

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CRAIG ALLEN ROGERS
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE
COUNTY OF CLARK
Respondent,

and

THE STATE OF NEVADA,
Real Party in Interest.

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Elizabeth A. Brown
Clerk of Supreme Court

CASE NO: 87610-COA

**ANSWER TO PETITION FOR WRIT OF
MANDAMUS OR PROHIBITION**

COMES NOW, the State of Nevada, Real Party in Interest, by STEVEN B. WOLFSON, District Attorney, through his Chief Deputy, JOHN AFSHAR, on behalf of the above-named Real Party in Interest and submits this Answer to Petition for Writ of Mandamus or Prohibition in obedience to this Court's order filed December 27, 2023, in the above-captioned case. This Answer is based on the following memorandum and all papers and pleadings on file herein.

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Dated this 2nd day of January, 2024.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY /s/ John Afshar
JOHN AFSHAR
Chief Deputy District Attorney
Nevada Bar #014408
Office of the Clark County District Attorney

MEMORANDUM OF
POINTS AND AUTHORITIES
STATEMENT OF THE CASE

Petitioner Craig Rogers is litigating a post-conviction petition for writ of habeas corpus in district court.¹ He initially filed a habeas petition on August 31, 2020, challenging a conviction from a guilty plea he entered in 2019. The judgment of conviction was filed August 23, 2019, and remittitur from his direct appeal issued December 20, 2019.

The district court denied the petition on March 5, 2021. The petition was denied as untimely because Rogers had not filed his petition until one year and one week after his judgment of conviction had been filed. On appeal the State agreed,

¹ There is no appendix or Record on Appeal in this case. Accordingly, the State cannot provide citations to the record. The procedural history is summarized as relevant to this petition, but excludes a great deal of corollary hearings, and pleadings.

and the Court of Appeals reversed because, the clerk had received the petition within the one-year time period. Rodgers v. Hutchings, 498 P.3d 278 (Nev. App. 2021).

The matter returned to district court, and Rogers filed an “Amended” habeas petition. The district court heard the petition on March 15, 2022, with Rogers present via videoconferencing and the State not present at all. The district court issued an amended order denying Rogers Amended Petition on May 17, 2022. The district court denied his claims on the merits or subject to procedural bars other than NRS 34.726.

Rogers appealed again. The Court of Appeals largely affirmed the denied of Rogers’ petition, but remanded the case for an evidentiary hearing on two claims: First, whether counsel “erroneously advis[ed] him that good time credits would apply toward his eligibility for parole,” and Second, whether counsel failed to timely file a direct appeal when requested to do so. Rodgers v. Hutchings, 526 P.3d 1113 (Nev. App. 2023). Remittitur issued July 24, 2023.

The matter again returned to district court, and the district court set a status check to schedule the evidentiary hearing. On September 6, 2023, Rogers was present for a hearing via videoconferencing, but the “video timed out.” The district court subsequently issued an order, setting the hearing for January 9, 2024, at 1:30 p.m. on October 20, 2023, Rogers requested to appear in-person at the evidentiary hearing. The district court denied the motion on October 23, 2023, allowing Rogers

to be present via videoconferencing but not in person.

Almost two months later, on December 15, 2023, Rogers filed the instant petition for writ of mandamus or prohibition. This Court ordered Real Party in Interest to respond on December 27, 2023.

ARGUMENT

I. ROGERS HAS AN ADEQUATE REMEDY BY WAY OF APPEAL

This Court has expressly circumscribed mandamus relief as “a remedy distinguishable from all others listed therein, to the extent ‘it recognizes legal duty, and compels its performance where there is either [1] no remedy at law or [2] no adequate remedy.’” Walker v. Second Judicial Dist. Ct., 136 Nev. Adv. Op. 80 (2020) (quoting Thomas Carl Spelling, *A Treatise on Injunctions and Other Extraordinary Remedies* 1173 (2d ed. 1901)). The Walker Court further explained, “to the extent that appellate relief is available at the conclusion of a matter, it would typically be preferable to an extraordinary writ proceeding because [the Court] can issue a decision after ‘review[ing] the entire record in the regular way, when [it] can enjoy the advantage of having the whole case before [it].” Id. (internal quotation omitted).

“[M]andamus and prohibition are extraordinary remedies, and the decision of whether a petition will be entertained lies within the discretion of this court.” Hickey v. Eighth Jud. Dist. Court, 105 Nev. 729, 731 (1989). However, extraordinary relief

will not issue “where the petitioner has a plain, speedy and adequate remedy, such as an appeal, in the ordinary course of law.” Id. at 731. The petitioner carries “the burden of demonstrating that extraordinary relief is warranted.” Pan v. Eighth Judicial Dist. Ct., 120 Nev. 222, 228 (2004); see also NRAP 21(a). The Nevada Supreme Court has previously emphasized the “narrow circumstances” under which mandamus is available and has cautioned that extraordinary remedies are not a means for routine correction of error. State v. District Court (Riker), 121 Nev. 225 (2005).

Mandamus will not lie to control discretionary action unless it is manifestly abused or is exercised arbitrarily or capriciously. Office of the Washoe County DA v. Second Judicial Dist. Court, 116 Nev. 629, 635 (2000). Thus, a writ of mandamus will only issue to control a court’s arbitrary or capricious exercise of its discretion.” Id. citing Marshall v. District Court, 108 Nev. 459, 466 (1992); City of Sparks v. Second Judicial Dist. Court, 112 Nev. 952, 954 (1996); Round Hill Gen. Imp. Dist. V. Newman, 97 Nev. 601 (1981). The Nevada Supreme Court has reaffirmed on numerous occasions “that an appeal is generally an adequate legal remedy that precludes writ relief.” Pan, 120 Nev. at 223 (internal citation omitted). Further, “even if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief.” Id. at 224.

Rogers does not demonstrate that an appeal would not provide an adequate remedy. Rodgers has twice appealed the denial of his habeas petition, demonstrating that an appeal *is* an adequate remedy. Rogers has also appealed several other decisions of the district court, as can be seen by the appellate docket in this case. NSC Docket 87610-COA (listing related cases as 79714, 81533, 82108, 82645, 82645-COA, 83301, 83517, 83816, 84718, 84822, 84822-COA, 87610.) The existence of an adequate remedy alone should preclude writ relief.

II. ROGERS FAILS TO DEMONSTRATE THAT THE DISTRICT COURT ERRED

To the extent this Court concludes that this issue is proper for mandamus relief, the district court was within its discretion to permit Rogers to appear via videoconferencing.

The right to confrontation and cross-examination is “a trial right,” not a right that attaches prior to trial. Sheriff v. Witzenburg, 122 Nev. 1056, 1060, 145 P.3d 1002, 1004 (2006)(collecting cases). In proceedings after trial, including revocation proceedings, “the full panoply of constitutional protections afforded a criminal defendant does not apply.” Anaya v. State, 96 Nev. 119, 122, 606 P.2d 156, 157 (1980). But *some* rights attach, even if in a more limited sense.

In Gebers, the Nevada Supreme Court held that “the provisions of NRS chapter 34 require the presence of the petitioner at any evidentiary hearing conducted on the merits of the claims asserted in a post-conviction petition for a writ of habeas

corpus.” Gebbers v. State, 118 Nev. 500, 504, 50 P.3d 1092, 1094 (2002). In Gebbers, the district court conducted an evidentiary hearing without either the petitioner *or* petitioner’s counsel present. The Gebbers court concluded that the lack of petitioner’s presence was not harmless error because Gebbers should have been permitted “an opportunity to deny, controvert, or present evidence to demonstrate that her imprisonment was unlawful.” Id.

Rogers relies on the same language from Gebbers and cites the case. Petition at 3. However, Rogers will be present, and will have the opportunity to introduce evidence, cross-examine witnesses, and provide testimony as the district court permits at the evidentiary hearing. Rogers appears to speculate that because a prior hearing had “a problem” that similar problems will occur at the evidentiary hearing. But that claim is sheer speculation, and hearings are routinely conducted via video conferencing without issue. Even trial witnesses are permitted to appear via video conferencing, provided the district court makes sufficient findings. Newson v. State, 139 Nev. Adv. Op. 9, 526 P.3d 717, 721 (2023). Parties, judges, and justices, regularly appear remotely for appellate court arguments. Defendants may be “present” for sentencing via videoconferencing software. Chaparro v. State, 137 Nev. 665, 668, 497 P.3d 1187, 1191 (2021). Attorneys have been “present” at disciplinary proceedings via videoconferencing software without violating due process. Matter of Discipline of Padgett, 509 P.3d 604 (Nev. 2022). In a divorce

proceeding, this Court has explained that a party may attend an evidentiary hearing remotely. Byrd v. Byrd, 137 Nev. 587, 597, 501 P.3d 458, 467 (Nev. App. 2021). In sum, in 2024, parties regularly attend contested hearings, present evidence, and provide testimony remotely without prejudice both when the “full panoply” of rights attach and when they do not. Unlike in Gebbers, the district court here is not preventing Rogers from being present, but merely requiring him to attend via videoconferencing software. Rogers does not demonstrate that the software is unavailable, or unreliable (outside of a single issue), or that it will prevent him from actively participating in the evidentiary hearing. He simply prefers to be present in person. Such a preference is not the appropriate subject of a petition seeking “extraordinary relief,” and the petition should be denied. Rogers may challenge the result of the evidentiary hearing via appeal, as he has in the past, so that this Court may consider whether the evidentiary hearing was sufficient without relying on speculation and with the benefit of a complete record.

CONCLUSION

Based on the foregoing, the State respectfully requests that Rogers’s Petition for Writ of Mandamus or Prohibition be DENIED.

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Dated this 2nd day of January, 2024.

Respectfully submitted,

STEVEN B. WOLFSON
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Nevada Bar #001565

BY /s/ John Afshar
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AFFIDAVIT

I certify that the information provided in this mandamus petition is true and complete to the best of my knowledge, information and belief.

Dated this 2nd day of January, 2024.

BY */s/ John Afshar*

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this Answer to Mandamus Writ complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 1,532 words and 136 lines of text, and does not exceed 15 pages.
3. **Finally, I hereby certify** that I have read this Answer to Mandamus Writ, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 2nd day of January, 2024.

Respectfully submitted

STEVEN B. WOLFSON
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BY */s/ John Afshar*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 2, 2024. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JOHN AFSHAR
Chief Deputy District Attorney

I, further certify that on January 2, 2024, a copy was sent via United States Postal Service to:

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Indian Springs, Nevada 89070

BY /s/ E. Davis
Employee, District Attorney's Office