IN THE SUPREME COURT OF GUAM

FRANCISCO S.A. IGNACIO
Petitioner- Appellant,

v.

THE PEOPLE OF GUAM,
Respondent-Appellee,

Supreme Court Case No. CVA11-013
Superior Court Case No. SP0028-10

OPINION

Cite as: 2012 Guam 14

Appeal from the Superior Court of Guam
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

PER CURIAM:

[1] Respondent-Appellee People of Guam ("People") previously filed a motion to dismiss Francisco S.A. Ignacio's appeal for lack of jurisdiction. In an Order issued December 7, 2011, this court denied dismissal and instead elected to treat Ignacio's appeal as an original petition for a writ of habeas corpus. *See* Order (Dec. 7, 2011). Notwithstanding the exercise of our discretion to treat Ignacio's appeal as the writ petition in this case, because nearly thirty years had lapsed since Ignacio's criminal appeal was denied, we required Ignacio to justify the considerable delay of filing his writ petition in the Superior Court of Guam, or justify how this case falls within an exception to the rule barring untimely writ petitions. Ignacio timely filed his Memorandum Regarding Timeliness and the People timely filed its response. *See* Mem. re Timeliness (Jan. 23, 2012); Appellee's Br. (Feb. 22, 2012). Subsequently, Ignacio filed a Motion to Amend Habeas Petition, alleging arguments regarding the merits of his underlying writ petition, but adding nothing new to his arguments regarding the untimeliness issue. *See* Mot. Am. Habeas Pet. (May 29, 2012).

[2] For the reasons below, we dismiss Ignacio's Petition for Writ of Habeas Corpus.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Ignacio was convicted of two counts of murder, attempted murder, and first-degree robbery on May 15, 1978. On May 17, 1979, Ignacio was sentenced to concurrent terms of life imprisonment. Ignacio appealed his conviction to the Appellate Division of the District Court of Guam on May 22, 1979. He is currently a prisoner confined at the United States Penitentiary

[1] This Opinion supersedes the Order granting the People's motion to dismiss, issued on August 8, 2012.

in Atwater, California. After his initial unsuccessful appeal, Ignacio appealed the District Court of Guam Appellate Division's decision to the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") on January 23, 1981, which the Ninth Circuit subsequently affirmed in an unpublished opinion on February 19, 1982. He initially pursued a habeas claim in 2004, and after failed attempts to obtain copies of his 1979 trial transcript, Ignacio finally sought post-conviction relief in the federal courts. After attempts to conduct discovery, requesting discovery from Attorney General Douglas Moylan in 2008, Ignacio finally contacted the Ninth Circuit to request copies of the unpublished opinions resulting from his original case, which eventually led him to file a petition for writ of habeas corpus in the trial court on February 17, 2010.

[4] On July 1, 2011, Judge Anita A. Sukola issued and entered into the docket a decision denying Ignacio's petition for writ of habeas corpus as a result of its untimeliness. On July 26, 2011, Ignacio filed a notice of appeal from the lower court's denial of his petition for writ of habeas corpus. On August 3, 2011, Ignacio filed a Rule 7(b)(1) certificate indicating he did not intend to order transcripts of the proceedings in the trial court below regarding the habeas corpus petition, but wished instead to obtain a copy of the original transcripts of his criminal trial, The People made the representation in the lower court that the trial transcript is not readily available because of the passage of time. On August 9, 2011, Ignacio filed a statement enumerating several issues for this court to consider.

II. JURISDICTION

[5] As we stated in our December 7, 2011 order, under *Borja v. Bitanga*, this court may use its discretion to review Ignacio's appeal of writ denial as an original writ petition. *See* 1998 Guam 29 ¶ 15 ("Using our discretion, we elect to treat Petitioners' appeals as original petitions for writs of habeas corpus.").

III. STANDARD OF REVIEW

[6] At this stage of the appeal, the litigants have yet to propose any standard of review in their briefs. Nevertheless, because we elected to treat Ignacio's appeal denying petition for writ of habeas corpus as the original writ petition in this case, the standard of review is *de novo*. *See White v. Klitzkie*, 1998 Guam 31 ¶ 13 (citing *United States v. Span*, 75 F.3d 1383 (9th Cir. 1996)).

IV. ANALYSIS

A. Whether California Authority is Appropriate for the Instant Case

1. Ignacio's Objection to Following California's Timing Guidelines

[7] Ignacio's first argument is that following California authority is inappropriate for this case. Although Ignacio acknowledges that this court in *May v. People*, 2005 Guam 17, approved of Guam's reliance on California case law in habeas cases, Ignacio also argues that reliance on such law is subject to a caveat: California case law should not be considered when there is no compelling reason to deviate from the jurisdiction's interpretation of these statutes. *See* Mem. re Timeliness at 2 (Jan. 23, 2012) (citing *May*, 2005 Guam 17 ¶ 9 (citing *People v. Hall*, 2004 Guam 12 ¶ 18; *Fajardo v. Liberty House Guam*, 2000 Guam 4 ¶ 17)). From this legal proposition, Ignacio argues that California's timeliness requirements established by *In re Clark*, 855 P.2d 729 (Cal. 1993), and *In re Robbins*, 959 P.2d 311 (Cal. 1998), are inapplicable in his case. The reason for not following *In re Clark*, Ignacio alleges, is that the creation of a 90-day timeliness presumption "was part of a set of policies regarding Habeas Corpus petitions which the Supreme Court had promulgated simultaneous with the Clark decision." *See id.* at 2-3 (citing *In re Clark*, 855 P.2d at 751). Ignacio argues that because such policies and guidelines do not exist in Guam, we should not follow the *In re Clark* presumption of timeliness.

[8] In our previous Order's citation to *In re Clark*, we did not rely or even refer to the 90-day presumption of timeliness mentioned in that case. *See* Order at 10 (Dec. 7, 2011). Rather, we cited *In re Clark* for the proposition that "[d]espite the lack of any bright-line rule specifying a deadline for filing a writ of habeas corpus, if there is a significant delay in the filing of the writ petition, a petitioner is required to justify such delay in seeking relief." *Id.* at 9 (citing *In re Clark*, 855 P.2d at 738). Ignacio distinguishes his case from *In re Clark* because *In re Clark* accounted for the California Supreme Court's promulgation of policy guidelines, which were simultaneous with the decision. Nevertheless, the general proposition of law—that a petitioner should justify the untimeliness of relief sought—is not so narrow as to be confined to cases involving California's promulgated policies.

[9] A closer look at *In re Clark* clarifies the use of "the Policies" in that case. The Policies in *In re Clark* refer to policies that "supplement legislative restrictions on habeas corpus; they also have as their purpose a curb on abuse of the writ of habeas corpus." *In re Clark*, 855 P.2d at 745. The Supreme Court of California published the "Policies Regarding Cases Arising From Judgments of Death" in June 1989. *See id.* at 750. In *In re Clark*, the petitioner's counsel began investigating possible bases for habeas corpus, but did not file his first petition until almost two years after the policies were published. *See id.* However, the *In re Clark* court addressed the *general* rule of justifying the potential delay in habeas corpus petition, one that predated the 1989 publication of the policies. *Id.* ("Even before June 1989, a habeas corpus petitioner who had knowledge that grounds for a habeas corpus petition existed was on notice that any substantial delay in filing a petition after the grounds became known had to be justified.").

[10] Therefore, regardless of *In re Clark*'s unique factual circumstances involving publishing policies, the broad rule of justifying one's delay in filing a habeas petition should still apply in Guam cases.

2. Use of Guam Timing Guidelines for Civil Actions Generally

[11] The People argue that we should follow Guam's catch-all provision for civil actions. That is, the People proffer that before looking to California case law for guidance, we "must first find controlling law absent." Appellee's Br. at 8 (Feb. 22, 2012) (citing *People v. Hall*, 2004 Guam 12 ¶ 18 (finding California case law persuasive in interpreting a Guam statute derived from a California statute, "absent a compelling reason to deviate")). Given that Ignacio, this court, and the U.S. Supreme Court have each characterized habeas corpus petition as a civil matter, the People argue that we should determine whether a civil statute of limitations applies to Ignacio's delayed filing of his petition.

[12] Citing the Guam Civil Procedure Code, the People urge that we be guided by the following provision: "Civil actions, *without exception, can only be commenced within the periods prescribed* in this Chapter, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by law." *Id.* at 9 (quoting 7 GCA § 11101 (2005)) (emphasis in Appellee's Br.). Accordingly, because Guam does not have any distinct limitations for habeas corpus actions, the People argue that the Guam Civil Procedure Code's four-year statute of limitations governs habeas proceedings. *See id.* (citing 7 GCA § 11312 (2005) (providing that "[a]n action for relief not otherwise provided for must be commenced within four (4) years after the cause of action shall have accrued")). The People assert that "[a] habeas petitioner's cause of action accrues when he has exhausted the appeals process and his judgment becomes final." Appellee's Br. at 10. However, the People do not cite authority for

this legal assertion. Furthermore, for certain extreme circumstances, it would be inappropriate to impose a strict four-year statute of limitations on a habeas corpus petition. Indeed, the habeas corpus petition is not a conventional "cause of action" that would provide a clear, definitive time of initial accrual.

[13] Therefore, contrary to what the People suggest, we do not adopt the general four-year statute of limitation for civil actions as a strict guideline for habeas actions.

3. California Authority and the Reasonable Delay Standard

[14] Alternatively, the People suggest that the court adopt California's timeliness standard, which is that the petition "must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as the legal basis of the claim." Appellee's Br. at 11 (internal quotation marks omitted) (quoting *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993)).

B. Significance of the Fact that a Petitioner Claims He Was Unaware of the Factual and Legal Basis for a Habeas Claim

[15] Ignacio asserts that despite his objection to this court's reliance on California case law, we should assess a number of *In re Clark* factors, including the following:

> 1. [W]hether the facts on which the claim is based, although only recently discovered, could and should have been discovered earlier;
> 2. whether the factual basis for a claim was unknown to the petitioner and the petitioner had no reason to believe that the claim might be made;
> 3. or where the petitioner was unable to present his claim, whether it was pursued reasonably prompt upon discovery;
> 4. where the claim is based upon a change in the law which is retroactively applicable to final judgment is promptly asserted and if application of the former rule is shown to have been prejudicial.

Mem. re Timeliness at 3 (citing *In re Clark*, 855 P.2d at 745). We hereby adopt this reasonable delay standard from California's *In re Clark* for the purposes of determining what justifies a

significant delay in a petition for writ of habeas corpus. It appears that Ignacio intimates that this case satisfies the first, second, and fourth factors; he argues that he was not aware of facts only recently discovered and that he was unaware of the legal basis for his claim until he was recently provided a copy of the unpublished Ninth Circuit decision for his criminal appeal from 1982. *See id.*

1. Whether There Were New Facts Brought to Light as a Basis for Ignacio's Claim

[16] One basis for Ignacio's claim is that District Judge Shriver sentenced him on a murder conviction on October 6, 1967, at which time he claims Paul Abbate was the prosecutor on his case and, subsequently, Judge Abbate became the presiding judge who sentenced Ignacio on his conviction on May 17, 1979. *See Ignacio v. People*, SP0028-10 (Pet. for Writ of Habeas Corpus at 1, 3 (Feb. 17, 2010)). These alleged facts, if true, were available as public knowledge at the time of Ignacio's trial in the Superior Court of Guam. Yet, Judge Abbate was not disqualified from his role as presiding judge on Ignacio's 1979 trial.

[17] Therefore, Ignacio's petition for habeas corpus brings to light no new unknown facts that justify his delayed petition for habeas corpus.

2. Whether There Exists a Retroactive Change in the Law as a Basis for Ignacio's Claim

a. Retroactive Change in the Law through *People v. Yang*

[18] As another basis for his claim, Ignacio states that it was not until 2008 that he discovered his appeal was denied for the same reason that the conviction in *People v. Yang*, 850 F.2d 507 (9th Cir. 1988), was reversed. *See* Mem. re Timeliness at 3. In *Yang*, the Ninth Circuit reversed a Superior Court of Guam conviction because of an erroneous jury instruction regarding reasonable doubt, which failed to conform to Guam's statutory definition of reasonable doubt. *See People v. Yang*, 850 F.2d 507, 513 (9th Cir. 1988) ("[T]he trial court chose not to use the

statutory definition of reasonable doubt."); *id.* at 513-14. Ignacio alleges that "[h]ad Petitioner Ignacio known that his appeal was denied on the exact same grounds the Yang conviction was reversed, he may have been able to make the argument that Yang constituted a retroactive change in law that led to a prejudicial result in his conviction," which fulfills the fourth *In re Clark* factor enumerated above. Mem. re Timeliness at 3.

[19] Ignacio insists he did not discover this pertinent detail until he received his unpublished Ninth Circuit opinion in 2008. Now, Ignacio alleges his case is the same as that in *People v. Yang*. In *Yang*, the Ninth Circuit reversed the District Court of Guam Appellate Division, concluding that the use of a reasonable doubt jury instruction that failed to use Guam's statutory definition of reasonable doubt constituted reversible error. *See Yang*, 850 F.2d at 513-14. Likewise for Ignacio, the District Court of Guam Appellate Division's decision touched upon the reasonable doubt issue briefly. Similar to the case in *Yang*, the District Court of Guam Appellate Division rejected Ignacio's raised error on appeal regarding the use of the "important affairs" standard for reasonable doubt instead of the "moral certainty" standard defined in the Guam Criminal Procedure Code § 90.23(a). *People v. Ignacio*, No. 79-00036A, at *9 (D. Guam App. Div. 1981). Later in 1982, the Ninth Circuit's analysis affirmed the District Court of Guam Appellate Division's decision as follows: "[W]e are convinced that the instructions to the jury were not so imperfect as to require reversal." *People v. Ignacio*, No. 81-1107, slip op. at 6 (9th Cir. Feb. 19, 1982).

[20] In response, the People assert that the Ninth Circuit has since overturned *Yang*, the case on which Ignacio relies. *See* Appellee's Br. at 15. The People cite *United States v. Keys*, 133 F.3d 1282 (9th Cir. 1998), in which the Ninth Circuit purportedly overturned *Yang* by overruling "any implication in . . . Yang . . . that a failure to object to a jury instruction—even where the

law of the circuit is clear—will entitle a defendant to have an error claimed for the first time on appeal." *Id.* at 15 (internal quotation marks omitted) (quoting *United States v. Keys*, 133 F.3d at 1287).

[21] However, a full reading of this portion of *Keys* indicates that the Ninth Circuit's overruling of *Yang* was actually narrower than what the People suggest. Instead, *Keys* overruled any implication in *Yang* that failure to object to jury instructions on reasonable doubt will "entitle a defendant to have an error claimed for the first time on appeal *measured according to Rule 52(a)*," which is the Federal Rules of Criminal Procedure governing harmless error. *Keys*, 133 F.3d at 1287. *See generally* Fed. R. Crim. P. 52(a). The opinion further expounds: "Changes in the law will be accorded retroactive effect as required by *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L.Ed. 2d 649 (1987), but only to the extent that the error satisfies the requirements of Rule 52(b) as interpreted in *Olano* and *Johnson*." *Keys*, 133 F.3d at 1287 (internal citations omitted).[2] Thus, the People's contention that *Yang* has since been overruled *entirely* regarding the failure to object to an erroneous jury instruction is a mischaracterization of the *Keys* holding. A more accurate reading of the portion of the *Keys* opinion overruling *Yang* indicates that it only prohibits a defendant from claiming an error on appeal using the *harmless error* standard in Rule 52(a). *See Keys*, 133 F.3d at 1287. It does not assert that the defendant is

[2] The portion of the *Keys* opinion illustrating its instruction to act in a manner consistent with *Olano* and *Johnson* is as follows:

> According to *Johnson*, however, Rule 52(b) determines the benefit to which he is entitled, not Rule 52(a) as he requests. Thus, under *Olano* and *Johnson*, we can correct this alleged error not raised at trial only if (1) an error occurred, (2) the error is plain on appeal, and (3) it affects substantial rights. If these conditions are satisfied, we have the discretionary authority to "notice" a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467, 117 S. Ct. at 1549. We note here that Keys's failure to object because of the state of the law of the circuit is regarded not as a waiver, but a "forfeiture." *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc).

Keys, 133 F.3d at 1286.

completely barred from claiming *any* error on appeal. Rather, the resulting alternative to claiming error based on Rule 52(a) is that the defendant may still claim error based on Rule 52(b), governing the *plain error* standard.

[22] Insofar as Ignacio argues his habeas corpus petition is based on a retroactive change in the law by virtue of *Yang*'s ruling, that particular ruling concerning erroneous jury instructions might still be a ground for an error on appeal, subject to a plain error standard. *See, e.g.*, *People v. Felder*, 2012 Guam 8 ¶¶ 16-17. Thus, Ignacio's change-in-law basis for his habeas claim might function as a factor for this court to consider in determining the reasonableness of the petition's delay.[3] Indeed, to the extent that *Yang* changed the law, it was decided in 1988, six years after the Ninth Circuit issued its decision affirming the District Court of Guam Appellate Division's appeal decision in *Ignacio*. It is worth noting, however, that Ignacio began to investigate his habeas case in 2004. *See* Mem. re Timeliness at 2. Further complicating Ignacio's claim is that Ignacio did not request for a copy until February 19, 2008—which suggests the delay in receiving this crucial information is not the fault of any third party. *See* Mem. re Timeliness, ex. D (Letter from Ignacio to Ninth Circuit, Feb. 19, 2008). Rather, the delay is attributable to the part of Ignacio's own lack of diligence in pursuing a potential habeas claim, which is discussed in more detail later. *See* discussion *infra* Part IV.C.1.

[23] In summary, although Ignacio has not shown any new facts unknown at the time of trial, it is possible that *Yang*'s retroactive change in law provides a basis for Ignacio's habeas claim,

[3] The People further assert that the *Teague* anti-retroactivity principles for federal habeas petitioners might apply in this case. *See* Appellee's Br. at 16 (citing *Teague v. Lane*, 489 U.S. 288, 296 (1989)). In *Teague*, the habeas petitioner's conviction became final two and a half years before the new law he attempted to claim was a retroactive basis for habeas relief. *See Teague*, 498 U.S. at 295-96. *Teague* does not, however, establish a stringent rule against retroactive application of new law. *See id.* Moreover, the People do not adequately brief its proffered *Teague* anti-retroactivity issue; it appears as an afterthought rather than an argument. Thus, we will not address the merits of *Teague*'s applicability to this case.

and it serves as a factor that the court should assess when determining the petition's tardiness. Thus, we must evaluate whether there was plain error in the erroneous jury instruction at trial.

b. Plain Error Determination

[24] A defendant has the burden of proving plain error by showing "(1) that there has been a violation of a legal rule, not waived by [the defendant], during court proceedings; (2) the error must be plain in that it is 'clear' or 'obvious' under current law; and (3) the plain error must have affected [defendant's] substantial rights." *People v. Perry*, 2009 Guam 4 ¶ 9 (internal quotation marks omitted) (quoting *People v. Van Bui*, 2008 Guam 8 ¶ 10). As a final step of analysis, if the three elements above are satisfied, the court has the discretion to reverse the conviction and order a new trial when necessary "to prevent a miscarriage of justice or to maintain the integrity of the judicial process." *Id.* ¶ 31 (internal quotation marks and citation omitted).

i. Whether There Is Error

[25] According to the portions of *Yang* that have not been overruled by *Keys*, when the trial court chooses not to use the statutory definition of reasonable doubt for a jury instruction, as was in the case in Ignacio's trial, this constitutes error under Guam law. *See Yang*, 850 F.2d at 513. The portion of the statutory language left out in Ignacio's trial is the "moral certainty" language. *Ignacio*, No. 81-1107, slip op. at 4 n.2. *Yang* stated: "however strongly we may be inclined to side with those jurisdictions that reject the 'moral certainty' language—this court has neither the duty nor the right to substitute its judgment for that of the Guam legislature. The instruction given by the trial court is erroneous under Guam law and therefore we must reverse." *Yang*, 850 F.2d at 513-14.

[26] Therefore, the failure to use the "moral certainty" language during Ignacio's trial constituted error, which fulfills the first element of finding plain error.

ii. Clear or Obvious Error

[27] An appellate court can correct an error under the plain error standard if that error is, at minimum, clear under "current law." *United States v. Olano*, 507 U.S. 725, 734 (1993). And, "[w]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal-it is enough that an error be 'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468 (1997). Here, even though the law regarding the reasonable doubt instruction language was not clear or obvious at the time of Ignacio's trial, it became clearly recognized as the current law following the *Yang* decision in 1988. *See Yang*, 850 F.2d at 513-14. In addition, while at the time of Ignacio's Ninth Circuit appeal in 1982, the *Yang* decision had not yet been rendered, the relevant *Yang* proposition is now clear under current law during this court's original writ consideration. As discussed above, *Yang*'s proposition regarding the defendant's entitlement to appeal under the plain error standard still holds under current law because that portion has not been overruled by *Keys*, contrary to the People's contention. *See* discussion *supra* Part IV.B.2.a.

[28] Therefore, the second element of clear or obvious error is fulfilled.

iii. Error Affecting the Defendant's Substantial Rights

[29] The third element is whether the asserted error has affected the defendant's substantial rights. *See Perry*, 2009 Guam 4 ¶ 9. An erroneous jury instruction given at trial does not necessarily affect a defendant's substantial rights. *See, e.g.*, *People v. Alvarez*, No. 83-00017A, 1984 WL 48831, at *3 (D. Guam App. Div. 1984) (finding that erroneous jury instruction did not constitute error affecting defendant's substantial rights). Furthermore, a conviction may be affirmed despite error resulting from the failure to use specific language for jury instructions

where the error does not necessarily affect a defendant's substantial rights. *See, e.g., United States v. Benitez*, 92 F.3d 528, 534 (7th Cir. 1996).

[30] Guam's statutory language defining reasonable doubt, provided at 8 GCA § 90.23, is as follows:

> **§ 90.23. Reasonable Doubt: Defined; May be Read to Jury Verbatim.**
>
> (a) Reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge."
>
> (b) In charging a jury, the court may read Subsection (a) to the jury and no further instruction defining reasonable doubt need be given.

8 GCA § 90.23 (2005).

[31] In contrast, the jury instructions on reasonable doubt at Ignacio's trial provided:

> [R]easonable doubt is a doubt, that is based upon common sense and reason. It's a kind of doubt that would make a reasonable person hesitate—stop from doing a certain act. Proof beyond the reasonable doubt must be therefore, be proof of such a convincing character That, [sic] a reasonable person would not hesitate to rely and act-upon it in the most import of his/her own affairs You remember as jurors that the defendant is never to be convicted on just mere suspicion or conjecture. That's evidence that might be too weak, or too remote to cause belief.
>
> . . . .
>
> But, if any reasonable doubt remains in your mind, that after impartial consideration of all the evidence, that is your ladies and gentlemen of the jury is the identification of the defendant as the perpetrator of the crime charged. . . . If your [sic] not convince[d] beyond the reasonable doubt, that the defendant was the person who committed the crime charged, then you must find the defendant not guilty.

Ignacio, No. 81-1107, slip op. at 4 n.2.

[32] Here, failure to use the statutory "moral certainty" language for reasonable doubt, in the totality of the instructions' context, does not fail to inform a jury of the general concept of

reasonable doubt. Furthermore, Ignacio failed to carry his burden to show how the erroneous jury instruction affected his substantial rights.

[33] The erroneous jury instructions did not affect Ignacio's substantial rights as a defendant and, thus, the plain error test fails on the third element.

iv. Error Resulting in the Miscarriage of Justice

[34] Having evaluated the three elements to determine plain error, we conclude that Ignacio's case does not meet the third element and, thus, there is no finding of plain error here. Nevertheless, even assuming the error rises to the level of plain error, reversal of the conviction is only necessary when a "miscarriage of justice would result, viewed in the light of all evidence, and the effect which the erroneous instruction would have on the verdict." *Alvarez*, 1984 WL 48831, at *3 (internal quotation marks omitted); *see also Perry*, 2009 Guam 4 ¶ 31.

[35] Erroneous jury instructions may be considered harmless and would not require reversal if, "looking at the instructions and the record as a whole, [the court is] convinced that a properly instructed jury would have reached the same verdict." *United States v. Thomas*, 86 F.3d 647, 651 (7th Cir. 1996). When making this determination, a court may consider whether jury instructions, as a whole and despite the erroneous portion, have adequately informed a jury of the applicable law. *See United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983); *United States v. Martin*, 475 F.2d 943, 947 (D.C. Cir. 1973); *State v. Woehlhoff*, 540 N.W.2d 162, 164 (N.D. 1995). As mentioned above, the jury instructions—despite the lack of the "moral certainty" language—had indeed served the crucial purpose of adequately informing the jury of the legal meaning of reasonable doubt. *See supra* Part IV.B.2.b.iii. Furthermore, in a situation where the evidence establishing the defendant's guilt is strong, affirming a conviction does not result in a miscarriage of justice. *See, e.g.*, *Alvarez*, 1984 WL 48831, at *3 ("A careful review of the

totality of the evidence by this Court reveals that the evidence establishing the Defendant's guilt was overwhelming. Thus, the conviction of the Defendant-Appellant is affirmed."). Accordingly, the Ninth Circuit's review of Ignacio's case revealed that the overwhelming evidence of Ignacio's guilt was indeed sufficient to sustain the jury's verdict, which compelled the court to "conclude that a rational trier of fact could have found that the essential elements of the crimes were established beyond a reasonable doubt." *Ignacio*, No. 81-1107, slip op. at 7.

[36] Because a jury would have likely reached the same verdict upon receiving the proper reasonable doubt instruction language, declining to reverse Ignacio's conviction will not result in the miscarriage of justice. Nevertheless, we must still proceed to consider the People's defense.

C. Whether Habeas Relief Is Barred by the Laches Doctrine

[37] The People argue that the doctrine of laches should bar habeas relief here. *See* Appellee's Br. at 16. "Laches applies in the face of unreasonable delay and prejudice to the opposing party." *Id.* (citing *In re Douglas*, 132 Cal. Rptr. 3d 582, 589 (Ct. App. 2011)). Indeed, habeas corpus may be denied if the petitioner was responsible for laches, which results in undue delay prejudicing the prosecution insofar as the "memories of the judge and court personnel are uncertain, or the rights sought to be asserted have become matters of speculation due to the dislocation or death of witnesses and the loss of records." 39A C.J.S. *Habeas Corpus* § 281 (2012). In Guam, the doctrine of laches applies when "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice against the party asserting the defense." *Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶ 77 (internal quotation marks omitted) (quoting *Torres v. Superior Court*, 1990 WL 320360, at *5 (D. Guam App. Div. 1990)).

1. Lack of Diligence on the Part of Ignacio, Against Whom Laches Is Asserted

[38] Providing some guidance is *May v. People*, in which this court assessed a habeas corpus and coram nobis petitioner's issue of untimely petition filing. *See* 2005 Guam 17 ¶ 28. In *May*, the petitioner filed for habeas corpus and coram nobis relief after over twenty-four years had passed since his 1981 conviction, without providing "a sound reason for not attacking the conviction earlier . . . provid[ing] no facts which had not been previously known at the time of the conviction which could render the conviction invalid." *Id.* Additionally, May argued that during the time between 1993 and 2005, he was ignorant of the law regarding the possibility of filing a habeas corpus petition or coram nobis petition until another inmate informed him of such. *See id.* The *May* court asserted, however, that the petitioner's "failure to provide unknown facts, his lack of incentive and his ignorance of the law in no way justifies the tardiness of his petition." *Id.* Despite the distinguishable fact that the petitioner in *May* filed for both habeas corpus *and* coram nobis relief, this court found that "a twenty-four year 'delay is strong evidence of a lack of reasonable diligence in ascertaining potential grounds for relief.'" *Id.* ¶ 29 (quoting *United States v. Darnell*, 716 F.2d 479, 481 (7th Cir. 1983)). Likewise, Ignacio has not justified his twenty-six-year delay with any explanation as to why he waited from 1982 until 2008 to request a copy of the Ninth Circuit opinion affirming the District Court of Guam Appellate Division's decision in his appeal, which he claims to be the basis of his habeas claim.

[39] Thus, Ignacio fails on the first prong of the People's laches defense.

2. Prejudice to the People, the Party Asserting the Laches Defense

[40] The People cite the California case of *In re Douglas* as an instance of laches exhibiting a magnitude of delay that prejudiced the opposing party. *See* Appellee's Br. at 17 (citing *In re Douglas*, 132 Cal. Rptr. 3d at 589). The *In re Douglas* court noted how the petitioner's delay

caused the prosecution to suffer prejudice due to the diminished memory and dispersion of witnesses. *See In re Douglas*, 132 Cal. Rptr. 3d at 589. Not only did the prosecution's law enforcement witnesses no longer recall the petitioner defendant, the defendant's counsel lived out of the country and also forgot the defendant as well as the particular case. *See id.* In conclusion, the *In re Douglas* court held the delay made it impossible for the prosecution to respond to the petitioner's claim and, thus, the claim was barred by a proper laches defense. *See id.* ("Thus, we find the substantial delay unjustified and the petition for writ of habeas corpus untimely and barred by laches.").

[41] Similarly, in this case, the People would have difficulty responding to the claims alleged in Ignacio's petition. The People note that Ignacio alleges the transcripts have been altered. *See* Appellee's Br. at 17. In addition, Ignacio's constitutional claims of injustice such as the fact that "counsel failed to exclude hearsay testimony and court's refusal to give certain eyewitness identification" would most likely require the trial transcript to be available for review. *Ignacio v. People*, SP0028-10 at 1 (Pet. for Writ of Habeas Corpus). To the extent that Ignacio attempts to pursue these claims, the original trial transcripts are currently inaccessible, and the People claim "it is unknown whether the many witnesses and other players reflected in the transcript are available to review their prior testimony or are capable of recognizing whether it has been altered." Appellee's Br. at 18. These hurdles potentially prejudice the People in responding to Ignacio's habeas claim, which fulfills the second prong for asserting the laches defense.

[42] Ignacio's lack of diligence, resulting in the passage of substantial time, has prejudiced the People's potential substantive response to Ignacio's habeas petition and, following our precedent

in *May*, the People are correct that the doctrine of laches ought to bar relief for Ignacio.[4]

V. CONCLUSION

[43] We decline to follow the People's suggestion of adopting a strict four-year statute of limitations for a writ of habeas corpus, which is what applies to civil actions generally. Rather, we adopt California's reasonable delay standard for timeliness pronounced in *In re Clark*, which assesses various factors. These factors include a retroactive change in the law—a legal basis of his claim that Ignacio contends he was not aware of until he received his requested Ninth Circuit appeal decision. One factor considered is Ignacio's claim that *Yang* constitutes a retroactive change in the law, which applies here to the erroneous jury instructions given at his jury trial. However, at best, *Yang* gives Ignacio a right of appeal for an unpreserved erroneous reasonable doubt jury instruction, subject to the plain error standard of review. We conclude that the erroneous jury instructions at Ignacio's trial did not constitute plain error and, further, that a miscarriage of justice would not occur by affirming his conviction.

[44] Lastly, the People correctly assert that the doctrine of laches applies as a defense to Ignacio's habeas claim because (1) Ignacio did not diligently pursue his rights; and (2) the delay in filing prejudices the People's ability to respond to the claim.

[45] Because Ignacio has not justified the substantial delay in pursuing his petition for a writ of habeas corpus, we hereby grant the People's motion to dismiss Ignacio's petition as barred for untimeliness. We will not address Ignacio's motion to amend the petition or the People's opposition thereto because upon dismissing the petition as untimely, the proposed amendments

[4] We decline to address the People's equitable tolling theory of defense because this court has not adopted equitable tolling outside of the narrow context of insurance claims. *Guam Hous. & Urban Renewal Auth. v. Dongbu Ins. Co.*, 2001 Guam 24 ¶ 14. Also, the motion to dismiss the petition is granted on the alternative grounds of laches, so discussion of equitable tolling is unnecessary.

to change the substantive merits of the petition are now moot. Thus, Ignacio's Petition for Writ of Habeas Corpus is hereby **DISMISSED**.

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Chief Justice