

IN THE SUPREME COURT OF THE STATE OF NEVADA

CECIL L. HARVEY, III,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 36567

FILED

SEP 09 2002

ORDER OF REVERSAL AND REMAND

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

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

On July 7, 1998, appellant Cecil L. Harvey, III, was convicted, pursuant to a jury verdict, of one count each of burglary, conspiracy to commit robbery, robbery with the use of a deadly weapon, battery with the use of a deadly weapon, coercion with the use of a deadly weapon, and possession of a firearm by an ex-felon. The district court sentenced Harvey to serve multiple prison terms. Harvey appealed and this court affirmed his conviction.<sup>1</sup>

On December 5, 1999, Harvey filed a proper person post-conviction petition for a writ of habeas corpus alleging that his trial and appellate counsel were ineffective. The State opposed the petition. The district court conducted a hearing on the merits of the claims raised in Harvey's petition. At the hearing, the district court received evidence and testimony from Harvey's former counsel regarding the merits of the claims Harvey raised in the petition. Harvey, however, was not present at the hearing nor was post-conviction counsel appointed to represent Harvey at

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<sup>1</sup>Harvey v. State, Docket No. 32820 (Order Dismissing Appeal, March 11, 1999).

the hearing. After the hearing, the district court denied Harvey's petition. Harvey, with the assistance of counsel, filed the instant appeal.

This court recently held in Gebers v. State<sup>2</sup> that a petitioner's statutory rights are violated when a district court conducts evidentiary hearings regarding the merits of the claims raised in a petitioner's petition when the petitioner is not present at the hearings. This court also recently held in Mann v. State<sup>3</sup> that a petitioner's statutory rights are violated when the district court improperly expands the record. Thus, pursuant to Gebers and Mann, the district court violated Harvey's statutory rights when it conducted an ex parte evidentiary hearing on the claims that Harvey raised in his petition and when it improperly expanded the record by requesting that Harvey's former attorneys submit written responses to the claims raised in Harvey's petition. Therefore, we reverse the order of the district court denying Harvey's petition and remand this matter to a different district court judge for an evidentiary hearing on the merits of the claims Harvey raised in the petition. The district court shall provide for Harvey's presence at the hearings.<sup>4</sup>

Having reviewed the records on appeal and for the reasons set forth above, we

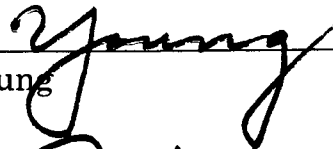
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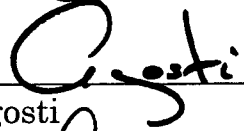
<sup>2</sup>See Gebers v. State, 118 Nev. \_\_\_, \_\_\_ P.3d \_\_\_ (Adv. Op. No. 53, August 2, 2002).

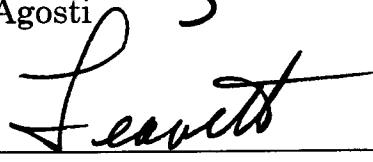
<sup>3</sup>See Mann v. State, 118 Nev. \_\_\_, 46 P.3d 1228 (2002).

<sup>4</sup>See NRS 34.390. The district court may exercise its discretion to appoint post-conviction counsel. See NRS 34.750.

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

 \_\_\_\_\_, J.  
Young

 \_\_\_\_\_, J.  
Agosti

 \_\_\_\_\_, J.  
Leavitt

cc: Hon. Donald M. Mosley, District Judge  
Graves & Leavitt  
Attorney General/Carson City  
Clark County District Attorney  
Clark County Clerk