ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

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DAMON LAMAR CAMPBELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

S.C. CASE NO. 44799

FILED

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

APPELLANT'S OPENING BRIEF

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05-17634

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ISSUES PRESENTED FOR REVIEW

I. **MR. CAMPBELL IS ENTITLED TO A NEW TRIAL BASED ON A VIOLATION OF THE CONFRONTATION CLAUSE PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ALTERNATIVELY IS ENTITLED TO A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE.**

A. **STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL.**

B. **VIOLATION OF THE CONFRONTATION CLAUSE, SIXTH AMENDMENT.**

C. **CRAWFORD SHOULD BE APPLIED RETROACTIVELY.**

D. **MR. CAMPBELL IS ENTITLED TO A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

II. **MR. CAMPBELL WOULD RESPECTFULLY REQUEST HE BE PERMITTED AN EVIDENTIARY HEARING TO ESTABLISH FACTS OUTSIDE OF THE RECORD REGARDING THE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL.**

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STATEMENT OF THE CASE

DAMON LAMAR CAMPBELL (hereinafter referred to as CAMPBELL) was charged with Murder with Use of A Deadly Weapon and two counts of Attempt Murder with Use of a Deadly Weapon arising from an incident which occurred on July 22, 2000 (A.A. Vol. I, pp. 1-7). After a preliminary hearing (A.A. Vol. I, pp. 010-018). CAMPBELL was bound over to Department 15 for trial and arraigned on September 7, 2000 (A.A. Vol. IV, pp. 694).

The State filed a Notice of Intent to Seek Death Penalty against CAMPBELL alleging the existence of three (3) aggravating circumstances; great risk of death to more than one person; the murder was committed because of perceived race, color, religion or national origin and in the alternative that the murder was committed upon one or more persons at random and without apparent motive (A.A. Vol. IV, pp. 696).

Trial commenced on November 5, 2001 (A.A. Vol. II, pp. 140), and concluded on November 13, 2001, with the jury returning a verdict of guilty as to Count I Murder with Use of a Deadly Weapon and Count II Attempt Murder with Use of a Deadly Weapon and Not Guilty as to Count III, Attempt Murder with Use of a Deadly Weapon (A.A. Vol. IV, pp. 579). The Penalty Hearing lasted two days commencing on November 14, 2001 and on November 16, 2001 the jury returned a verdict of Life Without the Possibility of Parole (A.A. Vol. IV, pp. 631). On January 14, 2002, Mr. Campbell was sentenced to a concurrent forty-three (43) to one hundred ninety -two(192) months on the Attempt Murder Conviction (A.A. Vol. IV, pp. 647). The Judgement of Conviction was filed January 22, 2002 (A.A. Vol. IV, pp. 642).

On July 23, 2003, Mr. Campbell filed a bare bones Petition for Writ of Habeas Corpus (A.A. Vol. IV, pp. 694-701). On November 5, 2003, the Court denied Mr. Campbell's bare bones writ with the stipulation that the writ may be supplemented and allowed Mr. Schieck to withdraw as counsel of record (A.A. Vol. IV, pp. 764).

On August 23, 2004, the district court heard Mr. Campbell's motion to place on calendar and set a briefing schedule and permitted the undersigned to file a supplemental brief (A.A. Vol. IV, pp. 764). On October 25, 2004, the undersigned filed the supplemental brief in support of defendant's writ of habeas corpus (A.A. Vol. IV, pp. 702-726). On November 17, 2004, the State filed a response to defendant's petition for writ of habeas corpus (post-conviction)(A.A. Vol. IV, pp.727-737). On January 5, 2005, the Honorable Sally Loehrer, heard arguments regarding the writ. On January 26, 2005, the Honorable Sally Loehrer denied Mr. Campbell's writ of habeas corpus (post-conviction)(A.A. Vol. IV, pp. 738-743). The notice of entry of order and decision was filed on January 27, 2005 (A.A. Vol. IV, pp. 738). On February 28, 2005, Mr. Campbell filed his notice of appeal (A.A. Vol. IV, pp. 744). This appeal follows.

STATEMENT OF FACTS

Sergeant Ken Hefner was dispatched to 2933 Elm Avenue in Las Vegas on July 22, 2000, and when he arrived the scene had already been secured and a perimeter set up (A.A. Vol. II, pp. 256). After a short while Hefner became concerned because one suspect was believed to be in an apartment with windows that faced the scene (A.A. Vol. II, pp. 257). Entry was gained to the apartment with a key provided by the manager of the apartment after there was no response to knocks on the door (A.A. Vol. II, pp. 257). Two males (CAMPBELL and Hollimon) and two females (Theresa West and Alissa Rapaglia) were found on a mattress that was in the center of the living room floor (A.A. Vol. II, pp. 257).

Crime scene analyst Larry Morton responded to the scene and found a deceased male laying behind some cars parked to the north of the apartments (A.A. Vol. II, pp. 260-261). There were several expended cartridge cases, some splintered wood, clothing strewn about and what appeared to be blood in several locations (A.A. Vol. II, pp. 261). A search warrant was

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obtained for the apartment where the four individuals were located and Morton recovered a Ruger .45 caliber pistol and a Winchester shotgun from inside of the residence (A.A. Vol. II, pp. 261). No bullets or projectiles were recovered (A.A. Vol. II, pp. 263).

Six of the cartridges were same type of ammunition, .45 ACP with a headstamp of WWC99 and three cartridge cases contained the headstamp WWC94 (A.A. Vol. II, pp. 264). The three WWC94 were located under the bathroom windows outside of the apartments (A.A. Vol. II, pp. 264), and had been fired from the Ruger .45 recovered in the apartment (A.A. Vol. II, pp. 264).

Forensic pathologist Gary Telgenhoff performed the autopsy on Luis Alberto Martinez on. July 22, 2000 (A.A. Vol. II, pp. 287). Martinez was 5 feet 4 inches and weighed one hundred and forty- two pounds (A.A. Vol. II, pp. 287). There were a number of scrapes and slight tears in the skin on the left side of the face that had small pebbles or sand in them as if the person had come in contact with the ground (A.A. Vol. II, pp. 288). There was a gunshot wound on the left side of the head with an exit wound on the right side of the head (A.A. Vol. II, pp. 288). Cause of death was the penetrating gunshot wound to the head (A.A. Vol. II, pp. 288). Blood alcohol level was .24 (A.A. Vol. II, pp. 289).

Just prior to trial Sheldon Hollimon entered into a plea bargain with the State in exchange for his testimony, pleading guilty to accessory to murder with the State agreeing to make no recommendation at the time of sentencing (A.A. Vol. II, pp. 301). Hollimon first met CAMPBELL in high school and they were good friends on July 22, 2000 (A.A. Vol. II, pp. 292). Hollimon called CAMPBELL around noon on the 21st and asked him to come pick him up because he was having problems at home (A.A. Vol. II, pp. 292). CAMPBELL picked him up a few hours later (A.A. Vol. II, pp. 292). The plan for the evening was to rent movies and watch them at CAMPBELL'S apartment with the two girls (A.A. Vol. II, pp. 293). After they

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pulled the car into the parking area and got out Hollimon observed two Hispanic males squatting down at the corner of the building drinking liquor (A.A. Vol. II, pp. 293-294).

CAMPBELL and Hollimon started walking toward CAMPBELL'S apartment. CAMPBELL asked the two men to watch his car because it had been stolen in the past (A.A. Vol. II, pp. 294-295). After Hollimon went through the gate he heard CAMPBELL ask the men not to pee on the wall of his apartment (A.A. Vol. II, pp. 295). The men answered in Spanish and CAMPBELL went toward them and told them that he had asked them not to pee on the wall (A.A. Vol. II, pp. 295). The body language of the two Hispanic males showed aggravation or aggression (A.A. Vol. II, pp. 296). As CAMPBELL approached the two Hispanic men, they stood up and started swinging and then whistled (A.A. Vol. II, pp. 296). Hollimon believed that CAMPBELL threw the first punch (A.A. Vol. II, pp. 296). Holliman tussled with the other Hispanic male and then he ran and several other Hispanic males came around the corner (A.A. Vol. II, pp. 297). Hollimon tried to run away and was tackled against a truck (A.A. Vol. II, pp. 297). He recalled that one of them had a stick and that they were throwing bottles at him and CAMPBELL.

Hollimon pushed the individual off of himself and then ran to CAMPBELL'S apartment (A.A. Vol. II, pp. 297). While he was running to the apartment, he heard shots (A.A. Vol. II, pp. 298). A couple of seconds after Hollimon entered the apartment, CAMPBELL ran in and told them to lay down (A.A. Vol. II, pp. 298). Hollimon heard several more shots prior to CAMPBELL entering the apartment (A.A. Vol. II, pp. 298). CAMPBELL was carrying a chrome automatic handgun (A.A. Vol. II, pp. 299). The lights were off in the apartment and they did not call the police (A.A. Vol. II, pp. 298-299). CAMPBELL told everyone to lay down in his room and then Hollimon heard a racket in the house like CAMPBELL was tripping over stuff (A.A. Vol. II, pp. 298-299). CAMPBELL stated that he thought they had a gun and he

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shot a couple of them (A.A. Vol. II, pp. 299). Outside in the parking lot Hollimon could hear a bunch of Spanish talk and noises like someone kicking a car (A.A. Vol. II, pp. 299). CAMPBELL then stated that they're messing up my car and Hollimon heard shots that sounded like they were being fired from inside the apartment (A.A. Vol. II, pp. 300). He was not sure whether the shots were fired inside or outside the apartment (A.A. Vol. II, pp. 300).

Hollimon lay on the floor until they heard a knock on the door that was the manager stating he wanted to talk (A.A. Vol. II, pp. 300). Shortly thereafter the police came in and pulled everyone out of the apartment (A.A. Vol. II, pp. 301). Hollimon had visited at CAMPBELL'S apartment on July 4, 2000 and the Mexican neighbors had been firing guns into the air (A.A. Vol. II, pp. 302-303). He knew that they had guns and that was one of the reasons he ran when the instant incident occurred (A.A. Vol. II, pp. 303). Prior to July 22nd, CAMPBELL had told Hollimon that he had his children sleep in the living room because he was afraid to let them sleep in the bedroom as the Mexicans were always out by the window drinking and getting drunk (A.A. Vol. II, pp. 303).

During the evening of Friday, July 21st Leonardo Martinez and his friends and brothers had been playing soccer and then decided to go to Rigoberto Villanueva's house to watch a soccer match (A.A. Vol. II, pp. 355, 315). The plan was to watch the game, eat some tacos, and drink some beer (A.A. Vol. II, pp. 355,316). At about 1:30 a.m., Leonardo and his brother Augustin were in the parking lot of the apartment complex discussing whether to go home or stay for a little while longer (A.A. Vol. II, pp. 355, 316). While they were talking a vehicle drove up and parked and two black men exited (A.A. Vol. II, pp. 356, 316). The two individuals walked around a corner for about three seconds and then came back over where the Martinez' were located, and CAMPBELL had a gun in his hand (A.A. Vol. II, pp. 356, 317).

CAMPBELL walked up to about two feet away and stated that he did not want to see

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any more fucking Mexicans here (A.A. Vol. III, pp. (A.A. Vol. II, pp. 318). When Augustin stood up, CAMPBELL hit him in the face with the hand that held the gun, and Augustin went inside to call the police (A.A. Vol. II, pp. 318). Augustin called out for help and Carlos, Javier, Huiriberto and Wilfredo came to see what was happening, and when they arrived CAMPBELL started shooting (A.A. Vol. II, pp. 318-319). There was a group of about seven other individuals that ran over to the incident and then ran away before the police arrived (A.A. Vol. II, pp. 318). Rigoberto and Leonardo's four year old son also came out and went to hide behind the truck when the shooting started (A.A. Vol. II, pp. 319). Leonardo told CAMPBELL not to shoot because the boy was there and CAMPBELL stated "so, it's just a little Mexican" (A.A. Vol. II, pp. 319).

According to Leonardo, CAMPBELL was chasing Humberto, Augustin and Javier across the parking lot while shooting (A.A. Vol. II, pp. 319). Leonardo ran with his son to Rigoberto's apartment and called the police (A.A. Vol. II, pp. 320). A minute later he heard two or three more shots (A.A. Vol. II, pp. 320). He looked up and saw two people on the ground (A.A. Vol. II, pp. 320).

Leonardo was interviewed by the police on the night of the incident and told that the reason he went outside was because hear heard the first shot. He also told the police that heard his brother yelling for help and that was whey he ran outside. Three or four days later Leonardo gave another statement to the police and told them a different story, that he was outside with his brother when CAMPBELL approached them.

Augustin Martinez recalled that he was arguing a little bit with his brother, Leonardo and that he had urinated at the back of a truck located by the corner of the apartment building (A.A. Vol. II, pp. 335). CAMPBELL came over to where they were located and had a gun next to his leg in his hand (A.A. Vol. II, pp. 335-336). CAMPBELL said mother fucker Mexicans

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and Augustin tried to stand up hit him in the forehead (A.A. Vol. II, pp. 336). Augustin then went to Rigoberto's house and called 911 (A.A. Vol. II, pp. 336). He heard two gunshots while he was on the phone and went back outside (A.A. Vol. II, pp. 336). He encountered Huroberto and the two of them were joined by Leonardo (A.A. Vol. II, pp. 336). When Augustin was interviewed by the police on the night of the incident he told them that because he heard the first shot he ran outside. Leonardo gave another statement different story, that he was outside when CAMPBELL approached them. Augustin had consumed at least eight beers prior to the incident (A.A. Vol. II, pp. 340).

Javier Villanueva on July 22, 2000 resided at 2929 Elm Avenue, apartment number one (A.A. Vol. II, pp. 348). At about 1:30 he was standing at the front of the apartment with between six and eight friends (A.A. Vol. II, pp. 348). Javier was talking with his friend Luis Alberto Martinez (A.A. Vol. II, pp. 348). He had consumed between two and three beers (A.A. Vol. II, pp. 349). Suddenly the other people took off running toward the back of the apartments where the cars are parked (A.A. Vol. II, pp. 349). Javier jogged over to the area and encountered two black men and was struck in the head and knocked unconscious (A.A. Vol. II, pp. 349-350). He was the last one to reach the parking lot and heard gunshots just as he was getting there (A.A. Vol. III, pp. 350). When he regained consciousness he saw his brother, Carlos Villanueva, and Luis Martinez laying on the ground behind a pickup truck (A.A. Vol. II, pp. 350). Carlos Villanueva testified from a wheelchair that he had played soccer on July 21st and then went to Rigoberto's house to watch TV, eat tacos and drink beer (A.A. Vol. II, pp. 355). He drank five or six beers (A.A. Vol. II, pp. 355). He was going into the apartment when he heard Augustin and Leonardo arguing with two black individuals (A.A. Vol. II, pp. 355). He went over to try to calm things down and the two black individuals started backing up (A.A. Vol. III, pp. 355-357). When Carlos and the others got close one of the men took out a gun and

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started shooting into the air (A.A. Vol. II, pp. 356). He fired two shots and Carlos ran to the side and hid behind a car (A.A. Vol. II, pp. 356). He turned and saw one of the guys hitting his brother on the head with a gun (A.A. Vol. II, pp. 356, Voll. III, pp. 362). Carlos went over and pulled Javier into the parking lot (A.A. Vol. II, pp. 356, Vol. III, pp. 362). He then went back over by the pickup and felt something hot going into his body (A.A. Vol. III, pp. 363). While he was on the ground he heard another shot and he thought his friend was hit (A.A. Vol. III, pp. 363).

Noe Villanueva recalled that he was outside the apartment where he lived talking with his brothers and friends (A.A. Vol. III, pp. 395). At one point Luis and Augustin were arguing and had to be separated by Noe and Leonardo (A.A. Vol. III, pp. 397). They were getting angry with each other and talking about fighting each other (A.A. Vol. III, pp. 397, 408-411). Both of them were drunk (A.A. Vol. III, pp. 411). Shortly later Augustin came and said he got into an argument with a black man and he wanted them to go over and help him so they all ran over (A.A. Vol. III, pp. 412). CAMPBELL fired two shots into the air (A.A. Vol. III, pp. 399). CAMPBELL hit Javier two times on the head with the gun and also pointed the gun at Noe (A.A. Vol. III, pp. 400). Javier attempted to take the gun away from CAMPBELL (A.A. Vol. III, pp. 413). Noe also saw CAMPBELL shooting at Humberto and Javier (A.A. Vol. III, pp. 414). Noe stood and watched what was happening and didn't see CAMPBELL anymore but saw a hand come out of the bathroom window and fire shots at Luis and Carlos (A.A. Vol. III, pp. 417-419).

Wilfredo Menendez lived at 2937 Elm, Apartment number 3 (A.A. Vol. III, pp. 424). He was over at Rigoberto's house having kind of a party, having drinks and eating barbeque (A.A. Vol. III, pp. 424). He drank about five beers (A.A. Vol. III, pp. 424-425). There was an argument outside of the apartment and he went outside and saw CAMPBELL with a gun in his

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hand pointing it at all of them (A.A. Vol. III, pp. 425). Some of the others ran away, but Wilfredo ducked behind a truck (A.A. Vol. III, pp. 428). He saw CAMPBELL go around the side to where his apartment was at and then saw a gun stick out the bathroom window (A.A. Vol. III, pp. 428-430). The gun was fired three or four times (A.A. Vol. III, pp. 433)..

John Woodring was the maintenance manager for the apartment complex and had been out to a concert and came by the apartments to drop off his daughter (3 APP 368). He observed a party going on outside the sliding glass door of 2929 Elm (3 APP 371). He made his rounds of the apartments and stopped and told the individuals that were partying to be good and not be drinking from glass bottles (3 APP 371). Some of them were getting drunk and were a little rude to him (3 APP 375). He and his wife left and went back to their house and later received a call from their daughter that prompted him to return to the complex, where he observed police cars and the apartment taped off (3 APP 376). Woodring talked with the police and gave them the key to CAMPBELL'S apartment so they would not have to kick the door down (3 APP 378)

After the police left, Woodring cleaned up the area and picked up wooden sticks, broken bats or chair legs, broken glass and cans (3 APP 381). He picked a whole trash can full of trash (3 APP 382). He had had problems with the Mexican tenants drinking, partying too much, urinating on buildings and causing fights between other tenants (3 APP 402).

Roberta Sandlin was the manager of the apartment complex and also noticed on July 22nd that the boys from Villanueva's apartment were outside drinking (A.A. Vol. III, pp. 506-508). Because of past problems she had enacted rules that without permission there was to be no parties outside after 10 o'clock and no glass containers at all (A.A. Vol. III, pp. 508). There had been a party once where someone was stabbed with an icepick, and they would fight amongst themselves when they got drunk (A.A. Vol. III, pp. 512). She had had a number of confrontations about people urinating on the premises (A.A. Vol. III, pp. 513).

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Tovah Gold lived at 2917 Elm Avenue, apartment number 2 (A.A. Vol. III, pp. 515). After the concert she went back to her apartment and went into the bathroom and heard some Mexicans getting really loud and obnoxious and yelling some pretty rude stuff (A.A. Vol. III, pp. 516). She opened her bathroom window and saw a couple of people in the alleyway by CAMPBELL'S car and hanging on the fence in the alleyway (A.A. Vol. III, pp. 516-518). The noise seemed to get louder and she heard gunshots, then a couple more and a final couple of shots (A.A. Vol. III, pp. 520). She called her mother and father (John and Roberta) and told them that she had heard gunshots and they needed to come back to the apartment complex (A.A. Vol. III, pp. 521). She again looked out her window and saw two of the Mexicans running through the alleyway and one of them threw something into the dumpster that made a clank (A.A. Vol. III, pp. 521). She had never observed anyone urinating against the buildings but it always smelled bad right by CAMPBELL'S apartment (A.A. Vol. III, pp. 524).

Rhianna Sandlin on July 22, 2000 lived at 2917 Elm, Apartment 4, which was located above the apartment of Tovah Gold (A.A. Vol. III, pp. 507). Early that morning she heard a lot of screaming, yelling and bad words in Spanish (A.A. Vol. III, pp. 516-517, Vol. IV, pp. 507). 540). She looked out her bedroom window but did not see anything at first but then observed a group of about ten Hispanic males yelling towards the front of a vehicle (A.A. Vol. III, pp. 517, Vol. IV, pp. 541). She observed one of them holding something silver in his hand and then heard shots and called 911 (A.A. Vol. IV, pp. 541). While she was on the phone she heard additional shots and looked out her window again and it looked like a fight was going on (A.A. Vol. IV, pp. 541). After the police arrived she told them what she had observed, but they did not take a statement from her (A.A. Vol. IV, pp. 542).

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ARGUMENT

I. MR. CAMPBELL IS ENTITLED TO A NEW TRIAL BASED ON A VIOLATION OF THE CONFRONTATION CLAUSE PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ALTERNATIVELY IS ENTITLED TO A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE.

A. STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

Standard of review for ineffective assistance of counsel. To state a claim of ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness,
2. counsel's errors were so severe that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P. 2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U. S. 668, 104 S. Ct. 205, (1984)). Once the defendant establishes that counsels performance was deficient, the defendant must next show that, but for counsels error the result of the trial would probably have been different. Strickland, 466 U.S. at. 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601,602, 817 P. 2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U. S. 364,113 S. Ct. 838 122 2d, 180 (1993); Strickland, 466 U. S. at 687 104 S. Ct. at 2064.

B. VIOLATION OF THE CONFRONTATION CLAUSE, SIXTH AMENDMENT.

During the closing argument, District Attorney, David Roger, explained to the jury:

> Don't let me forget this tape because there's some answers on this tape that when you listen to it you're going hear from people who called the 911 operator and gave their present sense impressions. They talk to the 911 operator about what they were observing. You'll hear from Leonardo where he is crying hurry, hurry, they shot my friend. You determine whether or not that is the person who allegedly attacked someone with a baseball bat. **You'll hear from someone else on that tape and listen to it very closely.** (A.A. Vol. IV, pp. 568).

In fact, the 911 tape was introduced without objection by the defense. Unfortunately, the 911 tape had more than one phone call on it. Mr. Roger made mention of this call when he stated, "[Y]ou'll hear from someone else on that tape and listen to it very closely." [1] In the instant case, the caller that is on the 911 tape which the prosecutor suggest the jury should listen to did not testify. Upon information and belief, the call in question is from an unidentified male who said that he is observing someone reaching out the window and firing the shots. This unidentified individual never testified. More importantly, trial counsel would have no choice at an evidentiary hearing but to testify that they were unaware of this call and the identity of the witness.

NRS 51.035 "Hearsay" defined. "Hearsay" means a statement offered in evidence to prove the truth of the matter asserted unless:

> A. The Statement is one made by a witness while testifying at the trial or hearing:
> B. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is: . . .

A review of the hearsay statute clearly establishes that the prosecutor elicited damaging testimony against Mr. Campbell without calling the declarant to testify. Moreover, it clearly

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[1] The undersigned has contacted trial counsel for Mr. Campbell regarding this additional phone call the district attorney asked the jury to listen to carefully. At an evidentiary hearing, the Court will learn that neither trial attorney had in fact listened to this particular 911 call. However, after the introduction of the 911 tape, sometime after the jury began deliberating, defense counsel listened to the tape. For the first time, defense counsel became aware that there was a caller on the 911 tape that they had not heard of nor had this caller testified.

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violates the defendant's confrontation rights under both the Nevada, and the United States Constitutions. Moreover, in Miranda v. State, 101 Nev. 562, 707 P.2d 1121 (1985), this Court held that:

> [I]n criminal prosecution, transcribed statements of witnesses made to police before trial which were inconsistent with his testimony at trial was not admissible under NRS 51.135, which allows admission of reports during regularly conducted course of business, because statute does not permit parties to introduce into evidence actual contents of statement given to police by witnesses to crime concerning events of that crime itself." (Emphasis added.) Id.; see Frias v. Valle, 101 Nev. 219, 698 P.2d 875 (1985). Any statement given by a witness to a police officer is itself hearsay and must itself be independently admissible under a separate and distinct exception to the hearsay rule. see also NRS 51.365 (hearsay included within hearsay is not excluded under the hearsay rule if each part of the statement is independently admissible under an exception to the hearsay rule).

Moreover, in Johnstone v. State, 92 Nev. 241, 548 P.2d 1365 (1976), Justice Batjer explained in his dissenting opinion that:

> Police reports are not admissible for the sole purpose of establishing the truth of the matter asserted by a third party informant. The recital of a statement of others in a police report is hearsay within hearsay or 'double hearsay,' NRS 51.365, and is inadmissable upon proper objection unless it comes within a recognized exception to the hearsay rule independent of the business or public record exception, NRS 51.135 and NRS 51.155. In re Estate of Paulos, 229 N.W.2d 721 (Iowa 1975); Westinghouse El. Corp. v. Dolly Madison L. & F. Corp., 42 Ohio St.2d 122, 326 N.E.2d 651 (1975).

Clearly, in the case at bar, the prosecutor was required to call the witnesses. It was absolutely inadmissible under Nevada's hearsay statutes, to introduce witnesses statements without permitting the defense a right to confront those witnesses.

In Franco v. State, 109 Nev. 1229, 866 P.2d 247 (1993), this Court stated,

> The Confrontation Clause limits the state's ability to use hearsay as evidence in criminal trials when the hearsay declarant does not testify. The Clause requires that hearsay offered against an accused be sufficiently reliable to substitute for in-court scrutiny through cross-examination. Hearsay statements are sufficiently reliable when they fall within a "firmly rooted" hearsay exception. Idaho v. Wright, 497 U.S. 805, 815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638 (1989); Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980). If they do not fall within such an exception, they must be supported by a showing of "particularized guarantees of trustworthiness. Id.

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The Confrontation Clause provides that "[I]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witness against him." In Crawford v. Washington,72 U.S.L.W. 4229 124 S. Ct. 1354; 158 L.Ed 2d 177 (2004) the Court considered the issue of whether the out of court statement may be admitted as long as it has adequate indicia of reliability or falls within a firmly rooted hearsay exception. The United States Supreme Court explained that "[T]he right to confront ones accusers is a concept that dates back to Roman times." (Crawford, pp. 13, citations omitted). In Crawford, the U.S. Supreme Court carefully examined the history of the Confrontation Clause. The Court reasoned that,

> First, the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex-parte examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding -era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind. Id. at 26. (Crawford, pp. 9, citations omitted).

In Crawford, the United State Supreme Court considered the issue of whether an out of court statement had been determined to be reliable. The Court provided that, "[W]e have no doubt that the courts believe were acting in upmost good faith when they found reliability. The Framers, however, would not have been content to indulge this assumption. They knew that judges, like other government officers, could not always be trusted to safe guard the rights of the people; the likes of the dread Lord Jeffreys were not yet to distant a memory. They were loath to leave much discretion in judicial hands." (Crawford, pp. 18, citations omitted).

In the instant case, there could be no better example of a violation of the Confrontation Clause than the instant case. Defense counsel was unaware of this phone call on the 911 tape. The jury was instructed by the prosecutor to specifically listen to this call. This caller remains unidentified. This caller did not testify. Mr. Campbell attorney's were given no opportunity to

confront one of the most important accusers against Mr. Campbell. Even the prosecutor stated in closing arguments that this would provide the jury with "some answers". Pursuant to the reasoning of the United States Supreme Court in Crawford, this type of potential testimonial evidence mandates that the State call a witness to the stand so that Mr. Campbell may confront the witness. The jury was able to hear that a independent witness had seen the shooting but was never called to the stand for confrontation.

This witness may have been partially blind, or intoxicated, was biased against Mr. Campbell or the victims, or have numerous felony convictions for perjury. Unfortunately, we will never know because this witness was never testified and was never provided to the defense.

During trial, on November 13, 2001, Ms. Rhianna Sandlin, testified for the defense. During cross-examination, Mr. Roger moved for the admission of Ms. Sandlin's call to 911. (A.A. Vol. IV, pp. 543). Without objection by defense, the 911 tape was introduced into evidence. It is on this tape, that there is a subsequent unidentified caller to 911. This unidentified caller provided highly incriminating evidence against Mr. Campbell. In fact, the caller provided corroboration of the State's theory of the case. This argument is obvious given the prosecutor's urging of the jury to listen to the call and that the 911 tape would give them "some answers".

It is incumbent upon the State to present the witnesses against a defendant for the purpose of confrontation. Here, one of the most incriminating and damaging portions of evidence was presented through a 911 tape without the identity of the caller being presented nor calling the actual witness. The United States Supreme Court considered this type of issue in Crawford and the reasoning mandates that this witness must be called to testify. Without calling the witness, the State blatantly violated the Confrontation Clause. Mr. Campbell is entitled to a reversal of his convictions based upon errors of constitutional magnitude in

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violation of the Sixth and Fourteenth Amendments to the Constitution.

C. CRAWFORD SHOULD BE APPLIED RETROACTIVELY.

In the instant case, the Crawford decision should be applied retroactively to Mr. Campbell's case. Crawford does not announce a new rule.

In Teauge v. Lane, 489 U.S. 288, at 301; 109 S. Ct. 1060; 103 L.Ed 2d. 334; 1989, the United States Supreme Court explained that,

> It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define this spectrum of what may or may not constitute a new rule for retroactive purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the states or the federal government. (Citations omitted).

The United States Supreme Court further provided that, "[T]o put it differently a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. (citations omitted).

For example, a new rule was announced in Rock v. Arkansas, 483 U.S. 44, 62 (1987); wherein, the Court determined that there was a per se rule excluding all hypnotically refreshed testimony. In Ford v. Wainright, 477 U.S. 399, 410 (1986), a new rule was enunciated where it was determined the Eighth Amendment prohibits the execution of prisoners who are insane.

Hence, the Crawford decision did not provide a new obligation upon the state or federal government. Crawford did not provide a new rule and therefore, the case should be applied retroactively to Mr. Campbell's case. Retroactivity is a issue only when the issue is new. In the instant case, as it did not impose new obligations on the States or the federal government.

In conclusion, this testimony was extremely damaging. Mr. Campbell had the right under the Sixth Amendment to confront his accusers. The State had no right to cut corners and present some of the most damaging circumstantial evidence against Mr. Campbell by way of inadmissible hearsay.

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D. MR. CAMPBELL IS ENTITLED TO A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The prior arguments suggests that Mr. Campbell is entitled to a new trial based upon a violation of the Confrontation Clause. In the event that the State argues that it was defense counsel for failing to obtain a copy of the 911 tape and interviewing this unidentified caller, Mr. Campbell would suggest that his trial attorneys were ineffective. Mr. Campbell has already provided the standard for ineffective assistance of counsel in this brief.

In State of Nevada v. Love, 865 P.2d 322, 109 Nev. 1136, (1993), the Supreme Court considered the issue of ineffective assistance of counsel for failure of trial counsel to properly investigate and interview prospective witnesses. In Love, the District Court reversed a murder conviction of Rickey Love based upon trial counsel's failure to call potential witnesses coupled with the failure to personally interview witnesses so as to make an intelligent tactical decision and making an alleged tactical decision on misrepresentations of other witnesses testimony. Love, 109 Nev. 1136, 1137.

The question of whether a defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent review. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, at 2070, 80 L.Ed.2d 674 (1984). This Court reviews claims of ineffective assistance of counsel under a reasonable effective assistance standard enunciated by the United States Supreme Court in Strickland and adopted by this Court in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504, (1984); *see* Dawson v. State, 108 Nev. 112, 115, 825 P.2d 593, 595 (1992). Under this two-prong test, a defendant who challenges the adequacy of his or her counsel's representation must show (1) that counsel's performance was deficient and (2) that the defendant was prejudiced by this

deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Under Strickland, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id. at* 691, 104 S.Ct. at 2066. (Quotations omitted). Deficient assistance requires a showing that trial counsel's representation of the defendant fell below an objective standard of reasonableness. *Id. at* 688, 104 S.Ct. at 2064. If the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's errors, the result of the trial probably would have been different. *Id. at* 694, 104 S.Ct. at 2068.

In the instant case, trial counsel was required to complete an adequate investigation. In the instant case, upon information and belief, it appears that neither defense counsel was aware that there was this unidentified caller on the admitted 911 tape. It is incumbent upon counsel to properly investigate the case. One would be hard pressed to argue that defense counsel was not remiss in their duties for failing to determine that there in fact was this incriminating piece of evidence on a tape which defense agreed to it's admission without knowing what was present on the tape. Additionally, defense counsel would have rendered ineffective assistance of counsel by failing to interview and identify this witness. At an evidentiary hearing, Mr. Campbell would like to question his trial attorneys as to how they were not aware about this phone call and why the State had not presented the identity of this caller so that there could have been an adequate investigation. Mr. Campbell is entitled to a new trial based on his trial attorney's failure to perform to the standard as set forth in Strickland. Additionally, but for the errors of counsel, the result of the trial would have been different. Mr. Campbell is entitled to a new trial based upon ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

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II. 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).

Clearly, the court should hold an evidentiary hearing to permit Mr. Campbell to call his trial counsel.

In fact, an evidentiary hearing would establish the actual reason that trial and appellate counsel failed to raise the issues raised herein. It is incumbent upon the court to hold the evidentiary hearing as opposed to attempting to divine the reason that trial counsel failed to raise these issues.

An evidentiary hearing is necessary in Mr. Campbell's case so he may question trial counsel as to why he did not listen to the 911 tape (of the second caller). Additionally, Mr. Campbell would respectfully request that he be permitted to an evidentiary hearing to establish a violation of the confrontation clause. The second caller was not called to testify, however, trial counsel stipulated to the admission of the tape. Defense counsel had no opportunity to cross-examine. The State was permitted to comment to the jury the 911 tape of the second caller. In fact the State, in closing argument states,

> Don't let me forget this tape because there's some answers on this tape that when you listen to it you're going hear from people who called the 911 operator and gave their present sense impressions. . . **You'll hear from someone else on that tape and listen to it very closely.** (A.A. Vol. IV, pp.568).

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An evidentiary hearing is necessary to question defense counsel as to why they did not listen to the tape prior to trial. The district court erred when they did not order an evidentiary hearing. Mr. Campbell would have then had the opportunity to have the 911 tape transcribed. At an evidentiary hearing, Mr. Campbell would have questioned trial counsel as to why this witness was not called and why they failed to investigate this witness.

The undersigned is aware the facts may not be argued outside of the record. However, the district court did not permit Mr. Campbell and evidentiary hearing. In anticipation of an evidentiary hearing, the undersigned had contacted trial counsel for Mr. Campbell regarding this additional phone call the district attorney asked the jury to listen to carefully. Had the district court held an evidentiary hearing the Court would have learned that neither trial attorney had in fact listened to this particular 911 call. However, after the introduction of the 911 tape, sometime after the jury began deliberating, defense counsel listened to the tape. For the first time, defense counsel became aware that there was a caller on the 911 tape that they had not heard of nor had this caller testified. However, the district court denied an evidentiary hearing and the Mr. Campbell was not permitted to inquire of trial counsel why they had not investigated this very important 911 call. The State found it so important they informed the jury to listen to the tape carefully.

During the January 5, 2005, the undersigned argued to the district court that he has spoken with trial counsel, Mr. Schieck (A.A. Vol. IV, pp. 686). The undersigned argues to the Court that Mr. Schieck indicated that he did not listen to the tape before it was introduced to the jury. Mr. Schieck also indicated that he had listened to the first caller only. Again, the undersigned is aware that facts may not be argued outside of the record. However, he feels it is necessary to show to this Court the reason he is requesting an evidentiary hearing and why the district court erred in not permitting one. It was essential for an evidentiary hearing. Mr.

Campbell should be permitted to question trial counsel why they did not locate this witness and why they were not prepared for this second caller on the 911 tape.

In sum, Mr. Campbell requests an evidentiary hearing to establish facts not in evidence. These issues should have been permitted to be explored at an evidentiary hearing. As in Hatley, this Court concluded that it is err for the district court to deny an evidentiary hearing to a petition for post-conviction writ of habeas corpus, wherein allegations of facts outside the record, if true, would entitled petitioner relief. Mr. Campbell has established that there existed facts outside the record, if true, would entitle him to a new trial. For the foregoing reason, Mr. Campbell would respectfully request that this Court grant him an evidentiary hearing.

CONCLUSION

Therefore, based upon the arguments herein, Mr. Campbell would respectfully request that this Court grant an evidentiary hearing so as to establish the level of ineffective assistance of counsel necessary for the reversal of his convictions. Moreover, the defendant did not receive a fair trial as afforded by the United States Constitution's Amendments VI and XIV.

DATED this 6 dated this September, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this amended 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 6 day of September, 2005.

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CERTIFICATE OF MAILING

I hereby certify that I am an employee of CHRISTOPHER R. ORAM, ESQ., and that on the 6 day of September, 2005, 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 OPENING BRIEF**, addressed to:

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