

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
KELLY EUGENE RHYNE,
Respondent.

No. 57293

FILED

JAN 24 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court granting appellant Kelly Eugene Rhyne's post-conviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Norman C. Robison, Senior Judge.

A jury convicted Rhyne of first-degree murder and sentenced him to death for killing Donald Brown. This court affirmed the conviction and sentence. *Rhyne v. State*, 118 Nev. 1, 38 P.3d 163 (2002). Rhyne unsuccessfully sought relief in a prior post-conviction proceeding. *Rhyne v. State*, Docket No. 43761 (Order of Affirmance, July 26, 2005). Rhyne filed the instant petition in the district court on August 21, 2008. The district court granted the petition, and this appeal followed.

The State argues that the district court erred in granting the petition without addressing the applicable procedural bars. We agree. Rhyne filed his petition more than six years after this court issued its remittitur on his direct appeal and more than three years after this court issued its remittitur from its decision affirming the denial of his first post-conviction petition. Therefore, his petition was untimely and successive,

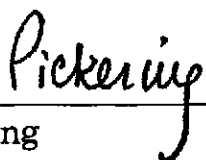
and it was procedurally barred absent a showing of good cause and actual prejudice or that failure to consider his claims would result in a fundamental miscarriage of justice. See NRS 34.726(1); NRS 34.810(2), (3); *Mazzan v. Warden*, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Rhyne raised several claims of good cause as well as a claim that the failure to consider some of his claims would result in a fundamental miscarriage of justice. The district court failed to address whether these arguments were sufficient to overcome the procedural bars. See *Clem v. State*, 119 Nev. 615, 623 n.43, 81 P.3d 521, 527 n.43 (2003) (noting that procedural default rules are mandatory); *Pellegrini v. State*, 117 Nev. 860, 886, 34 P.3d 519, 536 (2001) (similar). It is unclear from the district court's order whether the district court inadvertently overlooked the procedural bars or whether the district court determined that appellant had demonstrated good cause sufficient to overcome the procedural bars but omitted this finding from the written order. See *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (providing the failure to make a determination as to the procedural bars "constitute[s] an arbitrary and unreasonable exercise of discretion").

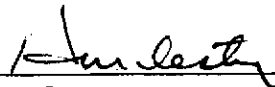
Therefore, we reverse the order of the district court and remand this matter for the district court to consider the procedural bars. The district court's final order resolving the petition should contain specific findings of fact and conclusions of law analyzing the procedural bars and whether Rhyne has demonstrated good cause and prejudice, a

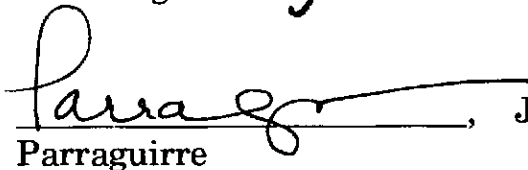
fundamental miscarriage of justice, or circumstances that justify avoiding the law of the case doctrine.¹ Accordingly, we

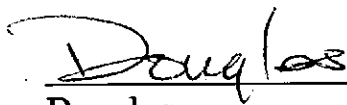
ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

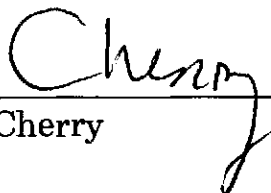

_____, C.J.
Gibbons



_____, J.
Pickering


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Saitta

¹Some of the good cause allegations in Rhyne's post-conviction petition fail as a matter of law, *i.e.*, the discretionary application of procedural bars, *see State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 236, 238-39, 112 P.3d 1070, 1077, 1079 (2005), and whether the delay in filing is Rhyne's fault, *see Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003), because good cause is established by demonstrating that some impediment external to the defense prevented petitioner from raising claims earlier, and prejudice is established by demonstrating that petitioner is entitled to relief. *See Lozada v. State*, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994).

cc: Chief Judge, Fourth Judicial District Court
Hon. Norman C. Robison, Senior Judge
Attorney General/Carson City
Richard W. Sears
Federal Public Defender/Las Vegas
Elko County Clerk