

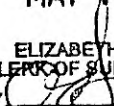
IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON GUEVARA-PONTIFES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86381

FILED

MAY 15 2024

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. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Appellant Brandon Guevara-Pontifes was convicted of sexual assault, first-degree kidnapping, and battery with the intent to commit sexual assault. The Court of Appeals affirmed the judgment of conviction. *Guevara-Pontifes v. State (Guevara-Pontifes I)*, No. 70435-COA, 2017 WL 2119471 (Nev. Ct. App. May 4, 2017) (Order of Affirmance). In 2017, Guevara-Pontifes filed a postconviction petition for a writ of habeas corpus. This court affirmed the district court's denial of that petition, *Guevara-Pontifes v. State (Guevara-Pontifes II)*, No. 78948, 2020 WL 5652413 (Nev. Sept. 18, 2020) (Order of Affirmance), and remittitur issued on October 13, 2020. On October 13, 2022, Guevara-Pontifes filed a second postconviction habeas petition raising collateral challenges to the conviction and sentence. The district court denied the petition as procedurally barred. Guevara-Pontifes appeals, and we affirm.

As Guevara-Pontifes concedes, his current petition is subject to multiple procedural bars. The petition was untimely because it was filed over 5 years after remittitur issued from Guevara-Pontifes's direct appeal. See NRS 34.726(1). The petition was also successive because Guevara-

Pontifes had previously filed a postconviction petition, and it constituted an abuse of the writ because Guevara-Pontifes raised claims new and different from those raised in the previous petition, which were therefore also subject to waiver. *See* NRS 34.810(1)(b), (2).¹ Petitions that are untimely, successive, or an abuse of the writ are subject to dismissal absent a showing of good cause and actual prejudice. NRS 34.726(1); NRS 34.810(1)(b), (3). To establish good cause, “a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules.” *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003).

Regarding good cause to overcome the procedural bars, Guevara-Pontifes makes two contentions. First, Guevara-Pontifes argues that good cause is irrelevant because new evidence warrants reconsidering claims that were raised and rejected in prior proceedings. We find this argument insufficient to overcome the procedural bars. Although presenting “substantially new or different evidence” may avoid the doctrine of the law of the case, *Hsu v. County of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (discussing “specific exceptions to the law of the case doctrine”), Guevara-Pontifes neither alleges nor demonstrates that the new evidence makes a colorable showing of actual innocence such that the failure to consider the procedurally barred claims would result in a fundamental miscarriage of justice, *see Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015) (explaining that when a petitioner cannot

¹The Legislature recently made a technical amendment to NRS 34.810, which renumbered the subsections. A.B. 49, 82d Leg. (Nev. 2023). We use the numbering in effect when the district court denied Guevara-Pontifes’s postconviction petition.

demonstrate good cause, the district court may nonetheless excuse any procedural bars if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice).

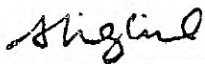
Second, Guevara-Pontifes argues that first postconviction counsel provided ineffective assistance. But this argument is precluded by our decision in *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014). As a noncapital petitioner, Guevara-Pontifes was not entitled to the appointment of postconviction counsel. *See id.* at 571, 331 P.3d at 871-72 (explaining that NRS 34.750(1) “provides for the discretionary appointment of counsel to represent noncapital habeas petitioners”). Because appointment of postconviction counsel was not mandated, Guevara-Pontifes had no constitutional or statutory right to the effective assistance of that counsel. *See id.* at 569, 331 P.3d at 870. As we explained in *Brown*, “[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel.” *Id.* (quoting *McKague v. Whitley*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996)). And we decline Guevara-Pontifes’s invitation to reconsider our prior decision as Guevara-Pontifes has not demonstrated that *Brown* was badly reasoned or unworkable. *See State v. Lloyd*, 129 Nev. 739, 750, 312 P.3d 467, 474 (2013) (“[W]hen governing decisions prove to be unworkable or are badly reasoned, they should be overruled.” (internal quotation marks omitted)).

Furthermore, even were we to reconsider *Brown*, Guevara-Pontifes would not be entitled to relief. Guevara-Pontifes filed his second petition two years after remittitur issued in the first postconviction appeal. Thus, Guevara-Pontifes’s claims of ineffective assistance of first postconviction counsel would be untimely under NRS 34.726(1), as they were not raised within one year after the remittitur issued in the first

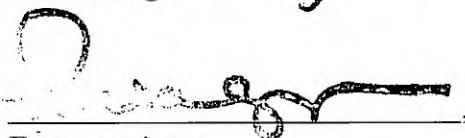
postconviction appeal. *Rippo v. State*, 134 Nev. 411, 419-22, 423 P.3d 1084, 1095-97 (2018). Guevara-Pontifes does not address or explain the delay in raising the postconviction-counsel claims. Thus, even crediting Guevara-Pontifes's arguments that *Brown* should be reconsidered, Guevara-Pontifes has not shown that relief is warranted.

Because "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," *State v. Eighth Jud. Dist. Ct. (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005), and Guevara-Pontifes failed to demonstrate any grounds to excuse those procedural default rules, the district court did not err in denying Guevara-Pontifes's petition as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Stiglich


_____, J.
Pickering


_____, J.
Parraguirre

cc: Hon. Egan K. Walker, District Judge
Federal Public Defender/Las Vegas
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk