

IN THE SUPREME COURT OF THE STATE OF NEVADA

DUANE A. HARPER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37918

FILED

OCT 08 2002

ORDER OF REVERSAL AND REMAND

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

This is an appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus.¹

Appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. In his petition, appellant claimed, among other things, that his counsel, who represented him in the proceedings leading to his conviction, provided ineffective assistance. The district court requested that appellant's former attorney submit a written response to the district court regarding the claims raised in appellant's petition.² The district court then conducted a hearing on the merits of the

¹We note that appellant was acting in proper person in the district court, and so this appeal should not have been subject to NRAP 3C. See NRAP 3C(a)(2). Unfortunately, the district court minutes and the order both incorrectly stated that appellant was represented by counsel. Because counsel did not move to withdraw, but instead filed a fast track statement, this appeal is being treated as a fast track appeal. The district court is reminded, however, of the importance of accuracy in its minutes and orders.

²We note that the written response is not contained in the record on appeal.

claims appellant raised in his petition. At the hearing, the district court received evidence and testimony regarding the merits of the claims appellant raised in his petition. Appellant, however, was not present at the hearing nor was post-conviction counsel appointed to represent appellant at the hearing. After the hearing, the district court denied appellant's petition. This appeal followed.

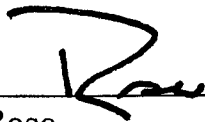
This court recently held in Gebers v. State³ that a petitioner's statutory rights are violated when a district court conducts evidentiary hearings regarding the merits of the claims raised in a petition when the petitioner is not present at the hearings. This court also recently held in Mann v. State⁴ 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 appellant's statutory rights when it conducted an ex parte evidentiary hearing on the claims that appellant raised in his petition and when it improperly expanded the record by requesting that appellant's former attorney submit a written response to the claims raised in appellant's petition. Therefore, we reverse and remand this matter to a different district court judge for an evidentiary hearing on the merits of the claims appellant raised in his petition. The district court shall provide for appellant's presence at the hearing.⁵

³See Gebers v. State, 118 Nev. ___, 50 P.3d 1092 (2002).

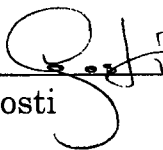
⁴See Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002).

⁵See NRS 34.390. The district court may exercise its discretion to appoint post-conviction counsel. See NRS 34.750.

Based on the foregoing, we
ORDER the judgment of the district court REVERSED AND
REMAND this matter to the district court for proceedings consistent with
this order.


_____, J.
Rose


_____, J.
Young


_____, J.
Agosti

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk