

The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
April 22, 2021

2021COA54

No. 19CA1465, *Coyle v. State of Colorado* — Criminal Law — Compensation for Certain Exonerated Persons — Actual Innocence Required — Legal Error Unrelated to Actual Innocence

A division of the court of appeals considers Colorado's Exoneration Act, §§ 13-65-101 to -103, C.R.S. 2020. The Act permits some wrongly convicted people to seek compensation from the State, but the Act does not permit a person to file a petition for compensation if the person's conviction was reversed based on a legal error unrelated to actual innocence. As a matter of first impression in Colorado, the division concludes that an error involving the failure to ensure juror unanimity is a legal error unrelated to the person's actual innocence. Because the appellant's conviction was reversed on only that ground, he is ineligible to file a

petition for compensation under the Act. Therefore, the division affirms the district court's judgment dismissing his petition.

Court of Appeals No. 19CA1465
Washington County District Court No. 18CV30004
Honorable Charles M. Hobbs, Judge

William Andrew Coyle,

Plaintiff-Appellant,

v.

State of Colorado,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE NAVARRO
J. Jones and Yun, JJ., concur

Announced April 22, 2021

Levin Jacobson Japha, P.C., Daniel J. Levin, Don D. Jacobson, David C. Japha, Evan J. House, Denver, Colorado, for Plaintiff-Appellant

Philip J. Weiser, Attorney General, Stephanie Lindquist Scoville, First Assistant Attorney General, Melissa D. Allen, Senior Assistant Attorney General, Denver, Colorado, for Defendant-Appellee

¶ 1 Colorado’s Exoneration Act, §§ 13-65-101 to -103, C.R.S. 2020, permits some wrongly convicted people to seek compensation from the State. But the Act does not permit a person to file a petition for compensation if the person’s conviction was reversed based on a legal error unrelated to actual innocence. As a matter of first impression in Colorado, we conclude that an error involving the failure to ensure juror unanimity is a legal error unrelated to the person’s actual innocence. Because appellant William Andrew Coyle’s conviction was reversed on only that ground, he is ineligible to file a petition for compensation under the Act.¹

¶ 2 Because we also reject Coyle’s contention that the Act precludes a motion to dismiss under C.R.C.P. 12(b)(5), we affirm the district court’s judgment granting the State’s partial motion to dismiss his petition for failure to state a claim upon which relief can be granted.

¹ To the extent Coyle sought a refund of fees, court costs, and restitution imposed as a result of his conviction, the State did not contest his entitlement to those payments. *See Nelson v. Colorado*, 581 U.S. ___, ___, 137 S. Ct. 1249, 1253 (2017). So those payments are not at issue here.

I. Factual and Procedural History

A. The Conviction

¶ 3 Coyle was charged with sexual assault on a child by one in a position of trust and attempted sexual assault on a child. The alleged victim testified that Coyle touched her inappropriately on two occasions. At trial, the jury instructions did not specify which act applied to which charge, and the prosecutor did not explain to the jury which incident constituted the alleged completed assault and which incident constituted the alleged attempted assault. The jury acquitted Coyle of the completed sexual assault charge but convicted him of the attempted sexual assault charge.

B. *Coyle I* and the Remand

¶ 4 Coyle appealed his conviction on the ground that the trial court plainly erred by not requiring the prosecution to elect which act it relied on to support the attempted sexual assault charge or, alternatively, by not instructing the jurors that they must unanimously agree that Coyle committed a specific act or that he committed all the alleged acts (i.e., a modified unanimity instruction). A division of this court agreed, discerning “a reasonable likelihood that the jurors disagreed upon which act

Coyle committed to support the attempted sexual assault on a child conviction.” *People v. Coyle*, slip op. at 7-8 (Colo. App. No. 12CA2600, May 28, 2015) (not published pursuant to C.A.R. 35(f)) (*Coyle I*). The division reversed the conviction and remanded for a new trial on the attempt charge — subject to the trial court’s consideration of whether a new trial would violate Coyle’s double jeopardy rights because it was unclear which incident was the subject of his acquittal.

¶ 5 On remand, the parties agreed that another trial would violate Coyle’s double jeopardy rights. The trial court thus granted Coyle’s motion to dismiss the attempt charge.

C. Coyle’s Petition for Compensation

¶ 6 Following dismissal of the criminal case, Coyle filed a petition for compensation under the Act. As pertinent here, he sought compensation for the time he spent in prison, the time he spent on the sex offender registry, child support payments that became due while he was incarcerated, interest on child support arrearages that accrued during his incarceration, and reasonable attorney fees.

¶ 7 The State moved to dismiss for failure to state a claim, arguing that Coyle’s conviction was reversed for legal error unrelated to

actual innocence. He countered that the *Coyle I* division had reversed his conviction based on his actual innocence. The district court agreed with the State and granted the motion to dismiss.

¶ 8 Coyle moved for reconsideration on the basis that the court should have denied the motion to dismiss on procedural grounds. He argued the Act provides that, if the State objects to the relief sought in a petition, the State must file a response as prescribed by the Act and the court must hold a trial. The district court again disagreed. The court concluded that C.R.C.P. 12, which permits motions to dismiss, governs this action.

II. Coyle's Procedural Arguments

¶ 9 Coyle first contends that, by granting the State's motion to dismiss, the district court departed from the procedure the Act requires. According to Coyle, section 13-65-102(5)(d)(II), C.R.S. 2020, creates a unique process that limits the bases for challenging a petition either to the facts supporting actual innocence or to the petitioner's eligibility for compensation. He reasons that, because both grounds trigger the right to a trial, the Act necessarily requires

a trial on all contested petitions and forbids granting a motion to dismiss. See § 13-65-102(6)(b).² Coyle is mistaken.

A. Standard of Review

¶ 10 Coyle’s argument raises questions of statutory interpretation, which we review de novo. *McCoy v. People*, 2019 CO 44, ¶ 37. In construing any statute, we seek to ascertain and effectuate the General Assembly’s intent. *Martin v. People*, 27 P.3d 846, 851 (Colo. 2001). To do so, we begin with the plain language of the statute, reading the words and phrases in context and construing them according to their common usage. *McCulley v. People*, 2020 CO 40, ¶ 10. We also consider the statutory scheme “as a whole, giving consistent, harmonious, and sensible effect to all of its parts.” *McCoy*, ¶ 38. If the statutory language is clear and unambiguous, we apply it as written without resorting to other means of discerning legislative intent. *People v. Huckabay*, 2020 CO 42, ¶ 13.

² At oral argument, Coyle’s counsel seemed to suggest that a trial is not necessary to resolve every contested petition. Because it is unclear whether, through this passing suggestion, Coyle intended to abandon the procedural arguments he presented in his briefs, we address those arguments.

B. Colorado's Exoneration Act

¶ 11 Because Coyle's argument concerns the proper procedure under the Act, we provide an overview of the Act.

¶ 12 The Act is found in Article 65 of Title 13; this article is titled "Compensation for Certain Exonerated Persons." The General Assembly itself authored this title. See Ch. 409, sec. 2, §§ 13-65-101 to -103, 2013 Colo. Sess. Laws 2412-23; see also *In re Title, Ballot Title, & Submission Clause for 2009-2010, No. 24*, 218 P.3d 350, 353-54 (Colo. 2009) (noting that a reviewing court can employ a heading selected by the legislature as an aid in construing a statute). Consistent with this title, the Act creates a civil claim for relief aimed at compensating certain people wrongfully convicted of and incarcerated for felonies, but it erects procedural and substantive barriers to limit those who are entitled to relief. See § 13-65-102(1); *Abu-Nantambu-El v. State*, 2018 COA 30, ¶ 12.

¶ 13 First, the Act sets forth threshold eligibility requirements for filing a petition. *Abu-Nantambu-El*, ¶¶ 13-14. "A petition may be filed . . . only" in the following circumstances: (1) "[w]hen no further criminal prosecution of the petitioner for the crimes charged, or for crimes arising from the same criminal episode in the case that is

the subject of the petition, has been initiated”; (2) after a court vacates or reverses “all convictions in the case based on reasons other than legal insufficiency of evidence or legal error unrelated to the petitioner’s actual innocence”; (3) after “an order of dismissal of all charges” or “an acquittal of all charges after retrial”; and (4) no more than two years have passed since the first three conditions have been met. § 13-65-102(2).³

¶ 14 Second, after satisfying these requirements for filing a petition, the petitioner must then demonstrate eligibility for compensation. *Abu-Nantambu-El*, ¶ 14. The petitioner must prove that the petitioner (1) meets the Act’s definition of “actual innocence,” § 13-65-102(4)(a)(I), *see* § 13-65-101(1)(a), C.R.S. 2020;⁴ and (2) is not ineligible for compensation for various enumerated reasons — for instance, because the petitioner committed perjury or pleaded guilty in the case at issue to avoid prosecution in another case, § 13-65-102(4)(a)(II)-(III).

³ The Act also specifies where to file the petition, whom to name as respondents, what facts to include, and what documents to attach. § 13-65-102(5)(a)-(c), (f), C.R.S. 2020.

⁴ We discuss this definition later in this opinion.

¶ 15 If the State elects to admit the petition’s allegations, the Act permits the State to file a “response” to that effect. § 13-65-102(5)(d)(I). In such a case, the district court must enter a final order finding the petitioner to be actually innocent. § 13-65-102(5)(d)(I) & (6)(a).

¶ 16 If, however, the State elects to contest “the nature, significance, or effect of the evidence of actual innocence, the facts related to the petitioner’s alleged wrongful conviction, or whether the petitioner is eligible to seek compensation,” the State must file a “response” to that effect and recite facts necessary to understand why the petition is being contested. § 13-65-102(5)(d)(II). Where the State contests “the petitioner’s declaration of actual innocence or his or her eligibility for compensation . . . or both, the district court shall set the matter for a trial.” § 13-65-102(6)(b). Either party may elect to try the matter to a jury of six; otherwise, the district court hears the petition. *Id.*

¶ 17 The petitioner bears the burden to show by clear and convincing evidence “that he or she is actually innocent of all crimes that are the subject of the petition, and that he or she is eligible to receive compensation.” *Id.* If the petitioner satisfies this

burden as to both elements, the district court must award the petitioner compensation pursuant to section 13-65-103, C.R.S. 2020. § 13-65-102(6)(b).

¶ 18 Finally, Colorado’s rules of civil procedure apply to a petition except as otherwise provided in the Act. § 13-65-102(5)(g).

C. Application

¶ 19 The State moved to dismiss on the ground that Coyle did not satisfy the threshold requirements for filing a petition because his conviction was reversed for reasons unrelated to his actual innocence. *See* § 13-65-102(2)(a)(I). Coyle contends that this procedure was improper under the Act because the State contested his eligibility for compensation. When a State contests either eligibility for compensation or actual innocence, Coyle says, the State must present such a challenge in a response to the petition, which triggers his right to a jury trial. *See* § 13-65-102(5)(d)(II), (6)(b).⁵

⁵ Coyle treats “eligible to seek compensation” in section 13-65-102(5)(d)(II) as essentially the same as the phrase “eligibility for compensation” in section 13-65-102(6)(b). We do the same, discerning no legislative intent indicating otherwise.

¶ 20 In substance, however, the State did not challenge Coyle’s eligibility for compensation. Instead, the State challenged his eligibility to file a petition in the first place. (The State’s motion below sometimes referred to Coyle’s eligibility “for compensation,” but the motion, and the State’s appellate brief, make clear that the State challenges Coyle’s eligibility to file a petition under section 13-65-102(2)(a)(I).) As explained, the Act distinguishes between eligibility for compensation and the threshold eligibility requirements for filing a petition. *See Abu-Nantambu-El*, ¶¶ 13-14. And, unlike with a challenge to eligibility for compensation, the Act does not prescribe a procedure for challenging a petitioner’s eligibility to file a petition.

¶ 21 Because the Act says the rules of civil procedure otherwise apply to a petition, the district court properly considered the State’s motion under C.R.C.P. 12. Indeed, a division of this court in *Abu-Nantambu-El*, ¶¶ 6, 27-28, affirmed a district court’s dismissal of such a petition where a C.R.C.P. 12(b)(5) motion showed that the petitioner was not eligible to file a petition under section 13-65-102(2). While the division there addressed a different subpart of section 13-65-102(2), *id.* at ¶ 16, the analysis logically remains the

same. A district court may resolve a person’s eligibility to file a petition under section 13-65-102(2) via a C.R.C.P. 12(b)(5) motion to dismiss. *See id.* at ¶¶ 27-28 (holding that, because the petitioner did not meet the eligibility requirements to file a petition, the division “reject[s] his contention that the [district] court erred in denying him a trial on the petition under section 13-65-102(6)(b)”).

¶ 22 Our conclusion comports with our duty to avoid a statutory interpretation that leads to an absurd result. *See Roberts v. Bruce*, 2018 CO 58, ¶ 9; *Mosely v. People*, 2017 CO 20, ¶ 16. We cannot adopt a view of the Act under which a court must empanel a jury at the petitioner’s request even when no version of the facts would entitle the petitioner to file a petition — for example, because the petitioner’s conviction was never reversed or vacated, or because the petition was filed outside the two-year limitations period. *See* § 13-65-102(2)(a)(I), (2)(b) & (6)(b). Such an interpretation would eviscerate the Act’s gatekeeping provisions, create potential for abuse, and waste judicial resources on meritless petitions.

¶ 23 Therefore, we reject Coyle’s argument that the district court should have denied the State’s motion on procedural grounds, and we proceed to address the merits.

III. Coyle's Arguments on the Merits

¶ 24 To reiterate, the Act permits a person to file a petition for compensation only if their conviction was reversed or vacated “based on reasons other than legal insufficiency of the evidence or legal error unrelated to the petitioner’s actual innocence.” § 13-65-102(2)(a)(I). Coyle says that he qualifies because his conviction was reversed “based on his actual innocence.” We disagree.

A. Standard of Review

¶ 25 We review de novo a district court’s order granting a motion to dismiss under C.R.C.P. 12(b)(5). *Abu-Nantambu-El*, ¶ 8. To survive a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim, a party must have pleaded sufficient facts to suggest plausible grounds to support a claim for relief. *Warne v. Hall*, 2016 CO 50, ¶ 9. We accept all matters of material fact alleged in the petition as true and view the allegations in the light most favorable to the plaintiff. *Abu-Nantambu-El*, ¶ 8. But conclusory allegations or allegations purporting to assert principles of law are not entitled to that presumption of truth and will be disregarded. *Warne*, ¶ 37.

¶ 26 As noted, to the extent the parties’ arguments raise questions of statutory interpretation, we review them de novo. *McCoy*, ¶ 37.

B. Legal Error Unrelated to the Petitioner’s Actual Innocence

¶ 27 What is “legal error unrelated to the petitioner’s actual innocence”? § 13-65-102(2)(a)(I). To answer this question, we must consider what is legal error *related to* the petitioner’s actual innocence. We begin with the meaning of actual innocence.

¶ 28 Generally, actual innocence refers to factual innocence as distinguished from legal innocence, the legal presumption of innocence afforded to people who are acquitted or not yet convicted of a crime. *See People v. Allee*, 740 P.2d 1, 6 (Colo. 1987) (“[A]n acquittal establishes a legal status of innocence that conceptually can be distinct from a factual status of innocence.”). As our supreme court has explained,

A verdict of acquittal does not establish a status of innocence. Innocence, while it entitles one to an acquittal, is not always present where a verdict of not guilty is returned. If the jury has a reasonable doubt of guilt under all the evidence, even if defendant is in fact guilty, it is its duty to acquit. *Innocence is a factual status.* Nonliability to account resulting from acquittal is a legal status.

Id. (quoting *Roberts v. People*, 103 Colo. 250, 257, 87 P.2d 251, 255 (1938)) (emphasis added).

¶ 29 Consistent with this understanding of actual innocence, the Act requires a showing of the petitioner’s factual innocence, describes it as a “finding,” and places the burden of proof on the petitioner. § 13-65-101(1)(a); § 13-65-102(6)(b). Therefore, a person asserting actual innocence under the Act is not afforded a presumption of such innocence.

¶ 30 Indeed, the Act requires more than a showing of factual innocence to establish actual innocence. The Act gives the following definition:

“Actual innocence” means a finding by clear and convincing evidence by a district court pursuant to section 13-65-102 that a person is actually innocent of a crime such that:

(I) His or her conviction was the result of a miscarriage of justice;

(II) He or she presented reliable evidence that he or she was factually innocent of any participation in the crime at issue;

(III) He or she did not solicit, pursuant to [section] 18-2-301, C.R.S., the commission of the crime at issue or any crime factually related to the crime at issue;

(IV) He or she did not conspire, pursuant to [section] 18-2-202, C.R.S., to commit the crime at issue or any crime factually related to the crime at issue;

(V) He or she did not act as a complicitor, pursuant to [section] 18-1-603, C.R.S., in the commission of the crime at issue or any crime factually related to the crime at issue;

(VI) He or she did not act as an accessory, pursuant to [section] 18-8-105, C.R.S., in the commission of the crime at issue or any crime factually related to the crime at issue; and

(VII) He or she did not attempt to commit, pursuant to [section] 18-2-101, C.R.S., the crime at issue or any crime factually related to the crime at issue.

§ 13-65-101(1)(a).

¶ 31 Additionally, the Act provides that a court “may not reach a finding of actual innocence pursuant to this section merely” (1) because the court found the “evidence legally insufficient to support the petitioner’s conviction”; (2) because “the court reversed or vacated the petitioner’s conviction because of a legal error unrelated to the petitioner’s actual innocence or because of uncorroborated witness recantation alone”; or (3) on the “basis of uncorroborated witness recantation alone.” § 13-65-101(1)(b). Finally, a court may not declare a person to be actually innocent unless the person “committed neither the act or offense that served as the basis for the conviction and incarceration that is the subject

of the petition, nor any lesser included offense thereof.” § 13-65-102(3)(a).

¶ 32 The term “unrelated” to actual innocence in section 13-65-102(2)(a)(I) indicates that legal errors bearing no relationship to actual innocence preclude a petition. *See Webster’s Third New International Dictionary* 1916 (2002) (“Related” means “connected by reason of an established or discoverable relation.”); *Black’s Law Dictionary* 1541 (11th ed. 2019) (“Related” means “[c]onnected in some way; having relationship to or with something else.”). Identifying an error that is connected to a finding of actual innocence is, therefore, sufficient to survive a motion to dismiss filed under section 13-65-102(2)(a)(I).

¶ 33 Consequently, we agree with Coyle that a district court should not dismiss a petition under the Act solely because the court reversing or vacating the conviction did not do so expressly on the ground that the petitioner was actually innocent. Nothing about the phrase “unrelated to . . . actual innocence” forbids a court facing a petition from drawing its own conclusions about the relationship of an error to actual innocence. If it did, the Act would place the proverbial cart before the horse, premising a finding of

actual innocence on a previous finding of actual innocence. See *Irwin v. Commonwealth*, 992 N.E.2d 275, 285 (Mass. 2013) (interpreting a similar exoneration statute in a similar manner).

¶ 34 At the same time, we cannot adopt a view of the Act that permits a petition regardless of the reason why the petitioner’s conviction was reversed or vacated — i.e., regardless of whether the reason was related to actual innocence. While some states’ exoneration statutes permit people to demonstrate their actual innocence irrespective of the reason for the reversal of the conviction,⁶ Colorado’s Act plainly falls in the category of statutes

⁶ States that permit people to demonstrate their actual innocence regardless of the reasons for reversal (or even where there was no legal error at all) include Illinois, 735 Ill. Comp. Stat. 5/2-702 (West 2014); Indiana, Ind. Code § 5-2-23-8(a)(2)(A) (West 2021); Iowa, see *State v. DeSimone*, 839 N.W.2d 660, 667-68 (Iowa 2013) (discussing Iowa’s exoneration statute); Kansas, Kan. Stat. Ann. § 60-5004(c)(1)(B) (West 2021); Louisiana, La. Stat. Ann. § 15:572.8(A) (2020); Michigan, Mich. Comp. Laws Ann. § 691.1754(1)(b) (West 2021); Missouri, Mo. Rev. Stat. § 650.058 (West 2020); Nebraska, Neb. Rev. Stat. Ann. § 29-4603 (West 2021); New Jersey, N.J. Stat. Ann. § 52:4C-3 (West 2021); Ohio, see *Lemons v. State*, 2020-Ohio-5619, ¶ 40 (discussing amendments to Ohio Rev. Code Ann. § 2743.48 (West 2021); Utah, Utah Code Ann. § 78B-9-402 (West); West Virginia, W. Va. Code Ann. § 14-2-13a (West 2021); and Wisconsin, Wis. Stat. Ann. § 775.05 (West 2020).

that look beyond the fact of reversible error and consider the nature of the error.⁷

¶ 35 Neither the Act nor any Colorado decision addresses what types of errors relate to — or are connected to — actual innocence. We note, however, that Massachusetts has a similar exoneration statute. *See* Mass. Gen. Laws Ann. ch. 258D, § 1(B)(ii) (West 2021). Under that statute, people eligible to file a petition are “those who

⁷ Most jurisdictions condition the filing of petitions (either through a procedure prescribed by the statute or through a motion to dismiss) on the ground that the reversal, dismissal, or pardon was given on the basis of (or on grounds tending to show) actual innocence. *See* Ala. Code § 29-2-156(2) (2021); Cal. Penal Code § 4900 (West 2021); Conn. Gen. Stat. § 54-102uu(2) (West 2021); D.C. Code § 2-422(a)(2) (2021); *Fessenden v. State*, 52 So. 3d 1, 5 (Fla. Dist. Ct. App. 2010) (affirming motion to dismiss for failure to state a claim where the petitioner failed to establish that the conviction and sentence were vacated by an order “based upon exonerating evidence,” as required by Florida’s exoneration statute, Fla. Stat. § 961.04 (West 2020); Haw. Rev. Stat. § 661B-1(b)(1) (West 2021); Me. Rev. Stat. Ann. tit. 14, § 8241 (West 2019); Md. Code Ann., State Fin. & Proc. § 10-501 (West 2021); Mass. Gen. Laws Ann. ch. 258D, § 1(B)(ii) (West 2021); Minn. Stat. Ann. § 590.11 (West 2021); Miss. Code Ann. § 11-44-3(1)(b) (West 2021); Nev. Rev. Stat. Ann. 41.900(2)(d)(2) (West 2021); *Fudger v. State*, 520 N.Y.S. 950, 953 (App. Div. 1987) (discussing New York’s exoneration statute); N.C. Gen. Stat. Ann. § 148-82 (West 2020); Okla. Stat. Ann. tit. 51, § 154 (West 2021); Tenn. Code Ann. § 40-27-109 (West 2021); *State ex rel. Abbott v. Young*, 265 S.W.3d 697, 706 (Tex. App. 2008) (discussing Texas exoneration statute); Va. Code Ann. § 8.01-195.10 (West 2021); Wash. Rev. Code Ann. 4.100.040(1)(c) (West 2021).

have been granted judicial relief by a [S]tate court of competent jurisdiction, on grounds which tend to establish the innocence of the individual.” *Peterson v. Commonwealth*, 85 N.E.3d 965, 968 (Mass. 2017) (quoting Mass. Gen. Laws Ann. ch. 258D, § 1(B)(ii)). Because grounds tending to establish innocence are surely those related to actual innocence, the Massachusetts model supplies a useful analogy.

¶ 36 Like Colorado’s Act, the Massachusetts statute does not restrict eligibility to people whose convictions were vacated or reversed strictly on the ground that they were actually innocent. *Id.* Hence, we find useful the standard articulated by the Massachusetts Supreme Judicial Court. A person may file a petition for compensation under the statute if their conviction was overturned “on grounds resting upon facts and circumstances probative of the proposition that the [person] did not commit the crime.” *Id.* (citations omitted). Convictions that are reversed only because of procedural or evidentiary errors or structural deficiencies at trial that could be consistent with actual innocence but lack any connection to it (i.e., lack a tendency to show actual

innocence) would be insufficient to support a petition under the Act.
See id.

¶ 37 For instance, courts have recognized that the following errors or circumstances are related to actual innocence: (1) ineffective assistance of counsel where defense counsel, to avoid a conflict of interest, declined to call crucial witnesses who would have presented exculpatory evidence, *see Guzman v. Commonwealth*, 937 N.E.2d 441, 448 (Mass. 2010); or (2) ineffective assistance of counsel where defense counsel failed to present available scientific evidence that ruled out the defendant as the culprit, *see Abu-Nantambu-El*, ¶¶ 3-6 (discussing the district court’s unchallenged ruling). In such cases, the “fact finder was forestalled from making a fully informed decision as to the defendant’s guilt or innocence’ because of an omission of evidence probative of the defendant’s innocence.” *Santana v. Commonwealth*, 59 N.E.3d 430, 434 n.7 (Mass. App. Ct. 2016) (citation omitted).

¶ 38 Similar errors might include those excluding evidence of an alternate suspect or evidence of the petitioner’s alibi defense. Such grounds for reversal may be probative of the proposition that the petitioner did not commit the crime. *See People v. Elmarr*, 2015 CO

53, ¶ 29 (“[E]vidence indicating that someone else committed the crime tends to make the defendant’s identity as the perpetrator less probable”); *People v. Huckleberry*, 768 P.2d 1235, 1238 (Colo. 1989) (“The defense of alibi has been defined as ‘[a] defense that places the defendant at the relevant time in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party.’”) (citation omitted).

¶ 39 On the other hand, courts have held that errors that do not relate to a defendant’s actual innocence include the following: (1) jury instruction errors, *see Santana*, 59 N.E.3d at 434; *Guzman*, 937 N.E.2d at 445 n.6; (2) prosecutorial misconduct in which the prosecutor misstated the evidence but where the jury heard all relevant evidence, *see Silva-Santiago v. Commonwealth*, 9 N.E.3d 850, 853 (Mass. App. Ct. 2014); (3) improper admission of a defendant’s prearrest silence as evidence of guilt, *see Irwin*, 992 N.E.2d at 290; and (4) improper denial of a motion to suppress evidence on constitutional grounds, *see Peterson*, 85 N.E.3d at 970.

¶ 40 The foregoing examples are not exhaustive but merely illustrative. And, of course, each case must turn on its own

particular facts. With these principles in mind, we turn to the reasons why Coyle’s conviction was reversed.

C. Application

¶ 41 To recap, the division in *Coyle I* reversed the conviction due to the trial court’s failure to either require the prosecution to elect which incident supported the charge of attempted sexual assault on a child or give the jury a modified unanimity instruction. The division explained that the requirement of an election or modified unanimity instruction assures that a conviction does not result from some jurors finding the defendant guilty of one act while others convict based on a different act. *See Coyle I*, slip op. at 2-3. Due to this error, the division discerned “a reasonable likelihood that the jurors disagreed upon which act Coyle committed to support the conviction.” *Id.* at 9.

¶ 42 In reaching its conclusion, the division rejected the People’s argument that the failure to require a prosecutorial election or to give a modified unanimity instruction was harmless because the evidence clearly showed which of the two incidents fit the attempt charge. The division explained that the incidents were not so clearly different from each other because the evidence of either

could have supported a completed sexual assault (the charge of which Coyle was acquitted), as opposed to an attempted sexual assault. Accordingly, the division held that, “because Coyle’s conduct in neither incident clearly applied to the attempt charge,” the error was sufficiently prejudicial to require reversal even under a plain error standard. *Id.* at 13.

¶ 43 But the *Coyle I* division did not hold that the trial court erred by instructing the jury to decide the charge of attempted sexual assault — i.e., that the evidence could not support such a conviction. On the contrary, the division remanded for a new trial on the attempt charge (subject to double jeopardy considerations). *See id.* at 15. Therefore, we disagree with Coyle that the division held that “no evidence adduced supports the People’s case.”⁸

¶ 44 Even if, however, the *Coyle I* division had held that the evidence was insufficient to show an attempted sexual assault

⁸ As Coyle notes, the *Coyle I* division cited *Apodaca v. People*, 712 P.2d 467, 475 (Colo. 1985), for the proposition that a court should not give an instruction on the lesser included offense of attempt if the evidence clearly established the completed crime. *People v. Coyle*, slip op. at 13 (Colo. App. No. 12CA2600, May 28, 2015) (not published pursuant to C.A.R. 35(f)). But, as explained, the division did not hold that the trial court erred in that regard; instead, the division remanded for a new trial on the attempt charge. *Id.* at 15.

(because it showed only a completed sexual assault), the division's reversal would not entitle Coyle to file a petition under the Act. The Act does not permit a petition where the petitioner's conviction was vacated due to the "legal insufficiency of evidence." § 13-65-102(2)(a)(I).

¶ 45 In any event, the error precipitating the reversal of Coyle's conviction did not relate to his actual innocence. The instructional error did not affect the presentation of evidence, did not keep important facts from the jury, and did not affect the jury's ability to weigh competing evidence to determine the truth or falsity of the events surrounding the allegations. *See Santana*, 59 N.E.3d at 433-34 (holding that a reversal due to an improper jury instruction on a lesser included offense was not a reversal for reasons that tended to establish innocence). The error related to whether the jurors agreed on which act Coyle committed, not whether he was actually innocent of the criminal offense charged. The reversal, therefore, was not on grounds reflecting facts and circumstances probative of the proposition that Coyle did not commit the crime.

¶ 46 Finally, we are not persuaded otherwise by Coyle's contention that his conviction was the result of a miscarriage of justice and,

therefore, his conviction was reversed on grounds related to his actual innocence. See § 13-65-101(1)(a)(I) (a showing of a miscarriage of justice is necessary to a finding of actual innocence). In support of his argument, Coyle relies on the fact that the *Coyle I* division found plain error in the failure to require a prosecutorial election or to give a modified unanimity instruction. To accept his argument, however, would be to conclude that every plain error is related to the defendant's actual innocence. We reject that sweeping proposition because the plain error standard does not necessarily pertain to actual innocence. Instead, it concerns legal innocence — whether an error so undermined the fundamental fairness of the trial as to cast serious doubt on the *reliability* of the judgment of conviction. See *Hagos v. People*, 2012 CO 63, ¶ 14.

¶ 47 In sum, Coyle did not satisfy the threshold eligibility requirements for filing a petition because his conviction was reversed due to legal error unrelated to his actual innocence. See § 13-65-102(2)(a)(I). As a result, the district court properly dismissed his petition.

IV. Attorney Fees

¶ 48 Because Coyle has not prevailed in this appeal, we deny his request for appellate attorney fees. C.A.R. 39.1.

V. Conclusion

¶ 49 The judgment is affirmed.

JUDGE J. JONES and JUDGE YUN concur.