

20-8305

No. _____

Supreme Court, U.S.
FILED

JAN 08 2021

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

GERSU GUIAO

— PETITIONER

(Your Name)

vs.

Sec'y, Dep't. of Corr.

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT.

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

GERSU GUIAO, #C01107

(Your Name)

CROSS CITY CORRECTIONAL INSTITUTION

(Address)

568 NE 255TH STREET

(City, State, Zip Code)

CROSS CITY FL 32628

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. Did retained initial review collateral counsel breach his fiduciary duty by waiving three of four grounds that included the critical expert and material witnesses, once again available to testify?
2. Whether waiving a substantial ground in an initial review collateral proceeding is tantamount to not having raised the ground for the purposes of a Martinez federal review?
3. Whether "new" evidence for the purpose of the actual-innocence gateway of Perkins includes reliable evidence that was available but not presented at trial, initial review collateral and federal proceedings, or if, instead, must be newly discovered, previously unavailable evidence?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[✓] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Secretary, Florida Department of Corrections

Attorney General

State of Florida

RELATED CASES

Direct Appeal: Second District Court of Appeals for Florida, No. 2007-3783; Guisao v. State, 4 So. 3d 1231, 2008 Fla. App. LEXIS 13656 (Fla. 2d DCA 2008) Per Curiam - Affirmed Sept. 03, 2008.

Initial Review Collateral Proceeding Appeal: Second District Court of Appeals for Florida, No. 2013-3519; Guisao v. State, 156 So. 3d 1090, 2014 Fla. App. LEXIS 15875 (Fla. 2d DCA 2014) Per Curiam - Affirmed Oct. 10, 2014.

Order to Petition for Writ of Habeas Corpus (Doc 10): U.S. Middle District of Florida, Tampa Division, No. 8:15-CV-9-T-35AAS; Guisao v. Sec'y, Dept. of Corr., 2018 U.S. Dist. LEXIS 238468 (Fla. M.D. 2018) Dismissed as Time-barred March 26, 2018.

Order to Motion for Certificate of Appealability: U.S. Middle District of Florida, Tampa Division, No. 8-15-cr-9-T-35AAS; Guisao v. Sec'y, Dep't. of Corr., 2018 U.S. Dist. LEXIS 23866 (Fla. M.D. 2018) Denied May 11, 2018.

Order to Motion for COA/IFP: U.S. Eleventh Circuit Court of Appeals, No. 18-11769-H; Guisao v. Sec'y, Dept. of Corr., 2018 U.S. App. LEXIS 27746 (11th Cir. 2018) COA Granted and IFP Granted Sept. 28, 2018.

Appeal from U.S. Middle District of Florida, Tampa Division (Unpublished): U.S. Eleventh Circuit Court of Appeals, No. 18-11769 NAC; Guisao v. Sec'y, Dep't. of Corr., Atty Gen, State of Florida, 806 Fed Appx. 682, 2020 U.S. App. LEXIS 7324 (11th Cir. 2020) Per Curiam - Affirmed March 10, 2020, Rehearing Denied Aug. 11, 2020.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A1-4 to the petition and is

☒ reported at 806 Fed. Appx. 682 (11th Cir. 2020); or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B1-9 to the petition and is

☒ reported at 2018 US Dist. LEXIS 238468 (Fla. MD 2018); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B1-9 to the petition and is

☒ reported at 156 So.3d 1090 (Fla. 2d DCA 2014); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the Second District Court of Appeals (direct) court appears at Appendix B18 to the petition and is

☒ reported at 4 So.3d 1231 (Fla. 2d DCA 2008); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was MARCH 10, 2020.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: AUGUST 11, 2020, and a copy of the order denying rehearing appears at Appendix C1-2.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including JANUARY 8, 2021 (date) on MARCH, 2020 (date) in Application No. A / Memorandum Appendix F1-2.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5, United States Constitution

Amend. 6, U.S. Const.

Amend. 14, U.S. Const.

Title 28 United States Code §89

28 U.S.C. § 1254(i)

28 U.S.C. § 2101(c) and (f)

28 U.S.C. § 2244(d)

28 U.S.C. § 2254

STATEMENT OF THE CASE

Petitioner Gersu Guisao ("Guisao") is a prose Florida state prisoner serving a life sentence for a 2007 sexual battery conviction, by jury trial in the Thirteenth Judicial Circuit Court, Hillsborough County. (Appx. A2). Expert and material witnesses, available for the trial,¹ were never called to testify. (Appx. B3-4). Their testimonies² demonstrate Guisao's actual innocence such that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."³ On direct appeal, the Second District Court of Appeals Per Curiam - Affirmed without an opinion. (Appx. B18).

Retained counsel for Guisao's initial review collateral motion raised four grounds for relief and an evidentiary hearing was granted on all four.⁴ (Appx. B6). At the evidentiary hearing counsel breached his fiduciary duty by waiving three claims, which included the critical expert and material witnesses, once again, available to testify. (Appx. B6). The initial review collateral court denied the remaining single ground, and dismissed the waived grounds with prejudice.⁵ The Second District Court of Appeals Per Curiam - Affirmed the appeal, without an opinion. (Appx. B19).

Guisao filed a petition for writ of habeas corpus in the United States Middle District of Florida⁶ challenging his state conviction under 28 U.S.C. § 2254. (Appx. B1). The court dismissed the petition as being time-barred. (Appx. B1). However, the court's order provided for the filing of a Rule 59(e) or Rule 60(b) motion to re-open the case, contingent upon having an affidavit signed under penalty of perjury from the expert and/or

the victim. (Appx. B8). Under the actual innocence exception, a full review and consideration of the petition is available beyond the procedural/time-bar. (). However, the gateway to proving actual innocence is blocked by the underlying constitutional violation, and initial review collateral counsel's breach of fiduciary duty. ().

An appeal to the United States Eleventh Circuit Court of Appeals was ultimately Per Curiam - Affirmed (Appx. A4). After issuing a COA and IFP (Appx. B15-16), reversed and remanded after briefing. The court then vacated the remand based on a new opinion issued in Paez⁷. (Appx. A3). However, because of the appointment of counsel (Appx. B17), some of the supporting materials for the actual innocence gateway were obtained. The case is "unripe" for review without further proceedings in the district court.⁸

The materials also support a quasi-Martinez claim. (Question #2). They demonstrate the fact that the witnesses, especially the expert witness, should have testified at trial because the jury would not have found the petitioner guilty. Not only does the doctor disprove the nurse's testimony, but provides the jury with a better understanding of why the State's case is not supported by the other evidence.⁹

Unfortunately, the evidence was not in time for, and/or beyond the scope of the COA, and after the opinion issued on March 10, 2020 by the district court,¹⁰ but before the filing for rehearing en banc, which was denied on August 12, 2020 (Appx. C1-2). The judgment issued on August 19, 2020. (Appx. D-1).

This Court has jurisdiction pursuant to 28 U.S.C. §1254,
§ 2101(c) and (f). (Appx. E2-3).

REASONS FOR GRANTING THE PETITION

Does initial review collateral counsel have a fiduciary duty to his postconviction defendant?

Generally, the vast majority of postconviction litigants are pro se. At least until an evidentiary hearing is granted. Then, most courts appoint counsel. However, in either situation, counsel is often retained. Retained or appointed, counselors are being paid to represent the defendant.

It has been well established that there is no constitutional right to postconviction counsel. Therefore, there is no constitutional right to effective assistance of counsel. Therefore, theoretically, rather constitutionally, it does not matter what postconviction counsel does, or does not do. This non-right holds true regardless of being retained or appointed.

Martinez¹¹ established an exception for federal review of procedurally barred substantive trial counsel claims. The impact upon the vast postconviction litigators was effectively narrowed by the Martinez court. This was accomplished by limiting the substantive claims to only initial review collateral proceedings. Further, the well established postconviction counsel doctrines were specifically maintained.

In this case, the same initial review collateral limitation is applicable. The limitation can be further narrowed by addressing only retained counsel. Thereby, leaving the great number of controversial cases, where counsel is appointed, for another day.¹²

Guisao is actually innocent. His trial counsel substantially erred by not calling any of the expert, material, or

character witnesses who were available to testify. Their testimony is such "that no reasonable juror would have found [Guisao] guilty beyond a reasonable doubt." ¹³ This matter was raised as a ground in Guisao's initial review collateral proceeding.

Did retained initial review collateral counsel breach his fiduciary duty by waiving three of four grounds, that included the critical expert and material witnesses, once again available to testify?

Guisao seeks also:

Whether waiving a substantial ground in an initial review collateral proceeding is tantamount to not having presented the ground for the purposes of a Martinez federal review?

Since Guisao's federal habeas is time-barred, it appears that his actual innocence must be addressed prior to determining any other error. ¹⁴ However, it is essential to consider that the underlying constitutional violations act to prevent Guisao from entering into the actual innocence gateway. ¹⁵ In other words, the very evidence which would have kept Guisao from being convicted cannot be considered now because of trial counsel's ineffectiveness, initial review collateral counselor's breach of fiduciary duty, as well as, trial and federal courts.

Gomez¹⁵ better explains the "roadblock" principle, which in this case spearheads the "newly presented" versus "newly discovered" conflict between circuits.¹⁶

Whether "new" evidence for the purpose of the actual-innocence gateway of Perkins includes reliable evidence that was available but not presented at trial, initial review collateral and federal proceedings, or if, instead, must be newly discovered, previously unavailable evidence?

For the purposes of this case, Guisao searched the progress of Gomez to the Eleventh Circuit. This leads to Rivera v. Humphrey, 2017 U.S. Dist. LEXIS 200949 (Ga. S.D. 2017). Rivera not only addresses the "significant circuit split" but also joins the Eleventh Circuit to the "newly discovered" side. Further, this creates a three-way internal split with each of the states within the circuit. Georgia and Alabama side with the "newly discovered" evidence, while Florida in Guisao (Appx.B8) sides with "newly presented".

An evidentiary hearing is necessary to "ripen" this case for this court's review. In light of the limited materials obtained during appeal and the promise of substantially critical testimony, Guisao will follow with a motion to grant, vacate, and remand, or invites this court to stay proceeding so he can file a Rule 60(b) motion with district court.

END NOTES

STATEMENT OF THE CASE

¹ The inappropriate change of venue was not told to Guisao's witnesses before trial. Therefore, they showed up at the wrong court. Those witnesses at the changed venue court were specifically ordered by the court, while the trial recessed, to bring the petitioner's clothes. The witnesses were then excluded by rule, however, even they were not called. Having no witnesses called by the counselor, Guisao's objection to the court led to his testifying. In the end the court disallowed Guisao's narrative response and removed him from the stand.

² Each witness has their own probative testimony. An affidavit from each is being obtained. However Guisao's incarceration, plus COVID protocols, is hindering the substantial testimony. Only general content has been obtained in the dozen plus notarized statements.

Besides the material content of Guisao's actual innocence, the witnesses will testify as to their availability, their showing up at the wrong court for trial, and their availability for the postconviction evidentiary hearing.

The parents will testify that the doctor was retained for trial and the evidentiary hearing. Further, this raises the question as to why the doctor was retained per counselor's instructions if the counselor did not intend to call the doctor.

The doctor's testimony not only disproved the nurses testimony, but also provided the jury with a better understanding why the State's case was not

Supported by the other evidence.

Other testimonies will demonstrate that the victim was coerced into testimony, has a desire to recant, and that circumstances and events took place that the jurors were not made aware of concerning the victim's mother and step-father.

³ Guisao v. State (Appx B16) quoting Schlup v. Delo, 513 U.S. 298, 324, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); see also Rozelle, infra at 1011.

⁴ Initially, Ground I was granted in part and denied in part, therefore, the evidentiary hearing was held on the granted part of Ground I.

⁵ Another substantive condition during the waiver is the confusion over the lack of interpreter during the initial review collateral evidentiary hearing in the beginning and more so during the court's colloquy concerning the waiving of the grounds. This later led to the disruption and appointment of an interpreter, but the colloquy was never re-addressed.

⁶ 28 U.S.C. § 89 Florida (Appx. E2).

⁷ Paez v. Sec'y, Fla. Dep't of Corr., 947 F.3d 649 (11th Cir. 2020)

⁸ A motion for GVR - Grant, Vacate, and Remand is following. Petition has demonstrated that with an attorney, investigator and judicial assistance, proof of his actual innocence is available without prison limits.

8 cont.

In Amrine v. Bowersox, 128 F.3d 1222, 1228-29 (8th Cir. 1997) (en banc) cert. denied, 523 U.S. 1123 (1998), the en banc court found that the petitioner was entitled to an evidentiary hearing to determine whether new evidence obtained since the district court's denial of relief satisfies the "miscarriage of justice" exception established in Schlup, supra.

Guisao intends to file a Rule 60(b) motion with the district court. He has already filed for stays in the Eleventh Circuit and this Court to no avail. The order from the district court provides for it. (Appx. B8). This Court should GVR with instructions to hear the Rule 60(b) to "ripen" the case for certiorari; review should review be necessary.

9 Finally, failure of the district court to appoint counsel and/or conduct a limited evidentiary hearing deprived Guisao of his witnesses again.

REASONS FOR GRANTING THE PETITION

10 supra. n. 8

11 Martinez v. Ryan, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)

12 Appointed counsel, although paid by the court, is still bound by a fiduciary duty — yet to whom?

13 Supra. n. 3

14 Rozelle v. Sec'y, Fla. Dep't. of Corr., 672 F.3d 1000, — (11th Cir. 2012)

¹⁵ Gomez v. Jainet, 350 F.3d 673 (7th Cir. 2003); see also Rozelle at n.21.

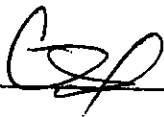
¹⁶ Rivera v. Humphrey, 2017 U.S. Dist. LEXIS 200949 (Ga S.D. 2017)

CONCLUSION

The district court needs to consider the "unripe" evidence of actual innocence.

The petition for a writ of certiorari should be granted, vacated, and remanded. See following motion for GVR.

Respectfully submitted,



Date: APRIL 19, 2021