

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN DESALES HAYES A/K/A
MARTIN DANIEL HAYES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38592

FILED

SEP 04 2002

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

ORDER OF REVERSAL AND REMAND

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

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.¹ The district court then conducted a hearing on the merits of the 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

¹We note that the written response is not contained in the record on appeal.

appellant at the hearing. After the hearing, the district court denied appellant's petition. This appeal followed.

This court recently held in Gebers v. State² 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. State³ 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.⁴

²See Gebers v. State, 118 Nev. ___, ___ P.3d ___ (Adv. Op. No. 53, August 2, 2002).

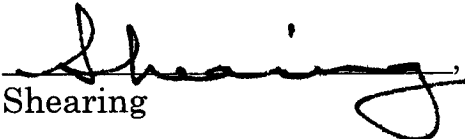
³See Mann v. State, 118 Nev. ___, 46 P.3d 1228 (2002).


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

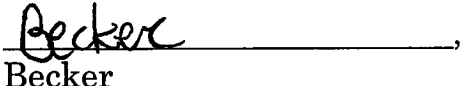
Having reviewed the record on appeal and for the reasons set forth above, we conclude that oral argument and briefing are unwarranted in this matter.⁵ Accordingly, we

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

It is so ORDERED.⁶

 J.
Shearing

 J.
Rose

 J.
Becker

⁵See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975). On August 19, 2002, attorney Martin R. Boyers entered an appearance in this case as counsel for appellant. Mr. Boyers has indicated that he intends to file a motion requesting this court to permit briefing in this appeal. Having concluded that the district court's decision must be reversed and remanded, however, we conclude that briefing at this stage of the proceedings is unnecessary.

⁶We have considered all proper person documents filed or received in this matter. We conclude that appellant is entitled only to the relief described herein. This order constitutes our final disposition of this appeal. Any subsequent appeal shall be docketed as a new matter.

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Martin R. Boyers
Martin Desales Hayes
Clark County Clerk