ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * *

DAMON CAMPBELL,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 39127

FILED

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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STATEMENT OF ISSUES

1. WAS IT ERROR FOR THE COURT TO REFUSE TO INSTRUCT THE JURY ON DEFENDANT'S THEORY OF SELF DEFENSE

2. WHETHER THE COURT ERRED IN DENYING CAMPBELL'S MOTION TO STRIKE AGGRAVATING CIRCUMSTANCES

3. WHETHER THE AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 ARE UNCONSTITUTIONAL AS THEY FAIL TO TRULY NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS

4. WAS THERE SUFFICIENT EVIDENCE TO CONVICT CAMPBELL OF FIRST DEGREE MURDER

5. WHETHER THE COURT ERRED IN ALLOWING THE ADMISSION OF OTHER BAD ACTS AGAINST CAMPBELL

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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 (1 APP 1-2). After a preliminary hearing CAMPBELL was bound over to Department 15 for trial and arraigned on September 7, 2000 (1 APP 139). Subsequent to CAMPBELL'S preliminary hearing the State obtained a Grand Jury Indictment against Sheldon Holliman arising from the same incident and upon Motion of the State the Court on October 17, 2000 consolidated the cases for trial. (1 APP 141)

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 (1 APP 3-4).

Trial commenced on November 5, 2001 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. (1 APP 151) The Penalty Hearing was lasted two days commencing on November 14, 2001 and on November 15, 2001 the jury returned a

verdict of Life Without the Possibility of Parole. (1 APP 152) CAMPBELL was thereafter sentenced to a concurrent forty-three (43) to 192 months on the Attempt Murder Conviction (1 APP 153-54). The Judgement of Conviction was filed January 22, 2002. (1 APP 135-36) The Notice of Appeal was therefore timely filed on January 25, 2002. (1 APP 137-38)

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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 (2 APP 157). After a short while Hefner became concerned because one suspect was believed to be in an apartment with windows that faced the scene (2 APP 158). 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 (2 APP 158). 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 (2 APP 158-159).

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 (2 APP 162). There were several expended cartridge cases, some splintered wood, clothing strewn about and what appeared to be blood in several locations (2 APP 162). A search warrant was 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 (2 APP 162). No bullets or projectiles were recovered (2 APP 164).

Six of the cartridges were same type of ammunition, .45 ACP with a headstamp of WWC99 and three cartridge cases contained the headstamp WWC94 (2 APP 165). The three WWC94 were located under the bathroom windows outside of the

apartments (2 APP 165) and had been fired from the Ruger .45 recovered in the apartment (2 APP 186).

Forensic pathologist Gary Telgenhoff performed the autopsy on Luis Alberto Martinez on July 22, 2000 (2 APP 188). Martinez was 5 feet 4 inches and weighed one hundred and forty-two pounds (2 APP 189). 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 (2 APP 189). There was a gunshot wound on the left side of the head with an exit wound on the right side of the head (2 APP 189). Cause of death was the penetrating gunshot wound to the head (2 APP 189). Blood alcohol level was .24 (2 APP 190).

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 (2 APP 202). Hollimon first met CAMPBELL in high school and they were good friends on July 22, 2000 (2 APP 193). Hollimon called CAMPBELL around noon on the 21st and asked him to come pick him up because he was having problems at home (2 APP 193). CAMPBELL picked him up a few hours later (2 APP 193). The plan for the evening was to rent movies and watch them at CAMPBELL'S apartment with the two girls (2 APP 194). After they pulled the car into the parking area and got out Hollimon observed two Hispanic males squatting down at the corner of the building

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drinking liquor. (2 APP 194-95)

CAMPBELL and Hollimon started walking toward CAMPBELL'S apartment and CAMPBELL asked the two men to watch his car because it had been stolen in the past (2 APP 195). After Hollimon went through the gate he heard CAMPBELL ask the men not to pee on the wall of his apartment (2 APP 196). The men answered in Spanish and CAMPBELL went toward them and told them that he had asked them not to pee on the wall (2 APP 197). The body language of the two Hispanic males showed aggravation or aggression (2 APP 197). As CAMPBELL approached the two Hispanic men, they stood up and started swinging and then whistled (2 APP 197). Hollimon believed that CAMPBELL threw the first punch (2 APP 197). Holliman tussled with the other Hispanic male and then he ran and several other Hispanic males came around the corner (2 APP 198). Hollimon tried to run away and was tackled against a truck (2 APP 198). He recalled that one of them had a stick and that they were throwing bottles at him and CAMPBELL (2 APP 209). Hollimon pushed the individual off of himself and then ran to CAMPBELL'S apartment (2 APP 198). While he was running to the apartment, he heard shots (2 APP 199). A couple of seconds after Hollimon entered the apartment, CAMPBELL ran in and told them to lay down (2 APP 199). Hollimon heard several more shots prior to CAMPBELL entering the apartment (2 APP 199). CAMPBELL was carrying a chrome automatic handgun (2 APP 200).

The lights were off in the apartment and they did not call

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the police (2 APP 199). CAMPBELL told everyone to lay down in his room and then Hollimon heard a racket in the house like CAMPBELL was tripping over stuff (2 APP 200). CAMPBELL stated that he thought they had a gun and he shot a couple of them (2 APP 200). Outside in the parking lot Hollimon could hear a bunch of Spanish talk and noises like someone kicking a car (2 APP 200). 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 (2 APP 201). He was not sure whether the shots were fired inside or outside the apartment (2 APP 211).

Hollimon lay on the floor until they heard a knock on the door that was the manager stating he wanted to talk (2 APP 201). Shortly thereafter the police came in and pulled everyone out of the apartment (2 APP 202).

Hollimon had visited at CAMPBELL'S apartment on July 4, 2000 and the Mexican neighbors had been firing guns into the air (2 APP 203-04). He knew that they had guns and that was one of the reasons he ran when the instant incident occurred (2 APP 203). 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 (2 APP 204).

During the evening of Friday, July 21st Leonardo Martinez and his friends and brothers had been playing soccer and then

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decided to go to Rigoberto Villanueva's house to watch a soccer match (2 APP 216). The plan was to watch the game, eat some tacos, and drink some beer (2 APP 217). 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 (2 APP 217). Leonardo had consumed about four beers (2 APP 217). While they were talking a vehicle drove up and parked and two black men exited (2 APP 218). 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 (2 APP 218).

CAMPBELL walked up to about two feet away and stated that he did not want to see any more fucking Mexicans here (2 APP 219). 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 (2 APP 219). Augustin called out for help and Carlos, Javier, Humberto and Wilfredo came to see what was happening, and when they arrived CAMPBELL started shooting (2 APP 219). There was a group of about seven other individuals that ran over to the incident and then ran away before the police arrived (2 APP 229). Rigoberto and Leonardo's four year old son also came out and went to hide behind the truck when the shooting started (2 APP 219). Leonardo told CAMPBELL not to shoot because the boy was there and CAMPBELL stated "so, it's just a little Mexican" (2 APP 220). The person with CAMPBELL was behind him telling him to shoot (2 APP 220).

According to Leonardo, CAMPBELL was chasing Humberto, Augustin and Javier across the parking lot while shooting (2 APP 220). Leonardo ran with his son to Rigoberto's apartment and called the police (2 APP 221). A minute later he heard two or three more shots (2 APP 221). He looked up and saw two people on the ground (2 APP 221). Leonardo starting kicking CAMPBELL'S car and that was when the police arrived (2 APP 227).

Leonardo was interviewed by the police on the night of the incident and told them that the reason he went outside was because he heard the first shot (2 APP 224). He also told the police that he heard his brother yelling for help and that was why he ran outside (2 APP 225). 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 (2 APP 228).

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 (2 APP 236). CAMPBELL came over to where they were located and had a gun next to his leg in his hand (2 APP 236). CAMPBELL said mother fucker Mexicans and when Augustin tried to stand up hit him in the forehead (2 APP 237). Augustin then went to Rigoberto's house and called 911 (2 APP 237). He heard two gunshots while he was on the phone and went back outside (2 APP 237). He encountered Humberto and the two of them were joined

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by Javier and ran across the parking lot to the apartments on the other side and heard a bullet hit the wall (2 APP 237). Augustin had consumed at least eight beers prior to the incident (2 APP 241).

Javier Villanueva on July 22, 2000 resided at 2929 Elm Avenue, apartment number one (2 APP 249). At about 1:30 he was standing at the front of the apartment with between six and eight friends (2 APP 249). Javier was talking with his friend Luis Alberto Martinez (2 APP 249). He had consumed between two and three beers (2 APP 250). Suddenly the other people took off running toward the back of the apartments where the cars are parked (2 APP 250). Javier jogged over to the area and encountered two black men and was struck in the head and knocked unconscious (2 APP 250). He was the last one to reach the parking lot and heard gunshots just as he was getting there (2 APP 253). When he regained consciousness he saw his brother, Carlos Villanueva, and Luis Martinez laying on the ground behind a pickup truck (2 APP 251).

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 (2 APP 256). He drank five or six beers (2 APP 256). He was going into the apartment when he heard Augustin and Leonardo arguing with two black individuals (2 APP 256). He went over to try to calm things down and the two black individuals started backing up (2 APP 257). When Carlos and the others got close one of the men took

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out a gun and started shooting into the air (2 APP 257). He fired two shots and Carlos ran to the side and hid behind a car (2 APP 257). He turned and saw one of the guys hitting his brother on the head with a gun (2 APP 257). Carlos went over and pulled Javier into the parking lot (2 APP 257). He then went back over by the pickup and felt something hot going into his body (3 APP 264). While he was on the ground he heard another shot and he thought his friend was hit (3 APP 264).

Noe Villanueva recalled that he was outside the apartment where he lived talking with his brothers and friends (3 APP 296). At one point Luis and Augustin were arguing and had to be separated by Noe and Leonardo (3 APP 298). They were getting angry with each other and talking about fighting each other (3 APP 310). Both of them were drunk (3 APP 312). 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 (3 APP 313). CAMPBELL fired two shots into the air (3 APP 299). CAMPBELL hit Javier two times on the head with the gun and also pointed the gun at Noe (3 APP 301). Javier attempted to take the gun away from CAMPBELL (3 APP 314). Noe also saw CAMPBELL shooting at Humberto and Javier (3 APP 302). 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 (3 APP 304).

Wilfredo Menendez lived at 2937 Elm, Apartment number 3 (3 APP 325). He was over at Rigoberto's house having kind of a

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party, having drinks and eating barbeque (3 APP 325). He drank about five beers (3 APP 337). There was an argument outside of the apartment and he went outside and saw CAMPBELL with a gun in his hand pointing it at all of them (3 APP 326), and then fire some shots (3 APP 329). Some of the others ran away, but Wilfredo ducked behind a truck (3 APP 329). He saw CAMPBELL go around the side to where his apartment was at and then saw a gun stick out the bathroom window (3 APP 329). The gun was fired three or four times (3 APP 334).

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

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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 (3 APP 408). 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 (3 APP 409). There had been a party once where someone was stabbed with an icepick, and they would fight amongst themselves when they got drunk (3 APP 413). She had had a number of confrontations about people urinating on the premises (3 APP 414).

Tovah Gold lived at 2917 Elm Avenue, apartment number 2 (3 APP 416). 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 (3 APP 417). 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 (3 APP 418). The noise seemed to get louder and she heard gunshots, then a couple more and a final couple of shots (3 APP 421). 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 (3 APP 422). She again looked out her window and saw two of the Mexicans running through the alleyway and one of them threw

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something into the dumpster that made a clank (3 APP 422). She had never observed anyone urinating against the buildings but it always smelled bad right by CAMPBELL'S apartment (3 APP 425).

Rhianna Sandlin on July 22, 2000 lived at 2917 Elm, Apartment 4, which was located above the apartment of Tovah Gold (3 APP 441). Early that morning she heard a lot of screaming, yelling and bad words in Spanish (3 APP 441). 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 (3 APP 442). She observed one of them holding something silver in his hand and then heard shots and called 9-1-1 (3 APP 442). 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 (3 APP 442). After the police arrived she told them what she had observed, but they did not take a statement from her (3 APP 443).

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ARGUMENT

I.

IT WAS ERROR FOR THE COURT TO REFUSE TO INSTRUCT THE JURY ON DEFENDANT'S THEORY OF SELF DEFENSE

At the settling of jury instructions, CAMPBELL proposed an instruction that provided that when a person is attacked by more than one person he had the right to act in self defense against all of the assailants (3 APP 449). The Court refused to give the instruction and instead only modified on instruction to include the plural version of assailant (3 APP 449).

Instruction No. 29 as given to the jury was adjusted by the Court to read:

> "The right to self-defense is not available to an original aggressor, that is a person who has sought a quarrel with the design to force a deadly issue and thus through his fraud, contrivance or fault, to create a real or apparent necessity for a making a felonious assault.
>
> However, where a person without voluntarily seeking, provoking, inviting or willingly engaging in a difficulty of his own free will, is attacked by an assailant(s) he has the right to stand his ground and need not retreat when faced with the threat of deadly force" (1 APP 96).

This instruction did not address the basic defense that CAMPBELL was putting forth, that he was attacked by a group of individuals and was justified in defending himself against the entire group as much as if he was defending himself against on individual that attacked him with deadly force. Witnesses for CAMPBELL were able to testify that they observed some of the

group of Hispanic males with weapons, but could not identify those individuals that suffered gunshot wounds as the individuals that welded the weapons. The jury thus could have been confused into believing that CAMPBELL'S action could not be shown to be self-defense, unless the specific individuals the weapons were the ones that were shot.

The jury was given eight separate instructions with respect to self-defense which were taken from the decision in Runion v. State, 116 Nev.Ad.Op. 111 13 P.3d 52 (2000). The Court, however, ignored the holding in Runion that:

> "Because not all aspects of the self-defense statutes will be applicable in each case, we direct the district courts to cease merely quoting the applicable statutes when instructing a jury on self-defense, and we take the opportunity to set forth sample instructions for consideration by the district courts in future cases where a criminal defendant asserts self-defense. Whether these or other similar instructions are appropriate in any given case depends upon the testimony and evidence of that case. The district court should tailor instructions to the facts and circumstances of a case, rather than simply relying upon 'stock instructions'..."

Runion 116 Nev. at 8.

In every criminal case a defendant is entitled to have the jury instructed on any theory of defense that the evidence discloses, however improbable the evidence supporting it may be. Allen v. State, 97 Nev. 394, 632 P.2d 1153 (1981); Williams v. State, 99 Nev. 530, 665 P.2d 260 (1983). The eight self defense instructions given to the jury did not address the situation where one individual is confronted by a group of individuals in a threatening manner. Merely making the non-

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retreat instruction plural did not address the specific aspects of CAMPBELL'S defense as required by Runion, supra.

It has been recognized that where the circumstances are such as to justify one killing in self-defense, the assailant is not culpable if, in defending himself he unintentionally kills a third person. People v. Matthews, 154 Cal.Rptr. 628, 631 (1979). The same reasoning can be applied to situations where a defendant is confronted by a group of individuals, some of which are armed with weapons capable of doing bodily harm, and in defending himself kills a person not part of the assaulting group. See e.g. Shelton v. Commonwealth, 140 S.Ct. 670 (1911).

The instructions proffered by CAMPBELL is supported by the general rule of law stated in 40 Corpus Juris Secundum section 136, p. 1021 as follows:

> "Where accused is attacked by two or more persons, or is attacked by one person and others are acting with the assailant or are present and aiding and encouraging him, he has a right to act in self-defense against all and, in a proper case, to kill one or all. However, accused is not justified in killing one of such persons where he does not entertain a belief that he is in danger of serous bodily injury or loss of life at the hands of such person."

See also, People v. Johnson, 316 N.W.2d 247, 249 (Mich. 1982).

The failure to correctly instruct the jury on CAMPBELL'S theory of defense was prejudicial error and this Court should therefore reverse his conviction and remand the case for further proceedings.

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II.

THE COURT ERRED IN DENYING CAMPBELL'S MOTION TO STRIKE AGGRAVATING CIRCUMSTANCES

Prior to trial CAMPBELL filed a Motion to Strike Aggravating Circumstances based on the insufficient evidence to support the allegations and that conducting a capital trial without the existence of a valid aggravating circumstance would deny CAMPBELL a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (1 APP 18-23) There can be no doubt that treating a non-capital case as a capital case is waste of judicial resources as it effects motion practice, jury selection, trial proceedings, daily transcripts and involves the use of resources better spent for cases wherein the death penalty is a legitimate option for the jury. It also unfairly results in a trial before a jury selected more based on their views on punishment than on guilt or innocence. Such a jury is a guilt-prone jury because the panel necessarily has excluded any jurors that do not believing capital punishment.

It has long been the law of this nation that the decision to seek the death penalty is not without legitimate constitutional limitations; it cannot be arbitrary, capricious, discriminatory or vindictive. Zant v. Stephens, 462 U.S. 877, 103 S.Ct. 2733, (1982); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Most certainly it cannot be sought because a defendant does not agree to accept

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negotiations tendered by the prosecutor, and even more certainly it should not be sought in order to gain a tactical advantage in the selection of a jury or to enhance publicity surrounding a case. The instant case was not a capital case, it was only tried as one to gain a tactical advantage over the defense.

It is the position of CAMPBELL that death qualifying a jury in a non-capital case and going through all of the time, expense and rigors of treating a case as a capital case, when it was not, violated his right to an impartial jury guaranteed by the Sixth and Fourteenth Amendments and that he was thereby also denied of Due Process of Law and a fundamentally fair trial.

The United State Supreme Court touched upon these issues in Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). In Lockhart, the jury convicted McCree of capital felony murder, but rejected the State's request for the death penalty and instead sentenced him to life without the possibility of parole. McCree filed a federal writ challenging his conviction, contending that the "death qualification" of the jury denied him of his right to a fair and impartial jury. McCree was successful at both the District Court and Court of Appeals level, however was unsuccessful before the United States Supreme Court, with the Court stating:

> "Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both

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> methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' that 'non-death-qualified' juries. We hold, nonetheless, that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases."

Lockhart, 476 U.S. at 172.

The obvious distinction in the instant case, is that this was not a capital case. The trial court should have granted the Motion to Strike the Aggravating Circumstance, and therefore this jury should never had been "death qualified".

CAMPBELL was denied Due Process of Law, a fundamentally fair trial and an impartial jury comprised of a cross-section of the community by the manipulative and improper procedures in this case. The only remedy is a new trial before a non death qualified jury.

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III.

THE AGGRAVATING CIRCUMSTANCES ENUNCIATED IN NRS 200.033 ARE UNCONSTITUTIONAL AS THEY FAIL TO TRULY NARROW THE CATEGORIES OF DEATH ELIGIBLE DEFENDANTS

In Gregg v. Georgia, 428 U.S. 238, 92 S.Ct. 2726. 3 L.Ed.2d 346 (1972), the United States Supreme Court held that death penalty statutes must truly guide the jury's determination in imposing the sentence of death. The Court held that the sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." Id. at 188, 96 S.Ct. at 2932.

In Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980), the Supreme Court struck down a Georgia death sentence holding that the aggravating circumstance relied upon was vague and failed to provide sufficient guidance to allow a jury to distinguish between proper death penalty cases and non-death penalty cases. The Court held that under Georgia law, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 877, 103 S.Ct. at 2742.

Recent decisions of the United States Supreme Court demonstrate that all the factors listed in the Nevada Capital Sentencing Statute (NRS 200.033) are subject to challenge on the grounds of 8th Amendment prohibition against vagueness and arbitrariness, for both on its face and as applied in the this

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case.

In Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130 (1992), the United State Supreme Court noted that where the sentencing jury is instructed to weigh aggravating and mitigating circumstances, the factors guiding the jury's discretion must be objectively and precisely defined:

> "Although our precedence do not require the use of aggravating factors they have not permitted a state in which aggravated factors are decisive to use factors of vague or imprecise content. A vague aggravated factor employed for the purpose of determining whether defendant is eligible for the death penalty fails to channel the sentencers discretion. A vague aggravating factor used in the weighing process is in essence worst, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty and he might otherwise be by relying upon the existence of illusory circumstance." Id. at 382."

Among the risk the court identified as arising from the vague aggravating factors are randomness in sentence decision making and the creation of a bias in favor of death. Each of the factors contained in NRS 200.033 is subject to the prescription against vague and imprecise sentencing factors that fail to appraise the sentencer of the findings that are necessary to warrant imposition of death. (Maynard v. Cartwright, 486 U.S. 356 (1988)).

The factors listed in NRS 200.033, individually and in combination, fail to guide the sentencers discretion and create an impermissible risk of vaguely defined, arbitrarily and capriciously selected individuals upon whom death is imposed. It is difficult, under the factors of NRS 200.033 for the

perpetrator of first degree murder not to be eligible for the death penalty.

The Supreme Court in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980) reversed under the 8th Amendment a sentence of death obtained under Georgia Capital Murder Statute that permitted the death penalty for an offense that was found beyond a reasonable doubt to have been "outrageously and wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." (Id. at 422). Despite the prosecutor's claim that the Georgia courts had applied a narrowing construction to the statute (Id. at 429-430), the plurality opinion recognized that:

> "In the case before us the Georgia Supreme Court has affirmed the sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.'"

There is nothing in these words, standing alone, implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility can fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." (Id. at 428-429).

To be consistent with the 8th Amendment, capital murder must take into account the concepts that death is different (California v. Ramos, 463 U.S. 992, 103 S.Ct. 3445 (1983)), in that the death penalty must be reserved for those killings which society views as the most "aggrievious . . . affronts to

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humanity." (Zant v. Stephens, 462 U. S. at 877, Footnote 15 (citing Gregg v. Georgia, (1976) 428 U.S. 153, 184.)) Across the board eligibility for the death penalty also fails to account for the different degrees of culpability attendant to different types of murders, enhancing the possibility that sentencing will be imposed arbitrarily without regard for the blameworthiness of the defendant or his act.

The Nevada Statutory scheme is so broad as to make every first degree murder case into a death penalty case. The Statute does not narrow the class of murderers that are eligible for the death penalty. The scheme leaves the decision when to seek death solely in the unbridled discretion of prosecutors. Such a scheme violates the mandates of the United States Supreme Court.

At the hearing on CAMPBELL'S Motion to Strike Aggravator the District Court agreed with CAMPBELL but nonetheless denied the Motion due to existing precedent, stating in relevant portion:

> "THE COURT: Thank you. No. 2, motion to strike aggravating circumstances. This Court is of the personal opinion that the Nevada statutory scheme truly does not provide a narrowing group of people who are death qualified which is required by Furman. However, this Court also knows, and it has taken an oath to uphold the law as given to us by the Nevada Supreme Court, and so I'm constrained since our Nevada Supreme Court has indicated that our statutory scheme is constitutional. I'm constrained to deny the motion to strike aggravating circumstances" (1 APP 34-35).

Even though CAMPBELL did not receive the death penalty,

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the validity of his life without parole sentence is questionable. The jury was allowed to consider the death penalty as an option and therefore could have selected life without parole as a compromise between the options. If the death penalty had not been an option it is much more likely that the jury would have determined that life with the possibility of parole was appropriate. CAMPBELL was therefore prejudiced by the failure of the District Court to strike the aggravating circumstances.

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IV.

THERE WAS NOT SUFFICIENT EVIDENCE
TO CONVICT CAMPBELL OF FIRST DEGREE MURDER

It is respectfully urged upon this Court that the properly admissible evidence presented by the State at trial failed to establish the guilt of CAMPBELL beyond a reasonable doubt of First Degree Murder.

NRS 175.191 provides that:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in the case of a reasonable doubt whether his guilt is satisfactorily shown he is entitled to be acquitted."

This Court in Edwards v. State, 90 Nev. 255, 524 P.2d 388 (1974) stated that:

> "...the test for sufficiency upon appellate review is not whether this court is convinced beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had the right accept."

It is a well recognized rule that where there is substantial evidence in the record to support the verdict it will not be overturned by the appellate court. Nix v. State, 91 Nev. 613, 541 P.2d 1 (1975); Sanders v. State, 90 Nev. 433, 529 P.2d 206 (1979). It is also well accepted that a conviction must be reversed where the evidence is so weak that it constitutes no evidence at all. In re: Corey, 41 Cal.Rptr. 397 (1964); People v. Brown, 92 P.2d 492, 132 Cal.Rptr. 397 (1939). No guilty verdict should be upheld merely because some evidence supporting the conviction was offered. The appellate court must determine if there was evidence sufficient to

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justify a rational trier of fact to find "guilt beyond a reasonable doubt." See, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct 2781 (1979); In re: Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct 1068 (1970).

While it is possible for a conviction to be sustained based solely on circumstantial evidence, the circumstances proved must be unequivocal and inconsistent with innocence. Woodall v. State, 97 Nev. 235, 627 P.2d 402 (1981); State v. Weaver, 371 P.2d 1006 (Wash. 1962); State v. Jones, 373 P.2d 116 (Wash. 1961). This Court held in Woodall, supra, that a jury is obligated to afford the defendant the benefit of all reasonable doubt. The standard enunciated in Woodall, was whether a rational trier of fact could reject a plausible explanation consistent with the defendant's innocence. Additionally, it must be determined whether the defendant was inferred to be guilty based upon evidence from which only uncertain inferences may be drawn. Conald v. Sheriff, 94 Nev. 289, 579 P.2d 768 (1968); Oxborrow v. Sheriff, 93 Nev. 321, 565 P.2d 652 (1977); Gilespey v. Sheriff, 89 Nev. 221, 510 P.2d 623 (1976); State v. Luchette, 87 Nev. 343, 486 P.2d 1189 (1979).

The jury was instructed that first degree murder is murder which is perpetrated by any kind of willful; deliberate and premeditated killing. This definition is taken directly from the provisions of NRS 200.030(1)(a). Murder in general without distinction between the degrees thereof is defined as "the unlawful killing of a human being with malice aforethought,

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whether express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned; NRS 200.010. Examination of the evidence in this case even if believed to be sufficient to amount to murder does not fit the definition of first degree murder. No premeditation to kill was demonstrated by the State as opposed to an act which occurred during the heat of a violent confrontation with a superior force.

The evidence that came before the jury presented a clear picture of a number of the fact that mitigate against a verdict of first-degree murder. There was a large number of drunken Hispanic males that engaged in the fight with CAMPBELL. Each witness told a different story, but the stories show that there was an initial confrontation between CAMPBELL and two males and that a signal was given and numerous other is came running. Tovah Gold and Rhianna Sandlin believed they saw firearms in the hands of the attacking Hispanic males. At least one stick was used to vandalize CAMPBELL's car. Holliman, the State's witness, described how he was attacked and had to escape from the physical attack on him.

The jury apparently rejected that CAMPBELL acted in pure self-defense (although not fully and properly instructed), but the acts could not rise to the level of premeditated and deliberate murder. The evidence before the jury did not support in law or in fact a finding of first-degree murder as defined by the legislature and the Courts.

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Based on the facts and circumstances of the instant case, it is respectfully urged that the first degree murder conviction be reversed.

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V.

THE COURT ERRED IN ALLOWING THE ADMISSION OF OTHER BAD ACTS AGAINST CAMPBELL

Prior to trial the State filed a Motion to Admit Evidence of Other Crimes (1 APP 22-17), seeking to introduce evidence that on April 10, 2000 CAMPBELL had his car parked outside of his bedroom window at 2933 Elm Avenue and at approximately 12:24 a.m. he saw his tail lights illuminate. CAMPBELL looked out his window and observed a person entering his car, at which point CAMPBELL retrieved his .22 caliber rifle and fired four shots out the bathroom window at the person fleeing in his car. CAMPBELL filed an Opposition to the Motion (1 APP 27-31) and prior to the commencement of the trial the Court held a Petrocelli hearing. (1 APP 44-66)

At the conclusion of the evidentiary hearing the Court reserved it's ruling until hearing the testimony at the trial and determining whether there was sufficient similarities between the two incidents to allow the introduction of the previous incident (1 APP 66). At the conclusion of the State's case the Court reexamined the issue and determined that it was a close call but that the Court was going to err on the side of defense and that the April incident was not admissible. (1 APP 364)

Thereafter the Court found that during the testimony of John Woodring, CAMPBELL opened the door and that the State would be allowed to inquire concerning that incident. CAMPBELL

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timely objected to the Court's ruling that the door had been opened to allow the evidence. (3 APP 436). The sequence of questions which formed the basis of the Court's decision to reverse it's previous ruling was as follows:

During cross-examination by the prosecutor of John Woodring:

"Q You didn't like the Mexican people over there, did you?

A I didn't care if they were Mexican or who they were. I just, you know.

Q You didn't like them?

A No, at my apartment complex.

Q Right.

A I didn't care if someone had a small party and kept the mess cleaned up or who they had visiting, if that's what you meant.

Q They were a pain to you, weren't they?

A The tenants?

Q Yeah.

A They were paying their rent.

Q Not the pain I was talking about.

A The pain from them drinking and partying all the time?

Q Right.

A Yeah" (3 APP 399-400).

On re-direct CAMPBELL attempted to clarify Woodring's problems with the Hispanic tenants that were brought up by the prosecutor on cross-examination:

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"Q As far as you were concerned, Mr. Campbell was nothing more than a paying tenant, correct?

A Exactly.

Q As long as he didn't violate your rules, you didn't have no problem with him being there?

A I didn't have no problem with Damon Campbell at all starting any kind of trouble at all.

. . .

Q Did you have any problems with any of your Mexican tenants?

A Yes, I did.

Q And your problems with your Mexican tenants were what?

A Drinking, partying too much, urinating on the buildings, causing fights between other tenants.

Q Now, if they had paid their rent and didn't cause the problems that you just told the jury about, would you have a problem with them?

A No." (3 APP 401-403).

NRS 48.045(2) provides that:

"Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

"Evidence of other crimes committed by a defendant must be determined to be admissible pursuant to NRS 48.045(2). While such evidence usually does not come in the form of statements or confessions made by the defendant, we see no reason to make an exception to this statutory requirement for prior bad act evidence disclosed in a defendant's confession."

Walker v. State, 112 Nev. Ad. Op. 107 (1996).

It is hornbook law that evidence of other criminal conduct

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is not admissible to show that a defendant is a bad person or has a propensity for committing crimes. State v. Hines, 633 P.2d 1384 (Ariz. 1981); Martin v. People, 738 P.2d 789 (Colo. 1987); State v. Castro, 756 P.2d 1033 (Haw. 1988); Moore v. State, 96 Nev. 220, 602 P.2d 105 (1980). Although it may be admissible under the exceptions cited in NRS 48.045(2), the determination whether to admit or exclude evidence of separate and independent criminal acts rests within the sound discretion of the trial court, and it is the duty of that court to strike a balance between the probative value of the evidence and its prejudicial dangers. Elsbury v. State, 90 Nev. 50, 518 P.2d 599 (1974).

The prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that the accused committed the charged crime because of a trait of character. Tucker v. State, 82 Nev. 127, 412 P.2d 970 (1966). Even where relevancy under an exception to the general rule may be found, evidence of other criminal acts may not be admitted if its probative value is outweighed by its prejudicial effect. Williams v. State, 95 Nev. 830, 603 P.2d 694 (1979).

The test for determining whether a reference to criminal history is error is whether "a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." Morning v. Warden, 99 Nev. 82, 86, 659

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P.2d 847, 850 (1983) citing Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972). In a majority of jurisdiction improper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court must therefore determine whether the error was harmless beyond a reasonable doubt. Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

It was error for the Court to allow the prosecutor to elicit testimony concerning the prior incident. CAMPBELL had done nothing to violate the Court's previous ruling nor gained any unfair advantage over the State during the testimony of Woodring. The prior incident was prejudicial to CAMPBELL and should have been completely excluded. Improper admission of the evidence dictates reversal of the conviction.

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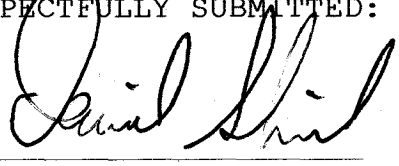
CONCLUSION

Based on the authorities herein contained and in the pleadings heretofore filed with the Court, it is respectfully requested that the Court reverse the conviction and sentence of DAMON CAMPBELL and remand the matter to District Court for a new trial.

Dated this 31 day of July, 2002.

RESPECTFULLY SUBMITTED:



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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: July 31, 2002

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CERTIFICATE OF MAILING

I hereby certify that service of the Appellant's Opening Brief was made this 31 day of July, 2002, by depositing a copy in the U.S. Mail, postage prepaid, addressed to:

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