

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE JOHN
S. MCGROARTY, DISTRICT JUDGE,

Respondents,

and

RICHARD C. HINGER,
Real Party in Interest.

No. 44272

FILED

MAR 07 2005

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

ORDER DENYING PETITION

This is an original petition for a writ of prohibition or mandamus. Eighth Judicial District Court, Clark County; John S. McGroarty, Judge.

In the proceedings below, the district court is considering the second post-conviction petition filed in state court by Richard Hinger, the real party in interest. Hinger filed his petition for habeas relief more than six years after his direct appeal was decided. The State moved to dismiss the petition. It claimed that the petition was procedurally barred because it was untimely and successive. Following a hearing on the matter, the district court denied the State's motion. The State now petitions this court, asserting that the district court has disregarded Nevada's procedural bars.

This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station or to control a manifest abuse or arbitrary or capricious exercise of discretion.¹ It may issue a writ of prohibition to arrest the proceedings of any tribunal exercising judicial functions in excess of its jurisdiction.² Neither writ will issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.³ This court considers whether judicial economy and sound judicial administration militate for or against issuing either writ.⁴ Mandamus and prohibition are extraordinary remedies, and the decision to entertain a petition lies within the discretion of this court.⁵ In this case, we are not satisfied that this court's intervention by way of extraordinary relief is warranted at this time.

NRS 34.726(1) provides in part that absent a showing of good cause for delay, a petition challenging the validity of a judgment or

¹See NRS 34.160; Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

²See NRS 34.320; Hickey v. District Court, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989).

³See NRS 34.170; NRS 34.330; Hickey, 105 Nev. at 731, 782 P.2d at 1338.

⁴See State v. Babayan, 106 Nev. 155, 175-76, 787 P.2d 805, 819 (1990).

⁵Hickey, 105 Nev. at 731, 782 P.2d at 1338.

sentence must be filed within one year after this court issues its remittitur on direct appeal.⁶ Good cause requires the petitioner to demonstrate that the delay was not his fault and that dismissal of the petition will unduly prejudice him.⁷

NRS 34.810(2) provides that a second or successive petition must be dismissed if "it fails to allege new or different grounds for relief and . . . the prior determination was on the merits or, if new and different grounds are alleged, . . . the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." A petitioner can avoid dismissal if he meets the burden of pleading and proving specific facts that demonstrate good cause for his failure to present claims before, or for presenting a claim again, and actual prejudice.⁸ He cannot rely on conclusory claims for relief but must provide specific supporting factual allegations that if true would entitle him to relief.⁹ And he is not entitled to an evidentiary hearing if the record belies or repels the allegations.¹⁰

To show good cause, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with

⁶See Pellegrini v. State, 117 Nev. 860, 874-75, 34 P.3d 519, 529 (2001).

⁷NRS 34.726(1).

⁸NRS 34.810(3).

⁹Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001).

¹⁰Id.

procedural default rules.¹¹ Actual prejudice requires a petitioner to demonstrate "not merely that the errors . . . created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceeding with error of constitutional dimensions."¹² Absent a showing of good cause to excuse procedural default, this court will consider claims only if he demonstrates that failure to consider them will result in a fundamental miscarriage of justice.¹³

The application of statutory procedural default rules to post-conviction habeas petitions is mandatory.¹⁴ Therefore, the State is correct that the law requires the district court to determine whether procedural bars apply to Hinger's petition. The district court's refusal to make this determination would constitute an arbitrary and unreasonable exercise of discretion.

Here, the district court has not disregarded its mandatory duty to consider whether Hinger's claims are procedurally barred. After considering the parties' written and oral argument, the district court

¹¹See Crump v. Warden, 113 Nev. 293, 302, 934 P.2d 247, 252 (1997).

¹²Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

¹³See Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996).

¹⁴State v. Haberstroh, 119 Nev. 173, 180, 69 P.3d 676, 681-82 (2003).

determined that Hinger had alleged facts which if proven would constitute good cause.¹⁵ In its written order, the district court states in part:

Petitioner has alleged . . . that the State failed to disclose exculpatory evidence to the defense These facts, along with other factual allegations . . . were not discovered until Petitioner was appointed counsel in federal court and an investigation was conducted.

The State does not contend that it disclosed the evidence and does not refute the representations made by Petitioner with regard to the nature of the evidence or the testimony of the witnesses. Accordingly, the allegations of good cause, if proven, would be sufficient to overcome any procedural bars and an evidentiary hearing is required.

With regard to the remaining claims, having reviewed the pleadings on file and heard the arguments of counsel, the court finds that the allegations of good cause, if proven, would be sufficient to overcome any procedural bars and that an evidentiary hearing is required.

Implicit in the district court's order is the requirement that Hinger prove good cause and prejudice during an evidentiary hearing.


Moreover, even if the district court erred in concluding that Hinger's allegations of good cause warranted an evidentiary hearing,

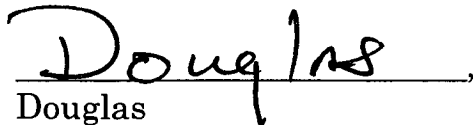
¹⁵See Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (stating that a petitioner is entitled to an evidentiary hearing if he raises claims which, if true, would entitle him to relief and which are not belied by the record).

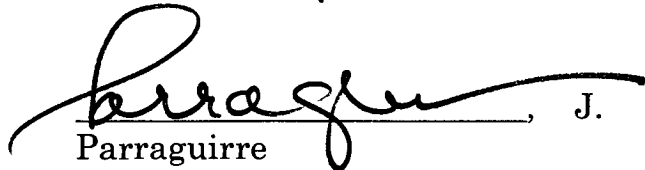
judicial economy and administration considerations militate against intervening by way of extraordinary writ to simply correct an error which can be corrected on appeal unless the error would overly burden judicial resources. We conclude that the State has not demonstrated that an evidentiary hearing to determine good cause will overly burden judicial or prosecutorial resources.

Accordingly, we

ORDER the petition DENIED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. John S. McGroarty, District Judge
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Federal Public Defender
Clark County Clerk