IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Sep 13 2021 03:45 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SHAWN GLOVER JR.	)	
	)	
Appellant,	)	
	)	CASE NO.: 82700
vs.	)	
	)	
THE STATE OF NEVADA	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

ALEXANDER CHEN, ESQ.
Clark County District Attorney
Nevada Bar No. 10539
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2500
Attorney for Respondent
State of Nevada

LUCAS J. GAFFNEY. ESQ
Nevada Bar No. 12373
Gaffney Law
1050 Indigo Drive
Suite 120
Las Vegas, Nevada 89145
(702) 742-2055
lucas@gaffneylawlv.com
Attorney for Appellant
Shawn Glover Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES & REGULATIONS **PAGE**

I.
JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter as an appeal of the district court's Judgment of Conviction pursuant to Nev. Rev. Stat. 177.015(3).

II.
NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

NONE

Attorney of Record for Shawn Glover Jr.:

/s/ Lucas J. Gaffney

///

///

///

///

///

///

III.
STATEMENT OF THE CASE

This is an appeal from a Findings of Fact, Conclusions of Law, and Order filed on February 25, 2021, in which the district court denied the Appellant's Petition for Writ of Habeas Corpus (post-conviction).

IV.
ROUTING STATEMENT

Pursuant to the Nevada Rules of Appellate Procedure (hereinafter, "NRAP") 17(b)(1) and (3), this case is presumptively assigned to the Nevada Court of Appeals.

V.
STATEMENT OF THE ISSUES

A. Whether The District Court Erred By Not Finding Trial Counsel Provided Ineffective Assistance To Glover By Failing To Object To Testimonial Hearsay Introduced In Violation Of Crawford V. Washington. And Whether The District Court Further Erred By Failing To Grant Glover An Evidentiary Hearing Regarding This Claim.

B. Whether The District Court Erred By Failing To Find Trial Counsel Provided Ineffective Assistance To Glover By Possessing A Conflict Of Interest Resulting

From The Public Defender's Office Previously Representing Fleming In A Criminal Case. And Whether The District Court Further Erred By Failing To Grant An Evidentiary Hearing Regarding This Claim.

VI.
RELEVANT PROCEDURAL HISTORY

On February 4, 2016, the State of Nevada (State) filed its Indictment in case number C-16-312448-1, charging the Appellant, Shawn Glover Jr. (Glover), with the crimes of: Count 1 - Murder with use of a Deadly Weapon; Count 2 - Assault with a Deadly Weapon; Count 3 - Ownership or Possession of a Firearm by a Prohibited Person; and Count 4 - Discharge of Firearm.

On February 8, 2016, the district court arraigned Glover on the Indictment. Glover pleaded "Not Guilty" and waived his right to a trial within sixty (60) days.[1]

On March 4, 2016, Jess Marchese, Esq. (Marchese) filed a Substitution of Counsel indicating he would represent Glover instead of the Clark County Public Defender. On April 7, 2016, Marchese filed a Motion to Withdraw as Counsel. The

[1] On January 6, 2016, the North Las Vegas Justice Court appointed the Public Defender to represent Glover in case number 16CRN000001. On February 9, 2016, the State dismissed the North Las Vegas Justice Court case due to the filing of the Indictment.

motion indicated Marchese should be allowed to withdraw as Glover's attorney because Glover failed to fulfill his contractual obligations. On April 18, 2016, the district court granted the motion. On April 25, 2016, the Public Defender reconfirmed as Glover's counsel.

On May 15, 2017, Glover filed his Motion to Compel Production of Discovery & Brady Material. On May 26, 2017, the State filed its Opposition. On July 18, 2017, the district court granted the motion in part and denied the motion in part.

On November 9, 2017, the State filed its Notice of Witnesses and/or Expert Witnesses.

On May 4, 2018, Glover filed his Motion to Strike Expert Witnesses. Specifically, the motion sought to prevent Las Vegas Metropolitan Police Detectives Ben Owens and Sayoko Wilson-Fay from testifying as expert witnesses. That same day, Glover filed his Motion to Bifurcate Count 3 (Ownership or Possession of a Firearm by a Prohibited Person).

On June 28, 2018, the district court granted Glover's motion to bifurcate Count 3 as unopposed. The district court reserved its ruling on Glover's Motion to Strike Expert Witness pending an evidentiary hearing. That same day, Glover advised the district court the parties agreed to waive the penalty phase.

On July 20, 2018, the State filed its State's Notice of Witnesses [NRS 174.234(1)(a)].

A five-day trial, beginning on July 30, and concluding on August 3, 2018, was conducted in District Court, Department IX, before the Honorable Jennifer Togliatti. On July 31, 2018, the State filed its Amended Indictment charging Glover with the crimes of: Count 1 - Murder with use of a Deadly Weapon; Count 2 - Assault with a Deadly Weapon; Count 3 - Discharge of Firearm from or within a Structure or Vehicle; and Count 4 - Ownership or Possession of a Firearm by a Prohibited Person.

After the presentation of evidence, and deliberation, the jury returned a verdict of: Count I - Guilty of First-Degree Murder with use of a Deadly Weapon; Count; Count 2 - Guilty of Assault with use of a Deadly Weapon; and Count 3 - Guilty of Discharge of Firearm from or within a Structure or Vehicle. The State dismissed Count 4 after receiving the verdict.

On October 10, 2018, the district court sentenced Glover to the following: Count 1 - Life without the possibility of Parole plus a consecutive term of 180 months with a minimum parole eligibility of 48 months for the use of a deadly weapon; Count 2 - a maximum of 72 months with a minimum parole eligibility of 28 months, concurrent with Count 1; and Count 3 - a maximum of 180 months with

a minimum parole eligibility of 60 months, concurrent with Counts 1 and 2. (Count 4 was dismissed. The court imposed 1,011 days credit for time served.

On November 8, 2018, Glover filed a Notice of Appeal in Nevada Supreme Court Case 77425. On April 17, 2019, Glover filed his Appellant's Opening Brief, which raised the following issues:

1. There was insufficient evidence presented at trial to overcome the presumption of innocence and thereby to sustain the convictions against Shawn Glover.
2. Mr. Glover was denied his constitutionally guaranteed right to a fair trial when the State attempted to shift the burden of proof to him.
3. Glover was denied his constitutionally guaranteed right to a fair trial when the court allowed the state to solicit from Miranda Sutton and Akira Veasley Improper Character Evidence.

On May 16, 2019, the State filed its Respondent's Answering Brief. Glover did not file a Reply Brief. On November 23, 2019, this Court filed its Order of Affirmance. On November 18, 2019, this Court filed its Remittitur.

On September 14, 2020, Glover filed his Petition for Writ of Habeas Corpus (post-conviction) in case number A-20-821176-W. On September 17, 2020, the Clerk of the Court filed a Notice of Nonconforming Document. On November 13, 2020, the State filed its Response to Glover's Petition for Writ of Habeas Corpus

(post-conviction). On January 4, 2021, Glover filed his Amended Petition for Writ of Habeas Corpus (post-conviction) (Petition).

On January 8, 2021, the district court heard oral arguments on the post-conviction pleadings. On February 5, 2021, the district court filed a Minute Order denying Glover's Petition. On February 25, 2021, the district court filed its Findings of Fact, Conclusions of Law and Order. On March 1, 2021, the district court filed its Notice of Entry of Findings of Fact, Conclusions of Law and Order. On March 26, 2021, Glover filed his Notice of Appeal in the instant case.

VII.
STATEMENT OF FACTS

In December of 2015, about two weeks before the death of the victim, Patrick Fleming (Fleming), his wife Miranda Sutton (Sutton), their 21-year-old daughter Akira Veasley (Veasley), and 12-year-old twins, moved into a townhouse with their goddaughter Angela. Appellant's Appendix (AA), Volumes II & III (II & III), bates numbers 500-503. Shortly after that, around Christmas Eve, Shawn Glover (Glover) also moved into the townhouse. AA III 503-504. Glover has a daughter in common with Angela. AA III 504. On January 1, 2016, five adults, along with several children were living in Angela's townhouse on 4032 Smokey Fog Avenue, in North Las Vegas. AA II & III 500, 504-505.

On the morning of January 1, 2016, after he returned from taking Angela to work, Fleming got into an argument with his stepdaughter Veasley over her behavior the night before. AA III 505-506. The night before, Fleming had a friend follow and videotape Veasley while she drove Fleming's vehicle and picked up a boy for a date. AA III 532. The argument took place downstairs in the garage and Sutton was present. AA III 505-506. According to Sutton's testimony, "it was an argument. It was a loud argument. It was a lot of shouting and that's primarily why we went to the garage. There was a lot of handclapping, you know, when you talk with your hands. But other than that… it was a typical argument that we were having." AA III 506. Sutton testified that she and Veasley were screaming during the argument. AA III 532-533.

At some point during the argument, according to Sutton, Glover came downstairs and told Sutton that Angela was on the phone and wanted to speak to her. AA III 507. After Sutton told Angela that everything was okay, Glover went back upstairs. AA III 507. Later, as the argument in the garage was winding down, Glover returned downstairs to the garage. AA III 507. Sutton testified that Glover asked her to come upstairs with him, which she did. AA III 508. Sutton testified that Glover asked her if she wanted him to handle the situation. AA III 508-509. Sutton told Glover that everything was fine and not to worry. AA III 508-509.

Sutton testified that shortly after Fleming and Veasley had come back upstairs Fleming confronted Glover about wanting to talk to his wife, Sutton. AA III 510. Glover indicated he was concerned because of the heated argument that occurred in the garage. AA III 510. According to Sutton, when Fleming attempted to touch Glover on his shoulder, Glover pulled away "like man, get off me, you're too close to me." AA III 510. Fleming then looked at Glover and said "do we have a problem, do we need to talk?" AA III 510. Fleming suggested he and Glover go downstairs to talk. AA III 510.

Sutton told Fleming that he did not need to talk to Glover, but Fleming pushed Sutton to the side and walked downstairs. AA III 510. Sutton testified that Mr. Glover followed Fleming. AA III 511. Sutton then went towards Angela's bedroom when she heard three gunshots. AA III 511. Sutton and Veasley ran to the landing at the top of the stairs and saw Fleming lying on the floor and Glover standing over him holding a gun. AA III 512. Sutton testified that Glover pointed the gun at her and said something to the effect of "don't tell on me." AA III 512, 520-521. Sutton later testified that Glover told her "if you and your kids want to live, you'll shut the fuck up." AA III 522. In response, Sutton raised her hands and said "Okay." AA III 512. At that point, Glover left and Veasley called 911. AA III 513.

Sutton testified that she moved Fleming's body in an attempt to perform cardiopulmonary resuscitation (CPR). AA III 513-514. Sutton further testified that at some point during the argument, Glover took the five children into a bedroom to play, he told them to stay in the bedroom and closed the door. AA III 515.

On cross examination, Sutton testified that she told the 911 operator Fleming was shot after he answered the front door, and that she did not know who shot Fleming. AA III 525-526. Sutton also testified that she told the 911 operator that she knew Fleming had talked to someone on the phone that was supposed to come over to the house, but she did not see anything. AA III 526. After the police arrived, Sutton gave a statement to detectives where she indicated that Fleming was selling marijuana and was looking to "re-up." AA III 528-529. As such, Sutton left the police with the initial impression that a potential customer had shot Fleming during a drug deal.

Veasley testified to substantially the same version of events with a few exceptions. Veasley testified that when Glover and Fleming were arguing at the top of the stairs, Glover confronted Patrick for trying to physically harm Veasley and Sutton. AA III 552-553. Glover also indicated to Veasley that he heard her and Sutton crying. AA III 552. Veasley testified that Fleming grabbed Glover by his elbows but Glover pulled away. AA III 95. One of them suggested going downstairs to talk, and shortly after they went downstairs Veasley heard three gunshots. AA III

553. After she and Sutton ran over to the stairs she believed Glover warned them "about not snitching on him." AA III 555.

Veasley further testified that immediately following the shooting, she told the detectives that there was a man named Hatch in the house who was a customer of Fleming's. AA III 561. And that Fleming would average two to three customers a day selling marijuana. AA III 561. Veasley told the detectives that Hatch waited upstairs during the argument, but at some point came down stairs to speak to Sutton. AA III 562. Fleming became upset with Hatch for speaking to Sutton and told Hatch to mind his own business. AA III 562. Veasley testified that she told the detectives she had never seen Hatch before, and as far as she knew Sutton did not know Hatch. AA III 562. Veasley also testified that she told the detectives that she did know if Hatch went by any other names or had any tattoos. AA III 563. Veasley then testified that the next day she told the detectives that Hatch is Glover, and she lied because she was afraid of him. AA III 564. Veasley also testified that Fleming owned a Dodge Durango which he let other people drive. AA III 563. But Veasley noticed after the shooting that the keys to the Durango, which Fleming normally left on the kitchen counter were gone, and the Durango was missing. AA III 563, 566.

Dr. Jennifer Corneal (Dr. Corneal) testified that Dr. Timothy Dutra (Dr. Dutra) performed the autopsy of Fleming. AA III 579. Dr. Corneal had merely

reviewed the autopsy report and investigative files, including photographs, as it related to the autopsy performed on Fleming on January 2, 2016. AA III 579.

Dr. Corneal testified that Fleming was shot in the back of his head on the left side. AA III 581. The entrance wound was located in the back of Fleming's head. AA III 581-582. The trajectory of the projectile was left to right, and downward. AA III 584. The projectile passed through Fleming's brain, which transected his brain stem and immediately incapacitated him. AA III 585. Dr. Corneal testified that she did not observe any soot or stippling that would indicate the gun was fired at close range. AA III 586. She further testified she could not determine the range at which the gun was fired possibly due to Fleming's thick hair, which may have absorbed the soot—the gray material deposited around the wound edges—and/or the stippling—the unburnt gun powder that strikes the skin during a shooting at close range. AA III 586.

