

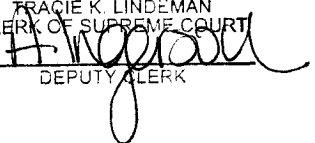
IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDERIC GREEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 59153

**FILED**

JUN 13 2012

FRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order by the district court dismissing appellant Frederic Green's post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Green filed his petition on July 12, 2010, more than six years after issuance of the remittitur on direct appeal on January 6, 2004. Green v. State, 119 Nev. 542, 80 P.3d 93 (2003). Thus, his petition was untimely filed. See NRS 34.726(1). Green's petition was also successive and an abuse of the writ because he had previously litigated a post-conviction petition for a writ of habeas corpus.<sup>1</sup> See NRS 34.810(1)(b)(2), (2). Accordingly, Green's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(1)(b), (3). "To show 'good cause,' a petitioner must demonstrate that an impediment external to the defense prevented him

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<sup>1</sup>Green v. State, Docket No. 47318 (Order of Affirmance, June 4, 2007).

from raising his claims earlier.” Pellegrini v. State, 117 Nev. 860, 886, 34 P.3d 519, 537 (2001).

Green argues that the district court’s dismissal of his petition as procedurally barred is a violation of due process because it will result in an inability to exhaust his claims and obtain review of them in federal court. In his petition, he asserted that the federal habeas court determined that he failed to exhaust state remedies, and the goal of his post-conviction petition was to “clarify the Court’s earlier denial in terms that will be recognized by the federal court system as exhausted for purposes of review.” To the extent that he argues that the procedural defects should be excused because he needs to exhaust his claims for federal review, raising claims in an untimely and successive petition for purposes of exhaustion does not constitute good cause. See Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994) (holding that good cause must be an impediment external to the defense); see also Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). Because the petition was procedurally barred and application of the procedural bars is mandatory, the district court did not err in dismissing the petition.<sup>2</sup> See State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

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<sup>2</sup>Green also asserts that the district court lacked jurisdiction to dismiss his federal habeas claims. In dismissing his post-conviction petition, the district court dismissed “all claims from Grounds 2, 3, 4, and 5(E) of Petitioner’s Federal Petition.” Green is correct that the district court does not have jurisdiction to rule on his federal habeas claims. We note that it is unclear whether the district court intended to do so, but, in any event, we conclude that the district court’s statement has no bearing on the dismissal of his state post-conviction petition, nor does it have any effect on the resolution of Green’s federal habeas petition.


Green next contends that this court failed to rule on claims that were properly raised in his opening brief on appeal from the denial of his first post-conviction petition, which precluded the federal court from deeming those claims exhausted. He argues that this court should rule upon those claims now so that he may raise them in federal court. Green's contention that this court failed to address arguments in his prior appeal should have been raised in a petition for rehearing, see NRAP 40, and his failure to file such a petition precludes us from considering his claims in the instant post-conviction petition, see NRS 34.810(1)(b)(3). Further, as discussed above, the need to exhaust claims for federal review does not constitute good cause.

Green also contends that the district court erred by dismissing his petition because he demonstrated that he is actually innocent. A petitioner may be entitled to review of defaulted claims if failure to review the claims would result in a fundamental miscarriage of justice—that is, where the petitioner makes a colorable showing of actual innocence. Id. at 887, 34 P.3d at 537. In support of his actual-innocence claim, Green asserts in a conclusory fashion that he has maintained his innocence and demonstrated constitutional error with regard to jury instructions, cross-examination limitations, and improperly admitted evidence of bad acts. His claims of constitutional error, however, were procedurally barred, and he failed to identify any new evidence that would undermine the jury's verdict. See Calderon v. Thompson, 523 U.S. 538, 559 (1998) (holding that to demonstrate actual innocence, a petitioner “must show ‘it is more likely than not that no reasonable juror would have convicted him in light of the new evidence’ presented in his habeas petition.” (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995))); see also Evans v. State, 117 Nev. 609, 621, 28

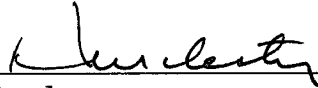
P.3d 498, 507 (2001) (“A defendant seeking post-conviction relief cannot rely on conclusory claims for relief.”). Therefore, Green failed to show that he was actually innocent.

Having considered Green’s contentions and concluded that he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Pickering

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Janet J. Berry, District Judge  
Karlà K. Butko  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk