

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VALERIE CAMPBELL,

Petitioner,

v.

GLORIA HENRY,

Respondent. _____/

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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Question Presented

1. Whether the Court of Appeals erred in ruling that the state court's determination that petitioner received constitutionally effective assistance of counsel was not contrary to, or an unreasonable application of, clearly existing federal law where defense counsel failed to introduce the murder victim's dying declaration that someone other than petitioner was the shooter.

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**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

The petitioner, Valerie Campbell, respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit.

OPINION AND ORDER BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit in case number 15-17157, to which this petition relates, was filed on January 16, 2018 and is included in Appendix A. The district court order dated September 30, 2015 is included in Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit to be reviewed was filed January 16, 2018. This petition for certiorari is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court’s jurisdiction under 28 U.S.C. section 1257(a).

**CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED**

The constitutional provision at issue in this petition is the Sixth Amendment to the United States Constitution, which provides that every criminal defendant shall “enjoy the right . . . to the assistance of counsel for his defence.”

STATEMENT OF CASE

A. The State Prosecution

Petitioner was charged in the Alameda County Superior Court with one count of murder, and two counts of attempted premeditated murder. ER 49. It was further alleged that she was both armed and personally used a firearm in the commission of these crimes. ER 52.

1. The Prosecution Evidence

At trial, the state showed that Andrea Johnson (Andrea) and Jewell Sutton (Jewell) were lovers who lived together for 17 years. RT 2-10, p. 829. The two women knew petitioner and her boyfriend, Carl Sampson. RT 2-10, pp. 830-831. Sampson was well known as a hustler of women as well as drugs. RT 2-9, pp. 583-584. Andrea thought of petitioner as a good friend. RT 2-10, p. 832. All four individuals were regular users of rock cocaine. RT 834. Petitioner also had an on again, off again romantic relationship with Chet Hunter, mostly when Sampson was away serving a prison sentence. RT 2-9, pp. 583-587. Hunter loved petitioner and remained good friends with petitioner even when she was going out with Sampson. He was also good friends with Sampson. RT 2-9, p. 589.

Andrea began working for petitioner selling drugs after she accidentally dropped some of petitioner's cocaine down the sink. RT 2-10, p. 832. Petitioner

told Andrea she had to work off the cost of cocaine by helping her sell drugs. RT 2-10, p. 833. Petitioner lived at 842 Isabella Street in Oakland. RT 2-9, p. 591. Jewell had seen an Uzi rifle under the bed in petitioner's room as well as a pistol or revolver in the house. RT 2-10, pp. 846-847.

In August, 1991, Jewell and Andrea decided to move from Oakland back to Union City. RT 2-10, p. 835. A storage company came to their house to move all of Jewell's personal possessions into storage. RT 2-10, p. 836. On the day of the move, Sampson came over to Jewell's residence as the movers were working to take her property to storage. RT 2-10, p. 837. He was looking for petitioner and Andrea, who had taken a trip together to Reno. RT 2-10, p. 837. While at the house, Sampson began talking to the movers and invited them to his apartment because he said he was also moving and wanted them to give him an estimate. RT 2-10, p. 838.

About a month after Jewell moved to Union City, she called the storage company because she never received a bill from them for storing her property. RT 2-10, p. 838. The storage company told Jewell that someone had already come and removed all her property from storage. RT 2-10, p. 839. All her personal possessions had been taken and it amounted to over \$50,000 worth of property. RT 2-10, p. 843. After receiving a description of the individuals who took her

property, Jewell suspected that petitioner, Sampson and Hunter were responsible for the theft. RT 2-10, p. 839-840. Jewell and Andrea immediately contacted the police. RT 2-10, p. 840.

Petitioner and Sampson called Jewell on the phone about a week after she reported the theft to the police. RT 2-10, p. 843. Sampson accused Jewell and Andrea of calling the police on him and threatened to break both of Jewell's legs. RT 2-10, p. 844. Petitioner said, "If you fuck people, you get fucked." RT 2-10, p. 844.

Andrea and Jewell went to the FBI to report that they had been threatened and told the agent there that if anything happened to them, to look for petitioner and Sampson as the responsible parties. RT 2-10, p. 845. The women also discovered that Sampson was still on parole and they contacted his parole agent, who said that he was looking for Sampson because he had not reported in as required. RT 2-10, p. 845. In November, 1991, Andrea asked her brother, Michael Ward, to get a gun for her. RT 2-10, p. 795. Ward purchased a .22 automatic on the street for \$50 and gave it to Andrea. RT 2-10, p. 796. Andrea returned the gun to Ward around December 1, 1991. RT 2-10, p. 797. Claude Lovett lived across the street from petitioner, on 831 Isabella. RT 2-10, p. 703.

On December 14, 1991, Jewell and Andrea went to Lovett's house sometime after 2:00 a.m. RT 2-10, p. 847. They had been out partying and wanted to continue after the bars and clubs closed. RT 2-10, p. 848. They drove to Lovett's house in Jewell's white Thunderbird but parked the car around the corner because petitioner had warned them never to come to Isabella Street. RT 2-10, p. 849. Lovett and his girlfriend Carolyn were at the house and they spent the entire day in the house drinking alcohol and snorting and smoking cocaine. RT 2-10, p. 850.

When Andrea and Jewell decided to leave later that day, they discovered that someone had slashed the tires to the Thunderbird. Three of the tires were flat. RT 2-10, p. 851. They used an electric tire inflator and also went to the tire store to get foam to fix the tires. After several unsuccessful attempts, they were finally able to inflate the tires and the women went back inside Lovett's house. RT 2-10, p. 852.

Meanwhile, Hunter, who was working with Sampson to sell drugs and staying at his penthouse apartment in Oakland, received a telephone call from Sampson. RT 2-9, p. 593. Sampson wanted to know if Hunter knew anything about Andrea and Jewell being over at Lovett's house. RT 2-9, p. 593. Hunter said he had heard something about it and Sampson ordered Hunter to get a couple of guys to go over to the house and shake them up, meaning to do some harm to the women. RT 2-9, p. 594. Hunter knew that Sampson was feuding with Andrea and

Jewell but tried to know as little as possible about it. RT 2-9, p. 594. Hunter considered Sampson to be a “very dangerous individual.” RT 2-9, p. 594.

Andrea and Jewell stayed at Lovett’s house for a couple of more hours. They decided to wait for a while before driving home because they had been drinking. RT 2-10, p. 852. They were joined there by Lovett, Carolyn, a male Hispanic and Clinton Dupree. RT 2-10, p. 854. They were sitting in the living room. RT 2-10, p. 705. At one point, Lovett left the house and told Dupree not to let anyone into the house. RT 2-10, p. 708. Sometime while Lovett was gone, Hunter came to the door and asked to come inside. RT 2-10, p. 708. Pursuant to Lovett's instructions, Dupree refused to let Hunter in. RT 2-10, p. 708. Lovett returned to the apartment and the group played cards and dominoes. RT 2-10, pp. 709-710.

However, when they went outside to get to their car, they discovered that the tires were flat again. RT 2-10, p. 852. The women went back inside Lovett’s house, where Andrea said she believed that they were being “set up.” RT 2-10, p. 853. She called her brother, Michael Ward, to come and pick them up. RT 2-10, pp. 711, 771, 853. Andrea sounded very frightened. RT 2-10, p. 771. She asked Ward to bring her the gun that he had bought for her earlier. RT 2-10, p. 797.

Ward immediately drove over to help his sister. Ward had no idea that he was going to be involved in a shootout. RT 2-10, p. 801. Andrea never said

anything about shooting anyone. RT 2-10, p. 801. She just sounded scared on the telephone and said her tires had been slashed. R 2-10. p. 802. He waited in the living room while Andrea got ready to leave. RT 2-10 p. 777.

About 15 to 20 minutes after Ward got there, there was a loud knocking at the door. RT 2-10, pp 712, 778, 854. Lovett went to open the door. RT 2-10, pp.712, 778, 854. Sampson demanded to be let into the house. RT 2-10, pp 712, 778, 854. There was a loud argument between Sampson and Lovett. RT 2-10, p. 712. Lovett kept telling Sampson to calm down and to be quiet. RT 2-10, p. 713. He said to Sampson, "You can't do that in here." RT 2-10, p. 854. Jewell also heard petitioner say, "Why are you trying to protect those bitches?" RT 2-10, p. 855. She knew that Lovett was scared and that Sampson and petitioner were very angry. RT 2-10, p. 856. Lovett also said, "Shoot me if you want to, if that's what you want to do." RT 2-10, p. 714.

Andrea recognized the voices and said, That's Carl." RT 2-10, p. 780. She left the living room and went into the rear of the house. RT 2-10, p. 780. On the way to the back of the house, Andrea asked her brother for the gun and took it with her into the rear of the house. RT 2-10, p. 798.

Petitioner walked into the living room, followed by Sampson. RT 2-10, p. 781. Petitioner was wearing a full-length fur coat and her hands were in her

pockets. RT 2-10, pp 781, 857. Sampson wore a long leather jacket. His hands were also in his pockets. RT 2-10, p. 781. Jewell tried to appear calm and said hello to Sampson and petitioner. RT 860. However, Sampson was angry and demanded to know where Andrea was. RT 2-10, pp. 822-823, 860. He told everyone in the room, “Don’t nobody move.” RT 2-10, p. 718. He turned to the Hispanic man in the living room and said, “I don’t have a beef with you, buddy. You can leave.” RT 2-10, p. 860. The man left the house. RT 2-10, p. 860.

In response to Sampson’s questions regarding the whereabouts of Andrea, Jewell said, “I don’t know. Why are you bothering us? Why don’t you leave us alone?” RT 2-10, p. 861. Sampson said, “Because you called the police on us, bitch.” RT 2-10, p. 861. Jewell turned to petitioner and could see that she had a gun on her right side by her thigh. RT 2-10, p. 861. Jewell also saw an Uzi under Sampson’s coat. The barrel of the gun was not pointed straight ahead. RT 2-10, p. 862. Lovett asked Sampson, “What do you have under the coat?” RT 2-10, p. 783. Sampson did not respond and Lovett tried to pat him down. RT 2-10, p. 783. However, before Lovett could do that, Sampson warned, “Don’t touch me. Don’t put your hands on me.” RT 2-10, p. 784.

Petitioner spotted Andrea in the back of the house and approached her, saying, “Here she is Carl.” RT 863. Andrea said to petitioner, “Get off my foot.”

RT 2-10, p. 863. Sampson said to Andrea, “You don’t know who you’re fucking with, bitch.” RT 2-10, p. 863. He also asked her, “What is that you have in your pocket?” RT 2-10, p. 863. Andrea opened up her hands to her side and replied, “What? Nothing.” RT 2-10, p. 863. Both of Andrea’s hands were on her side. RT 2-10, p. 864.

Sampson pointed his Uzi at Andrea and fired shots at her. RT 2-10, p. 864. These were loud shots fired in rapid succession. RT 2-10, pp. 724, 784, 864-865. Andrea fired back at Sampson. RT 2-10, p. 865. These shots were not as loud and sounded more like “pops.” RT 2-10, pp. 785, 865. Sampson then turned his Uzi away from Andrea and towards the rest of the people in the room. RT 2-10, p. 865. He sprayed the room with bullets. RT 2-10, pp. 785, 865. Ward was shot in the arm. RT 2-10, p. 786. He dove behind the television to hide from Sampson. RT 2-10, p. 787. Dupree also fell behind the TV next to Ward. RT 2-10, p. 725. Lovett jumped out the bathroom window. RT 761. Jewell had been shot in the leg and she, too, hid behind the TV.

Andrea said, “I’m not dead yet, Carl. I’m not dead yet. I’m going to get you.” RT 2-10, p. 869. Ward, Dupree, and Jewell then heard several more gunshots, anywhere from two to six additional shots. RT 2-10, pp. 726, 789, 726, 870-871. These were not bursts from an Uzi but were individual gun shots. RT

2-10, pp. 726, 790.

Sampson and petitioner fled from the scene. RT 2-10, p. 871. Jewell tried to get up but discovered that her foot was numb and just hanging there.¹ Andrea was laying face down in a puddle of blood. RT 2-10, p. 792. Her gun was on the ground next to her. RT 2-10, p. 798. Ward picked up the gun and sat down on the couch. RT 2-10, p. 799. Lovett's girlfriend, Carolyn, who had been out the house when the shooting began, came inside and said to Andrea, "Hold on. Hold on. It will be all right." RT 2-10, p. 868. However, Andrea was not conscious or moving. RT 2-10, p. 792. Ward dialed 911 before he lost consciousness. RT 801, 873. Dupree was in shock. He could not talk. RT 2-10, pp. 872-873. He put on his coat and walked out of the house without waiting for the police to arrive. RT 2-10, p. 873. Ward and Jewell waited for the police. RT 2-10, p. 874.

Chet Hunter testified that he received a telephone call from Sampson soon after the shooting. He asked Hunter to drive over to Lovett's house to find out who had been shot and how badly they had been injured. RT 2-9, p. 597. Hunter found a lot of police cars and ambulances at the scene. RT 2-9, p. 600.

Three days after the shooting, on December 17, 1991, Officer Vincent Araneo of the Oakland Police Department was on the lookout for petitioner and Sampson when he was told that Sampson was at a burger joint on San Pablo and

Sycamore. RT 2-10, pp. 688-689. Sampson was not there when Araneo arrived but he saw Chet Hunter drive up in a car with expired registration tags. RT 2-10, p. 690. Hunter was arrested after failing to provide identification and the police searched his car. RT 2-10, p. 690. In the hatchback compartment was an Uzi assault weapon and clip. RT 2-10, p. 690. A .22 caliber pistol was located under the front seat and a clip was found inside the glove box. RT 690. The car belonged to petitioner's daughter, Mary Campbell. RT 2-10, p. 606. Hunter told the police that he had picked up the car the day after the shootings. RT 2-10, pp. 627-628. However, at trial, Hunter explained that his own car was in the garage for repairs and he had borrowed the car just minutes before being stopped by the police. RT 2-10, pp. 606, 610. He also testified that his statement to the police that he had seen petitioner with a gun prior to December 14, 1991, was not true. RT 2-9, p. 630. Hunter pleaded guilty to felony possession of those weapons in the car and spent two and a half months in jail. RT 2-9, p. 615.

Jewell sustained a serious injury to her leg and the physicians at first thought they had to amputate her foot. It took Jewell seven months to recover from her injury. RT 2-10, p. 875. seen petitioner with a gun prior to December 14, 1991, was not true. RT 2-9, p. 630.

Sampson was arrested and convicted of murder in 1995. RT 2-9, p. 603-604.

However, petitioner managed to evade arrest and prosecution for nine years. She lived in various parts of the country under different names, including Dean Taylor, Janet Buckley, Valleria Greer, Valerie Green, Janet Hunter, and Virginia Peavy. RT 2-10 pp. 640, 649; RT 2-12, pp. 1057, 1058, 1079, 1080. Virginia Peavy was a woman who lived in a convalescent center in Texas where petitioner worked for a while. RT 2-9, p. 651-652. Hunter joined petitioner in 1996 and lived with her while she was eluding the authorities. RT 2-9, p. 638.

The FBI, who were looking for petitioner for unlawful flight to avoid prosecution, finally tracked petitioner down in Safford, Arizona in February, 2000. RT 2-12, p. 1059. They arrested her at a trailer part where she was living with Hunter. RT 2-12, p. 1059, 1064. When arrested, petitioner told the FBI that she had not done anything wrong and did not know why she was in custody. RT 2-12, p. 1080. She never mentioned that an individual named Buster was responsible for the shootings nor did she ever indicate to the agents that the reason she was running from the authorities was because she was afraid of Sampson. RT 2-12, p. 1080.

Numerous .22 caliber and 9 mm casings were found at the scene of the crime, in the living room of 831 Isabella Street. RT 2-9, p. 454-458. At least 10 of the casings recovered from the scene were fired by the Uzi found in the back of the

hatchback driven by Chet Hunter on December 17, 1991. RT 2-9, pp. 544-545. Jewell Sutton identified the Uzi as the weapon used by Sampson that night. RT 2-9, pp. 486-487.

However, none of the bullets that killed Andrea were fired from the Uzi. Instead they were all fired from the same .38 caliber weapon. RT 2-9, p. 530. One of those shots entered Andrea's upper lip, collapsed the eye, broke the maxilla bone, then progressed through the right nostril and came to rest in the jawbone. RT 2-9, p. 400. That shot was fired from extremely close range, from six inches to three feet away. RT 2-9, p. 406. There were powder burns at the bullet's entry point. RT 2-9, pp. 400, 407. The second bullet entered Andrea's right chest, went through the ribs and pierced the lung before becoming lodged in the ribs. RT 2-9, p. 410. A third shot entered the back of Andrea's forearm and exited out her upper arm. RT 2-9, pp. 404-406. This forearm injury was consistent with Andrea putting up her right forearm in a defensive gesture and having the bullet enter the back of the forearm. RT 2-9, p. 410.

2. The Defense Case

Petitioner testified and denied shooting Andrea Johnson and denied having a gun in her possession on the night of the shooting. RT 2-12, p. 1095. Petitioner moved in with Carl Sampson in 1989. RT 2-12, p. 1105. Sampson sometimes acted

crazy and violently. On one occasion, at her brother's wedding in San Diego, Sampson became angry when one of his brother's friends hugged petitioner. RT 2-12, p. 1108. While he did not hit petitioner, Sampson fought for the keys to the car and after he left to return to Oakland, Sampson would call petitioner every half hour. RT 2-12, p. 1110. On another occasion, Sampson became angry, pulled a chain off Andrea and whipped her all over her body with it. RT 2-12, p. 1111. Sampson also used cocaine. RT 2-12, p. 1112. Petitioner moved out and into her mother's house at 842 Isabella. RT 2-12, p. 1112. She tried not to have any contact with Sampson, but he was obsessed with her and would appear unannounced. Once, he kicked all the doors to the house, yelling and screaming petitioner's name. RT 2-12, p. 1114. He also had a front door key to the house and came in one night and beat petitioner up. RT 2-12, p. 1114.

Petitioner was afraid of Sampson. RT 2-12, p. 1117. Petitioner denied being involved in any drug dealing with Sampson. RT 2-12, p. 1115. Petitioner admitted going over to Lovett's house on December 14, 1991 with Sampson. RT 2-12, p. 1118. She was leaving her house to go to a party, dressed in a full-length mink coat, when Sampson approached her and grabbed her arm. RT 2-12, pp. 1120-1121. Sampson ordered petitioner to come with him across the street and it would only take five minutes of her time. RT 2-12, p. 1121. He said he wanted to

talk to Jewell and Andrea. RT 2-12, p. 1122. Sampson remarked that Jewell had told him that petitioner had called Sampson's parole officer about the furniture. RT 2-12, p. 1122. Petitioner swore to Sampson that she did not call the parole officer. RT 2-12, p. 1122. Sampson forced petitioner to go across the street with him. RT 2-12, p. 1124. Waiting for them outside Lovett's house was someone Sampson identified as "Bus" or "Buster." RT 2-12, p. 1125. Petitioner had never seen Buster before. RT 2-12, p. 1125. Sampson knocked on the door. RT 2-12, p. 1125. Lovett said he had company and there was some sort of transaction going on. RT 2-12, p. 1126. Petitioner, Sampson, and Buster waited outside for a little while until a Hispanic man came out and left the house. RT 2-12, p. 1126. Thereafter, petitioner walked into the living room, followed by Lovett and Sampson. RT 2-12, p. 1126. Petitioner said, "Where is Andrea?" RT 2-12, p. 1126. Petitioner walked towards the back of the room where she ran into Andrea, stepping on her foot. RT 2-12, p. 1127. Petitioner and Andrea joked about stepping on each other's feet. RT 2-12, p. 1128. They were good friends. RT 2-12, p. 1128. Petitioner got along well with both Andrea and Jewell. RT 2-12, pp. 1129-1130. Andrea had never accused petitioner of stealing her property. RT 2-12, p. 1130. In fact, petitioner accused Jewell of stealing all the property from Andrea after Jewell hit her with a cognac bottle. RT 2-12, pp. 1132-1133.

After Sampson walked into the living room, he said that Andrea had a gun. RT 2-12, p. 1137. Petitioner, who was standing next to Andrea, said, “You’re tripping. Andrea doesn’t have a gun.” RT 2-12, p. 1137. Lovett also said he did not want any trouble at his house. RT 2-12, p. 1138. Sampson put his hand in his pocket and brought it up as if he was carrying a weapon, and warned, “Don’t nobody move.” RT 2-12, p. 1139-1140. Petitioner had not noticed previously any rifle or gun on Sampson. RT 2-12, p. 1140. At that point, Andrea pulled out a gun. RT 2-12, p. 1141. Petitioner, who was not armed, stood behind Andrea with her hands in her pockets. RT 2-12, pp. 1141-1142. Lovett ran past petitioner and into the bathroom. RT 2-12, p. 1143. There were gunshots. RT 1143. Andrea staggered past petitioner, bleeding in the face. RT 2-12, p. 1144. She was carrying a gun in her hand, firing her weapon until she hit the ground. RT 2-12, p. 1144. Buster appeared carrying the Uzi. RT 2-12, p. 1144-1145. He fired the machine gun into the living room. RT 2-12, p. 1145.

