

IN THE SUPREME COURT OF THE STATE OF NEVADA

GISTARVE RUFFIN, JR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 37666

**FILED**

AUG 23 2002

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from a district court order denying appellant Gistarve Ruffin, Jr.'s post-conviction petition for a writ of habeas corpus.

On August 9, 1994, Ruffin was convicted, pursuant to a jury verdict, of burglary (Count I) and possession of tools commonly used for the commission of burglary (Count II). The district court sentenced Ruffin to serve a prison term of 10 years for Count I and a concurrent jail term of 1 year for Count II. The district court also adjudicated Ruffin a habitual criminal and sentenced him to serve a life prison term with the possibility of parole. Ruffin appealed. This court affirmed Ruffin's conviction, but remanded the matter for resentencing, concluding the district court erred in separately sentencing Ruffin for his habitual criminal status.<sup>1</sup>

Pursuant to this court's order, on January 29, 1996, the district court entered an amended judgment of conviction, resentencing Ruffin to serve a prison term of life with the possibility of parole for Count I and a concurrent jail term of 1 year for Count II. Ruffin appealed, but

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<sup>1</sup>Ruffin v. State, Docket No. 26230 (Order of Remand, December 12, 1995).

thereafter this court granted Ruffin's motion to voluntarily withdraw his appeal.<sup>2</sup>

On December 17, 1996, Ruffin filed a proper person post-conviction petition for a writ of habeas corpus. The State opposed the petition. Without conducting an evidentiary hearing or appointing counsel, the district court dismissed the petition "without prejudice," finding that Ruffin failed to attach trial transcripts in support of his allegations.

On March 9, 1998, Ruffin filed a proper person "corrected" petition for a writ of habeas corpus. The district court denied the petition, ruling that Ruffin had failed to demonstrate good cause to excuse his procedural default. Ruffin appealed with the assistance of counsel, but thereafter this court granted Ruffin's motion to voluntarily dismiss the appeal.<sup>3</sup>

On March 26, 1998, Ruffin filed a proper person "ex parte motion for leave to file a belated petition for a writ of habeas corpus," alleging his procedural default should be excused because the law library at the Northern Nevada Correctional Center was inadequate, and because his claims of ineffective assistance of counsel had never been considered on the merits resulting in a fundamental miscarriage of justice. On October 8, 1998, Ruffin filed another "ex parte motion for leave to file a belated petition for a writ of habeas corpus," alleging that his procedural default

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<sup>2</sup>Ruffin, Jr. v. State, Docket No. 28239 (Order Dismissing Appeal, October 24, 1996).

<sup>3</sup>Ruffin, Jr. v. State, Docket No. 32205 (Order Dismissing Appeal, March 2, 1999).

should be excused because his appellate counsel never gave him vital documents in the case. The district court granted the ex parte motion. Accordingly, on November 18, 1998, Ruffin filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel, who supplemented the petition on May 25, 2000. The State opposed the petition. After conducting an evidentiary hearing, the district court denied the petition, finding that counsel was not ineffective. Ruffin filed the instant appeal.

Our review of the record on appeal reveals that Ruffin's petition was untimely because it was filed approximately one and one-half years after this court issued the remittitur in the direct appeal from the amended judgement of conviction.<sup>4</sup> Additionally, Ruffin's petition is successive because he has previously filed two other petitions.<sup>5</sup> Because Ruffin's petition was untimely and successive, it is procedurally barred absent a showing of good cause for the delay and prejudice, or to prevent a fundamental miscarriage of justice.<sup>6</sup> This court has held that good cause must be an impediment external to the defense.<sup>7</sup>

To excuse his procedural default, Ruffin alleged that: (1) his access to the law library was inadequate; (2) his appellate counsel withheld his legal files; and (3) his claims were never considered on the merits resulting in a fundamental miscarriage of justice. We conclude

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<sup>4</sup>See NRS 34.726(1).

<sup>5</sup>See NRS 34.810(1)(b)(2); NRS 34.810(2).

<sup>6</sup>See NRS 34.726(1); NRS 34.810(1)(b)(2); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

<sup>7</sup>See Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994).

that the district court abused its discretion in finding good cause. Ruffin's claims that he lacked legal knowledge, had poor assistance from inmate law clerks or inadequate access to the prison law library did not excuse the procedural default.<sup>8</sup> Similarly, the difficulties Ruffin experienced in retrieving his files from his appellate counsel did not constitute good cause.<sup>9</sup> Finally, we conclude that Ruffin did not demonstrate that the failure to consider his petition would result in a fundamental miscarriage of justice.<sup>10</sup> Because Ruffin failed to establish good cause and prejudice, or a fundamental miscarriage of justice, the petition is procedurally barred, and we explicitly conclude that the petition should have been denied on that basis.<sup>11</sup>

We note, however, that the district court correctly determined that Ruffin's petition lacked merit, and we affirm the district court's ruling on that separate, independent ground.<sup>12</sup> The district court found that counsel was not ineffective. The district court's factual findings regarding

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<sup>8</sup>See Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

<sup>9</sup>See Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

<sup>10</sup>Mazzan, 112 Nev. at 842, 921 P.2d at 922 (holding that a fundamental miscarriage of justice may be shown "where a constitutional violation has probably resulted in the conviction of one who is actually innocent") (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).

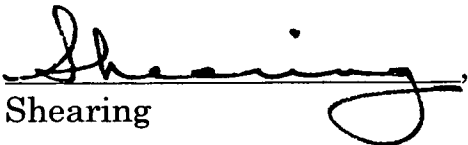
<sup>11</sup>See generally Harris v. Reed, 489 U.S. 255, 263 (1989) (holding that procedural default does not bar federal review of claim on the merits unless state court rendering judgment relied "clearly and expressly" on procedural bar) (citation omitted).


<sup>12</sup>Id. at 264 n.10 (holding that as long as the state court explicitly invokes a state procedural bar, "a state court need not fear reaching the merits of a federal claim in an alternative holding").

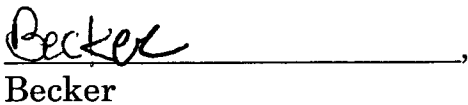
a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal.<sup>13</sup> Ruffin has not demonstrated that the district court's findings of fact are not supported by substantial evidence or are clearly wrong.<sup>14</sup> Moreover, Ruffin has not demonstrated that the district court erred as a matter of law.<sup>15</sup>

Having considered Ruffin's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. Brent T. Adams, District Judge  
Nathalie Huynh  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk

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<sup>13</sup>See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

<sup>14</sup>See id.

<sup>15</sup>See id.