DAMON LAMAR CAMPBELL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 44799



# RESPONDENT'S ANSWERING BRIEF

**Appeal From Order Denying Petition for Writ of Habeas Corpus (Post Conviction**

**Eighth Judicial District Court, Clark County**

CHRISTOPHER ORAM
Attorney at Law
Nevada Bar No. 004349
520 South Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711
State of Nevada

BRIAN SANDOVAL
Nevada Attorney General
Nevada Bar No. 003805
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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

DAMON LAMAR CAMPBELL,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 44799

# RESPONDENT'S ANSWERING BRIEF

**Appeal From Order Denying Petition for Writ of Habeas Corpus (Post Conviction**

**Eighth Judicial District Court, Clark County**


CHRISTOPHER ORAM
Attorney at Law
Nevada Bar No. 004349
520 South Fourth Street, 2nd Floor
Las Vegas, Nevada 89101
(702) 384-5563

Counsel for Appellant

DAVID ROGER
Clark County District Attorney
Nevada Bar #002781
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711
State of Nevada

BRIAN SANDOVAL
Nevada Attorney General
Nevada Bar No. 003805
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Nevada Revised Statutes**

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

DAMON LAMAR CAMPBELL,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

Case No. 44799

# RESPONDENT'S ANSWERING BRIEF

**Appeal From Order Denying Petition for Writ of Habeas Corpus (Post Conviction**

**Eighth Judicial District Court, Clark County**

## STATEMENT OF THE ISSUES

1. Whether Defendant 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 or in the alternative entitled to a new trial based upon ineffective assistance of counsel for failure to properly investigate.
   a. Whether Crawford should be applied retroactively.
   b. Whether there was a violation of the confrontation clause, sixth amendment.
   c. Whether Defendant is entitled to a new trial based on ineffective assistance of counsel in violation of the sixth, fifth, and fourteenth amendments to the United States Constitution.
   d. Standard for ineffective assistance of counsel.
2. Whether Defendant is entitled to an evidentiary hearing to establish facts outside the record regarding claims of ineffective assistance of counsel.

## STATEMENT OF THE CASE

Damon Lamar Campbell (Defendant) was charged by way of Information with one count of Murder with Use of a Deadly Weapon and two counts of Attempt Murder with Use of Deadly Weapon. The State filed notice of intent to seek the death penalty stating three aggravating circumstances; (1) great risk of death to more than one person; (2) the murder was committed because of perceived race, color, religion, or national origin; and (3) that the murder was committed upon one or more persons at random without apparent motive.

After a jury trial, Defendant was found guilty as to Count I, Murder with Use of Deadly Weapon and Count II, Attempt Murder with Use of a Deadly Weapon and a verdict of not guilty as to Count III, Attempt Murder with Use of Deadly Weapon. Following a penalty hearing, the jury returned a verdict of life without the possibility of parole for Count I, Murder with Use of a Deadly Weapon. Defendant was thereafter sentenced to concurrent forty-three (43) months minimum to one hundred and ninety-two (192) months maximum on the Attempt Murder conviction. The Judgment of Conviction was filed on January 22, 2002.

Defendant filed Notice of Appeal on January 25, 2002. On July 14, 2003, the Nevada Supreme Court affirmed Defendant's convictions, concluding with the observation that "overwhelming evidence was adduced to support [Defendant's] convictions." The remittitur was filed on August 8, 2003.

On September 8, 2003, Defendant filed his first Petition for Writ of Habeas Corpus (Post-Conviction) and Motion for Appointment of Counsel. The district court denied Defendant's Motion to Appoint Counsel as well as his habeas petition, filing its order on November 13, 2003.

On July 23, 2004, Defendant filed a second Petition for Writ of Habeas Corpus (Post-Conviction), filing a supplemental brief on October 25, 2004. On January 26, 2005, the district court denied Defendant's second Petition for Writ of Habeas Corpus

and filed its Notice of Entry of Decision and Order on January 27, 2005. Defendant filed this instant appeal to the Nevada Supreme Court on February 28, 2005.

## STATEMENT OF THE FACTS[1]

On the evening of Friday, July 22, 2000, Leonardo Martinez and his friends and brothers had been playing soccer. A.A, p. 315. Following their soccer practice, they planned to eat tacos, watch a game and drink some beer. A.A, p. 315. Leonardo Martinez and his brother Rigoberto Martinez were in the parking lot of their apartment complex drinking cans of beer. A.A., p. 294. The Defendant and his friend Sheldon Hollimon drove into the parking lot, pulling the Defendant's Cadillac into the parking stall just adjacent to their apartment. A.A., p. 293. The Defendant and Hollimon started walking toward the side entrance of the apartment complex but returned and approached Leonardo and Rigoberto Martinez. A.A., pp. 294, 316. The Defendant was carrying a chrome automatic handgun. A.A., pp. 299, 309, 317. The Martinez brothers told the Defendant to calm down and that they did not want any problems. A.A., p. 318. The Defendant responded, "I don't want to see any more fucking Mexicans here" and hit Rigoberto Martinez in the face with the hand that was holding the gun. A.A., pp. 318, 335, 426. Rigoberto called for help and went into the apartment to call the police. A.A., p. 318

In response to the call for help, several other unarmed individuals came out of the apartment to see what was happening, including Leonardo Martinez's four-year-old little boy. A.A., p. 297. The Defendant immediately fired shots at them. A.A., pp. 318-19. Rigoberto Martinez and Leonardo's four year old son hid behind the truck. A.A., p. 319. Leonardo Martinez said, "Please don't shoot, don't shoot, watch my little boy." A.A., p. 301. In response the Defendant stated, "So, it's a little Mexican too." A.A., pp. 308, 319. The Defendant fired several shots in the direction of the individuals in the parking lot. A.A., pp. 356, 376, 399, 414, 428. The Defendant

---

[1] A.A represents Appellant's Appendix. Volume numbers of the appendix are not indicated herein.

chased three of the unarmed individuals (Humberto, Augustin and Javier) to the back of the parking lot. A.A., pp. 319, 336, 355. Leonardo received a graze wound to his arm as he was carrying his young son back to the apartment. A.A., p. 319

The Defendant retreated back to his apartment and told Sheldon Hollimon and two girls inside the apartment to go into the bedroom and lay down. A.A., p. 298. While the Defendant was stumbling through the apartment he said, "They're fucking up my car." A.A., pp. 300, 326. He went to one of the windows which overlooked his car and fired three shots out of the window. A.A., pp. 401, 428, 432-33. One shot struck Luis Alberto Martinez in the head, killing him. A.A., p. 363. The other gunshot struck Carlos Villanueva in the back through his vertebrae, paralyzing him. A.A., p. 363.[2]

//

//

//

//

//

//

//

//

//

//

//

---

[2] These are the facts as presented from the victims, but it should be noted that the record does present conflicting views as to how the shootings started. But it should also be noted that Crime Scene Analyst Larry Martin found three cartridge cases below Defendant's bathroom window which matched the Ruger .45 pistol belonging to Defendant. Moreover, Defendant's friend, Sheldon Holliman testified that he heard shots that sounded like they were coming from within Defendant's apartment. A.A., p. 300.

## ARGUMENT

## I

**WHETHER DEFENDANT 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 OR IN THE ALTERNATIVE ENTITLED TO A NEW TRIAL BASED UPON INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY INVESTIGATE**

### A. Crawford Does Not Apply Retroactively To Cases On Collateral Review That Have Been Deemed Final.[3]

Notwithstanding the fact that the State contends that the 911 call admitted into evidence at trial is nontestimonial and thus outside of the sixth amendment's Confrontation Clause (Argument B, infra); we will address Defendant's claim that the call implicates the United States Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004).

Crawford was a case in which a man, Michael Crawford, was tried for assault and the attempted murder of a man who allegedly raped his wife, Sylvia Crawford. Id. During trial, the prosecution played for the jury Sylvia's tape-recorded statement to the police after the incident occurred. Id. at 36. The statement described the stabbing, but Crawford was never given an opportunity to cross-examine Sylvia concerning the statement because of the state marital privilege. Id. The court ruled that it was

---

[3] As Defendant's claim is a collateral attack on the judgment and not pending on direct review, the State will not discuss Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002). Richmond adopted the Supreme Court rule enunciated in Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708 (1987), which stated that a "new rule" applies to all criminal cases still pending on direct review. Griffith, 479 U.S. at 328.

reliable, reasoning that it had "particularized guarantees of trustworthiness." Id. at 40.[4] The Supreme Court overruled the lower court's decision in Crawford, reasoning that, "Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Id. at 59.

Thus, the Supreme Court specifically delineated for the first time that out-of-court testimonial statements will not be admitted unless the witness is unavailable and the defendant had an opportunity to cross-examine the witness. [5] Contrary to the Roberts analysis, it is irrelevant whether or not the out-of-court statement was reliable. Defendant must be able to confront and cross-examine witnesses through "live" proceedings. "What [Crawford] holds is that defendants enjoy this right *even when the hearsay is trustworthy.*" Murillo v. Frank, 402 F.3d 786, 790-91 (2005). (Emphasis in original). Hence, Crawford is new rule, but it is not one which adopts a fundamental rule essential to a fair and accurate trial. Id. at 790. The only decision that has had such a far reaching effect on criminal procedure was Gideon v. Wainright, 372 U.S. 335, 93 S.Ct. 792 (1963). Murillo, supra. at 790. "The point of [Crawford] is not that only live testimony is reliable, but that the sixth amendment gives the accused a right to insist on live testimony, whether that demand promotes or frustrates accuracy." Id.

---

[4] The lower court had relied on Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, which stated that the admissibility of testimonial hearsay depends on whether the hearsay statement "bears adequate indicia of reliability". Crawford, supra, at 40. "To meet the test, evidence must fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.'" Id. The Roberts criteria, up until Crawford, on all out-of-court statements offered for their truth with no distinction between testimonial and non-testimonial.

[5] The Supreme Court in Crawford stated:

> "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."

Further, Crawford is a new rule, but it is procedural rather than substantive and thus, has no retroactive effect. Moreover, the procedural decision in Crawford is not one that fits within the narrow confines of a "watershed rule" set out in the exceptions in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989).

In Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002), this Court delineated exact guidelines for this court to follow when addressing issues of retroactivity. These guidelines were adapted from longstanding principles established in Teague, supra.[6] There is essentially a three-step analysis to follow.

The first step is to determine whether the subsequent interpretation by the court established a "new rule." If a rule is *not* considered new, then it would apply even to final cases on collateral review and retroactivity would not be an issue. Colwell, supra, at 820. While the court stated that there was no bright-line test to determine if a rule was new or not, it did set forth guidelines to follow. Id. When a decision merely interprets and clarifies existing rules and does not announce altogether a new rule of law, the court's interpretation is merely a restatement of existing law and not considered new. Id; (citations omitted). If a decision simply applies a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law, it is not new. Id; (citations omitted). When a decision announces that it overrules precedent, "or disapproves of practices this Court has arguably sanctioned in prior cases, or overturn[s] a longstanding practice that lower courts had uniformly approved," then the rule is new. Id.; (citations omitted).

The second step is to determine whether the conviction of the person(s) seeking the application of the new rule has become final. Id. A conviction is final when

---

[6] "New rules of criminal procedure do not apply in habeas proceedings unless they fall within two exceptions: (1) the rule places a class of private conduct beyond the power of the state to proscribe; or (2) the rule is a 'watershed rule' of criminal procedure, implicating the fundamental fairness and accuracy of the proceeding." Teague, supra, at 310-11.

judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for the petition has expired. Id. If a conviction is not finalized, then the Court must apply new rules of federal constitutional law or be in violation of the basic norms of constitutional adjudication. Id. If a conviction is final, however, then the general rule is to not apply new rules retroactively. Id.

The final step, once it is determined that a subsequent interpretation has announced a new rule and that the conviction of the person(s) seeking adjudication has become final, is to determine if one of the two exceptions to the retroactivity bar apply to the specific case at hand:

> Exception 1: Did the new rule establish that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense?
>
> Exception 2: Did the new rule establish a procedure without which the likelihood of an accurate conviction is seriously diminished?

"There is no doubt that Crawford announces a new rule." Corey v. United States of America, 2005 WL 2217959, *4 (D.Me. 2005). The question is whether it fits into any of the exceptions provided by Teague, and the answer is "no." Obviously, the first exception is not in argument, but there has been some debate over the second exception.

Six circuits have considered the retroactivity of Crawford pursuant to the Teague decision. Of those six, five have decided that Crawford is not retroactive as to cases on collateral review: Murillo v. Frank, 402 F.3d 786, 789-90 (7th Cir.2005); Dorchy v. Jones, 398 F.3d 783, 788 (6th Cir.2005); Mungo v. Duncan, 393 F.3d 327, 336 (2d Cir.2004), cert. denied, --- U.S. ----, 125 S.Ct. 1936, 161 L.Ed.2d 778 (2005); Brown v. Uphoff, 381 F.3d 1219, 1227 (10th Cir.2004); Evans v. Luebbers, 371 F.3d 438, 444 (8th Cir.2004), cert. denied, --- U.S. ----, 125 S.Ct. 902, 160 L.Ed.2d 800 (2005). See Danforth v. State, 700 N.W.2d 530, 531 (Min. App. 2005). The Ninth Circuit in Bockting v. Bayer, 399 F.3d 1010, 1014 – 21 (9th Cir.2005), *amended* 408

F.3d 1127 (9th Cir.2005) "concluded that Crawford announced a new rule of criminal procedure that is watershed within the meaning of Teague." Corey v. United States of America, 2005 WL 2217959, *3 (D.Me 2005)).

Bockting reasoned that the Crawford decision was "both a watershed rule and one without which the likelihood of an accurate conviction was seriously diminished, and therefore applied retroactively in pending habeas proceedings." Bockting, supra, at 1015. Three things should be noted, however, concerning the Bockting decision. The first is that the three judges who decided Bockting wrote separate opinions that had differing views as to why Crawford applied retroactively. The second is that on a motion for rehearing *en banc* "nine members of the Ninth Circuit joined in a dissent from the denial of rehearing *en banc*, stating: Because Bockting conflicts with the decision of every other circuit to have considered the retroactivity of Crawford; because it conflicts with our own decision in Hiracheta, and most of all, *because it was wrongly decided.*" Corey, supra, at *3 (internal citations omitted). (Emphasis added).

The third "red flag" presented in the Bockting decision concerns its analysis of Schriro v. Summerlin, 542 U.S., 348, 124 S.Ct. 2519 (2004). That case was decided approximately four months after the Crawford decision.[7] The Summerlin Court reasoned:

> New rules of procedure [...] generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding.... That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished . . . . (Emphasis added by the Court) *This class of rules is extremely narrow, and 'it is unlikely that any ... 'ha[s] yet to emerge.'"* (Emphasis added).

---

[7] Crawford was decided on March 8, 2004, and Summerlin was deiced on June 24, 2004

Summerlin, supra, at 2523.

It is apparent that the Supreme Court's decision in Crawford did not fall into this narrow requirement. Moreover, it seems implausible that the Summerlin Court was so far removed from its decision in Crawford that it would somehow bar Crawford from the narrow requirement. To reiterate, the cases were decided less than four months from each other and Summerlin was the latter case. See also Beard v. Banks, 542 U.S. 406, 124 S.Ct. 2504 (2004); Murillo, supra, at 790.[8] The Crawford Court did not want to discuss retroactive effects of Crawford at the time it released its decision, but it would seem that it cleared up (*sub silentio*) any questions as to whether Crawford, a new procedural rule, applies retroactively to issues on collateral review when it decided Summerlin.

Nevertheless, the court in Bockting claims that Crawford and Summerlin are at odds with one another. It refers to the Summerlin Court's reasoning as an "admonishment" and that the above quote from Summerlin offers discouragement but no guidance. Bockting, supra, at 1016. Furthermore, the court in Bockting claims that the retroactive bar in Teague, which is further explained in Summerlin, is not absolute and the Crawford rule meets the criteria of the second Teague exception. Id.

The State must respectfully disagree. The Supreme Court in Summerlin could not have been any clearer when it essentially said that it has not seen a new criminal procedural rule yet that would apply retroactively to cases in habeas proceedings. This is even truer when we consider that Summerlin was decided *after* Crawford. "...It does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the state faithfully applied the Constitution as we understood it at the

---

[8] The court in Murillo stated, supra, at 790:

> [The Supreme Court of the United States] has repeatedly declined invitations to treat one or another decision as a 'watershed rule,' including both Banks and Summerlin last Term.... [The Summerlin holding is] surely a more sweeping change than Crawford (and more important to defendants, too, because it entitles them to a jury decision, while Crawford affects only what evidence the jury hears), *is not retroactive on collateral attack.*" (Emphasis added). (Internal citations omitted).

understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart." Summerlin, supra, at 2526 (2004).

Thus, Defendant's claim that Crawford is not a new rule is wrong, and the allegation that even if it were new, it should apply retroactively is completely without merit. Here, Defendant's case is final. His conviction was affirmed on direct appeal on July 14, 2003. The remittitur issued on August 8, 2003. Thus, Crawford does not apply retroactively to Defendant's case.

As noted in the beginning of this argument, the 911 tape used is not a testimonial statement as explained by the Supreme Court, and thus it was still admissible per a Roberts analysis, which was upheld by the Court as it pertained to non-testimonial statements.

**B. The Sixth Amendment Right To Confrontation In Not Implicated Here.**

The Nevada Supreme Court has held "[b]oth hearsay and Confrontation Clause errors are subject to a harmless error analysis." Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993); see also Power v. State, 102 Nev. 381, 382, 724 P.2d 211, 213 (1986); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967); Deutscher v. State, 95 Nev. 669, 683, 601 P.2d 407, 418 (1979).

Defendant claims that under Crawford, supra, the 911 tape should be considered inadmissible hearsay and therefore inadmissible as a violation of the confrontation clause because Defendant was not given a chance to cross-examine the unidentified caller. AOB, p. 17. The State contends that the tape was admissible and its admission did not implicate the sixth amendment. Further, the tape qualifies as a hearsay exception.

The district court in its Findings of Fact found in relevant part that:

> 13. The second call on the 911 tape would have been admitted into evidence at trial regardless of whether defense counsel objected
> 14. The information or description of events contained in the second call on the 911 tape also was testified to by trial witnesses, Noe Villanueva and Wilfredo Villanueva.

> 15. Therefore, even if the second call had been excluded as evidence, there is no indication that the result of the proceeding would have been different because the jury heard the same information from another source—testifying witnesses.
> 16. Defendant has provided this Court with no evidence that there was any deficient performance of defense counsel which resulted in prejudice to [Defendant] or which establishes that the result of the trial proceeding would have been different.

A.A., p. 740-41.

The Court's Conclusions of Law reiterated its Findings. "The second call placed to the 911 operator falls under the exception to the hearsay rules as [*sic*] qualifies as an excited utterance and/or a present sense impression. NRS. 51.095; NRS. 51.085" A.A., p. 741. The court further found that by law, a 911 call is not considered testimonial and thus, would not trigger Crawford. Id. at 741.

The Framers of the United States Constitution created the Confrontation Clause to prevent the evil of using ex parte examination as evidence against the criminally accused. Id. S.Ct. at 1363-64. The Confrontation Clause leaves non-testimonial statements to regulation by State hearsay law, but it imposes "an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine [...]." Id. at 1370.

In City of Las Vegas v. Walsh, 120 Nev. Adv. Op. 44, 91 P.3d 591 (2004), the Nevada Supreme Court attempted to clarify what is or is not testimonial in nature pursuant to Crawford. In Defendant's case, if the 911 tape is non-testimonial in nature then the Confrontation Clause is not implicated. In Walsh, the court noted that a 911 call would not be testimonial in nature because of a variety of factors, such as:

> 1. The call would not be initiated by the police, it would be initiated by the victim of the crime;
> 2. The call would not be generated by the desire of the prosecution or the police to seek evidence against a particular suspect, it would be generated by the caller's desire to be rescued from immediate peril; [and]
> 3. A testimonial statement is produced when the government summons a citizen to be a witness; in a 911 call it is the citizen who summons the government.

Id. (citing People v. Moscat, 3 Misc.3d 739, 777 N.Y.S.2d 875 (N.Y. Crim. Ct. 2004).

The 911 tape admitted at Defendant's trial falls exactly within the standard set by Walsh. The tape was non testimonial and fell within at least two hearsay exceptions, and therefore did not trigger Crawford. "The Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee". Crawford, supra, at 1370. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner; by testing in the crucible of cross-examination." Id.

In Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980), the Court allowed testimonial hearsay to be admitted if it bore "particularized guarantees of trustworthiness." Crawford, supra, at 1369 (quoting Roberts, 448 U.S. at 66, 100 S.Ct. at 2531). But the problem with a reliability determination is that reliability "is an amorphous, if not entirely subjective, concept." Id. at 1371. The Roberts test erroneously allowed the admittance of testimonial statements that were meant to be excluded under the Confrontation Clause. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution prescribes: confrontation." Id. at 1374. Thus, in partially overruling Roberts, Crawford held that where testimonial evidence is at issue and the declarant is unavailable, the statements are only admissible if the defendant previously had the opportunity to cross-examine the declarant upon the evidence, regardless of the reliability of the evidence. Id. at 1374. As discussed, the 911 tape hardly falls into the category of 'testimonial'.

### C. Defendant Should Not Receive A New Trial Based On Ineffective Assistance Of Counsel.

NRS 176.515(1) provides that "The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence."

This Court has held that:

> In seeking a new trial the newly-discovered evidence must be (1) newly discovered, (2) material to movant's defense, (3) such that it could not with reasonable diligence have been discovered and produced for the

> trial, (4) not cumulative, and (5) such as to render a different result probable upon retrial. To which we add (6) that it does not attempt only to contradict a former witness or to impeach or discredit him, unless witness impeached is so important that a different result must follow, [citation omitted]; and (7) that these facts be shown by the best evidence the case admits, [citations omitted].

Admitting the 911 tape into evidence does not qualify as "evidence material to the movant's defense", though Defendant claims it aided rather than hindered in his conviction. "Evidence is material when there is a reasonable probability that had the evidence been available to the defense, the result of the proceeding would have been different." Steese v. State, 114 Nev. 479, 492, 960 P.2d 321, 330 (1998). Here, the essential claim by Defendant is that the exclusion of the tape would have somehow changed the outcome of the trial. Findings by the lower court, supra, however, make this allegation clearly incorrect.

Moreover, in the instant case, the 911 tape was available to both the prosecution and defense. Defense counsel could easily access the records just as well as the prosecution. Defendant cannot explain how the jury not hearing the second call would have influenced the outcome of the case. And the fact that the State referenced the second call one time during closing arguments does not negate the "overwhelming evidence" pointing to Defendant's guilt. "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be reviewed in context." Steese, supra, at 496. Defendant needs to remember that the jury heard *all* relevant evidence, not just one comment by the State.

The most important aspect of Defendant's argument is that Defendant concedes that he failed to listen to the tape. "Without objection by defense, the 911 tape was introduced into evidence." AOB, p. 19. Defendant cannot now point the finger at the State and claim a denial of confrontation. Defendant claims, "in fact, the caller provided corroboration of the State's theory of the case." Id. Defendant's argument would intimate that his conviction was based entirely on the admission of the 911

tape.[9] See Steese, supra, at 498. On the contrary, both the Defendant's and State's witnesses, without use of the 911 tape, corroborated the State's theory of the case.

**D. Standard For Ineffective Assistance Of Counsel.**

In order to assert a claim for ineffective assistance of counsel the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2063-2064 (1984); State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the 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. Strickland, 466 U.S. at 687-688 and 694, 104 S.Ct. at 2065 and 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting Strickland two-part test in Nevada). "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, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

Defendant's contention is that counsel failed to investigate the 911 tape admitted during trial, which contained an unidentified caller whose statements corroborated other witness statements.[10] AOB, p. 15. Applying the Strickland standard of review, the State will address Defendant's contentions to refute his claim of ineffective assistance of counsel.

---

[9] Defendant argues, "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 or calling the actual witness." AOB, p. 19.

[10] Defendant's opening brief quotes a portion of the State's closing argument which stated in pertinent part, "You'll hear from someone else on the tape and listen to it very closely." Appellant's Opening Brief (AOB), p. 15.

First, in considering whether trial counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066). Finally, counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Here, Defendant's counsel failed to investigate the 911 tape. A defendant who alleges that there was a failure to investigate must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United State v. Porter, 924 F.2d 395, 397 (1st Cir. 1991); (quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989)). Furthermore, it is well established that a claim of ineffective assistance of counsel alleging a failure to properly investigate will fail where the evidence or testimony sought does not exonerate or exculpate the defendant. Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989). In this case, there is no revelation. The tape has the voice of a second unidentified caller who observed Defendant's actions. If the tape had not been admitted, its inadmissibility would not have exonerated or exculpated Defendant.

The court begins with the presumption of effectiveness and then must determine whether or not defendant has demonstrated, by "strong and convincing proof" that counsel was ineffective. Homick v State, 112 Nev. 304, 310, 913 P.2d 1280, 1285 (1996); citing Lenz v. State, 97 Nev. 65, 66, 624 P.2d 15, 16 (1981); Davis v. State, 107 Nev. 600, 602, 817 P.2d 1169, 1170 (1991). The role of a court in considering an allegation 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) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

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." Donovan, 94 Nev. at 675, 584 P.2d at 711. 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.

"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); citing Strickland, 466 U.S. at 690, 104 S. Ct. at 2066; see also Ford v. State, 105 Nev. 850, 784 P.2d 951 (1989).

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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., (citing Strickland, 466 U.S. at 687-89, 694). As discussed in argument I (C), supra, Defendant has offered nothing which would leave the Court to believe that there was any doubt as to how the case would turn out.

## II

## DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING TO ESTABLISH FACTS OUTSIDE THE RECORD REGARDING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

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 v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994); Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (referencing Grondin v. State, 97 Nev. 454, 634 P.2d 456 (1981)). "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." NRS 34.770(1). There are no facts outside the record that would entitle the Defendant to an evidentiary hearing. Hatley v. State,100 Nev. 214, 215, 678 P.2d 1160, 1161 (1984)

The defendant is not entitled to a full evidentiary hearing on all of his claims because his allegations are either contradicted by the record or consist of bare claims that do not entitle him to relief. See Hargrove v. State, 100 Nev. 498, 501, 686 P.2d 222, 225 (1986). This Court does not need to hold an evidentiary hearing to be in position to properly rule on the validity of the defendant's claims. For the claims that are not mere bare allegations, the issues are such that a review of the record that already exists on the matter is sufficient.

The record here reflects that defense counsel did not object to 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. The Defendant should not now be granted an evidentiary hearing when it comes down to the fact that defense counsel were "remiss in their duties for failing to determine that there in fact was this [. . .] piece of evidence on tape which defense *agreed* to its admission . . . ." AOB, p. 22. (Emphasis added). The Nevada Legislature has given the District Court the ability to make such a determination without holding a full evidentiary hearing.

## CONCLUSION

For the foregoing reasons, the Court should DENY Defendant's petition in full.

Dated this 7th day of October, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 
JAMES TUFTELAND
Chief Deputy District Attorney
Nevada Bar #000439

Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711

## 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 7th day of October, 2005.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY _____

JAMES TUFTELAND
Chief Deputy District Attorney
Nevada Bar #000439
Office of the Clark County District Attorney
Clark County Courthouse
200 South Third Street, Suite 701
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 455-4711

## CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 7th day of October, 2005.

Christopher Oram
Attorney at Law
520 South Fourth Street, 2nd Floor
Las Vegas, Nevada 89101

Employee, Clark County
District Attorney's Office

TUFTELAND/Nikki Hearon/english