

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANK KEVIN BLACKBURN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 70061

**FILED**

SEP 20 2016

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from an order of the district court denying a postconviction petition for a writ of habeas corpus.<sup>1</sup> Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Appellant Frank Blackburn filed his petition on December 4, 2015, more than two years after issuance of the remittitur on direct appeal on March 11, 2013. *See Blackburn v. State*, 129 Nev. \_\_\_, 294 P.3d 422 (2013). Thus, Blackburn's petition was untimely filed. *See* NRS 34.726(1). Moreover, Blackburn's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus, and it constituted an abuse of the writ as he raised claims new and different from those raised in his previous petition. *See* NRS 34.810(2). Blackburn's petition was procedurally barred absent a demonstration of good cause and actual prejudice. *See* NRS 34.726(1); NRS 34.810(3).


In an attempt to overcome the procedural bars, Blackburn claims he is actually innocent of attempted sexual assault because he was


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<sup>1</sup>This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

not seen by a magistrate within 72 hours of arrest, the victim used an alias because she had warrants for her arrest, the victim had been convicted of lying to a police officer, the victim is a known prostitute, the State withheld her criminal record, he received ineffective assistance of counsel, and the State committed "fraud on the court." Blackburn did not demonstrate actual innocence because he failed to show that "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); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Further, all of Blackburn's assertions go to legal insufficiency and not factual innocence. *Bousley v. United States*, 523 U.S. 614, 623-24 (1998). We therefore conclude the district court did not err in denying Blackburn's petition, and we

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

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<sup>2</sup>We conclude the district court did not abuse its discretion by denying Blackburn's motion to appoint counsel. See NRS 34.750(1).

cc: Hon. Stefany Miley, District Judge  
Frank Kevin Blackburn  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk