

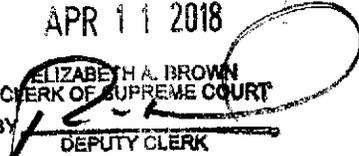
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRENDAN DUNCKLEY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 73095

FILED

APR 11 2018

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Brendan Dunckley appeals from an order of the district court denying the postconviction petition for a writ of habeas corpus he filed on November 7, 2016.<sup>1</sup> Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Dunckley filed his petition more than seven years after issuance of the remittitur on direct appeal on June 2, 2009. *See Dunckley v. State*, Docket No. 52383 (Order of Affirmance, May 8, 2009). Thus, Dunckley's petition was untimely filed. *See* NRS 34.726(1). Moreover, Dunckley's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus.<sup>2</sup> *See* NRS 34.810(2). Dunckley's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3). Moreover,

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<sup>1</sup>This appeal has been submitted for decision without oral argument and we conclude the record is sufficient for our review and briefing is unwarranted. NRAP 34(f)(3), (g).

<sup>2</sup>*Dunckley v. State*, Docket No. 59958 (Order of Affirmance, January 16, 2013).

because the State specifically pleaded laches, Dunckley was required to overcome the rebuttable presumption of prejudice. *See* NRS 34.800(2).

First, Dunckley claimed he had good cause and prejudice to overcome the procedural bars because he is exhausting his claims for federal review. Exhausting claims for federal review is insufficient to demonstrate cause to excuse the procedural bars. *See Colley v. State*, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Therefore, the district court did not err by denying this claim.

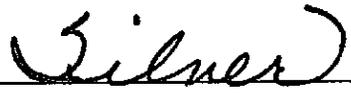
Second, Dunckley claimed he could overcome the procedural bars because he was actually innocent. Specifically, he claimed he was actually innocent because he had alibi evidence placing him outside of the State during the time period alleged in count one of the information and because the victim's DNA was not found on Dunckley's genitals minutes after the alleged conduct in count two.

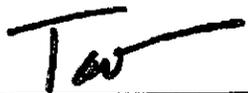
Dunckley failed to demonstrate actual innocence because he failed to show "it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence." *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). Dunckley argued in his previous petition that counsel was ineffective for failing to investigate his alibi evidence or to present him with the DNA evidence prior to pleading guilty. However, after holding an evidentiary hearing on those claims, the district court concluded counsel did investigate and discuss the DNA evidence with Dunckley prior to him pleading guilty, and Dunckley decided to plead guilty anyway. This conclusion was affirmed on appeal by the Nevada Supreme Court. *See Dunckley v. State*, Docket No. 59958 (Order of Affirmance, January 16, 2013). Therefore, Dunckley failed

to show new evidence demonstrates he is actually innocent. Accordingly, the district court did not err by denying this claim.

Finally, Dunckley failed to overcome the presumption of prejudice to the State. Therefore, the district court did not err by denying the petition as procedurally barred, and we

ORDER the judgment of the district court AFFIRMED.

, C.J.  
Silver

, J.  
Tao

, J.  
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge  
Brendan Dunckley  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk