

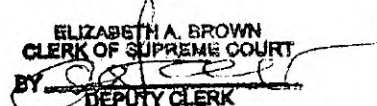
IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD WAYNE OSBY,
Appellant,
vs.
CALVIN JOHNSON, WARDEN; AND
THE STATE OF NEVADA,
Respondents.

No. 86477

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. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Appellant Gerald Osby was convicted of first-degree murder with the use of a deadly weapon, and this court affirmed the judgment of conviction. *Osby v. State (Osby I)*, No. 61032, 2013 WL 7163002 (Nev. Nov. 14, 2013) (Order of Affirmance). In 2014, Osby filed a postconviction petition for a writ of habeas corpus. The Court of Appeals affirmed the district court's denial of that petition, *Osby v. State (Osby II)*, No. 71223-COA, 2017 WL 4216530 (Nev. Ct. App. Sept. 13, 2017) (Order of Affirmance), and remittitur issued on October 10, 2017. On June 4, 2020, Osby filed a second petition raising collateral challenges to the conviction and sentence. The district court denied the petition as procedurally barred. Osby appeals, and we affirm.

As Osby concedes, his current petition is subject to multiple procedural bars. The petition was untimely, because it was filed over 6 years after remittitur issued from Osby's direct appeal. See NRS 34.726(1).

The petition was also successive because Osby previously filed a postconviction petition, and it constituted an abuse of the writ because Osby 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).

As good cause to overcome the procedural bars, Osby argues that first postconviction counsel provided ineffective assistance by not raising every issue on the appeal from the denial of Osby’s first postconviction petition. This argument is precluded by our decision in *Brown v. McDaniel*, 130 Nev. 565, 331 P.3d 867 (2014). As a noncapital petitioner, Osby was not entitled to the appointment of postconviction counsel. *See id.* at 571, 331 P.3d at 871 (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 in this case, Osby 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.*

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 Osby’s postconviction petition.

(quoting *McKague v. Whitley*, 112 Nev. 159, 164-65, 912 P.2d 255, 258 (1996)). And we decline Osby's invitation to reconsider our prior decision as Osby 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*, Osby would not be entitled to relief. Osby filed his second petition over two years after remittitur issued in the first postconviction appeal. Thus, Osby'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). Osby does not address or explain the delay in raising the postconviction-counsel claims. Therefore, even crediting Osby's arguments that *Brown* should be reconsidered, Osby 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 Osby failed to demonstrate any grounds to excuse those procedural default rules, the district court should have resolved the petition on that basis. See NRS 34.810(1)(b). Instead, the district court concluded that one claim challenging appellate counsel's performance could proceed, held an evidentiary hearing, and denied that claim on the merits. Despite this misstep, we conclude that the district court did not err in denying Osby's petition. See *Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970)

