UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 11, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-11769-HH
Case Style: Gersu Guisao v. Secretary, Florida Department, et al
District Court Docket No: 8:15-cv-00009-MSS-AAS

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Christopher Bergquist, HH/lt
Phone #: 404-335-6169

REHG-1 Ltr Order Petition Rehearing

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11769-HH

GERSU GUISAO,

Petitioner - Appellant,

versus

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

Respondents - Appellees.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, MARTIN and HULL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11769
Non-Argument Calendar

D.C. Docket No. 8:15-cv-00009-MSS-AAS

GERSU GUISAO,

Petitioner-Appellant,

versus

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

Respondents-Appellees.

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

(March 10, 2020)

Before WILLIAM PRYOR, MARTIN and HULL, Circuit Judges.

PER CURIAM:

Gersu Guisao, a Florida prisoner, appeals the *sua sponte* dismissal of his petition for a writ of habeas corpus as untimely. We issued a certificate of appealability on the issue whether the district court procedurally erred in *sua sponte* dismissing Guisao's petition as untimely without ordering the State to respond. We affirm.

Guisao is serving a life sentence in Florida for sexual battery. After seeking postconviction relief in state court, he filed a petition for a writ of habeas corpus in federal court. *See* 28 U.S.C. § 2254. The district court conducted a preliminary review of Guisao's petition, *see* Rules Governing § 2254 Cases, Rule 4, and concluded that it was untimely. *See* 28 U.S.C. § 2244(d). The court ordered Guisao to show cause why it should not dismiss his petition on that ground and warned him that it would dismiss his petition if he did not timely respond. *See Day v. McDonough*, 547 U.S. 198, 209–10 (2006). Guisao argued that he was entitled to equitable tolling, *see Holland v. Florida*, 560 U.S. 631, 645 (2010), and that the actual-innocence exception to the limitations period applied, *see McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). The court explained that Guisao's response failed on both fronts, but it gave him a second opportunity to show that his petition was timely. It warned him that "[a]n insufficient response, or the failure to respond, . . . will result in the dismissal of this action without further notice." The

court determined that Guisao's second response was insufficient, so it dismissed his petition as untimely.

The only issue on appeal is whether the district court procedurally erred when it *sua sponte* dismissed Guisao's petition as untimely without ordering the State to respond. We review a district court's decision to *sua sponte* raise the untimeliness of a petition for abuse of discretion. *Paez v. Sec'y, Fla. Dep't of Corr.*, 947 F.3d 649, 651 (11th Cir. 2020). After the parties filed their briefs, we issued a new opinion in *Paez*. We held that untimely petitions are subject to dismissal at the screening stage under Rule 4, which requires district courts to dismiss petitions that are "legally insufficient on [their] face," if the court provides the petitioner with notice and an opportunity to be heard. *Id.* at 653 (internal quotation marks omitted). We explained that the district court did not abuse its discretion when it dismissed a petition that it had determined to be untimely without ordering the State to respond because it provided the petitioner with "notice of its decision and an opportunity to be heard in opposition." *Id.* Because of *Paez*'s relevance to this appeal, we ordered the parties to submit supplemental letter briefs addressing its impact.

Guisao admits that *Paez* "eliminate[s] the argument" in his initial brief about the *sua sponte* dismissal of his petition because it is plain from the face of his petition that he filed it "almost a year too late," and the district court gave him

notice and an opportunity to be heard in opposition before the dismissal. But he argues that *Paez* is distinguishable. Without explaining why, he contends that because he tried to invoke equitable tolling or the actual-innocence exception, the court should have ordered the State to respond.

His attempt to distinguish *Paez* is unpersuasive. It is clear from the face of Guisao's petition and the judicially noticed online docket entries for his state proceedings, *see id.* at 652–53, that he filed his petition well beyond the one-year limitations period. The district court gave him two opportunities to argue to the contrary, and it warned him that an insufficient response would result in dismissal. We discern no error in the district court's ruling that Guisao's responses failed to show that his petition was timely. *Paez* establishes that the district court did not abuse its discretion, especially because Guisao, not the State, had the burden of establishing either equitable tolling or the actual-innocence exception and possessed the necessary information. *See McQuiggin*, 569 U.S. at 386; *Holland*, 560 U.S. at 649.

We **AFFIRM** the *sua sponte* dismissal of Guisao's petition as untimely.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GERSU GUISAO,

Petitioner,

v. **Case No. 8:15-cv-9-T-35AAS**

SECRETARY, DEPARTMENT OF CORRECTIONS, *et al.*,

Respondent.
_____/

ORDER

Gersu Guisao petitions for the writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1) This cause comes before the Court on Petitioner Guisao's response to the second Order to show cause why federal review of his petition is not barred. (Docs. 7 and 8) Upon consideration of the petition and the responses, and in accordance with the *Rules Governing Section 2254 Cases in the United States District Courts*, it is **ORDERED** that the petition is **DISMISSED AS TIME-BARRED**:

Earlier Orders determined that Guisao's petition is untimely, and in response to those Orders, Guisao asserts entitlement to the "actual innocence" exception to the limitation. As discussed in the earlier Orders and in this Order, "actual innocence" requires evidence that was unknown and could not have been known at the time trial. Only an "extraordinary case" will qualify for the "actual innocence" exception because qualifying is "rare." Guisao fails to adequately show his "actual innocence" because the evidence upon which he relies was admittedly available at trial and at the post-conviction

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evidentiary hearing, at which Guisao explicitly abandoned presenting the evidence he now claims shows his actual innocence.

BACKGROUND

Guisao challenges the validity of his state conviction for sexual battery by an adult with the victim being less than twelve, for which he is imprisoned for life. In an earlier Order the Court found that Guisao's petition is untimely and instructed him to establish entitlement either to actual innocence or to equitable tolling, or otherwise show why his petition should not be time-barred from federal review. (Doc. 5) *See Day v. McDonough*, 547 U.S. 198, 210 (2006) (Although a district court may raise timeliness *sua sponte*, "before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."). In his response to the first Order to show cause (Docs. 5 and 6), Guisao argued (1) that he is entitled to equitable tolling and (2) that he has evidence that will prove his actual or factual innocence. A second Order to show cause (Doc. 7) determined that Guisao's claim of ineffective assistance of counsel during post-conviction proceedings does not satisfy the requirements for equitable tolling. *Lawrence v. Florida*, 549 U.S. 327, 336–37 (2007) ("[C]ounsel's mistake in miscalculating the limitations period . . . is simply not sufficient to warrant equitable tolling, particularly in the post-conviction context where prisoners have no constitutional right to counsel."). Additionally the second Order determined that the attorneys' allegedly not knowing the statutory limitation does not change this analysis.

The second Order also determined that Guisao did not satisfy the actual innocence exception because he failed to adequately explain the testimony by his proposed medical expert, Dr. Edward N. Willey. Based on this finding, the Court directed Guisao to

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"(1) disclose the substance of Dr. Willey's proposed testimony, (2) explain when he learned about Dr. Willey's possible testimony, and (3) explain why the testimony was not presented at trial or if the testimony was presented in the post-conviction proceedings." (Doc. 7 at 6) In response, Guisao argues that the petition should not be dismissed as time-barred because of the "fundamental constitutional miscarriage of justice exception" and the actual innocence exception. (Doc. 8 at 2) However the miscarriage of justice exception and the actual innocence exception are the same exception. *See Sawyer v. Whitley*, 505 U.S. 333, 333 (1992) ("The miscarriage of justice exception applies where a petitioner is 'actually innocent' of the crime of which he was convicted."); *Schlup v. Delo*, 513 U.S. 298, 321 (1995) ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence."); *House v. Bell*, 547 U.S. 518, 537 (2006) (using both miscarriage of justice and actual innocence to describe the same exception).

In his response Guisao incorporates his arguments in the original petition and supporting memorandum and addresses the three questions the Court posed in the second Order about his asserted actual innocence. First, Guisao represents that the testimony of Dr. Willey would challenge the medical testimony used to support the sexually battered child's allegations. Second, Guisao admits that Dr. Willey was available for trial and present at the post-conviction proceedings. Third, Guisao alleges that Dr. Willey was not called to testify at either the trial or the post-conviction proceedings (even though Dr. Willey was present at the post-conviction evidentiary hearing) because both

trial and post-conviction counsel were ineffective. Guisao's specific representations are as follows (Doc. 8 at 3):

> Dr. Willey, M.D. was available for trial and for the Evidentiary Hearing but was not called. Dr. Willey, M.D. would have testified that the exam done by Ms. Nadkami (nurse practitioner) was incomplete for either diagnostic or medical treatment and was incomplete for confirming the allegation made by E.L. (the alleged victim) because an internal exam was not done, nor were other available tests that are generally accepted in the scientific community done which would include the use of a dye on the external area to show microscopic fissures in the external anal area. Dr. Willey, M.D. would have also testified that Ms. Nadkami's opinions regarding the length of time semen can be detected, her opinion regarding the likelihood of physical findings, and the type of exam she did would not be generally accepted in the relevant medical community.
>
> The Petitioner did not fully learn about Dr. Willey's possible testimony until long after the Evidentiary Hearing when discussing WHY this witness was not called at the Evidentiary Hearing.
>
> Post-conviction Counsel told the Petitioner before the Evidentiary Hearing that the next time he would be called back to court would be to release the Petitioner and talk about monetary compensation.
>
> Post-conviction Counsel led the Petitioner and his family to believe that everything was taken care of and that the Petitioner would be released very soon.

DISCUSSION

To rely on the "actual innocence" (or "manifest injustice" or "fundamental miscarriage of justice") exception, "such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial." *Schlup*, 513 U.S. at 324. The earlier Order (Doc. 5) explained "that 'actual innocence' means factual innocence not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 614 (1998). Additionally the petitioner must "demonstrate

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that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." *House*, 547 U.S. at 538.

In the response to the second Order to show cause, Guisao relies on Dr. Willey's testimony as "new evidence" that, if presented, could rebut the expert testimony used to support the victim's allegations of sexual battery. However Guisao's evidence is neither "new" nor sufficient to satisfy the actual innocence exception for two reasons.

First, Dr. Willey's proposed testimony does not qualify as "new evidence" because trial and post-conviction counsel either did know or should have known about the evidence Guisao claims proves that he is innocent. Guisao admits that Dr. Willey was available for trial and actually present (but not called to testify) for the post-conviction evidentiary hearing, and as a consequence, the proposed testimony is not "new." *See, e.g., United States v. Staff*, 275 Fed. App'x 788, 790 (10th Cir. 2008) (finding that evidence was not "new" because it was available and could have been presented at trial); *Goldblum v. Klem*, 510 F.3d 204, 226 n. 14 (3d Cir. 2007) ("Evidence is not 'new' if it was available at trial, but a petitioner merely chose not to present it to the jury."); *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir.) (approving district court's determination on remand that "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence"), *cert. denied*, 534 U.S. 963 (2001).

Moreover, Guisao represents that Dr. Willey was present for the evidentiary hearing in the state post-conviction proceeding (Doc. 4 at 3):

> The Petitioner identified the expert witness Dr. Edward N. Willey, M.D. and proffered the testimony that he would have testified to at trial. Furthermore, Dr. Willey, M.D. was present, ready and wanted to testify at the Evidentiary

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> Hearing but was never called due to constitutionally ineffective assistance of post-conviction counsel.

This proposed testimony was intended to support Guisao's ground two. As the post-conviction court stated in denying relief (Doc. 1-1 at 1), post-conviction counsel withdrew this ground at the evidentiary hearing:

> At the April 16, 2013, evidentiary hearing on Defendant's Motion for Post-Conviction Relief, Defendant withdrew grounds two, three, and four of his Motion and proceeded only on ground one, resulting in the Court's dismissal with prejudice of grounds two, three, and four.

Consequently, the basis for proving "actual innocence" — Dr. Willey's testimony — was abandoned during the state post-conviction proceedings and is inadequately supported here. Affording a generous interpretation to his response to the second Order to show cause, Guisao represents that he cannot be more specific about Dr. Willey's proposed evidence (1) because he does not know what testimony Dr. Willey would present, (2) because Dr. Willey will not release the purported evidence to him, and (3) because post-conviction counsel was ineffective for not requesting the evidence even though Dr. Willey was present for the evidentiary hearing (Doc. 8 at 5) (emphasis original):

> Dr. Willey has documents that are necessary and relevant to these proceedings but will only turn them over to the court or an attorney, hence the Petitioner's request for this Honorable Court to either order Dr. Willey to provide all documents related to this present case at bar to this Honorable Court and/or schedule an Evidentiary Hearing so the Petitioner can present the live testimony of Dr. Willey in conjunction with the supporting documents proving the Petitioner's actual and factual innocence.
>
> The Petitioner has NEVER seen these documents and Dr. Willey told the Petitioner's family that the Petitioner's post-conviction counsel NEVER requested the documents that PROVE the Petitioner did not commit these allegations.
>
> The Petitioner does fully believe that Dr. Willey has testimony and documents that the Petitioner has never seen or heard about that are "new reliable evidence" that will show and prove the Petitioner is innocent of

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> these allegations and that a true fundamental constitutional miscarriage of justice has transpired.

In these representations Guisao admits that he does not know what evidence Dr. Willey would present as proof of Guisao's actual innocence. Guisao must present more than his speculation about the proposed testimony. *Cochran v. McNeil*, 2009 WL 1748522 at *3 (M.D. Fla. June 18, 2009) ("Furthermore, '[a] petitioner's own affidavit adds little weight to an actual innocence claim because it is self-serving and inherently unreliable.'") (quoting *Rickard v. Wolfe*, 2007 U.S. Dist. LEXIS 92447 at * 11, 2007 WL 4526522 (N.D. Ohio Dec. 17, 2007). *See United States v. Ashimi*, 932 F.2d 643, 650 (7th Cir. 1991) ("Under whatever framework, however, evidence about the testimony of a putative witness must generally be presented in the form of actual testimony by the witness or an affidavit. A defendant cannot simply state that the testimony would have been favorable; self-serving speculation will not sustain an ineffective assistance claim.") (footnotes omitted); *Estiven v. Sec'y, Dep't of Corr.*, 2017 WL 6606915 at *4 (11th Cir. Sept. 28, 2017) (citing *Ashimi* for the proposition that "speculation cannot form the basis of a valid claim" and denying application for a certificate of appealability). *See also Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) (recognizing that vague, conclusory, or unsupported allegations cannot support an ineffective assistance of counsel claim), *cert. denied*, 502 U.S. 1105 (1992); *Aldrich v. Wainwright*, 777 F.2d 630, 636 (11th Cir. 1985) ("Speculation is insufficient to carry the burden of a habeas corpus petitioner as to what evidence could have been revealed by further investigation.").[1]

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[1] Similarly, Guisao asserts that "Dr. Willey is ready to testify right now, as is E.L. (the alleged victim) . . . ." (Doc. 8 at 4) Guisao does not disclose the victim's trial testimony or reveal the basis for his belief that the victim would now testify favorably for him.

Second, the "new evidence" only addresses part of the prosecution's case. *Schlup*, 513 U.S. at 328 (determining that the actual innocence exception requires the court to review the entirety of the evidence). The "new evidence" does not rebut either the victim's testimony or the testimony by a child protective services nurse practitioner,[2] upon which a reasonable juror could rely to convict Guisao. *House*, 547 U.S. at 538.

Guisao fails to meet the actual innocence exception to the limitation and, as a consequence, review of the petition is barred. Guisao may move under Rules 59(e) or 60(b), Federal Rules of Civil Procedure, to re-open this action if he acquires an affidavit, sworn under the penalty of perjury, from Dr. Willey or the victim. To qualify for the "actual innocence" exception to the limitation, the affidavit must contain "new" evidence (1) that is proof of Guisao's "factual innocence," *Bousley*, 523 U.S. at 614, and (2) that, "in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." *House*, 547 U.S. at 538.

Accordingly, the petition for the writ of habeas corpus (Doc. 1) is **DISMISSED AS TIME-BARRED**. The **CLERK** is directed to **CLOSE** this case.

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[2] Guisao alleges that trial counsel was ineffective for not objecting to the state's "improper bolstering of the victim" by presenting the testimony of the nurse practitioner, who allegedly testified to hearsay statements by both the victim and the victim's mother. This was the sole ground pursued at the post-conviction evidentiary hearing. The court denied this claim of ineffective assistance of counsel because of a failure "to present any competent and substantial evidence at the [post-conviction evidentiary] hearing." (Doc. 1, Exhibit A at 3) The nurse practitioner was also the prosecution's expert witness who examined the victim. Although Dr. Willey's proposed testimony would allegedly rebut the nurse practitioner's testing and findings, the proposed testimony would not have affected the testimony that Guisao characterizes as "bolstering," which testimony the state court determined was admissible under state law.

CERTIFICATE OF APPEALABILITY
AND
LEAVE TO APPEAL *IN FORMA PAUPERIS*

IT IS FURTHER ORDERED that Guisao is not entitled to a certificate of appealability. A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). Section 2253(c)(2) limits the issuing of a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." To merit a certificate of appealability, Guisao must show that reasonable jurists would find debatable both (1) the merits of the underlying claims and (2) the procedural issues he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478 (2000); *Eagle v. Linahan*, 279 F.3d 926, 935 (11th Cir 2001). Because the petition is clearly time-barred and he fails to show that reasonable jurists would debate untimeliness, Guisao is not entitled to a certificate of appealability and he is not entitled to appeal *in forma pauperis*.

Accordingly, a certificate of appealability is **DENIED**. Leave to appeal *in forma pauperis* is **DENIED**. Guisao must obtain permission from the circuit court to appeal *in forma pauperis*.

DONE AND ORDERED in Tampa, Florida, 26th day of March, 2018.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

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