

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALISHA BURNS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 82686

FILED

JAN 12 2023

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Appellant Alisha Burns pleaded guilty to second-degree murder for her participation in a 2002 murder and robbery with Steven Kaczmarek. *See Kaczmarek v. State*, 120 Nev. 314, 320-23, 91 P.3d 16, 21-23 (2004). She did not appeal the June 10, 2003, judgment of conviction but instead filed a timely postconviction petition, which she later withdrew. Appellant filed the postconviction habeas petition at issue here on May 14, 2019, nearly 16 years after entry of the judgment of conviction. Thus, appellant's petition was untimely and constituted an abuse of the writ. *See* NRS 34.726(1); NRS 34.810(2). Appellant's petition was procedurally barred absent a demonstration of good cause and prejudice, *see* NRS 34.726(1); NRS 34.810(3), or that the failure to consider her petition on the merits would result in a fundamental miscarriage of justice, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). The fundamental-miscarriage-of-justice standard is met when the petitioner demonstrates actual innocence. *Id.* To demonstrate actual innocence, a petitioner must show that "it is more likely than not that no reasonable juror would have convicted [her] beyond a reasonable doubt given . . . new evidence." *Id.* at 968, 363 P.3d at

1155. Thus, a petitioner must make a colorable showing of “factual innocence, not mere legal insufficiency.” *Bousley v. United States*, 523 U.S. 614, 623 (1998). Further, actual innocence in a case involving a guilty plea requires that the petitioner demonstrate that she is actually innocent of any charges forgone by the State in the course of plea bargaining. *See id.* at 624. “In reviewing the district court’s application of the procedural default rules, we will give deference to its factual findings but ‘will review the court’s application of the law to those facts de novo.’” *Rippo v. State*, 134 Nev. 411, 415-16, 423 P.3d 1084, 1093 (2018).

Appellant primarily argues that the district court erred because she demonstrated that the failure to consider her petition on the merits would result in a fundamental miscarriage of justice. In support of that argument, appellant points to the following as new evidence of her actual innocence: (1) a medical opinion suggesting the time of death on the victim’s autopsy report was inaccurate and the victim may have died two days later than was alleged; (2) evolving attitudes about sex trafficking and victims of sex trafficking that would show the control Kaczmarek wielded over appellant; and (3) letters sent by Kaczmarek to appellant while they were in pretrial detention that show the nature of their relationship and explain her confession to participating in the murder.

We agree with the district court that appellant did not demonstrate actual innocence. The district court found that the new medical opinion was inconsistent with the physical evidence. Because that finding is supported by the record, we afford it deference. And based on that finding, we agree with the district court that the new medical opinion does not establish appellant’s innocence. The testimony and evidence about attitudes toward sex trafficking and Kaczmarek’s letters to appellant

similarly do not establish her innocence. Although sex trafficking had not yet been criminalized under that moniker in Nevada when appellant pleaded guilty, Kaczmarek had been charged with kidnapping and sexually assaulting her. Thus, a defense characterizing appellant as Kaczmarek's child victim was available when she pleaded guilty. In other words, more recent legislation criminalizing "sex trafficking" does not amount to new evidence. Similarly, Kaczmarek's letters were not new evidence—appellant had them before she pleaded guilty and acknowledged providing them to her first postconviction counsel. And at best, the sex trafficking evidence and letters are relevant to a possible defense based on appellant's state of mind and thus implicate a sufficiency-of-the-evidence challenge rather than establishing appellant's factual innocence. *Bousley*, 523 U.S. at 623; *Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006); see also *Rozzelle v. Sec'y, Florida Dep't of Corr.*, 672 F.3d 1000, 1015-16 (11th Cir. 2012) (explaining that the actual innocence exception contemplates the "extremely rare" cases where the State convicted an innocent defendant, not "run of the mill" cases where the petitioner argues that he or she is guilty of a lesser offense than that for which he or she was convicted). Accordingly, the district court did not err in rejecting appellant's gateway actual innocence claim.

Next, appellant contends that first postconviction counsel's failure to raise certain ineffective-assistance-of-counsel claims amounts to good cause to excuse the procedural bars. Appellant was not entitled to the appointment of postconviction counsel, see NRS 34.750(1); thus, she had no right to the effective assistance of postconviction counsel and cannot rely on ineffective assistance of postconviction counsel as good cause. See *Brown v.*

*McDaniel*, 130 Nev. 565, 571, 331 P.3d 867, 871-72 (2014). Therefore, we conclude the district court did not err by rejecting this good-cause claim.

Lastly, appellant argues that the district court should have permitted discovery. In particular, she wanted to compare unidentified fingerprints found at the scene with updated databases. We conclude the district court did not abuse its discretion. Because appellant did not allege and prove sufficient facts to avoid the procedural bars to her petition, she necessarily did not demonstrate good cause to conduct discovery. *See* NRS 34.780(2) (“After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so.”). And it does not appear that new fingerprint evidence would make it more likely than not that no reasonable juror would have convicted appellant given her admission that she participated in the attack on the victim with Kaczmarek and wiped the surfaces they touched after the robbery and murder.<sup>1</sup> *See Berry*, 131 Nev. at 968, 363 P.3d at 1155 (explaining that even when determining whether to grant an evidentiary hearing on an actual innocence claim, the court must “review both the reliability of the new evidence and its materiality to the conviction being challenged, which in turn requires an examination of the quality of the evidence that produced the original conviction”).

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<sup>1</sup>Appellant also contends that the State’s failure to disclose Kaczmarek’s letters to her violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that counsel should have arranged for appellant to undergo a psychological evaluation before she entered her guilty plea. These arguments were not raised in her petition below; therefore, we decline to consider them on appeal in the first instance. *See McNelton v. State*, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999).

Having reviewed appellant's contentions and concluding that they lack merit, we

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

*Stiglich*, C.J.  
Stiglich

*Gibbons*, Sr. J.  
Gibbons

*Silver*, Sr. J.  
Silver

cc: Hon. Tierra Danielle Jones, District Judge  
Paul Padda Law, PLLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>2</sup>The Honorable Mark Gibbons and the Honorable Abbi Silver, Senior Justices, participated in the decision of this matter under general orders of assignment.