

JAN 4 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY BROWNLEE,

Petitioner-Appellant,

v.

KELLY SANTORO, Acting Warden,
Director Cal. Department of Corrections,

Respondent-Appellee.

No. 20-55351

D.C. No.

2:17-cv-09320-ODW-GJS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted November 18, 2022
Pasadena, California

Before: NGUYEN and SUNG, Circuit Judges, and FITZWATER,** District Judge.
Concurrence by Judge SUNG.

Petitioner-appellant Gary Brownlee (“Brownlee”) appeals the district court’s
judgment dismissing his habeas petition as a second or successive petition that does

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Sidney A. Fitzwater, United States District Judge for the
Northern District of Texas, sitting by designation.

not satisfy the requirements of 28 U.S.C. § 2244(b)(2)(B). This court granted a certificate of appealability on the following issue: whether the petition satisfied the requirements of 28 U.S.C. § 2244(b). We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. We review the district court’s judgment de novo, *Woods v. Carey*, 525 F.3d 886, 888 (9th Cir. 2008), and we affirm.

1. As to Brownlee’s “Gourdine” claim—that his trial counsel provided ineffective assistance by failing to ensure that the jury heard the testimony of Lisa Gourdine, a key alibi witness—Brownlee has failed to establish that “the factual predicate for the claim could not have been discovered previously through the exercise of due diligence.” 28 U.S.C. § 2244(b)(2)(B)(I). The due diligence requirement “turns on two factors: (1) whether the petitioner was on inquiry notice to investigate further, and, if so, (2) whether the petitioner took reasonable steps to conduct such an investigation.” *Solorio v. Muniz*, 896 F.3d 914, 921 (9th Cir. 2018). Brownlee cannot demonstrate due diligence because the evidence on which the Gourdine claim is based is not newly discovered. *See Jones v. Ryan*, 733 F.3d 825, 844 (9th Cir. 2013). Brownlee has asserted factually identical claims in several previous habeas proceedings—at both the state and federal levels—such that it is clear that he cannot satisfy the due diligence requirement for pressing the Gourdine claim. The claim was properly dismissed for failure to satisfy 28 U.S.C. § 2244(b)(2)(B)(I).

2. Concerning Brownlee’s “Filer” claim—that his counsel rendered ineffective assistance by failing to interview and secure the testimony of Carol Filer, an acquaintance of the murder victim—Brownlee has satisfied the due diligence requirement. No one knew that Filer possessed exculpatory information; Brownlee was not on inquiry notice to investigate further by interviewing her and securing her testimony at trial; and as soon as Brownlee was made aware of Filer’s knowledge, he acted upon it by obtaining a signed declaration from Filer and by filing a state habeas petition based on this new claim and including it in his present petition.

But Brownlee’s habeas claim must still be dismissed under 28 U.S.C. § 2244(b)(2)(B)(ii) because he has failed to show that “the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” This prong of § 2244(b)(2)(B) requires the applicant to assert a predicate constitutional violation and then establish that “no reasonable factfinder” would have convicted him if the evidence that was excluded because of that constitutional error

had been admitted.¹ *Gimenez v. Ochoa*, 821 F.3d 1136, 1143 (9th Cir. 2016). Brownlee cannot satisfy this requirement as to the Filer claim, or, for that matter, the Gourdine claim.

Because Brownlee has failed to show that no reasonable factfinder would have found him guilty had that constitutional error not occurred, he cannot meet this heavy burden. Had Filer’s testimony been discovered earlier and presented to the jury, it would have conflicted with the statements of several prosecution witnesses. The same is true for Gourdine’s alibi testimony. Had this evidence been admitted, it would have presented a weight-of-the-evidence issue that the jury could have reasonably resolved for the prosecution or for Brownlee. This is insufficient to carry the applicant’s burden with respect to the clear and convincing evidence requirement of § 2244(b)(2)(B)(ii).

Brownlee therefore cannot satisfy all the requirements of § 2244(b)(2)(B) as to either claim on which his petition is based. Accordingly, the district court did not err

¹ Brownlee argues that the state misstates the burden under § 2244(b)(2)(B)(ii) and that he must simply “raise enough doubt as to his guilt to show that no reasonable juror would find him guilty beyond a reasonable doubt.” In essence, Brownlee asks us to apply the preponderance standard from *Schlup v. Delo*, 513 U.S. 298, 327 (1995). But the Ninth Circuit has already held that *Schlup* does not abrogate § 2244(b)(2)(B) and that the heightened burden of proof under § 2244(b)(2)(B)(ii)—clear and convincing evidence of innocence—continues to apply to second or successive claims. *See Gage v. Chappell*, 793 F.3d 1159, 1168-69 (9th Cir. 2015).

by dismissing the petition as a second or successive one that does not comply with the standards set forth in § 2244(b)(2)(B).

3. Brownlee requests in the alternative that we remand for an evidentiary hearing to present additional evidence of his actual innocence. Brownlee did not request an evidentiary hearing in the district court. Further, to warrant a hearing, Brownlee must have alleged facts that, if proved, would entitle him to relief. *Nevius v. Sumner*, 852 F.2d 463, 466 (9th Cir. 1988). But as discussed above, even if Brownlee's contentions are presumed to be true, they do not "entitle him to relief" because of § 2244(b)(2)(B)'s stringent gatekeeping requirements. *See id.* Accordingly, we decline to remand for an evidentiary hearing.

The facts on which Brownlee's petition is based are largely undisputed, and even if Brownlee's contentions are presumed to be true, they likely do not "entitle him to relief" because of the stringent § 2244(b)(2) standards. *Nevius*, 852 F.2d at 466. And in any event, the issue is not one of Filer's and Gourdine's credibility. Accordingly, we decline to remand for an evidentiary hearing.²

AFFIRMED.

² Brownlee's motion and second motion to take judicial notice, Dkt. Nos. 19 and 41, are GRANTED.

Brownlee v. Santoro, No. 20-55351

JAN 4 2023

SUNG, Circuit Judge, concurring:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I write separately to recognize Mr. Brownlee’s personal attempts to properly frame the Gourdine claim in both his state and federal habeas petitions. The record reflects that Mr. Brownlee told his appellate counsel that his trial counsel was ineffective for failing to subpoena a key alibi witness, Lisa Gourdine, to testify at his retrial.¹ Despite this, when appellate counsel filed Mr. Brownlee’s first habeas petition in state court (filed simultaneously with his direct appeal), appellate counsel did not include an ineffective assistance of counsel claim based on trial counsel’s failure to subpoena Gourdine. Likewise, appellate counsel did not include that claim in Mr. Brownlee’s petition for review to the California Supreme Court. Although Mr. Brownlee included that claim in his first federal habeas petition, because it had not been presented to the California Supreme Court, the federal court was required to dismiss it for failure to exhaust state court remedies. *See Brownlee v. Hill*, 2005 WL 8162488, at *1 (C.D. Cal. Sept. 26, 2005) (citing 28 U.S.C. §§ 2244(b) and (c)). Appellate counsel wrote a letter describing these circumstances and suggesting that he was “now subject to the same charge, -the

¹ Gourdine testified at Mr. Brownlee’s first trial, which resulted in a mistrial because the jury deadlocked, with four jurors voting to acquit.

ineffective assistance of counsel.”² I recognize Mr. Brownlee’s diligent efforts to pursue his claim and the difficulties of the circumstances presented, even though doing so does not change the outcome of this case.

² However, there is no claim that appellate counsel provided ineffective assistance before this court.