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MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (MAY 3, 2002)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-14467-A

JERMAINE ANDRA WHITAKER,

Petitioner -Appellant,

versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS

Respondents-Appelles.

Appeal from the United States District Court
for the Southern District of Georgia

Jermaine Whitaker is a Georgia prisoner serving a sentence of life imprisonment plus 20 years for aggravated child molestation, child molestation, and rape. On May 25, 2021, he filed a pro se 28 U. S. C. § 2254 habeas corpus petition, raising 14 grounds for relief. The District Court the § 2254 petition, finding that it was time-barred. Whitaker now seeks a certificate of appealability ("COA").

To obtain a COA, a movant must make " a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). where the district court dismissed a habeas petition on procedural grounds, the movant must show that reasonable jurists would debate (1) whether the motion states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct and is procedural ruling. Slack v. McDaniel, 529 U. S. 473, 484 (2000).

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA "), § 2254 petitions are governed by a one-year statute of limitations that begins to run on the latest of four triggering events,

including " the date on which the Judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." U. S. C. 28 § 2244(d)(1)(A). The limitation period under § 2244(d) is statutorily tolled for the time during which a properly filed application for State Post conviction relief, attacking the relevant judgment, is pending. 28 U. S. C. § 2244(d)(2). A Georgia habeas petition tolls the limitation period to file a § 2254 petition. Knight v. Schofield , F. 3d 709, 710-11 (11th Cir. 2002). Under Georgia law, the prison mailbox rule does not apply to the original filing of a pro se State habeas petition. See Roberts v. Cooper, 286 Ga. 657, 660-61 (GA. 2010). A Georgia habeas proceeding is complete when the Georgia Supreme Court issues a remittitur. Dolphy v. Warden, Cent. State prison, 823 F. 3d 1342, 1345 (11th Cir. 2016). " this means that the case remains pending - and tolled - under § 2244(d)(2) until the Georgia Supreme Court issues the remittitur. " Id.

While " the time during which a petition for writ of Certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of the time for 28 U. S. C. § 2244(d)(1) statute of limitation purposes." Coates v. Byrd, 211 F. 3d 1225, 1227 (11th Cir. 2000)

The limitation period may be equitably tolled if a petitioner "shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Holland v. Florida, 560 U. S. 631, 649 (2010) Additionally, under the fundamental - miscarriage-of-justice exception, " actual innocence, if proved," allows a petitioner to avoid the dismissal of an untimely § 2254 petition. McQuiggin v. Perkins, 569 U. S. 383, 386 (2013).

Here, The District Court properly determined that Whitaker's § 2254 petition was untimely. Whitaker's conviction became final when the period for seeking a writ of certiorari from the Georgia Supreme

Court expired, on November 15, 2016. While Whitaker dated his State habeas petition on October 19, 2017, and indicated that he placed it in the mail on October 20, 2017, it was not deemed filed under Georgia law until it was received by the clerk on October 26th, 2017. See Roberts, 286 Ga. at 660-61. Therefore, when the Georgia Supreme Court's remittitur issued on March 4, 2021, following the denial of his State habeas petition, only 21 days of the limitation period remained, which began running the next day on March 5, 2021. Because Whitaker did not file his § 2254 petition until May 25, 2021, the District Court properly determined it as untimely.

Reasonable jurists also would not debate whether Whitaker was entitled to Equitable tolling or whether the miscarriage of Justice exception applies. See Slack, 529 U. S. at 484. First, while Whitaker made a conclusory assertion that he pursued his rights diligently, he did not explain why he waited over 11 months to file his State habeas corpus petition, which constituted most of the Statute of limitations

period. While the covid-19 pandemic may have impacted his access to legal materials in the remaining 21 days, his circumstances were not different than any other prisoner attempting to access legal resources. Accordingly, he could not show due diligence or extraordinary circumstances warranting equitable tolling. Additionally, Whitaker failed to present sufficient evidence to support a claim of actual innocence. See McQuiggin, U. S. at 386.

Accordingly, Whitaker's motion for a COA is DENIED.

UNITED STATES CIRCUIT JUDGE

Pet. App. B 1

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA DENYING THE HABEAS CORPUS PETITION (12/02/2021)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

JERMAINE ANDRA WHITAKER

Petitioner,

v.

TIMOTHY C. WARD, COMMISSIONER,
Georgia Department of Corrections,

Respondent,

Case No. CV 121-092

Before: Hon. J. Randall Hall
United States District Judge

After a careful, de novo review of the file, the Court concurs with the Magistrate Judge's report and recommendation ("R&R") , to which objections have been filed,(doc. No. 13). The Magistrate Judge recommended granting Respondent's motion to dismiss the habeas corpus petition as untimely. Nothing in the Petitioner's objections convinces the Court that dismissal is improper, but several new arguments advanced in the objections deserve attention.

Petitioner argues three grounds of his petition are compelling enough to satisfy the actual innocence exception for time barred claims. (Doc. No. 15, pp. 1-4.) An untimely petition may be considered if Petitioner "(1) [presents] ' new reliable evidence... that was not presented at trial, 'and (2) [shows] 'that is more likely than not that no reasonable juror would have found petition or guilty beyond a reasonable doubt ' in light of the new evidence." Rozzelle v. Sec'y Fla Dept. of Corr., 672 F. 3d 1000, 1011 (11th Cir. 2012) (citations omitted). However, the actual innocence standards are demanding

and will be successful in only an extraordinary case. House v. Bell, 547 U. S. 518, 538 (2006). As a Supreme Court has cautioned, "'[T] enable actual innocence Gateway pleas are rare, " McQuiggin v. Perkins, 569 U.S. 383, 386 (2013), and "in virtually every case, the allegation of actual innocence has been summarily rejected. " Calderon v. Thompson, 523 U. S. 538, 559 (1998).

Petitioner attaches to his objections as" Exhibit 1" the first two pages of a psychosexual evaluation report showing one of Petitioner's victim made sexual advances toward her foster parent in 1999. (Doc. no. 15 pp. 8-9, (" Exhibit " 1).) Petitioner argues testimony at trial and this report supports a finding he is innocent of the charges related to that victim. (Doc.no.15, p 2.) Though Petitioner claims the prosecution withheld the report, this cannot be true because Petitioner states in ground Eight of his petition the report was found to be "admissible on the child molestation counts, and not the rape and aggravated child

molestation counts. " (Doc. no. 1, p 18.)

Petitioner attaches as Exhibit 2 an investigative report, written in 2002 by Investigator Lee D. Woods, stating one victim appeared inconsistent and coached in her interview, leading investigator was to doubt her allegations and conclude the case against petitioner requires no further investigation. (Doc. no. 15, p. 10,

("Exhibit 2").) Petitioner's Counsel did not call Investigator Woods to testify at

trial, and that decision is the basis of Ground Nine of the petition. (Doc. no. 1, p. 20.)

Petitioner submits as Exhibit 3 an affidavit by trial witness Philanna Peterson, Dated February 5, 2018, claiming a member of the jury was her daughter's former math teacher. (Doc. no. 15, p. 12 (" Exhibit 3 ").) At the time of trial, Peterson alerted both the Assistant District Attorney and Defense Counsel of her past relationship with the juror, but the Court did not remove the juror and denied

Petitioner's motion for a mistrial. (Doc. no. 15, p. 3.) Counsel's performance during voir dire leading up to this denial form the basis of Ground Eleven of the petition. (Id. at 23.)

These three exhibits are neither new nor sufficiently compelling to satisfy the demanding " actual innocence" standard. Evidence only "new evidence " if it was unavailable at trial and could not have been discovered earlier through the exercise of due diligence. Riviera v. Humphrey, CV 113- 161, 2017 WL 603-5017, at *11 (S. D. Ga. Dec. 6, 2017); see also Martin v. Stewart, No. 219-CV- 214 MHH-JHE, 2019 WL 8051701, at *3 (N. D. Ala Jan 7, 2020). Petitioner has not established these exhibits and the information contained within them were available to him at trial. Even assuming they were unavailable, he has not alleged that showing these documents and the information contained within them could not have been discovered through the exercise of due diligence. More importantly, these exhibits are not compelling enough to support a finding no reasonable juror would

have found petitioner guilty beyond a reasonable doubt in light of them, either individually or collectively. Therefore, the petition is not eligible for the actual innocence Gateway exception to his time bar claims.

