IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAWN GLOVER, JR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82700

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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RESPONDENT'S ANSWERING BRIEF

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STATEMENT OF THE ISSUE(S)

I. Whether the district court properly denied Shawn Glover (Glover)'s Petition for Writ of Habeas Corpus (Post-Conviction).
   A. Whether the district court correctly determined Glover's trial counsel was not ineffective by failing to object to Dr. Corneal's testimony
   B. Whether the district court correctly determined Glover's trial counsel did not possess a conflict of interest through their prior representation of the victim
   C. Whether the district court properly denied Glover's request for an evidentiary hearing for both claims

STATEMENT OF THE CASE

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

Conviction was filed on October 15, 2018. Glover previously appealed but his appeal was denied. On November 18, 2019, this Court filed its Remittitur and on November 23, 2019, this Court filed its Order of Affirmance. On September 14, 2020, Glover filed his Petition for Writ of Habeas Corpus. The State filed its response on November 13, 2020. On January 4, 2021, Glover filed an Amended Petition for Writ of Habeas Corpus. On January 8, 2021, the district court held a hearing.

After hearing argument on Glover's Petition for Writ of Habeas Corpus on January 8, 2021, the district court denied the petition on February 25, 2021 when the court filed its Findings of Fact, Conclusions of Law and Order. Glover filed a Notice of Appeal on March 26, 2021. Glover filed his Opening Brief on September 13, 2021. The State responds herein.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it found Glover received effective assistance of counsel. First, Glover's trial counsel was not deficient for failing to object to Coroner Medical Examiner Doctor Jennifer Corneal ("Dr. Corneal")'s testimony. Dr. Corneal testified to her independent opinion as an expert witness after reviewing the laboratory results. Her testimony was not objectionable and was not a violation of Glover's constitutional right under the Confrontation Clause. Second, Glover's trial counsel was not ineffective due to a conflict of interest. Glover fails to demonstrate an actual conflict existed, therefore

his argument fails on the merits. As such, the district court did not err in denying Glover's requests for evidentiary hearings on both claims.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND GLOVER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Glover complains that the district court erred when it denied his Petition for Writ of Habeas Corpus (Post-Conviction). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). However, a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994).

The district court did not abuse its discretion in denying the Petition. The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S.Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S.Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S.Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the

same way." Strickland, 466 U.S. at 689, 104 S.Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (*citing* Strickland, 466 U.S. at 687-89, 694, 104 S.Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus Petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State,

118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). NRS 34.735(6) states in relevant part,

In Appellant's Opening Brief ("AOB"), Glover alleges that trial counsel was ineffective in two (2) ways: first, trial counsel failed to object to testimonial hearsay; second, trial counsel had a conflict of interest that rendered counsel ineffective. See AOB at 16, 26. The district court did not abuse its discretion by denying both claims because each respective argument lacks merit.

A. The District Court Correctly Determined Glover's Trial Counsel Was Not Ineffective by Failing to Object to Dr. Corneal's Testimony

Glover first claims that the district court erred by ruling his trial counsel was effective despite failing to object to Dr. Corneal's testimony, even though she reviewed an autopsy report and accompanying photographs prepared by one Dr. Dutra (retired) before testifying. AOB at 16-25. Specifically, Glover relies on Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009) (erroneously cited in both Glover's petition and appeal as "Commonwealth v. Melendez-Diaz"), and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), to argue Dr. Corneal's testimony amounted to "testimonial hearsay evidence" that violated the Confrontation Clause. See AOB at 16-25. Glover's argument is based on a misapplication of these cases and overlooks relevant Nevada case law that contradicts his position.

The Nevada Supreme Court has explained that "the Confrontation Clause bars the use of a testimonial statement made by a witness who is unavailable for trial unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement." Medina v. State, 122 Nev. 346, 353, 143 P.3d 471, 476 (2006) (*citing* Crawford, 541 U.S. at 68). While this constitutional restriction applies to forensic laboratory results (see, Melendez-Diaz, 557 U.S. at 329), the Nevada Supreme Court has determined that a surrogate may provide her "independent opinion as an expert witness" regarding the laboratory results. Vega v. State, 126 Nev. 332, 340, 236 P.3d 632, 638 (2010). Accord, State v. Navarrette, 294 P.3d 435, 443 (N.M. 2013) ("[A]n expert witness may express an independent opinion regarding his or her interpretation of raw data without offending the Confrontation Clause."). The admissibility of the surrogate's testimony, relying on a third party's laboratory report, was explained by the U.S. Supreme Court:

When an expert testifies for the prosecution in a criminal case, the defendant has the opportunity to cross-examine the expert about any statements that are offered for their truth. Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause. Williams v. Illinois, 567 U.S. 50, 58, 132 S.Ct. 2221, 2228 (2012) (emphasis added).

Glover claims that his trial counsel provided ineffective assistance by failing to object to Dr. Corneal's testimony because it was testimonial hearsay in violation of Crawford. AOB at 16-25. Below, Glover argued his constitutional rights were violated because Dr. Corneal testified as to cause and manner of death, even though Dr. Corneal was not the pathologist who conducted the autopsy. IV AA 903; III AA 576-591 (Citation to trial transcript within Appellant's Appendix). Glover claims Dr. Corneal presented Dr. Dutra's findings. Id. However, the district court's ruling is supported by substantial evidence because Dr. Corneal's testimony did not violate Glover's constitutional rights. IV AA 952; III AA 576-591. The district court found Dr. Corneal testified as an expert who formed her own independent opinion based on the laboratory results. Id. Dr. Corneal testified as to her qualifications as an expert in autopsies and pathology and she testified she had reviewed the autopsy report and associated photographs of Fleming. IV AA 952; III AA 579. The district court concluded Dr. Corneal made her own opinions as to cause and manner of death and "[n]othing contained in Dr. Corneal's testimony referred to the opinions and conclusions of Dr. Dutra." IV AA 952; III AA 576-591.

Therefore, contrary to Glover's representation that the State "present[ed] the findings of an expert witness that did not testify at trial," the district court correctly found the State introduced Dr. Corneal as an expert who then testified to her own opinions as to the cause and manner of death. See AOB at 19, IV AA 952-953; III

576-591. Because Glover had the opportunity to cross-examine Dr. Corneal on her findings and conclusions, pursuant to Williams, 567 U.S. at 58, 132 S.Ct. at 2228, the district court correctly concluded Dr. Corneal's testimony falls outside the scope of the Confrontation Clause. See IV AA 951-952; II AA 589-591.

Glover relies extensively on Melendez-Diaz and Crawford to support his assertion that Dr. Corneal's testimony was improper. AOB at 16-20. However, those cases are easily distinguishable from Glover's case. In Crawford, the prosecution played a witness's (the defendant's wife's) tape-recorded statement to the police describing a stabbing, though the witness did not testify at trial due to marital privilege. 541 U.S. at 40, 124 S.Ct. at 1357-58. The State conceded that the statement amounted to hearsay but sought to admit the statement under a hearsay exception. Id. In Melendez-Diaz, the State sought to introduce affidavits of laboratory analysts for the truth of the results of certain drug tests, rather than having the analysts testify in person. 567 U.S. at 308-09, 129 S.Ct. at 2530-31. In both cases, the U.S. Supreme Court determined that the evidence was testimonial hearsay and was therefore subject to Confrontation Clause restrictions. See, Crawford, 541 U.S. at 52-53, 124 S.Ct. at 1364-65; see also, Melendez-Diaz, 567 U.S. at 310-11, 129 S.Ct. at 2532. On the contrary, pursuant to Vega, Dr. Corneal's testimony did not include testimonial hearsay; instead, it was Dr. Corneal's independent opinion as an expert

witness. 126 Nev. at 340, 236 P.3d at 638; see also, Williams, 567 U.S. at 58, 132 S.Ct. at 2228 (such testimony does not implicate the Confrontation Clause).

The Nevada and U.S. Supreme Court rulings that exclude testimony such as Dr. Corneal's rendered Glover's proposed objections futile. See AOB at 19 (suggesting counsel should have objected to Dr. Corneal's testimony). Glover's claim fails on the merits as counsel cannot be deemed ineffective for failing to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Therefore, because the testimony challenged by Glover is not testimonial hearsay, and falls outside the scope of the Confrontation Clause, the district court's judgment should be affirmed.

B. The District Court Correctly Determined Glover's Trial Counsel Did Not Possess A Conflict of Interest Through Their Prior Representation of the Victim

Glover's second claim alleges that trial counsel was ineffective due to a conflict of interest. AOB at 26-31. Glover fails to demonstrate an actual conflict existed. Therefore, the district court's ruling should be affirmed.

The U.S. Supreme Court explained in Mickens v. Taylor 535 U.S. 162, 122 S.Ct. 1237 (2002) when a conflict of interest may violate a defendant's Sixth Amendment right to effective assistance of counsel. The Mickens Court specifically rejected the notion that a defendant "need only show that his lawyer was subject to a conflict of interest." Id. at 170-71, 122 S.Ct. at 1243. Instead, that court determined

that "an actual conflict of interest" was necessary, meaning "precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties." Id. at 171, 122 S.Ct. at 1243 (*citing* Cuyler v. Sullivan, 446 U.S. 335, 349-50, 100 S.Ct. 1708 (1980)) (emphasis in original).

The district court found that Glover failed to support his claim of a conflict of interest. IV AA at 953. The district court's ruling is supported by substantial evidence. See Riley, 110 Nev. at 647, 878 P.2d at 278. Glover cites to two (2) former cases in which trial counsel's office represented the victim ("Fleming"), and Glover admits "[t]he precise scope of Fleming's former representation is unknown. It also remains unknown whether Fleming disclosed information to the Public Defender's Office..." AOB at 30. This claim is speculative and baseless. The district court correctly denied Glover's petition because below Glover made a claim for relief without any evidence to support it. Glover stated below that it is "unknown…whether any information disclosed to the Public Defender's Office would be relevant to the issues presented." IV AA at 856. The district court could not find for Glover because Glover did not provide any evidence to support either an actual conflict or that Fleming disclosed any relevant information to the Public Defender's office that supported a conflict of interest. Now, Glover presently asks this Court to find the district court erred in denying a claim that was speculative and

not supported by evidence. The district court had no choice but to deny Glover's claim. Therefore, this court should affirm the district court's ruling.

Furthermore, Glover does not assert that any actual conflict existed. Instead, Glover relies on the theoretical division of loyalties that has previously been rejected by the U.S. Supreme Court. Mickens, 535 U.S. at 170-71, 122 S.Ct. at 1273. As such, Glover asks this Court to allow him to base his appeal on mere speculation derived from two (2) prior misdemeanor cases, rather than any specific and substantiated factual basis.

Glover asks this Court to make "infer[ences]" in support of his claims that a conflict existed. AOB at 28. However, the district court called Glover's argument "mere conjecture." IV AA at 942, see IV AA at 953. The court correctly established nothing in the record or Glover's petition that establishes an actual conflict that affected Counsels' performance. IV AA at 953. Furthermore, Glover claims the conflict of interest undermined a possible theory of self-defense. See generally AOB. However, Glover's theory at trial was that he was not the shooter, not that he shot the victim in self-defense. IV AA at 953. Moreover, a theory of self-defense would have been undermined by evidence presented at trial that established Glover shot the victim in the back of the head at a downward angle. IV AA at 953, III AA at 584, 589. Therefore, the district court's ruling is supported by substantial evidence.

Because Glover failed to show an actual conflict of interest, and never suggested below that counsel was deficient for failing to present a self-defense theory, the district court properly denied his unsupported "conflict" claim. However, even if there was an actual conflict, the district court still properly denied the claim because pursuing a different defense theory would be irrelevant if there was nothing deficient or prejudicial about the theory of defense trial counsel presented at trial. Glover does not claim the defense theory presented at trial was deficient or prejudicial. See generally AOB. Accordingly, he failed to demonstrate either deficiency or prejudice and his claim was properly denied.

C. The District Court Properly Denied Glover's Request for An Evidentiary Hearing for Both Claims

During the post-conviction process, the district court did not abuse its discretion when it concluded that Glover's claims did not require an evidentiary hearing. IV 949-54. Throughout his appeal, Glover requests this Court remand this case for an evidentiary hearing because it "is warranted" to "develop the facts" and argues that the district court erred by not granting one. AOB at 31; See generally AOB. Denial of an evidentiary hearing is reviewed for abuse of discretion, and Glover does not claim the district court abused its discretion at any point in his appeal. Berry v. Nevada, 131 Nev. 957, 969, 363 P.3d 1148, 1156 (2015); See generally AOB.

Regardless, the court concluded Glover failed to satisfy both prongs of Strickland in both of his claims, and therefore an evidentiary hearing is unwarranted because "the record does not need to be expanded." IV 953-54.

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. An Appellant must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
>
> 2. If the judge or justice determines that the Appellant is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
>
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A

claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (*citing* Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Strickland, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Here, Glover claims that an evidentiary hearing was necessary to determine whether counsel's performance was deficient by failing to object to Dr. Corneal's testimony and counsel's alleged conflict of interest. AOB at 16-31. However, Glover's claims did not require an expansion of the record. The district court made these rulings based upon the grounds Glover presented in his Petition. The district court did not abuse its discretion because Glover's claims were either belied by the record and/or meritless allegations. IV AA 949-954. There was no need to expand the record to resolve his unfounded claims. The existing record was substantial and did not require an evidentiary hearing for the aforementioned reasons. Thus, Glover's claim that the district court erred by denying Glover evidentiary hearings for both claims is meritless and was properly denied.

CONCLUSION

Accordingly, respondent respectfully requests that this court affirm the district court's denial of Glover's Petition for Writ of Habeas Corpus.

Dated this 6th day of October, 2021.

Respectfully submitted,

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BY *<u>/s/ John Niman</u>*
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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief 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 32(a)(7) 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 3,854 words and does not exceed 30 pages.
3. **Finally, 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 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 6th day of October, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 6, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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