IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT'S REPLY BRIEF

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I.
ARGUMENT

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 Respondent's Answering Brief (RAB), the State argued the district court correctly determined trial counsel was not ineffective for failing to object to Dr. Corneal's testimony because Glover misapplied and/or overlooked Federal and State legal authority he cited in support of his claim. RAB at 7-8. The State further argued Dr. Corneal's testimony did not constitute testimonial hearsay because she testified as an expert who formed her own independent opinions as to cause and manner of death and did not refer to the opinions and conclusions of Dr. Dutra. RAB at 9.

Despite the State's arguments and the district court's findings, Dr. Corneal never testified the opinions and conclusions she presented were solely the result of her own independent analysis of the evidence. Dr. Corneal testified she reviewed the autopsy report authored by Dr. Dutra, as well as the investigative file and photographs generated by the coroner's office in order to testify about the cause and manner of Fleming's death. AA III 579. Dr. Corneal referenced those reports during

her testimony, such as when she acknowledged Dr. Dutra memorialized a number of items of evidence during the autopsy process and then testified as to how many gunshot-wounds Dr. Dutra observed and documented in his autopsy report. AA III 580-581.

Additionally, Dr. Corneal referenced the coroner office's photographs during her testimony. Dr. Corneal testified she selected only certain photographs—out of a large number of photographs—taken during the autopsy to assist the jury in understanding her testimony and **the findings**, as opposed to her findings, regarding Fleming's autopsy. AA III 580. Using the photographs, Dr. Corneal testified about the trajectory of the bullet that killed Fleming. AA III 585-585. In doing so, Dr. Corneal used the word "we" in her description of who found the bullet in Fleming's right jaw where it ultimately came to rest.[1] AA III 583. Dr. Corneal's testimony regarding the trajectory of the bullet was crucial to determining cause of death as the bullet reportedly transected Fleming's brain stem causing him to "instantaneously die." AA III 585. Dr. Corneal also used the word "we" to describe the examination of Fleming's head for soot or stippling, which was critical to determining the distance of the shooter to Fleming. AA III 585-586. Relying on the

[1] "And as we radiograph everyone, we knew the projectile was in his right jaw area, so that was dissected out from below." AA III 583, lines 21-24.

photographs rather than first-hand observations, Dr. Corneal testified the distance of the shooter was indeterminate because Fleming's hair caused the stippling or soot not to appear. AA III 586. Glover submits Dr. Corneal's use of the phrase "we" indicates the opinions and conclusions she presented were not solely her own. As such, the preponderance of the evidence demonstrates Dr. Corneal did not form her own independent opinions as to cause and manner of death but referred to, and/or incorporated, the opinions and conclusions of Dr. Dutra. RAB at 9. Thus, the district court's findings and the State's arguments are based on a faulty presumption that Dr. Corneal's testimony were the sole product of her independent evaluation of the evidence.

Additionally, the State argued Glover mistakenly relied on Melendez-Diaz and Crawford to support his assertion that Dr. Corneal's testimony was improper because the cases are distinguishable.[2] RAB at 10. First, Glover discussed Melendez-Diaz and Crawford in order to provide this Court with the necessary historical and legal context for his argument. While the facts of the respective cases are somewhat different than the facts presented here, the legal precedent set forth in both cases—that the admission of testimonial hearsay violates the Confrontation Clause—is directly on point.

[2] *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.CT. 2527 (2009); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004)

Secondly, the State ignored the numerous cases cited on pages 20-21 of the Appellant's Opening Brief which highlighted how other jurisdictions have held autopsy reports constitute testimonial evidence. However, rather than addressing whether a medical examiner's opinion as to cause and manner of death is testimonial hearsay, the State sidestepped the issue by reiterating its presumption that Dr. Corneal based her testimony solely upon her independent examination of the evidence. Glover submits that Dr. Dutra's autopsy report is testimonial because "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).

Furthermore, Dr. Corneal testified that Dr. Dutra retired, but the record does not indicate what efforts the State undertook to secure Dr. Dutra's testimony in order to qualify him as an unavailable witness. AA III 579. Again, the State failed to address this issue.

Based on the above, 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 district court erred in not finding trial counsel provided ineffective assistance to Glover in regard to this claim.

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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 Response, the State argued this Court should deny Glover's claim that trial counsel was ineffective due to a conflict of interest because Glover failed to demonstrate an actual conflict existed. RAB at 11. The State further argued that Glover provided no 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. RAB at 12.

In Hargrove, this Court found a Petitioner was not entitled to an evidentiary hearing because his post-conviction pleading consisted primarily of "bare" or "naked" claims for relief, unsupported by any **specific factual allegations** that would, if true, have entitled him to relief. Hargrove v. State, 100 Nev. 498, 502–03, 686 P.2d 222, 225 (1984). Specifically, the Petitioner in Hargrove alleged certain witnesses could provide favorable information, but the Petitioner failed to provide the witness' names or descriptions of their intended testimony. Id. Additionally, this Court ruled that a defendant seeking post-conviction relief is not entitled to an

evidentiary hearing on factual allegations belied or repelled by the record. Id.; *See* Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981).

Here, Glover did not present bare or naked claims for relief but put forward specific factual allegations that entitled him to an evidentiary hearing to determine the extent of trial counsel's conflict of interest. It is undisputed the Public Defender's Office represented Fleming in two criminal cases prior to Glover's trial. It is undisputed that at least one of Fleming's convictions—Battery Domestic Violence—involved violent conduct on Fleming's part. It is further undisputed the Public Defender's Office did not disclose the conflict to the district court. In Leonard, this Court found it was proper for the Public Defender's Office to withdraw from representing a client due to a purported conflict of interest caused by the Office representing a defendant and a possible alternative suspect. Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 404 (2001). (The purported conflict of interest provided a facially legitimate reason for the public defender to withdraw. *See* SCR 157; SCR 166); *see also* Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (stating that counsel has an obligation to avoid conflicts of interest).

Similarly, because the Public Defender's Office represented Glover and the victim, a purported conflict of interest existed which provided a facially legitimate reason for the Public Defender to withdraw from representing Glover. In other

words, Glover put forward specific factual allegations regarding trial counsel's conflict that were not belied by the record. As such, Glover's factual allegations were sufficient to overcome the district court's finding, and State's mere assertion, that Glover's claim was a bare and naked assertion undeserving of an evidentiary hearing. Indeed, aside from Fleming, only trial counsel could expand the record regarding the extent of the conflict, thereby necessitating an evidentiary hearing. Thus, the district court erred by failing to grant an evidentiary hearing on this issue, which would have provided the means to determine the extent of the conflict.

Glover submits he received ineffective assistance of counsel due to trial counsel's conflict of interest as provided herein.

II.
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 19th day of November 2021.

By: */s/ Lucas J. Gaffney*
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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 9.

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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 2,110 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 19th day of November 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 November 19, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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BY /s/ *Lucas Gaffney*
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