Patrick was also shot in his inner, right upper arm, and in the right groin area. AA III 587-588. The trajectory of the projectile in the groin area was right to left, front to back and downward. AA III 589. Dr. Corneal testified that the gunshot wound to the head was the cause of Patrick's death, and the manner of death was homicide. AA III 589.

///

///

VIII.
SUMMARY OF THE ARGUMENT

The district court erred by not finding trial counsel provided ineffective assistance to Glover by failing to object to testimonial hearsay presented during his trial, and by failing to grant an evidentiary hearing on this claim. Prior to trial, Dr. Dutra—a medical doctor employed by the Clark County Coroner Medical Examiner—performed an autopsy on the victim. Dr. Dutra produced an autopsy report that contained his findings and conclusions regarding the cause and manner of death. At trial, the State called Dr. Suiter rather than Dr. Dutra to present information contained in the autopsy report, as well as information contained in an investigative file presumably produced by the Clark County Coroner's Office. Glover's state and federal constitutional rights to due process, confrontation and cross-examination were violated when trial counsel failed to object to the introduction of testimonial hearsay evidence in the form of Dr. Suiter presenting Dr. Dutra's findings and conclusions.

The district court also erred by not finding trial counsel provided ineffective assistance to Glover by failing to disclose a conflict of interest. The district court also erred by failing to grant an evidentiary hearing on this claim. Trial counsel—a deputy public defender—possessed a conflict of interest because the Public Defender's Office previously represented the victim in two criminal cases. The

general nature of one criminal case—battery domestic violence—supported Glover's assertion the Public Defender's Office likely had privileged information regarding the victim's violent conduct that Glover could have used to present a theory of self-defense at trial. However, the deputy public defender never disclosed its representation of the victim to allow the district court to determine the extent of the conflict.

IX.
ARGUMENT

LEGAL AUTHORITY RELEVANT TO ALL CLAIMS

A conviction cannot stand when defense counsel fails to provide effective assistance during a critical stage of criminal proceedings. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I. Counsel is ineffective, thereby depriving a defendant of his rights, when (1) it is deficient, such that counsel made errors so serious it ceased to function as the "counsel" guaranteed by the Sixth Amendment, and (2) when that deficiency prejudicial to the defendant, such that the result of the proceeding is rendered unreliable. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). The question of whether a defendant has received ineffective assistance is a mixed question of law and fact and is subject to independent review. State v. Love, 109 Nev. 1136-38, 865 P.2d 322, 323 (Nev. 1993).

Performance of counsel will be judged against the objective standard for reasonableness, and is deficient when it falls below that standard. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (Nev. 2006); Means v. State, 120 Nev. 1001, 103 P.3d 25 (Nev. 2004). Where counsel might claim that an action was a strategic one, the reviewing court must satisfy itself that the decisions were, indeed, reasonable. Strickland, 466 U.S. at 691.

Prejudice to the defendant occurs where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev. 1996). A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id.

With respect to post-conviction habeas corpus petitions, all factual allegations in support of an ineffective assistance of counsel claim must only be proven by a preponderance of the evidence. Powell, 122 Nev. at 759.

///

///

///

///

///

///

A. THE DISTRICT COURT ERRED BY NOT FINDING TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO GLOVER BY FAILING TO OBJECT TO TESTIMONIAL HEARSAY INTRODUCED IN VIOLATION OF CRAWFORD V. WASHINGTON. THE DISTRICT COURT FURTHER ERRED BY FAILING TO GRANT GLOVER AN EVIDENTIARY HEARING REGARDING THIS CLAIM.

In its Findings of Fact, Conclusions of Law and Order (Findings), the district court found trial counsel did not provide ineffective assistance by failing to object to the testimony of Dr. Corneal. AA IV 952-953. Specifically, the district court found that because Dr. Corneal testified regarding her own opinion(s) as to the cause and manner of death and did not refer to the opinions and conclusions of Dr. Dutra, Dr. Corneal's testimony did not constitute testimonial hearsay. AA IV 952-953. The district court erred in reaching this conclusion.

Glover's state and federal constitutional rights to due process, confrontation and cross-examination were violated when trial counsel failed to object to the introduction of testimonial hearsay evidence in the form of Dr. Dutra's autopsy report and related findings. U.S. Const. amend. V, VI, XIV; Nevada Const. Art. I, Sec. 3, 6 and 8; Art. IV, Sec. 21.

