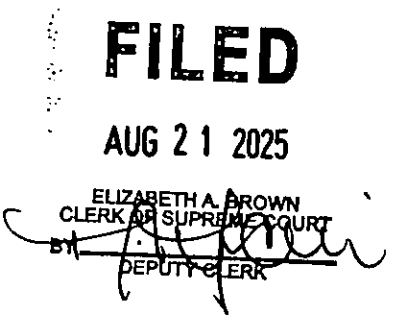
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDY MERWIN STONE,
Appellant,
vs.
TIM GARRETT, WARDEN, LOVELOCK CORRECTIONAL CENTER; JAMES DZURENDA, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS; AARON D. FORD, NEVADA ATTORNEY GENERAL; AND THE STATE OF NEVADA,
Respondents.

No. 88833-COA



ORDER OF AFFIRMANCE

Randy Merwin Stone appeals from a district court order denying a postconviction petition for a writ of habeas corpus filed on August 25, 2023. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

Stone filed his petition more than 17 years after issuance of the remittitur on direct appeal on January 17, 2006. *See Stone v. State*, Docket No. 42738 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, December 20, 2005). Thus, Stone's petition was untimely filed. *See* NRS 34.726(1). Moreover, Stone's petition was successive because he had previously filed a postconviction petition for a writ of habeas corpus that was decided on the merits, and it constituted an abuse of the writ as he raised claims new and different from those raised in his four previous petitions.[1] *See* NRS 34.810(1)(b)(2); NRS 34.810(3).

[1]*See Stone v. State*, No. 72141-COA, 2018 WL 1040109 (Nev. Ct. App. Feb. 13, 2018) (Order of Affirmance); *Stone v. State*, No. 63380, 2014 WL

Stone's petition was procedurally barred absent a demonstration of good cause and actual prejudice, *see* NRS 34.726(1); NRS 34.810(1)(b); NRS 34.810(4), or a showing that "the failure to consider the petition on its merits would amount to a fundamental miscarriage of justice," *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015). Further, because the State specifically pleaded laches, Stone was required to overcome the rebuttable presumption of prejudice to the State. *See* NRS 34.800(2). To warrant an evidentiary hearing, a petitioner's good-cause claims must be supported by specific factual allegations that are not belied by the record and, if true, would entitle the petitioner to relief. *Berry*, 131 Nev. at 967, 363 P.3d at 1154-55.

First, Stone argues the district court erred by denying his claim that he demonstrated a fundamental miscarriage of justice sufficient to overcome the procedural bars and laches without first conducting an evidentiary hearing. In his petition, he argued he could demonstrate a fundamental miscarriage of justice because his double jeopardy rights were violated when he went to trial after his *Alford* plea was improperly withdrawn.

"A fundamental miscarriage of justice requires a colorable showing that the petitioner is actually innocent of the crime or is ineligible for the death penalty." *Lisle v. State*, 131 Nev. 356, 361, 351 P.3d 725, 730 (2015) (internal quotation marks omitted). Actual innocence means factual innocence, not legal innocence. *Brown v. McDaniel*, 130 Nev. 565, 576, 331

4639451 (Nev. Sept. 16, 2014) (Order of Affirmance); *Stone v. State*, Docket No. 48710 (Order of Affirmance and Directing Correction of Judgment of Conviction, February 8, 2008). Stone did not appeal from the denial of his second petition.

P.3d 867, 875 (2014). To demonstrate actual innocence a petitioner must show that "it is more likely than not that no reasonable juror would have convicted [the petitioner] 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), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018). "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." *Schlup*, 513 U.S. at 316.

Stone's double jeopardy claim is not a claim of factual innocence, nor does he allege that no reasonable juror would have convicted him based on his double jeopardy claim. Thus, his claim does not implicate actual innocence or a fundamental miscarriage of justice. And we decline Stone's invitation to extend the fundamental miscarriage of justice standard beyond a claim of actual innocence. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Second, Stone argues the district court erred by denying his claim that he demonstrated a fundamental miscarriage of justice sufficient to overcome the procedural bars and laches because he is actually innocent without first conducting an evidentiary hearing. In his petition, Stone contended he was actually innocent based on a new expert report that Stone argued would undermine the credibility of the victim. Expert testimony in this regard would have at most given the jurors another factor to assess the victim's credibility. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573

(1992) ("[I]t is the jury's function, not that of the [reviewing] court, to assess the weight of the evidence and determine the credibility of witnesses."); *Clark v. State*, 95 Nev. 24, 28, 588 P.2d 1027, 1029 (1979) (stating that expert "testimony is not binding on the trier of fact, and the jury [is] entitled to believe or disbelieve the expert witnesses"). But we conclude such evidence does not amount to a colorable showing of Stone's actual innocence. Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing.

Third, Stone argues the district court erred by denying his claim that he demonstrated good cause to overcome the procedural bars without first conducting an evidentiary hearing. In his petition, Stone contended he had good cause because he was not appointed counsel in the first postconviction habeas proceedings. The Nevada Supreme Court previously rejected this good-cause claim with regard to a prior petition filed by Stone because Stone was not entitled to the appointment of counsel in his first postconviction proceedings.[2] *See Stone*, No. 63380, 2014 WL 4639451, at *1. Thus, this claim is barred by the doctrine of law of the case which "cannot be avoided by a more detailed and precisely focused argument." *Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975).

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[2]While Stone does not specifically request this court to overrule *Brown v. McDaniel*, 130 Nev. 565, 569 331 P.3d 867, 870 (2014) (stating "there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and where there is no right to counsel there can be no deprivation of effective assistance of counsel" (internal quotation marks omitted)), Stone's argument would require this court to do so. "[T]his court cannot overrule Nevada Supreme Court precedent." *Eivazi v. Eivazi*, 139 Nev. 408, 418 n.7, 537 P.3d 476, 487 n.7 (Ct. App. 2023). Further, we note the supreme court recently upheld *Brown* in an unpublished order. *See Coca v. State*, No. 85519, 2024 WL 1266990 (Nev. Mar. 22, 2024) (Order of Affirmance).

Therefore, we conclude the district court did not err by denying this claim without first conducting an evidentiary hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Crystal Eller, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk