

1 CODE No. 3370
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
6
7 IN AND FOR THE COUNTY OF WASHOE

8 * * *

9 BRENDAN DUNCKLEY,

10 Petitioner,

11 v.

Case No. CR07-1728

12 Dept. No. 4

13 THE STATE OF NEVADA,
14 ROBERT LEGRAND,

15 Respondent.
16 _____/

17 FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

18 This matter comes before the Court on Petitioner's post-conviction petition for a writ of
19 habeas corpus. The Court held a hearing on the State's motion to dismiss the petition on April
20 27, 2017. The Court grants the motion to dismiss and makes the following findings of fact and
21 conclusions of law.

22 1. On August 5, 2008, this Court convicted petitioner, pursuant to his guilty plea, of
23 lewdness with a child under the age of fourteen years and attempted sexual assault. On May 8,
24 2009, the Nevada Supreme Court affirmed the judgment of conviction on direct appeal.
25 *Dunkley v. State*, Docket No. 52383 (Order of Affirmance, May 8, 2009).

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1 2. On July 8, 2009, petitioner filed a motion in this Court to modify his sentence,
2 arguing he was innocent. This Court denied the motion, and on September 9, 2010, the
3 Nevada Supreme Court affirmed this Court's order. *Dunckley v. State*, Docket No. 55545
4 (Order of Affirmance, September 9, 2010).

5 3. On July 21, 2009, petitioner filed a post-conviction petition for a writ of habeas
6 corpus. The Court denied the petition after an evidentiary hearing, and on January 16, 2013,
7 the Nevada Supreme Court affirmed this Court's order denying habeas relief. *Dunckley v.*
8 *State*, Docket No. 59957 (Order of Affirmance, January 16, 2013).

9 4. On November 7, 2016, petitioner filed a second post-conviction petition for a writ of
10 habeas corpus. The State moved this Court to dismiss the petition because it is untimely and
11 successive.

12 5. A petitioner must file a post-conviction petition for a writ of habeas corpus within
13 one year after entry of the judgment of conviction, or one year after the Supreme Court issues
14 its remittitur, if an appeal is taken. NRS 34.726(1). An untimely or successive petition is
15 procedurally barred and must be dismissed absent a demonstration of good cause for the delay
16 and undue prejudice. *Id.*; NRS 34.810(1)(b)(2); *State v. Haberstroh*, 119 Nev. 173, 180, 69
17 P.3d 676, 681 (2003) (application of the procedural default rules to post-conviction petitions
18 for writs of habeas corpus is mandatory); *Pellegrini v. State*, 117 Nev. 860, 876, 34 P.3d 519,
19 530 (2001) (the Nevada Legislature "never intended for petitioners to have multiple
20 opportunities to obtain post-conviction relief absent extraordinary circumstances.").

21 6. Good cause is established by showing that an impediment external to the defense
22 prevented a petitioner from filing a timely petition. *See Harris v. Warden*, 114 Nev. 956, 959,
23 964 P.2d 785, 787 (1998), *clarified by Hathaway v. State*, 119 Nev. 248, 71 P.3d 503 (2003);
24 *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986).

25 7. "An impediment external to the defense may be demonstrated by a showing 'that the
26 factual or legal basis for a claim was not reasonably available to counsel, or that 'some

1 interference by officials,' made compliance impracticable.' ” *Hathaway v. State*, 119 Nev. 248,
2 252, 71 P.3d 503, 506 (2003) (quoting *Murray*, 477 U.S. at 488 (1986) (citations omitted)).

3 8. “[A]ctual prejudice” requires a showing “ ‘not merely that the errors [complained of]
4 created a possibility of prejudice, but that they worked to [the petitioner's] actual and
5 substantial disadvantage, in affecting the state proceeding with error of constitutional
6 dimensions.’ ” *Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting
7 *United States v. Frady*, 456 U.S. 152, 170 (1982)).

8 9. A claim of ineffective assistance of post-conviction counsel may provide good cause
9 for filing a successive petition if counsel was appointed under statutory mandate, *Crump v.*
10 *Warden*, 113 Nev. 293, 304–05, 934 P.2d 247, 254 (1997); see also *McKague v. Warden*, 112
11 Nev. 159, 164–65 & n. 5, 912 P.2d 255, 258 & n. 5 (1996), but such a claim is still subject to
12 other procedural bars, including timeliness under NRS 34.726, *State v. Dist. Ct. (Riker)*, 121
13 Nev. 225, 235, 112 P.3d 1070, 1077 (2005); see also *Hathaway v. State*, 119 Nev. 248, 252–53,
14 71 P.3d 503, 506 (2003) (explaining that “to constitute adequate cause, the ineffective
15 assistance of counsel claim itself must not be procedurally defaulted”).

16 10. The failure to show good cause may be excused where the prejudice from a failure to
17 consider the claim amounts to a “fundamental miscarriage of justice.” *Mazzan v. Warden*, 112
18 Nev. 838, 842, 921 P.2d 920, 922 (1996); *Hogan*, 109 Nev. at 959, 860 P.2d at 715–16; cf. NRS
19 34.800(1)(b). This standard can be met where the petitioner makes a colorable showing he is
20 actually innocent of the crime or is ineligible for the death penalty. See *Mazzan*, 112 Nev. at
21 842, 921 P.2d at 922; *Hogan*, 109 Nev. at 954–55, 959, 860 P.2d at 712, 715–16.

22 11. To prove actual innocence as a gateway to reach procedurally-barred constitutional
23 claims of error, a petitioner must show that “ ‘it is more likely than not that no reasonable juror
24 would have convicted him in light of the new evidence.’ ” *Calderon v. Thompson*, 523 U.S.
25 538, 559 (1998); see also *Pellegrini*, 117 Nev. at 887, 34 P.3d at 537. “ ‘[A]ctual innocence’

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1 means factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614,
2 623-24 (1998) (citing *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)); see also *Rozzelle v. Sec’y,*
3 *Florida Dep’t of Corr.*, 672 F.3d 1000, 1016 (11th Cir. 2012) (explaining that the actual
4 innocence exception contemplates the “extremely rare” cases where the State convicted an
5 innocent man, not “run of the mill” cases where the petitioner argues that he is guilty of a
6 lesser offense than that for which he was convicted). “‘To be credible,’ a claim of actual
7 innocence must be based on reliable evidence not presented at trial.” *Calderon v. Thompson*,
8 523 U.S. 538, 559 (1998) (quoting *Schulp*, 513 U.S. at 324 (1995)).

9 12. Here, petitioner filed his second post-conviction habeas petition on November 7,
10 2016. The Nevada Supreme Court affirmed petitioner’s judgment of conviction on direct
11 appeal on May 8, 2009, and issued the remittitur on June 2, 2009. Thus, the present petition
12 is untimely and successive. It is barred absent a demonstration of good cause and prejudice or
13 actual innocence to overcome the procedural bars. NRS 34.726(1); NRS 34.810(1)(b)(2).

14 13. Petitioner claims he is actually innocent because certain exhibits he has provided
15 purportedly show he was in other cities when he committed his crimes.¹ The exhibits, however,
16 do not show petitioner was never in Reno during the time the State alleged he committed his
17 crimes, although they do tend to show he may have also been in other places during the general
18 time frame the State contends he committed his crimes. In other words, petitioner may have
19 been in other cities and in Reno during the relevant time period alleged in the Information. In
20 short, petitioner’s exhibits do not show he is actually innocent.

21 14. Nor is the alibi evidence new. According to petitioner’s allegations in his petition
22 (pp.28-29), both his lawyer and the prosecutor knew of the evidence.

23
24 ¹Petitioner appears to assert actual innocence more as a substantive claim for habeas
25 relief rather than a procedural claim to overcome the procedural bars. See *Berry v. State*, 131
26 Nev. Adv. Op. 96, 363 P.3d 1148, 1154-55 (2015) (explaining that actual innocence provides a
gateway to have procedurally defaulted claims heard on the merits). The Court addresses the
actual innocence claim procedurally and substantively.

1 15. Petitioner also pursued his alibi defense at his first habeas proceeding. There, as the
2 Nevada Supreme Court noted, “[t]he district court denied Dunckley relief on this ground
3 because it found credible counsel’s testimony that he investigated Dunckley’s alibi defense yet
4 Dunckley insisted on pleading guilty in an attempt to receive probation.” *Dunckley v. State*,
5 Docket No. 59958 (Order of Affirmance, January 16, 2013). The Nevada Supreme Court
6 concluded this Court’s finding was supported by substantial evidence, and affirmed this Court’s
7 finding that Dunckley had failed to demonstrate his counsel’s performance was deficient. *Id.*
8 Thus, Dunckley failed to prove that even if he had an alibi defense, he would not have pleaded
9 guilty and would have insisted on proceeding to trial. *See Hill v. Lockhart*, 474 U.S. 52, 58-59
10 (1985) (To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment
11 of conviction based on a guilty plea, a petitioner must demonstrate that his counsel’s
12 performance was deficient in that it fell below an objective standard of reasonableness, and
13 that there is a reasonable probability that, but for counsel’s errors, petitioner would not have
14 pleaded guilty and would have insisted on going to trial); *Kirksey v. State*, 112 Nev. 980, 988,
15 923 P.2d 1102, 1107 (1996).

16 16. The Nevada Supreme Court’s ruling is law of the case and may not be litigated again,
17 absent new and unforeseen evidence of actual innocence. *See Hall v. State*, 91 Nev. 314, 315,
18 535 P.2d 797, 798 (1975) (“The law of a first appeal is the law of the case on all subsequent
19 appeals in which the facts are substantially the same.” (quoting *Walker v. State*, 85 Nev. 337,
20 343, 455 P.2d 34, 38 (1969))). Thus, petitioner’s actual innocence claim, as a substantive and
21 procedural claim, fails to show he is entitled to relief.

22 17. Petitioner also asserts he is actually innocent because DNA results show the absence
23 of the victim’s DNA on him. He alleges that if he forced the victim to perform fellatio on him,
24 certainly her DNA would have been on him, since police officers responded within minutes of
25 the victim’s report.

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1 18. The absence of DNA, however, is not evidence of actual innocence. There are any
2 number of reasons why there was no DNA evidence found on Dunckley.

3 19. The DNA evidence is also not new evidence. Petitioner litigated the effect of the
4 DNA results on his guilty plea, this Court rejected the claim, and the Nevada Supreme Court
5 affirmed this Court's ruling. *Dunckley v. State, supra*. Thus, the DNA evidence is irrelevant
6 both as a substantive claim and as a procedural device to overcome defaulted claims, it is not
7 new evidence, and the claim is barred by the law of the case.

8 20. At the hearing on the State's motion to dismiss, petitioner argued the fact that
9 because he pursued habeas relief in federal court good cause exists to overcome the procedural
10 bars. The Court disagrees. *See Colley v. State*, 105 Nev. 235, 773 P.2d 1229 (1989).

11 21. The State also moves to dismiss the petition because "[a] period exceeding 5 years
12 between the filing of a . . . decision on direct appeal of a judgment of conviction and the filing of
13 a petition challenging the validity of a judgment of conviction creates a rebuttable presumption
14 of prejudice to the State." NRS 34.800(2).

15 22. Petitioner has failed to rebut the presumption of prejudice to the State because of
16 laches. The Court dismisses the petition for this additional reason.

17 23. Wherefore, the Court dismisses the post-conviction petition for a writ of habeas
18 corpus.

19
20 DATED this 28 day of June, 2017.

21
22 Connie J. Steinheimer
23 DISTRICT JUDGE
24
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CERTIFICATE OF SERVICE

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the
STATE OF NEVADA, COUNTY OF WASHOE; that on the 29th day of
June, 2017, I filed the attached document with
the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document
by the method(s) noted below:

 Personal delivery to the following: [NONE]

☒ **Electronically filed with the Clerk of the Court, using the eFlex system which
constitutes effective service for all eFiled documents pursuant to the efile User
Agreement:**

Joseph Plater, Esq.
Deputy District Attorney

☒ **Transmitted document to the Second Judicial District Court mailing system
in a sealed envelope for postage and certified mailing with the United States Postal
Service in Reno, Nevada:**

Brendan Dunckley
Inmate no. 1023236
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

 Placed a true copy in a sealed envelope for service via:

 Reno/Carson Messenger Service – **[NONE]**

 Federal Express or other overnight delivery service – **[NONE]**

 Inter-Office Mail – **[NONE]**

DATED this 29th day of June, 2017.



1 **Code 1350**

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Elizabeth A. Brown
Clerk of Supreme Court

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6 **IN AND FOR THE COUNTY OF WASHOE**

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8 **BRENDAN DUNCKLEY,**

Case No. CR07-1728

9 **Petitioner,**

Dept. No. 4

10 **Vs,**

11 **THE STATE OF NEVADA**
12 **ROBERT LEGRAND,**

13 **Respondent.**

14 _____ /
15 **CERTIFICATE OF CLERK AND TRANSMITTAL**

16 I certify that I am an employee of the Second Judicial District Court of the State of
17 Nevada, County of Washoe. On the 17th day of August, 2017, I electronically filed to the
18 Supreme Court the Findings of Fact, Conclusions of Law and Judgment filed June 29,
19 2017. The Order is transmitted pursuant to the Supreme Court's Order Directing Entry and
20 Transmission of Written Order filed August 16, 2017.

21 I further certify that the transmitted record is a copy of the original pleadings on file
22 with the Second Judicial District Court.

23 Dated this 17th day of August, 2017.

24
25 Jacqueline Bryant
Clerk of the Court

26
27 By /s/Yvonne Viloria
Yvonne Viloria
28 Deputy Clerk