

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICARDO ANTONIO ABREGO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 38602

FILED

NOV 06 2002

ORDER OF REVERSAL AND REMAND

DAVID E. BLOCH  
CLERK OF THE SUPREME COURT  
BY *J. Richards*  
DEPUTY CLERK

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.

On May 1, 1998, the district court convicted appellant, pursuant to a jury verdict, of one count of conspiracy to commit robbery (count I), one count of attempted robbery with the use of a deadly weapon (count II), and one count of coercion with the use of a deadly weapon (count III). The district court sentenced appellant to serve in the Nevada State Prison a term of 12 to 48 months for count I; two consecutive terms of 16 to 72 months for count II, to run concurrent with count I; two consecutive terms of 16 to 72 months for count III, to run consecutive to counts I and II. This court dismissed appellant's direct appeal.<sup>1</sup>

On March 2, 2002, appellant filed a proper person post-conviction petition for a writ of habeas corpus in the district court. Appellant claimed, among other things, that he received ineffective assistance of trial and appellate counsel. The State opposed the petition.

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<sup>1</sup>Abrego v. State, Docket No. 32442 (Order Dismissing Appeal, March 2, 2000).

The district court declined to appoint post-conviction counsel to represent appellant, but conducted a hearing on the merits of the claims raised in appellant's petition. At the hearing, the district court received evidence in affidavit form, as well as testimony from appellant's former counsel regarding the merits of the claims raised in appellant's petition. Appellant, however, was not provided an opportunity to be present at the hearing. On August 23, 2001, the district court denied appellant's petition. This appeal followed.

This court recently held in Gebers v. State<sup>2</sup> that petitioners' statutory rights are violated when district courts conduct evidentiary hearings regarding the merits of the claims raised in post-conviction habeas petitions without the petitioners being 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 by accepting affidavits of former counsel regarding the merits of the claims asserted in the petition without conducting a valid evidentiary hearing where the petitioner can be provided an opportunity to respond. Thus, pursuant to Gebers and Mann, the district court violated appellant's statutory rights in this case by conducting an evidentiary hearing on the claims that appellant raised in his petition and by receiving evidence in affidavit form from appellant's former attorney regarding the claims raised in appellant's petition without providing appellant an opportunity to respond to the affidavit evidence or to be present at the hearing.

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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).

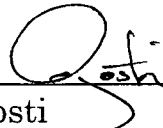
Therefore, we reverse and remand this matter for a proper evidentiary hearing on the merits of the claims raised in appellant's petition. The district court shall provide for appellant's presence at the hearing.<sup>4</sup>

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMANDED for further proceedings consistent with this order before a different district court judge.

  
\_\_\_\_\_, J.  
Rose

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

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

cc: Hon. Donald M. Mosley, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Ricardo Antonio Abrego  
Clark County Clerk

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