## IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTOPHER BRIAN KINDER, Appellant, vs. ROBERT LEGRAND, WARDEN; AND THE STATE OF NEVADA, Respondents. No. 89074-COA

AUG 2 1 2025

CLERY OF SUBPLEME COUNTS

## ORDER OF AFFIRMANCE

Christopher Brian Kinder appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on August 29, 2019. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Kinder filed his petition more than five years after issuance of the remittitur on direct appeal on May 20, 2014. See Kinder v. State, No. 62401, 2014 WL 1679560 (Nev. Apr. 25, 2014) (Order of Affirmance). Thus, Kinder's petition was untimely filed. See NRS 34.726(1). Kinder's petition was procedurally barred absent a demonstration of cause for the delay and undue prejudice, see NRS 34.726(1), or a showing he is actually innocent such that "the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice," Berry v. State, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). In order to demonstrate a fundamental miscarriage of justice, a petitioner must make a colorable showing of actual innocence—factual innocence, not legal innocence. Bousley v. United States, 523 U.S. 614, 623 (1998); Brown v. McDaniel, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014).

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Kinder asserts that the district court erred in denying his petition because the failure to consider his petition would result in a fundamental miscarriage of justice. He argues that he is actually innocent of one of the counts of possession of child pornography to which he pleaded guilty because the State could not have convicted him of two counts of possession of child pornography pursuant to *Castaneda v. State*, 132 Nev. 434, 444, 373 P.3d 108, 115 (2016) (limiting prosecution for possession of depictions of child sexual abuse to the instance of possession instead of per item possessed).

To succeed on his gateway claim of actual innocence, Kinder had to "show that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." Berry, 131 Nev. at 966, 363 P.3d at 1154 (quotation marks omitted); see also House v. Bell, 547 U.S. 518, 537 (2006) ("[A] gateway claim requires 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." (quoting Schlup v. Delo. 513 U.S. 298, 324 (1995))); Schlup, 513 U.S. at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.").

Kinder's claim relied solely on *Castaneda*, and he did not identify any new evidence supporting his actual innocence allegation. Because Kinder's claim involves legal innocence, he fails to make a colorable showing of actual innocence. Kinder suggests *Bousley* recognizes an actual innocence claim may be based on a petitioner's assertion that he was convicted under a statute that did not apply to him. Although *Bousley* 

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recognized that a change in the interpretation of an offense may predicate an actual innocence argument, *Bousley* still required the habeas petitioner to make a factual showing of actual innocence under the new interpretation. *Id.* Here, Kinder only alleges that, like in *Castaneda*, the images were found at the same time and in the same room. He does not allege sufficient facts to demonstrate that the State could not show "individual distinct crimes of possession" related to the images found across Kinder's devices. *Castaneda*, 132 Nev. at 444, 373 P.3d at 115 ("This case does not require us to decide whether distinct downloads at different times and in different locations would establish separate units of prosecution as some courts have held."). We therefore conclude the district court did not err by denying Kinder's petition as procedurally barred and barred by laches. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Bulla , C.J.

Gibbons

Westbrook

<sup>&</sup>lt;sup>1</sup>The district court erred by denying the petition on the merits because Kinder had not demonstrated circumstances excusing or avoiding the procedural bars. Nevertheless, the district court also properly denied the requested relief because the petition failed to plead sufficient facts to overcome the procedural bars. See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (holding a correct result will not be reversed simply because it is based on the wrong reason).

cc: Hon. Kimberly A. Wanker, District Judge Federal Public Defender/Las Vegas Attorney General/Carson City Nye County District Attorney Nye County Clerk