Petitioner heard Andrea say, “I’m not dead yet.” RT 1146. Sampson stepped up to Andrea, said, “I’m not dead yet” and fired two shots into her. RT 2-12, p. 1146. Sampson fired more shots with a revolver into the living room and ran out the front door. RT 2-12, pp. 1147, 1150. Buster grabbed petitioner by the collar

and arm and pulled her out the back door with him. RT 2-12, p. 1147. Buster took petitioner to Sampson's garage where he was there with another couple. RT 2-12, p. 1152. Buster put petitioner into the couple's van. RT 1152. Buster ordered petitioner to shut up when petitioner asked to be let go. RT 2-12, pp. 1152-1154. Petitioner was taken to a motel. RT 2-12, p. 1154. She considered herself to be a prisoner. RT 2-12, p. 1154. Sampson had been shot during the incident and Buster told petitioner that if Sampson died, she would die too. RT 2-12, p. 1155. Petitioner was frightened of Buster. RT 2-12, p. 1157. Buster wanted to kill petitioner because she could be a witness against him. RT 2-12, p. 1158. A doctor came and treated Sampson for the gunshot wound. RT 2-12, p. 1156.

After a couple of days at the motel, Buster and Sampson brought petitioner to a house in Pueblo City. RT 2-12, p. 1157. She remained there for a month until Buster drove her down to Los Angeles. RT 2-12, p. 1157.

Petitioner admitted to being on the run from the police and using numerous aliases during that time. RT 2-13, pp. 1258-1260. She moved from Los Angeles to Indianapolis, to Louisiana to Texas. RT 2-13, pp. 1260-1262. She was on the run from 1992 to 2000. RT 2-13, p. 1264. She was on the run because she was afraid the police wanted her as a witness in the case and because Sampson's family threatened to kill her family. RT 2-13, p. 1265. She never reported these threats to

the police. RT 2-13, p. 1265. Indeed, she never told her family members about the threats to their lives for all those years until after her arrest. RT 2-13, pp. 1265-1266. Petitioner knew in 1996 from Hunter that Sampson had been convicted even without petitioner's testimony and had been sentenced to prison. RT 2-13, p. 1266. Nevertheless, she continued to hide for an additional four years, living under false names. RT 2-13, pp. 1266-1267, 1269. Petitioner's mother attended Sampson's trial and she talked with petitioner during the time petitioner was a fugitive. RT 2-13, pp. 1267-1268. She never asked or found out about Sampson's arrest and conviction from her family members. RT 2-13, p. 1268.

3. The Prosecution Rebuttal Case

Petitioner's mother, Johnnie McGough, testified that she talked via telephone with her daughter during the years petitioner was in hiding from the authorities. RT 2-13, p. 1278-1279. Petitioner told her mother that she was afraid to come back to Oakland because some of Sampson's friends had threatened her. RT 2-13, pp. 1279-2-13, p. 1280. Petitioner never told her mother that Sampson had threatened to harm members of her family. RT 2-13, p. 1282. According to McGough, petitioner was on the run because of the threats and not from any warrant for her arrest in the murder of Andrea. RT 2-13, p. 1288.

McGough was present throughout Sampson's trial. RT 2-13, p. 1282.

Following Sampson's conviction, McGough wrote a letter to the sentencing judge. In it, she said, ". . . I love my daughter; who is on the run since this nightmare began. . . . I haven't been able to sleep since I heard the verdict. Whenever I hear from my daughter, I would try to convince her to come and face this thing that they have accused them of doing." RT 2-13, p. 1285. McGough testified that when she said "this thing they have accused them of doing," she meant the authorities accused her of being a witness and not of murder. RT 2-13, p. 1289-1290.

In 2001 appellant was sentenced to a term of 25 years to life imprisonment, to be followed by two consecutive life terms for the attempted murder convictions. CT 2-4.

B. State Post-Conviction Proceedings

Appellant's direct appeal to the California Court of Appeal was denied on February 5, 2003. ER Vol 1, p. 49-61.

Her petition for review to the California Supreme Court was denied on June 11, 2003. ER Vol 1, p. 48.

Petitioner's application for a writ of habeas corpus to the Alameda County Superior Court was denied October 26, 2004. ER Vol 1, p. 46-47.

Her petition in the California Court of Appeal was denied January 7, 2005. ER Vol 1, p. 45.

On February 8, 2005 the California Supreme Court denied her petition for a writ of habeas corpus. ER Vol 1, p. 44.

C. District Court Proceedings

On March 28 2006 the clerk of the United States District Court for the Northern District of California filed petitioner's federal habeas petition. ER Vol 2, p. 67.

Respondent filed a motion to dismiss on timeliness grounds, which the district court granted. Appellant filed notice of appeal. In that appeal, this court found that the district court had erroneously failed to give appellant the benefit of the mailbox rule in dismissing her petition was untimely, and reversed and remanded. *Campbell v. Henry*, 614 F.3d 1056 (9th Cir. 2010).

On September 30, 2015, the district court issued a written decision denying all claims raised by appellant. ER Vol 1, pp. 4-43. The district court declined to address the various procedural defenses raised by respondent; instead, in the interest of judicial economy, the district court reviewed the merits of each of appellant's claims and denied them all on the merits. *Id.*

The district court declined to issue a certificate of appealability. *Id.*

D. Court of Appeal Proceedings

Appellant filed timely notice of appeal to the Ninth Circuit Court of Appeals

on October 28, 2015, and the court issued a certificate of appealability. ER Vol 1, pp. 1-2. The court issued a memorandum disposition denying the claims on January 16, 2018.

REASONS FOR GRANTING REVIEW

The Court should grant review because the decision below resolved important federal questions in a way that conflicts with prior decisions by this Court.

ARGUMENT

I. STANDARD OF REVIEW OF STATE COURT JUDGMENTS

Campbell can prevail on a claim "that was adjudicated on the merits in State court" only if she can show that the adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The writ may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim, "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the

United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Under the “‘unreasonable application’ clause, [] a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411.

A federal court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was “objectively unreasonable.” *Id.* at 409. The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. *Id.* at 412; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003). While circuit law may be “persuasive authority” for purposes of determining whether a state court decision is

an unreasonable application of Supreme Court precedent, only the Supreme Court's holdings are binding on the state courts and only those holdings must be "reasonably" applied. *Clark*, 331 F.3d at 1069. "It is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents.'" *Nevada v. Jackson*, 133 S. Ct. 1990, 1992 (2013).

II. THE STATE COURT DECISION DENYING MS. CAMPBELL'S CLAIM THAT SHE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS BOTH CONTRARY TO, AND AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW

A. Standard of Review

A "convicted defendant's claim that counsel's assistance was so defective as to require reversal . . . has two components." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "First, the defendant must show that counsel's performance was deficient." *Id.* "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* To establish *Strickland* prejudice, Campbell must therefore show that but for trial counsel's deficient performance, "there is a reasonable probability that [the jury] would have returned with a different" verdict. *Wiggins v. Smith*, 539 U.S. 510, 536, 123 S.

Ct. 2527, 156 L. Ed. 2d 471 (2003).

B. The Dying Declaration of Andrea Johnson

One of the first officers to arrive at the scene of the shooting was Oakland Police Department Officer T. Smith #7654P. ER 277-278. On arrival, he spoke with Andrea Johnson before she died. *Id.* The officer asked Johnson who shot her. She “slowly replied ‘Carl’ in a disfigured voice.” Her voice then became muffled and she died of her wounds without giving any further statements. *Id.*

C. A Reasonably Competent Attorney, Acting As a Diligent Advocate For Ms. Campbell, Would Have Introduced Evidence of the Homicide Victim’s Dying Declaration Because It Identified Someone Else As The Shooter

Trial counsel failed to introduce Johnson’s last words before her death, which would clearly have been admissible as a dying declaration. California Evidence Code section 1242 provides “[e]vidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death.” See, e.g., *People v. Mayo*, 140 Cal. App. 4th 535 (2006) (holding that trial court did not err in admitting a murder victim's hearsay statement identifying the killer where, although there was no direct evidence of the victim's belief as to his impending death, there was abundant circumstantial evidence to that effect, including the fact

the victim was shot multiple times from close range). At Ms. Campbell's trial, the only truly contested issue was the identity of the person who actually killed Johnson. Several witnesses were present inside the residence at the time of the shooting testified at trial. But none of them actually saw who fired the fatal bullets.

The evidence was clear that Carl Sampson fired an Uzi at Johnson. Everyone then started taking cover from his gunfire. Johnson was then heard to say "I'm not dead yet Carl. I'm not dead yet. I'm going to get you," RT 2-10, pp. 869, 870, after which more gunshots were heard.

This second round of shots sounded different than the shots fired from the Uzi. And the ballistics evidence showed the fatal shots were not from an Uzi, but instead came from a .38 caliber handgun.

The issue, then, was who fired the second--and fatal--gunshots. There were no witnesses to who was shooting the gun during the second round of gunfire. And with one exception, none of the witnesses at the scene of the shooting saw petitioner with a gun. The one exception was Jewell Sutton, who testified that although she did not see petitioner with a gun, she did see petitioner holding what appeared to be the barrel of a handgun.

Given this testimony, a reasonably competent attorney, acting as a diligent advocate for a client charged with murder, would have offered evidence of a statement from the victim who was murdered identifying someone else as the person who fired the fatal shots. Just before she died, Johnson stated to the officer that “Carl [Sampson]” shot her. She did not say that “Valerie Campbell” or anyone else fired the fatal shots.

The homicide victim’s dying declaration would have been powerful and persuasive evidence to the jury, and there was no tactical or strategic reason that a reasonably competent attorney would have chosen not to put this dying declaration before the jury for consideration. It was substantially exculpatory as to petitioner Campbell, and substantially inculpatory as to Sampson.

The state court below, in denying this claim, stated without any elaboration or analysis that there was no evidence that trial counsel had been ineffective. In fact, there was substantial evidence. Petitioner attached the police report which included the victim’s dying declaration to her state habeas petition. The state court failed to explicitly address whether there were in fact any sound tactical reasons that trial may have decided not to introduce evidence of this dying declaration.

The district court below reasoned that trial counsel “could reasonably have

wanted to avoid gruesome and potentially harmful descriptions of the victim's attempts to speak while bleeding from the face.” ER 22-23. However, the jury was shown much more explicit and gruesome evidence, including multiple autopsy photos of Johnson. CT 2-4, p. 196. An officer's testimonial description of Johnson's physical state before she died would have been far less gruesome than any autopsy photos of her physical state after dying. Given the significance of her dying declaration, there could not have been a reasoned tactical decision not to elicit the declaration for fear of eliciting gruesome details.

Respondent argued in the district court that trial counsel may have been worried about introducing the officer's testimony because the officer also reported that Johnson seemed to be trying to say something further but could not, such that trial counsel was trying to avoid an inference that Johnson was trying to identify petitioner as the shooter. This argument is wholly without merit. The trial court could not have permitted testimony as to what Johnson was “trying” to say but did not say because any such testimony would have been inadmissible as sheer speculation.

When the victim of the homicide is asked to identify her killer, and she does, such evidence is too powerful to ignore. If exculpatory to a defendant, it must be presented to the jury absent a very significant and very compelling reason not to elicit the declaration. Here, the dying declaration here was exculpatory. Johnson said that “Carl” shot her, not that “Valerie” shot her. Unfortunately for petitioner, the jury never heard this testimony because her counsel did not introduce it into evidence. There simply could not have been a significant and compelling reason not to present the victim’s dying words for the jury’s consideration. Respondent’s various arguments as to counsel’s possible tactical reasons for not presenting the dying declaration are weak and ring hollow. Ultimately, there was no plausible tactical and counsel’s failure to introduce this evidence fell far below professional norms.

D. Trial Counsel’s Failure Prejudiced Ms. Campbell

It is clearly established Supreme Court law that a criminal defendant is entitled under the Sixth Amendment to the assistance of an attorney acting as a zealous advocate. Strickland v. Washington,

466 U.S. 668 (1984).¹ The failure to introduce probative and exculpatory evidence in this case was prejudicial to petitioner. It is reasonably probable that the jury would have reached a different verdict if they had heard testimony that the homicide victim, in response to a question from a police officer, said that “Carl” was the one who shot her. In this regard, it is significant that the jury found to be “not true” the special allegation that Ms. Campbell personally used a firearm in connection with the murder.

E. The State Court Determination That There Was No Ineffective Assistance of Counsel Was An Unreasonable Application of Clearly Established Federal Law

The state court’s determination that there was no Sixth Amendment violation based on trial counsel’s failure to present the victim’s dying declaration was an unreasonable application of clearly established federal law to the facts of this case. Accordingly, the

¹ *Strickland*, not *Brecht v. Abrahamson*, 507 U.S. 619 (1993), provides the proper prejudice standard for ineffective assistance of counsel claims. See *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009) (“[W]here a habeas petition governed by AEDPA alleges ineffective assistance of counsel under [Strickland], we apply *Strickland*’s prejudice standard and do not engage in a separate analysis applying the *Brecht* standard.”).

lower federal courts erred in holding otherwise and this court should reverse and remand.

CONCLUSION

The court should grant the writ because the state court unreasonably applied clearly established federal law in finding that Campbell did not receive constitutionally ineffective assistance.

DATED: 4/16/2018

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