IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GREGORY SCOTT SQUIRES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70698

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Appellant Gregory Squires appeals from an order of the district court denying his postconviction petition for a writ of habeas corpus filed on March 23, 2016.[1] Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Squires claims the district court erred by denying his ineffective-assistance-of-counsel claims. To prove ineffective assistance of counsel, a petitioner must demonstrate counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability, but for counsel's errors, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown, *Strickland*, 466 U.S. at 697, and the petitioner must demonstrate the underlying facts by a preponderance of the evidence, *Means v. State*, 120 Nev. 1001, 1012,

[1]This appeal has been submitted for decision without oral argument. NRAP 34(f)(3).

103 P.3d 25, 33 (2004). We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). To warrant an evidentiary hearing, a petitioner must allege specific facts that, if true, entitle him to relief. *See Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). It is within the district court's discretion to appoint counsel to represent a petitioner who has filed a postconviction petition for a writ of habeas corpus. *See* NRS 34.750(1).

First, Squires claimed counsel was ineffective for failing to present additional mitigation evidence at sentencing. Specifically, he claimed counsel failed to file the psychosexual examination report showing he was a very low risk to reoffend and failed to present the fact Squires had completed a sexual boundaries class. Squires failed to demonstrate counsel was deficient or resulting prejudice. Counsel informed the district court Squires had been found to be a very low risk to reoffend. Further, Squires failed to demonstrate a reasonable probability of a different outcome at sentencing had counsel filed the psychosexual examination report or informed the district court Squires had completed a sexual boundaries class. At sentencing, the district court specifically based its sentence on the harm caused to the victim and Squires failed to demonstrate further evidence of his character would have changed the outcome at sentencing. Therefore, we conclude the district court did not err in denying this claim without holding an evidentiary hearing or appointing counsel.

Second, Squires claimed counsel was ineffective for failing to provide him with his case file. Squires failed to demonstrate counsel was deficient or resulting prejudice. The only document provided by Squires showing he requested anything to do with his files showed he only

requested very specific portions of his files and not his entire file. He failed to demonstrate counsel's failure to provide those documents prevented him from raising claims in the instant petition. Accordingly, Squires failed to demonstrate counsel was ineffective for failing to provide his entire file. Therefore, we conclude the district court did not err by denying this claim without holding an evidentiary hearing or appointing counsel.

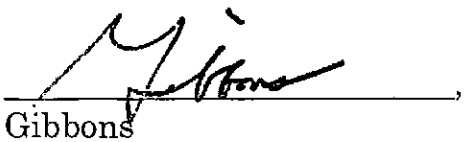
Third, Squires claimed counsel was ineffective for failing to file a notice of expert witnesses in a timely manner and for failing to receive the victim's medical exam or therapist follow-up evidence. Squires failed to demonstrate counsel was deficient or resulting prejudice. Squires failed to support this claim with specific facts that, if true, would entitle him to relief. *See Hargrove*, 100 Nev. at 502, 686 P.2d at 225. Therefore, we conclude the district court did not err in denying these claims without holding an evidentiary hearing or appointing counsel.

Fourth, Squires claimed counsel was ineffective for failing to explain the law to him so he could make an informed choice regarding a plea offer and for failing to inform him about other plea offers. We conclude Squires presented specific facts that, if true, would entitle him to relief. *See id*; *see also Missouri v. Frye*, 566 U.S. ___, 132 S. Ct. 1399, 1409 (2012) (discussing failure to communicate a plea offer); *Lafler v. Cooper*, 566 U.S. ___132 S. Ct. 1376, 1384 (2012) (discussing advising a defendant to reject a favorable plea offer). While the district court correctly noted there was discussion on the record at calendar call prior to trial regarding plea offers, the discussion does not reveal whether counsel specifically informed Squires of each plea offer made by the State or whether counsel erred by advising Squires to reject a favorable plea offer. Therefore, we reverse the district court's determination on this issue and remand this

case to the district court to hold an evidentiary hearing on this issue.[2] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[3]

_____, C.J.
Silver



_____, J.
Gibbons

TAO, J., concurring:

A recurring question in the law relates to whether courts should treat the actions of other entities—for example, executive branch agencies, legislative bodies, lower courts, or courts of sister states—through the lens of "formalism" or "realism." *See generally*

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[2]To the extent Squires argues counsel was ineffective for failing to investigate and prepare for trial, failing to request a continuance of the *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985) hearing, and for confessing to his lack of experience, these claims were not raised below, and we decline to consider them in the first instance on appeal. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), *overruled on other grounds by Means*, 120 Nev. at 1013, 103 P.3d at 33. And to the extent Squires alleges cumulative error entitled him to relief, we conclude this claim lacked merit.

[3]The district court may exercise its discretion to appoint postconviction counsel to assist Squires with the evidentiary hearing. *See* NRS 34.750(1).

Richard Pildes, "Institutional Formalism and Realism in Constitutional and Public Law," 2013 Supreme Court Review 1 (2014); Oliver W. Holmes, *The Common Law* (1881). As the names suggest, a "formalist" cares primarily about the form of an action and gives deference to it, while a "realist" might be more willing to look behind the curtain at the underlying reality behind the form before deciding whether deference is actually due.

Here, the prosecutor and defense attorney both stated in open court during a pre-trial colloquy that the State had attempted to resolve the case through plea-bargain offers, but Squires was only interested in a negotiation allowing him to plead guilty to a misdemeanor offense and would consider nothing more severe, which the State was not interested in offering:

> [PROSECUTOR]: I reached out to defense counsel a couple of weeks ago about possible negotiations. I was informed that they were only interested in misdemeanor negotiations. I just wanted to make sure that was on the record and understood.
>
> THE COURT: Was there an offer that was extended that you want to make a record of.
>
> [PROSECUTOR]: There have been multiple offers before. They've been rejected. I reached out -- I was informed that unless it was a misdemeanor offer, it wasn't going to be discussed. We didn't get to that point.
>
> I wanted to make sure that was on the record.
>
> THE COURT: [Defense counsel], do you agree.
>
> [DEFENSE COUNSEL]: I agree that there was an e-mail sent to me, your Honor, to that [e]ffect.
>
> [THE COURT]: The characterization -- and this is just kind of, I don't want to say more -- it's a newer thing, although I think it is a more recent thing. Wherein if there is an offer that's made before

> trial and rejected, a record is made of what the offer was and that it was rejected and you're going ahead and proceeding to trial.
>
> So is his characterization correct that there was some communication about, do you want to talk about offers or that you all represented unless it involves misdemeanors there wasn't really anything to talk about.
>
> [DEFENSE COUNSEL]: That's correct, your Honor.

Squires was present during the entire colloquy and made no objection and expressed no disagreement, either then or at any time during the multiple days of trial that followed.

Now, four years later, after losing at trial, Squires contends that those representations weren't accurate. Now, he contends that he was not made aware of the State's plea bargain offers and would have accepted a reasonable plea bargain offer (even for something more severe than a misdemeanor) rather than proceed to trial had his attorney given him the chance.

I suppose that, technically, this case must be remanded for an evidentiary hearing to probe the truth behind the new assertions. The governing case, *Missouri v. Frye*, 566 U.S. ___, 132 S.Ct. 1399, 1409 (2012), can be read to impose an absolute requirement that defense counsel must always relay all plea bargain offers to a defendant and always discuss them with him. As things stand today, apparently no exception to that requirement exists even when defense counsel has already been told by his client in advance that the offer would not be accepted.

Applying that bright-line rule to the present case, it's true that the record does not indicate the defense counsel discussed each and every offer with Squires one at a time before rejecting them; indeed, the *whole*

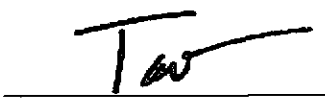
point of the colloquy is that he *did not do so* because he had already been told by his client that the offers would not even be considered, much less accepted.

So a remand appears required by law, but I don't know what's really being accomplished here. There are times when judicial rules end up promoting form over substance and the illusion of justice over actual justice, and the rule here seems to me to ignore the reality of how defendants and lawyers actually speak with one another in the confines of an attorney-client relationship. When a client has unequivocally stated that he has no interest whatsoever in a particular range of negotiations, I imagine most lawyers would consider it pointless to thereafter convey an offer falling squarely within that range that he already has been told in no uncertain terms will be rejected. I wonder how many lawyers would feel a compelling moral or ethical need to spend time doing something he knows to be pointless and futile *but for* the existence of an artificially-created rule that now says that he must do so anyway.

Thus, I wonder why we couldn't conclude instead that no remand is necessary because Squires clearly expressed that he wasn't interested in pleading guilty to anything more serious than a misdemeanor no matter how many offers were made or what those offers consisted of. A "realist" might also take note that the district judge who witnessed the colloquy—and saw, first-hand, Squires' demeanor, body language, and his nonverbal (perhaps whispered off the record or handed over in a note) interactions with his attorney—was also the same district judge who denied the subsequent petition on the ground that the new assertions flatly contradicted the prior colloquy.

But I suppose that sometimes we're not permitted to engage in that kind of realism. I agree that it's theoretically possible, in a hairsplitting way, that somewhere within the space between what the

record says and what the defendant now claims may lie a truth that could entitle the defendant to relief. But when accepting that truth requires us to thread a needle as narrow as this one, I wonder whether that possibility is so wholeheartedly remote and implausible that a remand will end up just being a thoroughgoing waste of time and judicial resources.



_____, J.
Tao

cc: Hon. Douglas W. Herndon, District Judge
Gregory Scott Squires
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk