

IN THE SUPREME COURT OF THE STATE OF NEVADA

TIMOTHY W. CONNORS,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
DONALD M. MOSLEY, DISTRICT
JUDGE,
Respondents.

No. 48403

FILED

FEB 01 2007

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

ORDER GRANTING PETITION

This is a proper person petition for a writ of habeas corpus. Petitioner challenges the district court's failure to comply with this court's January 17, 2006 writ of mandamus directing the district court to place petitioner's August 6, 1999 post-conviction petition for a writ of habeas corpus back on calendar for the district court's resolution. Because the relief sought is more properly sought in a petition for a writ of mandamus, we elect to construe the petition as a petition for a writ of mandamus.

Petitioner filed a proper person post-conviction petition for a writ of habeas corpus in the district court on August 6, 1999. The April 24, 2000 district court minutes state,

The Court stated Mr. [William] Terry was counsel, and he may elect to represent his view of this representation, or he may decline, at which time upon his decline, the defendant's petition will not be entertained as to the extent that it alleges ineffective assistance of counsel. COURT ORDERED, OFF CALENDAR.

In 2005, petitioner filed a petition for a writ of mandamus challenging the district court's decision to take his petition off calendar. This court granted the petition in part and issued a writ of mandamus directing Judge Donald Mosley to place the August 6, 1999 petition back on calendar for the district court's resolution.¹ Petitioner asserts that to date Judge Mosley has failed to place his petition back on calendar for resolution.

The district court may not resolve a post-conviction petition for a writ of habeas corpus by simply taking the petition off calendar. A decision taking the petition off calendar is not a final decision as the district court retains the jurisdiction to place the petition back on calendar for review. There is no authority in NRS chapter 34 allowing the district court to take a petition off calendar in lieu of resolving the petition on the merits or other procedural grounds. NRS 34.740 requires the district court to provide an expeditious examination of a post-conviction petition for a writ of habeas corpus. NRS 34.830 further provides that any final order that disposes of a post-conviction petition for a writ of habeas corpus must contain specific findings of fact and conclusions of law and that service of notice of entry of the order be performed by the clerk of the district court. NRAP 4(b)(2) requires the district court to enter any order finally resolving a post-conviction petition for a writ of habeas corpus within 20 days of the district court's oral pronouncement of a final

¹Connors v. District Court, Docket No. 46025 (Order Granting Petition for a Writ of Mandamus in Part and Denying Petition in Part, January 17, 2006) (Writ of Mandamus, January 17, 2006).

decision. Petitioner may not file an appeal to this court unless the district court has entered a final decision on the petition.²

Because it appeared that petitioner had set forth an issue of arguable merit for which there was no plain, speedy and adequate remedy in the ordinary course of law, this court directed the State to file a response.³ The State was to inform this court whether the August 6, 1999 habeas corpus petition had been placed back on calendar for resolution, and if so, whether the petition had been resolved, and the result of any decision. The State filed a timely response and informed this court that the August 6, 1999 habeas corpus petition had not been placed back on calendar and had not been resolved. The State appeared to indicate that the petition had been taken off calendar because former trial counsel had not submitted an affidavit as requested by the district court.

Having reviewed the documents before this court, we grant the petition for a writ of mandamus and direct the issuance of a writ of mandamus instructing the district court to place the August 6, 1999 habeas corpus petition on calendar within 30 days from the date of issuance of the writ of mandamus. We note that the district court may not refuse to calendar the habeas corpus petition because former trial counsel had not submitted an affidavit; a factual dispute may not be resolved by an affidavit when an evidentiary is required.⁴ An evidentiary hearing is required where a petitioner has raised claims supported by specific facts,


²See NRS 34.575; NRAP 4(b)(1).

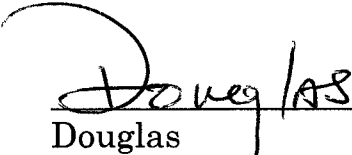
³See NRS 34.160; NRS 34.170.

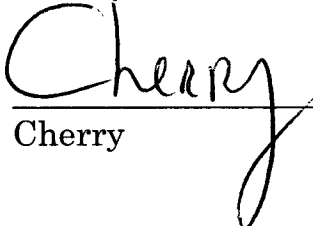
⁴See Mann v. State, 118 Nev. 351, 46 P.2d 1228 (2002).

not belied by the record, which if true, would entitle the petitioner to relief.⁵ If an evidentiary hearing is required, it must be conducted in the presence of petitioner.⁶ Former trial counsel's refusal or failure to file an affidavit may not obstruct petitioner's ability to timely prosecute his habeas corpus petition. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to place the August 6, 1999 habeas corpus petition on the district court's calendar within 30 days from the date of issuance of the writ of mandamus.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

⁵See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984). We express no opinion as to whether an evidentiary hearing would be required on the claims raised in the habeas corpus petition, however, we note only that a factual dispute may not be resolved by an affidavit in habeas corpus proceedings. Thus, former trial counsel's failure to submit an affidavit would not require the district to take the habeas corpus petition off calendar and should not prevent the prosecution of the petition.

⁶See Gebbers v. State, 118 Nev. 500, 50 P.3d 1092 (2002).

cc: Hon. Donald M. Mosley, District Judge
Timothy W. Connors
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk