

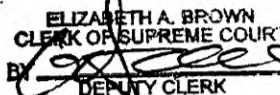
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT MICHAEL FLUKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 86989-COA

FILED

MAY 16 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert Michael Fluker appeals from a district court order granting a motion to dismiss a postconviction petition for a writ of habeas corpus and denying a motion for the appointment of postconviction counsel. Second Judicial District Court, Washoe County; Lynne K. Jones, Judge.

Fluker filed his petition on November 28, 2022, more than nine years after issuance of the remittitur on direct appeal on June 12, 2013. *See Fluker v. State*, No. 61703, 2013 WL 3294092 (Nev. May 15, 2013) (Order of Affirmance). Thus, Fluker's petition was untimely filed. *See* NRS 34.726(1). Moreover, Fluker'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 previous petition.<sup>1</sup>

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<sup>1</sup>*See Fluker v. State*, No. 69162, 2017 WL 897776 (Nev. Ct. App. Feb. 23, 2017) (Order of Affirmance).

See NRS 34.810(3).<sup>2</sup> Fluker's petition was procedurally barred absent a demonstration of good cause and actual prejudice. See NRS 34.726(1); NRS 34.810(4). Further, because the State specifically pleaded laches, Fluker was required to overcome the rebuttable presumption of prejudice to the State. See NRS 34.800(2).

Fluker claimed he had good cause because he could not raise his claims of ineffective assistance of counsel at sentencing and on direct appeal until the Nevada Supreme Court issued its decision in *Gonzales v. State*, 137 Nev. 398, 492 P.3d 556 (2021). However, Fluker's petition was not filed within a reasonable time of that decision, see *Rippo v. State*, 134 Nev. 411, 422, 423 P.3d 1084, 1097 (2018) (holding a good cause claim must be raised within a year of when the claim becomes available), and he failed to allege an impediment external to the defense explained his delay, see *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). In light of these circumstances, we conclude that Fluker failed to demonstrate good cause to overcome the procedural bars. Further, Fluker did not overcome the presumption of prejudice to the State. For the foregoing reasons, we conclude the district court did not err by dismissing the petition as procedurally barred.

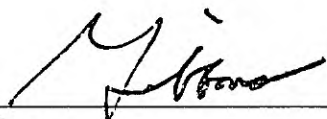
Fluker filed a motion for the appointment of postconviction counsel on February 27, 2023. NRS 34.750(1) provides for the discretionary appointment of postconviction counsel if the petitioner is indigent and the

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<sup>2</sup>The subsections within NRS 34.810 were recently renumbered. We note the substance of the subsections cited herein was not altered. See A.B. 49, 82d Leg. (Nev. 2023).

petition is not summarily dismissed. Here, the district court found the petition was procedurally barred pursuant to NRS 34.810(3) and declined to appoint counsel. Because the petition was subject to summary dismissal, *see* NRS 34.745(3), we conclude the district court did not abuse its discretion by declining to appoint counsel. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Lynne K. Jones, District Judge  
Robert Michael Fluker  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk