

**ORIGINAL**

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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DAMON LAMAR CAMPBELL,

S.C. CASE NO. 44799

Appellant,

**FILED**

vs.

FEB 02 2006

THE STATE OF NEVADA,

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

Respondent.

**APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS  
(POST-CONVICTION)  
EIGHTH JUDICIAL DISTRICT COURT  
THE HONORABLE SALLY LOEHRER, PRESIDING**

**APPELLANT'S REPLY BRIEF**

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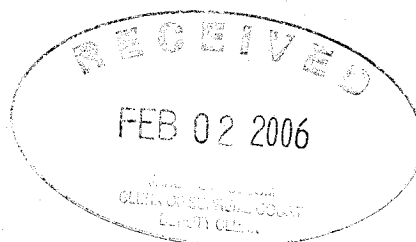
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**TABLE OF AUTHORITIES**

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| <u><b>Crawford v. Washington</b></u> , ___ U.S. ___ 124 S. Ct. 1354 (2004) . . . . . | 7,9 |
| <u><b>Strickland v. Washington</b></u> , 466 U.S. 668, 687 (1984).. . . .            | 5   |
| <u><b>People v. Moscat</b></u> , 777 NYS 2d 875 (NYCRIM. CT) (2004). . . . .         | 7   |

1 ISSUES PRESENTED FOR REVIEW

- 2 I. THE DISTRICT COURT ERRED IN DENYING MR. CAMPBELL AN  
3 EVIDENTIARY HEARING TO ESTABLISH FACTS OUTSIDE OF THE RECORD  
4 REGARDING THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.
- 5 II. MR. CAMPBELL WAS ENTITLED TO A NEW TRIAL BASED UPON A  
6 VIOLATION CLAUSE PURSUANT TO THE SIXTH AND FOURTEENTH  
7 AMENDMENTS TO THE UNITED STATES CONSTITUTION;  
8 ALTERNATIVELY IS ENTITLED TO A NEW TRIAL BASED UPON  
9 INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO  
10 PROPERLY INVESTIGATE.

11 STATEMENT OF THE CASE

12 Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

13 STATEMENT OF FACTS

14 Appellant hereby adopts the statement of the facts as annunciated in Appellant's Opening Brief.

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**ARGUMENT**

I. **THE DISTRICT COURT ERRED IN DENYING MR. CAMPBELL AN EVIDENTIARY HEARING TO ESTABLISH FACTS OUTSIDE OF THE RECORD REGARDING THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

In Hatley v. Nevada, 100 Nev. 214, 678 P.2d 1160 (1984), this Court held that:

We conclude that it was an error for the District Court to deny the petition without first holding and evidentiary hearing. It is well settled that when a petition for Post-Conviction Relief contains allegations of fact outside the record which, if true, would entitle the petitioner to relief, an evidentiary hearing thereon is required (quotations and citations omitted) Id.

See also Bolden v State 99 Nev. 181, 659 P.2d 886 (1983).

In the State's answering brief, they contend that there is no requirement for an evidentiary hearing. However, the State claims, "[t]he record here reflects that defense counsel did not object to the admission of the 911 tape. The record further reflects that defendant had the opportunity to listen to the tape, but chose not to do so." Emphasis added. (State's Answering Brief, pp. 18, lines 21-23). In the instant case, it appears that the State concedes that the defense counsel had an opportunity to listen to the tape but chose not to do so. Mr. Campbell would contend that this is ineffective assistance of counsel. The undersigned is well aware that this Court will not consider matters or facts that are not contained within the record on appeal. However, the district court was aware that the undersigned had contacted trial counsel for Mr. Campbell and what trial counsel's potential testimony would be.

Again, trial counsel's testimony and affidavit is not in the record and the undersigned is well aware this Court frowns upon any argument containing facts outside of the record. However, in appellant's opening brief, Mr. Campbell provided foot note one which came directly from the supplemental post-conviction petition. In foot note one, the district court was placed on notice that the undersigned had spoken with trial counsel and desired to have trial counsel testify regarding

1 the investigation, if any, conducted by defense counsel regarding the 911 tape. Upon information  
2 and belief, Mr. Campbell would contend his trial attorney was unaware of the second caller on the  
3 911 tape until after the jury was deliberating. Mr. Campbell understands that this is a fact outside  
4 of the record. This is exactly why Mr. Campbell specifically requested that the district court permit  
5 him an opportunity to conduct an evidentiary hearing to determine whether counsel had been  
6 ineffective.  
7

8 A claim of ineffective assistance of counsel presents a mixed question of law and fact,  
9 subject to independent review. See Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107  
10 (1996). To establish ineffective assistance of counsel, the claimant must show both that counsel's  
11 performance was deficient and that the deficient performance prejudiced the defense. Id. (citing  
12 Strickland v. Washington, 466 U.S. 668, 687 (1984)). To establish prejudice, the client must show  
13 a reasonable probability that but for counsel's errors the result of the proceedings would have been  
14 different. Id. at 988, 923 P.2d at 1107. Hence, it is incumbent upon Mr. Campbell to demonstrate  
15 ineffective assistance of counsel. The State appears to be conceding that the defense did not bother  
16 to listen to the tape. Mr. Campbell is not permitted to speculate to this Court as to why the defense  
17 would have failed to listen to the 911 tape.  
18  
19

20 At an evidentiary hearing, the district court would be better suited to determine whether  
21 Mr. Campbell's attorney's had a justifiable or tactical reason for failing to listen to the tape.<sup>1</sup> "By  
22 observing the witnesses demeanor during an evidentiary hearing, the district court will be better  
23 able to judge credibility." Mann v. Warden, 118 Nev. 351; 46 P.3d 1228, 1231 (2002).  
24

25 In the instant case, had the district court held an evidentiary hearing, neither the State nor  
26

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27 <sup>1</sup> Perhaps at an evidentiary hearing, we will find out that defense counsel did in fact  
28 listen to the tape, but for some tactical reason decided not to object. Again, pure  
speculation. This is reason that an evidentiary hearing should be mandated.

1 Mr. Campbell would have to speculate as to why defense counsel permitted the second caller on  
2 the 911 tape to be introduced without objection. Mr. Campbell would contend that his defense  
3 counsel was unaware of the second call.

4 The importance of the second call is best demonstrated by the State's closing argument.  
5 As was cited in the opening brief, the prosecutor stated, **"You'll hear from someone else on that**  
6 **tape and listen to it very closely."** (A.A. Vol. IV, pp. 568). Thus, the State was well aware of  
7 the second caller on the 911 tape. The State recognized the importance of that inadmissible  
8 evidence in corroboration of the State's case. The prosecutor urges the jury to listen to that  
9 unidentified caller, "very closely". Upon information and belief, defense counsel had not heard  
10 the unidentified caller's 911 call until after the jury began deliberating.

11 The failure to conduct an evidentiary hearing compounds the difficulty for Mr. Campbell  
12 in this appeal. Because no evidentiary hearing was conducted, there is not a transcript in the record  
13 of the 911 call. At an evidentiary hearing, Mr. Campbell would request permission to call trial  
14 counsel as well as play the 911 call for trial counsel during his testimony. This would give Mr.  
15 Campbell and the Court an opportunity to hear from defense counsel and also to hear the 911 call.

16 As the record stands, all parties are left to speculate as to why trial counsel did not object  
17 to this phone call and the reasons therefore. Additionally, there is no transcript of the 911 call in  
18 the record. Mr. Campbell was denied an evidentiary hearing at his oral argument. For those  
19 reasons, Mr. Campbell would respectfully request that this Court remand the matter to the district  
20 court for a limited evidentiary hearing wherein Mr. Campbell would be permitted to call his trial  
21 attorney's and question them regarding the actual 911 call in evidence. A proposed evidentiary  
22 hearing would take no longer than two to three hours and would at a minimum complete the record.

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1           II.     MR. CAMPBELL WAS ENTITLED TO A NEW TRIAL BASED UPON A  
2               VIOLATION CLAUSE PURSUANT TO THE SIXTH AND FOURTEENTH  
3               AMENDMENTS TO THE UNITED STATES CONSTITUTION;  
4               ALTERNATIVELY IS ENTITLED TO A NEW TRIAL BASED UPON  
5               INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO  
6               PROPERLY INVESTIGATE.

7           In Mr. Campbell's opening brief, he cites to legal authority for the proposition that the  
8           unidentified caller on the 911 call was inadmissible hearsay. One of the cases cited by Mr.  
9           Campbell was Crawford v. Washington, 124 S. Ct. 1354; 158 L.Ed 2d 177 (2004). Mr. Campbell  
10          submits that under Crawford v. Washington, the 911 unidentified caller was inadmissible hearsay.  
11          The State devotes a substantial portion of their brief to a Crawford analysis. However, the State  
12          fails to address the other authority cited by Mr. Campbell. See Miranda v. State, 101 Nev. 562, 707  
13          P.2d 1121 (1985); Johnstone v. State, 92 Nev. 241, 548 P.2d 1365 (1976); Franco v. State, 109  
14          Nev. 1229, 866 P.2d 247 (1993).

15          Additionally, the State cites to City of Las Vegas v. Walsh, 120 Nev. Ad. Op. 44, 91 P.3d  
16          591 (2004), for the proposition that this Court had determined that a 911 call would not be  
17          testimonial in nature for a variety of factors (See State's Answering Brief, pp. 12, lines 17-27).

18          In Walsh, this Court noted several factors that would demonstrate that a 911 call is not  
19          testimonial. Such as: 1) the call would not be initiate by the police, it would be initiate by the  
20          victim of the crime; 2) the call would not be generated by the desire of the prosecution or the police  
21          to seek evidence against a particular suspect, it would be generated by the callers desire to be  
22          rescued from immediate peril; and 3) the testimonial statement is produced when the government  
23          summons a citizen to be a witness; in a 911 call it is the citizen who summons the government.  
24          Id. (citing People v. Moscat, 777 NYS 2d 875 (NYCRIM. CT) (2004)).

25          The State concludes that pursuant to this Court's decision in Walsh, the 911 call admitted  
26          at defendant's trial "falls exactly within the standards set by Walsh" (State's Answering Brief, pp.  
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1 13, lines 1-2).

2  
3 Unfortunately, the State's analysis of Walsh appears to be liberally construed in favor of  
4 the State. First, in the instant case, the 911 call was not initiated by the victim. Again, the caller  
5 is unidentified but does not appear nor has the State argued that the caller is the victim. Therefore,  
6 the first factor cited by the State of Nevada pursuant to Walsh, is not met. Secondly, the caller does  
7 not appear to be rescued from immediate peril. The opinion in Walsh, demonstrates that the Court  
8 was concerned that the 911 call from a victim of crime, who needed to be rescued from immediate  
9 peril. Again, this is not the case with the instant 911 call. Therefore, the first two requirements  
10 in Walsh are not met. More importantly, Mr. Campbell is convicted by the assistance of an  
11 unidentified caller on a 911 call. Not only did Mr. Campbell not have an opportunity to cross-  
12 examine this witness, it appears that none of the parties know who this person is.

13  
14 Moreover, in the City of Las Vegas v. Walsh, this Court considered the persuasive authority  
15 of a New York criminal case regarding a 911 call by a victim of domestic assault. This Court cited  
16 the New York criminal court, wherein the Court considered that many victims of domestic violence  
17 often do not appear at trial. In that case, the defense would be aware of who the victim was. The  
18 defense would have had an opportunity to investigate the alleged victim. The defense would have  
19 had an opportunity to present impeachment evidence against the alleged victim.

20  
21 In the instant case, Mr. Campbell and the State have no idea who the 911 caller was. The  
22 caller remains anonymous. Additionally, it is not hard to imagine a scenario where a vindictive  
23 caller could tell the police that a defendant was guilty of a crime and remain anonymous and have  
24 that phone call used against the defendant. This exactly why there should be confrontation. The  
25 State's reliance upon the Walsh decision is misplaced.

26  
27 The State would argue that the 911 call is of limited importance in terms of the evidentiary  
28 value. However, Mr. Roger during his closing argument, specifically told the jury to listen to the

1 second caller on the 911 call. Mr. Roger felt it was so significant to inform the jury that this  
2 evidence should be listened to "very carefully". The State should not be permitted to now argue  
3 to this Court that the evidence was of limited value, given the emphasis during closing argument  
4 when the prosecutor urged the jury to listen to the tape and second caller.  
5

6 Interestingly enough, citing from Crawford, the State explains, "[t]he framers of the United  
7 States Constitution created the Confrontation Clause to prevent the evil of using ex parte  
8 examination as evidence against the criminally accused." Crawford, S.Ct. at 1363-64 (State's  
9 Answering Brief, pp. 12, lines 11-13). In the instant case, this is exactly what happened to Mr.  
10 Campbell. What could be a better example of ex parte evidence then a anonymous 911 call made  
11 to the authorities. There is absolutely no indica of reliability. The defense was never given a  
12 chance to confront this witness or apparently even interview this witness. This must be assumed  
13 because the State acknowledges in their brief that the person is anonymous. Therefore, Mr.  
14 Campbell should be safe in assuming that trial counsel did not investigate and could not investigate  
15 this person because the State did not have a name for this anonymous caller. It is chilling to think  
16 that a man could be convicted of first degree murder and sentenced to life without parole partially  
17 on evidence of an unknown 911 caller. An unknown person whom the defense had not  
18 interviewed. An unknown person who perhaps the defense was completely unaware of until  
19 closing argument and deliberations. Is the State really claiming that any unidentified caller can  
20 call 911 and make incriminating statements about an accused and the State can use that evidence  
21 without producing the witness.  
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25 NRS 34.770(1), provides that a district court "must not" order a change in a petitioner's  
26 custodial supervision unless an evidentiary hearing is held. Mr. Campbell recognizes the  
27 importance of an evidentiary hearing for purposes of his argument. This Court should be  
28 concerned that to many questions are left unanswered; 1) What were the tactic and reasoning that

1 trial counsel had for failing to listen to the tape and not object to the tape; 2) What did the 911 call  
2 state; 3) Why did defense fail to conduct investigation. Several questions are left unanswered due  
3 to the district court's denial of an evidentiary hearing.  
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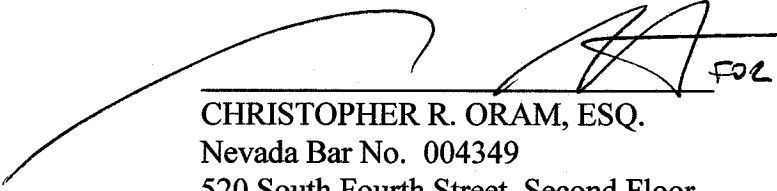
5 In the instant case, but for the errors of counsel, the result of the trial would have been  
6 different. Mr. Campbell is entitled to a new trial based upon ineffective assistance of counsel in  
7 violation of the Sixth and Fourteenth Amendments to the United States Constitution.  
8

### 9 CONCLUSION

10 Mr. Campbell would respectfully request he be granted an evidentiary hearing. Further,  
11 based on the foregoing Mr. Campbell would respectfully request that this Court reverse his  
12 convictions based on violations of the Sixth, and Fourteenth Amendments to the United States  
13 Constitution.  
14

15 DATED this 30 day of January, 2006.

16 Respectfully submitted by:

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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 further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 30 day of January, 2006.

Respectfully submitted by,



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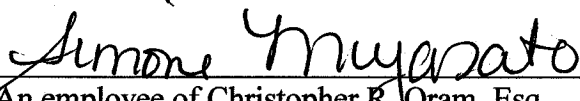
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**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 30 day of January, 2006, I did deposit in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing **APPELLANT'S REPLY BRIEF**, addressed to:

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