Finally, Petitioner argues he is entitled to Equitable tolling because he had no access to the prison law library due to the pandemic and he did not understand AEDPA 's statute of limitations.(Doc. no 15, pp 4-5.) As explained in the R&R, Petitioner failed to show " that he has been pursuing his rights diligently, and that some extraordinary circumstance stood in his way." (Doc. no 13, pp 6-8); Holland v. Florida, 560 U. S. 631, 649 (2010).

While petitioner attempts to distinguish the cases cited in the R&R because he was denied access to the law library rather than legal papers, the law makes no distinction. See, e. g., Atkins v. United States 204 F. 3d 1086, 1089 (11th Cir. 2000) (holding lack of access to law library or legal papers did not justify equitable tolling). With respect to Petitioner's claimed ignorance of the AEDPA deadline, ignorance about the law is not a basis for equitable tolling under AEDPA. Perez v. Florida, 519F. App'x 995,997 (11th Cir. 2013).

For the reasons set forth above, the Court overrules Petitioner's objection, adopts the report and recommendation of the Magistrate Judge as its opinion, grants respondents' motion to dismiss, (doc. no. 6) and dismisses as untimely the instant petition brought pursuant to 28 U. S. C. § 2254.

A prisoner seeking relief under § 2254 must obtain a certificate of appealability ("COA") Before appealing the denial of his application for a writ of habeas corpus. This court " must issue or

deny a certificate of appealability When it enters a final order adverse to the applicant." Rule 11(a) to the Rules Governing Section 2254 Proceedings. This courtship Grant a COA only if the prisoner makes a " substantial showing of a denial of a constitutional right." 28 U.S C. § 2253 (c) (2). For the reason set forth in the report and recommendation, and in consideration of the standards enunciated in Slack v. McDaniel, 529 U. S. 473, 482-84 (2000), Petitioner has failed to make the requisite showing. Accordingly, the Court denies a COA in this case.1 Moreover, because there are no non-frivolous issues to raise on appeal, an appeal would not be taken in good faith, and Petitioner is not entitled to appeal in forma pauperis. See 28 U. S. C. § 1915(a)(3).

1" If the Court denies a certificate, the parties may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." Rule 11(a) to the Rules Governing Section 2254 Proceedings.

Upon the forgoing, the Court closes this civil action and directs the clerk to enter final judgment and favor of respondent.

SO ORDERED this 2nd day of December, 2021, at Augusta, Georgia.

J. Randall Hall, Chief Judge

United States District Court

Southern District of Georgia

MAGISTRATE JUDGE REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA (October 20, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

JERMAINE ANDRA WHITAKER

Petitioner,

v.

TIMOTHY C. WARD, COMMISSIONER,

Georgia Department of Corrections,

Respondent.

Case no. CV 121-092

Before: Hon. Brian K. Epps
United States Magistrate Judge

MAGISTRATE JUDGE REPORT AND RECOMMENDATION

Petitioner brings the above caption petition for a writ of habeas corpus pursuant to 28 U. S. C. § 2254. The matter is currently before the Court on respondent's motion to dismiss the petition as untimely, (doc. no. 6), which Petitioner opposes, (doc. no .12). For the reason set forth below, the Court reports and recommends respondents motion to dismiss the granted, this petition be dismissed as untimely, and a final judgment be entered in favor of respondent.

I. BACKGROUND

A sitting jury in the Superior Court of Richmond County, Georgia, convicted Petitioner of rape, aggravated child molestation, and child molestation. (See doc. no 1, p 1.) Petitioner was sentenced on March 3, 2011, to life imprisonment and 20 years. (Id) The Georgia Court of Appeals affirmed the conviction on October 26th, 2016.(doc. No. 1, Whitaker v. State, No. A16A1085 (Ga. App. Oct. 26, 2016).)

Petitioner filed his State habeas corpus petition on October 26, 2017, and amended it on January 27, 2018 1 (doc. nos. 7-3, 7-4.) The state habeas Court denied relief in an order dated July 31, 2020. (Doc. no. 7-5.) The Georgia Supreme Court denied Petitioner's application for certificate of probable cause to appeal ("CPC") on February 1, 2021, and issued its remittitur on March 4, 2021. (doc. nos. 7-6, 7-7.) Petitioner executed his Federal habeas corpus petition on May 25,

2021, and the Clerk of Court filed it on June 1, 2021. (doc. no. 1, Pp. 1, 32.)

Respondent argues the petition should be dismissed as time barred under 28 U. S. C. § 2244(d). (See doc. no. 6) In his response, the only date Petitioner contested was the day his State petition was filed, arguing the filing date should be on October 20, 2017, the day Petitioner placed the petition in the mail. (See doc. no. 12)

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1 Petitioner dated his original state habeas petition October 19, 2017 and placed it in the mail on October 20, 2017, (doc. no. 7-3, p. 7; doc. no. 12, p. 1.), But in Georgia, the mailbox rule does not apply to the original filing of pro se State habeas petitions. See Roberts v. Cooper, 691 S. E . 2d 875, 877-78 (Ga. 2010). Thus, state habeas petitions are filed on the date the clerk receives it, not the date the petitioner signs it.

II. DISCUSSION

A. The petition should be dismissed As Time barred

Pursuant to the Anti-Terrorism and Effective Death Penalty

Act of 1996 (AEDPA), 28 U. S. C. § 2244 (d), there is a one-year statute of limitations for § 2254 petitions that run from the latest of:

(1)(A) the date on which the Judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.

(B) the day on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action.

(C) the date on which the constitutional right asserted was initially recognized by the Supreme court, if the right has been newly recognized by

the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due

diligence.

(2) The 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.

Under § 2244(d)(1)(A), a judgment becomes final upon " The conclusion of direct review or the expiration of the time for seeking such review."

See Gonzalez v. Thaler, 565 U. S. 134, 150 (2012) (explaining judgment for petitioners who do not seek certiorari from United States Supreme Court " becomes final at the ' expiration of the time for seeking such review' - when the time for pursuing direct review in this Court, or in state court, expires."); Stubbs v. Hall, 840 S. E. 2d 407, 412 (Ga. 2020) (interpreting Georgia habeas corpus law in accordance with Gonzales, supra, to conclude

judgment of conviction is final when the Supreme Court affirms conviction on merits or denies certiorari, " or when the time for pursuing the next step in the direct appellate review process expires without that step having been taken").

Accordingly, for a Georgia defendant who has his or her conviction affirmed on direct appeal by the Court of Appeals but does not petition for certiorari to the Georgia Supreme court, the conviction becomes final when the 20 days to petition for certiorari expires without filing such a petition. Stubbs, 840 S. E. 2d at 413 (citing Ga. Sup. Ct. R. 38(2)). This is so because the United States Supreme Court does not allow filing for a writ of certiorari unless a judgment " has been entered by a state court of last resort." Id. (citing U. S. Sup. Ct. R. 13.1). Petitioner did not seek a writ of certiorari from Georgia Supreme Court

and was ineligible to appeal to the United States Supreme court, so his conviction became final on November 15, 2016, 20 days after the Georgia court of appeals issued its ruling on October 26, 2016. See Id. At 414-15.

Petitioner had one year from the date his conviction became, November 15, 2016, to file his federal habeas corpus petition or take other action to toll the one year limitations period. Pursuant to 28 U. S. C. § 2244(d)(2), the one-year statute of limitations does not run while a properly file application for state post conviction or other collateral review is pending in state court. Cramer v. Sec'y, Dep't of Corr., 461 F. 3d 1380, 1383 (11th Cir. 2006).

When petitioner filed his State habeas corpus petition on October 26, 2017, 20 days remained on his AEDPA one year statute of limitations. That one year clock was tolled throughout the state habeas corpus

proceedings, including the time during which Petitioner sought a CPC from the Georgia Supreme Court and until issuance of the Georgia Supreme Court's remittitur on March 4, 2021. See Dolphy v. Warden, Cent. State Prison, 823 F. 3d 1342, 1345 (11th Cir. 2016) (per curiam) ("When a state habeas petitioner seeks a certificate of probable cause from the Georgia Supreme Court and the Court denies the request, the petitioner's case becomes complete when the court issues the remittitur for the denial." (Citations omitted)).

