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MAR 24 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Respondent,<br><br>v.<br><br>DANELL McALISTER,<br><br>Petitioner. | 2 CA-CR 2010-0408-PR<br>DEPARTMENT A<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR035163

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

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Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Danell McAlister
Florence
In Propria Persona

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E S P I N O S A, Judge.

**¶1** Petitioner Danell McAlister seeks review of the trial court's summary dismissal of his successive petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

**¶2** McAlister was convicted in 1992 of three counts of sexual conduct with a minor under fifteen, all dangerous crimes against children, and one count of sexual conduct with a minor under eighteen. He was sentenced to a total of eighty-six years' imprisonment. We affirmed his convictions and sentences on appeal. *State v. McAlister*, No. 2 CA-CR 92-0878 (memorandum decision filed Sept. 6, 1994). He subsequently filed at least five petitions for post-conviction relief, all of which were denied, as well as three petitions for review, which also were denied. *State v. McAlister*, No. 2 CA-CR 2009-0054-PR (memorandum decision filed Jun. 25, 2009); *State v. McAlister*, No. 2 CA-CR 2006-0159-PR (memorandum decision filed Jan. 26, 2007); *State v. McAlister*, No. 2 CA-CR 95-0007-PR (memorandum decision filed May 31, 1995).

**¶3** In 2010, McAlister filed another notice and petition for post-conviction relief, asserting: (1) he was innocent and therefore his various claims should not be precluded; (2) the state had concealed exculpatory evidence; (3) his trial and appellate counsel had been ineffective; (4) his right to confrontation had been denied because he was not permitted to use testimony from his previous trial, which had ended in a mistrial, to impeach witnesses at his second trial; (5) the trial court had committed misconduct by permitting the admission of evidence precluded at his first trial; (6) the state had tampered with witnesses and suborned perjury; (7) he was being denied access to

transcripts from his first trial that would support his claims; (8) the evidence was insufficient to support his convictions; (9) and the trial court had lacked subject matter jurisdiction because it had permitted the admission of evidence precluded at his first trial. The trial court summarily dismissed McAlister's petition, finding his claims precluded or untimely, and denied his subsequent motion for reconsideration.

**¶4** On review, McAlister again argues his claims should not be precluded because they are based on a claim of actual innocence, which he asserts provides a "gateway" for this court to review his constitutional claims. He relies on United States Supreme Court cases defining an exception to preclusion in federal habeas cases wherein a defendant can raise a procedurally precluded claim upon demonstrating "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Schlup v. Delo*, 513 U.S. 298, 327 (1995), *quoting Murray v. Carrier*, 477 U.S. 478, 496 (1986); *see also Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."). In order to meet that burden, a petitioner must show "it is more likely than not that no reasonable juror would have convicted him in the light of . . . new [reliable] evidence," that was not presented at trial, "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Schlup*, 513 U.S. at 324, 327.

**¶5** But McAlister cites no authority, and we find none, applying *Schlup*'s reasoning to a precluded claim under Rule 32. Nor do we find any reason to do so;

claims of actual innocence and newly discovered evidence are not cognizable in federal habeas proceedings. *See Herrera*, 506 U.S. at 404-05; *see also* Ariz. R. Crim. P. 32.1(e), (h). In contrast, under Rule 32, a petitioner may obtain relief if he actually is innocent or obtains new evidence that "probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e), (h). And Rule 32 claims of actual innocence or newly discovered evidence are not subject to preclusion, provided a petitioner gives "meritorious reasons" for having failed to bring the claim in a previous petition, *see* Ariz. R. Crim. P. 32.2(b), which the trial court correctly found McAlister had not. In any event, even if *Schlup* applied, McAlister has not met his burden, having identified no new evidence supporting his innocence claim. Therefore, even under *Schlup*, his claim of actual innocence would not prevent preclusion of his other claims.

**¶6** McAlister additionally asserts his claims should not be precluded because he was "deni[ed] . . . access to the courts" by not having been provided transcripts from his first trial. It appears we rejected this argument in 2007, stating McAlister had been provided "a copy of the record on appeal and the transcripts of his trial." *McAlister*, No. 2 CA-CR 2006-0159-PR, ¶ 4. And, even assuming McAlister's present argument is distinguishable from that claim, he offers no explanation for having failed to raise it adequately when he first sought post-conviction relief. *See* Ariz. R. Crim. P. 32.1(f), 32.2(b); *see also McAlister*, No. 2 CA-CR 95-0007-PR, at 1-2 (denying relief because McAlister failed to file amended petition for post-conviction relief despite "trial court's numerous orders to do so").

**¶7** Our review of the record shows the trial court correctly determined McAlister's claims, to the extent they are cognizable under Rule 32, were either precluded or untimely raised. Accordingly, although we grant review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge