Similarly, reasonable jurists would not debate the district court's denial of Mr. Glenn's Rule 60(b) motion, as he simply reiterated his argument that he could overcome the AEDPA's limitations period through a showing of actual innocence. *See Cano v. Baker*, 435 F.3d 1337, 1341-42 (11th Cir. 2006). He claimed that the district court failed sufficiently to evaluate the merits of his actual innocence claims, but his actual-innocence claims were facially insufficient, and therefore, there was no need for the district court to further assess them.

Accordingly, Mr. Glenn's motion for a COA is DENIED, and his motion for leave to proceed IFP is DENIED AS MOOT.

UNITED STATES CIRCUIT JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY GLENN,

Petitioner,

-vs- **Case No. 8:16-cv-699-T-36TGW**

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

Before the Court is Petitioner's Motion for Reconsideration (Dkt. 17) filed under Rule 59(e), Federal Rules of Civil Procedure. "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). Petitioner has neither presented newly-discovered evidence nor demonstrated that the Court committed a manifest error of law or fact in dismissing his federal habeas petition as time-barred.

Petitioner further requests relief under Rule 60(b), Fed.R.Civ.P. (*see* Dkt. 17, p. 7). The request is liberally construed as a motion under Rule 60(b)(6).

"Rule 60(b)(6) is a catchall provision; it permits a court to relieve a party from a final judgment upon such terms as are just, provided that the motion is made within a reasonable time...." *Rismed Oncology Sys., Inc. v. Baron*, 2015 U.S. App. LEXIS 12335, at *18-19 (11th Cir. July 17, 2015) (unpublished) (citation and internal quotation marks omitted). Additionally, "[r]elief under Rule 60(b)(6) is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances, and that absent such relief, an extreme and unexpected hardship will result." *Id.* at *19 (citations and internal

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quotation marks omitted). Finally, "even under exceptional circumstances, the decision to grant Rule 60(b)(6) relief is a matter for the court's sound discretion." *Id.* (citations omitted).

The Court exercises its discretion in denying Plaintiff's Rule 60(b)(6) motion, as Petitioner has failed to demonstrate that exceptional circumstances warrant granting him relief from the Court's Order dismissing his federal habeas petition. Dismissal of his petition was appropriate because the petition was untimely, and Petitioner failed to present a colorable claim of actual innocence to overcome the timebar.

Accordingly, it is **ORDERED** that Petitioner's Motion for Reconsideration (Dkt. 17) is **DENIED**.

CERTIFICATE OF APPEALABILITY AND LEAVE TO APPEAL IN FORMA PAUPERIS DENIED

The Court declines to issue a certificate of appealability because Petitioner has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2). Nor will the Court authorize the Petitioner to proceed on appeal *in forma pauperis* because such an appeal would not be taken in good faith. *See* 28 U.S.C. § 1915(a)(3).

DONE AND ORDERED in Tampa, Florida, on August 7, 2018.

Charlene Edwards Honeywell

Charlene Edwards Honeywell
United States District Judge

Copies to: Petitioner *pro se*; Counsel of Record

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY GLENN,

Petitioner,

v.

Case No: 8:16-cv-699-T-36TGW

SECRETARY, DEPARTMENT OF CORRECTIONS and ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment against Petitioner.

ELIZABETH M. WARREN,
CLERK

s/D.G., Deputy Clerk

Date: June 26, 2018

Copies to:

Counsel of Record

Unrepresented Parties

Appendix B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BOBBY GLENN,

Petitioner,

-vs- **Case No. 8:16-cv-699-T-36TGW**

SECRETARY, DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

ORDER

Petitioner, a Florida inmate, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 on March 17, 2016 (Dkt. 1). Before the Court are Respondent's limited response/motion to dismiss the petition as time-barred (Dkt. 4), and Petitioner's reply/response (Dkt. 7). Upon consideration, the motion to dismiss will be GRANTED, as the petition is time-barred.

Procedural Background

Petitioner was convicted of sexual battery on November 25, 1987, and sentenced to life in prison (Respondent's Ex.1, record pp. 29-31). His conviction was affirmed on November 17, 1989 (Respondent's Ex. 2). In November 1991, he filed a motion for post-conviction relief, the denial of which was affirmed by the state appellate court on November 9, 1994 (Respondent's Ex. 3).

On July 8, 2013, Petitioner filed a petition for writ of habeas corpus in state court, which the state circuit court dismissed (Respondent's Ex. 4). The dismissal was affirmed by the appellate court on February 19, 2014, and the mandate issued on March 31, 2014 (Respondent's Ex. 5). On April 7, 2014, Petitioner filed a petition for writ of habeas corpus in the Florida Second District Court of Appeal, which was denied on April 15, 2014 (Respondent's Ex. 6). On April 28, 2014, Petitioner filed a motion to correct illegal

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sentence, which was denied (Respondent's Ex. 7). The denial was affirmed by the appellate court on January 21, 2015, and the mandate issued on April 7, 2015 (Respondent's Ex. 8). Petitioner's request for discretionary review in the Florida Supreme Court was dismissed for lack of jurisdiction on April 1, 2015 (Respondent's Ex. 9).

Lastly, Petitioner filed another petition for writ of habeas corpus in the state circuit court on June 1, 2015, which was dismissed on June 29, 2015 (Respondent's Ex. 10). The dismissal was affirmed by the state appellate court on November 18, 2015, and the mandate issued on January 25, 2016 (Respondent's Ex. 11).

Discussion

Respondent moves to dismiss the petition as time-barred under 28 U.S.C. §2244(d), arguing that more than one year passed after Petitioner's judgment became final. Petitioner contends that his petition is timely, and his claims should be considered on the merits because he is actually innocent (Dkt. 1, p. 11).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a one year statute of limitations in which a state prisoner may file a federal habeas petition. 28 U.S.C. § 2244(d)(1). *Lawrence v. Florida*, 549 U.S. 327, 331 (2007). The limitations period runs from "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). Additionally, "[t]he 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)(2).

Petitioner's conviction became final on February 15, 1990, when the time to file a petition for writ of certiorari in the United States Supreme Court expired. *Clay v. United States*, 537 U.S. 522, 527 (2003); *Bond v. Moore*, 309 F.3d 770, 774 (11th Cir. 2002). Since the conviction became final before the enactment of the AEDPA, the limitations period expired one year from the April 24, 1996, effective date of the AEDPA, or on April 24, 1997. *See Wilcox v. Fla. Dep't of Corr.*, 158 F.3d 1209, 1210 (11th Cir. 1998) (per curiam)

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(holding that § 2254 petitions of prisoners whose convictions became final before the passage of the AEDPA are timely if filed within one year from the AEDPA's effective date). Accordingly, Petitioner's federal habeas petition (filed in March 2016) is time-barred unless he can demonstrate that he is actually innocent of the crimes for which he was convicted. *See McQuiggin v. Perkins*, 569 U.S. 383 (2013).[1]

The AEDPA's one-year limitation bar can be overcome if a petitioner makes a credible showing of actual innocence. *McQuiggin*, 569 U.S. at 386 ("We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations."). However, that showing requires the petitioner to present new reliable evidence demonstrating actual innocence. *Coleman v. Warden*, 2017 U.S. App. LEXIS 18322, at *4 (11th Cir. June 9, 2017) (unpublished) (citing *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1017 (11th Cir. 2012) ("To show actual innocence, a petitioner must present new, reliable evidence that was not presented at trial, and show that the new evidence makes it more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt.").

Petitioner has not made a credible showing of actual innocence because he has not presented new reliable evidence showing that it is more likely than not that no reasonable jury would have convicted him. Rather, he points to evidence presented at trial, and argues the sufficiency of the evidence (*see* Dkt. 7).[2] *See Marshall v. United States*, 2018 U.S. Dist. LEXIS 85745, at *30 (M.D. Ala. May 21, 2018) ("Allegations going to the sufficiency of and/or weight afforded the evidence do not constitute 'new reliable evidence' regarding a petitioner's actual innocence.") (citation omitted).

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[1]Petitioner does not contend that he is entitled to equitable tolling of the limitations period.

[2]Specifically, Petitioner asserts that the victim testified that Petitioner did not commit any sexual act or contact the victim, and the State's medical expert testified that there was no physical evidence showing a sexual battery (*see* Dkt. 7).

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513 F. 3d 1328

Accordingly, it is **ORDERED** that Petitioner's petition for writ of habeas corpus (Dkt. 1) is **DISMISSED** as time-barred. The **Clerk** is directed to enter judgment against Petitioner and close this case.

Certificate of Appealability

A certificate of appealability will issue only if the Petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Generally, a petitioner must demonstrate that reasonable jurists would find this court's assessment of the constitutional claims debatable or wrong. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quotation omitted), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

Where, as here, claims have been rejected on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*; *Webster v. Moore*, 199 F.3d 1256, 1257 n. 2 (11th Cir. 2000) (dismissal of habeas petition as time-barred is procedural). Petitioner cannot make that showing. And since he is not entitled to a certificate of appealability, he is not entitled to appeal *in forma pauperis*.

DONE and ORDERED in Tampa, Florida on June 25, 2018.

Charlene Edwards Honeywell

Charlene Edwards Honeywell
United States District Judge

Copies to: Petitioner *pro se*; Counsel of Record

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