This issue was considered by the United States Supreme Court. In Commonwealth v. Melendez-Diaz, 557 U.S. 305, 129 S.Ct. 2527 (2009), the Supreme Court found that admission of a laboratory analysts' affidavits violated the defendant's right of confrontation:

> In short, under our decision in Crawford the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial.

Id. at 2532 (*alteration in original*) (*quoting* Crawford v. Washington, 541 U.S. 36, 53, 124 S.Ct. 1354, 1365-1366 (2004).

As in Melendez-Diaz, evidence of the victim's autopsy was admitted, even though the expert who performed the autopsy did not testify at trial. Thus, Glover was denied the opportunity to question Dr. Dutra about his methodology, competence as an expert, and other factors relevant to the weight and admissibility of the testimony provided through Dr. Corneal. As set forth at length in Melendez-Diaz, findings by expert witnesses must be subject to confrontation:

> Nor is it evident that what respondent calls "neutral scientific testing" is as neutral or as reliable as respondent suggests. Forensic evidence is not uniquely immune from the risk of manipulation. According to a recent study conducted under the auspices of the National Academy of Sciences, "[t]he majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency." National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 6-1 (Prepublication Copy Feb. 2009) (hereinafter National Academy Report). And "[b]ecause forensic scientists often are driven in their work by a need to answer a particular question related to the issues of a particular case, they sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." Id., at S-17. A forensic analyst responding to a

request from a law enforcement official may feel pressure --or have an incentive -- to alter the evidence in a manner favorable to the prosecution.

Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant, post, at 10, the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as Amicus Curiae 15-17 (discussing cases of documented "drylabbing" where forensic analysts report results of tests that were never performed); National Academy Report 1-8 to 1-10 (discussing documented cases of fraud and error involving the use of forensic evidence). Like the eyewitness who has fabricated his account to the police, the analyst who provides false results may, under oath in open court, reconsider his false testimony. See Coy v. Iowa, 487 U.S. 1012, 1019 (1988). And, of course, the prospect of confrontation will deter fraudulent analysis in the first place.

Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." Metzger, Cheating the Constitution, 59 Vand. L. Rev. 475, 491 (2006). One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases. Garrett & Neufeld, Invalid Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 14 (2009). And the National Academy Report concluded: "The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country." National Academy Report P-1 (emphasis in original). Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination.

Melendez-Diaz, 129 S. Ct. at 2537 (footnote omitted).

Glover's constitutional rights were violated as trial counsel failed to object to the State presenting the findings of an expert witness that did not testify at trial. Specifically, Dr. Dutra, the medical examiner that performed the autopsy of Fleming and authored the autopsy report did not testify at trial.[2] Instead, Dr. Dutra's findings were presented by Dr. Corneal. TT III 118-113. The State did not file formal notice that Dr. Corneal would testify as an expert witness pursuant to NRS 174.234(2).[3] Although the State indicated Dr. Dutra had retired, it did not provide an explanation for why Dr. Dutra was unavailable to testify at Glover's trial.[4] TT III 121. During the proceedings below, the State speculated that trial counsel "clearly was not surprised at Dr. Corneal's testimony," and purposely failed to object to Dr. Corneal's testimony. AA IV 936-937. However, the State's assertion was never tested because the district court denied Glover an evidentiary hearing.

---

[2] The State included Dr. Dutra (and/or designee) on its State's Notice of Expert Witnesses filed November 9, 2017. The Notice indicated that Dr. Dutra would "testify to all aspect [sic] of the coroner's investigation and conclusions in the death of Patrick Fleming." *See* AA I 133.

[3] It is unknown whether the State provided trial counsel with Dr. Corneal's CV, or some other documentation that listed Dr. Corneal's qualifications to testify as an expert.

[4] The defense never had an opportunity to cross examine Dr. Dutra.

Trial counsel also erred by not objecting to the district court allowing the State to present the findings of an expert witness without requiring those experts testify at trial. In doing so, trial counsel and the district court violated Glover's rights under Crawford, as Dr. Dutra's autopsy findings constituted testimonial hearsay evidence and was inadmissible under these circumstances. *See also* Bullcoming v. New Mexico, 564 U S. 647, 664, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011) ("A document created *solely* for an 'evidentiary purpose,' ... made in aid of a police investigation, ranks as testimonial.") (emphasis added) (*quoting* Melendez-Diaz, 557 U.S. at 311, 129 S.Ct. 2527).

This Court has not decided in a published opinion whether autopsy reports constitute 'testimonial evidence' so as to trigger the protections of the Confrontation Clause. And courts elsewhere have been almost evenly divided in their opinions on this issue. *See* Rosario v. State, 175 So. 3d 843, 858 (Fla. Dist. Ct. App. 2015) ("In sum, we conclude that an autopsy report prepared pursuant to chapter 406 is testimonial hearsay under the Confrontation Clause."); Commonwealth v. Brown, 2016 PA Super 98, 139 A.3d 208, 216 (2016), aff'd sub nom. Commonwealth v. Brown, 646 Pa. 396, 185 A.3d 316 (2018); State v. Kennedy, 229 W. Va. 756, 768, 735 S.E.2d 905, 917 (2012) ([F]or purposes of use in criminal prosecutions, autopsy reports are under all circumstances testimonial.); United States v. Ignasiak, 667 F.3d 1217, 1233 (11th Cir. 2012) ([A]utopsy reports

in this case are testimonial.); Wood v. State, 299 S.W.3d 200, 210 (Tex. App. 2009) (Holding that an autopsy report was a testimonial statement and that medical examiner was a witness within the meaning of the Confrontation Clause); United States v. Williams, 740 F. Supp. 2d 4, 10 (D.D.C. 2010) (Ruling the autopsy report and death certificate were excluded from evidence as testimonial hearsay.); Martinez v. State, 311 S.W.3d 104, 111 (Tex. App. 2010) (Holding that autopsy report was a testimonial statement and that medical examiner was a witness within the meaning of the Confrontation Clause of the Sixth Amendment.); State v. Navarette, 294 P.3d 435, 444 (Defendant's confrontation rights were violated by forensic pathologist's testimonial hearsay to the jury); State v. Jaramillo, 2012-NMCA-029, ¶ 16, 272 P.3d 682, 687 (In the absence of the cross-examination requirement in satisfaction of the Confrontation Clause admission of autopsy report resulted in the violation of Defendant's right to confrontation.); United States v. Moore, 651 F.3d 30, 72 (D.C. Cir. 2011), aff'd sub nom. Smith v. United States, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013)([G]overnment's attempts to avoid the Confrontation Clause, on the grounds that the autopsy reports rank as non-testimonial and that the DEA reports contain raw data, rather than statements, are foreclosed by Bullcoming*.);* Garlick v. Lee, No. 18CV11038CMSLC, 2020 WL 2854268, at 7 (S.D.N.Y. June 2, 2020) (Autopsy Report was testimonial and

surrogate testimony from a qualified expert in medical examination was not a sufficient substitute for cross examination)

Indeed, an autopsy report is testimonial if "it would lead an objective witness to reasonably believe that the statement would be available for use at a later trial." Vega v. State, 126 Nev. 332, 236 P.3d 632 (2010). It is also incriminating on its face. Under Crawford, 541 U.S. 36 (2004), the testimonial statement of an otherwise unavailable witness is inadmissible "unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement. Id., Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006); *see also* Polk v. State, 126 Nev. 180; 233 P.3d 357 (2010) (Gunshot residue test results were inadmissible under Crawford where the witness was unavailable and had not been cross examined by the defense. Accordingly, a medical examiner's opinion as to cause and manner of death in a homicide case is clearly a statement that would lead an objective witness to reasonably believe the statement would be available for use at trial.

Under this authority, there can be no question that Glover was entitled to cross-examine Dr. Dutra and it was constitutional error to admit the hearsay statements of Dr. Dutra's examination and his findings related to the autopsy of Fleming. Dr. Corneal testified she reviewed the autopsy report authored by Dr. Dutra and an investigative file—presumably produced by the coroner's office—that

included photographs taken during the autopsy at Dr. Dutra's direction. AA III 579. Dr. Corneal testified the State asked her to testify "to the cause, and manner, and findings as a result of that autopsy." AA II 579. Dr. Corneal never testified the findings she presented were the result of her own conclusions and opinions based upon her independent evaluation of the evidence. As such, the record suggests that Dr. Corneal acted as a surrogate for the findings and opinions contained in Dr. Dutra's autopsy report.

During the proceedings below, the State relied on Vega, 126 Nev at 340 for the proposition that an expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the constitution. In Vega, Dr. Mehta testified regarding the contents of a report written by Dr. Suiter in a sexual assault case. Id. This Court ruled that Dr. Mehta's testimony regarding the content of Dr. Suiter's written report violated the confrontation clause because it functioned as the equivalent of Dr. Suiter testifying without being subject to cross-examination. Id. This Court further indicated that Dr. Mehta's testimony based on her interpretation of a video recording and a diagram of the SANE examination were properly admitted. Id. Thus, this Court drew a clear distinction between testimony derived from objective evidence such as a video that does not contain the findings and opinions of others, and testimony derived from an expert's written

report—such as an autopsy report—that includes the findings and opinions of another expert.

Accordingly, there is no feasible strategic reason for trial counsel's failure to object to the admission of testimonial hearsay presented through Dr. Corneal's testimony at trial. Therefore, the preponderance of the evidence demonstrates that trial counsel provided ineffective assistance to Glover by failing to object to Dr. Corneal's testimony because it included testimonial hearsay in violation of Glover's right to confront Dr. Dutra, thereby resulting in a violation of Glover's constitutional right to effective assistance of counsel, due process of law, and equal protection of laws. U.S. Const. Amends VI, VIII, XIV; Nev. Const. Art. 1 Sec. 6, 8.

Glover was prejudiced by trial counsel's failure to object to Dr. Corneal's testimony. Glover submits there was a reasonable probability that such an objection would have either been sustained by the district court, or that Glover's conviction would have been overturned on direct appeal. Either outcome would have resulted in the omission of a critical element of the homicide charge—cause and manner of death—thereby preventing Glover's conviction and changing the outcome of the case. Additionally, potential prejudice from a Crawford error is reviewed for harmless error. Medina, 122 Nev. at 346. Therefore, the state must show beyond a reasonable doubt that the error complained of did not contribute to the verdict. Polle

v. State, 126 Nev. 180, 233 P.2d 257 (2010); Idaho v. Wright, 497 U.S. 805, 827, 110 S.Ct. 3139, 3152 (1990). The State failed to meet this burden below.

Additionally, the district court erred by failing to grant Glover an evidentiary hearing. The record does not contain any direct evidence that trial counsel's failure to object to Dr. Corneal's testimony constituted a strategic decision. Thus, the district court should have granted an evidentiary hearing to determine the extent of counsel's deficient performance and to create an adequate record regarding this claim because it is not currently belied by the record, and if true, would entitle Glover to relief. *See* Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Glover requests this Court vacate his conviction and sentence and remand his case for a new trial. In the alternative, Glover requests this Court remand his case for an evidentiary hearing on this claim.

///

///

///

///

///

///

///

///

B. THE DISTRICT COURT ERRED BY FAILING TO FIND TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE TO GLOVER BY POSSESSING A CONFLICT OF INTEREST RESULTING FROM THE PUBLIC DEFENDER'S OFFICE PREVIOUSLY REPRESENTING FLEMING IN A CRIMINAL CASE. THE DISTRICT COURT FURTHER ERRED BY FAILING TO GRANT AN EVIDENTIARY HEARING REGARDING THIS CLAIM.

In its Findings, the district court ruled that Glover failed to establish trial counsel possessed an actual conflict of interest by previously representing Fleming in a criminal case. AA IV 953.

The adversarial process protected by the Sixth Amendment compelled trial counsel to act as Glover's advocate. United States v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045 (1984). As such, trial counsel's role required him to represent Glover fully and vigorously. Young v. Ninth Judicial Dist. Court, In & For City of Douglas, 107 Nev. 642, 649, 818 P.2d 844, 848 (1991) (internal quotations, citation omitted). [5] However, trial counsel was constitutionally ineffective in his representation of Glover due to conflicting loyalties. *See* Clark v. State, 108 Nev.

[5] *See also, e.g.,* Greenberg Traurig v. Frias Holding Co., 331 P.3d 901, 904 (Nev. 2014) ("[a]ttorneys must zealously pursue the[ir] [clients'] interests …."). This is "particularly true in criminal cases …." Young, *supra* 107 Nev. at 649. (internal quotations, citation omitted).

324, 326, 831 P.2d 1374, 1376 (1992) (In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties.)

If a defendant shows counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance prejudice is presumed. *See* Strickland, supra, 466 U.S. at 692 (internal quotations, citation omitted); *see also,* Clark, supra, 108 Nev. at 326*;* Cuyler v. Sullivan*,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Mannon v. State*,* 98 Nev. 224, 226, 645 P.2d 433, 434 (1982). This exception is based, in part, on the difficulty in measuring the effect of representation tainted by conflicting interests. Strickland*,* 466 U.S. at 692, 104 S.Ct. at 2067.

Rule 2.1 of Nevada's Rules of Professional Conduct (NRPC) states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) The representation of one client will be directly adverse to another client; or
> >
> > (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) The representation is not prohibited by law;
>
> (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) Each affected client gives informed consent, confirmed in writing.

In Waid, this Court adopted the Seventh Circuit's three-part test for analyzing former client conflicts of interest. Waid v. Eighth Judicial Dist. Court ex rel. Cty. of Clark, 121 Nev. 605, 610, 119 P.3d 1219, 1223 (2005). Pursuant to Waid, a court must: (1) make a factual determination concerning the scope of the former representation, (2) evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether that information is relevant to the issues raised in the present litigation. Id.

Here, trial counsel failed to disclose the Public Defender's former representation of Fleming in two criminal cases. The Public Defender represented Fleming in Las Vegas Justice Court case number 01M20858X, that resulted in the court convicting Fleming of Battery Domestic Violence following a bench trial. AA IV 860-870. The Public Defender also represented Fleming in Las Vegas Justice

Court case number 10F15357X, where Fleming pleaded Nolo Contendre to a charge of Disorderly Conduct. AA IV 862-863.

Given the general nature of battery domestic violence, it is reasonable to infer that Fleming would have provided confidential and/or sensitive information about his violent conduct to his deputy public defender.[6] That information may have been used to support a self-defense claim during Glover's trial. Such a defense would have been bolstered by trial testimony revealing: 1) Fleming initiated a confrontation with Glover following a heated argument with Sutton and Veasley; 2) Fleming pushed Sutton to the side when she attempted to deescalate the confrontation between Fleming and Glover; and 3) Fleming was in physical possession of a firearm at the time of his death. AA III 510, AA III 651. However, the Public Defender's Office would have been precluded from utilizing any information Fleming disclosed about his history of violence in order to remain in compliance with NRPC 1.6, which governs the confidentiality of attorney-client communications.[7] Thus, there was a significant risk that the representation of

[6] Disorderly conduct encompasses a wide range of conduct that can be violent and nonviolent. Thus, Fleming may have disclosed information regarding violent conduct that supported Glover's post-conviction claim.

[7] NRPC 1.6 provides that a lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted for another express reason contained in NRCP 1.6.

Fleming materially limited trial counsel's responsibilities to represent Glover. As such, an actual conflict of interest existed, and trial counsel should have withdrawn or obtained informed consent from Glover to continue the representation.

Although it is clear the Public Defender previously represented Fleming in two criminal cases, the precise scope of the Public Defender's representation remains unknown. It also remains unknown whether Fleming disclosed information to the Public Defender's Office that supported a theory of self-defense, thereby supporting Glover's post-conviction claim. As such, the district court erred by failing to grant an evidentiary hearing on this issue. Indeed, an evidentiary hearing would have allowed the district court to make a factual determination concerning the scope of the former representation, evaluate whether it is reasonable to infer that Fleming would have disclosed confidential information regarding his violent nature to the Public Defender's Office, and to determine whether that information was relevant to Glover's post-conviction claim. *See* Waid, 121 Nev. at 610.

Because trial counsel did not disclose the conflict, the district court never had an opportunity to determine if the public defender should be disqualified from representing Glover due to its former representation of Fleming. Additionally,

Glover never had an opportunity to give informed consent in order to potentially waive the conflict.

Based on the foregoing, Glover submits he received ineffective assistance of counsel due to trial counsel's conflict of interest as provided herein. Prejudice to is presumed because an actual conflict of interest adversely affected Glover's lawyer's performance.

Glover requests this Court vacate his conviction and sentence and remand his case for a new trial. In the alternative, Glover requests this Court remand his case for an evidentiary hearing to develop the facts that will assist in conducting the Waid analysis and determine the extent of counsel's deficient performance. An evidentiary hearing is warranted as this claim is not belied by the current record, and if true, would entitle Glover to relief. *See* Hargrove, 100 Nev. at 502.

///

///

///

///

///

///

///

///

X.
CONCLUSION

Based on the foregoing, Glover submits the district court erred in denying the claims contained in his post-conviction petition. Therefore, Glover respectfully requests this Honorable Court vacate his conviction and remand his case for a new trial. In the alternative, Glover requests this Court remand his case for an evidentiary hearing on the claims contained herein.

Respectfully submitted this 13th day of September, 2021.

By: /s/ Lucas J. Gaffney

LUCAS J. GAFFNEY, ESQ.
Nevada Bar No. 12373
1050 Indigo Drive, Suite 120
Las Vegas, Nevada 89145
Telephone: (702) 742-2055
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I 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 of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14-point Times New Roman.*

*Certificate of Compliance containing word count continued to page 34.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

I further certify that this brief does comply with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains 8,083 words. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of September, 2021.

Respectfully submitted,

By: */s/ Lucas J. Gaffney*

LUCAS J. GAFFNEY, ESQ.
Nevada Bar No. 12373
1050 Indigo Drive, Suite 120
Las Vegas, Nevada 89145
Telephone: (702) 742-2055
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 13, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

ALEXANDER CHEN
Chief Deputy District Attorney

BY /s/ *Lucas Gaffney*
Employee of Gaffney Law