Petitioner argues that the one year clock remained tolled for an additional 90 days during which petitioner could have filed a writ of certiorari with the United States Supreme Court to review the Georgia Supreme Court denial of a CPC. (Doc. no.12 p. 3.) However, the Eleventh circuit has held, " the time during which a petition for writ of certiorari is pending [before the United States Supreme Court], or could have been filed, following the denial of collateral relief and the state courts, is not to be subtracted from the running of

the time for 28 U. S. C. §2244(d)(1) Statute of limitation purposes." Coates v. Byrd, 211 F. 3d 1225, 1227 (11th Cir. 2000) (per curiam); see also Lawrence v. Florida, 549 U. S. 327, 337 (2007). The tolling period did not extend beyond March 4, 2021, when the Georgia Supreme Court issued the remittitur. By that time, 345 days of Petitioner's one year statute of limitations had elapsed. Petitioner then waited 82 days until filing his Federal habeas corpus petition on May 25, 2021, The date on which the Petitioner declared under penalty of perjury he executed the federal petition and placed it in the prison mailing system. (Doc. no. 1, p. 32.) Under the " prison mailbox rule, " Petitioner's pro se filing is deemed filed on the date of delivery to the prison officials for mailing. Houston v. Lack, 487 U. S. 266, 275-76 (1988); Daniel v. United States, 809 F. 3d 588, 589 (11th Cir. 2015)(per curiam). The petition was filed 62 days after expiration of the one-year statute of limitations, so petitioner's current federal challenge is time barred and should be dismissed.

B. The limitations period was not otherwise reset under AEDPA and petitioner has not shown that he is entitled to equitable tolling or that a fundamental miscarriage of Justice has occurred.

Petitioner has not provided any explanation that would delay or reset his one year statute of limitations under any statutory sections of AEDPA set forth above. Nevertheless, an otherwise untimely § 2254 petition may be considered if a petitioner can demonstrate that either he is entitled to equitable tolling or that a fundamental miscarriage of justice has occurred. Equitable tolling can be applied to prevent the application of AEDPA'S statutory deadline, but only if a petitioner "shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way ' and prevented timely filing." Holland v. Florida, 560 U. S. 631, 649 (2010) (Quoting Pace v. DiGuglielmo, 544 U. S. 408, 418 (2005); see also Lawrence v. Florida, 549 U. S. 327, 336 (2007). Nevertheless, equitable tolling is typically applied sparingly, Steed v. Head 219 F.

3d 1298, 1300 (11th Cir. 2000), and is available " Only and truly extraordinary circumstances." Johnson v. United States, 340 F. 3d 1219, 1226 (11th Cir. 2003). The Petitioner bears the burden of proving his entitlement to Equitable tolling, San Martin v. McNeil, 633 F. 3d 1257, 1268 (11th Cir. 2011) and will not prevail based on a showing of either extraordinary circumstances or diligence alone; the petitioner must establish both. See Chavez v. Sec'y Fla. Dep't of Corr., 647 F. 3d 1057, 1072 (11th Cir. 2011).

Consideration of an otherwise untimely petition for federal habeas corpus relief may also be appropriate upon a showing that a "fundamental miscarriage of Justice" has occurred, whereby " a constitutional violation has probably resulted in the conviction of one who is actually innocent. " McQuiggin v. Perkins, 569 U. S. 383, 392 (2013) (citing Murray v. Carrier, 477 U. S. 478, 495-96 (1986)); see also Wyzkowski v. Dep't of Corr., 226 F. 3d 1213, 1218-19 (11th Cir. 2000).

The actual innocence exception " is exceedingly narrow in scope," and a time barred petition seeking to invoke it must be able "(1) to present ' new reliable evidence... that was not presented at trial, ' and (2) to show' that it is more likely than not that no reasonable juror would have found petition or guilty beyond a reasonable doubt' in light of the new evidence." Rozzelle v. Sec'y, Fla. Dep't of Corr., 672 F. 3d 1000, 1011 (11th Cir. 2012) (citations omitted). As the Supreme Court emphasized, " the Miscarriage of Justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows 'it is more likely than not that no reasonable juror would have convicted the petitioner.' " McQuiggin, 569 U. S. at 395 (emphasis added).

Here, Petitioner has not shown he satisfies the test for application of equitable tolling or that a miscarriage of Justice will occur if his claims are not considered. Petitioner claims the covid-19 pandemic, the subsequent lockdown, and his own illness amount to

extraordinary circumstances. However, petitioner fails to explain what, if anything, prevented him from filing his State habeas petition until October 2017, 11 months after his sentence became final in November 2016 and years before the Covid-19 pandemic.

Regardless, delays due to covid-19 are not extraordinary circumstances for the purposes of equitable tolling. See Rush v. Sec'y, Fla. Dep't of Corr., No. 21- 10218-C, 2021 WL 3134763, at *1 (11th Cir. June 22, 2011) (petitioner could not show extraordinary circumstances due to Covid-19 as "all prisoners were subject to Covid-19 protocols"); see also Hess v. Sec'y, Fla. Dep't of Corr., No. 16-14118-E, 2017 WL 6607169, at *3 (11th Cir. October 18, 2017) (recounting precedent finding no extraordinary circumstances result from lockdowns or separation from legal papers).

Turning to diligence, petitioner offers no details on any efforts he made to ensure he could timely file his § 2254 motion, let alone provide sufficient information to satisfy his burden to show due

diligence in pursuing his rights. He left the section on his petition concerning reasons for untimeliness blank, and in his response, petitioner simply concludes he " pursued his rights diligently." (Doc. no. 1, pp 30-31, doc. No. 12, p. 4.) Vague or conclusory allegations are insufficient to satisfy petitioner's burden to show how he acted with diligence. Lugo v. Sec'y, Fla. Dep't of Corr., 750 F. 3d 1198, 1209-10 (11th Cir. 2014). In reality, by waiting over 11 months before taking an action that would toll the statute of limitations, Petitioner left himself only 20 days to file a potential Federal petition. He has not shown diligence. See United States v. Cruz, CV No. 15-CR-260 (13)-PAM-TNL, 2020 WL 5995260, at *2 (D. Minn. Oct. 9, 2020) (denying petitioner equitable tolling where petitioner failed to show efforts made to diligently pursue his rights before the Covid-19 pandemic began); United States v. Barnes, 20 - CV-2084-CVE-FHM, 2020 WL-4550389, at *2 (N. D. Okla. Aug. 6, 2020) (same).

Further, petitioner has not presented any evidence, much less new,

reliable evidence to show that he did not commit the offense of which he is convicted such that no reasonable juror would have found him guilty beyond a reasonable doubt. Indeed, he never claims he did not commit the offense in which he was convicted.

Rather, his stated grounds for relief focused on alleged legal errors committed by the trial court and counsel. There is no mention of new evidence. In sum, petitioner has presented no evidence to support, let alone satisfy, the high burden that no reasonable factfinder could have found him guilty of the offense for which he was convicted. See Ray v. Mitchem, 272 F. App'x 807, 810-11 (11th Cir. 2008) (per curiam) (emphasizing" actual innocence mean factual innocence, not merely legal insufficiency " (citing Bousely v. United States, 523 U. S. 614, 623 (1998)).

Because petitioner has not shown he had been pursuing his rights diligently, and some extraordinary circumstance stood in his way to prevent him from timely filing his Federal habeas corpus petition or that a miscarriage of Justice will occur if the untimely claims are

dismissed, neither Equitable tolling nor the fundamental miscarriage of Justice exceptions saves the untimely petition from dismissal.

III. Conclusion

For the reason set forth above, the court reports and recommends respondent's motion to dismiss be granted, (doc. no. 6), this petition be dismissed as untimely, and a final judgment be entered in favor of the respondent.

So reported and recommended this 20th day of October 2021, at Augusta, Georgia.

BRIAN K. EPPS
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING RECONSIDERATION (JUNE 6, 2022)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERMAINE ANDRA WHITAKER,

Petitioner-Applicant,

Versus

COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS,

Respondents - Appellees.

No. 21-14467-A

Appeals from the United States District Court
for the Southern District of Georgia
Before: JILL PRYOR and LAGOA, Circuit Judges.

BY THE COURT:

Jermaine Whitaker has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's May 3, 2022, order denying his construed motion for a certificate of appealability from the denial of his 28 U. S. C. § 2254 petition. Upon review, Whitaker's motion for reconsideration is denied because he has offered no new evidence or arguments of merit to warrant relief.

Additional material from this filing is available in the Clerk's Office.